(2006) 10 ADJ 145 : AIR 2007 All 26 : (2007) 1 AWC 732 : (2006) 2 RD 773

Allahabad High Court

Case No: None

Jagannath		APPELLANT
	Vs	
The Board of Revenue and Others		RESPONDENT

Date of Decision: Sept. 15, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151
- Constitution of India, 1950 - Article 226

Citation: (2006) 10 ADJ 145 : AIR 2007 All 26 : (2007) 1 AWC 732 : (2006) 2 RD 773

Hon'ble Judges: Janardan Sahai, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Janardan Sahai, J.

The petitioners application for cancellation of the patta of respondent No. 5, which was allowed by the Collector. The order was challenged by respondent No. 5 in revision and was set aside by the Additional Commissioner. The petitioner challenged the order of the Additional Commissioner in revision before the Board of Revenue. The Board of Revenue dismissed the revision. Aggrieved the petitioner has filed this writ petition. During the pendency of the writ petition, respondent No. 5 died on 10.11.2004 but no application for bringing his heirs on record was filed by the petitioner and an order was passed on 17.2.2006 that the writ petition has abated as respondent No. 5 was the sole contesting party. The petitioner has filed this application for recall of the order of abatement dated 17.2.2006. The application has been opposed by Sri S.K. Lal, counsel for respondent.

2. It was submitted by Sri S.K. Lal the petitioner''s counsel that under Chapter VIII, Rule 38-A of the Rules of the Court provisions of Rules 1 to 6 and 9 of Order XXII of the CPC shall, so far as may be and with necessary modifications and adaptations, apply to special appeals and writ petitions under Article 226. He submits that once the order of

abatement has been passed, an application for setting aside that order is not maintainable. He placed reliance upon two decisions - Pradip Narain Singh and Others Vs. Brij Nandan Prasad and Others, Brij Jivan Lal and Another Vs. Shiam Lal and Others, In the Patna case it was held that where an order of abatement has been passed the exemption from the necessity of substituting the legal representatives of the defendant under Sub-rule 4 of Rule 4 of Order 22 CPC cannot be claimed. In Brij Jeevan Lal"s case it has been held that the order dismissing the suit as abated after an adjudication that the right to sue does not survive is a decree and as such is subject to appeal and no application to set aside abatement lies. He has also relied upon Morasa Anjaiah Vs. Kondragunte Venkateswarlu (died) and others, in which it has been held that the Court has no inherent power to set aside abatement. In my opinion the decisions cited by the counsel for respondent have no application on the facts of the present case. No doubt by virtue of Chapter VIII, Rule 38-A of the Rules of the Court certain provisions of Order 22 have been made applicable to writ petitions but the application has not been made in absolute terms and is subject to necessary modification and adaptation. The order dismissing a writ petition whether as abated or otherwise is not a decree. The present writ petition has been filed against the order of the Additional Commissioner and the Board of Revenue in revision in proceedings for cancellation of a patta and no special appeal lies against such an order passed in the writ petition. This position is not disputed by counsel for both the sides. The order passed in writ petition is thus not subject to appeal. For these reasons the decision in Brij Jeevan Lal"s case is not applicable. The Patna case is also based on different facts. So far as the case of Morasa Anjaiah Vs. Kondragunte Venkateswarlu (died) and others, is concerned that too is distinguishable inasmuch as the question of invoking inherent power u/s 151 of CPC does not arise. Rule 9 of Order 22 CPC has been made applicable to writ petitions by Rule 38A of Chapter VIII and therefore the application for setting aside abatement would lie under that provision.

3. Sri Manish Goyal counsel for the petitioner relied upon a decision of the Apex Court in Puran Singh and others Vs. State of Punjab and others, in which it has been held that the provisions of CPC are not applicable to a writ petition. As we have noticed that it is not in absolute terms that the provisions of Order XXII have been made applicable by the Rules of the Court to writ proceedings. It is to be noted that in some of the earlier cases it was held that an application for setting aside an order of abatement was maintainable if a formal order of abatement was passed. This Court in Mst. Gujrati v. Sital Misir and Ors. AIR 1922 All. 209 went to the extent of holding that there can be no automatic abatement and a formal order of dismissal of the suit as having abated is necessary before an application for setting it aside can be entertained. This view has since been overruled by a Full Bench in Churya and Others Vs. Baneshwar, and a formal order is not necessary but that does not mean that no application would lie to set aside an abatement if a formal order of abatement has been passed.

4. For these reasons, the contention of Sri S.K. Lal that the application for setting aside the abatement is not maintainable has no merit.

5. The explanation for the delay in filing the application for setting aside the abatement order is that the applicant was not aware that the duty of filing a substitution application was that of the petitioner and that on receipt of the abatement application a letter was sent by the counsel on 18.11.2005 but the same was not received by the petitioner and when the petitioner came to enquire about the position of the case on 25.3.2005 he was informed about the dismissal of the writ petition on 17.2.2006 and the application was prepared and was filed on 31.3.2006. Although a counter affidavit has been filed controverting these averments but I am not inclined to disbelieve the version of the petitioner who has special knowledge of these facts. The delay in filing the application for setting aside the abatement order dated 17.2.2006 and for substitution are condoned. The application for setting aside the abatement order is allowed and the order dated 17.2.2006 dismissing the writ petition as abated is set aside. The application for substitution is also allowed.