

Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR.

(JUDICIAL DEPARTMENT)

Cr. Revision No.81-P/2022JUDGMENT

Date of hearing --- 13.02.2023.

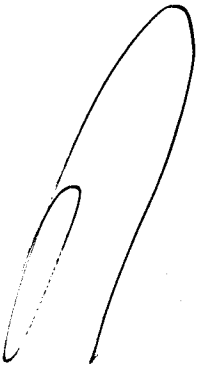
Petitioners by --- Mr. Muhammad Tariq Afridi,
Advocate.

Respondents by --- Mr. Abdul Sattar Khan, Advocate.

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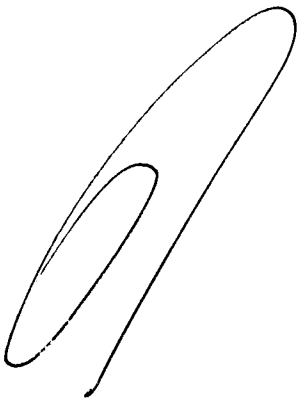
S M ATTIQUE SHAH, J:- Instant petition is directed against the order of learned Additional District and; Sessions Judge-IX, Peshawar dated 01.04.2022, whereby application of the respondents filed under section 7 of Illegal Dispossession Act, 2005 was accepted.

2. Brief facts of the case are that respondent No.1 filed a complaint under section 4 of the Illegal Dispossession Act, 2005 against the petitioners alongwith an application under section 7 of the ibid Act for restoration of possession of the flour mill in question. The learned trial Court solicited report of the local police, and; thereafter, summoned the petitioners. The petitioners appeared before the Court. Subsequently, the

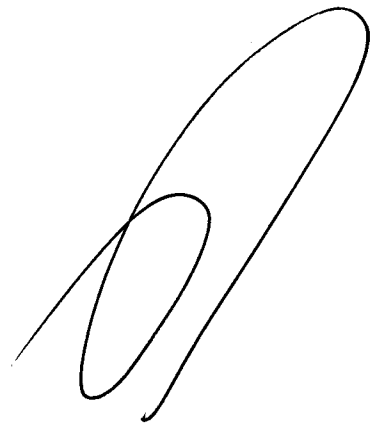


learned trial Court vide impugned order dated 04.10.2022, accepted the application of respondent No.1, filed under section 7 of the Illegal Dispossession Act, 2005 while restoring the possession of mill in question to the respondent No.1; hence, instant petition.

3. Learned counsel representing the respondents, at the very outset has challenged maintainability of instant petition filed under section 439 Cr.P.C. on the ground that the impugned order is interim in nature and; as such, the same cannot be challenged before this court in instant petition. Further, that Illegal Dispossession Act, 2005 has not provided any specific provision of revision against the impugned order and as such on this score too, the instant petition is not competent. Further, that if substantial justice has been done to a party by the learned trial court while exercising its jurisdiction, and during such exercise, if any irregularity has been committed, the same requires to be ignored in the larger interest of justice. Further, that the learned trial court has properly exercised its jurisdiction in accordance with law applicable thereto while passing the impugned judgment as such the same is not open to any interference by this court. On merits, learned

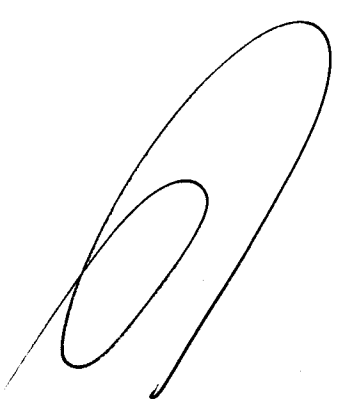


counsel for the respondents argued that the learned trial court has properly assumed the jurisdiction and; passed the impugned order qua restoration of possession in terms of section 7 of the Illegal Dispossession Act, 2005 after appreciating the material available on record of the case, therefore, the same requires no interference by this court in instant petition. In support of his contentions learned counsel placed reliance on various judgments. ***Saleem Ran and 23 others Vs. IInd Additional Sessins Judge, Malir, Karachi and 5 others, (2020 YLR 634), Atta Rasool and 3 others Vs. Haji Muhammad Rafique and 2 others (2019 P.Cr.L.J. 1023), MuhammadAnwar Qureshi Vs. The State and 7 others (2019 YLR 2307), The State/Anti Narcotics Force through Assistant Director Vs. 3rd Additional Sessios Judge/Special Judge CNS Court, Hyderabad, (2019 YLR 1037), Ehsanullah and 2 others Vs. Manzar Hussain (2010 YLR 3161), Samander Khan and another Vs. Haji Abdul Rehman and 23 others (PLD 2007 Quetta 72) Muhammad Ramzan alias Jani Vs. Muhammad Aslam and others (2007 P.Cr.L.J. 1784), Nazir Ahmed and others Vs. The State and others (PLD 2005 Karachi 18), Mahmood Ali***



