

IN THE HIGH COURT OF SINDH AT KARACHI

Constitution Petition No.S-2445 of 2017

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

Before: Mr. Justice Nazar Akbar

Petitioner : M/s Climax Film through
Shaikh Muhammad Wasim, Advocate.

Versus

Respondent No.1 : Habib Muhammad Naseeb
Respondent No.2 : Taha Muhammad Naseeb
Respondent No.3 : Yahya Muhammad Naseeb
Respondent No.4 : Shamimuddin.
Through Syed Hassan Ali, Advocate.

Respondent No.5 : The Presiding Officer, III Additional District
Judge, Karachi South.

Respondent No.6 : The Presiding Officer VI Rent Controller
Karachi South.

Date of hearing : **10.12.2018**

Date of Decision : **08.02.2019**

JUDGMENT

NAZAR AKBAR, J. The petitioner through this constitution petition has challenged the concurrent findings of two Courts below. The VI-Rent Controller, South Karachi by Judgment dated **09.5.2013** allowed **Rent case No.1147/2010** filed by Respondents No.1 to 3 and the III-Additional District Judge, South Karachi by Judgment dated **01.11.2017** in **FRA No.142/2013** maintained the said judgment of Rent Controller. The Petitioner was directed to vacate the premises and handover its peaceful possession to the Respondents within 15 days from the date of appellate order.

2. Briefly stated the facts of the case are that the Respondents filed Rent Case stating therein that they are the owners of the property bearing plot No.RB-6/74, Muhammadi Building, Harmusji Street, Mazar Wali Gali, Khata M.A Jinnah Road, Karachi, whereas the Petitioner was tenant in respect of a Room on 2nd Floor in the said building (the tenement) at monthly rent of Rs.29/- per month. The rent of the tenement was collected by the owner/landlord through the rent collector namely Jan Muhammad who died in the month of **July, 2004**, thereafter no rent was being collected by Respondents nor the tenant has offered the rent to them. In the month of **June, 2005** son of Respondent No.1 namely Ali Habib demanded rent from the Petitioner but he refused to pay the same. The son of owner/ landlord came to know that the Petitioner is depositing rent in the Court, so he made an application for withdrawal of the rent but the Petitioner opposed the same, therefore, rent could not be withdrawn. It was claimed that the Petitioner failed to pay the rent from January, 2005 at Rs.29/- per month till filing of ejectment application and committed willful default in payment of rent, therefore, he sent legal notice dated **18.11.2009** to the Petitioner which was not received by him, therefore, Respondents filed rent case against the Petitioner on the ground of default in payment of rent.

3. The Petitioner/opponent on service of notice of rent case filed his written statement wherein he denied the allegations and contended that he was depositing rent in Court since 1977 as Respondents had refused to receive the same and they went to Muscat Saltanat-e-Oman and their whereabouts were not known to any of the tenants of building and, therefore, he started depositing rent in Court in **MRC No.4393/1977** and subsequently the

Petitioner was allotted new **MRC No.280/2001** and he paid rent upto **December, 2010** with the Nazir of the Court, therefore, he claimed that he has not committed willful default.

4. The Rent Controller after recording evidence and hearing learned counsel for the parties, allowed Rent Application filed by Respondents No.1 to 3 by Judgment dated **09.5.2013** and directed the Petitioner to vacate the tenement and handover the same to Respondents within 45 days. The Petitioner filed **FRA No.142/2013** against the said judgment before the appellate Court which was dismissed by judgment dated **01.11.2017**. Both the judgments have been impugned herein this constitution petition.

5. I have heard learned counsel for the parties and perused the record.

6. Learned counsel for the Petitioner in his synopsis of the arguments has referred to the evidence of depositing of rent in Court since 1997 and claimed that no default has been committed by him. The Petitioner has also claimed that there has been no default, however, if any, stand waived since the rent has been withdrawn upto 1987. It has also been contended that such deposit of rent has not been examined by the Courts below. The other ground taken by him is that the Petitioner is tenant since 1957 and as such, SRPO, 1979 was not relevant to hold him guilty of default in payment of rent. He has relied upon the following case-laws:-

- i. *Messrs Eagle Star Insurance Co. Ltd. vs. Messrs Usman Sons Ltd and others* (**PLD 1969 Karachi 123**);
- ii. *Habib Ahmed vs Liaquat Hussain* (**PLD 1985 Karachi 741**);
- iii. *S.Y Mohajir vs. Mst. Aisha Jamal* (**PLD 1983 Karachi 489**);

- iv. *Orient Pakistan (Pvt.) Ltd. vs. Abdul Majid Carim* [**1992 ALD 58(1)**];
- v. *Malik Muhammad Nawaz vs. Haji Muhammad Hayat* (**1996 MLD 1895**);
- vi. *Muhammad Hussain vs. Khushi Muhammad through L.Rs.* (**2003 CLC 478**);
- vii. *Haji Riaz Ahmed Mir vs. Brig. (Retd) Ch. Muhammad Sharif* (**PLD 2003 Karachi 45**);
- viii. *Malik Abudl Qayyum vs. Muhammad Hussain and others* (**1990 SCMR 1716**);
- ix. *Sabir-ur-Rehman and another vs. Government of Sind and 3 others* (**PLD 1989 Karachi 572**);
- x. *Messrs Shamim Akhtar vs. State Life Insurance Corporation of Pakistan, Karachi and 2 others* (**PLD 2005 Karachi 554**);
- xi. *Federation of Pakistan, Minisry of Interior Federal Secretariat, Islamabad vs. Muhammad Haris Hassan* (**PLD 2004 Karachi 119**);

