IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11018 OF 2026

Evershine Builders Private Limited,
a private limited company incorporated
under the provisions of Companies Act, 1956
and having office at 215, Veena-Beena, Shopping
Centre, Opp Bandra Station, Bandra (W),
Mumbai 400 050. ...Petitioner

Versus

Hiren Jaswant Rajani,
Adult, Indian Inhabitant,
aged 69 years, residing at
Narlibaug, Killa Road, Vasai Road,
Vasai Gaon, Vasai (W), Taluka Vasai,
Dist: Palghar …Respondent

Mr. Karl Tamboly, with Karan Bhide, Nitesh Ranavat (V.C.), Vedant Joshi (V.C.) and Dhanashree, i/b Wadia Ghandy & Co, for the Petitioner.

Ms. Aafreen S Shaikh, i/b Krupali H Rajani, for the Respondent.

ARUN RAMCHANDRA SANKPAL

Digitally signed by ARUN RAMCHANDRA SANKPAL
Date: 2026.11.18 20:31:02 +0530

CORAM : N. J. JAMADAR, J.
RESERVED ON : 6th OCTOBER 2026
PRONOUNCED ON : 18th NOVEMBER 2026

JUDGMENT:

1. Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

2. This Petition under Article 227 of the Constitution of India calls in question, the legality, propriety and correctness of an order dated 23rd April 2026, passed by the learned Civil Judge, Senior Division, Vasai, in SCS No. 11 of 2010 whereby the following additional issue has been framed:

> "Whether the entire suit would abate as a whole in view of abatement of the suit against the some of the defendants on the ground that, the legal heirs and representatives of deceased defendants are not brought on record?"

3. Shorn of superfluities, the background facts can be stated as under:

3.1 The petitioner-plaintiff instituted a suit for specific performance of a contract to sell immovable properties bearing Survey No. 55A (part), Survey No. 26 Hissa No. 1A, Survey No. 25 and Survey No. 58 Hissa No. A/1, admeasuring 47356.87 sq mtrs at village Malonde, Taluka Vasai, District Thane ("the suit properties"). The plaintiff asserted that, late Lalitaben Chabildas Rajani, the predecessor-in-title of the defendants, was the holder of the suit properties. Post negotiation, the predecessor-in-title of original defendant Nos. 1 to 9 and the plaintiff entered into a Memorandum of Understanding on 1st June 1996, whereby and whereunder the predecessor-in-title of original defendant Nos. 1 to 9 agreed to sell the suit properties on the terms and conditions incorporated thereunder, for a consideration to be computed

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

@ Rs.75,000/- per guntha. The plaintiff claimed to have paid a sum of Rs.24,21,000/- by way of earnest/part consideration.

3.2 The plaintiff further asserted that on 26th August 1997, late Lalitaben alongwith original defendant Nos. 1, 2, 4, 5 and Mrs. Sudhaben, wife of defendant No.3/1 and mother of defendant Nos. 3/2, and late Jaswant Rajani, the father of defendant No. 6 to 9, executed an Agreement for Sale in favour of the plaintiff. Under the said Agreement for sale, the plaintiff claimed to have parted with further consideration of Rs.24,21,000/-. Alleging refusal of performance of the contract contained in the aforesaid MoU dated 1st June 1996 and the Agreement for Sale dated 26th August 1997, the plaintiff instituted the suit for specific performance of the said contract.

3.3 On 30th April 2012, the Consent Terms were purportedly executed between the petitioner and original defendant Nos. 1 to 5 and 7 to 9 and thus the dispute, according to the plaintiff, was settled qua defendant Nos. 1 to 5 and 7 to 9.

3.4 In accordance with the Consent Terms, the plaintiff asserts, the original defendant Nos 1 to 5 and 7 to 9 executed three separate Deeds of Conveyance dated 31st December 2011, 31st December 2011 and 25th July 2012, respectively, in respect of the said defendants' 23/24th undivided share out of the suit properties in favour of the plaintiff and Green Court Associates.

