

Form No: HCJD/C.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Writ Petition No. 3783 of 2015

Muhammad Anwar

Vs.

Additional District & Sessions Judge and 2 others

**Petitioner by: Ch. Abdur Rehman Bajwa,
Advocate.**

**Respondent No.2 by: Mr. Muhammad Wajid
Hussain Mughal, Advocate.**

Date of Hearing: 15.04.2016

AAMER FAROOQ, J.- Through the instant petition the petitioner has assailed judgement dated 18.11.2015 passed by respondent No.1 whereby the appeal filed by the petitioner against order dated 30.07.2015 passed by respondent No.3 was dismissed.

2. The facts, in brief, are that respondent No.2 filed an eviction application under section 17 of Islamabad Rent Restriction Ordinance, 2001 against the petitioner with respect to the properties comprising shops No.1 2,& 3, ground floor, 1st floor and 2nd floor, Block No.12-K, G-7 Markaz, Islamabad (the property). The eviction application was filed on the grounds of default in payment of rent, expiry of lease, violation of terms and conditions of lease and personal *bona fide* need. The petitioner in his reply denied the relationship of landlord and tenant between himself and respondent No.2 and it was alleged that the property was obtained on lease from

the father of respondent No.2. Out of the pleadings of the parties, respondent No.3 framed issues including issue of relationship. The eviction application of respondent No.2 was allowed vide order dated 30.07.2015. The appeal was filed by the petitioner which was dismissed vide the impugned judgement dated 18.11.2015.

3. Learned counsel for the petitioner *inter alia* submitted that the case of respondent No.2 is of no evidence inasmuch as the affidavit tendered during evidence before respondent No.3 is not in the prescribed form and did not qualify as an affidavit. In this behalf it was further contended that in the affidavit the name of the Court; title of the case is not mentioned and even the same is not verified. In support of his referred argument learned counsel placed reliance on the case titled *Bashir Ahmed v. Abdul Wahid* (PLD 1995 Lahore 98), *Master Muhammad Bashir v. Moinuddin* (1990 CLC 703), *Habib Bux v. Zahoor ul Hasan* (1986 CLC 1119), *Mughees ud Din Mirza v. Mst. Maryam Masood and 3 others* (2008 CLC 1287). It was further contended that respondent No.2 had filed the petition through power of attorney which is neither registered nor is on the stamp paper. Learned counsel in this behalf further submitted that the power of attorney is required to be compulsorily registered under section 17 of the Registration Act, 1908 and since it is not, therefore, does not confer a valid authority to Muhammad Makhdoom/attorney. It was also contended that neither the power of attorney is on the stamp paper nor any revenue stamps are appended on it, therefore, it is of no value. In support of his contention learned counsel placed reliance on the case titled *Zafarul Islam v. Mrs. Azra Malik* (PLD 1991 Karachi 377). Learned counsel also pointed out that the case of

respondent No.2 in the eviction application was that he had purchased the property in question from his father, however, it was contended that under the provisions of Islamabad Rent Restriction Ordinance, 2001 notice of change in ownership was required to be served which was not done in the instant case, hence the petitioner has no notice of change in the ownership and cannot be held responsible for default and also has no relationship with respondent No.2. Lastly, it was contended that the attorney of respondent No.2 appearing in the witness box conceded that he was also the attorney of father of respondent No.2 and received rent in that capacity.

4. Learned counsel for respondent No.2 *inter alia* submitted that the property in question was transferred to respondent No.2 by his father and notice of change in ownership was duly given to the petitioner; that even otherwise, it is an established principle that filing of eviction application is a sufficient notice. It was further contended that where in a power of attorney power to sale or transfer the rights in an immovable property is not granted the same is not required to be compulsorily registered under section 17 of Registration Act, 1908. In this behalf it was contended that the bare reading of the power of attorney shows that no power to sell or transfer ownership rights in the property have been granted to the attorney, therefore, power of attorney is not required to be registered. It was also submitted that the non-payment of stamp duty does not render a document ineffective and at the best the Court before which such document has been presented can impound the same and impose penalty in addition to the stamp duty under section 35B of the referred Act. In support of his contentions learned counsel placed reliance on the case titled *Abdul Hai v.*

