

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:

Mr. Justice Muhammad Shafi Siddiqui

C.P. No. S-631 of 2012

Nusrat Hussain @ Shahid Warsi

Versus

Aal-e-Aba Trust & others

Date of Hearing: 12.04.2018

Petitioner: Through Mr. Muhammad Ali Waris Lari
Advocate.

Respondent No.1: Through Mr. S.M. Akhtar Rizvi Advocate

Respondents No.2 to 4: Nemo

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Petitioner, being tenant, has filed this petition seeking declaration to the effect that there was no such trust in respect of the property in question nor the gift in respect thereof was lawfully executed. He further prayed that the two impugned orders of the Rent Controller and that of the appellate Court in Rent Case No.649 of 2007 and FRA No.157 of 2009 be set aside. The dates of the two impugned orders are not available in the prayer clause and the counsel for petitioner has orally argued that the two orders/judgments dated: 07.09.2009 and 20.03.2012 are impugned in this petition.

I have heard the learned counsel for parties and perused material available on record.

This petition is against the concurrent findings as far as personal requirement is concerned and conflicting findings as far as default is concerned of the two Courts below. The Rent Controller framed four issues, which are as under:-

1. Whether the opponent committed default in payment of monthly rent?
2. Whether the opponent made alteration and addition in the demised premises?

3. Whether the demised premises requires by the applicant for his personal bona fide use?
4. What should the order be?

The Rent Controller declined the application on the ground of default and alteration and addition whereas allowed the application on the ground of personal requirement. The appeal was preferred by the tenant/petitioner as FRA No.157 of 2009 and the appellate Court maintained and allowed the ejectment application not only on the ground of personal requirement but also reversed the findings on default without an appeal of landlord, as argued, which is claimed to be in violation of law as he could not have reversed the findings in the absence of appeal. Previously also a Rent Case was filed by respondent No.2, as being the owner of the property, however subsequently the property claimed to have been acquired by the respondent No.1 who then issued notice under section 18 of Sindh Rented Premises Ordinance, 1979 apparently on 17.05.2007.

It is the case of the petitioner that the application was not filed by the concerned/authorized person as no trust deed was available. Learned counsel for the petitioner in this regard has relied upon the case of Abdul Fayyaz Khan v. IIIrd Additional District Judge, Karachi South reported in 2012 CLC 793.

At the first instance, as to the contention of learned counsel for the petitioner that the applicant/respondent No.1 is not authorized to file the ejectment application, it may be relevant to see that the eviction application is supported by a letter of the Deputy Managing Trustee authorizing Hassan Alam Khan as secretary who was further authorized to institute and initiate proceedings for the eviction of the tenant from the subject premises. These letters were attached along

with ejectment application and so also attached/exhibited with the affidavit-in-evidence which were not denied.

In case the petitioner is of the view that the trustees have not resolved or passed resolution appointing Syed Hassan Alam as Deputy Managing Trustee or authorizing him to institute and initiate proceedings against the tenant he (petitioner) could have summoned the Deputy Managing Trustee or trustees which has not been done hence inference can be drawn that none of the trustees came forward to object such proceedings. The case law relied upon by learned counsel for the petitioner i.e. case of Abdul Fayyaz Khan (Supra) thus distinguishable from the facts of the instant case as letters authorizing Hasan Alam were available on record before Rent Controller. It is not the case where the names of trustees are not shown, rather it is a case, as argued by petitioner's counsel, that Syed Hassan Alam is not authorized, which claim/assertion in the presence of the documents attached/ exhibited with the ejectment application, as well as with the affidavit-in-evidence is not sustainable.

It is not and should not be the concern of the tenant/petitioner as to how the property was transferred. It is sufficient that the respondent No.1 Aale-e-Aba Trust acquired this property and thus it then vested with the trust. The application was lawfully filed on behalf of the trustees by the General Secretary Syed Hassan Alam who has been authorized by the Trust to initiate such ejectment proceedings.

The appellate Court while considering the fact that the rent was being deposited by tenant without first offering it to the respondent No.1 was rightly noticed. It is a material deviation of law as section 10(3) of Sindh Rented Premises Ordinance, 1979 does not permit a

tenant to deposit it without first being offered by tenant and refused by the landlord.

Similarly, insofar as case of personal requirement is concerned, the premises was required for personal need of the applicant/ respondent No.1 as Moazzan and Pesh Imam has no accommodation and it has been decided by the trustees that the subject premises be used for the accommodation of Moazzan and Pesh Imam being in close vicinity of mosque.

Thus, insofar as the case of personal requirement is concerned there is absolutely no evidence to reach to a conclusion other than reached by the two Courts below. The premises is situated in the near vicinity where Moazzan and Pesh Imam are performing their duties. They offer prayers as Imam and are also running therein a Madarsah. The petitioner has not been able to make out a case that the personal requirement was not established.

Insofar as the ground of default is concerned no doubt this was declined by the Rent Controller along with the ground of material alteration and addition but when the appeal was preferred by the tenant/petitioner, entire case, as being first appellate Court, was reopened. The appellate Court discussed entire evidence and gave reasoning as to how the default was committed.

