IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.251 of 2008
[Government of Pakistan and another vs. Mian Khalid Manzoor]

Present:
Mr. Irfan Saadat Khan, J.
Mr. Muhammad Faisal Kamal Alam, J.

Date of hearings : 04.09.2020 and 11.09.2020

Appellants : Government of Pakistan and Estate Officer, through Mr. Bilal Khilji, Assistant Attorney General for Pakistan.

Respondent : Mian Khalid Manzoor, through Mr. Haad Abid, Advocate.

JUDGMENT

***Muhammad Faisal Kamal Alam, J*:** The Appellants have called in question the Judgment (dated 21.04.2008) and Decree of 20.06.2008 handed down in Suit No.1427 of 2000, instituted by present Respondent against the present Appellants, *inter alia,* for recovery of arrears of rent.

1. Mr. Bilal Khilji, the learned Assistant Attorney General, has argued that learned single Bench while passing the impugned Judgment, misread the evidence, particularly with regard to number of Floors, which were hired by Appellants in the ***"Subject Building"***, viz, a multi storey building by the name ***"Manzoor Square"*** existing on Plot No.PR-1/35, Nouman Plaza Quarters, Karachi.

2. The main stance of Appellants is that since no Agreement was executed by the Parties hereto, therefore, the entire suit of present

Respondent was misconceived and the claim mentioned therein was liable to be discarded by the learned Trial Court. It is further averred that even the amount of rent was disputed, hence, Appellants were not liable to pay the amount claimed by present Respondent, but the rent liability of the former (the Appellants) was only to the extent of Rs.69,775/- *(rupees sixty nine thousand seven hundred seventy five only)* per month as per sanction of Government. According to the Appellants, the impugned Judgment does not fulfill mandatory requirement of Rule 5 of Order XX of the Code of Civil Procedure ***(CPC)***, because evidence that was brought on record, was not properly discussed while deciding the Issues. It is submitted that the impugned Judgment is based on the earlier decision passed in Rent Case No.158 of 1998, which was instituted by the present Respondent against the Appellants and latter (Appellants) did not get proper opportunity to contest the said rent proceeding.

3. Mr. Haad Abid, learned counsel for Respondent while supporting the Judgment has referred to paragraphs-3 and 4 of Written Statement of present Appellants (at page-95 of the present Appeal) to show that corresponding paras-2, 3 and 4 of the plaint are admitted, which were about the terms and conditions of Tenancy between the parties hereto. Mr. Abid further referred Exhibit-**D/6**, which is a correspondence dated 15.01.1998 by Appellant No.2, purportedly containing the terms of the tenancy and submitted that even there was no formal Agreement of Lease/Tenancy but neither relationship *inter se* is denied nor the terms as claimed by Respondent.

4. From the pleadings, following Issues were framed and since they cover the entire controversy, the same can be treated <u>as Points for determination</u> for deciding this Appeal_

"1. Whether plaintiff took the possession of demised premises through execution proceedings No.19/99 on 29.01.2000?

2. Whether the defendant No.2 has taken on rent only 4th and 5th floors of Manzoor Square?

3. Whether the defendant No.2 is liable to account for rent only for fourth and fifth floors which were occupied by Pak PWD?

4. What should be the quantum of rent and other charges payable to the plaintiff and for what period?

5. Whether recovery of arrears of rent falling due 3 years prior filing of the present suit i.e. October, 1997 has become barred under Article 110 of the Limitation Act.?"

5. It would be advantageous to reproduce the prayer clause as contained in the plaint of above suit (filed by present Respondent)_

"That in the light of above stated facts that this Honourable Court be pleased to pass a decree as under: -

a) A decree in the sum of Rs.14925076.00 jointly and severally against defendants.

b) Profit at the Bank rate of 16% per annum against the defendants on the amount claimed as arrears of rent / other charges from the date of filing of the case till the decretal amount realized.

c) Costs of the Suit.

d) Any other relief or reliefs that this Hon'ble Court may deem just and proper under the circumstances of the case be granted."

ISSUE NO.2.

6. Issue No.2, that is, the controversy about how much floors and area was taken on rent, is decided as first Point for determination. As per

