

(2024) 10 BOM CK 0004

Bombay High Court (Nagpur Bench)

Case No: Writ Petition No. 902 Of 2023

Saraswatha S/o Sampatrao
Bhoyar

APPELLANT

Vs

Late Ravindra S/o Sadashiv
Khodke Since Deceased Thr. Lrs.
And Others

RESPONDENT

Date of Decision: Oct. 8, 2024

Acts Referred:

- Code of Civil Procedure, 1908 - Order 22 Rule 4, Order 22 Rule 4(2)

Hon'ble Judges: Anil L. Pansare, J

Bench: Single Bench

Advocate: S.N. Bhattad, Alok Daga, U.K. Bisen

Final Decision: Allowed

Judgement

Anil L. Pansare, J.

1] The petitioner - original plaintiff is aggrieved by order dated 14/10/2022 passed below Exh. 118 by the Civil Judge Junior Division, Kuhi, permitting the legal representatives of respondent no.1 - original defendant no.1 (since deceased), to adduce further evidence at the stage of final hearing.

2] Having heard both sides and having gone through the material placed before me, it transpires that the petitioner has filed a suit for declaration, partition, separate possession and permanent injunction against the respondents/defendants of whom original defendant no.1 expired pending suit. Prior to his death, both the parties had led evidence, which includes original defendant no.1. The original defendant no.1 had cross-examined the petitioner - plaintiff's witnesses. Similarly, the petitioner - plaintiff

had cross-examined the respondent – defendants' witnesses. The suit was then fixed for final argument. The petitioner in fact filed written notes of arguments as well.

3] At such stage, the respondent nos. 1(a) and 1(b) (hereinafter referred to as legal representatives of defendant no.1) filed application seeking permission to adduce evidence as well as to cross-examine the petitioner and other witnesses. As such, they adopted the written statement filed by their father, i.e., original defendant no.1. In that sense, the legal representatives of defendant no.1 did not set up an independent defence.

4] The legal representatives of defendant no.1 filed aforesaid application stating therein that after having been brought on record, they have not applied to allow them to lead evidence and/or to cross-examine the witnesses, who have been examined. They have then pleaded that inadvertently, the previous Counsel failed to cross-examine the petitioner and other witnesses on behalf of legal representatives of defendant no.1 and also did not examine other witnesses to bring on record major and important facts. They have, however, conveniently omitted to disclose the alleged major and important facts.

5] The application was opposed by the petitioner on the ground that original defendant no.1, during his lifetime, has cross-examined the petitioner. He has also adduced evidence. After his death, his legal representatives have stepped into his shoes and have, thus, no independent defence, particularly when they have adopted original defendant no.1's written statement.

6] The issue involved will have to be examined in above background. The trial Court has allowed the application on the ground that evidence of legal representatives of defendant no.1 is not yet closed and that it is necessary to bring major and important facts on record. The trial Court has placed heavy reliance upon sub-rule (2) of Rule 4 of Order XXII of the Code of Civil Procedure, 1908 (the Code), to permit these legal representatives to cross-examine the witnesses and to lead additional evidence. According to the trial Court, in terms of sub-rule (2) of Rule 4 of Order XXII of the Code, any person so made party to the suit may make any defence appropriate to his character as legal representative of the deceased defendant. Accordingly, allowed the application.

7] The learned Counsel for the petitioner submits that this finding is erroneous inasmuch as the legal representatives, having adopted the written statement of original defendant no.1, have no independent right to put up a new defence. He has referred to the judgment of the Hon'ble Supreme Court in the case of **Vidyawati Vs. Man Mohan And Others [(1995) 5 SCC 431]**, wherein after quoting facts of the case, the Supreme Court, while dealing with the scope under Order XXII Rule 4 of the Code, has held thus :

“3. It is true that when the petitioner was impleaded as a party-defendant, all rights under Order 22, Rule 4(2), and defences available to the deceased defendant became available to her. In addition, if the petitioner had any independent right, title or interest in the property then she had to get herself impleaded in the suit as a party defendant in which event she could set up her own independent right, title and interest, to resist the claim made by the plaintiff or challenge the decree that may be passed in the suit. This is the view the court below has taken rightly.”

