

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.1215 of 2016

Sajjad & another

Versus

Muhammad Younas Khilji & others

Date of Hearing: 19.04.2016

Petitioners by: Mr. Muhammad Illiyas Sheikh,
Advocate

Respondent No.1 by: Abdul Shakoor Peracha, Advocate

MIANGUL HASSAN AURANGZEB, J:-Through the instant Writ Petition, the petitioners, Sajjad Khan and his brother Mumtaz Khan, impugn the Judgment dated 25.03.2016, passed by the Court of learned Additional District Judge (West), Islamabad, whereby the petitioners' appeal against the Order dated 02.01.2016, passed by the Court of learned Rent Controller, Islamabad, was dismissed. Vide the said Order dated 02.01.2016, the learned Rent Controller allowed respondent No.1's eviction petition under Section 17 of the Islamabad Rent Restriction Ordinance, 2001 ("IRRO") and directed the petitioners to vacate House No.61, Street No.33, Sector G-9/1, Islamabad ("the rented premises").

2. This case seems to have a long chequered history. Respondent No.1 is the brother-in-law (*behnoi*) of the petitioners. On 07.01.2011, respondent No.1 filed an eviction petition under Section 17 of the IRRO seeking the eviction of the petitioners from the rented premises. In the said eviction petition, the position taken by respondent No.1 was that the rented premises had been rented out to the petitioners in the year 1992 on the basis of an oral agreement; that up to 30.06.2010, a monthly rent Rs.35,000/- was paid by the petitioners, but since 01.07.2010, the petitioners had not paid any rent; and that under the provisions of the IRRO, the petitioners were liable to pay rent at a 25% increased rate of Rs.43,750/- per

month. The grounds taken by respondent No.1 in the eviction petition were, (i) that the rent premises are required by respondent No.1 to accommodate his married son, and (ii) that the petitioners had defaulted in the payment of rent since 01.07.2010.

3. The petitioners contested the said eviction petition by filing their reply in which the petitioners denied the relationship of landlord and tenant. The petitioners pleaded that in the year 1999, the rented premises had been orally gifted to petitioner No.2 (Mumtaz Khan), and that possession of the rented premises was also delivered to him. From the divergent pleadings of the contesting parties, the learned Rent Controller framed the following issues:-

- "1. *Whether the respondents are willful defaulter and liable to be ejected as prayed? OPA*
2. *Whether the suit premises is required by the petitioner for his personal bonafide use? OPA*
3. *Whether the petitioner has not come to the court with clean hands ?OPR*
4. *Whether the suit house has been gifted to respondent No.2 by the petitioner? OPR*
5. *Whether the petitioner has concealed the material facts from the court ? OPR*
6. *Whether the petition in hand is false, frivolous, baseless and vexatious, hence, the same is liable to be dismissed ?OPR*
7. *Whether there is no relationship of landlord and tenant exist between the parties ? OPR.*
8. *Relief."*

4. On 10.02.2014, after the evidence was recorded and arguments were addressed on the eviction petition, the petitioners filed an application for re-framing/reverting issue No.7 so as to place the onus of proof on respondent No.1. Respondent No.1 opposed this application. The learned Rent Controller, vide order dated 16.06.2014 modified issue No.7 and placed the onus of proof on both the parties. Thereafter, respondent No.1 filed an application for additional evidence, which was allowed.

5. The learned Rent Controller, vide order dated 18.11.2014, dismissed respondent No.1's eviction petition by holding that no relationship of landlord and tenant

existed between the parties. The rent deposited in the Court by the petitioners in compliance with a tentative rent order passed by the learned Rent Controller under Section 17(8) of the IRRO, was directed to be reimbursed to the petitioners. Respondent No.1, in appeal before the Court of Additional District Judge, Islamabad, impugned this order. Vide order dated 07.03.2015, the learned Appellate Court dismissed the said appeal. Respondent No.1 challenged the said appellate order dated 07.03.2015 in W.P.No.763/2015, before the Hon'ble Islamabad High Court. Vide Order dated 16.04.2015, the Hon'ble High Court allowed the said writ petition, and the concurrent orders passed by the courts below were set aside. The matter was remanded to the Court of learned Rent Controller with the direction to decide the matter afresh in the light of the observations made by the Hon'ble High Court. The said order dated 16.04.2015 was challenged by the petitioners before the Hon'ble Supreme Court of Pakistan in Civil Petition No.1468/2015. On 18.09.2015, the petitioners withdrew the said petition.

