

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1810 OF 2016
IN
SUIT NO. 550 OF 1981**

Kirit J Mehta & Anr	...Plaintiffs
<i>Versus</i>	
Jaywant D Patil & Ors	...Defendants
<i>And</i>	
Keshari Liladhar Patil & Ors	...Applicants

**WITH
CHAMBER SUMMONS NO. 573 OF 2018
IN
EXECUTION APPLICATION NO. 214 OF 2006**

None for the Plaintiffs.
Mr Prashant Tikare, *for the Applicant in NMS/1810/16.*
Mr RS Tripathi, *for Applicant in CHS/573/18.*

CORAM: G.S. PATEL, J
DATED: 14th January 2019

PC:-

1. None for the Plaintiffs. Mr Tripathi for the heirs of Defendant No. 1 has filed Chamber Summons No. 573 of 2018 to be impleaded. In the meantime, the five Applicants who are the heirs of Defendant

No. 2 have filed Notice of Motion 1810 of 2016 to set aside an *ex parte* decree dated 11th March 2004 on the ground that it was passed against dead persons without their heirs being impleaded. The chronology tendered by Mr Tripathi indicates that although the Plaintiff was repeatedly informed of the passing of Defendants Nos. 1, 2, 3 and 4, all of whom died before the decree, and despite the Plaintiff and the court being repeatedly told of this, the Plaintiff took no steps whatsoever. This list of dates indicates that between 2002 and 2004 the matter was adjourned repeatedly *inter alia* to enable the Plaintiff to take the necessary steps.

2. Actually that decree could never have been passed. The suit abated in the absence of any proper impleadment of the heirs of the deceased Defendants and all four of the Defendants had by then passed away. Indeed there was no surviving Defendant to the suit at all at the time of the decree and none of the heirs of any of the original Defendants had been impleaded.

3. The decree passed on 11th March 2004 is recalled and set aside. I find that the order of 11th March 2004 does not note that the Defendants had all passed away or that previous orders, including the orders of 21st November 2003 and more importantly 5th December 2003, specifically note the death of all the Defendants.

4. The Notice of Motion is made absolute in terms of prayer clause (a).

5. The suit is now dismissed as abated. However, I will permit as an exceptional case the Applicant(s) in Chamber Summons to be joined as the heir(s) of original Defendant No. 1 so that should any application be made hereafter Mr Tripathi will at least be given notice.

6. The registry will permit Mr Tripathi to carry out the necessary changes to the cause title of the suit.

7. As a result, the Execution Application cannot proceed since there is no longer any surviving or underlying decree. The Execution Application is dismissed, and all attachments, if any, in execution stand vacated.

(G. S. PATEL, J)