
(2007) 11 DEL CK 0117

In the Delhi High Court

Case No : CM (M) No. 1419 of 2007

Smt. Manju Parthi, Ms. Nikita Parthi and Ms. Divya Parthi

APPELLANT

Vs

Sh. Rohit Parthi

RESPONDENT

Date of Decision : 06-11-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 22 Rule 4(2)
Constitution of India, 1950 — Article 227

Citation : (2007) 99 DRJ 257 : (2007) 9 ILR Delhi 202 Supp

Hon'ble Judges : J.M. Malik, J

Bench : Single Bench

Advocate : Sanjay Shangari, for the Appellant; D.S. Dalal, for the Respondent

Final Decision : Dismissed

Judgement

J.M. Malik, J.—The controversy in the instant case pivots around the question, whether the legal representative of a deceased defendant,

who is already proceeded against ex parte and has not filed the written statement, is entitled to file written statement. The trial court vide its order

dated 17.08.2007 answered this question in negative. Aggrieved by that order the instant petition under Article 227 of the Constitution of India has

been filed.

2. I have heard the counsel for the parties. Counsel for the respondent made two submissions. Firstly, he drew my attention towards Rule 4

appended to Order XXII of CPC. Sub clauses (1) & (2) run as follows:

(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 defense appropriate to his character as legal representative of the deceased defendant.

3. He also urged that the petitioner / legal representative of the deceased defendant is entitled to file written statement. In this context, he has drawn my attention towards an authority by the Apex Court in Bal Kishan Vs. Om Parkash and Another, , wherein it was held:

The said sub-rule authorises the legal representative of a deceased defendant or respondent to file an additional written statement or statement of

objections raising all pleas which the deceased tenant (defendant) had or could have raised except those which were personal to the deceased

defendant or respondent. In the instant case Bal Kishan, the appellant could not have, Therefore, in the capacity of the legal representative of the

deceased respondent Musadi Lal who was admittedly a tenant, raised the plea that he was in possession of the building as a trespasser and the

petition for eviction was not maintainable. It is true that it is possible for the Court in an appropriate case to implead the heirs of a deceased

defendant in their personal capacity also in addition to bringing them on record as legal representatives of the deceased defendant avoiding thereby

a separate suit for a decision on the independent title as observed in Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another, . The

relevant part of that decision at page 854 (of SCR) : (at pp. 2528-29 of AIR) reads thus:

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 defense 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.

4. For the following reasons, I locate no substance in these submissions. The law laid down in the above said authority does not dovetail with the facts of the present case. The facts of the present case are altogether different. It must be borne in mind that in this case the deceased defendant was proceeded against ex parte. He was deprived of the right to file the written statement. The petitioner has stepped into his shoes. The petitioner is not authorised to alter or amend that situation. The proceedings are to start from that stage where the same were left by his father. Merely because he is legal representative of the deceased defendant, he does not get a new right to put the clock back and file the written statement as if the case had started afresh. Procedure is not meant to hamper the cause of justice or sanctify miscarriage of justice. The only remedy open to the petitioner is to move application for setting aside the ex parte decree, if sufficient grounds exist in his favor or that of his predecessor, or, if, he has got independent right, he can move an application for impleadment nor merely as a LR of the deceased but also in his personal capacity.

5. The above said view finds support from a case titled as Ramgopal and Another Vs. Khiv Raj and Others, wherein it was held:

7. In my opinion, the contention of the learned Counsel appearing for the petitioners is devoid of any force. It is settled law that the legal representatives are stepped into the shoes of the deceased-plaintiff or defendant, as the case may be, and they must adopt the position occupied by his predecessor plaintiff or defendant. The legal representatives, Therefore, must proceed with the litigation from the stage where death of defendant or plaintiff had taken place. They are legally bound by the pleading of his predecessors-in-interest in whose place they have been substituted. Hence, the legal representatives substituted under Order 22, Rule 4; C.P.C. cannot set up a new case. The petitioners are bound by the proceedings taken so far against the deceased-defendant. They cannot be allowed to file the written statement, the right of which was closed as soon as the ex parte order was passed against the deceased-defendant-Govind Ram.

8. In this connection, I may refer to a decision of the Madras High Court in Kizhiakalathil Puthan Veetil Thavazhi Karnavan Vs. Manikat Variath

Ukkali Varissiar's son Sankunni and Others, , wherein it has been observed as under:

A party who comes into the suit as the legal representative of another party cannot be allowed to depart from or vary or contradict the attitude

taken up by the party whose legal representatives he is, it is obvious that if he were permitted to do so, it would be impossible to conduct any

litigation where legal representatives come in.

9. I further place reliance on a decision of the Calcutta High Court in Babulal N. Shukla Vs. Jeshankar N. Shukla, , wherein it has been observed

as under:

A legal representative substituted in place of a deceased-defendant cannot be permitted to make out a new case afresh in another written

statement at this stage. He has to take up the suit at the stage at which it was left when the original party died and to continue it. The only right he

has is to make a defense appropriate to his character as a legal representative of the deceased-defendant. His case is on a different footing than the

addition of a new defendant which is governed by Order 1, Rule 10(iv). Therefore, only the order for substitution would be served on the

substituted defendant and no fresh writ or summons could be issued for service on the substituted defendant.

6. Again, the Apex Court in Vidyawati Vs. Man Mohan and others, was pleased to hold:

3. It is seen that the petitioners' claim of right, title and interest entirely rest on the will said to have been executed by Champawati in favor of the

first defendant and herself. It is now admitted across the Bar that the first defendant had life interest created under the will executed by

Champawati. Therefore, the said interest is co-terminus with his demise. Whether the petitioner has independent right, title and interest de hors the

claim of the first defendant is a matter to be gone into at a latter proceedings. It is true that when the petitioner was imp leaded as a party-

defendant, all right under Order 22 Rule 4(2), and defenses 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 imp leaded 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. This is the view the court below has taken rightly.

4. This Court in Bal Kishan v. Om Parkash and Anr.(supra) has said thus:

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.

5. The same view was expressed in Jagdish Chander Chatterjee and Ors. v. Sri Kishan and Anr. (Supra), wherein this Court said:

(already quoted above)

7. See also Gaurav Uppal and Others Vs. Mrs. Sunita Uppal,

8. In view of the discussion, I find no force in the petition. The petitioner stands dismissed.

CM No. 14497/2007

The present application has rendered infructuous in view of the dismissal of the petition. The application stands dismissed.