

IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A. No. 22 of 2010

Arshad Naseemuddin Ahmed

Versus

Javed Baloch t others

BEFORE:

**Justice Nadeem Akhtar
Justice Muhammad Shafi Siddiqui**

Date of Hearing: 14.04.2012

Appellant: Through Mr. Munir-ur-Rehman Advocate.

Respondent No.1: Through Mr. Malik Naeem Iqbal, Advocate.

Respondent No.2: Nemo

Respondents No.3 & 4: Through Mr. Ch. Khalid Rahim Arain, Advocate.

JUDGMENT

Muhammad Shafi Siddiqui, J.- This appeal has arisen out of an order dated 03.11.2009 passed by a learned Single Judge of this Court in Execution Application No.21 of 2008.

2. Brief facts of the case are that the respondent No.1 filed a suit bearing No.912 of 2007 under Order XXXVII Rule 1 CPC for recovery of Rs.42,80,000/- against respondents No.2, 3 and 4. The said suit was decreed vide order dated 04.03.2008 followed by decree dated 07.03.2008. Pursuant to the said decree, the respondent No.1 filed execution application No.21 of 2008 and prayed for attachment and sale of movable properties lying in Shops No. 34, 38 on Ground Floor and 41 and A-15 on the First Floor of the subject building. That pursuant to the

order dated 09.04.2008, the learned executing Court directed the Nazir to attach the goods and stocks lying therein and to be stored at the place to be arranged by the decree holder/respondent No.1 at his cost. That the Nazir submitted his report pursuant to the said order on 17.04.2008 along with inventory of goods lying in Shop No.41 and A-15, First Floor, Hashmi Charitable Trust, Urdu Bazar, Karachi. Through the report dated 17.04.2008 the Nazir also sought permission to break open the locks of Shops bearing No.34 and 38 on the Ground Floor. Accordingly, vide order dated 21.04.2008 the said permission was granted and the Nazir took over possession of the said shops. He then submitted another report dated 29.04.2008 in compliance of the above order. Vide CMA No.330/2008, the decree holder/respondent No.1 prayed that the Nazir be directed to sell the property rights and interests of judgment debtor's properties bearing Nos.34, 38, 41 and A-15, which were lying attached and were in the custody and possession of the Nazir and the sale proceeds thereof be paid to the decree holder/respondent No.1 to satisfy the decree. It was further prayed in this application that the receipts of the said shops be changed in the name of the purchaser in the record of the landlord Hashmi Charitable Trust. That vide order dated 11.03.2009 pursuant to the 'Nazir report dated 20.11.2008, the learned executing Court ordered to transfer the tenancy rights in the name of the decree holder/ respondent No.1. Consequently, the Nazir complied with the order dated 11.03.2009 and the tenancy receipts were transferred in the name of decree holder/respondent No.1.

3. In view of the above, the appellant filed an application under section 47 read with Order XXI Rules 95, 100 and 103 CPC (CMA No.421/2009) claiming that he was in possession of Shop Nos. 41 and

41/1 on the ground floor as a tenant, and that the same were handed over to the Nazir in view of fraud and misrepresentation committed by the decree holder/respondent No.1. It was prayed in this application that possession of the said shops should be delivered to the appellant. The said application was dismissed by the impugned order dated 03.11.2009, which has resulted into filing of this appeal.

4. It is contended by the learned counsel for the appellant that the learned Single Judge while hearing the application bearing CMA No.421/2009 has overlooked the provisions of law whereby an investigation was required in order to completely and effectively adjudicate upon the issues. He submitted that an investigation is a necessary condition precedent before reaching to a conclusion. It has further been argued by the learned counsel for appellant that as far as shops on the ground floor bearing No.34 and 38 are concerned, the appellant has no concern with them. He submitted that the shops situated on the first floor were in fact the shops wherein the rights of the appellant have been infringed and frustrated. It was further urged that the identification and location of these shops on the first floor ought to have been determined by allowing the parties to lead evidence before passing any order on the subject application. It is further

contended by the learned counsel that the learned Judge has ignored the provisions of Sindh Rented Premises Ordinance, 1979 while passing the impugned order.

