

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 419 of 2010

Appellant : Rizwan Ahmed
through Mr. Shaikh Adnan, Advocate

Respondents : Mst. Rukhsana
through Mr. Shamraiz Khan, Advocate

The State
through Mr. Talib Ali Memon, A.P.G.

Date of short order: 31st October, 2022

JUDGMENT

Omar Sial, J: Rizwan Ahmed was accused of illegally dispossessing Ms. Rukhsana from an apartment in the year 2006. The learned 4th Additional Sessions Judge, Karachi East on 30.09.2010 convicted him under section 3(2) of the Illegal Dispossession Act, 2005 and sentenced him to a 2 year prison term in addition to pay a compensation of Rs. 100,000 to Rukhsana. Rizwan was also directed to handover the possession of the apartment to Rukhsana. It is this judgment of the learned trial court that has been called into question through this appeal.

2. A background to the case is that Rukhsana claimed that she had purchased an apartment numbered B-11 which was situated on the 2nd Floor of a building known as Faraz Avenue, built on Plot No. 118/9, Block 20, Gulistan-e-Jauhar in Scheme No. 36 of Karachi from one Muhammad Irfan. She testified that after she had taken possession of the apartment, she fell ill and therefore moved to her parents' house. After a few days when she came back, she saw that Rizwan was living in the said apartment. Rizwan told Rukhsana that the apartment was owned by his mother.

3. Learned counsel for Rizwan has argued that no dispossession took place and that though there was a long standing dispute between the brothers Rizwan and Irfan, they had been living in that apartment along with their father and families long before the false allegation of dispossession was made against Rizwan. Learned counsel for Rukhsana has relied solely on one statement made

by PW-4 A.S.I. Noorul Wahab in support of his case. Learned APG has half-heartedly supported the impugned judgment.

4. After hearing the arguments of the counsels and reviewing the record, it transpires that Rizwan (the appellant) and Irfan (the person who ostensibly sold the apartment to **PW-1 Rukhsana**), both lived in the apartment along with their father. The 2 brothers and their father, to date, are living in that same apartment. Both counsels confirmed this. Rukhsana too, in her testimony acknowledged, to the extent of Irfan, that he was living in the apartment along with his family. Perhaps due to friction between the brothers, Irfan, claiming that he was the sole and undisputed owner of the apartment entered into an agreement to sell on a date which is not mentioned on the agreement, to Rukhsana. Irfan, also executed and registered a General Power of Attorney in favour of Rukhsana in August 2004. It is an admitted position that the title of the property was never transferred in the name of Rukhsana. Rukhsana could not identify when she took possession of the apartment or when Rizwan dispossessed her, however she claimed that it was some time in the year 2006. She could not support her claim that she had moved out of the apartment because she had fallen sick because of the renovation work. While asserting that someone else was supervising the renovation, at trial she could not identify who that someone was and thus she referred to that person as a "well wisher". She acknowledged that she had earlier on 29.06.2007 registered an F.I.R. bearing number 364 of 2007 under sections 448 and 506-B P.P.C against Rizwan and that though the trial emanating from that F.I.R. was still ongoing, she was not interested in that trial as she wanted to file a complaint against Rizwan under the legislation of illegal dispossession. She also acknowledged that she was aware that civil litigation in connection with the said property was ongoing between the 2 brothers, Irfan and Rizwan. She admitted that she could show no utility bill or maintenance fee receipt for the apartment. A perusal of the agreement to sell shows that the agreement in itself records an undertaking from Irfan that the peaceful, vacant possession of the apartment will be given to Rukhsana meaning thereby that it had not when the agreement was executed. This clarifies, that contrary to Rukhsana's claim, possession was not handed over to her when the agreement to sell was executed.

5. Rukhsana's husband, a gentleman by the name of **Zahoor Ahmed (PW-2)**, was examined as the second prosecution witness. His testimony was on similar lines like his wife. He however elaborated by saying that he had taken possession of the apartment when Irfan had executed the General Power of Attorney in Rukhsana's name. This would be 07.08.2004. Husband and wife, both claiming that they had lived in the apartment were at odds as to how many bedrooms and bath rooms the apartment had. According to Rukhsana, it had 5 bedrooms and 5 bathrooms. According to Zahoor, it had 3 bedrooms and 3 bathrooms. He also claimed that he and his wife had been in possession of the apartment for nearly 18 months, however, like his wife, he too expressed his inability to show any bill or receipt which would indicate the couples occupation of the apartment. Like his wife, he too could not produce any evidence that possession was ever taken over by the couple. Zahoor asserted that he had bought the apartment for Rs. 955,000 in cash, but just like his wife, he too could not produce any evidence of the payment. Both husband and wife after stating that the agreement to sell had been executed in the presence of 2 witnesses, ultimately acknowledged that no signature or details of the 2 witnesses, except their first names, were written on the agreement to sell. Like his wife, Zahoor too expressed his inability to give either the date or the month or the year when they were dispossessed. The record further reflects that although the couple claimed that renovation work in the apartment was in full swing when Rukhsana had left for her parents' home, no evidence in the shape of a resident, management, watchman or labourer statement was produced at trial.

