

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

**CIVIL APPLICATION NO.7538 OF 2021  
IN SA/451/2017**

VITTHAL S/O ASHRUBA DAVKAR AND OTHERS  
VERSUS  
VASANT S/O ASHRUBA DAVKAR AND OTHERS

.....  
Advocate for Applicants : Mr. V. D. Salunke  
Advocate for Respondents No.1, 3A, 3B and 3D. : Mr. H. V. Tungar  
Advocate for Respondent No.3C : Mr. S. V. Natu,

.....  
**WITH**  
**SECOND APPEAL NO.451 OF 2017**  
**WITH**  
**CIVIL APPLICATION NO.3208 OF 2021 IN SA/451/2017**  
**WITH**  
**CIVIL APPLICATION NO.8447 OF 2017 IN SA/451/2017**  
.....

**CORAM : SMT.VIBHA KANKANWADI, J.**

**Date of Reserving the Order :  
07-10-2021**

**Date of Pronouncing the Order :  
07-12-2021**

**ORDER :**

1. Present application has been filed for bringing the legal representatives of deceased respondent No.3 on record and for setting aside the abatement and to condone the delay of 3657 in filing this application.
2. Present applicants are the original appellants. They contend that

respondent No.3/original plaintiff No.3 expired on 26-04-2011. He used to reside at Ashti whereas the appellants used to reside at Jalna. Original plaintiffs No.1 to 4 and defendant No.1 i.e. present applicant No.1 are the real brothers. It was the case of the plaintiffs that there was no partition in respect of the suit properties and, therefore, they had filed suit for partition. Death of plaintiff No.3/respondent No.3 was not intimated to the defendants as mandatorily prescribed under Order 22 Rule 10-A of the Code of Civil Procedure and no notice was given by the Court to the defendants/appellants. The said respondent No.3 had expired when the matter was before the First Appellate court itself. It is stated that the applicants had not stated that they had no knowledge of death of plaintiff No.3. Original defendant No.3 i.e. present appellant No.3 had given the said knowledge to the Advocate representing them before the First Appellate court, however, it was told to them that since all the real brothers are on record, who are also the legal representatives of plaintiff No.3, the Advocate told that the appeal will not abate. Under this circumstance, the name of plaintiff No.3's widow and sons could not be brought on record, and the appeal continued in the name of rest of the persons. It was then contended that for the first time in the second appeal, the point was

raised as on 06-04-2021 that the appeal has abated against respondent No.3 and, therefore, the entire appeal should be disposed of in toto as abates against all. Thereafter, the application has been filed to remove the technicalities. It is then stated that due to pandemic, it was difficult to get death certificate and some delay has been caused. The delay is unintentional, substantial questions of law are arising in the second appeal and, therefore, the application deserves to be allowed.

3. The application has been resisted by the respondents by filing affidavit-in-reply on behalf of respondent No.3A to 3D and it has been specifically stated that the applicants/appellants had every knowledge about death of respondent No.3. The applicants/appellants cannot take shelter that notice under Order 22 Rule 10-A of the Code of Civil Procedure has not been given. The real brother had the knowledge about death of plaintiff No.3. In fact the appeal before the District Court itself had resulted in abatement.

4. Heard learned Advocate Mr. V. D. Salunke for applicants/appellants, learned Advocate Mr. S. V. Natu for respondent No.3C, and learned Advocate Mr. H. V. Tungar for Respondents No.1, 3A, 3B and 3D.

5. It has been vehemently submitted on behalf of the applicants that since there was no compliance under Order 22 Rule 10-A of the Code of Civil Procedure, the action was not taken by the applicants before the First Appellate court. In fact, meaning of legal representatives as defined in *Section 2 (11) of the Code of Civil Procedure* is as under :-

*"Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."*

The other brothers are on record who can represent the assets of the deceased.

