

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.3189 of 2016
Dr. Muhammad Saeed

Versus.

Sardar Muhammad Akram and others

Date of Hearing: 20.01.2017
Petitioner by: Raja M. Aleem Khan Abbasi, Advocate
Respondents 1 and 2 by: Mr. Babar Mumtaz, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Dr. Muhammad Saeed, impugns the judgment dated 09.06.2016, passed by the Court of the learned Additional District Judge, Islamabad, whereby, the petitioner's appeal against the orders dated 10.03.2016 and dated 09.04.2016, passed by the Court of the learned Rent Controller, Islamabad, was dismissed.

2. Vide order dated 10.03.2016, the learned Rent Controller, had passed a tentative rent order under Section 17(8) of the Islamabad Rent Restriction Ordinance, 2001 ("IRRO"), directing the petitioner to deposit tentative rent at the rate of Rs.70,000/- per month from December, 2015 to March, 2016. Furthermore, the petitioner was directed to keep depositing the future rent at the rate of Rs.70,000/- per month before the 15th day of each month, in advance, until the decision on respondents No.1 and 2's eviction petition. Vide order dated 09.04.2016, the learned Rent Controller, struck off the petitioner's defence and allowed respondents No.1 and 2's eviction petition by invoking the provisions of Section 17(9) of the IRRO, 2001. The learned Rent Controller directed the petitioner to vacate ground floor of House No.4, Street No.13, F-8/3, Islamabad ("the rented premises") within a period of fifteen days.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:-

3. Raja Aleem Khan Abbasi, A.S.C., learned counsel for the petitioner submitted that vide lease agreement dated 17.08.2011, the rented premises were leased out by respondents No.1 and 2 to the petitioner and Dr. Anser Maxood for a period of three years (i.e. upto 30.06.2014) for a monthly rent of Rs.70,000/-. On 06.09.2014,

respondents No.1 and 2 filed an eviction petition against the petitioner and Dr. Anser Maxood under Section 17 of the IRRO. The petitioner had no knowledge about the institution of the said eviction petition, which was contested only by Dr. Anser Maxood. Vide order dated 23.06.2015, the learned Rent Controller dismissed the said eviction petition to the petitioner's extent. On the same very day (i.e. 23.06.2015), the said eviction petition was allowed under Section 17 (9) of the IRRO. Dr. Anser Maxood's appeal against the said order dated 23.06.2015, was dismissed on 26.03.2016. Respondents No.1 and 2 had instituted execution proceedings for the execution of the order and decree dated 23.06.2015, against Dr. Anser Maxood. On 05.06.2015, the petitioner came to know about the eviction petition instituted by respondents No.1 and 2. On 06.07.2015, the petitioner filed an objection petition to the said execution proceedings. In the said objection petition, the petitioner's plea was that the petitioner and Dr. Anser Maxood were co-tenants as per the lease agreement dated 17.08.2011, and that since the eviction order was only against Dr. Anser Maxood, the same could not be executed against the petitioner. Vide order dated 18.09.2015, respondents No.1 and 2's execution petition was dismissed. Respondents No.1 and 2's appeal against the said order dated 18.09.2015, was also dismissed.

4. Learned counsel for the petitioner further submitted that on 23.12.2015, respondents No.1 and 2 filed another eviction petition under Section 17 of the IRRO. This eviction petition was filed only against the petitioner. In the written reply to the said eviction petition, the petitioner denied the relationship of the landlord and tenant with respondents No.1 and 2. In the earlier round of litigation, respondents No.1 and 2 had also denied the relationship of landlord and tenant with the petitioner, and had withdrawn the eviction petition to the petitioner's extent. The Court of the learned Rent Controller was bereft of the jurisdiction to adjudicate upon the dispute between the petitioner and respondents No.1 and 2 since there was no relationship of landlord and tenant between them. The tentative rent order passed by the learned Rent Controller on 10.03.2016, had been complied since rent for the months of October 2015 to March 2016 had been deposited by Dr. Anser Maxood. It

