

RAJASTHAN HIGH COURT

Prem Singh

Vs.

Smt. Savitri Devi

S.B. Civil Writ Petition No. 7682 of 2004

(Prem Shanker Asopa, J.)

07.04.2006

JUDGMENT

Prem Shanker Asopa, J.

1. The instant writ petition is directed against the order dated 6.10.2004 passed by the Civil Judge (Sr. Division), Dholpur whereby the written statement dated 26.5.2004 along with counter claim filed by legal representatives Nos. 2/1 to 2/5 of deceased-defendant No. 2 Prem Singh has not been taken on record on the objection of defendant No. 1 Madan Singh that the written statement has been filed by deceased Prem Singh wherein the amendment of similar counter claim was rejected on 25.1.2001, therefore, the legal representative are bound by the same and they have no individual right to take inconsistent pleas by re-agitating the same.

2. Briefly stated the relevant facts of the case are that plaintiff- respondent No. 1 filed a civil suit for partition and possession against Madan Singh, Prem Singh, amended suit was filed by the plaintiff and the present petitioners were also brought on record as legal representatives of deceased Prem Singh.

3. A bare perusal of the contents of the writ petition would reveal that the civil suit for partition and possession was filed by plaintiff-respondent No. 1 Smt. Savitri Devi d/o Late Shri Dilvar Singh Thakur, w/o Rattan Singh Negi against Madan Singh, Prem Singh and others claiming possession of 1/5th share in the property. Deceased Prem Singh in his written statement admitted 1/5th share of the plaintiff in the property but the legal representatives of the deceased have filed counter claim seeking partition of the property.

4. Defendant No. 1 Madan Singh raised an objection for taking on record the subsequent written statement filed by the legal representatives of deceased Prem Singh along with the counter claim on the ground that there was counter claim sought to be made by way of amendment by deceased Prem Singh (which) was rejected and

now the legal representatives cannot be allowed to raise inconsistent plea.

5. The trial Court after hearing both the parties, accepted the objection raised by defendant No. 2 Madan Singh and has not taken on record the written statement dated 26.5.2004 and counter claim filed by defendant Nos. 2/1 to 2/5 on the ground that earlier the application for amendment of the written statement similar to the counter claim filed by Prem Singh was rejected on 25.1.2001 and upheld by this Court on 22.2.2002 in revision, which is valid. Therefore, the legal representatives of deceased Prem Singh cannot re-agitate the issue.

6. The submission of the counsel for the petitioners is that the heirs and legal representatives of the deceased under sub-rule (2) of Rule 4 of Order 22 Civil Procedure Code in a case of suit for partition are entitled to make defence appropriate to their character and claim independent right. He further submits that it is true that legal representatives are bound by the plea raised by their predecessor in title and are further entitled to raise contrary plea but not inconsistent plea already raised by him. In support of his submissions, the counsel for the petitioners placed reliance on the judgments in *Smt. Shyama Devi & Ors. v. Smt. Manju Shukhla & Ors.*,¹ to 39, 41 and 42 and *Nasiruddin & Ors. v. Smt. Noor Jahan & Ors.*²

7. The counsel for the respondents has submitted that this Court has on another occasion while examining the scope of the said sub-rule in the case of *Dayali (Smt.) & Ors. v. Kumari Lata & Ors.*,³ and has held that it is not open for legal representative of deceased to assert their individual right or hostile title to the suit. All the legal representatives can do is to take up the suit at the stage at which it was left when the original defendant died and to continue it. They cannot take up a plea contrary to the one taken up by the deceased defendant. Here in the instant case, deceased Prem Singh himself filed an application for amendment of the written statement for inserting counter claim which was rejected on 25.1.2001 and upheld by this Court, therefore, the same cannot be allowed to be reagitated by filing counter claim.

8. I have gone through the record of the writ petition and further considered the rival submissions of the parties.

9. Order 22 Rule 4(2) Civil Procedure Code read as under:

Order "XXII Rule 4. Procedure in case of death of one of several defendants or of sole defendant -

(1) * * * *

(2) Any person so made a party may make any defense appropriate to his character as legal representative of the deceased defendant."

10. In the judgments of this Court in *Smt. Shyama Devi & Ors. v. Smt. Manju Shukhla*

& Ors. (supra) and *Nasiruddin & Ors. Smt. Noor Jahan & Ors.* (supra), cited by the counsel for the petitioners, there was no issue with regard to rejection of the similar nature of amendment sought by the deceased defendant in the written statement. However, the latter case was arising out of rejection of the amendment by the legal representatives of the written statement that the property has been gifted to them, thus earlier this was not the issue in the partition suit and there was no inconsistent plea. Therefore, the said judgments are distinguished. The issue dealt by this Court was assertion of the individual undecided right of the legal representatives not inconsistent with the plea raised by the deceased-defendant which is not the position in the present case as referred hereinabove.

