

JUDGMENT SHEET.

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

Crl. Appeal No. 203/2015

Raja Asif Khan

Versus

Masood Ahmad Bhatti, etc.

Appellant by: Syed Wust Ul Hassan Shah, Advocate

Respondent No. 1 by: Mr. Asad Raan, Advocate

State by: Ch. Abdul Khaliq Thind,

Date of hearing: 15.02.2016.

MOHSIN AKHTAR KAYANI, J:- The instant criminal appeal has been directed against the judgment dated 17.12.2015, passed by learned Additional Sessions Judge (West) Islamabad, whereby, the appellant was convicted and sentenced U/S-3 of Illegal Dispossession Act 2005 for 02 months simple imprisonment and fine of Rs. 10,000/-, in default in payment of fine, the accused shall further undergo simple imprisonment for 15 days. The Trial Court also directed the appellant/accused to pay compensation of Rs. 50,000/- to the complainant.

2. The facts, in brief are that respondent No. 1 on 15.01.2014 filed a complaint U/S 3 of the Illegal Dispossession Act 2005 against the appellant by maintaining that on 11.01.2014 at about 5:00 p.m, the complainant took a survey of the disputed property alongwith his colleagues Mr. Atique Nawaz and Mr. Riaz and was shocked to note that someone has carried out illegal activities and unlawfully raising building over the plot of land and further construction was in progress. The complainant/respondent No. 1 investigated the matter and a labourer Mr. Sabir Khan without disclosing his identity informed him that one Mr. Raja Asif of CDA is constructing the building and his whereabouts or

contact address is not known to him. The neighbourer also stated and narrated same story.

3. Cursory statement of the complainant was recorded and report from the SHO Police Station Ramna was summoned. Thereafter the appellant/accused was summoned to face the trial. On 12.06.2014 charge was framed against the appellant/accused, to which he pleaded not guilty, therefore, prosecution evidence was summoned. Prosecution evidence was recorded and after hearing the arguments of the learned counsel for the parties, the appellant was convicted and sentenced through impugned judgment, hence instant criminal appeal.

4. Learned Counsel for the appellant argued that after proper demarcation from the CDA, the appellant took over the possession of the plot in question, later on the plan/map was approved by the CDA of the same plot, on which a house is constructed. The CDA official came to the plot twice to approve the plinth level and never objected about the number of the plot. He further argued that the master plan of CDA about G-11, Islamabad, Ex. D-1, also shows that CDA has handed over the possession according to the CDA plan, the appellant has constructed the house on an accurate plot. He further narrated that the impugned judgment dated 17.12.2015 is against the law and facts. He also stated that the appellant has no previous record at his credit as a land grabber. He has been involved in this case with malafide intention. He further argued that the appellant is quiet innocent, and has no concern whatsoever with the commission of the offence. He further argued that impugned judgment is based on surmises and conjectures. The learned Trial Court has acted with material irregularities and illegalities in exercise of jurisdiction while passing the impugned judgment. He further submitted that

the judgment dated 17.12.2015 clearly indicates that the same has been passed merely on assumptions and presumptions, which is a deformat expression of the adjudication. He lastly argued that the instant appeal may kindly be allowed and the appellant be acquitted in this case. He has relied upon 2012 SCMR 1533, 2009 YLR 1252, 2013 P Cr. LJ 188, PLD 2007 (Lahore) 231, 2007 P Cr. LJ 1347, PLD 2010 SC 661 & PLD 2011 SC 181.

5. Learned Counsel for the respondent argued that the appellant has filed the instant appeal on the basis of forged documents i.e. Ex.P1 & Master Plan of CDA Ex.D1. That the police has also submitted the report that appellant Raja Asif Khan has illegally constructed double storey plot on the suit land and the instant appeal being devoid of merits is liable to be dismissed and the impugned order is well within four corners of law.

