IN THE HIGH COURT OF JUDICATURE AT PATNA

Smita Chandramani Kumar
vs.
Bihar College of Pharmacy and another

Civil Miscellaneous Jurisdiction No. 121 of 2024

03 April 2025

(Hon’ble Mr. Justice Arun Kumar Jha)

Issues of Consideration

- Whether the execution case could have been legally dismissed despite it not being fixed or set down for hearing?
- Whether the limitation period under Order 21 Rule 106(3) was applicable, or if the case should have been treated under Section 151 CPC?
- Whether the dismissal of the restoration petition for delay was sustainable in law in the facts and circumstances of the case?

Headnotes

Dismissal of Execution Case was erroneous since the case had never been set down for hearing and was consistently adjourned for submission of Nazir's report. Since the present matter, case was not fixed for hearing , technically it could not have been dismissed by the learned executing court. For this reason, there could be no application of Order 21 Rule 106 of the Code for restoration of the execution case. If Order 21 Rule 106 is not applicable in the facts of the present case, the limitation of 30 days for filing the restoration application goes out of window and in such circumstances, provisions of Section 151 of the Code would come into play. Even if the application was filed mentioning wrong provision but seeking a relief of restoration of execution case ought to be treated as an application under Section 151 of the Code.(Para 12).

On account of death of decree holder or judgment debtor during pendency of the execution proceeding, the execution proceeding will not abate but will remain pending. (Para 15)

Petition is allowed. (Para 21)

Case Law Cited

Damodaran Pillai & Ors. Vs. South Indian Bank Ltd., (2005) 7 SCC 300 : AIR 2005 SC 3460; S. Ponnupandian vs. Selvabakiyam, AIR 2004 Mad 272; Regional Manager

& Anr. vs. Pawan Kumar Dubey, AIR 1976 SC 1766; Director of Settlement A.P. & Ors. vs. M.R. Apparao & Anr., (2002) 4 SCC 638; Commissioner Of Income-Tax vs. M/S. Sun Engineering Works (P.) Ltd., (1992) 4 SCC 363; Ambica Quarry Works & Anr. vs. State Of Gujarat & Ors., (1987) 1 SCC 213; Formosa Plastics Corporation USA vs. Ashok Chauhan & Ors., 2016 SCC OnLine Del 3141; Deutshe Ranco GmbH vs. Mohan Murti, 2010 SCC OnLine Del 4220; State of Gujarat vs. Ramprakash P. Puri & Ors., 1969 (3) SCC 156; Smt. Dhira Mishra @ Dhira Devi & Ors. vs. Md. Laique Ahmad & Ors., 2024 (1) PLJR 818; Quinn vs. Leathem, (1901) AC 495; Roger Shashoua & Ors. vs. Mukesh Sharma & Ors., AIR 2017 SC 3166; V. Uthirapathi vs. Ashrab Ali & Ors., (1998) 3 SCC 148;

List of Acts

Code of Civil Procedure, 1908; Limitation Act, 1963

List of Keywords

Execution Petition; Restoration; Default Dismissal; Limitation; Order 21 Rule 105; Order 21 Rule 106; Section 151 CPC; Inherent Powers; Procedural Law; Abatement; Nazir's Report

Case Arising From

Order dated 22.11.2023 in Misc. Case No. 54 of 2017 rejecting restoration of Execution Case No. 07 of 1991 by the learned Sub Judge-II, Danapur.

Appearance of Parties

For the Petitioner(s): Mr. Amit Shrivastava, Sr. Advocate; Mr. Girish Pandey, Advocate; Mr. Sunil Kr. Tiwari, Advocate; Mr. Brajesh Sahay, Advocate

For the Respondent(s): Mr. Raushan, Advocate

(Headnotes prepared by Reporter: Amit Kumar Mallick, Advocate)

Judgment/Order of the High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.121 of 2024

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Smita Chandramani Kumar, Daughter of Late Arun Prasad Permanent Resident of Sri Sathya Sai Vidya Vihar, 20, Lane No.1, Vijay Nagar, P.S. Rupaspur, Patna-800014, at Present resident of F-1902, Tower-II, Ashok Garden, (Swan Mills Compound), Near KEM Hospital, T.J. Road, Sewri Road, Mumbai-400015, Maharashtra.

... ... Petitioner/s

Versus

1. Bihar College Of Pharmacy, through Chairman cum Director, Bailey Road, Patna-800014.

2.1. Prateek Soni At present Chairman-cum-Director, Bihar College of Pharmacy Bailey Road, Patna - 800014.

... ... Respondent/s

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Appearance :
For the Petitioner/s : Mr. Amit Shrivastava, Sr. Adv.
Mr. Girish Pandey, Advocate
Mr. Sunil Kr. Tiwari, Advocate
Mr. Brajesh Sahay, Advocate
For the Respondent/s : Mr. Raushan, Advocate

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT
Date : 03-04-2025

Heard learned senior counsel for the petitioner as well as learned counsel for the respondents.

2. The instant petition has been filed by the petitioner for quashing the order dated 22.11.2023 passed by learned Sub Judge-II, Danapur in Misc. Case No. 54 of 2017 whereby and whereunder the learned Sub Judge rejected the prayer for restoration of Execution Case No. 07 of 1991.

3. Briefly stated, the facts of the case are that Smt. Venu Prasad, mother of the petitioner, was the sole owner of a property at Bailey Road, Patna which was let out to respondent

no.1 on lease admitting it as tenant. On refusal of respondent no.1 to handover the peaceful and vacant possession after expiry of the period of lease, and also due to default in payment of rent by respondent no.1, Smt. Venu Prasad filed Title Suit No. 220 of 1981 in the court of learned Sub Judge-1st, Danapur for realization of arrears of rent and also for eviction of respondent no.1 from her let out property. On contest, the suit was decreed in favour of the mother of the petitioner by judgment and decree dated 19.03.1991. The mother of the petitioner filed Execution Case No. 07 of 1991 for execution of the said decree. During pendency of the said execution case, Smt. Venu Prasad died on 19.07.2011 from Cancer. Shri Arun Prasad, the father of the petitioner, tried to do *pairvi* in the said Execution Case No. 07 of 1991. However, due to his serious illness he was being treated at Mumbai and he also expired on 10.11.2014. The present petitioner was employed as an officer in Reserve Bank of India and was posted at Mumbai and other places. She retired as Chief General Manager of the Bank. The elder brother of the petitioner had been working in the United States of America since 1991. The younger sister of the petitioner was earlier stationed in USA and thereafter she has been living at Hydrabad with her family. The petitioner learnt about pendency of the

Execution Case No. 07 of 1991 sometime in the month of June, 2017 while she visited Patna and had been going though the belongings of her parents. On further inquiry, she came to know about Title Suit No. 220 of 1981 being decreed and dismissal of the Execution Case No. 07 of 1991 for non-prosecution on 24.03.2017. At that time, she also came to know about chronology of events of litigation. The petitioner further gathered information that respondent no.1, namely, Bihar College of Pharmacy had challenged the judgment and decree of the Title Suit No. 220 of 1981 by filing Title Appeal No. 140 of 1991 which was dismissed for default by the order dated 12.07.2002. The Misc. Case No. 22 of 2005 was filed challenging the order dated 22.07.2002 and this miscellaneous case filed by respondent no.1 was also dismissed by the learned 1st Appellate Court vide order dated 23.04.2010. Against the said order, Misc. Appeal No. 464 of 2010 was filed which came to be dismissed by the orders of this Court dated 05.04.2014. The petitioner also came to know that some writ petitions were also filed by respondent no.1 which were also dismissed by this Court in default. That apart, Special Leave to Appeal (Civil) No. 2962 of 1988 filed by respondent no.1 was also dismissed by the Hon’ble Supreme Court vide order dated 07.12.1988. After

taking legal advise, the petitioner filed the petition for restoration of Execution Case No. 07 of 1991 on 11.08.2017. It further transpires that Misc. Case No. 54 of 2017 was heard and dismissed by the learned Sub Judge-II, Danapur vide order dated 22.11.2023 holding it to be barred by limitation. This order is under challenge before this Court.

4. Mr. Amit Shrivastava, learned senior counsel appearing on behalf of the petitioner vehemently contends that the impugned order is not sustainable as the same has been passed by applying wrong legal principles and without appreciating the facts and circumstances before the learned executing court. Mr. Shrivastava submits that the learned executing court did not appreciate the fact that the matter has been coming up for the report of Nazir and the date on which the Execution Case No. 07 of 1991 was dismissed, again a date was fixed for submission of the report of Nazir and the matter was not put up for hearing. On the date of dismissal i.e., 24.03.2017, the date was not fixed for hearing/set down for hearing. Learned senior counsel further submits that a bare reading of the relevant portion of the order sheet of various dates on and prior to 09.09.2014 will reveal and demonstrate that *pairvi* was being made on behalf of the decree holder.

Thereafter, since 11.02.2015 till 21.02.2017, the decree holder did not file *haziri* but it is evident that all these dates, the matter was being adjourned for report of the *Nazir*. Even on the fateful date, i.e., 24.03.2017, the matter came up for report of the *Nazir*. Mr. Shrivastava reiterates that even on 21.02.2017, the learned Sub Judge, Danapur had not fixed the said Execution Case No. 07 of 1991 for hearing/set down to hearing. Thereafter, Mr. Shrivastava refers to Order 21 Rule 105 of the Code of Civil Procedure (for short 'the Code') which provides that the court before which an application under any of the Rules under Order 21 of the Code is pending, the court may fix a date for hearing of the application and where on the date fixed or any other date to which hearing might be adjourned and the applicant does not appear when the case is called on for hearing, the court may make an order that application be dismissed. Thus, Mr. Shrivastava submits that the learned Sub Judge-II, Danapur did not comply with the provisions of Order 21 Rule 105(1) and (2) of the Code. For this reason provisions of Order 21 Rule 106(3) of the Code is not at all attracted in the facts and circumstances of the facts of the Execution Case No. 07 of 1991. The learned Sub Judge-II, Danapur who has passed the impugned order was wrong in holding that there is applicability of Order 21 Rule 106

of the Code in the facts and circumstances of the case. For this reason, heavy reliance placed by the learned Sub Judge-II on the ratio of the decisions of the Hon'ble Supreme Court in the case of ***Damodaran Pillai & Ors. Vs. South Indian Ban Ltd.,*** reported in ***(2005) 7 SCC 300 : AIR 2005 SC 3460*** and ***S. Ponnupandian vs. Selvabakiyam***, reported in ***AIR 2004 Mad 272*** is wholly misconceived and untenable in the eye of law. The learned Sub Judge missed to appreciate the settled principle of law that ratio of a case so decided has to be considered and applied on the facts of that particular case and any slight difference in the facts will not be sufficient to invoke and apply the principle or ratio decidendi. Learned senior counsel refers to the decision of the Hon'ble Supreme court in the case of ***Regional Manager & Anr. vs. Pawan Kumar Dubey***, reported in ***AIR 1976 SC 1766*** wherein a Three Judge Bench of the Hon'ble Supreme Court held in paragraph no.7 that it is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

Referring to the decision of the ***Regional Manager & Anr.*** **(supra), the** ***Director of Settlement A.P. & Ors. vs. M.R. Apparao & Anr.***, reported in ***(2002) 4 SCC 638***, ***Commissioner Of Income-Tax vs. M/S. Sun Engineering Works (P.) Ltd.***, reported in **(1992) 4 SCC 363** and ***Ambica Quarry Works & Anr. vs. State Of Gujarat & Ors.***, reported in ***(1987) 1 SCC 213***, wherein the Hon'ble Supreme Court declared through the aforesaid authorities that it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment *de hors* from the context and understand the ratio decidendi which has the precedential value. That apart, the court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process.

