

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 2227 of 2015

[Allied Bank Ltd. v. Mr. Qamar Hussain Naqvi and others]

Date of hearing : 28.01.2019 and 13.02.2019.

Date of Decision : 18.11.2019.

Plaintiff : Allied Bank Limited, through Mr. Javed Asghar Awan, Advocate.

Defendants No.1 : Qamar Hussain Naqvi, through Mr. Javaid Mussarrat, Advocate.

Defendants No.2-3 : Nemo.

ORDER

Muhammad Faisal Kamal Alam, J: - This action at law is filed by the Plaintiff against surviving legal heirs of late Wajahat Hussain Naqvi, who was the employee of Plaintiff Bank and died on 21.01.2014. Plaintiff contains the following prayer clause_

- “(i) Directing the Defendants jointly and severally to pay an amount of Rs.51.061 (Million) to the Plaintiff.***
- (ii) To pay markup on the above amount at the rate of 15% per annum with quarterly rest from date of filing of the Suit till realization under the decree.***
- (iii) Cost of the Suit.***
- (iv) Any other relief deemed just and proper in the circumstances of the suit.”***

2. On 23.01.2019, a legal question about the maintainability of present suit was framed in view of a *legal maxim ‘actio personalis moritur cum*

persona’ {**the maxim**}, which has been expounded through various judicial pronouncements including a reported Judgment of this Court, viz. **P L D 2018 Sindh page-360** [*Muhammad Sarwar v. Government of Sindh through Secretary and others*]. Both learned counsel for Plaintiff and Defendants addressed their respective submissions.

3. As per the averments of the plaint, predecessor-in-interest of Defendants, namely, Wajahat Hussain Naqvi (*the deceased*), committed fraudulent acts and caused colossal losses to the Plaintiff Bank, when he was posted as Business Development Manager (“**BDM**”) at Hassan Square Branch. When the audit was carried out a comprehensive report was prepared by the Audit Division of Plaintiff Bank, which is also filed with the plaint as Annexure ‘**A**’. This Audit Report is of 06.02.2013 and in the light of the recommendations, a Charge Sheet dated 29.03.2013 was issued to the deceased employee, contents whereof are already reproduced in the plaint and is not required a reproduction here. It is further stated that the second set of facts pertaining to another fraud committed by the above deceased came to light when one of the customers of Plaintiff Bank, namely, Ameerzadi on 06.02.2014 visited the branch for collecting profit against her investment in ‘**Allied Ba-ikhtiar Deposit Scheme**’. Upon perusal of the record, it transpired that the computerized term deposit acknowledgment receipts (TDR) were fake, which were provided to her by the above deceased employee. An investigation was done and in the plaint relevant portion of the investigation is reproduced, according to which the above deceased employee in league with other staff members of Plaintiff Bank and particularly the then CSM Aamir Talib, committed a fraud of Rs.20 Million. In paragraph-10 of the plaint a figure of the legal dues of deceased employee payable by Plaintiff Bank to the Defendants is mentioned, but as per the pleadings, the same has been adjusted.

4. The allegations are vehemently denied in the Written Statement filed by the Defendants, who are parents, widow and minor children of the above deceased. It is mentioned in paragraph-2 that the deceased employee lost his life in a bomb blast on 21.01.2014. It is further stated that no disciplinary action against the deceased employee was taken as neither he was dismissed from service nor any FIR was lodged when he was alive, even though the above Audit Report, relied upon by Plaintiff, is of a period prior to the death of said ex-employee. In paragraph-3, the Defendants have raised the question of maintainability of present suit by stating that a suit against a dead person is not maintainable. The Defendants have also disputed the calculation of claim of Plaintiff Bank and in paragraph-7 of the Written Statement, it is categorically refuted that the Defendants, who are surviving legal heirs of deceased employee, got any benefit from the purported embezzlement committed by deceased employee.

