

MHWS100013102021



ORDER BELOW EXH.17 IN R.C.S.NO.43/2021

(Ramdas Vishwanath Thakare Vs. Tulshiram Demaji Kolhe)

(Passed on 08th August, 2023)

1. By filing present application the applicants are seeking permission to set aside deemed abatement of suit, condonation of delay as well as bringing legal representative of deceased defendant (hereinafter referred to as “LR's of deceased defendant”) on record of suit.
2. I have perused the application and affidavit in support of the application.
3. Legal representatives of deceased defendant have filed their say at Exh.21 and strongly opposed application. They have further submitted that, defendant died on 27.01.2022 and this application filed by plaintiff after 90 days. Hence, it is time barred as per Article-120 of Limitation Act. They have further submitted that, suit is already abated against defendant as per law i.e. Order XXII Rule 4 (3) of C.P.C. and the proceeding under Section 5 of Limitation Act, for condonation of delay required judicial inquiry as per Chapter XIX of Civil Manual. Inquiries of a judicial nature which do not form part of the proceeding in a suit or darkhast or appeal pending before the Court. Hence, application is liable to be reject with costs.
4. I have heard Mr.D.C.Agrawal, learned Advocate for plaintiff as well as Mr. P.D.Wanare, learned advocate for LR's of deceased defendant. They have submitted their argument as per the application and say respectively.

5. Plaintiff has filed this suit for permanent injunction against sole defendant. The plaintiff has filed Death Certificate of deceased defendant below list of document at Exh.22. The Death Certificate of deceased defendant shows that he died on 27.01.2022. The present application is filed on 13.06.2022. It is ought to have filed on or before 27.04.2022. The delay of 48 days occurred to file the present application. It is submitted that the plaintiff got knowledge when the death of deceased has been informed by the learned Advocate. The delay is not intentional. Therefore, he could not have filed this application within a period of limitation. The right to sue survives in favour of LR's of deceased defendant. Hence, plaintiff prayed for setting aside deemed abatement of the suit, condonation of delay and permission to bring legal representative of deceased defendant on record the suit.

6. The Ld. Advocate for the deceased defendant filed pursis below Exh.16 and stated the death of defendant. The matter pertains to immovable property. The suit is for perpetual injunction. The right to sue survives against the LR's of deceased defendant. It is better to rely on the judgment of the Hon'ble Karnataka High Court in the case of the Chenniaah @ Doddachennaiah Since deceased by his LR's Gangaiah and others Vs. Bylappa since dead By LR's Smt. Naraasamma and others, reported in 2022 Live Law (Kar) 149 wherein it was held that :-

"There is absolutely nothing indicated in provision of part III or Part IV of the Specific Relief, which even remotely indicates that an injunction is a right which is personal to the plaintiff. The right to enjoy the possession of an immovable property is not a right that can be enjoyed only by one person and it is not a right that cannot survive beyond the life of that person. The right to enjoy property is a transferable right and thus is not limited to any one person. On the death of a person, the right to enjoy possession of that

property can and does survive to his legal representative. A person in whose favour the rights of a property devolve by operation of law or by way of testament would ve a legal representative since he acquires a right to intermeddle with the estate of the deceased. If it is to be held that in a suit for injunction , whenever a plaintiff or defendant dies, the suit would abate, it would be virtually creating never ending cycle of litigation, which obviously would result in an absurd situation where a party to the suit is to be perennially litigating in courts. In a suit for injunction in relation to an immovable property, obviously, the legal representative of the deceased would enjoy the relief that the original party (plaintiff or defendant) would have been entitled to by virtue of the succession or inheritance in their favour and thus the suit would not abate as would have to be continued by bringing the legal representatives of the deceased on record.”

7. On perusal of the prayer it appears that, plaintiff has not only prayed to restrain the deceased defendant but also to the any person on behalf of him. The present suit is for permanent injunction in respect of immovable property and deceased defendant is survived by the legal representative. Therefore, the plaintiff has apprehension that legal representatives of defendant may obstruct her possession. Thus, considering the above ratio and prayer clause is is proper to conclude that the right to survive against the LR's of deceased defendant.

8. 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 and Ors. Vs. Annabai Devram Kini and 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”

9. 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 the 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. Therefore, plaintiff has no need to file separate application which requires judicial inquiry (As per Chapter XIX of Civil Manual) for setting aside abatement

order and delay caused to file the same because the suit is not disposed off. The deemed abatement order can be set-aside by filling the application for setting aside in the present suit also.

10. As discussed supra the right to sue survives against the LR's of deceased defendant therefore the suit can not cause to abate. The **Hon'ble Jharkhand High Court** in the 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 when the same has been informed to the court. They tried to get the information of the LR's of deceased defendant. Therefore the delay has been caused. In my view, the reasons are proper and sufficient cause is properly explained by the plaintiff. Thus, in such circumstances the objection of the LR's of defendant regarding the separate miscellaneous proceeding is not maintainable.

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 on record. Present application is supported by affidavit. The death certificate of deceased defendant is filed below list of document at Exh.22. Therefore, the 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 permanent injunction in respect of immovable property and deceased

defendant is survived by the legal representative.

13. The case of the plaintiff is regarding the perpetual injunction. Therefore, the legal representative of defendant 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 LR's of the defendant. 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 is hereby set aside subject to costs of Rs.500/- (Five Hundred only).
3. Permission is granted to bring the LR's of defendant 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 : 08.08.2023

(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 : 08.08.2023

Order Signed by : 09.08.2023

Presiding Officer on

Order Uploaded on : 09.08.2023