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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 13407 OF 2024

OM PRAKASH GUPTA ALIAS LALLOOWA (NOW DECEASED) & ORS. ... APPELLANTS

VERSUS

SATISH CHANDRA (NOW DECEASED) ...RESPONDENT

WITH

CIVIL APPEAL NO. 13408 OF 2024

OM PRAKASH GUPTA ALIAS LALLOOWA (NOW DECEASED) & ORS. ... APPELLANTS

VERSUS

SMT. ROOPRANI (NOW DECEASED) ...RESPONDENT

J U D G M E N T

DIPANKAR DATTA, J.

BRIEF RESUME OF FACTS

1. FACTS OF CIVIL APPEAL NO. 13407 OF 2024:

a. Satish Chandra instituted a suit[1] against Om Prakash Gupta[2] seeking specific performance of an agreement[3]. The suit was dismissed by the

1 Civil Suit No. 264/1972
2 Om Prakash
3 agreement to sell dated 8th February,1970

trial court[4] *vide* judgment and order dated 7th October, 1974. In first appeal[5], Satish Chandra succeeded and the suit was decreed *vide* judgment and decree dated 31st March, 1977. Aggrieved, Om Prakash preferred a second appeal[6] before the High Court of Judicature at Allahabad[7]. The High Court granted stay of operation of the decree *vide* order dated 11th May, 1977.

b. Satish Chandra passed away on 2nd December 1996 during the pendency of the second appeal. On 2nd January, 1997, his heirs moved an application for substitution[8]. The High Court was informed of the death of Satish Chandra by the heirs and prayer was made for their substitution. Paragraph no. 1 of the application for substitution contained details as follows:

> "That in the above noted second appeal, the sole respondent Satish Chandra son of Sri Ram died on 2.12.1996 leaving behind the following heirs and legal representatives: -
>
> 1/1 Anil Kumar
> 1/2 Vimal Kumar
> 1/3 Manoj Kumar"

Prayer in the said application is as follows:

> "It is prayed that the Hon'ble Court may be pleased to delete the name of the respondent no. 1 Sri Satish Chandra from array of the parties and on his place the following:
>
> 1/1 Anil Kumar
> 1/2 Vimal Kumar
> 1/3 Manoj Kumar
>
> All sons of Late Sri Satish Chandra
> R/o Gandhi Tola, Nawabganj, Bareilly
> Be substituted as his heirs and legal representatives"

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[4] the court of the Civil Judge, Bareilly
[5] Civil Appeal No.11 of 1975
[6] Second Appeal No. 885 of 1977
[7] High Court, hereafter
[8] Civil Miscellaneous Substitution Application No. 211 of 1997

c. Om Prakash died on 8th December 2001.

d. From the sequence of orders passed in the second appeal between 17th March, 2004 and 8th December, 2006, it is seen that multiple opportunities were given to counsel for Om Prakash to file an application for substitution. However, pendency of the application for substitution filed by the heirs of Satish Chandra escaped the notice of the High Court.

e. Ultimately, the second appeal was ordered to have abated in the whole *vide* order dated 2nd January 2007 on the ground that no application for substitution was filed by Om Prakash or his heirs to bring on record the heirs/legal representatives of Satish Chandra.

f. In the year 2017, the heirs of Satish Chandra initiated proceedings for execution of the decree[9].

g. Put on notice, the heirs of Om Prakash preferred an application for recall/restoration[10] seeking recall of the aforesaid order recording abatement of the second appeal. On the same day, they also filed an application for substitution[11] along with an application for condonation of delay[12].

h. The restoration application was allowed by the High Court and the second appeal restored to its original file and number *vide* order dated 25th May, 2018.

