

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

Shuja Ahmed Vs. Additional District Judge (West), Islamabad, etc.

Respondent No.2: In person.

MOHSIN AKHTAR KAYANI, J:- Through the instant writ petition, the

petitioner has assailed the judgment & decree dated 17.10.2017 passed by learned Additional District Judge (West), Islamabad, whereby appeal filed by the petitioner was dismissed and judgment and decree dated 09.09.2016 passed by the learned Rent Controller (West), Islamabad in ejectment petition filed by petitioner against respondent No.2 was upheld.

2. Brief facts are that the petitioner is owner of house No.311, street No.58, sector I-8/2, Islamabad and he entered into lease agreement dated 15.08.2012 with respondent No.2 against monthly rent of Rs.1,00,000/- for period of 10 years till 14.08.2022. The petitioner filed ejectment petition against respondent No.2 due to non-confirming use of the leased premises as respondent No.2 has established Dar-e-Arqam School and CDA has initiated proceedings against non-confirming use under section 49-C of CDA Ordinance, 1960 and imposed fine of Rs.5,00,000/- under clause 2.17.3 of Islamabad Residential Sectors Zoning (Building Control) Regulations, 2005 vide order dated 28.11.2013 by the Deputy Commissioner, CDA. The ejectment petition was contested by respondent No.2 by filing his written reply, in which he has taken specific stance that he is running Dar-e-Arqam School after entering into lease agreement with the petitioner and the leased premises was not taken on lease for residential purpose and the school was established with consent of the petitioner and as such the ejectment petition is pre-mature, therefore, the same is not maintainable. Respondent No.2 has alleged that he has regularly paid rent till October, 2018 and deposited the same in the Court and even

enhanced rent at the rate of Rs.1,61,000/-. Learned Rent Controller, after completion of the proceedings, dismissed the ejectment petition vide impugned judgment and decree dated 09.09.2016, which was upheld by the first Appellate Court through impugned judgment & decree dated 17.10.2017, hence, this writ petition.

3. Learned counsel for the petitioner has contended that both the Courts below have not considered the evidence in its true perspective as relationship of the parties has not been denied and non-suited the petitioner on technical grounds.

4. On 20.06.2018, respondent No.2 was proceeded against ex-parte as despite service of notice he did not turn up on the date fixed, however on 25.10.2018, Raja Zaki Jabbar Advocate proxy counsel, appeared on behalf of respondent No.2 and was directed to ensure personal appearance of respondent No.2 before this Court on 26.10.2018, whereby respondent No.2 has put appearance on the said date alongwith proxy counsel and furnished details of deposited rent along with original receipts, which demonstrate that he paid monthly rent @ Rs.1,46,931/- till September, 2018 and thereafter he has paid monthly rent of Rs.1,61,624/- till October, 2018.

5. I have heard the arguments and gone through the record.

6. From perusal of the record, it has been observed that the petitioner filed ejectment petition against respondent No.2 regarding house No.311, street No.58, sector I-8/2, Islamabad, which was leased out to respondent No.2 vide lease agreement dated 21.07.2012 at monthly rent of Rs.1,00,000/- till 14.08.2022 and this relationship continued till notice was issued by the petitioner to respondent No.2 mainly on the ground that respondent No.2 is running Dar-e-Arqam School, which is violation of lease agreement and CDA has initiated proceedings against non-confirming use of property by the petitioner, who has been given show cause notice U/S 49-C of the CDA Ordinance, 1960 and fine of Rs.5,00,000/- has been imposed under clause 2.17.3 of Islamabad Residential Sectors Zoning (Building Control) Regulations 2005 and to stop the non-confirming use within 15 days, failing which, the petitioner has to pay Rs.5,000/- per day vide order dated 28.11.2013. The ejectment petition was contested by respondent No.2 by filing his written reply, in which he has acknowledged that he is running Dar-e-

Arqam School, which is registered with Government of Pakistan, Capital Administration and Development Division, ICT-Private Educational Institution Regulatory Authority and under clause 13 of the lease agreement, the petitioner/lessor is responsible to clear all the matters with CDA. Respondent No.2 has further taken the stance that 1600 private schools are running in different sectors and rural areas of ICT, in which more than 320,000 students are getting education and teaching along with allied staff of about 35,000 human resources is working in these schools and as per CDA policy, no school has been vacated. Respondent No.2 has also taken the stance that lease agreement is valid till 14.08.2022, hence, ejectment petition is pre-mature and is not maintainable during subsistence of lease agreement. Respondent No.2 has also taken plea in his written reply that the school has been established with consent and permission of the petitioner and the same was obtained for residential purpose and he is paying rent in excess of market rent.

