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1. Birendra
2. Ravindra
3. Pramod
4. Rajeshv
5. Harendra
6. Ramesh
7. Sadhu S
8. Ghend

- Petitioner/s

1. Aash Narayan Singh son of Laxmi Singh.
2. Sunaina Kuwar wife of late Udai Narayan Singh.
3. Ramji Singh son of late Udai Narayan Singh.
4. Meena Devi daughter of late Udai Narayan Singh.
5. Nita Devi daughter of late Udai Narayan Singh.
6. Archana Kumari daughter of late Udai Narayan Singh.
7. Ranjana Kumari daughter of late Udai Narayan Singh.
8. Nikki Kumari daughter of late Udai Narayan Singh, all residents of village Ramchandrapur, P.O. Thawe, District-Gopalganj presently residing at Mohalla-Sareya, P.O. and P.S. Gopalganj, District-Gopalganj.
9. Geeta Devi wife of late Vijay Kumar Singh.
10. Manisha Kumari daughter of late Vijay Kumar Singh.
11. Neha Kumari daughter of late Vijay Kumar Singh.
12. Seema Kumari daughter of late Vijay Kumar Singh, all resident of Mohalla-Sareya Hussai, P.O. and P.S. Gopalganj, District-Gopalganj.

.... Respondent/s

For the Petitioner/s : Mr. Y.V. Giri, Sr. Adv.
Mr. V. R. Bharti, Adv.
Mr. Nikhil Kumar Agrawal, Adv.
For the Respondent/s : Mr. Umesh Kumar Singh, Adv.

For the Respondent/s : Mr. Umesh Kumar Singh, Adv.

CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL JUDGMENT
Date: 01-07-2016

Heard learned counsel for the petitioners and learned counsel for the contesting opposite parties.

This revision application has been filed against the order passed in the Misc. Appeal No. 11 of 2007 on 07.08.2008 by which the appellate court below has dismissed the appeal both on merits as well as limitation.

The facts are not in dispute that the suit was filed by the plaintiff-petitioners for declaration of their title and confirmation of possession over the part of the suit land and also for recovery of possession over the other part of the suit land. During the pendency of the suit, the defendant no. 1 died on 25.07.1999. The plaintiffs thereafter filed a petition for substitution on 14.09.1999 and an objection to the said petition was filed by the remaining defendants pointing out that the plaintiff had omitted to mention the date of death of the defendant no. 1. Consequent thereupon, the plaintiff filed another petition on 29.09.1999 which also purported to be a substitution petition wherein date of death of defendant no. 1 was mentioned and the names of the heirs and legal representatives was also mentioned. The remaining defendant again raised an objection that all the heirs of the deceased defendant no. 1 were not included

and proposed to be substituted in place of the deceased defendant no.

1. It also transpires that subsequent thereto the remaining defendants filed another petition purporting to be under Order 22 Rule 5 C.P.C. praying for inquiry as to who was the legal representatives of the deceased defendant no. 1 but as mentioned in the order of the trial court, no inquiry could be made on the said petition. Those petitions remained pending till 2006 when the remaining defendants filed a petition praying for abatement of the suit. It was thereafter that the trial court took up the pending petitions with regard to the substitution of the heirs and legal representatives of the deceased defendant no. 1 and after coming to the conclusion that all the heirs of the deceased defendant no. 1 had not been sought to be substituted in his place by the plaintiff, it was held that the suit had abated.

The plaintiff-petitioners questioned the said order of abatement by filing a civil revision application before this Court. However, by order dated 30.04.2007 passed in C.R. No. 854 of 2007, this Court held that the revision application was not maintainable in view of the nature of the order impugned therein and accordingly dismissed the said revision application. The plaintiff-petitioner thereafter filed the Misc. Appeal No. 11 of 2007 before the court below on 11.05.2006 which has been dismissed by the impugned as barred by limitation and also on merits.



Learned counsel for the petitioners has firstly submitted that the learned court below has committed error of jurisdiction in dismissing the appeal both on limitation as well as on merits. It has been propounded that once after holding the appeal to be barred by limitation, the court has no jurisdiction to proceed and determine the merits of the case as well and any such finding would be a nullity. It has been next contended that after the death of the defendant no. 1 during the pendency of the suit, the plaintiff-petitioners filed the petition within the time seeking substitution of his heirs and legal representatives. It has been submitted that the trial court committed error of jurisdiction in holding the suit to have abated only on the ground that the certain persons suggested to be also the heirs of the deceased defendant no. 1 by the remaining defendants had not been proposed to be substituted in place of deceased defendant no. 1. It has been argued that the appellate court below has failed to appreciate the said aspect also particularly when there was no allegation by the remaining defendant that there was any malafide or deliberate suppression of all the heirs and legal representatives of the deceased defendant no. 1 by the plaintiffs in the suit. Learned counsel in support of his submission has placed reliance upon the Full Bench decision of this Court in the case of **Jagarnath Singh Vs. Srimati Singhashan Kuer 1984 PLJR 217** and also the Apex Court



