

IN THE HIGH COURT OF SINDH AT KARACHI

**C.P No. S-352 of 2018**

Present

**Mrs. Justice Kausar Sultana Hussain**

Noman Ghani son of M.A. Hameed.....Petitioner

Versus

Moin-ur-Rehman & two others.....Respondents

Date of Hearing                      28<sup>th</sup> May, 2018

Date of Judgment                      August, 2018

Mr. M. Ibrahim, advocate for Petitioner alongwith petitioner.

Ch. A. Rasheed, advocate for respondent No. 1 alongwith respondent No. 1

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**J U D G M E N T**

**Kausar Sultana Hussain, J. :-** Through instant Constitution Petition, the the petitioner has impugned judgment dated 22.12.2017, passed by learned IVth Additional District Judge Karachi (Central), whereby First Rent Appeal No. 179 of 2017, filed by him was dismissed up holding eviction order dated 15.08.2016 passed in Rent Case No. 709 of 2016 by the Rent Controller-VIIth Karachi (Central).

2. The necessary facts spelt out from instant petition are that respondent No. 1 filed eviction application under Section 15 of the Sindh Rented Premises Ordinance, 1979 (Rent Case No. 209 of 2016) against the petitioner on the ground of default in payment of rent, subletting as well as personal need. It was alleged that respondent No. 1 is co-owner/landlord of the property bearing No. L-61, Ground Floor, 11-D, U.P. Society, North Karachi, having inherited from his mother Eidoo Begum W/O Waheedullah, who expired on

28.12.2010 leaving behind four sons and one daughter, who entered into family settlement on 06.02.2011 in respect of the said property. According to the respondent no.1, shop No.2 was rent out, which was in the possession of the petitioner as tenant and after death of Mst. Eidoo Begum, the petitioner was paying rent to the applicant through his Rent Collector/brother namely Hameedullah at the rate of Rs.350 per month upto the month of February and was issued such receipts. It was alleged that petitioner stopped the payment of monthly rent from March 2016 and committed wilful default. It was also alleged that the petitioner has sublet the said shop to the opponent No.2 without prior permission of the respondent No.1 and contrary to provisions of Sindh Rented Premises Ordinance, 1979. It was also claimed by the respondent No.1 that he required the said shop for his personal use as he has no job and source of personal income and wishes to carry / establish his own business and he has owned no other shop or any other suitable commercial premises to establish his business.

3. The petitioner as well as opponent No.2 resisted the eviction application by filing their joint written statement, wherein they challenged the ownership of the respondent No.1, however, admitted that petitioner was inducted into the demised premises by deceased mother of respondent No.1 namely Eidoo Begum in the year 1993 on goodwill/pugri. According to the petitioner, he is an old ailing person and appointed opponent No.2 as a caretaker for his business in the said shop and did not sublet the premises to him. He also denied personal need of the respondent no.1 contending that the subject building consists upon six (6) shops on ground floor, four shops are already in their possession and only shops No.1 and 2 are in possession of the tenant so also

shop No.5 is already in possession of Abdullah, the son of Respondent No.1, whereas the Shop No.6, the respondent no.1 is doing his business of MAMAWHEEL. The petitioner also denied to have committed default as alleged and stated that he regularly paid the rent to the respondent No.1 upto December 2016 while the rents of January and February 2016 were paid but the later did not issue such receipt, he also paid rent upto June 2016 and when the respondent No.1 had refused to receive rent he tendered it through money order, then he started depositing rent in MRC No.17 of 2017 with effect from March 2016 onwards.

4. As per record, both the parties led their evidence, and after evaluating the evidence and arguments advanced by the learned counsel for the parties, learned Rent Controller allowed the rent application on all the three grounds viz. default in payment of rent, subletting as well as personal need vide order dated 15.08.2016. The petitioner assailed the said order through FRA No.179 of 2017, which was ultimately dismissed by the Court of learned Additional District Judge IVth, Karachi Central vide impugned judgment dated 22.12.2017. Being aggrieved, the petitioner had preferred the instant Constitutional Petition.