7. Learned Rent Controller initially framed issues on 31.05.2016, which are reproduced as under:-

ISSUES:

1. *Whether the respondent has violated the terms & conditions of lease agreement?OPP*
2. *Whether the petitioner has no cause of action or locus standi to file the eviction petition?OPR*
3. *Whether the eviction petition is premature & is not maintainable?OPR*
4. *Relief?*

Later on, three additional issues were framed vide order dated 18.07.2016, which are reproduced as under:-

ADDITIONAL ISSUES.

- 3-A *Whether the rented premises was obtained by the respondent for use of commercial purposes i.e for establishing of school?OPR*
- 3-B *Whether on the insistence of petitioner, the words "residential purposes" in the lease agreement was mentioned in order to avoid any complication with CDA or any other authority?OPR*
- 3-C *Whether the respondent is utilizing the subject property for commercial purposes with the consent and knowledge of petitioner since very inception?OPR*

8. The petitioner put appearance as A.W.1 and submitted his affidavit as Exh.A.1, in which he has reiterated his stance and categorically stated that premises in question was leased on 15.05.2012 for residential purposes and CDA is taking action against him for non-confirming use and respondent No.2 is not vacating the premises.

9. During cross-examination, the petitioner acknowledged that lease agreement dated 15.05.2012 is not available in the file and when the property was leased out to respondent No.2, he was neither present nor he is witness to the lease agreement. The petitioner is not even aware regarding terms of the lease, however, he acknowledged that he is receiving rent from respondent No.2 through cheques. He also acknowledged that he visits respondent No.2 for receiving of the cheques and he acknowledged copies of the cheques, which he received as Exh.R.1 to Exh.R.13, which are part of the record and all the cheques were encashed except those, which were dishnoured but the rent was subsequently paid through cash and all the cheques were issued by Dar-e-Arqam School, Sector I-8 Branch Islamabad. Naveed Ullah, attorney of the petitioner, acknowledged the relationship as well as other credentials confronted to him during the course of cross-examination. During the cross-examination, A.W.1 admitted the following facts:-

- یہ درست ہے کہ معاہدہ کرایہ دہری دس سال کے لئے تھا۔ جو کہ 14-08-2022 تک ہے۔
- یہ درست ہے کہ مسول علیہ نے جائیداد متدعو یہ کرایہ پر لے کر اسے سکول میں تبدیل کر دیا۔
- یہ درست ہے کہ مابین فریقین مورخہ 15-05-2012 کی تاریخ کا کوئی معاہدہ موجود نہ ہے۔
- یہ درست ہے کہ جائیداد متدعو یہ کرایہ شروع سے مسول علیہ بذریعہ چیک ادا کرتا تھا۔
- یہ درست ہے کہ جو چیکس میں اور شجاع احمد مسول علیہ سے وصول کرتے تھے وہ پڑھ کر وصول کرتے تھے۔ گواہ کو چیکس کی مصدقہ نقول دکھائی گئیں جن کو گواہ نے درست شناخت کیا۔ مذکورہ نقول کو بطور Exh.R.1 و Exh.R.30 مل کا حصہ بنایا گیا۔
- یہ درست ہے کہ تمام چیکس دارالرقم سکول I-8 اسلام آباد کے ہیں۔

10. The petitioner also produced Jumma Khan as A.W.2, who produced his affidavit as Exh.A.3 and reiterated stance of the petitioner including the proceedings of non-confirming use. He also acknowledged that all the cheques of rent were issued by Dar-e-Arqam School.

11. Respondent No.2 put appearance as R.W.1 and produced his affidavit as Exh.R.31 and during course of his evidence, he acknowledged the relationship of the landlord and tenant in the following manner:-