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

3.5 The dispute, according to the plaintiff, thus survived qua original defendant No.6-the respondent herein.

3.6 In the intervening period the original defendant No.2 passed away on 6th February 2015. The legal representatives of the deceased-defendant No.2 were not brought on record during the stipulated period.

3.7 In the wake of the aforesaid development, it appears that three applications, came to be filed. First, an application for dismissal of the suit as abated (Exhibit "126") preferred by defendant No.6; second, an application to bring the legal representatives of the deceased defendant No.2 on record (Exhibit "130") and third, an application for an amendment in the plaint to delete the defendant Nos. 1 to 5 and 7 to 9, and prosecute the suit qua defendant No. 6 only by incorporating the necessary amendment in the plaint (Exhibit "136").

3.8 By an order dated 14th July 2022, the application for dismissal of the suit as having been abated (Exhibit "126") was rejected by the learned Civil Judge. After adverting to the settlement arrived at between the parties and the execution of the Consent Terms and the Conveyance Deed by the deceased-defendant No.2 on 25th July 2012, during his lifetime by deceased defendant No.2, the learned Civil Judge observed that when the deceased-defendant No.2 had performed his part of the contract, during the lifetime, nothing remained to be

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

answered by the legal representatives of the deceased-defendant No.2 and, therefore, the suit could not be dismissed as having abated despite the non-impleadment of the legal representatives of the deceased-defendant No.2, within the stipulated period.

3.9 The application for amendment preferred by the plaintiff (Exhibit "136") was allowed by the learned Civil Judge, observing that the amendment was necessary on account of the subsequent events that occurred during the pendency of the suit; the plaintiff had no claim against defendant Nos. 1 to 5 and 7 to 9 and the surviving lis was only between the plaintiff and defendant No. 6. It was noted that defendant No.6 also instituted a suit, being RCS No. 597 of 2018, against the plaintiff alone for the partition of the suit properties. It would be necessary to immediately notice that the said order was not assailed by defendant No.6. Accordingly, necessary amendment in the plaint has been carried out to confine the suit to the extent of the share of defendant No.6.

3.10 The second application preferred by the plaintiff to bring the legal representatives of deceased-defendant No.2 on record, was also rejected by the trial Court opining that, the plaintiff had filed an application seeking an amendment in the plaint so as to delete the original defendant Nos. 1 to 5 and 7 to 9 and restrict the claim to the share of defendant No. 6 only, and that defendant No. 2 had passed away after

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

the execution of the Conveyance Deed in favour of the plaintiff. No purpose would be served in bringing the legal representatives of deceased-defendant No.2 on record.

3.11 Defendant No. 6 challenged the order dated 14th July 2022, whereby the application preferred by him for the dismissal of the suit as abated came to be rejected, in revision before this Court.

3.12 By an order dated 26th November 2025 passed in Civil Revision Application No. 619 of 2022, the said revision application, came to be dismissed as withdrawn with liberty to file an application before the trial Court for framing an additional issues as to whether the entire suit would abate as a whole in view of the abatement of the suit against some of the defendants on the ground that the legal representatives of the deceased-defendant were not brought on record.

3.13 In the intervening period, original defendant No.1 passed away on 3rd March 2022. The legal representatives of deceased-Defendant No.1 were also not brought on record within the stipulated period of limitation.

3.14 Availing the aforesaid liberty, defendant No. 6 preferred the instant application (Exhibit 302) seeking framing of an additional issue about the abatement of the suit as a whole. The substance of the contention of defendant No. 6 was that the alleged MoU dated 1st June 1996 and Agreement for Sale dated 26th August 1997 were executed by

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

the owners as a single, independent and indivisible transaction in respect of a single composite and undivided parcel of land and, thus, the cause of action was one and indivisible. Therefore, as the suit abated against defendant Nos. 1 and 2, on account of the failure to bring their legal representatives within the stipulated period, the suit abated as a whole, as it could not proceed against the surviving defendants in the absence of the legal representatives of defendant Nos. 1 and 2.

3.15 The plaintiff resisted the application.

3.16 By the impugned order, the learned Civil Judge, was persuaded to allow the application and frame the additional issue (extracted above). The learned Civil Judge was of the view that in the backdrop of the nature of the suit and the transactions that had taken place between the parties, the additional issue was required to be framed in the interest of justice and to decide the real controversy between the parties.

3.17 Being aggrieved, the plaintiff has preferred this petition.

3.18 An affidavit in reply has been filed on behalf of the respondent-now the sole defendant, supporting the impugned order.

4. I have heard Mr. Karl Tamboly, the learned Counsel for the petitioner, and Ms. Aafreen Shaikh, the learned Counsel for the respondent, at some length. With the assistance of the learned Counsel

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

for the parties, I have perused the pleadings, the documents and the orders that have been passed.

5. Mr. Karl Tamboly, the learned Counsel for the petitioner, submitted that the impugned order is in teeth of the fundamental principles which govern the framing of issues. The question as to whether the suit would abate as a whole does not necessarily arise out of the pleadings, as even after the amendment in the plaint the sole defendant has not raised a contention by way of an additional written statement that the suit stood abated as a whole.

6. An issue cannot be framed on the basis of vague statements. To buttress this submission, Mr. Tamboly, placed reliance on the judgments of the Supreme Court in the cases of **Sita Ram Vs Radhabai And Ors,**[1] **D. M. Deshpande and Ors Vs Janardhan Kashinath Kadam (Dead) by Lrs and Ors,**[2] a decision of the learned Single Judge of this Court in **Ramu Shivappa Agalgave and Ors Vs Iaman Kashim Pathan and Ors**[3] and a decision of the Karnataka High Court in **Nagarathnamma W/o Late M Ramaswamy And Daughter in law of Chikkalamma (URUF) Muniyamma and Ors Vs Gorappa Alias Munivenkatappa S/o Late Kundali Muniyapa and Ors.**[4]

---

1 1967 SCC OnLine SC 27.

2 (1998) 8 SCC 315.

3 1992 SCC OnLine Bom 1.

4 Writ Petition No. 47224 of 2016 (GM-CPC), decided on 13th March 2023.

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

7. Secondly, Mr. Tamboly would urge that, in the facts of the case at hand, there was no question of abatement of the suit even qua defendant Nos. 1 and 2, much less in its entirety. With the execution of the Consent Terms and Conveyances by the rest of the defendants, including deceased defendant Nos. 1 and 2, there was no subsisting cause of action qua those defendants, and, therefore, by no stretch of imagination could it be said that the right to sue survived against the legal representative of those defendants. At any rate, Mr. Tamboly would urge, the plaint came to be amended so as to confine the same to the subsisting lis between the plaintiff and the sole defendant only. The order passed by the trial Court permitting the amendment in the plaint has attained finality. In this view of the matter, there was absolutely no occasion or propriety in framing the issue of abatement of the suit as a whole for the purported non-impleadment of the legal representatives of the deceased defendant Nos. 1 and 2.

8. Mr. Tamboly made a strenuous effort to drive home the point that the order passed by this Court permitting withdrawal of the civil revision application with liberty to file an application to frame an additional issue could not have been construed as a permission to frame the additional issue. The trial Court was enjoined to judiciously examine whether the aforesaid issue really arose for consideration. As the trial

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

Court has failed to exercise the jurisdiction in consonance with the law, the impugned order deserves to be quashed and set aside.

9. Ms. Aafreen Shaikh, the learned Counsel for the respondent, stoutly countered the submissions canvassed on behalf of the petitioner. At the outset it was submitted that this Court in exercise of its limited supervisory jurisdiction need not interfere with a procedural order. By no standard can it be said that, the impugned order is perverse or suffers from the vice of patent illegality. In the absence of an apparent error of law which impairs justice, this Court may not exercise the writ jurisdiction, submitted Ms Shaikh.

10. Secondly, Ms. Shaikh urged with tenacity that the aforesaid additional issue is indispensable to effectively and completely adjudicate the suit. It was urged that, when admittedly interest of the original defendants in the suit properties agreed to be sold was joint, indivisible and undivided, the suit for specific performance cannot proceed against a few of the co-owners, in the absence of the legal representatives of the deceased-co-owners. An endeavour was made to demonstrate that the cause of action was single and indivisible and, thus, the contract cannot be enforced piecemeal or split up against the individual co-owners. Resultantly, the failure to implead the legal representatives of the deceased defendants, entails the consequence of

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

the abatement of the suit as a whole *de hors* the amendment in the plaint.

11. To buttress these submissions, Ms Shaikh placed very strong reliance on the judgments of the Supreme Court in the cases of **State of Punjab Vs Nathu Ram,**[5] **Sri Chand and Ors Vs M/s Jagdish Pershad Kishan Chand and Ors**[6] and **Union of India Vs Shree Ram Bohra and Ors.**[7]

12. Ms. Shaikh further submitted that it cannot be said that the lis between the plaintiff and the deleted defendant Nos. 1 to 5 and 7 to 9 has come to an end. The legality and validity of the purported Deeds of Conveyance in favour of the plaintiff has been put in jeopardy by few of those defendants by instituting suits and proceedings. Therefore, the plaintiff cannot draw any mileage from the said fact.

13. I have given anxious consideration to the submissions canvassed across the bar. Before adverting to the aforesaid submissions, it is necessary to keep in view the position of the suit as it obtains today. In view of the order passed by the learned Civil Judge on the application for amendment (Exhibit "136") on 31st January 2023, original defendant Nos. 1 to 5 and 7 to 9 stand deleted and the suit is confined to the share of the sole defendant (original defendant No.6) in the suit

---

5 AIR 1962 SC 89.

6 AIR 1966 SC 1427.

7 AIR 1965 SC 1531.

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

properties. Thus, only the petitioner and the respondent are the parties to the suit. It is also not much in dispute that defendant Nos. 1 to 5 and 7 to 9 have executed the Deeds of Conveyance in respect of their aggregate 23/24th share in the suit properties on 31st December 2011 and 25th July 2012.

14. It would be contextually relevant to note that even if subsequently disputes have arisen between the plaintiff and defendant Nos.1 to 5 and 7 to 9 and the legality and validity of those Conveyances is put in contest, that is of no relevance for the purpose of the determination of the controversy at hand. It is also necessary to note that defendant Nos. 1 and 2 passed away after the execution of those Conveyances. Indubitably, no effort was made to bring the legal representatives of defendant No.1 who passed away on 3rd March 2022 on record, whereas the application (Exhibit "130") filed by the plaintiff to bring the legal representatives of deceased defendant No.2, albeit belatedly and under protest, came to be rejected by an order dated 31st January 2023.

15. In the backdrop of the aforesaid facts, the justifiability of the order framing the aforeextracted additional issue deserves to be examined.

16. To explore an answer, it is necessary to appreciate whether in the facts of the case at hand, the suit would abate qua defendant Nos. 1 and

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

2 and, if yes, whether it would also abate as a whole, *prima facie.* Evidently, the position would be governed by the provisions contained in Order XXII Rule 4(1) of the Code of Civil Procedure, 1908 ("the Code"). It provides that where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Sub-Rule (3) of Order XXII of the Code provides that where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

17. Thus, ordinarily, if no application is made to bring the legal representative of one of the defendants, who has passed away, the suit abates primarily as against the deceased-defendant, and that it does not abate necessarily as a whole. However, if the suit is of such a nature that no relief can be granted against the surviving defendant in the absence of the legal representatives of the deceased co-defendant, the failure to bring the legal representatives within the stipulated period of limitation may entail the consequence of the dismissal of the suit as a whole.

