

IN THE HIGH COURT OF SINDH AT KARACHI

Constitution Petition No.S-440 of 2017

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before: Mr. Justice Nazar Akbar

Petitioner : Mubashir Aftab S/o Aftab Manzar, through
Mr. Shahab Sarki, Advocate.

Versus

Respondent No.1 : VIth Addl: District Judge South Karachi.

Respondent No.2 : VIIth Rent Controller South Karachi.

Respondent No.3 : Rukhshanda Aftab

Respondent No.4 : Rabiya Aftab

Respondent No.5 : Sadiya Aftab

Respondent No.6 : Muzamil Aftab (Nemo).

Respondent No.7 : At serial No.7 only address of Respondents
No.3 to 7 are mentioned in the petition.

Respondent No.8 : Dewan Metharam Dharamdas Trust,
Through Mr. Mukesh Kumar, Advocate.

Date of hearing : **25.01.2019**

Date of Decision : **12.02.2019**

JUDGMENT

NAZAR AKBAR, J. The petitioner through this constitution petition has challenged concurrent findings of two Courts below. The VIth Rent Controller, South Karachi by Judgment dated **10.2.2016** allowed **Rent case No.544/2011** filed by Respondent No.8 and the VIth Additional District Judge, South Karachi by Judgment dated **21.01.2017** in **FRA No.55/2016** maintained the said judgment of Rent Controller and the Petitioner was directed to vacate the demised premises within 90 days from the date of appellate order.

2. Briefly stated the facts of the case are that Respondent No.8 is the owner and landlord of shop No.1, in the building known as “Ekanek Building” constructed on plot No.13SB4, Zaib-un-Nisa Street, Saddar Karachi (the demised shop). Late grandfather of the Petitioner and Respondents No.4 to 6 and father-in-law of Respondent No.3 was tenant in the demised shop on monthly rent of **Rs.320/-** excluding all other utility charges and after the death of said original tenant, the father of Petitioner was in possession of the demised shop. Respondent No.8 filed Rent Case under **Section 15(2)(ii)** of the Sindh Rented Premises Ordinance, 1979 (SRPO, 1979) for eviction of the petitioner and Respondents No.3 to 6 on the ground of default as well personal bonafide need stating therein that original tenant was paying rent of the demised shop to Respondent No.8 and lastly he paid rent of the demised shop upto **September 1983** and on 07.11.1983 father of the Petitioner sent money order for the months of October, 1983 and November, 1983 in his personal name without informing Respondent No.8 about death of Manzar Ahmed, therefore, it was refused as father of the Petitioner was stranger to Respondent No.8/landlord. The Petitioner on **30.12.1983** informed Respondent No.8 that original tenant i.e Manzar Ahmed has died and again sent money order to Respondent No.8/ landlord which was refused by Respondent No.8/landlord, as the Petitioner has never submitted any document of heirship to show that he is legal heir of the original tenant. However, Respondent No.8 initially filed suit bearing No.2411/1985 for declaration and permanent injunction against the Petitioner, his mother and his sisters praying therein for their declaration that they are trespassers in the demised shop. The said suit was dismissed for non-prosecution on 21.3.1998 and Respondent No.8 came to know that the Petitioner is claiming

possession of the demised shop as tenant and he has deposited rent for four months from **October, 1983** to **January, 1984** in his name in MRC No.579/1984 on **19.02.1984**. Therefore, Respondent No.8 filed rent case as the Petitioner has committed willful default in payment of rent. It was also averred that Respondent No.8 also required the demised shop for personal bonafide use as no other suitable shop on main road of Zaib-um-Nisa Street, Saddar, Karachi. It was also averred by Respondent No.8 that the Petitioner has occupied the demised shop illegally and he has sub-let it to Respondent No.3 without consent of Respondent No.8/ landlord. Therefore, Respondent No.8 filed rent case against the Petitioner and Respondents No.3 to 6 on the ground of default in payment of rent as well as personal bonafide need.

3. The Petitioner/opponent on service of notice of rent case filed his written statement wherein he admitted the ownership of the demised shop by Respondent No.8. He contended that by letter dated **31.12.1983** he informed Respondent No.8 about death of Manzar Ahmed and he being his legal heir was holding the possession of the demised shop and also provided death certificate and details of other legal heirs and no objection/declaration dated **26.01.1984** to Respondent No.8. He denied the allegation of trespassing the demised shop by his mother and sisters and contended that the suit No.2411/1985 was malafidely filed by Respondent No.8 merely to create ground of ejectment of the Petitioner from the demised shop. He claimed that being legal heir of original tenant Manzar Ahmed, he was statutory/legal tenant covered under **Section 2(J)** of SRPO, 1979 and is not in illegal possession of the demised shop. He contended that Respondent No.8 has refused to accept money order of the rent, therefore, the Petitioner filed MRC No.579/1984 in the

Court of XIX Rent Controller and by order dated **15.02.1984** he was allowed to deposit rent in the said MRC. He denied the allegation of committing default in payment of monthly rent and claimed that he has deposited rent in MRC No.579/1984.

