

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**Present:**

Mr. Justice Irfan Saadat Khan  
Mr. Justice Muhammad Shafi Siddiqui

**Civil Appeal No.99-K/2022**

Against the Order dated passed by High  
Court of Sindh, Karachi in IInd Appeal  
No.18/2019.

Muhammad Azam & others

...Appellant (s)

**Versus**

Muhammad Aijaz

...Respondent(s)

For the Appellant(s):            Mr. Muhammad Aqil, ASC  
    Mr. K.A. Wahab, AOR

For the Respondent(s):        Mr. Muhammad Saleem Ansari, Adv. HC.  
    Mrs. Abida Parveen Channar, AOR

Date of Hearing:                    17.03.2025

**ORDER**

**Muhammad Shafi Siddiqui, J.-** This Civil Appeal under Article 185(2) of the Constitution of Islamic Republic of Pakistan, 1973 has been filed against the judgment/order of the High Court dated 26.05.2022 passed in "Second Appeal No.18 of 2019" filed under Section 100 CPC read with Section 101 CPC.

2.        Brief facts of the case are that a suit for performance was filed by the respondent Muhammad Ejaz against the appellants. The suit was contested. The issues were framed and the evidence was recorded. The trial Court in consideration of the material before it decreed the suit for performance on 18.09.2015 in respect of three out of four plots which were subject matter of the suit. Aggrieved of it the three appellants/defendants then filed appeal against whom the suit was decreed whereas fourth defendant was arrayed in the appeal as respondent No.2 through her legal heirs. The Appeal under section 96 of CPC was then allowed by a judgment dated 10.01.2019 which reversed the findings of the trial

Court. In result the suit of the respondent was dismissed by the First Appellate Court. The respondent then aggrieved of the judgment of the First Appellate Court filed a Second Appeal under section 100 CPC against all four defendants/respondents who contested the suit. The Second Appeal was allowed by virtue of impugned order hence this appeal.

3. We have heard the learned counsel and perused material available on record.

4. The primary question is whether the circumstances of the case warrant interference by the High Court in the Second Appeal preferred under section 100 CPC. In order to understand the scope of Section 100 read with Section 101 CPC it is necessary to understand its frame. Section 100 read with section 101 CPC read as under:-

*100. Second appeal. (1) Save where otherwise expressly provided in the body of this Code or in any other law, for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to that High Court, on any of the following grounds, namely:—*

*(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 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.*

*101. Second appeal on no other grounds. No second appeal shall lie except on the grounds mentioned in section 100.*

5. The scope of Section 100 is limited as demonstrated above i.e. a decision should be contrary to law or to some usage having the force of law; that the decision failed to determine some material issue in that regard; a substantial error or defect in the procedure provided by the Code or 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. Undoubtedly, the specific performance is a relief which is dependent on the discretion of the Court. The Court has to assess the equity based on material facts deposed/brought on record in the case. As

could be seen a suit for performance was filed in respect of four plots on the basis of an agreement; a part of the amount claimed to have been paid but a substantial amount remained unpaid up until decision of the suit. Only judgment of trial Court directed respondent to deposit the consideration after about seven years of litigation. The primary duty of the trial Court was to see whether the buyer seeking performance of the agreement was "at the relevant time" willing to perform his part of the contract. Prima facie the balance payment was never deposited by the respondent till decision is made by the trial Court, which is a sign of unwillingness on his part. He kept the money with him for his own use and to the contrary the value of the plots also enhanced with the passage of time many fold as adjudged by trial Court. The respondent/plaintiff seeking performance cannot have two bites of cherry i.e. he would enjoy the enhanced value of the plots and would also retain the balance consideration for his own use. The trial Court attempted an equity by directing the respondent to pay the balance of the sale consideration in respect of three plots by enhancing the balance sale consideration up to 12% per annum. The trial Court failed to appreciate that it was a deal of four plots together; initial amount was paid to all four individuals hence learned Judge cannot on his own wisdom consider it to be a part consideration for three plots ignoring the plot of a lady who was arrayed as defendant No.4 who later expired after execution of the agreement and retained part of consideration. The adjustment of initial amount towards three plots is only imaginary.