7. In rebuttal, learned counsel for Respondents has contended that the two courts below have found the Petitioner guilty of default in payment of rent in accordance with the rent laws and the factual controversy cannot be re-examined by this Court being not the appellate Court. He has further contended that legal notice which was also served on the Petitioner to tender rent after the Petitioner refused to pay the rent to Ali Habib son of Respondents. He contended that on the one hand the Petitioner has claimed that he has never tendered rent to the attorney of landlord Jan Muhammad and on the other hand he has shown the withdrawal of rent upto 1987 through late attorney of Respondents/ applicants. He further contended that in 1977 the Petitioner deposited rent in MRC No.4393/1977 without offering rent to the landlord and/or even sending money order to the landlord. Then in 2005 the Petitioner again refused to tender rent to landlords when their son Ali Habib personally demanded the rent. Even after legal notice in 2009 the

Petitioner never showed their intention to pay rent to the landlord. He referred to the impugned judgment and contended that both the courts have noticed the admitted position from the record that the Petitioner has failed to establish refusal of rent by the Respondents even in 1997 before depositing rent in Court and thereafter in 2005 when landlord demanded rent from the Petitioner. He has contended that mere deposit of rent or its withdrawal does not absolve the tenant from the consequences of default even if the amount so deposited has been withdrawn by the landlord through his attorney. In support of his contentions learned counsel for Respondents has relied on the following case-laws:-

- i. *Muhammad Amin Lasania vs. Messrs Ilyas Marine and Associates and others (PLD 2015 Supreme Court 33);*
- ii. *Mst. Yasmeen Khan vs. Abdul Qadir and another (2006 SCMR 1501);*
- iii. *Muhammad Asif Khan vs. Sheikh Israr (2006 SCMR 1872);*
- iv. *Mrs. Ram Lal and 8 others vs. Mst. Nargis Khanum (PLD 1996 Karachi 440).*

8. The record shows that the Petitioner in his written statement has denied that the rent was collected by the Petitioner through Jan Muhammad and in para-3 of the written statement he has stated that “*applicants have refused to receive the rent and they went to Masqat and their whereabouts were not known to any of the tenants of the building, therefore, the tenants started depositing rent in Court*”. The Petitioner has not given any date and time of refusal by the landlord before depositing rent in Court, but he has allowed the Respondents to withdraw the rent through their attorney Jan Muhammad and at the same time he contends that the applicants have gone to Masqat then to whom he has tendered the rent other than Jan Muhammad and if not Jan Muhammad, then who has

refused to receive the rent. In these circumstances the Petitioner was under obligation to prove by cogent evidence that on what point of time and date who has refused to receive the rent. The Petitioner (tenant) has not led any evidence except his own words. Then it is also an admitted position from the record that money order of rent was also not sent to verify that there is nobody at the address of the Respondents/ landlords to receive the rent. In the affidavit in evidence, the Petitioner conceded that in 2005 a stereo type notice was received by all the tenants of the building and thereafter Mst. Rehana Habib has come to collect the rent from different tenants and most of the tenants have vacated the premises in consultation with the landlord but he denied that said Rehman Habib or son of Respondent No.1 has come to him for collecting the rent even in 2005. In this context in para-9 of his own affidavit, the Petitioner has stated that Mst. Rehana Habib has received the rent from the tenants from 2004 and 2005 as informed by the tenants of the building to him and that she also disappeared but he fell short of explaining that what prevented her/him not to approach the Petitioner for realizing the rent in the changed circumstances on the death of their attorney Jan Muhammad in 2004. This missing link in the story of the Petitioner to save him from consequences of default is fatal. This statement of the Petitioner in affidavit in evidence when read with his claim that in 1977 Respondents refused to accept the rent and in 2005 nobody has come to collect rent stand negated. It is settled law that once the landlord makes a statement on oath and stand by it in cross-examination, then burden is shifted on the tenant to prove the contrary stand taken by him. The Respondents have claimed default. The Petitioner has not offered any explanation that why like other tenants he did not offer rent to the landlord in 2005. At least if the

legal notice was not delivered, the Petitioner should have offered rent to the Respondents on service of rent case.

