

IN THE HIGH COURT OF SINDH AT KARACHI

C.P No.S-1216 of 2018

Present: Mr. Justice Nazar Akbar

Petitioner : Mst. Farzana Javed
Through Mr. Javed Anwar, Advocate

Respondent No.1 : Mst. Nighat Sultana. (Nemo)

Respondent No.2 : The District Judge, Karachi-East. (Nemo)

Respondent No.3 : IX-Senior Civil Judge & Rent Controller,
Karachi-East. (Nemo).

Date of hearing : **30.5.2018**

Date of decision : **18.07.2018**

J U D G M E N T

NAZAR AKBAR,J:- This constitution petition is directed against the judgment dated **19.02.2018** passed by the District Judge, Karachi East, whereby First Rent Appeal No.269/2017 filed by Respondent No.1 was allowed and order of dismissal of Rent Case No.236/2015 dated 4.10.2017 passed by the Rent Controller was set aside. Consequently the petitioner was directed to vacate the tenement in his possession within 45 days.

2. Brief facts of the case are that the petitioner is tenant of respondent No.1 in a portion of a House bearing House No.BR-188, Bostan Raza Road, Model Colony, Karachi (hereinafter referred to as said premises) on monthly rent of Rs.5000/=. The Petitioner from July, 2015 stopped paying rent to Respondent No.1. The said premises was also required by Respondent No.1 to accommodate her married daughter, who has been residing at Kharadar, therefore, Respondent No.1 requested the petitioner to vacate the said premises. When the Petitioner refused to vacate the said premises,

Respondent No.1/landlady on the ground of default and personal need filed Rent Case No.236/2015 under Section 15, Sindh Rented Premises Ordinance, 1979 (SRPO, 1979) before the Court of IX Rent Controller, East Karachi.

3. The Petitioner was duly served with eviction proceedings and she filed written statement. She averred that she has deposited rent in MRC No.153/2015 without any details and denied the personal bonafide need of Respondent No.1/landlady. She stated that two unmarried daughters of Respondent No.1 have been residing with her, whereas one married daughter was residing in Germany. She further stated that another married daughter of Respondent No.1 has been residing in Mithadar in her own flat and she was not interested to shift in the said premises, therefore, she prayed for dismissal of rent case.

4. After recording evidence and hearing learned counsel for the parties, learned Rent Controller has been pleased to dismiss the Rent case filed by Respondent No.1/ landlady by order dated **04.10.2017** holding that Respondent No.1/landlady has failed to prove her personal need of the said premises in good faith and did not decide the issue of default on the ground that it was not agitated by the counsel for the applicant at the time of final arguments.

5. The order of Rent Controller dated **04.10.2017** was challenged by Respondent No.1 in F.R.A. No.269/2017 before the learned District Judge East Karachi which was allowed by the impugned order dated **19.02.2018**. The petitioner/tenant after more than three months has challenged the order of the First Appellate Court on **25.5.2018** through this Constitution Petition. On **28.5.2018** notices were issued and I have heard the counsel for the petitioner on

30.5.2018, and reserved for orders with directions to the learned counsel for the Petitioner to file written arguments within three days, if any.

6. Learned counsel for the petitioner has placed on record an statement alongwith photocopies of case law on personal need. He has not filed even any case law on the point of default. The petitioner's counsel has failed to point out the evidence on the basis of which the Rent Controller has apparently unfairly left the question of default undecided on the pretext it has not been agitated by the counsel for the applicant at the time of final arguments as well the evidence on personal need which prompted the Rent Controller to conclude that bonafide personal need of the respondent has not been established. He has, however, filed certain case laws on personal need which are not relevant in the given facts of the case in hand. By now it is settled law that even if there are more than one premises available with the landlord and he/she chose to occupy for personal need a particular one then tenant has no right to challenge such choice of the landlord. However, it was not the case of the petitioner since she has never made such allegation in her written statement and affidavit-in-evidence. The learned Appellate Court has also followed the dictum laid down by Supreme Court in this context while setting aside the order of Rent Controller on the issue of personal need.

7. Learned Appellate court has categorically observed that learned Rent Controller has failed to exercise its jurisdiction under Rent Laws in terms of provision of Section 16(1) & 16(2) as well as Section 15 of SRPO, 1979. The record shows that the landlord has seriously alleged default in payment of rent. The landlord has even filed an

application under **Section 16(1)** of SRPO, 1979 which was allowed by order dated **09.3.2016** with the following observation:-

*However, in the interest of justice the **opponent is directed to deposit the monthly rent in the instant rent case (R.C No.236/2015)** with the Nazir of this Court @ Rs.5000/- from March, 2016 and onwards **on or before 10th of each English calendar month.***

8. On Petitioner's failure to comply with the tentative rent order, Respondent No.1 filed an application under **Section 16(2)** of SRPO, 1979 for striking off defense of the opponent showing specific violation of the petitioner in depositing rent in Court for the month of July, August & December, 2016 and January, February & March, 2017. Respondent No.1 has also filed even true certified copy of ledger of Nazir of the Court showing statutory default. The petitioner did not dispute the fact that she has deposited rent after specified date given in the tentative rent order. However, it is indeed unfortunate that learned Rent Controller instead of striking of defense favoured the petitioner and dismissed application under **Section 16(2)** of SRPO, 1979 on the frivolous excuse that the matter has been ripped for final arguments in the following terms.

