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IN THE HIGH COURT OF PATNA
FULL BENCH

M.A. Nos. 147 and 157 of 1973 and C.R. No. 837 of 1975

Decided On: 12.05.1983

Appellants:**Jagarnath Singh and Ors.**
Vs.
Respondent:**Singhasan Kuer and Ors.**

Hon'ble Judges/Coram:
S.K. Choudhuri , S.P. Sinha and M.P. Varma , JJ.

JUDGMENT

S.K. Choudhuri, J.

1. In these cases the common question of law referred to the Full Bench are the following-

> (1) When a party to a suit dies and some of his heirs are already on the record and some are not, and are not substituted in the proceeding, the proceedings abate or the heirs on the record represent the entire estate of the deceased for the purpose of the proceeding and the proceeding does not become defective?
>
> (2) Whether the answer to the first question is of universal application or is dependent on certain conditions, if so, what are the conditions.

Before answering the questions, for convenience I re-formulate the first question in the following language:

> (1) When some of the heirs of the deceased party are already on record and the rest of the heirs are not substituted, whether the proceeding becomes defective and abates or whether by application of the principle of representation by the heirs on record the proceeding does not abate?

2. In order to answer the questions mentioned above it is necessary to state the salient facts of the appeal. Miscellaneous Appeal No 157 of 1975 has been preferred by plaintiffs Nos. 2 to 6 against an order of partial abatement of the suit dated 16th July 1975 passed by the Second Additional Subordinate Judge, Bhagalpur in Title Suit No. 178 of 1966 by which an application for setting aside abatement against deceased respondent No 8 (Sri Bandhu Ram Marwari) and bringing his heirs and legal representatives on record has been rejected and it has been held that the suit has abated only against deceased respondent No. 8, and has not abated as a whole.

The aforesaid Civil Revision (Civil Revision No. 837 of 1975) has been filed by the defendants first party against that portion of the said order by which the court below has refused to hold that the appeal has abated as a whole The Civil Revision was ordered to be heard along with the aforesaid miscellaneous appeal.

M.A. No. 147 of 1973 has been filed by the sole plaintiff against an order dated 10th May, 1967 passed in Title Appeal No. 49 of 1962 by the Additional Subordinate Judge, Muzaffarpore arising out of the judgment dated 16th February 1962, passed in Title Partition Suit No. 79 of 195c, holding that the appeal has abated as a whole for non-substitution of one of the heirs, namely, the daughter in place of deceased No. 1 Narain Singh, although his two sons were already on record as respondent Nos. 2 and 3.

3. The plaintiffs had filed a title suit which was registered as Title Suit No. 1978 of 1966 under Section 72(2) of the Bihar Hindu Religious Trust Act praying therein for setting aside two sale deeds dated 21.4.1946 and 22.9.1952 executed by defendant No. 17 in his capacity as one of the trustee. The first sale deed was executed is favour of one Budhulal Marwari (defendant No. 8) and the second sale deed was executed in favour of Raghubans Bhagat and Kaushal Kishore Bhagat, defendants Nos. 2 and 3 respectively. A relief for Khas possession was also prayed.

During the pendency of the suit, the plaintiff filed an application on 18.3.1975 for deleting the name of defendant No. 8, who is said to have died, on 15.10.1974 and which fact, according to plaintiff was learnt on 16.3.1975, from one Shri Babulal Mohansaia. Tnus a prayer was made for amending the plaint, accordingly. It was also stated in that application that the sons of defendant No. 8 are already on record as defendant Nos. 9 to 12. The names of four other heirs, namely, the four daughters have also been disclosed in that petition and, accordingly, a prayer was made to add their names. Another application was filed on 4.3.1995 by the plaintiffs for condonation of delay and substitution after sitting aside abatement against defendant No. 8. Defendants Nos. 1 to 6 who were arrayed as defendant first party contested the said application. The trial Court took evidence and thereafter on discussion of the evidence held that there was no sufficient cause for setting aside abatement against defendant No. 8, and therefore, the suit has abated as against defendant No. 8, however, held that the entire suit has not abated.

4. Title partition suit No. 79 of 1956 was filed by the sole plaintiff claiming one-third share in the suit property and the defendant first party who were defendants Nos. 1 to 9 contested the suit. The defendant second party who were defendants Nos. 10 to 16, however supported the plaintiff.

