

IN THE HIGH COURT OF SINDH, KARACHI

Constitutional Petition No.S-1237 of 2010

Present

Mr. Justice Aqeel Ahmed Abbasi

M/s Ford Rhods Sidat Hyder & Company.....Petitioner

Versus

James Finlay Limited & another..... Respondents

Date of hearing : 12.03.2013

Date of judgment : 15.07.2013

Mr. Fazle Rabbi, Advocate for the Petitioner

Mr. Mian Mushtaq Ahmed, Advocate for the Respondent.

JUDGMENT

Aqeel Ahmed Abbasi, J: Being aggrieved and dissatisfied with the judgment dated 23.10.2010 passed by the learned VIth Additional District Judge (South) Karachi in F.R.A No.172 of 2009 and the order of the learned Rent Controller in Rent Case No.125 of 2004 passed on an application under Section 8 (1) of the Sindh Rented Premises Ordinance, 1979 filed by the respondent. The petitioner has filed instant Constitution Petition to set aside the impugned judgment dated 23.10.2010 passed by the learned VIth Additional District Judge in F.R.A No.172 of 2009 and the order dated 15.05.2009 passed by the learned IXth Civil Judge and Rent Controller Karachi South.

2. Brief facts of the case as recorded by the learned VIth Additional District Judge Karachi South in the impugned judgment are that the respondent/applicant filed an application for fixation of fair rent on the grounds that the appellant/opponent is the tenant of respondent/applicant since 01.11.1966 of

commercial space measuring 41 x 48 sq. feet situated at first floor in the Central Block of said building and at present they are paying rent for the said premises @ Rs.3.01 per sq. feet per month excluding electricity charges and premises is located in the heart of the commercial area of I.I.Chundrigar Road, Karachi, where the principle office of the State Bank of Pakistan, Karachi Stock Exchange, Police Head Office, Divisional Office of Pakistan Railways, Karachi, Karachi Port Trust, Customs House. The registered/Head Office of Commercial Banks, Foreign Banks, Insurance Companies Multinational Companies and various renowned corporate bodies are situated. It was further alleged that the notification issued under Section 27-A of the Stamp Act, 1899 by the Collector Sindh Karachi, the said premises fall in the category A-1 and for the purpose of stamp duty, its minimum value of Rs.12,000/- per sq. yard and if the value of the said premises is calculated at above rate, its minimum value would come to Rs.5,578,667/- although its market value is more than Rs.2 million and in consideration of such huge meager. It was further alleged by the respondent/applicant that the prevailing rent of the similar premises situated in the similar premises situated in the similar circumstances in the same and adjoining locality is up till Rs.42/- per sq feet per month excluding electricity and other charges and the respondent/applicant further alleged that in the same locality different premises were rented out at Rs.36/38, 35/88, 35/70, 26/25 and the cost of construction is also increased and the Govt. of Sindh also imposed property tax and other new taxes upon the said building in the name of surcharge @ 30%. He further submitted that after service of the notice of the said application the appellant/opponent filed its written statement and denied all the adverse allegations and in the written statement the case of the appellant/opponent is that under the agreement that the appellant/opponent is the tenant of respondent/applicant since 01.11.1968 and originally the rate of rent was Rs.20,90/- per month and it was increased from time to time and in the year it was mutually agreed between appellant/opponent and the respondent/applicant that the

