IN THE HIGH COURT OF SINDH AT KARACHI

FRA No.25 of 2021

[M/s Nixor College (Pvt.) Ltd and another v. Dr. Suleiman Muhammad Al Suleiman]

Date of hearing	:	14.03.2023
Appellants	:	Through M/s. Salahuddin Ahmed, Tariq Ahmed Memon, Muhammad Rizwan, Samil Malik Khan, Advocates. Mr. Amir Khosa, Advocate.
Respondent	:	Khawaja Shamsul Islam, Advocate a/w Mr. Imran Taj & Muhammad Usman Ahmed, Advocates.

JUDGMENT

Zulfiqar Ahmad Khan, J:- This First Rent Appeal under Section 24 of the Cantonment Rent Restriction Act, 1963 is directed against the order of Additional Controller of Rents Clifton Cantonment dated 13.04.2021 whereby eviction application of the respondent landlord under section 17(2)(i) of the Cantonments Rent Restriction Act, 1963 ("CRRA, 1963") was allowed and appellants were directed to vacate House No.59-C, Khayaban e Shaheen, Phase VI, DHA, Karachi ("the demised premises").

2. Brief facts of the case are that, appellant No.1 claims to be a private co-educational college providing educational opportunities in the form of standardized programs, whereas appellant No.2 is the Director of Academics of appellant No.1 company. In the year 2008, the appellant claims to have planned to open an educational institution to produce quality individuals, who would bring positive

changes in every sphere of life, whereas the respondent landlord seemingly at the same time was looking forward to rent out the demised premises to a tenant, resultantly, the parties entered into a tenancy agreement on 01.07.2008 fixing the rent of Rs.605,000/- per month and Rs.7,260,000/- were paid as advance rent for the period of twelve months from the date of the agreement and the appellant took over possession of the property. The said agreement expired on 30.06.2009 whereupon the said agreement was renewed vide agreement dated 01.07.2009 making the rent payable at Rs.700,000/- per month whereupon the appellants paid Rs.8,400,000/- as advance rent for the twelve months. Before expiry of subsequent tenancy agreement on 30.06.2010, it is alleged that the respondent started demanding “exorbitant” increase in the rent and in case of non-compliance, threatened to cancel the agreement, whereupon a notice was received by the tenant from the respondent on 20.06.2010 where the appellants were directed to vacate the demised premises and in failure thereof the landlord was to initiate civil/criminal proceedings. At the same time, the landlord also got a public notice published in the daily Dawn newspaper on 26.06.2010 advising general public that the rent agreement dated 01.07.2009 has now been terminated. Whereupon the appellant No.2 requested the landlord to renew the agreement as per their “mutual understanding” and even offered to pay advance rent for the subsequent periods, however the respondent refused to extend the agreement any further, whereupon the appellants approached M/s. Aqeel Khan Dhedhi and Yaseen Dhedhi in order to enter into an agreement and pay rent for the next years, but they stated that they were unable to convince the respondent to accept the same.

3. Per FRA, having no other efficacious remedy, the appellants filed suit for declaration and permanent injunction bearing Suit No.1100 of 2010 before this Court *inter alia* seeking declaration that the appellant is tenant of the demised premises till the year 2016 and that the respondent should be directed to execute a fresh tenancy agreement in favour of the appellant, wherein *status quo* order was passed. Simultaneously, the appellants filed MRC No.51 of 2010 on 02.07.2010 in the Court of Additional Controller of Rent, Clifton Cantonment, Karachi, wherein vide order dated 06.07.2010 the appellants were allowed to deposit monthly rent of Rs.700,000/- from July, 2010 onwards with the leaned Rent Controller. While the aforesaid suit was pending, the respondent filed an application under Section 17(2)(i) of CRRA, 1963 bearing Rent Case No.85 of 2013 on 13.08.2013 seeking peaceful and vacant possession of the demised premises on the ground of personal *bonafide* need and default on the pretext that per clause-14 of the Rent Agreement (i.e. the lessee shall have to pay rent until 30th day of June, 2010 and in case of failure, to vacate the demised premises within extended time the lessee shall pay three times enhanced rent of the existing rate), which ejectment application was allowed by the impugned order.

