JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.1590/2017
Umer Tanveer Butt
Versus
Muhammad Ibrahim and others

Dates of Hearing:	22.05.2019 and 16.04.2020
Petitioner by:	Sheikh Azfar Amin, Advocate
Respondents by:	Mr. Ahmad Nawaz Bhatti, Advocate for respondents No.1 (i) to 1 (iv)

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Umer Tanveer Butt, impugns the order and decree dated 03.04.2017, passed by the Court of the learned Additional District Judge (West), Islamabad, whereby his appeal against the order and decree dated 01.02.2017, passed by the Court of the learned Rent Controller, Islamabad, was dismissed. Vide the said order and decree dated 01.02.2017, the learned Rent Controller allowed the eviction petition filed by Muhammad Ibrahim (deceased) **("M. Ibrahim")** under Section 17 of the Islamabad Rent Restriction Ordinance, 2001 **("I.R.R.O.")**, seeking the petitioner's eviction from Shop No.19, Plot No.22-E, Ground Floor, Saeed Plaza, F-6/G-5, Blue Area, Islamabad **("the case premises")**.

2. Learned counsel for the petitioner submitted that a relationship of landlord and tenant never existed between M. Ibrahim or his legal heirs and the petitioner or his predecessor/father; that at no material stage was any rent agreement executed between the petitioner's father and M. Ibrahim; that the petitioner's father's entry into the case premises was on the basis of a sale agreement dated 03.09.1999 executed between the petitioner's father and M. Ibrahim; that subsequently, M. Ibrahim refused to transfer the case premises through execution of a sale deed in favour of the petitioner's father; that at no material stage had the petitioner or his father paid rent to M. Ibrahim or his legal heirs with respect to the case premises; and that since the relationship of landlord and tenant does not exist between M. Ibrahim or his legal heirs and the petitioner or his father, the

learned Rent Controller was bereft of the jurisdiction to entertain or adjudicate upon the eviction petition. Learned counsel for the petitioner prayed for the instant petition to be allowed and the concurrent orders passed by the learned Courts below to be set-aside.

3. On the other hand, learned counsel for respondents No.1(i) to 1(iv), who are the legal heirs of M. Ibrahim, submitted that the petitioner's father and M. Ibrahim entered into a lease agreement for a period of ten years (i.e., with effect from 30.03.2000 to 30.03.2010); that the petitioner's father died on 12.03.2008; that M. Ibrahim and the petitioner executed a lease agreement dated 14.10.2009 for a period of five years (i.e., with effect from 01.03.2010 to 01.03.2015); that since the original lease agreement was handed over to the petitioner, a copy of the said agreement was produced as 'Mark-A' before the learned Rent Controller; that on the expiry of the lease period, M. Ibrahim issued a legal notice dated 07.03.2015 to the petitioner requiring him to vacate the case premises; that since the petitioner did not vacate the case premises, M. Ibrahim filed the eviction petition on 11.04.2015 against the petitioner; that the petitioner had denied the relationship of landlord and tenant with M. Ibrahim by taking the plea that the lease agreement dated 14.10.2009 was a forgery; that M. Ibrahim had filed an application before the learned Rent Controller for summoning of the stamp vendor along with the record to prove execution of the lease agreement dated 14.10.2009 but the said application was dismissed vide order dated 10.01.2017; that throughout the tenancy period the petitioner was regularly paying rent in cash; that M. Ibrahim was 84 years of age when his statement was recorded before the learned Rent Controller; that M. Ibrahim's admission during cross-examination with respect to his signatures on the sale agreement dated 03.09.1999 was due to his advanced age; that M. Ibrahim denied the said signatures as soon as he was told about the document being a sale agreement; that the original sale agreement dated 03.09.1999 was not produced by the petitioner during evidence; that the petitioner's stance that the original agreement was

submitted to the Capital Development Authority was to conceal the forgery; that the said forged sale agreement was prepared on a stamp paper, and the stamp vendor's records were stated to have been misplaced.

4. Learned counsel for respondents No.1(i) to 1(iv) further submitted that the petitioner, while relying on the alleged sale agreement dated 03.09.1999, did not explain as to why he did not take any legal action for its enforcement for nearly 18 years; that in fact the petitioner filed the suit for specific performance of sale agreement dated 03.09.1999 on 15.06.2017 during the pendency of the instant petition; that ownership of the case premises was transferred in favour of M. Ibrahim on 24.03.2016 pursuant to order dated 27.11.2015 passed by the learned Civil Court executing the consent decree dated 06.09.2001; that throughout M. Ibrahim had been paying municipal taxes for the said premises; that the petitioner's father with whom the said sale agreement is alleged to have been executed died on 12.03.2008; that during cross-examination, the petitioner admitted that for the issuance of '*warasatnama'* after his father's demise, the petitioner did not mention the case premises in the list of his father's estate; that this omission shows that the case premises were not owned by his father and that the said agreement was a forgery; that the petitioner did not raise the claim of ownership in his application for setting aside *ex-parte* proceedings (Ex-A.3); that the petitioner's claim in its entirety is based on fraud, therefore he is not entitled to any relief; and that the petitioner cannot be allowed to remain in possession of the suit property merely because he had filed a suit for specific performance. Learned counsel for respondents No.1(i) to 1(iv) prayed for the petition to be dismissed.