The main defence of the contesting defendants was that there was a previous partition, The title partition suit was dismissed by the trial court, and thereafter the plaintiff filed an appeal which was registered as Title Suit No. 49 of 1962-During the pendency of the appeal, respondent No. 1 (defendant no 1) died. On 10th September, 1964 the appellant filed a petition stating that the sons of the deceased respondent No. 1 are already on record as respondent Nos. 2 and 3 (i.e. defendant Nos. 2 and 3) which fact may be noted and the name of deceased respondent No. 1 be deleted from the memorandum of appeal. On 21st September 1964, the defendants first party filed an application praying therein to hold that the appeal has abated as against the daughters of the deceased has not been substituted. Accordingly, the plaintiff-Appellant filed an application on 1st October, 1964, for adding the daughter (Singhasan Kuar) as party respondent after setting aside abatement alleging that he knew about the death of defendant respondent No. 1 only on 6th September 1964. The lower appellate court rejected the application for setting aside abatement, and refused to set aside the abatement. Following the Division Bench decision of this Court reported in 1962 BLJR 728, it held that the appeal as a whole, has abated, Miscellaneous Appeal No. 147 of 1973 has been directed against the said order.

5. It appears that in both the cases some of the heirs of the deceased are on record. In the first case, namely, Title Suit No. 178 of 1966, the sons were on record as defendants Nos. 9 to 13 and the four daughters could not be brought on the record within the period of limitation and the application for substitution after setting aside abatement of the four daughters of deceased defendant No. 8 was rejected. In the second case, namely, Title Appeal No. 49 of 1962, two of the legal representatives of deceased respondent No. 1 were already on record as respondent Nos. 2 and 3 and the daughter was not substituted within time, though an application was filed for substituting her in place of the deceased respondent No. 1 after setting aside abatement which stood rejected.

It is in those circumstances that the aforesaid two questions have been referred to the Full Beach for answer. The detailed reference order is to be found in the records of Miscellaneous Appeal No. 147 of 1973. In the order reference dated 9th July, 1976, made by Division Bench of this court, it has observed that there are some inconsistency between the Supreme Court's decision and the Patna High Court decisions. The Patna High Court decisions referred to in the reference order are Gauri Shanker Singh and Anr. v. Jwala Mukhi Devi and Ors. (1962) B.L.J.R. 728 : A.I.R. 1962 Pat 395 The State of Bihar and Anr. v. Saubhagya Sundari Devi and Ors. MANU/BH/0052/1972 : AIR1972Pat200 and Prahlad Jha and Ors. v. Sonalal Mahtc and Ors. MANU/BH/0096/1974 : AIR1974Pat338 Reference has also been made to a single Judge decision of this Court in the case of Harbans Singh v. Rajpaltan MANU/BH/0044/1975 : AIR1975Pat184 in which as pointed out in the reference order, it has been held that the decision in Prahlad JhA's case (supra) washer incuriam, besides being distinguishable, as the previous Bench decision in MANU/BH/0052/1972 : AIR1972Pat200 (supra) was not brought to their Lordship's notice. The reference order has also referred to the Supreme Court's decision in the case of Mahabir Prasad v. Jagu Ram and Ors. MANU/SC/0010/1971 : [1971]3SCR301

6. Mr. Bishwanath Agrawal, learned counsel, appearing in Miscellaneous Appeal No. 157 of 1976 contended that where in a case some of the heirs of the deceased already on record as defendants or respondents, the question of abatement would not arise as it would. be deemed that the heirs on record would represent the estate of the deceased for the purpose of litigation. He contended that it is not necessary to bring the rest of the heirs on record within time as the estate of the deceased would be deemed to be represented by the heirs of the deceased record unless, of course, there was fraud or collusion between the parties on record, or that those left out heirs had a special case to be tried. In support of this contention he relied upon the case of Mahabir Prasad v. Jagu Ram and Ors. (supra), Harihar Prasad Singh and Ors. v. Balmiki Prasad Singh and Ors. AI.R. 1976 SC 733 N. Jayaram Beddi v. The Revenue Divisional Officer MANU/SC/0018/1979 : [1979]3SCR599 and Muhammad Arif v. Allah Babbul Alamin and Ors. A.I.R. 1982 S.C. 948 (1) We also contended that in the Bench decision of this Court in the cases of Prahlad Jha and Ors. v. Sonalal Mohton and Ors. (supra) though the collusion arrived at in that case is correct, the observation with regard to abatement of appeal was incorrect. The argument of Mr. Agarwal was fully adopted by Mr. S.C. Mukherjee learned Counsel appearing in Miscellaneous Appeal No. 147 of 1973.

