

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1378 OF 2010**

1.Govind Baban Shelar and Ors	Petitioners
Vs	
1. Dnyanoba Tukaram Shelar and Ors	.. Respondents

Mr. A.B.,Tajane, Advocate for Petitioners.
Mr. S.P.Thorat, Advocate for Respondents no.1, 2A to 2C. & 20.
Mr. Sanjeev Sawant, Advocate for respondents no. 3 to 8.
Mr. Tejas Dande, Advocate for Respondents No.18B and 19.

CORAM : R.G.KETKAR,J.
DATE : 11/04/2016

PC:

1. Heard Mr. A.B.Tajane, learned counsel for the petitioners, Mr. S.P.Thorat, learned counsel for respondents no.1, 2A to 2C and 20, Mr. Sanjeev Sawant, learned counsel for respondents no. 3 to 8, Mr. Tejas Dande learned counsel for respondents no. 18B and 19. Office remark shows that all the respondents are duly served. Leave to amend so as to challenge order dated 21.11.2005 is granted. Amendment shall be carried out forthwith.
2. In view of order dated 25.2.2010, Rule. Learned counsel for the respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.
3. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'plaintiffs', have challenged (1) Judgment and order dated 21.11.2005 below

Exhibit 18, (2) Order dated 17.9.2007 below Exhibit 51, (3) Order dated 29.10.2007 below Exhibit-1, (4) Order dated 14.7.2009 below Exhibit-64 passed by the learned Civil Judge, Senior Division, Pune in Spl. Civil Suit no.163 of 1999. By order dated 21.11.2005 below Exh.18, the learned trial Judge rejected application made by the plaintiffs for (a) condoning delay in filing the application for bringing legal representatives of plaintiff no.2 Ramdas Shelar, since deceased, on record and (b) for setting aside abatement on the ground that plaintiff no.1- Govind Shelar filed such application without authority of legal representatives of plaintiff no.2.

4. By order dated 17.9.2007, the learned trial Judge rejected the application filed by legal representatives of plaintiff no.2 for condoning the delay and setting aside abatement on the ground that the application was not filed within limitation. By order dated 29.10.2007 below Exhibit-1, the learned trial Judge held that the suit stands abated in so far as plaintiff no.2, since deceased, is concerned. By order dated 14.7.2009 below Exhibit-64, the learned trial Judge rejected the application Exh.69 for recalling order dated 29.10.2007 passed below Exh.1.

5. Plaintiffs have instituted suit against the respondents, hereinafter referred to as 'defendants', for partition as also for declaration that Sale Deeds dated 11.7.1994 and 7.8.1994 in respect of land bearing Gat no.1563 are illegal and the same are

not binding upon the plaintiffs and for damages. Plaintiffs no. 1 to 4 are sons of plaintiff no.5 and Baban Shelar. It is their case that the suit properties are ancestral properties of the plaintiffs and defendants no. 1 to 17. The plaintiffs have given genealogy in paragraph 2 of Plaint.

6. During the pendency of the suit, plaintiff no.2 – Ramdas Shelar died on 25.1.1999. Widow of plaintiff no.2-Ms Meena Ramdas Shelar filed application dated 24.6.1999 at Exh.18 for herself and as natural mother guardian of minor son Vaibhav Ramdas Shelar for bringing them on record after condoning the delay as also for setting aside abatement. On 25.11.2005, the learned trial Judge rejected the application by passing following order.

“Perused application. Applicant/plaintiff no.1 has no right to file their application without authority of legal representatives of plaintiff no.2. Hence application is rejected.”

7. On 17.9.2007, application at Exh.51 was filed by legal representative of plaintiff no.2-Ramdas Shelar for setting aside order dated 21.11.2005 passed below Exh.18. On the same day, the learned trial Judge rejected the application by passing following order.

“Application not within limitation. Hence cannot be allowed.”

8. By order dated 29.10.2007, the learned trial Judge held that

suit stands abated so far as deceased plaintiff no.2 is concerned. The learned trial Judge was of the view that though plaintiff no.5 is the mother of deceased plaintiff no.2, she does not become legal representative as inter-meddler as she would not inherit the property. Mr. Tajane submitted that as the suit is for partition and as the application was made by the widow in her capacity as natural guardian of minor son Vaibhav, the learned trial Judge was not justified in rejecting application Exhibit-18 on the ground that the application filed by plaintiff no.1 was without any authority of legal representatives of plaintiff no.2. In fact, the application was not filed by plaintiff no. 1. The learned trial Judge, therefore, should have allowed application Exhibit-51 which was rejected on the ground that the application was not filed within limitation. If these two orders are set aside and the applications are allowed, the order dated 29.10.2007 as also the order dated 14.7.2009 passed below Exhibits-1 and 64 respectively deserve to be set aside.

9. On the other hand, Mr. Sawant and Mr. Thorat supported the impugned orders. They invited my attention to the order dated 29.10.2007 below Exhibit-1 as also paragraphs 8 and 9 of the order dated 14.7.2009. It was submitted that the application was filed after more than two years. The learned trial Judge rightly held that the plaintiffs did not prosecute the proceedings diligently.

10. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Perusal of the order dated 21.11.2005 below Exhibit-18 shows that the learned trial Judge failed to appreciate that the application was made by legal representative of plaintiff no.2. That apart, admittedly plaintiff no.5 is mother of plaintiff no.2 and she was already on record. In this view of the matter, the order dated 21.11.2005 cannot be sustained.

11. By cryptic order dated 17.9.2007, the learned trial Judge rejected the application- Exhibit-51 for recalling order dated 21.11.2005 below Exhibit-18 only on the ground that the application was not within limitation. As the order dated 21.11.2005 itself is set aside, the order dated 17.9.2007 cannot survive and the same has to be set aside.

12. By subsequent order dated 29.10.2007, the learned trial Judge declared that the suit abated as far as plaintiff no. 2 is concerned. As I have already held that the learned trial Judge should have allowed application Exhibit-18, this order also cannot survive. The learned trial Judge also did not properly consider the submissions advanced on behalf of the plaintiffs that as plaintiff no.5, being mother of plaintiff no.2, is already on record, in view of the decision of the Apex Court in the case of Mahabir Prasad Vs Jage Ram, AIR 1971 S.C.742 the suit cannot abate, even qua plaintiff no.2. Resultantly, the order dated 29.10.2007 also

deserves to be set aside. In view of setting aside of the orders dated 21.11.2005, 17.9.2007, 29.10.2007, the order dated 14.7.2009 also does not survive and the same is set aside. Hence, petition succeeds. Rule is made absolute in terms of prayer clause (a), with no order as to costs.

13. Application Exhibit-18 stands allowed. Plaintiffs shall carryout amendment in the trial Court within 4 weeks from production of the authenticated copy of this order.

(R.G.KETKAR, J.)