4. It is contended by the learned counsel for the appellants that the impugned order is contrary to the law and suffers from material, legal and factual inaccuracies and has been passed without application of mind, on the basis of misreading of the facts and non-reading of the available evidence. By referring to Section 74 of the Contract Act, 1872 and judgments reported as 2005 CLC 913 and PLD 1969 SC 80, learned counsel contended that the learned Rent Controller failed to appreciate that the clause 14 is penalty clause

wherein it is specified that '*the lessee shall pay rent at present rate until 30th day of June 2010 and in case of failure to vacate the subject property within extended time the lessee shall pay three time enhanced rent of the existing rate*' and it could not be construed as "rent" within meaning of Cantonment Rent Restriction Act, 1963. The amount in excess of the actual rent amount per learned counsel was merely placed to be treated as "penalty" and could not be recovered without adducing proof of loss(es) and reasonableness of such penalty. He contended that the learned Rent Controller also failed to appreciate that mediator Mr. Yaseen Dhedhi in his affidavit-in-evidence has categorically admitted in paragraph 12 that "*when the issue of penal clause came up, in our telephonic conversation between myself, Nasir Ghani and Suleiman. Nasir Ghani did not want to add the penal clause-14 however in my presence, Suleiman assured him that the same was only for formality sake and as the agreement/understanding was for long term hence same would never be invoked*."

5. Learned counsel for the appellants further contended that there was no failure to tender rent by the appellants as the rent was being paid annually in advance through M/s. Aqeel Karim Dhedhi and Yaseen Dhedhi, but vide notice dated 20.06.2010 and 'Public Notice' dated 26.06.2010 the respondent clearly exhibited their refusal to extend the tenancy agreement and to receive rent, hence the appellants deposited the rent through MRC, which is allegedly withdrawn by the respondent regularly. That the learned Rent Controller failed to appreciate the fact that the interim order passed in C.P No.D-846 of 2020 was still operative.

6. On the other hand, leaned counsel for the respondent contended that the appellants are occupying the demised premises

illegally without any extension or renewal of tenancy agreement from 01.07.2010, where they have failed to deposit the arrears of the defaulted rent as per last tenancy agreement, which default has been proved during trial. Being out of pocket, the respondent is facing huge financial losses, as he required the demised premises for his personal *bonafide* need and for establishing his own hospital, but due to adamant attitude of the tenants, he is being deprived of his legitimate rights to use the demised premises according to his desire and choice, for the last 11 years.

7. Heard the counsel for the rival parties and perused the record. Whilst the learned counsel for the appellant has premised his case on the argument and challenged the competence and jurisdiction of Additional Controller of Rents, Clifton Cantonment in entertaining and deciding the instant matter, however, there is no exception to the legally established principle of law that jurisdiction is a creation of law which could never be made subservient to consent or whims of the parties. As any challenge to jurisdiction can render an order as *coram non judice* hence the same is taken up first. As the said challenge pertains to section 6(2) of the Act, it is considered pertinent to reproduce the said Section hereunder:-

> *"Section 6. Appointment of Controller.-(1) The (Federal Government) may, for purposes of this Act, by notification in the official Gazette, appoint a person to be the Controller of Rents for one or more cantonments.*
>
> *(2) The (Federal Government) may also, by notification in the official Gazette, appoint a person to be the Additional Controller of Rents for one or more cantonments".*

8. It is gleaned from appraisal of the foregoing provision of law that "appointment of controller" only requires issuance of Notification in the official gazette, which the Court has been

informed having already been complied with. Learned counsel's contentions are that such appointment should be made in consultation with Chief Justice, without consenting or differing from such a view, I may refer the judgment placed in the case of Khan Gul Khan v. Daraz Khan 2010 SCMR 539 where the Hon'ble Supreme Court went on to hold that:-

> *"26. It is a settled proposition of law that Courts have only power to interpret the law as laid down by this Court in various pronouncements. See Zia-ur-Rehman's case PLD 1973 SC 49. In the garb of interpretation, the Courts have no power to add or omit even a single word from the provision of law. In Muhammad Tariq's case supra by holding that pre-emptor and vendee are two distinct classes the distinction between the pre-emptor and vendee is not based on any legal, valid reason or logic or mandate of section itself."*

9. Apart from above, the preamble of the Cantonments Rent Restriction Act, 1963 sets forth it being a statute to control rent matters of certain classes of buildings within the limits of cantonment area only, hence the Act enjoys status of special law, thus would prevail over the general law and the Courts usually do not encrouge widening scope of such special laws by adding (or deleting) anything contrary to the object and intention of the legislature.