On the other hand, Mr. Shrinath Singh, learned Counsel for the respondents Miscellaneous Appeal No. 147 of 1973 contended that merely because some of the heirs are already on record as defendants or respondents, the suit or appeal, as the case may be, will not be free from abatement. According to the learned Counsel as soon as a defendant in a suit or a respondent in an appeal dies, it becomes the duty

of the plaintiff or the appellant, as the case may be, to enquire about the heirs and the said enquiry must be bona fide. It is only after such an enquiry if done of the heirs are brought on record or that opinion is formed that the heirs already on record would represent the estate, then by application of the theory of representation, the abatement of the suit or the appeal would not take place. Learned Counsel elaborated his argument with reference to Rules 2, 3 and 4 of the Order XXXI of the Code of Civil Procedure read with the definition of the 'legal representative' as given in Clause (ii) of Section 2 of the Code of Civil Procedure. He pointed out that the 'legal representative' has been defined to mean a person who in law represents the estate of the deceased person, and include any person who intermeddles with the estate of the deceased....' The phrase 'right to sue' appearing in Rules 2, 3 and 4 of Order XXXI of the Code of Civil Procedure according to the learned Counsel would survive only if all the heirs are on record, but if some of them are not on record, then Rule 3 or Rule 4, as the case may be, shall come into play and, therefore, under these rules, namely, Rule 3 or Rule 4 it was the bounden duty of the plaintiff or appellant to enquire and bring on record the left out heirs of the deceased as representative of the estate of the deceased. When after such an enquiry an application is filed within the time and the court passes necessary order on that application, then by application of the theory of representation the estate would be represented even though subsequently it is found that still some of the heirs have been left out. Learned Counsel contended that the law regarding abatement has been elaborately laid down by the Supreme Court in the cases of Daya Ram v. thyam Sundari MANU/SC/0298/1964 : [1965]1SCR231 and N.K. Mohd. Suleman Sahib v. N.C. Mohd Ismail Saheb and Ors. MANU/SC/0364/1965 : [1966]1SCR937 Learned Counsel for the respondents further contended that neither the case of Mahabir Praaad, (supra) nor the other cases of the Supreme Court relied upon by the learned counsel for the appellant lay down the law regarding abatement. The decisions of the Supreme Court relied upon by the learned Counsel for the appellant, according to the learned Counsel for the respondents, have been decided on their own facts and cannot be taken as laying down any proposition to the effect that where some of the heirs are already on record, the question of abatement would not arise, though no enquiry or attempt was made for bringing the left out heirs on record to fully represent the estate of the deceased.

7. In view of the discussions which I will make hereafter, it is difficult to accept the argument of Mr. Singh that only the cases of Daya Ram and Ors. v. Shyam Sundari and Ors. (supra) and N.K. Mohd. Sulaiman Sahib v. N.B. Mohd. Ismail Sahib and Ors. (supra) lay down the law regarding abatement whereas other cases of the Supreme Court merely are cases in which the law laid down in the aforesaid two Supreme Court cases has been applied.

8. In Daya Rani's case, (supra) one Shyam Sundari obtained a decree in apparitional suit for her one-third share in the suit property. Appeal was filed by the heirs of Matadin in which Shyam Sundari was the sole respondent. Shyam Sundari died and the appellant substituted her husband and four sons as her legal representatives within time. The substituted heirs took objection that the appeal has abated as her other son and a daughter has not been substituted. It appears that in support of this contention, learned Counsel for the respondent relied upon the previous decisions of the Supreme Court in State of Punjab v. Nathu Ram MANU/SC/0019/1961 : [1962]2SCR636 and Ramswarup v. Munshi MANU/SC/0401/1962 : [1963]3SCR858 . Their Lordships have pointed out that Nathu Ram's case arose out of a proceeding under the Land Acquisition Act in relation to a land belonging to two brothers, who refused to accept the compensation offered to them and applied to the Government to

refer the dispute to arbitration. The matter was thereafter referred to arbitration under the Punjab Land Acquisition (Defence of India) Rules, 1943 and an award was passed in favour of the two brothers. The Government being aggrieved preferred an appeal to the High Court against the said award. It appears that during the pendency of the appeal, one of the brothers died and no application was made for bringing on record the legal representative within the prescribed time. In these circumstances the Supreme Court held that it was a case of joint decree which was indivisible and as such the appeal against one respondent alone could not proceed as the appeal has abated against the deceased respondent and in such a case, there was a chance of obtaining inconsistent decree. This was thus a case where there was no heir of the deceased respondent on the record and the decree passed in favour of the two respondents was joint and inseparable.

While dealing with the Ramsarup's case, it has been pointed out that that was also a case of joint decree holders who were respondents and none of the legal representatives of the deceased respondent was on the record. Therefore, there was none on the record who could represent the estate of the deceased respondent. It has also been pointed out that, if the decree is joint and indivisible, the then abatement in such a case would be total, but if it is confined to the share of the deceased respondent as against whom the appeal has abated, the abatement will be partial.

