IN THE HIGH COURT OF SINDH AT KARACHI

C.P. NO.S-285/2007

Petitioners	:	Ogra Khairaj and others, through Mr. K. B. Bhutto, advocate.
Respondents	:	Abid Quettawala and others, through Mr. Badar-ud-Duja, advocate for respondent No.1.

Date of hearing	:	14.05.2018.
Date of announcement	:	16.08.2018.

J U D G M E N T

Salahuddin Panhwar, J: Through this petition against concurrent findings, petitioners/tenants have assailed judgment dated 31.03.2007 passed by Appellate Court in F.R.A. No.142/2005 whereby such F.R.A. against order dated 30.04.2005 passed by Rent Controller concerned in Rent Case No.165/2001, was dismissed while maintaining direction of Rent Controller to petitioners to vacate the demised premises.

2. Facts of the case are that Applicant (respondent No.1 herein) filed Rent Case No.165/2001 before the concerned Rent Controller stating that he is one of the owners/landlords of Plot No.K/5, 36/B, Planning Scheme No.49, New Survey No.LY 12/84 (Excise & Taxation No.AK-V-1S-36), admeasuring 535 Square yards situated at Hussain Bhoy Ismail Ji Road, near Lassi Khoja Jamat Khana, Lea Market, Karachi; opponents (petitioners herein) are his tenants as per order dated 20.07.1983 passed by the 8th Senior

Civil Judge & Rent Controller, Karachi; that as per aforesaid order of the Rent Controller, petitioners/opponents were jointly depositing rent in court through their leader Karobhoy and after his death through his daughter Heer Bai and after her death through her son Olga Khairaj at Rs.57.50 per month of the said plot of land and constructed thereon and Ogra Khairaj is in occupation of the tenement of her mother Heer Bai. It was stated that applicant/respondent No.1 is carrying business of pipes, fittings and valves etc. by import and local purchase and intended to expand his business for which he required the said plot of land for his personal bonafide need for the purpose of his godown and workshop on said plot and the demised plot is most suitable for his requirement as aforesaid; that he has no other suitable place in his possession for that purpose. It was added that opponent/petitioners according to their own statement depositing rent at rate of Rs.57.50 in Court although they were requested to pay the rent directly to applicant/respondent No.1, moreover, Rent Case No.2327/1972 filed by applicant against the opponents concluded on 08.05.1988 in Supreme Court by condoning the default in payment of rent, opponent failed to pay rent to applicant directly inspite of demand but chose to deposit it in Court which after decision in aforesaid case is not proper and legal tender of rent to applicant hence opponent are defaulter in payment of rent.

3. Case of the petitioners, as was before the two courts below, is that they had not committed any default and continuously depositing rent first in Rent Case No.2327/1972 till 04.03.2000 and then in MRC No.911/2000 upto September 2001, therefore, there is no default on the part of petitioners. It is stated that demised property is a residential property and that being

situated in a thickly populated area of the City it is not permissible under the law to establish a workshop in residential area as well requirement of workshop does not come within definition provided under section 2(h) of the Sindh Rented Premises Ordinance 1979; that a residential property cannot be converted into commercial unit unless such permission is granted by the lessee and that respondent No.1 has other commercial properties in the City such as (1) Quettawala building which has 300 shops and godown (2) one plot situated in front of Sindh Madrassa-Tul-Islam School (3) one big plot at Altaf Hussain Road formerly New Challi (4) one big property situated at Chakiwara, Karachi; that respondent No.1 had neither demanded rent nor sent any notice for that purpose; that petitioners are ready and willing to pay the rent to respondent No.1 and have no objection if rent already deposited in court is withdrawn.

4. At trial, learned Rent Controller framed and answered the issues as under:-

Issue	Finding
1. Whether the opponents have committed wilful default in payment of rent?	Affirmative.
2. Whether the case premises is required by applicant for bonafide personal use?	Affirmative.
3. What should the order be?	Ejectment application is stand allowed.

5. I have heard learned counsel for the parties and gone through the record including the order and judgment of the Courts below.

