IN THE HIGH COURT OF MADHYA PRADESH AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE G. S. AHLUWALIA

ON THE 29th OF JULY, 2025

SECOND APPEAL No. 155 of 2009

SMT.MUNNI AND OTHERS

Versus

NAYAB TEHSEELDAR AND OTHERS

Appearance:

Shri Anmol Khedkar - Advocate for appellants.

Shri S.S. Kushwaha - Government Advocate for State.

ORDER

Heard on the question of admission.

2. This Second Appeal under Section 100 of CPC has been filed against the judgment and decree dated 19.12.2008 passed by I Additional Judge to the Court of I Additional District Judge, Shivpuri in MJC No.28-A/2008 by which an application filed under Section 5 of Limitation Act was rejected and as a consequence thereof, civil appeal filed by appellants against judgment and decree dated 22.08.2005 passed by Civil Judge, Class II, Kolaras, District Shivpuri in Civil Suit No.113A/2004 was dismissed as barred by time.

3. It is submitted by counsel for appellants that somebody has informed that appellant No.1 has expired. However, it is fairly conceded by Shri Anmol Khedkar that appellant No.2 is the son of appellant No.1 and he is already on record.

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4. Accordingly, name of appellant No.1 is permitted to be deleted from the array of cause title.

5. This is a shocking case where counsel for appellants was not ready to understand the legal provisions of law in spite of various efforts made by this Court. On the contrary, when the Court was trying to suggest the counsel for appellants to read out the provisions of Order 22 Rule 6 of CPC, still counsel for appellants was not ready to look into the suggestion which was being given by this Court.

6. Be that whatever it may be.

7. Since counsel for appellants was adamant in not listening to the Court, therefore, with heavy heart, this Court was left with no other option but to stick to the argument which was advanced by counsel for appellants.

8. Kisna had filed a civil suit which was dismissed by Trial Court by judgment and decree dated 22.08.2005 passed in RCSA No.113-A/2004. It appears that appellants filed Civil Appeal under Section 96 of CPC alongwith an application under Section 5 of Limitation Act. In the application filed under Section 5 of Limitation Act, it was mentioned by appellants that plaintiff/Kisna had expired on 23.04.2005 and since Kisna was looking after the Court case, therefore, appeal could not be filed within a period of limitation. Application filed by appellants under Section 5 of Limitation Act was rejected by Appellate Court and accordingly, appeal was also dismissed as barred by time.

9. In the impugned order, it was mentioned by Appellate Court that Kisna had expired on 23.04.2005 but by that time, trial was already fixed for

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final arguments and it was obligatory on the part of legal representatives of Kisna to get themselves substituted in his place and since same has not been done, therefore, they would not get the benefit of abatement of suit.

10. According to this Court, aforesaid findings given by Appellate Court were contrary to law and accordingly, this Court tried to draw the attention of counsel for appellants to develop his arguments on the basis of provisions of Order 22 Rule 6 of CPC. It is not the case where death of plaintiff took place after the case was finally heard and was fixed for delivery of judgment. It is the case where plaintiff has expired prior to final hearing of the case, therefore, in fact suit had abated.

11. The Supreme Court in the case of **Gurnam Singh (Dead) Through Legal Representatives and others Vs. Gurbachan Kaur (Dead) by Legal Representatives** reported in **(2017) 13 SCC 414** read as under:-

> *"9. During the pendency of the second appeal, Gurbachan Kaur, appellant (plaintiff) died on 10.05.1994. Likewise, Joginder Singh (respondent-Defendant 2) died on 6-12-2000 and lastly, Gurnam Singh (respondent-Defendant 4) also died on 19-4-2002. Despite bringing to the notice of the High Court about the death of the appellant and the two respondents, no steps were taken by anyone to bring their legal representatives on record to enable them to prosecute the lis involved in the appeal.*
>
> *10. On 18-5-2010, the High Court allowed the second appeal, set aside the judgment/decree of the two courts below and decreed the plaintiff's suit for specific performance of the contract against the defendants in relation to the suit land.*
>
> *11. It is against this judgment of the High Court, the legal representatives of defendant 2 (late Joginder Singh) and defendant 4 (late Gurnam Singh) filed the present appeal by way of special leave petition and sought permission to question its legality and correctness.*
>
> *12. Heard Mr. Basava Prabhu S. Patil, learned Senior Counsel for the appellants and Mr. Subhasish Bhowmick, learned counsel for the respondents.*

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13. 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 the 2 respondents had expired during the pendency of appeal and their legal representatives were not brought on record?

