

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WITH CA/3865/2016 WITH CA/3866/2016
FIRST APPEAL NO. 165 OF 1997

DATTATRYA GENBA DAREKAR & OTHERS.
VERSUS
THE STATE OF MAH.& ANOTHER.

...
Advocate for Appellant : Mr. R R Karpe
AGP for Respondents: Mr. K.D. Mundhe
Advocate for Respondents : Mr. V.P. Latange

.....

CORAM : V. K. JADHAV, J.
DATED : 15th APRIL, 2016

PER COURT:-

1. Heard both sides.
2. Learned A.G.P. submits that there is no specific prayer in the applications for setting aside the order of abatement and therefore, the applications are required to be rejected.
3. Learned counsel for the applicants by placing reliance on the judgment of the Supreme court in the case of ***Mithailal Dalsanagap Singh and others vs. Annabai Devram Kini and others, reported in 2004 (4) Bom.C.R. 363*** and in the case of ***Anthony Valentio Antonio Dsa vs. Daria Lino Dsa e Casmiro Dias and others, reported in 2008 (2) Bom.C.R. 50***, submits that payer for bringing

legal representatives on record if allowed, it would have effect of setting aside the abatement. In the case of ***Mithailal Dalsanagap Singh and others (supra)***, the Supreme Court in para 8 has made the following observations:-

“8. Inasmuch 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 the 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 necessary implied. Too technical or pedantic an approach in such cases is not called for.”

4. In view of this, both the civil applications are allowed in terms of prayer clause B and C and the same are disposed of accordingly.

(V. K. JADHAV, J.)

rlj/