

2019 M L D 2095

[Lahore]

Before Shahid Jamil Khan, J

SHERAZ PERVAIZ MUSTAFA---Petitioner

Versus

The SPECIAL JUDGE (RENT), LAHORE and others---Respondents

Writ Petition No. 25703 of 2019, decided on 27th June, 2019.

(a) Punjab Rented Premises Act (VII of 2009)---

----Ss. 5, 8, 9, 19 & 21---Ejectment of tenant---Tenancy being oral---Payment of fine---Effect---Ex-parte proceedings---Scope---Petition for leave to contest was dismissed and eviction petition was accepted ex-parte---Validity---Payment of fine would authorize the Rent Tribunal only to entertain an eviction petition---Mere entertainment of ejectment application did not confer jurisdiction to the Rent Tribunal nor could it be assumed unless relationship of landlord and tenant was accepted or its existence had been established through evidence---Rent Tribunal was to assume jurisdiction if eviction petition was supported by a registered tenancy---Relationship of landlord and tenant stood proved by operation of law in existence of written and registered tenancy agreement---Rent Tribunal was to determine the question of tenancy in absence of registered tenancy agreement for which relationship of landlord and tenant was sine-qua-non---Rent Tribunal to determine the terms and conditions of tenancy before determining the grounds of seeking an eviction order--If Rent Tribunal had proceeded ex-parte after denying leave to contest then existence of tenancy and its breach was prima facie to be proved by a non-compliant applicant through unimpeachable and undeniable evidence---Impugned order had been passed in a mechanical manner and no findings with regard to existence of tenancy or non-payment of rent had been passed---Rent Tribunal had failed to discharge its duty, in circumstances---Impugned orders passed by the Courts below were set aside---Ejectment petition was to be deemed to be pending before the Rent Tribunal---Constitutional petition was allowed, in circumstances.

Umer Ikram-ul-Haq v. Dr. Shahida Hussnain 2016 SCMR 2186; Rana Abdul Hameed Talib v. Additional District Judge PLD 2013 SC 775; Afzal Ahmad Qureshi v. Mursaleen 2001 SCMR 1434; Haji Khudai Nazar v. Haji Abdul Bari 1997 SCMR 1986; East and West Steamship C. v. Queensland Insurance Co. PLD 1963 SC 663; Qureshi Salt and Spices Industries, v. Muslim Commercial Bank 1999 SCM R 2353; Haji Ali Khan v. Messrs Allied Bank of Pakistan Limited PLD 1995 SC 362 and and Provincial Government through Collector, Kohat v. Shabbir Hussain PLD 2005 SC 337 rel.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---High Court in constitutional jurisdiction could not replace a finding of fact recorded by the Court of competent jurisdiction.

(c) Qanun-e-Shahadat (10 of 1984)---

---Art. 129(e)---Presumption of truth was attached to the judicial proceedings.

Muhammad Khalil Rana for Petitioner.

Masood A. Malik for Respondent No.3.

Date of hearing: 27th June, 2019.

JUDGMENT

SHAHID JAMIL KHAN, J.---This and connected petitions (Writ Petitions Nos. 25701, 25706 and 25695 of 2019) are against even dated orders passed on 23.02.2019 by the learned Additional District Judge, Lahore. Petitioner's appeals against ejection orders, by learned Special Judge (Rent), Lahore ("Tribunal"), were dismissed being barred by time. The application/request for condoning delay was declined on technicality that Section 5 of the Limitation Act, 1908 was not applicable to proceedings under Punjab Rented Premises Act, 2009 ("Act of 2009"), being a special statute.

It shall also decide another Writ Petition No. 201972 of 2018, a connected matter, filed by one of the petitioners, assailing order dated 11.04.2018 by the Tribunal, passed on a direction by this Court in an earlier petition.

2. The facts, discernable from the pleadings, are that applications for ejection were filed by respondent No.3 (Mst. Shabina Kausar) through Farina Khan, her real daughter, as General Attorney. The petitioners entered appearance through their counsel, being respondents to the application for ejection. However, their applications for leave to contest were not entertained being barred by time. The rejection was assailed through an earlier petition (Writ Petition No.118222 of 2017), pleading that the facts noted in the impugned order were not correct. This Court, giving credence to personal affidavit of the learned counsel, set aside the rejection order, with direction to the Tribunal to re-determine the facts. The Tribunal again rejected the applications, for leave to contest, through order dated 11.04.2018. Thereafter, the Tribunal proceeded to pass the ex parte eviction orders against the petitioners.

