ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

CP NOS.S-157, 158 AND 294 OF 2010

Date	Order with signature of Judge

28.09.2020

Mr. Amar Naseer advocate for petitioner in CP Nos.S-157 & 158 of 2010 and for respondent in CP No.S-294/2010.

Mr. Abdur-Rehman advocate for petitioner in CP No.S-294/2010 and for respondent in CP Nos.S-157 & 158 of 2010.

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SALAHUDDIN PANHWAR, J: By this order I decide captioned petitions filed by landlord and tenant respectively with regard to fixation of fair rent. Application for fair rent was filed by landlord that was decided on merits on 12.12.2009 with direction to the tenant to pay Rs.40,000/- per month while increasing the rent, from filing of rent application. Accordingly such order was challenged in FRA and while deciding FRA learned appellate court decreased the rent from Rs.40,000/- to Rs.5,000/- vide judgment dated 27.01.2010. Since cross appeals were filed therefore landlord filed two petitions bearing No.S-157 and 158 of 2010 whereby challenging the order of the appellate court. In similar way tenant filed petition No.S-294/2010 while challenging the appellate court's order with regard to fixation of fair rent as Rs.5,000/-.

2. Learned counsel for the tenant has argued that there had been *failure* on part of the landlord in proving the required ingredients of Section 8 of the Ordinance, therefore, the learned appellate Court rightly appreciated such aspects but wrongly increased the rent to extent of 500% which is quite *abnormal*. It is added that in vicinity no such rent, as was / is being claimed, is not prevailing, therefore, the

order of the appellate court is also liable to be modified to extent of increase to such an *abnormal* extent.

3. On the other hand, learned counsel for the landlord argued that the landlord *did* establish all the required ingredients of section 8 of the Ordinance; shop is located at *highly* valuable commercial place; increase in value of such place is not deniable; there has been increase in property tax; goodwill cannot be treated as ownership however the order of the trial court is well reasoned; tenant failed to examine himself though sufficient opportunities were provided to him hence evidence of the petitioner (landlord) goes un-rebutted, besides he has highlighted evidence and contends that he is ready with little modification of the order of the trial court and fixation of fair rent may be considered from the order which was passed in 2010. At this juncture he has placed on record copy of order passed by same appellate court judge Mr. Aftab Ahmed Khan in another rent appeal No.5/2009 wherein amount of rent was increased from Rs.5000/- to Rs.100,000/- though that shop is situated in front of the demised premises.

4. I have heard the learned counsel for the respective parties and have also perused the available record.

5. The *issue* squarely revolves round Section 8 of the Ordinance, therefore, I find it just and proper to refer the section directly for a proper answer. The mechanism and procedure for fixation of fair rent is provided in section 8 of the Ordinance, which reads as under:--

> *"8. Fair rent. ---(1) The Controller shall, on application by the tenant or landlord determine fair rent of the premises after taking into consideration the following factors:--*

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."*

The plain language of the Section 8(1) of the Ordinance *prima facie* requires the Rent Controller to consider above *four* aspects while determining *fair* rent. All the above *four* aspects are *independent* in nature and character therefore every *independent* aspect would be a factor affecting upon *quantum* of **fair-rent** but failure of any of them would not result in rejection of the application**.** I am guided in such conclusion with the case of *Muhammad Farooq v. Abdul wahid Siddiqui* (2014 SCMR 630) wherein it is held as:-

> "5. It is pertinent to note that in the case of Mst. Muneera Kaleemuddin noted hereinabove this Court has observed that the failure of the landlord to bring on record the material in respect of any of the four elements to show increase would not necessarily lead to the rejection of an application but it may affect the quantum of fair rent. In the case of Abdul Rehman (supra) this controversy seem to have been rested with lucid pronouncement that **the Rent Controller is not required to consider all the factors of Section 8 of the Ordinance as a composite whole rather these factors are independent or each other** and in a given case may be **supplemented for the purpose of fixation of a fair rent**. The submissions of the learned counsel for the petitioner on this point needs no further consideration."

