PATNA HIGH COURT

Sudama Devi

Vs

Jogendra Choudhary

Letters Patent Appeal No. 42 of 1982

(S.S. Sandhawalia, C.J., Lalit Mohan Sharma and S. Ali Ahmad, JJ.)

29.09.1986

JUDGEMENT

S.S. Sandhawalia, C.J.

1. Whether the legal guardian of a minor in possession of his property, who is himself a party to the suit along with such minor, would, on the latter's death, become his legal representative as an intermeddler with the estate under Section 2(11) of the Civil Procedure Code is the somewhat significant and ticklish question necessitating this reference to a Full Bench.

2. The facts are not in serious dispute. The deceased, Dinesh Paswan, along with his father, Parmeshwar Paswan, and others, had brought the suit for partition of the two-fifth share of the plaintiff's in the suit property and also for a declaration that the deed of sale executed by Raghuni Paswan in favour of Defendant 17, Hari Jha, was collusive, without consideration and inoperative. The said suit was decreed on the 29th July, 1975. The defendants preferred Title Appeal No. 25/10 of 1975/77, which was allocated to the First Additional District Judge, Darbhanga.

3. During the pendency of the appeal, Dinesh Paswan, aforesaid, died on the 30th June, 1976, leaving behind his mother Buchi Devi and his father, Parmeshwar Paswan. Admittedly, the mother, who was Class I heir under Section 8 of the Hindu Succession Act, was not brought on the record as a legal representative within the period of limitation. An objection petition was preferred on behalf of the respondents, raising the plea that the whale suit had abated because of the failure to substitute the Class I legal representative of the deceased minor Dinesh Paswan. In the circumstance, an application under Section 5 of the Limitation Act was also preferred for condoning the delay in filing the petition for setting aside the abatement of the appeal on the ground that there was sufficient cause therefor as the appellants were not aware of the death of the respondent and his legal heirs. The learned Additional District Judge, in an elaborate order dated the 26th September, 1978, rejected the stand of the appellants before him and held that there was no sufficient ground for condonation of delay and that the appear abated as a whole.

4. On appeal, the learned single Judge, apparently first dismissed the same. However, on the

basis of an application filed by the respondents therein, the matter was re-heard. By the judgment under appeal, the learned single Judge came to the view that if the legal heir of any class, irrespective of the fact whether he is of Class I or Class II, under Section 8 of the Hindu Succession Act, is on the record, no question of abatement would arise. Consequently, he reviewed his earlier order and remitted the case back to the learned Additional District Judge, with a direction that he should add the mother of the deceased Dinesh Paswan as a respondent also and thereafter dispose of the appeal in accordance with law.

5. This letters patent appeal originally came up before a Division Bench, where the firm stand taken on behalf of the respondents was that the legal guardian of a minor in possession of the latter's estate must at least be deemed as an intermeddler with the said estate on the death of the minor and, therefore, would represent the same under Section 2(11) of the Civil Procedure Code On behalf of the appellants, however, reliance was placed on *Jiba Devi v. Satyanand Roy*[1], Expressing some doubt with regard to the passing observations in the later judgment, the appeal has been referred to a larger Bench for an authoritative decision.

6. As before the Division Bench, so before us, the learned Counsel for the respondents did not attempt to support the judgment under appeal on the basic ground therein that even if a Class II legal heir under Section 8 of the Hindu Succession Act is on the record, despite the exclusion of the Class I heirs, no question of abatement would arise. Instead he took the alternative stand that the legal guardian of the minor being in possession of the latter's estate would, on his death, be, in the eye of law, the intermeddler with the said estate, and, consequently, within the ambit of Section 2(11) of the Civil Procedure Code This stand was, however, stoutly opposed by the learned Counsel for the appellants, and, inevitably, he relied on and commended for the acceptance of the view in *Jiba Devi v. Satyanand Roy* (supra).

