

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Appeal No.S-41 of 2013

Date of Hearing: 31.01.2022
Date of Judgment: 31.01.2022

Appellants/accused: Sajid Ali & Rashid Ali, both sons of Allah Wadhayo (present on bail). through Mr. Mian Taj Muhammad Keerio, Advocate.

The State: Mr. Shahzado Saleem Nahiyoon,
Additional Prosecutor General.

One Bashir Ahmed son of complainant is present.

J U D G M E N T

NAIMATULLAH PHULPOTO, J.-Appellants Sajid Ali and Rashid Ali were tried by learned Sessions Judge, Tando Allahyar in I.D Complaint No.06 of 2012 for offence under Sections 3, 4 and 7 of Illegal Dispossession Act, 2005. On conclusion of the trial, vide judgment dated 20.04.2013, appellants were convicted under Section 3 of Illegal Dispossession Act, 2005 and sentenced to suffer one year RI and to pay the fine of Rs.50,000/- each and also pay compensation to the complainant for a sum of Rs.50,000/- each. In case of default in payment of fine, the appellants were ordered to undergo further imprisonment of two months. In case of their failure to pay the compensation to complainant, the same shall be recovered as arrears of land revenue. Appellants / accused were further directed to handover the vacant physical possession of the shop in question immediately to the complainant.

2. Brief facts of the I.D Complaint as reflected in the impugned judgment are as under:-

“It is the case of complainant that he is the owner of plot No.108 admeasuring 221 Sq. Feet situated in Deh Daro Qubi, Taluka and District Tando Allahyar, in which he constructed a shop and running as Kiryana Shop (shop in question) and was earning bread for himself as well as for his family and was enjoying peaceful physical possession of the shop in question as sole owner since last 30 years.

It is further case of complainant that accused Sajid Ali and Rashid Ali, who are his nephews, had evil eyes on the shop in question and wanted to occupy the same and for that purpose, they started harassing and threatening the complainant off and on for his forcible and illegal dispossession. However, complainant being an old ailing person and real uncle of both the accused did not take their threats as serious nor initiated any action.

Regarding the incident, complainant alleged that on 29.04.2012 when he was present in the shop in question, both the accused Sajid Ali armed with hatchet, Rashid Ali armed with TT pistol, Kevo Ram Bheel armed with lathi and two other unknown persons armed with Rifles came and started abusing him upon which he tried to make them understand that he was the owner and running the shop for last 30 years but the accused got very annoyed and accused Sajid Ali inflicted back side of hatchet blow at the right shoulder of the complainant and other accused started causing fists and kicks blows upon which complainant fell down on the ground, in the meantime accused Rashid Ali snatched Rs.20,000/- which were lying in front pocket of complainant’s shirt. According to complainant, he raised cries, on which Ali Akbar and Wazir Ahmed came and resisted, upon which accused Sajid Ali inflicted right side of his hatchet over Ali Akber, which had hit on his left hand, who started bleeding. The accused then dragged the complainant out from the shop and dispossessed him forcibly.

It is the further case of complainant that he alongwith injured and Wazir Ahmed rushed to P.S Tando Allahyar and obtained letter for treatment and went to Hospital but the police did not lodge the FIR. The complainant came back to his village and he saw that all the articles lying in his shop worth of Rs.2,00,000/- were missing alongwith one deepfreezer, 30 bags of wheat, two tables, four plastic chairs, one Fan, an amount of Rs.13,000/-, one mobile phone, 12 iron Tears and even door of the shop were taken away. On his enquiry, the complainant came to know that all the above articles have been shifted by the accused persons to their house. According to complainant, he again went to P.S but his FIR was not lodged whereupon he filed an application U/S 22 A & B Cr.P.C and obtained order for lodging of FIR and subsequently lodged the FIR against the accused persons. However, his shop remained

in possession of the accused persons and the complainant therefore, filed the complaint in hand.

REPORT U/S 5 OF THE ACT.

After the complaint was filed, a report U/S 5 of the Act was called from concerned Station House Officer, which was received, in which it was reported that shop in question was found in possession of both the accused, who are not ready to leave the same. During the course of his local enquiry, SHO also came to know that complainant was running his shot for A considerable period.

