

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Acquittal Appeal No.339 of 2018

Date	Order with signature of Judge
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For hearing of main case

Date of hearing:-21.11.2023

Date of Order:-07.12.2023

Mr. Mahmood-ul-Hassan advocate for the appellant
Mirza Sarfaraz Ahmed advocate for respondent No.1
Mr. Talib Ali Memon, Assistant PG

ORDER

This Criminal Acquittal Appeal has been filed by the Appellant against the order dated 5.4.2018, passed by learned Additional Sessions Judge, Malir-1 Karachi, whereby respondent No.1 has been acquitted of the charges leveled against him under Section 3(2) of Illegal Dispossession Act, 2005, an excerpt of the order is reproduced as under:-

“7) Heard the parties counsels and I have perused the fresh reports submitted by the Chairman Rizwan Cooperative Housing Society Ltd Karachi and SHO Police Station Sachal, District Malir, Karachi and have also gone through the material available on record, from it appears that prior to this complaint and prior to sale deed dated 18.12.2007 produced by the complainant, one Muhammad Umer son of Muhammad Wali Khan who is uncle of present accused Nazeer Ahmed had filed the civil suit No.108/1999 before the Civil and family Judge Malir, Karachi against Kazi Moulana Syed Attiqur Rehman for permanent injunction for restraining the defendant, his agents, servants, attorneys, employees, successor, representatives and other acting under their control or guardian from dispossessing, ejection, eviction the complainant from his house bearing No.B-15, Rizwan Cooperative Housing Society, Scheme No.38-A, Scheme-33, Malir, Karachi. The perusal of judgment and decree dated 11.01.2001 and 15.01.2001 in Civil Suit No.108/1999 reveals that the defendant Syed Muhammad Attiqur Rehman contested the said suit in which six issues were framed. The Issue No.4 & 5 were as under:-

Issue No.4 Whether plaintiff is bonafide owner in possession of plot No.B-1/5, Rizwan Cooperative Housing Society, Karachi?

Issue No.5. Whether plaintiff has encroached upon the plot of defendant No.B-7, Sector 38-A, Rizwan Cooperative Housing Society Ltd Karachi?

8) The learned Civil Judge in his judgment decided the issues No.4 in affirmative and decided the issue No.5 in negative and accepted the claimed of plaintiff and declined the claimed of defendant Syed Muhammad Atiqur Rehman and decreed the suit vide judgment dated 11.01.2001 and decreed dated 15.1.2001, prior to the Illegal Dispossession Act, (XI, 2005). This judgment and decree of Civil Suit No.108/1999 is judicial record which is not denied by the complainant of this case. The above judgment and decreed of civil suit for permanent injunction was neither challenged before any appellant Court nor it was got set aside from any Court of appellant forum, meaning by that the said Kazi Moulana Syed Muhammad Atiqur Rehman accepted the claimed of plaintiff of the suit of Muhammad Umer and accepted his possession over the plot No.B-1/5 Rizwan Cooperative Housing Society and accepted the claimed of plaintiff is bonafide owner in his possession and the Syed Muhammad Atiqur Rehman failed to prove his claimed that the plaintiff has encroached upon the plot No.B-7 Sector 38-A Rizwan Cooperative Housing Society Ltd, Karachi.

9) In such circumstances the defendant of civil suit No.108/1999 Syed Muhammad Atiqur Rehman was incumbent to have filed the suit for declaration of his claimed but he failed to seek such declaration of his claim of plot No.B-7 Sector 38-A Rizwan Cooperative Housing Society and transferred the alleged plot in favour of plaintiff and the complainant of this complaint without looking to the facts of Civil Suit No.108/1999 allegedly purchased the alleged disputed plot, through alleged sale deed in December, 2007. Plaintiff/complainant purchased the dispute without verification of title and possession of seller Syed Muhammad Atiqur Rehman.

10) Since, the possession of Muhammad Umer son of Muhammad Wali Khan of plaintiff of Civil Suit No.108/1999 was established through the judgment and decree dated 11.01.2001 and 15.01.2001 prior to the promulgation of the Illegal Dispossession Act, 2005. The proposed accused Nazeer Ahmed is nephew of plaintiff Muhammad Umer, his possession, occupation of plot in question and uncle of prior to 2001. It is held in 2011 SCMR 1137 that above act is introduced in 2005, Panel provisions contained in the Illegal Dispossession Act, 2005 could not be given retrospective effect in view of article 12 (1) of the Constitution. In the case in hand the possession of accused and his uncle is established in the judgment and decree passed on 11.01.2001 and 15.01.2001 and there is no proof that alleged possession was delivered to complainant by the defendant of the suit, there is no prove which could show that the complainant was forcibly dispossessed from the plot in question in 15th July, 2009, therefore the complaint in hand could not be given retrospective effect, the same is not maintainable, no prima facie case under the complaint of Illegal dispossession Act, 2005 is made out, hence the same is hereby dismissed. The complainant is at liberty to seek remedy from civil court against the Chairman Society and against Syed Attiqur Rehman and also is at liberty to sue them for damages.”

