

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No.156 of 2023

Present
Mr. Justice Muhammad Jaffer Raza

Amjad. Appellant

Versus

Khuda Bano Respondent

Appellant : Present in person.

Respondent : Through Mr. Nasir Ahmed,
Advocate

Date of Hearing: 07.03.2025

Date of announcement: 11.03.2025

J U D G M E N T

MUHAMMAD JAFFER RAZA – J: Instant IInd Appeal has been filed under Section 100 C.P.C., the brief facts are set out in the subsequent paragraphs: -

1. The Respondent filed civil suit bearing No.136/2020 against the Appellant with the following prayers: -

- a) To direct the defendant to hand over the physically possession of Flat No.36, third floor, measuring 950 sq. fts. In the Project of Garden Luxury Apartments on Sub-Plot No.175/176, Britto Road, Garden East, Karachi through Nazir of this Honourable Court.
- b) To direct the defendant not to create third party interest regarding the subject property.
- c) Cost of the suit and / or any other relief, which this Hon'ble Court may deem fit and proper in the circumstances of the case may be granted.

The above-mentioned civil suit was decreed in favour of the Respondent vide Judgment and Decree dated 10.02.2023.

2. Thereafter, the Appellant preferred civil appeal No.46/2023, same was dismissed vide judgment and decree dated 27.05.2023. Appellant present in person has argued that the Respondent is his biological mother and the suit mentioned above has been filed at the instigation of his siblings. Appellant has further stated that Respondent is only the ostensible owner of the suit property, which was purchased initially by the father of the Appellant in the year 1990. The suit property was thereafter, according to Appellant, transferred in the name of the Respondent on the condition that she will hold it in interest for Appellant.

3. Appellant has further stated that no cause of action has accrued in favour of the Respondent to file above mentioned suit for the reason that a complaint under the Illegal Dispossession Act 2005 (**‘Act’**) was filed against the Appellant bearing No.08/2019 and the same was dismissed vide judgment dated 07.01.2020. It was argued by the Appellant that the suit has been filed subsequent to the above complaint (which was dismissed), therefore, no cause of action accrued in favour of the Respondent. Appellant has further argued that the suit is barred by limitation and the plaint was liable to be rejected under Order VII Rule 11 CPC. Upon being inquired by the Court, Appellant admitted that an application under Order VII Rule 11 CPC of rejection of plaint was filed and the same was dismissed. Admittedly, no appeal or revision was filed against said dismissal. It was further averred that additional issue may be framed at the stage of second appeal under Order XLI Rule 25 as the learned trial Court has failed to resolve the controversy between the parties due to the fact that the issues were improperly framed. Lastly, Appellant prayed for the judgment and decree passed by the Appellate and the trial Court may be set-aside. In support of his contention, Appellant has placed reliance in the following judgments: -

1) **Karam Din and another v. Ahmad Din.¹**

¹ 2002 YLR 3881

- 2) *Maduman-e-Malle Zai Nida Kahol through Haji Saleh Muhammad and others v. Marduman-e-Killi Khudai-e Rahim Sadezai (Shai) through their Elders and others*²
- 3) *Wazir Khan v. Qutab Din and others*³

4. Conversely, learned counsel for the Respondent has argued that this Court has very limited scope under Section 100 CPC and the Judgments and Decrees are concurrent. It has been pointed out by the learned counsel for the Respondent that admittedly the title document of the subject property is in favour of the Respondent, and therefore, she is entitled to be in possession of the same. Lastly, it was argued by the learned counsel that not a single lacuna has been pointed by the Appellant in both the judgment(s) and decree(s) below.

5. Heard both the parties and perused the record with their assistance. It is an admitted position between the parties that conveyance deed dated 11.05.1998 is in favour of the Respondent. She has specifically pleaded in her plaint that she was ousted from the subject property by her son on 19.08.2018 and the Appellant continues to be in possession of the subject property ever since. I have gone through the cross-examination of the Appellant relevant part of the same is reproduced below: -

“It is correct to suggest that title documents of the suit property are registered in the name of plaintiff, Vol. says that she is benami dar. It is correct to suggest that till to day I have not filed any suit for declaration of benami transaction, cancellation of documents and recovery against the plaintiff. Vol. says that the transaction was conditional till lifetime of plaintiff”.

“It is correct to suggest that till to day I have not filed any suit for declaration of benami transaction, cancellation of documents and recovery against the plaintiff. Vol. says that the transaction was conditional till life time of plaintiff. It is correct to suggest that I have not produced any banking transaction / money trail regarding suit property between me and plaintiff. Vol. says that transaction was in cash as community loan and private loan. It is correct to suggest that I have not produced by acknowledgement

² 2014 CLC 426

³ PLD 2009 SC 95

receipt signed by the plaintiff. Vol. says that I have produced family settlement deed.”

