

2011 C L C 452

[Lahore]

Before Nasir Saeed Sheikh, J

Mirza ALLAH RAKHA---Petitioner

Versus

FAHEEM UD DIN AZIZ and 10 others---Respondents

Writ Petition No. 16457 and Civil Revision No. 1626 of 2009, heard on 26th November, 2010.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

---S. 13---Civil Procedure Code (V of 1908), S.12(2)---Constitution of Pakistan, Art.199---
Constitutional petition---Application under S.12(2), C.P.C. before Rent Controller---
Maintainability---Scope---Application under S.12(2), C.P.C. was maintainable before the Rent
Controller if the order obtained from the Rent Controller was the result of fraud or
misrepresentation or was without jurisdiction.

Mst. Asia Bano v. The Rent Controller, Gujranwala and others 1991 MLD 813; Tariq Mehmood
v. Additional District Judge and others 2000 YLR 227 and Sh. Muhammad Ibrahim v. Syed
Abdul Aziz Shah and others 1990 SCMR 542 ref.

Sh. Muhammad Ibrahim v. Syed Abdul Aziz Shah and others 1990 SCMR 542; Tariq Mehmood
v. Additional District Judge and others 2000 YLR 227 and Mst. Asia Bani v. The Rent
Controller, Gujranwala and others 1991 MLD 813 distinguished.

Mst. Fehmida Begum v. Muhammad Khalid and another 1992 SCMR 1908 rel.

Rao Abdul Jabbar Khan for Petitioner.

Ch. Ehsan Sabri for Respondents.

Date of hearing: 26th November, 2010.

JUDGMENT

NASIR SAEED SHEIKH, J.---This judgment will dispose of two connected matters of Writ
Petition No.16457 of 2009 and Civil Revision No.1626 of 2009.

2. Briefly stating the facts of the case are that the petitioner instituted an ejectment petition in the court of learned Rent Controller, Pasrur, District Sialkot against one Muhammad Idrees son of Bashir Ahmad in respect of a house situated in Mohallah Machiwara Chiwinda, Tehsil Pasrur, District Sialkot comprising the construction and the boundaries described in the ejectment petition (Exh.P.7) dated 16-5-2002. The basis of the ejectment petition moved by the petitioner was that his mother Roshan Bibi daughter of Reham Ali wife of Jalal Baig was the owner of the house on the basis of an unregistered sale deed dated 15-10-1942. As the value of this house was shown Rs.99, therefore, the sale deed was unregistered. The petitioner's mother expired on 29-5-1987 and he claiming to be the sole legal heir, thus, alleged that the respondent of the ejectment petition Muhammad Idrees son of Bashir Ahmad is a tenant in the house in question at the rate of Rs.700 per month and he has defaulted in the payment of rent totalling Rs. 4900 for the previous seven months. The petitioner also raised the ground of personal need of the house in question for moving the ejectment petition.

3. This ejectment petition was not contested by the said Muhammad Idrees, who appeared before the Rent Controller on 6-6-2002 and got recorded his statement before the Rent Controller that he would vacate the subject house on 1-7-2002 and that the matter of rent has been resolved and no rent is due till 1-7-2002. On the basis of the above statement of Muhammad Idrees, an ejectment order dated 6-6-2002 was passed by the learned Rent Controller.

4. This ejectment order was executed through the Bailiff of the court vide report (Exh.P.12) dated 7-12-2002, who reported that Muhammad Idrees son of Bashir Ahmad has gone somewhere else and he obtained the possession of the house from Master Muhammad Tufail son of Rahmat Ali, Muhammad Iqbal Yazdani son of Faqir Muhammad Yazdani and handed over the luggage present in the house to said two persons.

