

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.18340 of 2013

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Lakshmi Devi, daughter of Lakshman Ram, wife of Raj Kumar Mehta, Resident of Kazi Mohalla, Arwal, P.O. and P.S.-Arwal, District –Jehanabad (Now Arwal). At present, resident of Daudnagar, Brahmtoli, Ward No.10, P.O. and P.S.-Daudnagar, District-Aurangabad (Bihar).

.... Petitioner

Versus

Munna Kumar Mehta, son of late Sohrai Ram Kewani, resident of Daudnagar Brahmtoli, Ward No.10, P.O. and P.S.-Daudnagar, District-Aurangabad (Bihar).

.... Respondent

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Appearance :

For the Petitioner/s : Mr. Mrigendra Kumar, Advocate

For the Respondent/s : Mr. Rakesh Kumar, Advocate

Mr. Rikesh Sinha, Advocate

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CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR
ORAL ORDER

3 07-03-2018 This writ application has been filed by the plaintiff of Partition Suit No.74 of 2001 pending in the Court of Subordinate Judge-I, Aurangabad whereby and whereunder a substitution petition filed by the petitioner was rejected.

2. Heard learned counsel for the petitioner and the respondent.

3. The plaintiff has filed the aforesaid partition suit against the full brother of her husband and his family members. The brother of the husband of plaintiff was defendant no.1, who died leaving behind one daughter and one son. A substitution petition was accordingly filed on 26.05.2011. The court below rejected the petition holding that no limitation petition for



condoning the delay was filed and on account of expiry of statutory period of 90 days the suit has abated.

4. The learned counsel for the petitioner submits that the defendant no.1 died leaving behind one son and one daughter. Out of them, his son Munna Kumar is already on record as defendant no.2 and so right to sue survives. In a partition suit every co-sharer has right to sue for partition. The defendant no.2 is already on record and so he is competent to represent the estate and so the court below has erred in holding the suit has abated.

5. The learned counsel for the respondent, on the other hand, opposed the submission.

6. It is not in dispute that the defendant no.1 died leaving behind his son (defendant no.2) who was already on record since before and so the question of abatement in view of the settled principles of law does not arise as the right to sue survives. In ruling reported in A.I.R. 2004 Supreme Court 4346, the Apex Court has held that order rejecting the application on the ground that no prayer for setting aside abatement of the suit and no prayer for condonation of delay was made, is liable to be set aside.

7. In view of above proposition of law, the impugned order holding the suit abated on account of non-substitution is not



sustainable. Accordingly, the impugned order is set aside and this writ application is allowed.

Harish/-

(Sanjay Kumar, J)

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