ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

II- Appeal No.45 of 2021

Date	**Order with Signature of Judge**

Muhammad Ajmal ……..……..……*Appellant*

Versus

Gulab Khan and others……...…….....*Respondents*

Date of hearing :12.03.2025

Date of announcement of judgment :19.03.2025

Mr. Muhammad Aaquib Rajpar, Advocate for the Appellant.
Mr. Ahmed Khan Khasheli, Asstt. A. G. Sindh.

J U D G E M E N T

MUHAMMAD JAFFER RAZA, J; **-** Instant 2nd Appeal has been preferred against judgment and decree dated 19.01.2021 passed in Civil Appeal No.141/2020 by the Additional District Judge-V (MCAC) Karachi West. Brief facts of the case are summarized as follows: -

2. That the Appellant filed Civil Suit No.654/2017 with the following prayers:

   a. Declare that the Plaintiff is the lawful purchaser, owner and allottee of house constructed on Plot/Survey No.1986, measuring 100 Sq. Yds., situated in Block No.5, Street No.18, Gulshan-e-Sikandarabad, Keamari, Karachi, by virtue of sale agreement and title documents.

   b. Pass decree for eviction/ejectment of the Defendant No.1 or anyone else found in possession of the house constructed by the Plaintiff on Plot/Survey No.1986, measuring 100 Sq. Yds., situated in Block No.5, Street No.18, Gulshan-e-Sikandarabad, Keamari, Karachi and order for handing over peaceful possession thereof to the Plaintiff or his nominee.

   c. Pass decree for payment of mesne profit by the Defendant No.1 to the Plaintiff at the rate of Rs.10,000/- per month from July, 2010 till finally the possession is handed over to the Plaintiff.

d. Direct the Defendant No.4 to register a case of illegal stay and forgery/fraud against the Defendant No.1, as well as to arrest him and deport him to Afghanistan.

e. Grant permanent injunction restraining the Defendants, more particularly the Defendant No.1, his agents, attorneys, successors, representatives or any one claiming on his behalf, from creating any nature of third party interest and/or from parting with possession of the suit property/house or any part thereof to anyone except the Plaintiff.

f. Pass any other order or provide any better/alternative relief, as deemed appropriate by this Hon'ble Court under the circumstances of the case.

g. Grant costs of the suit.

3. Written Statement was filed by Respondent No.1, denying the entitlement of the Appellant, however, the said Defendant did not cross-examine the Appellant. The Appellant relies upon allotment order/Sanad, which can be found at page 53 of the Court file. Subsequently, the learned Trial Court passed judgment dated 15.02.2020 and the suit of the Appellant was dismissed. The Appellant thereafter preferred Civil Appeal No.141/2020 and the same was dismissed vide Impugned Judgment.

4. Learned counsel for the Appellant has argued that the suit filed by him should have been decreed in his favour for the reason that he was not cross-examined and hence all his averments were implicitly admitted by the Defendant in the suit. Learned counsel has further argued that the Appellate Court has also not appreciated his contention and lastly prayed before this Court to set-aside the Impugned Judgment and Decree and remand the case before the learned Trial Court for decision afresh. Conversely the learned AAG has argued that both the judgements passed by courts below require no interference and the Appellant has miserably failed to prove his case.

5. I have heard the learned counsel at great length. It is not necessary for the Court to decree a suit in favour of the Plaintiff in cases where the Plaintiff has not

been cross-examined or even in ex-parte cases. It is a settled principle of law that the Plaintiff has to prove his case on its own merits and he cannot rely upon the weaknesses of the Defendant. The learned counsel in this respect has failed to discharge the burden as shall be elucidated in the subsequent paragraphs. It was held by me in the case of ***Abdul Alim Quadri versus Rauf Ahmed Rufi and others***[1] as follows: -

