

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.206 of 1989

AND

I.A. Nos.33, 35 & 34 of 2022

Sarojini Dei

.... ***Appellant***
Mr.S.K. Joshi, Advocate

-versus-

Laxmipriya Sahu & Others

.... ***Respondents***
Mr.R.C. Rath, Advocate for R.2

CORAM:

MR. JUSTICE D.DASH

ORDER

25.04.2022

Order No.

18. 1. This matter is taken up through hybrid arrangement (virtual/physical) mode.
2. Heard Mr.S.K. Joshi, learned Counsel for the Petitioners and Mr.R.C.Rath, learned counsel for the Respondent No.2.
3. This Appeal under section 100 of the Code of Civil Procedure (for short, 'the Code') has been filed in assailing the judgment and decree dated 14.03.1989 and 06.04.1989 respectively passed by the learned Additional District Judge, Jajpur in Title Appeal No.62 of 1985 (10/87) whereby the judgment and preliminary decree dated 09.07.1985 and 29.07.1985 respectively passed by the learned Subordinate Judge, Jajpur in T.S. No.108 of 1981.
4. The Petitioners claiming to be the legal representatives of the sole Appellant, who has died on 12.02.2001 have filed these applications for their substitution as Appellants by setting aside abatement and condoning the delay in filing the said application for setting aside the abatement in pursuing this Appeal further.

5. Keeping in view the submissions made, I have carefully gone through the record. It is seen that in the present Appeal, the sole Appellant Sarojini Dei after admission of the Appeal by order dated 17.08.1989, had filed Misc. Case Nos.213, 214 & 215 of 1990 with the prayer for substitution of the legal representatives of Respondent No.6 by setting aside the abatement and condoning the delay in filing the said application for abatement. This Court, upon hearing, by order dated 01.08.1990 has rejected those applications on the ground that the death of said Respondent No.6, having taken place during pendency of the First Appeal, i.e., T.A. No.62/85 (10/87), the prayers, as advanced therein, are not entertainable.

At this juncture, it may be stated that said Respondent No.6 had been arraigned as Defendant No.8 in the Original Suit and Respondent No.7 in the First Appeal. The First Appeal being disposed of by judgment dated 14.03.1989, Respondent No.6, who was the Respondent No.7 therein had died on 24.01.1987.

6. After the order passed by this Court in Misc. Case Nos.213, 214 & 215 of 1990, as afore-stated, the sole Appellant had made another attempt in filing Misc. Case Nos.386, 387 & 388 of 1990 for substitution of the legal representatives of said Respondent No.6 (Respondent No.7 in the First Appeal & Defendant No.8 in the Original Suit) by setting aside the abatement and condoning the delay in filing the application for abatement. Those applications have also been rejected on merit by order dated 16.10.1990.

It may be stated here that the present Appellant was the Defendant No.4 in the original suit and she being aggrieved by the judgment and preliminary decree passed by the Trial Court in the said suit, had carried the First Appeal under section 100 of the Code with present Respondent No.8.

Said Appeal having been dismissed, she had filed this Second Appeal under Section 100 of the code.

The suit had been filed by present Respondent No.1 as the Plaintiff seeking partition of the properties involved in the suit and adjustment of her purchased land towards the share of present Respondent No.7 (Defendant No.9 in the Original Suit and Respondent No.8 in the First Appeal) and one Ghanashyam Sahu, who was the Defendant No.5 in the Original Suit and Respondent No.4 in the First Appeal. The Trial Court has preliminary decreed the suit allotting 1/4th share to Defendant No.1; 1/4th share to Defendants 5 and 9; 1/4th share to Defendants 6, 7 and 8; and 1/4th share to Defendants 2 and 3 with a direction that the land purchased by the Plaintiff and Defendant No.4 are to be allotted to them as within the extent of the shares of their respective vendors.

With such state of affairs emerging from record, when the sole Appellant (Defendant No.4 in the Original Suit and Appellant No.2 in the First Appeal) died on 12.05.2001, after lapse of more than two decades, these applications for substitution of her legal representatives by setting aside abatement in condoning the delay in filing that application for setting aside abatement have come to be filed on 15.03.2022.

The explanations for the delay of such long 20 years 10 months and 3 days run on the score that as the legal representatives were not aware of the legal provisions; they were waiting for the instruction of the learned counsel, who had filed the Appeal and only when the Appellant, who was since dead, had come to ascertain the position of the Appeal, steps have been taken which per se are not believable. This rather shows that these legal representatives were aware of the pendency of the Appeal and in that situation, it was their duty to inform the learned counsel and

merely saying that they were not aware of the legal position, would not suffice as the ignorance of law is no excuse. It is also seen that in the present Appeal, Respondent No.6 (Defendant No.8 in the Original Suit and Respondent No.7 in the First Appeal) being dead at the time of presentation of Memorandum of Appeal, her estate has remained unrepresented and the fact remains that she had too with Defendants 7 and 8 has been allotted with 1/4th share out of the suit property and although in the First Appeal, she too had no representation, the result therein has gone in favour of her legal representatives. But that situation cannot be so predicted at this stage of Second Appeal which has been admitted to answer the substantial question of law framed way back on 17.08.1989.

In view of all these above, had even the sole Appellant been alive as on date, this Appeal could have been heard for its disposal on merit as the First Appeal whose judgment and preliminary decree are under challenge in the present Appeal stood abated by the time those were passed in confirming the judgment and preliminary decree passed by the Trial Court. Therefore, the judgment and preliminary decree passed by the Trial Court in T.S. No.108 of 1981 have attained finality since long and are no more amenable to challenge in the present Second Appeal. So, for the above reason, this Second Appeal also cannot further proceed for answering the substantial question of law and is liable to be dismissed.

7. For all the aforesaid, the present Applications for substitution of the legal representatives of the deceased-Appellant with further prayer to set aside the abatement by condoning the delay in filing the same stand rejected.

8. Accordingly, this Second Appeal as well as the above noted IAs stand dismissed. There shall, however, be no order as to cost.

***(D. Dash),
Judge.***

Basu

