

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO. 1346 OF 2023
IN
SECOND APPEAL NO. 84 OF 2023**

Sudhir Puroshottam Khodake ..Applicant.

v/s.

Sashikumar Vishnu Khodake (deceased) ..Respondents

Mr. Ajay Joshi i/b. Mr. Rahul More for the Appellant/Applicant.
Mr. Sandesh patil a/w. Mr. Surel Shah i/b. Raut Satish for the
Respondent No.11.
Mr. S.C.Mangale for the Respondent Nos. 12 to 16 and 19.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 30th OCTOBER, 2023 .**

P.C.

1. By this application, the applicant has sought to condone the delay of 10 years and 280 days, to set aside the abatement, and to bring on record the legal representatives of deceased Respondent No.2.

2. The applicant claims that the respondent no.1 had expired on 08.02.2011 i.e. during the pendency of the first appeal. The respondent no.1, who is the brother of the respondent no.2 had not reported the death of the respondent no.2. The applicant has further stated that his relationship with the respondent no.2 was strained and that he had no knowledge of the death of Respondent No.2. It is alleged that the delay

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was neither intentional, nor due to negligence on the part of the applicant. Based on these grounds, the applicant has sought to condone the delay and set aside the abatement and to allow him to bring on record the legal representatives of deceased Respondent No.2.

3. Heard learned Counsel for the applicant and the respondents. I have perused the records.

4. Order XXII Rule 4 of CPC stipulates that when no application is made within the prescribed time to bring on record the legal representatives of the deceased defendant, the suit shall abate as against the deceased defendant. It is well settled that the omission to implead the legal representatives would not lead to the abatement of the suit as a whole unless the decree is joint and indivisible. If the interests of the co-defendant are separate, as in the case of co-owners, the suit will abate only as regards the particular interest of the deceased party. Hence the question is whether allowing the appeal would lead to two inconsistent decrees.

5. The records reveal that the dispute is in respect of the property of Vishnu, who had a son by name Purshottam from his first wife. The respondent no.1, the deceased respondent no.2 and the respondent no.3 are the children of Vishnu from his second wife. The applicant and the

other legal representatives of Purshottam had filed a suit claiming right over the property on the basis of Will purportedly executed by Vishnu in favour of Purshottam, whereas, the respondent no.1 had claimed that the Will was not acted upon and the property was partitioned by a registered Deed of Partition. The dispute was essentially between the legal representatives of Purshottam and respondent no.1. The deceased respondent no.2 as well as the respondent no.3 had not filed the written statement, and had not contested the suit despite due service. The Trial Court rejected the contention of the applicant / plaintiffs that they are the exclusive owners of the property by virtue of the Will. The Trial Court held that the applicant /plaintiffs have half share to the property under CTS No.2363 and 2364. This judgment and decree was challenged by the applicant as well as the respondent no.1. The deceased respondent no.2 as well as the respondent no.3 did not raise any challenge to the said judgment. The Appellate Court has confirmed the findings that the property described in para 1 (A) of the plaint is in possession of respondent no.1 and his mother, and did not grant any relief to the applicant in respect of the said property. The Appellate Court has also confirmed the finding that the applicant and respondent no.1 have equal share in the property described in the plaint at para no.1(B). Both the courts below have not granted any relief in favour of the deceased respondent no.2 or respondent no.3. In such circumstances, the decree cannot be said to be indivisible and would not lead to abatement of the

appeal in its entirety.

6. Be that as it may, the records reveal that the respondent no.2 had expired during the pendency of the appeal and no steps were taken before the First Appellate Court to bring on record the legal representatives of the deceased respondent no.2. The applicant has stated that he was not aware of the death of the deceased respondent no.2 and that the respondent no.1 who is the brother of the deceased respondent no.2 had not reported the death of the respondent no.2. This statement has gone unchallenged, and hence there is no reason to disbelieve or discard the same. Moreover, the respondent nos.11 to 19 have given no objection to condone the delay, to set aside the abatement, and to bring on record the legal representatives of deceased respondent no.2. Hence sufficient cause is made out to condone the delay and set aside the abatement.

7. Under the circumstances, the application is allowed in terms of prayer clauses (a), (b) and (c).

8. Appeal be listed for admission on 8.11.2023. Ad-interim relief to continue till then.

(ANUJA PRABHUDESSAI, J.)