6. It has clearly been admitted in the cross-examination reproduced above that the suit property registered in the name of the Respondent. Moreover, it is noteworthy that till the time of the said cross-examination and even after the suit was decreed in favour of the Respondent, the Appellant had not filed any suit for declaration or cancellation against the Respondent. Upon specific query by the Court, Appellant revealed that he has recently filed a Civil Suit for the same bearing No.576/2023 and the plaint of the same has been rejected by the learned Trial Court and an appeal whereof is pending bearing No.407/2024. No further deliberation regarding the suit and appeal is required as it may prejudice the case of the Appellant before the relevant forum.

6. The ground taken by the Appellant regarding filing of the complaint under the Act, is groundless. It is a settled principle of law that the standard of proof required in a criminal case is drastically different from the standard of proof required in a civil suit. Reference in this regard can be made to a recently pronounced judgement of the Honorable Supreme Court of Pakistan in the case of **Salman Ashraf Versus Additional District Judge, Lahore etc**⁴ where it was held in paragraph No. 14 as follows: -

“14. Needless to mention that the standard of proof required in civil and criminal proceedings is different. In the former, a mere preponderance of probability is sufficient to decide the disputed fact but in the latter, the guilt of the accused must be proved beyond any reasonable doubt. There are, therefore, chances of giving divergent judgments by the civil and criminal courts on the facts that give rise to both civil and criminal liabilities.”

7. It is clear that a dismissal of complaint under the Act does not debar or disentitle the Respondent to institute civil proceedings, which will only be adjudicated on their own merits and standard of proof. In regard to the argument advance by the Appellant in reference to additional issues being framed at the

⁴ Civil Petition No. 2000-L of 2020

appellate stage, I hold that the same is not necessary for proper adjudication as most, if not all, relevant issues were already framed and adjudicated by the Trial Court. Framing of issues at the appellate stage will only defeat the end of justice and delay the inevitable.

8. The scope of IInd appeal under Section 100 is restricted and there must be compelling grounds for interfering with concurrent findings of the Courts below.

The said section is reproduced below: -

100.-(1) Save where otherwise expressly provided - in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the following grounds, namely: (a) the decision being contrary to law or to some usage having the force of law. (b) the decision having failed to determine some material issue of law or usage having the force of law (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

9. Several judgements of the superior courts have outlined the parameters of IInd appeal and the same listed and relevant portions thereon are reproduced below: -

i. Haji Sultan Ahmad through L.Rs. v. Naeem Raza and 6

***others.*⁵**

"5. From the above discussed legal position, it is quite obvious that the concurrent finding recorded by the Courts 'below' cannot be interfered with by the High Court while exercising jurisdiction under section 100 C.P.C. how so erroneous that finding may be, unless such finding has been arrived at by the Courts below either by misreading of evidence on record, by ignoring a material piece of evidence on record or through perverse appreciation of evidence",

ii. Amjad Sharif Qazi And Others Versus Salim Ullah Faridi And

***Others.*⁶**

13. The concurrent findings of fact could not be reversed on surmises and conjectures or merely because, another view was also possible. P.W.3 and P.W.4 have been disbelieved merely on the basis of minor contradictions without any reference to the reasoning advanced by the trial Court and

⁵ 1996 SCMR 1729

⁶ P L D 2006 Supreme Court 777

the appellate Court. It is reiterated that learned Judge did not realize that it was a second appeal before him and he could not interfere in the concurrent findings of facts recorded by two Courts below while exercising jurisdiction under section 100, C.P.C., how so erroneous those findings were, unless such findings had been arrived at by the Court below either by misreading of evidence on record or by ignoring a material piece of evidence on record or through perverse appreciation of evidence. The learned Judge did not point out any misreading or non-reading of evidence or the other criteria laid down by this Court in the judgments discussed below to enable him to undertake the reappraisal of evidence in the second appeal.

iii. Nazeer Ahmed versus Maqsood Ahmed.⁷

4. It is well settled that a second appeal to the High Court shall lie from every decree passed in appeal by any Court subordinate to a High Court on the grounds: (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; and (c) a substantial error or defect in the procedure provided by Civil Procedure Code, 1908 or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits.

iv. Syed Rafiul Qadre Naqvi Versus Syeda Safia Sultana And Others.⁸

5. We have heard the arguments of learned counsel for the parties and facts in the light of the case-law cited at bar. Now, we have to examine the extent and scope of interference of section 100, C.P.C. regarding second appeal involving challenge to concurrent findings of fact recorded by the Courts below whether the High Court was empowered to interfere to set aside the concurrent findings howsoever erroneous by misreading of evidence on record, by ignoring a material piece of evidence on record or through perverse appreciation of evidence. It will be advantageous to examine the scope of section 100, C.P.C. regarding second appeal. The following are the grounds for its consideration: ---

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or, defect in the decision of the case upon the merits.

6. From perusal of above grounds mentioned in section 100, C.P.C., second appeal does not lie on the ground of error or question of fact. It only lies on ground of law or error in procedure which may have affected decision of case upon merits.

