

## IN THE HIGH COURT OF SINDH AT KARACHI

C.P. NO.S-146/2009

Petitioner: Syed Anwer Ali,  
through Mr. Abdul Wajid Wyne, advocate.

Respondents : Saeed Akhtar and others,  
Mr. Abdul Karim Khan, advocate for respondent  
No.1.

Date of hearing : 08.05.2018.

Date of announcement : 23.05.2018.

### JUDGMENT

Salahuddin Panhwar, J: This petition assails judgment dated 14.03.2009 passed by appellate Court in FRA No.147/2005 and order dated 21.05.2005 passed by Rent Controller concerned in Rent Case No.1171/2003 whereby present petitioner was directed to vacate the demised premises.

2. Brief facts of the case are that applicant/present respondent No.1 had filed application for ejection of opponent/present petitioner from demised flat and for recovery of arrears of rent on the plea that he (respondent) is landlord and owner of the demised flat, rented out to petitioner at monthly rent of Rs.20,000/- excluding utility charges in the year 1998 for one year; the petitioner and respondent were running business of construction, being partners, as such due to relations no agreement was prepared; respondent asked the petitioner in the year 1999 to vacate the premises as he wanted to sale it, on which petitioner replied that he will arrange a purchaser for the flat and induced the respondent to give him

power of attorney for selling the flat and some time for negotiation hence in good faith power of attorney was executed in favour of petitioner; thereafter petitioner avoided payment of monthly rent and also did not make arrangement for selling the flat nor paid rent since October 1999 hence respondent demanded to vacate the premises. Petitioner promised to vacate it in the month of March 2003 and to arrange for payment of arrears of rent meanwhile but he did not fulfill his promise hence respondent cancelled the power of attorney on 07.04.2003 and filed ejectment application on the ground of default and personal bonafide need as he wanted to shift his family in the flat instead of selling.

3. Petitioner contested the ejectment application by filing written statement whereby denied the relationship of landlord and tenant and stated that the disputed flat was never rented out to him in the year 1998 or to have committed default in payment of rent from October 1999; petitioner also denied partnership with respondent and pleaded that under the sale agreement respondent had sold out the flat to petitioner and respondent also executed registered general power of attorney in his favour; he further pleaded that consideration amount Rs.20,00,000/- were paid to respondent under the receipts.

4. Learned advocate for petitioner contended that there is no rent agreement between the parties; respondent had not produced any receipt proving payment of rent so as to establish relationship between the parties as claimed; that witnesses produced by the respondent were interested ones hence their evidence is not tenable in law; that the agreement of sale,

payment receipt and registered irrevocable power of attorney executed in favour of petitioner prove the entitlement of petitioner and could not be discarded without reference of tangible material; that petitioner never remained tenant of respondent as he was owner of the property and his claim has been substantiated from above referred documents and authenticity of these documents could not be made null and void, as those documents hold significance under the law; counsel referred section 2(f)(J), 15 and 21 of SRPO 1979 and placed reliance on 2006 SCMR 152, PLD 2016 SC 358, PLD 2003 Karachi 444, 1987 CLC Karachi 1134, 1989 CLC 252 Karachi, 1990 CLC 1529, 1984 SCMR 925, PLD 1992 Karachi 46 and 2000 YLR Lahore 527.

5. Learned counsel for respondent No.1 argued that respondent No.1 and petitioner were partners in the construction business and having full faith on each others, respondent let out the flat to petitioner orally with no receipt; that entire transaction was held in presence of witness namely Waseem and Maqbool in respect of demised flat and both have supported the respondent's case and their evidence was not shattered and is trust worthy which proves relationship between the parties as landlord and tenant; that rent case was filed in the month of October 2003, and written statement was filed in the month of February 2004 while petitioner all along remained silent and did not file any suit for specific performance of contract in the light of documents which were in his possession; that trial Court after evaluating and appreciating the evidence of respondent and witness on the point of letting out of the flat to petitioner has correctly held that there existed relationship between the parties as landlord and tenant and

petitioner with malafide intention denied the relationship; that when landlord denied the transaction of amount or otherwise then burden automatically shifts upon the tenant to prove that but in present case he failed to prove the payment of rent from October 1999 thus the findings of the trial Court are proper and do not require interference by this court; that the petitioner has totally failed to shatter the evidence of respondent and could not prove his status over the flat in question as owner as such the findings of the trial court were correct. He placed reliance upon 2000 MLD 1089, 1999 MLD 2925, PLD 1992 SCP 822, 1993 SCMR 597, NLR 1996 AC 115, NLR 1989 civil 638, NLR 1996 civil 663 and 1982 CLC 1383.