Judgments in the case of **Harihar Prasad Singh Vs. Balmiki Prasad Singh, A.I.R. 1975 SC 733, N. Jayaram Reddi Vs. The Revenue Divisional Officer, A.I.R. 1979 SC 1393, Custodian of Branches of BANCO National Ultramarino Vs. Nalini Bai Naique A.I.R. 1989 SC 1589 and Dolai Maliko Vs. Krushna Chandra Patnaik, A.I.R. 1967 SC. 49** . It has been next argued that the rejection of the prayer for condonation of delay by the appellate court below is also not sustainable in the admitted facts and circumstances of the case when the present petitioners had filed a civil revision application against the order of the trial court on wrong legal advice and after the dismissal of the revision application, the appeal was properly filed within thirty days thereafter. It is also been contended that the learned appellate court below has exceeded its jurisdiction in holding that the learned counsel for the petitioners had not acted in good faith in advising the petitioners to prefer revision application which finding has been recorded only on the basis of surmises and conjectures.

Learned counsel for the contesting opposite party nos. 1 to 8, on the other hand, has submitted that the appellate court below has committed no error of jurisdiction in passing the impugned order. By placing the orders of the trial court and the appellate court below, it has been canvassed that the petitioners' appeal in the appellate court below was clearly barred by limitation as it was preferred after lapse



of nearly 50 days from the date of the order of the trial court. It has also been submitted that the remaining defendants have brought on record cogent evidence and certificate by the municipality as well as Panchayat to show that the plaintiffs had left out the persons who were also the heirs of the deceased defendant no. 1. It has also been submitted that the trial court after considering the said fact and also the fact that those certificates were not denied by the plaintiffs had rightly held the suit to have abated and sequentially the appellate court below has also rightly come to the conclusion on the reappraisal of those materials that there was no error or illegality in the order of abatement passed by the trial court. During the course of submission, however, it has been accepted by the learned counsel for the opposite parties that the petition under order 22 Rule 5 was filed on behalf of the remaining defendant for determination of the legal representative of the deceased defendant no. 1 but no order could be passed on the said petition. It has been also accepted during the course of submission that though at the time of admission of the appeal in the appellate court below the delay was condoned allowing the prayer of the petitioners in that regard and no petition thereafter was filed by the defendants for recall/review of the said order and only oral submissions has been made before the appellate court below on the point of limitation.

After considering the submissions and perusal of the order passed by the appellate court below including the impugned order, it is manifest that the order dated 22.02.2007 abating the suit as passed by the trial court was firstly questioned by the petitioners before this Court by filing civil revision application no. 854 of 2007 which eventually came to be dismissed by this Court by order dated 30.04.2007 holding that the order impugned therein was appealable and, therefore, the revision application was not maintainable. The petitioners, thereafter, filed appeal on 11.05.2007 before the appellate court below apparently within a period of 10 days alongwith a petition for condonation of delay. It is further also manifest that the appellate court below allowed the prayer for condonation of delay and admitted the appeal for hearing. There was admittedly no petition filed by the defendant subsequently for recall/review of the said order condoning the delay. In this backdrop, it is clear that there was no occasion before the appellate court to reconsider the issue of limitation which stood condoned at the time of the admission of the appeal. Even otherwise also in absence of the allegation of malafide or gross negligence, the petitioners were entitled to the exclusion of the period during which the abortive proceeding of the civil revision application no. 854 of 2007 was pursued. As laid down by the Apex Court in a recent decision in the case of **M.P. Steel Corporation Vs.**



Commissioner of Central Excise, 2015 (7) SCC 58 the entire period right from the passing the order of the trial court upto the order passed in the revision application by this Court will have to be excluded. In that view of the matter, this Court comes to the conclusion that the appeal filed by the present petitioners in the learned court below was not barred by limitation. The conclusion by the appellate court below in this regard in the impugned order is accordingly set aside.

After holding the appeal to be barred by limitation, the appellate court below has recorded the findings on merits as well. As held by a Bench decision of this Court in **Rajesh Kumar Singh Vs. Rita Singh, 2000 (2) PLJR 120** that a court has no jurisdiction to go into the merits of the case after coming to the conclusion that the proceeding before it is not maintainable and even if a decision is rendered on merits the same shall not operate as res judicata in a subsequent proceeding or the different stage of the said proceeding as the case may be.

Even otherwise also, the appellate court below while recording the findings on the issue of abatement in the facts and circumstances of the case and thereby affirming the order of the trial court, has ignored the principles of law in this regard as laid down by the full bench of this Court in of **Jagarnath Singh Vs. Srimati Singhashan Kuer, 1984 PLJR 217**. In the opinion of this Court, in

this backdrop, the issue of abatement requires to be examined afresh by the appellate court on merits in accordance with law.

Accordingly, this revision application is allowed and the impugned order is set aside. The appeal is remitted back to the appellate court below for hearing and disposal afresh on merits in accordance with law.

Devendra/-

(V. Nath, J)

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