

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

CR No. 107/2011
CM No. 6573/2020
CM No. 3426/2022
IA No. 1/2016
CM No. 9348/2021
IA No. 82/2013
CM No. 2101/2023

Hakim Din

.... Appellant(s)/ Petitioner(s)

Through :- Mr. Rajesh Bhushan, Advocate

V/s

Akbar Noor & Ors.

....Respondent(s)

Through :- Mr. Abhishek Wazir, Advocate

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
24.05.2023

(ORAL)

1. Through the medium of the instant revision petition filed under Section 115 of CPC, the petitioner has thrown challenge to order dated 14.07.2011 (*for short, 'the impugned order'*) passed by the court of Sub-Judge Rajouri (*for short, 'the trial court'*) in case titled as "*Hakam Din vs. Mohd. Rafiq & Ors.*".
2. The facts emerging from the petition would reveal that the petitioner herein filed a suit as plaintiff for declaration and possession against three defendants including defendant 1 namely Mohd. Rafiq.
3. The plaintiff/petitioner herein during the pendency of the suit filed an application for impleadment of the legal heirs of the defendant Mohd. Rafiq on the premise that the said defendant had died and since succession has opened up to the legal heirs of the deceased defendant in terms of Muslim law of inheritance and as such, they need to be impleaded as party to the suit.

4. The application filed by the plaintiff/petitioner herein came to be opposed by the defendants/respondents herein, *inter alia* on the grounds that the deceased defendant died on 06.12.2006 and that the plaintiff/petitioner herein was required to bring his legal heirs on record within the prescribed period of limitation and that the application being time barred as such is liable to be rejected.
5. The trial court upon considering the application (supra) filed by the plaintiff/petitioner herein, dismissed the same in terms of the impugned order holding that the suit has abated against the deceased defendant Mohd. Rafiq under Order-XXII R-4 (3) CPC.

Heard learned counsel for the parties and perused the record.

6. The fundamental question that begs consideration of this Court in the instant revision petition would be as to whether the application filed by the plaintiff/petitioner herein before the trial court was an application for impleadment of a party under Order-1 R-10 (2) CPC or else an application under Order-XXII R-4 CPC.
7. Admittedly, the plaintiff/ petitioner herein at the time of institution of the suit had impleaded the deceased Mohd. Rafiq as defendant 1. It is also an admitted fact that the application wherein, the impugned order has been passed came to be filed by the plaintiff/petitioner herein on 19.01.2009 much after the death of the deceased on 06.12.2006. It is also not in dispute that in the application (supra) impleadment of the legal heirs of the deceased defendant in his place on account of his death came to be sought by the plaintiff/petitioner herein.
8. Before proceeding further in the matter, it would be appropriate to refer to Order-1 R-10 (2), Order-XXII R-4 CPC hereunder:-

“Order-1 R-10 (2). Court may strike out or add parties:- The Court may at any stage of the proceedings, either upon or without

the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

A bare perusal of the aforesaid provision would show that the same provides for addition, deletion and substitution of the parties, to be done either upon or without an application of the either party on the fundamental principle as may appear to the Court to be just in order to enable it to effectually and conclusively adjudicate upon and settle all the questions involved in the suit.

It further emanates from the above that, only two classes of persons can be added as parties to a suit namely:-

- (i) *Necessary party i.e. a person who ought to have joined as a party and in whose absence no decree or order can be passed or;*
- (ii) *Proper party i.e. a person whose presence is necessary for complete and effectual adjudication of the questions involved in the suit.*

Furthermore, the *sine qua non* for exercise of aforesaid power by a court is that the proceedings must be alive and pending before the court and the power, being discretionary in nature has to be exercised reasonably and on sound judicial principles and before making any such order, a court has also to bear in mind well established principles, such as, that the plaintiff is *dominus litis* who has a right to choose his opponent, as also that the order of addition, deletion, substitution or transposition should not change the nature of the suit or cause of action or else interfere with the rights accrued in favour of an individual.

“Order-XXII R-4. Procedure in case of death of one of the 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 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) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it is has been pronounced before the death took place.

(5) Where-

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said Section,5, have due regard to the fact of such ignorance, if proved.”

Order-XXII R-4 (supra) deals with the cases of death of the defendant/s and provides that where one of the two or more defendant dies and right to sue does not survive against the surviving defendant/s alone, or where the sole surviving defendant dies and a right to suit survives, on an application being made, the Court will make legal representatives of the deceased defendant a party and proceed with the suit.

For invoking the provisions of R-4 of Order-XXII (supra), the following conditions must be fulfilled:-

(i.) The sole defendant or one of the several defendants must have died;

(ii.) The right to suit must have survived;

(iii.) Such right must not have survived against the sole surviving defendant or defendants alone.

It is significant to mention here that for maintaining an application under Order-XXII R-4 for bringing on record legal heirs of a deceased

defendant, the code has not prescribed any particular format. The only requirement is that the application must be in writing and should be in the language of the Court supported by an affidavit, though non filing of an affidavit is a curable irregularity. The application must contain the names of the legal representatives of the deceased defendant and upon entertaining such an application, the Court must issue notice to the proposed legal heirs/representatives of the defendant for affording them an opportunity of hearing and thereafter make an appropriate order either grant the application or refuse the same. It is significant to note here that if such an application is filed wherein a suit has abated, the same can also be treated as an application for setting aside of abatement, in that, the procedural provisions of Order-XXII CPC have been held to be procedural in nature and to be construed liberally to advance substantial justice. It also needs to be mentioned here that on the death of the defendant till his legal heirs are brought on record, the suit/appeal remains in a state of suspense and if a court proceeds with the matter that carries no legal effect.