5. I have heard the contentions of the learned counsel for the contesting parties, and perused the record with their able assistance.

FACTUAL BACKGROUND:-

6. The record shows that on 11.04.2015, the late M. Ibrahim (the predecessor of respondents No.1(i) to 1(iv) filed a petition under Section 17 of the I.R.R.O. seeking the petitioner's eviction from the

case premises. The grounds taken in the said eviction petition were; (i) expiry of the lease period, and (ii) personal *bonafide* need of the landlord. Vide order dated 27.11.2015, the petitioner was proceeded against *ex-parte*. On 16.01.2016, M. Ibrahim produced his examination-in-chief in the form of an affidavit dated 15.01.2016. On 30.01.2016, M. Ibrahim's counsel produced documentary evidence, including Mark-A, which is a copy of the lease agreement dated 14.10.2009 alleged to have been executed between the petitioner and M. Ibrahim.

7. After M. Ibrahim produced his affidavit-in-evidence, and his documentary evidence had been brought on record, the petitioner, on 13.02.2016, filed an application for setting-aside the *ex-parte* proceedings. This application was allowed subject to the payment of costs for an amount of Rs.1500/- by the learned Rent Controller vide order dated 22.02.2016. The learned Rent Controller fixed 07.03.2016 for the filing of the written reply to the eviction petition. The petitioner, in his written reply, denied the relationship of landlord and tenant with M. Ibrahim. The position taken by the petitioner in the said written reply was that in August 1999, M. Ibrahim had offered the petitioner's father to purchase the case premises for an amount of Rs.16,00,000/-; that after the said offer was accepted, an amount of Rs.3,00,000/- was paid by the petitioner's father to M. Ibrahim; that the petitioner's father was able to obtain possession of the case premises from its occupant on the intervention of a *jirga*; that in September 1999, an amount of Rs.9,00,000/- was paid by the petitioner's father to M. Ibrahim, whereas the remaining Rs.4,00,000/- was to be paid at the time of the transfer of ownership of the case premises in the petitioner's father's favour; that a formal sale agreement dated 03.09.1999 was executed between M. Ibrahim and the petitioner's father; that in the said sale agreement, M. Ibrahim acknowledged the receipt of Rs.9,00,000/-; that thereafter M. Ibrahim avoided the fulfillment of his obligation to transfer the case premises to the petitioner's father; and that the rent agreement relied upon by M. Ibrahim was bogus.

8. If a party whose eviction is sought denies the relationship of landlord and tenant with the party seeking his eviction, the Rent Controller has to return a definite finding about such a relationship. For deciding the question relating to such relationship between the parties, the Rent Controller has to frame an issue. An issue as to relationship of landlord and tenant between the parties is essentially an issue of fact. In order for the learned Rent Controller to have the jurisdiction to adjudicate upon M. Ibrahim's eviction petition, it had to be established that there existed a relationship of landlord and tenant between him and the petitioner. Since the question relating to the relationship between the petitioner and M. Ibrahim was vital for making the provisions of the I.R.R.O. applicable to the dispute between the petitioner and M. Ibrahim, the sole issue framed by the learned Rent Controller, vide order dated 29.07.2016, was whether there exists a relationship of landlord and tenant between the said parties. The onus for proving this issue was placed on M. Ibrahim.

9. After the framing of the said issue, M. Ibrahim appeared as AW.2 and produced a fresh affidavit-in-evidence (Exh.A.2), whereafter he was cross-examined. However, a copy of the lease agreement dated 14.10.2009 alleged to have been executed with the petitioner was not exhibited. Abdur Rehman, who is M. Ibrahim's son, gave evidence as AW.1. Umer Tanveer Butt (the petitioner) appeared as RW.1. The petitioner produced his affidavit-in-evidence as Exh.-R1.

