

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Jurisdiction Case No.1054 of 2014

IN

First Appeal No. 80 of 1978

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1. Ram Ratan Singh
2. Binod Singh - Both Sons of Late Shiv Nandan Singh, Both Residents Of
Village- Aslampur Mehus, P.S- Sheikhpura, District- Shekhpura.

.... Petitioner/s

Versus

Surjamani Prasad Singh, Son Of Late Ramchandra Singh and Grand Son Of Late
Kameshwar Singh, Resident Of Village- Aslampur, Mehus, P.S- Sheikhpura,
District- Sheikhpura.

.... Respondent/s

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Appearance :

For the Petitioners : Mr. Amar Nath Mishra
For the Respondent : Mr. B N Sinha
Mr. Shailendra Sinha
Mr. Gautam Kumar

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CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date: 18-08-2017

This is an application filed under Section 151 of the
Code of Civil Procedure and the prayer made in the application is
to restore First Appeal No. 80 of 1978 which has been dismissed
on 22.02.2012. In the prayer clause in Paragraph-1, it is stated that
this Court be pleased to direct for restoration of First Appeal No.
80 of 1978 which has been dismissed for non-prosecution vide
order dated 22.02.2012.

It is seen that in FA No. 80 of 1978 two applications
praying for substitution of the legal heir of appellant no. 1 and the
sole respondent late Kameshwar Singh were filed vide IA No.



1228 of 2008 and IA No. 1229 of 2008 and none appeared to prosecute both these applications. On 22.11.2011 both these applications were dismissed. Thereafter, this application was listed for hearing before a Bench on 22.02.2012. The Bench found that once the substitution application was dismissed and there was only the appellant and one respondent, and both had died, nothing further remains to be done, the appeal has abated and, therefore, the appeal was dismissed as having been abated on this count.

Thereafter, it seems that for restoration of the First Appeal, MJC No.4446 of 2013 was filed. When the said MJC came up for consideration, the learned Court found that the application for restoration is not maintainable as the sole opposite party has also died and the appeal has been dismissed on abatement and, therefore, the application was not maintainable. The petitioner was granted liberty to file a fresh and correct restoration application.

Again, this application has been filed seeking restoration of FA No. 80 of 1978, on the ground that it has been dismissed for want of prosecution on 22.02.2012. There is delay of about 2 years and the application for condonation is also filed. However, from the facts that have come on record it is clear that the First Appeal was dismissed as the sole defendant died and the



appeal was treated to have abated.

Procedure under Order 22 Rule 4 of the Code of Civil Procedure deals with the procedure in case of death of one of several of the defendants or the sole defendant and sub-rules (3) and (4) of Order 22 contemplate that when within the time limit prescribed under the law an application is made for substitution under Order 22 Rule 4(1), the suit shall abate against the deceased defendant and when a suit or appeal stands abated under this provision, the only remedy available to seek setting aside of the abatement after condonation of delay by resorting to the procedure under Order 22 Rules 5(a) and (b) of the Code, as the case may be.

In this case, the appeal stands dismissed as having been abated under Order 22 Rule 4 and, therefore, an application simplicitor for restoration would not be maintainable. An application would have to be filed seeking set aside of the abatement by condoning the delay and seek restoration of the appeal by setting aside the abatement. No such application is filed or prayer made. As done on the earlier occasion, an application simplicitor for restoration has been filed and earlier on 14.02.2014 itself as an application, i.e., MJC No. 4446 of 2013 has already been rejected with the liberty to file a correct restoration application. Correct restoration would be an application for



restoration of the First Appeal after setting aside the abatement as contemplated under Order 22 Rule 4 of the Code. As no such application has been filed following the procedure as prescribed, I see no reason for making any indulgence into this application.

This MJC application is therefore dismissed.

(Rajendra Menon, CJ)

mrl./-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	24.08.2017
Transmission Date	N.A

