CLC Aug 2016 1348 (SB)

(1)

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

(1)

Const. Petition No. S-800/2010

Iqbal Hussain Vs. Moazzam Zaheer Khan and another.

SINDH HIGH COURT

Composition of Bench. Single/~~D.B.~~

Hon'ble Mr. Justice Mohammed Karim Khan Agha.

Dates of hearing: 11/01/2016

Decided on [:] 18/01/2016

(a) Judgment approved for reporting. ✓ Yes ~~No~~

KAgha

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a princip-le of law */decides a question of law which is of first impression/distinguishes/ over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Rerder must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

Recd 20/1/16 Compared 20/1/16.

SGP., Kar.—L (iii) 1459—5,000—6-93—T.S.S.

(2)

IN THE HIGH COURT OF SINDH AT KARACHI.

C.P. NO. 800 /2010

Presented on 04.8.10

Deputy Registrar (Judl.)

Iqbal Husain S/o Tajammul Hussain
Muslim, adult, tenant of Shop No. 6,
In the building known as
SKY VIEW BUILIDNG
Survey No.26. Sheet A.M Freer Road .
Karachi..... .....Petitioner

Tenant

VERSUS

i) Moazzam Zaheer Khan
S/o Muhammad Zaheer Khan
Muslim, adult,
R/o H.No. 165, Sector 11-A,
North Karachi, Karachi

Fresh address
F-D 2581

ii) Vth ADJ South at
Karachi.....Respondents

CONSTITUTION PETITION UNDER ARTICLE 199 OF THE ISLAMIC REPUBLIC OF PAKISTAN 1973.

Being aggrieved and dissatisfied by the Order dated 31-05-2010 passed by respondent No.2 and order dated 3-2-2009 passed by Vith Rent Controller Karachi South, whereby the eviction application filed by respondent No.1 has been allowed incompetently, illegally and against the settled principles of law. **(Certified copy of Order dated 31-05-2010 is annexed and marked as annexure-P).**

Continued

(3)

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Muhammad Karim Khan Agha

C.P. No.S-800 of 2010

Iqbal Hussain
Versus
Moazzam Zaheer Khan & another

Date of hearing:	11.01.2016
Petitioner:	Through Mr. Mustafa Lakhani Advocate
Respondent No.1:	Through Mr. Adnan Ahmed Advocate.
Respondents No.2 :	None for Respondent No.2.

JUDGMENT

Muhammad Karim Khan Agha, J.- This Constitutional Petition has been filed by the Petitioner against Judgment passed by Learned District and Sessions Judge Court No.V Karachi South (Respondent No.2) dated 31-5-2010 (the Impugned Judgment).

2. The brief facts of the case are that the Petitioner's father Mr.Tajammul Hussain had been the tenant of Shop No.6, Sky View Building, Survey No.26 Sheet, A.M. Frere Road, Karachi (the Property) since 1952 paying a monthly rent of RS 34.59 to the then Landlord GME Patel. On the death of the Petitioner's father the Petitioner continued working in the Premises and running the business of photocopying and became a statutory tenant (the Tenant). On 27-5-1984 the Respondent No,1 (the Landlord) purchased the Property by registered sale deed from the then owner subject to the occupation of the Tenant and became the Tenants new landlord.

3. After the purchase the Landlord sent a legal notice dated 10-7-84 (legal notice/notice) through his counsel to the Tenant informing him about the purchase of the Property by the Landlord and according to the Landlord instructed the Tenant to pay an increased monthly rent of Rs 350 to the Landlord. The Tenant on the other hand confirmed having received the notice but disputed that it contained any increase in rent and in any event he did not agree to any increase in rent and hence he deposited the rent at the existing rate in MRC No.791/1968 up to 31-7-1984 with the Nazir of the civil Court in the name of the previous Landlord GME Patel. He also sent rent at the existing rate i.e. 34.59 per month to the Landlord's Rent Collector Mr. Haroon Rehmatullah (Haroon) on 25-8-1984 through money

order for the months of August, September and October 1984 who according to the Tenant declined to accept the same.

4. According to the Tenant he again on 12-9-1984 sent rent through money order amounting to Rs. 105/- to the landlord's Rent Collector being rent for the months of August, September and October 1984 at the existing rate but again the landlord's rent collector refused to accept the payment. According to the Tenant since he apprehended false grounds of non-payment of rent by the Landlord he moved an application under section 10(3) of Sindh Rented Premises Ordinance, 1979 (XVII of 1979) (SRPO 1979) in Court of IInd Rent Controller, Karachi South on 08.10.1994 (sic) for depositing amount of Rs. 210/- with the Nazir of the Court being rent of the Property at the existing rate from July to December, 1984. He also further obtained permission to deposit monthly rent at the said rate regularly in MRC No.3338/1984 and had been paying the rent accordingly till date.

5. The Landlord moved an application under section 15 of the SRPO 1979 before the Vth Rent Controller Karachi South seeking to evict the Tenant. The main grounds were that (a) the tenant had failed to pay rent within 60 days after the rent had become due for payment (b) the tenant had used the property for purposes other than which it was let out (c) that the Tenant had committed such acts as were likely to impair the material value of the Property and that (d) the Landlord required the Property in good faith for his own occupation or use.

6. After the recording of evidence, the V-Rent Controller, Karachi South by order dated 02.03.2009 (the Order) held that the Landlord required the Property for his personal use in good faith and that the Tenant was a willful defaulter in the payment of rent of the Property. Accordingly, the Tenant was directed to vacate the Property within 30 days from the date of the Order.

7. Being dissatisfied with the above mentioned Order the Tenant preferred an appeal in the Court of District Judge at Karachi South (FRA No.75/2009) under section 21 of the SRPO 1979 on the basis that the Rent Controller had erred in finding that the Landlord had conclusively established his personal requirement of the Property in good faith due to a misreading of evidence and that he had also erred in finding that the Tenant was a willful defaulter based on a non-reading of the evidence.

