

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

CP NO.S-66& S-67 OF 2022

Date Order with signature of Judge

CP NO.S-66/2022

1. For order on office objection
2. For hearing of MA No.474/2022
3. For hearing of main case

CP NO.S-67/2022

1. For order on office objection
2. For hearing of MA No.477/2022
3. For hearing of main case

Ch. Abdur-Rasheed advocate for petitioner
Shaikh Adnan Usman advocate for respondent

Date of hearing: **18.04.2023**

Date of decision: **18.04.2023**

ORDER

SALAHUDDIN PANHWAR, J.- By the dint of this order, I intend to decide captioned Petitions, as the same involve similar questions of law and fact.

2. Precisely relevant facts are that Respondent No.1 filed Eviction Application contending that Mst. Noor Jehan W/o Nazer Ahmed was original owner of the building known as Noor-e-Nazeer Mansion, Hardas Building, Plot Sheet No.R.C-10, Survey No. 22/1, Karachi and petitioner is tenant in respect of shop No.5 of aforesaid building on the monthly rent of Rs.100/- excluding electricity and water charges; that Mst. Noor Jahan gifted the aforesaid building to her daughter namely Aziz Nigar, who died leaving behind legal heirs Riaz Ahmed, Ejaz Ahmed, Mustafa R. Rasheed, Syed Masood Ahmed, Mst. Anees Mujtaba, on whom the aforesaid building devolved by way of inheritance; that legal heirs Riaz Ahmed, Mustafa R. Ahmed and Syed Masood Ahmed died leaving behind the legal heirs and out of them, the appellant/respondent No.1 being legal heir of Mustafa Rasheed Ahmed became co-owner of

aforesaid building by way of inheritance and the petitioner became tenant of respondent No.1; that petitioner did not pay rent to appellant, however, the respondent No.1 apprised the fact of being co-owner of demised premises to petitioner but even then he did not pay rent to him, whereas, other tenants are paying rent to the respondent No.1; that appellant/respondent No.1 served notice under section 18 of SRPO 1979 on 02.04.2012 upon petitioner to pay monthly rent as well as arrears of demised premises, which was replied on 13.04.2012 whereby, it was asked to prove inheritance and his entitlement over the property, where the demised premises is situated, to which the respondent No.1 replied on 13.04.2012 explaining the position but despite this no rent was paid to respondent No.1, hence it was submitted that petitioner committed default in payment of rent from December 1995 and specially from April 2012 up to date therefore it was prayed for direction to petitioner to vacate the demised premises.

3. Initially Respondent No.1 filed Eviction Application being co-owner on the ground of default and that Eviction Application was dismissed, appeal was preferred and the same was allowed by judgment dated 26.10.2019 passed by the Court of XII-Additional District & Sessions Judge Karachi South in First Appeal No.411/2017; that order was assailed by present petitioner in CP No.S-626/2021, however that petition was not pressed and dismissed by order dated 29.03.2022, being relevant same is reproduced herewith:-

"Learned counsel for the petitioners under instruction of her client does not press both the listed petitions. Both petitions are dismissed as not pressed alongwith pending applications."

4. Learned counsel for the petitioner contends that those petitions were not pressed because petitioner filed Application under section 12(2) CPC before the Appellate Court on the plea that SMA was filed and in SMA directions were issued with regard to auction/sale of the property, where the demised is situated. According to him, petitioner is ready to deposit the rent with the Nazir as well as he is ready to hand over the possession as and when the property is sold out.

5. It would be conducive to reproduce, Point No.1 of judgment passed on 26.10.2019 which reads as under:

POINT NO.1:

“On scrutiny, the appellant alleged in Para No.2, 3,4 & 5 that Mst. Noor Jahan gifted the aforesaid building to her daughter namely Aziz Nigar who died leaving legal heirs Riaz Ahmed, Ejaz Ahmed, Mustafa R. Rasheed, Syed Masood Ahmed, Mst. Anees Mujtaba, on whom the aforesaid building devolved by way of inheritance. It is averred the legal heir Riaz Ahmed, Mustafa R. Ahmed and Syed Masood Ahmed died leaving the legal heirs and out of which the appellant being legal heir of Mustafa Rasheed Ahmed became co-owner of aforesaid building by way of inheritance and the respondent No.1 became tenant of appellant. To the contrary, the respondent No.1 denied in Para No.4 of the written statement that appellant has not filed any single document to show and prove his contention that his father, Mustafa R. Ahmed has been expired leaving him behind as his one of the legal heirs and he has one of the co- owner of said building.”