5. The respondent No.1 Faheem ud Din Aziz son of Najam ud Din Aziz then moved an application under section 12(2), of C.P.C. dated 15-12-2003 against the present petitioner Mirza Allah Rakha and Muhammad Idrees son of Bashir Ahmad, the alleged tenant, whereas, the other co-owners/legal heirs of Najam ud Din Aziz were impleaded as the respondents Nos.3 to 10 as pro forma respondents. It was contended by the respondent No.1 that the ejectment order dated 6-6-2002 was obtained through fraud and misrepresentation by the petitioner Mirza Allah Rakha with the collusion of Muhammad Idrees son of Bashir Ahmad. It was contended by the respondent No.1 in the application under section 12(2) of C.P.C. that the house in question was never owned by the mother of the petitioner and the alleged unregistered sale deed dated 15-10-1942 is a forged and fabricated document. The respondent No.1 contended that the house in question was owned by his father Najam ud Din Aziz as well as the father of the respondents No.3 to 10 and that his late father was DIS in Government Science College, Karachi and was a Professor of Biology, who had entrusted the house to Muhammad Iqbal Yazdani son of Faqir Muhammad Yazdani for the purpose of running a Sewing School by the name of "Gulshan-e-Banat" and that Master Muhammad Tufail son of Rehmat Ali was a teacher in the said school, who was living in one room of the house in question and that the possession was forcibly taken from the said two persons by the Bailiff through the execution of a fraudulently obtained ejectment order dated 6-6-2002. The respondent No.1 then prayed for setting aside of the ejectment order dated 6-6-2002 on the ground of having been obtained through fraud and misrepresentation and also prayed for the restoration of the possession.

6. The respondent No.1 also instituted a separate suit for declaration and cancellation of the deed dated 15-10-1942 with the prayer of permanent injunction and for possession against the present petitioner Mirza Allah Rakha. In the said suit also, the other legal heirs of Najam ud Din Aziz, father of the respondent No.1 were impleaded as defendants Nos.2 to 9 as pro forma defendants.

7. The petitioner contested the application under section 12(2) of C.P.C. as well as the suit instituted by the respondent No.1 by submitting his replies. It is important to note that Muhammad Idrees, the alleged tenant, against whom the petitioner obtained the ejectment order dated 6-6-2002 submitted a written reply dated 27-4-2004 of the application under section 12(2) of C.P.C. moved by the respondent No.1 and contended that he was never a tenant in the house in question nor did he appear in the court on 6-6-2002-and that he had even no knowledge of the ejectment order and the entire proceedings have been procured through fraud and misrepresentation by the petitioner Miraz Allah Rakha. The petitioner contested the application under section 12(2) of C.P.C. as well as the suit instituted by the respondent No. 1.

8. The learned Civil Judge consolidated both the matters together and framed the following consolidated issues:--

ISSUES.

- (1) Whether the suit is within time? OPP.
- (2) Whether the suit is not maintainable in its present form, if so, what is its effect? OPD-1.
- (3) Whether the plaintiff and pro forma defendants are not sons/ daughters of Najam-ud-Din and have no right to file the suit? OPD-1.
- (4) Whether the suit has not been properly valued for the purpose of court fees and jurisdiction, if so, what its correct valuation? OPD-1.
- (5) Whether the suit is bad due to non-joinder of necessary parties? OPD-1.
- (6) Whether the sale-deed dated 15-10-1942 in favour of Rowshan Bibi is against law, fact and based on fraud,, if so, what its effect? OPP.
- (7) Whether the ejectment order of court of Mr. Abdul Rehman Awan Civil Judge Pasrur dated 6-6-2002 obtained by Allah Rakha (respondents/defendants) is result of fraud and misrepresentation and hence liable to be cancelled? OPP.
- (8) Whether the plaintiff and pro forma defendants are entitled to get the decree as prayed for? OPP.
- (9) Whether the defendant No.1 is in possession of disputed property since 15-10-1942 as owner? OPD-1.