18. The crucial words in Sub-Rule (1) of Rule 4 are, "where …. the right to sue does not survive against the surviving defendant or

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

defendants alone". These words necessitate an inquiry as to whether the right to sue survives and, if yes, against whom. The general principle of law is that all rights of action and all demands whatsoever existing in favour of or against a person at the time of his death survive to or against his legal representative. (**Sri Krishna Singh Vs Mathura Ahir).**[8]

19. In the context of the controversy at hand, the first question that warrants consideration is whether the right to sue survived against the legal representatives of deceased defendant Nos. 1 and 2.

20. The provisions contained in Section 306 of the Indian Succession Act, 1925, provide a legitimate answer. It reads as under:

> "**306 Demands and rights of action of or against deceased survive to and against executor or administrator.—**
>
> All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, 1860 (45 of 1860) or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

21. A plain reading of the aforesaid section would indicate that all demands and rights existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators;

8 1981 (3) SCC 689.

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

except in cases of personal actions. Thus for the survival of the demands and rights to and against the executors and legal representatives, the primary condition is that, those demands and rights must exist in favour of or against the person at the time of his demise. The right to sue, therefore, cannot survive in the abstract. In a case where there were no surviving demands and rights to prosecute or defend any action in favour of or against a deceased-party, on the date of his demise, nothing survives to and against the legal representatives. Thus the expression, "where …. the right to sue does not survive against the surviving defendant or defendants alone" assumes critical salience. To put it in other words, if the right to sue does not survive against the legal representative of the deceased-defendant, the provisions contained in Rule (4) of Order XXII would not be attracted.

22. Since the instant case arose out of a contractual obligation, reference to the provisions contained in Section 37 of the Indian Contract Act may also become relevant. The second part of Section 37 provides that, promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

23. In the case at hand, the plaintiff asserts that in view of the settlement arrived at between the parties, defendant Nos. 1 and 2 had executed Deeds of Conveyance in respect of their respective shares

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

in the suit properties, and thereby performed their part of the contract in that manner. The plaintiff has amended the plaint to incorporate all those subsequent developments and confined the suit to the share of the sole defendant.

24. In the aforesaid view of the matter, in the considered view of this Court, right to sue did not survive against the legal representative of deceased defendant Nos. 1 and 2 and, thus, there was no question of the abatement of the suit qua those defendant Nos.1 and 2.

25. Ms. Shaikh would urge that, notwithstanding the amendment in the plaint consequent to the execution of the Deeds of Conveyances by the erstwhile co-defendant Nos. 1 to 5 and 7 to 9, the failure to bring the legal representatives of the deceased defendant nos. 1 and 2 entails the dismissal of the suit as a whole as it cannot proceed against the sole defendant.

26. On first principles, since it appears that the suit would not abate qua deceased defendant Nos. 1 and 2, the edifice of the submission that the suit would abate as a whole, for the reason of abatement qua defendant Nos. 1 and 2, gets dismantled. It is true that in a given case if the right to sue does not survive against the surviving defendants alone and the suit is of such a nature that no effective decree can be passed against the surviving defendant alone, the suit may abate as a whole.

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

However, in a case of the present nature the aforesaid principle may not be attracted.

27. Neither there is prohibition in law to enter into a Agreement for Sale of an undivided interest in the property, nor the Court is precluded from passing a decree for specific performance of the contract, leaving the purchaser to work out his remedies to seek partition of the undivided share so purchased. Undoubtedly, it would be in the discretion of the Court whether to pass a decree for specific performance of the contract or not.

28. The decision in the case of **State of Punjab (Supra),** on which reliance was placed by Ms. Shaikh, considered the aspect as to whether the appeal abates as a whole when the appeal abates against one of the respondents. In the said case, the Supreme Court clarified that when Order XXII Rule 4 does not provide for the abatement of the appeals against the co-respondents of the deceased respondent, there can be no question of abatement of the appeals against them. To say that, the appeals against them abated in certain circumstances, is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore to be dismissed. Such a result depends on the nature of the relief sought in the appeal. The observations of the Supreme Court in paragraphs 6, 7 and 8 read as under:

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

"6. The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (s) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.

