

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

1. Cr.M Q.P No. 48-M/2020
With Cr.M 50/2021 & Cr.M 138/2021
(Muhammad Ali v. The State and another)

2. Cr.M Q.P No. 6-M/2021
(Muhammad Ali v. The State and another)

Present: Mr. Yousaf Khan, Advocate for the petitioner.


Mr. Saeed Ahmad, Asst:A.G for the State.

Mr. Ihsanullah, Advocate for the respondent
No. 2.

Date of hearing: 20.02.2023

JUDGMENT

Dr. Khurshid Iqbal, J.-

 1. By this single opinion, I propose to dispose of the above captioned two Quashment Petitions (QPs). The reason is that they pertain to the custody of one vehicle (a 1996 model Toyota car, locally called “ghwagai”; hereafter “vehicle in question) between the same parties and their respective applications, having been decided by the same Court (the learned Judicial Magistrate) though by different orders: one, passed on 23/10/2019, and the other, on 27/11/2019, and Criminal Revisions Petitions (CRPs) decided by the same Court (learned Additional Sessions Judge). The question for determination is that whether the principle that the person last in possession of a property is still

applicable when more persons than one (the last possessor, being the petitioner herein) have come to the Court with competing claims.

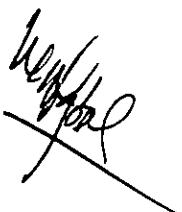
2. The germane facts of the case are that Gulbaz (Respondent # 2), claiming to be the owner of the vehicle in question, reported to the police that 19 months ago, he had given the vehicle in question to Malak Sahil alias Tawabuddin for his temporary personal use. But Malak Sahil never returned it to him despite his efforts. His report was recorded in the daily diary # 56, on 27/09/2019. An inquiry was launched which culminated into a criminal case at the strength of FIR # 301, on 11/10/2019, against Malak Sahil under section 406, PPC, registered in Police Station (PS) Dir, District Dir Upper. The vehicle in question was recovered from the possession of the petitioner in Swat. The petitioner and the complainant both agreed to park the vehicle in PS Charbagh in Swat. However, it was later shifted to Dir Upper where the complainant, the petitioner and one Shah Jehan, filed separate applications for the custody before Judicial Magistrate, who has allowed the application of the complainant per his orders referred to above. When arrested, Malak Sahil admitted that he has sold the



vehicle in question and promised to make good a sum of Rs. 6,30,000/- to the complainant, but he never honoured his promise.

3. I have heard arguments of learned counsel for the parties and the learned Assistant Advocate General, for the State and perused the record.


4. A preliminary objection was raised that one QP against the judgment of the Revisional Court is not maintainable for the reason that the petitioner didn't challenge the Judicial Magistrate's order dated 23/10/2019 before the Revisional Court. However, he filed a CRP against the Magistrate's order dated 27/11/2019 which the Revisional Court decided by a consolidated Judgment dated 06/06/2020. The record confirms this fact.

 5. It is pertinent to mention that one Shah Jehan also came forward and claimed custody, contending that he has purchased the vehicle from Malak Sahil, he then sold it to Awal Khan. He further contends that Awal Khan returned it to him owing to the dispute over it and subsequently, he returned it to Malak Sahil.


6. Coming to petitioner's case, a bare perusal of his QPs would show that he has set up no specific plea as from whom he has purchased or otherwise got the vehicle in question when and where. His only plea is that he is the last possessor. He claims it from the complainant only to whom the custody has been given by the Judicial Magistrate, which has been confirmed by the learned Revisional Court. The record reflects that the entire story, till this stage, revolves around the complainant and Malak Sahil: the former having registered the criminal case against the latter on the charge of criminal breach of trust.