9. Thus, what emerges from the above is that the ambit and scope of Order-1 R-10 (2) and Order-XXII R-4 CPC is totally different, while Order-1 R-10 (2) enables the Court to add, substitute or strike down a person impleaded as party to the suit, Order-XXII R-4 on the other hand requires the plaintiff to bring legal heirs/representatives of a deceased defendant on record. Therefore, where a case is covered by Order-XXII R-4, the provisions of Order-1 R-10 (2) stand excluded on the well known principle **“general words do not derogate special provisions”**. Indisputably the deceased defendant 1 died on 06.12.2006 and the said fact of death of defendant 1 was never brought to the notice of the trial

court by the counsel for the said deceased defendant, so much so, the trial court proceeded with the trial of the suit, though, it was incumbent and obligatory upon the counsel for the deceased defendant 1 to communicate the death of the said defendant to the trial court under in terms of provisions of Order-XXII R-10-A CPC which for convenience and reference is extracted and reproduced hereunder:-

“Order-XXII R-10-A. Duty of pleader to communicate to Court death of a party: - *Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.”*

A bare perusal of the aforesaid provision would show that the same is salutary in nature not being an empty formality. The ambit and scope of the said rule has been dealt with and deliberated upon by the Apex Court in case titled as **“Perumon Bhagvathy Devaswom vs. Bhargavi Amma (Dead) by LRs & Ors.”** reported in **(2008) 8 Supreme Court Cases 321** wherein, at Para 17, following has been laid down:-

17. “Rule 10-A of Order 22 casts a duty on the counsel for the respondent to inform the court about the death of such respondent whenever he comes to know about it. When the death is reported and recorded in the order-sheet/proceedings and the appellant is notified, the appellant has knowledge of the death and there is a duty on the part of the appellant to take steps to bring the legal representative of the deceased on record, in place of the deceased. The need for diligence commences from the date of such knowledge. If the appellant pleads ignorance even after the court notifies him about the death of the respondent that may be an indication of negligence or want of diligence.”

It also has been laid down by the Apex Court in series of judgments that the legislative intention of casting a burden on an advocate of a party to give intimation of the death of a party represented by him and for this limited purpose to introduce a deeming fiction of the contract subsisting

between the advocate and the deceased party so that the other party may not be taken unawares at the time of hearing of the case by springing surprise on it that the defendant/respondent is dead and that the suit/appeal has abated. The provisions of R-10-A of Order XXII have been held by the Apex Court to have been introduced in order to mitigate the hardship arising from the fact that the party to the suit or appeal may not come to know about the death of the other party during the pendency of the suit or appeal.

It has been the further consistent view of the Apex Court expressed in various judgments that besides the obligation cast upon an advocate of the deceased party to intimate the factum of death of the deceased party to the court, the provision of Order-XIII R-10-A also enjoins upon the court to give notice of such death to the other party as the word **“there upon”** appearing in Rule 10-A of Order-XXII leaves no room for doubt that on intimation received from the advocate of the deceased party, **“the court shall give notice to the other party”** suggesting that the duty on the part of the court is equally statutory in nature and has necessarily to be observed.

It is significant to note here that the provisions of Order-XXII R-10-A CPC, simultaneously does not absolve the other party from taking requisite steps for substitution, particularly when that party has the knowledge of the death of his adversary and if there is total inaction, negligence or want of bonafide on his part in bringing legal representatives of the defendant on record, despite such information and knowledge, the suit/appeal would abate and in such kind of situation, the burden would be on the opposite party to explain delay in approaching the court belatedly. Thus, when the factum of the death of

the defendant is reported and is recorded in the order by the Court, it is the duty of the other party to take steps for bringing on record the legal heirs of the defendant/s and the need for diligence would commence from the date of such knowledge.

10. Having regard to the aforesaid position and principles of law and reverting back to the case in hand as has been noticed and observed in the preceding paras, the plaintiff/petitioner herein sought impleadment of the legal heirs of the deceased defendant 1 as party in the suit on account of death of the said defendant, as such, the application filed by the plaintiff/petitioner herein cannot by any sense of imagination, said to be an application under Order-1 R-10 (2) CPC but an application made under Order-XXII R-4 CPC and since, the fact of death of the deceased/defendant 1 had never been reported by the counsel for the defendant to the trial court and consequently, the trial court has also not recorded any such fact in the record of the proceedings, thus same leads to an irresistible conclusion that the plaintiff/petitioner herein was never aware about the death of the deceased defendant 1 or else of the particular date, on which the said defendant 1 died.

11. In view of the aforesaid analysis, what emerges is that the application filed by the plaintiff/petitioner before the trial court has not been considered by the trial court having regard to the aforesaid facts and circumstances in as much as, the position and principles of law enshrined in Order-1 R-10 (2), Order-XXII R-4 & Order-XXII R-10-A of CPC. The order impugned therefore, is not legally sustainable. Resultantly, **the petition succeeds and is allowed**, as a consequence whereof, **the impugned order** dated 14.07.2011 is **set aside** and **the application filed** by the plaintiff/petitioner herein **for substitution of**

the deceased defendant by his legal representatives **shall stand allowed**. The trial court shall proceed in the matter, in accordance with law.

The revision petition along with connected application(s), if any, is **accordingly, disposed of**.

(Javed Iqbal Wani)
Judge

Jammu:
24.05.2023
Manan

Whether the order is speaking : **Yes**
Whether the order is reportable : **Yes**

