JUDGMENT-SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Revision No. 104 of 2023

Fazal Noman Sabir
Versus
Haji Abdul Khaliq Awan, etc.

Appellant By	:	M/s Adil Aziz Qazi and Nasir Mahmood,Advocate.
Respondents By	:	Mr. Mudussar Khalid Abbasi, Advocate Mr. Sardar Khan State Counsel.
Date of Hearing	:	11.03.2024

Arbab Muhammad Tahir, J:- Through the listed revision petition in terms of Section 435 read with Section 439 Cr.P.C, petitioner namely *Fazal Noman Sabir* (son of Fazal Inam Sabir-accused since died) impugns order dated 06.07.2023, passed by the learned Additional Sessions Judge-Islamabad- (East), whereby his application *for abatement of entire proceedings of the case due to death of his father, one of the accused and on account of declaration of two other accused persons as proclaimed offender*, was dismissed, by observing that "*evidence of the complainant is to be recorded in absentia of proclaimed accused persons to preserve the same for using in case of their arrest and they will also be provided right of cross-examination*." It was further observed in paragraph No.14 that:-

> *"Nevertheless, the applicant while continuously watching the proceedings of the complaint himself filed an application to afford him an opportunity of cross-examination to the PWs showing his interest in the disputed property, therefore, his application was allowed vide order dated 09.06.2023 with addition of implicating him as respondent into the petition for two reasons firstly in case of success of the complainant into the complaint, the order for restoration of the possession be passed against him as per dictum laid down in the case of Muhammad Sharif (ibid), secondly he has not denied to be in possession of the disputed property rather shown his keen interest, and his unalienable right with property, therefrom implicated as respondent vide order dated 09.06.2023, against which no relief given by Hon'ble Islamabad High Court, Islamabad. Additionally, his conduct also depicts his*

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overwhelming interest in the complaint while filing multiple applications to rebut the stance of the complainant and strive hard to bring at end the proceedings of the complaint without its logical and despite his father was blamed to be illegal and unauthorized possession of the disputed property, which the petitioner has succeeded."

2- Precisely, subject matter of the lis is "*land/house measuring 17 Marla, bearing Khewat No.780, Khatooni No.1384 to 1448/22, Khasra No. 3237, 4411, 4437, 4452, situated in Mauza Hamak, Zone V, Islamabad*" (**'subject property'**). As per documents available on file, on 19.10.2015, respondent No.1 namely *Haji Abdul Khaliq Awan* (**'complainant'**) filed complaint under Sections 3 & 4 of the Illegal Dispossession Act, 2005 (**'Act of 2005'**) against respondents 2 & 3 namely *Muhammad Aslam Malik* and *Malik Touqeer* (proclaimed offender) and *Fazal Inaam Sabir*, father of the petitioner. Initially, proclaimed offenders and father of the petitioner *Fazal Inaam Sabir* were acquitted in terms of Section 265-K Cr.P.C by the Trial court vide order dated 18.03.2016. The complainant assailed the said order before this Court through W.P. No.1658 of 2016 which, along with connected W.P. No.3853 of 2014 was allowed vide order dated 10.06.2022 and pursuant thereto by setting aside the impugned order, matter was remanded to the Trial Court for decision afresh in accordance with law on the subject after giving due opportunity of hearing to the parties.

3- In post-remand proceedings, respondents 2 & 3 *Muhammad Aslam Malik* and *Malik Tauqeer* absconded and after completing codal formalities, declared proclaimed offenders vide order dated 27.03.2023. Vide the same order, proceedings to the extent of *Fazal Inaam Sabir*, father of the petitioner were abated due to death of said accused person. Vide order dated 26.05.2023, learned Trial Court proceeded to record evidence in terms of Section 512 Cr.P.C in view of the law laid down in case law reported as *2006 SCMR 1287* and *2019 P.Cr.L.J 131*. Thereafter, on 06.06.2023 petitioner filed application praying *to allow him to appear and participate in the proceedings.* The Trial Court allowed the said application vide order dated 09.06.2023. The petitioner then joined the proceedings and was formally charge sheeted on 21.06.2023. Subsequently, on

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04.07.2023, petitioner filed another application with title "*application for abatement of entire proceedings in the case on behalf of Fazal Noman Sabir"*, with prayer "*that the entire proceedings may kindly be dropped due to death of the accused Fazal Inaam Sabir (deceased), the file may kindly be consigned till the proclaimed offenders are arrested and brought before this court in the interest of justice".* The said application of the petitioner was dismissed by the Trial Court vide order dated 06.07.2023, being impugned through the instant petition.