Butt. Vs. Inspector General of Police, Punjab, Lahore and 10 others (PLD 1997 Supreme Court 823), Zulfiqar and others Vs. The State and 10 others (1991 SCMR 326), J.Samuel and 9 others Vs. Mst. Rabia Bibi and others (1991 P.Cr.L.J. 885), Shahzada and others Vs. Malik Shamsuddin and another (PLD 1977 Supreme Court 384) and Abdul Wahab Vs. The Crown (PLD 1955 Federal Court-88).

4. Conversely, learned counsel representing the petitioners strongly controverted the submissions of the learned counsel for the respondents made at the bar qua the maintainability of the instant petition, and; on merits as well, while arguing that in its revisional jurisdiction under section 439 of the Code of Criminal Procedure 1898, this Court has ample power to entertain the instant petition filed against the interim order of learned trial court passed in terms of section 7 of the Illegal Dispossession Act, 2005. Further, that section 9 of the Act ibid provides that at the time of exercise of its jurisdiction under Illegal Dispossession Act, 2005 the learned trial court can recourse to the provisions of the Code of Criminal Procedure, 1898 if the same is not specifically excluded. On merits,



learned counsel argued that impugned order is nullity in the eye of law being passed in violation of the explicit provision of section 7 of the Act, 2005 as the same has been passed before the commencement of trial and; as such is liable to be set aside upon acceptance of instant petition. Placed reliance on ***Habibullah and another Vs. The State and 9 others (2000 MLD 1162)***, ***Haq Nawaz and others Vs. The State and others (2000 SCMR 785)***, ***Rana Muhammad Ahsan Rasool Vs. The State and others (2013 P.Cr.L.J. 953)*** and ***Edward Henry Louis Vs. Dr. Mutammad Safdar (2009 P.Cr.L.J. 1359)***.

5. Heard. Record perused.

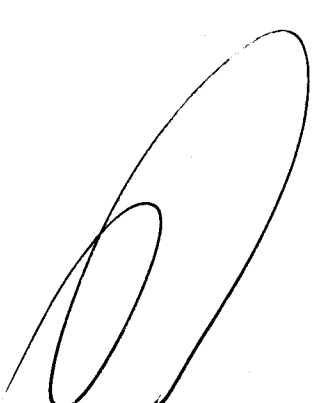
6. This court intends to first dilate upon the question of maintainability of instant petition filed under section 439 of the Code of Criminal Procedure, 1898 (the code). A thorough perusal of the provision of Illegal Dispossession Act, 2005 (the Act) would show that only an appeal u/s 8-A of the said Act has been provided in the matters covered under sub-section 2 & 3 of section-3 alongwith sub-section-1 of section 8 of the said Act before this court which clearly show that an appeal u/s 8-A is only restricted to the above referred provisions, which undoubtedly excludes all other



orders either final or interim from the appeal jurisdiction of this court u/s 8-A of the Act. However, it does not mean that other orders i.e. final or interim passed by the learned trial court while exercising its jurisdiction under the provisions of said Act are not amenable to the jurisdiction of this court in terms of the provision of section 439 of the Code, otherwise the aggrieved person would be left remediless which is certainly neither permissible nor desirable under the law. It is worth mentioning that section-9 of the Act, 2005 envisages that ***“unless otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1898 (V of 1898), shall apply to proceedings under this Act”***, which means that in absence of a specific provision in the Act, 2005 recourse could be made to the relevant provision of the Code when a difficulty arise during the proceedings under the said Act. Admittedly, no provision of appeal or revision has been provided by the Act, 2005 in the matters arising out of section 7 of the said Act, therefore, in such eventuality, the aggrieved person can avail the remedy provided by the Code for redressal of his grievance. **2015 P.Cr.L.J 1490 Abdul Haque Vs. Mir Ahmad and 6 others.** It is

worth mentioning that a similar question came up for hearing before Hon'ble Lahore High Court Lahore in case of **Sana Ullah Khan Vs. The State and 3 others (2022 P.Cr.L.J. 1828 Lahore)** which was dealt with in the following manner: -