10. On 24.11.2016, M. Ibrahim moved an application for summoning the stamp vendor as a witness along with the record pertaining to issuance of the stamp paper whereon, according to him, the lease agreement dated 14.10.2009 was scribed. The ground taken in the said application was that during cross-examination, the petitioner had denied the execution of the lease agreement dated 14.10.2009 which necessitated summoning the stamp vendor. The learned Rent Controller dismissed the said application vide order dated 10.01.2017. The relevant portion of the said order reads as follows:-

> ***"...Instant application for summoning of the stamp vendor has been moved by the petitioner at this belated stage without giving any plausible and satisfactory reasons in the application. Even otherwise, one preliminary issue has been framed in the instant ejectment petition and sufficient material is available on record to decide the real controversy between the parties on merits."***
> **(Emphasis added)**

11. The said order dated 10.01.2017 was not assailed by M. Ibrahim at any stage. Vide order and decree dated 01.02.2017, the learned Rent Controller allowed the eviction petition and held that a relationship of landlord and tenant existed between M. Ibrahim and the petitioner. Furthermore, the petitioner was directed to hand over vacant possession of the case premises to M. Ibrahim within a period of thirty days. The said order and decree dated 01.02.2017 was assailed by the petitioner in an appeal before the Court of the learned Additional District Judge, Islamabad. Vide order and decree dated 03.04.2017, the said appeal was dismissed. The said concurrent orders and decrees passed by the learned Courts below have been assailed by the petitioner in the instant writ petition. During pendency of the instant petition, M. Ibrahim died on 14.04.2018. Vide order dated 24.05.2018 his legal heirs were impleaded as respondents No. 1(i) to 1(iv).

BURDEN OF PROOF FOR SHOWING THAT THERE DOES EXIST A RELATIONSHIP OF LANDLORD AND TENANT BETWEEN THE PARITES:-

12. The object behind the enactment of the I.R.R.O. is set out in its preamble, viz., "*to regulate the relations between the landlords and tenants of rented premises in the Islamabad Capital Territory and to provide for matters ancillary thereto or connected therewith.*" Where there is no relationship of landlord and tenant between the parties before the Rent Controller, he would have no jurisdiction to proceed with the matter. Recently, the Hon'ble Supreme Court in the case of Mian Umar Ikram-ul-Haque Vs. Dr. Shahida Hasnain (2016 SCMR 2186) held that *"[i]f the respondent in a rent matter denied the relationship of tenancy, a question of jurisdictional fact would arise. The doctrine of jurisdictional fact connotes that the jurisdiction of an adjudication forum is dependent upon the ascertainment and determination of certain facts."* Furthermore, it was held as follows:-

> ***"The jurisdictional fact in this context would be whether the relationship of landlord and tenant existed between the parties. If the Rent Controller positively ascertained such a relationship through factual enquiry, he would assume jurisdiction, otherwise the petition had to fail because the Rent Controller in that situation would not have any jurisdiction over the parties and consequently the matter before him."***

13. As mentioned above, after the petitioner denied the relationship of landlord and tenant with M. Ibrahim, the learned Rent Controller framed the sole issue of whether there existed such a relationship between the said parties. The onus for proving this issue was placed on M. Ibrahim. The form in which the said issue had been framed obligated M. Ibrahim to prove that there existed a relationship of landlord and tenant between him and the petitioner. Now, Paragraph 10 of the learned Rent Controller's order dated 01.02.2017 shows that he was cognizant of the fact that the burden to prove the said issue had been placed on M. Ibrahim, but nonetheless he took the view that the *"initial onus"* was on the petitioner, and that the latter had not been able to shift the burden on M. Ibrahim. For the purposes of clarity paragraph 10 of the said order is reproduced herein below:-

> ***"10. The onus to prove the sole issue was upon the petitioner, but as per the norms of law, initial onus is always upon a person, who alleges a fact, therefore, the initial burden was on the respondent to discharge his onus, however, as discussed in detail, respondent [UmerTanveer Butt] was unable to shift the initial burden on the petitioner, therefore, the evidence of the petitioner [M. Ibrahim] is not required to be discussed…"***

14. Although the provisions of the *Qanun-e-Shahadat* Order, 1984 are not strictly applicable to the proceedings before the Court of the Rent Controller, once the Rent Controller frames an issue and places the burden of proof on a certain party, he cannot absolve such party from such burden. Parties are expected to lead evidence in accordance with the onus placed at the time of framing issues. At no material stage had M. Ibrahim applied for the said issue to be amended so that the onus of proof was placed on the petitioner. The learned Rent Controller simply discharged M. Ibrahim from the onus placed on him of proving that there was a relationship of landlord and tenant between him and the petitioner.

The learned appellate Court did not give any finding as to whether it was lawful for the learned Rent Controller not to have required M. Ibrahim to prove that there existed such a relationship between him and the petitioner.

