

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No. S – 2013 of 2017

Date	Order with signature of Judge
------	-------------------------------

Petitioner : Haji Umer through Mr. M. Ilyas Khan Tanoli
Advocate

Respondent No.1 : Muhammad Farooq Motan, called absent.

Date of hearing : **07.12.2021.**

ORDER

NADEEM AKHTAR, J. – Rent Case No.421/2016 was filed by the petitioner against respondent No.1 for his eviction from Godown No.4, Qasr-e-Umer, Plot No.BR-1/51, Ram Das Street, Kharadar, Karachi, (**‘demised premises’**) on the grounds of personal need, default in payment of the monthly rent and illegal conversion of the demised premises from a godown to an office / shop. The rent case was dismissed by the Rent Controller and the dismissal was maintained by the appellate Court by dismissing F.R.A. No.181/2017 filed by the petitioner. The concurrent findings of the Courts below have been impugned by the petitioner through this constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

2. It was the case of the petitioner before the Rent Controller that respondent No.1 was irregular in paying the monthly rent ; in January 2016, the petitioner asked him to pay the monthly rent in accordance with law i.e. after expiration of each calendar month, but he failed to do so ; the petitioner received a notice in MRC No.232/2016 filed by respondent No.1 for depositing the monthly rent in Court ; through the said case the petitioner came to know that respondent No.1 had arranged a fake money order and its report, and on the basis thereof it was alleged by him that the petitioner had refused to accept the rent for the period January to December 2016 sent by him through the said money order ; such allegation was false as no amount whatsoever was sent by respondent No.1 to the petitioner through a money order and as such the said MRC was filed by respondent No.1 without any cause of action and against the settled law ; the demised premises were illegally converted by respondent No.1 from a godown to an office / shop ; the petitioner was engaged in the business of manufacturing aluminum ladders etc. and was carrying on

such business under the stairs of the building where the demised premises were located ; the demised premises were required by him for his personal use as the same were suitable as a godown for his business and he did not have any other premises in his possession that can be used for this purpose ; and, he had requested respondent No.1 to vacate the demised premises in view of his personal need, but the latter refused to do so.

3. In his written statement, respondent No.1 admitted that he was a tenant of the petitioner, but denied all the averments made by the petitioner in his rent case. It was claimed by him that in January 2016 when he went to tender rent to the petitioner, the latter refused to receive the same whereafter the rent for the period January to December 2016 was sent by him to the petitioner through a money order which was also refused by the petitioner ; and, in view of such refusal, he filed MRC No.232/2016 and started depositing rent in the said case. The allegation that the money order receipt and the certificate issued by the postal authorities were fake, was denied by respondent No.1. The allegation with regard to illegal conversion of the demised premises from a godown to an office / shop was also denied by respondent No.1 by claiming that the demised premises were not let out to him for any specific purpose. The fact that he was running a shop in the demised premises was not denied by him by stating that he was entitled to do so. The petitioner's claim of personal need was disputed by respondent No.1 by denying that the former was engaged in the business of aluminum ladders etc. or that he was carrying on such a business under the stairs of the building in question. It was claimed by him that the petitioner was engaged in the business of jewelry and was already carrying on such business at Bhagnari Street, Mithadar Karachi.

4. In view of the divergent pleadings of the parties, four points for determination were settled by the Rent Controller viz. *“(1) Whether the opponent has converted the godown into a shop without the permission of the applicant ?, (2) Whether the opponent has deposited the rent directly in Court without paying to the applicant ?, (3) Whether the subject premises are required by the applicant for his personal use for running business of aluminum ladders ?, and (4) What should the order be ?”*. Evidence was led by both the parties by examining themselves and by producing relevant documents in support of their respective contentions. After evaluating their evidence and hearing the arguments advanced on their behalf, all the points for determination were decided against the petitioner and accordingly his rent case was dismissed by the Rent

Controller. Being aggrieved with the dismissal of his case, the petitioner filed an appeal which was dismissed by the appellate Court.

5. As per the bailiff's report dated 11.12.2017, the notice of the present petition was duly served upon respondent No.1, however, he did not appear herein. Vide order dated 11.12.2017, service was held good upon him. In order to afford another opportunity to him as the last chance and only by way of indulgence, notice was again issued to him in pursuance of order passed on 21.09.2020. He was again served as per the bailiff's reports dated 13.10.2020 and 17.11.2020, but he did not appear to contest this petition.

