

**HIGH COURT OF TRIPURA
AGARTALA**

RSA No.29 of 2024

1. Smti Aparna Rudra Paul

Aged about 39 years, wife of Sri. Pradip Rudra Paul, resident of-
Tuichindrai, P.S- Teliamura, District-Khowai, Tripura, Pin-799205

2. Sri Pradip Rudra Paul

aged about 46 years, son of Lt. Kebal Rudra Paul, resident of-
Tuichindrai, P.S- Teliamura, Dist- Khowai, Tripura, Pin-799205.

.....Defendant-Appellants

Vs.

1. Smti Sipra Das

wife of late Biresh Chandra Das, resident of Tuichindrai, P.S-Teliamura,
District- Khowai, Tripura, Pin-799205

2. Sri. Bishu Das

son of late Biresh Chandra Das, resident of Tuichindrai, P.S-Teliamura,
District- Khowai, Tripura, Pin-799205

Serial Nos. 1 and 2 are represented by their alleged attorney **Sri Swapan Das**, son of late Sailesh Chandra Das, resident of Dharmanagar, Sukantapalli, P.S- Teliamura, District- Khowai, Tripura, Pin-799205

.....Plaintiff-Respondents

For the Appellant(s)	:	Mr. Sankar Lodh, Advocate Mr. Subham Majumder, Advocate
For the Respondent(s)	:	Mr. D.K. Biswas, Sr. Advocate Mr. S.S. Debnath, Advocate
Date of hearing	:	19.03.2025
Date of delivery of Judgment & Order	:	19.05.2025
Whether fit for reporting	:	Yes

HON'BLE MR. JUSTICE S.D. PURKAYASTHA

JUDGMENT & ORDER

The appeal arises out of a judgment and decree dated 20.03.2024, passed by learned Addl. District Judge, Khowai, in Case No. Title Appeal No.03 of 2023 whereby the appeal of the defendant-appellants was dismissed.

2. The suit land comprises of an area of 0.19 acres under mouja-Tuichindrai, tehsil- Hawaibari recorded in Khatian No.437 against R.S Plot No.3192 & 3195. According to the plaintiff-respondents, the original owner of the land was one Ruhini Kumar Das who transferred the same to Biresh Chandra Das (now deceased) and Pijush Kanti Das (original plaintiff No.3 and now deceased) jointly, vide registered Sale Deed No. 1-1481, dated 28.03.1976 (Exbt. A1 to A3). Biresh Chandra Das died on 27.03.2012, leaving behind him the present respondents as his legal representatives. In the original plaint, said late Pijush Kanti Das was plaintiff No.3 who has meanwhile died, but substitution of his legal representatives was not made.

3. The plaintiffs also asserted in the plaint that on request of the mother of present appellant-defendant No.2 on 23.07.2009, they allowed the appellant-defendants to stay within the suit land for 02 years, but when in the year 2011 they were requested to vacate the same, the mother of defendant No.2 vacated the same, but the present defendants, who are her daughter-in-law and son respectively, did not leave the land. Thereafter, on 20.06.2016 the present defendants gave boundary fencing around the suit land and dispossessed the original plaintiffs therefrom. In that contexts, the suit was filed to declare the right, title and interest of the original in the suit land and to recover possession of it. All the plaintiffs appointed one Swapn Das as their attorney through a Power of Attorney deed

(Exbt.C), authorizing him to institute the suit on their behalf and accordingly he instituted the same.

4. The present appellants, i.e. the original defendants in their written statement state that the original owner of the suit land was one Jamini Paul and not Ruhini Kumar Das and the ROR would also stand in his name, but simultaneously they have also claimed adverse possession of the suit land w.e.f. 05.07.1991.

5. Both sides led their respective evidences during trial and learned Trial Court ultimately decreed the suit.

6. Being aggrieved thereby, the present appellants preferred Title Appeal No.10 of 2018 and learned First Appellate Court i.e. the court of learned District Judge allowed the appeal and remanded the matter back to the learned Trial Court to decide the suit afresh by giving issue-wise decision. Then, the present respondents preferred an appeal before the High Court bearing SAO No.2 of 2020, but it came to the notice that original plaintiff No.3, namely, Pijush Kanti Das expired in Bangladesh and challenge was made in this regard by the respondents of that appeal. Then without causing any substitution of legal representatives there, the present respondents withdrew the appeal, and as a consequence thereof, the remand order as was passed by learned First Appellate Court became final.

