

Kamrar: Shah's personal bonafide use, he is in need of the demised premises in good faith while opponent admitted that son of applicant Kamran run a vegetable cart. The opponent has questioned applicant's bonafide personal need by saying that the applicant malafidely claiming the shops for marriage of her son. The applicant is already available reasonable accommodation for her family and son who have been married. In fact applicant is intending to give the shops on rent on higher otherwise the applicant is not requiring the shops for her son's marriage. However, the opponent has admittedly not produced any proof showing availability of suitable accommodation with the legal heirs of applicant.

I have gone through wording of Section 2(g) of the Ordinance, in my humble view such term is not restricted to the owner as it includes a person who is legal heir/son in respect of such premises. Section 2(g) of the Ordinance reads as under:

Section 2-----

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g) "Personal use" means the use of the premises by the owner thereof of his wife (or husband), son or daughter.

It is a well settled proposition of law that mere statement of the landlord to the effect that he needed premises in question for his personal need, would be sufficient proof of personal need of landlord. If landlord requires tenement in good faith and filed ejectment application by showing his prima-facie need, the burden shifted to the tenant to establish that the requirement of the landlord not in good faith but based on bad faith. So much so it is a general principle that if the statement of landlord on oath consistent with application for ejectment and not shaken in cross examination or disproved in rebuttal, it is sufficient to prove that requirement of landlord is bonafide. In this regard I am fully guided by the case law cited as PLD 2013 Sindh 39 fully supports his case, wherein it was held that:

"... No unreasonable restriction can be placed on exercise of right of landlord which would offend fundamental rights guaranteed under Art.23 of the Constitution - Initial burden for landlord to prove bona fide is very light and court is required to consider that evidence adduced on behalf of the landlord, is unshaken and consistent with averments made by him in ejectment application, then the burden would shift to tenant to establish that claim of landlord is not bona fide - Real test whether premises is required for personal use is whether need is based on good faith - such being question of fact and finding on the subject cannot be taken exception to unless it is shown that it suffers from violation of some fundamental legal principle in the matter of appreciation of evidence or misreading of evidence."

On the above discussion it is proved that applicant requires the demised premises for her son Kamran Shah's personal bonafide use as he is running a vegetable cart, he is in need of the demised premises in good faith. This point is replied in affirmative

POINT NO.3 & 4

I would like to decide the both points together and same are interconnected with each other and can be disposed of through single stroke of discussion. The burden to prove of both points lies upon the applicant. It is admitted facts that demised premises is rented out by the husband of the applicant to the opponent No.1. The contention of opponent No.1 that opponent No.2 is his servant is without any proof as admitted in his cross-examination that may of Muhammad Siddique opponent No.2 is appearing as proprietor of Pak Islam Dari form Meo Brothers on sign board installed on the demised premises. Opponent No.1 also admitted that visiting card of opponent No.2 in which the name of opponent No.1 is not mentioned. He further stated that Muhammad Siddique opponent No.2 remained present at the main counter of demised premises. These all facts shows that the status of the opponent No.2 is not same as claimed by opponent No.1. Moreover opponent No.1 admittedly made alternation in demised premises by removing central wall of the shops and made two shops in one without the permission of the landlord. Opponent No.1 admitted that they committed default in payment of monthly rent that admission made by opponent during his cross-examination in which he admitted that on 06.04.2011 he deposited rent of three months in MRC No. 7/2011. He further admitted that on 17.12.2011 he deposited rent of five months in MRC. He also admitted that they paid last rent in the year 2014. The claim of opponent that the instant matter hit by the principal of res-judicata is without force as applicant filed previous rent case against the opponent No.1, who subsequently died and then applicant withdrew that rent case and by file fresh by impleading legal heirs of the opponent. The essential ingredients of res-judicata are as follows:

1. *The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (Explanation III), or constructively (Explanation IV), in the former suit.*
2. *The former suit must have been a suit between the same parties or between parties under whom they or any one of them claim (Explanation IV).*
3. *The parties as aforesaid must have litigated under the same title in the former suit.*
4. *The Court which decided the former suit must have been a Court competent to try the subsequent suit in which such issue is subsequently raised (Explanation II).*

5. *The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit (Explanation V)*

In order to bring the case under the principle of res-judicata it is mandatory that all above conditions must be fulfilled but in the present case the issue between the parties has not been decided by any court, therefore the principle of res-judicata is not applicable in the present case.

