ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P. No.2552 of 2016
Malik Manzoor Hussain
Versus.
Additional District Judge, Islamabad & others

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	21.10.2016	**Mr. Iftikhar Ahmed Bajwa, Advocate for the petitioner,** **Mr. Sohail Mehmood, Advocate for respondent No.3.**

Through the instant writ petition, the petitioner, Malik Manzoor Hussain, impugns the order dated 20.06.2016, passed by the Court of the learned Additional District Judge, Islamabad, whereby the petitioner's revision petition against the order dated 02.02.2016, passed by the Court of the learned Rent Controller, Islamabad, was dismissed. Vide the said order dated 02.02.2016, the learned Rent Controller dismissed the petitioner's application under Section 12(2) of the Code of Civil Procedure, 1908 ("C.P.C.") praying for the setting aside of the ejectment order dated 14.09.2015, passed against respondents No. 4 and 5. Vide the said ejectment order, the learned Rent Controller allowed respondent No.3's eviction petition against respondents No. 4 and 5, who were directed to vacate Shop No.6, Ground Floor, Feroze Centre, 14-West, Block-D, Blue Area, Islamabad, ("the rented premises") within a period of 15 days.

2. Learned counsel for the petitioner submitted that on 16.11.2010, an agreement to sell the rented premises was executed between respondent No.3 and the petitioner, whereby respondent No.3 agreed to sell Shop No.6, Ground Floor, Block D, Feroze Centre, Blue Area, Islamabad, to the petitioner; that at the time of the execution of the said agreement to sell, Rs.40,00,000/- was paid to respondent No.3 in

cash, and possession of the said property was handed over to the petitioner; that till date, the petitioner is in possession of the said property; that on 28.11.2015, the petitioner filed a suit for specific performance of the said agreement to sell against respondent No.3 before the Court of the learned Civil Judge, Islamabad; that the said suit is still pending adjudication; that due to the pendency of the said suit, the petitioner cannot be dispossessed from the rented premises; that the eviction petition instituted by respondent No.3 against respondents No.4 and 5 was collusive, and by absenting themselves from the Court, respondents No.4 and 5 virtually conceded to the said eviction petition; that the petitioner was not impleaded as a respondent in the eviction petition; that the petitioner never paid rent to respondent No.3; that the petitioner came to know about the order and decree dated 14.09.2015, after the filing of the execution proceedings by respondent No.3 on 30.09.2015; that in such circumstances, the petitioner was left with no option but to file an application under Section 12(2) C.P.C. against the order and decree dated 14.09.2015; that the learned Rent Controller could not have dismissed the petitioner's application under Section 12(2) C.P.C. without framing issues; that even otherwise, the power of attorney executed by respondent No.3 in favour of her attorney, Barkat Hussain was with respect to Shop No.5 and not Shop No.6, which had been purchased by the petitioner. Learned counsel for the petitioner prayed for the writ petition against the concurrent orders passed by the learned lower courts to be allowed. In making his submissions, learned counsel for the petitioner placed reliance on the law laid down in the cases of Fahmida Begum Vs. Mohammad Khalid (1992 SCMR 1908), Muhammad Nawaz Khan Vs. Muhammad Khan (2002 SCMR

2003), Anis Haider Vs. S. Amir Haider (2008 SCMR 236), and Allah Rakha Vs. Faheem-ud-Din Aziz (2011 CLC 452).

3. On the other hand, learned counsel for respondent No.3 submitted that the eviction proceedings before the Court of the learned Rent Controller were not collusive; that the written reply filed by respondent No.4 to the eviction petition, was not a conceding reply; that the eviction proceedings were contested by respondent No.4; that respondent No.5 had also filed an appeal against the eviction order; that the said appeal was dismissed on 28.11.2015; that the petitioner filed an application under Section 12(2) C.P.C. on the same very day on which respondent No.5's appeal was dismissed; that the petitioner appeared on the scene after the eviction was accepted on 14.09.2015; that the petitioner's application under Section 12(2) C.P.C. is silent regarding his possession of the rented premises; that the suit for specific performance instituted by the petitioner is also silent as regards the possession of the rented premises; that respondent No.3 never entered into an agreement to sell with the petitioner; that the petitioner filed a suit for specific performance five years after the alleged agreement to sell; that an application under Section 476 Cr.P.C has been filed against the petitioner; that the petitioner's assertion that he paid Rs.40,00,000/- in cash to respondent No.3 is not believable; and that the petitioner in collusion with respondents No.4 and 5 has started a new round of litigation against respondent No.3. Learned counsel for respondent No.3 prayed for the writ petition to be dismissed.