8] Thus, the Supreme Court has held that once the legal representatives of the deceased defendant are brought on record, all rights under Order XXII Rule 4(2) and defence available to the deceased defendant would be available to the legal representatives. The Supreme Court further held that if the petitioner therein had any independent right, title or interest in the property, then she had to get herself impleaded in the suit as party defendant in which event she could set up her independent right, title and interest to resist the claim made by the plaintiff or challenge the decree that may be passed in the suit.

9] Thus, there are two types of rights available to the legal representatives as regards the subject matter of the suit. One that flows from the rights available to the deceased defendant and the other is an independent right different from and/or in addition to what is/was available to the deceased defendant. In the first category, the legal representatives will have all the rights that were available to the deceased defendant. These rights ought to be within the rights available to the deceased defendant.

10] In my view, so far as first set of rights are concerned, sub-rule (2) of Rule 4 of Order XXII of the Code, which provides that the legal representatives having been made party to the suit may make any defence appropriate to their characters as legal representatives of the deceased defendant, will permit legal representatives to make defence as available to the deceased defendant. In other words, the defence ought to be within the rights available to the deceased defendant. Say for example, if, in a partition suit, the deceased defendant had claimed 1/4th right in the suit property and if there are more than one legal representative, each legal representative is entitled to make any defence appropriate to his character, which would be in context with his right to share vis-a-vis the shares of other legal representative.

11] If the legal representatives have any other defence, the said defence will fall in the second category, viz., independent right in the subject matter of the suit. In such an eventuality, the appropriate remedy is to get himself/herself impleaded in a suit as party defendant, not only in the capacity of legal representative of the deceased defendant but also in the capacity of independent defendant.

12] This position has been made clear in the subsequent two paragraphs of Vidyawati's case, which read thus :

"4. This Court in Bal Kishan v. Om Parkash (1986) 4 SCC 155 has said thus :

"The sub-rule (2) of Rule 4 of Order 22 authorises the legal representative of a deceased defendant to file an additional written statement or statement of objections raising all pleas which the deceased-defendant had or could have raised except those which were personal to the deceased-defendant or respondent."

5. The same view was expressed in Jagdish Chander Chatterjee v. Sri Kishan (1972) 2 SCC 461 wherein this Court said : (SCC pp. 464-65, para 10)

"... legal representative of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title."

13] As could be seen, in the case of **Bal Kishan** (supra), the Supreme Court has held that sub-rule (2) of Rule 4 of Order XXII of the Code authorizes the legal representative of a deceased to file additional written statement or statement of objections raising all pleas which the deceased defendant had or could have raised except those which were personal to the deceased defendant. Thus, the legal representative is/are entitled to raise all pleas which the deceased defendant had or could have raised.

14] In **Jagdish Chander Chatterjee** (supra), the Supreme Court further clarified that the aforesaid position of law does not prevent the legal representatives from setting up also their own independent defence, in which case they should be impleaded not merely as legal representatives of the deceased but also in their personal capacity in order to avoid multiplicity of the proceedings.

15] Thus, where the legal representative has independent right, he has to get himself impleaded as party defendant in independent capacity and the said remedy is available to him even during the lifetime of his predecessor.

16] In any case, the legal representatives should clarify the capacity in which they have been impleaded in the suit, merely as legal representatives or in their personal capacity as well. It is only then the defence made by the legal representatives could be

examined on the touch-stone of sub-rule (2) of Rule 4 of Order XXII, as to whether the defence is in the personal capacity or merely as a legal representative. Thus, the legal representatives will have to make specific pleading on this point, if they intend to file additional written statement or to examine/cross-examine witnesses. It's a different matter where the deceased defendant has failed to file written statement and/or to examine/cross-examine witnesses. The legal representatives would then be entitled to raise defence and/or to examine/cross examine witnesses to afford them an opportunity of hearing.

17] In the instant case, it is not the case of the legal representatives of defendant no.1 that they have any independent right over and above the rights available to the deceased defendant no.1. In fact, the legal representatives have adopted the written statement of original defendant no.1. They further admit that after having been brought on record, they have not applied for leading evidence and to cross-examine previously examined witnesses. Their failure led to fixing the suit for final hearing. At this stage, they filed application only on the ground that their previous Counsel has inadvertently failed to cross-examine the petitioner and other witnesses on their behalf and has also not examined other witnesses to bring on record major and important facts. As stated earlier, they have not disclosed the so called major and important facts.

