

**(1989) 05 J&K CK 0001**  
**In the Jammu And Kashmir High Court**  
**Case No : Civil Miscellaneous P. 46 of 1989**

Prabh Dayal

APPELLANT

Vs

Dhan Devi & Ors.

RESPONDENT

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**Date of Decision :** 11-05-1989

**Acts Referred:**

Jammu and Kashmir Civil Procedure Code, 1977 — Order 22

**Citation :** (1989) KashLJ 436

**Hon'ble Judges :** K.K.Gupta, J

**Bench :** Single Bench

**Advocate :** T.S.Thakur, K.Chopra, Advocates appearing for the Parties

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## Judgement

1. Collector Land Acquisition P. W. D. Jammu acquired land measuring 669kanal 17marla in Housing colony at Rail Head Complex, Jammu and

some of the land belonging to the parties included in it. The collector then made award in favour of the parties but Bhagmal disputed apportionment

worked out by the collector and accordingly a reference under sec. 31 of the Land Acquisition Act was made by the collector to learned District

Judge, Jammu. The reference was, however, heard by the learned Additional District Judge, Jammu who, vide his order dated 1461980 held the

apportionment of the awarded compensation to be made in three shares, one share going to Bhagmal, respondent No. 1, other to Sardha Ram,

respondent No. 2 herein and third share to the appellant. Aggrieved by that judgment and decree appellant has come up in appeal before this court.

2. During the pendency of appeal, Bhagmal respondent No. 1 died. An application C. M. P. 166/81 was filed for bringing on record his legal

representatives. This court on Nov. 17, 1981 allowed that application and legal representatives of Bhagmal respondent, namely Smt. Dhan Devi

widow and Smt. Nirmal Kumari daughter of the deceased were brought on record. Afterward Dhan Devi also died and another application CMP

No 151/82 was moved for substituting her daughter Smt. Nirmal Kumari for her which was allowed vide order passed on 27/4/1983. Sardha Ram,

respondent No. 2 also died and this application has been filed by the appellant for bringing on record his widow Maya Devi as he had died

issueless. In the application date of death has been given as 8/8/1982 but according to the petitioners information was provided to them by the

counsel appearing for legal representatives of Bhagmal respondent. Smt. Nirmal Kumari has filed objections opposing the application. She has

averred in her objections that Sardha Ram respondent, died on 8/8/1982 in house No. 86B, Rampore, Gandhi Nagar, Jammu but the

petitioner/appellant chose to file application after a gap of more than 61 years. She has further stated that Sardha Ram had all along been living

during his life time along with Vishwa Mitter appellant No. 4 who happened to be the real brother of Prabhdayal petitioner. Sardha Ram expired

in House No. 86B Rampore Gandhi Nagar, Jammu whereas Prabhdayal petitioner was putting up in adjacent house No. 85B Rampore Gandhi

Nagar, Jammu having common wall. According to her application is hopelessly barred by time and the appeal abates as a whole.

3. I have heard the learned counsel appearing for the petitioner/appellant as also learned counsel for the respondent. Learned counsel for the

appellant has argued that appellants had no knowledge about the death of Sardha Ram and they came to know about it from the counsel appearing

for the other side and he immediately moved an application. His further contention is that Order 22 C. P. C. does not apply to proceedings under

Land Acquisition Act and even if application has been filed after expiry of period of limitation it cannot be treated to be time barred. In support of

his argument he has referred to AIR 1964 M. P. 171 and AIR 1970 Patna 209. Learned counsel for the respondent has, however, I pleaded that

the parties were closely related to each other and in fact the deceased respondent Sardha Ram was putting up in adjacent house of the petitioner

where Vishwa Mitter, appellant No. 4 was also residing and the appellants had full knowledge about the death of Sardha Ram which took place

on August 8, 1982. He has further argued that present application has not been filed in proceedings under Land Acquisition Act but the court is

adjudicating upon an appeal against the judgment and decree and as such provisions of O 22 C. p. C. would certainly apply. I have considered

these contentions raised by either side.

4. In AIR 1964 M. P. (supra) it has been held that order 22 C. P. C. does not apply in reference proceedings under sec. 18 of land Acquisition Act

and there can be no dismissal or abatement of proceedings and the court is bound to make award under sec. 26 of the said Act. Similar principle is

laid down in AIR 1970 Patna (supra). It cannot be denied that a claim under a reference under sec. 18 or S. 30 of Land Acquisition Act does not

get barred for failure to bring on record legal representatives of the deceased claimant. Reference has to be disposed of by the court irrespective of

the appearance of the parties and in that event provision of order 72 C. P. C. do not apply at all. But in the present case the question is altogether

different. Reference made by the collector was replied by the District Court and in accordance with S. 26 of the Land Acquisition Act award given

by that court is to be treated as decree. We are presently dealing not with reference but with appeal against the judgment and decree though it may

be from an award in a reference. As such provisions of Order 22 C.P. C. will certainly apply. Sardha Ram respondent died on August 8, 1982

and the present application was filed for bringing on record his legal representatives on Feb. 11 1989 i. e. after 61 years period. Period of limitation

provided for riling such application is six months. No doubt petitioner in his application alleged about his knowledge which he got regarding death

of Sardha Ram respondent from the counsel of the other side but he has not led any evidence to substantiate his this application. He also chose not

to lead any evidence in support of his application. In the absence of any proof to the contrary the application is admittedly time barred and it is held

so.

5. Parties were cosharers in the land which was acquired by the collector. The Division Bench of this court in case Mst. Jani and others versus

Hassan Sofi and others AIR 1973 J&K 67 held that in a suit for partition of a joint holding every cosharer has joint and indivisible interest in every

inch of it and each one of cosharer is a necessary party to the suit and in

absence of any of the cosharers and in case of his death it is not possible to determine effectively the rights and interests of the remaining cosharers and as such suit abates as a whole. The judgment of the supreme court AIR 1967 S C. 89 was followed in this regard.

6. Ordinarily a suit or appeal does not abate in its entirety on the death of one of the respondents because of failure of the appellant to revive it

against legal representatives of the deceased. Abatement only takes effect against the latter. The question whether whole appeal abates or only a

part of it because of appellant's failure to bring on record, within time, legal representatives of one of the deceased respondent has to be decided in

each case on its own merits. Where one of the respondents dies pending disposal of appeal, test of judging whether there is partial or total

abatement is to see whether the appeal can proceed in absence of the deceased respondent. In other words it is to be seen whether the suit is one

in which liability of the respondent is joint and indivisible or not or whether the decree against the surviving respondent, if appeal succeeds, be

ineffective and it cannot be successfully executed. In the present case parties are cosharers and respondents 1 & 2 and the appellants have been

held to be entitled to receive compensation in three equal shares. With the death of respondent No. 2 and inability of the appellant to bring on

record his legal representatives within time, the decree has become final as it pertains to this respondent. Can decree be now amended to be

modified in respect of other respondents in the absence of respondent No. 2? The reply will be in the negative. Rights and interests of the parties

being cosharers are joint and indivisible in the land in question for which compensation has been awarded. Those cannot be separated in any

manner for or against any party. In view of these facts appeal cannot proceed against the remaining surviving respondents alone.

7. For the aforesaid reasons this application is dismissed and appeal No. 10 of 1980 filed by prabhdyal and other shall abate as a whole.