

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
CP.No.S-2506 of 2018

Date Order with signature of Judge

1. For hearing of main case.
2. For hearing CMA No. 10124 of 2018.

10th March 2020

Mr. Abdul Waheed Kanjoo, advocate for the Petitioner.
Mr. Manzoor Hameed Arain, advocate for respondent No.1.

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Salahuddin Panhwar,J:- This petition assails judgment dated 22.10.2018 passed by appellate Court in FRA No.288/2017 and order dated 09.11.2017 passed by Rent Controller concerned in Rent Case No.217/2016 whereby present petitioner was directed to vacate the demised premises.

2. Precisely, the facts of the case are that the respondent filed ejectment application No. 217 of 2016, in respect of flat No.15, 4th Floor, Building No.8, Sector, Karachi on the grounds of default in payment of rent and personal bona fide need, to which petitioner filed his objections/written statement, *inter alia*, denying therein the relationship as well as questioned title of the respondent over the demised premises. Thereafter, in order to prove their assertions, parties led their evidence and ultimately the learned Rent Controller, vide order dated 09.11.2017, allowed the ejectment application directing the petitioner to vacate the subject premises. Against such order, an appeal bearing FRA No.288 of 2017 was preferred by the petitioner before the appellate Court, which, too, was dismissed vide judgment dated 22.10.2018. The concurrent findings of the Courts below have been challenged through the instant petition.

3. Heard learned counsel for the respective parties.

4. Learned counsel for the petitioner vehemently emphasis over the litigation between the petitioner and attorney as claimed by the petitioner

with regard to the recovery of Rs.600,000/- as “*malicious prosecution*” so has challenged the orders of lower courts as not tenable.

5. The respondent, however, opposed the petition being not maintainable.

6. I have perused the impugned judgment in juxtaposition of contentions of learned counsel for the respective parties and perused the cases cited by learned counsel for the petitioner i.e. 1981 CLC 327 (Karachi), 1993 SCMR 183, 1991 CLC 882 (Lahore), 1983 SCMR 1064, PLD 1985 SC 01, 2009 MLD 144 (Karachi), 2007 SCMR 152, 1992 CLC 1930 (Karachi), 2005 CLC 1696 (Karachi), 1998 MLD 575 (Karachi), 1991 CLC 1256 (Karachi) and 1994 SCMR 572.

7. At the outset, it needs to be reiterated that this Court, *normally*, does not operate as a Court of appeal in rent matter (s) rather this jurisdiction is *limited* to disturb those findings which, *prima facie*, appearing to have resulted in some *glaring* illegalities resulting into miscarriage of justice. The finality in rent hierarchy is attached to appellate Court and when there are concurrent findings of both rent authorities the scope becomes rather *tightened*. It is pertinent to mention here that captioned petition fall within the *writ of certiorari* against the judgments passed by both courts below in rent jurisdiction and it is settled principle of law that same cannot be disturbed until and unless it is proved that same is result of misreading or non-reading of evidence which lacks here. The instant petition is against concurrent findings recorded by both the Courts below, thus, it would be conducive to refer paragraphs No. 17 and 20 of the trial Court:

“17. Keeping in view the ratio of above referred judgments, I have preferred to see whether the applicant, in the particular circumstances, is land-lord of the demised premises. Before dilating upon merits of the case, it is pertinent to have a look at the definition of Land-Lord provided under section 2 (f) of the Sindh Rented Premises Ordinance, 1979 (the Ordinance 1979), which provides, “*land-lord means the owner of the premises and includes a person who is for the time being authorized or entitled to receive rent in respect of such premises*”. It is true that an agreement of sale (Ex.A-4), relied upon by the applicant, is not a document of title and it does not create any right, title or interest in the property. But this is not end of story in this case. He also relied upon a letter of ownership dated 28-10-2015 (Ex.A-3) issued by trustee on behalf of the trust. Before discussing further, I pause here to discuss the

second ground of the learned counsel for the opponent that the trust property can not be sold out and that rent controller has no jurisdiction in respect of the trust property. To substantiate his argument he has placed reliance on *Madrassa Darul Aloom Al-Baqat-ul-Salihah* V/S Additional District Judge, Lahore and another- 1991 CLC 882 and Abdul Fayyaz Khan V/S IIIrd Additional District Judge Karachi South and 4 others-2012 CLC 793. With due deference to both the judgments, the conclusions arrived at in these judgments do not help the submission of the learned counsel for the opponent. In the case of *Madrassa Darul Aloom Al-Baqat-ul-Salihah*, the property in dispute was evacuee trust property and was governed by the exemption notified by the Provincial Government at the relevant time from operation of Urban Rent Restriction Ordinance, 1959. While in the second case of Abdul Fayyaz Khan, ejectment application was filed by trustee of the trust without authority/resolution of the charitable trust. It was under these circumstances that the Honourable High Court of Sindh was pleased to hold that the respondent No.3 had not discharged the burden that Dr. Zarkis H. Anklesaria had authority to file the Rent Case. But in the present case, position is different one. Neither the demised premises is evacuee trust property nor the applicant has filed the ejectment application on behalf of the trust being its trustee. But he has claimed his independent right being purchaser of the demised premises from the trust and his said status has been confirmed by the trust through letter (Ex.A-3). The learned counsel for the applicant has not cited any law or/any by-laws to show that there was any embargo on sale and purchase of the property of the Agha Khan Ismailia Charitable Trust. The opponent himself belongs to the said community and claims to be in possession of the demised premises through purchase of the same from attorney of the applicant. Therefore, if for the sake of argument it be presumed that property of the Agha Khan Ismailia Trust can not be sold out, the question would arise here that how he purchased it from the attorney of the applicant. The answer to the submission of the learned counsel would certainly be in "No". If there was any such embargo, the opponent, being himself an advocate, would not have made any claim for purchase of the demised premises from the attorney. Therefore, it can be concluded that there was a common practice of the sale and purchase of the trust property between the community to which both the applicant and the opponent belong. The learned counsel for the applicant has tried to point out defect in the title of the applicant by putting a number of suggestions in cross examinations regarding mode of payment and power of attorney (Ex.A-5). Suffice it to say that the opponent has claimed to have purchased the demised premises from the attorney of the applicant knowing his imperfect title. There is nothing on record to show that he had taken any serious measures, as mandated under section 41 of the Transfer of Property Act, 1882, to know the status of the applicant before allegedly purchasing demised premises from him. Hence, defect, if any, in the title of the applicant is question relevant only between the Agha Khan trust and the applicant; and the opponent for that matter being third person can not challenge his defect of title. It is pertinent to mention here that questions with regard to defect in the title of the applicant or

