*This appeal coming on for hearing this day, the court passed the following:*

**JUDGMENT**

This second appeal under Section 100 of CPC has been filed against the judgment and decree dated 14.10.2014 passed by District Judge, Anuppur in Civil Appeal No.22-A/2013 arising out of judgment and decree dated 13.08.2023 passed by Civil Judge Class-2 in Civil Suit No.116A/2011.

**2.** I.A. No.421/2019 has been filed under Order 22 Rule 4 of CPC for substitution of legal representatives of respondent no.2 Bhudha Rathore.

**3.** According to this application, Buddha Rathore had expired on 06.09.2014. The death certificate is also annexed with as Annexure D/1. Thus, respondent no.2/Bhudha had expired during the pendency of the civil appeal before the First Appellate Court and on the said date the appeal was not reserved for judgment and even the final arguments took place after the death of respondent no.2/Bhudha.

**4.** Accordingly, the appeal is admitted on the following substantial questions of law:

> "Whether the judgment and decree dated 14.10.2014 passed by Appellate Court is a nullity as respondent no.2 Bhudha had already expired and his legal representatives were not brought on record."

**5.** Heard finally.

**6.** From the order sheets of the First Appellate Court, it is clear that final arguments of the counsel for the appellant were heard on

18.09.2014 and at the request of respondent no.1, the case was adjourned to 19.09.2014 for hearing of final arguments by the remaining parties and accordingly, on 19.09.2014 the case was reserved for judgment and was fixed for 29.09.2014. On 29.09.2014 the appellant filed an application under Order 17 Rule 1 of CPC on the ground that she wants to file certain documents by filing an application under Order 41 Rule 27 of CPC and therefore, sometime may be granted. Accordingly, the application was allowed and the case was fixed for 09.10.2014 for filing of an application under Order 41 Rule 27 CPC. On 09.10.2014 the appellant did not file any application under Order 41 Rule 27 of CPC and raised certain objections to the judgment and decree passed by the trial Court and accordingly, it was directed that the case be listed for delivery of judgment on 14.10.2014 and the judgment was delivered on 14.10.2014.

**7.** Under these circumstances, it is clear that the decree was passed by the Appellate Court in favour of a dead person.

**8.** The Supreme Court in the case of **Gurnam Singh (Dead) Through Legal Representatives and others v. Gurbachan Kaur (Dead) by Legal Representatives** reported in **(2017) 13 SCC 414** has held as under:

> **13.** The short question which arises for consideration in this appeal is whether the impugned order allowing the plaintiff's second appeal is legally sustainable in law? In other words, the question is whether the High Court had the jurisdiction to decide the second appeal when the appellant and the 2 respondents had expired during the pendency of appeal and their legal representatives were not brought on record?

**14.** In a leading case of this Court in Kiran Singh v. Chaman Paswan [Kiran Singh v. Chaman Paswan, AIR 1954 SC 340], the learned Judge Venkatarama Ayyar, J. speaking for the Bench in his distinctive style of writing laid down the following principle of law being fundamental in nature: (AIR p. 342, para 6)

> "*6.* … It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

**15.** The question, therefore, is whether the impugned judgment/order is a nullity because it was passed by the High Court in favour of and also against the dead persons? In our considered opinion, it is a nullity. The reasons are not far to seek.

**16.** It is not in dispute that the appellant and the two respondents expired during the pendency of the second appeal. It is also not in dispute that no steps were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved, to file an application under Order 22 Rules 3 and 4 of the Code of Civil Procedure, 1908 (for short "the Code") for bringing their names on record in place of the dead persons to enable them to continue the lis.

**17.** The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party

concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated".

**18.** Order 22 Rule 3(2) which applies in the case of the death of appellant-plaintiff and Order 22 Rule 4(3) which applies in the case of the respondent-defendant provides the consequences for not filing the application for substitution of legal representatives by the parties concerned within the time prescribed. These provisions read as under:

**18.1.Order 22 Rule 3(2)**

> **"3. (2)** Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

**18.2.Order 22 Rule 4(3)**

> "**4. (3)** Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

**19.** In the case at hand, both the aforementioned provisions came in operation because the appellant and the two respondents expired during the pendency of the second appeal and no application was filed to bring their legal representatives on record. As held above, the legal effect of the non-compliance with Rules 3(2) and 4(3) of Order 22 of the Code, therefore, came into operation

resulting in dismissal of second appeal as abated on the expiry of 90 days from 10-5-1994 i.e. on 10-8-1994. The High Court, therefore, ceased to have jurisdiction to decide the second appeal which stood already dismissed on 10-8-1994. Indeed, there was no pending appeal on and after 10-8-1994.

**20.** In our considered view, the appeal could be revived for hearing only when firstly, the proposed legal representatives of the deceased persons had filed an application for substitution of their names and secondly, they had applied for setting aside of the abatement under Order 22 Rule 9 of the Code and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the substitution application under Order 22 Rules 3 and 4 of the Code beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed.

