

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Constitution Petition No. S-654 of 2022

[Dr. Syed Abid Imam Zaidi Vs. Shoukat Ali Shaikh & others]

Mr. Arbab Ali Hakro, advocate for petitioner.

Mr. Aghis-U-Salam Tahirzad, Advocate for respondent No.2.

==

Date of hearing & order: 07.11.2022.

ORDER

ADNAN-UL-KARIM MEMON, J. The instant petition has been filed impugning Judgment dated 13.08.2022 passed by learned Model Civil Appellate Court-II / VIth Additional District Judge Hyderabad whereby FRA No. 12 of 2022 preferred by respondent No.2 against his eviction by learned Rent Controller through impugned order 28.02.2022 was disposed of and matter was remanded to the Rent Controller with direction to rewrite the order with proper opinion.

2. Briefly stated the facts necessary for the decision of this lis are that petitioner filed Rent Application No.141 of 2020 for ejection of respondents 1 & 2 claiming to be the owner of rented premises viz. house constructed over plot No.162/A, Block-C, Unit No.2 Shah Latifabad Hyderabad through registered lease deed dated 12.01.1997 which petitioner rented out to respondent No.1 through Rent Agreement dated 23.05.2009 at the rate of Rs.35,000/- per month and tenancy commenced from 01.06.2009 for the period of 11 months in lieu thereof, petitioner received Rs.200,000/- as security deposit to be refundable at the end of termination of tenancy of demised premises wherein the tenant is running school which rent enhanced periodically and lastly tenant was paying rent at the rate of Rs.155,000/- per month from January 2020 to Rent Collector Raheemuddin, thereafter stopped paying rent thereby committed willful default in payment of Rent from March 2020 when petitioner came to know that respondent No.1 sublet his rented premises to respondent No.2 against condition No.5 of the rent agreement executed in the month of July 2016 and now respondent No.2 is running school in the demised premises; however, the petitioner contacted with respondent No.2 informed him that respondent No.1 had no authority to sublet the demised premises, upon which he misbehaved and issued threats of dire consequences. Petitioner has averred that he being retired from service intend to settle in his own house / demises premises at

Hyderabad and in this connection a year ago informed respondent No.1 to vacate his house but respondents 1 & 2 neither vacated the premises nor paid rent till March 2020, hence he initiated ejectment proceedings which were allowed by learned Rent Controller directing respondent No.2 to vacate the premises in question within 45 days; that the said order was challenged by respondent No.2 in appeal which was disposed of remanding the matter to learned Rent Controller to re-write the order, hence the petitioner being aggrieved by and dissatisfied with the above order has filed the instant constitutional petition.

3. The main thrust of arguments advanced by Mr. Arbab Ali Hakro, learned counsel for the petitioner is that impugned judgment of learned Appellate Court is opposed to law hence suffering from illegalities having passed without jurisdiction; that learned Appellate Court illegally exercised the jurisdiction in excess of his authority while passing impugned judgment dated 13.08.2022; that learned Appellate Authority failed to determine the case finally as it was not the case in which learned Rent Controller misread the evidence or there is insufficient evidence which ought to have been brought on record to enable it to pronounce judgment/order for any other substantial cause; that admittedly findings on point Nos. 1 to 3 of learned Rent Controller upheld by appellate Authority in its para No.14 but case was illegally remanded back to Rent Controller for re-writing on point No.4; that learned Appellate Court reproduced evidence of petitioner in para No.15 of judgment for the purposes of deciding point No.4 in respect of personal need does not reflect any element of malafide and such observation is erroneous and without application of judicial mind. He lastly prayed for setting-aside the impugned judgment of learned Appellate Court by restoring the order passed of learned Rent Controller.

4. Mr. Aghis-U-Salam Tahirza, advocate appearing for respondent No.2 supported the impugned judgment of learned Appellate Court by contending that case was not decided by applying judicial mind hence it was rightly remitted back by learned Appellate Court to-write the same with proper opinion and justification which need not to be interfered in these proceedings. He lastly prayed for dismissal of this constitution petition.

