

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.972 of 2005

*[Dr. Hasan Fatima Jaffery and 2 others vs. Royal Saudi
Consulate Karachi and another]*

Dr. Hasan Fatima Jaffery,
Satieh Jaffery and Ali Mohsin Jaffery
(*Plaintiffs*).

: Through Mr. Hamza
Hidayatullah, Advocate.

Royal Saudi Consulate Karachi
(*Defendant No1*)

: Through M/s. Muhammad
Zubair Quraishy and
Muhammad Rehan
Quraishy, Advocates.

Mohammad Ibrahim
Al-Khortooter
(*Defendant No.2*).

: Nemo

Dates of hearing

: 27.02.2019 and 14.03.2019

Date of Decision

: 18.12.2019

Case law relied upon by Plaintiffs' Counsel

1. 1996 CLC page-530 [Karachi]
[Dost Muhammad vs. Pakistan Steel Mills and another]
2. 1991 S C M R page-2300
[Mst. Nur Jehan Begum through Legal Representatives vs. Syed Mujtaba Ali Naqvi]
3. 1990 CLC page-729 [Lahore]
[Messrs Nazir Muhammad & Brothers and others vs. Islamic Republic of Pakistan]
4. 1987 CLC page-1855 [Lahore]
[Anwar Baig and another vs. Mst. Naziran Bibi and 8 others]
5. PLD 1952 Peshawar page-50
[(Haji) Abdul Ghaffar Khan vs. Gullah Jan]
6. PLD 1997 Karachi page-6
[Nooruddin and 11 others vs. Abdul Waheed]

7. 2013 S C M R page-507
[Malik Gul Muhammad Awan vs. Federation of Pakistan through Secretary M/o Finance and others]
8. PLD 1981 Supreme Court page-377
[A. M. Qureshi vs. Union of Soviet Socialist Republics and another]
9. PLD 2004 Supreme Court page-633
[Islamuddin and others vs. Ghulam Muhammad and others]

Case law relied upon by learned counsel for Defendant No.1.

1. 2006 CLD page-191 [Karachi]
[Messrs Sakhi Dattar Cotton Industries and Oil Mills through Authorized Partner vs. Messrs Mahmood Pvt. Ltd. and 4 others]-Dattar case.
2. 2003 YLR page-943 [Karachi]
[Imran Raza Shaikh and 5 others vs. Mst. Zarina Gul and 4 others]-Imran case.
3. Unreported decision given by this Court in Suit No.1429 of 2006
[Syed Salman Jahan vs. Khalid Faisal N. Alotabi and 2 others]-Salman case.

- Other Precedents:**
- (1) 2012 C L D page-6
(Abdul Majeed Khan v. Tawseen Abdul Haleem) [Abdul Majeed case].
 - (2) PLD 1996 Supreme Court page-737
(Sufi Muhammad Ishaque vs. The Metropolitan Corporation Lahore through Mayor) [Ishaque case].

- Law under discussion:
- (1) The State Immunity Ordinance, 1981
[Immunity Law].
 - (2). Diplomatic and Consular Privileges Act, 1972. *[Consular Law].*
 - (3). The Code of Civil Procedure, 1908
[CPC].
 - (4). The Sindh Rented Premises Ordinance, 1979 *[SRPO].*
 - (5). Qanoon-e-Shahadat Order, 1984.
[Evidence Law].
 - (6). Limitation Act, 1908.
[Limitation Law].

JUDGMENT

Muhammad Faisal Kamal Alam, J: Through the present action at law, Plaintiffs have made a monetary claim against Defendants, arising out of a Tenancy / Lease Agreement dated 01.03.1998 entered into between

Plaintiffs and Defendants in respect of a residential Bungalow. Plaint contains the following Prayer Clause_

“It is, therefore, prayed that this Hon'ble Court may be pleased to:

- a. *Grant Judgment and Decree against the Defendants requiring them to pay jointly and / or severally the aforesaid total amount of Rs.4,830,040/- [Rupees Four Million Eight Hundred Thirty Thousand and Forty only) to the Plaintiffs, together with mark-up thereon @ 14% per annum, as well as late fees, surcharge, penalty and other charges claimed or as may be claimed by the concerned Authorities, on account of the delays and defaults committed by the Defendants.*
- b. *Cost of the suit to the Plaintiff.*
- c. *Any other relief(s) as this Hon'ble Court deems fit and proper in the circumstances of the case.”*

2. Upon issuance of summons, the Defendant No.1 contested the case by filing the Written Statement.

3. The claim of Plaintiffs is that latter (Plaintiffs) being lawful owners of a built up property / bungalow bearing No.32/I/II, 32nd Street Phase-V, DHA, Karachi, let out the same to Defendant No.1 under the Lease Agreement (**Exhibit P/2**) and Hire Agreement for Fixtures and Fittings (**Exhibit P/3**) both dated 01.03.1998. The lease period was of 25 months ending on 31.03.2000 in terms of Clause-1 of the said Lease Agreement, but Defendant No.2 is one of the staff members of Defendant No.1 continued as tenant. Somewhere in December, 2003, the Plaintiffs discovered that the suit property / demised premises was abandoned and Defendants did not hand over the vacant, peaceful possession to Plaintiffs. When the suit property was visited, Plaintiffs found out that structural damage was also done; besides, utility bills were not paid. It is averred that

in fact physical, vacant possession was handed over to Plaintiffs in April, 2004, after a meeting was held in the office of Defendant No.1, on 06.04.2004, wherein, Defendant No.2 was also present.

4. On the other hand, above averments have been denied by Defendant No.1 in its Written Statement. The main defence of Defendant No.1 is that after expiry of tenancy of suit premises on 31.03.2000, the Defendant No.1 was not liable to pay anything either towards rental, utility bills or damages. It is further stated that Defendant No.1 has paid and cleared all its liabilities towards rent and other charges including utilities on 31.03.2000 when possession was delivered to Plaintiffs. It is stated in the Written Statement, that the Consul General of Defendant No.1 at the relevant time merely to resolve the issue between Plaintiffs and Defendant No.2 arranged a meeting and called Defendant No.2 from Riyadh, Saudi Arabia but Plaintiffs did not contact Defendant No.1 and the said Defendant No.2 had to return to Saudi Arabia. The Defendant No.1 has taken a specific legal objection with regard to maintainability of present *lis*.

5. Vide order dated 26.01.2009, following Issues were settled by the Court_

“1. Whether the suit as filed, is maintainable in law?”

1-A. Whether the claim made in the plaint is barred by time?

2. Whether the defendants are obliged to pay jointly and / or severally to the plaintiffs the amounts as claimed in the suit including paragraph Nos.16 and 17 of the plaint of the suit?

3. Whether the defendants are obliged to pay jointly and / or severally to the plaintiffs the amounts of damages as claimed in paragraph No.18 of the plaint of the suit?

4. What should the decree be?”

ISSUES NO.1 AND 1-A.

6. Since both Issues relate to maintainability of present *lis*, therefore, they have to be answered first.

7. Mr. Zubair Qureshi, Advocate, while representing Defendant No.1, has vehemently argued that the present suit is not maintainable and Defendant No.1 enjoys diplomatic immunity in view of the Article 43 of the Diplomatic and Consular Privileges Act, 1972. In addition to this, he has further submitted that the present suit is time barred.

8. The learned counsel for Defendant No.1 has also invoked Section 86-A of CPC, to further augment his arguments. He has relied upon the cases of *Sakhi Dattar [2006 CLD page-191]*, *Imran Raza [2003 YLR page-943]* and an *unreported Judgment* handed down in Suit No.1429 of 2006, wherein, present Defendant No.1 was a defendant.

