

CNR NO-MHWS100002952012

R.C.S. No.34 OF 2012

ORDER BELOW EXHIBIT – 90

(Shantabai Parbati Khodake, etc -2 Vs. Motiram Baburao Surve etc-3)

1. By filing present application (Exh.32) the plaintiff is seeking permission to bring legal heirs of the deceased plaintiff No.1 (hereinafter referred to as 'LR of the deceased plaintiff No.1') on record of the suit. The defendants by filing say overleaf of the application has taken strong objection.

2. I have perused the application and affidavit in support of the application. I have also perused say of defendants and documents on record.

3. I have heard Mr.B.S.Sathe, learned advocate for the plaintiffs and Mr.M.M.Khillare, learned advocate for the defendants.

4. Mr.B.S.Sathe, submitted that the plaintiffs have filed present suit for partition, separate possession and mesne profit in respect of the suit property, however during the pendency of the suit, plaintiff No.1 is died on 31/10/2021 and she has three heirs as named in the application. He further submitted that due to some unavoidable circumstances the plaintiff could not make contact to him and due to which the plaintiff was unable to file application for bringing LR's of the deceased plaintiff No.1 on record of the suit within stipulated period. Therefore, delay was caused and same was not intentional. Hence, he prayed for permission to bring LR's of the deceased plaintiff No.1 on record of the suit.

5. On the other hand, Mr. M.M.Khillare, during argument submitted that the plaintiffs have not filed present application within limitation. The suit has been abated against the deceased plaintiff No.1. Therefore, application is not tenable. Hence, he prayed for rejection of the application.

6. In view of above factual matrix, I have perused the judgment of the Hon'ble Supreme Court in the case of, **Mithailal Dalsangar Singh and others V/s. Annabai Devram Kini and others, reported in 2003(4) Mh.L.J.(SC) 721.** In para No.8, the Hon'ble Supreme Court has observed as follows :

“8. In as much as the abatement results in denial of hearing on the merits of the case, the provision of

abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement. So also a prayer for setting aside abatement as regard one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. 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. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.”

7. In view of above ratio laid down by the Hon'ble Supreme Court, the matter in hand should be decided as far as possible on merits and should not be dismissed on technicalities. The plaintiffs have filed present application for bringing LR's of the deceased plaintiff No.1 on record. Present application is supported by affidavit. Therefore, the application filed by the plaintiffs is found bona-fide and reasonable, so that in my humble opinion too technical and pedantic approach is not called for. Moreover, the plaintiffs are seeking permission to bring Lrs' of the deceased plaintiff No.1 on record and it is sufficient compliance. There is no deliberate delay on record. The present suit is for partition, possession and for mesne-profits in respect of immovable property and the deceased plaintiff No.1 is survived by the LR's. Therefore, right to sue survived. Hence, I proceed to pass the following order:

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-: O R D E R :-

1. Application (Exh.90) is hereby allowed.
2. Delay is hereby condoned and deemed abatement of the suit against the deceased plaintiff No.1 is hereby set aside.
3. Permission is granted to the plaintiffs to bring LRs' of the deceased plaintiff No.1 on record of the suit within stipulated period from the date of this order.
4. The plaintiffs are hereby directed to file amended copy of the plaint on record within stipulated period from the date of this order.
5. There is no order as to costs.

Date : 06/04/2022.

(G.S.Badgujar)
Jt.Civil Judge Jr.Dv., Malegaon.

CERTIFICATE

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 Stenographer	Shri. U. M. Killekar (Jr. Clerk)
Name of Court	Jt. C.J.J.D. & J.M.F.C., Malegaon, Dist. Washim.
Date of Dictation	06/04/2022
Judgment/Order signed by the PO on	06/04/2022
Judgment /order uploaded on	07/04/2022