

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

RSA No. 07 of 2014

M/s Pakistan Accumulators, Pvt. Ltd. through its Chief Executive

Versus

Mst. Muhammad Jee alias Muhammad Bee, etc.

Appellant by: Sardar Shaukat Hayat Khan, Advocate.

Respondents by: Nemo.

Date of Hearing: 06.08.2020.

MOHSIN AKHTAR KAYANI, J:- Through this RSA, appellant has assailed the judgment and decree dated 13.03.2013, passed by learned Additional District Judge-III (West), Islamabad, whereby RFA filed by the appellant against judgment & decree dated 22.11.2010, passed by learned Civil Judge, 1st Class, Islamabad was dismissed.

2. Learned counsel for the appellant contends that respondent No.1 filed the suit for possession through ejectment recovery of rent, compensation of illegal use and permanent injunction on the basis of his ownership of Plaza No.74-E, Blue Area, F-7, G-7, Islamabad, whereas second floor of the plaza measuring 3752 sq. ft. was leased out by respondent No.1 to the appellant vide lease agreement dated 12.04.1994 @ Rs.30,016/- per month; that appellant had paid the rent till 10.04.1997 and respondent No.1 claimed that the possession of the subject premises was delivered beyond agreed period and appellant is liable to pay rent alongwith additional charges of Rs.500/- per day w.e.f. 11.04.1997 to 10.08.1997 for illegal use; that both the Courts below have committed error while not appreciating the evidence in its true perspective and gone beyond the pleadings as well as the evidence, even judgment & decree dated 22.11.2010, passed by the

trial Court had wrongly been upheld by the Appellate Court contrary to the evidence available on record and as such this question falls within the mandate of Section 100 CPC being substantial question of law to be considered by this Court in the second appeal.

3. Notice was issued to respondent No.1 but despite hectic efforts no one put appearance on behalf of respondent No.1 and even last known address of respondent No.1 has been confirmed by the appellant through affidavit, therefore, this Court left with no option but to adopt the substituted mode of service through publication in Daily Pakistan (Urdu) dated 08.07.2020, however, no one has put appearance on behalf of respondent No.1. Resultantly, respondent No.1 has been proceeded *ex-parte*.

4. Arguments heard, record perused.

5. From the perusal of record, it reveals that respondent No.1 had filed suit for recovery against the appellant with the following prayer:-

That a decree for possession through ejectment of 2nd floor, measuring 3752 sq. ft. of plaza No.74-E, Blue Area, F-7, G-7, Islamabad, recovery of rent @ Rs.34,518/- per month alongwith additional charges @ Rs.500/- per day from 11-04-1997 to 10-8-97 and compensation of illegal use @ Rs.69036/- per month from 11-08-1997 till the vacation and permanent injunction restraining the defendant from sub-letting the suit property to anybody else and from delivering the possession of suit property to anybody else except the plaintiff, may kindly be passed in favour of the plaintiff against the defendant with costs of the suit.

6. The entire claim of respondent No.1 in the suit is based upon the allegation that appellant was his tenant in Plaza No.74-E, second floor, Blue area, F-7, G-7, Islamabad, which was leased out to the appellant vide lease agreement dated 12.04.1994. The terms of agreement also reflect that in case of default in any of the agreed terms, Rs.500/- per day additional charges may also be imposed. As per stance referred in the plaint rent upto 10.04.1997 was paid, where-after notice dated 26.07.1997 was served by respondent No.1 through her

counsel. The matter was contested by the appellant through written statement, whereby relationship being landlord and tenant was admitted, however, appellant has taken a categorical stance in para-6 of the written statement that rent was paid upto 10.04.1997 and it was claimed by the appellant that he had already vacated the premises on 31.09.1997, therefore, no rent or dues could be imposed upon the appellant.

7. The issues were framed vide order dated 27.01.2001, whereby particular issues No.9 & 10 were framed. Respondent No.1 appeared through PW-1 and admitted that rent was paid up to 10.04.1997 but the possession was not delivered. During the course of cross-examination he acknowledged that property was vacated by respondent No.1 but keys were not handed over to him.

8. Contrary to said evidence Muhammad Haroon Mehmood put appearance as DW-1 on behalf of appellant and has taken a specific stance that advance rent was paid up to 31.03.1997 and vacant possession was delivered to Hashmat Ali, who is stated to be the attorney of Fazal Karim Agha, as such the question raised by the appellant in the RFA belongs to factual and disputed facts, which have been considered by both the Court below and answer to issues No.9 & 10 have been given in the impugned judgment of the trial Court in details and as such no illegality has been observed.

9. There is no cavil to the proposition that findings of fact arrived at lower appellate Court without consideration of material on which trial Court had based its decision are not binding in the second appeal, however, it is the duty and obligation of the appellant to convince this Court that disputed facts highlighted by him are not appreciated by the Courts below in accordance with law as such the scope of RSA is limited to the extent of substantial question of law or where substantial error or defect has been highlighted in the procedure. Reliance is placed upon 2013 SCMR 1570 (Anwar Textile Mills Limited Vs. Pakistan Telecommunication Company Limited).

10. I have gone through the findings of issues No.9 & 10 with the able assistance of learned counsel for the appellant and as such the claim of respondent No.1 is conclusively reflected from the record and no misreading or non-reading as claimed has been proved. The pre-condition for maintainability of second appeal in terms of Section 100 CPC has been highlighted in 2017 CLC 839 [Islamabad] (Naseem Ahmed Khan Vs. Syed Fahad Ali), whereby ground raised by the appellant on factual side is not legally justified on the basis of pre-conditions referred in the Naseem Ahmed Khan case *supra*. The fact findings arrived by the trial Court as well as by the appellate Court have fully been proved against the appellant and decree has rightly been passed qua the rate, amount due as well as question of delivery of possession of the suit property.

11. It is the case of appellant that possession was delivered on the agreed date and property was not used beyond the said period, therefore, it is easily detectable in terms of Article 117 of the *Qanun-e-Shahadat* Order, 1984 that onus to prove the delivery of possession is upon the appellant and as such no positive evidence has been brought on record to prove that immovable property was handed over on the agreed date. When there was no answer to this question given by the appellant in the trial Court or in the record, the fact narrated in the arguments could not be considered having validly been made.

12. In view of above, instant RSA is not maintainable and the same is hereby dismissed.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 18. Aug 2020.

✓ JUDGE