

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE HIRDESH

ON THE 20th OF MARCH, 2024

MISC. APPEAL No. 344 of 2014

BETWEEN:-

**BANO BEE W/O PEER MOHAMMAD, AGED ABOUT 63 YEARS,
1. STATION ROAD, VILLAGE DHODHAR TEH. JAORA (MADHYA
PRADESH)**

**HABEEB KHAN S/O PEER MOHAMMAD STATION ROAD, VIL.
2. DHODHAR TEHSIL JAORA DIST. RATLAM (MADHYA
PRADESH)**

**HAMEED KHAN S/O PEER MOHAMMAD STATION ROAD, VIL.
3. DHODHAR TEHSIL JAORA DIST. RATLAM (MADHYA
PRADESH)**

**MUNNA KHAN S/O PEER MOHAMMAD STATION ROAD, VIL.
4. DHODHAR,TEHSIL JAORA DIST. RATLAM (MADHYA
PRADESH)**

**KHURSHEED KHAN S/O PEER MOHAMMAD STATION ROAD,
5. VIL. DHODHAR TEHSIL JAORA DIST. RATLAM (MADHYA
PRADESH)**

**SHEHNAJBE D/O PEER MOHAMMAD DINDAYAL NAGAR
6. RATLAM (MADHYA PRADESH)**

**AYASHABEE W/O SALEEM KHAN STATION ROAD, VIL.
7. DHODHAR TEHSIL JAORA DIST. RATLAM (MADHYA
PRADESH)**

**ABID KHAN S/O SALIM KHAN OCCUPATION: MINOR U/G
8. MOTHER AYASHA BEE STATION ROAD, VIL. DHODHAR
TEHSIL JAORA DIST. RATLAM (MADHYA PRADESH)**

**AMAN KHAN S/O SALEEM KHAN OCCUPATION: MINOR U/G
9. MOTHER AYASHABEE STATION ROAD, VIL. DHODHAR
TEHSIL JAORA DIST. RATLAM (RAJASTHAN)**

.....APPELLANTS

(SHRI J.B. MEHTA, ADVOCATE FOR APPELLANTS)

AND

- YUSUF AND ORS. S/O ISMAIL KHAN, AGED ABOUT 58 YEARS,
1. VILLAGE DHODHAR TEH. JAORA DISTRICT RATLAM (MADHYA PRADESH)
 2. HAMEED S/O ISMAIL KHAN STATION ROAD, VIL. DHODHAR TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 3. GABEEF S/O USNAUK JGAB DIL. DHODHAR TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 4. MUMTAZ ALI S/O ISMAIL KHAN VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 5. GULAM JILANI S/O ISMAIL KHAN VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 6. MOHD S/O ISMAIL KHAN VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 7. JAMEELA BEE D/O ISMAIL KHAN VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (RAJASTHAN)
 8. SHEHNAZ BEE D/O ISMAIL KHAN VIL. DHODHAR TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 9. ZAKIRA BEE D/O ISMAIL KHAN VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (RAJASTHAN)
 10. ZAHIRA BEE D/O ISMAIL KHAN VIL. DHODHAR TEHSIL JAORA DISTRICT RATLAM (RAJASTHAN)
 11. IMAMUDDIN S/O NAHAR KHAN OCCUPATION: (DECEASED SUIT AGAINST HIM IS STILL ABATED) (MADHYA PRADESH)
 12. GRAM PANCHAYAT DHODHAR THR: SARPANCH DHODHAR (MADHYA PRADESH)
 13. RAJESH KUMAR S/O BHANWARLAL VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 14. KIMATI KUMAR S/O JAGDISHCHANDRA OCCUPATION: MINOR U/G FATHER JAGDISHCHANDRA VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 15. RADHESHYAM S/O JAGANNATH VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 16. SHOBHADEVI W/O RAMESHCHANDRA VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 17. DHANNALAL S/O BABRU VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 18. SHIVLAL S/O BHAWAN VIL. DHODHAR, TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)
 19. ABHAYKUMAR S/O KANHAIYALAL STATION ROAD, VIL.

DHODHAR TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)

- RAMESHCHANDRA S/O HARIVALLABH (D) THR: LR'S SMT.**
20. **RESHU D/O RAMESH STATION ROAD, JAORA DISTRICT RATLAM (MADHYA PRADESH)**
 21. **RAHUL S/O RAMESH STATION ROAD, JAORA DISTRICT RATLAM (MADHYA PRADESH)**
 22. **LILADHAR S/O HARIVALLABH VIL.DHODHAR,TEHSIL JAORA DIST. RATLAM (MADHYA PRADESH)**
 23. **BHERUDAS S/O RADHESHYAMDAS VIL.DHODHAR,TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)**
 24. **SUDHEERDAS S/O RADHESHYAMDAS VIL.DHODHAR,TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)**
 25. **NIRMALDAS S/O RADHESHYAMDAS VIL.DHODHAR,TEHSIL JAORA DISTRICT RATLAM (MADHYA PRADESH)**

.....RESPONDENTS

(SHRI MANISH JAIN, ADVOCATE FOR RESPONDENTS NOS.12, 13, 14, 15, 16, 20, 21, 22 AND 23).

This appeal coming on for orders this day, the court passed the following:-

ORDER

Heard on **IA No.1382 of 2014** which is an application for condonation of delay in filing the appeal under Section 5 of the Limitation Act, 1963. The delay is of 66 days.