7. From the rival stands noticed above, it is somewhat obvious that the core question herein, which indeed has been solely debated before us, is whether the legal guardian of a minor in possession of an estate would, on the death of such a minor, be an intermeddler with the estate within the meaning of Section 2(11) of the Civil Procedure Code This question cannot today be viewed in isolation of authoritative precedent, and the answer thereto would consequently depend on the true approach to the problem herein. Now there is a positive shift away from the earlier technicalities of abatement and the refreshing trend to opt for a decision on merits instead. This precedential trend of the Final Court itself, which is now unbroken, extends over a period of more than two decades by now. Apparently, the first straw in the wind in this context is the observations in *Daya Ram v. Shyam Sundari*[2], holding that where the plaintiff or the appellant, after a diligent and *bona fide* inquiry ascertained the legal representatives of a deceased defendant or respondent and brings them on record within time, the re would be no abatement even though some of the legal representatives may have been-left out. Two years later, in *Dolai Maliko v. Krushna Chandra Patnaik*[3], their Lordships reiterated the earlier departure from the fossilised
trend of legalism which short-circuited meaningful issues on paltry technicalities of abatement, with the following observations :-

> "We are of opinion that these cases have been correctly decided and even where the plaintiff or the appellant has died and all his heirs have not been brought on the record

> because of oversight or because of some doubt as to who are his heirs, the suit or the appeal, as the case may be, does not abate and the heirs brought on the record fully represent the estate unless there are circumstances like fraud or collusion to which we have already referred above."

The aforesaid trend was further expanded in *Mahabir Prasad v. Jage Ram*[4], in the following words :-

> "Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate." Thereafter, acknowledgedly, in *Harihar Prasad Singh v. Balmiki Prasad Singh*[5], and *N. Jayaram Reddi v. Revenue Divisional Officer*[6], the shift away from technical abatement stands further buttressed."

8. In the light of the aforesaid catena of binding precedent, Mr. S.B.N. Singh, learned Counsel for the respondents, pinpointed himself particularly on the aforequoted observations in *Mahabir Prasad v. Jage Ram* (supra). It was contended that the father of the minor, in his capacity as his legal guardian, was already on the record and further was so individually in his own right as well in the suit for partition. After the death of the minor, even if that capacity of legal guardianship inevitably changes, the factum of his being on the record in another capacity remains undisputed. He, therefore, contended that herein the father, who earlier represented the minor as being legally and factually in possession of his estate, would continue to represent that estate, in any case, as an intermeddler therewith, even if he had no legal title thereto. In such a situation, he would be the legal representative of his deceased son in his capacity as an intermeddler with the estate of the minor.

9. To my mind, the heart of the issue herein is whether in the facts situation as also in the eye of law, the legal guardian of the deceased minor is not also at least an intermeddler with his estate. Section 2(11) of the Civil Procedure Code is in the following terms :-

> "'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or
> sued;"

10. It is plain from the above that the definition herein is a wide and inclusive one and conceives of two distinct categories. Firstly, the heirs or persons, who in law represent the estate of the deceased person. However, at par with them and in a class by itself is any person who intermeddles with the estate of the deceased. Such a person is equally a legal representative. Now the phrase intermeddler with the estate has come to be a term of art and has been construed as

one of the widest amplitude. This apart, even the dictionary meaning of the word is one of considerable width. In Chambers's Twentieth Century Dictionary the word 'meddle' is given the meaning to "interfere unnecessarily, or, without being entitled". Intermeddle is "to meddle or to interfere improperly". In the New Oxford Illustrated Dictionary, 'meddle' means to concern one-self with what is not ones business. According to the Random House Dictionary 'intermeddler' means one who "interferes or intermeddles", which in turn means to "interfere officiously and unwantedly". It is thus manifest that even on its plain dictionary meaning the word is one of wide amplitude.

