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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 9th December, 2016

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FAO(OS) 202/2016 & CM No. 25105/2016

NIRMAL JAIN AND ORS.

..... Appellants

Through: Mr.P.V. Kapur, Sr.Adv.
with Mr.Ankit Jain, Mr. Sidhant
Kapur, Mr. V.K.Nagrath and Ms.
Pratibha Sridhar, Advs.

versus

AHUJA IMPEX PVT. LTD. & ORS.

..... Respondents

Through: Mr. Anil Sapra, Sr.Adv.
with Mr. Rakesh Malhotra, Mr.
Lavnish Kumar, Ms. Piyusha Singh
and Ms. Rupali Kapoor, Advocates for
respondent No.1.

Mr. Abhijat with Mr. Nikhil Parikshit,
Advocates for respondents 2,3,5 and 6.

CORAM:

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

JUDGMENT

INDIRA BANERJEE, J.

1. This appeal is against a judgment and order dated 26.4.2016 passed by the learned Single Judge, in the application being I.A. 261 of 2016, under Order XXII Rule 4 (wrongly mentioned as Order XXII Rule 3 of the Civil Procedure Code for substitution of the Appellants as Defendants in the suit being C.S. (O.S.) 2017 of 2015 filed by the Respondent No.1, in place of the defendant No.4, who is dead.

2. By the impugned order, the learned Single Judge was pleased to convert the application filed by the Respondent No.1 under Order XXII Rule 3 as an application under Order VI Rule 17 for amendment of the plaint, allow the application and implead the Appellants as Defendants in the suit.

3. The Appellants filed the suit being C.S. (O.S.) 2017 of 2015 against M/s. Rockman Projects Ltd. impleaded Defendant No.1 and its directors, impleaded Defendant Nos. 2 to 5, for a decree of Rs.10,25,000,00/- (Rupees Ten Crore twenty five Lakhs) and other consequential reliefs. Mr. D. K. Jain, impleaded as Defendant No. 4, was already dead, when the suit was filed. The Defendant No.4 died on 13.03.2015. The suit was filed on or about 30.06.2015.

4. On or about 11.12.2015, the Plaintiff filed an application being IA No.261/2016, under Order XXII Rule 4 (wrongly stated to be under Order XII Rule 3) for substitution of the Appellants, being the heirs of the Defendant No.4 in place of the Defendant No.4. After the Appellants were served with notice of the application being I.A. 261 of 2016 under Order XXII Rule 4, the Appellants entered appearance through their lawyer Shri Ankit Jain on 5.4.2016, being the date mentioned in the notice for appearance.

5. On 5.4.2016, the learned Joint Registrar granted two weeks' time to the Appellants time to file their reply to the said application. The Appellants contend that the Appellants were only served with a copy of the application. No copy of the plaint was served on the Appellants.

6. In course of hearing before the learned Joint Registrar, the learned lawyer engaged on behalf of the Appellants requested the learned lawyer appearing on behalf of the plaintiff to furnish him with a complete copy of the plaint.

7. According to the Appellants, the Appellants were to file their reply within 26.4.2016, but could not do so, since the Appellants had not been served with a copy of the plaint, complete with the annexures thereto.

8. The records reveal that the application being I.A. 261 of 2016 was due to be listed before the learned Joint Registrar on 15.07.2016. However, on 26.4.2016 the suit was listed before the learned Single Bench pursuant to the directions of the learned Joint Registrar.

9. Order XXII Rule 4 of the Civil Procedure Code provides as follows

“4. Procedure in case of death of one of several defendants or of sole defendant.- (1) Where one of the 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 has been pronounced before 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 there for 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.]”

10. Order XXII Rule 4 contemplates the substitution of the legal heirs of the defendant, when one of two or more Defendants or the sole Defendant dies during the pendency of the suit and the right to sue survives. An application under Order XXII Rule 4 has to be filed within the period prescribed under Article 120 of the Schedule to the Limitation Act 1963, that is 90 days from the date of death of the defendant. Of course the delay in making an application for substitution may be condoned under Section 5 of the Limitation Act, if there is sufficient cause shown for the delay.

