

IN THE HIGH COURT OF SINDH, KARACHI
Const. Petition No. **S-931** of **2021**

Petitioner : Ghulam Nabi, through Mr. Amir Asher Azeem,
Advocate.

Respondents : Ashfaq Hussain and Zain-ul-Abideen, through
No.1 & 2 Mr. Adil Rasheed, Advocate

Respondent : Additional District Judge- XII, Karachi-South
No. 3 (*Nemo*)

Date of Hearing : 10.02.2022 & 11.02.2022

Date of Order : 07.03.2022

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JUDGMENT

ZAFAR AHMED RAJPUT, J: The petitioner/opponent, through this Const. Petition has impugned the Judgment, dated 20.11.2021, whereby the respondent No.3/ learned XIIth Additional District Judge, Karachi-South, while dismissing Rent Appeal No. 120 of 2021, maintained the order, dated 05.04.2021, passed by the learned Vth Rent Controller, Karachi-South (*“the Controller”*) in Rent Case No. 656 of 2020, thereby the application under section 15 of the Sindh Rented Premises Ordinance, 1979 (*“the Ordinance”*) filed by the respondents No. 1 & 2/applicants against the petitioner was allowed by directing him to handover vacant and peaceful possession of the shop bearing No.4, located at Ground Floor of Haji Naik Muhammad Building, constructed over Plot No.RC-4/32, situated in Aja Maoji/ Al-Shifa Street, Ranchoreline, Gazdarabad, Karachi-South (*“the rented premises”*) to said respondents within a period of 60 days from the date of passing said order.

2. The facts giving rise to this petition are that the respondents No. 1 & 2 filed above said Rent Case before the Controller averring therein that they are co-owners/landlords of the rented premises by virtue of inheritance. It was further averred that many years ago the grandfather of the petitioner, namely, Allahuddin was inducted as tenant by the respondent No.1 in rented premises under an oral

agreement, who paid the monthly rent i.e. Rs.600/- upto June 2009. It was also averred that after the death of Allahuddin, the petitioner introduced himself as his grandson and occupied the rented premises without permission of respondents and made promise to pay monthly rent but he deliberately failed and neglected to pay the same despite repeated requests of the respondents for payment of monthly rent from the month of July 2009 as well as electricity, municipal service, water, conservancy and gas charges/bills to the concern departments; hence, he committed willful default in payment of monthly rent as well as utility charges. It was asserted that the petitioner without any prior permission and intimation handed over the possession of the rented premises illegally to a doctor, who was/is running a clinic therein. It was further asserted that the S.B.C.A. declared the entire building including rented premises as dangerous; however, the respondents filed Constitution Petition No.7965/2019 before this Court against the S.B.C.A. It was also asserted that the respondent No.2 being one of the co-owners required the rented premises for his personal bonafide use and occupation in good faith but the petitioner flatly refused to hand over its peaceful vacant possession to him.

3. The petitioner contested the said Rent Case by filing his written statement, wherein he pleaded that the respondent No.2 was not a co-owner of the rented premises and there was no relationship of landlord and tenant between the respondent No.2 and the petitioner and tenancy exists only between respondent No.1 and the petitioner. It was further pleaded that after the death of Allauddin, the petitioner contacted to respondent No.1 and started to pay rent to him at the monthly rate of Rs. 600/- up to June, 2005, which he accepted and issued receipts to him without making any objection and; thereafter, the respondent No.1 refused to receive the rent for the month of July 2009 and demanded to vacate the rented premises, thus, having no alternative he sent the rent for the period from July 2009 to September 2009 through money order to respondent No.1 but same was too refused by him and then he started depositing monthly rent in MRC No.1208/2009

in the Court of learned IVth Rent Controller Karachi-South and got intimation notice issued to respondent No.1, and he is regularly depositing the monthly rent in the said MRC without any default. It was also stated by the petitioner that he was/is regularly paying electricity bills, while the water and conservancy charges and municipal charges are not payable by him as the said charges were/are to be divided among all tenants of the buildings; as such, he was/is not liable to pay the same. It was further stated by the petitioner that he was/is himself running a clinic in the name and style of Muhammadi Clinic in the rented premises by hiring different doctors on salary basis; he denied to have handed over the rented premises to any doctor.