does not make any difference as to who deposits the rent, so long as the rent is deposited within the time stipulated in the tentative rent order. Vide order dated 09.04.2016, the learned Rent Controller struck off the petitioner's defence under Section 17(9) of the IRRO, and allowed respondents No.1 and 2's eviction petition. The learned Rent Controller erred by holding that since the rent had been deposited by Dr. Anser Maxood, and not by the petitioner, the tentative rent order had been violated. The petitioner filed an appeal against the said order dated 09.04.2016. Upon the passing of the said order dated 09.04.2016, the tentative rent order dated 10.03.2016, passed by the learned Rent Controller lost its affect, and the petitioner was under no obligation to deposit tentative rent after 09.04.2016. After an eviction petition is decided by the learned Rent Controller, he becomes *functus officio*. Section 21(6) of the IRRO, the Appellate Court has the power to pass a tentative rent order. At no material stage did the learned Appellate Court pass a tentative rent order under Section 21 (6) of the IRRO. Vide judgment dated 09.06.2016, the learned Appellate Court dismissed the petitioner's appeal on the ground that rent for the months of April and May, 2016, had been deposited on 31.05.2016, when the same should have been deposited before the 15th day of April and May, 2016. Even if there was a delay in the deposit of rent for the months of April and May, 2016, the appellate Court could not have invoked the penal provisions under Section 21(6) of the IRRO by dismissing the appeal summarily, but should have remanded the matter to the learned Rent Controller for a full fledged trial. The Appellate Court could not have penalized the petitioner for not complying with a tentative rent order passed by the learned Rent Controller. Since the petitioner's co-tenant (Dr. Anser Maxood) had been depositing rent, it should have been treated as the deposit of rent by the petitioner. There was no willful default on the petitioner's part in the deposit of rent.

5. Furthermore, it was submitted that the learned Courts below erred by not appreciating that the relationship of landlord and tenant between the petitioner and respondents No.1 and 2 had been denied by respondents No.1 and 2 in their earlier eviction petition. Since there was no relationship of landlord and tenant between the

petitioner and respondents No.1 and 2, the learned Rent Controller had no jurisdiction to adjudicate upon the matter. A trespasser cannot be evicted by the Court of the learned Rent Controller under the provision of IRRO. Before passing an eviction order, an issue on the question of the relationship of landlord and tenant should have been framed.

6. In making his submissions, the learned counsel for the petitioner placed reliance on the following case law:-

- (a) In the case of Aisha Bibi Vs. Anwer Sultana (2000 YLR 1352), the Rent Controller having been satisfied that the tenant had deposited rent in a miscellaneous case, directed the tenant to deposit future monthly rent, but without giving a clear direction that instead of depositing the future monthly rent in the miscellaneous case, it should have been deposited in the ejectment case. The tenant by mistake continued depositing rent in the miscellaneous case. Since the tenant had not deposited tentative rent in the main case, his defence was struck off for not showing compliance with the tentative rent order. The Hon'ble High Court held that the tenant's failure to deposit tentative rent in the main/ejectment case would be treated as a 'technical default'. Furthermore, it was observed that the tentative rent order passed by the Rent Controller should have been clear and specific as to the proceedings in which the tentative rent was to be deposited. Therefore, the eviction order was set aside. A similar view was taken in the cases of Zafarullah Khan Vs. Abu Bakar (1995 CLC 23), Zafar H. Ismahil Vs. Rubina Ali Aamir (2010 YLR 902), Babar Pervez Vs. Muhammad Saad (2000 CLC 1134), and Ismail Vs. Sara Bai (1987 CLC 1393).
- (b) In the case of Noor Muhmmad Vs. Mehdi (PLD 1991 SC 711), the tenant had deposited rent within time in the previous proceedings between the same parties. Default in the subsequent proceeding was held to be purely technical in nature, there being no deliberate or contumacious disregard of the order of the Rent Controller. In such circumstances, it was held that striking off the tenant's defence was not

justified. A similar view was taken in the case of Aftab Ahmad Khan Vs. Zaibun Nisa (1998 SCMR 2085).

