

IN THE HIGH COURT OF SINDH AT HYDERABAD

CP No.S-432 of 2021 : Abdul Sattar vs. Azmat Ali & Others
For the Petitioner/s : Mr. Muhammad Jameel Khan Advocate
For the respondent/s : M/s Muhammad Arshad S.Pathan &
Safdar Hussain Laghari, Advocates
Date/s of hearing : 07.11.2023
Date of announcement : 07.11.2023

ORDER

Agha Faisal, J. Rent Application 79 of 2018 was filed before the Vth Senior Civil Judge / Rent Controller, Hyderabad and the same was dismissed vide judgment dated 01.09.2020 *inter alia* on account of being barred by *res judicata*. It is considered illustrative to reproduce the order herein below:

“The burden to prove this Point lies on the shoulders of Opponents; because the plea of Maintainability on the ground of previous litigation/Rent Application and FRA preferred there against, had been taken by them in their Joint Written Objections/Statement (Ex. 10). The Opponent No. 1 filed his Affidavit in Evidence, so also their witnesses; besides this, Opponent side had specifically asserted in their written objections (Ex. 10) that, previously the Applicant had made Rent Ejectment Application, which was dismissed by the Court of Ist. Rent Controller, Hyderabad; further this, such Judgment was impugned, through FRA, which too was dismissed.

On the other hand, it has been pleaded by the Applicant that, both the Opponents are brothers and with malafide intention, the Opponent No. 1 is depositing the Rent in Court, though Rented Shop is running by the Opponent No: 2 and both of them executed Rent Agreement with him, but as per previous proceedings, the Opponent No. 1 is his tenant; therefore, he is liable to pay monthly Rent of Rs. 5,000/- per month; yet he avoiding to pay the same intentionally and deliberately, and is depositing the same in Court by committing default in illegal manners.

I have considered the claims of both sides. It is an admitted fact of the matter that, prior to captioned Application, an Application for same nature was made by the Applicant against Opponents on same grounds, which was dismissed by the Rent Controller, so also FRA there against and the same attained its finality. Now, the question, which I have to see is that, Whether after decision of previous litigation, anything has been changed in the matter. Admittedly, in previous litigation, both Opponents were party, the same was made on the grounds of default and personal need, so far present Rent Application is concerned, both same grounds are taken by the Applicant therein to evict them from the Premises/Shop, in question. The Applicant, during the course of cross-examination had very categorically deposed that, the Opponent side is depositing the Monthly Rent in Court, which was withdrawn by him; hence, this piece of evidence clear enough to show that, Opponent side has not committed any default in payment of monthly Rent; so far the other ground of personal bonafide use is concerned, though, the Applicant has claimed that, the Premises/Shop, in question, is required by him to establish the Business for his Son and at the same time, he also claimed that, he wants to shift in such Property/Premises; however, it is an admitted fact of the matter that, no any description of his Son/Child had been given by the Applicant, during the course of his evidence that, how old is his Son and what Business they want to establish; so mere saying such words are not enough for getting the Order in their favour; especially in the circumstances, when earlier Rent Application was dismissed on merits and the findings given by the learned Ist. Rent Controller, Hyderabad in earlier Rent Application had attained its finality; hence, my answer to this Point is Affirmative.

This Point was framed from the pleadings of Applicant; as such, its burden to prove was upon the shoulder of Applicant. The Applicant filed his Affidavit in Evidence and thereafter he was subjected to cross-examination and during such course of cross-examination, conducted by the learned counsel for the Opponents, the Applicant had very categorically deposed that, the Opponent is depositing the Rent in Court till today, which he withdrawn the same, hence, same is reproduced, as under: -

“It is fact that, I had withdrawn the rent, so deposited by the opponent, from Court. It is fact that, the opponent is depositing the rent in Court till today in respect of shop, in question.”

