

(2008) 03 OHC CK 0027

Orissa High Court

Case No: None

Union of India (UOI) and Others

APPELLANT

Vs

Smt. Nirupama Jena and Others

 Smt. Subhashree Jena and
Another Vs Union of India (UOI)
and Others

RESPONDENT

Date of Decision: March 14, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4, Order 22 Rule 5

Citation: (2008) 106 CLT 76 : (2008) 2 OLR 332

Hon'ble Judges: Indrajit Mahanty, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

Indrajit Mahanty, J.

Misc. Case No. 55 of 2004 has been filed by the Union of India and others under Order 22 Rule-4 of the CPC

intimating that Respondent No. 1-Smt. Nirupama Jena, W/o. Late Abdhut Jena died on 12.10.2004 during the pendency of this appeal, leaving no

issue of her own. It further asserted that the other Respondents being the legal heirs of Late Abdhut Jena and Late Smt. Nirupama Jena-

Respondent No. 1 (1st wife) i.e., Respondent Nos. 2 to 5 be accepted as substituted legal heirs of Respondent No. 1 This petition was filed on

7.12.2004.

2. The 2nd Misc. Case, i.e., Misc. Case No. 51 of 2005 has been filed by one Smt. Subhashree Jena and Smt. Parbany Jena. In their petition

supported by an affidavit state that their Late father Abdhut Jena (Original Respondent) had expired on 10.10.2003 leaving behind him, his wife

Late Nirupama Jena and two married daughters (the present Petitioners). The said petition further contains a declaration that Nirupama Jena had

also expired during the pendency of the appeal on 12.10.2004 and prayed for substitution by impleading them in place of Respondent No. 1(a)-

Nirupama Jena. Their claim was sought to be justified on the basis of Legal Heir Certificate issued in their favour by the Tahasildar, Sadar, Cuttack

under Annexure-3 to the said application.

3. Mr. A.B. Mishra, Learned Counsel for the Petitioner, inter alia, asserts that Misc. Case No. 55 of 2004 (filed by the Union of India) ought to

be allowed and consequently, Misc. Case No. 51 of 2005 filed by Smt. Subhashree Jena and Parbany Jena ought to be rejected since the present

appeal was filed by the Union of India and applying the ""principles of dominus litus"". He submitted that it was the right of the Appellant to substitute

the deceased-Respondent and, therefore, the prayer of the Petitioner Misc. case should not be entertained.

Mr. Mishra further submitted that when the original sole Respondent, Sri Abdhut Jena passed away on 10.10.2003, the Union of India had filed an

application for substitution of sole Respondent under Order 22 Rule 4 C.P.C. and the same has been registered as Misc. Case No. 01 of 2004

and the said Misc. Case came to be allowed by Order No. 13 dated 24.2.2004, thereby permitting the impletion the following legal heirs of the

deceased-Respondent, namely, Smt. Nirupama Jena [R-1(a)-1st wife], Nayanbala Jena [R-1(b)-2nd wife] and Nayanbala Jena's children

namely, Smt. Susmita Jena [R-1 (c)], Kumari Abhiskta Jena [R-1(d)] and son Ashis Jena [R-1(e)].

Learned Counsel submits that since this Court has accepted the substitution as prayed for in Misc. Case 1 of 2004 and no objection was raised on

behalf of Smt. Nirupama Jena who had been impleaded as Respondent No. 1 about the non-inclusion of her alleged daughters. Apart from the

said fact, he placed reliance on the Order No. 14 dated 24.2.2004 passed by this Court in Misc. Case No. 30 of 2003 which was filed by Smt.

Nirupama Jena and Orders thereon passed on the self-same date, i.e. 24.2.2004. From these facts, Learned Counsel contended that Misc. Case

No. 51 of 2005 filed by Smt. Subhashree Jena and Smt. Parbany Jena are wholly unlawful and should not be entertained. Mr. Mishra further

contended that no reliance should be placed upon the Legal Heir Certificate, issued by the Tahasildar, Sadar Cuttack declaring Smt. Subhashree

Jena and Smt. Parbany Jena as married daughters of the deceased Smt. Nirupama Jena (Annexure-3 to Misc. Case No. 51 of 2005).