- (c) In the case of Jahangir Khan Jadoon Vs. Gulnigar Manzoor (2008 CLC 547), it was held that when the relationship of landlord and tenant was denied, the Rent Controller was bound to treat such an objection as a preliminary one and to tentatively determine that question in the light of the material brought on record by the parties or such material which the parties might produce.
- (d) In the case of Muhammad Tariq Khan Vs. Khawaja Muhammad Jawad Asami (2007 SCMR 818), it was held that where a Rent Controller feels that complicated questions required to protracted inquiry for his decision, then he can observe that such questions should be decided by a court of general jurisdiction, namely, the ordinary civil court.
- (e) In the case of Maqsood Ahmed Vs. Bhagwani Bai (2003 SCMR 1364), it has been held that where the plaintiff also did not acknowledge the defendant as her tenant in a shop, suit for possession was the proper remedy, as the status of the defendant was not that of a tenant, but he would be deemed to be an unauthorized occupant.
- (f) In the case of Afzal Ahmad Qureshi Vs. Mursaleen (2001 SCMR 1434), it has been held that where the relationship of landlord and tenant between the parties is denied, such an issue, being one of the jurisdiction should be determined first. Furthermore, it was held that where there was no relationship of landlord and tenant between the parties, the learned Rent Controller loses scission over the //s and he must stay his hands forthwith.
- (g) In the case of Khadija Wadood Vs. 1st Additional District Judge (2009 YLR 1165), it has been held that even where there is a flaw in the presentation of the power of attorney at the relevant time, then the benefit of Section 196 of the Contract Act, 1872, could also be given. The said Section had provided that a person on whose behalf an agent or attorney had acted, then irrespective of the defect in the power, the principal could ratify the act of the attorney or agent.

CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENTS NO.1 AND 2: -

7. On the other hand, Mr. Babar Mumtaz, Advocate, learned counsel for respondents No.1 and 2 submitted that the writ petition was not maintainable, because it had been filed by Munir Hussain as the petitioner's special attorney, whereas, the Special Power of Attorney dated 14.07.2015, does not authorize Munir Hussain to file a writ petition. The said power of attorney only authorizes Munir Hussain to file appeals etc. before the Appellate Courts, High Court and Supreme Court against the judgment and decree dated 23.06.2015 (which had been passed against Dr. Anser Maxood). Learned counsel drew the attention of the Court to the lease agreement dated 17.08.2011, to show that the petitioner was respondents No.1 and 2's tenant, and that the said lease agreement had long expired. He also drew the attention of the Court to the objection petition filed by the petitioner in the execution proceedings *qua* the order and decree dated 23.06.2015, to show that the petitioner had explicitly admitted that he was respondents No.1 and 2's tenant. The learned counsel also submitted that in the order dated 18.09.2015, passed by the learned Executing Court accepting the petitioner's objection petition, it has been observed that the petitioner was a party to the lease agreement and in co-occupation of rented premises. This observation was in line with the plea taken by the petitioner before the learned Executing Court. The petitioner could not subsequently change his stance by asserting that there was no relationship of landlord and tenant between the petitioner and respondents No.1 and 2.

8. Learned counsel for respondents No.1 and 2 further submitted that the petitioner and Dr. Anser Maxood were collaborating with each other against respondents No.1 and 2 only to protract their possession of the rented premises. The petitioner had proceeded to Lahore, but was pursuing the case against respondents No.1 and 2 only to protect Dr. Anser Maxood. Even though an eviction order was passed on 23.06.2015 against Dr. Anser Maxood, he could not be evicted from the rented premises due to the objection petition filed by the petitioner before the learned Executing Court. Dr. Anser Maxood had filed a time barred

appeal against the eviction order dated 23.06.2015. The said appeal was filed on 09.02.2016 (much after the filing of the second eviction petition by respondents No.1 and 2). Furthermore, it was submitted that in the proceedings before the learned Rent Controller, the petitioner had tried to escape the penal consequences of his failure to comply with the tentative rent order by taking the position that the deposit of rent made by Dr. Anser Maxood should have been treated as compliance with the tentative rent order by the petitioner, who claimed to be Dr. Anser Maxood's co-tenant. If the petitioner is to take the benefit of the deposit of rent made by Dr. Anser Maxood, he should also bear the consequences of default on the part of Dr. Anser Maxood to deposit the rent. Rent for the month of March 2016 was deposited on 15.03.2016, when it should have been deposited 'before' 15.03.2016. In making his submissions, learned counsel for respondents No.1 and 2 placed reliance on the following case law:-

- (a) In the case of Mushtaq Ahmed Kiani Vs. Bilal Umair (2009 SCMR 1008), it was held that the provisions of Section 17(9) of the IRRO were mandatory, and that in case of non-compliance with a tentative rent order, passed under Section 17(8) of the IRRO, no discretion was left with the Rent Controller except to order ejectment of the tenant without further proceedings.
- (b) In the case of Sohail Javed Vs. Atiq-ur-Rehman (PLD 2008 SC 470), it has been held that if a tenant defaults in complying with a tentative rent order, then if he is the petitioner, his application shall be dismissed summarily and if he is the respondent, his defence shall be struck off and the landlord is to be put in possession of the property without taking any further proceedings in the case. Where such mandatory provisions of law have neither been complied with by the Rent Controller nor attended to by the High Court, both the orders of the Rent Controller and the High Court were not sustainable and liable to be set aside. Law to the same effect has also been laid down in the cases of Shamshad Ali Vs. Ghulam Muhammad Chaudhry (2009 CLC 52), and Fazli Ahad Vs. Hussain Zari (2013 YLR 1804).

