THE HIGH COURT OF ORISSA: CUTTACK

No. XI-27/2025/13485**/ Dated**18/08/2025

From;

Asanta Kumar Das,
Registrar General

To,

The District & Sessions Judge,..... (All)

Sub.: **Forwarding of the judgment dtd. 14th July, 2025 passed in Civil Appeal No. 7706 of 2025 (arising out of SLP(C) No.1536 of 2015) titled "Binod Pathak & Ors. Vrs. Shankar Choudhury & Ors." by Hon'ble the Supreme Court of India relating to the procedural issue of abatement in appellate proceedings and the correct application of Order XXII Rule 10A of the Civil Procedure Code (CPC), 1908.**

Sir,

With reference to the subject cited above, I am directed to forward herewith a copy of the judgment dtd. 14th July, 2025 passed in Civil Appeal No. 7706 of 2025 (arising out of SLP(C) No.1536 of 2015) titled "Binod Pathak & Ors. Vrs. Shankar Choudhury & Ors." by Hon'ble the Supreme Court of India relating to the procedural issue of abatement in appellate proceedings and the correct application of Order XXII Rule 10A of the Civil Procedure Code (CPC), 1908 for your information and to request you to communicate the same to all the Judicial Officers working under your jurisdiction for their information and necessary guidance.

This is for your kind information and necessary action.

Yours faithfully,

ASANTA KUMAR DAS

Digitally signed by ASANTA KUMAR DAS
Date: 2025.08.13 13:31:54 +05'30'

REGISTRAR GENERAL

Encl.: As above.

2025 INSC 842

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7706 OF 2025

(Arising out of Special Leave Petition (C) No. 1536 of 2015)

BINOD PATHAK & ORS. ...APPELLANT(S)

VERSUS

SHANKAR CHOUDHARY & ORS. ...RESPONDENT(S)

J U D G M E N T

Signature Not Verified
Digitally signed by CHANDRESH
Date: 2025.07.14 18:49:23 IST
Reason:

J. B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided in the following parts: -

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1. Leave Granted.

2. This appeal arises from the judgment and order passed by the High court of Judicature at Patna dated 22.10.2014 (hereinafter referred to as the "**Impugned Order**") in Second Appeal No. 190 of 2008 by which the Second Appeal filed the respondents herein; the original defendants, came to be allowed thereby setting aside the judgment and order passed by the First Appellate Court allowing the First Appeal filed by the appellants herein; the original plaintiffs, and decreeing the suit in their favour.

3. For the sake of convenience, the appellants herein shall be referred to as the original plaintiffs and the respondents herein shall be referred to as the original defendants.

A. FACTUAL MATRIX

4. The plaintiffs instituted Title Suit No. 106 of 1984 in the Court of the Sub Judge – (I) Gopalganj (hereinafter, the "**title suit**") for declaration of title and recovery of possession of suit land bearing Khewat Nos. 11 and 12 respectively, revisional survey Nos. 688, 689 and 690 respectively under Khata Nos. 571 and 574 respectively situated in the Village Harkhauli, P.S. Mirganj, District Gopalganj.

5. We need not go into the details of the nature of the suit instituted by the plaintiffs as we are inclined to dispose of this appeal on a neat question of law and remand the matter to the High Court for fresh consideration on merits.

6. In the aforesaid title suit instituted by the original plaintiffs referred to above, the trial court framed the following issues: -

(i) Is the suit, as framed, maintainable?

(ii) Have the plaintiffs got a valid cause of action or right to sue?

(iii) Whether the ancestors of Defendant nos. 7 to 10 had acquired occupancy right in respect of the suit land?

(iv) Have the plaintiffs got subsisting title and possession over the suit lands at the time of vesting of the intermediary interest in the state of Bihar as also on the date of proceeding under Section 145 of the Code of Criminal Procedure, 1973 (for short, the "**Cr.P.C.**")?

(v) To what relief or reliefs, if any, are the plaintiffs entitled to in the aforesaid suit?

7. Upon appreciation of the oral as well as documentary evidence on record the trial court recorded a finding that the plaintiffs had failed to establish their case and accordingly the suit came to be dismissed *vide* the judgment and decree dated 05.07.1989.

8. The original plaintiffs being dissatisfied with the judgment and order passed by the trial court dismissing the suit went in First Appeal before the Court of Additional District Judge – (I), Gopalganj. The appeal came to be registered bearing Title Appeal No. 60/1989 renumbered as Title Appeal No. 58 of 2007.

9. The appeal filed by the plaintiffs came to be allowed by the First Appellate Court *vide* the judgment and order dated 02.06.2009.

10. The First Appellate Court while allowing the First Appeal of the plaintiffs held as under: -

> *"18. In view of aforesaid finding I hold that plaintiffs have title on the suit land and they have been illegally dispossessed by the defendants, so plaintiffs title on suit land mentioned in schedule 2,3 and 4 of plaint is hereby upheld and the plaintiffs are entitled for recovery of possession of suit land. Plaintiffs have claimed mesne profit, but the lower court neither framed issue nor decided the same but in the light of aforesaid finding plaintiffs are entitled to mesne profit from the date of dispossession upto getting possession on the suit land which has to be determined by the lower court in separated proceeding if it will be initiated by the plaintiffs after delivery of possession.*
>
> *Hence, the appeal is allowed with cost, the judgment and decree of the lower court is hereby set aside and the suit is decreed with cost. The plaintiffs have title and possession on schedule K. 2, 3 and 4 of the plaint and they are entitled for mesne profit from date of dispossession upto the date of getting delivery of possession. Defendants (respondents) are directed to deliver possession of the suit land to the plaintiffs within thirty days from today failing which plaintiffs (appellants) will be entitled to get delivery of possession according to the process of law.*

I have already recorded finding that defendants (respondents) have constructed house and structures on suit land during pendency of the suit so plaintiffs will have obtain to take delivery of possession either with house or structures by evicting persons residing in it or if they so like they may apply for demotion of house and structures at the cost of the defendants and to take vacant possession of the suit land. Pleaders fee Rs. 1000/- and Pleader's clerk fee Rs. 250/-."

