

HIGH COURT OF SINDH AT KARACHI

C.P. No.S-311 of 2012.

Present: Mr. Justice Abdul Rasool Memon, J.

Date of hearing: 10.10.2012.

Mr. Masood Shaharyar, Advocate for the
Petitioner.

Mr. Tufail H. Ebrahim, Advocate for the
Respondent No.1.

J U D G M E N T

Abdul Rasool Memon, J. The petitioner Muslim Commercial Bank has filed this Constitution Petition to impugn Judgment dated 16.02.2012 and order dated 09.8.2011 passed by the respondents No.2 and 3 respectively in Rent Case No.291/2010 and First Rent Appeal No.193/2011.

2. The facts of the case giving rise to this petition are that petitioner is the tenant of the respondent No.1 in respect of Shop No.20 (Ground Floor) admeasuring 583 Sq. Ft. in Royal Apartment constructed on plot No.SB-3 situated in K.D.A. Scheme No.1, Karachi. The demised premises was rented out to the petitioner on monthly rent basis for three years vide tenancy agreement dated 12.12.2006 at the rate of Rs.80,000/- per month which shall be inclusive of present and future taxes, levies, dues and cesses. Per agreement the schedule is mentioned as under:-

SCHEDULE

<u>Date</u>	<u>Monthly Rent</u>	<u>Amount</u>
12.12.2006 to 11.11.2007	Rs.80,000/-	Rs. 88,000/-
12.11.2007 to 11.10.2008	Rs.88,000/-	Rs. 968,800/-
12.10.2008 to 11.09.2009	Rs.96,800/-	Rs.10,46,800/-

3. As per agreement the petitioner was required to pay advance rent in lump sum of 11 months basis. The petitioner paid the advance rent up to 11.9.2009. On 29.8.2009 the respondent No.1 requested the petitioner to confirm renewal of lease agreement for another period of three years on terms and conditions mentioned therein or alternately to vacate the premises so that the respondent No.1 may not suffer any loss because as per conditions mentioned in the lease agreement if the lease was not mutually renewed for the period of three years, then the petitioner was required to handover the physical possession to the respondent No.1. On 10.10.2009 once again the respondent No.1 requested the petitioner to confirm renewal of agreement for another period as per terms and conditions of the agreement. The respondent No.1 was informed by the petitioner's representative that his renewal of agreement was being considered by the petitioner and would be accepted in due course of time.

4. It is alleged in the rent application by the respondent No.1 that inspite of assurance, no renewal of lease agreement was executed and thus petitioner failed to pay the advance rent for further period of 11

months commencing from 12.9.2009 to 11.8.2010 and thereby the petitioner willfully neglected to pay the advance rent in respect of demised premises to the respondent No.1. Further that the respondent No.1 through courier service sent two Pay Orders being alleged rent from 12.9.2009 to 31.12.2009 Rs.335,209/- and for 01.01.2010 to 31.3.2010 amounting to Rs.275,880/- which was dispatched on 27.3.2010 and received by the respondent No.1 on 29.3.2010. As per respondent No.1 the said rent was received under protest. The respondent No.1 therefore, brought the rent application for ejectment of petitioner on the ground of willful default in payment of rent.

5. The petitioner filed written objections admitting the relationship of landlord and tenant, rate of rent and the contents of agreement but claimed that the lease agreement was un-registered, therefore, under section 17 and 49 of the Registration Act, does not create any right, title or interest. The receipt of notice from the respondent No.1 for renewal of agreement is admitted and it is stated that the respondent No.1 demanded enhancement of rent to the tune of 24% approximately. It is further claimed that the petitioner has not committed any default and in view of section 15(2)(ii) of Sindh Rented Premises Ordinance, 1979 as amended in 2011 the petitioner was protected as the default was not exceeding beyond 6 months.

6. The learned Rent Controller vide order dated 09.8.2011 allowed the rent application of the respondent No.1 (landlord) holding that the petitioner has committed willful default in payment of rent for 6 months and 20 days.

7. The petitioner preferred appeal against the said order bearing F.R.A. No.193/2011 which was dismissed by learned IIIrd Additional District Judge (East) vide order dated 16.02.2012 and upheld the findings of Rent Controller.