6. Heard the respective sides and carefully examined the available material.

7. The petitioner has denied existence of relationship of landlord and tenant but specifically claimed to be *bona fide* purchaser. In such eventuality, it is always requirement of safe *administration* of justice to frame such issue as same would control the competence / *jurisdiction* of Rent Controller to proceed further or *otherwise*. I am also conscious of the legal position that mere title of ownership is never sufficient to accept one as **landlord**. In absence of rent agreement the burden to prove existence would, *no doubt*, would be upon the person, claiming the status as **landlord**. Reference may be made to the case of Afzal Ahmed Qureshi v. Mursaleen (2001 SCMR 1434) wherein it is held as:-

“4. ... In absence of relationship of landlord and tenant between the parties the question of disputed title or ownership of the property in dispute is to be determined by a competent Civil Court as such controversies do not fall within the jurisdictional

domain of the learned Rent Controller. It is well-settled by now that “the issue whether relationship of landlord and tenant exists between the parties is one of jurisdiction and should be determined first, in case its answer be in negative the Court loses scission over lis and must stay his hands forthwith”. PLD 1961 Lah. 60 (DB). There is no cavil to the proposition that non-establishment of relationship of landlady and tenant as envisaged by the ordinance will not attract the provisions of the Ordinance. In this regard we are fortified by the dictum laid down in 1971 SCMR 82. We are conscious of the fact that ‘ownership has nothing to do with the position of landlord and payment of rent by tenant and receipt thereof by landlord is sufficient to establish relationship of landlord and tenant between the parties’.

However, it needs not necessarily be added that in every case of *rent* framing of such *issue* is necessary even if the opponent takes such *plea* but with an admission of his being put into possession as *tenant*. Reference may be made to the case of Mst. Zarina Khan v. Mst. Farzana Shoib (2017 SCMR 330) wherein it is observed as:

“9. .... We may observe that it is not a rule of thumb that wherever a person inducted in the rented premises subsequently denies his / her status as tenant, the Rent Controller is bound to first frame point for determination / issue to this effect and decide it before passing a rent order to secure the interest of the landlord during the pendency of such proceedings. More so, as such rent order will be tentative in nature and subject to final adjudication. The Rent Controller was, thus, fully justified in passing the rent order in terms of.....”

In the instant matter, it is a matter of record that such *point* was framed as ‘**point No.1**’ as:

“Whether the relationship of landlord and tenant between the parties exists?”

hence, the present petitioner legally cannot take an exception to competence (jurisdiction) of Rent Controller as well appellate Court to the effect that this aspect was *first* not entertained. It is also a matter of record that parties led

their respective evidence (s) which convinced both the courts below to answer the above point in *affirmative*. I would add here that it is also well established principle of law that constitutional jurisdiction would not be available as a *court of appeal* nor concurrent findings would be reversed merely on reason of possibility of a different conclusion. Reference may be made to the case of Shakeel Ahmed & another v. Muhammad Tariq Farogh & others (2010 SCMR 1925) as:-

“8. .... that jurisdiction under Article 199 of the Constitution cannot be invoked as substitute of another appeal against the order of the appellate Court. Therefore, mere fact that upon perusal of evidence, High Court came to another conclusion would not furnish a valid ground for interference in the order of the appellate Court, which is final authority in the hierarchy of rent laws i.e Sindh Rented Premises Ordinance, 1979.”

No doubt, in absence of written rent agreement, the burden to prove existence of relationship of landlord and tenant is upon the one, claiming to be *landlord* which fact can also be established through *oral* evidence, so was rightly observed by both the courts below while placing reliance on the case law, reported as 1989 CLC 252 Karachi.