[9] E.A. No. 6 of 2017
[10] Civil Miscellaneous Restoration Application No. 2 of 2018
[11] Civil Miscellaneous Substitution Application No. 5 of 2018
[12] Civil Miscellaneous Delay Condonation Application No. 4 of 2018

i. Seeking recall of the said order, heirs of Satish Chandra preferred an application for recall[13] along with an application for condonation of delay[14]. These applications were allowed *vide* order dated 11th January 2019, with the result that the order restoring the second appeal to its original file upon setting aside of abatement stood recalled. Liberty was, however, reserved for the heirs of Om Prakash to file an application for setting aside abatement.

j. While hearing the pending applications, referred to in paragraph g. (*supra*), the High Court did not find sufficient reasons for condoning the delay in filing the application for substitution. Resultantly, such application filed by the heirs of Om Prakash along with the application for substitution was dismissed *vide* impugned order dated 27th February 2019.

k. Taking exception to such order of the High Court, the heirs of Om Prakash have filed Civil Appeal No. 13407 of 2024.

2. FACTS OF CIVIL APPEAL NO. 13408 OF 2024:

a. Smt. Rooprani[15], Satish Chandra's wife, instituted a suit[16] for specific performance of an agreement[17] against Om Prakash and his minor sons (represented through their mother). The suit was dismissed *vide* order dated 7th October, 1974 by the Trial Court[18]. In an appeal[19] preferred by

[13] Recall Application No. 7 of 2018
[14] I.A. No. 8 of 2018
[15] Rooprani
[16] Suit No. 94 of 1973
[17] agreement to Sell dated 7th June, 1970
[18] Court of Civil Judge, Bareilly
[19] Appeal No. 12 of 1975

Rooprani, the suit was decreed *vide* judgment and decree dated 31st March, 1977. Om Prakash carried the first appellate decree in a second appeal[20]. The High Court granted stay of operation of the impugned decree *vide* order dated 11th May, 1977.

b. After the death of Rooprani on 18th May, 1991, an application[21] was filed on or about November/December, 1992 by deceased Rooprani's son, Anil Kumar, praying that the High Court may take note of an alteration made by Om Prakash and his heirs in the decretal property. In the affidavit accompanying such application, it was stated that the deponent (Anil Kumar) is one of the sons of deceased Rooprani (plaintiff). The same is reproduced below:

> "That the deponent is one of the sons of the deceased respondent Smt. Roop Rani and conversant with the facts deposed."

c. As noted earlier, Om Prakash passed away on 8th December, 2001.

d. The second appeal of Om Prakash was dismissed for non-prosecution[22] as the counsel for the remaining appellants (the heirs of Om Prakash) submitted that his clients were not responding.

e. After almost 11 (eleven) years, on 15th September, 2017, the legal representatives of Rooprani filed for execution of the decree[23].

f. This is when the heirs of Om Prakash, on 5th April, 2018, filed an application[24] seeking recall of the order dismissing the second appeal for

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[20] Second Appeal No. 884 of 1977
[21] C.M.A. No. 5306 of 1992
[22] vide order dated 3rd November, 2006
[23] E.A. No. 7 of 2017
[24] Recall/ Restoration Application No. 2 of 2018 in Second Appeal No. 884 of 1977

want of prosecution. They filed an application[25], 40 (forty) days later, praying for their substitution as heirs of deceased Om Prakash, along with an application seeking condonation of delay[26].

g. Finding that sufficient cause had been shown, the High Court allowed the recall application and restored the second appeal to its original file and number *vide* order dated 25th May, 2018.

h. Seeking recall of the aforesaid order, the heirs of Rooprani filed a recall application[27] which was dismissed by the High Court *vide* order dated 11th January, 2019. The High Court opined that restoration of the second appeal, in itself, did not amount to setting aside of the abatement and unless abatement is set aside, the second appeal is *non-est* in the eyes of law and no right will accrue to either side.

i. Thereafter, the impugned orders were passed by the High Court on 27th February, 2019. By the first order, the application by heirs of Om Prakash for condonation of delay in filing the substitution application[28] was dismissed. The second order, having regard to the first order, dismissed their application for substitution[29]. For the reasons assigned in the first order, the High Court did not find sufficient reasons to condone the delay.

j. Taking exception to the above, the heirs of Om Prakash have filed Civil Appeal No. 13408 of 2024.