4. To prove the pleadings, the respondent No.2/applicant No.1 filed his affidavit-in-evidence as Exh. A/1 and produced Extract from Property Register, General Power of Attorney, death certificates of his father and grandfather, six counter foils of rent receipts, K-Electric, K.M.C. and W&S bills at Exh. A/2 to A/14; computer generated list of dangerous buildings at Exh. A/15; intimation letter and legal notice at Exh. A/16 & A/17.

5. From the other side, the petitioner/opponent filed his affidavit-in-evidence as Exh. O/1 and produced two money order coupons and money order receipts at Exh. O/2 to O/4; application addressed to Chief Post Master at Exh. O/5; two paid challans of MRC No. 1208/2009 at Exh. O/6 & O/7; intimation notice at Exh. O/8; paid utility bills of K-Electric at Exh. O/9 & O/10; computer generated record of F.B.R. on three pages at Exh. O/11; three paid challans of F.B.R. at Exh. O/16, computer generated record of four pages at Exh. O/17 to O/20 and registration certificate of Sindh Health Care Commission at Exh. O/21.

6. Out of the pleadings and evidence produced by the parties, the Controller while passing order, dated 05.04.2021, settled following points for determination in the Rent Case:

- (1). *Whether there exists no relationship as landlord and tenant between applicant No. 1 and opponent?*
- (2). *Whether rented premises is required by the applicant No.1?*
- (3). *Whether the provisions of Sindh Rented Premises Ordinance, 1979 could be invoked for eviction of tenant on the ground of dangerous or dilapidated condition of the premises?*
- (4). *Whether opponent committed default in payment of rent?*
- (5). *Whether there is any default on part of opponent in payment of utility bills of rented premises?*
- (6). *Whether partnership of opponent in business in subject premises is violation of S. 15(2) (iii) (a) of Sindh Rented Premises Ordinance?*
- (7). *What should the order be?*

7. The Controller, while recording his findings on above Points No. 1 to 3 in “Negative”, on Point No. 5 as “Accordingly” and on Points No. 4 and 6 in “Affirmative”, allowed the Rent Case/Application, vide order dated 05.04.2021, by directing to the petitioner to vacate the rented premises within 60 days of the order, which was confirmed by the impugned judgment in appeal. It is against those concurrent findings of the Courts below on issues of default in payment of monthly rent and subletting, the petitioner has maintained instant Const. Petition.

8. Learned counsel for the petitioner has contended that the Courts below while deciding point of default have erred in concluding that the petitioner had deposited monthly rent in MRC after passing of twelve days from the date of grace period of 60 days, as provided in section 15 (2) (ii) of the Ordinance, and that the petitioner should have paid the rent of July 2009 by the 1st October 2009, which calculation is absolutely wrong in view of section 10 (1) of the Ordinance; that the rent of July 2009 was due on 10th of August 2009, and in view of section 15 (2) (ii) of the Ordinance, the petitioner could pay the same up to 10th October 2009, which he paid on 13th October 2009, as the petitioner sent money order on 29.09.2009, which was returned unserved and; thereafter, the petitioner having no other option filed MRC No.1208/2009 on 10th October 2009, which was granted

on 12th October 2009, on the very next day when ledger Number was allotted, the petitioner deposited monthly rent in the said MRC without any default; as such, the petitioner committed no default in payment of monthly rent; that the petitioner after depositing monthly rent in MRC also got issued Intimation Notice, dated 14.10.2009, from the Controller through TCS; hence, he caused no hardship to the respondent No.1; that the Courts below, while relying on Registration Certificate issued by the Sindh Health Care Commission (Exh. O/21), have also erred in holding that there is a partnership between petitioner and some doctors, who are running "Muhammadi Clinic" in the rented premises, as the said Certificate is a formal document, which required nature of ownership of business; therefore, the same was filled with "Partnership" in the relevant column; however, no partnership ever existed between any doctor and the petitioner; moreover, the relevant documents of FBR clearly show that the petitioner pays salaries to his employed doctors appointed time to time. In support of his contentions, learned counsel has relied upon the cases of Zafar Ali v. Allah Bachayo (PLD 1989 SC 294), Barkhurdar v. Muhammad Razzaq (PLD 1989 SC 749) and Nazir Ahmad v. Zeban Bibi (2001 CLC 527).