8. The aforesaid appeal was dismissed vide judgment dated 31.5.2010 by the learned V-th Additional District and Sessions Judge, Karachi South. It is against this Impugned Judgment that the Tenant has preferred this constitutional petition before this Court.

(5)

9. Learned counsel for the Tenant/Petitioner submitted that the Impugned Judgment was bad in law and was liable to be set-aside. In the alternative he argued sections 21 (1) (C) and (D) of the SRPO, 1979 were applicable and that the case ought to be remanded back to the appellate authority to enable a compromise to be reached between the parties or enable him to continue his tenancy subject to payment of enhanced rent fixed by the authority. He submitted that since the Appellate Authority had not pressed into service these two sections of the SRPO 1979 it was an error in law which justified the remand of the case back to the Appellate Authority in order to comply with these sections.

10. Learned counsel further argued that the use of the word "may" in the above mentioned sections was not strictly directory. In this respect he relied upon the case of **Abdul Latif Vs. Ghulam Nabi & others SBLR 2006 Sindh 112.**

11. He further submitted that the Impugned Judgment was required to be set-aside because the learned Judge had erred in finding under section 15 of the SRPO, 1979 that the Landlord required the Property in good faith for his own occupation or use. According to the learned counsel for the Tenant/Petitioner the Landlord had other property in which he could set up his business and had no need of the Property in dispute especially since he had purchased the Property in 1984 knowing full well that it was subject to an existing tenancy.

12. He also submitted that the affidavit in evidence of the Landlord's witness Mr. Azam Zaheer Khan who is the real brother of the Landlord had admitted that the Property was to be used for establishing his business i.e. Mr. Azam Zaheer Khan and not that of the Landlord and as such the Landlord did not require the premises in good faith for his own occupation or use of his spouse or any of his children as per section 15 (2) (vii) as per the requirement of SRPO, 1979.

13. He further submitted that the Landlord in cross examination had also admitted that he had not disclosed the nature of the business which he wanted to start in the Property in his affidavit in evidence. He also admitted that prior to the filing of the rent case he had not given any notice to the tenant in respect of default in payment of rent or in respect of alteration of the Property. In his evidence he had only voluntarily stated that he had verbally asked the Tenant for payment of arrears of rent.

14. He also argued that the correct monthly rent was Rs.34.59 per month and not Rs. 350/- per month since neither was any figure in respect of revised rent communicated to him in the notice which he had received from the Landlord nor had he agreed to any increase in rent.

15. With regard to willful default in the payment of rent learned counsel for the Tenant/Petitioner submitted that there had been no default by him in terms of Section 15 (2) (ii) SRPO, 1979 as upon receiving the notice from the Landlord he had immediately paid the rent at existing rate which was then due upto 31.7.1984 into the MRC account issued pursuant to his application under section 10(3) of the SRPO, 1979. He had continued paying rent into this account till date and there was no question of any willful default on his part and the learned Judge had erred in such finding in the Impugned Judgment.

16. Learned counsel for the Tenant/Petitioner in further support of his contentions referred to the cross examination of landlord whereby the landlord had admitted that the Tenant was directed to pay rent to his rent collector Mr. Haroon and it was correct that the rate of rent was not mentioned in the legal notice. The landlord had admitted that he was unaware that the Tenant had started depositing rent in MRC No.338/1984 in the court of learned 2nd Rent Controller, Karachi South and did not know whether the Tenant had committed any default in payment of rent.

17. With regard to the aspect of the Tenant/petitioner using the Property for the purpose other than for which it was let out and the Tenant committing acts which were likely to impair the material value of the Property under section 15 of the SRPO, 1979, this was denied by him in his evidence and he submitted that there was no evidence on record to contradict him in this regard.

18. In summary for all the above reasons learned counsel for the Tenant/Petitioner submitted that the Impugned Judgment should be set-aside or in alternative the matter should be remanded back to the learned Appellate Authority to deal with the matter in accordance with section 21 (1) (C) and (D) of the SRPO, 1979.

19. Learned counsel for the Landlord fully supported the Impugned Judgment which he submitted had been correctly decided in accordance with law. The learned Judge had rightly based on the evidence found (a) that the landlord required the Property in good faith for his own occupation or use and (b) that the Tenant had willfully defaulted in the payment of rent so as to attract the provisions of section 15 SRPO, 1979 to justify the eviction of the Tenant from the Property.

20. With regard to section 21 (1) (C) and (D) of the SRPO, 1979 learned counsel for the Landlord submitted that it was settled law that the use of the word "may" used in the said sections was purely directory in nature and not mandatory and therefore the learned Judge was not bound to follow these sections. In support of his contention, learned counsel relied on **Azam Khan through General Attorney Vs. Muhammad Hussain & 5 others 2003 CLC 278.**

(7)

21. Learned counsel for the Tenant/Petitioner further submitted that the writ jurisdiction was not maintainable in cases where there had already been two concurrent findings i.e. in this case of the Rent Controller and thereafter the District & Sessions Judge in the First Rent Appeal.

22. In this respect he placed reliance on **Ittehand Chemicals Ltd. Vs. VII-Additional District Judge & others 2010 CLC 599 and Shakeel Ahmed & another Vs. Muhammad Tariq Farogh & others 2010 SCMR 1925.**

23. With regard to the increase in the payment of rent to Rs. 350/- per month learned counsel for the Landlord submitted that this had been admitted by the Tenant in paragraph No.9 of his written statement.

24. Learned counsel for the Landlord also submitted that section 10 (3) of the SRPO, 1979 had not been complied with since the Landlord had not refused or avoided to accept the rent since this had never been offered to him by the Tenant in the first place and as such since this pre-condition of section 10(3) of the SRPO, 1979 had not been complied with the Tenant did not have the right to send the rent by postal money order or depositing the same with the Controller within whose jurisdiction the Property was situated and in so doing the Tenant had committed willful default. In this respect Learned counsel placed reliance on **Mst. Yasmeen Khan Vs. Abdul Qadir & another 2006 SCMR 1501.**

25. He also submitted that section 18 of the SRPO, 1979 had been violated since the Tenant had not paid the Landlord the due rent within 30 days of receipt of notice of the new landlord together with revised rent.