- "1. That the defendant/respondent obtained the subject property bearing No.311, Street No.58, Sector I-8/2, Islamabad from the petitioner for a period of ten years commencing from 15.08.2012 to 14.08.2022 against a monthly rent of Rs.1,00,000/- per month with 08% increase per annum for running a school with the name and style of "Dar e Arqam School in the subject property.*
- 2. The Capital Administration and Development Division, ICT-Private Education Institution Regulatory Authority (ICT-PEIRA), Government of Pakistan, Islamabad through a registration certificate registered the school of the deponent/respondent namely Dar-E-Arqam School, located at House No.311, Street No.58, Sector I-8/2, Islamabad in accordance with the provisions of Islamabad Capital Territory Private Educational Institution (Registration and Regulation Act 2013) with the approval of Chairman PEIRA which was subsequently renewed by PEIRA, as such the deponent/respondent is running the school in the subject premises strictly in accordance with law after registration from competent authority and no violation has been committed by the deponent/respondent in any manner whatsoever.*
- 3. That the subject property was never obtained or utilized by the deponent/respondent for residential purposes, the answering respondent obtained the property for school purposes in which necessary changes were also carried out with the consent, permission and knowledge of landlord and made such property suitable for school purpose, whereas, on the insistence of petitioner, the words "residential purposes" was mentioned in the lease agreement in order to avoid any complication with CDA or any other authority. It was impossible for the deponent/respondent to establish school in the subject premises without consent and permission of the petitioner. "*

12. During the cross-examination, R.W.1 disowned his signatures on copy of the agreement attached with the ejectment petition but he himself did not produce copy of the lease agreement in the Court.

13. While considering above referred evidence, learned Rent Controller decided issue No.1 in negative against the petitioner and declared that during the cross-examination, the petitioner has failed to shatter the stance of respondent No.2 and even no lease agreement was produced by the petitioner during the evidence, therefore, "evidence was word against word & the petitioner failed to prove this issue."

14. No other finding was given in the impugned judgment dated 09.09.2016 and the same was upheld by the Appellate Court in similar manner, in which it was held that the property in question was obtained by respondent No.2 for commercial use and the petitioner has failed to establish that it is for residential purpose.

15. The entire background of the case as well as findings of learned Rent Controller and the Appellate Court clearly demonstrate that both the forums below have not understood the clear intention of the law i.e. Islamabad Rent Restriction Ordinance, 2001 in its true perspective and misconceived the intent of the legislature. The preamble of the Ordinance reads as under:

“whereas it is expedient to regulate the relations between landlords and tenants of the rented premises in Islamabad Capital Territory and to provide for matters ancillary thereto or connected there with.”.

In this regard, the legislative intent has to be considered on the basis of complete law and every provision enshrined therein has to be taken into account while deciding the fate of any petition relating to issue between landlord and tenant, and the issues could not be taken into account in isolation. In order to understand the status of landlord, it is necessary to reproduce the definition of landlord referred in 2(g) of the Ordinance, which is as under:

“2(g) “landlord” means the owner of the premises and includes any person for the time being authorized or entitled to receive rent in respect of any building or rented land, whether on his own account or on behalf, or for the benefit, of any other person, or as a trustee, guardian or receiver, and or a tenant who, being authorized under the terms of his lease so to do, sublets the building and every other person for the time being deriving title from the landlord.”

16. The above referred definition clearly demonstrates that any person, who is appearing on behalf of the landlord and managing the affairs of rented premises with the tenant, is authorized under terms of lease as landlord and as such, A.W.1, who appeared through Exh.P.2 Special Power of Attorney, issued by the petitioner Shuja Ahmed, who received different cheques from respondent No.2 as rent, was fully authorized to perform duties of Shuja Ahmed, although during the cross-examination, he acknowledged that he was not authorized to file ejectment petition rather Exh.P.2 is only for District Courts, but in my humble view, the said attorney gives authority to A.W.1/Naveed Ullah to represent

Shuja Ahmed before all Courts on his behalf regarding the leased property and was allowed to do all acts with reference to the leased property. Although, copy of the lease agreement appended with ejectment petition was not acknowledged by respondent No.2 due to his signatures, but he has not produced copy of any lease agreement to prove his contention that the lease agreement produced by the petitioner in his ejectment petition is tampered.

17. The basic dispute amongst the parties is regarding terms of the lease as to whether the petitioner leased out the demise premises to respondent No.2 for residential purpose or commercial use to run a school in the name and style of Dar-e-Arqam. Even, if for the sake of arguments, it is admitted that premises in question was leased out for commercial use, the same cannot be treated in favour of respondent No.2 as CDA Ordinance 1960 as well as Islamabad Residential Sectors Zoning (Building Control) Regulations, 2005 do not permit such kind of business/commercial activity in the residential premises and the petitioner is facing music of his illegal concession as fine of Rs.5,00,000/- has been imposed upon him by the Deputy Commissioner, CDA. The ground taken by the petitioner regarding non-confirming use has neither been denied by respondent No.2 in his written reply nor in his evidence, rather there is unqualified admission that respondent No.2 is running a school in the name and style of Dar-e-Arqam in the leased premises and all the rent/amounts were paid to the petitioner through cheques Exh.R.1 to Exh.R.30 issued by Dar-e-Arqam School and in such circumstances, there is no denial that lease period is valid up to 14.08.2022 and both the parties have not submitted any lease agreement and the relationship has been admitted. But in my humble view, learned Rent Controller as well as Appellate Court have to consider each and every document brought on record as they are holding an inquiry, which could not be seen on the parameters of the Qanun-e-Shahadat Order, 1984 or strict principles of law of evidence. Even otherwise, the petitioner appended a photocopy of lease agreement with his ejectment petition, against which respondent No.2 has not produced any lease agreement to justify his standpoint that the subject house was leased out for commercial purposes. On the other hand, in this case, under the general principles of evidence, the onus is upon tenant

