

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.977/2018

M/s Panther Developers

Versus

Additional District Judge (ADJ), West, Islamabad and others

Date of Hearing: 02.04.2018

Petitioner by: Sardar Arshad Mahmood Khan, Advocate,

Respondent No.3 by: Syed Asghar Hussain Sabzwari, and Syed Qamar Hussain Sabzwari, Advocates.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, M/s Panther Developers, impugns the judgment and decree dated 10.03.2018, passed by the Court of the learned Additional District Judge, Islamabad, whereby the petitioner's appeal against the order dated 18.12.2017, passed by the Court of the learned Rent Controller, Islamabad, was dismissed. Vide the said order dated 18.12.2017, the learned Rent Controller struck off the petitioner's right of defence under section 17(9) of the Islamabad Rent Restriction Ordinance, 2001 ("I.R.R.O."), and accepted respondent No.3's eviction petition. Furthermore, the petitioner was directed to forthwith handover vacant possession of the rented premises (i.e., Half Basement, 1-E, Ali Plaza, Jinnah Avenue, Blue Area, Islamabad) to respondent No.3.

2. The record shows that on 12.03.2014, a lease agreement was executed between the petitioner (tenant) and respondent No.3 (landlord), whereby the rented premises were leased for a period of five years (from 01.04.2014 to 31.03.2019). On 24.04.2017, respondent No.3 filed an eviction petition against the petitioner under Section 17 of the I.R.R.O. The grounds taken in the said eviction petition were; (i) default in the payment of rent and (ii) violation of the terms and conditions of the lease agreement on the petitioner's part. The petitioner contested the said eviction petition by filing a written reply. In the said reply, it was pleaded *inter-alia* that respondent No.3 had refused to accept the rent from the petitioner, and that the lease agreement was valid until 31.03.2019.

3. On 31.05.2017, the learned Rent Controller passed a tentative

rent order fixing Rs.1,15,762/- per month as the tentative rent, and directed the petitioner to deposit the monthly rent from April 2017 in the Court. Furthermore, the petitioner was directed to deposit the future monthly rent at the said rate *“in advance before 15th of each month till final conclusion of the petition.”* This order was passed by the learned Rent Controller under Section 17(8) of the I.R.R.O., 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.”

4. On 04.07.2017, the said eviction petition was dismissed for non-prosecution. Until the dismissal of the eviction petition, the petitioner had deposited rent in accordance with the tentative rent order. On 08.07.2017, respondent No.3 filed an application for the restoration of the eviction petition. The petitioner claims to have got knowledge of the said application on 27.07.2017. Even though the eviction petition has not been restored, the petitioner deposited the tentative rent on 28.07.2017. On 21.09.2017, the learned Rent Controller restored respondent No.3's eviction petition.

5. Vide order dated 18.12.2017, the learned Rent Controller struck off the petitioner's defence by invoking the provisions of Section 17(9) of the I.R.R.O. Furthermore, the said eviction petition was allowed, and the petitioner was directed to forthwith hand over vacant possession of the rented premises to respondent No.3. Section 17(9) of the I.R.R.O., is reproduced herein below:-

“17(9) If the tenant fails 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.”

6. The petitioner's appeal against the said order dated 18.12.2017 was dismissed by the learned appellate Court, vide judgment dated 10.03.2018. The said concurrent orders/judgments

passed by the learned Courts below have been impugned by the petitioner in the instant writ petition.

7. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant writ petition, submitted that as per the terms of the lease agreement between the petitioner and respondent No.3, the former had until 10.04.2017 to pay yearly advance rent to the latter; that in discharge of the said obligation, the petitioner sent cheque No.43697199, dated 04.04.2017 for an amount of Rs.1,380,000/- to respondent No.3, which he refused to accept; that the grounds taken by respondent No.3 in his eviction petition were frivolous; that the petitioner had not committed any default in the payment of rent; that the petitioner had shown compliance with the tentative rent order by depositing the rent in Court; that the petitioner could not have been expected to deposit the tentative rent after the eviction petition had been dismissed for non-prosecution; that a day after the petitioner came to know about the filing of the application for the restoration of the eviction petition, the tentative rent was deposited in the Court; that although the eviction petition was restored on 21.09.2017, the petitioner could not have been penalized for not depositing the tentative rent for the month of July, 2017 when the eviction petition stood dismissed for non-prosecution; and that Section 17(9) of the I.R.R.O. is a penal provision which must be construed strictly. Learned counsel for the petitioner prayed for the instant petition to be allowed, and for the concurrent orders passed by the learned Courts below to be set-aside.

