

GAHC010004822023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Civil)/2103/2019

NALINI KANTA DEKA
S/O LATE CHENIRAM DEKA
R/O NIZARAPAR
P.S. AND P.O. CHANDMARI
DIST. KAMRUP
PIN 781003

VERSUS

ON THE DEATH OF NURJAHAN BEGUM HER LEGAL HEIRS SMT. SAMA
BEGUM (DAU)
R/O KUMARPARA
GUWAHATI 781009
KAMRUP (M)
DIST. ASSAM.

2:SMTI SIMA BEGUM (DAU)
R/O KUMARPARA
GUWAHATI 781009
KAMRUP (M)
DIST. ASSAM.

3:SUREYA BEGUM (DAU)
R/O KUMARPARA
GUWAHATI 781009
KAMRUP (M)
DIST. ASSAM.

4:NAZMA BEGUM (DAU)
R/O KUMARPARA
GUWAHATI 781009
KAMRUP (M)
DIST. ASSAM.

5:SMTI RIAJAT ALI @ RAJU (SON)

R/O KUMARPARA
GUWAHATI 781009
KAMRUP (M)
DIST. ASSAM.

6:ON THE DEATH OF IMTAZ ALI HIS HEIRS AND LEGAL REPRESENTATIVES
FIROZA BEUM (WIFE)

R/O KUMARPARA
GUWAHATI 781009
KAMRUP (M)
DIST. ASSAM.

7:REHAN ALI (SON)

R/O KUMARPARA
GUWAHATI 781009
KAMRUP (M)
DIST. ASSAM.

8:RAHUL ALI (SON)

R/O KUMARPARA
GUWAHATI 781009
KAMRUP (M)
DIST. ASSAM.

9:RIHA BEGUM (DAU)

R/O KUMARPARA
GUWAHATI 781009
KAMRUP (M)
DIST. ASSAM.

Advocate for : MR. A C SARMA

Advocate for : MR. S SHARMA (R-1

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5) appearing for ON THE DEATH OF NURJAHAN BEGUM HER LEGAL HEIRS
SMT. SAMA BEGUM (DAU)

Linked Case : RSA/62/2018

ON THE DEATH OF NALINI DEKA HIS LEGAL HEIR SMT.HEMALATA DEKA
AND 4 OTHERS

R/O NIZARAPAR
P.S. AND P.O. CHANDMARI
DIST. KAMRUP
PIN 781003

VERSUS

ON THE DEATH OF NURJAHAN BEGUM HER LEGAL HEIRS MD. MAKIBUR
RAHMAN AND 4 ORS

R/O KUMARPARA
P.S. BHARALUMUKH
DIST. KAMRUP

2:MD IMRAN HUSSAIN
R/O KUMARPARA
P.S. BHARALUMUKH
DIST. KAMRUP

3:MD. FARUK HUSSAIN
R/O KUMARPARA
P.S. BHARALUMUKH
DIST. KAMRUP

4:MUSST. NURNAHAR BEGUM
R/O KUMARPARA
P.S. BHARALUMUKH
DIST. KAMRUP

5:MUSST. BIELKISH BEGUM
R/O KUMARPARA
P.S. BHARALUMUKH
DIST. KAMRUP

Advocate for : MR. A C SARMA

Advocate for : MR. M B U AHMED (R1) appearing for ON THE DEATH OF
NURJAHAN BEGUM HER LEGAL HEIRS MD. MAKIBUR RAHMAN AND 4
ORS

BEFORE

THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the petitioner :Mr. AC Sarma,SeniorAdvocate

For the Respondent : Mr. TG Baruah, Advocate
Mr. S Sarma, Advocate
Mr. MBU Ahmed, Advocate

Date of Hearing : 24.02.2023

Date of Judgement : 26.04.2023

JUDGEMENT & ORDER (CAV)

Heard Mr. AC Sarma, learned Senior counsel assisted by Mr. B Deory, learned counsel for the applicant. Also heard Mr. TG Baruah, learned counsel for the respondent Nos. 2 and 3 and Mr. S Sarma, learned counsel for the legal heir of respondent No. 4 and Mr. MBU Ahmed, learned counsel for the respondent No. 1.