5. Mr. Javed Asghar Awan, Advocate for the Plaintiff, has argued that the present proceeding is maintainable and falls within the exception of the above mentioned legal *maxim*, because the present Defendants are the direct beneficiaries of the embezzled amount; that Section 306 of the Succession Act, 1925, is also applicable in the present case. He has relied upon the following case law_

- i. 2006 S C M R page-1287 [*Mst. Itrat Zahida and others v. President, A.B.L. and others*] – *Mst. Zahida Case*;
- ii. P L D 1967 Karachi page-755 [*Mercantile Co-operative Bank Ltd. v. Messrs Habib & Co. and others*] – *Mst. Sardaran Case*;
- iii. P L D 2004 Supreme Court page-185 [*Ali Muhammad Mirza and others v. Mst. Sardaran and others*] – *Ali Muhammad Case*;
- iv. 1990 C L C page-404 [*Government of Punjab through Secretary, Ministry of Agriculture Lahore and another v. Mst. Kamina and others*] – *Government of Punjab Case*;
- v. 2008 C L C page-107 [*Syed Zaheerul Hassan Jeelani Chandpuri v. Government of Sindh through Secretary, Local Self-Government, Sindh and 6 others*] – *Zaheerul Hassan Case*.

6. Mr. Javaid Mussarrat, Advocate, representing the Defendants, has controverted the submissions of Plaintiff's Advocate, while reiterating his stance that the present suit is not maintainable because it is filed against the legal heirs of a deceased employee, in respect of a purported wrong done by the deceased. It is contented that the acts complained of were not committed by the present Defendants and even if it is assumed that the deceased was involved in some fraudulent acts in collusion with other employees of Plaintiff (as claimed by Plaintiff), even then such allegations were never proved against the deceased in a disciplinary proceeding. The learned Advocate distinguished the reported precedents relied upon by Plaintiff's counsel while arguing that the afore-referred *maxim* is fully attracted to the facts of present *lis* and consequently it should be dismissed.

7. Arguments heard and record perused.

8. The crux of the reported decisions relied upon by the learned counsel for the Plaintiff is that above *maxim* '*actio personalis moritur cum persona*' (*a personal right of action dies with the person*) is a part of the Law of Pakistan, and is enforceable on ground of justice, equity and good conscience, **but is** subject to certain exceptions; *first*, where a tortfeasor's (a person who has committed wrong against whom a claim is brought) estate is benefited by the wrong done, an action would lie against a representative of a wrong doer; *secondly*, when in a litigation a decree for damages is awarded, against which an appeal is filed, then the legal heirs of a decree holder can pursue the matter; the *third* exception is a rare one and is only applicable when such a situation has arisen as mentioned in the reported decision handed down by the Honourable Supreme Court in Mst. Zahida Case (*ibid*), where one Ghulam Shabbir, who was a clerk in the Allied Bank of Pakistan (coincidentally the present Plaintiff) challenged his

dismissal in the Labour Court with a favourable result, which was overturned in Appeal and in the intervening period the said employee died. It is held that legal representatives of the employee would be entitled to continue the litigation, because, if the decision of Labour Appellate Tribunal is set aside by a higher forum and that of Labour Court is restored, then the legal heirs would be entitled for pensionary benefits.

9. It is also noteworthy to mention that in all the above cited cases, the above legal *maxim* is considered and interpreted vis-à-vis Order XX of the Civil Procedure Code, 1908, because one of the parties died during pendency of a court case. The undisputed facts of present case are to be appraised in the light of the above case law.

10. Admittedly, the present suit has been instituted after twenty two months from the date of death of late Wajahat Hussain Naqvi, against his legal heirs.

11. It is relevant to reproduce paragraph-9 of the plaint herein below_

“9. The above revealed that predessor-in-interest of Defendants (Mr. Wajahat Hussain Naqvi) by committing fraud so far, caused loss of the following amount to the plaintiff bank.

i) Rs.3,776,000 in respect of Hassan Square Branch
ii) Rs.20,000,000 in respect of Ms. Ameerzadi

Total Rs.57,776,000/-.”

12. The present claim is about the alleged acts of fraud said to have committed by the above deceased; the first one committed (purportedly) when the deceased employee was working at Hassan Square Branch and the other one in respect of a customer, namely, Mst. Ameerzadi. It appears that the total claim mentioned in the plaint in relation to the above contradicts

the figures and calculation mentioned in paragraph-9 above, though this is not a deciding factor of this Order.

