IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-2801 of 2011

Iftikhar Ahmed

Versus

Shahid pervaiz & others

A N D

C.P. No.D-2802 of 2011

Iftikhar Ahmed

Versus

Mohammad Saleem & others

BEFORE:

Mr. Justice Mushir Alam, Chief Justice

Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 07.12.2012

Petitioner: Through Mr. Muhammad Akbar Awan Advocate.

Respondent Through Mr. Mirza Sarfaraz Ahmed Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Except the shop numbers, facts of both the petitions are common and identical, therefore, these petitions were disposed of by a short order dated 07.12.2012. These are the common reasons for the same.

C.P. No. D-2801/2011

One Shahid Pervaiz being tenant filed Suit No.1087 of 2004 against Fazal Dad for possession and injunction whereas Fazal Dad filed suit No.1086 of 2004 against Shahid Pervaiz for recovery of rent arrears. Both the suits were consolidated and were decided by a common judgment by III-Sr. Civil Judge Karachi South dated 30.10.2010. In terms of the judgment both the suits were dismissed. The tenant/plaintiff (Shahid Pervaiz) in Suit No.1087 of 2004 i.e. Shahid Pervaiz filed a Revision Application bearing No.123 of 2010 whereas the landlord did not prefer any Appeal or revision against the dismissal of his suit bearing No.1086 of 2004. The

result of the said Revision No.123 of 2010 was that the consolidated judgment and decree in suit No.1087 of 2004 was set aside by order dated 17.5.2011 and the suit filed by the respondent/tenant Shahid Pervaiz was decreed. The legal heirs of Fazal Dad filed this writ petition against the order of the revisional/appellate Court. These proceedings are in respect of Shop No.3.

CP No.2802 of 2011: The suit bearing No.1085 of 2004 filed by Fazal Dad against Muhammad Saleem tenant for recovery of rental arrears whereas the suit bearing No.1088 of 2004 was filed by Muhammad Saleem being tenant in respect of Shop No.1 against landlord Fazal Dad. Both the suits were consolidated and a common judgment was passed by learned III-Senior Civil Judge Karachi South vide judgment dated 30.10.2010 in terms whereof both the suits were dismissed. Against the said judgment and decree dated 30.10.2010 Muhammad Saleem filed Civil Revision Application No.124 of 2010 which was heard by VII-Additional District Judge Karachi South and vide order dated 17.05.2011 the suit bearing No.1088 of 2004 filed by the tenant/plaintiff (Muhammad Saleem) of Shop No.1 was decreed as prayed whereas the landlord did not prefer any appeal or revision against dismissal of his suit. Against the said order of Additional District Judge Karachi South Civil Revision No.124 of 2010, the legal heirs of Fazal Dad filed this Constitution Petition.

It is the case of the petitioners that the learned Appellate Court has not given the issue-wise findings which is illegal and unlawful. Learned counsel for the petitioner further argued that the appellate Court got impressed by the fact that the evidence of respondent No.1/tenant, has gone unrebutted and unchallenged, therefore, the issues regarding dispossession of respondent stood proved. Learned counsel for the petitioner further submitted that he remained absent for cross-examination just on one day on which date the side to cross examine the respondent was closed and no final chance was given to them. He further argued that the appellate Court failed to appreciate that the respondent did not pay rent w.e.f. January, 2001 at the rate of Rs.3500/- per month.

Learned counsel for the respondent has argued that the evidence of the respondent has gone unchallenged and therefore the factum of illegal dispossession was proved. Learned counsel for respondent further argued that the claim of handing over the possession voluntarily by the respondent was never proved and they also failed to substantiate that no rent was paid by the respondent. Additionally he argued that since the order of the trial Court whereby the suit of the petitioner for recovery of arrears was dismissed was not challenged, therefore, it does not lie in the mouth of the petitioner to urge such facts now in this writ jurisdiction.

