

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 03 of 2023

Aashiq Ali Azad Appellant

Versus

Muhammad Asif Khan & others Respondents

Date of Hearing : 30.04.2025

Date of Order : 30.04.2025

Appellant through Mr. Ch. Rasheed Gujjar, Advocate.

Respondent through : Mr. Faraz Faheem, Advocate

J U D G E M E N T

Muhammad Jaffer Raza, J: - The instant IInd Appeal has been filed against the Impugned judgment dated 07.09.2022 and Decree dated 14.09.2022 passed in Civil Appeal No. 39/2021. The said appeal was filed against the Impugned judgment and decree dated 11.12.2021 passed in suit No. 295/2015.

2. Brief facts of the case are as follows:-

The Respondent No.1 filed suit No. 295/2015 with the following prayers

“A. Decree for a sum of Rs.80,00,000/- alongwith 12% interest with quarterly rests from the date of the suit till the date of realization.

B. Maximum cost of the suit be awarded.

C. Any other equitable relief(s), as this honorable Court may deems fit and proper under the circumstances of this suit.”

3. The suit was decreed in favour of the Respondent No.1 vide judgment and decree dated 11.12.2021 for a sum of Rs.2.9 million plus interest as stipulated in the decree. Thereafter, the Appellant filed Civil Appeal No.39/2021 and the same was dismissed vide Impugned judgment. Learned counsel has Impugned the concurrent findings of the courts below.

4. It is contended by the learned counsel for the Appellant that he himself is a victim of fraud and the Appellant and Respondent No.1 collectively invested

large sums of money with AAS International who was an alien to the proceedings as mentioned above, and suffered significant losses. Learned counsel has further stated that while acknowledging the loss, he is not responsible for the said loss and he has reiterated his contention regarding him being a victim of the fraud purported to be committed by AAS International. Learned counsel has further stated that earlier an ex-parte decree was passed against him and thereafter the same was set aside in Civil Appeal No. 39/2021. The matter was remanded back to the learned trial Court who after recording of evidence pronounced the Impugned judgment and decree.

4. Conversely, learned counsel for the Respondent has argued that the Appellant is largely responsible for the predicament of the Respondent as the fraud was perpetrated by him. He further stated that amount invested has already been admitted by the Appellant in a petition filed before this Court bearing No. 1063/2014. He further averred that the Appellant is trying to shift the burden from himself to another party, with whom the Respondent has no nexus or privity. Learned counsel stated that he has examined three witnesses and the said witnesses have advanced the cause of the Respondent No.1.

5. Heard the learned counsels and perused the record. I have examined both the Impugned judgments and decrees. It is apparent from the bare perusal of the Impugned judgment and decree passed by learned trial and appellate court that the Appellant did not step into witness box to give his version. Further I have also examined the cross-examination of the Respondent No.1 conducted by the counsel for the Appellant. It is apparent from the bare perusal of the cross-examination that while several questions regarding the transaction were posed to Respondent No.1, not a single question regarding the stance taken in the instant appeal was asked from the said Respondent during the above noted cross-examination. Further it does not advance the case of the Appellant that he failed to step into witness box despite being given repeated chances. Leaned counsel in

this regard has stated that he has earlier filed an application under Order VII Rule 11 CPC (“**dismissal order**”) which was dismissed by the learned trial Court. According to the learned counsel, his failure to appear in the witness box can solely be attributed to his presence before the Appellate Court pursuing remedy against the dismissal order. It is held that pursuing the remedy against the dismissal order, did not disentitle or bar the Appellant from appearing in the witness box.

6. The scope of IInd appeal under Section 100 is restricted and there must be compelling grounds for interfering with concurrent findings of the Courts below. Several judgements of the superior courts have outlined the parameters of IInd appeal and the same are listed and relevant portions thereon are reproduced below: -

i. Haji Sultan Ahmad through L.Rs. v. Naeem Raza and 6 others¹

“5. From the above discussed legal position, it is quite obvious that the concurrent finding recorded by the Courts `below cannot be interfered with by the High Court while exercising jurisdiction under section 100 C.P.C. how so 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”. (Emphasis added)

ii. Amjad Sharif Qazi And Others Versus Salim Ullah Faridi And Others.²

13. The concurrent findings of fact could not be reversed on surmises and conjectures or merely because, another view was also possible. P.W.3 and P.W.4 have been disbelieved merely on the basis of minor contradictions without any reference to the reasoning advanced by the trial Court and the appellate Court. It is reiterated that learned Judge did not realize that it was a second appeal before him and he could not interfere in the concurrent findings of facts recorded by two Courts below while exercising jurisdiction under section 100, C.P.C., how so erroneous those findings were, unless such findings had been arrived at by the Court below either by misreading of evidence on record or by ignoring a material piece of evidence on record or through perverse appreciation of evidence. The learned Judge did not point out any misreading or non-reading of evidence or the other criteria laid down by this Court in the judgments discussed below to enable him to undertake the reappraisal of evidence in the second appeal. (Emphasis added)

¹ 1996 SCMR 1729

² P L D 2006 Supreme Court 777

iii. Nazeer Ahmed versus Maqsood Ahmed³

4. It is well settled that a second appeal to the High Court shall lie from every decree passed in appeal by any Court subordinate to a High Court on the grounds: (a) the decision being contrary to law or to some 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 Civil Procedure Code, 1908 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.

iv. Syed Rafiul Qadre Naqvi Versus Syeda Safia Sultana And Others⁴

5. We have heard the arguments of learned counsel for the parties and facts in the light of the case-law cited at bar. Now, we have to examine the extent and scope of interference of section 100, C.P.C. regarding second appeal involving challenge to concurrent findings of fact recorded by the Courts below whether the High Court was empowered to interfere to set aside the concurrent findings howsoever erroneous by misreading of evidence on record, by ignoring a material piece of evidence on record or through perverse appreciation of evidence. It will be advantageous to examine the scope of section 100, C.P.C. regarding second appeal. The following are the grounds for its consideration: ---

- (a) the decision being contrary to law or to some 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;
- (c) a substantial error or defect in the procedure provided by this Code 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 the merits.

6. From perusal of above grounds mentioned in section 100, C.P.C., second appeal does not lie on the ground of error or question of fact. It only lies on ground of law or error in procedure which may have affected decision of case upon merits.

v. Zafar Iqbal and others Versus Naseer Ahmed and others.⁵

“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

³ 2008 SCMR 190

⁴ 2009 SCMR 254

⁵ 2022 SCMR 2006

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 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."

7. The learned counsel for the Appellant has not raised any compelling grounds for interference with the concurrent findings below. For the foregoing reasons instant second appeal is dismissed with no order as to cost.

JUDGE