5. The learned counsel for the petitioner/tenant argued that both the Courts below had mis-appreciated material part of evidence and ignored the important fact that the tenancy agreement dated 1993 executed between the petitioner and deceased mother of the respondent No.1 clearly allows the former to sublet the premises to any person and also bound herself to have no right to get the said shop vacated from him. He has referred clause 2 and 4 of agreement available at page No.171 produced in evidence, whereas,

learned counsel for the respondent No.1 has strongly refuted the above contention and contended that the petitioner in his evidence admitted the fact that the business in the subject shop is being done by opponent No.2 and also admitted to have no partnership with him. Learned counsel also pointed out that in the evidence of opponent No.2 he contended and has categorically admitted the fact of having in possession of the subject premises as a tenant and paying Rs.350/- per month to petitioner on account of rent. It was contended by the learned counsel that Sindh Rented Premises Ordinance, 1979 neither recognizes the pugri, nor allows subletting of the premises by tenant. Considered the above submissions and perused the record in the prospective of relevant provisions of law. It is an admitted fact that deceased mother of respondent No.1 had let out the subject shop to the petitioner under a written agreement dated 04.04.1993 with the title "*Agreement of Shop on Goodwill cum Tenancy Basis*". It is also noted that opponent No.2 Saeed in his cross-examination also admitted to be tenant of the petitioner and also paying Rs.350/- per month as rent to him. The fact of running of business by opponent No.2 Saeed in the said shop also categorically admitted by the petitioner. In such circumstances, it is abundantly proved on record that the petitioner has pointed with the possession of said shop in favour of opponent No.2 Saeed. Now, the point raised by the petitioner that as per agreement, he was already entitled to sublet the said shop to anyone, so also vacation cannot be asked for in view the clause-4 of the agreement, needs consideration. In my considered view the said agreement between the petitioner and deceased mother of the respondent No. 1 has no backing of law, firstly that Sindh Rented Premises Ordinance, 1979 does not recognize pugri, secondly it is not registered one though having been for an indefinite period

and thirdly it is hit by the provision of section 5 of the Sindh Rented Premises Ordinance, 1979 and section 17 Read With Section 49 of Registration Act, 1908. The Section 5 of the Sindh Rented Premises Ordinance, 1979 deals with the agreement in omitting even if tenancy agreement is not in writing, oral tenancy also sufficient for invoking the provisions of said ordinance. It may be observed that in case the tenancy agreement in writing, it must be in conformity with Section 5 of the Sindh Rented Premises Ordinance, 1979 for the purpose of its enforceability in law. According to aforesaid tenancy agreement, relied by petitioner or to have registered and it was compulsory due to nature of its contents as provided under Registration Act, 1908, as the petitioner claims protection of his rights to held tenancy for the rest of his life on the ground that the deceased mother/landlady/owner had abundant/surrendered her right to seek ejectment of petitioner for valuable consideration. The language and contents of agreement shows that the tenancy was covering entitlement of the parties beyond one year and for an indefinite period, therefore, its registration was compulsory in view of Section 17 (1) (d) of Registration Act, 1908. The relevant provision of laws is reproduced for ready reference:-

**Section 17. Documents of which registration is compulsory (1).** The following documents shall be registered, if the property to which they relate is situate in a District in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act, came or comes into force, namely:-

- a).....
- b).....
- c).....

d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

6. Admittedly, the goodwill tenancy agreement was not registered, it was neither admissible in evidence nor it was enforceable in law. Irrespective of the fact that relationship of landlord and tenant was admitted, the tenancy agreement itself was not a "valid contract" and any rights claimed by the petitioner under the said agreement cannot be enforced as its non-registration has rendered it worthless, ineffective, and void by the operation of Section 49 of the Registration Act, 1908. It read as follows :-

"Section 49. **Effect of non-registration of documents required to be registered.** No document required to be registered under this Act or under any earlier law providing for a relating to registration of documents shall---

- (a) Operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, to or in immovable property, or
- (b) Confer any power to adopt, unless it has been registered.

