

**GANESH KUNDU VS. SUMITRA KUNDU &
ORS.**

Ms. Suman Agarwal
..for the petitioner
Ms. Sonali Ghosh Basu
..for the opposite parties

This revisional application has been filed by one of the sons of late Gopi Nath Kundu, who died on January 25, 2018. The said Gopi Nath Kundu was the sole plaintiff in the partition suit. Upon expiry of the sole plaintiff, the petitioner herein filed an application for substitution under Order 22 Rule 3 read with Section 151 of the Code of Civil Procedure.

It was contention of the plaintiff that the original plaintiff had transferred his right, title and interest in respect of the suit property in his favour by virtue of a deed of sale and a deed of gift and as such the petitioner was the sole heir of the deceased representing the estate of the deceased. Accordingly, the application for substitution was filed on April 17, 2018 upon the death the original plaintiff. The application was filed on time.

The learned Court below upon arriving at a finding that the plaintiff was only transferred 6½ sataks

out of total 39 satak, and the original plaintiff claimed $\frac{1}{4}$ share of the 39 sataks which was more than the area transferred to the petitioner and thus, rejected the application and dismissed the suit as abated.

In my opinion, the proper course of the learned Court would have been to implead the petitioner as a plaintiff being one of the heirs and if the Court was not convinced with the claim of the petitioner, the petitioner should have been directed to implead the other heirs of the deceased instead of directing the suit to be disposed of as abated against the plaintiff. This is a partition suit and the provisions of Order 1 rule 10 of the Code of Civil Procedure should have been applied, otherwise the only other alternative would be for the petitioner herein to file a fresh suit which would be time consuming and expensive.

Reference is made to the decision of **Provat Chandra Coomer & Ors. vs. Rabindra Nath Coomer & Ors.** reported in **AIR 1960 Cal 291**. The relevant paragraphs are quoted below:-

“6. There are however certain classes of suits in which a defendant is equally interested. Such are for example partition or administration suits. In such suits the decree passed enures not merely for the benefit of the plaintiff but for the benefit of the defendants as well. It is because of this that it is stated that in a partition suit everybody including the defendants are in the position of the plaintiff. If such a suit for partition abates by reason of the death of one of the defendants, when the proceedings have far advanced and have reached almost the journey's end, is the Court powerless to save the suit if the plaintiff or his legal representative as the case may be refuses to apply to set aside abatement? In such cases even though the

defendant has been given no power to make an application to set aside the abatement, the Court has inherent power to set aside abatement and enable the suit to be proceeded with. The Court should exercise this inherent power to save the parties, the trouble and costs of a second partition suit and traverse the grounds already traversed. That the Court has this inherent power and should exercise it in appropriate cases has been recognised by the Madras High Court and the Bombay High Court in cases to be noticed presently.

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9. This power is very extensive and there is no limitation curtailing or restricting the power of the Court to add parties under O. 1 R. 10 of the CPC. In exercise of the power under this rule, the Court has power and should exercise that power to save a partition suit which has abated. The defendant or his legal representatives in a partition suit is equally interested as the plaintiff in having the properties in suit partitioned. In fact in the instant case the defendants have claimed that their share in the property be also partitioned by metes and bounds in this proceeding. The position of the parties in a partition suit is different from the position of the parties in ordinary suit. In a partition suit every party is in the position of the plaintiff and the Court in such cases should in exercise of the power under O.J.R. 10 add the legal representatives of a deceased party even after 1316 suit is abated. The legal representatives of the deceased defendants are co-sharers and as such necessary parties in partition suit. The direct authority in support of this proposition is the decision of the Bombay High Court in the case of *Lakshmichand Rewa Chand v. Kachubhai Gulabchand* reported in ILR 35 Bom 393. At p. 395 of the report Scott, C.J. makes the following observations:

“It is obvious, however, that in a partition suit all the parties should be before the Court. The suit has actually reached the stage of a commission to divide the property, and the applicant is a sharer. Nothing in the Code limits or affects the inherent power of the Court to make such orders as may be necessary for the ends of justice, and under O. 1 Rule 10, the Court may, at any stage of the proceedings, order that the name of any person whose presence may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit, be added. We, therefore, order that the applicant be added as a defendant in the suit, being bound by all the proceedings up to date.”

The order impugned is set aside and quashed.

The learned Court below is directed to implead

the petitioner in place of the original plaintiff.

It is further submitted by the petitioner that other heirs do not want to be added as plaintiffs in the proceeding as the property was transferred by the father to the petitioner in question.

The petitioner is directed to file an application before the learned Court below within 15 days from date, for adding other heirs of the deceased plaintiff as parties in the proceeding. In such a way, all the heirs of the deceased plaintiff will be represented and the suit may be regularized and heard in the presence of all. If the added parties have any contention, they will be at liberty to approach the Court for appropriate relief. The respective shares will be decided at the time of drawing up the preliminary decree.

This revisional application is disposed of.

There will be however no order as to costs.

Urgent photostat certified copy of this order be given to the parties on priority basis, if the same is applied for.

(Shampa Sarkar,J.)