

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

WRIT PETITION NO. 721/2014

HAFAEZ AKHTAR KIYANI
VERSUS
BASHIR AHMED & 5 OTHERS

Petitioner by : **Mr. Munawar Hussain Abbasi Advocate.**
Respondents by : **Rana Muhammad Irshad Advocate.**
Date of Hearing : **24-11-2015**

ATHAR MINALLAH, J.- The petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the 'Constitution'*) assailing order dated 29-01-2014 passed by the learned Additional Sessions Judge (East), Islamabad.

2. The facts, in brief, are that the petitioner filed a complaint under section 3, read with section 4 of the Illegal Dispossession Act 2005 (*hereinafter referred to as the 'Act of 2005'*). It was alleged in the complaint that the petitioner is the owner in possession of plot measuring 10 *marlas*, *khasra* No.2306, 2775, *khewat* No.952/1/905, *khatooni* No.1440, situated at *Mohra Noor, Tehsil* and District Islamabad (*hereinafter referred to as the 'Property'*). The Property is claimed to have been purchased in 1980. It was further alleged that on 18-09-2007 the petitioner was forcibly dispossessed by the respondents. The learned Additional Sessions Judge sought a report from the officer in charge of the concerned police station. Pursuant to the said directions, a report dated 04-12-2013 was submitted by the officer in charge of police station Bani

Gala. The learned Court was not satisfied with the report and, therefore, directed that the matter may be re-investigated and a report submitted. Pursuant to the said directions the officer in charge of the police station submitted a report in the Court on 12-12-2013. After receiving the report and the documents annexed therewith, the learned Court passed the impugned order and dismissed the complaint, hence the instant petition.

3. The learned counsel for the petitioners contended that; the learned Court misread the report submitted by the officer in charge of the police station on 12-12-2013; the learned Court did not appreciate that the report had confirmed possession of the petitioner for 26/27 years; the report submitted on 12-12-2013 had also confirmed that the petitioner had been illegally dispossessed on 18-09-2007; the misreading of the report submitted by the relevant officer in charge of the police station, dated 12-12-2013, erroneously led to the dismissal of the complaint; also, the learned Court did not observe the mandatory procedure as described in the Criminal Procedure Code.

4. The learned counsel for the respondents on the other hand has argued that the impugned order is well reasoned, and no illegality or material irregularity has been pointed out so as to interfere therewith; the learned Court, after perusal of the copy of the Plaint and the written statement in the suit titled '*Zareena Bibi vs Hafeez Akhtar Kiani*' , dismissed the complaint; the complaint filed by the petitioner was to counter the suit titled '*Zareena Bibi vs Hafeez Akhtar Kiani*', which is pending before the learned Civil Judge (East), Islamabad; the petitioner has no cause of action; the Property was transferred in the name of the

petitioner only for the time being, without possession etc; the petitioner had filed an application in December 2008 under section 135 of the Land Revenue Act 1969 for partition and no mention was made of the alleged incident of 18-09-2007.

5. The learned counsels have been heard and the record perused with their able assistance.

6. The Act of 2005 is a special law enacted to protect the lawful owners and occupiers of immovable properties from any illegal or forcible dispossession there from by the property grabbers. Clause (c) of section 2 defines an "Occupier" as meaning a person who is in lawful possession of a property while clause (d) defines an "Owner" as meaning a person who actually owns the property at the time of his dispossession, otherwise than through a process of law. Sub-section (1) of section 3 provides that no one shall enter into or upon any property to dispossess, grab, control or occupy it without having any lawful authority to do so, having the intention to dispossess, grab, control or occupy the property from the owner or occupier of such property. Sub-section (2) of section 3 prescribes that a person contravening the provisions of sub-section (1) shall be punishable with imprisonment which may extend to ten years with fine. Moreover, it further provides that the victim of the offence shall also be compensated in accordance with the provisions of section 544 of the Code of Criminal Procedure 1898. Section 4 begins with a non-obstante clause and provides that the contravention of section 3 shall be triable by the court of Sessions on a complaint, and further declares the offence under the Act of 2005 to be non-cognizable. It further provides for

the power of the court to direct the police to arrest the accused at any stage of the proceedings. Section 5 prescribes the procedure for investigations. The special procedure provided under section 5 envisages that upon a complaint the Court is vested with the discretion to direct the officer in charge of the police station to investigate, and after completing the investigations to forward a report within fifteen days to the court unless, as provided in the proviso, the court has extended the time where good reasons are shown for not doing so within the time specified. After taking into consideration the complaint and other material, including the report filed by the officer in charge of the police station, the court forms an opinion as to whether or not to take cognizance of the case.

