Stereo.HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P. No.38767 of 2023

Shameem Omer and others

v.

Niaz Ahmad and others

J U D G M E N T

Date of Hearing	**29.02.2024**
Petitioners by	Mr. Imran Aslam Kharal, Advocate.
Respondent No.1 by	Syed Ali Allow-u-Din, Advocate.

RASAAL HASAN SYED, J. This petition stems from order dated 05.4.2023 of the learned Addl. District Judge, Faisalabad in terms whereof the appeal of respondent No.1/Niaz Ahmad against order of his eviction dated 06.9.2022 was accepted; the order was set aside and the ejectment application brought by petitioner was dismissed.

2. Brief facts out of which this petition arises are that on 6.7.2021 petitioner filed an application for ejectment of respondent No.1 from a house No. 173-P, covering an area of 04 marlas and 111 sqft located at District Faisalabad on grounds of default in payment of rent and unauthorized structural changes. Stance taken therein was that the property

was rented out in favour of respondent No.1 on a monthly rent of Rs. 6,000/- in March 2019 in the presence of Painda Khan and Muhammad Ejaz. The tenancy was oral, the respondent paid the rent but after the death of petitioner's predecessor namely Umer Hayat, the respondent did not pay rent from January 2021 and also raised illegal structural changes including blockage of passage of first floor. In view of the default and illegal structural changes, respondent's eviction was solicited. Respondent No.1 denied the relationship of landlord and tenant; claimed that he was in occupation of the property as an owner on the plea of agreement of sale dated 26.6.2018. Leave to contest was allowed by the Rent Tribunal; issues were framed whereafter parties led oral and documentary evidence. On consideration of entire evidence the Rent Tribunal allowed the ejectment petition vide order dated 06.9.2022; directed the respondent to deliver the vacant possession of the property to the petitioner and also pay the arrears of rent and future rent at the agreed rate with utility bills till delivery of possession. Appeal filed by the respondent No.1 was allowed, and judgment of Rent Tribunal was set aside. The order of learned

Addl. District Judge, Faisalabad dated 05.4.2023 has been challenged in the instant petition.

3. Heard.

4. As observed supra the ejectment of respondent No.1 was claimed on the basis of default in payment of rent and unauthorized structural changes. The case of the petitioner was that she along with her husband were owners of noted house and that on the death of her husband she along with the remaining petitioners being legal heirs of the deceased became joint owners. It was claimed that respondent No.1 was inducted as a tenant on a monthly rent of Rs. 6,000/- with 10% annual increase; induction of respondent No.1 was in the presence of Painda Khan and Muhammad Ejaz; the respondent paid the rent but defaulted from January 2021 and that the respondent illegally made structural changes in the rented premises. As against this respondent No.1 claimed that he was owner of property by virtue of agreement dated 26.6.2018 allegedly executed by Umer Hayat son of Taj Muhammad, late husband of petitioner No.1 and had paid total price of Rs.60,00,000/- which was allegedly acknowledged

vide receipt dated 26.6.2018 and had allegedly filed a suit for specific performance on 29.11.2021.

5. In view of the stance taken by respondent No.1 issue of relationship of landlord and tenant was framed, along with the issues on merits. Petitioner produced oral evidence of A.W.1 to A.W.3. Petitioner/Shamim Umer appeared as A.W.1 while Muhammad Ejaz and Painda Khan witnesses appeared as A.W.2 and A.W.3. Documents comprising Exh.A-1 to Exh.A-10 were tendered in evidence while some other documents were placed as Mark-A to Mark-C. Respondent No.1 appeared as R.W.1 and produced Muhammad Amin and Muhammad Adnan as R.W.2 and R.W.3. Their affidavits were produced as Exh.R-1 to Exh.R-3 while agreement to sell was produced as Exh.R-4, receipt of earnest money was Exh.R-5, Front Desk Receipt was Exh.R-6, application to SHO as Exh.R-7 and an application to DCO was placed as Mark-A.

