

IN THE HIGH COURT OF SINDH AT KARACHI

**IInd Appeal No.81 of 2018**

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DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)  
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**Before: Mr. Justice Nazar Akbar**

Appellant : M/s. COMSTAR, through  
Mr. Muhammad Sidiq Mirza, advocate.

**Versus**

Respondent : State Life Insurance Corporation,  
Through Mr. Sultan A. Alana, advocate.

Date of hearing : **07.05.2019**

Date of Decision : **07.05.2019**

**JUDGEMENT**

**NAZAR AKBAR, J.** The appellant through this IInd Appeal has challenged the appellate order dated **10.05.2018** passed by the XI-Additional District Judge, South Karachi in Civil Appeal No.117/2017, whereby the order passed by the XI-Senior Civil Judge, South Karachi rejecting the plaint of civil suit No.189/2014 under Order VII Rule 11 CPC was set aside and the said suit filed by Respondent was restored to its position where it was earlier pending before the trial Court.

2. To be very precise the facts of the case are that the Respondent filed civil suit for recovery of Rs.30,92,199/- against the appellant on account of arrears of rent in respect of office on 6<sup>th</sup> Floor of State Life Building No.5 at Abdullah Haroon Road Karachi (the tenement). The appellant/defendant contested the said suit and filed written statement and thereafter evidence of Respondent/plaintiff was

recorded. Subsequently instead of producing evidence in rebuttal, the appellant/defendant filed application under Order VII Rule 11 of the CPC. The Respondent/plaintiff filed counter affidavit to the said application. The learned trial Court after hearing learned counsel for the parties allowed the said application and rejected the plaint of the suit filed by the respondent.

3. The Respondent/plaintiff against the order of trial Court filed Civil Appeal No.117/2017 before the appellate Court which was allowed by order dated **10.05.2018** and the civil suit filed by the Respondent was restored to its position where it was earlier pending. The appellant has impugned the order of the appellate Court in this IInd Appeal.

4. I have heard learned counsel for the parties and perused the record.

5. Learned counsel for the appellant has mainly contended that the Court fee has not been paid by the appellant at the time of filing of appeal before the first appellate Court, therefore, the appeal before the appellate Court was not maintainable and it should have been dismissed. He has reiterated all the grounds taken in the memo of appeal and referred to the following case-laws:-

1. *Assistant Commissioner and Land Acquisition Collector, Badin vs. Haji Abdul Shakoor and others* (**1997 SCMR 919**);
2. *Muhammad Ali and others vs. Province of Punjab and others* (**2009 SCMR 1079**);
3. *China Annang Construction Cooperation vs. K.A. Construction Co. through Attorney* (**2001 SCMR 1877**);
4. *Hafeezuddin vs. K.M.C., ETC* (**NLR 1997 Civil 66**);
5. *Muhammad Anwar and others vs. Mst. Ilyas Begum and others* (**PLD 2013 Supreme Court 255**);

6. *Muhammad Ashraf Tiwana and others vs. Pakistan and others* (**2013 SCMR 1159**);
7. *Pakistan Agricultural Storage and Services Cooperation Ltd. vs. Mian Abdul Latif and others* (**PLD 2008 Supreme Court 371**);
8. *American Life Insurance Company (Pakistan) Ltd. vs. Commissioner, Sindh Employees' Social Security Institution and others* (**2010 PLC (C.S.) 1150**).
9. *Haji Abdul Karim and others vs. Messrs Florida Builders (Pvt) Limited* (**PLD 2012 Supreme Court 247**).

6. In rebuttal the counsel for the Respondent has contended that the appeal has been preferred by one Rafiq Ahmed, claiming to be the company secretary but there is no document authorizing the company secretary for filing this second appeal. He further contended that the power of attorney attached with the memo of appeal is not in consonant with the requirement of the Power of Attorney Act, 1882 and, therefore, instant second appeal is not maintainable. He further contended that irrespective of the defect in the power of attorney the second appeal does not lie against the dismissal of an application under Order VII Rule 11 of the CPC by the appellate Court. He has further contended that the appellate Court has not decreed the suit. The suit has been remanded and no decree has been passed by the first appellate court. Since the suit by itself is pending, it means there is no decree against the appellant and no appeal lies without a decree. He has relied on the following case-laws:-

1. *Basheshar Naih Geola vs. Bidhi Chand and others* (**A.I.R 1937 Lahore 380**);
2. *Kassam vs. Kassam and 2 others* (**PLD 1977 Karachi 854**);
3. *Mst. Ghulam Sakina and 4 others vs. Nishan and 2 others* (**1992 CLC 87 Lahore**);
4. *Khushi Yar, etc. vs. Risaldar Malik Nawab Khan, etc.* (**NLR 1987 Civil 354**).

7. The contentions raised by the learned counsel for the Respondent that the second appeal does not lie appears to be forceful. The perusal of **Section 100** of the CPC read with **Order XLIII Rule 2** of the CPC shows that both refer to the appeals from appellate decrees. In **Section 100** of the CPC it has been very specifically mentioned that “***an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court***”. The perusal of record shows that there is no decree attached to the memo of this second appeal and further that the impugned order is not an order falling within the definition of decree under **Section 2(2)** of the CPC. Since the impugned order is not a decree by the first appellate Court, the second appeal does not lie. In this context the reliance placed by the learned counsel for the Respondent on the case of *Kassam vs. Kassam and 2 others* (**PLD 1977 Karachi 854**) squarely covers the case of the appellant.

8. Besides the above, the contentions of the appellant that the Court fee has not been paid by the Respondent before the first appellate Court is of no consequence in the second appeal, since the appellant has never refused, if at all, any Court fees was payable on the first appeal preferred by him. Unless the Court determines Court fee payable by the appellant or plaintiff and it is not specifically determined and direction given by the Court to pay Court fee and decide the issue it cannot be decided by the appellate Court if the appeal or suit has been disposed of without touching the said issue of Court fee. In the case in hand also since the first appellate Court has not ordered to pay any Court fee, the failure of the appellate Court cannot provide an advantage to the appellant whose second

appeal is even otherwise not maintainable. The case-laws relied upon by the learned counsel for the appellant are not relevant to the facts and circumstances of the instant case.

9. In view of the above, this IInd Appeal was dismissed by short order dated **07.05.2019** and the above are the reasons for the same.

JUDGE

Karachi, Dated: 24.07.2019

Ayaz Gul