

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.96 of 1992

1. Jagernath Prasad Rai son of Rameshwar Rai
2. Bhairo Prasad Rai son of Ramyad Rai, resident of village Dipahi Darharwha, P.S. Chiraia,
District East Champaran Appellant/s

Versus

1. Most. Kalwa Yadav Debi widow of Janak Rai
2. Jangli Lal Roy Yadav
3. Brahmdeo Rai Yadav
4. Balkrishna Rai Yadav
5. Raj Mangal Prasad Yadav
6. Awadhesh Kumar Yadav
All sons of Late Janak Rai and resident of Tangraha, P.S. Gour, District Rentahat Nepal Terai
at present resident of village Dipahi Dharwara, P.S. Chirai, District- East Champaran.
... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Chandradeep Kumar, Advocate
For the Respondent/s : Mr. Anshay Bahadur Mathur, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

C.A.V. JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA MISHRA)

Date : 14-02-2019

The litigation which has been lingering before this Court since 1992 in the shape of a Letters Patent Appeal, has been placed before us under the heading “Orders on Petition”.

2. A substitution petition bearing Interlocutory Application No. 4538 of 2018 along with the limitation petition being Interlocutory Application No. 6101 of 2018 as well as Interlocutory Application No. 8902 of 2018 came for consideration before us.

3. The aforementioned appeal was filed by the original appellants against the judgment in F.A. No. 89 of 1975 passed on 04.09.1992 reversing the judgment and decree passed



by Shri R.N. Singh, Third Additional Sub Judge, Motihari in Title Suit No. 100/33 of 1971/72. The aforementioned appeal was admitted on 20.01.1993. Notices were issued to the respondents but for want of filing registered cover on respondents, the appeal stood dismissed for default. However, the same was restored to its original file on 23.12.1993 vide order passed in M.J.C. No. 1766 of 1993. The appeal again stood dismissed for default for non-compliance of order dated 13.08.1999 and, thereafter, a fresh *Vakalatnama* was filed on behalf of the appellants, which was kept on record in M.J.C. No. 3838 of 2013. Ultimately, the Letters Patent Appeal was again restored to its original file vide order dated 26.02.2018 passed in M.J.C. No. 3838 of 2013. When the matter was again placed for “orders” before the Bench, again a peremptory order was passed for filing the Appellants’ list as pointed out earlier by the office in the said L.P.A.

4. Soon thereafter, Interlocutory Application No. 4538 of 2018 under Order 22 Rule 3 of the Code of Civil Procedure has been filed for substituting the legal heirs of Appellant No. 1, who is said to have died. The said application was placed before a Bench, wherein vide order dated 19.07.2018, it was directed that in view of the filing of



supplementary affidavit which reports the death of the concerned appellant no. 1 on 12.04.1996, the prayer for substitution is barred by limitation. However, the Court granted four weeks' time enabling the appellants to file the limitation petition in support of the substitution petition. Thus, a limitation petition bearing Interlocutory Application No. 6101 of 2018 was filed with a prayer for condonation of delay of 22 years 26 days in filing the substitution petition, coupled with the prayer for setting aside the abatement.

5. It was contented that the appellants were not aware of the legal provisions regarding substitution and the other ground taken was that the learned counsel of L.P.A. No. 96 of 1992 had not given the advice to file substitution petition after the death of the appellant no. 1 and, therefore, on account of want of advice of the counsel, neither the substitution petition nor a prayer for condonation of delay could be filed earlier. It was only on 22.12.2017 that the present learned counsel filed a *vakalatnama* along with a no objection from the counsel in L.P.A. No. 96 of 1992 and after inspecting the file, it came to be known that no substitution petition has been filed after the death of the appellant no. 1. The appellants further contended in their application that it was only thereafter, the Appellant filed



substitution petition on the learned counsel's advice. Therefore, there has not been any wilful, negligence or laches on the part of the applicants. It was further submitted that heirs of the deceased-appellant no. 1 are farmers and illiterate persons and, therefore, in the interest of justice, the delay may be condoned and the legal heirs of deceased-appellant no. 1 be substituted. It is important to indicate here that the substitution petition filed earlier did not contain the date of death of the Appellant No. 1 and thus, as directed, a supplementary affidavit was filed indicating the date of death as 12.04.1996.

6. A counter affidavit has been filed on behalf of the respondent nos. 4 and 6 in Interlocutory Application No. 4538 of 2018 and Interlocutory Application No. 6101 of 2018 in which it was pointed out that the date of death stated in the supplementary affidavit is wrong. It appears that after several adjournments, the matter came up before this Court.

