

IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA

Criminal Revision Application No. 51 of 2018

Peer Muhammad Shah @ Zahid Shah Applicant.

Versus

Syed Khudan Shah and others Respondents.

Date of hearing: 31st December, 2018

Mr. Makhdoom Syed Tahir Abbas Shah, Advocate for the applicant.

Mr. Ghulam Rasool Narejo, Advocate for Respondent No.1.

Mr. Ali Anwar Kandhro, Addl. P.G for the State.

ORDER

ADNAN-UL-KARIM MEMON, J:- Through the instant Criminal Revision Application, the applicant has impugned Order dated 20.8.2018 passed by the learned IIIrd Additional Sessions Judge, Larkana in Sessions Case No. 183 of 2018

2. That on 15.12.2017, Respondent No. 1 filed Criminal Complaint No.63/2017, against the Applicant, under sections 3, 4, 5, 7 and 8 of the Illegal Dispossession Act, 2005, before the learned IIIrd Additional Sessions Judge, Larkana (re.Syed Khudan Shah v. Syed Peer Muhammad Shah @ Zahid Shah and others), whereby the Application of the Applicant, under section 265-K, Cr.P.C was dismissed vide order dated 20.8.2018. The applicant being aggrieved by and dissatisfied with the aforesaid order has approached this Court on 14.9.2018.

3. Mr. Makhdoom Syed Tahir Abbas Shah, the learned counsel for the applicant has premised his case on the ground that the charge framed by the

learned trial court, under the Illegal Dispossession Act-2005, against the Applicant is groundless and there is/was no probability of the Applicant being convicted of any offense under the Illegal Dispossession Act-2005, therefore the trial of Applicant under the aforesaid law is a futile exercise; that case between the parties is of civil nature, that has been converted into criminal litigation; that the learned trial Court has mentioned in the impugned order that on 22.5.2018, 7.6.2018, 13.7.2018 and 6.8.2018 counsel for the Applicant remained absent, however the case diaries show contrary view to the observation made by the learned trial court ; that that impugned order is based on misreading of material facts and wrong application of law; that that learned Trial Court has erred in travelling beyond the pleadings of the parties and dismissed the application of the Applicant without assigning any cogent reason and posted the matter for evidence of the parties; that learned Trial Court has wrongly taken adverse inference against the Applicant; that observation of learned trial Court is based on presumption, having no evidentiary value; that that impugned order is in violation of fundamental rights of the Applicant as provided in Constitution; that the learned trial Court failed to consider, the various aspects of the matter, which went into the root of the case; that grave prejudice has been caused to the Applicant by passing of the impugned order; that the Applicant was not heard on the law point involved in the matter, which touched merit of the case; that his version was not recorded by the learned trial Court regarding documentary evidence in favour of the Applicant; that the learned trial court has wrongly observed that the Applicant was not interested in pursuing the matter; that the dispute is with regard to Survey No.382 (0-37 Ghunta) and Survey No.383 (0-38 Ghunta) registered in the record of rights on 02.06.1986. Per Applicant,

section 265-K, Cr.PC for his acquittal, in the matter, which was wrongly dismissed by the learned trial Court, on wrong premises. Learned counsel for the Applicant has called in question the impugned Order and narrated the story as discussed supra and has drawn my attention to the Annexure-B page 19, which is form VII, which shows that he has interest in the subject property being share holder. He lastly prayed for allowing the instant Cr. Revision Application. Learned counsel in support of his contention has relied upon the cases reported as *The State v. Muhammad Rafi and another* (1990 P.Cr.L.J 1042), *Muhammad Khalid Mukhtar v. The State* (1997 SCMR 275), and *Ali Mardan v. Muhammad Bux and another* (2003 YLR 736).

4. Conversely, Mr. Ghulam Rasool Narejo, learned counsel for Respondent No.1 has supported the impugned order and contended that there is no relationship between Applicant and Respondent No.1, he is simple trespasser, illegally occupied the land of the Respondent No.1, which act of the Applicant is punishable under the Act, 2005; that original title documents of subject premises are in possession of Respondent No.1; that learned trial Court had rightly dismissed application of Applicant, through impugned Order, which does not call for interference at the revision stage; that the instant revision application is not maintainable under the law and liable to be dismissed. Learned counsel in support of his contention has relied upon the cases reported as *Sarfraz Ahmed v. Mst. Naheed* (2014 PCRLJ 1659), *Muhammad Bakhsh v. Additional Sessions Judge & others* (2010 PCRLJ 268), *Dr. Mukhtiar Hussain v. Muhammad Aslam and others* (2013 MLD 778) and

Zafar Mehmood Khokhar v. Dr. Muhammad Afzal (PLD 2013 Islamabad 121).