9. Conversely, learned counsel for the respondents No.1 & 2 has fully supported the impugned order/judgment of the Courts below on the ground that the same are well-reasoned and do not suffer from any illegality or irregularity requiring any interference of this Court under its Constitutional jurisdiction; hence this petition is liable to be dismissed.

10. Heard the learned counsel for the parties and perused the material available on record with their assistance.

11. For the sake of convenience and ready reference, the provisions of sections 10 and 15(2) (ii) of the Ordinance are reproduced, as under:

"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 or, be deposited with the Controller within whose jurisdiction the premises is situated.

(4) The written acknowledgement, 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:

Provided that nothing contained in this section shall apply in the case pending before the Controllers on the commencement of this Ordinance.

15. Application to Controller.-- (1) Where a landlord seeks to evict the tenant otherwise than in accordance with section 14, he shall make such application to the Controller.

(2) The Controller shall, make an order directing the tenant to put the landlord in possession of the premises within such period as may be specified in the order, if he is satisfied that:

(i)

(ii) the tenant has failed to pay rent in respect of the premises in his possession within fifteen days after the expiry of the period fixed by the mutual agreement between the tenant and landlord for payment of the rent, or in the absence of which agreement, within sixty days after the rent has become due for payment.

12. From the plain reading of the above provisions, it appears that section 10 (1) of the Ordinance provides period for payment of monthly rent, in the absence of any date fixed by mutual agreement between the landlord and tenant, as not later than the tenth of the month next following the month for which it is due. Sub-sections (2) & (3) of the section 10 *ibid* provide three modes of payment of rent, *firstly* the rent should be paid to landlord directly, *secondly* in case of refusal or avoidness on the part of landlord to accept the rent, it could be sent to him through postal money order and, *thirdly* the rent could be deposited with the Controller within whose jurisdiction the premises is situated. It further appears that clause (ii) of sub-section (2) of section 15 of the Ordinance visualizes two situations namely:

where the tenant has failed to pay rent in respect of the premises within fifteen days after the expiry of the period fixed by mutual agreement between the tenant and landlord for payment of rent or in the absence of such agreement within sixty days after the rent has become due for payment.

13. It is an admitted position that there is no mutual written agreement between the parties for the payment of rent. The case of the respondents No.1 & 2 is that the petitioner defaulted in payment of monthly rent from July, 2009; as such, the period stipulated under section 10 (1) of the Ordinance would have expired on 10.08.2009. Default within the purview of the meaning of section 15(2)(ii) of the Ordinance, would arise if the tenant fails to pay, in the absence of mutual agreement between the parties regulating the terms and condition for payment of rent, within sixty days after the rent has become due for payment. In the instant case, the due date as stated above was 10.08.2009; therefore, the alleged default would have arisen on 10.10.2009. It is the instance of the petitioner that respondent No.2 refused to receive the rent for the month of July, 2009 malafidely demanding vacant possession of the rent premises; hence, having no alternative he sent the rent through money order No. 1723, dated 29.09.2009, which was refused by the respondent No.2. Hence, the petitioner tendered the rent to respondent No.2 within stipulated period when it was due i.e. 10.08.2009 and; thereafter, he filed MRC No.1208/2009 on 10th October 2009, which was again within stipulated period; however, the same was granted by the Rent Controller on 12th October 2009 and on the very next day when ledger Number was allotted, the petitioner deposited monthly rent in the said MRC; hence, the petitioner cannot be held defaulter in payment of monthly rent. The findings of the Courts below on the point of default in payment of monthly rent by 12 days being against the law and facts are not sustainable in law.