Their Lordships after discussion of the aforesaid two cases have pointed out that the case before them was entirely different, as Shyam Sundari's heirs were brought on record within time, and the question before them was as to whether the absence of two of the legal representatives of deceased Shyam Sundari Devi, who have been omitted to be brought on record would render the whole appeal incompetent. Their Lordships have laid down:

> When this provision speaks of legal representatives is it the intention of legislature that unless each and every one of legal representatives of the deceased defendants, where these are several, if brought on record there is no proper constitution of the suit or appeal with the result that the suit or appeal would abate. The almost universal of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record....

This decision has further said:

> In a case where a person brought on record is a legal representative, we consider that it would be consonant with justice and principle that in the absence of fraud or collusion the bringing on record of such a legal representative sufficient to prevent the suit or appeal from abating....

This decision states that this view of law was approved in Mohd. ZafarYab Khan v Abdul Razzac Khan MANU/UP/0109/1928 and also by the Bombay High Court in Jahrahi Salluduh Khan v. Bismillabi Sadruddi MANU/MH/0038/1924 as also by the Patna High Court in Lilo Sonar v. Jhagru Saliu MANU/BH/0159/1924 and Shib Butta Singh v. Shaik Karam Baksh A.I.R. 1925 Pat. 531 The Nagpur High Court has also

approved the same view in Abdul Baki v. Bansilal Abirchand Firm Nagpur A.I.R. 1945 NaG 53 as also the Lahore High Court in Umrao Begum v. Rahmat Illahi. A.I.R. 1939 Lah. 428 It has, therefore, been held by the Supreme Court that the appeal has not abated.

9. The other case for discussion is N.K. Mohd. Sulaiman Sahib v. N.C. Mohd. Ismail Sahib and Ors. (supra). In this case the principle of representation, as applied to case under Order XXXI, Rules 4 and 5 has been applied also in a case filed by a creditor against the heirs of a debtor, who was a Mohammadan and was dead on the date of the filing of the suit. It has extended the principle laid down in the aforesaid case just discussed, namely, Dayaram's case (supra) to this case also. Their Lordships have said as follows:

> ...In a suit constituted against the heirs of a deceased debtor, it is the creditor who takes upon himself the responsibility to bring certain persons as heirs and legal representatives of the deceased on the record. If he has proceeded bona fides and after the enquiry and under a belief that the persons who are brought on the record are the only legal representatives, it would not make any difference in principle that in the former case the heirs have been brought on the record during the pendency of the suit, the creditor having died since the institution of the suit, and in the other at the instance of the plaintiff certain persons are impleaded as legal representatives of the deceased person. In either case, where after the enquiry certain persons are impleaded after diligent and bona fide enquiry in the genuine belief that they are the only persons interested in the estate, the whole estate of the deceased will be only represented by those persons who are brought on the record or impleaded, and the decree will be binding upon the entire estate. This rule will of course not apply to cases where there has been fraud or collusion between the creditor and the heir impleaded or where there are other circumstances which indicate that there has not been a fair or real trial, or that the absent heir had a special defence which was not and could not be tried in the earlier proceeding.

10. The next decision cited at the Bar is the case of Mahabir Prasad (supra). The fact of this case shows that Mahabir Prsad, his wife Saroj Devi and his mother Gunwanti Devi filed a suit against one Jagan Ram and others, for realisation of arrears of rent. The suit was decreed and after execution was filed, the said execution case was resisted by the defendants saying that the decree was unexecutable in view of the provisions of the Delhi Reforms Act, 1954. The said objection was allowed and execution case was dismissed. Thereafter Mahabir Prasad alone filed an appeal against the judgment-debtors and making Saroj Devi and Gunwanti Devi as respondents. During the pendency of appeal, Saroj Devi died, and, therefore, Mahabir Prasad applied for striking out her name. It was allowed by the High Court, "subject to all just exceptions". The High Court held that the appeal had abated. The matter went to the Supreme Court where the decision of the High Court was reversed. It was held that Order XLI, Rule 4 of the Code of Civil Procedure would apply in such a case and, therefore, the appeal will not abate. Alternatively it was held as follows:

> Even on the alternative ground that Mahabir Prasad being one of the heirs of Saroj Devi tnere can be no abatement merely because no formal application for showing Mahabir Prasad as an heir and legal representative of Saroj Devi was made. Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only

> necessary that he should be described by an appropriate application made in that behalf that he is alone on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate. On that ground also the order passed by the High Court cannot be sustained.