rent of the premises would be increased by 25% after every three years and this practice continued to be in vogue up till December 2003 and the last rent received by the respondent/applicant is Rs.12,579/- per month and betterment tax of Rs.629/- thereafter, the appellant/opponent tendered rent to the respondent/applicant at Rs.16,510/- per month inclusive of 25% increase in monthly rental for a period of three years with effect from 01.01.2004 but the respondent/applicant refused to accept the rent from the appellant/opponent and demanded rent @ Rs.40/- per sq. feet although rent was agreed to be paid in lump sum basis and never on sq. feet basis as claimed by the respondent/applicant. The respondent/applicant having mutually agreed to receive rent by 25% increase after every 03 years. This exorbitant demand in rent made by the respondent/applicant from Rs.12,579/- to Rs.167,360/- is most unjust, illegal unlawful and against all canons of justice and equity. He further submitted that it is denied that the prevailing rate of similar premises situated in the similar circumstances, in the same and adjoining locality is Rs.40/- per sq. feet per month excluding electricity and other charges. It is denied that if the said premises is let out to any one else, it is likely to fetch minimum rent of Rs.40/- per sq. feet per month excluding electricity and other charges. It is denied that if the said premises is let out to any one else, it is likely to fetch minimum rent of Rs.40/- per sq. feet per month excluding electricity and other charges, the respondent/applicant having accepted the rent up till December 2003 at mutually agreed rent of Rs.16,510/- per month inclusive 25% increase in rent. It does not be sound reason that increase in rent is now demand from Rs.12,579/- to Rs.167,360/- which comes to 1330% increase in rent and the prevailing rent in the vicinity is very much low in comparison to the exorbitant and illegal demand made by the respondent/applicant and it may be pointed out that the factors pertaining to inflation and devaluation of Pakistani currency does not fall within the ambit of Section 8 of the Sindh Rented Premises Ordinance, 1979 and the building also not properly maintained and there is only one old lift which is operating in the

building regarding the cost of construction and it is submitted that the cost of construction of newly construction building in comparison to old building has no doubt increased but the building in question being an old building of pre 1970 period does not warrant such an increase in rent. It is denied that cost of construction for old building, manifold as alleged. Regarding maintenance charges, it is being paid separately by the tenants and it is denied that after the commencement of tenancy of KWSB having several times enhanced the water conservancy, sewerage and fire rate charges of the building/premises and they are frequently enhancing year to year, it is denied that due to shortage of water supply from the water line laid by the KWSB the respondent used to provide in the said building through water tank supplies and all other allegations are denied. It is also denied that the govt. had imposed new taxes under the name of betterment tax, property surcharge and additional property surcharge, it is submitted that by the appellant/opponent the respondent/applicant did not file any objection/appeal against the said proposed assessment and the outcome of its objection/appeal filed by it and/or if any litigation is pending in respect of the enhancement/proposals and it is admitted that the respondent/applicant up till December, 2003 the respondent/applicant received rent mutually agreed upon and thereafter instead of receiving rent at the agreed rate by increasing rent by 25% after every 3 years from @ Rs.3.01 per sq. feet as alleged to Rs.40/- per sq. feet and increase of 1330% which is against all canons of justice and equity, and the learned trial court without considering the evidence on record and the admission of the respondent applicant illegally and arbitrarily allowed the application filed by the respondent/applicant under Section 8 of the Sindh Rented Premises Ordinance, 1979 and fixed the fair rent at 1330%.

3. Being aggrieved by such order passed by the learned Rent Controller the petitioner filed F.R.A No. 172 of 2009 under Section 21 of the Sindh Rented Premises Ordinance, 1979 before the learned VIth Additional District Judge

Karachi South, who vide impugned judgment has modified the order of the learned Rent Controller by holding as under:

“Considering all such facts and circumstances, on record I find that the learned Rent Controller has jurisdiction to fix the fair rent and the factors for the fixation of fair rent have been proved by the respondent/applicant which were considered by the learned Rent Controller, therefore, the findings drawn in this regard are not interfered by this Court, however, the rate of rent is hereby modified from Rs.40/- per sq. feet per month to Rs.271/- per sq. feet per month from the institution of rent application till existence of tenancy, as such the appellant has admitted that he is no more in possession, with these observations the appeal in hand is dismissed and disposed of accordingly in terms of modification in impugned order.”