15. I am of the view that when a respondent in an eviction petition denies the relationship of landlord and tenant with the party seeking his eviction, he is, in effect, asserting a negative fact. In the instant case, the petitioner denied the relationship of landlord and tenant with M. Ibrahim not just in his written reply to the eviction petition but also in his evidence. Therefore, even if it assumed that the initial burden was on the petitioner, he had discharged it by denying such relationship. After such denial, it was for M. Ibrahim to have proved such relationship. By not requiring M. Ibrahim to discharge the burden of proving that there existed a relationship of landlord and tenant between him and the petitioner, the learned Court below committed a jurisdictional irregularity. In holding so, reliance is placed on the following case law:-

(i) In the case of Kamran Butt Vs. Lt. Col. Syed Iftikhar Ahmad (PLD 1991 Karachi 417), it was held that "*[i]t is a settled proposition of law that onus to prove, existence of relationship of landlord and tenant between the parties, is on the landlord who seeks eviction of his tenant*." In the said case the landlord had filed a copy of the rent agreement but had withheld the original. The eviction order passed by the Rent Controller was set-aside by the Hon'ble High Court of Sindh since the landlord was unable to prove that the appellant was inducted in the property in question as a tenant.

(ii) In the case of Ghulam Hussain Vs. Noor Shah Ali (1994 MLD 36), the appellant had filed an eviction petition against the respondent, who had denied the relationship of landlord and tenant with the appellant. The Hon'ble High Court of Sindh held that *"[i]t is the appellant, who invoked jurisdiction of the Rent Controller and onus is on him to establish that*

relationship of landlord and tenant exists between him and the respondent.

(iii) **In the case of Mst. Nasira Afridi Vs. Muhammad Akbar (2015 MLD 171), the Rent Controller had framed an issue with regard to the relationship of landlord and tenant without placing the burden of proof on any party. Although, such an omission was held by the Hon'ble Lahore High Court to be an *"improper exercise of jurisdiction"* it was also held that the burden of proof to establish the relationship of landlord and tenant was on the party seeking the eviction order. In holding so, reliance was placed on the law laid down in the case of Abdul Haque Vs. The State (PLD 1996 SC 1) wherein it was held that *"[a]ny person who comes to the Court and seeks its judgment dependent upon existence of the facts, he has to prove such facts, for he who asserts must prove the same."***

WHETHER THERE WAS SUFFICIENT EVIDENCE ON THE RECORD TO SHOW THAT THERE EXISTED A RELATIONSHIP OF LANDLORD AND TENANT BETWEEN M. IBRAHIM AND THE PETITIONER:-

16. The mere fact that the petitioner had not been able to prove that he was the owner of the case premises would not be sufficient for allowing M. Ibrahim's eviction petition. For M. Ibrahim's eviction petition to succeed, he had to prove that the petitioner was his tenant. The term 'tenant' has been defined in the Section 2(j) of I.R.R.O as follows:-

> *(j) 'tenant' means any person who undertakes or is bound to pay rent as consideration for the possession or occupation of a building or rented land by him or by any other person on his behalf, and includes,---*
>
> *(i) any person who continues to be in possession or occupation after the termination of his tenancy; and*
>
> *(ii) in the event of the death of the tenant, the members of his family who continue to be in possession or occupation of the building or rented land.*
> **(Emphasis added)**

17. To show that the petitioner was M. Ibrahim's tenant, the latter had to prove that the petitioner either undertook or was bound to pay the rent as consideration for the possession or occupation of the case premises. This could have been done by production of a

lease agreement (in accordance with the law), rent receipts or witnesses to depose in support of the eviction petition.

(i) Sale agreement dated 03.09.1999:-

18. The edifice of the petitioner's case is based on the sale agreement dated 03.09.1999 (Mark-D/A). The petitioner asserts that his entry into the case premises was not on the basis of any lease agreement but on the basis of the said sale agreement. The petitioner did not produce the original sale agreement in the proceedings before the learned Rent Controller. The petitioner's stance was that the original sale agreement was taken from his father by M. Ibrahim to be submitted to the Capital Development Authority. M. Ibrahim denied the execution of the said agreement. Although F.I.R.No.350/17 dated 10.10.2017 police station Kohsar, Islamabad had been registered against the petitioner on M. Ibrahim's complaint that a forged sale agreement had been produced before the Court by the petitioner, the said F.I.R. was cancelled primarily on the ground that the dispute between the parties was of a civil nature.

19. It was mentioned in the said agreement that physical possession of the case premises had been handed over by M. Ibrahim to the petitioner's father. In the said agreement, it is also acknowledged that out of the total sale consideration of Rs.16,00,000/-, only Rs.4,00,000/- remained to be paid on the date of transfer of the ownership of the case premises to the petitioner's father.

20. It was not until 15.06.2017 that the petitioner filed a suit for specific performance of the agreement to sell dated 03.09.1999 against M. Ibrahim. It ought to be borne in mind that the said suit was filed during the pendency of the instant petition. The mere fact that the petitioner had filed a civil suit for the specific performance of the sale agreement dated 03.09.1999 cannot be a valid ground for allowing the petitioner to remain in occupation of the case premises. It is well settled that an agreement to sell immovable property would neither create nor purport to create any right or interest in such property nor would ownership stand transferred to the vendee. It confers only a right of enforcement of the promise.