14. In a leading case of this Court in Kiran Singh v. Chaman Paswan, the learned Judge Venkatarama Ayyar, J. speaking for the Bench in his distinctive style of writing laid down the following principle of law being fundamental in nature: (AIR p. 342, para 6)

> *"6.... It is a fundamental principle well established 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."*

15. 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 9 the dead persons? In our considered opinion, it is a nullity. The reasons are not far to seek.

16. 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.

17. 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".

18. Order 22 Rule 3(2) which applies in the case of the death of appellant-plaintiff and Order 22 Rule 4(3) which applies in the

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case of the respondent-defendant 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:

18.1. Order 22 Rule 3(2)

> *"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."*

18.2. Order 22 Rule 4(3)

> *"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."*

19. In the case at hand, both the aforementioned provisions came in operation because the appellant and the two respondents expired during the pendency of the second appeal and no application was filed to bring their legal representatives on record. As held above, the legal effect of the non-compliance with Rules 3(2) and 4(3) of Order 22 of the Code, therefore, came into operation resulting in dismissal of second appeal as abated on the expiry of 90 days from 10-5-1994 i.e. on 10-8-1994. The High Court, therefore, ceased to have jurisdiction to decide the second appeal which stood already dismissed on 10-8-1994. Indeed, there was no pending appeal on and after 10-8-1994.

20. 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.

21. It is a fundamental principle of law laid down by this Court in Kiran Singh case that a decree passed by the court, if it is a nullity,

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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 v. LAO³, Ashok Transport Agency v. Awadhesh Kumar and Amba Bai v. Gopal).

22. The appellants are the legal representatives of defendants 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.

23. In the light of the foregoing discussion, we allow the appeal and set aside the impugned judgment/decree.

12. The Supreme Court in the case of **Amba Bai Vs. Gopal** reported in **(2001) 5 SCC 570** reads as under:-

"8. Before considering the question of merger, we have to consider the effect of abatement. When the second appeal had abated and the legal representatives of the appellant were not brought on record, the decree, which was passed by the first appellate court, would acquire finality. A similar matter came up before this Court in Rajendra Prasad v. Khirodhar Mahto [1994 Supp (3) SCC 314] wherein it was held that as a consequence of the abatement of the appeal filed against final decree in a partition suit, the preliminary decree would become final. In that case, the appellants and Tapeshari Kuer filed a suit for partition of immovable properties, including Plaint 4 and 5 properties. The property originally belonged to one Bishni Mahto. He had two sons, namely, Sheobaran Mahto and Ramyad Mahto. Tapeshari Kuer was the daughter of Ramyad Mahto. Plaint 4 and 5 properties were not partitioned between these two sons of Bishni Mahto. Ramyad Mahto, the father of Tapeshari Kuer died and she succeeded to the one-half of the undivided share of the two sons of Bishni Mahto. Tapeshari Kuer had executed a gift deed in favour of the appellants bequeathing her undivided interest inherited from her father in respect of Plaint Item 4 property. The trial court decreed the suit declaring the half share of Tapeshari Kuer in Plaint 5 of the property. The appellants who had joined as Plaintiffs 1 and 2 were held to have half share in Plaint Item 4 by virtue of the gift deed executed by her. The defendants in the suit filed an appeal and pending appeal, Tapeshari Kuer died. Her legal heirs were not brought on record. The appellate court gave a finding that

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Tapeshari Kuer was not the daughter of Ramyad Mahto and the appellant did not acquire any interest in the undivided share. The suit was dismissed. Original Plaintiffs 1 and 2 filed the second appeal before the High Court. The second appeal was dismissed as the heirs of Tapeshari Kuer were not brought on record. Original Plaintiffs 1 and 2 carried the matter to this Court by special leave. It was contended that Plaintiffs 1 and 2 were entitled to the benefit of preliminary decree. Ultimately, this Court held that whether Tapeshari Kuer was the daughter of Ramyad Mahto or not was required to be gone into only when her legal representatives were brought on record. It was held that the decree against a dead person was a nullity and, therefore, the declaration by the first appellate court that Tapeshari Kuer was not a daughter of Ramyad Mahto was not valid in law. The High Court had held that the decree of the appellate court was a nullity and the respondent did not file any appeal against that part of the decree, the result was that the preliminary decree became final.