6. I have heard learned counsel for the petitioner and have carefully examined the material available on record and the law cited at the bar. I shall first deal with the ground urged by the petitioner for seeking eviction of respondent No.1 that the latter had illegally converted the demised premises from a godown to an office / shop. This allegation was denied by respondent No.1 by claiming that the demised premises were not let out to him for any specific purpose. The rent receipts for different periods produced by respondent No.1 show that in some of them godown was mentioned while the rest were issued in respect of a shop. However, the number of the tenement was the same in all the said receipts. In his cross-examination, the petitioner had admitted that there was no written rent agreement between the parties and he had not filed or produced any document to establish that the demised premises were let out to respondent No.1 for the purpose of a godown. Thus, the petitioner had failed to discharge the burden, which was undoubtedly upon him, to prove his assertion and due to this reason, the burden never shifted upon respondent No.1 to prove the contrary. Even otherwise, if there was any such conversion by respondent No.1, the petitioner would have been deemed to have acquiesced in such conversion in view of his long and unexplained silence for twenty four (24) years i.e. from the year 1992 till the year 2016 as admitted by him in his cross-examination. The first point for determination was, therefore, rightly decided against the petitioner by both the Courts below.

7. The next ground urged by the petitioner for the eviction of respondent No.1 was default in payment of the monthly rent. It was alleged by the petitioner that the rent for the period January to December 2016 was deposited in Court by respondent No.1 without first tendering the same directly to him and or without sending the same to him through a money order. On the other hand, it was claimed by respondent No.1 that the rent for the said period was offered by him to the petitioner and upon his refusal to accept the same, a money order was sent by him which was

also refused by the petitioner. It was further claimed by respondent No.1 that the rent was deposited by him in Court after complying with the above requirements. According to him, the rent for the relevant period tendered by him in January 2016 was refused by the petitioner on two occasions ; firstly, when it was personally offered by him to the petitioner ; and secondly, when it was sent by him through a money order. In his cross-examination, the petitioner had specifically denied that respondent No.1 had offered the rent to him in January 2016 or had sent a money order to him. Therefore, the burden to prove that the petitioner had refused to receive the rent from respondent No.1, either directly or through money order, had shifted upon respondent No.1. Regarding the first alleged refusal by the petitioner, respondent No.1 had claimed in paragraph 4 of his affidavit-in-evidence / examination-in-chief that he, along with a “companion”, went to the petitioner in January 2016 to pay the rent, but the petitioner refused to accept the same. The said alleged companion was never examined by respondent No.1 to prove his above assertion and there was no explanation by him for not examining his own companion who would have been an important witness to prove his claim. Therefore, respondent No.1 had failed in discharging the burden in order to prove the alleged first refusal by the petitioner.

8. In support of his allegation with regard to the second refusal by the petitioner i.e. refusal to accept his money order, respondent No.1 relied upon Exhibit O/7 produced by him which was a letter dated 13.02.2016 purportedly issued by Assistant Chief Post Master (Complaints), Karachi City G.P.O., in response to his application dated 09.02.2016. In Exhibit O/7, it was stated that the payee / addressee “Umer Haji Ibrahim” had refused to accept the amount of Rs.10,200.00 sent to him by respondent No.1 vide money order No.394 dated 04.02.2016. Respondent No.1 produced only one part of the above mentioned money order i.e. the sender’s copy as Exhibit O/6. It is significant to note that he did not produce the actual counterpart of the money order, or even its copy, with the endorsement of the concerned postman that the petitioner had refused to accept the money order, nor did he examine the concerned postman and or the author of Exhibit O/7 viz. Assistant Chief Post Master to verify the contents of the said exhibit. Due to this reason, the petitioner did not get the opportunity to cross-examine the concerned postman and the Assistant Chief Post Master in order to rebut the respondent No.1’s claim. In the absence of the above, respondent No.1 could not be deemed to have discharged the burden, which was squarely upon him, to prove the tender of rent through money order prior to depositing the same in Court. Moreover, respondent No.1 also did not produce his application dated

09.02.2016, referred to in Exhibit O/7, in response to which the said exhibit was purportedly issued.

9. It is an admitted position that the money order allegedly sent by respondent No.1 was in favour of Haji Umer Ibrahim, whereas admittedly the correct name of the petitioner throughout the proceedings was/is Haji Umer S/O Haji Siddiq. The Rent Controller did not give much importance to this important aspect as it was held by him in an evasive manner while deciding point No.2 against the petitioner that the petitioner had admitted in his cross-examination that the shop belonged to his brother. This finding had no relevance with the incorrect name of the petitioner on the disputed money order. This clearly shows that no finding whatsoever was given by the Rent Controller regarding the admitted discrepancy in the names of the petitioner and the beneficiary of the money order. Instead of giving a specific finding on this important and fundamental point, a vague and unrelated observation was made by the Rent Controller that the statement of the opponent had remained unrebutted and unchallenged, which finding, being contrary to the record, was incorrect in any event. As the correct name of the petitioner was admittedly not mentioned in the alleged money order, it could not be deemed or held by any stretch of imagination that the money order was meant for or sent to the petitioner, or that the petitioner had refused to accept the same. Thus, respondent No.1 had failed in discharging the burden in order to prove the alleged second refusal by the petitioner.

