

## IN THE HIGH COURT OF SINDH AT KARACHI

**C.P. No. S - 123 of 2022**

M/s. Muhammad Ali & Co. through legal heirs namely Mst. Azra Zaheer & others	.....	Petitioner
	versus	
Ali Akbar & Others	.....	Respondents

Mr. Sikandar Khan, advocate for petitioner.

Mr. Abdul Qadir Khan a/w Hafiz Danish, advocates for respondent No.1.

**Date of hearing** : 21<sup>st</sup> March, 2022

**Date of judgment** : 25<sup>th</sup> March, 2022

### JUDGMENT

**Omar Sial, J:** This petition is directed towards an order dated 29.01.2022 passed by the learned 11<sup>th</sup> Senior Civil Judge, Karachi South. In terms of the said order an application under section 12(2) C.P.C. filed by the applicant herein (i.e. Muhammad Ali and Company acting through the legal heirs of the late Muhammad Ali) was dismissed.

1. The relevant brief background to the current proceedings is as follows:

Shop No. 14 in the Multan Building situated on Maclean Street, off M.A. Jinnah Road in Karachi was owned by one Fida Hussain who gifted the said property by virtue of a registered gift deed to Ali Akbar (the answering respondent in these proceedings). Before the shop was gifted, Fida Hussain had rented it out to Muhammad Ali and Company whose sole proprietor was Mr. Muhammad Ali. There is no dispute between the parties on this count.

2. Ali Akbar filed a Rent Case (being No. 1198 of 2018) before the learned 11<sup>th</sup> Rent Controller, Karachi South seeking eviction of Muhammad Ali and Company on the ground of (i) default in payment of rent as well as (ii) personal bonafide requirement. The learned Rent Controller on 27.01.2020 passed an order whereby he allowed Ali Akbar's plea of

eviction on the ground of default in payment of rent but dismissed the plea of bonafide need.

3. Against the order of the learned Rent Controller (to the extent of the default in rent), Muhammad Ali and Company preferred an appeal (being F.R.A. No. 66 of 2020) before the learned 2<sup>nd</sup> Additional District Judge, Karachi South. Simultaneously, Ali Akbar also preferred an appeal for being denied eviction on the basis of personal requirement (being F.R.A. No. 70 of 2020). Through a common judgment dated 28.05.2021 the learned appellate court dismissed F.R.A. No. 66 of 2020 (filed by Muhammad Ali and Company) and allowed F.R.A. No. 70 of 2020 filed by Ali Akbar. This judgment of the learned appellate court was not challenged by Muhammad Ali and Company and thus attained finality.
4. Muhammad Ali and Company acting through the legal heirs of Muhammad Ali then filed a section 12(2) C.P.C. application before the learned 11<sup>th</sup> Rent Controller, Karachi South stating therein that the order dated 27.01.2020 (mentioned in paragraph 2 above) was obtained by Ali Akbar through fraud and misrepresentation. On **29.01.2022**, this application was dismissed.
5. Muhammad Ali and Company acting through the legal heirs of Muhammad Ali then preferred an appeal (F.R.A. 25 of 2022) before the learned District Judge, Karachi South challenging the section 12(2) C.P.C. dismissal order dated 29.01.2022 (mentioned in paragraph 4 above). An application seeking a stay of the execution was filed but the same was also dismissed vide order dated **7.02.2022**. It is this order, in addition to the one passed on 29.01.2022 that have now been assailed through these proceedings.
6. The counsel for the applicant has laid great stress that the learned Rent Controller who had passed the order of eviction on 27.01.2020 (mentioned in paragraph 2 above) could not have done so as Muhammad Ali has died in the year 1987 and thus an order for eviction was passed against a dead person. He also argued that neither was Ali Akbar the owner nor was there a relationship of landlord and tenant between the

parties. To the contrary the counsel for Ali Akbar argued that as Muhammad Ali's legal heirs did not challenge the order dated 28.05.2021 passed by the learned 2<sup>nd</sup> Additional District Judge (mentioned in paragraph 3 above) the same had attained finality and that the filing of the section 12(2) C.P.C. application and then the challenge to its dismissal through these proceedings was merely an attempt to deprive the landlord the enjoyment of his property. Learned counsel also argued that it was only after the execution proceedings had concluded and the writ of possession issued that the section 12(2) C.P.C. application was filed.