11. The original defendants being dissatisfied with the judgment and order passed by the First Appellate Court referred to above challenged the same before the High Court by way of Second Appeal. In the Second Appeal, the High Court formulated the following substantial questions of law: -

i. *"Whether the judgment and decree of the appellate court could be said to be illegal in view of the same having been passed against several dead respondents, i.e. respondent nos. 3, 6(gh), 8, 9, 11 and 12?*

ii. *Whether the entry in the concerned 'record of right can be presumed to be the entry in favour of the erstwhile intermediary as his private land?*

iii. *Whether in absence of any finding regarding the method and manner of dispossession as alleged by the plaintiffs, the relief of restoration of possession could have been granted especially when the plaintiffs have not adduced any evidence on this aspect of the matter?*

iv. *Whether the finding of the appellate Court that in absence of plea taken in the written statement no such plea can be allowed to be taken by the defendants is sustainable in law when both the parties had understood the respective cases and adduce evidence?"*

12. It appears from the materials on record that when the aforesaid Second Appeal was taken up for hearing it came to the notice of the High Court that some of

the respondents before the First Appellate Court i.e., some of the original defendants had passed away and their legal heirs were not brought on record. The High Court took the view that in the absence of the legal heirs being substituted in accordance with the provisions of Order XXII Rule 4 of the Code of Civil Procedure, 1908 (for short, the "**CPC**") the First Appellate Court could not have heard the First Appeal on merits and decided the same in favour of the plaintiffs. The High Court took the view that the First Appeal had already stood abated as the decree was joint and indivisible.

13. The High Court held that in case of joint and indivisible decree the abatement of proceedings in relation to one or more of the appellant(s) or respondent(s) on account of omission or lapse and failure to bring on record his or their legal representatives in time would prove fatal to the entire appeal and the appeal would be liable to be dismissed.

14. The High Court while allowing the Second Appeal filed by the defendants held as under: -

> *"At this juncture, it would be pertinent to mention that the judgment and decree in the suit has been passed on 25.07.1989 and the appeal thereafter came to be decided on 02.06.2008 reversing the judgment and decree in the suit and granting the decree to the plaintiff as prayed. The memo of this second appeal has been filed on 27.06.2008 by the original defendant no. 2 Bihari Choudhary, defendant no. 4 Baijnath Chaudhary and defendant no. 5 Harilal Choudhary along with the substituted heirs of the deceased defendant no. 1 Khobhari Choudhary and deceased defendant no. 6 Yamuna Choudhary.*

The appellant no. 7 Dhananjay Choudhary in this appeal is the substituted heir of Yadunandan Choudhary who was one of the substituted heirs of deceased defendant no. 6 Jamuna Choudhary in the appellate court below. From the perusal of the memo of the instant appeal, it further transpires that the respondent nos. 10 to 13 in this appeal' have been impleaded as heirs of deceased defendant no. 3 Sheonath Choudhary.

On behalf of the appellants, it has been emphatically submitted that the defendant no. 3-respondent no. 3 (in the appellate court below) namely Sheonath Choudhary died on 07.05.1997 and similarly the substituted respondent no. 6 (Gha) (one of the substituted heirs of the deceased defendant no. 6 Yamuna Choudhary in the appellate court below) died on 29.09.2000 during the pendency of the appeal in the court below. It has been further pointed out that the substituted respondent no. 7 (ka) Most. Dipiya (one of the substituted heirs of the deceased defendant no. 7 Mangaru Bhagat) died on 07.08.1999, the defendant no. 8- respondent no. 8 Bacha Bhagat died on 05.04.2003 and respondent no. 9 Nagina Bhagat also died on 05.11.2005 during the pendency of the appeal in the court below. From the order dated 14.11.2008 passed in this appeal, it becomes evident that the fact of death of the aforesaid defendant respondents during the pendency of the appeal in the court below has been admitted by the plaintiff-respondents and it has been also admitted that their heirs could not be substituted in the said appeal.

Examined in the backdrop of these facts, it is vivid that the deceased defendant no. 3-respondent no. 3 Sheonath Choudhary was one of the purchasers of the suit land and similarly the deceased respondent no. 6 (Gha) was one of the substituted heirs of the original purchaser (Yamuna Choudhary) of the suit land. The remaining deceased respondent nos. 7(ka), 8 and 9 in the appeal in the court below were the heirs of the vendor of the defendant no. 1 to 6. The impugned judgment and decree by the appellate court below granting the declaration of title and entitlement of recovery of possession in favour of the plaintiffs has been passed against these deceased persons as well, along with the other respondents. In view of the nature of the decree as prayed for and granted by the appellate court below being joint and inseverable, it is evincible therefore that the same has been

passed against the defendant no. 3-respondent no. 3 Sheonath Choudhary, respondent no. 6 (gha) Sheonandan Choudhary and some other respondents as abovementioned who were already 'dead and their interest was not represented.

Tested on the anvil of the aforesaid principle the conclusion is inevitable that the decree dismissing the suit as against the aforesaid deceased respondents had attained finality and could not have been varied or overturned in absence of their heirs and legal representatives by the appellate court below. In other words, the appeal before the appellate court at the time of passing of the decree had become defective (not properly constituted) as all the necessary parties for the determination of the controversy were not before the court and the non-substitution of the heirs of the deceased respondents was fatal to the entire appeal.