6. Learned counsel for petitioners while giving the background of the case has submitted that petitioners are poor persons doing menial jobs

in Karachi, since pre-partition days, residing in 15 Katcha and Pakka houses, situated in the compound bearing No.K-5, as tenants of its hindu owner named Moti Lai who migrated to India and sold it to one Essa Bhai, who filed R.C. No.2327/1972 against Kara Bhai alleging it as tenement No.6 for his ejectment on the grounds of default, making additions and alterations in the said tenements and sub-letting it; during the proceedings, tenant Kara Bhai expired and his daughter Heer Bai was substituted as opponent; during proceedings, Essa Bhai also expired leaving his 3 sons including the respondent as his legal heirs who were joined in the said rent case; that Rent case was dismissed vide order dated 20.07.1982 and said three legal heirs approached this Court and filed the FRA No.945/1982 against that dismissal, which was allowed by judgment dated 29.10.1986; Heer Bai/tenant preferred C.P.No.28-K/1987 against the judgment of this Court before Hon'ble Supreme Court and honourable supreme court by Order dated 02.09.1987 directed the petitioner/tenant to continue depositing the rent on or before the 10th of every calendar month and by judgment dated 08.05.1988 the Hon'ble Supreme Court allowed the said Civil Appeal No.115-K/1987 / C.P. No.28-K/1987; that later, respondent filed Rent Case No.165/2001 for ejectment of 16 opponents from Plot No.K-5 on repeated ground of default of rent and additional ground of personal requirement; that case was allowed vide order dated 30.04.2005; petitioners filed FRA No.142/2005 against that ejectment order, before the learned District Judge South, Karachi, which was dismissed by judgment dated 31.03.2007. Learned counsel has argued that M.R.C. 165/2001 filed by the respondent/landlord against the 16 opponents/tenants, describing no Tenements (vide Para-2, Annexure-K) as such it is in violation of Order-7 Rule-3 CPC; further in that MRC respondent

has mentioned the petitioners as the residents of Bohri Compound, Plot No.K-5 without describing respective residential tenements which in fact 15 houses; the inspection report dated 12.01.2007 submitted by Nazir in FRA shows 11 single stories and 4 double stories buildings and not the plot of land therefore the respondent has misrepresented the premises as plot by concealing 15 residential houses; that the findings of the lower court regarding default of the rent are illegal as the allegation of the default has not been specified for a particular period and same is vague, even otherwise the rent is being deposited by Heer Bai in previous R.C. No.2327/1972 as per the direction of the Supreme Court in C.P.No.28-K/1987/Appeal No.115-K/1987 and thereafter in MRC No.911/2000 which fact has not been disputed by the respondent in his Cross-Examination; even otherwise it is a technical default and not actual default as held in PLD 1991 SC 711; that the tenant Heerbai has not withheld the rent amount and had been out of pocket of the said rent amount. Both the lower courts have failed to consider that the respondent has not discharge his burden of proof regarding default and also misplaced burden of proof which actually casts upon the respondent per Article 117 of the Qanoon-e-Shahadat Order; that the findings of the lower court regarding personal requirement are also without evidence and illegal, the respondent merely alleged that he wants to use the plot as a workshop; in fact there are 15 houses including the double stories constructed by petitioners, Workshop is of the nature an industry/factory which cannot be established in a residential area without permission of the City Surveyor who is the lessor and the KBCA which regulates buildings; that respondent has admitted in his cross-examination that "*we did not obtain any permission from City Survey to convert residential premises into commercial one it is not necessary to obtain*

permission from the City Survey Officer to run the workshop in the property in question.... At present we did not obtain any permission from KBCA to construct / run workshop in the property in question." It is argued that good faith is an essential ingredient of law which is missing in this case, furthermore the respondent wants to usurp all residential buildings of petitioners under grab of personal requirement, that the property has always been under the Municipal Administration of Karachi therefore governed by Municipal Administration Ordinance 1960 (un-repealed Act) and by virtue of its Section 92, the license is to be obtained for using the properties for any dangerous or offensive trade. Such trade has been specified under the rules made under the said ordinance. Such trade has been prohibited under Rule-1, Sub Rule-32-A and 33; that the alleged unauthorized construction, default and sub-letting in the previous case was rejected by the rent controller and Hon'ble Supreme Court, which has attained finality; that the lower courts have failed to consider and determine the term 'premises' u/s 2(h) of the SRPO, 1979, and allowed the ground of personal requirement unauthorisedly; that the claim of personal requirement is to be proved as a fact, by the landlord, who has failed to discharge his burden of proof u/s 117 & 118 of the Qanoon-e-Shahadat Order as held in PLD 2000 SC 829 (836-E), 1991 CLC 1902, PLD 1991 K 226; that instant petition is maintainable as the impugned order and judgment are based on misreading and non-reading of the material facts and in violation of law as pointed out above, reliance is placed on PLD 2006 SC 214, 2001 SCMR 338 and PLD 2001 Pesh 42. It is further contended that since the property is governed by the Municipal Administration Ordinance 1960 supplemented by the Rules framed thereunder, the crucial question of law goes to strike the very root of the said ejectment case and is of public

importance; such question of law which can be agitated at any stage of the proceeding of the said case, hence such plea was raised in Para-3 of the Written Statement at page 129 and the petitioners' affidavit-in-evidence in para-4 (page-155) but no issue of law was framed by the learned lower Courts, apart from the fact that parties pleaded it or not, reliance is placed on PLD 1965 SC 690; while relying upon 1999 SCMR 1555 learned counsel contended that this is a fit case for remand to the lower court as empowered u/s 107 CPC as the provisions of CPC are applicable in constitution petitions.

