

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui

C.P. No. S-704 of 2015

Anthony D'Silva
Versus
Sarfraz Ali & others

Date of Hearing: 20.11.2017

Petitioner: Through Mr. Makhdoom Ali Khan Advocate.

Respondents No.1&2: Through Mian Mushtaq Ahmad Advocate.

Respondents No.3&4: Through Mr. Shaharyar Mehar, AAG.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Petitioner has filed this petition as being tenant of the demised premises since 1926. The question involved is the service of notice under section 18 of Sindh Rented Premises Ordinance, 1979 through registered post A/D. The petitioner claimed to have offered the rent to the landlords/respondents No.1 and 2 on receipt of notice of ejectment application. The rent claimed to have been offered in the month of April 2008 and was consequently sent through money order to both the respondents which was refused and the petitioner started depositing the rent w.e.f. August 2007 before the Rent Controller in MRC No.528 of 2000 on 29.04.2008 in the names of respondents.

2. Brief facts are that an application under section 15 of Sindh Rented Premises Ordinance, 1979 was filed by respondent No.1 as Rent Case No.309 of 2008 on the ground of default. Respondent No.1 who had filed the ejectment application disclosed in paragraph 4 of the application that notice under section 18 of Sindh Rented Premises Ordinance, 1979 was served upon petitioner vide letter/notice dated

16.07.2007 through registered post A/D and courier service. This letter also stated to have been replied by the petitioner vide letter dated 24.07.2007 sent to respondent's counsel through courier however it was denied by the petitioner.

3. The petitioner also denied to have received any notice under section 18 of Sindh Rented Premises Ordinance, 1979 and it is claimed that as soon as he received notice of the ejectment application, he offered the rent to respondents and on their refusal sent the rent through money order and ultimately deposited it in Court in the above referred MRC.

4. Learned counsel for petitioner has relied upon proviso to Section 15(2)(ii) of Sindh Rented Premises Ordinance, 1979 and submitted that since default, as claimed in the application, does not exceed six months, therefore, the default on the first date of hearing, on it being offered, was liable to be condoned. Learned counsel submitted that petitioner was prevented from availing the fruits of aforesaid provision as the ejectment application for the reasons best known to the respondents, remained pending and on the first date of hearing when the notices were received, the period of six months had already lapsed. Had the notices been issued immediately, the fruits of the aforesaid provision could have been availed by the petitioner as he has offered the rent on the first date of hearing.

5. The Rent Controller allowed the parties to lead their respective evidence. Applicant/respondent No.1 filed his affidavit-in-evidence and was subjected to cross-examination. Learned counsel for the petitioner has referred to cross-examination whereby the respondent's father was stated to be dealing with the tenants from the date of confirmation of oral gift i.e. 13.03.2006 till July 2007. Counsel has also referred to cross-examination whereby the landlords/respondents admitted that the

signature of the petitioner on postal acknowledgment receipt is different with the signatures on written statement.

6. Learned counsel submitted that it is perhaps incorrectly written when the witness deposed to a question regarding the reply to notice under section 18 of Sindh Rented Premises Ordinance, 1979 Ex. A/6 that, “It is incorrect to suggest that my father had not sent written reply at Exh. A/6 through TCS and registered A/D sent to the landlords/respondents.” The petitioner in fact intended to say that his father has not sent reply and this has been a consistent stance of the petitioner had it been compared to the pleadings i.e. written statement and affidavit-in-evidence.

7. The petitioner’s counsel took a plea that the petitioner paid the rent of the subject period twice. He claimed to have deposited rent up to December 2007 yet on receipt of notice of the ejectment application he was compelled to pay the rent w.e.f. August 2007 and after considering the depositions/evidence, the application was allowed and appeal was dismissed, hence this petition. Learned counsel in support of his arguments has relied upon the cases of Gul Hussan v. Hamidullah (1980 CLC 73), Khair Muhammad v. Akhtar Hussain (1983 CLC 302) and Mushaikuddin v. Syed Ali Hyder (1989 MLD 539).

8. On the other hand learned counsel for respondents No.1 and 2 supported the judgments passed by the Courts below. He submitted that both the Courts below have considered all aspect of the matter by evaluating the evidence came on record and a well-reasoned judgment both on facts and law was passed. As to the contention of the learned counsel that notice under section 18 of Sindh Rented Premises Ordinance, 1979 was not served upon the petitioner, learned counsel for respondents relied upon reply which was sent through courier and registered post. He further contended that since all factual aspects of

the matter have very carefully considered by the two Courts below this petition is not maintainable as being against the concurrent findings of the two Courts below.

9. I have heard the learned counsels appearing for the parties and perused the material available on record and so also the written arguments filed by learned counsel for petitioner.

10. The Rent Controller on the pleadings of the parties framed two issues i.e.:-

i) Whether after receipt of notice under section 18 of Sindh Rented Premises Ordinance, 1979 the opponent failed to pay rent to the applicant within time?

ii) What should the decree be?

