

IN THE HIGH COURT OF JHARKHAND AT RANCHI

(Civil Writ Jurisdiction)

WP(C) No. 5299 of 2019

Shambhu Lal Agarwal

..... Petitioner

Versus

Shankar Rajak & Anr.

.... Respondents

CORAM : HON'BLE MR. JUSTICE KAILASH PRASAD DEO

For the Petitioner : Mr. Amar Kumar Sinha, Advocate

For the Respondents :

The matter is being taken up through Video Conferencing. Learned counsel for the parties have no objection with it and submitted that audio and video qualities are good.

Order No.05/Dated: 07th November, 2022

Mr. Amar Kumar Sinha, learned counsel for the petitioner has submitted that the petitioner is the decree holder of Title Suit No. 24 of 1998, against which, he has preferred Execution Case No. 4 of 2000.

Learned counsel for the petitioner has further submitted that the judgment-debtor has preferred First Appeal being FA No. 26 of 1997, which was dismissed by the learned Additional District Judge, Simdega confirming the judgment and decree passed by the trial court dated 06.06.2000. Against the said judgment of the first appellate court the judgment debtor preferred Second Appeal being SA No. 67 of 2000.

Learned counsel for the petitioner has further submitted that in SA No. 67 of 2000, an application vide IA No. 858 of 2001 under Order 41 Rule 5 of the Code of Civil Procedure was filed by the judgment-debtor appellant, which was rejected by this Court and the matter went to the Hon'ble Apex Court in SLP (Civil) No. 16264 of 2001, in which, an interim order was passed directing the parties to maintain the status quo till SA No. 67 of 2000 is pending before this Court and thus SLP was dismissed with the interim order. However, the SA No. 67 of 2000 in terms of judgment dated 05.01.2018, was dismissed for default.

Learned counsel for the petitioner has further submitted, that in the meantime, the judgment-debtor Kamla Devi has died, which was not informed to the petitioner and the substitution petition could not be filed within time and the learned executing Court in Execution Case No.4 of 2000 has passed an order that since the application was not filed within time and, as such, in view of the judgment passed by the Hon'ble Patna High Court in the case of "*Suryakant v. Laxmikant*" reported in *AIR Patna 285*, the Kerala High Court in the case of *Kochukunj Narayan v. Kochukunju v. Kochu*

Valayadhan and the judgment passed by this Court in the case of “**Sumitra Devi v. State of Jharkhand**” reported in **2005 (3) JLJR 57**, the execution case has been dismissed as abated.

Mr. Amar Kumar Sinha, learned counsel for the petitioner has submitted that the executing court has taken a hyper technical issue though there is provision under Order XXII Rule 4 of the Code of Civil Procedure in case of death of one of several defendant or sole defendants. Learned counsel for the petitioner has relied upon Order XXII Rule 4 (5)(b), which reads as follows:

“(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

The Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.”

It has specifically been mentioned that the Court shall in considering the application under Section 5 of the Limitation Act, have due regard to the the fact of such ignorance and the Court can set aside the abatement and also condone the delay under Section 5 of the Limitation Act if it has reason to condone on sufficient cause shown that the application was not filed earlier.

Learned counsel for the petitioner has relied upon the judgment passed by the Hon'ble Apex Court in the case of “**Balwant Singh (Dead) v. Jagdish Singh & Ors.**” reported in **(2010) 8 SCC 685**.

Let notice be issued upon the legal heir of Kamla Devi, namely, Shankar Rajak, son of late Binod Dhobi (respondent No.1 herein) and Baby Devi, wife of late Vijay Raja (respondent No.2 herein), resident of Lower Bazar, Main Road, Simdega, PO, PS & District: Simdega under speed post, for which, requisites etc. must be filed by Friday.

Office is directed to track the speed post.

Put up this case after service of notice.

(Kailash Prasad Deo, J.)