8. Per Mr. Masood Sheharyar, learned counsel for the petitioner, findings of the learned two courts below are contrary to the facts and record; that respondent No.2 and 3 have erred in appreciation of evidence of the parties on the point of default, advance payment of the rent, un-registered lease agreement and the status of the present petitioner as a statutory tenant. He has further contended that material pieces of evidence have been omitted and not considered; that under amended section 15(2)(ii) of Sindh Rented Premises Ordinance, 1979 the petitioner is protected if the default committed not exceeding 6 months. He further added that observation made by the learned Rent Controller that the petitioner has committed default for 6 months and 20 days treating the advance payment of rent is contrary to law. In support of his contention he has placed reliance on the cases reported as ALLIES BOOK

CORPORATION through L.Rs. v. SULTAN AHMAD and others (2006 SCMR 152), MUHAMMAD LEHRASAB KHAN v. Mst. AQEEL-UN-NISA and 5 others (2001 SCMR 338) and AMINA NUZHAT BABAR v. KHAN SHER (2002 CLC 1 Peshawar).

9. On the other hand Mr. Tufail H. Ebrahim on behalf of respondent No.1 has contended that on expiry of the agreement the terms and conditions of the said expired agreement as to the rate of rent which are permissible having terms not inconsistent with law or repugnant to that special law remain operative for other purposes. He has further contended that non-registration of the lease agreement does not operate to create, declare, assign limit or extinguish right or title or interest in any immovable property but could be received in evidence for collateral purpose and the same is not relevant to disposal of appeal in rent cases. He has contended that the agreement which is executed between the petitioner and respondent No.1 is an admitted document. The rent in advance was to be paid by the petitioner and thereby if the period expired on 11.9.2009 is to be taken into consideration then the petitioner had to pay rent in advance from 12.9.2009 and the rent for 12.9.2009 to 31.3.2010 was dispatched on 27.3.2010 and received by the respondent No.1 on 29.3.2010 revealed that the petitioner had committed default in payment of rent for 6 months and 20 days, therefore, he cannot take the benefit of section 15(2)(ii) Proviso (as inserted by Sindh Rented Premises

(Amendment) Ordinance (XIV of 2011). Per learned counsel the agreement dated 12.11.2006 the periods of 11 months each have been mentioned, therefore, on the very face of it if the contents of said agreement be read as a whole, the period of agreement comes to 33 months notwithstanding the period of three years. mentioned therein that per agreement the rent was to be increased 10% after the period of 11 months and the rent was payable in advance. He supported the impugned order and judgment and further contended that constitutional jurisdiction of the High Court in such matter is very much limited and confined only to ascertain whether court has flouted the provisions relating to the statute or failed to violate the law as laid down by the superior courts. According to him on the very face of it the concurrent findings of facts arrived at by both the courts below do not suffer from any legal flaw, thus C.P. is not maintainable.

10. In support of his contention learned counsel for the respondent No.1 has placed reliance on the case of AKBAR ALI and 4 others v. Mst. HAMEEDA SAHAF (1993 CLC 290), MUHAMMAD ASHRAF v. MUHAMMAD SHARIF AND 3 OTHERS (PLD 1971 Lahore 610), NASEEM BEGUM v. Mrs. RAEESA KHATOON and 2 others (1997 MLD 1030), MUHAMMAD YUNUS MALIK v. Mst. ZAHIDA IRSHAD (1980 SCMR 184), NOOR HASSAN AND ANOTHER v. TUFAIL AHMAD AND ANOTHER (1980 SCMR 144), Syed ARSHAD ALI HASHMI v. KHURSHEED BEGUM (2001 CLC 690), MUHAMMAD ASIF RANA v. ABDUL MAJEED ALI

M. SABADIA through Attorney and 2 others (2010 CLC 214), Syed IZHAR ALI v. Mst. AMINA BEGUM through L.Rs and 2 others (2011 CLC 633), MESSRS RAHMAN COTTON FACTORY v. MESSRS NICHIMEN Co. LTD. (PLD 1976 Supreme Court 781), Sh. JAMILUR RAHMAN v. AKBAR HASAN (1985 CLC 922), Mirza ABDUL AZIZ BEG v. MUSHTAQ AHMED SHEIKH (1980 SCMR 834), MUHAMMAD SHARIF AND ANOTHER V. MUHAMMAD AFZAL SOHAIL (PLD 1981 Supreme Court 246, ZAHIR AHMED v. SETH SUGNICHAND AND ANOTHER (PLD 1965 W.P) Karachi 195 and Mst. ZARINA KHAWAJA v. Agha MAHBOOB SHAH (PLD 1988 Supreme Court 190).

