

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.259 of 2015

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1. Sushila Devi, wife of Late Raghunath Sahni.
 2. Ranjan Sahni, son of Late Raghunath Sahni Both are residents of Mohalla Panda Sarai, P.O. and P.S. Laheria Sarai, District Darbhanga.
 3. Mamta Devi, daughter of Late Raghunath Sahni, and wife of Baijnath Sahni, resident of Mohalla Shahganj Benta, P.S. Laheria Sarai, District Darbhanga.

.... Appellant/s

Versus

Upendra Sahni, son of Late Dhorai Sahni, resident of Mohalla Panda Sarai, Ward No.37, P.S. Laheria Sarai, District Darbhanga.

.... Respondent/s

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Appearance:

For the Appellants : Mrs. Mahashweta Chatterjee, Advocate.
For the Respondent : Mr. Shashank Shekhar Sinha, Advocate.
Mr. Vijayeshwar Prasad, Advocate.

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date: 03-08-2017

Heard both learned counsel for the appellants and the respondents.

2. This appeal has been filed against the order dated 09.04.2012 passed by the District Judge, Darbhanga in Title Appeal No. 04 of 2011, whereby the learned Judge has rejected the substitution petitions dated 31.01.2012 and 13.03.2012 filed by the appellants.

3. Factual matrix of the case is that Raghunath Sahni, husband of appellant no.1 and father of the appellant nos.2 and 3 had filed a Title Suit No. 182/2003-70/2010 against the respondent-



Upendra Sahni in the court of Sub-Judge-V, Darbhanga for declaration of title of the properties mentioned in schedule II of the plaint which was dismissed on 15.01.2011.

4. Being aggrieved and dissatisfied with the judgment dated 15.01.2011 and decree dated 24.01.2011 passed by the Sub-Judge-V, Darbhanga, the said Raghunath Sahni had preferred Title Appeal No. 04 of 2011 in the court of District Judge, Darbhanga on 14.02.2011, but during the pendency of the appeal, he died on 13.10.2011. So, a petition was filed by the counsel on 18.10.2011 communicating the death of the sole appellant and the next date was fixed as 31.01.2012. On the said date, a substitution petition along with a delay condonation petition supported with affidavit was filed by the legal heirs, namely, Sushila Devi, Ranjan Sahni and Mamta Devi of the deceased. After that, opposite party prayed for time to file reply to the aforesaid petition and the next date was fixed as 13.03.2012. On 13.03.2012, the opposite party filed reply and since there were some defects in the substitution petition, a petition for not pressing the earlier substitution petition dated 31.01.2012 and another substitution petition with affidavit along with delay condonation petition was filed by the legal heirs of the deceased on 13.03.2012.

5. After hearing the parties, the learned Sub-Judge-V



reserved the order and fixed the date on 09.04.2012 for passing the order and on 09.04.2012, learned Sub-Judge V rejected the substitution petition filed by the appellants and abated the appeal.

6. Being aggrieved and dissatisfied with the impugned order, the appellants filed this Miscellaneous Appeal.

7. It is submitted by learned counsel for the appellants that after the death of the original appellant, namely, Raghunath Sahni, the appellants (legal heirs of the deceased) informed the conducting lawyer for taking steps and accordingly lawyer informed the learned court on 18.10.2011 regarding the death of the original appellant. Thereafter, next date fixed was as 31.01.2012. A substitution petition along with delay condonation petition was filed on the same date by the appellants, as the opposite party took time to file rejoinder against substitution petition, the next day was fixed as 13.03.2012. As there was some defect in the substitution petition, another substitution petition along with delay of condonation petition was filed on 13.03.2012. The learned lower court rejected the aforesaid petitions of the appellants merely on technical ground of defect in the Vakalatnama filed along with the earlier petitions, such as, not affixing the court stamp fee and giving description of the appellants in the power and also due to not filing of the petitions for setting aside the abatement by the appellants though the aforesaid



two petitions were filed well within the stipulated period of 60 days allowed for filing the petition for setting aside the abatement. Moreover, no mistake was committed by the appellants in taking steps for filing substitution petition, whatever mistake in the power was due to laches of the conducting lawyer and his clerk for which the appellants may not be punished and suffer.

