

MHAU060000622004



**ORDER PASSED BELOW EXH. 116-B IN R.D. NO. 10/2004**

1] Present application is filed by applicant Sahebrao Bhojane for adding him as party in present proceeding as per Order 1, Rule 10 of Code of Civil Procedure, 1908 and to permit him to conduct present proceeding on behalf of deceased Decree holder.

2] It is contended by the applicant that, the original plaintiff Vitthabai Shankar Bhojane had filed civil suit for possession of Gat No. 126 situated at Sitanaik Tanada, Tal. Kannad, Dist. Aurangabad and said suit was decreed. Appeals were preferred against said decree before Hon'ble High Court and Hon'ble Supreme Court. However, said appeals were dismissed and decree of trial court was confirmed. After, the judgment in favour of plaintiff she had filed present execution proceeding. During the pendency of it she expired on 19.04.2017. The decision of Hon'ble Supreme Court was passed on 30.01.2017. However, after the decision of Hon'ble Supreme Court, Judgment debtors had sought order of stay before Hon'ble Bombay High Court. Since the order of stay was passed by Hon'ble Bombay High Court Bench At Aurangabad, the Legal representative of deceased decree holder were not able to be taken on record. It was necessary to take her legal representative on record. However, due stay order it was not possible.

3] Applicant is son of deceased Vitthabai Shankar Bhojane and Vitthabai had executed a Power of Attorney in his favour for conducting the suit and other proceeding regarding the suit property. On basis of said Power of Attorney applicant was looking after present proceeding.

However, since after demise of Vitthabai he can not work further. On 20.02.2016 Vitthabai had executed a registered Will in favour of present applicant and on basis of it, he is legal heir of deceased Vitthabai. Hence, he is necessary party in present proceeding and hence, he prayed that, his name be substituted for the name of decree holder in present proceeding and he be permitted to conduct present proceeding.

4] Judgment debtor No. 1 and 2 has filed their say at Exh. 122 and submitted that, present application is not maintainable. The applicant had ought to applied for probate for Will on basis of which he is claiming to be legal heir. He can not apply for being made party as per Order 1, Rule 10 of Code of Civil Procedure, 1908. There are other legal heirs of deceased decree holder and they are also necessary parties. The applicant is not decree holder so he can not be permitted to be substituted. The decree holder has expired on 19.04.2017 and present application is filed on 29.07.2019. Therefore, unless and until the abatement is set aside the legal heirs of decree holder can not be brought on record. Therefore, the application is beyond period of limitation and hence, is required to be rejected.

5] Heard both parties. Perused record. Considering the rival contentions of both the parties, following point for determination arise which is decided as follows.

Sr.No.	Points	Findings
1]	Whether applicant can be added as party and permitted to continue present proceeding ?	Yes
2]	What order ?	As per final order

**:: Reasons ::**

**As to point nos. 1 and 2.**

6] It is argued by learned advocate for the applicant that, the possession warrant in present matter was issue during the life-time of decree holder. The judgment debtor had preferred writ petition before Hon'ble High Court and in said writ petition they had included the legal heir of decree holder. As per Section 264 of Indian Succession Act, 1956 probate is required only for Metropolitan cities. Hence, the provision regarding probate is not applicable. As per Order 1, Rule 10 of Code of Civil Procedure, 1908 Court can add any party at any stage of proceeding. The applicant is necessary party and hence, he is required to be added.

7] Per contra learned advocate for the judgment debtor no. 1 and 2 argued that, the decree holder has expired on 19.04.2017 and hence present proceeding is abated, as within limitation her legal heir are not taken on record. Present recovery proceeding is filed by Power of Attorney holder of decree holder and on death of decree holder, the existence of said Power of Attorney has come to end. Therefore, Power of Attorney holder has not right or authority to continue further. Order 1 Rule 10 of Code of Civil Procedure, 1908 is applicable to suit and will be applicable only for questions relating to suit. Also, Will is not supported by probate. Therefore, application is required to be rejected.

8] On perusal record, it appears that present execution proceeding is filed by decree holder Vitthabai on 04.02.2004 through her Power of Attorney holder i.e present applicant. It is admitted fact that, during pendency of present proceeding decree holder expired on 19.04.2017. Also, present proceeding was stayed by the order passed in Writ Petition No. 5339 of 2014 and 3854 of 2014. The pursis to that effect is at Exh.103.

