

(1981) 12 OHC CK 0030
In the Orissa High Court
Case No : First Appeal No. 62 of 1976

State of Orissa

APPELLANT

Vs

Purnananda Samal and Others

RESPONDENT

Date of Decision : 01-12-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2)

Citation : AIR 1982 Ori 199

Hon'ble Judges : R.N. Misra, C.J.; R.C. Patnaik, J

Bench : Division Bench

Advocate : Additional Government Advocate, for the Appellant;

Judgement

1. This is a plaintiff's appeal against the judgment and decree of the learned Subordinate Judge of Cuttack, The suit was instituted on 11-4-1970, the judgment was delivered on 18-12-1975 and the decree is dated 8-1-1976. The first appeal was presented in this Court on 19-3-1976. 8 respondents were found to be dead in this court though death in each case excepting one had occurred long before. The particulars are given below:--

Serial Number Number of the respondent. Date of death. Date of knowledge of the appellant. Date of application for substitution.

1 2 3 4 5

1. R. 48 23-3-1970 Feb. 1977 1-2-1978

2. R. 30 4-5-1972 -do- -do-

3. R. 104 18-1-1973 -do- -do-

4. R. 21 4-5-1974 -do- -do-

5. R. 101 4-7-1974 -do- -do-

6. R. 83 25-1-1970 -do- -do-

7 R. 15 23-11-1976 -do- -do-

Apart from these deaths, respondent No. 29 was dead on 1-6-1969, yet in the suit filed on 11-4-1970, he was impleaded as a defendant.

2. From the record of the first appeal, it appears that notices were taken out to these respondents along with others and in view of the report of the process server that these respondents were not found at the addresses given, fresh notices were directed to these respondents by order dated 14-1-1977. A memorandum was filed on behalf of the appellant on 27-1-1977 to the following effect:--

"On 14-1-77, two weeks" time was granted for fresh service on the respondents. As the correct address of the respondent could not be collected two weeks" further time may be granted in the above noted case."

On 2-3-1977, on the basis of the said memorandum, the following order was made:--

"As requested further ten days time allowed to comply order No. 5 dated 14-1-77, failing which place before the Bench for dismissal as against concerned respondents....."

On 8-4-1977, two weeks" further time was obtained from the Court for filing of requisites for service to these respondents. On 18-8-1977, the matter was again listed, as notwithstanding the order dated 8-4-1977, steps were not taken. A week"s time was allowed that day for complying with the earlier direction. No action was taken by the appellant to comply with these orders. Therefore, the matter was relisted on 21-9-1977, when a further extension by one week was granted. Requisites were not filed against these respondents and notice to them was not taken. On 1-2-1978, the application for substitution as against these deceased respondents was made along with an application for setting aside abatement and for condoning the delay in making of the application.

3. In regard to respondent No. 29 who died prior to the institution of the suit, learned Additional Government Advocate says that the legal representatives should be brought on record in exercise of powers under Order 1, Rule 10 of C.P.C. Sub-rule (2) of that Rule provides:--

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

This provision does vest wide powers in the Court but the same has to be exercised in a prudent and judicious manner. It is the obligation of every litigant

to make appropriate enquiries and obtain requisite information about the state of the defendants on the date the suit is filed. If a reasonable enquiry had been made prior to the institution of the suit, the information which has now been in possession of the appellant could have been obtained and a dead person could not have been added as a defendant. To add the legal representatives of respondent No. 29 for the first time at this stage would certainly be pre-judicial to the legal representatives. They would have no occasion for filing a written statement and they would be precluded from leading evidence in support of their possible stand in the litigation. To plant them into the lis at this stage would, therefore, be prejudicial to their interest. Impleading a dead man was an act of gross negligence and the conduct of the plaintiff cannot be lost sight of in dealing with the question. Again, to accept the submission of learned Additional Government Advocate that the suit could be remanded by vacating the decree and the legal representatives of respondent No. 29 could be given adequate opportunity of participating in the contest would be conceding a premium in favour of negligence. Ordinarily award of costs relieve the affected party from the strain and stress of litigation, but a stage comes in every litigation where mere award of costs would not be a panacea to go the whole way. In our opinion, this seems to be a case where if for the utter negligence of the plaintiff-appellant, we vacate the decree of the trial court, it would amount to a wholly unwarranted treatment to the matter.

