

Judgment Sheet**PESHAWAR HIGH COURT, ABBOTTABAD BENCH**

JUDICIAL DEPARTMENT

Writ Petition No.245-A/2011**Ali Bahadur... (Petitioner)****Versus****Khan Bahadur etc... (Respondents)****Present:** Mr.Sajjad Ahmad Abbasi, Advocate for petitioner.

Mr.Abdur Rehman Qadir, Advocate and Haq Nawaz, Advocate for respondents.

Date of hearing: **19.09.2024.****JUDGMENT**

MUHAMMAD IJAZ KHAN, J.- Through the instant petition filed under Article 199 of The Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged the judgment of learned Additional Sessions Judge-II, Haripur dated 24.03.2011 whereby the complaint filed by the present petitioner was dismissed and respondents No.1 and 2 were acquitted.

(Jamil)

(SB) *Hon'ble Mr.Justice Muhammad Ijaz Khan.*

2. Precisely, the facts of the case as per contents of instant petition are that there was a water-course (*Kathi*) and path situated in Khasra No.828 which is the ownership of *Mahazi Malkan* including the petitioner which was blocked by the respondents No.1 and 2 through raising construction thereon after taking possession of the same. In the wake, thereof the petitioner instituted a complaint against them under section 3 of Illegal Dispossession Act, 2005 (hereinafter called **The Act of 2005**). The learned trial court referred the matter to the local police for inquiry and the report was submitted accordingly. Thereafter the respondents were summoned, charge was framed and served upon them to which they pleaded not guilty and claimed trial. In support of his case, the complainant produced as many as five witnesses. Thereafter, statements of acquitted respondents were recorded under section 342 Cr.PC whereby they did not want to appear as their own witness on oath under section 340(2) Cr.PC, however, they produced defence

evidence in shape of DW-1 (Muhammad Akhtar SOK) and DW-2 (Muhammad Parvez Patwari Halqa). After hearing arguments of both the parties, the learned trial court dismissed the petitioner's complaint and acquitted the respondents No.1 and 2 of the charges levelled against them vide impugned order and judgment dated 24.03.2011 which order and judgment has now been challenged by the petitioner through the instant petition.

3. Arguments of learned counsel for the parties were heard in considerable and record perused with their able assistance.

4. At the very outset, learned counsel for the petitioner states that since the acquitted respondent No.1 namely Khan Bahadur has died during the pendency of this writ petition, therefore, his complaint to bring home punishment against the aforesaid acquitted respondent would abate, however, the impugned order could be set aside to the extent whereby

even restoration of the disputed property has not been ordered, therefore, for the restoration of the possession of the disputed property within the meaning of section 8 of **The Act of 2005** the instant case would proceed.

5. Learned counsel representing the acquitted respondents states that once the accused/respondent now dead was acquitted of the criminal charge then even an order for restoration of possession could not be made. In view of the above controversy, the only question before this Court was that as to whether after the death of nominated accused who has been acquitted in the complaint from criminal charge, an order for restoration of possession could be made or not? In order to dilate upon the legal proposition, it would be relevant to reproduce below section 3 and section 8 of **The Act of 2005**:

“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 subsection (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 subsection (1), 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.

Section 8.

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 subsection (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.

The combined perusal of the aforesaid provisions would show that for the criminal charges if an accused person is proved to have entered upon any property and has dispossessed the owner/occupier from the same then he shall be punished for a term as mentioned in subsection (2) of section 3 of **The Act of 2005**. Similarly, an accused person could also be convicted for a sentence under subsection (3) of section 3 of **The Act of 2005** on the ground mentioned therein. The plain and simple language of section 8 of **The Act of 2005** would also show that the Court who is seized with the complaint under **The Act of 2005** at the time of passing order under sub-sections (2) and (3) of section 3 of **The Act of 2005**, may direct the accused for restoration of the possession of the property to the owner/occupier/complainant, therefore, the combined effect of both the above sections of law would be that if a nominated accused is convicted under subsection (2) or subsection (3) of section 3 of **The Act of 2005** then in such an eventuality, Court would

also restore possession to the complainant/ owner and as against this if an accused person has not been convicted and punished under section 3 of **The Act of 2005** then in such an eventuality an order for restoration of possession of the property could not be ordered. The words “at the time of passing order under sub-sections (2) and (3) of that section” and “direct the accused for restoration of the possession of the property to the owner” are of prime significance and they clearly demonstrate the intention of the Legislatures that the restoration of the possession of property to the complainant/owner could only be made if an accused person is convicted under sub-sections (2) and (3) of section 3.

