

JUDGMENT SHEET

PESHAWAR HIGH COURT

MINGORA BENCH

(Judicial Department)

Cr.A No. 86-M/2023

Said Ali Shah son of Said Ahmad Shah

(Appellant)

V/S

Bakht Zada & others

(Respondents)

Present:

*Mr. Majeed Ullah, Advocate, for the
appellant/convict.*

*Muhammad Hayat Khan, Advocate, for the
respondent/complainant.*

Miss Mehnaz, Astt: A.G for the State.

Date of hearing: **08.05.2023**

JUDGMENT

SHAHID KHAN, J.- Through the subject criminal appeal, the appellant has called in question the order/judgment of learned Additional Sessions Judge/Izafi Zila Qazi, Matta, Swat dated, 07.03.2023, whereby, the accused/appellant, Said Ali Shah was convicted U/S 3, Illegal Dispossession Act, 2005 (hereinafter referred to as "*Act of 2005*") and sentenced to three years simple imprisonment with fine of Rs. 50,000/-, or in default of payment of fine, he shall further undergo two months simple imprisonment. The appellant/accused was ordered to pay compensation of Rs. 300,000/-, payable to the respondent/

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complainant, U/S 544-A, Cr.P.C. and he was also extended the benefit of section 382-B, Cr.P.C. The local police/Administration were directed to restore possession of the disputed property to the respondent/complainant. The co-accused, Mian Said Tahir alias Taghir was declared proclaimed offender and proceedings U/S, 512 Cr.P.C were initiated against him.

2. In short compass, the case of respondent/complainant is that he filed a complaint U/S 3 of Act 2005 to the effect he is owner by purchase of the disputed property vide mutation dated 05.05.2005, which was purchased by him from wife of co-accused Mian Said Tahir i.e. Mst. Mastoria and since then he is in possession of the same. It was further alleged that the accused-party comprising of the present appellant, Said Ali Shah and one Mian Said Tahir alias *Tagir* were influential people of the locality, whereas, the respondent/complainant at present is settled in Saudi Arabia, therefore, the accused are taking advantage of his absence and have illegally occupied the

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disputed property, as such, the matter was reported to the local police, but to no avail.

3. When the instant complaint was filed, accused were summoned, *challan* was drawn and was sent up for trial to the learned trial Court. Accused was confronted with the statement of allegations through formal charge-sheet to which he pleaded not guilty and claimed trial.

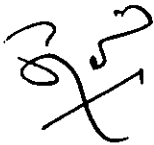
4. To substantiate the guilt of the accused, the prosecution furnished its account consist of the statements of five (05) witnesses. The accused was confronted to the evidence so furnished through statements of accused within the meaning of section 342 Cr.P.C.

5. On conclusion of the trial, in view of the evidence so recorded and the assistance so rendered by the learned counsel for the accused and learned counsel for the complainant/learned Public Prosecutor, the learned trial Court arrived at the conclusion that in view of the evidence so recorded and assistance so provided, allegations against the accused are doubtful and case against the accused/respondents is tinted with doubts, as such, by extending the benefit of doubt, the

acquittal of the respondents/accused was recorded accordingly.

6. It obliged the appellant/complainant to approach this Court through criminal appeal No. 277-M/2021, which was allowed by this Court vide order/judgment dated 01.11.2022 and the case was remanded back to the learned trial Court with the following directions; -

“Accordingly, with the concurrence of both the learned counsels for the parties, this appeal is allowed and consequently the impugned order and judgment of the learned trial Court dated 05.10.2021 is set aside and the case is remanded back to the learned trial Court who after hearing both the parties shall re-write the judgment keeping in view the evidence recorded by the parties and as per the mandate of the provisions of The Illegal Dispossession Act, 2005. Order accordingly.”



7. After remand, the learned trial Court/Additional Sessions Judge, Matta, Swat, vide the impugned order/judgment dated, 07.03.2023 convicted & sentenced the accused/appellant, Said Ali Shah, as highlighted in the opening Para of this judgment.