10. Now, I would take up the second part of learned counsel's plea whereby competence of the Additional Cantonment Executive Officer has been challenged on the account that no notification with regard to his appointment, as required by section 6 of the Act, was issued by the Federal Government. As evident, section 6 of the Act itself gives absolute and exclusive jurisdiction to the Federal Government to appointment "a person" as "Controller or Additional Controller of Rent" which power has not been limited to say that such a "person" cannot be a public servant, rather the fact is that

such appointed person has been clothed as public servant under section 30 of the Act. In short, viz the issuance of notification, in my humble view Federal Government is competent to declare "any person" as "Controller or Additional Controller Rents" which would be the requisite compliance of section 6 of the Act and such "person" stands designated as such even if the same is "ex officio".

11. The learned counsel for the appellant has claimed that there exists no notification designating Additional Cantonment Executive Officer as "Controller or Additional Controller Rents" but in support whereof placed no such proof. In the case of Ghulam Haider v. Farooq Ahmed Bhatti (PLD 1983 SC 238) the Hon'ble Supreme Court while discussing Section 6 of the Act has noted that office of "Additional Executive Officer" of Cantonments of Lahore, Multan and Karachi has also been given ex-officio designata of "Additional Controllers of Rent", therefore, in my humble view the learned counsel is factually misplaced. Such ex-officio designata in my view would be sufficient to competently clothe Additional Executive Officer with powers available to the Controller or Additional Controller of Rents under the Act. The referral to relevant portion (page-242) of judgment to the case of Ghulam Haider supra would also make the picture clearer per the following:-

> *"To draw the analogy, such an appointment if made of a functionary who is already acting as an Additional Executive Officer, would not be relatable to his competence and or authority as an Additional Executive Officer but (as a mere persona designata) for the purpose to pick out, a person who is to function as an Additional Controller of Rents; used in section 6(2) of the Cantonment Rent. Viewed in this light the two relevant provisions, namely, sections 2(d) and 6(2) of the Cantonments Rent Restriction Act, would produce the result that any person could be appointed and designated by the Federal Government as an Additional Controller of rent. The appointed, through a properly issued*

> *notification, a person not by his name but by his designation as such Additional Controller of Rent; In this exercise the qualification; authority or competence of such person as Additional Executive Officer under the Cantonments Act was not a relevant element, under the Cantonments Rent Restriction Act, so as to be gone into. Once the act of appointment by designation was complete, the person concerned would be clothed with full power and authority of a "controller" as defined in section 2(d); because whosoever thus stood appointed would be a controller under the relevant sub-clause (d) of section 2, unless of course there is any thing repugnant in the subject or context. Nothing in that behalf was presented at the bar nor has it been discovered otherwise. We, therefore, hold that notwithstanding any defect in the appointment or qualification of the concerned Additional Executive Officers, they having been validly designated as Additional Controllers of Rent and could exercise the power and jurisdiction accordingly under the Cantonments Rent Restriction Act, 1963."Besides, a legally issued notification would continue holding the field unless otherwise so expressly intended. The referred notification prima facie was not subject to any time limitation nor there has been placed anything on record that said notification was either recalled cancelled etc".*

12. In view of above deliberation and rationale, I am of the opinion that proceedings were rightly entertained and decided by the learned Additional Controller of Rents as subject matter undisputedly fell within the Cantonment area.

13. Reverting to the merits of the case, learned Controller of Rents Clifton Cantonment ("Rent Controller") framed nine points for determination and found the appellant/tenant defaulted in the payment of monthly rent (issue No.8). It would be thus conducive to reproduce the relevant constituents of the impugned Order which are delineated hereunder:-

> "The applicant stated that the premises in question was rent out to the opponents vide tenancy agreement dated 01.07.2008 which was renewed vide tenancy agreement dated 01.07.2009 on monthly rent of Rs.700,000/- per month and as per clause-2 of the agreement, the tenure of tenancy was with effect from 01.07.2009 to 30.06.2010.

