

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

WRIT PETITION NO. 3884 OF 2018

Subhash Dhanraj Sankla,	]
Aged about 60 years, Occ. Business,	]
Residing at F/Shruti Kunj, Opp. GPO,	]....Petitioner
Pune 411 001.	] (Org. Plaintiff)
V/S	
Shri Kaikhushroo @ Keki Phiroze	]
Noble (since deceased through his	]
Heirs and legal representatives) :	]
	]
1(a) Mrs. Zubil P. Noble Dennis,	]
Aged 70 years, Occ. : Household,	]
R/at 18 Sopan Baug Coop. Hsg.	]
Society Ltd. Ghorpadi, Pune-1.	]
	]
1(b) Smt. Noble D.K. w/o. Kersi Noble	]
R/at. 169/07, Village Hadoo,	]
Dist. South Andaman, Port Blair.	]
	]
1(c) Mr.Shiraz Kersi Noble,	]
Age : Adult, Occ.: Service,	]
R/at Plot No. 655, Dadar Parsi Colony,	]
Dadar, Mumbai 400 014.	]
	]
1(d) Miss Tanaz Kersi Noble,	]
Age : Adult, Occ. : Service,	]
R/at 169/07, Village Haddo,	]....Respondents
Dist. South Andaman, Port Blair.	] (Org. Defendants)

Mr.R.D. Soni a/w. Mr.Tushar R. Momaiyar i/b M/s. Ram and Co. for petitioner.

Mr.Siddhartha Ravindra Ronghe i/b M.K. Irani for respondent Nos.1(a) to 1(d).

**CORAM: N. J. JAMADAR, J.
RESERVED ON : 26th SEPTEMBER 2019**

PRONOUNCED ON : 18th NOVEMBER, 2019

JUDGMENT :

1. Rule. Rule made returnable forthwith and with the consent of the learned counsels for the parties, heard finally.

2. This petition under Article 227 of the Constitution of India takes exception to an order dated 27th July 2016 passed by the learned Civil Judge, Senior Division, Pune on the applications (below Exh. 184 and Exh.186) of the defendant Nos.1(a) to 1(d), the respondents herein, whereby the defendants being the legal representatives of Kaikhushroo @ Keki Phiroze Noble, were permitted to file written statement pleading their title to the suit property and the subsequent order dated 18th December 2017 on an application for review of the former order, whereby the said application also came to be rejected.

3. The background facts leading to the instant petition can be stated, in brief, as under :-

[a] Smt. Rhoda Phiroze Noble was the owner of the property bearing Plot No.18, Survey No. 59, ad-measuring 499.5 square meters

situated at Village Ghopadi, Pune (hereinafter referred to as “the suit property”). Smt. Rhoda Phiroze Noble died on 9th November 2006 leaving behind her last registered Will and testament dated 21st March 1989, under which the suit property was bequeathed to Khaikhushroo alias Keki Phiroze Noble, the defendant, who agreed to sell the suit property to the petitioner for a consideration of Rs.1,25,00,000/-. Initially, token consideration of Rs.11,000/- was paid by the plaintiffs to the defendant. It was followed by a further payment of Rs.1,00,000/- The defendant, however, resiled from the said concluded contract. The defendant endeavaoured to sell the suit property to other persons in breach of the agreement for sale. Upon a Public Notice, issued by the plaintiff inviting objections to the execution of the Sale Deed, the defendant Nos.1(a) to 1(d) staked claim over the suit property. The defendant failed to make out a clear and marketable title to the suit property. Hence, the plaintiff was constrained to institute a suit for specific performance of the said contract.

[b] The defendant filed written statement on 11th February 2009. The defendant did not dispute the agreement to sale. However, the defendant claimed that there was failure on the part of the plaintiff to perform his part of the contract and thus the agreement stood

repudiated on account of breach on the part of the plaintiff.

[c] During pendency of the suit, the original defendant died. The defendant Nos. 1(a), 1(b) and 1(d) filed an application (Exh.184) and the defendant No.1(c) filed another application (Exh.186) praying for condonation of delay in filing the written statements. It was the contention of the defendant No.1(a) to 1(d) that they have 1/3rd share in the suit property being the heirs of the deceased brother and the sister of the deceased defendant, respectively. It was also sought to be contended that Smt.Rhoda Phiroze Noble, the original owner, had no right to bequeath the whole property in favour of the deceased defendant.

