

Before Muhammad Hashim Khan Kakar, J

ABDUL QAHIR alias SADIQ and 3 others---Petitioners

Versus

BIBI AISHA and 2 others---Respondents

Criminal Revision No.73 of 2012, decided on 8th June, 2012.

(a) Illegal Dispossession Act (XI of 2005)---

---Ss. 2(c), 2(d), 3, 4 & 7---"Lawful possession"---Proof---Scope---"Owner"---Proof---Scope--- Property was recorded in the name of the deceased-husband of the complainant--- Whether complaint under the Illegal Dispossession Act, 2005, was maintainable under such circumstances---Watchman residing in the property on behalf of the complainant---Whether such possession of watchman qualified as possession by the complainant---Lodging of F.I.R. not a bar to availing remedy under the Illegal Dispossession Act, 2005 and vice versa---Trial Court had allowed the application of the complainant under S.7 of the Illegal Dispossession Act, 2005--- Contentions of the accused persons (petitioners) were that documents referred to and relied upon by the complainant were fake and fabricated; that the complainant was neither occupier nor recorded owner of the property in question, and the complainant not being in possession of the property had no legal status to maintain the direct complaint under the Illegal Dispossession Act, 2005---Validity---For the purpose of proving lawful possession, it was incumbent upon the person claiming such possession to produce certain documents or evidence to prove his possession as lawful possession over the property--- Complainant had produced ownership documents of the property, while the accused persons did not produce any evidence or documents to show that they were either lawful owners or occupiers of the property---Although complainant was not the recorded owner of the property, which stood recorded in the name of her deceased-husband but a Muslim's estate vested immediately in his or her heirs after his/her death and the devolution of property took place immediately through inheritance without any intervention---Although complainant was not in actual and physical possession of the property at the time of the alleged dispossession but her watchmen was residing therein along with his family members, who were forcibly

dispossessed by the accused persons---Possession of the complainant could not be denied in such circumstances---Complainant being the owner and occupier of the property had the legal status to maintain the direct complaint---Lodging of F.I.R. by the wife of the watchman would not act as a bar to avail remedy under the Illegal Dispossession Act, 2005, nor availing of remedy under the said Act would act as a bar from initiating proceedings under any other law---Trial Court had given valid and lawful reasons while exercising its jurisdiction in the matter---Revision petition was dismissed, in circumstances.

Ghulam Ali v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1; Black's Law Dictionary 6th Edn. P.1163 and Surrah Baqarah, Verse No.220 ref.

(b) Illegal Dispossession Act (XI of 2005)---

---S. 7---"Possession"---Connotation---Possession would cover both constructive and physical possession---Word "possession" had to be given the widest possible meaning and it should not be confined to actual or constructive possession, but must be extended to every sort of possession known to law---Word "possession" within the meaning of S.7 of the Illegal Dispossession Act, 2005, must be interpreted in its broadest sense, and apart from physical possession, it must also mean the ownership of, control over the immovable property concerned.

(c) Words and phrases---

----"Possession"---Meaning.

Black's Law Dictionary 6th Edn. P.1163 ref.

(d) Illegal Dispossession Act (XI of 2005)---

---Ss. 3, 4 & 7---"Constructive possession"---Scope---Person who is not in actual possession over a thing, but knowingly has both the power and the intention at a given time to exercise dominion or control over it, either directly or through another person or persons, is in constructive possession of it.

(e) Criminal Procedure Code (V of 1898)---

---S. 403--- Illegal Dispossession Act (XI of 2005), Ss. 3 & 4---Double jeopardy---Scope--- Complaint under the Illegal Dispossession Act, 2005---Lodging of F.I.R./filing of complaint concerning the same property---"Double jeopardy" rule of---Applicability---Scope---Concept of double jeopardy was attracted where the accused had been tried for the offence charged with by a competent court and there was a judgment or order of conviction or acquittal--- Punishment provided in S.3(2) of the Illegal Dispossession Act, 2005, appeared to be in addition to the one that a person might entail under any other law---Mere lodging of F.I.R. and filing of complaint under the Illegal Dispossession Act, 2005, would not attract the rule of double jeopardy.

