

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Criminal Appeal No.77/2020

Muhammad Dawood Khan

versus

Riyat Ullah Khan & 4 others

Appellant by: Syed Salman Aziz, Advocate.
Respondents by: Ch. Ihtesham-ul-Haq, Advocate for Respondent No.2.
Mr. Muhammad Saeed Khan Sadozai, State Counsel.
Shah Nawaz, ASI, P.S. Kohsar, Islamabad.

Date of Decision: 22.06.2020.

MOHSIN AKHTAR KAYANI, J: Through this criminal appeal, the appellant has assailed order dated 29.02.2020, passed under Section 7 of the Illegal Dispossession Act, 2005, whereby the learned Trial Court has directed the S.H.O., P.S. Kohsar, Islamabad to deliver possession of House No.10, Nazim-ud-Din Road, Sector F-6/1, Islamabad (disputed premises) and fix the case for evidence.

2. Learned counsel for appellant contends that appellant was not made party in criminal complaint filed by Nadeem Kiani (Respondent No.2) under Section 3/4 of the Illegal Dispossession Act, 2005 and as such, the complaint was collusively filed against Riyat Ullah Khan (Respondent No.1), who was not in possession of disputed premises; that respondent No.1 has recorded his statement before the learned Trial Court on 25.02.2020 that he is not in possession of House No.10, Nazim-ud-Din Road, Sector F-6/1, Islamabad and as such, the criminal complaint was not maintainable, but this aspect was not considered by the learned Trial Court; that as per sale agreement dated 22.09.2018, the appellant is bona fide purchaser of house in question against total sale consideration of Rs.28,000,000/-, out of which an amount of Rs.20,000,000/- was paid as part payment and received possession of the house from one Sardar Ali son of Sher

Muhammad; that the requirements of Section 7 of the Illegal Dispossession Act, 2005 have not been adhered to by the learned Trial Court and the impugned order is illegal.

3. Conversely, Riyat Ullah Khan/Respondent No.1, who appeared before this Court on last date of hearing i.e. 14.05.2020 and confirmed that he was not in possession of disputed property and even he recorded his stance before the learned Trial Court in similar manner.

4. On the other hand, Respondent No.2 contends that he is attorney of his brother-in-law namely Khalid Mehmood and filed the complaint against Respondent No.1 for illegally occupying the premises after breaking locks of the house in question when Khalid Mehmood left the country along with his mother due to demise of his elder brother namely Farooq; that Respondent No.1 has filed a frivolous civil suit for declaration and claims to be tenant of Respondent No.2, but failed to prove anything on record that the house was ever handed over to him as tenant nor he has paid any rent in this regard to justify his plea, whereafter the civil suit filed by respondent No.1 was dismissed; that respondent No.1 filed another civil suit for damages against Respondent No.2, which was also not attended to and even Respondent No.1 prepared certain forged documents in proceedings of the Civil Court, whereupon a separate application under Section 476 Cr.P.C. has been filed, which is pending adjudication before the learned Civil Court; that the appellant has nothing to do with said property and after dismissal of the suit of respondent No.1 the present appellant came into sight to retain the possession in illegal manner, although he could not justify his possession in any manner, even the alleged agreement to sell referred by him was executed with a stranger and not with the owners of subject premises, therefore, claim of appellant is misconceived and is not justified.

5. Similarly, the Investigating Officer in attendance has been confronted who confirms that a separate criminal case i.e. FIR No.471, dated 23.10.2018, under

Section 448 PPC, Police Station Kohsar, Islamabad was lodged by respondent No.2 and challan under Section 173 Cr.P.C. was filed before the competent court; that the house in question was presently occupied by the appellant, but he has not produced any ownership record during the course of investigation.

6. Arguments heard, record perused.

7. Perusal of record reveals that the appellant has called in question the order of the learned Additional Sessions Judge (West), Islamabad, dated 29.02.2020, whereby application under Section 7 of the Illegal Dispossession Act, 2005 was allowed in favour of Respondent No.2.