[d] The plaintiff resisted the application. It was asserted by the plaintiff that the defendant Nos.1(a) to 1(d) being the legal representatives of the deceased defendant were not entitled to take a defence which was divergent to the stand taken by the deceased defendant in the written statement. The defendant Nos.1(a) to 1(d), in view of the prescription contained under Order XXII Rule 4(2) of the Code of Civil Procedure, 1908 ('the Code') were only entitled to file written statement appropriate to their character as the legal

representatives of the deceased defendant.

[e] The learned Civil Judge considered the rival contentions and submissions advanced across the bar. He was persuaded to allow the application holding, *inter-alia*, that though in view of the provisions contained in Order XXII Rule 4(2) of the Code, the legal representatives were not entitled to raise a defence which was at variance with the defence raised by the deceased defendant, yet, in the backdrop of the legal position expounded by the Supreme Court in the case of *Sumtibai & Ors. Vs. Paras Finance Co. Reg. Partnership Firm Beawer (Raj.) Through Mankanwar (Smt.) W/o Parasmal Chordia (Dead) & Ors.*¹, the legal representatives were entitled to file written statement to plead their interest in the suit property, if they had a semblance of title thereto. The learned Judge, in the process, segregated the pleadings in the written statement which were divergent to the stand of the deceased defendant and directed that those portions be struck off. The learned Judge was, thus, persuaded to pass the following order :

“1. Defendants/applicants are permitted to file written statement subject to following conditions :-

(a) They may file written statement with

¹ (2007) 10 SCC 82

pleading of semblance of their title in the suit property and the pleadings connected thereto.

(b) Defendants are not allowed to take plea of incapacity of original defendant to enter into contract. They are not allowed to question the agreement itself. As far as the agreement is concerned, they have to stick up with the plea taken by original defendant (Exh.23).

(c) The defendant shall strike out the pleading in the written statement (which is not yet accepted) which is not allowed by the Court and thereafter only written statement will be read and recorded.”

[f] The written statements filed by the defendant Nos.1(a) to 1(d) were taken on record. By an application (Exh.207), the plaintiff sought striking out the portions of the written statement which were not in conformity with the directions of the Court in the order dated 22nd July 2016. By a further order dated 16th December 2016, the learned Civil Judge directed that the portions of the written statement quoted in paragraphs 7 and 8 of the said order be struck out, being contrary to the directions of the Court in the order dated 22nd July 2016.

Thereafter, by an application (Exh.223), the plaintiff sought to recall clause (a) of the order dated 22nd July 2016 (extracted above), whereby the permission was granted by the Court to the defendant Nos.1(a) to 1(d) to file written statement pleading their title to the

suit property. It was averred in the application that the said order dated 22nd July 2016 was passed in derogation of the settled legal position that the legal representatives were entitled to file written statement only in their character as the legal representatives of the deceased defendant. The judgment in the case of *Sumtibai & Ors.* (Supra), on which reliance was placed by the trial court, was further explained in a subsequent judgment by the Bombay High Court in the case of *Ashokkumar Daulatsingh Madan Since deceased through legal heirs 1A] Mina Ashok Madan & Ors. Vs. Hemant Narayandas Pamnani & Ors.* ². Otherwise also, the legal position has been settled by a series of judgments, which the learned counsel for the plaintiff could not bring to the notice of the Court at the time of passing of the order dated 22nd July 2016 and, therefore, it was imperative to recall clause (a) of the order dated 22nd July 2016. The defendants resisted the said application. The learned Civil Judge, after noticing the development, since the passing of the order dated 22nd July 2016, was persuaded to reject the application holding, *inter-alia*, that the fact that the learned counsel for the plaintiff came to notice the precedents after passing of the order which was sought to be reviewed, was not a justifiable ground for review.

2 2015 SCC OnLine 6538

[g] Being thus aggrieved by the order dated 22nd July 2016, whereby the defendant Nos.1(a) to 1(d) were permitted to file written statement pleading their title to the suit property and the subsequent order dated 18th December 2017, whereby the application to recall the former order came to be rejected, the plaintiff has invoked the writ jurisdiction of this Court.

4. I have heard Shri R.D. Soni, the learned counsel for the petitioner and Shri Siddhartha Ronghe, the learned counsel for the respondent Nos.1(a) to 1(d) at some length. Perused the material on record.

5. The controversy between the parties revolves around the entitlement of the legal representatives of the deceased defendant to file written statement raising contentions which questioned the competence of the deceased defendant to enter into an agreement to sell the entire suit property.

6. Shri Soni, the learned counsel for the petitioner, after taking me through the written statement of the deceased defendant, urged that by questioning the competence of the deceased defendant

to sell the suit property on the premise that the defendant Nos.1(a) to 1(d) have a share in the suit property, the defendant Nos.1(a) to 1(d) are taking a defence which is diametrically opposite to the pleadings of the deceased defendant that he was the exclusive owner of the suit property, being the legatee of Smt.Rhoda Phiroze Noble, the original owner of the suit property. Laying emphasis upon the provisions contained in Order XXII, Rule 4(2) of the Code, the learned counsel for the petitioner strenuously urged that the initial order dated 22nd July 2016, whereby the defendant Nos.1(a) to 1(d) were permitted to plead their title to the suit property, on a complete misreading of the ratio in the case of *Sumtibai & Ors.* (Supra), suffers from serious legal infirmity. If the defendant Nos.1(a) to 1(d) intended to set up their independent title to the suit property, contrary to the claim of the deceased defendant that he was the exclusive owner thereof, the remedy of the defendant Nos.1(a) to 1(d) was to seek impleadment in their own right and not as the legal representatives of the deceased defendant. It was not open for them to disown their character as the legal representatives of the deceased defendant and file a written statement setting forth their independent title, urged the learned counsel for the petitioner.

7. A strong reliance placed on the judgment of a learned Single Judge of this Court in the case of *Ashokkumar Daulatsingh Madan Since deceased through legal heirs 1A] Mina Ashok Madan & Ors.* (Supra), wherein the pronouncement in the case of *Sumtibai* (Supra) was explained. Shri Soni further submitted that the legal position has been crystallized by the judgments of the Supreme Court in the case of *Vidyawati Vs. Man Mohan & Ors.* ³, and this Court in the cases of *Maguesh Rajaram Wagle & Anr. Vs. Suresh D. Naik* ⁴ and *Nilkanth Pandurang Wath Vs. Amarkanth Pandurang Wath* ⁵. Thus, the learned Civil Judge, according to the learned counsel for the petitioner, committed a grave error in permitting the defendant Nos.1(a) to 1(d) to file the written statement pleading their title to the suit property.

8. In contrast to this, Shri Ronghe, the learned counsel for the defendant Nos.1(a) to 1(d) would urge that the learned Civil Judge was wholly justified in passing the impugned order by placing reliance on the case of *Sumtibai & Ors.* (Supra) as the identical controversy was dealt with by the Supreme Court in the said case. The

3 AIR 1995 SCC 1653

4 2008(2) Bom.C.R.248

5 2017 (1) All. M.R. 819

pronouncement of the Supreme Court in the case of *Sumtibai & Ors.* (Supra), according to the learned counsel for the respondent Nos.1(a) to 1(d), was on all four to the facts of the instant case.

9. It was further submitted that the learned Judge was within his rights in rejecting the application for review of the said order as the only ground which was sought to be urged in the application is that the learned advocate for the plaintiff could lay hands on governing judgments subsequently. There is neither any error apparent on the face of the record nor any sufficient cause to recall the order dated 22nd July 2016, submitted the learned counsel for the respondent Nos.1(a) to 1(d). Inviting the attention of the Court to the nature of the claim of the plaintiff and the initial written statement of the deceased defendant wherein, a reference is to be found to the proprietary claim of title of the defendant Nos.1(a) to 1(d) to the suit property, it was submitted that the defendant Nos.1(a) to 1(d) have neither taken a defence which was not made known to the plaintiff nor the defendant Nos.1(a) to 1(d) can be precluded from pleading their defence.

