

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(Judicial Department)

Cr.A. No.129-D/2017.

Muhammad Bilal
Vs.
Ahmad Sultan, etc.

JUDGMENT

Date of hearing: **27.06.2018.**

Appellant: by: **Muhammad Mohsin Ali, Advocate.**

Respondent: by: **Haji Muhammad Shakeel,**
Advocate.

State: by: **Mr. Ilyas Ahmad Damani,**
Advocate.

SHAKEEL AHMAD, J.- The petitioner, namely, Muhammad Bilal, by filing this Criminal Appeal has impugned the order dated 13.11.2017, passed by the learned Additional Sessions Judge-V, Dera Ismail Khan, whereby the complaint filed under Section 3/4 of Illegal Dispossession Act, 2005, was dismissed.

2. Precisely, the facts giving rise to the instant petition are that the petitioner filed a complaint under Section 3/4 of the Illegal Dispossession Act, 2005, against the respondent No. 1 to 3, alleging therein that he alongwith his brother and sisters and mother are owners in possession of

the land in Khasra No. 696, 695 at Mouza Dewala, Tehsil & District Dera Ismail Khan, prior to that Karim Bakhsh predecessor-in-interest of the petitioners was owner of the property in question and after his death the property was inherited by them. The house of the respondents lies towards eastern side of the property in question. On 23.02.2011, the respondents attempted to affix a door at western side of their wall upon which the said Karim Bakhsh (now dead), moved an application before SHO, police station Cantt; DIKhan, whereon, the respondents were restrained by the police. The respondents had purchased adjacent property to subject property, where against the petitioner filed a suit for possession through exercise of right of pre-emption, which is subjudice before the Apex Court. Again, after lapse of two year, the respondents affixed the door. Feeling aggrieved, the father of the petitioners moved an application on 23.04.2013 to DPO DIKhan, which was marked to SHO Cantt, but in vain. It was also alleged that respondents No. 2 & 3 are police officials, who prevailed upon the police department. The respondents taking advantage of their position demolished the walls of *Kocha* and encroached upon

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a portion of disputed land by constructing a new boundary wall. The matter was again reported to the police by the father of the petitioner (now dead), which was again reported to the SHO Police Station, Cantt: but no fruitful result came out. Being aggrieved mother of the petitioner moved an application to the DPO, DIKhan for registration of FIR against the respondent No. 1 to 3, but all her efforts in this respect proved to be a wild goose chase, which necessitated to file a complaint under Section 22-A Cr.P.C., which was dismissed. Therefore, the petitioner filed complaint under Section 3/4 of Illegal Dispossession Act, 2005, which too was dismissed by the learned Additional Sessions Judge-V, DIKhan vide order dated 13.11.2017, hence this petition.

3. It is argued by the learned counsel for the petitioner that impugned order is illegal, without lawful authority and without jurisdiction, that no opportunity was given to the petitioner to prove their case through evidence and the complaint was dismissed summarily, which resulted in gross-miscarriage of justice, therefore, warrants interference; that specific allegation was levelled that the respondents had illegally occupied the land

owned by the petitioner and recording of evidence was necessary, hence an opportunity may be afforded to the petitioner to prove his case and prayed for setting aside the impugned order.

4. Conversely, the learned counsel for the respondents argued that it is settled law that special proceedings were to be conducted under Section 3/4 of Illegal Dispossession Act, 2005, and after receipt of the complaint, the Court had referred the matter to the SHO concerned for investigation, who then submitted his report; that it was a matter of civil nature i.e., dispute over path and no offence under Section 3/4 of the Illegal Dispossession is made out, therefore, the complaint was rightly dismissed summarily; that no ground exist to proceed under the special enactment, and prayed for dismissal of the petition.

5. I have heard the learned counsel for the parties and perused the impugned order as well as the documents appended with appeal and the relevant law.

