

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
LARKANA**

Cr. Revision Application No. S-13 of 2017

Applicant: Sikandar Ali Khoso son of Muhammad Bux Khan
through Mr. Riaz Hussain Khoso, Advocate

Respondent(s): Baran Mazari and Azizullah both sons of Jogi Khan
through Mr. Safdar Ali Ghouri, advocate

The State: Through Mr. Ali Anwar Kandhro, Addl.P.G.

Date of hearing: 21.12.2018

Date of decision: 21.12.2018

ORDER

Khadim Hussain Tunio, j.- This criminal revision application is directed against the impugned order, dated 25.02.2017, passed by learned Additional Sessions Judge, Kashmore at Kandhkot in Direct Complaint No. 07/2017, u/ss 3, 4 and 5 of Illegal Dispossession Act, 2005, whereby the learned Judge dismissed the complaint of applicant. The applicant preferred this revision application and prayed that the impugned order may be set aside.

2. Precisely, facts of the prosecution case are that the applicant party is the real owner of the agricultural land admeasuring 12-5 acres in the name of Sikander Ali, while 9-27 acres out of the land of the applicant out of the total land admeasuring 32-27 acres includes other co-sharers situated in block No.2 Deh Domewali, Taluka Kashmore. The applicant had previously filed a complaint using his Power of Attorney against one Piyaro Khan, but later patched up and withdrew the same complaint. On the eventful day, at about 07:30 AM, when the applicant was present in his agricultural land alongwith PW Nawab Khan and Hazar Khan, the respondents No.1 &2 arrived, duly armed with deadly weapons enquired why the applicant had not vacated the land, hence they will not be spared. Thereafter, the respondents caused, kicks, fist blows and aimed their weapons at them, threatening that if the applicant party approached the police station, they will be murdered. On 11.01.2017, when the applicant was present at his wife's agricultural land along with Nawab Khan and Hazar Khan, the respondents appeared once again with deadly weapons and issued threats to the applicant that if he does not vacate the land, he

will be murdered. The respondents No.1 & 2 dispossessed the applicant from his land and when the applicant approached them and requested that they vacate his land, they clearly refused and became annoyed, upon after they issued threats of murder to the applicant. Hence, the applicant filed direct complaint under Sections 3, 4 & 5 against the respondents.

3. Mr. Riaz Hussain Khoso, learned counsel for the applicant contended the applicant is a respected and peace loving citizen of the locality and the respondents No.1 and 2 are infamous land-grabbers who have forcibly dispossessed the applicant from his rightful property; that the respondents No.1 and 2 are well-renowned parts of *qabza mafia* and have dispossessed many other people of the locality at the strength of their criminal force; that the learned Additional Sessions Judge, Kashmore has dismissed the direct complaint of the applicant without verifying real facts and circumstances of the case; that if the respondents No.1 and 2 do not vacate the land of the applicants, the applicant will sustain irreparable loss.

4. Conversely, the learned A.P.G., while refuting the submissions of applicant's counsel, contended that impugned order being well-reasoned does not require to be interfered with by this Court.

5. I have heard the learned counsels for the applicant as well as the respondents and learned A.P.G. and perused the material available on record.

6. I would like to divert my attention to the argument advanced by learned counsel for the respondents that the complaint was not maintainable as it was filed through attorney, I would like to refer to the case law reported as **2016 MLD 1238**, wherein it has been held that a complaint can be filed by anyone but an attorney. This Court, in the above case observed that:-

“14. Now let's examine whether an attorney can act as a complainant or a witness in criminal matters or otherwise? The term 'attorney', legally, in most general sense draws a picture of one who is not speaking for himself but for his 'principal'. As per Black's Law Dictionary (fourth addition) the term 'attorney' is defined as:--

'In the most general sense this term denotes an agent or substitute or one who is appointed and authorized to act in the place of or stead another'

Per Marriam- Webster, it is defined as:

'one who is legally appointed to transact business on another's behalf'

Since the 'Criminal administration of justice' recognizes only those as a witness or complainant who either have seen; heard or least perceived any fact towards the offence hence an 'attorney', being not speaking of his own knowledge, would not fall within meaning of 'witness/complainant'. Thus, an attorney cannot legally, under such status of attorney, file the FIR or a criminal complaint.

