IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

C.P. No.S-431of 2024

Petitioner:	Muhammad Majid, M/s Abdul Malik Shaikh and Jahanzeb Laghari Advocates.
Respondent:	Mst. Bano, through Mr. Muhammad Kamran Qureshi Advocate.
Date of hearing:	06.02.2025
Date of Decision:	06.02.2025

J U D G M E N T

MUHAMMAD HASAN (AKBER), J.- The Judgment dated 05.08.2024 passed by learned Model Civil Appellate Court-II /6th Additional District Judge, Hyderabad passed in First Rent Appeal No.01 of 2024 filed by the petitioner has been assailed in this petition under Article 199 of the Constitution of Pakistan, 1973. The said appeal was preferred against the Order dated 02.12.2023 passed by learned 8th Senior Civil Judge & Rent Controller Hyderabad in Rent Application No.20 of 2022 (*Mst. Bano v. Muhammad Majid*) whereby, ejectment application filed by the respondent/ applicant was allowed on the grounds of, default in payment of rent & personal *bona fide* need, and the petitioner was directed to vacate the demised premises.

2. Brief history of the case is that the respondent/ applicant filed application under Section 15 of the Sindh Rent Premises Ordinance 1979 (**'SRPO'**) seeking ejectment of the petitioner/ opponent from shop on ground floor constructed on Plot No.36 situated at Zulfiqar Colony, Jamia Cloth Market Unit No.8 Latifabad, Hyderabad ('**demised premises'**). It was alleged that applicant's husband Muhammad Boota was the owner/ landlord of the said property, whereas the opponent was tenant, against monthly rent of Rs.600/-, which was enhanced by the deceased from time to time and at present, the monthly rent of demised premises was Rs.7000/-. Upon demise of Muhammad Boota ('**deceased**') on 16.06.2016, his widow/ respondent became landlady of the demised premises. The respondent claimed that the tenant has defaulted in payment of monthly rent for the last 66 months, since expiry of her husband, whereafter she continuously approached the petitioner and insisted him to pay monthly rent amount or to vacate the rented premises for her personal *bona fide* use, who always kept her on false hopes. The

respondent, through her counsel also served a legal notice dated 21.12.2021 upon the petitioner for payment of monthly rent and to vacate the rented premises on the ground of default and personal need, but to no avail. Finally, respondent filed ejectment application No.20 of 2022 with the following prayers:

> *"a). Pass an order directing the opponent to put the applicant in the peaceful physical possession of the rented premises viz. Ground Floor Shop Constructed on Plot No.36 situated at Zulfiqar Colony Jamiya Cloth Market Unit No.8 Latifabad Hyderabad on the ground of willful default and personal bona fide use and need for her son for the business purpose in good faith and in case of failure to do so any officer or Nazir of this Honourable Court be appointed to act accordingly.*
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> *b). Direct to opponent pay to monthly rent @ 7000/Per month for the period of last three years which total amounting to Rs.2,52,000/- and future rent at the same rate till the vacation of the physical possession of the rented shop to the applicant.*
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> *c). Cost of this rent application be borne by the opponent.*
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> *d). Any other relief which this Honourable Court deems fit and proper."*

3. All the above allegations were denied by the petitioner in his written statement, along with denial of the landlord-tenant relationship between the parties. The learned trail Court framed the following points for determination:

> *i). Whether the Rent Ejectment Application filed by the Applicant is not maintainable under the law?*
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> *ii). Whether the Opponent has committed default in payment of monthly rent from 16.06.2016 to December 2021? If so, whether he is liable to be evicted from the rented premises in question on the ground of default in payment of rent?*
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> *iii). Whether the rented premises are required to the applicant for her personal use?*
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> *iv). Whether the Opponent obtained Shop No.36, situated at Zulfiqar Colony Unit 08 Latifabad on pagri basis in the month of July 1997 from Muhammad Boota husband of the applicant against a sum of Rs. 120,000/-?*
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> *v). What should the order be?*

4. After a full-dressed trial, the learned Rent Controller allowed the ejectment application vide Order dated 02.12.2023, which was assailed in the

First Rent Appeal No.01 of 2024, which also upheld the Order of the Rent Controller, hence this petition was preferred.

5. The learned counsel for petitioner argued that the Courts below did not consider the points raised in the written statement and the evidence; that the learned Courts wrongly decided the point of maintainability; that the Rent Controller was not qualified to be a Rent Controller; that the Rent Controller did not have the jurisdiction to decide the dispute between the petitioner and the respondent; there was no tenancy between the parties, since mandatory requirements under section 5, SRPO were not complied with; that there was no landlord-tenant relationship between the parties and application under section 15, SRPO was not maintainable; that the petitioner had no knowledge about the death of Muhammad Boota since no notice under section 18, SRPO was served upon him; that the Courts did not consider that Miscellaneous Rent Application No.50 of 2022 (**MRA**) was duly filed by petitioner under section 10, SRPO and rent was deposited therein; that the learned Courts did not consider that the petitioner was regularly paying rent to the deceased husband of the respondent; the Courts also did not consider that there was a practice of receiving periodic rent by the deceased husband of the respondent; that the Courts did not call relevant witnesses as required under SRPO; that the Courts did not consider and apply the '*Iqrarnama Barai Malba Pagri'* dated 07.07.1997 (**'*Iqrarnama*'**) executed between the petitioner and the deceased husband of respondent whereby valuable rights in the subject property were created in favour of petitioner; that no willful default was committed by the petitioner; and that the respondent failed to prove her personal *bona fide* need in good faith. It was finally prayed that the impugned Orders be set-aside and instant petition be allowed.