(10) Whether Mr. Iqbal Yazdani and Muhammad Tufail filed objection petition titled Iqbal Yazdani and others v. Mirza Allah Rakha and others and thereafter it was withdrawn on 27-4-2003. Both these objection petitioners instituted the said suit in collusion with plaintiff, if so, with what effect? OPD.

(11) Relief.

9. The parties produced their respective evidence. The alleged tenant Muhammad Idrees appeared as P.W.2, Muhammad Tufail School Master appeared as P.W.3 and Muhammad Iqbal Yazdani appeared as the attorney of the plaintiff as P.W.4. The oral and documentary evidence was produced by the respondent No.1 from (Exh.P.1 to Exh.P.8). The petitioner, who was the defendant No.1 appeared in his evidence as D. W.1 and produced another witness Humayon Butt as D.W.2 and by producing the sale deed dated 15-10-1942 as (Exh.D.1) closed his evidence.

10. The learned Civil Judge/Rent Controller recorded important findings on Issues Nos. 6, 7 and 10 against the present petitioner and held that the ejection order dated 6-6-2002 has been obtained through fraud and misrepresentation, the application under section 12(2) of C.P.C. was accepted and the ejection order as well as entire proceedings were set aside. The civil suit instituted by the respondent No.1 for declaration and possession was also decreed in his favour vide consolidated judgment and decree dated 20-11-2006.

11. An appeal was preferred by the petitioner against the judgment and decree dated 20-11-2006, passed by the learned Civil Judge/Rent Controller in the civil suit and a revision was preferred by the petitioner against the same judgment and decree dated 20-11-2006, announced with respect to the application under section 12(2) of C.P.C. by the learned Rent Controller/Civil Judge. The learned Additional District Judge through a consolidated judgment and decree dated 27-5-2009 dismissed the appeal as well as the revision preferred by the petitioner.

12. Both the judgments and decrees passed by the two courts-below have been assailed by the petitioner through the instant writ petition and the civil revision.

13. It is contended by the learned counsel for the petitioner that an application under section 12(2) of C.P.C. is not maintainable before the learned Rent Controller as the provisions of C.P.C. are not applicable. He has relied upon the judgments reported as Mst. Asia Bano v. The Rent Controller, Gujranwala, and others 1991 MLD 813 Tariq Mehmood v. Additional District Judge and others (2000 YLR 227) and Sh. Muhammad Ibrahim v. Syed Abdul Aziz Shah and others (1990 SCMR 542) to contend that the application under section 12(2) of C.P.C. moved by the respondent No.1 in this case was not maintainable. It is further contended that the respondent could not prove his title over the subject property. It is further contended that only the attorney of the respondent No. 1 namely Muhammad Iqbal Yazdani has been pursuing the case, but the power of attorney was not exhibited. It is next contended that there was no title deed available with the respondent No. 1 to file the application under section 12(2) of C.P.C., therefore, his suit should have been dismissed by the learned trial court as well as by the learned first appellate court. It is next contended that the title deed Exh.D.1/Exh.P.10 which although is an unregistered sale deed as the value of the property at that time was Rs.99, but it was sufficient to prove the title of the petitioner. It is next contended that Exh.D.1/P.10 was a thirty years old document,

therefore, presumption of correctness is attached to it under Article 100 of the Qanun-e-Shandat Order, 1984. It is next contended that the witnesses produced by the respondent No.1 are interested witnesses and were inimical to the petitioner.

14. Conversely, the learned counsel for the respondents submits that the ejectment order was obtained by the petitioner through fraud and misrepresentation, which facts have been established on the record and that two courts below have recorded concurrent findings of fact against the petitioner, which findings are based upon the evidence produced and call for no interference by this Court. It is next contended that the statements of the witnesses produced by the petitioner made contradictory statements. The learned counsel for the respondents elaborated that P.W.3, who appeared in the evidence of the petitioner stated that the house in question was purchased by the predecessor of the petitioner from Muhammad Idrees which is absolutely an unfounded plea. It is next contended that the application under section 12(2) of C.P.C. is maintainable before the learned Rent Controller and that the case-law relied upon by the learned counsel for the petitioner is not applicable to the facts and circumstances of the instant case.