11. In ***Puran Singh and Ors Vs. State of Punjab and Others*** reported in (1996) 2 SCC 205, the Supreme Court held as under:-

4. *A personal action dies with the death of the person on the maxim action personalis moritur cum persona. But this operates only in a limited class of actionex delicto, such as action for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the granting of the relief would be nugatory (Girja Nandini Devi v. Bijendra Narain Choudhury). But there are other cases where the right to sue survives in spite of the death of the person against whom the proceeding had been initiated and such sright continues to exist against the legal representative of the deceased who was a party to the proceeding. Order 22 of the Code deals with this aspect of the matter. Rule 1 Order 22 says that the death of a plaintiff or defendant shall not cause the suit to abte if the right to sue survives. That is why whenever a party to a suit dies, the first question which is to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which is extinguished with the death of the person concerned and does not devolve on the legal representatives or successors, then it is an end of the suit. Such suit, therefore, cannot be continued. But if the right to sue survives against the legal representative of the original defendant, then procedures have been prescribed in Order 22 to bring the legal representative on record within the time prescribed. In view of Rule 4 Order 22 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 dies and the right to sue survives, the Court, on an application being made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit. If within the time prescribed by Article 120 of the Limitation Act, 1963 no application is made under sub-rule (1) of Rule 4, the suit shall abate as against the deceased defendant. This rule is based not only on the sound*

principle that a suit cannot proceed against a dead person, but also on the principle of natural justice that if the original defendant is dead, then no decree can be passed against him so as to bind his legal representative without affording an opportunity to them to contest the claim of the plaintiff. Rule 9 of Order 22 of the Code prescribes the procedure for setting aside abatement.”

12. Where a defendant dies during the pendency of the suit, but the right to sue survives, the legal representative of the deceased Defendant may be substituted and they may contest the suit. In this case, it is patently clear from the Plaint itself that the Defendant No.4 was already dead, when the suit was filed. There can be no suit if there is no defendant in existence. The suit is a nullity as against the defendant No. 4. There being no suit against defendant No. 4, in the eye of law, there would be no question of substitution of his heirs under Order XXII Rule 4 of the Civil Procedure Code, as held by a learned Single Bench of this Court in Shri Pratap Chand Mehta vs. Smt. Krishna Devi Mehta reported in AIR 1988 Del 267. This proposition also finds support from the judgment of a Division Bench of the High Court of Jammu and Kashmir in Ali Mohd. Khan vs. Vijay Tulsi reported in AIR 1986 Jammu and Kashmir 26.

13. The attention of the learned Single Bench was duly drawn to the fact that the Plaintiff was already dead at the time when the suit had been filed. A suit against a dead person is a nullity. There can be no question of substitution under Order XXII Rule 4, when the Defendant was already dead at the time of institution of the suit and/or in other words there was no Defendant No.4 in existence.

14. The learned Single Bench observed that strictly speaking the application might not be maintainable under Order XXII Rule 4 (wrongly typed Order XXII Rule 3) since the Defendant No. 4, Mr. D.K. Jain did not die during the pendency of the suit.

15. The learned Single Bench, however, proceeded to treat the application under Order XXII Rule 4 as one under Order VI Rule 17 for amendment of the plaint and allowed the same. The relevant part of the impugned order is extracted herein below for convenience:

“Having heard learned counsel, I am inclined to allow this application. Though, strictly speaking, the present application may not be maintainable under Order XXII Rule 3 CPC since the said defendant No.4/Mr.D.K. Jain did not die during the pendency of the suit and was dead at the time of filing of the suit, one cannot forget that the rules or procedure should not be permitted to come in the way of the Court in proceeding with the progress of the case. Procedural rules, as is well known, are handmaids of justice and are meant to advance the cause of justice. By not entertaining the present application, and requiring the plaintiff to file an application under Order VI Rule 17 CPC, the proceedings in the suit would immensely get delayed. The present application itself can be considered as one under Order VI Rule 17 CPC for amendment of the plaint. No prejudice is caused to the defendants if this procedure is adopted.

