

**ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI**

Suit No.860 of 2012

Date	Order with signature of Judge
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1. For hearing of CMA 7196/12
2. For hearing of CMA 11664/12

**Date of hearing: 22.04.2014:**

Mr. Naim-ur-Rehman for the plaintiff.  
Mr. Mirza Adil Baig for defendants No.1 and 2.  
Mr. S. Jahangir Akhtar for defendant No.3.

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**Muhammad Shafi Siddiqui, J.**- These are two applications, both filed by plaintiffs, one under Order XXXVIII Rule 5 CPC for attachment of the subject properties i.e. Shop No.D and Flat No.A-2, on Ground Floor and first floor of Silver Jubilee Center, Britto Road, Garden East, Karachi and the other application under Order 39 Rules 1 & 2 CPC.

The case of the plaintiff, as stated by learned counsel, is that in respect of the above two premises two tenancy agreements were executed on 04.02.2012 with defendants No.1 and 2 separately. It is contended by learned counsel for the plaintiffs that since there were two owners of the two premises referred to above, therefore, two tenancy agreements were executed on the same day. The salient features of the agreement are that the tenancy was to commence from the date of handing over vacant physical possession of the premises in question and on receipt of formal approval from the State Bank of Pakistan for commencing and operation of the business by the lessee i.e. plaintiffs. It was further agreed that the rent of the premises shall be Rs.35,000/- per month subject to annual increase. It was also agreed that at the time of execution of the lease, lessee (plaintiffs) shall pay to

the lessor (defendants) a sum of Rs.1,05,000/- being three months' rent as security amount which is to be returned on expiry or termination of the agreement. On the same terms and conditions tenancy agreement was entered into with defendant No.2 in relation to the premises i.e. Flat No.A-2 of the said building.

It is the case of the plaintiffs that since operation of business was dependent upon the formal approval by the State Bank of Pakistan, therefore, tenancy was to commence from such date and also from the date of handing over physical vacant possession of the premises in question. Learned counsel has added that the approval was given on 03.07.2012 as such they are entitled for commencement of their tenancy from that date provided defendants would have handed over vacant physical possession of the premises in question to the plaintiff.

Learned counsel further submitted that they have handed over two cheques of Rs.20,000/- each to defendants No.1 and 2 on 07.05.2012. In view of the above, learned counsel submitted that the plaintiffs are entitled for possession of the premises in question and till such time the possession is handed over the defendants should not only be restrained from letting out the premises in question but since there is apprehension that they would create third party interest by letting out the premises, the Court in terms of order XXXVIII Rule 5 CPC shall attach the premises in question for the reasons mention hereinabove.

On the other hand learned counsel for defendants No.1 and 2 while relying on the counter-affidavit to the listed applications denied the facts as narrated by learned counsel for the plaintiffs. He submitted the plaintiffs himself breached the terms and conditions of the tenancy agreement as it was under obligation to pay sum of Rs.1,05,000/- being three months advance rent as security to each defendants i.e. 1 and 2 on the date of execution of the agreement i.e. 04.02.2012. It is

contended by the learned counsel that the plaintiffs requested that the permission would be given by the State Bank of Pakistan within a period of one month which was not provided till the notices were issued by the defendants No.1 and 2 terminating the tenancy agreements. Such notice was issued on 29.05.2012. Learned counsel submitted that although the plaintiffs were under obligation to pay a sum of Rs.105,000/- as advance three months on the date of execution of the agreement i.e. 04.2.2012 however they handed over two cheques of Rs.20,000/- to each defendants on 07.05.2012 which was not encashed by defendant No.1 whereas defendant No.2 in good faith that the balance amount would be paid soon encashed it.

Learned counsel further submitted that after waiting for more than 3½ months for which no legitimate reasons were provided by the plaintiffs the subject agreement was cancelled and the premises in question was rented out to defendant No.3 by defendants No.1 & 2 for establishment of fast food restaurant in the name and style of Pizza Hutt on receipt of Rs.5,92,750/- through cross cheque as one year advance rent as security at a rate of Rs.52,500/- per month after deduction of income tax. Learned counsel submitted that despite having knowledge the plaintiffs filed the suit in August, 2012. Learned counsel submitted that in view of the above the plaintiffs have no prima facie case; balance of inconvenience also does not lie in its favour nor it shall suffer irreparable loss in case the injunction application is dismissed. So also no case is made out for attachment of properties in question. Learned counsel in support of his contentions has relied upon the cases of (i) Sandoz Limited. v. Federation of Pakistan (1995 SCMR 1431) and (ii) Muhammad Raza v. Abdul Ghaffar (PLD 1992 Karachi 17).

Learned counsel appearing for defendant No.3 in addition to the arguments of learned counsel for defendants No.1 and 2 has added that

the defendant No.3 has incurred huge expenses towards campaign and in establishing the restaurant/Pizza Hutt and it is only because of the plaintiffs that it is suffering unnecessarily. He submitted that he had no knowledge of earlier agreements. He submitted that entire work has been completed.

I have heard the learned counsel and perused the material available on record.

