

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(JUDICIAL DEPARTMENT)

Writ Petition No. 3244 of 2012

Syed Sibte-e-Hassan

Versus

Additional Sessions Judge, Islamabad, and another.

Petitioner By:	Mr. Muhammad Munir Paracha, Advocate.
Respondent No.2 By:	Syed Ishtiaq Hussain Advocate alongwith respondent in person.
Date of Hearing:	10.07.2020

Ghulam Azam Qambrani, J:- This writ petition has been filed with the following prayer.-

"It is, therefore, respectfully prayed that the instant writ petition may kindly be accepted and the order dated 10.09.2012 passed by respondent No.1 may kindly declared to have been passed without lawful authority having no legal effect.

Any other relief which this Hon'ble Court deems fit and appropriate may also be granted."

2. This writ petition has been directed against order, dated 10.09.2012 passed by the learned Additional Sessions Judge, Islamabad, in a Private Complaint under Sections 3 & 4 of Illegal Dispossession Act, 2005, filed by the petitioner whereby, the accused/ respondent was acquitted under Section 265-K Cr.P.C., without any proceeding and recording of the statement of the witnesses.

3. Brief facts of the case are that the petitioner/complainant filed a complaint under Sections 3 & 4 of the Illegal Dispossession Act, 2005, against the respondent/accused alleging therein that he is owner in possession of land comprising Khasra No. 1585/2 & 1586, measuring 66-Kanals, 19-Marlas, situated in Mauza Jhangi Syedan, Tehsil & District Islamabad, which is his ancestral property and was gifted to him by his father vide mutation No.654, dated

16.04.1969, Since then, he is owner in possession of the said land. On 04.11.2009, after his visit to the said land, it came to his knowledge that respondent No.2/ accused alongwith other unknown accomplices had forcibly and illegally occupied 05-Kanals of land without any justification and started construction over it and said land was still in his illegal possession and he refused to hand over the same to the petitioner.

4. Learned counsel for the petitioner has submitted that application under Section 265-K Cr.P.C., can only be entertained by the learned trial Court, if in its opinion, in case all the allegations levelled in the complaint and the evidence adduced by the complainant are taken to be true, even then there is no possibility of the accused being convicted of any offence; that as per report of Tehsildar, land measuring 05-Kanals has been shown to be encroached upon by respondent No.2; that the respondent himself stated that he had no interest or at least possession in Khasra Nos.1585 & 1586, therefore, the learned trial Court has passed the impugned order against the facts and circumstances of the case. He has further submitted that the impugned order is based upon mis-interpretation of the provisions of Section 3 of the Illegal Dispossession Act; that in the instant case, the petitioner is not only in occupation of the land as "Hissadar", but he is also owner of the said land. He further submitted that under Section 3 of the Act, even an owner can be convicted for committing, the offence if he illegally dispossesses and occupies the land without due course of law which is under the possession of his tenant. He also contended that the petitioner was in possession of the land as "Hissadar" since long and before him his father and earlier his grandmother was in possession of the said land.

5. On the other hand, learned counsel for respondent No.2 has opposed the contentions stating that Section 9 of the Illegal Dispossession Act, 2005 provides that the provisions of Cr.P.C. are applicable to the proceedings under the Act. He further stated that the petitioner and respondent No.2 belongs to same family and are

co-sharers. Property in dispute is 'Shamlat Deh' and respondent No.2 is in possession of the property since his forefather. He next stated that the petitioner visited the land on 04.11.2019, whereas he filed the complaint on 14.11.2019 and did not disclose the reasons of delay for 10 days in filing the complaint. He further submitted that he raised construction over the property in the year 2004 and also got installed electricity connection in the house. Lastly, he prayed for dismissal of the writ petition.

6. I have heard the arguments of the learned counsels for the parties and perused the record with their able assistance.

7. Perusal of the record reveals that as per Register Haqdarane-Zameen for the year 1956-57, land situated in Khasra No.1585 measuring 71-Kanals 19-Marlas and Khasra No.1586 measuring 05-Kanals 17-Marlas was in 'Hissadari' possession of Mst.Noor Khatoon and Ghulam Fatima in equal share and after the death, possessory rights of the said land devolved upon Najam-ul-Hassan, which is depicted from Register Haqdarane-Zameen for the year 1962-1963. The said Najam-ul-Hassan, father of the petitioner, gifted the possessory title of the said land in favour of the petitioner, which is evident through Mutation No. 654, sanctioned on 16.04.1969, where petitioner is also shown in possession of the said land in Register Haqdarane-Zameen for the year 1970-1971 and also for the years 1990-1991 and 2002-2003; further that the Khasra Girdavari also shows the possession of the petitioner over Khasra Nos. 1585 & 1586, as such, it is established on record that the petitioner was in possession of the land as 'owner' since long and before him, his father and earlier his grandmother was in possession of the said piece of land. It is nowhere mentioned that respondent No.2 was co-sharer, it is astonishing to note that from where the learned trial Court has assumed that respondent No.2 is a co-sharer. If there is any such fact, it has to be proved by respondent No.2 through oral and documentary evidence before the learned trial Court. Record further shows that after demarcation of the land, Tehsildar has submitted a report dated 19.12.2009,