6. Conversely, learned counsel for the respondent pleaded that the instant petition is not maintainable; that filing of writ petitions in rent cases has been discouraged in a large number of decisions by superior Courts of Pakistan; that the present petition is not an appeal and therefore concurrent findings of fact given by two Courts below cannot be reversed on the premise that a different view could be taken of the same evidence; that no agreement named *Iqrarnama* was executed between the parties which is a fake and fabricated document; that the pleas taken by the petitioner are clearly hit by the principles of 'approbate and reprobate'; that the petitioner cannot be allowed to blow hot-and-cold at the same time; that the petitioner was fully aware about the demise of the owner/ landlord; that the Orders impugned are legal, valid and have been passed as per material made available on record;

that the petitioner is *estopped* from challenging the ownership of the respondent after demise of her husband; that the respondent brought sufficient material to prove her case and the ejectment application was rightly allowed on the ground of default in payment of rent and personal *bona fide* need, and therefore, it was prayed that the instant petition be dismissed with costs.

7. Heard both sides in detail, minutely perused the material available on record and considered the factual and legal pleas raised from both sides. With respect to the first challenge to the maintainability of the rent application due to alleged lack of competence of the learned Rent Controller by the petitioner, it has been settled long ago that proceedings before Rent Controller are quasi-judicial in nature,[1] and the learned Civil Judges are empowered to function as Rent Controllers being only '*persona designata*', which could not be equated to exercise powers of Civil Court.[2] Furthermore, a party could only raise such objection during the proceedings before the Rent Controller, and not thereafter.[3] The argument is also unacceptable being against the doctrine of 'approbate and reprobate' (discussed in detail at para 12 of this Judgment) because on one hand, the petitioner fully participated in proceedings before the rent controller without any such objection, so also in appeal, and so also in the memo of this petition, but such an objection could not be allowed to be raised at this stage of hearing of this petition. The plea that there was a different counsel for petitioner in the proceedings below, would not be a valid ground to raise this objection at this stage. The objection, being untenable, is therefore, rejected.

8. The second objection raised by the petitioner was the non-maintainability of rent application due to absence of any written tenancy agreement between the parties, as required under section 5, SRPO, which provides that:

> *5. (1) The agreement by which a landlord lets out any premises to a tenant shall be in writing and if such agreement is not compulsorily registerable under any law for the time being in force, it shall be attested by, signing by, and sealing with the seal of, the Controller within whose jurisdiction the premises is situate or, any Civil Judge or First Class Magistrate.*

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1. *2009 YLR 1024 'Mehran Distributors V. UBL & others'*
2. *1987 CLC 1109 'Boolchand v. Muhammad Bachal'*
3. *1998 CLC 1987 'Mehboob Ahmad v. State Life Insurance Corp. Pakistan'*

> *(2) Where any agreement by which a landlord lets out any premises to a tenant is compulsorily registerable under any law for the time being in force, a certified copy of the registered deed and where the agreement is not so registerable, the original deed duly attested under sub-section (1), shall be produced and accepted in proof of the relationship of the landlord and tenant:*
>
> *Provided that nothing in this section shall affect any agreement between the landlord and tenant immediately before coming into force of this Ordinance."*

9. It may be noted that although section 5 clearly enjoins the existence of an agreement in writing, but the language used in the provision makes it directory in nature and not mandatory,[4] and in this regard, the earlier view was not concurred. Providing a method for execution of tenancy agreement under section 5, with an object to avoid any doubt or ambiguity in execution thereof, neither means that oral tenancy is prohibited under the Ordinance, nor the jurisdiction of the rent controllers have been barred in cases of oral tenancy agreements.**[5]** Therefore, once a tenancy is admitted between the parties and acted upon, the parties would be *estopped* from raising objections as to its legality. Even with regards to the requirement of countersigning of the rent agreement by the respective Rent Controller or the Area Magistrate, the rule is that in the absence of any penalty, such an agreement at the most could be called as irregular, but cannot be declared as illegal.**[6]** Lastly, mere non-production of a rent agreement in terms of section 5 SRPO could not be made a valid ground to dismiss an ejectment application, as the landlord-tenant relationship can be proved through other means as well, as provided under the law.**[7]** The petitioner is again faced with the same situation of approbating and reprobating his stance because on one hand, he dienes the relationship but on the other hand, he was admittedly claiming to make payment of rent directly to the deceased and also to the respondent husband and later depositing rent in Court. Lastly, this argument was also raised by petitioner's counsel for the first time during course of hearing of this petition. Such objection to lack of landlord-tenant relationship based upon absence of a written tenancy agreement, being untenable in view of the above detailed discussion and the legal position, is therefore rejected.

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4. 1994 SCMR 1102 'Faiz Sons vs. Hakim Sons (Impex) Pvt. Ltd.; 1999 MLD 2137 'Sharfuddin v. Riazuddin'; 1992 SCMR 46 'Hakim Ali vs Muhammad Salim'
5. 2002 CLC 256 'Muhammad Younus v. Irfanullah Khan'
6. 1999 CLC 2088 'Farrukh Jamal v. Iqbal Ahmad'
7. 1994 SCMR 1485 'Fariddudin v. Mahboob Ali'

10. The third argument pleaded by the petitioner's counsel was that, after the demise of the original landlord, notice under section 18, SRPO was not served by the opponent/ widow upon the petitioner and therefore no default could be attributed to him. On this point as well, it is surprising to note that on one hand, the petitioner claims lack of notice, whereas on the other hand he himself admittedly claims to have paid rent to the respondent regularly (which though is denied by the respondent). It has also been claimed by the petitioner that after receipt of rent for many years, when the respondent refused the money order, Miscellaneous Rent Application No.50 of 2022 was filed. Such argument is again self-contradictory to the other pleas raised by the petitioner, because the petitioner himself admits and claims paying rent to the widow of the original landlord upon his demise. The rule is that when the tenant was cognizant of the death of landlord and he also knew the persons entitled to receive the rent, then he is bound to pay rent to his successors-in-interest, failing which, he could be held a defaulter.[8] Even if the case of the petitioner was that he was regularly paying rent to the respondent, then his act of suddenly depositing the same in the miscellaneous rent application 50/2022 was not justified. Looking at the precedence on this point, where a tenant was paying rent to the landlord but suddenly shifts to depositing rent in Court in miscellaneous rent application 50/2022 in the name of previous owner, the same was declared as harassment to the landlord and the tenant was ordered to be evicted.[9] Likewise, in a case where the tenant received the knowledge of change of ownership but instead of making enquiry about the title, started depositing rent in Court in the name of previous owners, such conduct was declared as causing harassment to the new landlady, for she would not be able even to withdraw the rent deposited in Court by the tenant. The conduct of such a tenant challenging the gift deed as illegal in favour of the new landlady, was held as contumacious and amounted to causing harassment to the landlady and such default was not even treated as a technical default.[10] In a case where tenant had the knowledge about death of original landlord, he was required to tender rent to legal representatives of deceased and his depositing rent in Court in the name of original landlord, was not considered as valid tender of rent.[11] Refusal by landlord to receive rent is yet another relevant factor which is required to be proved by the tenant, and in the absence of any such proof, conduct of the tenant was