8. It obliged the appellant/accused to approach this Court through the subject criminal appeal.

9. Arguments of learned counsel for the parties as well as learned Astt: A.G for the State have

been heard and the record gone through with their valuable assistance.

10. Surely, under the theme & scheme of Act of 2005, the trial Court who is seized of a complaint U/S 8 (1) of the ibid Act can restore possession to a complainant without awarding the punishment of imprisonment and after taking cognizance U/S 4, Act of 2005 and after preliminary investigation as required U/S 5, the trial Court if considered can attach the property U/S 6 of the Act. Similarly, the trial Court as an interim arrangement can also evict a trespasser or an illegal occupier from the disputed property and hand it over to a complainant U/S 7, Act of 2005. Likewise, after conclusion of the trial, the learned trial Court under the theme of Illegal Dispossession Act can punish the nominated accused for a period of ten years U/S 8 (1) of Act 2005 if the Court found that an owner or occupier of the property was illegally dispossessed then he can issue direction to the nominated accused to restore the possession of the property to an owner or occupier. Sections 6,7 & 8 of the aforesaid Act

being relevant for the present controversy, which are reproduced below:-

6. Power to attach property.- (1) If the Court is satisfied that none of the persons are in possession immediately before the commission of the offence, the Court may attach the property until final decision of the case.

(2) In case of attachment, the methods of its management, safeguard against natural decay or deterioration shall be determined by the Court.

7. Eviction and mode of recovery as an interim relief.- (1) If during trial the Court is satisfied that a person is found prima facie to be not in lawful possession, the Court shall, as an interim relief direct him to put the owner or occupier, as the case may be, in possession.

(2) Where the person against whom any such order is passed under subsection (1) fails to comply with the same, the Court shall, notwithstanding any other law for the time being in force, take such steps and pass such order as may be necessary to put the owner or occupier in possession.

(3) The Court may authorize any official or officer to take possession for securing compliance with its orders under subsection (1). The person so authorized may use or cause to be used such force as may be necessary.

(4) If any person, authorized by the Court, under subsection (3), requires police assistance in the exercise of his power under this Act, he may send a requisition to the officer-in-charge of a police station who shall on such requisition render such assistance as may be required.

(5) The failure of the officer-in-charge of police station to render assistance under subsection (4) shall amount to misconduct for which the Court may direct departmental action against him.

8. Delivery of possession of property to owner, etc.- (1) On conclusion of trial, if the Court finds that an owner or occupier of the property was illegally dispossessed or property was grabbed in contravention of section 3, the Court may, at the time of

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passing order under subsection (2) of that section, direct the accused or any person claiming through him for restoration of the possession of the property to the owner or, as the case may be, the occupier, if not already restored to him under section 7.

(2) For the purpose of subsection (1), the Court may, where it is required, direct the officer-in-charge of the police station for such assistance as may be required for restoration of the possession of the property to the owner or, as the case may be, the occupier.

The aforesaid provisions of law would unmistakably show that proceedings under the aforesaid Act are quasi-criminal & quasi-civil. The provisions of the Act are distinguishable from a Court who is seized of other criminal cases like murder, hurt and theft etc as the trial Court who is seized of a complaint U/S 3 of the Act can attach the property, it can as an interim arrangement evict an accused/person from the disputed property and hand it over to a complainant and even on the conclusion of the trial it can restore possession to the complainant, however, such powers are not available to the trial Court who are conducting proceedings of other kinds of criminal cases like murder, hurt and theft etc, therefore, the proceedings under the Act could not be *stricto-senso* said to be that of exclusive criminal proceedings as compared to other kind of

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criminal cases where an attorney could not act as a complainant or as a witness on behalf of his principal.

