

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD

IInd Appeal No.08 of 2020

[Muhammad Yasin v. Muhammad Aslam]

Constitution Petition No. S-167 of 2021

[Muhammad Aslam v. Muhammad Yasin & another]

Constitution Petition No.S-826 of 2022

[Muhammad Aslam v. Muhammad Yasin & others]

- Appellant : Muhammad Yasin in IInd Appeal No.08 of 2020
through Mr. Abdul Malik Shaikh,
Advocate
- Respondent : Muhammad Aslam in IInd Appeal No.08 of 2020
through Mrs. Razia Ali Zaman Khan Patoli,
Advocate
- Petitioner : Muhammad Aslam in CP No.S-826 of 2022
through Mrs. Razia Ali Zaman Khan Patoli,
Advocate
- Respondent : Muhammad Yasin in CP No.S-826 of 2022
through Mr. Abdul Malik Shaikh alongwith his Associate
Mr. Jahanzeb Laghari, Advocate

Date of Hearing: 18.05.2023

Date of Announcement: 27.11.2023

J U D G M E N T

MUHAMMAD FAISAL KAMAL ALAM, J.- Due to commonality,
through this Judgment, the title Cases are decided.

2. It is necessary to clarify first the status of the Constitution
PetitionNo.S-167 of 2021, which is filed against the Judgment dated
24th March 2021, passed by the learned Appellate Court in the First Rent
Appeal No.01 of 2021 preferred by Muhammad Yasin, holding that the Order

of the Executing Court [Rent Controller] to *sine die* the proceeding is incorrect and directed to decide the execution in according with law.

3. It is stated by Mrs. Razia Ali Zaman, Advocate for Muhammad Aslam / [the petitioner in the above C.P.No.S-167 of 2021] that this Constitution Petition is still alive, whereas Mr. Abdul Malik Shaikh, Advocate, representing the Respondent [Muhammad Yasin], states that since Writ of Possession was already issued, thus, this Constitution Petition has become infructuous and should be dismissed. In this regard a Statement dated 31.10.2022 was filed by the above Respondent's Advocate together with a Copy of the Writ of Possession. Considering this aspect of the case that Executing Court proceeded in pursuance of the impugned Judgment [*ibid*], I am of the considered view, that this petition has become infructuous and is disposed of.

4. Adverting to the other two cases – IInd Appeal No.08 of 2020 and Constitution Petition No.S-826 of 2022.

5. Relevant facts are that Muhammad Aslam claims that he has purchased the Suit Property from Muhammad Yasin; whereas, the latter (Mohammad Yasin) avers that he let out the Subject Property to Muhammad Aslam, and upon his committing default as tenant, he is liable to be evicted from the Premises, which is also required for the *bonafide* personal use of Muhammad Yasin. The Suit Property is a built-up Property on Plot No. 2385/1, Phullelipar, Hyderabad, comprising of a Hall at Ground Floor and the two upper Floors.

6. Merely for reference only Muhammad Aslam, who is a Petitioner in Constitution Petition No.S-826 of 2022 and a Respondent in the IInd Appeal

No.08 of 2020, is referred to as Claimant; whereas, Muhammad Yasin as the Owner.

7. The Claimant filed a F.C. Suit No.727 of 2013, against the Owner, for Specific Performance of Agreement, *inter alia*, stating that the Owner being the sole and absolute Owner of the Subject Property had agreed to sell the same for the total sale consideration of Rs.10,50,000/- [*rupees ten lacs and fifty thousand*] under a Sale Agreement dated 23.10.2004, executed between the Parties hereto; whereas, this claim has been vehemently refuted by the Owner and he insisted that the Sale Agreement is a forged Document.

8. The Second Appeal is preferred by Muhammad Yasin (the Owner) against the Judgment of the Appellate Court (dated 25.11.2019), setting aside the Judgment and Decree of the learned Trial Court, whereby the earlier Suit for Specific Performance filed by the Respondent (Claimant) was dismissed. It is argued by Mr. Abdul Malik Shaikh, Advocate for the Appellant, that the Impugned Appellate Judgment has completely misinterpreted the evidence on record and instead of evaluating it, has given the adverse finding, besides not discussing the reason, as required under Rule 37 of the Order 41 of CPC. He has cited the following the Case Law_

