

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.S.A.No.03 of 2018
M/s COMCEPT (Pvt.) Ltd. and another
Versus
Saeed Iqbal

Date of Hearing: 21.10.2020
Appellants by: M/s Javed Saleem Shorish and Hassan
Javed, Advocates
Respondent by: Mr. Tariq Mehmood Mirza, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular second appeal, the appellants impugn the judgment and decree dated 07.11.2017 passed by the Court of the learned Additional District Judge, Islamabad whereby the appellants' appeal against the judgment and decree dated 15.03.2017 passed by the Court of the learned Senior Civil Judge, Islamabad was dismissed. Vide the judgment and decree dated 15.03.2017, the learned Civil Court decreed the respondent's civil suit for specific performance of the service contract dated 08.10.2007, cancellation of termination letter dated 17.10.2008 and recovery of damages amounting to Rs.24,46,986/- only to the extent of recovery of Rs.9,43,986/-.

2. The record shows that through service contract dated 08.10.2007 (**Exh.P.1**), the respondent was appointed as Technical Lead at M/s IPhonica (appellant No.2) by M/s COMCEPT (Pvt.) Ltd. (appellant No.1). Appellant No.2 is appellant No.1's subsidiary. The duration of the respondent's service contract was one year renewable for a further period only if the respondent was not served with a written notice to the contrary by appellant No.1 within thirty days of the completion of the contract period. Clause 3 of the contract provided that the respondent's services could be terminated on one month's written notice or one month's salary in lieu thereof. The letter dated 30.08.2007 (**Exh.P.2**) from appellant No.2 shows that the respondent was entitled to medical facility as per the appellants' scheme.

3. Vide letter dated 17.10.2008 (**Mark D/C**) issued by appellant No.1, the respondent's services were terminated. In the said letter, it was mentioned that warning letters had been issued to the respondent on 18.08.2008 (**Mark D/B**) and 18.09.2008 (**Mark D/A**). Furthermore, it was alleged that the respondent had been absent from duty for a long time.

4. On 04.12.2008, the respondent issued a legal notice (**Mark P/B**) to appellant No.1 seeking the release of the respondent's medical admission charges. Furthermore, appellant No.1 was called upon to reinstate the respondent in service. On 16.12.2008 appellant No.1 sent a reply (**Exh.P.4**) to the respondent's counsel. In the said reply, the position taken by appellant No.1 was that the respondent had absented himself from duty since 17.07.2008 without informing appellant No.1.

5. On 19.01.2009 the respondent filed a civil suit against appellant No.1. Subsequently, vide order dated 17.12.2013, appellant No.2 was impleaded as defendant No.2 in the said suit. Against the said order dated 17.12.2013, the respondent filed a revision petition, which was dismissed by the Court of the learned Additional District Judge, Islamabad.

6. Instead of filing a written statement, appellant No.1 filed an application under Order VII, Rule 11 C.P.C. in the suit praying for the rejection of the plaint on the ground that the respondent was the employee of appellant No.2 and not appellant No.1. The said application was contested by the respondent. Vide order dated 11.02.2012, the said application was dismissed by the learned Civil Court. Against the said order dated 11.02.2012, appellant No.1 filed a revision petition, which was dismissed, vide order dated 04.01.2013.

7. Appellant No.1 had appeared before the learned Civil Court on 04.07.2009 through counsel. After giving several opportunities to appellant No.1 to file written statement, the learned Civil Court, vide order dated 12.03.2010, closed appellant No.1's right to file a written statement. Against the said order dated 12.03.2010, appellant No.1 preferred an appeal, which was dismissed vide order dated 24.02.2011 passed by the learned Appellate Court.

8. Vide order dated 13.10.2015, the learned Civil Court framed issues from the divergent pleadings in the suit and the written statement filed by appellant No.2. After the recording of evidence and hearing arguments, the learned Civil Court, vide judgment and decree dated 15.03.2017 decreed the respondent's suit to the extent of recovery of Rs.9,43,986/-. Against the said judgment and decree, the appellants preferred an appeal, which was dismissed by the Court of the learned Additional District Judge, Islamabad, vide judgment and decree dated 07.11.2017. The said concurrent judgments and decrees

have been assailed by the appellants in the instant regular second appeal.

