

**IN THE HIGH COURT OF JHARKHAND AT RANCHI  
C.M.P. No. 493 of 2022**

Nimai Mahato -----  
..... Petitioner

Versus

1. Jagarnath Mahato
2. Agnu Mahto
3. Sonkar Mahato
4. Sanjay Mahto
5. Shanti Devi
6. Kanti Devi
7. Tetwa Devi
8. Anita Devi
9. Bhushan Mahto
10. Harakhlal Mahto
11. Purni Mahtain
12. Parwa Mahtain
13. Pobia Mahtain
14. Durgi Mahato
15. Kalawati Mahtain
16. Chhutki Mahatain
17. Urmila Mahtain
18. Indranath Mandal
19. Chandi Mandal
20. Deepak Mandal
21. Kailash Mandal
22. Amulya Mandal
23. Mantu Mandal
24. Bhogi Sen
25. Dukhan Sen @ Dukhu Sen
26. Satish Sen
27. Bharat Mandal
28. Ashiruddian Mian
29. Rafique Ansari
30. Safizuddin Ansari
31. Maniruddin Ansari
32. Gayasuddin Ansari
33. Phulbiya Devi
34. Jaideo Prasad Saw
35. Bhudeo Prasad
36. Smt. Funnu Devi
37. Smt. Champa Devi
38. Smt. Jamuna Devi
39. Guhi Ram Sen
40. Ghanshyam Mahato
41. Ashok Mahato
42. Nemlal Mahato
43. Suresh Mahato
44. Sanju Mahato
45. Subhadra Devi ..... Opposite Parties

**CORAM: HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY**

For the Petitioner : Mr. Lukesh Kumar, Advocate

For the Opp. Party :

**Oral Order**

**03/ Dated : 10.11.2022**

1. Surviving defects are ignored.
2. The instant civil miscellaneous petition has been filed by one Nimai Mahato for quashing the order dated 16.06.2022 passed in Civil Appeal No.152 of 2019 whereby and whereunder the petition under Order XLI Rule 5 of the C.P.C. for stay of Execution Case No.99 of 2019, has been rejected by learned Additional District & Sessions Judge, XVI, Dhanbad.
3. The principal ground for seeking stay of the execution proceeding is that judgment debtor Nos.2, 8, 14, 17, 18, 19 & 21 have since died, who have been substituted before preparation of the final decree. Secondly, the Pleader Commissioner made a spot verification in August, 2018 when the parties were not there. The report of the Pleader Commissioner was challenged before this Court in W.P.(C) No.2684 of 2019 wherein it was held that since it was a final decree, same can be challenged under Section 96 of the C.P.C. In pursuance to the order passed in the writ petition, Civil Appeal No.152 of 2019 has been filed.
4. The learned Court below in the impugned order has noted that the judgment debtors referred to above, have been substituted in the Execution Case No.99 of 2019 by order dated 28.03.2022. The appellant had not preferred any appeal against the preliminary decree and after passing of the decree, execution case has been filed by the decree holder.
5. Under the circumstance, the petition filed for stay under Order XLI Rule 5 has been rejected by the learned Court below.
6. There is a specific mandate under Order 22 Rule 12 that the provisions under Rules 3, 4 and 8 of Order 22 do not apply to execution proceeding. The Rules 3 and 4 relate to the death of a party pending a suit or appeal, and Rule 8, relate to the insolvency of the plaintiff pending a suit and the insolvency of an appellant pending an appeal. Thus, where a party to an execution proceeding dies during its pendency, provisions as to abatement do not apply. If after the filing of an execution petition in time, the decree holder dies and his legal representative do not come on record, or the judgment debtor dies and his legal representatives is not brought on record, then there is no abatement of the execution petition. If there is no abatement, the position in

the eye of law is that execution petition remains pending on the file of the Execution Court. If it remains pending and if no limit is prescribed to bring the legal representatives on record in such proceeding it is open to his legal representatives to come on record at any time.

7. As far as the stay of execution proceeding is concerned, it has been held in *2020 (1) JLJR 240 Jhar.; Sr. Prasanna Vs. Arvind Kumar* by this Court that order under Rule 5 is required to be passed if the substantial loss may result to the party applying for stay of execution. It means and includes that even by obtaining restitution the appellant, if he were to succeed in the appeal, will not be restored to the full benefits of the decree which may ultimately be passed in his favour, but not the mere temporary deprivation of the use of benefits he would have and if the decree holder is not permitted to execute a decree which he has the right to execute, unless the Court has reason to believe that restitution wholly or partly cannot be had from the party seeking stay orders.

I do not find any infirmity in the impugned order.

The learned Court below, is however, directed to dispose of the appeal within three months of this order.

This civil miscellaneous petition is disposed of.

**(Gautam Kumar Choudhary, J.)**