26. Learned counsel for the Landlord further submitted that the delay in paying the rent by the Tenant in violation of section 15 (2) (ii) of the SRPO, 1979 had been proved from the evidence and as such this violation entitled the tenant to be evicted under section 15 SRPO, 1979 as such delay amounted to willful default. Learned counsel placed reliance on **Muhammad Subhan & another Vs. Mst. Bilquis Begum through legal heirs & three others 1994 SCMR 1507(2),** and **Pakistan State Oil Company Ltd. Karachi Vs. Pirjee Muhammad Naqi 2001 SCMR 1140.**

27. In connection with the Tenant paying the rent at the rate lower than the fixed amount as in this case i.e. the Tenant was paying only Rs.34.59 instead of Rs. 350/- per month this also amounted to willful default in terms of section 15 (2) (ii) of the SRPO, 1979. He placed reliance on the case of **M/s. Ali Brothers & others Vs. Mrs. Naushaba Jabeen & others 2001 MLD 648.**

28. In connection with the question whether the Landlord required the Property for his bona fide occupation or use Learned counsel for the Landlord submitted that it was not fatal to his case the fact that the landlord had not disclosed in his evidence the precise nature of the business for which the Landlord required the Property. In this respect he placed reliance on **Khawaja Imran Ahmed Vs. Noor Ahmed & another 1992 SCMR 1152, Mst. Saira Bai Vs. Syed Anisur Rahman 1989 SCMR 1366,** and **Shakeel Ahmed & another Vs. Muhammad Tariq Farogh & others 2010 SCMR 1925.**

29. In conclusion based on his submissions learned counsel for the Landlord contended that the Landlord required the property for his own use in good faith and in addition this was a case of willful default and that the matter had rightly been decided in the Impugned Judgment which did not require any interference by this Court.

30. I have perused the record in detail and carefully considered the submissions of the learned counsel at the bar and considered the case law cited by them.

31. The first issue to consider is the maintainability of the Petition bearing in mind that there have already been two concurrent findings in respect of this matter as contended by the Landlord.

32. In the case of **Shakeel Ahmed & another Vs. Muhammad Tariq Farogh & others 2010 SCMR 1925** the Hon'ble Supreme Court held as under at placitum "i":

> "(e) Sindh Rented Premises Ordinance, (XVII of 1979)---
> ---S. 15---Constitution of Pakistan (1973), Art. 199---Constitutional petition against order of Appellate Court---Scope---Appellate Court was final authority under Sindh Rented Premises Ordinance, 1979---Constitutional jurisdiction could not be invoked as substitute to another appeal against such order---Mere fact that upon perusal of evidence High Court came to another conclusion would not furnish a valid ground for interference in such order."

33. Furthermore in the case of of **Ittehand Chemicals Ltd. Vs. VII-Additional District Judge & others 2010 CLC 599** it was held as under at placitum (a):

> "Art. 199---Constitutional jurisdiction---Constitutional petition challenging concurrent findings given by courts below---Interference with such findings by High Court---Scope.
>
> The scope of interference in constitutional jurisdiction is **very limited particularly so when there are concurrent findings by the Courts below. High Court should interfere with concurrent findings, inter alia, in the following circumstances** :---(bold added)

(a) When there is a misreading of evidence;

(b) When there is non-reading of evidence;

(c) When there is erroneous presumption of facts;

(d) When there is a misapplication of law;

(e) In the aid and to serve cause of justice but surely not to defeat it;

(f) When a rule of law laid down by the superior courts has not been correctly applied by the courts below;

(g) Constitution of jurisdiction cannot be exercised to reappraise evidence unless lower Courts appraised evidence in violation of well-settled principles for appraisal of evidence.

(h) Even if a different conclusion is possible, the evidence shall not be reappraisal (Sic) and such conclusion shall not be recorded by the High Court in exercise of its constitutional jurisdiction;

(i) Constitutional jurisdiction cannot be used a second appeal;

(j) If the conclusion of the courts below are not found to be arbitrary, capricious or perverse."

34. Both of the aforesaid authorities in my view indicate there is very limited scope in the Constitutional jurisdiction for the High Court to interfere with the findings of the appellate Court in rent cases especially after two concurrent findings.

35. I am however of the view that although the scope may be limited it is not totally barred as there is always room for the High Court in its discretionary jurisdiction to ensure that complete justice is done. However, as indicated such interference in my view must only be used very sparingly and only where there has been a blatant and glaring error by the appellant Courts and that such interference will serve the cause of justice. Thus, I find the Petition to be maintainable under A.199 of the Constitution.

36. At this stage it is significant to note that during the course of his arguments the learned counsel for the Landlord did not press his contention that the Property was being used for purposes for other than which it had been let out i.e. by also using a part of the Property for living purposes and that the Tenant had committed such acts as were likely to impair the material value or utility of the Premises i.e. through making unauthorized alterations. Neither of these grounds had been accepted by the Rent Controller nor by the learned Judge in the Impugned Judgment and thus do not require to be adjudicated upon.

37. The only issues which therefore remain are as under:

(a) Whether the Rent Controller in his Order and learned Judge in the Impugned Judgment had erred in failing to apply S.21 (1) (C) and (D) SRPO 1979

(b) Whether the Rent should be paid at the monthly rate of Rs.34.59 or Rs. 350 and

(c) Whether the Rent Controller in his Order and learned Judge in the Impugned Judgment had erred in finding that the Landlord required the Property in good faith for his own occupation or use and

(d) Whether the learned Judge in the Impugned Judgment had erred in finding that the Tenant had failed to pay rent to the Landlord within 60 days after it became due and as such this was a case of willful default.

