IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.58 of 1988
CNR No- ODHC010006761988

Bhagaban Sunari	**....**	***Appellant (s)***
		Mr. S.K. Mund, Adv.
-versus-		
1. Gopal Gouda (dead) issueless	**....**	***Respondent (s)***
2(a). Niranjan Raxa and others.		
		Mr. J.R. Deo, Adv.

CORAM:
HON'BLE DR. JUSTICE SANJEEB K PANIGRAHI

Order No. **ORDER**

25. **30.10.2026**

(I.A. Nos.144, 145 & 146 of 2026)

1. These matters are taken up through hybrid arrangement.

2. These I.As. have been filed for substitution of deceased-Respondent No.2(c) by proposed legal heirs, condonation of delay in filing the substitution petition and setting aside abatement of the appeal.

3. Heard learned counsel for the Appellant and learned counsel for the Respondents.

4. Learned counsel for the Appellant submitted that the present Second Appeal is arising out of the common judgment dated 26.09.1987 and decree dated 17.10.1987 passed by the learned District Judge, Sundargarh in Title Appeal Nos.32 and 35 of 1986 confirming the judgment dated 02.04.1986 and decree dated 09.04.1986 passed by the learned Subordinate Judge, Sundargarh

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in Title Suit No.41 of 1983 by which the suit was decreed on contest against the Defendants preliminarily in part.

5. It was further submitted that after issuance of notice to the L.Rs. of the deceased Respondents more particularly to the Respondent No.2(c), it came to the notice that the said Respondent No.2(c) had also died. The Appellant/ Petitioner is now residing with his son outside the ancestral village. Hence, he had no knowledge about the death of the Respondent No.2(c). In such premises, delay was caused in filing the applications for substitution of L.Rs. of the deceased Respondent No.2(c) and setting aside abatement of the appeal. However, the names mentioned in the I.A. No.144 of 2026 are the L.Rs. of the deceased Respondent No.2(c).

6. It appears from the record that this appeal has arisen out of a partition suit and the decree was passed for a partition. Respondent No.2, the father of the deceased Respondent No.2(c) was the defendant No.2 in the suit vide T.S. No.41 of 1983 and he was the Appellant No.2 in the appeal vide T.A. No.32 of 1986.

7. Now, the question arises when, this Second Appeal has already been abated against the deceased Respondent No.2(c) vide order dated 08.09.2025 and when, the Second Appeal has arisen out of the decree passed in the suit for partition, then, whether due to the abatement of the Second Appeal against the deceased Respondent No.2(c), the entire appeal shall be abated or the appeal shall be abated against the deceased Respondent No.2(c) only.

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8. Before the question framed above is answered, the statutory scheme may be dealt with so as to have a clear understanding. Order XXII Rule 3 CPC governs the death of one of several plaintiffs, and Order XXII Rule 4 CPC governs the death of one of several defendants. Under Rule 4(1), where one of the two or more defendants dies and the right to sue does not survive against the surviving defendants alone, the court shall, on an application made in that behalf, cause the legal representative of the deceased defendant to be made a party. Under Rule 4(3), where no such application is made within the time limited by law, the suit shall abate as against the deceased defendant. By virtue of Order XXII Rule 11 CPC, these provisions apply to appeals. In an appeal, the expression "defendant" includes a respondent, and the expression "suit" includes an appeal.

9. The time limited by law is ninety days from the date of death, under Article 120 of the Limitation Act, 1963. Abatement takes place by operation of law on the expiry of that period, without any order of the court. An order recording abatement only records a consequence that has already occurred. Under Order XXII Rule 9(2) CPC, the plaintiff or the person claiming to be the legal representative may apply for an order to set aside the abatement. If it is proved that he was prevented by sufficient cause from continuing the suit, the court shall set aside the abatement on such terms as to costs or otherwise as it thinks fit. Article 121 of the Limitation Act prescribes sixty days from the date of abatement for

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such an application. Order XXII Rule 9(3) CPC makes Section 5 of the Limitation Act applicable to these applications.

10. Rule 4(3) prescribes abatement "*as against the deceased defendant*". On its terms, therefore, the abatement is confined to the party who has died. The question whether it extends further, to the whole suit or appeal, is not answered by the text of the Rule. The answer turns on the nature of the decree and on whether the appeal can proceed meaningfully in the absence of the deceased party.