7. On 09.12.2021, a petition was filed in the Trial Court by the attorney of the plaintiffs to substitute the legal representatives of plaintiff No. 3, late Pijush Kanti Das, namely

his wife, Smt. Arati Rani Das, and son, Sri Jiban Krishna Das, residing at North Harishyama, Madhbpur, Habiganj, Bangladesh. Along with the said petition, photocopy of one deed of Power of Attorney in favour of one Attorney Swapan Das by the said two legal representatives on 03.01.2021 before the Notary Public at Bangladesh and one photocopy of Legal Heirship Certificate issued by one Chairman of 5, Andiura Union Council, Madhapur standing in the name of said Arati Rani Das and Jiban Krishna Das as legal representatives of Pijush Kanti Das, son of Late Dinesh Chandra Das of Harishyama, Madhapur, were also submitted. When said petition was pending before the learned Trial Court, again on 03.02.2022, two further petitions were submitted on behalf of the said plaintiffs; one for condoning the delay in filing the petition for setting aside of abatement and another petition for setting aside of abatement. Defendants also filed another petition on the same day under Section 151 CPC asserting that said Pijush Kanti Das had left 3(three) daughters and the wife as his legal representatives and therefore the names which were mentioned in the certificate as legal representatives of Pijush Kanti Das were not correct and thus an enquiry was required for verification of the authenticity of the said certificate and simultaneously, they also prayed for a direction to the plaintiffs to supply the annexed documents with the Passport and Visa of the Attorney for verification of the survival certificate and alleged deed of Power of Attorney and also for verification of

Passport and Visa of the Attorney to show as to how he had gone to Bangladesh to get the said deed of Power of Attorney executed.

8. On 25.08.2022, the learned Trial Court rejected the said two petitions filed on 03.02.2022, seeking condonation of delay and for setting aside of abatement being not moved and consequently, the court also rejected the petition of the defendants seeking a direction for verification of said Legal Heirship Certificate, Passport and Visa of the plaintiffs' Attorney, as purpose of the said petition was frustrated due to rejection of said two petitions submitted on behalf of the plaintiffs. At that time and prior thereto, the petition for substitution of legal representatives filed by the plaintiffs were not rejected, rather same was rejected on 05.11.2022 holding that the suit was abated against plaintiff No.3.

9. Thereafter, learned Trial Court proceeded to hear the arguments of both sides and finally passed the judgment on 17.12.2022 by decreeing the suit in favour of two plaintiffs i.e. present respondents declaring their right, title and interest in respect of whole portion of the suit land and also allowing their prayer for recovery of possession by evicting the defendants from the suit land. Against the said judgment, the appeal bearing T.A No.03 of 2023 was preferred by the defendants before the learned District Judge, Khowai which is also dismissed by Ld. Addl. District Judge, Khowai by the impugned judgment.

10. Now in this appeal, the primary question that arises for consideration is as to whether learned Trial Court and learned First Appellate Court were justified in granting decree in respect of the whole portion of the suit land in favour of the two plaintiffs when third plaintiff was already dead and when the suit was decided without the substitution of legal representatives of plaintiff No.3.

11. At the time of admission of this second appeal, following substantial questions of law have been formulated by this Court:-

"(i) Whether right to sue survived in favour of the plaintiff-respondents alone after the death of Pijush Kanti Das.

(ii) Whether the judgment of both the learned trial court and the first appellate court are perverse at law."

12. During the course of hearing, learned counsel for the appellants, Mr. Sankar Lodh submits that the approach taken by the learned Trial Court and as affirmed by the learned First Appellate Court by decreeing the suit in favour of the plaintiffs was wholly perverse, as all the 3(three) plaintiffs were the joint owners of the suit land and their ownership was inseparable from each other, and thus, when the suit was abated against the deceased plaintiff, it resulted in abatement of the whole suit. Learned counsel, Mr. Lodh, relied on the decisions of Hon'ble Apex court, in case of ***Hemareddi through Legal Representatives vs. Ramachandra Yallappa Hosmani***

reported in **(2019) 6 SCC 756** and **Sunkara Lakshminarasamma vs. Sagi Subba Raju and Ors.** reported in **(2019) 11 SCC 787**. Mr. Lodh, learned counsel also relied on another decision of Hon'ble Supreme Court in case of **Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar vs. Chandran and Ors** reported in **(2017) 3 SCC 702** wherein at para 29, it was observed that one of the issues framed in that suit was whether the suit was bad for non-joinder of parties, and said issue was answered against the plaintiff, but, without advertng to the said findings of the Trial Court and the First Appellate Court, the High Court decreed the suit in favour of the plaintiff. Hon'ble Supreme Court in that perspective observed that such finding of the High Court was erroneous and ultimately upset the judgment of the High Court. The above-said decision, in my considered opinion, is not much relevant for the issues involved in the present case.

