

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2844 OF 2025

Shivaji Rupchand Pardeshi (deceased)
through LRs.

...Petitioners

Versus

Balu Ghaman Gaikwad and ors.

...Respondents

Mr. Gaurav Ugale, for the Petitioners.

CORAM: N. J. JAMADAR, J.

DATED: 3rd MARCH, 2025

ORDER:-

1. Heard the learned Counsel for the petitioners.
2. The challenge in this petition is to an order dated 1st August, 2024 passed by the learned Principal District Judge, Nashik, whereby an appeal preferred by the petitioners – appellants against an order dated 5th October, 2011 passed by the Civil Judge in Misc. Civil Application No.22 of 2000 came to be dismissed affirming the said order rejecting the application preferred by the petitioners for restoration of RCS/611/1993.
3. Shivaji Pardeshi, the father of the petitioners, had instituted the suit for specific performance of contract and the consequential reliefs. Shivaji Pardeshi, the plaintiff,

passed away on 19th February, 1994. It appears, the legal representatives of deceased plaintiff were not brought on record within the stipulated period. On 5th February, 1999, it seems, the petitioners had filed an application to bring them on record. By an order dated 7th December, 1999, the said application was rejected and the suit was disposed as abated. It seems, the petitioners did not assail the said order by preferring an appeal.

4. Instead, the petitioners preferred an application being Misc. Civil Application No.22 of 2000 for restoration of the said suit by setting aside the order dated 7th December, 1999.

5. By a judgment and order dated 5th October, 2011, the learned Civil Judge rejected the said application observing *inter alia* that the application preferred by the petitioners to bring them on record was already rejected by the Court and, thus, the said order cannot be set aside or reversed by the same Court.

6. Being aggrieved, the petitioners preferred Misc. Civil Appeal No.59 of 2016 before the District Court. By the impugned judgment and order, the learned Principal District Judge was also persuaded to dismiss the appeal. The learned Principal District Judge concurred with the view of the

learned Civil Judge that once the application to implead the petitioners was rejected by the Trial court, the proper remedy for the petitioners was to file an appeal against the said order. An application for restoration of the suit which thus stood abated, when an application for bringing the legal representatives on record already stood rejected, was not maintainable.

7. Mr. Ugale, the learned Counsel for the petitioners, submitted that the courts below have in terms recorded that apart from the roznama of the proceedings in the suit, the application which was filed by the petitioners in the year 1999 to bring them on record and the order passed by the learned Civil Judge thereon are not available. The abatement of the suit is automatic. Even if the application of the petitioners to bring them on record was rejected by the learned Civil Judge, as is evident from the roznama of the proceedings dated 7th December, 1999, the courts below could have taken a liberal view of the matter and restored the suit to file.

8. A strong reliance was placed on a judgment of the Supreme Court in the case of ***Ram Nath Sao alias Ram Nath***

*Sahu and others vs. Gobardhan Sao and others*¹, wherein it was enunciated that the expression “sufficient cause” within the meaning of Section 5 of the Limitation Act, 1963 or Order XXII Rule 9 of the Code of Civil Procedure, 1908 or any other similar provision should receive a liberal construction so as to advance the cause of substantial justice when no negligence or inaction or want of bona fides is imputable to a party.

9. I have given anxious consideration to the submission canvassed by Mr. Ugale. Ordinarily, the Courts lean in favour of the condonation of delay so as to advance the cause of substantive justice. The principle that the procedure which is a handmaid of justice should not be permitted to score a march over the substantive justice, generally weighs with the Court. Thus the term ‘sufficient cause’ receives liberal construction. In the matter of setting aside the abatement and bringing the legal representatives of a deceased party, a more liberal approach is adopted.

10. It is well recognized no formal order is required to be passed and the abatement of a suit or proceeding is automatic, if the legal representatives of a deceased party, in

1 (2002) 3 Supreme Court Cases 195.

a case where right to sue survives, are not brought on record. Once an application to bring the legal representatives on record is filed, the Court can set aside the abatement, even if there is no specific prayer for setting aside the abatement. In the absence of any deliberate inaction or mala fide, ordinarily, courts liberally condone the delay in seeking setting aside the abatement and bringing the legal representatives on record.

11. The facts of the case at hand are peculiar. The suit was instituted by the father of the petitioners in the year 1993. The deceased plaintiff passed away on 19th February, 1994. Evidently, no steps were taken to seek setting aside of the abatement and bring the legal representatives of the deceased plaintiff on record, till February, 1999. The petitioners claimed that they were unaware of the pendency of the suit and the claim for specific performance therein.

12. At this stage, this Court may not delve into the justifiability of the reasons or the sufficiency of cause for not seeking setting aside of the abatement or bringing the legal representatives of the deceased plaintiff on record, for five years. It is the course adopted by the petitioners which assumes significance.

13. Incontrovertibly, the petitioners filed an application to bring them on record in the month of February, 1999 and the said application was rejected by the trial court by an order dated 7th December, 1999. Mr. Ugale made an endeavour to urge that the rejection of the said application was of no consequence as the suit already stood abated by the efflux of time and, therefore, that did not constitute an impediment for setting aside the said order and restoration of the suit.

14. I am afraid to accede to this submission. Undoubtedly, no formal order of abatement is required to be passed. At the same time, when the petitioners filed application to bring them on record as the legal representatives of the deceased plaintiff, implicit in the said application was a prayer to set aside the abatement. Thus, the order of rejection of the said application cannot be said to be inconsequential.

15. It is pertinent to note that an order passed under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit is appealable under Order XLIII Rule 1(k). Thus, the proper course for the petitioners was to assail the said order, in an appeal. Instead, the petitioners preferred another application for restoration of the suit by setting aside the dismissal order, as if the said suit was dismissed for want

of prosecution. As the suit abated and an application for setting aside the said abatement also stood rejected, the learned Civil Judge was well within his rights in declining to restore the suit. The learned District Judge was also justified in declining to interfere with the said order.

16. The submissions on behalf of petitioners that the courts below could have adopted a liberal approach appears attractive at the first blush. However, the fact that the situation was brought about by the acts on the part of the petitioners cannot be lost sight of. Moreover, the element of passage of time also deserves consideration. The suit was instituted for specific performance of a contract purportedly executed by the defendants and the predecessor-in-title of the defendants on 22nd March, 1970 and 11th September, 1970. The suit was instituted in the year 1993. It was dismissed as abated in the year 1999. All that the petitioners assert is a right to seek specific performance of the contract executed by the predecessor-in-title of the respondents prior to 50 years. Should the respondents be vexed at this length of time, when by the sheer passage of time, equities intervene and new rights and obligations are created, is the moot question. In

the totality of the circumstances, the answer ought to be in the negative.

17. For the foregoing reasons, I am not inclined to interfere with the impugned order.

18. The petition stands dismissed.

[N. J. JAMADAR, J.]