

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

**Constitutional Petition No. S – 558 of 2020**

Date	Order with signature of Judge
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Petitioners : Mr. Zia-ul-Haq Makhdoom, Advocate along with  
M/S Faisal Aziz and Hira Agha Advocates.

Respondent No.1 : Mr. Muhammad Zeeshan, Advocate.

Date of hearing : 22.02.2022.

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**ORDER**

**NADEEM AKHTAR, J.** – The petitioners are the real sons and legal heirs of Syed Najaf Ali Shah (**‘deceased’**). Respondent No.1 filed an eviction application bearing Rent Case No.80/2018 against the deceased for his eviction from Shop No.3, situated on Plot No.39/423-A, Kala Board, Malir Colony, Karachi, (**‘demised premises’**) on the grounds of personal need and default in payment of the monthly rent. Vide judgment dated 05.12.2019, the eviction application was allowed by the Rent Controller ; and, First Rent Appeal No.04/2020 filed by the petitioners against the order of their eviction was dismissed by the appellate Court vide impugned judgment dated 07.03.2020. This constitutional petition has been filed by the petitioners against the concurrent findings of the learned Courts below.

2. It appears that after filing of the above mentioned rent case by respondent No.1, the petitioners were substituted as parties / opponents therein by the Rent Controller in place of the deceased / their late father. In their written statement, the petitioners raised a specific objection that the rent case was not maintainable as it was filed against a dead person. It was pleaded by them that the deceased had passed away on 17.12.2017 i.e. prior to the filing of the rent case in February 2018. A copy of the death certificate of the deceased was filed by them along with their written statement in support of their above objection. The allegation of default in payment of the monthly rent was denied by them by asserting that the rent was being deposited by them in Court. The claim of respondent No.1 regarding his personal need was also denied by them by submitting that he was already in possession of several tenements in the building in question and the remaining tenements thereof had been rented

out by him to other persons. Only two points for determination with regard to the personal need and default were settled by the Rent Controller, and despite the specific objection raised by the petitioners in their written statement with regard to the maintainability of the rent case on the ground that it was filed against a dead person, no such point for determination was settled. Thereafter, evidence was led by the parties and they also produced relevant documents in support of their respective contentions.

3. The eviction application filed by respondent No.1 was allowed by the Rent Controller only on the ground of personal need. Respondent No.1 did not file appeal against the rejection of his application on the ground of default. Whereas, the petitioners filed an appeal against the order of their eviction on the ground of personal need, which was dismissed by the appellate Court as noted above.

4. It was contended by learned counsel for the petitioners that the rent case filed by respondent No.1 against a dead person was a nullity in the eyes of law and as such it ought to have been dismissed by the Rent Controller. It was further contended by him that the above defect could not be cured subsequently by impleading the legal heirs of the deceased. In support of this submission, he placed reliance upon (i) Muhammad Yar (deceased) through L.Rs. and others V/S Muhammad Amin (deceased) through L.Rs. and others, 2013 SCMR 464, (ii) Akhtar Hussain V/S Widow of Malik Naeem Ullah and 3 others, 2017 CLC 382, (iii) Malik Bashir Ahmed Khan and another V/S Qasim Ali and 12 others, PLD 2003 Lahore 615, and (iv) Capt. Shahid Saleem Lone and others V/S Ata-ur-Rahman and others, 1985 CLC 2555. Without prejudice and in addition to his above submission, it was further contended by him that the rent case on the ground of personal need was not maintainable even on merits in view of submissions made by the petitioners in their written statement. He contended that the ground of default in payment of the monthly rent alleged by respondent No.1 need not be addressed as it was decided in favour of the petitioners and such finding of the Rent Controller has attained finality as it was not challenged by respondent No.1.

5. On the other hand, it was contended by learned counsel for respondent No.1 that the impugned judgments do not suffer from any infirmity or illegality and as such the concurrent findings of the learned Courts below are not liable to be interfered with by this Court in its constitutional jurisdiction. According to him, respondent No.1 was not aware of the fact that the father and predecessor-in-interest of the

petitioners was not alive when the rent case was filed by him, however, the defect, if any, in the proceedings initiated by respondent No.1 stood cured when the petitioners were substituted as opponents in place of their late father. No law was cited by the learned counsel in support of his above contention.

