

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. NO.S-733/2009

Petitioners. : Aurangzeb Ali and another,
through Mr. Jamil Ahmed advocate.

Respondents : IIIrd Additional District Judge, Karachi Central
and others,
Shaikh Abdul Majeed advocate for respondents
No.2, 4, 5 to 10.

Date of hearing : 31.05.2018.

Date of order : 31.05.2018.

JUDGMENT

Salahuddin Panhwar, J: This petition assails order dated 16.09.2009 passed by appellate Court in First Rent Appeal No.49/2007 whereby FRA filed by petitioner against order passed by the Rent Controller on 08.01.2007 in Rent Case No.618/1997 allowing eviction application of respondents, was dismissed.

2. Concisely, facts leading to filing of this petition are that the respondents No.2 to 10 (applicants before the Rent Controller) are the owners of Shop Nos.2 & 3 Mumtaz Cloth Market, Main Road constructed on Plot No.G/1-208, 209 and 266 Liaquatabad, Karachi where petitioners (opponent before the Rent Controller) are tenants at the monthly rent of Rs.400/- per month excluding electricity and other charges. The petitioners used to pay the rent through money order which they continued to pay till June 1997 but suddenly stopped remitting the same till the filing of application before Rent

Controller; that petitioners neither paid nor tendered nor deposited the rent in the Court and that they were willful defaulters in payment of rent from July 1997 to October 1997; that despite repeated demands they failed to pay the same and by the time the Rent application was filed an amount of Rs.1,600/- was outstanding against them as arrears of rent; that a partition wall between the two shops without the consent, permission and knowledge of the respondents was demolished by the petitioners hence the value and utility of the rented premises was impaired besides the building became weak and dangerous and that the petitioners despite promise to raise the wall failed to do so.

3. Reham Ali the father of present petitioners claiming himself as proprietor of M/s Aurangzeb Ali Akber Ali filed written statement and denied the contents of the Rent application. It was pleaded that rent till July 1995 against valid receipts had already been paid and thereafter the same was remitted through money order and received by the respondents till September 1997. However, the rent for the months from October to December 1997 sent in advance vide Money order No.2953 dated 05.08.1997 was refused by the respondents hence petitioners started depositing the same in MRC No.522/1997 which is continuously being deposited; petitioners denied demolition of wall and impairing the value and utility of the rented premises as claimed.

4. Heard learned counsel for the parties and perused the record.

5. Learned counsel for petitioners argued that their father Reham Ali was the tenant in rented premises and that prior to filing Rent Case No.618/1997 the respondents filed Rent case No.71/1995 u/s 8 of S.R.P.O. 1979 for fixation of fair rent and the same was withdrawn on 26.03.2002; that rent upto June 1997 was paid against valid receipts and from July 1997 to November 1997 the rent was remitted through money order and on its refusal the petitioners started depositing rent in MRC No.522/1997; that the wall between the two shops was removed/ demolished with the consent and prior permission of the owner at the time of inception of tenancy; that the Rent controller decided the point of demolition/ removal of intervening wall in negative, against the respondents; though point of default was decided in favour of the respondents, against the petitioners without considering the oral and documentary evidence on the record; that the impugned orders suffer from various infirmities, were result of misreading and non-reading of the evidence and despite suppression of material facts by the respondents, learned Rent Controller as well as appellate Court failed to take judicial notice of the same and passed the impugned orders without appreciating the evidence led by the petitioners and that no credence was given to the documents placed on the record by the petitioners. It was argued that Rent case was filed against M/s. Aurangzeb Ali Akbar Ali through proprietor Reham Ali who expired during the pendency of Rent case on 19.12.2000 but in fact both the opponents/ petitioners are sons of Reham Ali and not that of Anwar Ahmed, therefore, the very Rent case being incompetent was liable to be dismissed on this score; that there were material contradictions in

the evidence of two respondents who filed their affidavits-in-evidence and were subjected to cross-examination but those contradictions were overlooked and discarded without any plausible reason; hence orders of both Courts below are liable to be set aside. He has relied upon 1997 AC 39, 1997 MLD 1998; PLD 1993 Karachi 642 84 and PLD 1984 SC 44.

6. Learned counsel for respondents has supported the findings of the appellate Court and prayed for dismissal of instant petition.

7.