14. The Controller has also allowed the subject rent application on the ground of subletting by recording his findings that in the Registration Certificate of Muhammadi Clinic, issued by the Sindh Health Care Commission (Exh. O/21), the column of Type of Ownership shows 'partnership' and petitioner had admitted in his cross-examination that Dr. Fazal Ellahi, Dr. Japal and Dr. Chateen Lal were his partners; hence, the petitioner changed the nature of business in rented premises and started Muhammadi Clinic by entering into partnership with above-named three doctors in violation of section 15(2) (iii) (a) of the Ordinance by creating interest of other partners in the rented premises without the consent of the respondents No. 1 and 2. In this regard, the Controller has relied upon the cases of Muhammad Shafi v. State Life Insurance Corporation (2009 SCMR 893), wherein the tenant inducted his two brothers as partners and categorically asserted that he had ceased to remain a tenant and that the tenancy rights stood transferred to the entire partnership firm consisting of three partners. The Hon'able Supreme Court observed and held that the law expressly required that transfer of such right could only be effected with prior consent of the landlord. The Controller has also relied upon the case of Muhammad Subhan and another v. Mst. Bilquis Begum through Legal Heirs and 3 others (1994 SCMR 1507), wherein the petitioner No.1/original tenant was the sole proprietor of the business being run by him in rented premises, but he converted his business into a partnership firm. The petitioners/tenants did not file the partnership deed but relied upon the certificate of registration of firm and the order of the Income Tax Authority. The Apex Court observed that once a proprietary firm is changed into a partnership firm, then all the partners have right, title and interest in the tenancy, goodwill, business and assets according to their share unless otherwise provided in the partnership deed. The Apex Court further observed that the petitioners/tenants did not file partnership deed from which it could be ascertained that although the firm is a partnership firm, yet the right of tenancy was preserved in the name of petitioner No.1 and other partners did not

have any right in the tenancy. In these circumstances the Apex Court held that the petitioner No.1 created interest of other two partners in the rented premises who shall be deemed to be in possession as partners in violation of section 15(2) (iii) (a) of the Ordinance.

15. It may be observed that in order to prove subletting, without written consent of the landlord, as ground for ejectment of a tenant from the rented premises under the Ordinance, the basic ingredients of parting with the possession of tenancy by the tenant in favour of third party with exclusive right of possession and/or in case of sole proprietorship of a business being run by the tenant in rented premises, its conversion into a partnership firm creating in all the partners right, title and interest in the tenancy, goodwill and business have to be established. In the instant case, there is no denial to the fact that it is the petitioner who is depositing monthly rent in MRC and not any of his so-called partners. The FBR's record shows that the petitioner is the sole proprietor of the Muhammadi Clinic. Nothing is available on record to establish that the petitioner has ceased to remain a tenant and/or he has parted with the possession of the rented premises and/or he has transferred tenancy rights or otherwise created any right, title and interest in the tenancy, goodwill and business in favour of any of the so-called partners through any partnership deed, registration of partnership firm with the Registrar of Firms or any other document. Hence, the right of tenancy is preserved in the name of petitioner and other so-called partners/doctors do not have any right in the tenancy. These are the distinguishable facts of the case in hand.

16. For the foregoing facts and discussion, I am of the considered view that the impugned order and judgment of the Courts below are contrary to the letter and spirit of law, as the question of default in payment of rent on the part of the petitioner and subletting was required to be determined on the principles employed in sections 10, 15(2) (ii) and 15(2) (iii) (a) of the Ordinance. Since the Courts

below fail to determine the rights of the parties in lis under the governing laws and as per settled principles of administration of justice, this Court has jurisdiction under Article 199 of the Constitution to rectify the wrong and upset the erroneous concurrent findings of the Courts below by interfering in the impugned order and judgment.

17. This Constitutional petition is; therefore, allowed by setting a side order dated 05.04.2021, passed by the Vth Rent Controller, Karachi-South in Rent Case No. 656 of 2020 and the Judgment dated 20.11.2021, passed by the Additional District Judge, Karachi-South in Rent Appeal No. 120 of 2021. Consequently, rent ejection application being Rent Case No. 656 of 2020, filed by the respondents No.1 & 2 stands dismissed.

18. Above are the reasons of my short order dated 07.03.2022, whereby the instant Constitutional petition was allowed.

JUDGE

Athar Zai