The opponent raised objection that the demised premises is not mutated in the name of applicant as she is not sole owner of the demised premises. It is settled principle of law that the relationship of landlord and tenant admitted between the parties then mere ground that applicant is one of the legal heir having no exclusive title over the demised premises will not create bar on the legal heirs for filing rent case. Reliance placed upon PLJ 1974 Lahore 487 in which Hon'ble Lahore High Court held that a wife is landlady within the meaning of section 2 if the tenant admits her husband was landlord. Definition of word landlord mentioned in section 2 A of the ordinance would include more than one landlords who are co-owner/co sharers in a property as held in PLJ 1973 Lahore 313.

Under these circumstances, it is proved that opponents had committed default in payment of monthly rent, beside the opponents made alteration in the demised premises without the permission of landlord and opponent No.1 sub-let the property to opponent No.2 he failed to produce any proof that opponent No.2 is his servant and he himself carrying business in demised premises, hence point No. 3 & 4 answered in affirmative.

POINT NO.5

The upshot of above discussion is that the applicant has proved the case, therefore in view of the findings the present ejectment application is allowed with direction to the opponent to vacate the demised premises and handover its peaceful possession to the applicant within (45) days. "

Whereas, learned appellate court while reversing the findings of the Rent Controller has contended that:

"10. I have perused the record and found that the respondent No.1/applicant has contended in her ejectment application that her husband rented out shops bearing No. 1& 2 to the appellant/opponent No.1 since long and the rent was fixed at Rs.100/- for Shop No.2 and Rs.200/- for Shop No.1 per month and the rent was increased for Shop No.2, the appellant/opponent to respondent No.1/applicant in the month of October, 2010, thereafter,

he failed to pay the monthly rent to the respondent No.1/appellant without any reason till today.

11. On the other hand, appellants/opponents have denied such allegation of respondent No.1 and have filed affidavit-in-evidence and stated that the legal heirs of deceased Gohar Shah have refused to receive the rent for the month of December, 2011, therefore the appellant/opponent No.1 tendered the rent through money order which was refused to receive by the legal heirs of the deceased Gohar Shah so no option having been left for the legal heirs of appellant excepting to deposit the same in Court as such the monthly rent is being deposited in MRC No.11/2011 Ledger No.03/2011 and not default has been committed. It is an admitted position of the case that the actual owner of the property in question is Gohar Shah, who had rented out two shops bearing Nos. 1 & 2 to one Manzoor Ahmed Khan (since deceased). It appears from the record that the owner of the shops namely Gohar Shah has passed away and her widow namely Mst. Haleema Bi had earlier filed a Rent case bearing No.29/2011 against Manzoor Ahmed Khan and Muhammad Siddique. It may be noted that the fact about the death of Manzoor Ahmed Khan had been brought on record by the appellant No.2 in his written statement in Rent Case bearing No.29/2011. It is pertinent to here that the respondent No.1/applicant did not brought on record the names of legal heirs of appellant No.1 after his death, however, she withdrew the said rent case. After the withdrawal of above case, the respondent No.1 filed another case, which has been decided in her favour vide judgment. The attorney of the respondent No.1/applicant in his evidence has admitted that *"it is not in my knowledge that instead of bringing the record of legal heirs of Mst.Haleema and Manzoor Ahmed, the applicant withdrew the Rent Case bearing No.29/2011 against the opponent Manzoor Ahmed. It is not in my knowledge that after withdrawing the aforesaid rent case against the Manzoor Ahmed, the applicant filed Amended Rent Application. It is not in my knowledge that thereafter the rent case bearing No. 29/2011 withdrawn by the applicant against the Manzoor Ahmed, the opponent"*. Be that as it may, I have perused the record and found that attorney of appellants/opponents has produced money order coupon/receipt at Ex.O-1/C and six deposit vouchers/challans of M.R.C. No. 17/2011 and Rent Case No. 190/2011 before the learned trial Court alongwith his affidavit-in-evidence , which shows that the appellant No.1 is paying the rent in Court. The attorney of respondent No.1/applicant in his cross-examination while replying to the suggestion of learned counsel for the appellants/opponent has deposed that *"It is correct to suggest that since November 2010, the applicant has refused to receive the rent from Mr. Manzoor Ahmed, the opponent No.1"*. From the above admission of the attorney of respondent No.1/applicant, it appears that the respondent No.1/applicant herself refused to receive the rent from the tenant, therefore the tenant sent the rent through money which was too refused and thereafter tenant started depositing the same in MRC as pointed out hereinabove. The conduct of the respondent No.1 by not accepting the rent from the appellants shows her malafide and the appellant No.1 was compelled to send the rent to respondent No.1 through money order, which was refused and later on appellant filed MRC and is depositing rent in Court. The attorney of appellants while

