

IN THE HIGH COURT OF SINDH AT KARACHI
H.C.A. No.198 of 2007

Present:

Mr. Justice Irfan Saadat Khan
Mr. Justice Zafar Ahmed Rajput

Applicants : Tariq Saleem & others, through
Mr. Adnan I. Chaudhry, advocate

Respondents : M. Sohail Shakil Faruqi & others,
No. 1 & 3 to 5 through Mr. Badar Alam, advocate

=====

(1) C.M.A. No. 520 of 2013

(2) C.M.A. No. 521 of 2013

Date of hearing : 15.04.2016

Date of order : 29.04.2016

ORDER

ZAFAR AHMED RAJPUT, J: (1) C.M.A. No. 520 of 2013: This is an application, under section 5 of the Limitation Act, 1908 (“the Act of 1908”), filed on behalf of the legal representatives of Muhammad Saleem Khan, the appellant No. 2, seeking condonation of delay in filing application under Order XXII, Rule 3, C.P.C. read with section 151 C.P.C. (C.M.A. No. 521 of 2013) for making the legal representatives of said appellant a party in appeal, who died on 30.04.2012, leaving behind him 17 legal representatives, as per details given in the said application.

2. An application to bring the legal representative of a deceased appellant or respondent, as the case may be, is required to be made within ninety days, under Article 176 and 177 of the Act of 1908, from

the date of the demise of the party. In the instant case the application has been made on 29.03.2013, which is barred by time for 242 days and for its condonation, the instant application has been filed.

3. Mr. Adnan I. Chaudhry, learned counsel for the legal heirs of appellant No. 2, has contended that the Suit bearing No. 367 of 1995 was filed by the appellant No. 1/ company through its Managing Director, Muhammad Saleem Khan on the Original Civil Jurisdiction of this Court, which was dismissed by the learned Single Judge of this Court, vide judgment dated 08.08.2007, inter-alia, observing that the appellant No. 1/ company was not competent to file the suit when the shares of the company were acquired by Muhammad Saleem Khan, therefore, the appellant No. 2, who was not co-plaintiff in the civil suit, filed this High Court Appeal (H.C.A.) as a co-appellant, even he was otherwise competent to file this H.C.A., being aggrieved by the impugned judgment and decree. The learned counsel has further contended that such legal objections with regard to the maintainability of this H.C.A were raised by the office of this Court, which were for the time being overruled by this Court, vide order dated 20.09.2007, making it clear that if the said objections are raised by the respondents, the same would be examined. The learned counsel added that during the pendency of this H.C.A., the appellant No. 2 died on 30.04.2012 and the delay in filing C.M.A. No. 521 of 2013 was neither deliberate nor willful but due to the fact that the legal heirs of appellant No. 2 were unaware of the pendency of this appeal, and they came to know about it few days before filing of instant application when the then counsel of the appellants called the appellant No.2 for seeking instructions to proceed with the matter. He

has further added that the H.C.A. is likely to be proceeded on merits, if the legal representatives of the deceased appellant No. 2 are made party to it, as their shares and interest are involved in this matter and no prejudice would be caused to any of the parties if the legal representatives of said deceased appellant are made party in this H.C.A.

4. On the other hand, Mr. Badar Alam, learned counsel for the respondent Nos. 1 and 3 to 5, has vehemently opposed this application. He has raised preliminary legal objections on the maintainability of this application and in this regard he has relied upon the case of *Shabbir Ahmed and another vs. Nazir Ahmed and others (2000 M L D 702)*, wherein learned Single Judge of this High Court has observed that the provisions of section 5 of the Act of 1908 are applicable to specified matters, alone, and are not applicable to the application under Order XXII, Rule 3 C.P.C.

5. Mr. Badar Alam has further maintained that Tariq Saleem, the son of appellant No. 2 was aware of pendency of instant appeal, but he has deposed falsely in his affidavit that he was not aware of the pendency of H.C.A. In this regard, he has invited our attention towards the Extract of Minutes available at page 161 of the case file, which was signed by Tariq Saleem himself. He has also maintained that the appellant No. 1 in the instant appeal is M/s. Faruqi House Building Corporation (Pvt.) Limited, allegedly through its Managing Director, Muhammad Saleem Khan, who has expired and the alleged legal heirs cannot be substituted as the post of Managing Director of a private

limited company is not inheritable, thus the alleged legal heirs cannot be impleaded in the H.C.A.

6. We have heard the learned counsel for the parties and perused the material available on record.

7. The provisions of Rule 3 and 4 of the Order XXII, C.P.C. read as under:-

“3. Procedure in case of death of one of several plaintiffs or of sole plaintiff. (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or on receipt of an intimation of the death of such plaintiff from the person nominated by him for that purpose under rule 26, Order VII or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time allowed by law no application is made or intimation is given under sub-rule (1), the Court may proceed with the suit, and any order made or judgment pronounced in such suit shall, notwithstanding the death of such plaintiff, have the same force and effect as if it had been made or pronounced before the death took place.

