

*Order Sheet***IN THE HIGH COURT OF SINDH, KARACHI**

IInd Appeal No. 192 of 2021

[Mrs. Shehla Hussain and another v. M/s. Habib Bank Ltd and others]

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|-------------------------|---------------------------------------|
| Appellants | Through Qazi Hifz-ur-Rehman, Advocate |
| Respondents | Nemo |
| Date of Hearing & Order | 14.03.2025 |

ARSHAD HUSSAIN KHAN, J. The appellants through instant second appeal have challenged the concurrent findings of the two courts below and have sought the relief as follows:

“It is therefore prayed that this Honorable court may be pleased to call for the R&P of the case i.e. Civil Appeal No 339/2019 with the title of Mst. Shehla Hussain and another V/s HBL from the court of Vth ADJ Karachi West and after hearing the parties the court may be pleased to set aside the impugned judgment and remand the case to be decided on merit with cost to be awarded to the appellant”.

2. Learned counsel for the appellants has argued that the judgments of both the courts below are bad in law and against the facts of the case. He has argued that the suit of the appellants/plaintiffs was also wrongly dismissed being barred by time. Learned counsel has further argued that the written statement was required to be filed and issues were required to be framed by the trial court and the suit should be decided on merit. He has further argued that the documentary evidence is there in the bank’s record and transaction has to be proved through evidence only and the parties could not be disappointed by way of such disposal of suit to defeat the end of justice. He has argued that rejection of the plaint on the technical ground is against the law. Lastly, he has argued that the courts below have not appreciated the judgments of the superior court in its true perspective, which resulted in miscarriage of justice.

3. Heard learned counsel for the appellants and perused the material available on the record.

4. Precisely, the case of the appellants is that they are joint owners of locker No.154, Key NO.212, Account No.09470038760501 at M/s Habib Bank Limited IECC, SITE Branch, Karachi, which was under the supervision of respondent No.1. In the Memo of Appeal, the appellants have given details of the articles of gold ornaments, which were lying in the locker of the bank. On 19.06.2013, the appellants visited the branch to collect the gold ornaments, when they opened the locker they were shocked while defendant No.1 verbally informed them that the gold ornaments lying in the said locker were missing due to the incident of assassination of Benazir Bhutto on 27.12.2007. The appellants then time and again approached the respondents but their grievance was not redressed. Consequently, they filed suit against the respondents.

5. From perusal of the record, it reveals that the appellants/plaintiffs initially filed suit No.434/2013 in the Banking Court No.1, however, plaint of the suit was returned to the appellants/plaintiffs to be filed in the proper court of civil jurisdiction. Subsequently, suit No.1979/2015 was filed before Vth Sr. Civil Judge Karachi [West], which was rejected under Order VII Rule 11 CPC, being barred by limitation and on the ground that the suit was filed against wrong defendants. Thereafter, the appellants/plaintiffs filed Suit No.1339/2018 before IInd Sr. Civil Judge, Karachi [West] **for Recovery of Articles or in alternate recovery of its market price and Damages**, with the following prayers :

- a. To direct the defendants to deliver the above article to the plaintiffs in the alternate its market price to tune of Rs.2854113/- along with mark up till realization of the amount.
- b. To pass judgment and decree for recovery of damages of Rs.1,00,00,000/- as damages against the defendants jointly and severally to be paid to the plaintiffs.
- c. Any other relief.
- d. Cost of the suit.

The plaint of the aforesaid suit was also rejected being on the same cause of action as that of the earlier suit [suit 1979/2015] vide order of the trial court dated **23.10.2019**.The concluding paras of the order reads as follows:

“7. In the present case, the plaint of the earlier suit on the basis of same cause of action and relief was rejected on the point of limitation, therefore, by virtue of above principle laid down by the Apex Court, such findings cannot be re-agitated by the plaintiffs in this subsequent suit by just substituting the defendants of previous suit with present ones. So far as the case laws cited by the counsel for the plaintiffs are concerned, it is humbly observed the facts of the same are quite distinguishable from the case in hand, hence are not applicable.

8. In the light of above discussion, the application in hand under Order VII Rule 11 CPC is accepted and the plaint of the instant suit is rejected under order VII Rule 11 CPC”.