6. After the case was remanded, the learned Rent Controller, vide judgment dated 02.01.2016, allowed the eviction petition and directed the petitioners to handover vacant possession of the rented premises to respondent No.1 within a period of fifteen days. This judgment was challenged in an appeal by the petitioners before the Court of the learned Additional District Judge, Islamabad. Vide judgment dated 25.03.2016, the said appeal was also dismissed. The petitioners, through the instant writ petition have challenged the concurrent judgments dated 02.01.2016 and 25.03.2016, passed by the learned Rent Controller and the Court of the learned Additional District Judge, Islamabad, respectively.

7. Learned counsel for the petitioners submitted that the relationship of landlord and tenant does not exist between respondent No.1 and the petitioners; that in the

year 1999, the rented property was gifted by respondent No.1 to petitioner No.2; that the petitioners' entry into the rented premises was not in the capacity of tenants, but as owners; that while making an oral gift, respondent No.1 had also given possession of the rented premises to the petitioners; that the rent receipts submitted by respondent No.1 were forgeries; that the payment of rent during the pendency of the eviction petition was made by the petitioners in order to avoid the penal consequences envisaged under Section 17(9) of the IRRO; that petitioner No.2 had instituted a suit for declaration and permanent injunction in the court of the learned Civil Judge, Islamabad, against respondent No.1 praying for *inter-alia* a declaration to the effect that petitioner No.2 is the owner in possession of the rented premises on the basis of an oral gift made in the year 1999 by respondent No.1 in favour of petitioner No.2; that the petitioners had filed a petition before the Hon'ble Islamabad High Court praying for the transfer of the appeal from the Court of Ms. Zeba Chaudhry, learned Additional District Judge, Islamabad to another Court; that the learned appellate court instead of waiting for a decision on the said petition, decided the appeal in the absence of the petitioners and their counsel; that instead of deciding the appeal on merits, the learned appellate court should have dismissed the appeal for non-prosecution. Learned counsel prayed for the judgment of the learned appellate court to be set aside and matter remanded for arguments. In making these submission, learned counsel for the petitioners placed reliance on cases of Mazhar Saeed and another Vs. A.D.J. and eleven others (2011 YLR 3089), Akhtar Hussain Vs. Allah Ditta (2011 MLD 1834), Mst. Wakeelan Begum Vs. Additional District Judge, Gujranwala and two others (2006 CLC 1886) and Allies Book Corporation through L.Rs Vs. Sultan Ahmad and others (2006 SCMR 152).

8. On the other hand, learned counsel for respondent No.1 submitted that no gift, oral or written, was ever made by respondent No.1 in favour of the petitioners; that the petitioners were respondent No.1's wife's real brothers; that respondent No.1 continued to remain owner of the rented premises in the C.D.A. records; that the petitioners used to pay rent to respondent No.1, but stopped doing so since 01.07.2010; that the rented premises are required by respondent No.1 for his bonafide use and to accommodate his married son; that the learned appellate court decided the appeal in the petitioners' absence because the petitioners were trying to linger on the matter by not appearing before the appellate court. The learned counsel for respondent No.1 prayed for the dismissal of the writ petition. In making these submissions, learned counsel for respondent No.1 placed reliance on the case Shajjar Islam Vs. Muhammad Siddique (PLD 2007 SC 45).

9. I have heard the arguments of the learned counsel for the contesting parties and have perused the record with their able assistance.

