

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Constitutional Petition No. S – 11 of 2014

Present :

Mr. Justice Nadeem Akhtar

1. For Katcha Peshi :
2. For hearing of M. A. No. 167 of 2014 :

Petitioners : Muhammad Ishaque & another (both deceased) through their L.Rs, through Mr. Kamaluddin advocate.

Respondent No.1 : Shamsuddin, through Mr. Naimatullah Soomro advocate.

Respondents 2 to 5 : Azizuddin, Nasiruddin, Mst. Hashmat and Mst. Anwari Begum, all deceased through their L.R. Shamsuddin / respondent No.1.

Respondent No.6(a): In person.

Mr. Allah Bachayo Soomro, Additional A.G. Sindh.

Date of hearing : 14.02.2014

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

**NADEEM AKHTAR, J.** – This Constitutional Petition has been filed by the petitioners against the order passed on 09.12.2013 by the learned District Judge, Hyderabad, in the petitioners' First Rent Appeal No.70/2001, whereby the application filed by the petitioners under Order VI Rule 17 CPC seeking amendments in their written statement, was dismissed.

2. The relevant facts of the case, as averred in the petition, are that one Mst. Zohra Begum, the wife of petitioner No.1 and the real mother of petitioner No.2, and Mst. Halima Bai, the real mother of the respondents, were in possession of separate portions of property bearing C.S. No. F/543, Station Road, Hyderabad (**'the property'**). Mst. Zohra Begum was a non-claimant, and was in possession of the major portion of the property ; whereas, Mst. Halima Bai was a claimant and was in possession of the smaller portion. There was an agreement between the above named occupants that Rs.9,312.00 and Rs.2,688.00 will be paid by Mst. Zohra Begum and Mst. Halima Bai, respectively, to the Settlement Department towards the total price of Rs.12,000.00 for the property. It was further agreed by them that as Mst.

Halima Bai was a claimant, the property will be transferred in her name, whereafter she will transfer the major portion belonging to Mst. Zohra Begum in the name of Mst. Zohra Begum. As per the arrangement, they paid the agreed amounts to the Settlement Department, and the agreement was acted upon by the parties, but the major portion of Mst. Zohra Begum was not transferred in her name by Mst. Halima Bai. Meanwhile, Mst. Zohra Begum passed away leaving behind her husband / petitioner No.1 and son / petitioner No.2, as her surviving legal heirs. Subsequently, the husband and then the son of late Mst. Zohra Begum also passed away, who are survived by the present petitioners 2(a) to 2(g), who have been pursuing the litigation for the past many years.

3. Mst. Halima Bai filed an eviction application against the legal heirs of late Mst. Zohra Begum on the ground of default, which was allowed. The First Rent Appeal filed by the said legal heirs was allowed and the order of eviction was set aside. The Constitutional Petition filed against the order of the appellate court was allowed by this Court, and the order of eviction was maintained. The legal heirs of Mst. Zohra Begum then filed Civil Petition for Leave to Appeal before the Hon'ble Supreme Court, wherein leave to appeal was granted. Mst. Zohra Begum had filed a Civil Suit against Mst. Halima Bai for declaration in respect of the property, which was dismissed for non-prosecution. The dispute in the said Suit also went up to the level of the Hon'ble Supreme Court. Through a consolidated judgment delivered on 15.01.2009 in both the above matters, Civil Appeal No.1484/2007 filed by the legal heirs of Mst. Zohra Begum was allowed, and the petitioners' First Rent Appeal was remanded to the learned District Judge, Hyderabad, with the direction "*to decide the appeal on the pleas so raised before us regarding effect of execution of agreement dated 17.11.1961 arrived at between Mst. Zohra Begum and Mst. Halima Bai*".

4. After the remand of the case by the Hon'ble Supreme Court, the petitioners filed an application in their First Rent Appeal No.70/2001 before the learned District Judge Hyderabad, for bringing on record the agreement dated 17.11.1961 and other related documents referred to in the judgment of the Hon'ble Supreme Court. The application was allowed on 26.01.2011, and accordingly, the said documents were filed along with a statement. Thereafter, an application was filed by the petitioners in their appeal before the learned District Judge under Order VI Rule 17 CPC, praying that they may be allowed to amend the written statement filed by them in reply to the respondents' eviction application, by adding therein such pleas which were raised by them before the

Hon'ble Supreme Court. This application seeking amendment by the petitioners was contested by the respondents, and through the impugned order, the same was dismissed by the learned District Judge.

