

Wakodikar

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1538 OF 2017**

Sou.Yamuna Ganpat Wajage and others. Petitioners.

V/s.

Shri.Ganpat Vithuji Shinde and others. Respondents.

Mr.Santosh M.Suryawanshi, Advocate for the Petitioners.
None for the respondents.

CORAM : M. S. SONAK, J.

DATED : 30th APRIL, 2019.

ORAL JUDGMENT :

1. Heard Mr.Suryawanshi for the petitioner. Mr.Suryawanshi states that all the respondents have been duly served in the matter.

2. Accordingly, Rule. Rule is made returnable forthwith, taking into consideration the issue involved in the present petition.

3. The challenge in this petition is to the order dated 07/10/2016 made by the Learned Trial Judge, to the extent the said order dismisses the prayer for impleading of Legal Representatives of deceased defendant No.10. The operative portion of the impugned order dated 07/10/2016 reads thus;

1. *Application is partly allowed.*
2. *The plaintiffs are permitted to implead the legal representatives (mentioned in the application) of pre-deceased son of deceased defendant No.2 in the suit*

subject to cost of Rs600/- to be paid the defendants.

3. The prayer of impleading of legal representatives heir of deceased defendant No.10 is rejected.

4. Cost in cause.

5. The impugned order has been made in Special Civil Suit No.242 of 2014 which seeks a decree of partition. In a suit seeking partition, all the parties are in the nature of plaintiffs or defendants as the case may be. Accordingly, there was no good reason not to allow the petitioners to bring on record the Legal Representatives of defendant No.10, if necessary, by *suo moto*, setting aside the abatement.

6. In the case of the Hon'ble Supreme Court, in **Pankajbhai Zalabadia V/s. Jethabai Zalabadia AIR 2018 SC 490**, has held that even after dismissal of an application under Order 22 Rule 4 of Civil Procedure Code, subsequent application under Order 1 Rule 10 of Civil Procedure Code for addition of Legal Representatives is maintainable and the earlier order cannot act as *res judicata*.

7. Accordingly, the impugned order to the extent it precludes the petitioners from bringing on record the Legal Representatives of deceased defendant No.10 is hereby set aside. The abatement if any, is set aside and leave is granted to the petitioners to bring on record the Legal Representatives of deceased defendant No.10. However, this shall be subject to payment of costs of Rs.2,500/- by the petitioners to the Legal Representatives of defendant No.10.

8. Rule is made absolute in the aforesaid terms.

9. Necessary amendment to be carried out within six weeks from today. The interim order granted earlier in this matter is hereby vacated.

10. All concerned, to act on the basis of an authenticated copy of this order.

(M. S. SONAK, J.)