IN THE HIGH COURT OF SINDH AT KARACHI

C.P. NO.S-560 and 561 of 2003

Dates of hearings	:	08.12.2020 & 15.12.2020
Petitioner(s)	:	Saeed Ahmed Khanzada and Rao Rahimuddin through Mr. R.F. Virjee, advocate.
Respondents No.1 & 2	:	N.R
Respondents No.3 & 4	:	Mst. Fatima (in both petitions) Muhammad Kashif (in C.P.No.S-560 of 2003) Zahoor Ahmed (in C.P.No.S-561 of 2003) Through Mr. Muhammad Imtiaz Khan, advocate

J U D G M E N T

Salahuddin Panhwar J.- These petitions assail judgments dated 19.05.2003 passed by Appellate Court in FRA New Nos. 77 & 78 of 2001 (Old Nos. 608 & 609 of 1999), whereby the orders dated 29.09.2003 passed by Rent Controller concerned in Rent Cases No.730 & 731 of 1998 were upheld and consequently, the FRAs were dismissed and present petitioners were directed to vacate the shops/demised premises within two months. Being bound by common thread, I intend to dispose of both the above captioned petitions through this single Judgment.

2. Precisely, the facts of the case are that respondents No.3 and 4/ applicants filed applications under Section 15 of the Sindh Rented Premises Ordinance, 1979 against the petitioners/ opponents, who are their tenants in respect of shops Nos. 3 and 3-A, LS-67/2 on Plot No. ST-4-C/1, main Bazar, Block-2, near Jama-e-Hamadia, Shah Faisal Colony, Karachi (hereinafter referred to as demised shops). The demised shops were rented out to the petitioners on a monthly rent of Rs.400/- and 450/- respectively. The petitioners being irregular and irresponsible towards payment of rent had committed willful default in payment of rent w.e.f October 1997, though several requests, reminders and written notices were sent to them by the respondents. It is further stated in the Rent cases that the demised shops were also required by the respondents No.4 (who are sons of the respondent No.3)

for their personal bonafide use. The petitioners contested the rent cases and after recording evidence and hearing the counsel for the parties, the rent cases were allowed and petitioners were directed to vacate the demised shops within 45 days and to hand over their peaceful vacant possession by separate orders dated 29.09.1999, which orders were challenged by the petitioners through captioned F.R.As., which also met the same fate, hence these petitions are filed. Being bound by common thread, I intend to dispose of both the petitions through this single judgment.

3. Learned counsel for the petitioners, inter alia, contended that during pendency of the appeal both the petitioners and the respondents entered into Sale Agreement(s) and civil suit(s) pending between the petitioners and the landlord , hence there is no relationship between the parties as tenant and lordship; that both Rent Controller and the Appellate Court have failed to consider that aspect of the matter; that it was the practice of the attorney/husband of respondent No.3 to collect rent after long intervals; hence no default in payment of rent has been committed by the petitioners; that there were other shops as well which could be used by the respondents in case of acute need; that respondent failed to prove personal bonafide need; that impugned orders and judgments of both the fora are liable to be set aside.

4. Learned counsel for the respondents No. 3 and 4, however, opposed the petition being not maintainable and while supporting the concurrent findings of the Courts below, contended that personal bonafide need of the respondents duly proved at trial and hence no interference is required in such findings; that denial of relationship of tenant and landlord by the petitioners is nothing but an attempt in futility that the petitioners in order to linger on the matter have filed instant petitions without any cogent reason, hence the same are liable to be dismissed.

5. Heard learned counsel for respective parties and minutely examined the material available on record as well impugned orders/judgments, recorded by both the courts below, whereby eviction applications have been allowed.

6. Since this is a writ of *certiorari* wherein concurrent findings of the courts are challenged. It is settled principle of law that question of facts, if not falling within the term of misreading and non-reading, cannot be questioned in writ petition, particularly in matter(s) of rent jurisdiction wherein the appellate Court is *final* authority. Reliance may be made to case of *Shakeel Ahmed &*

another v. Muhammad Tariq Farogh& others 2010 SCMR 1925, wherein it is held 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.

Thus in such like matters, the burden becomes heavier upon challenger (petitioner) to *prima facie* establish a patent *illegality* in findings of two courts below which, too, should be shown to have resulted in some miscarriage of justice.

