JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A. No.10 of 2016

M/s Samba Bank Ltd.

Versus

M/s Hotel Hill View Limited

Date of Hearing:-	11.01.2022
Appellant by:	Raja Muhammad Aleem Khan, Abbasi, Advocate.
Respondent No.1 by:	Mian Abdul Razzaq, Advocate.

ARBAB MUHAMMAD TAHIR, J. Through this Regular First Appeal, the appellant, M/s Samba Bank Limited, calls in question the judgment and decree dated 30.10.2015, passed by the Court of the learned Civil Judge, Islamabad, whereby the suit for recovery of rent amounting to Rs.54,64,050/- up to 11.11.2011 and onward @ Rs.72,187.5/- per day till the handing over of vacant possession and mandatory injunction, instituted by the respondent, M/s Hotel Hill View Limited, was decreed in the following terms:-

> *"In view of my findings on issues the suit of the plaintiff is decreed to the extent of arrears at the rate of Rs.72,187.5/- per day with effect from 06.09.2011 to 26.03.2013 (both days inclusive) total Rs.72,187.5 x 546 = Rs.39,414,375/-. However, dismissed to the extent of recovery of Rs.6,99,275/- on account of damage to the building."*

2. The facts essential for the disposal of this appeal are that the respondent, M/s Hotel Hill View Pvt. Ltd., being owner of Block No.12-A, Markaz F-7, Islamabad had rented out Ground Floor and Mezzanine of the said property (hereinafter referred to as **"the rented premises"**) to the appellant, M/s Samba Bank Limited (previously known as Crescent Commercial Bank Ltd.). Vide a lease agreement dated 02.06.2008 (hereinafter referred to as "**the lease agreement**"). The said lease agreement was effective for a term of seven years commencing from 01.05.2008. The rent as agreed upon by the contesting parties was as under:-

"1. The rent shall be charged at the rate of Rs. 275/- (Rupees Two hundred and seventy five only) per square foot of the DEMISED PREMISES amounting to Rs. 1,732,500/- (Rupees One Million Seven hundred Thirty Two Thousand Five hundred Only) per month for the first three (03) years of the LEASE PERIOD.

2. The rent for the fourth year will be increased by twenty five (25) percent of Rs. 275 (Rupees two hundred and seventy five only) per square foot and will be paid to the LESSOR for the fourth year in advance upon the commencement of the fourth year.

3. The rent for the fifth, sixth and seventh years shall be increased at the rate of ten (10) percent of the previous year's rent and shall be payable yearly in advance.

3. Pursuant to Clause 1 of the lease agreement, the appellant had sent termination notice dated 10.03.2011 to the respondent informing the latter that since the rented premises are no more required for its business use, therefore, the same will be vacated within a period of 180 days. This caused the respondent to initiate proceedings against the appellant by instituting the aforementioned suit, which was decreed by the learned Civil Court in terms of the impugned judgment and decree dated 30.10.2015. Hence, this appeal.

4. Learned counsel for the appellant, after narrating the facts leading to the filing of this appeal, contended that the learned Trial Court erred by not appreciating that the suit instituted by the respondent was not maintainable; that the learned Trial Court fell in error by not appreciating the documents brought on record by the appellant; that the appellant paid the advance rent of the rented premises to the respondent till 05.09.2011, which was duly received by the respondent; that prior to the vacation of the rented premises, the respondent had duly been informed by the appellant about the vacation of the rented premises; that after vacation of the rented premises, all the utility bills had been cleared by the appellant; that the respondent was well aware as to the fact that the appellant shifted its place of business from the rented premises in the month of August, 2011 since the former's business was also located in the same building; that the appellant had also given an advertisement in the Newspaper regarding shifting of its place of business from the rented

premises; and that this material aspect of the matter escaped notice of the learned Trial Court.

