

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.30 of 2003

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Tej Narayan Upadhaya Son of Brij Nandan Upadhaya R/o Village-
Upadhayapur P.S. Buxar (Industrial Area) District-Buxar.

... .. Appellant/s

Versus

1. Sri Niwas Upadhaya S/o Late Hargovind Upadhaya.
2. Shakuntala Devi W/o Late Brindavan Upadhaya.
3. Vinay Kumar Upadhaya S/o Late Brindavan Upadhaya.
4. Abhay Kumar Upadhaya S/o Late Brindavan Upadhaya.
5. Nirbhay Kumar Upadhaya S/o Late Brindavan Upadhaya.

All 1 to 5 are R/o village-Upadhayapur, P.S. Buxar (Industrial Area), District-Buxar.

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Om Prakash Upadhyay
For the Respondent/s	:	None.

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date : 23-04-2018

Heard learned counsel for the appellant on this
miscellaneous appeal and perused the records.

2. No one turned up on behalf of the respondents
despite service of notice.

3. This miscellaneous appeal has been preferred
against the Order dated 20.11.2002 passed by Additional District
Judge-1st, Buxar in Title Appeal no. 76 of 1986 whereby the
learned lower court rejected the petition dated 7.12.1998 and



22.01.2001 filed by the appellant for substitution of the sole deceased-appellant Bhola Tiwary and for condonation of delay in filing the aforesaid substitution application respectively.

4. Factual matrix of the case is that Bhola Tiwary had filed Title Appeal no. 76 of 1986 against Brindaban Upadhyaya and Ors. During the pendency of the said appeal, the sole appellant, namely, Bhola Tiwary has passed away on 1.11.1996. For substitution of Bhola Tiwary, the appellant Tej Narayan Upadhyay filed a petition under Order 1 Rule 10 read with Order 22 Rule 10 CPC and Section 151 CPC dated 7.12.1998 claiming himself to be sister's son of said Bhola Tiwary and sole heir of the deceased. Subsequently, he filed a petition dated 22.01.2001 under Section 5 of Limitation Act for condoning the delay in filing the aforesaid substitution petition.

5. Respondents have filed rejoinder against the said petition.

6. After hearing the parties and perusing the record, learned lower court passed the impugned order.

7. Being aggrieved and dissatisfied with the aforesaid Order, the appellant has preferred the present appeal.

8. It is submitted by learned counsel for the appellant that the appellant has shown the sufficient cause for



condonation of delay in filing the substitution petition dated 7.12.1998. It is further submitted that even though separate petition for setting aside the abatement has not been filed by the appellant, the substitution petition and delay condonation petition filed by him ought not have been rejected by the learned lower court merely on technicality.

9. From perusal of record it appears that during pendency of the Title Appeal no. 76 of 1986, the sole appellant Bhola Tiwary has passed away on 1.11.1996. The appellant claiming himself to be sister's son of Bhola Tiwary and sole heir and legal representative of the deceased-appellant filed petition under Order 1 Rule 10 read with Order 22 Rule 10 and Section 151 CPC for impleading him in the memo of appeal by way of substitution of deceased-appellant. He, subsequently, filed petition dated 22.01.2001 under Section 5 of Limitation Act for condonation of delay of around two years in filing the aforesaid substitution petition on the ground that he was in service in Indian Iron Steel Company Burnpur, West Bengal since 1961 to 31.01.1997 and after superannuation, he came to his village and learnt about filing of the aforesaid appeal and its pendency by his maternal uncle Bhola Tiwary for the first time on 30.11.1998, who has died on 1.11.1996 issueless. Preceding



to that, he had no knowledge of the aforesaid appeal, so he could not file the substitution petition for substituting him in the memo of appeal in place of the appellant. On learning about the filing and pendency of the aforesaid appeal, he filed petition on 7.12.1998 and also a petition dated 22.01.2001 for condonation of delay in filing the said petition. Hence, condoning the delay in filing the aforesaid petition, he may be impleaded in the memo of appeal by way of substitution.

10. Respondent also filed rejoinder against the said petition with the case that the appellant does not happen to be heir and legal representative of the deceased-appellant Bhola Tiwary and has no right to file the aforesaid petitions. Moreover, he had knowledge of filing and pendency of the aforesaid appeal since very beginning. But, he intentionally filed the aforesaid petition after around two years to linger the case. The aforesaid appeal stood abated due to not filing of substitution petition within the stipulated period of limitation but he has also not filed any petition for setting aside the abatement.

11. From perusal of record, it appears that admittedly the substitution petition dated 7.12.1998 was filed after around two years of the death of the sole appellant Bhola



Tiwary. To explain the aforesaid delay in filing the said substitution petition, the appellant has taken the case that he had no knowledge of filing and pendency of the aforesaid title appeal by Bhola Tiwary earlier, and for the first time, he came to know the same on 30.11.1998 on arrival at his village after superannuation from his service and for condonation of the aforesaid delay in filing the aforesaid petition, he has also filed a delay condonation petition on 22.01.2001. Though he has not filed any petition for setting aside the abatement of the appeal as the appeal stood abated after passing of 90 days from the date of death of the deceased-appellant, but the Hon'ble Apex Court in *Mithailal Dalsangar Singh and Ors. Vs. Annabai Devram Kini and Ors.* reported in (2003) 10 Supreme Court Cases 691 has been pleased to rule that inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. A prayer for bringing the legal



representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court.

12. Though, there has been delay of around two years in filing the aforesaid petition but for condonation of said delay, the appellant has filed petition explaining the aforesaid delay and it is settled principle of law that injustice should not be done merely on technicality and shutting down the opportunity of hearing rather justice should be done after hearing the parties.

13. In the aforesaid facts and circumstances of the case, condoning the delay in filing the aforesaid substitution petition and setting aside the abatement, the aforesaid petition filed under Order 1 Rule 10 read with Order 22 Rule 10 and



Section 151 CPC is allowed and the impugned order is set aside. Accordingly, this Miscellaneous Appeal is allowed.

(Prakash Chandra Jaiswal, J)

rohit/-

AFR/NAFR	AFR
CAV DATE	N.A.
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