13. There is also a third set of claim as mentioned in paragraph-12 of the plaint, in which it is pleaded that a fraud of Rs.594.370 Million is detected in the same Hassan Square Branch in respect of the Account maintained by Karachi Metropolitan Corporation, however, the fraud is under investigation. Till the conclusion of the arguments on 13.02.2019, no application for amendment in the pleadings in respect of the above third claim of fraud has been filed by the Plaintiff Bank. Hence, this third type of alleged fraud as mentioned in paragraph-12 of the plaint cannot be considered, inter alia, because it is itself mentioned in the said para that it was under investigation.

14. Adverting to the first two claims of embezzlement / fraud, which is the subject matter of the present proceeding. The basis of claim of Plaintiff is the afore-referred Investigation Report, which is annexed with the plaint as **Annexure 'A'** and was issued on 06.02.2013, that is before the death of above named employee and on the basis of which a disciplinary proceeding was initiated against him as mentioned in the plaint itself. Relevant paragraphs of this Investigation Report have been referred to during arguments and have been duly taken into the account. The conclusion contained in this Investigation / Audit Report is that the main culprit was Amir Talib (CSM of the said Branch), who committed the fraud in collaboration with other staff members. Name of deceased employee Wajahat Hussain Naqvi is also mentioned as one of the delinquent employees, involved in committing the fraud and causing loss to the Bank. There are eight other employees, who are mentioned in the said Investigation Report, apart from deceased, but the plaint is silent that what action against them has been taken so far.

15. Undisputedly, the above named deceased (late Wajahat Hussain), who was son of Defendants No.1 and 2, husband of Defendant No.3 and father of Defendants No.4 and 5 [minors] did not die during pendency of present suit, but this *lis* has been filed after twenty two months of his death. The plaint is silent about any benefit, which the present Defendants have gained or the amount of embezzlement was in any way added or diverted to the estate left by above named deceased, or landed in the bank accounts of present Defendants. Plaintiff Bank has not stated as required (in the form of material facts) that how present Defendants are the beneficiaries of the embezzled amount. Had the pleadings not been vague, as they are at present, then it would be a triable issue and present suit could have survived.

16. **Secondly**, even if the afore-referred Investigation Report of Plaintiff is considered for deciding the present controversy at this stage, the acts complained of, were the individual acts of the deceased and do not fall within the aforementioned exceptions of the legal *maxim*; rather, the present case falls within the ambit of legal *maxim*, as expounded by the Courts, *inter alia*, that the 'death extinguishes the liability in tort'. The present Defendants cannot be punished for the above acts, or, in place of the said deceased. Similarly, in view of the above discussion, Plaintiff's Advocate reliance on Section 306 of the Succession Act, 1925, is incorrect. In addition to the above, the earlier order of 18.04.2016, is also worth considering, although for a limited purpose, in which a CMA filed by Plaintiff Bank for attaching the bank account of Defendant No.1 (father of deceased employee) was turned down with costs of Rs.5000/-.

17. **Thirdly**, there is another inescapable aspect of the case; applicability of Article 36 of the Limitation Act, 1908, which prescribes a limitation of two years when the malfeasance, misfeasance or nonfeasance takes place.

In this regard a reported decision of this Court in **1990 M L D page-1261** [*Nasir Ahmad Shaikh v. The State Life Insurance Corporation of Pakistan and another*] is relevant, wherein it is held, “*that Article 36 refers to actions founded on torts or such wrongs as are distinguishable from breaches of contract.*” Even if benefit of Section 18 (relating to the computation of limitation from the date of knowledge of fraud) of the Limitation Act, 1908, is extended to Plaintiff, still the present *lis* is hit by the said provisions, because after acquiring knowledge of the impugned acts of deceased employee and other staff members a thorough investigation was conducted and the above **Investigation Report was issued on 06.02.2013, although the date of acquiring knowledge** of fraud can be ascertained from the opening part of the above Investigation Report, which is 7-11-2012. If a lenient view is also taken, this suit should have been filed within two years from the date of this Report, but it is filed on 17.11.2015, that is, after a delay of seven months from the expiry of limitation period, regarding which no justification is given. Thus the present *lis* is also barred by Limitation.

18. Hence the present claim is adversely affected by the above legal *maxim* which is applicable in Pakistan as part of the Statute, as also held in the Government of Punjab Case (*supra*) by the learned Division Bench of this Court so also the afore-referred provision of the Limitation Act. Consequently, in terms of Rule 11, Order VII of CPC, the plaint is rejected.

Judge

Karachi,
Dated: 18.11.2019.

Riaz / P.S.