

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui

C.P. No. S-2068 of 2016

Gulistan Textile Mills Limited

Versus

Additional District & Sessions Judge VIII & another

Date of Hearing: 30.04.2021

Petitioner: Through Mr. Abdul Karim Khan Advocate.

Respondent No.2: Through Mian Mushtaq Ahmed Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.-This writ petition has been filed by the tenant in respect of a premises situated on the Second Floor of the building commonly known as “Finlay House” built on Plot/Survey No.3/1, Sheet No.RY-5, Railway Quarters, situated at I.I. Chundrigar Road, Karachi.

2. An application under section 8 of Sindh Rented Premises Ordinance, 1979 was filed by respondent No.2 James Finlay Limited, being the owner/landlord of building in question. After a contest the application was allowed by the Rent Controller and fair rent was fixed at Rs.10/- per sq. foot per month from the date of order. Aggrieved of it respondent No.2/landlord filed an appeal bearing FRA No.428 of 2010 and in terms of impugned judgment, the rate was revised from Rs.10/- per sq. foot to Rs.50/- per sq. foot per month.

3. In addition to fixation/re-fixation of fair rent, the appellate Court also observed that this enhancement shall be from the institution of rent application, instead of order, and will remain operative for three years from the date of its fixation whereas after three years the rent will automatically be enhanced/increased by 10% after every year.

Respondent however was allowed to pay the arrears in six months' time from the date of the judgment of the appellate Court.

4. Aggrieved of above judgment of appellate Court, the tenant/petitioner has filed this petition on the consideration/ground that the fixation of the fair rent by the appellate Court is contrary to the evidence available on record.

5. I have heard learned counsel for parties and perused material available on record.

6. Respondent No.2/landlord in support of its application filed affidavit of one Major (R) Syed Husnain Jeelani who exhibited documents in support of the statement recorded on oath. The documents Ex. A/2 to A/5 are formal documents. Ex. A/6 is a deed of lease of September 29, 2006 between State Life Insurance Corporation and Citibank. This was filed by the landlord's witness to establish that the adjacent building of State Life Insurance Corporation is fetching Rs.62.0 per sq. foot per month in respect of second floor, which is in occupation of Citibank. Similarly Ex. A/7 is also a lease deed executed in 2006 between State Life Insurance Corporation and Citibank. This is in respect of ground and first floor. By virtue of this deed the landlord was fetching 52.63 per sq. foot.

7. Ex. A/8 is apparently a letter of State Life Insurance Corporation issued and addressed to one Maudood A. Khan of ORR, Dignam & Co. It is of 22.06.1998 whereby premises was offered for rent at the rate of Rs.25 per sq. foot per month inclusive of car parking and 10% escalation. Ex.A/9 again is a letter of 20.06.1998 of State Life Insurance Corporation wherein it was suggested that the rate of rent was agreed at Rs.23 per sq. foot excluding electricity, gas, water and car parking charges. Ex. A/10 is a letter of 10.07.1998 of ORR, Dignam & Co. addressed to the Assistant General Manager of State Life Insurance Corporation of

Pakistan wherein apparently rate of rent was agreed at Rs.23 per sq. foot. Ex. A/11 is a letter of 27.06.2006 issued by ORR, Dignam & Co. to State Life Insurance Corporation which disclosed a lump-sum rent of two offices on third floor of the building of State life Insurance Corporation.

8. Ex. A/12 is a lease deed of Pakistan National Shipping Corporation and NIB Bank in respect of ground, first, second and seventh floor and the cumulative rent being fetched by them was Rs.43.93 per sq. foot. The deed was executed on 02.03.2006.

9. Ex. A/13 is an important lease deed executed between James Finlay Limited and New Hampshire Insurance Company. It seems to be a registered instrument and executed in November, 2003. It is in respect of a portion of third floor yielding rent of Rs.84,490/- at the rate of Rs.25 per sq. foot plus 5% service charges.

