

to be impleaded as necessary party in the said appeal as according to them dispute between the parties pertains to legacy of their late father and the applicant has intentionally concealed the said fact from the trial Court as well as appellate Court. The applicant being Respondent in the said Civil Appeal filed her objections on the said application under Order 1 Rule 10 CPC stating therein that all family members including Respondents No.2 to 5 were aware of the civil litigation and the applicants are motivated by personal grudge and dislike against the applicant.

3. Learned appellate Court after hearing both the learned counsel for the parties i.e applicant and Respondents No.2 to 5, allowed the application under Order 1 Rule 10 CPC and impleaded them as “co-appellants” in Civil Appeal No.72/2014. Therefore, the applicant has preferred the instant Revision Application against said order of impleading Respondents No.2 to 5 as co-appellant. Respondent No.1 and Respondents No.2 to 5 have filed their separate but almost common objections/counter affidavit to the revision application.

4. I have heard learned counsel for the applicant and Respondent No.1 and gone through the written arguments submitted by the learned counsel for Respondents No.2 to 5 and perused the record.

5. The learned counsel for the applicant has argued that the appellate Court had erred in entertaining an application under Order 1 Rule 10 CPC mainly because Respondents No.2 to 5 are sisters of appellant/Respondent No.1 and their application to become party to appeal was a clear-cut case of malafides and abuse of the process of the Court because all the Respondents were aware of the pendency of suit right from 2011 when the suit was filed against their brother Masood Ahmed. The suit has been decreed on **18.8.2014** and if

Respondents No.2 to 5, were aggrieved by the impugned judgment allegedly obtained by the applicant by fraud and concealment of facts, the remedy to them was to either file an application under **Section 12(2) CPC** or they could have filed independent appeal but they preferred to remain silent as they know about the existence of gift and suddenly came to be impleaded at the appellate stage to save their brother from the consequence of judgment and decree against him. Their application in appeal under Order 1 Rule 10 CPC was not maintainable as they were not necessary party to the dispute.

6. The counsel for Respondents No.2 to 5/intervenors has contended that the property belongs to the deceased father of Respondents who died on **12.10.1992** and they were never aware of any gift. The gift has been fraudulently obtained by the husband of appellant and since their interest was involved in the property, they have been rightly impleaded by the appellate Court as co-appellants. He has contended that the contention of the applicant's counsel that the appellate Court has no power to implead a party at appellate stage is misconceived.

7. There is no cavil to the proposition that a party can be impleaded at any stage even in appeal because appeal is continuation of suit. However, the basic requirements of impleading someone as necessary party in a suit in terms of **Order 1 Rule 10 CPC** are also different than the parameters of impleading a party in appeal. In appeal the relevant provision for an interested party to be joined in appeal is **Order XLI Rule 20 CPC**. It reads:-

20. Power to adjourn hearing and direct persons appearing interested to be made respondents. Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is

preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

In either case without offending the provision of relevant law a party can be impleaded in appeal if a case is made out that the applicant has a bonafide interest in the result of the appeal. Generally, at appellate stage an applicant is allowed to be joined as respondent in terms of **Order XLI Rule 20 CPC** and not as appellant for the simple reason that in case the applicant was aggrieved by the order impugned in appeal, he can file an appeal even if he was not party to the suit subject to law of limitation after obtaining certified copy of impugned order. I have never come across the concept of impleading someone as **“co-appellant”** on an application under **Order 1 Rule 10 CPC**. Learned appellate Court without looking into the case law relied upon by learned counsel for respondents No.2 to 5 has declared that the case laws referred by them are very much applicable. Unfortunately it is not the case. The case law mentioned in the impugned order on behalf of Respondents No.2 to 5 are:-

- i. *Muhammad Akhtar ETC,..Vs..Abdul Hadi ETC* (**1981 SCMR 878**)
- ii. *Mst. Safia Bibi ..Vs.. Mst. Aisha Bibi* (**1982 SCMR 494**)
- iii. *Central Government of Pakistan and others ..Vs.. Suleman Khan and others* (**PLD 1992 SC 590**)
- iv. *Muhammad Shahban and others ..Vs.. Falak Sher and others* (**2007 SCMR 882**)
- v. *Ghulam Ahmed Chaudhry ..Vs.. Akbar Hussain (deceased) through his LR's and another* (**2003 PLJ (S.C) 50**)
- vi. *Ghulam Ahmed Chaudhry ..Vs.. Akbar Hussain through Legal Heirs and another* (**PLD 2002 SC 615**)