38. Turning to the first issue (a) whether the Rent Controller and learned Judge in the Impugned Judgment had erred in failing to apply S.21 (1) (C) and (D) SRPO 1979.

39. For ease of reference sections 21 (1) (C) and (D) of the SRPO, 1979 are set-out below:-

> *"(1-C) The appellate authority, **may**, at any stage of appeal attempt to effect a compromise between the parties.(bold added)*
>
> *(1-D) The appellate authority **may**, where it deems fit, before passing a final order allow the tenant to continue his tenancy subject to payment of enhanced rent fixed by the authority."(bold added)*

40. According to learned Counsel for the Tenant these amendments had been made in the SRPO 1979 in around 2001 (which was not disputed by learned counsel for the Landlord). Since as a rule Parliament does not amend Statutes or Ordinances for the sake of it and rather does so in order to fill in loop holes in the law or to make a law more effective there is in my view good reason to believe that these two sections had been specifically added by Parliament with a view to attempt to short circuit the rather cumbersome and time consuming process as laid down in the SRPO 1979 in connection with the matters set out therein.

41. In the case of **Abdul Latif Vs. Ghulam Nabi & others SBLR 2006 Sindh 112** it was held in relevant part as under:

> "Para-12. The above two provisions were inserted in the enactment (SRPO, 1979) by way of subsequent amendment. They confer powers upon the appellate authority, which can exercise at its own **or even at the request of any of the parties**. No doubt word, "may" has been used in these provisions and normally it implies what is optional/permissible, but here the provisions have scheme of resolving the dispute by bringing compromise between the parties or allowing the tenancy to continue by enhancing the rate of rent. Obviously, the scheme is not to be rendered unworkable by leaving the provisions inactive. Thus, the powers conferred upon

an authority under a scheme being discretionary or coupled with duty and are not discretionary simplicitor.(bold added)

12. Under Subsection (1-C) the Court has to attempt for bringing compromise between the parties. Although the compromise can only be effected when the parties agree to its terms but the authority has to use its skill for bringing the parties to some solution/terms in order to achieve the object of the law. **No matter, if the attempt fails. However, if the authority considers it futile exercise due to visible rigid attitude of the parties or any of them or for any other reason it may not resort to such attempt.** (bold added)

13. Under Subsection (1-D) the appellate authority shall apply its mind about the fitness of the case for exercising the power to allow the tenancy to continue subject to payment of enhanced rent fixed by it. After that it may exercise the powers in a case considered fit for that. **The cases where the controversy at the appellate stage relates only or mainly to the rate or non-payment of the rent can be fit for the exercise of the powers under Section 21(1-D). There may be the other cases also for exercise of these powers by the appellate authority. Thus the fitness of the cases for exercise of the powers depends upon the facts and circumstances of an individual case.** (bold added)

14. Since the provisions have their scheme the appellate Court is ordinarily to exercise the powers conferred upon it by these provisions. The absence of an attempt to bring compromise may not but the non-application of mind about the fitness of a case for exercised of powers under subsection (1-D) may warrant the upsetting of the decision recorded on merits, in the cases which are fit for exercise of that power." (bold added)

42. It is an admitted permission between the parties that these sections were not pressed in to service. The question therefore arises whether these provisions of law are mandatory and must be followed by the Appellant Authority or whether they are only directory in nature.

43. It is well settled law that if the words "may" are used they are only directory and not binding whereas if the word "shall" is used it is mandatory and must be complied with especially if adverse consequences may follow.

44. In the case of **Azam Khan through General Attorney Vs. Muhammad Hussain & 5 others 2003 CLC 278**, it was held at placitum "B" as under:

"(b) S.21 (1-C) [as amended by Sindh Rented Premised (Amendment) Ordinance (XIV of 2001)---Provisions of S. 21 (1-C) of the Ordinance, whether directory or mandatory---Non-compliance of such provisions---Effect---**Such provisions are directory in nature and not mandatory---No penalty, adverse conclusion, inference or action has been provided against any party or regarding conduct of proceedings for non-compliance thereof**---Such provisions are required to be complied with in letter and spirit---Appellate Courts are expected to make any attempt to effect a compromise between parties---**Mere fact of not settling dispute by litigants or conduct of parties in not**

arriving at a compromise cannot render an order of Appellate Court illegal." (bold added)

45. The case of **Abdul Latif (Supra)** suggests that the use of this section is not discretionary simplicitor and I find that there is some weight, both in common sense and saving the time of both the parties and the relevant authorities, in the argument that both provisions should be pressed into service in order to reach a compromise at an early stage of the proceedings.

46. However on balance, based on the settled law, I am unable to conclude that these two sections are all but mandatory. If the legislature wanted them to be mandatory then it would have made them so in clear language by using the word "shall" and adding an adverse consequence for failure to comply. It is the duty of the Court to apply the law and not make law. Interpretation by the Courts is only required if the law is unclear and requires interpretation. In this case the law is absolutely clear. Namely, that the provisions are directory only in nature.

