

**IN THE HIGH COURT OF SINDH AT KARACHI**

**IInd Appeal No. 159 of 2019**

Abdul Waheed Khan ..... Appellant

Versus

Khush Muhammad Bhutto ..... Respondent

Date of Hearing : 16.04.2025

Date of Announcement : 08.05.2025

Appellant through M/s. Nausheen Tajammul & Tajammul  
Hussain Lodhi, Advocates.

Respondent through : Ms. Sarwar Jahan, Advocate

**J U D G E M E N T**

**Muhammad Jaffer Raza, J:-**The instant IInd Appeal has been filed against Judgment and Decree dated 05.09.2019 and 07.09.2019 respectively, (“**Impugned Judgment & Decree**”) passed by the Appellate Court in Civil Appeal No. 159/2018.

2. Facts of the case are summarized as under:-

That the Respondent filed Civil Suit No. 832/2007 seeking the following relief: -

- (a) For possession of Flat No. B-7, 2<sup>nd</sup> Floor, Abbas Square, Block No. 7, FB Area, Karachi*
- (b) Rent at the rate of Rs.2300 from 5<sup>th</sup> of September 2006 onwards till the plaintiff is physically inducted into possession by the defendant.*
- (c) Cost of the suit.*
- (d) Any other relief that may be expedient in the circumstances of this case may also kindly be granted.”*

3. After recording of evidence and hearing the parties at length, the learned trial Court passed Judgment and Decree dated 10.11.2018 and 12.11.2018 respectively, whereby the suit of the Respondent was decreed as prayed. Thereafter, the Appellant preferred Civil Appeal No. 159/2018 and the same was dismissed vide impugned Judgment and Decree. The instant second appeal has been filed against the concurrent findings of the courts below.

4. It has been argued by the learned counsel for the Appellant that the agreement to sell was executed between the parties on 05.09.2006 and possession was handed over to the Appellant pursuant to the above-mentioned agreement of sale. Learned counsel for the Appellant has candidly admitted that the sale consideration was not paid entirely and only the partial sum was paid by the Appellant. Learned counsel has further stated that the full payment was made after the time stated in the agreement had lapsed, however, due to fact that the sale consideration was accepted by the Respondent, time was not essence of the contract. Thereafter, in the same vein, learned counsel for the Appellant submitted that there was no clause for cancellation in the said agreement and no consequence thereof has been provided. Learned counsel has lastly relied upon Section 53-A of the Transfer of Property Act, 1882 (“Act”) and stated that his possession may not be interfered with as the same is protected under the above noted provision. In support of his submissions, learned counsel relied upon the following judgments: -

**Ahmed Mujtuba Khan v. Iqbal Shah<sup>1</sup>**

**Naib Subedar Taj Muhammad v. Yar Muhammad Khan<sup>2</sup>**

**Faqir Muhammad v. Abdul Momin<sup>3</sup>**

**Sardar Arshid Hussain v. Mst. Zenat un Nisa<sup>4</sup>**

**Mrs. Sherbano v. Kamil Muhammad Khan<sup>5</sup>**

5. Conversely, learned counsel for the Respondent has stated that the Respondent is the lawful and legal owner of the subject property, as admitted between the parties and is being unnecessarily deprived of possession of the same. Learned counsel for the Respondent has further stated that the payment, as is being referred to by the learned counsel for the Appellant, has been specifically

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<sup>1</sup>1990 CLC 1381

<sup>2</sup> 1992 SCMR 1265

<sup>3</sup> PLD 1995 Lahore 405

<sup>4</sup>2017 SCMR 608

<sup>5</sup> PLD 2012 Sindh 293

denied, and the Appellant has not been able to produce any receipt or proof thereof. Moreover, learned counsel stated that the agreement to sell cannot be valid for an indefinite period. Learned counsel has submitted that the concession under Section 53-A of the Act is not available to the present Appellant for the reason that he was responsible, through his conduct, for recession of the sale agreement and therefore his possession is unauthorized and unlawful. Learned counsel has stated that the protection of Section 53A of the Act would only be available in cases where the sale consideration was proved and same is an equitable principle. The Appellant, according to learned counsel for the Respondent, is not entitled for any equitable relief. Lastly, learned counsel has argued that the scope of Section 100 CPC is restricted and this Court in adjudicating the instant second appeal cannot revisit and reappraise the evidence, which exercise has already been conducted by the courts below. In support of her submissions, learned counsel relied upon the following judgments, relevant parts of which are reproduced as under: -

