

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

ON THE 22nd OF JANUARY, 2024

REVIEW PETITION NO.353 OF 2023

BETWEEN:-

**D.F. DIAS (DEAD) THROUGH
LRS:-**

**FRANSISAKA DIAS, AGED 75
YEARS, W/O LATE D.F. DIAS,
OCCUPATION: HOUSE WIFE, R/O
BUNGALOR NO.46, PENTI NAKA,
SADAR, CANTT, JABALPUR**

....APPLICANT

(SHRI ASHOK LALWANI - ADVOCATE)

AND

**SHRIMURTI PARASNATH
DIGAMBAR JAIN BADA MANDIR
TRUST HANUMAN TALL,
THROUGH ITS SECRETARY,
SINGHAI SHRI POORAN CHAND
JAIN S/O LATE SHRI SAWAI
SINGHAI BHAGCHAND JAIN,
RAMAYAN VASTRALAY, BADA
PHUARA, JABALPUR**

....RESPONDENT

(BY SHRI SANJAY SETH - ADVOCATE)

*This review petition coming on for admission this day, the
Court passed the following:*

ORDER

This review petition has been preferred by the applicant/LR of appellant/defendant/tenant challenging the order dated 07.12.2022 passed in second appeal no.2358/2022 whereby, second appeal filed against

concurrent judgment and decree of eviction passed under the general law as well as of arrears of rent, was dismissed at the admission stage itself and while dismissing the second appeal, upon request of the counsel for appellant/tenant, one year time to vacate the tenanted premises was granted, which has been expired on 31.12.2023.

2. This review petition has been preferred with delay of 80 days and by filing I.A. No.5213/2023 condonation of delay has been sought on the premise that due to ailment, the appellant-D.F. Dias had died on 04.11.2022 and his wife i.e. the applicant aged 79 years, being under shock, could not contact to the counsel and during this period she also got fracture in her leg, due to which she remained on bed and could not instruct her counsel to file the review petition.

3. Even after issuance of notice of the said I.A., no reply/counter affidavit has been filed, therefore, in absence of any rebuttal, ground taken for condonation of delay, appears to be based on bonafides, hence by allowing the application, delay in filing of the review petition is hereby condoned. Accordingly, I.A. No.5213/2023 is disposed off.

4. Also heard on **admission**.

5. In this review petition several grounds have been taken but during course of argument, review has been sought mainly on the ground that before passing order in second appeal on 07.12.2022, sole appellant had died on 04.11.2022, hence the counsel had no right to argue the second appeal on behalf of the deceased appellant and the order passed in second appeal by this Court on 07.12.2022 is nullity and cannot be given effect. In support of his submissions, learned counsel placed reliance on decision of Supreme Court in the case of Gurnam Singh (D) through LRs and

others vs. Gurbachan Kaur (D) by LRs & others (2017) 13 SCC 414.

Relevant paragraphs of which are as under:-

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 ap-

plication 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. v. Revenue Divisional Officer & Land Acquisition Officer, Kurnool, (1979) 3 SCC 578, Ashok Transport Agency v. Awadhesh Kumar & Anr., 1999(1) R.C.R.(Civil) 197 : (1998) 5 SCC 567 and Amba Bai & Ors. v. Gopal & Ors., 2001(3) R.C.R.(Civil) 169 : (2001) 5 SCC 570.)”

6. Heard learned Counsel for the applicant and perused the record.
7. In the present case, appellant/defendant/tenant suffered a decree of eviction and arrears of rent from two Courts below, against which second appeal was filed by the appellant and after taking into consideration submissions made on behalf of the appellant, this Court observed as under:-

“2. Although the learned counsel appearing for the appellant/defendant has tried to raise the question with regard to validity of notice (Ex.P/2) dated 30.07.2008 issued by the respondent/plaintiff as required under Section 106 of the Transfer of Property Act, but has failed to point out any defence/pleading in that regard in para 5 of the written statement. As such, there does not appear any substantial question of law involved in the second appeal.”