8. In order to resolve the controversy, it is necessary to reproduce the provisions of Section 7 of the Illegal Dispossession Act, 2005, which is as under:

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.*

9. The appellant has been confronted to justify his lawful possession at the preliminary stage as envisaged in Section 7(1) of the Illegal Dispossession Act, 2005, whereupon the appellant contends that he is bona fide purchaser of House No.10, Sector F-6/1, Islamabad, vide agreement dated 22.09.2018, against total sale consideration of Rs.28,000,000/-, referred at Page-37 of the instant appeal. It

was further referred in the agreement that appellant has paid an amount of Rs.20,000,000/- in cash to one Sardar Ali son of Sher Muhammad, who portrayed himself to be owner of subject property.

10. The appellant has also submitted copy of suit for specific performance dated 22.09.2018 and contends that he has sought appropriate remedy for specific performance of agreement. The plaint has been perused with the able assistance of learned counsel for appellant and it reveals that the appellant has allegedly purchased the disputed property from one Sardar Ali on 23.10.2018, who allegedly purchased the house in question from Raja Muhammad Farooq (owner) vide agreement dated 17.02.2015, whereas the ownership of Raja Muhammad Farooq has already been transferred in the name of Khalid Mehmood, vide transfer letter dated 04.05.2018 issued by the Estate Management Directorate, CDA appended by the appellant with this appeal. The said transfer letter further reveals that after demise of Raja Muhammad Farooq the property was transferred in the name of Khalid Mehmood i.e. his brother with consent of other legal heirs, whereby all the legal heirs have released their shares in favour of Khalid Mehmood vide release letter dated 23.11.2017, and as such, the appellant does not figure out in this entire background.

11. The perusal of record further reveals that Respondent No.2 submitted complaint against Respondent No.1 Riyat Ullah Khan for allegedly trespassing into the subject premises after breaking the locks, whereupon case FIR No.471, dated 23.10.2018, under Section 448 PPC, Police Station Kohsar, Islamabad has been registered. The Investigating Officer submitted challan against Respondent No.1 before the competent court and the trial is pending, however the complaint under Section 3/4 of the Illegal Dispossession Act, 2005 was filed by respondent No.2 against Respondent No.1, who has initially filed a civil suit for declaration and permanent injunction, claiming himself to be a tenant but failed to submit any record for his tenancy, resultantly his suit was dismissed. Later on,

Respondent No.1 filed another suit for recovery of damages, whereby certain forged documents were used by him, a separate application under Section 476 Cr.P.C. was filed by Respondent No.2 against him, which is pending. Evidently, Respondent No.1 Riyat Ullah Khan prepared forged documents in order to retain possession without lawful authority, however when confronted, he recorded his stance before this Court as well as before the learned Trial Court that he is not in possession of house in question and later on the learned Trial Court passed the order under Section 7 of the Illegal Dispossession Act, 2005.

12. This background of the case reveals that appellant does not figure anywhere in this case, who kept on watching the proceedings and approached this Court when order under Section 7 of the Illegal Dispossession Act, 2005 has been passed with the claim of bona fide purchaser. If at all the contention of appellant is admitted and acknowledged at this stage he would be a purchaser from a third party i.e. Sardar Ali, who has nothing to do with the case property and if he succeeds, he will get his decree in suit for specific performance of agreement to sell with possession, no right has so far been accrued in his favour.

13. The main requirement of Section 7 of the Illegal Dispossession Act, 2005 is the satisfaction of the Court, if demonstrated by the occupier that he is in lawful possession, however in this case Respondent No.1 Riyat Ullah Khan is initially occupier of premises, which he has acknowledged in his civil suit being tenant, but after dismissal of his suit the present appellant came in limelight through the instant appeal, however his alleged claim of possession could not be considered at this stage as he has to prove his case of specific performance before the competent court of law and if he succeeds in his civil suit he will get the decree and possession of suit property with its ownership as civil dispute is decided on the basis of preponderance of probabilities and the test of proof is not the proof of fact beyond reasonable doubt but is the preponderance of evidence. Reliance is placed upon 2006 CLC 289 (Nazim Ali vs. Rasheed, etc.). Even otherwise, while

considering the claim of Respondent No.1 being a tenant who failed to justify his tenancy and occupation being a tenant, therefore, any person subsequently claiming the similar stance on the basis of some other agreement comes within the purview of doctrine of sinker, where Respondent No.1 and present appellant should sail or sink together, therefore, statement given by Respondent No.1 before the learned Trial Court as well as before this Court has a negative impact upon the appellant case.