the plaint of present Respondent, the Appellants acquired second, third, fourth and fifth floors in the subject building, for the purposes of accommodating Government Offices. Total area alleged to be let out was 30200 square feet at the rate of Rs.8 per square foot and Rs.1 per square foot for maintenance charges, whereas, water and conservancy charges were also required to be payable by the present Appellants; the first Annexure of the plaint, which is a letter dated 23.05.1995 on behalf of Respondent to Appellants, contain the above terms, in which the present Respondent had offered his subject building for rent. Apart from this, Respondent in support of his claim has relied upon a correspondence of 03.09.1995, which was annexed as **D/2** with the plaint. Perusal of this correspondence shows that it was addressed to Appellant No.2 by Respondent in which it is stated that vacant possession was handed over to Appellant No.2 in the subject building on 31.08.1995. This correspondence is a response to an earlier official letter of 28.08.1995 sent on behalf of Appellants, which is Annexure D-1 (of plaint), stating that Appellants agreed to take vacant possession of second, third, fourth and fifth floors, which were to be occupied by different Government Departments, viz. Collectorate of Excise and Sales Tax and Pak PWD (present Appellants). The correspondence dated 12.09.1995 (Annexure D/3) was between the Appellants and Collectorate of Sales Tax, wherein, the latter was called upon to occupy second and third floors in the subject building, while acknowledging that the Respondent (owner) had spent an adequate amount on its renovation, as per the request of Sales Tax Collectorate; but, in the Written Statement it was averred that Sales Tax Department backed out; a letter of 12.09.1995 with Written Statement is attached, from Collectorate of Sales Tax (which was to occupy the second and third floors) wherein it is stated that the said premises was not required by the Collectorate and delay was attributed

towards present Appellant No.2. However, this document was not produced in their evidence. Similarly and surprisingly Respondent who led the evidence through his attorney Mian Abid Manzoor Hussain, did not opt to produce any document, particularly on which Respondent has relied upon and appended with his plaint, hence, those documents which were not exhibited cannot be considered. As against that Appellants' witness (Sohail Sarwar Johra, Joint Estate Officer) has produced following documents, which were Exhibited as '**D-2'** to '**D-7'**_

i. **Exhibit-D/2** is the document of Appellants purportedly 'handing/taking over reports', in which date of occupation is mentioned as <u>03.09.1995 of the fourth floor of the subject building.</u> At the bottom of this document, there is an endorsement that possession taking over on 20.02.1998 and bearing the name of present Respondent.

ii. **Exhibit-D/3**-identical document as above for 5th floor, in which date of occupation is mentioned as 22.10.1995 and same endorsement of 20.02.1998, that possession was taking over by Respondent.

iii. **Exhibit-D/4**-a official correspondence dated 06.01.1998 addressed to Direction General Audit and Accounts (Works Lahore), mentioning the hiring of 4th and 5th floors having covered area of 7550 and 6405 square ft., respectively, in the subject building at the rate of Rs.5 per square ft., which comes to Rs.69,775/- per month with effect from **03.09.1995 to 15.1.1998.**

iv. **Exhibit-D/5**-letter from Appellants to Respondent in which sanction to hire fourth and half portion of 5th floor in the subject building was communicated through official correspondence dated 12.01.1998.

v. **Exhibit D/6-** A letter from Respondent to Appellant No.2 dated 15.01.1998, wherein, the Respondent conveyed his consent to sign the Agreement but "under protest" for the following reasons_

> ***"1) The number of floors hired were four, namely 2nd, 3rd/4th and 5th and not just 4th and half of 5th.***
>
> ***2). Rate of rent as agreed was Rs.8/- per sq. fit. and Rs.1 per sq. fit. service charges.***
>
> ***3). The sanctioned amount should cater for the mandatory 30 day notice period also.***
>
> ***4) Water and conservancy charges should be paid to us.***
>
> ***5) Proof of utility bills payment be provided to us.***
>
> ***6) As no advance has been paid provision should be there for funds for damages if any."***

vi. **Exhibit D/7-**Official correspondence dated 12.01.1998 between the Appellants *inter se,* wherein approval was granted for the hiring the subject premises.

7. Admittedly, no formal Tenancy Agreement was signed between the parties hereto and in view of above undisputed official sanction

dated 06.01.1998 (Exhibit D/4), onus was on Respondent to prove the area/number of floors let out to Appellants so also the amount of rent.

8. Mainly the claim of Respondent was based on the earlier rent proceeding-Rent Case No. 158 of 1998 and subsequent Execution proceeding. Record shows the said rent case was not properly contested by the present Appellants. However, at a belated stage, the Appellants filed an application under Order IX Rule 13 of CPC, so also under Section 12(2) of CPC, for setting aside of the eviction order, but could not succeed in their plea; with the result that eviction order in respect of subject premises attained finality. Despite this fact, in view of the evidence led by the Parties hereto a careful appraisal is still necessary**.**

9. In his examination-in-chief/Affidavit-in-evidence, Respondent has referred to earlier rent proceeding and Bailiff's Report in support of his claim that four floors (2nd, 3rd, 4th and 5th floors) in the subject building were let out to Appellants and not only 4th and portion of 5th floor, as falsely claimed by Appellants. In his Statement, the Respondent has also referred to above paragraphs-3 and 4 of the Written Statement of Appellants, that it is an admission on the part of the latter. In this context, the Respondent has also raised the plea of *res judicata,* that once the fact about number of floors and rate of rent were decided in the rent proceeding, any plea contradictory to the outcome of rent proceeding is not available to present Appellants.