- (c) In the case of Bilal Adil Vs. District Judge West (2015 YLR 2405), this Court did not condone a delay of two days by the tenant in showing compliance with a tentative rent order. Furthermore, it was held that even if the Rent Controller was on leave on the date on which the rent was to be tendered, the deposit receipts of the rent should have been filed before a Duty Judge.
- (d) In the case of Seema Begum Vs. Muhammad Ishaq (PLD 2009 SC 45), the respondent denied the relationship of landlord and tenant with the petitioner on the ground that the respondent had purchased the property in question from the petitioner by entering into an agreement to sell, and that the petitioner had also filed a suit for specific performance of the said agreement. It was held by the Honourable Supreme Court that once a person acknowledges himself to be a tenant of the landlord, the principle of estoppel enunciated in Article 115 of the *Qanun-e-Shahadat* Order, 1984, would come into play, debarring such a tenant to deny the title of his landlord.
- (e) In the case of Qaiser Javed Malik Vs. Pervaiz Hameed (2009 SCMR 846), it has been held that by virtue of the provisions of Section 6 of the IRRO, a tenancy ceases to be valid upon the expiry of the lease period, and that the fact as to the expiry of the agreed lease period between the parties as the tenure of tenancy would suffice to order the ejectment of a tenant by the Rent Controller.
- (f) In the cases of Wajid Ali Vs. Board of Revenue, Punjab (PLD 1982 Lahore 716), and Ghulam Shah Vs. KDA (2003 YLR 1501), it was held that discretionary relief under Article 199 of the Constitution could be granted only to a party who had approached the High Court with clean hands.
- (g) In the case of Muhammad Siddique Vs. Muhammad Rashid (1985 SCMR 21), it was held that the words “before 15th” means “exclusive of the last day of 15th of the month.”
- (h) In the case of Noor Alam Vs. Muhammad Bashir (2015 CLC 1675), it was held that a power of attorney must be strictly construed. Furthermore, it was held that an agent could exercise only those powers which were expressly,

unambiguously and specifically delegated to him and were specifically mentioned in the document of the power of attorney.

9. I have heard the arguments of the learned counsel for the contesting parties and have perused the record with their able assistance.

THE FIRST EVICTION PETITION FILED BY RESPONDENTS NO.1 AND 2:-

10. This case has a long chequered history. On 06.09.2014, Sardar Muhammad Akram (respondent No.1) and his wife Mrs. Munawar Sultana (respondent No.2) filed an eviction petition before the Court of the learned Rent Controller, Islamabad, under Section 17 of the IRRO, 2001 against Dr. Anser Maxood and Dr. Muhammad Saeed (petitioner), seeking their eviction from the rented premises. In the said eviction petition, it was *inter-alia*, pleaded that respondents No.1 and 2 were co-owners of the rented premises, and that Dr. Anser Maxood had occupied the rented premises as a tenant against the monthly rent of Rs.70,000/-. Furthermore, it was pleaded that Dr. Muhammad Saeed (the petitioner herein), was just a facilitator at the time of the negotiations pertaining to the lease agreement with Dr. Anser Maxood, and that the petitioner was not an occupant of the rented premises. Respondents No.1 and 2 in the said eviction petition had prayed for the eviction of Dr. Anser Maxood and the petitioner from the rented premises.

11. Dr. Anser Maxood contested the said eviction petition by filing a written reply. The position taken by Dr. Anser Maxood was that the rented premises had been leased, vide lease agreement dated 17.08.2011, to him and the petitioner for an initial period of three years i.e. until 30.06.2014. Furthermore, it was pleaded that as Dr. Anser Maxood and the petitioner had expended a huge amount on carrying out renovation work at the rented premises, the amounts so expended were to be adjusted against the future rent i.e. from 01.07.2014 to 30.06.2017. Dr. Anser Maxood pleaded that the tenancy was valid until 30.06.2017.