10. Now the entire edifice of the petitioners' case stands on their claim that the rented premises were gifted by respondent No.1 to petitioner No.2 in the year 1999. Respondent No.1 denies this, and wants the petitioners to be evicted from the rented premises. He wants these premises for his own use and the use of his family. He asserts the relationship of landlord and tenant between himself and the petitioners.

11. On account of respondent No.1's denial as to the alleged oral gift, petitioner No.2, on 18.05.2011 instituted a suit for declaration and permanent injunction before the court of learned Civil Judge, Islamabad. In this civil suit, it is pleaded that petitioner No.2 is the owner of the rented premises on the basis of an oral gift made by respondent No.1 in his favour on 25.05.1999. In this suit, petitioner No.2 *inter-alia* prays for a declaration to the effect that he

is lawful owner in possession of the rented premises. According to the learned counsel for the petitioners, this suit is still pending adjudication. Copies of the pleadings in the said suit have been placed on record. In this suit, petitioner No.2 is yet to establish and prove the *factum* of the oral gift of the rented premises in his favour. Until a declaration as to the ownership of the rented premises in favour of petitioner No.2 is made by the learned civil court, he cannot, in my view, resist his eviction from the rented premises.

12. The mere fact that the petitioners assert that the rented premises were orally gifted by respondent No.1 to petitioner No.2, they impliedly admit and acknowledge that prior to the said alleged gift, respondent No.1 was the owner of the rented premises. Unless and until, it is established through a declaratory decree in favour of petitioner No.2 that the rented property was indeed gifted to him by respondent No.1, the petitioners cannot continue to remain in occupation of the rented premises. He must first vacate the rented premises and re-gain possession of the same, in the event, he is successful in establishing his title to the same through a declaration to this effect from a court of competent jurisdiction. As Section 2(g) of the IRRO defines 'landlord' as the owner of the premises, and as petitioner No.2 is yet to have himself adjudged as the owner of the rented premises, the petitioners have no legal basis for denying respondent No.1's title to the rented premises. Reference to case law, at this stage would be apposite:-

- (i) In the case of Iqbal Vs. Rabia Bibi, reported as PLD 1991 SC 242, it has been held at page 245 of the report as follows:-

"Be that as it may, in some recent judgments this court has taken the view that in cases like the present one, where the sale agreement or any other transaction relied upon by a tenant is seriously and bona fide disputed by the landlord, the appellant/tenant cannot be allowed to retain the possession during the litigation where he

continues to deny the ownership of the landlord who had inducted him as a tenant, without any condition and/or reservation. It has been ruled that in such cases although the tenant has a right to adduce evidence and take a short time for that purpose to remain in occupation despite having set up a, hostile title which is denied by the landlord, but on the well-known bar of estoppel in this behalf, he (the tenant) cannot be permitted to remain in occupation and right the litigation for long time--even for decades. In this case it is more than a decade that the appellants have been able to keep the possession on a claim which the landlord asserts is false. Accordingly, as held in those cases in fairness to both sides, while the tenant is at liberty to prosecute the litigation, wherein he should try to establish his claim but it should not be at the cost of landlord/owner. It should be at the cost of himself and he must vacate--though of course he would be entitled to an easy and. free entry as soon as he finally succeeds in establishing his title against his own landlord. See Makhan Bano V, Haji Abdul Ghani (PLD 1984 Supreme Court 17), Allah Yar and others v. Additional District Judge and others (1984 SCMR v. Mufti Abdul Ghani (PLD 1985 SC 1)."

(ii) In the case of Jumma Khan Vs. Zarin Khan, reported as PLD 1999 SC 1101, the relationship of landlord and tenant was denied by the tenant on the ground that the landlord had executed an agreement to sell the rented premises to the tenant, and that a substantial amount had been paid to the landlord, and that a civil suit for specific performance was pending adjudication against the landlord. The landlord had unequivocally refuted the execution of any agreement for sale. The Hon'ble Supreme Court of Pakistan dismissed the tenant's petition in the following terms:-

"7. On the basis of dictum laid in aforequoted reports we unhesitatingly hold that petitioner cannot legitimately resist maintainability of ejectment proceedings pending against him on the ground of sale-agreement. Suffice it to observe that genuineness or otherwise of such agreement and its consequential effort will be independently determined by the Civil Court. However, in the instant case we are satisfied that issue regarding relationship of tenancy and personal bona fide requirement of respondent-landlord has been

correctly decided by the Courts below. There does not appear any material defect or legal infirmity with regard to conclusions drawn in the impugned judgments. Accordingly the petition having no merit is dismissed and leave to appeal is refused.”