5. It was next contended that the learned Trial Court while wrongly relying on the Local Commission's report decreed the respondent's suit to the extent of the rent with effect from 06.09.2011 to 26.03.2013; that the appellant had filed objections to the Local Commission's report, but they were unceremoniously spurned; that the Local Commission's report was not binding on the learned Trial Court; that it was not the mandate of the Local Commission to handover physical possession of the rented premises to the respondent; that the learned Trial Court did not take into account the appellant's reply to the legal notice sent by the respondent; that the learned Trial Court also failed to appreciate that the keys of the rented premises had been handed over to the respondent's representatives; and that the learned Trial Court ignored the law on the subject. Furthermore, it was contended that the learned Trial Court ignored the provisions of Section 4 of the Islamabad Rent Restriction Ordinance, 2001 ("hereinafter referred to as the **"IRO"**); that the learned Trial Court was under an obligation to give its issue wise findings separately; the impugned judgment and decree passed by the learned Court below suffer from material irregularity, concluded the learned counsel. Learned counsel for the appellant prayed for the appeal to be allowed in terms of the relief sought therein.

6. On the contrary, learned counsel for the respondent has vehemently controverted the arguments advanced by the learned counsel for the appellant by contending that the appellant did not honour its commitment by giving prior notice for vacation of the rented premises; that the appellant had neither paid the rent of the rented premises from 06.09.2011 till the institution of the suit nor has it handed over vacant possession of the same to the respondent; that it was agreed by the appellant that after expiry of the lease agreement, vacant possession of the rented premises would be handed over to the respondent; that the appellant unlawfully demolished the walls inside the rented premises;

that the appellant also removed marble and chips floor of the rented premises; that on 10.03.2011, the appellant sent a notice to the respondent informing the latter that the rented premises are no more required; that the appellant did not remove its furniture and fixtures until 05.09.2011; that the appellant has caused damage to the rented premises by demolishing walls and removing granite tiles; that on 08.10.2011, a notice was sent to the appellant to vacate the rented premises and restore the same in the original condition, but to no avail; that the impugned judgment and decree are based on sound reasons; that the learned Trial Court has not committed any illegality in decreeing the respondent's suit; and that the impugned judgment and decree passed by the learned Court below do not suffer from any illegality or infirmity calling for interference by this Court. Learned counsel for the respondent prayed for the appeal to be dismissed.

7. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts necessitating the filing of this appeal have already been discussed in paragraphs No.02 to 04 above and need not be reiterated.

8. As mentioned above, on 02.06.2008 (wrongly mentioned in the impugned judgment and decree as 02/04-2006-2008), the lease agreement was executed between the appellant and the respondent. The said lease agreement was effective from 01.05.2008. As per Clause 3 of the said lease agreement, the appellant was authorized to make any alterations/ structural changes in the rented premises according to the appellant's business requirements. Clause 8 of the lease agreement authorized the appellant to install air conditioners, appliances, fixtures, fittings, furnishings, generators and communication equipments in the rented premises. Clause 10 of the lease agreement provided that in the event, the appellant intended to raise any constructions in the rented premises, prior permission in writing was to be obtained from the respondent and further the respondent was to be given 30 days' prior notice in writing regarding construction activities and the proposed plan with specifications. The

termination Clause in the lease agreement provided that upon expiry of the leased period, vacant possession of the rented premises was to be handed over by the appellant to the respondent in a reasonable order.

9. Prior to the expiry of the term of the lease agreement, the appellant in pursuance of Clause-1 of the lease agreement, sent a termination notice dated 10.03.2011 to the respondent conveying its intention that since the rented premises do not meet the requirement of its business, hence, the same will be vacated within a period of 180 days. Furthermore, the rent for the period of three months was also paid in advance to the respondent. The said termination notice was responded to by the respondent through letter dated 17.09.2011. In the said letter dated 17.09.2011, the appellant had been asked to remove all window glasses, wall and re-build the bricks wall and bring the rented premises in the original condition as they were at the time of taking over.

10. On 08.10.2011, the respondent had sent another legal notice to the appellant reiterating the same assertions. On 13.10.2011, the appellant filed a reply to the respondent's said legal notice dated 08.10.2011. The stance taken in the aforesaid notices was repudiated by the appellant by pleading that in fact the appellant honoured its commitment by vacating the rented premises and handing over the keys and vacant possession of the rented premises to Syed Zahid Hussain and Maqsood, the Chairman and the Manager of the respondent, respectively. The respondent's other assertions were vehemently denied by the appellant being based on misrepresentation. Additionally, in reply to the notices, the appellant asserted that all the utility bills had been cleared by it.

