

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH : NAGPUR**

**Appeal Against Order No. 1/2017**

Vinayak S/o Ramaji Kaore  
Aged about 75 years. Occ.- Nil  
R/o Nr. Lakdipool, Telipura Nagpur,  
Tah. & Distt.- Nagpur ...Applicant

Vs

Sharad s/o Pandurang Adulwar through L.Rs.  
1. a. Sharayu wd/o Sharad Adulwar  
Aged about 70 years. Occ.- Nil. ...Respondents

1.b. Sandip s/o Sharad Adulwar.  
Aged about 35 years. Occ.- Service

1.c. Suwarna d/o Sharad Adulwar  
Aged about 30 years, Occ.- Household

1.d. Swapna d/o Sharad Adulwar  
Aged about 28 years. Occ.- Household

All r/o Ramnagar hilt of Suryoday Bldg.  
C-20, First Floor. Opp. Shabri Apartment  
Nagpur- 440 010

Shri P.K. Mishra & Shri A.P. Mishra, Adv for the appellant

**CORAM : S.B. Shukre, J.**

**DATE : 19.7.2017.**

**Oral Judgment**

**Admit.**

2] By consent of the parties heard finally.

3] The applications vide exhibit nos. 8, 9 & 10 have been decided by common order dated 08-12-2015 by the District Magistrate-10, Nagpur. These applications were in relation to the setting aside abatement, condonation of delay for setting aside abatement for bringing the heirs of the deceased respondent filed by the appellant. In fact, the admitted position is that, there is no need for filing any application in relation to setting aside abatement of the appeal. The impugned decree was passed on 21<sup>st</sup> April, 2006 and thereafter on 3<sup>rd</sup> January, 2009, the original defendant or the original respondent expired. But, the appeal was filed in the year 2013. It was filed against a dead person and as such there could not have been any abatement of the appeal in this case. But, such abatement was presumed by the appellant and accordingly the application for condonation of delay occurred in filing an appeal. The applications for setting aside the abatement of the appeal and application for condonation of delay in filing the appeal for bringing on record the legal heirs of the deceased vide exhibit nos. 8, 9 & 10 were filed. Since these applications were based upon the presumption that the appeal had abated against the original defendant, the applications were not maintainable. However, the impugned order rejecting these applications does not consider this aspect of the case and it seems that the learned District Judge

has only adverted to the reason given for justifying the delay occurred in filing these applications. However, the fact remains that these applications were not maintainable. If this is so, there would not be any reason for this Court to make any interference with the impugned order. However, in the interest of justice, it is necessary that the appellant is given liberty to file proper application explaining the delay occurred in filing an appeal and seeking condonation of day afresh in view of the law laid down by the Hon'ble apex Court in Gurcharan Singh Vs. Surjit Singh & Anr. reported in 2012(10), Scale 638.

4] In the situation, the appeal against order stands dismissed. However, liberty is granted to the appellant for filing a fresh application as stated above and if such any application is filed, the same shall be decided without influenced by earlier order of this Court. No Costs

JUDGE