8. Thought legally, this Court in *constitutional jurisdiction* cannot examine the evidence (s) unless it is *prima facie* established that findings of the two courts below are based on *no* evidence thereby erred in law. Reference may be made to the case of Mst. Mobin Fatima v. Muhammad Yamin & Ors (PLD 2006 SC 214) wherein it is held as:-

“8. The High Court, no doubt, in the exercise of its constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 can interfere if any wrong or

illegal conclusion are drawn by the Courts below which are not based on facts found because such an act would amount to an error of law which can always be corrected by the High Court. .... The findings of the appellate Court were cogent and consistent with the evidence available on the record. Its conclusions were in accordance with the facts found. The finality was attached to its findings which could not be interfered with merely because a different conclusion was also possible. The High Court, in the present case, in our view, exceeded its jurisdiction and acted as a Court of appeal which is not permissible under the law. Therefore, the High Court ought not to have undertaken the exercise of the reappraisal of the evidence."

From above discussion, I may safely conclude that:

- i) the fact of relationship of landlord and tenant can be established through *oral* evidence;
- ii) the concurrent findings *normally* be not interfered in Constitutional Jurisdiction even on possibility of *different* conclusion;
- iii) the reappraisal of evidence is not available in *writ jurisdiction* unless it is shown that conclusion, drawn by courts below, is based on *no facts / evidence*;

9. The perusal of the record shows that respondent no.1, in discharge of his burden, examined himself as well witnesses Muhammad Waseem and Maqsood Ahmed. The respondent no.1 came with specific claim that premises in question was let out to opponent (petitioner) in the year 1998 for one year and that execution of power of attorney was in consequence to assurance of petitioner (opponent) that he would arrange sale of premises in question which he (petitioner) however didn't rather stopped paying rent. It was claim of the respondent no.1 that non-execution of *written* tenancy was because of relationship of business partner between the parties. Such claim, though, was denied by the petitioner *however* he (petitioner/opponent) stated in para-2 of his written reply/statement as:-

“2. ...It is submitted that the applicant is a Architecture Engineer in the name and style of Shami Associate and **the opponent is basically Contractor** and the parties are / were herein remained as partner.”

Such admission seems to have admitted relationship between the parties to extent of faith and confidence upon each other. The faith and trust between parties also appear from conduct of either sides i.e allegedly putting petitioner / opponent into possession as *tenant* without written agreement; despite claim of having paid Rs.12,00,000/- (twelve lacs) as advance money per sale agreement (executed in February, 1999) containing clause-2 as:

“2. That the Second installment a sum of Rs.5,00,000/-(Rupees Five Lac only) will be paid by the Vendee to the Vendor on 10<sup>th</sup> June 1999 and remaining balance amount of Rs.3,00,000/- (Rupees Three Lac only) will be paid by the Vendee at the time of registration / transferring. The said property will be transferred to vendee in his own name or his nominee (s), if so requires.”

yet in month of September, 1999 (after date of second installment) the petitioner / opponent preferred to take the status of *agent* in place of *owner*. It is also a matter of record that the petitioner / opponent preferred to file a suit for Specific Performance in year 2006. I would add that since it is always the reaction of a man which displays his intention towards a claim, action or threat by other. A claim *alone* would not necessarily gives rise to file a *lis* but if such claim is found by one as *infringement* or *threat* to one's right or legal character. It is the reaction which controls cause of action and an inaction results in bringing the pleas of *estoppel* or *laches* to be lawfully raised. It is so that honourable Apex Court held in the case of Dr. Muhammad Javaid Shafi v Syed Rashid Arshad & Ors PLD 2015 SC 212 at its rel. p-232 as:-



“8..... **a person is estopped by his own conduct**, if he though was aware of certain fact (s), which is likely to cause harm to his rights and adversely affect and is prejudicial against him, avowedly or through some conspicuous act or by omission, intentionally permits and allows another person to believe a thing to be true an act on such belief..

Thus, I would conclude that a reaction (conduct) of a person may also be considered while examining the existence or non-existence of a fact.