5. Learned senior counsel further submits that the

learned Sub Judge did not appreciate that the facts of the case on which the reliance has been placed were clearly distinguishable from the facts of the present case. In ***Damodaran Pillai & Ors*** (supra) the Hon'ble Supreme Court in paragraph no. 8 clearly recorded the provisions of Order 21 Rule 105 of the Code. The said judgment was based on the premises and fact that the execution case which came up for consideration before the Hon'ble Supreme Court, i.e., the Execution Case No. 234 of 1988, had been set down for hearing and it was dismissed for default on 01.11.1990. But the present Execution Case No. 07 of 1991 was never set down for hearing rather it was adjourned for 24.03.2017 for the report of Nazir. Hence, there could be no applicability of the ratio of ***Damodaran Pillai & Ors.*** (supra) in the facts of the present case. Learned senior counsel next submits that once it is clear that the execution petition could not have been dismissed applying the provision of Order 21 Rule 105(2) of the Code, there could be no requirement of restoration clause under Order 21 Rule 106 of the Code. So no question arises for condonation of delay or applicability of Section 5 of the Limitation Act, 1963 to the petition filed for setting aside the dismissal on the ground of non-prosecution.

6. Mr. Shrivastava further submits that similar issue

came before a Division Bench of Delhi High Court in the matter of ***Formosa Plastics Corporation USA vs. Ashok Chauhan & Ors.,*** reported in ***2016 SCC OnLine Del 3141,*** wherein it has been held that ***Damodaran Pillai*** (supra) is undoubtedly an authority for the proposition that where an execution application is set down for hearing and the applicant does not appear, the court is empowered to dismiss it and that if the application for restoration is not preferred within the time prescribed, it is barred. Further, referring to the case of ***Deutshe Ranco GmbH vs. Mohan Murti,*** reported in ***2010 SCC OnLine Del 4220,*** wherein it has been held that since the execution petition had not been set down for hearing, it should not have been dismissed in default and resultantly the Division Bench held that order of dismissal of the execution petition challenged before it could not have been treated as one for dismissal of the execution proceeding and it was the kind of order, which the Division Bench had in mind in ***Deutsche Ranco GmbH*** (supra) and was not covered by ***Damodaran Pillai*** (supra). Thus, the Division Bench held in ***Formosa Plastics Corporation USA*** (supra) that the application for recall of dismissal order under Section 151 of the Code was maintainable and it was for the learned Single Judge to decide whether the appellant had disclosed sufficient

cause for the delay in filing Interlocutory Application under Section 151 of the Code-seeking to set aside of the order of dismissal. Thus, Mr. Shrivastava submits that the learned Sub Judge recording a finding, that the application of the petitioner for restoration of execution case was barred by limitation which could not be rectified even by filing condonation application under Section 5 of the Limitation Act, is not correct and the learned Sub Judge ought to have taken into consideration this aspect of the matter that the execution petition was not adjourned for hearing or set down for hearing and for this reason could not have been dismissed under Order 21 Rule 105(2) of the Code.

7. Learned senior counsel further submits that it is well settled law that provisions of Code are procedural in nature and such procedural law is there to advance the cause of justice and not to defeat the same. Learned senior counsel refers to the decision of the Hon'ble Supreme Court in the case of ***State of Gujarat vs. Ramprakash P. Puri & Ors.*** and ***State of Gujarat vs. Satu Khayaldas & Ors.***, reported in ***1969 (3) SCC 156*** wherein it has been held that procedure has been described to be a hand-maid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it.

8. Learned senior counsel further submits that the facts of ***Damodaran Pillai*** (supra) are further distinguishable from the present case. In ***Damodaran Pillai*** (supra), the learned advocate who had been appearing in the matter therein had knowledge of the date of final hearing of the execution case which was the subject matter of the said judgment. Moreover, admittedly execution case was dismissed for default on 01.11.1990 and the restoration application was filed on 04.04.1998, that is to say, that after almost seven and half years of dismissal, wherein in the instant case, the execution case was dismissed for non-prosecution on 24.03.2017 and the restoration petition was filed on 11.08.2017. There is no finding by the learned Sub Judge that the learned advocate who was appearing on behalf of the applicant of the Execution Case No. 7 of 1991 had any knowledge about the date being fixed on 24.03.2017. Rather, it has been recorded that no *pairvi* have been made since 06.12.2014. The petitioner herein had absolutely no knowledge about the dates in the said Execution Case No. 7 of 1991 as her father had been looking after the said case in his lifetime. Thus, there was no occasion for any knowledge of the petitioner with regard to any date of the said execution case on or before 24.03.2017. For this reason, even Order 21 Rule 106 (3) of the