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

5. The record shows that on 01.01.1998, a lease agreement was executed between Khawaja Muhammad Naim, Farhad J. Khawaja and Mehmooda Ajmal Khawaja (respondent No.3), as lessors, and Muhammad Ali (respondent No.4), as lessee, for the lease of Shops No.6 and 7, Ground Floor, Feroze Centre, 14-West, Block-D, Blue Area, Islamabad. The lease period was three and half years, but the same could be extended subject to the concurrence of the parties thereto. The said tenant, on 01.11.2010, vacated shop No.7. On 12.02.2014, respondent No.3 filed an eviction petition against respondent No.4 and respondent No.5, before the Court of the learned Rent Controller, Islamabad, for their eviction from Shop No.6/the rented premises. The grounds taken in the said eviction petition were, (i) default in the payment of rent, (ii) the sub-letting of the rented premises by respondent No.4 to respondent No.5, and (iii) the expiry of the lease agreement. Respondent No.4 contested the said eviction petition by filing a written reply. From the divergent pleadings of the contesting parties, issues were framed.

6. The record further shows that on 14.02.2015, respondent No.4's right to cross-examine respondent No.3's witnesses was closed. On 07.03.2015, respondent No.4's right to produce evidence was also struck off. As regards respondent No.5, the case had proceeded *ex-parte* against him. Vide order dated 14.09.2015, the said eviction petition was accepted and respondents No.4 and 5 were given a period of fifteen days to hand over vacant possession of the rented premises to respondent No.3.

7. On 28.11.2015, the petitioner came onto the scene and filed an application under Section 12 (2) C.P.C before the learned Rent Controller praying for

the setting aside of the eviction order dated 14.09.2015. The stance taken by the petitioner was that an agreement to sell the rented premises was entered into between the petitioner and respondent No.3, whereby the latter agreed to sell rented premises for a total sale consideration of Rs.50,00,000/-, out of which Rs.40,00,000/- was paid in cash to respondent No.3. It is further pleaded that subsequently respondent No.3 did not fulfill her part of the obligation and did not transfer "the house" in the petitioner's favour. The petitioner also alleged fraud against respondent No.3 but gave no particulars in support of the said allegation. After the matter was adjourned on a few occasions at the instance of the petitioner, the learned Rent Controller, vide orders dated 23.01.2016 and 27.01.2016, gave the petitioner last and final opportunity to advance arguments on the maintainability of the application under Section 12 (2) C.P.C. Since the counsel for the petitioner absented himself from the Court of the learned Rent Controller on 02.02.2016, the said application was decided on the basis of the available record. The learned Rent Controller dismissed the said application, vide order dated 02.02.2016, which was assailed by the petitioner in a revision petition before the Court of the learned Additional District Judge, Islamabad. Vide order dated 20.06.2016, the said revision petition was also dismissed. These concurrent orders have been challenged by the petitioner in the instant writ petition.

8. It may also be mentioned that on 28.11.2015, the petitioner filed a suit for specific performance and permanent injunction against respondent No.3 before the Court of learned Civil Judge, Islamabad. This suit was filed on the same very day as the application under Section 12 (2) C.P.C. The contents

of this suit and the application under Section 12 (2) C.P.C. are almost the same except that in the suit the date of the alleged agreement to sell is stated to be 16.11.2010. This suit is still pending adjudication.

9. The entire edifice of the petitioner's case is rooted in the alleged agreement to sell dated 16.11.2010. The petitioner did not bring any material on record which could lead a Court to take a prima facie view that the petitioner had remained in occupation of the rented premises since 2010. How the petitioner came into possession of the rented premises has neither been pleaded in the suit, nor in the application under Section 12 (2) C.P.C. The suit for specific performance was filed on 28.11.2015 (i.e. five long years after the alleged agreement to sell). This delay in the institution of the suit has not been explained by the petitioner. The suit was filed by the petitioner after respondent No.3 was successful in getting an order and decree in her favour from the Court of the learned Rent Controller. Now, it is well settled that an agreement to sell immovable property would neither create nor purport to create any right or interest in such property nor would ownership stand transferred to the vendee. It confers only a right of enforcement of the promise. An agreement to sell is not a title document and has never been treated as an alienation. Reference in this regard may be made to law laid down in the cases titled as Mst. Rasheeda Begum Vs. Muhammad Yousaf (2002 SCMR 1089), Muhammad Ibrahim Vs. Fateh Ali (2005 SCMR 1061), and Shah Muhammad Vs. Atta Muhammad (2005 SCMR 969). Hence, unless and until the suit for specific performance instituted by the petitioner is decreed by the learned Civil Court, he cannot claim to have become an owner of the rented premises.

