

## **IN THE HIGH COURT OF SINDH AT KARACHI**

**CR. MISC. APPLICATION NO.31/2017**

**Applicants : Mehmood Rangoonwala and others,**

**Respondents : Furqan Ali Mustafa and others,**

Mr. Khawaja Shamsul Islam advocate for applicants.

Mr. Muhammad Zubair Qureshi alongwith Mr. Muhammad Rehan Qureshi, advocates for respondent No.1.

Mr. Muntazir Mehdi, APG.

Date of hearing : 18<sup>th</sup> and 20<sup>th</sup> April, 2018.

Date of announcement : 3<sup>rd</sup> May, 2018.

### **J U D G M E N T**

**Salahuddin Panhwar, J:** Applicants filed present criminal miscellaneous application when cognizance was taken by learned Additional Sessions Judge on I.D. Complaint No.5/2011 filed by respondent No.1 and non-bailable warrants against applicants were issued, applicants prayed that :-

- a) Quash the entire proceedings initiated by the Respondent No.1 against the Applicants in I.D No.05/2011 pending in the Court of Respondent No.2 and discharge the Applicants from the same, in the interest of justice.
- b) Suspend the operation of the NBWs dated 25.02.2017 issued against the applicants by Respondent No.2.

It is stated by applicants that case set by respondent No.1 before learned Additional Sessions Judge, District Jamshoro @ Kotri

(respondent No.2) is that respondent No.1 is lawful owner of the agricultural land bearing Khet No.664 (Measuring 33-14 acres) S.No.665 (measuring 31-13 acres) and S.No.666 (measuring 36-25 acres) totaling 101-12 acres, Deh Kalo Kohar, Taluka thana Bula Khan, District Dadu now Jamshoro having been purchased by auction from Banking Court Karachi; that the mortgager/Mohammad Iqbal Kapadia mortgaged the said land on 5.10.1989 with HBL; that HBL filed Suit No.1250/1992 for recovery of loan amount against Shaikh Brothers and Muhammad Iqbal Kapadia which was decreed; that the auction process remained continued for 16 years and no objection was filed, as such the respondent No.1 participated in the auction, offered highest bid that was accepted and sale certificate was issued; thereafter the Directorate Settlement Survey and Land Record recorded the sale/transfer of the said land in his favour; that on 22.01.2010 demarcation was conducted and measurement certificate was prepared; that thereafter the DDO(Rev) on 09.02.2010 and 01.03.2010 reported to the Banking Court regarding handing over physical possession of the land; thereafter the applicant came forward and claimed the said land and lodged a complaint at P.S Nooriabad on 16.02.2010. It is stated by applicants that applicants No.2 and 3 are running their business under the name and style of Yassir Industries (Pvt) Ltd. and Pakistan Beverages Ltd at Karachi. Applicant No.1 is running his business under the name and style of "Terry World and Terry Towel Textile Mills"; on 23.08.1986 M/s Yasir Industries had purchased a piece of land admeasuring 37 acres 19 ghuntas comprising of various portions of agricultural land bearing different survey numbers situated in Deh Kalu Kohar, Taluka Bula

Khan, Nooriabad Industrial area, Super highway, District Dadu from its owner Faiz Muhammad Pallari vide Conveyance Deed dated 23rd August, 1986. The land was mutated in the name of M/s Yassir Industries and since then the said land is in possession of M/s Yassir Industries; that likewise M/s Habib Muhammad Industries Ltd. has purchased a piece of land admeasuring 22 acres 37 ghuntas, M/s Tumbi Industries (Pvt) Ltd. have purchased a piece of land admeasuring 42 acres 14 ghuntas and M/s Sehgul Industries (Pvt) Ltd purchased a piece of land admeasuring 21 acres 1 ghuntas in the year 1986 from its previous owners through Conveyance Deed and land was duly mutated in their respective names; that the total piece of land comes to 123 acres 31 ghuntas from various survey numbers, said land falls in old Survey No. 601(14-24), 604(19-19), 605(11-13), 606(19-19), 659(1615) and 669(29-10); that thereafter the applicants constructed boundary wall and a guard room, however, with the passage of time and due to rains, the boundary wall, wiring and room have partially damaged; that on 15.02.2010 while the applicants and above companies are in lawful possession of the land, respondent No.1 in collusion with some undesirable elements has attempted to enter the said land and tried to take possession by illegal means therefore a complaint was lodged with PS Nooriabad on 15.02.2010 and followed by lodging of FIR No.22/2010 at the same Police Station on 17.02.2010; that thereafter the applicants came to know that respondent No.1 has purchased land bearing S.No. 664(33-14), 665(31-13) and 666(36-25) total 101 acres 12 ghuntas in deh Kalokohar, Thana Bola Khan, District Dadu in Ex. No.46/1993 of Suit No.1250/1992 on 26.11.2009 and in connivance with some