11. This word has also been the subject matter of considerable judicial scrutiny both in Indian and English laws. In *Mst. Naro v. Harbanslal*[7] Tek Chand, J., speaking for the Division Bench, observed as under :-

> "Intermeddling means to meddle with the affairs of others in which one has no concern, to meddle officious; to interpose or interfere improperly. It signifies meddling with the property of another improperly. Intermeddling may take several forms including collecting or taking possession of the assets or other act, which might evince a legal control.
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> A legal person, who intermeddles, is on the same footing as an executor de son tort (executor of his own wrong) as he takes upon himself the office of an executor by intrusion and not so constituted by the testator. He is a person who without authority intermeddles with the estate of the deceased. Very slight act of intermeddling with the property of the deceased makes a person executor de son tort....
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> There is authority for the proposition that when a person intermeddles with the property of the deceased he is a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled...." It would follow from the above that precedent has also authoritatively given to the word 'intermeddler' an extremely expanded construction. Indeed, as has been noticed above, an intermeddler is on the same footing as an executor de son tort. In the Halsbury's Laws of England, Fourth Edition, Vol. 17, in Para 754, it has been said as under with regard to an executor de son tort :-
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> "The slightest circumstance may make a person executor de son tort, if he intermeddles with the assets in such a way as to denote an assumption of the authority or an intention to exercise the functions of an executor or administrator. Demanding payment of debts due to the deceased, paying the deceased's debts, carrying on his business, or disposing of goods may make a person executor de sontort; but setting up a colourable title to the deceased's
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> goods is not enough. A person who enters upon or collects the rents of a deceased's person's leasehold property and pays the ground rent may, by reason of privity of estate or estoppel, render himself liable to the landlord upon the covenants of the lease as executor de son tort, but a person who take over leasehold property from an executor de son tort does not."

12. It would be manifest from the above that an intermeddler (who is on the same footing as an

executor de son tort in English law) is one who in any way whatsoever dabbles with or comes in touch with the estate of the deceased. The wide sweep of the phrase, as term of art, and the intention of the legislature in expressly including an intermeddler in the definition of legal representatives under Section 2(11) of the Civil Procedure Code is thus not in doubt.

13. Now, once the width and sweep of the word intermeddler and the intent of the legislature in including it in Section 2(11) of the Code is manifested, it would seem somewhat elementary that a legal guardian in possession of the estate would, in the event of the death of the minor, come squarely within the ambit of an intermeddler with the estate in the eye of law, even if he himself does not happen to be a Class I heir thereto. The legal position of a guardian vis-a-vis his ward with regard to the property of the latter is not in doubt. A minor, because of the incapacity to contract till his majority, holds the estate and property through his legal guardian. It seems unnecessary to enter in any great legal sophistry in this context. It can hardly be disputed that a legal guardian, during the lifetime of the minor is legally and factually in possession of his ward's estate. The minor has title to the property and is in possession only through his lawful guardian. It seems that the position would not admit of any doubt that the legal guardian of the minor is notional possession of the estate of his ward.

14. The issue that then arises is as to what is the consequence of the minor dying in such a situation - does the factum of the actual or notional possession of the estate of the legal guardian evaporate in the thin air with the last breath of the minor ? I do not think so. No such fiction can be exercised. There is a settled general rule that if a person is specifically found in possession of an estate at a prior date, there is a presumption of continuity of such possession till the contrary is established. This general rule of law is too well settled to admit of any doubt. Yet, within this jurisdiction, if a precedent was needed, it is first available in the authoritative decision of the Full Bench of this Court in *Shiva Prasad Singh v. Hira Singh*[8], and again reiterated in *Ghoghar Raut v. Jagannath Prasad Singh*[9] in the following terms :-

> "The decision can only be based on the general rule of evidence in favour of presuming the continuity of things shown to exist at a prior date. It is certainly a plausible argument that if the plaintiff has shown that he was in possession in 1896, he must be presumed to have continued in possession, unless and until his dispossession is proved by the defendants. But the presumption in question is a general presumption. It would equally apply, no matter what the evidence on which the plaintiff relied to prove his possession in 1896."

15. It is somewhat plain on both authority and general principle that with regard to a legal guardian in possession of the estate of the minor, there would be a presumption of the continuity of possession after the death of the minor till it has been shown otherwise that he was dispossessed thereof.

