



**ORDER BELOW EXH. NO. 196 IN REG. CIVIL
SUIT NO. 67/2008**

**Sou. Shalabai Dashrath Lohar Vs. Shri Janaba Tukaram
Sutar.**

This is an application filed by applicants in setting aside the abatement with respect to plaintiff as per Order XXII rule 9(2) of Code of Civil Procedure 1908, (*hereinafter referred to as 'C.P.C' 1908 for the sake of the brevity and convenience*).

02. The brief contents of the application is as under.

It is the contention of the plaintiffs that, they have instituted this suit for partition and separate possession against defendants. **Plaintiff No. 1. Shalabai Dashrath Lohar** died on 23/09/2019, however they could not bring on record the legal-representatives of deceased plaintiff No. 1. Thus, the suit was abated against plaintiff. Hence, it is necessary to set aside the abatement against him.

03. Say of the other side was called for. However, no say has been filed till today. Hence, the application is proceeded without say of the defendants.

04. Heard the learned counsel for the plaintiff and defendants. Perused the application and the record of the case.

05. It would be very helpful if, at the outset, the necessary legal provisions with respect to the abatement and condonation of delay in setting aside abatement is discussed. The provisions of Order XXII rule 3 of C.P.C, 1908 are reproduced as below.

3(1)	Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole defendant or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
------	---

06. As per Order XXII, rule 3(2)

2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

07. As per the above provisions, sufficient cause for not making the application within period specified has been shown by the plaintiff No. 2 and 3. Hence, the delay has been condoned as per order below Exh. No.194. Consequently, the instant application gains importance and has to be considered.

08. It is a settled position of law that the Court in dealing with such application should not be over strict and highly technical so as to sacrifice the cause of substantial justice and thereby deny the parties to have their cause decided on merits. Also, from the facts on record, the failure of the applicants to set aside abatement against deceased plaintiff No. 1 has not caused any prejudice to the defendants. The present suit is for partition, separate possession of shares and declaration. The parties have adverse claimed against

each other. The right to sue survives considering the proprietary rights and obligation of the parties. Hence, it would be appropriate and fair to set aside the abatement against deceased plaintiff No. 1. Hence, the following order is passed.

ORDER

The abatement against Plaintiff No. 1. Shalabai Dashrath Lohar , is hereby set aside.
--

There shall be no order as to costs.

Date : 10/01/2022.
Place : Kagal.

(Katkar Vijaya N.S.)
Jt. Civil Judge, Junior Division,
Kagal.