

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

CP No.S-364 of 2021

Hawa Zaib Ul Nisa Petitioner

Vs.

Ghulam Haider & others Respondents

CP No.S-749 of 2021

Hawa Zaib Ul Nisa Petitioner

Vs.

Ghulam Haider & others Respondents

Mr. Muhammad Umer Lakhani, advocate for petitioner in CP No.S-364/2021

Mr. Ishrat Zahid Alvi, advocate for petitioner in CP No.S-749/2021

Mr. Farhatullah, advocate for respondent No.1

Date of hearing 10.09.2024.

Date of order: 18.09.2024

ORDER

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MUHAMMAD IQBAL KALHORO J: Through this constitution petition, petitioner has assailed a judgment dated 09.03.2021 passed by District Judge, Karachi East dismissing FRA No.36 of 2022, and upholding the findings of the Rent Controller rejecting an application filed by petitioner u/s 12(2) CPC.

2. As per record, respondent No.1 filed a rent case against respondent No.2 in respect of Shop G-98, on ground floor of Dolmen Mall, located in Block No.3, Delhi Mereantile Cooperative Housing Society, Karachi on the ground of default. The rent application was contested by respondent No.2 after a notice, however, it was allowed vide order dated 14.01.2019 and respondent No.2 was directed to vacate the said shop and hand over peaceful possession to respondent No.1 within 60 days. The said order was challenged in FRA No.38/2019 but the same was dismissed vide judgment dated 16.10.2019. A Constitution Petition No.S-1292/2019 was preferred before this Court against the said judgment, however, it was also dismissed on 02.11.2020.

3. When after the dismissal of constitution petition, the Rent Controller was about to issue execution proceedings, petitioner filed an application u/s 12(2) CPC claiming that she was co-owner of the property and rent application was filed without her permission and consent. This application was dismissed by Rent Controller vide order dated 21.01.2020 which she challenged in FRA No.36/2020 but met the same fate vide impugned judgment dated 09.03.2021.

4. Learned counsel for the petitioner has argued that the rent case was filed without permission and consent of the petitioner, hence, it was not maintainable. Further, she has already filed a civil suit against respondent No.1 seeking

cancellation of registered sale deed in respect of 50% share in the demised premises executed purportedly by her in his favour, hence, the rent application filed against respondent No.2 was not maintainable and all the judgments passed in this regard are not sustainable in law. He has relied upon the case laws reported in **AIR 1982 ORISSA 167, 1988 M L D 1043, 2015 M L D 605** and **1983 S C M R 1064.**

5. On the other hand, learned counsel for the respondent has supported the impugned judgment.

6. I have heard the parties and gone through the material available on record. It appears that the Constitution Petition No.S-1292/2019 filed before this Court against the judgment in FRA No.38/2019 was disposed of on 02.11.2020 in the following terms;

“At this juncture petitioner is ready to evict the premises and also ready to pay 50% rent to respondent No.3 with understanding that he will not pursue any remedy against respondent No.3. Petition is disposed of. In case petitioner failed to vacate the premises executing court would be competent to ensure such eviction.”

After disposal of the said petition in above terms, application u/s 12(2) CPC was filed by the petitioner before this Court in the same petition, which was dismissed in the following terms:

“Through listed application under section 12 (2) CPC (CMA No.5110 of 2020) learned counsel for the applicant contends that she was not party in the proceedings at the trial, hence, filed application under section 12 (2) CPC before the trial court, that was dismissed then preferred FRA wherein ad-interim order is operating, therefore, findings of this court will influence such proceedings. Needless to mention that scope of section 12 (2) is that if any order is passed without jurisdiction, misrepresentation or fraud, thus, that is not available by the ground as raised to disturb the findings of this court. Accordingly, instant application is dismissed along with other pending application(s).

7. It appears that against the said order, the petitioner filed a civil petition for leave to appeal before the Supreme Court of Pakistan, which was disposed of vide order dated 31.10.2022 with the observation that this Court is expected to decide the present petition in accordance with law and by first taking up the issue as to the competence of respondent No.1 to initiate ejectment application against respondent No.2 in absence and without concurrence of the petitioner / landlady.

8. As per record the petitioner and respondent No.1 are co-owner of the demised premises. It is well settled that co-owner being a landlord within the scope of definition of landlord appearing in section 2(c) of SRPO, 1979 can file ejectment an application against the tenant. The dispute between petitioner and co-owner pending in the civil suit whereby the petitioner has sought cancellation

of registered sale deed to the extent of 50% share in the subject property in favour of respondent No.1 executed by her will not make the proceedings of rent application filed by respondent No.1 against respondent No.2, *void abintio*, illegal or unsustainable in law. The rent application filed by respondent No.1 has been maintained and decided up-to-the Supreme Court against respondent No.2. The dispute between petitioner and respondent No.1 relating to their rights over the demised premises cannot be adjudicated in rent proceedings, nor by this Court in constitutional jurisdiction.

9. The application u/s 12(2) CPC was filed by the petitioner on the ground that without her permission, the rent application was filed. Respondent No.1 being co-owner of the property was competent to file the ejectment application against respondent No.2 and there was no necessity to join the petitioner in the said proceedings as a party. The application u/s 12(2) CPC is filed when there is material showing that the impugned order was passed without jurisdiction, by misrepresentation of facts or by committing fraud with the Court. Learned counsel for the petitioner has failed to point out that respondent No.1 obtained the orders of eviction from the demised premises against respondent No.2 either from the Court, which had no jurisdiction, by misrepresenting the facts, or by committing fraud with the Court. In absence of any of such grounds, the application u/s 12(2) would not be maintainable on the ground that the co-owner in the property was not made a party in the rent proceedings.

10. Both the Courts below have gone through every aspect of the case including the one agitated here that whether the rent application was maintainable in absence of petitioner having been joined as a party by respondent No.1. Both the Courts below have come to the conclusion that rent application was maintainable as there is no embargo on the co-owner to file rent proceeding against the tenant exclusively. It is further observed that the attempt of petitioner of filing application u/s 12 (2) CPC before this Court in earlier round of litigation has already ended in dismissal. I do not find, therefore, any merit in this constitution petition and dismiss it along with pending application(s).

CP No.S-749/2021:- This constitution petition has been filed by the petitioner against an order dated 14.09.2021 passed in FRA No.76/2021. This appeal was filed against the order passed by the Executing Court in Ex. Application No.06/2019 issuing writ of possession in favour of decree holder to the extent of 50% of his share in the demised premises in exclusion of 50% share of petitioner.

2. Learned counsel appearing for the petitioner did not advance any argument as to what illegality has been committed by the Executing Court after

the rent case has been decided up-to-the Supreme Court in favour of respondent No.1. It is not disputed that ostensibly the sale deed to the extent of 50% of share in the demised premises stands registered in the name of respondent No.1 and the Executing Court had issued writ of possession by directing to hand over only 50% of the demised premises to him. Admittedly, in the rent proceedings, the title of the parties cannot be adjudicated upon, nor any final decision can be given in this regard. The parties are already before the Civil Court in this respect and until and unless, the issue is finally decided by the Civil Court in favour of either party, the order of the Executing Court as above cannot be dubbed as illegal or a result of wrong exercise of jurisdiction. No illegality has been pointed out by the learned counsel for the petitioner in this regard to justify interference by this Court in constitutional jurisdiction. This being the position, I also find no merit in this petition and dismiss it accordingly.

Both the aforesaid petitions are disposed of accordingly.

J U D G E

Rafiq/P.A.