The proposition by the learned senior counsel on behalf of the plaintiff-respondents on the strength of the decision of the Apex Court in the case of K. Naina Mohamed (supra), in the peculiar facts and circumstances of this case as mentioned, is clearly misplaced. In the said decision the purchaser was already on record to represent the interest of his deceased vendors and, in fact, it was the purchaser who filed the appeal as well as contested the second appeal thereafter. In the present case, one of the purchasers and one of the substituted heirs of another purchaser of the suit land died during the pendency of the appeal and their interest remained unrepresented as no substitution was admittedly done. Similarly, no rule has been laid down in the said decision prescribing that the provision of Order 22 Rule 10 A shall override the mandatory provision relating to abatement as contained in Order 22 Rule 4 C.P.C. for want of substitution of a defendant/respondent who was a necessary party. In this fact situation, this Court is inclined to hold that the impugned judgment and decree passed by the appellate court below cannot be stained in law, and the same is, accordingly, set aside. The substantial question of law, as formulated in this regard, is accordingly answered in favour of the appellants.

In view of the aforesaid conclusions, there remains no necessity for determining the other substantial questions of law as framed/suggested.

In the result, this appeal is allowed. In the facts and circumstances, there shall be no order as to cost."

15. In such circumstances referred to above, the plaintiffs are here before this Court with the present appeal.

B. SUBMISSIONS OF THE PARTIES

i. Submissions on behalf of the Appellants / Original Plaintiffs.

16. Mr. Gagan Gupta, the learned counsel appearing for the plaintiffs vehemently submitted that the High Court committed a serious error in passing the impugned judgment and order. He would submit that the impugned judgment and order passed by the High Court is in gross violation of the provisions of Order XXII Rule 10A of the CPC. He would submit that respondents / defendants in the First Appeal deliberately omitted to bring it to the notice of the plaintiffs that some of the defendants had passed away. According to the learned counsel, the respondents in the First Appeal not only failed to bring it to the notice of the First Appellate Court about the passing away of some of the defendants but allowed the First Appeal to be heard on merits. The failure on the part of the respondents to bring to the notice of the plaintiffs as well as to the Court concerned the factum of death of some of the defendants could be said to be in gross violation of Order XXII Rule 10A of the CPC.

17. Mr. Gupta submitted that even while conceding to the fact that some of the respondents before the First Appellate Court had passed away and their legal heirs were not brought on record, still the appeal as a whole could not be said to have stood abated. In this regard, Mr. Gupta has given a chart indicating why the First Appeal could not be said to have wholly abated in absence of the legal heirs being brought on record. The chart indicates as follows: -

S.N	Respondent	Position before the Trial Court	Position before the High Court	Position before this Court	Particulars
1.	***Hari Lal Choudhary*** *(First Sale Deed)*	Defendant No. 5	Appellant No. 6	Respondent No. 6	No Dispute w.r.t abatement
2.	***Yamuna Choudhary*** *(Second Sale Deed)*	Defendant No. 6	His LRs were Appellants Nos. 11 & 12	His LRs are Respondents Nos. 8,11 and 12	No Dispute w.r.t abatement
3.	***Khobari Choudhary*** *(Third Sale Deed)*	Defendant No. 1	His LRs were Appellants Nos. 1-3	His LRs are Respondents Nos. 1-3	No Dispute w.r.t abatement
4.	***Bihari Choudhary*** *(Third Sale Deed)*	Defendant No. 2	Appellant No. 4	Respondent No. 4	No Dispute w.r.t abatement
5.	***Sheonath Choudhary*** *(Fourth Sale Deed)*	Defendant No. 3	His LRs were Appellants Nos. 10-13	His LRs are Respondents Nos. 30-33	***Dispute w.r.t. abatement*** *(As he died on 07.5.1997 during First Appeal however in the Second Appeal his LRs were Impleaded.*
6.	***Baijnath Choudhary*** *(Fourth Sale Deed)*	*Defendant No. 4*	*Appellant No. 5*	*Respondent No. 5*	*No Dispute w.r.t abatement*

18. Mr. Gupta thereafter, by way of one another chart pointed out that all those respondents who passed away during the pendency of the First Appeal before the district court were only "Performa respondents". The said chart reads as under: -

S.N	Respondent	Position before the High Court	Position before this Court	Particulars
1.	***Sheo Nandan Choudhary*** *(Died on 07.05.1997)*	His LRs were Appellant No. 10 & Respondent Nos. 14-20	His LRs are Respondents Nos. 10 and Nos. 36-41	*His LRs were not impleaded in First Appeal but he has no connection with the impugned sale deeds and LRs were impleaded in the High Court.*
2.	***Dipiya*** *(Died on 07.08.1999)*	Not a Party.	Not a Party.	*No connection with the impugned sale deeds or the proceedings.*
3.	***Bachha Bhagat*** *(Died on 05.04.2003)*	Not a Party.	Not a Party.	*No connection with the impugned sale deeds or the proceedings.*
4.	***Nagina Bhagat*** *(Died on 05.11.2005)*	Not a Party.	Not a Party.	*No connection with the impugned sale deeds or the proceedings.*
5.	***Md. Islam*** *(Died on 08.03.2001)*	His LRs were Respondents Nos. 27 & 28	His LRs are Respondents Nos. 46 & 47	*No connection with the impugned sale deeds or the proceedings.*
6.	***Sheo Dhari Bhagat*** *(Died on 08.07.2008 i.e., after the passing of the judgment in First Appeal)*	His LRs were Respondents Nos. 29 & 30	His LRs are Respondents Nos. 48 & 49	*No connection with the impugned sale deeds or the proceedings.*

19. In such circumstances referred to above, the learned counsel appearing for the plaintiffs prayed that there being merit in his appeal the same may be allowed

and an appropriate order be passed with a view to do substantial justice between the parties.

ii. Submissions on behalf of the Respondents / Original Defendants.

20. Mr. Shantanu Sagar, the learned counsel appearing for the defendants on the other hand submitted that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned judgment and order. According to the learned counsel the High Court is right in saying that provisions of Order XXII Rule 4 CPC would override the provisions of Order XXII Rule 10A of the CPC.

21. In such circumstances referred to above, the learned counsel prayed that there being no merit in the present appeal, the same may be dismissed.

