

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Aqeel Ahmed Abbasi

Criminal Petition No.66-K & 67-K of 2024

[Against the Order dated 23-02-2024 passed by the High Court of Sindh
Karachi in Crl. Revision Applications No. 219 of 2021 and 262 of 2022]

Niaz Ahmed & another

...Petitioner(s)

Versus

Aijaz Ahmed & Others.

...Respondent(s)

For the Petitioner(s) : Mr. Shamshad Ali Qureshi, ASC
(*in both cases*)

For Respondent(s) : N.R.

Research Conducted by : Paras Zafar, Judicial Law Clerk

Date of Hearing : 15.07.2024.

JUDGMENT

Syed Hasan Azhar Rizvi, J.- Through these petitions, the petitioners have challenged the judgment dated 23.02.2024 (**“the impugned judgment”**), passed by the High Court of Sindh, Karachi (**“the High Court”**), whereby Criminal Revision Applications No. 219 of 2021 and 262 of 2022 filed by them were dismissed.

2. Facts in brief are that the respondent No. 1 and petitioner No.1 are the real brothers whereas the petitioner No.2 is the wife of petitioner No.1. They had another brother namely Iftikhar (deceased), who was unmarried and disable, residing with the respondent No.1 in the four storey House No.4/94, Muhallah

Shah Faisal Colony, Karachi (**"the subject house"**). Iftikhar had independently purchased and owned the subject house. Iftikhar(deceased) on 30.09.2008 transferred the ownership of the subject house to the respondent No. 1 by virtue of a legally executed registered Declaration and Confirmation of Oral Gift of the subject immovable property during his lifetime. Iftikhar passed away in 2015, meanwhile, respondent No. 1 continued to enjoy peaceful possession of the subject house being its absolute owner. On 07.11.2020, the petitioners, in absence of respondent No.1 unlawfully entered in the subject house by breaking locks, and occupied the fourth floor of the building. Respondent No. 1 sought intervention from law enforcement, which proved ineffective. Consequently, respondent No. 1 filed Complaint (I.D Complaint No. 173 of 2020) under sections 3/4 of the Illegal Dispossession Act, 2005 (**"IDA, 2005"**), alongwith, an application under section 7 thereof before the learned Additional Sessions Judge-III, Karachi East. The application of the respondent No.1 was allowed vide order dated 18.09.2021 passed by the learned Additional Sessions Judge-III, Karachi East whereas petitioners were directed to restore the possession of the fourth floor of the subject house to the respondent No.1. This order was challenged by the petitioners in Criminal Misc. Application No.219 of 2021.

In the meanwhile, petitioners moved an application under section 265-K of the Code of Criminal Procedure, 1898 (**Cr.P.C**) for their acquittal which was dismissed vide order dated 22.10.2022. This order was challenged by the petitioners through a Criminal Revision Application No.262 of 2022. Both those Criminal Revision Applications were subsequently consolidated and dismissed by the

learned Judge of the Sindh High Court through the impugned judgment dated 23.03.2024. Hence, these petitions.

4. The learned counsel for the petitioners contends that the subject house is inherited one as such no proceedings under IDA, 2005 can be initiated against the legal heirs and the proceedings under IDA, 2005 are non-maintainable against petitioner No.1 as he is the brother of deceased Iftikhar Ahmed; that proceedings under IDA, 2005 can only be initiated against Qabza Mafia or Land grabbers but not against family members.

5. We have heard the learned counsel for the petitioners and perused the material available on record.

I. SCOPE AND APPLICABILITY OF IDA, 2005

6. IDA, 2005 is a unique legislation aimed to safeguarding legitimate owners and occupants of immovable properties from being unlawfully or forcefully deprived of their possessions by Illegal occupants or grabbers. This legislation specifies the category of persons who can approach the court of competent jurisdiction for seeking relief i.e. the owner or occupier. Definitions of both these expressions namely “occupier” and “owner” for the purpose of applicability of the provisions of the IDA, 2005, have been provided by clauses (c) and (d) respectively of Section 2 of the IDA, 2005 as reproduced below:-

"2(c) "occupier" means the person who is in lawful possession of a property;

"2(d) "Owner" means the person, actually owns the property at the time of his dispossession, otherwise than through a process of law."

Thus, any person who being lawful owner or lawful occupier of the property has been illegally dispossessed can bring a complaint under the provisions of IDA, 2005.

7. It is settled principle of law that in order to make out a case under sections 3 and 4 of the IDA, 2005, complainant has to *prima facie* establish before the court that he is the lawful owner or was the occupier of the subject property; that accused had entered into or upon the said property without having any lawful authority; that the accused had done so with the intention to dispossess or to grab or to control or to occupy the said property.

