

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.21651 of 2021

Mst. Parveen Akhtar, etc

Versus

Noor Muhammad, etc

S.No. of order/ Proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel, where necessary
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01.04.2021

Mr. Manzoor Hussain Khan, Advocate.

The petitioners are the daughters of Muhammad Bukhsh, who was one of the defendant alongwith respondents No.2 to 9 in a suit instituted by respondent No.1 (hereinafter referred "respondent") seeking recovery of possession of a house.

2. The suit was resisted by the respondents/defendants, who submitted their written statement wherein they controverted the assertions contained in the plaint.

3. From the divergent pleadings of the parties, multiple issues were framed by the learned Civil Judge to the following effect:-

1. Whether the house in question belongs to the plaintiff and he has given to the defendants on temporary basis? OPP.
2. Whether the plaintiff is entitled to get possession of house in question from defendants, as prayed for? OPP.
3. Whether the plaintiff is not owner of the house in question ?OPD.
4. Whether the plaintiff has no cause of action and locus standi to file this suit ?OPD
5. Whether suit of plaintiff is not maintainable in its present form?OPD.
6. Relief.

4. After framing of issues evidence of both the suits was recorded and finally suit was dismissed through judgment and decree dated 8th May 2018. The "respondent" feeling

aggrieved preferred an appeal before the learned Additional District Judge Jhang. The appeal was however, accepted vide judgment and decree dated 25th August, 2020. The petitioners then moved an application under Section 12 (2) of the Code of Civil Procedure (V of 1908) (hereinafter referred as “CPC”) seeking annulment of the judgment and decree on the ground that pending appeal their father namely Muhammad Bukhsh had though passed away but they were not impleaded in his place and the “respondent” thus has obtained the decree through mis-representation. The application was resisted by the “respondent” who submitted his reply. The application was finally dismissed through order dated 04.03.2021, which is now impugned in the instant petition under Section 115 of the Code *ibid*.

5. Learned counsel for the petitioners contended that father of the petitioners died during the pendency of the appeal but that fact was not brought in the notice of the court which resulted into passing of judgment and decree dated 25th August, 2020. He added that the petitioners, being legal representatives of the deceased were necessary and proper party but they were not impleaded and as such judgment passed by the learned Additional District Judge cannot sustain. Learned counsel emphasized that on attaining the knowledge, the petitioners moved an application under Section 12(2) CPC but it has been dismissed in a summary manner without even framing of issues, which is highly unwarranted under the law.

6. Heard. Record perused.

7. The suit for recovery of possession was instituted by the “respondent” with the contention that he purchased land measuring 4 ½ Marla through registered sale deed bearing No.3320 dated 18th October, 1977 and registered sale deed bearing No.1220 dated 16th March 1978. It was averred in the plaint that at the time of purchase, it was in the shape of vacant plot, whereafter the “respondent” constructed a

residential house upon the same. As per averments contained in the plaint the father of the petitioners demanded the house for temporary residence. Whereafter he started residing there alongwith respondents No.2 to 9 but later on they refused to vacate the same. Suit was initially dismissed by way of judgment dated 08th May 2018, however, in appeal preferred by the “respondent”, the learned Additional District Judge proceeded to decree the suit while allowing the appeal. It is an admitted fact that the father of the petitioners was one of the respondents in the appeal, who as per claim of the petitioners has died, pending appeal. It is the stance of the petitioners that the factum of death of their father was not brought in the notice of the Court by the “respondent” purposely and thus he succeeded in obtaining a decree in his favour at the back of the petitioners.

8. It clearly evinces from the record that Muhammad Bukhsh was not the only respondent in the appeal but he was also accompanying respondents No.2 to 9 in the array of respondents. All the other respondents werenot only closely related to him but they were duly represented by Mansoor Hussain Khan Balouch, Advocate. It was thus not only the duty of the “respondent” to bring in the notice of the Court the alleged factum of death of Muhammad Bukhsh but the respondents as well as their counsel were bound to apprise the court but they have also remained mum to this effect, so no question of fraud and misrepresentation arises on the part of the “respondent” at all.

9. Order XXIIof “CPC”deals with the death, marriage and insolvency of parties pending proceedings. Rule 4 provides the procedure in case of death of one or several defendants or sole defendant which reads as under:-

4. *Procedure in case of death of one of 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 on receipt of an intimation

of the death of such defendant from the person nominated by him for that purpose under rule 13, Order VIII 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) When within the time limited by law no application is made or intimation is given under sub-rule (1), the Court may proceed with the suit, and any order made or judgment pronounced in such suit shall, notwithstanding the death of such defendant, have the same force and effect as if it had been pronounced before the death took place.

(4) It shall not be necessary to substitute the legal representatives of any such defendant who has failed to file a written statement or has failed to appear and contest the suit at the hearing; and judgment may in such case be pronounced against the said defendant notwithstanding his death, and such judgment shall have the same force and effect as if it had been pronounced before his death took place.

10. By virtue of Rule 11, Order XXII has been made applicable to the appeals *mutatis mutandis*. From the analysis of the above referred provisions of law it becomes crystal clear that in case of death of one of the respondent in the appeal, if the right to sue survives against the surviving respondents, non-implementation of legal representative of deceased respondent would have no adverse bearing on the merits of the appeal. It is trite law that failure to bring on record legal heirs of dead party in the pending proceedings would not be fatal to the said proceedings unless it causes some serious prejudice to them. Guidance in this respect can be sought from the case of *MIRAJ DIN and 56 others vs. EVACUEE TRUST PROPERTY BOARD, LAHORE and others (PLD 2004 Supreme Court 430)*, *BASHIR AHMAD through L.Rs. vs. MUHAMMAD HUSSAIN and another (2010 SCMR 822)* and *Haji ALI*

MUHAMMAD and others vs. MIR AHMED KHAN and others(2000 MLD 435).

11. Adverting to the contention of the learned counsel for the petitioners that the application under Section 12(2) of “CPC” was decided without framing of issues, suffice to observe that it is not necessary for the Court to frame issues in every such application for deciding its fate. Court is vested with the powers to decide the application even without framing of issues if it is of the opinion that framing of issues is not necessary. Reliance in this respect can be placed on Mrs. AMINA BIBI through General Attorney vs. NASRULLAH and others(2000 SCMR 296).

12. Leaving aside the above discussion, it is observed that application under Section 12(2) of “CPC” was highly misconceived and ill-founded, as the case of the petitioners even at the face of it does not come within the purview of Section 12(2) of “CPC”. The petitioners should have availed remedy under Order XXII Rule 9(2) of “CPC” but even then if we treat the application of the petitioners under the said provision of law that too was not maintainable in the light of principle laid down in the judgments referred here-in-above.

13. The nutshell of above discussion is that the petitioners have failed to point out any illegality or material irregularity in the impugned order warranting exercise of revisional jurisdiction, as contemplated under Section 115 of “CPC”. This petition thus fails and is **dismissed in limine.**

(MIRZA VIQAS RAUF)
JUDGE

APPROVED FOR REPORTING

JUDGE