7. Learned counsel for respondent No.1 has argued that respondent/owner has no concern with the building as he filed the case for plot of land and the same was filed for plot itself in Supreme Court also by the petitioners; that the Appellate Court appointed the Nazir of this Court in respect of the site / premises and to conduct inquiry as to whether commercial activities are in the area where the premises in question is situated or the same is exclusively is a residential area and the appellate court observed that "*During the course of arguments, in order to ascertain the truth whether the property in question i.e. Plot No.K/5, 36/B Planning Scheme No.49, New Survey No.LY-12/84 (Excise and Taxation No.AK-V-18-18-36) admeasuring 535 Sq. Yds situated at Hussain Bhoy Ismail Ji Road, near Lassi Khoja Jamat Khana, Lea Market, Karachi is actually situated within the residential area as alleged by the appellant. The Nazir of this Court was directed to conduct SITE Inspection and submitted his report in this connection. In compliance of order/direction, the Nazir has submitted his report on 12.01.2007, which reveals that the premises in question is a compound where he found 11 single stories portion and*

4 double stories portion (Katcha) all portion residential no shop and godown available in case premises on the left side of the premises one constructed building was available having shops in its ground floor on the right side of the premises in question one story building was situated having a shop and transporter office. From the Nazir report, it is also reveal that there are many shops were situated in front of premises in question but the same were closed at that time"; that it is pointed out by the petitioner that there was order of deposit of rent at the time of granting the leave (page No.101) that "*the petitioner shall continue to deposit rent on or before 10th of each calendar month."* However it is a interlocutory order, the learned judge condone the default for one month in the final order, it is submitted that there is no order in respect of depositing rent in this final order as such the interlocutory does not remain in field after final order; that P.L.D. 1991 Supreme Court 711 in which the learned advocate for petitioner shown before this Court, it is pointed out that parties who filed the appeal before the Hon'ble Supreme Court were dead person, petitioner as well as the respondent / Essa Bhoy. the witness himself admitted in his cross examination at page 37; in the order at page 37 the learned A.D.J., observe and decided default in payment of rent "*It is further submitted by the appellants that it is a fact that MRC No.911/2000 filed by me against Abid applicant. The father of the applicant has been expired thereafter, I started depositing the rent in Court in the name of applicant. I do not know that when the father of the applicant has been expired. We are depositing the rent in the Court since 1972*". This piece of evidence clearly manifests that neither the petitioner has tendered the rent to the respondent/landlord directly after decision of the Honourable Supreme Court nor sent money order after refusal of the respondent which clearly violation the Provision of section 10 of Sindh Rented Premises Ordinance

1979; be that as it may, that the appellant has committed wilful and negligent default in payment of rent not only months but of years; in this view that it is matter there is no escape from the conclusion that the learned Rent Controller has decided this issue rightly in affirmative and no legitimate objections can be taken in the impugned order in this behalf; that the concurrent finding cannot be disturbed easily as this Court is not Appellate Court and cannot change the judgment at his own as Appellate court, the case under Article 199 of the Constitution is limited as mentioned in cases of concurrent finding decided by the superior Court; that PLD 1991 Karachi 226 is quite distinguishable from present case; the same party tenant deposited rent which was previous owner sold out the property in question Under Section 18 of Sind Rented Premises Ordinance 1979 the citation is in respect of payment of rent in favour of previous landlord but in our case it is not the parties filed the cases are not same as above mentioned in this case as witness admitted in his cross examination page 37; that appellate court rightly decided the issue of personal need observing that "*So far the point of personal bonafide need of the landlord is concerned the appellant has failed to brought any evidence on record that the respondent has several properties in city to expand his business";* that 1991 CLC 1902 is quite different in respect of properties mentioned by the petitioner but he himself admitted that he has not filed any document in respect of properties of the respondent, the petitioner himself admitted in his cross-examination; likewise P.L.D. 2000 S.C. 829 it is in respect of bonafide personal need the learned Controller and A.D.J. in F.R.A clearly mentioned bonafide of the respondent/owner for the personal need and he himself had appeared and was cross-examined by the other side (petitioner) as such cited case is distinguishable due to different