*The matter has been ripped. The purpose of Section 16(2) of SRPO, 1979 is to stuck off the defence of opponent but **I am of the humble view** that the matter should be decided on merits rather on technicalities, as such, in the attending circumstances the application under Section 16(2) SRPO, 1979 stands dismissed.*

9. The striking of defense in rent case is not mere technically. Rather refusal to strike of defense amounts to denying statutory right accrued to the respondent / landlord. The use of the word "**shall**" in Section 16(2) SRPO, 1979 leaves no room for the Rent Controller to

form even “a humble view” to deny a statutory right accrued to respondent / landlady after acknowledging that the “purpose” of **Section 16(2)** SRPO, 1979 is to struck off the defence. She wrongly held that such order would be a decision on technicality not on merit. Then in final judgment the same Rent Controller refused to give a verdict on the question of default in payment of rent merely because the learned counsel for the respondent/landlord in the final argument has not agitated default. Even the Appellate Court was surprised by the Rent Controller’s treatment to the issue of default when it observed in the impugned order that:-

“But surprisingly, such point of default was not settled by the trial Court. However, the Appellant filed an application u/s. 16(1) of the Sindh Rented Premises Ordinance, 1979 and the learned trial Court after hearing the parties passed tentative rent order whereby the respondent/opponent was directed to deposit the monthly rent of Rs.5000/-, but later-on when the Appellant filed an application u/s.16(2) to strike of the defense of the respondent/opponent, the trial Court after hearing the learned counsel for the parties, dismissed the same vide order dated 17.07.2017, observing that it is better to decide the matter on its merits rather on technicalities.”

10. It cannot be believed that the counsel who filed a rent case on default, then filed an application for tentative rent order and after obtaining certifies copies of ledger of Nazir filed an application for striking off defense, has failed to agitate ground of default in final argument. Admittedly, the Petitioner has failed to deposit rent in Court strictly in accordance with tentative rent order, which was even otherwise established from the record of the learned Rent Controller herself. It is mandatory duty of the Rent Controller / any Judge entrusted with the sacred duty of doing justice between the parties to decide each issue between them in accordance with law on merit on the basis of record and evidence before the Court irrespective of

arguments by the Counsel. In several cases Court passes orders on merit without even hearing of counsel on account of their absence. The impugned judgments are examined by appellate Courts in the light of Record and Proceedings in trial Court’s file and arguments of lawyers are not and cannot be part of Court record. In presence of record/evidence, unless the question of default was dropped in writing, the Rent Controller was not supposed to leave this crucial issue between the parties undecided merely for want of arguments. Even otherwise there is no concept of framing formal issues in rent cases. The requirement of law under Section **19(5)** of SRPO, 1979 is that the Rent Controller **shall** briefly state issues in the judgment and **shall** record findings on each issue. **Section 19(5)** SRPO, 1979 is reproduced below:-

- 19.** ---(1).....
- (2).....
- (3).....
- (4).....

*(5) The Controller **shall**, instead of formally framing issues arising between the parties, state them briefly in the judgment and **shall** record findings on each such issue separately.*

In fact repeated use of the word “**shall**” in **Section 19(5)** of SRPO, 1979 and also in **Section 16(2)** SRPO, 1979 confirms that the learned Rent Controller had no option except to decide the issue of default by the tenant/ petitioner either way by looking into the pleadings and evidence. This was patent failure of the Rent Controller **Mrs. Uzma Khan** to exercise her jurisdiction in accordance with Rent Laws and I am afraid her observation in the final judgment on the point of default that “*during course of final argument the learned counsel for the applicant agitated only one ground that his personal*

bonafide need” was her second excuse to avoid giving decision on the question of default.

11. The findings of the Rent Controller on the issue of personal bonafide need of the respondent also appears to be equally perverse and contrary to the record and evidence. The petitioner neither in her written statement nor in her affidavit-in-evidence has even alleged that two flats were lying vacant in the same building, though it does not make any difference since it is the matter of choice of the petitioner, but I am surprised to read the observation of the learned Rent Controller in the judgment that **“Moreover the opponent (petitioner) in her evidence has stated that two flats are lying vacant in the same building”** Then the learned Rent Controller on believing the statement which is not on record in the evidence denied the need of the petitioner by holding that:-

“It is held in 1993 CLC 2370 that nondisclosure of two other flats in possession of landlord in the same building and concealment of other material facts which creates great doubt as to credibility and good faith”.

