

HIGH COURT OF CHHATTISGARH, BILASPUR

MCC No. 683 of 2018

1. Nankusiya Bai (Now Dead) Nil
 - 1.1 - (A). Ramkumar S/o Gopal Prasad Aged About 60 Years R/o Village - Sirgiti, Tahsil And District Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh
2. Gopal Prasad (Dead) S/o Puri Ram, Both Were Wife And Husband Through Proposed Appellants -
 - 2.1 - (A). Ramkumar S/o Gopal Prasad Aged About 60 Years R/o Village Sirgiti, Tahsil And District Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh

--- **Petitioner**

Versus

1. Bodhram S/o Late Jiyala Lohar Aged About 40 Years R/o Village Sirgiti, Tahsil And District Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh
2. Jagdish Prasad (Dead) S/o Jiyalal , Through Proposed Respondents Legal Heirs
 - 2.1 - (A). Gurucharan Vishvakarma S/o Late Jagdish Prasad Aged About 48 Years
 - 2.2 - (B). Sandeep Vishvakarma S/o Late Jagdish Prasad Aged About 34 Years
 - 2.3 - (C). Manish Vishvakarma S/o Late Jagdish Prasad Aged About 32 Years
 - 2.4 - (D). Smt. Vedmati @ Bedin Bai W/o Late Jagdish Prasad Aged About 53 Years
 - 2.5 - (E). Suraj Vishvakarma S/o Late Jagdish Prasad Aged About 22 Years
3. Ramsharan S/o Gopal Prasad Aged About 52 Years R/o Village - P.S. Sirgiti, Tahsil And District Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh
4. Gaurishankar S/o Gopal Prasad Aged About 46 Years R/o Village - P.S. Sirgiti, Tahsil And District Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh
5. Giraja Shankar S/o Gopal Prasad Aged About 40 Years R/o Village - P.S. Sirgiti, Tahsil And District Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh
6. Draupati Bai W/o Tijau Ram Vishvakarma Aged About 62 Years R/o Near Dipupara Talab, Bilaspur, Tahsil And District Bilaspur Chhattisgarh. (Note The Respondent No. 3 To 6 Are Legal Heirs Of The Dead Appellants / Applicants And At This Stage They Have Not Interested The Proceed The Case, Therefore The Present Proposed Legal Heirs Of The Appellants Are Made A Party Against As A Formal.), District : Bilaspur, Chhattisgarh

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For the applicant	:	Mr. Bharat Rajput, Advocate.
For the Respondent	:	Mr. Vikram Dixit, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order on Board

11.12.2018

1. The present petition (MCC) is to set aside the peremptory order passed on 09.02.2012 in Second Appeal No.402 of 1997 as also to set aside the abatement of second appeal.
2. When the second appeal was taken up on 09.02.2012, learned counsel appeared on behalf of the appellant and submitted that he would be filing Vakalatnama within a week in absence of filing such Vakalatnama the Court passed peremptory order for automatic dismissal of the appeal. Subsequently the MCC has been filed on 15.09.2018. Along with M.C.C., the application u/s 5 of the Indian Limitation Act has been filed.
3. Learned counsel for the applicant would submit that the peremptory order though was passed on 09.02.2012 but much before that date both the appellants had expired which would be evident from the death certificates of Gopal Prasad who died on 28.06.2003 and Nankusia Bai who died on 18.07.2006. He submits that since the certified copy of peremptory order is annexed to MCC and it shows that the second appeal automatically stood dismissed, therefore, unless and until the MCC is restored, the applicant could not have preferred any application to set aside the abatement. Consequently, the Second Appeal No. 402/1997 be restored. He referred to the documents and the order of this Court and would submit that under the circumstances unless the second appeal is restored, the application for abatement could not have been made.

4. Counsel for the respondent opposes the argument and submits that the application itself is misconceived and no ground has been made to condone the delay u/s 5 of the Limitation Act. It is submitted that in execution Court, the applicant appeared on 15.09.2016, thereafter also did not file any application to set aside the abatement and as such unexplained delay exists.
5. Perused the record and documents filed along with this petition. The order sheet dated 09.02.2012 would show that a peremptory order was passed by this Court in Second Appeal wherein counsel appeared and submitted that he would be filing power on behalf of the appellants. The Court further directed that in absence of filing of power, the appeal shall automatically stand dismissed. Admittedly, thereafter the power has not been filed, automatically the dismissal was followed.
6. The order sheet would show that the MCC was filed on 15.09.2018. Along-with M.C.C., two death certificates have also been filed. One is of appellant no.2 Gopal who is said to have died on 18.06.2003 and appellant No.2 Nankusia Bai is said to have died on 18.07.2006. Therefore, when the peremptory order in second appeal was passed on 09.02.2012, the application to bring the legal heirs have not been filed. The second appeal already stood abated as abatement is effect of law and no judicial order is required to be passed. Subsequently after dismissal of the second appeal, the applicant appeared before the executing court and thereafter on 15.09.2018, this MCC has been filed to restore the original second appeal No. 402/1997.

7. The records would show that since both the appellants in S.A.No.1997 have died, one in 2003 and the other appellant in 2006 and the application to bring the legal heirs was not filed within a period of 90 days, the appeal already stood abated. Consequently the order dated 09.02.2012 loses its efficacy as on that date and the second appeal already stood abated by effect of law. The records would further show that on 15.09.2016 the applicant appeared before the executing court but even thereafter the application to set aside the abatement as also the application u/s 5 to condone the delay has not been preferred which eventually was made on 15.09.2018, therefore, the reason should have been explained that why such long delay occurred from September 2003 against the abatement of appeal of appellant No.2 Gopal and from 2006 against the abatement of appeal of Nankusia Bai. Both the appellants have expired much before the peremptory order passed on 09.02.2012 in Second Appeal. Apart from non-explanation of such long delay, the fact still remains that even after appearance in execution case on 15.09.2016, no such petition has been preferred, therefore, the application to condone the delay is devoid of merits.
8. In view of the above discussion, I am not inclined to allow this petition. Accordingly, M.C.C., is dismissed.

Sd/-
GOUTAM BHADURI
JUDGE