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IN THE HIGH COURT OF ORISSA AT CUTTACK

OJC No. 11568 OF 1999

Jugal Kishore Ray and others* *Petitioners

Mr. D.P. Mohanty, Advocate

-versus-

Bhagabat Panda (Dead) and others* *Opp. Parties

Mr. Abhijit Pal, Advocate

(For Opp. Party Nos.1(a) to 1(j))

Mr. Ajodhya Ranjan Dash,
Additional Government Advocate

**CORAM:
JUSTICE K.R. MOHAPATRA**

**ORDER
03.11.2022**

Order No.

I.A. No. 21 of 2022

14. 1. This matter is taken up through hybrid mode.
2. This application has been filed by the Opposite Party Nos.1 (a) to 1(j) with a prayer to recall the order dated 14th March, 2022 by which the writ petition was disposed of.
3. Mr. Pal, learned counsel for the Opposite Party Nos.1 (a) to 1(j) submits that during pendency of the writ petition, Petitioner Nos. 4(a), 4(b) and 5 to 9 died on different dates. But, no step for their substitution was taken by the surviving Petitioners although they knew about their death. In view of non-substitution of above named deceased Petitioners, the writ petition has abated. Had the death of above named Petitioners been brought to the notice of the Court, the final order would not have been passed before their substitution. It is his submission

that even death of a single Petitioner would result in abatement of the writ petition as a whole. In view of such non-disclosure, the writ petition was disposed of with the following direction:

“10. In that view of the matter, the writ petition is disposed of with a direction that the impugned order dated 8th October, 1998 (Annexur-4) passed by the Joint Commissioner, Consolidation, Cuttack in Consolidation Revision Case No.796 of 1996 shall be subject to the result of TS No.134 of 1996 pending before learned Civil Judge (Junior Division), Jajpur. Learned trial Court may take steps for expeditious disposal of T.S. No.134 of 1996, if there is no legal impediment.”

4. Mr. Pal, learned counsel relied upon the ratio decided by the Full Bench of Allahbad High Court in the case of **Churya and others –v- Baneshwar**, reported in AIR 1926 All 217, in which it is held as under:

“If we turn now to Act No. IX of 1908, which was passed in the same year as the present Code of Civil Procedure, we find that article 171 is couched in different language. The article provides a period of sixty days for an application under the Code of Civil Procedure, 1908, for an order to set aside an abatement (not to set aside an order for abatement), and the period of sixty days begins to run not from the date of any order of abatement but from the date of the abatement.

I am satisfied, therefore, that the decision in I.L.R., 44 All., 459, is not a correct decision and ought to be overruled. In my opinion the correct law was laid down in the judgement above referred to, which is reported in I.L.R., 42 All., 540. The true interpretation of order XXII is that in order to work the abatement of a suit or appeal it is not necessary for the court to pass any order.”

5. He, therefore, submits that no specific order of abatement of the writ petition is required to be passed. On the death of above named Petitioners and due to their non-substitution within

the statutory period, abatement of the writ petition has taken place automatically. He thus relied upon a decision in the case of ***Niranjan Dass –v- Shiromani Gurudwara Prabandhak Committee, Amritsar***, reported in 1993 Supp (1) SCC 586, in which it is held as under:

“3. We see no force in the above contention of the learned counsel for the applicant. Article 120 of the Limitation Act, 1963 clearly provides a period of 90 days for having the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent to be made a party. In our view the language of Article 120 is clear and according to this the application in the present case ought to have been filed within 90 days of the death of sole appellant Niranjan Dass. The Punjab High Court in the above referred case took a wrong view that the provision of Article 120 is inapplicable and that the period of limitation would be three years and not 90 days. In the case before us Mahant Niranjan Dass was the sole appellant and he had died on March 21, 1988 and the applicant claiming himself to be a Chela of Mahant Niranjan Dass ought to have filed the application for bringing him on record within 90 days of the death of the appellant Niranjan Dass. Even if for argument's sake the period is calculated from the date of knowledge of the applicant with regard to the present appeal pending in the Supreme Court, that date comes to August 29, 1990 the date of the plaint filed by Gur Preet Dass. The application filed on January 24, 1991 is even beyond 90 days of the date of knowledge of the present litigation.....”

Relying upon the aforesaid case laws, Mr. Pal, learned counsel for the Opposite Party Nos.1 (a) to 1(j) submits that the surviving Petitioners having not taken step for substitution of the deceased Petitioners within a period of ninety days, the writ petition has abated.

6. The effect of such abatement results in dismissal of the writ petition itself. In support of his case, he relied upon the case of ***Amba Bai and others –v- Gopal and others***, reported in 2001 (5) SCC 570, in which it is held as under:

“6. The various provisions contained in Order 22 CPC explain the consequences of death of parties in a civil litigation. If one of the plaintiffs dies and if the cause of action survives his legal representatives have got a right to come on record and to continue the proceedings. If the sole plaintiff dies and if the legal representatives are not brought on record, the suit will abate and Rule 9 Order 22 CPC specifically prohibits the filing of a fresh suit on the same cause of action. The only remedy available to the legal representatives is to get themselves impleaded and continue the proceedings, if the suit is already not abated, and if abated, they have to file an application to set aside abatement also.”