7. It would be conducive to reproduce the relevant paragraphs of the findings of the Rent Controller, which are almost same in other case:-

> " **POINT NO.1**
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> Burden of proof lies upon the applicants. The tenancy and the rate of rent are not denied. The applicants have specifically alleged that the opponent committed default in payment of rent w.e.f. October, 1997. The attorney of the applicants have fully supported the case as stated in the ejectment application by filing his affidavit in evidence and he was cross-examined at length but his evidence remained un-shaken to the effect that the default in payment of rent stood committed w.e.f. October, 1997. However, in the cross-examination, the attorney admitted that before filing of the rent case, he sent the rent through money order to the applicant but she refused to receive the money order. He further voluntarily says that the money order was refused for the reason that it was sent in April 1998 being the rent for three months whereas the rent for 7 months had become due against the opponent. The contention of the opponent is that on 10th or 11th October 1997, he had gone to tender the rent to the attorney of the applicants but he was refused too and he further made 2/3 attempts and thereafter the rent was sent through money order for 2/3 times. In cross-examination it was further stated by the opponent that the money order was sent in the month of December, 1997but the contention of the opponent stands falsified from *his* own documents i.e. money order coupon Exh.0/9which reveals that it was sent on 16th April, 1998 showing the rent of three months i.e. October to December, 1997. The opponent further stated in the cross-examination that there is every possibility that there may be no other money order sent excepting money orders which are at Exh.0/9, 0/10 and 0/11. It is, therefore, proved beyond any doubt that the rent through money order was tendered for the first time on 16th April, 1998 for 1200/= being rent of three months i.e. October to December, 1997. Hence the contention of

the attorney of the applicants as stated by him in the cross-examination for the refusal of the money order stands proved that the applicant No. 1 was justified to refuse the money order being the short payment as such the rent had become due for 7 months. It may be pertinent to make mention that again on 16th May, 1998 the rent for three months was tendered through money order without any excuse or explanation for not tendering rent from January to April, 1998. It is also pertinent to make mention that no question was suggest to the attorney of the applicants regarding tendering of rent through the subsequent money order Exh.O/10 and O/11 nor there is any endorsement of the post-man that the same was refused by the applicant. Anyhow, it is proved through the oral and documentary evidence that the opponent committed default in payment of rent from October, 1997 as such tendering of rent through the money order in April1998 for the month of October to December 1997 would not absolve him from the default already committed because by that time the rent for October to December 1997 and January to March had already become due, Moreover, the contention of the opponent is that the applicant had been expecting rent for 2/3 months together is not plausible excuse until and unless it is established that the accumulated rent was being paid at the request of landlord or by express agreement to that effect between the parties. The burden of proof regarding payment of accumulated rent entirely lay on tenant and more acceptance of delayed payment of rent would not established that the parties had agreed to follow practice of payment of payment of accumulated rent. The reliance is placed on an authority reported in 1991 CLC 632.

The learned counsel of the opponent has contented that the present case on the ground of default was filed in November 1998 whereas the rent already stood deposited in the MRC No. 493/1998 in the month of August, 1998, he therefore submitted that subsequent default alleged, can not be made ground of ejectment as such fresh application could be filed. The submission of the counsel of the opponent is not plausible being not attracted in the present case because the case was filed in November, 1998 whereas the default already stood committed w.e.f. October, 1997, therefore this case is not of subsequent default. Even otherwise, deposit of rent in the MRC would not absolve the tenant for the default already stood committed. It is held in a case reported in 1987 CLC-364 that tenant once failed to pay rent within specified time and payment made subsequently to landlord, would not entitled him to get application for eviction dismissed on ground that the rent had been paid. The similar view is taken in another case reported in 1996 CKC-496(b). Regarding the money order, it is held in a case reported in 1987 CLC 2858(c) that landlord would be within his right to refuse money order tendering defaulted rent.

Consequent upon the above discussion and in the circumstances, it is proved that the opponent has committed willful default in payment of rent and he is liable for the consequences. The point is therefore, answered in the affirmative.

POINT NO.2.

