

Form No.HCJD/C-121
ORDER SHEET
LAHORE HIGH COURT LAHORE.
JUDICIAL DEPARTMENT

W.P. No.23511 of 2016.

M/s Shaikh Naveed Ikhlas etc. Versus Shaikh Abdul Hafeez etc.

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15.03.2017. Mr. Muhammad Hussain Awan, Advocate for the petitioners.
Mr. Khalid Ishaq, Advocate for respondents No.1 to 5.

Briefly put, respondents No.1 to 5 filed an ejectment petition against the petitioners which was dismissed by the learned Special Judge (Rent), Lahore (respondent No.7), *vide* order, dated 02.11.2015, against which respondents No.1 to 5 filed an appeal. The learned Additional District Judge, Lahore (respondent No.6), *vide* order, dated 09.06.2016, accepted the appeal and set aside order, dated 02.11.2015, passed by respondent No.7; hence this petition.

2. The legal prepositions put forward by learned counsel for the petitioners can be summed up in the words that as the petitioners are enjoying possession of the rented premises as a result of Lease in Perpetuity, the ejectment petition filed by respondents No.1 to 5 was not maintainable before respondent No.7; that no persuasive reasons have

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been advanced by respondent No.6 while reversing the findings of respondent No.7; that *mala-fide* on the part of respondent No.6 is manifest from the fact that though on the date when the appeal was decided learned counsel representing the petitioners sought an adjournment but the matter was decided in absence of the counsel of the petitioners; that while passing the impugned order respondent No.6 has not only ignored Exh.R/7 but also has not paid any heed to section 53 of the Transfer of Property Act, 1882; that observation of respondent No.6 that no reliance could be placed on Exh.R/7, being erroneous in nature, deserves to be brushed aside and that section 10 of the Punjab Rented Premises Act, 2009 only comes into play when tenancy agreement already exists. In support of his contentions learned counsel has relied upon the cases reported as Abdul Karim v. Mirza Bashir Ahmad (PLD 1974 SC 61), Muslim Commercial Bank Ltd. v. Abdul Ghaffar and 2 others (2013 YLR 344), Muhammad Bakhsh through Representatives and 5 others (2005 YLR 2464), Muhammad Rafi and others v. Khalid Rauf Ahmad and another (1986 MLD 722), Ali Muhammad v. Mst. Azeemun Nisa Begum (1986 CLC 576) and The

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Pakistan Employees Co-operative Housing Society Ltd. Karachi v. Mst. Anwar Sultana and others (PLD 1969 Karachi 474).

3. Conversely, learned counsel appearing on behalf of respondents No.1 to 5, while defending the impugned judgment, submits that pursuant to order, dated 04.07.2016, passed in C.M. No.1/2016, the petitioners were supposed to deposit monthly rent with the learned Executing Court but according to the report on the application submitted by respondents No.1 to 5 for withdrawal of the monthly rent no amount has been deposited by the petitioners in compliance with the orders of this Court, thus, they have no right of audience; that case of petitioners is based on inconsistent pleas inasmuch as while filing their reply to the ejectment petition they admitted themselves to be tenant of respondents No.1 to 5 but later on, they, while taking U-turn, adopted entirely different stance; that respondent No.6 has committed no illegality while setting aside order passed by respondent No.7; that admittedly the properties were jointly owned by two persons but execution of Exh.R/7 by one of them was not valid; that any Lease Deed extending more than one year is compulsorily

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registerable and in case of its non-registration, the party concerned is bound to face its consequences; that during the course of evidence respondents No.1 to 5 were confronted with certain documents by the petitioners tending to manifest that they were tenants of the respondents; that on the one hand the petitioners are of the view that they are in possession of rented premises on the basis of Lease in Perpetuity but on the other have filed a suit for specific performance of agreement to sell and that the case-law referred by learned counsel for the petitioners is not applicable to the facts and circumstances of instant case firstly for the reason that the same having been rendered by this Court or other High Courts cannot be given precedence over the law laid down by the apex Court of the country on the subject and secondly they having been passed in different background cannot be stretched unnecessarily to the present case. In addition to his oral submissions learned counsel has relied upon the cases reported as Govt. of Sindh through Secretary and Director General, Excise and Taxation and another v. Muhammad Shafi and others (PLD 2015 SC 380), Rana Abdul Hameed Talib v. Additional District

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Judge, Lahore and others (PLD 2013 SC 775), Muhammad Iqbal Haider and another v. Vth Rent Controller/Senior Civil Judge, Karachi Central and others (2009 SCMR 1396), Barkat Masih v. Manzoor Ahmad (deceased) through L.Rs (2006 SCMR 1068), Habib Bank Limited v. Dr. Munawar Ali Siddiqui (1991 SCMR 1185) and Dr. Nisar Ali Khan and another v. P.I.A. through Chairman and another (PLD 2004 Lahore 494).