⁷ 2008 SCMR 190

⁸ 2009 SCMR 254

v. **Zafar Iqbal and others Versus Naseer Ahmed and others.**⁹

“8. At the very outset, we observe that the High Court hearing a second appeal, in the present case, has re-read and re appraised the evidence of the parties in the way a first appellate court does, without realizing the distinction between the scope of the first appeal and the second appeal. Under section 100 of the Code of Civil Procedure, 1908 ("C.P.C."), a second appeal to the High Court lies only on any of the following grounds: (a) the decision being contrary to law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; and (c) a substantial error or defect in the procedure provided by C.P.C. or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits. The scope of second appeal is thus restricted and limited to these grounds, as section 101 expressly mandates that no second appeal shall lie except on the grounds mentioned in section 100. But we have noticed that notwithstanding such clear provisions on the scope of second appeal, sometimes the High Courts deal with and decide second appeals as if those were first appeals; they thus assume and exercise a jurisdiction which the High Courts do not possess, and thereby also contribute for unjustified prolongation of litigation process which is already choked with high pendency of cases.

9. No doubt, the expression "law" used in the phrase "the decision being contrary to law" in the ground (a) mentioned in section 100 of the C.P.C. is not confined to "statutory law" only, but also includes the "principles of law" enunciated by the constitutional courts, which have the binding force of law under Articles 189 and 201 of the Constitution of the Islamic Republic of Pakistan 1973. And, it is an elementary principle of law that a court is to make a decision on an issue of fact on the basis of legally relevant and admissible evidence available on record of the case, which principle is also incorporated in the statutory law, that is, the first proviso to Article 161 of the Qanun-e-Shahadat Order 1984. The said proviso states in unequivocal terms that a judgment must be based upon facts declared by the Qanun-e- Shahadat Order to be relevant and duly proved.

10. The decision of a court is, therefore, considered "contrary to law" when it is made by ignoring the relevant and duly proved facts, or by considering the irrelevant or not duly proved facts. The expressions "relevant evidence" and "admissible evidence" are often used interchangeably, in legal parlance, with "relevant facts" and "duly proved facts" respectively, and a decision is said to be "contrary to law" and is open to examination by the High Courts in second appeal when: (i) it is based no evidence, or (ii) it is based on irrelevant or inadmissible evidence, or (iii) it is based on non-reading or misreading of the relevant and admissible evidence. A decision on an issue of fact that is based on correct reading of relevant and admissible evidence cannot be termed to be "contrary to law"; therefore, it is immune from scrutiny in second appeal. A High Court cannot, in such case, enter into the exercise of re-reading

⁹ 2022 SCMR 2006

and re-appraisal of evidence, in second appeal, and reverse the findings of facts of the first appellate court, much less the concurrent findings of facts reached by the trial court as well as the first appellate court. It has, in second appeal, no jurisdiction to go into the question relating to weightage to be attached to the statements of witnesses, or believing or disbelieving their testimony, or reversing the findings of the courts below just because the other view can also be formed on the basis of evidence available on record of the case.”

10. The Appellant, despite being repeatedly asked has not pointed to any material defect in the Impugned Judgements and neither has the Appellant pointed out any mis-reading and non-reading of evidence, material enough for this court to allow the instant second appeal. The Appellant is also a counsel of this Court and in this regard was unable to assist regarding the parameters under Section 100 C.P.C. I am not inclined to reread and reappraise the evidence in Second Appeal and set aside concurrent findings of the learned Trial Court and Appellant Court.

11. The controversy boils down to the simple equation that the Respondent being the registered owner of the suit property does not have possession of the same and the suit belatedly filed by the Appellant for declaration of ownership has also been rejected by the Learned Trial Court.

12. The judgments relied upon by the Appellant do not advance his cause for the following reasons: -

- In the case of **Karim Din** (supra) the matter was decided by a learned single judge of the Lahore High Court pertaining to a claim for adverse possession and the limitation period provided for by law for such claims. Admittedly, the suit filed by the Respondent is clearly distinguishable with the cited judgement.
- The case of **Maduman-e-Malle Zai Nida Kahol** (supra) was also along similar lines as **Karim Din** (supra) where a divisional bench of the Balochistan High Court delineated on the limitation provided for claims under adverse possession.
- In the case of **Wazir Khan** (supra) it was held by the Honourable Supreme Court that the period of limitation for a suit for

dispossession is to be reckoned from the date of dispossession. It was been specifically pleaded by the Respondent in the suit that she was dispossessed on 19.08.2018 after which she filed a complaint under the Act and filed the suit immediately after the dismissal of the said complaint. Hence, it is held that the same was not time barred.

In light of what has been discussed above, the Appellant is not entitled for the relief sought. The Impugned judgment(s) and Decree(s) require no interference and instant Second Appeal is dismissed with no order as to cost.

JUDGE

Nadeem "PA"