

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. NO.S-733/2009

Petitioners. : Aurangzeb Ali and another,
through Mr. Jamil Ahmed advocate.

Respondents : IIIrd Additional District Judge, Karachi Central
and others,
Shaikh Abdul Majeed advocate for respondents
No.2, 4, 5 to 10.

Date of hearing : 31.05.2018.

Date of order : 31.05.2018.

JUDGMENT

Salahuddin Panhwar, J: This petition assails order dated 16.09.2009, passed by appellate Court in First Rent Appeal No.49/2007, whereby FRA filed by petitioner against order passed by the Rent Controller on 08.01.2007 in Rent Case No.618/1997 allowing eviction application of respondents, was dismissed.

2. Concisely, facts leading to filing of this petition are that respondents No.2 to 10 (applicants before the Rent Controller) are the owners of Shop Nos.2 & 3 Mumtaz Cloth Market, Main Road constructed on Plot No.G/1-208, 209 and 266 Liaquatabad, Karachi where petitioners (opponent before the Rent Controller) are tenants at the monthly rent of Rs.400/- per month excluding electricity and other charges. The petitioners used to pay the rent through money order which they continued to pay till June 1997 but suddenly stopped remitting the same till the filing of application before Rent Controller; that petitioners neither paid nor tendered nor deposited

the rent in the Court and that they were willful defaulters in payment of rent from July 1997 to October 1997; that despite repeated demands they failed to pay the same and by the time the Rent application was filed an amount of Rs.1,600/- was outstanding against them as arrears of rent; that a partition wall between the two shops without the consent, permission and knowledge of the respondents was demolished by the petitioners hence the value and utility of the rented premises was impaired besides the building became weak and dangerous and that the petitioners despite promise to raise the wall failed to do so.

3. Reham Ali the father of present petitioners, claiming himself as proprietor of M/s Aurangzeb Ali Akber Ali, filed written statement and denied the contents of the Rent application. It was pleaded that rent till July 1995 against valid receipts had already been paid and thereafter the same was remitted through money order and received by the respondents till September 1997. However, the rent for the months from October to December 1997 sent in advance vide Money order No.2953 dated 05.08.1997 was refused by the respondents hence petitioners started depositing the same in MRC No.522/1997 which is continuously being deposited; petitioners denied demolition of wall and impairing the value and utility of the rented premises as claimed.

4. Heard learned counsel for the parties and perused the record.

5. Learned counsel for petitioners argued that their father Reham Ali was the tenant in rented premises and that prior to filing Rent Case No.618/1997 the respondents filed Rent case No.71/1995 u/s 8 of S.R.P.O. 1979 for fixation of fair rent and the same was withdrawn on 26.03.2002; that rent upto June 1997 was paid against valid receipts and from July 1997 to November 1997 the rent was remitted through money order and on its refusal the petitioners started depositing rent in MRC No.522/1997; that the wall between the two shops was removed/ demolished with the consent and prior permission of the owner at the time of inception of tenancy; that the Rent controller decided the point of demolition/ removal of intervening wall in negative, against the respondents; though point of default was decided in favour of the respondents, against the petitioners without considering the oral and documentary evidence on the record; that the impugned orders suffer from various infirmities, were result of misreading and non-reading of the evidence and despite suppression of material facts by the respondents, learned Rent Controller as well as appellate Court failed to take judicial notice of the same and passed the impugned orders without appreciating the evidence led by the petitioners and that no credence was given to the documents placed on the record by the petitioners. It was argued that Rent case was filed against M/s. Aurangzeb Ali Akbar Ali through proprietor Reham Ali who expired during the pendency of Rent case on 19.12.2000 but in fact both the opponents/ petitioners are sons of Reham Ali and not that of Anwar Ahmed, therefore, the very Rent case being incompetent was liable to be dismissed on this score; that there were material contradictions in

the evidence of two respondents who filed their affidavits-in-evidence and were subjected to cross-examination but those contradictions were overlooked and discarded without any plausible reason; hence orders of both Courts below are liable to be set aside. He has relied upon 1997 AC 39, 1997 MLD 1998; PLD 1993 Karachi 642 84 and PLD 1984 SC 44.

6. Learned counsel for respondents has supported the findings of the appellate Court and prayed for dismissal of instant petition.

7. Since, there are *concurrent* findings of *two* Courts below hence to succeed in the petition, existence of *mere* possibility of another *conclusion* on reappraisal of evidence is not sufficient but the petitioners must establish some *patent* illegality resulting into miscarriage of justice. Reliance in this regard can safely be placed on the case of Farhat Jabeen v. Muhammad Safdar and others (2011 SCMR 1073) wherein the august Supreme Court of Pakistan has declared as under:-

"3. Heard. From the impugned judgment of the learned High Court, it is eminently clear that the evidence of the respondent side was only considered and was made the basis of setting aside the concurrent finding of facts recorded by the two courts of fact; whereas the evidence of the appellant was not adverted to at all, touched upon or taken into account, this is a serious` illegality committed by the High Court because it is settled rule by now that interference in the findings of facts concurrently arrived at by the courts, should not be lightly made, merely for the reason that another conclusion shall be possibly drawn, on the reappraisal of the evidence; rather interference is restricted to the cases of misreading and non-reading of material evidence which has bearing on the fate of the case."

