

THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 219 of 2019

Appellant : Anant Kumar Parshotam in person.

Respondents 1 to 9 : Managing Committee of Swami Narain Temple Estate Trust through Mr. Neel Keshav, Advocate.

Respondent 10 : S.H.O., P.S. Mithadar, through M/s. Amina Ansari, Additional Prosecutor General Sindh and Muntazir Mehdi Deputy Prosecutor General.

Dates of hearing : 12-12-2019 & 17-12-2019

Date of decision : 17-03-2020

JUDGMENT

Adnan Iqbal Chaudhry J. - This case has been filed as an appeal under section 8-A of the Illegal Dispossession Act, 2005 from the order dated 13-03-2019 passed by the learned Additional Sessions Judge-III, Karachi South, dismissing the Appellant's complaint while declining to take cognizance of the allegation that the Respondents had illegally dispossessed the Appellant from Tenement No. 153, a premises attached to the building known as the Swami Narain Temple Estate.

2. Under section 8-A of the Illegal Dispossession Act, 2005, an order that is appealable to the High Court is an order made: (a) under sub-section (2) of section 3 of the said Act; (b) under sub-section (3) of section 3 of the said Act; and (c) under sub-section (1) of section 8 of the said Act. The orders passed under sub-sections (2) and (3) of section 3 of the said Act are those where a punishment is handed down; whereas an order under sub-section (1) of section 8 is where a further direction is given for restoration of possession of the property. The order impugned herein is neither of such orders as it is an order dismissing the complaint, and therefore not appealable

under section 8-A of the Illegal Dispossession Act, 2005. However, since the Appellant is in person and of advanced age, in the interest of justice I am inclined to convert this appeal to a criminal revision under sections 435 and 439 Cr.P.C., which is hereby so converted.

3. The background is that the Trustees of the Swami Narain Temple Estate Trust (hereinafter 'the Trustees') filed Suit No. 1387/1999 for evicting one Arjun Kumar from Tenement No. 121 where he was running a lodging and boarding house. Since Tenement No. 121 was found to be a 'hotel' excluded from the purview of the Sindh Rented Premises Ordinance, 1979, the suit was held to be maintainable. On behalf of Arjun Kumar, the suit was contested by one Mangal Sumar who claimed to be his Attorney. The suit was decreed on 24-12-2008 and Arjun Kumar was directed to deliver possession of Tenement No. 121 to the Trustees.

4. From the aforesaid decree, the Trustees filed Execution No. 28/2009 while Arjun Kumar preferred High Court Appeal No. 51/2009. A compromise decree was passed in the appeal when the Trustees offered to compensate Arjun Kumar. Therefore, Mangal, as Attorney of Arjun Kumar, conceded to Execution No. 28/2009 wherein a writ of possession was issued on 13-03-2012 directing the Nazir to take possession of Tenement No. 121 from Mangal and to deliver the same to the Trustees.

5. In May 2012, the Applicant Anant Kumar filed J.M. No. 4/2012 under section 12(2) CPC to challenge the judgment and decree passed in Suit No. 1387/1999 and orders passed in Execution No. 28/2009. He also filed objections to the said Execution. It was his case that he was a tenant of the Trustees in respect of the adjoining Tenement No. 153, and that under the garb of delivering possession of Tenement No. 121, Mangal had also given possession of the Applicant's Tenement No. 153 to the Nazir for onward delivery to the Trustees. Tenement No. 153 was described as a cabin adjoining Tenement No. 121. The Trustees conceded that the cabin was not covered by the decree; that they had intended to receive possession

only of Tenement No. 121; and that the matter of the cabin was between Mangal and the Applicant. On the other hand, Mangal contended that the cabin was part and parcel of Tenement No. 121 and had been in his use as such since long. The Applicant contended that Mangal had taken possession of the cabin unlawfully and in that regard the Applicant had lodged FIR No. 19/2013 under section 448 PPC (house trespass) which was then pending as Criminal Case No. 859/2010 before the Judicial Magistrate. By that time, the Nazir had yet to deliver possession of the cabin to the Trustees. Therefore, vide order dated 06-11-2013 passed in Execution No. 28/2009 the Nazir was directed to hold on to the cabin until orders were passed for delivering the cabin either to the Applicant or to Mangal depending on the outcome of Criminal Case No. 859/2010 pending between the Applicant and Mangal.

6. J.M. No. 4/2012 filed by the Applicant under section 12(2) CPC was dismissed on 29-11-2013. In Criminal Case No. 859/2010 (FIR No. 19/2013 under section 448 PPC), Mangal was eventually acquitted by the Judicial Magistrate vide judgment dated 03-05-2014 on the ground that the Applicant (Anant Kumar) had been unable to prove his prior possession of the cabin. Criminal Acquittal Appeal No. 185/2014 preferred by the Applicant was dismissed by the High Court on 29-04-2015, and leave to appeal against that was also refused by the Supreme Court vide order dated 28-08-2015 passed in Criminal Petition No. 33-K of 2015.