4. Mr. Pattnaik and Mr. Mishra, Learned Counsel for the Respondents, in essence, supported the stand taken by the Union of India advanced by

Mr. Mishra as noted hereinabove, and objected to the petition filed by Smt. Subhashree Jena and Smt. Parbany Jena.

5. Mr. Palit, Learned Counsel appearing for Smt. Subhashree Jena and Smt. Parbany Jena, on the other hand, submitted that the application filed

by his clients in Misc. Case No. 51 of 2005 ought to be allowed since his clients are the legal heirs of Late Smt. Nirupama Jena and this fact can

no longer be in doubt in view of the Legal Heir Certificate granted in their favour by the Tahasildar, Sadar, Cuttack in Misc. Certificate Case No.

05 of 2005. Mr. Palit further submitted that is a fact that upon the death of the original sole Respondent-Abdhut Jena on 10.10.2003, the

Appellant-Union of India had sought substitution in Misc. Case No. 1 of 2004 and the same was allowed by order No. 13 dated 24.2.2004. He

also submitted that Misc. Case No. 30 of 2003 had been filed by Late Abdhut Jena while he was alive and an affidavit therein had been filed by

Smt. Nirupama Jena after the death of her husband. On reading of the said affidavit, it would be clear that she was compelled to file such an

affidavit since the Garrison Engineer (I), INS, Chilka had sought to encash the bank guarantee which had been provided by Late Abdhut Jena

during the pendency of the challenge to an award made in his favour in the present appeal. Mr. Palit submitted that this affidavit on behalf of Smt.

Nirupama Jena, in no manner come on the way of the present Petitioners, namely, Smt. Subhashree Jena and Smt. Parbany Jena from seeking

substitution in place of the mother Late Smt. Nirupama Jena.

6. Considering the rival contentions and shorn of unnecessary details, the following facts emerge from the pleadings and/or in the case records.

i) The present Arbitration Appeal was filed on 7.1.2003. The sole Respondent, namely, Abdhul Jena passed away on 10.10.2003. The Union of

India sought to substitute the sole Respondent by filing an application in Misc. Case No. 1 of 2004 and in the schedule of Legal Heirs in the said

application, the name of Smt. Nirupama Jena is mentioned at serial No. 1 but admittedly, the names of Smt. Subhshree Jena and Smt. Parbany

Jena do not figure in the said schedule of constitution.

ii) From the order-sheet In Order No. 13 dated 24.2.2004, there is no doubt that the said substitution petition was allowed, but it is most

important to take note herein that the said substitution petition was allowed, without issuing notice to the persons named in the said schedule for

substitution. Therefore, it would be clear that this Order Dated 24.2.2004 was passed in the absence of the legal heirs of Late Abdhut Jena and

the present controversy could not held to have been settled.

iii) On a verification of the affidavit in support of Misc. Case No. 1 of 2004, it is seen that the said affidavit has been sworn to by one, Shri M.

Yagaiah who was then working as Garrison Engineer (I), INS, Chilka, Balugaon. That said petition does not disclose the manner or source of

knowledge for filing of such application.

iv) It is also a fact that an affidavit was filed on 24.2.2004 by Late Smt. Nirupama Jena in support of late husband's application registered as Misc.

Case No. 30 of 2003, which had been filed seeking an order restrain from encashing his bank guarantee. On a reading of the said affidavit, it is

clear that since the Appellants had attempted to encash the bank guarantee provided by her husband after the death of her husband, she had filed

an affidavit in support of the prayer made in Misc. case seeking injunction against the encashment of bank guarantee.