10. Until Ex.A/13, as signed by the Presiding Officer, there was no discrepancy whereas while exhibiting A/14 perhaps inadvertently a Power of Attorney was exhibited as A/14 instead of a lease deed of 12.11.2003 between James Finlay and Gulistan Textile Mills Ltd. This deed is actually Ex.A/14 page 175 of R & P, which exhibit number was inadvertently marked to a Power of Attorney available at page 143of the R & P. Thus, for all intent and purposes lease of James Finlay and Gulistan Textile Mills Ltd of 12.1.2013 is being considered as Ex. A/14. This is a lease deed executed by James Finlay with Gulistan Textile Mills Ltd. i.e. between the petitioner and respondent No.2 in respect of third floor of the same building. Present controversy is with regard to second floor.

11. Ex. A/15 to A/212 onwards are the statements disclosing the maintenance charges of the building along with attached challans and debit vouchers PT-1s, conservancy charges etc.

12. Perusal of record reveals that deeds of lease executed in between State Life Insurance Corporation and Citibank as Ex.A/6 and A/7 loses its priority in its application in presence of a lease deed (Ex.A/13 page 131 of R & P) of the same building i.e. James Finlay and New Hampshire Insurance Company. Though it is in respect of third floor and executed in the year 2003 but would still likely to be applied in priority as against rest of the lease deeds of other buildings. The lease deeds of James Finlay (Ex.13 and Ex.14) apparently are the only deeds in respect of the building in question and filed by an authorized person i.e. witness of the landlord whereas rest of the documents/deeds which have been filed by the witness of the landlord have not been “proved” as neither landlord nor its witness was either an author or executant/ recipient of the said exhibits/documents nor the same were addressed and/or sent to them. Hence no doubt other documents were produced by the witness of the landlord but under Qanoon-e-Shahadat Order, 1984 the contents thereof are yet to be proved.

13. The office of the petitioner and/or demised premises is situated on the second floor of the building whereas Ex. A/13 and A/14 are in respect of third floor of the same building and the tenants are New Hampshire Insurance Company and Gulistan Textile Mills Ltd. (petitioner in this petition but it is with reference to other tenement on third floor). In respect of both the tenements situated on the third floor of the building the landlord James Finlay was fetching Rs.25 per sq. foot per month in the year 2003. There is no direct evidence as to the rent which is being lawfully recovered in respect of period which is being claimed against the petitioner in the year 2006 as these lease deeds were of 2003 i.e. A/13 and A/14.

14. Original application for fixation of fair rent was filed in the year 2006. Original rent of office space measuring 6624 sq. feet situated on

second floor of the building (subject premises) was Rs.4.471 per sq. foot at the time of filing application for determination of fair rent excluding electricity charges etc. whereas the landlord/respondent claimed fair rent at Rs.50 per sq. foot on account of rent of the similar adjoining premises, apart from inflation and devaluation of Pak rupee, cost of construction, repair and maintenance charges etc. The Rent Controller while applying the cumulative effect of all components of Section 8 of Sindh Rented Premises Ordinance, 1979 came to the conclusion that the landlord is entitled for a fair rent at the rate of Rs.10/- per sq. foot from the date of order. Rent Controller was of the view that the building where the subject premises is situated is an old building which cannot be compared with new building or the one providing better facilities. The building maintenance however was denied by the tenant's witness.

15. The appellate Court in appeal filed by the landlord James Finlay Limited, discussed the evidence in terms of paragraph 10 of the impugned judgment as well as relevant documents which per appellate Court had an effect on the determination of fair rent. The appellate Court considered Ex.A/6, A/7, A/12, A/13 and A/14.

16. Ex. A/6 and A/7 are in respect of buildings of State Life Insurance Corporation and hence the appellate Court has not seriously perused the documents which were exhibited for the determination of fair rent.

17. In paragraph 11, the appellate Court hypothetically considered the overall inflation as well as rate of taxation, which was allegedly enhanced from time to time. The appellate Court found that such inflation and enhancement in taxation was proved and established by the respondent/landlord through documentary evidence. It is also stated that the maintenance charges have also been proved by documents attached with affidavit-in-evidence. Learned appellate Court however has failed to discuss and deliberate the documents in this regard.

