2025 INSC 873

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS..... OF 2025
(Arising out of SLP (C) Nos.15900-15902/2022)

SURESH CHANDRA (DECEASED) THR. LRS. & ORS.

...APPELLANT (S)

VERSUS

PARASRAM & ORS. **...RESPONDENT (S)**

J U D G M E N T

MANOJ MISRA, J.

1. Leave granted.

2. These appeals arise from Civil Suit No.13 of 1983 (renumbered 16A of 1997), which was dismissed by the trial court and decreed by the first appellate court. On second appeal[1] before the High Court[2], by the impugned order dated 21.02.2022, the appeal of the appellant(s) herein was declared to have abated due to non-substitution of the legal

[1] Second Appeal No.446 of 2001
[2] The High Court of Madhya Pradesh at Gwalior

representatives (for short LRs) of Ram Babu (i.e., appellant no.2 in the second appeal) within time. By the second impugned order dated 04.08.2022, the High Court rejected the applications[3] preferred for condonation of delay in applying to set aside abatement and for substitution of the LRs of deceased Ram Babu.

FACTS:

3. The facts relevant for deciding the present appeal are as follows:

(i) Suit No.13 of 1983 (renumbered as 16A of 1997) was instituted against Suresh Chandra (predecessor-in-interest of the appellants herein) and Ram Babu by the respondent seeking declaration, recovery of possession, mesne profits in respect of a house.

(ii) Plaintiff claimed exclusive title over the suit property through its ancestor Tej Singh and pleaded that the defendants were his tenant.

(iii) Defendants i.e., Suresh Chandra and Ram Babu, filed a joint written statement in the suit.

[3] MCC No.697 and MCC No.700 of 2022

(iv) Suresh Chandra died during the suit proceeding, his LRs, namely, the appellants, also filed their written statements.

(v) In the written statement, while denying the alleged tenancy, the defendants claimed title over the suit property through their ancestor late Gokul Prasad who, according to them, had derived exclusive interest in the suit property through a partition with his brothers in the year 1947.

(vi) The trial court dismissed the suit against which an appeal was preferred by the plaintiff.

(vii) The first appellate court decreed the suit of the plaintiff against which the LRs of Suresh Chandra and Ram Babu filed the second appeal.

(viii) During the pendency of the second appeal, appellant no.2 (Ram Babu) died on 19.08.2015. Information of his death was given to the Court on 04.04.2016. However, his LRs were not brought on record within time.

(ix) The High Court vide first impugned order dated 21.02.2022 declared the appeal to have abated.

(x) To set aside abatement and to substitute the LRs of Ram Babu two set of applications were filed along with delay condonation applications. One set, namely, MCC No.700 of 2022 was filed by the appellants (i.e., LRs of Suresh Chandra, who were already on record) and the other set, namely, MCC No.697 of 2022 was filed by LRs of Ram Babu. Both were rejected by second impugned order dated 04.08.2022.

4. Aggrieved by the aforesaid orders, the appellants are before us.

5. We have heard Shri Jayant Mehta, learned Senior Counsel for the appellants; Shri N.K. Mody, learned Senior Counsel for the contesting respondent; and have perused the record.

APPELLANTS' SUBMISSIONS

6. The learned counsel for the appellants submitted that, on non-substitution of legal heirs of a dead co-appellant, to determine whether the appeal abated partially, or wholly, what needs to be examined first is whether the surviving appellant has an independent right to pursue the appeal. If yes, whether he could seek for reversal of the entire decree under appeal. If not, then whether the decree in

favour of the surviving appellant would result in a decree contradictory or conflicting with the one *qua* the deceased party. According to him, the appellants' (L.Rs of Suresh Chandra's) right was independent of the deceased appellant (Ram Babu) and as under Order XLI Rule 4[4] of the Civil Procedure Code, 1908[5] one of the defendants can seek reversal of the whole decree, when the decree is based on ground common to all, there could be no abatement of the appeal. In the alternative, it was submitted that abatement can always be set aside when substitution of LRs is applied for by showing sufficient cause for the delay. It was contended that the appellants as well as LRs of deceased Ram Babu applied for substitution by showing sufficient cause for the delay, therefore, the High Court ought to have set aside the abatement and proceeded to decide the appeal on merit. Certain decisions[6] were cited by appellants' counsel which shall be dealt with, if considered necessary.

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[4] **Order XLI Rule 4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.—**Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

[5] CPC

[6] **Decisions cited by the appellant**: (i) Delhi Development Authority v. Diwan Chand Anand, (2022) 10 SCC 428; (ii) Sakharam v. Kishanrao, 2022 SCC OnLine SC 2035; (iii) Gurnam Singh v. Gurbachan Kaur, (2017) 13 SCC 414; and (iv) State of Punjab v. Shamlal Murari, (1976) 1 SCC 719; (v) Baij Nath v. Ram Bharose, AIR 1953 All 565 =1953 SCC OnLine All 43.

RESPONDENT'S SUBMISSIONS

7. Per contra, the learned counsel for the contesting respondent submitted, firstly, the heirs of Ram Babu have neither filed Special Leave Petition nor have joined as petitioners, though impleaded as proforma- respondents, therefore the order rejecting their substitution application cannot be questioned. Secondly, the decree against the defendants was joint and indivisible, therefore, if the decree stands against Ram Babu, a decree in favour of Suresh Chandra (through LRs) would result in a conflicting decree. Further, the provisions of Order XLI Rule 4 do not exclude the applicability of Order XXII Rule 3. Thus, once all defendants join to file an appeal, death of one of the appellants would necessitate a substitution, if the right to sue does not survive on the surviving appellants alone. Therefore, Order XLI Rule 4 would not come to the rescue of the appellants. Hence, the whole appeal abated. To buttress his submissions learned counsel for the contesting

respondent cited certain decisions[7] which we shall deal with, if considered necessary.

ISSUES

8. Based on the rival submissions, following issues fall for our consideration:

(a) Whether the order rejecting application(s) seeking condonation of delay for setting aside abatement and substitution of legal representatives of deceased-appellant Ram Babu suffers from any legal infirmity?

(b) If the answer to (a) is in the negative, whether the second appeal abated wholly or partially, or not at all, on account of non-substitution of LRs of deceased defendant-appellant no.2 (i.e., Ram Babu)?

ANALYSIS

Issue (a)

9. Issue (a) arises for our consideration because the High Court rejected two set of applications. One filed by LRs of Ram Babu and the other filed by LRs of Suresh Chandra (i.e.,

[7] **Decisions cited by contesting respondent's counsel:** (i) Baij Nath v. Ram Bharose, AIR 1953 Allahabad 565 = 1953 SCC OnLine All 43; (ii) State of Punjab v. Nathu Ram, AIR 1962 SC 89 = 1961 SCC OnLine SC 137; (iii) Ram Sarup v. Munshi, AIR 1963 SC 553 = 1962 SCC OnLine SC 168; (iv) Pandit Shri Chand and others v. Jagdish Parshad Kishan Chand and others, AIR 1966 SC 1427 = 1966 SCC OnLine SC 206; (v) Badni v. Shri Chand, AIR 1999 SC 107; (vi) Hemareddi (dead) through Legal Representatives v. Ramchandra Yallappa Hosmani, (2019) 6 SCC 756; Delhi Development Authority v. Divan Chand Anand & Ors. (supra); Ashok Transport Agency v. Awadesh Kumar & Ors., (1999) SCC 567; Gurnam Singh v. Gurbachan Kaur (supra); Amba Bai v. Gopal, (2001) 5 SCC 570; and Venigalla Koteswarmma v. Madampati Suryamba, (2021) 4 SCC 246.

the surviving appellants of the second appeal) who were already impleaded. Both were filed after the High Court had declared the appeal to have abated for non-substitution of LRs of Ram Babu. No doubt, the Court has power to condone the delay in filing an application for setting aside abatement as well as for substitution and can set aside the abatement in exercise of its power under Order XXII Rule 9[8] of CPC. But before condoning the delay the Court must consider whether sufficient cause has been shown for condonation.