Burden of proof lies upon the applicants. The applicant is mother of applicant No.2 and it is specifically asserted in the ejectment application that the applicant No.2 is married and to earn his livelihood, he wants to start business in the demised premises, The attorney of the applicant is husband of applicant No.1 and father of applicant No.2. He has stated tm his affidavit in evidence that the demised premises is required in good faith for the applicant for the personal use and occupation of applicant No.2 as presently he is jobless as such not earning. To a suggestion he has denied that the applicants have other shops suitable for the applicant No, 2 where the business could be started to earn liveli-hood. It is also denied by him that the applicant No.2 is earning any amount as monthly rent. The main contention of the opponent is that the applicant No.2 is also owner of other shop and earning the livelihood from the rent and the other two sons are running the separate business in same locality. It is also the case of the opponent that another shop owned by the applicants is under the tenancy of tenant Mohammad Sharif at the rate of Rs.550/= per month. He has also stated that all the shops have been let-out to the tenants on good-will as such the heavy amount has been received from each tenant. The attorney of the applicant was suggested the question that his both sons are running their business in Shah Faisal Colony having Electric Store adjacent to Mosque electric store in the name of "A" One Electronics Store. The said suggestion was vehemently denied and he further said that his both sons are jobless. Hence in such circumstances, the burden lay upon the opponent to prove that the sons of the applicant No.1 run the business under the name and style of A-One Electronic but in this respect the opponent has neither produced any documentary evidence nor even examined any person of the locality as witness to prove that the sons of the applicant No.1 are running the business of electronicsstore. Moreover it is pertinent to note the opponent himself stated in para-3 of the written statement that the applicant has more shops and earning the monthly rent. He further stated in paraNo. 8(c) that the applicant rented out her all shops on good-will to the tenants. It is, therefore, evident from the contention of the opponent in the written statement that all the shops of the applicant are on rent and no positive evidence has been adduced by the opponent that the sons of the applicant No.1 are running the business of electronics. The learned counsel of the opponent has, however, contended that the son of the applicant No.1 has not been examined for whom the business is to be established in the demised premises. It is held in a case reported in 1981 SCMR 844 that there is no requirement of law that the person for whose benefit the premises are required to be vacated, must be produced in the support of the ejectment application. All that is to be seen whether enough evidence has been brought on record by the applicant to sustained finding of the requirement of the premises for the personal use of her son.

In the present case, the opponent has failed to prove that the sons of the applicant are running the business as alleged. Moreover, it is also evident from the contents of the written statement that all the shops are on rent, therefore it can easily to

be presumed that the sons of the applicant are jobless. Although, in the ejectment application and evidence of attorney of the applicant, it is not stated regarding an specific business to be established by the son of the applicant No.1 but in the light of the case reported in 1984 CLC 2025, it was held that ejectment application not liable to be dismissed on sole ground that specific business intended to be started and carried on in premises in question is not specifically given in memorandum of ejectment application. It is also held in a case report in PLD 1985 Supreme Court 38 that failure of landlady and her son to appear before Rent Controller an offer themselves for cross-examination, not fetal to their plea that they require premises in good faith for their personal occupation and use.

Now it stands established that the son of the applicant No. 1 is not doing anything nor he is in occupation of any shop, therefore he is in genuine need of the demised premises. It is prerogative of the landlady to pick and choose any shop suitable to her in the light of business to be established. The tenant can not question that why his shop is being required by the applicant.

Now the point left is that of pugri. The contention of the opponent is that he paid the pagri/good will but it is very surprising that the amount is not mentioned in the written statement. However in the affidavit in evidence, the opponent stated that an amount of Rs.1,00,000/- was paid as good-will an agreement of rent was executed on 3rd August, 1990. It is however, admitted by opponent in cross-examination that he did not obtain the receipt of pagri amount nor it was paid before any witness. It is very surprising that the amount of Rs. 1,00,000/= is sufficiently heavy amount and it was paid without obtaining anything in writing when admittedly the terms and conditions of the tenancy were settled in writing. The opponent even did not examine anybody else or any other witness in support of his case that the pagri amount was paid by him to the applicant at the time of inception of tenancy. Hence in the circumstances it goes to prove that there is doubt that the alleged pagri amount was received by the applicant from the opponent.

Consequent upon the above discussion and in the circumstances, the applicants have established ground of bonafide personal use. The point is therefore answered in the affirmative."

8. The findings of the Rent Controller as regards to personal bonafide need duly stamped by the Appellate Court are proper and legal. It is well established principle of law that it is *always* the prerogative of the landlord to choose and select any of the tenement for his personal need and for this purpose the tenant or the Court have no *locus standi* to give their advice for alternate accommodation, as held in the case of ***Pakistan Institute of International affairs v. Naveed Merchant & Ors*** **2012 SCMR 1498**. It is further observed that as regards to the findings of both the fora below in respect of default in payment of rent are concerned, learned counsel for

the petitioners has failed to point out any illegality or infirmity in such findings. As regards to the plea of purchase of the demised shops is concerned, it would suffice to say that taking of such a plea (filing and pendency of such *lis)* by a tenant leaves him with no option but to do what has been enunciated by Apex Court i.e "to put the landlord into possession and then to *proceed* for enforcement of his rights". Reference may be made to ***Abdul Rasheed v. Maqbool Ahmed & others*** **2011 SCMR 320** wherein it is 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 exist.

9. For the foregoing reasons, captioned petitions, being not maintainable, were dismissed along with pending application(s) on 15.12.2020. These are the reasons of the short order.

J U D G E

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