JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE

R.S.A.No.216 of 2011
Mian Zaheer Ahmad Versus Muhammad Sabir and others

JUDGMENT

Date of hearing:	31.03.2017
Appellant (s) by:	Sheikh Muhammad Waqas, Advocate
Respondent (s) by:	M/s Ijaz Hussain Naqvi and Raheel Kamran Cheema, Advocate for respondent No.1

Shahid Bilal Hassan-J: Succinctly, the respondent No.1 instituted a suit for declaration, possession, specific performance and permanent injunction against the present appellant and the respondents No.2 to 4 claiming therein the possession alongwith declaration through Specific Performance with regard to two shops. It was averred in the plaint that the appellant had received Rs.300,000/- from the respondent No.1 as loan on 13.01.2000 with an undertaking to return the same till 30.06.2000 and he was liable to pay Rs.100,000/- as compensation if amount of Rs.300,000/- would not be returned in time. Mian Bashir Ahmad, respondent No.2 stood guarantor for his son and he promised to alienate his two shops mentioned in para No.1-A of the plaint in consideration of Rs.300,000/- already paid to the respondent No.1. The agreement dated 13.01.2000 was written by the respondent No.4; the respondent No.1 was an uneducated simple villager while the appellant and respondents No.2 to 4 were wily and astute people, so in the above noted agreement, by playing fraud the shops were shown to be owned by the appellant while the respondent No.2 was cited as marginal witness instead of guarantor of his son. On

04.08.2000, the appellant received further amount of Rs.140,000/- which was to be disbursed till 10.09.2000; that time the respondent No.3 emerged as a guarantor for payment of the disputed amount and in default he was to transfer his shop mentioned in para No.1-B of the plaint in favour of the respondent No.1. That agreement was also reduced into writing by the respondent No.4, but instead of showing the respondent No.3 as guarantor for return of loan amount, his name was cited as marginal witness. Allegedly, the respondents did not pay above said amount of Rs.440,000/- till 10.09.2000. On the intervention of the respectables of the area, the period for payment of disputed amount was extended on 10.07.2001 and it was agreed that appellant and respondents No.2 & 3 would pay Rs.150,000/- till 10.10.2001 and rest of the loan amounting to Rs.290,000/- would be paid on 10.01.2002. In this regard, agreement dated 10.07.2000 was scribed in the Punchayat. It was further averred that the respondent No.4 joined hands with the remaining respondents/defendants and the appellant and for that reason he mentioned outstanding amount as Rs.307,000/- only in agreement dated 10.07.2001. Moreover, the previous agreements were also shown to have been cancelled. The appellant and the respondents No.2 to 4 were required to return the loan amount of Rs.440,000/- but demand of the respondent No.1 was not met. He thus had become owner of the shops mentioned in Para No.1-A and B of the plaint. The appellant and respondents No.2 to 4 were required to execute sale deed regarding disputed shops but they refused. He prayed for declaration to the effect that he had become owner of the disputed shops and in the alternative he prayed for decree of specific performance with injunction.

The appellant and respondents No.2 to 4 being defendants filed joint written statement and took the stance that

the respondent No.1/plaintiff was a money lender by profession; the whole amount of loan was returned to him. The respondent No.1/plaintiff filed an application before the Deputy Superintendent of Police, Pasrur which was sent for inquiry to the Station House Officer, Police Station Sabiz Peer. Zaffar Iqbal, Sub-Inspector called the parties and it was resolved that an amount of Rs.137,000/- only was outstanding against the appellant and respondents No.2 to 4, which was to be paid in January to April 2003. Allegedly, the appellant and the respondents No.2 to 4 had paid the entire amount as per decision of Punchayat held under the supervision of Zaffar Iqbal SI and nothing was left to be payable against them. It was further contended that the respondent No.1 had been demanding interest on the principal amount and he filed the suit with mala fide intention; the appellant and other defendants prayed for dismissal of the suit.

Out of the divergent pleadings of the parties, to resolve the controversy, the learned trial Court framed as many as 13 issues including "Relief" and invited evidence of the parties. The respondent No.1/plaintiff and the appellant as well as respondent No.2 to 4/defendants adduced their evidence in pro and contra. The learned trial Court vide judgment and decree dated 09.04.2010 dismissed the suit instituted by the respondent No.1, who being aggrieved of the same, preferred an appeal before the learned lower appellate Court, which was, vide impugned judgment and decree dated 15.09.2011, accepted with the following observation:-

> *'……In the light of above stated facts and circumstances, the appellant is found entitled to recover Rs.137,000/- from respondents No.1 and 2 along with profit payable under PLS account of scheduled bank till the realization of suit*

amount. This appeal is accepted accordingly leaving the parties to bear their own costs……..'

The appellant being aggrieved of the impugned judgment and decree passed by the learned lower appellate Court has preferred the instant regular second appeal.