2. One Musstt. Nurjahan Begum, predecessor-in-interest of respondent Nos. 1 (i) to 1(iv) filed a suit for declaration of right title and interest, confirmation of possession as co-sharer, decree for partition, cancellation of gift deed and sale deed and for permanent injunction. The said suit was registered as TS No. 37/1989. The Nalini Deka, also contested the suit by filing written statement though he was a proforma defendant. The suit was decreed by the learned court of Civil Judge No. 3, Kamrup under its judgment dated 23.11.2009.
3. Being aggrieved, two appeals were preferred, one by the principal defendant and also by proforma defendant No. 8 i.e. Nalini Kt. Deka. Both the appeals were dismissed by the learned appellate court under its judgment and decree dated 10.10.2013 with certain modification. The applicant preferred a second appeal which was registered as RSA No. 62/2018. Said second appeal was admitted by this court under its order dated 14.03.2018 framing the two following substantial questions of law:
 - I. Whether the suit was barred by limitation?
 - II. Whether the appellant is a bona-fide purchaser and is protected under Section 41 of the Transfer of Property Act?
4. During the process of service of notice, the respondent No. 1 (i) to 1 (iii)

appeared in the second appeal. The learned Advocate for the respondent Nos. 2 and 3 informed the court that respondent No. 1 (iv) i.e. Nurjahan Begum died during the pendency of the first appeal on 13.07.2010.

5. In the aforesaid backdrop, the present application under Order 41 Rule 20 of the CPC is filed for impleadment of the legal heirs of the respondent No. 1 (iv) as party respondents.
6. A serious objection has been raised by Mr. TG Baruah, learned counsel appearing for the respondent Nos. 2 and 3. Also heard Mr. S Sarma, who has appeared on behalf of the legal heirs of deceased respondent No. 1 (iv).
7. Mr. Baruah contends that as the respondent No. 1 (iv) had expired during the first appellate stage, the first appeal stood abated against the all the respondents. Therefore, at this stage of second appeal, such substitution cannot be made. It is also the contention of Mr. Baruah that as the relief sought for in the suit was a joint decree and no separate claim was made against any of the defendants, the appeal has abated as a whole under Order 22 Rule 4 of the CPC. In support of such contention, Mr. Baruah relies on the decision of the Hon'ble Apex Court in ***Babu Shukhram Singh vs Ram Dular Singh*** reported in ***AIR 1973 SC 204*** and judgment of this court in the case of ***Susanta Kr. Choudhury vs Birendra Kumar Dev*** reported in ***(1996) 2 GLT 385*** and judgment of Honble Apex Court in ***Gurnam Singh vs Gurbachan Kaur*** reported in ***(2017) 13 SCC 414***.
8. The Hon'ble Apex court in the case of ***Delhi Development Authority vs. Diwan Chand Anand*** reported in ***(2022) 10 SCC 428*** after dealing elaborately with the proposition of law as regards to substitution and abatement, more particularly, the decision in ***Hemareddi vs Ramachandra***

reported in **(2019) 6 SCC 756** and **Vennigalla Koteswaramma vs Malampati Suryamba** reported in **(2003) 3 SCC 272** culled out the following principles:

“30. After referring to the decision of this Court in the case of Nathu Ram (supra), in the case of Vennigalla Koteswaramma vs. Malampati Suryamba and Others, (2003) 3 SCC 272, it is observed by this Court that the nature and extent of the abatement in a given case and the decision to be taken thereon will depend upon the facts of each case and, therefore, no exhaustive statement can be made either way and that the decision will ultimately depend upon the fact whether the decree obtained was a joint decree or a separate one. It is further observed that this question cannot and should not also be tested merely on the format of the decree under challenge or it being one or the manner in which it was dealt with before or by the Court which passed it.

31.1. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives;

31.2. If there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants (Order 22 Rule 2);

31.3. where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, 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. Where within the time limited by law no application is made under subrule 1 of Order 22 Rule 4, the suit shall abate as against the deceased defendant;

31.4. the provision of Order 22 shall also apply to the appeal proceedings also.