replying to the suggestion of learned counsel for the respondent No.1/applicant in his cross-examination has deposed that "*It is wrong that I did not pay rent for the months of October 2010, January 2011 to the applicant*". The attorney of appellant has been cross-examined by the counsel for the respondent No.1 but he has not shaken his evidence. The respondent No.1 has failed to produce any tenancy agreement on record executed by her and /or by husband to show that what was rate of rent of property in question, on which date the rent was to be deposited whether monthly or periodically and further what were the terms and conditions of rent agreement. Hence, I am clear in my mind that the appellants have not committed default in payment of rent.

12. The respondent No.1/applicant in her ejectment application has stated that she has number of five sons and all residing in the same premises and number of 4 sons are married and one son now just married on 14.05.2011 but she is unable to arrange the separate accommodation for her family, now she want to remove the shop from the said house and managed accommodation for his last son. As per respondent No.1/applicant, she has made many requests to applicants/opponents that shops may be vacated because the same is required for her son but the appellant has refused to vacate the same and demanded huge amount against vacation of the said shop. On the other hand, this contentions of respondent No.1 has been specifically denied by the appellants/opponents in their written statement as well as cross-examination. It is pertinent to mention here that the respondent No.1 has not produced approved plan/permission letter of the KBCA to prove her version that she wants to remove/demolish the shops and after demolishing it, will construct the same for residential purpose for her son. Furthermore, without approval from the competent authority the commercial shops cannot be used for residential purpose. The respondent No.1/applicant has not mentioned the name of her son who has married and for whome the said premises is required. The son/attorney of respondent No.1 in one breath of his evidence has deposed that "*It is correct to suggest that it is mentioned in Para No.6 of the present rent application that my said brother got married on 14-05-2011. Vol. say that says that he has not got married yet as he is ill and is suffering from Hepatitis-B*". It is important to note here that in Para No.6 of ejectment application the respondentNo.1 has stated that her one son now just married on 14.05.2011 but the witness appeared on behalf as attorney has totally contradicted her version by saying that her brother is not married, which of the version of respondent No.1 is true. I am of the view that the landlord in case of personal bonafide need has not only to allege but has to prove as well. In this regard, I am fortified with the reported case **1995 MLD (KHI) 1880, 1987 CLC 1338 AND 1991 CLC 1902**. It is suffice to say here that the respondent No.1 has failed to examine her son and/or any witness to prove that the fact that the premises under case is required to applicant for her son. It is for the respondent No.1/applicant to prove by tangible evidence that the premises is required by her for personal bonafide use of her son. The evidence produced by the respondent No.1/applicant is not sufficient to establish the need of applicant in respect of premises in question for personal use of her son when the son has not been examined.

13. It is well settled law that personal need must be coupled with good faith and must be bonafide. The good faith is to be assessed from the evidence on record. In the present case from the replies of respondent of respondent No.1's attorney in his cross-examination, the personal need in good faith of respondent No.1 is not established. In this regard, I am fortified by case law reported in **1987 MLD 2092, 1995 CLC 1353, 1986 CLC 448, 1987 CLC 686, 1989 CLC 287, 1987 SCMR 2051 and 1983 CLC 1905.**

14. In view of above, I am satisfied that the respondent No.1/applicant has failed to establish her case with regard to need of premises in question for personal use of her son in good faith.

