

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

Cr.R 73-M/2017

JUDGMENT

Date of hearing: **26.10.2017**

Petitioners: (Said Zamin & others) by
Mr. Sardar Abdul Hakim Tajik,
Advocate.

Respondents: (State) by Muhammad Rahim Shah,
Assistant Advocate General.
(Complainant) by Mr. Ikramullah Khan,
Advocate

ISHTIAQ IBRAHIM, J.- This Criminal Revision under section 439 Cr.P.C is directed against the judgment dated 20.5.2015 rendered by the learned Additional Sessions Judge/Izafi Zilla Qazi, Samrabagh District Dir Lower, whereby the judgment dated 10.7.2014 of the Assistant Commissioner/S.D.M, Samrabagh District Lower Dir regarding conviction of the Petitioners under section 447 PPC of Rs.500/- each or in default of payment of fine to undergo 05 days S.I, was upheld.

2. Brief facts of the case are that on 23.10.2012, complainant Sardar Khan approached

Assistant Commissioner/ Sub-Divisional
Magistrate, Samarbagh through written application
complaining that the Petitioners being influential
professional litigants are making interference in the
decreed landed property of the complainant to
dispossess him, by extending life threats and if
preventive action under the law against the
Petitioners is not taken, then there is the likelihood
of creation of blood-shed between the parties. This
application was marked to the SHO Police Station
Samarbagh for taking legal action, who further
marked the same to Javed Khan IHC for conducting
an inquiry in the matter. In light of the report of the
inquiry officer, the Assistant Commissioner/ Sub-
Divisional Magistrate ordered the registration of the
case against the Petitioners, hence, case vide FIR
No.68 dated 27.01.2012 under sections 447/34 PPC
at Police Station Samarbagh, District Dir Lower
was registered against the Petitioners. After
completion of the investigation, challan was
submitted. The Petitioners were charge sheeted,
wherein they pleaded not guilty and claimed trial. In

order to bring home guilt against the Petitioners, the prosecution examined as many as seven (07) witnesses followed by the statements of the accused under section 342 Cr.P.C, wherein they professed their innocence, however, they neither wished to be examined on oath nor desired to produce evidence in their defence. Thereafter, both the parties submitted written arguments and ultimately vide judgment dated 19.11.2012 of the learned Assistant Commissioner/SDM, the Petitioners were convicted and sentenced as stated above. Feeling aggrieved, the Petitioners preferred an appeal bearing No.3/10 of 2012 before the learned Additional Sessions Judge/Izafi Zila Qazi, Samargagh, which was accepted. The judgment 19.11.2012 was set aside and the case was remanded to the learned trial Court with the directions to rewrite judgment keeping in mind the provision of section 367 Cr.P.C. After remand, the learned trial Court, after discussing the evidence at length, again convicted the Petitioners under section u/s 447 PPC and sentenced them to fine of Rs.500/- each or in default of payment of

fine, each accused shall undergo 01 month S.I vide judgment dated 10.7.2014, whereagainst, the Petitioners filed an appeal before the learned Additional Sessions Judge/Izafi Zila Qazi, Samarbagh, but the same was also dismissed vide judgment dated 20.5.2015 recorded in Criminal Appeal No.5/10 of 2014, hence, this appeal.

3. Arguments heard and record perused.

4. Learned counsel for the petitioners contended that the learned trial Court as well as the learned Appellate Court failed to appreciate the evidence and other materials in shape of the record of previous civil litigation between the parties; that the learned Assistant Commissioner was not competent authority to register a criminal case against the petitioners and by ordering so, grave miscarriage of justice has been caused to the petitioners; that the complainant side has concealed all the material facts from this the Hon'ble Courts and that by way of registration of the instant criminal case against the petitioners, the complainant has converted the civil litigation into criminal by

filings complaint against the petitioners. He concluded that the judgments of both the learned Courts are suffering from mis-reading and non-reading of evidence, therefore, the same are not sustainable and requested for setting aside the impugned judgments. In support of his contentions, he placed reliance on the judgments reported as **2017 SCMR 56, 1986 PCr.LJ 953 [Dacca], 2012 PCr.LJ 1770 [Sindh], 2008 PCrLJ 812 [Lahore], 1983 PCr.LJ 42 [Karachi], 2001 MLD 1089 [Peshawar], 2001 PCrLJ 585 [Peshawar], 2006 PCr.LJ 476 [Karachi], PLD 1960 Dacca 631.**

5. Learned counsel for the respondent/complainant strongly repelled the arguments of learned counsel for the petitioners by contending that act of the petitioners clearly constituted a cognizable offence; that despite decisions of civil Courts in favour of the complainant, the petitioners have entered upon the property of the complainant, which act of the petitioners not only amounts to criminal trespass but also amounts to the contempt of Court; that the

petitioners are high-handed persons and in view of the inquiry report of the inquiry officer followed by trustworthy and confidence inspiring evidence, the petitioners have rightly been convicted by the learned trial Court. He requested for dismissal of the revision petition.