11. The law on this has been settled by a long line of decisions of the Supreme Court. In ***State of Punjab v. Nathu Ram***[1], the Supreme Court has time and again held that when an appeal abates against one respondent, the question whether it abates against the others depends on whether the decree is joint and indivisible. If the decree is joint, the appeal as a whole fail, because the appellate court cannot pass a decree that contradicts a decree that has become final with respect to the same subject matter between the appellant and the deceased respondent. The Court laid down three tests:

> (a) *whether the appellate court can deal with the appeal in the absence of the legal representatives of the deceased respondent;*
>
> *(b) whether the appellant's success in the appeal would result in a decree that conflicts with the decree which has become final in favour of the deceased respondent; and*

[1] AIR 1962 SC 89

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(c) whether any decree passed in the appeal against the surviving respondents would be ineffective, that is to say incapable of being successfully executed.

If any one of these tests is answered against the appellant, the appeal cannot proceed against the surviving respondents either.

12. In ***Rameshwar Prasad v. Shambehari Lal Jagannath***[2], and ***Sri Chand v. Jagdish Pershad Kishan Chand***[3], the Supreme Court applied the same principle. It has categorically held that the appellate court cannot, in the absence of the legal representatives of a deceased party, reverse or vary a decree that has become final as regards that party, where the relief claimed is common to all. The Constitution Bench in ***Sardar Amarjit Singh Kalra (dead) by LRs v. Pramod Gupta (dead) by LRs***[4], examined the entire body of law. It has held that the provisions of Order XXII CPC are not penal in nature. They are part of procedural law, which is the handmaid of justice, and they should be construed liberally so as to advance the cause of justice rather than defeat it on technicalities. At the same time, the Court affirmed the core principle,where the decree is joint and inseverable, so that the rights of the parties are interdependent and the appellate court cannot grant relief without affecting the rights of the deceased party, the appeal abates in its entirety. Where the decree is joint and severable, so that the rights of each party are distinct and separable, the appeal abates only as against the deceased. In ***Budh Ram v. Bansi***[5], the

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[2] AIR 1963 SC 1901

[3] AIR 1966 SC 1427

[4] ***(2003) 3 SCC 272***

[5] (2010) 11 SCC 476

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Supreme Court has reiterated these principles and held that whether the appeal abates as a whole is to be decided on the facts of each case, applying the tests of inconsistency and executability.

13. These principles must now be applied to a decree for partition. A suit for partition is a suit of a peculiar nature. Every co-sharer is entitled to seek partition, and every party to such a suit stands, in substance, in the position of a plaintiff as well as a defendant. The preliminary decree does not grant relief to the plaintiff alone. It declares the shares of all the co-sharers in the joint property together, and each party is bound by the declaration of the share of every other. The shares so declared are interlocking. The share of one co-sharer cannot be enlarged without diminishing the share of another and it cannot be diminished without enlarging the share of another. A preliminary decree for partition is thus one composite decree governing the entire joint property, and not a bundle of separate decrees in favour of or against individual parties.

14. It follows that in an appeal against a preliminary decree for partition, the appellate court ordinarily cannot vary the shares declared without the presence of every co-sharer whose share would be affected. If a co-sharer dies and his legal representatives are not brought on record, the decree becomes final as against his estate. Any variation of the shares in the appeal would then produce two decrees in respect of the same joint property that cannot stand together: one final as against the estate of the deceased co-sharer, and another passed in the appeal as against the others. Such inconsistent decrees could not be worked out

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in the final decree proceeding, where the property must be divided by metes and bounds in accordance with one set of shares.

15. Turning to the facts of the present case, this Second Appeal arises out of T.S. No.41 of 1983, a suit for partition, in which a preliminary decree was passed in part. The decree was confirmed by the first appellate court in the common judgment in T.A. Nos.32 and 35 of 1986. Respondent No.2 was Defendant No.2 in the suit and Appellant No.2 in T.A. No.32 of 1986. On his death, his interest in the joint property devolved on his legal heirs, who were brought on record as Respondent Nos.2(a), 2(b), 2(c) and so on. Respondent No.2(c), being one of them, held to have a defined interest in the share allotted to the branch of Respondent No.2.

16. If the Second Appeal were to proceed without the legal representatives of the deceased Respondent No.2(c), and the Appellant were to succeed, the shares declared under the preliminary decree would stand varied. Any such variation would necessarily operate on the share of the branch of Respondent No.2, including the portion devolving on Respondent No.2(c). The decree of the first appellate court has become final as against the estate of Respondent No.2(c) by reason of the abatement. Each of the three tests in ***Nathu Ram(supra)*** is therefore answered against the Appellant:

(a) This Court cannot adjudicate on the shares of the parties without the representation of the estate of Respondent No.2(c).

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(b) Success of the Appellant would result in a decree directly in conflict with the decree that has become final as against that estate.

(c) A decree so passed would be incapable of execution in the final decree proceeding, since the property could not be divided according to two inconsistent sets of shares.