So far as the submission that the suit against the legal representatives of defendant No.4 is barred by limitation is concerned, the said objection can be taken in the written statement by the defendants concerned and cannot be gone into, while dealing with the present application.

Accordingly, the application is allowed and the legal representatives of Mr. D.K.Jain are impleaded as party defendants in place of Mr.D.K.Jain as defendants

No. 4(a) 4(b), 4(c) and 4(d) respectively. The plaintiff shall file the amended memo of parties within a week.

The application stands disposed of.”

16. The learned Single Judge proceeded on the basis that an application for substitution of the heirs of the Defendant could be treated as an application for amendment of the plaint by addition of parties, without allowing the rules of procedure to delay the suit.

17. Order I Rule 10 (2), Order I Rule 10 (4) and Order I Rule 10 (5) provide as follows:

*“(2) **Court may strike out or add parties.** – The court may at any stage of the proceedings, either upon or without the application or 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.*

*(4). **Where defendant added, plaint to be amended** – Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.*

*(5) **Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1822), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.”***

18. The question is whether the heirs of the Defendant No. 4 were either necessary or proper parties or whether their presence was

necessary for effectual and complete adjudication of the questions involved in the suit.

19. On the face of the averments in the plaint, the Appellants had nothing to do with the Defendant No.1 Rockman Projects Limited. The plaint discloses no cause of action whatsoever against the Appellants.

20. As observed above, the Appellants are the heirs of Shri D.K. Jain, an erstwhile director of the Defendant No.1, who had died before the suit was filed. In paragraph 3 of the plaint it is pleaded that the Defendant had died in March 2015, but the Plaintiff was not aware of the details of the legal heirs of the Defendant No. 4. Even though it is pleaded in the plaint, that the Plaintiff had impleaded the Defendant No.4's wife as his legal heir, the wife had not in fact been impleaded Defendant.

21. In paragraph 5 of the plaint, it is pleaded that the suit for recovery of money on the strength of a memorandum of understanding dated 26.4. 2010. It is pleaded that the Defendant No.1 and thereafter Defendant No.2 admitted liability. Defendant No. 2 gave undertakings before the Company Law Board to pay Rupees Four Crores on or before 30.6.2012.

22. It would perhaps be pertinent to set forth Paragraph 7 of the plaint

“7. That the defendant No.1 is a Public Limited Company incorporated under the Companies Act, 1956. Defendant No.2 and 5 are/were the Directors of the Defendant No.1 Company and Defendant No. 2 to 5 are/were the person responsible for the day to day affairs of the Defendant No.1 company. They are equally liable to meet the liabilities of Defendant No.1

Company in this suit as they have personally guaranteed the debt to the Plaintiff Company, through MOU.”Furthermore all the Directors of the Company who is hereinafter be called as Defendants committed fraud and by their improper conduct to evade obligations imposed by law and in which situations the corporate veil has to be disregarded/lifted, according to the provisions of the Companies Act, 1956. Further stated that Directors of the Defendant No. 1 Company in wider sense means that Directors who were holding the position of the Director in the Defendant No. 1 Company in past and further newly appointed Directors of the Defendant No. 1 Company who are presently looking after the affairs of the Defendant No. 1 Company. Further more one of the Director has paid part of the settled amount as such this kind of voluntary payment by one of the Director entitled the plaintiff to proceed against the Directors.

Besides this it is submitted that all the Defendants used the company in order to commit the fraud and despite entering into arriving at settlement and filling the same before various Ld. Courts and this amount have not been shown in the accounts books of the company which would demonstrate the fraud committed by them which is also corroborated by other documents. Pertinently three Directors i.e. Defendant no. 2, 4 & 6 are stated to be related to each other who have misappropriated the funds of the company in order to deprive the Plaintiff from realization of its dues.