C. ANALYSIS

22. Having heard the learned counsel appearing for the parties and having gone through the materials on record the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment and order?

23. We regret to state that we are thoroughly disappointed with the manner in which the High Court dealt with the Second Appeal and more particularly the understanding of the High Court as regards the position of law on the issues in question. Such procedural errors are not expected at the level of any High Court. It is not in dispute that the provisions of Order XXII Rule 10A of the CPC were not complied with.

24. While the First Appeal was being heard, the defendants could have brought to the notice of the First Appellate Court that some of the respondents had passed away and the appeal had stood abated. Had the defendants brought this fact to the notice of the First Appellate Court, the Court could have looked into the matter accordingly. It appears that the defendants being fully aware of the death of some of the respondents kept quiet and allowed the First Appellate Court to proceed with the hearing of the First Appeal on merits. When the First Appeal came to be allowed and the matter reached the High Court in Second Appeal that the issue as regards the abatement came to be raised.

i. <u>Relevant Statutory Provisions</u>.

25. Order XXII Rule 1 of the CPC reads thus: -

> *"**1. No abatement by party's death if right to sue survives.—** The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives."*

26. Order XXII Rule 2 of the CPC reads thus: -

> *"**2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.—***
> *Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to the effect to be made on the record,. and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants"*

27. Order XXII Rule 4 and 4A, of the CPC reads thus: -

> *"**4. Procedure in case of death of one of several defendants or of sole defendant.—***
> *(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit. (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant. (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.*
>
> *(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place. (5) Where— (a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and*

the suit has, in consequence, abated, and (b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application with the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.

4A. Procedure where there is no legal representative.— *(1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may be order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit. (2) Before making an order under this rule, the Court— (a) may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased person as it thinks fit; and (b) shall as certain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person."*

28. Rule 1 of Order XXII of the CPC provides that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Rule 4, Order XXII of the CPC prescribes that where a defendant dies, on an application made by the plaintiff, the Court shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. It cannot be disputed that such an application has to be filed

within the time limit prescribed by law; otherwise, the suit would stand abated against the deceased defendant. A clear provision is to be found to that effect in sub-rule (3) of Rule 4. Obviously in case of failure to bring the legal representative on record within prescribed time, the suit having abated, the plaintiff will have to seek the remedy of setting aside abatement in accordance with the provisions of law.

ii. <u>Order XXII, Rule 10A of the CPC</u>.

29. With enforcement of 1976's amendment to the CPC, once a party to the suit dies, a duty is cast upon the lawyer representing such party, to communicate the fact of death to the opposite party in terms of provisions contain in Rule 10A of Order XXII of the CPC. It is nobody's case that there was compliance of this rule in the case at hand by the advocate appearing for the defendants. Unless this primary obligation is discharged and it is established with cogent evidence that the opposite party had sufficient opportunity to know and, had, in fact, knowledge of the death of the defendant, the plea of abatement of the suit at the instance of party having failed to comply with the obligation mentioned under Rule 10A of Order XXII of the CPC cannot be entertained. Nobody can be allowed to reap the benefit of his own lapse and to non-suit the plaintiff.

30. Order XXII, Rule 10A reads thus: -

> *"**10A. Duty of pleader to communicate to Court death of a party.—***
> *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 thereupon 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."*

31. Rule 10A has been newly inserted by the Code of Civil Procedure (Amendment) Act, 1976.

32. Rule 10A is intended to avoid delay in making an application for bringing legal representatives of the deceased party on record. It seeks to mitigate the hardship arising from the fact that a party to a suit may not come to know about the death of the other side during the pendency of the proceedings. In such a situation, it would be appropriate to ask the advocate of the party to give intimation of the death of the party represented by him so as to enable the other side to take appropriate steps.

33. The Law Commission stated thus: -

> *"A new rule is proposed to be inserted to the effect that where a pleader comes to know of the death of a party to the suit, he shall inform the court, and the court, in its turn, shall give notice to the plaintiff of the death. Such a provision will, to some extent reduce the complications that arise by reason of the plaintiff's ignorance of the death of a defendant."*

34. In the Statement of Objects and Reasons for the Code of Civil Procedure (Amendment) Bill, 1976, it was observed: -

> "*Clause 76—Sub-clause* (v).—New Rule 10-A is being inserted to impose an obligation on the *pleaders* of the parties to communicate to the Court the death of the party represented by him."

35. The Joint Committee also said: -

> *"Clause 73 (Original clause 76).—(iii) During the course of evidence, a point was raised, that, on the death of the client, the contract with the pleader comes to an end and so the obligation of the pleader to act on behalf of his client ceases on the death of the client. The Committee, however, feel that it should be made obligatory on the part of the pleader to inform the Court about the death of his client and for this purpose the contract between the pleader and the party should be deemed to subsist. Sub-rule (1) of new proposed Rule 10-A of Order 22 has been amended accordingly.*
>
> *[...] The Committee feel that in view of the amendment made in sub-rule (1) of new proposed Rule 10-A proposed sub-rule (2) in Rule 10-A is not necessary as the provision is likely to cause hardship to the pleader. Sub-rule (2) of the new proposed Rule 10-A of Order 22 has been omitted accordingly."*

36. Rule 10A, as inserted by the Amendment Act, 1976, imposes an obligation on the pleader of the parties to communicate to the court the fact of the death of the party represented by him.

37. Rule 10A of Order XXII should be read with Rule 4 of Order III of the Code. Rule 4 of Order III reads thus: -

> *"**4. Appointment of pleader.—***
> *(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognised agent or by some other person duly authorised by or under a power-of-attorney to make such appointment. (2) Every such appointment shall be filed in Court and shall, for the purposes of sub-rule (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client."*

38. Order III, Rule 4 prescribes the manner of appointment of a pleader and also the limit upto which such appointment remains in force. Every appointment of a pleader will be continued *inter alia* until the client or the pleader dies. As a general rule, therefore, on the death of the client his contract with the pleader comes to an end. So also, his authority to act on behalf of his client expires.