(f) Illegal Dispossession Act (XI of 2005)---

---Ss. 3 & 4---Constitution of Pakistan, Art.24---Protection of property rights of widows and orphans---Scope---Primary duty of the State and the courts to protect the rights of widows and orphans and they should not be let alone at the mercy of the land grabbers.

Kamran Murtaza, Amanullah Batezai and Rizwan Ejaz for Petitioners.

Muhammad Hassan Mutawakil for the Complainant.

Abdul Karim Malghani for the State.

Date of hearing: 4th June, 2012.

ORDER

MUHAMMAD HASHIM KHAN KAKAR, J.--This criminal revision petition has been directed against the order dated 15th May, 2012 (the "impugned order"), passed by learned

Additional Sessions Judge-I, Quetta (the "trial Court"), whereby an application under Section 7 of the Illegal Dispossession Act 2005 (the "Act of 2005") was allowed.

2. Precisely the facts, giving rise to the instant petition, are that a complaint under Sections 3 and 4 of the Act of 2005 was filed in the court of Sessions Judge, Quetta by complainant/respondent No.1 Bibi Ayesha (the complainant), which was transferred to the file of the trial Court, who had forwarded the same for inquiry to Station House Officer (SHO) Airport Police Station (PS), Quetta and, accordingly, SHO submitted the report, wherein he reported that actually ownership of Bungalow No.112-CC, measuring 203 square yards, Chiltan Housing Extension Scheme, Airport Road, Quetta (the "bungalow in question") vests with the, complainant, who happens to be the widow of late Muhammad Sharif and the petitioners had forcibly occupied the bungalow in question, which was in possession of the complainant. After having gone through the report of SHO, the trial Court vide impugned order has ordered restoration of peaceful possession of the bungalow in question to the complainant as provided under section 7 of the Act of 2005.

3. M/s. Kamran Murtaza, Amanullah Batezai and Rizwan Ejaz, learned counsel for the petitioners, inter alia; contended that the trial Court acted in haste, while deciding the application under Section 7 of the Act of 2005; that the documents referred to and relied upon by the complainant were fake and fabricated; that the complainant was neither occupier, nor recorded owner of the bungalow in question, and furthermore, the complainant being not in possession has no legal status to maintain the direct complaint and the trial Court has fallen in error, while taking cognizance of the offence.

4. On the other hand, Mr. Hassan Mutawakil, learned counsel for the complainant and Mr. Abdul Karim Malghani, Advocate, representing the State, submitted that the complainant is a widow; that after the death of her husband, she, along with her minor son, viz. Muhammad Sharif, had gone to Dalbandin to celebrate Eid vacations and her watchman, namely, Abdul Zahir was residing in the bungalow in question; and that the petitioners, taking advantage of complainant's absence, illegally and forcibly occupied the bungalow in question by dispossessing the watchman and his family members. He also referred to Crime No.162 of 2011 dated 28th November 2011, lodged by Mst. Bibi Najma wife of Abdul Zahir, as at the time of forcible dispossession, she was also subjected to criminal assault with intent to outrage her modesty.

5. I have considered the arguments advanced by learned counsel for the parties and have gone through the material available before me.

6. At the very outset, it would be appropriate to set out some relevant particulars of the present petition. It is complainant's contention, inter alia; that she is widow of one

Muhammad Karim son of Khan Muhammad (the "deceased"), who, during his lifetime, had purchased the bungalow in question in the year 2006 from petitioner No.1 and, thereafter, started residing therein. According to the complainant, the ownership rights were also transferred in the name of the deceased vide letter No.112-CC/Chiltan Housing EXT (QDA)E 4512-15 dated 25th November 2006. As per the complainant, she and the minor are the legal heirs of the deceased, who expired in the year 2010, and on 6th October 2011, taking advantage of her absence, the petitioners illegally and unlawfully occupied the bungalow in question by dispossessing her watchman.

7. I am of the view that the Act of 2005 has been promulgated by the government to protect the lawful possession of lawful owners of the property and possession of lawful occupiers and against illegal dispossession at the hands of land grabbers and land mafia. The Preamble of the Act of 2005 is quoted herein below:

"Whereas it is expedient to protect the lawful owners and occupiers of immovable properties from their illegal or forcible dispossession therefrom by the property grabbers."

