

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.38 of 1989

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1. Ramadhar Dusadh Son of Late Kapil Dusadh Resident of Village- Bishunpur, Dumaria, P.S.- Koilwar, District- Bhojpur.
 2. Ashok Kumar, Son of Ramadhar Dusadh Resident of Village- Bishunpur, Dumaria, P.S.- Koilwar, District- Bhojpur.
 3. Sarbjit Dusadh, Son of Ramadhar Dusadh Resident of Village- Bishunpur, Dumaria, P.S.- Koilwar, District- Bhojpur.

... .. Appellant/s

Versus

1. Awadhesh Dusadh Son of Late Babu Lal Dusadh Resident of Village- Bishunpura, Dumaria, P.S.- Koilwar, District- Bhojpur.
2. Ramjhari Dusadhin, W/o Late Babu Lal Dusadh Resident of Village- Bishunpura, Dumaria, P.S.- Koilwar, District- Bhojpur.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Gopal Govind Mishra, Adv.

For the Respondent/s :

CORAM: HONOURABLE MR. JUSTICE DR. ANSHUMAN

ORAL ORDER

17 23-09-2024

The present Second Appeal No.38 of 1989 has been preferred against the judgment and decree dated 17.08.1988 and 02.09.1988 respectively, passed by Sri Tarkeshwar Prasad, 1st Additional District Judge, Arrah in Title Appeal No.50 of 1981 & Title Appeal No.51 of 1981, by which he has confirmed the judgment and decree dated 24.03.1981 and 02.04.1981 respectively, passed by Sri Braj Kishore Sinha, 3rd Munsif, Arrah, District- Bhojpur in Title Suit No.07 of 1971 & Title Suit No.203 of 1975.

2. This second appeal has arisen against the judgment of affirmance. It transpires to this Court from the record that *vide* order dated 24.03.1981, two Title Suits namely, Title Suit No.07 of 1971 & Title Suit No. 203 of 1975 have been decided



by common judgment. Similarly, by common judgment dated 17.08.1988, Title Appeal No.50 of 1981 and Title Appeal No.51 of 1981 have been decided. Against Title Suit no.07 of 1971 & Title Appeal No.50 of 1981, present second appeal has been filed, whereas, from Title Suit No.203 of 1975 and Title Appeal No.51 of 1981, Second Appeal No.37 of 1989 has been filed. From the record, it transpires that the said Second Appeal No. 37 of 1989 has been dismissed for default *vide* order dated 26.06.2006.

3. Mr. Gopal Govind Mishra, Advocate appearing on behalf of appellant no.2 submits that *vide* order dated 01.04.2024, notices were issued to the appellants as well as to the respondents under both process and notices of appellant nos.2 and 3 were validly served. Notice of appellant no.1 has been received by his *karinda*, who is appellant no.3 in this appeal. But, postal peon acknowledged that respondent nos.1 and 2 have already died.

4. Today, at the time of hearing, Learned Counsel for the appellants No.2 submits that interest of all the appellants are common but, separate *Vakalatnama* has not been provided to him by appellant no.2 for other appellants. But he is ready to defend the interest of all the appellants as their interest are common in the present Second Appeal No.38 of 1989. Counsel



also submits that substantial question of law has already been formulated in this second appeal *vide* order dated 07.04.1993. Counsel further submits that the present Second Appeal No.38 of 1989 was analogous with Second Appeal No.37 of 1989 but the said Second Appeal No.37 of 1989 has been dismissed for default *vide* order dated 26.06.2006.

5. Learned Counsel appearing on behalf of appellant no.2 further submits that *vide* order No.16 dated 20.08.2024, opportunity was granted to the appellants to file application for substitution as well as a petition under Order XXII Rule 10A of the Code of Civil Procedure, 1908. But counsel submits that his client has provided *Vakalatnama* only and thereafter, he has not turned up in this appeal even after repeated information to his client, as his legal responsibility. He is present before this Court to assist on the point of law. Counsel further submits that in case of ***Gurnam Singh (Dead) through Legal Representatives & Ors. Vs. Gurbachan Kaur (Dead) by Legal Representatives*** reported in ***(2017) AIR (SC) 2419; (2017) 13 SCC 414; (2017) 3 SCR 901***, where such situation has been dealt and it has been held that in such situation, no order could be passed on merit save and except that appeal abated against both the respondents. Therefore, there is no need of pursuance in this matter.