39. Rule 10A, as inserted by the Amendment Act, 1976 carves out an exception to the above general rule and casts a duty upon the advocate appearing for the party to intimate the court about the death of his client. For this purpose, a deeming fiction has been created that the contract between the (deceased) client and the pleader subsists to that limited extent. **[See: *Gangadhar v. Raj Kumar,* (1984) 1 SCC 121]**

40. Rule 10A of Order XXII is salutary in nature. It has been introduced to mitigate hardship arising from the fact that a suit, appeal or other proceeding

may take long time and a party to a suit, appeal or other proceeding may die and the other party may not be aware of such a situation. Rule 10A seeks to do justice over technicalities by requiring an advocate appearing for the party to intimate the court about the death of his client and provides an opportunity to the other side to take necessary steps to bring heirs and legal representatives of the deceased party on record. Rule 10A is thus not an empty formality. Pre-eminent object of the rule is to do full and complete justice.

a. Rationale behind Order XXII Rule 10A.

41. An "innovative provision" in the form of Rule 10A has been introduced by the Amendment Act, 1976 in the Code to avoid procedural technicality scoring march over substantial justice.

42. In ***Gangadhar (supra),*** dealing with the object underlying Rule 10A, this Court observed that it was introduced to mitigate the hardship arising from the fact that the party to a suit or appeal, as the case may be, may not come to know about the death of the other party during the pendency of such suit or appeal. A suit or appeal takes years to come up for hearing and it is very difficult to expect the other party to be a watch-dog for day-to-day survival of his opponent. Then when the suit / appeal comes up for hearing, it comes to the light that not only one of the parties to the suit / appeal had died but the

time for substitution had also run out and the suit or appeal had abated. It is with a view to avoid technicalities and to do full and complete justice that an important provision has been inserted in CPC, in the form of Order XXII Rule 10A, requiring the advocate appearing for the party to inform death of his client to the court so as to enable the other side to take appropriate steps to bring on record legal representatives of the deceased. For that purpose, a deeming fiction is introduced that the contract between the dead client and pleader will subsist to the limited extent to supply information to the court about the death of his client. This Court stated that: -

> *"The Legislative intention of casting a burden on the learned advocate of a party to give intimation of the death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the learned advocate and the deceased party was that the other party may not be taken unawares at the time of hearing of the appeal by springing surprise on it that the respondent is dead and appeal has abated. In order to avoid procedural justice scoring a march over substantial justice Rule 10-A was introduced by the Code of Civil Procedure (Amendment) Act of 1976 which came into force on February 1, 1977."*
>
> (Emphasis supplied)

b. Nature of the salutary provision of Order XXII Rule 10A.

43. Rule 10A is procedural in nature. No penalty is provided for non-compliance with the rule. The provision is not "absolutely mandatory" **[See*: United Bank of India v. Kanan Bala,* (1987) 2 SCC 583]**.

44. The new provision has been inserted with a view that just delay in preferring substitution application may not be put forward a ground for dismissal of the

application. Since a lawyer for the party is obliged to inform the court about the death of his client, his failure to do so should be treated as good and sufficient ground for condonation of delay. **[See*: Kathpalia v. Lakhmir Singh,* (1984) 4 SCC 66]**.

I. Distinction between the legal maxims '*ex injuria ius non oritur' and 'nullus commodum capere potest de injuria sua propia'*.

45. The genesis of the provision of Rule 10A of the Order XXII lies in the doctrine of 'clean hands'. The doctrine of 'clean hands' originates from the Roman Law, and finds expression in two latin maxims being **(i)** *ex injuria ius non oritur* and **(ii)** *nullus commodum capere potest de injuria sua propia*, which mean "from wrong, no right arises" and "no one can take advantage of their own wrong", respectively. **[See: Schwebel, Stephen M. "*Clean Hands, Principle*" Eds., Rüdiger Wolfrum, Oxford University Press, 2009]**.

46. Although the aforesaid two maxims, semantically appear to be one and the same, with the courts often applying the two interchangeably, yet there lies a very fine but pertinent distinction between the two maxims. The two maxims are comparable to each other but they are not interchangeable, and differ in their scope. Aaron X. Fellmeth and Maurice Horwitz in the "*Guide to Latin Maxims in International Law*" 1st Ed., Oxford University Press, has explained the maxim *ex injuria ius non oritur* as follows: -

> *"A right does not arise from wrongdoing." A maxim meaning that one cannot generally rely on a violation of law to establish a new legal right or to confirm a claimed right. E.g., "As Lauterpacht has indicated the maxim ex injuria ius non oritur is not so severe as to deny that any source of right whatever can accrue to third persons acting in good faith. Were it otherwise the general interest in the security of transactions would be too greatly invaded and the cause of minimizing needless hardship and friction would be hindered rather than helped." Advisory Opinion on Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Rep. 16, 167 (separate opinion of Judge Dillard). An alternative formulation is Ius ex iniuria non oritur. Compare with Nullus commodum capere (potest) de sua iniuria propria."*
>
> (Emphasis supplied)

47. On the other hand, they have explained the maxim '*nullus commodum capere potest de injuria sua propia'* as follows: -

> *"No advantage (may be) gained from one's own wrong." A maxim meaning that the law will not recognize or validate any profit a person derives from his own wrongdoing. For example, one may not destroy evidence of the extent of damages caused by one's illegal act, then counter a claim for damages based on that act by pointing to the lack of evidence. E.g., "[T]he State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it [...]"*
>
> (Emphasis supplied)