5. Replying to the above arguments, the learned counsel for respondent No.1 has submitted that the appeal has been incompetently filed as it is time barred and that the appellant does not claim the tenancy rights as in application CMA No.421 of 2009 before the learned executing Court the tenancy was claimed for M/s Rehbar Publishers

(Pvt.) Limited. He submitted that the said CMA No.421 of 2009 was resisted before the learned executing Court and a detailed counter-affidavit to the said application was filed. However, the appellant did not file any rejoinder affidavit to the said counter-affidavit. It is further contended that the appellant has not challenged the order dated 11.03.2009 whereby the tenancy rights were ordered to be transferred and which order in fact was complied by the Nazir of this Court and that the said even attained finality. He however specifically submitted that the claim of the appellant pertains to the shops of the ground floor upon which this Court immediately enquired from the counsel for appellant as to which shops the appellant is claiming rights in this appeal. On enquiry the learned counsel for the appellant candidly submitted that his claim pertains to the shops on the ground floor. This statement in fact is totally contrary to the arguments raised by him wherein he claimed tenancy rights for shops No. 41-41/1 situated on the first floor.

6. The counsel appearing for respondents No.3 and 4 supported the case of the appellant. They, however, on query were unable to explain that since they have already transferred the tenancy rights pursuant to an alleged promissory note to M/s Rehbar Publishers (Pvt.) Limited, what rights and interests of them would be infringed in case the appeal is heard and decided one way or the other.

7. We have heard the learned counsels at Length and perused the record. We would first deal with the preliminary objection raised by the counsel for the respondent No.1 regarding the appeal being time barred. The learned counsel has referred and invited our attention to the certified copy of the impugned order and has stated that on 19.11.2009 the applicant/appellant applied for the certified copy of the impugned order dated 03.11.2009 whereafter the cost was estimated on

25.01.2010. The learned counsel for the purpose of aforesaid legal issue relied upon these two dates and contended that this inordinate delay as far as estimation of the cost is concerned is to be attributed towards the appellant. He further submitted that he (the appellant) should have been vigilant and have pursued the case for obtaining certified copy as early as possible. Learned counsel in support of his contentions has relied upon the case law of Mst. Jamila Khatoon V. Mst. Tajunnisa others reported in PLD 1984 SC 208 and that of Fateh Muhammad Et others V. Malik Qadir Bakhsh reported in 1975 SCMR 157. We are afraid that as far as issue of estimation of cost is concerned, the appellant has no role to play in it. It is solely within the discretion and powers of the concerned officer/copyist who had estimated the cost on 25.01.2010 which cost was promptly paid on 29.01.2010 by the appellant. The case laws cited above by the counsel for respondent No.1 are not applicable to the case in hand. The circumstances were beyond the power and control of the appellant to have got the cost estimated hence the facts of case law cited as 1975 SCMR 157 are not applicable. Similarly the second case referred as PLD 1984 SC 208 also prescribes "time requisite" to be excluded for obtaining copy of order. Hence the time taken by the Copyist to estimate the cost is required to be excluded while calculating time taken by appellant to file this appeal. Since this delay from 19.11.2009 to 25.01.2010 cannot be attributed towards appellant's negligence or be put in his basket, we are of the view that we cannot consider this appeal as being time barred and hence we would now like to deal with merits of the case as under.

8. It appears that the appellant initially filed an application bearing CMA No.588 of 2008 in Ex. Application No.21/2008 with the same prayer as in CMA No.421/2009. The said CMA No.588/2008 was dismissed for

non-prosecution on 12.09.2008. The said application then by consent order dated 24.11.2008 restored which was again dismissed for non-prosecution on 22.12.2008. In order to get the said application restored again the appellant moved CMA No.40 of 2008 which was ultimately dismissed for non-prosecution on 06.03.2009 whereafter the appellant filed yet another application bearing CMA No.421 of 2009 on 20.4.2009 upon which the impugned order dated 03.11.2009 was passed. The appellant throughout in the proceedings such as in his application, supporting affidavit and so also in the present appeal claimed the tenancy rights in respect of Shop No.41-41/1, Ground Floor, Hashmi Charitable Trust, Urdu Bazar, Karachi, for M/s Rehbar Publishers (Pvt.) Limited. In para 3 of his affidavit filed in support of CMA No.421 of 2009 the appellant categorically submitted as under:-

"That I say that applicant M/s Rahbar Publication (Pvt.) Limited, having bonafide and independent tenancy rights of Shop No.41-41/1, ground floor, Hashmi Charitable Trust, Urdu Bazaar, Karachi, the copies of tenancy receipts are submitted herewith vide Annexure A to A/4."