10. In the instant case, death of Ram Babu took place on 19.08.2015; 90 days period of limitation to move an application for substitution[9], and 60 days limitation period to set aside abatement[10], expired in the month of January 2016 itself. Importantly, through IA No.1621 of 2016 filed by the respondent, the Court was informed about the death of Ram Babu in 2016 itself, yet no application was moved till

[8] **Order XXII Rule 9. Effect of abatement or dismissal. –** (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.
(3) The provisions of Section 5 of the Indian limitation Act, 1877 (15 of 1877), shall apply to applications under sub-rule (2).
Explanation. -- Nothing in this rule shall be construed as barring, in any later suit, a defense based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.
[9] Article 120 of the Schedule to The Limitation Act, 1963
[10] Article 121 of the Schedule to The Limitation Act, 1963

2022. In fact, the applications were filed after the appeal was declared to have abated. Besides that, the surviving appellant(s) and the deceased appellant were close relatives, therefore, it cannot be believed that they were not aware of the death of co-appellant Ram Babu. In these circumstances, if the High Court found there was no sufficient cause to condone the delay, no fault can be found with its order as to justify our interference under Article 136 of the Constitution. Issue (a) is decided accordingly.

Issue (b)

11. Now the question arises whether the second appeal abated wholly or partially on death of sthe deceased appellant.

GENERAL PRINCIPLES RELATING TO ABATEMENT OF AN APPEAL

12. Before we set out to address the aforesaid issue, an overview of the provisions governing abatement of an appeal under the CPC would be apposite. Order XXII Rule 1[11] of the CPC lays down the general principle that if the right to sue survives, the suit shall not abate on death of either the

[11] **Order XXII Rule 1 – No abatement by party's death if right to sue survives. -** The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

plaintiff or the defendant. Order XXII Rule 11[12] makes it clear that all previous rules i.e., rules 1 to 10 of Order XXII would apply to appeals and for that purpose reference to the word 'plaintiff' would include an appellant; 'defendant' would include a respondent; and suit would include an appeal. As a logical corollary thereof, the right to sue includes the 'right to appeal'. Rule 2[13] of Order XXII deals with a situation where one of the plaintiffs or defendants to a suit dies and the right to sue survives to the surviving plaintiff(s) or defendant(s). In a situation governed by Rule 2, the suit does not abate; only a note is to be put that the right to sue survives to the surviving plaintiff(s) or defendant(s). Order XXII Rule 3[14] deals with a situation where one of two or more plaintiffs dies and the right to sue survives, though not to the surviving plaintiff(s) alone, or where the sole plaintiff dies

[12] **Order XXII Rule 11 – Application of Order to appeals. –** In the application of this Order to appeals so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal.

[13] **Order XXII Rule 2 – Procedure where one of several plaintiffs or defendants dies and right to sue survives. -** Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

[14] **Order XXII Rule 3 – Procedure in case of death of one of several plaintiffs or of sole plaintiff. –** (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the court on the application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. (2) Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application the defendant, the court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

and the right to sue survives. In such a case, if within time limited by law no application is made for substituting the legal representatives of the deceased plaintiff or plaintiffs, the suit would abate so far as the deceased plaintiff is concerned. Rule 4[15] of Order XXII is a provision corresponding to Rule 3 to deal with a situation where one of several defendants or the sole defendant dies and the right to sue survives, though not against the surviving defendant alone.

13. A plain reading of Rules 3 and 4 of Order XXII of the CPC would create an impression that in absence of substitution of the legal representatives of the deceased

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[15] **Order XXII Rule 4 – Procedure in case of death of one of several defendants or of sole defendant. –** (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, 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.

(2) Any person so made a party may make an any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where --

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

the court shall, in considering the application under the said Section 5 have due regard to the fact of such ignorance, if proved.

plaintiff or defendant, or the deceased appellant or respondent, as the case may be, abatement is *qua* the deceased plaintiff or defendant alone, in the context of a suit, or the deceased appellant or respondent alone, in the context of an appeal, provided the right to sue does not survive to the surviving plaintiff(s) or appellant(s) alone, or against the surviving defendant(s) or respondent(s) alone, as the case may be. Though this is all that Rules 3 and 4 declare, the law has evolved that in certain kinds of litigation the consequences of abatement *qua* a party are not limited to the deceased party alone; rather, it affects the litigation in its entirety.

14. As to when an appeal would abate in its entirety for non-substitution of legal representatives of a deceased party depends upon the facts and circumstances of an individual case. The law in this regard has been discussed in detail and summarized by a five-Judge Bench of this Court in **Sardar *Amarjit Singh Kalra (Dead) by LRs and Others v. Pramod Gupta (Smt.) (Dead) by LRs and Others***[16] as under:

> "21. ..... (*a*) In case of "joint and indivisible decree", "joint and inseverable or inseparable decree", the abatement of

[16] (2003) 3 SCC 272

proceedings in relation to one or more of the appellant(s) or respondent(s) on account of omission or lapse and failure to bring on record his or their legal representatives in time would prove fatal to the entire appeal and require to be dismissed in toto, as otherwise inconsistent or contradictory decrees would result and proper reliefs could not be granted, conflicting with the one which had already become final with respect to the same subject-matter vis-à-vis the others; (*b*) the question as to whether the court can deal with an appeal after it abates against one or the other would depend upon the facts of each case and no exhaustive statement or analysis could be made about all such circumstances wherein it would or would not be possible to proceed with the appeal, despite abatement, partially; (*c*) existence of a joint right as distinguished from tenancy-in-common alone is not the criterion but the joint character of the decree, dehors the relationship of the parties *inter se* and the frame of the appeal, will take colour from the nature of the decree challenged; (*d*) where the dispute between two groups of parties centered around claims or was based on grounds common relating to the respective groups litigating as distinct groups or bodies — the issue involved for consideration in such class of cases would be one and indivisible; and (*e*) when the issues involved in more than one appeal dealt with as a group or batch of appeals, are common and identical in all such cases, abatement of one or the other of the connected appeals due to the death of one or more of the parties and failure to bring on record the legal representatives of the deceased parties, would result in the abatement of all appeals.

xxxx xxxx xxxx

30. The question, therefore, as to when a proceeding before the court becomes or is rendered impossible or possible to be proceeded with, after it had partially abated on account of the death of one or the other party on either side has been always considered to depend upon the fact as to whether the decree obtained is a joint decree or a severable one and that in case of a

joint and inseverable decree if the appeal abated against one or the other, the same cannot be proceeded with further for or against the remaining parties as well. If otherwise, the decree is a joint and several or separable one, being in substance and reality a combination of many decrees, there can be no impediment for the proceedings being proceeded with among or against those remaining parties other than the deceased. ...

31. But, in our view also, as to what those circumstances are to be, cannot be exhaustively enumerated and no hard and fast rule for invariable application can be devised. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really serve as handmaid, make it workable and advance the ends of justice, technical objections which tend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law inevitably necessitates it. ..... At times, one or the other parties on either side in the litigation involving several claims or more than one, pertaining to their individual rights may settle among themselves the dispute to the extent their share of proportion of rights is concerned and may drop out of context, bringing even the proceedings to a conclusion so far as they are concerned. If all such moves are allowed to boomerang adversely on the rights of the remaining parties even to contest and have their claims adjudicated on merits, it would be a travesty of administration of justice itself.