The rent was deposited in the name of two persons i.e. Aale-e-Aba Trust and as well as previous owner Fayyaz Hussain Qazalbash. This was done after receipt of notice under section 18 of Sindh Rented Premises Ordinance, 1979 from new owner i.e. Aale-e-Aba Trust. Despite having knowledge and despite having seen the documents, as the correspondence shows, the tenant/ petitioner without first offering the rent to the respondent No.1 started depositing rent in Misc. Rent Case.

This deposit is not a lawful deposit in terms of Section 10(3) of Sindh Rented Premises Ordinance, 1979. Though the landlord/respondent No.1 had not preferred an appeal against this finding nor filed a cross-appeal but as being first appellate Court these questions were open for discussion before the appellate Court. The rent case and proceedings are governed by Special Law i.e. Sindh Rented Premises Ordinance, 1979 and the concept of cross appeal may not be available. Moreover respondent was not an aggrieved person in respect of judgment of Rent Controller as the application was allowed, though on solitary ground of personal requirement but he could not have filed any appeal in respect of grounds gone against him and hence not an aggrieved person in terms of judgments mentioned below. In this regard learned counsel for respondent No.1 has relied upon the case of Muhammad Ayub Khan v. Abdul Aziz Burney reported in 1994 CLC 1123 in which it has been observed as under:-

“Having examined the above-noted case-law, cited and supplemented respectively by Mr. S.M. Akhtar Rizvi for the appellant and Mr. Badruduja Khan as Amicus Curiae, as a general principle it may be stated that a landlord, who has succeeded in a rent case, lodged on more grounds than one, one or more such grounds going in his favour but the other or the others against him, can only (in an appeal of the adversary) support the order of eviction and such may also be on the ground or grounds decided against him but the landlord cannot either prefer an appeal or file cross-objections, independently assailing the finding (s) on the ground (s) found against him. This seems to be the position both under the Urban Rent Restriction Ordinance of 1959 and the Sindh Rented Premises Ordinance, 1979. It arises on the premises that an order or decree can be assailed only by such a party to the lis against whom the order of decree has operated, whether wholly or in part. Examples of a partly adverse order or decree can be numerous but the most common is one, where several reliefs are claimed by a person but the order or decree accords on or more and declines the other or others.

.....At the same time, however, it cannot be ignored that the landlord had a free choice to file separate rent cases,

encompassing each ground independently in a separate rent case. Were he to fail in any such case, he' would have had a right to prefer an independent appeal. That he preferred to club such grounds together in a single rent case would imply a conscious act on his part, equating all such grounds and notionally making it manifest that success on any of those grounds would be equally acceptable, he being interested in eviction alone, irrespective of the fact as to which ground finds favour with the forum coming to adjudicate in the matter. Success on any one of those grounds should, therefore, bring complete satisfaction to him and he would not be treated as "an aggrieved part" in relation to one or more such grounds, if he has succeeded in the rent case on the remaining other or others. He would, accordingly, have no right either for a cross appeal or cross objections in relation to the grounds in which he failed to succeed and can duly substantiate the same without such appeal or cross-objections in the appeal of the other aggrieved party.

In the instant case also the landlords combined the grounds of personal requirement and default together and having succeeded only on the first cannot be permitted to prefer an appeal as to the second.

This appeal, therefore, is not competent and was dismissed in limine through a short order, as reflected above."

Similarly in the case of *Ismail v. Sher Bano* reported in 1988 SCMR

772 it has been observed by the Hon'ble Supreme Court as under:-

"We have carefully considered the arguments of the learned counsel for the parties. Apparently the finding on the issue of default) of payment of rent arrived at by the Rent Controller was based on' misreading of evidence on record. However, he had decided the eviction petition in favour of the landlady Mst.Sher Bano respondent on another ground namely the premises being required for her bona fide personal use. Therefore, there was no question of her filing cross-objections or cross-appeal in the instant case. The appeal in this case was filed by the tenant i.e. Ismail appellant and the learned Single Judge while hearing the same under section 21(3) of the Sind Rented Premises Ordinance was empowered to reverse the finding of the Rent Controller on the issue regarding default in payment of rent decided in favour of the appellant even in the absence of any cross-appeal/ objection by the landlady i.e. Mst.Sher Bano respondent.

In the light of the above discussion we do not find any substance in this appeal which is accordingly dismissed. There shall be no order as to costs.”

Since issue in hand was settled by the Hon’ble Supreme Court, which is binding on this Bench, I do not find any reason to interfere in the judgment of the appellate Court who rightly observed that the deposit of rent in MRC without first offering it to the landlord is not lawful tender. Thus case laws relied upon by counsel for petitioner i.e. (1) 1987 MLD 2407, (2) PLD 2011 SC 119 and (3) 1990 CLC 1320 are thus distinguishable from the facts of present case and not applicable.

In view of the above, I am of the view that the petitioner has not been able to make out a case to interfere in the findings as recorded by the appellate Court in the impugned judgment. Accordingly, the petition was dismissed vide short order dated 12.04.2018 of which these are the reasons.

Dated:

Judge