6. Learned Counsel further argued that the appellant has produced forged master plan of CDA about G-11, Islamabad which is Ex.D1 with above numbered criminal appeal to mislead this Hon'ble Court. Ex.D-1 is a private interest map printed by M.B MAPS which has no mention of authority, print date/year, printer/publisher address and without any responsibility of its authenticity. The appellant has again committed forgery by concealing the facts of the map that he has produced as master plan of CDA about G-11, Islamabad, in his above numbered criminal appeal. CDA witness PW-5 categorically denied his knowledge about it. The appellant himself failed to bring on record that Ex.D1 is a CDA Master Plan of G-11 approved by CDA. He further argued that even considering this forged document, the unique well denied and undisputed boundaries of the plot No. 1534-H are same as shown in sketch on possession taking over certificate dated

29.07.2013 issued by the appellant. He further submitted that the appellant has falsely blamed without any evidence about any change in infrastructure of G-11 to mislead and misguide this Hon'ble Court. The respondent was handover possession in year 2007 whereas the appellant took possession in year 2013. The possession certificates are on record which has nothing to do with infrastructure. The appellant has failed to show any evidence that verify non-existence or disappearance of already constructed house on plot No. 1534-J after 6 years when he took possession in the year 2013. Even otherwise these are not legal ground to attack Sec 3 of the Illegal Dispossession Act, 2005. He further argued that appellant has himself admitted and CDA has also proved that correct possession of plot No. 1534-H is given to the appellant after demarcation of the plot. He argued that the finds of the inquiry report of PW-7 marked as Ex.P4 and the report of PW-8 marked as Ex.P5 manifestly indicate that the appellant (accused) was in illegal possession of the plot No. 1534-I, Sector G-11/2, Islamabad of the respondent (complainant) and he has illegally dispossessed the respondent from his property. He further argued the accused himself got prepared building plan and approved for plot # 1534-H on 26.08.2013. He has correctly mentioned the identification of his plot as "KEY PLAN". He further argued that the appellant (accused) U/S 342 Cr. P.C on oath had admitted that the plot on which he carried out construction, does not belong to him. He also admitted that he did not take any consent or permission for construction on the plot in question from the respondent. He relied upon 2009 SCMR 1066, 2010 SCMR 1254, PLD 2007 SC 423, PLD 2010 SC 725, 2012 SCMR 229, PLD 2013 IBA 121, 2011 PCrLJ 1300, 2011 CLC 1369, 2010 YLR

1982, 2010 PCr.LJ 268, 2010 YLR 495, 2010 PCr.LJ 422, SBLR 2007, 1047.

6. I have heard the arguments and gone through the record.

7. It is admitted on record that appellant Raja Asif Khan is owner of plot No. 1534-H, Street No. 30, G-11/2, Islamabad, which was transferred by the CDA in his name on 08.07.2013. The respondent No. 1 is owner of plot No. 1534-I, Street No. 30, G-11/2, Islamabad (measuring 200 s.q) Respondent No. 1 Masood Ahmad Bhatti becomes the owner of plot No. 1534-I after its reallocation vide letter dated 02.07.1998 issued by the CDA, thereafter he applied for the possession through application dated 06.09.2006 submitted before the Estate Management Officer-II CDA and on the said application the disputed plot No. 1534-I was handed over to the respondent No. 1 on 10.12.2007. It is further admitted on record that Planning Wing, Land Survey Division, CDA had given possession of the suit plot on 10.12.2007 to respondent No. 1 and he has not raised any construction on the said plot. Contrary to these facts, the appellant was also owner of plot No. 1534-H in the same street and become the owner in CDA record on 08.07.2013 and after his request Land Survey Division, Planning Wing, CDA had delivered the possession on site to the appellant on 29.07.2013 and possession letter was also issued. After obtaining possession from CDA, the appellant has submitted the construction plan through application in the One Window Operation CDA which was approved on 26.08.2013. It is evident from the record that possession of plot No. 1534-I, Street No. 30, G-11/2, Islamabad was delivered by Land Survey Division, CDA to appellant and after the delivery of possession, the appellant has

raised construction in accordance with the approved plan. At the plinth level the Surveyor of CDA Land Survey Division visited the site and issued Form-D dated 8th October, 2013 and the structure was completed by the appellant.

8. The main controversy in the complaint filed by the respondent No. 1 U/S 3 of Illegal Dispossession Act 2005 is relating to the fact as to whether possession of plot No. 1534-I was delivered by the Land Survey Division, CDA to the appellant under the mistake and fact that the said plot is 1534-H (owned by the appellant).