- i. **PLD 2009 Supreme Court 453**
[Ahmad Ali alias Ali Ahmad vs. Nasar-Ud-Din and another]
- ii. **2022 SCMR 933**
[Khudadad vs. Syed Ghazanfar Ali Shah alias S. Inaam Hussain and others]
- iii. **2022 SCMR 1093**
[Mah Jabeen Ashfaq vs. Noor Mahi and others]
- iv. **2022 SCMR 778**
[Syed Athar Hussain Shah vs. Jaji Muhammad Riaz and another]

9. Whereas, Mrs. Razia Ali Zaman, the learned counsel representing the Respondent (Claimant) has supported the Impugned Appellate Judgment,

which has decreed her Suit for Specific Performance by overturning the Decision of the learned Trial Court. She has cited the following Case Law_

PLD 1985 Karachi 741

[Habib Ahmad vs. Liaquat Hussain]

10. The Constitution Petition No.S-826 of 2022 is preferred by Muhammad Aslam (Claimant), impugning both the Decisions of the learned Rent Controller and the Appellate Court, whereby his eviction was ordered on the Rent Application No.178 of 2015 preferred by Muhammad Yasin (Respondent in the said Constitution Petition), being the Owner / Landlord of the demised premises against the present Petitioner, which after conclusion of evidence, was decided in favour of present Respondent / Owner and the same was maintained in the First Rent Appeal No.41 of 2018. It is stated that both Courts have not appreciated the fact that the Petitioner has purchased the Property from the Respondent No.1 and he was not a Tenant. Whereas the captioned Second Appeal is preferred by Muhammad Yasin (Owner) against the Claimant. Since outcome of the Constitution Petition filed by the Claimant is dependent on the adjudication of his main claim about purchase of the Property, which is the subject matter of the Second Appeal, therefore the latter is decided first.

11. Arguments heard and record perused.

12. Since the learned First Appellate Court has overturned the Judgment and Decree of the learned Trial Court, thus, the Record is considered minutely.

13. The Complaint, Written Statement and Depositions of the Claimant are available in record. The Claimant in his F.C. Suit No.727 of 2013 has stated that he is a labourer and earning his livelihood through hard work, whereas, the Owner is a businessman and being the sole, absolute and exclusive Owner

of the Suit Property, had agreed to sell the same along with the construction thereat upto First Floor for a total sale consideration of Rs.10,50,000/- (*rupees ten hundred fifty thousand only*) by way of Sale Agreement dated 23.10.2004. In his pleadings, he has given the description of the constructed area, as Godown on Ground Floor and Rooms on the First Floor, whereas, the Second Floor was constructed by the Claimant himself at the costs of Rs.1,50,000/- (*rupees one hundred fifty thousand only*). When in March, 2005, Owner refused to receive the balance sale consideration of Rs.100,000/- (*rupees one hundred thousand only*), as already Rs.8,50,000/- (*rupees eight hundred fifty thousand only*) was received by the Owner, the latter stated that he will receive the entire balance amount of Rs.200,000/- (*rupees two hundred thousand only*) in the month of October, 2005 before the Sub-Registrar and shall also handover the possession of Ground Floor. It is admitted in the pleadings of the Claimant that Ground Floor possession was retained by the Owner. In the Written Statement, all this is denied by the Owner / Appellant, besides stating that the purported Agreement to Sell [**Subject Agreement**] is a fake and bogus document, while reiterating that Claimant is merely a Tenant by an Oral Agreement since 2002.

14. The Claimant in his evidence has stated that first he paid an amount of Rs.8,50,000/- (*rupees eight hundred fifty thousand only*) to the Owner and thereafter they came to the learned District Court for execution of agreement along with the two witnesses, namely, Shabbir and Abdul Ghani. Same day Sale Agreement was executed and balance amount of Rs.2,00,000/- (*rupees two hundred thousand only*) was to be paid in the months of March and October, 2005. Possession of upper storey of the Suit Property was handed over by the Owner to Claimant and the Ground Floor possession was retained by the latter. One room was constructed at the Second Floor by the Plaintiff at his own cost. In the month of October, the Owner refused to receive

Payment, transfer of Property and execution of Sale Deed. In the month of May, 2011, (that is after 6 years from the date of refusal to receive the payment), the Legal Notice was sent by the Claimant to the Owner, who demanded extra amount for transfer of the Suit Property. In his examination-in-chief, he stated that he ever remained tenant of the Owner. He produced the original Sale Agreement as Exhibit-40 / A, Payment Receipt of Rs.8,50,000/- (*rupees eight hundred fifty thousand only*) as Exhibit-40/B, Receipt of another amount of Rs.1,00,000/- (*rupees one hundred thousand only*) as Exhibit-40/C, Legal Notice as Exhibit-40/D, Birth Certificate as Exhibit-40 / 10, Rent Agreement between Claimant and one Umeruddin as Exhibit-40, besides Electricity Bills as Exhibits-40/G and H.

