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10-ca-14750-23

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**10 CIVIL APPLICATION NO. 14750 OF 2023
IN CA/3117/2023**

**CHHAYA W/O SUBHASHLAL CHANGEDIYA
VERSUS
RAVINDRA S/O SUBHASHLAL CHANGEDIYA AND OTHERS**

...
Advocate for Applicant : Mr. A. P. Bhandari
h/f. Mr. Niraj Pradeep Chudiwal
Advocate for Respondent No.1 : Mr. P. R. Nangare
...

CORAM : Y. G. KHOBRAGADE, J.

DATE : 22.04.2024

PER COURT :

1. Heard Mr. Bhandari, learned counsel appearing for the applicant, Mr. Nangare, learned counsel appearing for the respondent no.1 / original plaintiff at length.
2. None appeared for legal heirs of deceased respondent no.7, though they are served.
3. The learned counsel appearing for the applicant submits that the respondent No.7 Smt. Leelabai Sheshmal Gandhi died on 08.10.2019. Her son – Respondent No. 7-B -Rajendra Sheshmal Gandhi died on 09.01.2013 much prior to death of original respondent no.7. The suit was proceeded without Written Statement as against the Respondent No.7.

4. On 20.03.2019, the learned Trial Court decreed the suit for partition and declared that the present respondent no.1/original plaintiff is entitled for share in suit property.

5. On 30.09.2022, the learned First Appellate Court passed the Judgment and decree holding that the respondent no. 1 / original plaintiff is entitled to get 2/21st share in the suit properties described in the Judgment and decree. Therefore, the Judgment and decree passed by the learned First Appellate Court is subsequent to death of Respondent No. 7 Smt. Leelabai Sheshmal Gandhi.

6. According to the applicant/appellant, she was not having knowledge about death of deceased respondent no. 7 as well details of legal representatives of respondent no. 7. Therefore, delay of 1383 days caused in filing the application for bringing on record the legal heirs of deceased respondent no. 7 and setting aside abatement.

7. The learned counsel appearing for the respondent no.1/ original plaintiff has not raised any objection. Though the legal heirs of deceased respondent no. 7 are duly served with notice with this application but they remained absent.

8. In the case in hand, it prima-facie appears that, the respondent no. 7 - Smt. Leelabai Sheshmal Gandhi has died on 08.10.2019 and during the pendency of Regular Civil Appeal No. 219/2019, but said fact was not brought to the notice of the First Appellate Court. Ultimately, on 30.09.2022, the learned First Appellate Court passed the impugned Judgment and decree against the deceased Respondent No.7. Therefore, said Judgment and decree as against the deceased respondent no. 7 is non-est.

9. ***Sub-Rule 4 of Rule 4 of Order XXII of the Code of Civil Procedure*** provides as under :-

“R.4 Procedure in case of death of one of several defendants or of sole defendant -

(4)The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.”

10. Indeed, the Court can exempt the plaintiff from substituting the legal representatives of any such defendant who failed to file written

statement or who, having filed it but failed to appear in the matter and did not contest the suit at the hearing.

11. In the case in hand, the respondent no. 7 / original defendant no. 7 fail to file written statement and suit decreed ex parte in favour of the plaintiff. The original defendant no.3 had carried Regular Civil Appeal No. 219/2019 against the Judgment and decree dated 20.03.2019 passed in Regular Civil Suit No. 219/2019 and said appeal came to be partly allowed and Judgment and decree passed by the learned Trial Court was partly modified.

12. The legal heirs of respondent no. 7 has not objected the present application as well the respondent no.1/ original plaintiff. Since the common interest of the respondent no. 7 is involved in the joint family property and no any specific decree is passed against the deceased respondent no.7, therefore, it would be just and proper to permit the applicants to bring the legal heirs of deceased respondent no.7 on record. Taking into consideration principles laid down by the Hon'ble Apex Court in the case of *Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) by LRs & Ors. , AIR 2009 SC (SUPP) 886*, the delay of 1383 days caused in filing the application is hereby condoned. The abatement is set aside. Permission granted to the

applicant to bring the legal heirs of respondent no.7 on record.

13. Necessary amendment be carried out within a period of 7 (seven) days from today.

14. The prayer for costs is hereby rejected.

(Y. G. KHOBRADE, J.)

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