8. Thereafter, in later part of the order, at the request of counsel for the appellant/defendant/tenant, more than one year time i.e. time upto 31/12/2023 was given to vacate the tenanted/suit premises upon filing usual undertaking.
9. Apparently, decision in the case of Gurnam Singh (D) through LRs and others vs. Gurbachan Kaur (D) by LRs & others (2017) 13 SCC 414 (**supra**) is based on previous decision in the case of Amba Bai and others

vs. Gopal and others (2001) 5 SCC 570, in which Hon'ble Supreme Court held as under:-

“6. The various provisions contained in Order 22, CPC, explain the consequences of death of parties in a civil litigation. If one of the plaintiffs dies and if the cause of action survives his legal representatives have got a right to come on record and to continue the proceedings. If the sole plaintiff dies and if the legal representatives are not brought on record, the suit will abate and Rule 9 of Order 22, CPC specifically prohibits the filing of a fresh suit on the same cause of action. The only remedy available to the legal representatives is to get themselves impleaded and continue the proceedings, if the suit is already not abated, and if abated, they have to file an application to set aside abatement also.

7. In the instant case, deceased Radhu Lal, the second appellant died on 14-12-1990 and his death was not brought to the notice of the Court and the learned single Judge disposed of the appeal on merits by dismissing the Second Appeal on 25-3-1991. As the judgment in the Second Appeal was passed without the knowledge that the appellant had died, the same being a judgment passed against the dead person is a nullity. When the second appellant Radhu Lal died on 14-12-1990, his legal representatives could have taken steps to get themselves impleaded in the Second Appeal proceedings and as it was not done, the Second Appeal should be taken to have abated by operation of law. Therefore, the question that requires to be considered is that when there was abatement of the Second Appeal, can there be a merger of the same with the decree passed by the First Appellate Court?”

10. Aforesaid decision in the case of Amba Bai and others vs. Gopal and others (2001) 5 SCC 570 (*supra*), came to be considered in the case of P. Jesaya (Dead) By LRs vs. Sub Collector and another (2004) 13 SCC 431, in which Hon'ble Supreme Court held as under:-

“3. The only contention taken up in this appeal is that the first respondent, in the appeal before the High Court, had died during the pendency of that appeal. It is contended that his heirs were not brought on record and, therefore, the appeal before the High Court had abated. In support of this contention reliance is placed on Order 22 Rule 4 of the Code of Civil Procedure as well as the judgments of this Court in the case of Mithailal Dalsangar Singh v. Annabai Devram Kini ((2003) 10 SCC 691) and in the case of Amba Bai v. Gopal ((2001) 5 SCC 570) It is submitted that as the appeal had abated, the judgment delivered by the High Court is non est and cannot be enforced.

4. Though the arguments are attractive one must also keep in mind Order 22 Rule 10 of the Code of Civil Procedure. It is obligatory on the pleader of a deceased to inform the court and the other side about the factum of death of a party. In this case we find that no intimation was given to the court or to the other side that the first respondent had died. On the contrary a counsel appeared on behalf of the deceased person and argued the matter. It is clear that the attempt was to see whether a favourable order could be obtained. It is clear that the intention was that if the order went against them, then thereafter this would be made a ground for having that order set aside. This is in

effect an attempt to take not just the other side but also the court for a ride. These sort of tactics must not be permitted to prevail. We, therefore, see no reason to interfere. The appeal stands dismissed. There will be no order as to costs.”

11. In view of the aforesaid decision in the case of P. Jesaya (Dead) By LRs vs. Sub Collector and another (2004) 13 SCC 431 (**supra**) and further in view of the provision contained in Order 22 Rule 10-A CPC duly engaged Counsel for the deceased appellant, Shri Abhishek Dilraj, Advocate not having discharged his duty to inform the Court, of the death, and continued to plead/argue second appeal, L.Rs. of appellant including the applicant, are bound by the order passed in second appeal.

12. It is pertinent to mention here that in present case, the second appeal had also not abated because it came in hearing within a period of about 33 days of death of the appellant. As such death of appellant/defendant/tenant has no adverse effect on the order passed in second appeal.

13. In view of the aforesaid discussion, finding no ground for review of the order dtd. 07.12.2022, instant review petition is **dismissed**.

14. Pending application(s), if any, shall stand dismissed.

(DWARKA DHISH BANSAL)
JUDGE