

ISLAMABAD HIGH COURT, ISLAMABAD

NO. \_\_\_\_\_ IHC/Jude. Deptt.

(REVISED FORM OF BLUE SLIP)

Case No. RFA-70-2010

Titled Famila Pizzada Vs Col(R) Mansoor Akbar

(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).

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.

Issued  
on 24.11.11

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

CASE NO.: R.F.A. NO.70 OF 2010

JAMILA PIRZADA AND THREE OTHERS

APPELLANT  
PETITIONER

VERSUS

COL(R) MANSOOR AKBER AND TWO OTHERS.

RESPONDENT  
DEFENDANT

Appeal/revision against the decree or order (as the case may be) of \_\_\_\_\_

SERIAL NO. OF ORDER OF PROCEEDINGS	DATE OR ORDER OF PROCEEDINGS	Order with signatures of judge, and that of parties or counsel, where necessary.
1	2	3

19.5.2011. M/S Samina Khan, ASC and Adnan  
Muhammad Khan Advocate for the  
appellants.  
Syed Javed Akbar, Advocate for respondent  
No.1  
Col.(R) Mansoor Akbar respondent No.1 in  
person.

**MUHAMMAD ANWAR KHAN KASI, J. :-** This

order shall dispose of the objection about the  
maintainability of appeal filed by the appellants, who  
were not parties before the learned Trial Court.

2. Background of the case is that the  
present respondent No.1 filed a suit for specific  
performance against defendant/respondent No.2 in  
respect of an agreement dated 17.9.2002 regarding  
the sale of House No.5-B (half portion of Plot No.5),  
Street No.61, F-7/4, Islamabad, which initially was  
contested by the defendant/respondent No.2, but  
thereafter he disappeared and exparte proceedings  
vide order dated 08.2.2005 were ordered against him

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and an exparte judgment and decree was passed on 16.3.2010, which necessitated the filing of present appeal.

3. The appellants are the legal heirs of respondent No.2, who had been a defendant in Civil Suit No.1349/2008 filed by the present respondent No.1, which was decreed exparte against the defendant/respondent No.2.

4. The exparte decision has been challenged by the present appellants as being adversely affected by the judgment and decree dated 16.3.2010.

5. After hearing the preliminary arguments, pre-admission notices were issued to the respondents and operation of the impugned judgment and decree was suspended on 21.5.2010.

6. The respondent No.1 appeared through counsel and challenged the maintainability of the appeal on the ground that the present appellants have no locus standi to file the present appeal as they had never been a party before the learned Trial Court. The counsel for respondent No.1 insisted that the question about the maintainability of the appeal be decided before a decision on merits, therefore, by this order, we have confined ourselves to decide the issue of maintainability of appeal only.

7. The learned counsel for respondent No.1 reiterated his arguments and stated that the execution of the agreement by the defendant/

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respondent No.2 is not disputed. The appellant No.4 had submitted an application under Order I Rule 10 CPC before the learned trial court, which was rejected and her civil revision petition No.422/06 was also dismissed in limine by the Hon'ble Lahore High Court Rawalpindi Bench. It is further submitted that the appellants remained silent for a long time and during the execution proceedings came up with a plea that the defendant/respondent No.2 is a missing person, therefore, for the purposes of these proceedings, they are neither necessary nor proper party. It is argued that the appeal under Section 96 CPC can be filed by the aggrieved party only and not by the strangers.

8. On the other hand, learned counsel for the appellants submitted that the appellants are being adversely affected by the impugned exparte judgment and decree as admittedly they are legal heirs of the defendant/respondent No.2 and are in possession of the suit property. It is further submitted that for all purposes appellants are affected party and there is no specific mention in section 96 CPC that only an aggrieved person can file an appeal. It is stated that section 96 CPC states about the filing of appeal against every decree including exparte decree. The counsel relied upon the following authorities:-

- i. PLD 1965 Kar 603
- ii. PLD 1969 SC 65
- iii. 1991 MLD (AJ&K) 2178

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- iv. 1992 CLC 1099
- v. 2001 CLC 781
- vi. 2009 SCMR 385

9. The case reported in **PLD 1965 Karachi 603** discusses in detail the principles determining right of person, not party to proceedings. It was held that such person has a right of appeal if his interest is adversely affected by judgment or decree. The other authorities fortify this view.

10. We have heard the arguments and examined the record with the assistance of the learned counsel for the parties.

11. At this stage, we are refrain ourselves to discuss the merits of the case as the parties desire to have an order about the maintainability of appeal filed by the present appellants first. Record reveals that suit was filed against respondent No.2/defendant, who initially contested the suit, but by order dated 08.2.2005 was proceeded exparte and thereafter an exparte judgment and decree was passed on 16.3.2010, impugned herein. There is no denial that the present appellants are the legal heirs of respondent No.2/defendant and they should be adversely affected by the execution of impugned judgment and decree, therefore, they have no alternate remedy, but to challenge the said decree/judgment when their predecessor-in-interest is missing since September 2004. The record further reveals that a proper report about his missing was

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lodged in the concerned Police Station and his case is also pending before the Hon'ble Supreme Court alongwith other missing persons.

12. It is observed that as a general principle none can appeal from a decree unless he is a party, but a person, who is not a party to the trial proceedings in a civil suit can file an appeal if he/she is adversely affected by the order and the Appellate Court considers it necessary in the interest of justice, because in such cases right of appeal is a safety wall against the perpetuation of injustice as well as against useless appeals.

13. In our opinion, it does not violate the common law doctrine that the right to appeal is a substantive right and the appeals cannot be filed without a statutory sanction and such rights are given to the parties after examining the applicability in the given circumstances of the case. The right of appeal arises under the statutory provisions such as Sections 96, 100, 104 and Order XLIII Rule 1 CPC, but it is attached to those persons, whose interests are prejudicially affected.

14. The facts of the case leads us to the conclusion that ordinarily leave to appeal should be granted to the persons, who, though not parties to the proceedings, shall be bound by the decree or judgment in that proceedings and who cannot otherwise attack its correctness in other proceedings.



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The dismissal of application under Order I Rule 10 CPC of appellant No.4 would not debar her for filing the appeal if her rights are being affected. Even otherwise, the first three appellants had not filed any application for impleadment and there is no rejection order against them and being legal heirs and by affecting adversely they could file the appeal, because the civil rights are involved and they have no alternate remedy but to file an appeal. On this view we are fortified by the authorities referred by the learned counsel for the appellants.

15. In view of the above, the appeal filed by the present appellants is held maintainable. The same is **admitted for regular hearing**. Injunctive order dated 21.5.2010 shall continue and operation of impugned judgment and decree shall remain suspended till the decision of the appeal.

16. Re-list on **08.6.2011**.

  
(RIAZ AHMAD KHAN)  
JUDGE.

  
(MUHAMMAD ANWAR KHAN KASI)  
JUDGE

AR.ANSARI /

**ANNOUNCED IN OPEN COURT ON 26.05.2011.**

Uploaded By: "Zulqarnain Shah"

  
JUDGE

  
JUDGE

**Approved for reporting**

*Filed  
Dt. 04-06-11.*