6. It may be noted the burden lies upon the appellant/respondent No.1 to prove relationship of landlord and tenant. The attorney of appellant/respondent No.1 in support produced memo of SMA No.271 of 1998 at Ex. A/3 filed before this Court. On perusal of said SMA, it reveals one Reaz Ahmed filed aforesaid SMA as legal heir of deceased Mst.Nigar Shareef daughter of Nazeer Ahmed in respect of property at Schedule "A". Further showing the names of legal heirs including the name of Mustafa R. Ahmed (father of Appellant/respondent No.1) and on his demise, appellant/respondent No.1 being his son, moved an application to bring him on record as legal heir of deceased Mustafa R. Ahmed, which was allowed and the appellant/respondent No.1 being legal heir was brought on record vide order dated 10.12.2012 available at Ex-A/8. It may be noted that it is nowhere denied with regard to said SMA No. 271 of 1998 in respect of property where demised premises is situated and so also order was passed on 10.12.2012 by this Court in said SMA where the appellant was brought as legal heir.

7. It may also be noted here that the cardinal principle of Mohammadan law is that the inheritance of a person opens the moment he dies and all the legal heirs become owners to the extent of their

respective shares there and then by the dint of settled law. Sanction of inheritance, mutation, issuance of succession certificate etc. are the procedural matters regulated by the procedural laws just to make the records in order and also for fiscal purposes. Reliance is placed upon the reported case **2018 SCMR 762** referred by learned counsel for the appellant/respondent No.1. It would be pertinent to mention here that Section 2(f) of SRPO, 1979 also stipulates that after demise of the original owner his legal heirs would be construed as 'owner' within definition of Section 2(f) of the Sindh Rented Premises Ordinance, 1979. It is a general rule of law that a co-sharer can file ejectment proceedings against a tenant without impleading other co-sharers. The wisdom behind such principle is that co-sharer acts on behalf of and represents the interests of all the co-owners of the property. Reliance in this respect is made to the case reported as *Muhammad Hanif and another v. Muhammad Jamil Turk and 5 others (2002 SCMR 429)*. In the present case, nothing has been brought on record that there is any dispute among the legal heirs and/or anyone is disputing the right of inheritance of appellant/respondent No.1 in the property left by Mst. Aziz Nigar.

8. This court has also noticed the attorney of petitioner during cross-examination admitted that petitioner sent rent through money order to appellant/respondent No.1 for the period of 01 year and have deposited the rent in the year 2017. The relevant portion of cross examination is reproduced as under: -

"I know I sent rent through postal money order at the address of applicant 5/6 days or one, week ago. I sent rent through postal money order to applicant for the period of 1 year of 2017. I sent Rs.1200/- as a rent through postal money order."

9. The admission of petitioner that he sent rent through money to appellant and depositing rent for the year 2017, meaning thereby the petitioner accepted the appellant/respondent No.1 as landlord and is sufficient to hold that there exists relationship of landlord and tenant between the parties. The learned Rent Controller failed to appreciate the same and apparently committed misreading and non-reading of evidence. The point No.1 is therefore, answered in affirmative.

10. Admittedly issue of SMA was discussed in Appeal as well orders were referred and question of inheritance was also adjudicated. Besides, notice issued by respondent No.1 was also reproduced in that Judgment. Accordingly learned counsel for respondent while relying upon NLR 1987 AC 151 and 1987 CLC (Karachi) 1520, contends that application under section 12(2) CPC filed by the petitioner was incompetent on the plea of *res-judicata* and estoppel hence present petitions are also not maintainable on this ground alone.

11. It is a matter of record that Judgment of the appellate courts on subject matter though challenged but such petitions were withdrawn by the petitioner and he started fresh litigation by way of filing an application under section 12(2) CPC. Suffice to say that application under section 12(2) CPC can be pressed on the ground of misrepresentation, fraud and want of jurisdiction. Here petitioner was party in Appeal; he was aware about pendency of SMA, even notice was given by respondent No.1 was reproduced in earlier order therefore all three grounds were not available with the petitioner and in similar way by impugned order dated 15.01.2022 learned Appellate Court while discussing all pleas raised by learned counsel with regard to 1990 SCMR 647, application under section 12(2) CPC was dismissed. It appears that the Petitioner has mainly raised grounds touching merits of the case rather than the grounds of fraud, misrepresentation or error of the jurisdiction, which are not at all available to the Petitioner in view of the observations made here-in-above. So far as the grounds raised for setting aside the Impugned Judgment are concerned, they were not at all grounds envisaged by Section 12(2), C.P.C. but pertained to the merits of the case. In such circumstances, the application under Section 12(2), C.P.C. was not maintainable under the law in view of the dictum laid down by the Apex Court in Case of *Subedar Sardar Khan through Legal Heirs and others v. Muhammad Idrees through General Attorney and another* (PLD 2008 Supreme Court 591).

12. Needless to mention that a party cannot be allowed to simultaneously blow hot and cold at the same time hence, for what has

been discussed above, the present petitions are dismissed as not maintainable. However petitioner shall hand over the possession of the demised premises within two months. Needless to mention here that with regard to auction proceedings or legal character, that issue is not within rent jurisdiction of rent proceedings and it is between the legal heirs that would be decided separately.

13. Office to place copy of this order in connected petition.

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