

MHWS100011312023 	<u>ORDER BELOW EXH.25 IN RCS NO. 52/2023</u> Namdev Puranasa Ganode Vs. Nanda Ramkrushna Ganode & Ors. Passed on 28th August, 2024
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01. By filing the present application the plaintiff is seeking permission to set aside deemed abatement of suit, condonation of delay as well as bringing legal representatives of deceased defendant No.5 on record of suit.

02. I have perused the application and affidavit in support of the application.

03. Legal representatives of deceased defendant No.5 are defendant No.2 and one Lata Shashikant Raut. Defendant No.2 has filed say and submitted that there is delay to file this application. Hence, prayed to reject the application. The legal representatives of deceased defendant No.5 Lata appeared but she did not file say. Hence, matter is proceeded without say of Lata.

04. I have heard Mr.V.R.Lahoti, Ld.Advocate for the plaintiff as well as Mr.G.M.Gujar, Ld.Advocate for the legal representatives of deceased defendant No.5. They have submitted their argument as per the application and say respectively.

05. Plaintiff has filed this suit for recovery of possession of the encroached portion and permanent injunction against defendants. The Advocate for defendant No.5 has filed pursis below Exh.23 that defendant No.5 had died on 29.09.2023. The pursis is alongwith death certificate of deceased defendant No.5.

06. The present application is filed on 06.03.2024. It is ought to have filed on or before 29.12.2023. The delay of sixty seven days occurred to file present application. The right to sue survives in favour of legal representatives of deceased defendant No.5. Hence, the plaintiff prayed for setting aside deemed abatement of the suit, condonation of delay and permission to bring legal representative of deceased defendant No.5 on record the suit.

07. The present suit is for recovery of possession of the encroached portion and permanent injunction in respect of immovable property and deceased defendant No.5 is survived by legal representatives. Therefore, the plaintiff has apprehension that legal representatives of defendant No.5 may obstruct his possession. Thus, considering the above ratio and prayer clause is proper to conclude that the right to survive against the legal representatives of deceased defendant No.5.

08. There is no specific express order of abatement of suit. In view of above factual matrix, I have perused the Judgment of the Hon'ble Supreme Court in the 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”

09. 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. In view of above ratio laid down, the prayer for bringing the legal representatives on record itself the prayer for setting aside the abatement order. Though the plaintiff has not prayed for setting aside deemed abatement, there is no need to pray for the same. Even there is no need to file separate application for delay condonation when prayed the same in one application. As there is no express abatement order, the matter is not disposed of finally.

10. As discussed supra the right to sue survives against legal representatives of deceased defendant No.5, therefore suit can not

cause to abate. The Hon'ble Jharkhand High Court in case of **Radhu Napit Vs Tarapado Napit and others reported in 2018 SCC OnLine Jhar 635** it was held that "The underlying principle under Order XXII is that if the right to sue survives, the suit shall not abate."

11. The delay is not enormous delay. The reason for the delay when they got the knowledge of the death of defendant No.5 when the same has been informed to the court. They tried to get the information of the legal representatives of deceased defendant No.5. Therefore, delay has been caused. In my view, reasons are proper and sufficient cause is properly explained by the plaintiff.

12. The applicant has filed present application for setting aside deemed abatement of the suit against plaintiff, for condonation of delay and bringing legal representative of deceased defendant No.5 on record. Present application is supported by affidavit. The death certificate of deceased is filed below list of document at Exh.23. Therefore, application filed by the applicant is found bona-fide and reasonable, so that in my humble opinion too technical and pedantic approach is not called for. There is no deliberate delay on record. The present suit is for recovery of possession of the encroached portion and permanent injunction in respect of immovable property and deceased defendant No.5 is survived by the legal representative.

13. The case of the plaintiff is regarding the recovery of possession of the encroached portion and permanent injunction. Therefore, legal representative of defendant No.5 has apprehension that defendant may obstruct his possession. On perusal of application it appears that, plaintiff was ignorant about death of the defendant.

He known the facts after filling of the pursis. Therefore, the applicant plaintiff has right to protect the suit property at the hands of the legal representatives of defendant No.5. Therefore, considering the factual aspect and right to sue survives 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.5 is hereby set aside subject to costs of Rs.300/- (Three Hundred only).
3. Permission is granted to bring the LR's of defendant No.5 on record of the suit within stipulated period from the date of this order.
4. The plaintiff is hereby directed to file amended copy of the plaint on record within stipulated period from the date of this order.

(Dictated and pronounced in open Court)

Place : Malegaon
Date : 28.08.2024

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

<u>CERTIFICATE</u>		
I affirm that, contents of this PDF file is same word to word, as per original Order :-		
1. Name of the Stenographer	:-	Shivam B.Patange (LG)
2. Court Name	:-	Jt. CJJD & JMFC, Malegaon
3. Order dated	:-	28.08.2024
4. Order Signed by the P.O.	:-	30.08.2024
5. Order uploaded on	:-	30.08.2024