11. Through an acknowledgment receipt (Exh.D/2), Syed Tassaduq Hussain, Chief Executive Officer of the respondent had categorically admitted the fact that the appellant had in fact cleared the full and final payment against the claim raised by the respondent and there is nothing outstanding against the appellant. Consequently, the legal notice sent by the respondent was also withdrawn. The said acknowledgment receipt is reproduced herein below for ease of reference:-

"I, Mr. Syed Tassaduq Hussain, holding CNIC No. 61101-4434726-1 Chief Executive office of M/s. HOTEL HILL VIEW PRIVATE LIMITED, Markaz F-7, Islamabad, have received a sum of Rs. 200,833/- (Rupees Two hundred thousand eight hundred and thirty three only) in respect of water Charges @ Rs. 5,000/- per month from May 01, 2008 to September 05, 2011 (i.e., 03 years, 04 Months and 05 days). As per clause 01, titled ***"Bills"*** *and in compliance of the Lease Agreement dated 02.06.2008 and on my request, Samba Bank Limited (herein after referred as "SBL") has offered the said amount of Rs. 188,773/- (Rupees one hundred eighty eight thousand seven hundred and seventy three only), after deduction of tax through pay order NO. 0091840, dated 09.07.2011, issued by SBL.*
Now after receiving the said pay order, I ensure and admit that is full and final payment against my claim through legal notice dated 02.07.2011 and nothing is outstanding and remains against SBL as per lease agreement*.*
Therefore, ***I am withdrawing my legal notice vide reference letter No. CCX-MMXI, dated 02.07.2011*** *served through my legal counsel Mr. Malik Babar Hameed, Advocate High Court of M/s. Baber Legal Services.*

(Emphasis is supplied)

12. On 11.11.2011, the respondent instituted the abovementioned suit for recovery etc. The said suit was contested by the appellant by filing a written statement. The plea taken by the appellant in its written statement was that the rented premises were insufficient for its business requirements as such through its letter dated 10.03.2011, the appellant informed the respondent about the vacation of the rented premises. Out of the divergent pleadings of the contesting parties, the learned Court below framed the following issues under Order XIV of the Code of Civil Procedure, 1908 (hereinafter referred to as **"C.P.C."**):-

1. *Whether the plaintiff is entitled to recover Rs. 5464050/- up to 11.11.20211 and onward @ Rs. 72,187,5/- per day till the handing over the possession to the plaintiff and mandatory injunction as prayed for? OPP?*
2. *Whether instant suit is neither maintainable nor proceedable? OPD*
3. *Whether the plaintiff has no cause of action and the suit is barred by law, hence, plaint is liable to be rejected under Order VII Rule 11 CPC? OPD*
4. *Whether plaintiff has no locus standi to file the instant suit? OPD.*
5. *Relief.*

13. The onus to prove issue No.1 was solely upon the respondent, whereas the learned Trial Court has not been able to appreciate/dig into the evidence, rather it has decided the said issue in favour of the respondent in a cursory and haphazard manner. The record further reveals that the learned Court below while taking the evidence into consideration led by the appellant, decided the said issue in the respondent's favour. Perusal of the record further depicts that in order to discharge the burden of this issue, there was no evidence adduced by the respondent. However, the evidence in this regard was produced by the PWs, who were neither present during the execution of the lease agreement or the handing over of the rented premises by the respondent to the appellant nor they were the signatory to any of the documents presented by them during the trial. It is by now well settled proposition of law that the onus of proving a factum must be proved by the person alleging it. **Maxim---"Secundum allegata et probate---Meaning---who lodges a fact must prove it.** Guidance in this regard is solicited from the judgment of the Hon'ble Supreme Court in the case reported as **2010 SCMR 1351 titled** *Khan Muhammad vs. Muhammad Din through LRs*.

14. Furthermore, the evidence adduced by the appellant had not been given due credence by the learned Court below. The appellant, being a bank, had categorically given a wide circulation for the transfer of its place of business from the rented premises to a new place in the same vicinity. Generally, it is a matter of fact that when a bank shifts its place of business from one place to another place, it gives a notice in writing to its customers / public to this effect, which in fact, the appellant in the case at hand, had done so. Another important aspect of the matter is that while shifting the place of the appellant's business from the rented premises to a new location, further possessing the rented premises in question by the appellant, does not appeal to a prudent mind, but no evidence to this effect had been produced by either party. The learned Trial Court in the impugned judgment has simply relied upon the cross-examination of DW-1 to the effect of handing over vacant possession of the rented

premises to the respondent by the Local Commission on 26.03.2013. It seems that the learned Trail Court was nescient of the facts and of the evidence produced in *pro* and *contra* capacity by the parties to the proceedings while decreeing the respondent's suit.

