

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. NO.S-513/2019

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

Petitioner : Muhammad Younus Billoo,
through Mr. Farrukh Aziz Shaikh, advocate.

Respondents : Piyari Sadiq Wahab through legal heirs,
and others,
through Ms. Maria Ahmed, advocate for
respondent No.1.

Date of hearing : 8th and 10th December, 2020.

Date of announcement : 18th December 2020.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Through instant petition, petitioner has challenged concurrent findings recorded by both courts below whereby eviction application has been allowed.

2. Precisely relevant facts as reflect from Rent Application under section 15 of Sindh Rented Premises Ordinance, 1979 are that deceased applicant (respondent No.1 herein through her legal heirs) was owner while opponent (petitioner herein) was her tenant in respect of Bungalow No.13/C, Block-6, P.E.C.H.S., Karachi against monthly rent of Rs.20,000/- vide tenancy agreement dated 12.05.2000; that petitioner/tenant had paid US\$15,000/- to the respondent No.1/landlady as advance monthly rent conditionally that if petitioner purchases the premises, the amount of US\$ 15,000/- will be adjusted in sale consideration. Thereafter the parties entered into sale agreement dated 13.07.2000 at United States of America and the sale consideration was settled at US\$ 1,20,000/-

and the balance amount of US\$ 1,05,000/- agreed to be paid within 60 days; that on 25.07.2000 the petitioner paid US \$ 9,500/- and on 29.07.2000 he paid another amount of US \$ 9,000/- and on 05.12.2000 paid US \$ 5,000/- which aggregates to US \$ 23,500/- that petitioner thereafter filed Suit No.312 of 2003 before this court for Specific Performance of Contract challenging respondent No.1's claimed balance sale price without executing sale deed which was dismissed and petitioner preferred HCA No.364/2006 before this court which is pending for adjudication; that petitioner paid total amount of US\$ 38,500 and in the year 2000 when rate the dollar was Rs.50 hence has paid a sum of Rs.19,25,000/-; that from June 2000 to January 2015 there are 175 months and at the rate of Rs.20,000/- per month the amount of rents comes to Rs.35,00,000/- hence the tenant is defaulter of Rs.15,75,000/- up to January 2015; that as stated due to limitations of law respondent claimed monthly rents from April 2012 on words; she also claimed to have sent legal notice to petitioner for vacation of the premises; that petitioner has not enhanced the rate of rent as the rate of rent should be Rs.50,000/-; that whatever was paid by petitioner after initial amount of US\$ 15,000/- was towards sale consideration and nothing was paid towards the rent and this Court in its dictum has laid down that amount of US \$ 15,000/- can be adjusted against monthly rents hence applicant/respondent No.1 prayed for vacant possession of the case premises together with the arrears of rent.

3. Petitioner/Opponent filed his written statement denying the allegations and raised preliminary objections that there is no relationship of landlady and tenant between the parties as same having ended on 15.07.2000 when the land lady agreed to sell the case premises to him and under section 53-A of the Transfer of

Properties Act respondent No.1 is debarred from claiming restoration of subject property after having sold it out to petitioner; that the landlady filed the case through her attorney but the Special Power of Attorney is not signed by her as her signatures on the same as compared to the sale agreement dated 13.07.2000 are different; landlady is settled as U.S.A. and the power is not attested by the Pakistani consulate in U.S.A; that the ejectment application is filed in disregard of section 15 of Sindh Rented Premises Ordinance, 1979 which is not attracted to the circumstances of the present case; that amounts of US \$ 15,000/- and US \$ 26,500 are admitted against sale of the property; that respondent No.1 malafidely concealed the real facts and also concealed order dated 28.03.2005 passed by this Court in Suit No.312/2003 whereby balance amount of US \$ 78,500/- was deposited with the Nazir; that how respondent No.1 is demanding rent up to January, 2015 after deposit of balance sale consideration with the Nazir in compliance of said order and execution of sale agreement dated 13.07.2000; that question of default does not arise and the application amounts to harass the petitioner hence he prayed for dismissal of the ejectment application.