9. Learned counsel for the appellants, after narrating the facts leading to the filing of the instant appeal, submitted that the respondent was not unwell but had willfully absented himself from duty without informing his employer; that under the terms of the service contract, the respondent was supposed to render services for appellant No.2; that on two occasions, appellant No.1 had issued warnings to the respondent regarding his absence from duty; that the appellants were under no obligation to pay for the respondent's medical ailment; that the learned Courts below erred by not appreciating that the appellants had no policy to pay their employees who were on sick leave; that the learned Civil Court ought to have granted another opportunity to appellant No.1 to file a written statement; that since the respondent had initially been appointed for one year, the learned Courts below had correctly denied the respondent's claim for the payment of salary beyond the date of the termination of his contract; and that the concurrent judgments and decrees passed by the learned Courts below suffer from jurisdictional irregularities. Learned counsel for the appellants prayed for the appeal to be allowed and for the concurrent judgments and decrees passed by the learned Courts below to be set-aside.

10. On the other hand, learned counsel for the respondent submitted that neither in the memo of the appeal nor in the arguments advanced by the learned counsel for the appellants has any question of law been agitated; that ample evidence had been brought on record to show that the respondent had been absent from duty due to a medical condition and that appellant No.1 had been duly informed about the same; that the documents brought on record especially Exh.P.2 shows that the respondent was entitled to a medical facility; and that the evidence brought on record by the respondent regarding the amounts spent on his medical treatment had gone un rebutted. Learned counsel for the respondent prayed for the appeal to be dismissed.

11. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

12. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 8 above and need not be recapitulated.

13. Unlike in a first appeal, a Court in a second appeal does not have powers akin to that of a Trial Court and cannot make a reappraisal of the entire evidence. It is only when the findings of two Courts below are at variance that the High Court could evaluate the evidence in order to determine which of the two decisions was in accordance with the evidence on the record. It is well settled that findings of facts cannot be interfered with in the second appeal if the same are found to be substantiated by the evidence on the record and supported by logical reasons. Interference in the second appeal under Section 100 C.P.C. was permissible only if the impugned judgments were contrary to law or it had been rendered without deciding some material issue of law. A second appeal lies on the grounds mentioned in Section 100 C.P.C. and not on questions of fact. Concurrent findings of facts ought not to be likely interfered with in a second appeal. Reference in this regard may be made to the following case law:-

- (i) In the case of Muhammad Khan Vs. Rasul Bibi (PLD 2003 SC 676), it has been held *inter alia* as follows:-

“Ordinarily concurrent findings recorded by the courts below could not be interfered with by the High Court while exercising jurisdiction in the second appeal howsoever erroneous the findings may be, unless such findings had been arrived at by the courts below either by ignoring a piece of evidence on record or through perverse appreciation of evidence. High Court, in the present case, was justified in interfering with concurrent findings, after noticing that the judgments of the courts below suffer from acute miscarriage of evidence and exclusive of material available on the record, resulting in gross miscarriage of justice.”

- (ii) In the case of Iftikhar Vs. Khadim Hussain (PLD 2002 SC 607), it has been held *inter alia* as follows:-

“Concurrent findings are not sacrosanct and can be reversed when such findings are based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous assumption of facts, patent errors of law or consideration of inadmissible or something so outrageous or so gross as to shock the very basis of justice.”

14. Learned counsel for the appellants did not even refer to the testimony of any of the witnesses produced by either party before the learned Civil Court. The edifice of the appellants' case was that the

respondent had absented himself from duty without obtaining permission from his employer. In response to notices from the learned Civil Court, appellant No.1 had appeared through counsel. Instead of filing a written statement, an application under Order VII, Rule 11 C.P.C. was filed on behalf of appellant No.1. After the said application was dismissed by the learned Civil Court, appellant No.1 had been granted several opportunities to file a written statement. Costs had also been imposed on appellant No.1 for its failure to file a written statement. The order of the learned Civil Court to close appellant No.1's right to file a written statement attained finality when the appeal against the said order was dismissed by the learned Appellate Court. It is the negligence on the part of appellant No.1 to have filed a written statement within the time provided by the learned Civil Court which lead to its right to file a written statement having been closed. The closure of this right resulted in the denial of an opportunity to appellant No.1 to produce evidence. As a result of this, most of the evidence adduced by the respondent went un rebutted. The respondent's unpaid salary upto the date when his services were terminated was Rs.3,00,000/- whereas his medical charges were Rs.6,43,986/-. The learned Trial Court turned down the respondent's claim for compensation beyond the said amount as well as his claim for reinstatement in service.

15. There is absolutely no question of law involved in the second appeal for me to interfere with the concurrent findings of fact arrived at by the learned Courts below on proper appreciation of evidence on the record. Consequently, this appeal is dismissed with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

*Qamar Khan**