4- Learned counsel argued that since one of the accused, *father of the petitioner*, had died and rest of the two had been declared proclaimed offenders, Trial Court cannot proceed with the complaint as proceedings to the extent of father of the petitioner already stood abated due to his death whereas under the law, trial in absentia cannot be held against absconder accused; that petitioner, in no way is connected with the commission of alleged offence and only joined the proceedings in order to protect his rights; that petitioner cannot be held guilty for the alleged offence; that under the law, provisions of Code of Criminal Procedure are applicable upon proceedings under the Act of 2005 where under in case of death of an accused, appeal shall stand abated in terms of Section 431 Cr.P.C as appeal is always considered continuation of trial, therefore, proceedings in trial would also be abated on the death of the accused. Lastly, learned counsel prays for setting aside of the impugned order.

5- Conversely, learned counsel for the complainant while reiterating the proceedings highlighted in the impugned order prayed for dismissal of the instant petition, whereas the learned State Counsel support the impugned order.

6- Heard, record perused.

7- The Act of 2005 is a special law, promulgated "*to curb the activities of the property grabbers"* and *"to protect the lawful owners and occupiers of immovable properties from their illegal or forceful dispossession therefrom by the property grabbers*". In terms of

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Section 9 of the Act of 2005 "*Unless otherwise provided in this Act, t*he provisions of the Code of Criminal Procedure 1898 (V of 1898) shall apply to proceedings under this Act." The provisions in the Act 2005 which has overriding effect include:-

> ***3. Prevention of illegal possession of property, etc.***_*(1) No one shall enter into or upon any property to dispossess, grab, control or occupy it without having any lawful authority to do so with the intention to dispossess, grab, control or occupy the property from owners or occupier of such property.*
> *(2) Whoever contravenes the provisions of the sub-section (1) shall, without prejudice to any punishment to which he may be liable under any other law for the time being in force, be punishable with imprisonment which may extend to ten years and with fine and the victim of the offence shall also be compensated in accordance with the provision of section 544-A of the Code.*
> *(3) Whoever forcibly and wrongfully dispossesses any owner or occupier of any property and his act does not fall within sub-section (l), shall be punished with imprisonment which may extend to three years or with fine or with both, in addition to any other punishment to which he may be liable under any other law for the time being in force. The person dispossessed shall also be compensated in accordance with provisions of section 544-A of the Code.*
>
> ***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) Where the person against whom any such order is passed under sub-section (1) fails to comply with the same, the Court shall, notwithstanding any other law for the time being in force, take such steps and pass such order as may be necessary to put the owner or occupier in possession.*
> *(3) The Court may authorize any official or officer to take possession for securing compliance with its orders under sub-section (1). The person so authorized may use or cause to be used such force as may be necessary.*
> *(4) If any person, authorized by the Court, under sub-section (3), requires police assistance in the exercise of his power under this Act, he may send a requisition to the officer-in-charge of a police*

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station who shall on such requisition render such assistance as may be required.

(5) The failure of the officer-in-charge of police station to render assistance under sub-section (4)shall amount to misconduct for which the Court may direct departmental action against him.

***8. Delivery of possession of property to owner, etc**._(1) On conclusion of trial, if the Court finds that an owner or occupier of the property was illegally dispossessed or property was grabbed in contravention of section 3, the Court may, at the time of passing order under sub-sections (2) and (3) of that section, direct the accused or any person claiming through him for restoration of the possession of the property to the owner or, as the case may be, the occupier, if not already restored to him under section 7.*

(2) For the purpose of sub-section (1), the Court may, where it is required, direct the officer-in-charge of the police station for such assistance as may be required for restoration of the possession of the property to the owner or, as the case may be, the occupier.