48. A perusal of the aforesaid makes it abundantly clear, that while the maxim '*ex injuria ius non oritur'* is a principle governing the general spirit of the jurisprudence of "rights", that a right cannot emanate or emerge from a wrongful act, the maxim '*nullus commodum capere potest de injuria sua*

propria', on the other hand, confirms the general rule of equity and prudence that no one can benefit from their own wrongdoing. The scope of the latter is wider than the former. The first maxim explains that the legitimacy of a right stands vitiated if such right, which otherwise would have been legitimately exercisable, accrues from a wrongdoing of the person claiming under or exercising such right. Although, under the law, a right may arise even if from a wrongdoing, yet if exercise of such right is allowed, it would malign the very jurisprudential underpinning of 'right' and 'duty'. A right has a legal sanctity and backing to it, in order for it to have a legitimising effect, since the jural correlative of a right is duty. More particularly, the term "right" is very specific to not include every benefit, profit or advantage. The maxim solidifies the faith in law that no wrong action will be given a legal validity. The legal validity of a right flows from other legal norms or from a source of law **[See: Niel MacCormick, "Rights in Legislation", Law, Morality and Society: Essays in Honour of H.L.A. Hart, P.M.S. Hacker, and Joseph Raz (eds). 189-206, Oxford: Clarendon Press (1977)]**.

49. The maxim, '*nullus commodum capere potest de injuria sua propria'*, on the other hand, lays itself as a rule of equity. An advantage falling from wrongdoing may be a legal or illegal advantage. The maxim dictates that, be that as it may, no profit or advantage of a person's wrongful act may be validated by the seal of law. It may very well happen, that the advantage may

be legal or illegal, but the validation of law will not be extended to it by the law. Thus, the courts that have the discretion to allow or disallow the availment of such advantage in ordinary circumstances, are constrained to not permit a person who has committed a wrongful act to benefit from the advantageous position afforded to him because of such wrongful action as a matter of justice, equity and fairness. Fellmeth and Horwitz rightly extend an illustration, that when a person himself destroys evidence, he cannot take shelter of the defence of lack of evidence. The advantage falling from the wrong will not be validated by the courts of law.

50. The interpretation of Order XXII Rule 10A is a manifestation of the latter and not the former i.e., the cornerstone of its nature and the effect is the maxim '*nullus commodum capere potest de injuria sua propria'* or no one should derive benefit from their own wrong. This is because of the procedural nature of the provision as held in ***Kanan Bala*** (supra) and a catena of other decisions of this Court. Although, the provision aims to do justice over technicalities by casting a duty upon the pleader to apprise the court as-well as all parties about the demise of his client, yet it does not prescribe any penalty for the non-compliance of the same, wilful or inadvertent. A pleader may not be put to the perils of any penalty for his failure in performing the duty under Rule 10A in law, yet it does not mean that such failure would also be of no bearing in equity or of inconsequence to the ultimate abatement of the suit or appeal.

The benevolent object underlying Order XXII Rule 10A to ensure complete justice on one hand and the contrasting patent absence of any penalty for non-compliance on the other, would simpliciter be irreconcilable, without the resort to the maxim '*nullus commodum capere potest de injuria sua propria'*. It would be preposterous to say that a court of conscience would take no cognizance of such a failure in duty of the pleader in deciding whether the suit or appeal could be said to be abated for want of any application in the stipulated time in terms of sub-rule (3) of Rule 4, Order XXII, and allow an erring party through its pleader to derive undue advantage thereof. To ignore such lapses in equity would render Rule 10A completely otiose and do violence to the legislative intent behind it.

51. Thus, the principle that no party can take advantage of his/her own wrong i.e. '*nullus commodum capere potest de injuria sua propria'* is squarely attracted in the event of a failure in complying with the provision of Rule 10A of Order XXII of the CPC, and any abatement as a result of such wrongdoing or failure ought not to be validated by the courts.

52. In ***Kusheshwar Prasad Singh v State of Bihar, (2007) 11 SCC 447***, it was held that the aforesaid maxim is based on elementary principles, is fully recognised in courts of law and of equity, and, admits of illustration from every branch of legal procedure. The relevant observations read as under: -

> *"14. In this connection, our attention has been invited by the learned counsel for the appellant to a decision of this Court <u>in</u>*

Mrutunjay Pani v. Narmada Bala Sasmal [AIR 1961 SC 1353] wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim commodum ex injuria sua nemo habere debet (no party can take undue advantage of his own wrong).

15. In Union of India v. Major General Madan Lal Yadav [(1996) 4 SCC 127: 1996 SCC (Cri) 592] the accused army personnel himself was responsible for delay as he escaped from detention. Then he raised an objection against initiation of proceedings on the ground that such proceedings ought to have been initiated within six months under the Army Act, 1950. Referring to the above maxim, this Court held that the accused could not take undue advantage of his own wrong. Considering the relevant provisions of the Act, the Court held that presence of the accused was an essential condition for the commencement of trial and when the accused did not make himself available, he could not be allowed to raise a contention that proceedings were time-barred. This Court (at SCC p. 142, para 28) referred to Broom's Legal Maxims (10th Edn.), p. 191 wherein it was stated:

"It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

16. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong".

(emphasis supplied)

53. We would like to remind the High Court of this very important legal maxim of '*nullus commodum capere potest de inuria sua propria'*. It is the duty of the court to ensure that dishonesty or any attempt to abuse the legal process

must be effectively curbed and the court must ensure that there is no wrongful, unauthorised or unjust gain for anyone by abusing of the process of the court. No one should be permitted to use the judicial process for earning undeserved gains for unjust profits. The courts' constant endeavour should be to ensure that everyone gets just and fair treatment.