From such piece of evidence, it is crystal clear that, Opponent side is being depositing the Rent in Court and same is withdrawn by the Applicant there from; hence, in such circumstances, how it could be said that, the Opponent side had committed any default in payment of Rent respecting Rented Premises/Shop; as such, my answer to this Point is Negative.

This Point is relating with personal bonafide use of Applicant side. I have perused the Point No: 3, which was discussed in the previous Judgment by the learned Ist. Rent Controller, Hyderabad, perusal of which reflects that, during the course of cross-examination, the Applicant had admitted that, he himself is running Grocery/Kiryana Shop; besides this, the Applicant, during the course of his cross-examination made in the instant matter, he admitted that, he is serving in Jail Department, as Constable. I have also gone through with the pleadings of Applicant and in Paras-12 & 16, he had taken this Point/Personal Bonafide Use, in following Manner: -

"12. That, the Applicant has no any house or personal *Property, except the Rented Premises; as such, he wants to shift, after construction of Plot No: 9/F Mir Nabi Bux Town, near Noor-ul-Islam Masjid, Hyderabad bearing City Survey No: 4404, admeasuring 1000 sq. fts Ward-G Paretabad, Hyderabad Sindh.*"

"16. *That, the Son of the Applicant want to start his Business, as he is adult and jobless and he has no source of income*"

So in view of the preceding paras and such admission, it could not be said that, Rented Premises/Shop is required to the Applicant side for personal bonafide need and to me further discussion upon such Point would be wastage of precious time of the Court; resultantly, my answer to this Point is Negative.

For the fore-going reasons and findings on referred Points, the instant Rent Ejectment Application is dismissed.

The Case Law, so relied upon by the learned counsel for the Applicant is not applicable to the present matter, being distinguishable with the facts and circumstances, even otherwise, it is well settled Principle of Law that, each and every case/matter is to be decided on its own merits."

The petitioner filed First Rent Appeal No.17 of 2020 and the same was dismissed by the 9th Additional District Judge, Hyderabad vide judgment dated 26.07.2021. The operative part of the judgment is reproduced herein below:

"12. A perusal of the record reveals that previously the appellant had also moved Rent Ejectment Application No.14 of 2008 of similar nature against same respondents/opponents which was dismissed on 31.08.2010, whereafter the present appellant also filed F.R.A No.140 of 2010 against the impugned Judgment dated 31.08.2010 passed by learned 1st Senior Civil Judge & Rent Controller Hyderabad which too was dismissed by learned Additional District Judge-VII Hyderabad vide Judgment dated 17.01.2012 and the same Judgment of appellate court is in intact and has not been challenged. It is an admitted position that in previous litigation both the respondents were party and the same rent application was moved on the ground of default & personal need and the appellant instead of challenging the Judgment of appellate court in previous round of litigation, repeated the rent application No.79 of 2018 before learned Senior Civil Judge-V Hyderabad with same prayer and against same party. The evidence of the appellant reveals that he admitted that the opponent side is depositing monthly rent in court, which is being withdrawn by him, hence the learned trial court has rightly observed that there is no default on the part of respondents. The appellant has claimed and deposed that he wants to establish his business for his son and he also deposed that he wanted to shift in the property/premises, however he failed to disclose the age of his son and the nature of business his son wants to run. The learned trial court rightly discussed the point No.1 regarding the maintainability of the rent application and rightly answered the same in "affirmative". Since it is an admitted position that respondents are depositing the rent in court and the appellant is withdrawing the same, hence the appellant failed to prove that the respondents have committed default in payment of rent with regard to rented premises/shops. The appellant also admitted and deposed in cross-examination that he is serving in Jail Department as Constable. The appellant admitted that since 2008 the rented premises/shop is running by same person and since 2008 the rent is being paid by the opponent side in court. The learned trial court has rightly observed that the rented premises/shops are not required to appellant side for personal bonafide need as in Para No.12 of the Rent Application he claimed that he has no house or personal property except the rented premises & wants to shift after construction of the plot No.9/F Mir Nabi Bux Town, near Noor-ul-Islam Masjid Hyderabad and in same rent application Para No.16 he asserted that his son wanted to start his business as he is adult and jobless and has no source of income. The learned counsel for the appellant during arguments could not point out any illegality or irregularity committed by learned trial court while passing the impugned Judgment, hence the Judgment delivered by the learned trial court calls no interference of this court "*Findings Accordingly*".