COGNIZANCE U/S 4 OF THE ACT.

After compliance of provision of section 5 of the Act and when a positive report was received in favour of the complainant, cognizance as provided U/S 4 of the Act was taken on 29.04.2012 and order for issuance of NBW against the accused persons was passed. The accused obtained bail before arrest and they after furnishing their surety joined the trial.”

3. Trial Court framed the charge against appellants / accused at Ex.2, to which they pleaded not guilty and claimed to be tried.
4. At the trial, complainant examined in all 04 witnesses, thereafter, advocate for complainant closed the side at Ex.15.
5. Trial court recorded the statements of accused under section 342 Cr.P.C. at Ex.16 and 17 in which accused claimed false implication in this case and denied the complainant's allegations. Appellants did not lead any defence and denied to give statement on Oath in disproof of the allegations leveled by the complainant against them.
6. Trial court after hearing the learned counsel for the parties and assessment of evidence vide its' judgment dated 20.04.2013 convicted and sentenced the appellants in the terms as stated above. Hence, this appeal.
7. The facts of this case as well as the evidence produced before the trial court find an elaborate mention in the judgment passed by the trial court and therefore the same may not be reproduced here so as to avoid duplication and unnecessary repetition.
8. Mr. Mian Taj Muhammad Keerio, learned advocate for appellants mainly contended that Mukhtiarkar and the concerned SHO who had conducted spot enquiry were not examined before the trial court; that material pieces of evidence were not put to appellants / accused in their statements recorded u/s 342 Cr.P.C but the trial court based conviction on

those pieces of evidence. It is further contended that there is civil litigation over the shop and litigation is pending before the concerned Civil Court; that regarding the same incident complainant had lodged FIR at concerned police station but it was found false during investigation and disposed of under 'C' class; that there is no tangible evidence that appellants have forcibly occupied the shop involved in this case. Lastly, it is submitted that appellants are real nephews of the complainant who has expired and son of the complainant is present and he has recorded no objection for allowing this appeal and it has also been lastly submitted that disputed shop is ancestral property of both the parties. In support of his contentions, learned counsel has relied upon the case of HABIBULLAH and others v. ABDUL MANAN and others (2012 SCMR 1533).

9. On the other hand, Mr. Shahzado Saleem Nahiyoon, Additional P.G after going through the evidence submitted that the dispute was between the appellants and the complainant over the ancestral immovable property and no case is made under the provisions of Illegal Dispossession Act, 2013.

10. Now while discussing the evidence produced by the parties before the trial court I find that complainant Allahyar Bux no where mentioned that he was the exclusive owner of the shop in question. Trial court found tampering in the title documents / entries produced before the trial court. Most important ingredient of Illegal Dispossession Act, 2005 is that there should be dispossession of the owner or occupier of the property and in case the owner or occupier did not level allegation of his dispossession or forcible occupation of accused over the property then provisions of Illegal Dispossession Act, 2005 are not applicable. It may be mentioned here that object of Act, 2005 is to protect the lawful owners and occupiers from their illegal or forcible dispossession and prevent dispossession of an lawful owner or occupier through illegal means. Act is not meant to decide the ownership of property in dispute which can only be decided by Civil Court.

From the close scrutiny of evidence, I find that it was a dispute over the shop between two individuals belonging to same family. There was tampering with title documents. Material witnesses such as Mukhtiarkar Tando Allahyar and concerned SHO, who conducted spot enquiry were not produced before the trial court. Presumption could be drawn, in case these witnesses would have been examined before the trial court, they might have not supported the case of complainant. Facts and circumstances of the case were not sufficient to conduct trial under the provisions of Illegal Dispossession Act, 2005 against the appellants and the trial court had no

tangible material to convict the appellant. The provisions of Illegal Dispossession Act, 2005 have been made for special purposes and for special objects and the trial court had no legal justification to convict the appellants. Accordingly, I allow this appeal and set aside the impugned judgment of the trial court dated 20.04.2013. Resultantly, appellants Sajid Ali and Rashid Ali are acquitted of the charge. Appellants are present on bail, their bail bonds stand cancelled and surety is hereby discharged.

JUDGE

Tufail