5. Learned counsel for the appellant while placing reliance on the case "Mst. Farah Deebe v. Said Muhammad alias Toti and another" (2021 MLD 580) contends that the word "any" used in section 8-A means any order either of conviction or acquittal because it is passed while dealing with the complaint under subsections (2) and (3) of section 3 of the Act. The contention of learned counsel for the appellant is not sustainable for the reason that legislator has not provided right of appeal against all orders passed under the provisions of this Act. For reference, following are the orders which can be passed during proceedings under the Act on a complaint, but no appeal is provided there-against:-

- 
- i) Dismissal of complaint under section 203, Cr.P.C. when there is no sufficient ground;*
 - ii) Taking cognizance of complaint and summoning of accused;*

iii) *Direction to the police to arrest the accused as authorized under section 4(3) of the Act;*

iv) *Order of attachment of property under section 6 of the Act;*

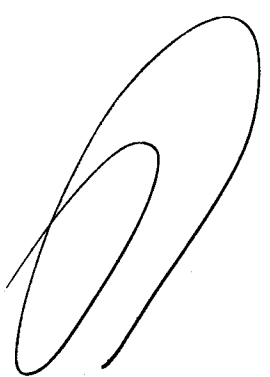
v) ***Order of eviction and mode of recovery of possession as an interim relief under section 7 of the Act;***

vi) *Rejection of application under section 265-K, Cr.P.C.;*

vii) *On conclusion of trial, award of compensatory costs to the person complained against if the complaint is found false, frivolous or vexatious under section 5(4) of the Act.*

The above situations reflect that the legislator has not felt the necessity to provide a right of appeal against such orders because they are regulated under the provisions of Code of Criminal Procedure and most of the suitable remedy is to invoke revisional jurisdiction of the High Court.

7. In view thereof, the instant Criminal Petition filed u/s 439 of the Code is held maintainable while the objection raised by the respondents' qua maintainability of the same is turndown; being misconceived. The case law



produced at the bar by the learned counsel for the respondents is distinguishable and; thus does not attract to the matter in hand.

8. Coming towards merits of the case, record reflects that complaint under the provisions of Act, 2005 was filed by respondent No. 1 against the petitioners on 22.01.2022, after recording the statement of the complainant, matter was referred to the SHO concerned for inquiry. Upon receipt of such inquiry, learned trial court passed the impugned order after hearing the parties which suggests that the impugned order was passed before the commencement of trial. As the impugned order is passed u/s 7 of the Act, 2005 therefore, the same is reproduced for ready reference:-

7. Eviction and mode of recovery as an interim relief.-

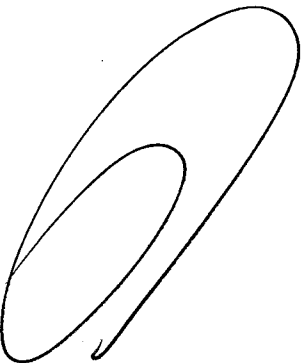
(1) If during trial the Court is satisfied that a person is found prima facie to be not in lawful possession, the Court shall, as an interim relief direct him to put the owner or occupier, as the case may be, in possession.

(2) ----

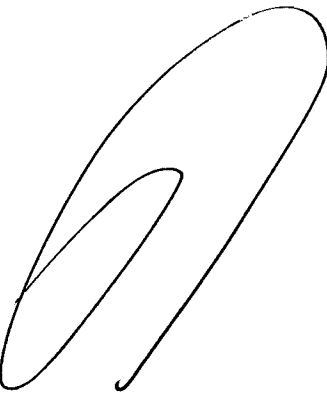
(3) ----

(4) ----

(5) ----



9. The *ibid* provision explicitly provides that the court can pass an order in terms of section 7 during the trial which clearly shows that such order is to be passed after the commencement of trial. The matter of the cognizance of a case by the court and; commencement of the trial came up for hearing before the august Apex court in the case of **HAQ NAWAZ and others V. THE STATE and others 2000 SCMR 785** wherein it was held "*that taking of cognizance of a case is not synonymous with the commencement of the trial in a case. Taking of cognizance of a case by the court is the first step, which may or may not culminate into the trial of the accused. The trial in a criminal case, therefore, does not commence with the taking of the cognizance of the case by the court*". The matter of cognizance of a case and; commencement of the trial in specific context to the provision of section 7 of the Act, 2005 also came up for hearing from time to time before the courts in various cases wherein it was held that provision of section 7 shall only come into operation when a charge is framed against the accused. **2007 Y L R 1657 Lahore SABIR AYYAZ and others V. GUL RUKH SAMINA and others. 2008 PCr.LJ 719 Lahore ASHIQ HUSSAIN and**