11. It is and admitted fact on record that rent for the above periods of each 11 months was paid advance in lump sum as per said agreement and past practice. On expiry of period of agreement petitioner became statutory tenant. As last tenure of agreement was from 12.10.2008 to 11.9.2009 thus petitioner was liable to pay the advance rent from 12.9.2009 as per terms of the agreement. The petitioner sent two Pay Orders for the rent from 12.9.2009 to 31.12.2009 bearing No. 2514058 amounting to Rs.335,209/- and another Pay Order No. 2514056 for a sum of Rs.275,880/- for the rent from 01.01.2010 to 31.03.2010 which were dispatched on 27.3.2009, received by the respondent No.1 on 29.3.2009, this period comes to 6 months and 20 days. So far as the contention of learned counsel for the respondent No.1 that the terms and conditions which are inconsistent or repugnant to the Sindh Rented Premises

Ordinance, 1979 are to be disregarded and all other terms and conditions of the lease agreement would remain alive and operative viz. the rate of rent, time and mode of payment of rent. Similar point was involved in the case of Mrs. Zarina Khawaja v. Agha Mahboob Shah (PLD 1988 Supreme Court 199) wherein it was held as under:-

"It needs to be clarified that the four judgments of this Court reported in 1980 Law Journals and one in 1985, though seemingly containing some element requiring further explanation, are not mutually exclusive. They are in the cases of Muhammad Yousuf PLD 1980 SC 298; Muhammad Yunus Malik 1980 SCMR 184; Alif Din 1980 SCMR 767; Mirza Abdul Aziz Beg 1980 SCMR 834 and Sheikh Abdus Sattar PLD 1985 SC 148. One case of 1981 viz. Muhammad Baqar Qureshi v. Mst. Razia Begum 1981 SCMR may also be included. In the first case the concept of holding over in the general law of Transfer of Property Act (No. IV of 1882) was accepted, as lawful vehicle of keeping the terms of an expired agreement alive subject of course to repugnancy with any provision of the rent law to the contrary. In particular, the covenants as to advance rent and date of payment in the expired agreement were enforced and thus, the agreement was continued. Same is the position in the third case. In both of them, Muhammad Ashraf v. Muhammad Sharif PLD 1971 Lah. 610, a case of Lahore High Court, was approved. In the second case though the tenancy, after expiry of the agreement, was termed as 'statutory' and holding over concept was kept excluded but the terms of tenancy as to rate of rent were nevertheless taken from the so-called expired agreement. Its naming as "statutory rent" was not meant to obliterate its source being the same agreement. And, it is important to emphasise, that at page 306 the possibility of expired agreements having terms not inconsistent with the rent law, has been visualized, though stated to be

exceptional. Thus, such terms would continue to operate. We may add that in the ultimate analysis such tenancies which are controlled by rent law are in any case composite; having both statutory and mutually agreed terms; and, when an expired agreement is kept alive, this composite nature does not change, though law of holding over is added to the rent law and the agreement. The fourth case recognizes advance rent and security deposit as possible subjects of an agreement enforced by the rent law. The fifth case goes in line with the third case and not beyond it but in a different context. The remaining cases also do not change the position.

Thus, it can safely be said that the rent laws permit all covenants in agreements, alive or expired; which, are permissible under the general law and not inconsistent with or repugnant to that special law; and enforces the same accordingly whenever it is so required under that law. In addition, they also remain operative for other purposes permitted by the general law. The fourth question is answered in the negative".

12. In view of the dictum laid down in the aforesaid case the tenancy between the petitioner and the respondents No.1 was governed by the tenancy agreement dated 12.12.2006. As per contents of said agreement and past practice the rent was to be paid lump sum in advance for each 11 months with increase by 10%.

