

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT

(*Judicial Department*)

1. W.P No. 737-M/2020 with Interim Relief

(Karim Bakhsh Vs. Zahir Shah Subedar Malakand
Levies and others)

2. W.P No. 1366-M/2020

(Saeed Ullah Vs. Rahim Shah and others)

3. W.P No. 6-M/2021

(Hayat-ur-Rehman and another Vs. The State and others)

4. W.P No. 714-M/2020

(Aziz-ur-Rehman Vs. Muhammad Roaz Khan and
others)

Present: M/S Iftikhar Ahmad (Senior), Rahman
Ali Khan, Barrister Dr. Adnan Khan and
Abdul Jalil, Advocates for the petitioners.

Mr. Said Muhammad Durrani, Advocate
for the private respondents in W.P
No. 6-M/2021.

Mr. Abdul Nasir, Advocate as amicus
curiae.

Mr. Razauddin Khan, Addl:A.G for the
State.

Date of hearing: 03.03.2021

JUDGMENT

WIQAR AHMAD, J.- Through this judgment,
we intend to decide a preliminary question
regarding maintainability of the writ petitions
bearing Nos. 737-M/2020, 1366-M/2020, 6-M/
2021 and 714-M/2020.

2. While hearing the cases in limine, the question regarding maintainability of the instant writ petitions required determination for the reason that Section 8-A has been inserted in the Illegal Dispossession Act, 2005 (hereinafter referred to as the “Act”) vide the Illegal Dispossession (Amendment) Act, 2017 and thereby a forum of appeal had been provided. All these cases except W.P No. 6-M/2021 have been arising out of summary rejection of the complaints, whereas, the above-mentioned writ petition has been arising out of order dated 05.12.2020 of learned Additional Sessions Judge Malakand at Dargai, whereby complaint of petitioners had been dismissed and the accused facing trial (respondents No. 2 & 4 to 6) as well as the absconding accused (respondent No. 3) had been acquitted of the charges leveled against them. The question that has cropped up before this Court was, “whether an order whereby complaint filed under section 3 of the Act is summarily rejected would be appealable or not?”

3. Section 8-A of the Act provided;

“8A. Appeal. Any order made under sub-section (2) and sub-section (3) of Section 3 and sub-section (1) of Section 8 shall, within thirty days of the order, be appealable before the High Court.”

Since, specific clauses had been mentioned by the legislature while making the orders passed there-under appealable, therefore certain confusion existed whether an order of conviction passed under sub-section (2) and sub-section (3) of Section 3 of the Act and restoration of possession under sub-section (1) of Section 8 of the Act (specified in the amending act) would only be appealable or other orders passed under the Act would also be appealable?

4. Learned counsel for petitioners in most of these cases had argued that scope of Section 8-A of the Act had been kept limited by the legislature and therefore impugned orders in the constitutional petitions had not been appealable. They had been unanimous that except order of conviction passed by a Court under sub-section (2) and sub-section (3) of Section 3 of the Act, other orders would not be appealable and that they had therefore filed writ petitions against said orders.

5. Learned Addl:A.G appearing on behalf of the State has however been contending that a remedy of appeal had been provided by way of Section 8-A of the Act and therefore the instant

constitutional petitions had not been maintainable as all the impugned orders had been covered by the words “any order” used in Section 8-A of the Act.

6. Mr. Abdul Nasir Advocate, learned amicus curiae appointed in one of the cases (W.P No. 6-M/2021) also relied upon a Single Member Bench judgment of this Court passed in Cr.M No. 3-M/2019 (Leave to appeal) and contended that appeals lie against “any order”, which wordings should be construed liberally and that all the orders passed under the Act would be appealable under section 8-A of the Act.

7. We have heard arguments of learned amicus curiae, learned counsel for the parties and learned Addl:A.G appearing on behalf of the State.

8. Section 3 of the Act provided for preventing illegal dispossession from immovable property and has also provided punishment for contravention of the provision thereof. Said Section being relevant is reproduced hereunder for ready reference;

“3. Prevention of illegal possession of property, etc. (1) 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 owners or occupier of such property.

