Judgment sheet

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 53 of 2025

Present
Mr. Justice Muhammad Jaffer Raza

M/S Fly Dubai …….…… Appellant.

Versus

Syed Yawar Hussain …….……..…… Respondent.

Mr. Shan-ur-Rehman, Advocate for the Appellant.

Syed Mustafa Mehdi, Advocate for the Respondent a/w
Mr. Faraz Akbar Shah Advocate.

Dates of Hearing: 16.04.2025, 30.04.2025 and 15.05.2025.

Date of announcement: 27.05.2025

J U D G M E N T

***MUHAMMAD JAFFER RAZA – J*:** The instant Second Appeal under Section 100 CPC has been preferred by the Appellant being aggrieved with the judgment and decree dated 25.11.2024 passed in Civil Appeal No.113/2024. The said Civil Appeal emanated from the judgment and decree of the learned Trial Court dated 19.03.2024 passed in Civil Suit No.511/2021. The Appellant in the instant appeal has impugned the conflicting findings of the Courts below.

2. Brief facts of the case pertaining to the instant Civil Appeal are that the Respondent herein filed Civil Suit No.511/2021 with the following prayer clauses:-

> "(a) This Hon'ble Court may be pleased to pass judgment and decree Rs.5,519,137/- against the Defendant.
>
> (b) This Hon'ble Court may be pleased allow @ 10% markup per annum for the years 2017, 2018, 2019 and 2020 till realization of the outstanding amounts agreed and withheld by the Defendant.

(c) This Hon'ble Court may also be pleased to pass Decree of Rs.3,000,000/- towards compensation for mental torture caused as damages by the Defendant.

(d) Any other relief which this Hon'ble Court deems appropriate."

3. Thereafter an application was preferred by the Appellant under Order VII Rule 11 CPC. The said application was allowed vide order dated 05.11.2021. The said order was impugned by the Respondent in Civil Appeal No.221/2021. The said Civil Appeal was allowed vide order dated 24.12.2022 and the matter was remanded back to the trial Court for decision afresh on merits.

4. Thereafter, after framing the issues and recording of evidence of the respective parties, the learned Trial Court vide judgment and decree dated 19.03.2024 dismissed the above suit filed by the Respondent, primarily on the ground of limitation. Thereafter, the Respondent preferred the above-mentioned Civil Appeal which was allowed vide impugned judgment and decree.

5. Learned counsel for the Appellant has argued that the suit preferred by the Respondent was time barred as the Respondent through the above-mentioned Civil Suit was seeking recovery of outstanding amount pertaining to the year 2016. Learned counsel has further placed reliance on Article 62 of the Limitation Act, 1908 which prescribes a limitation period of three years. In this regard, learned counsel has stated that the limitation period had expired in the year 2019 and the said Civil Suit was filed in the year 2021, approximately two years after the prescribed limitation period had lapsed. He has further argued that the judgment and decree of the learned Trial Court has deliberated in depth the ground of limitation and has agreed with the contention of the learned counsel for the Appellant with regard that no application under Section 5 of the Limitation Act 1908, for condonation of delay, has been filed by the Respondent. Learned counsel has further submitted that the learned Trial Court has also dismissed the case of the Respondent on merits. He has contended that there is no case is made

out by the Respondent and the learned Appellate Court by setting aside the judgment and decree of the trial court, has erred in law.

6. On merits, learned counsel for the Appellant has very categorically stated that the statement of account e-mailed to the Respondent was only for the purposes of audit and cannot be used as an admission on their part. He has further stated that the statement account sent by the Appellant has various discrepancies and the same is highly unreliable. It is also contended that the Respondent owed significant sums of money to the Appellant. He has further stated that the arrangement between the parties was such, that money was deposited by the Respondent in advance and thereafter the Appellant being the airline, issued the respective tickets on the request of the Respondent. The learned counsel has relied upon the following judgments: -

