

MHWS100002952012



ORDER BELOW EXH.80 in R.C.S. NO.34/2012

(Shantabai Parbati Khodake Vs. Motiram Baburao Surve)

Passed on 25th August, 2023

1. By filing present application the plaintiffs are seeking permission to set aside deemed abatement of suit, condonation of delay as well as bringing legal representatives of the deceased defendant No.3 on record of the suit.
2. I have perused application and affidavit in support of application.
3. The defendant Nos.1 and 2 by filing say overleaf of the application have taken strong objection to the application. The suit survives after the death of defendant. The suit needs to be abated against the defendant No.3. Hence, prayed to reject the application.
4. I have heard Mr. B.S.Sathe, learned advocate for the plaintiffs as well as Mr. P.D.Wanare, learned advocate for the defendant Nos.1 and 2. They have submitted their argument as per the application and say respectively.
5. It is contended in the application that the plaintiff has filed present suit is for partition and separate possession. However, during the pendency of the suit, defendant No.3 is died on 16.05.2012 and she has other legal heirs. It is further contended that the right to survive against this legal representatives. Therefore, it is necessary to set aside the abatement. Hence, the plaintiff prayed for setting aside deemed

abatement of the suit, condonation of delay and permission to bring legal representatives of the deceased defendant No.3 on record the suit. The plaintiff has filed the death certificate of deceased defendant No.3 below list Exh.79. The notices were issued to the legal representatives of defendant No.3. The report of notices are at Exhibits-94, 95 and 98. They failed to appear and contest the application.

6. In view of above factual matrix, I have perused the Judgment of the **Hon'ble Supreme Court** in case of, **Mithailal Dalsangar Singh & Ors. Vs. Annabai Devram Kini & Ors, 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 plaintiff has filed present application for setting aside. On perusal of the record it appears that, suit proceeded *Ex-parte* against the defendant No.3. As the suit is for partition and separate possession. The defendant No.3 is the coparcener in the present suit. Though, the suit is proceeded *Ex-parte* against the defendant No.3. The Court cannot exempt the plaintiff from substituting the legal representatives of this defendant No.3. The simple reason is the legal representatives have share in the suit property. Their presence is necessary in this case. There is no deliberate delay on record. The present suit is for partition and separate possession in respect of immovable property and deceased defendant No.3 is survived by the legal representatives.

8. Therefore, considering the factual aspect and right to sue survived against them it is needs to be taken on record. Hence, I proceed to pass the following order :-

ORDER

1. Application is hereby allowed.
2. Delay is hereby condoned and deemed abatement of the suit against the deceased defendant No.3 is hereby set aside.
3. Permission is granted to the plaintiffs to bring legal representatives of the deceased defendant No.3 namely Sundarabai w/o Ramdas Gudade 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.
(Dictated and pronounced in the open Court)

Place : Malegaon
Date : 25.08.2023

[Pravin U.Kulkarni]
Jt. Civil Judge (J.D.) Malegaon
Dist. Washim

CERTIFICATE

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

Name of Stenographer : **Shivam B. Patange (L.G.)**

Name of Court : P.U.Kulkarni
Jt. C.J.J.D. and J.M.F.C., Malegaon.

Date of Order : 25.08.2023

Order Signed by : 25.08.2023

Presiding Officer on

Order Uploaded on : 25.08.2023