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## REGULAR CIVIL SUIT NO. 141 OF 2018

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Order below application at Exh. 50 :-

1. By way of filing the present application, the plaintiff has prayed to condone the delay in preferring the application for bringing the heirs and legal representatives of – (1) deceased defendant no.2 – Banubibi Aaiyub Malek, (2) deceased defendant no.1 – Usmangani Rasul Malek and (3) deceased defendant no.6 - Rabiya Bibi Bashir Malek and for setting the abatement.

2. Read this application, plaint and other related papers on record. Heard Mr. Y.A. Lunat, learned advocate appearing for the plaintiff and Mr. M.S.Kanungo, learned advocate appearing for the proposed heirs of the deceased defendant no.2 and Mr. I.M. Sardar, learned advocate appearing for the defendant nos. 3 & 5 and Mr. A.P. Shah, learned advocate appearing for the proposed heirs of the deceased defendant no.6. None appeared on behalf of the rest of the defendants.

3. Having heard the learned advocates appearing for the respective parties and on perusal of the entire record, it appears that the plaintiff has filed the present suit for Administration of the properties of deceased Rasul Murad Malek as per the Muslim law and also for permanent injunction against the defendants. It is submitted that during the pendency of the present suit, the defendant no.2 - Banubibi Aaiyub Malek expired on 24<sup>th</sup> August, 2019 at Surat whereas the defendant no.1

- Usmangani Rasul Malek also expired on 22<sup>nd</sup> December, 2014. It is also submitted that one of the sons of deceased defendant no.1 named Shabbir Usmangani Malek has also expired on 2<sup>nd</sup> May, 2018 and the defendant no.6 - Rabiya Bibi Bashir Malek expired on 19<sup>th</sup> June, 2019 at Village : Nani Naroli, Taluka : Mangrol, District : Surat.

4. It is submitted that during the pendency of the present suit, the defendant nos. 1, 2 and 6 expired and, therefore, the heirs and legal representatives of the deceased defendant Nos.1, 2 and 6 are required to be brought on record of the present suit within the period of 90 days after the death of the concerned defendant as per the provisions of Art.120 of the Limitation Act. However, it is submitted that since the parties have filed other suits i.e. (1) Regular Civil Suit No. 96 of 2018; (2) Regular Civil Suit No. 140 of 2018 and (3) Special Civil Suit No. 49 of 2021 and since the suit properties are almost common in all the aforesaid four suits, while the plaintiffs and defendants are alternate in the suits and the basis of their rights are different. It is further submitted that since there was no court of Senior Division was in existence, the present suit along with Special Civil Suit No. 49 of 2021 were transferred to the court of Senior Civil Judge at Surat, however, thereafter, the present suit has been transferred back to this court and accordingly, the notices were issued upon the parties and at that relevant point of time, it has come to the notice of the plaintiff that the defendant nos. 1, 2 and 6 of the

present suit have already expired. It is further submitted that thereafter, due to covid-19 pandemic, the physical functioning of the courts were closed for long time and thus, in such circumstances, the plaintiff could not file the application for bringing the heirs of the deceased defendant Nos.1, 2 and 6 on the record of the present suit within the stipulated time and therefore, the delay have been occurred.

5. It is further submitted that the heirs and legal representatives of the deceased defendant Nos.1, 2 and 6 are proper, necessary and interested parties and the result of the present suit would be affected the rights of the heirs of the deceased defendant Nos.1, 2 and 6. It is further submitted that if they are not being joined as parties in the present suit, it would prejudice the rights of the heirs of the deceased defendant Nos.1, 2 and 6 and if the present application be allowed, there would not be any adverse affect to any of the parties and as such by joining the heirs of the deceased defendant Nos.1, 2 and 6, the nature of the suit will not be changed and, therefore, the plaintiff has prayed to condone the delay in preferring the application for bringing heirs and legal representatives of – (1) deceased defendant no.2 – Banubibi Aaiyub Malek, (2) deceased defendant no.1 – Usmangani Rasul Malek and (3) deceased defendant no.6 - Rabiyyabibi Bashir Malek, on the record of the present suit.

6. It appears that the suit properties are almost common in all the suits being (1) Regular Civil Suit No.

96 of 2018; (2) Regular Civil Suit No. 140 of 2018 and (3) Special Civil Suit No. 49 of 2021 as well as the plaintiffs and the defendants are alternate in the aforesaid suit and the properties and the rights of the parties are administered by the Mohammedon Law and as such the heirs of the deceased defendant Nos.1, 2 and 6 are proper, necessary and interested parties in the suit and if they are brought on record, there would be no substantial change in the nature of the present suit. The learned advocates appearing for the proposed heirs of the deceased defendant No.2 – deceased defendant no.2 – Banubibi Aaiyub Malek and deceased defendant no.6 - - Rabiya Bibi Bashir Malek have also fairly submitted that they have no objection if the present application be allowed and the heirs of the deceased defendant nos.1, 2 and 6 are brought on record of the present suit.

7. It is settled legal position that when the right to sue survives, the suit would not abate ipso facto on the death of the plaintiff or defendant. It is also settled principle that the laws of procedure are devised for advancing justice and not impeding the same. Code of Procedure is designed to facilitate justice and further its ends, not a penal enactment for punishment and penalties, not a thing designed to trip people up.

8. In case of M/s. Mohatta Brothers vs. Sheth Chaturbhai Chimanlal, reported in AIR 1982 Gujarat 96, our Hon'ble High Court has held that the court must take a liberal view and should not be overstrict or highly

technical while deciding such application condonation of delay and setting aside the abatement.

9. It is settled law that the court must take a liberal view and should not be over strict or highly technical while deciding such application for condonation of delay and more particularly when the cause survives, no technical objections are required to be considered. It is settled principle that technical objections should not come in doing full and complete substantive justice between the parties.

10. Looking to the facts and the circumstances of present case and in view of the decisions of our Hon'ble High Court, after considering the averments made in the present application, the court is of the view that the delay caused in filing the application has been sufficiently explained and, therefore, by adopting a liberal and pragmatic approach, the present application is required to be allowed by condoning the delay by setting aside the abatement and, accordingly, in the interest of justice, I pass the following order :-

**O R D E R**

This application at Exh. 50 is hereby ALLOWED.

The delay occurred in preferring the present application for bringing heirs and legal representatives of – (1) deceased defendant no.2 – Banubibi Aaiyub Malek, (2) deceased defendant no.1 – Usmangani Rasul

Malek and (3) deceased defendant no.6 - Rabiya Bibi Bashir Malek are hereby condoned and the abatement, qua defendant Nos.1, 2 and 6, are hereby set aside under the provisions of Order 22 Rule 9 of the Code of Civil Procedure.

No order as to costs.

Pronounced in the open Court on this 11<sup>th</sup> day of October, 2023.

Date: 11<sup>th</sup> October, 2023. (Rajendra Ghanshyambhai Barot)  
Principal Senior Civil Judge  
Mangrol, District : Surat  
Judge Code : GJ00572