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MCC-2808-2025

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PAVAN KUMAR DWIVEDI

MISC. CIVIL CASE No. 2808 of 2025

*DAYARAM @ DAYLA DECEASED THROUGH LRS ANTER SINGH
AND OTHERS*

*Versus**SMT. RAJU BAI AND OTHERS*

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Appearance:

Shri Vaibhav Bhagwat, learned counsel for the petitioner.

Shri Abhishek Gupta, learned counsel for the respondents

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Reserved on : 19.12.2025

Pronounced on : 15.01.2026

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ORDER

Heard on I.A. No.8458/2025, which is an application for condonation of delay. There is a delay of 86 days in filing the present application for rehearing of appeal.

For the reasons stated in the application, I.A. No.8458/2025, the same is allowed and disposed of. The delay in filing the present application is condoned.

2. The present application has been filed under Order 41 Rule 21 CPC for rehearing of Second Appeal No.105/2005 in which ex-parte judgment and decree dated 15.04.2025 has been passed.

3. The facts of the case are that the present applicants are legal heirs of



original respondent No.1/Dayla and were on record as respondent No.1 (a) to (e) in the second appeal. The respondent Nos.1 and 2 had filed the said second appeal being aggrieved by the judgment and decree dated 17.10.2004 passed in RCA No.2A/2002 whereby the first appellate court modified the judgment and decree of the trial court. The said judgment and decree was passed by the trial court in a civil suit instituted by the present respondent Nos.1 and 2 (Civil Suit No.26A/1998) which was filed for declaration of title and partition. The appellate court partially modified the judgment and decree of the trial court inasmuch as while affirming the findings of the trial court that the defendants have not proved that Jairam was not son of Kunwarji and also the finding that upon death of Kunwarji, Jairam and defendant No.1 were having equal shares in his land as also the finding that the defendant No.1 has not proved acquisition of title of the suit property by virtue of adverse possession, has also held that Dayal and Jairam had four sisters and as per the provisions of Hindu Succession Act, 1956 and M.P. Land Revenue Code, 1959, all of them are having a share in the suit land in view of which the share of plaintiffs would be 1/6th. The plaintiffs being aggrieved by this, filed second appeal before this Court. In the said second appeal notices were issued which were duly served upon the respondents and the respondents have filed their Vakaalatnaama through counsel. Initially the Counsels as engaged by them remained present before this Court in the said second appeal, however, from 14.01.2016 onward none of the counsel as engaged by the respondents in second appeal (who are the applicants in the present MCC) appeared. However, the Court proceeded in the matter in absence of



the respondents (present applicants) and on various dates certain proceedings were carried out and ultimately on 24.02.2025, the appellants were heard in absence of respondents/present applicants. What is noteworthy here is after noting absence of counsel for respondents on 14.01.2016, the case was listed on 26.02.2016, 09.05.2016, 02.04.2019, 25.02.2020, 09.09.2020 and 24.02.2025. However, on none of the dates SPC was issued to the respondents. The applicants have come before this Court with a case that they had duly engaged counsel for representing them in second appeal but the said counsel without any reasons did not appear in the case. It has also been pleaded that the counsel for present applicants/respondents in the second appeal never informed the applicant about the listing of the case and passing ex-parte judgment and decree on 15.04.2025. It is only when they received caveat in the month of August 2025 from the respondent Nos.1 and 2, that they came to know about ex-parte judgment and decree dated 15.04.2025 as such the present application under Order 41 Rule 21 was filed for rehearing of the appeal by permitting the respondents to argue their case.