An agreement to sell is not a title document and has never been treated as an alienation. Reference in this regard may be made to law laid down in the cases titled as Mst. Rasheeda Begum Vs. Muhammad Yousaf (2002 SCMR 1089), M. Ibrahim Vs. Fateh Ali (2005 SCMR 1061), and Shah Muhammad Vs. Atta Muhammad (2005 SCMR 969). Hence, unless and until the suit for specific performance instituted by the petitioner is decreed by the learned Civil Court, he cannot claim to have become an owner of the case premises.

21. It is an admitted position that when the eviction petition was filed, the title in the case premises vested in M. Ibrahim. Had the title in the case premises not vested in M. Ibrahim, the occasion for filing a civil suit by the petitioner would not have arisen. M. Ibrahim had appeared as AW-2, and in his cross-examination deposed that the ownership of the case premises was transferred to him on 24.03.2016 pursuant to an order dated 27.11.2015 passed by the learned Civil Court executing the consent decree dated 06.09.2001. Furthermore, the petitioner appeared as RW-1 and during his cross-examination he admitted that he or his father did not pay taxes for the case premises because the property was not transferred in their names.

22. Whether or not the petitioner's father had purchased the case premises is for the learned Civil Court to determine. Presently, there is no decree with respect to the ownership of the case premises in favour of the petitioner or his father. It is well settled that a person cannot remain in occupation of rented premises simply because he asserts to be the owner of such premises and has instituted a suit for specific performance or declaration in this regard. There is a catena of case law in support of the proposition that ejectment proceedings could not be stayed or stalled on the plea that tenants in possession were holding an agreement to sell. Reference in this regard may be made to the following cases of Iqbal Vs. Rabia Bibi (PLD 1991 SC 242), Jumma Khan Vs. Zarin Khan (PLD 1999 SC 1101), Barkat Masih Vs. Manzoor Ahmad (2006 SCMR 1068), Abdul Rasheed Vs. Maqbool Ahmed (2011 SCMR 320), Gohar Ali Shah Vs. Shahzada Alam (2000

MLD 82), Muhammad Akmal Vs. Faisal Saeed Mirza (2004 CLC 862), Muhammad Parvez Vs. Additional Rent Controller, Lahore (2013 YLR 1881), and Refhat Hamidee Vs. Abdul Aziz (2013 YLR 1898). In the case of Muhammad Rafique Vs. Farida Khan (2016 CLC 1451), I have had the occasion to hold as follows:-

> ***"It has become commonplace for unscrupulous tenants/litigants to avoid eviction proceedings by contending that the rented premises had been sold to them. Unless and until the petitioner was able to establish his claim for specific performance on the basis of the alleged sale agreement through a judgment (not an interim order) in his favour passed by a Court of competent jurisdiction, respondent No.1 would continue to enjoy the status of being the owner and landlord of the rented premises. Pendency of a civil suit does not give a license to the tenant to remain in occupation of the rented premises. There is a catena of case law in support of the proposition that ejectment proceedings could not be stayed or stalled on the plea that tenants in possession were holding an agreement to sell. Mere pendency of a suit for declaration or specific performance of an agreement is no ground to avoid eviction of tenants, who claim to have purchased the rented premises."***

23. In view of the above, the factum as to the filing of the suit for specific performance by the petitioner shall have no bearing on my decision on the question whether there existed a relationship of landlord and tenant between M. Ibrahim and the petitioner.

(ii) Payment of rent:-

24. The relationship of landlord and tenant comes into existence as the result of an agreement. Payment of rent is a normal incident of tenancy. In the case of Mst. Nasira Afridi Vs. Muhammad Akbar (2015 MLD 171), the Hon'ble Lahore High Court held that eviction could not be sought before the Rent Controller without establishing the relationship of landlord and tenant, and that payment of rent was *sine qua non* for the relationship of landlord and tenant. One of the most important circumstances from which inference as to the existence of such relationship may be drawn is the payment of rent. The fact that no rent was paid by the person in possession of the premises would negate the existence of such relationship. However, the non-payment of rent in the presence of a rent agreement, express or implied, would not by itself be sufficient to hold that there does not exist such relationship. In the case at hand not a single rent receipt had been produced by M. Ibrahim in support of his eviction petition. M. Ibrahim, during his cross-

examination, admitted that no rent receipts exist. His evidence is also silent as to the quantum of rent, if any, received from the petitioner or his father.

