

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 284 of 2024

Present

Mr. Justice Muhammad Jaffer Raza

Faisal Akram Appellant.

Versus

Pervaiz Iqbal since deceased

Through his legal heirs Respondents.

Mr.Imtiaz Ali Shah, Advocate for the Appellant.

Ch. Atif Rafiq, Advocate for the Respondents.

Dates of Hearing: 12.05.2025.

Date of announcement: 23.05.2025

J U D G M E N T

MUHAMMAD JAFFER RAZA – J: The instant Second Appeal has been preferred by the Appellant impugning the judgment and decree dated 17.08.2024, passed in Civil Appeal No.152/2024. The above-mentioned Civil Appeal emanated from the judgment and decree of the learned Trial Court dated 13.05.2024 passed in Civil Suit No.918/2022.

2. Succinctly stated, the Respondent preferred Civil Suit No.918/2022 for possession with the following prayers: -

- “(a) Direct Defendant to immediately hand over peaceful physical vacant possession of the suit property viz. Commercial Shop bearing No.22 on Ground Floor measuring 11x30 Square Feet, situated in Gulberg Square, Block-16, Plot No.ST/4-C to the legal heirs of deceased p Landlord, in view of the decision passed by the Hon’ble Supreme Court of Pakistan, dated 21.01.2019 as well as on the Transfer/Mutation Order dated 25.03.2021, in favour of the legal heirs of the deceased Plaintiff (Plaintiffs No.1 to 3).

- (b) Prohibit the Defendant, his employees, subordinates, agents, attorney and /or any person(s) working through or under him from doing any act which would be detrimental and harmful to the interest of legal heirs of deceased Plaintiff.
- (c) Grant such other and further relief(s) as this Hon'ble Court may deem fit and proper under the circumstances of the case.
- (d) Cost of the Suit."

3. The said Suit was decreed in favour of the Respondent to the extent of prayer clause (a). Thereafter, the Appellant preferred Civil Appeal No.152/2024 which was dismissed vide Impugned judgment and decree. The instant Second Appeal has been filed against the concurrent findings of the learned Courts below.

4. Prior to delineating on the factual and legal aspects of the the present Appeal, it is imperative, for the purposes of the instant appeal, to note the brief history of litigation between the contesting parties.

5. It is admitted between the parties that an Agreement of Sale dated 04.09.2004 was executed between the Appellant and one Pervaiz Iqbal (deceased father of the Respondent). Thereafter, the Appellant on the basis of the above Agreement of Sale filed a Suit for specific performance of contract bearing Suit No.563/2010. Without going into details of the history of litigation emanating from the above-mentioned suit, suffice it to say that the same eventually culminated before the Hon'ble Supreme Court in Civil Petition No.61-K/2018. The Hon'ble Supreme Court of Pakistan vide order dated 21.01.2019 dismissed the leave application filed by the Appellant and directed cancellation of the sale deed dated 30.04.2015, executed in favour of the Appellant. It is pertinent to mention that the said sale deed executed in favour of the Appellant, was pursuant to the judgment and decree emanating from the Suit filed for specific performance bearing No.563/2010. Thereafter, the Respondent filed suit bearing No.918/2022 details of which have already been explicated above.

6. Learned counsel for the Appellant has argued that he is entitled to retrain the possession of the subject property on the basis of the Agreement of Sale dated 04.09.2004 executed between the respective parties. He has further argued that

Respondents have no title document in their favour and hence are not entitled for the possession of the subject property. He has also made an attempt for me to compare the signature of the respective parties on various documents. He has further contended that the Suit of the Respondent was barred by limitation as the possession of the suit property was handed over to him back in the year 2004 and therefore the Suit filed by the Respondent was hopelessly time barred. He has further averred that no issue was framed regarding the ownership and title of the subject property and the documents relied upon by the Respondents are deficient, forged and fabricated. Learned counsel has relied upon Section 53-A of the Transfer of Property Act, 1882 (“**the Act of 1882**”) and has stated that he is entitled to retain the possession of the subject property. He has relied upon the following judgments: -

- *Rehmat Noor v. Zulqarnain*¹
- *Lal Bux and 2 others v. Government of Sindh through Executive District Officer (Revenue, Khairpur and 4 others*²
- *Syed Ahmed v. Ali Akbar and others*³
- *Sultan Mahmood Shah through L.Rs and others v. Muhammad Din and 2 others*⁴
- *Ghulam Hyder Mahar v. Illahi Bux Mahar through legal heirs and others*⁵
- *Wazir Khan and others v. Qutab Din and others*⁶
- *Dr. Nafeez Zubair and others v. Saeeda Bano and others*⁷
- *Khurshid Ali and others v. Miangul Adnan Aurangzeb*⁸
- *Syed Abdullah Abidi v. sMst. Hajra Abidi and another*⁹