6. Petitioner No.1 in her evidence candidly deposed that respondent No.1 was rented the property in March 2019; that the respondent committed default after January 2021 and raised illegal construction. She deposed that the oral

tenancy was created in the presence of A.W.2 and A.W. 3 who in their statements corroborated the stance of the petitioner. She denied execution or existence of any sale agreement and alleged receipt of payment. She also produced copies of two registered deeds to prove that she was owner along with her husband Umer Hayat and that Umer Hayat was only owner to the extent of 02 marlas while the remaining part of 02 marlas was owned by petitioner No.1. Copy of the sale deeds dated 29.6.2018 were tendered in evidence as Exh.A-4 and Exh.A-5. After demise of her husband Umer Hayat on 27.11.2020 the property to the extent of his share was also mutated in favour of his legal heirs as mentioned in the Jamaband at Mark-B and Mark-C. In this backdrop she claimed that all the petitioners were owners/landlords of property in question. Her statement in respect of induction of respondent No.1 as tenant in the property was duly supported by A.W.2 and A.W.3. The petitioner, therefore, satisfactorily discharged the onus of proving the tenancy through her evidence. As against this the plea of respondent was that he had purchased the property and was owner thereof. In defence reliance was placed on an agreement of

sale which shows that the property was allegedly agreed to be purchased for Rs. 60,00,000/- from Umer Hayat on 26.6.2018. Exh.A-4 shows that only Umer Hayat was not owner of the 04 marla house; rather he and his wife were co-owners and Umer Hayat's share was 02 marlas. Therefore, he could not have executed the document for the sale of total property. Secondly sale agreement was claimed to have been executed on 26.6.2018 while sale deed Exh.A-4 itself was registered on 29.6.2018 which means that the petitioner claimed that the alleged purchase of property was before the sale deed in favour of the vendor came into existence or in other words respondent's agreement was claimed to be before the purchase of property by the petitioners or their predecessor which obviously could not be possible.

7. Respondent No.1 raised the claim of having been intending buyer of the property pursuant to an agreement of sale dated 26.6.2018 which was seriously denied by the petitioners and his witnesses while the document was claimed to be concocted and forged and not ever had been executed by Umer Hayat deceased husband of petitioner No.1. Onus to establish and prove the

execution and existence of agreement Exh.R-4 and Receipt Exh.R-5 was upon the respondent No.1. These two documents were claimed to be attested by Muhammad Amin and Muhammad Adnan as attesting witnesses. Evidence of the respondent comprised of R.W.1 (respondent himself), Muhammad Amin R.W.2 and Muhammad Adnan R.W.3. It is observed that the statement of R.W.1 i.e. respondent himself was cross-examined by the opposite side but R.W. 2 and R.W.3 did not appear for their cross-examination despite being given opportunities and ultimately the respondent himself voluntarily closed his oral evidence on 21.7.2022. It is thus a case where the statement of R.W.2 and R.W.3 will be deemed to be unreliable, inadmissible and not considered as a part of evidence. Under law the statement of a witness comprises examination-in-chief and cross-examination. The exercise of cross-examination is right of the opposite side as a device of due process to provide opportunity to show the statement to be false and unworthy of consideration. If the witness does not turn up for cross-examination nor the party produced such witness or show any interest to produce the

witness, the presumption will be that the witness was not prepared to face the truth and that his statement is not worthy of consideration. Reference can be made to the case of Mst. Nasim Sharif v. Imtiaz Ali Khan and 3 others (**2006 CLC 1393**) where it was observed to the effect that if the witness during cross-examination boycotted the proceedings or walked out from the court along with his counsel, the trial court may refuse to read the statement in evidence as such conduct of the witness will be uncalled for and alien to judicial process and that the party having refused to be subjected to cross-examination must face the consequences. In Abid Ali v. The State (**2022 P.Cr.LJ 1088**) it was observed to the effect that where after the examination-in-chief the case is adjourned for cross-examination and subsequently the witness does not turn up or is not made available for cross-examination, statement without cross-examination could not be termed as legal statement as it had lost its evidentiary value and must not be considered being unreliable piece of evidence. In so far as the affidavits as statement in examination-in-chief of witnesses tendered, the same are also unworthy of consideration as in law

the deponent unless appears for cross-examination and allow this opportunity to the opposite side, the affidavit of the witness would be deemed in law inadmissible and unworthy of credence. Reference can be made to the case of Mst. Shahnaz Begum v. Muhammad Shafi and others (**PLD 2004 Lah. 290**).

