

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.448 of 2016**

Radheshyam Rai, Son of Late Sati Ram Rai, Resident of Village-
Panchhimwari Bharauli, Post Office- Giridhar, Police Station- Nawanagar,
District- Buxar.

... .. Petitioner/s

Versus

1. Jai Ram Rai
2. Rama Shankar Rai.
Both are sons of Ram Govind Rai.
3. Gauri Rai.
- 4.1. Somaru Rai, S/o Late Rambilash Rai, Resident of Village- Pachhimwari
Bharauli, P.O.- Giridhar, P.S.- Nawa Nagar, District- Buxer.
5. Sheo Bilash Rai, son of Late Butai Rai.
6. Lallan Rai, son of Late Butai Rai.
8. Ram Visun Rai, Son of Late Sati Ram Rai, Resident of Village-
Panchhimwari Bharauli, Post Office- Giridhar, Police Station- Nawanagar,
District- Buxar.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Abhishek, Advocate Mr. Anil Kumar Roy, Advocate
For the Respondent/s	:	None.

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT**

Date : 24-09-2024

Heard learned counsel for the petitioner.

2. However, despite opportunity, no one appeared for the respondents.

3. The petitioner has filed the instant petition under Article 227 of the Constitution of India for setting aside the order dated 22.03.2016 passed by the learned Additional District Judge-III, Buxar in Title Appeal No. 08/1994 whereby and whereunder the prayer of the respondent 1st set for abatement of



appeal due to non-substitution of respondent Bhola Rai has been allowed.

4. The learned counsel for the petitioner submits that the impugned order has been passed on erroneous consideration of law and facts of the case. The respondent no. 3 Bhola Rai died and an application has been moved on behalf of the respondent no.1 Jai Ram Rai that as the respondent no.3 Bhola Rai has not been substituted, the appeal has abated. This contention of the respondent no.1 was accepted by the learned first appellate court. But the learned first appellate court has not considered the provisions of law in its right prospective. The learned counsel further submits that Order 22 Rule 4 (3) of the Code of Civil Procedure (hereinafter referred to as 'the Code') provides that the suit/appeal would abate only against the deceased defendant/respondent if right to sue survives against other respondents. In the present case, the respondents were the plaintiffs and the suit was filed with regard to right, title and possession over the suit property which was ancestral land. Even if respondent no.3/defendant no. 3 died, the appeal is maintainable against the other respondents against whom the appellant/defendant has sought relief. The learned counsel further submits that the learned first appellate court has wrongly



placed its reliance on the decision in the case of ***Roshan Rai & Ors. vs. Sk. Nizamuddin & Ors.*** reported in ***2014 (3) BBCJ 77***. The learned counsel further submits that even if no application has been made under Order 22 Rule 4 (1) of the Code, the suit shall abate against only deceased respondent and suit will not abate as a whole as right to sue survives. The learned counsel further submits that there is no adjudication by the learned first appellate court that the appeal has become incompetent. The learned counsel relies on the decision in the case of ***Ram Kailash Bhagat vs. Md. Hussain*** reported in ***(2013) 3 PLJR 825***. Thus, learned counsel submits that the impugned order is not sustainable and the same be set aside.

5. I have given my thoughtful consideration to the rival submission made on behalf of the petitioner.

6. Order 22 Rule 11 of the Code provides that in the application of Order 22 to appeals, as far as may be the words “plaintiff”, “defendant” and “suit” shall respectively include an appellant, a respondent and an appeal.

Order 22 Rule 1 of the Code provides that the death of a respondent shall not cause the appeal to abate if the right to sue survives.

7. Order 22 Rules 4 & 9 of the Code reads as under :

“4. Procedure in case of death of one of



several defendants or of sole defendant.—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where—

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of



1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

the Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved.]

9. Effect of abatement or dismissal.—(1)

Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent 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 of dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of Section 5 of the Indian Limitation Act, 1877 (15 of 1877), shall apply to applications under sub-rule (2).

[Explanation.—Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of



action in the suit which had abated or had been dismissed under this Order.]”

8. A plain reading of the provisions makes it amply clear that if the right to sue survives, the appeal would not abate as a whole against all the respondents unless there is clear cut finding by the learned first appellate court against the other respondents as well. The learned first appellate court was required to record an unequivocal finding in this regard that relief claimed against the respondents was specific against the respondent no.3 only and no relief has been sought against the other respondents and with the death of respondent no.3, the interest of all plaintiffs/respondents came to an end. Thus, there is no finding recorded that the appeal has become incompetent after death of respondent no.3.

9. The Hon’ble Supreme Court in the case of ***Perumon Bhagvathy Devaswom v. Bhargavi Amma & Ors.*** reported in ***(2008) 8 SCC 321***, with regard to abatement of suit, held as under :

“5. Having regard to the wording of Rule 4, it is clear that when a respondent dies and an application to bring his legal representative on record is not made, abatement takes place on the expiry of the prescribed period of 90 days, by operation of law. Abatement is not dependent upon any judicial adjudication or declaration of such abatement by a judicial order. It



occurs by operation of law. But nevertheless “abatement” requires judicial cognizance to put an end to a case as having abated. To borrow a phrase from Administrative Law (used with reference to void orders), an appeal bears no brand on its forehead that it has “abated”, nor does it close itself automatically on abatement. At some stage, the court has to take note of the abatement and record the closure of the case as having abated (where the deceased was a sole respondent) or record that the appeal had abated as against a particular respondent (if there are more than one and the cause of action survives against the others).”.

10. In the light of the discussion made here-in-before and in view of the clear provision of law, I do not think the impugned order dated 22.03.2016 is sustainable. Hence, the same is set aside.

11. As a result, the instant petition stands allowed.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	NAFR
CAV DATE	NA
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