8. The contention of the learned counsel that applicability of IDA, 2005 is restricted to the Qabza Mafia or land grabbers is misconceived one as it contradicts the established legal principles. By now it is settled by this court that scope of IDA, 2005 is wide enough to cover any illegal occupant and is not limited to the mafia or Qabza Groups only.

9. This court in the case of Mumtaz Hussain v. Dr. Nasir Khan and others,¹ has elaborately dealt with the scope of IDA, 2005 and ruled as under:-

"Thus section 3 of the Act is very clear and unambiguous and its scope is wide enough to cover the class of persons mentioned in the preamble: Therefore, the preamble of the Act cannot restrict its meaning as such the 'Act would be applicable to dispossession of a person from the property by any person including property grabber, Qabza group or land mafia."

Thus, if act of accused comes within the meaning of any of the words viz. dispossess, grab, control or occupy on the date when IDA, 2005 was promulgated then action can be initiated as provided under Sections 3 and 4 of IDA, 2005.²

10. Moreover, this court in the case of Mst. Gulshan Bibi and others v. Muhammad Sadiq and others,³ has held as under:

¹ Mumtaz Hussain vs. Dr. Nasir Khan and others [2010 S C M R 1254] paragraph 10

² Ibid.,

³ [PLD 2016 SC 769]

“7. From what has been discussed above it is evident that no provision of the Illegal Dispossession Act, 2005 imposes any precondition on the basis of which a particular class of offenders could only be prosecuted. The Act aims at granting efficacious relief to lawful owners and occupiers in case they are dispossessed by anyone without lawful authority. Section 3(1) of the said Act by using the terms 'anyone' and 'whoever' for the offenders clearly warns all persons from committing the offence described therein and when found guilty by the court are to be punished without attaching any condition whatsoever as to the maintainability of the complaint. So all that the Court has to see is whether the accused nominated in the complaint has entered into or upon the property in dispute in order to dispossess, grab, control, or occupy it without any lawful authority. Nothing else is required to be established by the complainant as no precondition has been attached under any provision of the said Act, which conveys the command of the legislature that only such accused would be prosecuted who holds the credentials and antecedents of 'land grabbers' or 'Qabza Group'. It does not appeal to reason that for commission of an offence reported in the complaint filed under the Illegal Dispossession Act, 2005 the Legislature would intend to punish only those who hold history of committing a particular kind of offence but would let go an accused who though has committed the offence reported in the complaint but does not hold the record of committing a particular kind of offence. In our view trial of a case is to be relatable to the property which is subject matter of the complaint, pure and simple. Any past history of the accused with regard to his act of dispossession having no nexus with the complaint cannot be taken into consideration in order to decide whether the accused stands qualified to be awarded a sentence under the Act or not. Once the offence reported in the complaint stands proved against the accused then he cannot escape punishment under the Illegal Dispossession Act, 2005.

8. In view of the above discussion we conclude that in any proceedings initiated under Illegal Dispossession Act, 2005, the issues which fall for decision would be whether the offence against a lawful owner or occupier, as described in the complaint, has taken place and whether it is the accused who has committed it without any lawful authority. Anyone found committing the offence described in Section 3 would be amenable to prosecution under the provisions of Illegal Dispossession Act, 2005 and no past record of the accused needs to be gone into by the court.”

11. The contention of the learned counsel for the petitioner that a civil dispute is pending between the parties therefore IDA, 2005 is inapplicable has been rightly answered by the learned High Court in the paragraph 10 of the impugned Judgment, as reproduced below:-

10. In the present case, it is also the stance of the applicants that a civil litigation in respect of the subject property is pending between the parties as such the impugned order cannot be passed.

Although the suit filed by the applicant was dismissed which till date has not been restored and if for the sake of arguments, it is assumed that the litigation is pending even then it is well settled position of law that merely on the basis of pendency of civil litigation neither the proceedings in criminal matter can be terminated nor the transfer of possession in terms of section 8 of the Act of 2005 can be declared illegal. This controversy was put to rest by the Supreme Court of Pakistan in the case of Shaikh Muhammad Naseem v. Mst. Farida Gul [2016 SCMR 1931] wherein it is held as under:

“5. In the impugned judgment it was also held that where civil litigation with regard to illegal dispossession from immoveable property is pending between the parties, the proceedings under the Illegal Dispossession Act, 2005 cannot be maintained. This finding is also based on the decision of the Lahore High Court in Zahoor Ahmed's case (PLD 2007 Lahore 231), reasoning of which was adopted by three-member bench of this Court in Bashir Ahmed's case (PLD 2010 SC 661). We are of the view that such a finding is also not sustainable in law. Any act which entails civil liability under civil law as well as criminal penalty under criminal law, such as the Illegal Dispossession Act, 2005 then a person can be tried under both kinds of proceedings, which are independent of each other. Once the offence reported in the complaint stands proved against the accused within the confines of the provisions of the Illegal Dispossession Act, 2005 then he cannot escape punishment on the ground that some civil litigation on the same issue is pending adjudication between the parties. No one can be allowed to take law in his own hands and unlawfully dispossess an owner or lawful occupier of an immovable property and then seek to thwart the criminal proceedings initiated against him under the Illegal Dispossession Act, 2005 on the pretext that civil litigation on the issue is pending adjudication between the parties in a court of law. Therefore, irrespective of any civil litigation that may be pending in any court, where an offence, as described in the Illegal Dispossession Act, 2005, has been committed, the proceedings under the said Act can be initiated as the same would be maintainable in law.”