54. We may clarify with a view to obviate any possibility of confusion that the maxim '*ex injuria ius non oritur'* is different from the maxim '*nullus commodum capere potest de inuria sua propria'* for the reason that the former pertains to a 'right' that may become available to a wrongdoer due to the wrongful act and the latter relates to an 'advantage' or 'benefit' that a wrongdoer may derive from his wrongful conduct. Although both are in essence a byproduct of the doctrine of equity and share a common genealogy under the doctrine of clean hands, the field in which they operate are different and distinct. In case of the first maxim, had the right not emanated from a wrongful act, it would have been cemented in law and the person in whose favour such right had accrued, could have pleaded for vindication of the same, with sufficient guarantee, that his plea would be accepted by the court. However, in the case of the second maxim, if the advantage was not being derived from a wrongful act, the courts would nevertheless still have the discretion to hold whether the person in whose favour such advantage had arisen, could avail such advantage or not. While in such a case there would

be no embargo on the courts to deny the advantage to the person eligible to benefit from the same, the courts could still rule that such person could not avail the benefit. Having considered the cases in which there is no wrong done by the person deriving the right or benefit from their actions, we shall now see how the wrongful action affects the conclusion of the courts in both such scenarios as-well. The answer to this is straightforward. In the first case, when a right accrues to the person who has committed the wrongful act due to such act, and while the law regards it as an enforceable right, yet the courts are armed with power to deny the vindication of such rights, which they ordinarily could not have done. Put it differently, while the existence of such rights is undeniable in the eyes of law, yet the exercise or enforceability of such rights would nevertheless be deniable by the courts in equity. The way the maxim envisages the application of this principle is based on one another well-known principle; that equity cannot supplant the law. When the courts deny the right that may have accrued by a wrongdoing, the courts in essence are not denying the right itself i.e., they are not supplanting the right emanating from a law, rather, they are drawing upon the reservoir of equity within their conscience, to withhold its enforcement, not to contradict the law, but to ensure that the law does not become an instrument for legitimizing its own violation through the hands of courts who are expected and reposed of the faith to uphold the law in the first place. Hence, under the first maxim, the courts cannot deny such rights, as they flow from the law, but any vindication

or enforcement can be if they require the touch of courts, by invoking a higher standard of fairness that guards against the instrumentalization of legal rights as vehicles of injustice.

55. Whereas, when it comes to the second maxim, irrespective of how the advantage has accrued, it is not an enforceable advantage. The reason being a simple one, that they are simply not a 'right' so as to have the force or backing of any law. In the absence of any enforceability flowing from a law or legal norm, the enforcement or vindication of such advantage as a natural corollary can only flow from the discretion of the courts, who are required to supply the legal formalities to make them enforceable in the first place. Hence, the courts in the case of the latter, being a court of conscience, built upon the edifice of fair-play, would prohibit inurement of any such benefit lacking the backing of law by virtue of this discretion and as a matter of fairness disallow a person who has committed the wrongful action to avail the benefit or advantage derived from his own wrong. The second maxim encapsulates the aforesaid principle and mandates that courts, having the conscience of justice, equity and fairness, ought to necessarily disallow the benefit of the wrong to such a person.

56. This distinction marks a crucial difference in the scope of the two maxims; in the former, equity steps in after the law has recognized a right, to decide

whether justice permits its enforcement; in the latter, however, equity acts more preemptively, interrogating the moral propriety of allowing any gain from potentially tainted conduct. In either case, where no wrong is committed, the courts duty remains guided by legal principle, more so in the case of the second maxim. However, in the instance of the first maxim, once wrongdoing results in contaminating the jural relation of 'rights and duty', a shift occurs, where equity steps in in the sphere of entitlement from such 'rights'.

57. On the basis of the aforesaid, we are of the considered view that the underlying ethos of Order XXII, Rule 10A is not based on the maxim of '*ex injuria ius non oritur'*. A 'right' accrues in the eyes of law through two principal channels: *first* through the force of any law or statute itself, and *secondly,* through acts enabled by the law that possess the normative force to create enforceable claims backed by the operation of law or facilitated by conventional legal norms such as a gift, will, consent, contract etc., acts that have the capacity to create legal rights. Any legal norm, must possess normativity and generality, which together must have such an effect that the norm ought to become valid in law or through the law, in order for it to give birth to a right. In other words, only those acts which attain legal validity inherently within the legal system or through its mechanism can be said to give rise to a 'right'.

58. In the case on hand, the respondents or the original defendants have pleaded for the abatement of the suit due to non-substitution of legal heirs therein by the plaintiff, within the statutorily prescribed period of time. Abatement of suit is not a right that accrues to a party when the other party has failed to substitute legal heirs within the specified period of limitation. Abatement may be disallowed by the court if it has sufficient cause for condoning the delay of the party that ought to have filed for the substitution of legal heirs. In fact, Rule 10A was enacted for the purpose to allow for mitigation of the legal effects of delay and can be used to request for condonation of delay.

59. The question of allowing abatement of suit is one of discretion and therefore, an advantage. Under Rule 10A of Order XXII, the duty of a pleader to apprise the court as well as the other parties to the suit or appeal of the death of his client is a duty of candour and propriety as a responsible officer of the court. The failure of a party to perform the duty under Rule 10A constitutes a wrongful act and such party must not be allowed to avail the benefit arising therefrom in the form of abatement of suit.

II. Duty of Pleader.

60. Rule 10A of Order XXII, as inserted by the Amendment Act, 1976 imposes an obligation on the pleader appearing for the party to intimate death of his client to the court. But there is difference of opinion as to whether the duty

imposed on the pleader is confined to factum of death of a party or also to furnish names and particulars of legal representatives.

61. According to one view, there is no obligation on the pleader appearing on behalf of the deceased party to furnish or supply list of legal representatives of the deceased.

62. According to the other view, however, the pleader has not only to inform the court as to death of the party but he must also furnish particulars of legal representatives.

63. However, we are of the view that providing merely an information with regard to the fact of death is not sufficient compliance of the Rule 10A of the CPC. unless and until the counsel furnishes the information with regard to the details of the persons on whom and against whom the right to sue survives and the information under Rule 10A of the CPC. and the object behind it would remain incomplete as the parties would still be labouring to inquire who are the legal representatives and find out as to upon whom and against whom the right to sue survives.