Prima facie, per the concurrent findings of the two courts below, there is a *default* on part of the petitioners because of which their

ejectment has been ordered. It is needless to add that it is by now settled that once the landlord claims failure on part of the tenant in making timely payment of rent then it is the *tenant* who has to establish timely payment of the rent. Reference may well be made to the case of Muhammad Amin Lasaia v. M/s Ilyas Marine & Associates & Ors (PLD 2015 SC 33) wherein it is observed as:-

“8. **The burden of establishing the timely payment of rent lay upon the tenant** which he failed to discharge. ...”

I would further add that such burden is upon the tenant because *legally* the payment of the **monthly rent** was / is not subject to any further demand at end of every month but an obligation, created by relationship of **landlord & tenant** therefore, tenant , *legally*, is left with no option but to *timely* tender the rent and in case of *refusal* to follow the procedure, detailed by the law itself. The guidance is taken from the case of M/s Tar Muhammad Janoo & Co. v. Taherali & others (1981 SCMR 93) wherein it is observed as:-

“7. In cases where there is no rent deed or written agreement, a tenant would be a defaulter if he failed to pay the rent within two months of the date when the rent became due. It is the duty of the tenant to pay or at least tender the rent to the landlord and he cannot be allowed to plead that the landlord did not make any effort to collect the rent. The mere fact that a tenant has made it a habit not to pay the rent regularly every month, and that the landlord has tolerated his default for some time and accepted the rent paid at irregular intervals cannot in any way, be deemed to have established a practice of payment of rent whenever the tenant pleases or affect the liability of the tenant to pay the rent unless the landlord comes and collects it. Nor does it absolve the tenant from paying the rent every month.”

Having said so, I would be safe in saying that before insisting a *success* in constitutional jurisdiction against **concurrent findings** on **'default'**, the petitioners are, *prima facie*, required to show that:-

- i) the monthly rent was *timely* paid; and
- ii) findings are *prima facie* arbitrary and not in accordance with available material;

It was case of the petitioners that monthly rent till September, 1997 was paid through money order; rent for months from **October to December, 1997** was sent in advance vide Money order No.2953 dated 05.08.1997 but was refused hence started depositing in MRC No.522/1997. At this juncture, it would be conducive to refer findings of two courts below on such point so as to see a *prima facie* illegality if any, in arriving at a conclusion, which are:-

Findings of Rent Controller

“.... According to opponent (deceased Rahim Ali) had paid monthly rent of the premises in question through money orders till Sept: 1997 and rent for the months of October to December 1997 was sent in advance through **money order No.2953 dated 5.8.1997** which was refused therefore it was deposited in MRC No.522 of 1997. In support of his above plea has produced money order coupon No.0302 and its postal receipt at Ex: O/2, money order coupon No.2953 at Ex: O/3 and receipt of MRC No.522/1997 at Ex: O/4. The opponent in para 5 (v) of his affidavit in evidence has stated that he produced money order receipt / coupon No.0302 dated 28.11.1997 which he claims that it was rent sent by the opponent through above money order for the month of July to September 1997 but perusal of above Ex: O/2, which is money order coupon No.0302 and its postal receipt No.0302 clearly shows that **it was sent on 28.4.1997 and not on 28.11.1997** as claimed by the opponent in para 5(v) of his affidavit in evidence. **The stamp of post office also shows the date of its sending as 28.4.1997 and it was received by applicant No.1 Nasreen Ehsanuddin on 29.4.1997 and it bears her signature with her name.** This fact is also admitted by opponent in cross examination that **rent through money order Ex: O/2 is sent on 28.4.1997.** He has further admitted in cross examination that postal receipt (Ex. O/2) the month of July, August and September has been

mentioned by himself and not by post office staff. The opponent further claims that rent for the month of October to December 1997 was sent in advance through **money order No.2953 dated 05.8.1997** but it was refused to receive therefore he deposited the same in MRC No.522 of 1997 but **money order coupon produced at Ex: O/3 does not show anything that above money order was refused by the applicants nor it bears any endorsement of post man and this fact is also admitted by the opponent in cross examination that Ex: O/3 does not bear any endorsement of postman.** He has further admitted that affidavit in evidence of postman is also not filed in this case, **even he failed to produce postal receipt of above money order to show that above money order was sent to the applicants.** The perusal of receipt of MRC shows that rent of three months amounting to Rest.1200/- was deposited on 23.9.1997 in MRC No.522 of 1997 and according to para 5(v) of affidavit in evidence of opponent this was deposited as advance for October to December 1997. The claim of the applicants that the rent sent by money order Ex: O/2 is rent for the month of April to June 1997 while opponent claims that Ex: O/2 pertains to rent for July 1997 sent on 28.11.1997 but as already discussed above that Ex: O/2 is sent on 28.4.1997 and not on 28.11.1997 and **from the above fact it appears that claim of the applicants that Ex: O/2 pertains to rent from April to June 1997 is correct as it was sent as advance rent for three months from April to June 1997 on 28.4.1997.** The perusal of receipt of MRC further shows that rent for three months were deposited in above MRC and according to opponent himself it is rent for October to December 1997 which means in view of above discussion that **rent for July to September 1997 are due against the opponent which is not paid by him.**

