

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH
(Judicial Department)

Criminal Revision No.27-D of 2022

Muhammad Younas Parvez Khan

Versus

Zahoor ud Din and others

JUDGMENT

For petitioner: Mr. Salahuddin Khan Gandapur,
Advocate.

For respondents: Mr. Aamir Farid Saddozai, Asstt: A.G
and Muhammad Salim Marwat,
Advocate.

Date of hearing 20.02.2024

FAZAL SUBHAN, J.- Instant criminal revision is filed by the petitioner against the order dated 03.02.2016 of the learned Additional Sessions Judge-VI, D.I.Khan, vide which the complaint of the petitioner filed under sections 3/4 of the Illegal Dispossession Act, 2005 (Act), was dismissed.

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2. Relevant facts of the case are that complainant Muhammad Younis Parvez Khan claimed to be the owner and in possession of property bearing Khasra Nos.423, 424, 544 and 6261/545 total measuring 29 kanals 04 marlas situated in Takwara Nulla Hussainzai, Tehsil Kulachi, District D.I.Khan, and that Juma Khan and Zabtu Khan were cultivating the disputed property as tenants-at-will and after their death, the property was reverted to him and therefore, the accused/respondents have no right in the

disputed property. That on 22.11.2015 at 10 AM, he alongwith Haqnawaz and Fazal Rehman, residents of Kulachi, went to the disputed property for cultivation, when in the meanwhile the accused/respondents came duly armed with weapons and started altercation with them and after expelling them from the disputed property, forcibly occupied it, hence, the petitioner being law abiding and respectable person, has approached the Court of learned Sessions Judge with the complaint.

3. After filing the complaint, the learned trial Court, after recording the statement of petitioner/complainant, sought report from the SHO, police station Kulachi, who submitted his report alongwith the report of Patwari Halqa and revenue record and after hearing arguments, the learned trial Court dismissed the complaint on 03.02.2016. Aggrieved therefrom, the petitioner has filed the instant criminal revision.

4. Arguments of learned counsel for the petitioner and that of learned counsel for the respondents heard and record gone through.

5. It is well settled by now that for proving the assertions under sections 3/4 of the Illegal Dispossession Act, 20025, a complainant has to give full details of the mode and manner in which he was holding possession of an immovable property and the time, mode and manner in

which he has been dispossessed. The august Supreme Court in the case of Mumtaz Hussain. Vs. Dr. Nasir Khan and others (2010 SCMR 1254) has laid down the criteria for establishing the commission of offence under the Act and the relevant portion is reproduced herein below for the sake of convenience:-

"Thus for the purpose of attracting the provisions of section 3 of the Act, the Court is required to examine as to whether the property was an immovable property; secondly that the person was owner of the property or in the lawful possession. Thirdly, that the accused has entered into or upon the property unlawfully. Fourthly, that such entry is with intention to dispossess i.e. ouster, evict or deriving out of possession against the will of the person in actual possession, or to grab i.e capture, seize suddenly, take greedily or unfairly, or to control i.e. to exercise power or influence over, regulate or govern or relates to authority over what is not in one's physical possession."

Similarly, in another case, the Honourable Sindh High Court in the case of Dr. Babar Yaqoob Sheikh. Vs. Haris Hafeez and 3 others (2020 MLD 1274 Sindh) has also held that:-

"It is necessary at the time of dealing with the complaint under the Illegal Dispossession Act, that the complainant should specifically describe the unlawful act of dispossession (actus rea) by complete detail of action done by all those, who were responsible for his dispossession of the property illegally and nominate them as proposed accused in the complaint. What is more, it is also necessary for a complainant to establish that there exists a clear cut criminal intention

(mens rea) on the part of such proposed accused. I am of the view that in the absence of description of unlawful act (actus rea) and a willful knowledge a belief that he is doing an unlawful act (animous nocendi) or criminal intention (mens rea), a complaint under Illegal Dispossession Act, 2005 even against an encroacher cannot succeed. It is a settled principle of criminal law that the person, who alleges some fact, has to prove the same without reasonable doubt. In this regard reliance is placed on the case of Waqar Ali and others. Vs. State and others (PLD 2011 SC 181)."

In his complaint, the complainant has admitted that Juma Khan and Zabtu Khan, predecessors of respondents No.1 and 2, were in possession of the property in dispute and after their death, the disputed property has been reverted to him. No date and time and reversion/return of possession of the disputed property is mentioned in the complaint to prove that he got possession after the death of Juma Khan and Zabtu Khan and therefore, when he has not mentioned the actual fact of receiving possession of the property, then the question of his dispossession does not arise. The record also suggests that Muhammad Salim son of Javed is recorded in possession of the disputed property on the basis of Khasra Girdawri, already annexed with the file. The learned counsel for the respondents also produced copy of mutation No.3008 dated 22.02.2018 through which the respondents have purchased some shares of Mst. Iqbal Akhtar and Mst. Naheed Anwar, daughters of Ghulam Sarwar, the real sisters of the complaint and prima facie, by virtue of this

mutation, the respondents have become co-owners in the disputed property, unless rebutted through cogent and convincing evidence, and therefore, their status has been changed during pendency of the complaint from tenants-at-will to co-owners/co-sharers.

6. The learned counsel for the respondents, during his arguments, also produced copy of Gazette Notification through which amendment has been made in the Khyber Pakhtunkhwa Tenancy Act, 2014 (Act) and submitted that by way of insertion of section 3A, after section 3 of the said Act, a bar on the succession of non-occupancy tenancies has been imposed. The newly inserted section 3A(1)(2) are reproduced hereinbelow for sake of convenience:-

Q. *"3A(1)—Notwithstanding anything contained in this Act or in any other law for the time being in force, on commencement of the Khyber Pakhtunkhwa Tenancy (Amendment) Act, 2014, right of succession of tenancy to the predecessor or successor in interest of a tenant shall cease.*

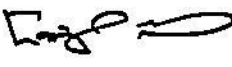
3A(2)—The existing tenants, enjoying tenancy rights before the commencement of the Khyber Pakhtunkhwa Tenancy (Amendment) Act, 2014, shall continue their right of tenancy till their eviction through due process of law."

After going through the said provision, true, that amendment has been brought and section 3A has been inserted into the Act, which prohibits the succession of non-

occupancy tenancies, however, under sub-section (2) of the added section 3A of the Act, a tenant who enjoys tenancy right before the commencement of the Act, has been given protection and such tenants were to continue their right of tenancy till their eviction through a due process of law. The complainant has not adopted the normal procedure for eviction of the tenants. At the same time, the respondents have improved their status from one of tenants to that of co-owners/co-sharers through the alleged mutation No.3008 dated 22.02.2018 and therefore, they cannot be said to have illegally occupied the disputed property and the only course now available to the petitioner is to file a petition for partition before the relevant forum to separate his share of the disputed property.

7. In this view of the matter, the instant petition being without any substance and merits is hereby dismissed.

Announced.
Dt. 20.02.2024.
Habib/*


JUDGE

(SB)
Hon'ble Mr. Justice Fazal Subhan


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