6. Learned Assistant Advocate
representing the State supported the contentions made by the learned counsel for the complainant.

7. The first and foremost question for determination before this Court is that as to whether in view of the allegations against the Petitioners/convicts in the application of the complainant followed by the inquiry report of the inquiry officer and the evidence recorded before the learned trial Court can reasonably constitute an offence which amounts to criminal trespass or otherwise. For such purpose, I would like to refer herein below the wordings which constitute criminal trespass as defined in section 441 of the Pakistan Penal Code.

"441. Criminal trespass. Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy such person, or with intent to commit an offence is said to commit "criminal trespass".

8. The recommendation of the inquiry officer that the petitioners have allegedly started construction work on the property of the complainant is incredible for the reason that the complainant Sardar Khan (PW-6) and the other prosecution witnesses examined as PW-1, PW-2 and PW-3 stated that the petitioners were illegally occupying landed property of the complainant side by digging ditch and carrying out construction thereon, but the initial complaint, on the basis of which the whole proceedings were set in motion, is totally mute regarding this aspect of the case. They have not disclosed that the construction was being carried out by the petitioners. This development in the case seems to be afterthought and *malafide*. Moreover, as to whether every unlawful entry, on the

property of a person in possession, amounts to criminal trespass or not as according to section 441 PPC entry into the property in the possession of another must be with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. In the present case, allegations of the complainant against the Petitioners are that they have entered the property of the complainant by starting construction thereon, but looking into the wordings of essential ingredients of section 441 PPC, mere constructive possession would not be sufficient as a person in absentia cannot be said to be intimidated, insulted or annoyed and such person had to be named by the prosecution in order to sustain the charge of criminal trespass. The difference between civil and criminal trespass has been made clear in the judgment reported as **2013 P.Cr.R (R. Pindi) 334 (a)**. The relevant portion the judgment is reproduced herein below for the sake of convenience.

"There is difference between civil trespass by way of taking possession of the property without the consent of the person in possession and criminal trespass for which insult or annoyance to the person in possession of such property is condition precedent."

Since, there is no mention of the presence of the complainant party on the spot at the relevant time when the petitioners were allegedly taking possession of the landed property of the complainant, therefore, the element of criminal trespass is missing here. In this respect, wisdom is derived from the judgment reported as **PLD 1965 Supreme Court 640**, wherein the following view has been taken.

“....A person who is in possession may be absent from the property and his rival claimant may come and enter into possession; he may actually lock it from inside. But whether he locks it or not there would be no method of turning him out if his intention is just to dispossess his rival and not to annoy him. The person in possession will have to file a suit if he wants to eject him, but if after years of he gets a decree and the decree is executed he will gain no advantage for the next day again the opposite-party can enter the property and the same process will have to be repeated”.

Remedy available after the commission of civil trespass is the way of filing of the civil suit against the trespasser.

9. Moreover, Muhammad Javed IHC is the inquiry officer, who has played a pivotal role in the matter in order to find the truth, has been examined as PW-4 in the learned trial Court. His report in this regard is Ex PW4/8, on the basis whereof the learned Sub-Divisional Magistrate has ordered stopping the construction work and registration of a case against the Petitioners. Inquiry report Ex PW4/8 in a place shows that:

درخواست کنندہ غلام دوست فریق کو ہدایت ہوئی کہ مداخلت بے جای حکم اتناگی کے لیے
عدالت سے رجوع کریں۔ لیکن درخواست کنندہ نہ ہی مداخلت بے جا کے متعلق روپرٹ
کرنے کرتا ہے اور نہ ہی حکم اتناگی لانے کا لیے عدالت جانے کو تیار ہے۔

Name of Ghulam Dost does not appear in the application as applicant rather he has witnessed only the recovery memo, whereby the Inquiry Officer has taken into his possession decision of the Court relating to the civil disputes between the parties. He in the cross examination has stated to have recorded statements of the eyewitnesses but neither any such statement is available on the case file nor the names of the eyewitnesses are mentioned in the inquiry report nor in the initial application filed by the complainant for taking legal action against the petitioners.

