

JUDGMENT SHEET.
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

Criminal Revision No.38 of 2013.

Muhammad Sharif, etc **Vs.** **Muhammad Sadiq, etc.**

Petitioners by:

Mr. Zaheer Bashir Ansari,
Advocate.

Respondent No.1 by:

Raja Muhammad Rizwan Abbasi,
Advocate.

Date of Decision:

15.05.2018.

MOHSIN AKHTAR KAYANI, J:- Through this criminal revision, the petitioners have assailed the judgment dated 29.06.2013, passed by learned Additional Sessions Judge-VII (West), Islamabad, whereby application U/S 265-K, Cr.P.C filed by respondent No.1 was accepted and he was acquitted from the complaint U/S 3 & 4 of Illegal Dispossession Act, 2005.

2. The principal claim of the petitioners recorded before learned Trial Court is as follow:-

“Statement of Muhammad Sharif complainant on oath.

Stated that he alongwith Muhammad Siddique, his brother are in possession of land measuring 46 kanals 6 marlas in khasra No.843, khatooni No.67, khewet No.33, in Mauza Gokina, Islamabad and Muhammad Sadiq, respondent No.1 has no concern with it, though he owned piece of land adjacent to our lands. The respondent No.1 illegally and forcibly occupied our land. The respondent No.1 is cutting trees from our lands, therefore, pray for restoration of our lands from the respondent No.1 and the respondent No.1 be dealt in accordance with law.”

"بیان ازاں محمد صدیق ولد حاجی محمد خان قوم راجپوت سکنہ گوکینہ خورد تحصیل و ضلع اسلام آباد بمقام 55 سال۔

بیان کیا کہ میں مستقل رہائشی گوکینہ کاہوں اور حلفا بیان کرتا ہوں کہ ہمارے اور محمد صادق کے درمیان زمین کا جو تنازعہ ہے وہ ہماری ملکیت ہے جو خسرہ نمبر 843 کھیوٹ نمبر 35 کھتونی نمبر 67 ہے ہماری اس زمین کے کچھ حصہ پر جس کا رقبہ 60 کنال کے لگ بھگ ہے محمد صادق نے قبضہ کیا ہوا ہے جو کہ بالکل ناجائز ہے ہم نہیں چاہتے ہم محمد صادق سے کوئی جھگڑا کریں میں اور میرے بھائی محمد شریف قانونی طور اپنی زمین واپس لینا چاہتے ہیں اور ہم نے متعدد بار مقامی معززین کا جرگہ کیا مگر محمد صادق نے زمین کا قبضہ چھوڑنے سے انکار کیا۔ لہذا عدالت سے استدعا ہے کہ جس زمین پر صادق نے ناجائز قبضہ کیا ہے وہ ہمیں واپس دلوائی جائے بیان سن لیا اور میں نے پڑھ لیا جو کہ درست ہے۔ نیز ہمارا ملکیت ثبوت کورٹ میں موجود ہے اور محکمہ مال مین بھی ریکارڈ موجود ہے۔ یہ زمین ہماری باپ دادا سے خانگی ملکیت ہے اگر محمد صادق وغیرہ کے پاس اپنی زمین کا کوئی ملکیتی ثبوت موجود ہے تو پیش کریں۔"

3. Learned counsel for the petitioner has contended that the petitioners

Muhammad Sharif and Muhammad Saddique earlier filed a suit titled *Muhammad*

Sharif and another vs. Muhammad Sadiq seeking permanent injunction against deceased respondent No.1 Muhammad Sadiq on 10.09.2003 regarding same property, in which it was alleged that respondent No.1 Muhammad Sadiq and others tried to interfere into possession of the petitioners, whereas the said suit was disposed of vide order dated 16.10.2003 on the statement of learned counsel for deceased Muhammad Sadiq, which is reproduced as under:-