corrupt officials of revenue department manipulated the record and some portion of the land of Applicant No.2 in survey No.665 has been shown in the sketch in favour of respondent No.1. It is pertinent to note that per record of the Banking Court in the above execution the alleged possession has been delivered to respondent No.1 on 22.01.2010 which was also false and fabricated; that respondent No.1 knew the fact that the auctioned land was situated at some other place and the senior Revenue Department Officers would rectify the position as they have observed the fabrication of the documents, therefore, with malafide intention and after concealing the real facts respondent No.1 filed C.P. No.100/2010 claiming possession of the land; in that petition on 01.06.2010 this Court was observed that the respondent No.1 has not come to Court with clean hands and the petition was disposed of; that record shows that at no stage the respondent No.1 had the possession of the land in question but malafidely he filed application under Sections 3, 4 & 7 of the Illegal Dispossession Act, 2005. It is pleaded that respondent No.1 has full knowledge that his property is far away from the premises of applicants, hence the proceedings of the trial Court against the applicants are liable to be quashed.

2. Learned counsel for applicants has argued that neither civil nor criminal case is made out against the applicants, respondent No.1 (complainant) with malafide intention and ulterior motives had filed the complaint just to frustrate the enquiry pending against him before the Revenue Department; that the learned Division Bench of this Court passed series of orders in C.P. No.11/2007 and others on

05.05.2009, 14.5.2009, 25.09.2009, etc. whereby noticing serious discrepancies in the record of Deh Hatal Bhatt and Deh Babar Band and observation was made that the revenue record is not maintained in accordance with law and that no mutation shall be effected in the revenue record nor revenue record in the above Deh be tampered, however despite repeated orders, the DDO (Revenue) Latif Brohi got huge bribe from respondent No.1 and changed the location in favour of respondent No.1 contrary to the record, that in view of the above judicial proceedings, since respondent No.1's Petition No.1100/2007 had already been dismissed, therefore, in terms of Section 11 CPC and Article 114 of Qanoon-e-Shahadat Order 1984 the Respondent No.1 cannot maintain any proceedings under the Illegal Dispossession Act before learned District Court, besides in terms of the mandatory provisions of Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 no Court has any jurisdiction to interfere in the matter pertaining to banking Court; admittedly respondent No.1 purchased the property from Banking Court No.II, Karachi, therefore, the title and possession of the land has to be decided by the Banking Court in terms of Section 19(7) of the Financial Institutions (Recovery of Finances) Ordinance, 2001; however, respondent No.1 even otherwise cannot maintain the aforesaid proceedings while invoking the provisions of the Illegal Dispossession Act, 2005 as his petition was dismissed; such facts have not been appreciated by respondent No.2, therefore, the entire proceedings suffer from lack of jurisdiction and liable to be quashed. It is further argued that this Court has territorial jurisdiction to proceed with the matter as all the previous litigation have been