(iii) In case of Barkat Masih Vs. Manzoor Ahmad, reported as 2006 SCMR 1068, it was held that if a tenant denies the relationship of the landlord and tenant he should first vacate the premises in his possession and then contest his proprietary rights.

(iv) In the case of Abdul Rasheed Vs. Maqbool Ahmed, reported as 2011 SCMR 320, the petitioner/tenant had denied the relationship of landlord and tenant between parties. The petitioner had claimed that he had purchased demised premises subsequently through a sale agreement. The Hon'ble Supreme Court of Pakistan dismissed the petition by holding as follows:-

“5. ... It is settled law that where in a case filed for eviction of the tenant by the landlord, the former takes up a position that he has purchased the property and hence is no more a tenant then he has to vacate the property and file a suit for specific performance of the sale agreement whereafter he would be given easy access to the premises in case he prevails. In this regard reference can be made to Shameem Akhtar v. Muhammad Rashid (PLD 1989 SC 575), Mst. Azeemun Nisar Begum v. Mst. Rabia Bibi (PLD 1991 SC 242), Muhammad Rafique v. Messrs Habib Bank Ltd. (1994 SCMR 1012) and Mst. Bor Bibi v. Abdul Qadir (1996 SCMR 877). In so far as determination of the relationship of landlord and tenant is concerned, such enquiry by the Rent Controller is of a summary nature. Undoubtedly the premises were taken by the petitioner on rent from the respondent and according to the former he later on purchased the same which was denied by the latter. Consequently, the relationship in so far as the jurisdiction of the Rent Controller is concerned stood established because per settled law the question of title to the property could never be decided by the Rent Controller.”

(v) In the case of Gohar Ali Shah Vs. Shahzada Alam, reported as 2000 MLD 82, the appellant was seeking to avoid eviction from the rented premises by claiming that he had purchased the rented

premises. The Hon'ble High Court of Sindh struck off the tenant's defence and directed him to vacate the premises subject to refund by the landlord of the amount of consideration paid towards the price of the premises in question to the tenant after adjustment of rent till the delivery of possession. Furthermore, it was held as follows:-

"Mere agreement to sale would not absolve the appellant to pay rent only because he was proposed purchaser of the premises when there has been no term that appellant would not pay rent on this executing such agreement of sale when such agreement of sale would not create any right title or interest in or over the property in favour of appellant the proposed purchaser until and unless the said relationship of landlord or tenant is determined by an agreement."

(vi) In the case of Muhammad Akmal Vs. Faisal Saeed Mirza, reported as 2004 CLC 862, the tenant had denied the existence of relationship of landlord and tenant between the parties alleging that predecessor-in-interest of the landlord had entered into agreement to sell the premises in question in favour of the tenant. The tenant had also stated that he had filed a suit for specific performance of the agreement to sell. The said assertions of the tenant did not find favour with the Hon'ble Lahore High Court, and in paragraph 8 of the said report, it was held as follows:-

"8. ... It may be pointed out here that learned Rent Controller has not to decide the fact of sale and purchase allegedly made between the appellant and predecessor-in-interest of the respondents. The Civil Court, seized of the matter, is competent to decide such dispute and if appellant turns successful in that suit he would have the chance for the recovery of possession, in case of his ejectment. Till the decision of the civil suit proceedings of this case (ejectment petition) cannot be stayed or stalled as held in Iqbal and 6 others v. Mst. Rabia Bibi and another PLD 1991 SC 242. The intention of suit for specific performance of contract cannot furnish a ground to the appellant to get the proceedings before the Rent Controller stayed as held in Muhammad Amjad v. Mst. Rehana Kausar 2001 YLR 939."