7. In these circumstances, the petitioner in absence of a valid contract, was a statutory tenant of the deceased landlady and after her death, her legal heirs; and rights as well as obligations of the petitioner and respondent No. 1 were covered by the Sindh Rented Premises Ordinance, 1979. In case of *M.K. Muhammad and another Vs. Mohammad Abu Bakar (1991 MLD 801 Karachi)*, it was held that when provisions of law permitting a landlord to eject a tenant on grounds specified in it which were not subject to any agreement and conferred statutory right and no one could contract out of it, any agreement

contrary to it would be void. Such a view was also laid down by the Hon'ble apex court in the case of *Sheikh Mohammad Yousuf Vs. District Judge, Rawalpindi and two others (1987 SCMR, 307)*. Thus in view of discussed legal position, question of waiver concerning permission to sublet or non-eviction of the petitioner by the deceased landlady or her heirs was not applicable in the case of the petitioner. Since the fact of sub-letting of the subject shop to the opponent No. 2 by the petitioner has sufficiently established and in absence of any lawful tenancy agreement between the parties, the sub-letting of premises clearly rendered the petitioner as well as sub-tenant liable for eviction as provided under Section 15 (2)(iii) (a) of the Sindh Rented Premises Ordinance, 1979.

8. The next contention of the learned counsel for the petitioner that Courts below have not properly examined the evidence wherein the petitioner in his reply dated 15.08.2016 to legal notice dated 25.07.2016 categorically stated to have paid rent up to the June, 2016, for which no rent receipt was issued by the respondent. In para-3 of grounds mentioned in petition, the learned counsel also quoted the very claim of petitioner that when he appreciated to the respondent No. 1 to receive rent for July, and August, 2016, it was refused by the later, same was therefore, transmitted through Money Order in September, 2016 followed by another Money Order in December, 2016 being rent for September and December, 2016 and when same was returned un-accepted, it was deposited in Court in M.R.C. No. 17 of 2017, thus committed no default. It is noted that respondent No. 1 in eviction application alleged default in payment of rent, w.e.f. March, 2016 onwards. From the evidence of the parties, the factum of tenancy as well as contum of

monthly rent is admitted. The agreement of tenancy, though not a lawful as observed above, yet it shows that monthly rent was to be paid on month to month basis. Even, otherwise, if the said agreement is taken for eleven months, due to its non-registration after expiry of such period, the tenancy was to be regulated under the provision of the Sindh Rented Premises Ordinance, 1979. Section 10 of the Sindh Rented Premises Ordinance, 1979 deals with the payment of monthly rent, which read as under :-

**S. 10. Payment of rent--(1)** The rent shall, in the absence of any date fixed in this behalf by mutual agreement between the landlord and tenant, be paid not later than the tenth of the month next following the month for which it is due.

(2) The rent shall, as far as may be, be paid to the landlord, who shall acknowledge receipt thereof in writing.

(3) Where the landlord has refused or avoided to accept the rent, it may be sent to him by postal money order, be deposited with the Controller within whose jurisdiction the premises is situate.

(4) The written acknowledgment, postal money order receipt or receipt of the Controller, as the case may be, shall be produced and accepted in proof of the payment of the rent :

9. It may be observed that the tenant is bound to pay due rent of the premises every month regularly in accordance with the mutual agreement or ordinance,, as the case may be, and any practice of payment of rent in lump-sum cannot modify the statutory obligation of the tenant and subsequent payment of rent does not wipe of default in payment of rent. Reliance is placed to the case of *Abdul Rasheed Vs. Saleh Mohammad (1980 SCMR, 506)*, *Amir Ali and others Vs M/s. Burma Oil Mills Limited (1990 SCMR, 1327)*. It is noted that the petitioner has not produced any rent receipt for the period January,