15. Another important aspect of the matter is that the suit was instituted by the respondent on 11.11.2011, whereas the list of witnesses was filed on 14.06.2014 i.e. after lapse of almost three years. The law provides a time period of seven days for filing of the list of witnesses soon after the filing of the suit. Moreover, the list of witnesses along with certificate of readiness and documents relied upon by the respondent were to be filed within a period of seven days, but the respondent failed in doing so. The learned Court below did not appreciate this pivotal aspect of the matter. It is also quite surprising to note that no objection to the said effect was ever raised by the learned counsel for the appellant either on the trial stage, the appellate stage or before this Court.

16. Similarly, under Order VII, Rule 14 C.P.C., all the documents are to be filed by the plaintiff along with his / her suit. List of reliance of the documents under Order XIII C.P.C. shall be produced at the first hearing of the suit. This principle of law is mandatory and in case of non-compliance, no documents ought to be receivable at a subsequent stage unless good cause is shown to the satisfaction of the Court under Order XIII Rule 2 C.P.C. for its non-production. But the plaintiff (i.e. the respondent herein) had failed to perform its statutory obligation. The learned Trial Court has also not taken this import aspect of the matter into account while dealing with the issue under dispute. Reliance in this regard is placed upon the judgment of the Hon'ble Supreme Court reported as **1992 SCMR 2182** titled as *Fazal Muhammad v. Chohara.*

17. Additionally, as per the record of the suit, the list of reliance was neither annexed with the plaint nor with the written statement, but surprisingly, the documents relied upon had been exhibited by the PWs, who were strangers to those documents. The PWs, who produced the said documents were neither the custodian of those documents nor were they

cited as marginal witnesses to the said documents. Order VII, Rule 18 C.P.C. deals with the inadmissibility of the documents not produced at the stage when a plaint is filed. This important aspect of the matter also escaped notice of the learned Court below. All these documents have been exhibited without there being any objection from either side under Article 78 of Qanon-e-Shahadat Order, 1984. It is well settled principle of law that when any document is exhibited without there being an objection in respect of it by the other side, the same shall be deemed to be admitted. Reliance can be placed upon the judgment of the Hon'ble Supreme Court in the case reported as **2014 SCMR 630** *titled, Muhammad Farooq vs. Abdul Waheed Siddiqui and others",* wherein it was *inter-alia* held that once a document was exhibited without objection from the opposite side, such a document cannot be termed as inadmissible evidence. Furthermore, in the case reported as **2005 SCMR 364** titled, *S.A.K. Rehmani vs. The State,* it was *inter-alia* held that the "*documents exhibited without objection can be taken into consideration and no such objection can be raised in appeal or revision.*"

18. On 05.03.2013, upon an application for appointment of a Local Commission filed by the respondent, Mr. Nawazish Ali Khan, Advocate was appointed as the Local Commission, who was mandated with the task to physically inspect the rented premises in question and submit a report on 19.03.2013. On 23.04.2013, the Local Commission submitted his report which was Exhibited as "PW-4/1". The record further transpires that the Local Commission had been examined as PW/4. As per law, at best the Local Commission can appear as a Court Witness and can be examined and cross-examined as Court Witness and not as PW or DW.

19. The moot question that begs an answer in the instant appeal is that how much reliance can be placed upon the report submitted by the Local Commission appointed under Order XXVI, Rule 10 C.P.C. The learned Trial Court has solely relied upon the report submitted by the Local Commission which was exhibited as PW-4/1, who appeared as PW-4. The learned Trial Court has further relied upon the cross-examination of DW-1 wherein the defendant witness has admitted that *"they have no*

proof of handing over the possession and that the Local Commission after breaking the lock handed over the possession to the plaintiff". Moreover, the learned Trial Court has observed that the report of the Local Commission establishes this very fact that the possession of the rented premises was handed over to the respondent on 26.06.2013. The learned Trial Court seemed to have ignored the fact that onus of proving of issue No. 1 was upon the plaintiff (i.e. respondent herein) to establish that vacant possession of the rented premises had not been handed over to it as per the said lease agreement.