7. Conversely learned counsel for the Respondent has categorically argued that the instant appeal has been filed against the concurrent findings of the learned Courts below and the jurisdiction of this Court and the scope of Section 100 CPC is circumscribed. He has further argued that both the judgments below require no interference by this Court as the same are legally sound. The learned counsel

¹ 2023 SCMR 1645

² PLD 2023 Sindh 44

³ 2021 SCMR 743

⁴ 2005 SCMR 1872

⁵ 2022 CLC 1374 [Sindh]

⁶ PLD 2009 SC 95

⁷ 2024 CLC 1146 [Sindh]

⁸ 2025 SCMR 34

⁹ PLD 2009 Karachi 252

categorically stated that the cause of action in favour of the Respondent arose after the sale deed in favour of the Appellant was cancelled in accordance with the judgment of the Hon'ble Supreme Court. He has further argued that prior to cancellation of the said sale deed, he was not legally competent to file a suit for possession, and in this regard the suit was filed well within the prescribed limitation period. He has specifically averred that he has not been dispossessed and has in fact, put the Appellant in possession pursuant to the Agreement of Sale mentioned above. In regards to the contention of learned counsel for the Appellant in reference of alleged defect in the title of the property, the learned counsel has argued that the Appellant is a stranger to the property and has no locus standi to question the title of the Respondent. He has further contended that the verification of his title, though not necessary, was done by the learned Trial Court and the same is reflected in paragraph No.26 of the judgment of the learned Trial Court. He in support of his contentions relied upon the following judgments:-

- *Hazrat Ullah and other Vs Rahim Gul and other*¹⁰
- *Syed Rafiul Qadre Naqvi Vs. Syeda Safia Sultana and others*¹¹
- *Gulzar Ahmad and others vs. Ammad Aslam and others*¹²

8. Order 41, Rule 31 C.P.C. mandates the Appellate Court to state points of determination. The said provision was expounded in the case of *Gul Rehman Versus Gul Nawaz Khan*¹³. The points for determination are set out below:

1. Whether the Appellant is entitled to retain the possession of the subject property?
2. Whether the concurrent findings of the courts below require any interference?

POINT NO.1.

9. I have heard the learned counsels for the parties and perused the record. The entire controversy between the parties is encapsulated in the point for determination under adjudication. For the sake of expediency, it will be

¹⁰PLD 2014 SC 380

¹¹ 2009 SCMR 254

¹² 2022 SCMR 1433

¹³ 2009 SCMR 589

advantageous to bifurcate two separate sets of litigations between the respective parties.

10. I have already noted above that suit No.563/2010 filed by the Appellant eventually culminated in the leave application of the Appellant being dismissed by the Hon'ble Supreme Court vide order dated 21.01.2019. Subsequent to the order of the Hon'ble Supreme Court the sale deed dated 30.03.2015 executed in pursuance of the Agreement of Sale dated 04.09.2004 mentioned above, was cancelled. It is evident that the Appellant is in possession of the subject property since 2004 and the said Appellant held the title of the suit property up until the sale deed was cancelled, as revealed above. After the cancellation of the sale deed, it is held, that the Appellant is not entitled to retain the possession of the subject property.

11. The reliance placed by the learned counsel for the Appellant on Section 53-A of the Act of 1882 is misplaced for the reason that the Agreement of Sale and the subsequent sale deed have been cancelled in view of the directions given by the Hon'ble Supreme Court, therefore the question of retaining the possession on the basis of the Agreement of Sale does not arise. The equitable concession under Section 53-A of the Act of 1882 cannot be afforded to the Appellants. The Hon'ble Supreme Court in the case of **Muhammad Yousaf Versus Munawar Hussain and 5 others**¹⁴ explicated the principles of 53-A and held as under: -

“5. Before proceeding further it would be necessary to examine in brief the scope of section 53-A of the Act. The said provision of law enables the transferee to protect his possession provided the conditions laid down therein are fulfilled. The said conditions are the existence of the agreement and the transferee having been put in possession in part performance of the said agreement. In other words as rightly observed by the learned Judge of the Lahore High Court, the aforesaid provision of law is a shield and cannot be used as a sword.” (Emphasis added)

11. The said principles were further explained in the case of **Malik Ellahi Bux v. Muhammad Aslam**¹⁵ wherein it was held as under: -

“The next contention of the petitioner that their possession shall be protected under section 53A of the Transfer of Property Act, 1882 is devoid of force. In order to seek protection or I benefit under the said provision of law, the petitioners must

¹⁴2000 SCMR 204

¹⁵ 2002 CLC 433

show that the possession was in pursuance of an agreement to sell which still subsists. It is indeed idle to urge that despite having committed default in performing his part of the contract a vendee can continue to remain in possession in the garb of protection of an agreement to sell. In the present case it has been found that the petitioners and their predecessor -in interest had failed to abide by the terms of the contract which was executed by them of their own free volition. Specific time frame for payment was fixed in the said agreement. The ground on which the nonpayment of balance price was sought to be justified (purchase of a mare by the respondent) has been found against the petitioners by both lower Courts. Thus, by their own conduct, the petitioners were responsible for revision of the sale agreement. Their possession, thereafter, became unauthorized and unlawful. No benefit of section 53A of the Transfer of Property Act extended to the petitioners.” (Emphasis added)

12. Relying on the dicta as expounded in the judgements noted and reproduced above, it is evident that the Appellant cannot benefit from the provision of the above-noted section. The agreement to sell, the basis on which possession was transferred to the Appellant has ceased to exist, and the sale deed pursuant to the said agreement has been cancelled.