2. The brief facts of the case are that the applicant/complainant Mst. Razia filed the Criminal Illegal Dispossession Complaint No. No.53/2009, under section 3 (1) and (2) of the Illegal Dispossession Act, 2005 before the Court of Additional Sessions Judge, Malir-1, Karachi on 24.10.2009, with the allegations that She was/is the owner of the immovable property/plot bearing No.B-7, measuring 400 square yards situated in Rizwan Cooperative Housing Society, KDA Scheme No.33, Sector 38-A, District Malir, Karachi. She claimed that she had purchased the above plot from one Attiqur Rehman through registered documents after obtaining the NOC from the Administration of the Society dated 13.12.2007 and such Sale Deed was executed/registered on 18.12.2007 before Sub-Registrar-II Gulshan-e-Iqbal Town, Karachi and it was registered through MF Roll No.U7922-4836, before Photo Registrar, Karachi on 08.02.2008 and in lieu of such Sale Deed, she had been enjoying the possession thereof, without any interruption. The complainant further averred that on 15.07.2009, she along with her family members visited the plot where they found that the respondent-Nazeer Ahmed illegally and forcibly occupied the subject plot and was running his business of Cement Block, Reti, Bajri, etc. After knowing such facts, she approached the local Police but the Police avoided taking action against the accused persons. Applicant asserted that the Trial Court issued a process against the accused, who put his appearance, and the Charge was framed against the accused on 05.03.2010 to which he pleaded not guilty and claimed to be tried. As per the applicant, after trial, the Trial Court passed the Judgment dated 31.10.2012 whereby the respondent-accused was found guilty of the offense/charge under section (2) of section 3 of the Illegal Dispossession Act, 2005 and he was sentenced to suffer R.I for five months and fine of Rs.20,000/-, in case of failure of payment of fine, it was further ordered that the accused shall suffer R.I for three months more. The SHO of Police Station Sachal was directed to assist the complainant with the restoration of the property in question under the law and the accused was remanded to jail to serve out the Sentence. She added that the respondent-accused being aggrieved by and dissatisfied with the aforesaid decision preferred the criminal Appeal No.305/2012 before this Court, which was heard, and finally, this Court set aside the impugned judgment/order dated 31.10.2012 and it was, unfortunately, consent was recorded and the matter was remanded to the Trial Court for De-novo trial on 30.11.2017. She further submitted that after the remand of the case, the Trial Court simply dismissed her Criminal Illegal Dispossession Complaint No. No.53/2009, on the premise that the complainant purchased the disputed plot without verification of title and possession of seller Syed Muhammad Atiqur Rehman, the possession of Muhammad Umer in Civil Suit No.108/1999

was established through the Judgment dated 11.01.2001 and Decree dated 15.01.2001 passed by the learned Senior Civil Judge Malir-Karachi, before the enactment of the Illegal Dispossession Act, 2005. And the respondent-Nazeer Ahmed had been in possession/ occupation of the plot in question before 2001 and the Illegal Dispossession Act, 2005 had no retrospective effect.