32. The area of differences in the catena of decisions brought to our notice is not so much with reference to the principles to be applied to different nature of decrees but only as to which of the decree(s) falls, when or under what circumstances under one or the other of the classification i.e. joint and inseverable or joint and severable or separable. This aspect seems to have been adjudged in different cases depending upon the nature/source of rights, the cause of

action, the manner they were asserted by the parties themselves and the contradictory nature of decrees impossible of execution, likely to result when considered differently. It is for this reason any standardized formula was avoided and the matter left for the consideration of courts, on the peculiar nature of the cases coming for determination. ……

33. Even assuming that the decree appealed against or challenged before the higher forum is joint and several but deals with the rights of more than one recognized in law to belong to each one of them on their own and unrelated to the others, and the proceedings abate in respect of one or more of either of the parties, the courts are not disabled in any manner to proceed with the proceedings so far as the remaining parties and part of the appeal is concerned. As and when it is found necessary to interfere with the judgment and decree challenged before it, the court can always declare the legal position in general and restrict the ultimate relief to be granted by confining it to those before the court only rather than denying the relief to one and all on account of a procedure lapse or action or inaction of one or the other of the parties before it. The only exception to this course of action should be where the relief granted and the decree ultimately passed would become totally unenforceable and mutually self-destructive and unworkable vis-à-vis the other part, which had become final. As far as possible, courts must always aim to preserve and protect the rights of parties and extend help to enforce them rather than deny relief and thereby render the rights themselves otiose, *"ubi jus ibi remedium"* (where there is a right, there is a remedy) being a basic principle of jurisprudence. Such a course would be more conducive and better conform to a fair, reasonable and proper administration of justice.

34. In the light of the above discussion, we hold:

(*1*) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their

rights, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.

(*2*) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(*3*) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(*4*) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-à-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other."

(Emphasis supplied)

15. In ***State of Punjab vs. Nathu Ram***[17], which was noticed and followed by the five-Judge Bench in ***Sardar Amarjit Singh*** **(supra)**, this Court enumerated certain tests to determine whether the whole appeal would abate on account of non-substitution of the legal representatives of one or some of the deceased parties. In this regard it was observed:

> "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 (a) when the success of the appeal may lead to the court coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to court 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

[17] Referred to in Footnote 7

succeeds, be ineffective that is to say, it would not be successfully executed."

(Emphasis supplied)

16. In ***Ram Sarup vs. Munshi***[18] there was a decree of pre-emption against the defendant-appellants who had bought the property from the co-defendants in the suit. One of the appellants died and his legal representatives were not brought on record. The issue which fell for consideration was whether the whole appeal abated, or the abatement was *qua* the deceased appellant only. Argument on behalf of the surviving appellants was whatever might be the position as regards the share to which the deceased appellant was entitled in the property purchased, the interest of the deceased was distinct and separate from that of the others and that the abatement could, in any event, be only partial and would not affect the continuance of the appeal by the surviving appellants at least as regards their share in the property. To deal with the above argument, this Court called for the sale deed by which the appellants had purchased the property. Upon consideration of the sale deed, the Court found that it was not a case of sale of any separated item of

[18] Referred to in Footnote 7

property in favour of the deceased appellant but of one set of properties to be enjoyed by vendees in equal shares. Based on that, the five-Judge Bench of this Court held:

> "It is clear law that there can be no partial pre-emption because pre-emption is the substitution of the pre-emptor in place of the vendee and if the decree in favor of the pre-emptor in respect of the share of the deceased Mehar Singh has become final it is manifest that there would be two conflicting decrees if the appeal should be allowed and the decree for pre-emption insofar as appellants 2 to 5 are concerned is interfered with. Where a decree is a joint one and a part of the decree has become final, by reason of abatement, the entire appeal must be held to be abated."
>
> (Emphasis supplied)

17. Having regard to the aforesaid decisions, the law governing determination of the issue as to whether abatement of an appeal on non-substitution of a deceased party is partial or whole, can be summarized as under:

1. The answer to the question whether the entire appeal abates or it abates partially *qua* the deceased party alone, will depend on facts of each case and, therefore, no exhaustive statement about the circumstances in which the entire appeal would abate can be made.

2. As a matter of course courts will not proceed with an appeal (a) when the success of the appeal may lead to the court coming to a decision which is in conflict with the decision between the appellant and the deceased respondent 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 would not be successfully executed.

3. In a case of "joint and indivisible decree" or "joint and inseverable or inseparable decree", the abatement of appeal in relation to one or more of the appellant(s) or respondent(s) on account of failure to bring on record his or their legal representatives in time would prove fatal to the entire appeal because proceeding *qua* the surviving party or parties may give rise to inconsistent or contradictory decrees.

4. The question as to whether the decree is joint and inseverable, or joint and severable or separable, must be decided, for the purposes of abatement or dismissal of the entire appeal, only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-à-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees.

5. A decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other which means that the two decrees are mutually irreconcilable or totally inconsistent, that is, if laid side by side, the only impression would be that one is in the teeth of the other.

6. Where the plaintiffs or appellants have distinct, separate and independent rights of their own i.e., not inter-dependent upon the other, and for the purpose of convenience, or otherwise, joined

together in a single litigation to vindicate their rights, the decree passed by the court thereon is to be viewed in substance as a combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree.

7. Existence of a joint right as distinguished from tenancy-in-common is not the criterion of a joint or inseverable or inseparable decree. The joint character of the decree will take colour from the nature of the decree challenged.

ILLUSTRATIVE CASES WHERE ENTIRE APPEAL STOOD ABATED ON NON-SUBSTITUTION OF A DECEASED PARTY

18. Now, we shall examine those decisions where this Court held appeal to have abated in its entirety on non-substitution of legal representatives of one of the deceased parties.

19. In ***Hemareddi vs. Ramachandra***[19], one Govindareddi, the propositus died, leaving behind two sons and a daughter. The plaintiffs were children of one of the two sons. The second defendant was the wife of the

[19] Referred to in Footnote 7

other son. The suit properties were alleged to be the properties of the joint family of Govindareddi and his sons. Suit was filed for injunction as also for declaration that defendant no.1 is not the adopted son. Trial court dismissed the suit and upheld the adoption. Against which, an appeal was filed. During the pendency of the appeal, one of the plaintiff-appellants died. His LRs were not brought on record. The High Court took the view that the entire appeal abated. The matter travelled to this Court. The question that fell for consideration was whether the whole appeal abated, or it abated *qua* the deceased appellant only. Upholding the decision of the High Court, this Court reasoned thus:

> "17. ……. The appeal having abated in regard to the late brother, the decree of the trial court has become final *qua* the deceased brother of the appellant. The effect of the same is that the adoption is found legal. The result of the appeal being allowed to proceed further and succeed in the appeal would be the passing of a decree by the High Court. The said decree would be to the effect that the adoption is invalid. The suit which was jointly filed by the appellant and his late brother would have to be decreed whereas the suit filed by the appellant and his late brother stands dismissed by the trial court. Both the decrees cannot stand together. There would be irreconcilable conflict. The defendants are common. They would be faced with two

> decrees regarding the same subject matter which are irrevocably conflicting."

20. In ***State of Punjab vs. Nathu Ram*** **(supra)**, the State acquired on lease certain parcels of land belonging to Labhu Ram and Nathu Ram for military purposes under the Defence of India Act, 1939. Labhu Ram and Nathu Ram, brothers, refused to accept the compensation offered to them by the Collector and applied to the Punjab Government through the Collector, under rule 6 of the Punjab Land Acquisition (Defence of India) Rules, 1943. The State Government referred the matter to an arbitrator under rule 10, who, after inquiry, passed an award ordering the payment of an amount higher than what was offered by the Collector. The State Government appealed against the award to the High Court of Punjab. During the pendency of the appeal, Labhu Ram, one of the respondents, died. The High Court held that the appeal abated against Labhu Ram and that its effect was that the appeal against Nathu Ram also abated. The State Government appealed to this Court. While dismissing the appeal, this Court, *inter alia*, observed:

> "9. ..... the award of the arbitrator in each of these cases was a joint one, in favor of both the respondents Labhu Ram and Nathu Ram. To illustrate the form of the award, we may quote

the award for the year 1945-46 in the proceedings leading to Civil Appeal No.635 of 1957. It is:

> "On the basis of the report of S Lal Singh, Naib Tehsildar (Exhibit PW9/1) and Sheikh Aziz Din, Tehsildar, (Exhibit PW9/2), the applicants are entitled to sum of Rs. 4140 on account of rent, plus Rs.3872/ 8/0 on account of income tax etc., due to the inclusion of Rs. 6193/8/0 in their total income, plus such sum as the petitioners have to pay to the Income Tax Department on account of the inclusion of Rs. 4140 in their income as awarded by this award."