8. On the other hand, learned counsel for respondent No.3 submitted that there are no jurisdictional infirmities in the concurrent orders passed by the learned Courts below so as to warrant interference in the Constitutional jurisdiction of this Court; that it is well settled that upon the restoration of the suit, all the interim orders stand revived with retrospective effect; that the tentative rent order obligated the petitioner to deposit the monthly rent in advance before the 15th of each month; that it is an admitted position that the tentative rent for the month of July, 2017 was

deposited on 28.07.2017; that by not depositing the tentative rent for the month of July, 2017 on or before 15.07.2017, the petitioner exposed himself to penal measures under Section 17(9) of the I.R.R.O.; that even when an eviction petition is dismissed for non-prosecution, the tenant should continue to deposit the tentative rent in accordance with the tentative rent order; that the tentative rent order had required the petitioner to deposit the tentative rent *“till final conclusion of the petition”*; and that dismissal of an eviction petition for non-prosecution could not be considered as *“final conclusion of the petition”*.

9. Furthermore, it was submitted that respondent No.3 does not agree with the petitioner’s contention that the latter had paid yearly advance rent to respondent No.3 through cheque dated 04.04.2017; and that relief sought in writ jurisdiction cannot be given to a petitioner who has twice committed default in the payment of rent. Learned counsel for respondent No.3 prayed for the writ petition to be dismissed. In making his submissions, learned counsel for respondent No.3 placed reliance on the judgments in the cases of Muhammad Saleh Vs. Muhammad Shafi (1982 SCMR 33) and M.A. Shami Vs. Additional District Judge, Lahore (2012 YLR 2058).

10. I have heard the contentions of the learned counsel for the contesting parties, and perused the record with their able assistance.

11. The facts leading to the filing of the instant writ petition have been set out in sufficient detail in paragraphs 2 to 6 above, and need not be recapitulated.

12. The sole question that needs to be determined is whether after the restoration of respondent No.3’s eviction petition in September, 2017, the petitioner’s defence could have been struck off under Section 17(9) of the I.R.R.O. for not depositing the tentative rent for the month of July, 2017 by 15.07.2017, when respondent No.3’s eviction petition stood dismissed for non-prosecution and an application for the restoration of the eviction petition was pending.

13. It is an admitted position that the petitioner’s eviction petition, which was dismissed for non-prosecution on 04.07.2017, was

restored on 21.09.2017. The petitioner was non-suited by the learned Courts below by holding that upon the restoration of the eviction petition, the tentative order revived with retrospective effect, and that since the petitioner had deposited the tentative rent for the month of July, 2017 on 28.07.2017 instead of 15.07.2017, its defence was liable to be struck off and respondent No.3's eviction petition was to be allowed under Section 17(9) of the I.R.R.O. In non-suited the petitioner, the learned appellate Court relied on the judgments in the cases of Muhammad Saleh Vs. Muhammad Shafi (supra) and M.A. Shami Vs. Additional District Judge, Lahore (supra).