13. I agree with the contention of the learned counsel for the Appellant that his cause of action for seeking the relief sought in suit No.918/2022, arose after the Hon’ble Supreme Court’s judgment issued directions for cancellation of the sale deed. I further agree with the judgment of the learned Trial Court that the entitlement of the Defendant arising out of the Agreement of Sale dated 04.09.2004 and subsequent sale deed has extinguished and Plaintiff in this regard cannot claim possession of the subject property. I have also noted, with the assistance of learned counsel for the Respondent, that the learned Trial Court called for verification in respect of the suit property from the concerned authorities. The said report was furnished by the concerned authorities in favour of the Respondent.

14. I further agree with the contention of the learned counsel for the Respondent that once he was found entitled to the possession by the courts below the declaration of title is inbuilt relief. The said principle was expounded in the case of **Hazrat Ullah** (supra) wherein it was held as under: -

“Once the plaintiff is found to be entitled to the possession, it means that he/she has been declared to be entitled, which includes the declaration of title of the plaintiff qua the property, and this is integrated into the decree for possession;”

15. The judgments relied upon by the learned counsel for the Appellant are distinguishable for the following reasons: -

- The judgements in the cases of **Syed Abdullah Abidi** (supra) **Dr. Nafees Zubair** (supra), **Syed Ahmad** (supra) and **Rehmat Noor** (supra) elaborately discuss the ingredients of a gift deed. The same does not advance the cause of the Appellant as the Appellant never sought a cancellation of the said instrument. Further, the Appellant is an alien in respect of the same.
- The reliance on the cases of **Khurshid Ali** (supra) and **Ghulam Hyder Mahar** (supra) is misplaced for the reason that there is no direct challenge to the title of the present Respondent and in that respect the suit filed by the said Respondent is held to be maintainable.
- The judgement in the case of **Wazir Khan** (supra) doesn't advance the case of the Appellant. The said judgement expounds the limitation period for suit for possession. However, it has already been noted above that the cause of action accrued in favour of the Respondent to file the above-noted suit only after the sale deed of the Appellant was cancelled pursuant to orders of the Hon'ble Supreme Court. Therefore, it is held that the suit was within the limitation period prescribed by law.

16. In light of the above, point No.1 is answered in the Negative.

POINT NO.2.

17. It is trite law that right to file Second Appeal provided under section 100 of CPC, can be set into motion only when the decision is contrary to law; fails to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law. The principles governing the scope of

Section 100 CPC have been expounded by the Honourable Supreme Court in the case of **Bahar Shah versus Mansoor Ahmed**¹⁶ in the following words: -

“10. Now we would like to pay attention to the niceties of a right to file Second Appeal provided under section 100 of C.P.C, which can be set into motion only when the decision is contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law. In the case of Madan Gopal vs. Maran Bepari (PLD 1969 SC 617), this Court held that if the finding of fact reached by the first Appellate Court is at variance with that of Trial Court, such a finding by the lower Appellate Court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first Appellate Court. In another case reported as Amjad Ikram v. Mst. Asiya Kausar (2015 SCMR 1), this Court held that in case of inconsistency between the trial Court and the Appellate Court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary.

11. The first Appellate Court thoroughly evaluated and mull over the evidence adduced by the parties and reached to a just and proper conclusion that the appellants failed to prove and justify their defence pleas and judgment of Trial Court was not based on correct exposition of law and facts, whereas the learned High Court in second appeal has also gauged and assessed the overall evidence perfectly and rightly maintained the judgment of first Appellate Court.”

18. More recently the Honourable Supreme Court in the case of **Faqir Syed Anwaruddin versus Syed Raza Haider and others**¹⁷ held as under: -

“It is settled law that concurrent findings are not interfered with under section 100 of the C.P.C. unless the lower courts have misread the evidence on record, or may have ignored a material piece of evidence on record through perverse appreciation of evidence. It is also settled law that reappraisal of evidence on record by the second appellate court is not permissible while exercising jurisdiction under section 100 of the C.P.C. The High Court had rightly dismissed the regular second appeals filed by the defendants on the touchstone of the aforementioned principles.”

19. In light of above discussion, the instant appeal merits no consideration and the same is dismissed with no order as to cost.

J U D G E

Nadeem Qureshi “PA”

¹⁶ 2022 SCMR 284

¹⁷ PLD 2025 Supreme Court 31