ORDER SHEET

IN THE HIGH COURT OF SINDH HYDERABAD CIRCUIT.

C.P. No. S –143 of 2010.

DATE	ORDERS WITH SIGNATURE OF JUDGE

26.10.2015.

FOR ORDERS ON APPLICATION RECEIVED FROM MIT II KARACHI.
FOR KATCHA PESHI.
FOR HEARING OF M.A. 3168/2010.
FOR HEARING OF M.A. 2163/2013.

Mr. M. Arshad S. Pathan, Advocate for the petitioners

Mr. Abdus Salam, Advocate for respondents.

MUHAMMAD SHAFI SIDDIQUI, J. - The prime issue which came out of the litigation is the relationship of landlord and tenant between the parties.

Counsel for the petitioner submits that insofar as the issue of relationship of landlord and tenant is concerned that is to be based on independent evidence irrespective of the dismissal of the suits filed by them for declaration and injunction in relation to their title. In this regard learned counsel for the petitioner submits that the litigation between the parties has a history. As stated by the counsel the first rent case was filed in the year 1973 bearing Rent Application No.38 of 1973 which order is available as annexure 'H' at page 117 in terms whereof the application was dismissed as there exists no relationship of landlord and tenant between the parties. The appeal No.207 of 1974 was also dismissed by IVth Additional District Judge Hyderabad on 22.9.1980. Subsequently there was another Rent Application filed which is available at page 137. This application appears to have been filed in the year 1993 and this was also dismissed on 20.9.1997. The record when called from trial Court further shows that there was yet another Rent Application No.13 of 1993 which was consolidated and was dismissed on

20.9.1997 by IInd Senior Civil Judge Hyderabad. Present petition is arising out of a Third or Fourth Rent Application bearing No.109 of 2003 available as annexure 'C' page 63. Counsel submits that previously all rent cases preferred by the respondent were dismissed despite the fact that they alleged the rent agreement to have been executed in the year 1986 and 1990 respectively. Counsel also submitted that the two dates of at least two respective rent applications were subsequent to the execution of the two alleged rent agreements i.e. 1986 and 1990. Hence insofar as the issue of relationship of landlord and tenant between the parties is concerned based on the evidence which was available to the respondent at the time when the Rent Applications were filed has attained finality.

The present Rent Application also based on certain facts which provides that on the intervention of Nekmard and respectable persons the dispute was settled and a rent agreement dated 22.1.1986 was also executed for 11 months and another agreement was executed on 11.10.1990 as alleged in the rent application. (These are same agreements relied upon earlier by respondent). Counsel for the petitioner submits that though this could hardly be a case of the respondent that these were the dates of the rent agreements since earlier two rent cases were filed subsequent to dates of execution of rent agreements, he submits that no such "decision" or "Faisla" of Nekmards were produced in the Court that in fact there was a decision to enter into such compromise which include execution of rent agreement. Counsel submits that only a photocopy of an agreement was claimed to have been produced but not available on record.

Be that as it may, it appears that the Rent Controller was required to ascertain this fact as to whether there exists any relationship of landlord and tenant when earlier applications were dismissed on such score. Counsel submits that though there was an issue which relates to the relationship of landlord and tenant framed by the Rent Controller but the reasoning

assigned by the Rent Controller as well as by the Appellate Court are absolutely contrary to the evidence that has come on record. Hence the two orders were based on non-reading and misreading of evidence. Counsel submits that there is not an iota of evidence even to remotely presume that there was relationship of landlord and tenant. He concluded that irrespective of the dismissal of the suits such issue required independent findings to reach positive conclusion of issue of relationship of landlord and tenant.

On the other hand learned counsel for the respondents has gone through the evidence and has also read the orders of the courts below. He has also relied upon the cross examination of the applicant which is reproduced by the Rent Controller while deciding the point No.1 i.e. relationship of landlord and tenant. Counsel submits that since they have lost the civil litigation in terms whereof the suit was dismissed and so also the appeal, therefore, in view of such dismissal the issue of relationship of landlord and tenant ought to have been decided in favour of the respondent. Counsel submits that in the cross examination they have admitted that the Nekmards have intervened, however, such 'Faisla' or "compromise" could not be produced. He submits that the rent agreement in fact was the outcome of the decision of the Nakmards. Copy of which is claimed to have been filed along with the application but not on record. He submits that the original copy of such agreement could not be filed and exhibited since counsel to whom the document was handed over died at the time when the rent case was pending. Hence only the photocopy was placed on record. Counsel for the respondent has relied upon 1999 MLD 2137 and 2000 CLC 1841 and submits that aforesaid litigation based on identical facts and the relationship of landlord and tenant was declared to have been existing between the parties in view of the dismissal of the civil suits filed by tenant therein. Counsel has also relied upon two orders passed by this Court in C.P. No.S-173 of 2005 and C.P. No.S-174 of 2005 in terms whereof after the

dismissal of the suit the rent application was allowed irrespective of any independent finding of relationship of landlord and tenant. Hence he submits that since this petition is based on concurrent findings of two courts below, therefore, in writ jurisdiction the Court has limited scope to intervene and only the apparent error, irregularity and illegality could be considered.

I have heard the learned counsel and perused the material available on record. I have also called record and proceedings between the parties and the Superintendent of District Judge Hyderabad sent following cases:

(1) Rent Appeal No.207 of 1974.

(2) Rent Application No.13 of 1993.

(3) Civil Appeal No.201 of 2001.

(4) Rent Application No.109 of 2003.

(5) First Rent Appeal No.26 of 2009.

Some of the cases were not available and copies are available on record of this file. I would first like to narrate those admitted facts which have not been denied.