wherein, it is stated that respondent No.2 has occupied upon land measuring 05-Kanals, out of Khasra No.1585. Further, respondent No.2 stated before the SHO, Police Station Tarnol, Islamabad that he has not occupied land in Khasra Nos.1585 & 1586, but he is in 'Hissadari' possession of Khasra Nos.1558, 1559, 1560 & 1562; he has further stated that if he is found in possession of disputed land under Khasra Nos.1585 & 1586, he would vacate the said land. The S.H.O submitted his report on 21.12.2009 wherein, it is mentioned that respondent No.2 is in illegal possession of land measuring 04-Kanals, which belongs to the petitioner. Whereas, stance of respondent No.2 is that he and the petitioner belongs to the same family and are co-owners and that the property in dispute is 'Shamlat Deh'. All these facts and circumstances lead this Court to the conclusion that there is factual controversy between the parties which can only be determined after recording of evidence of both the parties by the learned trial Court. However, the learned trial Court has not considered these facts and circumstances in its true perspective, while passing impugned order, dated 10.09.2012.

8. To establish title of the property is the function of only Civil Court and the Criminal Court is not competent to give any findings qua it. The Criminal Court is simply required to examine the material available before it to form an opinion as to whether, prima facie, a case is made out for holding that the person who has complained about his dispossession was in lawful possession or owner because the words used in section 3 of the Act are "owner" and "occupier" of the property. The word occupier has been defined in section 2(c) of the Act viz. "occupier" means the person who is in lawful possession of a property; the word owner is defined in section 2(d) of the Act viz. "owner" means the person who actually owns the property at the time of his dispossession, otherwise than through a process of law; and the word property has been defined in section 2(e) of the Act, as "property" means immovable property. Thus for the purpose of attracting the provisions of section 3 of the Act, the Court is required to examine as to whether the property

was immovable property; secondly that the person was owner of the property or in its lawful possession; thirdly, that the accused has entered into or upon the property unlawfully; fourthly, that such entry is with intention to dispossess i.e. ouster, eviction or deriving from possession against the will of the 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. The definitions of above words have been drawn from Black's Law Dictionary and Concise Oxford Dictionary. Though all the four words carry somewhat similar meaning in general, but individually applicable to different situations, times, places and circumstances, therefore, they cannot be given one and same meaning as by doing that one or more words become redundant, which cannot be attributed to the Legislature.

9. So far as the question of Shamlat-e-Deh is concerned, Khasra Nos.1585 & 1586 are altogether different and separate Khasra numbers solely registered in the name of petitioner/complainant in the Record of Rights, Nowhere in the said Khasra numbers, the name of respondent is mentioned and in the said Mutations, 'Hissadari' of respondent has also not been shown, anywhere. At this stage, it cannot be said with certainty that the respondent is a land grabber or he has forcibly, illegally has dispossessed the petitioner which fact also needs to be proved through evidence. On the other hand, if the respondent has shares in the said land, then it can also be proved through evidence. Mere pleadings of the parties cannot be taken into consideration as evidence on the basis whereof the learned trial Court has accepted the application under Section 265-K Cr.P.C. The record transpires that the respondent himself has clearly mentioned in his statement that he is not in possession of the above mentioned Khasra numbers (land in dispute). However, he claims himself co-sharer, which fact requires evidence that in which Khasra numbers he has

rights and in which piece of land, he is a co-sharer. For the purpose of examining the question of title in respect of the property, as already pointed out, the Court has to simply form an opinion as to whether, prima facie, any party is coming within the ambit of definition mentioned in Section 3 of the Act and if the Court forms such opinion from the material placed before it, then the Court can proceed with the matter or otherwise, as the case may be. In the instant case, Tehsildar and the S.H.O. Police Station Tarnol, Islamabad have reported that respondent No.2 was in illegal possession of land situated in Khasra Nos.1585 & 1586, therefore, this fact was sufficient to, prima facie, form an opinion that a full trial was required, so that a just conclusion qua the alleged offence could be drawn, based on the evidence brought on record by the parties.

10. 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 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. In the case in hand, as per revenue record, the petitioner is owner of land situated in Khasras No.1585/2 and 1586, whereas respondent No.2 has failed to bring on record any cogent evidence in black and white, in support of his version. Although the learned Court is competent to acquit the accused at any stage of the trial under Section 249-A or 265-K, Cr.P.C. as the case may be,

but in the instant case, there is some evidence available on record against respondent No.2, on the basis whereof, this Court is constrained to set aside the impugned order passed by the learned trial Court.

11. For the reasons mentioned above, the impugned order is not sustainable, therefore, this petition is converted into appeal and is **accepted**. The impugned order dated 10.09.2012 passed by the learned trial Court is **set aside**. The complaint before the learned trial Court shall be deemed to be pending. Case is remanded back to the learned trial Court with a direction to decide the same after recording evidence of both the parties in accordance with law, expeditiously preferably within a period of three months from the date of receiving certified copy of this order.

(Ghulam Azam Qambrani)
Judge

Announced in Open Court, on this 24th day of July, 2020.

Judge

M. 9/2.