13. Learned counsel appearing for the plaintiff-respondents, Mr. S.S. Debnath, argues that after the suit was decreed by learned Trial Court, on the basis of the same, an execution petition was filed by the plaintiffs and the decree was already executed during pendency of the first appeal in the first round, but the appellants have suppressed the said fact before the Court. To justify the decision of learned First Appellate Court, learned counsel, Mr. Debnath relies on a decision of the Hon'ble Supreme Court rendered in **A. Viswanatha Pillai and Ors vs.**

The Special Tahsildar for Land Acquisition No.IV and Ors., (1991) 4 SCC 17. According to him, after completion of the execution process, all rights of the defendants in respect of the suit land have been extinguished. Ld. Counsel also submits that the plaintiff No.3 died after the execution. Mr. Lodh, learned counsel in this regard replies that the decision of the Hon'ble Supreme Court rendered in ***A. Viswanatha Pillai (supra)*** is misplaced.

14. Before advertng to the points as argued by the learned counsel of both sides, some important evidences and materials placed on record by the parties require some reference. Though learned counsel, Mr. S.S. Debnath submits that execution was completed on 23.08.2019, but no such document is placed in the record. Anyway, as per the petition for substitution as submitted by the plaintiffs, the date of death of plaintiff No.3, Pijush Kanti Das is not mentioned by them. Even in the annexed documents submitted with said petition also, no such date was mentioned. Therefore, the point as raised by learned counsel, Mr. Debnath that during the pendency of the first appeal in the first round of litigation, said Pijush Kanti Das expired, requires no further discussion and consideration.

15. The plaintiffs proved the original purchase deed bearing number 1-1481 dated 28.03.1976 which shows that late Biresh Chandra Das (predecessor of plaintiff Nos.1 and 2) and late Pijush Kanti Das purchased 0.19 acre of land with two

different boundaries from one Ruhini Kumar Das. Said Biresh Chandra Das and Pijush Kanti Das appear to be two brothers. The khatian No.437 (Ext.B) was subsequently mutated based on the said deed in the names of the plaintiffs. Plaintiffs namely Sipra Das and Bishnu Das, according to the Khatian, are having 25% share each in the suit land and said Late Pijush Kanti Das was having 50% share therein. Khatian creates the impression that the suit land still remains in jointness of all the owners. It is also not the claim of the plaintiffs that said land was partitioned among the said two brothers or between the plaintiffs.

16. Keeping in mind said facts of jointness of ownership as co-sharers, we may now examine the relevant provisions of the Code of Civil Procedure (for short, 'CPC') applicable in the related dispute. Order 22 Rule 3 of CPC deals with the matter of substitution in case of death of one of several plaintiffs or of sole plaintiff, and the relevant provision is extracted hereunder:

"3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.-(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."

17. As per sub-Rule (1) of Rule 3, when one or more plaintiffs dies (as applicable in the instant case) and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, 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. As per sub-Rule (2), if no application is made within the prescribed period of limitation under sub-Rule (1), the suit shall abate, so far the deceased plaintiff is concerned.

(Emphasis Supplied).

18. Rule 9(1) of Order 22 envisages that where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action. As per sub-rule (2) of rule 9, the plaintiff or the person claiming to be the legal representative of a deceased plaintiff may apply for an order to set aside the abatement or dismissal and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

19. There is no dispute in this case that no substitution of legal representatives of said plaintiff No.3 (Pijush Kanti Das) was made in the suit and therefore, the suit abated in respect of him. Now, the question falls for consideration whether such abatement

in respect of deceased Plaintiff No.3 disentitle the other plaintiffs from getting the decree in their favour, more particularly when they are owners of the suit land to the extent of 50%.