18. Similarly, a presumptive view in respect of overall inflation and rate of taxes cannot be applied. The maintenance claimed to have been made/done by the landlord/respondent and in support thereof they have filed some accounts and debit vouchers but it pertains to a period w.e.f. March 2007 onward. How these debit vouchers and maintenance bills are being applied to entire building and on what calculation and basis its ratio in terms of facilities provided to the premises is being applied, is inconceivable on the strength of the evidence available on record. Floor-wise true calculation is not provided. The presumptive analysis thus is beyond the domain and jurisdiction of the Rent Controller. The statistics in terms of inflation and maintenance charges should have been provided in statement recorded on oath and only then it could have been taken into consideration by the appellate Court. Filing plethora of documents disclosing them as debit vouchers in respect of maintaining the entire building is inconceivable. Statistics showing percentage of taxation over the building in question as well as maintenance has to be applied to entire building and has to be established statistically and not generally. Such data was not provided to Rent Controller. Taxation and maintenance are differently applied on ground floor and upper floors.

19. The appellate Court was also of the view that in Rent Case No.700 of 2007 filed under section 8 of Sindh Rented Premises Ordinance, 1979 between same parties in respect of the premises on third floor of the building, fair rent was fixed at Rs.35/- per sq. foot per month whereas the same Rent Controller, which had fixed fair rent of third floor of the building as Rs.35/- per sq. foot, has determined it at Rs.10 per sq. foot for second floor in the instant controversy. Thus, the appellate Court was of the view that the rate of rent of the second floor should have been more than the fair rent of third floor of the same building.

20. I am not convinced with above analysis, proposition and presumptive analysis of the appellate Court. Firstly, determination of fair rent is dependent on the quality of the evidence in each case which may determine fair rent. The evidence recorded in Rent Case No.700 of 2007 filed under section 8 of Sindh Rented Premises Ordinance, 1979 was neither available nor readable by the appellate Court or even before the Rent Controller which determined the fair rent at Rs.10 per sq. foot. Apparently the judgment in above referred Rent Case and the evidence recorded therein were also not exhibited or relied upon. It is only at the appellate stage when these documents i.e. judgment and evidence were asked to be considered. I am of the view that in the absence of these depositions being made part of trial Court's order, this factor alone should not have disturbed the findings of the Rent Controller as the quality of evidence in the instant matter may be different than the one recorded in earlier case. In addition to this the parties/landlord never relied upon the earlier determination of fair rent by the same Rent Controller in the earlier rent case.

21. Similarly in presence of lease deeds of the same building between same landlord and tenant or between same landlord and other tenants, the reliance/applicability of rent or fair rent of other buildings in the adjoining locality should not have been applied as a priority, where in respect of which direct evidence is available. When a building is operated by lifts there is not a serious degree of difference between second and third floor of the same building where premises are situated.

22. Both the petitioner and respondent No.2 have relied upon a consolidated judgment of the appellate Court which is passed in FRA Nos.425 and 429 of 2010 challenging order of the Rent Controller determining fair rent of a portion of third floor at Rs.35 per sq. foot per month. The appeals were dismissed as the appellate Court as did not

find anything to interfere in the order of the Rent Controller. No one claimed to have challenged the consolidated judgment of the appellate Court in aforesaid FRA Nos.425 and 429 of 2010 arising out of Rent Case No.700 of 2007.

23. Similarly, the application for determination of fair rent as Rent Case No.1603 filed in the year 2005 also comes within the parameters of the lease deed executed in the year 2003 by James Finlay with New Hampshire Insurance Company and Gulistan Textile Mills Ltd. (for different tenement). Both are exhibited as Ex.A/13 and A/14 respectively hence the closest document that should have been applied by the Rent Controller and the appellate Court are these two documents which are lawfully filed and proved by the witness of the landlord and in the year 2003 wherein the rate was agreed at Rs.25 per sq. foot though in respect of a portion of the third floor of the building. Apart from this the landlord has not placed any subsequent lease executed in respect of same premises.