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8. 2001 SCMR 1140 'Pakistan State Oil Company Ltd. v. Muhammad Naqi'
9. 1997 SCMR 945 'Fazal Elahi v. Gul Khan Ahmad Qureshi'

considered contumacious and harassing towards the landlord.[12] Direct deposit of rent in Court, without first tendering the same to landlord, was treated as willful default and the same was not accepted even as a technical default.[13] The expressions used in section 10 of the Ordinance viz, "in advance", "monthly rent payable in advance" and "rent payable every month in advance" have already been defined by the Supreme Court.[14] In view of the above discussion, considering the principles and rules in respect of section 10 SRPO, the contradictory pleas raised by the petitioner, and the admitted claim by the petitioner that he was paying rent after the demise of the deceased, this objection raised by the petitioner, also stands rejected.

11. The fourth argument raised by the petitioner was that, for filing application under section 15, SRPO, the respondent was first required to establish her ownership on the demised premises by producing title documents of the property in her name. The petitioner's counsel is again faced with the question of inventing new pleas at this late stage, so also, of approbating and reprobating i.e. adopting self-contradictory stances. The said objection is neither reflected in any of the pleadings before the two Courts below, nor in the memo of this petition. Secondly, the petitioner was legally *estopped* from raising such plea and from demanding of title documents of his landlady. No sooner a notice is served upon the tenant under section 18 about the new owner of the property, or it was otherwise conveyed to him either in the judicial proceedings or by some other reliable source, the tenant was bound to accept the new owner as his landlord.[15] Thirdly, in his cross examination, the petitioner himself admitted that: ***"It is correct to suggest that husband of the applicant was owner/landlord of the demised premises".*** Thus, by virtue of petitioner's admission, the status of the respondent falls section 2(f) of the SRPO, as "landlord". Although the petitioner has objected to the ejectment application, but he also admits himself as tenant, and therefore, the status of the petitioner rightly falls within the definition of "tenant" under section 2(g) of the SRPO-1979.

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10. 1995 SCMR 204 'Abdul Malik v. Qaiser Jehan'
11. PLD 1996 Karachi 357 'Zubaida Begum v. Muhammad Muslim'
12. 2006 SCMR 1872 'Muhammad Asif Khan v. Shaikh Israr'
13. 2006 SCMR 1501 'Mst. Yasmeen Khan v. Abdul Qadir'
14. 1992 SCMR 2400 'Shezan Limited v. Abdul Ghaffar'
15. 2001 SCMR 679 'Habib Bank Ltd. v. Sultan Ahmad'; 1995 SCMR 1407 'Tahir Hussain Malik v. Najma Rafi'

12. The plea of denial of landlord-tenant relationship is therefore untenable and falls within the mischief of the doctrine of *approbate* and *reprobate*. The petitioner cannot be allowed to blow hot and cold in the same breath. The doctrine of approbation and reprobation, is derived from the maxim "***qui approbate non reprobate***" (one who approbates cannot reprobate)[16], which is defined in the Halsbury's Laws of England, Vol. XIII, page 464, para 512 as a specie of the principle of *estoppel*:

> "On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between *estoppel* by record and *estoppel in pais*, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it".

13. The phrases, approbate and reprobate are borrowed from the Scottish law and would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. It is a principle of equity, coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants, cannot be allowed to do so while enjoying the fruits from the same document. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument, while questioning the same. Such a party has, either to affirm or to disaffirm the transaction.[17] The doctrine is not confined to instruments only. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

14. In the context of tenancy laws in Pakistan, the principle is that no person can be allowed to reprobate in the same breath while admitting tenancy on one hand, and setting up the plea of non-maintainability of application for ejectment challenging title of the landlord on the other.[18]

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16. 2017 CLD 397 'Naeem Zafar Industries V. Bank of Punjab'

17. 'Ker v. Wauchope' [(1819) 1 Bli 1, 21]; Douglas-Menzies v. Umphelby [(1908) AC 224, 232]

Hence, the conduct of a tenant to deviate from the agreed terms of the agreement would amount to approbation and reprobation, which was not permitted in law and equity.[19] On the same principle, a party was not allowed to raise the plea of limitation and claiming the proceedings to be time barred.[20] The objection to jurisdiction was also not allowed to be raised by a party having participated before a forum without raising such an objection, under the principles of *estoppel* and *waiver*.[21] Nor was a party allowed to object to a particular course, once it has taken advantage under the same arrangement.[22] The Court also did not allow vendees to challenge title of their vendors after purchasing the share of minors through their uncles as vendors.[23] Nor did it allow to challenge the constitutionality of a forum which was chosen by the same party himself,[24] nor allowed to raise a point before Supreme Court which was specifically given up before the High Court;[25] or to allow to take a self-contradictory stance in respect of the same transaction.[26] Even in a case where a public authority claimed earlier that the subject land could not be allotted to anyone in view of the public interests, such authority was not allowed to change its stance in an abrupt and arbitrary manner and allot the same to a stranger, without notice to persons likely to be affected by such action.[27] The principle is that one could not be permitted to Approbate and Reprobate to the detriment of the opponent.[28] The same principles have been consistently followed in a large number of cases by Courts in Pakistan.[29] The Indian Supreme Court describes it in the following words:[30]

> "15. A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience."

