

# IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

## *Second Civil Appeal No.S-01 of 2025*

Appellants : Azad Ahmed Khoso & others, *through* M/s. Ghulam Dastagir Shahani & Muhammad Qasim Khan, Advocates.

Respondents : Mst. Shazia and others *through* Mr. Muhammad Ibrahim Lashari, Advocate, Mr. Abdul Rehman Mughal, Advocate and Mr. Aftab Nek Muhammad Bhutto, Assistant Advocate General, Sindh.

Date of Hearing : 01.09.2025.

Date of Decision : 01.09.2025.

## **JUDGMENT**

**Ali Haider 'Ada'.J:-** The appellants have assailed the judgment and decree dated 24-08-2024 and 27-08-2024, passed by the learned Senior Civil Judge-II, Jacobabad (trial court) in F.C. Suit No.32 of 2020 filed by Mst. Shazia, respondent No.1/plaintiff, whereby the suit filed by her was decreed. Thereafter, the appellants preferred Civil Appeal No.27 of 2024 before the learned Additional District Judge, Thull (appellate court), who, vide judgment and decree, upheld the findings of the trial court and dismissed the appeal of the appellants. Hence, being aggrieved by the concurrent findings of both the learned Courts below, the appellants have preferred the present Second Civil Appeal against the said decisions.

2. In nutshell, the case of the parties is that respondent No.1, Mst. Shazia, being the sister of appellant Azad Ahmed, filed a civil suit seeking declaration, cancellation of the gift deed, possession, and permanent injunction. Her main plea was that the alleged gift deed executed in favour of the appellant was false, illegal, and liable to be cancelled, and that her lawful share in the suit property be handed over to her. The dispute pertains to agricultural land measuring 95-12½ acres situated in Deh Sher Wah, Thull, Jacobabad, originally owned by late Nisar Ahmed Khan, father of the parties. After his death, the property was duly mutated in the names of all legal heirs in the year 2002. It was later shown that all the legal heirs had gifted the property to the appellant in presence of the revenue authorities, by affixing thumb impressions and completing other formalities. Respondent No.1,

however, challenged the validity of the said gift deed. The stance of the appellant, supported by another legal heir/brother Afaq and their mother/widow Mst. Noor Jahan, was that the property had in fact been gifted to him by all the legal heirs.

3. As, the learned trial Court, after obtaining the written statement from the defendants, framed the following issues:-

1. Whether suit is not maintainable?
2. Whether the plaintiff inherited her share of suit land from her father?
3. Whether the plaintiff gifted / sold out her share of suit land to defendant No.1?
4. Whether the mutation entries through which allegedly the plaintiff transferred her share in name of defendant No.1, the registered sale deed No. 164 dated 13.05.2015 and subsequent entries are liable to be cancelled?
5. What should the decree be?

4. After framing of issues, evidence from both sides, as well as from the revenue officials, was recorded. Each party supported its respective stance, while the revenue officials admitted the existence of the gift deed before the concerned Mukhtiarkar. Thereafter, the learned trial Court, after hearing the parties, passed the impugned judgment and decree in favour of respondent/plaintiff, whereby the gift deed was cancelled and possession of the suit property was ordered to be handed over to her. The appellants challenged the said judgment and decree in appeal before the learned appellate court but remained unsuccessful. Hence, the present second appeal has been filed.

5. Learned counsel for the appellant mainly argued that the gift deed in his favour was cancelled by the trial court without proper framing of an issue on that aspect. He contended that although evidence was led in view of the framed issues, the trial court cancelled the gift deed without putting the matter to trial in its correct perspective. It was further argued that the suit was instituted in the year 2020, whereas the gift deed was executed in 2014, but no issue regarding limitation was framed nor any evidence recorded on that point; yet the trial court decreed the suit solely on the pleadings of the respondent. Learned counsel further assailed the appellate judgment and decree on the ground that the mandate of Order XLI Rule 31, C.P.C. was not complied with, as the appellate court merely endorsed the findings of the trial court by framing a single point of determination i.e., whether the decree of the trial court called for interference, and by simply answering it in the negative without giving proper and detailed reasoning. Learned counsel submitted that such approach is contrary to the settled principles of law, resulting in prejudice

to the appellant, whose gift deed stood cancelled without proper framing of issues, without complete evidence, and despite the bar of limitation. He, therefore, prayed that the matter be remanded to the trial court for fair and proper adjudication.

