Form No: HCJD/C

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

Civil Revision No.309 of 2015

Mst. Riffat Shamim

Versus

Mehmood Hussain and 03 others.

Petitioner's by : Mst. Riffat Shamim, petitioner in person.

Respondent's by : Ms. Rakhshanda Yunus, Advocate.

Date of Hearing : 25.09.2018

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AAMER FAROOQ, J. - The facts, leading to filing of the instant petition, are that the Petitioner contracted marriage with one Azhar Hussain in August 2003. The referred Azhar Hussain, in 2011, moved an application to the Chairman, Arbitration Council for grant of Divorce Certificate to the Petitioner, which was accordingly done. Azhar Hussain died on 04.06.2013. After his death, the Petitioner filed a suit seeking declaration and cancellation of the Divorce Certificate against public at large as well as Chairman, Arbitration Council. During the course of proceedings, the legal heirs of Azhar Hussain moved an application to be impleaded as a party. The referred

application was dismissed on 21.04.2014 and the said order was not challenged any further. The suit filed by the Petitioner was decreed in her favour, vide judgment and decree dated 18.09.2014, which was challenged by way of appeal by Respondents No.1 to 3, which was allowed, vide the impugned judgment, dated 18.06.2015 and the case was remanded to the Trial Court for decision afresh after impleading the referred Respondents.

2. Petitioner in person, *inter-alia,* contended that the application filed by Respondents No.1 to 3 for impleadment was dismissed and no further challenge to the same was made; that the appeal preferred by Respondents No.1 to 3 was defective in the sense that they were not party to the suit and no permission to file the appeal was obtained from the Appellate Court; that Respondents No.1 to 3 were not adversely affected, in any way, from the judgment and decree passed by the Trial Court, therefore, had no locus *standi* to file the appeal.

3. Learned counsel for Respondents No.1 to 3, *inter-alia,* contended that the Respondents were proper and necessary party, hence, ought to have been impleaded; that a stranger to the suit can file an appeal. It was further submitted that Azhar Hussain had divorced his wife during his lifetime, therefore, she has no locus *standi* to file the suit.

4. Arguments advanced by the learned counsels for the parties have been heard and the documents placed on record examined with their able assistance.

5. The relevant facts have been mentioned with brevity hereinabove, therefore, need not be reproduced.

6. Admittedly, Respondents No.1 to 3, were not a party to the suit filed by the Petitioner. They moved an application for impleadment as defendants but the same was dismissed and no further challenge to the same was made. Under Section 96 of Code of Civil Procedure, 1908, an appeal lies from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court. Under Section 105 of Code of Civil Procedure, 1908, no appeal lies from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. Generally, it is settled that since a party to the suit is adversely affected from the judgment and decree passed in any civil suit, hence, an appeal can be preferred by it. However, in certain circumstances a stranger to the suit can also prefer an appeal. In this behalf, the seminal judgment on the issue is case reported as *"H. M. Saya & Co., Karachi Vs. Wazir Ali Industries Ltd., Karachi and another"* ***(PLD 1969 SC***

65). In this referred judgment, the august Apex Court observed as follows:-

> ***"The English Courts have consistently followed the practice that a person who is not a party to a suit or a proceeding may prefer an appeal if he is affected by the judgment, decree or order of the trial Court provided he obtains leave from the Court of appeal. The test applied in granting leave to appeal, in such cases, is that if the person who wants to prefer the appeal might properly have been a party in the suit or proceeding then he may obtain leave to appeal. The case of In re : B. An Infant (2) on which Mr. Dingoomal has relied lends support to the above proposition. In our view this is an equitable rule which should be followed in the absence of any provision to the contrary in the Code of Civil Procedure."***

This view is being consistently followed by the Courts ever since it was propounded. Reliance is also placed on *"Muhammad Rafique Vs. Khalid Masood and 22 others"* ***(2001 CLC 781)*** and *"Sahib Dad Vs. Province of Punjab and others"* ***(2009 SCMR 385)***. The bare perusal of the dictum of the august Apex Court in ***(PLD 1969 SC 65)*** shows that the appeal can only be filed with the leave of the Appellate Court and the test to be applied in granting leave is that if the person, who wants to prefer the appeal might properly have been a party in the suit or proceedings then he may obtain leave to appeal.

7. Respondents No.1 to 3, were declared not to be either a proper or necessary party in the suit filed by the

petitioner. However, during the course of arguments, learned counsel for the Respondents No.1 to 3 agitated that any order passed during the course of the trial can be assailed in appeal filed against judgment and decree. The referred argument by learned counsel for Respondents No.1 to 3 is spurned inasmuch as not every order can be assailed in the appeal against judgment and decree, however, the appellant has to show in light of Section 105 ibid that the error, defect or irregularity in the order affects decision of the case, which the learned Appellate Court failed to take into account. Moreover, the test propounded by the august Apex Court when is read with Section 105 ibid, clearly shows that Respondents No.1 to 3 when filed an appeal had to show that the dismissal of their application under Order I Rule 10 C.P.C. was erroneous and that error, defect or irregularity affected decision of the case.

8. In the dictum laid down by the august Apex Court in ***(PLD 1969 SC 65)***, supra it was also held that leave to appeal is to be obtained from the Appellate Court, which was not done in the instant case, hence, the impugned judgment is not tenable.

9. In view of the foregoing, the instant petition is allowed and the impugned judgment and decree dated 18.06.2015 is set-aside. Consequently, the appeal filed by Respondents No.1 to 3 shall be deemed to be pending and shall be decided in light of the observations made hereinabove.

Since, the matter is pending since long, it is expected that the learned Appellate Court shall decide the matter expeditiously preferably within two months from the date of this judgment.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on _____/11/2018.

JUDGE

M. Zaheer Janjua