3. Mr. Mahmood-ul-Hassan, learned counsel for the Appellant/Complainant, at the very outset submits that the impugned order passed by learned Trial Court is illegal, unlawful and void thus liable to be set aside in terms of previous Judgment passed by the Trial Court whereby the respondent was convicted and sentenced; that learned Trial Court while passing the impugned Judgment has not appreciated the evidence of the Appellant/Complainant and his witnesses with regard to commission of offence committed by the respondent/accused already recorded; that the learned Trial Court did not consider the evidence of complainant, which was consistent with the contents of complaint and was duly supported by the prosecution witnesses wherein respondent/accused was specifically attributed proper role of occupying the subject property forcibly and was convicted by the trial court; that impugned order is based on presumption and assumption so also on surmises and conjectures; that civil litigation cannot be made basis to dismiss the Criminal Complaint; learned trial Court did not apply its judicial mind while passing the impugned order; that there is nothing available on record to suggest that the Complaint was not maintainable under the Act, 2005. In the last, he submits that the impugned order passed by the learned Trial Court may be set aside and the respondent may be convicted as already done by the Trial Court vide Judgment 31.10.2012. On the issue of retrospective effect, the learned Counsel submitted that the appellant was evicted forcibly by the private respondent in the year 2009, thus the question of retrospective effect of the Act, 2005 does not arise and the Complaint was very much maintainable under the Act, 2005 as such there was no occasion for the learned Trial Court to ignore the law and facts of the case to dismiss the Complaint. On the question of the De-novo Trial, learned counsel extensively read the previous Judgment and order for a De-novo Trial of the case by this Court and submitted that De nova trial means Trial afresh or started again and it would be against the fact to treat De novo trial as merely re-summoning and rehearing the witnesses.

4. Mirza Sarfaraz Ahmed learned Counsel representing respondent No.1 has raised the question of maintainability of the captioned Appeal on the ground that the appellant has never remained in possession of the subject property as such the question of illegal dispossession does not

arise. The learned Counsel further submitted that Since, the possession of Muhammad Umer plaintiff in Civil Suit No.108/1999 was established through the Judgment dated 11.01.2001 and Decree dated 15.01.2001 before the enactment of the Illegal Dispossession Act, 2005 and the respondent being his nephew, this his possession, occupation of the subject plot before 2001 was established as such the Act, 2005 has no retrospective effect. The learned Counsel heavily relied upon the Judgment rendered by the Supreme Court reported as **2011 SCMR 1137** and argued that the penal provisions contained in the Illegal Dispossession Act, 2005 could not be given retrospective effect because of Article 12 (1) of the Constitution. He emphasized that in the case in hand the possession of the respondent and his uncle Muhammad Umer was/is established in the Judgment and Decree passed by the Trial Court and no proof of alleged possession was delivered to the complainant by the defendant Syed Attiqur Rehman in Civil Suit, and there is no prove which could show that the complainant was forcibly dispossessed from the plot in question on 15.7.2009, therefore the Complaint was rightly dismissed by the Trial Court as the Act,2005 has no retrospective effect, and the Complaint was not maintainable under the Illegal dispossession Act, 2005 is made out, however, the complainant was provided the remedy to seek remedy from Civil Court against the Chairman of the Society and Syed Attiqur Rehman for damages if she can prove her case. He lastly prayed for dismissal of the instant Acquittal Appeal.

5. Mr. Talib Ali Memon, learned Assistant PG has supported the impugned order passed by the learned Trial Cout and submitted that the Illegal Dispossession Act, 2005 has no retrospective effect.

6. I have heard learned counsel for the parties and perused the record available in the file and case law cited at the bar.

7. First and foremost, regarding the issue of the De-novo Trial ordered by this Court in the earlier round of litigation, let it be resolved first, primarily, when the Court uses the phrase "De novo trial" which has no fixed meaning, (if it has no fixed meaning), it is to blame, but the accused, when he adopts the phrase and claims De novo Trial, also makes himself responsible for using vague language, he cannot, when it suits his purpose, say that what he meant was not recommencement of the trial but simply re-summoning and rehearing of the witnesses under the proviso. If it is relevant to consider what the Court and the parties understood by the De novo trial, and I think it is, there can be no doubt that the respondent understood the De novo Trial to mean the re-

summoning of witnesses and recommencement of the trial. In the present case, the trial Court has discharged the respondent and dismissed the Complaint also understood the phrase has the same meaning. It is well settled that the Court when it grants a De novo Trial, certainly means that it does not propose to act on the evidence already recorded. Since the Court has a choice of only two alternatives, it must mean the adoption of the other alternative of re-summoning the witnesses and recommencing the trial.

8. The question involved in the present proceedings is whether, after remand of the matter for conducting the De-novo trial, the Trial Court can ignore to evidence already recorded and dismiss the Illegal Dispossession Complaint; and, whether the alleged dispossession had taken place before the enactment of Illegal Dispossession Act, 2005, and whether Illegal Dispossession Act, 2005 has no retrospective effect and Illegal Dispossession Complaint was/is liable to be dismissed on the aforsiasd annology.