(2) Whoever contravenes the provisions of the subsection (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 provision of Section 544-A of the Code.

(3) Whoever forcibly and wrongfully dispossesses any owner or occupier of any property and his act does not fall within sub-section (1), shall be punished with imprisonment which may extend to three years or with fine or with both, in addition to any other punishment to which he may be liable under any other law for the time being in force. The person dispossessed shall also be compensated in accordance with provisions of section 544-A of the Code.”

9. The above reproduced Section has been providing for definition of the offence of illegal dispossession as well as furnishing penalty for contravention thereof. The punishment provided under subsection (2) of Section 3 of the Act has been covering the case of contravention of the dictates of subsection (1) of Section 3 of the Act.

Subsection (3) of Section 3 of the Act covers all the rest of cases of forcible and wrongful dispossession. Section 8 of the Act provided for the remedy of restoration of possession in the cases of wrongful dispossession from immovable property

as provided in Section 3 of the Act. Section 8-A of the Act has made all the orders passed under subsections (2) and (3) of Section 3 of the Act as well as orders passed for restoration of possession under subsection (1) of Section 8 of the Act as appealable.

10. For interpreting Section 8-A of the Act so as to find its true intent, purpose and scope, we would be studying it according to both the literal as well as purposive rules of interpretation. To discern the scope of Section 8-A of the Act, we would first interpret it according to the literal rule of construction. Section 8-A of the Act starts with the connotation "**any order made**". The word "**any**" is a word of vast amplitude. "**Any**" has been explained in Oxford Dictionary in its 12th edition as;

"To refer to one or some of a thing or number of things, no matter how much or how many."

Hon'ble Supreme Court of Pakistan while giving its judgment in the case of **Government of NWFP through Chief Secretary and another vs Muhammad Irshad and 3 others** reported as ***PLD 1995 Supreme Court 281***, has

also held that the word “any” is ordinarily used to enlarge the amplitude of the term to which it is attached. Similarly, in the matter of Reference No. 2 of 2005 by the President of Pakistan reported as *PLD 2005 Supreme Court 873* at 951 while interpreting Article 186 of the Constitution, the connotation “any question of law” conferring advisory jurisdiction upon the Supreme Court of Pakistan was interpreted as having widened jurisdiction of the Court and made it more comprehensive in its scope and thereby covering both the questions of law that had arisen as well as the question of law that was likely to arise.

11. Legislature has purposely used the word “any” because it had been cognizant of the fact that an entire mechanism relating to filing, scope and the categories of appealable orders had not been furnished in the Act (like it stood provided under Cr. PC). The legislature therefore intended to cover the full spectrum of orders passed under subsections (2) and (3) of Section 3 of the Act as well as all the orders passed under subsection (1) of Section 8 of the Act. When we say that the full spectrum of orders passed there-under, it cannot then be limited to orders of conviction passed under

subsections (2) and (3) of Section 3 of the Act or affirmatively making an order for restoration of possession under subsection (1) of Section 8 of the Act. It would include all the orders passed under said provision of law including the refusal to pass such orders there-under. Therefore, when allegations of commission of an offence under section 3 of the Act are brought before a competent Court, then there may emerge two situations, one is that the Court finds those allegations substantially true and proved beyond reasonable doubt, and then pass an order of conviction under subsection (2) or subsection (3) of Section 3 of the Act; the other situation may be that when a Court entertains reasonable doubts that the prosecution or complainant has failed to prove case against the respondent/accused, then in that case the Court would naturally pass an order for acquittal and would hold that contravention of the provisions of Section 3 of the Act have not been proved. The latter case would also be covered in the definition of the words "**any order**" and would therefore be appealable under section 8-A of the Act. Another scenario which is more pertinent to the case in hand has been that a person comes up

