
(1967) 05 OHC CK 0001
In the Orissa High Court
Case No : Civil Revision No. 322 of 1965

Rautani Bewa and Others

APPELLANT

Vs

Rupei Bewa and Gurubari Bewa and Others

RESPONDENT

Date of Decision : 05-05-1967

Acts Referred:

Citation : (1967) 33 CLT 951

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : R.N. Panigrahi and L.K. Dasgupta, for the Appellant; N. Mukherjee and J.N. Mitra, for the Respondent

Final Decision : Allowed

Judgement

Misra, J.—Muralidhar Sahu (Defendant No. 16) died on 27th of June, 1964. On 16th of February, 1965; Plaintiff filed an application for substitution of his widow Raoutani Bewa and one Gopinath Sahu as the only heirs. The date of death was given as 24-7-1964. The finding of the learned Subordinate Judge is that this is not the correct date of death. The real date of death is 27-6-1964. It is not disputed that notice of the application for substitution was not issued to the legal representatives of the deceased. On 11th of March, 1965 the learned Sub-Judge passed an order allowing substitution of the widow and the son as Defendants Nos. 16 and 16.80 respectively. On 13th May, 1965, these two legal representatives filed objection regarding the date of death and also stating that there .was minor daughter of the deceased who had not been substituted. On 29th June, 1965 Plaintiff filed another application for substitution of the daughter. The matter was ultimately beard and the learned Subordinate Judge passed an order on 9-9-1965 allowing the daughter to be impleaded and rejecting the application of the legal representatives that the substitution should not have been allowed in their absence. It is to be noted that Defendants Nos. 3 to 8 also objected to the substitution. Their objection was over-ruled. Though admittedly no notice of the substitution application was served on Defendants Nos. 3 to 8

their objection was not entertained as they had appeared in the suit and in their presence substitution was allowed. Defendants nos 3 to 8 have filed no revision. The order of the learned Subordinate Judge over-ruling their objection need not therefore be considered in this revision.

2. The main questions for consideration in this revision are two fold:

(1) Whether the legal representatives of the deceased were entitled to notice of substitution; and

(2) Even if they were not entitled to notice whether they had a right to get their objections against the substitution heard.

3. Mr. Mukherjee on behalf of the Plaintiff-opposite party very seriously contended that there being no specific provision under Order 22 Rules 3 and 4 for service of notice on the question of setting aside abatement notice was not mandatory or essential. The contention is wholly devoid of merit. It is to be noted that original Defendant No. 16 died on 27-6-1964 and three applications for Sub-section, setting aside abatement and condonation of delay u/s 5 of the Limitation Act were filed on 16-2-1965 about seven and half months after the suit had abated against Defendant No. 16. In both the applications for setting aside abatement and u/s 5 of the Limitation Act, Plaintiff had to make out that there was sufficient cause for not filing the application for substitution within 90 days from the date of death. A valuable right had accrued to the legal representatives of the deceased after the suit abated against the original Defendant No. 16. In any case of infringement of right whether the statutes specifically provide for service of notice or not, notice is mandatory. It is unnecessary to refer to plethora of authorities. It is sufficient to refer to *M. Nizamul v. Mst. Bibi* AIR 1954 Pal. 61, and *Om Srun v. Gur Harain* AIR 1965 P&H 667. This doctrine is based on principle of natural justice that the case against a party or a person who at the moment is not actually a party but is going to be impleaded as a party in future is not to be affected without his being heard and being given full opportunity of adducing evidence in defence. A similar matter was discussed in *Prahald Prusty v. Sk. Abdul Raheman* 32 C.L.T.467, under Order 9, Rule 4 CPC which does not prescribe for service of notice. This Court observed thus:

The position therefore is that generally a notice to the opposite party is not essential in a proceeding under Order 9, Rule 4, Code of Civil Procedure. There may, however, be cases where a valuable right of the Defendant may be affected. In such cases service of notice is mandatory.

The learned Subordinate Judge therefore committed an illegality and exercised his jurisdiction with material irregularity in not issuing notice of the application for substitution and setting aside abatement to the legal representatives of the deceased.

4. In this case, two of the legal representatives who were made parties

appeared. Two objections were raised one regarding the incorrectness of the date of death and the other regarding the non-substitution of the minor daughter. The learned Subordinate Judge over-ruled this objection on the view that the prior order allowing substitution on 11-3-1965 should have been assailed either in review, appeal or revision. The order had attained finality and he has no jurisdiction to review his previous order and allow the objections to be heard. The conclusion of the learned Judge is wholly contrary to law. In *M. Nizamul v. Mst. Bibi* AIR 1954 Pal. 61, the matter was discussed and his Lordship held that it was incumbent on the learned Judge in that case to recall his own order which was contrary to the principle of natural justice. The learned Judge therefore has a jurisdiction to decide the objection raised before him and he failed to exercise his jurisdiction. This Court in exercise of its power u/s 115 CPC must accordingly quash that order. Mr. Mukherjee placed strong reliance on *Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others*, in support of the contention that where a Court below comes to a finding that there was sufficient cause for setting aside abatement, the High Court in exercise of its power u/s 115 CPC cannot interfere with such an order. This decision has no application to the present case. In that case, a finding of fact was recorded by a subordinate Court that there was sufficient cause for setting aside abatement. The High Court in exercise of its revisional power set aside the finding of fact which was contrary to the provision of Section 115 CPC Code. The Supreme Court accordingly quashed that order.

5. In view of my conclusion that the notice should have been served on the legal representatives before the abatement was set aside and the further conclusion that their objections should have been heard after their appearance as they were not previously heard, the case must go back on remand to the learned Subordinate Judge. He would expeditiously discuss of the various applications filed by the Plaintiff for substitution of the three legal representatives and the objection thereto. If after hearing the parties, the learned Subordinate Judge is satisfied that there was sufficient cause, it is open to him to set aside the abatement and condone the delay. That is a matter lying entirely within the jurisdiction of a Court of fact. But it is altogether a different matter for the Court of fact to refuse exercise of jurisdiction for hearing objection raised by a person having a right to do so.

6. In the result, the order of the learned Subordinate Judge is set aside and the civil revision is allowed, but in the circumstances of the case, parties to bear their own costs up to this stage on the question of substitution and setting aside, abatement.