I would also add that term ***'fair-rent'*** is not available for multiplicity of the existing / agreed rent but a *reasonable* appreciation of all the given factors so as to fix the ***fair-rent.*** Out of such factors, the one mentioned as:

> *"the rent of similar premises situated in the similar circumstances, in the same or adjoining locality"*

would be decisive one while other factors would *independently* cause effects upon quantum of ***fair-rent.***

Having said so, let's examine the findings of appellate Court *first.*

> "The learned Rent Controller has not given such importance to the defence plea taken by the appellant for the reason that the appellant could not be available for cross-examination and the affidavit-in-evidence was discarded, therefore, the learned Rent Controller had given all importance to the contention of respondent and has given all the benefits to him. In my humble view the burden of proof did lie upon the respondent to establish whether he was entitled to fixation of fair rent by increase from Rs.80(E- to Rs.1,00,000/- per month and I am clear in my mind that even in exparte matter the Judge has to consider all aspects of the case. The exparte matters are not to *be decided* in favour of applicant or plaintiff as a punishment to the defendant on account of his absence from the proceedings.
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> In the present ease, the tenancy was created by two agreements executed in 1993 and 1994 respectively whereby the rent of Rs.800/- per month was fixed and no specific period of tenancy was fixed nor any condition of increasing the rent *per year* was imposed and even no advance rent or fix deposit was taken from the appellant at *the time of* execution of tenancy agreement. It is an open *secret* that the practice of PUGREE/GOOD WILL is prevailing in some valuable arrears of the City like Commercial Area of P.E:C.H.S. and Old City of Kharadar etc.
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> Therefore. non-realization of fix security deposit by the respondent gives an impression that the respondent's father must have realized PUGREE amount. The Application of respondent in this respect that the appellant was a poor man and he was given shop on nominal *rent* without any advance or fix deposit as a token of mercy. This contention of respondent does not appeal to be logical and does not Appeal to my mind.
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> The first ground taken by the respondent that the water, conservancy and other taxed including property tax have increased to high rates, is concerned the respondent in his evidence is admitted that <u>there is no water connection provided in the shop occupied by the appellant,</u> therefore, such taxes are not payable by the appellant so far property tax is concerned, clause 2(i) of the rent agreement (not readable) 1994 between appellant and the respondent reads as under:-
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> "To pay all taxes and charges whether of KMC or any other department levied at present or to be levied in future except **<u>the property tax</u>**."

Hence it is crystal clear that the other taxes and charges of KMC and other department if any had to be paid by the appellant/tenant directly to the concerned department but the property tax is in exemption. The respondent has not produced any evidence that the appellant is ever in arrears of any taxes of any department. So the property tax is concerned under the above condition of tenancy agreement the appellant is not liable to pay the property tax.

The learned Rent Controller has taken into consideration even **the increase in quantum of property tax perhaps** without going through the condition of tenancy agreement.

Sub-clause B, C, and E of Sub-Section 1 of Section 8 of the Ordinance, do not apply in the present case because the rise on cost of construction is irrelevant **because there is no question of the use of the construction material** and so also Clause "C" because it is not alleged that any New Tax is imposed on the Property and Clause "11" does not apply as it relates to the Annual Property Tax which is not payable by the appellant as per agreement, Sub-Section 2 of Section 8 of the Ordinance also does not apply in the *present* circumstances of the ease.

The case of respondent for fixation by increase of rate of rent can only be considered under Clause "A" of Sub-Section 1 of Section S of the Ordinance, whereby the rent *or similar* premises situated *in* the similar *circumstances* in *the* same or adjoining locality has to be considered for determining fair rent. On their point the contention of respondent has been that the rent of the shop of similar category *in* the *vicinity have increased to* Rs.1.00,000/- and Rs.2,00,000/- *per* month by increase from the year 1999 to 2008 because of increase of taxes and other reason. **This contention is reasonable to some extent but 'the ratio of increase in quantum of rent from year 1999 to 2008 being Rs.1,00,000/- or Rs.2,00,000/- per month is not logical**. On this point, the respondent examined two witnesses that he gave two flats on first and second floor on rent in the year 2007 at the rate of Rs.30,800/- per month. The rate of rent of flats of big size fixed as **commercial cannot be compared with the rent of a shop.** The respondent did not produce any witness from his tenants of shops in the same building or any (not readable) shop in the vicinity as a witness. Therefore, the increase of rent at the rate of suggested by the respondent cannot be relied in to to but however, it is true that the rates of everything in market including rent of the shops or flats have increased in the market approximately 500% from year 1994 to 2008 therefore I believe that the respondent landlord is entitled to fixation of rent by

