

ORDER BELOW EXHIBIT-75 IN R.C.S.No.25 of 2010

Legal representatives of the decree-holder has filed the present application to issue possession warrant.

2. It is asserted that the present R.D. has been filed for recovery of possession of the suit property and arrears of the rent. Judgment debtors have challenged the judgment and decree passed in R.C.S.No.533/1991 by preferring R.C.A.No.5/11 (new No.120/2014). During the pendency of the said appeal, decree-holder was died. Judgment debtors have not brought the legal representatives of deceased decree-holder on record within stipulated time and hence, the said appeal was abated. Thereafter, judgment debtors have filed an application to set aside abatement along with an application for condonation of delay.

3. It is further asserted that due to abatement of the appeal, the order of stay passed by the appellate court is vacated. Now, stay order is in existence. Hence, the decree passed in R.C.S.No. 533/1991 can be executed. It is necessary in the interest of justice to issue possession warrant for delivery of possession of the suit property. Hence, the application.

4. Judgment debtors have filed the say (Exh.80) and opposed the application. Thereafter, they have filed a pursish (Exh.83) and informed the Court about the relevant dates. According to them, R.C.A.No.120/2014 (old No.5/11) is pending before the District Court. District Court has stayed the handing over of possession of the suit property by an order dated 11.3.2011 passed below Exh.07. It is incorrect to say that the appeal is abated

and the stay order is vacated. Appeal is still pending. Only appellate court is having the jurisdiction to decide whether the appeal is abated or not. Decree-holder died on 24.05.2011. Intimation pursish (Exh.20) in respect of his death was filed on 11.10.2011. Judgment debtors have filed an application (Exh.24) to set aside the abatement on 13.1.2012. Say (Exh.46) to that application came to be filed on 06.11.2015. Presently, R.C.A. No.120/14 is pending for hearing on applications (Exhibits-22 & 24). They have, therefore, prayed for rejecting the application.

5. Perused the record and proceeding. Heard both the sides. Facts are not disputed. Parties to the present R.D. differ on the effect of death of the decree-holder on the appeal and particularly on the stay order passed by the District Court. This court is called upon to apply the law to the facts of the present case. The point which needs to be answered is : Whether the legal representatives of the decree-holder have made out a case to issue possession warrant ?

6. Before proceeding further, it is necessary to notice few relevant dates. R.C.S.No.533/1991 was decreed partly on 25.3.2010. By an order dated 11.03.2011 passed by the District Court below application (Exh.7) in R.C.A.No.5/2011, execution of the decree was stayed to the extent of delivery of the possession of the suit property until further order. Decree-holder died on 24.5.2011. Intimation pursish (Exh.20) in respect of the death was filed on 11.10.2011. Application (Exh.24) to set aside the abatement was filed on 13.1.2012. Say (Exh.46) to that application

came to be filed on 06.11.2015.

7. It is pertinent to note that it is not the business of this Court to decide whether the appeal is abated or not. However, nature of the present application is such that this court cannot adjudicate it without touching the aspect of abatement of the appeal. Thus, the said question cannot be ignored totally and has to be considered in order to decide the present application.

8. In respect of abatement, the Supreme Court in the case of **Mathailal Dalsangar Singh Vs. Annabai Kini (2003) 10 SCC 691** observed thus in paragraph 8 of the judgment :

Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement.

9. In the case of **Balwant Singh Vs. Jagdish Singh AIR 2010 SC 3043**, the Supreme Court observed that abatement is automatic & a specific order is not required to be passed.

10. As noted above, the judgment debtors have given the relevant dates in pursish (Exh.83). Legal representatives of the decree holder have not disputed the dates mentioned therein. Thus, it is an admitted position of fact that intimation pursish (Exh.20) in respect of the death of decree holder was filed on

11.10.2011 and the applications for condonation of delay (Exh.22) and setting aside abatement (Exh.24) were filed before the District Court on 13.1.2012. It is seen that the judgment debtors have filed the said applications after the expiry of period of more than 90 days from the date of filing intimation pursish (Exh.20), that is, 11.10.2011. Legal representatives are required to be brought on record within a period of 90 days from the date of death or from the date of information. Admittedly, judgment debtors have not taken steps to bring the legal representatives of deceased decree-holder on record within a period of 90 days from the date of intimation pursish (Exh.20). In view of the above and in the light of the law laid down by the Supreme Court, it cannot be said that the appeal is not abated. Indeed, application (Exh.24) was filed by the judgment debtors (appellants) before the District Court to set aside the abatement order. Thus, the judgment debtors cannot say that the appeal was not abated. They cannot be permitted to take a contrary stand.

11. Now the effect of the abatement of the appeal has to be considered. Judgment debtors have not denied the proposition that the abatement of appeal vacates the stay order passed in the appeal. They have not commented upon that aspect either in their say (Exh.80) or pursish (Exh.83). It is, thus, seen that they admit the proposition that the abatement of appeal vacates the order of stay. Learned advocate representing the legal representatives of the decree holder has submitted that filing of application (Exh.59) before the appellate court by the judgment debtors to stay the hearing of the present application makes it clear that the stay order

passed by the appellate court below application (Exh.7) is not in existence. She went on to submit that had the said order was in force then there was absolutely no necessity for them to file the application (Exh. 59). Be that as it may, it is not necessary to deal with the said aspect since the judgment debtors have not denied the proposition that the abatement appeal vacates the stay order passed in the appeal.