- ***Awan Apparels (Private) Limited & Others vs. United Bank Limited & Others[1];***
- ***Dr. Anwar Ali Sahito vs. Pakistan[2];***
- ***Muhammad Tufail Danish vs. Deputy Director FIA[3];***
- ***Ali Mardan Shah vs. Mushtaque[4];***
- ***Muhammad Saeed vs. Shahabudin[5];***
- ***Amir Bibi through Legal heirs vs. Muhammad Khursheed and others[6];***
- ***Hussain Developers vs. 1st Senior Civil Judge, Karachi South and 2 others[7];***

7. Conversely learned counsel for the Respondent has argued that the judgment of the Appellate Court warrants no interference. He at the very outset stated that in case of conflicting findings, preference must be given to the Appellate Court. In this regard he has relied upon the following judgments: -

- ***Amjad Ikram vs. Mst. Asiya Kausar and others[8];***
- ***Muhammad Nawaz vs. Haji Muhammad Baran Khan and others[9];***

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[1] 2004 CLD 732
[2] 2002 PLC (CS) 526
[3] 1991 SCMR 1841
[4] PLD 2024 Sindh 121
[5] PLD 1983 SC 385
[6] 2003 SCMR 1261
[7] PLD 2018 Sindh 274
[8] 2015 SCMR 1
[9] 2013 SCMR 1300

8. He has stated most vehemently that the email and the attachment sent by the Appellant constitute an admission and the Appellants are *estopped*, through their conduct, from raising any plea which is contrary to the statement of account and the respective email sent to the Respondent. Learned counsel in this regard referred to various email correspondences (total 32 in number) and has attempted to demonstrate that the claim of the Respondent was admitted by the Appellant.

9. With regards to limitation, the learned counsel has invited my attention to the email dated 04.03.2021, which according to him, is the second email sent by the Appellant denying the claim of the Respondent. Learned counsel has stated that in this regard he has filed the above-mentioned suit on 15.04.2021 which was only a few days after the claim of the Respondent was denied in the above noted email. He has categorically stated that Article 62 of the Limitation Act 1908 does not apply to the present case, and even if it does, the period of limitation according to the learned counsel will be computed from 04.03.2021, which was according to him, the date on which his claim was denied by the Appellant. He has stated that Article 120 of the Limitation Act 1908 is applicable to the present proceedings, and irrespective of the article applicable to the present case, the cause of action accrued in favour of the Respondent on 04.03.2021. He has further argued that the Appellant raised a claim for Rs.7 million, however, no counter claim and/or set-off was filed by the Appellant. Learned counsel has lastly contended that the decretal amount is in accordance with the admission of the Appellant.

10. Order XLI, Rule 31 C.P.C. mandates an appellate court to determine points for determination, the decision on those points, and the reasons for the decision. The said principle was also expounded in the case of ***Meer Gul vs. Raja Zafar Mehmood through legal heirs and others***[10]. The points for determination are set out below: -

1. **Whether the Civil Suit filed by the Respondent was barred by the law of limitation?**

[10] 2024 SCMR 1496

2. **Whether the suit can be decreed in accordance with the statement of account furnished by the Appellant to the Respondent?**

3. **Whether the Impugned judgment and decree suffer from infirmity and are liable to be set aside?**

POINT No.1

11. I have heard the learned counsels for the parties and perused the record with their able assistance. Prior to delineating on the points raised by the learned counsels, it is imperative to first examine paragraph No.17 of the plaint, pertaining to the cause of action. The said paragraph is reproduced below: -

> "17. *That, the cause of action for tiling of the Suit arose to the Plaintiff firstly when the Defendant emailed vide emails dated 16.04.2016 and 03.11.2016 for the period from 01.10.2015 to 30.06.2016, the latter shows that a balance amounts of* Rs. *4.617,021/ secondly when the Plaintiff vide emails dated 08.05.2017 and 09.05.2017 repeatedly requested the Defendant to provide an updated SOA to consolidate his accounts "Thirdly when the Plaintiff again after checking his available record emailed the Defendant vide email dated 09.01.2018 and 20.02.2018 asking the Defendant that the provided ledger does not include some slips/transactions and are missing from the ledger Fourthly when the Plaintiff again in his email vide email dated 04.04.2018 reminded the Defendant of earlier requests to recheck missing slips and transaction total amounting to* Rs. *902116 which are missing from the ledger provided by the Defendant via email dated 03.11.2016 as the total amount laying with the Defendant is* Rs. *5,519137/- as per Plaintiff SOA fifthly when the Defendant vide its email dated 23.12.2020 asked the Plaintiff to visit their office to discuss the outstanding, amounts of the Plaintiff and the Plaintiff accordingly replied vide email dated 23.12.2020 sixthly when the Plaintiff responded vide email dated 29.03.2021 replying therein that the case is not closed at our end as we are claiming our legit and admitted amount. Lastly when the Defendant failed to repay the outstanding liability due despite demand made and admission at the part of the Defendant, which continues till date."*

12. I have also taken the liberty of perusing the cross-examination of the respective parties. More particularly, I have perused the cross-examination of the Respondent and it appears on the bare perusal of the said cross-examination that the Appellant conceded to the cause of action arising in the year 2021. The

suggestion in this regard was put by the learned counsel for the Appellant and the relevant excerpts of the said cross-examination are reproduced below: -

> *"It is correct to suggest that the Plaintiff used to work as a freelancer with Defendant. It is correct to suggest that the Plaintiff had account with Defendant Company as Yawar Samba. Voluntarily say that Plaintiff was working as freelancer at first place and later on he was allotted account with defendant Company. It is correct to suggest that the Plaintiff used to make advance payment for future ticket booking with Defendant Company. It is incorrect to suggest that Plaintiff's substantial amount used to remain in account of Defendant Company. It is correct to suggest that the Defendant sent two emails dated 16.04.2016 and 03.11.2016 along with attachment of statement of account of Plaintiff with Defendant Company. It is correct to suggest that as per that statement the amount was shown as Rs.4,617,021/- belonged to Plaintiff, Voluntarily say that, it was not officially sent to him. It is correct to suggest that the emails were sent from official account of Defendant Company. Voluntarily says that employee of the Defendant Company has sent emails from his official account but the Defendant Company does not own it. It is incorrect to suggest that the Defendant Company never disowned these emails in past. It is correct to suggest that Defendant Company does not own it. It is correct to suggest that the Plaintiff sent email 08.05.2017 & 09.05.2017 to the Defendant Company for demanding updated statement of account. It is correct to suggest that as per email dated 26.10.2016 the status of Plaintiff has been changed from freelancer to Travel Agent. It is correct to suggest that Plaintiff vide email dated 25.09.2020 has provided all details in respect of his outstanding amount to the Defendant Company.* (Emphasis added)

13. Further in addition to the suggestion made by the Appellant in the above noted cross-examination, the Appellant witness when examined has made the following statement on oath: -

> *"It is correct to suggest that the Plaintiff was in communication with the Defendant Company through email from 2016 to 2021. …….. It is correct to suggest that the Defendant Company sent emails through Sales Manager Khuram Salar and Senior Regional Manager namely Vijay Kumar vide dated 27.10.2020 & 15.11.2020 to the Plaintiff and informed him that their team is working on it and investigating the matter. It is correct to suggest that email dated 04.03.2021 sent by Sales Manager namely Khurram Salar of Defendant Company if the Plaintiff closes claim then the Defendant Company will not claim its claim and closes his side. Voluntarily say that, email under reference is actual response to email sent by the Plaintiff. I say that I don't know whether email dated 25.01.2021 sent by one Talha Tanveer RAS on behalf of Defendant Company to the Plaintiff wherein a sated at an amount of Rs. 7 million is outstanding towards Plaintiff and he is liable to pay the same or not. I say that I don't acknowledge that whether Plaintiff's claim is*

> *Rs.55.19,137/- excessive amount deposited with Defendant Company or not."* (Emphasis added)

14. It is apparent that the email of 2021 has been admitted by the Appellant and in this regard, I agree with the findings of the learned Appellate Court that even if it is presumed that Article 62 of the Act of 1908 is applicable to the present case, even then the suit filed by the Respondent is within the prescribed period of limitation. The time, it is held, was correctly calculated from the date of refusal i.e. 04.03.2021, by the learned Appellate Court. The judgments relied upon by the learned counsel for the Appellant in reference to applicability of Article 62 of the Limitation Act 1908, do not advance his cause. It has already been held above that the cause of action arose in favour of the Respondent in the year 2021 and therefore, I have deliberately circumvented any deliberation on the judgements noted above. In this regard point No.1 is answered in the Negative.

