

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Appeal No.99 of 2019

Muhammad Afzal etc

Vs

Muzaffar Khan & others

Date of Hearing: 20.12.2019
Appellants By: Raja Abid Hussain Janjua, Advocate
Respondents 1 to 11 By: Mr. Ijaz Janjua, Advocate

Ghulam Azam Qambrani, J: This appeal has been directed against the Judgment dated 11.4.2019 passed by learned Additional Sessions Judge-West, Islamabad, whereby complaint filed by respondents/complainants under Section 3, 4 & 7 of the Illegal Dispossession Act, 2005 was allowed and the appellants were convicted Under Section 3 (2) of the Act and sentenced to simple imprisonment for 06 months with fine of Rs 1,00,000/-, failing which the accused shall further undergo simple imprisonment for one month. The accused was also directed to pay compensation of Rs 50,000/- to the complainant. It was also directed that possession of the disputed property of 07 marlas be handed over to the complainants.

2. The brief facts of the case are that the complainant/respondents 1 to 11 filed complaint Under Section 3, 4 & 7 of the Illegal Dispossession Act, 2005 with the contention that they filed a civil suit No. 912 of 2013 for declaration and permanent injunction before the learned Court of Civil Judge-West, Islamabad; that they are exclusive owners in possession of land measuring 7-Marlas under khewat No. 189, khatooni number 256, khasra number 09 with the prayer that they may also be declared as owners in possession of land measuring 2-marlas in khewat number 47, khatooni number 64, khasra number 16 situated in the revenue estate of village Baradari Golra Sharif, Tehsil & District Islamabad; that the respondents appeared before the learned Civil Judge-West, Islamabad, and initially contested the suit by filing written statement and thereafter failed to pursue the same. Resultantly, they were proceeded against ex-parte and after recording of ex-parte evidence, the learned Civil Judge passed ex-parte judgment & decree dated 15.10.2014. Admittedly, the appellants till date failed to challenge the above said judgment & decree; that respondents 1 to 11 by filing complaint Under Section 3, 4 & 7 of the Illegal Dispossession Act, 2005 alleged that during the Eid holidays on 8.7.2016, the appellants illegally and forcibly, armed with deadly weapons with manpower dispossessed the respondents from the subject land in the presence of judgment & decree dated 15.10.2014. That on receiving complaint by the learned Additional Sessions Judge-West, Islamabad, a direction was issued to the SHO, concerned Police Station for submission of report; that the SHO conducted a detailed inquiry after preparing site plan and recording the statements

of the inhabitants, which are part of the record. That after usual investigation and submission of report of the SHO, Golra Sharif, the learned Additional Sessions Judge-West, Islamabad directed the petitioners for appearance.

3. Charge was framed against the appellants on 20.2.2018. Appellants/accused pleaded not guilty and claimed trial. On denial of the charge, respondents/complainants were directed to produce evidence.

4. For proving the charge, complainant Muzaffar Khan appeared as PW.1, Muhammad Sodagar appeared as PW.2 and placed attested copy of report of local commission Ex.CW.1/1, attested copy of judgment & decree as Ex.CW.1/2 along with copies of order sheet & plaint etc.

5. After closure of the prosecution evidence, appellants/accused were examined Under Section 342 Cr.P.C, they did not opt to record statement on oath as envisaged Under Section 340 (2) Cr.P.C. Appellants/accused in their defence during statement Under Section 342 Cr.P.C produced a chart showing legal heirs of Qaim Din as annexure “ A”, copy of farad Jamabandi as annexure “B” and further stated that the complainant/respondents are in possession of excessive land over and above their due shares. That learned Additional Sessions Judge-West, Islamabad, after hearing the parties passed the impugned Judgment dated 11.4.2019, whereby convicted the appellants/accused namely Muhammad Afzal & Muhammad Akhtar both sons of Sultan and sentenced them under Section 3 (2) of the Act with simple imprisonment for a period of six months with fine of Rs 1,00,000/- and in case of default of the payment of fine amount, they will further undergo simple imprisonment for one month and also ordered for payment of compensation to the respondents/complainants to the tune of Rs. 50,000/- with further direction for handing over the peaceful possession of the disputed land to the respondents/complainants.

6. Feeling aggrieved from the impugned Judgment dated 11.4.2019, the appellants/convicts filed instant appeal Under Section 8 of the Illegal Dispossession Act.

7. Learned counsel for the appellants/convicts has argued that in fact the complaint under the Illegal Dispossession Act, 2005 itself was not competent while learned Additional Sessions Judge-West, Islamabad without considering material facts entertained the matter and without cogent reasons and evidence, passed the impugned judgment by convicting the appellants. He further argued that in fact the parties are descendants of one Qaim Din, who left behind three sons namely (i) Fazal Ellahi, predecessor of present complainants and Shahzad etc, (ii) Muhammad Sultan, father of answering appellants/accused & (iii) Bostan, transferred in favour of appellants/accused and other legal heirs of Muhammad Sultan. Further argued that the SHO, Police Station, Golra Sharif, Islamabad, submitted detailed report wherein mentioned that the dispute at the site was of 4½ Marlas. The I.O/SHO also recorded the statements of inhabitants of the locality.