initiated by respondent No.1 at Karachi, even the property was obtained from the Banking Court at Karachi, therefore, respondent No.2 does not have any territorial jurisdiction to proceed with the matter as respondent No.1's alleged title is drawn from banking Court No.II Karachi; it is also a matter of record that the applicant's land is 91 KM away from Karachi to Hyderabad far away from the land claimed by respondent No.1. that the I.D Complaint is not maintainable in view of the fact that the respondent No.1 had filed C.P. No.D-1100/2010 before this Hon'ble Court which was disposed of on 01.06.2010 with the directions that the official respondents shall act in the matter strictly in accordance with law and shall not harass any party unnecessarily; that on 20.04.2010 a learned Division Bench of this Court passed detailed order in respect of possession or otherwise of the land in question; on 17.5.2010 Nazir of this Court was appointed to inspect the land in question which was done. It is a matter of record that the applicants are lawful owners of the land since 1986 through Conveyance Deed dated 23.8.1986 and that the applicants' land is located at 91 KMs from Hyderabad to Karachi and 71 KM from Karachi to Hyderabad far away from the so-called land of respondent No.1 which is distinct and different as claimed by him; that the subsequently, respondent No.1 filed a Review application which was dismissed on 01.11.2010, therefore, the present I.D Complaint is not maintainable and is hit by the principle of resjudicata; that Respondent No.2 cannot take cognizance of the case under the provisions of Illegal Dispossession Act,2005, as the said Law is not applicable in the present proceedings in view of the fact that the applicants are lawful owners

of the land in question since 1986 running their factory and doing business and enjoying reputation, besides respondent No.1 claims that he has purchased land from Banking Court II at Karachi in open auction, as such the application has to be decided by the banking Court first. Even criminal proceedings can be initiated in terms of Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 but not under Illegal Dispossession Act, 2005, hence the learned Respondent No.2 had no jurisdiction in view of the judgment passed by this Court in C.P. No.1100/2010. Besides, the learned trial Court has illegally dismissed application under Section 265-K Cr.P.C.

3. Learned counsel for respondent No.1 has contended that he is lawful owner of the subject that was purchased by auction from Banking Court at Karachi; that the auction process remained continued for 16 years and no objection was ever filed, he had participated in the auction, offered highest bid that was accepted and sale certificate was issued, Directorate Settlement Survey and Land Record recorded the sale/transfer of the said land in his favour; on 22.01.2010 demarcation was completed, measurement certificate was issued, report was submitted by concerned DDO (Revenue) on 09.02.2010 and 01.03.2010 to the Banking Court for handing over of physical possession of the land; that respondent No.1 has all documents that he placed on record confirming title, boundaries, location and possession of the subject land; that concerned Sub-Registrar Kotri had submitted report to Nazir of Banking Court

confirming that said land has been recorded in his favour. It is contended that applicants with malafide intentions to grab the land came at the site and issued threats hence complaint was lodged at PS Nooriabad on 16.02.2010 but no action was taken, on the contrary applicants having influence registered a false case No.22/2010 at same P.S. and on 17.02.2010 police accompanied with offenders had conducted raid on site and took away staff and working material with them whereas remaining material on the site had been removed/stolen by the offenders; that report dated 15.03.2010 of DDO Revenue, report dated 13.03.2010 of Land Record Officer, Hyderabad, report dated 18.5.2010 of Director SS & LR Hyderabad and report dated 14.4.2010 of microfilming officer reveal absolute ownership of respondent No.1 and also negate version of applicants; respondent No.1 filed CP No.1100/2010 before this Court wherein title of respondent No.1 as well as location of the land was also got verified; that applicants continued their attempts by using their factory workers and others and ultimately they dispossessed the respondent No.1 from land forcibly on 24.05.2010 and also occupied the said room by shunting their watchmen/staff and to manipulate to establish the situation to be seen by Nazir of this Court on his inspection next day they installed sign boards and changed the colour of room with new titles, said petition was disposed of with direction to official respondents to act strictly in accordance with law, a Review was filed against that order which was dismissed; hence I.D. complaint was filed. He relied upon PLD 2016 SC 55 and P.Cr.L.J 2005 1524.



4. Learned A.P.G. adopted the submissions made by learned counsel for respondent No.1.

5. Perusal of the available material *prima facie* makes it clear that earlier a CrI. Misc. Application No.S-156 of 2011 was filed before this Court challenging order of *cognizance* by trial Court, however, the said application was disposed of with direction to applicants to agitate their claim before the trial Court by making such an application. In consequence whereof such an application U/s 265-K Cr.PC was moved before the trial Court for *one* accused which was dismissed by learned Additional Sessions Judge, Kotri vide order dated 05.05.2012. Such order was challenged before this Court vide Criminal Misc. application No.S-267 of 2012. Said CrI. Misc. application, *however*, was dismissed vide order dated 13.3.2017. Later, the applicants again moved Criminal Misc. Application No.267/2012 before this Court for all accused persons without moving to the trial Court. When confronted, the counsel for the applicants made statement which is reproduced hereunder:-