**21.** It is a fundamental principle of law laid down by this Court in *Kiran Singh case [Kiran Singh v. Chaman Paswan, AIR 1954 SC 340]* 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 v. LAO [N. Jayaram Reddy v. LAO, (1979) 3 SCC 578] , Ashok*

*Transport Agency v. Awadhesh Kumar [Ashok Transport Agency v. Awadhesh Kumar, (1998) 5 SCC 567] and Amba Bai v. Gopal [Amba Bai v. Gopal, (2001) 5 SCC 570] ).*

**22.** The appellants are the legal representatives of Defendants 2 and 4 on whom the right to sue has devolved. They had, therefore, right to question the legality of the impugned order inter alia on the ground of it being a nullity. Such objection, in our opinion, could be raised in appeal or even in execution proceedings arising out of such decree. In our view, the objection, therefore, deserves to be upheld. It is, accordingly, upheld."

**9.** The Supreme Court in the case of **Amba Bai and others v. Gopal and others** reported in **(2001) 5 SCC 570** has held as under:

**"7.** In the instant case, the 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 a 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, could there be a merger of the same with the decree passed by the first appellate court?

**8.** Before considering the question of merger, we have to consider the effect of abatement. When the second appeal had abated and the legal representatives of the appellant were not brought on record, the decree, which was passed by the first appellate court, would acquire finality. A

similar matter came up before this Court in *Rajendra Prasad v. Khirodhar Mahto [1994 Supp (3) SCC 314]* wherein it was held that as a consequence of the abatement of the appeal filed against final decree in a partition suit, the preliminary decree would become final. In that case, the appellants and Tapeshari Kuer filed a suit for partition of immovable properties, including Plaint 4 and 5 properties. The property originally belonged to one Bishni Mahto. He had two sons, namely, Sheobaran Mahto and Ramyad Mahto. Tapeshari Kuer was the daughter of Ramyad Mahto. Plaint 4 and 5 properties were not partitioned between these two sons of Bishni Mahto. Ramyad Mahto, the father of Tapeshari Kuer died and she succeeded to the one-half of the undivided share of the two sons of Bishni Mahto. Tapeshari Kuer had executed a gift deed in favour of the appellants bequeathing her undivided interest inherited from her father in respect of Plaint Item 4 property. The trial court decreed the suit declaring the half share of Tapeshari Kuer in Plaint 5 of the property. The appellants who had joined as Plaintiffs 1 and 2 were held to have half share in Plaint Item 4 by virtue of the gift deed executed by her. The defendants in the suit filed an appeal and pending appeal, Tapeshari Kuer died. Her legal heirs were not brought on record. The appellate court gave a finding that Tapeshari Kuer was not the daughter of Ramyad Mahto and the appellant did not acquire any interest in the undivided share. The suit was dismissed. Original Plaintiffs 1 and 2 filed the second appeal before the High Court. The second appeal was dismissed as the heirs of Tapeshari Kuer were not brought on record. Original Plaintiffs 1 and 2 carried the matter to this Court by special leave. It was contended that Plaintiffs 1 and 2 were entitled to the benefit of preliminary decree. Ultimately, this Court held that whether Tapeshari Kuer was the daughter of Ramyad Mahto or not was required to be gone into only when her legal representatives were brought on record. It was held that the decree against a

> dead person was a nullity and, therefore, the declaration by the first appellate court that Tapeshari Kuer was not a daughter of Ramyad Mahto was not valid in law. The High Court had held that the decree of the appellate court was a nullity and the respondent did not file any appeal against that part of the decree, the result was that the preliminary decree became final.
>
> **14.** In the instant case, there is no question of the application of the doctrine of merger. As the second appellant Radhu Lal died during the pendency of the appeal, and in the absence of his legal heirs having taken any steps to prosecute the second appeal, the decree passed by the first appellate court must be deemed to have become final. By virtue of the order passed by the first appellate court, the plaintiff's suit for specific performance was decreed. Failure on the part of the legal heirs of Radhu Lal to get themselves impleaded in the second appeal and pursue the matter further shall not adversely affect the plaintiff decree-holder as it would be against the mandate of Rule 9 Order 22 of the Code of Civil Procedure. The impugned order is, therefore, not sustainable in law and the same is set aside and the appeal is allowed. The executing court may proceed with the execution proceedings. Parties to bear their respective costs."

**10.** Thus, it is clear that any decree passed in favour of or against a dead person is a nullity.

**11.** In the present case also respondent no.2 had already expired during the pendency of the first appeal. The final arguments were heard after the death of respondent no.2. Therefore, it is clear that the decree which has been passed by the First Appellate Court is in nullity as it has been passed in favour of a dead person.

**12.** Accordingly, the substantial question of law is answered in affirmative.

**13.** The judgment and decree dated 14.10.2014 passed by District Judge, Anuppur in Civil Appeal No.22-A/2013 is hereby **set aside** being the nullity.

**14.** However, the appellant shall have a right to file an application for setting aside abatement in civil appeal.

**(G.S. AHLUWALIA)**
**JUDGE**

vc

VARSHA CHOURASIYA

Digitally signed by VARSHA CHOURASIYA
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