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ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARK ANA

Civil Revn. Appln. No.S-64 of 2014

DATE OF HEARING	ORDER WITH SIGNATURE OF HON'BLE JUDGE.
29.9.2015.	

Date of order: 29.9.2015

1. For orders on office objections.
2. For Katcha Peshi.
3. For hearing of C.M.A. No.235/2014.

Mr. Ghulam Ali A. Samtio, advocate for applicants.

Mr. Gulab Rai C. Jessrani, advocate for respondents No.1 to 3.

Mr. Ali Akbar Kalhoro, State Counsel.

Through instant civil revision application, applicants have challenged order dated 30.4.2014 passed by 2nd Additional District Judge, Shikarpur in Civil Appeal No.23/2013 re-Suhrab and others v. Ali Akbar and others, whereby such appeal was dismissed, resultantly judgment and decree dated 05th August, 2013 and 15th August, 2013 respectively passed by 1st Senior Civil Judge, Shikarpur in First Class Suit No.37/2006 were maintained.

2. Precisely, relevant facts are that respondents/plaintiffs filed suit for declaration, possession, cancellation of mutation, permanent injunction and mesne profits, against the applicants/ defendants in respect of agricultural land comprising of survey Nos.48, 50, 51, 52, 85 to 97, 156, 157, 158, 190, 191, 199, 200, 202, 241 to 249, 376, 377 and 397, total area 257-30 acres, situated in Deh Vakro Jagir, Taluka and District Shikarpur. After full-dressed trial that suit was allowed by judgment and decree, hence applicants

preferred appeal. After failure in appeal, applicants have preferred this civil revision application.

3. At the outset, learned Counsel for the applicants, *inter alia,* contended that impugned order is not maintainable under the law; that appeal was filed in time and same was admitted for regular hearing, but learned appellate Judge has not discussed a single line as to the merits of the case; due to non-availability of Vakalatnama on behalf of appellants such appeal was dismissed, thus, appellate Court has traveled beyond its jurisdiction; that appellate Court was required to decide the controversy between both the parties on merits of the case, but such course was not adopted; that it is not the requirement of the law that appeal should be filed through advocate, it can be filed directly. Once it was admitted for regular hearing, even in absence of appellant and his Counsel such Court was legally under duty to decide the merit of the appeal on the basis of grounds available in memo of appeal.

4. On the other hand, when, learned Counsel for respondents No.1 to 3, was confronted with this legal position, being senior Counsel he was unable to defend the impugned order. Learned State Counsel also failed to support the same.

5. Since the learned Counsel for applicants has mainly taken legal point that the appellate Court was legally required to examine the merits of the case and dismissal of appeal on the ground of non-availability of Counsel was unjustified. To examine

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this aspect, it would be conducive to refer the relevant portion of impugned order, which reads as under :-

> *"I have perused.....It is matter of record that Mr. Gural Das M. Chhabria has filed instant appeal with statement that he has been instructed by the appellants to appear and file the appeal on their behalf before appellate Court, but Mr. Gural Das M. Chhabria has not yet filed power on behalf of the appellants in the matter. In this context the law is very much clear that pleader which term also includes an advocate engaged by a party to appear or act on its behalf in the court must file in the court a document commonly referred to as Vakalatnama, which must be in writing and signed by such partyor his recognized agent or by some other person duly authorized by or under a power of attorney to make such an appointment. The order III rule 4 CPC clearly refer to the procedure which must be followed by the parties but object behind the above provision is only appear to be that the Vakalatnama should evidence the act of appointment of the counsel in the case. The order III rule 4 CPC is reproduced as under :-*
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> > *No pleader shall act for any person in any court unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power of attorney to make such appointment.*
>
> *But in case in hand the filing appeal without Vakalatnama shows the provision of order III rule 4 CPC is* **violated by the counsel.** *No doubt there is no dispute that the appeal is continuation of a suit. But in the suit there is no Vakalatnama of Mr. Gural Das M. Chhabria is available. In this respect.... Since the appeal is continuation of a suit and non filing of power by Mr. Guras Das M. Chhabria in the suit as well* **as in the appeal shows he was not legally competent/pleader of such part to file appeal mere on statement.** *Non-availability of Vakalatnama in the R & Ps of trial court as well as in the appeal proves that Mr. Gural Das M. Chhabria was not legally competent as required by order III rule 4 CPC. Therefore, Mr. Gural Das M. Chhabria was not legally competent to appear or act and file appeal on behalf of appellants before the Court.*