16. Now, if that be so, and, it is not disputed that the legal guardian was in possession at the time of the death of the minor, the presumption of the continuity of the possession is a strong one, which has to be specifically dislodged. Once it is so, the former legal guardian would be in possession of the estate either lawfully or unlawfully. Where the legal title to the property of the minor has passed to another heir, then the possession of the legal guardian may either be on

behalf of those legal heirs with consent or he may nevertheless continue in possession in opposition to their claim. Whatever be the situation, for our purpose, it would suffice that on the principle of continuity of possession, the legal guardian, after the death of the minor, remains in the same situation *qua* the estate, whether lawfully or unlawfully. To be an intermeddler, the legality or the entitlement is irrelevant. Can it possibly be said that such a person, lawfully or unlawfully in possession of the whole of the estate at the moment of the demise of the minor and thereafter, would not be even intermeddling with the same ? As has been highlighted earlier, the concept of the intermeddling with the estate is wide one and even a trifling intrusion there in may bring one within the concept of an intermeddler or an executor de son tort. To say that the person, who, the day before, was lawfully in possession of the estate and who continues to be so in a different capacity, would not at least be an intermeddler therewith, appears to me as wholly untenable. It must, therefore, be held that the legal guardian in such a situation is undoubtedly within the sweep of the phrase "any person who intermeddles with the estate of the deceased", and, is, therefore, a legal representative, within the inclusive definition of Section 2(11) of the Civil Procedure Code Once that is so, it is plain that if he is already on the record of the case, the mere absence of one or the other heirs would not result in the abatement in view of the long line of authority noticed earlier. Indeed this position is too axiomatic to deserve further elaboration.

17. In fairness to Mr. S.B.N. Singh, learned Counsel for the respondents, one must notice his reliance on Rules 3 and 4 of Order 22 of the Civil Procedure Code He rightly emphasised that the language employed therein is not that the heirs or the heirs in Class I or Class II must be made a party in the event of the death of the original party, but only that the legal representatives of the deceased should be so made. It was contended with plausibility that herein the requirement is not of heirship and whether it is of Class I or of Class II, but of being a legal representative, and, if a person comes within the ambit of being an intermeddler with the estate and subsequently a legal representative, then he would as well represent the estate as the preferential heir in Class I or the subsidiary heir in Class II of Section 8 of the Hindu Succession Act.

18. As a last ditch of attempt, learned Counsel for the appellants attempted to raise the ghost of partial abatement despite the factum of a legal representative being on record. Primal reliance for this contention was sought to be placed on *Prahlad Jha v. Sonelal Mahto*[10], and, in particular, the observations of the Division Bench in para 6 of the report. Undoubtedly, these do Lend some credence to the stand taken on behalf
of the appellants, with regard to the partial abatement. It is, perhaps, time that for the sake of clarity of precedent, the cobwebs should also be cleared. A reading of the decision in Prahlad Jha's case (supra) would indicate that the Division Bench somewhat narrowly and constrictedly construed the observations of the Supreme Court in *Mahabir Prasad v. Jage Ram's case AIR 1971 Supreme Court 742* (supra). With respect, the narrowing down of the rule laid down by their Lordships in the said case does not appear to us as well warranted. Apart from the facts of the particular case, their Lordships in no uncertain terms laid down a principle of general application, which does not deserve to be constricted. This position indeed is manifested by subsequent decisions of the Final Court itself, which, far from limiting the rule, have expanded the same.

19. In the aforesaid context, what first calls for notice within this jurisdiction is the fact that an earlier Division Bench in *State of Bihar v. Saubhagya Sundari Devi*[11], had taken a contrary view, which seems to have been missed notice in Prahlad Jha's case. Yet again, a later Single Bench

decision in *Ramchandra v. State of Bihar*[12], *preferred to follow the earlier decision in *State of Bihar v. Saubhagya Sundari Devi*[13] and disagreed with the construction of the wider rule laid down in Mahabir Prasad's case. Still later, another Division Bench in *Ramdeo Jha v. Chandar Thakur*[14], though seeking to distinguish Prahlad Jha's case as one being on its own facts, apparently took a contrary view. This apart, it would appear that in the subsequent decision of the Final Court in *Harihar Prasad Singh v. Balmiki Prasad Singh*[15], which was also a case from this Court, their Lordships, in a very exhaustive judgement found no reason to limit the ratio in Mahabir Prasad's case (supra), and, indeed virtually took a more liberal and expanded view. In the still later decision in *N. Jayaram Reddi v. Revenue Divisional Officer and Land Acquisition Officer, Kurnool*[16], Desai J. formulated the undermentioned propositions, divorced from any limitations of the facts of a particular case :-

