

ISLAMABAD HIGH COURT, ISLAMABAD

NO. _____ IHC/Jude. Deptt.

(REVISED FORM OF BLUE SLIP)

Case No. R.F.A. 20 2011.

Titled *Jamila Pirzada* Vs: *Muhammad Ali Sheikh and*
and three others. *three others.*

(a) Judgment approved for reporting

Yes / No ☒

(b) Judgment any comment upon the Conduct of the
Judicial Officer for Quality of the impugned
judgment is Desired to be made.

Yes / No ☒

(In case the answer is the affirmative Separate
confidential note may be Sent to the Registrar
drawing his Attention to the particular aspect).

D

Initial of the Judge.

NOTE

1. If the slip is used, the Reader must attach on top of first page of the judgment.
2. Reader may ask the Judge writing the judgment whether the judgment is to be approved for Reporting of any comment is to be made about the Judicial Officer/ quality of judgment.
3. This slip is only to be used when some action is to be taken.

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

RFA No.20 of 2011

Jameela Pirzada and three others

VERSUS

Muhammad Ali Sheikh and two others.

RFA No.70 of 2010

Jameela Pirzada and three others

VERSUS

Col (R) Mansoor Akber and two others.

Date of Hearing: 09.10.2012.

Date of Decision: 18.10.2012

Appellants by: Ms. Samina Khan and Mr. Adnan Muhammad Khan, Advocates.

Respondents by: M/s Muhammad Munir Peracha and Nauman Munir Peracha and Syed Javed Akbar, Advocates.

Ch. Haseeb Muhammad, Advocate for
Respondent No. 3 (CDA)

*Note
In compliance of
Honble Courts order
dated 01-11-2012 learned
counsel's name inserted
in the judgment.*

MUHAMMAD AZIM KHAN AFRIDI, J:- Jameela Pirzada

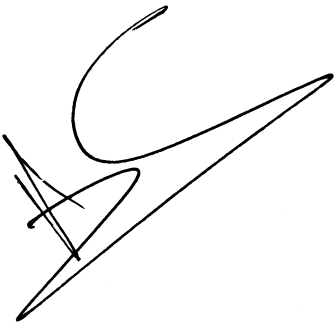
and three others hereinafter referred to as the appellants have preferred the instant appeal under Section 96 of Civil Procedure Code against judgment and decree dated 13.2.2010, passed by learned Civil Judge Islamabad, whereby suit of respondent No.1/plaintiff was decreed ex-parte against respondent No.2/defendant in the said case and the

latter was declared entitled to recover Rs.5 Millions from the former. Appellants have also preferred RFA No.70 of 2010, wherein ex-parte judgment and decree dated 16.3.2010, passed by learned Civil Judge Islamabad, in favour of respondent No.1/plaintiff is under challenge.

2. Since both the appeals are identical in nature as such we intend to dispose of the same with this single judgment.

3. Facts relevant for adjudication of the controversy are that Muhammad Ali Sheikh plaintiff in civil suit No.1708-A of 2009 and Col. (R) Mansoor Akber plaintiff in civil suit No.1349/2008 hereinafter referred to as plaintiffs instituted separate suits for specific performance of contracts and injunctions against respondent/defendant, hereinafter referred to as defendant wherein the latter put appearance and contested the same by submitting written statements. It was the stage of recording of evidence of the plaintiffs when the defendant was proceeded ex-parte on 08.2.2005 and the suits were thereafter processed and decreed vide the impugned judgments referred to above.

4. Learned counsel for the appellants have argued that the appellants are the legal heirs of defendant Fazal-e-Rab Pirzada, whose whereabouts are not known. That the absence of defendant was not intentional and that the ex-parte proceedings and judgments recorded against him are not tenable in law. That the August Supreme Court of Pakistan in its judgment dated 13.1.2012 has ruled that the appeal of the appellants challenging the impugned judgment and decree is competent as the defendant would be presumed dead for the purpose of appeals. That no decree can be passed against a dead person. That defendant has given the suit property to his wife in lieu of dower and as such the impugned judgments and decrees are also void on the said count.



5. Reliance was placed on case law reported in PLD 1975 Lahore 1399, PLD 1987 Supreme Court 01, PLD 1978 Lahore 245 and 1999 SCMR 1362, which we have considered so far as disposal of I.C.A. is concerned.

6. Learned counsel for the plaintiffs argued that allegations made in the complaints and narrations made in the written statements are sufficient for justifying grant of impugned judgments and decrees as required under Order 12 Rule 6 CPC. That the absence of

defendant was intentional and that the appellants are not entitled to seek the relief on the plea that their predecessor was unable to appear before the Court. That Mst. Zohra Bibi wife of defendant has instituted a separate suit regarding the claim of the suit property in lieu of her dower. In respect of the maintainability of appeals, learned counsel argued that the August Supreme Court of Pakistan in its judgment dated 13.1.2012 maintained the order of this Court and as such the appeals were maintainable.