12. On 23.06.2015, the learned Rent Controller recorded the statement of the learned counsel for respondents No.1 and 2 to the effect that the petitioner was neither respondents No.1 and 2's

tenant, nor was the petitioner in possession of the rented premises. It was also recorded that respondents No.1 and 2 were not seeking relief against the petitioner. Accordingly, vide order dated 23.06.2015, respondents No.1 and 2's eviction petition to the extent of the petitioner was dismissed being infructuous/withdrawn. Vide the same very order, the learned Rent Controller struck off Dr. Anser Maxood's defence under Section 17(9) of the IRRO, and allowed the eviction petition and directed him to handover the rented premises to respondents No1 and 2 forthwith. It was also held that Dr. Anser Maxood had not shown compliance with the tentative rent order passed by the learned Rent Controller on 16.02.2015.

EXECUTION PROCEEDINGS INSTITUTED BY RESPONDENTS NO.1 AND 2:-

13. On 30.06.2015, respondents No.1 and 2 instituted proceedings for the execution of the order and decree dated 23.06.2015. Dr. Anser Maxood was the respondent in the said execution proceedings. On 06.07.2015, the petitioner came on the scene and filed an objection petition to the execution proceedings. The petitioner claimed to have been unaware of the proceedings before the learned Rent Controller until 05.06.2015, when Dr. Anser Maxood telephonically informed him about the same. In the said objection petition, it has been pleaded that the petitioner was a co-tenant along with Dr. Anser Maxood, and that since the eviction petition was dismissed to the extent of the petitioner, the order and decree dated 23.06.2016 could not be executed against him. It was asserted that just like a co-sharer, a co-tenant was deemed to be in possession of every inch of the rented premises.

14. Vide order dated 18.09.2015, the learned Executing Court accepted the petitioner's said objection petition, and dismissed the execution petition. It was held that since no eviction order had been passed against the petitioner, the said order and decree dated 23.06.2015, could not be executed against the petitioner. Furthermore, it was observed that the petitioner had not been afforded an opportunity of being heard since the eviction petition to the petitioner's extent had been dismissed as withdrawn. Against the said order dated 18.09.2015, respondents No.1 and 2 preferred

an appeal before the Court of the learned Additional District Judge, Islamabad. Vide judgment dated 15.12.2015, the said appeal was dismissed.

APPEAL FILED BY DR. ANSER MAQSOOD AGAINST THE ORDER AND DECREE DATED 23.06.2015:-

15. Against the order and decree dated 23.06.2015, passed by the learned Rent Controller, Dr. Anser Maxood had filed the appeal on 09.02.2016, before the Court of the learned Additional District Judge, Islamabad. Vide ad-interim order dated 10.02.2016, the learned Appellate Court suspended the operation of the said order and decree. On 12.03.2016, the learned Appellate Court passed a tentative rent order directing Dr. Anser Maxood to deposit all the rent from June 2015 and submit the deposit receipt by 26.03.2016. Furthermore, Dr. Anser Maxood was directed to deposit future rent before the 15th of each month. On 15.03.2016, Dr. Anser Maxood deposited Rs.4,83,000/-. However, vide order dated 26.03.2016, the said appeal was dismissed as time barred. I am told that against the said appellate order, Dr. Anser Maxood has filed a petition, which is pending before another Bench of this Court. It was suggested to the learned counsel for the contesting parties that this petition should be heard by the same Bench hearing the petition filed by Dr. Anser Maxood, but consensus could not be brought about between the learned counsel.

THE SECOND EVICTION PETITION FILED BY RESPONDENTS NO.1 AND 2:-

16. After the dismissal of respondent No.1 and 2s' execution petition, the said respondents on 23.12.2015, filed another eviction petition under Section 17 of the IRRO. This eviction petition was filed against the petitioner only. In this eviction petition reference to the proceedings pursuant to the earlier eviction petition was specifically made. The grounds taken in this eviction petition were; (1) that the petitioner had defaulted in the payment of rent, (2) that the rented premises were being used for commercial purposes, (3) that the lease agreement had expired on 30.06.2014, and (4) that the rented premises had not been maintained in their original condition, and structural alterations were made therein. This eviction petition was contested by the petitioner, who filed a written

reply thereto. The petitioner took the position that since earlier respondents No.1 and 2 had denied the relationship of landlord and tenant with the petitioner, the learned Rent Controller did not have jurisdiction to entertain the eviction petition. It was also pleaded that the dispute between the petitioner and respondents No.1 and 2 could only be decided by a Court of plenary jurisdiction under Section 9 C.P.C. The petitioner's stance was that since rent had been paid to respondents No.1 and 2 by Dr. Anser Maxood, the question of any default in the payment of rent did not arise.