The next case for discussions is Harihar Prasad Singh v. Balmiki Prasad Singh and Ors. (supra) In this case one Harihar Prasad Singh died in 1953 and his son and widow were substituted on 12th August, 1953. With the coming into force of the Hindu Succession Act the widow's estate become full estate. The widow Manmohini died on 1st November, 1967 and the appellant informed the court that the son is only and heir already on record and, the widow's name may be struck off. The respondents filed an application on 27th April, 1968 stating that the daughter Ghia Devi of the deceased widow has not been brought on the record of the case and, therefore, the appeal as a whole abated. Accordingly, a fresh application was filed on 30th July, 1968 for adding Ghia Devi after setting aside abatement. The said application, it appears, was rejected. In the circumstances, argument was put forward that the whole appeal has abated. Their Lordships referred to Natnu Rain's case (supra) which decided that if the decree is joint and indivisible, the abatement will be total. While referring to the case of Rameshwar Prasad v. Shyam Behari Lal (supra), it has been pointed out that it was a case where all the plaintiffs filed a second appeal before the High Court. During the pendency of that appeal one of them died and his legal representatives were not brought on record. An objection was taken that the entire appeal had abated. The argument of the appellants that the surviving appellants could file the appeal against the entire decree in view of the provisions of order XLI Rule 4 of the Code of Civil Procedure and, therefore, they were competent to continue the appeal even after the death of one of them and the abatement would be only in so far as the appeal on his behalf is concerned, was negatived. It has been held that where all of them preferred the appeal, there is no question of application of Order XLI Rule 4 of the Code of Civil Procedure. It has also held that if some party dies during the pendency of the appeal, his legal representatives have to be brought on record within the time prescribed by law and if that is not done, then the appeal by the deceased appellant abate and does not proceed any further. In so doing Supreme Court over-ruled the contrary view taken by the Bombay, Calcutta and Madras High Courts in Balwant v. Nagu Kushwaha A.I.R. 1942 Bom. 301 Satulal Bhattacharya v. Ashiuddin Shaikh A.I.R. 1984 Cal. 703 and Somasundram Chattiar v. Vaithilinga Mudaliar A.I.R. 1918 Mad. 794. It has further been stated by the Supreme Court in A.I.R. 1975 S.C. 733, as follows:

> 32. The important point to note about this litigation is that each of the reversionary is entitled to his own specific share. He could have sued for his own share and get a decree for his share. This is why five title suits Nos. 53 and 61 of 1934 and 20, 29 and 41 of 1935 were filed in respect of the same estate. In the present case also the suit in the first instance was filed by the 1st and 2nd plaintiffs for their 1/12th share. Thereafter many of the other reversioners who were originally added as defendants were transposed as plaintiff. Though the decree of the trial court was one, three appeal Nos. 325, 332 and 333 of 1948 were filed by three sets of parties. Therefore, if one of the plaintiffs dies and his legal representatives are not brought on record the suit or the appeal might abate as he is concerned. Further more the principle that applies to this case is whether the estate of the deceased appellant or respondent is represented. This is not a case where legal representatives of

Man-mohini was on record.

This case MANU/SC/0008/1974 : [1975]2SCR932 , has referred to a number of decisions and noticed different principles regarding abatement laid down in those cases. It has referred to the case of Kadir Mohideen v. Marakeyyear Muthu Krishna Ayyer .I.L.R1968 . Mad. 230. In this case the facts appear to be that when the defendant died the first defendant before the court was impleaded as his legal representative. The impleaded person raised no objection that he was not the sole legal representative of the deceased and there were other heirs to be joined. The decision of the High Court has been quoted in paragraph 33 which stands thus:

> In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purpose of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate.... If this were not the law, it would, in no few cases be practically impossible to secure a complete representation of the party dying pending a suit and it would be specially so in the case of Mohammadan party and there can be no hardship in a provision of law by which a party dying during the pendency of a suit is fully represented for the purpose of the suit, but only for that purpose by a person whose name is entered on the record in place of the deceased party under Sections 365, 267 and 368 of the Civil P.C. though such person may be only one of several legal representatives or may not be the true legal representative.

The other case noticed in the case of Dolai Malliko v. K.C. Patnayak MANU/SC/0311/1966 : AIR1967SC49 one of the plaintiffs applicants dies where the appeal was pending before the Jower appellate court. The widow and the major son were substituted, Later it was discovered that there were some other heirs. The respondents contended that the appeal has abated as there could not be any want of knowledge of existence of other heirs on the part of the widow and the kanor son, who applied to be brought on record in place of the deceased plaintiff-appellant. It has been pointed out that there is difference between this case and the two cases of the Supreme Court in Mohd. Sulaiman Sahib's case MANU/SC/0364/1965 : [1966]1SCR937 , and in Daya Ram's case. MANU/SC/0298/1964 : [1965]1SCR231 Ir these cases the plaintiffs or the appellant applied for bringing the heirs of the deceased defendant or respondent on the record. In this case the heirs themselves have applied to be brought on the record in place of the deceased appellant. In such a case, it has been stated, the question of diligent or bonafide enquiry would not arise as heirs who applied to be brought on the record must know all the heirs. The Supreme Court has stated:

> Even so we are of opinion that unless there is fraud or collusion or there are other circumstances which indicate that there has not been fair or real trial or that against the absent heir there was special case which was not and could not be tried in the proceeding there is no reason why the heirs who have applied for being brought on record should not be held to represent the entire estate including the interests of the heirs not brought on record. This is not to say that where heirs of an appellant are to be brought on record all of them should not be brought on record and any of them should be deliberately left out. But if by oversight or an account of some doubt as to who are the heirs, any heirs of a deceased appellant is left out that in itself

> would be no reason for holding that the entire estate of the deceased is not represented unless circumstances like fraud or collusion to which we have referred to exist

it is also noticed that the decision in the case of Raton Lal v. Lal Man Das MANU/SC/0021/1969 : [1970]1SCR296 while dealing with that case. It has been pointed out by the Supreme Court that the If High Court could not have dismissed the appeal as Order XLI Rule 4 of the Code of Civil Procedure applied. Notice was also taken of the case reported in MANU/SC/0010/1971 : [1971]3SCR301 Supra. That case has already been referred to above. However, after discussing the said case and quoting the relevant portion on the point from that case, which has already been quoted in this judgment in paragraph above, their Lordships of the Supreme Court have stated:

> That meets point raised by the respondents, exactly. The principle of representation of the estate of the deceased which need not be by all the legal representatives of the deceased.

Thus Hairhar Prasad Singh's case MANU/SC/0008/1974 : [1975]2SCR932 , appliec the principle of representation and held that as one of the heirs of the deceased Manmohani was already on record the appeal did not abate.

12. The other case of the Supreme Court cited at the Bar was the case of Jayaram Reddy and Anr. v. Revenue Divisional Officer and Land Acquisition Officer, Kurnool MANU/SC/0018/1979 : [1979]3SCR599 . The question involved in this case before the Supreme Court was as to whether the Government appeal arising out of a land acquisition proceeding stood abated in the High Court when the appeal was pending there, for non-substitution of the heirs of one of the respondents Y. Prabhakar Reddy, though in other appeal preferred by the claimants the heirs of the said deceased, who was one of the appellants in the appeal before the High Court, were substituted. Singhal J.-held that the question of abatement was not raised before the High Court and the two appeals having been heard together and disposed of by a common judgment, it would be taken that there was an abatement of the technical plea of abatement. Though Desai, J. gave a separate judgment, but has fully agreed with the judgment of Singhal, J.-that the appeal be dismissed. The learned judge gave additional reasons, apart from agreeing with the 'abandonment of the technical plea of abatement', and has pointed out that the principles underlying order XXII Rules 2 and 3 of the Code of Civil Procedure, which provisions, on account of Rule 11 of that Order would apply to appeals, is undoubtedly a facet of natural justice or a limb of audi altrem partem rule. The learned Judge pointed out that the first limb of this rule audi altrem partem is that a person must be given an opportunity of being heard before any decision, one way or the other affecting him is recorded. The learned Judge has also referred to Mahabir Prasad's case MANU/SC/0010/1971 : [1971]3SCR301 , and has quoted the relevant position from page 744 which need not be repeated here as it has already been quoted in this judgment in paragraph 10 above.

That the principle deduced, after referring to the quotation, by the learned Judge, is that 'where one of the legal representatives of the deceased party is before the court at the time when the proceeding is heard but in another capacity, it is immaterial whether he is described as such or not and even if there are other legal representatives, the cause will not abate'. The consequences, which have emerged after discussions of several decisions, have been given by the learned Judge in

paragraph 40 as follows:

> **40.** The following conclusion emerge from these decisions:
>
> (1) If all legal representatives are not impleaded after diligent search and some one brought on record and if the Court is satisfied that the estate is adequately represented meaning thereby that the interests of the deceased party are properly represented before the Court, an action would not abate.
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> (2) If the legal representative is on record in a different capacity, the failure to describe him also in his other capacity as legal representative of the deceased party would not abate the proceeding.
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> (3) If an appeal and f cross-objections in the appeal arising from a decree are before the appellate court and the respondent dies, substitution of his legal representatives in the cross-objections being part of the same record, would unsure for the benefit of the appeal and the failure of the appellant to implead the legal representatives of the deceased respondent would not have the effect of abating the appeal but not vice versa.
>
> (4) A substitution of legal representatives of the deceased party in an appeal or revision even against an interlocutory order would enure for the subsequent stages of the suit on the footing that appeal is a continuation of a suit and introduction of a party at one stage of a suit would enure for all subsequent stages of the suit.
>
> (5) In cross appeal arising from the same decree where parties to a suit adopt rival positions, on the death of a party if his legal representatives are impleaded in one appeal it will not enure for the benefit of cross appeal and the same would abate.