15. I have considered the arguments of the learned counsel for the parties and have perused the record with their assistance.

16. The petitioner first obtained an ejectment order from the learned Rent Controller, Pasrur, District Sialkot on 6-6-2002 by producing some person as Muhammad Idrees claiming himself to be a tenant in the house in question and got recorded his statement. The actual Muhammad Idrees appeared in the court during the proceedings of the instant case as P.W.2 and categorically stated that he was neither a tenant in the house in question nor was aware of the ejectment proceedings and that he also did not appear before the Rent Controller to get his statement recorded. This fact is supported by the report of the Bailiff (Exh.P.12) dated 7-12-2002, wherein the Bailiff took the possession of the house in question from Muhammad Iqbal Yazdani and Master Muhammad Tufail and not from Muhammad Idrees. The statement as P.W.2 of the projected tenant is a sufficient circumstance to establish the fact that the ejectment order was obtained by the petitioner from the learned Rent Controller through fraud and misrepresentation. The two courts below have recorded findings of facts after correctly appreciating the evidence on the record.

17. The case-law relied upon by the learned counsel for the petitioner that the application under section 12(2) of C.P.C. is not applicable to the proceedings of the Rent Controller is distinguishable on its own facts.

18. In the reported judgment *Sh. Muhammad Ibrahim v. Syed Abdul Aziz Shah and others* (1990 SCMR 542) an ejectment order was passed against the tenant on the ground of personal requirements of the landlord. The tenant lost his case uptill the level of the High Court as his Constitutional Petition was dismissed. Before the honourable Supreme Court of Pakistan, a plea taken was that an earlier ejectment petition by the tenant on personal ground was withdrawn by him, therefore, the provisions of Order XXIII, Rule 1 of C.P.C. will create a legal bar for the landlord to file a second ejectment petition on the same grounds of personal need. The Honourable Supreme Court of Pakistan did not grant leave to such a tenant on this ground by

holding that although the provisions of C.P.C. are not applicable to the rent cases, but its equitable principles might be applied to advance justice, but not to penalise the landlord.

19. In the reported judgment *Tariq Mehmood v. Additional District Judge and others* (2000 YLR 227) an ejectment order was passed with respect to a property and the possession was recovered of the rented premises from the respondent of the said writ petition, who was party to the ejectment proceedings. His application for restoration of such possession was allowed by the executing court and the appeal of the landlord was dismissed. In the Constitutional petition filed before the High Court, the landlord took the plea that the remedy available to the person from whom possession was taken was to file a suit under section 9 of the Specific Relief Act, 1877. The Honourable High Court held that the provisions of Order XXI, Rule 103, of C.P.C. were applicable for restoration of possession and it was in that context an observation was made by the learned Judge regarding non-application of the provisions of section 12(2) of C.P.C., but at the same time the provisions of Order XXI, Rules 100 and 103 of C.P.C. were held to be applicable by the learned Judge of the High Court hearing the writ petition of the landlord. The learned Judge of this Court announced the judgment holding that an application for setting aside the eviction order is not maintainable under section 12(2) of C.P.C.

20. The third judgment *Mst. Asia Bano v. The Rent Controller, Gujranwala and others* (1991 MLD 813) relied upon by the learned counsel for the petitioner on the proposition that an application under section 12(2) of C.P.C. is not at all maintainable after the rent proceedings were concluded before the Rent Controller and the matter did not reach the appellate forum, of the District Judge is also a distinguishable judgment. The facts of the said reported case were that an ejectment petition was moved before the Rent Controller, which was decided on the basis of a compromise recorded by the learned Rent Controller. It was alleged that the compromise recorded by the Rent Controller is the result of a collusion with a view to deprive the petitioner from her property, which was in possession of its owners. The learned Rent Controller entertained this application, framed the issues, recorded the evidence and dismissed the same on merits. A writ petition was instituted before the High Court and the learned Single Judge of this Court came to the conclusion that an application under section 12(2) of C.P.C. was not maintainable before the Rent Controller and in this respect relied upon a well-known judgment pronounced by the Honourable Supreme Court of Pakistan *Rehmat Ullah v. Ali Muhammad and another* (1983 SCMR 1064) to come to the conclusion that the learned Rent Controller is not a (Court) so as to attract the provisions of section 12(2) of C.P.C. The writ petition was thus dismissed by the learned Single Judge.

