

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

CR. APPEAL NO.659/2018

Date	Order with signature of Judge
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1. For order on MA No.1841/2019
2. For hearing of main case.
3. For hearing of MA No.11024/2018.

21.05.2019

Mr. Muhammad Javed advocate for appellant
Mr. Ali Asghar Buriro advocate for respondent.
Mr. Faheem Hussain Panhwar, DPG.

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Salahuddin Panhwar, J: Through instant appeal, appellants have challenged impugned judgment dated 20th December, 2018 passed by Additional Sessions Judge Karachi South in Cr. Misc. application No.1342/2018.

2. Briefly, facts of prosecution case are that the complainant represented through its special attorney and alleged that the complainant is lawful owner in respect of the premises over plot bearing survey No. 54-B, Sheet No. RB-11 measuring 494 Sq yds situated in Rattan Talao Rambagh Quarters Karachi constructed as single story / ground floor. The complainant visited the property and found that the same has been encroached upon by the above named accused persons and illegally dispossessed him from his lawful and legal possession. He approached to the police station concerned but nothing availed. Consequently he filed the instant complaint praying that the matter may be proceeded under Illegal Dispossession Act, accused be punished and delivery of possession. Inquiry report on the complaint was called from the SHO PS Preedy who submitted the report and stated that the complainant produced him all ownership documents and these were got verified from the concerned department and came as genuine. He further reported that the accused persons are non-cooperative in the enquiry proceedings but

occupants verbally informed that they are occupying the premises pre-partition of Pakistan i.e. before 1947 but they did not produce any proof.

3. Thereafter point for determination were framed as :-

1. Whether the complainant is lawful owner of the immovable property and complaint u/s 3 of Illegal Dispossession Act 2005 is maintainable?

2. Whether the accused persons have committed the alleged offence of dispossession of the complainant from the property in question?

3. Whether the accused persons are in legal possession or ownership of the property in question?

4. What should judgment be?

4. After full dressed trial, trial court reached at conclusion addressed in points No.2 and 3 which are that :-

POINT NO. 2 AND 3

The complainant has clearly stated in the evidence recorded at Exh-3 that he approached the accused persons and requested them to vacate the property but they flatly refused to vacate the property but manhandling him after which he approached to the concerned police station. In support of the ownership the sale deed bearing registration No. 1005 dated. 23-02-3006 with Sub-Registrar-II Sadder Town Karachi MF Roll No. U-61315 / 3609 dated 28-07-2006 with Photo Registrar Karachi attached with lease deed, conveyance deed documents. The registered sale deed was executed by Muhammad Anwar and others in favour of GulshanElahi (the complainant). The title as mentioned in the sale deed was duly verified by the Mukhtiarkar and Sub-Registrar concerned. Thus the complainant sound lawful owner of the property in question. The SIP Sher Khan of PS Preedy submitted inquiry report called by this court and produced at Ex-3/I wherein he has confirmed the valid title and ownership of the complainant and the possession on the premises is of accused persons jointly. Inquiry officer also confirmed that the accused persons did not cooperated him during the inquiry. It appears that the accused persons are in illegal possession of the property without any legal status i.e. owners, purchasers or tenant of the complainant or of any third person who may declare them entitled for

retaining possession. The learned counsel for the accused persons kept focus on the power of attorney of the agent of complainant as to invalidate the same. the plea of learned defense counsel is discarded due to the fact of filing applications, statements etc on his behalf and appear before any court of law in respect of my case mentioned above pending before the concerned court as well mentioned at paragraphs No.1, 2 and 3 of the power of attorney produced at ex.3/A. the accused failed to rebut and deny the claim of complainant for his dispossession from the property. Only the accused persons informed the enquiry officer that they are in possession from pre-partition of Pakistan i.e. year 1947 but they did not produce a single document or evidence before this court as well as before the enquiry officer to establish their claim. The only saying of accused is not sufficient to prove their legal session over the suit property is since their fore-fathers. Even the accused persons failed to produce their ownership over the suit property and legal status i.e. purchasers or tenant and the ownership of third person other than complainant and how they got possession/entered into the possession either by force or by legal course. Hence at this stage it could not be denied that the complainant is lawful owner of the property and accused are in illegal possession. **However, the ingredient of forcible dispossession could not be proved.**

The promulgation of The Illegal Dispossession Act 2005 is an special enactment. It has limited scope i.e. "An Act to curb the activities of the property grabbers". The legislature has intention to enact the Act 2005 that "whereas it is expedient to protect the lawful owners and occupiers of immovable properties from their illegal or forcible dispossession therefrom by the property grabbers".

