

IN THE HIGH COURT OF SINDH AT KARACHI

F.R.A. No.37 of 2021

Appellant : Fazal Mehmood, through Mr. Muhamed Vawda advocate
Respondent: Faisal Imran, through Mr. Zahid Kabeer advocate
Date of hearing & order : 20th October 2022

ORDER

SALAHUDDIN PANHWAR, J.-This appeal assailed order dated 27th July 2021, passed by learned Additional Controller of Rent concerned in Rent Case No.05/2019, allowing ejection application of applicant (respondent herein).

2. Applicant/respondent had filed a rent case against opponent/appellant with pleas that he is landlord of subject bungalow and appellant is a tenant vide tenancy agreement dated 01.07.2009 with rent of Rs.100,000/-per month; opponent paid 1stsix months' rent amounting to Rs.600,000/ in advance besides paying Rs.200,000/- as fixed security deposit at the time of commencement of tenancy. It was further pleaded that opponent/appellant proved himself a difficult tenant as he never paid monthly rent as agreed; that rent was to be enhanced @ 10% after every eleven months as per Clause-2 of tenancy agreement, but was not; opponent/appellant had failed to pay advance monthly rent since January 2010 onwards inspite of several requests by applicant/respondent; **that agreement to sell (part payment) dated 21.07.2009 was executed between the parties but was canceled due to limitation laws because balance payment was not made within time specified hence resultantly advance payment was forfeited**; that opponent/appellant had rendered himself to be ejected on ground of default by not paying the rent to the applicant/respondent. It was specifically pleaded that possession of rented property was not handed over under sale agreement; that the property was mortgaged with Askari Commercial Bank and it was disclosed to opponent at the time of execution of sale agreement and due to non payment of balance sale consideration the property could not get released from bank.

3. Opponent in rent case/appellant herein filed written statement denying his relationship with applicant as a tenant, execution of any tenancy

agreement, payment of rent or security deposit and pleaded that alleged tenancy agreement is fake and fabricated, bearing his forged signature. It was pleaded that applicant/respondent had sold out the subject property to him through sale agreement dated 21.07.2009 against a total sale consideration of Rs.30 million and at the time of sale agreement peaceful vacant possession was also handed over to him on major part payment of Rs.20 million made through bank; that he has filed a suit for declaration and specific performance of contract bearing No.2670/2017 before this Court and in compliance of directions as contained in order dated 12.01.2018, he has deposited remaining amount of Rs.10 million with the Nazir of this Court; that he is lawful and *bonfide* purchaser by virtue of referred sale agreement; that sale agreement came to an end and cancelled staying that he was always ready to pay balance amount as per terms and conditions within time but applicant/respondent had left the country and went abroad with *malafide* intention and ulterior motives. It was denied that applicant/respondent had disclosed regarding mortgage of the property with Askari Bank limited or that due to non-payment of the balance of sale consideration, the property could not be got released from the Bank as alleged; he pleaded that clause-10 of the sale agreement is very much clear that property is not mortgaged and it is free from all encumbrances, therefore, the applicant/respondent has raised false and fabricated contention.

4. Learned counsel for appellant contended that no tenancy agreement was ever executed hence there exists no relationship of landlord and tenant between the parties, alleged agreement is fake/ fabricated, signature thereon are not of appellant; that true facts are that respondent had sold out in question property appellant through sale agreement dated 21.07.2009 against total sale consideration of Rs.30 million, at the time of sale agreement peaceful vacant possession was handed to appellant on major part payment of Rs.20 million; that appellant had also filed a Suit for declaration and specific performance of contract bearing Suit No.2670/2017 before this Court whereas in compliance of directions of this court appellant had also deposited the remaining amount of Rs.10 million with Nazir of this Court hence appellant is a lawful and *bonfide* purchaser by virtue of referred sale agreement; that since appellant was always ready to make payment of remainder no question arises of sale agreement being cancelled, that the fact is that respondent had went abroad with *malafide* intention and ulterior motives; that clause 10 of the sale agreement clarifies that property is not

mortgaged and is free from all encumbrances, therefore, respondent had raised false and fabricated contention before trial court for which he is liable to be prosecuted under Section 193 PPC; that Additional Rent Controller had no jurisdiction to pass eviction order on the basis of false and fabricated rent agreement hence that order is liable to be set aside. He has relied upon 1991 SCMR 850 (Aleemuddin and another vs. Muhammad Aslam and others).