21. I have the advantage of referring to a judgment reported as *Mst. Fehmida Begum v. Muhammad Khalid and another* (1992 SCMR 1908) in which the honourable Full Bench of Supreme Court of Pakistan has laid down the following law:

"The legal position, which emerges from the above case-law, seems to be that under section 17 of the Ordinance, the jurisdiction to execute an order of ejectment passed therein was executable by the Civil Court and, therefore, the provisions of the C.P.C. relating to the filing of objections to the execution order were attracted to. However, after the substitution of section 17 in 1969 by Punjab Ordinance No.9 of 1969, an ejectment order was to be executed by the Rent Controller as

if it were decree of a Civil Court and this Court in the case of Muhammad Yasin (supra) has held that since the Controller has been conferred power to execute an order in the manner of a decree of a Civil Court, then by virtue of the ordinary rule of interpretation, all the powers necessary or enjoyed by the executing authority for effectively and completely executing a decree of a Civil Court shall be available to the Controller. It may further be observed that, as pointed out hereinabove, the original section 22 of the Ordinance did not provide that the Controller shall be competent to decide the question arising between the parties relating to execution, discharge or satisfaction and that a suit would not be competent, but this court in the case of Messrs Bambino Limited (supra) held that the Rent Controller was competent to have invoked the provisions of section 151 read with section 141, Order XXI, Rules 100 and 101, C.P.C., The above view was reiterated by this Court in the case of Mst. Kulsoom Bhai (supra). It also seems that the above cases of Haji Abdur Rashid and Muhammad Hussain Tahir (supra) proceeded before this Court on the assumption that an application under section 12(2), C.P.C. is competent before the Rent Controller and that it can be filed even by a person who was not a party to an ejectment proceeding keeping in view the judgment of this Court in the case of Ch. Jalal Din (supra). It is, therefore, evident that if a person wishes to challenge the validity of an ejectment order on the plea of fraud or misrepresentation, he may file an application under section 12(2), C.P.C., before the Rent Controller, whereas if a person claims restoration of possession of a property on the ground that he was in possession of his own ejected fraudulently, he may file an application for restoration of the possession under Rule 101 of Order XXI, C.P.C. or if he claims right or interest in or possession of immovable property under Rule 97 or Rule 100 of Order XXI, C.P.C., he may file an application under Rule 103, C.P.C. before the Rent Controller.

The question which requires consideration is, as to whether if a person who was neither a tenant nor was claiming through him or under him or was a party to the ejectment proceeding after having been ejected from the property owned by him under provisions of the Ordinance, on account of fraud practised by the landlord on the Court instead of opting to file an application under section 12(2), C.P.C. or an application under Order XXI, Rules 101 and 103, C.P.C. can file a civil suit. This Court has not held in any of the above cases that either on account of the original or substituted section 22 of the Ordinance, a civil suit would not be original or substituted section 22 of the Ordinance, but what a civil suit would not be competent by such a person, to file has been laid down, is that if such a person opts objections either under section 12(2) or under Order XXI, Rule 100 or Rule 103, C.P.C., he would have to agitate question before the hierarchy of the forums provided thereunder and after having lost before such forums, he cannot re-agitate the same question by filing a suit. This being so, it does not lead to an inference that if a person, who was not a party to the ejectment proceedings and who claims to have been ejected from the property owned by him, opts to file a suit in respect of an ejectment order on the ground that the same was obtained by practising fraud on the Court, his suit would be barred either under section 12(2), C.P.C. or Order XXI, Rule 103, C.P.C. Such a suit would be competent provided it is patently bona fide and is based prima facie on reliable documentary evidence and is not actuated to undo a lawfully executed ejectment order."

