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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3362 OF 2018

Shamsundar Shankarlal Varma ... Petitioner

V/s.

Ramesh janu Hingane (decd)
Through Smt. Ahilya Hingane and ors ... Respondents

Mr. Girish R. Agrawal, for the Petitioner.
Mr. Purshottam G. Chavan, for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 3RD APRIL, 2018.

P.C. :

1] Heard learned counsel for the petitioners and respondents.

2] By this petition filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 21st December, 2017 passed below Exh.74, by Civil Judge Senior Division, Pune in Special Civil Suit No.2626 of 2012 and being aggrieved by the order dated 9.2.2017, passed below Exh.70 in the same suit.

3] By the order dated 21st December, 2017, trial Court has rejected the application filed by the present petitioners, seeking to

strike out the portion in paragraph Nos 6 to 8 of the Additional Written Statement filed by the defendant No. 1A to 1D, who are the legal heirs of original defendant No.1, who has died during the pendency of the suit.

4] It is submitted by learned counsel for the petitioner that in the Additional Written Statement, in paragraph Nos 6 to 8, defendant Nos. 1A to 1D, have taken the stand which is inconsistent with the stand taken by the original defendant No.1 and therefore, the portion in paragraph Nos 6 to 8 be struck off.

5] Per contra, the submission of learned counsel for respondents, is that the stand taken by the legal heirs of deceased defendant No.1 is not inconsistent with the stand taken by him. Conversely they are reiterating the stand taken by the original defendant No.1 and hence the trial Court has rightly rejected the application filed by the petitioner.

6] The perusal of the impugned order passed by the trial Court, goes to show that the instant suit is filed by the petitioner for specific performance of the agreement of sale. The defendant No.1 has resisted the suit vide his written statement, contending inter alia that the said agreement of sale was mutually cancelled and terminated and therefore, specific performance of the agreement cannot be granted.

7] However, by filing this Additional Written Statement after the death of original defendant No.1, his legal heirs are contending that the suit property being ancestral joint family property, they are having undivided share in the same and therefore, their predecessor-original defendant No.1 was not having any locus standi to sell it so as to deprive them from getting their share and legal right in the suit property.

8] The trial Court, has rejected this application filed by the petitioner for striking off the inconsistent stand taken by the legal heirs of the original defendant No.1, on the ground that the legal heirs of the original defendant cannot be prevented from raising their independent defence, which might be contrary to the defence raised by original defendant.

9] In my considered opinion, this observation of the trial Court is totally contrary to the legal position, which is spelt out by the Hon'ble Apex Court in its decision in the case of *Gajraj -vs- Sudha and others*, [1999 AIR SCW 4910], wherein it has been categorically held that the legal representative cannot set up a new or individual right. He also cannot take up a new and inconsistent plea contrary to the one taken up by the deceased. It was held that the proposed legal heirs stand in the shoes of the deceased defendant and must accept the position adopted by their predecessor.

10] Learned counsel for the petitioner has also relied upon various other decisions of this Court e.g. in the case of *Ashokkumar Daulatsingh Madan through Lrs -vs- Hemant Narayandas Pamnani and anr* [2016 (4) ALL MR 901, it was held that the petitioner being legal heir would not be entitled to take divergent stand to the stand which was taken by the original defendant.

11] In another decision of this Court in the case of *Nilkanth s/o Pandurang Wath and ors -vs- Amarkanth s/o Pandurang Wath (dead), through Lrs*, [2016 (6) Mh. L.J. 46], it has been held that by the impleadment of the as legal heir of deceased defendant, he would merely step in the shoes of said defendant. A plea contrary to the one taken by deceased defendant as well as a plea personal to legal representative, could not be permitted to be taken by him by virtue of such impleadment. Legal heir could only take the plea that was available to deceased defendant and cannot diverse plea from the one taken by the deceased defendant.

12] Learned counsel for the petitioner, has then relied upon the judgment of Madhya Pradesh High Court, in the case of *Yashwantrao Sabnis -vs- Bhalchandrarao and others* [AIR 1952 Madhya Bharat 207], in which the plea taken by the legal heirs was similar to one raised in this suit by the legal heirs that the suit house being ancestral joint family property, the deceased defendant alone

had no right to mortgage it. Such stand being contrary to the stand taken by the deceased defendant, it was held in that case that, “such plea which is inconsistent with the plea taken by the deceased defendant cannot be allowed”.

13] Here in the case also, the legal heirs of the original defendant No.1 are claiming “independent right” as observed by the trial Court by contending that the suit property is their ancestral joint family property and they are having independent right in it which deceased defendant could not have agreed to sell. Thus, this stand being not taken by the deceased defendant himself, his legal heirs cannot take such stand, so as to defeat the suit filed by respondent. As they step in the shoes of deceased defendant, they could not be entitled to take the stand which is divergent to the stand taken by the deceased. Hence whatever inconsistent stand taken by the legal heirs of defendant No.1, in paragraph Nos.6 to 8 of their Additional Written Statement needs to be struck off. The impugned order, therefore, passed by the trial Court, rejecting the application to that effect being not legal, correct and proper, is required to be quashed and set aside.

14] As a result, the Writ Petition is allowed.

15] The application filed by the petitioner at Exh.70 is allowed. Paragraph Nos. 6 to 8 of the Additional Written Statement

filed by defendant Nos. 1(A) to 1(D) stands struck off.

16] Consequently Additional issues framed on the basis of additional Written Statement also stand deleted.

[DR.SHALINI PHANSALKAR-JOSHI, J.]