5. Mr. Ali Anwar Kandhro, Addl. P.G for the State has contended that allegations leveled by the parties required evidence but, the same is yet to be done by the learned trial court; that the matter between the parties required evidence, therefore the case may be remanded to the trial court for recording of evidence of the parties then an appropriate decision may be given in accordance with law.
6. I have heard learned counsel for the parties and perused the material available on record as well as case law cited at the bar.
7. There is one primordial question as follows, which requires my determination.
 - a. Whether section 3 of Illegal Dispossession Act, 2005 is attracted in the present proceedings against the applicant?
8. Much emphasis has been laid on the aforesaid report of Mukhtiarkar Revenue Taluka Ratodero, to claim that the Illegal Dispossession complaint against the Applicant was not maintainable before the learned trial Court.
9. To elaborate on the aforesaid issue, it is expedient to shed light on the report of concerned Mukhtiarkar, which explicitly shows that the Applicant is in possession of the subject land, but it does not disclose as to whether it is legal or otherwise, which needs to be determined by the learned trial court by

appreciating the evidence. For convenience, an excerpt of the same is reproduced under:-

"In compliance of Honourable Court letter No.3865 dated 16.12.2017, I have honour to submit that Revenue Record has been verified which transcribes that as per entry No. 196 dated 03.02.2001 of VF-VII-B deh Masoodero S.No. 382, 383 and others stands in the names of Khuda Shah, Syed Buland Shah, Syed Imdad Shah, Mst: Amir Khatoon and Ashraf Khatoon inherited from father at the extend of 0-40 paisa share. As regards possession at site the S. No. 382 is in possession of Syed Imdad Shah while S. No.383 is in possession of Pir Muhammad Shah & Zahid Shah".

10. Let us see the other legal aspect of the case, the substantive provisions of Illegal Dispossession Act, 2005 which describe the offence and the offender are contained in section 3 of the Act which is reproduced as follows:-

"3. Prevention of illegal possession of property, etc., (1) No one shall enter into or upon any property to disposes, 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 provisions of section 544 of the Code".

11. It is evident from bare reading of section 3 of the said Act that it describes the offence exclusively but does not describe the offenders in specific terms. On the contrary, it uses general terms such as, "no one" and whoever for the offenders. The use of such general terms clearly indicates that widest possible meaning has been attributed to the offenders. Thus use of such general terms clearly indicates that widest possible meaning has been attributed to the offenders. Thus, Section 3 clearly demonstrates that

whosoever commits the act of illegal dispossession, as described in the Act (supra) against a lawful owner or a lawful occupier, he can be prosecuted under its provision without any restriction.

12. In the light of forgoing, I am of the considered view that Section 3 of Illegal Dispossession Act, 2005 can only be attracted when any person dispossess, grab, control or occupy the property 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. In this case, prima-facie, as per record, Applicant is neither lawful owner nor lawful occupier of the subject land for the simple reason that he has failed to produce the title documents in his favour that he is either shareholder or owner of the subject property, merely saying that he possesses the land is not sufficient to claim ownership of the land in question. Therefore, prima-facie section 3 of the said Act, 2005 is fully attracted in the present proceedings. Besides, Applicant has failed to point out that he was put in possession of the subject premises by Respondent no.1, rather contrary claim has been made by the Respondent No.1 that he was dispossessed by the Applicant on gun point, for which the matter is pending under adjudication before the learned trial court and fixed for evidence of the parties to decide the issue of illegal dispossession of the Respondent No.1 and other ancillary issues. Five Member Bench of Hon'ble Supreme Court has already settled the above proposition of law in the case of Mst. Gulshan Bibi and others v. Muhammad Sadiq and others (PLD 2016 SC 769).

13. It is well settled now that where the possession of transferee is not under proper, legal and enforceable contract, protection of section 53-A of Transfer of Property Act is not available to him and transferee cannot use the same as weapon. This court has already settled the above proposition of law in the case of Haji Muhammad Usman vs. Abdul Sattar and others (2012 S.L.J 1429).

14. From the perusal of record it is quite clear that Applicant has failed to establish his claim of possession of the subject premises on the basis of title documents. Record does not reflect that his name is appearing in the record of rights as discussed supra, therefore, no sanctity can be attached with the assertion of Applicant at this stage, which is for the trial court to determine on the basis of documentary evidence, led by the parties if any.

15. Reverting to the plea of the Applicant that the charge framed by the learned trial court, under the Illegal Dispossession Act-2005, is groundless and there is no probability of the Applicant being convicted of any offense under the Illegal Dispossession Act-2005. I do not agree with the assertion of the Applicant for the simple reason that in the instant case, as I have noticed that the "pointing finger of accusation" against the Applicant under the Illegal Dispossession Act-2005 is 'the serious charge'. The offences alleged against the Applicant are offences against the society, which needs to be determined by the learned trial court. In my view, seriousness of the charge is, no doubt, one of the relevant considerations while considering the application under section 265-K Cr.PC but that is not the only test or the factor to acquit the accused at the premature stage, when the charge has been

framed and the matter is posted for recording of the evidence of the parties. There are other factors, that also require to be taken note of. The provisions of Cr.PC. confer discretionary jurisdiction on Criminal Courts to allow acquittal of accused if there is no probability of the accused to be convicted of the offence, however, the aforesaid powers ought to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general. In my view, the reasoning adopted by the learned trial court in the matter is just and proper, which is affirmed by this court.

16. The case laws referred to by learned counsel for the applicant are not relevant to the facts and circumstances of the present case.

17. The observation made by this court, in the preceding paragraphs is tentative in nature, which shall not prejudice the case of either party at the trial stage.

18. In the light of facts and circumstances discussed above, I do not find any illegality or irregularity in the Impugned Order dated 20.8.2018 passed by the learned IIIrd-Additional Sessions Judge, Larkana, in Illegal dispossession Complaint No. 63/2017. Therefore, instant Criminal Revision Application is dismissed.


JUDGE

Larkana.
Dated: 31.12.2018.