5. Mr. Kamaluddin, learned counsel for the petitioners, submitted that in view of the direction of the Hon'ble Supreme Court to the learned District Judge to decide the petitioners' appeal on the pleas raised by them before the Hon'ble Supreme Court, the amendment sought by the petitioners had become not only necessary, but the direction of the Hon'ble Supreme Court could not be complied with without allowing such amendment. He further submitted that by simply allowing the petitioners to place on record the relevant documents referred to in the judgment of the Hon'ble Supreme Court, the pleas raised by the petitioners before the Hon'ble Supreme Court could not be decided by the learned District Judge, unless the petitioners were allowed to raise such pleas specifically in their written statement. It was urged that the amendment sought by the petitioners had, therefore, become inevitable, and as such the same ought to have been allowed. In support of his above submissions, learned counsel for the petitioners cited and relied upon the cases of Mst. Qamarunnisa V/S Muhammad Hanif, **1984 CLC 1013**, Mst. Jana Bai V/S Mst. Gulshan and another, **1984 CLC 1061**, Allah Ditta V/S Mst. Rasoolan Bibi and 7 others, **1976 SCMR 459**, and Zulfiqar and others V/S Shahadat Khan, **PLD 2007 Supreme Court 582**.

6. The learned counsel also argued that the findings of the learned District Judge that the amendment could not be allowed as the provisions of the Code of Civil Procedure, 1908 (**'the Code'**), were inapplicable to the proceedings under the Sindh Rented Premises Ordinance, 1979 (**'the Ordinance'**), were contrary to the law laid down on this point by the Superior Courts. In support of this submission, he cited and relied upon Messrs Bambino Ltd. V/S Messrs Selmor International Ltd. and another, **PLD 1983 Supreme Court 155**, Sattar Muhammad Raja V/S Anwarullah Khan, **1985 CLC 1550**, and Mst. Taj Ikram Samiullah V/S Ghulam Jilani Dossul, **1999 CLC 239**. As to the scope of allowing amendment in pleadings, and amendment in pleadings can be allowed at any stage, the learned counsel referred to the cases of Ghulam Nabi V/S Sardar Nazir Ahmed, **1985 SCMR 824**, and Mst. Mumtaz Begum and 8 others V/S Province of Sindh through Chief Secretary Government of Sindh and 5 others, **2004 CLC 697**. The learned counsel also argued that the possession of the petitioners is protected under Section 53-A of the Transfer of Property Act, 1882, but as the dispute before me is confined to the issue as to whether the amendment sought by the petitioners should have been allowed or not, the

above submission of the learned counsel is not relevant in my humble opinion. The learned counsel complained that the law cited by him was neither discussed nor was it applied by the learned District Judge. In the end, it was urged that the learned District Judge failed in exercising such jurisdiction which was vested in him, and as such the impugned order is liable to be set aside by this Court.

7. Mr. Naimatullah Soomro, learned counsel for respondents 1 to 5, strongly opposed this petition and the arguments advanced on behalf of the petitioners. He raised a preliminary objection that, as the order impugned herein is an interlocutory one, this petition is not maintainable under Article 199 of the Constitution. In support of this objection, he relied upon Syed Saghir Ahmed Naqvi V/S Province of Sindh through Chief Secretary, S&GAD, Karachi and another, **1996 SCMR 1165**, Dadex Eternit Limited V/S Syed Haroon Ahmed and 3 others, **2011 CLR 1024**, Haji Noor Muhammad Khan V/S S. A. Majeed and another, **2002 CLC 254**, Khurram Zulfiqar V/S Mst. Benish Mubarak and another, **2009 MLD 766**, Osman Khan through attorney V/S Aisha Naz and 2 others, **2010 CLC 475**, and an un-reported judgment of the Hon'ble Supreme Court of Pakistan in C.P.L.A. No.376-K of 2007.

8. In addition to and without prejudice to his preliminary objection, learned counsel for the respondents submitted that if the amendment sought by the petitioners had been allowed, it would have changed the nature and complexion of the rent case and the cause of action thereof, which is not permissible in law. The cases of Ghulam Haider V/S Muhammad Ayub, **2001 SCMR 133** and Abdul Karim V/S Muhammad Ismail and another, **PLD 1987 Lahore 298**, were relied upon by the learned counsel in support of this submission. It was also urged that the application was hopelessly barred by limitation ; it was malafide ; and, the sole object of filing the same was to further prolong the litigation which has been going on between the parties for over the past forty years. Lastly, it was urged that the petitioners' application was rightly rejected by the learned District Judge, and the impugned order does not call for any interference by this Court.

9. In his rebuttal, learned counsel for the petitioners submitted that the petition is maintainable against the impugned order as the petitioners have no other remedy ; the learned District Judge has committed a grave illegality by not applying the correct law in relation to the applicability of the provisions of the Code to rent proceedings ; and, such illegality of non-application of the correct law can always be rectified by the High Court in the exercise of its constitutional

jurisdiction under Article 199 of the Constitution. He relied upon the cases of Muhammad Ashraf Butt and others V/S Muhammad Asif Bhatti and others, **PLD 2011 Supreme Court 905** and Muhammad Anwar and others V/S Mst. Ilyas Begum and others, **PLD 2013 Supreme Court 255** in support of his above submission.