4. Learned counsel for the petitioner has stated that both the Courts below have erred in law and fact by allowing the application filed by the respondent for fixation of fair rent without following the requirement of law as contained in Section 8 (1) of the Sindh Rented Premises Ordinance, 1979. Per learned counsel, the rent of the subject tenement was being increased regularly in terms of agreement after every three years at the rate of 25%, hence the respondent was not justified to file an application under Section 8 (1) of the Sindh Rented Premises Ordinance, 1979 for fixation of the fair rent in violation of rent agreement. It is contended by the learned counsel for the petitioner that the increase in rent was valid upto December 2003, whereas, further increase was due in January 2004, which increased rent was offered to the respondent, who refused to accept the same and filed the application under Section 8(1) of the Sindh Rented Premises Ordinance, 1979 in February 2004 for fixation of fair rent of the subject tenement. However, the petitioner vacated the subject tenement in July 2004. It is further contended by the learned counsel for the petitioner that there was no justification with the respondent to file application for determination and fixation of fair rent as neither the respondent undertook any repair or construction nor any new taxes were imposed, whereas all taxes and maintenance charges, except property tax, were paid by the petitioner. Per learned counsel, in any case, the increase in property tax was to be distributed proportionally among all the co-tenants, keeping in view the area occupied by them. It has been further contended that the

rates of rent in respect of the adjoining tenement in the same premises was applicable to new tenants and could not apply to the petitioner's case, who is an old tenant, whereas, there was already increase in rent at the rate of 25% after every three years. Learned counsel has further argued that the increase in rent could have been made on lump sum basis, keeping in view all the factors as required under Section 8 (1) of the Sindh Rented Premises Ordinance, 1979, and not on square yard basis as done by the learned Controller. While concluding his arguments, learned counsel has further submitted that the impugned judgment and the order passed by both the Courts below may be set-aside and the matter may be remanded to the learned Rent Controller to decide the application of the respondent under Section 8 (1) of Sindh Rented Premises Ordinance, 1979 afresh, keeping in view the requirements of law as contained in Section 8 (1) and the terms of the agreement executed between the petitioner and respondent in this regard. In support of his contention learned counsel for the petitioner has placed reliance in the following case laws:-

1. Fazal Hanan v. Mukarram Jan 2003 CLC 397
2. Hafiz Mansoor Ahmed and others vs. Messrs Rajput Films Corporation 1998 CLC 963
3. Volkat (Pakistan) Ltd., Karachi v. Interavia Pakistan Ltd., Karachi 2001 SCMR 671
4. Messrs Olympia Shipping and Weaving Mills Ltd. & another v. State Life Insurance Corporation 2001 SCMR 1103
5. Qazi Majid Ali vs. State Life Insurance Corporation of Pakistan SBLR 2011 Sindh 461
6. Messrs Mermaid Constructions (Pvt) Ltd. vs. State Life Insurance Corporation PLD 1999 Karachi 322
7. Nighat Riaz vs. Manzoor Hussain 1985 MLD 1533 (Karachi)

5. Conversely, learned counsel for the respondent has vehemently opposed the maintainability of the instant petition and submitted that concurrent findings recorded by the Courts below cannot be set aside by this Court while exercising

the constitutional jurisdiction. It has been contended by the learned counsel that writ jurisdiction under Article 199 of the Constitution of Pakistan, cannot be equated with appeal or revision and can be invoked only in exceptional circumstances whereby the impugned judgment/order suffers from patent illegality or has been passed without jurisdiction, whereas, per learned counsel, the petitioner could not point out any such jurisdictional error or illegality in the impugned judgment/order passed by the Courts below. Learned counsel has also drawn the attention of this Court to the fact that when the application under Section 8(1) of the Sindh Rented Premises Ordinance, 1979 was filed by the respondent for fixation of fair rent there was no written agreement of tenancy between the petitioner and respondent as the same was already expired, whereafter, the petitioner was statutory tenant of the respondent. Therefore, per learned counsel, reference to the terms of the agreement and alleged practice pursuant to such agreement, which was already expired, is misconceived in fact and law. It has been further contended by the learned counsel for the respondent that the learned Rent Controller was fully competent and authorized in terms of the provision of Section 8(1) of the Sindh Rented Premises Ordinance, 1979 to fix the fair rent in respect of a tenement, keeping in view the ingredients as provided in terms of Section 8 (1) of the Sindh Rented Premises Ordinance, 1979. Per learned counsel, from perusal of the application filed by the respondent for fixation of fair rent in respect of subject tenement it can be ascertained that almost all the ingredients as provided under Section 8 (1) of the Sindh Rented Premises Ordinance, 1979 for determination and fixation of fair rent were in favour of the respondent, whereas the learned Rent Controller, after having carefully examined the material placed on record by both the parties and by respectfully following the ratio of the judgments of the superior Courts in this regard, was pleased to allow the application filed by the respondent. However, the petitioner feeling aggrieved by such order passed by the learned Rent Controller preferred F.R.A No.172 of 2009 whereby the learned VIth Additional District Judge Karachi South has

