

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

SECOND APPEAL NO.207/2021

Date	Order with signature of Judge
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1. For order on CMA No.5089/2021
2. For order on CMA No.5090/2021
3. For hearing of main case.

07.03.2022

Mr. Muhammad Shahid advocate for appellants.
Respondent No.1 present in person.

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ORDER

This appeal is against judgment and decree dated 16.08.2021 and 23.08.2021 respectively (Civil Appeal No.4/2021) whereby dismissing that appeal while modifying decree dated 02.12.2020 (Civil Suit No.757/2020) in favour of respondent No.1.

2. Precise facts are that plaintiff Abdul Abid advocate (respondent No.1 herein) filed a Summary Suit under order XXXVII Rules 1 & 2 CPC pleading that on 12.02.2012 the two defendants (appellants herein) gave Rs.6,00,000/- to appellants for investment in cement business, they promised with respondent No.1 to return principle amount with 10% profit per month; that after receiving the said amount the appellants failed to return principle amount and profit; respondent No.1 alongwith his colleague Zafar Alama advocate went to the house of appellant No.1 on 21.04.2013 where appellant No.1 with his own handwriting executed an Iqranama dated 21.04.2013 in presence of appellant No.2 according to which the appellant No.1 took responsibility and gave the schedule of repayment of amount and promised to pay amount in installments of one lac per month for which both the appellants put their respective signatures on the "Iqarnama" in presence of his colleague however,

despite “Iqrarnama” no payment was made. Respondent No.1 had pleaded that fraud and cheating by the appellants caused financial loss to the respondent No.1 and he is suffering poverty, that the entire family members of respondent No.1 suffered irreparable financial losses as well as suffered mentally which could not be counted in terms of money hence he claimed Rs.14,000,000/- with his given amount the pecuniary and non pecuniary losses (lump sum) from the appellants were recoverable either jointly or and severally with compound profits accrued there on it 10% profit per month according to the promise of the appellant from the date 12-02-2012 when the appellants took money from the respondent No.1 till the realization of decree on account of causing mental torture and financial losses sustained at the hands of the appellants. He prayed:-

- 1) To direct the defendants jointly or and severally to pay Rs.14,000,000/- (Fourteen Million) as damages and with plus principle amount and plus 10% profits per month on 1 lac as they promised according to the agreement from dated 12.02.2012 when defendants took amount from the plaintiff and with the compensation to the plaintiff pecuniary and non pecuniary lump sum with the date of filing of this suit till the realization of decree on account of causing.
 - a. Loss of health.
 - b. Loss of valuable time.
 - c. Damages for mental torture.
 - d. Damages for mental agony/shock and extreme physical pain
 - e. Financial loss.
- 2). To grant cost of the whole litigations.
- 3) To grant any other better relief or relief(s) which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

3. Defendants (appellants herein) filed joint written statement, whereby the contents of the suit plaint and claim of the plaintiff was denied.

4. Record reveals that in first round of litigation the matter was decided on merits by the learned VIth Additional District Judge Karachi Central vide Judgment dated 31.05.2018 whereby the suit was partly decreed only to the extent of recovery of an amount of Rs.6,00,000/- and partly dismissed in respect of remaining claims including damages. Subsequently both, plaintiff and defendants filed Ist Appeals bearing Nos.76 & 77 of 2018 before this court whereby challenged the judgment and decree dated 31.05.2018; both those appeals were disposed of by common order dated 30.07.2020 of this Court with the following observations:-

The judgment is based on erroneous reasoning and incorrect exposition of law therefore the impugned judgment and decree dated 31.5.2018 are set aside. Since the evidence has already been recorded therefore to save time and avoid further protracted litigation, we do not deem it appropriate to direct de novo trial, however the matter is remanded back to the learned District and Sessions Judge Karachi Central to consign the matter to the concerned Senior Civil Judge as an ordinary suit for decision on merits after considering the pleadings and evidence lead by the parties. The consignee court shall provide ample opportunity of hearing to the parties or their advocates and if required, he court may also frame additional issues and allow parties to lead additional evidence. We except that the learned consignee court will decide the matter on merits within four months”.

Matter was assigned a new number viz. 757/2020 and proceeded on following issues:-

- 1) Whether verbal agreement was executed in between plaintiff & defendants & received two lacs rupees

cheque of NBP City Court Branch and four lacs rupees cash to defendants on 12.02.2012?

- 2) Whether plaintiff is entitled for 14 million as damages?
- 3) Whether plaintiff has approached the defendant to return the principle amount with profit?
- 4) Whether on 21.04.2013 Iqarnama was executed in between plaintiff and defendant?
- 5) Whether plaintiff is entitled for the relief claimed?
- 6) Whether suit of the plaintiff is not maintainable and time barred?
- 7) What should the decree be?