20. It is further astonishing to observe that when the Local Commission, who appeared as PW-4, the learned counsel for the appellant did not raise any objection over the presentment of the Local Commission as PW-4. However, during the course of the arguments, learned counsel for the appellant contended that the appellant had filed objections over the report of the Local Commission which was not decided by the learned Court below. The record transpires that while appointing the Local Commission on 05.03.2013, the learned counsel appearing on behalf of the appellant had consented to the appointment of the Local Commission. Thus this contention of the learned counsel for the appellant cannot hold ground as the learned counsel for the appellant had given his consent to Local Commission's appointment. Furthermore, ample opportunity had been given to either of the party for cross-examination on the Local Commission and putting their case upon the said witness, who appeared before the trial Court as PW-4.

21. It has further to be seen that the Local Commission could only perform limited and narrow functions by way of Terms of Reference framed by the Court. The report of the Local Commission could not be termed as findings, but the same was to be considered as an inquiry for information and assistance of the Court. Reliance in this regard may be placed upon the judgment reported as **2019 CLC 596** *Kh. Abdul Rehman (Deceased) v. Muhammad Farooq Mirza.*

22. The cross examination of the Local Commission (PW-4) is an important piece of evidence which escaped notice of the learned trial Court while deciding the issues. In the cross-examination, PW-4 **had pleaded that he is not aware of the fact that who put the lock on the doors of the rented premises. He also affirmed that there was no security guard or staff of the appellant present on the spot.** Further, more importantly, **he admitted the fact that it was unclear who was in possession of the rented premises.** These all aspects of the matter have not been discussed by the learned trial Court while deciding the fate of the plaint filed by the respondent. Guidance on the question as to whether reliance can be placed upon the report of the Local Commission can be sought from the judgment passed by the Hon'ble Supreme Court of Pakistan in the case reported as **PLD 2004 SC** 633 titled, *Islam ud Din & others v. Gul Muhammad & others,* wherein, it has *inter-alia* been held that the report of the Local Commission can be referred to for explanation of the evidence, but the same cannot form basis for the grant of relief. The perusal of Local Commission's report exhibit PW-4/1 reveals that the Commission at Para-05 of its findings stated that "*Apparently*" the wire lock of main entrance was the property of the tenant. The trial Court while parting with the impugned judgment seeing overwhelmed with these observations of the Local Commission. The learned trial Court regardless of the evidence produced by the parties and taking the same into consideration as to what iota of evidence has been produced by the respondent/plaintiff regarding the possession of the rented property has embarked on a journey of drawing inferences from the report of the Local Commission, whereas the Local Commission's report itself reflects that the Commission was not sure about the possession of the rented premises by using the word "Apparently".

23. Another important aspect of the matter would be that if the appellant was in possession of the rented premises and was a defaulter in the payment of rent to the respondent, then the proper course available to the respondent was to invoke the jurisdiction of the learned Rent

Controller under the provisions of IRO instead of invoking the jurisdiction of the learned Civil Court. In such a scenario, it would have been the Court of the learned Rent Controller, who could have decided the fate of the controversy involved in the *lis* at hand. Let that be as it may, this aspect of the matter was never agitated by the learned counsel for the appellant before the learned trial Court to say the least, where he had ample opportunity to raise this objection. However, the written statement filed by the appellant is also silent on this aspect of the matter therefore, no findings could be given on this issue as it would amount to framing of a new issue and requiring of evidence or amendments in the pleadings of either party.

24. Under Order XLI, Rule 31(d) C.P.C., it is obligatory upon the appellate Court to decide each of the point under dispute and to state reasons for its decision. It should be evident from the judgment that the appellate Court has applied its mind consciously to the dispute agitated before it.

25. In view of what has been discussed above, and on the touchstone of the principle of balance of probabilities, we have arrived at an irresistible conclusion that the impugned judgment and decree dated 30.10.2015 suffer from material irregularities and factual infirmities as such the same cannot be upheld. Consequently, the instant appeal is allowed and the impugned judgment and decree dated 30.10.2015 are set aside leaving the parties to bear their own costs.

(CHIEF JUSTICE) **(ARBAB MUHAMMAD TAHIR)**
JUDGE

Announced in open Court on ____February, 2022

CHIEF JUSTICE **JUDGE**

Approved for reporting

Kamran*