9. On the other hand, Mr. Hamza Hidayatullah, learned counsel for Plaintiffs, has argued that diplomatic immunity is not extended to Defendants in relation to commercial transactions. The learned counsel has relied upon the provision of the State Immunity Ordinance, 1981. Per learned counsel, Sections 5 and 7 of the said Immunity Law are exceptions to the general rule of immunity. He has relied upon a well know reported Judgment handed down by Hon'ble Supreme Court in A. H. Qureshi case (*ibid*) (1981 SC page-377). It is further argued that this issue of Diplomatic Immunity was already settled by the learned Division Bench of this Court in the High Court Appeal No.100 of 2007, filed by the present Defendant No.1, in which while dismissing the Appeal, it was observed that the afore referred Laws do not give absolute immunity to Defendants, as suit

property was let out for residential purpose and not any function relating to the Consulate (Defendant No.1).

10. With the passage of time, the principle governing immunity has undergone a change. National Courts in different jurisdictions, specially where there exists constitutional dispensation, have generally narrowed down the scope of immunity, whether constitutional, diplomatic or any other type of immunity. One of the reasons for adopting such view, while interpreting the law or clauses relating to immunity is that the concept of immunity is to be balanced with the accountability and those rights guaranteed as fundamental and human rights. The learned Division Bench in the above High Court Appeal has held that to the transaction in question the Diplomatic Immunity is not extended to, but at the same time has observed that an issue with regard to maintainability of the suit should be decided first after recording the evidence. Admittedly, the Plaintiffs and Defendant No.1 had a relationship of landlord and tenant in respect of the suit property. The main claim of Plaintiffs is that the tenancy continued after 31.03.2000 when Defendant No.2 being a staff member of Defendant No.1 shifted in the suit premises, whereas, the main defence of Defendant No.1 is that the tenancy came to an end on 31.03.2000 and thereafter the relationship ceased to exist. The claim of Plaintiffs has arisen out of certain obligations directly relating to the Lease / Tenancy Agreement. Such nature of claim and transaction squarely falls within the exceptional clauses of Sections 5 and 7 of the above referred Immunity Law, which are reproduced herein under for ready reference_

“5. Commercial transactions and contracts to be performed in Pakistan.—(1) A State is not immune as respects proceedings relating to,---

***(a) a commercial transaction entered into by the State; or
(b) an obligation of the State which by virtue of a contract,***

which may or may not be a commercial transaction, falls to be performed wholly or partly in Pakistan.

(2) Sub-section (1) does not apply to a contract of employment a between a State and an individual or if the parties to the dispute are States or have otherwise agreed in writing; and clause (b) of that sub-section does not apply if the contract, not being a commercial transaction, was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section "commercial transaction" means—

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity, whether of a commercial, industrial, financial, professional or other similar character, into which a State enters or in which it engages otherwise than in the exercise of its sovereign authority."

"7. Ownership, possession and use of property.— (1) *A State is not immune as respects proceedings relating to,---*

(a) any interest of the State in, or its possession or use of, immovable property in Pakistan; or

(b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia.

(3) The fact that a State has or claims an interest in any property shall not preclude any Court from exercising in respect of such property any Jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A Court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property,---

(a) which is in the possession of a State; or

(b) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case referred to in clause (b), if the claim is neither admitted nor supported by prima facie evidence."

{Underlined to add emphasis}.

11. *Secondly*, decisions relied upon by learned counsel for Defendant No.1 are distinguishable. In the first case of *Sakhi Dattar*, the commercial dispute was admittedly between plaintiff (a partnership firm) and defendants (a private limited company and its Managing Director); thus it was held that defendant No.2, who signed a letter on behalf of defendant No.1 as its Managing Director, cannot be made personally liable for payment of unpaid invoices of plaintiffs; this is a settled rule which the cited Judgment has reiterated, that a director of a limited liability company cannot be personally held liable for payment of amounts in such type of transaction. In the second reported Judgment (*Imran Raza, ibid*), this Court held, that statutory bar could only be invoked by a statutory authority (*of the reported case*) and not extended to other private respondents. The third unreported Decision, wherein plaint was rejected, basically on the ground, that from the record it was evident that there was no privity of contract between plaintiff and defendant No.2 (coincidentally the present Defendant No.1) and thus it was held that the defendant No.2 could not be made liable for any private commercial obligation, which was done in the personal capacity by defendant No.1, who was a consular agent of the present Defendant No.1. Since the present transaction in question was between Plaintiffs as landlord and Defendant No.1 being tenant in its official capacity as Consulate General of Saudi Arabia, hence the privilege of diplomatic immunity cannot be extended to Defendants in the present circumstances and particularly in view of above referred provisions of the Immunity Law and the evidence, which has come on record. Issue No.1 is answered in Affirmative that the present suit is maintainable.