5. I have heard learned counsel for the parties having also gone through the record with their able assistance.

6. The learned counsel for the petitioner argued that learned lower appellate court committed error of law and facts in remanding the case, instead of deciding the same on the basis of material available before it;

that learned first appellate court has failed to examine the legal point which was submitted by the counsel for petitioner; that learned lower appellate court had the power to decide the case on the available evidence produced by the parties before the trial court and the exercise of such power by the learned first appellate court is provided as an alternate remedy and that learned lower appellate court failed to exercise the jurisdiction vested to him.

7. The learned lower appellate court vide impugned judgment has remanded the case to the trial court for re-writing the decision, the relevant excerpt of the impugned judgment is reproduced as under:-

“ In the light of the discussion held in the preceding point, the instant appeal is disposed of with direction to the learned Rent Controller to re-write the order with proper opinion, justification and evaluation of the evidence of the parties to show their clear malafide or bonafide within thirty days of receipt of this judgment. The parties to bear their own costs. Let true copy of judgment be transmitted to learned rent Controller along with R&Ps for information and compliance”.

8. There is no dispute that the entire evidence on the issue involved in the ejection case was on record before learned appellate court. The learned trial court has been directed just to re-write the judgment. This clearly shows that the evidence on record so made available was sufficient to give a finding.

9. In principle, the judgment should not only state the findings but also the evidence and how it supports the findings. In the impugned judgment dated 13.8.2022 passed by learned appellate court in FRA No.12 of 2022, no reason has been given to remit the case to trial court to re-write the judgment though the trial court vide order dated 28.2.2022 in rent application has given reasoning and has briefly considered the evidence adduced by both the parties and it contains discussion of the evidence of the parties.

10. It is settled principle of law that remand can only be ordered when the evidence on record is insufficient to pronounce the judgment. In the present case, reasons advanced by the lower appellate court for remanding the case were not supported by any record. The learned lower appellate court just to escape from the labour of analyzing the evidence and rendering its decision, that might be contrary to the findings of trial court diverted his responsibility by passing a remand order which is not desirable.

The purpose of learned lower appellate court is to rehear the entire matter, but in the present case, the impugned judgment reveals that the findings of appellate court are based upon presumption, but on the other hand, instead of recording its own findings, the matter was remanded to the trial court for re-writing the decision afresh. Remand of case by the appellate court is provided in Order 41 Rule 23 CPC which reads as under:-

“Remand of case by Appellate Court.—Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under the original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.”

11. However, the other provisions of Order 41 Rule 25 is also essential to be reproduced, which reads as under:-

“Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.—Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.”

12. Reading of both the provisions indicates the intention of draftsman of the statute. Remand of case by the appellate court is only permissible when requirements of Rule 23 *ibid* are fulfilled, otherwise, the other Rule 25 gives the way to appellate court to remit suit for performance of any act provided in rule and after compliance, learned trial court shall return the record of the case to the appellate court, in the meanwhile, the file of learned lower appellate court shall remain within his custody so that agony, expenditure and time of litigants and courts can be saved. The practice of frequent remand orders merely for rewriting of judgment by the lower court has always been reprimanded by the superior courts. reliance can be placed on the case “*Arshad Ameen Vs. Messrs Swiss Bakery and others*” (1993 **SCMR 216**), “*Robeena Shaheen Vs. Muhammad Munir Ahmad*” (PLD 2013 **Lahore 106**) and (2010 **SCMR 1119**).

13. Primarily the appellate court has acted with material irregularity and illegality for not giving the reasons for its decision to remit the matter to the trial court to re-write the order; therefore, such judgment being no judgment in the eyes of law cannot be allowed to sustain.

14. In view of the above discussion, this petition is allowed, resultantly the impugned judgment dated 13.8.2022 passed by learned appellate court in FRA No.12 of 2022 is set aside and the order dated 28.2.2022 passed by the learned rent controller in rent application No.141 of 2020 is maintained.

Muhammad Danish

JUDGE