

**JUDGMENT SHEET.**

**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT.**

**W.P No.162/2016.**

**Sajid Javed, etc.      VS      Addl: Sessions Judge (West) Islamabad, etc.**

**Petitioners by                      Malik Ghulam Mustafa Kandwal,**  
**Advocate.**

**Respondent No.2 by              Mr.Rizwan Akhtar Awan, Advocate.**  
**Aman Ullah, ASI, P.S Sabzi Mandi.**

**Date of hearing:                      01.02.2016.**

**MOHSIN AKHTAR KAYANI, J:-** Through the instant constitutional petition, the petitioner has assailed the order dated 13.1.2015, whereby, learned Additional Session Judge (West), Islamabad dismissed the petition U/S 265-K, Cr.P.C filed by the petitioners and allowed the petition U/S 7 of Illegal Dispossession Act, 2005 filed by respondent No.2.

2.      The facts, in brief, are that petitioners No.5 to 7 and respondent No.2 are real brothers, whereas petitioners No.1, 2 & 4 are nephews of co-petitioners and respondent No.2. As per contents of the complaint under Illegal Dispossession Act, 2005 shops No.73 & 74 situated in wholesale fruit market I-11/4, Islamabad were purchased by Bashir Ahmed (late), (Grand father of petitioners No.1 to 4, father of petitioners No. 5 to 7 as well as father of respondent No.2) in the year 1992 from one Haji Muhammad Sharif, however, the said shops were transferred through sale deed No.2520 dated 28.6.1992 in the name of Arif Bashir, respondent No.2 and Mst. Hajra; that respondent No.2 is owner as per record and on 12.11.2015 Pervez Bashir, petitioner No.7 alongwith his servant Tariq came on the disputed property, threatened the Munshi and contractor to vacate the premises and he also put locks on the said shops; that on 15.11.2015 at about 6 p.m the petitioners alongwith 8/10 persons armed with weapons came on the said shops and forcibly dispossessed respondent No.2 and put their lock over the same; that police was informed through Rescue 15, the police visited the spot and took away the parties to the Police Station Sabzi Mandi; that the petitioners forcibly, unlawfully and illegally dispossessed respondent No.2; that respondent No.2 filed a complaint U/S 3, 4, 5, 6, & 7, Illegal Dispossession Act, 2005 before the Sessions Judge (West) Islamabad, which was

entrusted to respondent No.1, who issued notice to SHO, P.S Sabzi Mandi, whereupon two reports dated 26.11.2015 & 3.12.2015 were filed by the SHO before learned Additional Sessions Judge (West) Islamabad. In response to these proceedings, the petitioners filed petition u/s 265-K, Cr.P.C, which was dismissed whereas petition u/s section 7 of Illegal Dispossession Act, 2005 for restoration of possession filed by respondent No.2 was allowed by learned Additional Sessions Judge (West) Islamabad, hence, this writ petition.

3. Learned counsel for petitioners argued that the petitioners are in the possession of disputed shops since 1992 and Arif Bashir, respondent No.2, younger brother is Benami owner, who did not contribute a single penny towards the purchase of said shops, rather Bashir Ahmed (late) managed to get registered the sale deed in the name of Arif Bashir, respondent No.2 and the mother Mst.Hajira Begum (wife of Bashir Ahmed) for the time being in order to save the wealth tax; that the petitioners were in possession of the suit shops till October, 2015. Learned counsel for petitioners has submitted the copies of original telephone bills of the disputed shops. Learned counsel for petitioner further argued that the suit shops are in the name of respondent No.2, Arif Bashir in CDA record and all tax, notice and utility bills were issued in his name but he is just Benami owner, which is evident from suit titled Arif Bashir Vs Ch.Farooq Bashir, etc, filed by respondent No.2 before the Civil Court, Rawalpindi, wherein respondent No.2 sought the partition of ten properties situated at Rawalpindi and Islamabad; that in the said suit respondent No.2 Arif Bashir himself referred in Para 2(b) of the plaint that