> "(1) If all legal representatives are not impleaded after diligent search and some are brought on record and if the Court is satisfied that the estate is adequately represented, meaning thereby that the interests of the deceased party are properly represented before the Court, an action would not abate.
> (2) If the legal representative is on the record in a different capacity, the failure to describe him also in his other capacity as legal representative of the deceased party would not abate the proceeding.
> (3) If an appeal and cross-objections in the appeal arising from a decree are before the appellate Court and the respondent dies, substitution of his legal representatives in the cross-objections being part of the same record would enure for the benefit of the appeal and the failure of the appellant to implead the legal representatives of the deceased respondent would not have the effect of abating the appeal but not vice versa.
> (4) A substitution of legal representatives of the deceased party in an appeal or revision even against an interlocutory order would enure for the subsequent stages of the suit on the footing that appeal is a continuation of a suit and introduction of a party at one stage of a suit would enure for all subsequent
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> stages of the suit.(5) In cross-appeals arising from the same decree where parties to a suit adopt rival positions, on the death of a party, if his legal representatives are impleaded in one appeal it will not enure for the benefit of cross-appeal and the same would abate."

20. In the light of the aforesaid subsequent precedent, it appears to me, with the deepest respects, that the view of the Division Bench in *Prahlad Jha v. Sonelal Mahto, AIR 1974 Patna 338* (supra), cannot now hold the field and is hereby overruled.

21. It now remains to consider *Jiba Devi v. Satyanand Roy*[17], which, as already noticed, had necessitated this reference to the larger Bench. Therein, the point involved herein undoubtedly was raised in specific terms. However, it appears from the judgment that the issue was not elaborately canvassed and the learned Counsel for the parties were somewhat remiss in not bringing all the facets on principle and precedent on the point to the notice of the Bench. In this context, M.P. Varma, J., who wrote the main judgment, summarily disposed of the matter in the following lines :-

> "In this view of the matter, the contention that father of the deceased minor is the legal representative fails. Such a position was permissible before the passing of the Hindu Succession Act, 1956, when the law of survivorship did hold the field in the matter of devolution of the interest of the deceased coparcener."

22. It is plain from the aforesaid that the core question of intermeddling with the estate was neither projected nor considered and the issue was somewhat narrowly and cryptically adjudicated upon on the question of legal heirship alone and the change in law and the provisions of the Hindu Succession Act, 1956. It is true that my learned Brother, S. Ali Ahmad, J., who was a party to that judgement, adverted very briefly to this aspect in his concurring observations. However, he seems to have been primarily influenced in holding so on the ground that the appellants had failed to prove the factum of intermeddling with the estate, and, it deserves notice that in the second appeal both the courts below had held against the appellants and the Bench apparently did not choose to interfere on the peculiar findings of facts arrived at. It is equally well to recall that in the order of reference in this case, his Lordship, S.Ali Ahmad, J., has himself doubted the ratio in Jiba Devi's case (supra). With the deepest respect, in the light of the exhaustive discussions above, the view in *Jiba Devi v. Satyanand Roy,* (supra) does not lay down the law correctly and is hereby overruled.

23. Finally to conclude on the legal aspect, the answer to the question posed at the outset is rendered in the affirmative, and, it is held that the legal guardian of a minor in possession of his property, who is himself a party to the suit along with the said minor, would, on the latter's death, become his representative as an intermeddler with the estate of the minor under Section 2(11) of the Civil Procedure Code.

24. Once it is held as above, it is plain that on the virtually admitted facts, the father of the deceased minor was an intermeddler with his estate and consequently his legal representative. Indeed it may be highlighted that the present case was a suit for partition. That being so, it is well settled that each of the co-sharers is deemed to be in possession of the joint properties. The possession of the minor as such and that of his legal guardian on his behalf is, therefore, not in doubt, and, equally so the possession of the father in his own right of the joint coparcenery properties. Therefore, the father, being on the record already, as the legal representative, no question of abatement would arise.

