

IN THE HIGH COURT OF JUDICATURE AT PATNA  
Civil Writ Jurisdiction Case No.2806 of 2013

In  
C.R. 578 of 2008

Bibi Bijloo & Ors

.... Petitioner/s

Versus

Bibi Aaisa & Ors

.... Respondent/s

**Appearance :**

For the Petitioner/s : Mr. Mohamad Sufiyan

For the Respondent/s : Mr. Mrigank Mauli

**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI  
SHARAN SINGH  
ORAL ORDER**

21 19-06-2013 Heard learned Counsel for the petitioners and learned  
Counsel appearing on behalf of Respondent no.2.

This application under Article 227 of the Constitution of India has been filed for setting aside the order dated 18.2.2008 passed by learned Ist Additional District Judge, Araria in Title Appeal No. 2 of 2007, whereby the learned appellate Court rejected an application said to have been filed under Order 22 Rule 4 of the Code of Civil Procedure for setting aside abatement and deleting the name of Opposite party No.9 from memo of appeal, namely, Most. Khairun Nisha who died during the pendency of the suit itself.

During the pendency of the present writ application, respondent no.1 Bibi Aaisa is said to have died. An application vide I.A. No. 4863 of 2012 has been filed for expunging her name

and it has been stated that she is represented by legal heirs who are already on record as respondent nos. 17 to 22. In such view of the matter, let name of respondent no.1 be expunged from the cause title of the present application.

I.A. No. 4863 of 2012 is accordingly, allowed.

Bereft of all unnecessary details, the facts in the present case for the determination of dispute involved are short.

The suit being Title Suit No. 134 of 1996 was filed by the plaintiff on 7.8.1996. Most. Khairun Nisha was impleaded as defendant no.9 in the said suit. The suit was decreed in favour of the plaintiff vide judgment and decree dated 10.5.2000. An appeal against the said judgment was preferred by the petitioners herein, and was placed before the learned First Additional District Judge, Araria vide Title Appeal No. 2 of 2007. In the memo of appeal Most. Khairun Nisha was impleaded as respondent no.9.

This is the plea of the petitioners that during the pendency of the title appeal, the appellants learnt that respondent no.9 had already died during the pendency of the suit on 10.10.1999, though her heirs were already there on record as defendant nos. 4 to 8 in the title suit. In such view of the matter, petitioners made an application for expunging the name of said respondent no.9 of the appeal before the learned First Additional District Judge,

Araria. The said application was filed under Order 22 Rule 4 of the Code of Civil Procedure with a limitation petition under Section 5 of the Limitation Act. It has been pleaded in the writ application that while drafting the memo of appeal, learned lawyer found the name of respondent no.9 in the decree and accordingly impleaded her party in the memo of appeal, though she was not alive on the date of filing of appeal.

The said application, however, came to be dismissed by an order dated 18.2.2008 passed by the learned First Additional District Judge, Araria on the ground that earlier also similar prayer was made in an application dated 29.3.2007 which was rejected by the Court vide order dated 18.4.2007 and accordingly, the petition filed by the appellant/writ petitioners was dismissed as not maintainable.

Learned counsel appearing on behalf of the petitioners has submitted that it was under a wrong advice that earlier petition dated 29.3.2007 was filed under order 6 Rule 17 of the Code of Civil Procedure seeking deletion of the name of said Most. Khairun Nisha and it was accordingly, dismissed.

Learned counsel for the petitioners submits that learned Court below held that such amendment was not permissible in law. He further submits that even in earlier order dated 18.4.2007

learned First Additional District Judge, Araira wrongly applied order 22 Rule 4 of the Code of Civil Procedure as there was no question of abatement in the present case.

He submits that the only relief which was sought before the Court below that name of respondent no.9 be expunged as she died during the pendency of the suit itself and she could not continue to the party in appeal. He submits that as the right to sue survived and the legal heirs of defendant no.9 were already there on record, a dead person should not have been allowed to continue on the record of the memo of appeal.

Mr. Mirgank Mouli, learned counsel appearing on behalf of respondent no.12, on the other hand, submitted that for similar relief the petitioners had earlier filed a misconceived petition under Order 6 Rule 17 of the Code of Civil Procedure for amendment in the memo of appeal which was rightly rejected. He further submits that the application dated 20.7.2007, which came to be dismissed by the learned Court below vide impugned order dated 18.2.2008, was also misconceived as in the present case the heirs of defendant no.9 were already there on record. According to him, in the facts and circumstances of the case Order 22 Rule 2 of the Code will have application and only an entry to the effect that defendant no.9 was dead was required to be made. He submits that

this application is wholly misconceived and name of respondent no.9 Most. Khairun Nisha was not required to be expunged from the memo of appeal.

None of the parties, however, have disputed certain basic facts. Respondent no.9 Khairun Nisha died on 10.10.1999 during the pendency of the Title Suit No. 134 of 1996. The suit was decreed in favour of the plaintiff on 10.5.2000. During the pendency of the suit no steps were taken for expunging the name of Khairun Nisha. Her heirs were admittedly there on record in the title suit.

In such circumstance, in my opinion, Khairun Nisha was wrongly impleaded as a party in the memo of appeal. The explanation that her death was not within the knowledge of the appellant could have been considered by the learned Court below. It is a basic rule that no case/appeal can be filed and continued on behalf of or against a dead person. This being an admitted position that Khairun Nishra died on 10.10.1999 and her heirs are already there on record, no purpose could have been served by still maintaining her as one of the parties in the memo of appeal. In my opinion, there being no dispute over her death before institution of the memo of appeal, her ( Respondent no.9 in memo of appeal) name should have been ordered to be expunged from

the memo of appeal on a request having been made on behalf of the appellant/writ petitioners. The reasoning assigned in the impugned order that earlier also similar application was filed and was rejected as recorded by the learned First Additional District Judge, Araria is not valid as there was absolutely no dispute over the fact by any of the parties that Khairun Nisha was dead at the time of institution of the memo of appeal.

In view of the above, the impugned order dated 18.2.2008 is set aside. The Court below is directed to expunge the name of respondent no.9 from the memo of appeal of Title Appeal No. 2 of 2007 pending in the Court of learned First Additional District Judge, Araria.

This application is, accordingly, allowed.

**(Chakradhari Sharan Singh, J)**

Arun Kumar/-