(vii) In the case of Muhammad Parvez Vs. Additional Rent Controller, Lahore, reported as 2013 YLR 1881, an applicant, claiming to be the purchaser of the rented premises, had filed an application under Order I, Rule 10 C.P.C. for impleadment in the eviction petition before the Rent Controller. The landlord's writ petition against the order of the Rent Controller allowing the application for impleadment was allowed by the Hon'ble Lahore High Court, holding as follows:-

"6. ...By applying above said principles in the instant case the inescapable conclusion is that a tenant remains a tenant, he cannot prolong his occupation by exercising his right of being subsequent purchaser unless so held by the court of competent jurisdiction. The reasons behind is that he has no status to justify his possession and if he denies the relationship of landlord and tenant he will be known to be an illegal occupant. The rent proceedings are between the land owner and tenant and entry or interference by the third party is to be jealously guarded. In this view of the matter, the impugned order is set aside and the writ petition is allowed. Resultantly application under Order 1 Rule 10, C.P.C. filed by respondents Nos.2 and 3 is dismissed."

(viii) In the case of Refhat Hamidee Vs. Abdul Aziz, reported as 2013 YLR 1898, it has been held by the Hon'ble High Court of Sindh that unless and until a registered sale deed existed between the parties, the relationship of landlord and tenant existed between the parties, the tenant could not get the benefit of a 'sale agreement' to avoid payment of rent. The eviction of the tenant from the rented premises was held to be justified.

(ix) In the judgment dated 24.03.2016, passed in Writ Petition No.1050/2016, titled "Muhammad Rafique Vs. Farida Khan and others", 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.”

13. It is trite law that a person cannot remain in occupation of rented premises simply because he asserts to be the owner of the rented premises and has instituted a suit for declaration in this regard. The above mentioned case law pertains to a person who claims to be the owner of the rented premises on the basis of an alleged agreement to sell. It is my view that the case of such a person is on an equal footing with a person who alleges that the rented premises had gifted, whether orally or in writing.

14. As regards the case law relied upon by the learned counsel for the petitioners, in the case of Mst. Wakeelan Begum Vs. Additional District Judge, Gujranwala and two others (2006 CLC 1886), it has been held that the initial burden would lie on the eviction petitioner to prove by production of documentary or sufficient oral evidence that the respondent was a tenant. In the case of Suleman Mashkoo Vs. Abdul Ghafoor (2002 CLC 143), after making reference to Section 2 (c) of the Urban Rent Restriction Ordinance, 1959, it has been held by the Hon'ble Lahore High Court that, in view of the definition of the term 'landlord' in the said Ordinance it is not necessary that in order to fall within the definition of landlord, the person must be the owner of the rented land or building. Under the

provisions of the said Ordinance, it was possible that a person may not be the owner of the building but still be the landlord. Additionally, it has been held that a person may be the owner of the property, but does not fall within the definition of a landlord, as given in the said Ordinance. In the case of Mazhar Saeed and another Vs. A.D.J. and eleven others (2011 YLR 3089) it has been held that a person in occupation of an immovable property would be bound to establish his capacity in which he was occupying the same. It was also held that the initial burden was on the landlord to prove the existence of the relationship of landlord and tenant through convincing and cogent evidence. In the case of Akhtar Hussain Vs. Allah Ditta (2011 MLD 1834), it was held that the onus of proving the existence of the relationship of landlord and tenant was on the eviction petitioner. In the case of Allies Book Corporation Vs. Sultan Ahmad (2006 SCMR 152), it has been held that where the concurrent findings of the forums below suffered from illegality, infirmity, misreading and non-reading of evidence on record, misconstruing the evidence or based on extraneous material, then the High Court would be justified in setting aside concurrent findings.