> increase but to a **reasonable extent**. 1 therefore, fix the rent of the shop in question at Rs.5,000/- per month by increase from Rs.800/- which shall be payable by the appellant/tenant from the date of filing of the rent case i.e. 01.07.2008 onwards. The appellant/tenant shall have to pay the regular rent of February, 2010 at the present fixed rent before 10th February, 2010. The arrears of rent from 01.07.2008 till 31.01.2010 with a difference of Rs.4„200/- per month shall be paid by the appellant / tenant by installment of Rs.4.200/- per month in advance before *10th of* each calendar month commencing from 1st February, 2010.
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> The impugned order dated 12.12.2009 of the learned Rent Controller is accordingly modified and the present appeal is accordingly decided."

The reading of the above makes it quite clear and obvious that the learned appellate Court *also* found the landlord entitled for fixation of ***fair rent*** as was found by the learned Rent Controller but there has been considerable difference in quantum of ***fair-rent,*** so determined by both the lower Court (s). I shall have to *add* here that provision of Section 8 of the Ordinance, nowhere, gives any importance to the ***'advance money'*** nor the Ordinance has any room for **'PUGRI AMOUNT'** therefore, learned appellate Court was not legally justified in giving weight to such *aspect* while making discussion onto question of fixation of ***fair-rent.*** Needless to add that factors, for such appreciation, are well defined hence the Court (s) are not supposed to add or subtract any of these detailed factor (s). Light is taken from the case of *Hasnat Ahmed Khan v. Institution Officer* (2010 SCMR 354) wherein it is held as:

> "Thus applying the well-recognized rule of interpretation of statute that no word used by lawmaker is either redundant or can be subtracted, substituted, added or read in a piece of legislation ……. "

The perusal of the judgment of the appellate Court would also show that he appreciated the fact that there is no comparison between rent

of a ***residential flat*** and ***commercial shop*** but surprisingly fixed the rent to Rs.5000/- per month when the ***residential flat*** of same building was shown to be more than Rs.30,000/- per month. There appears no reasonable justification for such approach when *admittedly* the premises in question is situated at ***'Main Tarique Road'*** which is a known commercial area having high rates.

6. Further, the learned appellate Court also erred while confining the case to Section 8(1)(a) of the Ordinance only though the subsection (1)(d) of the Ordinance does speak about as:

> *"the annual value of the premises, if any, on which property tax is leveled".*

Admittedly, there has been increase in the ***property tax*** which, too, is indicative of the fact that there has been increase in annual value of the premises. This was not properly appreciated by the learned appellate Court. I would add that an affirmation to any of the factors, detailed in section-8(1)(b) to (d) of the Ordinance, shall be taken as an *'adding factor'* towards increase in the ***'monthly rent'*** which the Rent Controller or appellate Court finds ***reasonable*** in satisfaction of Section 8(1)(a) of Ordinance.

7. Worth adding here that a balance is always to be appreciated by the Rent Controller, including appellate Court, while fixing the ***fair-rent*** which must find strength with detailed factors as well reasonable approaches to available material and ***circumstances.*** Now, it is proper time to refer relevant portion (s) of the judgment of Rent Controller so as to have a comparative look. Same reads as:-

> "The case has a distinct current inasmuch as except the written defence and cross-examination of applicant (not readable) opponent stands nowhere as he did not opt to step into the witness box for the purpose of cross-examination. Needless to say, statement in chief

without cross-examination is of no value and the witness who fails to tender himself for cross-examination his evidence is inadmissible. **NLR 2005 Civil 14** and **2004 YLR 1999** are cited with advantage. In view of such well celebrated judicial pronouncement on question of cross-examination and consequences thereof in case of non-appearance for such purpose, I am unable to understand what are the basis and circumstances under which opponent opted not to appear himself to face cross-examination or adduce any other evidence in support of defence plea when contesting party is supposed to undergo test for cross-examination failing which adverse presumption arises.