to demonstrate from the record that the document placed by the petitioner (landlord) is fake, forged or based upon misrepresentation, but respondent No.2 failed to discharge his onus to prove such plea and simply took an oral stance before the forums below. Whereas, it is settled law that oral evidence could not exclude the documentary evidence and while considering the said analogy, the photocopy of the lease agreement is a document which establishes the relationship between the petitioner and respondent No.2 as of landlord and tenant, even otherwise, respondent No.2 acknowledged the general terms of the lease agreement, except the usage of premises, therefore, the learned Rent Controller as well as learned first Appellate Court have to consider the grounds referred in Section 17 of IRRO, 2001, however the grounds referred in the said Section has to be considered with reference to its procedure provided in Section 24 of the Ordinance, which is reproduced as under:-

“24. Procedure and power of Controller.-(1) Unless otherwise provided in this Ordinance, no order under sections 9, 14, 15, 17 or 18 shall be made by the Controller except after holding an inquiry and affording to the parties an opportunity of being heard.

(2) For the purposes of holding an inquiry of execution of orders under this Ordinance, the Controller shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (Act V of 1908), when trying a suit or executing a decree in respect of the following matter, namely:---

- (a) summoning and enforcing the attendance of any person and examining him on oath;***
- (b) compelling the discovery and production of any document and other material evidence; and***
- (c) issuing a commission for the examination of witness.”***

18. The above referred provision puts emphasis upon technical term used in law ***“after holding an enquiry”***, therefore, in order to understand meanings of word enquiry used in Oxford Thesaurus of English Dictionary means *investigation, examination, exploration, probe, search, scrutiny, scrutinization, study, inspection, inquest, hearing* and with reference to these meanings a Rent Controller can only enquire the matter by affording an opportunity of being heard. The said phrase of *opportunity of being heard* is based upon the golden principle of law enshrined in Constitutional guarantees for fair trial under Article 10-A read with Article 4 and the word “hearing” means *“chance to speak, opportunity to express one’s point of view, opportunity to put one’s case, interview, audience”* as referred in Oxford Thesaurus of English and these meanings

have also been explained in reported judgment **PLD 2016 Islamabad 112 (Ashfaq Ahmad Khan vs. PTCL, etc.)**.

19. The above referred definitions/meanings of words enquiry and hearing clearly demonstrate that a Rent Controller has to decide the matter within the legislative intent in order to protect the rights of landlord and tenant, especially within **four months** as mentioned in Section 25(3) of IRRO, 2001, and it is not required to frame issues, record evidence in every case and to adjudicate upon the matter in eviction proceedings in the manner of regular civil trial. In this regard, it is crucial to reproduce Section 17(8) of IRRO, 2001, which is as under:

(8) In proceedings under this section on the first date of hearing, or as soon thereafter as may be but before the issues are framed, the Controller shall direct the tenant to deposit in his office before a specified date all the rent due from him and also to deposit regularly till the final decision of the case before the fifteenth day of each month, the monthly rent which subsequently becomes due and if there be any dispute as to the amount of rent due, the Controller shall determine such amount approximately.

In the above referred provision, it is specifically mentioned that **issues are framed**, but this does not mean that in every case issues have to be framed unless the disputed question of facts requires the framing of issues to decide the controversy. In the present case, the parties admitted their relationship as landlord and tenant, the rent was being paid and received, and the parties also admitted the terms of lease, except the clause pertaining to the status of building as to whether the same is meant for “*residential purpose or for commercial usage of school*” and this controversy was rightly pointed out by the learned Rent Controller, who has framed Issues No.3-A, No.3-B and No.3-C read with Issue No.1, but surprisingly, no separate findings have been given, rather the decision was passed on the basis of findings on Issue No.1 and even it has been referred in the impugned judgments that no lease agreement was brought on record, which is factually incorrect. The copy of lease agreement is available on record but that has not been considered despite the fact that both the parties acknowledged the placing of the said document and it was available before the learned Rent Controller as well as before the first Appellate Court even it is appended with this petition and respondent No.2/tenant acknowledged the terms except the usage and as per his stance the building was leased

