

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
CP.No.S-663 of 2020

Date _____ Order with signature of Judge _____

1. For orders on office objection as at "A".
2. For hearing of CMA No. 3373 of 2020 (Stay).
3. For hearing of main case.

29th April 2021.

Mr. Abdul Ghaffar Kalwar, advocate for petitioner.
Mr. Sultan A. Allana, advocate for respondent No.3.
Mr. Pervez Ahmed Mastoi, AAG.

Heard learned counsel for the respective parties at length.

2. Trial Court framed following issues:-

"Issue No. 01 Whether the opponent / company has committed default in payment of the rents of the demised premises?

Issue No. 02 Whether the opponent has made unauthorized and illegal construction of servant block after demolishing the old servant block and that alter the ground and first floor of the annexe building by constructing illegal bifurcation walls and illegally got constructed new bathrooms, block over the terrace area of first floor of annexe building and that also illegally got constructed cafeteria and mosque in the lawn area without permission and approval of the applicant and as such impaired the material value and utility of the premises?

Issue No. 03 What should the judgment be?"

3. Before making any comments onto merits, it is worth appreciating that it is always the requirement of the law that dispute (s) always arise out of the pleadings of the parties therefore, not only framing of proper '**issues / point of determinations**' is duty of the Court but proper and complete adjudication of each issue or if one issue consists of different parts then of each part is responsibility of the Court.

4. Perusal of the impugned judgment (s) of learned lower Courts below show that both courts below failed to adjudicate the issue/dispute regarding demand of increased amount, as decided by both the parties in rent agreement. The tenancy between parties was never disputed but default is claimed by the landlord which, too, with reference to increased 2% amount per annum. Permission to renovate the premises is also not disputed, however, there is dispute with regard to quantum of amount because according to respondent's counsel that amount was around Rs.13 Crore and same was adjusted in the rent while counsel for the petitioner (tenant) contends that around Rs.16 crore were utilized and that were neither considered nor adjusted, hence he was not liable to pay rent with the increase of 2 % as well as no notice/demand was made by the landlord.

5. To make point clear, it would be conducive to refer relevant portion of the appellate court judgment, which is that:

“As far as the default is concern it has been alleged by the respondent that after 23.12.2013 onward the appellant failed to pay the rent and there were arrears of rent outstanding against the appellant. It is also alleged by the appellant that it was agreed under the tenancy agreement that the rent would be increased by 2% per annum but the appellant failed to pay the rent as per the terms and conditions of the tenancy agreement that the rent would be increased by 2% per annum but the appellant failed to pay the rent as per the terms and conditions of the tenancy agreement. It is a settled law that statement of landlord on oath is sufficient that no rent was paid to him and by saying so burden is shifted to tenant to prove payment of rent by saying so burden is shifted to tenant to prove payment of rent by positive evidence. **In the instant matter it is the own admission of the appellant that the rent was not deposited after increasing 2% per annum. It is also the own admission of default.** I may reproduce the relevant portion of the appellant which reads as under:-

“It is correct to suggest that opponent did not deposit the rent after increasing 2% per annum in rent with the applicant or in the Court..... It is correct to suggest that opponent made short payment in rent by not depositing rent by increasing 2% from July 2013 to onward... It is correct to suggest that monthly rent of the demised premises from 1st June 2018 was to be paid at the rate of Rs.1214490/- per month to the applicant, which the opponent has admittedly not paid to the applicant till today at the above rate.....It is correct to suggest that the opponent has been depositing rent in MRC at the rate of Rs.5,00,000/- per month without making any enhancement..... It is correct to suggest that as per Ex.O/26 the opponent paid the rent for the month of May 2015 on 9th June 2015 after commission of default.

It is correct to suggest that as per Ex.O/27 we tendered the rent for the month of November 2014 to March 2015 through cheque dated 20.04.2015 after commission of default. It is correct to suggest that as per Ex.O/29 opponent tendered the rent for the month of July 2015 on 11.08.2015 after commission of default”.

The admission made by the appellant in his evidence are sufficient to prove default in payment of rent. It is held in 1989 CLC 673 that default in payment of rent having once been committed cannot be wiped out or erased by subsequent payment of rent. In these circumstances, it is clear that the appellant has committed default in payment of rent and rendered himself liable for ejection.

The next ground which has been agitated for eviction of appellant from the demised premises is illegal construction, addition and alternation in the demised premises is illegal construction, addition and alteration in the demised premises. It is alleged in the ejection application by the respondent that the appellant without obtaining approval from the competent authority demolished the existing servant block and raised illegal new construction. It is also alleged that the appellant altered the ground and first floor of the annexe building by constructing illegal bifurcation walls and also constructed new bath rooms over the terrace area at the first floor. It is also alleged that without obtaining approval the appellant illegally constructed cafeteria and mosque in the lawn adjacent to Annexe building. It is stated by the respondent that due to these illegal additions and alterations the appellant violated the terms and conditions of the tenancy agreement and also impaired the material value and utility of the said building. All these allegations were reiterated by the respondent in the affidavit in evidence before the learned trial Court. The learned counsel for the appellant conducted a lengthy cross examination but he failed to shatter the evidence of the respondent. The respondent during his cross examination categorically stated that the appellant was not permitted to construct the mosque and cafeteria. The allegations of construction of bath room on the terrace of the first floor and demolish of the existing servant block also remained unchallenged. On the other hand the appellant failed to bring on record any authority letter or permission letter of the respondent for making such construction. The appellant also failed to bring any evidence to controvert and disprove that such alteration/addition or construction was made with the consent of the respondent and the same did not impair the value and utility of the demised premises. In absence of any evidence it is clear that the appellant has made illegal construction and thus impaired the utility of the demised premises.