17. Vide order dated 10.03.2016, the learned Rent Controller passed a tentative rent order directing the petitioner to deposit rent at the rate of Rs.70,000/- per month from December 2015 to March 2016. Furthermore, the petitioner was directed to keep on depositing future rent at the said rate before the 15th day of each month, in advance, until the eviction petition is decided. This order was passed by the learned Rent Controller under Section 17(8) of the IRRO, which is reproduced herein below:-

"17(8) In proceedings under this section on the first date of hearing, or as soon thereafter as may be but before the issues are framed, the Controller shall direct the tenant to deposit in his office before a specified date all the rent due from him and also to deposit regularly, till the final decision of the case before the fifteenth day of each month, the monthly rent which subsequently becomes due, and if there be any dispute as to the amount of rent due, the Controller shall determine such amount approximately."

18. On 15.03.2016, an amount of Rs.4,83,000/- had been deposited by Dr. Anser Maxood as rent for the period between October 2015 to March 2016. Now, as mentioned above, Dr. Anser Maqsood had filed an appeal before the Court of the learned Additional District Judge, Islamabad, against the order and decree dated 23.06.2015, passed by the learned Rent Controller. The Appellate Court, vide order dated 12.03.2016, had passed a tentative rent order directing Dr. Anser Maxood to deposit all the rent due from June, 2015, and place the deposit receipts on the record by 26.03.2016. It was in compliance with the said tentative rent order dated 12.03.2016 that Dr. Anser Maxood on 15.03.2016 deposited Rs.4,83,000/-.

19. The petitioner wants the payment of tentative rent deposited by Dr. Anser Maxood in compliance with the tentative rent order

passed by the learned appellate Court, to be treated as his (i.e. the petitioner's) compliance with the tentative rent order passed by the learned Rent Controller. This assertion on the part of the petitioner establishes that the petitioner and Dr. Anser Maxood were acting in collaboration in the litigation before different *fora* against respondents No.1 and 2. Indeed, it was the contention of the learned counsel for the petitioner even though the rent had been deposited by Dr. Anser Maxood, an eviction order could not have been passed against the petitioner, since Dr. Anser Maxood was the petitioner's co-tenant, and the deposit of rent by Dr. Anser Maxood should have been treated as a deposit made by the petitioner.

20. Vide order and decree dated 09.04.2016, the learned Rent Controller struck off the petitioner's defence, and allowed respondents No.1 and 2s' eviction petition by invoking the provisions of Section 17 (9) of the IRRO, which is reproduced herein below:-

"17(9) If the tenant fail to deposit the amount of rent before the specified date or, as the case may be, before the fifteenth day of the month, his application if he is an applicant shall be dismissed or his defense, if he is a respondent, shall be struck off, and the landlord shall be put in possession of the building without any further proceedings."

21. The learned Rent Controller held that since a direction had been given to the petitioner to deposit rent, and since the rent had been deposited by Dr. Anser Maxood, therefore, the petitioner had failed to comply with the order to deposit the rent.

APPEAL FILED BY THE PETITIONER AGAINST THE ORDER AND DECREE DATED 09.04.2016 PASSED BY THE LEARNED RENT CONTROLLER:-

22. The petitioner preferred an appeal against the said order dated 09.04.2016, before the Court of the learned Additional District Judge, Islamabad. Vide judgment dated 09.06.2016, the learned Appellate Court dismissed the petitioner's appeal. Although, the Appellate Court held that rent deposited by the petitioner's co-tenant was presumed to be rent deposited by the petitioner, but it was noticed that rent for the months of April 2016 and May 2016 had been deposited by Dr. Anser Maxood on 31.05.2016, when the rent should have been deposited by the 15th of each month. This, the learned Appellate Court held, was a default on the part of the

petitioner in showing compliance with the tentative rent order. The learned Appellate Court held that in the objection petition filed by the petitioner to the Execution Petition filed by respondents No.1 and 2 for the execution of the order and decree dated 23.06.2015, the petitioner had admitted his relationship of landlord and tenant with respondents No.1 and 2. The petitioner had also filed an application for the setting aside of the ex-parte proceedings against him in the earlier round of litigation. Based on all this, the learned Appellate Court held that the petitioner had earlier admitted the relationship of landlord and tenant with respondents No.1 and 2, and that the petitioner had changed his stance by denying the relationship of landlord and tenant in order to prolong his possession of the rented premises. The concurrent orders passed by the learned Courts below have been impugned by the petitioner in the instant Civil Revision Petition.