12. Adverting to Issue No.1-A. Main claim of Plaintiffs is that Defendants (*particularly Defendant No.1*) defaulted in payment of rentals

and utility bills. However, both Plaintiffs and Defendant No.1 are at variance about the expiry of tenancy; further Plaintiffs are claiming rentals and unpaid utility bills upto March, 2004, whereas, the stance of Defendant No.1 is that the Lease / Tenancy Agreement came to an end on 31.03.2000.

Plaintiff in her evidence has produced the Demand Letter of PTCL dated 01.01.2005 in which a demand of Rs.228,870/- (*Rupees Two Lacs Twenty Eight Thousand Eight Hundred Seventy only*) was raised and produced other bills also as **Exhibit-P/10 (i)**, **Exhibit-P/10 (ii)** and finally **Exhibit-P/10 (vi)**, which is a telephone bill of July 2005, dated 10-8-2005, issued in the name of Defendant No.1 in respect of the suit property for a sum of Rs.4,38,160/- (*Rupees Four Lacs Thirty Eight Thousand One Hundred and Sixty*). In terms of **Sub-Section-1 of Section 2 of Rent Law**, rent includes water and electricity charges and such other charges, which a tenant (*present Defendant No.1*) is liable to pay but are unpaid. This Suit was instituted on 09.08.2005, that is, around the same time when above utility bills remained unpaid, and as per Article 110 of the Limitation Law, three years time is mentioned for recovery of arrears of rent. Since nonpayment of utility bills also form part of arrears of rent, therefore, this suit is within time and not a time barred claim. Issue No.1-A is replied in Negative.

ISSUES NO.2 AND 3.

13. Both Issues are interlinked. The Lease Agreement dated 01.03.1998-**Exhibit P/2** and the Hire Agreement for fixtures and fittings-**Exhibit P/3** of same date and for the same period of tenancy, this is, 25 (*twenty five*) months, are not disputed. It is the claim of Plaintiffs that after expiry of lease period on 30.03.2000, Defendant No.2 continued in the demised premises being one of the diplomats of Defendant No.1. The sole Plaintiff witness, namely, Dr. Hasan Fatima Jaffery (*PW-1*) has testified that once

she visited the premises in September, 2003, she found the place in damaged condition and finally in December, 2003, discovered that the Defendants have vacated the premises sometime in November, 2003. She further deposed that after exchange of legal notices and couple of meetings, particularly, the one on 06.04.2004 in the office of Defendant No.1, where the Defendant No.2 was also present, it was agreed that all the outstanding amount of rent, charges, utility bills upto 31.03.2004 will be paid, besides, Plaintiff got the physical possession after this meeting. The Plaintiffs' witness in support of her testimony has produced utility bills and rent receipts as **Exhibit P/9** to **Exhibit P/16**; (*these documents are available at pages-83 to 155 of the Court file*). **Exhibit P/9** is the notice dated 01.01.2005, issued by Pakistan Telecommunication Company Limited (PTCL) to Plaintiff No.1 (*Dr. Hasan Fatima Jaffery*) for payment of Rs.2,28,870/- (Rupees Two Lacs Twenty Eight Thousand Eight Hundred Seventy only) against Telephone No.5846374; **Exhibit P/10** is also a PTCL Bill dated 08.12.2004 bearing the address of demised premises / suit property for Telephone No.5846734-98 (*same number of Exhibit P/9*); **Exhibit P/10 (v)** is a Telephone Bill bearing the address of suit property and issued in the name of "**Consulate General of Saudi Arabia**"; **Exhibit P/10 (vi)** is again a Telephone Bill (for number 5853350-1) bearing the address of suit property and is in the name of Defendant No.1, in which the name of Defendant No.2 is also mentioned; this bill is of 08.09.2005; **Exhibits P/11 (i), (ii) and (iii)** are the three Electricity Bills for the suit property, accumulated amount whereof is Rs.450,600/- (*Rupees Four Hundred Fifty Thousand Six Hundred only*) [*approximately*]. **Exhibit P/11 (iv), (v) and (vi)** are the Gas Bills issued by Suit Sothern Gas Company Limited (SSGCL) for the suit premises showing the total payable dues as Rs.3,350/- (*Rupees Three Thousand Three Hundred Fifty only*).