8. Learned counsel for respondents/complainants has contended that there is a decree in favour of respondents/complainants whereby they have been declared as owners of the land in dispute. Further argued that the respondents/complainants produced oral as well as documentary evidence which proved the version of respondents and lastly he supported the impugned Judgment.

9. I have heard the arguments of learned counsel for the parties and perused the record.

10. Perusal of the record reveals that the respondents/complainants, in support of their version produced PW.1 Muzaffar Khan complainant. He stated that “ *it is an inherited property and 40/50 years ago divided into three parts, out of which one part came into share of maternal uncle of the respondents and remaining two parts became the share of petitioners’ father and their uncle. In the year 2005, we were handed over possession of 7-Marlas only through private partition. After a few days, I constructed a boundary wall with the help of respondents. In the year 2011, when I started raising construction over the said property, the respondents started interference and creating hindrance, therefore, we approached Civil Court and filed a suit against the respondents in which a local commission was appointed. After submission of report by the local commission Ex.CW.1, the said suit was decreed in our favour. Due to weak financial position, I could not raise construction on said plot. In July 2016 during Eid holidays, when I visited the plot for construction, the appellants started quarrelling. We approached the Court and filed the instant complaint.*” During cross-examination, he admitted that it is correct that the parties are co-owners and co-sharers in khasra numbers 09 & 16 which is inherited property of both the parties. He admitted that our mother namely Karam Jan inherited only 1/3rd share from her father Fazal Ellahi. Further stated that Fazal Ellahi was owner of 1-Kanal & 6-1/2 Marlas. He also admitted that disputed land falling in khasras No. 09 and 16 was never partitioned by the Revenue Department. He showed his innocence as to where the house of Shahzad is constructed and upon how much land in khasra No. 09. He admitted the factum of jirga in between them before filing of the instant petition. PW.2 Sodagar deposed that “ *almost 12 years back appellants Muhammad Afzal & Muhammad Akhtar themselves partitioned the land and handed over the physical possession to the complainants. After five years, the complainant started constructing walls which the respondents did not allow. Thereafter, litigation started between the parties and the Court decided the case in favour of the complainants. Then again they did not allow the complainant to raise any constructions and again litigation started. If the respondents sworn before the Court that this land belongs to them then we would draw our claim.*” In cross-examination, he stated that the complainant is my real uncle (Mamoo). It is correct that the complainant Muzaffar is presently occupying the share of Fazal Ellahi. The complainant had constructed house on the said land. It is correct that the complainant is living in the said house. It is correct that respondents 2 to 11 had no possession in the

land and they had never the possession in land falling in khasras No. 09 and 16.” PW.1 in his statement produced the copy of report of local commission namely Imran Yousaf Niazi, Advocate wherein it has been mentioned that the Naib Tehsildar, Halqa Golra Sharif, will submit his report. This witness himself produced copy of the report of local commission, which has no evidentiary value in the eyes of law. Same has not been properly tendered in evidence. The report has been prepared in the year 2011 in an early litigation between them. Reliance has been placed on case law titled as “ Abdul Hameed Vs Ghulam Farid & three others” [2016 P Cr.LJ 18], wherein it has been stated that “ All co-sharers would enjoy one and same status, until partition of joint property, no one could be considered as exclusive owner of property.”

11. Perusal of report of local commissioner Ex.CW.1/1 produced by complainants/respondents reveals that the commission was constituted on 7.9.2011 long long before filing of the complaint under the Illegal Dispossession Act, 2005 and much before filing of the suit consequent upon which ex-parte judgment & decree dated 15.10.2014 was obtained by the respondents. The production of Ex.CW.1/1 by the PW.1 himself was not proper and the learned Trial Court failed to consider that how a copy of any document is produced in evidence. The Illegal Dispossession Act, 2005 is a special one which has empowered the Court to get conduct a special investigation within the stipulated period of fifteen days. The learned Trial Court in accordance with the Illegal Dispossession Act, 2005, Section 5 directed for conduct of an investigation to the SHO. The concerned SHO after a thorough investigation submitted report dated 22.10.2016. Perusal of report submitted by SHO reveals that the disputed piece of land is in possession of the petitioner since long time and are in possession of the same. The report further reveals that on inquiry from the neighbourers namely Arif Nadeem, Imran Khan, Muhammad Sarfraz and Muhammad Akhtar while recording their statements, they have clearly stated that the petitioner is in occupation of the piece of land since long time. It is also transpired from the report of SHO that the land in dispute which the respondents are claiming to be their ancestral property, came in their share from their mother. The report further reveals that the exact khasra numbers of the piece of land can only be determined by the revenue officials whether the same piece of land falls within such numbers. The learned Trial Court has totally ignored the report submitted by the SHO and nowhere in the report it has been stated that the petitioners have forcibly dispossessed the respondents/complainants. It is an admitted fact of the case that the parties are the descendants of one Qaim Din who left behind Fazal Ellahi, Muhammad Sultan & Bostan and some land were left behind them which are in joint possession of the parties. However, it was the case of complainant that they have divided the lands according to their shares, but on the face of record no such evidence has been brought to prove the factum of partition in between them. It is well settled law that all the co-sharers are deemed to be owners of the land unless the land is divided /partitioned in accordance with law Under Section 135 of the Land Revenue Act, 1967. It is well settled proposition of law that every

