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ORDER XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

1. No abatement by party's death if right to sue survives.--The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

COMMENTS

Abatement of suit. Where right to sue survives to legal heir after plaintiffs death under the provisions of O. XXII, R. 1, C.P.C. the suit will not abate and under O. XXII, R. 2, the names of the surviving plaintiffs will be entered in the plaint. [PLD 2000 Kar. 280]. Legal Representative of deceased cannot adopt any instance which is at variance with the position taken by deceased himself. [2007 MLD 304]

Right to sue. Where deceased was a respondent in the appeal, the appellant in no way is aggrieved by virtue of acceptance of application for impleading the respondent as party as son of deceased. [2000 CLR 1411].

Application to suits only. Provisions of O. XXII of the Code and rules thereunder, cannot be attracted to proceedings on applications either for restoration of suit or for restoration of application for restoration of suit dismissed in default. [PLD 1981 AJ&K 1(2)].

Application to revision. The provision of O. XXII are not applicable to revision lodged in High Court. [1987 CLC 229].

Application to third party. Sale of property confirmed in favour of third party/intervenor under preliminary decree and as such valuable rights created in his favour. On death of third party, Court has ample power under S. 151 of the Code to substitute legal representatives of intervenor so that order passed by Court qua sale of property in his favour could be fully complied and given effect to. [1984 CLC 2851].

Suit against dead person. Suit against dead person is nullity in the eyes of law. [PLD 2003 Lah. 804]. Such rule, however, would not be applicable where the suit had been instituted against more than one defendants and one of them was dead at the relevant time. [PLD 2003 Lah. 615].

Appeal. No appeal lies against an order simply recording an abatement whereas an appeal will lie against an order of the so-called "total abatement". [PLD 1965 S.C. 651].

2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.--Where there are more

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plaintiffs or defendants than one, and any of them dies and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

COMMENTS

Legal representatives. Legal representative who can be impleaded as party after death of plaintiff would be a person who had some interest in estate of the deceased. Such person can be a legal heir in someone else interested in maintaining his claim. [2000 CLC 1267].

Azad Jammu and Kashmir. Shares of Muslim heirs being ascertainable under Muslim Law, appeal would abate only to the extent of a share and not in toto. Abatement of suit or appeal for non-impleading of legal representative in toto would only occur if adjudication upon disputed share of legal representative is not possible. [1999 MLD 1193].

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.--(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, ¹[or on receipt of an intimation of the death of such plaintiff from the person nominated by him for that purpose under Rule 25, Order VII] or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

²[(2) Where within the time allowed 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 plaintiff, have the same force and effect as if it had been made or pronounced before the death took place.]

COMMENTS

Section 5, Limitation Act. Provision of S. 5, Limitation Act 1908 is applicable. [2000 MLD 702].

Appeal against dead person. Non-impleading of legal heirs of such dead person does not abate the suit and the Court is fully empowered to pass judgment and decree despite the same. [2000 MLD 435].

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, ³[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.

⁴[(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.]

⁵[(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.]

COMMENTS

Applicability. Provisions of Order XXII, Rule 4 of CPC are not applicable to revision petition rather same were applicable to suits and appeals only. [PLJ 2013 Lahore 498]

Right in property. Right in property not personal right of action, cannot abate, it survives and devolves on the legal heirs of the party concerned. [2009 CLC 413].

Compromise affected by deceased. Where deceased had conceded claim of plaintiffs in his written statement there was nothing left for his legal heirs to agitate against. [1988 CLC 973]

Order not appealable. Order allowing application to implead legal heirs of deceased defendant is not appealable. [1988 MLD 2258].

Review. Appeal decided without notice to heirs of deceased, order reviewed to hear appeal afresh with due notice to legal heirs. [1988 SCMR 350].

3. Inserted by Ordinance, XII of 1972.
4. Subs. by Ordinance, XII of 1972.
5. Added by Ordinance, XII of 1972.

Revision. In case of *ex parte* order against deceased defendant during his lifetime, revision would not be maintainable against finding of Court if it had come to conclusion that bringing legal heirs of deceased defendant was not necessary. [PLJ 1996 Kar. 3537]

5. Determination of question as to legal representative.—Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

6. No abatement by reason of death after hearing.—Notwithstanding anything contained in the foregoing rules whether the cause of action survives or not, there shall be no abatement by reason of death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment many in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

7. Suit not abated by marriage of female party.—(1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

8. When plaintiff's insolvency bars suit.—(1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

(2) **Procedure where assignee fails to continue suit or give security.** Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

9. Effect of dismissal.—(1) When a suit is dismissed under Rule 8, no fresh suit shall be brought on the same cause of action.

(2) Any person claiming to be the legal representative of a deceased plaintiff or defendant or the assignee or the receiver in the case of an insolvent plaintiff or the receiver in the case of a defendant may apply to the Court for setting aside any order made or judgment pronounced by it in his absence; and if it is proved that he was prevented by any sufficient cause from continuing the suit or defending the suit, as the case may be, the Court shall set aside the order or the judgment, upon such terms as to costs or otherwise as it thinks fit.]

[(3) The provisions of Section 5 of the Limitation Act, 1908 (IX of 1908) shall apply to application under sub-rule (2).]

COMMENTS

Remedy. Rule 9(2), O, XXII of the Code provides remedy to legal representatives against whom adjudication is made in their absence to apply the same Court for setting aside any order made or judgment pronounced as the case may be, and Court is empowered upon shown sufficient cause to set aside the same upon such terms as to costs or otherwise as it thinks fit. [PLJ 1990 Lah. 546].

Limitation. Application under O. XXII, R. 9(2) of the Code is required to be made within 60 days of the date of order or judgment as provided under Art. 171, Limitation Act, 1908. [1990 MLD 2363]. Provision of S. 5, Limitation Act is made applicable under R. 9(2) of O. XXII of the Code from the date of commencement of Code of Civil Procedure (Amendment) Act, 1989, Act IV of 1990 w.e.f. 8.1.1990. [PLD 1993 Lah. 452].

10. Procedure in case of assignment before final order in suit.—(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

11. Application of Order to appeals.—In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent and the word "suit" an appeal.

COMMENTS

Application. While applying provisions of O. XXII of the Code to appeal appellant would be in a position of plaintiff where respondent would be in a position of defendant. [1990 MLD 2363]

12. Application of Order to proceedings.--Nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

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Rules