out to him for commercial use, therefore, when the question is confined to the extent of usage of building, then no controversy is left to be adjudicated in any other manner and the Rent Controller as well as the first Appellate Court has to consider the other documents i.e. notices issued by CDA for non confirming use of the building by the Deputy Commissioner, CDA, Islamabad, show cause notice and decision in which action U/S 49-C of the CDA Ordinance, 1960 was taken by the Deputy Commissioner, CDA in which Rs.500,000/- fine was imposed upon the petitioner/landlord.

20. The above referred grounds have to be seen with reference to overall jurisdiction of Rent Controller, where he is only inquiring the matters and the wisdom of the said legislation is to protect the rights of the landlords and tenants and timeline for decision of these matters has been given in section 25(3) of the IRRO, 2001, which is “4 months”.

21. The Rent Controller as well as the first Appellate Court are under legal obligation to consider the available record and give due opportunity of hearing to the parties by considering the legislative intent, whereby they are exercising the jurisdiction of Rent Controller within the meaning of term “inquiry” which gives an inquisitorial authority to the Rent Controller as well as to the first Appellate Court to ask for any information from the landlord or the tenant as the case may be for just decision of the case, and if they come to conclusion that matter covers U/S 17 of the IRRO, 2001 then they shall pass the judgment in summary manner like cases of default or expiry of lease, if the said situation is apparent from record and in such eventuality there is no need to frame issues and further record the evidence of the parties. In the recent judgment of the apex Court reported as PLD 2018 SC 81 Waqar Zafar Bakhtawari vs. Haji Mazhar Hussain Shah, wherein it was held that *after expiry of lease period the tenancy was rendered invalid and come to an end.*

22. Keeping in view the above background and legal analogy, the relationship of the parties as landlord and tenant is admitted, even respondent No.2 appeared in-person before this Court and produced rent receipts deposited before the Rent Controller and he himself acknowledged that he is running a school in the name of Dar-e-Arqam in the

leased premises, which is not permissible under CDA Ordinance, 1960 read with Clause 2.17.3 of Islamabad Residential Sectors Zoning (Building Control) Regulations, 2005, hence, it has been proved that the tenant/respondent No.2 has violated the law and terms of the lease agreement, although he has not produced any lease agreement on record and denied the available copy of lease agreement, which was available before the learned Rent Controller, but it was not taken into account. Respondent No.2/tenant has indulged in activities, which are causing nuisance to neighbor and at the same time it will impair the utility of the building. Similarly, as per CDA bye-laws, the said building can be used for the purpose of living and not to run any commercial activity, and if at all, landlord agrees to let out his residential building for the purpose of commercial usage, the same will defeat the very purpose of prevailing law and it would be considered in violation of law. This Court, in several judgments, has declared the usage of residential buildings for non-confirming use as illegal and no premium can be given to any tenant to enjoy such illegality under the garb that landlord has permitted him to use the same.

23. For the foregoing discussion, I am of the view that the concurrent findings of both the Courts below are against the mandate of IRRO, 2001 as well as CDA bye-laws, therefore, instant writ petition is allowed. Impugned judgments and decrees of learned Rent Controller and first Appellate Court are hereby set aside.

24. In view of above, Respondent No.2 is directed to hand over possession of the premises back to the petitioner forthwith, however he requested the Court at the time of announcement of this judgment that current session of the school will end on 31.03.2019, whereafter he will shift the students to another location and hand over the possession of premises back to the petitioner, therefore, reasonable time may be granted. In order to safeguard the rights of the students, respondent No.2 is directed to hand over the possession of premises back to the petitioner on or before 31.03.2019 subject to payment of monthly rent of Rs.161,000/-, which is acknowledged by respondent No.2 before this Court, and in case, if the rent is not paid, respondent No.2 shall proceed with the execution to obtain warrant of possession for vacation of the premises forthwith. This

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judgment will not be considered as impediment in the way of CDA, who are at liberty to evict respondent No.2 and can seal the premises in accordance with CDA bye-laws under their own legal proceedings. This judgment, in any way, will not affect orders of CDA in relation to non-confirming use of residential buildings.

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(MOHSIN AKHTAR KAYANI)
JUDGE

APPROVED FOR REPORTING.

JUDGE

Khalid Z.