9. In Bibi Rahmani Khatoon v. Harkoo Gope [(1981) 3 SCC 173 : AIR 1981 SC 1450] this Court held at AIR p. 1453 at para 10 as under:- (SCC p. 178, para 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."

10. The learned Single Judge of the High Court in the impugned order held that the order passed in the first appellate decree merged into the order passed in the second appeal and hence there is no executable decree. "The doctrine of merger arises only when there are two independent things and the greater one would swallow up or may extinct the lesser one by the process of absorption." (Law Lexicon by P. Ramanatha Aiyar — p. 1224, 2nd Edn.)

11. If the judgment or order of an inferior court is subjected to an appeal or revision by the superior court and in such proceedings the order or judgment is passed by the superior court determining the rights of parties, it would supersede the order or judgment passed by the inferior court. The juristic justification for such doctrine of merger is based on the common law principle that there cannot be, at one and the same time, more than one operative order governing the subject-matter and the judgment of the inferior court is deemed to lose its identity and merges with the judgment of the

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superior court. In the course of time, this concept which was originally restricted to appellate decrees on the ground that an appeal is continuation of the suit, came to be gradually extended to other proceedings like revisions and even the proceedings before quasi-judicial and executive authorities.

12. This Court in State of Madras v. Madurai Mills Co. Ltd. [AIR 1967 SC 681 : (1967) 19 STC 144] observed as under: (AIR Headnote)

> *"The doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction."*

13. In a recent decision in Kunhayammed v. State of Kerala [(2000) 6 SCC 359] this Court held that an order dismissing special leave petition, more so when it is by a non-speaking order, does not result in merger of the order impugned into the order of the Supreme Court.

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."

13. Under these circumstances, findings given by Appellate Court that since legal representatives of plaintiff/Kisna were not brought on record,

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therefore, appellants cannot take advantage of death of Kisna prior to final hearing, was erroneous. Unfortunately, in spite of repeated suggestions given by this Court, counsel for appellants was not ready to accept the suggestions and was adamant in submitting that suit has not abated.

14. Although Court must decide on the basis of law and should not get swayed away by arguments advanced by appellants, but once a lawyer has refused to accept the suggestion given by this Court and insisted that suit has not abated, then it is clear that concern lawyer is not ready to sharpen his legal knowledge.

15. Be that whatever it may be.

16. Once it is the stand of appellants that suit has not abated on account of death of Kisna on 23.04.2005, accordingly, this Court is left with no other option but to give away this issue.

17. Now the only question for consideration is as to whether Appellate Court committed a material illegality by rejecting the application filed under Section 5 of Limitation Act or not? In application filed under Section 5 of Limitation Act, appellants had merely mentioned that it was Kisna who was looking after the case, but nowhere mentioned in the application that appellants were not aware of pendency of civil suit.

18. In absence of categorical statements by plaintiffs/appellants that they were no aware of the pendency of civil suit, this Court is of the considered opinion that merely because Kisna was looking after the case would not be a good ground to condone the delay of three years. Although counsel for appellants tried to submit that appellants would not gain by filing

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appeal with delay of three years, but same cannot be the sole criteria to decide the application for condonation of delay. It is true that application for condonation of delay should be decided by adopting a liberal view, but that does not mean that delay should be condoned even in those cases where even sufficient cause has not been explained.

19. Under these circumstances, this Court is of considered opinion that as the appellants have failed to point out the sufficient cause for condonation of delay of three years, Appellate Court did not commit any mistake by rejecting the application filed under Section 5 of Limitation Act. Therefore, no substantial questions of law arises in the present appeal.

20. Accordingly, judgment and decree dated 19.12.2008 passed by I Additional Judge to the Court of I Additional District Judge, Shivpuri in MJC No.28-A/2008 as well as judgment and decree dated 22.08.2005 passed by Civil Judge, Class II, Kolaras District Shivpuri in Civil Suit No.113A/2004 are hereby **affirmed.** Second appeal fails and is hereby **dismissed.**

(G. S. AHLUWALIA)
JUDGE

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