Code would come to the rescue of the petitioner as the position of the petitioner was akin to a person who has not been duly served with any notice of dismissal and she filed the application for restoration within 30 days from the date of her knowledge. Thus, learned senior counsel submits that the impugned order dated 22.11.2023 deserves to be quashed and Execution Case No. 7 of 1991 deserves to be restored to its original file as the impugned order cannot defeat the legal, lawful and valid right of the petitioner to seek restoration of the Execution Case No. 7 of 1991. Learned counsel next refers to a decision of this Court in the case of ***Smt. Dhira Mishra @ Dhira Devi & Ors. vs. Md. Laique Ahmad & Ors.***, reported in ***2024 (1) PLJR 818***, wherein this Court observed that the woes of decree-holders have not subsided and execution proceedings are being used by judgment-debtors with impunity who exploit every provision to their benefit to the fullest extent possible to frustrate the execution proceedings making the whole process look like a farce and the courts becoming unwitting tools in the shenanigans of unscrupulous litigants. Thus, Mr. Shrivastava submits that fruits of execution of decree must be made available to decree holder and if the impugned order is not set aside, irreparable injury would be caused to the petitioner.

9. Mr. Raushan, learned counsel appearing on behalf of the respondents vehemently contends that there is no infirmity in the impugned order and the same does not need any interference by this Court. At the outset, Mr. Raushan submits that he places his full reliance on the decision of ***Damodaran Pillai*** (supra) and submits that if an order has been passed dismissing an application for default, the application for restoration thereof must be filed within 30 days from the date of said order and not thereafter. For this reason, the date when the decree holder acquired the knowledge of the order of dismissal of execution petition is wholly irrelevant. Learned counsel further submits that the case of the petitioner is hopelessly time barred by limitation. The decree holder left *pairvi* since 06.12.2014 and it is also apparent that decree holder died in the year 2011 but no steps were taken to bring her legal representatives on record in the execution case. Even the original judgment debtor died in the year 2002 but no steps were taken for substitution of the deceased judgment debtor. Even the miscellaneous case was filed in the name of deceased/decree holder and no steps were taken to bring the legal representatives of decree holder or judgment debtor in this case. If the execution case was dismissed for non-appearance and lack of interest of

the applicant, the said case cannot be restored even under Order 9 Rule 4 of the Code. Moreover, the learned Subordinate Court has held that the case was required to file under Order 21 Rule 106 of the Code and essential ingredients of Rule 106 of Order 21 of the Code were required to be satisfied by the petitioner and the learned trial court rightly came to the conclusion that the restoration application of the petitioner was hit by limitation and it was rightly dismissed. There could be no condonation of delay if the time limit of 30 days was crossed. The learned counsel refers to the prayer portion of the petitioner and submits that the order for dismissal of execution case is not under challenge. It is the order by which Miscellaneous Case No. 54 of 2017 seeking restoration of the execution case has been dismissed for being time barred has been challenged before this Court. For this reason, the argument advanced on behalf of the petitioner are against the dismissal of the execution case and could not be said to be advancing the cause of the petitioner against the dismissal of the miscellaneous case. Thus, the learned counsel submits that the present petition is not having any merit and the same be dismissed.

10. I have given my thoughtful consideration to the rival submission of the parties and perused the record.

11. The issue before this Court is whether the learned subordinate judge was right in holding that petition brought before it for restoration of Execution Case No. 7 of 1991 by setting aside the order dated 24.03.2017 was barred by limitation? Dismissal of execution case for non-appearance of the applicant has been provided under Order 21 Rule 105 of the Code which reads as under:-

> *"**105. Hearing of application**.- (1) The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.*
> *(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.*
> *(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit."*

Thereafter, Order 21 Rule 106 of the Code provides for setting aside the *ex-parte* order etc., which reads as under:-

> *"**106. Setting aside orders passed ex parte, etc.**-(1) The applicant, against whom an order is made under sub-rule (2) rule 105 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance whom the application was called on for hearing, the*

> *Court shall set aside the order or such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.*
> *(2)No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.*
> *(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when applicant had knowledge of the order."*

