

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal No. 136 of 2014

PRESENT :**MR. JUSTICE ARSHAD HUSSAIN KHAN*****Basar & others V/s. The State and another***

Appellants: Basar & others
through M/s. Noor Wali Khan & Dhani Bux Otho
Advocates.

Respondent No.1: The State through Mr. Abdullah Rajput, State counsel

Complainant: Fakhar-ul-Jamil
Mr. Muhammad Imran Advocate

Date of hearing 19.12.2016

JUDGMENT

ARSHAD HUSSAIN KHAN, J. The present criminal appeal has been preferred against the judgment dated 23.4.2014 passed by IInd Additional Sessions Judge Thatta, whereby the appellants were convicted under Section 3(2) of the Illegal Dispossession Act, 2005 to suffer R.I. for two years each with directions to pay Rs.25,000/- each as compensation to the complainant. In case of default in payment of compensation the accused persons shall suffer three months R.I. more.

2. Brief facts arising out of the present appeal are that complainant is the owner in possession of agricultural land bearing Survey No.617/1-A, 617/1-D and 617/1-C total measuring 1-20 acres, situated at Deh Badipur Taluka Jati, District Thatta [**subject land**]. The family members of the complainant also hold 280 acres of land in the surrounding and adjacent to above survey numbers. The survey Nos.617/A, 617/1D and 617/1C are situated by the side of road leading from Sujawal to Chuhar Jamali, which is being owned/possessed and cultivated by the complainant with the help of

his son and local Haries. It is the case of complainant that in the last days of May, 2012 appellants namely (i) Basar, (ii) Moosa and (iii) Babu all sons of Qasim by caste Otho, who are allegedly the land grabbers and also belong to a group of land mafia have illegally grabbed the above land and occupied the same without having any lawful authority and thereby dispossessed the complainant from the said land. The complainant filed application before the Deputy Commissioner, Thatta. The report was called from Assistant Commissioner and Mukhtiarkar, Thatta, Jati after getting the site visit reported that the appellants have forcibly dispossessed the complainant and occupied his land.

3. The statement under Section 200 Cr.P.C. of the complainant had been recorded who reiterated the contents of his complaint the reports were called for from SHO PS Mureed Khoso and Mukhtiarkar Jati who supported the contention of the complainant. Inquiry under Section 3 and 4 of the Illegal Dispossession Act, 2005 was made bailable warrants were issued to the accused. Copies under Section 265-C, Cr.P.C. were supplied to the accused and Charges against them were framed for commission of alleged offence to which the appellants had pleaded not guilty and claimed to be tried.

4. The complainant in support of his case examined himself as **Exh.03** and produced (i) Village Form VII (**Exh.3/A**), (ii) copy of Sketch (**Exh.3/B**), (iii) Report of Mukhtiarkar Jati (**Exh.3/C**) and (iv) report of SHO PS (**Exh. 3/D**), PW-3 Muhammad Ali, Mukhtiarkar Jati District Thatta as Exh.04, PW-3 Asif Ahmed SHO Mureed District Sujawal as Exh.05 who produced sketch (**Exh.5/A**) and report (**Exh.5/B**). Whereas the statement of Appellants were recorded under Section 342, Cr.P.C. wherein they stated that they are innocent and have been falsely implicated by the complainant who himself encroached upon their land of Survey No.87 to which application was moved to Mukhtiarkar and Deputy Commissioner but no action was taken by them against the complainant.

5. The learned trial Court determined the following two issues:-

1. Whether in the last days of May, 2012 accused Basar, Moosa and Baboo without having any lawful authority or title or right, illegally encroached / dispossessed the complainant from his land bearing Survey Nos.617/1A, 617/1D and 617/1C total admeasuring 01-20 acres situated in Deh Badipur Taluka Jati District Thatta?
2. What should the judgment be?

After recording of the evidence the learned trial Court convicted and sentenced the appellants vide its judgment dated 23.04.2014, which is impugned in the instant proceedings. Relevant portion of the impugned judgment is reproduced as under:-

“18. I have perused the evidence in the light of submission made by the learned counsel for the parties. The learned defence counsel for the accused persons has not put a single question/suggestion from the complainant regarding the illegal dispossession by the accused persons from the land in question. The contentions of learned counsel for complainant that the land, which has been occupied by the accused persons are situated in their land main road of sujawal and Chuhar Jamali and due to this they are facing inconvenience. The evidence of Mukhatiarkar and SHO both officials witnesses have supported the contentions of complainant regarding the illegal encroachment land belonging to the complainant. The learned defence counsel for accused did not seek any contradiction from the complainant regarding disputed land. The report of Mukhtiarkar has been produced as Ex.3/C, wherein it has categorically mentioned that the land in question is illegally encroached by accused persons.

