

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Second Appeal No. 55 of 2003

Smt. Swatantri Devi, wife of Parmeshwar Mahto, resident of village and P.O. Dipauwa, P.S. Patan, Dist. Palamau

... **...Defendant/Appellant/Appellant**
Versus

1. Kanti Devi, wife of Shri Bhola Prasad resident of village-Khajuri, P.S. Patan, P.O. Dipauwa, Dist. Palamau
2. Smt. Radhika Devi wife of Madan Mohan Sahay (**deleted v.o.d. 25.01.2018**)
3. Shri Ashok Kumar @ Muna Lal, son of Late Madan Mohan Sahay, nos. 2 and 3 are of village-Khajuria, P.O. Dipauwa, Tola Bahartand, P.S. Patan, Dist. Palamau
4. Smt. Asha Devi, wife of Ramesh Prasad, at and P.O. Banjari, PS. Rohtas, Dist. Rohtas
5. Smt. Sarmanti Devi wife of Mahendra Prasad, village Manhi, P.O. and P.S. Najarutani, Dist. Garhwa
6. Smt. Usha Devi, wife of Awadh Kumar Sinha, her husband working as Asst. in the State Bank of India, Ranchi, Court Branch, Ranchi ... **Plaintiffs/Respondents/Respondents**

CORAM :HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Appellants	: Mr. Kushal Kumar, Advocate
	: Ms. Apurva Mehta, Advocate
For the Respondents	: Mr. Amaresh Kumar, Advocate
	: Mr. Advita Arya, Advocate

27/22.01.2026

The learned counsel for the parties are present.

2. I.A. No. 5045 of 2024 has been filed for substitution of respondent nos. 1 and 5 who are said to have expired as back as on 05.07.2020 and 23.05.2005 respectively.
3. A separate I.A. being ***I.A. No. 8417 of 2024*** has been filed for setting aside abatement of respondent no. 1 and 5 and for condonation of delay.
4. Further ***I.A. No. 5060 of 2024*** has been filed for substitution of the appellant who is said to have expired on 08.11.2018.
5. ***I.A. No. 8416 of 2024*** has been filed for condonation of delay in filing the substitution petition of the sole appellant.
6. The learned counsel for the appellant has submitted that the second appeal was dismissed for default on 31.03.2018 and a petition for restoration was filed through CMP No. 302 of 2018 on 09.07.2018.

The learned counsel has submitted that ultimately the appeal was restored vide order dated 15.03.2024 and thereafter a prayer for substitution has been made in the present case. The learned counsel submits that since the appeal stood dismissed for default, there has been delay in filing the petition seeking substitution.

7. The learned counsel for the respondents has vehemently opposed the prayer and has submitted that the sole appellant who was the sole petitioner in the petition seeking restoration of second appeal , that is, CMP No. 302 of 2018 had expired during the pendency of the CMP and opposite party no. 1 of the C.M.P. had also expired during the pendency of the C.M.P. on 05.07.2020 and so far as respondent no. 5 in the appeal is concerned, she had expired much prior to filing of the petition for restoration i.e. expired on 23.05.2005. He submits that this is apparent from the interlocutory application filed by the appellant.

8. The learned counsel has further submitted that at the time of disposal of the petition for restoration, the sole petitioner had also expired including the fact that the opposite party no. 1(respondent no. 1 in the appeal) and opposite party no. 4 (respondent no. 5 in the appeal) had also expired but without substituting them, the restoration application was allowed. The learned has also submitted that the petitioner in CMP had also filed I.A. No. 960 of 2020 for substitution of the sole petitioner and I.A. No. 8694 of 2022 seeking condonation of delay and setting aside abatement but the same was dismissed as withdrawn vide order dated 08.12.2023 and *neither* any liberty was reserved to file any fresh petition *nor* any fresh petition was filed. He has submitted that by the said order dated 08.12.2023, it was recorded that the CMP was abated as against opposite party no. 4, but no petition for substitution was filed in the CMP and in the present proceeding also, no petition for substitution of respondent no. 4 has been filed.

9. The learned counsel submits that the order restoring the second appeal is itself a nullity as the sole petitioner in the CMP had expired and there were dead persons in the record in the CMP and therefore

the petition seeking substitution may not be allowed. He has submitted that for all practical purposes, the second appeal cannot be treated as restored as the order of CMP is a nullity. The learned counsel for the respondent has relied upon the judgment passed by the Hon'ble Supreme Court reported in **(2017) 13 SCC 414 (Gurnam Singh (dead) through legal Representatives and Others), para 21 & 22** which are quoted as under: -

“21. It is a fundamental principle of law laid down by this Court in Kiran Singh case that a decree passed by the court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree-holder. The reason is that the defect of this nature affects the very authority of the court in passing such decree and goes to the root of the case. This principle, in our considered opinion, squarely applies to this case because it is a settled principle of law that the decree passed by a court for or against a dead person is a “nullity”.