reduced the rate of fair rent fixed by the learned Rent Controller from Rs.40 per sq. feet per month to Rs.27/- per sq. feet per month from the institution of the rent application till existence of tenancy hence, substantial relief has already been granted to the petitioner. Per learned counsel, though the learned Appellate Court was not justified to reduce the rate of fair rent which was determined by the learned Rent Controller after complying with all the legal requirements in the instant case, however, in order to avoid further litigation and to be reasonable the respondent has not assailed such order, whereas, the petitioner has filed instant Constitution Petition without any legal or factual justification, which is liable to be dismissed with cost. In support of his contention, learned counsel has placed reliance on the following case-laws:

1. Shahid Ahmed alias Shahid Mukhtar & 9 others v. Mst. Rasheeda Khatoon PLD 1996 Karachi 494
2. Sultan Ali v. Mst. Khatija Bai 1995 CLC 1441
3. Mst. Fatima & 3 others v. Abdul Jabbar 1987 MLD 321
4. Messrs Olympia Shipping and Weaving Mills Ltd. & another v. State Life Insurance Corporation 2001 SCMR 1103
5. Messrs Abdul Majeed Chawla & Sons v. Anwar Yahya 1990 MLD 1711
6. Unreported judgment passed in FRA No.610/1998 page 10

6. I have heard both the learned counsel and perused the record. Before examining the legality of application filed under Section 8(1) of Sindh Rented Premises Ordinance, 1979 by the respondent for fixation and determination of amount of fair rent in respect of subject tenement by the learned Rent Controller, and the modification by the learned Appellate Court vide impugned judgment in the instant mater, it will be appropriate to first address the objection raised by the learned counsel for the petitioner with regard to its maintainability. It has been argued on behalf of the petitioner that since the rent of the subject tenement was being enhanced by 25% after every three years in terms of the tenancy agreement executed between the parties, therefore, an application under Section 8 (1) of the

Sindh Rented Premises Ordinance, 1979 for enhancement and fixation of fair rent was not maintainable. During the course of hearing of instant petition, it was noted that no such written rent agreement was placed on record by the parties, who were directed to ascertain as to whether there was any written agreement which expired on 31.12.2003, as asserted by learned counsel for the respondent, or it was on account of some practice or other arrangement on the basis of which the terms of lease after expiry on 31.12.2003 were continued. However, no such agreement was placed on record by either party, whereas, both the learned counsel candidly stated that at the time of filing application under Section 8 (1) of the Sindh Rented Premises Ordinance, 1979 for fixation of fair rent in respect of subject tenement there was no written agreement between the parties as the same was already expired on 31.12.2003, whereafter, the petitioner was a statutory tenant. In view of hereinabove facts, and the candid statement of both the learned counsel reference to past practice with regard to enhancement of rent after every three years by the learned counsel for the petitioner appears to be misplaced. Admittedly, the application filed by the respondent under Section 8 (1) of the Sindh Rented Premises Ordinance, 1979 for fixation of fair rent was the first application for such purpose, therefore, the bar as contained in Section 9 of the Sindh Rented Premises Ordinance, 1979, particularly in the absence of mutual written agreement between the parties to this effect, is prima-facie not attracted to the facts of the instant case. The Rent Controller in terms of Section 8 of the Sindh Rented Premises Ordinance, 1979 is competent to entertain an application for fixation of fair rent by the landlord or tenant to determine the fair rent of the premises after taking into consideration the four factors as provided in terms of Section 8 of the Sindh Rented Premises Ordinance, 1979.

