

MHKO130011372012

**ORDER BELOW EXH. NO.116 IN REG.
CIVIL SUIT NO. 331/2012**



**Shivaji Dnaynu Patil and others
Vs.
Dinkar Dnyanu Patil and others**

This is an application filed by the plaintiffs to condone the delay in setting aside the abatement with respect to deceased plaintiff No. 10 i.e. Shripati Tukaram Patil 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.) read with Section 5 of Limitation Act, 1963.

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

It is the contention of plaintiffs that they have filed this suit for partition and perpetual injunction against defendants. Plaintiff No. 10 Shripati died on 05/10/2020, however they could not bring on record the legal-heirs of deceased Shripati within the prescribed period of limitation of 90 days as per article 120 of Limitation Act, 1963. Thereafter, they also could not take steps to set aside abatement. Thus, there was delay of 14 days. The delay was not intentional and it is of not so long period. Hence, plaintiffs pray to condone the delay in bringing on record of legal-heirs of deceased plaintiff No. 10 and the delay caused in setting aside abatement against plaintiff No. 10 be condoned in order to decide the rights of the parties.

03. Defendant No.1 has filed reply to this application below Exh. No.117 wherein he has contended that this application is false and misleading and the reasons mentioned therein are not tenable. Plaintiffs and deceased plaintiff No.10 are residing in the same village. Hence, plaintiffs had sufficient knowledge about death of plaintiff No.10. Hence, they are unnecessarily delaying the matter by avoiding to take steps at appropriate time in order to prolong the proceedings. Hence, the present application be rejected.

04. Heard the learned counsel for the plaintiffs and defendant. Perused the application and the say. In view of the rival contentions of both the parties, the following points arise for my determination for which findings are recorded along with the reasons.

SR. NO.	POINTS FOR DETERMINATION	FINDINGS
1.	Whether delay of 14 days be condoned in applying for setting aside abatement against deceased plaintiff No. 10 Shripati Tukaram Patil ?	Yes.
2.	What order?	Application is allowed.

REASONS

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)	<i>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 plaintiff or sole surviving plaintiff dies</i>
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	<i>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.</i>
3(2)	<i>Where within the time limited by law no application is made under sub-rule(1), the suit shall abate so far as 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 deceased plaintiff.</i>

06. As per Article 120 of Limitation Act, 1963, plaintiffs are supposed to bring on record the legal-representatives of deceased plaintiff No.10 Shripati within 90 days from the date of death of plaintiff No.10 i.e. 05/10/2020. As this was not done so, hence proceedings were automatically abated against plaintiff No.10 after the expiry of 90 days from 05/10/2020. As per Article 121 of Limitation Act, 1963, plaintiffs were supposed to apply for setting aside abatement within 60 days from the date of abatement. As per Section 5 of Limitation Act, 1963, application under Order XXII of C.P.C., may be admitted after the prescribed period if the plaintiffs satisfy the Court that they had sufficient cause for not making the application within prescribed period.

07. In this backdrop of the provisions, it is necessary to find out whether plaintiffs were prevented by sufficient cause for applying for setting aside abatement within 60 days from the date of abatement. Plaintiffs have pleaded that deceased plaintiff No.10 died on 05/10/2020, however they could not bring on record legal-representatives of deceased plaintiff No.10 within prescribed period

as they could not secure the death certificate of deceased plaintiff No.10. They also pleaded that they have not deliberately or intentionally avoided to take steps. The said pleadings are supported by the affidavit of power of attorney holder Pandurang Shivaji Patil on behalf of plaintiffs. The delay is of 14 days only and it do not appear to be so long. The reasons shown by plaintiffs are logical and can be accepted.

08. The contention of the defendant that, the application is misleading and plaintiffs are deliberately prolonging the matter are unsubstantiated. Plaintiffs have instituted this suit for partition and perpetual injunction. Deceased plaintiff No.10 had grievance against defendants. Considering the nature of the suit, the cause of action survives to the legal-representatives of deceased plaintiff No.10. Deceased plaintiff No.10 being one of the party claiming shares in the suit properties, hence, legal-representatives need to represent his interest in the suit.

09. 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. In the present case, delay by plaintiffs in bringing on record the legal-representatives of deceased plaintiff No.10 and thereafter applying for setting aside abatement due to the reasons stated above can be said to be sufficient cause. Also, from the facts on record and from the say of the defendant No.1 to this application, it appears that the failure of the plaintiffs to set aside abatement against deceased

plaintiff No.10 has not caused any prejudice to the defendant. Considering the above facts and circumstances and coming to the conclusion that there exist sufficient reasons in not applying within limitation period in setting aside the abatement, it would be appropriate and fair to condone the delay in applying for setting aside the abatement against deceased plaintiff No.10.

10. As there has been delay of 14 days and considering the situation of lock-down, it would not be appropriate and fair to impose costs of this application. Accordingly, point No. 1 is answered in the affirmative and in answer to point No. 2, following order is passed.

ORDER

The delay of 14 days in applying for setting aside abatement against deceased plaintiff No. 10 Shripati Tukaram Patil is hereby condoned.

Date :- 15/03/2021

Place :- Kagal

(Katkar Vijaya N.S.)

**Jt. Civil Judge, Junior Division,
Kagal.**

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

Name of the Stenographer :- Sidram V. Kamble

Name of Court :- Katkar Vijaya N.S. Jt. Civil
Judge (Jr.Dn.), Kagal.

Date of dictation/typed :- 15/03/2021

Judgment/order signed by the :- 15/03/2021

P.O. on

Judgment/order uploaded on :- 15/03/2021