12. Before proceeding further, it is necessary to note here that the present application was filed on 24.11.2016. On the said date, say of the judgment debtors was called. On 6.12.2016, application (Exh.78) was filed and time to submit the say to the present application was solicited. This court by a speaking order has granted time till 14.12.2016. Judgment debtors have filed the say (Exh.80) on 14.12.2016. Since then, present application is pending. This court has adjourned the hearing of the present application on many dates on the request of the judgment debtors for the reason that the hearing on applications (Exhibits- 22 & 24) has been concluded before the appellate court and the order is awaited. Learned advocate representing the legal representatives of the decree holder has pressed on each and every date for passing the order on the present application. However, this court was very slow and cautious to decide the present application because the appellate court was seized of the matter. This court has, therefore, taken more than 100 days to decide the present application. This court has granted more than sufficient time to the judgment debtors to approach the appellate/superior court and to get the present R.D./ application stayed.

13. Reference in this connection can be made to the case of Vishwanath P. Mahadeshwar Vs. Suryawanshi Balrup Thakur and Ors., MANU/MH/0293/2011 (Writ Petition No. 9411 of 2010, Decided On: 10.02.2011) wherein the Bombay High Court has issued the guidelines for the guidance of the sub ordinate courts. It has made reference to it's earlier judgment delivered in the case of *Kishor Bhikansingh Rajput v. Preeti Kishor Rajput* 2007(3) Bom.C.R. 279 and observed that the observations made in the peculiar facts and circumstances of that case are being misused by the litigants. The High Court went on to clarify the legal position in the following terms -

9. However, it has come to notice that in several matters, the Petitions are filed before this Court challenging the interlocutory orders passed in the suits or other proceedings and after the Petitions are filed, by pointing out stamp number and even without circulating the matter before this Court, adjournments are sought before the lower courts by pointing out to them my aforesaid judgment in *Kishor Rajput's* case, it is urged that since the matter is pending before this High Court, the trial Court should not proceed further with the matter. I am at pains to say that the aforesaid judgment in *Kishor Rajput's* case is being used as a tool to protract the proceedings by the litigants not interested to proceed with the matters before the lower courts. No doubt that if the order of the subordinate court is challenged before this Court and the subordinate court is informed about the pendency of the matter before this Court, it would be expected of the trial Court to stay its hands away for a period of a week or two, so as to enable the parties to get circulation before this Court and obtain appropriate orders. However, merely by filing the proceedings before this Court, the proceedings before the lower courts cannot be permitted to be protracted for months together at the

interest of the litigants who neither circulate the matters before this Court nor get the interim order staying the proceedings.

14. It is seen that the High Court has deprecated the practice of the litigants seeking adjournments on the ground that their petition is pending before the High Court and hence, the trial court should stay its hands away. The High Court has further held that the trial court can grant the time of a week or two to the litigants to approach the High Court and to obtain appropriate order from the High Court. It has been specifically held by the High Court that merely by filing the proceedings before the High Court, the proceedings before the lower courts cannot be permitted to be protracted for the months together. As noted above, this court has granted three months time to approach the superior court and to obtain the stay order. In fact, judgment debtors have approached the District Court by filing application (Exh.59) to stay the present application. Said application was filed by them on 13.12.2016. Till date, present application has not been stayed by the appellate/superior court. In such circumstances, I am bound by the law to decide the present application one way or the other.

15. Once it is held (though for a limited purpose for deciding the present application) that the appeal is abated and that the stay order is not in force, then there is no impediment or hurdle to issue the possession warrant. Needless to note that R.C.S.No.533/1991 was instituted prior to 25 years. Decree-holder is waiting for justice since last 25 years. In the circumstances, he cannot be asked to wait further. Hence, the application is allowed.

Issue possession warrant, as prayed for.

16. At this stage, learned advocate representing the judgment debtors has prayed for granting four weeks breathing time so as to approach the superior court. In effect, he has prayed for keeping the present order in abeyance for a period of four weeks. On the other hand, learned advocate representing the legal representatives of the decree holder has not objected for granting one week's time to them. After a careful consideration of the submissions advanced by both the sides, I am of the opinion that three weeks time would serve the ends of justice. Hence, the office is directed not to materialize the order till 29.03.2017.

Date :07.03.2017.

(S.K. Khan)
Jt. Civil Judge (J.D.),
Barshi.

CERTIFICATE

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

Name of Stenographer	:	Bhaskar G.B.
Court Name	:	S.K.Khan, Jt.C.J.J.D.& J.M.F.C. Barshi.
Date	:	07.03.2017
Judgment signed by the presiding officer on	:	07.03.2017
Judgment uploaded on	:	07.03.2017