14. An analysis of the above referred judgments of the Superior Courts is necessary before I give my findings on the merits of the case. In the case of M.A. Shami Vs. Additional District Judge, Lahore (supra), it was held by the Hon'ble Lahore High Court that upon the restoration of a suit, which had earlier been dismissed for non-prosecution, all the ancillary orders made prior to its dismissal become alive and operate retrospectively. In holding so, the Hon'ble Lahore High Court relied on the law laid down by the Hon'ble Supreme Court in the case of Muhammad Saleh Vs. Muhammad Shafi (supra). In the latter case, the tenant had failed to deposit the tentative rent for the months of February and March, 1977 in accordance with the tentative rent order inasmuch as the tentative rent for the said months was deposited with the delay of one day. Subsequently, in July, 1977 the eviction petition was dismissed for non-prosecution. On the landlord's application under Order IX, Rule 9, C.P.C., the eviction petition was restored in December, 1977. During the period when the eviction petition stood dismissed for non-prosecution, the tenant kept on sending the monthly rent to the landlord by money order which the latter refused to receive. The tenant admittedly stopped tendering the monthly rent after the eviction petition had been restored in December, 1977. The learned Rent Controller allowed the landlord's application for striking off the tenant's defence for not showing compliance with the tentative rent order. The tenant's appeals were dismissed by the Court of the

learned Additional District Judge as well as the Hon'ble High Court. The Hon'ble Supreme Court also dismissed the tenant's petition. In the said report, it was held *inter-alia* that *"once a suit or appeal, dismissed for default is restored by the order of the Court under Order IX, Rule 9, C.P.C. all ancillary orders passed in the suit or appeal before the dismissal also stand revived and become operative since that date with all their legal implications"*.

15. As regards the case at hand, it is my view that reliance by the learned appellate Court on the above referred judgments in non-suiting the petitioner was misconceived. I say this because a closer study of the case of Muhammad Saleh Vs. Muhammad Shafi (*supra*) shows that the tenant was non-suited not because of non-compliance with the tentative rent order during the period when the landlord's eviction petition stood dismissed for non-prosecution, but because after the restoration of the eviction petition in December, 1977, the tenant did not deposit the tentative rent in accordance with the tentative rent order. Perusal of paragraph-6 of the said judgment shows that the landlord had urged that the tenant had not paid any rent after December, 1977 and had also been guilty of one day's default in depositing the installments of arrears of rent in the months of February and March, 1977. The Hon'ble Supreme Court overlooked the delay in the deposit of rent by one day in the months of February and March, 1977. However, it was on the basis of the tenant's failure to deposit rent after the restoration of the eviction petition in December, 1977, that the tenant's defence was held to have been correctly struck off. Nowhere in the said judgment is mentioned that the tenant's defence was struck off due to his failure to deposit the tentative rent during the period when the eviction petition stood dismissed for non-prosecution. On the contrary, it has been noted in the said judgment that *"during the period from July, 1977 (when the ejectment application was dismissed in default) to December, 1977 (when the same was restored), the petitioner kept on sending the monthly rent to the landlord by money order which the latter refused to receive"*.

16. It is not disputed that it is always within the realm of possibilities that an application for the restoration of a suit or an eviction petition would not be allowed. What the learned Courts below have, in effect, held is that the petitioner should have, in July, 2017 crystal ball gazed and foretold the future that in September, 2017 respondent No.3's eviction petition will most definitely get restored, and therefore, in order to escape the penal consequences envisaged by Section 17(9) of the I.R.R.O., he should deposit the tentative rent by the 15th of each month during the period when respondent No.3's eviction petition stood dismissed for non-prosecution and his restoration application was pending. Hypothetically speaking, if a Court passes an injunctive order against a defendant, and subsequently the suit in which such an order was passed is dismissed for non-prosecution; and after such dismissal, the defendant performs acts which would have amounted to violation of the injunctive order had the same remained in the field, would the defendant be liable to be proceeded against for contempt of Court upon the restoration of the suit? I would say, certainly not.