5. The evidence of plaintiff/respondent No.1 was recorded wherein produced copy of Iqarnama alongwith other documents; he examined his witnesses Muhammad Zafar Alam and Muhammad Naeem, Bank Manager and closed his side. Evidence of the defendants/appellants namely Muhammad Ahmed Siddiqui and his brother namely Mashood Ahmed Siddiqui was recorded. The trial court decreed the suit only to the extent of recovery of an amount of Rs.6,00,000/- and partly dismissed in respect of remaining claims including damages with no order as to costs. In appeal filed by appellants, appellate court modified that decree as described above.

6. Appellate court framed and answer following issues:-

1	Whether impugned judgment and decree dated 01.12.2020 and 02.12.2020 respectively are based upon proper appreciation of documentary and oral evidence and do not call for any interference?	Accordingly.
2	What should the decision be?	Appeal dismissed with costs and decree modified.

7. I have heard learned counsel for appellants and respondent No.1 in person.

8. Learned counsel for appellants contended that trial Court so also appellate court never consider material brought on record and failed to appreciate the provision of law and observations of superior court that Iqarnama was not properly inspected nor the intention of appellants was gauged; that learned trial court wrongly assumed its powers and its all findings were based on assumption tainted with lacunas; that judgment and decree was passed in hasty manner though legal and factual points agitated by the appellants were not considered; that modification of the decree by appellate court was not warranted. He relied upon 2012 CLD 1754.

9. In contra, respondent No.1 in person argued that he has suffering from 2015 when he had filed a suit under summary chapter, which was though decreed but in appeal the same was reversed and in the second round of litigation he also succeeded where the appellants/defendants failed to rebut the oral and documentary evidence placed on record; he contended that his entire prayer was not granted and even the damages as claimed by him were declined; that remaining prayer may also be allowed; that learned Trial Court has arrived at the conclusion that an amount of Rs.6,00,000/- was taken by the appellants as loan, it was upon learned trial court to grant profit incurring on the amount of Rs.6,00,000/- He relied upon PLD 2005 LAHORE 654.

10. At the very outset, it needs to be clarified that scope of the **Second Appeal** is limited one and normally the concurrent

findings, so recorded, would not be open to interference unless it is, *prima facie*, established that decision of lower courts is contrary to law or that same is contrary usage having the force of law. Reference may be made to the case of **Naseer Ahmed Siddique v. Aftab Alam & another** (PLD 2011 SC 323) wherein it is held as:-

“17. Where trial Court has, exercised its discretion in one way and that discretion has been judicially exercised on sound principles and the decree is affirmed by the appellate Court, the High Court in second appeal will not interfere with that discretion, unless same is contrary to law or usage having the force of law.”

In another case of **Akhtar Aziz v. Shabnam Begum**(2019 SCMR 524), it is held as:-

“14. ... Although in second appeal, ordinarily the High Court is slow to interfere in the concurrent findings of fact recorded by the lower *fora*. This is not an absolute rule. The Courts cannot shut their eyes where the lower *fora* have clearly misread the evidence and came to hasty and illegal conclusions. We have repeatedly observed that if findings of fact arrived by Courts below are found to be **based upon misreading, non-reading or misinterpretation of the evidence on record**, the High Court can in second appeal reappraise the evidence and disturb the findings which are based on an incorrect interpretation of the relevant law....”

Since this is a second appeal, hence appellants, per settled principles of law, are required to prove that both judgments are, *prima facie*, contrary to evidence and against such principles of law.

11. Bare perusal of record shows that appellants did never come up with specific denial of claim of plaintiff, either in their written statement or during evidence, about execution of Iqarnama wherein certain undertakings were made by appellants in respect of plaintiff's/respondent's claim. Rather appellants have clearly admitted in cross examination as to the execution of such iqarnama and signature thereon. Such aspect of the matter was well discussed

by the trial court as well as appellate court in their respective judgments. Needless to mention that not only amount of Rs.6,00,000/- was admitted to have been borrowed but for the purpose of giving it back with its profit, it is mentioned that appellant No.1 being real brother of appellant No.2 had undertaken that he would give to Abdul Abid his original amount and last five months profit to the extent of Rs.1,00,000/- total Rs.7,00,000/- payable from 05.05.2013 in the shape of Rs.1,00,000/- it was also admitted that for the remaining amount he would pay profit. However inspite of acceptance of Iqrarnama the trial court at the time of granting relief to the respondent No.1 to extent of principal amount, did not grant any other relief, for which no reason was even given, hence appellate court has modified the judgment of the trial court.

11. In view of above findings, the appellants have failed to point out any illegality or infirmity in the concurrent findings of the Courts below, which were arrived at after proper assessment of the evidence and material available on record, hence the same do not require any interference by this Court. Consequently, the instant II-Appeal is dismissed along with pending applications.

J U D G E

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