ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

SECOND APPEAL NO.17/2017

Date	Order with signature of Judge

1. For order on office objection as at A.
2. For hearing of CMA No.824/2017
3. For hearing of main case.

29.09.2020

Mr. Muhammad Khalid advocate for appellants.
Mr. Ali Afsar Jan advocate for respondents.

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SALAHUDDIN PANHWAR, J. Appellants have filed this appeal against judgment and decree dated 21.12.2016 in Civil Appeal No.23/2015 passed by 6th Additional District and Sessions Judge Karachi Central and judgment and decree dated 10.03.2015 and 17.03.2015 respectively in Civil Suit No.456/2010 passed by 2nd Senior Civil Judge Karachi Central.

2. Brief facts of the case are that respondents (plaintiffs) filed suit for recovery of Rs.2850,000/- for breach of contract and damages against appellants (defendants) contending that appellant No.1 is Chief Executive of appellant No.2 company running business with name as M/s. Abdullah Carvan (Pvt) Ltd, respondent No.1 and 2 in order to perform Hajj, entered into contract whereby respondent No.1 paid an amount of Rs.100,000/- on 28.06.2007, on 06.09.2007 Rs.360,000/-, on 29.09.2007 further amount of Rs.50,000/-, totaling to Rs.510,000/- for himself, his mother namely Mst. Amna Khatoon and his wife Mst. Nasim Akhtar for performing Hajj, to appellant No.1 who had issued acknowledgement receipt; that respondent No.2 also came in contact with appellants for performing of Hajj and paid Rs.340,000/- for himself, his wife Mst. Zeenatul Firdous to appellant No.1 who issued acknowledgement. As per agreement it was 40 days

hajj package and appellants had to make arrangements in the month of November 2007; that on 12.10.2007 when respondents went to office of appellants it was found locked, they again visited their office on 12.10.2007 but position was same, thereafter they came to know that appellant No.1 has fled to Dubai; that appellants in association with each other had committed fraud with respondents as well violated the contract for providing service for performance of hajj; that one of the victims namely Muhammad Hanif Khan lodged FIR No.418/2007 at PS North Nazimabad Karachi against them under section 420, 468, 471, 406, 34 PPC on 23.10.2007, police arrested appellant No.1 and produced before the concerned court but later on all the accused obtained bail from that court; that due to fraudulent act and behavior of appellants, respondents suffered monetary losses, metal disturbance and pain and appellants No.1 and 2 are jointly liable to pay damages as prayed for.

3. Heard learned counsel for respective parties. At the outset learned counsel for appellants while relying upon 2013 CLD 1280, 1982 CLC 2387, 1980 SCMR 440, 2009 SCMR 589 and 2004 SCMR 1591 contends that appellate court has failed to determine point for determination which is mandatory under order XLI rule 31 CPC; besides judgment of the trial court is against the law as amount received by company hence decree against directors as passed by trial court is incompetent. Learned counsel for appellant also contended that suit cannot be decreed against directors and appellate court has failed to examine the point for determination.

4. *Prima facie,* through instant Second appeal the appellants are seeking setting aside of concurrent findings of two courts below. Scope of the 2nd appeal is *narrow* and it could be

exercised *only* if findings of fact arrived by Courts below are based upon misreading, non-reading or misinterpretation of the evidence on record. Guidance is taken from the case of the *Akhtar Aziz v. Shabnam Begum* 2019 SCMR 524 wherein scope of *second appeal* stood defined as:-

> "14. … Although in second appeal, ordinarily the High Court is slow to interfere in the concurrent findings of fact recorded by the lower *fora.* This is not an absolute rule. The Courts cannot shut their eyes where the lower *for a* have clearly misread the evidence and came to hasty and illegal conclusions. We have repeatedly observed that if findings of fact arrived by Courts below are found to be based upon misreading, non-reading or misinterpretation of the evidence on record, the High Court can in second appeal reappraise the evidence and disturb the findings which are based on an incorrect interpretation of the relevant law. …"

5. Keeping in view the above *limited* scope of the second appeal, I would *first* attend the plea, raised with reference to non-framing of the ***'point of determination'*** by trial Court. I would take no exception to legal position that framing of point for determination is *mandatory* in nature, however, the purpose thereof is to have a *reasonable* and *legal* response from the appellate Court with regard to available material for stamping or reversing the judgment of trial court. If the appellate Court, *otherwise,* appears to have properly examined the available material and has given its own reasoning for stamping or reversing the *impugned* judgment, it would not be within spirit of *safe administration of justice* to remand the matter merely for reason of compliance of a *procedural* requirement which, *otherwise,* floats onto surface. In other words, for pressing such point, the asserter would also required to show, *prima facie,* failure of the appellate Court in not examining the available material for its conclusion as well that some *prejudice* has occasioned because of such departure. In the instant matter, the learned counsel for the

appellants has not been able to point out any material *prejudice* because of such departure by appellate Court nor refers to failure of appellate court in examining the available material for its conclusion. I would take guidance from the judgment, relied upon by learned counsel for appellant as 2009 SCMR 589. The relevant portion thereof are as follows:-

> "8. ..... In the instant case, a bare prusal of the judgment of the first appellate Court clearly reflects that it has not given due attention to the available evidence on record...
>
> 9. ..... In the case in hand the appellate Court has given cursory judgment mainly depending on the decision of the trial Court although sufficient material in the shape of evidence was available before it. The judgment of the first appellate Court is itself a big reason for remand of the case."