The first rent case was filed in 1973 available on record bearing Rent Case No.38 of 1973 available at page 117 was dismissed in view of nonexistence of relationship of landlord and tenant. The subsequent rent case, application of which is available at page 137 was also dismissed as the respondent failed to lead evidence. The present and third rent application based on same earlier rent agreements. Photo copies of such agreements are available in the rent case. It is also available in one of the earlier rent case of filed in the year 1993. The contention that such rent agreement of 1986 and 1990 were the outcome of decision of Nekmard has no force as previous rent applications were dismissed subsequent to dates of rent agreements. These agreements were available in Record and Proceedings of earlier rent application but not in the Rent Appeal No.207 of 1974 in relation to first rent case. Thus the question of Resjudicata played a vital role

insofar as the present rent application is concerned as it contain no other fresh cause or rent agreement. The second Rent Application was filed in the year 1993 based on the evidence and documents that were available to the respondent which definitely include Rent Agreements referred above. The second rent application has both “copies” of rent agreement on record. The Rent Applications were dismissed as observed by both the courts. Hence the burden is very heavily cast upon the respondent to establish that in fact there was yet another fresh cause of action to initiate such rent proceedings and that the principle of resjudicata is not applicable. Irrespective of the contents of para-3 of the latest rent application the cause of action claimed to have been accrued to the respondent in the year 1991 when the petitioner stopped paying rent to the respondent which cause of action allegedly accrued to them prior to the filing of the second rent application. Be that as it may, the respondent was saddled with this burden to establish such relationship of landlord and tenant though in my tentative view the third rent application at-least is hit by the provisions of resjudicata since it is based on a cause of action accrued in the year 1991 and earlier at least two rent applications were dismissed which are based on same facts and documents.

I have also read the evidence of the parties, in particular the cross examination of the petitioner wherein though he has admitted that the ‘Faisla’ and/or “decision” of Nekmard was held outside the Court and dispute was settled between them, yet no such ‘Faisla’ in writing available on record. It was neither filed by the petitioner nor by the respondent though in my view it is a burden to be discharged by the respondent who is required to establish the relationship of landlord and tenant. It is also denied by the petitioner in the cross examination that there was/is no written or verbal rent agreement and there was no settlement in respect of the rent of premises in question at the rate of 100 per month. This reply was given by the petitioner after he has suggested that the ‘Faisla’ was held by the Nekmards due to intervention but

what that ‘Faisla’ was is still a mystery. Thus the petitioner’s contention appears to be clear and unambiguous and he dispute the execution of any such rent agreements either in oral or in writing. It could never be in writing as the agreements claimed to have been executed in the year 1986 and 1990. The Rent Controller while deciding the issue has initially observed that the burden is upon the respondent to discharge and establish relationship of landlord and tenant yet in the concluding paras he has observed that in view of such admission of ‘Faisla’ of the Nakmard the relationship was held to be of landlord and tenant. The Rent Controller has reproduced all such suggestions of respondent’s counsel which were replied by witness as “incorrect” which under no stretch of imagination can be construed as admission. The Rent Controller while deciding the issue No.1 has held that in view of the dismissal of the civil suits regarding the declaration and permanent injunction of the premises in question it could only conclude as existence of relationship of landlord and tenant. Thus on such assumption the petitioner was held to be a tenant of the premises.

The findings of the Rent Controller are based on misreading and non-reading of evidence. There is absolutely no admission on the part of the petitioner that they have ever paid the rent to the respondent or that any rent agreement was executed. Whatever evidence that has come on record could not contributes towards discharge of burden of the respondent to establish that there exists relationship of landlord and tenant. The agreement relied upon could not be construed as evidence as only “photocopies” of the claimed agreements have been filed and none of the two attesting witnesses as admitted by the respondents were produced to establish such assertion. Even otherwise the earlier rent application in presence of such rent agreements was dismissed. Hence in all respects the document i.e. rent agreements remained unproved and hence the relationship remained unproved. The Appellate Court while deciding the said controversy of

relationship of landlord and tenant has in a summary manner opted to adopt the version of the Rent Controller that since in the affidavit in evidence it has been said that they were paying rent to the respondents, therefore, the default has been established.

I am of the view that the appellate Court has put the cart before the horse. The need of establishing relation of landlord and tenant is to be considered first and that cannot be decided on the basis of the dismissal of the suit and appeal of the petitioner. The relationship of landlord and tenant has its own independent reasoning and finding. The first rent case was disposed of with the reasoning that petitioner is a “licensee” of respondent.

I do not agree with the contention of the learned counsel for the respondent that once the suit and appeal of the petitioner are dismissed therefore the issue of relationship ought to have been decided in favour of the respondent. There is no question of shattering the evidence of the respondent since they have to discharged this burden that the petitioner is a tenant of the premises in question which they have failed. None of the judgment as cited is applicable to the facts and circumstances of the case. Even otherwise I am of the view that the decision of the civil suits shall have no nexus to the issue of relationship of landlord and tenant in view of facts and circumstances of the case. Since it is a dispute between the private parties therefore by no operation of law the petitioner became tenant as it is claimed to be owned by one private party/respondent. Every occupant need not to be considered as a tenant after dismissal of suit. He may be a “trespasser” or a “licensee” and for that facts of each case plays a vital role. In my view the judgment of the two courts below based on misreading and non-reading of evidence. Hence insofar as the relationship of landlord and tenant is concerned I am of the view that respondent failed to establish and consequently the ejectment application must fail. I do not find any reason to touch rest of the two issues. Accordingly the petition is allowed and the two

judgments of the two courts below are set-aside and the ejectment application stands dismissed.

The R & Ps called from the concerned Court be sent back to the District Judge for keeping the same intact.

Judge

A.