(iii) <u>Lease agreement dated 14.10.2009</u>:-

25. The basis on which M. Ibrahim asserted the relationship of landlord and tenant with the petitioner was the lease agreement dated 14.10.2009. In his affidavit-in-evidence, M. Ibrahim (AW-2) had deposed that through a written lease agreement dated 14.10.2009, the case premises had been taken on rent by the petitioner from 01.03.2010 to 01.03.2015. It is an admitted position that a copy of the lease agreement dated 14.10.2009 had not been filed by M. Ibrahim along with the eviction petition. It was not filed along with M. Ibrahim's affidavit-in-evidence. As mentioned above, a copy of the said lease agreement was produced as Mark-A by the learned counsel for M. Ibrahim when his statement was recorded on 30.01.2016. This was after AW.2's *ex-parte* evidence was recorded, and before the *ex-parte* proceedings were set- aside.

26. In holding that there existed a relationship of landlord and tenant between M. Ibrahim and the petitioner, both the learned Courts below referred to the copy of the lease agreement produced by M. Ibrahim's learned counsel on 30.01.2016 as Mark-A. The learned Courts below did not apply their judicial mind to the question whether such a document could be read in evidence in view of the fact that (a) it was not produced by M. Ibrahim but by his learned counsel, whose statement was not under oath and who could not be cross-examined, and (b) it was produced after the petitioner was proceeded against *ex-parte* and before the *ex-parte* proceedings were set-aside.

27. Now, M. Ibrahim's earlier affidavit-in-evidence dated 15.01.2016 and the documents produced by his learned counsel prior to the setting aside of the *ex-parte* proceedings were not resubmitted in evidence. Nonetheless the learned Rent Controller as well as learned appellate Court took such documents into consideration while deciding the eviction petition and the appeal. The learned Courts below concurrently erred by not appreciating that M. Ibrahim's evidence recorded prior to the *ex-parte*

proceedings being set-aside was liable to be discarded. The learned Rent Controller, while setting aside the *ex-parte* proceedings vide order dated 22.02.2016, had not saved the evidence recorded by M. Ibrahim or the documents produced by his learned counsel. No explanation was put forth by the learned counsel for respondents No.1(i) to 1(iv) as to why the lease agreement dated 14.10.2009 was not produced by M. Ibrahim (AW-2) along with the eviction petition or both his affidavits-in-evidence. Since the said lease agreement was neither a public document nor an admitted document, its copy could not have been tendered in evidence by M. Ibrahim's learned counsel. In the case of Muhammad Nawaz Vs. Shahida Parveen (PLD 2017 Islamabad 375), this Court held as follows:-

> ***"31. In certain circumstances, the counsel for either party may produce documents which are certified copies of public or judicial record. Documents cannot be produced by the counsel for a party in order to plug the loopholes or to address the deficiencies in the such party's evidence. In the case of BABAP Enterprises Vs. United Bank Limited (2011 CLC 1534), the Hon'ble Lahore High Court held that documents that could be exhibited or tendered in evidence by a witness, could not be exhibited in the statement of the counsel for a party. The statement of the counsel is not on oath and he is not cross-examined by the opposing party on the veracity and evidentiary value of the documents so tendered. In the case of Muhammad Ashraf Vs. Shah Noor Khan (1996 MLD 1819), it has been held inter-alia that documents which were required to be proved in accordance with the provisions of the Qanoon-e-Shahadat Order, 1984, could not be tendered in evidence through bare statement of the counsel for a party and got exhibited even if there was no objection from the other side."***

28. The petitioner, in his written reply to the eviction petition, had not just denied the relationship of landlord and tenant with M. Ibrahim but had also explicitly pleaded that the lease agreement was *"fake and bogus."* After such a pleading, it became essential for M. Ibrahim to have produced the original lease agreement executed with the petitioner in his evidence. Neither M. Ibrahim (AW.2), nor his son, Abdur Rehman (AW.1), in their statements gave any explanation as to why the original rent agreement could not be tendered in evidence. M. Ibrahim did not even produce the marginal witnesses of the lease agreement to prove its execution. Learned counsel for M. Ibrahim could not present any justification for said witnesses not producing the original rent agreement. True,

the proceedings before the learned Rent Controller are in the nature of an inquiry and the provisions of Civil Procedure Code, 1908 and the *Qanun-e-Shahadat* Order, 1984 are not strictly applicable to such proceedings, but where the existence of the relationship of landlord and tenant is denied by the party whose eviction is sought, and the sole basis on which an applicant asserts the existence of such a relationship is a disputed copy of a rent agreement, it becomes essential for the original rent agreement to be produced in evidence unless a plausible explanation is given for not producing the same.