7. It will be advantageous to reproduce hereunder the provisions of Section 8 and 9 of the Sindh Rented Premises Ordinance, 1979 to comprehend the controversy involved in the instant matter:

Section.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 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.
- (2) Where any addition to or, improvement in any premises has been made or any tax, or other public charges has been levied, enhanced, reduced or withdrawn in respect thereof, or any fixtures such as lifts or electric or other fittings have been provided thereon subsequent to the determination of the fair rent of such premises, the fair rent shall, notwithstanding the provisions of section 9 to be determined or, as the case may be, revised after taking such changes into consideration.

Section 9. Limited 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.

8. Perusal of hereinabove statutory provisions shows that prima-facie there is no restriction provided for filing of an application for the first time under Section 8 (1) of the Sindh Rented Premises Ordinance, 1979 either to a landlord or tenant for fixation of fair rent of the premises by the Rent Controller having jurisdiction thereon. However, law requires that while deciding such application the Rent Controller shall take into consideration the four factors as stated in clause (a) to (d) of subsection (1) of Section 8 of the Sindh Rented Premises Ordinance, 1979, including “the rent of similar premises situated in the similar circumstances, in the same adjoining locality”, “the rise in cost of construction and repair charges”, “the imposition of new taxes, if any, after commencement of the tenancy” and “the

annual value of the premises, if any, on which property tax is levied". If a party succeeds in establishing through evidence the aforesaid factors, the Rent Controller is required to examine cumulative effect of all four factors as enumerated in Section 8 (1) for fixation of fair rent. It may be observed that the limit upon increase in rate of rent as prescribed by Section 9 cannot be applied where determination of the fair rent is undertaken for the first time. However, while determining the rate of fair rent in respect of any tenement the Rent Controller has to carefully examine all the four factors as referred to hereinabove and to keep in mind all the mitigating circumstances of each case by ensuring that no injustice is done to either party to the proceedings.

9. From perusal of the contents of application under Section 8 (1) of the Sindh Rented Premises Ordinance, 1979 filed by the respondent in the instant matter, it appears that almost all the factors required to be taken into consideration for fixing of fair rent have been referred, whereas supporting material and evidence was also placed before the learned Rent Controller by the respondent. Both the parties led their evidence, whereas their witnesses were duly cross-examined, whereafter the learned Rent Controller, after examining the evidence and the case law relied upon by both the parties in detail, allowed the application of the respondent and determined the fair rent of the premises at the rate of Rs.40/- per sq. feet per month from the date of institution of the application.

10. The aforesaid order passed by the learned Rent Controller on application under Section 8(1) of the Sindh Rented Premises Ordinance, 1979 was assailed by the petitioner through First Rent Appeal No.172 of 2009 filed by the petitioner under Section 21 of the Sindh Rented Premises Ordinance, 1979, wherein, similar objections were raised by the petitioner with regard to maintainability as well as fixation of rate of fair rent determined by the Rent Controller in respect of subject tenement. Learned Appellate Court after having examined the evidence produced by the parties and keeping in view the cumulative effect of the factors which are