13. The admitted and factual position is that rent for the period commencing from 12.9.2009 up to 31.3.2010 and 01.01.2010 to 31.3.2010 was paid through two pay orders on 29.3.2010 after a delay of 6 months and 20 days. The said date of payment has not been denied in the written statement and the witness of the petitioner

in his cross-examination, on the contrary in clear terms admitted the dispatch of rent through pay orders from 11.9.2009 up to March, 2010 through T.C.S. on 27.3.2010 and received on 29.3.2010, it clearly indicates that there is default in payment for more than 6 months on the part of petitioner, thus the findings given by the two courts below do not suffer from any misreading or non-reading of evidence, therefore, in the circumstances discussed above, the second Proviso of section 5(2)(ii) is not applicable in this case as the four conditions contained in the *ibid* section have not been complied with or completed which are (i) filing of ejectment application on the sole ground of default in payment of rent, (ii) the period of default not exceeding 6 months, (iii) admitting his liability by tenant on first date of hearing for payment of claimed rent, (iv) that it was not the case of first default and direction of the Rent Controller regarding payment of rent claimed on or before the date to be fixed for that purpose. As per contents of written statement filed by the petitioner he has not admitted the default on the first date of hearing as his liability to pay rent claimed, and the default committed has exceeded 6 months, therefore, petitioner cannot take benefit of section 15(2)(ii) of Sindh Rented Premises Ordinance, if any law is needed on this point reliance may be placed on the case of *Muhammad Asif Rana v. Abdul Majeed Ali Sabdia supra*.

14. Regarding non-registration of the agreement it may be mentioned here that the registration of document is compulsorily under the law when it shall be used as proof for creating, declaring, transferring, limiting or extinguishing in present or in future right, title or interest in any immovable property.

15. In the instant case no such right, title or interest is being enforced on the basis of lease deed as the Respondent No.1 has come to the court for seeking ejectment of the petitioner from the demised premises. The relief of ejectment obviously is not in nature or right or interest which is enforceable in accordance with the lease deed. Moreover, the right of ejectment is statutory right which is conferred upon the landlord by Sindh Rented Premises Ordinance. In this connection reference may also be made to subsection(j) of section 2 of Sindh rented Premises Ordinance wherein the definition of tenant is given as under:-

(j) "tenant" means any person who undertakes or is bound to pay rent as consideration for the possession or occupation of any premises by him or by any other person on his behalf and include--

(i) any person who continues to be in possession or occupation of the premises after the termination of his tenancy;

(ii) heirs of the tenant in possession or occupation of the premises after the death of the tenant; and

16. It would appear from the above provisions of law that the right of ejectment can be enforced by the respondent No.1 in respect of what has been specified in the lease agreement, therefore, it is not correct to say that the said document is being used for enforcement of any right. All that is being ascertained from the lease agreement is the rate of rent payable by the tenant and the mode of its payment. Thus non-registration of the lease agreement is not relevant to disposal of the rent appeal. Even otherwise, it was no longer prohibited to receive such unregistered document and used the same for collateral purpose. In this respect I am fortified by a case of Messrs Rehman Cotton Factory v. Messers Nichiman Company Limited (PLD 1976 Supreme Court 781) and also case of Shaikh Jamilur Rehman v. Akbar Hassan (1985 CLC 922).

17. For the foregoing reasons, I am of the considered view that the petition merits no consideration and the same is dismissed accordingly. However, looking to tenure of tenancy and business of the petitioner, the petitioner is granted three months time for shifting his business from today and to vacate the demised premises and hand over the same to the respondent No.1. The petition stands dismissed accordingly.

JUDGE

Arif

ORDER SHEET
HIGH COURT OF SINDH, KARACHI.

C.P. No.S-311 of 2012.

Date	Order with signature of Judge
------	-------------------------------

MCB Bank Limited
KDA Scheme No.1 Branch, Karachi.....Petitioner.

Versus

Abdul Ghaffar S/o. Haji Suleman.....Respondent.

Date of hearing: 10.10.2012.

Mr. Masood Shaharyar, Advocate for the
Petitioner.
Mr. Tufail H. Ebrahim, Advocate for the
Respondent No.1.
