IN THE HIGH COURT OF JHARKHAND AT RANCHI
C.M.P. No. 436 of 2025

Prabodh Kumar Tiwary (Adopted), Son of Sahdeo Tiwary, aged about 59 years, resident of Village- Tharhi Dulampur Tq. Rohini, P.O.- Devsangh P.S.- Jasidih, Sub-Division & District- Deoghar. **... Petitioner**

-Versus-

1. Rakesh Kumar Tiwari (Adopted), Son of Late Malti Devi, Wife of Late Sahdeo Tiwary, resident of Village- Tharhi Dulampur, P.O.- Devsangh, P.S. Kunda, Sub-Division & District- Deoghar.
2. Birma Debya, Wife of Late Mahendra Tiwary (Deleted)
3. Shailja Debya, Wife of Late Chandrika Tiwary (Deleted)
4. Sukun Debya, daughter of Late Mahendra Tiwary.
5. Sudama Devi, daughter of Late Mahendra Tiwary
6. Malti Devi, Wife of Late Sahdeo Tiwary (Deleted)

   Respondent No. 2 to 6, all are resident of Village- Tharhidulampur Tq. Rohini, P.O.- Devsangh, P.S.- Jasidih now Kunda, Sub- Division & District- Deoghar.
7. Binod @ Binodanand Tiwary, Son of Late Annapurna Devi.
8. Barun Choubey
9. Pradeep Choubey

   Sl. No. 8 and 9, both are Son of Late Tripurari Choubey
   Respondent nos. 7 and 9 are resident of Village- Chihardhania, P.O.- Tapovan, P.S.- Kunda, Sub-Division & District- Deoghar.

... Opposite Parties

CORAM: HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI

For the Petitioner : Mr. R.N. Sahay, Senior Advocate
Mrs. Bakshi Vibha, Advocate
For the O.P. No. 1 : Mr. Shiv Narayan Singh, Advocate.
Mr. Pran Pranay, Advocate.

04/24.06.2025 Heard Mr. R.N. Sahay, learned senior counsel appearing for the petitioner and Mr. Shiv Narayana Singh along with Mr. Pran Pranay, learned counsel appearing for the opposite party no. 1, who have appeared *suo motu.*

2. This petition has been filed under Article 227 of Constitution of India for setting-aside the order dated 11.04.2025 passed in Miscellaneous Civil Application No. 19 of 2025 by the learned District Judge-III, Deoghar, arising out of Civil Appeal No. 82 of 2024, whereby, the learned Court has been

pleased to reject the prayer regarding correction in the genealogical table to incorporate the name of Kunti Devi, the first wife of Sahdeo Tiwary and the mother of this petitioner in the plaint of Title (Partition) Suit No. 497 of 1997.

3. Mr. R.N. Sahay, learned senior counsel appearing for the petitioner submits that the Title Partition Suit No. 497 of 1997 was instituted by the plaintiff/petitioner for a decree for partition for allotment of entire share to the plaintiff in Schedule-A and half share in Schedule-B and C after getting in carved out through process of court and for appointment of receiver and for cost of suit for which the plaintiff is legally entitled. He further submits that said suit was on contest decreed in favour of the petitioner/plaintiff vide judgment and decree dated 26.04.2024 and 09.05.2025 respectively. He also submits that during the proceeding of trial, an amendment petition was filed by the petitioner under Order VI Rule 17 of the CPC which was registered M.C.A. No. 171 of 2024 and after hearing the parties, the learned Court has been pleased to allow the amendment petition vide order dated 19.04.2024. He submits that however inadvertently amendment No. VII was not carried by the petitioner in the plaint and decree has been passed and that was not carried out in the decree. He submits against the said judgment and decree, the defendants/opposite parties herein preferred the Civil Appeal No. 82 of 2024. He further submits that in course of examining the record of the appeal, it was found that amendment No. VII, allowed by the learned Trial Court, has not been incorporated in the plaint and in view of that, the petition has been filed under Order VI Rule 17 read with Rule 18 of the CPC before the learned first Appellate Court and the learned Court has been pleased to reject the same. He submits that inadvertently that has not been incorporated in the

plaint and formal amendment was sought to be carried at the appellate stage and in view of that, the learned first Appellate Court has erred in rejecting the said petition. He relied upon the judgment passed in the case of ***Dwarika Prasad (D), through LRs v. Prithvi Raj Singh*** reported in ***2024 SCC OnLine SC 3828***. Paragraphs 9 and 10 of the said judgment read as under:

> ***"9.*** *We have heard learned counsel for the appellant and perused the record. We are of the opinion that the High Court has erred in upholding the order of the Additional District Judge. The Trial Court had rightly allowed the restoration application filed by the Appellant under Order IX Rule 13 of CPC. It is well settled that Courts should not shut out cases on mere technicalities but rather afford opportunity to both sides and thrash out the matter on merits. Further, we cannot let the party suffer due to negligent or fault committed by their counsel. This principle has been enunciated by this court in the case of Rafiq v. Munshilal1, quoted as follows:*
>
> > *"3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe, we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr A.K. Sanghi invited us to do, the only one who would suffer would*

> *not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order….."*
>
> ***10.*** *In the present case, the appellant has trusted his counsel to manage the suit proceedings. However, he was not made aware of the ex-parte decree by his previous counsel. It is only after the appointment of the new counsel, the appellant got to know about the exparte decree. Therefore, the Additional Sessions Judge ought not to have exercised the revisional jurisdiction in interfering with the order of the Trial Court where it had exercised its discretion in setting aside the ex-parte decree for justifiable reasons accepting the reasons given by the defendant-appellant."*

4. Learned senior counsel appearing for the petitioner further relied upon the judgment passed in the case of ***Rafiq and another v. Munshilal and another***, reported in ***(1981) 2 SCC 788***. He also relied upon the judgment passed in the case of ***Ram Kumar Gupta and others v. Har Prasad and another***, reported in ***(2010) 1 SCC 391***. He further relied on the judgment passed in the case of ***Salmona Villa Co-operative Housing Society Ltd. v. Mary Fernandes and others***, reported in ***1996 SCC OnLine Bom 475***. Relying on the above judgments, he submits that the Courts are very liberal in allowing the amendment petition and in view of that, formal order is required to be passed, however, the learned first Appellate Court has been pleased to reject the said petition. On these grounds, he submits that the impugned order dated 11.04.2025 passed in M.C.A. No. 19 of 2025 may kindly be set-aside.

5. Per contra Mr. Shiv Narayan Singh, learned counsel appearing for the opposite party no. 1 opposed the prayer and submits that trial has already been commenced and judgment has been passed and decree is already prepared and in a casual way, the petition has been filed by the petitioner/plaintiff before the learned first Appellate Court, which is not maintainable. He further submits that the learned first Appellate Court has rightly passed the said order. He also submits that in the copy, which has been served upon the defendants, the said amendment is not incorporated. According to him, amendment No. -VII has been inserted by way of handwriting, whereas, the entire petition is typed one. He further draws the attention of the Court to Order VI Rule 18 of the CPC and submits that if the amendment is not carried out within the time, that cannot be allowed. On these grounds, he submits that this petition may kindly be dismissed.

6. It is an admitted position that the Title (partition) Suit No. 497 of 1997 was instituted by the petitioner/plaintiff, which has been decreed vide judgment dated 26.04.2024 and decree dated 09.05.2025. The amendment petition filed by the petitioner was allowed by the learned Trial Court vide order dated 19.04.2024. The Court has perused the amendment petition annexed as Annexure-5 and finds that the entire petition is typed one, whereas, amendment No. VII is incorporated in handwriting. The next amendment sought should be VIII, which has also not been corrected and it has been written as VII. Although, the amendment was allowed by the learned Trial Court, however, Amendment No. VII has not been carried out before the learned Court and the petitioner herein was allowed to continue

the proceeding and pursuant to that the judgment and decree has been passed by the learned Trial Court. In the appeal preferred by the defendants/opposite parties, the said amendment was further sought to be made in the plaint that too at the appellate stage and the learned first Appellate Court considering the arguments of both the sides and the further looking into the order of the learned Trial Court, has found that no order has been passed by the learned Court on the prayer mentioned in para-7 of the plaintiff's application dated 27.03.2024.