25. In view of the above, it is unnecessary to adjudicate upon the alternative stand of the learned Counsel for the respondents. It would suffice to highlight that facts were brought to our notice which would render plausible the projected claim on their behalf for the condonation of the delay in bringing the Class I heirs on the record also, as there was sufficient cause for the same. As the appeal must fail on the preliminary ground, it is unnecessary to delve into the factual grounds for condonation.

26. In the light of the above, the judgement of the learned single Judge is sustained and upheld, though for a somewhat different reason. In view of some intricacies involved and the conflict of precedent on the point, we leave the parties to bear their own costs.

LALIT MOHAN SHARMA, J.

27. (Minority view) :- I have gone through the judgement of Hon'ble the Chief Justice, and I regret my inability to agree.

28. It is true that an intermeddler is included in the expression 'legal representative' and the guardian of a minor may in an appropriate case be held to represent the estate after his death, but only if the guardian is an intermeddler in fact. A person can be assumed to be such with reference to the estate of a deceased person only if he "intermeddles with the estate" as mentioned in Section 2(11) of the Civil Procedure Code. The question whether a person is an intermeddler so as to be the legal representative of a deceased party in a given case is dependent on the relevant facts, which facts have to be alleged by somebody. If denied, the allegation will have to be proved. The burden of proof initially must rest on the person who so alleges; and, if may stand discharged in some cases on the basis of slight evidence and in other cases stronger evidence may be needed, depending on the facts and circumstances. In the case of the father representing a minor as his guardian it may readily be presumed that he continued in possession of the property of the deceased minor after his death, unless effectively rebutted. He may, therefore, be assumed to represent the estate as an intermeddler. But the question remains one dependent on fact to be alleged. If necessary assertion is made by a party, the other side will be entitled to an opportunity to deny the same; and, the Court will have to decide the issue only after ascertaining the factual aspect. If none of the parties in a particular case so alleges, the question whether the guardian is an intermeddler does not arise for decision and he cannot be presumed to be so as a matter of law. In my view, a general proposition cannot be laid down for universal application that on the death of a minor his guardian must be held to be an intermeddler and, therefore, his legal representative.

29. In the present case, on the death of the minor, leaving behind his mother as the sole heir, during the pendency of the case in the Court below, nobody alleged that the guardian was an intermeddler. It was the duty of the defendants (appellants in the Court below) to have so asserted as they had to save the appeal from abatement. Ori the other hand, from the statements made On the other hand, from the statements made in the judgment of the lower appellate Court and of the learned single Judge of this Court it appears that there was no dispute between the parties that the estate was represented by the mother of the minor. The prayer for her substitution was seriously opposed and the parties were allowed to lead their evidence. Since there was no suggestion by anybody that the guardian, as a matter of fact, intermeddled with the estate and was, therefore, the legal representative, no evidence on this aspect was led by either side. I wanted to examine the lower Court records and was informed that the same was lost. The discussion in the judgment of the lower appellate Court clearly indicates that the only question debated by the parties was whether there was sufficient cause for condoning the delay in filing the application for substitution after setting aside abatement. The appellants were alleging want of knowledge of the death of the respondent in time. Evidence was led in support of their case that after the respondent filed an application raising the plea of abatement, the appellant Umakant Chaudhary had to verify the position which took time. After considering the evidence (led in the substitution matter before the appellate Court) and the arguments addressed on behalf of the parties, the Court below held that the appellants had failed to establish "sufficient cause" explaining the delay. The only other point, which was urged and decided was that as the result of the partial abatement, the appeal abated in its entirety.