4. Learned Rent Controller and the appellate court framed following points for determination:-

- a) Whether special power of attorney is an invalid power?
- b) Whether there exists relationship of landlord and tenant between the parties?
- c) Whether opponent being tenant has committed default in monthly rent?
- d) What should the judgment be?

5. To substantiate her claim, respondent No.1/ Applicant's attorney James Benjamin filed his affidavit-in-evidence who produced photocopy of tenancy agreement as exhibit A/1, photocopy

of Sale agreement as Exh. A/2, copy of Judgment dated 14.09.2006 passed by this Court as Exh A/ 3, photocopy of legal notice as Exh. A/4, copy of TCS confirmation report and its receipt as Exh. A/5 & A/6, copy of special power of attorney as Exh A/7, Copy of General Power of Attorney as Exh A/8. Learned counsel for Petitioner/Opponent duly cross-examined respondent No.1/ Applicant's attorney.

6. Learned counsel for petitioner has contended that rent case was not filed by respondent/owner as the alleged power of attorney on the basis of which rent case was filed, was admittedly executed in the USA and same was not duly attested in accordance with law as also the same was not witnessed and the signature of the deceased were forged and fabricated; learned rent controller without dilating upon or discussing this aspect summarily passed the order answering issue No.1 in negative in favour of respondent; that respondent No.1 claimed that petitioner was a tenant since the year 2000 yet no demand of rent was ever made by respondent till 2015 when suddenly the rent case was instituted and that too without authority and knowledge of respondent No.1; that it the agreement to sell was not a cancellable agreement and time was not of essence since there was no clause in the said agreement to sell for rescinding nor there was anything contained therein whereby any situation was given in the event of default. The learned rent controller failed to appreciate this and passed the ejectment in a mechanical manner; that it has been stated that Rent Case of respondent No.1 was hit by the principle of laches and estoppels, as she executed sale Agreement on 13.07.2000 and filed ejectment case in the year 2015 after 15 years thereof without any explanation or justification; that rent proceedings are hit by Section 3-A of Transfer

of Property Act whereby respondent No.1 was debarred from claiming restoration of subject property after having first agreed to sell the same to the petitioner' that the learned Rent Controller as well as appellate court failed to consider that the ejectment case was not maintainable in law as respondent No.1 was not the landlady after having sold out the case premises to petitioner and there was no relationship of landlord and tenant between the parties; that the courts below failed to consider that the operation of the judgment passed by this court in suit No.312/2003 was suspended in appeal No.364/2006 which is pending yet and no impression of same was required to be accepted while deciding the present case. He has relied upon 2003 MLD 319 and 2011 MLD 36.

7. Learned counsel for respondent No.1 has contended that petition filed is not competent as petitioner has not come to this court with clean hands having concealed material facts; that default in payment of rent has well been proved before the learned Rent Controller; and that judgments of the two courts below are just and proper hence do not require interference by this court. She has relied upon PLD 1974 SC 139, 2019 CLC 1266, 2017 YLR 453, 2017 CLC Note 197, PLD 20004 Karachi 502, 2011 SCMR 320, 2006 SCMR 1068, 2019 YLR 1763, 2015 CLC 1451, 2013 YLR 2011 and 2020 CLC 1599.

8. I would take no exception to principle, so laid down in the case of Abdul Rasheed v. Maqbool Ahmed & others (2011 SCMR 320) as:-

“5. We have heard both the learned Advocates Supreme Court. 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. In this regard reference can be made to Shameem Akhtar v. Muhammad Rashid (PLD 1989 SC 575), Mst. Azeemun Nisar Begum v. Mst. Rabia Bibi (PLD 1991 SC 242), Muhammad Rafique v. Messrs Habib Bank Ltd. (1994 SCMR 1012) and Mst. Bor Bibi v. Abdul Qadir (1996 SCMR 877). In so far as determination of the relationship of landlord and tenant is concerned, such enquiry by the Rent Controller is of a summary nature. **Undoubtedly the premises were taken by the petitioner on rent from the respondent and according to the former he later on purchased the same which was denied by the latter. 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.”

Accordingly, the factual position had been that:-

- i) there existed relationship of landlord; and
- ii) tenant comes with plea of having purchased the *premises* which (plea) was denied / disputed by the landlord.

I would take no exception to above legal position that where above *two* conditions coexist then there would be no *legal* option for a *tenant* but to *first* vacate the premises and then to file the suit for *Specific Performance of Contract* for enforcement thereof which includes possession.

9. The above principle, however, would not apply where the ***sale*** in favour of a tenant is acknowledged by the owner (landlady) even with a ***tenant*** because the law, *nowhere*, restricts a ***tenant*** to lawfully purchase the property in his possession as ***tenant*** even. In other words the law does permit turning of status of a tenant into a purchaser and for such right he (purchaser) even can get enforcement of his such right from Court of law, so is evident from referred case laws. However, to avoid delay towards rights of landlord

in getting possession of premises from a **tenant** on such plea of *purchase*, being easy to be raised, the above principle was so enunciated but while keeping the door *wide* opened upon such asserter to seek enforcement of such pleaded sale in shape of suit for *Specific Performance of Contract*.

10. Accordingly, it can *safely* be concluded that in a case of tenant, fitting in said *two* conditions, or where the sale is admitted by seller (landlord) then they would not be *legally* justified to invoke the jurisdiction of **Rent Controller** rather would require to approach Civil Court for determination of their rights and liabilities, arising out of a '**contract/agreement**' because their rights and liabilities are, *independently*, dealt with by the **Contract Act**.

11. Keeping in view the above, I have perused the Rent application which portrays a different picture. For sake of clarity the relevant para (s) of Rent Application are reproduced hereunder:-

- 1) That applicant is the Landlady/owner of Bungalow No.13/C, Block-6, P.E.C.H.S Karachi, and the opponent was inducted as tenant in the demised premises vide Tenancy Agreement dated:12-05-2000 at the rate of monthly rent of Rs.20,000/- (Rupees Twenty Thousands only) Further tenant has paid US\$15,000/- to the Landlady as advance monthly rent, **with condition that if the tenant shall purchase the demised bungalow the US\$15000/- shall be adjusted in sale consideration.** Copy of Tenancy agreement dated 13-05-2000 is attached herewith as Annx "A".
- 2) That thereafter the parties entered into a sale agreement dated 13.07.2000, at U.S.A, total sale consideration was settled as to US\$120,000/- **and already received US\$15000/- was adjusted in sale consideration.** It is pertinent to mention here that **balance amount of US\$105,000/-** was to be paid within sixty days from the date of signing of the sale agreement. Copy of sale agreement is attached as Annx. "B".
- 3) That thereafter the tenant paid US\$9500/- On 25.07.2000, & US\$9000/- On 29.07.2000, & US\$5000 on 05.12.2000, & total US\$23,5000/- were paid to the landlady.

The above contents are, *prima facie*, showing that in instant matter the execution of **sale agreement** between parties was never a matter of *dispute* therefore, with any prejudice to binding effect of said principle regarding *plea* of sale by tenant in rent matters, hence suffice to say that such proposition is not applicable to instant case.

12. It is settled principle of law that it is not the heading or caption of an agreement which *exclusively* determines the nature of the contract but various clauses thereof would be material in determining the real nature of the agreement. (PLD 2004 SC 860). Keeping above, principles of law in view, I have examined the findings of two courts below on this point. At this juncture, it is relevant to refer the operative part of findings of Rent Controller on this point:-

“..... It is an admitted position that opponent is residing in the demised premises and admittedly tenancy agreement dated 12.05.2000 was executed between the parties as such both are bound by this tenancy agreement. I may mention as under, the clause 4 of said tenancy agreement :-

Clause-4: “That this agreement is valid until terminated by the consent of the owner and tenant.”