II. CONDITIONS FOR APPLICATION OF SECTION 7 OF IDA, 2005

12. Present case requires determination as to what are the conditions for invocation and application of section 7 of IDA, 2005 and whether, in law, the view taken by the learned trial court and High Court is correct. For the sake of convenience, Section 7 is reproduced below:-

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.

The intent behind section 7 *ibid* is to grant interim relief during the course of the trial.

13. Bare perusal of section 7(1) of IDA, 2005 reveals three principal considerations/conditions; **Firstly**, the jurisdiction conferred thereby is exercisable during the trial only. Thus, interim relief can be granted by the court when trial is still in progress even when the guilt of accused has not been established; **Secondly**, the use of expression “*prima facie*” indicates that court has to only form a *prima facie* opinion and must be satisfied that accused is “*not in lawful possession*” of the property. This requirement is less onerous and distinct from reaching a conclusive finding or determination that the accused has entered the property without lawful authority with intent to dispossess, grab, or control the immovable property as specified in the third and fourth elements of section 3 of IDA, 2005. The use of the expression “*not in lawful possession*” by the Legislature appears to be a deliberate choice reflecting a less stringent criterion to enable interim relief during the trial this is because the offence under section 3 can only be proved/otherwise at the conclusion of the trial; and **Finally**, if the court finds that section 7 is applicable then it is duty bound to provide interim relief specified therein.

Thus, interim order under section 7 of IDA, 2005 can be passed when *prima facie* it is established to the satisfaction of the Court that the accused is in unlawful possession of the immoveable property and complainant is either owner or was in a lawful possession of the immoveable property before dispossession.

14. Now what needs to be determined is whether these conditions stand fulfilled in the present case. Firstly, grant of interim relief is subject to condition "during trial". The expression "trial" has been interpreted by this Court in the case of Hagnawaz and others v. The State and others,⁴ wherein it has been held that:-

"From a review of the above provisions of the Code, it is quite clear to us that taking of cognizance of a case by a Court 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 criminal case, therefore, does not commence with the taking of the cognizance of the case by the Court".

Thus, use of word by the legislature "*during the trial*" in section 7(1) of the IDA, 2005 is of significant importance. There is no cavil to the proposition that taking of cognizance is not commencement of the trial. Trial of a case commences with the framing of the charge against the accused. In the case at hand, charge was framed and case was at the stage of recording of evidence.

Secondly, complainant must satisfy the court that accused is *prima facie* in unlawful possession of the immoveable property. The expression "*prima facie*" is a latin term which means "*its face or at first impression.*" Thus, a *prima facie* case only means that there is ground for proceeding. It is not the same thing as proof which comes later when the Court has to find whether the accused is guilty or not guilty. In the case at hand, learned trial court has rightly concluded that respondent No.1 had *prima facie* case while petitioners could not justify their possession on the fourth floor of the subject house. In view thereof, application under section 7 of IDA, 2005 was rightly allowed and upheld by the trial court and High Court respectively.

⁴ (2000 SCMR 785)

III. SCOPE AND APPLICABILITY OF SECTION 265-K Cr.P.C

15. The legal point requiring determination is whether application of accused under section 265-K of the Cr.P.C was rightly rejected by the Trial court and High Court.

16. Cr.P.C has granted an inherent jurisdiction by virtue of sections 249-A and 265-K to the trial courts to acquit any or all accused at any stage of the judicial proceedings for reasons to be recorded, after providing an opportunity of hearing to the parties.⁵

Section 265-K is reproduced below:-

“265-K. Power of Court to acquit accused at any stage:
Nothing in this Chapter shall be deemed to prevent a Court from acquitting an accused at any stage of the case, if, after hearing the prosecutor and the accused and for reasons to be recorded, it considers that there is not probability of the accused being convicted of any offence.”

(Emphasis supplied)

The bare perusal of the above-provision reveals that law permits the exercise of powers "*at any stage of the case*" without specifying a particular stage. The words "*at any stage*" used in both the sections include the stages before or after framing of the charge or after recording of some evidence.⁶ The only condition required to be fulfilled is the adherence to the principle of *audi alteram partem*, ensuring both parties are heard and afterwards if the court considers that there is no probability of the conviction of the accused, it may take appropriate action.