14. Most relevant documents produced and exhibited by the Plaintiffs' witness are the receipts for payment of rents bearing emblem of Defendant No.1 in the middle and on the left side the name of Defendant No.1 in English and on the right side the name of Defendant No.1 in Arabic. These receipts bear the signatures of Plaintiff No.1. The last receipt (*at page-155 of the evidence file*) acknowledges that Plaintiff No.1 had received rent for the suit property upto **31.08.2003**. On this specific assertion, the Plaintiff was not cross-examined to an extent to impeach her credit. No question was put about the authenticity of these receipts. The emblem of Defendants on the above receipts are also compared with the stamp of Defendants on the Lease Agreement – **Exhibit P/2**, Handing over / taking over document (*at page-41 of the evidence file*), which is part of the Lease Agreement and Hire Agreement for fixtures and fittings–**Exhibit P/3**. Stamps containing the emblem and that on the above Rent receipts are identical, therefore, these rent receipts are genuine. More so, the sole witness of Defendants, namely, Mr. Moflih, who was the Vice Consul General at the relevant time of Defendant No.1, has not stated anything contrary in his testimony about the above Rent receipts (**Exhibit P/16 onwards**).

Same is the case for utility bills produced by the Plaintiffs' witness (*as mentioned above*) authenticity whereof has not been questioned in the evidence. Presumption of genuineness as envisaged in Article 129 of the Evidence Law is applicable to above documents.

15. In view of above, the rule laid down in two cited Judgments of Honourable Supreme Court (*ibid*) (i) *Mst. Nur Jehan (1991 SCMR 2300)* and (ii) *Islamuddin (PLD 2004 Supreme Court 633)* relied upon by learned counsel for Plaintiffs, relating to the appraisal of evidence and consequence of not cross examining a witness on material assertion, are

relevant and applicable to the facts of present case. Admittedly, Defendant No.2 was a staff member of Defendant No.1. The onus has been shifted on Defendants to prove their defence that after termination of lease period on 31.03.2000, as per the lease period mentioned in the lease Agreement (**Exhibit P/2**), the possession was handed over to Plaintiffs and hence Defendants are not liable to pay any amount either towards rental, utility bills or damages.

Documents governing the relationship between the parties, that is, Lease and Hire Purchase Agreements (*Exhibits P/2 and P/3*) are undisputed. With Exhibit P/2 (Lease Agreement) a handing over and taking over letter is also attached, whereby, the suit property was handed over by Plaintiffs to Defendant No.1, as it also contains the official stamp of Defendant No.1. In this letter, electricity meter reading and gas meter reading as of 23.02.1998 are also mentioned. If the defence of Defendants is to be believed, that they handed over the suit property on 31.03.2000, then there should have been a fresh handing over / taking over of possession letter or any other document to evidence the fact that possession was handed over back to Plaintiff. This aspect cannot be ignored in the present case, *inter alia*, because the present Tenancy Agreement was not between two ordinary persons but it was with a responsible Diplomatic Mission, which is required to maintain a proper record of such type of transactions.

In his cross-examination, to a specific question, the above named Defendant witness has stated that documents for handing over the possession of suit premises was with the previous Vice Consul of Defendant No.1 but they are not with Defendant No.1, as they are not required to keep a record of such documents. It means that the Defendants have failed to prove the fact about handing over possession of

the suit property to Plaintiffs. *Secondly*, the above Rent receipts and utility bills are sufficient evidence that suit property remained in the use and possession of Defendants even after 31-3-2000 (the expiry of lease period as contained in the above Lease Agreement).