The petitioners approached the Appellate Court against the eviction orders, besides filing Writ Petition No. 201972 of 2018. The appeals were dismissed being time barred by 12 days. Hence, this and other connected petitions.

3. Learned counsel for the petitioner (Sheraz Pervaiz Mustafa) argued, that the subject rented premises, comprising of two storey house with 04 shops, is in his possession for last 28 years as a co-sharer and then owner. Ownership is claimed after paying the price to other shareholders i.e. a brother, sister (respondent No.3) and mother. The sale deed in favour of respondent No.3 is claimed to have been challenged through a suit for declaration. It is also claimed that the other petitioners are his tenants of the shops.

Learned counsel for respondent No.3 argued conversely, claiming that the rented premises was purchased by her from late father, which was not challenged by Sheraz Pervaiz Mustafa, her brother, in their father's lifetime. She claimed her brother to be in possession of the house as her tenant and other petitioners are claimed to be her tenants of the shops.

4. Arguments heard. Record perused.

5. Arguments of learned counsel, in Writ Petition No. 201972 of 2018, that this Court vide order dated 03.04.2018 in Writ Petition No.118222 of 2017 accepted petitioner's contention of filing the application for leave to contest within time are not correct. The order of this Court, reproduced in the impugned order dated 11.04.2018, does not support this contention. The direction was only for redetermination of the fact whether the application was filed within time or not. Learned Tribunal has reiterated the findings that first appearance was made, before the Tribunal, on 27.11.2017 and a date i.e. 06.12.2017 was fixed for filing of leave to contest. On 06.12.2017, the case was listed before the Duty Judge but no application for leave to contest was filed. The petitioner's contention that the application was filed within time cannot be accepted on mere assertions. This Court, in Constitutional jurisdiction, cannot replace a finding of fact arrived at by a Court of competent jurisdiction. Even otherwise presumption of truth is attached to the judicial orders and proceedings. No exception can be drawn to the order impugned in this petition, therefore, it is dismissed.

6. For remaining petitions, this Court cannot ignore the fact that petitioners had never been heard at any stage on merits, particularly in presence of admitted fact that the petitioner (Sheraz Pervaiz Mustafa) is real brother of respondent No.3 (Mst. Shabina Kausar) and the property originally belonged to their father. It is settled law that even in absence of contesting party, the Court is duty bound to satisfy its conscious that facts pleaded in the application/plaint are correct and supported by evidence. In rent matters, relationship of landlord and tenant is required to be established and Tribunal is bound to satisfy itself before assuming jurisdiction, particularly, while proceeding and passing ex parte final order.

In this backdrop of facts and legal position, this Court is inclined to look into the impugned eviction order passed by the Tribunal to examine, whether Tribunal has discharged its duty.

7. Learned counsel for respondent No.3's contention that after dismissal of all the appeals on limitation, merits of ejection order cannot be looked into, has no force.

He extensively argued, on merits, that the property being transferred in the name of respondent No.3 (Mst. Shabina Kausar) in the year 2008 was never challenged in their father's lifetime till 2012. On a specific question, whether filing of suit by the petitioner in February, 2017 i.e. before filing of ejection petition in October, 2017 was disclosed in the application for ejection, his answer was in negative. He, however, explained that disclosure was not required because the suit was dismissed for non-compliance under Order XVII, Rule 3 of C.P.C., which being not assailed in appeal had attained finality. Learned counsel for the petitioner, in rebuttal, explained that plaint was returned under Order VII, Rule 11 of C.P.C., therefore, a fresh suit was filed after institution of the applications for ejection.

Despite contrary stance on challenge to the sale deed, it is established that the suit was filed prior to filing of the application for ejection and this fact was not disclosed.

8. It is also an admitted position that the tenancy is being claimed on the basis of oral agreement. Learned counsel's submission that on payment of ten percent fine under Section 9(b) of the Act of 2009 tenancy stood accepted is against the law.