Keeping in view the reasons mentioned in the application and in absence of any opposition, the same is allowed. Delay in filing the appeal is hereby condoned. Accordingly, **IA No.1382 of 2014** stands disposed of.

This miscellaneous appeal has been preferred by the appellants under Order 41 Rule 3 A of Code of Civil Procedure, 1908, against the order dated 22.08.2013 passed by First Additional District Judge, Jaora, District-Ratlam (MP) passed in

Civil Regular Appeal No.09A/2013 in the effect of abatement.

(2) The brief facts of the case was that the appellants have filed the civil appeal before the First Additional District Judge, Jaora, District-Ratlam (MP) against the respondents. During the pendency of the appeal, the respondent No.1 Ismail Khan has passed away then the appellant has filed an application for bringing the legal representatives of dead respondent No.1 on record under Order 22 Rule 4 CPC and under Order 22 Rule 9 CPC and Section 5 of Limitation Act, 1963.

(3) After hearing counsel for both the parties, the first appellate court has dismissed the application on the ground that the application for bringing the legal representatives of dead respondent No.1 is not within time and the application for condonation of delay has not been properly explained and hence appeal is abated with regard to dead respondent No.1.

(4) Being aggrieved by the impugned order, the appellants have filed this appeal and has submitted that the first appellate court has erred in not allowing the application under Order 22 Rule 4 CPC on flimsy grounds and grounds not tenable in law. It is further submitted that first appellate court has also erred in not considering the fact that respondent Ismail was served and was set ex parte in appeal and also the fact that he had already sold the suit property pendente lite and they were joined under Order 22 Rule 10 CPC and hence they represented deceased respondent. It is also submitted that first appellate court has also erred in not considering the fact that while deciding such applications a very

liberal view is to be taken and in particular the view has taken that the delay was not much. It is stated that the findings of learned lower court are perverse and contrary to law and evidence on record.

(5) *Per contra*, counsel for the respondents has supported the order impugned and prays for rejection of this appeal.

(6) I have heard counsel for the parties at length and have perused the records with due care.

(7) It is true that legal representatives of deceased respondents are not brought on record within ninety days of his death then the suit shall be abated. Thereafter application for setting aside the abatement of appeal is to be filed within 90 days and if the said application is not filed then application under Order 22 Rule 9 CPC along with application for condonation of delay under section 5 of Limitation Act, 1963 is to be filed looking to the aforesaid facts.

(8) Supreme Court in the case of *Mithailal Dalsangar Singh vs. Annabai Devram Kini, (2003) 10 SCC 691* has held as under:-

“8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record

within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.”

(9) Supreme Court in the case of **Banwari Lal vs. Balbir Singh,** **(2016) 1 SCC 607** has held in paragraphs 9 and 10 as under :-

“9. Provisions of Order 22 CPC are not penal in nature. It is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspects of law. In Sardar Amarjit Singh Kalra v. Pramod Gupta [(2003) 3 SCC 272] , a five-Judge Bench of this Court held as under: (SCC pp.300-01, Para 26).

“26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice. The fact that the khata was said to be joint is of no relevance, as long as each one of them had their own independent,

distinct and separate shares in the property as found separately indicated in the jamabandi itself of the shares of each of them distinctly. We are also of the view that the High Court [Amarjit Singh v. Pramod Gupta, 1991 SCC Online Del 131 : (1991) 20 DRJ 337] should have, on the very perception it had on the question of abatement, allowed the applications for impleadment even de hors the cause for the delay in filing the applications keeping in view the serious manner in which it would otherwise jeopardize an effective adjudication on merits, the rights of the other remaining appellants for no fault of theirs. Interests of justice would have been better served had the High Court adopted a positive and constructive approach than merely scuttled the whole process to foreclose an adjudication of the claims of others on merits. The rejection by the High Court of the applications to set aside abatement, condonation and bringing on record the legal representatives does not appear, on the peculiar nature of the case, to be a just or reasonable exercise of the Court's power or in conformity with the avowed object of the Court to do real, effective and substantial justice.”

(emphasis supplied)

“10. In Sital Prasad Saxena v. Union of India [(1985) 1 SCC 163], it was observed that the rules of procedure under Order 22 CPC are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties. On sufficient cause, delay in bringing the legal representatives of the deceased party on record should be condoned. Procedure is meant only to facilitate the administration of justice and not to defeat the same. The dismissal of the second appeal by the High Court does not constitute a sound and reasonable exercise of its powers and the impugned order [Banwari Lal v. Balbir Singh, 2013 SCC Online Del 6406] cannot be sustained.”

(10) Hon’ble Apex Court in the case of **Ram Nath Sao alias Ram Nath Sahu and others Vs. Gobardhan Sao and others, reported in AIR 2002 SC 1201** has held that it becomes plain that the expression ‘sufficient cause’ within the meaning of Section 5 of the Limitation Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want

of bonafide is imputable to a party.

(11) In view of law down by *Hon'ble Apex Court in aforesaid cases (supra)*, in the considered opinion of this Court, the first appellate court has erred in dismissing the appeal filed by the appellants as the same is not sustainable under the eyes of law, as the first appellate court has interpreted the provision in a strict view. Consequently, the instant appeal filed by the appellants is allowed and the impugned order dated 22.08.2013 is set-aside. The first appellate court is directed to take legal representatives of the dead respondent No.1 on record.

(12) Accordingly, the instant appeal stands allowed and is disposed of, in aforesaid terms.

(13) Certified copy, as per Rules.

Arun/-

**(HIRDESH)
JUDGE**