22. The appellants are the legal representatives of Defendants 2 and 4 on whom the right to sue has devolved. They had, therefore, right to question the legality of the impugned order inter alia on the ground of it being a nullity. Such objection, in our opinion, could be raised in appeal or even in execution proceedings arising out of such decree. In our view, the objection, therefore, deserve to be upheld. It is, accordingly, upheld.”

10. To this, the learned counsel for the appellant has submitted that even if dead persons were in the record of CMP No. 302 of 2018, the same has no bearing in the matter and has referred to Order 22 of CPC to submit that the provision applies only with respect to appeals arising out of suit and the suit. The petition for restoration is not covered and is filed under Order 9 of C.P.C. The learned counsel submits that the abatement can be only of a suit and an appeal and there cannot be any abatement of the petition seeking restoration of the case dismissed for default. He submits that the petition seeking restoration of the case could have been filed under the provisions of Order 9 Rule 9 of C.P.C. The learned counsel has submitted that the court has to be satisfied with the reasons for dismissal of the case for

default and therefore the satisfaction of the court was sufficient to restore the second appeal. The learned counsel for the appellant has relied upon the judgment passed by the Hon'ble Supreme Court reported in ***(2016) 1 SCC 607 [Banwari Lal (Dead) by Legal Representatives and Another versus Balbir Singh]. Para 5,6.***

11. Section 141 of the CPC is quoted as under:-

“ Miscellaneous proceedings-The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction.

[Explanation- In this section, the expression “proceedings” includes proceeding under Order IX, but does not include any proceeding under Article 226 of the Constitution.]”

12. The judgment reported in ***(2016) 1 SCC 607 (supra)*** does not help the appellant in any manner. In the said case, second appeal was dismissed for non-prosecution on 02.08.2010 and by the order dated 02.03.2012 the second appeal was restored to its file. In the said case only second appeal was restored, but the interlocutory applications seeking substitution etc. were not restored and the High Court had dismissed the second appeal as abated. It was held by the Hon'ble Supreme Court that the provision of Order 22 CPC is not penal in nature. It is a rule of procedure and that substantive rights of the parties cannot be defeated by observing strict adherence to the procedural aspect of law.

In the present case the sole petitioner seeking restoration of the 2nd appeal had also expired and the petition seeking his substitution in the restoration application vide I.A. No. 960 of 2020 and prayer for condonation of delay and setting aside abatement vide I.A. No. 8694 of 2024 were dismissed as withdrawn vide order dated 08.12.2023. Further neither any liberty was reserved to file any fresh petition nor any fresh petition was filed. Therefore, this court is of the considered view that a dead person could not have pursued petition seeking restoration.

13. It is not in dispute that the CMP No. 302 of 2018 seeking restoration of the 2nd appeal was decided when the sole petitioner (the

sole appellant in the 2nd appeal) had expired and the respondent no. 1 had also expired. The respondent no. 5 had expired way back in 2005, still she was retained in the CMP. It is further not in dispute that an order was passed in CMP that the proceeding for restoration of 2nd appeal has abated as against the opposite party no. 4. The fact remains that prayer for substitution of the sole appellant, who was the sole petitioner in the CMP, was made in the C.M.P. through interlocutory application but the same was dismissed as withdrawn and ***neither*** liberty was reserved ***nor*** was granted to file any fresh application ***nor*** any such fresh application was filed. In the CMP, no petition for substitution of opposite party no. 1 was ever filed.

14. Ultimately the CMP seeking restoration of the 2nd appeal was allowed in which the sole petitioner had already expired and the two opposite parties had died, one prior to filing of the CMP during the pendency of the second appeal ***and*** other during the pendency of the CMP.

15. This court is of the view that once a second appeal is dismissed, valuable right accrues in favour of the respondents and the provisions of substitution and the consequence of not taking appropriate steps for substitution applies to the petition seeking restoration also. Even the petition seeking restoration and the substitution in such proceedings are guided by the law of limitation. The restoration of 2nd appeal is not a mere formality.

16. Since admittedly the order of restoration has been passed when the sole petitioner had already expired, there can be no doubt that the order of restoration is a nullity in the eyes of law. Section 141 of Civil Procedure Code provides that the procedure provided in the code regarding also shall be followed as far as applicable in all the proceeding in any court of civil jurisdiction and the proceedings include the proceedings under Order 9.

17. Thus, the argument of the appellant that order 22 would not apply for proceeding in CMP, is rejected. The order of C.M.P. restoring the 2nd appeal, *when the sole petitioner in C.M.P. (sole appellant in the 2nd appeal) was dead and his petition seeking*

substitution with condonation of delay and setting aside abetment were dismissed as withdrawn and two of the opposite parties were also dead, is a nullity in the eyes of law. Accordingly, the 2nd appeal does not stand restored in the eyes of law. Consequently, the petitions seeking substitution/condonation of delay in seeking substitution/prayer for setting aside abetment are also dismissed.

18. All interlocutory applications stand dismissed. Consequently, the second appeal is also dismissed.

(Anubha Rawat Choudhary, J.)

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