

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.461 of 2017**

Kaushlya Devi, Wife of late Adya Prasad, resident of Village Mangalpur
Gudariya, Police Station- Nautan, District- West Champaran.

... .. Petitioner/s

Versus

1. Rameshwar Singh, Son of late Dhenukha Singh, resident of Village-
Bariyarpur, P.O.- Teluwan, Police Station- Nautan, District- West
Champaran.
2. Anjani Prasad Shrivastava @ Raju Prasad, Son of late Adya Prasad,
3. Deepak Prasad Shrivastava, Son of late Adya Prasad,
4. Rupak Prasad Shrivastava, Son of Late Adya Prasad.
5. Rajeev Prasad Shrivastava, Son of Late Adya Prasad, 2 to 6 are residents of
Village Mangalpur Gudariya, Police Station- Nautan, District- West
Champaran.
6. Smt. Ibha Devi, Wife of Shri Bimlesh Prasad Verma, daughter of Shri
Mithilesh Prasad Verma, resident of Village Mangalpur Gudariya, Police
Station- Nautan, District- West Champaran.

... .. Respondent/s

Appearance :

For the Petitioner/s :	Mr. Bashishtha Narayan Mishra, Advocate
For the Respondent no.1 :	Mr. Shashank Shekhar Sinha, Advocate
	Mr. Ajay Kumar Singh, Advocate

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT**

Date : 02-09-2024

Heard learned counsel for the petitioner as well as
learned counsel for respondent no.1 on the point of admission
and I intend to dispose of the present petition at the stage of
admission itself.

2. The instant petition has been filed by the
petitioner/defendant no.1 under Article 227 of the Constitution
of India for setting aside the order dated 01.10.2016 passed by
the learned Sub-Judge-III, Bettiah, West Champaran in Title Suit



No. 166 of 2001 whereby and whereunder the petition dated 21.05.2015 filed by the plaintiff/respondent 1st set under Order XXII Rule 4 and Section 151 of the Code of Civil Procedure (hereinafter referred to as 'the Code') has been allowed.

3. Learned counsel for the petitioner submits that the impugned order is bad in the eyes of law for the reason that no petition was filed by the plaintiff for setting aside the abatement against defendant no.2 who died on 11.04.2013 and no step was taken for substitution of his legal heirs till 20.05.2015. Learned counsel further submits that the learned trial court has not taken note of the fact that the suit has already abated against defendant no.2 and unless the abatement was set aside, no substitution could be allowed. Moreover, the substitution petition was also filed after delay. Learned counsel further submits that petitioner is defendant no.1 and the respondent no.1 is plaintiff in Title Suit No. 166 of 2001, respectively. Learned counsel further submits that the impugned order is not in accordance with law for the reason that suit has abated against defendant no.2 and no step was taken by the plaintiff for setting aside the abatement. Learned counsel pointed out that under Order XXII Rule 9 (1) of the Code, where a suit abates or is dismissed, no fresh suit shall be brought on the same cause of action. This order



provides a valuable right to a party against whom abatement has taken place due to lapse of time. Thereafter, Order XXII Rule 9 (2) of the Code provides that abatement could be set aside on proper application being moved on behalf of the plaintiff and Section 5 of the Indian Limitation Act would be applicable for condonation of delay. Thus, the learned counsel submits that in the light of express provision of law, the impugned order is not sustainable and the same needs to be set aside.

4. On the other hand, learned counsel appearing on behalf of respondent no.1 submits that there is no infirmity in the impugned order and the same does not need any interference. Learned counsel further submits that once the substitution petition has been allowed, there is no need to set aside the abatement in specific terms by the learned trial court and referred to the decision of the Hon'ble Supreme Court in the case of *Mithailal Dalsangar Singh & Ors. Vs. Annabai Devram Kini & Ors.*, reported in (2003) 10 SCC 691, wherein the Hon'ble Supreme Court held that prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief for setting aside abatement though not asked for in so many words, is in effect being actually asked for and is necessarily implied. The Hon'ble



Supreme Court further held that too technical or pedantic approach in such cases is not called for. Learned counsel further submits that the facts of the present case are similar to the matter which reached before the Hon'ble Supreme Court as in that matter as well the learned trial court found sufficient cause for condonation of delay in moving the application for substitution and the Hon'ble Supreme Court held that the Division Bench was not justified in interfering with the said order.

5. I have given my thoughtful consideration to the rival submissions of the parties and the facts and circumstances of the case. It is trite to say that the procedure of law is hand maid of the justice and the approach of the Court should be towards the determination of the controversy between the parties and bring an end to the dispute between the parties. Admittedly, in the present, there are other defendants as well and if right to sue survives, naturally the suit would not abate as a whole. Order XXII Rule 4(1) of the Code provides if right to sue survives against other defendants, the suit would not abate as a whole. The Hon'ble Supreme Court, giving a liberal interpretation to the provisions of Order XXII Rule 9 of the Code in the case of *Mithailal Dalsangar Singh & Ors.* (supra)



has held that allowing an application for substitution impliedly means setting aside the abatement which might have set in the suit. Considering the aforesaid two aspects, I do not think there is any infirmity in the impugned order dated 01.10.2016 passed by the learned Sub-Judge-III, Bettiah, West Champaran in Title Suit No. 166 of 2001 and the same is affirmed.

6. Accordingly, the instant civil miscellaneous petition stands dismissed.

7. Since it has also been taken notice by this Court that the suit has been filed in the year 2001 and since then the matter has been pending and, therefore, the learned trail court is directed to take up the matter considering its antiquity and try to dispose of the same preferably within a period of one year from the date of receipt/production of a copy of this order.

(Arun Kumar Jha, J)

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AFR/NAFR	NAFR
CAV DATE	NA
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Transmission Date	NA