The term "occupier" has been defined under subsection (c) to Section 2 of the Act 2005, which means that the person, who is in lawful possession of the property. The definition contained in subsection (2) *ibid* shows that the occupation of the person, who is claiming the said possession, must be in lawful possession over the said property. For the purpose of proving the said fact, it is incumbent upon the person, claiming the lawful possession of the property, to produce certain documents or evidence to prove his possession as lawful possession over the property. The complainant has produced the ownership documents of the bungalow in question, while, on the other hand, on repeated queries from learned counsel for the petitioners no evidence or documents have been shown or produced to show that they were either-lawful owners or occupiers of the bungalow in question within the meaning of subsections (c) and (d) to Section 2 of the Act of 2005. Thus, their claim, being lawful occupiers of the bungalow in question, could not be acceded to.

8. Similarly, the term "owner" has also been defined in sub-section (d) to section 2 of the Act of 2005, which also means that the person, who actually owns the property at the time of dispossession, otherwise than through a process of law. The said definition again shows that the owner, who is claiming the said property, must prove his status as lawful, in case, he has been dispossessed from the said property.

9. It is correct, as pointed out by learned counsel for the petitioners, that the complainant is not recorded owner and the bungalow in question stood recorded in the name of the

deceased, viz. Muhammad Karim, however, while making this submission, learned counsel for the petitioners, seems to have overlooked the settled principle of law that, Muslim's estate vests immediately on his death in his or her heirs and devolution of property takes place through inheritance immediately without any other intervention. In determining the scope of my view, reference can be given to a case of Ghulam Ali v Mst. Ghulam Sarwar Naqvi, PLD 1990 Supreme Court 1, wherein the Hon'ble apex Court observed as under:

"As soon as an owner dies, succession to his property opens. There is no State intervention or clergy's intervention needed for the passing of the title immediately, to the heirs. Thus it is obvious that a Muslim's estate legally and juridically vests immediately on his death in his or her heirs and their rights respectively come into separate existence forthwith. The theory of representation of the estate by an intermediary is unknown to Islamic Law of inheritance as compared to other systems. Thus there being no vesting of the estate of the deceased for an interregnum in any one like an executor or administrator, it devolves on the heirs automatically, and immediately in definite shares and fraction. It is so notwithstanding whether they (the heirs) like it, want it, abhor it, or shun it. It is the public policy of Islamic law. It is only when the property has thus vested in the heir after the succession opens, that he or she can alienate it in a lawful manner.

About the vesting of the property in a Muslim heir, if the State, the Court, the clergy, the executor, the administrator does not intervene, no other body intervenes on any other principle, authority, or relationship--even of kinship. Thus the brothers, the father, husband, son or vice versa, does not or cannot intervene as an intermediary."

10. It is true that on 31st October 2011, the complainant was not in actual and physical possession of the bungalow in question, but it is equally true that at the relevant time, her watchman, namely, Abdul Zahir was residing in the bungalow in question along with his family members, who was forcibly dispossessed by the petitioners. Although the term "possession" has not been defined in Section 2 of the Act of 2005, yet in the ordinary acceptance of the term "possession", the said expression would cover both constructive and physical possession. The word "possession" must be given a widest possible meaning. It should not be confined to possession, actual or constructive, but must be extended to every sort of possession known to law. To constitute "possession" within the meaning of Section 7 of the Act of 2005, it must be interpreted in its broadest sense, and apart from physical possession, it must also mean the ownership of, and control over, the immovable property concerned. According to Black's Law Dictionary Sixth Edition page 1163, the term "possession" means:

"Having control over a thing with the intent to have and to exercise such control. The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name.

Act or State of possessing that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons."

