IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

ON THE 11th OF OCTOBER, 2023

CIVIL REVISION NO.74 OF 2021

Between:-

1. **ROSHANLAL TIWARI (DIED) THR. LRS. RAJKUMAR TIWARI S/O LATE SHRI ROSHANLAL TIWARI, AGED ABOUT 54 YEARS, OCCUPATION: SERIVCE R/O VILLAGE LAUAA KOTHAR TEHSIL RAIPUR KARCHULIYAN DISTT. REWA (MADHYA PRADESH)**
2. **VIRENDRA KUMAR TIWARI S/O LATE SHRI ROSHANLAL TIWARI, AGED ABOUT 48 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE LAUAA KOTHAR, TEHSIL RAIPUR KARCHULIYAN DISTT. REWA (MADHYA PRADESH)**
3. **KAILASH PRASAD TIWARI S/O LATE SHRI ROSHANLAL TIWARI, AGED ABOUT 46 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE LAUAA KOTHAR, TEHSIL RAIPUR KARCHULIYAN DISTT. REWA (MADHYA PRADESH)**
4. **KRISHNA PRASAD TIWARI M/O LATE SHRI ROSHANLAL TIWARI, AGED ABOUT 36 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE LAUAA KOTHAR, TEHSIL RAIPUR KARCHULIYAN DISTT. REWA (MADHYA PRADESH)**
5. **RAVENDRA PRASAD TIWARI S/O LATE SHRI ROSHANLAL**

TIWARI, AGED ABOUT 30 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE LAUAA KOTHAR, TEHSIL RAIPUR KARCHULIYAN DISTT. REWA (MADHYA PRADESH)

6. **WD. RAMSAKHI W/O LATE SHRI ROSHANLAL TIWARI, AGED ABOUT 72 YEARS, OCCUPATION: HOUSEWIFE R/O VILLAGE LAUAA KOTHAR, TEHSIL RAIPUR KARCHULIYAN DISTT. REWA (MADHYA PRADESH)**

……...APPLICANTS

(***BY SHRI BHUPENDRA KUMAR SHUKLA - ADVOCATE***)

AND

1. **PANNALAL TIWRI S/O LATE RAMKISHORE BRAMHIN, AGED ABOUT 65 YEARS, OCCUPATION: PENSIONER R/O VILLAGE LAUAA KOTHAR TEHSIL RAIPUR KARCHULIYAN DISTT. REWA (MADHYA PRADESH)**
2. **JAGDISH PRASAD CHOUBEY S/O SHRI SOBHANATH CHOUBEY, AGED ABOUT 68 YEARS, R/O VILLAGE LAUAA KOTHAR, TEHSIL RAIPUR KARCHULIYAN DISTT. REWA (MADHYA PRADESH)**
3. **THE STATE OF MADHYA PRADESH COLLECTOR DISTT. REWA (MADHYA PRADESH)**

……...RESPONDENTS

(***BY SHRI HIMANSHU MISHRA - ADVOCATE FOR RESPONDENT NO. 1 AND MS. MAMTA MISHRA - PANEL LAWYER FOR THE STATE***)

This revision coming on for final hearing this day, the Court passed the following:

ORDER

This Civil Revision has been preferred by the legal representatives of the original appellant/plaintiff-Roshanlal Tiwari (dead) challenging the order dated 13.02.2021 passed by 3rd Additional District Judge, Rewa in Civil Appeal No. 7/21 which has been dismissed as having abated for want of filing of application under Order 22 Rule 9 CPC.

2. Short facts of case are that the plaintiff had instituted a suit for declaration of title and restoration of possession in respect of the agriculture lands described in the plaint and after holding trial, learned trial Court dismissed the suit vide judgment and decree dated 29.01.2013 passed in Civil Suit No. 87-A/2010 and the judgment and decree passed by learned trial Court was challenged by original plaintiff-Roshanlal Tiwari but during pendency of the civil appeal, he died on 09.12.2015. Although applications under order 22 rule 3 CPC and section 5 of the Limitation Act, 1963 were filed but for want of application under order 22 rule 9 CPC, the applications under order 22 rule 3 CPC as well as under section 5 of the Limitation Act were dismissed and consequently the civil appeal also was dismissed as abated.