19. Both the official witnesses have deposed before this Court that the land in question is mutated in the name of complainant, whereas, the accused persons have illegally occupied the land bearing S.Nos. No. 263, 617/1-A, 617/1-C, 617/1-D which is owned by complaint Fakhar-ul-Jameel son of Muhammad Ishaque Shaikh and such entry is available on their record. PW SHO Asif Ahmed has stated that he made inquiry from the local people and they disclosed to him that the disputed land situated in S.No. 617/A, 617/C and 617/D is originally owned by the complainant Fakhar-ul-Jameel. The learned defence counsel for the accused persons did not seek any contradiction from both officials witnesses in respect of illegal dispossession of disputed land in favour of the accused persons.

20. The learned defence counsel has failed to shatter the evidence of complainant and the official witnesses in their cross-examination by putting question nor brought any material contradictions regarding the illegal dispossession of the complainant from the land in question by the accused persons from S.No. 617/A, 617/D and 617/C total admeasuring 01-20 acres situated in deh Badipur, Taluka Jati District Thatta. The accused persons have stated in their statement u/s 342 Cr.P.C. that the complainant himself encroached their land situated in survey No.87 and they moved such application to Mukhtiarkar and Deputy Commissioner but no action was taken by them. The

accused persons have failed to produce any documentary evidence in support of their contention along with their statement u/s 342 Cr. P.C. Even otherwise they have denied to examine them on oath u/s 340 (2) Cr. P.C. and failed to examine any witness of locality in their defence in support of their version, which clearly shows that they do not have any substantial evidence viz any title documents or oral evidence regarding their contentions in respect of the possession of the disputed land. The plea of the accused persons that the complainant has encroached upon their land situated in survey No.87 but the accused persons have not produced any evidence which shows that the complainant has made any encroachment over the land of accused persons. The purpose of the illegal Dispossession Act, 2005 is to protect the right of possession of lawful or occupier and not to perpetuate the possession of illegal occupants. In this regard I sought strength from the case law relied upon by the learned defence counsel reported in PLD 2007 S.C. 423.

21. The complainant has produced sufficient material and documents in his support, the report of Mukhtiarkar and SHO also supported the version of complainant; hence I am of the humble opinion that the complainant has established his case regarding the offence of illegal Dispossession Act, 2005 against the accused persons.

22. In view of the above circumstances, and discussion, I am satisfied that complainant has established his case beyond the shadow of doubt against the accused persons, therefore, I answer point No.1 as proved.

Point No.2

23. Since the accused persons are not habitual offenders, therefore, I am taking lenient view being first offenders and convict accused Bassar son of Qassim (2) Moosa s/o Qassim and (3) Babu son of Qasim all by cast Otho under Section 3(2) of the Illegal Dispossession Act 2005 for the alleged offence to suffer R.I for two years each with directions to pay Rs.25,000/-each as compensation to the complainant. In case of default in payment of compensation of Rs.25000/- each, the accused persons shall suffer three months R.I more. Accused persons are present on bail, their bail bond stands cancelled and surety discharged. They are taken into custody to serve out sentence awarded herein above to them today by this Court. Furthermore, under Section 8 of illegal Dispossession Act 2005 SHO Jati/Mureed Khoso is directed to restore the possession of subject land to the complainant after proper demarcation under the supervision of Mukhtiarkar (Revenue) Jati after expiry of appeal period.”

