

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

**WRIT PETITION NO.6506 OF 2019**

Yuvraj Badrinath Bombale,  
Age : 21 years, Occ: Education  
R/o. A.P. Pachalgaon, Tk. Paithan  
District Aurangabad

**PETITIONER**

**VERSUS**

Bappasaheb Sheshrao Bombale,  
Age : 30 yrs, Occ. Agriculture,  
R/o. As above (Original Deft. No.1)

**RESPONDENT**

...  
Advocate for Petitioner : Mr. A.B. Kadethankar  
Advocate for Respondent : Mr. V.H. Salonke

...  
**CORAM : MANGESH S. PATIL, J.**

**DATE : 10.12.2020**

**JUDGMENT :**

Leave is granted to delete the respondent Nos. 2 and 3.

2. Heard. Rule. The Rule is made returnable forthwith. With the consent of both the sides, the matter is heard finally at the stage of admission.

3. One Bhimrao Mahipati Bombale had filed a suit for partition and separate possession against the respondent herein. During pendency of the suit he died. His widow Sulabai was brought on record as his legal representative who prosecuted the suit further. The suit was decreed by the judgment and order dated 20.10.2016. The respondent challenged the judgment and decree before the District Court but since there was a delay, he preferred M.A.R.J.I. No.83/2017 for condonation of delay. While that

application was still pending Sulabai died. The petitioner claiming to be a legatee under a will executed by her preferred an application under Order XXII Rule 10 of the Code of Civil Procedure for his impleadment in the Appeal. By the impugned order his application is rejected by the learned District Judge. Hence this Writ Petition.

4. The learned advocate Mr. Kadethankar for the petitioner submits that since the petitioner is propounding a will of Sulabai and claiming a right in her place in the suit properties, the question as to if he becomes the legal representative is an issue which is determinable under Order XXII Rule 10 of the Code of Civil Procedure. However, by the impugned order his such request has been turned down merely on the ground that the delay was still to be condoned and the Appeal was still to be registered. The learned advocate would submit that an innocuous prayer based on a will being propounded by the petitioner is being turn down. There will not be any finality to the litigation in his absence. The petitioner is ready to establish the Will but for that purpose he will have to be added as a party to the Appeal. He therefore submits that the Writ Petition be allowed and the impugned order be quashed and set aside.

5. The learned advocate for the respondent submits that there is no error committed by the learned District Judge in rejecting the application of the petitioner.

6. I have carefully perused the impugned order and considered the rival submissions. Obviously, if the petitioner is propounding a Will of

Sulabai and claiming right in the properties through her based on the bequest, *prima facie* he would be a person to prosecute the matter in her place.

7. Even if it is only a matter of condonation of delay, in the absence of Sulabai who is dead there would be no one to defend that application. If this be so, the observations of the learned Judge in the impugned order are clearly arbitrary and capricious. He has merely rejected petitioner's request on the ground that the application for condonation of delay will have to be first decided. Obviously it cannot be decided in the absence of the sole plaintiff Sulabai.

8. Considering the peculiar fact situation of the matter in hand, the request of the petitioner to allow him to defend the Appeal in place of the Sulabai on the basis of the Will being propounded by him should have been easily accepted. Needless to state that the further course of the Suit would depend upon several other facts and circumstances.

9. The Writ Petition is allowed. The impugned order is quashed and set aside. The learned District Judge may now consider the request of the petitioner afresh and pass appropriate order in the light of Order XXII Rule 10 of the Code of Civil Procedure. The Rule is accordingly made absolute.

**(MANGESH S. PATIL, J.)**