

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr. M (Q.P) No.82-M/2016

Habib Ullah and others.....Petitioners.

Versus

Chaman and others.....Respondents.

Present: *Mr. Abdul Halim Khan, Advocate for Petitioners.*

Mr. Saeed Ahmad, A.A.G for official Respondents.

Mr. Aurangzeb, Advocate for Private Respondents.

Date of hearing: **31.05.2022**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.-This single judgment in the instant petition shall also decide the connected **W.P No.620-M/2016** titled "**Habib Ullah and others Vs. Chaman and others**" and **W.P No.625-M/2015** titled "**Chaman and others Vs. Habib Ullah and others**" as an identical question of law and facts is involved in all the three petitions. The instant quashment petition and connected **W.P No.620-M/2016** are the outcome of one and same consolidated judgment dated 20.08.2016 passed by the learned Sessions Judge/Zila Qazi, Malakand at *Batkhela* in **Criminal Revision No.7/10 of 2016** and **Misc. Application No.10/04 of 2016**, whereby the petitioners were directed to hand over possession of the property to the respondents whereas connected **W.P No. 625-M/2015** has been filed by the petitioners Chaman and others against order dated

25.11.2015 of the learned Sessions Judge, Malakand at *Batkhela* in case No.1/1 of 2015 for enhancement of punishment u/s 3 of the Illegal Dispossession Act, 2005 to the respondents/ accused. Though the learned counsel for petitioner contended that the W.P No.620-M/2016 may be converted into Criminal Appeal because it was filed in the year 2016 when no right of appeal against the order passed on the application under sections 3/8 of Illegal Dispossession Act, however, keeping in view the amendment and insertion of section 8-A in the Illegal Dispossession Act 2005. This contention of the learned Counsel for petitioners is of no avail to the petitioners because the Criminal Revision of petitioners was filed against the order by which possession was handed over to the complainants. Right of appeal under section 8-A of the Act is restricted to the orders passed under sub-section 2 & sub-section 3 of section 3 and sub-section 1 of section 8 of the Act. Thus, the request for conversion of writ petition into Criminal Appeal is hereby turned down. Insofar as the W.P No. 625-M of 2015 by which the petitioners have prayed for enhancement of sentence is appealable u/s 8-A of the Act by dint of the Illegal Dispossession (Amendment) Act, 2017 on 03.07.2017 (Act XXVIII of 2017), therefore, the connected W.P No.625-M/2015 is hereby converted into criminal appeal. Office shall do the needful in this respect. Learned Counsel for



petitioner in W.P No. 625-M of 2015 submitted that he is under instruction not to press the petition, therefore, this petition as converted into appeal stands dismissed being not pressed.

2. Learned counsel for the petitioners who are appellants in connected criminal appeal contended that respondent No.1 to 4 filed a complaint u/s 3/8 of the Illegal Dispossession Act, 2005 against the petitioners contending therein that they have been illegally dispossessed from the property by the petitioners; that in view of Ex.CW1/5 and the decision of this Court dated 26.11.2014, the parties are litigating against each other since 1982 and since then the parties are at dagger drawn against each other but still the determination of controversy could only be made through appointment of a local Commission. He, while referring to civil suit No.24/1 of 1979 decided on 18.11.1979 where a decree for perpetual injunction was granted, contended that ultimately this suit was finally decreed to the extent of plot "alif", which was held as *shamilat* and said plot was denoted as "ABCD" (plot "alif") measuring 90 feet south, 63 feet north, 89 feet west and 100 feet east and this judgment was maintained by this Court when C.R No.508 of 1992 which was dismissed on 30.11.1994 and C.P.L.A No.76-P of 1995 was dismissed by the apex Court on 25.12.1997 and leave to appeal was refused. He also referred to suit titled "Rahmat Khan Vs.

Chaman and others” wherein Abdul Waris who was predecessor in interest of the present petitioners was at serial No.49 in the array of the defendants and contended that once again the said subject matter was made disputed wherein a decree was granted being based upon the decision of “*musliheen*”, against which, Civil Appeal No.69/13 of 1998 was filed, which was dismissed on 13.05.1999 by the then learned District Judge, Malakand. He also referred to certain objection petitions and contended that the objection of the petitioners was allowed on 11.09.2004. He added that the respondents have submitted Revenue Suit No.22/ of 2005 for determination of the boundaries of the property, which was dismissed on 21.06.2006. Lastly, he submitted that the impugned order in Criminal Revision No. 07/2010 and Criminal Miscellaneous No.10/04 of 2016 dated 20.08.2016 whereby the criminal revision of petitioners was against the order of Assistant Commissioner dated 03.02.2016 sending the application of respondents to Tehsildar for handing over the possession to complainants was illegally dismissed. He maintained that the learned Court below was required to adhere to the provisions of section 3 & 8 of the Act of 2005 and also the facts of the long litigation between the parties.