with a complaint of commission of contravention of the provisions of Section 3 of the Act. The Court marks such complaint for investigation under section 5 of the Act, wherein the investigation report is submitted and the Court comes to the conclusion that there has been no substance in the allegations of illegal dispossession as levied in the complaint and dismiss the same summarily. In that case also, the Court gives a finding, on the basis of material before it, that the allegations of contravention of provisions of subsection (1) of Section 3 of the Act as well as wrongful dispossession alleged otherwise have not been committed. Such order would also be considered an order made under subsections (2) and (3) of Section 3 of the Act. It also needs mention here that Section 5 of the Act provides for investigation but it has not provided for powers of the Court to dismiss a complaint in a summary manner. We can therefore easily say that the order of summary dismissal of complaint has not been an order under section 5 or any other provision of the Act but an order made under section 3 of the Act.

12. Subsection (2) of Section 3 of the Act has also been containing general words like it

makes an act punishable because of contravention of the provision of subsection (1) of Section 3 of the Act. When the Court say that contravention of the provision of subsection (1) of Section 3 of the Act had not taken place – whether it is after a full-fledged trial or after the investigation is conducted and the person has not yet been indicted – it would carry same effect that the Court has held that a case of contravention of subsection (1) of Section 3 of the Act has not been existing. In such a situation, it would equally be an order under subsection (2) or subsection (3) of Section 3 of the Act, for the purpose of Section 8-A of the Act. It becomes clear that it was for this very reason of intending to cover all the orders passed under subsections (2) and (3) of Section 3 of the Act that the legislature has used the words “any order”. Same would be the case of refusal to handover possession under subsection (1) of Section 8 of the Act and all the orders passed under said provision of law would no doubt be appealable.

13. An Hon’ble Single Member Bench of this Court while resolving a similar controversy in the case of Mst. Farah Deeba vs. Said Muhammad and another (Cr.M No. 03-M/2019)

(Leave to appeal)) has also reached to similar conclusion, wherein it has been observed;

"Section 3 (1) of the Act makes illegal occupying of the property as an offence and subsections (2) and (3) thereof provides the punishment for illegal occupation of the property. It is the discretion of the trial Court, either to acquit or convict the accused or even dismiss the complaint, if found non-maintainable, keeping in view the law and evidence on record. The said order of acquittal of the accused, dismissal of the complaint or conviction of the accused would fall within the mischief of word "order" and are thus appealable in terms of section 8-A of the Act. Similarly the dismissal of the complaint will have the same consequences because the complaint, as provided in the Act, is not synonymous with the complaint as provided in section 4 (h) of the Code."

14. While adopting the purposive approach, we can also identify the mischief with ease for suppression of which this Section had been provided. While giving judgment in the case of

Mian Sharif Shah vs Nawab Khan and 5 others

reported as ***PLD 2011 Peshawar 86***, a full Bench of this Court had advised the Provincial Government to insert a provision in the Act, which would provide for remedy of an appeal to a person aggrieved of an order of his conviction or acquittal under the Act. Relevant part of observation in this regard is reproduced hereunder for ready reference;

"Now the question is as to what should be the better course to provide a remedy of an appeal to the aggrieved person from the order of conviction or acquittal, passed by the Court of Session under the Illegal Dispossession Act, 2005. It is well entrenched principle of law that no criminal Court of Tribunal shall be invested with absolute authority particularly, in cases where right to liberty and property of a citizen is involved. If finality is attached to the judgment of the Sessions Court then, in cases of patent injustice committed to anyone either in case of conviction or that of acquittal, the only remedy for the aggrieved person would be to file a constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, however, it is an ironclad principle of law that in writ jurisdiction, the High Court is neither supposed nor it is permissible for it to make reappraisal of evidence or determine the controversy of facts and to draw conclusion therefrom like a Court of appeal, hence, such remedy, being of a very restricted scope, is not efficacious in any manner, thus, conviction recorded or order of acquittal passed causing miscarriage of justice would go unchecked at High Court level. There may be cases where valuable State property is grabbed but the culprits are acquitted, thus, the public exchequer would suffer irreparable loss. In such circumstances, the land "MAFIA" and property grabbers, the most influential devious by manipulating to go scot-free would successfully defeat the objects and purpose of the very law and its efficacy would be brought to naught which may lead to dangerous results."