7. The august Supreme Court, in the judgment titled '*Waqar Ali and others v. The State through Prosecutor/Advocate-General, Peshawar and others*' [PLD 2011 SC 181] has elaborately elucidated the principles in the context of the above provisions of the Act of 2005, and the relevant portions are reproduced as follows.-

"It is clear from section 3 ibid that in order to constitute an offense there under the complaint must disclose the existence of both, an unlawful act (actus reas) and criminal intent (mens rea).

"The Court, it should be noted is not obliged on the filing of each complaint, to direct the police to investigate the matter. Section 5 of the Act is clear that "upon a complaint the Court may direct" the police to investigate the matter. This enabling power of the Court can only be exercised on the basis of and after considering the contents of the complaint. The power to direct an investigation under section 5 ibid is to be exercised judicially and not as an unconsidered or mechanical action undertaken on every complaint filed under the Act, regardless of the merits of the

same. The purpose of the investigation under the aforesaid statute is to ascertain prima facie, the authenticity of what has been stated in the complaint. The complaint itself has to show that an offence cognizable by the Court has been committed by the accused person(s) named herein."

"The aim of directing an investigation by the police is not to add to the allegations or grounds raised in a complaint. The purpose of such investigation, if resorted to by the trial Court, is to inquire into the correctness of allegations made in the complaint itself. The Court need not order investigation under section 5 of the Act if it concludes from the complaint and the material furnished by the complainant in support thereof, that all essential elements of an offence under section 3 ibid are or not, sufficiently disclosed and established."

"Under the statutory scheme, the Court is not to become a party in gathering information or evidence in support of the complaint to justify the existence of mens rea when none can be made out from the complaint itself."

"As in any criminal case, the complaint is to state the facts which, without extraneous considerations or evidence, satisfy the Court of the existence of every ingredient of an alleged offence. Without this a complainant is not entitled to invoke the aid of the Court and to foist the travails of a criminal trial on the person(s) accused by him. In a very important sense a Court empowered to take cognizance of an offence under the Act, is required to act as a sieve and to filter out those complaints which do not disclose the requisite criminal intent. Courts which have been authorized to try cases under the Act thus have a responsibility to see that the persons named in the complaint have a case to be answered, before they are summoned to face trial."

"In the first instance the Court has to decide if the complaint merits further action such as taking cognizance. This decision, properly speaking, cannot be equated with a mere interlocutory order because in respect of the complaint, taking or refusing cognizance brings to an end the first step of the process. The criminal trial commences and can only be said to be pending after

cognizance is taken and the accused is summoned. Thus in the event the Court does not find sufficient material in the complaint to justify cognizance, it may dismiss the same without proceeding to order an inquiry or investigation and without summoning the accused."

"However, in order for the Court to exercise its jurisdiction by taking cognizance, certain facts must first be held to exist. These facts which constitute an offence under section 3 of the Act have to be evident from the complaint and documents filed in support thereof. Thus, if the necessary ingredients of an offence under section 3 of the Act are not disclosed through the complaint and accompanying documents, the Court of Session will not be justified in exercising jurisdiction and taking cognizance. It will nevertheless have the jurisdiction to dismiss the complaint on the ground that an offence under section 3 of the Act is not made out."

8. Likewise in the case of '*Mst. Inayatan Khatoon and others vs. Muhammad Ramzan and others*' [2012 SCMR 229] the august Supreme Court has held as follows.-

"The trial of an accused under the Act cannot be equated as trial in a complaint case under section 190, Cr.P.C. Section 5 of the Act provides that the court may order Incharge of the Police Station to investigate the matter and report. The Act itself is a Special Law and overrides the provisions of Code of Criminal Procedure in terms of section 4 ibid. In fact complaint under the Act could be equated as complaint under section 154, Cr.P.C. whereas report under section 5(1) could be equated as reported under section 173, Cr.P.C. The Court on perusal of such report and other material could take cognizance as provided under section 190, Cr.P.C. but in no way the complaint under section 5(1) can be equated as a private complaint to be processed under section 200, Cr.P.C. before a Magistrate."

