

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Review No.105 of 2016

1. Parth Kumar Yadav
2. Suresh Prasad Yadav, both sons of Late Ramjanam Rai, residents of village Lodipur Chirand, P.O. & P.S. Chirand, District Saran

... .. Petitioner/s

Versus

1. Ram Nath Prasad son of Bachchu Sah
2. Smt. Savitri Devi W/o Bachchu Sah, residents of village Manopur, P.S. Dighwara, District Saran

.....Plaintiffs/Respondents/Respondents 1st set/O.P.

3. Srinandan Pushtakalaya through Secretary, Srinandan Pushtakalaya, Mohalla Dahiyawan, P.S.Chhapra Town, District Saran
4. Sri Kameshwar Dixit, Secretary, Srindand Pushtakalaya (Library), Mohalla Dahiyawan, P.S.Chhapra Town, District Saran
5. Surya Narayan Vishwakarma, S/o Ram Lagan Prasad, resident of Manopur, P.S. Dighwara, District Saran, presently residing at Mohalla Dahiyawan, P.S.Chhapra Town, District Saran
6. Sukeshiya Devi @ Manju Kumari D/O Late Ram Sakal Sharma
7. Most. Deopati Devi, W/o Late Ram Sakal Sharma
8. Tripti Sharma
9. Kedar Sharma, both sons of Late Ram Sakal Sharma
10. Most. Jalandhar W/o Late Shiv Prasad Sharma, all permanent residents of village Manopur, Prg. Kasmar, P.O. & P.S. Dighwara, District Saran, presently residing at Mohalla Dahiyawan, P.S.Chhapra Town, District Saran
11. Prakash Kumar
12. Subhash Kumar, all sons of Awadhesh Mishra
13. Visash Kumar, all residents of Mohalla Salempur, P.S. Chhapra Town, District Saran
14. Deo Nandan Singh S/o Late Bhuwaneshwr Singh, permanent resident of Village Dohan, P.S. Rasulpur, District Saran, presently residing at Mohalla Dahiyawan Tola, P.S.Chhapra Town, District Saran

...Defendants/Respondents/Respondents 2nd Set/O.P

15. Satya Narayan Sharma, S/O Late Sri Kishun Sharma, resident of Village Bagora, P.S. Duraundha, District Siwan, at present resident of Mohalla Dahiyawan Tola, P.S.Chhapra Town, Pragana Manjhi, District Saran

with

Civil Review No. 109 of 2016

1. Parth Kumar Yadav
2. Suresh Prasad Yadav, both sons of Late Ram Janam Rai, both residents of Village Lodipur Chirand, P.O. and P.S. Chirand, District Saran

... .. Petitioner/s



Versus

1. Ram Nath Prasad S/o Bachchu Sah
2. Smt. Savitri Devi W/o Bachchu Sah, residents of Village Manopur, P.S. Dighwara, District Saran

... ..Plaintiffs/ Respondents/Respondents 1st Set/O.P.

3. Srinandan Pushtakalaya through Secretary, Srindandan Pushtakalaya, Mohalla Dahiyawan, P.S. Chhapra Towan, District Saran
4. Sri Kameshwr Dixit, Secretary, Srindandan Pushtakalaya (Library), Mohalla Dahiyawan, P.S. Chhapra Town, District Saran
5. Surya Narayan Vishwakarma S/O Ram Lagan Prasad, resident of Manopur P.S. Dighwara, District Saran, presently residing at Mohalla Dahiyawan, P.S. Chhapra Town, District Saran
6. Sukeshiya Devi @ Manju Kumari D/o Late Ram Sakal Sharma
7. Most. Deopati Devi, W/o Late Ram Sakal Sharma
8. Tripti Sharma
9. Kedar Sharma, both sons of Late Ram Sakal Sharma, all permanent residents of Village Manopur, Prg. Kasmar, P.O. & P.S. Dighwara, District Saran, presently residing at Mohalla Dahiyawan, P.s. Chhapra Town, District Saran

..Defendants/Respondents/Respondents 2nd Set/O.P.

10. Satya Narayan Sharma S/o Late Sri Kishun Sharma, resident of Village Bagora, P.S. Duraundha, District Siwan at present resident of Mohalla Dahiyawan Tola P.S. Chhapra Town, Pragan Manjhi District Saran

...Defendant/Appellant/Appellant/O.P.

Appearance :

(In Civil Review No. 105 of 2016)

For the Petitioner/s : Mr. Shashi Shekhar Dwivedi, Sr. Advocate
Mr. Ranjan Kumar Dubey
Mr. Parth Gaurav
Mr. Mithilesh Kumar Upadhyay

For the Respondent/s : Mr.

(In Civil Review No. 109 of 2016)

For the Petitioner/s :
For the Petitioners Mr. Shashi Shekhar Dwivedi, Sr. Advocate
Mr. Ranjan Kumar Dubey
Mr. Parth Gaurav
Mr. Mithilesh Kumar Upadhyay

For the Respondent/s : Mr.

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER

CAV

Date : - 22-06-2018

Since both the review applications arise out of the



same Title Suit No. 109 of 1981/25 of 1990 which had given rise to S.A. No.126 of 2002 and S.A. No. 159 of 2002, they have been taken up and heard together and are being disposed of by the present common judgment and order.

2. I have heard Mr. Shashi Shekhar Dwivedi, learned Senior Counsel, appearing on behalf of the petitioners in both the cases, assisted by Mr. Ranjan Kumar Dubey, Mr. Parth Gaurav, and Mr. Mithilesh Kumar Upadhyay, learned Advocates.

3. S.A. No.126 of 2002 filed by Satya Narayan Sharma was dismissed by this Court under Order XLI Rule 11 of the Code of Civil Procedure,1908 (hereinafter referred to as 'the Code') by a judgment and order of this Court dated 04.03.2010, holding that the appeal did not involve any substantial question of law. S.A.No.159 of 2002 preferred by the same appellant, came to be finally dismissed by an order dated 05.03.2010 due to non-compliance of the specific and peremptory order of this Court dated 12.01.2005. These are to two orders under review in the present proceedings.

4. It is being asserted in the present civil review



applications that Satya Narayan Sharma died issueless on 09.01.2008, leaving behind his widow Chano Devi, who was impleaded in the final decree proceeding in place of her husband, who also died on 19.01.2010. The sole ground on which the petitioners seek review of the orders of this Court dated 04.03.2010, passed in S.A. No.126 of 2002 and 05.03.2010 in S.A.No.159 of 2002 is that the factum of the death of the sole appellant was not brought to this Court's notice and, therefore, the judgment and decree having been passed against the dead person, is a nullity.

5. Before I consider the grounds for review taken on behalf of the petitioners of these applications, I must take note of certain facts which are evident from the judgment and order of this Court dated 04.03.2010 passed in S.A.No.126 of 2002 and the assertions made in the applications seeking review.

6. Title Suit No.109 of 1981/25 of 1990 was filed by respondent nos.1 and 2 for declaration of their title over the Schedule III property of the plaint, on the basis of the sale deeds or, in the alternative, allow partition of 5/6th share out of 1/3rd share in Schedule I property and



other ancillary reliefs. The suit was decreed, on contest, against the appellant, Satya Narayan Sharma by learned Subordinate Judge-V, Chapra, vide his judgment and decree dated 12.04.1991. Appellant/Defendant no.1 filed title appeal against the judgment and preliminary decree of the learned trial court, giving rise to Title Appeal No. 67 of 1992 which was dismissed by the learned Additional District Judge-VI, Saran, vide his judgment and decree dated 04.03.2002. Aggrieved by the said judgment and preliminary decree of the courts below, Satya Narayan Sharma preferred second appeal before this Court giving rise to S.A. No.126 of 2002. Based on the preliminary decree, a final decree was prepared, vide order dated 30.06.1995 and the decree dated 04.09.1995 passed by the learned 5th Subordinate Judge, Saran, which was assailed by the said Satya Narayan Sharma by filing Title Appeal No. 61 of 1995, which also came to be dismissed by a judgment dated 16.03.2002, passed by learned 6th Additional District and Sessions Judge, Chapra. The aforesaid judgment dated 16.03.2002 passed in Title Appeal No. 61 of 1995 was assailed by Satya Narayan Sharma by filing S.A.No. 159 of 2002.



Apparently thus, whereas S.A.No. 126 of 2002 arises out of the preliminary decree passed in Title Suit No.109 of 1991, whereas S.A.No. 159 of 2002 arises out of the final decree, emanating from the same suit.

7. Assailing the judgment and preliminary decree in S.A.No. 126 of 2002, the appellant Satya Narayan Sharma asserted that the S.A.No.126 of 2002 involved the following substantial questions of law:-

“1. Whether the appellate court’s findings regarding the points raised by the appellants, are correct so far as the story of death of Ram Lagan Prasad, prior to 1936 is correct.?”

2. Whether the appellate court’s finding is correct regarding the story of separation among the sons of Ram Lagan Barhai concerned?

3. Whether the findings of appellate court is correct regarding the inheritance of properties by the heirs?

4. Learned appellate court committed an illegality in giving its finding regarding the two sale deeds in question.

5. The findings arrived at by the trial court suffered from the vice of law and admitted facts.”



8. Exactly similar issues were raised by the appellant in S.A.No.159 of 2002.

FACTS OF THE CASE

9. It transpires from the records that one Ram Lagan Prasad, the only son of Gokul Barhi, had died leaving behind three sons, namely, Sheo Prasad Sharma, Ram Sakal Sharma and Surya Narayan Sharma as their heirs. Sheo Prasad died, leaving behind his widow Jaleshwari Devi as his only heir. Ram Sakal Sharma had two sons, namely, Tripti Sharma and Kedar Sharma. Surya Narayan Sharma (Vishwakarma) had four sons, namely, Nand Kishore Sharma, Brij Kishore Sharma, Jawahar Sharma and Chhathi Sharma. It was the case of the plaintiff that one Banshraj Hajam had transferred 06 katha 08 dhurs of land appertaining to C.S.Plot No.1334 to Ram Lagan Prasad by a registered sale deed dated 11.01.1902 and when it came to light that the land stood in the name of some other person, the son of the said Banshraj Hajam, executed another sale deed in favour of Ram Lagan Prasad. Ram Lagan Prasad and Gokul Barhi were joint and Gokul Barhi being the father was the *Karta* of the joint family. After the death of Gokul Barhi



and Ram Lagan Prasad, the three sons of Ram Lagan Prasad partitioned among themselves getting 1/3rd share of the said plot each; Surya Narayan got his share as mentioned in Schedule II of the plaint. It was also claimed in the plaint that there was partition among the heirs of Surya Narayan in 1975 of the properties, including the propriety, as mentioned in Schedule II of the plaint(1/3rd share of the plot in question). The wife of Surya Narayan Sharma, namely, Tetari Devi, Nand Kishore Sharma, Brij Bihari Sharma, Jawahar Sharma and Chhathi Sharma got 5/6th share together and Surya Narayan Shama/Vishwakarma got 1/6th share and they came in possession accordingly. The property allotted to the sons and wife of Surya Narayan Sharma was described in Schedule III of the plaint. The plaintiff asserted that the sons and wife of Surya Narayan Sharma being in need of the money for their food and business, had sold the Schedule III property for a sum of Rs. 19,000/- to the plaintiffs whereafter they were put in possession. Two sale deeds were executed in respect of the property of Schedule III and though there were certain minor mistakes in description of the boundary, the



plaintiffs remained in possession over the property described in Schedule III. It was mutated in their names in Chapra Municipality and a separate holding was created in their names. In October 1980, when the plaintiffs were preparing to construct a boundary wall around the Schedule III property, the defendant first party and second party, in collusion with the local police, caused obstruction. The plaintiffs subsequently learnt that the defendant first party had got her deed of gift executed by Jaleshri on 31.10.1980. The defendants, including defendant no.1, filed their written statement.

Case of Defendant No. 1

10. Since the appeals had been preferred by defendant no.1 Satya Narayan Sharma, his stand in his written statement is being referred to in the present judgment and order. He contested the suit on the ground that the plaintiffs did not have any unity of title nor unity of possession in respect of the suit property, with the defendant(s). He claimed that Ram Lagan Prasad had two wives, Sheo Prasad Sharma was his son from the first wife and Ram Sakal Sharma and Surya Narayan Sharma here his sons from the second wife. Ram Sakal Sharma



and Surya Narayan Vishwakarma had one sister Razwato Devi who had not been made party. Ram Lagan Prasad had acquired the property with his own income separately and he had separate possession and the said land was never recorded in the name of Gokul Barhi and the joint family had no concern with the said property. During the lifetime of Ram Lagan Prasad, his three sons had separated and all properties, including the disputed property, was/were partitioned between Ram Lagan Prasad and his three sons. Ram Sakal Sharma and Surya Narayan Vishwakarma did not get any share of the disputed property by partition. Surya Narayan Sharma and his heirs never came in possession over the Schedule II property and the said property was never partitioned between Surya Narayan Sharma, his sons and wife. He asserted that Surya Narayan Vishwakarma was joint with his sons nor *Karta* of the joint family. The alleged sale by the plaintiffs did not take place and consideration amount of Rs. 19,000/- was never paid and the plaintiffs did not acquire any title and possession over the property in Schedule III and they are not coming in possession. He claimed that the entire suit



property belonged to defendant no.5, the mother-in-law of the defendant no.1. He asserted that Ram Lagan Prasad had allotted the disputed property to Sheo Prasad Sharma and since he was coming in possession as the owner of the Schedule III property and after his death his wife (defendant no.5) came in possession. The remaining properties were kept joint with Ram Lagan Prasad in respect of Manopur and Siwan, but he intended to give the property of Siwan to Surya Narayan Sharma and the property of Maopur ($\frac{1}{2}$ and $\frac{1}{2}$) to Sheo Prasad Sharma and Ram Sakal Sharma. Surya Narayan Vishwakarma is said to have sold the property of Siwan and utilized the consideration amount and though Ram Sakal Sharma and Jaleshwari Devi had no concern with the said property, they joined in the sale deed for satisfaction of the purchaser. Defendant no.5, being pleased with the services rendered by defendant no.1, executed deed of gift in respect of the property of Schedule I on 31.10.1980. Accordingly, defendant no.1 denied the claim of the title of the plaintiff over the suit property and, on the contrary, claimed his title on the basis of deed of gift dated 31.10.1980 executed by defendant



no.5, his mother-in-law, in his favour.

11. The parties adduced evidence at the trial, both oral and documentary. The courts below concurrently held that Ram Lagan Sharma had admittedly three sons, namely Sheo Prasad, Ram Sakal Sharma and Suraya Narayan. There was no evidence to suggest that Ram Lagan had given the suit property exclusively to Sheo Prasad. The trial court accepted the plea of partition between three brothers which was upheld by the lower appellate court below also.

12. This Court found that no substantial question of law arose in S.A. No. 126 of 2002, by the judgment and order dated 04.03.2010. While refusing to admit the second appeal, this Court specifically held that the courts below had carefully considered the pleadings and evidence of the parties and decided their respective claims. The Court further held that mere municipal records and rent receipts could not prove any such transfer in absence of any valid material specially when there was sufficient evidence to support the claim of the plaintiffs that all the three sons of Ram Lagan Sharma had mutually partitioned the entire suit property and each



of them got 1/3rd share and, therefore, Surya Narayan, his widow and his four sons were entitled to 1/3rd share which they got in partition.

13. The findings in respect of partition between the three brothers were findings of facts, after consideration of the pleadings and appreciation evidence of the parties. This Court further held that the transfer of 5/6th share out of 1/3rd property given to the branch of Surya Narayan was rightly done by the wife and sons of Surya/Suraj Narayan, who were defendants-respondents, but did not object to the said claim. This Court specifically held that the widow Jaleshwari Devi was not entitled to transfer the entire suit property to defendant no.1/appellant who was none else than her son-in-law. This Court specifically held that the courts below had very carefully considered the entire matter in detail and came to the exclusive findings that the plaintiffs had unity of title and possession over the suit property and they were entitled to 5/6th share out of 1/3rd partitioned share of Suraj/Surya Narayan.

14. S.A. No. 159 of 2002 was dismissed by operation of a peremptory order dated 12.01.2005. This



aspect was noticed by this Court in order dated 05.03.2010, recording that the appeal had already been dismissed in its entirety due to non-compliance of the specific and peremptory order dated 12.01.2005.

15. As has already been noticed at the very outset, the plea which is being taken for review of the orders of this Court is that the appellant Satya Narayan Sharma had died prior to the order dated 04.03.2010 in S.A. No. 126 of 2002.

16. It is the case of the review petitioner that the appellant had sold 07 dhur of his land out of entire property to one Bishun Devi and Sabita Devi by two registered sale deeds, both dated 16.12.1998 who, in turn, sold the same through two registered sale deeds dated 08.01.2001 to Shyam Babu Sharma and Om Prakash Viswakarma. The said vendees came in possession and their names were mutated in government as well as Municipal records. Satya Narayn Sharma died on 09.01.2008 issueless, leaving behind his widow Chano Devi, who was impleaded in final decree proceeding in place of her husband, who also died on 19.01.2010. It is his case that after the death of Satya Narayan Sharma and



widow Chano Devi, Shyam Babu Sharma and Om Prakash Viswakarma sold away the said 01katha 07 dhurs of land to the review petitioner by a registered sale deed dated 08.02.2010 whereafter they came in possession. The petitioner had filed their impleadment application in final decree proceeding which was finally allowed under orders of this Court dated 06.05.2014 passed in CWJC No.2176 of 2012. Only after knowing about the details of the case, including S.A. No. 159 of 2002, they learnt about the order passed by this Court dated 05.03.2010. In that background, the present review applications seeking review of the orders dated 04.03.2010 passed in S.A.No.126 of 2002 and 05.03.2010 passed in S.A.No.159 of 2002, have been preferred. In review applications, 18 grounds have been taken for review of the said orders.

17. In the Court's opinion, however, the ground nos. 2 to 18, which have been taken in review applications, cannot be valid grounds for review since the court, in review jurisdiction, cannot sit in appeal over the judgment under review.

18. Apparently these petitioners are claiming their



right over the suit property on the basis of the sale deed executed by the widow of the appellant Satya Narayan Sharma and the vendees of Shyam Babu Sharma and Om Prakash Vishwakarma, through registered sale deed dated 08.2.2010. Shyam Babu Sharma and Om Prakash Vishwakarma, it is being claimed, were the vendees of Satya Narayan Sharma, who is said to have executed two sale deeds, both dated 16.12.1998 in favour of Bishun Devi and Sabita Devi, who, in turn, had executed the sale deed in favour of Shyam Babu Sharma and Om Prakash Sharma on 08.01.2001 in respect of the disputed property.

19. If the case of the petitioners is to be accepted that the appellant Satya Narayan Sharma died on 09.01.2008, much before that S.A.No. 159 of 2002 had stood dismissed for non-compliance of the peremptory order dated 12.01.2005; 05.03.2010 cannot be treated to be the date of dismissal of S.A. No. 159 of 2002 as the order of this Court dated 05.03.2010 is a formal order recording the fact that the second appeal stood dismissed on 27.01.2005 due to non-compliance of the specific and peremptory order of this Court dated 12.01.2005. The appellant, during the lifetime till his alleged date of death



on 09.01.2008, did not take any step for restoration of the second appeal. Consequently, the judgment and the decree passed in T.A. No.61 of 1995 preferred against the judgment and decree dated 30.06.1995 and in the final decree proceeding of Title Suit No.109 of 1981/25 of 1990 attained finality as on 27.01.2005. Even if the case of the review petitioners of execution of the sale deed by the appellant, as narrated in the review applications is accepted, they cannot seek review of the order dated 05.03.2010, passed in S.A.No.159 of 2002, arising out of the final decree proceeding, in the background of the fact that the said order merely records dismissal of the second appeal on 27.01.2005 due to non-compliance of the peremptory order. The plea that the said order dated 05.03.2010 was passed when the appellant had already died is a nullity on that ground is not at all sustainable in view of dismissal of the second appeal on 27.01.2005, during the lifetime of the said appellant.

20. Mr. Shashi Shekhar Dwivedi, learned Senior Counsel, appearing on behalf of the review petitioners, has placed much reliance on the Federal Court's decision in case of **Mt. Jamna Kuer Vs. Lal Bahadur and others**



(A.I.R. (37) 1950 Federal Court 131) and a decision of this Court in case of **Kirat Rai Vs. Guneshwar Rai and others (1978 BLJ 132)**, to contend that both the orders of this Court dated 04.03.2010, passed in S.A.No. 126 of 2002 and 05.03.2010, passed in S.A No. 159 of 2002, suffer from an error, apparent on the face of the record, which occurred by the reason of the mistake inasmuch as this Court dismissed the second appeal in ignorance of the fact that the appellant had already died. In view of the fact, as discussed above, that the S.A.No. 159 of 2002 stood dismissed for default during the lifetime of the appellant, who died nearly three years after the date of dismissal of the appeal, the argument on behalf of the review petitioners has no leg to stand. Mr. Shashi Shekhar Dwivedi has argued with much vehemence that since the judgment and order of this Court dated 04.03.2010, dismissing the second appeal of Satya Narayan Sharma was passed after his death, the same is a nullity since the decree passed against a dead person is a nullity.

21. I am not going into the question as to whether Satya Narayan Sharma, the appellant, had died during the



pendency of the appeals or after the dismissal thereof. Since I am of the view that even if the asserted date of death of the appellant is accepted, no ground for review of the judgment/order of this Court in S.A.No.126 of 2002 is made out, I have not considered it proper to notice the respondents.

22. In fairness to Mr. Dwivedi, I must refer to the two decisions cited by him which have been noted above. There cannot be any gainsay that where there is an error apparent on the face of the record, whether the error occurred by reason of the counsel's mistake or it crept in by reason of oversight on the part of the Court, a ground for review of a judgment or an order is made out. This principle has been clearly laid down in the Order XLVII Rule 1(1) of the Code which reads thus:-

“(1) Any person considering himself aggrieved, _

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new



and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.”

23. This view has been reiterated in Federal Court’s decision in the case of **Mt. Jamna Kuer** (supra) and in case of **Kirat Rai** (supra). It is true that it is immaterial whether such error, apparent on the face of the record, is by reason of counsel’s mistakes or an oversight on the part of the Court. A case for review can certainly be made once an error apparent on the face of the record is shown to have occurred and the question as to how the error occurred, becomes irrelevant, as held in the case of **Kirat Rai** (supra).

24. Said decisions in the case of **Mt. Jamna Kuer** (supra) and in case of **Kirat Rai** (supra), have, in my view, no application in the facts and circumstances of the present case, in view of the law laid down by the



Supreme Court in the case of **Amba Bai and others Vs. Gopal and others**, reported in **(2001) 5 SCC 570**. The facts of the case of **Amba Bai** (supra) are somewhat similar to the present case/fact. In that case, a suit for specific performance was filed by the plaintiff against the defendant which was dismissed by the trial court. The plaintiff filed an appeal and the appellate court allowed and decreed the suit. Aggrieved by the appellate court's judgment and decree, the defendant preferred second appeal in the High Court against the decree for specific performance. During the pendency of the second appeal, the plaintiff died and his legal representatives were brought on record as respondents in the second appeal. While the second appeal was pending, the defendant (appellant of the second appeal) died, which fact was not brought to the notice of the Court and the appeal was dismissed by the High Court subsequent to the death of the defendant-appellant. No steps were taken by the legal heirs of the deceased defendant-appellant to have the judgment in the second appeal set aside. A plea was taken that, as the appellant had died prior to the passing of the judgment, the decree and judgment passed against the



dead person was a nullity. The High Court in a revision proceeding instituted against the order passed by the executing court had held that the decree passed in the second appeal was a nullity, the same having been passed against a dead person. Overruling the High Court's view, the Supreme Court, referring to Order XXII Rule 3 of the Code, held in paragraphs 4 to 7 as follows:-

“4. Order 22 Rule 3 of the Civil Procedure Code prescribes the procedure in case of death of one of several plaintiffs or of the sole plaintiff. It states that where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or a sole-surviving plaintiff dies, and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Rule 3(2) Order 22 says that where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be



recovered from the estate of the deceased plaintiff. Rule 11 of Order 22 says that the provisions contained in Order 22 shall be applicable to appeals and so far as the word "plaintiff" is concerned, it shall be held to include an appellant, the word "defendant" shall be held to include respondent and the word "suit" an appeal.

5. Rule 9 Order 22 states about the effect of abatement or dismissal. Rule 9 is to the following effect:-

“9(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal, and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit."

6. The various provisions contained in Order 22, CPC, explain the consequences of death of parties in a civil litigation. If one of the plaintiffs dies and if the cause of action survives his legal representatives have got a right to come on record and to continue the



proceedings. If the sole plaintiff dies and if the legal representatives are not brought on record, the suit will abate and Rule 9 Order 22 CPC specifically prohibits the filing of a fresh suit on the same cause of action. The only remedy available to the legal representatives is to get themselves impleaded and continue the proceedings, if the suit is already not abated, and if abated, they have to file an application to set aside abatement also.

7. In the instant case, deceased Radhu Lal, the second appellant died on 14.12.1990 and his death was not brought to the notice of the Court and the learned Single Judge disposed of the appeal on merits by dismissing the second appeal on 25.3.1991. As the Judgment in the second appeal was passed without the knowledge that the appellant had died, the same being a judgment passed against a dead person is a nullity. When the second appellant Radhu Lal died on 14.12.1990, his legal representatives could have taken steps to get themselves impleaded in the second appeal proceedings and as it was not done, the second appeal should be taken to have abated by operation of law. Therefore, the question that requires to be considered is that when there was abatement of the



second appeal, could there be a merger of the same with the decree passed by the first appellate court?”

25. The Supreme Court dealt elaborately the effect of abatement in the light of its previous decision in case of **Bibi Rahmani Khatoon & Ors. vs Harkoo Gope & Ors.** Reported in **1981 (3) SCC 173**. In case of **Bibi Rahmani Khatoon** (supra), the Supreme Court held in paragraph 10 as follows:-

“10. The concept of abatement is known to civil law. If a party to a proceeding either in the trial court or any appeal or revision dies and the right to sue survives or a claim has to be answered, the heirs and legal representatives of the deceased party would have to be substituted and failure to do so would result in abatement of proceedings. Now, if the party to a suit dies and the abatement takes place, the suit would abate. If a party to an appeal or revision dies and either the appeal or revision abates, it will have no impact on the judgment, decree or order against which the appeal or revision is preferred. In fact, such judgment, decree or order under appeal or revision would become final. Such is not the scheme of



abatement as conceived by s. 4 of the Act. Here, if the abatement as is conceptually understood in the Code of Civil Procedure is imported, it will do irreparable harm. To illustrate, if an appeal abates rendering either the trial court judgment or the judgment in first appeal final and binding, the consolidation authorities would also be bound by it and the party whose appeal or revision abated would lose its chance of persuading the appellate or revisional authority to accept its case which may result in interfering with or setting aside the judgment, order or decree in appeal. Such was not and could not be the intention of s. 4. This becomes manifestly clear from the proviso to clause (c) of s. 4 extracted hereinabove which shows that such abatement shall be without prejudice to the rights of the person affected to agitate the rights or interest in dispute in the suit or proceeding before the appropriate consolidation authorities under and in accordance with the provisions of the Act. No one would, therefore, stand to suffer on account of the abatement because there is a special forum carved out for adjudication of the rights which were involved in proceedings which would abate as a consequence of the notification



under s. 3. If the construction as canvassed for were to be adopted it would result in irreparable harm and would be counter-productive. The consolidation work would be wholly hampered and a party whose appeal is pending would lose the chance of convincing the appellate court which, if successful, would turn the tables against the other party in whose favour the judgment, decree or order would become final on abatement of the appeal. Therefore, the legislature intended that not only the appeal or revision would abate but the judgment, order or decree against which the appeal is pending would also become honest as they would also abate and this would leave consolidation authority free to adjudicate the claims of title or other rights or interest in land involved in consolidation. In our opinion, therefore, the High Court was right in not only holding that the second appeal pending before it abated but also the judgment and decree of the trial court and first appellate court would stand abated along with those proceedings. We reach this conclusion on the language of ss. 3 and 4 and the scheme of the Act but the view which we are taking is also borne out by some decisions though in none of them



this position was directly canvassed.”

26. Answering the question posed in paragraph 7 as quoted above, the Supreme Court in case of **Amba Bai** (supra), ruled in paragraph 14 that failure on the part of the legal heirs of the deceased appellant to get themselves impleaded in the second appeal and pursue the matter further, would not adversely affect the plaintiff decree-holder. The Court held that, in such circumstance, the decree passed by the first appellate Court, must be deemed to have become final. Paragraph 14 of the Supreme Court’s decision in case of **Amba Bai** (supra) being relevant is being quoted herein below:-

“14. In the instant case, there is no question of the application of the doctrine of merger. As the second appellant Radhu Lal died during the pendency of the appeal, and in the absence of his legal heirs having taken any steps to prosecute the second appeal, the decree passed by the first appellate court must be deemed to have become final. By virtue of the order passed by the first appellate court, the plaintiff’s suit for specific performance was decreed. Failure on



the part of the legal heirs of Radhu Lal to get themselves impleaded in the second appeal and pursue the matter further shall not adversely affect the plaintiff decree-holder as it would be against the mandate of Rule 9 Order 22 of the Code of Civil Procedure. The impugned order is, therefore, not sustainable in law and the same is set aside and the appeal is allowed. The executing court may proceed with the execution proceedings. Parties to bear their respective costs.”

27. Even if the petitioners’ case that the second appellant had died on 09.01.2008, is accepted, the second appeal stood abated by operation of law. Apparently, neither any steps were taken by legal representatives for their substitution or for setting aside of the abatement.

28. In view of law laid down by the Supreme Court in clear terms in case of **Bibi Rahmani Khatoon** (supra) and **Amba Bai** (supra), I do not have any hesitation in coming to a definite conclusion that when the second appeal had abated as the legal representatives of the appellant did not take any step to get themselves substituted in place of the appellant, the decree which was



passed by the first appellate court, acquired finality. In that background, no fruitful purpose could be served by entertaining Civil Review No. 105 of 2016, filed against the judgment and order of this Court dated 04.03.2010, passed in S.A. No. 126 of 2002.

29. Unfortunately, despite knowing that S.A. No. 159 of 2002, was dismissed on 27.01.2005 itself when the appellant was alive, the petitioners have ventured to file review of the order, dated 05.03.2010, passed in the said case, which merely records the factum of dismissal of second appeal on 27.01.2005. The petitioners were also knowing, at the time of filing of the review applications that in the background of their own plea of death of the appellant on 19.01.2010, S.A. No. 126 of 2002 had abated. It seems that filing of the present review applications is nothing but an attempt to obstruct the execution proceeding of the final decree and abuse of the process of the Court. The Court strongly deprecates the conduct of the petitioners.

30. I was considering the imposition of exemplary cost for filing these civil review applications, which apparently lack *bona fide*. However, I have restrained



myself from doing so, since I am dismissing these petitions without noticing the contesting respondents.

31. These review applications are, accordingly, dismissed.

(Chakradhari Sharan Singh, J)

HR/Ashish

AFR/NAFR	AFR
CAV DATE	10.05.2018
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Transmission Date	