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18. *1992 SCMR 1290 'Home Comforts V. Rashid Baig'*
19. *1991 MLD 1755 'Ghulam Rasul V. Tauheed Akhtar'*
20. *PLD 2003 SC 242 'Muhammad Waris V. Province of Punjab'*
21. *ibid*
22. *2001 MLD 431 'Nasir V. Hakim-Ud-Din, Managing Director, Jahangir Engineering Company, Gujranwala'*
24. *PLD 1987 SC 107 'A.R. Khan v. P.N. Boga'*
23. *1992 SCMR 1457 'Sultan V. Abdullah Khan'*
24. *2001 SCMR 1959 'Federation of Pakistan V. Amir Hamza'*
25. *1992 CLC 1966 'Muhammad Rasheed Khan V. Sajawal Khan'*
26. *2007 SCMR 569 'Overseas Pakistanis Foundation v. Sqn. Ldr. R Syed Mukhtar Ali'*

15. In view of the above discussion, considering the principles and rules in respect of approbation and reprobation and the contradictory pleas raised by the petitioner, this objection raised by the petitioner, also stands rejected. For removal of doubts, the above principles would fully apply to all the incidences in this Judgment wherever the petitioner's instances of approbation and reprobation have been discussed.

16. The petitioner's fifth objection was the absence of landlord-tenant relationship between the parties, based upon the purported '*Iqrarnama Barai Malba Pagri'* dated 07.07.1997 which is being claimed by the petitioner to have been executed between the deceased husband of the respondent and the petitioner. Such document is plainly denied by the respondent as forged and fictitious. The rent application was filed on two grounds viz. default in payment of rent and personal *bona fide* need. With respect to the first ground of default, it was claimed by the respondent in her rent application that since the demise of her husband, the petitioner has not paid rent to her for the last 66 months, and lastly, legal notice was also served for ejectment of the tenant. The petitioner *inter alia* denied landlord-tenant relationship between the parties so also claimed *pagri* rights on the demised premises, on the strength of the '*Iqrarnama Barai Malba Pagri*' dated 07.07.1997, which was reduced into writing on a non-judicial stamp paper against *pagri* amount of Rs.120,000/-. On the other hand, the monthly rent amount of Rs.7000/- was also denied. It was also claimed by the petitioner that he had paid rent to the respondent at the rate of Rs.1000/- per month till December 2021, therefore, the question of default for 66 months does not arise. It was also claimed that in presence of the *Iqrarnama*, the rent application was not maintainable. While denying the claims of the respondent, the petitioner's case was that rent was regularly being paid to Muhammad Boota and after his demise, the rent was regularly paid to the respondent as well. It was however claimed that

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27. 1992 CLC 2329 'Maniar Industries (Pvt.) Ltd. V. Sindh Industrial Trading Estate Ltd'

28. 2017 CLC 1043 'Khushnood Ahmad V. Additional District Judge, Islamabad'

29. 1996 SCMR 145 'Muhammad Sharif V. Inayat Ullah; 2004 CLC 132 Muhammad Nazir V. Begum Maryam Salamat; 2005 CLC 1066 Zahra Hanif V. Pakistan Medical And Dental Council (P.M.D.C.); 2006 MLD 367 Al-Mumtaz Agencies v. Millat Tractors Limited; 2007 CLC 811 Sajjad Ahmed V. Secretary, Government Of The Punjab; 2003 CLC 1711 Messrs Jamil & Co. v. Government of Punjab; 2000 YLR 652 Mubarik Ali V. Muhammad Anwar; 2000 YLR 1343 Inam Elahi V. Muhammad Javed; 2000 YLR 1449 Muhammad Alam V. Zarina Bibi; 1995 PLD 255 Abdus Saeed Khan v. Basharat Ali; 1995 CLC 428 Inam-Ur-Rehman v. Jalal Din; 1993 MLD 955 Sabira Begum V. Muhammad Akhtar; 2003 PCRLJ 216 The State V. Umar alias Chotoo; 2015 PLC(CS) 32 Muhammad Juman Malana V. Government Of Sindh; PLD 2017 Lahore 68 JDW Sugar Mills Ltd. V. Province Of Punjab

30. Nagubai Ammal v. B. Shama Rao AIR 1956 SC 593; CIT v. V. MR. P. Firm Muar AIR 1965 SC 1216; Ramesh Chandra Sankla v. Vikram Cement [(2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706 : AIR 2009 SC 713]; Pradeep Oil Corpn. v. MCD [(2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712 : AIR 2011 SC 1869]; Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd. [(2011) 10 SCC 420 : (2012) 3 SCC (Civ) 685]; V. Chandrasekaran v. Administrative Officer [(2012) 12 SCC 133 : (2013) 2 SCC (Civ) 136 : JT (2012) 9 SC 260]

no rent receipts were being issued by Muhammad Boota and likewise, no rent receipts were being issued by the respondent. It was also claimed that rent was being paid in lump sum. In this regard, a simple look at the cross examination of the respondent clarifies a few things:

> *"I do not know the date since when opponent is occupying the premises in question in capacity of tenant. Voluntarily says I have seen him as tenant since the time of my marriage. I was got married in the year 1998. It is correct that he was occupying the premises in question as tenant since even before my marriage……It is correct that opponent used to pay rent to my husband. My husband did not issue rent receipts to the opponent. It is correct that did not issue rent receipt to opponent. Voluntarily says that he did not pay rent to me after death of my husband. I do not know if rate of rent was supposed to be increased at 10% after three years. It is correct that my husband received rent from opponent at the rate of Rs. 600/- per month till he remained alive. It is incorrect to suggest that opponent paid me rent at the rate of Rs. 1000/- per month from year 2016 till December 2021.*
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> (underlining added for emphasis)

17. From the above cross examination, petitioner's burden to the extent of two of his claims stood established i.e. (a) that no rent receipts were being issued by the husband of the respondent; and (b) that the rate of rent being received by the late husband was Rs.600/-. However the burden to establish that rent was being paid to the respondent by the petitioner, could not be established in the above cross examination. The ratio settled by the Supreme Court in this regard is that the mere fact that the landlord accepted the rent periodically would not mean that landlord did not desire payment of rent in time as required by law. The practice of accepting accumulated rent or sending of monthly rent bills by a landlord, would in no way, absolve the tenant from discharging his statutory obligations of paying the rent under the legal provision.[31] Hence, no agreement for deviation from or non-observance of the mode prescribed by law for ensuring prompt payment of monthly rent could be presumed merely by reason of occasional waiver of default by landlord or acceptance of accumulated rent by him and any deviation, to be effective, should be by any mutual agreement, voluntarily, and conscientiously entered into between the parties.[32]