***“Shops No.73 & 74 wholesale fruit market sector I-11/4, Islamabad  
alongwith share in business with the name and style of “Ch.Zahid  
and Company”***

so he admitted the joint business and properties; that in the said suit respondent No.2 categorically admitted the fact that the properties were established and purchased by the deceased father and as per prayer, decree for partition of the properties including shops No.73 & 74 has been made. Learned counsel for petitioners further argued that if respondent No.2 was in possession at the time of the filing of the said suit on 12.1.2013, he should have mentioned this fact in the body of the plaint, whereas, no such averment was made, hence, respondent No.2 was not in possession of the said shops. Learned counsel for petitioner further argued that another civil suit titled “*Pervez Bashir Vs. Arif*

*Bashir etc.*” is pending in the Court of Mr.Shahzad Khan, Civil Judge (West) Islamabad, wherein an injunctive order was also issued vide order dated 9.11.2015 and in the said suit declaration, cancellation of document, perpetual and mandatory injunction was prayed for against the said shops. Learned counsel for petitioners has also referred the police report, wherein it has been mentioned by the SHO Sabzi Mandi that both the parties were fighting with each other on 15.11.2015 in front of the disputed shops and there is no evidence regarding illegal dispossession on the record. On the legal side, learned counsel for petitioner has referred section 7 of Illegal Dispossession Act, 2005, provisions of which clearly shows that the same is applicable only when the requirement referred in the Act *ibid* i.e. “*if during trial*” has been complied with and the trial only commenced, if the charge has been framed. He has relied upon PLD 2015 Lah 93, 2013 P Cr. L J 953, PLD 2011 Lahore 340, 2008 P Cr. L J 719 and 2015 YLR 715. In last, learned counsel for petitioners argued that the requirements of section 3 & 4 of Illegal Dispossession Act, 2005 are not attracted as the matter in dispute is of civil nature, which is pending before Civil Court, even otherwise the parties are co-sharer in the subject property, which is admitted by respondent No.2 in his civil suit, therefore, application u/s 265-K, Cr.P.C was rightly filed and the impugned order dated 13.1.2016 is illegal; that the learned Additional Sessions Judge (West) Islamabad while passing the impugned order ignored the principles laid down in 2010 P Cr. L J 575, 2014 Y L R 1791, 2014 Y L R 390, 2015 P Cr. L J 913 and PLD 2007 Lahore 231.

4. Per contra, learned counsel for respondent No.2 while arguing his case referred the police report dated 3.12.2015, wherein Ch.Arif Bashir, respondent No.2 was declared in possession of the suit shops for the last 3 months. Learned counsel further argued that the disputed shops alongwith the cold storage in the basement were rented out by respondent No.2 to Abdul Wahab and Abdul Qayyum Butt; that respondent No.2 became the owner in possession of the suit shops vide registered sale deed No.2520, dated 28.6.1992 and the same was duly incorporated in the CDA record. Learned counsel for respondent No.2 submitted certificate issued by Islamabad Chamber of Commerce and Industry and Membership Card, where the name of respondent No.2 is registered against the said shops. Learned counsel for respondent No.2 emphasized on inquiry report No.921-RSP/IA/23.11.2015, conducted by DSP Industrial Area, wherein possession of

the complainant/respondent No.2 was confirmed. Learned counsel for respondent No.2 further argued that the electricity connection and telephone connection were installed in the name of respondent No.2. Learned counsel for respondent No.2 has relied upon the lease agreement of the disputed shops with one Abdul Qayyum Butt dated 14.11.2015 and also placed copy of second lease agreement of cold storage room with one Abdul Wahab dated 1.9.2015. Learned counsel for respondent No.2 further argued that the impugned order dated 13.1.2016 has rightly been passed keeping in view the police report and other circumstances of the case, even otherwise the warrant of possession issued by the Trial Court was complied in letter and spirit and as a result whereof the possession through SHO P.S Sabzi Mandi was delivered to respondent No.2, hence, the matter to the extent of petition U/S 7 of Illegal Dispossession Act, 2005 becomes infuctuous and the application U/S 265-K, Cr.P.C is premature, which can only be adjudicated after framing of the charge.