4. Procedure in case of death of one of several defendants or of sole defendant. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or on receipt of an intimation of the death of such defendant from the person nominated by him for that purpose under rule 13, Order VIII or a sole defendant or sole surviving defendant dies and the right to sue survives the Court on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) When within the time limited by law no application is made or intimation is given under sub-rule (1) the Court may proceed with the suit and any order made or judgment pronounced in such suit shall notwithstanding the death of such defendant have the same force and effect as if it had been pronounced before the death took place.

(4) It shall not be necessary to substitute the legal representatives of any such defendant who has failed to file a written statement or has failed to appear and contest the suit at the hearing; and judgment may in such case be pronounced against the said defendant notwithstanding his death and such judgment shall have the same force and effect as if had been pronounced before his death took place.

8. It may be relevant to mention here that under Rule 11 of the Order XXII, C.P.C. the entire Order XXII (ibid) has been made applicable to appeals also with slight modification and variation of the nomenclature of plaintiff and defendant as appellant and respondent.

9. Now, reverting to the objections with regard to maintainability of this application with reference to application of section 5 of the Act of 1908, it may be seen that Order XXII, Rule 3 (2), so also Rule 4 (3), C.P.C., does not prescribe a period of limitation for making an application under corresponding sub-rule (1) but declare that where within the time allowed by law no application is made or intimation is given under sub-rule (1), the Court may proceed with the suit. Nevertheless, it is the Articles 176 and 177 of the Act of 1908 that allow ninety days' time for making such applications.

10. There is no cavil with the arguments that if the Statute governing the proceedings does not prescribe period of limitation, the proceedings instituted thereunder shall be controlled by the Act of

1908 as a whole. However, where the law under which proceedings has been launched prescribes itself a period of limitation then benefit of section 5 of the Act of 1908 cannot be availed unless it has been made applicable, as per section 29 (2) of the Act of 1908.

11. Civil Procedure Code, 1908, though being a “general law” for all legal and practical purpose, for having prescribed itself a period of limitation i.e. 90 days for filing a revision petition under section 115, C.P.C. is considered a “special law” for the purposes of section 29 (2) Act of 1908. But so far the provisions of Order XXII, Rule 3 and 4, C.P.C. are concerned; C.P.C. cannot be regarded as a “special law” as the same do not prescribe a period of limitation. Had legislature intended to treat C.P.C. as a special law in respect of its afore-stated provisions for the purposes of Act of 1908, then the period of limitation for making the legal representative of a deceased plaintiff/appellant or deceased defendant/respondent a party would have not been prescribed under Articles 176 and 177 of the Act of 1908 but in the Order XXII, Rule 3 and 4, C.P.C. and in such case Section 5 of the Act of 1908, for not finding mentioned in Section 29 (2) could not be applicable to the said provisions of C.P.C. Thus, we are of the considered view that the provisions of section 5 of the Act of 1908 are applicable to the application under Order XXII, Rule 3 and 4, C.P.C.

12. So far the merit of the application is concerned, it may be examined that according to the sub-rule (2) of Rule 3 of Order XXII, C.P.C. an application for the impleadment of the legal representatives of the deceased is to be made within ninety days as prescribed under Article 176 of the Act of 1908, which period is to be computed from

the date of death of the deceased appellant. However, on the receipt of an intimation of the death of such appellant from the person nominated by him for that purposes under Order VII, Rule 26, C.P.C. the Court may implead the legal representatives of the appellant suo motu according to the list given under Order VII, Rule 26 (ibid) by the plaintiff accompanied with the plaint. But in this case since the appellant No. 2 was not the co-plaintiff in the suit, no list was given by him under Order VII, Rule 26 C.P.C. and; therefore, his legal representatives were not on record of the Court.

13. It has been pleaded on behalf of legal representatives that they were not aware of pendency of this appeal. Unless the legal heirs are aware that their deceased predecessor has brought action in a particular Court, they will not be able to make an application for making them party in the appeal. So far the contention of the learned counsel for the respondents No. 1 and 3 to 5 is concerned, the Extract of Minutes available at page 161 of the case file, though issued by one of the legal representatives of deceased appellant, as Director of appellant No. 1, authorizing the appellant No. 2 to file, conduct and maintain H. C. A. against the respondents by impugning the judgment and decree dated 08.08.2007 passed in Suit No. 367 of 1995 on behalf of the company. No inference can be drawn on the basis of said Extract of Minutes that the legal representatives of appellant No. 2 were aware of pendency of this High Court Appeal as it is only to the extent of authorizing the appellant No. 2 for filing of appeal against the impugned judgment and decree.

14. Since sufficient cause has been shown for not making the application i.e. C.M.A. No. 521 of 2013 by the legal representative of deceased appellant No.2 within the prescribed period, we allow this application.

15. **C.M.A. No. 521 of 2013:** For the facts and reasons assigned by us for allowing C.M.A. No. 520 of 2013, we also allow this application. The legal representatives of deceased appellant No.2, namely, Muhammad Saleem Khan are directed to be impleaded as appellants No. 2(i) to (xxvii), respectively in this H.C.A. The learned counsel for the appellant No. 2 is directed to file amended title within one week hereof.

JUDGE

JUDGE

HANIF