

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

**916 CIVIL APPLICATION NO. 1055 OF 2019
IN SA/234/2000**

Kantabai Machindranath Hake

.. Applicant

Versus

Suryabhan Shripat Hake and Ors

.. Respondents

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Advocate for applicant : Mr. Kishor D. Khade
Advocate for respondent Nos.2 to 4 : Mr. S.R. Deshpande
Advocate for respondent no.5 : Mr. A.N. Patale

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CORAM : MANGESH S. PATIL, J.

DATE : 19-01-2022

PER COURT :

. This is an application for setting aside the order passed by the Registrar (Judicial) dated 08-12-2010 declaring that the appeal stands abated as against respondent no.1 Suryabhan and for bringing on record his legal representatives by condoning the delay of 1669 days.

2. I have heard the learned advocates of both the sides. The applicant / appellant asserting to have a share in the suit properties has filed this appeal against Suryabhan respondent no.1,

his wife Ankitabai respondent no.2 and their two sons namely Ashok and Dinkar, who are respondent nos.3 and 4.

3. Though now it is being declared that the appeal is abated on death of respondent no.1 Suryabhan, considering the nature of the dispute and cause being represented by all the respondents together, the cause of action does not abate as against rest of them who represent respondent no.1 Suryabhan. The appeal would abate only if the cause of action does not survive qua the surviving respondents, which is not the case in the matter in hand. Therefore, though Suryabhan and subsequently Ankitabai who are respondent nos.1 and 2 have died, since their two sons are already on the record in the form of respondent nos.3 and 4 the appeal cannot, in fact, abate.

4. Same is the case in respect of respondent no.4 namely Dinkar who is also stated to have subsequently died. Again, since the cause of action survives against the surviving respondent, namely Ashok, appeal would not abate.

5. If such is the state-of-affairs, when there is no question of any abatement of appeal because of death of some of the respondents

when Ashok is there since inception as respondent no.3, the order passed by the Registrar (Judicial) disposing of the appeal as abated against respondent no.1 Suryabhan is not sustainable. Therefore, the prayer for condoning the delay is superfluous.

6. The applicant now only seeks to demonstrate and bring on record the legal heirs of the surviving respondents. The respondent no.3 Ashok is already there and the legal heirs of respondent no.4 have also appeared / served.

7. So far as the dispute being raised regarding non-joinder of Alka who is stated to be the daughter of deceased respondents Suryabhan and Ankita and sister of respondents Ashok and Dinkar, again, when she is being represented by Ashok and heirs of Dinkar even if she is a legal heir her presence is not necessary for decision of the appeal. One need only to refer to the following judgments :

(i) **Perumon Bhagvathy Devaswom, Parinadu Village Vs. Bhargavi Amma (dead) by LRs and others; [2009 (2) Mh.L.J.] 1.**

(ii) **Nagpur Improvement Trust Vs. Sardar Mulkha Singh; [2011 (6) Mh.L.J.] 324.**

8. In view of above, the application deserves to be allowed and is accordingly allowed.

9. The necessary amendment to be carried out within two weeks in the appeal memo.

10. After such amendment, issue notice in the appeal to the legal heirs of respondent no.4.

(MANGESH S. PATIL)
JUDGE

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