6. Per contra, it has been submitted on behalf of the respondents that Civil Application No.3208 of 2021 has been filed under Order 41 Rule 27 of the Code of Civil Procedure for allowing the applicants/appellants to produce documents by way of additional evidence and thereby the applicants intend to bring certain properties in to the hotch-pot. That application was filed on 01-03-

2021 wherein it was disclosed that the applicants came to know about death of respondent No.3/plaintiff No.3 in February 2021 when wife of respondent No.3/plaintiff No.3 gave an application for recording her name in the revenue record. In spite of the said fact, the present application came to be filed on 29-07-2021. There is absolutely no explanation as to why no action was taken from 01-03-2021 to 29-07-2021. It is hard to believe that the brother would not have come to know death of his real brother. In the application itself, the applicants have stated that original defendant No.3, who is the son of original defendant No.1, had given instructions to the Advocate that one of the respondents has expired, but then the Advocate expressed that since other brothers are on record, the appeal will not abate. Applicants cannot take advantage of any such wrong advice when they had the knowledge that the plaintiff No.3/respondent No.3 was survived by wife and sons. In fact, the applicants cannot take shelter of Order 22 Rule 10-A of the Code of Civil Procedure in view of the fact that that provision has been made to safeguard the interest of such appellants who will not be able to know the fact of death of the respondent. Under that circumstance, the duty is cast on the Advocate of the respondent to intimate it to the Court about the said fact, thereupon the Court would issue

notice to the appellant. In fact, the appeal itself was filed almost a dead person and, therefore, it should be dismissed as a whole.

7. The learned Advocate appearing for respondents No.3A to 3D as well as respondent No.1 relied on the decision in, *Budh Ram and Others vs. Bansi and Others*, reported in (2010) 11 Supreme Court Cases 476, wherein it has been held that :-

*"This depends upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not interdependent upon one or the other, nor the parties have conflicting interest inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject-matter in the same suit. Thus, whether the judgment/decreed passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test."*

In this case, it has been held that the abatement takes place automatically by application of law without any order of the Court.

Setting aside of abatement can be sought once the suit stands abated. The abatement results in denial to hearing of the case on merits and, therefore, it was further submitted that the First Appellate Court ought not to have gone ahead with the hearing of the appeal itself. As regards co-owners/joint ownership is concerned, it has been observed that :-

*"Every co-owner has a right to possession and enjoyment of each and every part of the property equal to that of other co-owners. In theory, every co-owner has an interest in every infinitesimal portion of the subject matter, each has a right irrespective of the quantity of its interest, to be in possession of every part and parcel of the property jointly with others. A co-owner of a property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place."*

Further reliance has been placed on the decision in, *Equbalbegum w/o Sk. Ahmed and others vs. Abdul Rahim Fateh Mohammad and others*, reported in 2009 (2) Mh.L.J., 547, wherein it has been held that :-

*"In a partition decree when there is appeal and there is death of one of the respondents, and in absence of bringing the legal representatives on record of that*

*respondent, the entire appeal would abate. Passing of the decree in favour of the appellants will be contradictory to the decree, which has become final with respect to the same subject matter between them and deceased."*

Further reliance has been placed on the decision in, *Shanti Devi and others vs. Kaushaliya Devi*, reported in (2016) 16 Supreme Court Cases 565, wherein it has been held that :-

*"When there is delay of more than 11 years in filing of application for condonation of delay, subsequent to death of plaintiff, it was held that delay cannot be condoned on insufficient grounds and by abusing process of law."*

8. At the outset, it is to be noted that the relationship between the parties is not denied. Original plaintiffs No.1 to 4 and defendant No.1 were the real brothers. Special Civil Suit No.81 of 2007 was filed by the plaintiffs before Civil Judge, Senior Division, Beed for partition and separate possession, and it came to be decreed on 24-03-2009. The said decree was challenged by the present appellants/applicants i.e. original defendants who are the father and sons *inter se* by filing Regular Civil Appeal No.86 of 2009. Learned District Judge-5, Beed

dismissed the appeal on 14-10-2016 and, therefore, the original defendants filed the second appeal challenging the said concurrent Judgment and decree. It is to be noted that though the second appeal was filed in the year 2017, it was not taken up for circulation till 17-02-2021.

