

## Natthu Gawali Vs Shivram Gawali

**Court:** Madhya Pradesh High Court (Indore Bench)

**Date of Decision:** Oct. 29, 1986

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€” Order 22 Rule 4, 2(11)

**Citation:** (1987) MPLJ 372

**Hon'ble Judges:** K.L. Shrivastava, J

**Bench:** Single Bench

**Advocate:** B.I. Mehta, for the Appellant; B.K. Gupta, for the Respondent

**Final Decision:** Allowed

### Judgement

@JUDGMENTTAG-ORDER

K.L. Shrivastava, J.

This revision petition is directed against the order dated 29-4-1986 passed by the Additional Judge to the Court of District Judge, Mandleshwar in

Civil Appeal No. 43-A of 1983 whereby the Non-applicant's application under Order 22 Rule 4 CPC (for short "the Code") has been allowed

and the application has been dismissed.

Circumstances giving rise to this petition are these. Mst. Balibai widow of Ghisaji instituted a Civil Suit (C.S. No. 86-A of 1979 of the Court of

Civil Judge Class II Maheshwar) for declaration of title to immovable property and injunction and alternatively for possession against the present

petitioner, who contested the suit on the ground that he is the adopted son of the said Ghisaji. His defence did not find favour with the learned trial

Court and the suit was decreed in favour of Mst. Balibai.

Natthu preferred an appeal. During the pendency of that appeal, Mst. Balibai died. Thereupon Natthu applied stating that he is the legal

representative of deceased Balibai. Non-applicant Shivram also filed an application stating that he is the legal representative of Balibai on the basis

of will executed by her.

The learned trial Judge rejected the petitioner's application and, without any inquiry, allowed the one filed by the Non-applicant Shivram.

The contention of the learned counsel for the petitioner is that as the impugned order has been passed without any enquiry it is vitiated. In support

of his submission, he has placed reliance on the Full Bench decision in Mithulal & others vs. Badriprasad & others (1980 MPLJ 778 = 1981 JLJ

21) and in the decision in Dinesh Kumar Khare's case (1986 ) M.P. W.N. 11).

The contention of the learned counsel for the Non-applicant is that substitution of the legal representative is only for continuity of the proceeding

and as it involves no determination of any right, the impugned order is sustainable on the material on record. In support of his submission, he has

invited my attention to the decisions in the The Kalyanmal Mills Ltd. Vs. Volimohammed and Another, and Suraj Mani and another vs. Kishorilal (

AIR 19876 H.P. 74).

The point for consideration is whether the revision petition deserves to be allowed.

The relevant provision in Order 22 Rule 5 of the Code reads thus :

Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such

question shall be determined by the Court.

It is true that as pointed out in the decision in The Andhra Bank Ltd. Vs. R. Srinivasan and Others, even a legatee who obtains only a part of the

estate of the deceased under a will can be said to represent his estate and is, therefore, a legal representative u/s 2(11) of the Code. But the

question here is whether the person claiming a legatee in fact holds that status and in terms of Order 22 Rule 5 of the Code the same has to be

determined

Substitution of a person as legal representative results in continuation of the proceedings and is certainly against the interest of the other party. To

this extent, the determination of conflicting claims though for a limited purpose, is certainly involved. In this view, the contention that the substitution

of a person as legal representative does not result in any final determination of rights of the parties is of no avail. Therefore, when the right of a

person to represent the estate of the deceased is in controversy the same has to be determined by holding an inquiry into the same as provided by

law. Though the findings therein would not affect the merits of the respective rights at the trial.

As pointed out in the Full Bench decision in Mithulals case (supra) before ordering substitution an inquiry is, in law, necessary. In paragraph 3 of

the decision in Suraj Mani's case it has been observed as under :-

The substitution does not make the legal representative heir to the property of the deceased. It was pointed out by the Lahore High Court in AIR

1941 Lahore 142 , in a case where the legal representative of a deceased plaintiff was brought on the record, that a decision to do so under Order

22, Rule 5 must be limited to the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property. Even

if the learned Senior Subordinate Judge has held that the will relied on by the respondent is a valid will, that finding had been rendered merely for

the purpose of enabling the prosecution of the suit to go on. It cannot be construed as a decision on the merits of the suit The finding that the will is

valid cannot operate as res judicata where that very question needs to be decided in order to resolve the controversy in the suit on its merits.

In the result, the revision petition is allowed. The impugned order so far as it relates to the decision of the application under Order 22 Rule 4 of the

Code is set aside.

The learned Trial Court is directed to dispose of the said applications after due inquiry. There will be no order as to costs.