From the above reading of clause 4 of tenancy agreement, it appears that tenancy agreement remain valid until its termination by consent of both parties. Simultaneously, I have perused the sale agreement dated 13.07.2000, nothing is mentioned in sale agreement in respect of termination of tenancy agreement, besides, nowhere in the evidence has come on record that tenancy agreement dated 12.05.2000 was terminated due to part payment of demised premises. I may further mention that in sale agreement dated 13.07.2000, I have seen a clause, find it necessary to reproduce the same as under:-

“Final payment constitutes complete relinquishment of any interest seller has in property.”

It appears from the above clause of sale agreement that till final payment of demised premises the interest of applicant remain intact. In presence of above clause of sale agreement, what is the status of opponent who is residing in demised premises. Definitely the position of

opponent in demised premises is as tenant. Thus, it is proved that till finalization of full sale consideration there exists relationship of landlord and tenancy between applicant and opponent. The plea of opponent in respect of non existence of relationship with the applicant is not convincing to influenced me to record my opinion in favour of opponent. Accordingly I record my findings on this issue in affirmative.”

It is pertinent to mention that the conclusion of Rent Controller because learned Rent Controller has given much weight to clause-4 of the Tenancy Agreement which, for sake of clarity, is reproduced again as:-

“That this agreement is valid until terminated by the consent of the owner and tenant”

The learned Rent Controller never appreciated that referred para (s) of the ejectment application, if are *jointly* read, the same concludes into nothing but that:

- i) landlady had already (while entering into rent agreement) offered to turn rent agreement into sale agreement, if petitioner/tenant, agrees to purchase premises (accepts offer of landlady);
- ii) the offer of landlady was accepted thereby making such offer (made in rent agreement) into an independent contract.

therefore, the execution of the **‘sale agreement’** was always with consent of the parties whereby they both from their conduct proved termination of earlier *rent agreement*, particularly when landlady herself accepted earlier paid **advance monthly rent** as part of the **sale consideration**. Not only this, but the landlady also received / accepted other amount as part of **sale consideration** therefore from her conduct and attitude affirmed execution of a *valid* sale agreement and even the landlady in sale agreement included as:

“From the date of this agreement, buyer assumes all local costs for maintenance and taxes due on the property.”

Not only this but she even in her affidavit-in-evidence, filed by respondent (Piyari Begum) in Suit No.312/2003, affirmed sale agreement but also her being agreed to perform her obligation i.e to execute sale deed on payment of full consideration:-

“4. That I say that, I agreed to sell the sit property to the plaintiff for US\$ 120,000/- vide sale agreement dated 19.07.2000 on the condition that, **the plaintiff will pay the balance sale consideration amounting to US\$ 1,05,000/- within 60 days from the date of signing of the said agreement and thereafter,** plaintiff only paid US\$ 26,500/- despite my repeated requests, reminders and demand, the plaintiff did not bother to pay the balance, so much so, after more than 2 years I was compelled by my dire needs, as I am an old widow of over 70 years, suffering from chronic ailments and am on permanent medication, to request the plaintiff through a common attorney, namely, Mr. Hiram W. Kwan, vide letter / notice dated 11.03.2003, but the plaintiff instead of acting as a gentleman **by paying the balance amount of sale proceeds as requested by me, ..**

Further, the learned Rent Controller also wrongly took help while referring clause of sale agreement which, for sake of clarity, is reproduced again as:-

“Final payment constitutes complete relinquishment of any interest seller has in property.”

I am unable to appreciate that how such clause was of any help in answering the point No.2 because there can be no legal exception that purchaser can *only* demand for complete and perfect title in his favour by making final payment or *least* readiness of making such payment. Thus, I am not in agreement with findings of the learned Rent Controller that possession of the petitioner / tenant over premises was as that of **‘tenant’** but it was within capacity of **buyer**. The learned appellate Court also went on such dotted line though legally was required to appreciate. Accordingly, findings of two courts below on point No.2 are not in accordance with law hence are reversed accordingly.