24. So far as other lease deeds in respect of buildings which are known as State Life Insurance Corporation are concerned, the landlord has not demonstrated if the condition of the building and the facilities provided therein are similar and/or identical to that of subject building. In the presence of the primary evidence which is Ex.A/13 and A/14, the other lease deeds claimed to be of same vicinity should not have been applied, at least not in priority.

25. Though the Rent Controller while determining fair rent of the premises in question has taken a very conservative view by fixing fair rent at Rs.10/- per sq. foot, yet I am of the view that fair rent fixed by the appellate Court is on higher side. The Rent Controller and appellate Court were required to provide a cumulative effect of all those factors available under section 8 of Sindh Rented Premises Ordinance, 1979

subject to availability of evidence though the quantum of inflation and the enhancement of taxation has not been statistically provided in terms of applicability of such claim/charges per sq. foot yet the other factors may contribute for the determination of fair rent.

26. The rise in cost of construction has also not been demonstrated statistically. It is only presumptive analysis that cost of construction rises with the passage of time, however, the witness is required to provide data of such rise in cost of construction through his affidavit or any expert witness. It is a difficult assignment but the requirement of law. This burden could be relieved had appropriate lease deeds of same building or of adjoining building having similar facilities could be cited in evidence. It would have been justified for both the landlord and tenant had a deed of lease in respect of same building with same set of facilities is considered, though of the third floor of the building, as it would not have taken away any benefit from any one if yardstick of the said lease deeds is applied to premises in question. As I have stated that in a building operated by a lift there is not much difference between second and third floor, I am thus of the view that keeping in view quality of evidence available on record the re-determination of fair rent from Rs.10 to Rs.50 per sq. foot per month by the appellate Court is on higher side and not in consonance with evidence and the fair rent should not have been more than Rs.35/- per sq. foot per month.

27. The appellate Court has also enhanced the rent of the premises by 10% every year after first period of three years is over. This perhaps is not within the domain and jurisdiction of the Rent Controller exercising jurisdiction under section 8 of Sindh Rented Premises Ordinance, 1979 as the said provision provided only fixation of fair rent on the cumulative effect of four factors i.e.

- (a) The rent of similar premises situated in the similar circumstances, in the same or adjoining locality.*
- (b) The rise in cost of construction and repair charges.*
- (c) The imposition of new taxes, if any, after commencement of the tenancy; and*
- (d) The annual value of the premises, if any, on which property tax is levied.*

28. Section 8(2) of Sindh Rented Premises Ordinance, 1979 enables the Rent Controller to revise such fair rent on account of changes/ additions brought or improving the premises in question which is not the case here. Similarly, there cannot be an automatic enhancement at the rate of 10% per annum on the fair rent in terms of Section 9 of Sindh Rented Premises Ordinance, 1979. It provides a maximum cap of 10% per annum on the existing fair rent and not an automatic enhancement to its maximum. Such enhancement at any particular rate, which in any case should not be 10% per annum, is dependent on certain factors which were not decided in the application under section 8 of Sindh Rented Premises Ordinance, 1979. Besides, there was no prayer for such enhancement under section 9 of Sindh Rented Premises Ordinance, 1979.

Section 9 is reproduced as under:-

“9. Limit of Fair rent. (1) Where the fair rent of any premises has been fixed no further increase thereof shall be effected unless a period of three years has elapsed from the date of such fixation or commencement of this Ordinance whichever is later.

(2) The increase in rent shall not, in any case, exceed ten per cent per annum on the existing rent.”

29. Hence I score of determination of appellate Court also insofar as enhancement at 10% every year after three years of the determination of fair rent is concerned, however, I maintain the applicability of fair rent w.e.f. date of application.

30. In view of above, the petition is allowed with the modification to the effect that the fair rent of the premises is fixed at Rs.35/- per sq.

foot per month from the date of filing application under section 8 of Sindh Rented Premises Ordinance, 1979. The arrears of difference in the rent be deposited within a period of three months.

Dated: 25.05.2021

Judge