15. The respondent No.1/applicant has also claimed that appellant/opponent No.1 has now sub-let both shops to appellant/opponent No.2 without permission of the respondent No.1/applicant which is clearly violation of the agreement of tenancy and the appellant/opponent No.1 is liable to be ejected from the rented premises. Appellants have denied the above allegation of the respondent No.1 and have stated in the written statement as well as affidavit-in-evidence that the appellant/opponent No.1. The respondent No.1 had to prove her case and she cannot take the weaknesses of the other party as provided in law. No any document has been produced by the respondent No.1 to show that the appellant/opponent No.2 is sub-lettee of the appellant/opponent No.1. The respondent No.1 has also not examined any witness to prove her such version. I have perused the record and found that the attorney of respondent No.1 in his evidence has deposed that "*It is correct to suggest that there are three shops in the property bearing No. 2/486, Block No.2, Shah Faisal Colony, Karachi. It is correct to suggest that deceased Manzoor Ahmed Khan was the tenant of the two shops while the shop No.3 is in the possession of Mr. Rasheed being a tenant. It is correct to suggest that Rasheed is the brother of Muhammad Siddiqui, the opponent No.2*". It is well settled law that he who asserts has to prove the same. It appears that learned Rent Controller did not understand the above case and wrongly allowed the ejectment application. Moreover, the ejectment application has been filed by one Mst. Haleema and she has not produced any power of attorney executed by other legal heirs in her favour to prove that she was authorized by other legal heirs of deceased to file the above rent case. The attorney of respondent No.1 in his cross-examination has admitted that the legal heirs have not authorized him to appear before the Court and to prosecute the present case. Furthermore, the names of other legal heirs of the deceased have not been mentioned by the respondent No.1 in the title of the ejectment application, therefore, in my view the ejectment application was also not maintainable before the trial Court.

16. In the circumstances mentioned above, I allow this Rent Appeal, reverse the findings of point No.2 to 4 of trial Court and reply as not proved and set-aside the judgment dated 11.02.2016. Consequently, the Rent Case No. 190/2011 is dismissed. Parties shall bear their own costs. Resultantly application U/S XXXIX Rule 1 & II CPC R/W Section 151 CPC stands dismissed being infructuous. The

office is directed to send the copy of this judgment to the learned trial Court and R&Ps within five days for information.”

4. Before commenting on merits of the case, it is relevant to reiterate some of the well-established principles of law which are:-

- i) the ejectment petition can *competently* be filed by any of the sharer (s) even without permission of other sharer (s);

(Abdul Ghani v. Abrar Hussain 1999 SCMR 348 & Muhammad Hanif & Ors v. Muhammad Jameel & 5 others 2002 SCMR 429)

- ii) for seeking eviction of a tenant from the rented shop, the only requirement of law is the proof of bona fide need by the landlord, which stands discharged the moment he/she appears in the witness box and makes such statement on oath or in the form of an affidavit-inn-evidence as prescribed by law, if it remains un-shattered in cross-examination and un-rebutted in the evidence adduced by the opposite party;

(Shakeel Ahmed & another v. Muhammad Tariq Farogh & Ors 2010 SCMR 1925)

- iii) the burden of establishing timely payment of rent is *squarely* upon tenant

(Muhammad Amin Lasaia v. M/s Ilyas Marine & Associates & Ors PLD 2015 SC 33)

- iv) landlord is not bound to mention name of business *even*; as well where seeks possession in name of construction/accommodation the same be not denied on grounds of requisite NOCs because the failure in resorting to such course would entitle the tenant to ask for possession;

(Muhammad Iqbal v. Syed Sohail Wajid Gillani 2004 SCMR 1607)

- v) Once tenant is found not in possession then burden is upon him to prove that it is not *subletting*;

(M/s Uzma Construction Co. v. Navid H. Malik 2015 SCMR 642)

5. Keeping in view the above settled principles, I have examined both judgments in juxtaposition and found that the findings recorded by the trial

court with regard to default and personal bonafide need, including subletting, are well justified. Learned counsel for the petitioner has relied upon decision reported as **2020 MLD 7** wherein issue of personal bonafide need was deliberated while relying upon 2000 SCMR 1613, 2000 SCMR 1292 and 2010 SCMR 1925. Accordingly, I am of the view that judgment of the trial court is well-reasoned, hence, impugned judgment is set aside and judgment of the trial Court is hereby maintained. Since demised premises is commercial property, therefore one year's time is granted for eviction. In case, the respondent failed to deposit the future rent, executing court would be competent to hand over the possession even before the stipulated period.

Petition stands disposed of.

Sajid

J U D G E