- **Malik Ellahi Bux v. Muhammad Aslam**<sup>6</sup>

*“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 benefit under the said provision of law, the petitioners must 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 timeframe for payment was fixed in the said agreement. The ground on which the non payment 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 recession 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.”*

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<sup>6</sup>2002 CLC 433

- **Muhammad Yousif v. Syed Wali Muhammad Shah**<sup>7</sup>
- **Abdus Samad Khan v. Molvi Abdullah**<sup>8</sup>

6. I have heard both learned counsels and perused the record. It is not denied that the agreement of sale as mentioned above was executed between the parties. However, learned counsel for the Appellant has failed to point out any material irregularity, misreading or non-reading of the evidence. It is unconscionable for the Appellant to maintain possession of the subject property in light of the fact that the Respondent continues to be the registered owner of the same. Moreover, the courts below have correctly held that the Appellant was unable to prove that he had paid anything over Rs.200,000 to the Respondent and categorically admitted that he has no receipt or proof of the same. Further, the Appellant admittedly never approached the Respondent seeking performance of the above-mentioned agreement.

7. There is another aspect which requires consideration. It is pertinent to note that the civil suit mentioned above was filed in the year 2007 and suit for specific performance of the said sale agreement was only filed by the Appellant in the year 2019, after the judgment and decree was pronounced by the learned trial court. This conduct, itself does not warrant any equitable relief in favour of the Appellant. Had the Appellant been vigilant the said suit for specific performance ought to have been filed earlier. It is also evident that the Appellant is enjoying the possession of the subject property only after payment of a fraction of the sale consideration. It is also noteworthy to mention that the suit No. 157/2019 filed by the Appellant for specific performance has already been dismissed by the learned trial Court vide Judgment dated 27.02.2024 and appeal has been filed bearing No. 95/2024 and the same is still pending adjudication.

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<sup>7</sup>1994 CLC 132

<sup>8</sup>1989 CLC 1563

8. The judgements relied upon by the learned counsel for the Appellant are distinguishable for the following reasons.

- The case of **Abdus Samad Khan** (supra) authored by a single judge of the Peshawar High Court pertained to the ingredients of a *benami* transaction which are not applicable to the facts of the present case as highlighted above.
- The case of **Muhamamad Yousuf** (supra) does not advance the case of the Appellant. Whilst delineating the difference between a sale deed and agreement to sell, it was correctly held that the latter does not create any vested right.
- The question in the case of **Sardar Arshid Hussain** (supra) pertained to the validity of a registered gift deed vis-à-vis an unregistered sale/dower deed.
- The judgements relied upon by the Appellant in the cases of **Ahmed Mujtaba Khan** (supra), **Mrs. Sherbano** (surpa) and **Naib Subedar Taj Muhammad** (supra) do not advance the case of the Appellant. The said cases lay down the test to be satisfied in cases where equitable relief under Section 53-A is sought. The test was laid down in the case of **Naib Subedar Taj Muhammad** (supra) as under: -

*“5. So far as the applicability of section 53A of the Transfer of Property Act is concerned, it depends upon the following factors:*

*(i) There is a contract in writing signed by the transferor in respect of an immovable property;*

*(ii) From the writing, transfer can be ascertained with reasonable certainty;*

*(iii) In part performance of the contract, the transferee has taken possession of the property or any part thereof or if he was in possession, he continues to be in possession in part performance of the contract and has done some act in furtherance of the contract, and*

*(iv) The transferee has performed or is willing to perform his part of the contract.*

*5. If all these conditions are satisfied, then even if the contract is not registered, the transferor or any person claiming under him cannot enforce*

*any right in respect of the property of which the transferee has taken possession except such right, which a transferor is entitled to enforce by virtue of the contract.” (Emphasis added)*

9. It is evident from the bare perusal of the evidence led by the respective parties before the learned trial court, that the Appellant has not taken any steps in furtherance of the said agreement. Further, his conduct belies that he is not willing to perform his part of the contract. The same can be deciphered from the fact that the Appellant filed a suit for specific performance **after** the learned trial court had passed a judgement and decree in favour of the present Respondent. No further observation in this regard is warranted as the same may jeopardize appeal No. 95/2024 preferred by the Appellant.

10. The scope of Section 100 CPC is limited, as expounded by the Honourable Supreme Court in the case of **Zafar Iqbal and others Versus Naseer Ahmed and others**<sup>9</sup> wherein it was held as under: -

*“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*

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<sup>9</sup> 2022 SCMR 2006

*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 on 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."(Emphasis added)*

11. No substantial error or defect has been identified by the learned counsel for the Appellant which would require interference of this court. In the light of what has been discussed above, instant appeal is dismissed with no order as to cost.

JUDGE