

**IN THE COURT OF THE ADDITIONAL CIVIL JUDGE AND
J.M.F.C., AT TARIKERE**

Present : Sri RAMAMURTHY N. B.A., LL.B.,
Addl. Civil Judge & JMFC. Tarikere.

Ex.48/2013

Dated: 07th day of January 2021.

ORDERS ON I.A.No.9 to11

The counsel for Dhr has filed I.A.9 U/S.5 of Indian Limitation Act, I.A.10 U/O.22 Rule 9 and I.A.11 U/O. 22 Rule 3 R/W Sec.151 of CPC along with affidavit of the applicant and prayed for condone the delay in filing the application to bring the Lrs of the deceased Dhr on record and set aside the abatement of case against the deceased Dhr.

2. In the annexed affidavit the applicant has stated that, he is the son of deceased Dhr C.Maheshwarappa. He is swearing the affidavit on his behalf and on behalf of his mother, brother and sister. His father C.Maheshwarappa who is the Dhr in the present petition died on 19/06/2020 leaving himself and his mother, brother and sister as his legal heirs. They are all necessary and proper parties to adjudicate the matter effectively. There is some delay in filing the Lr application. The non filing of the applications is bonafide one and unintentional one and the delay is beyond his control. If the delay is not condoned he will be put to great hardship, irreparable loss and injury. Hence, prays for allow the application.

3. On other hand, the Jdr has filed objection to present I.A.s stating that, I.A.s filed by the applicant is not sustainable under law or on fact. The sole purpose behind the I.A.s are to delay the proceedings. The affidavit of the applicant is silent that, why they have not filed said application well within the time as the Dhr is his father. The application not filed well within the time. Hence, prayed for reject the IA.s

4. Heard both side and perused the materials in file.

5. The Dhr has filed present petition for execution of decree against Jdr. According to applicant, his father Jdr C.Maheshwarappa had died on 19/06/2020 leaving him and his mother, brother and sister as his legal heirs. All are necessary parties to adjudicate the matter effectively. It is relevant to note that, according to Order 22 Rule 9 of CPC the Lrs of deceased plaintiff, if it is proved that, he was prevented by any sufficient cause from continuing the suit, the court shall set aside the abatement of dismissal upon such terms as to costs otherwise as it things fit and as per Or.22 Rule 3 the plaintiff dies and right to suit survives, the court on an application made in behalf shall cause the Lrs the deceased plaintiff to be made a party and shall proceed with the case. Further as per article 120 of Limitation Act, in respect of bring the legal representative of the deceased plaintiff or appellant, the limitation is 90 days from the date of death of the plaintiff or appellant and as per article 121 of Limitation Act, the limitation is for order to set aside the abatement is 60 days. According to applicant, his father Jdr C.Maheshwarappa had died on 19/06/2020. The presents I.As filed on 04-12-2020, which are after sixty days of abatement. In this regard, the Hon'ble Gujarat High Court observed in respect of set aside the abatement, in the case of Legal Heirs And Representative Of ... vs State Bank Of India on 23 December, 2004-Equivalent citations: (2005) 3 GLR 2590 as follows:-

Apart from as discussed above, looking to facts of the present case, as per [Article 120](#) of the [Limitation Act](#), 1963, an application for bringing the legal representatives of the deceased as a party to the proceeding is required to be made within ninety days from date of death of appellant. There is no dispute that within the said period of limitation, no application was filed by the applicants under Order 22, Rule 3 [of the Code](#) of Civil Procedure. It is further provided that if such application has not been made within time limit prescribed by law, the appeal shall abate against the appellant. In the instant case also, since no such application was made by the applicants within prescribed period of ninety days from date of death of the deceased, the appeal has abated against the appellant. However, sub rule (2) of rule 9 of Order 22 [of the Code](#) of Civil Procedure provides that the applicants can apply for an order to set aside the abatement and if it is established that applicants were prevented by any sufficient cause in continuing the appeal, the Court shall set aside the abatement or dismissal of the appeal on such terms as to cost or otherwise as it thinks fit. [Article 121](#) in the Schedule to the [Limitation Act](#), 1963 provides that such an application has to be made within sixty days from the date of abatement. Admittedly, within the said period of limitation as prescribed in [Article 121](#) of the [Limitation Act](#) has not been made for setting aside the abatement by the applicants.

Provisions of [section 5](#) of the Limitation Act shall also apply to such application. That means, under sub rule (3), if the applicants satisfy to Court that the applicants were having sufficient cause for not making an application for setting aside the abatement within sixty days from the date of abatement, the Court is having discretion to set aside the abatement even after the expiry of sixty days.

6. According to observations of the Hon'ble High court, the court can set aside the abatement even after the expiry of 60 days of abatement. The present I.A. filed on 04/12/2020 which was after 75 days of abatement. There is a delay of fifteen days, such circumstances by considering the reasons assigned in the I.A. and observations of the Hon'ble High court, opinion of this court is that, it is just and proper to condone the delay in filing the I.A.s to bring the Lrs of Dhr by set aside the abatement in the interest of justice. Accordingly, this court proceed to pass the following:-

ORDER

The I.A.No.9 to 11 filed by the applicant U/S.5 of Limitation Act, and U/O.22 Rule 9 and U/O.22 Rule 3 R/W.151 of CPC are allowed on cost of Rs.100/- each.

The delay is condoned and abatement against Dhr is set aside.

To carryout necessary amendment and furnish amended plaint. Call on

Sd/-
(RAMAMURTHY N.)
ADDL.CIVIL JUDGE & J.M.F.C.,
TARIKERE.