5. I have heard the learned counsel for the parties and perused the record.

6. Legal question raised in this petition is application of section 7 of Illegal Dispossession Act, 2005. In order to interpret section 7 of Act *ibid* in its true prospect, the same is reproduced hereunder for ready reference:

**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 sub-section (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 owner or occupier in possession.*

(3) *The Court may authorize any official or officer to take possession for securing compliance with its orders under sub-section (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 sub-section (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 sub-section (4) shall amount to misconduct for which the Court may direct departmental action against him.*

The perusal of above section manifests that grant of interim relief is subject to condition **“during trial”**. The expression **“trial”** has been interpreted by the Hon’ble Supreme Court of Pakistan in case of “ *Haqnawaz and others Vs. The State and others* (2000 SCMR 785), wherein it has been held that:-

*“From a review of the above provisions of the Code, it is quite clear to us that taking of cognizance of a case by a Court is not synonymous with the commencement of the trial in a case. Taking of cognizance of a case by the Court is the first step, which may or may not culminate into the trial of the accused. The trial in criminal case, therefore, does not commence with the taking of the cognizance of the case by the Court”.*

7. From the reading of Criminal Procedure Code, it is clear that the order of section 265-C and 265-D, Cr.P.C shall be maintained as under section 265-C, the accused is entitled to be supplied the relevant documents of the complaint in order to enable him to know the exact nature of allegations before he is sent up for the trial. The very purpose is to afford the accused sufficient time to study the allegations against him and prepare his defense, if any. The other purpose of the said provision is to provide the copies of the complaint or any other document to the accused free of cost not later than seven days before the commencement of the trial. The supply of relevant copies of complaint to the accused before seven days of the commencement of the trial has direct connotation to the framing of charge, which means that the trial of the accused would not start unless the relevant documents are supplied to him in terms of section 265-C, Cr.P.C, which shall then lead to framing of charge U/S 265-D, Cr.P.C.

8. In order to understand the provisions of section 265-C, Cr.P.C, the same is reproduced hereunder:-

**265-C. Supply of statements and documents to accused.** (1) In all cases instituted upon police report, copies of the following documents shall be supplied free of cost to the accused not later than seven days before the commencement of the trial, namely:

- (a) the first information report;
- (b) the police report;
- (c) the statements of all witnesses recorded under S.161 and 164, and
- (d) the inspection note recorded by an investigating officer on his first visit to the place of occurrence and the note recorded by him on recoveries made, if any:

Provided that, if any part of a statement recorded under section 161 or section 164 is such that its disclosure to the accused would be inexpedient in the public interest, such part of the statement shall be excluded from the copy of the statement furnished to the accused.

(2) In all cases instituted upon a complaint in writing:

(a) the complaint shall;

(i) state in the petition of complaint the substance of the accusation, the names of his witnesses and the gist of evidence which is likely to adduce at the trial, and

(ii) within three days of the orders of the Court under Section 204 for issue of process to the accused, file in the Court for supply to the accused, as many copies of the complaint and any other document which he has filed with his complaint as the number of the accused; and

(b) copies of the complaint and any other documents which the complainant has filed therewith and the statements under section 200 or section 202 shall be supplied free of cost to the accused not later than seven days before the commencement of the trial.