PROCEEDINGS BEFORE THIS COURT

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[25] Civil Miscellaneous Substitution Application No. 5 of 2018
[26] Civil Miscellaneous Application No. 4 of 2018
[27] Recall Application No. 7 of 2018
[28] C.M. Delay Condonation Application No.4 of 2018
[29] C.M. Substitution Application No.5 of 2018

3. A coordinate bench of this Court, on 12th July, 2019, granted permission to file the special leave petitions and issued notice on such petitions as well as the accompanying applications for substitution and the connected applications. Pursuant to service of notice, the heirs of Satish Chandra and Rooprani entered appearance. Mr. Thomas Joseph, learned senior counsel and Mr. Shekar Devessa, learned senior counsel represented the heirs of Om Prakash. Heirs of Rooprani were represented by Mr. Raghenth Basant, learned senior counsel. While granting leave and reserving judgment on these civil appeals, we had made an order allowing the applications for substitution and the connected applications, filed in the present proceedings, subject to just exceptions.

CONTENTIONS OF THE PARTIES

4. Learned senior counsel/counsel appearing for the parties have meticulously taken us through the facts of both these appeals which, though not very complicated, are a bit extensive considering that proceedings commenced in 1972-1973.

5. Learned senior counsel/counsel for the appellants have argued that the High Court fell in error on both occasions by not granting the prayers of the appellants and having the two second appeals heard on merits. According to them, procedural requirements have been allowed to steal a march over substantive justice without duly appreciating the materials on record.

6. *Per contra*, Mr. Basant appearing for the respondents has assiduously contended that there is no infirmity, far less manifest infirmity, in the impugned orders of the High Court and no interference under Article 136 of the Constitution is warranted. He highlighted how Om Prakash was negligent in pursuing the second appeals before the High Court. According to him, it well within the knowledge of Om Prakash that Rooprani and then Satish Chandra passed away and who their heirs were. Lack of due diligence by Om Prakash being writ large, he prayed that the longstanding dispute between the parties be laid to rest by dismissing these appeals and leaving it open to the respondents to pursue the execution applications in accordance with law, should the need arise.

ISSUES

7. The issue arising for decision in C.A. No.13407 of 2024 is, whether the High Court was justified in dismissing the application for condonation of delay in filing the application for substitution and could the second appeal be regarded as having abated.

8. In C.A. No. 13407 of 2024, whether the High Court was justified in passing the impugned orders dismissing the applications filed by the appellants seeking substitution and condonation of delay is the issue.

ANALYSIS AND REASONS

9. The principles to guide courts while considering applications for setting aside abatement and application for condonation of delay in filing the

former application are laid down by this Court in ***Perumon Bhagvathy Devaswom v. Bhargavi Amma***[30]. An instructive passage from such decision reads as follows:

> "13. The principles applicable in considering applications for setting aside abatement may thus be summarised as follows:
> (*i*) The words 'sufficient cause for not making the application within the period of limitation' should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.
> (*ii*) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.
> (*iii*) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.
> (*iv*) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.
> (*v*) Want of 'diligence' or 'inaction' can be attributed to an appellant only when *something* required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal."
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> (emphasis supplied in original)

The aforesaid passage is followed by other instructive passages too on special factors which have a bearing on what constitutes "sufficient

[30] (2008) 8 SCC 321

cause", with reference to delay in applications for setting aside abatement and bringing the legal representatives on record. To the extent relevant for decisions on these two appeals, the same are extracted hereunder:

> "15. The first is whether the appeal is pending in a court where regular and periodical dates of hearing are fixed. There is a significant difference between an appeal pending in a subordinate court and an appeal pending in a High Court. In lower courts, dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and keep track of the case. The process is known as 'adjournment of hearing'. ...
> 16. In contrast, when an appeal is pending in a High Court, dates of hearing are not fixed periodically. Once the appeal is admitted, it virtually goes into storage and is listed before the Court only when it is ripe for hearing or when some application seeking an interim direction is filed. It is common for appeals pending in High Courts not to be listed at all for several years. (In some courts where there is a huge pendency, the non-hearing period may be as much as ten years or even more.) When the appeal is admitted by the High Court, the counsel inform the parties that they will get in touch as and when the case is listed for hearing. There is nothing the appellant is required to do during the period between admission of the appeal and listing of the appeal for arguments (except filing paper books or depositing the charges for preparation of paper books wherever necessary). The High Courts are overloaded with appeals and the litigant is in no way responsible for non-listing for several years. There is no need for the appellant to keep track whether the respondent is dead or alive by periodical enquiries during the long period between admission and listing for hearing. When an appeal is so kept pending in suspended animation for a large number of years in the High Court without any date being fixed for hearing, there is no likelihood of the appellant becoming aware of the death of the respondent, unless both lived in the immediate vicinity or were related or the court issues a notice to him informing the death of the respondent.
> 17. The second circumstance is whether the counsel for the deceased respondent or the legal representative of the deceased respondent notified the court about the death and whether the court gave notice of such death to the appellant. Rule 10-A of Order 22 casts a duty on the counsel for the respondent to inform the court about the death of such respondent whenever he comes to know about it. When the death is reported and recorded in the order-sheet/proceedings and the appellant is notified, the appellant has knowledge of the death and there is a duty on the part of the appellant to take steps to bring the legal representative of the deceased on record, in place of the deceased. The need for diligence commences from the date of such knowledge. If the appellant pleads ignorance even after the court notifies him about the death of the respondent that may be an indication of negligence or want of diligence.
> 18. The third circumstance is whether there is any material to contradict the claim of the appellant, if he categorically states that he was unaware of

> the death of the respondent. In the absence of any material, the court would accept his claim that he was not aware of the death.
> 19. Thus it can safely be concluded that if the following three conditions exist, the courts will usually condone the delay, and set aside the abatement (even though the period of delay is considerable and a valuable right might have accrued to the opposite party—LRs of the deceased—on account of the abatement):
> (*i*) The respondent had died during the period when the appeal had been pending without any hearing dates being fixed;
> (*ii*) Neither the counsel for the deceased respondent nor the legal representatives of the deceased respondent had reported the death of the respondent to the court and the court has not given notice of such death to the appellant;
> (*iii*) The appellant avers that he was unaware of the death of the respondent and there is no material to doubt or contradict his claim.
>
> (emphasis supplied)

10. Having the benefit of the aforesaid pertinent guiding principles, we also consider it prudent to dwell on another matter of some importance which quite frequently this Court is called upon to consider. It is the appropriate sequence in which remedies available to have an order for setting aside abatement of a suit should be pursued. This discussion is necessitated in view of the facts in C.A. No.13408 of 2024 revealing that the appellants had applied for substitution and an application for condonation of delay in filing the former application was filed, without there being an application for setting aside the abatement.

11. Rule 1 of Order XXII, CPC provides that when a party to a suit passes away, the suit will not abate if the right to sue survives. In instances where the right to sue does survive, the procedure for bringing on record the legal representative(s) of the plaintiff/appellant and the defendant/respondent are provided in Rules 3 and 4, respectively, of Order XXII. The suit/appeal automatically abates when an application to substitute the legal representative(s) of the deceased party is not filed

within the prescribed limitation period of 90 days from the date of death, as stipulated by Article 120 of the Limitation Act, 1963. It could well be so that death of a defendant/respondent is not made known to the plaintiff/appellant within 90 days, being the period of limitation. Does it mean that the suit or appeal will not abate? The answer in view of the scheme of Order XXII cannot be in the negative. In the event the plaintiff/appellant derives knowledge of death immediately after the suit/appeal has abated, the remedy available is to file an application seeking setting aside of the abatement, the limitation wherefor is stipulated in Article 121 and which allows a period of 60 days. Therefore, between the 91st and the 150th day after the death, one has to file an application for setting aside the abatement. On the 151st day, this remedy becomes time-barred; consequently, any application seeking to set aside the abatement must then be accompanied by a request contained in an application for condonation of delay under Section 5 of the Limitation Act in filing the application for setting aside the abatement. Thus, the total time-frame for filing an application for substitution and for setting aside abatement, as outlined in Articles 120 and 121 of the Limitation Act, is 150 (90 + 60) days. The question of condonation of delay, through an application under Section 5 of the Limitation Act, arises only after this period and not on the 91st day when the suit/appeal abates. From our limited experience on the bench of this Court, we have found it somewhat of a frequent occurrence that after abatement of the suit and after the 150th day of death, an application is