Clearly, this affidavit of Smt. Nirupama Jena has nothing to do with the present controversy and does not whisper a word either/or on substitution

and/or on the possibility of existence of other legal heirs if any.

7. Therefore, on a consideration of the facts as noted hereinabove, it would be clear that no inference or presumption of law would arise from the

said facts in order to try and stone wall/prevent any attempt being made by Smt. Subhashree Jena and sister Smt. Parbany Jena in their seeking to be impleaded in the present appeal on their claim to be legal heirs of Late Smt. Nirupama Jena.

8. Mr. A.B. Mishra, Learned Sr. Counsel's contention in so far as the principle of ""dominus litus"" is concerned, is necessary to be considered on its merits. The present controversy between the parties can be resolved by applying the provision of Order 22 Rule-5 C.P.C., which provides that, 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 a question shall be ""determined"" by the Court. The term "Court" contained in Order 22 Rule 5 obviously includes a Court hearing the appeal. The provision of the said Rule further stipulates that if such question arises before an Appellate Court, the said Court while an Appellate Court ""may before determining the question, direct any subordinate Court to try the question and to return the records together with evidence along with its findings and reasons and the Appellate Court may take the same into consideration in final decision after considering all the records.

9. In this respect this Court in case of Sitaram Beura Vs. Birakishore Beura and Others, held that if a dispute is raised as to whether any person is or is not the legal representative of the deceased party, it should be judicially determined by the Court under Order 22 Rule 5 CPC. This principle has been reiterated by this High Court in the case of Sukanta Chandra Sahoo Vs. Jayakrishna Routray and Others, .

The provision to Order 22 Rule 5 C.P.C. is quoted here in below:

5. Determination of question as to, legal representative - 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: [Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such Trial, its findings and reasons therefore, and the Appellate Court may take the same into consideration in determining the question].

10. It is now important to note herein that in Misc. case No. 51 of 2005 which was filed by Smt. Subhashree Jena and her sister Smt. Parbany

Jena, claimed to be the legal heirs of Late Smt. Nirupama Jena on the basis of a Legal Heir Certificate granted to them under Annexure-3 to the

said petition. The Learned Counsel for the Union of India, as well as, Learned Counsels appearing for the other Respondents, namely, Smt.

Nayanbala Jena and her children, strenuously urged that no reliance should be placed on the said ""certificate"" since Mr. Palit, Learned Counsel

appearing for them had claimed that his clients were the ""adopted daughters"" of Late Abdhut Jena and since no deed of adoption nor requisites of

adoption was filed in the said Misc. case and further since no explanation or any cause was given on their behalf to the Court, prior to the Order

Dated 24.2.2004 on Misc. case No. 1 of 2004.

11. The vehemence, in which the Union of India seems to oppose the substitution application filed by Smt. Subhashree Jena and Smt. Parbany

Jena is indeed a matter of surprise. Once again an objection was filed to Misc. case No. 51 of 2005 going into 8 pages whereby one Shri M.

Yagaiah, Garrison Engineer (I), INS, Chilka, Balugaon has raised various issues regarding as to whether the present Petitioners were daughters of

Smt. Nirupama Jena or not and if so, as to why the Counsel of Smt. Nirupama Jena did not object to the non-inclusion of her daughters as

substituted legal heirs when Order Dated 24.2.2004 was passed. However, surprisingly this issue has been raised by a Garrison Engineer, who

obviously has no personal knowledge as to whether these persons have been at all adopted, and if adopted and whether have been adopted in

compliance of the requirements of the Hindu Adoption and Maintenance Act.