15. *Accordingly, I am of the clear view that the plea regarding competency of attorney to file direct complaint is having weight and thus anybody can bring the law into motion but not as an 'attorney'.*

16 *In view of above, instant application is dismissed.”*

7. At the very outset, it needs not to be mentioned that it is by now a settled proportion of law that Illegal dispossession Act, 2005 has general application upon all cases of illegal and unauthorized dispossession. Reference is made to the case of ***Gulshan Bibi v. Muhammad Sadiq (PLD 2016 SC 769)***. However, it needs not to be reiterated that above principle of law cannot be exploited as a tool to drag one into *criminal litigation*, but the Court(s) shall always be competent to examine whether available material, *prima facie*, satisfies judicial conscious of the Court to take cognizance or otherwise? There can be no denial to the legal position that *cognizance* is always take of the *offence* hence before taking cognizance it shall always be the duty of every Court to examine whether commission of the offence is, *prima facie*, made out or otherwise? Such exercise though does not permit the Court(s) to examine material in a manner of fashion which it (Court) can while evaluating the evidence *however* does not relieve it (Court) to examine available material so as to see whether available material constitute the offence of which cognizance is to be taken or not? Reference may be made to the guidance, provided in the case of ***Raja Khushbakhtur Rehman & another v. State (1985 SCMR 1314)***, wherein it was observed as under:-

6. *Under section 190(3), Cr. P. C. the Magistrate takes cognizance of an offence and not of an offender. He takes cognizance of the case as a whole and not qua only some of the*

accused found by the police to be implicated in the case. Cognizance can be taken even if the offenders be unknown. On taking cognizance of the offence the Court acquires jurisdiction over all the persons involved and not only over persons against whom the challan is submitted. The word "cognizance" is a term of art implying application of mind to the facts of a case in order to determine whether the facts disclosed constituted an offence triable...

Thus, it can *safely* be concluded that if on examination of available material, the Court finds the facts not constituting the complained **offence** or any other **offence** then the Court is competent to dismiss the complaint. It may also be added that an act of taking **cognizance** or *otherwise* is a discretionary one. Every *discretionary* jurisdiction shall always include two ways powers i.e to **accept** or **decline**. Thus, I would conclude that if while examining material the court finds no reasonable grounds to proceed further, it (Court) shall always be competent to dismiss the complaint.

8. Now, I would revert to merits of the case. It cannot be denied that applicant/complainant has alleged commission of an **offence** within meaning of Section 3 of the *Illegal Dispossession Act*. For *prima facie* constitution of an offence within meaning of Section 3 of the Act, it is always necessary that the complainant must establish illegal possession of accused (3(1) of Act) or his (complainant's) forcibly and wrongful **dispossession** (3(3) of the Act). Since, the provision of Section 5 of the Act allows the Court to conduct a '**local inquiry**' which report has been given the status of '**evidence**'. The relevant portion of the Section 5 of the Act reads as:-

"Provided further that whenever a local inquiry is necessary for the purpose of this Act, the Court may direct a Magistrate or **revenue officer** in the district to make inquiry and submit report.,..... The report of the Magistrate or **revenue officer** , as the case may be, **shall be constructed as evidence in the case.**"

9. Not only this, report of the SHO and Mukhtiarkar, *prima facie*, shows that the accused / respondents have neither occupied any area of land of complainant nor continuing with *illegal possession* thereon. In absence of '**illegal possession**' or '**wrongful or forceful dispossession**' no offence within meaning of Section 3 of the Act could be said to have been made out.

10. It is also a matter of record that the report or physical position, claimed therein, was never challenged by the applicant / complainant.

Further, the applicant / complainant *even* while arguing before this Court has not challenged such report, available on record. In existence of such *evidence*, no offence within meaning of Section 3 of the Act can be said to have been made out.

11. Further, the learned counsel for applicant has failed to refer any piece of material available on record which could persuade to hold that the inference drawn by trial Court is against the principles of appreciation of record. The impugned order of the trial Court, while dismissing the complaint cannot be said to be perverse and the reasons thereof are not fanciful, capricious, speculative and artificial, thus, in absence of holding the order of dismissal of complaint as such, it cannot be interfered with.

12. Keeping in view the above position and circumstances, I am of the opinion that the applicant has failed to make out a case for interference with the impugned order, therefore, criminal revision application was dismissed by short order dated 21.12.2018. These are the reasons for the same.

J U D G E