The main ingredient of S. 3 Illegal Dispossession Act 2005 has been defined by the honorable Apex Court in the judgment reported in 2010 P Cr L.J 2010 observing that the ingredient or element of S.3 of Act 2005 or that accused enters into or upon any property without any lawful authority to do so and with intention of dispossession or of grabbing controlling or occupying the property form the owner or occupier thereof. Therefore, I am of the view that the accused are entered in the property of complainant without any lawful authority.

In the case in hand the forcible dispossession of complainant not established against the accused. The other plea of defence counsel is considered that the date and time of dispossession in the entire proceedings of the case is missing. The second contention of learned defense counsel is discarded that his plea is not

substantial that the Illegal Dispossession Act 2005 has retrospective effect due to the complaint can be agitated for the illegal and forcible dispossession even before the promulgation of Act 2005, it is a principle laid down by the honorable e Supreme Court of Pakistan that complaint under Act 2005 can be filed if no other litigation was already pending for illegal dispossession. In this case the ownership of property with the complainant is from year 2006 and no any other proof of pendency of any other litigation has been brought before this court.

In view of my above discussion, I am of the opinion that the complainant failed to prove forcible dispossession from the property punishable u/s 3 of the Illegal Dispossession Act 2005 as required by the law beyond the reasonable doubt. It is well settled principle of law that the benefit of a slight of doubt always goes in favour of the accused.
(underlining is mine for emphasis)

5. In consequence to above discussion, the learned trial Court, while extending benefit of doubt, acquitted the accused / appellants yet trial court directed that :-

“..... However the accused are found in illegal possession of the property i.e construction on plot survey NO.54-B, street RB-11, measuring 494 sq. yards situated Latan talao ram bagh quarter Karachi and the complainant is entitled for restoration of possession. Therefore, the accused persons above named occupying directly or indirectly or any other person on the property are directed to hand over peaceful vacant possession of property forthwith to the complainant. The SHO PS Preedy Karachi is directed to provide assistance to the complainant if required for restoration of the possession of the property and to submit such report before this court. The accused are present on bail and their bail bonds stands cancelled and surety discharged.”

6. The above referral are sufficient to indicate that appellants / accused were not found *guilty* of offence within meaning of Section 3 of the Act hence were acquitted of the charge yet there has been recorded an order for restoration of possession to the complainant. Before going any further, I would say that provision of section 3 of the Act defines the offence and punishments thereof

which, *however*, does not include restoration of possession. Therefore, restoration of possession cannot be ordered as **'punishment'** which, on proving of *guilt*, is legally awarded as **must**. If the restoration of possession is not a **punishment** (per section 3 of the Act) then how the same can be ordered?. For an answer to this, it would be conducive to refer section 8 of the Act which reads as:-

“8. Delivery of possession of property to owner, etc.—(1) On conclusion of trial, if the Court finds that an owner or occupier of the property was illegally dispossessed or property was grabbed in contravention of section 3, the Court may, at the time of passing order under sub-section (2) and (3) of that section, direct the accused or any person claiming through him for restoration of the possession of the property to the owner or, as the case may be, the occupier, if not already restored to him under section 7”.

From above, it is quite obvious and clear that an order for restoration of possession has been dealt with *independently* which the Court **may** order but only when it (*Court*) is passing a **punishment** within meaning of subsection (2) and (3) of Section 3 of the Act. In the instant matter, it is matter of record that no punishment within meaning of said sub-section (s) of section-3 of the Act has been passed rather appellants / accused stood acquitted of offence, defined in section 3 of the Act. In such eventuality the trial Court was never competent to *legally* order for restoration of possession which could only be recorded within meaning of Section 8 of the Act. Admittedly complainant has not filed acquittal appeal. Thus, it can safely be said that such direction / order was nothing but a *pure* excess of jurisdiction without any back of law hence the same cannot sustain. Accordingly trial court has travelled beyond jurisdiction thus instant appeal is allowed. Impugned judgment is set aside only to extent to challenged portion regarding restoration of possession.

While parting, it may be added that a *failure* in complaint under section 3 of the Act would never create a *legal* bar in obtaining possession or removal of illegal occupants by resort to other legal remedies because such remedy was / is a special one and in no way prejudices other available legal remedies.

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