In later part of the same judgment at page 1930 the honourable Supreme Court of Pakistan further elaborated the proposition in the following words:

"Whether an application under section 12(2), C.P.C. would be competent under the provisions of the Ordinance is a matter which does not present much difficulty even if the provisions of C.P.C. are not application by their own force. As expressed by me in Civil Appeal No.29-K of 1987, Ismail v. Subedar Gul Inayat Shah, the Rent Controller, as a Tribunal of limited jurisdiction is, on the general principles recognized jurisprudence, competent to recall or review an order obtained by fraud or misrepresentation. In that case this aspect of the matter was expressed by me in the following words:-

There cannot be any doubt that section 12(2), C.P.C. is in recognition of the well-settled principle that every Court or Tribunal has inherent jurisdiction to rescind or recall a void order passed by itself. In the Chief Raja Muhammad Fazil Khan and others PLD 1975 SC 331, it was held that the preponderance of judicial authority supports the proposition that every authority, Tribunal or Court has power to even suo motu recall or review an order obtained from it by fraud, on the general principles that fraud vitiates the most solemn proceedings, and no parts, should be allowed to take advantage of his own fraud. On this principle's in that case the Court held that there can be no distinction between the powers available in this behalf to a Court of general jurisdiction and a Court or Tribunal of a special or limited jurisdiction, for in either case the effect of fraud is the same and the duty to undo that effect must lie on the authority on which fraud is practised. Therefore, on the rule that the equitable principles of C.P.C. can be invoked by the Rent Controller and that fraud vitiates the proceedings of a Court or a Tribunal, there can be no escape from the conclusion that the Rent Controller under the Rented Premises Ordinance has the power to set aside any order which has been secured by practising fraud 'or misrepresentation upon him.

However, it is one thing to concede a power to the statutory forum to recall an order obtained from it by fraud, but another to hold that such power of adjudication or jurisdiction is exclusive so as to hold that a suit filed in a civil Court of general jurisdiction is barred. I am therefore in agreement with my brother that a stranger to the proceedings, in a case of this nature has two remedies open to him. He can either go to the special forum with an application to recall or review the order, or file a separate suit. Once he acts to invoke either of the remedies, he will, on the general principles to avoid a conflict of decisions, ultimately before the higher appellate forums, be deemed to have given up and forfeited his right to the other remedy, unless as held in Mir Salah-ud-Din v. Qazi Zaheer-ud-Din PLD 1988 SC 221, the order passed by the hierarchy of forum under the Sindh Rented Premises Ordinance, leaves scope for approaching the Civil Court."

Thus the legal proposition now stands settled that an application under section 12(2) of C.P.C. is maintainable before the Rent Controller if the order obtained from the Rent Controller is the result of fraud or misrepresentation or is without jurisdiction.

22. The two courts below therefore have rightly come to the conclusion by entertaining the application under section 12(2) of C.P.C. moved by the respondent No.1 that the ejectment order

was obtained through fraud and misrepresentation. The judgments passed by the two courts below are in accordance with law based upon correct appreciation of evidence, which calls for no interference. In exercise of my writ jurisdiction while deciding Writ Petitioner No.16457 of 2009, I am not persuaded to hold that the impugned judgments passed by the two courts below are illegal or without lawful authority. The Writ Petition No.16457 of 2009 is therefore dismissed. Similarly the Civil Revision No.1626 of 2009 has also no merits and is dismissed with no orders as to costs.

M.U.Y./A-279/L

Petitions dismissed.