

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

C.P. No.S-813 of 2021

Allah Rakha and another PETITIONERS.

Versus

Muhammad Rafique Lalwani and others RESPONDENTS.

1. For orders on office objection.
2. For orders on M.A. 137/2022
3. For orders on M.A. 138/2022
4. For hearing of main case

28.03.2022

Mr. Irfan Ahmed Qureshi advocate for petitioners.

ORDER

MUHAMMAD SHAFI SIDDIQUL, J. This petition is assailed against the concurrent findings of two courts below which held the relationship of landlord and tenant between the petitioners and the respondents and consequently eviction order was passed.

2. Brief facts are that at some point of time the predecessor-in-interest of petitioner No.2, (claimed as mother of petitioner No.2 in affidavit-in-evidence of Ishtiaque) was residing in the premises in question as tenant. The sale agreement was produced before the rent controller as Ex.50-B. However, this sale agreement does not disclose if any possession of subject premises was handed over in part performance of sale agreement, hence possession claimed to be retained as tenant / statutory tenant by predecessor-in-interest / petitioners. This prime evidence is somehow missing in the proceedings before the rent controller and on account of unsuccessful attempt to discharge this burden, rent controller concluded that the relationship existed between them. On the strength of the agreement of

sale a suit has already been initiated by the petitioners which is pending adjudication.

Para-4 of the affidavit-in-evidence of Ishtiaque, in an attempt to discharge the burden of relation between parties, is relevant and is reproduced for convenience:

“That, I advised to say, that the applicant are not the owner of the premises, which is in possession of the opponent No.1, the opponent No.1 is residing in 2nd floor, as a owner of the property as the same was purchased by his mother namely Late Mst. Tahira Bano alias Atiya W/o Sartaj Ali in the year 2003 and since that time the opponent No.1 are residing in the same house. Moreover, the applicant received the consideration from my late mother in the sum of Rs.200,000/- in two installments viz. Rs.1,25,000/- on dated 21.08.2002 and Rs.75,000/- on dated 14.10.2003, after receiving the full and final sale consideration, the applicant Muhammad Rafique Lalwani executed an stamp paper in presence of witnesses, which original is submitted through this affidavit in evidence. The witnesses of the said documents are our community fellow namely 1). Muhammad Ameen, who was died, witness No.2 Iqbal and witness No.3 Muhammad Yahya. Moreover, it is pertinent to mention that the applicant Muhammad Rafique Lalwani is the maternal uncle of the Muhammad Ishtiaque and as well as Sartaj Ali, husband of late Mst. Tahira Bano and both are died. The possession of the property since the time of purchase is in the hands of opponent No.1 and his sister, who are residing without any interruption and paying the utilities. The applicant filed the present rent application for harassment as well as with concealment of fact, the application is liable to be dismissed with cost.”

This is not inconsonance with alleged agreement as no possession claimed to have been delivered in part performance.

3. A number of witnesses have been examined such as Muhammad YahiyaSilawat, Muhammad Rafique Lalwani, Muhammad Iqbal and Riaz etc. who except Rafique were the signatories of the alleged sale agreement, and none of them deposed that the possession of the premises was given to Mst. Tahira mother of Allah Rakha, one of the petitioners here, in part performance. Riaz son of Gul Muhammad respondent's witness confirmed that Mst. Tahira mother of one of the petitioners was residing in the premises as a tenant and she was a defaulter in the payment of monthly rent. It is also stated by the witness Riaz that after the sad demise of Mst.

Tahira, one of opponents paid monthly rent to the respondent/landlord upto three months whereafter he became defaulter. The evidence of rest of the witnesses is also absolutely silent that the possession of Mst. Tahira or that any of the petitioners claiming or acting through Mst Tahira to be a possession in part performance of sale agreement. In fact a fatal question was suggested by petitioners' counsel in the second line of cross as under:

“It is correct to suggest that Mst. Tahira was in possession of subject premises i.e. the second floor of building since the year 2000”

This is a date prior to date of alleged sale agreement.

4. There is nothing in evidence that could alter the concurrent findings as far as the premises in question is concerned as the two courts below, on the preponderance of evidence reached to the conclusion that the possession of the petitioners was/is that of a continued relationship of landlord and tenant, may it be statutory or contractual, however this relationship cannot be altered with the relationship of a purchaser and a seller on the strength of evidence available and consequently the eviction order was passed. There has to be strong and unclouded evidence that possession of petitioners is in part performance, which petitioners failed to discharge. The suit for performance is pending and in case they succeed in establishing case of performance independently, it may be taken to its logical end and no further comments are required. I do not find any reason to interfere with the concurrent findings of two courts below in view of the above facts and circumstances of the case. Petition is accordingly dismissed with no order as to costs along with pending applications.

JUDGE