6. It is also relevant to mention here that initially there was no provision regarding filing of an appeal against an order passed by trial Court either under subsection (2) or subsection (3) of section 3 or an order passed under subsection (1) of section 8 of **The Act of 2005**, however, through an Act No.XXVIII of 2017, section **8-A** was

inserted in **The Act of 2005** and the right of appeal was provided to a person who has been convicted and against whom an order for restoration of possession has been passed. The said section of law i.e. section **8-A** being relevant in the present controversy is also reproduced below:

“8-A. Appeal.- Any order made under sub-section (2) and sub-section (3) of section 3 and sub-section (1) of section 8 shall, within thirty days of the order, be appealable before the High Court.”

The aforesaid section of law would manifestly show that a word “**and**” has been used between “**Any order made under sub-section (2) and “sub-section (3) of section 3” and “sub-section (1) of section 8”** and as under the established jurisprudence of interpretation of statute the word “**and**” is always used as a conjunctive, while “**or**” is used as disjunctive which further supports the stance of learned counsel for the accused/respondents that conviction under subsection (2) or subsection (3) of section 3 of **The Act of 2005** is a condition

precedent for passing an order under subsection (1) of section 8 of **The Act of 2005**. In a case¹ Supreme Court of Pakistan has observed that there can be no escape from the fact that in common parlance '**and**' is used in the conjunctive sense, while '**or**' is employed in the disjunctive sense.

7. It is also by now settled jurisprudence that where language of the Statute is clear and unambiguous, the law enunciated therein should be interpreted by assigning it the plain and ordinary meaning. The Supreme Court of Pakistan in recent cases² has observed that when the intent of the legislature is manifestly clear from the wording of the statute, the rules of interpretation require that such law be interpreted as it is by assigning the ordinary English language and usage to the words used, unless it causes grave injustice which may be irremediable or leads to absurd situations which could not have been intended by the legislature. Only then, the Court

¹ PLD 2019 Supreme Court 201

² Government of Khyber Pakhtunkhwa and others v. Abdul Manan and others (2021 SCMR 1871), 2022 SCMR 472 and 2023 SCMR 1502.

may see the mischief which the legislature sought to remedy and interpret the law in a manner that meets the intent of the legislature. We are therefore of the view that the conclusion to this effect reached by the High Court is quite erroneous and unsustainable in law.

8. The question as to whether in absence of any order of conviction under subsection (2) or subsection (3) of section 3 of The Illegal Dispossession Act, 2005 an order for restoration of possession under subsection (1) of section 8 of **The Act of 2005** could be passed came before this Court in the case of Syed Zanon Mian³ where para No.6 being relevant is reproduced below:

“6. It is manifest from section 8 read with subsections (2) and (3) of section 3 of the Act that the Court in case of conviction of the accused can pass the order for restoration of the property but in the present case the learned trial Court, after recording evidence in the case, has acquitted the accused on one hand and on the other hand has ordered for restoration of possession of the land to complainant. In other words, conviction is sine qua non for handing over the possession under section 8 of the ibid Act. Thus, findings of the learned trial Court are not in

³ Syed Zanon Mian and 4 others v. Mst.Misslunisa (2022 YLR 2252)

consonance with the above referred provisions of the Act as well as section 367, Cr.P.C. requiring the Court to give specific findings for determination of a criminal controversy. So, the judgment of the learned trial Court, being illegal, is liable to be set aside.”

9. In view of the above, the answer to the above question is that where an accused person has been acquitted from the charges and no order of conviction has been passed against him under sub-sections (2) and (3) of section 3 of **The Act of 2005** then an order for restoration of the property under subsection (1) of section 8 of the *ibid* Act could not be passed.

10. Even otherwise, on merits of the case, the instant complaint of the petitioner was liable to be dismissed as the same was filed under **The Illegal Dispossession Act, 2005**, which aims at to safeguard and protect the private ownership/possession of immovable property and not joint/common ownership/occupation as the case in hand where the subject property is admittedly “*Ghair Mumkin Kathi*” (Khasra No.828) and as per “Wajib-ul-Arz” for the year 1947-1948 the

same would remain ownership-in-possession of “*Mahazi Malkan*” i.e. the petitioner and other co-owners including the nominated accused to enjoy their right of irrigation and right of way, and as such the same cannot be claimed by the petitioner as his exclusive ownership-cum-possession entitling him to seek any remedy under **The Act of 2005**, therefore, the learned trial court has rightly dismissed complaint of the petitioner and consequently acquitted the respondents No.1 and 2 of the charges levelled against them.

11. In view of above, this writ petition being bereft of any merits is hereby dismissed. Needless to mention that right of irrigation and right of way attached to the subject property being “*Ghair Mumkin Kathi*” and every violation thereof would give rise to a fresh cause of action to all the co-owners for redressal of their grievance(s) under other relevant laws.

ANNOUNCED.
19.09.2024.

(Jamil)

J U D G E

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(SB) *Hon’ble Mr. Justice Muhammad Ijaz Khan.*