32.....whether the suit/appeal has abated due to non-bringing the legal representatives of plaintiffs/defendants or not, the Court has to examine if the right to sue survives against the surviving respondents. Thereafter the Appellate Court has to consider the question whether non-bringing the legal representatives of some of the defendants, the appeal could have proceeded against the surviving respondents..

34..... No co-owner has a definite right, title and interest in any particular item or a portion thereof. On the other hand, he has right, title and interest in every part and parcel of the joint property. He owns several parts of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner in the property. It is observed that, therefore, one co-owner can file a suit and recover the property against strangers and the decree would enure to all the co-owners. The aforesaid principle of law would be applicable in the appeal also. Thus, in the instant case, when the original plaintiffs – two co-owners instituted the suit with respect to the entire suit land jointly owned by the plaintiffs as well as defendants nos. 9 to 39

and when some of the defendants/respondents in appeal died, it can be said that estate is represented by others – more particularly the plaintiffs/heirs of the plaintiffs and it cannot be said that on not bringing the legal representatives of the some of the co--sharers – defendants – respondents in appeal the appeal would abate as a whole.”

9. In the case in hand, the case of the applicant was that he had purchased a portion of the suit property bona-fide from the co-sharer of the suit land and he claims his right as a bona-fide purchaser and seeks protection under section 41 of the Transfer of Property Act, 1882. Admittedly, the suit was for partition and cancellation of sale deeds and gift deeds executed by other co sharer. One part of the decree was for partition and other part was cancellation. Decree was in favour of the predecessor-in-interest of the respondent Nos. 1 (i) to 1 (v).
10. On the death of respondent No.1 (iv), the other legal heirs of plaintiff / respondent No. 1 still remain as party respondents. Their claims over the property are as co-owner by virtue of inheritance from the deceased plaintiff/ respondent No. 1. The principle of law that one co-owner can file a suit and recover the property against strangers and that such decree ensuresto all co-owners and that such principle is also applicable at the appellate stage, shall also be applicable in the present case. In the original suit the plaintiff claimed right title and interest being a co-sharer and accordingly sought for partition of the suit. The plaintiff also sought for cancellation of some sale deeds and gift deeds which were executed by other co-sharer of the plaintiff in favour of third party, one of which was defendant No. 8. Thus, the claim of the present respondent No. 1 (i) to 1 (v) are based on the decree passed in favour of the predecessor-in-interest/ the plaintiffs. Therefore, when the respondent No. 1 (iv) died during the pendency of the first appeal, it cannot be said that appeal would abate as a whole inasmuch as the interest of the plaintiff's estate was duly contested and protected by her legal heirs except respondent No. 1 (iv), who died in the meantime.

11. Order 22 Rule 10 A of the CPC also cast a duty upon a pleader appearing for party to the suit to inform the court about the death of any party if such pleader is within the knowledge of such death and the court shall thereupon issue notice to the other party. Admittedly, in the case in hand during the first appellate stage such course of procedure was not adopted by the pleader of the respondent No. 1 (iv).
12. Be that as it may, it is not in dispute that the interest of estate of respondent No. 1, the original plaintiff was represented by the respondent Nos. 1 (i) to 1 (v) except respondent No. 1 (iv) during the first appellate stage being the legal heir of respondent No. 1. Therefore, in view of the settled proposition of law as discussed hereinabove, the suit will not abate as a whole on the death of respondent No. 1 (iv). The fact also remains that the legal heirs of respondent No. 1 (iv) has duly appeared in this case after issuance of notice and no objection has been filed. Therefore, considering the matter in its entirety, this court is of the view that the respondent No. 1 (iv) be substituted / impleaded as party respondents shown in the 'Particular' at page 7 of the instant application, in place of the deceased respondent No.1(iv). The delay caused in seeking substitution/impleadment is for the reason of having no information regarding such death. Accordingly, the present application stands allowed.
13. The respondent No. 1 (iv) be substituted / impleaded as party respondents shown in the 'Particular' at page 7 of the instant application.

JUDGE

Comparing Assistant