

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CR No.3016 of 2018 (O&M)

Date of Decision: September 11, 2018

Shabudin (since deceased) through his son ---Petitioner

Versus

Narinder Malhotra ---Respondent

Coram: Hon'ble Mr. Justice Harinder Singh Sidhu

Present: Mr.O.P.Goyal, Sr. Advocate with
Ms.Deep Shikha, Advocate for the petitioner.

Mr.Gaurav Mohunta Advocate and
Mr.Gaura Gogna, Advocate for the respondent.

HARINDER SINGH SIDHU, J.

The present petition has been filed impugning the order dated 6.11.2017 of the learned Rent Controller, Chandigarh, whereby the petitioner has been directed to vacate the premises within two months for failure to deposit the provisional assessed rent. Also impugned is the order dated 22.2.2018 of the Appellate Authority, Chandigarh, whereby the appeal of the petitioner against the aforesaid order has been dismissed.

The respondent filed a petition for ejectment of the petitioner from the tenanted premises described as Room No.6 alongwith and within open space of 33 ft. x 40 ft. at the rear portion of showroom No.7, Sector 7-C, Chandigarh. Vide his order dated 4.10.2017, the learned Rent Controller assessed the provisional rent at Rs.2,00,248/- and adjourned the case to 2.11.2017 for tendering the assessed provisional rent.

The case of the petitioner is that on 2.11.2017, the Rent

Controller was not holding court. The case was listed before lunch on 2.11.2017 before the Duty Magistrate, who had been assigned the work of the Rent Controller. The petitioner was blessed with a son on 30.10.2017 and had remained busy in the hospital. Therefore, he sought extension of time for deposit of provisional rent when the case was called before lunch and an application dated 2.11.2017 (Annexure P-2) for extension of time to deposit rent was filed and the case was adjourned to 6.11.2017. However, on advise of his counsel, the petitioner prepared a draft of Rs.2,00,250/- on 2.11.2017 in the name of the respondent. The draft was ready at 2.29 P.M. as per the certificate (Annexure P-7) issued by the HDFC Bank, Sector 8-C, Chandigarh. Immediately, thereafter he went to the Duty Magistrate along with his counsel and requested the Duty Magistrate to accept the draft. However, as the case had already been adjourned to 6.11.2017, the learned Duty Magistrate did not accept the draft and asked him to tender it on the adjourned date.

It is stated that on 2.11.2017, no written application was filed before the Duty Magistrate to accept the draft and only an oral request was made, which was declined orally. It is the case of the petitioner that the Ld. Rent Controller remained on leave from 2.11.2017 to 5.11.2017. On 6.11.2017, the petitioner moved an application (Annexure P-4) before the Ld. Rent Controller to be allowed to deposit the provisional rent. In the application, the petitioner stated all the aforementioned facts. The Ld. Rent Controller dismissed the application vide order dated 6.11.2017. It held that the plea of the petitioner that he had got prepared a draft of the amount of provisionally assessed rent on 2.11.2017 itself and also apprised the Ld.

Duty Magistrate on the same date who refused to accept the same as the matter had already been adjourned, was not convincing as there was no zimni order to that effect on the record. It was further observed that the pleas were self contradictory. As the petitioner had failed to deposit the assessed rent on the first date, the rent petition was allowed and the petitioner was directed to vacate the premises within two months of the date of the order.

The appeal filed by the petitioner was dismissed by the Appellate Authority vide order dated 27.2.2017. The Appellate Authority also did not find the version as narrated by the petitioner to be convincing. It noted that if the events had transpired as contended, then the petitioner would have moved an application in writing to the Court and if his application was not entertained by the Ld. Duty Magistrate then he could have moved an application before the District Judge for acceptance of the rent because the consequence of not tendering the rent on the first date was automatic eviction.

These orders have been impugned in the present revision petition.