another V. ATHAR SHER and others. 2013 PCr.LJ 953 RANA MUHAMMAD AHSAN RASOOL V. THE STATE. YLR 2015 93 LAHORE FAQIR BAKHSH V. THE STATE. YLR 2015 715 Sindh ABDUL FATAH V. MAHARRAM ALI and others. 2016 P CR. L J 1103 Islamabad GHULAM UMER MEMON and others V. JABBAR SATTI and others. The *ibid* legal question has also recently been extensively, dealt with in the case of *KHAIR MUHAMMAD V. ALI SHER and others* reported in *2022 P Cr. LJ 1603 Sindh* in the following manner:-

8. The main point for the consideration before this court is that whether section 7 of the *ibid* Act is applicable after taking cognizance and before framing the charge or after framing of the charge and recording evidence. For ready reference section 7 is reproduced as under:-

"7. Eviction and mode of recovery as an interim relief.---(1) If during trial the Court is satisfied that a person is found *prima facie* to be not in lawful possession, the Court shall, as an interim relief direct him

to put the owner or occupier, as the case may be, in possession.

(2)

(3)

(4)

(5)

(6)

9. The perusal of section 7 of the Act manifests that the grant of interim relief is subject to the condition "during trial". The expression during trial has been interpreted by the Hon'ble Supreme Court of Pakistan in a case of Haq Nawaz and others (2000 SCMR 785), wherein it was held as under:-

"From a review of above provisions of the court, it is quite clear to us that taking of cognizance of the case by the court is not synonymous with the commencement of trial in a case. Taking cognizance of case by the court is the first step which may or may not culminate into the trial of the accused. The trial in a criminal case, therefore, does not commence with the taking of the cognizance of the case by the court."

10. It is observed that for taking cognizance of the offence and

investigation under the provision of Illegal Dispossession Act, 2005 a separate provisions are provided under sections 4 and 5 of the Illegal Dispossession Act, 2005 which reads as under:-

4. Cognizance of offence.---

(1) Notwithstanding anything contained in the Code or any law for the time being in force, the 'contravention of section 3 shall be triable by the Court of Session on a complaint.

(2) The offence under this Act shall be non-cognizable.

(3) The Court at any stage of the proceedings may direct the police to arrest the accused.

5. Investigation and procedure.---(1) Upon a complaint the Court may direct the officer-in-charge of a police station to investigate and complete the investigation and forward the same within fifteen days to the Court:

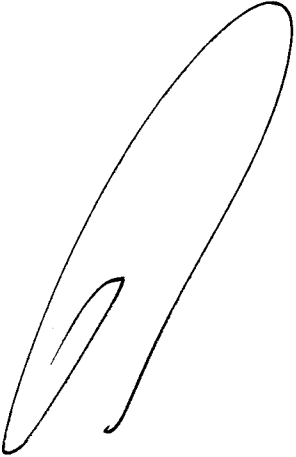
Provided the Court may extend the time within which such report is to be forwarded in case where good reasons are shown for

not doing so within the time specified in this subsection.

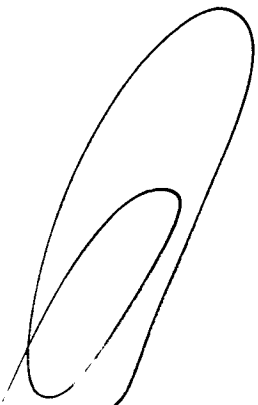
(2) On taking cognizance of a case, the Court shall proceed with the trial from day to day and shall decide the case within sixty days and for any delay, sufficient reasons shall be recorded.

(3) The Court shall not adjourn the trial for any purpose unless such adjournment is, in its opinion, necessary in the interest of justice and no adjournment shall in any case be granted for more than seven days.