9. Respondent No.3/plaintiff No.3 expired on 26-04-2011, that means when the matter was before the First Appellate court. The applicants are contending that since there was no compliance under Order 22 Rule 10-A of the Code of Civil Procedure, they had not filed any application for bringing the legal representatives of respondent No.3 on record. However, at the same time we cannot forget the contents of this application wherein the applicants themselves are contending that original defendant No.3 i.e. present applicant No.3 had intimated the said fact to his Advocate, but then it was said that all other real brothers of plaintiff No.3 are on record, and it is then stated that, they are also the legal representatives of plaintiff No.3. Thereupon, the learned Advocate representing them stated that the appeal will not abate. It can be seen that it appears that there was half hearted information that appears to have been

given by applicant No.3 or with some such knowledge, the statement has been made that the learned Advocate had advised that the appeal will not abate. In fact, the present application is not supported by the affidavit of the Advocate who had given such kind of advise, if at all the said statement in the application is to be believed. The fact remains that the applicants are not claiming ignorance of the fact that respondent No.3/plaintiff No.3 was married and he had children. It cannot be stated that other brothers would be the legal representatives in respect of the share of plaintiff No.3 in the suit property. The definition given in Section 2 (11) of the code of Civil Procedure cannot be interpreted in such a way. When plaintiff No.2 has his own right in the suit properties, as stated in *Budh Ram and Others (Supra)* and *Equbalbegum w/o Sk. Ahmed and others (Supra)*, the brothers cannot represent the estate of another brother. Here, it is to be noted that the applicants are very much harping upon compliance of Order 22 Rule 10-A of the Code of Civil procedure. But as aforesaid, it can be seen that the said amendment came to be inserted by Act of 01-04-1976 with effect from 01-02-77 with an obligation on the pleaders of the parties to communicate to the Court the death of party represented by him. It has a

limited scope and it does not give an excuse to the party to have the compliance of bringing the legal representatives on record when the party itself has knowledge of death of the rival party. Again at the cost of repetition it can be said that it is hard to believe that the real brother would not have come to know about death of his real brother, and as aforesaid, the applicants themselves are coming with a case that they had the knowledge about death of plaintiff No.3, still they had not taken any step when the matter was before the First Appellate Court. Further, when they filed First Appeal in 2017, they had every knowledge that respondent No.3 has expired, yet they filed the appeal against a dead person. They did not take the matter for circulation for about three years, and further it is to be noted that they filed Civil Application No.3208 of 2021 on 01-03-2021 for permitting them to adduce additional evidence with specific statements regarding death of respondent No.3/plaintiff No.3, yet for about four months, they had not taken steps to file this application. This shows sheer Negligence on the part of the applicants to take up the appropriate legal proceedings. By any stretch of imagination it cannot be said that there is reasonable much less sufficient ground to condone the delay of 3657 days.

Present case is not that of showing leniency for the aforesaid reasons and, therefore, definitely the observations in *Shanti Devi and Others (Supra)* that the delay cannot be condoned on insufficient grounds and by abusing process of law, will have to be applied to this case.

10. When sufficient ground has not been shown for condoning the delay and for setting aside the abatement, then definitely the ratio in *Budh Ram and Others (Supra)* as well as *Equbalbegum w/o Sk. Ahmed and Others (Supra)*, will have to be made applicable. So also the ratio in *State of Punjab vs. Nathu Ram, reported in AIR 1962 SC 89* and *Bibijan and Others vs. Murlidhar and Others, reported in 1995 (1) SCC 187*, are also required to be considered in view of the fact that what decree was passed against the appellants/applicants by the Trial Court was joint and indivisible, and in view of death of one of the plaintiffs and failure on the part of the applicants to bring his legal representatives on record within the period of limitation, this Court cannot proceed the decree had become final as against the respondent No.3/plaintiff No.3 when no steps were taken before the First Appellate court. In view of the same, the entire

second appeal stands abated in toto. Hence, following order is passed.

**ORDER**

- 1) Civil Application No.7538 of 2021 stands rejected, in consequence the Second Appeal No.451 of 2017 stands abated as whole.
- 2) Civil Applications No.3208 of 2021 and 8447 of 2017 stand disposed of.

**(SMT. VIBHA KANKANWADI)**  
**JUDGE**

*vjg/-*