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The case law relied .. are distinguishable from the facts and circumstances of the present appeal.

Moreover, the perusal of memo of appeal reveals that there are 12 appellants in the C.A and only **memo of appeal is signed by the one appellant No.10 Abdul Sattar**, *who is not attorney of remaining appellants. Today no any appellant is present before this Court, though the appeal is fixed for hearing, which shows they have no interest in the matter. Consequent upon what has been discussed above the appeal of appellants is hereby dismissed. Parties will bear their own cost."*
(Underlining has been supplied for emphasis)

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6. The perusal of the above shows that the learned lower court *did* focus on the provision of Order III, Rule 4(1) of the Code of Civil Procedure. I am not in disagreement with the interpretation did by the learned appellate Court with regard to the provision of Order-III, Rule 4(1) of the Code but what the learned appellate court failed in appreciating that Mr. *Gural Das M. Chhabria,* claimed to have represented the applicants before Trial Court and even party was under such impression. The position, being so, is clear from the order of the learned appellate court itself. The relevant portion thereof is referred hereunder:

> *In this context I have perused the R & Ps of trial Court it appears that Vakalatnama of advocate Mr.Gural Das M. Chhabria is not available. This court invited to advocate Mr. Narendar Kumar, (associate & son of Mr. Gural Das M. Chhabria) to inspect the R & Ps of trial court whether their power is available or not,* **who after inspection of R&Ps disclosed that their power is not available**

This *prima facie* goes to suggest that status of Mr. Gural Das M. Chhabria to be ***pleader*** was not challenged during course of the trial which ended in a judgment on merits. At this juncture, it would

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be relevant to refer the sub-rule (5) of Order-III of Civil procedure Code, which reads as:-

> (5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, **unless he has filed in Court a memorandum of appearance signed by himself and stating**-
>
> (a) the names of the parties to the suit,
>
> (b) the name of the party for whom he appears, and
>
> (c) the name of the person by whom he is authorized to appear.
>
> Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.

7. Though, Vakalatnama was not filed before the trial Court but the Trial Court never objected and said counsel was allowed to plead on behalf of the applicants during whole ***trial proceedings,*** hence the error/mistake *in this regard* was on part of the learned Trial Court which allowed the party (applicants) to hold an impression of legal appointment of pleader hence the learned appellate Court was never legally justified in dismissing the appeal of the applicants on this count alone because the parties cannot be allowed to suffer for the error or mistake of the Court. I would take advantage of the case of *Muhammad Talha Adil v. Muhammad Lutfi*, reported as 2005 SCMR 720, wherein honourable Supreme Court held that:

> *'In the present case,* ***trial Court acting in good faith and being unmindful of the provisions of law proceeded to*** *concede to the prayer of the respondent and allowed him to invest the amount in the purchase of a defence saving certificate and to deposit the same in Court*

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before the last date fixed by the Court. Technically speaking, the order, on the face of it, may not be sustainable but respondent cannot be punished for an act or error on the part of the Court. Indeed, he cannot be saddled with the responsibility of passing of a defective or erroneous order on the part of the trial Court, **as it is well-settled that no person shall suffer for the act or omission of the Court and the act of Court shall not prejudice any one. In law.'** *(underlining has been provided for importance)*