6. **PW-3 was Muhammad Aijaz.** He was one of the 2 persons who had ostensibly witnessed the execution of the sale agreement between Irfan and Rukhsana. His testimony was of not much use to the prosecution as he admitted that no money changed hands when the agreement was signed; he had not seen the ownership documents; he did not know the contents of the agreement to sell; he had never seen the apartment in question.

7. The preliminary inquiry in the matter was conducted by **PW-4 A.S.I. Noorul Wahab.** This witness testified that he had found out that the General Power of Attorney had been registered in the office of the Sub-Registrar but when he had visited an old man by the name of Khursheed, who was the 2 brothers' father, had opened the door. This witness also stated that he had met

with a member of the management committee, a gentleman by the name of Naseer Ahmed Wahidi, who had told him that Irfan had sold the apartment to “a lady” but that there was some dispute between the parties. Rizwan had been living in the apartment according to Wahidi. It is pertinent to mention that Wahidi was not called as witness at trial. This is the only witness which the learned counsel has relied upon to support Rukhsana’s case. According to the learned counsel this witness stated at trial that *“On conclusion of the inquiry I revealed that Mst. Rukhsana had purchased the flat in question from one Irfan and has got possession of the same.”* It was not clarified by this witness however as to how he reached this conclusion. To the contrary, in his cross examination this witness admitted that *“it is not in my knowledge that when the complainant has taken over the possession of the flat in question.”* He admitted that *“It is fact that complainant did not possess any NOC regarding the purchase of the flat in question from the builders known as Shakeel Enterprises.”* He further acknowledged that *“It is correct to suggest that complainant has not given me a proper date when accused Rizwan has illegally occupied her flat. It is correct to suggest that the complainant has not produced any possession letter before me which established that Irfan had physically handed over flat in question to her.”* This witness, in his cross examination, negated his earlier conclusion by stating that the agreement to sell and power of attorney were not title documents. The inquiry, if it can even be termed that, of this witness was restricted to go to the apartment only once and even on that visit he did not reveal his identity to the father of the 2 brothers, and that only once did he call Rizwan on his cell phone but had not met him or questioned him. Irfan, of course, was not on his radar. Further inefficiency, negligence and dishonesty of this witness was revealed when he was confronted with the statement of Wahidi which he himself had recorded, and then he admitted that nowhere in the statement had Wahidi said that Irfan had sold the apartment to Rukhsana. He admitted that nobody in the apartment building had told him that Rizwan had illegally possessed the apartment. He admitted that the complainant had also not produced even the keys of the lock she claimed she had installed on the door of the apartment, and which was broken by Rizwan. He admitted that there was no evidence that Rizwan had broken the locks. The complainant had not even told him what belongings of her were inside the apartment. Strange keeping in view the fact that Zahoor claimed that the couple had been living in the house for 18 months.

This witness acknowledged that the none of the residents told him that Rukhsana ever visited the apartment, let alone ever live in it. Rukhsana had also not produced any witness to support her claim of dispossession.

8. The above was the entire evidence which was produced at trial by the prosecution. By no stretch of imagination was the allegation made by Rukhsana against Rizwan illegally dispossessing her from the apartment established or proved at trial. Prima facie, she was not the owner of the apartment, admittedly she had no documents to show title or possession in her favour, she was unaware of the date of dispossession, none amongst the residents or management of the building had ever seen her, payment for the purchase of property was not evidenced, at the time of the supposed inquiry made by A.S.I. Noorul Wahab, the 2 brothers and their father were living in the apartment. Not an iota of evidence to show that Rukhsana had taken possession and that she was subsequently dispossessed by Rizwan was produced at trial.

9. Rizwan recorded a long drawn out statement to show that the ownership of the property was an ongoing dispute between him and his brother Irfan and that there was also a civil suit pending between the brothers which was filed in the year 2004 (Suit No. 1184 of 2004 before the learned Senior Civil Judge, Karachi East). He also produced documents to show that his daughter Aqsa was born in the apartment in 2002, that he had made partial payment for the apartment to his brother through pay order in 2003, that his brother had entered into an agreement to sell with him in the year 2003, that the originals of whatever documents Irfan had in his possession to show payment of installments to the builder were in his possession as Irfan had handed over the same to him. He also produced telephone, electricity and gas bills issued in his name, the date of which go well beyond the year 2004. He also produced receipts showing payment of maintenance to the management committee also going well into the year 2007. I have not gone into a detailed analysis of the defence taken by him as in my view the prosecution had failed completely to prove its case against him. Even then suffice to say that when put in juxtaposition, it is the defence version that sounds more convincing and true.

10. In view of the above finding and observations it appears that the apartment in question is a bone of contention between the brothers. There is a strong possibility that Irfan tried to make some money by "selling" the property

to the complainant. A property which at the relevant time was not vacant. He may not have disclosed the actual position to Rukhsana when he took the money from her. He had certainly not disclosed to her that the ownership of the property is disputed. Be that as it may, if Irfan duped Rukhsana, the proper forum for her to seek remedy was the civil courts. No case of Rizwan illegally dispossessing Rukhsana was made out.

11. The appeal is allowed and the appellant is acquitted of the charge. He is on bail. His bail bonds stand cancelled and surety discharged.

12. Above are the reasons for my short order of earlier today.

JUDGE