47. Reliance is placed on the case of **Justice Khurshid Anwar Bhinder** V **Federation of Pakistan (PLD 2010 SC 483)** which a larger Bench of the Hon'ble Supreme Court found at placitum (i) as under:

> "Interpretation of statutes---
> ---Intent of framers of law/Constitution---Determination---Principles.
>
> A fundamental principle of constitutional construction has always been to give effect to the intent of the framers of the organic law and of the people adopting it. **The pole star in the construction of a Constitution is the intention of its makers and adopters. When the language of the statute is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation. Such language best declares, without more, the intention of the lawgivers, and is decisive of it. The rule of construction is "to intend the Legislature to have meant what they have actually expressed". It matters not, in such a case, what the consequences may be. Therefore, if the meaning of the language used in the statute is unambiguous and is in accord with justice and convenience, the courts cannot busy themselves with supposed intentions, however admirable the same may be, because, in that event they would be traveling beyond their province and legislating for themselves.** But if the context of the provision itself shows that the meaning intended was somewhat less than the words plainly seem to mean then the court must interpret that language in accordance with the indication of the intention of the Legislature so plainly given. **The first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.** The essence of law lies in its spirit, not in its

> letter, for the letter is significant only as being the external manifestation of the intention that underlies it, Nevertheless in all ordinary cases the courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sententia legis*. They must, in general, take it absolutely for granted that the Legislature has said what it meant, and mean what it has said. Its scriptumest is the first principle of interpretation. Judges are not a liberty to add to or take from or modify the letter of the law simply because they have reason to believe that the true *sententia legis* is not completely or correctly expressed by it. That is to say, in all ordinary cases grammatical interpretation is the sole form allowable." (bold added)

48. It is true that when interpreting a statute it must be read as a whole and no part of it should be made redundant but in my view making a provision directory as opposed to mandatory does not make the provision redundant as the Court or any concerned party may have recourse to the provision if it is considered necessary.

49. In my view the case of **Azam Khan (Supra)** is more applicable as opposed to that of **Abdul Latif (Supra).**Thus, I find S.21 (1) (C) and (D) to be only directory in nature.

50. Even otherwise, based on the particular facts and circumstances of this case I do not consider that it would be fair at this stage to remand the case back to the Appellant authority in order to apply S.21 (1) (C) and (D) before proceeding further in this matter. This is because the Tenant himself could have raised the ground of compromise under S.21 (1) (C) and (D) which he was perfectly entitled to do at the time of hearing both the S.15 Application and his appeal against the Order of the Rent Controller under the S.15 Application which he failed to do.

51. To raise it now at this belated stage almost 6 years after the Rent Controller's Order under S.15 during which time the Tenant has had the benefit of occupation in my view is inequitable under the A.199 discretionary jurisdiction especially as during this period and prior to and after it the Tenant has been paying the rent at the rate of Rs. 34.59 throughout rather than the rent claimed by the Landlord of Rs. 350 per month. It is also significant that these sections were not referred to in the Constitutional Petition under adjudication and were only raised during oral arguments which suggests that they are an after thought which have been brought up at this belated stage to extend the litigation and stave off eviction for a further period of time at the expense of the Landlord.

52. The facts and circumstances of this case also tend to suggest that there would have been little chance of compromise between the parties since the Landlord moved his eviction application under S.15 under 4 distinct and separate grounds i.e. (a) he required the Property for his personal use, (b) default in payment of rent (c) the use of the Property for use other than for which it was let out and (d) acts

committed by the tenant which impaired the material value of the Property. In addition the amount of rent to be paid was also in dispute.

53. It is also significant in terms of compromise under S.21 (1) (C) and (D) that as per order sheet dated 24-4-2014 learned counsel for both the parties submitted that compromise talks were going on between the parties and accordingly they requested for an adjournment. Since this matter has now proceeded, almost 9 months after the order sheet which referred to an attempted compromise, it is apparent that the attempt at compromise between the parties did not bear fruit and as such in effect S.21 (1) (C) has been complied with and there would therefore appear to be little utility in referring the matter back to attempt compromise between the parties when such attempts in recent times have already failed.

54. Thus, not only do I find that S.21 (1) (C) and (D) is only directory in nature but based on the particular facts and circumstances of this case it would be inappropriate, inequitable and most probably an exercise in futility to remand the matter back to the learned Judge so that he may apply these sections.

55. Turning to the next issue (b) Whether the monthly Rent should be paid at the rate of RS.34.59 or RS 350

56. The Rent Controller in his Order found that there was no evidence to suggest that the rent had been increased to RS 350 and that the monthly rent remained 34.59 or 35 per month. This issue was not addressed in the Impugned Order and does not seem to have been seriously disputed, if at all, by the Landlord in the Impugned Judgment.

57. Learned Counsel for the Landlord argued that the rent had been increased from RS 34.59 to RS 350 per month when the legal notice was served on the Tenant informing him of his new Landlord and that this had been admitted in Para 9 of the Tenants written statement. A close examination of para 9 however does not reveal any such admission rather it points to a denial.

58. In my view there appears to be no written evidence on record to show that the Tenant had been informed that his rent had been increased to RS 350 at the time when the Landlord purchased the Property let alone any agreement by the Tenant in writing to this new increased rent. The Landlord cannot under S.7 SRPO 1979 unilaterally increase the rent of the Tenant on his own whims. If the Landlord was dissatisfied with the amount of rent currently being paid by the Tenant his remedy lay in moving the Controller to fix a fair rent under S.8 SRPO 1979 which it appears he failed to do.

59.The case relied upon by the Landlord of **M/s. Ali Brothers & others** Vs. **Mrs. Naushaba Jabeen & others 2001 MLD 648** is thereby distinguished as in the present case there had been no agreement on the rate of rent to be paid.

60. As such I find that the rental payable by the Tenant to the Landlord from the date of the Landlords legal notice to date to remain at the rate of RS 34.59 per month or in the alternative RS 35 per month as found by the Rent Collector in the Order and upheld in the Impugned Judgment.

61. Turning to the next issue © Whether the Rent Controller in the Order and learned Judge in the Impugned Judgment had erred in finding that the Landlord required the Property in good faith for his own occupation or use.