9. From the perusal of complaint Ex.A, the complainant/respondent No. 1 described the alleged incident of Illegal Dispossession that on 11.01.2014 at 5:00 p.m, when he visited the subject plot alongwith his colleagues Mr. Attiq Nawaz and Riaz, PW-2 & PW-3. As per para 3 of the complaint, the complainant/respondent No. 1 has leveled the acquisition against *“someone has carried out illegal activities and unlawful raising building over the plot of land and further construction was in progress”*. This sentence referred in the complaint demonstrates the state of mind of the complainant/respondent No. 1, wherein the ingredients of section 3 of the Illegal Dispossession Act 2005 were missing. In order to understand the true intent of said Provision of section 3, the same is reproduced bellow:-

“No one shall enter into or upon any property to dispossess, grab, control or occupy it without having any lawful authority to do so with the intention to dispossess, grab, control or occupy the property from owner or occupier of such property. Whoever contravenes the provisions of the sub-section (1) shall, without prejudice to any punishment to which he may be liable under any other law for the time being in force, be punishable with imprisonment which may extend to ten years and with fine and the victim of the offence shall also

be compensated in accordance with the provisions of section 544 of the Code”

10. From the perusal of above provisions the main ingredients are as under:-

- i. Dispossess. ii. Grab. iii. Control. iv. Occupy. v. without lawful authority. vi. Intention to dispossess, grab, control or occupy property from owner.

11. This shows that referred provisions are foundation main for provisions of illegal possession and any person who has no lawful authority to control or occupy the property shall be punished under the said provisions, however, the application of said provision can only be justified when there is clear ***Intention*** to do such act to dispossession, hence the question of Mensrea is to be proved by the prosecution on all counts and it is basic principle of law of evidence that he who alleges a fact has to prove the same and especially in criminal cases the prove must beyond any reasonable doubt.

12. In my estimation the complainant/respondent No. 1 is under a lawful duty to prove all the ingredients of section 3 of Illegal Dispossession Act especially intention can be ascertained from the act of wrongdoer. In the present case the principle to measure the intention is based upon the allegation leveled in para 3 of the complaint where the act of dispossession has not been referred substantial. Even otherwise the complainant /respondent No. 1 is not aware of the details of the appellant rather he has used the word investigation for the collection of details and thereafter filed the criminal complaint.

13. In order to ascertain the intention we have to look into the defence put forward by the appellant before the Trial Court

especially in his statement recorded before the Investigating Officer/SHO, Police Station Ramna in the preliminary inquiry Ex.P4 wherein he is in possession of plot No. 1534-H which was delivered to the appellant on the basis of Mark-D and the same was further confirmed by the Deputy Director Land Survey Division, CDA Ex.P1 i.e. survey of plinth and verification Form-D.

14. At the time of recording of cursory statement by the respondent No. 1/complainant, at the initial stage of complaint he has not cited the witnesses rather the witnesses were created by filing an application u/s 540 Cr. PC along with an application for submission of list of witnesses in which Mr. Attiq Nawaz, Habib Ullah Sheikh, Sardar Nawaz Ex. Deputy Director Land Survey Division, CDA and Raja Naeem Pervez Land Surveyor, Land Survey Division, CDA were mentioned, the said application was allowed vide order dated 18th June, 2015, hence, it can safely be concluded that at the time of filing of complaint respondent No. 1/complainant himself was not clear about the evidence and he has created the evidence during the pendency of trial.

15. From the perusal of charge dated 12.06.2014, the Learned Trial Court framed the charge to the extent of possession of respondent No. 1 /complainant even though the dispute is not related to numbers of plots i.e. 1534-I & 1534-H rather it is a dispute of factual nature which was made by the CDA officials and as such evidence regarding delivery of physical possession of particular land has not been referred as a result one can safely conclude that the charge is defective from its inception.