facts as mentioned in Point No.2 of order of Rent Controller; while PLD 2006 SC 214 is not relevant in the case before this Court there is no error of law in the petition shown by the petitioner the citation is in favour of the respondent/ owner as mentioned in detail in para 6 at page No.217 of the order. It was argued that the concurrent finding of the superior Courts are mentioned there in all honesty and good faith in respect of concurrent finding of facts and in the petition no evidence can be discussed for the evidence two Court are sufficient in respect of as mentioned above in a case 1991 PLD SC 711 mentioned that the evidence cannot be reappraisal and the principle has been laid down also, that the petitioner admitted the tenancy in their written statement, no plea was taken as mentioned in this petition as such no new plea can be considered which is not taken in the written statement. There is no dispute for tenancy, relationship is admitted, rate of rent and issuance of joint receipt in the name of leader is also admitted, the plea otherwise in Constitution Petition cannot be taken into consideration by this Court; that as per order of the Controller only leader may be a party as one receipt was being issued in the name of the leader, the other persons have been made party by way of abundant caution although were not necessary; that there is no bar to file rent case against all tenants jointly; that a plea that was not raised before lower Court, cannot be raised before this Court nor same can be legally considered by this Court. Learned counsel contended that both the lower Courts concurrently decided that the petitioner/tenant committed default in payment of rent as well as personal need and default as such this Court has very limited jurisdiction in respect of concurrent finding of two Courts below and that in the orders of the two Courts below there is no misreading or misinterpretation of law as such this

Court has no jurisdiction while hearing this petition to change such decisions as this Court is not sittings as appellate authority, it is not appeal but is only a petition which has very limited scope; that the learned Rent Controller as well as the appellate Court discussed the facts in detail and also referred the case law properly and with cogent reasons allowed application under Section 15 of Sindh Rented Premises Ordinance 1979 and learned Appellate Court dismissed the appeal; learned counsel relied upon NLR 1982 SC 23, 2002 CLC (Peshawar) 1527 relevant page 1532, 2003 MLD 480 Karachi, PLD 2005 Karachi 416, PLD 2001 SC 158, 1982 C.L.C. 682 and 1994 CLC (Karachi) 613 and prayed for dismissal of petition.

8. I have heard the respective sides and have also *carefully* gone through the available record.

9. The *plea,* raised by the learned counsel for the respondent to the effect of competency of the instant petition in interfering in concurrent findings of the two courts below, it would suffice to refer the following cases, so decided by the honourable Supreme Court of Pakistan, wherein *jurisdiction* of this Court has been explained:-

> ***Mst. Mobin Fatima v. Muhammad Yamin & 2 Ors.***
> **(PLD 2006 SC 214)**
>
> "8. **The High Court, no doubt, in the exercise of its constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 can interfere if any wrong or illegal conclusion are drawn by the Courts below which are not based on facts found because such an act would amount to an error of law which can always be corrected by the High Court.** …… The findings of the appellate Court were cogent and consistent with the evidence available on the record. Its conclusions were in accordance with the facts found. The finality was attached to its findings which could not be interfered with merely because a different conclusion was also possible. The High Court, in the present case, in our view,

exceeded its jurisdiction and acted as a Court of appeal which is not permissible under the law. Therefore, the High Court ought not to have undertaken the exercise of the reappraisal of the evidence."

***Safeer Travels (Pvt.) Ltd. v Muhammad Khalid Shafi through L.Rs* (PLD 2007 SC 504)**

"26. This Court, on several occasions, has held that the High Court in its constitutional jurisdiction can interfere with the judgment and order of the appellate Court if the view taken by the appellate Court was not only contrary to the established principles of law, but also contrary to evidence on record or had flouted the provisions of statutes or failed to follow the law relating thereto as held in the case of Lal Din Masih v. Mst. Sakina Jan and another 1985 SCMR 1972."

The above *legally* established principle is sufficient to conclude that this Court has jurisdiction to reverse the findings of two courts below *even* but if same appear to be not in conformity with available record as well those settled principles of law.

10. The point, so framed with regard to default, was answered in *affirmation* by both the courts below which *however* has seriously been challenged by petitioners to be against record and settled principles, therefore, I would attend the same *first.*

11. Before going into merits, I find it appropriate to refer the relevant para (s) of the *ejectment petition,* so filed by the respondent himself which are:-

"2. The opponents are tenant of the applicant as per **order dated 20.7.1982 passed by the Court No.VIII of Senior Civil Judge / ASJ and Rent Controller Karachi**. Copy of the said order is filed herewith and marked as X-L.