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31. 1999 SCMR 519 'Abdul Razzaque Abdul Sattar v. Abdul Shakoor'
32. 2000 SCMR 1209 'Khalid Ghouri v. Tazeen Chaudhry'

18. The linchpin of the petitioner's entire defense on the issue of default and personal need hinges upon the document titled '*Iqrarnama Barai Malba Pagri'* dated 07.07.1997, which was claimed to have been executed between the petitioner and the late Muhammad Boota/ the husband of the respondent. The said document was denied as forged and fabricated by the respondent in so many words. During her cross examination, it was expressly stated by the respondent that:

> *"I do not know if rent agreement/Iqrarnama was executed between my husband and opponent it is correct that initially the rate of rent was Rs. 300/- per month and thereafter rate of rent became Rs. 600/- per month. It is correct that Rs. 1,20,000/- was paid by opponent as advance. I do not know if Rs. 1,20,000/- was paid as "Pagri". I do not know if formal agreement with respect to "Pagri" was executed between my husband and opponent. My husband was illiterate. It is correct that my husband used to affix thumb impression. I do not know if my husband had affixed thumb impression on any document pertaining to "Pagri". I do not have any objection if document is sent for verification of thumb impression of my husband. I do not know if such document was attested by Mukhtiarkar. it is incorrect to suggest that I have deliberately not produced Pagri document before this court….. I do not know if rate of rent was supposed to be increased at 10% after three years."*

19. Besides, during his cross-examination, clear suggestions were put to the petitioner to the effect that, the said document was forged and fabricated:

> *"It is incorrect to suggest that the Igrarnama dated: 07.07.1997 produced at Ex. 31/A is forged, fabricated and bogus document. It is incorrect to suggest that no such agreement through Iqrarnama has been executed in between me and Muhammad Boota (Deceased husband of the applicant)."*

20. Considering the above position, it was therefore, imperative upon the petitioner to have established the existence and the validity of the document/ *Iqrarnama* whereon his entire case was based. The mode of proof is the procedure by which the "relevant" and "admissible" facts are proved and admitted in Court of law as a piece of evidence, and the same can be proved by the party asserting the same, either through "primary" or "secondary" evidence.[33] The basic rule is that where a document is legally required to be attested, it shall not be used as evidence until its attesting witnesses have been called to prove its execution, unless the document is a registered one and has been admitted by the other side. Even where a registered document

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33. PLD 2021 SC 715 'Mst. Akhtar Sultana V. Major (R) Muzaffar Khan Malik'

is challenged, no statutory presumption could be attached to it without fulfilling the mandatory requirements of proving the same through marginal witnesses.[34] In the present case, the *Iqrarnama* was neither a registered document, nor was it admitted by the Respondent side, and therefore it was mandatory upon the petitioner to have proved the same. However, no attesting witness was produced by the petitioner side, nor were the other persons i.e. notary public or the *mukhtiarkar* or the FCM Magistrate were produced as witnesses. Even if one or both the attesting witnesses have expired, as presumptively opined by the learned counsel for petitioner, the settled principle would apply that mere assertion of death of marginal witness would not discharge the burden of a party. Besides, there was nothing to establish the death of said marginal witnesses and a simple assertion of their death would not suffice or discharge the petitioner's burden to locate and produce them.[35] The record reflects that no effort was made by the petitioner to prove death of his marginal witnesses, which could only lead to a strong presumption of withholding best evidence against the petitioner.[36]

21. Surprisingly, despite applicability of the above discussed rules, the petitioner completely failed to comply with the same and could not prove the execution of the *Iqrarnama* through witnesses of the said purported document. Such fact was also unequivocally admitted by the petitioner during his evidence in the following words:

> "It is correct to suggest that I not produced the stamp vendor from whom such stamp paper was purchased. It is correct to suggest that I have not produced the marginal witnesses of the Iqrarnama dated: 07.07.1997. It is correct to suggest that I have neither produced Notary Public nor City Mukhtiarkar & FCM First Class Magistrate as witness."

22. To avoid the above position, a fallback argument was invented by the petitioner's learned counsel, that the material witnesses ought to have been called by the rent controller. Firstly, the burden to establish the said document/ *Iqrarnama* was upon the petitioner. Secondly, the burden to bring marginal witnesses was also on the petitioner, which were not produced. Thirdly, no application for referring the said document for verification of thumb impression of the deceased landlord was made by the petitioner, despite clear no objection extended by the respondent during her evidence. Fourthly,

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34. 2007 SCMR 497 'Jang Bahadur & others V Toti Khan and others'
35. 2019 SCMR 567 'Ghulam Sarwar V. Ghulam Sakina'; PLD 2021 SC 538 'Sheikh Muhammad Muneer V. Mst. Feezan'
36. 2020 SCMR 276 'Muhammad Sarwar v. Mumtaz Bibi and others'; 2022 CLC 890 'Mst. Kamalan Bibi V. Province of Punjab'

no application for calling any other witness was moved by the petitioner before the Rent Controller. Fifthly, such plea was also not raised by the petitioner before the appellate Court. Record reflects that no application was moved by the petitioner before the learned Rent Controller nor was such ground ever taken in the First Rent Appeal before the learned appellate Court. The legal position is that even if the Rent Controller refuses to summon witnesses requested by tenant, such refusal would be no ground for reversing the concurrent findings of fact of default against the tenant, which in the present case was not even requested by the petitioner. Besides an application for summoning witnesses could not be granted as a matter of course in absence of cogent reasons.[37] If the counsel's plea is that such application was not moved since CPC. does not apply to proceedings before the Rent Controller, suffice it to say that although rules of pleading though do not strictly apply, however, a Rent Controller is free to follow equitable principles contained in CPC.[38] In the present case, since no application for summoning of witnesses was moved by the petitioner, nor such plea was taken in the appeal by the petitioner side, hence such argument is devoid of merits and the same is accordingly rejected.