2. Learned counsel for the appellant has argued that the impugned judgment and decree is result of exercise of jurisdiction which is not vested in the learned lower appellate Court, as the respondent No.1/plaintiff did not plead the relief extended to him in his plaint. He further argues that the impugned judgment and decree is against law and facts of the case as well as based on sheer misreading and non-reading of evidence on record, because the respondent No.1 admitted in his statement that he had obtained the signatures and thumb impressions of the appellant on blank paper and he further admitted that there was nothing between the parties except the loan amount, but these aspects have been ignored by the learned appellate Court. Moreover, the respondent No.1 could not produce any marginal witness of the agreement in his favour. As such, the learned lower appellate Court by travelling beyond vested jurisdiction has passed the impugned judgment and decree; hence, the same is not sustainable in the eye of law. By allowing the appeal in hand, the impugned judgment and decree may be set aside and the judgment and decree dated 09.04.2010 passed by the learned trial Court, dismissing the suit of the respondent No.1, may be restored. Relies on *Dr. Faqir Muhammad v. Maj. Amir Muhammad etc.* **(1982 SCMR 1178)**, *Muhammad Gohar and others v. Pakistan and others* **(1982 CLC 1621-Lahore)** and *Government of Khyber Pakhtunkhwa and others v. Mst. Zubaida* **(2013 YLR 372-Peshawar)**.

3. Perversely, the learned counsel appearing on behalf of the respondent No.1 has argued that the learned lower

appellate Court being Court of fact coupled with appeal before it in continuation of the suit had ample powers as contemplated under Rule 33 of Order XLI of the Code of Civil Procedure, 1908, to pass or make such or other decree or order as the case may require, even if the appeal or objection are not filed; therefore, the learned lower appellate Court has rightly exercised vested jurisdiction and has not committed any misreading and non-reading of evidence on record. Prays for dismissal of the appeal in hand.

4. Heard.

5. Convening of Punchayat under supervision of one Zaffar Iqbal, Sub-Inspector is admitted on record and the learned lower appellate Court while thrashing the record found an application filed by the respondent No.1 to the Deputy Superintendent of Police, Pasrur and inquiry report of the said Zaffar Iqbal SI dated 03.09.2002, which was accompanied by a writing duly signed/thumb marked by Muhammad Sabir (respondent No.1) as well as his real son Safdar Hussain, wherein it was resolved that amount of Rs.137,000/- only was outstanding against the appellant, which was undertaken to be paid by respondent No.2, being father of the appellant, as he had settled abroad and the learned lower appellate Court taking notice of the same, as the parties concealed true facts and could not bring on record substantive material assisting the learned Courts below in reaching just conclusion of the case. Moreover, in order to negate the factum with regard to convening of Punchayat, neither the appellant nor his father Bashir Ahmad, respondent No.2, jumped in the witness box.

In addition to the above, though the respondent No.1 did not plead his claim for recovery of amount in his plaint, but Rule 33 of Order, XLI of the Code of Civil Procedure, 1908 is much clear on the point of powers to be enjoyed by the learned

appellate Court while dealing with appeal. For ready reference, the same is reproduced infra:

> ***'33. Power of Court of Appeal**.—The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection:*
>
> ***Provided** ……'*

In view of the above provision of law, the learned lower appellate Court has not travelled beyond vested jurisdiction, rather to bring the litigation to an ultimate end has aptly exercised the same and has reached to a just conclusion. In this regard reliance is placed on *Basharat Ali and others v. Muhammad Anwar and others* **(2010 SCMR 1210)**, wherein it was invariably held:

> *'No doubt, Adalat Khan did not prefer appeal before the District Court but the dispute was common as the entry was affecting all the plaintiffs. The appellate Court allowed the prayer in toto, which can be done under Order XLI, rules 4, 20 and 33 of Code of Civil Procedure, 1908 (hereinafter referred to as 'C.P.C.) as held in the case of PRTB v. Abdul Ghafoor PLD 1989 SC 541.'*

Moreover, it is settled principle of law that the learned Appellate Court while deciding the appeal enjoys powers

similar to that of learned Trial Court and when it is established on record that the learned trial Court non-read the evidence produced by the parties, the learned Appellate Court by exercising powers delegated on it Under Order XLI, rule 33 of the C.P.C. could extend that relief even the same was not prayed. In this regard reliance is place don *Khaliqdad Khan and others v. Mst. Zeenat Khatoon and others* **(2010 SCMR 1370)**.

In addition to the above, in case of conflicting judgments of learned Trial Court and Appellate Court, the findings of the Appellate Court would be preferred and respected. In this regard reliance is placed on *Muhammad Hafeez and another v. District Judge, Karachi East and another* **(2008 SCMR 398)**.

6. As far as the case law relied upon by the learned counsel for the appellant is concerned, with utmost respect, the same has no relevance to the peculiar facts and circumstances of the case in hand; thus, it does not render any assistance or help to the appellant's case.

7. For the foregoing reasons and discussion, while placing on the judgments *supra*, the appeal in hand being devoid of any force and substance stands dismissed. No order as to the costs.

(Shahid Bilal Hassan)
Judge

M.A.Hassan

Approved for reporting.

Judge