The result of the abatement of the appeal against Labhu Ram is therefore that his legal representatives are entitled to get compensation on the basis of this award even if they are to be paid separately on calculating their rightful share in the land acquired, for which this compensation is decreed. Such calculation is foreign to the appeal between the State of Punjab and Nathu Ram. The decree in the appeal will have to determine not what Nathu Ram's share in this compensation is, but what is the correct amount of compensation with respect to the land acquired for which this compensation has been awarded by the arbitrator. The subject matter for which the compensation is to be calculated is one and the same. There cannot be different assessments of the amount of compensation for the same parcel of land. The appeal before the High Court was an appeal against a decree jointly in favour of Labhu Ram and Nathu Ram. The appeal against Nathu Ram alone cannot be held to be properly constituted when the appeal against Labhu Ram had abated. To get rid of the joint decree, it was essential for the appellant, the State of Punjab, to include both the joint decree holders in the appeal. In the absence of one joint-decree holder, the appeal is not properly framed. It follows that the State appeal against Nathu Ram alone cannot proceed."

While holding so, the argument on behalf of the State that Labhu Ram had an equal share in the land acquired and, therefore, the appeal against Nathu Ram alone could deal with half the amount of the award was rejected, reasoning thus:

> "10. …The mere record of specific shares in the revenue records is no guarantee of their correctness. The appellate court will have to determine the share of Nathu Ram and necessarily the share of Labhu Ram in the absence of his legal representatives. This is not permissible in law. Further, the entire case of Labhu Ram and Nathu Ram, in their application to the Government for the appointment of an arbitrator, was that the land jointly belonged to them and had been acquired for military purposes, that a certain amount had been paid to them as compensation, that they received that amount under protest and that they were entitled to a larger amount mentioned in the application and also for the income tax they would have to pay on account of the compensation received being added to their income. Their claim was a joint claim based on the allegation that the land belonged to them jointly. The award and the joint decree are on this basis and the appellate court cannot decide on the basis of the separate shares."

The aforesaid observations make it clear that a mere assertion that surviving party's own share could be determined would not save the proceeding from abatement on non-substitution of the legal representatives of the deceased co-sharer if the pleadings reflected a joint claim

based on an allegation that the subject matter of the suit belonged to them jointly.

21. In ***Venigalla Koteswaramma vs. Malampati Suryamba and Others***[20], a suit was instituted, inter alia, for partition, separate possession of plaintiff's one-fourth share and recovery of mesne profits in respect of immovable properties described in Schedule A and movable properties described in Schedule B of the plaint. The plaintiff pleaded, *inter alia*, that plaintiff and defendants 1 to 3 were siblings, born from the first wife of the propositus; on death of his first wife, propositus married another lady on whom suit properties vested after the death of the propositus; however, the second wife died intestate and issue less; as a result, the plaintiff and defendants 1 to 3 became owners of the suit properties, each having one-fourth share. The said suit was instituted by impleading several other defendants who had been intermeddling with the suit properties. In the suit, the defendants 1 to 3 supported the plaintiff's case. However, the other defendants contested the suit by setting up their rights through the second wife of the propositus either under an

[20] Referred to in Footnote 7

agreement or a Will, or other instruments. The trial court discarded the Will and the agreement and decreed the suit in part while excluding certain properties. Against the trial court decree, two separate appeals were filed. One by those who claimed under the agreement; and the other by those who claimed under the Will. During the pendency of the appeal, defendant no.2 died, but no application was made for substitution of his legal representatives. The High Court, however, proceeded to decide the appeals on merit by dismissing the appeal of those who claimed under the Will and allowing the appeal of those who claimed under the agreement. As a result, the property covered by the agreement was excluded from partition. Against such modification of the decree, the plaintiff filed an appeal by special leave before this Court. In the appeal before this Court, one of the points urged was that the whole appeal before the High Court had abated due to non-substitution of the legal representatives of deceased defendant no.2 and, therefore, the High Court's decree is liable to be set aside. This Court accepted the submission and after surveying several decisions including five-Judge Bench decision of this Court in ***Sardar Amarjit Singh*** **(supra)** observed:

"45.1. When we apply the principles aforesaid to the present case, it is not far to seek that the said appeal by Defendants 16 to 18, after having abated against Defendant 2 could not have been proceeded against the surviving respondents i.e., the plaintiff and Defendants 1 and 3. This is for the simple reason that the trial court had specifically returned the findings that the agreement Ext. B-10 was not valid and Defendants 16 to 18 (appellants of AS No.1887 of 1988) derived no rights thereunder. The trial court has also ordered that Defendants 13, 14 and 16 were liable for mesne profits in respect of the immovable properties in their possession belonging to Annapurnamma till they deliver possession of those items to plaintiff and defendants 1 to 3. Such findings in relation to the invalidity of the agreement Ext. B-10 and consequential decree for partition, for delivery of possession and for recovery of mesne profits attained finality qua Defendant 2 Malempati Radha Krishnamurthy; and his entitlement to one-fourth share in the suit properties (including the property covered by Ext. B-10) also became final when the appeal filed by Defendant 16 to 18 abated qua him. If at all the appeal was proceeded with and the alleged agreement Ext. B-10 was upheld (which the High Court has indeed done), inconsistent decrees were bound to come in existence and have in fact come in existence.

45.2. As noticed, the High Court has proceeded to hold that Ext. B-10 agreement is valid and binding on the plaintiff and Defendants 1 to 3. This part of decree is in stark contrast, and is irreconcilable, with the decree in favour of Defendant 2 which has attained finality that the said agreement Ext. B-10 is neither valid nor binding on Defendant 2. The High Court has gone a step further to say that the plaintiff and Defendants 1 to 3 were under obligation to execute sale deed in favour of defendant 16 to 18. Though making of such an observation in this suit, that heirs of Annapurnamma were under obligation to execute a sale deed in favor

> of defendant 6 to 18, remains seriously questionable in itself but, in any event, this observation could not have been made *qua* the deceased Defendant 2.
>
> 46. When the inconsistencies galore are writ large on the face of the record, the inescapable conclusion is that the appeal filed by Defendants 16 to 18 could not have proceeded further after its abatement against Defendant 2 (Respondent 3)."
>
> (Emphasis supplied)

22. In ***Sunkara Lakhminarasamma vs. Sagi Subba Raju and Others***[21], three suits were instituted. Suits A and B were, *inter alia*, for: (a) partition; (b) setting aside alienation; and (c) eviction of certain defendants from some of the properties. Suit C was for specific performance of an agreement to sell in respect of one of the suit properties. Trial court dismissed suits A and B, but partly decreed suit C to the extent of one-third of the property. The first appellate court affirmed the decree. Three second appeals were filed before the High Court. Two second appeals arising from suits A and B were dismissed whereas second appeal arising from suit C was allowed and the suit for specific performance was decreed fully in terms prayed for. Before this Court, the contentions of appellants i.e., plaintiffs in suits A and B were that Wills relied by defendants were not proved; moreover,