4. While exercising his right of rebuttal, learned counsel for the petitioners submits that as Exh.R/7 was executed in furtherance of Exh.R/6 no exception can be taken against it on the ground that the same was exclusively executed by Sheikh Abdul Hafeez; that section 10 of the Punjab Rented Premises Act, 2009 only operates when there already exists a tenancy agreement; that respondent No.6 failed to consider that Exh.R/7 is not tenancy agreement simplicitor and that as the petitioners have been paying monthly rent in bank pursuant to the order passed by this court, no exception can be taken against them on the ground that the same has not been deposited in the Court.

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5. I have heard learned counsel for the parties at considerable length and have also gone through the documents annexed with this petition as well as the case-law cited at the bar.

6. A perusal of order sheet of the appellate Court shows that on 08.02.2016, due to non-appearance, the petitioners were proceeded against *ex-parte* and the matter was fixed for *ex-parte* arguments on 10.03.2016, however, on the same day viz. 08.02.2016, Mr. Mazhar Hussain Bhatti, Advocate entered appearance on behalf of the petitioners, filed Memo of Appearance. Consequently, the order regarding *ex-parte* proceedings against the petitioners was recalled and the matter was fixed for arguments for 10.03.2016 on the said date learned counsel for the petitioners submitted power of attorney and requested for an adjournment. Thereafter case remained fixed on number of occasions, however, hearing of the case could not be possible for the reasons mostly attributed to the petitioner. On 26.05.2016, though Mr. Mazhar Hussain Bhatti, Advocate was present before the appellate Court but he sought an adjournment on account of engagement of senior counsel, namely, Mr. Muhammad Hussain

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Awan, Advocate before this Court. Resultantly, the hearing was postponed for 27.05.2016 on which date though the case was called with different intervals but hearing could not materialize and the case was adjourned for 30.05.2016. On 30.05.2016, the appellate Court was informed regarding filing of Transfer Application and distrust of the respondent-petitioners on the Presiding Officer, namely, Malik Shafiq Ahmad, the learned Additional District Judge, Lahore, whereupon he referred the matter to the District & Sessions Judge, Lahore for allocation of appeal to some other court. On 01.06.2016, the Learned District & Sessions Judge, Lahore, transferred the matter to Mr. Khizar Hayat Minhas, the learned Additional District Judge, Lahore, who took cognizance of the matter, on 02.06.2016, and fixed the matter for 04.06.2016 with clear cut note that it was a direction case. On 04.06.2016, Mr. Mazhar Hussain Bhatti, Advocate entered appearance as proxy counsel on behalf of the original counsel for the petitioners and requested for an adjournment on the ground that senior counsel is away to Chakwal, in connection with some domestic affair. While granting request of the proxy counsel, the appellate

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court postponed hearing of the appeal for 09.06.2016 with clear cut note that in case of failure of any party to advance arguments the case would be decided on the basis of available material as it was a direction case. On 09.06.2016, proxy counsel appearing on behalf of learned counsel for the petitioners requested for fixation of case after the month of Ramadan-ul-Mubarak. While declining request of the proxy counsel, the appellate Court decided the appeal on the basis of available material and set aside the order passed by the learned Special Judge (Rent).

The resume of the facts, portrayed above, leaves no ambiguity that the petitioners were accommodated by the appellate Court to the maximum and after coming to the conclusion that the petitioners were delaying the matter unnecessarily opted to decide the appeal in absence of the learned counsel for the petitioners. Further, when it was incorporated in the interim orders of the appellate Court that it was a direction case the plea of the learned counsel for the petitioners that neither the petitioners nor their counsel was aware about the fact that it was a direction case, cannot be given any weightage.

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7. Now reverting to the merits of the case, I have observed that the entire case of the petitioners hinges upon Exh.R/7. A cursory glance over Exh.R/7 shows that by virtue of said document a tenancy agreement was purportedly converted into a Lease in Perpetuity for 99 years. It was specified in the said document that in case of failure of Party-I viz. Sheikh Abdul Hafeez, Party-II (the petitioners) was given option to claim, through court, its shares from Party-I with retrospective benefits and profits plus 3.05 million rupees with 20% compound mark-up for the duration used. Further, the amount paid by the petitioners to Sheikh Abdul Hafeez was considered as *Pagri*. The word '*Pagri*' has been defined under section 2(e) of the Punjab Rented Premises Act, 2009 to the following effect:-

“(e) “pagri” includes any amount received by a landlord at the time of grant or renewal of a tenancy except advance rent or security”

The afore-quoted definition clause renders it crystal clear that any amount paid by the tenant at the time of renewal of a tenancy in addition to security amount is considered '*Pagri*'. The said fact also

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affirms that at the most Exh.R/7 could be treated as renewal of tenancy.