11. In the impugned order, there is a reference of rejection of the amendment application of the written statement on 25.1.2001 filed by deceased Prem Singh which was in the nature of counter claim. Therefore, no inconsistent or hostile plea is allowed to be taken by the legal representatives even in their individual capacity as held by this Court in the judgment in *Dayali (Smt.) & Ors. v. Kumari Lata & Ors.* (supra), cited by the counsel for the respondents, the relevant para No. 15 of which is as follows :-

"15. In view of the decisions and law cited above, the Court is of the opinion that the legal representative cannot take a hostile stand to that of the deceased-defendant. It is the rights and liabilities of the deceased- defendant which have to be considered and not those of the legal representatives can, therefore, do is to take up the suit at the stage at which it was left when the original defendant died and to continue it. It is not open to them to assert their individual right or hostile title to the suit. They cannot take up a plea contrary to the one taken up by the deceased-defendant." (emphasis supplied)

12. In such a situation the issue of amendment which has been finalized during life time of the deceased, cannot be allowed to be re-agitated. In case the written statement along with the counter claim is taken on record, then it would be inconsistent plea which was sought to be raised by the deceased- defendant but not allowed by the Court vide its order dated 25.1.2001.

13. The Supreme Court in the case of *Bal Kishan v. Om Prakash and another, reported ⁴ in* has held that the person impleaded as legal representative of the deceased-defendant and not in his personal capacity cannot raise pleas which were personal to the deceased. Even if Court allows him to be impleaded in his personal capacity also, Court cannot permit him to raise such pleas which would oust jurisdiction of the Court itself to try the suit. The Court has also held that Rule 4(2) of

Order 22 Civil Procedure Code authorizes 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 had or could have raised except those which were personal to the deceased defendant or respondent. Para Nos. 3 and 4 of the aforesaid judgment of *Bal Kishan v. Om Prakash and another* (supra) are as follows:

"3. Order 22 Rule 4 of the Civil Procedure Code, 1908 provides that 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. Since the action in this case related to property, the right to sue did survive and the Rent Controller was right in bringing the Legal representative of the deceased Musadi Lal on record. Sub-rule(2) of Rule 4 Order 22 authorizes any person who is brought on record as the legal representative of a defendant to make any defense appropriate to his character as legal representative of the deceased defendant. The said sub-rule authorizes 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 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 v. Sri Kishan*,⁶ The relevant part of that decision at page 854 reads thus : (SCC pp. 464-5 para 10) :

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. But in the instant case the appellant cannot claim the benefit of the above decision for two reasons. First, the appellant had not been brought on record as a respondent in the eviction petition in his personal capacity but had been brought on record only as the legal representative of Musadi Lal. Secondly, in the circumstances of this case, even if a prayer had been made to bring the appellant on record in his personal capacity, the Rent Controller could not have allowed the application and permitted him to raise the plea of independent title because such a plea would oust the jurisdiction of the Rent Controller to try the case itself. The observations made in the Jagdish Chander Chatterjee case have to be confined to only those cases where the Court hearing the case has jurisdiction to try the issues relating to independent title also. The Rent Controller, who had no jurisdiction to pass the decree for possession against a trespasser could not have, therefore, impleaded the appellant as a respondent to the petition for eviction in his independent capacity. We do not, therefore, find any substance in the above plea of the appellant. Further, the plea of the appellant that he was holding the property as a trespasser is also not tenable because the possession of Musadi Lal being permissive, the possession of the appellant who had succeeded to the estate of Musadi Lal as his heir could not be that of a trespasser in the circumstances of the case. He could not, therefore, resist the passing of the decree for eviction on proof of the ground in Section 13(2)(ii)(a) of the Act." (Emphasis supplied)

14. In the aforesaid case, the Supreme Court has not allowed the legal representative of the deceased tenant to raise the issue of trespasser in the Rent Control proceedings.

15. Above proposition of law wherein the word had or could have been raised by the deceased defendant can be raised by the legal representatives also suggests that in case plea sought to be raised by the deceased defendant by way of amendment in the written statement and the same was rejected, then the legal representatives are bound by it and cannot be allowed to re-agitate the same, otherwise there would be inconsistent pleas.

16. In view of the above, the contentions of the petitioners are rejected and the

contentions of the respondents are accepted.

17. The trial Court has acted within its parameters and the impugned order dated 6.10.2004 passed by the Civil Judge (Sr. Division), Dholpur in Civil Suit No. 2/2003 does not call for any interference under Article 227 of the Constitution of India.

18. Accordingly, the writ petition is dismissed with no order as to costs.

Petition dismissed.

Cases Referred.

1. 1991(1) RLR 351, para Nos. 37
2. 1990(2) RLR 234
3. 2003(2) DNJ (Raj) 568
4. (1996)4 SCC 155
5. AIR 1972 SC 2526