He further stated that as per clause 13 of the agreement, the lessee shall vacate the property mentioned herein on or before 30th June, 2010 without failure and without any notice by the lesser under all circumstances and as per clause 14, the lessee shall pay rent at present rate until 30th June, 2010 and in case of failure to vacate the demised premises within extended time, the lessor shall pay three times enhanced rent of the excising rent. He further stated that since June, 2010 to onward and with mala fide intention, the opponent deposited the rent in this Court @ Rs.700,000/- per month instead of Rs.21,00,000/- per month.

While the authorized officer of opponent No.1 contended with regard to Para-13 and 14 of tenancy agreement that it was signed due to contrary assurance of the applicant as the applicant specifically stated that clause 14 i.e. the penal clause was only added as a formality and the same could not be invoked as the agreement between the parties was for a longer duration. He further denied any default in payment of rent and stated that the rent in respect of the demised premises is regularly being deposited in this Court.

I have also gone through clause 13 of tenancy agreement dated 1st July 2009 whereby it was settled between the parties that the lessee shall vacate the property in question on or before 30th June, 2010 without failure and without any notice by the lessors under all circumstances and as per clause 14 it was further settled that the lessee shall pay rent at the present rate until 30th June, 2020 and in case of failure to vacate the demised premises, the lessee shall pay three times enhanced rent of the existing rent, and the same is also reaffirmed by the opponent's authorized officer during cross-examination. The plea taken by the applicant is that the opponent started depositing the rent in this Court in MRC without tendering the rent to the applicant through money order is against the law, and the same was further reaffirmed by the opponent's authorized officer during cross-examination that he has not produced any proof regarding tendering the rent through any mode.

In the light of above discussion, I am of the firm view and hold that **the opponent vide clause-13 of tenancy agreement dated 1st July, 2009 was under obligation to vacate the demised premises on or before 30th June, 2010 without any notice from the applicant side and as per clause-14 of the agreement, the opponent was further under obligation to pay three times enhanced rent of the existing rent in case of failure to vacate the premises in question but the opponent in order to avoid huge rent started to deposit monthly rent @ Rs.700,000/- per month in M.R.C. No.51/2010, without tendering the rent to the applicant either in cash or through money order is a willful in payment of rent in view of Section 17(2)(i) of the Cantonment Rent Restrictions Act, 1963. Hence I hold that the opponent has committed willful default in payment of monthly rent @ Rs.21,00,000/- per month from July, 2010 onward."**

14. The learned Rent Controller based his findings on the ground that the appellant/tenant vide clause-13 of tenancy agreement

dated 1st July, 2009 was under obligation to vacate the demised premises on or before 30th June, 2010 without any notice from the applicant side and per clause-14 of the agreement, the tenant was further under obligation to pay three times enhanced rent of the existing rent in case of failure to vacate the premises, but the opponent in order to avoid such quantum of rent started to deposit monthly rent @ Rs.700,000/- per month in M.R.C. No.51/2010, without tendering rent to the applicant either in cash or through money order, which act in my view is willful default in payment of rent as perceived by Section 17(2)(i) of the Cantonment Rent Restrictions Act, 1963. The second limb of the findings of the learned Rent Controller to the effect that tenant instead of tendering rent to the landlord deposited it in MRC, but provided no proof of tendering rent to the respondent/landlord through any mode including money order, in order to reach to a just conclusion of the issue at hand, it would be conducive to have a glance over clauses 13 and 14 of the Tenancy Agreement dated 1st July, 2009 (available at page 55 to 59) which are delineated hereunder:-

> *13. The Lessee shall vacate the property mentioned herein above on or before 30th day of June 2010, without failure and without any notice by the Lessors, under all circumstances.*
>
> *14. The Lessee shall pay rent at the present rate until 30th day of June 2010 and in case of failure to vacate the demised premises within extended time the lessee shall pay three times enhanced rent of the existing rent.*