7. He, therefore, submits that different provisions of Order XXII C.P.C. explain the consequences of death of parties to the civil litigation. If one or more of several Plaintiffs die(s) and the cause of action survives with the legal representatives, they have the right to come on record and continue the litigation. If any of the Plaintiffs dies and the legal representatives are not brought on record, the suit will abate under Order XXII Rule 9 C.P.C. In that event, the only remedy available to the legal representatives is to get themselves impleaded and continue the proceedings, if the suit is not already abated. Otherwise, they have to file an application to set aside the order of abatement and upon showing sufficient cause of not filing an application for their substitution within stipulated time, they can be brought on record and continue litigation. He also relied upon the case law in ***Pandit***

Sri Chand and others, -v- Jagdish Parshal Kishan Chand and others, reported in AIR 1966 SC 1427 and submits that abatement of the writ petition against one of the Petitioners results in dismissal of the writ petition in toto. In that view of the matter, he submits that the order dated 14th March, 2022 is not sustainable and prays to recall the said order by which the writ petition was disposed of.

8. Mr. Mohanty, learned counsel for the Petitioners contested the I.A. by filing objection. It is his submission that the Petitioners in the writ petition are the *marfatdars* of Mangala Thakurani Bije at Kuansa. Thus, death of any one or more marfatdar does not affect the right of the deity till it is being represented by at least one of the *marfatdars*. The deity being a perpetual minor has to be represented by its *marfatdar*. In the instant case, all the Petitioners are representing the interest of the deity and they have a common interest. Thus, non-substitution of one or some of the Petitioners does not affect the maintainability of the writ petition and the writ petition does not abate, as alleged. In support of his case, he relied upon the case of ***Akhandalmani Mahadev and others –v- Dayanidhi alias Daitari Mulia (dead) after him Rebati Bewa and others***, reported in 94(2002) CLT 792, in which it is held as under:

“17. So far as question of abatement is concerned, it appears that defendant No. 1 Akhandalmani Mahadev is the deity who has been represented through Marfatdar villagers and the painters in whose favour a gift deed was executed by Raghunath Sen. Even though some of the defendants have expired and no substitution has taken place, not only defendant No. 1 is represented

but also painters community has been represented. The Apex Court in the case of Collector of 24 Parganas and Ors. v. Lalith Mohan Mullick and Ors. reported in AIR 1988 SC 2121 held that even if some of the defendants died during the pendency of the appeals, if their estates are sufficiently represented, abatement does not take place. In view of the observations made above, I hold that though some of the defendants expired during pendency of the appeal and no substitution has taken place, the deity and the painters community having been sufficiently represented, there shall be no abatement of the appeals.”

9. It is his submission that the case law squarely applicable to the case at hand as the Court while dealing with the issue of abatement, relying upon the ratio in case of ***Collector of 24 Parganas and others –v- Lalith Mohan Mullick and others***, reported in AIR 1988 SC 2121, held that non-substitution of some of the defendants, who were representing the deity during pendency of the appeal does not result in abatement of the appeal till the estate of the deity is sufficiently represented. In the writ petition, the estate of the deity is being duly represented by the surviving Petitioners as *marfatdars*. Hence, the writ petition did not abate at all, as there was substantial representation of the interest of the deity. It is his submission that in T.S. No.134 of 1996 pending before learned Civil Judge, (Junior Division), Jajpur (referred to in the order sought to be recalled), the above named Petitioners have already been substituted. Thus, there is no difficulty in continuing the suit. While disposing of the writ petition, this Court did not delve into the merit of the case but held that the order dated 8th October, 1998 under Annexure-4 passed by learned Joint Commissioner,

Consolidation, Cuttack in Consolidation Revision Case No.796 of 1996, which was under challenge in this writ petition, shall be subject to result of T.S. No.134 of 1996. Thus, death of the above named Petitioners does not at all affect maintainability of the writ petition or sustainability of the order by which the writ petition was disposed of. Hence, he prays for dismissal of the I.A.

10. Considering the submissions made by learned counsel for the Parties, this Court finds that there is no dispute to the ratio decided in the case laws relied upon by Mr. Pal, learned counsel for the Opposite Party Nos.1(a) to 1(j). There cannot be any doubt that on the death of a party to the civil proceeding, if his substitution is not made within a period of ninety days, the civil litigation abates as against it. But, when there is substantial representation of the interest, non-substitution of a deceased party does not affect the maintainability of the litigation itself. In the instant case, the Petitioners were not claiming any interest in their individual capacity. They were the *marfatdars* of the deity and were representing the deity itself, which is a perpetual minor. In spite of death of some of the Petitioners as stated above, the deity is still being represented by the surviving Petitioners and its interest is being protected by them. Thus, in view of the ratio decided in *Akhandalmuni Mahadev and others* (supra), this Court has no hesitation to hold that though some of the Petitioners have expired during pendency of the writ petition and their substitution was not made, the deity having been substantially represented, there shall be no abatement of the writ

petition. Resultantly, the contention raised by Mr. Pal, learned counsel for the Opposite Party Nos.1 (a) to 1(j) merits no consideration.

11. In view of the discussions made above, the I.A. being devoid of any merit stands dismissed.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

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