4. The Rent Controller after recording evidence and hearing learned counsel for the parties, allowed Rent Application filed by Respondent No.8 by order dated **10.02.2016**. The Petitioner filed **FRA No.55/2016** against the said judgment before the appellate Court which was dismissed by judgment dated **21.01.2017**. Both the judgments have been impugned herein this constitution petition.

5. The instant petition was presented on **27.2.2017** and after more than one month it was fixed in Court for hearing on **30.3.2017** with an urgent application and on same day an exparte order of suspension of concurrent findings was obtained. The Respondent/Landlord was seriously annoyed with repeated adjournments since exparte order against him was hurting. However, after almost two years on **24.01.2019** when learned counsel for the Petitioner was again not present and only brief was held on his behalf by some other lawyer on the ground that he is busy before another bench, therefore, as an exparte stay was operating since **30.3.2017**, the case was adjourned to **25.01.2019** to be taken up at **8:30 A.M.** On **25.01.2019** the position was same, again the same lawyer held brief on behalf of learned counsel for the Petitioner and requested for a date, therefore, to facilitate the counsel both the parties were directed to file written arguments within three days and the case was reserved for judgment with a warning that otherwise judgment/order will be passed after going through the record available on Court file. Next day only counsel for Respondent No.8 submitted his written

arguments but counsel for the Petitioner has not filed written arguments till date. Therefore, after almost two weeks relying on the directions of the Hon'ble Supreme Court in the case of *Messrs MFMY Industries ..Vs.. Federation of Pakistan (2015 SCMR 1550)*, that the Court cannot indefinitely wait for hearing of arguments, I decided to take up the case for writing judgment. The relevant observations of Hon'ble Supreme Court is as under:-

If parties, despite the opportunity granted by the court to make oral submissions do not avail the same, the court is not bound to wait indefinitely for them and keep on adjourning the matter. This is highly deprecated and should be discouraged, rather the Court should pronounce the judgment without their arguments and this (such judgment) shall not be in violation of the rule of hearing.

6. I have perused the record as well as written arguments submitted by the counsel for Respondent No.8. The perusal of record shows that concurrent findings of the Courts below on the point of default are based on perfect reading of evidence. learned counsel for the Petitioner even in his memo of appeal has not pointed out any misreading or non-reading of evidence which could have absolved the Petitioner from the liability to default in payment of rent. The record shows that unfortunately Respondent No.8 under ill advice wasted his time when a civil suit was filed instead of rent case for recovery of possession of the demised shop from the Petitioner. The said suit was dismissed for non-prosecution. However, subsequently Respondent No.8 filed Rent Case and in para-10 and 11 a specific and clear plea of default was taken by the Petitioner for eviction of the Petitioner from the demised shop. Para 10 and 11 of rent application are reproduced below:-

10. *That the father of the Opponent No.1 has committed default in deposit of rent in court as he*

filed Misc: rent case No.579 of 1984 to deposit rent on 15/02/1984 being rent starting from October 1983 and started depositing rent from 19/02/1984 after lapse of about four months. (Copy of MRC and ledger report is attached as annexure A/3 and A/2).

11. *That the father and grand father of the Opponent No.1 and thereafter the Opponents have committed willful default hence this application.*

Respondent No.8 with the memo of rent case has annexed copy of Miscellaneous Rent Case No.579/1984 and ledger report. The prayer clause in the said Miscellaneous Rent Case by itself was enough to conclude that the Petitioner has been a defaulter in payment of rent even through the Court. Prayer clause from said MRC is reproduced below:-

*It is, therefore, most respectfully prayed that this Hon'ble Court will be pleased to allow the Applicant No.1 abovenamed to deposit Rs.1600/- in this Court **being rent for 5 months from 1.10.1983 to 29.2.1984** and the future monthly rent of the said premises at Rs.320/- p.m.*

7. The Petitioner had no defense to this default and may be for this very reason the Petitioner with the instant petition has not filed copies of his written statement to the Rent Application and evidence recorded by the trial Court. In fact the Petitioner in his evidence through his attorney Mubashir Ahmed has conceded in his cross examination that “it is correct that the first rent was deposited in MRC on 19.02.1984. It is correct to suggest that after about more than four months I deposited rent of October, 1983 in MRC”. He also admitted in his cross examination that “Mr. Jitendra Prem Shahani is an authorized person and rent collector of the Respondent Trust/landlord”.