6. Learned counsel for the appellants during the course of his arguments while reiterating the contents of memo of appeal has contended that the impugned judgment is against law and facts both. Further contended that the appellants have no previous criminal record and are innocent and have been falsely involved in the case with malafide intentions and have no concern whatsoever with the

commission of alleged offence. It is also contended that learned trial court while passing the impugned judgment misread the evidence and as such acted with material irregularities and illegalities in exercise of jurisdiction vested in it. Further contended that the learned trial Judge seriously erred in shifting the burden of proof on the appellants/accused persons for the purpose of proving their innocence whereas such a burden always lies on the prosecution and never shifts on the accused. It is also contended that the learned trial court while passing the impugned judgment has failed to consider that the version given in the complaint was never corroborated through any circumstantial evidence. Furthermore, the Prosecution witnesses so produced in the case clearly improved their version to strength the prosecution case. The learned trial judge has also failed to apply his judicial mind to consider that when a witness improves his version to strengthen the prosecution case his improved statement subsequently made in court cannot be relied upon as this affect the credibility of the witness making the evidence doubtful in nature and the veracity of such witness, being doubtful, cannot be relied upon. Further contended that the learned trial Judge not only ignored the deliberate dishonest improvement but on the contrary tried to justify the same. Per learned counsel wherever doubt has arisen, the same erroneously resolved in favour of the prosecution contrary to the established principles of law that the benefit of doubt always given to the accused. Further contended that the case law cited by learned counsel for the appellants completely ignored by the learned trial Judge. It is also contended that the conviction of the appellants is based upon conjecture, surmises and totally unsatisfactory evidence, such conviction of the appellants is therefore, not sustainable in the eye of law. Learned counsel lastly argued that the instant appeal may kindly be allowed and the appellant be acquitted from the case. Learned counsel in support of his stance has also relied upon the following case law;

1. **PLD 2010 SC 661***(Bashir Ahmed v. Additional Sessions Judge, Faisalabad and others)*

By virtue of recent pronouncement of larger bench of the Hon'ble Supreme Court in the case of Mst. Gulshan Bibi and others v. Muhammad Sadiq reported in PLD 2016 Supreme Court 769 the case of Bashir Ahmed does required consideration.

2. **2001 P.Cr.LJ 1312 (Muhammad Jumman v. The state)**

It is held in the case that one single circumstance in a criminal case leading towards the real doubt is sufficient to acquit the accused on benefit of doubt.

3. **2004 SD 258 (Muhammad Rafiq v. The state)**

In this case scope of Article of 71 of Qanun-e-Shahadat are discussed. It is held that evidence of witness who neither heard nor saw anything nor perceived anything would not come within ambit of Art. 71. Such evidence would not be admissible.

4. **2009 SCMR 230 (Muhammad Akram v. The State)**

It is held in the case that for giving the benefit of doubt it is not necessary that there should be many circumstances creating doubts, single circumstances, creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefit, not as a matter of grace and concession, but as a matter of right.

6. **2004 YLR 216 (Gul Muhammad alias Guloo v. The State)**

It is, inter alia, held that where despite availability of independent witnesses, none of them was produced to act as witness of incident, the presumption would be drawn that had they been produced, then they would not have supported the story of the incident of the case, as narrated by the prosecution, and that benefit of such circumstances is necessarily to be warded to the accused. It is also held that benefit of even single doubt created by defence in the prosecution case would go to accused and he need not to show that the prosecution case suffered from more than one doubts.

7. **PLD 2005 SC 63 (Pir Mazharul Haq and other v. The State)**

It is held in the case that where the prosecution has failed to discharge the onus of proof by adducing cogent, concrete and forthright evidence the presumption of guilt would not arise against him and thus the question of conviction would not arise. It is also held that in no circumstances, the defence should be expected to prove the accusation.

8. **PLD 2007 Lahore 231 (Zahoor Ahmed and others v. The state and others)**

This case was upheld by the Hon'ble Supreme Court in the case of Bashir Ahmed (PLD 2010 SC 661), however, since the case of Bashir Ahmed (supra) has already been declared as not good law by the larger bench of the Hon'ble Supreme Court in the case of Mst. Gulshan Bibi (Supra) therefore, the case of Zahoor Ahmed does not required consideration.

7. Conversely, learned counsel for respondent No.2/complainant after oral submissions has also filed synopsis/written arguments wherein he has vehemently controverted the stance of the appellants in the present appeal. Learned counsel while rebutting the above said arguments has urged that the complainant is the owner of subject land. It is also urged that the appellants being land grabbers, belong to a group of land mafia, are illegally and unlawfully occupied the said agricultural land of the complainant in the month of May 2012.