11. The Rent Controller while discussing Issue No.1 observed that the burden was discharged by the landlord/respondent when a notice under section 18 of Sindh Rented Premises Ordinance, 1979 was served and produced along with receipt of registry and A/D card. The Rent Controller was of the view that since the address was admitted to be correct, which notice was sent through registered post, therefore, the presumption would be that the notices were served at the address which is stated to be correct.

12. The Rent Controller also compared the signatures on the registered acknowledgement card with the signature on petitioner's NIC and other documents exhibited and found no difference hence the ejectment application was allowed, as rent was not tendered within 30 days of the service of notice under section 18 of Sindh Rented Premises Ordinance, 1979. The petitioner filed an appeal bearing FRA No.164 of 2011 which appeal was also dismissed.

13. The petitioner's attorney Christopher Anthony D'Silva was also subjected to cross-examination and he has admitted that Ex. A/3 bears correct address which is a notice under section 18 of Sindh Rented Premises Ordinance, 1979. The acknowledgement card produced by the respondent as Ex.A/5 also admitted to contain correct address of the petitioner/tenant. However, the petitioner denied that notice under section 18 of Sindh Rented Premises Ordinance, 1979 was replied vide Ex. A/6.

14. To me there are two points involved which require consideration; (i) whether notice under section 18 of Sindh Rented Premises Ordinance, 1979 stands served upon the petitioner and (ii) whether petitioner was prevented from availing the benefit of proviso to Section 15(2)(ii) of Sindh Rented Premises Ordinance, 1979.

15. In respect of first point, Section 27 of the General Clauses Act provides a meaning of the service by post. In the subject matter the notice under section 18 of Sindh Rented Premises Ordinance, 1979 was issued by registered post A/D and the presumption of law is that where any document is required to be served by post, whether expression "serve" or either of the expressions "give" or "send" or any other expression is used, then unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing documents, and, unless contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The address in the instant case is stated to be correct and the registered post acknowledgement is also available on record duly exhibited before the trial Court/Rent Controller. The respondents appear to have discharged their burden when an acknowledgement receipt is produced to establish that notice under section 18 of Sindh Rented Premises Ordinance, 1979

was sent and served which presumption is governed by Article 129 of Qanoon-e-Shahadat Order, 1984.

16. The case law relied upon by learned counsel for petitioner is perhaps overshadowed by two judgments of the Hon'ble Supreme Court which are directly on the same point. The first case in this regard is the case of Water & Power Development Authority v. Saeed Badar reported in PLD 1991 SC 660. Hon'ble Bench of Supreme Court held that on proof of the facts that a pre-paid and properly addressed letter, containing a document, has been sent by registered post, it gives rise to a presumption of due service. The principle laid down therein was further developed in the case of Muhammad Bashir v. Abbas Ali Shah reported in 2007 SCMR 1105 when onus, on account of a specific denial on oath, stands shifted/rebutted on the party who is relying on such endorsement, to prove the same by producing postman who made the endorsement. The Hon'ble Supreme Court in the latter judgment further observed that the onus to prove service of notice continues to be on the party relying on such notice unless there is other evidence to indicate that denial of service by addressee is against the record. The petitioner even denied the reply of notice under section 18 in his affidavit-in-evidence.

17. Although the strong presumption is attached to the service of notice under section 18 through registered post AD, by application of Section 27 of General Clauses Act and Article 129 of Qanoon-e-Shahadat Order, 1984 however considering denial on oath the Hon'ble Supreme Court shifted the burden to the party relying on such endorsement and presumption under the law. The case of Water & Power Development (Supra) was also referred to the subsequent Bench of the Hon'ble Supreme Court.

18. In the instant case however, the tenant i.e. Anthony D'Silva never appeared in the witness box nor the attorney in his affidavit-in-evidence says that any instructions as to such facts regarding denial of receipt of subject notice were passed on. In paragraph 1 of the affidavit-in-evidence it is stated by the deponent that he is attorney of the opponent and fully conversant with the facts. It is not stated that he was advised/instructed to depose that his father (opponent) who in fact is the tenant, never received such letter nor was it replied through registered post and courier/TCS. The written statement as well as amended written statement was filed by the opponent Anthony D'Silva himself whereas affidavit-in-evidence was filed by his son who appeared as his attorney. The affidavit-in-evidence is absolutely silent as to the passing of instructions by the opponent to the attorney with reference to receipt of notice and/or reply thereto. If attorney was deposing certain facts to which he was not party, he has to disclose the source of information. It has not been shown as to how he came to know facts regarding notice under section 18 and its reply. Since this was the main ground agitated by the opponent, the attorney should have specifically stated in his affidavit-in-evidence the facts narrated to him by the opponent/tenant, which he failed. Even the opponent/tenant chose not to appear in the witness box to assert on oath his claim as to non-receipt of notice under section 18 of Sindh Rented Premises Ordinance, 1979.