Payment of fine under the provision, *ibid*, only authorises the Tribunal to entertain an application by landlord. Mere entertainment of an application does not confer jurisdiction to

the Tribunal nor can it be assumed unless relationship of landlord and tenant is accepted or its existence is established through evidence. August Supreme Court in Umer Ikram-ul-Haq v. Dr. Shahida Hussnain (2016 SCMR 2186), held:-

"... the Rent Tribunal would only assume jurisdiction over a matter once the jurisdictional threshold is crossed by establishing that the matter involves a landlord and tenant..."

... Therefore, it follows that where the relationship of landlord and tenant is denied, the Rent Tribunal would lack jurisdiction, on account of the doctrine of jurisdictional fact, to pass an order for payment of rent due under section 24 of the Act until and unless the Tribunal positively ascertains the relationship of tenancy and establishes that the respondent to the eviction application is in fact a 'tenant' in terms of section 2(1) of the Act.

... The relationship of landlord and tenant is an essential question which has a direct effect upon the assumption and exercise of the jurisdiction of the Rent Tribunal, which (question) must necessarily be positively ascertained before passing an order for payment of rent due under section 24 of the Act"...

9. Collective reading of various provisions of the Act of 2009, reveals that existence of tenancy is presupposed, when the tenancy is in conformity with provisions of the Act of 2009, as envisaged under Section 8. "Tenancy Agreement" is defined under Section 2(m), which recognizes an agreement in writing. Section 5(1) casts a duty upon a landlord to let out premises only through a tenancy agreement and its subsection (2) obligates that the tenancy agreement shall be presented before the Rent Registrar for its registration. The law requires a tenancy agreement to be written and registered, which is a proof of the relationship of landlord and tenant under Section 5(5). It can safely be concluded, in light of the provisions, *ibid*, that the Tribunal shall assume jurisdiction forthwith under Section 19(1), if the application is supported by a registered tenancy agreement and the remaining applicable provisions shall follow.

An application for ejection shall be accompanied by affidavits of the landlord and two witnesses under Section 19(4), in addition to the documents required under Section 19(3). Notices shall be issued and date for appearance of the parties shall be fixed in accordance with the provisions of Section 21(1)(2). If respondent/tenant fails to appear and Tribunal is satisfied in terms of Section 21(3)(a), it shall proceed *ex parte* and shall pass final *ex parte* order under Section 21(3)(b).

Besides a right of appeal under Section 28 against a final order, a window is kept open for the respondent to move an application under Section 21(4) for setting aside an *ex parte* final order, before the Tribunal, within ten days of knowledge, with an application for leave to contest.

10. Rational of the provisions, discussed *supra*, is summary and speedy procedure for expeditious disposal of disputes relating to rented premises. To make the summary procedure viable within the accepted contours of 'due process' and 'fair trial', as ensured under Article 10A of the Constitution of the Islamic Republic of Pakistan, 1973, certain presumptions are construed and broad lines of the relationship are defined for a tenancy withstanding the test of conformity with special provisions of the Act of 2009. The relationship of landlord and

tenant stands proved, by operation of law, in existence of a written and registered tenancy agreement. The relationship is regulated through its various provisions like; Section 6 describes 'contents of the agreement', Section 7 regulates 'payment of rent', Section 10 titled 'Effect of other agreements' puts an end to long standing defense of subsequent agreement to sell, by declaring that an agreement, subsequent to the tenancy agreement, shall not affect the relationship, unless the tenancy agreement is revoked through a written and registered agreement. Section 11 deals with 'Subletting'. Sections 12 and 13 respectively fix 'Obligations of the landlord and tenant'.

For a tenancy, conforming to provisions of the Act of 2009, scope of the controversy or dispute is narrowed and for this reason, the condition of leave to contest is imposed under Section 22. The prolonged technical procedures and standards of evidence are avoided by restricting application of the provisions of Qanun-e-Shahadat Order, 1984 and the Code of Civil Procedure, 1908 through Section 34.

11. All, what has been discussed above, is the procedure when the tenancy is in conformity with provisions of the Act of 2009.

