

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 799 OF 2018

Shri Allen E. Valles,

... Petitioner

V e r s u s

Smt. Kantibai B. Borkar
(since deceased)

... Respondents

Shri S. S. Katak, Senior Advocate with Shri P. Talaulikar,
Advocate for the Petitioner.

Shri A. R. Katak, Advocate for the Respondent.

Coram :- C. V. BHADANG, J.

Date :- 18th February 2019.

P.C.

1. By this petition, the petitioner is challenging the order dated 06.10.2017 passed by the learned Additional Collector, North Goa, at Panaji, thereby dismissing the application dated 04.09.2015 for setting aside the abatement and for bringing the legal representatives of the sole deceased respondent Smt. Kantibai Borkar on record. The net result is that the learned Additional Collector by the impugned order has held that the appeal filed by the petitioner on 31.03.1994 stands abated.

2. I have heard Shri S. S. Kantak, learned Senior Counsel for the petitioner and Shri A. R. Kantak, learned Counsel for the respondent nos.1(a) and (b). Perused record.

3. The petitioners in the appeal filed before the learned Additional Collector were seeking to challenge an order of registration of the respondent Smt. Kantabai B. Borkar as a Mundkar under Section 29 of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (Act, for short). The respondent Smt. Kantibai B. Borkar, died on 28.09.2008. It is undisputed that this fact was intimated to the petitioner in Regular Civil Suit No.263/2000/B on 06.11.2008. According to the petitioner, this fact was informed by him to his Counsel to take appropriate steps in the appeal. However, no steps were taken till the year 2015. The learned Additional Collector relying upon the provisions of Rule 14(13) of the Goa, Daman and Diu Mundkars (Protection from Eviction) Rules, 1977 (Rules, for short), has held that there is no power to condone the delay when an application for bringing the legal representatives on record is filed beyond the period of one month.

4. Shri Kantak, the learned Senior Counsel has placed reliance on the Division Bench Judgment of this Court in the

case of **Shri Keshav N. Bhagat vs. Shri Damodar Kashinath Naik [Writ Petition No.31 of 1988]** decided on 14.03.1996, in which this Court in para 5 of the judgment has held thus :

"5. We also would like to point out that Order XXII, Rule 4(1) calls for procedure in case of death of one of several defendants or of sole defendant. Order XXII, Rule 4(3) provides that where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant. Sub-Rule (5) is as follows :-

"Where -

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the

period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved."

Similarly, Order XXII, Rule 9 provides for effect of abatement or dismissal. Sb-Rule (2) thereof provides that any plaintiff or the person claiming to be the legal representative of a deceased plaintiff etc., may apply for an order to set aside the abatement or dismissal and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. Sub-Rule (3) thereof makes a provision of Section 5 of the Limitation Act being made applicable to the applications which are filed under Sub-Rule (2). Therefore, there is provision made in Civil Procedure Code for setting aside the abatement and certain provisions of the Limitation Act are made applicable, particularly Section 5. We find there is absolutely no reason as to why this provision should not be read even in such cases where applications are filed before the Mamlatdar under the Act. In our opinion, therefore, the provisions of Section 5 of the Limitation Act, 1963 shall be applicable in such cases." (Emphasis supplied)

5. It is thus clear that in so far as the finding by the learned Additional Collector that there was no power to condone the delay and to set aside the abatement beyond the period of one month is not correct.

6. Shri Kantak, the learned Senior Counsel appearing for the petitioner, at this stage, on instructions, seeks leave to withdraw the petition as the petitioner has already raised the ground about non-maintainability of the application for purchase filed by the respondents on the ground of there being no declaration in their favour.

7. Subject to the clarification in para 6, the petition is disposed off as withdrawn with no order as to costs.

C. V. BHADANG, J.

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