

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

I.C.A. No.60/2022

Ashraf Rashid Siddiqi & another
Versus
Abdul Rasheed & another

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	28-02-2022	Barrister Khalique Zaman, Advocate for petitioners. Raja Rizwan Abbasi, Advocate for respondent.

Athar Minallah, C.J.- This appeal is directed against judgment, dated 10-01-2022, passed by the learned single judge in W.P. No.724/2021.

2. Mr Abdul Rasheed son of Miran Bakhsh (*hereinafter referred to as the "Respondent"*) filed a complaint on 11-02-2020 under sections 3 and 4 of the Illegal Dispossession Act, 2005 (*hereinafter referred to as the "Act of 2005"*). It was alleged in the complaint that Ashraf Rashid Siddiqi and one Muhammad Javaid Khan (*hereinafter referred to as "Appellants"*) had illegally dispossessed the Respondent. The dispute was regarding 11 kanal, 07 marlas situated in Khasra no.7 and 9, mauza Haroon Dhamyal, Tehsil and District Islamabad (*hereinafter referred to as the "Property"*). It was asserted by the Respondent that the alleged dispossession had taken place in January, 2019 and that the Appellants

had also constructed a boundary wall and a building consisting of two rooms. The respondent had filed a suit on 21-01-2020 regarding the same dispute seeking declaration and decree for possession. It was asserted by the Respondent in his complaint that he was indisposed to justify the delay in filing of the complaint. The learned trial court sought a report from the incharge of the police station. After perusing the report, the complaint was dismissed vide order, dated 30-01-2021. The respondents challenged the said order by invoking the constitutional jurisdiction of the Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the 'Constitution'*). The learned single judge vide the impugned order, dated 10-01-2021, allowed the constitutional petition and remanded the matter to the learned trial court for deciding the complaint afresh.

3. The learned counsels for the parties have been heard at length. The learned counsel for the Appellants has mainly argued that by filing a complaint under the Act of 2005, an attempt was made to convert a civil dispute to a case of illegal dispossession. He has argued that on a plain reading of the complaint filed by the respondent, no case was made out to proceed in the matter because a civil suit was earlier filed and it was pending before the competent court. Reliance has been placed on the case titled "*Chief Ehteshab Commissioner, Chief Ehtesab Commissioner's*

Secretariat, Islamabad v. Aftab Ahmad Khan Sherpao, Ex-Chief Minister, N.-W.F.P. Peshawar and others" [PLD 2005 SC 408].

4. On the other hand, the learned counsel for the respondent has contended that the impugned order does not suffer from any legal infirmity. Reliance has been placed on the case titled "*Sheikh Muhammad Naseem v. Mst. Farida Gul*" [2016 SCMR 1931].

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

6. The august Supreme Court in the judgment titled as "*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 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 thereunder 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."

7. 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."

8. A plain reading of the complaint filed by the Appellants clearly shows that the alleged illegal dispossession had taken place in January, 2009 and that construction had also been undertaken and it was completed before filing the suit. As noted, respondents before filing of the complaint had filed a suit regarding the same dispute. In the facts and circumstances of the case, the learned trial court had not exercised the power vested under section 5 of the Act of 2005 judicially, rather a report was sought from the incharge of police station in an unconsidered and mechanical manner. The assertions made in the complaint filed by the Respondent shows that the ingredients of the offence described under the Act of 2005 were not fulfilled. On the touchstone of the principles and law enunciated by the august Supreme Court in the case titled "*Waqar Ali and others v. The State through Prosecutor/Advocate-General, Peshawar and others*" [PLD 2011 SC 181], the learned trial court had sought a report from the incharge of the police station in an unconsidered and mechanical manner. The suit filed by the Respondent prior to filing of the complaint and assertions made therein do not justify taking of cognizance by the learned trial court. The proper remedy, in the facts and circumstances of the case, was by way of filing of a suit. As already noted, a suit was already pending when the complaint was filed. The case law relied upon by the learned single judge, therefore, was distinguishable in the facts and

circumstances of the case in hand. Moreover, the report sought by the learned trial court in exercise of powers conferred under section 5 of the Act of 2005 is likely to prejudice the proceedings relating to the suit. The report of the incharge police station submitted pursuant to a direction given by the learned trial court nor the proceedings or the impugned order shall in any manner prejudice the proceedings pending before the court of plenary jurisdiction regarding the suit, which has been filed by the Respondent.

9. For the above reasons, we allow the appeal and set aside the impugned judgment, dated 10-01-2022. Consequently, the order passed by the learned trial court stands restored.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE
(CHIEF JUSTICE)

Announced in the open Court on 10-06-2022.

JUDGE
(CHIEF JUSTICE)

Luqman Khan/*