For an existing tenancy, not conforming to provisions of the Act of 2009, two years' time was provided by Section 8 for bringing the tenancy in conformity with the provision of this Act. The effect of non-compliance is given in Section 9, which expounds a Rule that an application under this Act shall not be entertained and exception to the Rule is a fine equal to five percent if application is by the tenant and ten percent in case of landlord. The increased amount of fine for landlord corresponds to the increased responsibility to comply with the provisions of Section 8. Two years' time for compliance appears mandatory because a fine is imposed for its violation. Nevertheless, both the provisions do not put an embargo on filing of an application under Section 19(1) on the basis of an unregistered or unwritten (oral) agreement. August Supreme Court in Rana Abdul Hameed Talib v. Additional District Judge (PLD 2013 SC 775) held that compliance of statutory direction under Section 8 is mandatory for the landlord and tenant for an existing and future tenancy and Tribunal is bound to halt the proceedings, if an application is already entertained, unless the fine under Section 9 is paid. Concluding part for the judgment is reproduced:-

"13. Before parting it may however be observed that on account of the various provisions of the Act mentioned above, as it is the primary obligation of the landlord to create the tenancy through a valid tenancy agreement in conformity with the Act, 2009, it is for this reason that a failure on his part entails double the amount i.e. ten percent of the fine as compared to five percent by the tenant. Anyhow, as in the present case the fine already stands paid by the respondent at the appellate stage, therefore, Section 9 supra shall in view of the reasoning given in this discourse shall not render the judgments of the forums below invalid on this account."

Nevertheless, entertainment of such applications on payment of fine would inevitably result to frustrate the spirit of the Act of 2009.

Absence of registered tenancy agreement would certainly open the question of tenancy to be determined by the Tribunal, which is invested with limited jurisdiction to deal with disputes relating to rented premises, for which existence of landlord and tenant relationship is a sine qua non. If Tribunal proceeds on a tenancy, not conforming to

provisions of the Act of 2009, all the presumptions, necessary for speedy procedure, would not be available. Tribunal would be determining the terms and conditions of the tenancy, before determining the grounds for seeking an eviction order. Since date of the tenancy would be uncertain, therefore, any defense of 'agreement to sell' or 'challenge to the title deed' etc., would be tested and tried through an orthodox prolonged procedure, frustrating the intent of speedy trial and expeditious disposal.

12. In this Court's opinion, if Tribunal proceeds ex parte after denying the leave to contest, existence of tenancy and its breach should, prima facie, be proved by a non-compliant applicant, through unimpeachable and undeniable evidence. Otherwise, a non-compliant application should be rejected forthwith through final order under Section 21(3)(b).

Such practice of dealing with a non-compliant application would compel the landlord and tenant for compliance of the mandatory provisions under Section 8 of bringing it in conformity with the provisions of the Act of 2009. The Hon'ble Supreme Court, while dealing with a rent matter based on oral tenancy, has already given guidelines for the Trial Court in *Afzal Ahmad Qureshi v. Mursaleen* (2001 SCMR 1434). Relevant excerpt is reproduced hereunder:-

"4. ...as mentioned hereinabove the petitioner failed to prove that rent was ever paid to him by the respondent. It hardly needs any elaboration that the requirement of the relevant law is that the learned Rent Controller cannot decide the question of relationship of landlord and tenant against the tenant when the landlord has not established his position as landlord beyond reasonable doubt. The petitioner has neither produced any tenancy agreement nor any evidence in writing showing that rent was being paid to him. No counter-foil of any receipt, any letter from tenant, any notice or any other document could be produced and in our considered opinion the oral version of landlord is not sufficient to hold that relationship of landlord and tenant existed between the parties...."

13. The law has already been enunciated by Apex Court through various judgments giving guidelines to the trial courts, exercising jurisdiction under normal and special law, for ex-parte proceedings and decisions.

In *Haji Khudai Nazar v. Haji Abdul Bari* (1997 SCMR 1986), while answering the question, 'whether C.P.C. is applicable to the proceedings before the Rent Controller' it was held,

"the provisions of C.P.C. unless specifically made applicable by the rent laws, do not apply in terms to the rent proceedings, but the principles of C.P.C. so far they are not in conflict with the provisions of the rent laws and advance the cause of justice, may be applied in the facts and circumstances of the case."