4. Five deaths occurred during the pendency of the suit. Learned Additional Government Advocate says that deaths during the suit were not known and steps for substitution could not be taken before the suit was disposed of. He relies on several authorities in support of his proposition that the proper court to deal with a case of abatement and substitution would be the Court where death occurred. (See *Ram Saran Ahir and Others Vs. Prithvi Nath Singh and Another*, *Mrs. Gladys Coutts Vs. Dharkhan Singh and Others*, *Gurucharan Singh and Others Vs. Gorakhnath Singh and Others*, , unreported decision of a learned single Judge in Second Appeal No. 479 of 1965 disposed of on 26-3-1969 (*Dhobai v. Anirudha Das Gountia*) *Ram Sain and Others Vs. Bhagirath and Others*, .) On the basis of these authorities he contends that the judgment and decree of the trial Court be set aside and the matter be remitted to the learned trial Judge for dealing with the question of substitution and/or abatement. We are aware of a line of judicial thinking which has adopted the aforesaid basis, but we are not impressed with the argument, as if this be accepted, an indifferent and negligent litigant would be allowed to control the proceeding and in return for his negligent conduct, he would have the advantage of getting the decree against him set aside on technical ground and to the utter prejudice of the successful party who after a bona fide contest had succeeded in obtaining a decree on merits in his favour. It is the obligation of a litigant while presenting an appeal to take stock of the respondents on the day of such presentation. If in this case the several deaths which occurred during the pendency of the suit were not within the knowledge of the plaintiff-appellant, these could have been noticed if proper enquiry had been

made at the time of presentation of the first appeal. In that event, the appellant could have taken steps even before the trial Court before presenting the appeal to obtain orders of substitution or, as would be material in the case of respondent No. 83, an application for leave to proceed against the legal representatives could have accompanied the memorandum of first appeal. That also was not done. It is a well-settled proposition of law that procedural law should be allowed to work in aid of justice and the same should be liberally interpreted to advance its cause and not to stifle it. But the relevant question to ask at this point is, justice to what? It is the obligation of the Court to look at the litigation in a dispassionate way keeping both the parties in view. Where after a bona fide contest has been raised the suit is ultimately disposed the right that was accrued in favour of the defendant should not be allowed to be lightly interfered with and he should not be made to suffer by adopting the procedure followed in the Patna cases and thereby prejudice him. Everyone except those to whom to get involved in litigation is a pleasure would like to be free from litigation. When a defendant has raised a bona fide contest and succeeded, if the litigation is revived by obliterating the success with a view to overcoming a lacuna which was brought into the record by callous indifference and negligence of the plaintiff, the defendant would be dealt with in an unjust manner. We are, therefore, of the view that unless there be any special circumstances or justification, in every case as a rule the principle indicated in the Patna cases should not be followed and before a decree is vacated merely on the principle that it is the court where abatement took place that has to consider the substitution application if made, decrees should not be vacated and the relief to which the appellant on merit may not be entitled to, should not be conceded. We do not intend to close the doors finally by pronouncing that the Patna principles should not be adopted in any case. We would, however, like to sound a word of caution so that this practice should not be freely resorted to. In the facts of the present case, for the reasons we have indicated, we see no justification to set aside the decree merely for the reason that the plaintiff had failed to take steps for substitution in respect of the defendants who were dead when the suit was pending. It is true that a decree against a dead man is a nullity and, therefore, the decree so far as the deceased defendants are concerned would not be operative. That, however, does not justify a reversal of the decree.