7. Order VI Rule 17 of the CPC confers a discretionary jurisdiction on the Court exercisable at any stage of the proceedings to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The rule goes on to provide that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Unless and until the Court is told how and in what manner the pleading originally submitted to the Court is proposed to be altered or amended, the Court cannot effectively exercise its power to permit amendment. An amendment may involve withdrawal of an admission previously made, may attempt to introduce a plea or claim barred by limitation or may be so devised as to deprive the opposite party of a valuable right accrued to him by lapse of time and so on. It is, therefore, necessary for an amendment applicant to set out specifically in his application, seeking leave of the Court for amendment in the pleadings, as to what is proposed to be omitted from or altered or substituted in or added to the original pleadings.

8. The Court may allow or refuse the prayer for amendment in sound exercise of its discretionary jurisdiction. It would, therefore, be better if the reasons persuading the applicant to seek an amendment in the pleadings as also the grounds explaining the delay, if there be any, in seeking the amendment, are stated in the application so that the opposite party has an opportunity of meeting such grounds and none is taken by surprise at the hearing on the application.

9. It has been held by the Hon'ble Supreme Court in the case of ***J. Samuel & others v. Gattu Mahesh & others***, reported in ***2012 (2) SCC 300*** in paragraphs 12, 13 and 14, which read as under:

> ***"12.*** *The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that: no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.*
>
> ***13.*** *Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term `Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.*
>
> ***14****. A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."*

10. In spite of allowing the petition, the amendment was not carried and there is finding of the learned first Appellate Court that the said amendment was not carried. For allowing the amendment particularly at the appellate stage after conclusion of the trial, the parties are required to offer a reasonable explanation for the delay in making the application seeking amendment and particularly when such amendment is sought for, at the appellate stage, the party seeking amendment should adduce, strong and valid reasons, as to why the amendment sought for, was not made in the Trial Court.

11. It is well-settled that an amendment cannot be allowed, if it causes prejudice to the right of the party against whom an amendment is sought for. It is also well-settled that the scope of the appellate Court is to test the correctness of the judgment under the appeal and any benefit or vested right, on account of declaration of the rights, *inter se* between the parties to the *lis*, by the trial Court, cannot be allowed to be taken away by allowing in an amendment to the pleadings, at the appellate stage, when the party seeking an amendment could have brought in such amendment, even at the time of the commencement of the trial. An amendment admitting to wipe out the pleadings and admissions of the party, already considered by the Trial Court, for the purpose of arriving at a decision, in the suit, cannot be allowed to be substituted with a new case, at the appellate stage, which would certainly cause serious prejudice to the party, against whom the amendment is sought for. The effect of an admission in earlier pleading shall not be permitted to be taken away, by any proposed amendment at the appellate stage.

12. So far as the judgment relied by Mr. R.N. Sahay, learned senior counsel appearing for the petitioner in the case of ***Dwarika Prasad (D) through LRs v. Prithvi Raj Singh (supra)***, in that case, the restoration application was dismissed and amendment was not allowed and identical was the situation in the cases of ***Rafiq and another v. Munshilal and another*** and ***Ram Kumar Gupta and others v. Har Prasad and another (supra)***. All those cases were based on the point of restoration. What has been discussed herein above, the facts of the present case are different from those cases. So far as the judgments passed in the cases of ***Rafiq and another v. Munshilal and another*** and ***Ram Kumar Gupta and others v. Har Prasad and another*** and ***Salmona Villa Co-operative Housing Society Ltd. v. Mary Fernandes and others (supra)*** are concerned, these three judgments have been decided prior to insertion of Order VI Rule 17 with proviso or on the peculiar facts of those cases. The Hon'ble Supreme Court in various decisions upheld the power that in deserving cases, the Court can allow delayed amendment by compensating the other side by awarding costs. The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. In view of Order VI Rule 17 CPC which was amended in the year 2002, the said three judgments are further not helping the petitioner and other judgments are also on the point of restoration. Further, those cases were dismissed for non-prosecution of the learned counsel who were representing the petitioners therein and in light of that, those orders have

been passed. Thus, the judgments relied by the learned senior counsel appearing for the petitioner are not helping the petitioner.

13. What has been discussed herein above and in view of the aforesaid facts, reasons and analysis, this Court finds that there is no error in the order of the learned first Appellate Court in rejecting the said petition at the appellate stage and, as such, this petition is dismissed.

14. Pending I.A., if any, is disposed of.

(Sanjay Kumar Dwivedi, J.)

Ajay-Simran/ ***A.F.R.***