RELATIONSHIP OF LANDLORD AND TENANT BETWEEN THE PETITIONER AND RESPONDENTS NO.1 AND 2:-

23. I propose first to deal with the contention of the learned counsel for the petitioner that there does not exist the relationship of landlord and tenant between the petitioner and respondents No.1 and 2. As mentioned above, the learned counsel for the petitioner submitted that since there does not exist a relationship of landlord and tenant between the petitioner and respondents No.1 and 2, the learned Rent Controller did not have the jurisdiction to adjudicate upon the dispute. He also submitted that respondents No.1 and 2 in their earlier eviction petition had taken the position that the petitioner was not their tenant. Be that as it may, there is no denying the fact that the lease agreement dated 17.08.2011 was executed between respondents No.1 and 2 (as landlords) and Dr. Anser Maxood and the petitioner (as tenants). The petitioner has clearly pleaded so in his objection petition to the execution petition filed by respondents No.1 and 2 against Dr. Anser Maxood. Paragraphs 9 to 11 of the said objection petition are reproduced herein below:-

“9. That admittedly the present petitioner was and is co-tenant along with Dr. Anser Maqxood and shown as such in the lease agreement annexed with the eviction petition. The perusal of the lease agreement annexed with the eviction petition, clearly shows that the same has been signed and executed by both the co-

tenants and both of them are jointly under occupation of the demised premises.

10. That after dismissal of the eviction petition to the extent of the present petitioner, no decree which has been passed against above named Dr. Anser Maqsood, could be executed on the present petitioner and the present petitioner could not be dispossessed from the demised premises i.e. House No.4 (Ground Floor), St.No.13, Sector F-8/3, Islamabad, in execution of the judgment and decree dated 23.06.2015.

11. That it is also settled proposition of law that like a co-sharer and co-tenant is also deemed to be in possession of every inch of the rented premises along with other co-tenant, therefore, the judgment and decree dated 23.06.2015 could not be effectively executed for the reasons mentioned above.”

24. The above mentioned pleadings are a part of the record of this Court. After admitting that he was respondents No.1 and 2's tenant, it is most inappropriate for the petitioner to contend that there does not exist the relationship of landlord and tenant between him and the said respondents. From the record, it is apparent that where it suited the petitioner's interests, he has called himself a tenant, and where it did not, he denied being one. Such pleas were mutually contradictory and destructive. Such pleas could not be reconciled, and depicted unfairness on the petitioner's part. This has always been deprecated by the Courts. A party cannot be permitted to assume inconsistent positions in the Court by approbating and reprobating to the detriment of the opponent. The petitioner cannot be allowed to keep changing his position and must be held down to a case he had set up originally. The case that the petitioner had set up originally was that he was respondents No.1 and 2's tenant. The doctrine of **approbation** and **reprobation** has been elucidated in Halsbury's Laws of England (4th Edition) (Volume 16), thus:

*“The principle that a person may not **approbate** and **reprobate** expresses two propositions, (1) that the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.”*

25. Learned counsel for respondents No.1 and 2 had submitted that the petitioner was not in possession of the rented premises, and that he had gone to Lahore. The petitioner denies this. This factual controversy has not been determined by the Courts below. This Court in its constitutional jurisdiction under Article 199 of the

Constitution cannot resolve this controversy. However, if the petitioner is in possession of the rented premises, it is obvious that it was by virtue of the lease agreement dated 17.08.2011 to which the petitioner was a party. Therefore, his entry into the rented premises was as a tenant – once a tenant always a tenant. If on the other hand, Dr. Anser Maxood, and not the petitioner, is in possession of the rented premises, then it is a simple case of the petitioner contesting the matter only as a surrogate for the benefit of Dr. Anser Maxood. But for the petitioner's objection petition to respondents No.1 and 2's execution petition, the execution petition would not have been dismissed. In either case, the petitioner has rendered himself, by his own conduct, disentitled to any relief in the constitutional jurisdiction of the Court.