14. The concept of civil proceedings *vis-a-vis* criminal case in matter of the Illegal Dispossession Act, 2005 has been dealt with by the apex Court in reported case 2016 SCMR 1931 (Shaikh Muhammad Naseem vs. Mst. Farida Gul) in the following manner:

"5.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."

Hence, mere pendency of civil suit has no bearing on the criminal complaint under the Illegal Dispossession Act, 2005 and appellant cannot take a refuge behind his civil suit at this stage when, *prima facie*, his possession is not justified from the circumstances brought on record.

15. The record appended with the appeal reflects that Khalid Mehmood is the lawful owner of disputed property, who appointed Respondent No.2 Nadeem

Kiani as his attorney, vide registered attorney which was executed on 23.05.2017 in the Embassy of Pakistan, Washington, which was later on registered in Pakistan with Joint Sub-Registrar, Islamabad on 24.10.2017, whereby said Respondent No.2 has been authorized to deal with the subject property in all manner, who lodged the FIR against the Respondent No.1 Riyat Ullah Khan for trespassing in the property in question. The Investigating Officer has been confronted regarding ownership of the property, whereby he conceded that the property in question is in the name of Khalid Mehmood and Respondent No.2 Nadeem Kiani is lawful attorney, which, *prima facie*, reflects that the claim of possession of the appellant over the subject property could not be established in a lawful manner, which is the minimum requirement of Section 2(c) of the Illegal Dispossession Act, 2005, whereby the phrase "*lawful possession*" has been used by the legislature, which could not be demonstrated by the appellant in this case.

16. The most important facts reflected from tentative assessment are that Respondent No.2 lodged FIR No.471/2018 on 23.10.2018 against Respondent No.1 for the alleged trespassing, whereas the appellant filed the suit for specific performance on 10.12.2018 i.e. after about one and a half month of registration of the FIR and as such, the record of the events, *prima facie*, establishes that FIR was registered earlier on the complaint of Respondent No.2 prior to filing of civil suit and the appellant has not given a proper address of Respondent No.4 Raja Muhammad Farooq with whom he has no agreement and all the judicial record discloses that Respondent No.1, who has played havoc with the legal system under the garb of different civil proceedings to delay the matter on one pretext or other, whereby the learned Trial Court has rightly passed the order under Section 7 of the Illegal Dispossession Act, 2005. Similarly, the report called by the learned Trial Court from the S.H.O. Police Station Kohsar also reflects that appellant was aware of criminal proceedings but he intentionally has not opted

to join the proceedings, rather preferred to hide behind different legal proceedings of Respondent No.1 and when an initial order was passed against Respondent No.1, the appellant immediately came on surface and filed the instant appeal. Hence, both are in league with each other.

17. This entire background demonstrates that the appellant has no *locus standi* to file the instant appeal in terms of Section 8(A) of the Illegal Dispossession Act, 2005 as the same could only be maintainable if the order is passed in terms of sub-Sections 2 and 3 of Section 3 of the Illegal Dispossession Act, 2005 and as such, no appeal is provided against order passed under Section 7 of the Illegal Dispossession Act, 2005 nor same is covered under Section 8(A) of the Illegal Dispossession Act, 2005 by the legislature on the analogy that the complaint regarding illegal dispossession should have been decided earlier against the land grabbers.

18. It is trite law that remedy of appeal could only be exercised when it is provided in the statute, whereas in this case the appellant has filed the appeal under Section 8(A) of the Illegal Dispossession Act, 2005, which is not provided against an interim order passed under Section 7 of the Illegal Dispossession Act, 2005 and as such, when the learned counsel for appellant has been confronted regarding maintainability of instant appeal, no plausible reason has been given or demonstrated on record, although in some cases criminal revision could have been filed having different parameters.

19. I have gone through the order of the learned Trial Court and observed that the same has been passed with due care and caution, therefore, filing of the instant appeal is misconceived and the same is hereby **DISMISSED**. The learned Trial Court is directed to conclude the pending complaint within the period of 60 days while recording the evidence on day-to-day basis and decide the matter expeditiously. Similarly, the learned Sessions Judge is directed to ensure timely

conclusion of the pending civil suits, including the civil suit filed by the appellant, within the period of three (03) months, under intimation to this court. The S.H.O., P.S. Kohsar, Islamabad shall comply with the direction of the learned Trial Court within 24 hours and submit the compliance report to the concerned learned Trial Court.

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.