10. Now, I would go a little further and will say that since, the law *itself* permits the Court to presume existence of a fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Reference may be made to case of Pathan v. State (2015 SCMR 315) wherein it is observed as:-

*‘Art.129. Court may presume existence of certain facts.---*  
The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case—‘

If all above circumstances and conduct of parties is examined, keeping in view said principle, it can safely be said that all these, *prima facie*, facts establish existence of faith, trust and confidence between parties thereby making rooms of possibility of non-execution of *tenancy*, as claimed by respondent No.1 / applicant and stated in evidence on Oath.

11. Further, both the courts below, with reference to evidences of witnesses of respondent No.1/ applicant, found categorical support to effect

of putting of petitioner/ opponent as *tenant* as well payment of *rent* by him. This was sufficient to be taken as discharge of *initial* burden upon the landlord thereby shifting the burden upon the tenant to disprove such categorical claim. The perusal of the record *however* shows that the petitioner/ opponent brought nothing on record in rebuttal (disproof) of such categorical claims except mere denial which *legally* would not prevail. Therefore, I am of the view that conclusion, so drawn by both the Courts below, on **point No.1**, needs no interference.

12. As regard claim of *purchaser*, it would suffice to say that it has been a matter of record that the present petitioner/ opponent preferred to continue as *agent* and never attempted to seek enforcement of the sale agreement till year 2006 when he filed the suit for Specific Performance of Contract. I may further add that a *sale* agreement is not a title document but at the most grants a right to sue for such title as well rights arising out of such agreement. Such *right* never comes to an end even if order of *ejectment* is recorded in Rent jurisdiction nor such order could *legally* cause any prejudice to legal entitlement of the *purchaser*, if he succeeds in such *lis*. Reference may well be made to the case of *Syed Imran Ahmed v. Bilal & Ors* (PLD 2009 SC 546) wherein it is held as:

“5. It is principle too well established by now that a sale agreement did not itself create any interest even a charge on the property in dispute that unlike the law in England, the law in Pakistan did not recognize any distinction between the legal and equitable estates, that a sale agreement did not confer any title on the person in whose favour such an agreement was executed and in fact it only granted him the right to sue for such a title and further that such an agreement did not affect the rights of any third party involved in the matter. It may be added that till such time that a person suing for ownership of a property obtains a decree for specific performance in his favour, such a person

cannot be heard to deny the title of the landlord or to deprive the landlord of any benefits accruing to him or arising out of the property which is the subject-matter of the litigation. Postponing the ejection proceedings to await the final outcome of a suit for specific performance would be causing serious prejudice to a landlord and such a practice, if approved by this Court, would only give a license to un-scrupulous tenants to defeat the interests of the landlords who may be filing suits for specific performance only to delay the inevitable and to throw spanners in the wheels of law and justice."

13. In another case of Abdul Rasheed v. Maqbool Ahmed & others (2011 SCMR 320), it has been held as :-

"5. ... It is settled law that where in a case filed for eviction of the tenant by the landlord, the former takes up a position that he has purchased the property and hence is no more a tenant then he has to vacate the property and file a suit for specific performance of the sale agreement whereafter he would be given easy access to the premises in case he prevails..... Consequently, the relationship in so far as the jurisdiction of the Rent Controller is concerned stood established because per settled law the question of title to the property could never be decided by the Rent Controller. In the tentative rent order the learned Rent Controller has carried out such summary exercise and decided the relationship between the parties to exists."

14. It is also a matter of record that present petitioner does not deny or challenge the status of the respondent No.1 as *lawful owner* of the subject matter and since such suit for Specific Performance, so filed by the petitioner, is also pending. The *legal* adjudication of such suit shall protect all the rights of the petitioner, claiming under sale agreement which includes restoration of possession and *damages* even therefore, once the relationship as *landlord* and *tenant* is found it would always be better to allow the *landlord* continuing taking fruit of his *admittedly* owned property, particularly when *tenant / opponent* stops paying rent under plea of *purchaser*.

15. In consequence to what has been discussed above, I find no illegality in the order *impugned* which is accordingly maintained. In consequence thereof the appeal in hand is hereby dismissed.

**JUDGE**

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