9] In present matter the applicant has come before this Court to add him as decree holder claiming thereby to be legal heir of deceased decree holder. He has claimed that, the decree holder has executed Will in his favour and thereby has become the legal heir of decree holder pursuant to said Will. Copy of said Will is filed with list Exh. 119. On perusal of it, it appears that, on 20.02.2016 Vitthabai had executed it in favour of applicant regarding gat no. 126 situated at Sitanaik Tanda. It is contention of learned advocate for the Judgment debtor that, the applicant ought had applied for probate before coming before this Court on basis of said Will. The learned advocate for the applicant has quoted Section 264 of Indian Succession Act, 1925 and submitted that, as per sub section 2 of said section, no such probate is required. On perusal of said provision it appears that unless the State Government issues notification, no application for probate can be received by the Court except situated in towns of Calcutta, Madras and Bombay. Therefore, as per said provision there is no need of probate in present proceeding. It is further submission of the judgment debtor that, all the legal heirs of deceased decree holder is not added as party. It is necessary to consider that, no such details of other legal heirs is filed on record. There is no evidence to show that, the Will in favour of applicant is challenged by any of the legal heirs. Therefore, said objections sustains no ground.

10] The applicant has prayed for substituting him on behalf of decree holder and also prayed for adding him as necessary party to present proceeding. It is not in dispute that, the applicant is son of deceased decree holder. Order 1 Rule 10 of Code of Civil Procedure, 1908 provides for addition of party in suit at any stage of the proceeding. It is argued by learned advocate for the judgment debtor said provision is applicable to suit and not for execution proceeding. It is necessary to considered that, the applicant is coming in the capacity of legal representative of deceased decree holder. Admittedly, the suit is disposed

off much prior and only execution proceeding is pending, the plaintiff on one hand is claiming to be necessary party and on other hand is claiming to be legal representative. It appears that, there is no case to be considered for adding him as per Order 1 Rule 10 of Code of Civil Procedure, 1908, as said provision will be not attracted in present set of circumstances.

11] Coming to the other aspects whether he can be allowed to continue present proceeding on behalf of decree holder, it is necessary to consider the capacity of present applicant. Admittedly, present proceeding was filed by him as Power of Attorney holder on behalf of decree holder. Admittedly, after the death of principle, agency between the principle and agent comes to an end. Therefore, after death of decree holder present applicant had no authority to continue as decree holder. As, discussed above present applicant is also coming in the capacity of legal representative of decree holder on the basis of Will. At this juncture the authority of *Hon'ble Apex Court in the case of V. UTHIRAPATI VS. ASHRAB ALI AND OTHERS* is required to be taken into consideration, in which it was held that,

*B. Civil Procedure Code, 1908- Order 22, Rule 12- Petition for execution of decree filed within the period prescribed therefor- Death of decree holder or judgment-debtor during the pendency of the execution proceedings- Held execution petition will not abate but will remain pending- No limitation period prescribed for bringing on record the LRs. of the deceased - They can come on record at any time procedure indicated,*

12] As per the above ratio, on the death of decree holder execution petition will not abate but will remain pending as no limitation period is prescribed for bringing legal heirs on record of deceased. In view of ratio in said case, present applicant in the capacity of legal

representative of the decree holder can be permitted to proceed further with the present proceeding. Therefore, in view of above discussion, point no. 1 is answered in affirmative and point no.2 is answered as follows:-

**:: ORDER ::**

- 1) The application vide Exh. 116-B is allowed.
- 2) Applicant to be added as legal heir of decree holder in present proceeding and is hereby permitted to continue present proceeding.
- 3) No order as to costs.
- 4) Applicant to carry necessary amendment within 14 days.

Date: 18/01/2020.

**( Pankaj K. Ahir )**  
Civil Judge (J.D.),  
Kannad

**CERTIFICATE**

I affirm that the contents of this P.D.F. file order are same, word to word as per the original Order.

Name of the Stenographer : Y. S. Mali  
Court : C.J.J.D. & JMFC,Kannad.  
Date : 18.01.2020  
Order signed by the  
presiding officer on : 23.01.2020  
Order uploaded on : 23.01.2020

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