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"I am tax assessee. I used to pay tax on taxable income. ... At the time I was paying property tax at Rs.4436/- the division was about 1.4 paisa per Sq. Feet. At present per Sq. Feet I am paying 7.30/- paisa towards property tax. Vol says that the comparison of tax paid in the two period is not the right comparison because the amount 4436/- in the year 1993-94 included Rs.2915/- on account of property tax whereas Rs.646/- and Rs.875/- were paid under the heads of betterment and surcharge the exact tax towards property was .99 paisa per square feet while in the year 2007-2008 the entire 28482/- comes under the head of property tax. Presently no betterment tax is being paid.

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The set of evidence produced by applicant in support of plea for fixation of fair rent optimistically depicts that the rent in the vicinity of the tenement in question is much higher than the one being paid by opponent, On the other hand, it would be in the fitness of things to mention that the opponent could not examine himself or any other witness rather he seemingly attempted to avoid cross-examination and obviously tried to make a room for himself by just criticizing the worth of applicant's evidence on two distinct currents, one relates to the claim of payment of Pugri and the falsehood of applicant's claim. Importantly, payment of Pugree is no bar for a landlord to either seek ejectment or the fixation of fair rent for the obvious reason 'that Pugree is not recognized under rent laws, more so, question of payment of Pugree to the previous landlord does not debar the applicant to claim fixation of fair rent within the methodology with which the provisions is couched. PLD 2000 Karachi 498 and PLD 2001 Quetta 40 on the subject of Pugree are cited with advantage. Even otherwise opponent did not opt to examine any witness in support of his defence plea that his rent was lesser because of only the Pugh was paid by him and even he

> did not adduce any evidence of the locality to establish that the payment of Pugri was prevalent in the area which results fixation of lesser rent. Elementary question relating to the quantum/fixation of fair rent is still there so I would now turn up to the claim of applicant. applicant has claimed fixation of fair rent at the rate of Rs.1,00,000/- however, he failed to on record any tangible evidence to establish that he was receiving rent such rate rather he only rested his claim on his own testimony with support of property tax payment documents and two witnesses who happen to be his tenants and payment rent found Rs.30,000/-/ Counsel for the applicant pointed out that the (not readable) on rent cover lesser area than the area of the tenement in question. He further pointed out that not only the rate of rent in the vicinity has increased but also the cost of construction has increased. He contended that apart from the enhancement in the property tax applicant also has to bear the entire liability independently. He also contended that the right to seek the fixation of rent does not depend upon the duration of tenancy or the whim of the tenant but such right is recognized by fixation of law. However I am not impressed with the argument of learned counsel for applicant for the obvious reason that the value of the flat is not less than the value of the shop rather no circumstances exist which may show the inference that the value of the shop and required fixation is good enough to accept the theoretical approach of the applicant. applicant was supposed to lead evidence of those tenants who were paying rent at the rate of Rs.1,00,000/- for the shop alike to the tenement but it does not mean that applicant's case is not worthy of credit to discard it. Applicant, in my humble opinion, has succeeded in establishing that it is fit case for the fixation of fair rent. Therefore, without any hesitation, in the circumstances of the case and assessment of evidence available on record, I would humbly hold that this is fit case for the fixation of fair rent as such I fix fair rent of the tenement in question at Rs.40,000/- per month in place of existing rent of Rs.800/- per month.

The approach of the learned Rent Controller appears to be rather logical as it (*Rent Controller)* appreciated all the required aspects including failure / negligence of respective sides while fixing a reasonable amount as ***fair-rent.*** Needless to mention that that judgment cannot be taken as evidence before this court, relates to the separate building however on that subject matter property is in same location and same road. It may help in determining question of *fair-*

rent but can't be decisive. This circumstance *too* tilts in favour of the findings of the Rent Controller on such question, hence I allow CP No.S-157 and 158 of 2010; accordingly impugned judgment passed by the appellate court is set aside. Order passed by the trial court while fixing the rent as Rs.40,000/- per month is maintained, however, this amendment is to the extent that that amount shall be considered from the date of order passed by the Rent Controller. In similar way, CP No.S-294/2010 in view of above, is also disposed of.

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