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SA-2736-2022

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PRANAY VERMA

SECOND APPEAL No. 2736 of 2022*DUDHALAL**Versus**KARULAL AND OTHERS*

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Appearance:

Shri Suresh Kumar Surajmal Garg - Advocate for the appellant.

Ms. Kirti Saboo - Advocate for respondent No.1.

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Reserved on : 10.01.2025

Pronounced on : 18.02.2025

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JUDGMENT

This appeal under Section 100 of Code of Civil Procedure has been preferred by the plaintiff being aggrieved by the judgment and decree dated 13.09.2022 passed in Civil Appeal No.1/2022 by the District Judge, Bhanpura, District Mandsaur arising out of the judgment and decree dated 06.12.2021 passed in Civil Suit No.5A/2019 by the Civil Judge, Senior Division, Bhanpura, District Mandsaur.

2. The plaintiff had instituted an action against the defendants for declaration of title and permanent injunction with respect to the suit land. Rughnath was impleaded as defendant No.2 to the suit. He did not contest the claim by filing any written statement. The claim was contested only by defendant No.1. During pendency of the suit, Rughnath died on 22.03.2019 but no steps for bringing his legal representatives on record were taken by plaintiff. The suit was decided on merits by judgment and decree dated 06.12.2021 by the trial Court and was dismissed.



3. In appeal preferred by the plaintiff, notices were issued to the defendants. The notice issued to Rughnath was received back with the note that he has expired. The plaintiff then filed an application under Order 22 Rule 4 of the CPC for bringing his legal representatives on record. By order dated 12.09.2022 the said application was rejected by the Appellate Court finding no sufficient cause having been made out for permitting substitution. Thereafter, it proceeded to decide the appeal and dismissed the same on merits as well as recorded a finding to the effect that the same stands abated in view of death of Rughnath.

4. By order dated 10.01.2025 this appeal was admitted on the following substantial questions of law:

"A) Whether in view of death of Rughnath having taken place on 22.03.2019 i.e. before the trial Court, the Lower Appellate Court ought to have sent the application for substitution of his legal representatives to the trial Court for decision in accordance with law?"

B) Whether upon recording a finding to the effect that appeal has abated, the Lower Appellate Court had jurisdiction to decide the same on merits?"

5. Learned counsel for the plaintiff has submitted that since Rughnath had expired during pendency of the suit, the appellate Court had no jurisdiction to consider the application for his substitution. The same ought to have been sent to the trial Court for adjudication since death had taken place before the trial Court. It is further submitted that once the appellate Court had held that the appeal has abated, it could not have decided the same on merits.

6. *Per contra*, learned counsel for defendant No.1 has submitted that both the Courts below have recorded a categorical finding that plaintiff has failed to prove his case on merits hence no fruitful purpose would be served by remanding the matter back to the trial Court. The decision has been given on merits in which there is no illegality in view of which the appeal deserves to be dismissed.



7. I have heard the learned counsel for the parties and have perused the record.

8. It has been well settled by decisions of this Court as well as other High Courts that it is the Court where abatement takes place which alone is competent to deal with a prayer for setting aside the abatement. In *Hiralal Rupdeo Mandloi V. Deepa Bondar 1960 J LJ 415* this Court categorically held that the Court in which the suit or appeal has abated is the one competent to consider if the abatement should be set aside.

9. The Division Bench of this Court in *Ramanand vs. Indira Bai* F.A. No.95 of 1967 decided on 03.12.1970 reported in *1971 J LJ Short Note No.49* has held that if abatement takes place in the trial Court during pendency of the suit the decree would appear to have been passed against a dead person as such it would be a nullity. On account of that fact it would be necessary to set aside the decree. Where abatement takes place in the Court below the proper course is that the decree under appeal should be set aside and the case ought to be remitted to the Court where abatement might have taken place.

10. The Division Bench of the Calcutta High Court in *Kanailal Manna and others V. Bhabataran Santra and others, AIR 1970 Cal 99* reviewed the decisions of various High Courts on this issue and eventually came to the conclusion that in circumstances where death had taken place not before the Court where the second appeal was being heard but before trial Court or the appellate Court, then the proper procedure to be followed is to set aside the ineffective decree and remand the case to the Court where the abatement had taken effect. If the decree had been passed in ignorance of the death the same would be a nullity. It was held as under:

"21. We are of the opinion that if we accept the contention of Mr. Ghosh and



affirm the decree as passed by the trial Court we only take away a valuable right of the appellants before us to seek the remedy provided under law for setting aside the abatement consequent upon the death of one of the respondents. The statute has given him this right under Order 22, Rule 9 of the CPC and it would not be just and proper to deprive the party of such a valuable right. If we have come to the conclusion that we are unable to entertain any application on behalf of the present appellants for having abatement, which has taken place in the court of appeal below, set aside it is but just and proper that we must at the same time see that he gets an opportunity to move the appropriate court with such a prayer. But if we, on the other hand, accepting the contention of Mr. Ghosh in the meantime, affirm the decision as passed by the trial court we are afraid the Court of appeal below would no longer have any scope to entertain effectively any application for setting aside the abatement in such circumstances, in our opinion, the uniform procedure followed by the other High Courts as referred to hereinbefore should be accepted, namely, the ineffective decree passed by the court of appeal below should be set aside and the appeal should be remanded to the said court, keeping it open to the appellants to move the said court for an opportunity to have the abatement set aside if the appellants could satisfy the said court that they are so entitled in law. ***"

11. In the present case, Rughnath had died during pendency of the Civil Suit before the trial Court. The decree hence passed by the trial Court in ignorance of the said fact was a nullity. Application for substitution of his legal representatives was filed in the appeal. It could not have been decided by the appellate Court. It should have set aside the decree passed by the trial Court and remanded the matter to it for affording the plaintiff an opportunity to file an application for setting aside abatement resulting due to death of Rughnath. Substitution could not have been permitted in absence of setting aside of abatement which question could have only been considered by the trial Court. Though in appeal application for setting aside abatement was not filed and only substitution application was filed then also the appellate Court had no jurisdiction to decide that application since firstly question of setting aside abatement was required to be considered which could have only been done by the Trial Court.

12. The appellate Court instead of sending the application for substitution



to the trial Court has itself decided and rejected it. Thereafter, it has heard the appeal on merits and has dismissed the same. Once the appellate Court had recorded a finding that the appeal stands abated then it could not have proceeded to decide the same on merits. In doing so it has committed patent illegality .

13. In view of the aforesaid discussion, the substantial questions of law as framed are answered in favour of the plaintiff and against defendant No.1. The judgment and decree passed by the Courts below are set aside and the matter is remanded back to the trial Court for adjudication of application for substitution of legal representatives of deceased Rughnath. It shall also be open for the plaintiff to file an application for setting aside of abatement resulting due to death of Rughnath and also an application for condonation of delay in filing the application for setting aside abatement.

14. With the aforesaid, the appeal stands allowed and disposed off.

(PRANAY VERMA)
JUDGE