6. In the private complaint, the petitioner alleged that adjacent to the property in dispute, the property of the respondents is shown to be on the boundary line of Mauza Dewala and Mauza

Muryali. This property was possessed by the respondents, against which father of the petitioner filed a suit for possession through exercise of right of pre-emption, which is now *subjudice* before the August Supreme Court of Pakistan. However, till today demarcation of the properties in question was not carried out. Perusal of the last line of Para No. 2 of the complaint reveals that it was alleged by the petitioner that the respondents have encroached upon the property in question, the relevant portion of the complaint is reproduced as under.

مقامی پولیس نے جائے وقوع کا معرہ ریکارڈ ملا حظہ کیا اور تحریری رپورٹ دی کہ ملزمان نے سات فٹ چوڑائی اور تریاسی فٹ لمبائی اراضی پر ناجائز تجاوز کر کے راستہ بنایا ہے۔

The above allegation clearly indicates that it is an encroachment rather than criminal trespass or unlawful entry with the intention of grabbing the land in dispute or of dispossession of the appellant/complainant. Mere encroachment is something different from Illegal Dispossession as the former does not involve intentional grabbing of the property, therefore, the element of *mens rea* is missing in the instant case; therefore, I found that necessary ingredient of offence under Section 3 of the Illegal Dispossession Act, 2005 were not

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disclosed through the complaint, therefore, it was rightly dismissed by the learned trial Court. In this respect reliance is placed on the case reported as **Waqar Ali and others vs The State through Prosecutor/AG (PLD 2011 SC 181)**, wherein it was held as under:-

*“---Ss. 3 & 5 ---Illegal dispossession---
Quashing of complaint---Word ‘Tajawaz’-
--Effect---Criminal or civil matter---
Distinction---Complaint filed against
accused persons was forwarded to police
for investigation, such assumption of
jurisdiction by Trial Court was assailed
but High Court declined to interfere in
the matter---Validity---Word ‘Tajawaz’
was used by complainant, which could
only be translated as ‘encroachment’
rather than criminal trespass or unlawful
entry with intention of grabbing disputed
land or of dispossessing complainant---
Complainant claimed to have become
aware of encroachment only after
demarcation made by revenue
functionaries---Various investigations
undertaken by police or by local
commissioner could only be treated as
prima facie evidence of a civil dispute
between the parties, which dispute was to
be decided by competent Civil or Revenue
Courts having jurisdiction in the matter---
Trial Court observed that mere
encroachment was something different
from illegal dispossession as the former
did not involve intentional grabbing of
property, however not finding element of
mens rea in complainant, Trial Court
travelled outside the complaint--- Trial
Court was required under Illegal
Dispossession Act, 2005, to act as a sieve
and to filter out those complaints which
did not disclose requisite criminal intent-
-- Courts which were authorized to try
cases under Illegal Dispossession Act,*

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2005, had responsibility to see that persons named in the complaint had case to answer, before they were summoned to face trial---In order for the Court to exercise its jurisdiction by taking cognizance, certain facts must first be held to exist---Facts which constituted an offence under Section 3 of Illegal Dispossession Act, 2005, had to be evident from complaint and documents filed in support thereof---If necessary ingredients of offence under Section 3 of Illegal Dispossession Act, 2005, were not disclosed through complaint and accompanying documents, Trial Court was not justified in exercising jurisdiction and taking cognizance ---Judgment passed by High Court and order passed by Trial Court were set aside by Supreme Court and complaint was dismissed --- Appeal was allowed. [pp. 190, 191, 192, 195] F, H, K & N."

7. It is important to note that earlier, father of the petitioner had brought a complaint under Illegal Dispossession Act, 2005, against the respondents in respect of the same property, which was dismissed by the learned Additional Sessions Judge-II, DIKhan, vide order dated 14.04.2010, and order of the learned Additional Sessions Judge-II was maintained by this Court vide order dated 03.12.2013.

8. For what has been discussed above, I find no substance in the appeal in hand, therefore, the same being bereft of merit is hereby dismissed.

However, the petitioner shall be at liberty to seek his relief by filing civil suit, if so desired.

Announced.
Dt: 27.06.2018.


JUDGE

Minhas/*

(S.B) Hon'ble Justice Shakeel Ahmad


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