30. The prayer of the defendants for setting aside the abatement was inconsistent with the argument addressed on their behalf before us in the present letters patent appeal and they should not, therefore, be allowed to rely on a plea the other side had no opportunity to meet. Even in the memorandum of appeal of Miscellaneous Appeal No. 256 of 1978 it was not suggested that the father guardian of the deceased minor continued in possession of the estate of the deceased minor and, therefore, he, being an intermeddler, represented the estate. By the grounds taken in the memorandum, the findings were challenged on the same basis on which the prayer for substitution was pressed in the lower appellate Court. It was, however, argued at the time of the hearing of the Miscellaneous Appeal that since the father of the minor was "a second class heir" within the meaning of the Hindu Succession Act his presence on the record saved the appeal from abatement. The plea was accepted by the learned single Judge in the following terms :

> "In my opinion, if there is a legal heir of any class on the record, no question of abatement will arise. The appellants are only required to bring other heir, namely, mother on the record. Hence, I direct the court below to add mother as also the heir of Dinesh Paswan."

The appeal was, accordingly, allowed and the case was remitted to the lower appellate Court for disposal of the suit on merits.

31. The present letters patent appeal was admitted on 7-2-1983 and when it was placed for hearing before a Division Bench on 19-8-1985 the point now argued was taken for the first time, and the case was referred for the decision by a larger Bench. I have not discovered any petition on the records of the present appeal asserting that the father was the legal representative of the deceased minor as an intermeddler. I presume that a suggestion came only in the argument by the learned Advocate for the respondents. In the circumstances, I hold that the plea which is dependent on facts cannot now be entertained, specially when the consistent stand of the respondents has been otherwise.

32. The learned single Judge held that although the mother of the deceased minor was not substituted, the presence of his father and brothers would save the appeal from abatement, on the ground that a Class II heir within the meaning of the Hindu Succession Act is an heir attracting the application of the ratio of the case in *Mahabir Prasad v. Jage Ram*[18], I disagree. The Hindu Succession Act has in the Schedule enumerated the different classes and categories of heirs of a Hindu male, but while so doing it does not lay down that all the heirs in the list are to succeed at the same time. The relations mentioned in Class I, of course, inherit together but the right of those mentioned in Class II arises only in absence of a Class I heir. So long the deceased leaves behind any Class I heir, he or she shall exclude the Class II heirs altogether from taking any share in the estate. The fact that under the law, Class II heirs are mentioned as such is wholly irrelevant for deciding the present question. As admittedly the minor's mother exclusively inherited the estate the presence of the father and the other relations on the records is wholly immaterial. I, therefore, hold that the decision of the learned single Judge is erroneous in law.

33. The next question is as to what should be the further order in this background. The lower appellate Court, after considering the evidence of both sides, rejected the explanation of the defendants for filing the substitution petition late. In the Miscellaneous Appeal, which was a first appeal (under the provisions of Order 43, Rule 1 C.P.C.) the defendants were entitled to a re-

assessment of the evidence, which was not done in view of the appeal succeeding on the other point. If the decision of the learned single judge is set aside, the prayer of the defendants for setting aside abatement and substituting the mother of the deceased minor has to be reconsidered and while so doing, a liberal approach in their favour has to be adopted in view of the observations of the Supreme Court. This step has to await the reconstruction of the lower Court records. I may point out that the restoration (reconstruction ?) of the records cannot be avoided in this case, as even on the judgement of the Hon'ble Chief Justice (brother Ahmad, J. agreeing) the appeal in the lower appellate Court has to be heard and disposed of on merits.

34. In the result, the decision of the learned single Judge is set aside. M.A. 256 of 1978 will have to be heard again, but before that is done, the records will have to be reconstructed. This appeal is, accordingly, allowed.

S. Ali Ahmad, J.

Cases Referred.

[1] AIR 1982 Pat 177
[2] AIR 1965 SC 1049
[3] AIR 1967 SC 49
[4] AIR 1971 SC 742
[5] AIR 1975 SC 733
[6] AIR 1979 SC 1393
[7] AIR 1962 Pun 457
[8] AIR 1921 Pat 237
[9] AIR 1947 Pat 475
[10] AIR 1974 Pat 338
[11] AIR 1972 Pat 200
[12] AIR 1974 Pat 184
[13] AIR 1972 Pat 200
[14]1981 Pat LJR 533
[15] AIR 1975 SC 733
[16] AIR 1979 SC
[17] AIR 1982 Pat 177
[18] AIR 1971 SC 742

35. (Majority view) : - I agree with my Lord The Chief Justice.
, Order accordingly.