64. This Court in ***Perumon Bhagvathy Devaswom Perinadu Village v. Bhargavi Amma (Dead) by Lrs. and Others*** reported in **(2008) 8 SCC 321** has explained the principles applicable in considering applications for setting aside the abatement and as summarised such principles as under: -

"12. In State of M.P. v. S.S. Akolkar [(1996) 2 SCC 568] this Court held: (SCC pp. 569-70, paras 6-7)

> *"6. [...] Under Order 22 Rule 10-A, it is the duty of the counsel, on coming to know of the death of a party, to inform it to the court and the court shall give notice to the other party of the death. By necessary implication delay for substitution of legal representatives begins to run from the date of knowledge. [...]*
>
> *7. It is settled law that the consideration for condonation of delay under Section 5 of the Limitation Act and setting aside of the abatement under Order 22 are entirely distinct and different. The court always liberally considers the latter, though in some case, the court may refuse to condone the delay under Section 5 in filing the appeals. After the appeal has been filed and is pending, the Government is not expected to keep watch whether the contesting respondent is alive or has passed away. After the matter was brought to the notice of the counsel for the State, steps were taken even thereafter; after due verification belated application came to be filed. It is true that Section 5 of the Limitation Act would be applicable and delay is required to be explained. The delay in official business requires its broach and approach from public justice perspective."*

(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."

(Emphasis supplied)

65. The High Court in its impugned judgment and order has with a great air of conviction observed that Order XXII Rule 10A of the CPC is not mandatory and would not override the mandatory provisions relating to abatement as

contained in Order XXII Rule 4 of the CPC. We are afraid, the understanding of the High Court is not correct.

66. The legislative intention of casting a burden on the advocate of a party to give intimation of the death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the advocate and the deceased party was that the other party may not be taken unaware at the time of hearing of the appeal by springing surprise on it that the respondent is dead and appeal has abated. In order to avoid procedural justice scoring a march over substantial justice the Rule 10A was introduced by the Code of Civil Procedure (Amendment) Act of 1976 which came into force on February 1st, 1977. Unfortunately, the High Court took no notice of the wholesome provision and fell back on the earlier legal position which automatically stands modified by the new provision and reached an unsustainable conclusion.

67. It is not the question of Order XXII Rule 10A being directory or mandatory. The court should know how to apply the provision in the facts of each case. The line of reasoning adopted by the High Court if upheld would render Order XXII Rule 10A otiose.

68. Before we close this matter, we would like to observe that it is not even the case of the defendants that the plaintiffs had knowledge of the death of some

of the defendants. If such would have been the position, then probably the applicability of the Order XXII Rule 10A would have been inconsequential.

69. In the present appeal the plaintiffs as well as the defendants have filed their written submissions. The defendants in their written submissions have talked about the merits of the case but very conveniently have not said a word as to why it was not brought to the notice of First Appellate court when the First Appeal was taken up for hearing that the first appeal had in fact stood abated with the death of some of the defendants. Why the lawyer appearing for the defendants also kept quiet and proceeded to argue the matter on merits? This smacks of lack of good faith.

70. In the aforesaid context we may refer to and rely upon a decision of this Court in ***P. Jesaya (dead) by Lrs. v. Sub-collector and Anr.*** reported in ***(2004) 13 SCC 431*** wherein the only contention taken up in appeal before this Court was that one of the respondents in the appeal before the High Court had died during the pendency of that appeal. It was contended that his heirs were not brought on record and therefore the appeal before the High Court had abated. It was also submitted that as the appeal had abated, the judgment delivered by the High Court was *non-est* and could not have been enforced. In the case at hand the appeal stood abated according to the High Court before the First Appellate court whereas in ***P. Jesaya (supra)*** it had stood abated before the High Court. This is the only difference.

71. This Court observed that although the arguments were attractive, yet one must keep in mind Order XXII Rule 10-A of the C.P.C. This Court observed that it is obligatory on the pleader of the deceased to inform the court and the other side about the factum of the death of a party. This Court observed thus: -

> *"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."*
>
> (Emphasis supplied)

72. Had the lawyer of the defendants or the defendants themselves would have brought to the notice of the First Appellate court that some of the defendants had died then probably the defendants could have taken steps to first get the abatement set aside and bring the legal heirs on record.

D. CONCLUSION

73. In such circumstances referred to above we are left with no other option but to partly allow this appeal and set aside the impugned judgment and order passed by the High Court.

74. We are inclined to remand the matter to the High Court for fresh hearing of the second appeal keeping in mind the principles of law as discussed in this judgment.

75. In the result, this appeal succeeds and is hereby partly allowed. The impugned judgment of the High Court is set aside.

76. The matter is remanded to the High Court. The Second Appeal No. 190 of 2008 is restored to its original file and shall be heard afresh and decided on its own merits after giving opportunity of hearing to both the parties.

77. We clarify that so far as the question whether the decree can be said to be joint and indivisible or otherwise shall be looked into by the High Court while hearing the Second Appeal afresh. If the High Court reaches the conclusion that the decree is joint and indivisible and with the death of some of the defendants, the entire First Appeal could be said to have abated then it shall remand the matter to the First Appellate Court so as to give an opportunity to the plaintiffs to prefer an appropriate application for setting aside of the abatement and bring the legal heirs on record and thereafter hear the first appeal once again on its own merits.

78. In the event the High Court reaches the conclusion that the First Appeal as a whole could not be said to have stood abated as the nature of the decree is

such that it cannot be said to be joint and indivisible then the High Court shall hear the Second Appeal on its own merits on other issues involved in the litigation.

79. Since this litigation is of 1984, we direct the High Court to take up the Second Appeal No. 190 of 2008 for fresh hearing and decide the same within a period of three months from the date of receipt of the writ of this order. High Court shall inform about the disposal of the second appeal to this Court.

80. The Registry is directed to circulate one copy each of this judgment to all the High Courts.

..... J.
(J.B. Pardiwala)

..... J.
(R. Mahadevan)

New Delhi;
14th July, 2025.