

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 20.04.2012*
Judgment delivered on 24.04.2012.

+ **CM(M) 1485-89/2005**

RAJ PRAKASH DECD. THR .LR'S Petitioner
Through: Mr.Sanjeev Sindhwani,
Advocate.

versus

JAI PRAKASH THR. LR'S Respondent
Through: Mr.Vipin K. Singh, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 Order impugned before this Court is the order dated 13.4.2005 whereby the application filed by the legal representatives of the sole defendant (under Order 8 Rule 9 read with Order 22 Rule 4(2) read with Order 1 Rule 10 of the Code of Civil Procedure (hereinafter referred to as the Code) had been dismissed.

2 Record shows that the present suit is a suit for partition which was

filed in the year 1992 by the plaintiff against the sole defendant, his brother. Written statement was filed by the defendant on 06.9.1993; issues were framed on 25.7.1994; thereafter the defendant expired and his legal representatives had been brought on record vide order dated 31.3.2003; on 13.8.2003 the present application had been filed; the contention of the legal representatives of the deceased defendant was that they have their own independent right to file a written statement; this prayer made in the present application has been rejected. Admittedly along with this application the proposed written statement was not filed. Learned counsel for the petitioner has placed reliance upon a judgment of this Court reported in AIR 1992 Delhi 162 Saiyed Siurajul Hasan Vs. Syed Murtaza Ali Khan Bahadur & Ors. to support his submission that the provisions of Order 22 Rule 4 of the Code permits the legal representatives of the deceased defendant to take up “any defence”, only limitation being that the defence so made must be “appropriate to his character as the legal representative of the deceased defendant”. Reliance has also been placed upon other judgments reported in AIR 1995 SC 1653 Vidyawati Vs. Man Mohan & Ors. , JT

2010(1) SC 508 Abdul Razak Vs. Mangesh Rajaram Wagle & Ors. to support a submission that the legal representatives have a right to set up their own defence. Submission being that in the judgment of Abdul Razak (supra) even an inconsistent plea was permitted to be set up by the legal representatives of the deceased defendant.

3 Arguments have been countered. Submission being that limitation as contained in Order 22 Rule 4 (2) of the Code has to be strictly adhered to and the defence of the legal representatives of the deceased defendant is restricted to the language contained therein; meaning thereby that such defence must be “appropriate to his character as a legal representative of the deceased defendant”. Reliance has also been placed upon a judgment reported in AIR 2004 P & H 204 Gaurav Uppal Vs. Sunita Uppal , submission being that at best the legal representatives of the deceased defendant are permitted to amend the written statement; further submission being that in this case admittedly the proposed written statement is not on record and the proposed plea which the legal representatives of the deceased defendant now seek to incorporate can be taken care of by an application seeking amendment of the earlier

written statement.

4 Record has been perused. The submission which has to be answered is a legal submission. Language of Order 22 Rule 4 of the Code is relevant; the said provision reads as under:

“ORDER XXII- DEATH, MARRIAGE AND INSOLVENCY OR PARTIES

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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 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 therefore 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.]”

5 This statutory mandate makes it clear that a person who has been made a party under Order 22 Rule 4 of the Code may make “any defence”, the limitation being that the defence so made must be appropriate to his character as legal representatives of the deceased defendant.

6 The averments made in the application filed by the plaintiff before the trial court have been perused. This is an application filed under Order 22 Rule 4 read with Order 1 Rule 10 of the Code. The

proposed written statement has not been filed along with the said application. A perusal of this application shows that the legal representatives have contended that in this suit for partition since the properties have been jointly inherited by them as well they can set up their own individual defence and this right is an independent right which is available to them under the provisions of Order 1 Rule 10 of the Code.

7 Record shows that on 31.3.2003 the legal representatives of the deceased defendant had been brought on record. This was on an application filed by the plaintiff under Order 22 Rule 4 of the Code. The present application has been filed on 13.8.2003 i.e. after a lapse of four months. Admittedly along with this application the proposed additional written statement has also not been filed; as such this Court is at loss to know what additional pleas the legal representatives of the deceased defendant wish to incorporate in their written statement; whether they are consistent or inconsistent with the pleas taken by the deceased defendant are not known to the court. The application filed by the petitioner under Order 22 Rule 4 read with Order 1 Rule of the

Code is also lacking in particulars about this averment; it nowhere discloses the defence which is to be set up by the legal representatives of the deceased defendant.

8 The Apex Court in a judgment reported in AIR 1986 SC 1952 Bal Kishan Vs. Om Prakash & Anr. had noted in the context of Order 22 Rule 4(2) of the Code noted herein below:

“The Sub-rule (2) of Rule of Order 22 authorised 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.”

9 The same view was expressed in a judgment reported in AIR SC 2526 Jagdish Chander Chatterjee Vs. Sri Kishan; relevant extract of which reads hereinunder:

“The 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 representative 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 Lrs. of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the title.”

10 Record shows that the present petitioners in their capacity as legal representatives of deceased defendant have been impleaded on 31.3.2003 on an application under Order 22 Rule 4 of the Code. The petitioners had been impleaded only in their capacity as legal representatives of the deceased defendant; the order dated 31.3.2003 is clear; this order was passed on the application under Order 22 Rule 4 of the Code; the petitioners have not been impleaded on any independent right, title or interest in the property which order could have been passed only on an application under Order 1 Rule 10 of the Code. The proposed written statement is also not a part of the record.

11 Impugned order declining the prayer in this factual scenario thus suffers from no infirmity.

12 The judgments relied upon by the learned counsel for the petitioners are clearly distinguishable. In the case of Vidyawati (supra) the Apex Court had noted that if the legal representatives were to set up any independent right, title or interest in the property they have to be impleaded as a party in their own right which application has to be filed under Order 1 Rule 10 of the Code; as noted supra the petitioners have

already been impleaded vide order dated 31.3.2003 which was on an application under Order 22 Rule 4 of the Code limiting their right only to the defence being available to them which is appropriate to their character as legal representatives of the deceased defendant. The judgment of Abdul Razak (supra) is also not applicable. This was a case where the legal representatives of the deceased defendant had filed their additional written statement in 2004 and the application filed by the plaintiff three years later seeking striking out of the defence of the defendant under Order 6 Rule 16 of the Code had been rejected. In the present case there is no written statement of the legal representatives which is on record.

13 Impugned order calls for no interference. Dismissed.

INDERMEET KAUR, J

APRIL 24, 2012

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