

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.582 of 2022

Appellants : 1. ZainabBibi daughter of Noor Rehmat
2. Saima daughter of Abdul Rasheed,

ThroughMr. Atta Muhammad Khan,
advocate for Appellants.

Respondent : 1. Syed Kamal Shah Son of Syed Bakhsha

Mr. Siraj Ali Khan Chandio, Additional
Prosecutor General Sindh for Respondent.

Dates of hearing : **03.05.2023**

Date of Judgment : **18.05.2023**

JUDGMENT

AMJAD ALI BOHIO. J-Appellantsin the instant appeal have assailed the order dated 13.09.2022 passed by the Court of Xth Additional Sessions Judge, Karachi, Eastin the complaint filed under sections 4 & 5 of Illegal Dispossession Act, 2005, whereby the trial court refused to take cognizance of the offence and the complaint was dismissed at initial stage.

2. According to the complaint, following the death of Noor Zaman's husband, the appellants entered into an agreement on 07.04.2018 with Noor Zaman's brothers regarding the distribution/partition of the disputed building. Based on this agreement, the ground floor of the building was allocated to the appellants, who rented out the premises and were entitled to collect its rent. Additionally, the rent from the second floor was to be distributed among various individuals from whom the deceased, Noor Zaman, had obtained a loan. It was agreed that once the loan was cleared, possession of the second floor would be handed over to one of the appellants. However, it is alleged that respondent No.1 forcibly evicted the tenants of both the ground and second floors and locked those portions. As a result, the appellants filed a complaint seeking action under sections 4 and 5 of the Illegal Dispossession Act to hold respondent No.1 accountable. They also requested the delivery of possession of House No.22-B, a residential

property measuring approximately 130 square yards, located in Old Sabzi Mandi, Custodian Compound, Welfare Colony, P.E.C.H.S Karachi.

3. Upon the filing of the complaint, the concerned SHO and relevant departments were directed to provide their reports. The report from the SHO of the P.S. P.I.B. Colony in Karachi East, dated 06.08.2022, which is available in the trial court records, states that the appellants have entered into marriages with individuals who are unfamiliar to respondent No.1. As a result, respondent No.1 is unwilling to hand over the disputed property. However, it is mentioned that respondent No.1 is prepared to transfer the legal rights of the children or legal heirs left by his late brother, Noor Zaman.

4. After hearing, the trial court declined to take cognizance of the offense mentioned in the complaint under the provision of Illegal Dispossession Act of 2005.

5. I have carefully heard the arguments presented by the learned counsel representing the appellants as well as the learned Additional Prosecutor General Sindh and examined the relevant record of Criminal Petition No.140 of 2022.

6. The learned counsel representing the appellants argued that the trial court failed to take into account the appellants' share in the disputed property that according to the agreement, the appellants are entitled to receive the rent from the first floor, and once the loan is cleared, one of the appellants is entitled to take possession of the second floor. However, it is argued that the respondents have forcibly evicted the tenants of both the first and second floors and have put their own locks on the premises, thus forcibly dispossessed the appellants. The counsel further asserts that the trial court overlooked the appellants' entitlement and rejected the relief sought in the complaint. It is further contended that the trial court did not properly appreciate evidence and failed to apply judicial mind while passing the impugned order dated 13.09.2022, which is liable to be set aside.

7. The learned Additional Prosecutor General supported the impugned order issued by the Xth Additional Sessions Judge in Karachi East. It is contended that the appellants' complaint does not fall within the scope of the provision of Illegal Dispossession Act of 2005 since the respondent is acknowledged to be a co-sharer. The learned Additional Prosecutor General lastly argues that the appellants' grievance is purely of a civil nature, and therefore, the current appeal may be dismissed.

8. Upon considering the arguments presented by the learned counsel for the appellants and the learned Additional Prosecutor General, as well as reviewing the available evidence, it is noted that the appellants, in their complaint, have stated that respondent No.1 is the brother of the deceased, Noor Zaman. The appellants have also provided a joint agreement regarding the distribution of different portions of the building in a private capacity. However, they alleged that subsequently, respondent No.1 annoyed with the appellants' second marriage after the death of his brother Noor Zaman, and as a result, he affixed locks on the first and second floors of the building. Based on the appellants' own admission, respondent Syed Kamal Shah, being the real brother of Noor Zaman, is a shareholder in the disputed property. Thus, the agreement dated 07.04.2018 was executed to distribute their respective shares. Even if the possession of respondent No.1 is proved, it shall be considered possession as a co-sharer. It is a well-established principle of law that each co-sharer is deemed to be in possession of every inch of the disputed property unless the property has been properly divided or partitioned in accordance with the law. It is pertinent to note that since the disputed building has not been divided among the co-sharers, all the co-sharers are considered owners of the building until its partition.