29. Be that as it may, the vital question is whether the *ex-parte* evidence recorded in the absence of the petitioner prior to the setting aside of the *ex-parte* proceedings is legal evidence which could be looked into by the learned Rent Controller and made the basis of the eviction order. It is pertinent to bear in mind that the learned Rent Controller, while setting aside the *ex-parte* proceedings, did not save the evidence produced by M. Ibrahim or the documents produced by his learned counsel. In fact after the setting aside of the *ex-parte* proceedings, M. Ibrahim had filed a fresh affidavit-in-evidence dated 06.09.2016. This is because with the setting aside of the *ex-parte* proceedings, the clock was taken back to the stage when the petitioner had not filed his reply to the eviction petition. That is why after the setting aside of the *ex-parte* proceedings the petitioner was given an opportunity to file his reply to the eviction petition. After the petitioner filed his reply and the learned Rent Controller framed the issue, M. Ibrahim filed another affidavit-in-evidence dated 06.09.2016. In the subsequent affidavit-in evidence, M. Ibrahim did not depose that he relied on the documents that had earlier been produced by his learned counsel. M. Ibrahim could have applied for his *ex-parte* evidence to be treated as his evidence after the setting aside of the *ex-parte* proceedings. This M. Ibrahim did not do. Hence, the learned Rent Controller could not have relied on the documents produced by M. Ibrahim's learned counsel prior to the setting aside of the *ex-parte* proceedings while allowing the eviction petition.

30. It is well settled that the result of setting aside an *ex-parte* decree is that all the proceedings taken from the stage of non-appearance of the defendant become ineffective. By the same analogy when the order to proceed *ex-parte* as well as the *ex-parte* proceedings are set-aside, the clock is taken back to the stage when the order to proceed *ex-parte* was passed. In such a scenario the *ex-parte* evidence recorded after the passing of the order to proceed *ex-parte* is liable to be discarded and the proceedings which had taken place in the defendant/respondent's absence will have to be taken afresh in his presence. It is not open to the Court to form its opinion on material which is not legal and reliable evidence. The legal effect of setting aside the *ex-parte* proceedings is that all that was done from the date of the respondent/defendant's non-appearance in Court becomes *non est* as against him. Therefore, M. Ibrahim's *ex-parte* evidence and the documents produced by his learned counsel cannot bind the petitioner after the setting aside of the *ex-parte* proceedings. The mere fact that M. Ibrahim submitted a fresh affidavit-in-evidence shows that he was also aware that his earlier affidavit-in-evidence as well as the documents produced by his learned counsel were of no evidentiary value after the *ex-parte* proceedings were set-aside. The natural result of the *ex-parte* proceedings being set-aside was that the parties were relegated back to the same position as they occupied when the order to proceed *ex-parte* was passed. Therefore, it is my view that the learned Courts below concurrently misread the evidence and committed a jurisdictional irregularity by holding that there existed a relationship of landlord and tenant between M. Ibrahim and the petitioner on the basis of the copy of the lease agreement dated 14.10.2009 produced by the M. Ibrahim's learned counsel prior to the setting aside of the *ex-parte* proceedings. In holding so reliance is placed on the following case law:-

(i) In the case of Raza Muhammad etc. Vs. Jumma Khan (NLR 1991 Civil 148), it was held that the real object of moving the application under Order 9 Rule 7 C.P.C. is to 'set the clock back,' so that parties are relegated to the position which

stood on the date when *ex-parte* proceedings were drawn. Thus if the defendant is able to show 'good cause' about his absence then the trial Court would invariably reverse the action, and all effective proceedings taken in the matter shall be set-aside and deemed to have been wiped-off.

(ii) In the case of Sohaj Khan etc. Vs. Registrar District Court Jhelum (1988 CLC 973), it was held inter alia that the effect of an order setting aside an *ex-parte* decree is that all proceedings from the stage of the defendant's non-appearance are set-aside and do not bind him, that is, if the defendant's non-appearance is condoned by the setting aside of the *ex-parte* decree, evidence recorded in his absence will not bind him.

(iii) In the case of Mst. Lakshmi Devi Vs. Roongta (AIR 1962 Allahabad 381), the question was whether the statement of the plaintiff's witness recorded in the absence of the defendant resulting in an *ex-parte* decree can be admissible in evidence at a later stage after the *ex-parte* decree had been set-aside and can form the basis of a decree. It was held as follows:-

> ***"A decree can be passed against defendant only on admissible material and any evidence produced in his absence cannot be utilised against him and treated admissible material. The earlier ex parte decree against the appellants having been set aside they became entitled to be relegated back to the stage at which they were absent and could insist that everything which had been done in their absence should be done again in their presence. ... On the basis of the evidence recorded in their absence, the decree in question could not, therefore, be passed against them."***

(iv) In the case of Phani Bhusan Mukherjee Vs. Phani Bhusan Mukherjee (AIR 1957 Calcutta 170), it was held that the effect of the order setting aside an *ex-parte* decree is that all proceedings subsequent to the stage of the defendant's non-appearance would no longer bind him. Furthermore, it was held that as the defendant's non-appearance was condoned by the setting aside of the *ex-parte* decree, the evidence which was recorded in his absence will also not be admissible against him.