11. Admittedly, on 31st October 2011, possession of the complainant cannot be denied, as at that point of time, her watchman Abdul Zahir was holding the bungalow in question on her behalf. It is by now settled that a person, who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

12. Reverting to the contention of learned counsel for the petitioners regarding maintainability of direct complaint. I am of the considered view that under Sections 3 and 4 of the Act of 2005, two persons have been defined, who can approach the Court of competent jurisdiction for enforcement of said law; (i) owner and the other is (ii) occupier. As already observed, the complainant, being owner and occupier, had the legal status to maintain the instant direct complaint.

13. Besides the above legal and factual position, in Holy Qur'an in Surrah Baqarah Verse No.220, it is the commandment of Almighty Allah to protect the rights of orphans:

"(Their bearings) on this life and the Hereafter. They ask the concerning orphans. Say: "The best thing to do is what is for their good; if ye mix their affairs with yours, they are your brethren; but Allah knows the man who means mischief from the man who means good And if Allah had wished, he could have put you into difficulties: He is indeed exalted in Power, Wise."

14. Similarly, I was also not impressed by the prime contention of learned counsel for the petitioners regarding the provisions of section 403 of the Criminal Procedure Code 1898 (Cr.P.C.). Before this section can be invoked, the following conditions have to be satisfied:

- (i) that the accused has already been tried for the offence charged against him;
- (ii) that the trial was held by a Court of competent jurisdiction; and

(iii) that there was a judgment or order of acquittal or conviction;

The concept of double jeopardy is attracted where the accused had been tried for the offence charged with by a competent Court and there is judgment or order of conviction or acquittal and mere lodging of F.I.R. and filing of complaint would not attract the rule of double jeopardy. Even otherwise, it may be observed that the Act of 2005 is a special law providing remedy to aggrieved person, who has been illegally dispossessed from the property and provides for a new punishment for offence committed under the Act of 2005. The punishment that is providing in subsection (2) of section 3 of the Act of 2005 appears to be in addition to the one that a person may entail under any other law. Apparently, the lodging of F.I.R., that too by the wife of complainant's watchman, under general law will not act as a bar to avail remedy under the Act of 2005 by the petitioners, nor the availing of remedy under the Act of 2005 will act as bar from initiating proceedings under any other law for the time being in force. The record is indicative of the fact that Crime No.162 of 2011 was lodged under sections 337-AD, 354, 447, 448, 452 read with sections 147 and 149 of the Pakistan Penal Code, 1860 (PPC) and the accused persons have been, reportedly, charged under the said Sections of law by the Judicial Magistrate-II, Quetta regarding assaulting Najma, complainant of the aforesaid F.I.R. and the matter is still subjudice before the said Court. The concept of double jeopardy is attracted, where the accused has been tried for the offence charged by a competent Court and there is a judgment or order of conviction or acquittal. Merely lodging of F.I.R. and filing of a complaint under the Act of 2005 will not attract the rule of double jeopardy.

15. It is also mandate of the Constitution of Islamic Republic of Pakistan, 1973 (the "Constitution"), as provided under Article 24 thereof, that "no person shall be deprived of his property save in accordance with law". It is the primary duty of the Courts, as well as, the State to protect the rights of widows and orphans and they should not be let alone at the mercy of land grabbers. Section 7 of the Act of 2005, authorizes the Court to conclude that the person, prima facie, is not in lawful possession; section 7(1) of the Act of 2005 speaks 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."

16. A perusal of the documents placed on record by the complainant, the factum of authenticity of which was also confirmed and verified by the Director Law, Quetta Development Authority (QDA), Deputy Director (ER) QDA and Assistant Director (ER.) QDA, reveal beyond any doubt that the complainant was owner in possession of the bungalow in question, who had been deprived by the petitioners. Even otherwise, the impugned order reveals that valid and lawful reasons have been given by the trial Court, while exercising jurisdiction in the matter. The discretionary order passed by the trial Court

cannot be interfered within the exercise of revisional jurisdiction of this Court, until it can be shown that the same is whimsical, fanciful or arbitrary. Learned counsel for the petitioners have not been able to point out any illegality or infirmity in the impugned order, thus, is immune from interference.

17. For what has been discussed above, I see no force in this revision petition, which is dismissed.

These are the reasons of my short order dated 4th June 2012, announced in the open Court.

M.W.A./42/Bal.

Petition dismissed.