7. Another application bearing Interlocutory Application No. 8902 of 2018 has now been filed. The said application in support of the earlier application is for amendment in the limitation petition wherein they have sought to rectify the Interlocutory Application No. 6101 of 2018 by stating that the delay of 23 years 4 months and 6 days be



condoned taking the date of death of the appellant no. 1 to be 22.04.1995 instead of 12.04.1996. The said amendment seeks to explain the earlier wrong statement made in Interlocutory Application No. 4538 of 2018 wherein the date of death had been described to be 12.04.1996 which was supported by a death certificate issued by the *Sarpanch* of Gram Kacheri, Dipahi, Dharharwa. It was submitted that the date 12.04.1996 has been recorded in the said certificate on the basis of the memory of Premchand Prasad, who is son of appellant no. 1. It was further submitted that the appellants were not aware of the legal proceedings and since the learned counsel of LPA No. 96 of 1992 did not give advice, the substitution petition could not be filed in time. The said petition was filed only when the present learned counsel took no objection from the previous learned counsel, who inspected the file and has advised the sons of the appellant no. 1 to file a substitution petition. It was thus, submitted that the delay, if any, was not on account of any wilful negligence and laches on the part of the appellants. Thus, it was prayed that the date of death may be corrected and the said amendment petition be allowed and after condoning the delay of 23 years, 4 months and 6 days, the substitution petition may also be allowed.



8. Learned counsel for the respondents has resisted the aforementioned three petitions by filing a counter affidavit. The respondents contended that the Appellant no. 1, namely, Jagernath Prasad Rai died on 22.04.1995 at a prior period of more than 23 years and the appellants failed to take any step for substitution of his legal heirs. As such, the present appeal abated as a whole. Further, in the absence of any reference to the provision of law for setting aside the abatement, the application for substitution having been filed by one of the legal heirs along with limitation petition, the same is fit to be rejected. It was further contended that the substitution petition dated 25.06.2018, originally did not declare the date of death of the appellant no. 1 with the motive of suppressing the extent of delay of more than 22 years in filing of the substitution petition. However, when this fact was noticed by the Hon'ble Court, the substitution-petitioner provided the date of death as 12.04.1996 through a supplementary affidavit dated 12.07.2018 but again did not make a prayer for condonation of delay in terms of the provisions of the Limitation Act. Such limitation petition was filed only on 19.07.2018 showing delay of about 22 years and 26 days but the substitution-petitioner has failed to ascribe sufficient cause for such delay. His explanation to the effect that



he was ill advised by his counsel, does not appear to be satisfactory or convincing and the act of change of counsel is nothing but a clever device to evoke the sympathy of this Court. The appellants/substitution-petitioners are also silent on the fact as to whether he had communicated the factum of the death of appellant no. 1, father of these petitioners, to the earlier counsel so as to prompt him to advice accordingly. Thus, the appellants have failed miserably in showing sufficient cause for not filing the application for the delay in filing the substitution petition after a period of more than 23 years. They, thus, pray that the appellants should not be permitted at this stage to deprive the respondents of the right which has accrued to them since long, i.e. for a period of over 23 years. It was submitted in view of the fact that there is no prayer for setting aside the abatement with the correct provisions of law, the limitation petition as well as the application for substitution of the legal heirs or deceased-appellant no. 1 is not maintainable and the Court may not grant the prayers as sought for in the aforementioned interlocutory applications.

9. Learned counsel for the respondents contended that it is settled proposition of law that if no substitution petition is filed within time, abatement sets in automatically without any



judicial order. In the present case, the appeal has abated more than 22 years prior to the filing of the substitution petition and no specific prayer with provision of law for setting aside abatement has been made by the appellants and, as such, the present application is devoid of any merit and deserves to be dismissed. It was also pointed out that apart from this other respondents being respondent no. 2 Jangli Lal Roy, respondent no. 3, Brahmdeo Rai Yadav and respondent no. 5, Raj Mangal Prasad Yadav have died but the appellants have not taken any steps for substituting their legal heirs with the sole intention of delaying the disposal of the present appeal. Learned counsel further drew the attention of this Court to the misleading statement made in the substitution petition by pointing out that the Appellant no. 1, Jagernath Rai died on 22.04.1995 at village Dipahi Darharwha P.S. & Circle Chiraia District – East Champaran and to this effect brought on record a Death Certificate No. 024963 dated 08.05.1995 issued by the Competent Authority of the Government of Bihar. It was pointed out that the deponent of the substitution-petitioners had wrongly stated the date of death as 20.12.1996 and had placed on record a manufactured and forged death certificate of Gram Kacheri, Dipahi Darharwha dated 10.07.2018. It was thus, urged



that the appellant-substitution petitioners were liable to be prosecuted for producing manufactured and forged documents before this Court. On this ground alone, the applications were fit to be dismissed. It was further submitted that they have sought to saddle the entire blame of the delay on the earlier counsel and have leveled allegation of ill-advice whereas they have failed to state as to when the factum of death of their father was communicated to the earlier counsel. Thus, the delay in filing the substitution petition is fit to be dismissed for want of sufficient cause and the limitation petition along with the substitution petition be rejected.