15. The case law relied upon by the learned counsel for the petitioners are with regard to the meaning of the term 'landlord' under the West Pakistan Urban Rent Restriction Ordinance, 1959. Section 2 (c) of the said Ordinance defines 'landlord' as follows:-

"landlord" means any person for the time being 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, receiver, executor or administrator for any other person, and includes a tenant who sublets any building or rented land in the manner hereinafter authorized and every person from time to time deriving title under a landlord;"

16. The definition of 'landlord' under the IRRO is different from the one under the West Pakistan Urban Rent

Restriction Ordinance, 1959. Section 2(g) of the IRRO defines the term 'landlord' as follows:-

"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."(emphasis added).

17. Now Section 2(g) of the IRRO 'landlord' *inter-alia* means 'the owner of the premises'. This phrase is conspicuously absent from the definition of 'landlord' under West Pakistan Urban Rent Restriction Ordinance, 1959. In the case of Shajar Islam Vs. Muhammad Siddique (PLD 2007 SC 45), it has been held by the Hon'ble Supreme Court of Pakistan that where the title of the eviction petitioner is not disputed and in the absence of any evidence in rebuttal, there would be a strong presumption of existence of tenancy between the parties. Furthermore, at page 47 of the report, it is held as follows:

"This is settled proposition of law that a landlord may not be essentially an owner of the property and ownership may not always be a determining factor to establish the relationship of landlord and tenant between the parties. However, in the normal circumstances in absence of any evidence to the contrary, the owner of the property by virtue of his title is presumed to be the landlord and the person in possession of the premises is considered as tenant under the law or the tenancy may not be necessarily created by a written instrument in express terms rather may also be oral and implied."

18. During the trial, respondent No.1 was subjected to rigorous cross-examination. In response to a suggestion put by the petitioners, respondent No.1 denied the factum of an oral gift in favour of petitioner No.2. The learned Rent Controller has correctly held that such a suggestion is an implied admission on the part of the petitioners that respondent No.1 was an absolute owner of the rented premises and had the power to gift the same to someone else. In view of the denial of the factum of the oral gift by

respondent No.1, the onus to prove the gift shifted on to the petitioners. As mentioned above, Section 2(g) of the IRRO defines 'landlord' to mean the owner of the premises. The denial of the relationship of landlord and tenant placed a heavy burden on the petitioners to establish that they were not tenants in the rented premises. This onus the petitioners were not able to discharge. The petitioners also failed to produce any title document in their favour. Nevertheless, petitioner No.2 is yet to prove his ownership of the rented premises on the basis of the oral gift in the civil suit instituted by him against respondent No.1. In the developed sectors of Islamabad, a transfer/allotment letter issued by the Capital Development Authority is like a title document. Such a title document has not been issued at any material stage in favour of petitioner No.2. It does not appeal to reason as to why for a period over a decade, petitioner No.2 remained silent and did not have the rented premises transferred in his name on the basis of the alleged oral gift. The four witnesses produced by the petitioners before the Court of learned Rent Controller were not able to establish the absence of the relationship of landlord and tenant. Therefore, the learned lower courts have correctly held that the petitioners have failed to discharge the onus placed on them to establish ownership of the rented property.

19. Section 25(3) of the IRRO requires the Rent Controller to finally dispose of an application under the IRRO as expeditiously as possible but not later than four months of the date of the first hearing after the service of summons on a respondent. As mentioned above, the eviction petition was instituted on 07.01.2011. It had been five long years when the matter was in the appellate court. Perusal of the appellate judgment dated 25.03.2016 reveals that no one appeared on behalf of the petitioners. The petitioners' absence from the Appellate Court on a date fixed for arguments is not understandable. The mere

fact that the petitioners had filed a civil revision petition before the Hon'ble High Court for the transfer of the appeal to some other court did not absolve them from attending the appellate court and addressing arguments. The mere pendency of such a transfer petition, in the absence of the stay order, cannot stop a court from proceeding with the case. Therefore, the decision of the appeal in the absence of the petitioners, the petitioners have only themselves to thank for.

20. In the result, there is no merit in this petition, and it is, accordingly, dismissed, but in the circumstances of the case, there will no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON 29/04//2016

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*