(v) In the case of Selvarayan Samson v. Amalorpavanadam (AIR 1928 Madras 969), it was held that when the Court sets aside an *ex-parte* decree, it really sets aside all the proceedings from the defendant's non-appearance.

31. Even if it is assumed only for the sake of argument that M. Ibrahim's affidavit-in-evidence and the documents produced by his learned counsel prior to the setting aside of the *ex-parte* proceedings could be taken into consideration by the learned Rent Controller, the absence of the petitioner did not dispense M. Ibrahim's responsibility to prove his case to the satisfaction of the learned Rent Controller. He had to discharge his onus in the same manner as he should have done in the presence of the petitioner. He had to prove his case with the help of the material which was legal evidence. His burden was in no way lightened by the absence of the petitioner. In fact, the responsibility of the learned Rent Controller increased as it had to reach its conclusions without the assistance of the petitioner who, if present, would have objected to the production of a copy of the disputed lease agreement by M. Ibrahim's learned counsel. The learned Rent Controller could not have passed an eviction order in M. Ibrahim's favour unless his claim was established on the basis of admissible evidence. A copy of the lease agreement dated 14.10.2009 produced by M. Ibrahim's learned counsel as 'Mark-A', prior to the *ex-parte* proceedings being set-aside, cannot be termed as legal evidence. It goes without saying that the photocopy of a document having been produced as 'Mark' has no evidentiary value. In the case of State Life Insurance Corporation of Pakistan Vs. Javaid Iqbal (2011 SCMR 1013) the Hon'ble Supreme Court observed that "*we are not convinced that, such a document, which has not been produced and proved in evidence but only "marked", can be taken into account by the Courts as a legal evidence of a fact.*"

32. M. Ibrahim, in his affidavit-in-evidence dated06.09.2016 (Exh. A.2), had also deposed that the petitioner's father was his tenant and in this regard the lease agreement was executed for a period of 10 years with effect from 30.03.2000 to 30.03.2010, and that the said lease agreement was duly attested by the Notary Public on

30.03.2000. This agreement was also not produced or brought on record at any stage by M. Ibrahim. M. Ibrahim had appeared as AW.2 and in his cross-examination recorded on 06.10.2016, he had deposed *inter alia* that the lease agreement between himself and the petitioner's father had not been brought on the record.

33. Section 5 of the I.R.R.O. provides *inter alia* that every agreement for letting out a building or rented land shall be in writing. M. Ibrahim, by not producing/exhibiting the rent agreement alleged to have been executed between him and the petitioner or the rent agreement alleged to have been executed between him and the petitioner's father, leads me to the view that M. Ibrahim did not discharge the onus of proving that he had a relationship of landlord and tenant with the petitioner. Such an onus cannot be held to have been discharged by a bare deposition that that there existed such a relationship.

34. Eviction proceedings under Section 17 of the I.R.R.O. can be instituted for the eviction of a 'tenant' as defined in Section 2(j) of the I.R.R.O. Absence of the relationship of landlord and tenant with the person whose eviction is sought denudes the Court of the Rent Controller of the jurisdiction to proceed with the matter. An owner of immovable property has other remedies under the law to seek the eviction of an illegal occupant from such property. Reference in this regard may be made to the judgments reported as Kamran Butt Vs. Lt. Col. Syed Iftikhar Ahmad (PLD 1991 Karachi 417), Mst. Roshan Bi Vs. Munawar Hussain Gill (1987 MLD 3263), Mst. Nasira Afridi Vs. Muhammad Akbar (2015 MLD 171), and Hafeezuddin Vs. Badaruddin (PLJ 2003 Karachi 134).

35. I am cognizant of the fact that the petitioner has assailed concurrent orders and decrees passed by the learned Courts below, and that the scope for interference by this Court in exercise of jurisdiction under Article 199 of the Constitution is narrow. In the case of Shajar Islam Vs. Muhammad Siddique (PLD 2007 SC 45), it was held as follows:-

> ***"[It 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 or 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."

36. Since for the reasons mentioned above, I find the concurrent orders passed by the learned Courts below to be the result of misreading of evidence, and derogation of the law laid down by the Superior Courts the said orders are liable to be set-aside. Therefore, this instant petition is allowed; the order dated 01.02.2017 passed by the learned Rent Controller and the order dated 03.04.2017 passed by the learned appellate Court are set-aside; and the matter is remanded to the learned Rent Controller for a decision afresh. Since the proceedings pursuant to Section 17 of the I.R.R.O. are not a trial stricto senso but an inquiry, the learned Rent Controller may afford another opportunity to the legal heirs of M. Ibrahim to prove that there existed a relationship of landlord and tenant between their late father and the petitioner. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**