3. The opponents as per order of the Rent Controller as mentioned here in above **were / are jointly paying / depositing rent in Court through their leader Karabhoy**, after his death through his deaughter Heer Bai and **after her death her son Oga Khairaj at Rs.57.50** per month of the said plot of land and construction thereon

and Oga Khairaj is in occupation of the tenement of her mother Heer Bai."

"7. The opponents according to their own statement depositing rent at the rate of Rs.57.60 of the said plot of land in Court although <u>they were requested to pay the rent directly to the applicant</u>, moreover, the rent case No.2327/1972 filed by the applicant against the opponents concluded on 08.5.1988 in Supreme Court by condoning the default in payment of rent.

8. The opponent failed to pay rent to the <u>applicant inspite of demand to pay directly to the applicant but they are continuing to deposit rent in Court</u>. The deposit of rent in Court after the decision of the case <u>**is not proper and legal tender of rent to the applicant**</u> as such the opponents are defaulter in payment of rent."

From above, it can *safely* be concluded that respondent / landlord claims the petitioners / opponents as his **'tenants'** with reference to order of learned Rent Controller, maintained by honourable Supreme Court. It also appears to be *not* disputed that the rent was continuously being deposited in following order:-

'<u>**Karabhoy**</u>, after his death through <u>his daughter **Heer Bai**</u> and <u>**after her death her son Oga Khairaj**</u> …'

Prima facie, there was / is no *specific* default but respondent / landlord claimed the deposit of rent as ***'not proper'*** as despite his demand the rent was not tendered to him. These *conclusions* are *prima facie* from pleadings of the respondent / landlord hence *legally* the respondent / landlord never possessed any *liberty* to change his specifically *pleaded* stance (s) which, *no doubt,* would be at the cost of right of other side to have a fair opportunity of rebuttal. Reference may well be made to the case of <u>*Mst. Noor Jehan v. Muhammad Yousuf*</u> (2002 SCMR 1933) wherein it is held as :-

"12. …. Anyway, she never pleaded that business shall be run by her husband on her behalf. Inasmuch as learned Controller framed issue with regard to need of husband for occupying the premises in

question. Above all, appellant did not enter into witness-box nor filed her own affidavit to say that she intends to run business through her husband.

13. …. she intends to run business through her husband as per pleadings **and no departure is permissible from the pleadings, else it would cause injustice to other side, who will have no opportunity to rebut the stand taken by the appellant**."

Now reverting to merits of the case, I would again say that it is *prima face* case of the respondent / landlord *himself* that petitioners / opponents are his ***'tenants'*** with reference to earlier round of litigation but he *(respondent/landlord)* claims that after order of honourable Supreme Court in said round of litigation, the petitioners / opponents were to render the rent to him particularly when he *(respondent / landlord)* claimed to have demanded so. Here, the order (s), so passed by honourable Supreme Court in said round of litigation, being relevant, are referred hereunder:-

ORDER DATED 02.07.1987 OF SUPREME COURT (LEAVE GRANT)

Para-2

It is uncontestable position that the respondents / landlords at fault in not accepting the rent when the same was time and again sent to them by the petitioner through money orders. Finding no other way out he had then to deposit it in Court. *In such state of affairs, the ground made out against him is that he deposited the rent for a month beyond time. There is no finding that there was no deposit for the default period.*

Admittedly the default was not regarding the deposit of tentative rent during the pendency of the proceedings and consequential striking off of the defence. There was no legal compulsion for the High Court to order eviction in any case. The question of exercise of discretion has not been properly dealt with. The conduct of the respondents and the findings of the learned Rent Controller have not been given due weight. These questions as also the question whether there was any fault at all, need re-examination.

Leave to appeal is accordingly granted.
Security Rs.2,000/-

> **<u>The petitioner shall continue</u>** *to deposit rent on or before 10th of each calendar month.*
>
> *The appeal shall be made ready on the present record for hearing within six months.*
> *Status-quo to continue.*

From above, it is quite obvious that there was *denial* by the landlord (father of present respondent / landlord) only then rent was being deposited in court by the then *tenant* (as she then was in such round of litigation) and in last the *sentence* **'petitioner shall continue to deposit rent'** was used. The word ***'continue'*** ordinarily means '*to keep doing something in the same way as before*', therefore, the plea of said order, being *interim* in nature, would not prejudice to meaning of such word **'continue'.** Be that as it may, the final order, so was passed by honourable Supreme Court, shall also make such position clear. The same reads as :-

> "...... In these circumstances to attribute contumacy to the tenant would not be proper exercise of judicial discretion. Since the ejectment proceedings were instituted on 10th December, 1975, the only rent due on that date was the rent for the month of September but the grace period had not expired. <u>Be that as it may the tenant has been penalized for the non-payment of rent for one month for which also the rent had been paid long</u> **<u>before the institution of the proceedings</u>**. All these circumstances fully justified the exercise of judicial discretion in favour of the appellant which was, however, declined by the High Court improperly.
>
> In the result this appeal is allowed and the impugned judgment of the High Court is set aside, with the consequence that **<u>the Rent Controller's order dismissing the eviction application is upheld</u>**. The parties are, however, left to bear their own costs."