[21] (2019) 11 SCC 787

those bequests conferred no right, therefore, remaining defendants, who claimed as transferees from the legatee, were liable to be evicted. The respondents in the aforesaid case, refuted those contentions and pleaded that the appeals were not maintainable since a number of defendants (purchasers from the legatee), were deleted from the array of parties, and some of the defendants have died and their legal representatives were not brought on record; as a result, the decree passed in favour of such defendants had attained finality. In other words, the validity of the Wills as well as the sale deeds stood confirmed *qua* the deceased/deleted defendants and, therefore, the appeals, pending against other defendants, were liable to be dismissed in view of the fact that if any order is passed adverse to the interest of the remaining defendants (i.e., respondents in the appeal), it would be in conflict with the judgment and decree which stood confirmed as against the deceased/ deleted defendants. Accepting the aforesaid submissions of the respondents, a three-Judge Bench of this Court held:

> "13. In the matter on hand, the absence of certain defendants who have been deleted from the array of parties along with the absence of legal representatives of a number of deceased defendants will prevent the court from hearing

the appeals as against the other defendants. We say so because in the event of these appeals being allowed as against the remaining defendants, there would be two contradictory decrees in the same suit in respect of the same subject-matter. One decree would be in favor of the defendants who are deleted or dead and whose legal representatives have not been brought on record; while the other decree would be against the defendants who are still on record in respect of the same subject matter. The subject matter in the suit is the validity of the two Wills. The courts including the Division Bench of the High Court have consistently held that the two Wills are proved, and thus Veeraswamy being the beneficiary under the two Wills had become the absolute owner of the suit properties in question. Such decree has attained finality in favor of the defendants who are either deleted or dead and whose legal representatives have not been brought on record. In case these appeals are allowed in respect of the other defendants, the decree to be passed by this court in these appeals would definitely conflict with the decree already passed in favour of the other defendants.

14. As mentioned supra, the court cannot be called upon to make two inconsistent decrees about the same subject matter. In order to avoid conflicting decrees, the court has no alternative but to dismiss the appeals in their entirety.

15. In view of the above, the appeals fail not only on the ground of non-maintainability, but also on merits, and are dismissed."

(Emphasis supplied)

23. In ***Budh Ram and Others vs. Bansi and Others***[22] plaintiffs instituted a suit for declaration to the effect that they and proforma defendant no.6 were co-owners and co-

[22] (2010) 11 SCC 476

sharers in joint possession to a certain extent of the property in dispute. They also prayed for permanent prohibitory injunction to restrain the defendants 1 to 5 from ousting them. Defendant no.6, namely, Smt Parwatu, did not enter appearance in the suit. However, defendants 1 to 5, who were appellants before this Court, contested the suit by claiming title over the suit land through adverse possession. The trial court decreed the suit in favour of the plaintiffs and defendant no.6. Against the trial court decree the defendants 1 to 5 preferred an appeal to the High Court in which defendant no.6 was arrayed as one of the respondents. However, during the pendency of appeal, defendant no.6 died but no substitution was brought within time. Later, when substitution application was filed, it was dismissed for want of sufficient cause for the delay. Consequent thereto, the High Court held that as the trial court had passed a joint decree, the appeal stood abated in toto. Challenging the order of the High Court, appeal was laid before this Court. Affirming the order of the High Court, this Court observed:

> "19. In the instant case a declaratory decree was passed in favor of the respondent plaintiffs and Smt Parwatu to the effect that they were co-owners, though, they had specific shares but were held entitled to be in joint possession. The

> appellant applicants had sought relief against Smt Parwatu before the first appellate court as there was a decree in her favour, passed by the trial court where Smt Parwatu had been impleaded by the appellant applicants as pro forma respondent. In such a fact situation, she had a right to contest the appeal. Once a decree had been passed in her favor, a right had vested in her favor. On her death on 19-11-2000, the said vested right devolved upon her heirs. Thus, the appeal against Smt. Parwatu stood abated. In the instant case, the first appellate court rejected the application for condonation of delay as well as the substitution of LRs of Smt Parwatu, Respondent 4 therein.
>
> 20. The only question remains as to whether the appeal is abated in toto or only in respect of the share of Smt Parwatu. The High Court has rightly reached the conclusion that there was a possibility for the appellate court to reverse the judgment of the trial court and in such an eventuality, there could have been two contradictory decrees, one in favor of Smt Parwatu and the other, in favor of the present appellants. The view taken by the High Court is in consonance with the law laid down by this court consistently. The facts of the case do not warrant any further examination of the matter."
>
> (Emphasis supplied)

24. In ***Pandit Sri Chand and Others vs. Jagdish Parshad Kishan Chand and Others***[23] five persons stood sureties for satisfaction of the decree under a common surety bond which recited that the five sureties mortgaged the properties specified in the schedule thereto and jointly and severally agreed that if any decree was passed against X they

[23] Refer to Footnote 7

shall comply with the same and in default the amount payable under the decree subject to a ceiling shall be realized from the properties mortgaged. In the suit, decree was passed which was put to execution. Sureties raised multiple objections to execution of the decree against them. The execution court rejected the objection and the appellate court (i.e., the High Court) confirmed the order of the execution court. The matter was appealed to this Court by three out of the five sureties. During the pendency of the appeal here, one of the appellants died. Application for bringing his LRs on record being belated was dismissed for want of sufficient cause for the delay. During hearing of the appeal, the respondent counsel contended that the appeal had abated in its entirety as the heirs had not been brought on record and the ground on which the judgment of the High Court proceeded was common to all the parties. Accepting the submission of the respondent counsel, this Court held:

> "6. …The order of the High Court holding that the sureties are liable to satisfy the claim notwithstanding the objections raised by Basant Lal has become final. In the appeal filed by the appellants 1 and 3 if this court holds that the High Court was in error in deciding that the surety bond was not enforceable because it was not registered, or that the first respondent has done some act which has discharged the sureties

> from liability under the bond, there would unquestionably be inconsistent orders -- one passed by the High Court holding that the surety bond was enforceable, and the other, the view of this Court that it is not enforceable.
>
> xxx xxx xxx
>
> 9. When the decree in favor of the respondents is joint and indivisible, the appeal against the respondents, other than the deceased respondent cannot be proceeded with if the appeal against the deceased respondent has abated."

25. The underlying principle in the aforesaid decisions is that in respect of the subject matter of a suit or a proceeding arising therefrom, the court cannot pass inconsistent decrees. In consequence, if, due to non-substitution of LRs of a deceased party, the decree *qua* the deceased party has attained finality by abatement of proceedings *qua* him, the Court cannot proceed further if a reversal or modification of the decree under appeal would result in conflicting or inconsistent decrees. Therefore, in such a situation, the appeal would abate in its entirety.

ORDER XLI RULE 4 CPC CANNOT PREVENT ABATEMENT OF AN APPEAL OF THE DECEASED CO-APPELLANT ON NON-SUBSTITUTION OF HIS LRS

26. Now, we shall consider whether the provisions of Order XLI Rule 4 of CPC can prevent abatement of an appeal of the deceased co-appellant on non-substitution of his LRs.

27. Order XLI Rule 4 of CPC provides that where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or the defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favor of all the plaintiffs or defendants, as the case may be.