16. The statement of complainant /respondent No. 1 reveal that “someone entered into my plot illegally and started raising construction of the house in result *“he wants to dispossess*

me". Hence, there is no direct allegation against the appellant in complaint as well as in the examination in chief recorded by the respondent No. 1 as PW-I. In order to resolve the controversy the para 3 of the complaint Ex.PA and examination in Chief of PW-I complainant is reproduced below:-

"That on 11.01.2014 at about 5:00 p.m, the complainant took a survey of his aforesaid property along with his colleagues Mr. Atiq Nawaz and Mr. Riaz and were shocked to note that someone has carried out illegal activities and unlawfully raising building over the plot of land and further construction was in progress. The Complainant investigated the matter and a labour Mr. Sabir Khan without disclosing his identity informed that one Mr. Raja Asif of CDA is constructing this building and whereabouts or contact address is not known to them. The neighbor also stated and narrated same story. He gave his cell# 0345-5240698.

17. From the perusal of cursory statement of Masood Ahmad Bhatti as CW-I it is also proved on record that there is no direct allegation of dispossession leveled by the complainant /respondent No.1 and during the course of trial both the parties tried to settle their dispute in terms of Ex.R1 letter dated 30th April, 2014 issued by the respondent No. 1 which further confirms that dispute is of a civil nature. Even otherwise the defence of appellant on the very first day of proceedings comes on record in the police inquiry report dated 31st January 2015 Ex.P4 in which the appellant has stated that he has received the possession of subject plot on 26.08.2013 from Land Survey Division CDA. He further states that his construction work when reached at the plinth level, the Supervisor of Survey Department, CDA visited the site and issued Form-D dated 08.10.2013 referred as Mark-D and Ex.P1.

The appellant at the conclusion of trial while recording his statement U/s342 Cr. PC stated that plot No. 1534-I was last plot in the street which is evident from Ex.D1 (detailed survey map of Sector G-11). He further stated that he is not liable for any action under Illegal Dispossession Act 2005 as he has not taken over the possession through force and even does not belong to Qabza Mafia. While examining the document EX.D1 that the plot survey map of Sector G-11 in which every street, plot, playgrounds, shopping centre, park, bazaar, schools and mosques were referred reveals that plot No. 1534-I claimed by the respondent No. 1/complainant is a corner plot and the attached plot is 1534-H which belongs to appellant as the said map does not contain plot No. 1534-J which give rise a disputed situation because at the time of handing over of possession the plot claimed by the respondent No. 1 /Complainant is a corner plot. But the possession letter Ex.P3 submitted by the respondent No. 1 disclosed a different situation where corner plot is 1534-J, hence, the plot belongs to respondent No. 1/complainant situated in between 1534-H & 1534-J and at present it is admitted on record that plot No. 1534-J has already been constructed hence the question of delivery of possession by the CDA official is a mystery and same has been negated in terms of Ex.P4 in which plot No. 1534-J does not exist and 1534-I, is corner plot.

18. The complainant in his entire scheme of evidence also recorded the evidence of PW-5 Naeem Pervez Survey Division Surveyor CDA, Islamabad and also got recorded the statement of Sardar Muhammad Nawaz Ex-Deputy Director Land Survey as PW-6 who states that the possession of the respective plots were given to the respective owners in accordance with the possession letters who has denied the suggestion of document

Mark-B when confronted to him during the course of cross-examination and has stated that there is no need to give further site identification references except the four sides of the plot delivered. However, he has denied Ex.P1 on the ground that same was not entered into Diary Despatch Register of CDA, however he has not placed any such Diary Despatch Register on record. Hence the entire case revolves around the issue of identification of the plot as to whether the possession of plot 1534-I was delivered on the site of plot 1534-J by the CDA Land Survey Division or not.

19. It is evident that both the parties are owners of plot 1534-H & 1534-I in CDA record rather the appellant has constructed, hence under mistake of fact.

20. Learned Trial Court ASJ (West), Islamabad in para 19 of the judgment has held that:-

“It is proved that evidence led by the complainant stands credited for reliance and it is manifestly cleared that accused Raja Asif has committed of illegally possessing the complainant from his plot. The defence has failed to create any iota of doubt in the evidence of complainant.