6. After hearing the argument of Counsel for appellant



no.2, it is relevant to quote paragraph nos.14 to 23 of the said judgment i.e. ***Gurnam Singh (Dead) through Legal Representatives & Ors. Vs. Gurbachan Kaur (Dead) by Legal Representatives (supra)*** which is quoted as under:-

“14. The short question, which arises for consideration in this appeal, is whether the impugned order allowing the plaintiff's second appeal is legally sustainable in law? In other words, the question is whether the High Court had the jurisdiction to decide the second appeal when the appellant and 2 respondents had expired during the pendency of appeal and their legal representatives were not brought on record?

*15. In a leading case of this Court in **Kiran Singh & Others vs. Chaman Paswan & Others (AIR 1954 SC310)**, the learned Judge Venkatarama Ayyar speaking for the Bench in his distinctive style of writing laid down the following principle of law being fundamental in nature:-*

"It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or



relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

16. The question, therefore, is whether the impugned judgment/order is a nullity because it was passed by the High Court in favour of and also against the dead persons. In our considered opinion, it is a nullity. The reasons are not far to seek.

17. It is not in dispute that the appellant and the two respondents expired during the pendency of the second appeal. It is also not in dispute that no steps were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved to file an application under Order 22 Rules 3 and 4 of the Code of Civil Procedure, 1908 (for short, 'the Code') for bringing their names on record in place of the dead persons to enable them to continue the lis.

18. The law on the point is well settled. On the death of a party to the appeal, if



no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated".

19. Order 22 Rule 3(2) which applies in the case of the death of plaintiff/appellant and Order 22 Rule 4(3) which applies in the case of defendant/respondent provides the consequences for not filing the application for substitution of legal representatives by the parties concerned within the time prescribed. These provisions read as under:-

Order 22 Rule 3(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."

Order 22 Rule 4(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."

20. In the case at hand, both the aforementioned provisions came in operation because the appellant and the two respondents expired during the pendency of second appeal and no application was filed to bring their legal representatives on record. As held above, the legal effect of the non-compliance of Rules 3(2) and 4(3) of Order 22, therefore, came into operation resulting in dismissal of second appeal as abated on the expiry of 90 days from 10.05.1994, i.e., on 10.08.1994. The High Court, therefore, ceased to have jurisdiction to decide the second appeal which stood already dismissed on 10.08.1994. Indeed, there was no pending appeal on and after 10.08.1994.

21. In our considered view, the appeal could be revived for hearing only when firstly, the proposed legal representatives of the deceased persons had filed an application for substitution of their names and secondly, they had



applied for setting aside of the abatement under Order 22 Rule 9 of the Code and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the substitution application under Order 22 Rules 3 and 4 of the Code beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed.

22. It is a fundamental principle of law laid down by this Court in Kiran Singh's case (supra) that a decree passed by the Court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree holder. The reason is that the defect of this nature affects the very authority of the Court in passing such decree and goes to the root of the case. This principle, in our considered opinion, squarely applies to this case because it is a settled principle of law



that the decree passed by a Court for or against a dead person is a "nullity" (See-N. Jayaram Reddy & Anr. vs. Revenue Divisional Officer & Land Acquisition Officer, Kurnool, (1979) 3 SCC 578, Ashok Transport Agency vs. Awadhesh Kumar & Anr., (1998) 5 SCC 567 and Amba Bai & Ors. v. Gopal & Ors., (2001) 5 SCC 570).

23. The appellants are the legal representatives of defendant Nos. 2 and 4 on whom the right to sue has devolved. They had, therefore, right to question the legality of the impugned order inter-alia on the ground of it being a nullity. Such objection, in our opinion, could be raised in appeal or even in execution proceedings arising out of such decree. In our view, the objection, therefore, deserves to be upheld. It is, accordingly, upheld."

7. Upon going through the said judgment, it transpires to this Court that process server has categorically indicated that respondent nos.1 and 2 have already been died and the said report has been received to this Court on 15.04.2024. Now, more than 160 days have been crossed, therefore, according to the provisions of Order XXII Rule 9 of the Code of Civil Procedure, 1908, the present second appeal stands abated



against those respondent nos.1 and 2.

8. It is also fundamental principle of law that any judgment or decree passed by the Court for or against a dead person is a nullity. Since, the respondent nos.1 and 2 died, information is on record which has been received in this Court on 15.04.2024 and more than 160 days have been crossed. But, no steps have been taken by the appellant no.2 after appointing

9. As such, the present second appeal stands dismissed as abated.

10. Office is directed to return back the records of present Second Appeal No.38 of 1989 analogous with Second Appeal No.37 of 1989 to the Original Court so that execution be made by the decree holder of Title Appeal No.50 of 1981 & Title Appeal No.51 of 1981 arising from Title Suit No.07 of 1971 & Title Suit No.203 of 1975 respectively.

(Dr. Anshuman, J)

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