10. Sub-Sections (1) and (3) of Section 10 of The Sindh Rented Premises Ordinance, 1979, prescribe the time and mode, respectively, of payment / tender of the monthly rent by the tenant. Under Sub-Section (3) *ibid*, the tenant would be entitled to tender the monthly rent to the landlord through a postal money order or to deposit same with the Rent Controller, provided the landlord had refused or avoided to accept such rent from him. A plain reading of Sub-Section (3) *ibid* shows that the refusal or avoidance by the landlord in accepting the monthly rent from the tenant is a condition precedent for entitling the tenant or justifying him to tender the monthly rent to the landlord through a postal money order or to deposit the same with the Rent Controller. It is well-settled that the tenant shall not be entitled in law to deposit the rent with the Rent Controller without first offering / tendering the same directly to the landlord and only when, upon such offer / tender, the landlord had refused or avoided to accept the rent from him ; and, the burden to prove the tender of rent to the landlord and the refusal or avoidance by the landlord in accepting the rent from him shall lie upon the tenant. As discussed in paragraphs 7, 8 and 9 above, in the instant case respondent No.1 had clearly failed in

discharging the burden not only to prove the alleged first and second refusals by the petitioner, but also the tender of rent by him to the petitioner through money order prior to depositing the same with the Rent Controller. Accordingly, the findings of both the Courts below on point No.2 regarding the default alleged by the petitioner are contrary to the evidence on record and as such are not sustainable in law.

11. In the above context, I may refer to Muhammad Asif Khan V/S Sheikh Israr, **2006 SCMR 1872**, wherein the Hon'ble Supreme Court was pleased to hold, *inter alia*, that there was no evidence in the cited case with regard to refusal of the landlord to accept the rent so as to provide authority or justification to the tenant to deposit the rent in Court, and there being no evidence to that effect, the tenant could not absolve himself from being a defaulter for the relevant period ; and, it was mandatory for the tenant to bring sufficient and reliable evidence on record that the landlord had refused to accept the rent so as to entitle him for deposit of rent in Court. I may also refer to Abdul Malik V/S Mrs. Qaiser Jahan, **1995 SCMR 204**, wherein it was held, *inter alia*, by the Hon'ble Supreme Court that it has to be seen that while depositing the rent in Court, there has been refusal or avoidance on the part of the landlord, and further that the conduct of the tenant is not contumacious or malafide to harass the landlord.

12. While deciding point No.3 with regard to the personal need pleaded by the petitioner, it was observed by the Rent Controller that the petitioner had admitted in his cross-examination that he did not produce any document to show that he was engaged in the business of aluminum ladders and he also did not state for how long he was engaged in such business ; he was not operating such business under the stairs of the building in question ; and, it was not clear whether the place where he was carrying on such business was owned by him or not. On the basis of these observations, the Rent Controller came to the conclusion that the petitioner had failed in proving his personal need. Such finding of the Rent Controller is contrary to law. It is well-settled that if the statement made on oath by the landlord is consistent with the averments made by him in his ejectment application and neither is his statement shaken nor is anything brought in evidence to contradict his statement, it would be sufficient for the grant of his ejectment application ; all that the landlord has to show is that he required the demised premises of a particular tenant for his personal use and the choice was his as to the suitability of the demised premises which he required for his personal use, and that his need is reasonable and bonafide ; the landlord has the complete option to choose from any one of the several tenements occupied by the tenants in order to

avail of the ground of personal need ; and, the landlord himself would determine in what way, subject to law, he wants to utilize his premises after eviction of the tenant. In my humble opinion, the petitioner had successfully discharged his burden in proving that his personal need was reasonable, genuine and bonafide, and respondent No.1 had failed in dislodging his claim or in proving him wrong. Thus, the findings of both the Courts below on point No.3 regarding the personal need pleaded by the petitioner are contrary to law and the evidence on record, and as such are not sustainable in law.

13. As respondent No.1 has chosen to remain absent before this Court despite proper service and several opportunities and the case has proceeded ex-parte against him, the record of the case was minutely and more cautiously examined by me. After thoroughly examining the record and all the aspects of the case as discussed above, I am of the firm view that this is a case not only of misreading and non-reading of evidence by both the Courts below, but also a case wherein findings on the questions of default and personal need have been rendered against the settled law by the both the Courts below. By not appreciating the evidence on record in its true perspective and by not applying the law correctly, the Rent Controller failed in exercising the jurisdiction vested in him by law ; and, by maintaining such illegal order, the appellate Court committed a grave error in law. Thus, the illegal concurrent findings of the Courts below on point Nos.2 and 3, being not sustainable in law, cannot be allowed to remain in the field.

14. Foregoing are the reasons of the short order announced by me on 07.12.2021 whereby the impugned judgments were set aside to the extent of the findings of the Courts below on point Nos.2 and 3 ; this petition was allowed with costs throughout ; and, Rent Case No.421/2016 filed by the petitioner was allowed on the said points.

J U D G E