Muhammad Salahuddin (PLD 1967 Karachi 424), *Muhammad Yousaf v. Asif Siddique and another* (PLD 1987 Lahore 659), *Sultan Samundar alias Samundar Khan through Legal heirs v. Muhammad Bashir and 4 others* (2015 MLD 378), *Mrs. Escolastica and 3 others v. Peter D'Souza and 2 others* (1986 CLC 1472) , *Nawabzada Mir Balach Khan Marri through Attorney v. Appellate Election Tribunal, Balochistan through Registrar, Balochistan High Court and 2 others* (PLD 2003 Quetta 35) & *Sahibzada Anwar Hamid v. Messrs Topworth Investments (Macau) Ltd. through Chairman and 5 others* (2003 YLR 2843). It was also emphasized that the arguments advanced in the writ petition were neither agitated before the learned Rent Controller nor Appellate Authority, hence cannot be raised in the instant writ petition. It was further contended that that the title document is a proof of ownership of a person. In this behalf reliance was placed on the case titled *Hafiz Muhammad Shahid Nawaz v. Hafiz Muhammad Saeed* (2010 CLC 1941) and *Shajar Islam v. Muhammad Siddique and 2 others* (PLD 2007 Supreme Court 45). With respect to the affidavit, it was contended that it is an established principle that the affidavit when tendered in evidence, even if it is not in prescribed form, becomes part of the evidence as examination in chief of deponent, therefore, even if it is not in prescribed form the same is immaterial.

5. Respondent No.2 filed an eviction application against the petitioner on the ground that the lease agreement was executed between father of respondent No.2 and the petitioner on 20.04.2009 and the monthly rent was fixed as Rs.120,000/- per month which after enhancement the respondent was paying @ Rs.145,000/-

per month till 20.06.2013. It was also alleged that the lease expired on 30.06.2013 and the petitioner did not pay monthly rent from July to November 2013. It was also alleged that the property was transferred in the name of respondent No.2 on 07.10.2010 vide CDA letter No.CDA/EM-27(520)/74/701 and the change in the ownership of the property was duly intimated to the petitioner on 08.11.2010, hence respondent No.2 in eviction application alleged expiry of lease agreement on 30.06.2013, default in payment of rent from July to November 2013, violation of lease agreement by way of structural changes without consent of respondent No.2 and personal *bona fide* need. The petitioner denied relationship with respondent No.2 as tenant. It was further alleged that the lease was renewed by Dr. Mushtaq Ahmed Ghughtai (father of the petitioner) through an oral arrangement with the petitioner. Learned Rent Controller framed issues and recorded evidence after which the eviction application of respondent No.2 was allowed. Appeal filed by the petitioner was dismissed vide impugned judgement.

6. The basic thrust of the arguments by the petitioner before this Court is that the case against the petitioner is of no evidence inasmuch as the affidavit tendered in evidence of the attorney of respondent No.2 is not duly attested, does not bear the name of the Court and also the title of the parties. In this behalf learned counsel for the petitioner placed reliance on the case titled *Habib Bux v. Zahoor ul Hasan* (1986 CLC 1119) wherein the Hon'ble Sindh High Court observed that the affidavit verified as true to knowledge and belief of deponent, without clearly stating how much of statements were true to knowledge of deponents and how

much on information or belief, and without stating source of information or belief would be valueless and could be ignored. Similarly, in case titled *Master Muhammad Bashir v. Moinuddin* (1990 CLC 703) the Hon'ble Sindh High Court held that non-appearance of deponent before Oath Commissioner or before anybody or have statement on Oath makes the affidavit inadmissible in evidence as such. Similarly, in *Bashir Ahmed v. Abdul Wahid* (PLD 1995 Lahore 98) the Hon'ble Lahore High Court reproduced the requirements of the affidavit according to High Court (Lahore) Rules and Orders Volume-IV Part-B Chapter 12-B Rules 8, 9, 14 & 15 whereby the affidavit is required to be verified in accordance with the verification in the form in Rule 16 of the High Court Rules and Orders and also to contain the name of the Court and title of the proceedings.

7. On the contrary it has been submitted by the learned counsel for respondent No.2 that the proceedings before the learned Rent Controller are in the capacity as *quasi judicial* and not a Court. Reliance was placed on the case titled *Khadim Mohy ud din and Mrs. S. Mahmud v. Ch. Rehmat Ali Nagra and Mst. Aziz Begum* (PLD 1965 Supreme Court 459). Moreover, in *Hameed Jilani Tiwana. V. Abdul Aziz Ghafoor Khan and 2 others* (2005 MLD 1232) the Hon'ble High Court observed that the proceedings before the learned Rent Controller are not judicial proceedings and Code of Civil Procedure and Qanoon-e-Shahadat are not strictly applicable. The Hon'ble Lahore High Court in case titled *Muhammad Yaqoob through legal heirs. V. Sh. Muhamamd Anwar through legal heirs* (PLD 2011 Lahore 446) examined the nature of the affidavit submitted in the proceedings before the learned Rent Controller and observed that it is

a settled principle of law that if an objection was not taken before original Court of jurisdiction it could not be allowed at the appellate stage. It was further observed as follows:

“No doubt affidavits in this case are not as per High Court Rules and Order Volume IV Part B Chapter 12-B Rules 8, 9, 12, 14 and 15 but this irregularity stands cured in the circumstances of this case. The witnesses when appeared before the learned trial Court they made a statement on oath that they have submitted their affidavit and contents of affidavit are correct, this means that the contents of affidavit have been admitted by the deponent before the court on oath and as such it will be deemed the examination-in-chief of the witness on oath. The appellants cross-examined all the witnesses without raising the objection that affidavits are not according to law and rules and rightly so because the witnesses have taken oath before the court accepting the contents of affidavits. The admission on the part of witnesses about the contents on oath is sufficient to negate the objection of learned counsel for appellant. Learned counsel for appellants has failed to point out any authoritative judgment whereby the admission on oath by the witnesses before the court about the contents of affidavit was refused on the sole ground that contents of statement are not attested by an Oath Commissioner.

6. The affidavits, if were not attested by the Oath Commissioner maximum it can be said that it was written examination-in-chief of witnesses proposed to appear. When the witness after, taking oath before the court states that he accepts the contents of his written statement, it will be considered the examination-in-chief of witnesses in the absence of any objection. The appellants have cross-examined all witnesses in detail but on merits they lost their case before two courts below. It is also an admitted fact on record that appellants have not taken this objection before the learned First Appellate Court and continued to build their case on the basis of available evidence. Now they have suddenly somersaulted and tried to wriggle out from the ejectment orders. In these circumstances the appellants could not be allowed to take this objection in second appeal in violation of his earlier stance.”

8. In light of above judgement of the Hon'ble Lahore High Court even if an affidavit is not in the

prescribed form and the deponent enters the witness box on Oath and presents himself for cross-examination then the affidavit is taken as a written examination in chief of the deponent. In the instant case the attorney of respondent No.2 entered the witness box for cross-examination, however, at the time of evidence no objection regarding the form of affidavit was taken by the petitioner. The affidavit was tendered in evidence as Ex.A-1, therefore, became part of his examination in chief and the petitioner cross-examined him on the basis thereof. In this behalf notwithstanding the principles laid down in the case law relied upon by the learned counsel for the petitioner they are distinguishable in the facts and circumstances of the case. Even otherwise, the judgement of the Hon'ble Lahore High Court is later in time and holds the field.

9. The petitioner has also challenged the power of attorney in favour of Muhammad Makhdoom on the ground that the same is neither registered nor bears the stamp duty. Reliance was placed on *Zafarul Islam v. Mrs. Azra Malik* (PLD 1991 Karachi 377). Under section 17 of Registration Act, 1908 where a document creates right, title or interest whether vested or contingent in immovable property of value of Rs.100/- onwards the same is required to be registered compulsorily besides payment of stamp duty. The bare reading of the power of attorney in the instant case shows that it does not confer on the attorney any right, title or interest in the immovable property, rather it has been given in order to initiate legal proceedings or defend the same with respect to the property in question. Such like documents are not compulsorily registerable. Moreover, the power of attorney is duly attested by the Consulate of Pakistan

in UK, therefore, is in accordance with the mandate of the law. Reliance is placed on the case titled *Mrs. Escolastica and 3 others v. Peter D'Souza and 2 others* (1986 CLC 1472), *Nawabzada Mir Balach Khan Marri through Attorney v. Appellate Election Tribunal, Balochistan through Registrar, Balochistan High Court and 2 others* (PLD 2003 Quetta 35) & *Abdul Hai v. Muhammad Salahuddin* (PLD 1967 Karachi 424).

10. The petitioner in reply to the eviction application as well as appeal had not taken these legal objections and for the first time has raised in this Court. In response to the objections taken by respondent No.2 as well as query of the Court it was contended that since the questions are legal, therefore, can be taken. In the interest of justice, the petitioner was allowed to raise such objections and findings thereon have been given hereinabove.

11. Respondent No.2 had filed the eviction application on the basis/ground mentioned above and had duly proved the same. The petitioner in the instant petition has failed to point out any legal or factual infirmity in the findings of the Courts below which calls for interference by this Court in its jurisdiction under Article 199 of the Constitution. It is an established principle that the findings on facts rendered by the Courts below cannot be interfered with under Article 199 of the Constitution unless there is some illegality or jurisdictional error or findings are otherwise perverse. No such infirmity exists in the instant case.

12. For the foregoing reasons, the instant petition is without merit and is accordingly dismissed.

(AAMER FAROOQ)
JUDGE

Announced in open Court on the 20th day of June 2016.

JUDGE

M Naveed

Approved For Reporting

Uploaded By :- Engr. Umer Rasheed Dar