IN THE HIGH COURT OF SINDH AT KARACHI

C. P. NO.S-1223/2017

Petitioners : Muhammad Naveed and two others,
through Mr. Azizullah Kumbhar advocate for petitioner No.1.
Mr. Abdul Qadir Khan advocate alongwith Ms. Shabana and Mr. Aftab Ali advocates, for petitioners No.2 and 3.

Respondents : VIIIth A.D.J, Karachi South and two others.
through Mr. Muhammad Ilyas Khan Tanoli advocate for respondent No.3.

Date of hearing : 25th September and 7th October 2020.

Date of announcement : 18th March, 2021.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Petitioners (tenants) have impugned judgment dated 29.04.2017 delivered by appellate court whereby order dated 08.01.2015 of the Rent Controller allowing the Rent Case filed by respondent No.3 on the ground of default in payment of rent, was upheld and appeal was dismissed.

2. Facts leading to filing of instant petition are that petitioners were inducted as tenants in Shop No.4, Jamestrace Road, Rubab Mansion, Nanakwara, Pan Mandi, Karachi, in 2003 at monthly rent of Rs.2500/-, they paid rent upto February 2004 and thereafter did not pay rent till filing of rent case hence committed willful default, however when they deemed that they are committing default in payment of rent for the last 8 months from March to October 2004, they sent monthly rent due from March to October 2004 by money order dated 24.07.2004 and even then did not pay rent dues of two months for March and April 2004; besides they have

impaired the value and utility of demised premises materially, moreover demised premises was required by landlord for personal bonafide need, hence prayed for direction to tenant to hand over its peaceful passion to landlord with arrears of rent due.

3. Opponents/Petitioners filed written statement denying above allegations and grounds of default, personal bonafide need and allegation of impairment of value or utility of demised premises. It was urged that the premises is on *pagri* basis, they were paying monthly rent regularly, after refusal to receive the rent, they sent money order to landlord but he even refused to receive the same hence depositing the rent in MRC No.815/2004 till March 2012; that such rent was fixed as landlord had received an amount of Rs.1200,000/- for change of tenancy receipt and for physical possession from previous tenant and paid Rs.1600,000/- with the consent of applicant/landlord.

4. I have heard learned counsel for respective parties and perused the record. Learned counsel for petitioner has relied upon PLD 1980 SC 298, 2005 CLC 3, PLD 1990 SC 681, 2001 SCMR 1888, 1991 MLD 1393, 2012 SCMR 177, PLD 2008 Karachi 205, PLD 1990 SC 389, 1987 SCMR 1313, 1998 MLD 903, 1993 SCMR 207, 1993 MLD 1817; whereas learned counsel for respondent No.3 place reliance on 2006 SCMR 1872, 1999 MLD 3312, 1995 CLC 1351, 1994 SCMR 1900, 2008 YLR 10, 2015 CLC 310, 2017 CLC 656, 2017 CLC 112, KLR 1985 Civil Cases 380, 1990 CLC 1324 and 1983 CLC 1451.

5. At the outset, it can safely be recorded that jurisdiction under Article 199 of the Constitution cannot be invoked as substitute

of another appeal against the order of the appellate Court. Therefore, mere fact that upon perusal of evidence there exists possibility of a different view would never be sufficient to seek concurrent findings disturbed by invoking constitutional jurisdiction of this Court. Reference may well be made to the case of *Shakeel Ahmed & another v. Muhammad Tariq Farogh & others* (2010 SCMR 1925).

6. Thus, while pressing Constitutional Jurisdiction in such like matter, the petitioner must establish that the findings of two Courts below, particularly of appellate Court, are *prima facie* not in accordance with law and available material. There is no denial to existence of relationship of landlord and tenant between the parties and in such like matter the claim is to be accepted once landlord states on Oath and same goes un-shattered in cross-examination. Reference is made to case of *Pakistan Institute of International affairs v. Naveed Merchant & Ors* (2012 SCMR 1498) wherein it is held as:-

> "10. The claim of appellant as regard their personal need, when examined on the basis of their word to word pleadings in paragraphs Nos.4 and 5 of the rent application and the affidavit in evidence of their witness leaves no room for doubt open for discussion on the subject of their choice and preference which has already come on record and remained un-shattered and un-rebutted from the side of respondents Nos.1 and 2. in these circumstances, subsequent developments which might have been relevant in some other cases are of no help to improve the case of respondents Nos.1 and 2 before the High Court in exercise of its jurisdiction under Article 199 of the Constitution. **It will be nothing, but reiteration of settled legation position that the statement on oath of the landlord as regards claim of their / his personal need un-shattered in cross-examination and un-rebutted in defence evidence is to be accepted by the Court as bona fide**. Moreover, the choice lies with the landlord to select any of the tenement for his personal need and for this purpose the tenant or the Court have no *locus standi* to give their advice for alternate accommodation."

It is also legally established principle of law that burden of establishing the timely payment of rent is upon the tenant which, if he fails, has to face the legal consequences. Reference is made to the case of *Muhammad Amin Lasaia v. M/s Ilyas Marine & Associates & Ors* (PLD 2015 SC 33).