7. In the meantime, in view of its earlier order dated 06-11-2013, and in view of Mangal's acquittal in Criminal Case No. 859/2010, the Executing Court (in Execution No. 28/2009) directed the Nazir on 26-03-2015 to deliver possession of the cabin to Mangal, which was so delivered by the Nazir on 25-04-2015.

8. The Applicant (Anant Kumar) then proceeded to file Complaint No. 878/2015 under the Illegal Dispossession Act, 2005 against the Trustees. At first, the Complaint was dismissed in *limine* essentially on the findings recorded in the acquittal of Mangal.

However, the matter was remanded by the High Court in Criminal Revision No. 160/2015 on the ground that a complaint under the Illegal Dispossession Act could not have been dismissed merely on the ground of an acquittal recorded in another criminal case, and a direction was given to conduct a preliminary enquiry before deciding the complaint.

9. By the impugned order, the Applicant's complaint under the Illegal Dispossession Act has again been dismissed and cognizance refused. The dismissal is essentially on the ground that the matter of possession of the cabin stands determined by order dated 26-03-2015 passed by the High Court in Execution No. 28/2009, and therefore the question of illegal dispossession does not arise.

10. Heard the Applicant, the learned counsel for the Respondents, and perused the record.

That the cabin was Tenement No. 153 which was separate from Tenement No. 121, at least in the books of the Trustees, was a fact not disputed by the Trustees. The record shows that the Trustees had also acknowledged they had let that cabin originally to the Applicant's father, Parshotum, in 1972; that Purshotum had left for India in 1989 leaving a default; and that the Applicant claimed to be a tenant of the cabin in place of his father. But then, even taking the best case of the Applicant, that he was in possession of the cabin at some point in time, the central question remained whether the Applicant had been dispossessed illegally from the cabin to attract section 3 of the Illegal Dispossession Act, 2005.

11. Per the Applicant's complaint under the Illegal Dispossession Act and the statement recorded by him in the said proceeding, he left for India in 1992 leaving the cabin with his brother Suresh; that his stay in India was prolonged; that in 1995, Suresh also left for India leaving the cabin with Mangal along with a Power of Attorney; that Suresh came back to Pakistan in 2001 and took back possession of the cabin from Mangal; that Suresh again left for India in 2005 while placing the cabin under his lock; that Suresh did not

return and passed away in India in 2007; that in the meanwhile Mangal took illegal possession of the cabin; that the Applicant himself came back from India in 2008 and demanded possession of the cabin from Mangal who refused.

Therefore, it was the Applicant's own case that in the year 1995 Mangal was given possession of the cabin by the Applicant's brother Suresh, who was acting as agent of the Applicant. The chronology of events narrated above show that at that time Mangal was also in possession of the adjoining Tenement No. 121 as Attorney of Arjun Kumar where he was running a boarding and lodging house. The Applicant's contention that possession of the cabin was taken back by Suresh from Mangal in 2001, that would have been worthwhile had Suresh been alive to corroborate that. Admittedly, the Applicant was not in Pakistan from 1992 to 2008 so as to have witnessed that possession of the cabin had reverted to Suresh. However, even assuming that to be the case, the complaint made by the Applicant under the Illegal Dispossession Act was not against Mangal, but against the Trustees.

12. The Trustees came into possession of the cabin as follows. To recall, while delivering possession of Tenement No. 121 to the Nazir in satisfaction of the decree, Mangal had also delivered possession of the cabin to the Nazir, which was retained by him pending Criminal Case No. 859/2010 between the Applicant and Mangal. After Mangal's acquittal, the Executing Court directed the Nazir, vide order dated 26-03-2015, to return the cabin's possession to Mangal, which was so done on 25-04-2015. Per the preliminary investigation into the Applicant's complaint, after the Nazir had returned possession of the cabin to Mangal, the latter delivered its possession to the Trustees, and to that effect, letter dated 20-6-2015 addressed by Trustees to S.I., P.S. Mithdar, is also on the record of the R & P.

13. Consequently, when possession of the cabin with the Trustees is through Mangal, to whom possession had been restored by an order of the High Court, which order remains intact, such possession of the Trustees cannot be termed as illegal. In other

words, the very allegation in the Applicant's complaint does not disclose a case of illegal dispossession within the meaning of section 3 of the Illegal Dispossession Act. In *Waqar Ali v. The State* (PLD 2011 SC 181) it has been held by the Supreme Court that in order to constitute an offence under the Illegal Dispossession Act, the complaint must disclose *actus reas* and *mens rea*, and if the facts that constitute an offence under section 3 of the Illegal Dispossession Act are not disclosed through the complaint or documents with it, then the Court can dismiss the complaint straight away. In light of that, I do not see any reason to interfere with the impugned order. Therefore, this revision is dismissed.

JUDGE

Karachi:
Dated: 17-03-2020