"بیان کیا کہ اراضی متدعوہ میں نہ پہلے کبھی مداخلت کی ہے۔ نہ آئندہ مداخلت کریں گے۔ درحقیقت مدعیان مدعا علیہم نمبر 4 و 1 کی اراضی واقع خسرہ نمبر 724 کھیوٹ نمبر 237، کھٹونی نمبر 443 میں مداخلت کر رہے ہیں۔ جس کے لیے مدعا علیہم نمبر 4 و 1 علیحدہ قانونی چارہ جوئی کا حق محفوظ رکھتے ہیں۔

4. The petitioners filed another suit in 2009 for permanent injunction regarding land measuring 465 Kanal 6 Marla situated in Khasra No.843, Khatooni No.67, Khewat No.33 Mahal Gokeena Khurd Tehsil & District Islamabad for another interference of deceased respondent No.1/Muhammad Sadiq and others on 25.06.2009, which was rejected vide order dated 15.09.2009 on the statement of learned counsel for the deceased respondent No.1/Muhammad Sadiq. Statement of learned counsel for deceased respondent No.1/Muhammad Sadiq is reproduced as under:-

بیان کیا کہ مدعا علیہم کا جائیداد متدعوہ سے کوئی تعلق واسطہ نہ ہے۔ نہ پہلے کبھی مدعا علیہم نے جائیداد متدعوہ میں مداخلت کی ہے اور نہ کبھی آئندہ ایسا کریں گے اور نہ ہی درخت اور گھاس وغیرہ کاٹیں گے۔

5. In view of above background and keeping in view the history, when the deceased respondent No.1/Muhammad Sadiq again interfered into land of the petitioners and took over the possession illegally, the complaint U/S 3 & 4 of Illegal Dispossession Act, 2005 was filed by the petitioner, in which two reports were obtained by learned Trial Court. First report was submitted by the Investigation Officer, Police Station Kohsar, Islamabad on 04.11.2009, which is reproduced as under:-

جائے وقوعہ خسرہ نمبر 843 کھیوٹ نمبر 85 کھٹونی نمبر 67 رقبہ 465 کنال 6 مرلے ملاحظہ کیا گیا ہے۔ معززین دیہہ کی موجودگی میں الزام علیہ محمد صادق جو کہ 60 کنال پر قابض ہے متنازع زمین ہذا کے بارے میں ثبوت ملکیت مانگا جو پیش نہ کر سکا درخواست دہندہ محمد شریف وغیرہ نے ثبوت ملکیت فرد فوٹو کاپی خسرہ نمبر 843 جاری کردہ ذوالفقار علی پٹواری متعلقہ حلقہ پٹواری پیش کیا 13 کس معززین دیہہ کے تحریری بیانات قلمبند کے گئے جن کی روشنی میں متذکرہ بالا رقبہ میں سے تقریباً 60 کنال محمد صادق ولد بہادر خان قوم راجپوت سکند گوکینہ خورد تحصیل و ضلع اسلام آباد کا قابض ہونا پایا گیا ہے۔ معززین دیہہ کے بیانات لف رپورٹ ہیں۔

6. The second report was submitted by Naib Tehsildar Islamabad on 04.02.2011. The extract of the said report is reproduced as under:-

"اندریں حالات واقعات و ملاحظہ ریکارڈ و موقع کی صورتحال کے مطابق فریق دوئم محمد صادق خسرہ نمبر 843 رقبہ تعدادی 465 کنال 6 مرلہ میں مالک اراضی نہ ہے۔ اور نہ ہی خسرہ گرداوری میں فریق دوئم کا کہیں بھی ذکر ہے۔ مذکورہ خسرہ نمبر میں فریق دوئم نے رقبہ تعدادی 47 کنال 15 مرلہ پر ناجائز قبضہ کر رکھا ہے۔ موقع کی صورتحال عکس شجرہ بندوبستی مال-1956-57 مرتبہ پٹواری حلقہ ہیں بقلم سرخی قبضہ کو واضح کر دیا گیا ہے۔"

7. The above referred reports of the I.O and Naib Tehsildar Islamabad clearly reveal that deceased respondent No.1 Muhammad Sadiq is in illegal occupation of the land belonging to the petitioners and even the deceased respondent No.1 failed to produce any documentary proof of his ownership rather his illegal possession is visible from the said reports.