POINT No.2.

15. Prior to delineating and adjudicating the instant point it will be imperative to highlight the dispute between the respective parties. The Appellant being an airline approached the Respondent for the purpose of selling tickets. It is not denied between the parties that the Respondent was, amongst other things, in the business of selling tickets of the Appellant's airline. It is also not denied that the Respondent, at least at a later stage in the relationship between the parties, maintained personal and official accounts from which he regularly booked tickets of the Appellant's airline. It is also not denied that the Appellant had issued a Travel I.D. to the Respondent in the year 2016, even though the relationship of the said parties was established prior to 2016 where the Respondent was working as a freelancer.

16. In order to determine the above point for determination, it is imperative to peruse the cross-examination of the respective parties for the reason that emails and statements of accounts attached therewith are not disputed. Such detailed deliberation is necessary as concurrent findings have been impugned before me through the instant appeal.

17. The only question which ought to be considered by me, is whether the said statement was sent for the purposes of audit as contended by the learned counsel for the Appellant, or the same was an admission of the outstanding amount owed to the Respondent. To answer the above noted question I have examined the cross-examination of the respective parties. The suggestions of the Appellant counsel during the cross-examination of the Respondent are fatal to his claim. The relevant portions are reproduced below: -

> *"It is correct to suggest that Defendant Company has to pay Rs.4,617,021.62. Voluntarily says that it was the claim of the Defendant Company that they are liable to pay the said amount."*

18. Further certain admissions made by the Appellant during the course of cross examination do not advance their case. The same are reproduced as under: -

> *"It is correct to suggest that as per that statement the amount was shown as Rs.46,17,021 belonged to the Plaintiff. Voluntarily say that it was not officially sent to him…… It is correct to suggest that the emails were sent from official account of the Defendant Company."*

19. In addition to the cross-examination of the contesting parties reproduced above, perusal of the record will reflect that Statements of Accounts admittedly sent by the Appellant through email dated 16.04.2016 and 03.11.2016, reflect the amount owed to the Respondent. The said Statement of Accounts have not been denied by the Appellant's witness. Further on specific query by me, it was admitted that the Appellant did not produce their Accountant before the learned Trial Court to rebut the claim of the Respondent. It is further held that once the Statement of Accounts were exhibited by the Respondent before the learned Trial Court, the burden shifted to the Appellant to disprove the same. The Appellant made no such effort and it is evident from the cross-examination reproduced above, that the Statement of Accounts were sent through official address, which fact has been duly admitted by the witness of the Appellant. Further perusal of the email dated 03.11.2016, along with the requisite attachment reads as follows: -

> *"Other Subsidiary Ledger (from 01.10.2015 to 30.06.2016), Account ID 27090 0154 Title Yawar Samna-Khi Group."*

20. I agree with the findings of the learned Appellate Court that said email negates the plea of the Appellant that no ledger was maintained by the said Appellant. In light of above the point No.2 is answered in affirmative.

POINT No.3.

21. 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***[11] 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.* (Emphasis added)

22. It is therefore held that the learned trial court needlessly deliberated, very extensively, on the applicability of various articles of the Limitation Act 1908, without appreciating that the cause of action arose in the favour of the Respondent lastly on 4.03.2021. Once this apparent conclusion is reached the deliberation regarding the applicability of various articles under the Limitation Act 1908 becomes futile. The learned trial court was perhaps influenced by its findings earlier when the plaint of the Respondent was rejected on the ground of limitation and subsequently the said order was set aside in appeal as noted above.

[11] 2022 SCMR 284

23. In light of above discussion, the instant appeal devoid of merits is hereby dismissed with no order as to cost. Consequently, the suit of the Respondent is decreed in the sum of Rs.4,617,021.62/- only. Office to prepare decree in the above terms.

J U D G E

Nadeem Qureshi "PA"