9. The appellant in support of this application has attached four tenancy receipts purportedly issued in respect of Shop No.41-41/1 showing M/s Rahbar Publisher (Pvt.) Limited as the tenant. It is surprising to note that in all these four receipts the floor of the subject shops is not mentioned. Another point which is significantly notable is the payment of rent through cash despite the fact that the tenancy was claimed for M/s Rahbar Publisher (Pvt.) Limited. Apart from these four receipts no other material was placed on record such as account of M/s. Rehbar Publisher (Pvt.) Limited to demonstrate that rent was being paid by it nor any correspondence viz-a-viz shops in question was shown. The next annexure attached to the said application (CMA No.421/2009) is an alleged promissory note purportedly issued/executed by respondent

No.4 and a loan of Rs.250,000/- shown to have been obtained from M/s Rahbar Publishers (Pvt.) Limited by her. However, even in this annexure the floor and the number of the shops are not traceable. As against this affidavit and documents, the decree holder/respondent No.1 filed a detailed counter-affidavit in which he submitted that since no lis is pending, therefore, the Executing Court has become functus officio. He

further pleaded that the appellant had no locus standi as the tenancy rights were claimed for M/s Rahbar Publisher (Pvt.) Limited. In Para 5 of the counter-affidavit, the contention that the appellant had no locus standi is highlighted and despite this categorical assertion no rejoinder affidavit was filed, neither any correction or amendment was sought in the application bearing CMA No.421 of 2009 or the affidavit filed in support thereof. It is significant to note that in Suit No.912 of 2007 the first order of attachment was passed on 07.08.2007. The Nazir's reports filed in the Execution Application No.21 of 2008 dated 07.04.2008, 29.04.2008, 10.11.2008, 20.10.2009 and 30.12.2009 show that the orders as and when passed by the learned executing Court were complied with. Even the tenancy of the subject premises in question stood transferred in compliance of order passed by this Court, which orders have not been challenged by the appellant. In fact the tenancy of Shop No.41 A-15 on First Floor has now been transferred to a third party who is also not before us. When confronted with the counsel for the appellant that the tenancy rights are being claimed for M/s Rahbar Publishers (Pvt.) Limited and this appeal has been filed by one Arshad Naseemuddin son of Naseemuddin being two different legal entities, the counsel candidly conceded that he has no authorization or Board Resolution of M/s Rahbar Publisher (Pvt.) Limited. The counsel then claimed that in fact M/s Rahbar Publisher (Pvt.) Limited does not exist. Now we realize that no wonder respondents No.3 and 4 were supporting the case of the

appellant as it seems apparent that they are in collusion with the appellant.

10. We are of the view that the issues/issue which are emerging out of the pleadings i.e. affidavit and counter-affidavit in respect of CMA No.421/2009 are not at all triable since the appellant who is before us does not claim tenancy rights in respect of the premises and the alleged actual former tenant i.e. M/s Rahbar Publishers (Pvt.) Limited is neither before us nor was before the Executing Court. Learned counsel for the appellant relied upon the following four case laws in support of his application under order XXI Rule 100 and 103 read with section 47 CPC:-

- i) Muhammad V. Hussain *Et 2 others* (1986 CLC 2600)
- ii) Ghulam Qadir V. Haji Munir Ahmed (1989 MLD 2503)
- iii) Shahida Parveen V. Saeed Mirza (1990 CLC 938) and
- iv) Surayya Begum V. Muslim Commercial Bank (PLD 1990 Lahore 04)

11. All the cases referred by the learned counsel for the appellant in support of his contentions are distinguishable. The said cases involved questions for determination of the rights of the parties who were before the Court with substantial documents and the Court felt that the determination of such rights was not possible in a summary manner. The tenancy rights in this case are being claimed for a party who is not before us and hence these case laws are not available to support the appellant and thus it would have been a futile effort to have undergone such process, as claimed by the appellant.

12. It is not the mandate of the provisions of Order XXI Rules 100 and 103 CPC to have always record evidence even if the Court finds the subject application as frivolous and meant to cause delay and drag the proceedings.

13 With these facts the learned Single Judge had no option but to dismiss the application summarily as it would have been a futile effort to involve the litigants in the process of recording of evidence. It is neither obligatory nor lawful to have always decide the application under section 47 and Order XXI rule 95, 100, 103 CPC by recording the evidence. It actually depends upon the facts and circumstances of each case. The learned Single Judge has done nothing wrong while dismissing the application summarily since there was no material or facts which were required to be investigated. Learned counsel for the appellant also failed to point out any provision of Sindh Rented Premises Ordinance which was violated through the impugned order.

14 In view of the above facts we are of the view that the appeal has no merits and is liable to be dismissed. Order accordingly. We may, however, observe that the order dated 11.3.2009 whereby the rights in respect of the shops in question were ordered to be transferred is not impugned before us nor this order passed by us would create any influence or would prejudice the rights of the parties who may wish to challenge or already challenged the said order dated 11.3.2009.

Sd. Judge
Sd. Judge