8. On the other hand, it is submitted by learned counsel for the respondent that on the death of sole appellant, namely, Raghunath Sahni on 13.10.2011, substitution petition must have been filed within 90 days i.e. by 12.01.2012. Thereafter, the appeal stood abated. The application for setting aside the abatement should have been filed by 11.10.2012. Though the appellant filed substitution petition on 31.01.2012, but it was neither signed nor verified by the appellant nor supported by any affidavit. Moreover, no application for setting aside the abatement was filed. More so, by filing petition on 13.03.2012, the appellant have not pressed the said petition and again filed fresh substitution petition on the same day i.e on 13.03.2012 without any signature of the appellants and its verification. Though an affidavit was filed in support of the said petition, but it was not sworn on that date rather on 31.01.2012. Moreover, no application for setting aside the abatement was filed on the same day too rather a delay condonation petition was filed by the



appellants on the said date. Said substitution petition was filed beyond the stipulated period of limitation of 90 days *san* signature of the appellants and its verification, hence, due to not filing of the substitution petition within the aforesaid period, appeal stood abated. For setting aside the abatement, the appellants have not filed any petition under Order XXII Rule 9 of the Code of Civil Procedure. The appellants have also not shown sufficient cause for not filing the substitution petition within the stipulated period of limitation, hence, the abatement was not set aside. By the impugned order, the learned lower court has rightly and validly rejected the aforesaid substitution petition of the appellants as it has no merit in it. This appeal has also no substance and is liable to be dismissed.

9. Heard both the parties at length and perused the records. From perusal of the records, it appears that the sole appellant of Title Appeal No. 04 of 2011 died on 13.10.2011. A petition for substitution of the legal heirs of the deceased-appellant was filed by his legal heirs along with the limitation petition on 31.01.2012. However, on 13.03.2012, by filing the petition, the appellants had not pressed the aforesaid petition and filed another substitution petition with affidavit along with a petition for condonation of delay on the said date i.e. on 13.03.2012. As per Order XXII Rule 3 of the CPC, in case of death of sole-plaintiff, if the right to sue survives, the legal



representative of deceased plaintiffs is required to file substitution petition within 90 days as per Article 120 of the Limitation Act. If the said petition is not filed within the aforesaid period of limitation, then the suit stands abated. As per the provisions of Order XXII Rule 9 CPC, for setting aside the aforesaid abatement, application is required to be filed within further 60 days as per Article 121 of the Limitation Act. In the case in hand, 90 days had expired on 12.01.2012 and 150 days expired on 12.03.2012, but the appellants have not filed any substitution petition within 90 days, rather after expiry of the said stipulated period of limitation on 31.01.2012 and that too was not pressed by filing another petition on 13.03.2012 and another substitution petition was filed on the said date i.e. on 13.03.2012 along with the petition for condonation of delay. Thus, the substitution petition was filed after expiry of the 150 days and no application for setting aside the abatement was filed by the appellants. After 12.01.2012, the said appeal stood abated and the appellants had opportunity to get the said abatement set aside by filing petition under Order XXII Rule 9 CPC by 12.03.2012. But the appellants have failed to do so. Meaning thereby that the said abatement does not stand set aside at the behest of the appellants.

10. Thus, in my considered opinion, the aforesaid appeal stood abated due to non-filing of the substitution petition within the



stipulated period of limitation by the appellants and said abatement does not stand set aside due to not filing of an application in this regard by the appellants within the stipulated period of limitation. The impugned order also indicates that the appellants have also failed to show any sufficient cause for condonation of delay in filing the substitution petition. Learned counsel for the appellants has failed to rebut the aforesaid finding of the learned lower court regarding not showing of sufficient cause. More over, as no application for setting aside the abatement was filed by the appellants, the application for condonation of delay is of no help to the appellants.

11. In the aforesaid facts and circumstances, I find no illegality or impropriety in the impugned order and it does not warrant any interference by this Court, hence, the impugned order passed by the learned lower court is upheld. Accordingly, this appeal is dismissed.

(Prakash Chandra Jaiswal, J)

Mishra/-

AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
Uploading Date	11.08.2017
Transmission Date	