17. The expressions "*consider*" and "*no probability of conviction*" within the provision are crucial yet undefined in the Cr.P.C. Consequently, resort shall be made to the ordinary meaning of the said phrases.

⁵ Ammad Yousaf v. The State [P L D 2024 Supreme Court 273]

⁶ The State v. Raja Abdul Rehman [2005 SCMR 1544]

The expression "*consider*" has been defined in Oxford Dictionary of English (Second Edition) as follow:

"consider means to think carefully about (something), typically before making a decision."

The word "*probability*" has been defined in Oxford Dictionary of English (Second Edition) in following words:-

"probability means the quality or state of being probable; the extent to which something is likely to happen or be the case".

18. Section 265-K of the Cr.P.C is designed to prevent unnecessary trials when a conviction is unlikely. Thus, available evidence, whether presented or pending, must be carefully evaluated to assess the possibility of conviction. Evidence must be thoroughly examined rather than just briefly reviewed hence conscious application of judicial mind is mandatory for assessment of incriminating material collected during the course of investigation in order to test the same on the touchstone of "*probability*".

19. This court in the case of *The State v. Raja Abdul Rehman*,⁷ has delineated the scope and extent of powers of court under Section 265-K of Cr.P.C as follows:-

"This Court in the case of Bashir Ahmad v. Zafar ul Islam PLD 2004 SC 298 and Muhammad Sharif v. The State and another PLD 1999 SC 1063 (supra) did not approve decision of criminal cases on an application under section 249- A, Cr.P.C. or such allied or similar provisions of law, namely, section 265-K, Cr.P.C. and observed that usually a criminal case should be allowed to be disposed of on merits after recording of the prosecution evidence, statement of the accused under section 342, Cr.P.C., recording of statement of accused under section 340(2); Cr.P.C. if so desired by the accused persons and hearing the arguments of the counsel of the parties and that the provisions of section 249-A, section 265-K and section 561-A of the Cr.P.C. should not normally be pressed into action for decision of fate of a criminal cases.

⁷ [2005 SCMR 1544]

20. It is a settled principle of law that in normal circumstances, full-fledged trial has to be conducted providing fair opportunities to the prosecution to prove evidence. However, departure can be made from the settled practice when "Extraordinary circumstances" are shown.⁸ The extraordinary circumstances means and includes inability of prosecution to collect incriminating evidence during the course of investigation sufficient to record conviction.

21. In order to establish extraordinary circumstances and to prove that there is no probability of conviction, accused mainly relies on any of the following grounds:-

- (i) that even if the facts alleged by the prosecution are taken to be true on their face value, they do not make out/constitute the commission of any offence by the accused⁹;
- (ii) that there is no evidence or incriminating material supporting the alleged offence¹⁰;
- (iii) the evidence gathered is insufficient for a conviction, even if presented at trial¹¹; and
- (iv) the existing prosecution evidence does not support a conviction, and any additional evidence is unlikely to strengthen the case against the accused.¹²

22. In the case at hand, petitioners relied on the ground that proceedings under IDA, 2005 are not maintainable against family members as it is restricted only to the Qabza Mafia and land grabbers and furthermore that there is a civil dispute between the parties hence no probability of conviction of the petitioners. Both the contentions raised by petitioners are against the settled

⁸ Abbas Haider Naqvi and another v. Federation of Pakistan and others [PLD 2022 SC 562]

⁹ Muhammad Taqi v. The State [1991 PCrLJ 963]; Yasin Khan v. The State [1995 PCrLJ 142]

¹⁰ Muhammad Sharif v. Muhammad Hussain [1993 PCrLJ 2053]

¹¹ Ghafooran v. Muhammad Bashir [1977 SCMR 292]

¹² Muhammad Sharif v. The State [PLD 1999 SC 1063]; The State v. Asif Ali Zardari [1994 SCMR 798]

principles of law and they failed to raise or prove any ground within the ambit of section 265-K of the Cr.P.C. Thus, their application was rightly rejected by trial court.

23. For what has been discussed above, we find that impugned judgment is well-reasoned and learned High Court has considered all the legal and factual aspects of the matter correctly. The learned counsel for the petitioner has failed to make out a case warranting any interference in the impugned judgment.

24. Consequently, these petitions, being devoid of merit, are hereby dismissed and leave is refused. However, it is reiterated that the observations made hereinabove are tentative in nature and the learned Trial Court is at liberty to decide the main case/complaint under section 3 and 4 of the IDA, 2005 on its own merits without being influenced by these observations.

25. Above are the reasons of our short order pronounced on even date.

Judge

Judge

Karachi,

15th June, 2024

APPROVED FOR REPORTING

*Paras Zafar, LC**