

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No.No.544 of 2022

Subash Chandra Agarwal ***Petitioner***
Mr. Bidesh Ranjan Behera, Advocate

-versus-

Giridharlal Agarwal and another ***Opp. Parties***

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
10.11.2022

Order No.

3. 1. This matter is taken up through Hybrid mode.
2. Office Note discloses that notice on Opposite Parties returned un-served with endorsement '*refused*'. Hence, notice on Opposite Parties is treated to be sufficient.
3. Petitioner in this CMP seek to assail the orders dated 22nd January, 2022 and dated 7th March, 2022 (Annexure-8 series) passed by learned Senior Civil Judge, Rourkela in CS No.119 of 2017, whereby by a petition filed under Order XXII Rule 3 CPC and Section 5 of the Limitation Act were dismissed and further learned trial Court recorded abatement of the suit for non-substitution of the Plaintiff.
4. Mr. Behera, learned counsel for the Petitioner submits that CS No.119 of 2017 was filed for declaration of right, title and interest and for consequential and ancillary reliefs. During pendency of the suit, the sole Plaintiff died on 12th May, 2021 and his wife died on 17th June, 2021. Thereafter, the Petitioner claiming to be the legal heir of the Plaintiff as his son and

daughter-in-law, namely, Sunita Agarwal @ Sunita Devi Agarwal, filed an application for substitution. They also stated in the petition for substitution that the Plaintiff before his death had executed the registered will on 11th December, 2019 in favour of the Petitioner and said Sunita Agarwal. Learned trial Court with an observation that Petitioner cannot be representative of the Plaintiff on the strength of a testamentary deposition dismissed the petitions vide order dated 22nd January, 2022. Subsequently, vide order dated 7th March, 202, learned trial Court recorded that the suit has abated due to non-substitution of the Plaintiff. Mr. Behera, learned counsel for the Petitioner placed reliance on the case law in the case of ***Pramodini Pattnaik (since dead) Vs. Smt. Jayashree Tarai and another***, reported in 2016 (I) ILR-CUT-201, wherein this Court relying upon the case laws in the case of ***Ramcharan Singh Vs. Mst. Dharohar Kuer***, reported in AIR 1954 Pat, 175, ***Surendra Chandra Jena and others Vs. Laxminarayan Jena and others***, reported in AIR 1988 Ori 143 and ***Kannhialal Sarda and another Vs. State of Orissa and others***, reported in AIR 1980 ORISSA 27, held as under :-

“Thus, from the discussions made in the aforesaid reported decisions and the law laid down therein, ti is crystal clear that an executor can only represent and continue the litigation on behalf of the testator, but he cannot claim/establish his independent right over the property covered under the Will/testament unless the probate or letter of administration is granted in his favour by a competent court of law.”

From the aforesaid case laws, it is apparent that the beneficiaries of the testamentary deposition can only represent and continue the ligation on behalf of the testator by getting themselves substituted and transposed, but they cannot claim their

independent right over the suit property covered under the Willnama/testament. This aspect has not been taken into consideration by the learned trial Court. In that view of the matter, the impugned orders under Annexure-8 series are not sustainable and are accordingly set aside.

4.1 Further the Petitioner had not filed an application for setting aside abatement under Order XXII Rule 9 CPC.

5. Accordingly, the CMP is disposed of with a direction that in the event Petitioner files an application under Order XXII Rule 9 CPC for setting aside of the abatement of the suit within a period of two weeks hence along with certified copy of this order before learned trial Court, it shall do well to consider the application under Order XXII Rule 3 CPC along with allied applications in accordance with law giving opportunity of hearing to the parties concerned keeping in mind the ratio decided in the case of *Pramodini Pattnaik (since dead) (supra)*

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge