

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.527 OF 2023

Vitthal Kashinath Veerkar and Others ...Petitioners

Versus

Narayan Keshav Veerkar and Others ..Respondents

Mr. Sugandh B. Deshmukh for the Petitioners.

Ms. Siddhi Bhosale for Respondent Nos.3A to 3C.

Coram : Sharmila U. Deshmukh, J.

Date : 17th July , 2023.

P. C. :

1. Heard.

2. The challenge in the Petition is to the order dated 7th October, 2022 rejecting the Petitioner's application seeking a direction that the written statement filed by the legal heirs of the deceased Defendant No.2 be struck off as the same does not comply with the requirement of Order XXII Rule (4)(2) of Code of Civil Procedure.

3. The suit had been filed by the Respondent No.1-original Plaintiff for removal of the alleged encroachment and for declaration. In those proceedings original Defendant Nos.2 to 4 and Defendant Nos.4 to 8 had filed a common written statement taking the stand that the original Plaintiff did not have any right in the suit property

and as such not entitled to maintain the suit. It appears that subsequently during the pendency of the proceedings the property in question was purchased by the Defendant No.2 and Defendant No.8 pursuant to which the application was filed by Defendant No.2 for transposition as Plaintiff which came to be rejected by the trial Court. Similarly, the application filed by Defendant No.2 for amendment of the written statement seeking to place on record, by way of proposed amendment, that the Defendant Nos.2 and 8 had purchased the property from Plaintiff Nos.2 and 4 came to be rejected. The Defendant No.2 expired in the year 2020 and subsequently the Respondent Nos.3A to 3C being the legal heirs of the original Defendant No.2 came to be impleaded. The legal heirs sought to file a written statement in which the averment was made that the original Defendant No.2 had during the pendency of the proceedings purchased the property from the Plaintiff and as such the original Defendant No.2 has acquired the right to get the encroachment of Defendant Nos.4 to 7 removed from the suit property. This written statement was objected to by the Petitioners which came to be rejected giving rise to the present Petition.

4. Learned counsel appearing for the Petitioners points out that the written statement purported to be filed by the legal heirs of

Defendant No.2 pleads the same facts which formed the basis of the previous applications for transposition of Plaintiff as well as the Application for amendment of the written statement, both of which were rejected by the trial Court. He would submit that being so, the legal heirs of the Defendant No.2 cannot raise the same pleadings and support the case of the Plaintiff adverse to interest of Petitioners. He has pointed out that initially the Defendant No.2 had filed joint written statement with Defendant Nos.4 to 7 and the stand was that the Plaintiff has no right in the suit property and so not entitled to maintain the suit for encroachment and thereafter claiming that the Defendant No.2 has purchased the property, sought to change his stand, which was rightly rejected by the trial Court and Defendant No.2 was not permitted to amend his written statement. He would further contend that as the stand sought to be taken by the legal representative is adverse to the interest of the Defendant Nos.4 to 7 i.e. Petitioners herein although the Plaintiffs have no objection, the Petitioners are entitled to raise the objection. He has pointed out the provisions of Order XXII Rule 4(2) of the CPC and would submit that the legal heirs have to take a defence which is appropriate as regards their character as legal representative of the deceased. He draws support from the decision of the Apex Court in the case of **Vidyawati**

vs. Man Mohan and Others¹ and would contend that the decision which have been relied upon by the trial Court while rejecting application has been considered by the Apex Court in the decision of the **Vidyawati** (supra).

5. *Per contra*, learned counsel appearing for the Respondent Nos.3A to 3C would contend that the written statement which has been file, places on record the subsequent events which have taken placed during the pendency of the proceedings. She would further contend that by application below Exhibit 448 the legal heirs of the deceased Defendant No.2 has sought to set aside the order of “no written statement” which came to be allowed and the same has not been challenged by the Petitioners. She would contend that it is not clear as to under which provisions the present application has been filed.

6. Considered the submissions.

7. Before proceeding it would be appropriate to refer to the provisions of Order XXII which deals with the death, marriage and insolvency of parties and in particular Rule (4) of Order XXII which deals with the procedure in case of death of one of several defendants or of sole defendant and sub-rule (2) thereof provides

1 (1995) 5 SCC 431

that any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant. A plain reading of the provisions would make it clear that the defence to be taken by the legal representative of the Defendant No.2 is to be appropriate to his character as legal representative. In the present case the original Defendant No.2 had taken the defence in his written statement that the Plaintiff has no right in the suit property and as such the suit is not maintainable at his instance. Subsequently, the applications made for placing the subsequent developments on record came to be rejected, whereas by the written statement filed by the legal representative, the same is sought to be brought on record. In my opinion the legal representative stepping into shoes of original Defendant No.2 cannot be permitted to take a stand which is different from the stand taken by the original Defendant No.2. The fact remains that the applications made for placing the subsequent developments was rejected by the trial Court and the orders were not challenged by the original Defendant No.2 and as such the defence to be taken by the Respondent Nos.3A to 3C as legal representative of Defendant No.2 is to be in alignment with stand taken by the original Defendant No.2. The decision which has been relied upon by the learned counsel for the Petitioners in the case of **Vidyawati** (supra) makes it clear if any independent right is being claimed by the legal

representative on the basis of the subsequent development then it is for the legal representative to implead themselves in their personal capacity and not as legal representative of the deceased. In the present case being impleaded as legal representative of Defendant No.2 the defence taken by the legal representative of the Defendant No.2 cannot be contrary to the defence which is taken by the original Defendant No.2. As the stand which is now being taken by the legal representative of Defendant No.2 is clearly adverse to the right of the co-defendants, in my opinion, Defendants have a right to object the written statement filed by the legal representative.

8. In that view of the matter, the impugned order dated 7th October, 2022 is hereby quashed and set aside and the written statement filed by the legal representatives to be disregarded.

9. It is open for the legal representative to file a written statement appropriate to their character as legal representative.

10. Writ Petition stands allowed.

[Sharmila U. Deshmukh, J.]