In his cross-examination the Claimant admitted that even after refusal to perform the Subject Agreement, the above Suit was filed after passage of more than seven years; not denied that Godown situated in the Suit Property is in possession of the Owner though voluntarily stated for only one year it remained in his possession (possession of Claimant). He has **admitted** in his cross-examination, that he is living on the First Floor of the Suit Property since the year 2004, where after, he constructed one Room on the Roof of Second Floor in the year 2010 without seeking any permission from the concerned Authority or the Owner, for the reason that the Claimant himself was the Owner. He has admitted that payment was not made in presence of the Notary Public, whereas, it was made on the same day at about '8 / 9 AM', (at the Rice Husking Factory of the Owner situated in Muslim Colony). At the time of payment, only the Owner and his Son were present while the Claimant was alone. To a question, he has answered that Claimant has no Bank Account. In his cross-examination, he has stated that Claimant's brothers contributed substantial amount towards purchase of Property.

This cross-examination of Claimant (*Plaintiff of the above Suit*), itself is self-contradictory **and belies his claim**, as in his examination-in-chief he stated that he paid an amount of Rs.8,50,000/- (*rupees eight hundred fifty thousand only*) in cash at the residence, whereas, in his cross-examination, he has stated that the amount was paid to Owner at his Factory Premises where no witnesses from the Claimant's side were present. In his cross-examination, he has stated that he plies a Mini Taxi and on average earned Rs.700/- to 800/- per day and has to look after his family comprising five persons. His other brothers have financially contributed towards Sale Price, but the same fact has not been mentioned in his *Plaint*.

Another contradiction is, that in the Subject Sale Agreement (Exhibit-40-A), the term Plot has been used instead of a built-up property. ***Secondly***, in Clause-5, it is stated that physical and vacant physical possession of the Plot has been handed over by Owner to Claimant to be followed by the Sale Deed upon payment of balance sale consideration. However, in the evidence, it is admitted by the Claimant that Owner is in possession of Godown at the Ground Floor of the Subject Property. The Receipt dated 11.05.2011, that is, after six years of the Subject Agreement (Exhibited-40-C), is acknowledging that Owner has received an amount of Rs.100,000/- (*rupees one hundred thousand only*) towards above sale transaction. It is witnessed by Shahzad Qureshi and Nadir Hussain. The PW-2 is Moindudion son of Zahooruddin, the Stamp Vendor. He has deposed that stamp paper for the Sale Agreement was purchased by the Owner (Muhammad Yasin) but in his cross-examination, he could not produce the relevant record / register whereupon signature of Muhammad Yasin / Owner was obtained, to confirm his above assertion, thus his evidence is not believable.

15. PW-3 is Abdul Hameed, who is a relative of Claimant. In his examination-in-chief stated that the Subject Sale Agreement was reduced in writing in Sessions Court Premises in his presence, another Witness Shabbir Ahmed, the Owner and the Claimant and all of them had put their respective signatures on the said document (Subject Sale Agreement).

In his cross-examination, he has shown his ignorance that whether Claimant is residing in the **Suit Property** even before the signing of the Subject Agreement, which means he did not deny the stance of the Owner that Claimant is the Tenant. To a question, he stated that both portions First and Second Floor (upper portions) were constructed by the Owner (Yasin) before the Subject Agreement. To a question, he has admitted that **prior to the Sale Agreement, the Claimant was residing in the Suit Property as Tenant;** his another admission completely belies the claim of Claimant, when he has admitted that payments were not paid in his presence nor at the time of signing of the Sale Agreement and Receipt Exhibit-40/B; though Voluntarily stated, that Aslam (Claimant) had already paid the amount to Yasin (Owner) before coming to the said Witness House.

