

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CIVIL MISCELLANEOUS JURISDICTION No.1427 of 2017**

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Javed Ahmad, Son of Late Mukhtar Ahmad, Resident of Mohalla- New Colony,  
Near I.T.I., P.O.+ P.S.- Digha, District- Patna.

.... .... Petitioner

Versus

Tabrej Sultan, Son of Late Md. Ibrahim, Resident of C/o E. Akhtar, Near Ramana  
College, Ramna Road, P.S.- Pirbahore, District- Patna.

.... .... Respondent

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**Appearance :**

For the Appellant/s : Mr. Rakesh Kumar Sharma, Advocate.

For the Respondent/s : Mr. Avinash Kumar, Advocate.

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**CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA**  
**ORAL JUDGMENT**

**Date: 28-02-2018**

Heard both sides.

The petitioner has moved this court to quash the order dated 22.06.2017 passed by Civil Judge (Sr. Division) in Title Suit No.90 of 2011 by, by which, the additional written statement of the petitioner is rejected.

The plaintiff filed suit for Specific Performance of Contract relating to the property mentioned in Schedule-1 of the Plaint. Defendant be directed to register the sale deed in favour of the plaintiff in pursuance of an agreement to sale.

During the pendency of the suit, the defendant no.1 Johra Khatoon died. On the petition of plaintiff filed under Order XXII Rule 4(2), the petitioner Javed Ahmad was substituted as legal heir of Johra Khatoon. The petitioner happens to be the son of Johra Khatoon. After appearance, petitioner filed additional written statement stating the



facts that the father of defendant no.1 had purchased the land mentioned in Schedule-1 of the plaint and mother is not the exclusive owner of the land. The mother got share according to Muslim law but learned Sub-Judge rejected the additional written statement of the petitioner holding that substituted legal heir of the defendant cannot set up independent claim other than the claim of the original defendant and if the substituted defendant intends to set up independent claim he should have approached the Court with the prayer to be added as necessary party but not as substituted legal heir.

Learned counsel for the petitioner submits that Order XXII Rule 4(2) says that substituted legal heir of the defendant may make any defence appropriate to his character as legal representative of the deceased defendant. It is further submitted that under Sub-clause (ii) of Rule 4 of Order 22, Code of Civil Procedure, any person so made a party as a legal representative of the deceased, was entitled to make any defence appropriate to his character as legal representative of the deceased defendant. It is further submitted that 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.

Learned counsel for the petitioner placed reliance on para-10 of the Judgment, reported in **(1972) 2 Supreme Court Cases 461** in **Jagdish Chander Chatterjee and Others Vs. Shri Sri Kishan and Another**. Learned counsel for the petitioner further placed reliance in the case of **Bal Kishan Vs. Om Prakash**, reported in **AIR 1972 SC 2526**, in which the Hon'ble Apex Court has held in para-3 of the Judgment that "Order XXII Rule 4 of the Code of Civil Procedure, 1908 provides that where one of two or more defendants dies and the right to sue does 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. Since the action in this case related to property, the right to sue did survive".

"Under Sub-clause (ii) of Rule-4 of Order 22, Civil Procedure Code, any person so made a party as a 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”.

On the other hand, learned counsel for the respondent submitted that if substituted legal heir of defendant put forth individual case besides the case of original defendant, the substituted legal heirs could have filed a petition under Order 1, Rule 10 to contest the suit in independent capacity or reserve his right to file a separate suit. Learned counsel for the respondent placed reliance on para-6 of the Judgment reported in **AIR 1995 Supreme Court 1653** in the case of **Vidyawati, the petitioner Vs. Man Mohan and Others.**

On the submission of both the parties, the sole question arises for consideration is to whether the defendant who died during the pendency of the suit and his/her the substituted legal heirs of the deceased defendant can put forth his/her own independent case?

On perusal of the Order 22 Rule 4(ii), it appears that substituted legal heir has got liberty to place and put forth his own independent case during pendency of the suit and in that event, the



court may allow him to contest the suit in the capacity of legal representative of the deceased in order to avoid multiplicity of the suit. In the case of **Vidyawati, the petitioner Vs. Man Mohan and Others** reported in **AIR 1995 Supreme Court 1653**, on which the learned counsel for the respondent also placed reliance, the Hon'ble Apex Court has held in para-5 of the aforesaid judgment, which are as follows:-

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

In the case of **Jagdish Chander Chatterjee and Others Vs. Shri Sri Kishan and Another** reported in **(1972) 2 Supreme Court Cases 461**, the Hon'ble Apex Court has held in para-10 of the Judgment, which are as follows:-

**“Under sub-clause (ii) of Rule-4 of Order XXII, Civil Procedure Code any person so made a party as a legal representative of the deceased, respondent was entitled to make any defence appropriate to his character as legal representative of the deceased-responder. 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”.**

Similar view has been reiterated in the case of Bal Kishan Vs. Om Prakash, reported in AIR 1972 SC 2526.

Considering the facts aforesaid, I find that once the substituted legal heir put forth his independent case other than the case of original defendant, the court could have allowed the substituted heir to contest the suit instead of giving him liberty to contest the suit by filing a petition under Order-1 Rule-10 of the Code of Civil Procedure or allow him to file a separate suit. Therefore, I find that the learned Sub-Judge has committed material irregularity in rejecting the additional written statement of the petitioner.

Accordingly, order dated 22.06.2017 passed by Civil Judge (Sr. Division) in Title Suit No.90 of 2011 is set aside and this writ petition is allowed.

**(Prabhat Kumar Jha, J)**

Amit/-

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