FINDINGS OF THE TRIAL COURT ARE THAT

POINTS

1. Whether the opponent has committed default in payment monthly rent from July 1997 to October 1997?
2. Whether the opponent has demolished/removed intervening wall in between shop No.2 and 3 without permission of the applicants?
3. What should the order be?

REASONS

Point No.1

The applicants in para 3 of main ejection case and applicant No.1 and 5 in para 4 of their respective affidavit in evidence have stated that the opponents have intentionally not paid rent since

01.7.1997 to 31.10.1997. despite of demands, reminders and request. The opponent on the other hand has denied to have committed default in payment of rent. According to opponent (deceased Rahim Ali) had paid monthly rent of the premises in question through money orders till Sept: 1997 and rent for the months of October to December 1997 was sent in advance through money order No.2953 dated 5.8.1997 which was refused therefore it was deposited in MRC No.522 of 1997. In support of his above plea has produced money order coupon No.0302 and its postal receipt at Ex:O/2, money order coupon No.2953 at Ex:O/3 and receipt of MRC No.522/1997 at Ex:O/4. The opponent in para 5 (v) of his affidavit in evidence has stated that he produced money order receipt / coupon No.0302 dated 28.11.1997 which he claims that it was rent sent by the opponent through above money order for the month of July to September 1997 but perusal of above Ex:O/2, which is money order coupon No.0302 and its postal receipt No.0302 clearly shows that it was sent on 28.4.1997 and not on 28.11.1997 as claimed by the opponent in para 5(v) of his affidavit in evidence. The stamp of post office also shows the date of its sending as 28.4.1997 and it was received by applicant No.1 Nasreen Ehsanuddin on 29.4.1997 and it bears her signature with her name. This fact is also admitted by opponent **in** cross examination that rent through money order Ex:O/2 is sent on 28.4.1997. he has further admitted in cross examaintion that postal receipt Ex.O/2 the month of July, August and September has been mentioned by himself and not by post office staff. The opponent futher claims that rent for the month of October to December 1997 was sent in advance through money order No.2953 dated 05.8.1997 but it was refused to receive therefore he deposited the same in MRC No.522 of 1997 but money order coupon produced at Ex:0/3 does not show anything that above money order was refused by the applicants not it bears any endorsement of post man and this fact is also admitted by the opponent in cross examination that Ex:O/3 does not bear any endorsement of postman. He has further admitted that affidavit in evidence of postman is also

not filed in this case, even he failed to produce postal receipt of above money order to show that above money order was sent to the applicants. The perusal of receipt of MRC shows that rent of three months amounting to Rest.1200/- was deposited on 23.9.1997 in MRC No.522 of 1997 and according to para 5(v) of affidavit in evidence of opponent this was deposited as advance for October to December 1997. The claim of the applicants that the rent sent by money order Ex:O/2 is rent for the month of April to June 1997 while opponent claims that Ex:O/2 pertains to rent for July 1997 sent on 28.11.1997 but as already discussed above that Ex:O/2 is sent on 28.4.1997 and not on 28.11.1997 and from the above fact it appears that claim of the applicants that Ex:O/2 pertains to rent from April to June 1997 is correct as it was sent as advance rent for three months from April to June 1997 on 28.4.1997. The perusal of receipt of MRC further shows that rent for three months were deposited in above MRC and according to opponent himself it is rent for October to December 1997 which means in view **of** above discussion that rent for July to September 1997 are due against the opponent which is not paid by him. Both the applicants stated on oath that they received rent upto June 1997 through money order and thereafter they did not receive rent from July to October 1997 and both applicants have admitted in cross examination that they only claim arrears of rent for the month of July to October 1997 for only four months. The report of Nazir is in respect of above MRC is also called which shows that opponent started depositing rent from September 1997 and is regularly depositing rent and according to opponents themselves rent deposited in MRC on 23.9.1997 is rent for October to December 1997, which means that opponent has failed to pay rent for the month of July to September 1997 and has committed willful default in payment of rent of above three months. It is well settled law that if the applicants states on oath that he has not received rent then burden shifts on opponent to prove that he has paid rent which in the circumstances discussed above the opponents failed to prove. Reliance in this regard is placed in 1999 Y.L.R Page 230 in which it is

held that once the landlord states on oath that he has not received the rent due, the burden of proof which shift to the tenant. The citations relied upon by the learned counsel for opponent does not attract to the facts and circumstances of the present case. In view of my above findings the point No.1 is answered in affirmative.