21. This is the only conclusion referred by the Trial Court in the impugned judgment without referring its own reasoning and while ignoring the possession letters of both the plots Ex.D1 and even ignoring para 3 of the complaint read with cursory statement of CW-1 alongwith statement of PW-1 where the complainant/respondent No. 1 himself is not clear regarding the specific role in terms of section 3 of Illegal Dispossession Act 2005 hence the same amounts to misreading & non-reading of entire defence version as the evidence creates reasonable doubt in the complainant evidence.

22. The above facts clearly demonstrates that the object of Illegal Dispossession Act 2005 is to eliminate the dispossession of forcible dispossession and to deal with the persons called property grabbers, Qabza Group or land mafia, however no such allegation was leveled or referred in evidence, the scope of Illegal Dispossession Act 2005 is limited and its deal with the particular clause of persons who qualifies to be land grabber, hence reliance upon “PLD 2007 Lahore 231, Zahoor Ahmad and 5 others”

“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 Group/land mafia, i.e. cases 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”

23. Even otherwise it is the duty of the complainant to prove that a cognizable offence has been committed whereas the said allegation stands denied in the complaint in hand as section 3 of Illegal Dispossession Act 2005 has certain preconditions i.e. complainant must disclose existence of both unlawful (Actusrea) and criminal intent (Mensrea). In this regard I am justified by the the view taken by Hon’ble Supreme Court in PLD 2011Supreme Court 181 “Waqar Ali V.s The State”.

”Word Tajawiz was used by complainant, which could only be translated as encroachment’ rather

than criminal trespass or unlawful entry with intention of grabbing disputed land or of dispossessing complainant-- Complainant claimed to have become aware of encroachment only after demarcation made by revenue functionaries--- Various investigations undertaken by police or by local commissioner could only be treated as prima facie evidence of a civil dispute between parties, which dispute was to be decided by competent Civil or Revenue Courts having jurisdiction in the matter---Trial Court observed that mere encroachment was something different from illegal dispossession as the encroachment was something different from illegal dispossession as the former did not involve intentional grabbing of property, however not finding element of mens rea in complainant, Trial Court travelled outside the complaint---Trial Court was required under Illegal Dispossession Act, 2005, to act as to sieve and to filter out those complaints which did not disclose requisite criminal intent---Courts which were authorized to try cases under Illegal Dispossession Act, 2005, had responsibility to see that persons named in complaint had a case to answer, before they were summoned to face trial---In order for the Court to exercise its jurisdiction by taking cognizance, certain facts must first be held to exist-- -Facts which constituted an offence under S.3 of Illegal Dispossession Act, 2005, had to be evident from complaint and documents filed in support thereof---If necessary ingredients of offence under S.3 of Illegal Dispossession Act, 2005, were not disclosed through complaint and accompanying documents, Trial Court was not justified in exercising jurisdiction and taking cognizance--- Judgment passed by High Court and order passed by Trial Court were set aside by Supreme Court and complaint was dismissed---Appeal was allowed.

24. In my view, it is a dispute of intentional/unintentional mistake which at the most falls within the definition of encroachment in terms of municipal law as it is evident from statement of CDA officials that they were not admitting their fault of handing over of wrong possession by mistake, such kind of issues can be adjudicated upon through ordinary Civil Courts.

25. In view of above, the appeal is allowed the conviction of the appellant is hereby set-aside as the Learned Trial Court has not referred any reasoning for awarding punishment of two months R.I and even otherwise the complainant has failed to prove his case, therefore, the benefit of doubt under examination of fact goes to appellant. Even otherwise, the entire controversy is a civil dispute which is evident from entire evidence specially Ex.R1. Hence, the complaint U/S 3 of Illegal Dispossession Act 2005 filed by respondent No. 1 is hereby dismissed and parties are directed to resolve their dispute by approaching the Civil Court.

26. For what has been discussed above, the impugned judgment also does not qualify the proof of section 3 of Illegal Dispossession Act 2005 as the complainant and the entire chain of evidence has not proved the ingredients of dispossession in any manner. The appellant is declared innocent and has been acquitted from the charge.

(MOHSIN AKHTAR KAYANI)
JUDGE

Ramzan

Approved for reporting.

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