

IN THE HIGH COURT OF SINDH AT KARACHI

Ist Appeal No. 55 of 2013

**Homepack Freight International
& another ----- Appellant**

Versus

Saudi Pak Leasing Company Ltd. -----Respondent

Date of hearing: 22.09.2015

Date of judgment: 15.10.2015

Appellant: Through Khawaja Shamsul Islam Advocate.

Respondent: Through Mrs. Saima Faiz Durrani Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through instant appeal, the appellant has impugned Judgment dated 18.7.2013 and Decree dated 1.8.2013 passed in Suit No. 96 of 2007 by the Banking Court No. II at Karachi, whereby, the Suit filed by respondent has been decreed against all the defendants, jointly and severally in the sum of Rs. 32,64,213/- together with cost of funds from the date of default till realization of the entire decretal amount, including cost of Suit and repossession of the leased assets.

2. Briefly the facts as stated are that respondent had filed a Suit for recovery against appellant No. 1 (a Proprietary concern) as well as its proprietor Mst. Zubaida Abubakar since deceased, and Mr. Aijaz Ahmed Khawaja, for recovery of Rs. 4,740,776/- as well as leased assets, wherein, after issuance of summons, it transpired that Mst. Zubaida Abubakar the defendant No. 2 in the Suit, had expired on 5.9.2006, whereafter, the appellant No. 2 being the surviving legal heir of Mst. Zubaida Abubakar, was impleaded as a defendant on an application filed on behalf of the respondent Bank. The appellant No. 2 thereafter filed a leave to defend application, wherein it was contended that the lease finance facility was availed by Mr. Aijaz Ahmed Khawaja the defendant No. 3 in the Suit, by forging the signatures of the proprietor of appellant No.1, namely Mst. Zubaida Abubakar, who had since expired before

institution of the Suit. Such application for leave to defend was dismissed on 16.11.2010; whereafter the Suit of respondent has been decreed vide impugned Judgment.

3. Learned Counsel for the appellant has contended that since the proprietor of appellant No. 1 Mst. Zubaida Abubakar, had expired much before institution of the Suit, the learned Banking Court was not justified by impleading the legal heirs of the said defendant; that the Suit itself was filed by impleading the defendant No. 1 in the trade name of Defendant No.2 M/s Homepack Freight International, being admittedly a proprietorship concern, hence the Suit was liable to be dismissed for mis-joinder and non-joinder of the parties; that the actual borrower was defendant No. 3 in the Suit, who was an employee of appellant No.1, and had obtained the lease finance facility by forging the signatures of deceased wife of appellant No.2; that the learned Banking Court had misdirected itself by impleading her only surviving legal heir, the present appellant No.2, in the Suit proceedings, as neither he was the borrower nor a guarantor and therefore, the Suit could not have proceeded against appellant No. 2; that even otherwise and without prejudice, this was a fit case for grant of unconditional leave to defend, and judgment if any, could have been passed only after recording of evidence of the respective parties; that under the law the leased assets cannot be inherited by the legal heirs of a deceased person and therefore the Suit stood abated against Defendant No.2 and her legal heirs are not liable to pay the decretal amount. In support of his submissions the learned Counsel has relied upon the case of *Millwala Sons Limited V. M/S Jaymissco and another (2009 CLD 1157)*, *Meezan Bank Limited V. M/S Focus Apparels (Pvt.) Limited and 6 others (2013 CLD 2138)* and *Mst. Fayyazi Begum and 6 others V. Ali Hassan and another (2009 CLD 1476)*.

4. Conversely the Counsel for respondent has contended that the proprietor of appellant No.1 (Defendant No.2 in Suit) had entered into a lease agreement dated 19.12.2003, whereas, she had also executed a personal guarantee; that the allegation in respect of forgery in the signatures are belied by the fact that the deceased proprietor of appellant No.1 used to sign bank documents in Gujarati language, which fact was confirmed by the trial Court by summoning the signature cards from the concerned bank; that though the borrower had expired before filing of Suit but as soon as it came to their knowledge, the legal heir of the deceased was impleaded as a party in the Suit.

5. We have heard both the learned Counsel and perused the record. By consent instant appeal is being finally disposed of at Katcha peshi stage. It appears that insofar as appellant No.1 is concerned, it is in fact the trade name of the proprietary concern of deceased Mst. Zubaida Abubakar, whereas, the defendant No.3 in the Suit, Mr. Aijaz Ahmed Khawaja was working with her as a Manager, and some equipments were leased through respondent and on default in repayment of leased rentals, the respondent had initiated recovery proceedings by filing Suit No. 96 of 2007 before the Banking Court No.II at Karachi. After issuance of summons it transpired that the proprietor of appellant No.1, Mst. Zubaida Abubakar, in whose name the lease finance facility was availed, had expired even before filing of the Suit, whereafter on an application the present appellant No.2 being the only surviving legal heir of the deceased was impleaded as a defendant in the Suit. The appellant No.2 thereafter filed a leave to defend application which was dismissed by the learned Banking Court. The learned Banking Court after dismissing the leave to defend application filed by appellant No.2, has passed judgment and decree jointly and severally against all the defendants including appellant No.2. The main controversy which needs to be addressed by this Court is that whether in case of leased assets, any recovery proceedings are maintainable against the legal heirs of a deceased borrower, who had expired even before filing of Suit for recovery, and whether in such circumstances, the Banking Court was justified in dismissing the leave to defend application filed by the legal heir of the borrower.