Therefore, I am unable to understand *how* there ever occasioned any reason for the *tenants* to first tender the rent to the present respondent / landlord particularly when *undeniably* the respondent / landlord produced nothing on record to establish that he (*respondent / landlord)* ever asked the tenants to pay rent to him or that he (*respondent / landlord)* made such request in Misc. Rent

application (s), continuing from time of *earlier* round of litigation. In absence of *proof* for such demand, the mere words of respondent / landlord cannot be believed. This aspect was entirely ignored by the two courts below.

12. Here, it is also worth mentioning here that petitioner No.1 Ogra Khairaj never claimed to have acquired status of *tenant* under a written tenancy but he (*Ogra Khairaj)* had acquired such title on account of death of his successor i.e mother Heer Bai. This would mean that petitioner No.1 *Ogra Khairaj* falls within definition of *tenant,* as defined by Section 2(j)(ii) of the Ordinance which reads as :-

> *'heirs of the tenant in possession or occupation of the premises after the death of the tenant;"*

Therefore, I would feel myself quite *safe* in saying that act of depositing the rent by such *tenant* by his name after death of his successor cannot be said to be *improper* nor would require him to first tender the rent to *landlord* if the died *successor* (tenant) was already depositing rent with the Rent Controller. In short, such *tenant* shall always step into shoes of *original* tenant (dead successor) and shall be required to continue with *liabilities* as were upon *original* tenant *however* future *independent* acts / omissions shall bring their own consequences.

13. Be that as it may, there was never any *specifically* claimed default period but at the most case was that of ***improper*** deposit. The *continuity* of depositing of rent from MRC No.2327/1972 by present petitioner *Ogra Khairaj* was not denied by respondent / landlord hence there never occasioned any reason for the petitioners / opponents to establish

payment of rent for a *particular / specific* period. Even otherwise, it would never be justified to knock out *tenant* on mere claimed *improper* payment of rent particularly where the *tenant* proved from his conduct to be keen and alive in discharging his liabilities in paying / depositing rent. Reference may well be made to the case of Jan Muhammad v. Ishaq (2001 SCMR 762) wherein it is observed as :-

> "10. …… Discretion of the Rent Controller is, however, neither unrestricted nor unbridled. It is judicious in character and ought to be exercised in line with the facts and circumstances of each case. No hard and fast rule or parameters, however, can be laid down in this respect as the facts of each case would vary from case to case. There can, however, be no cavil with the proposition that where a tenant has been keen and dutiful in discharging his legal liability and the landlord has been creating difficulties and finding devices to render it difficult for the tenant to remit the rent in all probability and fairness discretion should be exercised in favour of a prompt, alive and conscious tenant. A reference may be made in this respect to …."

In addition to above, I would also add that when it was never claim of the respondent / landlord that the petitioners / opponents failed to pay the rent but assertion was specific to effect the that default is there because of ***improper*** depositing then *how* the petitioners / opponents could be expected to submit proof of payment of rent which *otherwise* was never denied. The stand of respondent / landlord shall stand evident from a re-referral of para-8 of *ejectment* petition which reads as :-

> '8. The opponent failed to pay rent to the applicant inspite of demand to pay directly to the applicant but they are continuing to deposit rent in Court. The deposit of rent in Court **after the decision of the case is not proper** and legal tender of rent to the applicant **as such the opponents are defaulter** in payment of rent'

Not only this but both the courts below also failed in appreciating the categorical admission (s), made by the respondent / landlord in his cross-examination as :-

> 'We have no knowledge that opponent is being deposited the rent in MRC upto 04.03.2000. It was also not in our knowledge that thereafter as per the order of honourable district judge Karachi south opponent stared depositing rent in MRC No.911 of 2000. **It is correct that opponent after passing the tentative rent order continued to deposit the rent in MRC No.911 of 2000**.'

These *prima facie* floating facts were completely ignored by the two courts below while answering *point No.1* as **'affirmative'.** Such conclusion, being *prima facie* not matching with settled legal positions and *undeniable* facts, cannot be stamped. Accordingly, such findings of two courts below in respect of *point No.1* are hereby set-aside and same is answered as **'negative'.**

14. Now, before attending the merits in respect of point No.2, I feel it quite justified to entertain the *first* objection, so raised by the counsel for the petitioners to the effect of non-describing of *premises* in question.