“It is very respectfully submitted in compliance of the order dated 13.01.2017 passed by this Honourable Court by directing the undersigned to satisfy maintainability of the application in respect of accused persons/applicants. It is submitted that initially the application U/S 265-K Cr.P.C. was filed on behalf of applicant/accused No.4 viz. Syed Unver Iqbal Jaffery before learned trial court and same was dismissed by order dated 05-05-2012. The above order was challenged before this Honourable Court through Criminal misc. application by learned counsel under the impression that co-accused’s application u/s 265-K Cr.P.C has been

dismissed and **if he will file the remaining accused before; learned trial court that will also be dismissed, hence he has filed application on behalf of all applicants/accused** before this Honourable Court, hence I am withdrawing/not pressing the name of applicants/accused Siraj Kassam Telli, Yaseen Haji Kassam, Mehmood Rangoonwala and Mukhtiar Ali Shah and filed and proceedings on behalf of applicant/accused Syed Unver Iqbal Jaffery who has filed application before learned trial court and same was dismissed. Further submitted that on behalf of accused/applicants No.1,2,3 & 5 the application will be file before learned trial court u/s 265-K Cr.P.C. hence this statement.”

The record shows that instant petition has again been filed by the applicants seeking quashment of *proceedings* without resorting to remedy, provided by section 265-K Cr.P.C., though was undertaken in *referred* statement.

The *above* position has given rise to *legal* propositions which may well be framed as under:-

- i) Whether rejection of application U/s 265-K Cr.PC for one accused is sufficient to be taken as a *decline* for all accused persons?
- ii) Whether the procedure, provided by the law, can be deviated from *merely* by change of name?
- iii) Whether this Court can examine its own order *even* if presented with different *name*?

6. While attending the *first* proposition, at the outset I would say that there has been *deliberation* in forming the provision of Section 249-A/265-K Cr.PC. In *both* sections the *terms* ‘**an accused**’

and **'at any stage of the case'** have been used and such exercise is subject to only condition that **'there is no probability of accused being convicted of any offence'**. It needs not be added that a case may include number of *accused* persons but it is not always necessary that all must be guilty of one *offence* therefore, legislature used the above **terms**. If the *intention* would have been otherwise, the legislature would have used the term **'all accused'** in place of **'an accused'**. It may well be made more easier for understanding that if at later stage the prosecution *evidence* does not stick against one of the accused persons but *other* accused persons then whether such *accused* must suffer rigours of trial despite the fact that during trial the prosecution no more claiming him so?. The answer thereof would be nothing but a big **'NO'**. This *position* was even acknowledged by learned counsel for the applicants while making the statement, referred hereinabove.

7. The *answer* to the second proposition in **'negative'** needs no *scholarly* work because it is by now a well settled principle of law that where law requires an action to be done in a particular manner, it has to be done accordingly and not otherwise. The *quashment of proceedings* as a whole *legally* is not *similar* to that provided by Section 249-A/265-K Cr.PC however, since, the honourable Apex Court in the case of Director General, Anti-Corruption Estt. V. Muhammad Akram Khan (PLD 2013 SC 401), made it clear that :

"2. ... The law is quite settled by now that after taking of cognizance of a case by a trial court the F.I.R. registered in that case cannot be quashed and the **fate of**

**the case** and of the **accused persons** challaned therein is to be determined by the trial court itself. It goes without saying that if after taking of cognizance of a case by the trial court an accused person deems himself to be innocent and falsely implicated and he wishes to avoid the rigours of a trial then the law has provided him a remedy under section 249-A/265-K Cr.PC to seek his premature acquittal if the charge against him is groundless or there is no probability of his conviction.”

In the instant matter, it is matter of record that cognizance has been taken therefore, the proper course for the applicants was / is to have their *early* acquittal by resort to provision of Section 265-K Cr.PC hence a *deviation* thereto in name of *quashment* is legally not permissible. In short, the applicants are to *first* approach the trial Court for their *early* acquittal, if they so feel so which *feeling* however is subject to satisfaction of the trial Court, as required by law.