20. Before delving upon the issue as involved in this appeal, reference is required to be made of the decision to the Hon'ble Supreme Court in ***Hemareddi (supra)***, as relied on by Mr. Lodh, Ld. Counsel. In that case, Govindareddi was propositus who died leaving behind him two sons and a daughter. The plaintiffs were children of one son and the defendant No.2 was the wife of another son. Suit property was joint family property of said Govindareddi. The plaintiffs filed the suit for declaration that defendant No.1 was not the adopted son of defendant No.2 and therefore he had no interest in the suit property. Another suit was also filed by the plaintiff, bearing number O.S. No.66 of 1990, against defendant No.2 for declaration that she had no right in the property. There also some allegations were made that she had created false document of adoption, adopting the defendant No.1 as her son. The Trial Court dismissed the suit and upheld the adoption. Then first appeal was preferred before the High Court and during pendency of the appeal, the second plaintiff died, but his legal representatives were not substituted, and the appeal abated *qua* the second appellant. The High Court took the view that having regard to the decree that had been passed, the appeal could not abate only *qua* the second appellant but as a whole. Against the said decision, the parties came

before the Hon'ble Supreme Court. In that background, the Hon'ble Supreme Court held as follows: –

"14. Admittedly, steps were not taken for substitution in regard to the second appellant. The appeal, therefore, abated qua him as is declared by Order 22 Rule 3(2). Though this is all that Order 22 Rule 2 declares, the principle has evolved that in certain kinds of litigation, the consequences of abatement qua a party are not limited to the deceased party alone but it affects all the other parties and the litigation itself. In other words, a suit or an appeal as the case may be, would suffer an untimely demise by the proceeding abating as a whole.

15. The question which we are called upon to answer is whether this is such a case? The allegation in the plaint as we have noticed is that the suit properties are joint properties and the second defendant had no exclusive right to the property. She had created a false document described as an adoption deed by which she has purported to adopt the first defendant. The first defendant cannot claim any right to the suit property as an adopted son. On the alleged date of adoption, the husband of the second defendant was alive. He had died on 16-4-1987, in jointness with the plaintiffs. The plaintiffs were the joint owners of the suit land and also other property. When Basavareddi, the husband of the second defendant was alive, she has no right to take the first defendant on adoption. Defendant 1 cannot claim any title interest or right over the suit property

16. In this case having noted pleadings and the relief sought we can proceed on the basis that it was the appellant's case that the plaintiff's property was the joint family property belonging to the appellant and his deceased brother. The trial court dismissed the suit. The result is that the adoption of the first defendant by the

second defendant which was challenged by the appellant and his late brother was upheld.

17. The said judgment was called in question in a single appeal by the appellant and his late brother. It is while the appeal was so pending that the late brother passed away. The appeal having abated in regard to the late brother, the decree of the trial court has become final qua the deceased brother of the appellant. The effect of the same is that the adoption is found legal. The result of the appellant being allowed to proceed further and succeed in the appeal would be the passing of a decree by the High Court. The said decree would be to the effect that the adoption is invalid. The suit which was jointly filed by the appellant and his late brother would have to be decreed whereas the suit filed by the appellant and his late brother stands dismissed by the trial court. Both the decrees cannot stand together. There would be irreconcilable conflict. The defendants are common. They would be faced with two decrees regarding the same subject-matter which are irrevocably conflicting."

21. In that case, another decision of Hon'ble Supreme Court rendered in ***State of Punjab vs. Nathu Ram, AIR 1962 SC 89*** was also referred wherein at para 6, the test to determine whether in case of a death of party will result in abatement of the whole suit was discussed. Said paragraph is reproduced here under:

"6. The question whether a court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the court in deciding upon this question are whether the appeal between the appellants and the

respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court; and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.

22. In case of ***Hemareddi (supra)***, finally the Hon'ble Supreme Court held that the decree, which the appellant, if successful in the appeal, would obtain, would be absolutely contrary to the decree that has also attained finality between his late brother and the defendants and they are mutually irreconcilable and totally inconsistent, and accordingly, the decision of the High Court that the appeal was abated not only in respect of the second appellant/plaintiff, but as a whole, was affirmed. In ***Sunkara Lakshminarasamma (supra)*** as relied on by learned counsel Mr. Lodh, at para 12, it was held by the Hon'ble Supreme Court that under Order 22 Rule 4 CPC, if no application is made to implead the legal representatives of the deceased defendant, the suit shall abate as against a deceased

defendant and not as a whole. If the interest of co-defendants are separate, as in case of co-owners, the suit will abate only as regards the particular interest of deceased party, but if the case is of such a nature that the absence of the legal representatives of the deceased respondents prevents the court from hearing the appeal as against other respondents, then the appeal abates *in toto*, otherwise the abatement takes place only in respect of the interest of the respondent who has died. In that case also it was observed that the test which is often adopted in such cases is whether, in the event of an appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same suit with respect to the subject matter.