criminal case has to be decided in its own peculiar circumstances and facts. The Honourable Supreme Court, in the dictum, reported as “Mumtaz Hussain vs. Dr. Nasir Khan and others” (2010 SCMR 1254), has provided guidelines for the Courts to examine, attracting of Provision of Section 3 of the Illegal Dispossession Act, 2005, while holding that Court is required to examine as to whether property was an immovable property; secondly that the person was owner or the property was in his lawful possession; thirdly the accused entered into or upon the property unlawfully; fourthly that such entry was with intention to dispossess i.e ouster, evict or deriving out of possession against the will of 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 or to occupy, i.e holding possession, reside in or something.

12. Accordingly it would be proper to examine the case in hand on the above touchstone. It transpires that the disputed land is un-divided in between the parties. It is legally presumed that every share holder of a joint holding would be deemed to be in joint possession. Since the respondent/complainant himself during cross-examination admits that “ It is also correct that the said land falling in khasra No. 09 & 16 was never partitioned by meets and bounds by any revenue department. During cross-examination, complainant further stated that it is correct that “ *I as well as respondents 2 & 3 agreed in the jirga of Zubair Farooq Khan that a person namely Azhar Mehmood be appointed for the measurement of whole property including house of Shahzad, later on I objected and refused to accept the measurement done by Azhar Mehmood.*” Meaning thereby, still the whole property has not been divided/partitioned in between them, therefore, under Illegal Dispossession Act, 2005, the learned Trial Court is not competent to determine the legal character and to pass upon for handing over of the possession of piece of land to some one, as same is not vested in its jurisdiction. In my humble view, Civil Court and the revenue authorities are competent to resolve the issues.

13. On the other hand, learned Additional Sessions Judge-West, Islamabad, did not consider the report of SHO, Golra Sharif, wherein it has been mentioned that the land in dispute is in possession of Afzal Khan and as per jirga members, Afzal Khan is the owner and in possession of the disputed land. Reliance has been placed on the case titled as “ Zahoor Ahmad Vs The State & three others” [PLD 2007 Lahore 231], wherein it has been stated that:-

- (i) The Illegal Dispossession Act, 2005 applies to dispossession from immovable property only by property grabbers/Qabza Groups/ Land mafia. A complaint under the Illegal Dispossession Act, 2005 can be entertained by a Court of Session only if some material exists showing involvement of the persons complained against in some previous activity connected with illegal dispossession from immovable property or the complaint demonstrates an organized or calculated effort by some persons operating individually or in groups to grab by force or deceit property to which they have no lawful, ostensible or justifiable claim. In the case of

an individual it must be the manner of execution of his design which may expose him as a property grabber.

- (ii) The illegal Dispossession Act, 2005 does not apply to run of the mill cases of alleged dispossession from immovable properties by ordinary persons having no credentials or antecedents of being property grabbers/Qabza Groups/land mafia, i.e. Case of disputes over possession of immovable properties between co-owners or co-sharers between landlords and tenants, between persons claiming possession on the basis of inheritance, between persons vying for possession on the basis of competing title documents, contractual agreements or revenue record or cases with a background of an on-going private dispute over the relevant property.
- (iii) A complaint under the Illegal Dispossession Act, 2005 cannot be entertained where the matter of possession of the relevant property is being regulated by a civil or revenue Court.

14. Perusal of the evidence transpires that there is no direct evidence against the appellants to attract the provisions of Section 3 of the Illegal Dispossession Act, 2005. So far as civil suit No. 912/2013 is concerned, the learned Civil Judge passed ex-parte judgment & decree against the appellants. It is an admitted fact that still the land in dispute has not been properly partitioned through the revenue staff and still no revenue record has been maintained in this regard about the partition in between the parties. The possession of one co-sharer always deems to be the possession of all the co-owners. No one can deny the possession of co-owner. The parties in the present case are in admitted feature that they are predecessor-in-interest of one Qaim Din who left behind landed property upon which the parties, i.e appellants and the respondents/complainant are in possession, but still no proper partition has been made. The respondents/complainants failed to produce any evidence with regard to Qabza Groups/property grabbers and land mafia against the appellants. The matter in between the parties is of civil nature. The exercise in such matter would be abuse of process of law which cannot be allowed.

15. For what has been discussed above, by accepting the instant Criminal Appeal, impugned judgment dated 11.4.2019, is hereby set aside and the complaint filed by respondents/complainants, is hereby dismissed. Resultantly, appellants/convicts namely Muhammad Afzal and Muhammad Akhtar are acquitted of the charge. They are on bail. Their sureties stand discharged.

Ghulam Azam Qambrani
Judge

Announced in Open Court, on this 09th day of January, 2020.

Ghulam Azam Qambrani
Judge

Approved for Reporting.

S.Akhtar