IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE UMAR ATA BANDIAL, CJ
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL APPEAL NO. 307 OF 2017
(Against the judgment dated 11.01.2017 passed by Lahore High Court, Rawalpindi in Regular Second Appeal No. 03 of 2014)

Muzafar Iqbal ...Appellant

Versus

Mst. Riffat Parveen and others ...Respondents

For the Appellant: Mr. Junaid Iftikhar Mirza, ASC

For the Respondents : Mr. Azmatullah Chaudhry, ASC

Date of Hearing: 29.03.2023

JUDGMENT

MUHAMMAD ALI MAZHAR, J- This Civil Appeal is directed against the judgment passed by Lahore High Court, Rawalpindi Bench, dated 11.01.2017 whereby Regular Second Appeal No.03/2014 filed by the respondents was allowed by upsetting the concurrent findings recorded by the lower *fora*.

2. According to the sequence of events highlighted in the memo of appeal, the appellant had filed a suit for possession through pre-emption for the property situated at Mohallah Kot Sultan, Pind Dadan Khan, District Jhelum ("**suit property**") which was purchased by the predecessor-in-interest of the respondents who died during the pendency of the suit. The suit of the appellant/plaintiff was decreed by the Trial Court *vide* judgment dated 27.09.2011. The respondents filed an appeal before the learned Additional District Judge, Pind Dadan Khan which was dismissed *vide* judgment dated 05.11.2013. Being aggrieved and dissatisfied, the respondents filed Regular Second Appeal No.03/2014 in the High Court which was allowed *vide* the impugned judgment dated 11.01.2017.

3. The learned counsel for the appellant argued that the learned High Court misread the evidence on record and wrongly observed that the appellant had failed to perform *Talb-e-Muwathibat* and *Talb-e-Ishhad* which fact was properly proved in the full-fledged trial. It was further averred that no plausible reasons have been assigned for upsetting the concurrent findings which had resulted in a grave miscarriage of justice. He further argued that the Trial Court and Appellate Court both decided Issue No.2 in favour of the appellant after considering the entire evidence, but the learned High Court, without any convincing reason, set aside the judgments and acted beyond the sphere of Section 100 of the Code of Civil Procedure, 1908 ("**CPC**").

4. The learned counsel for the respondents argued that the judgments and decrees passed by the lower *fora* were based on a serious misreading and non-reading of the material evidence on record, hence the suit of the appellant was liable to be dismissed. It was further contended that the learned High Court rightly considered the crucial issue of performance of *Talbs* in accordance with Section 13 of the Punjab Pre-emption Act, 1991, along with the question of proof of superior right of pre-emption.

5. Heard the arguments. The evidence recorded by the Trial Court was also taken into consideration by the first Appellate Court which reflects that the appellant came to know about the sale of the suit property on 25.04.2005 at 3.00 p.m. while he was sitting in his shop, and he pronounced his intention to purchase the suit property. Later, on 26.04.2005, he issued a notice by way of *Talb-e-Ishhad*, which fact is manifested from the Trial Court judgment in relation to the findings recorded on Issue No.2. The appellant also examined the postman as PW.1 who proved the factum of *Talb-e-Ishhad*. Whereas another witness, Muhammad Riaz, who was an official of the Post Office, Pind Dadan Khan, appeared as PW.2 but could not produce the post office record in relation to Registry No.554. The appellant appeared as PW.3 and deposed that he got the knowledge of sale through Javed Iqbal Jhamat on 25.04.2005 at 3.00 p.m. while he was sitting at the shop along with PW Muhammad Ramzan. The appellant further alleged that he announced his *Talb-e-Muwathibat* and, thereafter, on the next day, he gave the notice of *Talb-e-Ishhad* to Haq Nawaz (defendant) through registered post with acknowledgement due, which was exhibited as Ex.P.2 which bore his signature (Ex.P2/1). Javed Iqbal was examined

as PW.4 who corroborated the averments of the plaint, whereas Riffat Parveen appeared as DW.1 and deposed that the suit property was purchased by her deceased husband, Haq Nawaz, against a consideration of Rs.4,85,000/- and possession of the same was also taken. After purchase of the house they incurred Rs.30,000/- for white-wash and no notice of *Talb-e-Ishhad* was received by them. Muhammad Shafique, one of the vendors, appeared as DW.2 and deposed that the suit property was sold to Haq Nawaz against a consideration of Rs.4,85,000/-. Furthermore, they affixed the noticeboard on the door for the sale of suit property and all the inhabitants of the Mohallah had the knowledge of this fact. DW.3 Arshad Mahmood deposed that the noticeboard on the suit property was affixed one month prior to the sale of the same. All the PWs consistently deposed that on 25.04.2005 at 3.00 p.m. the plaintiff received knowledge of the sale of suit property and immediately announced his right of pre-emption. The defendant/respondents failed to establish that the plaintiff/appellant possessed the knowledge of sale of suit property prior to 25.04.2005. The receipt of acknowledgement of the notice (Ex.P.1) bore the signature of the respondent/defendant's son, Muhammad Zeeshan, which established that notice was given within time and duly executed.

6. What we have noted is that the learned High Court neither figured out any substantial question of law, nor appreciated the evidence recorded in the Trial Court, nor pointed out any formal defect in the concurrent findings of the lower *fora* to establish how it was found to be deficient or in violation of law within the parameters and confines of the right of second appeal provided under Section 100, CPC. On the contrary, the reasoning set forth for upsetting or dislodging the concurrent findings by the High Court is based on guesswork and conjectures, i.e. that a board with regard to the sale of the suit property was affixed at the outer door for about one year; the appellants (before HC) took the possession of property on 11.04.2005, therefore it cannot be assumed that the respondent (appellant before this Court) who was residing in the same locality was not aware of this fact and he was also aware that, after purchasing the suit property, Haq Nawaz got it white-washed. Due to the aforesaid foresight, the concurrent findings were set aside which we do not endorse.

7. According to the minutiae of Section 100 of the CPC, a second appeal may be preferred in the High Court against a decree passed in appeal

on the grounds such as (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, or (c) a substantial error or defect in the procedure provided by the CPC or by any other law for the time being in force, which may possibly have produced an error or defect in the decision of the case upon merits. It is categorically provided under Section 101, CPC that no second appeal shall lie except on the grounds mentioned in Section 100 and, consistent with Section 103, CPC, the High Court in any second appeal may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal which has not been determined by the lower Appellate Court or which has been wrongly determined by reason of illegality, omission, error or defect as alluded to under sub-section (1) of Section 100. The procedure for dealing with appeals from original decrees as provided under Order XLI, CPC is made applicable in terms of Section 108, CPC for hearing second appeal against the appellate decrees and orders made in the Civil procedure Code or under any special or local law in which a different procedure is not provided. The prerequisites and rudiments of the Order XLI, Rule 31, CPC is that the judgment of the Appellate Court 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.

8. The jurisdiction of a High Court under Section 100 CPC 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 CPC, 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, CPC 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 CPC 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 is confined to the questions of law which is *sine qua non* for the exercise of the jurisdiction under Section 100 CPC. 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 CPC are quite relevant which are replicated as under:-

> 1. Mir Abdullah v. Muhammad Ali and 2 others **(1977 SCMR 280).** Both the 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 CPC read with Section 101 of the CPC.
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> 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, CPC.
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> 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 Chowdhrani v. 'lewahir Singh Chowdhri (**1 L R 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 Sindh. 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 & 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.

Chief Justice

Judge

Islamabad, the
29th March, 2023
Khalid.
Approved for reporting.