

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 458 of 2018

Appellant	Mst. Farzana daughter of Zulfiqar Hyder through Barrister Sarmad Khan, Advocate
Complainant	Riaz Adam son of Adam through M/s. Faisal Gulfam and Muhammad Yousuf Narejo, Advocates.
For State	Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.

Criminal Appeal No. 474 of 2018

Appellant	Nasir Hussain son of Hamid Hussain through Mr. Sarmad Khan, Advocate.
Complainant	Riaz Adam son of Adam through M/s. Faisal Gulfam and Muhammad Yousuf Narejo, Advocates.
For State	Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.
Date of Judgment	15.01.2024

JUDGMENT

Mohammad Karim Khan Agha, J:- The appellants Mst. Fazana and Nasir Hussain were proceeded against in the Court of VIIIth Additional District & Sessions Judge, Karachi East in respect of offence under section 3/4 of Illegal Dispossession Act, 2005 at Police Station Ferozabad, Karachi and vide Judgment dated 05.09.2018 passed in Criminal Complaint No.34/2016 the appellants were convicted and sentenced as under:-

“The accused Farzana w/o Nasir Hussain and accused Nasir Hussain S/o. Hamid Hussain are convicted and sentenced U/s. 3(2) of Illegal Dispossession Act, 2005, to suffer R.I. for two years and they shall also pay the

fine of Rs.50,000/- jointly. In case of their default, in payment of fine amount, they shall further suffer S.I. for one month. It is further ordered that they shall also pay expenses of complainant and witnesses U/s. 544 of Cr.P.C. as provided in sub-section 2 of section 3 of illegal Dispossession Act, 2005, who attended the Court in trial proceedings. Accordingly complainant and witnesses are directed to furnish schedule of expenses in Court within one month' time. In case of accused default in payment of such expenses, the same are to be recoverable as arrears of Land Revenue, subject to availability, or when no land is available, accused shall further suffer S.I. for the period of one month. It is made clear that such expenses are payable shall be in addition to the sentence imposed by the Court for the offence.

2. The brief facts of the case that the complainant Riaz Adam purchased a Flat No. 101, with area 585 square feet, situated in P.E.C.H.S., Plot No. 7/0, Block-2, Karachi, from one Muhammad Ameen S/o Ayub against an amount of Rs. 45,00,000/-. On 09th January, 2014, he received its possession and flat was transferred in his name. In the month of March, 2014, he received transfer deed whereby he came to know that due to mistake, flat No. 201 was mentioned instead of Flat No. 101. Thereafter, he contacted with Ameen who gave to him rectification on 28.03.2014, after rectifying the Sub-Registrar record. In the month of April, he went to visit the flat, where he found Nasir Hussain and his wife Farzana possessing his flat by breaking locks and occupied his articles. He asked them and informed them that it was his flat. They told to him that they purchased the same from Rahim Bux. Complainant finally prayed for awarding punishment to the proposed accused and getting his property immediately cleared from accused.

3. After usual investigation the case was challaned and the matter was sent up for trial. The appellants pleaded not guilty to the charge and claimed trial.

4. The prosecution in order to prove its case examined 02 Witnesses and the court also called one C.W. who was the I.O. of the case. The appellants in their 342 Cr.P.C statements denied the allegations against them. The appellant Nasir Hussain gave evidence under oath but his wife appellant Farzana did not choose to do so. The appellants did not call any DWs in support of their defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted and sentenced the appellants as set out earlier in this Judgment, hence the appellants have filed these appeals against their convictions.

6. The facts and evidence have been well set out in the impugned judgment and as such there is no need to reproduce the same in order to avoid unnecessary repetition and duplication.

7. After commencing to read out the evidence, learned Additional Prosecutor General Sindh pointed out that section 342 Cr.P.C. Statements have been recorded on 22.07.2017 and the evidence under oath of appellant Nasir Hussain had been recorded on 03.08.2017. However, the evidence of CW-1 Syed Atta-ur-Rehman who was the I.O. of the case was recorded on 25.04.2018 which was after recording of the section 342 Cr.P.C. statements and evidence under oath of appellant Nasir Hussain. He contended that under the law evidence of CW-1 had to be recorded first and then section 342 Cr.P.C. statements of the appellants recorded and the evidence of Nasir Hussain then recorded under oath. This was because if any evidence given by CW-1 Syed Atta-ur-Rehman was material in convicting the appellants, such evidence had to be put to the appellants at the time of recording their section 342 Cr.P.C. statements which was obviously not done in this case as the appellants 342 Cr.P.C. statements had been recorded before the CW-1 Syed Atta-ur-Rehman gave his evidence and under these circumstances it was a case of remand. This position was also supported by learned counsel for the appellants and learned counsel for the complainant.

8. I have considered the contentions mentioned above of the parties and am in agreement with them that as a matter of law this case needs to be remanded to the concerned trial court as such the impugned judgment is set-aside and this case shall be returned to the VIIIth Additional Sessions Judge Karachi East for the limited purpose of re-recording section 342 Cr.P.C. statements of the appellants and re-recording the evidence under oath of Nasir Hussain and Mst. Farzana if they still wish to give evidence under oath and calling any DW if they so desire and then after hearing the parties issue fresh judgment based on the evidence on record without being influenced by the impugned judgment which has been set-aside. This exercise shall be

completed within 03 months by the concerned trial court from the date of receiving the copy of this order. A copy of this order shall be sent by fax to the concerned trial court along with R&Ps who shall proceed to summon the appellants, State counsel and the complainant for the purposes mentioned in this judgment. It is noted that after announcement of the judgment the appellant Nasir Hussain S/o. Hamid Hussain absconded from the trial court before later surrendering. Under these circumstances he shall be granted bail by the concerned trial court subject to providing solvent surety in the sum of Rs.50,000/- and P.R. Bond in the like amount to the satisfaction of the trial court within 14 days of the date of this order. Mst. Farzana shall remain on bail until the announcement of the final judgment in this case.

8. The appeals are disposed of accordingly.

JUDGE

M. Arif