8. It is admitted position that Exh.R/7 was purportedly executed for 99 years, thus, the same was compulsorily register-able under the Registration Act, 1908. The apex Court of the country in the case of Government of Sindh through Secretary and Director General, Excise and Taxation and another (supra) while determining the authenticity of an unregistered document, with specific reference to Lease in Perpetuity, has *inter alia* held as under:-

9. *From the above, it is clear that the word perpetuity, without much difficulty and improvisation, can also be construed in the sense of permanence and therefore a lease in perpetuity can be held to be a transaction of immovable property which is irreversible or non-returnable.....*

.....

Similarly it is clear from Section 107 of TPA that a lease of any property beyond one year could only be effected by a registered instrument (note:-subject to the exemption qua other leases orally made coupled with delivery of possession). This is the express and unequivocal mandate of the law. It is settled principle of law that where law requires an act to be done in a particular manner, it has to be done accordingly and not otherwise. At this point, we may also add that if an act is done in violation of law, the same shall have no legal value and sanctity,

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especially when the conditions/circumstances which may render such an act invalid have been expressly and positively specified in law (see section 49 ibid).

From the reproduced part of the two statutes above, it is abundantly and unequivocally clear that no lease in Pakistan (note: subject to section 117 of the TPA and leaving aside for the time being even section 17(d) of the Registration Act relating to agricultural properties) can be effected beyond the period of one year except by a registered instrument and if any lease is not so accomplished, it has no legal validity and sanction beyond the period of one year and would neither create nor purport to create any lease for the period exceeding one year (see Section 49 ibid). Therefore, on account of this clear mandate and compulsion of law, no lease which is not in consonance with these imperative provisions can at all be said or held to be permanent in nature under any circumstances whatsoever. It shall be ridiculous and ludicrous to conceive and hold, on account of the said law, that a lease which is for a period of less than one year is one in perpetuity only for the reason that the instrument of lease or even verbal stipulation between the parties enables the lessee to raise some structure of permanent nature or the lease is capable of being renewed or could be further transferred to a third party. (emphasis provided)

If case of the petitioners is considered on the touchstone of the afore-quoted judgment there leaves no ambiguity that in absence of proper execution and registration of Lease in Perpetuity the claim of the petitioners was rightly discarded by the appellate Court.

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9. Learned counsel for the petitioners has repeatedly argued that Exh.R/7 was executed in furtherance of Exh.R/6. I have gone through the contents of Exh.R/6 which only relates to minutes of meeting of the Board of Directors, held on 28.01.1997, wherein even not an illusory reference was made to the acclaimed Lease in Perpetuity, thus the assertion of the learned counsel for the petitioners cannot be given any weightage.

10. It is imperative to note that the petitioners while submitting reply to the ejectment petition categorically admitted that they are tenants of the respondents since the year 1972. Further, RW-1, while appearing in the witness box, admitted that the premises in question were given to them on rent, in the year 1972. He further admitted that the property was jointly owned by Sheikh Abdul Hafeez and his wife Zahida Hafeez; that though name of Zahida Hafeez was incorporated as owner in Exh.R/13 but she was not party to the Lease in Perpetuity; that the ejectment petition was filed by legal heirs of Zahida Hafeez. It is trite law that a transaction entered on behalf of one person *qua* joint property cannot be considered against other co-sharers. As Mst. Zahida

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Hafeez was not a party towards execution of Exh.R/7 her legal heirs cannot be debarred to sue against the petitioners *qua* the legacy left by their mother and principle of estoppel cannot be applied against them merely on account of execution of a document by their father to the exclusion of their mother.

11. It is important to observe over here that during pendency of the ejectment petition the petitioners filed an application for summoning of Sheikh Abdul Hafeez to establish as to whether he supported the contents of the same or not. The said application was allowed by the learned Special Judge (Rent). Resultantly, Sheikh Abdul Hafeez appeared before the Court, on 23.11.2013 and while owning the contents of the ejectment petition made statement to the effect that he appointed his real son, namely, Sheikh Nauman Hafeez as his Special Attorney.