7. During investigation of the case, the petitioner has recorded his statement under section 161, Cr. P.C. in which he has stated that he has purchased the vehicle in question from one Fazal Rahman son of Bakht Zada, a resident of village Rorya Charbagh at the sale consideration of Rs. 5,00,000/-, out of which he has paid Rs. 2,00,000/-, and the remaining is still outstanding against him. He has shown no sale deed in this respect. Malak Sahil has also recorded his statement under section 161, Cr. P.C. in which he has admitted having obtained the vehicle in question on the

pretext of his personal need and sold it to Shah Jehan. Shah Jehan has also recorded a similar statement in which he has reiterated his contention noted in paragraph 5, above. On the record, the sale deed in favour of the complainant is available which shows that he had purchased it from one Bacha Rahman, a resident of Dir Upper. Moreover, the complainant is also in possession of original documents of the vehicle in question.

 8. The conclusion of the above discussion is that the complainant has a deed showing him as a purchaser. He had given the vehicle in question to Malak Sahil for his personal use and charged the aforesaid Malak Sahil for committed criminal breach of trust (under section 406, PPC). Indeed, whatever transaction Malak Sahil has entered into with whomsoever at which particular point of time, has no legal value for the simple reason that a criminal case has been registered against Malak Sahil for which he has to face trial. While it is yet to be seen whether the charge against Malak Sahil would be proved or not, at the moment, a criminal charge exists against him which prima facie disentitles anyone whose claim, somehow or the other, is traceable to him. The record shows that

Shah Jehan has also filed a civil suit against the aforesaid Malak Sahil and the complainant. It is worth mentioning that copy of a sale deed dated 21/03/2018 is available on the record which shows that the complainant has sold the vehicle in question to Malak Sahil (showing his name as Bakhtuddin). However, there is no counterclaim of Malak Sahil against the complainant.

 9. Finally, I shall come to law on the subject. In a 1991 Karachi case, in which a criminal case under section 14 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, was registered, the Court ruled that the custody of a stolen car cannot be granted to a petitioner who claims its purchase from a thief in a criminal case regarding it (Qaiser Shafeeq Vohra v. The State and another, 1991 MLD 2590 [Karachi]). The Court referred to the cases of Ghulam Shabbir Lashari v. The State, 1991 P Cr. LJ 287 and A.K.A.RA. Chettyar v. Ma Saw Hla, AIR 1937 Rangoon 450, stating it as the “nearest parallel to the present case” and quoted the following observation of the Court:

“Where the known facts plainly show that the property has been stolen, it would be intolerable to allow the person in whose possession the property is found to retain it

as against the rightful owner and force the latter to a civil suit for its recovery if the accused absconds.”

A further reading of *Qaiser Shafeeq* above would show that the Court deviated from the established principle of grant of custody to the last possessor, for the following reasons:

“I am conscious of the fact that a different view has been expressed in number of cases including the one relied upon by learned Sessions Judge to the effect that ordinarily the Court is required to give temporary custody of the property to a person who was last in possession unless otherwise there are special features which may warrant a different course. The present case is certainly of an exceptional character where the concerned police has avoided to prosecute the persons who could be thieves or purchaser of the property from the thieves. A cruel wrong was done to the applicant which was perpetuated by different Courts at different stages. In this way a person who himself was a victim and who had a preferential right was denied the custody of his own car by a person who claimed to have purchased it from thief.”

W. H. S.

10. Another relevant case is Abdul Rashid v. Allah Ditta and other, 1985 MPD 1376 [Lahore]. The facts of this case reveal that while the petitioner was held entitled to the custody of vehicle in question (a tractor) as the person found last in possession, there was a criminal case registered regarding it under sections 382/148/149, PPC, and section 17 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, against

the respondent. In short, there was allegation of forcible removal of the vehicle in question from possession of the first owner.

11. The answer to the question mentioned in paragraph-1, above, is that where more than one person lay claim to the custody of property, the principle that the contender claiming to be last in possession would not apply, particularly when there is a criminal charge, say, theft or criminal breach of trust against one of them. In other words, it is to be seen whose claim stand on a higher pedestal.

12. In light of the above discussion, I find no force in both the QPs, which are accordingly dismissed.

Announced
Dt: 20.02.2023


JUDGE

office W/R
08/03/23