8. From the above, it becomes quite clear that trial Court, *acting in good faith* or being unmindful of the provision(s) of law, proceeded thereby reaffirming the belief of party regarding ***'appointment of pleader'.*** Thus, in such eventuality, the ***'termination of pleader'*** could only be with reference to sub-rules (2) and (3) of Order-III (CPC). At this juncture, it would be conducive to refer the sub-rule (2) of Order-III (CPC), *first* which reads as:-

> (2) Every such appointment shall be filed in Court and ***shall be deemed to be in force*** until determined with the leave of the Court by a ***writing signed by the client or the pleader***, as the case may be, and filed in Court or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.

The above provision leaves nothing that appointment of pleader shall come to an end only:

i) by a writing, signed by the client or the pleader which too with leave of the Court;

ii) on death of pleader or client;

OR

iii) all proceedings in the suit are ended so far as regards the client;

Since the term (iii) *supra* was requiring explanation; therefore, sub-rule (ii) is followed by sub-rule (iii), which reads as :-

> (3) For the purposes of sub-rule (2) an application for *review of judgment*, an application, under section 144 or section 152 of this Code, **any appeal from any decree or order in the suit** and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be ***deemed to be proceedings in the suit.***

9. The above explanation is sufficient to *prima facie* establish that to represent a party, the counsel representing it (party) before lower forum, would not require fresh Vakalatnama (appointment) for purpose of filing of an appeal *even*. The provision *for this purpose* makes it clear that even an order or decree in a suit shall not mean ***'ending'*** all proceedings in the suit **'so far as regards the client'** who *otherwise* has chosen to prefer appeal. This allows me to say that even an appeal, if filed with a statement that appeal is being filed on oral instructions of party, be not held as ***'incompetent.*** Reference, if any, can be made to the case of *Mst. Azra Begum v. Piran Ditta*, reported as PLD 1967 LAHORE 807.

10. Further, in the instant case, none has come forward to say that the applicant did not wish to engage Mr. Gural Das M. Chhabria to represent the applicant before trial Court nor the applicants have ever been enquired whether Mr. Gural Das M. Chhabria was not instructed to file the appeal. Even otherwise, let me insist that ***'rules'*** framed in the Code are rules made for the

advancement of justice and they should be interpreted so as for as possible and not to defeat the ends of justice which always demand decisions on merits and not on mere technicalities. Further, this provision is an enabling provision whereby a party is allowed to appoint a pleader to **'plead'** which otherwise is not the mandatory requirement of law that ***a party cannot plead his/her case without appointment of a pleader***. A reference to the case of 'Toor Gul v. Mst. Mumtaz Begum (PLD 1972 SC 9), being relevant, is made hereunder :-

> 'The rules framed in the Code of Civil Procedure are rules made for the advancement of justice and they should not, as far as possible, be allowed to operate so as to defeat the ends of justice. If we were to accept the highly technical view taken by the High Court in the present case, then it would result in making it extremely difficult for people living in the interior of the country to appoint pleaders to represent their cases at the District Headquarters where Courts are usually situated. ***These rules are in the nature of enabling provisions and substantial compliance with them should be enough.***

11. Hence, it is pertinent to mention that such omissions, including non-signing of plaints or non-verification of pleadings, should not be taken as ***'fatal'*** to bring a ***full-stop*** over the substantial right of a party because the law and judicial propriety always demands that ***'irregularities or technicalities should not be allowed to prevail on substantial justice'*** else whole structure of ***administration of justice*** shall fail. Let me take advantage of the case laws, reported as:

> ***Ismail & another v. Razia Begum, (1981 SCMR 687)***
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> *" the learned counsel conceded before us that the respondents had all along prosecuted their suits with diligence and had appeared as their own witnesses.* In

these circumstances, the non-signing of the plaints by them at the proper stage was a mere irregularity, *and consequently the learned District Judge was entirely justified to direct that the* **said irregularity may be rectified**. *Furthermore the learned counsel has not been able to show as to how he has been prejudiced, therefore, the objection raised by him is only technical*