28. Interplay between the provisions of Order XXII and Order XLI Rule 4 of CPC came for consideration before a three-Judge Bench of this Court in ***Rameshwar Prasad and Others vs. Shambehari Lal Jagannath and Another***[24]. In that case nine persons including one Kedar Nath instituted a suit for ejectment and recovery of rent against two defendants on the allegation that defendant 1 was the tenant-in-chief who had sub-let the premises to defendant 2. The suit for ejectment was decreed against both the defendants, and for arrears of rent against defendant 1. On appeal by defendant 2, the District Judge set aside the decree for ejectment against defendant 2 and confirmed the rest of

[24] 1963 SCC OnLine SC 146 : AIR 1963 SC 1901 : (1964) 3 SCR 549

the decree against defendant 1. Against this decree, 9 original plaintiffs filed second appeal in the High Court. During the pendency of appeal, appellant 3 died. No application for bringing his legal representatives on the record was made within the prescribed time. Later, however, two applications were filed in the High Court. One, for condonation of the delay in filing the application for substitution and the other for substitution in which it was prayed that the sons of Kedar Nath, the deceased, be substituted in place of the deceased. Those two applications were rejected with the result that the appeal stood abated as against Kedar Nath. When the appeal of the appellants, other than Kedar Nath, came up for hearing, a preliminary objection was taken for the respondent that the entire appeal had abated. On behalf of the surviving appellants it was contended that the deceased belonged to a joint Hindu family and other members of the family were already on the record and that it was not necessary to bring on record any other person. The court allowed parties to file proof of the deceased being a member of the joint Hindu family. On exchange of affidavits in that regard, a serious dispute regarding existence of a joint Hindu family surfaced. Consequently, at

the hearing of the appeal, the only point urged on behalf of the surviving appellants was that they were competent to continue the appeal in view of Order XLI Rule 4 of CPC. This contention, however, was rejected by the High Court and the appeal was declared to have abated. Aggrieved by this, the appellants appealed to this Court. One of the contentions raised before this court was that the surviving appellants could have instituted the appeal against the entire decree in view of the provisions of Order XLI Rule 4 of the Code; that they were, therefore, competent to continue the appeal even after the death of Kedar Nath and that the court could have reversed or varied the whole decree in favor of all the original plaintiffs and could have granted relief with respect to the rights and interests of Kedar Nath as well. Rejecting the aforesaid contention, this Court, in reference to the provisions of Oreder XLI Rule 1 of CPC, held:

> "These provisions enable one of the plaintiffs or one of the defendants to file an appeal against the entire decree. The second appeal filed in the High Court was not filed by any one or by even some of the plaintiffs as an appeal against the whole decree, but was filed by all the plaintiffs jointly, and, therefore, was not an appeal to which the provisions of Rule 4 of Order 41 could apply.
> The appeal could not have been taken to be an appeal filed by some of the plaintiffs against the whole decree in pursuance of the provisions of

Rule 4 of Order 41 from the date when the appeal abated so far as Kedar Nath was concerned. If the appeal could be treated to have been so filed, then, it would have been filed beyond the period prescribed for the appeal. At that time, the decrees stood against the surviving plaintiffs and the legal representatives of Kedar Nath. The legal representatives could not have taken advantage of Rule 4 of Order 41. It follows that Rule 4 of Order 41 would not be available to the surviving plaintiffs at that time.

Further, the principle behind the provisions of Rule 4 seems to be that any one of the plaintiffs or defendants, in filing such an appeal, represents all the other non-appealing plaintiffs or defendants as he wants the reversal or modification of the decree in favor of them as well, in view of the fact that the original decree proceeded on a ground common to all of them. Kedar Nath was alive when the appeal was filed and was actually one of the appellants. The surviving appellants cannot be said to have filed the appeal as representing Kedar Nath.

Kedar Nath's appeal has abated and the decree in favor of the respondents has become final against his legal representatives. His legal representatives cannot eject the defendants from the premises in suit. It will be against the scheme of the Code to hold that Rule 4 of Order 41 empowered the Court to pass a decree in favor of the legal representatives of the deceased on hearing an appeal by the surviving appellants even though the decree against him has become final. This court said in *State of Punjab versus Nathu Ram*:

> "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 absence of the legal representatives of the deceased respondent, 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."

No question of the provisions of Rule 4 of Order 41 overriding the provisions of Rule 9 of Order 22 arises. The two deal with different stages of the appeal and provide for different contingencies. Rule 4 of Order 41 applies to the stage when an appeal is filed and empowers one of the plaintiffs or defendants to file an appeal against the entire decree in certain circumstances. He can take advantage of this provision, but he may not. Once an appeal has been filed by all the plaintiffs the provisions of Order 41, Rule 4 became unavailable. Order 22 operates during the pendency of an appeal and not at its institution. If some party dies during the pendency of the appeal, his legal representatives have to be brought on record within the period of limitation. If that is not done the appeal by the deceased appellant abates and does not proceed any further. There is thus no inconsistency between the provisions of Rule 9 of Order 22 and those of Rule 4 of Order 41 CPC. They operate at different stages and provide for different contingencies. There is nothing common in their provisions which make the provisions of one interfere in any way with those of the other.

We do not consider it necessary to discuss the cases referred to at the hearing. Suffice it to say that the majority of the High Courts have taken the correct view that the appellate court has no power to proceed with the appeal and to reverse and vary the decree in favor of all plaintiffs or defendants under Order 41, 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 under Order 22 Rule 3."

29. The decision of this Court in ***Rameshwar Prasad* (supra)** was followed in ***Pandit Sri Chand* (supra)** and the same principle of law has been adopted in a recent two-Judge Bench decision of this Court in ***Goli Vijayalakshmi and Others vs. Yenduj Sathiraju (Dead) through LRs and Others***[25] where this Court declined to accept the argument that despite non-substitution of LRs of a deceased appellant, the other appellants could prosecute the appeal with the aid of Order XLI Rule 4 of CPC. The relevant portion of the judgment is extracted below:

> "23. The submission of the learned counsel for the appellants is that even if the appeals stood abated *qua* Appellant 2, the other appellants would be entitled to prosecute the appeals relying on the principle of Order 41 Rules 4 and 33 CPC. Suffice it to say that once the appeal stood abated against Appellant 2 (Defendant 2) and the decree which stands confirmed *qua* Appellant 2 (Defendant 2) cannot indirectly be reopened to challenge at the behest of persons claiming through him by relying on provisions of Order 41 Rules 4 and 33 CPC as prayed for."

30. In ***Mahabir Prasad vs. Jage Ram and Others***[26], this Court explained ***Rameshwar Prasad* (supra)** in the light of an earlier decision of this Court in ***Ratan Lal Shah vs. Firm Lalmandas Chhadammalal***[27] and thereby limited its

[25] (2019) 11 SCC 352
[26] (1971) 1 SCC 265
[27] (1969) 2 SCC 70

applicability to a situation where the deceased party was a co-appellant and not the one impleaded as a proforma-respondent. In ***Mahabir Prasad*** **(supra)** this Court held that if a decree is made on common ground against the plaintiffs or the defendants and the appeal against the same is filed by any one or some of the plaintiffs, or defendants, as the case may be, by impleading the remaining of those plaintiff(s) or defendant(s) as proforma-respondent(s), on non-substitution of LRs of such proforma respondent(s) the appeal would not abate as the appellants would be entitled to prosecute the appeal with the aid of Order XLI Rule 4 of CPC. The relevant portion of the judgment is extracted below:

> "5. In support of their view the High Court relied upon the judgment of this court in *Rameshwar Prasad v. Shyam Beharilal Jagannath*. That was a case in which nine persons instituted a suit for a decree in ejectment and for recovery of rent against two defendants and obtained a decree. In appeal the District Judge set aside the decree, against one of the defendants. The plaintiffs filed a second appeal in the High Court and when the appeal was pending one of the plaintiffs (appellants in the High Court) died. No application for bringing his legal representatives on the record was made within the prescribed time. The respondents objected that the entire appeal had abated because the interest of the surviving appellants and of the deceased appellant was joint and indivisible and that in the event of the success of the appeal there would be two inconsistent and contradictory decrees. The surviving appellants claimed that the appeal was maintainable on the ground that without

impleading the plaintiff who had died they could have appealed against the entire decree in view of the provisions of Order 41, Rule 4 of the Code of Civil Procedure and on that account they were competent to continue the appeal, even after the death of one of the joint decree holders and abatement of the appeal so far as he was concerned, and the court had the power to hear the appeal and to reverse or vary the whole decree. This court held that the provisions of Order 41, Rule 4 of the Code of Civil Procedure were not applicable for the second appeal in the High Court was filed by all the plaintiffs jointly, and the surviving appellants could not be said to have filed the appeal as representing the deceased appellant. The Court further held that the appellate court had no power to proceed to hear the appeal and to reverse or vary decree in favor of all the plaintiffs or defendants under Order 41, Rule 4 of the Code of Civil Procedure, when the decree proceeded on the ground common to all the plaintiffs, or defendants, if all the plaintiffs or the defendants appealed from the decree and any of them died, and the appeal abated in so far as he was concerned under Order 22, Rule 3 of the Code of Civil Procedure. *Rameshwar Prasad* case is obviously distinguishable from the present case. In *Rameshwar Prasad* case all the plaintiffs whose suit had been dismissed had filed an appeal and thereafter one of them died and his heirs were not brought on the record. In the present case there is an order against the decree holders but all the decree holders did not appeal; only one of them appealed and the other two were joined as party respondents.