It is also urged that against the criminal act of appellants, the complaint filed criminal complaint under section 3, 4 and 8 of illegal Dispossession Act, 2005 before the Court of IInd Addl. District and Sessions Judge, Thatta and the said complainant was finally decided by the learned judge on 23.04.2014, which judgment is impugned in the present proceedings. Learned counsel also argued that the facts of the case has been evaluated by the learned trial Court and after proper appraisal of the evidence available on record passed the judgment impugned in the instant proceedings. He further argued that the respondent/complainant has proved his ownership by the title documents and report of Mukhtiarkar is also in favour of the respondent/complainant. It is also argued that in the case of illegal dispossession there is no need to produce any witness to prove the ownership of the complainant. It is also argued that *Haries* were belonged to *Otho* caste hence they did not come forward to give evidence against the appellants/accused as the appellants are also belong to the same caste. It is further argued that the defence counsel during the cross-examination failed to ask any question regarding application which was submitted to the Deputy Commissioner prior to filing of the criminal complaint, hence the stance of the respondent/complainant gone un rebutted. Learned counsel further argued that the impugned judgment is within the four corners of law and hence, doesn't warrant interference by this court in the instant proceedings. Learned counsel in support of its stance relied upon the following case law:

2010 MLD 1920 (*Muhammad Ali v. Abdul Haq and others*)

In this case it is held that the complainant had made out a prima facie case of having invoked the provisions of Illegal Dispossession Act, 2005 as complainant had produced the title documents along with the registered sale deed, which was not only created a legal presumption of ownership of the land in question, in favour of the complainant, but also reflected the confirmation of possession of the complainant on the land, resultantly the criminal revision filed by Applicant/accused was dismissed.

8. Learned APG (state counsel), however, opposed the contentions of the learned counsel for the respondent/complainant and argued that the impugned judgment is suffered from material illegalities as the same is not based upon proper appreciation of

evidence available on record and further the learned trial judge while passing the impugned judgment has failed to apply his judicial mind and the law hence, the judgment impugned herein is not sustainable in law and liable to be set aside.

9. I have heard learned counsel for the parties as well as learned APG and with their assistance perused the record.

10. From the perusal of the record, it appears that the respondent No.2/complainant on 04.06.2012 filed a complaint before the Deputy Commissioner Thatta, against the appellants for taking over illegal and forcible possession of subject land. For the sake of ready reference relevant portion of the said letter is reproduced as under:

“I Date: 04/06/212
The Deputy Commissioner
District Thatta
Sindh.

SUBJECT: COMPLAINT FOR TAKING LEGAL ACTION AGAINST BASAR OTHO, BABO OTHO & MOOSA OTHO ALL SONS OF QASIM OTHO FOR TAKING ILLEGAL AND FORCIBLY POSSESSSION OF MY AGRICULTURAL LAND SURVEY NO.617/1A, 0.2 GUNTA, 617/1D 0.10 GHUNTA, 617/1C 0.30 GHUNTA, HAFIZ ISHAQUE SHAIKH FARMS DEH BAHADUR TALUKA JATI, DISTT. THATTA.

Respected Sir,

It is respectfully submitted that I am the sole owner and occupant of the subject land for the last 40 years and I am paying all the government dues against the subject land regularly.

That about 5 days ago, the subject culprits entered into my land along with 30 to 40 persons equipped with arms, and in my absence, they threatened and beaten my Harris and forcibly grabbed my subject land and started cultivation without any lawful authority and upon query, they also cut off and takeaway with them by force four babul 30 years old trees which cost around 200,000/- (two hundred thousand rupees) and upon query, they are issuing threats for dire consequences to me and my family members.

That about some years back, the same culprits had tried to grab my subject land but they could not get succeeded and now they are again trying to do so.

In the light of above facts and circumstances, you are requested to kindly look into this matter on urgent basis and help me for re-taking the physical possession of my subject land from the above said land grabbers and take appropriate legal action against them for committing such criminal act, to maintain justice and peace in the area.

Thanking you,
Sincerely yours.

Sd/-
FAKHAR-UL-JAMIL SHEIKH
SON OF MOHAMMAD ISHAQUE SHEIKH.

