

(2015) 01 OHC CK 0010
In the Orissa High Court
Case No : R.S.A. No. 237 of 2008

Golam Mohammed and Others

APPELLANT

Vs

Sk. Fakir and Others

RESPONDENT

Date of Decision : 28-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 22 Rule 9
Limitation Act, 1963 — Section 5

Citation : (2015) 1 OLR 417

Hon'ble Judges : D. Dash, J.

Bench : Single Bench

Advocate : A.K. Otta, S.K. Mishra, Suryakanta Dash and A. Dhalsamanta, for the Appellant; B. Mohanty, T.K. Patnaik, S. Patnaik, A. Patnaik, B.P. Ray, B.S. Raiguru, A. Patnaik and R.K. Mohanty, and D.K. Mohanty and associates, Advocates for the Respondent

Final Decision : Disposed off

Judgement

D. Dash, J.

Misc. Case Nos. 989/990/991/986/987/988 of 2014

1. The present appeal is pursued by the legal representatives of the unsuccessful plaintiff No. 1 in the trial Court challenging the judgment and decree passed by the learned District Judge, Cuttack in Title Appeal No. 124 of 1996 setting aside the judgment and decree passed by the Trial Court in decreeing the suit filed by the deceased plaintiff No. 1 and the other plaintiff declaring their right, title and interest over the disputed property as also for restoration of possession of the same to them.

2. Learned counsel appearing for the parties submit that during pendency of the appeal before the lower appellate Court, present respondent No. 1 who was defendant No. 1 in the suit and appellant No. 1 in the lower appellate Court had died on 28.01.2008 and respondent No. 2 who was defendant No. 2 in the suit

and appellant No. 2 in the lower appellate Court had died on 18.02.1999. But no step for substitution of their legal representatives were taken. So, the lower appellate Court being ignorant about the death of those two appellants before it heard and allowed the appeal in setting aside the judgment and decree passed by the trial Court. Thus, the judgment and decree of the lower appellate Court are against dead persons when in fact the appeal stood abated so far as those appellants are concerned.

3. Now before this Court petitions have been filed to bring the legal representatives of those deceased respondent No. 1 and 2 who died during pendency of the appeal before the lower appellate Court by setting aside the abatement of said appeal which had taken place on account of non-substitution of their legal representatives by condoning delay for not moving in time, such petition for setting aside the abatement.

4. In the above factual setting, reliance is placed on the decision in case of Arjan Singh (D) by L. Rs. and Others Vs. Gurdian Singh (D) by L. Rs.--> . In view of aforesaid decision this Court feels it proper to adopt the same course as it was done in the cited case.

5. Accordingly, the appeal is allowed without cost. The impugned judgment and decree rendered by the lower appellate Court are set aside and the appeal before the lower appellate Court is restored to its original file. It would be open to the appellants before the lower appellate Court to file an application under Order 22 Rule 4 read with Rule 9 of the Code of Civil Procedure and Section 5 of the Limitation Act for the above purpose. In case those applications are filed, the same shall be considered and disposed on their own merit in accordance with law and according to that, the appeal if so stands may be heard and disposed by the lower appellate Court in accordance with law.

In view of disposal of the appeal, all the Misc. Cases stand disposed of.

Since the litigation is running between the parties for a long period, the lower appellate Court is directed to bestow due attention for disposal of the matter at the earliest. The parties appearing before this Court are directed to appear in the lower appellate on 18.02.2015 for the needful.