***Pakland Scientific Production v. Poineer Insurance Co.* (PLD 1991 Karachi 414)**

"The aforesaid provision has been interpreted more than once by the superior Courts. It has been laid down that non-signing of the plaint at the proper stage is mere irregularity which can be cured at subsequent stage. Reference may be made to the case of Ismail and another vs. Mst. Razia Begum and 3 others 1981 SCMR 687. **It is also settled law that it is not necessary that a separate application should be filed for signing the plaint by authorized person and that the plaint can be allowed to be signed even at appellate stage.** *In the case of Rajab Ali vs . Messrs Gujrat Bus Service Karachi PLD 1961 (W.P) Kar. 486 it is held that there is no authority to support the contention that Order VI Rule 14, contemplates a formal application by a party who is unable to sign the pleadings.* **But even if that were the case, the omission is of a minor nature and the Court can get the plaint signed by the Appellant in addition to the signature of the legal attorney of the party.** ***The objection was treated purely of technical nature having no bearing on merits of the case and was overruled.*** *In the case Messrs Nabi Bakhsh & sons vs. Pakistan PLD 1969 Kar. 566 the objections filed Under Section 14 of the Arbitration Act were not signed by respondent. It was held that the failure to sign the objections in the circumstances was a mere irregularity and the respondent was allowed to sign the same at the Letters Patent Appeal stage. Similar view was expressed in case of Ali Muhammad and two others vs Gulfam & other s PLD 1983 Kar. 99.*

Accordingly, all enabling ***rules*** or ***provisions*** put equal responsibility upon the party concerned and the Courts, because accepting/admitting a plaint without ***signing or verification*** or ***allowing a pleader to plead without proper appointment*** also

amounts to an ***error or mistake on part of the Courts,*** which *otherwise are* required to take care of all procedural requirements at relevant time and stage.

11. Be that as it may, the learned appellate Court Judge also lost sight of the fact that one of the appellants had signed the memo of appeal too. This fact is evident from order of the learned appellate court. The operative part whereof is:

> *"Moreover, the perusal of memo of appeal reveals that there are 12 appellants in the C.A and only memo of appeal is signed by the one appellant No.10 Abdul Sattar, who is not attorney of remaining appellants."*

This is sufficient to draw an undeniable conclusion that appeal was filed in time even if it (memo) was signed by one, out of 12 appellants. It is never the requirement of law that all defendants or plaintiffs, as the case may be, should jointly file an appeal or that if one of several defendants/plaintiffs files the appeal, it would be ***incompetent*** rather the provision of Order 41, rule 4 of the Code permits this by saying that:

> ***'4. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.'***

Thus, on this count too, the learned appellate court was not justified to dismiss the appeal of the applicants on such technical

ground, particularly when at no material times the other appellants came and claimed to be not interested in filing appeal.

12. In view of above discussion, I am of the clear view that the learned appellate court was not justified in dismissing the appeal on such ground rather it should have decided the appeal on merits when counsel was available and heard. Accordingly, instant revision was accepted by short order dated 29.09.2015 and in consequence whereof the impugned judgment was set-aside in the following terms :-

> *"For reasons to be recorded later-on, instant revision is accepted. Consequently, Civil Appeal No.23/2013, re; Suhrab and others v. Ali Akbar and others, is restored as pending. Appellate Court shall decide the same on merits within three months after providing opportunity of hearing to all necessary parties."*

13. While parting, it is necessary to mention that sailing through the facts of instant matter it appeared that it was failure of trial Court in not taking care of enabling provision of Order-III, rule 5 CPC, therefore, I feel it proper to direct that this judgment be circulated for guidance of subordinate courts that due and proper care should be taken towards compliance of enabling or procedural provisions so as to avoid technical knockouts.

JUDGE 7/10/2015