In his cross-examination, present Respondent has denied the suggestion that possession of 4th and 5th floors was handed over to him (Respondent) on 20.02.1998, as the above Exhibits D/2 and D/3 show, but did not dispute the other suggestion that the Bailiff's Report states that at the time of handing over of possession the premises were already

vacant. He has also acknowledged this fact in his cross-examination that the present Appellants have always been asserting before the Rent Controller that they were occupying only 4th and 5th floors in the subject premises. Respondent has further stated that he was claiming rent at the rate of Rs.8 per square ft., whereas, Appellants had offered rent at the rate of Rs.5 per square ft. The Respondent has also admitted that he never approached the learned Rent Controller for fixation of rent in terms of the Rent Laws nor has he filed any application under Section 16(1) of the Sindh Rented Premises, 1979. This last provision is usually invoked for seeking direction of the Rent Controller, about depositing of rent by a tenant during pendency of a case.

Although Bailiff's Report has not been exhibited but since it is an undisputed official document of a judicial proceeding, therefore, it is considered for deciding the controversy at hand. The Bailiff's Report on which both Appellants and Respondent are relying in support of their respective claim, is at page-89 of the Court File and the same has been examined. Its English translation is also in the record. The gist of this Bailiff's Report is that on 29.01.2000, (the date on which the Respondent is claiming to have taken over the possession of the subject premises) present Respondent indicated the 2nd, 3rd, 4th and 5th floors in the subject building, which were completely vacant while doors were opened and no articles were present inside. In this condition the possession of the four floors were handed over to the Respondent.

10. The above sole witness of the present Appellants in his examination-in-chief/Affidavit-in-evidence, has specifically referred to the aforementioned Exhibits-D/2 and D/3, in support of his claim that only two floors were hired with effect from 03.09.1995 and 22.10.1995, respectively. He has further produced the sanction letter (Exhibit-D/4)

for the 4th and part of 5th floor. It is specifically mentioned in paragraphs-9 and 10 of Affidavit-in-evidence (of Appellant's witness) that despite taking over possession of 4th and 5th floors, the present **Respondent again took over the possession of the same through Court's Bailiff in the execution proceeding**. In paragraph-10, the witness has also stated that the rental of both floors were Rs.5 per square ft.

The cross-examination of Appellants' witness was mainly to the extent of earlier rent proceeding filed by Respondent against Appellants, which resulted in eviction of present Appellants, which otherwise was a matter of record, therefore, it was not denied in the cross-examination by the Appellants' witness. On above stated material assertion of Appellants' witness, he was not cross-examined. Significantly the above exhibited Documents produced by Appellants' witness was not challenged by Respondent; particularly to question about its authenticity. Except exhibit D/6 (which is a 'protest letter' from Respondent to Appellants) all of these are official documents issued in pursuance of official acts, which are covered by Articles 92 and 129 (e) of the Qanoon-e-Shahadat Order, 1984 **(Evidence Law)**, attaching presumption of genuineness and legality (respectively) to the above. It means, the above important assertion/stance of the Appellants was admitted by the Respondent. In this regard the celebrated decision of Hon'ble Supreme Court handed down in the case of ***Mst. Nur Jehan Begum through Legal Representatives v. Syed Mujtaba Ali Naqvi,*** 1991 SCMR page-2300, affirmed by subsequent decisions, are relevant.

11. No doubt the afore-referred record of rent proceeding is sacrosanct, but in view of the above unchallenged official documents, the rent proceeding cannot be considered as *res judicata* against present Appellants, because Respondent failed to dislodge and disprove the

presumption of genuineness about official documents and correctness/legality of official acts (as already observed hereinabove). In the impugned Judgment while deciding this question as Issue No.2, regretfully, appraisal of evidence is not done rather the finding is given on the basis of pleadings of the present Respondent, which in the present circumstances cannot be sustained; ***firstly,*** because it is a settled Rule as envisaged, *inter alia,* in Article-102 of the Evidence Law, that documentary evidence excludes the oral evidence. ***Secondly***, rule for an admission in terms of Article-30 of the Evidence Law, is, that it (admission) should be specific and unambiguous without any further conditionality attached to it. No doubt paragraphs-3 and 4 of the Written Statement have not disputed the corresponding paras of the plaint, but it is to be read with subsequent paragraphs; paragraph-5 of the Written Statement is very specific about the stance of Appellants, which has categorically refuted the plea of Respondent about renting out of four floors to the Appellants. ***Thirdly***, Exhibit D/6, (also relied upon Respondent), clarifies the position while contradicting stance of Respondent, that **he subsequently accepted** the terms of Appellant as contained in the official documents, viz. Exhibits-D/4 and D/5 (***ibid***), at least to the extent of number of floors and rate of rent.