6. Conversely, both the learned counsel for the respondents submitted that the trial court rightly decreed the suit as the impugned gift deed was fraudulent and liable to be cancelled. They argued that the respondent/plaintiff filed the suit promptly upon coming to know about the existence of the gift deed, and in evidence, the appellant failed to substantiate or defend its validity. Thus, the concurrent findings of both the courts below are well-reasoned and do not warrant interference in second appeal. It was further submitted that the scope of second appeal is limited, and the present appeal being devoid of merits is not maintainable. Learned Assistant Advocate General adopted the arguments advanced by learned counsel for the respondent.

7. Heard the learned counsel for the parties and perused the material available on record.

8. At the very threshold, it is to be underscored that the jurisdiction of this Court under Section 100, C.P.C. is confined to substantial questions of law. It does not extend to a re-appraisal of evidence or interference on pure questions of fact. When entertaining a second appeal, the Court must formulate the substantial question(s) of law arising from the record; those formulated questions circumscribe and define the bounds of jurisdiction in second appeal. In appellate adjudication, compliance with Order XLI Rule 31, C.P.C, setting out the points for determination, the decision thereon, and the reasons is the general rule. That said, the law insists on substantial, not pedantic, compliance. The correct litmus test is whether, on a fair reading of the appellate judgment, one can discern (i) what controversy was decided, (ii) how it was decided, and (iii) why it was decided that way. If those elements are evident and the cause of justice has not suffered, the judgment does not fail merely for want of expressly numbered points for determination. Interference in second appeal is exceptional and is warranted only where the appellant demonstrates a substantial question of law, for example that the courts below, misapplied the law or ignored a statutory bar, resulting in miscarriage of justice; reached findings vitiated by misreading or non-reading of material evidence; decided the case upon a jurisdictional error or proceeded on an inadmissible legal premise; or rendered perverse conclusions. Where a material issue such as limitation or the validity of a dispositive instrument and question of possession was neither framed nor tried and the omission has occasioned failure of justice, the proper course is to set aside the decree to that extent and remand for

framing and trial of the omitted issue(s). Support is drawn from the case of *Muzafar Iqbal vs Mst. Riffat Parveen and others* 2023 SCMR 1652, wherein it had been held that:-

8. *The jurisdiction of a High Court under section 100, C.P.C. is constricted to appeals encompassing a substantial question of law rather than causing interference on a pure question of fact and, while taking cognizance by means of second appeal under section 100, C.P.C., it is a foremost fragment of jurisdiction to formulate the question of law which is inherent in the spirit of such jurisdiction, hence, for all intents and purposes, the requirements of Order XLI, Rule 31, C.P.C. must be complied with, however, if it is conceivable from the judgment that substantial compliance has been made whereby the cause of justice has not suffered or depreciated, that would be sufficient for the safe administration of justice despite non-adherence to the said Rule stricto sensu. Instead the litmus test is to visualize from the perusal of the judgment whether the controversy between the parties has been decided with proper appraisement, weighing and balancing the evidence and law and, if it is manifested from the judgment, then obviously it would be valid even though it does not contain the points for determination. The right of appeal gives rise to a notion of accentuating by twofold and threefold checks and balances to prevent injustice, and ensuring that justice has been done. There is also 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 ibid, 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. At this juncture, certain dictums laid down on the niceties of section 100, C.P.C. are quite relevant which are replicated as under:-*

1. *Mir Abdullah v. Muhammad Ali and 2 others* (1977 SCMR 280). Both the Trial Court and the lower Appellate Court had taken into consideration the whole evidence on file and had discussed it in detail. The findings of fact arrived at by them, even if erroneous, could not be the subject of second appeal. The decisions arrived at by both the lower Courts were neither contrary to law nor had failed to determine any material issue. There was also no substantial error or defect in the procedure followed by them and under the circumstances their judgments and decrees were therefore not open to appeal under section 100 of the C.P.C. read with section 101 of the C.P.C.