9. The Court has to perform its judicial duty under section 265-D, Cr.P.C to frame the charge after perusal of the police report, complaint and all other documents/statements filed by the prosecution and if the Court is of the opinion that there are sufficient grounds to proceed with the trial, it shall frame a charge in writing against the accused. Hence, the provisions of section 7 of Illegal Dispossession Act, 2005 have to be seen in the context of the word used in the said section specially “*Court is satisfied*” and “*found prima facie*” cast a duty upon the Court to perform all those functions, which were required in the framing of charge, therefore, the application of section 7 can only be assumed when entire material has been looked into and Court is of the considered view that the charges prima facie exist against the accused, therefore, after framing of charge, application of Section 7 shall come into play. Reliance is placed upon 2015 YLR 715 “Abdul Fatah vs Maharram Ali and 4 others” wherein it was held that:-

*“the trial would not start until a period of seven days after supplying the relevant copies to the accused in terms of clause (b) to subsection (2) of section 265-C, Cr.P.C is expired and charge is framed, which can be considered as a first step towards the commencement of trial.”*

Moreover, in “2008 P Cr. L J 719 Ashiq Hussain and another Vs. Athar Sher and 2 others” PLD 2011 Lahore 340 “Rabart alias D.C. Vs. ASJ Mian Channu District Khanewal and 7 others” 2013 P Cr. L J 953 “Rana Muhammad Ahsan Rasool Vs. The

state and others & PLD 2015 Lahore 93 Faqir Bakhsh vs The State and others” it was held that:-

*“use of word by the legislature “during the trial” under section 7(1) of Illegal Dispossession Act, 2005 is of significant importance. There is little cavil with the well-settled proposition of law that taking of cognizance is not commencement of the trial. Trial of a case commences with the framing of the charge against the accused.”*

10. In the light of all the judgments referred in preceding paragraphs, trial Court is bound to proceed in accordance with the provisions of Criminal Procedure Code and section 265-C(2), Cr.P.C imposes a duty to wait, until period of 7 days expires after supplying of relevant copies to the accused and then charge has to be framed. Admittedly, in this case charge has not yet been framed and the impugned order has been passed, therefore, order dated 13.1.2016 passed under section 7 of Illegal Dispossession Act 2005 is illegal and without jurisdiction.

11. From the perusal of the record, it is evident that shops No.73 & 74 fruit and vegetable market sector I-11/4, Islamabad are in joint ownership of respondent No.2, Arif Bashir and the mother of the parties vide registered sale deed No.2520, dated 28.6.1992. It is also evident from the record that the said shops were purchased by late Ch.Bashir Ahmed, father of the parties and the same were transferred in the name of respondent No.2 for Benami purposes only. It is also evident from record that civil proceedings regarding the subject property and other properties are already pending prior to institution of complaint under Illegal Dispossession Act, 2005 on 20.11.2015, whereas, the complaint under Illegal Dispossession Act, 2005 was filed after the alleged incident of dispossession dated 15.11.2015. Respondent No.2 himself admits the filing of civil suits.

12. In view of above situation trial Court has yet to conclude, prima facie, existence of allegations after perusal of FIR, police report, statement of witnesses & other documents and has to formulate its mind to frame the charge U/S 265-D, Cr.P.C. or otherwise. Any order in terms of section 265-K, Cr.P.C. at this stage, amounts to circumvent the powers of trial Court. Even otherwise, when order dated 13.1.2015 to the extent of section 7 of Illegal Dispossession Act, 2005 has already been declared illegal, then there is no justification to pass any observation, which might effect the merits of the case and rights of the parties will be prejudiced. Hence, the learned trial Court has rightly held that application u/s 265-K, Cr.P.C is pre-mature. Therefore, the application U/S 7 of

W.P No.162/2016.

Illegal Disposessions Act shall be deemed to be pending before the learned Addl: Sessions Judge (West), Islamabad which shall be taken up after the commencement of trial.

13. For the above stated reasons, the instant writ petition is partially accepted to the extent of order u/s 7 of Illegal Dispossession Act, 2005, whereas to the extent of order u/s 265-K, Cr.P.C stands dismissed.

14. In view of above, learned trial Court is directed to conclude the matter within 60 days from the date of receipt of this order.

**(MOHSIN AKHTAR KAYANI)**  
**JUDGE**

**Announced in open Court on 04.02.2016.**

**(MOHSIN AKHTAR KAYANI)**  
**JUDGE**

R.Anjam

Approved for reporting.

JUDGE

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