I have repeatedly examined the written statement and affidavit-in-evidence of the Petitioner through attorney, I could not find the allegation of the petitioner that respondent / landlady has two other flats which are lying vacant. Then I examined cross-examination of the respondent / landlady and I could not find even a suggestion that she has another accommodation or vacant flats at her disposal to fulfill her needs. It looks that the learned Rent Controller has not read any case law on the subject of personal bonafide need except 1993 CLC 2370 and she has read the evidence which has **not** been produced by the petitioner before her. This is awful application of judicial mind by the learned Rent Controller, both on the issue of

default and personal bonafide need. The reading of evidence which is not available on Court file to draw a conclusion that personal need was not proved is even more serious than leaving the issue of default unsettled/undecided by the learned Judge on the pretext that the counsel for respondent has not agitated the point of default in the final argument. Learned Appellate Court was surprised on coming to know that issue of “default was not decided by the trial Court” and I am more surprised to note the way the issue of “personal need” has been settled by the Rent Controller.

12. In view of the above discussion, while maintaining the order of the Appellate Court in FRA No.269/2017, this petition is dismissed with cost of **Rs.20,000/-** to be deposited by the petitioner in favour of Karachi Bar Clinic/Dispensary within 15 days from the date of this order. In case of default in payment of cost, the General Secretary, Karachi Bar Association may pursue the payment of cost through the Court of IX Rent Controller like a Judgment Debtor and become party for the limited purpose in Execution proceedings arising out of the impugned appellate judgment since it has been maintained. If the learned Rent Controller is seized of execution proceeding, writ of possession should be issued with police aid on the 16th day from today without notice to the petitioner.

13. However, before parting with the judgment, keeping in view the standard of order of Rent Controller, I would be failing in my duty, if I do not direct the learned District and Sessions Judge, East Karachi to closely monitor performance of Rent Controller, **Mrs. Uzma Khan** at least for the next three months. She needs to improve her legal acumen which is missing in the order discussed in this judgment. I hope the impugned judgment was out of the blue moon and not her

regular characteristic but it does reflect adversely on her performance. Learned District Judge should not mark fresh appeals against her orders/judgments to other Additional District Judges and for monitoring her performance as Senior Civil Judge/Rent Controller, he should fill the following proforma and attach with each of his appellate judgment and send it to MIT-II of this Court for intimation to this Court in Chamber after three months.

Judgment of Mrs. Uzma Khan
Senior Civil Judge/Rent Controller

Case No. _____ of _____

(Particular of case which order is assailed)

The Judgment of District and Sessions Judge in (Criminal) (Civil) (Rent) Appeal No. _____ of _____ pronounced on _____. (Copy enclosed).

Remarks: - (Score of remarks not intend to be applied)

1. Good
2. Above Average
3. Average
4. Below Average
5. Poor

Any additional remarks:-
(Such as "The judge has not discussed the evidence of P.W 2 at all" or "Certain observations are not couched in proper language")

(_____)
District & Sessions
Judge/Additional

Endt: No. ____ Conf(J)Remarks)/ Dated:-_____
Copy forwarded to MIT-II for information and record.

14. With the ever-growing criticism on the state of affairs of lower judiciary, it would be expedient and appropriate if the learned District and Sessions Judge(s) on administration side issue a circular to all the Additional District and Sessions Judges who are generally appellate Courts against the judgments/orders passed by Senior Civil Judges/Civil Judges to make it **mandatory** for all appellate Courts to

fill a similar proforma after deciding an appeal before them and send copy of the same to MIT-II of Sindh High Court and District and Sessions Judge so that a resume of performance of all the judges under the administrative control of District and Sessions Judge be documented and readily available as and when needed to be examined in discharge of their administrative responsibility with reference to the judges under their administrative control. It may be mentioned here that in November, 2015, the then Hon'ble Chief Justice has been pleased to circulate a similar proforma amongst all the brother judges of this Court through the Registrar in a bid to keep an eye on the performance of District/ Additional District Judges. There are also complaints from Judges of lower Court about discrimination and favoritism in promotion and unilaterally prepared reports on whims and wishes without any supporting material which adversely result in development of their career. Personal likes and dislikes in the administration at any level in any institution cannot be ruled out but it can be checked by making the process of administration transparent. In addition to monitor performance of subordinate judiciary, this proforma would be an instrument/tool for maintaining transparency in smooth functioning of lower Courts and consequently control discrimination and nepotism. Therefore, the appellate Court should also upload filled proforma on the website of District Judiciary alongwith their judgments so that everyone amongst the members of lower judiciary should know about performance of their colleagues. Transparency in administration of District Judiciary is a matter of public importance and it cannot be maintained unless the minimum information about performance of subordinate judges is uploaded on the website of District Judiciary. It would be in the spirit of compliance of Article 19-A of the

Constitution of Islamic Republic of Pakistan, 1973 which guarantees to every citizen “*to have access to information in all the matters of public importance*”. Once the performance of judicial officer through the duly filled proforma by a responsible authority is made public on the website of District Judiciary, it would develop sense of competition amongst the judicial officers and definitely inculcate in them a will to improve their performance in discharge of judicial work.

Copy of this judgment be sent to all the District Judges in Sindh for information and compliance through MIT-II.

JUDGE

Karachi
Dated:18.07.2018.

Ayaz Gul/P.A