13. On reversal of findings on point No.2, the point No.3 becomes redundant.

Since, the point No.1 was also seriously challenged and has been a *legal* one, therefore, before parting I find it necessary to discuss this aspect too. For proper appreciation of the *legality* of the findings, it would be proper to have direct referral to findings of the Rent Controller *first* which read as under:-

“Point No.1:

It is contention of opponent in is affidavit in evidence that applicant has filed present case through her attorney James and special power of attorney dated 15.07.2004 is not signed by the applicant Piyari Begum and as the applicant is settled in USA but special power of attorney has not been attested by the Pakistan Commissioner in USA. In such circumstances when opponent state that special power of attorney has not been signed by the applicant and there is requirement of attestation from Pakistan Embassy then burden lies upon the opponent to prove such contention. The opponent has not brought any evidence to show that applicant has not signed the special power of attorney. Upon examination the evidence, there is only an oral statement of opponent against appellant. Simultaneously, **no law has been produced by the learned advocate for opponent to show that the attestation of Pakistan Embassy in USA is necessary on the special power of attorney**. Whereas, it is the arguments of learned advocated for applicant that special power of attorney do not need any attestation from Pakistan Consulate, who further argued that general power of attorney needs such attestation. **I have repeatedly asked learned advocate for opponent I respect of above arguments of applicant side, but learned advocate has chosen not to rebut on the above arguments of applicant’s advocate**. Therefore, I am unable to give weight on the aforesaid point in favour of opponent side. As such the answer of this point is in negative.

The perusal of findings, *prima facie*, show that answer to above point has *only* base i.e ***‘failure of counsel for opponent / petitioner in producing law in support of his contention’***. I am unable to appreciate such approach of the learned Rent Controller because passing the ***decision/judgment*** is not the responsibility of the counsel but is of the ***‘Judge(legal forum)’***. The presumption is always that ***‘law is written on the sleeves of the judges and they***

are supposed to know each and every law by heart'. Failure or negligence of the counsel or a party in making proper assistance shall never relieve the Judge of fact that **it is his duty to apply the appropriate and applicable law** therefore, the manner in which the learned Rent Controller has answered the point no.1 can neither be said as **legal** nor can be said to be as per requirement of duties of a **judge**.

14. The learned Rent Controller was always supposed to know *existence* of law on the point which have been referred by the learned counsel for the petitioner / opponent as '2003 MLD 319' and '2011 MLD 45' wherein the legal question, so raised regarding attestation of Special Power of Attorney by Embassy of Pakistan, if executed in a foreign country, have elaborately been answered as:-

In the first case of *Muhammad Yaseen Siddiqui v. Tahseen Jwaid Siddiqui* (2003 MLD 319) it is held as:-

"7.These admitted facts clearly indicate that the Power of Attorney having been allegedly executed in a foreign country has not been duly attested or endorsed by the Embassy of Pakistan or the concerned Consulate in United States of America. **This is, in fact, a worthless document and would hardly create an authority.** Reliance in this context may be placed on *S.M.Khalil v. Biswanath Basak* (1971 DLC (Rev) 62).

In other case of *Muhammad Maroof Ahsan v. Messrs Beach Developers through Partner* (2011 MLD 36 (Rel. P-45)), it is held as:-

"...It is mandatory requirement that a power of attorney executed in a foreign territory is to be attested by the Pakistan Embassy/Consulate in that country **otherwise it has no evidentiary value.** Reference in this regard may be made to the decision *Muhammad Yaseen Siddiqui v. Tehseen Javaid Siddiqui* reported as 2003 MLD 319...