7. The other aspect of the matter was that there was no determination as to the value of the property enhanced and a reasonable markup at the rate of 12% per annum over and above the unpaid amount and that too for plots which were only having survey numbers and yet to be identified thus presumptive. The discretion so exercised travelled beyond the limits of equity for enforcing specific performance, which was observed by the

First Appellate Court when Civil Appeal No.80 of 2015 was disposed of/allowed reversing the findings of the trial Court.

8. For the second Appellate Court, whose jurisdiction is framed under sections 100 and 101 of the CPC it was to be determined whether the nature of the case, as demonstrated, would fell within the scope of Section 100 CPC. It was not even pleaded. The memo of appeal itself disclosed that no such ground, as could be seen vested with the Second Appellate Court, was taken nor any of such ground was highlighted in the impugned judgment to warrant interference in Second Appeal.

9. As far as scope of Second Appeal is concerned there is nothing as an inherent right of appeal. Appeal is purely a creature of statute or the law, be it procedural, within which it is to be preferred. Since for the Second Appeal a frame of interference was provided there cannot be a transgression to it by an exercise of inherent powers. These sections i.e. Section 100 and 101 are expressed provisions giving a right of Second Appeal on the grounds mentioned therein. The provisions restricting the grounds that may be taken in second appeal are based on the ground of public policy expressed in the maxim *interest reipublicae ut sit finis litium* (it concerns the state that there be an end to litigation). Thus, the conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no Court has power to add or enlarge those grounds, so as to determine a question merely on an equitable ground if they come in conflict with them or ignore the provisions of law.

10. Thus, if the findings of facts reached by the First Appellate Court are at variance with those of the trial Court, the former will ordinarily prevail although it would not possess the same value or sanctity as that of a concurrent finding. Such findings by the lower Appellate Court will be immune from interference in a Second Appeal provided they pass the test prescribed under section 100 CPC. In the instant case, the findings

did not meet this test and the interference made by the learned Judge was a replacement of their own views, which is not permissible even if it could be borne out of the record. If the view of the First Appellate Court is based on the record of the trial Court then interference under section 100 read with 101 CPC will not be for the replacement of another view. Indeed, if the appraisal of evidence by first Appellate Court is found to be contrary to law and leads to miscarriage of justice, the situation may require indulgence as in that case only it would fall within the frame of Section 100 CPC. However, it has to be scrutinized very carefully as very often it may trap situation as regular first appeal. The appraisal of evidence may present two views, but only which is contrary to law would open the indulgence under Section 100 CPC.

11. It is a well settled principle that findings of two Courts could not be subjected to a Second Appeal, even if erroneous; in a Second Appeal concurrent findings of facts cannot be interfered with by the High Court despite its disagreement with the findings of facts, as it amounts to replacing another view<sup>1</sup>.

12. We have carefully perused the order of the Second Appeal impugned before us and it appears to be nothing but a replacement of their own view in an attempt to do equity which is not permissible under section 100 CPC. The Second Appeal cannot operate as a regular First Appeal under section 96 CPC.

13. In view of above facts and circumstances, we are of the view that the interference by way of impugned order/judgment was neither justified nor required. Even otherwise the specific performance was only a discretionary relief and this discretion was lawfully exercised by the First Appellate Court not warranting any interference in the Second Appeal by way of an impugned order. Appeal is allowed, and the

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<sup>1</sup> (i) 2001 SCMR 1641 (District Council Sialkot v. Nazir Ahmed Khan) and (ii) 1977 SCMR 280 (Mir Abdullah v. Muhammad Ali)

impugned decision/order is set aside and that of First Appellate Court is restored.

Judge

Judge

Announced in open Court on \_\_\_\_\_2025.

Judge

Karachi  
\_\_\_\_.03.2025

*“Approved for reporting”*