23. Before I turn to the issue of *pagri,* as raised by the petitioner, it would be relevant to understand the concept, evolution and pre-partition historical background of rent laws, as traced by a four-member bench of the Federal Shariat Court:[39]

> "3. Before proceeding to closely examine these sections it may be mentioned that the concept of putting fetters on the right of owners of property to enjoy ownership rights finds its origin in the years of the Second World War when in big cities particularly the port towns of undivided India there fell a shortage of accommodation and it was deemed necessary by the erstwhile British Government to intervene and not only to regulate the rents of the' premises but also the right to lease them to the tenants of their own choice. Thus tenancies were created not by agreements between landlord and tenant but by allotment orders. They were called statutory tenancies. Allotment of premises was made by the Rent Controller to one of a large number of competing aspirants of a particular premises and owners/landlords were bound to accept such tenants/allottees. These allotments continued in India and Pakistan even long after the war was over. Later in sixties they were discontinued."

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37. 2002 SCMR 680 'Karachi Tennery Pvt. Ltd. V. Muhammad Yousaf'
38. PLD 1983 SC 155 'Bambino Ltd. V. Salmor International Ltd.'
39. PLD 1992 FSC 286 'Ashfaq Ahmad & others v. Government of Pakistan & others'

24. The term '*pagri'* finds its genesis in the Transfer of Property Act 1882, wherein the same was treated as consideration for a lease, which may be "of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or no specified occasions to the transferor by the transferee". Normally, the initial amount paid for the acquisition of the leasehold right is 'premium', '*pagri*', '*salami*' or by whatever name it may be called. This is in consideration for being let in possession. The consideration for relinquishment of the tenancy rights may again be a lump sum called '*pagri*'. The periodical payments in terms of money for the use and occupation of the premises is called rent or lease money. What distinguishes rent from "premium" is that the latter represents money paid as a price or a consideration for being let in possession. '*Pagri*' is a consideration for the creation or surrender of the property or the relinquishment of the leasehold rights. When the interest of the Lessor is parted for a price, the price paid is premium or *salami* but the periodical payments made for the continuous enjoyments of the benefits under the lease are in the nature of rent; the former is a capital receipt and the latter a revenue receipt. Parties may camouflage the real nature of the transaction by using clever phraseology and, therefore, it is not the form but the circumstances of the transaction that matters. The nomenclature used may not be decisive or conclusive, but it helps the courts, having regard to the other circumstances of ascertain the intention of the parties. The value of the tenancy rights may be called '*pagri*', "premium", or '*salami*', etc., but it is an intangible property. Though intangible, it is materially valued.[40]

25. The history of pagri in the old areas of different cities in Pakistan,[41] was that shops and apartments change hands from one tenant to another on payment of *pagri*, subject to change of receipt by the landlord in the name of incoming tenant and the landlord only gets fixed percentage of commission on the *pagri* amount for the change of receipt, but in case no change in receipt is made by the landlord, the incoming tenant in respect of the premises would not pay *pagri* amount to the original tenant, who in return would not hand over possession to the proposed incoming tenant and the landlord would not in any case put him into possession of premises to enable him to use the said shop for his personal requirement. Consequently,

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40. 'Bawa Shiv Charan Singh vs Commissioner Of Income-Tax, Delhi' 25(1984) DLT 275, ILR 1984 Delhi 625, [1984]149 ITR 29(Delhi)

incoming tenant would not be put into unauthorized possession of the premises by the original tenant to entitle the landlord to sue the new occupant of the premises for sub-letting.

26. *Pagri* does not form terms or condition of a tenancy and in the context of tenancy rights, the concept of '*Pagri*' is held as contrary to public policy, therefore, on the settled principles, any supra-contractual arrangement which negates tenancy, would not affect maintainability of eviction proceedings.[42] When tenant was unable to establish the existence of arrangement of *pagri* between the parties, the same could not be adjusted against rent.[43] The statutory right of landlord to eject tenant on ground of personal need could not be abdicated in consideration for a `*pagri*', nor would it disentitle the landlord from seeking ejectment of tenant on ground of his personal need.[44] Payment of *pagri* has not been accepted by the Superior Courts as a bar for seeking eviction of tenant under the Ordinance. The claim of personal need was declared to have an overriding effect on any such terms of the tenancy agreement which are against public policy and the provisions of SRPO-1979 and therefore payment of *pagri* to the predecessor of landlady was not considered as a hindrance in or bar against seeking eviction of tenant under the Ordinance.[45] When in the first round of litigation no plea of goodwill/ *pagri* was taken by the petitioner before the Rent Controller or the appellate tribunal and such ground was taken after remand of the case, and even if it was presumed that goodwill/ *pagri* amount was actually paid in respect of demised premises, even then it would not debar the respondent /landlord to seek eviction of the tenant on the ground of personal bona fide need.[46] The widely accepted legal position is that a landlord could not be debarred from instituting eviction proceedings against his tenant for personal bona fide requirement, even if there be a plea of *pagri*.[47]

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41. 2003 SCMR 1667 'Muhammad Aslam & others v. Hanif Abdullah and Brothers'

42. 1997 SCMR 1819 'Azizur Rehman V. Pervaiz Shah & Others; 1987 SCMR 307 Sheikh Muhammad Yousaf v. District Judge, Rawalpindi & 2 others; Messrs M. Qasim v. Sharbat Khan 1992 MLD 1225; 1993 SCMR 200 M.K. Muhammad and another v. Muhammad Abu Bakkar; PLD 1996 Quetta 48 Saeed Muhammad v. Mehrullah and another

43. 2000 SCMR 498 'Muhammad Ashraf V. Ismail and 4 others; 1993 SCMR 200 M.K. Muhammad and another v. Muhammad Abu Bakar; 2001 SCMR 99 Mrs. Nargis Latif v. Mrs. Feroz Afaq Ahmed Khan'

44. 2004 MLD 587 'Raees Ahmed Pasha V. Kamaluddin and others; 1984 SC 38 Zehra Begum v. Pakistan Burma Shell; 1997 SCMR 1819 Azizur Rehman v. Pervez Shah.