13. With due respect & high regard to the case laws cited by the learned counsel for the appellant it is stated that the same are distinguishable with the circumstances of the case in hand.

14. In view of above discussion, First Rent Appeal in hand stands dismissed with no order as to costs. Consequently the Judgment passed by learned trial court is hereby maintained."

Learned counsel for the petitioner submits that the evidence was not appreciated in its proper prospective by the respective forums, hence, this Court ought to reexamine the evidence in writ jurisdiction and set aside the judgments impugned. Whereas, learned counsel for the respondents supports the impugned judgments and submits that no interference is warranted in the writ jurisdiction.

Heard and perused. The petitioner's counsel seeks to differentiate the earlier and subsequent rent applications, however, remained unable to do so; even the respective memoranda of application had never been filed. The matter was discussed by the respective forums and their deliberated findings are on record, as reproduced supra. It cannot be said that the issue was not considered by the Courts and the learned counsel has remained unable to identify any infirmity in the respective judgments.

It is observed that appeal is a creation of statute and in the absence of any such remedy being provided none can be presumed¹. Once the statutory remedial process has been exhausted, recourse to writ jurisdiction cannot be taken as a matter of right; *inter alia* as the same *prima facie* impinges upon the finality granted by statute to the judgment of the last appellate forum. Since, the appellate hierarchy has already been exhausted the only issue that could be looked in by this Court in the exercise of its writ jurisdiction is whether there is any patent illegality apparent from the orders impugned. In such regard it is observed that the learned counsel remained unable to identify any such infirmity in the respective judgments. In so far as the plea for *de novo* appreciation of evidence is concerned, it would suffice to observe that writ jurisdiction is not an amenable forum in such regard².

The concurrent findings appear to have been rendered in appreciation of the evidence and no infirmity could be identified in the orders impugned, nor could it be demonstrated that the conclusion drawn could not have been rested upon the rationale relied upon. A recent judgment of the High Court in the case of *Ali Tasleem*³ has also deprecated the tendency to utilize the writ jurisdiction of this Court as a subsequent unsanctioned appellate forum in rent matters *inter alia* in the following terms:

“It is settled law that the ambit of a writ petition is not that of a forum of appeal, nor does it automatically become such a forum in instances where no further appeal is provided, and is restricted *inter alia* to appreciate whether any manifest illegality is apparent from the order impugned... Insofar as the plea for *de novo* appreciation of evidence is concerned, it would suffice to observe that writ jurisdiction is not an amenable forum in such regard. In cases wherein the legislature has provided only one appeal as a remedy, like family and rent cases, it has been the consistent view of the Apex Court, that invoking of Constitutional jurisdiction in such matters as a matter of right or further appeal is not a correct approach.”

In view of the foregoing, this petition is found to be misconceived and even otherwise devoid of merit, hence, dismissed along with listed applications.

Judge

Ahmed/Pa,

¹ Per *Ijaz ul Ahsan J* in *Gul Taiz Khan Marwat vs. Registrar Peshawar High Court* reported as *PLD 2021 Supreme Court 391*.

² *2016 CLC 1*; *2015 PLC 45*; *2015 CLD 257*; *2011 SCMR 1990*; *2001 SCMR 574*; *PLD 2001 Supreme Court 415*.

³ Per *Muhammad Junaid Ghaffar J* in *Ali Tasleem vs. Court of IXth ADJ Karachi East (CP S 985 of 2023)*.