2. *Mst. Naziran Begum through Legal Heirs v. Mst. Khurshid Begum through Legal Heirs* (1999 SCMR 1171). A finding on a question of fact arrived at by the First Appellate Court which is based on no evidence or is the result of conjectures or fallacious appraisal of evidence on record is not immune from

*scrutiny by the High Court in exercise of its power under section 100 or 115, C.P.C.*

3. *Abdul Majid and others v. Khalil Ahmad* (PLD 1955 Federal Court 38). The High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross and inexcusable the error may seem to be, unless there is an error in the procedure provided by law, which may possibly have produced an error or defect in the decision of the case on the merits. The Court also referred to the decision of the Privy Council in *Durga Chowdhri v. Jawahir Singh Chowdhri* (ILR 18 Cal. 23) which laid down the proposition in clear and unmistakable terms.

4. *Keramat Ali and another v. Muhammad Yunus Haji and others* (PLD 1963 SC 191). The High Court in second appeal had no jurisdiction to go into the question relating to the weight to be attached to a particular item of evidence. The learned Judge in the High Court fallen into the error of drawing upon conjectures for which he has found fault with the trial Court. On a perusal of the judgments of the Courts below and the evidence in this case we are not in a position to agree with the High Court that their findings were based purely on conjectures or surmises. The findings of fact of the Courts below were neither based upon conjectures nor upon inadmissible evidence nor to have been arrived at by any error in the procedure provided by law.

5. *Pathana v. Mst. Wasai and another* (PLD 1965 SC 134). This Court considered the case reported as *Mst. Durga Choudhrani v. Jawahir Singh Choudhri* (171 A 122), wherein it was held that an erroneous finding of fact is a different thing from an error or defect in the procedure and that there is no jurisdiction to entertain a second appeal on the ground of such an erroneous finding, however gross or inexcusable the error may seem to be. This principle was also affirmed by the Federal Court of Pakistan in a case reported as *Abdul Majid v. Khalil Ahmad* (PLD 1955 FC 38). The fallacy in appraising the evidence as to a fact, unless it amounts to a material mistaken assumption, is merely an error in coming to a finding as to that fact, and such error has never been held to be an error of law justifying interference in second appeal.

6. *Muhammad Khan v. Mst. Rasul Bibi* (PLD 2003 SC 676). Ordinarily concurrent findings recorded by the Courts below could not be interfered with by the High Court while exercising jurisdiction in the second appeal however erroneous that finding may be, unless such finding has been arrived at by the Courts below either by misreading of evidence on record by ignoring a material piece of evidence on record or through perverse appreciation of evidence. The case in hand squarely falls within the exception clause, inasmuch as, the High Court interfered with concurrent findings, after noticing that the judgments of the Courts below suffered from acute misreading of evidence and exclusion of material available on the record, resulting in gross miscarriage of justice.

7. *Shah Muhammad v. Sardar Habibullah Khan and others* (1988 SCMR 72). The first appellate Court on re-appraisal of evidence upheld the conclusions reached by the trial Court.