9. In the light of the above principles, the complaint must contain such facts which would satisfy the Court, without any extraneous consideration or evidence, regarding the existence of the ingredients of the offence. The Court, therefore, has to first examine the complaint to form an opinion as to whether the ingredients of the offence therein fulfill the requirements of sub-section (1) of section 3 i.e. whether the complaint discloses the existence of both the unlawful act and criminal intent. If the Court is satisfied that the contents of the complaint discloses that an offence cognizable in terms of the Act of 2005 has, prima facie, been committed, only then the Court will decide whether to direct investigation by an officer in charge of a police station pursuant to powers vested under section 5 *ibid*. The said power must not be exercised as a matter of routine or mechanically, rather it is to be exercised judicially. It therefore implies that the same should be reflected from the record. The object of the power to have the complaint investigated through the in charge of a police station is to verify the contents of the complaint and that too after the satisfaction of the Court that upon examination of the complaint the ingredients of sub section 1 of section 3 have been found in existence. The investigation under section 5 cannot be used as a tool for adding to the allegations raised in the complaint, nor for gathering information or evidence so as to justify the existence of a criminal act when the same cannot be discerned from the complaint itself. In the eventuality that the Court is satisfied that upon examination of the complaint and the documents annexed therewith the ingredients of the offence are not found to be in existence, it may dismiss the same on the ground that no offence is made out under section 3 of the Act of 2005. Thus before taking cognisance, or even when directing investigation under

section 5 of the Act of 2005, the Court has to be satisfied that the complaint discloses or states the existence of an offence under section 3.

10. In the instant case, the complaint was filed on 21-11-2013 and on the same date a direction was given to the concerned police station to investigate and submit a report on the date specified in the order. It is not reflected from the order dated 21-11-2013 that the learned Court had examined the contents of the complaint and had satisfied itself regarding the existence of the ingredients of the offence. The record also does not show the reasons for not being satisfied with the first report submitted by the officer in charge of the police station, dated 04-12-2013 and, therefore, directing that another report be submitted. The same was submitted on 12-12-2013. The conclusion of the officer in charge of the police station in the second report submitted on 12-12-2013 is as follows.-

جناب عالی۔ دوران دریافت یہ بات پائی گئی ہے کہ متذکرہ پلاٹ 10 مرلے 1980 میں حفیظ اختر کیانی نے مسماۃ زریںہ بی بی زوجہ بشیر احمد سے خریدا اور قبضہ بحق حاصل کیا تھا مطابق دریافت، بیان گواہان سے یہ بات بھی معلوم ہوئی کہ 26/27 سال تک قبضہ بھی حفیظ کیانی کا ہی تھا اور یہ کہ مورخہ 18-9-07 کو الزام علیہاں فریق نے اسلحہ کے زور پر متذکرہ پلاٹ زمین سے زبردستی بے دخل کیا ہے اور اس وقت یہ متذکرہ زمین الزام علیہاں فریق کے زیر قبضہ ہے جبکہ مطابق ریکارڈ اس کا اصل مالک حفیظ اختر کیانی ہے۔

11. Contrary to the conclusion of the officer in charge of the police station, as reproduced above, the learned trial Court misread the report dated 12-12-2013 in concluding that the complainant had not been in possession of the land since 26/27 years. Similarly the learned Court referred to the first sentence of paragraph 2 of the plaint in the suit titled '*Hafeez Akhtar Kiyani vs. Zareena Bibi and Bashir Ahmed*', but it appears that the rest of the assertions were not taken into consideration. This obviously makes it a case of misreading and non-reading of the material

which had been taken into consideration while passing the impugned order. The learned Court, therefore, came to the conclusion that the complainant, by filing the complaint, was attempting to convert a civil dispute into proceedings under the Act of 2005. There is force in the argument of the learned counsel for the petitioner that the learned trial Court by misreading or non-reading of the material placed on record, was led to passing the impugned order. However, without making any observations regarding the merits of the case, it would be appropriate to remand the matter to the learned Additional Sessions Judge for taking into consideration the complaint of the petitioner which shall deem to be pending. The learned Court is expected to proceed in accordance with the principles enunciated by the august Supreme Court in the two judgments referred to above.

12. The instant petition is, therefore, allowed and the matter is remanded in the above terms.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 21-12-2015.

JUDGE

Approved for reporting.

*Luqman Khan/