Though Section 21(4) of the Act of 2009 provides remedy against an ex parte order before the Tribunal, however, it was not available under West Pakistan Rent Restriction Ordinance, 1959. Through the judgment in *Haji Khudai Nazar Case*, supra, the remedy was held available by applying principles under Order IX, Rule 13, C.P.C., relevant portion is also reproduce:--

"Reference can also be made to Muhammad Aslam Mirza v. Mst. Khurshid Begum (PLD 1972 Lahore 603) where after exhaustive discussion and reference to a long string of judgments it was held that although there is no express provision in the West Pakistan Urban Rent Restriction Ordinance, 1959 (hereinafter called the Ordinance), providing a remedy of the kind contained in Order IX, rule 13, C.P.C., i.e., for filing an application to set aside an ex parte order on the ground that the defendant was prevented for a sufficient cause for the date of hearing from attending, still its principles were made applicable and the application was held to be maintainable. The Controller was held to have power to set aside the order passed ex parte on satisfaction that the defaulting party was prevented due to sufficient reasons from attending the Court. It is now well-settled that in proceedings before Court or Tribunal of quasi-judicial nature, even if there is no provision for setting aside an ex parte order, the Court/Tribunal would be empowered to exercise such power by applying principles of natural justice. Such provisions which enshrine principles of natural justice have to be read in the statute which do not specifically debar such a remedy. Therefore, even without applying the provisions of C.P.C. in terms, the procedure provided under Order IX, Rules 9 and 13 and Order XLI, Rule 17, C.P.C. can be applied by the Controller or the High Court in rent proceedings."

[emphasis supplied]

For proceeding in absence of contesting party, Apex Courts have repeatedly asked the trial courts for extra vigilance. Reference can be made to East and West Steamship C. v. Queensland Insurance Co. (PLD 1963 SC 663), Qureshi Salt and Spices Industries, v. Muslim Commercial Bank (1999 SCMR 2353), Haji Ali Khan v. Messrs Allied Bank of Pakistan Limited (PLD 1995 SC 362), and Provincial Government through Collector, Kohat v. Shabbir Hussain (PLD 2005 SC 337) went a step forward to say.

"11. The Courts of law must always keep in mind that even where the law permitted passing of an ex parte decree, the learned Judicial Officers should not adopt the said course of action with their eyes completely shut to the factual and legal aspect involved in the matter e.g. if a suit is filed seeking a decree to export Heroin from Pakistan and supposing none comes forward, for whatever reasons, to defend the said suit, then could it be legal or permissible for a Court to pass a decree granting a relief which was absolutely illegal and unlawful?"

14. The ex-parte eviction order should speak loudly on existence of tenancy and its breach.

The impugned eviction orders dated 09.10.2018 are examined, operative part from one of the impugned order is reproduced hereunder:-

"6. All the witnesses have reiterated the same contents as mentioned in the ejectment petition. The right of respondent to file application for leave to contest has been closed on 06.12.2017. There is nothing in rebuttal from the other side. Evidence produced by the petitioner is quite in line with the averments of ejectment petition. Relying upon the oral account coupled with the documentary evidence, court has left with no other option but to accept the version of the petitioner. Hence, the ejectment petitioner is hereby accepted"

Bare reading of the order shows that it is passed in a mechanical way. Only finding in this impugned order is that 'evidence produced by the petitioner is quite in line with the averments of ejectment petition'. The documents accepted or relied upon are; an attested copy of General Power of Attorney, and attested copy of sale deed and site plan. None of the impugned orders bear finding on existence of tenancy or non-payment of rent. Even mode of paying rent or its receipts etc. is not discussed.

15. For what has been discussed above and in light of the law, it is held that the Tribunal failed to discharge its duty and exercise of jurisdiction is not in accordance with law, therefore, the impugned appellate orders, as well as, eviction orders by the Tribunal are set aside, the applications for ejectment shall be deemed pending before the Tribunal, which shall proceed and decide in light of the law and guideline discussed in this judgment.

The petitions (Writ Petitions Nos. 25703, 25701, 25706 & 25695 of 2019) are allowed in the manner and to the extent noted in the judgment and Writ Petition No. 201972 of 2018 is dismissed.

ZC/S-67/L

Petition allowed.