5. Learned counsel for respondent contended that appellant proved himself a difficult tenant and never paid monthly rent as agreed in terms and conditions of tenancy agreement. He further contended that the rent was to be enhanced @ 10% after every eleven months as per Clause-2 of tenancy agreement but the opponent has failed to pay advance monthly rent since January, 2010 to onwards inspite of several requests made by the applicant; that the agreement to sell (Part Payment) dated 21.07.2009 was executed between the parties but the factual and legal position is that the agreement to sell has been canceled as balance payment was to be made within one year from executing of sale agreement dated 21.07.2009 i.e. August, 2010 and after payment of balance amount of Rs.100,00,000/- the respondent was bound to execute conveyance deed in favour of appellant; that it is clearly mentioned that if the appellant fails to pay balance amount before August, 2010, the advance payment shall be forfeited, hence appellant had no right to defense ejection proceedings under sale agreement. Furthermore, learned counsel for the respondent contended that appellant entered into tenancy agreement dated 01.07.2009 for rented premises and had rendered himself to be ejected on ground of default by not paying the rent. The property in question was mortgaged with Askari Commercial Bank, which was disclosed to appellant at the time of execution of sale consideration and owing to non-payment of balance sale consideration, the property could not get released from the Bank. Whereafter the applicant arranged funds from his own resources and got released property; that the opponent has filed a Suit No.2670/2017 in this Court which is pending adjudication, whereas it is settled principle of law tenant cannot resist ejection proceedings on the basis of unregistered sale agreement.

6. Heard and perused the record.

7. 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** hereafter 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. MessrsHabib 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.

8. It is germane to mention that in existence of above proposition as affirmative there would be no *legal* option for a *tenant* but to *first* vacate the premises and then to file/pursue the suit for *Specific Performance of Contract* for enforcement thereof which includes possession.

The above principle, however, would not fit in where the *sale* in favour of a tenant is acknowledged by the owner (landlord) 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*.

9. Thus, 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) under these peculiar admitted position landlord (seller) would not be *legally* entitled 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*.

10. 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:-

"2. That the Appellant entered into an Agreement to Sell dated:21.07.2009 [hereinafter referred to as the 'Agreement to Sell'] with the Respondent for the purchase of the Subject Property for a total sale consideration of Rs.30,000,000/- [Rupees Thirty Million Only]. At the time of the execution of the Agreement to Sell, the Appellant made a payment of Rs. 10,000,000/- (Rupees Ten Million) through two Pay Orders of Rs.5,000,000/- [Rupees Five Million] each in favour of the Respondent. Accordingly, the Respondent signed a receipt dated: 20.7.2009 which was in the form of a payment voucher of 'Red Sea Logistics'. The payment of the aforementioned amount of Rs.10,000,000- [Rupees Ten Million) is also noted and acknowledged in clause 1 of the Agreement to Sell.

3. That the following aspects are important in relation to clause 2 of the Agreement to Sell:

a. As per clause 2 of the Agreement to Sell, a further payment of Rs.10,000,000/- [Rupees Ten Million) was to be made by the Appellant to the Respondent in August, 2009, and upon the receipt of such payment, the Respondent was required to hand over vacant, exclusive and peaceful possession of the Subject Property to the Appellant.

b. The remaining amount of Rs.10,000,000/- (Rupees Ten Million) was to be paid by the Appellant to the Respondent after one year from August, 2009, but the amount would be payable simultaneous to the execution of necessary documents for transfer/conveyance of the Subject Property in favour of the Appellant.

c. The Appellant was required to pay Rs.50,000/- a month for a period of one year from the date of payment of Rs.10,000,000- [Rupees Ten Million) which was due as the second installment as per the Agreement to Sell. This amount, which totals Rs.600,000- for the whole year, is not a part of the total sale consideration.