10. As mentioned above, it is not disputed that on 28.11.2015, the petitioner instituted a suit for specific performance of the agreement to sell dated 16.11.2010 against the respondent No.3 before the Court of Civil Judge, Islamabad. This suit is still pending adjudication and is being contested by respondent No.3. Whether or not the petitioner has purchased the rented premises or not is for the learned Civil Court to determine. Presently, there is no decree with respect to the ownership of the rented premises in the petitioner's favour. 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 specific performance or declaration in this regard. 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 ride 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 <u>Gohar Ali Shah Vs. Shahzada Alam, reported as 2000 MLD 82</u>, 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 sell 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 case of Muhammad Rafique Vs. Farida Khan (2016 CLC 1451), 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."

11. The learned counsel for the petitioner's contention that there was collusion between respondent No.3 on the one hand, and respondents No.4 and 5 on the other, is not believable because respondent No.4 had contested the eviction petition

by filing a written reply. Respondent No.4 had not filed a consenting written reply. From the divergent pleadings of the said parties, the Court of the Rent Controller had also framed issues. Furthermore, the order and decree dated 14.09.2015 passed by the Court of the learned Rent Controller was challenged by respondent No.5 in an appeal before the Court of the learned Additional District Judge, Islamabad. The said appeal was contested by respondent No.3. Vide judgment and decree dated 28.11.2015, the said appeal was dismissed. The application under Section 12 (2) C.P.C. was filed by the petitioner on the same very day on which respondent No.5's appeal was dismissed. Hence, the petitioner allegation regarding collusion is contradicted by the record.

12. As regards the contention of the learned counsel for the petitioner that the Court of the learned Rent Controller should have framed issues on the petitioner's application under Section 12 (2) C.P.C., I am of the view that it is not obligatory on a Court to frame issues every time such an application is filed. The Court of the learned Rent Controller was correct in not framing issues because the dispute raised by petitioner could have been decided on the basis of the material available on the record. In the case of (Nasira Khatoon versus Aisha Bai – 2003 SCMR 1050) the Hon'ble Supreme Court of Pakistan has held *inter alia* held as follows:-

> ***"7. The remedy of civil suit available for setting aside the judgement and decree obtained by fraud and misrepresentation prior to the enactment of subsection (2) of section 12, C.P.C. was taken away by this subsection but this remedy would not be available like a regular suit and the Court may dispose of an application under section 12 (2) C.P.C. without framing of issues, recording of evidence of the parties and following the procedure for trial of the suit. …"***

13. Similar view has also been taken by the Superior Courts in the following cases:-

i. **(Warriach Zarai Corporation versus F.M.C. United (Pvt.) Ltd. – 2006 SCMR 531)**
ii. **(Amiran Bibi versus Muhammad Ramzan – 1999 SCMR 1334)**
iii. **(Muhammad Azeem versus national bank of Pakistan – 2001 MLD 135)**
iv. **(Nazir Ahmed versus Muhammad Sharif – 2001 SCMR 46)**
v. **(Barkat Ali versus Nadir Khan – 2004 YLR 81)**
vi. **(Shabana Irfan versus Muhammad Shafi Khan – 2009 SCMR 40)**
vii. **(Imam Din versus Siftan Bibi – 2010 YLR 2825)**
viii. **(Muhammad Sharif versus Ghulam Ali – 2006 YLR 2909)**
ix. **(Muhammad Yousaf versus Lal Din – 2006 YLR 677)**
x. **(Saeed Iqbal versus Shabbir Ahmad – 2008 YLR 2142)**

14. As regards the contention of the learned counsel for the petitioner that the power of attorney executed by respondent No.3 in favour of her attorney, Barkat Hussain, was with respect to Shop No.5 and not Shop No.6, suffice it to say that the petitioner neither took this ground in his application before the learned Rent Controller, nor in his revision petition before the Court of the learned Additional District Judge, Islamabad. It is by now well settled that the ground not agitated before the lower Courts cannot be taken for the first time in a writ petition before the High Court.

15. In view of the above, I do not find any merit in the petition, which is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Sultan*

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