4. Learned counsel for the applicant while pointing out above stated facts of the case submits that it is purely a mistake on the part of the counsel as he failed to appear and even failed to give any satisfactory answer that why he did not appear before the Court when the appeal was listed on several occasions. He submits that neither SPC was issued to the respondents / applicants nor the counsel engaged by them informed about listing of the case and the fact that they are not appearing in the appeal. He thus submits that the fact of not informing the respondents about non appearance of



counsel/applicant constitutes a sufficient cause for not appearing when the appeal was called for hearing. In support of his submissions, learned counsel for the applicant placed reliance upon the judgments of the Hon'ble Apex Court in the cases of **Rafiq and another Vs. Munshilal and another**, AIR 1981 SC 1400 and **Ram Kumar Gupta and others Vs. Har Prasad and another**, 2010 AIR SCW 766 .

5. Per contra, learned counsel for the respondents submits that the applicants did not appear before the Court deliberately and also submits that second appeal was admitted for final hearing on 09.09.2022 and the matter was fixed for final hearing in January, 2023. On 24.05.2025, the non-applicant/respondent filed execution case before the Court of Tehsildar, Dewas for enforcement of the judgment and decree passed by this Court. The applicants participated in the proceedings before the Tehsildar on 30.05.2025 by filing their Vakaalatnaama and then they filed detailed objections in the said execution case contesting the enforceability of the order dated 24.05.2025. On 25.07.2025, the execution order was passed by the execution court as a bi-party order. These facts show that the applicants had complete knowledge of the judgment and decree dated 15.04.2025 at least by the last week of May, 2025, despite such knowledge they did not file any application for rehearing until 26.08.2025. In such circumstances, it has been urged that the applicant has not come with clean hands before this Court. Hence, prayer is made for dismissal of the present application. Learned counsel in support of his submissions has placed reliance upon the following orders.

- (1) Smt. Usha Jain Vs. Satish Chand Jain (MCC No.389/2014), order



dated 21.04.2017 passed by High Court of Madhya Pradesh, Bench at Gwalior.

(2) Vaibhav Banthia Vs. Smt. Usha Agrawal (MCC No.277/2021), judgement dated 15.07.2024 by High Court of Chhattisgarh, Bilaspur.

(3) Adhin Ram Sinha Vs. Smt. Kasturi Thakur (MCC No.542/2023), order dated 10.05.2024 by High Court of Chhattisgarh.

(4) Nitin Vs. State of Madhya Pradesh and others (MCC No.2644/2025), order dated 17.11.2025 by High Court of Madhya Pradesh, Bench at Indore.

(5) Ramkumar Vs. Aswini (CMP (MD) No.225/2023), order dated 13.10.2023, by Madurai Bench of Madras High Court.

(6) Mahendra Kumar Vs. Chhawali Devi (F.A. No.2300/2011) AFR, order dated 28.04.2023 by the High Court of Allahabad.

6. Heard the learned counsel for the parties and perused the record.

7. On bare perusal of the proceedings of second appeal, it would come to the fore that after issuance of notice to the respondents therein/the present applicants, they duly engaged a counsel who entered appearance and represented them up to 09.10.2015. However, from 14.01.2016 onward the counsel stopped appearing but, there is no material on record to show that in absence of counsel for the respondents/applicants any SPC was issued by this Court. The applicants have categorically pleaded in their application that their counsel did not inform about listing of the case. Learned counsel for the applicants has specifically argued that it was not informed by the counsel in appeal that they are not appearing in the appeal proceedings as such the



applicants in bonafide belief rest assured that they are being represented by their, who was counsel engaged by them in the proceedings of the second appeal.

8. The Hon'ble Apex Court in the case of **Rafique (supra)** has observed in para 3 as under:-

"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 he is better informed on 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 and 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. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K.Sanghi."