7. We have heard arguments of learned counsel for the parties and perused the record.

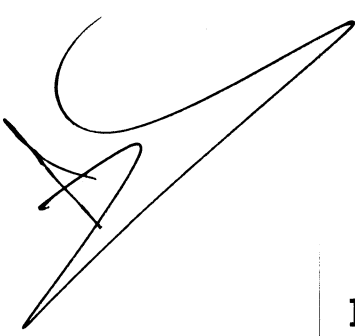
8. Since it is not disputed before us that the defendant was considered dead for the purpose of maintainability of appeals as such we do not feel obliged to give any findings on the said controversy which stood settled by the August Supreme Court of Pakistan vide worthy judgment dated 13.1.2012.

9. To appreciate the arguments of the learned counsel for the plaintiffs, with reference to alleged admissions in the written statement, we deem it necessary to reproduce Order 12 Rule 6 of the Code of Civil Procedure, 1908.

“Order 12 Rule 6”

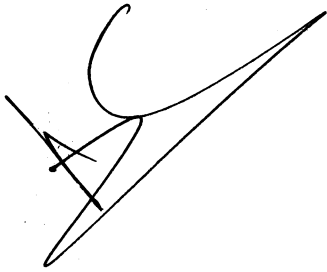
“Judgment on admission.-- Any party may, at any stage of a suit, where admissions of fact have been made, either in the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.”

10. A careful perusal of the afore-stated provisions of law would reveal that the Court may make such order or pass such judgment as it may think just when prerequisites mentioned hereinafter are found co-existing;

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- (i) When admissions of facts are made in pleadings or otherwise;
 - (ii) When a party seeking order or judgment on the basis of such admissions of facts apply to the Court for such order or judgment, and;
 - (iii) When such application is made without waiting for determination of any other question between the parties.

11. In the instant cases, the plaintiffs have submitted no applications as required under Order 12 Rule 6 CPC and the learned trial court proceeded with the suits by framing issues and directing parties to produce evidence, whereafter evidence was partially recorded and then ex-parte judgment was passed. A party who fails to make an application in a suit for order or judgment on the basis of admission of facts or finds it

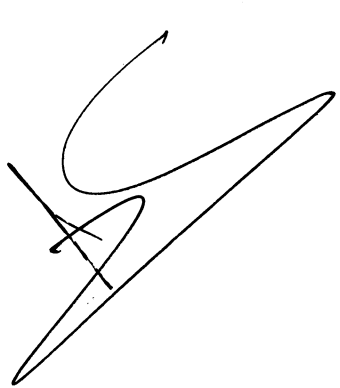
suitable and appropriate to proceed with the suit cannot be later on permitted or allowed to claim order or judgment on such contention. Moreover, such a prayer is limited to proceedings in the suit and that too, without waiting for the determination of any other question between the parties. Once the proceedings in the suit are finalized then provision of Order 12 Rule 6 CPC would lose significance. We therefore hold that the plea agitated and arguments adopted by the learned counsel for the plaintiffs on this count are not sustainable at this stage of the case.



12. To settle the controversy raised before us in appeals, with reference to setting aside the impugned judgments and decrees, we would like to reproduce para No.19 of the judgment of the August Supreme Court of Pakistan dated 13.01.2012 for facilitation and ready reference:-

"19. As far as the proceedings in Human Right Case are concerned, the same are independent proceedings and cannot be looked into for recording any finding in these proceedings. We may also observe that in the given circumstances, when respondent No.1 went missing and, prima facie, had failed to contest the suit proceedings, the respondents No.2 to 5 were competent, in law, to challenge ex-parte decree in order to secure the interest of the respondent No.1, which would ultimately devolve upon them. The purpose for passing ex-parte decree is to penalize a party which deliberately avoids

appearance, either in person or through his counsel, with the ulterior object to defeat or delay and / or frustrate the litigation or is grossly negligent or fails to appear without sufficient cause, but such principle of law would not extend to cover an eventuality of the nature where the respondent No.1 went missing."
Underlined by us for emphasis.



13. According to the observations of the August Supreme Court of Pakistan, the defendant went missing and failed to contest the suit proceedings. Since the absence of defendant was not intentional as such his case could not be considered at par with the case of a party which would deliberately avoid appearance, either in person or through his counsel. A party with the ulterior object to defeat or delay or frustrate the litigation or grossly negligent or fails to appear without sufficient cause is to be penalized by way of passing an ex-parte decree. Such principle of law would not extend to cover an eventuality of the nature where the defendant went missing.

14. Seeking guidance from the observations recorded by the August Supreme Court of Pakistan, referred to above and for reasons mentioned hereinabove we accept the present appeals and would, consequently, set aside the impugned judgments and decrees referred to above and would

direct that the learned trial court shall restore the suits and proceed with the same afresh from the stage when the defendant was proceeded ex-parte.

15. Since the litigations pertain to year 2003 as such we would direct the learned trial court to proceed with the trial of the suits on preferential basis and dispose of the same within a period of two months. Parties shall bear their own costs.

(NOOR-UL-HAQ N. QURESHI)
JUDGE

(MUHAMMAD AZIM KHAN AFRIDI)
JUDGE

ANNOUNCED IN OPEN COURT ON 18/10/2012.

(JUDGE)

(JUDGE)

Qamar Khan

Approved for Reporting

Uploaded By: "Zulqarnain Shah"