> *"5. The instant case is proceeding ex-parte, however, under order IX Rule 6(a) it is a well settled principle of law that the Court cannot pass an ex-parte judgment in a mechanical manner, shutting its eye to the record, which is before the Court. The Court even in ex-parte cases has the power to dismiss the suit if the plaintiff fails to discharge his burden as enumerated under Article 117 and 118 of the Qanoon-e-Shahadat Order, 1984, after striking the defence of the defendant. The plaintiff in this regard has to stand on his own feet to satisfy the Court as to the existence of any right. In other words, mere absence of the defendant does not justify the presumption that the whole of the plaintiff's case is true. The defendant absence does not in any way lower the plaintiff's burden to proof his case. I would go as far as to say that in ex-parte cases the court is saddled with the additional burden of ensuring that the plaintiff's version of events is atleast prima-facie true and fathomable."*

6. In the suit, the present Appellant relied upon an Agreement to Sell dated 01.02.2008, however, the Appellant failed to produce the attesting witnesses as required under Article 79 of the Qanoon-e-Shahadat Order 1984 **("Order 1984")**. The same is reproduced below: -

> *"79. Proof of execution of document required by law to be attested: If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of given Evidence.*
>
> *Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."* (Emphasis added)

7. It is a settled principle of law that for documents which are required to be attested by law, two attesting witnesses must be examined by the Court to prove

[1] Civil Suit Number 776 of 2019

the execution of the said document. Reliance in this regard can be made on the following judgment: -

- ***Hafiz Tassaduq Hussain versus Muhammad Din through legal heirs and others.***[2]

> *"8. The command of the Article 79 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested, it has to be proved by two attesting witnesses, if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting witnesses are not produced to prove it. As the consequence of the failure in this behalf are provided by the Article itself, therefore, it is a mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising, so long as there is an attesting witness alive capable of giving evidence and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called, the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document. See Sheikh Karimullah v. Gudar Koeri and others (AIR 1925 Allahabad 56). The purpose and object of the attestation of a document by a certain number of witnesses and its proof through them is also meant to eliminate the possibility of fraud and purported attempt to create and fabricate false evidence for the proof thereof and for this the legislature in its wisdom has established a class of documents which are specified, inter alia, in Article 17 of the Order, 1984. (See Ram Samujh Singh v. Mst. Mainath Kuer and others (AIR 1925 Oudh 737). The resume of the above discussion leads us to an irresistible conclusion that for the validity of the instruments falling within Article 17 the attestation as required therein is absolute and imperative. And for the purpose of proof of such a document, the attesting witnesses have to be compulsorily examined as per the requirement of Article 79, otherwise, it shall not be considered and taken as proved and used in evidence. This is in line with the principle that where the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise."* (Emphasis added)

8. Further verification of the Appellant's entitlement was called by the Mukhtiarkar, Harbour Sub-Division, Karachi West, who submitted report dated 27.01.2020 denying any entry of allotment/Sanad in favour of the Appellant.

[2] PLD 2011 SC 241

Mukhtiarkar in his report also contended that document in favour of the present Appellant was not issued from his respective office and therefore, denied the existence of the same.

9. It was specifically enquired from the learned counsel for the Appellant whether he has challenged the Mukhtiarkar report at any forum and the learned counsel categorically answered that question in the negative. Learned counsel for the Appellant has again reiterated his stance i.e. in the absence of the Appellant being cross-examined his averments ought to have been held true. The said argument does not find favour with me as it is settled principle of law that the Plaintiff must be in a position to discharge his burden and the Appellant in this respect has miserably failed to do the same. Moreover, the scope and parameters of Second Appeal are limited under Section 100 C.P.C. This principle was expounded recently by the Honourable Supreme Court in the case of ***Zafar Iqbal and others Versus Naseer Ahmed and others.***[3]

> *"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 chocked 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*

[3]2022 SCMR 2006

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 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. In the light of what has been held above, I see no illegally in the orders passed by the Courts below and hence no interference of this Court is required in the instant matter. Accordingly instant IInd Appeal is hereby dismissed with no order as to cost.

Judge

Nadeem