

**Srimoti Sarat Kamini Dasi and on her Death her Heirs and legal
Representatives Her Sons Jamini Mohan Sarkar and Others Vs Chaitanya
Chandra Prohoraj alias Chaitanya Charan (Chandra in Vokatlatnama)
Mohapatra and Others**

Court: Calcutta High Court

Date of Decision: Feb. 9, 1922

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 22 Rule 4(3)

Citation: AIR 1923 Cal 289 : 67 Ind. Cas. 290

Hon'ble Judges: Pearson, J; N.R. Chatterjea, J

Bench: Division Bench

Judgement

1. The plaintiffs-appellants sought to recover possession, by ejectment of the defendants, of the property in dispute under a purchase from Raja

Balabhadra Singh. There are a large number of defendants in the case. Among other defences they raised the plea that the plaintiff was the

benamdar for her husband and, as such, she could not maintain a suit for recovery of possession and for ejectment.

2. The suit was tried along with another which was also dismissed on the same grounds.

3. There were appeals in both suits. The other suit was remanded to the lower Court for re-trial, the Court having found that the plaintiff was

entitled to maintain the suit. So far as the present case is concerned, it appears that one of the defendants, namely, defendant No. 20, Nagendra

Nath Mahapatra, died while the appeal was pending before the Court of Appeal below and no application for substitution of the heirs was made

within the period allowed by law. The learned District Judge held that the entire suit be dismissed as there was nothing from which the interest of

the several defendants could be discriminated.

4. The plaintiffs appeal to this Court.

5. There is no doubt that when one of two or more defendants dies, and no application is made under Order XXII, Rule 4, Sub-rule (3) the suit

shall abate as against the deceased defendant.

6. The question, whether the suit abates as a whole, depends upon whether the suit can be proved in the absence of the legal representatives of the

deceased defendant.

7. No inquiry appears to have been made by the learned District Judge in the matter. He merely says there is nothing from which the interest of the

several defendants could be discriminated.

8. The plaintiff, no doubt, brought a suit for recovery of possession of a mouza but a very large number of persons were made parties defendants.

Some of the defendants in their written statement claimed to be in possession of specific parcels of land within the mouza separately from the other

defendants. It also appears from two petitions put in by some of the defendants, by which they compromised the case with the plaintiff, that they

claimed to hold specific parcels of land within definite boundaries, with regard to which they had come to an amicable settlement with the plaintiff.

9. These go to indicate that there are at any rate, some lands which are held separately by some of the defendants: and if the deceased defendant

had no joint interest in these plots of land which the defendants claim to hold separately from the others, it is difficult to see why the abatement of

the suit with respect to the defendant No. 20 should result in dismissal of the suit with respect to the entire property.

10. We think, in these circumstances, that there should be an inquiry into the question whether the lands held by the several sets of defendants

were held separately from each other. If the Court comes to the conclusion that the defendants are in possession of specific plots of land in which

the deceased defendant had no share, it will proceed to try the case as against such of the defendants. But if, with respect to any plot of land, the

deceased defendant No. 20 was jointly concerned, the suit must be dismissed with respect to such plot. The Court will also consider the petition of

compromise referred to above.

11. The case is accordingly remanded to the lower Appellate Court for disposal according to law, having regard to the observations made above.

12. Costs to abide the result.