12. I am constrained to note herein that in the present case while there obviously exists a dispute amongst the legal heirs of Late Abdhut Jena and

Late Smt. Nirupama Jena and which essentially remains a family dispute pertaining to the successors in interest of Late Abdhut Jena, unfortunately,

the Union of India has sought to drag itself into adjudication of such an issue which, in my view, is beyond their preview. It is indeed surprising to

note that instead of the Appellant pursuing its remedy by pursuing its appeal since filed the last four years, i.e., from 10.10.2003, has sought to

involve itself in the family dispute of Late Abdhut Jena by either supporting or opposing one branch of family. I am constrained to take note of this

fact because of the vehemence in which the Learned senior Counsel for the Union of India and contended that since the Union of India is the

Appellant in the present proceeding, principles of "dominus litus" permits an Appellant to decide for itself, whom to substitute in place of a

deceased Respondent,

While the ""principles of dominus litus"" has no application whatsoever to the present facts and circumstances of the case under Order 22 Rule 5

C.P.C. an obligation is on this Court to ""determine"" the question, whether a particular person is or is not the legal representative of the deceased

defendant. The principles of ""dominus litus"" can does not extend to depriving the Court of its obligation/authority in law in view of the aforesaid

Proviso of the C.P.C.

What is even more surprising is the nature of the contents in both Misc. case Nos. 1 of 2004 as well as 55 of 2004 filed by the Union of India and

the objection filed by the Union of India to Misc. case 51 of 2005. In all these applications, affidavits have been sworn to by one Shri M. Yagaiah,

Garrison Engineer (I), INS, Chilka. In none of the affidavits does the deponent disclose the source of his knowledge as to who are the legal heirs

of the deceased contractor, Abdhut Jena. Obviously, judicial notice has to be taken of the fact that the substitution sought to be effected pursuant

to Misc. case No. 1 of 2004, was based upon an affidavit filed by the person who did not and could not have personal knowledge of the fact as to

who are the legal heirs of Late Abdhut Jena.

13. The next issue to be dealt that this Court is as to the nature of an enquiry under Order 22 Rule 5 C.P.C. Whereas, it is a fact that this

controversy as to who are the legal heirs of Late Abdhut Jena and Late Smt. Nirupama Jena has arisen in the course of the present appeal, I am of

the view that the Appellate Court has the power to either direct any subordinate Court to resolve the question and return the records together for

evidence along with its findings and reasons and in the alternative an Appellate Court also possess the necessary authority to take up this

obligation, responsibility by itself.

14. In the present case, the Union of India and Smt. Nayanbala Jena (Respondent No. 2), both rely on the Legal Heir Certificate issued by the Tahasildar, Bhubaneswar in Misc. Certificate Case No. 1050 of 2003 under Annexure-4 to the counter affidavit filed by the Respondent Nos. 2 to 5 in Misc. Case 51 of 2005 to establish their status as legal heirs of Late Abdhut Jena. This very certificate contains the name of Late Abdhut Jena's 1st wife, namely, Smt. Nirupama Jena. Similarly, the present Petitioners in Misc. Case No. 51 of 2005 have placed reliance upon the Certificate issued by the Tahasildar, Sadar, Cuttack in Misc. Certificate Case No. 05 of 2005 certifying that Smt. Subhashree Jena and Smt. Parbany Jena are the legal heirs and married daughters of the deceased Smt. Nirupama Jena. In course of the present proceeding, since this certificate and its authenticity can be challenged by the Union of India as well as Smt. Nayanbala Jena and her children. Based on an application filed by the Respondent No. 1(C) Misc. case No. 48 of 2006, by Order Dated 12.12.2007, the Tahasildar, Sadar Cuttack was directed to produce the "original record" of the said case for the purpose of verification, since doubt arose over the "genuineness" of the said Legal Heir Certificate. Mr. Palit, Learned Counsel produced the original Legal Heir Certificate and the same is kept on record of the proceeding. Subsequent thereto, the Tahasildar, Sadar Cuttack vide letter dated 4.1.2008 intimated that he requires one month further time to submit the records of proceeding and again on 21.1.2008, two weeks" further time was sought for. On 4.2.2008, the Tahasildar, Sadar Cuttack appeared in person and submitted that the clerk-in-charge of the aforesaid case record had retired from service without handing over the charge of the concerned file to his successor and further submitted that necessary steps had already been initiated by the present clerk to obtain the said records. The Tahasildar further produced the original Institution register for the year 2005 and from the said register, it appears that Misc. Certificate Case No. 5 of 2005 dated 6.1.2005 had been filed by one Subhashree Jena for issuance of Legal Heir Certificate and the register further indicated that the same had been allowed and has been disposed of.