18] In the circumstances, the trial Court could not have, by taking recourse to sub-rule (2) of Rule 4 of Order XXII allowed the application as if the legal representatives have unbridled right to raise any defence at any stage of the suit without disclosing the nature of defence, whether independent or flowing from the defence available to deceased defendant.

19] It is for this reason, the details of the so called crucial/important facts to be brought on record are significant because unless the said crucial/important facts are disclosed, neither the opposite party nor the Court will be able to understand the nature of defence, whether it flows from the right of the deceased defendant or is of an independent nature.

20] Having not done so, it is not known as to on what basis the trial Court has given benefit under sub-rule (2) of Rule 4 of Order XXII of the Code to the legal representatives of defendant no.1. If such benefit is to be extended on a mere request made by the legal representatives of deceased defendant, that too at the fag end of the trial, it will not only permit filling lacunae in the defendant's case but will amount to permitting retrial, which will be highly prejudicial to the other side. The scope of order XXII Rule 4(2) can not be stretched to the extent of permitting retrial at the instances of legal representatives of deceased.

21] Thus, unless a case is made out to file written statement or to lead additional evidence or to cross-examine the witnesses, the trial Court should be reluctant in

affording such opportunity only because the legal representatives of deceased defendant are brought on record.

22] The learned Counsel for legal representatives of defendant no.1, however, supported the findings. He has relied upon the judgment passed by the High Court of Gujarat in the case of **Jignesh Ranjitbhai Patel Vs. Shantiben Hirabhai Gopalbhai** [AIR 2024 Gujarat 14], wherein the trial Court rejected the application filed by the legal representatives seeking time to make defence appropriate to their character as legal representatives of deceased defendant no.6 therein. The trial Court rejected the application on the ground that the suit was fixed for judgment and further that stage of filing reply has been closed much earlier. Similarly, the request for cross-examining the plaintiff's witnesses was declined on the ground that the plaintiff's evidence was closed and that defendant no.6 had not availed opportunity at the relevant time. The Gujarat High Court taking aid of sub-rule (2) of Rule 4 of Order XXII of the Code and certain precedents, set aside the finding on the ground that the legal representatives, despite having been added party defendants, were neither afforded any opportunity to file reply appropriate to their character nor were they given opportunity to cross-examine the plaintiff's witnesses. The denial of such opportunity was held to be in violation of principles of natural justice and further the provisions of Order XXII Rule 4(2) of the Code.

23] In my view, the aforesaid ruling will be of no help to the respondents herein. As is evident, the facts before the High Court were altogether different. In the said case, opportunity to file reply and to cross-examine the witnesses was availed immediately after the legal representatives were brought on record. In the said case, the deceased defendant no.6 had not even filed reply and cross-examined the witnesses. It is, thus, a case where legal representative's right to raise defence available to the deceased defendant was at stake.

24] In the present case, however, legal representatives of defendant no.1 have not only adopted written statement filed by their father but have admitted that they did not seek opportunity to cross-examine the witnesses previously examined or to lead additional evidence to bring on record the alleged crucial and important facts. It is further not the case of these legal representatives that they intent to raise a defence which could have been raised by their father. Thus, the legal representatives of defendant no.1 are to be blamed for their own lapses. In the circumstances, the least that could have been done by these legal representatives is to disclose the alleged crucial and important facts, which would have enabled the petitioner as also the trial Court to examine the issue on the touchstone of the provisions under Order XXII Rule 4(2) of the Code.

25] The learned Judge of the trial Court without examining the niceties of Order XXII, allowed the application. The order impugned, therefore, suffers from non-application of mind and is, thus, liable to be quashed and set aside.

26] Accordingly, the writ petition is allowed.

27] Order dated 14/10/2022 passed below Exh. 118 by the Civil Judge Junior Division, Kuhl, is quashed and set aside.

28] The legal representatives of defendant no.1, however, are at liberty to file an appropriate application making out a case under Order XXII of the Code, if any, in the light of what has been stated in the body of the judgment.