4. That the Appellant paid the Respondent the second installment of Rs. 10,000,00/-[Rupees Ten Million] as per clause 2 of the Agreement

to Sell through three Pay Orders on 17.08.2009 of Rs.5,000,000/-, 4,000,000/and 1,000,000/- respectively and accordingly, the Respondent issued a receipt dated 17.08,2009 to the Appellant acknowledging receipt of the aforementioned payment. Furthermore, as per clause 2 of the Agreement to Sell, the Respondent also handed over vacant, peaceful and exclusive possession of the Subject Property to the Appellant in August, 2009, and the Appellant and his family have been residing in the Subject Property and enjoying its exclusive possession since 2009 till date. It is submitted that for the sake of brevity, the Appellant has filed some of the original utility bills from August, 2009 till date but is ready and willing to submit the original utility bills for the entire period between August, 2009, till date if and when so Ordered by this Honourable Court.

5. That in compliance of clause 2 of the Agreement to Sell, the Appellant was required to pay an amount of Rs. 50,000/- per month for one year after the payment of the second installment of Rs.10,000,000- (Rupees Ten Million). Accordingly, the Appellant paid the Respondent the aforesaid amount through four (4) quarterly payments of Ra 150,000/ each. It is submitted that at the moment the Appellant has filed one receipt along with this Application showing a quarterly payment from September till November, 2009, but the Appellant is in the process of locating the other receipts and will submit these receipts in due course showing the total payment of Rs.600,000/- to the Respondent.

6. That the Appellant approached the Respondent in August, 2010, and stated that he was ready and willing to pay the remaining balance sale consideration amount of Rs.10,000,000/- (Rupees Ten Million) but the Respondent informed the Appellant that he was very busy with his work and since there was no rush as possession was with the Appellant, the sale could be completed as per the Agreement to Sell once the Respondent was less preoccupied. The Appellant had also written a letter dated:15.7.2010 to the Respondent in this regard. It is submitted that thereafter the Appellant was not able to get in touch with the Respondent and in the year, 2012,the Appellant Objector sent a Legal Notice dated: 9.03.2012 but the same was returned undelivered. It is submitted that the Appellant therefore, through Letters dated: 2.04.2012 and 4.04.2012 wrote to the Registrar, Clifton Town-1 narrating the above mentioned. The Respondent finally got in touch with the Appellant and disclosed to the Appellant that the reason why he was delaying the finalization of the transaction was because he was in the process of getting the title documents of the Subject Property from the Respondent No.3 as he had given these documents to the bank pursuant to certain finance facilities availed by him. This fact had not been disclosed by the Respondent to the Appellant and is not mentioned in the Agreement to Sell. Upon learning of this, the Appellant was very apprehensive and anxious but the Respondent gave the Appellant verbal assurances that there was no problem and that it was only a matter of time before the original documents were released by the bank to the Respondent and the sale could be completed as per the agreement to Sell.

7. That the Appellant has paid a sum of Rs.20,000,000- (Rupees Twenty Million) towards the total consideration of Rs.30,000,000/-

[Rupees Thirty Million] to the Respondent. As evident by the facts narrated above, the Appellant has always been ready and willing to pay the balance sum of Rs.10,000,000/- [Rupees Ten Million) to the Respondent since August, 2010, as required under clause 2 of the Agreement to Sell and is still ready and willing to pay the balance amount of Rs.10,000,000- [Rupees Ten Million] subject to the Respondent fulfilling the terms of the Agreement to Sell by executing necessary documents for the conveyance of the Subject Property in favour of the Appellant.”

11. 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 present case.