It can be concluded that the Appellants took on rent the 4th and part of 5th floors in the subject building from Respondent at the rate of Rs.5 per square feet, which comes to Rs.69,775/- per month. From the above it is proved that at the time of handing over of possession by Court Bailiff, **the premises were already vacant.**

12. Thus, the point of determination is answered in the terms that only 4th and portion of 5th floor were hired by Appellants from the Respondent for the period 03.09.1995 upto 20.02.1998, (when the possession was handed over to Respondent).

Issue No.1/second Point for determination.

13. Since the entire evidence has been discussed herein above, therefore, the reply to this is, that although possession of the subject premises was taken on 29.01.2000, through Bailiff of the Court in the above execution proceeding, but the Respondent could not successfully rebut the testimony of the Appellants' witness, that on the above date (29.01.2000) possession of the subject premises was taken second time through the execution proceeding of the above Rent Case, ***whereas***, possession of the 4th and 5th floors were already handed over to the Respondent vide Exhibit-**D/2**and Exhibit-**D/3**, that is, on **20.02.1998**, therefore, finding in Affirmative in the impugned Judgment is not correct and is set-aside.

Issues No.3 and 4/third and fourth Points for determination are taken up together as they are interlinked.

14. Appellant No.2 is liable to pay rent only for 4th and 5th floors to the Respondent. With regard to quantum of rent and other charges, since in this regard the offer of the Respondent was not accepted and the evidence brought on record is conclusive that the rate of rent was Rs.5 per square ft., therefore, the Appellants are liable to pay this amount of rent for the area they had occupied, viz. 7550 square ft. (4th floor) + 6405square ft. (5th floor) at the rate of Rs.69,775/- *(rupees sixty nine thousand seven hundred seventy five)* per month from **03.09.1995,** which itself is admitted by Appellants in their official correspondence upto the date when the possession was handed over to Respondent, that is, on **20.02.1998.** Thus Appellants are liable to pay to Respondent an amount of Rs.2,023,475/- (rupees two million twenty-three thousand four hundred seventy-five only).

No tangible evidence was brought on record by Respondent for his claim about payment of alleged charges by Appellants. Similarly, no utility bills have been produced in the evidence to substantiate the claim of Respondent in this regard. Thus, Appellants are liable to pay the above amount only to Respondent.

In view of the above discussion, findings on the above Issues in the impugned Judgment are erroneous and result of non-reading of the evidence, hence, overruled.

Issue No.5/fifth Point for determination

15. The above Issue No.5 / Fifth Point for determination is to be answered in favour of Respondent, because Respondent undisputedly was agitating his grievance in the above rent proceeding. Even otherwise, the overall conduct of the Appellants is not *bona fide*, because in all these years they never attempted to settle their liability of payment of rent with the Respondent. Appellants being officials have acted in violation of Section 24-A of the General Clauses Act, 1897, enjoining the officials to act reasonably, fairly and justly, therefore, the claim of Respondent is not time barred. The Appellants could have shown their *bona fide* by depositing the rent as per their calculation with the Nazir of this Court after seeking requisite permission, but they have not done so. Admittedly, they kept the Respondent, an owner of the subject premises deprived of his rental income for the past two decades (at least), which is ironic. With these peculiar facts, we are of the view, that Respondent should be paid a markup also over and above the arrears of rent. In the present circumstances, Article-110 of the Limitation Act, 1908, (prescribing three years' time limit for recovery of arrears of rent) is not applicable. This Point is answered accordingly.

16. Adverting to the case law mentioned in the impugned Judgment, which have been carefully taken into the account. The reported decisions pertain to Order XII Rule 6 of CPC, that is, judgment on admission; explaining the Rule of '*acquiescence*'; and expounding principle of *res judicata.* In view of the above discussion, the reported decisions are not applicable to the facts of the present Appeal and hence are distinguishable.

Exfacie the impugned Judgment is based on the averments of Respondent and the outcome of earlier rent proceeding and does not contain appraisal of evidence and thus does not fulfill the requirement of Rule 5 of Order XXI of the CPC, which is mandatory in nature. Consequently, to the extent of the above discussion, the impugned Judgment is set-aside. Present Appeal is allowed to the extent that Appellants are liable to pay the above amount of rent (arrears of rent), that is, Rs.2,023,475/- (rupees two million twenty-three thousand four hundred seventy-five only) to the Respondent with a markup of 10% from the date of institution of Suit till realization of the amount.

17. Parties to bear their respective costs.

JUDGE

JUDGE

Dated: 09.10.2020

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