While findings of trial court on Issue Nos.1 and 2 are reproduced hereunder:-

“Issue No. 01

Perusal of the record reveals that it is not disputed that the premises in question was let out to the opponent by virtue of the registered tenancy /lease agreement dated 17.09.2012 (the agreement). It is also not disputed that as per the tenancy agreement, the monthly rentals were fixed at the rate of Rs. 1.1 million per month; rent for initial two months was fixed at the rate of Rs. 150,000/- and for the next two months at Rs. 300,000/- due to mobilization of works and poor condition of the building; that annual escalation of two percent was to be levied on the rentals; that full monthly rentals were to be effective after four months of the agreement; that repair period and pay back due to cost of repairs by developers was fixed to be 25 months; that rentals during pay back period was to be paid at the rate of Rs. 500,000/- per month and deduction from the rentals was to be made at the rate of Rs. 600,000/- per month for the cost of repairs which was exactly to be calculated with mutual agreement between the respective engineers of the parties; that upfront payment of Rs. 50,00,000/- was made with the break-up--that an amount of Rs. 13,50,000/- was paid towards rent for initial repair period, Rs. 22,00,000/- towards advance rent for next two months and 14,50,000/- towards security deposit.

Perusal of the record shows that it is alleged that the opponent has failed to pay the rent of the premises in question as per agreement. In this connection, the applicant has averred in his application that on 14.10.2015, the opponent was in arrears of rent from 13.08.2014 to 31.10.2014 amounting to Rs. 16486,200/- after adjustment of the payment of the rents through cheques towards the arrears of the rent, the opponent paid an amount of Rs. 10 lacs through the cheque dated 16.10.2015, which was accepted with specific endorsement that it is without prejudice and without waiving the default and as such the opponent is stated to be in arrears of the rent from 09.09.2014 to 31.10.2015 amounting to Rs. 15468,200/-. It is further averred that because of the default in the payment of rents and unauthorized and illegal construction and alteration, the applicant sent a legal notice dated 03.11.2015 to the opponent to vacate the demised premises and handover its peaceful possession to the applicant. But, the opponent instead of vacating the premises, sent another cheque dated 08.01.2016 for an amounting Rs. 10 lacs alleging to be the rent for the premises for the months of December 2015 and January 2016. However, the said cheque was returned to the opponent. **It is further alleged that after 14.10.2015, neither the opponent has paid the arrears of rent from 09.09.2014 to 31.10.2015 amounting to Rs. 15468200/- nor paid the due rent from 01.11.2015 to 31.03.2016 amounting to Rs. 5677760/- and as such the opponent stated to have committed default in payment of the rents from 09.09.2014 to 31.03.2016 and stated to be in arrears of rent amounting to Rs. 21163960/-. The said arrears of the rents include the non-payment of 2% escalation to be made annually.**

Issue No. 02

As far as the issue No. 2 is concerned, I have gone through the averments made in the written statement and evidence of the opponent, but I have failed to find any denial/rebuttal to the contention of the applicant. It is stated by the applicant that the opponent has made unauthorized construction of bifurcation walls, bathrooms on the first floor and its terrace and Mosque on the lawn area of the demised premises, but the opponent has failed to deny the same in his written statement. He has also failed to lead any evidence in rebuttal thereof

and also failed to produce any record in order to show the authorization for said structural alteration/addition in the demised premises. The failure of opponent to deny the said fact stated on oath amounts to admission on its part. It will not be out of place to mention here that the demised premises is stated to be national heritage and as such it was specifically mentioned in the tenancy agreement between the parties that no structural or unauthorized construction shall be made so that the said building should stand in its original position. But, I find that the said unauthorized structural alteration/addition has impaired the material value and utility of the demised premises particularly as national heritage.

4. *Prima facie*, no proper adjudication was made despite, evidence led by the parties with regard to agreement in respect of renovation of the property; increased 2% amount, provided in agreement as well aspects regard plea of landlord to effect that Rs.03 Crore were adjusted while tenant's plea is that actual amount was more than 03 Crore. On confronting such position, both the learned Counsels, *candidly*, agreed that since such aspect was not considered by two courts below hence demand of law and procedure is that of remanding the matter. At this juncture, both parties contend that they intend to lead additional evidence, hence they shall be allowed to lead evidence.

5. In view of the above, with the consent of the parties, both order and judgment passed by the *fora* below are hereby set aside and the case is remanded back to the Rent Controller with directions that trial court shall record additional evidence, if submitted by the parties, thereafter shall decide the issues after hearing the parties in accordance of law. Trial Court would be at liberty to frame Additional issue if required or agitated by the parties.

Instant petition stands disposed of in the above terms alongwith pending applications.