

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

C.P.No.D- 2838 of 2012.

Present:-

Mr.Justice Ahmed Ali M Shaikh.

Mr.Justice SalahuddinPanhwar.

Petitioner: Syed TahirHussain Shah through Mr.Muhammad Saleh Bhutto, Advocate.

Respondents: Second Rent Controller and others through Mr.Nazir Ahmed Awan Advocate, Mr.Ishrat Qayoom Hanfi Advocate and Mr.Shuhabuddin Shaikh State Counsel.

Date of Hearing: 05th March, 2013.

ORDER.

SALAHUDDIN PANHWAR, J:- Through instant petition, the petitioner has invoked the constitutional jurisdiction of this Court and prayed as under:-

(a). That this Honourable Court may be pleased to call for R&P of R.A No. 5 of 2011 and Execution applicant No.1 of 2012 from learned 2nd Rent Controller Sukkur and after examining legality and propriety and sent aside the orders dated 9.10.2011 and 5-9-2012 till the decision of F.C.SuitNo.92 of 2012 pending before the 2nd Senior Civil Judge Sukkur.

(b).To stays the writ of possession till the decision of F.C.Suit filed by the petitioner before learned 2nd Senior Civil Judge Sukkur.

2. Relevant facts are that respondent No.2/applicant Farman Ali filed a Rent Application No.5/2011 for eviction against the petitioner and respondent No.3 in respect of S.No.28 Plot-B-2222/38 near Taxi Raksha Stand Rohri. Such rent application was allowed by order dated 25.09.2012. Thereafter petitioner filed Application under Section 12(2) CPC but the same was withdrawn simultaneously the petitioner filed Application under Section 47 CPC same was decided by order dated 20.4.2012. Thereafter again petitioner filed Application under Order 41 Rule 5 (2) CPC same was dismissed.

3. Learned counsel for the petitioner inter alia contended that the order passed by the Rent Controller is not sustainable under the law; petitioner was not in possession of the shop which was the subject matter of the rent application in spite of that writ of possession was issued against him and civil suit filed by petitioner was also pending; impugned orders dated 20.4.2012 and 25.09.2012 are illegal and against the norms of a settled principles of law. Rent Controller was not competent to issue writ of possession as no proper procedure was adopted as provided under Section 47 CPC; it was the duty of the Rent Controller to record the evidence regarding the plea taken by the petitioner.

4. Conversely, the learned counsel for the respondent No.2 assisted by learned counsel for the respondent No.3 and learned State Counsel argued that the petitioner has not availed the remedy by filing appeal against the order dated 25.04.2012 passed on the Application

under Section 47 CPC before the District Judge; order of the Rent Controller was according to law and no illegality was committed by the Rent Controller; under the rent laws CPC was not applicable therefore Application under Section 47 and 41 CPC were not maintainable thus impugned order is completely speaking and passed in accordance with the law.

5. Heard the learned counsel for the respective parties and perused the record.

6. After careful consideration and meticulous examination of available record, it is manifest that the Rent Controller allowed eviction application filed by respondent No.2 and subsequently application under Section 12(2) CPC was withdraw by the petitioner and he had filed two applications under Section 47 and under Order 41 Rule 5(2) CPC, the same were disposed of. Since the petitioner has taken plea that he is not in possession of the property which was subject matter in the rent application, therefore writ issued by the Rent Controller is illegal; and in that regard we have examined the order dated 25.9.12 passed on the application under Section 47 CPC. It will be conducive to refer the relevant portion of the impugned order:-

“It has also been pointed out by the bailiff that notice of writ of possession was affixed/delivered at the shop on the pointation of applicant party of the eviction application. The bailiff is not a technical person he will not be able to identify the demise premises which shop situated on S.No.28 Plot-B-2222/38 near Taxi Riksha

Stand Rohri, therefore in interest of justice application in hand stands allowed to avoid further delay, let writ of possession be issued through bailiff of the court who shall be assisted properly by City Surveyor Rohri and the bailiff shall get actual shop vacated in accordance with law in respect of which writ of possession was ordered to be issued under the scope of order passed on execution application. Consequently, application in hand under Section 47 CPC stands disposed of”.

7. Bare perusal of the above order makes it clear that the plea, taken by the petitioner, does not sustain in the eyes of law and same is devoid of merits because *writ of possession is issued in respect of the subject matter and not against the person*. If it is taken that writ of possession is to be issued against the person then the purpose of issuance of writ of possession can easily be delayed and frustrated by managing or putting another into possession thereof, which cannot be allowed to frustrate the outcome of a lawful process.

8. We have examined the order dated 25.9.2012, whereby said application was declined and we have not found any illegality in the said order and further it is a settled principle of law that mere pendency of civil suit is no ground for eviction in rent proceedings, as such it is laid down by the Hon'ble Supreme Court that no one can claim possession on the basis of sale agreement. I am also fortified with the dictum as laid down in the case of Abdul Rasheed v Maqbool Ahmed and others, wherein it is held.

“It is settled law that where in a case filed for eviction of the tenant by the landlord, the former takes up a position that he has purchased the property and hence is no more a tenant then he has to vacate the property and file a suit for specific performance of the sale agreement where after he would be given easy access to the premises in case he prevails”.

As regards to the applicability of section 47 and 41 Rule 5(2) CPC are not applicable to the rent proceedings, it would suffice to say that it is not the case of the petitioner that he was not party to the proceedings or that outcome of the proceeding based on fraud because the application, filed under such plea i.e application under section 12(2) CPC was withdrawn by petitioner himself and further such provisions of the Code of Civil Procedure are, not applicable in rent proceedings.

9. Since the petitioner has not availed remedy before the District Judge by way of filing rent appeal/execution appeal or revision, moreover he has failed to point out any illegality or infirmity in both the impugned orders, therefore instant petition is not maintainable under the law.

10. Above are the reasons for a short order dated 05.03.2013 whereby this petition was dismissed.

JUDGE

JUDGE

A.R.Brohi.