6. I have heard learned counsel for the parties and have also examined the material available on record and the law cited at the bar. Respondent No.1 has not disputed that the rent case was filed by him against a dead person as he has claimed that he was not aware about the death of the deceased. It is not his case that the deceased was alive at the time of filing the rent case and the assertion about his death at the relevant time was false. Thus, it is an admitted position that the rent case was filed by him against a dead person. His only defense is that the defect, if any, in the proceedings initiated by him stood cured when the petitioners were substituted as opponents in place of their late father. I am afraid this contention cannot be accepted as the legal representatives of a deceased defendant can be brought on record only if the Suit had been instituted during his lifetime and he dies after institution and during pendency of the Suit. It is well-settled that a Suit / proceedings initiated against a dead person, as in the present case, is a nullity and such fatal defect therein cannot be cured subsequently by bringing his legal representatives on record. If any authority on this point is needed, reference may be made to Muhammad Yar (deceased) through L.Rs. supra, wherein the law on this point has been settled by the Hon'ble Supreme Court. The relevant passage of the above-cited authority is reproduced below for convenience and ease of reference :

*“3. Heard. Attending to the first question, the legal position by now is quite settled and explicit, in that, where a suit / lis is against only one defendant / respondent of the case, undoubtedly it shall be invalidly instituted being against a sole dead person (defendant) and shall be a nullity in the eyes of the law as a whole ; it shall be a still born suit / lis ; an altogether dead matter, which cannot be revived ; it shall, thus not merely be a defect which can be cured, rather fatal blow to the cause. However, the position shall be different where the lis is initiated against more than one defendants / respondents and out of them only one or few are dead, while the other(s) is/are alive. In such a situation, it shall be a validly initiated suit / lis in respect of the respondent(s), who are alive, but invalid qua those who are dead. To cater for such a situation, it has been held in Malik Bashir Ahmed Khan and another v. Qasim Ali and 12 others (PLD 2003 Lahore 615) :--*

*“Obviously, if a suit has been filed against the only defendant, who was dead at the time of the institution, such suit shall be still born, non-existent, and a nullity*

*in the eyes of law, therefore, it could not be merely defective and thus, could not be revived by impleading the legal heirs of the deceased defendant. The plaintiff in such a situation, subject to law, may have the option to bring a fresh suit against the heirs on the basis of the same cause of action.....”*

*The above is the apt and correct exposition of law and such judicial opinion of the Lahore High Court is upheld and approved in its letter and spirit and should be taken to be the view of this Court. Therefore, we are constrained to set aside that part of impugned judgment, which is contrary to the law enunciated in the noted dictum (PLD 2003 Lahore 614 supra).”*

7. In view of the specific objection raised by the petitioners in their written statement regarding the maintainability of the rent case on the ground that it was filed against a dead person, a point for determination ought to have been framed by the Rent Controller. The record shows that the death certificate of the deceased was produced by the petitioners in their evidence before the Rent Controller as Exhibit–O/7. However, as no point for determination was framed in this behalf, no findings have been given in relation thereto by any of the Courts below and the impugned judgments are completely silent with regard to this important and fundamental objection raised by the petitioners.

8. As the rent case was filed by respondent No.1 admittedly against a dead person, the same, being void and a nullity in the eyes of law, was liable to be dismissed by the Rent Controller ; and, such fatal defect could not be cured subsequently by impleading the petitioners / legal representatives of the deceased. By not dismissing the rent case, the Rent Controller failed to exercise the jurisdiction vested in him by law ; and, by maintaining such illegal order, the appellate Court committed a grave error in law. Thus, the illegal concurrent findings of the Courts below are not sustainable in law and are liable to be set aside.

9. Foregoing are the reasons of the short order announced by me on 22.02.2022 whereby the impugned judgments were set aside and this petition was allowed with costs throughout.

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