filed for condonation of delay in filing the application for substitution but not an application seeking condonation of delay in filing the application for setting aside the abatement. The proper sequence to be followed, therefore, is an application for substitution within 90 days of death and if not filed, to file an application for setting aside the abatement within 60 days and if that too is not filed, to file the requisite applications for substitution and setting aside the abatement with an accompanying application for condonation of delay in filing the latter application, i.e., the application for setting aside the abatement. Once the court is satisfied that sufficient cause prevented the plaintiff/appellant from applying for setting aside the abatement within the period of limitation and orders accordingly, comes the question of setting the abatement. That happens as a matter of course and following the order for substitution of the deceased defendant/respondent, the suit/appeal regains its earlier position and would proceed for a trial/hearing on merits. Be that as it may.

12. We proceed with C.A. No.13407 of 2024 first.

13. Having regard to the facts noticed above, this appeal would require us to decide whether the heirs of Om Prakash were required to file a separate application for substitution when, admittedly, an application for substitution (Civil Misc. Substitution Application No. 211 of 1997) had previously been filed by the heirs of Satish Chandra. If the answer is in the negative, the impugned orders and also the order dated 2nd January 2007 (*vide* which the second appeal was dismissed as abated) will have

to be set aside, since dismissal of a second appeal as abated despite pendency of a valid substitution application would be bad in law.

14. Order XXII of the Code of Civil Procedure[31] is titled DEATH, MARRIAGE AND INSOLVENCY OF PARTIES. Rule 4 thereof lays down the procedure in case of death of one of several defendants or of sole defendant. It is clear on perusal of such rule that it does not expressly provide who between the parties to a civil suit is to present an application for substitution.

15. In ***Union of India v. Ram Charan***[32], this Court held:

> "10. It is not necessary to consider whether the High Court applied its earlier Full Bench decision correctly or not when we are to decide the main question urged in this appeal and that being the first contention. Rules 3 and 4 of Order 22 CPC lay down respectively the procedure to be followed in case of death of one of several plaintiffs when the right to sue does not survive to the surviving plaintiffs alone or that of the sole plaintiff when the right to sue survives or of the death of one several defendants or of sole defendant in similar circumstances. The procedure requires an application for the making of the legal representatives of the deceased plaintiff or defendant a party to the suit. It does not say who is to present the application. Ordinarily it would be the plaintiff as by the abatement of the suit the defendant stand to gain. However, an application is necessary to be made for the purpose. If no such application is made within the time allowed by law, the suit abates so far as the deceased plaintiff is concerned or as against the deceased defendant. The effect of such an abatement on the suit of the surviving plaintiffs or the suit against the surviving defendants depends on other considerations as held by this Court in State of Punjab v. Nathu Ram [AIR 1962 SCR 89] and Jhandha Singh v. Gurmukh Singh [CA No. 344 of 1956 decided on April 10, 1962]. Anyway, that question does not arise in this case as the sole respondent had died."
>
> (emphasis supplied)

16. The law, laid down in ***Ram Charan*** (supra), is clear. There seems to be no legal requirement that on the death of a defendant, an application for substitution in all cases has to be made by the plaintiff only and that, any application, made by the heir(s)/legal representative(s) of the

[31] CPC
[32] AIR 1964 SC 215

deceased defendant seeking an order to allow him/them step into the shoes of the deceased defendant and to contest the suit, cannot be considered. Once an application has been made by either party and the court has been informed about the death of a party and who the heir(s)/legal representative(s) he has left behind, the only thing that remains for the court is to pass an order substituting the heir(s)/legal representative(s). Such being the case, we have no doubt in holding that the application moved by the heirs of Satish Chandra (Civil Misc. Substitution Application No. 211 of 1997), whereby the court was informed by them of his death and the heirs that he had left behind, amounted to an application for substitution which was legally permissible and valid and deserved consideration.

17. According to Mr. Basant, the application filed by the heirs of Satish Chandra was an application intimating the death of Satish Chandra under Order XXII Rule 10-A, CPC and it was not an application under Rule 4 thereof; thus, there being no valid and proper application for substitution, the appeal was rightly held to have abated.

