

Form No: HCJD/C-121
JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

Regular Second Appeal No. 05 of 2018

Bushra Zia
Versus
Mansoor Nawab and another

Appellant by: Mr. Ahmed Bashir,
Advocate.

Respondents No.1 Mr. Muhammad Ali Imran,
& 2 by: Advocate.

Dates of hearing: 12.06.2018, 15.02.2021,
03.03.2021 & 24.03.2021,
27.07.2021

TARIQ MEHMOOD JAHANGIRI, J: The instant regular second appeal u/s 100 C.P.C has been filed against the impugned judgment/decreedated 08.01.2018 passed by Civil Judge, West-Islamabad and judgment dated 25.04.2018, passed by the learned Additional District and Sessions Judge, West-Islamabad, whereby the civil suit and regular first appeal filed by the appellant were dismissed.

02. The facts of the case are that the appellant filed a suit for declaration, recovery of profit, rendition of accounts and partition of immovable

property against the respondent No. 1 by contending that the appellant and respondent No. 01 got married on 13.02.2009 as per Muslim rites and ceremonies. At the time of marriage, the appellant was working as a Management Trainee at Pakistan Tobacco Company (PTC) and was drawing salary of Rs. 75,000/- per month. The appellant gave Rs. 750,000/- to respondent No.1 for investment purpose and respondent No.1 purchased two (02) gold bars weighing 10 tolas each with said amount which were sold against an amount of Rs. 1,132,000/- The entire amount was re-invested by respondent No. 1 for purchasing an apartment i.e Apartment No. 405, measuring 2400 square feet in Sughra Towers situated in F-11, Islamabad. The apartment was purchased in the name of respondent No. 1. Marital relations between the appellant and respondent No. 1 got strained and they started living separately from the month of August, 2012. The appellant filed a suit for declaration that she be declared a joint owner of the apartment alongwith respondent No. 2 to the extent of her investment i.e. approximately 15% and also be declared that the appellant is entitled to receive her share of profits i.e. 15% of rent of the

apartment and for rendition of accounts and for partition of the said apartment between the appellant on one hand and respondents No. 1 & 2 on the other hand with costs.

03. Respondents contested the suit by submitting the written statement. The learned trial Court framed the following issues:

- i. Whether the plaintiff is entitled for decree to declaration that, she is joint owner in apartment No. 405, Sughra Tower measuring 2400 sq. feet located in Sughra Tower, F-11 Islamabad alongwith Defendant No. 2 to the extent of her investment in it i.e. 15 per cent? OPP
- ii. Whether plaintiff is entitled to 15% of the rent, realized from the apartment, since January 2012 till disposal of case? OPP
- iii. Whether the plaintiff is entitled for a decree for rendition of accounts regarding the rent of the suit property and partition of the apartment? OPP
- iv. Whether two Gold bar weighing 10 tolas each were sold in January 2012? OPP
- v. Whether the suit is barred by law? OPD
- vi. Whether the plaintiff has not come to court with clean hands? OPD
- vii. Whether the plaintiff's suit is false, frivolous and based on mala fide? OPD

- viii. Whether the plaintiff has no cause of action to file this suit, hence same is liable to be dismissed? OPD
- ix. Whether the suit is liable to be dismissed, being bad for misjoinder of parties? OPD

04. After recording the evidence, suit filed by the appellant was dismissed by the Court of learned Civil Judge, 1st Class, West, Islamabad vide impugned judgment/decreed dated 08.01.2018, and regular first appeal was also dismissed by the Court of learned Additional District & Session Judge, West-Islamabad vide impugned judgment dated 25.04.2018.

05. That instant regular second appeal has been filed on the ground that the learned trial Court has violated the law by not framing an additional issue with respect to the appellant's ownership of the two gold bars weighing 10 Tolas each.

06. Learned counsel for the appellant, *inter-alia*, contends that an application for framing of following additional issue was filed:

"Whether the plaintiff is entitled to receive the two gold bars weighting 10 tolas each from Defendants No. 1 and 2? OPP"

But the learned trial Court refused to frame the above mentioned issue, hence violated the relevant

provisions of law as provided under Order XIV, Rule 5 of the Civil Procedure Code, 1908; that the appellant filed regular first appeal which was also dismissed without any valid reasons; that the law clearly provides that the court should frame issues regarding controversies between the parties.