When examined the above case law, I was surprised to note that case law at Sr.1 & 2 above (1981 & 1982 SCMR) have just no relevance

with the issue before Appellate Court. In these case laws the Hon'ble Supreme Court has discussed the provision of **Section 12(2) CPC** and **Order VII Rule 11 CPC**. Case law at Sr.3 & 4 (2007 SCMR 882, PLD 1992 SC 590), are not about impleading a party in **appeal** in terms of **Order 1 Rule 10 CPC** particularly in the context of the facts of the case in hand. The citations at serial No.5 & 6 reported in **PLD 2002 SC 615** and **2003 PLJ (S.C) 50** are one judgment reported in two journals. Learned appellate Court did not even check the title of reported cases and therefore, both citations containing one judgment have been mentioned. This citation is also of no help to Respondents No.2 to 5. This attitude of learned IVth Additional District & Session Judge Central Karachi **Mr. Muhammad Aamer Awan** towards the judgments of the Superior Court was flagrant violation of **Article 189** of the Constitution of Pakistan, 1973. In none of these case laws applicants have been impleaded as "co-appellant". However, I may take the advantage of reading the single judgment of Supreme Court reported in two journals in which guidance for impleading parties has been given in the following terms:-

A wide judicial discretion is vested in the Court to add parties at any stage of the suit in whose absence no effective decree can be passed. It may be observed that where a necessary party is not impleaded, the decree may not be binding on it. Likewise, a person against whom no relief is asked for, may not be a necessary party but he may be a proper party. **For the purpose of addition of parties, the Court is governed by provisions of Order I Rules 1 & 2 and Order II Rule 3 CPC.** In law a Court is empowered to bring on record only necessary or proper parties. Once a suit has been instituted, parties can be added only with the leave of the Court and not otherwise. **Power of adding parties is not a question of initial jurisdiction but of judicial discretion, which has to be exercised having regard to all the facts and circumstances of the case.** (Emphasis provided)

8. The learned appellate Court like case law did not examine the facts and circumstances of the cases either. The Hon'ble Supreme Court observed that "*power of adding parties has to exercised having regard to all the facts and circumstances of the case*". The perusal of the facts and circumstances of the case in hand shows that the contention of Respondents No.2 to 5 that they were unaware of the litigation from 2011 to 2014, when they filed an application under Order 1 Rule 10 CPC at appellate stage, appears to be a misstatement on the face of it. In their application under Order 1 Rule 10 CPC, it is averred that they came to know in the evening of Eid-ul-Adha that applicant and husband of Respondent No.4 have been in litigation against each other. This bald statement in para-10 of the application under Order 1 Rule 10 CPC was totally vague statement. Respondents No.2 to 5 have not even mentioned the name of the person from whom they came to know about the litigation nor they disclosed that when and how they realized that their interest is also involved in the subject matter of litigation, therefore, a need has arose for them to be impleaded in appeal. I have checked the exact date of Eid-ul-Adha in 2014. It was on **05.10.2014** and from that evening within five days including Eid holidays the applicant managed to file an application under Order 1 Rule 10 CPC. It is not disclosed in the application that when they applied for certified copies of pleadings and the impugned order or the same have been provided to them by Respondent No.1 who has already lost the case in the trial Court. They have not even disclosed that when, and from where and how they obtained copies of the pleadings for their lawyer to prepare a case on their behalf. The record further shows that Respondents No.2 to 5/ interveners were not strangers to either of the parties who were in the Court since **2011**. Learned counsel for the applicant has

pointed out that Respondents No.1 has mentioned names of husband of Respondent No.4 Aslam Usmani and other close relatives in the list of witnesses which is part of the record. Respondent No.1 in para-5 of his objections has conceded that defendant's witnesses Aslam, Zahid and Uroos were not produced but their relation with the parties are not denied. However, in her counter affidavit respondents No.2 to 5 have avoided to comment on the list of witnesses referred by the applicant in her reply to the application under Order 1 Rule 10 CPC.

9. In the above back ground their prayer in application under Order 1 Rule 10 CPC also adversely reflect on their bonafide. The prayer is reproduced below:-

*It is respectfully prayed on behalf of the applicants/intervenors above named that this Hon'ble Court may graciously be pleased to allow the applicants/intervenors above named as party in the aforesaid case and the Applicants/intervenors are necessary parties **as the dispute between the parties abovenamed pertains the legacy of late father of the applicants/intervenors and the parties above named particularly Respondent has intentionally concealed this fact from the trial Court as well as this Hon'ble Court whereas by the concealment of facts the rights of applicants/intervenors in the legacy of their late father has been infringed.** Hence this application on the following facts and grounds.*

The very statement in the prayer clause that “*there has been concealment of facts particularly by the Respondent*” automatically calls for attention. What about the appellant with whom they have been impleaded as co-appellants? Has he not concealed facts from his real sisters that inheritable property in which applicants have their share is subject matter of the suit he was facing since 2011? Therefore, prima facie they have not appeared before the appellate Court with clean hands at all.

10. The learned appellate Court has also failed to appreciate from the record that the applicants after **22 years** of death of their father as well as decree of Court in **Suit No942/2011** about status of the subject property have directly approached the appellate Court to claim their share by inheritance in the subject property which has already been declared by a Court of law that it belong to the applicant. Their cause of action and claim was distinct and different then the cause of action of the applicant/plaintiff in her suit. Even otherwise the issue of legacy of their father has been raised by their brother/respondent No.1 and it has been answered by the trial Court in the judgment impugned in appeal No.72/2014, therefore, even in the absence of “co-appellant” the impugned order can be set aside on merit provided sufficient evidence is there in favour of the appellant and the applicants will be benefitted by default. In view of this aspect of the case the applicants were not even a necessary party in whose absence an effective judgment in **appeal** cannot be delivered by the appellate Court. The conduct of “co-appellant” in appeal after the impugned order is worth taking note of. The record of R&Ps of **Civil Appeal No.72/2014** shows that without permission of Court, co-appellant No.2, Mrs. Farzana has filed an amended appeal. The order on their application under Order 1 Rule 10 CPC was only to amend the title by adding names of Respondents No.2 to 5/ interveners as co-appellants. The operative part the impugned order is reproduced below:-

*Accordingly application under Order 1 Rule 10 CPC read with Section 151 CPC stands allowed. There is no order as to cost. **The applicants/ interveners are directed to file amended title accordingly till the next date of hearing.***

Neither there was any order to amend the appeal by the newly added co-appellants nor an appeal can be amended suo moto or at the will of appellant. An amended appeal, if at all, it is allowed to be filed, it should be considered from the date of its presentation and the impugned order is dated **18.8.2014** and therefore, it would automatically be time barred. The perusal of unlawfully filed amended appeal shows that it is like a fresh suit on behalf of Respondents No.2 to 5 against the applicants as well as respondent No.1 which in fact they have already filed as stated by their counsel in his written arguments that a **suit No.603/2015** has already been filed by them. The very fact that after having been impleaded as “co-appellants” Respondents No.2 to 5/interveners/co-appellants have also filed a suit confirm that even the respondents No.2 to 5 knew that whatever is their claim / grievance, it is different and distinct then the suit for declaration and mesne profit filed by respondents No.1 & 2 against only respondent No.1. The decree impugned in appeal, even otherwise is not binding on them since they were not party to the suit. In this context I again refer to the judgment of Supreme Court in the case of Ghulam Ahmed Choudhry (supra) in which the Hon’ble Supreme Court has observed “**where necessary party is not impleaded, the decree may not be binding on it**”. In these circumstances, the purpose of filing an application under **Order 1 Rule 10 CPC** was to delay the decision in appeal on merit.

11. In view of the above facts, law and discussion, this Revision Application is allowed, the impugned order dated **07.8.2015** is set aside. However, on account of pendency of revision here for about three years the learned appellate Court is directed to decide **civil appeal No.72/2014** on merit within one month from the date of

receiving of this order. Both the parties are directed to appear fully prepared before IVth Additional District and Session Judge Central, Karachi on **Saturday, 19th January, 2019**. Send the R&P forthwith. No unnecessary adjournment shall be allowed by the trial Court to the original appellant or respondents. The appellate Court is directed to send copy of the final disposal of **civil appeal No.72/2014** in accordance with law to this Court within **30 days** through MIT-II for perusal in chamber.

JUDGE

Karachi
Dated:10.01.2019

Ayaz Gul/P.A
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