Point No.2

The applicants have failed to bring on record any documentary evidence to prove that opponents have demolished or removed intervening wall in between shops No.2 and 3 without permission of the applicants nor they produced evidence of any kind to prove that due to above act of opponents the building has been damaged rather it is admitted by the applicant No.1 in cross examination that no documentary proof is produced by her to show that due to removal of intervening wall the building has been damages. In the circumstances the point No.2 is answered in negative.

Point No.3.

In view of my findings on above point, the rent application No.618/1997 is hereby allowed the opponent is directed to hand over vacant physical possession of the demised premises viz. shops No.2 and 3 in Mumtaz Cloth Market, Main Road, situated at Plot Nos.G/1-208, 209 & 266, Liaquatabad, Karachi Central to the applicant within 30 days from today. There will be no order as to cost.”

.....

- 8. X
- 9. X

Para 9 of appellate order.

I have considered the above submissions, perused the case file as well as the R&Ps of the learned Rent. Controller and have gone through the case law referred to by learned counsel for the appellants. This is a very simple case of default in making payment of rent. According to the respondents the rent up to June 1997 was paid by the appellants through money order but from July onwards it was stopped intentionally and deliberately. On the contrary the appellants claimed that they have remitted rent through money order up to September 1997, which the respondents received. They stated that rent for three months from October to December 1997 was sent in advance through money order but it was refused, therefore; the same was deposited in M.R.C. No.522/1997. Hence, question of default does not arise. In the written statement filed by the father of the present respondents; in Para-2 it has been stated that monthly rent up to July 1995 was paid in cash against valid receipts and thereafter the same was being remitted through money orders. This fact is also confirmed by appellant Aurangzeb in in Para-5 of his affidavit-in-evidence. Therefore; the burden to prove that from August 1995 onwards the rent was remitted was upon the appellants. The respondents admitted that they have received rent up to June 1997 and in such circumstances the burden that rent from July 1997 was remitted was upon the appellants. To prove this fact the appellants have produced only two receipts of money order i.e. 1) bearing receipt No.0302 dated 28.04.1997 & 2) bearing receipt No.2953 dated 05.08.1997. The Appellant No.1 stated that through

money order receipt/ coupon No.0302 (Ex.O/2) the rent for the months of July; August & September 1997 was remitted on 28.11.1997 but this Ex.O/2 speaks otherwise, as the same clearly shows the date of remittance as 28.04.1994 and not 28.11.1997 and it was received by respondent No.1 Nasreen Akhtar on 29.04.1997. in fact it was rent for the period from April to June 1997, which has been received by Respondent No.1. So far receipt No.2953 dated 05.08.1997 (Ex.O/3) it was rent for the months of October to December 1997 and this fact is admitted by appellants also. There is no proof of whatsoever nature that rent for the period from July to September 1997 was ever paid or remitted through money order by the appellants. Since it is the case of appellants themselves that from August 1995 they are remitting rent through money orders, the appellants were legally bound to produce the copies of such money order coupons to prove that rent up to September 1997 was actually remitted by them. It is settled law that nonpayment of rent is a negative fact and initial burden is on the landlord to establish that the tenant has not paid rent as required under section 15(2) (ii) of the S.R.P.O. 1979 and once the landlord steps in the witness box and states on Oath that he has not received the rent due for a particular period, then the burden of proof would shift to the tenant who would be required through convincing and affirmative evidence to prove that rent for that particular period has been paid. Reference is invited to the case of Mst. Shabana & another Vs. M/s N.P. Cotton Mills (Pvt.) Ltd., 1999 YLR 230. In the said reported case, the cases reported as PLD 1982 HC 465, 1990 CLC 711 and 1997 CLC 216 were also referred. In the absence of any proof of payment of rent for the period

from July to September 1997 the learned Rent Controller rightly treated and declared the appellants as willful and deliberate defaulters. The learned counsel for appellants though argued that there are material contradictions in the statements/ evidence of two respondents namely Mst. Naseem Akhter (Respondent No.1) and Sharifuddin (Respondent No.5) but he failed to point out such contradictions. I have minutely gone through the affidavits in evidence of two respondents named above and that of Appellant No.1 but I do not find anything illegal in the impugned order and no exception could be taken to the same and the view taken by the learned Rent Controller on the question of default is based on correct appreciation of evidence. The impugned order has been passed after properly considering and assessing the evidence and the same calls for no interference.

..... **ends.**

10. These are the reasons for short order dated 31.05.2018.

IK

J U D G E