9. In the case of **Ram kumar Gupta (supra)** the Hon'ble Apex Court in para 4 has held as under:-

" 4 . We have heard the learned counsel for the appellants and also examined the materials on record including the two orders passed by the High Court, one being rejection of the writ petition for non- prosecution and the other being the order of rejection for restoration of the writ petition. The case that was made out by the appellants for restoration of the writ petition was that the learned counsel for the appellants Sh. Gupta could not appear before the learned Judge of the High Court as at that point of time, he was designated as Additional Advocate General of the State and for that reason, it was not possible for him to appear at the time of hearing of the writ petition as well as for restoration of the writ petition. Keeping this fact in mind and the fact that the appellants could not be represented at the time of hearing of the writ petition, we feel it appropriate to restore the writ petition to its original file in order to give an opportunity to the appellants to contest the same on merits. As noted hereinabove, for restoration of the writ petition dismissed for non-prosecution, an application for restoration was filed by the appellants which was rejected only on the ground of delay and laches. But on a perusal and on proper examination of the record of this case, we find that no delay was caused by the appellants in filing the application for restoration of the writ petition. In any view of the matter, the appellants cannot be punished for the lapses even if there was any, as the appellants had engaged a learned counsel to appear and contest the writ petition. That apart, considering the fact that the appellants had been prosecuting the litigation since 1982 diligently and there was no lapse on their part till the writ petition was dismissed for non prosecution and also considering the fact that a lawyer was engaged by them to contest the matter in the High Court who, however, subsequently was designated as an Additional Advocate General of the State and, therefore, could not be present at the time the writ petition was taken up for hearing, we cannot but hold that it would be improper that the appellants should be punished for non appearance of the learned counsel for the appellants at that time as we are of the view that the appellants were suffering injustice merely because their chosen advocate had defaulted. In Rafiq & Anr. vs. Munshilal & Anr. [1981 (2) SCC 788], this Court has also drawn the same conclusion while considering the application for restoration of a writ application when the learned counsel for the appellant could not be present at the time of hearing of the application."

10. As regards the contention of the counsel for the respondent that applicants appeared before the Tehsildar which shows that they were aware about the ex-parte judgment and decree, it is to be taken note of that knowledge of the impugned order is alleged, however, listing of the appeal



for hearing was in the knowledge of the applicant has not been stated, as such what has been expressed by the learned counsel for the respondent is that after passing the ex-parte order in the second appeal in execution proceedings an objection was filed by the applicant before the revenue authorities. However, it has not been alleged or asserted that the applicants were in knowledge of listing of the second appeal for final hearing. This Court has to see the reason or sufficient cause of remaining absent on the dates when the case was called for hearing and not knowledge of the order passed in ex-parte hearing. Thus, for the purpose of decision on merits of this application subsequent knowledge of the ex-parte order is immaterial.

11. As such, it is clear that once a party to the litigation engaged a lawyer to represent him/them then it was a bonafide belief on the part of the said litigant that the said counsel will duly represent him/them as and when the case is listed before the Court. It is not his duty to act as a watch dog of the advocate on each and every date. In the present case, there is no document to show that the applicants were aware about listing of the case. Even this Court had not issued any SPC to the respondents in view of the absence of their counsel, thus, in the considered view of this Court, the applicants have made out their case so as to establish before this Court the sufficient cause for not appearing when the case was called for hearing on 24.02.2025. As regards the orders relied upon by the learned counsel for the respondents, the facts of those cases are distinguishable on fact. In the case of **Smt. Usha Jain (supra)** counsel himself tried to explain his absence which the Court did not find sufficient. Similarly, in the case of **Nitin (supra)**, the



Hon'ble Division Bench of this Court considered the issue regarding writ petition filed under Article 226 of the Constitution of India and writ appeal which by itself was based on a purely discretionary relief. As regards the orders by the jurisdictional High Court, this Court is of the considered view that those judgments are not binding precedent and this Court is satisfied in view of the facts of the present case that the applicants have shown sufficient cause that prevented them from appearing before the Court in the second appeal when the case was called for hearing. As such, the application under Order 41 Rule 21 is hereby allowed. It is directed that the appeal be listed for rehearing. The MCC stands disposed of.

12. However, in the facts and circumstances of the case, the present applicants are directed to pay cost of Rs.10,000/- to the respondent Nos.1 and 2 within a period of 6 weeks from today.

(PAVAN KUMAR DWIVEDI)
JUDGE

N.R.