Therefore, I do not find much force in such plea of the learned counsel for the appellants.

6. Reverting to merits of the case, the claim of the respondents / plaintiffs had been that appellants / defendants had entered into a contract whereby they had assured to get them performed ***Hajj*** against the money, so obtained by the appellants but they failed to arrange Hajj visas. To such claim, a referral to para-3 of the written statement, being *decisive,* needs to be made which reads as:-

> "That the contents of para 3 are denied being wrong and maneuvered by the plaintiff. It is denied that amount mentioned in para No.3 are paid to the defendant No.2. <u>The amount was received by the defendant No.1 which was subsequently paid to M/s. Al Zahid Tours and Travels (Pvt) Limited</u> for depositing the same with Hajj department. It is denied that Chief Executive of defendant No.1 had executed any receipt personally."

From above portion of the *pleadings* of the appellants / defendants, it is evident that they never denied the claim of the respondents / defendants rather had admitted the claim to such extent with further

claim to have paid such amount to *M/s. Al Zahid Tours and Travels (Pvt) Limited.* Here, I would prefer in referring the case of *Muhammad Iqbal v. Mehboob Alam* (2015 SCMR 21) wherein it is held as:-

> "**It is a settled principle of law that a fact admitted needs no proof, especially when such admission has been made in the written statement** (*see PLD 1975 SC 242),* and it is also settled that no litigant can be allowed to build and prove his case beyond the scope of his pleadings. Therefore, only plea that remained to be determined; as set out by the appellant in his defence (*written statement)* was if the time was the essence of the contract or not. But neither from the contents of the agreement nor from the intent and conduct of the parties and / or from any evidence led by the appellant it has been established to be so. In relation to contracts of immovable property the rule is that time ordinarily is not the essence, however, this by of means is an absolute rule and it is always open to the party, who claims exception thereto, to establish otherwise form the contents/ text, letter and spirit of the agreement and / or from the intent and conduct of the parties, as well as the attending circumstances. The appellant / defendant has failed to do so in the instant case."

Further, nothing was produced on record that such deposit was permissible per contract between parties or was with consent of respondents / plaintiffs. In absence thereof, such plea can't help the appellants / defendants in escaping their liabilities to honour the contract as well compensation for breaching the same within meaning of Contract Act. In the case of *West Pakistan Tanks Terminal (Pvt.) Ltd. V. Collector (Appraisement)* (2007 SCMR 1318) it is observed as:-

> "10. (sic) **The law is well-settled that one cannot be allowed to take advantage of his wrong act or fraud played by him** and in fact applying the law applicable to the lawfully taking away of consignments from the bonded warehouse, if applied in such cases, would amount to placing a premium on the fraud played by an importer involved in the act of smuggling."

At this juncture it would be conducive to refer examination in chief of appellant No.1 at page 183 which is that :-

> "I am defendant No.2 and was working as chief executive of defendant No.1. I am dealing with the business of

> garments since last 30 years in Hydri market. In the year 2006 I got registered a private limited company with the name and style of defendant No.1 with SECP. The said company is working under the supervision of three board of directors including me and my mother Jamila Begum and defendant No.3 ..... **The defendant's company started to deal with the business of Hajj and Umrah tour operations**. I applied to the Ministry of Religious Affairs in order to get the permit for operating hajj quota with the approval of Dr. Farooq Sattar, however my request for quota was declined by ministry. Mr. Faizullah Khatak was deputy director Hajj posted at Karachi, who was also residing in new Haji camp. He assured me to assign me the hajj quota and in case of failure he given me choice that in case of failure of assigning quota he shall accommodate me from the quota of his son already allotted to his son."

Prima facie, the appellants only applied for *quota* which was never granted to them yet the appellants not only took amount from the people, including respondents / plaintiffs in name of *'getting such persons performed Hajj'*. There can be no denial to the fact that *'performing Hajj is normally* is the greatest desire of a ***Muslim*** who, for his life, prays and gathers money for such purpose therefore, when a person, with complete satisfaction of performing *Hajj,* is denied by the contractor (Travel agency), the mental shock and agony is inevitable.

7. With regard to case law as referred above, I have examined the same and facts of the case in Tariq Saeed Saigol vs. District Excise and Taxation Officer (1982 CLC 2387) are different from this case; in that case dispute with regard to education cess. In the case of Sultan-ul-Arfeen vs. D.O. (Revenue), CDGK (2013 CLD 1280) dispute was between the directors hence it was contended that individually directors are not liable to pay. Here situation is entirely different as six innocent persons, not having knowledge of legal ramifications with regard to non-payment or none performing of the

contract, cannot be punished when they intended to perform sacred holy work but it was not fulfilled by the appellants.

8. I also do not find any substance in the plea of the learned counsel for the appellant that a decree can't be recorded. In the instant case the defendant No.2 admitted that "***The said company is working under the supervision of three board of directors including me and my mother Jamila Begum and defendant No.3"*** therefore, they, being the directors of the company, can't escape their liabilities towards the company.

9. In view of what has been discussed above, I do not find any illegality or exceptional circumstances which could justify setting aside of the concurrent findings of the two courts below, particularly when the conclusion is based on proper appraisal of the available material as well admissions of the appellants / defendants. Accordingly, instant appeal merits no consideration, same is dismissed.

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