The above *legal* position is, *prima facie*, sufficient that attestation of special power of attorney, executed in a foreign country (USA), was not a mere formality but mandatory requirement and failure was making such document as nothing but worthless. A worthless document can't be given any weight nor same ever created a *legal* authority / competence to file the eviction application. Worth to add here that in the very *written statement/reply* it was pleaded as:-

“c. That the applicant has filed present application through her attorney Mr. James s/o Regineed Benjamin but the special power of attorney dated 15th July 2004 is not signed by the applicant Pyari Begum as the same fully differed from her signature on Sale Agreement dated 13.07.2000 annexure “B” **and further Applicant is settled in USA and the power is not attested by Pakistani Counselor in USA.**”

Not only competence of the person, filing eviction application, was challenged at very initial stage but *legality* of power of attorney, too which was also with reference to un-denied signature of principal Mst. Pyari on an ***admitted*** document i.e **‘sale agreement’**, therefore, it was not only obligatory upon attorney to prove document but also that same was executed as per *mandatory requirement* of law.

15. The record also shows that during cross-examination the very *first* question, posed to attorney of the respondent / landlady, was:

“It is incorrect that power of attorney Exh/A/7 is wrong document and I falsely exhibited in this case.”

but the attorney of the respondent / landlady never attempted to get the document (power of attorney) attested nor attempted to get another *fresh* power of attorney, as was / is required by law rather he preferred to continue with such *illegal authorization*. If such legal

position is added in findings of the Rent Controller for point No.1 the answer would be nothing but affirmation.

16. This fact was also not properly appreciated or discussed by the learned appellate Court while responding to such aspect of the *impugned* order of Rent Controller because legal position with regard to attestation of claimed power of attorney was never discussed by the learned appellate Court. This shall stand evident from referral to relevant portion of observation of learned appellate Court which reads as:-

“I have gone through the record which shows that there were two powers of attorney produced by the attorney of the respondent before the learned trial court during evidence as Ex. A-7 and A-8. From bare reading of both the documents it reveals that Para No.2 of Ex.A-7 and Para 1 of Ex. A-8 fully authorized to the attorney to file ejectment proceedings / case against the tenant of the demised premises therefore the objection raised by the learned counsel for the appellant is not considerable.”

Thus, it can *safely* be concluded that findings of two courts below on point No.1 are neither legal nor in accordance with settled principle of law, therefore, can't be stamped rather needs to be corrected even while exercising constitutional jurisdiction in rent matter (s). Reference is made to the case of Mst. Mobin Fatima v. Muhammad Yamin & 2 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.”

Accordingly, findings of the two courts below on point No.1 are hereby set-aside and point No.1 is answered in **affirmation**.

17. An answer in **affirmation** on point No.1 has given cause to go further regarding *legal* effects of filing of a **lis** by an incompetent rather unauthorized person. Here, at this juncture it would be relevant to refer the Order VI rule 14 of the *Code* which reads as:-

“14. Every pleading shall be signed by the party and his pleader (if any): Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person **duly authorized by him** to sign the same or to sue or defend on his behalf.”

Above provision *leaves* nothing ambiguous that **signing** by party *himself* or by his **duly authorized person** alone can give bunch of papers the status of **pleadings**. A bunch of papers, submitted / filed by an **‘incompetent’** person shall continue to be mere bunch of papers; cognizance as well trial thereon shall never make such *incompetent lis* as competent to *legally* hold a decision. A decision on an *incompetent lis*, I am to add, shall be of no legal effect rather whenever found would render the suit / *lis* liable to dismissal. Reference may be made to the case of Abdul Hameed Khan v. Mrs. Saeeda Khalid Kamal Khan & Ors (PLD 2004 Karachi 17).

18. In consequent to what has been discussed above, the instant petition is allowed and ejectment application is hereby dismissed. Needless to add that this judgment, in no way, shall cause

any prejudice to merits of the suit, filed by the petitioner for Specific Performance of Contract, being an independent proceedings, having nothing to do with jurisdiction and competence of Rent Controller in/for affairs of rent matter(s).

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