15. Most noticeable in the above reproduced para is that this Court while impressing upon the relevant authorities the need for introducing the amendment had also held that writ jurisdiction of a High Court could not be used for

determining a controversy of facts and to draw conclusions there-from like a Court of appeal would be able to do. It was also held that powers under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 being restricted would not be sufficient and efficacious for determination of various factual controversies that may be arising out of petitions filed against orders passed under various provisions of the Act. Such findings of the Court had not been binding on the legislature but are only quoted so as to have a glimpse of the background in which Section 8-A had been added to the Act. We entertain no doubt that the provision of appeal had been inserted in order to make the orders passed under the Act appealable before an appellate Court, which may have the powers and competence to give a rethought to the factual issues involved therein. Provisions of the Criminal Procedure Code, 1898 (hereinafter referred to as "Cr. PC") had been made applicable under section 9 of the Act and when the right of appeal had also stood furnished, then we can safely make resort to the provisions of Cr. PC for knowing the powers of an appellate Court. The appellate Court would therefore have all the powers of an appellate Court

provided under the relevant provisions of Cr. PC.

Purpose of the legislature while inserting Section 8-A in the Act had therefore been clear that it wanted to make orders passed under the Act appealable so as to afford a chance to the aggrieved party, which may be complainant or accused to avail the remedy of appeal, wherein the appellate forum would have all the powers for re-assessing the material available on record as well as re-appreciating the evidence, as the case may be.

Therefore, the literal construction supplemented by purposive construction in some respects are leading us to the conclusion that all the orders passed under section 3 of the Act as well as sub-section (1) of Section 8 of the Act have been made appealable before the High Court.

16. The mischief rule is most often employed where a departure from the literal meaning is needed to avoid absurdity, but not so always. Mr. S.M Zafar while seconding the observations expressed in statutory interpretation by F. Bennion 5th edition has observed in his book Understanding Statutes at page 20;

“The mischief rule was a great improvement on the then prevailing

literal rule, it at least encourages the Courts to have regard to the context in which the doubtful words appear. Language cannot be properly understood without some knowledge of the context. It is therefore obviously sensible to permit and even encourage the Court to go beyond the narrow confines of the disputed phrase. The mischief rule is designed to get the Court to consider why the Act was passed and then to apply that knowledge in giving the words under consideration whatever meaning will best accord with the social purpose of the legislation."

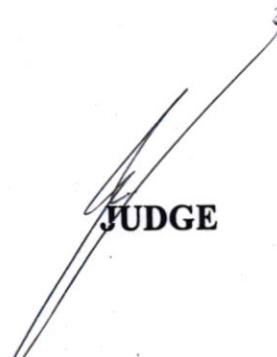
Recourse is not made here to purposive construction for the reason that a departure is needed from plain language of the statute but for unearthing the intention of legislature and having a holistic view of the situation. Purposive construction is being employed here in addition to literal construction and not as its substitute in entirety.

17. In light of what has been discussed above, we answer the question to the effect that all orders passed under subsections (2) and (3) of Section 3 of the Act, including the orders of conviction or acquittal of the accused or dismissal of complaint for there-being no case of contravention of provisions of Section 3 of the Act, would be appealable under section 8-A of the Act. Resultantly, we order all these writ petitions to be converted into appeals filed under section

8-A of the Act, against the impugned orders by relying upon judgment of the Hon'ble Supreme Court of Pakistan in the case of Muhammad Akram vs. DCO Rahim Yar Khan reported as **2017 SCMR 56**. Office shall accordingly fix all these cases before appropriate Benches for further proceedings.

Announced
Dt: 03.03.2021


JUDGE


JUDGE

Office
10/04/2021

Abdul Sabooh/* (D.B.) Hon'ble Mr. Justice Muhammad Nasir Mahfooz
Hon'ble Mr. Justice Wiqar Ahmad