3. Learned counsel for the applicants (LRs of original plaintiff/appellant/deceased Roshanlal Tiwari) submits that due to no knowledge of pendency of civil appeal, requisite application under order 22 Rule 3 CPC could not be filed timely and after getting knowledge of pendency of the civil appeal upon receipt of letter issued by the counsel, legal representatives contacted to the counsel, who filed applications

under order 22 Rule 3 CPC as well as under Section 5 of the Limitation Act supported by affidavit(s) but for the reasons not known to the applicants, application under Order 22 Rule 9 CPC was not filed by the counsel. Resultantly, learned first appellate Court taking harsh view and even without giving any opportunity of filing application under Order 22 Rule 9 CPC, dismissed the civil appeal as abated. Learned counsel for the applicants submits that in the available facts and circumstances of the case, either the applications filed under Order 22 Rule 3 CPC and Section 5 of Limitation Act ought to have been allowed or the applicants ought to have been given opportunity to file the application under Order 22 Rule 9 CPC before dismissing the civil appeal as abated. With the aforesaid submissions, he prays for allowing the Civil Revision.

4. Learned counsel for the respondent 1 supports the impugned order and prays for dismissal of the civil revision. He submits that in absence of prayer for setting aside abatement, especially for want of application under Order 22 Rule 9 CPC, learned Court below has not committed any illegality in dismissing the civil appeal as abated. He further submits that the order dismissing the civil appeal as abated upon dismissal of application under section 5 of the Limitation Act, is not revisable in view of proviso appended to section 115(1) CPC and he prays for dismissal of the Civil Revision as not maintainable.

5. Learned counsel for the State also supports the impugned order and prays for dismissal of the revision.

6. Heard learned counsel for the parties and perused the record.

7. In the light of objection of maintainability of the Civil Revision raised on behalf of the respondent it is appropriate to deal with the question of maintainability first. Fort that purpose, I would like to extract

hereunder Section 115 of the CPC as well as Article 227 of the Constitution of India for ready reference:

SECTION 115. Revision.--(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

*[Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.]

(2**) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

***(**3**) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation. In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue in the course of a suit or other proceeding."

* Inserted by Act 104 of 1976 and substituted by Act 46 of 1999 w.e.f.1.7.2002.

** Inserted by Act 104 of 1976.

***Inserted by Act 46 of 1999 w.e.f. 1.7.2002]"

ARTICLE 227 OF THE CONSTITUTION OF INDIA:

"227. Power of superintendence over all courts by the High Court.

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may-

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.**"**

8. In Shalini Shyam Shetty and another vs. Rajendra Shankar Patil (**2010) 8 SCC 329** (para 49) the Supreme Court has held as under :

> **"49**. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:
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> (a) to (i) …….
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> (j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. **At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.**
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> (k) to (o) ……**".**

9. After making analysis of the old and amended provisions of section 115 of CPC, the Supreme Court in the case of Shiv Shakti Co-op.

Housing Society, Nagpur Vs. M/s. Swaraj Developers and others **(2003) 6 SCC 659**, has held as under **:**

> **"32**. A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is `yes' then the revision is maintainable. But on the contrary, if the answer is `no' then the revision is not maintainable. Therefore, if the impugned order is of **interim** in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are **interim** in nature, cannot be the subject matter of revision under Section 115. ……. **."**

10. It is pertinent to mention here that Sub-section (2) which was introduced by the old amendment Act and retained even after present amendment in section 115 CPC, provides that the High Court shall not interfere where the order or the decree is appealable either to the High Court or to any Court subordinate thereto.

Para 11 deleted in terms of the order dated 08.11.2023 passed in CR No.74 of 2021.

* Para-11 is substituted and placed at the end of the order.

11. The Supreme Court in the case of Shiv Shakti Co-op. Housing Society, Nagpur Vs.M/s. Swaraj Developers and others **(2003) 6 SCC 659**, has also held as under **:**

> **"25.** If the court orders that suit has abated or dismissed the suit as having abated, as a consequence of rejection of an application under Order 22 Rule 3 of the Code, as noticed above, there is no determination of rights of parties with regard to any of the matters in controversy in the suit and therefore the order is not a decree. But if an order declares that the suit has abated, or dismisses a suit not as a consequence of legal representatives filing any application to come on record, but in view of a finding that right to sue does not survive on the death of sole plaintiff, there is an adjudication determining the rights of parties in regard to all or any of the matters in controversy in the suit, and such order will be a decree. But that is not the case here**."**

At the same time, the Supreme Court vide paragraph 23 of the same decision in the case of Shiv Shakti Co-op. Housing Society (**supra**) has held as under :

> **"23.** As the order dated 31.8.1996 is neither a `decree' appealable under section 96 of the Code nor an order appealable under section 104 and Order 43 Rule 1, the remedy of the applicant under Order 22 Rule 3, **is to file a revision**. The High Court was therefore, right in its view that the adjudication of the question whether an applicant in an application under Order 22 Rule 3 was a legatee under a valid will executed by the deceased plaintiff in his favour, was not a decree and therefore the remedy of the applicant was to file a revision**."**

12. As such it can be said that the power under section 115 of the High Court has been curtailed only in respect of the interim orders passed by any Court subordinate to such High Court and if any decree or order which is not interim or interlocutory and is final, whereby the suit or other proceeding has already been disposed of and is not appealable under sections 96, 100, 104 and Order 43 rule 1 CPC, still recourse to challenge such decree or order is available under section 115 CPC. At the same time it is relevant to mention here that against such decree or interim/interlocutory order against which the remedy of civil revision is not available or has been curtailed by the present amendment in section 115 of CPC, remedy under Article 227 of the Constitution of India can be availed. Resultantly, instant Civil Revision is held to be maintainable.