The case was listed for preliminary hearing on 7.5.2018 on which date notice of motion was issued for 14.5.2018. Mr.Puneet Gupta Advocate accepted notice on behalf of the respondent and stated that pursuant to the order of courts below, possession of the premises had already been handed over to the respondent on 5.5.2018. Thereafter, the case was listed on 14.5.2018 and adjourned to 17.5.2018 on which date it was adjourned to 23.5.2018. On 23.5.2018, an application i.e. CM

No.10646-CII of 2018 was listed seeking permission to place on record affidavit of Mr. G.S. Rangi, Advocate. Notice in this application was accepted by learned counsel for the respondent and the case was adjourned to 31.5.2018. On 31.5.2018, learned counsel for the respondent filed reply to CM No.10646-CII of 2018. In the affidavit of Mr.G.S.Rangi, Advocate, it has been stated that on 2.11.2017, the case was fixed for tendering the provisional rent assessed by the Rent Controller but as the Ld. Rent Controller was on leave on 2.11.2017, the case file was put up before the Duty Magistrate, Chandigarh. The petitioner had moved an application to extend the time to deposit the provisional rent. The Duty Magistrate fixed the case for 6.11.2017 for reply on the application but the petitioner arranged the funds for deposit of the provisional rent. A draft bearing No.075140 dated 2.11.2017 of the amount of Rs.200250/- in the name of the respondent payable at HDFC bank Sector 8, Chandigarh was prepared. It has been asserted that the deponent who was counsel for the petitioner requested the Court to accept the tender of provisional rent, but the Duty Magistrate directed that the provisional rent be paid before the Rent Controller on 6.11.2017 as the file of the case had been sent back to the concerned court by the Duty Magistrate.

In the reply to the application for placing on record the affidavit it has been stated by the respondent that the application for placing on record the affidavit is not maintainable as in exercise of the power under Section 15(5) of the East Punjab Urban Rent Restriction Act, 1949, this Court is only to test the legality of the impugned order on the basis of the available record. As the affidavit appended with the application was not

filed before the Courts below the same cannot be looked into and taken on record for the decision of the case. Even otherwise, the affidavit is nothing but an afterthought just to fill up the lacuna in this case. The affidavit was not filed along with the application for tendering the rent on 6.11.2017. It was not filed along with the appeal before the Appellate Authority against the order of the Rent Controller. It was also not appended along with the present revision when it was filed. Hence it cannot be looked into.

Shri O.P. Goyal, learned senior counsel for the petitioner contended that the impugned orders are wholly un-sustainable. The petitioner was to tender the provisional rent on 2.11.2017. On that date, the Rent Controller was on leave and the case was listed before the Duty Magistrate. Initially, when the matter was taken up before lunch, the petitioner moved an application for extension of time for deposit of the provisional rent as he had been blessed with a son and having remained busy in the hospital had been unable to arrange funds. Notice in this application was issued for 6.11.2017. However, on advise of his counsel, the petitioner immediately, got a draft prepared for the amount of Rs.2,00,250/- in the name of the respondent from HDFC bank Sector 8, Chandigarh. As per the certificate issued by the bank (Annexure P-7), the said draft was ready at 2.29 pm. He states that he immediately went to the Court in Sector 43, Chandigarh along with his counsel and requested the Duty Magistrate to accept the provisional rent. However, the Duty Magistrate did not accept the tender and asked the petitioner to tender the rent on the adjourned date i.e. 6.11.2017. On 6.11.2017, the petitioner filed an application for tendering the rent which was dismissed and the petitioner

was ordered to vacate the premises as he had not tendered the rent on the date fixed i.e. 2.11.2017. Learned Sr. Counsel contended that in these circumstances, the orders are wholly illegal. The fault for non deposit of the rent cannot be laid at the door of the petitioner. It was the Duty Magistrate who refused to accept the tender of the rent on 2.11.2017. The only fault of the petitioner was that he had only made an oral request before the Duty Magistrate to accept the draft and did not file an application to that effect. He stated that it has been the consistent stand of the petitioner before the Rent Controller and the Appellate Authority and now even his counsel has filed his affidavit affirming the same facts.

Mr.Gaurav Mohunta, Advocate for the respondent on the other hand argued that the affidavit of the lawyer cannot be taken into consideration. It could have been considered if it had been filed on 2.11.2017 or along with the application dated 6.11.2017 before the Rent Controller or even before the Appellate Authority. It was not even filed along with this revision and it having been filed at the last stage when the matter was to be finally argued, cannot be looked into. He further argued that if the Duty Magistrate had refused to accept the tender of the rent on 2.11.2017, the petitioner should have approached the District Judge to tender the provisional rent on that very date. In any event, he should have moved an application on the very next day to tender the rent and not waited till the adjourned date i.e. 6.11.2017 to move the application. He states that in terms of the very clear statutory provisions as interpreted by the Supreme Court, the provisional rent had to be tendered on the very first date after the assessment of provisional rent. There is no scope for extension of time and

any default has to be necessarily visited with an order of eviction.