[Underlining is to add emphasis]

The respondent/complainant thereafter filed a private complaint bearing No. 08 of 2012, under section 3, 4 and 8 of Illegal Dispossession Act. of 2005, before the Court of Sessions Judge, Thatta. The complainant in the said proceeding also recorded his statement under section 200 Cr.P.C., which for the sake of ready reference is reproduced as under:

“ I am complainant and am owner of agricultural land bearing survey Nos. 617/1-A, 617/1D and 617/C measuring 1-20 acres, situated in Deh Badipur, Taluka Jati, District Thatta. I and my family own 280-00 acres land adjacent and surrounding to said survey numbers which is called M. Ishaque Farm. I produce village Form-VII in respect of entire land. The three persons namely Basar, Moosa and Babu all sons of Qasim Otho are land grabbers type persons, have forcibly dispossessed me from my Survey Numbers 617/1-A, 617/1D and 617/C illegally and criminally trespassed over the said land in the last days of May 2012. I moved such application to Revenue Authorities. Report are called confirming my contention but nothing was done in the matter. Hence, I approached this Honourable Court that accused namely Basar, Moosa and Babu all sons of Qasim Otho resident of Deh Badipur have illegally dispossessed me from the said land which is situated on the main road leading to Sujawal to Chuhar Jamli thereby caused us inconvenience. I therefor pray that this Honourable court may be pleased to direct the accused persons to restore my possession over to survey numbers referred above and to punish them in accordance of Illegal Dispossession Act. I may further add that during pendency of proceedings Court may grant interim relief directing the accused to hand over the possession of the land to me. I pray for justice and action according to law.”

[Underlining is to add emphasis]

The appellants/accused persons filed their statements under section 342 of Cr.P.C. wherein they while denying the allegations leveled by the respondent/complainant in the complaint, have stated that they are innocent and falsely implicated in this case by the complainant. Further the complainant himself has encroached upon their land situated in Survey No.87, in this regard though they had submitted application before the Mukhtiarkar and Deputy Commissioner but no action was taken by them.

11. Before going into further discussion it would be advantageous, for the sake of ready reference, to reproduce Sections 3, 4 and 8 of Illegal Dispossession 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.

4. Cognizance of offence.- (1) Notwithstanding anything contained in the Code or any law for the time being in force, the 'contravention of section 3 shall be triable by the Court of Session on a complaint.

(2) The offence under this Act shall be non-cognizable.

(3) The Court at any stage of the proceedings may direct the police to arrest the accused.

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 subsection (2) 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."

From the perusal of above provisions, it appears that the main ingredients of Section 3 of Illegal Dispossession Act, 2005 are Dispossession, Grab, Control, Occupy, without lawful authority and Intention to dispossess, grab, control or occupy property from owner.

This shows that referred provisions are foundation for provisions of illegal possession and any person who has no lawful authority to control or occupy the property shall be punished under the said provisions, however, the application of said provision can only be justified when there is clear Intention to do such act of dispossession, hence the question of Mens rea is to be proved by the complainant on all counts and it is basic principle of law of evidence that he who alleges a fact has to prove the same and especially in criminal cases the proof must be beyond any reasonable doubt. In this regard reliance is placed on the case of *Waqar Ali and others v. The state and others* (PLD 2011 SC 181).

12. From the perusal of record, it appears that the stance of the respondent/complainant is not consistent, which fact can be ascertained from the perusal of initial complaint filed before the Deputy Commissioner Thatta and statement made under section 200 Cr.P.C. in the private complaint. Both the documents have already been reproduced above. Furthermore, it is also imperative to reproduce the evidence of the complaint and his witnesses recorded in the present case.

Cross examination of respondent/complaint (FAKHARUL JAMEEL).

“I am presently residing at Karachi. It is correct to suggest that our land is being cultivated by our haries. I am businessman by profession. It is correct to suggest that I have not mentioned the date and time when our land was encroached by the present accused persons. It is correct to suggest that it is not mentioned in my application that the accused persons are cultivating our land or built their houses. It is correct to suggest that I have not mentioned the names of witnesses, in whose presence accused have illegally dispossessed us. I can not say that survey No.87 pertains to the accused persons. I do not know that the land situated at survey No.87 owned by the accused persons from their forefathers. I can not say that this agricultural land is measuring about 10 acres. It is incorrect to suggest that 2 acres of land owned by the accused persons fall within our land. It is incorrect to suggest that I have filed this complaint in order to usurp the 2 acres land of the accused persons. It is incorrect to suggest that I have obtained false report from Revenue authorities in our favour. It is incorrect to suggest that I am deposing falsely.”