The aforesaid judgment and decree of the trial court were challenged before Additional District Judge-V, Karachi [West] in Civil Appeal No.339 of 2019, which was dismissed; the judgment and the decree of the trial court were maintained, vide order of the appellate court dated **08.04.2021**, the appellate court while dismissing the appeal has observed as follows:

“8. Keeping in view the relevant facts, and circumstances, there appears no negligence on the part of the bank therefore the bank is not liable for the loss suffered by the appellant. Furthermore no such documentary proof is annexed with the plaint to substantiate the claim of the appellant that the locker retained the alleged articles. The appellant has not filed copies of income tax returns and wealth tax statements regarding the said articles.

9. The learned trial court in the facts and circumstances of the case, has rightly observed that the suit is also barred by law of limitation.

10. For the aforesaid reasons, I do not find any legal infirmity in the impugned order which stands maintained while the instance appeal stands dismissed, with no order as to cost”.

The appellants have challenged the above concurrent findings in the present appeal.

6. The trial court, in rejecting the plaint of Suit No.1339/2018, relied upon the principle laid down by the Supreme Court of Pakistan in the case reported as *Muhammad Ali v. Province of Punjab and others* [2009 SCMR 1079] that if the plaint is rejected after proper adjudication as to the non-existence of cause of action or upon the suit being barred by law the findings could operate as res judicata and would not enable the plaintiff to re-agitate the same question through filing a subsequent suit upon the same cause of action and seeking the same relief. The appellate court, in Civil Appeal

No.339/2019, while upholding the judgment of the trial court has observed that (i) there was no negligence on the part of the bank (ii), the appellants failed to produce documentary evidence proving that the locker contained the alleged articles and (iii) the suit was time-barred, therefore, the same has rightly been dismissed.

From perusal of the impugned judgments, it appears that both the courts below thoroughly examined the contents of the plaint and properly evaluated the law and the facts of the case and reached a concurrent conclusion.

7. It is also well settled law that concurrent findings of facts by the courts below cannot be disturbed by the High Court in the second appeal, unless the courts below while recording the findings of fact have either misread the evidence or have ignored the material piece of evidence¹. Moreover, the concurrent findings of fact recorded by the two courts below are entitled to deference and cannot be interfered with in absence of any legal infirmity, jurisdictional error, or misreading of evidence, which in the present case is missing. Learned counsel for the appellants has also failed to point out any such material irregularity.

8. Besides, this is a second appeal, which has been filed under Section 100 C.P.C. 1908, under which 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 CPC 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. However, in the instant matter, none of the aforesaid grounds is involved.

9. The Supreme Court of Pakistan in the case of *Zafar Iqbal and others v. Naseer Ahmed and others* [2022 SCMR 2006] while

¹ *Keramat Ali and another v. Muhammad Yunus Haji and another* (PLD 1963 SC 191), *Phatana v. Mst. Wasai and another* (PLD 1965 SC 134) and *Haji Muhammad Din v. Malik Muhammad Abdullah* (PLD 1994 SC 291).

interpreting the scope and ambit of section 100 of the CPC has observed as follows :

“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”.

10. In another case viz. *Muzafar Iqbal vs. Mst. Riffat Parveen and others*, [2023 SCMR 1652] the Supreme Court of Pakistan while dilating upon the scope of second appeal, inter alia, has held as under :

“There is a marked distinction between two appellate jurisdictions; one is conferred by section 96, C.P.C. in which the Appellate Court may embark upon the questions of fact, while in the second appeal provided under section 100, C.P.C., the High Court cannot interfere with the findings of fact recorded by the first Appellate Court, rather the jurisdiction is somewhat confined to the questions of law which is sine qua non for the exercise of the jurisdiction under section 100, C.P.C. The High Court cannot surrogate or substitute its own standpoint for that of the first Appellate Court, unless the conclusion drawn by lower fora is erroneous or defective or may lead to a miscarriage of justice, but the High Court cannot set into motion a roving enquiry into the facts by examining the evidence afresh in order to upset the findings of fact recorded by the first Appellate Court”.

11. Accordingly, in view of the above discussion, present appeal is **dismissed** being devoid of any merit.

JUDGE