07. That it is abundantly clear from the provisions of Order XIV of the CPC that for framing of issues, the learned trial Court could not merely rely on what either party had prayed for in the pleadings and had to take into account all allegations made by the parties on oath and the contents of documents.

08. The law discourages multiplicity of proceedings and encourages conclusion of all matters in issue between the parties in one legal proceeding and both the impugned judgments are erroneous and has prayed for setting aside of impugned judgments passed by learned trial Court and First Appellate Court.

09. Learned counsel for the respondents has controverted the arguments advanced by the learned counsel for the appellant and has stated that the learned trial Court has framed all the issues properly; issue No. 4 was framed as to whether two gold bars weighing 10 tolas each were sold in

January 2012?OPP and both the impugned judgments and decrees have been passed in accordance with law and facts of the case, no illegality has been committed and has prayed for dismissal of the instant regular second appeal.

10. Arguments advanced by the learned counsel for the parties have been heard and record perused with their able assistance.

11. In para No. 6 of the civil suit titled as "*Bushra Mansoor Vs. Mansoor Nawab etc.*", it is mentioned that:

*"That the Defendant No. 1 used this money for purchasing two (2) gold bars weighing 116.64 grams each. Later, in January 2012 the gold bars were sold at a profit and a sum of total Rs. 1,132,000 was realized from them. This entire amount was re-invested by the Defendant No. 1 for purchasing an apartment, Apartment No. 405, measuring 2400 square feet in Sugra Towers situated in F-11, Islamabad (the "**Apartment**"). The apartment was purchased in the name of Defendant No. 2. But the Plaintiff did not object to this to prevent her marital relations from deteriorating further, as at that time she was going through a tough phase of her marital life due to harsh and callous attitude of Defendant No. 1 towards her."*

12. In written statement filed by respondents/defendants, they have categorically admitted that two gold bars were never sold by

defendant No.1 and plaintiff has further admitted that two gold bars were given by her to defendant No. 1/respondent for keeping in safe custody and the same are in possession of defendant No.1/respondent. It is further stated that defendant No.1/respondent is willing to return two gold bars (10 tolas each) to plaintiff.

13. Even during the course of arguments, learned counsel for the respondents has admitted that respondent No. 1 is ready to hand over two gold bars to the appellant whenever she likes.

14. As far as allegation of selling the two gold bars by the respondent No.1 in the year 2012 is concerned, issue No. 4 in this regard was framed and both the learned Courts below have decided the said issue against the appellant/plaintiff.

15. It is held by the Hon'ble Supreme Court of Pakistan in case titled as **"Naseer Ahmed Siddique through legal heirs Vs. Aftab Alam and another"** (PLD 2011 SC 323) that:

"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."

16. It has also been held in a case titled as **"Keramat Ali and another Vs. Muhammad Yunus Haji and others"** (PLD 1963 SC 191)

that:

"the High Court in second appeal has no jurisdiction to go into the question relating to the weight to be attracted to a particular item of evidence."

17. It has also been held by the Hon'ble Supreme Court of Pakistan in a case titled as **"Bashir Ahmed Vs. Mst. Taja Begum and others"** (PLD 2010 SC 906) that:

"The question of materiality, that is, whether or not an issue is of a material nature, will depend upon whether the ultimate decision of the Court of first appeal would have been different, if the omitted issue had been determined by it. Thus, in order to succeed in second appeal on ground (b) of subsection (1) of section 100, C.P.C, an appellant would have to show that the Court of first appeal would have reached a different conclusion, had it not failed to decide the issue of law or usage specified in ground (b) ibid."

18. It has also been held in a case titled as **"Muhammad Iqbal and another Vs. Mukhtar Ahmad through L.Rs"** (2008 SCMR 855) that:

"when the two Courts below came to the conclusion that they arrived at and rightly so. This perfectly sound conclusion should not have been interfered with by the High

Court in the exercise of its second appellate jurisdiction.”

Reliance is also placed on a case titled as **"Sheikh Akhtar Aziz Vs. Mst. Shabnam Begum and others"** (2019 SCMR 524).

19. In view of above, both the impugned judgments and decrees have rightly been passed and the instant regular second appeal is **dismissed** with cost of Rs. 200,000/- (Rupees Two Hundred Thousand) to be paid by the appellant to respondents.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Announced in Open Court on this 2nd Day of **August**, 2021.

JUDGE

Ahmed Sheikh*

Approved for Reporting