

# IN THE HIGH COURT OF SINDH AT KARACHI

## Second Appeal No.111/2016

Appellant : Pacific Traders Pakistan (Pvt.) Limited,  
through Mr. Muhammad Kamran Mirza,  
Advocate.

Respondent : Mst. Asma Riaz Khan, through Mr. Zia  
Ahmed Awan, Advocate.

Date of hearing: 15.01.2018

Date of Judgment :

### JUDGMENT

**YOUSUF ALI SAYEED, J.** This Second Appeal impugns the Judgment and Decree dated 13.08.2016 (the “**Impugned Judgment**”) passed by the learned VIIth Additional District and Sessions Judge, Karachi, South in Civil Appeal No. 174 of 2009 (the “**First Appeal**”), upholding the Judgment of 24.08.2009 and Decree dated 26.08.2009 passed by the learned V<sup>th</sup> Senior Civil Judge, Karachi, South on in Civil Suit No. 1713/2002 (the “**Underlying Suit**”), which had initially been filed before this Court under its original civil jurisdiction and numbered as Suit No. 1291/2001, but was transferred upon enhancement of pecuniary jurisdiction and renumbered as above.

2. The Appellant and the Respondent No.1 had entered into a Rent Agreement on 14.4.1997 in respect of premises admeasuring about 2240 square feet, on the roof top of a building by the name of Mehdi Tower, situated at Sindhi Muslim Cooperative Housing Society, Karachi (the “**Subject Premises**”, as per which the term of tenancy was five years, at an Annual Rent of Rs.4,80,000/-, with an increase of 15% after every three years.

3. A dispute apparently arose *inter se* the parties in relation to the said Rent Agreement, leading to the filing of the Underlying Suit by the Respondent No.1 with the following prayers:
- (a) To pay to the plaintiff Rs. 11,04,000/- (Rupees eleven lacs and four thousand only) at the increased rate of Rs. 5,52,000/- per annum for the period from April, 2000 and ending March, 2002, and with effect from April, 2002 to pay Rs. 46,000/- for each month or part thereof and with effect from April, 2003 to pay Rs.52,900/- for each month or part thereof as rent/mesne profit and to pay mark up for the period from the date money was due and up to the date it was paid.
  - (b) To pay directly to the Karachi Electric Supply Corporation the electricity charges immediately and keep on paying the same on account of meter Consumer No. AL 964955.
  - (c) To remove the LG Neon Sign from the rooftop of Mehdi Tower, Shahrea Faisal, Karachi.
  - (d) To pay to the plaintiff the cost of this suit and such other amounts as damages which this Court in the circumstances of this case may be pleased to determine.
4. The case essentially set up by the Respondent in her capacity as plaintiff was that the present Appellant had been in occupation of the Subject Premises from April 1997 to March 2002 and notwithstanding the fact that supply of electricity has been suspended due to non-payment of applicable charges, for which the responsibility lay solely with the Appellant, the Appellant nonetheless continued to enjoy the use of the Subject Premises and the publicity that the neon sign erected thereon continued to provide, the utility of which was undiminished during daytime, and that the appellant was thus liable to compensate the Respondent/plaintiff in that regard.

5. From the pleadings of the parties in the Underlying Suit, the following issues were framed:
  - (i) Whether from October 1999 onwards the defendant enjoyed the benefit of electricity so that his neon sign would be kept lit up?
  - (ii) Whether the plaintiff and the defendant had executed a lease agreement wherein the responsibility of providing electricity was with the plaintiff?
  - (iii) Whether any amount is due and payable?
  - (iv) Any other relief which this Court deems fit and proper in view of the circumstances of the case?
  
6. The VIIth Senior Civil Judge partly decreed the suit to extent that the Respondent was only entitled to recover an amount of Rs.26,200/- on account of dues in respect of an electricity bill, while the other prayers of the Respondent were disallowed. Being aggrieved, the Respondent preferred the First Appeal, which was allowed vide the Impugned Judgment with the result that the Judgment of 24.08.2009 and Decree of 26.08.2009 were set aside and the Underlying Suit was decreed as prayed.
  
7. Assailing the Impugned Judgment, learned counsel for the Appellant submitted that the same was unreasonable in as much as the first Appellate had acted capriciously while decreeing the Underlying Suit as prayed, ignoring the fact that the Respondent was thereby being granted the rent amount for the period in which the appellant was not in occupation of the Subject Premises for switching on and operating the neon sign.

8. Conversely, learned counsel for the Respondent argued that the Appellant had evidently remained in occupation of the Subject Premises for the period under claim, during which the Appellant's neon sign remained in place. He further submitted that the fault for discontinuation in supply of electricity lay with the Appellant in as much as the Appellant had defaulted in its obligation to pay applicable charges to the utility provider, but that notwithstanding such discontinuation, continued to otherwise avail the benefit of the said sign for all intents and purposes. He submitted that the first Appellate Court had rightly decreed the Underlying Suit on the basis of the evidence and the Appellant had failed to raise any question of law for consideration in these proceedings.
  
9. It light of the divergent findings of the Courts below, it merits consideration that in the context of a second appeal under S.100 CPC, it was inter alia observed by the Honourable Supreme Court in its judgment in the case reported as Madan Gopal & 4 others v. Maran Bepari & 3 others PLD 1969 SC 617 as follows:

*"If the finding of fact reached by the first appellate Court is at variance with that of the trial Court, the former will ordinarily prevail, although it would not possess the same value or sanctity as a concurrent finding. Such a finding by the lower appellate Court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first Court which have been disfavoured in the contrary finding. The finding being at variance with that of the trial Judge, the two will naturally come in for comparison for their comparative merits in the light of the facts of the case and the reasons on which the two different findings have respectively proceeded. If the finding of the first appellate Court cannot be supported on the evidence on record or if it has failed to take into account a material piece of evidence or if it does not reveal a logical basis for differing from the finding of the trial Court, or is otherwise found to be arbitrary or capricious, it will have to be rejected in second appeal."*

10. Having considered the arguments advanced at the bar and examined the record in light of this guiding precedent, it merits consideration the liability of the Appellant in respect of payment arrears of electricity stood adjudged in the Underlying Suit, and was not assailed, and as regards the aspect of possession of the Subject Premises for the period of the claim, in the deposition of the witnesses of the Appellant namely one Shahzad Khan, who represented himself to be the Manager of the Appellant company, it was admitted by the said witness as follows:

*“I do not remember the exact date on which the premises were vacated but it is in the year 2002. It is correct that during the tenure of the lease it was responsibility of the defendant to pay the dues of the KESC.”*

11. As such, it is apparent that the case set up by the respondent/plaintiff as to the Appellants possession and use of the Subject Premises stands squarely established in terms of the deposition of the Appellant’s own witness, providing a logical and sound basis for the assessment of the learned Additional District and Sessions Judge, in light of which the first appellate Court was justified in allowing the First Appeal, setting aside the Judgment of the trial Court and decreeing the Underlying Suit as prayed.

12. In view of the foregoing, the instant Second Appeal is hereby dismissed, with no order as to costs.

JUDGE

Karachi.

Dated: \_\_\_\_\_