62. Since this ground stems directly from S.15 SRPO 1979 for ease of reference S.15 SRPO 1979 is set out below:

> "15. Application to Controller. (1) Where a landlord seeks to evict the tenant otherwise than in accordance with section 14, he shall make such application to the Controller.
>
> (2) The Controller shall, make an order directing the tenant to put the landlord in possession of the premises within such period as may be specified in the order, if he is satisfied that:
>
> 7[* * * * *]
>
> (ii) **the tenant has failed to pay rent in respect of the premises in his possession within fifteen days after the expiry of the period fixed by mutual agreement between the tenant and landlord for payment of the rent, or in the absence of such agreement, within sixty days after the rent has become due for payment.**
>
> 8[Provided that where the application made by the landlord is on the sole ground mentioned in this clause and the tenant on the first day of hearing admits his liability to pay the rent claimed from him, the Controller shall, if he is satisfied that the tenant has not made such default on any previous occasion and the default is not exceeding six months, direct the tenant to pay all the rent claimed from him on or before the date to be fixed for the purpose and upon such payment, he shall reject the application.]
>
> (iii) the tenant has, without the written consent of the landlord:--
> (a) handed-over the possession of the premises to some other person;
> (b) used the premises for the purpose other than that for which it was let out;
> (c) infringed the conditions on which the premises was let out;

(iv) the tenant has committed such acts as are likely to impair the material value or utility of the premises;

(v) the tenant has committed such acts as are likely to impair the material value or utility of the premises;

(vi) the premises is required by the landlord for re-construction or erection of a new building at the site and landlord had obtained necessary sanction for such reconstruction or erection from the authority competent under any law for the time being in force to give such sanction;

(vii) the landlord requires the premises in good faith for his own occupation or use or for the occupation or use of his spouses or any of his children.(bold added)

63. As can be seen each of the grounds mentioned in S.15 (2) are separate and independent of each other. Thus, if the Landlord can prove one of these grounds to the satisfaction of the Controller then the Controller may under S.15 (2) make an order directing the tenant to put the landlord in possession of the premises within such period as may be specified in the order i.e. evict the tenant from the Property. The burden of proof shall rest on the Tenant and the standard of proof will be to the civil standard i.e. on the balance of probabilities.

64. Both the Rent Controller in the Order and the Impugned Judgment based on the evidence on record found that the Landlord had proven that he required the premises in good faith for his own use.

65. The main attack on this finding by the Tenant were two fold:

(a) that the Landlord had other property which he named in which he could set up his business and thus he had no need to use the Property in dispute especially since he had purchased the Property in 1984 knowing full well that it was subject to an existing tenancy and

(b) neither was the Landlord acting bona fide nor did he require the Property for his own use. In this respect the Tenant relied on the affidavit in evidence of the Landlord's witness Mr. Azam Zaheer Khan who is the real brother of the landlord who had admitted that the Property was to be used for establishing his business i.e. Mr. Azam Zaheer Khan and not that of the Landlord and as such the landlord did not require the premises for his own occupation or use of his spouse or any of his children as per section 15 (2) (vii) as per the requirement of SRPO, 1979.The landlord had not even in his S.15 Application stated for what use he required the Property which was indicative of the fact that he had no intention to use it himself. Furthermore, the Landlord was a US Citizen residing in the US who had no intention of using the Property himself.

66. With regard to the Landlord having other property the Tenant had specifically mentioned (i) Sky View Building Burns Road Karachi but added that it belonged to Irum Mozam. Not only is Irum Mozam not the Landlord but the Tenant failed to produce any evidence to show that Irum Mozam or the Landlord owned the said Property. (ii) House 165 Sector 11 A North Karachi. Again the Tenant did

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not produce any evidence to show that this Property was owned by the Landlord. Even otherwise it is a residential property whereas the Landlord required the Property in dispute for business purposes i.e. to set up a photo copying shop.

67. With regard to the Landlord not wanting the Property for his own use the Tenants case hinged on two aspects. Firstly the cross examination of his brother and secondly the fact that he was a US citizen residing in the US who had no intention to return to Pakistan and use the Property himself. The learned Judge in the Impugned Judgment deemed the admission by the brother as a typographical error and which when read with the other evidence that the Landlord had taken substantial steps to leave the US and return to Pakistan to run a business tends to suggest that the brothers admission was a typographical error and the Landlord does intend to return to Pakistan and open the business of a photo copying shop at the Property.

68. As the authorities set out below show it is not relevant that the Landlord did not disclose the use to which he proposed to put the Property and once he confirmed on oath that he required the Property for his own use unless he was shattered on cross examination on this point his evidence of requiring the Property for his own use would be sufficient to prove the ground.

69. With regard to not disclosing the use for which the Landlord required the Property the following authorities are relied upon:

Khawaja Imran Ahmed Vs. Noor Ahmed & another 1992 SCMR 1152 where it was observed at Placitum "C" as under:-

> "(c) Sindh Rented Premises Ordinance, 1979 (XVII of 1979)--
>
> ----S.15---Constitution of Pakistan (1973), Art.18---Landlord's requirement of premises for his bona fide personal use or for use and occupation of any of his spouses or children---Essentials---Embargo---Effect---Question whether landlord did not require the premises in good faith could be determined by cross-examining him on his affidavit or anybody else that he did not require the same in good faith---**Disclosure of nature of business which landlord wanted to do in the shop premises though relevant, yet a statement to that effect in the application, in absence of any provision in the Sindh Rented Premises Ordinance, 1979 requiring the landlord to state the nature of business, would neither be fatal nor essential**---Any restriction, even if provided by law would be hit by Art. 18 of the Constitution which provides freedom of trade or business or profession subject to the provisions contained in the proviso to that Article." (bold added)

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Mst. Saira Bai Vs. Syed Anisur Rahman 1989 SCMR 1366, which observed at placitum "c" as under:-

> "(c) Sindh Rented Premises Ordinance, 1979 (XVII of 1979)—
>
> ----S.15--Bona fide personal requirement for use of property--Landlord has to state in his application, the material facts i.e. facts which constitute cause of action alongwith those facts which prima facie showed that requirement was according to law and was made in good faith—**Landlord was not required to state the nature of business which he intended to carry on as same was neither essential nor formed part of cause of action.**" (bold added)