3. Conversely, learned counsel for the respondents contended that though there remained civil litigations between the parties from the trial Court upto the apex Court

but the act of the petitioners i.e., dispossessing of the respondents/ complainants from the disputed property on 30.12.2014 was proved through direct and convincing evidence thus the possession was rightly handed over to the respondents/ complainants. He added that the respondents have proved their case beyond any shadow of doubt against the petitioners, therefore, the instant quashment petition and the connected petition filed against the respondents deserves dismissal.

4. Arguments heard and record perused.

5. It appears from the contents of the complaint filed under sections 3/8 of the Act of 2005 by the respondents/ complainants that on 30.12.2014, they were illegally dispossessed from the property by the petitioners. They were charge sheeted to which they did not plead guilty and claimed trial. Complainant produced PW-1 Umar Said who deposed that on 30.12.2014, the respondents/ complainants were dispossessed from the property by the petitioners/ accused and thereafter they started construction therein. In cross examination, in response to a question, he deposed that the description of the property is mentioned in Ex.CW1/5, which was prepared in civil suit No.24/1 of 1979. He was cross examined at length qua the particulars of the civil litigations, Ex.CW1/5, Ex.PW1/2, date of decision of the civil Court, date of the application for determination of

boundaries of the property but it is pertinent to mention here that not even a single question regarding the dispossession which was not only mentioned in the complaint but the witness in his examination-in-chief has reiterated that the complainants/ respondents were dispossessed on 30.12.2014, was put to PW-1. Statement of Kamran-ud-Din was recorded as PW-2, in whose cross examination, too neither any direct question regarding illegal dispossession of the respondents/ complainants was put to the witness nor it was suggested by the present petitioners. Lastly, the statement of Hazrat Muhammad was recorded as PW-3, however, he was not cross examined despite opportunity was provided to the petitioners. Thereafter, petitioners Habib Ullah, Hakeem Ullah, Khalil Ullah, Shakir Ullah, Aziz Ullah, Shafi Ullah, Shahid Ullah and Noor Muhammad were examined u/s 342, Cr. P.C but once again they professed innocence by refuting the allegation of prosecution, however, they neither recorded their own statements on oath in terms of section 340(2), Cr. P.C nor produced any witness in their defence however, in reply to a question was put to them that since 12.5.1997, the respondents/ complainants are in possession of the disputed property, to which they replied that it is incorrect. On conclusion of trial, the learned trial Court vide judgment dated 25.11.2015 allowed the complaint and

directed the petitioner to deliver the possession to complainants.

6. It is pertinent to mention that the order of learned trial Court was assailed before this Court through W.P No. 580-M/2015 by the petitioners but their petition was dismissed in *limine* on 09.12.2015. The petitioners being aggrieved filed Civil Petition for leave to appeal bearing No. 3858 of 2015 before the Hon'ble Supreme Court but their petition was dismissed and leave was refused on 07.06.2016. In the meanwhile, earlier to the dismissal of leave to appeal on 08.01.2016 the respondents submitted an application to the Deputy Commissioner for recovery of possession in term of the judgment of learned Sessions Judge Malakand at Batkhela which was marked to Assistant Commissioner Batkhela for compliance who further marked it to Tehsildar for implementation and handing over the possession of property to respondents vide order 03.02.2016. This order was assailed by the petitioners through their Criminal Revision No. 07/10 of 2016 before learned Sessions Judge, Malakand at *Batkhela*. Learned Sessions Judge issued notices to both the parties. During proceedings before Sessions Judge on 20.08.2016 Post Commander *Alldand* namely Ghafoor Khan submitted report before Session Court to the effect that possession of the property has already been transferred, thus, after hearing the parties, learned Session Judge vide order

dated 20.08.2016 dismissed both Criminal Revision No. 7/10 and Criminal Miscellaneous Application No. 10/04 of 2016 through impugned order. The application was dismissed because the respondents were seeking possession of the property which was handed over to them and the Criminal revision was dismissed being infructuous.


