

## IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 197 of 2010

Appellant : Nisar Ahmed  
through Mirza Sarfraz Ahmed, Advocate

Respondent : The State  
through Mr. Talib Ali Memon, A.P.G.

Complainant : Muhammad Mushtaq Qureshi,  
through Mr. Bilal A. Khilji, Advocate

Date of hearing : 12<sup>th</sup> October, 2022

### JUDGMENT

**Omar Sial, J.:** Mohammad Mushtaq Qureshi accused Nisar Ahmed Awan of illegally occupying 2 shops in the New Sabzi Mandi and thus having committed an offence under section 3 of the Illegal Dispossession Act, 2005. Nisar pleaded not guilty and claimed trial. After a full dress trial, the learned 3<sup>rd</sup> Additional Sessions Judge, Malir on 05.05.2010 found Nisar guilty of an offence under section 3(1)(2) of the Act of 2005 and sentenced him to 5 years in prison as well as pay a fine of Rs. 10,000 or spend a further 3 months in prison. He was also directed to pay a compensation of Rs. 25,000 to Mushtaq and hand over possession of the 2 shops, as well, to Mushtaq. It is this judgment of the learned trial court that has been challenged through this appeal.

2. At trial, Mushtaq, the complainant, appeared as the first prosecution witness. Kara Khashkeli and Nabi Bux Chachar appeared as the second and third prosecution witnesses to support Mushtaq's case against Nisar. Nisar examined himself on oath and gave a long drawn out explanation, the gist of which was that he had purchased the 2 shops from one Jan Mohammad, who had been allotted the 2 shops and had taken possession of the same well before Mushtaq claims he had.

3. I have heard the learned counsels for both Nisar and Mushtaq, as well as the learned APG. All counsels have given lengthy arguments in a matter that was rather simple. Arguments have revolved around each side attempting to prove their ownership of the shops. Indeed the learned trial court too, after observing

that it had no jurisdiction to decide ownership issues, appears to have done exactly that.

4. The dispute that arose between the parties was that both claimed that the Market Committee of the New Sabzi Mandi had allotted and handed over possession to them of the 2 shops, Nos. 143 and 144. During the proceedings of this appeal, the parties reached a settlement as far as shop no. 143 was concerned. The dispute regarding shop no. 144 remained alive.

5. According to Mushtaq he owned 2 shops in the Old Sabzi Mandi and that, through a draw, he was given 2 shops (143 and 144) in the New Sabzi Mandi in lieu of his 2 shops in the Old Sabzi Mandi. In support of his assertion, Mushtaq had produced at trial 2 Possession Orders, both dated 01.09.2004. At trial, Mushtaq also produced 2 orders, both dated 24.12.2004 passed by the learned Senior Civil Judge in 2 suits bearing numbers 6 and 7 of 2002. These were 2 suits filed by Mushtaq (one for each shop) praying that the 2 shops be allotted to him and he be given possession of the shops. Both orders reflect that Mushtaq had withdrawn the suits as he had reached a settlement with the Market Committee and because the Market Committee had now allotted the shops to him and that he had also taken possession. It is pertinent to mention here that Nisar had not been made a party to either suit. Mushtaq's counsel has also relied upon an order dated 25.03.2006 passed in Suit no. 266 of 2004 in which Nisar had claimed a declaration that he was the owner of the 2 shops and had also sought a permanent injunction in this regard. Mushtaq as well as the Market Committee were both made parties in this Suit. Nisar's plaint in Suit No. 266 of 2004 was dismissed through this order dated 25.03.2006. Nisar filed an appeal against the order before the learned 3<sup>rd</sup> Additional District Judge, Malir, which too was dismissed on 04.12.2009. I understand from the counsels that a revision application is pending adjudication in this Court challenging the 04.12.2009 dismissal. The parties have been litigating on the civil side to establish who is the actual owner of the property.

6. Nisar on the other hand claims that Jan Mohammad was allotted the shops on 11.08.2004 and that on the same date a Possession Order was also issued in Jan Mohammad's favour. Jan Mohammad then on 12.08.2004 executed a sale agreement with Nisar and sold the shops to him. He too has documents issued by the Market Committee to prima facie prove the same. The date on

which the documents were issued are prior in time to those that were issued in favour of Mushtaq.

7. The Act of 2005 is to protect lawful owners and occupiers of immovable property from their illegal or forceful dispossession. It's provisions cannot be invoked to determine ownership or as an arm-twisting tactic by either claimant. At the moment it is not even clear as to who the lawful owner of the property is. The memo of complaint filed by Mushtaq, from where the whole saga started, does not indicate as to when the alleged dispossession occurred. A vague account has been given, and to the contrary, stress has been put on the fact that a learned magistrate had issued a stay order but that Nisar violated the stay order. If that was the case, the proper remedy for Mushtaq was to file a contempt application in those proceedings rather than invoke the Act of 2005.

8. The Station Head Officer, Sohrab Goth had also conducted an inquiry when the complaint was filed. The report categorically concludes that *"statements were also recorded from the shop keepers as well as the other concerned peoples and found that Respondent Nisar Ahmed Awan is running his business since last 2/3 years."* It shows that on the date Mushtaq claimed that he was dispossessed, it was actually Nisar who was in possession. While I have mentioned this aspect as documents are on record, and the same is admitted by Mushtaq, even the S.H.O. was not called as a witness to produce his report.

9. Mushtaq might have had some legs to stand on if at trial, at least a representative of the Market Committee would have come to record his testimony and clarify why 2 sets of documents for the same shops were issued and who according to their records has been in possession of the property. It was not a difficult task at all to do that, as there are a number of shops in the New Sabzi Mandi. I am also surprised that though Mushtaq claimed that he had been in possession, he could not get any shopkeeper owning or working in the adjacent shops to come vouch for him. This was not done, instead one Kara Khashkheli and one Nabi Bux were produced as witnesses who were both labourers and claimed to have done some masonry work on the 2 shops. Both vouched that the 2 shops had been allotted to Mushtaq by KMC. None came forward from KMC to confirm the same, however, this is also an aspect that has to be finally decided by the civil courts where the parties are litigating. To the contrary, one Akhundzada, who appeared as a defence witness testified that he

was the owner of shops numbers 147 and 148 and that Nisar and his brother had been in occupation of shops 143, 144, 145 and 146 when the dispossession is said to have occurred.

10. The complaint was filed by Mushtaq on 20.12.2006 claiming that he had been dispossessed. While no date of the dispossession is given, somehow the charge framed reflects that dispossession took place on 10.12.2006. How did the learned trial judge stipulate the date of dispossession when none was given in the complaint is not clear from the record. As mentioned above, the police inquiry showed that at that date Nisar had been in possession of the shops for the last 2 or 3 years.

11. There was no cogent evidence produced at trial to show that Nisar was not in lawful possession of the property when the dispossession is said to have occurred. To the contrary, there was evidence to show it was Nisar who had been in possession. Similarly, who exactly is the owner of these shops is still under adjudication. No final order or judgment is on record in this regard.

12. In view of the above, the appeal is allowed and the impugned judgment set aside. The parties had admittedly resolved their dispute to the extent of one of the two shops, hence that shop will not be impacted by this judgment. Nisar is on bail. His bail bonds stand cancelled and surety discharged. This acquittal will also have no impact on the ongoing civil litigation between the parties to determine who the actual owner of the property is.

JUDGE