18. We find no force in the argument advanced by Mr. Basant. The application filed by the heirs of Satish Chandra was registered as a substitution application and the prayer was also for deletion of the name of Satish Chandra and substitution of his three sons in his place. In view thereof and having regard to the law laid down in ***Ram Charan*** (supra), we hold that an application having been filed by the heirs of Satish

Chandra, the heirs of Om Prakash were not legally obliged to apply separately for substitution.

19. In our opinion, the law not having expressly mandated that an application for substitution has to be filed by the plaintiff/appellant upon receiving intimation of death, requiring a formal application from the plaintiff only will serve no tangible purpose. A justice-oriented approach has to be followed in interpreting the provisions of the CPC is the well settled law. Reference may usefully be made to the decision in ***Chinnammal v. P. Arumugham***[33], where it was held:

> "17. It is well to remember that the Code of Civil Procedure is a body of procedural law designed to facilitate justice and it should not be treated as an enactment providing for punishments and penalties. The laws of procedure should be so construed as to render justice wherever reasonably possible. It is in our opinion, not unreasonable to demand restitution from a person who has purchased the property in court auction being aware of the pending appeal against the decree."
>
> (emphasis supplied)

20. The High Court having been duly informed of the death of Satish Chandra, and substitution having been prayed by the heirs of the deceased, it ought to have proceeded to consider such application and pass an order bringing the heirs of the deceased respondent on record. This, the High Court omitted to order, perhaps, due to inadvertence whereby pendency of the application for substitution filed by the heirs of Satish Chandra escaped its notice.

21. Therefore, the order dated 2nd January 2007 *vide* which the second appeal was dismissed as having abated cannot sustain and will have to

[33] (1990) 1 SCC 513

be set aside. The said order, though not under challenge before this Court, there is no bar for this Court to erase defective orders by setting them aside, even in the absence of any challenge thereto. In ***A. Subash Babu v. State of A.P.***[34], this Court discussed its powers to make any order to cure a manifest illegality and to avoid travesty of justice even in the absence of any challenge to such order, and proceeded to express as follows:

> "58. There may be several reasons due to which the State might not have challenged that part of the judgment of the learned Single Judge quashing the complaint filed by Respondent 2 under Section 498-A of the Penal Code. So also because of several reasons such as want of funds, distance, non-availability of legal advice, etc. the original complainant might not have approached this Court to challenge that part of the judgment of the learned Single Judge which is quite contrary to the law declared by this Court. However, this Court while entertaining an appeal by grant of special leave has the power to mould relief in favour of the respondents notwithstanding the fact that no appeal is filed by any of the respondents challenging that part of the order which is against them. To notice an obvious error of law committed by the High Court and thereafter not to do anything in the matter would be travesty of justice.
>
> 59. This Court while disposing of an appeal arising out of grant of special leave can make any order which justice demands and someone who has obtained an illegal order would not be justified in contending before this Court that in the absence of any appeal against an illegal order passed by the High Court the relief should not be appropriately moulded by the Court or that the finding recorded should not be upset by this Court.
>
> x x x
>
> 66. Further, the powers under Article 136 can be exercised by the Supreme Court, in favour of a party even suo motu when the Court is satisfied that compelling grounds for its exercise exist. Where there is manifest injustice, a duty is enjoined upon this Court to exercise its suo motu power by setting right the illegality in the judgment of the High Court as it is well settled that illegality should not be allowed to be perpetuated and failure by this Court to interfere with the same would amount to allow illegality to be perpetuated.
>
> 67. When an apparent irregularity is found by this Court in the order passed by the High Court, the Supreme Court cannot ignore substantive rights of a litigant while dealing with the cause pending before it. There is no reason why the relief cannot be and should not be appropriately moulded while disposing of an appeal arising by grant of special leave under Article 136 of the Constitution."

[34] (2011) 7 SCC 616

(emphasis supplied)

22. There is another equally important aspect, which merits our attention. The second appeal was restored by the High Court *vide* order dated 25th May, 2018. This order, restoring the second appeal, was recalled *vide* order dated 11th January 2019. The reason given was that, in the absence of an application praying for setting aside the abatement, the second appeal could not have been ordered to be restored.