17. This Court, accordingly, answers the question framed in paragraph 7 in the further words. The decree under challenge, being a preliminary decree for partition, is joint and inseverable. The abatement of the Second Appeal as against the deceased Respondent No.2(c) cannot be confined to him alone. If it is allowed to stand, the Second Appeal abates as a whole. The conclusion lends weight to the applications for condonation of delay and for setting aside the abatement, because their refusal would non-suit the Appellant altogether and close the adjudication of the rights of all the co-sharers on merits.

18. The expression "sufficient cause" in Order XXII Rule 9 CPC and Section 5 of the Limitation Act has been construed by the Supreme Court in a number of decisions. In ***Union of India v. Ram Charan***[6]**,** the Supreme Court held that ignorance of the death of a party is not, by itself, sufficient cause. The applicant must also show that he acted with reasonable diligence in the prosecution of the court proceeding. Later decisions have, however, placed the emphasis on a liberal approach in the matter of abatement. In ***Collector, Land Acquisition, Anantnag v.***

[6] AIR 1964 SC 215

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Mst. Katiji[7]***,*** the Supreme Court held that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. In ***Mithailal Dalsangar Singh v. Annabai Devram Kini***[8]***,*** the Supreme Court held that in considering an application to set aside abatement, the court should adopt a justice-oriented approach. The Court said this applies with greater force where abatement of the proceeding as a whole would result in the impugned decree becoming final against all. In ***Perumon Bhagvathy Devaswom v. Bhargavi Amma***[9]***,*** the Supreme Court summarised the principles. It held that the words "sufficient cause" receives a liberal construction in such applications, and that the courts should not adopt a hyper-technical approach. In particular, the Court noted the following:

(a) an appellant is not expected to keep track of the welfare of every respondent; and

(b) the absence of knowledge of the death of a respondent, especially a respondent who is not actively contesting, can ordinarily be accepted as sufficient cause unless the circumstances show negligence, lack of bona fides or inaction.

19. Applying these principles, the explanation offered by the Appellant deserves acceptance. The Appellant has stated that he is residing with his son outside the ancestral village and had no knowledge of the

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[7] (1987) 2 SCC 107

[8] (2003) 10 SCC 691

[9] (2008) 8 SCC 321

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death of Respondent No.2(c). The death came to light only when notice was issued to the legal representatives of the deceased Respondents. That explanation is plausible in the circumstances of a partition litigation pending for several decades, in which the original parties have died and their heirs are scattered. Nothing on record shows the following:

(a) that the Appellant was informed of the death earlier;

(b) that he was otherwise aware of it; or

(c) that the delay was deliberate or intended to gain any advantage.

20. The persons named in I.A. No.144 of 2026 are stated to be the legal representatives of the deceased Respondent No.2(c), and their status as such is not seriously disputed The Respondents will suffer no prejudice that cannot be met, since the substituted legal representatives will have full opportunity to contest the Second Appeal on merits.

21. Weighed against this, if the applications were refused, the result would be the abatement of the entire Second Appeal in a partition matter. The result would also be the final determination of the shares of all the co-sharers without any adjudication of the substantial questions involved. That would be out of all proportion to the lapse shown. This Court is therefore satisfied that the Appellant was prevented by sufficient cause from bringing the legal representatives of the deceased Respondent No.2(c) on record within time, and from applying to set aside the abatement within the period prescribed.

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22. In view of the discussion above, this Court holds as follows:

(i) The Second Appeal arises out of a preliminary decree for partition, which determines the shares of all the co-sharers together. Such a decree is joint and inseverable.

(ii) Consequently, the abatement of the Second Appeal as against the deceased Respondent No.2(c), recorded by order dated 08.09.2025, cannot be confined to him alone. If it is allowed to stand, the Second Appeal abates as a whole.

(iii) The Appellant has shown sufficient cause for not bringing the legal representatives of the deceased Respondent No.2(c) on record within time and for the delay in seeking to set aside the abatement.

23. Accordingly, (a) I.A. No.145 of 2026 is allowed, and the delay in filing the application for substitution and for setting aside abatement is condoned.

(b) I.A. No.146 of 2026 is allowed, and the abatement of the Second Appeal as against the deceased Respondent No.2(c) is set aside. The Second Appeal stands restored as against all the Respondents.

(c) I.A. No.144 of 2026 is **allowed**, and the persons named therein are substituted as legal representatives of the deceased Respondent No.2(c), as Respondent Nos.2(c)(i) to 2(c)(vi)

24. The Appellant shall carry out the necessary corrections and file a consolidated cause title of the brief within two weeks and take steps for issuance of notice to the substituted Respondents by registered post

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with A.D. as well as by speed post and through the learned counsel, if any, within the same period.

25. These I.As. are disposed of, accordingly.

26. List the Second Appeal after two weeks from today.

(Dr. Sanjeeb K Panigrahi)
Judge

B.Jhankar

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