10. Learned counsel for the respondents have relied on a judgement of the Apex Court in the case of **Shanti Devi and Ors Versus Kaushaliya Devi reported in (2016) 16 SCC 565** wherein the court declined to entertain the delay of more than 11 years as it would amount to an abuse of process of law.

Paragraph 14 of the judgment reads as follows:-

“Having gone through the papers on record, as discussed above, and keeping in mind the spirit of the provision contained in Rule 3 of Order 22 CPC read with Article 120 of the Schedule of the Limitation Act, 1963, in our opinion the first appellate court and the High Court have committed grave error in law in condonation of delay of more than eleven



years in moving substitution application, and setting aside the abatement in the present case, particularly when the respondent daughter of the deceased had full knowledge of death of her father and also of the litigation pending before the first appellate court. Delay cannot be condoned on insufficient grounds and by abusing the process of law. We do not find that any sufficient reason was shown by the respondent before the courts below to get huge delay of eleven years condoned, for setting aside abatement, and her substitution.”

11. We have heard learned counsel for the parties at length and perused the documents on record. The entire exercise by the proposed heirs of the appellant no. 1, appears to be an exercise in futility, not only for the aforesaid reasons but also in view of the settled provisions of law. In this context, it would be appropriate to traverse through the provision of Order 22 Rule 3 of the CPC read with Article 120 of the Limitation Act, 1963. Order 22 Rule 3 is quoted hereunder for ready reference.

“Order 22 Rule 3. Procedure in case of death of one of several plaintiff

(1) 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 sole surviving plaintiff dies and the right to the 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.

(2) 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.”

12. A bare perusal of Clause 2 of Rule 3 indicates that within the time frame fixed under law, no application is made under Sub-Rule 1, the suit had abated so far as the deceased-plaintiff is concerned.

13. So far as the limitation is concerned, Article 120 of the schedule of the Limitation Act provides a period of 90 days, for moving the substitution application. Sub-Rule 3 of Rule 9 provides that the provision of Section 5 of the limitation Act shall apply to sub Rule 2, wherein a person claiming to be a legal representative of the deceased-plaintiff has a right to apply for setting aside the abatement, but was prevented by any sufficient cause from continuing the suit. Rule 11 or 22 provides that in the application of the said order to appeals, the word “plaintiff” shall be held to include appellant.

14. In the wake of such a situation, we have been called upon to decide as to whether the proposed substitution-petitioners have been able to assign sufficient reasons for



condoning the delay in filing the present substitution petition.

15. A bare perusal of the substitution petition bearing Interlocutory Application No. 4538 of 2018 appears to be shoddy exercise, inasmuch as even the date of death of the father of the petitioners has not been brought on record. It was only when the Court commented on it, that a supplementary affidavit was filed giving the date of death to be 12.04.1996. The said statement was supported by a fraudulent/concocted certificate dated 10.07.2018 from the Gram Kacheri, Dipahi Darharwha signed by one Sarpanch. In the said certificate, the date of death has been stated to be 12.04.1996. At this stage, there was no prayer for condonation of delay by the substitution-petitioners. A limitation petition under Section 5 of the Limitation Act was filed thereafter wherein the cause for the delay has been attributed to the negligence and lack of interest on the part of the learned counsel, as neither were they aware of the legal proceedings nor did the learned counsel of the LPA No. 96 of 1992 advise the substitution-petitioners after the death of the appellant. According to them, it was for this reason that no substitution petition could be filed earlier. It was however, not contended as to whether these appellants had communicated to the concerned counsel, the factum of death of their father. It was



for such reason, according to the petitioners that they contacted another counsel, who inspected the file and it was only on his advice that the substitution petition came to be filed. No statement has been made as to how and when they come to know of the pending litigation.