[Underlining is to add emphasis]

Cross Examination of Mukhtiarkar Jati, District Thatta

“It is correct to suggest that survey No.87 owned by the accused persons which is adjacent to the disputed land. It is incorrect to suggest that block survey are not in utilization. It is correct to suggest that of appeal No.494/2001 regarding disputed land was pending before Executive District Officer Revenue Thatta. I do not know the present status of the said appeal. It is correct to suggest that accused persons had moved applications for demarcation of their Qaboli lands. It is correct to suggest that in the year 2009 I visited the disputed land on the directions of EDO Revenue Thatta. It is correct to suggest that present status of the disputed land is not known to me. It is fact that I do not know about the possession of the disputed land at present. It is incorrect to suggest that I have produced false report and false sketch in this court. It is incorrect to suggest that applicant has encroached upon the land of accused persons. It is incorrect to suggest that the applicant has filed instant complaint falsely in order to usurp the land of accused persons.”

[Underlining is to add emphasis]

Cross Examination of SHO P.S. Mureed Khoso, District Sujawal

“It is correct to suggest that I do not know the date of previous report submitted by SHO of PS Mureed Khoso. It is correct to suggest that I am not well conversant of signature of SHO available at the previous report of the SHO. It is correct to suggest that I have received notice from the court. It is correct to suggest that I have not received letter for submission of report voluntarily says I myself presumed that court is requiring report as such I made visit and made report. It is not in my knowledge adjacent to disputed land there is land of the present accused persons. It is incorrect to suggest that the disputed land was shown by the Manager of Fakhar-ul-Jameel to me. It is correct to suggest that I am aware about covered area of survey numbers voluntarily says I have seen survey number from village Farm-VII. It is correct to suggest that the copy of Village Farm-VII was given by the son of the complainant to me. It is correct to suggest that the sketch prepared by me does not bear my signature and stamp. It is correct to suggest that I have not seen the present accused persons during my visit at the disputed land. It is correct to suggest that I have seen the houses of the accused persons at the disputed land voluntarily says I was told by local people that the accused persons are residing at the distance of two KM distance. It is correct to suggest that I have seen accused persons today in the court. It is correct to suggest that I have not recorded the statements of private persons during my visit at the disputed land. It is correct to suggest that I have not mentioned names of the local persons from whom I inquired about disputed land in my report. It is not my in my knowledge that there is dispute between the complainant and the accused persons over the demarcation of the disputed land. It is incorrect to suggest that accused persons do not have any connection with the disputed land of the complainant. It is incorrect to suggest that I have not visited the disputed land and prepared the report at PS. It is incorrect to suggest that I have prepared the report at the instance and of complainant. It is incorrect to suggest that I am deposing falsely.”

[Underlining is to add emphasis]

13. From the above evidence, it is manifestly clear that the complainant was not present at the time when according him the subject land was illegally occupied by the appellants/accused persons, and whatever stated by him, either in the complaint filed before the Deputy Commissioner or statement before the learned Jnd Addl. Sessions Judge, Thatta, was on the basis of hearsay information. Such fact is also reflected from the inconsistent stance of the respondent/complainant as mentioned in the preceding para. Furthermore, from the perusal of record it appears that the complaint failed to produce any title documents in the respect of subject land, which could substantiate the claim of ownership and possession of the respondent/claimant in respect thereof. Besides, the

respondent/complainant in support of his allegations of illegal dispossession neither cited any independent person as witness nor produced to support such piece of evidence; it is well settled principle of law that where the independent witnesses were found available but none of them was produced to act as witness of such incident, the presumption of is to be that had they been produced, then they would not have supported the story of the incident of the case, as narrated by the prosecution and the benefit of such circumstances, to be awarded to the accused. Reliance is made in the case of **2004 YLR 216** (*Gul Muhammad alias Guloo v. The State*).