16. PW-4 is Nadir Hussain. He is a witness on the Receipt-Exhibit-40/C (*supra*). In his examination-in-chief, he stated that he has made the payment of Rs.100,000/- (rupees one hundred thousand only) to Owner, as the same was earlier handed over to him [the above Witness] by the Claimant. It is countersigned by another Witness, namely, Shahzad, besides the Owner. Cross-examination of Nadir Hussain has shaken his deposition, when he **admitted** that the above Receipt-Exhibit 40-C, was neither signed by Co-witness-Shahzad nor the Owner (Yasin), in his presence [that is, in the presence of the above Witness-Nadir Hussain].

17. Whereas, the Co-witness Shahzad deposed as PW-5. His testimony is not believable, as it is full of contradictions. He has admitted that at the time of execution of the above Receipt, no money was paid and the same was signed by him on the request of Claimant, and when he signed the said Receipt no one was present except the said Witness and the Claimant.

18. The Owner-Muhammad Yasin (Appellant) has examined himself as DW-1. He has reiterated his stance that Ground Floor is in his possession and remaining portion was rented out by him to Claimant in the year 2002 and upon committing default, he filed the Rent Case. That the Sale Agreement is a bogus document.

The first portion of his cross examination is about tenancy, in which the Owner could not be falsified. He successfully refuted all the questions about each component of the sale transaction, including execution of the Subject Agreement in dispute, so also receiving any amount in pursuance thereof. It means that the sale transaction in question has been successfully disproved by the Owner in his testimony.

19. The impugned Judgment is given not only without appraisal of the evidence, which was mandatory for the Appellate Court, but, also contrary to record, in view of the above discussion, inter alia, in particular, the finding in the impugned Judgment in its paragraph 16, about “**admission**” regarding payment of substantial amount of sale consideration, which is a complete misreading of the evidence and is illegal.

20. If the First Appellate Court is to disagree with the findings of the learned Trial Court, which has handed down the Judgment while discussion the Issues framed, in accordance with Rule 5 of Order XX of Civil Procedure Code, then, if the First Appellate Court [being the Court of Final Facts], has not done the issue-wise discussion, **then**, under Rule 31 of Order XLI of Civil

Procedure Code, at least Points for Determination should have been framed for giving the Decision accordingly, which was also not done in the present *Lis*, except a formal Point for Determination was framed that whether the impugned Judgment of learned Trial Court calls for interference or not; thus, the impugned Judgment violated the law laid down through various judicial pronouncements. The Judgment of the Hon'ble Supreme Court with regard to framing of Points for Determination is relevant, viz. 2019 SCMR 1726 [*Pakistan Refinery Ltd., Karachi versus Barrett Hodgson Pakistan (Pvt.) Ltd. and others*]. Violation of the above principle would result in setting aside the Judgment, besides, it is given in a slip shod manner and without application of a judicial mind, that includes, element of visible fairness in a decision.

21. The upshot of the above discussion is that the Appellate Court has not given the Judgment as required, being the Court of final facts and hence, the same cannot be sustained. This Second Appeal is allowed. Consequently, the impugned Judgment is set aside and that of the learned Trial Court is restored, resulting in dismissal of the *Lis* [Suit No.727 of 2013] of private Respondent [the Claimant].

22. Adverting to the Constitution Petition number S-826 of 2022.

23. Learned Advocate for the Petitioner, Ms. Razia Zaman, has stated that both the impugned Decisions of the learned Rent Controller and the Appellate Court have not considered the crucial fact about the alleged sale transaction. Contended that the entire rent proceeding is void *ab initio*, because the above Petitioner was not a Tenant, but a Purchaser of the Subject Property.

24. Mr. Abdul Aziz Shaikh, the learned Counsel for the Respondent [the above Owner] has controverted the above arguments. He has supported both the impugned Decisions and stated that even the Execution is allowed, and the present Constitution Petition has become infructuous.

25. Both the impugned Decisions in the Rent Proceeding(s) have been considered. The learned Appellate Court has appraised the evidence of the Witnesses in the form of a comparative table. Whereas, the Judgment dated 6-3-2018 of the learned Rent Controller has evaluated the testimonies of the Parties and applied the law correctly. Both the Courts have considered the submissions of the Parties in the light of the pleadings and the evidence; therefore, exercised the jurisdiction properly and no illegality is successfully pointed out in their above Decisions; thus, no interference is required in this constitution petition, which is dismissed.

26. Consequently, both the Constitution Petition No. 167 of 2021, is disposed of as mentioned in the foregoing paragraphs, whereas, the Constitution Petition No. S-826 of 2022 is dismissed; and the IInd Appeal is accepted.

JUDGE

Shahid