

HIGH COURT OF SINDH, AT KARACHI

CP No.S-125 of 2013

ORDER

Petitioner : Syed Ali Athar,
Through Syed Hassan Ali, Advocate.

RespondentNo.1 : Mst. Shahida Fatima
Through Mr. Muhammad Yaseen Azad,
Advocate.

Respondent No.2 : First Additional District Judge, Karachi Central.

Respondent No.3 : Second Rent Controller, Karachi Central.

DATE OF HEARING : 26.05.2014

NAZAR AKBAR, J. This constitution petition arises out of judgment of First Additional District Judge, Central Karachi in FRA No.202/2012 whereby an order of Second Rent Controller, Central, Karachi in Rent Case No.656/2002 dismissing the application of the petitioner under Section 12(2) CPC has been upheld.

1. Brief facts leading to the petition are that the petitioner, after the final ejectment order dated 21.2.2007 passed by Rent Controller in Rent Case No.656/2002 whereby the rent application of Respondent No.1 was allowed against one Dr. Atia Jabeen wife of the intervener himself, preferred an application under Section 12(2) CPC challenging the said order. The learned Rent Controller after recording of evidence of the petitioner and respondent No.1 and giving a full hearing to both of them dismissed the petitioner's application by order dated 28.5.2012. The petitioner filed First Rent Appeal against the dismissal of his application under Section 12(2) CPC which was also dismissed. Now he has assailed both the orders through this petition.

2. I have heard the counsel for the parties and perused the record. The petitioner has contended that order passed by the learned Rent Controller

dated 21.2.2007 was without jurisdiction as according to him the original ejectment order in rent case No.656/2002 on appeal by Dr.Atia Jabeen was remanded by the Appellate Court and the remand order was to the effect that relationship of landlord and tenant between Respondent No.1 and the said Dr. Atia Jabeen should be decided afresh, after examining Mr. Mubeen Shahid advocate. The counsel for the petitioner further alleges that Dr. Atia was stopped from changing her stance which she had taken in the written statement and therefore, by misrepresentation she got order of ejectment, which has adversely affected the petitioner. He contended that the Rent Controller passed the judgment on the misrepresentation of Dr. Atia since she has stated in the written statement that the petitioner is the owner of the property and not respondent No.1.

3. Learned counsel for the Respondent has mainly contended that constitution petition against concurrent findings of Rent Controller and the Appellant Court is not maintainable. He has supported the impugned order and further contended that if at all any fraud has been committed, the petitioner has pointed the finger towards his own wife for retreating from her earlier statement before the Rent Controller. Whether the change of stance of Dr. Atia Jabeen before the Rent Controller was lawful or not and whether she was not supposed to disclose the circumstances in which she was contesting the rent case are the questions outside the scope of provisions of section 12(2) CPC. No answers to these questions would take away the jurisdiction of Rent Controller to pass an order on the basis of the facts available before him. The respondent's counsel has further contended that since Dr. Atia had been residing with the Intervener who admits that he was aware of the rent proceeding right from 2002 when notices were received by Dr. Atia Jabeen and yet he did not intervene in the rent proceeding between 2002 to 2007 nor did the intervener file any suit against Respondent No.1 to challenge her ownership rights in his property to protect his own claim on the

property on the basis of documents which he has produced with the application under Section 12(2) CPC.

4. Learned counsel for the petitioner has relied upon the following case law: -

1. Haji Abdul Ghafoor Vs. Abdul Qayyum and 3 others (1996 S C M R 1524)
2. Mrs. Anis Haider and others Vs. S. Amir haider and others (2008 S C M R 236)
3. Fida Hussain and others Vs. Abdul Aziz (P L D 2005 S.C 343)
4. Jameel Ahmed Vs. Saifuddin (P L D 1994 S.C 501)
5. Malik Muhammad Faisal and anothers Vs. State Life Insurance Corporation and 2 others (2008 S C M R 456)
6. Aurangzeb Vs. Massan and 13 others (1993 C L C 1020); and
7. Abdul Fattah and 8 others Vs. Nisar Ahmed and 3 others (2003 Y L R 2610)

The case law cited as 1996 S C M R 1524 and 2008 S C M R 236 are on the point of recording of evidence in the cases under Section 12(2) C.P.C. No such issue is involved in the present case since the evidence has been led by the parties before the final decision on the application of the intervener.

The case law cited as P L D 2005 S.C 343 is again on the issue of evidentiary value of attestation of mutation by revenue authority would not be sufficient for proof of title. This case is not relevant. Admittedly Rent Controller would not decide the issue of ownership.

The case law cited as P L D 1994 S.C 501 is on the question of remand of the case and the way proceedings should be regulated after the remand. This case is again out of context. Since after the remand of the case the parties have given up contest and in a case of no contest the court proceedings cannot be regulated by order of remand. Even otherwise the

remand order was obtained by the tenant on appeal against the order of the Rent Controller and she herself has given up the benefit of order in her favour. It was not in favour of the petitioner, therefore, the petitioner cannot be aggrieved by non-compliance of remand order. If the beneficiary of the order of remand does not press the case after remand it cannot be alleged that the trial Court has violated the terms of remand order, therefore, this case is not relevant either.

The case law cited as 2008 S C M R 456 is on the point of estoppel being misplaced. It has been alleged that the tenant was stopped from admitting the tenancy which she has denied earlier. The question of estoppel can be raised by the opposing contesting party and not by the stranger to the proceedings to prove fraud in an order. In the case in hand Dr. Atiya cannot be stopped from disclosing the circumstances in which she has been denying her status as tenant during the trial under the influence of the petitioner.