7. Insofar as the contentions of the petitioners that boundaries of the property were not property determined as per Ex CW-1/1 are concerned, suffice it to say that when it is proved that the petitioners have dispossessed the respondents and the complaint was decided against the petitioners which order was maintained by this Court in W.P No.580-M of 2015 dated 09.12.2015 and leave to appeal was dismissed by the Hon'ble Supreme Court on 07.06.2016, the possession was rightly transferred to the respondents. There is no force in the arguments of petitioners regarding the determination of the boundaries. The petitioners availed all the remedies available to them but failed to prove their contentions thus, they cannot be allowed to reopen the matter once again. Neither the order passed under section 3/8 of Illegal Dispossession Act 2005 can be amalgamated with the demarcation as sought by the petitioners nor the criminal Court could order the demarcation of the property. Learned Sessions Court was to confine itself with the order passed and to implement it in letter and spirit. Transfer of possession

of the property in term of section 8 of the Act of 2005 was the domain of Session Judge and the Court has rightly executed its order. In writ jurisdiction this court will have to ascertain as to whether the Court has acted in accordance with law or not. Section 8 of the Act of 2005 deals with the powers of the Court to deliver the possession of the property which reads as:

“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 passing order under sub-sections (2) and (3) 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.”

 When it was proved that the owner or occupier was illegally disposed from his property the Court would transfer the possession thereof. The impugned order is in consonance with the mandate of above reproduced section of law.

8. Moreover, the Hon'ble Supreme Court in its leave refusal order dated 07.06.2016 has discussed the illegal occupation of property be the petitioners from the respondents. The operative part of the judgment reads as:

“It seems that after the respondents were put in possession pursuant to the proceedings ended before this Court, the petitioners have again dispossessed the respondents by demolishing the pillars. The Courts

below have concurrently found that despite the matter having been settled upto the level of this Court and boundary pillars having been installed the petitioners have illegally removed such boundary pillars and have taken back possession of the property unlawfully. Such finding of the Courts below does not suffer from any mis-reading and non-reading of material available on record. Though petitioners' counsel stated that suit is pending in civil Court but was unable to show to us as to what suit was pending in the Civil Court more particularly in the face of the fact that in the earlier suit matter came up to this Court where the question of demarcation was decided. In the complaint under illegal Dispossession Act, the petitioners have been found to have unlawfully occupied the property of the respondents and thus have been directed to deliver it possession to the respondents.”

9. No doubt, civil litigations remained pending adjudication before the parties since 1982 but the merely on the basis of civil litigation neither the proceedings in criminal mater can be terminated nor the transfer of possession in term of section 8 of the Act of 2005 can be declared illegal. This controversy was put to rest by the apex Court in the case of *Shaikh Muhammad Naseem* (2016 SCMR 1931) where it was held:

In the impugned judgment it was also held that where civil litigation with regard to illegal dispossession from immoveable property is pending between the parties, the proceedings under the Illegal Dispossession Act, 2005 cannot be maintained. This finding is also based on the decision of the Lahore High Court in Zahoor Ahmed's case (PLD 2007 Lahore 231, reasoning of which was adopted by three-member bench of this Court in Bashir Ahmed's case (PLD 2010 SC 661). We are of the view that such a finding is also not sustainable in law. Any act which entails civil liability under civil law as well as criminal penalty under criminal law, such as the Illegal Dispossession Act, 2005 then a person can be tried under both kinds of proceedings, which are independent of each other. Once the offence reported in

the complaint stands proved against the accused within the confines of the provisions of the Illegal Dispossession Act, 2005 then he cannot escape punishment on the ground that some civil litigation on the same issue is pending adjudication between the parties. No one can be allowed to take law in his own hands and unlawfully dispossess an owner or lawful occupier of an immovable property and then seek to thwart the criminal proceedings initiated against him under the Illegal Dispossession Act, 2005 on the pretext that civil litigation on the issue is pending adjudication between the parties in a court of law. Therefore, irrespective of any civil litigation that may be pending in any Court, where an offence, as described in the Illegal Dispossession Act, 2005, has been committed, the proceedings under the said Act can be initiated as the same would be maintainable in law

10. In the case of Mst. Gulshan Bibi and others (PLD 2016 SC 769) the apex Court has observed that:

In view of the above discussion, we conclude that in any proceedings initiated under Illegal Dispossession Act, 2005, the issues which fall for decision would be whether the offence against a lawful owner or occupier, as described in the complaint, has taken place and whether it is the accused who has committed it without any lawful authority. Anyone found committing the offence described in Section 3 would be amenable to prosecution under the provisions of Illegal Dispossession Act, 2005 and no past record of the accused needs to be gone into by the court.