12. During the course of arguments learned counsel for the petitioners has also referred to communication (Exh.R/8) whereby Sheikh Abdul Hafeez apprised M/s Kronos (Pvt.) Ltd. that he had gifted a portion of his share from H-Block, Hafeez Chambers to his daughter, namely, Mrs. Hina

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Samiullah. The relevant portion of said letter reads as under: -

“Now hence forth, the rental receipt of the said portion shall be issued under ‘HS’ Block. However, for the remaining portion owned by me the rent receipts of ‘H’ Block shall continue to be issued. You are further informed that rental payments for all blocks including ‘HS’ Block shall be received either by me or my nominee Mr. Ali Hussain.”

The afore-quoted contents of letter render it crystal clear that it was tenancy and not Lease in Perpetuity. Had there been any lease as claimed by the petitioners there was no necessity for Sheikh Abdul Hafeez to clarify that in future the rent was to be paid to his daughter. Thus, the said communication, instead of lending any support to the claim of the petitioners, goes against them.

13. Learned counsel for the petitioners during the course of arguments took specific plea that section 10 of the Punjab Rented Premises Act, 2009, which deals with validity of any other agreement during currency of a tenancy agreement, only comes into play where there already exists a tenancy agreement. Perhaps, learned counsel for the petitioners has raised such plea in oblivion of the fact that in Exh.R/7, which is the edifice of the entire case of the

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petitioners, a reference has been made to some agreement executed in the year 1997. Admittedly, tenancy agreement was executed in the year 1997. In this backdrop, it cannot be believed that Exh.R/7 was not hit by section 10 *ibid* more importantly when the petitioners have already filed a suit for specific performance of agreement.

14. It is also worth mentioning here that filing of suit for specific performance of an agreement by the petitioners is admitted. The said aspect also confirms that the petitioners were aware that there was an agreement between the parties and not a Lease in Perpetuity. The Hon'ble Supreme Court of Pakistan in the case of Muhammad Iqbal Haider and another v. Vth Rent Controller/Senior Civil Judge, Karachi Central and others (2009 SCMR 1396) while dealing with the status of a tenant on the basis of an agreement to sell has *inter alia* held as under:-

“4.*****Once the petitioner was prima facie, shown to be inducted as a tenant of the demised premises, he could not claim any exemption from payment of rent on account of institution of suits for specific performance and for cancellation of sale-deed. Article 115 of the Qanun-e-Shahadat Order, 1984 lays down that no tenant of immovable property shall, during the continuance of the tenancy, be permitted to deny that his landlord had a

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title of such property. The relationship of landlord and a tenant is not severed even if the execution of an agreement to sell is admitted. The petitioner was not absolved of his responsibility of compliance of order passed by the Rent Controller under the provisions of section 16 of the Ordinance for making of payment of arrears and future rent. In our view, the impugned judgment of the High Court is plainly correct to which no exception can be taken.” (emphasis provided)

15. Now coming to the case-law cited by learned counsel for the petitioners I am of the view that the same is not applicable to the facts and circumstances of the instant case inasmuch as the case of Abdul Karim (Supra) arose out of a civil suit whereas matter in hand having stemmed from ejection petition stands distinguished. As far as the case of Muslim Commercial Bank Ltd. (Supra) is concerned, the said judgment being in clear cut conflict of the judgment of the apex Court of the country, noted above, cannot be given any weightage. In the case of Muhammad Baksh (Supra) this court *inter alia* considered the validity of an unregistered agreement to sell in part performance whereof possession was handed over to the vendee whereas in the case in hand the petitioners are basing their possession over the rented premises on the dint of Lease in Perpetuity. The case of Muhammad Rafi and others (Supra) goes against the

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petitioners inasmuch as in the said case it has been held that when the landlord establishes from evidence that respondents are his tenants he is entitled to eviction order. As far as the case of Ali Muhammad (Supra) is concerned, the same is of little value in the wake of judgments of the apex Court of the country in cases, referred *supra*, wherein it has unanimously been declared that the position of tenant does not stand changed until and unless he gets a decree for specific performance in lieu of execution of agreement to sell in his favour. Moreover, the said case also stands distinguished from the facts of the instant case for the reason that in the said case tenants were relying upon agreement to sell whereas in the instant case the petitioners are dubbing it as Lease in Perpetuity. Similarly, the case of The Pakistan Employees Co-operative Housing Society Ltd. Karachi (Supra) mainly revolves around the controversy regarding non-registration of agreement to sell *qua* landed property whereas in the case in hand claim of the petitioners is based on inconsistent pleas.

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16. For what has been discussed above, I see no force in this petition which is accordingly **dismissed** with no order as to costs.

(Shujaat Ali Khan)
Judge

Approved for Reporting.

Judge

GR*