7. I have heard the learned counsel for the applicant as well as the learned counsel for the respondent and with their able assistance perused the record.
8. The learned counsel for the applicant admitted that the issue of proceedings against a dead person was not agitated at trial nor in appeal. In fact it appears that the first time the ground of proceedings against a dead person were raised was in the section 12(2) C.P.C. application. The learned counsel's argument that the legal heirs of Muhammad Ali were not even aware of the proceedings till the time the writ of possession was issued, carries no weight. The record reveals that the legal heir of Muhammad Ali (namely Shafiq-ur-Rehman) was the person who has all along contested the rent eviction proceedings from the very beginning and was also the person who had filed the appeal (F.R.A. 66 of 2020) against the eviction order. The legal heirs of Muhammad Ali were thus aware of the proceedings and never raised the ground which was agitated in the section 12(2) C.P.C. application i.e. an eviction order against a dead person. It appears that it has been raised as an afterthought in an attempt to delay things. To the contrary, it appears from the record that it is the respondents themselves who being aware of the death of Muhammad Ali first did not disclose the same and kept silent throughout the trial and appeal proceedings and it was only after the execution proceedings commenced that they began to argue that as Muhammad Ali had died in the year 1987 the learned Rent Controller could not have ordered eviction. The prima facie malafide on the part of the respondent is also evidenced

by the fact that it was they themselves who continued to pay rent till February 2016 i.e. when the default in payment occurred. They now appear to seek premium for their own non-disclosure. Reference in this regard may also be made to the case of **Rashida Khatoon vs Syed Hamid Ali (1986 SCMR 256)** Learned counsel has also failed to show that the eviction order was obtained by Ali Akbar through fraud or misrepresentation committed by Ali Akbar or as a consequence of want of jurisdiction.

9. Learned counsel has also been unable to show that in light of the Honorable Supreme Court's decision in the case of **Mst. Seema Begum vs Muhammad Ishaq and others (PLD 2009 SC 45)** how is this petition maintainable as far as the challenge to the interlocutory order of 07.02.2022 is concerned.
10. Coming to the case law cited by the learned counsel for the respondent. The first case relied upon is *Khadim Hussain vs Abid Hussain (PLD 2009 SC 419)*. This case is not relevant as the Court in this case had reached the conclusion that the appellant had played a fraud when not disclosing the death of a person against whom an order was obtained. This is not the case in the present situation. The next case is *Muhammad Essa vs Government of Sindh through District Co-ordination Officer (2015 S.L.J. 147)*. I see no reason as to why this case has been cited. The third case is *Mohammad Saeed vs Khalilur Rehman and 2 others (1992 MLD 1021)*. This case is not relevant as in this case one of the two tenants had died and a decree was obtained against only one without impleading the legal heirs of the other tenant. Further, in this case the plea of a dead person was taken right in the beginning of the proceedings, which is not the case in the present situation. The last case referred to was *Abdul Rashid vs Haji Syed Ainullah (PLD 1985 Quetta 56)*. This case is not applicable as in this case the property was let out to one Musa Jan who died and his two wives were living in it. They raised an objection that they were not aware that their dead husband had sold the property in his lifetime; they were not aware that the property was rented or that there was an existing tenant-landlord relationship between their dead husband and the landlord; nor

did the two ladies receive the mandatory notice of change in ownership. In the present case none of the facts of the case cited exist. To the contrary, the legal heirs of Muhammad Ali did not raise any objection or inform the landlord of the death of Muhammad Ali and further continued to pay the rent to the landlord, which in itself establishes their awareness. None of the cases cited by the learned counsel are thus applicable to the current case.

11. In view of the above, the petition stands dismissed. The R& Ps should be returned immediately to the learned trial court seized of FRA 25 of 2022.

JUDGE