10. I have given careful consideration to the rival submissions

advanced by the learned counsels. At the hub of the controversy is the entitlement of the defendant Nos.1(a) to 1(d) to raise the defences in the written statement which they have tendered post impleadment as the legal representatives of the original defendant. The submissions were premised on the prescription contained in Order XXII Rule 4(2) of the Code. It reads as under :

*“ORDER XXII : DEATH, MARRIAGE AND INSOLVENCY
OF PARTIES -*

*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 part 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.

.....”

11. From the phraseology of sub-rule (1) of Rule 4, it becomes clear that when the sole defendant dies and the right to sue survives, the Court shall implead the legal representative of the deceased defendant and proceed with the suit. Sub-rule (2) then provides that

the legal representative so impleaded may make any defence appropriate to his character as legal representative of the deceased defendant. Sub-rule (2) envisages filing of an additional written statement by the legal representative. However, it conditions the right to take a defence to the one appropriate to his character as a legal representative. Evidently, in the absence of such a condition and conferring of an unbridled right to raise any defence, which the legal representative may desire to take, would have the consequence of changing the very nature of the *lis* which was initiated against the deceased defendant. If the legal representative is permitted to take a defence which is at a complete variance with, and divergent to, the resistance put-forth by the deceased defendant, it would imply that the legal representative would have an advantage in the sense that the legal representative can take a defence which the original defendant could not have taken, in view of the rules of pleading and estoppel etc. To obviate such situation, the right of the legal representative to make a defence is conditioned to his character as a legal representative.

12. This, however, does not necessarily lead to an inference that the legal representatives of the deceased defendant are not

permitted to raise any defence and, in the event, the deceased defendant had filed the written statement, the defence would freeze. Had the intention of the legislature been not to permit the legal representatives to make any defence, where the deceased defendant had already raised one, then sub-rule (2) would not have provided that the legal representative may make a defence appropriate to his character.

13. The learned Civil Judge had placed reliance upon the judgment of the Supreme Court in the case of *Sumtibai & Ors.* (Supra) to permit the defendant Nos.1(a) to 1(d) to make a defence on the basis of their claim of title. As the submissions revolved around the correct application of the principles expounded in the case of *Sumtibai & Ors.* (Supra), it may be apposite to immediately notice the facts, in the backdrop of which, the propositions were expounded in the case of *Sumtibai & Ors.* (Supra).

14. In the said case also, the suit was instituted against Kapoor Chand (the deceased defendant) for specific performance of a contract for sale allegedly executed in favour of Paras Finance Company, the respondent therein. The deceased defendant had

allegedly claimed in the agreement that the property in dispute was his self-acquired property. After the demise of Kapoor Chand, his wife and sons were brought on record as legal representatives and they sought permission to file additional written statement. The trial court as well as the High Court rejected the prayer of the legal representatives to raise the pleas, including one of the co-ownership of the suit property, in defence.

15. The Supreme Court, on facts, noted that the registered sale deed, on the basis of which, the deceased defendant acquired the ownership over the suit property, was itself shown to have been executed in favour of the deceased Kapoor Chand and his sons and, thus, the sons appeared to be, *prima-facie*, co-owners of the property in dispute. In the aforesaid backdrop, the Supreme Court held that the Courts below erred in rejecting the application of the heirs of Kapoor Chand to file an additional written statement. The Supreme Court expounded the legal position as under :-

“8. Every party in a case has a right to file a written statement. This is in accordance with natural justice. The Civil Procedure Code is really the rules of natural justice which are set out in great and elaborate detail. Its purpose is to enable both parties to get a hearing. The appellants in the present case have already been made parties in the suit, but it

would be strange if they are not allowed to take a defence. In our opinion, Order 22 Rule 4(2) CPC cannot be construed in the manner suggested by learned counsel for the respondent.