Thereafter the learned Judge has said in paragraph 41 as follows:

> Is it possible to ratiocinate these decisions? Apparently the task is difficult. Now, if the object and purpose behind enacting Order 22 Rules 3 and 4 are kept in forefront conclusions Nos. 1 to 4 would more or less fall in line with the object and purpose, namely, no decision can be recorded in a judicial proceeding without giving such party or his legal representatives an opportunity of putting forth their case. To translate this principle into action denuding it of its ultra technical or harsh application, the courts held that if some legal representatives are before the Court or {they are before the court in another capacity, or are brought on record at some stage of the suit, the action will not abate even if there is no strict compliance with the requirements of Rules 3 and 4....

13. In view of the discussions of the aforesaid Supreme Court cases, which have dealt with the subject of abatement of a proceeding either at the suit stage or at the appellate stage, it is not necessary to discuss in detail other cases of the learned Single Judge and Division Bench of our High Court. The only cases which are required to be worth mentioning are the cases of Prahlad Jha and Ors. v. Sonelal Mahton and Ors. MANU/BH/0096/1974 : AIR1974Pat338 , and the State of Bihar and Anr. v. Subhagya Sundari Devi and Ors. MANU/BH/0052/1972 : AIR1972Pat200 ,

because these two Division Bench decisions have been mentioned in the order under which reference has been made to the Full Bench. Prahlad Jha's case (Supra) was taken notice of in a subsequent Division Bench case in Ramdeo Jha and Ors. v. Chandra Thakur and Ors. MANU/BH/0044/1982 : AIR1982Pat172 , of which I was member. It has been pointed out in that case that Prahlad Jha's case is distinguishable as in that case when on a previous occasion the second appeal was remanded, rightly or wrongly, it was held that the appeal abated against deceased respondent No. 5 and consequently the appeal abated as a whole. After remand an application was filed for setting aside abatement and for substitution of the heirs of deceased respondent No. 5 but the same was rejected by the lower appellate court. The matter came up in second appeal again. In these circumstances, it was held that the plea of abatement of the appeal cannot be advanced again before the High Court as it was already decided on previous occasion by the High Court while remanding the case and, therefore, the point was barred by the principle of res-judicata.

14. Mr. Agarwal while referring to this case conceded that the conclusion arrived at in Prahlad Jha's case is correct, but he contended that the observation that the appeal would, however, abate although one heir was on record and the rest of the heirs have not been substituted, is not correct. Learned counsel, however, contended that the diction on the point would also be correct, if it is assumed that it is a case where in fact there was no heir of the deceased respondent No. 5 on the record. He has pointed out that the mother being class one heir excludes the father, who was on record, he being class two heir under the Hindu Succession Act, and, therefore, it was a case where factually none of the heirs was on record and, therefore, the abatement would be total. The submission of Mr. Agarwal appears to be correct.

15. Now coming to the case in Gauri Shanker Singh and Ors. v. Jwalamuhhi Den and Ors. MANU/BH/0104/1962 : AIR1962Pat392 , it appears that one of the respondents died and one of the heirs of the deceased was already on record. The widow and the two daughters of the deceased applied beyond time to substitute them. Appellants also applied for substitution of these heirs after setting aside abatement. Both the applications were rejected. It has been said by the learned Judges that it was not the case of the appellants that they had no knowledge of the existence of the widow and the two daughters of the deceased respondent, and, that there is nothing in the language of order XXII Rule 4 of the Code of Civil Procedure to indicate that it would be sufficient to substitute in time only some of the several legal representatives of the deceased. Thus it has been held that the whole appeal abated. It has been rightly pointed out in Barmeshwar Nath Prasad Smgh v Babu Kuer and Ors. MANU/BH/0033/1964 : AIR1964Pat116 , that the observation regarding interpretation of the Rule 4 of Order XXII of the Code of Civil Procedure in Gauri Shanker Singh's case (Supra) in obiter, as the said question did not arise in that case. The view taken in that decision, viz. Gauri Shankar Singh's case also appears to be not in consonance with the principle laid down in the recent decision of the Supreme Court discussed above.