8. From the resume of facts it is discernible that respondent No.1 could not prove the existence and execution of sale agreement dated 26.6.2018 in as much as neither the witnesses of the document appeared for cross-examination or were willing to expose them to the critical questions of cross-examination nor the deed writer, stamp vendor or any other person supported the plea of execution of the document through any admissible evidence. It was thus a case of uncorroborated statement of respondent No.1 which obviously could not save him from the consequences. As per settled rule, a document which is required to be attested by two witnesses need to be proved by production of two marginal witnesses who shall make complete statement i.e. examination-in-chief and cross-examination which course having not been followed in this case. In the case of Dawa Khan

through L.Rs and others v. Muhammad Tayyab (**2013 SCMR 1113**) it was observed to the effect that admissibility of the documents in evidence, by itself will not absolve the party from proving its contents in terms of Article 79 provided under the scheme of the Qanun-e-Shahadat Order, 1984. In Province of Punjab through Collector Sheikhupura and others v. Syed Ghazanfar Ali Shah and others (**2017 SCMR 172**) it was observed to the effect that the provisions of Articles 72 to 101 of Qanun-e-Shahadat Order, 1984 governing the mode of proof could not be compounded or dispensed with nor could the court which had to pronounce a judgment as to the proof or otherwise of the document is precluded to see whether the document had been proved in accordance with law and could, as such, form basis of a judgment. In the case of Messrs Bengal Friends And Co. Dacca v. Messrs Dour Benode Saha And Co. and the Deputy Registrar of Trade Marks, Chittagan (**PLD 1969 SC 477**) where the document was claimed to have been executed it was observed to the effect that if a document is alleged to have written by any person, the signatures or the hand writing of so much of the document and is alleged to be in that

person's handwriting must be proved to be in his hand writing and that mere fact that the production of document kept in regular course of business did not constitute evidence of the entries contained therein unless the same is proved in accordance with law.

9. Another important aspect in the matter which cannot be overlooked is that the respondent claimed to have paid the total price of Rs.60,00,000/- at the time of alleged execution of agreement of sale which is surprising as it does not speak to the reasons as to why the sale deed could not be registered at that time if there was no legal obstruction, encumbrances or any restraining order. This obviously reflect fraud and raises serious doubts to the existence of any such document. It is also proved on record that Umer Hayat did not own 04 marlas 111 sq. ft. and only owned 02 marlas, obviously being so he could not agree for transfer for the area not owned by him. So much so the agreement was never alleged during three years or during the lifetime of Umer Hayat. The record shows that ejectment petition was filed on 06.7.2021 while the agreement was claimed to be dated 26.6.2018 and during this

period no notice was sent or proceedings initiated to claim existence and enforcement of any sale agreement. The facts noted supra proved that the agreement was fabricated subsequently fabricated to concoct the story of alleged intending sale. The learned Rent Tribunal did take into consideration all these facts on record and reached the conclusion that the agreement could not be proved or established which findings were interfered with by the Addl. District Judge by misreading the evidence and in violation of law.

10. As regards the respondent's objection that the oral tenancy was claimed and that there was no document to support it, the same is ill founded. In law a tenant means a person who undertakes or is bound to pay the rent as consideration for the occupation of the premises by him and includes a person who continues to be in occupation of the premises after the termination of his tenancy as also legal heirs of the tenant after his demise. There is no restriction in law to the nature of tenancy which can be either oral or in writing. It is also a rule that if a person occupies the premises which is owned by other person then his status could be presumed to be as a tenant unless proved

otherwise. Petitioner in this case inducted the respondent as tenant who attempted to raise the defence of being in part performance of agreement of sale but could not prove the same. In the given circumstances his status was only of a tenant as claimed by the petitioner and proved on record by the evidence of A.W. 1 to A.W.3. Reference can be made to the rule in case of Shajar Islam v. Muhammad Siddique (**PLD 2007 SC 45**) where it was observed that in the absence of any evidence in rebuttal of the title of the landlord there would be strong presumption as to the existence of tenancy between the parties. Reference can also be made to the rule in Ahmad Ali alias Ali Ahmad v. Nasr Ud Din and another (**PLD 2009 SC 453**) in this regard.

11. In view of the rule supra, the objection raised by the respondent is not legally tenable. The learned Rent Tribunal did take care of the entire evidence and the legal position and by properly construing the same allowed the ejectment petition but the learned Addl. District Judge, misconstrued the law, misread the evidence and a result of erroneous assumption of law, passed the impugned order which is not sustainable.

12. For the reasons herein above, this petition is **allowed**; order dated 05.4.2023 of the learned Addl. District Judge, Faisalabad is declared to be illegal, without lawful authority and jurisdiction is accordingly set aside. In result, the order dated 06.9.2022 of the Rent Tribunal, Faisalabad is restored. Respondent No.1 is allowed **60 days** to vacate the premises and deliver its vacant possession to the petitioner. No order as to costs.

(RASAAL HASAN SYED)
JUDGE

Announced in open Court on **08.3.2024**.

JUDGE

Approved for reporting.

JUDGE

Rabbani