16. In their evidence, the Defendant No.1 accepted the fact that the Defendant No.2 was their staff member and was even called from Saudi Arabia for settling the dispute with Plaintiffs, but the latter (*Plaintiff No.1*) did not attend the meeting. However, in cross-examination, the Defendants' witness has showed his ignorance that when the said Defendant No.2 visited Karachi for settlement of dispute. One specific suggestion was not denied by Defendants' witness that Defendant No.2 was working at Defendant No.1 till April 2004. It means that there is no contrary evidence that the said Defendant No.2 was not working at Defendant No.1 till April 2004, that is, the time when finally possession of the suit property was handed over to Plaintiffs. Plaintiffs have proved that after expiry of lease period (even after 31.03.2000), Defendant No.2 was living in the suit premises being one of the staff officers / diplomats of Defendant No.1 and not in his individual capacity. Thus Defendants were tenants and are liable to pay rent for the period when the suit property was ultimately handed over to Plaintiffs, that is, 31.03.2004; the monetary claim of Plaintiffs as mentioned in the pleadings and testified by her is accepted. Defendants jointly and severally are liable to pay a sum of Rs.1,030,040/- (*Rupees One Million Thirty Thousand Forty only*) towards unpaid rent and utility bills.

17. Adverting to the claim of damages. The Plaintiffs have quantified their monetary claim in paragraph-18 of the Affidavit-in-evidence, which has been reiterated in the examination-in-chief. The claim includes a sum of Rupees Eight Hundred Thousand towards repairs and restoration and Three

Million towards damages and compensation, because it is stated that due to acts of Defendants, the Plaintiffs have suffered not only inconvenience but also mental anguish and humiliation. To a specific question, the Plaintiff's witness has acknowledged that the damage done to the suit property by the Defendants has not been surveyed or assessed by some surveyor, nor any documentary evidence is produced by Plaintiff witness to substantiate her claim about repairs and restoration of suit property.

18. Broadly, damages are of two kinds; general and special. Special damages are awarded only when a party successfully proves actual losses suffered by him / her. In the present case, the Plaintiffs have not produced any evidence in support of their claim of Rupees Eight Hundred Thousand incurred on repairs / restoration and Rupees Three Million towards compensation and damages, which fall within the category of special damages. Notwithstanding this aspect of the case, the Superior Courts have held in number of decisions, *Abdul Majeed Khan case (supra)*, being one of the leading cases, that if circumstances so warrant, general damages can be awarded by invoking the rule of thumb; particularly where violation of legal rights exists. Similarly, in the case of *Sufi Muhammad Ishaque (ibid)*, the damages vis-à-vis mental agony has been discussed and the conclusion is that there can be no yardstick or definite principle for assessing damages in such cases, which are meant to compensate a party who suffers an injury. The determination criteria should be such that it satisfies the conscience of the Court, depending on the facts and circumstances of the case.

19. In view of the above discussion, a general damages can be granted if undisputed facts of a case so warrants. In the present case undisputedly, the Plaintiffs being lawful owners / landlord, in order to get their legitimate

claim settled by Defendants, had been made to go through a protracted pre-litigation negotiations and then present litigation and thus Plaintiffs are at least entitled for general damages. Looking at the undisputed facts, I hereby Award a sum of Rs.500,000/- (*Rupees Five Hundred Thousand only*) as damages and compensation to Plaintiffs payable by Defendants jointly and severally. This is in addition to the above amount of Rs.1,030,040/- (*Rupees One Million Thirty Thousand Forty only*), which the Defendants are liable to pay towards outstanding rentals and utility bills.

20. In view of the above, the Defendants are liable to pay an amount of Rs.1,530,040/- (*Rupees One Million Five Hundred Thirty Thousand Forty only*) to Plaintiffs with 10% markup from the date of institution of this suit till realization of the amount. There will be no order as to costs.

Dated: 18.12.2019

JUDGE

M.Javid.PA