13. Apparently, during pendency of civil appeal preferred challenging the judgment and decree of learned trial Court dated 29.01.2013, sole plaintiff/appellant-Roshanlal Tiwari had died on 09.12.2015 and for substitution of his legal representatives, applications under Order 22 Rule 3 CPC as well as Section 5 of the Limitation Act supported by affidavits were filed on 13.07.2016, however no application under Order 22 Rule 9 CPC was filed.

14. Perusal of application under Section 5 of the Limitation Act shows that the reason of non-filing of the application for substitution within time has been shown to have no knowledge of pendency of civil appeal, therefore, in the light of decision of the Supreme Court in the case of Prithvi Raj (Dead) by LRS. Vs. Collector, Land Acquisition, H.P. and another **(2005) 12 SCC 198**, there appears to be a sufficient cause for condonation of delay in moving the application under Order 22 Rule 9

of CPC but unfortunately, no such application under Order 22 Rule 9 CPC was filed by the applicants before the first appellate Court.

15. In the case of Prithvi Raj (Dead) by LRS. (**supra**)**,** the Supreme Court has held as under :

> **"3**. By the impugned judgment, the High Court declined to implead the legal heirs of the original claimant in the pending proceedings. The petitioner widow submits that she was not aware of the pending proceedings, so she could not take any steps to this effect. The petitioner is permitted to implead/substitute the legal heirs of deceased Prithvi Raj in the appeal filed by the original claimant. We direct restoration of the case to the file of the High Court and we request the High Court to dispose of the same in accordance with law. We are told that the deceased Prithvi Raj has a living son. The present appellant shall take steps to implead the son also in the proceedings. The appeal is disposed of as above. No costs.**"**

16. In the case of K. Rudrappa Vs. Shivappa **(2004) 12 SCC 253,** the Supreme Court has held as under :

> **"10**. Having heard learned counsel for the parties, in our opinion, the appeal deserves to be allowed. The case of the appellant before the District Court was that he was not aware of the pendency of the appeal filed by his father against the order passed by the Tehsildar. The father of the appellant died in June, 1994 and the appellant came to know about the pendency of appeal somewhere in September, 1994 when he received a communication from the advocate engaged by his father. Immediately, therefore, he contacted the said advocate, informed him regarding the death of his father and made an application. In such circumstances, in our opinion, the learned counsel for the appellant is right in submitting that a hyper-technical view ought not to have been taken by the District Court in rejecting the application inter alia observing that no prayer for setting aside abatement of appeal was made and there was also no prayer for condonation of delay. In any case, when separate applications were made, they ought to have been allowed. In our opinion, such technical objections should not come in doing full and complete justice between the parties. In our considered opinion, the High Court ought to have set aside the order passed by the District Court and it ought to have granted the prayer of the appellant for bringing them on record as heirs and legal representatives of deceased Hanumanthappa and by directing the District Court to dispose of the appeal on its own merits. By not doing so, even the High Court has also not acted according to law.
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> **11.** Very recently, almost an identical case came up for considerations before us. In Ganeshprasad Badrinarayan Lahoti (D) by LRs. v. Sanjeev-in prasad Jamnaprasad Chourasiya and another, Civil Appeal No. 5255 of 2004, decided on August 16, 2004, the appellants heirs and legal representatives of deceased Ganeshprasad were not aware of an appeal filed by the deceased in the District Court, Jalgoan against the decree passed by the Trial Court. When the appeal came up for hearing the advocate engaged by the deceased wrote a letter to Ganeshprasad which was received by the appellant's and immediately, they made an application for bringing them on record as heirs and legal representatives of the deceased. The application was rejected on the ground that there was no prayer for setting aside abatement of appeal nor for

condonation of delay. The appellants, therefore, filed separate applications which were also rejected and the order was confirmed by the High Court. We had held that the applications ought to have been allowed by the courts below. We, therefore, allowed the appeal, set aside the orders of the District Court as well as of the High Court and allowed the applications. In our opinion, the present case is directly covered by the ratio in the said decision and the orders impugned in the present appeal also deserve to be set aside**."**

17. In the case of Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and others **(2003) 10 SCC 691,** the Supreme Court has observed that if the explanation of delay is available on record then even without filing application under Order 22 Rule 9 CPC, the prayer for setting aside abatement can be considered and allowed. In the present case, fault of non-filing of application under Order 22 Rule 9 CPC is not attributable to the applicants but it was legal duty of their counsel to file application under Order 22 Rule 9 CPC and it is well settled that the litigant should not be made to suffer for the faults of the counsel.