Similarly the case law cited as 1993 C L C 1020 is again on the question of jurisdiction with reference to the competence of Court to decide the suit in accordance with prevailing law and neither consent nor estoppel would confer jurisdiction where it does not exist. This is not the case of petitioner that the Rent Controller had no jurisdiction but it has been conceded or consented by the parties to approach the Rent Controller. Since the learned trial Court has independently exercised the jurisdiction in accordance with the Rent Laws without consent of the parties, therefore, this citation is of no help to the petitioner.

None of the case law is relevant to the facts of the present case. I have examined each and every case law, which is totally out of context as in the given facts of the case the appellant has not even referred to the fraud and misrepresentation in his application under Section 12(2) C.P.C., therefore it ought to have been dismissed on this ground alone.

5. The contention of the petitioner that the Court of Rent Controller had no jurisdiction to pass order dated 21.2.2007 merely because this order is not in conformity with the remand order has no force. The record shows that after the remand the tenant namely Dr. Atia filed a comprehensive undertaking spreading over four pages giving the circumstances in which she has been contesting the rent case and denying the relationship of landlord and tenant. In the said undertaking she conceded the relationship of landlord and tenant, therefore, the Rent Controller decided rent case No.656/2002 by order dated 21.2.2007 since nothing was left before the learned Rent Controller to proceed further including recording of statement of M. Mubeen Shahid Advocate. Since tenant herself has conceded that she was the tenant of Respondent No.1, therefore, contention of the petitioner that even after such a comprehensive statement given by the tenant the Rent Controller was required to summon Mr. Mubeen Shahid, advocate to come to a contrary conclusion is misconceived. I have examined the undertaking in which para-4 clearly shows that Mr. Mubeen Shahid, advocate has been acting only on her instructions and in para-5 she has explained the circumstances, in which she has been making false statement under the influence of petitioner. The petitioner has made allegations against his own wife in the application under Section 12(2) CPC but he has failed to point out any fraud or misrepresentation to the Court in obtaining the ejectment order. No ingredients of fraud and misrepresentation were mentioned in the application. To my surprise, he has drawn my attention to his own cross-examination available on page 293. In the cross-examination and even in his affidavit-in-evidence instead of alleging any fraud or misrepresentation, the petitioner has attempted to prove that the property did not belong to Respondent No.1 and therefore, she had no right to file rent case. In the cross-examination he admitted that it is correct to suggest that petitioner had gifted the property to Mst. Shahida Fatima (Respondent No.1) in 1989 and he also admitted that till

date he has not filed any civil suit for cancellation of gift in favour of Mst. Shahida Fatima. Learned counsel for the petitioner has contended that the Court below has failed to extend the scope of Section 12(2) C.P.C. beyond fraud and misrepresentation of facts hitting the jurisdiction of the Court which passed the impugned order. He is over zealous, the provisions of Section 12(2) cannot be extended to include the claim of ownership by the aggrieved party while challenging judicial orders passed by competent Court in exercising their lawful authority. The remedy to the petitioner is civil suit to claim his title on the property and not the provisions of section 12(2) CPC, which has a limited scope of examining the validity of a judgment / decree, on the plea of lack of jurisdiction, fraud and misrepresentation.

The petitioner has also relied on yet another application under Section 12(2) CPC filed by him through one Zulfiqar son of Rafiq Ahmed challenging the same order of Rent Controller dated 21.2.2007. Said Zulfiqar Ahmed in his separate application under section 12(2) CPC claimed that he was the tenant of the petitioner but the petitioner is unable to disclose the status of the said application which is available on page 155 of Court file. The petitioner's counsel was also the counsel of said Zulfiqar Ahmed, the other applicant who challenged the order dated 21.2.2007. In any case, the counsel for the petitioner has avoided to file the final outcome of the same. However, the impugned order of Rent controller shows that during the hearing of petitioner's application under Section 12(2) C.P.C., the Rent Controller has framed issue No.2 about status of Zulfiqar in the following terms:

“2) Wheter the intervener Zulfiqar Ahmed holding the possession of ground floor as tenant of intervener Syed Athar Mehoob?”

The findings of Rent Controller on the issue are again adverse to the interest / claim of petitioner. Like his wife, Dr. Atiya, the intervener also

withdrew from the stand taken by him as the order of Rent Controller clearly suggests. The order of Rent Controller on issue No.2 is as follows: -

“It may be noted that another application under Section 12(2) CPC filed intervener Zulfiquar Ahmed, which he later on withdrawn after framing the above issues. Thus the issue No.2 has become redundant.”

6. The fact remains that even in the memo of his application under Section 12(2) CPC, the petitioner has not alleged any fraud against Respondent No.1 in obtaining the orders rather the facts are otherwise. The petitioner has been making misrepresentation before the Rent Controller through his wife and despite knowledge of the rent case he did not intervene at the right time to challenge the *locus standi* of Respondent No.1 to file rent case.

7. In view of the above discussion, the inescapable conclusion is that the petitioner has miserably failed to point out any misreading and non-reading of evidence by the trial Court deciding the fate of his application under section 12(2) CPC. No jurisdictional defect is found in passing of orders by Courts below. Consequently, this petition is dismissed with no order as to cost.

JUDGE

Karachi
Dated: _____