8- Section 3(1) *ibid* stipulates that no one shall enter into or upon any property to *dispossess*, *grab, control* or *occupy* it without having lawful authority to do so with intention to *dispossess*, *grab, control* or *occupy* the property from lawful owner or occupier of such property. The provision, as evident from its plain reading deals with all eventualities of taking control by someone of someone's property, either owner or occupier i.e. *dispossess, grab*, *control* or *occupy* and not only the act of dispossession or grabbing. The first part of the provision is directly connected with the person against whom there was allegation of dispossession or grabbing of property without lawful authority whereas the second limb of the provision stipulates that no one shall enter into or upon any property to control or occupy it without lawful authority to do so with intention to control or occupy the property from owner or occupier of such property. Thus, to the extent of first limb of the provision, in case of death of any person against whom alleged act of dispossession or grabbing had been alleged, complaint would abate, as was done by the trial court vide order dated 27.03.2023. However, to the extent of second limb, complaint would continue as the provision also deals with the situation where anyone enters into or upon any property to

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control or occupy it without lawful authority with intention to control or occupy the property from owner or occupier of such property.

9- Section 7 of the Act 2005 provides that 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. As per Section 8 of the Act, 2005 order for restoration of possession is not confined to the accused but includes *"any person claiming through him"*. Under the said provision, at the conclusion of trial, a direction for restoration of possession may be issued either to accused or any person claiming through him, for the restoration of the possession of the property to the owner or occupier, as the case may be, if not already restored to him under Section 7 of the Act of 2005.

10- The above provisions clearly lay down procedure not only to convict an accused person but also to restore possession of the property to its lawful owner and occupier. The provisions contain in-built mechanism to deal with all types of cases of dispossession of immovable property without lawful authority and retain overriding effect in terms of Section 9 of the Act of 2005.

11- The subject matter in offence under the provisions is related to immovable property and whoever found in control or occupation of said property without lawful authority, may be ordered to restore its possession to the lawful owner or occupier, as the case may be. Not only this, but any person claiming possession through accused may be ordered to restore possession of the property to its lawful owner or occupier in terms of Section 8 of the Act of 2005. It can, therefore, be safely held that under the provisions *ibid*, petitioner cannot escape to face the proceedings on the pretext that as the provisions of Cr.P.C are applicable upon proceedings under the Act of 2005, after the death of accused-his father, it has to abate for the reason that the provisions *ibid* provide for specific procedure to deal with any person, found in possession of the property without lawful authority and said provisions retain overriding effect in terms of Section 9 of the Act of 2005. To accept the plea of the petitioner

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would mean to render in-built mechanism of the above provisions redundant.

12- The petitioner in paragraph 7 of his application for permission to appear and participate in proceedings, has taken a specific stance regarding subject property in terms that "*the petitioner being an interested and necessary party to the disputed land has an inalienable right to cross-examine any deposition made again him or his property*"**.** This specific stance of the petitioner ostensibly reflects his implied control over the property as he claimed it "*his property*", falling within the ambit of Section 3(1) of the Act of 2005 and also falls within the ambit of "*any person claiming through him"* contained in Section 8 of the Act of 2005. Above all, the Constitution of the Islamic Republic of Pakistan, 1973 is the supreme law of the land. Fundamental rights enshrined in Part-II, Chapter-I of the Constitution include "*protection of property rights*" in terms:-

> 24. **Protection of property rights.**– (1) No person shall be deprived of his property save in accordance with law.

13- Adverting to ground contained in paragraph 11 of the memo of instant petition that "*proceedings being conducted by the trial court are in contravention of right of fair trial*", Article 10A of the Constitution stipulates that "*for the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process*." Fair trial and due process is fundamental right of every citizen facing criminal charge. Perusal of record reveals that petitioner was not only allowed to join the proceedings on his own application but also provided with right to cross-examine the witnesses and adduce his version. Not only this, but his application for exemption from appearance was allowed by the Trial Court vide order dated 24.06.2023 subject to appearance of his counsel namely *Mr. Haseeb Hassan Advocate*. In such circumstances, when the petitioner has every right to contest the proceedings, as he had been doing so up till now, there arises no question of infringement of right of fair trial envisaged in Article 10A of the Constitution.