6. In a later judgment of this court in *Ratan Lal Shah v. Firm Lalmandas Chhadammalal* the plaintiffs obtained joint decree against two persons – Ratan Lal and Mohan Singh. Against the decree Ratan Lal alone appealed to the High Court of Allahabad. Mohan Singh was impleaded as a party respondent to the appeal. Notice of appeals sent to Mohan Singh was returned unserved, and no steps were taken to serve him with notice of the appeal. The High Court dismissed the appeal holding that there was a joint decree against Ratan Lal and

Mohan Singh in a suit founded on a joint cause of action and the decree against Mohan Singh had become final. The appellant could not, on that account claimed to be heard in his appeal; if he was heard and his claim was upheld, the High Court observed that there would be two conflicting decisions between the same parties and in the same suit based on the same cause of action. This court set aside the judgment of the High Court observing that even though Mohan Singh was not served with notice of appeal, the appeal filed by Ratan Lal was maintainable, in view of the provisions of Order 41 Rule 4 of the Code of Civil Procedure. In *Ratan Lal Shah* case this court allowed the appeal to be prosecuted, even though one of the joint decree-holders impleaded as a party respondent had not been served with the notice of appeal. In the present case one of the respondents had died and his heirs have not been brought on the record. No distinction in principle may be made between Ratan Lal Shah case and the present case. Competence of the appellate authority to pass a decree appropriate to the nature of the dispute in an appeal filed by one of several persons against whom a decree is made on a ground which is common to him and others is not lost clearly because of the person who was jointly interested in the claim has been made a party respondent and on his death his heirs have not been brought on the record. Power of the appellate court under Order 41, Rule 4, to vary or modify the decree of a subordinate court arises when one of the persons out of many against whom a decree or order has been made on a ground which was common to him and others has appealed. That power may be exercised when other persons who were parties to the proceeding before the subordinate court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to the appeal or are impleaded as respondents. The view taken by the High Court cannot therefore be sustained."

(Emphasis supplied)

31. Upon consideration of the decisions on the interplay between the provisions of Order XLI Rule 4 and Order XXII of CPC *qua* abatement of an appeal, the law that emerges is summarized below:

i. Rule 4 of Order XLI applies to the stage when an appeal is filed and empowers one of the plaintiffs or defendants to file an appeal against the entire decree in certain circumstances. A plaintiff or defendant can take advantage of this provision, but he may not. Therefore, once an appeal is filed by all the plaintiffs or defendants aggrieved by the decree, the provisions of Order XLI, Rule 4 become unavailable.

ii. Rule 4 of Order XLI is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The court in such an appeal may reverse or vary the decree in favour of all the parties who are having the same interest as the appellant, even though they have not appealed against the decree. This is so, because it is not the law that when a decree is passed on a ground common to all the parties, the appeal is to be filed by all the parties or not at all.

iii. Order XXII applies without exception to all proceedings covered by it. It operates during the pendency of a proceeding including an appeal and not at its institution. Therefore, if an appellant dies during the pendency of the appeal, his legal representatives must be brought on record within the period of limitation. If that is not done, the appeal by the deceased appellant abates.

iv. Where an appeal is filed by any one or some of the plaintiffs, or defendants, aggrieved by the decree, by impleading other such plaintiff(s) or defendant(s) as proforma-respondent(s), in the event of death of such proforma-respondent, the benefit of the provisions of Order XLI Rule 4 would be available to continue the appeal regardless of substitution of LRs of such proforma-respondent.

v. There is no inconsistency between the provisions of Order XXII and those of Rule 4 of Order XLI CPC. They operate at different stages and provide for different contingencies. There is nothing common in their provisions which make the provisions of one interfere in any way with those of the other.

DECISIONS CITED ON BEHALF OF THE APPELLANTS

32. Now we shall consider the decisions cited by the learned counsel for the appellants. The decisions cited by the learned counsel for the appellant are referred to in footnote 6, which shall be dealt with serially below:

(a) ***Delhi Development Authority vs. Diwan Chand Anand and Others***[28]: In this case two out of six persons, in whose favour the deeds of conveyance were executed, instituted a suit against the state-respondents including DDA by impleading the remaining co-owners as defendants. The suit was decreed by trial court against which DDA filed appeal impleading plaintiffs as well as other defendants, who were alleged co-owners, as respondents. One of the plaintiff-respondent and some of the defendant-respondent who were co-owners died during the pendency of the appeal. On ground of non-substitution of all the heirs of deceased plaintiff-respondent and the legal representatives of the deceased defendant-respondent(s) who were also one of the co-owners, the appellate court declared the appeal to have

[28] See Footnote 6

abated. When the matter travelled to this court, it was, *inter alia*, argued on behalf of the appellant that the suit was instituted by some of the co-owners for self and on behalf of the other co-owners, as is permissible in law, and since some of the heirs of the deceased plaintiff-respondent were already on record, the appeal would not abate on non-substitution of the legal representatives of deceased defendant-respondent as their estate stood duly represented by the other co-sharer, namely, the plaintiff-respondent. In that context, this Court while setting aside the decision of the High Court observed:

> "34. As observed and held by this court in *A. Vishwanatha Pillai*[29], the co-owner is as much an owner of the entire property as a sole owner of the property. No co-owner has a definite right, title and interest in any particular item or a portion thereof. On the other hand, he has the right, title and interest in every part and parcel of the joint property. He owns several parts of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner in the property. It is observed that, therefore, one co-owner can file a suit and recover the property against strangers and the decree would enure to all the co-owners. The aforesaid principle of law would be applicable in the appeal also. Thus, in the instant case, when the original plaintiffs -- two co-owners instituted the suit with respect to the entire suit land jointly owned by the plaintiffs as well as defendants 9 to 39 and when some of the respondent-defendants in appeal died, it can be said that estate is represented by others, more

[29] A. Vishwanatha Pillai v. LAO, (1991) 4 SCC17

> particularly the plaintiffs/heirs of the plaintiffs and it cannot be said that on not bringing the legal representatives some of the co-sharers, respondent- defendants in appeal, the appeal would abate as a whole."
>
> (Emphasis supplied)

In our view, this decision would not be of much help to the appellants herein because here there was no suit by co-sharer(s) for self as well as for other non-suing co-sharer. Even the appeal was jointly filed by both the defendants against the decree and not by one of them with the aid of Order XLI Rule 4 CPC. Therefore, the surviving co-sharer was not representing the estate of the deceased co-sharer.

(b) ***Sakharam (since deceased) Through LRs & Another vs. Kishanrao***[30] : In this case one of the two plaintiff-respondents in a second appeal died and the High Court dismissed the appeal as having abated on non-substitution of his LRs. In that context, this Court while allowing the appeal observed:

> "6. When two plaintiffs joined together and secured a decree of declaration and possession of an immovable property, the death of one of the decree holders will not make the second appeal abate. As against the surviving successful plaintiff, the cause of action survived. Abatement occurs only when the

[30] See Footnote 6

> cause of action does not survive upon or against the surviving party."