45. PLD 2007 Karachi 50 Mrs. Tahira Dilawar Ali Khan through Attorney and 2 others v. Mst. Syeda Kaneez Sughra and 2 others; PLD 2013 Sindh 245 Muhammad Ishaque Qureshi v. Zahir Hussain Jafri and 2 others; Raees Ahmed Pasha V. Kamaluddin and others (2004 MLD 587); PLD 2023 Sindh 411 Muhammad Salik Athar through Attorney v. Muhammad Obaid and 3 others; 2005 YLR 2158 Messrs Diamond Rubber Mills through General Manager v. Syed Amir Ali and 3 others.

27. Besides, charging of *pagri* or premium as a consideration for grant of, renewal or continuance of tenancy having been prohibited under that Ordinance, agreement between parties in that respect, was held to be void and not binding on parties and that no right could be created on that basis and no benefit could accrue to any party under such a void agreement.[48] Even if a landlord expressly waives his right to eject the tenant through an agreement between the parties, it was declared that, the right to eject a tenant being a statutory right of the landlord or any of the grounds recognized under SRPO, such statutory rights could not be nullified even by a written agreement between landlord and tenant.[49] The plea of tenant that he had paid goodwill for premises, in no manner could succeed as a ground of defence when eviction of tenant was being sought by the landlord.[50] Even if for the sake of argument it is presumed that goodwill amount was paid in respect of demised shops, even then it would not debar the respondent/landlord to seek eviction of the petitioner on the ground of his personal bona fide need.[51] The same principle also applies to the cases wherein execution of sale agreement between a landlord and his tenant is claimed by the tenant, which stands on a much higher footing than an agreement for *pagri* for the purposes of creating rights in the property. However it has been consistently held by Courts in Pakistan that an ejectment application could not be stayed or stalled nor could pendency of a suit for specific performance of agreement be a valid ground to bar eviction proceedings of the tenant.[52] In such circumstances, the landlord would be fully entitled to recover rent from the tenant until the civil court passes a decree in favour of tenant.[53]

28. In addition to the above, the next relevant question put to the petitioner during cross examination was that, even for argument's sake, if the contention of the petitioner was assumed to be correct, even then as per calculations of the *Iqrarnama*, the rent was not being paid by the tenant with 10% annual increase from 1997, as per the purported document and even

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46. *2023 CLC 1906 'Muhammad Sami alias Shabrati V. Model Civil Appellate Court'*
47. *1992 CLC 2504 'Ahmad v. Haji Khair Muhammad'*
48. *1991 MLD 801 'M.K. Muhammad and another v. Muhammad Aboobakar'*
49. *1992 CLC 1753 'Malik Islam Akber v. Mustafa Hussain'*
50. *1993 CLC 266 'Nargis Bano v. Rehman Bhai'.*
51. *1987 SCMR 307 'Sheikh Muhammad Yousuf v. District Judge, Rawalpindi and 2 others; 1996 MLD 1505 'Mohammad Sharif v. Iftikhar Hussain Khan'*
52. *PLD 1991 SC 242 'Iqba v. Rabia Bibi', 2008 CLC 1134 , 1995 MLD 1460 'Baboo Din v. Nasroo', 1996 CLC 1293 'Shahzada Gulzar v. Bashir Baig', 1999 CLC 1173 'Muhammad Yaqoob v. Mohsin Ali', 1986 CLC 2577 'Saee Khan Gul zad Gul v. Muhammad Ibrahim', 2008 YLR 2434 'Abdul Kareem Khan v. Mst. Zahida Khan'*
53. *1990 SCMR 647'Kassim & others v. S. Raheem Shah & others'*

based upon his own case, default in payment of rent was being admitted every month. The question was as follows:

> "It is incorrect to suggest that I am defaulter in payment of rent in the lump sum of Rs. 14,871/- since the execution of *Iqrarnama* dated: 07.07.1997 till today."

29. In this regard, during course of hearing, both the learned counsels were also directed to file their respective calculations to show what would have been the rent, if hypothetically speaking and for argument's sake, the *Iqrarnama* is considered to be existing. To this, both learned counsels submitted their calculations through separate statements, and which also does not support the petitioner's version. On this count also, the petitioner would be considered a defaulter towards payment of rent, if 10% increase is calculated after every three years, which became Rs.1166/- per month till 07.06.2021, as rightly observed by the learned Rent Controller. Perusal of the rent receipt issued by Nazir of 5th Senior Civil Judge Hyderabad reflect display that the petitioner has deposited an amount of Rs.1000/- for the month of January 2023 instead of Rs.1166/- with annual increment of 10%, which clearly shows that petitioner has become defaulter in payment of rent as provided U/S 15(2)(ii) SRPO-1979. The established legal position is that when landlord steps into the witness box and states on oath that she has not received the rent, in the eventuality the burden shifts onto the tenant to show in rebuttal that rent has been paid by him.[54]

30. Outcome of the above detailed discussion is that, the petitioner was neither able to establish the basic document *Iqrarnama* through evidence; nor was able to produce any receipt of rent paid to the respondent; nor was he able to produce any other evidence to establish that rent was being paid to the respondent; and the ratio settled in the above discussed cases also does not support his case.