Heard Ld. Counsel for the parties.

There is no dispute that on the date fixed for tendering the assessed rent i.e., 2.11.2017 the rent was not paid. The only question is whether the explanation tendered by the revision petitioner can be accepted to hold that, in the circumstances, there was no default of the petitioner and hence the order of ejectment is not justified. It is no doubt true as noted in a decision of this Court in **Vikas alias Raju and another vs. Harkesh Kumar 2010 RCR (Civil) 597** that hypothetically there may be any number of situations where it can be held as a fact that the tenant was throughout inclined to make the tender but was disabled by circumstances beyond his control from making the tender like when he meets with an accident on the way to the Court, or is hospitalized etc. etc. In such an eventuality the tenant may not be visited with an order of eviction.

In a different context, Hon'ble the Supreme Court in **Rosali V. v. TAICO Bank, (2009) 17 SCC 690**, observed that if one intended to comply with a Court order or the provisions of a statute but by reason of fortuitous circumstances, he was not in a position to do so, the statute would not be held to be operating harshly in such a case.

“38. We may consider another aspect of the matter. With a view to consider the question as to whether he intended to abide by the provisions of a statute or the order of a court, his conduct is relevant. If one intended to comply with order of a court but by reason of fortuitous circumstances, he is not in a position to do so, the statute would not be held to be operating harshly in such a case.”

Thus, if it is proved to the satisfaction of the Court that indeed the failure to comply was because of circumstances beyond the control of

the petitioner, the default being not intentional, may not operate to the prejudice of the petitioner.

But here we are concerned with a situation where the petitioner alleges that he orally tendered the amount/draft before the Court/ Duty Magistrate and the Court refused to accept it and asked him to tender it on the adjourned date. The reference being to the proceedings before the Court, the matter would have to be dealt with differently.

With respect to proceedings before the Court, the well-settled principle is that statements of fact as to what transpired at the hearing as recorded in the judgment/order of the Court, are conclusive of the facts so stated. No one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment/ order, it is incumbent upon the party, while the matter is still fresh in the minds of the Judge, to call the attention of the that very Judge point out the error and have the record corrected. It has been held that the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, and nowhere else.

The above proposition has been emphatically stated in **State of Maharashtra v. Ramdas Shrinivas Nayak, (1982) 2 SCC 463** as under :

“4. When we drew the attention of the learned Attorney-General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. “Judgments cannot

be treated as mere counters in the game of litigation.” We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In *R v. Mellor Martin, B.* was reported to have said:

“We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity.”

6. In *King-Emperor v. Barendra Kumar Ghose* Page, J. said:

“... these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive : It is not to be criticized or circumvented; much less is it to be exposed to animadversion.”

7. In *Sarat Chandra Maiti v. Bibhabati Debi Sir Asutosh Mookerjee* explained what had to be done:

“... It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment...”

8. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else."

In the present case, there is no zimni order of the proceedings of 2.11.2017 as according to the Ld. Counsel for the petitioner both the tender and the refusal were oral. In my view this should not make any difference to the application of the principle afore-stated. To know as to what transpired before the Court one has to look to the order of that very Court. No other evidence can be looked into and relied upon.

Another fact which militates against the claim of the petitioner, and which was held against him by both the Courts is that when on 02.11.2017, as pleaded by him, the Ld. Duty Magistrate had refused to accept the bank draft, the petitioner could have approached the District Judge, considering the drastic implications of not tendering the assessed provisional rent on the first date of hearing. He could have filed an application on the very next date. But he chose to wait for the adjourned date i.e., 6.11.2017. Surely, the rigour of the requirement to deposit/ tender the assessed provisional rent must be known to the petitioner and his counsel. Even if not so, it is well settled that ignorance of law is no excuse. The petitioner having failed to deposit the rent must suffer the consequences.

Thus, there is no merit in the petition and the same is dismissed.

September 11, 2018

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**(HARINDER SINGH SIDHU)
JUDGE**

Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No