*These findings of fact are based on proper and legitimate conclusions that can be drawn from the evidence recorded in the case and interference by the learned Judge in the High Court became a contrary view of evidence prevailed with him did not warrant interference by the High Court in a second appeal under section 100 of the Code of Civil Procedure.*

*8. Muhammad Tufail and 2 others v. Ghaus Muhammad through Legal Representatives (PLD 2007 S C 26). The finding by the lower appellate Court would be immune from interference in second appeal only if it was found to be substantiated by evidence on record and was supported by logical reasons. This exercise cannot be completed unless the High Court makes a comparison of the reasoning of two Courts, which again, is not possible unless evidence is appreciated.*

*9. Raruha Singh v. Achal Singh and others (AIR 1961 SC 1097). The High Court should not have entered to the question of appreciating the evidence as it appears to have done in the last portion of its judgment. This Court has repeatedly pointed out that in second appeal the High Court's jurisdiction is confined to questions of law.*

*10. State Bank of India and others v. S.N. Goyal (AIR 2008 SC 2594). The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties.*

*9. In the wake of the above discussion, this Civil Appeal is allowed and as a consequence thereof, the impugned judgment of the High Court is set aside and matter is remanded to the High Court to decide the aforesaid Regular Second Appeal afresh after providing opportunity of hearing to the parties.*

9. Now, advertent to the judgment and decree passed by the learned appellate court, it is necessary to examine the mandate of Order XLI Rule 31, C.P.C., which prescribes the form of an appellate judgment. For convenience, the same is reproduced as under:

*31. Contents, date and signature of judgment.- The judgment of the Appellate Court shall be in writing and shall state-*

*(a) the points for determination;*

*(b) the decision thereon;*

*(c) the reasons for the decision; and*

*(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.*

10. It is the bounden duty of the appellate court to decide the controversy between the parties after applying its independent and judicial mind. The appellate court is not to act as a mere confirming forum; rather, it must undertake its own appraisal of the pleadings, evidence, and law, and then render findings supported by reasons. It is a settled principle that the appellate court carries the responsibility and obligation to decide the matter with proper judicial application of mind. Mere reproduction of the judgment of the trial court and thereafter dismissing the appeal without engaging in an independent discussion of the points arising for determination would not be in consonance with the true spirit and mandate of the law. Reliance is placed upon the case of *Punjab Industrial Development Board vs United Sugar Mills Limited* 2007 SCMR 1394, and *Ghulam Mohayyauddin's case* PLD 1964 SC 829.

11. At the very least, points for determination, as mandated under Order XLI, Rule 31, C.P.C., ought to have been framed by the learned appellate court for giving a reasoned decision thereon. In the present case, however, only a formal and omnibus point was framed. Such a formulation cannot be said to satisfy the spirit of Order XLI, Rule 31, C.P.C, which requires the appellate court to clearly state the points arising in controversy, record its decision thereon, and provide reasons in support. Support for the above view is fortified from the dictum laid down by the Hon'ble Supreme Court in *Pakistan Refinery Ltd., Karachi v. Barrett Hodgson Pakistan (Pvt.) Ltd.* (2019 SCMR 1726) and *Muhammad Yaseen vs Muhammad Aslam* 2024 CLC 655.

12. Before framing issues, it is incumbent upon the trial Court to carefully examine the plaint and the written statement so as to ascertain with accuracy the allegations made by each party. The Court must ascertain the material propositions of law or fact on which the parties are at variance, as those constitute the foundation of the issues. The Court may, for the purpose of framing proper issues, examine the parties or their witnesses, and may even consider the evidence already led. Where a material point, though not raised in the pleadings, emerges during evidence, the Court has the power to frame an additional issue on that point. Under Order XIV, Rule 4, C.P.C, the Court may examine any person and summon any document for the correct framing of issues, even if such material is not otherwise produced before the Court. Reliance is placed upon the case of *Parveen Akhtar and 2 others vs Akhlaq Ahmed and 2 others* 2021 CLC 1491.

13. It is pertinent to mention that the very purpose of framing issues in civil litigation is to identify with precision the material propositions of fact and law upon which the parties are at variance. This exercise ensures that the controversy between the parties is narrowed down to specific points which require adjudication. Framing of issues not only enables the Court to appreciate the scope of the dispute, but also serves to inform the parties of the exact factual and legal questions on which they must lead evidence in order to succeed.