31. This brings us to the second ground for ejectment of personal bona fide need, for which the recognized principle is that a landlord cannot be abridged of the right to use his own premises suiting best need. The respondent has claimed that the demised shop is required for a personal *bona fide* need to start her own business. The Respondent's statement on oath in this regard has remained unshaken during her cross-examination. No evidence or material, contrary to the assertion of the respondent, with regards

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54. 2015 CLC 570 'Khalid v. VII ADJ Karachi'

to her claim of *bona fide* personal need, was brought on record by the petitioner. On the issue of personal need, statement on oath, if consistent with the application and not shaken in cross-examination or disapproved in rebuttal is sufficient to prove that it is *bona fide*. Applying this test, the respondent has been consistent, and the evidence produced by her is not in conflict or inconsistent with the ejectment application. No evidence in rebuttal has been produced to shake respondent's testimony, nor in the cross-examination shown any infirmity to discredit it.[55] No circumstance was available on record to show that desire of landlord to use his own property was tainted with malice or any evil design. Landlord's statement on oath had not been seriously challenged and same being consistent with the case pleaded but him must have been accepted on its face value and given weight.[56]

32. The respondent categorically stated in her evidence that the demised premises is required for her personal bona fide use, which plea as set up in Affidavit-in-Evidence went uncontroverted and un-shattered and the petitioner could not bring on record or establish that the purpose of personal need of the respondent for the requirement of the subject premises can be served by the use of other premises, even if available. Hence, on the ground of personal need, the respondent's claim remained unchallenged and not a single evidence or material could be brought on record to shake such claim, which stood proved beyond a shadow of doubt. Hence the conclusion by the two Courts below on such point also stands concurred.

33. Lastly, these are not proceedings in appeal, but under the Constitutional jurisdiction of Article 199 has been invoked, which can only be availed if it is shown that the impugned order is perverse and suffers from some inherent lack of jurisdiction. Such jurisdiction cannot be used as a substitute of second appeal.[57] The settled law is that, in petitions arising out of cases under the Ordinance 1979, this Court does not act as a Court of second appeal, and reappraisal of evidence is uncalled for, even if based on evidence available on record, some other conclusion was also possible.[58]

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55. 1980 SCMR 593 'Tauhid Khanum v. Muhammad Shamshad'; 1996 SCMR 1178 'Messrs F.K. Irani & Co. Vs. Begum Feroze'

56. 2000 SCMR 1613 'Mehdi Nasir Rizvi v. Muhammad Usman Siddiqui'

57. 2009 MLD 935 Syed Mazhar Imam Rizvi v. Mst. Yasmin Bano and 2 others; PLD 1974 SC 139 'Muhammad Hussain Munir v. Sikandar & others'

58. PLD 2005 Karachi 554 'Shamim Akhter v. State Life Insurance Corporation Ltd.;

34. Before parting with this Judgment, attention is drawn towards the following excerpts of the observations expressed by the Federal Shariat Court[59] way back in 1992, pointing out towards the much needed efforts to reconcile this law, to avoid acrimony in the society and to discourage the huge litigation emanating from it otherwise:

> *"This bunch of Shariat Petitions relate to a very controversial subject. The grievance raised in these petitions echoes in the Court rooms of the country from one end of the country to the other. It can be safely said that no other legislation in the country has caused so much social disorder. None other has created so much bad blood between the sections of the society and perhaps none has bred so much litigation and caused so much acrimony and bitterness as the statute under scrutiny. The pendency of the ejectment applications being tried as regular suits and the appeals arising out of the decisions of the Courts called "Rent Controller" would be enough to show how much public time and energy is consumed in these cases all on the pretext of regulating and controlling the relationship between the landlords and tenants. The statutes challenged in these petitions are known as West Pakistan Urban Rent Restriction Ordinance, 1959 and Sindh Rented Premises Ordinance, 1979."*
>
> *…..*
>
> *"16. ……Actually the thrust of the argument advanced before us in these petitions is precisely this that the Rent Acts instead of providing a machinery for enforcement of voluntarily concluded agreements between the tenant and the landlord have installed a set-up of the hierarchy of the Rent Courts for breaking those agreements. This, it is urged, cannot be countenanced by the Sharia, particularly in an Islamic State."*
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> *"17. ……...So much so that even a decree of a Court should be defeated on account of bar contained in these sections. It is a matter of common knowledge that the proceedings before a Controller seeking ejectment of a tenant on such grounds as urgent personal need or on the ground for reconstruction of the premises take as much as 15 years. The ejectment application before the Rent. Controller, the appeals, the remand and fresh decisions and further appeals to the Supreme Court; all overshadowed by trappings of procedure can easily be stretched to consume year after year shattering the nerves of the owner of property and defeating the purpose for which the ejectment was desired."*
>
> *……*
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> *"38. Before parting with the case, it is desirable to add that in case the Central or Provincial Government deem it necessary to continue with the Rent Courts and also bring new legislation, it should be provided that the paramount consideration before the*

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59. PLD 1992 Federal Shariat Court 286 'Ashfaq Ahmad and others v. Government of Pakistan and others'

> *Rent Controller should be to settle the disputes in obedience to the famous Hadith. Naturally this noble concept of which is a gift to the Muslim Ummah cannot be codified in precise terms. It should vary from case to case and the Judge will have to reconcile the conflicting claims of landlord and tenant in each peculiar situation. Further whether the dispute to be decided in the light of the maxim should be decided by a judicial officer or by Mohallah Committees of elders and retired judicial officers is for the Government to decide. This would ensure quick disposal of cases and an inexpensive and acceptable method of regulating the relationship between landlord and tenant."*

35. Based upon the above detailed discussion on the issue of default in payment of rent; the claim of execution of *Iqrarnama* but failure of the petitioner to prove the same in evidence; the claim of *pagri* by the petitioner, and its legal consequence on the ejectment application filed by respondent; so also the evidence produced by both sides on the above, I have no hesitation in concluding that, (a) landlord-tenant relationship existed between the parties; (b) that the rent application was maintainable; (c) that the petitioner on multiple counts attempted to approbate and reprobate which is not permissible under the law and which reflected negatively on his conduct; (d) that the petitioner was also unable to prove in evidence, the document *Iqrarnama* for the alleged *pagri*; (e) that the established legal position is that claim of *pagri* or even existence of a sale agreement would not debar a landlord from filing rent application for default and personal need; and (f) that the respondent fully proved in evidence, both her grounds of default and personal need for ejectment of the petitioner.

36. In the light of what has been considered above, no occasion for exercise of jurisdiction under Article 199 of the Constitution is made out. Consequently, the impugned Orders are maintained, and this petition is dismissed.

These are the reasons for the short order of dismissal of the petition, dated 06.02.2025 passed by me upon conclusion of the arguments.

J U D G E