required to be taken into consideration while deciding an application under Section 8(1) of Sindh Rented Premises Ordinance, 1979, has held that the learned Rent Controller had the jurisdiction to fix the fair rent, whereas the factors for the fixation of fair rent were duly proved by the respondent/applicant, which were also duly considered by the learned Rent Controller in his order. However, while approving the decision of the learned Rent Controller, the learned Appellate Court has been pleased to reduce the amount of fair rent fixed by the learned Rent Controller from Rs.40/- per sq. feet per month to Rs.27 per sq. feet per month, from the date of institution of rent application under Section 8(1) of the Sindh Rented Premises Ordinance, 1979 till existence of tenancy. Prima-facie, it appears that substantial relief has already been granted to the petitioner through impugned judgment, whereby the learned Appellate Court, keeping in view the four factors required to be taken into consideration and by applying lower rate of rent of the similar premises situated in the similar building, has reduced the amount of fair rent from Rs.40/- per sq. feet per month to Rs.27/- per sq. feet per month, whereas no error, illegality or arbitrariness on the part of the Courts below which may require any interference by this Court in its constitutional jurisdiction could be pointed out by the learned counsel for the petitioner.

11. In the case of Messrs Olympia Shipping and Weaving Mills Ltd. & another v. State Life Insurance Corporation 2001 SCMR 1103, the Hon'ble Supreme Court while defining the scope of fixation of fair rent and four factors of Section 8 incorporated has held as under:

“16. Viewed in the light of the language employed by the Legislature and the earlier precedents it may be observed that four factors incorporated in law are in the nature of guiding principles for the Rent Controller for determination of fair rent. The cumulative effect of all these factors being quite relevant and helpful in arriving at a just conclusion must be given due weight. Nevertheless, common ground available in most of cases would be the prevalent market rent of the similar premises situated in similar circumstances in the same or adjoining locality. It may thus, be made clear that existence of all the four conditions is not the invariable rule of law and presence of all factors in a case might lead to appreciation in determining rate of rent for the purpose of fair rent

Absence of any of the factors would not, in any case, prejudice the case of the applicant before the Rent Controller.”

12. In the case of Shahid Ahmad alias Shahid Mukhtar and 9 others PLD 1996 Karachi 494, it has been held as under:

“By plain reading of the above-quoted sections would reveal that the parties are free to approach the Rent Controller for fixation of fair rent at any stage if that has not been already done and any previous mutual agreement will be no bar for fixation of fair rent under the provisions of section 8 of the Sindh Rented Premises Ordinance. A reference in this regard can be made to the case of Sultan Ali v. Mst. Khadija Bai 1995 CLC 1441 and H. Cooper and others v. State Life Insurance Corporation of Pakistan 1994 SCMR 2115.”

13. In the case of Sultan Ali v. Mst. Khatija Bai 1995 CLC 1441, it has been held as under:

“A Priori it follows that the law having postulated the conditions for seeking fixation of Fair Rent and a previous mutual arrangement spelling no preclusion, a demand of variation from one side even if it, upon acceptance, matures into a contract cannot allowed to block the way for determination of Fair Rent, the right under section 8 *ibid*, being absolute. There is no estoppel against law and law having mandated specific rights and a special procedure for enforcement parties cannot even contract out of the same. Thus, even though the landlady, through notice, claimed a lower rate prior to seeking determination of Fair Rent such in itself would not bar her remedy for seeking fixation of Fair Rent.”

14. In the case of Messrs Abdul Majeed Chawla & Sons v. Anwar Yahya 1999 MLD 1711, it has been held as under:

“At any event, the application could be granted on an independent ground namely, the rise in the cost of construction and repair charges which, admittedly, have risen steeply during the continuation of the tenancy. Law does not make any distinction whether such cost of construction was actually applied in relation to a tenant-hold premises or repairs were actually made on such basis. The only relevant factor is the rise in such costs.”

15. In view of herein above facts, and by applying the ratio of the judgments as referred to hereinabove, I am of the view that the impugned judgment does not suffer from any illegality nor contains any perverse finding of facts, hence does not require any interference by this Court in its constitutional jurisdiction. Moreover, concurrent finding recorded by the Courts below, particularly in rent

matters, cannot be disturbed by this Court in its constitutional jurisdiction unless any grave illegality, jurisdictional error or perverse finding on facts is pointed out by the petitioner. Accordingly, instant petition being devoid of any merits is hereby dismissed, however, with no order as to cost.

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