8. In the first place the Petitioner had no justification to tender rent by money order since Respondent No.8/landlord has never

refused to accept the rent from the Petitioner with acknowledgement in writing in the same manner in which rent for the month of **September, 1983** was received on **02.10.1983**. The Petitioner has not pleaded refusal of rent for the month of October, 1983 by the landlord. It was mandatory duty of the Petitioner/tenant to pay the rent to Respondent No.8/landlord who had always acknowledge receipt of rent in writing in terms of **Section 10(2)** of SRPO, 1979 which reads:-

10. **Payment of rent.**--(1) *The rent shall, in the absence of any date fixed in this behalf by mutual agreement between the landlord and tenant, be paid not later than the tenth of the month next following the month for which it is due.*

(2) *The rent shall, as far as may be, be paid to the landlord, who shall acknowledge receipt thereof in writing.*

The Petitioner has become tenant by operation of law in terms of **Section 2(j)(ii)** of SRPO, 1979 as heir of the tenant in possession of the demised shop after his death. The Petitioner as statutory tenant like the original tenant since deceased was under mandatory obligation to have offered rent of the demised shop for the month of October, 1983 to the landlord/Respondent No.8 before sending it through money order. Therefore, even sending a money order of rent to Respondent No.8 was in contravention of afore-quoted provision of rent laws. The Petitioner has neither contacted the landlord to offer rent nor it was refused by the landlord. It is settled law that unless the landlord has refused to receive the rent, it could not be sent to him by postal money order. In this context, the learned trial Courts have relied on the case law reported as Muhammad Amin Lasania vs Messrs Ilyas Marine and Associates and others (**PLD 2015 SC 33**). Beside the legal defect in the tender of rent through Court. Even on

facts the Petitioner has no case. Rent for the month of October and December, 1983 was deposited after the time prescribed by law for approaching the Court to avoid default. **Section 10(1)** read with **Section 15(2)(ii)** of SRPO, 1979 the Petitioner was liable to tender rent for the month of October, 1983 within **60 days** from **30.10.21983** that is to say it was to be deposited not later than **10th** day of **January, 1984** and likewise the rent for the month of **November, 1983** was to be deposited on or before **10th** day of **February, 1984**. But it was deposited on **19.2.1984**. Therefore, in terms of the rent laws the Petitioner was a willful defaulter in payment of rent and he was liable to be evicted from the demised premises. The learned Rent Controller in the face of the above evidence and law had no option except to order eviction of the Petitioner on default.

9. The Petitioner, however, filed FRA No.55/2016 which was dismissed by the learned appellate Court on **21.01.2017** then as stated above, the Petitioner on **27.2.2017** filed instant constitution petition against the concurrent findings to defeat the justice by delay as much as he can. In fact Mr. Shahab Sarki, advocate for the Petitioner had no argument to defend the clear-cut case of default committed by his client except to delay the hearing of the instant petition to its maximum. Therefore, I believe his avoidance to file even written arguments after almost two years of exparte order dated **30.3.2017** against the concurrent findings dated **10.2.2016** and **21.1.2017** respectively in the Rent case No.544/2011 was the only option. The facts and circumstances of the instant petition reaffirms my belief that the observations of the Hon'ble Supreme Court in the case of Muhammad Sharif v. Muhammad Afzal Sohail (**PLD 1981 SC**

246) after thirty years are still as fresh as it was in **1981**. The observations are as follows:-

"We are of the view that the petitioners were fully aware that a writ petition did not lie in these circumstances, but had filed it merely to gain time and delay their eviction from the shop. We have been noticing, of late, that notwithstanding the fact that the Legislature, in its wisdom has abolished the second appeal in cases under the West Pakistan Urban Rent Restriction Ordinance and has made the orders of the District Judge as final, yet the parties, probably after obtaining legal advice, have taken to filing writ petitions in the High Court against the final order passed by the appellate Court, merely to take another chance or to delay their eviction, hoping that the matter shall take considerable time to be disposed of or that in any case the High Court while dismissing their writ petition may be persuaded to allow further time for vacating the premises-in-question.

10. In view of the above facts, the concurrent findings of two Courts below do not call for any interference, consequently this constitution petition is dismissed alongwith pending application. The Petitioner is directed to vacate the demised shop within **15 days**. If he fails to vacate the demised shop within **15 days**, the Executing Court will issue writ of possession with police aid and permission to break open the locks of the demised shop without even notice to the Petitioner.

JUDGE

Karachi
Dated:12.02.2019

Ayaz Gul