11. In view of the aforesaid yardstick, it is case of respondent/complainant, Bakht Zada, as highlighted in his complaint, that he has been illegally & forcibly dispossessed by the accused, Said Ali Shah, (the appellant herein) and absconding co-accused Mian Said Tahir from the disputed property bearing khasra No. 3503, measuring 02 kanals & 10 marlas. It was further alleged by respondent/complainant that the disputed property was purchased by him from wife of co-accused, Mian Said Tahir i.e. Mst. Mastoria vide mutation deed dated 05.05.2005.

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12. As against this, the appellant/accused not only in his statement recorded U/S 342 Cr.P.C vehemently denied the allegations of the respondent/complainant but he also opted to produce evidence in his own defence within the meaning of section 340 (2) Cr.P.C and examined Ibrahim Shah as DW-1, Mati Ullah as DW-2 & Sher-ul-Haq as DW-3, who have fully supported the case of appellant/accused coupled

with his claim with respect of the ownership & possession of the disputed property.

13. A bare look of the contents of complaint would transpire that the respondent/complainant has not complained of any specific occurrence in terms of time and date as well as mode & manner of the occurrence regarding the dispossession or interference in his lawful possession. The non-mentioning of the date & time of the alleged dispossession gained much more significance, when PW-3, Ikram Ullah Khan has stated in his cross-examination as under; -

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“It is correct that the landed property was never in possession and use of the complainant”

Same was the case of PW-2, Sherin Zada, who has made alike statement in the following words; -

“That it is correct that respondent No. 2 (the appellant herein) had constructed walls & DPC over the property”

The respondent/complainant when appeared in the Court as PW-1, he has also admitted in his cross-examination the existence of walls & DPC over the disputed property, from the last 16 years, therefore, the alleged plea of respondent/

complainant with respect to his lawful possession is prima facie not above the board. In the case of

“Ghulam Ali v/s Abu Bakar” reported as 2019

MLD 1163, the Sindh High Court has held that;-

That in order to maintain conviction under S.3 of Illegal Dispossession Act, 2005, complainant must establish either illegal dispossession by means of unauthorized entry into or upon disputed property or by proving forcible or wrongful possession and any failure or a reasonable doubt in such proof would be sufficient for acquittal by extending benefit of doubt.

Similarly, the in the case of “Khadim

Ali v/s Hakim Ali & another” reported as 2021

YLR 1556, the Sindh High Court has also observed

that;-

The descriptions and boundaries of the said areas from the survey numbers allegedly purchased by the complainant were nowhere mentioned either in the complaint or even in the evidence led by the prosecution and thus, the identity of the subject land could not be made.

14. Other than the above, prima facie the lawful ownership and possession of the respondent/complainant qua the disputed property is standing in vacuum, as it was his case that he purchased the disputed property from the wife of the co-accused, Mst. Mastoria through mutation dated 05.05.2005, however, it is also part of the record that the said Mst. Mastoria filed a civil suit before the competent Court of law challenging therein the aforesaid sale mutation.

15. In view of the above lacunas existed in the evidence so furnished by the respondent/complainant, benefit of the same has to be extended to the appellant/accused at least in terms of his conviction under the aforesaid Act of 2005. Even otherwise, the issue of handing over possession of the disputed property to the respondent/complainant has already been settled through the impugned order/judgment, whereby it was specifically directed to local Administration/S.H.O to restore possession of the disputed property to the respondent/complainant within a period of one month.

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16. In view of the above, the instant criminal appeal is disposed of in terms that the conviction and sentence awarded to the appellant, Said Ali Shah is maintained, however, his sentence is reduced to the period already undergone by him in the Jail. Findings in the judgment of learned trial Court in respect of payment of fine & compensation is set aside. The impugned judgment of learned trial Court dated 07.03.2023 is modified to the above extent.

17. The appellant has already been released on bail by this Court, U/S 426 Cr.P.C on 21.03.2023, therefore, his sureties are discharged from liability of the bail bonds.

Announced
Dt.08.05.2023


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