12. In the present case, perusal of the order sheet of the learned trial court shows from 11.03.2014 till 21.02.2017, the Execution Case No. 7 of 1991 got adjourned for the report of Nazir. During this period, the matter was never adjourned for hearing or had never been set down for hearing which is one of the requirements under Order 21 Rule 105(2). For dismissal of the execution application for non-appearance of the applicant, the matter is required to be set down for hearing and it is *sine qua non* for dismissal on the ground of non-appearance. Since the present matter of Execution Case No. 7 of 1991 was not fixed for hearing or set down for hearing on 24.03.2017, technically it could not have been dismissed by the learned executing court. For this reason, there could be no application of Order 21 Rule 106 of the Code for restoration of the execution case. If Order 21 Rule 106 is not applicable in the facts of the

present case, the limitation of 30 days for filing the restoration application goes out of window and in such circumstances, provisions of Section 151 of the Code would come into play. Even if the application was filed mentioning wrong provision but seeking a relief of restoration of execution case ought to be treated as an application under Section 151 of the Code.

13. Moving forward on the aforesaid premises, it becomes obvious that the approach of the learned trial court was flawed from the very beginning. No doubt in ***Damodaran Pillai*** (supra), the Hon'ble Supreme Court held that an application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order 21 of the Code and it further held that even an application under Section 5 of the Limitation Act was not maintainable. But the facts of ***Damodaran Pillai*** (supra) are quite distinguishable. The Execution Petition No. 234 of 1988 was admittedly set down for hearing and thereafter it was dismissed for default on 01.11.1990. But in the present case, Execution Case No. 7 of 1991 was never set down for hearing and it was dismissed for default on 24.03.2017. Therefore, the facts are different for applying the ratio of ***Damodaran Pillai*** (supra) in the present case.

14. I am wholly in agreement with the learned senior

counsel for the petitioner about the proposition of law that ratio of any decision must be understood in the background of the facts of that case. In ***Quinn vs. Leathem***, reported in ***(1901) AC 495***, it has been held that a case is only an authority for what it actually decides, and not what logically follows from it. The Hon'ble Supreme Court in the case of ***Roger Shashoua & Ors. vs. Mukesh Sharma & Ors.***, reported in ***AIR 2017 SC 3166***, paragraph nos. 51 to 54 of which held as under:-

> *"**51**. At this juncture, we think it necessary to dwell upon the issue whether Shashoua principle is the ratio decidendi of BALCO and Enercon (India) Ltd. (supra) and we intend to do so for the sake of completeness. It is well settled in law that the ratio decidendi of each case has to be correctly understood. In Regional Manager v. Pawan Kumar Dubey, a three-Judge Bench ruled:*
>
> > *"7. ... It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."*
>
> ***52**. In Director of Settlements, A.P. and others v. M.R. Apparao and another, another three-Judge Bench, dealing with the concept whether a decision is "declared law", observed:*
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> > *"7. ... But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the*

ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered.

***53**. In this context, a passage from Commissioner of Income Tax v. Sun Engineering Works (P) Ltd. would be absolutely apt:*

"39. ... It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. ..."

***54**. In this context, we recapitulate what the Court had said in Ambica Quarry Works v. State of Gujarat and others:*

"18. ... The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. (See Lord Halsbury in

Quinn v. Leathem). ...""

Thereafter, in ***Roger Shashoua*** (supra), the Hon'ble Supreme Court recorded its observation in paragraph no. 55, which reads as under:-

> *"**55**. From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the Court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to 32 (1992) 4 SCC 363 33 (1987) 1 SCC 213 34 (1901) AC 495 be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment de hors from the context and understand the ratio decidendi which has the precedential value. That apart, the Court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process."*

15. Learned counsel for the respondents raised an issue that the original decree holder died long before and she had not been substituted and even the judgment debtor died prior to the death of the original decree holder and he was also not substituted, and therefore, by implication the execution proceeding stand abated. I am afraid this is not the correct reading of the law. The Hon'ble Supreme Court in the case of ***V. Uthirapathi vs. Ashrab Ali & Ors.***, reported in ***(1998) 3 SCC***