10. Another important aspect of the case is that civil cases are pending in between the parties, but this factor has been ignored by the trial Court while recording the conviction of the appellant for the offence of criminal trespass. Learned Appellate Court has also ignored the relevant law on the point while upholding the judgment of conviction of the appellants. Reliance is placed on the case of “ Takri Moosa Khan Vs. The State and another” reported as **1998 MLD 1838 (Quetta)** wherein it has been held that:

“It appears that controversy was that of a civil nature which has been converted into criminal proceedings without examining the crux of the matter by the learned trial Court which resulted in grave miscarriage of justice on the one hand and petitioner suffered agony of protracted trial on the other hand and in such view of the matter re-writing of judgment or remand of the case would not serve any useful purpose.

11. It may be well that in doing a particular act a man may have more intentions than one. To bring a case within section 441 PPC, the intention specified therein must be the dominant intention. If the primary intention is something other than to

intimidate, insult or annoy, the section does not apply. Thus, where the primary and dominant intention of the accused was to take possession of the property, and entering into the property, they must have been conscious that annoyance to the complainant might be a natural and inevitable consequence of their action, but that was not the purpose with which they had entered into the property, they could not be convicted under section 441 PPC. Reliance is placed on **PLD 1952 Dacca 261**, wherein the following view has been laid down.

"Every unlawful entry does not amount to criminal trespass. The essence of section 441 PPC which defines criminal trespass is the intent with which the entry is made and in every case the intent must be either to commit an offence or to intimidate, insult or any person in possession of such property. The section does not penalize unlawful entry with any other intent, such as mere intent to take possession. The Court must come to a clear finding that the entry with one or more of the intents mentioned in section 411 PPC. Failure to come to such finding

amounts to failure to decide a vital point in the case".

Both the learned Courts below have failed to keep in mind at the time of rendering the judgments the crucial point relating to *mens-reas* or otherwise of the appellants at the time of the alleged act, therefore, both the impugned judgments are not sustainable on this reason as well.

12. It would not be out of place to note here that determination of the title and the ownership of the property, it is not the duty of this Court while seized of the criminal cases as that is the job of the Civil Court to determine the civil rights of the parties. At the moment, this Court has to see only whether any cognizable offence amounting to criminal trespass is committed by the Petitioners or not by analyzing the relevant law and the materials on the case record. However, there is nothing in the shape of documentary evidence/record nor any witness has been produced by the prosecution to the effect that the property in question is the exclusive ownership of the complainant side. On this ground

too, the alleged act of the petitioners does not amount to criminal trespass.

13. In order to prove the guilt of the Petitioners of being criminal trespassers, neither the complainant nor the alleged eyewitnesses have specified the date and time of the occurrence in their respective statements recorded before the learned trial Court. All the witnesses in their respective statements state that the Petitioners have dug out the property owned by the complainant for the purpose of raising construction thereon but they have not specified the time and date of such act. They have also not attributed any other act to the petitioners, which can constitute an offence amounts to criminal trespass. Moreso, neither the complainant nor the eyewitness state that they have seen the petitioners on the spot while digging the earth for the purpose of construction, therefore, the evidence as well as the other materials on the record does not make a sense that the Petitioners have committed an act of criminal trespass, as such, the conviction of the Petitioners is not maintainable.

14. In view of the above discussion, all the essential ingredients to make out a case of criminal trespass are missing in this case as by the complainants by no independent and confidence inspiring source or by producing trustworthy evidence in support of their stance to substantiate the criminal intention which could intimidate, annoy or insult them by the act of the petitioners/convicts.

15. For what has been discussed above, the learned Courts below have failed to properly appreciate the evidence on file, therefore, the impugned judgments are suffering from mis-reading and non-reading of evidence, as such, the same are not maintainable. Hence, by setting aside the impugned judgments, this revision petition is allowed and the Petitioners/convicts are acquitted of the charge. They may accordingly withdraw fine amount if deposited pursuant to the impugned judgment of the learned trial Court.

Announced
26.10.2017

*Ali
6/11/WK*

JUDGE