
(2014) 2 OLR 211

Orissa High Court

Case No: W.P. (C) No. 11886 of 2007

Maheswari Majhi

APPELLANT

Vs

Govt. of Orissa

RESPONDENT

Date of Decision: Feb. 21, 2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 22 Rule 4, Order 22 Rule 9, Order 6 Rule 17#Limitation Act, 1963 " Section 5

Citation: (2014) 2 OLR 211

Hon'ble Judges: B.R. Sarangi, J

Bench: Single Bench

Final Decision: Disposed Off

Judgement

Dr. B.R. Sarangi, J.

This writ petition has been filed by the petitioners assailing the order dated 25.08.2007 passed by the learned Civil

Judge (Junior Division), Jaleswar in T.S. No. 618 of 1998 rejecting the application filed by the plaintiff petitioners under Order 22, Rule 4, C.P.C.

along with a petition u/s 5 of the Limitation Act for substitution of legal representatives of deceased defendant No. 8 and to condone the delay for

filing of substitution petition.

2. The fact of the case in hand is that the predecessors of the present petitioner Nos. 1 to 6 and petitioner Nos. 7, 8 and 9 as plaintiffs filed a suit

registered as T.S. No. 618 of 1998 in the Court of the learned Civil Judge (Junior Division), Jaleswar impleading the present opposite parties as

defendants seeking for declaration that the R.O.R. in respect of "Kha" schedule property is null and void and for permanent injunction restraining

the defendants to create disturbance in the peaceful possession of the plaintiffs. The further case of the plaintiff is that the suit schedule property

was originally recorded in the name of Madhab Majhi and Gajendra Majhi, fathers of the plaintiff No. 1 and plaintiff Nos. 2 to 4 respectively. The

father of the respective parties while possessing the "K" schedule property died and there after the plaintiffs were possessing over the suit schedule

property jointly without any disturbance from any quarter. While they were in possession of "K" schedule property, the disturbance cropped up

between the plaintiffs for which reason there was an amicable partition of "K" schedule property between the plaintiffs. It is stated that while they

were in possession of the schedule land in respective shares, some of the Government employees on behalf of the opposite party Nos. 1 and 2

started creating disturbances by making measurement to construct bridge over the suit schedule land and on being asked by the defendants about

such work defendant Nos. 1 and 2 disclosed for the first time that the suit land has been recorded in the name of the Government during the Major

Settlement. Therefore, the plaintiffs were constrained to file the suit.

3. On being noticed, defendants have entered appearance and defendant Nos. 4, 5, 7 and 9 to 16 close to file written statement denying all the

contents raised in the plaint stating therein that the property appertains to Hal Plot No. 748 and 753 of Hal Khata No. 6 is the ancestral and

homestead property of the defendants and they are in possession of the same since time immemorial. It is stated that the suit schedule land is the

only approach road of the defendants to their agricultural land and there is no other alternative road to approach the agricultural land of the

defendants and they are in continuous possession of the said approach road to the knowledge of the plaintiffs and the plaintiffs have got no right,

title and interest over the same. Therefore, they claim for dismissal of the suit.

4. At this juncture, defendant Nos. 4, 5 and 7 to 16 filed a petition under Order 6, Rule 17, CPC to amend the written statement but the said

petition was signed by all the defendants except defendant No. 8. The said amendment petition was objected by the plaintiffs and seeks for

rejection of the same in absence of signature of the defendant No. 8 after commencement of trial. It is stated that for the first time on 21.7.2007

that defendant No. 8 had died and after coming to know about the death of the deceased, plaintiffs filed a petition for amendment mentioning

therein that the sons of deceased defendant No. 8 are already on record as defendant Nos. 3 to 7 being the legal heirs, there is no need to implead

two daughters of deceased defendant No. 8 being married daughters as it is difficult to get their whereabouts to implead them as parties which was

allowed by the learned trial Court.

5. After receiving the information about the two married daughter of the deceased defendant No. 8, plaintiffs filed a petition under Order 22, Rule

4, CPC on 18.8.2007 along with a petition under Order 22, Rule 9, CPC to substitute the two married daughters of the deceased defendant No.

8 in her place without mentioning the date of death which was not within the knowledge of the plaintiffs. However, two days after i.e. on

20.8.2007 the plaintiffs filed a memo not to press the petition filed on 18.8.2007 under Order 22, Rule 4, CPC read with Order 22, Rule 9, CPC

as there was no date of death of deceased defendant No. 8 has been mentioned in the petition. On the very same day, the plaintiffs filed a petition

Order 22, Rule 4 CPC along with a petition u/s 5 of the Limitation Act indicating the date of death as 15.03.2007 under Annexure-1.

6. The defendant Nos. 3 to 5, 7 and 9 to 16 filed their objection stating therein that defendant No. 8 died on 19.3.2007 not on 15.3.2007 and it

was within the knowledge of the plaintiff. It is further stated that the plaintiffs have already taken the plea that the left out legal representatives of

deceased defendant No. 8 are not required to be made as a party, the present application is not maintainable. That apart the petition to set aside

the abatement is not filed along with the petitions under Order 22, Rule 4, CPC and u/s 5 of the Limitation Act, the present petition is liable to be dismissed.