> "8. .. **The burden of establishing the timely payment of rent lay upon the tenant which he failed to discharge. The tenant could also have availed of the benefit of subsection (4) of section 10 of the Ordinance by producing receipts of the deposit of rent under the miscellaneous rent case, but this too was not done. Consequently, the case of default stood established against the tenant.** In addition, in paragraph seven (7) of the constitution petition filed before the Hon'ble High Court the Company had stated that the tenant had committed a default for 28 months and had not paid the amount of eighty four thousand rupees which worked out to the rent for such period. The petition was filed on 21st May 2007 and the impugned order is dated 28th August 2014 , but despite this interregnum no counter affidavit to the petition was filed, thereby the only presumption that can be drawn is that the said allegation was true."

Having reiterated the above principles, it is conducive to refer the findings of the Rent Controller on the issue of default are that:-

> "According to applicant that opponents failed to pay the rent for the month of March and April 2004 while opponents denied the said contention of applicant and produced money order receipts as exhibit O-4 to O-7 in which it is written by opponents themselves that they are sending rent for 6 months from May 2004 to October 2004 and they have sent money order on 31.07.2004 meaning thereby they have paid rent through money order for the month of May 2004 after 3 months **which is clear default on the side of opponents while they have not paid rent for the month of March 2004 and Ari 2004**. It is clear in section 15(i) that rent for tenement premises should be paid within 15 days after the expiry of the period fixed by mutual agreement between the tenant and landlord for payment of the rent or in absence of such agreement, within sixty days after the rent has due for payment.
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> It is pertinent to mention here as per statement of opponents that they have paid pagri to previous tenant Rs.18,00,000/- and to applicant Rs.1600,000/- but failed to produce any single document in this regard. They have produce two witnesses in support of their contentions. The witness No.1 namely Ehsanullah

deposed in his cross examination that opponents paid Rs.1200,000/- to applicant for changing of goodwill receipt and goodwill receipt has been changed in the name of opponents while opponents mentioned in the affidavit in evidence that no receipt has been issued to them by the applicant which shows clear contradiction between statement of opponents and witness namely Ehsanullah. The witness No.2 also deposed in cross examination that he does not know previous tenant Mustafa Lakarwala but opponents paid 1800,000/- to one Mustafa Lakarwala and Rs.1200,000/- lacs to applicant without any payment receipt and further paid huge amount in cash which also does not appeal the mind and it seems that it is after thought. **The law requires sufficient prove to believe the contention of parties and opponents failed to prove that they have paid pagri and they are not committed willful default while applicant establish his case and proved that opponents are willful defaulter for payment of rent of tenement premises on time as required by law.**

In the light of above discussion, it is observed that opponents are willful defaulter of payment of rent, hence I answer point No.1 as proved."

Likewise on such issue conclusion of the appellate court is that :-

"It is settled proposition of law that if the landlord steps into the witness box and adhere on oath that rent for certain period has not been paid by the tenant, heavy burden lies upon the tenant to prove the factor of payment of rent for such disputed period positively without committing default, reliance is placed on PLD 2001 Karachi 162, 2001 CLC 690, 1990 CLC 336, PLD 1994 Karachi 106, 1994 CLC 1769, 1994 MLD Karachi 955, PLD 2009 Karachi 268, PLD 1992 Karachi 314, PLD 191 Karachi 239 and 2018 YLR 1049. In these circumstances the burden to prove the factor of payment of rent heavily rest upon the appellant/tenant. On examination of evidence of the appellants/tenants side it is admitted on position of record that appellants are tenants of the respondent/landlord in respect of the demised premises at the monthly rent of Rs.2500/-. The record reflects that the appellants/tenants admittedly sent money order for the period from May 2004 to October 2004 and also deposited the rent in MRC No.815/2004 on 11.08.2004 from the period of May 2004 onwards. **The appellants/tenants had not been able to bring on record any rent receipt showing the payment of rent for alleged period i.e. March 2004 and April 2004**. The appellants/tenants categorically admitted the fact of issuance of receipt dated 20.04.2004 available on record and Ex.A/2 produced by respondent acknowledging the monthly rent for the month of January and February 2004. In this regard, the appellants/tenants in his cross examination took the

> plea that through paid rent receipt in fact the rent was paid for February 2004 to March 2004 and it was wrongly mentioned by the respondent/landlord that it was for January and February 2004. This plea appears to be after thought for a simple reason, there is nothing on record from the side of the appellants/tenants that they were objected on the contents of the said receipts if for the sake of arguments the plea of appellants/tenants is taken true, nevertheless they have failed to produce any tangible proof regarding payment of rent for the month of April 2004. **Moreover, it is also admitted position that the appellants/tenants have deposited the rent from May 2004 in MRC No.813/2004 on 11.08.2004 which clearly depicts that the rent for the month of May 2004 was deposited in August after committing willful default**."

7. *Prima facie,* there appears no illegality in the concurrent findings of the two Court(s) below while answering the question of *default* because legally the tenant cannot take an exception to his obligations in payment of the rent in the manner as provided by law or as agreed between parties. It shall always be the duty of the tenant to pay or atleast tender the rent to the landlord and he cannot be allowed to plead that the landlord did not make any effort to collect the rent. The mere fact that a tenant has made it a habit not to pay the rent unless the landlord comes and collects it. Nor does it absolve the tenant from paying the rent every month, as held in the case of *M/s Tar Muhammad Jnoo & Co. v. Taherali & others* (1981 SCMR 93).

8. Since, *prima facie,* the petitioner / tenant has failed to make out a case for interference into concurrent findings of two Courts below hence, constitutional jurisdiction of this Court cannot be exercised which, *otherwise,* is not only limited but could only be exercised in exceptional circumstances which are lacking in instant case. Accordingly instant petition is dismissed.

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