7. There has been no divergence between the Courts about the Court's proceeding with the appeal between the respondents other than the deceased respondent, when the decree in appeal was not a joint decree in favour of all the respondents. The abatement of the appeal against the deceased respondent, in such a case, would make the decree in his favour alone final, and this can, in no circumstances, have a repercussion, on the decision of the controversy between the appellant and the other

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

decree- holders or on the execution of the ultimate decree between them.

8. The difficulty arises always when there is a joint decree. Here again, the consensus of opinion is that if the decree is joint and indivisible, the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent. Different views exist in the case of joint decrees in favour of respondents whose rights in the subject matter of the decree are specified. One view is that in such cases, the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents can be suitably dealt with by the appellate Court. We do not consider this view correct. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the capacity of the joint decree- holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour. The abatement of an appeal means not only that the decree between the appellant, and the deceased respondent has become final, but also, as a necessary corollary, that the appellate Court cannot, in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondents, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken."

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

29. In the case of **Ram Sarup and Ors Vs Munshi and Ors**[9] a Constitution Bench of the Supreme Court enunciated that where a decree is a joint and part of the decree has become final, by reason of abatement, the entire appeal must be held to be abated.

30. The same principle was reiterated in **Sri Chand and Ors (Supra)**. It was enunciated that, an appellate Court has no power to proceed with an appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under Order XLI Rule 4 when the decree proceeds on a ground common to all the plaintiffs or defendants, if all the plaintiffs or the defendants appeal from the decree and any of them dies and the appeal abates so far as he is concerned.

31. In the case of **Shahazada Bi And Ors Vs Halimabi (Since dead) by her Lrs,**[10] on which reliance was placed by Mr. Tamboly, again in the context of the abatement of an appeal as a whole on account of abatement of an appeal against one of the co-respondents, the Supreme Court enunciated that, the test often adopted in such cases was whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same suit with respect to the same subject matter.

32. The aforesaid pronouncements were rendered in a completely different fact-situation. A case of abatement of an appeal as a whole on

---

9 AIR 1963 SC 553.

10 (2004) 7 SCC 354.

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

account of abatement of appeal against one of the parties thereto where the adjudication of the appeal is fraught with the risk of conflicting decrees, stands on a completely different footing than a suit where a co-defendant enters into a settlement with the plaintiff and stands deleted from the array of the defendants. The indivisibility of the initial cause of action, does not preclude the Court from proceeding with the suit to the extent the lis subsists with the surviving defendant. The Court may or may not pass a decree in favour of the plaintiff. However, the question of abatement of the suit as a whole may not arise if there was no abatement in the first place against the co-defendants and the right to sue did not survive against the legal representatives of the deceased co-defendant.

33. This Court was required to delve into the aforesaid aspect rather elaborately for the reason that, this Court has passed a series of orders stipulating a time-frame for the disposal of the suit. The framing of the aforesaid additional issue would further unnecessarily expand the scope of adjudication and warrant consideration of matters which are not germane for the determination of the pivotal issue as to whether the plaintiff is entitled to a decree for specific performance of the contract qua the share of the sole defendant. At any rate, it must be noted that the trial Court has also framed the issue of maintainability of the suit in the present form.

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10

34. The upshot of the aforesaid consideration is that, the impugned order of framing the afore-extracted additional issue cannot be sustained. Hence, the petition deserves to be allowed.

35. Hence, the following order:

: O R D E R :

(i) Petition stands allowed.

(ii) Impugned order dated 23rd April 2026 stands quashed and set aside.

(iii) The afore-extracted additional issue stands deleted.

(iv) The trial Court is requested to hear and decide the suit as expeditiously as possible in conformity with the directions already issued by this Court.

(v) Rule made absolute to the aforesaid extent.

No costs.

[N. J. JAMADAR, J.]

Uploaded on - 18/11/2026 Downloaded on - 19/11/2026 23:23:10