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14- The question left to be determined isthat in the given circumstances what course has to be adopted by the Trial Court. In terms of Section 3(1) of the Act of 2005, no one shall enter into or upon any property to *dispossess*, *grab*, *control* or *occupy* it without having lawful authority to do so with intention to dispossess or grab the property from owner or occupier of said property. The first part of the provision is directly connected with the person against whom there was allegation of *dispossession* or *grabbing* of property without lawful authority whereas the second limb stipulates that no one shall enter into or upon any property to *control* or *occupy* it without lawful authority to do so with intention to control or occupy the property from owner or occupier of such property. Thus, to the extent of first limb of the provision, in case of death of an accused against whom alleged act of dispossession or grabbing had been alleged, the complaint would abate, as was done by the trial court vide order dated 27.03.2023. However, to the extent of second limb, complaint would continue as the provision also deals with the situation where anyone enters into or upon any property to control or occupy it without lawful authority to do so with intention to control or occupy the property from owner or occupier of such property. Moreover, procedure to be followed at the conclusion of trial envisaged in Section 8 of the Act of 2005 stipulates that*at the conclusion of trial, a direction for restoration of possession may be issued either to accused or any person claiming through him, for the restoration of the possession of the property to the owner or occupier, as the case may be, if not already restored to him under Section 7 of the Act of 2005.*

15- Furthermore, irrespective of the nature of proceedings whether criminal or civil, *it is the nature of cause of action which determines its survivability*. Reliance is placed upon case of "*Mst. Itrat Zahida and others v. President ABL and others"* (**2006 SCMR 1287**). In the case of "*Bondada Gajapathi Rao v. State of Andhra Pradesh* (**AIR 1964 SC 1645**), the Supreme Court of India held that:-

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> "But where the appeal is against sentence of fine, the appeal may be permitted to be continued by the legal representatives of deceased appellant accused. The principle on which the hearing of a proceeding may be continued after the death of an accused would appear to be effect of the sentence on his property in the hands of his legal representatives. If the sentence affects that property, the legal representatives can be said to be interested in the proceedings and allowed it to continue."

16- Reliance is also placed upon judgment rendered by coordinate Bench of this Court in the case of "*Muhammad Sharif and another v. Muhammad Sadiq and another*" (**2019 P.Cr.L.J 131)**. On the subject, it was held that:-

> "19. The above referred provision of Cr PC relates to immovable property, when question of breach of peace is subjudice before a Magistrate and the person, who is in illegal possession of property, if dies during the proceedings then section 145(7) Cr.P.C comes to meet the situation but in cases of Illegal Dispossession Act, the accused has to be convicted for that matter and the court has to pass the order of restoration of property, in such case, if the accused dies during the appellate proceeding, the claim survives, however, to the extent of conviction, the matter is over."

17- So far as objection regarding trial in absentia is concerned, section 512 Cr.P.C. provides that if an accused person has absconded and there is no immediate prospect of arresting him, the Court competent to try such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. Any such depositions may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged. The provision is self-explanatory whereunder trial court is vested with authority to record evidence in absence of absconding accused. On the aspect the view expressed by the trial court on the touchstone of the case law on the subject does not warrant any review. Even otherwise, as observed above, trial / proceedings in complaint under the Act of 2005 are to be conducted in letter and spirit of the provisions particularly section 3, 7 and 8 of the Act of 2005, which entail in-built mechanism to conduct proceedings and to conclude the same in due course.

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18. In view of above, impugned order appears to be in accordance with law on the subject. The instant petition being devoid of merits is, therefore, **dismissed**. It is clarified that matter to the extent of conviction of petitioner's father is over on account of his death, proceedings to the extent of absconding accused shall be carried out in accordance with the provisions on the subject. However, proceedings in the complaint to the extent of restoration of possession in terms of Section 3, 4 and 8 of the Act of 2005, shall continue in the light of evidence on record, on its own merits, without being influenced by any observation recorded hereinabove which is restricted and shall be constructed to the extent of maintainability of complaint on the touchstone of provisions of the Act of 2005. The matter pertains to the year 2019. The learned Trial Court shall make every endeavor to decide the same expeditiously in term noted in order dated 09.06.2023. Copy of this Judgment shall be transmitted to the Court concerned for compliance.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in the open Court on _____2024

JUDGE

A.R.Ansari

APPROVED FOR REPORTING

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