8. During pendency of the instant criminal revision, it has been brought into notice of Court that respondent No.1 has died and in this regard death certificate of respondent No.1 has been placed on record, which has been issued by Secretary Union Council, which reveals that respondent No.1 Muhammad Sadiq has died on 10.04.2015. Same has also been confirmed through police.

9. Learned counsel for respondent No.1 raised objection on the maintainability of instant criminal revision mainly on the ground of death of respondent No.1/accused/Muhammad Sadiq, where-after learned counsel for the petitioners filed C.M No.103/16 on 14.03.2016 to implead the legal heirs of deceased respondent No.1. Learned counsel for the petitioners has also filed C.M No.180/2018 on 14.04.2018 for conversion of instant criminal revision into writ petition.

10. Learned counsel for the petitioners contends that due to death of respondent No.1/accused/Muhammad Sadiq the proceedings shall not abate and the proceedings shall continue against the legal heirs of the deceased/respondent No.1 to the extent of illegal possession of disputed land. In this regard, learned counsel for the petitioners has relied upon 2006 SCMR 1287 (Mst. Itrat Zahida and others vs. President ABL), AIR 1964 Supreme Court 1645 (Bondada Gajapathi Rao vs. State of Andhra Pradesh), AIR 1973 Jammu & Kashmir 70 (Sain Dass vs. Devi Dass and others) & AIR 1934 Calcutta 787 (Misil Mirdha and others vs. Abdul Rahim and others).

11. Before deciding the above mentioned two C.Ms, it is necessary to first decide the objection regarding maintainability of instant criminal revision after death of respondent No.1. In order to address the issue of maintainability of instant criminal revision, it is necessary to go through the procedural provisions of Criminal Procedure Code. Section 431, Cr.P.C is the only section, which deals with abatement of an appeal, the same is reproduced as under:-

“431. Abatement of Appeals. Every appeal under section 411A sub-section (2), or section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.”

12. The above referred concept gives rise to the situation that on death of accused every proposed action stands abated except fine, even during the pendency of the appeal against the conviction or acquittal, said principle is also applicable in the trials. The only action survives is fine, which could only be recovered from the properties of the accused, if he dies during the pendency of the appeal, whereas rest of punishment stands abated. Learned counsel for the petitioners has mainly relied upon 2006 SCMR 1287 (Mst. Itrat Zahida and others vs. President, A.B.L and others), wherein Apex Court held that:-

“Any “action” might abate on the death of a party but cause of action might survive his death---“Death” in such context did not mean a civil death---Irrespective of the nature of proceedings whether criminal or civil, it was the nature of cause of action which could determine its survival.”

13. The above referred concept in the said case relates to civil dispute, where the Apex Court defined “the right to sue” on the principle of survivability, whereby survivable actions are those, in which wrong complained of affects principally property and property rights and in which any injury to the person is incidental. Similarly, the non-survivable actions are those in which the injury complained of is to the person and any effect on property or property rights is incidental.

14. Learned counsel for the petitioners has persuaded this Court to continue with the proceedings of instant criminal revision while relying upon AIR 1973 Jammu & Kashmir 70 (Sain Dass Appellant v. Devi Dass and others,

respondents), in which the plaintiff died during the proceedings and the Court held that the suit does not abate. Learned counsel for the petitioner has relied upon AIR 1934 Calcutta 787 (Misil Mirdha and others vs. Abdul Rahim and others), wherein it was held that:-

“Once proceedings under S. 145, Criminal P. C., are started they must be proceeded with until the question of possession has been determined and the order of proceedings can only be cancelled under S. 145 (5) when the Court is satisfied that no dispute likely to cause a breach of peace exists or has existed. An order dropping such proceedings merely by reason of death of one party is ultra vires and fresh proceedings are without jurisdiction. Under such circumstances the Court should continue enquiry under S. 145 (7) holding original proceedings as still subsisting, and question of possession on the date on which first proceedings were started should be decided according to law.”