23. In ***A. Viswanatha Pillai (supra)***, as relied upon by learned counsel, Mr. Debnath, the coparceners' property devolved upon four brothers on the death of the propositus. Thereafter, four brothers also partitioned certain properties, but one Chalai Anicut was kept as common stock which was acquired by Government and said property before acquisition was under management of the eldest brother. The LA Collector made award to all the four brothers at 1/4th share each. The eldest brother sought reference, being dissatisfied with the award. The question for determination that arose in this case was whether, in a reference sought by one of the co-owners, other co-owners who did not express the said reference are entitled to enhance

compensation on pro-rata basis. While discussing said point, Hon'ble Supreme Court observed that it is settled law that one of the co-owners can file a suit and **recover the property** against stranger and the decree would enure to all the co-owners. It was further observed that no co-owner has a definite right, title and interest in a particular item or a portion thereof, on the other hand, he has right, title and interest in every part and parcel of joint property or coparcenary property under Hindu law by all the coparceners. Finally, Hon'ble Supreme Court held in that case that the claimants were entitled to payment of enhanced award on pro-rata basis of their 1/4th share each.

24. Now, in the case at hand, as already discussed above, said late Pijush Kanti Das was a joint owner with present respondents having 50% share therein. It is also not disputed that present appellants are stranger in the property and their claim of adverse possession failed in absence of any satisfactory evidence in this regard. Now, the Trial Court has passed decree declaring ownership of present respondents in respect of the whole suit land whereas they have only 50% share therein, and therefore, a manifest error has been committed by learned Trial Court by granting decree of declaration of right, title and interest of the respondents in respect of the whole property and said mistake has been carried over by subsequent affirmation of said judgment and decree by learned First Appellate Court. The decree of such declaration of ownership ought to have been

restricted only to the extent of 50% share of the respondents therein by moulding the relief in view of non-impleadment of legal representative of said Lt. Pijush Kanti Das.

25. So far the prayer for decree of recovery of possession is concerned, as discussed above, law is fairly settled that every co-owner has his right, title and interest in every part and parcel of the joint property unless the same is partitioned and possession of one co-owner represents possession of all the co-owners in such property. It is also settled that one co-owner can maintain a suit for recovery of property against the stranger to the benefit of other co-owners.

26. Now the issue which is required to be examined is- whether due to non-impleadment of Pijush Kanti Das, the suit abated as a whole. In the light of the test as laid down in **Nathu Ram (supra)**, said issue may be examined now. Here, in the written statement, though the appellants claimed adverse possession of the suit land, but no counter claim or cross suit was instituted by them in this regard and therefore, there is no scope of any conflicting decree if the present suit is decreed in favour of the appellants. In the present case, such information of death of plaintiff no.3 was brought before the High Court when the Court was hearing an appeal against an order of remand of original suit for fresh decision by Ld. Trial Court and on withdrawal of the appeal, said order of remand of the suit became final. Therefore, at that time there was no decree passed

by Ld. Trial Court which could bind the deceased plaintiff and could give a scope for creating a situation of existence of two conflicting decrees. In fact, the first decree was passed at the lowest grade when already plaintiff no.3 was dead. Therefore, there is no scope of having a situation of existence of two conflicting decrees in the instant suit. The present case is also not a case of such nature where the plaintiffs could not have brought the action for necessary relief against the stranger appellants alone without substitution of the legal representatives of late Pijush Kanti Das. It is the specific case of the respondents that respondent No.1, Smt. Sipra Das herself, allowed the appellants to stay inside the suit land and not said late Pijush Kanti Das. As to the third test, it can also be said that it is not such a case that the decree cannot be executed effectively against the defendant-appellants and moreover, it is also not a case of substitution of legal representative of any deceased defendant. Therefore, the instant suit qualifies all the three tests. Thus, practically, the suit abates only against the deceased plaintiff no.3 and not as a whole.

27. In view of above discussions and the conclusion as finally arrived, the appeal is partly allowed. The decree of the learned Trial Court is modified partially in the manner that *the right, title and interest of the plaintiff-respondents, Smt. Sipra Das and Sri Bishu Das in the suit property is declared to the extent of 50% share therein subject to partition in due course.*

The decree of recovery of possession as granted by Ld. Trial Court is affirmed.

28. The appeal is disposed of with the above said terms and the substantial questions of law as framed are answered accordingly. No cost is awarded to any of the parties.

29. Registry is directed to prepare the decree and re-consign the records of learned courts below with the copies of this judgment and decree.

Interim application(s) or any order, if any, shall also stand disposed of.

JUDGE

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