6. Insofar as arraying defendant No.1 in its trade name as a proprietorship concern of deceased defendant No.2, is concerned, it would suffice to observe that though the trade name by itself has no legal status, as it is neither a partnership concern nor a company incorporated, hence cannot *sue* in the trade name, however, in terms of Order 30 Rule 10 CPC, it can be *sued* in the trade name. Since in the instant matter, the proprietor of such trade name had expired much before institution of Suit, no further proceedings are valid against such trade name of the defendant and it is only through the legal heirs of the deceased that the Suit can proceed, however, subject to and in accordance with law.

7. Insofar as impleading legal heir(s) of defendant(s) is concerned, Order 22 Rule 4 CPC provides a complete mechanism for bringing the legal heirs of defendants on record. In cases where a person who is a sole

defendant in the Suit, has expired even before filing of such Suit, the settled law is that such Suit is non-existent, still born and a nullity in the eyes of law, and such defect cannot even be cured by bringing on record the legal heirs of the deceased, notwithstanding that any Court has even granted such permission for bringing them on record. In such situation, the only option available for a plaintiff is to file a fresh Suit against the legal heirs, if the cause of action survives, obviously subject to and in accordance with law. Reliance in this regard may be placed on a Division Bench judgment of the Lahore High Court in the case of **Ch. Muhamamd Tufail Khan alias Tufaul Muhammad Vs. Zarai Taraqiati Bank Ltd., (PLD 2007 Lahore 180)**. However, since in the instant case, the deceased was not the sole defendant, as such the Suit could continue against the other defendants validly, including the legal heirs if brought on record in accordance with law and permission of the Court. In the instant matter, though the legal heir i.e. appellant No.2 has been joined in the proceedings, however in such circumstances, we are of the view that the learned Banking Court was not justified in refusing to grant unconditional leave to defend to the legal heir of the deceased defendant No. 2, who should have been provided an opportunity to defend and to bring all facts on record, and thereafter to examine that as to whether a valid decree could be passed against him and to further examine that as to whether the legal heir has inherited any assets from the deceased or not.

8. In the instant matter insofar as joining of legal heirs of deceased and passing of judgment and decree as well as execution proceedings are concerned, it is pertinent to mention that this is not a case of mortgage of any property of the deceased, and, is rather a lease finance of assets, which are still plying on the road, whereas, the respondent has failed to take any action for repossessing the same. If this would have been a case of mortgage of property of the deceased, then on default, the legal heirs, in whom the property would have devolved, could have been arrayed as defendants, as the Financial Institution / respondent would have had a lien on such property, whereas, the legal heirs themselves would have claimed inheritance in respect of such property. In the present case there is no such situation, whereas, leased assets do not devolve on to the legal heirs under the law. As per clause 7.1 of the lease agreement the leased assets are to be registered in the name of respondent, hence, even otherwise there is no question or issue of devolving such assets to the legal heir of the borrower. Further, the appellant No.2 present in Court

had categorically stated that he is not claiming any right or interest in the leased assets and the respondent may take repossession of the same, which are in use of and under control of defendant No.3 in the Suit who is also a guarantor. In the circumstances, we are of the view, that in such matters it is always appropriate to grant unconditional leave to defend, once the legal heirs have been brought on record. This appears to be a consistent and settled view of the Apex Court insofar as joining of legal heirs of a defendant in Banking Case is concerned. Reference in this regard may be made to the case of ***Hafiz Brothers (Pvt) Ltd., Vs. Pakistan Industrial Credit and Investment Corporation Ltd., (2001 SCMR 1)***. In that case an Ex-parte decree was passed against the appellants and the case of appellant No. 5(i), (ii) and (iii) was that execution proceedings are not valid against them as the said Mst. Inayat Begum had expired before the institution of Suit and according to the provisions of Order XXII, C.P.C., a Suit against a dead person is a nullity and no decree can be passed against such person. The High Court of Sindh while hearing appeal in terms section 9 of the Banking Tribunals Ordinance (No. LVII of 1984) had remanded the matter to the Banking Tribunal by modifying the judgment and decree to the extent of deceased Mst. Inayat Begum. The said order was impugned before the Hon'ble Supreme Court and the Apex Court while declining leave to appeal observed as under:

8. There is no cavil to the proposition that the institution of legal proceedings against dead person is of no avail to the concerned litigant. The learned High Court rightly came to the conclusion that the suit of PICIC against deceased-Mst. Inayat Begum was incompetent and, therefore, a nullity in law. However, the remand of the matter by the High Court to the Tribunal "...with the directions to modify the judgment and decree by deleting the name of Mst. Inayat Begum and to examine whether the heirs of deceased Mst. Inayat Begum were validly joined and a valid decree could be made against them..." takes good case [care] of the petitioners in that behalf. (Underlining is ours)

9. In view of hereinabove facts and circumstances of the instant case, we are of the view that insofar as the impugned judgment and decree to the extent of the appellant No.2 is concerned, the same cannot sustain and is hereby set aside and the matter is remanded to the learned Banking Court with directions to examine as to whether a valid decree could be passed against the legal heir of deceased borrower who has been joined in the present proceedings and once the respondent is able to establish that the appellant No.2 has inherited any assets from the

deceased, then would pass a decree and that too not for an amount exceeding such inherited assets. Insofar execution proceedings against defendant No.3 / guarantor in the Suit, namely Mr. Aijaz Ahmed Khawaja, are concerned, they shall continue and the leased assets shall be repossessed by the Banking Court in accordance with law and the agreement between the parties.

10. Appeal stands allowed partly in the above terms.

Dated: 15.10.2015

JUDGE

JUDGE

ARSHAD/