9. To appreciate the aforesaid proposition, it is expedient to have a look at the factual aspect of the case. From perusal of the record, it appears that the impugned Judgment/order has been passed on a Complaint filed under Section 3(2) of the Illegal Dispossession Act, 2005, which was dismissed on the ground that the possession of Muhammad Umer uncle of respondent NO.1 was established through the Judgment dated 11.01.2001 and Decree dated 15.01.2001 passed by the learned Senior Civil Judge Malir Karachi, before the enactment of the Illegal Dispossession Act, 2005 and the respondent Nazeer Ahmed's possession, and occupation of the plot in question was before 2001. Further, there was no proof that alleged possession was delivered to the appellant/complainant by the defendant in the Suit proceedings; that there is no proof that the complainant was forcibly dispossessed from the plot in question on 15.7.2009, therefore no case under the Illegal Dispossession Act, 2005 was made out, and the appellant was directed to seek remedy from Civil Court for damages against the Chairman of Society and against Syed Attiqur Rehman.

10. To see from that aspect, it is a matter of record that in the earlier round of litigation, the respondent was tried and convicted by the Trial Court based on evidence; and, after remand of the matter, the same Trial Court took a contrary view and opined that no case of Illegal Dispossession was made out which seems to be strange findings for the simple reason that the Trial Court was simply directed to conduct De-novo Trial and decide the case on merit. It is evident from the impugned order that the trial Court without considering the material available on the record

comprising of the pleadings of the parties and evidence of the complaint, straightaway dismissed the Complaint. It may be noted that when the evidence of the complaint and her witnesses were recorded in the earlier round of litigation and where there was no sufficient material on the record, the Court should have asked the parties to tender their evidence and then have decided the case on merits. The Court should not decide the case summarily as it has to pass a Judgment under the Illegal Dipssposseion Act, 2005, which must conclusively determine the rights of the parties on the subject issue. In the instant case though the earlier deposition of the Complaint was on the record, the Court without considering it proceeded to dismiss the Complaint summarily, and that too under the wrong notion which is patently illegal. It is now well-settled law that the Court while proceeding with the matter on merits should record its finding after considering the entire material on the record. In the case of *Amanullah Khan. v. Mst. Akhtar Begun* (1993 SCMR 504), the Supreme Court of Pakistan observed that when any party fails to produce evidence, the Court may notwithstanding such default, proceed to 'decide' the lis forthwith on merits. To 'decide' means "settle (question, issue, dispute) by giving victory to one side; give judgment (between, for, in favor of, against), bring come to a resolution". 'Decision' means 'settlement, conclusion, formal judgment, making up one's mind'.

8. Coming to the point of the De-novo trial again say that in principle, the De-novo Trial is not new or fresh. All that it means is that the accused has the right to have all or any of the witnesses re-summoned and reheard by the Trial Court. 'Speedy Trial' and 'Fair Trial' for a person accused of a crime are integral parts of criminal law. The appellate court hearing a Criminal Appeal from a judgment of conviction has the power to order the retrial of the accused under the Code. Though such power exists, it should not be exercised routinely. A de-novo trial or retrial of the accused should be ordered by the Appellate Court in exceptional and rare cases and only when in the opinion of the Appellate Court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is the continuation of the same trial and the same prosecution. The guiding factor for retrial must always be the demand for justice. The exercise of the power of retrial under the Code will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the Appellate Court must closely keep in view that while protecting the right of an accused to a fair trial and due process, the people who seek the protection of law do

not lose hope in legal system and the interests of the society are not altogether overlooked.

9. In view of the dictum laid down in the above-cited case, it is apparent that the trial Court in passing the impugned order acted illegally and without lawful authority. So far as the question of possession of the respondent and dispossession of the Appellant is concerned which depends upon the evidence, which needs to be looked into by calling the parties to produce and the matter cannot be decided in a cursory manner by ignoring the facts and legal position of the case. So far as the issue of retrospective effect is concerned, the trial first record the evidence of the parties and decide such issue on merits by providing a meaningful hearing to them the appellant claims that she had been dispossessed in the year 2009 whereas as the respondent claims that he has been in possession in since 2001 and the trial court has to see the documents of the parties and after thrashing out the evidence give findings on merits within two months.

10. In view of the above facts and circumstances of the case, this Criminal Acquittal Appeal is allowed and the matter is remanded to the learned Trial Court to decide the case by recording evidence of the parties if not adopting earlier evidence, within two months. So far as the possession of the property is concerned the trial Court shall take over the possession and manage its affairs till a decision on the Illegal Dispossession Complaint on merits. MIT-II is directed to seek compliance within time, in the case of failure on the part of the Trial Court appropriate order shall be passed on the administrative side by the competent authority.

JUDGE