In our view, the aforesaid decision, which is by a two-Judge Bench, cannot be taken as a binding precedent since it does not at all deal with the possibility of conflicting or inconsistent decrees arising from abatement of appeal *qua* the deceased plaintiff-respondent. In fact, the judgment does not at all deal with earlier binding precedents of larger Benches including the one rendered by a five-Judge Bench which we have discussed in the earlier part of this judgment. We, therefore, hold the same to be *per incuriam*.

(c) ***Gurnam Singh (Dead) through LRs and Others vs. Gurbachan Kaur (Dead) by LRs.***[31] : In this case, it was held by this Court that where parties to an appeal had expired and the legal representatives of the deceased parties were not brought on record the proceedings would abate and the decree passed in ignorance thereof would be a nullity. In our view, this judgment is of no help to the appellant.

[31] See Footnote 6

(d) ***State of Punjab vs. Shamlal Murari***[32]**:** This decision does not deal with the issue of abatement. We, therefore, find it not relevant for discussion.

(e) ***Baij Nath & Another vs. Ram Bharose and Others***[33]: In this case a Full Bench of the Allahabad High Court held:

> "36. ...
> 1. If, in a suit, a plaintiff, makes a claim against a number of defendants on common grounds and all the defendants also contest the suit on common grounds and the suit is decided in favor of the plaintiff against all the defendants, an appeal filed by all the defendants can be heard in favor of the remaining defendants after one of the appealing defendants has died during the pendency of the appeal and his legal representatives have not been brought on record so that his appeal has abated, only if the rights and interests of the surviving defendants were not joint and indivisible with those of the deceased defendant, and in the event of the success of the appeal, it does not lead to two inconsistent and contradictory decrees.
> 2. While the appeal of the remaining defendants can be heard, the decision in it will not enure to the benefit of the legal representatives of the deceased defendant appellant."
>
> (Emphasis supplied)

In our view, the above decision of the Allahabad High Court makes it clear that the appeal filed can be heard in favour of the remaining defendant-appellants only if

[32] See Footnote 6
[33] See Footnote 6

the rights and interests of the surviving defendants were not joint and indivisible with those of the deceased defendant, and in the event of the success of the appeal, it does not lead to two inconsistent and contradictory decrees which is also the law laid down by five-Judge Bench of this Court in ***Sardar Amarjit Singh Kalra*** **(supra)**.

CONTINUANCE OF APPEAL MAY RESULT IN INCONSISTENT OR CONTRADICTORY DECREES

33. In the instant case, the civil suit was instituted by the first respondent (i.e., Parasram), *inter alia*, for declaration of title and possession of suit property by claiming that his grandfather (i.e., Tej Singh) was the sole owner of the suit property which he got constructed from his own funds and was recorded as such in the municipal records since 1938; that on his death in 1965, plaintiff's father's (i.e., Ramswarup) name was mutated in municipal records on 1.3.1967 and he became owner in possession; in between, defendants presented application for mutation which was rejected with liberty to them to bring a suit before competent court, which they did not; that tenants have been residing in the suit property since 1937 and they used to pay rent to the

plaintiff's grandfather and on his death to the plaintiff's father; that on 9.10.1979, partition was carried out, according to which, suit property came to the share of the plaintiff and plaintiff's name was recorded in municipal records vide resolution dated 31.1.1981; that defendants had been residing in the third floor of the disputed building as tenants of previous owner on a monthly rent of Rs.50/- p.m. and since 9.10.1979 they are tenants of the plaintiff; that defendants encroached upon the vacant portion of the ground floor of the disputed building and opened a Hotel for their son, in respect of which plaintiff served notice on 12.12.82, but despite service of notice, possession has not been handed over; that, in fact, defendants sublet certain portion of ground floor to Raghuveer without the permission of the plaintiff, for this reason also, plaintiff is entitled to possession of the building from the defendants; that defendants denied ownership of the plaintiff and on this ground also plaintiff is entitled to possession. Thus, by claiming termination of tenancy, suit was instituted.

34. Defendants Suresh Chandra and Ram Babu filed written statement, *inter alia*, claiming that disputed building has never been in the ownership of Tej Singh, if his name

was mutated in the revenue record it was by playing fraud. Similarly, if father of the plaintiff got his name mutated it was by fraud, which confers no right or title. Defendants claimed title and possession over the suit property extending for last 38 years as owners thereof. They denied tenancy and claimed that father of the defendants, namely, Gokul Prasad, received the property in mutual partition held with his brothers, namely, Tej Singh, Jwala Prasad, Gajadhar Prasad in the year 1947 and after the death of Gokul Prasad in the year 1950, defendants became complete owners in possession over disputed buildings. With the aforesaid averments, they prayed for dismissal of the suit.

35. The trial court dismissed the suit, *inter alia*, holding that plaintiffs failed to prove that they were the exclusive owner of the suit property and they also failed to establish that defendants were tenants thereof.

36. Aggrieved with the judgment and decree of the trial court, the first respondent filed civil appeal. The first appellate court allowed the appeal and decreed the plaintiff's suit, *inter alia*, holding that plaintiff is the owner of the suit property; defendants' father Gokul Prasad did not get the property in partition, therefore defendants who claim

through Gokul Prasad are not the owners, rather are tenants.

37. The aforesaid facts make it clear that the defendants claimed a joint interest in the suit property flowing from their father Gokul Prasad whereas the plaintiff claimed title through his own father with an additional claim that the defendants were his tenants through his predecessors-in-interest. The first appellate court accepted plaintiff's case and held the plaintiff to be owner of the suit property and defendants to be its tenants. In such circumstances, if, on non-substitution of the legal representatives of one of the defendant-appellants, the second appeal abated *qua* him, the decree as against him, holding him to be tenant and plaintiff the owner, attained finality. Therefore, if the second appeal is allowed to proceed, on it being allowed, possibility of conflicting and contradictory decrees, in respect of same subject matter, coming into existence cannot be ruled out because one, which attained finality, held the plaintiff to be owner of the suit property and the deceased defendant its tenant whereas the other could hold the surviving defendant to be its owner. What is important is that both defendants had set up a common defense of having a joint title over the

suit property flowing through their father, who, admittedly, was not found owner by the first appellate court. In such circumstances, the decree that came into existence was an indivisible/inseparable decree and if the second appeal had been allowed to proceed there was possibility of conflicting decrees coming into existence, hence, abatement of the second appeal *qua* the deceased defendant-appellant would result in abatement of the entire second appeal. Issue (b) is decided in the above terms.

CONCLUSIONS:

38. In the light of discussion above, we summarize our conclusions as under:

(a) The finding returned by the High Court that there was no sufficient cause for condonation of delay in filing application for substitution and setting aside abatement does not suffer from any illegality or perversity as to warrant an interference.

(b) On abatement of second appeal *qua* the second appellant Ram Babu, the entire second appeal abated as continuance of the second appeal would have given rise to a possibility of inconsistent decrees i.e., one in favour of the plaintiff against the deceased defendant-appellant

and the other in favour of the surviving defendant appellant, even though both defendants claimed joint interest in the suit property flowing from their father.

(c) As the second appeal was jointly filed by the two defendants, the benefit of the provisions of Order XLI Rule 4 CPC was not available to the surviving defendant appellant to continue with the second appeal and seek for reversal or modification of the decree operating against the deceased-appellant as well.

39. In view of our conclusions above, we find no merit in these appeals. The same are accordingly dismissed. Pending application(s), if any, stand disposed of. Parties to bear their own costs.

.....J.
(PAMIDIGHANTAM SRI NARASIMHA)

.....J.
(MANOJ MISRA)

NEW DELHI;
JULY 18, 2025