15. In the aforesaid circumstances, without awaiting the original file or reconstituted file and since delay in adjudication of the present appeal, by

Order Dated 4.2.2008 the Tahasildar was directed to verify the Legal Heir Certificate which had been kept in a sealed cover with the Deputy

Registrar (Judicial) and to file an affidavit with regard to the authenticity and genuineness of the said certificate by 12.2.2008, after verification of

the original certificate.

Pursuant to the aforesaid directions, an affidavit has been filed by the Tahasildar, Sadar Cuttack on 12.2.2008 stating therein as follows:

That pursuant to the aforesaid order of this Hon"ble Court, this deponent personally verified the legal heir certificate bearing No. 5/2005, before

the Learned Deputy Registrar (Judicial), Hon"ble High Court, Cuttack on 7.2.2008 and found that the signature of the then Tahasildar, Sri Shyam

Sundar Bal, is genuine and the certificate is filed up by the then dealing Asst. Sapan Ku. Banarjee is also genuine which is a fact and authentic. On

perusal of another mutation case record bearing No. 2097/06 is also ascertained that the same Misc. Certificate Case No. 5/05 issued on

21.4.2005 has been accepted by the then Tahasildar Sri S.S. Bal.

16. It is clear from Order 22 Rule 5 C.P.C. that the ""determination"" of question as to legal representative in case of dispute as to whether a person

is or is not the legal representative of a deceased Plaintiff or a deceased defendant, requires the Court to decide such a question forthwith but if it

arises as to whether a particular person is a legal representative of the deceased party, it is well settled by this Hon"ble Court in the Case of

Netrananda Dehuri Vs. Bhagirathi Dehuri and Another, that if and when such question arises as to whether a particular person is legal

representative of a deceased party, it is not permissible to be left open to be decided when the suit is heard. It is relevant to point out here that the

expression "determination" is of great significance. This ""determination"" cannot be equated with the word "decide". Therefore, it is well settled that an

enquiry"" in the matter of determination of a legal representative under this provision is by and large summary in nature. Reference in Mangat and

Another Vs. Surja,

Permitting a person to be substituted as a legal representative only results in, the continuation of the proceeding and grant of such prayer for

substitution made after an enquiry, only entitles such a person substituted to carry on the suit. This determination on summary enquiry cannot and

does not to confer any right of heirship on property. It is well settled that determination of a Court of an issue arising under Order 22 Rule 5 C.P.C

does not operate as res judicata. This has been settled as early in. *Dukh Haran Tewary and Others Vs. Dulhin Bihasa Kuer and Another, ; The*

Kalyanmal Mills Ltd. Vs. Volimohammed and Another, ; Muniappa Nadar and Others Vs. K.V. Doraipandi Nadar and Another, and Mohinder

Kaur and Another Vs. Piara Singh and Others,

17. Considering the facts and the pleadings advanced by the rival parties in law on the subject and the various citations referred hereinabove, I am

satisfied that the materials placed before me by the applicants, namely, Smt. Subhashree Jena and Smt. Parbany Jena and the affidavit of the

Tahasildar affirming the genuineness of the certificate relied upon by them are sufficient for the purpose of allowing their petition for substitution.

Hence, they are impleaded on contest but in the circumstances without cost.

18. Misc. Case No. 51 of 2005 is allowed in terms of the directions contained hereinabove and in view of the order passed in Misc. Case No. 51

of 2005, no further order need be passed in Misc. Case No. 55 of 2004 and the same also stands disposed of.