

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

911 CIVIL APPLICATION NO.3205 OF 2017
IN SA/642/2019 WITH CA/3206/2017 IN SA/641/2019

AHILYABAI AJINATH SHINDE
VERSUS
KUNDLIK RAMA AKRE DIED LRS ARUN AND ORS

Mr. Dhananjay Mane h/f Mr. N. G. Talekar, Advocate for
the applicant

Mr. K. R. Doke, Advocate for respondent Nos. 1/1/A to
1/1/C, 1/2, 2/1 to 2/5

CORAM : S. M. GAVHANE, J.

DATED : 14.01.2020

PER COURT :-

. Both the applications have been moved by the same applicant to allow her to bring on record the legal representatives of respondent No. 1/1 Arun Kunalik Akre, who died on 12/01/2011 during pendency of Regular Civil Appeal Nos. 149 of 2014 and 150 of 2014 filed by this applicant, by condoning delay caused in moving these applications and by setting aside order of abatement, if any.

2. Mr. Mane, learned counsel appearing for the applicant in both the applications submitted that respondent No. 1/1 died during pendency of the Regular Civil Appeals, before the appellate Court on the

aforesaid date. After his death learned counsel representing the said respondents before the appellate Court was required to give information to the appellate Court regarding death of said respondent and thereupon the appellate Court was required to give notice of death of respondent No. 1/1 to the other party in the light of provisions under Rule 10A of Order 22 of the Code of Civil Procedure, so as to give knowledge to the other side to take steps to bring on record the legal representatives of the deceased respondent. But, according to learned counsel for the applicant the Advocate representing the respondent No. 1/1 did not inform the Court about death of said respondent and further procedure of giving notice to other side was also not followed by the appellate Court. Therefore, according to learned counsel, when the applicant has got knowledge of abatement of appeals before the appellate Court, after obtaining the copies of judgments in the appeals the applicant has moved this applications and therefore, when there is no abatement of appeal, as such, against respondent No. 1/1, by judicial order passed by the appellate Court in both the appeals and as there should be liberal approach in condoning the delay,

both the applications may be allowed. It is also submitted that when cause of action survives against other respondents there cannot be abatement of appeal.

3. To support his submissions, learned counsel appearing for the applicant has relied upon the decision of the Hon'ble Apex Court in the case of ***Perumon Bhagvathy Devaswom, Perinadu Village Versus Bhargavi Ama (Dead) By Lrs & Ors.*** reported in ***2008 DGLS(SC)914*** and mainly the learned counsel has referred to the observations of the Hon'ble Apex Court in paragraph Nos. 4.5 and 5 which are as under:-

"4.5) Rule 10A of Order 22 provides that whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the court about it, and the court shall thereupon give notice of such death to the other party.

5. Having regard to the wording of Rule 4, it is clear that when a respondent dies and an application to bring his legal representative on record is not made, abatement takes place on the expiry of the prescribed period of 90 days, by operation of law. Abatement is not dependent upon any judicial adjudication or declaration of such abatement by a judicial order. It occurs by operation of law. But nevertheless abatement requires judicial cognizance to put an end to a case as having abated. To borrow a phrase from Administrative Law (used with reference to

void orders), an appeal bears no brand on its forehead that it has abated, nor does it close itself automatically on abatement. At some stage, the court has to take note of the abatement and record the closure of the case as having abated (where deceased was a sole respondent) or record that the appeal had abated as against a particular respondent (if there are more than one and the cause of action survives against the others)."

4. Mr. Doke, learned counsel appearing for the proposed LR's of respondent No. 1/1 i.e. respondent Nos. 1/1A, 1/1B and 1/1C referring to reply affidavit filed on behalf of the legal representatives submitted that, when the LR's of respondent No. 1/1 were not brought on record in the appeals before the appellate Court, within stipulated time the, appeals automatically get abated and no specific order is required in this respect. It is submitted that when the applicant has obtained copies of judgments in the appeals before the appellate Court, in which it is specifically observed by the appellate Court that appeals against respondent No. 1/1 are abated, no other order is required to abate the appeals against respondent No. 1/1. Thus, according to learned counsel these applications filed at the stage of second appeal to bring on record the LR's of respondent No. 1/1 are not maintainable, when LR's were not brought on record

in the appeals before the first appellate Court. Learned counsel however, could not point out from the record that advocate representing respondent No. 1/1 had informed the appellate Court about death of respondent NO. 1/1 and then the appellate Court had given notice of death of respondent No. 1/1 to the applicant/other side in the light of submissions made by the learned counsel appearing for the applicants. He, thus submitted that applications may not be considered and allowed.

5. I have carefully considered the submissions made by the learned counsels appearing for the applicant and LR's of respondent No. 1/1 in both the applications. There is no dispute that respondent No. 1/1 died on 12/01/2011 when both the appeals were pending before the first appellate Court and the proposed LR's are his legal representatives. There appears no dispute that respondent No. 1/1 was represented by advocate in both the appeals before the appellate Court. There is no material on record to show that said advocate gave information to the appellate Court regarding death of respondent No. 1/1 and thereupon the appellate Court had given specific notice to the other side i.e. present

applicant, regarding death of said respondent in the light of Order 22 Rule 10A of the Code of Civil Procedure. It appears that the suit in which counter claim was filed by the applicant was withdrawn and the counter claim proceeded and the plaintiff who had withdrawn the suit had filed separate suit and then counter claim and the suit filed by the plaintiff were disposed of by the common judgment and therefore, there were two appeals before the appellate Court. Considering the nature of proceedings between the parties and all the circumstances noted above, I am of the view that it is just to allow the applicant, who is same in both the applications to bring on record the LR's of respondent No. 1/1 to consider the controversy between the parties on merits, by condoning delay and setting aside the abatement of appeals considering the observations of the apex Court in the decision in ***Perumon Bhagvathy Devaswom (Supra)*** relied upon by the learned counsel appearing for the applicant.

6. Therefore, both the Civil Application No. 3205 of 2017 and 3206 of 2017 are allowed in terms of prayer clauses (B), (C) and (D).

7. The applicant to carry out necessary amendment to show respondent Nos. 1/1A to 1/1C as LR's of respondent No. 1/1 in the cause title of both the appeals within two weeks. Mr. Doke, learned counsel waives service of notice of appeal for respondent Nos. 1/1/A to 1/1/C. It appears that Mr. Doke, learned counsel has appeared for all other respondents in both the appeals.

8. Place both the appeals for admission on 11/02/2020.

[S. M. GAVHANE, J.]