16. Having perused the entire facts and circumstances and also after considering the fact that the respondents herein have brought on record the correct death certificate issued by the appropriate authority indicating the date of death to be 22.04.1995 we are not inclined to rely and accept the submissions, advanced on behalf of the appellants. Their attempt to explain the delay is wholly unsatisfactory for the reasons that it is ultimately not believable that the respondents would not have taken steps for implementation of the decree in the interregnum. It is also improbable to think that after death of the father the heirs of deceased-appellant no. 1, would be oblivious of the changed situation within his entire family set up, as since long the right had accrued in favour of the decree holders. The attempt by the substitution-petitioners to saddle the blame for the delay on the shoulders of the counsel for the appellants is also fit to be rejected for the reasons that they have never approached the counsel for any reason after the death of



their father.

17. Thus, in the considered opinion, we are of the view that since the rights have now accrued in favour of the respondents and the suit/Appeal having abated as against Appellant No. 1 way back in the year 1995 itself, such explanations cannot be accepted to the prejudice of the respondents. Further to condone the delay of 23 years is beyond the legal ambit of the provisions of law as in the considered opinion of this Court, it is clear that the law clearly enunciates to the contrary and the explanation, offered by the proposed heirs, is wholly illusory in nature and, is not substantiated by cogent and valid reasons so as to evoke this Court to turn a blind eye to the willful and deliberate laches by the appellants. Accordingly, for the aforesaid reason, we are not inclined to condone the delay in filing the substitution petition, moreso, because the suit has now abated in the light of the provision of the law which have been mentioned herein above. The interlocutory applications thus, stands dismissed and the appeal abates in so far as it relates to the Appellant no. 1.

18. Having come to the conclusion regarding abatement of the Appeal with regard to the Appellant No. 1, the question to be determined further would be whether the entire



appeal has abated and has been rendered infructuous as regards Appellant No. 2 also. In this context it would be appropriate to take a glance at the provisions of Order 22 Rule 4 which reads as hereinafter:-

“Procedure in case of death of one of several defendants or of sole defendant. - (1)

Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

3. Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

4. The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where -

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution



of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963),, and the suit has, in consequence, abated, and
(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act.”

19. The effect of non-substitution of the legal representatives of the deceased- appellant and their relationship vis-a-vis the surviving appellants has been settled wayback in the case of **Rameshwar Prasad & Ors. Vs. Shambhari Lal Jagannath and Anr. Reported in 1963 SC page 1901** which reads as hereunder. Paragraph -18 of the said judgment is relevant in the present context is set out herein below for determining the aforementioned question.

“Paragraph -18 – When the legal representatives of the deceased appellant and the surviving appellants were negligent in not taking steps for substitution, the court is not to exercise its discretion in favour of such a party. The discretionary power cannot be exercised to nullify



the effect of the abatement of appeal so far as Kedar Nath is concerned. In fact, such an exercise of power will lead to the existence of two contradictory decrees between the heirs of Kedar Nath and the respondents, one passed by the appellate court and another to the contrary effect by the Court below which has attained finality consequent on the abatement of the appeal in so far as they are concerned. This is always avoided.”

20. There is catena of judgment of this Court also in which the case of Rameshwar Prasad (supra) has been followed particularly. The Division Bench judgment of this Court in the case of **Mahabir Mistry & Ors. Vs. Lachhmini Devi & Ors.** reported in **AIR 1975 Patna 279** where their Lordships held at paragraph Nos. 15 and 16 as follows:-

Paragraph – 15. Learned counsel for the respondents has drawn our attention to several other decisions of our Court in Dhanuka Singh v. Saudagar Singh (AIR 1955 Pat 240) Janak Sahu v. Anant Jha, (AIR 1958 Pat 8), Deo Narain Singh v. Bibi Khatoon (AIR 1949 Pat 401) and Prabhlad Das v. Dasarathi Satpathi, (AIR 1940 Pat 117). The question in most of these cases was whether the whole appeal had abated in view of its abatement in respect of some of the respondents, and, as I have said earlier, the question before us is not whether the appeal has ‘abated’ as a whole, but the question is whether the appeal is now competent and can be heard in view of the existence of a decree already enuring to the benefit of defendants-respondents 26 to 28. It will not, therefore, be necessary to refer to these cases at any length.



16. In view of my finding that there is a likelihood of a decree being passed which would be in conflict with the decree already passed in favour of respondents 26 to 18 and this being not open to us to do, the present appeal must be held to be incompetent. The appeal is accordingly, dismissed. In the circumstances, there will be no order for costs”.

21. Having considered the aforementioned provisions, we also of the considered opinion that the appeal having abated with regard to the Appellant No. 1, the appeal as regards other appellants shall also be rendered incompetent and the Letters Patent Appeal which has been pending is now consigned to records.

22. The Letters Patent Appeal is thus, disposed of.

(Anjana Mishra, J)

Amreshwar Pratap Sahi, CJ : I agree.

(Amreshwar Kumar Sahi , CJ)

Jagdish/-

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