

Hadu Sundara Vs. Uma Sundara

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Court : Orissa

Decided On : Jun-29-2006

Reported in : 2006(II)OLR396

Judge : A.K. Parichha, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rules 2, 3, 3(1), 3(2) and 5

Appeal No. : C.R.P. No. 62 of 2004

Appellant : Hadu Sundara

Respondent : Uma Sundara

Advocate for Def. : Suvashish Pattanaik, Adv.

Advocate for Pet/Ap. : S.S. Ray, Adv.

Disposition : Appeal dismissed

Judgement :

ORDER

A.K. Parichha, J.

1. Heard

2. The petitioner, who is the defendant No. 1 in Title Suit No. 226 of 2006 of the Court of learned Civil Judge (Senior Division), Bhubaneswar, has filed this revision challenging the legality of the order dated 26.8.2004 passed by the learned Civil Judge (Senior Division), Bhubaneswar in the above noted suit allowing substitution of the opposite party in place of the deceased-plaintiff, Uma Sundara.

3. The deceased-plaintiff, Uma Sundara filed the above noted suit against the petitioner praying for partition of the suit property and recovery of possession of 50% share of the suit schedule property and for cancellation of some sale deeds executed by the petitioner in favour of defendant Nos. 2 to 11. She also prayed for permanent injunction against the defendants from interfering with her share in the suit schedule properties. Petitioner-defendant No. 1 filed written statement and contested the suit. When the matter stood thus, the plaintiff died and the present opposite party filed a petition on 20.1.2003 under Order 22, Rule 2, C.P.C. to implead him as a party in the suit on the ground that the deceased plaintiff had executed a registered will in his favour on 29.5.2001 in respect of her properties and probate of the will is under consideration in Misc. Case No. 1 of 2003.

4. Petitioner raised objection to the said prayer. Learned Civil Judge after hearing the parties, allowed the prayer and impleaded the opposite party in place of the deceased-plaintiff.

5. Mr. S.S. Ray, learned Counsel for the petitioner submits that after the death of the plaintiff, the entire property automatically passed on to the petitioner, he being the only surviving heir and so the right of the opposite party to sue did not survive. He also submits that when the alleged will has not yet been probated, substitution of the opposite party in place of the deceased-plaintiff without any enquiry under Order 22, Rule 5, C.P.C. was illegal. He also submits that the opposite party being a stranger to the family had no right to sue and when the alleged will had not been probated and the proceeding was pending, there was no scope for impleading the opposite party as a party. According to him, in the worst case, the suit could have been sent to the probate Court for analogous disposal. In support of his submission, Mr. Ray relied on the case of Nirmal Devi v. Arun Kumar Gupta and Ors. (2005) 12 Supreme Court Cases 505.

6. Mr. S. Patnaik, learned Counsel appearing for the opposite party, on the other hand, submit that the opposite party became the legal heir of the deceased-plaintiff by virtue of a registered will and had right to step into the shoe of the deceased-plaintiff to continue the civil proceeding. He further submits that the trial Court after inviting objection on the petition and after hearing the parties, passed the impugned order and so, there is no scope to say that the provision of Order 22, Rule 5, C.P.C. was not complied with. Mr. Patnaik also submits that holder of a will can pursue a legal action as the legal representative of the legator without waiting for the probate proceeding to be over. In this regard, he relies on the case of *Surendra Chandra Jena and Ors. v. Laxminarayan Jena and Ors.* : AIR1988 Ori143 .

7. The Order 22, Rule 3, C.P.C. provides the procedure in case of death of one of several plaintiffs or of sole plaintiff. The said Order 22, Rule-3, reads thus:

(1) where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) where within the time limited by law no application is made under Sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

8. So, the essential conditions are (i) death of the plaintiff, (ii) survived of the right to sue, (iii) prayer of the legal representatives of the deceased to be made as a party. Admittedly, in the present case, the plaintiff died during pendency of the suit. She was claiming partition of the suit property. So, her legal heirs had right to continue the proceeding. The opposite party came forward claiming himself as the legal representative of the deceased-plaintiff basing on the registered will. Now question is whether before probate of the will, he could have been impleaded as a party in place of the deceased-plaintiff. Order 22, Rule 5 comes into play in such a

situation. Order 22, Rule 5, C.P.C. reads as under:

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 therefor, and the Appellate Court may take the same into consideration in determining the question.

9. So, when the dispute arises as to whether any person is or is not the legal representative of the deceased-plaintiff, such question shall be determined by the Court by conducting enquiry. What is the form and extent of enquiry depends upon the facts and circumstances of the case. If the Court feels that oral and documentary evidence * are necessary to determine the issue, then such evidence can be demanded from the parties. But demanding of such evidence is not mandatory. On consideration of the petition, counter to the petition, affidavit, submission of the learned Counsel for the parties, the Court if satisfied can determine as to whether a person is the legal representative.

10. The impugned order shows that in the present case, the trial Court considered the petition, counter, submission of the learned Counsel for the parties and allowed the prayer for impletion of opposite' party in place of the deceased-plaintiff. It is further apparent from the impugned order that Misc. Case No. 1 of 2003 is pending for probate of a will allegedly executed by the deceased-plaintiff in favour of the opposite party. In the case of Surendra Chandra Jena (supra) this Court has already held that an executor of a will can continue the proceeding in the Court by getting himself transposed without waiting for grant of probate of the will. The said ratio is applicable to the present case and so, the trial Court did not commit any error in allowing the opposite party to continue the proceeding in place of the deceased-plaintiff. The impugned order thus, does not suffer from any illegality and is not to be interfered with.

11. Mr. Ray, submits that in case any decree is passed in the partition suit in favour of the opposite party but in the probate case, the probate of the will in his favour is refused, then there may be conflict of decisions and so, it was incumbent on the trial Court to refer the partition suit to the probate Court for analogous disposal of both the matters leaving the matter of substitution to the probate Court. In the case of Nirmal Devi (supra) the apex Court observed that proof of the will having direct impact on related suit, the suit should be transferred to the probate Court with direction for simultaneous disposal of the suit and the probate case. The fact of that case is some what different, yet fact remains that probate of the will relied on by the opposite party has direct impact on the suit for partition and therefore, it is desirable that both the matters should be disposed of in the same Court simultaneously, but such transfer is desirable only after the legal heirs of the deceased-plaintiff is/are impleaded as parties. The Title Suit No. 226 of 2005 pending in the Court of learned Civil Judge (Senior Division), Bhubaneswar should accordingly be transferred to the probate Court for analogous disposal.

12. With the above noted observation, the revision stands dismissed.