9. Learned counsel for the respondent relied on a three-Judge Bench decision of this Court in *Kasturi vs. Iyyamperumal and others - (2005) 6 SCC 733*. He has submitted that in this case it has been held that in a suit for specific performance of a contract for sale of property a stranger or a third party to the contract cannot be added as defendant in the suit. In our opinion, the aforesaid decision is clearly distinguishable. In our opinion, the aforesaid decision can only be understood to mean that a third party cannot be impleaded in a suit for specific performance if he has no semblance of title in the property in dispute. Obviously, a busybody or interloper with no semblance of title cannot be impleaded in such a suit. That would unnecessarily protract or obstruct the proceedings in the suit. However, the aforesaid decision will have no application where a third party shows some semblance of title or interest in the property in dispute. In the present case, the registered sale deed dated 12.8.1960 by which the property was purchased shows that the shop in dispute was sold in favour of not only Kapoor Chand, but also his sons. Thus prima facie it appears that the purchaser of the property in dispute was not only Kapoor Chand but also his sons. Hence, it cannot be said that the sons of Kapoor Chand have no semblance of title and are mere busybodies or interlopers.

.....

14. In view of the aforesaid decisions we are of the opinion that *Kasturi's case (supra)* is clearly distinguishable. In our opinion it cannot be laid down as an absolute proposition that whenever a suit for specific performance is filed by A against B, a third party C can never be impleaded in that suit. In our opinion, if C can show a fair semblance of title or interest he can certainly file an application for

impleadment. To take a contrary view would lead to multiplicity of proceedings because then C will have to wait until a decree is passed against B, and then file a suit for cancellation of the decree on the ground that A had no title in the property in dispute. Clearly, such a view cannot be countenanced.

15. Also, merely because some applications have been rejected earlier it does not mean that the legal representatives of late Kapoor Chand should not be allowed to file an additional written statement. In fact, no useful purpose would be served by merely allowing these legal representatives to be impleaded but not allowing them to file an additional written statement. In our opinion, this will clearly violate natural justice.”

(emphasis supplied)

16. The aforesaid observations indicate that the Supreme Court has enunciated in no uncertain terms that a third party who shows some semblance of title or interest in the property in dispute, cannot be precluded from contesting a suit for specific performance. The Supreme Court construed the earlier pronouncement of the Supreme Court in the case of *Kasturi Vs. Uyyamperumal* ⁶ to mean that a third party cannot be impleaded in a suit for specific performance if he has no semblance of title in the property in dispute. After advertng to the legal position as regards binding efficacy of a precedent, it was opined that it cannot be laid down as an absolute proposition that whenever a suit for specific performance is filed by A against B, a third party C can never be impleaded in that suit

⁶ (2005) 6 SCC 733

and if C can show a fair semblance of title or interest, he can certainly file an application for impleadment and taking a contrary view would lead to multiplicity of proceedings. It is pertinent to note that the Supreme Court expounded in explicit terms that the rejection of an application at an earlier stage of proceedings does not mean that the legal representatives of the deceased defendant should not be allowed to file an additional written statement and no useful purpose would be served by merely allowing the legal representatives to be impleaded but not allowing them to file an additional written statement as it would violate the principles of natural justice.

17. Shri Soni made an earnest effort to demonstrate that the purport of the judgment in the case of *Sumtibai & Ors.* (Supra) was explained by this Court in the case of *Ashokkumar Daulatsingh Madan* (Supra). In the said case, the question which was posed before this Court was, whether the petitioners therein, who were the heirs of the original defendant No.2, were entitled to take a stand which was divergent to the stand taken by the defendant No.2 in the joint written statement filed on behalf of the defendants. The said question arose in the backdrop of the fact that the legal representatives therein professed to contend that the signature of the deceased defendant

No.2 on the original written statement was forged, and thus, they be permitted to take a stand which might be divergent to the stand taken by the original defendant No.2. This Court answered the said question in the negative.

18. The learned Single Judge of this Court went on to explain the purport of the judgment of the Supreme Court in the case of **Sumtibai & Ors.** (Supra) as under :

“13 In so far as the judgment in Sumtibai's case (supra) is concerned, in my view, the said judgment would not further the case of the Petitioners in lgc 10 of 13 wp-6869.13.sxw so far as their claim for being entitled to take a divergent stand to the stand taken by the Defendant No.2 is concerned. The said case before the Apex Court concerned the claim of the legal representatives of the original Defendant to put in an additional written statement. The Apex Court in the said case was concerned with the issue as to whether the legal representatives are entitled to file their written statement and was not concerned with the issue as to whether the legal representatives are entitled to take a divergent stand to the stand taken by the Defendant No.2. It is in the said context that the observations made in paragraph 7 of the said judgment would have to be construed. The said observations cannot be stretched to mean that the legal representatives of the Defendant No.2 in the instant case would be entitled to file written statement taking a stand contrary to the stand taken by the original Defendant No.2.”