10. I shall first deal with the preliminary objection raised by the learned counsel for the respondents about the maintainability of this petition. After referring to the provisions of Sections 19 and 20 of the Ordinance, it was held by the learned District Judge that there was no scope of amendment in the written statement ; and, in case amendment therein was allowed, it will *ipso facto* invalidate the judgment passed by the Rent Controller, and the case will revert back to its initial stage. The learned District Judge failed to appreciate that it has now been well-settled that in situations / cases where the Ordinance does not provide any specific provision, or is silent, the provisions of the Code shall apply to rent proceedings. In this context, the submissions made by the learned counsel for the petitioners appear to be correct. To this extent, the learned District Judge did not follow the law laid down by the Superior Courts although various authorities on this point were cited before him by the learned counsel for the petitioners. As such, the learned District Judge did not properly exercise the jurisdiction that was vested in him by law, and due to this patent defect in the impugned order, this petition is maintainable in my humble opinion. Reference may be made to the cases of Muhammad Ashraf Butt and Muhammad Anwar (supra) relied upon by the learned counsel for the petitioners, wherein the Hon'ble Supreme Court was pleased to hold that on account of the provisions of Article 4 of the Constitution, it is an inalienable right of every citizen to enjoy the equal protection of law and to be treated in accordance with law ; if a court has passed an order which does not qualify the test of the said Article 4 and suffers from a patent error of fact, such as non-reading / misreading of the facts on the record, or has committed a grave illegality in applying the correct law, or is patently illegal and violative of law, the same can always be rectified by the High Court while exercising its constitutional jurisdiction under Article 199 of the Constitution ; and, there is no bar or limitation in this behalf on the exercise of constitutional jurisdiction of the High Court.

11. Regarding the grievance of the petitioners in relation to the amendment sought by them, I have minutely examined the impugned order, wherein the learned District Judge has reproduced not only the direction given to him by the Hon'ble Supreme Court to decide the appeal on the pleas raised by the

petitioners before the Hon'ble Supreme Court in relation to the execution of agreement dated 17.11.1961 between Mst. Zohra Begum and Mst. Halima Bai, but has also reproduced all the relevant pleas taken in this context by the petitioners before the Hon'ble Supreme Court. In paragraph 8 of the impugned order, it was observed by the learned District Judge that the Hon'ble Supreme Court had recognized the "*availability of the document i.e. agreement dated 17.11.1961 and its effect and some sort of admission of the witness*". It was further observed by him that the Hon'ble Supreme Court had emphasized for re-appraisal of the evidence in relation to the execution of the said agreement. After observing as above, it was held by the learned District Judge that he was under a statutory obligation to follow the directions of the Hon'ble Supreme Court in letter and spirit, and the above aspect of the case will be considered in letter and spirit at the time of final judgment.

12. With the above observations and findings, the application for amendment of the written statement filed by the petitioners was not dismissed, but was disposed of by the learned District Judge. However, the effect of the impugned order is that the amendment sought by the petitioners was declined. I have already held that the findings of the learned District Judge with regard to the applicability of the provisions of the Code to rent matters, were not correct. As far as the effect of the impugned order is concerned, it is my considered opinion that, despite refusing the amendment sought by the petitioners, their interest has been fully safeguarded by the learned District Judge. A bare perusal of the impugned order shows that the learned District Judge was fully conscious of his duty that he cannot decide the petitioners' appeal without considering and appreciating all those pleas which were raised by the petitioners before the Hon'ble Supreme Court, and without re-appraisal of the evidence, in relation to the execution of agreement dated 17.11.1961 between Mst. Zohra Begum and Mst. Halima Bai. In view of the specific direction to this effect by the Hon'ble Supreme Court to the learned District Judge, if any judgment / final decision is rendered by him which is not in consonance with the direction of the Hon'ble Supreme Court, the same shall be illegal and void. Therefore, it does not really matter whether or not pleas to this effect are raised by the petitioners through amendment in their written statement. I am of the view that even the respondents are bound by the order of the Hon'ble Supreme Court which has attained finality, and they will not be justified in raising any objection if the direction of the Hon'ble Supreme Court is followed by the learned District Judge by re-appraising the evidence and considering all those pleas which were raised by the petitioners before the Hon'ble Supreme Court.

13. There is another way of looking at the grievance of the petitioners. If the amendment sought by the petitioners had been allowed, they would have amended their written statement. I do not agree with the learned counsel for the respondents that in such an event, the matter would have reverted back to its initial stage, as the amendment could be made even in the appeal before the learned District Judge. Even after the amendment, the learned District Judge would have followed the direction of the Hon'ble Supreme Court in the same manner as he would have done without the amendment. Thus, the learned District Judge is duty-bound to follow the direction of the Hon'ble Supreme Court in any event, and he was fully conscious of his said duty as he has categorically stated so in the impugned order. I, therefore, conclude that the impugned order shall not affect the merits of the petitioners' case viś-a-viś the consideration of the pleas raised by them before the Hon'ble Supreme Court and re-appraisal of the evidence in their appeal by the learned District Judge in relation to the execution of agreement dated 17.11.1961 between Mst. Zohra Begum and Mst. Halima Bai.

14. As a result of the above discussion, the impugned order is set aside to the extent of the findings of the learned District Judge with regard to the applicability of the provisions of the Code to rent matters ; and, the petition and the listed application are disposed of in the above terms.

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