

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

R.A No.227 of 2002

Date

Order with signature of Judge

For hearing of Main case

23.05.2016

Syed Jamil Ahmed, advocate for the applicant.
Mr. Thawar Ali Khan, advocate for CDGK/KMC.
None present for Respondent No.3.

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JUDGMENT

NAZAR AKBAR.J.- This Revision application is directed against the concurrent finding of the courts below. First the learned trial Court while dismissing an application under **Order XXII Rule 4(1) CPC** filed by the applicant also dismissed Suit No.190/1994 by order dated **25.11.1998**. Then in appeal No.04/1999 the learned Additional District Judge (West), Karachi maintained the order of the trial court while dismissing the appeal by judgment dated 16.3.2002.

2. The courts below have not decided the suit on merit and therefore, I do not think that for the disposal of this Revision reproduction of facts in the judgment would be of any consequences. The impugned order of trial court dated 25.11.1998 suggests that applicant/Plaintiff has filed an application on behalf of the legal heirs of Plaintiff but he filed the said application under **Order XXII Rule 4(1) CPC**. It was also filed beyond 90 days from the date of death of applicant/plaintiff on **24.3.1995**. Learned Ist Sr. Civil Judge

(West) Karachi dismissed the application on the ground that it moved under a wrong provision of law as it should have been filed **Order XXII Rule 3 CPC**, since the Plaintiff has expired and also on the ground that it was time barred. The appeal preferred by the applicants bearing Appeal **No.4/1999** was also dismissed after long discussion on the question of limitation in filing an application under **Order XXII Rule 4(1) CPC** and also on the ground that the status of the applicant Muhammad Idress son of Muhammad Yaqoob as legal heirs of deceased Plaintiff since he had filed suit on behalf of Mst. Jamila Bano as next friend. The impugned appellate order appears to have discussed many things which include objections to the existence of very next friend, though the trial Court has not examined this issue. However, the appellate court like the trial court did not examine the provisions of **Rule 1 of Order XXIII CPC** and therefore; the order of dismissal of suit by itself was against the provisions of law. Learned Judge of the trial court, according to the counsel for the applicant and the official respondent has failed to appreciate the provisions of **Order XXII Rule 1 CPC**, which reads as follows:-

1. **No abatement by party's death, if right to sue survives.**---The death of Plaintiff or Defendant shall not cause the suit to abate if the right to sue survives.

The question of application filed by Muhammad Idrees as legal heirs should have been left to be decided by the trial court, if the respondents had any objection to the filing of such an

application by him. If said Muhammad Idrees had no locus standi to become party on the death of actual Plaintiff in the said case as legal heirs that objection should have been decided on merits after framing an issue by the trial court.

3. The most unfortunate part of this case is that this revision was filed in 2002 and a very short point was involved. On **18.11.2002** it was admitted for regular hearing in the following terms.

Counsel, inter alia, contends that while dismissing the application U/o.22 Rule 4 CPC the court could not order dismissal of the suit as the right to sue survives in favour of legal representatives of the Plaintiff whose names had been filed alongwith the plaint. Contention raised requires consideration. Admit. Notice.

On **21.3.2003** the respondent No.3 had filed objections which are available on record. The applicant was neither vigilant nor interest in disposal of the Revision involving short point at the earliest. This revision, after status quo on **10.3.2003**, remained pending for service on Respondent No.1 till **3.12.2008** when it was dismissed for non-prosecution. However, CMA No.4180/2008 was filed for recalling the order of dismissal and even notices of restoration application were not properly served on the respondents, yet it was restored on **5.5.2009** subject to cost of Rs.2000/-. Then again since no service was effected for restoration of application, none appeared for Respondent No.1 and 3. It is pertinent to mention here that respondent No.3 has not engaged any counsel for filing her objection, therefore, notices should have been served

on her for every date through intimation notice to the person of Respondent No.3. On **22.3.2016** this Revision application was dismissed second time for non-prosecution. Again application for restoration bearing CMA No.3058/2016 was filed, which was allowed in view of the personal affidavit of counsel and subject to hearing of this case today i.e 23.05.2016 at 8:30 a.m.

4. I heard learned counsel as discussed above and in view of clear legal position the dismissal of suit by all means was due to incorrect application of law. However, in view of lapse of 13 years' time, we cannot presume that the ground realities have not been changed by now. The responsibility of loss of 13 years' time is squarely on the applicant and his counsel as discussed in para-3 above, therefore, this Revision is allowed subject to payment of cost of **Rs.50,000/-** by the applicant and the case is remanded to the trial court for decision afresh on merit. The cost should be deposited by the applicant before the Nazir of the High court within **15 days** and in case of non-deposit of cost the Revision shall be deemed to have been dismissed. The cost shall be payable to respondent No.3 or her legal heirs, in case she is not alive by now. Subject to cost on remand the trial court is specifically directed to ensure that:-

- i. Before even issuing court motion notice the court should verify the status of the applicant whether he is alone lawful legal heirs of the deceased Plaintiff or not. All legal heirs verified from NADRA should be brought on record. Clear finding should be given on this point after going

through the record of the legal heirs of the deceased Plaintiff from the NADRA

ii. The trial court once satisfied that the legal heirs of the deceased Plaintiff are before the Court, Court motion notices may be issued to the respondents.

iii. After 18 years when the suit is taken again the court motion notices should be issued against the relevant private persons and each and every step should be taken for fair and lawful service of summons / notices on the private respondents.

iv. The trial court should not go for any shortcut for decreeing / dismissing the suit on account of absence of private respondents. The decision should be on merits.

v. This order should **not** be sent to the trial court unless the cost is deposited with the Nazir of this Court and such payment is duly mentioned on the covering letter to the trial court.

The revision is disposed of in above terms.

JUDGE

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