For this, it was argued that the respondent / landlord has mentioned the petitioners to be residents of Bohri Compound, Plot No.K-5, without describing respective residential tenements which in fact are 15 houses of the petitioners. To this, learned counsel for the respondent / landlord responded that *'respondent / landlord has no concern with the building as he filed the case for **plot of land** and the same was filed for plot in Supreme Court.* Such response seems to be contrary to what was pleaded by the respondent / landlord *himself* in para-2 of his ejectment petition as:-

> '2. The opponents are tenant of the applicant as per order dated 20.7.1982 passed by the Court NO.VIII of Senior Civil Judge / ASJ and Rent Controller Karachi. Copy of the said order is filed herewith and marked as X-L.'

Undeniably, the respondent / landlord claims the petitioners / opponents to be his *tenants* with reference to said order, therefore, he *(respondent/landlord)* legally cannot avoid findings, so recorded in the order which *even* was **upheld** by honourable Supreme Court. At this point, it would be appropriate to refer the relevant portion of order dated 20.7.1982 passed by the Court No.VIII of Senior Civil Judge / ASJ and Rent Controller Karachi which reads as:-

> "ISSUE NO.2 & 3 :
>
> .... He has produced the certified copies of the order Ex.6-JJ to prove that 16 tenements were in existence in 1963. The perusal of Ex.6-JJ which is the copy of the order dated 12.8.64 of the Director of Excise & Taxation Department passed in appeal No.840/63 filed by the original landlord Essa Bhoy Abdul Hussain shows that **the original landlord has himself admitted the fact of existence of 16 tenement in the compound in 1963**. This clearly shows that **these 16 tenement were in existence prior to 1963 and the same were in knowledge of the landlord**. The grievance of the opponent attorney is also supported by a witness Abdul Salam who has fully corroborated the opponent attorney who has specifically stated that **opponent and other 15 caste fellow** have been residing in one roomkuthca hutment as a tenant since prior to the partition and that **opponent was their head and used to collect the rent from other tenants and passed on to the landlord**. No reason or motive is assign to this witness for falsely deposing against the applicant. He appears to be a most independent witness. The evidence of the opponent attorney coupled with the evidence of witness Abdu Salam and the order of Director of Excise &Taxation bring me to the clear conclusion that the opponent has neither raised unauthorized construction or has sublet the premises. **There are in all 16 persons residing on the plot and the opponent Kara bhoy being their head used to collect the rent and pay the same to the landlord who used to passed on rent receipt in the name of opponent.** The burden was on the applicant to prove unauthorized addition and alteration and subletting but he has failed to prove the same by leading an satisfactory evidence."

The above order must have left no *ambiguity* to the effect that :

i) it was never a case of *plot of land* but there were / are **16** ***independent*** **tenements**, residing in such compound;

ii) the *original* owner / landlord (under whom respondent / landlord claims) was in active knowledge of such fact;

iii) **opponent Karabhoy (as he was in said litigation), being head, having collected the rent from *each* tenant, used to pay the same to the landlord who used to pass-on rent receipt in the name of opponent ;**

Therefore, the respondent / landlord *legally* was never justified to seek *ejectment* of all *premises* from *independent* occupants through a *single* ejectment petition merely by saying all such *premises* as ***plot of land.***

15. While taking a *pause,* I would add that *occupants* of such *independent* premises are not the *tenants* within meaning of ***'contractual tenants'*** but would squarely fall within meaning of ***'statutory tenants'.*** The contractual tenant is one who undertakes to pay or is bound to pay rent as consideration for possession or occupation of any premises by him or by any other person on his behalf during contractual period [section 2(j) of Ordinance] while the *statutory tenant* is the one who is bound to pay rent by operation of law such as contractual tenant, continuing possession or occupation of premises after expiry of agreed period of tenancy and shall also include *heirs* of tenant in possession / occupation of premises after death of tenant [Section 2(j) (i) & (ii) of Ordinance]. It may also be added that after death of a *tenant* [section 2(j)] all his legal heirs in possession / occupation of *premises* becomes tenants [section 2(j)(ii)] hence would always be required to be made *parties* to ejectment petition whereby their *eviction* is sought. Reference may be made to the case of *Muhammad Nisar v. Izhar Ahmed Sheikh & Ors* (PLD 2014 SC 347) wherein it is observed as:-

> "6. .... In our opinion such averment cannot displace the law itself since per section 2(j) of the Sindh Rented Premises Ordinance, 1979 each legal heir of the tenant after his demise becomes a tenant and consequently the learned lower forum below have correctly held that there was a relationship of landlord and tenant between the parties. ....."