We have heard the learned counsels and perused the record. It is an admitted fact that the petitioner did not file any appeal against the dismissal of their suit for

recovery of rental arrears. It is also an admitted fact that the petitioners did not cross examine the respondent and witness in respect of affidavit in evidence which were filed in the consolidated suits. Thus the contention of the respondent that they were dispossessed illegally has gone unchallenged.

We are therefore of the considered opinion that the revisional Court has rightly decreed the suit of the respondent which was filed against their unlawful dispossession as the petitioner neither cross examined the respondent nor proved the fact of voluntary handing over of possession otherwise and it was rightly determined by the appellate/revisional Court that the fact regarding the illegal dispossession stood proved whereas the fact regarding voluntarily handing over of the possession was not proved by the petitioner. We may add here that setting aside of judgment and decree by the revisional/ appellate Court is effective only to the extent of prayer made in the Revision Applications No. 123 and 124 of 2010 as the common judgments and decrees were challenged by the respondent and not by the petitioners nor any cross appeal was preferred by the petitioners before the appellate Court and findings as far as dismissal of the suit filed by the petitioners for the recovery of rental arrears are concerned have reached finality. The revisional Court discussed material issues relating to illegal dispossession of respondent only.

Dealing with the other limb of arguments of petitioner regarding compliance of order XLI rule 31 CPC we may observe that compliance has to be in substance and it

appears that the appellate forum has given its findings and reasoning in detail and in substance after considering the evidence.

The appellate Court in terms of para-13 of the impugned order has categorically discussed the fact that the affidavit-in-evidence of the respondent along with affidavit-in-evidence of one witness namely Khalid Mehmood have gone unchallenged. The appellate Court has categorically discussed the point that have been raised and which have been substantially decided. Para-13 of the impugned order is reproduced as under:

> ""13. I have gone through the entire record available before me and anxiously considered the arguments advanced by the respective parties and the case law as referred above. It appears that the applicant has impugned the judgment and decree Dt. 30-10-2010 passed in Civil Suit No. 1087 of 2004 after giving full opportunity to the applicant which was filed by the applicant for restoration of his possession and injunction. In which the applicant has filed his affidavit-in-evidence along with the affidavit-in-evidence of one witness namely Khalid Mehmood but they were not cross-examined by the counsel for respondents and their side was closed by the learned trial Court as such the contention of the applicant has gone unrebutted. Whereas in the impugned judgment the learned trial court has wrongly concluded that applicant has not produced any evidence in rebuttal despite the fact that applicant and his witness was not cross-examined and the side of respondent was closed by the learned trial court itself vide order Dt. 29-09-2010 for which no any application was preferred for setting aside of the said order as such the findings recorded by the learned trial court on issues No.6, 7 and 8 are illegal and arbitrary. Since the evidence of the applicant had gone unrebutted and unchallenged therefore, applicant has proved that he was dispossessed from the said shop by the respondents illegally without adopting due course of law as such the applicant is entitled for restoration of possession of the said shop, therefore, the findings recorded by the

> learned trial court on issues No.6,7 and 8 are modified to the extent that applicant has produced that he is entitled for restoration of possession of shop No.1 situated on Plot No. 8/8-A, Mehmoodabad, Karachi from which he was dispossessed ilelgally by the respondents No.1 and 2 and their deceased father."

Framing of points for determination in facts and circumstances of the case "issue wise" are not mandatory when in substance all material questions as raised have been answered by the appellate Court. Thus, the three ingredients of Rule 31 stood substantially complied with i.e. (1) points for determination, (b) decision and (c) reasoning for its decision. The learned Appellate Court thus is not obliged to frame the points for determination in the form as if "issues" are being framed. The contention that the points for determination have not been formulated in sequential manner has lost its force when all material questions have been answered in the judgment.

There is no substance in these writ petitions and the same were dismissed by this Court on 07.12.2012 and these are the reasons for the same.

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Dated: **Judge**

Chief Justice