It is a fact that the plaintiffs and defendants No.1 and 2 entered into two separate tenancy agreements on 04.02.2012 in terms whereof the plaintiffs were under obligation to pay a sum of Rs.1,05,000/- being three months advance rent as security on the date of execution of the agreement. This part of the agreements is very crucial as in my opinion this could be one of the determining factor in reaching to just and fair conclusion on the applications in hand. The same clause is reproduced hereunder for convenience sake:-

*“1.4. At the time of execution of this Lease, Lessee shall pay to the Lessor the sum of Rs.105,000/- (3 Three) month advance rent s security. Upon expiry of this lease, the security deposit shall be refunded by the Lessor (without interest, mark-up or any other charges) within a period of two months’ notice from the date of expiry or termination of this Lease/Rent Agreement.”*

Despite these agreements the plaintiffs appears to have paid cheques of only Rs.20,000/- to defendants No.1 and 2 and only defendant No.2 has encashed the same but defendant No.1 did not encash it as he objected that this is not the full amount in terms of above clause of the agreement. Such payment of Rs.20,000/- to defendants No.2 was also made on 07.05.2012 i.e. after almost three months of the date of execution of the agreements and that too was only 20% of the agreed amount that was to be paid. The bonafide in view of the above facts has not been disclosed by plaintiff. The plaintiff

cannot bind the defendants at one end and do not perform its part on the other.

The notice of termination was also issued by the defendants on 29.05.2012 wherein the plaintiffs were categorically informed that it has failed to pay the rent/security and that there was inordinate delay in obtaining the permission from the State Bank of Pakistan. The defendants No.1 and 2 also terminated the tenancy agreements in terms of notice dated 29.05.2012 which was replied to by the plaintiffs on 03.06.2012. Despite the notice of cancellation dated 29.05.2012 the plaintiffs have not taken into consideration the payment of Rs.1,05,000/- as advance rent/security in respect of the premises in question which led to cancellation of agreement and execution of tenancy agreements by defendants No.1 and 2 with defendant No.3. Such tenancy agreement though was stated to have been executed by defendants No.1 and 2 with defendant No.3, however, a copy is also available with application under order I Rule 10 CPC filed by defendant No.3 who also appeared before the Court. Said application under Order I Rule 10 CPC was allowed and defendant No.3 joined the proceedings.

The suit appears to have been filed on 01.08.2012 which is much after the execution of the subsequent lease agreement entered into between defendants No.1 and 2 and defendant No.3. The payment towards rent was made by defendant No.3 in pursuance of that agreement dated 01.06.2012. The Nazir was also appointed as commissioner to inspect the premises in question who in his report mentioned that the main shutter has been painted with golden colour and it was further noted that a big oven was lying outside shop which was covered with wooden frame. Such photographs are also placed along with the report which provides that the fitting and fixtures which

perhaps are essential for operation of a Pizza Hutt were also available outside the premises in question for its fixation.

In the case of Sandoz Limited (Supra) it is observed by the Hon'ble Supreme Court that it is to be first seen whether the party who has approached the Court has performed all obligation that he was liable for and only then he could bring an action against other party who has failed to perform his part under the contract. It was further held that the time for performance of contract is also to be seen whether it is essence of the contract or not which could be a determining factor in deciding the controversy. Same is the situation in the instant case where as observed above the plaintiff has failed to perform their part of contract by not paying three months advance as security at the time of execution of the tenancy agreements hence not liable for the relief claimed in the applications in hand. This part of payment is not dependent upon permission of State Bank or handing over possession.

Similarly, in the case of Muhammad Raza (Supra) learned Division Bench of this Court held that when the aggrieved party has claimed damages on account of the losses sustained and such losses could be ascertained the plaintiff would not be entitled to any injunction. In the instant case also the plaintiff seems to have determined its losses.

In view of the facts and circumstances there is no occasion to restrain defendants and also when defendant No.3 who is already in possession of the premises in question and have paid substantial amount towards rent of the premises in question so also on establishment of pizza hut in the premises in question. Balance of inconvenience at this point of time would be more in favour of defendant No.3 who has already after taking possession has incurred expenses apart from payment of rent and construction etc. In view of the above application

under order XXXIX Rule 1 & 2 CPC bearing CMA No.11664 of 2012 is dismissed.

Similarly, in respect of application of attachment of the premises in question there are essential conditions which are to be met by the plaintiffs. The same have not been disclosed either in the application or supporting affidavit and even by learned counsel for the plaintiffs during the course of arguments. It has not been stated that the defendants have an intention to delay or to avoid any process of Court or to obstruct or delay execution of any decree that may be passed against the defendants No.1 and 2 who have already handed over the possession to defendant No.3. Plaintiffs have also failed to disclose in the application that defendants have intention to move away from the local limits of the jurisdiction of the Court with intent to obstruct and avoid the execution of the decree that may be passed in this case in their favour. It has not been stated that the defendants are about to leave Pakistan.

For the foregoing reasons this application for attachment of the premises in question also merit no consideration and the same is accordingly dismissed.

**Judge**