148 held that on account of death of decree holder or judgment debtor during pendency of the execution proceeding, the execution proceeding will not abate but will remain pending. It further went on to hold that the execution application cannot even be dismissed for default behind the back of the decree holder's legal representatives. Paragraph nos. 13 and 14 of ***V. Uthirapathi*** (supra) are quite apposite and are extracted for reference:-

> *"**13**. In Venkatachalam Chetti vs. Ramaswami Servai [1932 ILR 55 Mad. 352 = AIR 1932 Mad. 73 (FB)], a Full Bench of the Madras High Court has held that this rule enacts that the penalty of abatement shall not attach to execution proceedings. Mulla's Commentary on CPC (Vol.3) p. 2085 (15th Ed., 1997) refers to a large number of judgments of the High Court:*
>
> > *"Rule 12 engrafts an exemption which provides that where a party to an execution proceedings dies during its pendency, provisions as to abatement do not apply. The rule is, therefore, for the benefit of the decree holder, for his heirs need not take steps for substitution under Rule 2 but may apply immediately or at any time while the proceeding is pending, to carry on the proceeding or they may file a fresh execution application."*
>
> ***14**. In our opinion, the above statement of law in Mulla's Commentary on the CPC, correctly represents the legal position relating to the procedure to be adopted by the parties in execution proceedings and as to the powers of the Civil Court."*

16. Thus, it is clear that there could be no abatement

of the execution petition after death of decree holder and his legal representatives not coming on record or judgment debtor dying and his legal representatives not brought on record. It is even open to the decree holder's legal representatives to file a fresh execution petition in case of death of decree holder or in case of death of judgment debtor, the decree holder can file a fresh execution impleading the legal representatives of the judgment debtor.

17. Therefore, I do not find any merit in the submission of learned counsel for the respondents regarding death of the decree holder or judgment debtor making the proceeding bad before the learned executing court.

18. One of the grounds taken before the learned trial court by the opposite parties/respondents was about wrong mentioning of provision. The learned trial court discarded the same by observing that mere mentioning of wrong title of application cannot be the sole ground for dismissing the application as that would be hyper-technical approach. However, it considered the application for restoration as filed under Order 21 Rule 106(1) of the Code and thereafter went on to discuss the issue of limitation under Order 21 Rule 106(3) of the Code holding that the limitation could not be condoned as

Section 5 of the Limitation Act has no application to a petition filed under Order 21 Rule 106 of the Code and placed reliance on the cases of ***S. Ponnupandian*** (supra) and ***Damodaran Pillai & Ors.*** (supra) wherein it has been held that if an order has been passed dismissing an application for default, the application for restoration thereof must be filed within a period of 30 days from the date of said order and not thereafter.

But in the light of discussion made here-in-before, It is apparent that the execution proceeding was wrongly dismissed and it is also apparent that there could be no application of Order 21 Rule 106 of the Code in the present facts and circumstances of the case. As already discussed that if Order 21 Rule 106 of the Code is not applicable, the limitation of 30 days for filing of restoration application would not be applicable and therefore, the petition filed by the petitioner would have to be read as one filed under Section 151 of the Code and not under Order 21 Rule 106 of the Code. Therefore, the miscellaneous case before the learned trial court ought to have been treated as one under Section 151 of the Code but the learned trial court completely missed this point.

19. Therefore, in the light of law discussed in the preceding paragraphs and applying the same to the facts of the

present case, I have no hesitation in holding that the learned Sub Judge committed an error of jurisdiction in passing the impugned order. Therefore, the impugned order dated 22.11.2023 passed by learned Sub Judge-II, Danapur in Misc. Case No. 54 of 2017 is set aside.

20. However, considering the fact that the execution case is of the year 1991 which was dismissed in default and the miscellaneous case was filed for its restoration in 2017, I do not think any useful purpose would be served in remanding the matter to the learned Subordinate Judge for fresh consideration. As the order dated 24.03.2017 whereby the Execution Case No. 07 of 1991 was dismissed in default was an illegal order, Misc. Case No. 54 of 2017 is allowed and the order dated 24.03.2017 passed in Execution Case No. 07 of 1991 is set aside.

21. Accordingly, the present petition stands allowed in terms of above-noted order.

(Arun Kumar Jha, J)

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AFR/NAFR	AFR
CAV DATE	NA
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Transmission Date	NA