Here, it is necessary to add that provision of Section 15 of the Ordinance vests a *right* in the landlord to get *premises* vacated on all or any of the grounds, provided by such provision *however* this provision nowhere permits the *landlord* to get all *independent* premises vacated through a *single* petition without describing *independent* status of each *tenant* and *premises* in his / their possession. An exception to such requirement cannot be taken merely for reason that landlord claimed all such *premises* as ***plot of land.*** I am quite conscious that a *single* petition may well be maintained for *number* of premises if a *common* question is involved but this shall never authorize the *landlord* to conceal the *separate* and *independent* status of each opponent / tenant and *premises*, in his / their possession.

16. While resuming, it may also be added that the *law*, nowhere, recognize the status of a ***'leader'*** equal to that of **'lawful agent'** therefore, the present respondent / landlord was never legally justified to have concealed all such material aspects as well *independent* status of *each* tenant and *independent* premises in possession of such *tenants.* Each *tenant [*section 2(j)(ii) of Ordinance] cannot be denied a full and *fair* right of opportunity merely for reason that one of them has been *alleged* as their ***leader*** who *otherwise* was / is in occupation of an *independent* premises though within one and same compound. The perusal of the record would show that no such question was ever framed by the learned Rent Controller to the effect that whether *each*

tenant [section 2(j)(ii) of Ordinance] has been a *party* to such proceedings or was / is in knowledge that premises in his / their possession was / is being processed for their likely *eviction.* The *eviction*, undeniably, is a *penal* one hence each *occupant* must be ensured a *full hearing* else such proceedings would be nothing but *corum non judice* and even will keep a *door* opened for any *left* independent *tenant* (out of **16 tenants)** to come and challenge such *time taking* proceedings as *nullity* which *even* would not be availed to be protected on count of *limitation.* Reference may be made to the case of *Haji Hussain Haji Dawood v. M.Y Kherati* (2002 SCMR 343) wherein at relevant page-349 it is held as:-

> *"It can be safely assumed that the proceedings without giving an opportunity of hearing are coram non judice and the order passed as a result thereof is a nullity. And if the party affected by such order had no knowledge of the same, the plea in limitation that it starts from the date of the order, cannot be pressed against such an affected party. That party would be clearly entitled to challenge the order within the prescribed time, counting the period from the date of his knowledge."*

In absence of *determination* of such aspect, the requirement of *natural justice* cannot be satisfied particularly when the meaning of a **'hearing** and **due process'** have been defined as:-

> ***Ishtiaq Ahmed v. Hon'ble Competent Authority* (2016 SCMR 943, relevant at page 955) as:**
>
> "4. The right of due process is not new to our jurisprudence and finds expression in the provisions of Article 4 of the Constitution. This right has been interpreted by this Court in several pronouncements. The case of *New Jubilee Insurance Company v. National Bank of Pakistan* (PLD 1999 SC 1126) summarizes the features of that right very aptly. It is held that the right of due process requires that a person shall have notice of proceedings which affect his rights; such person must be given a reasonable opportunity to defend himself; the adjudicatory tribunal or forum must be so constituted as to convey a reasonable assurance of its impartiality and that such tribunal or forum must possess competent jurisdiction."

<u>WARID Telecom (Pvt) Ltd. & 4 others v. PTA</u> **(2015 SCMR 338):**

> "13. ….. It is a principle of long standing that, whenever adverse action is being contemplated against a person a notice and / or opportunity of hearing is to be given to such person. This principle has now been elevated to the status of a fundamental right with the incorporation of Article 10-A in the Constitution of the Islamic Republic of Pakistan (pursuant to the Constitution (Eighteenth Amendment) Act, 2010). ……"

The respondent / landlord *categorically* claimed relationship of landlord and tenants under above *referred* order (recorded in *first* round of litigation) therefore, he had no exception to follow such *conclusion* but record is evident that there was / is *prima facie* concealment of all such material facts. In such circumstances to avoid any *prejudice* to the guaranteed fundamental right of ***fair-trial***, I feel it quite appropriate to remand the case for fresh decision but ensuring that each *tenant* [section 2(j)(ii) of ordinance] receives his / her due entitlement i.e *fair opportunity* of hearing before decision of *ejectment* petition.

It is needless to add that the learned Rent Controller shall be competent to decide the *question* of bona personal need of respondent / landlord after such *opportunity* strictly in accordance with law. I would also add that since respondent / landlord has been litigating since considerable period therefore, the learned Rent Controller shall ensure conclusion of proceedings preferably within a period of **six months.**

IK **J U D G E**