23. We find it difficult to agree with such reasoning. When an application praying for substitution had been made, then, even assuming that it does not have an explicit prayer for setting aside the abatement, such prayer could be read as inherent in the prayer for substitution in the interest of justice. We draw inspiration for such a conclusion, having read the decision in ***Mithailal Dalsangar Singh v. Annabai Devram Kini***[35]. This Court reiterated the need for a justice-oriented approach in such matters. *Inter alia,* it was held that prayer to bring on record heir(s)/legal representative(s) can also be construed as a prayer for setting aside the abatement. The relevant passage reads as under:

> "8. Inasmuch 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 the abatement. So also a prayer for setting aside abatement as regards 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

[35] (2003) 10 SCC 691

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.

9. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of 'sufficient cause' within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction.

10. In the present case, … such an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no order in writing passed by the court dismissing the entire suit as having abated. The suit has been treated by the Division Bench to have abated in its entirety by operation of law. For a period of ninety days from the date of death of any party the suit remains in a state of suspended animation. And then it abates. The converse would also logically follow. Once the prayer made by the legal representatives of the deceased plaintiff for setting aside the abatement as regards the deceased plaintiff was allowed, and the legal representatives of the deceased plaintiff came on record, the constitution of the suit was rendered good; it revived and the abatement of the suit would be deemed to have been set aside in its entirety even though there was no specific prayer made and no specific order of the court passed in that behalf."

(emphasis supplied)

24. Hence, the impugned orders as well as the order dismissing the second appeal as abated, under challenge in the first of the two appeals, is bad in law; the same deserve to be set aside.

25. Turning to the second of the two appeals, the facts are a little distinct.

26. The order of the High Court dated 27th February, 2019 records as follows:

"... this application was served on counsel for appellants on 12.11.1992, therefore, it cannot be said that appellants were not aware of death of sole

plaintiff-respondent and this fact also came to their notice that aforesaid application was filed in this court. Appellant 1 was also alive on that date, as admittedly he died in 2001, but no substitution application was filed, therefore, appeal stood abated in 1992 itself. When no attempt was made by appellant 1 himself for substitution and setting aside the abatement, now appellants 2, 3 and 3 (sic, 4) cannot be allowed to take advantage subsequently. More so, mother of appellants 2, 3 and 4 who represented appellants in filing appeal, was also aware of pendency of the case and it is not the case of appellants that she never told them about pendency of the case."

27. In this context, it is fruitful to refer to Order XXII Rule 10-A, CPC. The same is reproduced below for convenience:

> "Wherever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall there upon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist."

28. Rule 10-A was not originally contained in CPC, but was inserted in the CPC in the year 1976 for a noble purpose which has been acknowledged by this Court in multiple decisions. The first of such decisions, perhaps, is ***Gangadhar v. Raj Kumar***[36] where this Court held:

> "3. … Rule 10-A which has been added in Order XXII of the Code of Civil Procedure by the Amending Act of 1976 provides that when a pleader appearing for a party to the suit comes to know of the death of the party, he shall inform the court about it and the court thereafter shall issue notice to the other party. In the case of an appeal, the word 'suit' has to be read as 'appeal'. This provision was introduced specifically to mitigate the hardship arising from the fact that the party to an appeal may not come to know about the death of the other party during the pendency of the appeal but when it is awaiting its turn for being heard. The appeal lies dormant for years on end and one cannot expect the other party to be a watch-dog for day-to-day survival of the other party. When the appeal on being notified for hearing is activated, knowledge occasionally dawns that one or the other party has not only died, but the time for substitution has run out and the appeal has abated. In order to see that administration of justice is not thwarted by such technical procedural lapse, this very innovative provision has been introduced, whereby, a duty is cast upon the learned advocate appearing for the party who comes to know about the death of the party to intimate to the court about the death of the party represented by the learned counsel and for this purpose a deeming fiction is introduced that

[36] (1984) 1 SCC 121

the contract between dead client and lawyer subsists to the limited extent after the death of the client.