(emphasis supplied)

19. Banking upon the aforesaid observations that in the case

of *Sumtibai & Ors.* (Supra), the Supreme Court was not concerned with the issue as to whether the legal representatives are entitled to take a divergent stand to the stand taken by the deceased defendant, it was urged by Shri Soni that the pronouncement in the case of *Sumtibai & Ors.* (Supra) could not have been relied upon by the trial court to the extent it did do.

20. I am afraid to accede to the submission of Shri Soni. With respect, I find it difficult to agree with the proposition that in the case of *Sumtibai & Ors.* (Supra), the Supreme Court was dealing with the only question as to whether the legal representatives were entitled to file their written statement. The facts in the case of *Sumtibai & Ors.* (Supra), which have been extracted in detail, indicate that in the said case also, the deceased defendant had claimed exclusive ownership over the property which was allegedly agreed to be sold and the legal representatives sought to put-forth a defence that the deceased defendant was not the absolute owner and they were the co-owners thereof. An argument based on the restriction contained in sub-rule (2) of Rule 4 of Order XXII was advanced on behalf of the plaintiff therein and it was specifically negated by the Supreme Court. It would, in my opinion, be audacious to hold that *Sumtibai &*

Ors. (Supra) did not at all deal with the question of the legal representatives taking a stand which was divergent to the defence raised by the deceased defendant.

21. It would be contextually relevant to note that in the case of *Mumbai International Airport Private Limited Vs. Regency Convention Centre & Hotels Private Limited & Ors.*⁷, a criticism was made against the judgment of the Supreme Court in the case of *Sumtibai & Ors.* (Supra) on the ground that it was in conflict with the enunciation of the legal position by the Supreme Court in the case of *Kasturi* (Supra), which was by a larger Bench of three Judges. After comparing and contrasting the propositions expounded in the cases of *Sumtibai & Ors.* (Supra) and *Kasturi* (Supra), the Supreme Court concluded that there was really no conflict between the pronouncements in the cases of *Sumtibai & Ors.* (Supra) and *Kasturi* (Supra). The observations in paragraph 26 explain as to what was laid down in *Sumtibai & Ors.* (Supra) and *Kasturi* (Supra). They read as under :

“26 If the principles relating to impleadment, are kept in view, then the purported divergence in the two decisions will be found to be non-existent. The observations in *Kasturi* and *Sumtibai* are with

7 (2010) 7 SCC 417

reference to the facts and circumstances of the respective case. In Kasturi, this Court held that in suits for specific performance, only the parties to the contract or any legal representative of a party to the contract, or a transferee from a party to the contract are necessary parties. In Sumtibai, this Court held that a person having semblance of a title can be considered as a proper party. Sumtibai did not lay down any proposition that anyone claiming to have any semblance of title is a necessary party. Nor did Kasturi lay down that no one, other than the parties to the contract and their legal representatives/transferees, can be impleaded even as a proper party.”

(emphasis supplied)

22. Shri Soni then urged that if the defendant Nos.1(a) to 1(d) intended to set up a title to the suit property, which is *ex-facie* contrary to the claim of the deceased that he had exclusive title thereto, the defendant Nos.1(a) to 1(d) could get themselves impleaded as party to the suit in their independent right or institute independent proceedings to enforce their rights. However, once they are impleaded in the capacity of the legal representatives of the deceased defendant, they are enjoined to raise the defences commensurate to their legal character. A strong reliance was placed on the judgment of the Supreme Court in the case of ***Vidyawati*** (Supra). In the said case, the Supreme Court observed that when the petitioner was impleaded as a party-defendant, all rights under Order XXII Rule 4(2) and defences

available to the deceased defendant become 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.