8. Now, I would take up *third* and last proposition. At the very outset, I would feel *safe* in saying that the *procedure* always speaks of the **‘Court/forum’** and not the *person* (name of judge) and provides remedy of *appeal* etc before higher Court/ forum hence once a Court passes an *order* it becomes *functus officio* and *legally* cannot re-examine the same except to correct an error, floating on face of the record within *review* jurisdiction which, in no way, can be a substitute of **‘appeal’**. To have a second opinion of the findings, reached in the final order by the same Court, is not permissible which *solely* lies with the higher forum. Reference may well be made to the case of *Iqbal Pervaiz v. Harsan* (2018 SCMR 359) wherein it is *categorically* held as:

“8. ... Once a case is finally decided, the Court becomes *functus officio*. The only provision which allows to make change in the final order is the provision of review, scope of which is very limited i.e to correct an error that is floating on the face of the record. To have a second opinion of the findings reached in the final order by the same court is not permissible while exercising power of review. Such power lies solely with the higher forum. ....”

Having said so, the record shows that in the instant matter, it is a matter of record that this Court *earlier* vide order dated 13.3.2017 declined request of *early* acquittal of one of the applicants / accused and since the *sought* relief (quashment of proceedings as a whole) shall surely result in *acquittal* of such accused *too* which relief *legally* cannot be obtained from this (*same*) Court *even* indirectly. The law is quite settled by now that what one is not entitled *directly* cannot obtain *indirectly*. I would also add that *second* opinion *even* if result thereof comes in *decline* yet would prejudice the case of the applicants/accused. This is another reason that double stamping by same Court is not permissible.

9. The answers to above propositions though are sufficient for dismissal of instant petition, however, in response to *plea (s)* taken by learned counsel for the applicants/accused, I feel it proper to make it clear that remedy, provided by Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is without prejudice to any other action which one may take in the Ordinance or ***any other law for the time being in force***. Thus, even such *plea* seems to be not available with the applicants/ accused. It may also be added here that where an act entails civil liability under civil law as well criminal penalty under criminal law then a person can be

tried under both kinds of proceedings. In such like matter, it would never be sufficient for a *party* to challenge an *independent* proceedings for reason that *other* remedy (be it *criminal or civil action*) has been availed. The Illegal Dispossession Act, 2005 falls in category of such *law*, as was held in the case of *Shaikh Muhammad Naseem v. mst. Farida Gul* (2016 SCMR 1931), as:

“5. In the impugned judgment it was also held that where civil litigation with regard to illegal dispossession from immoveable property is pending between the parties, the proceedings under the Illegal Dispossession Act, 2005 cannot be maintained. This finding is also based on the decision of the Lahore High Court in *Zahoor Ahmed’s case* (PLD 2007 Lahore 231, reasoning of which was adopted by three member bench of this Court in *Bashir Ahmed’s case* (PLD 2010 SC 661). We are of the view that such a finding is also not sustainable in law. Any act which entails civil liability under civil law as well as criminal penalty under criminal law, such as the Illegal Dispossession Act, 2005 then a person can be tried under both kinds of proceedings, which are independent of each other. Once the offence reported in the complaint stands proved against the accused within the confines of the provisions of the Illegal Dispossession Act, 2005 then he cannot escape punishment on the ground that some civil litigation on the same issue is pending adjudication between the parties. ...Therefore, irrespective of any civil litigation that may be pending in any Court , where an offence, as described in the Illegal Dispossession Act, 2005, has been committed, the proceedings under the said Act can be initiated as the same would be maintainable in law.”

Further, if the *evidence* or *part* thereof has been recorded by the trial Court which, per the applicants / accused, is sufficient for their acquittal, yet the procedure would be that of seeking their acquittal by following the provision of Section 265-K Cr.PC on *fresh* grounds as this (section 265-K Cr.PC) is not subject to any particular stage but on satisfaction of Court is available **at any stage**.

10. In view of what has been discussed above, I am of the clear view that instant petition is not maintainable and is dismissed as such. However, it is needless to add that if the applicants/accused choose to file an application for their *early* acquittal the same shall be entertained by trial court after examination of material witnesses, strictly in accordance with law.

Imran/PA

**J U D G E**