17. It is well settled that when a suit is dismissed for non-prosecution, and an application for the restoration is filed, the Court/Tribunal can, while the said application is pending, pass interim orders. In the case of Muhammad Usman Khan and another Vs. Miraj Din and another (PLD 1978 Lahore 790), it has been held as follows:-

"5. The learned counsel then argued that the injunction could not be granted under Order XXXIX, rules 1 and 2, C.P.C. since no suit was pending before the Court. He further argued that section 151, C.P.C. could not apply after the termination of the suit. It is correct that Order XXXIX, rules 1 and 2 C.P.C. are applicable to injunction in suit but it cannot lead to the conclusion that section 151, C.P.C. which only saves inherent powers of the Court cannot apply. Although there is no suit pending before the Court yet an application for restoration is before it. If this application is allowed, the temporary injunction already issued will stand revived. If the wall is constructed before the restoration of the suit that will result in depriving the plaintiffs of their right to be benefited by the temporary injunction already granted even if their application for restoration of the suit is allowed. It will, therefore, be in the interest of justice to issue temporary injunction under inherent powers of

the Court. Such injunction can be granted wherever Order XXXIX is not applicable."

18. Since a tentative rent order is also in the nature of an interlocutory/interim order, by analogy, after an eviction petition is dismissed for non prosecution, the Rent Controller can, while entertaining an application for the restoration of an eviction petition, pass a tentative rent order for the period until the decision of the restoration application. Such an order will bind the tenant only after he is duly served with such an order. It is also well settled that when an application for the restoration of the suit is allowed, all interim orders passed prior to the dismissal of the suit for non-prosecution, stand revived. In the same way, if a tentative rent order is passed prior to the dismissal of the eviction petition for non-prosecution, upon the restoration of the eviction petition, the tentative rent order also stands revived. After the restoration of the eviction petition, there is no need to pass a fresh tentative rent order. In the event, after the restoration of the eviction petition, the tenant does not show compliance with the tentative rent order, which had been passed prior to the dismissal of the eviction petition for non-prosecution, the tenant exposes himself to penal measures under Section 17(9) of the I.R.R.O. However, where the Rent Controller does not pass a tentative rent order while entertaining an application for the restoration of the eviction petition, a tenant cannot be penalized under Section 17(9) of the I.R.R.O. for not depositing rent during the period when the eviction petition stood dismissed for non-prosecution.

19. In the case of Anees Ahmed Rushdi Vs. Mst. Zulekha (1984 CLC 748), that great jurist, the Hon'ble Mr. Justice Nasir Aslam Zahid (as he then was) did not non-suit a tenant for not depositing rent in accordance with the tentative rent order for the period during which the eviction petition had remained dismissed for non-prosecution. It in said report, it was held *inter-alia* as follows:-

"4. It was then contended by the learned counsel for the applicant/landlord that it was an admitted position that rent payable under the tentative rent order, dated 3rd December, 1965 was not deposited from July, 1966 till 21st December, 1966 when the respondent deposited one year's rent, that is, for the period from 1st

July, 1966 to 30th June, 1967. In my view as the rent application has not been restored till 15th August, 1966, in case the rent had not been deposited till 15th August, 1966 for the period when the rent application remained dismissed there would be no default on the part of the tenant. This is so as during this period, the rent application was lying dismissed and when the rent application was lying dismissed it cannot be said that the tentative rent order remained alive. The tentative rent order stood revived only when the rent application was restored.

(Emphasis added)

20. In the said case, it was also held that after the restoration of the eviction petition, it was not necessary for the Rent Controller to pass a fresh tentative rent order. While coming to the said conclusion, the Hon'ble High Court of Sindh was cognizant of the law laid down by the Hon'ble Supreme Court in the case of Muhammad Saleh Vs. Muhammad Shafi (*supra*).

21. Whether or not the petitioner tendered advance rent for one year in accordance with the terms and conditions of the lease agreement between the petitioner and respondent No.3 is to be determined during an inquiry by the learned Rent Controller. The learned Rent Controller is also to decide whether the petitioner committed a breach of the terms and conditions of the lease agreement.

22. In view of the above, the instant petition is allowed, the impugned orders/judgments dated 18.12.2017, and 10.03.2018, passed by the learned Rent Controller and the learned appellate Court, respectively, are set-aside. Furthermore, the matter is remanded to the learned Rent Controller who is expected to decide respondent No.3's eviction petition expeditiously. No order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON ____/2018.

(JUDGE)