14. Besides this, perusal of evidence and record it appears that the complainant claims ownership of subject agricultural land whereas the appellants are claiming ownership in respect of Survey No. 87, admeasuring 10 acres, adjacent to subject agricultural land. The case of the respondent/claimant is that appellants/accused persons illegally and forcibly occupied the subject agricultural land, whereas the claim of the appellants/accused persons is that the complaint has encroached upon portion (2-acres) of their land. Both the parties have stated that they have already filled application before the revenue authorities in respect thereof however the revenue authorities have failed to redress their grievances. From the above, it clearly transpires that the dispute between the parties is of factual and civil nature relating to location and demarcation of their respective lands. The said fact is also corroborated from the memo of constitutional petition bearing C.P No. D-5586 of 2014 filed by the appellants, inter alia, against the respondent/claimant, with the following prayers, copy of the said petition, which is still pending adjudication, is placed by the appellants through statement dated 24.03.2015:

- “i. To direct the respondent No. 4 to 7 to conduct a proper survey along with survey official and demarcation of survey no. 87 in presence of area khatedars of deh Badipur Taluka Jati and issue fresh Rubakari and through probe in connection with survey Nos. 617/1A, 617/ID & 617/1C total land admeasuring 2-10 Ghuntas of Deh Badipur Taluka Jati which land is owned and factually possessed by the respondent No.2 but under pre planned ill motive with the connivance of respondents 3 & 7 same was falsely

shown in the illegal possession of the petitioner whereas petitioners possess lawfully their land only in survey No.87 of Deh Badipur of Taluka Jati and they have no concern with the lands of the respondent No.2.

- ii. To direct the respondent No.2 & 3 not to harass the petitioners without any cause of action as the criminal appeal bearing no.136/2014 is lying pending for adjudication before this Honourable Court.
- iii. any other relief and relives which this Hon'ble Court may deem fit and proper under the circumstances of the case."

[Underlining is to add emphasis]

Moreover, the appellants through their statement dated 12.08.2014 has also placed on record plaint of suit No.50 of 2000 filed by the present appellants, inter alia, against respondent/complainant before Senior Civil Judge, Sujawal for declaration and permanent injunction in respect of their land bearing Survey No. 85 (3-10 acres) and 87 (10-acres) and the plaint of suit No. 352 of 2005 filed by the respondent/complainant before the learned civil judge Karachi central against father of the appellants for specific performance of contract and permanent injunction in respect latter's land bearing Survey No.85 (3-10 acres). In view of the above one can safely conclude that dispute between the parties are of civil nature.

15. All the above factors very much give rise to benefit of doubt, as Respondent/complainant has failed to prove his case beyond reasonable doubt and when case is built up on circumstantial evidence. It is a well-settled principle of safe administration of criminal justice that an accused has only to show a dent having occurred/created in the evidence/care of the prosecution, and that he is entitled to the benefit of even a single doubt, found in the evidence of the prosecution, and that he has not to show that its case suffers from more than one doubts; so also it is further settled provision of law that the quality of the evidence and not the quantity of the evidence has a bearing on the fate of the case of the prosecution; such is the guideline given by Honourable Supreme Court of Pakistan in the case of Haq Nawaz and others v. The State and others (2000 SCMR 785). So also, in the case of Muhammad Khan

and others v. The State (1999 SCMR 1220), in the said cases Honourable Supreme Court held that conviction of an accused must be based on unimpeachable evidence and certainty or guilt, and any doubt arising in the case of prosecution must be resolved in favour of the accused. In the present case it was the duty of complainant to link all the chain of evidence in a manner that it should form such a continuous chain which link to one end of appellants/accused persons and the other to act of dispossession, when one chain link is missing, the same loses its validity. Hence, inference can safely be drawn that it is a civil dispute relating to subject land between the parties, which dispute can be resolved by adopting proper legal course and does not fall within the ambit, purview and very spirit of Illegal Dispossession Act, 2005.

16. The case law cited by the learned counsel for the parties have been perused and considered by me; the case law cited by the counsel for the respondent/complainant are distinguishable from the facts of present case, whereas the case law cited by the appellants supports the stance of the appellants.

17. In essence, for what has been discussed above, the impugned judgment does not qualify the parameters of section 3 of illegal Dispossession Act, 2005 as the complainant and the entire chain of evidence have not proved the ingredients of illegal Dispossession in any manner. Hence, the instant appeal is allowed and the impugned Judgment dated 23.4.2014 is hereby set aside. The complaint filed by respondent No.1 shall be deemed to have been dismissed. The appellants are acquitted of the charge. Since the appellants are already on bail, hence, the surety is discharged.

JUDGE

Karachi
Dated: 13.02.2017