2016 to June, 2016 and alleged that the rent for the said period was paid though, but the respondent No. 1 did not issue the receipt thereof. Nothing produced by the petitioner under which it could be spelt out that any agitation in writing was made for alleged none issuance of rent receipt. The burden to prove payment of such period was upon the petitioner, which he failed to discharge through any convincing explanation or lawful substance. Even otherwise, it is abundantly clear on record that petitioner started depositing rent in M.R.C. No. 17 of 2017 in January, 2017 and first deposit was made on 17.01.2017 for the period from July, 2016 to December, 2016 and thereafter, on 25.01.2017 another payment was made for the months of January and February, 2017. The first deposit, clearly depicts that the rent for the month of July, 2016 was made on 17.01.2017, after six months. In the attending circumstances, it appears that the petitioner not produced any tangible/satisfactory documentary proof which could establish the payment of rent for the period from March, 2016 to June, 2016, rather started depositing the rent in aforesaid M.R.C, after committing default with the delay of six months beyond the time frame as provide under the Sindh Rented Premises Ordinance, 1979.

10. The next contention of the learned counsel for the petitioner is with regard to plea of personal need decided by both the courts below in favour of respondent No. 1. It was argued that both the courts below ignored the material evidence and referred the part of cross-examination of respondent No. 1, wherein he admitted that there are six shops. He further argued that no explanation whatsoever has been mentioned in eviction application or affidavit-in-evidence by the respondent No. 1 that how the subject shop is

suitable leaving behind the other shops and also concealed shop No. 6 in his possession. He further argued that both the Courts below failed to appreciate and ignored the above concealment and malafide on the part of respondent No. 1 and traveled contrary to the law in deciding the point of personal need in favour of respondent No. 1. He relied upon the case of *Tariq Ali Vs. Mst. Rubina Bano and others* (2014 MLD 693, Sindh). These contention has been refuted by the respondent No. 1 with the arguments that suitability and sufficiently of any premises is the sole prerogative of landlord. The record shows that respondent No. 1 has required the subject shop for his personal use and para No. 7 and 10 of eviction application has categorically stated that he has no job and source of personal income and wishes to carry/establish his own business so also he has owned no other shop or any other suitable commercial premises to install his business except the subject shop. In case of *S.M. Nooruddin and others Vs. Saga Printers* (1998 SCMR, 2119). The apex court has set the dictum that landlord has a complete option to choose from one of the several tenement occupied by tenant to avail the personal requirement and the discretion is not assailable, except in the rarest cases of bad faith. Likewise in another case of *Haroon Kasam and others Vs. Azam Suleman Madha* (PLD 1990 S.C. 394), it was also held by the apex court that if the landlord possess more than one premises it is surely matter within his prerogative and discretion and the law does not give either to the tenant or the rent controller the power to determine where the landlord should personally reside and the question as to which portion of the building which would suit to the landlord better must be left to his discretion. In another case of *Mehdi Nasir Rizvi Vs. Muhammad Usman Siddique* (2000 SCMR, 1613), the apex court set the principle that where landlord statement on Oath deem

consistent with the case pleaded by him and same has not been seriously challenged must be given weight. Besides above, the Sindh Rented Premises Ordinance, 1979 provides safe-guard to the tenant under the proviso 15(a), which envisages where the landlord, who has obtained the possession of a building under Section 15(vii) of the Ordinance, re-lets the premises to other person, or put it to a use other than personal use the tenant will be entitled to get the possession restored to him. The claim of respondent No. 1 has not been shaken in cross-examination. His need cannot be defeated by adversely interpreting evidence to reach another conclusion, both the courts below have accepted the version of respondent No. 1 in view of available evidence. It is settled law that findings arrived at by the two courts below on the basis of evidence cannot be interfered with by second appellate court or even by Revisional court simply because of same evidence in the opinion of second appellate court or Revisional court can lead to a different conclusion. The case law referred by the learned counsel for the petitioner reported in *2014 MLD 693 (Sindh)* is distinguishable from the facts of the case in hand as there is concurrent findings of courts below.

11. For the reasons, recorded above, the concurrent findings of two courts below do not suffer from arbitrariness nor the same are perverse, does require no interference. Consequently, the petition is hereby dismissed accordingly.

J U D G E