18. In the case of Mithailal Dalsangar Singh (**supra**)**,** the Supreme Court has held as under :

"7. In as much as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. **A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement.** So also a prayer for setting aside abatement as regard one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.**"**

19. In the case of State of Madhya Pradesh vs. Pradeep Kumar **(2000) 7 SCC 372**, the Supreme Court has held that if there is some delay in filing of the appeal and the appeal is not accompanied with an application under Section 5 of the Limitation Act, then the Court should not dismiss the appeal as not maintainable but it should give further opportunity of filing application under Section 5 of the Limitation Act. Relevant paragraph is quoted as under :

> **"19.** The object of enacting Rule 3-A in Order 41 of the Code seems to be twofold. First is, to inform the appellant himself who filed a time-barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the Rule that it is intended to operate as unremediably or irredeemably fatal against the appellant if the memorandum is not accompanied by any such application at the first instance. **In our view, the deficiency is a curable defect, and if the required application is filed subsequently, the appeal can be treated as presented in accordance with the requirement contained in Rule 3-A of Order 41 of the Code."**

20. For the purpose of convenience, the provision contained in order 22 rule 9 CPC is reproduced as under :

> **"9. Effect of abatement or dismissal**
>
> (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
>
> (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may **apply** for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.
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> (3) The provisions of section 5 of the Indian Limitation Act, 1877 (15 of 1877) shall apply to applications under sub-rule (2)**."**

Reading of the said provision of order 22 rule 9(2) CPC makes it clear that an application is to be made and not to be filed. The word *made* shows that the application can be orally made.

21. As such, while considering the applications under Order 22 Rule 3 CPC as well as Section 5 of the Limitation Act, if learned appellate Court was of the opinion that application under Order 22 Rule 9 CPC needs to be filed, then before proceeding further learned appellate Court ought to have afforded further opportunity to the applicants to file application under Order 22 Rule 9 CPC and in the available facts and circumstances of the case, where the applicants moved an application under Section 5 of the Limitation Act then it should not have dismissed the application for substitution for want of application under Order 22 Rule 9 CPC.

22. In view of the aforesaid discussion, in my considered opinion learned first appellate Court has committed illegality in passing the impugned order and in dismissing the civil appeal as having abated. However, as no application under Oder 22 Rule 9 CPC was filed before the first appellate Court, therefore, the matter is remanded back to first appellate Court to decide the applications under Order 22 Rule 3 CPC and Section 5 of the Limitation Act afresh and the applicants are free to move application under order 22 rule 9 before the first appellate Court.

23. With the aforesaid observation, this Civil Revision is allowed and **disposed off**. Parties are directed to appear before the first appellate Court on 06.11.2023.

24. Pending application(s), if any, shall stand disposed off.

(DWARKA DHISH BANSAL)
JUDGE

L.R.

Vide order dated 08.11.2023 passed in CR No.74 of 2021.

* Substituted Para 11

11. The Supreme Court in the case of Mangluram Dewangan vs. Surendra Singh and others **(2011) 12 SCC 773**, has also held as under **:**

> **"25.** If the court orders that suit has abated or dismissed the suit as having abated, as a consequence of rejection of an application under Order 22 Rule 3 of the Code, as noticed above, there is no determination of rights of parties with regard to any of the matters in controversy in the suit and therefore the order is not a decree. But if an order declares that the suit has abated, or dismisses a suit not as a consequence of legal representatives filing any application to come on record, but in view of a finding that right to sue does not survive on the death of sole plaintiff, there is an adjudication determining the rights of parties in regard to all or any of the matters in controversy in the suit, and such order will be a decree. But that is not the case here**."**

At the same time, the Supreme Court vide paragraph 23 of the same decision in the case of Mangluram Dewangan (**supra**) has held as under :

> **"23.** As the order dated 31.8.1996 is neither a `decree' appealable under section 96 of the Code nor an order appealable under section 104 and Order 43 Rule 1, the remedy of the applicant under Order 22 Rule 3, **is to file a revision**. The High Court was therefore, right in its view that the adjudication of the question whether an applicant in an application under Order 22 Rule 3 was a legatee under a valid will executed by the deceased plaintiff in his favour, was not a decree and therefore the remedy of the applicant was to file a revision**."**

(DWARKA DHISH BANSAL)
JUDGE

I.R.

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