Shakeel Ahmed & another Vs. Muhammad Tariq Farogh & others 2010 SCMR 1925, which observed at placitum "c" as under:-

> "(c) Sindh Rented Premises Ordinance, 1979 (XVII of 1979)---
>
> ----S. 15---Ejectment petition---Bona fide personal need of landlord---Proof---Selection of business and rented shop by landlord---Scope.
>
> **Selection of business is the sole prerogative of the landlord so also choice of rented shop, if having more than one, therefore, no restriction can be imposed upon landlord.**(bold added)

70. For the proposition that the Landlords word on oath that he requires the Property for his own personal use which is not shattered in cross examination is sufficient to prove this ground:

In the case of Shakeel Ahmed & another Vs. Muhammad Tariq Farogh & others 2010 SCMR 1925 the Hon'ble Supreme Court observed at placitum "d" as under:-

> (d) Sindh Rented Premises Ordinance, 1979 (XVII of 1979)---
>
> ----S.15---Ejectment petition---Bona fide personal need of demised shop by landlord---Proof---Principles.
>
> **For seeking eviction of a tenant from the rented shop, the only requirement of law is the proof of bona fide need by the landlord, which stands discharged the moment he appears in the witness box and makes such statement on oath or in the form of an affidavit-in-evidence as prescribed by law, if it remains unshattered in cross-examination and un-rebutted in the evidence adduced by the opposite party.(bold added)**
>
> It is not the requirement of law that the landlord, in order to prove bona fides of his personal need, shall keep himself away from all sorts of income generating ventures or to keep himself idle as long as the fate of his ejectment case, which may consume year and years together, is finally decided by the Court.(bold added)

71. As a consequence of the above discussion the Tenant has been unable to prove any malafides on the part of the Landlord and that he acted otherwise than in good faith. The use to which the Landlord proposes to put the Property as illustrated by the above case law is not relevant and the Landlord did make such a statement on oath which remained unshattered in cross examination as alluded to in the case of **Shakeel Ahmed & another (Supra)**

72. Thus, I find that the learned Judge in the Impugned Order has correctly held that the Landlord has proven that he requires the premises in good faith for his own use.

73. As such having up held the Impugned Judgment on this ground alone the eviction order is upheld.

74. However by way of completeness I will now turn to **the final issue whether the learned Judge in the Impugned Judgment had erred in finding that the Tenant had failed to pay rent to the Landlord within 60 days after it became due.**

75. In terms of method of payment of rent this is dealt with under S.10 and in particular S10. (3) SRPO 1979. S.10 provides as under:

> "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 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. (bold added)**
>
> (3) **Where the landlord has refused or avoided to accept the rent,** it may be sent to him by postal money order or, by deposited with the Controller within whose jurisdiction the premises is situated.(bold added)
>
> (4) The written acknowledgement, postal money order receipt or receipt of the Controller, as the case may be, shall be produced and accepted in proof of the payment of the rent:
>
> Provided that nothing contained in this section shall apply in the cases pending before the controllers on the commencement of this Ordinance."

76. At this Juncture it is of assistance to reproduce below the finding of the Rent Controller on this issue which he dealt with at issue No3 of the Order after the recording of evidence.

"Issue No.3.

Now coming to issue No.3, I hold that the opponent is a willful defaulter in the payment of rent of the demised premises for the following reasons.

The opponent admits to have received notice dated 10.7.1984 sent to him by the advocate for the applicant informing him about the purchase of the demised premises on 27.5.1984 and requiring him to pay rent of the demised premises to the applicant's rent collector within a month. Instead of paying rent from the date of purchase viz: 27.5.1984, the opponent admitted rent on 25.8.1984 amounting to Rs. 105/- for three months from August to October, 1984 at the rate of Rs. 35/- p.m., thus the opponent deliberately did not pay rent for the period from 27.5.1984 to 30.6.1984. Payment of lesser amount of rent is also willful default as held in 2001 MLD 684. Moreover, irregular payment of rent would not save the opponent from consequences of default as held in 1986 CLC 226. **The opponent had started irregularly depositing rent of the demised premises in MRC No.3338/1984 at the rate of Rs.35/- p.m. from July, 1984 after delay of more than 3 to 6 months as it clear from the bare perusal of rent receipts Exs. O/8 to Exh.O/64. (bold added)**

The applicant was not aware of deposit of rent in Court by the opponent as admitted by the opponent in his cross that he does not know that notice of MRC (3338/1984) was sent to the applicant. The opponent has, therefore, clearly willfully defaulted in timely payment of rent of the demised premises to the applicant. As stated above, the opponent failed to pay rent to the applicant for the period from 27.5.1984 to 30.6.1984, and than irregularly deposited rent in MRC No.3338/1984 without notice to the applicant beyond the permissible period of 70 days. It has been held in 1994 SCMR 1507 (2) that payment / deposit in this case, beyond 70 days is default. The applicant has claimed the arrears of rent from 25.7.1984 when he became owner of the demised premises. He instituted this rent case on 06.7.2006. He at the best is entitled to recover arrears of rent at the rate of Rs.35/- p.m. for a period of 3 years prior to filing the rent case and till the vacant possession of the premises to the applicant.

For the reasons discussed above, I answer the issue No.3 in the affirmative, by holding that the opponent has willfully defaulted in the payment of rent to the applicant."

77. The Impugned Judgment in connection with default of rent found as under:

"As regards, the point of default, it is an admitted position on the record, that the appellant had received the notice dated 10.7.1984 sent to him by the advocate for the respondent informing him to pay the rent of the demised to the respondent's rent collector within a month. As per own saying of the appellant, he sent rent on 25.8.1984 amounting to Rs.105/- for three months from August to October, 1984, instead from the date of purchase i.e. 27.5.1984 and failed to make the payment of rent for a period from 27.5.1984 to 30.6.1984. As such, the findings of the learned Rent Controller, while holding that appellant committed willful default is proper in the perspective of relevant provisions of law, thus not requires any interference."