9. It is relevant to mention that Section 3 of the Illegal Dispossession Act, 2005 provides the following definition of the offense:

"3. Prevention of illegal possession of property, etc.---(1)
No one shall enter into or upon any property to dispossess, grab, control or occupy it without having any lawful authority

to do so with the intention to dispossess, grab, control or occupy the property from owners or occupier of such property.

(2) Whoever contravenes the provisions of the subsection (1) shall, without prejudice to any punishment to which he may be liable under any other law for the time being in force, be punishable with imprisonment which may extend to ten years and with fine and the victim of the offence shall also be compensated in accordance with the provision of section 544-A of the Code."

The language used in Section 3 of the Illegal Dispossession Act indicates that for the offense to be constituted, the complainant must demonstrate the presence of an unlawful act (actus reus) accompanied by criminal intent (mens rea). If, upon prima facie examination, the complaint does not disclose the essential elements of the offense, the court is not obligated to mechanically register the complaint and initiate trial proceedings. Instead, it is the court's duty to dismiss the complaint at the outset if it is prima facie evident that there is no unlawful act or criminal intent involved, particularly when the allegations are leveled against a co-sharer who possesses lawful authority over the joint property and does not have any criminal intent to dispossess, seize, control, or occupy the property from its owners or occupants. In such cases, the actions cannot be categorized as constituting an offense under the definition provided. This distinction requires the court to carefully examine the material presented on record at the initial stage and then make an order based on a judicial application of mind. This ensures that complaints are not unnecessarily registered, which could cause distress and harm to the accused individuals, as ultimately these cases may be found to be excluded from the scope of this particular law. Reference in this regard can be made to the case of Waqar Ali v/s The State (PLD 2011 Supreme Court 181), which supports this approach.

10. Admittedly, the appellants and the respondents are co-sharers. In the case of Muhammad Afzal and others v. Muzafar Khan and 11 others (2020 P.Cr.L.J 721), it was held that the possession of a co-sharer shall be deemed as the possession of all co-owners. The court further determined

that the matter between the parties was of a civil nature, and utilizing the provisions of the Illegal Dispossession Act, 2005 in such cases would constitute an abuse of the legal process, which cannot be permitted. Similarly, in the case titled "Zahoor Ahmed v. The State and 03 others" (PLD 2007 Lahore 231), it is held as under:

“(i) The Illegal Dispossession Act, 2005 applied to dispossession from immovable property only by property grabbers/Qabza Group / land mafia. A complaint under the Illegal Dispossession Act, 2005 can be entertained by a Court of Session only if some material exists showing involvement of the persons complained against in some previous activity connected with illegal dispossession from immovable property or the complaint demonstrates an organized or calculated effort by some persons operating individually or in groups to grab by force or deceit property to which they have no lawful, ostensible or justifiable claim. In the case of an individual it must be the 4 W.P. No.1384 of 2008 manner of execution of his design which may expose him as a property grabber.

(ii) The Illegal Dispossession Act, 2005 does not apply to run of the mill cases of alleged dispossession from immovable properties by ordinary persons having no credentials or antecedents of being property grabbers/Qabza Group/land mafia, i.e. cases of disputes over possession of immovable properties between co-owners or co-sharers, between landlords and tenants, between persons claiming possession on the basis of inheritance, between persons vying for possession on the basis of competing title documents, contractual agreements or revenue record or cases with a background of an on-going private dispute over the relevant property.

(iii) A complaint under the Illegal Dispossession Act, 2005 cannot be entertained where the matter of possession of the relevant property is being regulated by a civil or revenue Court.”

11. Based on the aforementioned discussion, I have come to conclusion that the possession of respondent No.1, being a co-sharer of the property, cannot be considered as an offense under the provisions of Illegal Dispossession Act, 2005. Furthermore, according to the complainants'

version, there is an agreement in place where they are treated as owners of certain portions, and they allege that the accused has violated the terms of this agreement. Consequently, the dispute at hand pertains to the violation of the agreement, which falls within the exclusive jurisdiction of the Civil Court to resolve. The parties involved are co-sharers, and the nature of their dispute is purely of civil in nature, as affirmed in the case of *Usman Ali v. Additional Sessions Judge, Toba Tek Singh and 9 others* (2017 P.Cr.L.J 155). Therefore, the order issued by the trial court, which is being challenged in this appeal, does not require any intervention, the same is maintained and accordingly, this appeal is dismissed.

J U D G E