12. Since 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, touchstone of law, I have examined the findings of learned Rent Controller on this point. At this juncture, it is relevant to refer the operative part of findings of Rent Controller on this point:-

“I have carefully gone through the case record which reflects that opponent neither produced/exhibited any power of attorney nor exhibited sale agreement. It is also admitted by the opponent's attorney during Cross-Examination that as per sale agreement, the opponent was under obligation to pay rent in respect of the premises in question @ Rs.50,000/- per month from August 2009 to August 2010 but the opponent failed to pay the rent to the applicant, which is sufficient proof that the opponent retains the property as tenant and mere execution of unregistered sale agreement does not create any title in the immovable property. The record further reflects that the opponent neither denied execution of tenancy agreement in his Affidavit-in-Evidence nor put any question in this regard to the applicant during his Cross-Examination.

Whereas, the applicant contended that in Para-1 of ejectment application and deposit the same in Para-1 of his Affidavit-in-Evidence that opponent entered into tenancy agreement dated 01.07.2009 with the applicant and failed to pay the rent since execution of the agreement and consistent during Cross-Examination as nothing in rebuttal could be brought on record against execution of tenancy agreement. Besides, the counsel for the opponent neither put any question with regard to tenancy agreement nor on issue of relationship of landlord and tenant between the parties and relied upon sale agreement and emphasized to prove that after execution of sale agreement, the tenancy agreement expired. Furthermore, the

opponent also did not deny the execution of tenancy agreement in his Affidavit-in-Evidence.

It is also fact that as per Article-113 of Qanun-e-Shahadat Order, where a fact is not challenged in cross examination, it amounts to admission of part of other side. Reliance on case law (2007 SCMR 518)

Arts.113&133, Admitted fact. Fact not cross examined ..Effect.. if defense has failed to cross examine witness about a specific portion of his statement of examination in chief, such unchallenged statement would be deemed to have been admitted by defense.

(2008 CLD 412)

Arts, 113 &133.. Affidavit in evidence and documentary evidence produced by plaintiff not challenged in his cross examination by defendant. Effect.. Plaintiff's case would stand proved and would not require further proof.

In view of above as well as case law relied upon by the applicant, I am of the firm view and hold that there exists relationship between the parties as landlord and tenant and opponent has admittedly failed to pay the rent to the applicant, which he is under obligation to pay as per tenancy agreement dated 01.07.2009. Hence, the issue No.1 is decided in affirmative and against the opponent. As far as the issue of suit for specific performance with regards to the sale agreement is concerned, the same is of civil nature to be decided by the Hon'able High Court."

13. The learned Rent Controller has failed to properly evaluate the evidence of the respondent/applicant, who during cross examination has admitted that *"It is correct to suggest that balance sale consideration has been deposited before the Nazir of Sindh High Court pursuant to sale agreement."* Thus the respondent/landlord has impliedly admitted receiving of Rs.20 Million from the petitioner/tenant. Though, he raised plea that it was without his consent, however, he admitted that he did not initiate any complaint against his lawyer. Even nothing has been brought on record to show that the landlord has made any application in the said suit reflecting that he had not extended any consent for depositing the balance sale consideration.

14. 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. Not only this, but the landlord also not denied receiving of other amount as part of *sale consideration* therefore from his conduct and attitude affirmed execution of a *valid* sale agreement. 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*. Accordingly, findings of Rent Controller to that effect are not in accordance with law hence are reversed accordingly.

15. Thus, it can *safely* be concluded that findings of Rent Controller 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 on point No.1 are hereby set-aside and point No.1 is answered in *affirmation*.

16. In accumulative to what has been discussed above, the instant petition is allowed and ejection application is hereby dismissed. However, it would be significant to mention that it is settled principle of law that judgment passed in rent jurisdiction will not effect upon ipso facto and shall not cause any prejudice to the merits of the suit, filed by the petitioner for Specific Performance of Contract, being an independent proceedings.

17. These are the reasons for the short order announced on 20.10.2022.

J U D G E