78. It is to be noted that there is a marked distinction between S.10 (1) concerning the date when rent is to be paid (either a date by mutual agreement or otherwise by the 10th of each month) and the requirement of payment of Rent under S.15 (2) (ii) SRPO 1979 (within fifteen days after the expiry of the agreed date for payment or in the absence of such agreement, within sixty days after the rent has become due for payment) so as to warrant eviction of the tenant under that section. By way of comparative analysis both the sections are set out below:

> "S.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 which it is due.
>
> S.15 (2) The Controller shall, make an order directing the tenant to put the landlord in possession of the premises within such period as may be specified in the order, if he is satisfied that—
>
> (ii) **the tenant has failed to pay rent in respect of the premises in his possession within fifteen days after the expiry of the period fixed by mutual agreement between the tenant and landlord for payment of the rent, or in the absence of such agreement, within sixty days after the rent has become due for payment.** (bold added)
>
> [Provided that where the application made by the landlord is on the sole ground mentioned in this clause and the tenant on the first day of hearing admits his liability to pay the rent claimed from him, the Controller shall, if he is satisfied that the tenant has not made such default on any previous occasion and the default is not exceeding six months, direct the tenant to pay all the rent claimed from him on or before the date to be fixed for the purpose and upon such payment, he shall reject the application.]

79. The longer grace period which the Tenant is permitted in S.15 (2) (ii) SRPO 1979 in which to pay the rent would seem to be on account of the harsh consequences which may follow based on a S.15 application which places reliance on S.15 (2) (ii) i.e eviction of the tenant for default in paying the rent.

80. According to the Tenant he immediately attempted to pay the monthly rent to the Landlord on receipt of the legal notice on 10-7-1984 through the Landlords Rent Collector Mr. Haroon who refused to accept the same. However this assertion is to a large extent belied by his admission that he deposited rent up to 31-7-1984 after receiving the legal notice in the MRC No.791/1968 **in the name of the previous Landlord.** At least a part of this rent ought to have been paid directly to the current Landlord who had served legal notice on him or to Mr. Haroon rather than being paid at the first instance into the MRC account of the previous Landlord.

81. Furthermore, the Landlord in his evidence denied refusing to accept the rent which according to him the Tenant deliberately and intentionally failed to pay him. Significantly Mr.Haroon who was the Landlord's rent collector was not called as a witness by the Tenant to corroborate the Tenants version of events that he immediately paid the rent to the Landlord or himself (Mr.Haroon) on receipt of the legal notice. As such the Tenant failed to discharge his burden of proof to the required standard that he had attempted to pay the Landlord or his rent collector (Mr.Haroon) and they had refused to accept the same.

82. In this respect the case of **Haji Qaim through Legal heirs V Syeed Rahim Shah (1999 MLD 1014)** is relevant which found at placitum (a) as under:

> "----S. 15---Order for deposit of rent in the Court. Default---Tenant had committed the default technically, as he had been deposited the rent in the Court in case of a miscellaneous rent case---Tenant, in circumstances, had also to prove refusal on the part of the landlord which required the evidence of the postman---Postman having not been examined by the tenant, there was no reason to take exception with the order of the Rent Controller, ordering ejectment of the tenant."

83. The Tenant on receipt of the Legal notice as per S.10(3) should have immediately attempted to pay the rent directly to the Landlord or his rent collector and only then on their/his refusal attempt to pay either by postal money order to Mr.Haroon or deposit the amount in the MRC.

84. In this respect in case of **Mst. Yasmeen Khan Vs. Abdul Qadir & another 2006 SCMR 1501**, the Hon'ble Supreme Court found at placitum "A" as follows:

> "----Ss. 10 & 15 (2) (ii) ---Default in payment of rent for one month---Direct deposit of rent in Court without first tendering same to landlord and then on his refusal to accept same or issue receipt, remitting same through money order---Effect---Such would be a willful and deliberate default in payment of rent on the part of tenant, which could not be termed to be technical default."

85. Reliance is also placed on **Pakistan State Oil Company Ltd. Karachi Vs. Pirjee Muhammad Naqi 2001 SCMR** 1140 where the Hon'ble Supreme Court found at placitum "b" as under:-

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"(b) Sindh Rented Premises Ordinance, 1979 (XVII of 1979)---

----Sc.18 & 15(2(ii)---Default in payment of rent---Change in ownership---Default in payment of rent was a serious matter because it abridged the right of the landlord which was to be protected—Linking of the exemption of a tenant under S.18, Sindh Rented Premises Ordinance, 1979 with S. 15 (2)(ii) of the said Ordinance makes a complete whole for not transgressing the statutory provision regarding default in that anything not done by the concerned party to absolve itself of the responsibility under the statute will surely lead to the specified results, i.e. making of an order or ejectment on the ground of default which could not be deemed to be technical in nature---When default was proved to have been willful, deliberate, contumacious and not technical in nature, ejectment of tenant would be warranted---Findings recorded by the High Court being duly supported by the evidence on record and there being no misreading or failure to consider the same, Supreme Court declined interference."

86. That on the evidence on record I do not consider that there has been a misreading or non reading of evidence either by the Rent Controller in the Order or by the learned Judge in the Impugned Judgment on the question of willful default.

87. Thus, with regard to the final issue I find that this is a case of willful default of rent so as to attract the provisions of S.15 (2) (ii) SRPO 1979.

88. As noted earlier due to the narrow scope of such Petitions in writ jurisdiction and the fact that it has been proven that the Landlord under S.15 (2) (vii) SRPO 1979 does require the Property in good faith for his own use and that this is a case of wilfill default in the payment of rent by the Tenant attracting the provisions of S.15 (2) (ii) SRPO 1979 and as such there are no blatant or glaring errors by the lower Courts in their respective Order and Impugned Judgment I uphold the Impugned Judgment and dismiss the Petition.

Dated: 15-1-2016.