15. It is gleaned from the appraisal of the foregoing clauses that the appellant/tenant was mandated compulsorily to vacate the tenement in question by 30.06.2010 and in case of failure was obligated and under contract to tender enhanced rent of

Rs.21,00,000/- per month. Upon scanning record and proceedings it becomes evident that the appellant/tenant failed to comply with the conditions of these clauses. In fact the representative of the appellant/tenant admitted during the course of cross-examination that:-

> *"It is correct to suggest that as per clause-14 of tenancy agreement 2009, in case of failure to clear the rent on time, the tenant will have to pay the rent thrice the amount of the rent which is Rs.21,00,000/- per month."*
>
> *"It is correct to suggest that we have not produced any proof regarding tendering the rent through any mode to the applicant before depositing the rent in this Court in MRC."*

16. It is crystal clear from appraisal of the foregoing that the appellant/tenant neither vacated the tenement nor handed it over to the respondent/landlord by 30.06.2010 as well as did not tender the enhanced rent as mutually agreed between them vide Tenancy Agreement dated 01.07.2009, thus in my view the learned Rent Controller having examined all aspects of the case, rightly reached to the conclusion that the appellant/tenant committed willful default in payment of rent in view of Section 17(2)(i) of the Cantonment Rent Restrictions Act, 1963.

17. Reverting to the issue of tendering rent in MRC, there is nothing on record to show that the respondent/landlord ever refused to accept rent so as to entitle or give any justification to the appellant/tenant to send monthly rent through money order or thereafter to change even said mode into making deposits in the office of Rent Controller. It is an established position that deposit of rent in the office of Rent Controller in the absence of having proved refusal on the part of the respondent/landlord does not permit the appellant/tenant to deposit rent in the office of Rent Controller.

Consequently, such deposit cannot be considered to be a valid tender in the eye of law. Furthermore, where a landlord chose to refuse payment of rent, it is thereafter mandatory for the tenant to first remit the rent through postal money order and if that was not done, making deposit of rent in Court does not absolve him from being declared defaulter for the relevant period. The appellant/tenant failed to introduce on record any evidence that they ever tendered rent through money order. The Hon'ble Supreme Court in the case of Muhammad Asif Khan v. Sheikh Israr (2006 SCMR 1872) in the similar circumstances has held as under:-

> "5. On perusal of the evidence it would appear that the respondent/tenant was in habit of sending rent through money order to the appellant/landlord but all of sudden without any refusal on the part of appellant/landlord the respondent/tenant from the month of October, 1992 started depositing rent in the office of Rent Controller. We inquired from the learned counsel for the respondent/tenant as to what was the cause not to continue to send rent through postal money order as per practice which prevailed prior to October, 1992, but he could not give satisfactory reply/justification. **There is nothing on record to show that the appellant/ landlord ever refused to accept rent by tender so as to entitle or give any justification to the respondent/tenant to send monthly rent through money order or thereafter to change even said mode into deposit of rent in the office of Rent Controller. The deposit of rent in the office of Rent Controller in absence of having proved refusal on the part of the appellant/landlord would not authorize the respondent/tenant for the deposit of rent in the office of Rent Controller** in terms of subsection (3) of section 10 of Sindh Rented Premises Ordinance, 1979. Consequently, such deposit cannot be considered to be a valid tender in the eye of law. **Reference may be made to the decision of this Court Pakistan State Oil Company Ltd. Karachi v. Pirjee Muhammad Naqi 2001 SCMR 1140 where this Court observed that, where a landlord refused to accept rent, it was mandatory for the tenant first to remit the rent through postal money order and if that was not done, deposit of rent in Court would not absolve the tenant from being a defaulter for the relevant period."**
>
> **[emphasis added]**

18. So far as the case laws relied upon by the learned counsel for the appellant are quite distinguishable from the facts and circumstances of the present issue which have been so discussed in the foregoing.

19. In sequel to the above, I do not find any illegality or impropriety in the impugned Order of the learned Additional Controller of Rents Clifton Cantonment, therefore the FRA at hand is dismissed.

Karachi
Dated:08.09.2023 JUDGE

Aadil Arab