7. After hearing the parties, without considering the materials available on record, the learned trial Court rejected the petition vide impugned order dated 25.8.2007, hence this writ petition.

8. Mr. S.P. Mishra, learned Senior Counsel for the petitioners states that the learned Court below has committed gross error by rejecting the application filed under Order 22, Rule 4, CPC read with u/s 5 of the Limitation Act seeking impletion of rest of the legal heirs of the deceased

defendant No. 8. He further states that some of the legal heirs are already on record. Initially he filed the application indicating the factum that the

legal heirs of the deceased defendant No. 8 being on record, there is no need for any substitution. However, on subsequent information being

received that two of the married daughters of the deceased defendant No. 8 have been left out, by way of present application he sought for

impletion of them as party. Moreso, the suit cannot abate as some of the legal heirs are already on record. But the rejection of the application so

filed by the learned Court below is absolutely outcome of non-application of mind. Therefore, seeks for interference of this Court.

9. Mr. A.S. Nandy, learned counsel for the opposite parties states that in one hand the plaintiff-petitioners have admitted that since legal heirs of

deceased defendant No. 8 are already on record, there is no need for any substitution and later stage they come forward with an application for

impleading the married daughters of deceased defendant No. 8 as party. Therefore, the learned Court below by applying his mind has rightly

passed the impugned order and this Court should not interfere with the same. It is further stated that once the plaintiff-petitioners have filed an

application under Order 22, Rule 4, CPC and the same has not pressed, thereafter on similar consideration the second application has been filed

seeking for impletion of two left out married daughters of deceased defendant No. 8 amounts to disowning the statement made by the petitioners in

earlier petition. Therefore, the learned Court below has rightly rejected the same.

10. Considering the contention raised by the learned counsel for the parties and after perusing the records, the provision contained under Order

22, Rule-4, CPC which reads as follows:

Order-22, Rule 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 along, 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 defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who

has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case,

be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been

pronounced before death took place.

(5) Where-

(a) the plaintiff was ignorant of the death Of a defendant, and could not, for that reason, make an application for the substitution of the legal

representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963) and the suit has in consequence,

abated; and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963) for setting aside the abatement

and also for the admission of that application u/s 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not

making the application within the period specified in the said Act.

The Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved.

11. By virtue of the provisions mentioned above, the legal heirs of deceased defendant No. 8 have to be brought on record. The plaintiffs being

illiterate and innocent local villagers could not come to know the niceties of law with regard to the death of defendant No. 8. Therefore, after

knowing about the death of deceased defendant No. 8 from the counsel for the defendants, the plaintiffs filed a petition for amendment of their

pleading on 1.8.2007 mentioning therein that the legal heirs of deceased defendant No. 8 namely the defendant Nos. 3 to 7 are already on record

and there is no need to implead her two left out married daughters, which was allowed and the plaint has been amended. But as per the Hindu

Succession Act, 2005, the left out married daughters of defendant No. 8 are to be impleaded as a party by way of substitution. Accordingly, they

filed an application under Order 22, Rule 4, CPC but could not furnish the date of death of deceased defendant No. 8, which is not within their

knowledge. Therefore, the plaintiffs have not press such application and after coming to know the death of deceased defendant No. 8 filed the

present application under Order 22 Rule 4, CPC read with Section 5 of the Limitation Act to condone the delay though the date of death was not

correct indicated in the petition to amend the date of death as 15.3.2007 but the defendant Nos. 3 to 5, 7 and 9 to 16 have stated in their

objection petition that the date of death is 19.3.2007. Therefore, impletion of party to left out two married daughters as legal heirs of the deceased

defendant No. 8 will not cause any prejudice to the defendants. So far as the contention raised that the suit has been abated due to non-impletion

of legal heirs of deceased defendant No. 8 is concerned, the same is not sustainable in view of the fact that some of the legal heirs of deceased

defendant No. 8 are already on record. Therefore the suit cannot abate as against the legal heirs of the deceased defendant No. 8. But in the

present case all the legal heirs save and except two married daughters has not been impleaded as parties, therefore the suit cannot abate.

However, the application under Order 22, Rule 4 has been filed to implead those two left out married daughters in order to avoid some future

complicacies. Moreso, for impletion of such legal heirs is beyond the limitation period cannot be considered as fatal to the proceeding itself.

Therefore, the impugned order passed by the learned Court below is misconceived one.

12. In view of the facts and circumstances of the case, the impugned order dated 25.08.2007 passed by the learned Civil Judge (Junior Division),

Jaleswar in T.S. No. 618 of 1998 is hereby set aside. The legal heirs of deceased defendant No. 8, i.e. two married daughters be brought on

record and opportunity of hearing be given to them in conformity with the provision of law. The interim order dated 25.9.2007 stands vacated.

13. Since the suit is of the year 1998, learned Court below is directed to proceed with the matter as expeditiously as possible. Parties are directed

to cooperate with the trial for early disposal of the suit.

14. With the above observation and direction, the writ petition is disposed of. No cost.