(emphasis supplied)

29. Rule 10-A casts a duty upon a pleader appearing for a party to the suit to intimate the court about the death of such party. It further provides that once the court is informed by the pleader of a party that he is no more, the court "shall" notify the opposing party of the death. A straightforward interpretation of this rule would suggest that the court's obligation to issue notice to the other party is indeed mandatory. Nonetheless, this obligation may not arise in all circumstances. One notable exception could be when the information regarding the party's death is conveyed to the court in the presence of the opposing party's pleader or is documented by the court in the order sheet. In such cases, if the pleader of the concerned party (and consequently the party itself) has already been notified, issuing a further notice from the court would not serve any substantial purpose other than being an exercise by way of abundant caution. Therefore, in the aforementioned scenario, the absence of a notice from the court would not imply a failure to comply with Rule 10A, suggesting that it is not "always mandatory".

30. Had the circumstance outlined above applied to the present appeal, we would have likely concluded that Rule 10-A has been substantially complied with. However, the facts in this instant case are not particularly clear-cut. As previously noted, in the affidavit submitted alongside an application by Anil Kumar which primarily was not intended to inform the court of Rooprani's death, it was stated that he is "one of the sons

of deceased Rooprani". The inclusion of such pertinent information within an inconspicuous section of an application meant for a different purpose without the date of death does not, in our considered view, constitute sufficient compliance with Rule 10-A either by the pleader of the deceased or amount to due notice to Om Prakash by the court (without such death being recorded in any order passed subsequently in the presence of counsel for Om Prakash). To rule otherwise would undermine the intention of Rule 10-A, which mandates the clear communication of information relating to death of a party which, obviously, would mean not only the factum of death being conveyed but also the date of death since limitation to apply under Article 120 of the Limitation Act, 1963 for substitution begins to run from the date of death. It is implicit that this information must be conveyed in a straightforward and unambiguous manner to enable the plaintiff or the appellant, as the case may be, to take steps and apply for substitution. No advantage should be allowed to be derived if such death is, by clever drafting, sought to be disclosed in an obscure corner of an application seeking to bring to the notice of the court an alleged subsequent development resulting in violation of a court's order.

31. Having held that the manner of conveying information of the death of Rooprani was not wholly in accordance with Rule 10-A, information through the application of Anil Kumar cannot operate adversely against Om Prakash. Had Om Prakash been noticed by the High Court in due compliance with Rule 10-A, yet, did not file an application for

substitution, he would be estopped from pleading ignorance and we would have been inclined to hold otherwise. This not being the case, the abatement of the second appeal ought to be set aside.

32. Although no application praying for setting aside of abatement was ever made by the appellants before the High Court, but as held in ***Mithailal*** (supra), prayer for setting aside of abatement can be read in a prayer for substitution. Accordingly, the abatement of the second appeal can and ought to be set aside for ends of justice.

CONCLUSION

33. For the foregoing reasons, the appeals merit success.

34. While allowing Civil Appeal No. 13407 of 2024, the application for substitution[37] filed by the heirs of Satish Chandra is ordered to succeed. We set aside the order dismissing the second appeal[38] as abated. The said appeal is restored to its original file and number. Cause-title of the said appeal shall be amended to record the death of Satish Chandra and his heirs - Anil Kumar, Vimal Kumar and Manoj Kumar - shall be brought on record as substituted respondents.

35. Insofar as Civil Appeal No. 13408 of 2024 is concerned, the impugned orders stand set aside. The abatement of the second appeal is also set aside. Resultantly, the prayer for substitution stands granted. Cause-title of the said appeal shall be amended to record the death of Rooprani and her heirs – Anil Kumar, Vimal Kumar and Manoj Kumar - shall be

[37] Civil Miscellaneous Substitution Application No. 211 of 1997
[38] Second Appeal No. 885 of 1977

brought on record as substituted respondents in the second appeal. Consequently, Civil Appeal No. 13408 of 2024 is allowed.

36. Having regard to the long lapse of time ever since the second appeals were presented before the High Court, that the original parties are now dead and that the suits were for specific performance of contracts for sale, we request the roster bench of the High Court to consider the second appeals on priority and decide the same, subject to its convenience, preferably within 6 (six) months from date.

37. There shall be no order for costs.

.....J.
(DIPANKAR DATTA)

.....J.
(PRASHANT KUMAR MISHRA)

NEW DELHI;
11th FEBRUARY, 2025.