5. Apart from these considerations, there is another important feature which should not be lost sight of. In para 5 of the petition for condonation of delay, it has been stated on affidavit on behalf of the appellant that on 15-2-1977, a memorandum to the following effect was filed in this Court:--

"In the abovenoted case steps for fresh service on respondents Nos. 15, 21, 29, 30, 48, 83, 101 and 104 could not be taken as they are reported to be dead. Steps are being taken for substitution of legal representatives in place of deceased respondents."

We have already taken note of the fact that the petition for substitution was filed

on 1-2-1978 -- thus after a total delay of 11 1/2 months. The only justification indicated in the petition would appear from paragraphs 5, 6 and 7 which are extracted for convenience:--

"5. That the concerned officer (Land Acquisition Officer, Civil, Cuttack) caused enquiry to be made but since the enquiry involved a number of respondents, it took some considerable time before information regarding them was available. Information was received in February, 1977, during the enquiry that respondents Nos. 15, 21, 29, 30, 48, 83, 101 and 104 were dead. But their exact dates of death and names and addresses of their legal representatives required further enquiry. Accordingly a memo was filed on 15-2-1977 to the following effect :--

"In the abovenoted case steps for fresh service on respondents Nos. 15, 21, 29, 30, 48, 83, 101 and 104 could not be taken as they are reported to be dead. Steps are being taken for substitution of legal representatives in place of deceased respondents."

6. That after the aforesaid memo, enquiry proceeded in order to ascertain the exact dates of deaths and names and addresses of the legal representatives of the deceased respondents. The concerned officer had no personal knowledge of the dates of death and names and addresses of the legal representatives of the aforesaid deceased respondents. He had to make enquiries through official channels. There were a number of respondents in respect of whom enquiry had to be made. In these circumstances, extension of time was being taken from the Court for taking steps for substitution.

7. That having collected all the information through the aforesaid enquiry and after consultation with the counsel the appellant became ready for filing of a petition for substitution in place of the said deceased respondents on 30-1-1978 and accordingly the petition for substitution was filed on 31-1-1978 (sic.) (the correct date being 1-2-1978 as admitted in the memo of the Additional Standing Counsel which is kept on record)." The time allowed by law for taking steps for substitution was long over. Therefore, the obligation to apply for substitution had to be discharged immediately after the fact of death was known. The appellant, therefore, had to explain the entire period of eleven and half months from the date of knowledge to the date of making of the application. The explanation for this period of about a year is as indicated in the three paragraphs referred to above, Having given our anxious consideration to the matter, we are of the view that the appellant is not entitled to any indulgence. While dealing with a situation like this, it must be borne in mind that on account of the negligence of one side to the litigation to comply with the mandatory requirements of the procedural law, rights have accrued to others and to disturb such rights without any cogent or valid reason would be indiscreet and would also not be sound exercise of judicial discretion. If such a long period of delay had to be explained away, it was necessary for the appellant to put on record through affidavits as to how, by whom and in what manner, the enquiry for ascertaining the names of the legal representatives was being conducted. It was not open to the appellant also to

wait till the entire information was received as it is a duty to apply for substitution as and when information in regard to any particular respondent was obtained. We are aware of the fact that the State has certain difficulties as also advantages in pursuing litigation. That, however, cannot be a ground to excuse a gross delay of about a year. The State has to exhibit ideal conduct in order that the citizen may adopt it and, therefore, in all the litigations carried by the State, the conduct should not only be fair and prompt, but it should exhibit co-operation and full attention. For what we have said above, the prayer for substitution as also for leave to add the legal representatives of one of the respondents is rejected.

6. The appeal in these circumstances must be taken to have abated as against the eight respondents. The effect of such abatement on the entire appeal will have to be taken into consideration when the appeal is set down for hearing. We direct that attention of the Bench hearing the matter be drawn to today's order at that point of time.