26. As mentioned above, in the objection petition to the execution proceedings in the first round of litigation, the petitioner had pleaded that he was respondents No.1 and 2's tenant. In the second round of litigation, (from which these proceedings arise) the petitioner asserts that since in the earlier round of litigation, the said respondents had taken the position that the petitioner was not their tenant, the petitioner's status should metamorphosize from that of a tenant to an unlawful occupant, and the said respondents should initiate a third round of litigation before a Court of plenary jurisdiction for the ejectment of the petitioner. The petitioner is certainly not the owner of the rented premises. He now claims to wear the hat of an unlawful occupant, and asserts that only a civil court and not a rent controller can evict him. The petitioner has some nerve to think that with such conduct, a Court exercising equitable jurisdiction would give him relief. Estoppel is based on the Maxim: "*allegans contraria non set audiendus*" (a person alleging contradictory facts should not be heard). The petitioner is estopped by his own conduct to deny the relationship of landlord and tenant with respondents No.1 and 2.

DEFAULT IN THE PAYMENT OF TENTATIVE RENT ORDER:-

27. As mentioned above, vide order dated 10.03.2016, the learned Rent Controller passed a tentative rent order directing the petitioner to deposit rent at the rate of Rs.70,000/- per month from December 2015 to March 2016, and to keep on depositing future

rent at the said rate before the 15th day of each month, in advance, until the eviction petition is decided. True, the learned Appellate Court did not pass a tentative rent order under Section 21 (6) of the IRRO. Now, an appeal is a continuation of proceedings before the lower forum. The Appellate Court has all the powers which the original forum has. It is an admitted position that rent for the months of April and May, 2016 was deposited by Dr. Anser Maxood on 31.05.2016. The delayed deposit of rent for the said months was not just in default of the tentative rent order, but also the terms of the lease agreement dated 17.08.2011. The petitioner, in order to show his *bona fides* could have deposited the rent for the said months prior to the 15th day of each month.

28. The receipt dated 31.05.2016 for Rs.1,61,000/- shows that Dr. Anser Maxood had paid the said amount in purported compliance with the order of the learned Rent Controller (i.e. the Court of Syed Muhammad Zahid Tarmizi, Civil Judge, First Class, West, Islamabad) for the months of April and May, 2016. Now, after asserting that the payment of rent by the petitioner's co-tenant should be treated as the payment of rent by the petitioner, the petitioner takes yet another vault face by asserting that the payment of rent on 31.05.2016 after the disposal of the eviction petition by the learned Rent Controller on 09.04.2016, could not be said to be in compliance with the tentative rent order passed by the learned Rent Controller. This assertion is made regardless of the fact that on the deposit receipt, it is clearly mentioned that deposit is with respect to orders passed by the above-named Rent Controller. Hence, the invocation of the penal provisions of Section 17 (9) against the petitioner was in order. This conclusion is fortified by the law laid down in the cases of Mushtaq Ahmad Kiani Vs. Bilal Umair (2009 SCMR 1008), Bilal Abid Vs. District Judge (West) Islamabad (2015 YLR 2405), Shamshad Ali Vs. Ghulam Muhammad Chaudhry (2009 CLC 52), and Major (R) Shakil-ud-Din Ahmad Vs. Addl. District Judge, Islamabad, (2007 CLC 601).

29. The petitioner has also challenged the tentative rent order dated 10.03.2016, passed by the learned Rent Controller. After the said order was passed, the petitioner should have filed an application for recall of the said order on the ground that his co-

tenant (Dr. Anser Maxood) had deposited the rent for the months between December, 2015 to March, 2016 on 15.03.2016, *albeit* in compliance with the tentative rent order dated 12.03.2016, passed against Dr. Anser Maxood by the appellate court. This the petitioner did not do. The receipt dated 15.03.2016 for Rs.4,83,000/- (appended at Page 118 of this petition) clearly shows that Dr. Anser Maxood had paid the said amount in compliance with the order of the Appellate Court (i.e. the Court of Mr. Muhammad Adnan, Additional District & Sessions Judge-V, West, Islamabad). As long as the tentative rent order passed by the learned Rent Controller remained in the field, the petitioner was supposed to show compliance with it in order to avoid the adverse consequences contemplated by Section 17 (9) of the IRRO.

OBJECTION TO POWER OF ATTORNEY:-

30. As regards the power of attorney for the filing of the writ petition, learned counsel for the petitioner has placed on record a copy of special power of attorney dated 26.07.2016 executed by the petitioner in Munir Hussain's favour. This power of attorney authorizes Munir Hussain to file a writ petition against the impugned orders of the Courts below. Since, the said power of attorney pre-dates the filing of the writ petition, respondents No.1 and 2's objection to the maintainability of the petition is spurned.

31. In view of the above, I do not find any infirmity in the concurrent orders passed by the learned Courts below. Resultantly, this petition is dismissed.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

APPROVED FOR REPORTING