*From perusal of the above provisions it is clear that in respect of the "taking cognizance" and "investigation", the Act has its own provisions. However, for the trial and other proceedings for which there is no provision in the Act *ibid* then by virtue of section 9 of the Act, Criminal Procedure Code, 1898 is applicable which provides the procedure for framing of the charge and the said procedure for framing the charge is governed by sections 265(c) and 265(d) of the Criminal Procedure Code, 1898. Therefore, it is mandatory upon the trial court to*

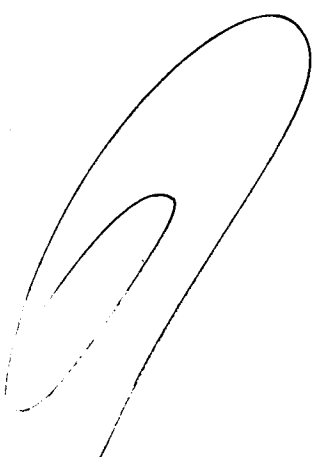


first comply with the provisions of sections 265(c) and 265(d), Cr.P.C. before commencing the trial. It is further observed that before complying section 265 (d), Cr.P.C., the provision of section 265(c), Cr.P.C., is to be complied with, wherein the accused is entitled to be supplied the relevant documents of the complaint in order to enable him to know the exact nature of allegations before he is sent-up to stand the trial. The purpose whereof is to afford the accused sufficient time to study the allegations against him and to prepare his defence if any. In clause (b) of subsection (2), it is further provided that the copies of the complaint or any other document which has been filed by the complainant shall be supplied to the accused free of cost not later than seven days before the commencement of the trial. The supply of the relevant copies of the complaint to the accused before seven days of the commencement of the trial has a direct connotation to the framing of charge, which means that the trial of an accused would not start unless the relevant documents are supplied to him in terms of section 265(c), Cr.P.C. which shall then lead to the framing



of charge under section 265(d), Cr.P.C.

11. It is further observed that under section 265(d), Cr.P.C, the court, after perusing the police report, the complaint and all other documents and statements filed by the prosecution, is of the opinion regarding availability of sufficient grounds to proceed with the trial, it shall frame a charge in writing against the accused. The study of above provisions of law shows that the trial would not start until a period of seven days after supplying the relevant copies to the accused in terms of clause (b) to subsection (2) of section 265, Cr.P.C. is expired and charge is framed, which can be considered as a first step towards the commencement of trial. After the first step as discussed above a second step for recording evidence starts and the condition provided in section 7 of the Illegal Dispossession Act "during trial" come in to the force.



12. It is well settled principle of interpretation law that "If the words of the Statute are themselves clear and unambiguous, no more is necessary to expound those words

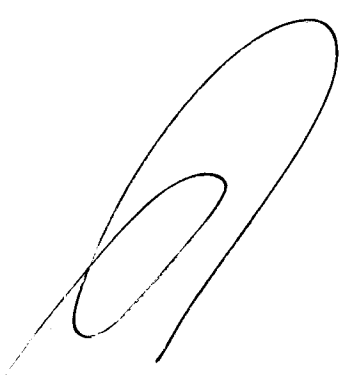
in their natural and ordinary sense, the words themselves in such a case best declare the intentions of legislature", as held in the case of Mumtaz Hussain v. Dr. Nasir Khan and others (2010 SCMR 1254).

Honourable Supreme Court in another case of Ghulam Haider and others v. Murad through Legal Representatives and others (PLD 2012 SC 501), has held as under:-

"Where the plain language of a statute admits of no other interpretation then the intention of the legislature conveyed through such language is to be given its full effect."

13. Admittedly in the present case charge has not been framed against the applicants, even the NBWs issued against them were not served upon some of the applicants as has been reflected from the impugned order, the application under section 7 of the Act was allowed. Relevant para of the impugned order is re-produced as under:-

"After preliminary inquiry cognizance was taken by this court

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and present complaint is on regular file is pending for service/ NBWs against some of the accused persons".

Perusal of the impugned order as re-produced above reflects that the learned trial court has not attended itself to the condition precedent appearing in section 7 of the Act 2005 before passing the impugned order, which is therefore, without lawful authority and not sustainable in the eyes of law.

10. In the present case, as earlier discussed, learned trial court passed the impugned order before commencement of the trial which is certainly violative of the provision of section 7 of the Act, 2005. Therefore, the impugned order is set aside, and; matter is remitted to the learned trial court for its decision afresh strictly in accordance with law applicable thereto.

Announced
13.02.2023


JUDGE

HON'BLE MR. JUSTICE S M ATTIQUE SHAH

(Shahid Ali Court Secretary)