

HIGH COURT OF SINDH, AT KARACHI

Civil Appeal No.13 of 2010

ORDER

Appellants : Muhammad Shafiq,
Through Mr. Aamir Asher Azeem, Advocate.

Respondents : Muhammad Suleman Jameel & others
Through Muhammad Younis Khan, Advocate.

DATE OF HEARING: 08.05.2014

NAZAR AKBAR, J. This second appeal is directed against the order of Vth Additional District Judge (South) Karachi in Civil Appeal No.112/2007, whereby the judgment of learned Trial Court in Civil Suit 1627/2002, had been maintained.

Brief facts of the case are that the Respondents have filed Rent Case No.762/1994 and Rent Case No.764/1994 on the grounds of default and personal need for ejectment of Muhammad Shafiq from the shops No.8 & 9 Mumtaz Manzil, Saddar, Karachi. Admittedly the present appellants are legal heirs of the tenant against whom rent cases were filed by the respondent in his lifetime in 1994. Muhammad Shafiq has also filed civil suit No.1201 of 2000 against the Respondents seeking declaration of his tenancy rights in these shops. The appellants claim that the rent cases were filed against the actual tenant after his death, therefore, they filed an application under Order 1 Rule 10 CPC to become party in the rent cases. Their application to become a party in the rent cases were dismissed by the Rent Controller and later on the two rent cases were even decided against the appellant. However, instead of appeal they preferred to file a Civil Suit No.1627/2002 with the following prayers;

- a) It is therefore prayed that this Hon'ble Court may be pleased to declare that the Plaintiff is the lawful tenant of shops Nos.8 and 9, situated on ground floor of Mumtaz Manzil, plot No.209, A-M, Saddar Karachi since 2.5.1972.

- b) To declare that Defendant had filed ejectment cases i.e. Rent Case No.762/1994 and 764/1994, knowingly against dead person Muhammad Shafi with malafide intention of obtaining ex-parte ejectment orders and dispossess the Plaintiff, their present tenants Muhammad Shafiq from shops Nos. 8 and 9 of Mumtaz Manzil and deprive running business of electronic since 2.45.1972 and to declare that the Rent Controller without consideration the admissions of defendants and documentary evidence on record has illegally dismiss the application U/O. 1 rule 10 CPC.
- c) To restrain the Defendants permanently from prosecuting Rent case No.762/1994 and Rent case No.764/1994 against the said dead tenant Muhammad Shafi without impleading, the Plaintiff as opponent/tenant intervene to the ejectment proceedings.

The trial Court dismissed the suit by order dated 19.5.2007. Appellant preferred First Appeal No.112/2007 but the same was also dismissed on 07.11.2009 by an order of the IInd Additional District & Sessions Judge (South) Karachi and this IInd Appeal is directed against the dismissal of their first appeal. Even in this IInd Appeal the appellants are faced with the initial objection raised by the trial Court that how a suit against ejectment order was maintainable and particularly the prayer (b), reproduced above. Can a Civil Judge declare that an order passed by Rent Controller was an order without consideration of the admission of the Defendants and documentary evidence on record resulting in dismissal of an application under Order 1 rule 10 CPC was illegal?

In fact the present appellant has preferred an application under Order 1 rule 10 CPC before the Rent Controller which was dismissed. Unfortunately they did not prefer any appeal or revision against the said order of the Rent Controller once their request to become a party in the rent cases was declined and through a civil suit they sought a declaration that such order was wrong. If the appellant were of the view that the order of dismissal of an application under Order 1 rule 10 CPC was an interim order, as such it was not appealable order, during

pendency of the rent case, the appellant at least after the final ejectment order should have filed First Rent Appeal and impugned both the orders viz; the order of dismissal of application under Order 1 rule 10 CPC and the final ejectment order.

Learned counsel for the appellant has vehemently urged that it was choice of the appellant to have preferred an application under Section 12(2) CPC to recall / review the ejectment order in rent cases No.762/1994 and 764/1994 or filed a separate suit against ejectment and the appellant preferred the later path. The learned Trial Court dismissed the suit as not maintainable and on appeal the Appellate Court while affirming the order of dismissal of the suit rejected the plaint under Order VII Rule 11 CPC by relying on the case law reported in **1991 CLC 740 Messrs Paper Corner. Vs. Board of Intermediate and Secondary Education**. Consequently, both the Courts below have dismissed the suit on pure law points.

Learned counsel has contended that even the plaint could have been treated as an application under Section 12(2) CPC by the Court and in support of his contention he has relied on the case law reported in **1992 SCMR 1744 Noor-ul-Amin and another ..vs.. Muhammad Hashim and 27 others**. The said judgment is quite distinguishable from the facts of the case of the appellant. The Hon'ble Supreme Court has restored the order of Additional Session Judge who has converted plaint into an application under Section 12(2) CPC, which was set aside by High Court. In the cited case the Plaintiff has challenged a decree of civil suit after the same was passed against the Plaintiffs at their back. Plaintiff in cited case had not filed any application under Order 1 rule 10 CPC during the trial of suit and the suit was filed in the same Court to set aside a decree which had passed the said Court. In the case in hand, the suit was filed before High Court against the orders passed by the Rent Controller. Therefore, as the plaint

was not before the same Court whose order was challenged on the basis of fraud and misrepresentation through the civil suit, the Court seized of the plaint had no jurisdiction to convert the plaint into an application under section 12(2) CPC. The other obstacle in the way of appellant was that once they had filed an application under Order 1 rule 10 CPC before the Rent Controller and it was dismissed, the course of action for the appellants was determined. Their grievance was against the order of Rent Controller under the special law i.e Sindh Rent Premises Ordinance, 1979, and therefore, they had no option except to find a remedy under the Rent Laws. They should have instantly filed an appeal or revision or even petition to press their grievance against the dismissal of their application under Order 1 Rule 10 CPC by the Rent Controller. The appellant has also relied on judgment reported in **1992 SCMR 1908 Mst. Fehmida Begum ..Vs.. Muhammad Khalid and another** and it supports the proposition that appellant had only one option, that of to go in appeal against the dismissal order on their application to become a party. In this case, the Hon'ble Supreme Court was pleased to hold that a stranger to the proceedings or third party against the order of Rent Controller may have two remedies open to him i.e an application under Section 12(2) CPC for recalling or review of the order based on fraud or filing a separate suit. But he can only pursue the one remedy he has initiated first or earlier in point of time, because having done so, other remedy shall stand forfeited in order to avoid a conflict of opinion in two forums. Therefore, since the appellant has already entered into jurisdiction of Rent Controller by filing an application under Order 1 Rule 10 CPC, their right to avail the other remedy of a separate suit was forfeited. The best option for them was to challenge the final rent order and the order of the dismissal of their application under Order 1 Rule 10 CPC in First Rent Appeal under section 21 of the Sindh Rented Premises Ordinance, 1979 but it has not been done. It is by now settled law that during the

proceedings of civil litigation, if any order has been passed by the Court in exercise of its original or appellate jurisdiction and if such order is not appealable, or even not appealed by aggrieved party pending the trial, the same can be attacked along with the final order in appeal as a defect or irregularity caused by such non-appealable order affecting the final decision.

The crux of the above discussion is that the appellant has chosen the wrong forum for filing a civil suit after the final ejectment order. They should have not abandoned the proceeding before the Rent Controller on the dismissal of their application under Order 1 Rule 10 CPC. Consequently this second appeal is also dismissed.

JUDGE

Karachi
Dated:_____

SM