14. The process further guarantees that neither party is taken by surprise during trial, and that the burden of proof is properly distributed. It provides a clear framework within which the trial proceeds, ensuring that irrelevant matters are excluded and only the real questions in controversy are determined. The law is settled that failure to frame necessary issues, particularly those going to the root of the case, such as limitation, title, validity of documents, or jurisdiction may result in miscarriage of justice, as the parties are deprived of the opportunity to lead evidence and address arguments on such points. Thus, framing of issues is not a mere formality; it is a substantive safeguard to secure a fair trial, prevent prejudice, and provide the foundation upon which the judgment must ultimately rest. In this context support is drawn from the case of *Haji Farman ullah vs Latif-ur-Rehman* **2015 SCMR 1708**.

15. In the present case the plaintiff discloses a claim for declaration, cancellation of a gift deed dated 2014, possession and permanent injunction; the record further shows that the suit was instituted in 2020. The gravamen of the plaintiff's claim was that the alleged gift deed was false/fraudulent and, on that basis, she sought cancellation and possession. These contentions squarely raised at least the following material points which called for specific issues to be framed and tried: (a) whether the suit is barred by limitation or the cause of action accrued at an earlier date; (b) whether the impugned gift deed was executed by all the alleged transferors and is otherwise valid; (c) whether the gift deed was procured by fraud, forgery or undue influence; and (d) whether the plaintiff is entitled to possession of the suit land and, if so, in what measure. The trial Court, however, proceeded to cancel the gift deed and ordered delivery of possession without framing and adjudicating the above necessary issues. By omitting to frame an issue on limitation and by failing to frame a specific issue on the validity or cancellation of the gift deed and on the claim for possession, the trial Court deprived the parties of their right to meet and appropriately traverse the exact points on which decisive relief was



granted. The first appellate Court, when seized of the appeal, was under a statutory and judicial obligation to apply its independent judicial mind (Order XLI, Rule 33, C.P.C.), and to record the points for determination, its decision thereon and the reasons in support (Order XLI, Rule 31, C.P.C.). The appellate judgment in the present matter, however, contains only an omnibus point whether the trial Court's decree calls for interference and proceeds to endorse the trial Court's findings with little or no independent analysis. That course is inconsistent with the duty of an appellate court to identify the specific legal and factual controversies and to explain why it accepts or rejects the conclusions of the Court below.

16. In view of the foregoing reasons, the instant appeal is partly allowed. Consequently, the judgment and decree of the learned trial Court, as well as that of the first appellate Court, to the extent of cancelling the gift deed and directing delivery of possession, are held to be unsustainable in law. Accordingly, the concurrent judgment and decree of the Courts below stand set aside. The matter is remanded to the trial Court for proper framing of issues and for a fresh trial on the following lines (without prejudice to either party raising additional necessary issues): (a) Whether the suit is barred by limitation, if so, when the cause of action accrued and whether any exception applies; (b) Whether the impugned gift deed was executed by the alleged transferors and is in law a valid instrument; (c) Whether the impugned gift deed was obtained by fraud, forgery or undue influence; (d) Whether, the plaintiff is entitled to the relief of cancellation of the gift deed; and (e) Whether the plaintiff is entitled to possession of the suit property and to what extent. The trial Court shall proceed to frame the above issues and any other issue necessary for a just determination, shall permit the parties to produce evidence afresh and shall afford full opportunity to examine witnesses and to address all points of law and fact arising within the ambit of the framed issues. The trial Court shall record its findings with reasons in the manner required under the law. The learned trial Court shall proceed to decide the matter expeditiously, preferably within a period of three (03) months. No adjournment shall be granted except on cogent and genuine grounds. The parties are also expected to extend full cooperation to ensure timely disposal of the case. This appeal stands disposed of in the above terms, with no order as to costs.

**JUDGE**