That all Defendants are jointly and severally liable to the plaintiff. The all the directors are personally liable to clear the dues of the plaintiff as they have stood as guarantors for discharge of such a liability. That all the Defendants have played fraud firstly by inducing the plaintiff to invest funds on non existing projects or on the basis of forged documents, thereby directing funds of Defendant No. 1 to their personal accounts, for personal use, as such corporate veil is to be lifted. Defendants used the corporate personality is being bluntly used as a

clock for fraud and improper conduct. That defendant no. 2 to 6 are guilty of malfeasance and misfeasance. That Defendants personally undertook to clear the dues, which itself suggest they are liable for the debt.”

23. Summarised in a nut shell, it is alleged in the plaint that the Defendants Nos. 2 to 5 are/were persons responsible for day to day affairs of the Defendant No.1 and liable to meet the liabilities of the Defendant No.1 as they had personally guaranteed repayment of debt to the Plaintiff Company through the MOU. However, a careful reading of the plaint reveals that it is the case of the plaintiff that the Defendant No.2 along with the Defendant No.1 acknowledged certain liabilities and guaranteed repayment of debt. The allegations against the other defendants and in particular, the Defendant No.4 are vague, sweeping allegations, devoid of any particulars.

24. The MOU has been annexed to the plaint and is thus, part of the plaint. Perusal of the MOU shows same was not signed by defendant No.4, predecessor in interest of the appellants.

25. It is well settled that a company is an independent juristic entity distinct from its directors and shareholders. A director cannot be held liable for the dues of a company, in the absence of any express contract of guarantee executed by him. Since Defendant No.4 did not sign the MOU, as noted above, there was on the face of the averments in the plaint, read with its annexures which are part of the plaint, no contractual obligation on the Defendant No.4, which could be enforced against the appellants.

26. In the plaint, it is also vaguely alleged that all the directors made misrepresentations, committed fraud by the improper conduct; evaded

obligations imposed by law and are guilty of malfeasance and misfeasance. Any claim on account of acts of fraud, misrepresentation, improper conduct, malfeasance and misfeasance are personal to the concerned Defendants. The heirs of the Defendants or any of them cannot be made liable for the tortious and/or criminal acts of their predecessors in interest. This proposition finds support from the judgment of a Division Bench of this Court in ***Bhai Analijit Singh Vs. Mitsui & Co. Ltd. & Ors.*** reported in 2009 (108) DRJ 217. In this case of course there was no claim in the suit for damages for tort.

27. Moreover, as argued by Mr. Kapur, Senior Advocate, appearing on behalf of the appellant, the application being IA No.261/2016, was directed to be listed on 15th July 2016. The application was not in the list on 26th April, 2016. It however, appears that the attention of learned Single Judge was not drawn to the fact that the application was due to be listed on 15th July, 2016. The Court Master attached to learned Single Bench ought to have drawn attention of learned Single Judge to the fact that the suit had been listed for certain directions, and the application was not to be taken up on that date.

28. There can be no doubt as observed by learned Single Bench, the rules of procedure are, “handmaids” of justice, meant to advance the cause of justice, and not to defeat or delay justice. We would not interfere with an order only on the technical ground of the same having being passed in an application taken out of turn. The anxiety of the learned Single Bench in expediting the hearing of suit is appreciable, considering the huge pendency of arrears. At the same time, a person against whom there is no cause of action, a person who is neither necessary nor a proper party, and whose presence is not necessary for

adjudication of issues involved in the suit ought not to be impleaded for the asking, on the basis of crafty pleadings devoid of substance.

29. The impugned order under appeal has been passed without at all considering whether the plaintiff respondent No.1 has any cause of action against the appellant, and without considering whether the appellants were either necessary or proper party to the suit whose presence was necessary for effective adjudication of issues raised in the suit.

30. It would be grossly unfair and unjust on the appellants, to have to defend a suit which *ex-facie* does not disclose any cause of action against them. The plaintiffs have not made out any right to sue the appellants. The addition of the appellants as parties to the suit would drag them into frivolous and vexatious litigation against them.

31. For the reasons discussed above, the appeal is allowed and the order of the Single Bench is set aside.

INDIRA BANERJEE, J

ANIL KUMAR CHAWLA, J.

DECEMBER 09, 2016/n