In other case cited at the Bar is the case of the State of Bihar and Anr. v. Subhagya Dundari Devi and Ors. MANU/BH/0052/1972 : AIR1972Pat200 . It is not a case of abatement nor any argument was put forward regarding abatement. Therefore, it is not an authority on the point under consideration. However, as this case has specific mention in the order of reference and it was cited at the Bar, it needs discussion here. It appears that the suit was filed by the joint creditors, who were members of the joint family, for his possession of the lands described in Schedule A of the plaint, for recovery of Rs. 44,791/- as arrears of royalty, besides other reliefs. The suit was

decreed for khas possession and preliminary decree was passed against defendant No. 1 for royalty and interest payable thereon and for case and damages to be ascertained by appointment of a pleader commissioner. The appeals were filed in the High Court, one by defendant No. 1 and the other by defendant No. 2, which were heard together. During pendency of the suit plaintiff No. 1 died and his two sons were already on record as plaintiffs Nos. 2 and 3, In the language of the learned Judge, "some of his heirs who were not already on record were substituted in his place." They are the widow and the daughter of the deceased plaintiff No. 1. It was argued that in view of Section 214 of the Indian Succession Act, the heirs of plaintiff No. 1 could not get a decree in absence of a succession certificate. This was one of specific questions which was canvassed and answered by this decision. It was held that a suit by one of the joint creditors who are members of the joint family, is maintainable on the death of the other and cannot fall for non-production of a succession certificate. Plaintiffs Nos. 2 to 4, therefore, could get a decree as claimed in the plaint, even without a succession certificate for arrears of royalty etc. The decision incidentally said that by application of the theory of representation also in view of the recent decision of the Supreme Court in Dola Mallko's case MANU/SC/0311/1966 : AIR1967SC49 , and Mahabir Prasad's case MANU/SC/0010/1971 : [1971]3SCR301 , the suit would not become defective.

16. The last case cited at the Bar which needs reference here is Mohammad Arif v. Allah Babbul Alamin and Ors. A.I.R. 1982 S.C. 948. I can do no better than quote paragraph 2 of the report here which reads thus:

> 2. After hearing counsel on either side we are satisfied that the High Court's order stating that the appeal has abated and the appellant Mohammad Arif could not be brought on record as a legal representative of Mohammad Ahmad is clearly wrong. It is true that the appellant did not prefer any appeal to the District Court against the original decree but in the first appeal he was a party respondent. But that part, in the second appeal itself Mohammad Arif had been joined as co-appellant along with his vendor Mohammad Ahmad. On the death of Mohammad Ahmad all that was required to be done was that the appellant who was on record should have been shown as a legal representative, inasmuch as he was the transferee of the property in question and at least as an intermeddler was entitled to be treated as legal representative of Mohammad Ahmad. He being on record the estate of the deceased appellant qua the property in question was representatives of the deceased appellant on record. The appeal in the circumstances could not be regarded as having abated and Mohammad Arif was entitled to prosecute the appeal. We, therefore, set aside the order of the High Court and send the appeal, back to the High Court for disposal according to law.

17. From the discussions of the several Supreme Court decisions made above, it emerges that when one or more heirs of the deceased defendant or respondent are on record, then the estate is fully represented in the suit or the appeal, as the case may be, and the suit or the appeal will not abate for not bringing on record the other left out side.

This will also include a case where some of the heirs at their own initiative are brought on the record of the case. Such heirs, who applied for bringing on record would represent the entire estate.

It may also include a case where through oversight or on account of such doubt as to

who the heirs are, any heir is left out to be brought on record, still the estate of the deceased is fully represented by the heirs brought on record. The left out heirs may subsequently apply to be brought on record, but there will be no abatement.

The aforesaid propositions are, however, qualified by the following exceptions.-

(i) Where the heirs on record collude with the plaintiffs or the appellants.

(ii) Where a special case could have been put forward by the left out heirs and they did not get an opportunity to present such case in the proceeding and.

(iii) Where there is an act of deliberate omission to include an heir while bringing the other heirs on record which may be said to be mala fide.

It is further held that where one or more of the heirs of deceased defendant or respondent are on record, or they are already before the court in another capacity, but the left out heirs were not brought on the record, and no formal application was made showing them as heirs and legal representatives of the deceased, still the estate of the deceased would be represented by the heirs on record and the decision will bind not only the heirs on record, but the entire estate including those not brought on record unless the case comes under any of the exceptions mentioned above. However, it will be open to the heirs on record to point out that they do not represent the interest of other heirs and in that case it becomes the duty of the plaintiff or the appellant, as the case may be to make diligent and bona fide enquiry of bringing other heirs on record in accordance with law. But if no such objection is taken, then after the decision it will be deemed that there has been abandonment of technical plea of abatement.

These exceptions may not be taken as exhaustive. I say this because of the observation made by Desai J.-in the Supreme Court decision in Jayram Reddy's case (Supra) to the effect that it is not possible to ratiocinate all these decisions as the task is difficult.

It may be stated here that the decisions of our High Court which have taken contrary view to those of the principles enumerated above are no longer good law in view of the recent pronouncement of Supreme Court in the decisions discussed above. Thus both the questions referred to the Full Bench have been answered accordingly.

18. The appeals as also the revision be now placed before the Division Bench for hearing.

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