11. Learned counsel for the respondents stated at the bar that this a fresh litigation which is pending adjudication before the Court and even this fact was not denied by the learned counsel for the petitioners/accused. The pending adjudication of the civil suit is something else from the commission of the offence, which was tried within the purview of sections 3 & 8 of the Illegal Dispossession Act, 2005. Thus, the civil litigations can, in no way, be considered

as a hurdle for the complainants/ respondents in the matter in hand. The preamble of the Illegal Dispossession Act, 2005 explicitly stipulates its object i.e., to protect the lawful owners and occupiers against illegal or forcible dispossession from their immovable property and the purpose of the Act is to provide a forum for quick investigation and trial of the offence under the Act of 2005. It is the primary duty of the State and the Courts to protect the right of occupants/ owners of the property. Likewise, the Act of 2005 does not debar a person from initiating the proceedings under the Act on the ground that some of the encroachers or unlawful occupiers in respect of any portion of the land have initiated some other legal proceedings either criminal or civil. More-so, any act which entitles civil liability under civil law as well as criminal penalty under the criminal law such as the Act of 2005, a person against whom the proceedings were initiated cannot take a plea that both the remedies cannot be availed at the same time. It was the duty of the respondents/ complainants to establish that they were occupants of the property and the petitioners/accused occupied possession thereof without any lawful authority and dispossessed them illegally other than due course of law. The description of the property was mentioned in the complaint and it is an admitted aspect rather the learned counsel for the petitioners himself referred to Ex.CW1/5, which was a sketch/map of

the property prepared by the learned local commission in civil suit of 1982. There are two conditions for invoking the provisions of section 3 of the Act of 2005; *firstly*, the act of dispossession, grab, control or occupy without lawful authority and *secondly* intention to dispossess, grab, control or occupy the property from actual owner. In accordance with the provisions of section 3 of the Act of 2005 in order to constitute an offence under this Act, the complainant must disclose the existence of both i.e., unlawful act (*actus reus*) and criminal intent (*mens rea*). The act of the petitioners by dispossessing the respondents/ complainants who were occupants of the property with a categorical stance that on a particular date, they were illegally dispossessed by the petitioners has been proved not only through oral but also through documentary evidence and the order has been maintained upto the Supreme Court.

12. It must be mentioned that learned counsel for the petitioners lastly argued that for proper determination of the boundaries of the property a commission may be appointed in order to put the controversy to rest, once for all. This argument of learned of learned counsel for the petitioners has got no relevancy with the matter in hand, where unlawful dispossession of the respondents by the petitioners from the property, which was in their possession on a particular date, has been proved on the record and that there is no need for

determination of the boundaries of the property in the criminal matters rather the petitioners, at the best, can move to the Court where civil suit is still pending adjudication to submit or to request for appointment of a local commission in order to re-determine the boundaries of the property and the resolution thereof.

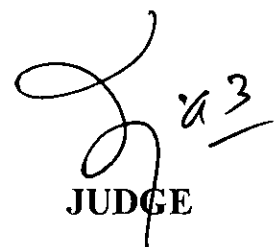
13. For the reasons discussed above, the petitioners of the instant quashment petition have not been able to point out any illegality or irregularity in the impugned order passed by the learned Sessions Judge because the instant petition was filed by the petitioners on the ground that in deciding Criminal Revision No.07/10 of 2016, their Miscellaneous Application No.10/04 of 2016 was decided through consolidated order but no specific order was made by the learned Sessions Judge, however, record reflects that the learned Sessions Judge in the order dated 20.08.2016 has categorically held that Miscellaneous Application No.4/10 of 2016, in view of the statement of Post Commander Ghafoor Khan alongwith Moharrir Gul Nabi that the possession of the property has already been handed over to the complainants has become infructuous. The petitioners Habib Ullah and others through their connected W.P. No. 620-M of 2016 were seeking dismissal of the application, by which, the complainants seeking restoration of the possession. Once, the learned trial Court has found that commission of offence i.e.,

dispossession of the complainants/ respondents has been proved then it was rightly ordered that the possession be restored/ handed over to the complainants, for which, the respondents/ complainants have submitted the application and the petitioners want to stay the execution proceedings, however, when the possession was given to the complainants, their petition was dismissed being infructuous. Thus, their revision petition/ application was rightly turned down. No case for quashing the order and for setting aside the impugned order was made out. Therefore, for the reasons discussed above, the instant petition and connected W.P No.620-M/2016 being without merit stand dismissed. No order as to costs.

Announced
31.05.2022



JUDGE



JUDGE

*Office
8/6/2022.*