19. Therefore, for all intent and purposes the requirement of law in terms of judgment of Muhammad Bashir (supra) that a denial on oath could only shift the burden upon landlord is not available with the petitioner in the instant case. The addressee neither appeared in the witness box himself nor the affidavit-in-evidence establishes the fact that such instructions were passed on by the addressee to his attorney. The burden of proof as such in view of above facts and circumstances is

not shifted against strong presumption referred above. In the instant case the negative oral evidence would lean for presumption of truth under section 27 of General Clauses Act and Article 129 of Qanoon-e-Shahadat Order.

20. The best evidence was withheld by petitioner. It is settled law that where a “fact” is required to be proved through oral evidence such evidence must be direct and of primary source within the meaning of Article 71 which provides instances of direct oral evidence regarding proof of “fact”. Reliance is placed on the case of Humayun Naseer v. Muhammad Saeed reported in 2007 AC 1088 and Muhammad Rafiq v. The State reported in 2004 SD 258.

21. The next point that requires consideration was whether petitioner was prevented by a sufficient cause from availing benefit of Section 15(2)(ii) of Sindh Rented Premises Ordinance, 1979. The contention of learned counsel for petitioner was that in the main ejectment application the default was claimed only for four months i.e. from August 2007 to November 2007 and the notices of the ejectment application was issued belatedly as the case remained pending for over a period six months to be lapsed. I have called the R & of the Rent Case to see the correct position on record. It appears that the verification of main ejectment application was signed on 12.03.2008 and for the first time it was fixed before the Rent Controller on 31.03.2008. The amended ejectment application was filed on 26.03.2010 which is immaterial for the purposes of deciding the present issue. The written statement was verified somewhere around 16.02.2009 and presumably filed on same day as no date of presentation is available on the written statement. No doubt he (petitioner) may have offered the rent for the period as claimed in the ejectment application and there may also be no doubt that a period of six months was exhausted/over when the notices

were serviced but that gives no benefit to the petitioner. This privilege of paying the rent in respect of defaulted period, which does not exceed six months, is irrespective of filing of an ejectment application. This shall not be an excuse for the tenant that he was prevented from availing such remedy/benefit as the notices of main rent case were issued belatedly consuming six months to avail benefit. There was nothing to prevent petitioner from making payment within six months of the receipt of notice under section 18 of Sindh Rented Premises Ordinance, 1979 which, in my view, as observed above, was served upon the petitioner.

22. I may further point out that the Sindh Rented Premises Ordinance, 1979 does not recognize categories of default. Section 15(2)(ii) of *ibid* law provides that if a tenant fails to pay rent in respect of the premises in his possession within 15 days after expiry of the period fixed by mutual agreement between tenant and landlord for the payment of rent or in the absence of such agreement then 60 days after the rent has become due for the payment. There is no written or oral agreement between the parties shown or established by any of the parties, so the rent perhaps was payable within 60 days after it has become due for payment. Once the notice under section 18 of Sindh Rented Premises Ordinance, 1979 was served upon tenant/petitioner it was obligatory upon the petitioner/tenant to have paid/tendered the rent within 30 days (or at times within 30 days of it becoming due), which is the requirement of Section 18. That privilege of paying rent within 60 days of its becoming due for payment is substituted by payment of “due rent” within 30 days in case of receipt of notice under section 18. Why would a landlord be deprived of his legitimate right once the notices have been served upon the tenant. If the Rent Controller is required to extract the intention of a willful or non-willful default it would end up every case as

non-willful default as every tenant may have some legitimate reason/excuse, may it be financial crisis or may it be payment of rent to the previous owner; or may it be any other excuse to overcome his unwillingness to pay rent. At times technical default is being considered by the Court but that is limited to the extent that it is being deposited in the name of same landlord, either in MRC or may be in some other rent case but in the name of same landlord. That depends upon the nature, circumstance and controversy of each case. This observation is fortified by the case law reported as Major (Rtd.) A.S.K. Samad v. Lt. Col (Rtd.) A. Hussain (1987 SCMR 1913).

23. As to the contention that jurisdiction under section 15(2)(ii) of Sindh Rented Premises Ordinance, 1979 with reference to proviso was not exercise by the Rent Controller, I am of the view that it would be immaterial if a period of default claimed in the application is less than six months. It may have taken some time to effect service upon tenant but it depends as to when the rent is being offered. If it is after the lapse of six months the discretion as required to be exercised may be declined.

24. In view of the above, I do not find any force in the petition to interfere with the decision of the two Courts below for the above reasoning. Accordingly, the petition is dismissed along with pending applications. However, considering the fact that the petitioner was tenant since 1926, he may not be evicted until next six months subject to payment of rent and other dues. The R & P of Rent Case No.309 of 2008 be returned to the Court concerned.

Dated: 04.12.2017

Judge