Learned counsel for the petitioners has also relied upon AIR 1964 Supreme Court 1645 (Bondada Gajapathi Rao, Appellant v. State of Andhra Pradesh, Respondent.), in which the accused died during proceedings before Supreme Court, whereupon it was held that:-

“If revision petitions may be allowed to be continued after the death of the accused so should appeals, for between them no distinction in principle is possible for the purpose of continuance. The principle on which the hearing of a proceeding may be continued after the death of an accused would appear to be the effect of the sentence on his property in the hands of his legal representatives. If the sentence affects that property, the legal representatives can be said to be interested in the proceeding and allowed to continue it. But where the sentence is not one of fine but of imprisonment, which on the death of the accused becomes infructuous, the sentence does not affect the property of the deceased-accused in the hands of his legal representatives, and therefore, the appeal, in such a case, would abate, upon the death of the accused.”

15. The above referred ratio gives rise to the situation, where death of an accused would not affect the rights upon the property as the same was devolved upon the legal heirs. This Court agrees with the concept in terms of section 431, Cr.P.C to the extent of fine recovered from the property of the deceased/accused, whereas in such case the Court of competent jurisdiction has declared the same in terms of fine as the right to sue survives to the extent of punishment of fine only. However, the qualified requirements for such kind of concept are as follow:-

- a). *Whether competent Court has passed order of conviction against the accused.*

- b). *Whether the competent Court has sentenced the accused for any fine or attachment of any property or recovery of any property.*
- c) *Whether legal heirs of deceased accused received any property benefits from the accused in any manner and they are holding the property on his behalf.*

16. If the above referred questions are answered in affirmative, then the proceedings shall continue subject to the condition that the property of the deceased accused is in the possession of the legal heirs/representative. In all other eventualities, where an offence only provides punishment of sentence without referring to fine or property the same would not be proceedable.

17. The other important aspect in this case is that deceased respondent No.1/accused was acquitted by learned Trial Court U/S 265-K, Cr.P.C and criminal revision has been filed against the acquittal of deceased respondent No.1, who died during pendency of instant criminal revision, which is continuation of complaint proceedings, therefore, in my humble view the right to sue survives, under criminal law accused can only be prosecuted, if he is alive for the purpose of punishment but when accused has been acquitted and appeal/revision or any appellate proceedings are pending before the higher Court and accused dies during the said proceedings, the said proceedings stand abated by virtue of section 431, Cr.P.C except punishment of fine or to the extent of disputed property.

18. The concept of survivability has also been referred in section 145(7), Cr.P.C, which is reproduced as under:-

“145. Procedure where dispute concerning land, etc., is likely to cause breach of peace.(1).....

(2).....

(3).....

(4).....

(5).....

(6).....

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8).....

(9).....

(10).....

19. The above referred provision of Cr.P.C relates to immoveable property, when question of breach of peace is subjudice before a Magistrate and the person, who is in illegal possession of property, if dies during the proceedings then Section 145(7) Cr.P.C comes to meet the situation but in cases of Illegal Dispossession Act, the accused has to be convicted for that matter and the Court has to pass the order of restoration of property, in such case, if the accused dies during the appellate proceedings, the claim survives, however, to the extent of conviction of accused, the matter is over.

20. The entire background of the cases persuaded this Court to consider provisions of section 31 of Illegal Dispossession Act, 2005, whereby the complainant is under obligation to show before the Court that:-

- (i) The complainant is actual owner of the immovable property in question.
- (ii) The accused has entered into or upon the said property.
- (iii) The entry of the accused into or upon the said property is without any lawful authority.
- (iv) The accused has done so with intention to dispossess him.