23. Shri Soni drew attention of the Court to the pronouncement of this Court in the case of *Maguesh Rajaram Wagle* (Supra), wherein this Court disallowed the legal representatives to take the plea based on their title, which was not raised by the deceased defendant, on the premise that the said defence was derogatory to the plea already taken by the deceased defendant, in the light of sub-rule (2) of Rule 4 of Order XXII of the Code.

24. Reliance was also placed on another judgment of this Court in the case of *Nilkanth Pandurang Wath* (Supra). In the said case also, a learned Single Judge of this Court observed that in view of the provisions of Order XXII Rule 4(2) of the Code, the legal representatives would merely step into the shoes of the deceased defendant and it was impermissible for him to take a plea contrary to

the one taken by the deceased defendant as well as a plea personal to the legal representative.

25. The legal position which emerges is that the legal representatives who are impleaded upon the demise of the defendant, are entitled to make a defence and tender the additional written statement. The legal representatives are, however, permitted to raise the defence which is in conformity with their character as the legal representatives of the deceased defendant. It is not open for the legal representatives to take a defence which is divergent to and diverse from the one raised by the deceased defendant. This proposition, however, cannot be stretched to such an extreme that, notwithstanding of the facts of the case, the legal representatives are precluded from taking a defence based on their title.

26. Reverting to the facts of the case, it is imperative to note that the claim of the defendant Nos.1(a) to 1(d) that the deceased defendant was not an absolute owner of the suit property and they have an interest therein, is not something of which the plaintiff was totally unaware. Two factors are of decisive significance. One, in the plaint itself, the plaintiff averred that in response to the public notice,

published in the newspapers for ascertaining the clear and marketable title of the deceased defendant, the defendant Nos.1(a), 1(c) and 1(d) had communicated their objections claiming to be the legal heirs of Smt. Rhoda Noble, the testatrix, and late Kersi Noble, the brother of the deceased defendant, respectively. The cloud on the title of the deceased defendant was thus raised much before the institution of the suit and it constituted one of the causes of action for the suit. Two, in the written statement itself, the deceased defendant claimed that he had apprised the plaintiff that the defendant Nos.1(a) to 1(d) were claiming right, title and interest in the suit property and the plaintiff had agreed to purchase the suit property despite the said claim at his own risk as to the costs and consequences. These twin factors indicate that the plaintiff was in the know of competing claims of the defendant Nos.1(a) to 1(d) over the suit property.

27. The nature of the suit also assumes significance. In the event, the Court ultimately comes to the conclusion that the deceased defendant was not the absolute owner of the suit property and was only a part owner thereof, while considering the relief for specific performance, the Court may examine the issue whether the plaintiff is entitled to specific performance of the agreement to the extent to

which the deceased defendant had title to the suit property.

28. It is true that it could be urged that the defendant Nos.1(a) to 1(d) may be permitted to agitate their grievances by either seeking their impleadment as party in their own right or instituting independent proceedings. This proposition, however, is fraught with risk of promoting multiplicity of proceedings. If this submission is taken to its logical conclusion, it may envisage a situation that the defendant Nos.1(a) to 1(d) should wait till a decree is passed in this suit and then file a proceeding questioning the legality of the decree on the ground that the deceased had no absolute title to the suit property. Such a situation is not conducive for an effective and complete adjudication of the dispute once and for all.

29. The conspectus of the aforesaid consideration is that in the peculiar facts of the case, the learned Civil Judge was justified in permitting the defendant Nos.1(a) to 1(d) to plead a defence based on their title to the suit property. No prejudice appears to have been caused to the plaintiff as the material on record indicates that the plaintiff was well aware of the claim of the defendant Nos.1(a) to 1(d). The fact that the defendant No.1(a)'s application for

impleadment was rejected at an earlier stage of the proceedings or, for that matter, the defendant Nos.1(a) has instituted an independent suit does not constitute an impediment in permitting the defendant No.1(a) to raise the said defence. This position was explicitly ruled by the Supreme Court in the case of *Sumtibai & Ors.* (Supra).

30. For the foregoing reasons, no illegality or infirmity is found in the impugned orders which warrants interference by this Court in exercise of writ jurisdiction. Resultantly, the petition deserves to be dismissed.

31. The petition stands dismissed.

However, there shall be no order as to costs.

32. Rule stands discharged.

[N.J. JAMADAR, J.]