9. The two courts below have found the Petitioner defaulter in payment of rent on the ground that he has failed to prove refusal by the landlord/respondents to accept the rent from him. He was also conscious of the fact that he has not tendered rent through money order to the landlord at any point of time. Therefore, in cross examination to the suggestion he voluntarily stated that *the rent was sent through money order by my counsel/advocate*. The documents produced by the Petitioner/tenant in support of payment of rent in trial Court were (i) affidavit in evidence as Exh.O, (ii) photocopies of notice of tenants, (iii) liquidity tax, (iv) partnership deed dated **04.11.1957**, (v) cancellation of partnership deed dated **21.04.1960**, (vi) electric bill for the month of September, 1963, November, 1963 and July, 2009, 05 **rent receipts pertaining to the year 1974 to 1976**, 14 **rent receipts of MRCs**, 05 property tax receipts, 03 water & sewerage charges bill and **certified copy of MRC No.4393/1977** vide Exh. O/I to O/34. In these documents the relevant for denial of default in payment of rent are only **14 rent receipts from MRCs for the period of 33 years from 1977 to 2010 and 5 receipts of rent for the period prior to start of MRC in 1977**. These documents read with the following evidence from cross-examination of the Petitioner were enough to hold him defaulter in payment of rent in terms of Rent Laws.

*It is correct that I have not filed in MRC 280/2001, regarding the proof of partnership firm. It is correct that no any letter/proof regarding the refuse of rent by the Nazir District Court - South in the month of March, 2000. It is correct that I seeking the permission to deposit the rent in MRC No.280/2001, from **January 2001**. It is incorrect to suggest that I have not given any proof*

*in W.S. as well as Affidavit-in-evidence regarding the authority of Mst. Rehana Habib to collect the rent from tenant. I never seen Mst. Rehana Habib till today. It is correct that the landlord/Applicant was issued the receipt in my name. It is correct that the Exh. O/8 to O/13, rent receipts were issued in the name of Climax Films. It is correct that no any agreement was executed between landlord and me as a proprietor of M/s. Climax Films. **It is correct that no any proof regarding the Money Order of rent sending by me attached with W.S. as well as Affidavit-in-evidence. Voluntarily says that the rent was sent through Money Order by my counsel/Advocate.** It is correct that I have never permitted by the landlord/applicant regarding making the partnership firm. It is correct that I have no any proof of payment of Pugri amount Rs.50,000/- to the landlord. Voluntarily says I paid Rs.50,000/-, cash to Khan Bahadur. **It is incorrect to suggest that no any rent collector approached to me for the purpose of collecting the rent in the year of 2005.** It is incorrect to suggest that I am deposing false evidence.*

The perusal of the documents produced and the above passage of cross examination reveals that there is a break in payment of rent from **March 2000** to **January 2001** since from March 2000 no rent was deposited in the previous MRC and new MRC No.280/2001 was filed in 2001 in which rent has been deposited from **January 2001** without showing last payment in previous MRC to the Court. The ledger of previous MRC No.4393/1977 was not exhibited and only 14 receipts from MRCs produced in evidence before the trial Court were not enough to discharge the burden when particularly last deposit of rent in MRC No.4393/1977 was not possible after March, 2000. The Petitioner had a golden chance to tender rent to the landlord in **2005** like other tenants of the building when son of landlord or wife of son of landlord personally demanded rent. But like 1977 in 2005 again he refused to directly pay the rent to landlord and continued to deposit rent in MRC.

10. The Petitioner has attempted to give a false impression that old MRC filed in 1977 has been converted into a new MRC in 2001 and, therefore, rent has been deposited in Court uninterrupted. If it was so, then from where the Petitioner has obtained copies of orders dated **24.2.2010** whereby application for withdrawal of rent filed on **01.7.2005** in **MRC No.4393/1977** was dismissed by the Court of VIII-Senior Civil Judge, South Karachi. Copies of these orders are available at page 191 to 197 of petition but these documents do not reflect new MRC number assigned to old MRC number until 2010. Why these applications were dismissed and why NO OBJECTION was not given by the Petitioner for withdrawal of rent? These documents were not part of evidence but the same were annexed with the petition to give an impression of misreading of evidence. I have noticed that the Petitioner instead of filing the documents produced in evidence in trial Court has filed several irrelevant documents with the instant petition. He has not filed copies of the memo of **MRC No.4393/1977** as well as memo of **MRC No.280/2001** with this petition. When he was relying on the MRC No.4393/1977 he should have filed complete ledger of rent deposited in Court from 1977 to 2001. The withholding of rent payment receipts from first to last rent deposited in Court also give strong presumption that there was default even in 1977. The Petitioner has filed statement with ledger of Rent Controller from MRC No.280/2001 with the petition at page No.405. MRC No.280/2001 was separate and different MRC from MRC No.4393/1977 and in fresh MRC he has tendered rent from **January, 2001** without proof of having deposited rent until December, 2000 in the previous MRC. There is clear-cut gap of seven months at least the evidence of default of rent in MRC to this effect. Therefore, the statement of the Petitioner that there has been

continuously paying rent without default from 1977 onward was not confidence inspiring and the Petitioner has repeatedly failed to discharge his burden of proof that when and who as landlord has refused to accept the rent offered by the Petitioner in 1977 then in 2005 and again after legal notice in 2009.

11. In view of the above facts and law, 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 premises within **30 days**. If he fails to vacate the demised premises within **30 days**, the Executing Court will issue writ of possession with police aid and permission to break open the locks of the tenement without even notice to the Petitioner.

JUDGE

Karachi
Dated:08.02.2019

Ayaz Gul