any irregularity in effecting such transaction can not be gone into by this forum having a limited jurisdiction. Reliance may be made to the case reported as *Bashir Ahmed V. Abdul Hamid and another-1983 SCMR 302*. It is also noted worthy here that the opponent has taken two different pleas; on the one hand, he claims to have purchased the demised premises from attorney of the applicant and on the other, he has challenged his title in the present proceedings. Both these pleas are contradictory with each other. I feel no hesitation to say that he can not blow hot and cold at the one and same time. Therefore, under peculiar facts of the case, the applicant is owner of the demised premises and the opponent has no valid reasons to show back on him by challenging his title.

20. Onus to prove this point is on the applicant as it is his case that he requires the demised premises for his personal use. A personal use of land-lord is clipped with the good faith. To find out good faith, the court has to probe the record to find out whether honest intentions are available and spelt out from the record itself. It will also be seen that apart from honesty, it is to be ascertained that there is absence of the malice and design to defraud or to seek an unconscionable advantage. Mere wish or whim or will of the land-lord is not sufficient to seek ejection of the tenant on ground of personal need. In his affidavit in evidence, the attorney of the applicant has categorically mentioned that applicant is poor man and works on daily wages; and is residing in rented premises. Hence, he wants the demised premises for his personal use. As matter of record, this part of evidence has not been specifically challenged by the learned counsel for the opponent while cross examining him. **Thus his evidence has gone unchallenged and un-rebutted and such piece of evidence would be deemed to have been admitted by necessary implication.** In this regard, I am fortified in my opinion from case law reported as *Muhammad Anwar V/S Haji Muhammad Ismail and others-1992 MLD 860* and *Rizwan Najmi V/ S Nasrullah Bholey Khan through attorney and 2 others-2013 YLR 2526*. Although, applicant Ashique Ali himself also appeared before the court as AW-1, but his evidence was only limited to the extent of the execution of power of attorney in favour of his attorney Abdul Rahim. Therefore, his failure to depose about personal use/need of the demised premises is of not much significance as his attorney has specifically deposed these facts, which remained unchallenged. Thus, this point is also replied in affirmative.

8. As well, it would be conducive to refer relevant paragraph of the judgment of the appellate Court:

“So far question of relationship between the parties is concerned the respondent/applicant contended in his eviction application that initially he rented out the said flat to Ms. Najmi Hisam wife of Mughal Jalaluddin through rent agreement dated 06-08-2006. Thereafter, on 06-09-2006 the applicant appointed one Abdul Rahim and his wife Mst. Mumtaz as his attorney to take care of the demised premises and collect rent. In the month of October, 2008, said tenant vacated the demised premises and requested that the demised

premises may be rented out to their real uncle Ali Khan (the opponent) against the security deposit of Rs. 25,000/= already deposited with him. Therefore, the opponent was inducted as tenant against the monthly rent of Rs. 3000/= which was increased to Rs. 5000/= per month. But the appellant/respondent denied the relationship between the parties as tenant and landlord and contended that the property in question is a trust property and as per by-laws of Trust no one can sale the trust property, even licensee has no right to use the same for his own benefits. But surprisingly he taken plea that he had paid amount of Rs. 600,000/- to attorney of respondent/applicant as sale consideration for purchasing of said flat, not as rent, which clearly shows that on the one hand the appellant/opponent himself stated that the trust property cannot be sold out or even can used by trustee, but on the other hand he himself contradicted his own version and stated that he had paid amount of Rs. 600,000/- for purchasing of property in question to the attorneys of respondent/applicant.”

9. *Prima facie*, there appears no illegality in conclusion, so arrived by two courts below, to the effect that one purchasing the property from respondent himself can't question the title in rent proceedings because this, *undeniably*, is a classic example of '*blowing hot & cold in a single breath*'. A plea by purchaser in rent jurisdiction legally results in nothing but requiring him to vacate the *premises* and then to fight for his claimed entitlement, arising from sale agreement. The findings on ground of personal *bona fide* also do not appear to be unjustified or unreasonable. Thus, failure of the petitioner in pin-pointing any material illegalities in concurrent findings of both rent hierarchy is sufficient for dismissal of the instant petition. I would also add that an *independent* dispute or claim legally can't be a ground to avoid the consequences of rent proceedings, therefore, pending litigation with attorney of respondent for *malicious prosecution* is not of any help. The case law relied upon by the learned counsel for the Petitioner is not helpful in the present case, hence, instant petition is dismissed along with pending applications. However, petitioner shall hand over peaceful possession of the demised premises to the respondent No.1 within two months from today.

J U D G E