Reliance is placed upon **2009 SCMR 1066 (Muhammad Akram and 9 others vs. Muhammad Yousaf and another.**

21. The material available on record clearly establishes that deceased respondent No.1 Muhammad Sadiq without any lawful authority illegally encroached upon the property in question as reflected from the revenue report prepared by Naib Tehsildar Islamabad as well as by the I.O, P.S Kohsar Islamabad, whereas criminal Court was only required and prompted to form prima facie opinion of the title for the purpose of Illegal Dispossession Act, 2005 and that too without prejudice to the final and authoritative adjudication on the matter of civil dispute, however, as such there is no civil suit pending at this stage.

22. I have also gone through the record, whereby learned Trial Court at the initial stage issued the process against the respondent No.1 on the basis of cursory statements and attached record, even two reports were called from revenue official as well as from the I.O but later on without recourse to the said reports, learned

Trial Court accepted the application U/S 265-K, Cr.P.C and acquitted the deceased respondent No.1 from the case, whereas it is trite law that when the Court has issued the process only on being satisfied that prima facie case was made out and as such the cognizance taken cannot be recalled and reversed, especially when charge has been framed by the Trial Court, only course to be left in such eventuality to accused side is to assail such process before the Appellate or Revisional Court as the criminal law does not provide any power of review to the same Court. Reliance is placed upon **PLD 2001 SC 433(Haji Junnat Gul vs. The State and 3 othes).**

23. This Court while exercising powers U/S 439, Cr.P.C can rectify wrongs as revisional powers of High Court are wider than appeal and any order, which is based upon misconception of law and facts or contrary to earlier orders of the Court can be revised while exercising powers U/S 439 read with section 561-A, Cr.P.C as and when the same was brought to the notice of the Court. Reliance is placed upon **1983 SCMR 775(Syed Manzoor Hussain Shah vs. Syed Agha Husain Naqvi and another) & 2011 P Cr. L J 666 [Lahore] (Mst. Zaib un Nisa vs. Rehmat and 2 others).**

24. In such eventuality the claim of the petitioners survives despite the fact that respondent No.1 Muhammad Sadiq is no more alive but the analogy settled on the strength of section 145(7), Cr.P.C as well as settled by the judgments referred in the preceding paragraphs. No doubt provisions of section 431, Cr.P.C clearly declare that in case the accused dies during the proceedings, the matter stands abated, however, in present case, the exception has been taken down as the question relating to illegal possession of the property remains alive, hence, I am of the considered view that legal heirs of deceased respondent No.1 can be proceeded for the restoration of possession of disputed land only, if they are in possession or claim their possession not otherwise, therefore, C.M No.103/2016 for impleadment of legal heirs of respondent No.1 is allowed and the legal heirs referred in the C.M have been declared respondents against the name of deceased Muhammad Sadiq.

25. Learned counsel for respondent No.1 (legal heirs of the deceased Muhammad Sadiq) has contended that the deceased in his life time never recorded

his statement that he was ever in possession of disputed property or he ever interfered into possession of the petitioners, however, at this stage under the instructions of legal heirs, learned counsel has taken the stance and conceded before this Court that legal heirs of deceased respondent No.1/Muhammad Sadiq are not in possession of the land as claimed by the petitioners and as such they have no objection, if this Court pass appropriate order for restoration of the possession of the disputed land to the petitioners in the light of the reports of officials of police and revenue.

26. For the foregoing discussion, instant criminal revision is allowed. The impugned judgment dated 29.06.2013, passed by learned Additional Sessions Judge-VII (West) Islamabad is hereby set aside. The SHO, P.S Kohsar Islamabad and Tehsildar Islamabad are directed to restore the possession of the disputed property of the petitioners within 30 days in accordance with the reports after demarcation on spot and shall also enter the same in the revenue record for future reference under the law.

27. As the instant criminal revision has finally been decided, therefore, C.M No.180/2018 has become infructuous.

(MOHSIN AKHTAR KAYANI)
JUDGE

APPROVED FOR REPORTING.

JUDGE

R.Anjam

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