Findings of appellate Court.

“9. This is a very simple case of default in making payment of rent. According to the respondents the rent up to June 1997 was paid by the appellants through money order but from July onwards it was stopped intentionally and deliberately. On the contrary the appellants claimed that they have remitted rent through money order up to September 1997, which the respondents received. They stated that rent for three months from October to December 1997 was sent in advance through money order but it was refused, therefore; the same was deposited in M.R.C. No.522/1997. Hence, question of default does not arise. In the written statement filed by the father of the present respondents; in Para-2 it has been stated that monthly rent up to July 1995 was paid in cash against valid receipts and thereafter the same was being remitted through money orders. This fact is also confirmed by appellant Aurangzeb in in Para-5 of his affidavit-in-evidence. Therefore; the burden to prove that from August 1995 onwards the rent was remitted was upon

the appellants. **The respondents admitted that they have received rent up to June 1997 and in such circumstances the burden that rent from July 1997 was remitted was upon the appellants.** To prove this fact the appellants have produced only two receipts of money order i.e. 1) bearing receipt No.0302 dated 28.04.1997 & 2) bearing receipt No.2953 dated 05.08.1997. The Appellant No.1 stated that through money order receipt/ coupon No.0302 (Ex. O/2) the rent for the months of July, August & September 1997 was remitted on 28.11.1997 but **this Ex. O/2 speaks otherwise, as the same clearly shows the date of remittance as 28.04.1994 and not 28.11.1997 and it was received by respondent No.1 Nasreen Akhtar on 29.04.1997.** In fact it was rent for the period from April to June 1997, which has been received by Respondent No.1. So far receipt No.2953 dated 05.08.1997 (Ex.O/3) it was rent for the months of October to December 1997 and this fact is admitted by appellants also. There is no proof of whatsoever nature that rent for the period from July to September 1997 was ever paid or remitted through money order by the appellants. Since it is the case of appellants themselves that from August 1995 they are remitting rent through money orders, **the appellants were legally bound to produce the copies of such money order coupons to prove that rent up to September 1997 was actually remitted by them.**”

Prima facie, the very document (s), produced by the petitioners (*tenants*) to prove his claim of *timely* payment of monthly rent, are sufficient to falsify such claim. It may be added that mere claim (words) would not prevail over the *documentary evidence*, particularly when same is produced by the party himself. *Prima facie*, failure of the petitioners in establishing *patent* illegality or arbitrariness in concurrent findings of two courts below would *alone* be sufficient for dismissal of constitutional petition in relation to *rent matters*. In the case of *Shajar Islam v. Muhammad Siddique and 2 others* (PLD 2007 SC 45) the Hon'ble Supreme Court has laid the law to the following effect:-

“The learned counsel for the respondent has not been able to point out any legal or factual infirmity in the concurrent finding on the above question of fact to justify the interference of the High Court in the writ jurisdiction and this is settled law that the High Court in exercise of its constitutional jurisdiction is not supposed to interfere in the findings on the controversial question of facts based on evidence even if such finding is erroneous. The scope of the judicial review of the High Court under Article 199 of the Constitution in such cases, is limited to the extent of misreading or non-reading of evidence for if the finding is based on no evidence which may cause miscarriage of justice but it is not proper for the High Court to disturb the finding of fact through reappraisal of evidence in writ jurisdiction or exercise this jurisdiction as a substitute of revision or appeal.

5. In sequel to above discussion, we are of the considered view that the interference of the High Court in the concurrent finding of the two Courts regarding the existence of relationship of land and tenant between the parties was beyond the scope of its jurisdiction under Article 199 of the Constitution and consequently, we convert this petition into an appeal, set aside the judgment of the High Court and allow the appeal with no order as to costs.”

8. In view of what has been discussed above, I am of clear view that both the courts below have committed no illegality in reaching to such *conclusion*. There is no case of misreading or non-reading of the evidence, so also no illegality or irregularity has been pointed out by the learned counsel for the petitioners. The two Courts below have exercised the jurisdiction properly vested in them by law. In consequence thereof, the petition in hand, was dismissed vide short order dated 31.05.2018. These are the *detailed* reasons thereof.