

ORDER BELOW EXHIBITE – 54

(Parvati Vitthal Sarkate, etc - 1 Vs. Narayan Pandhari Gawali, etc - 7)

1. By filing present application (Exh.54) the plaintiffs are seeking permission to set aside deemed abatement of suit, condonation of delay as well as bringing legal heirs of the deceased defendant No.1 (hereinafter referred to as “LRs of the deceased defendant No.1”) on record of the suit.

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

3. Defendant Nos.3, 5 & 7 by filing say overleaf of the application has taken strong objection to the application.

4. I have heard Mr.V.R.Lahoti, learned advocate for the plaintiffs as well as Mr.S.G.Gaikwad, learned advocate for defendant Nos.3, 5 & 7.

5. Mr.V.R.Lahoti, learned advocate for the plaintiffs submitted that the plaintiffs have filed present suit for partition, separate possession and for mesne profits, however, during the pendency of the suit, defendant No.1 is died before two years ago leaving behind one daughter namely- Mangal, two sons namely- Shivaji and Shankar. He further submitted that there is no any other heirs behind the deceased defendant No.1 except present LRs' of the deceased defendant No.1. He further submitted that all the plaintiffs are women and they are living another village and therefore, the plaintiffs could not collect their name and address withing period of limitation and hence, they could not file present application within limitation. According to the plaintiffs, delay is not intentional. Hence, the plaintiffs by filing present application prayed for setting aside deemed abatement of suit condonation of delay and permission to bring the LRs' of the deceased defendant No.1 on record the suit.

6. On the other hand, Mr.S.G.Gaikwad, learned advocate for defendant Nos.3, 5 & 7 submitted that the plaintiffs were having ample knowledge about death of defendant No.1 because the plaintiff No.3 and the defendants are from the same village. Reason mentioned from causing delay is not good one in the eyes of law and same can not be considered. The plaintiffs are gross negligent and there are delay and latches on their part. Hence, he prayed for rejection of application with heavy cost.

7. 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.”

8. 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 setting aside deemed abatement of the suit against the deceased defendant No.1, for condonation of delay and bringing LR's' of the deceased defendant No.1 on record. Present application is supported by affidavit. By filing say the defendants have not denied the fact that the deceased defendant No.1 is survived by legal heirs. No deliberate delay is found on the part of plaintiffs. Matter is old. The present suit is for partition and separate possession in respect of immovable property and the deceased defendant No.1 survived by the LR's'. Therefore, right to sue survived. Perusal of plaint shows that already one Lr's namely- Shivaji being defendant No.5 is on record of the suit and therefore, no need to bring him again on record. Hence, I proceed to pass the following order:

:- O R D E R :-

1. Application (Exh.54) is hereby allowed.
2. Delay is hereby condoned and deemed abatement of the suit against the deceased defendant No.1 is hereby set aside.
3. Permission is granted to plaintiffs to bring LR's' of deceased defendant 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 plaint supported by affidavit on record within stipulated period from the date of this order.
5. Both parties to bear their own cost.

Date : 19/12/2022.

(G.S.Badgujar)
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. C. R. Lande (Grade III)
Name of Court	C.J.J.D. & J.M.F.C., Malegaon, Distt. Washim.
Date of Dictation	19/12/2022
Judgment/Order signed by the PO on	19/12/2022
Judgment /order uploaded on	19/12/2022