

MANU/BH/0012/1940

Equivalent Citation: AIR1940Pat346

**IN THE HIGH COURT OF PATNA  
FULL BENCH**

Decided On: 15.04.1940

Appellants: **Ramphal Sahu and Ors.**  
**Vs.**

Respondent: **Babu Satdeo Jha and Ors.**

**Hon'ble Judges/Coram:**

*Arthur Trevor Harries, C.J., Wort and Manohar Lall, JJ.*

**JUDGMENT**

**Arthur Trevor Harries, C.J.**

**1.** On 7th July 1924, plaintiff 1 executed a mortgage bond for Rs. 1500 carrying interest at the rate of two per cent, per mensem with six monthly rests in favour of one Pandit Kapileshwar Missir, a pleader practising in the Courts at Laheria Sarai. On 16th October 1924, he executed another mortgage for Rs. 2000 with interest at two per cent, per mensem with quarterly rests in favour of the same mortgagee. On 14th May 1925, he executed a third mortgage for Rs. 2500, with interest at Re. 1-8-0 per cent, with annual rests in favour of the same mortgagee, and on 26th May 1926 he executed a fourth mortgage in favour of the same person for Rs. 7000 with interest at one per cent, per mensem with six-monthly rests. In all these four mortgages, the property mortgaged was an eight annas share in mauza Nebahi.

**2.** In order to redeem these bonds, plaintiff 1 sold five annas out of the eight annas share in village Nebahi already mortgaged to the four defendants on 30th June 1929 for a sum of Rs. 27,737. He left with the purchaser a sum of Rupees 4658-12-6 to redeem the first bond, Rs. 3695 for the second bond, Rs. 3033-10-0 for the third and Rs. 12,592-2-0 for the fourth bond. The four defendants redeemed the first two bonds and not the third and fourth. It transpired that plaintiff 1 had not left sufficient money to redeem the third bond, as the parties were apparently under a mistaken belief that this bond was for Rs. 1500, whereas in fact it was for Rs. 2500. On 20th November 1933 plaintiff 1 sold a further one anna share of his eight-anna interest in mauza Nebahi to the four defendants for Rs. 2500, and it is conceded that the four defendants had after this sale sufficient funds to discharge the third and fourth mortgages.

**3.** They however failed to do so, and eventually this suit was instituted praying that the liability of the four defendants be assessed at Rupees 33,070-4-2 1/2 and further that it might be ordered by the Court that within a period to be fixed the defendants should pay to Pandit Kapileshwar Missir or should deposit in his name in Court the said sum of Rs. 33,070-4-2 1/2 and cause the mortgage bonds to be filed in Court. In case of failure to pay the said debt in the manner indicated above, a money decree was prayed for the said sum.

**4.** The learned Subordinate Judge passed a decree in favour of the plaintiffs against all four defendants Ramphal Sahu, Ramkhelawan Sahu, Ramnarain Sahu and Bhola

Sahu. Against this decree the four defendants appealed to this Court. During the pendency of the appeal, Ramnarain Sahu died, and no steps were taken within the prescribed period to bring the names of his heirs or personal representatives on to the record. Later an application was made to set aside the abatement; but this application was rejected by a Bench of this Court. The remaining three defendants thereupon prosecuted the appeal.

**5.** On the appeal coming on for hearing before a Bench of this Court, counsel for the respondents took a preliminary objection that the appeal was incompetent and that by reason of the failure to bring on to the record the names of the personal representatives of Ramnarain Sahu the whole appeal had abated. On behalf of the appellants, it was contended inter alia that the three appellants could continue the proceedings by reason of the provisions of Order 41, Rule 4, Civil P.C. The Bench which heard the case was of opinion that the point involved was one of difficulty and importance and referred the matter to the Chief Justice for the constitution of a Full Bench. The question has therefore been heard by the present Bench. Order 41, Rule 4, Civil P.C., is in these terms:

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.

**6.** It is conceded by both parties that the decree in this case against the four defendants proceeded on the ground common to all. It was contended on behalf of the appellants that this rule applied not only to a case where one or more of a number of defendants had appealed but also to a case where all the defendants had appealed and one of them had died during the pendency of the appeal. It was argued that there was no difference whatsoever in principle between the case of some only of the defendants appealing and the case where all had originally appealed and one had died during the pendency of the appeal and no steps had been taken to bring the names of the heirs or personal representatives of the deceased appellant on to the record.

**7.** The wording of Order 41, Rule 4, Civil P.C., suggests that the rule was intended to apply to cases where all the plaintiffs or defendants were alive and that only one or more of such plaintiffs or defendants had appealed from the decree. The rule lays down that in such a case the Court may reverse or vary the decree in favour of all the plaintiffs or defendants in the suit as the case may be, provided that the decree appealed from proceeded on any ground common to all the plaintiffs or defendants. The words "and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be," suggest that all the plaintiffs or defendants are alive at the time when the decree of the Appellate Court is passed.

**8.** The wording of the rule does not appear to me to be appropriate to a case where one of the plaintiffs or defendant-appellants has died during the pendency of the appeal. A plaintiff or defendant-appellant who has died during the pendency of the appeal can no longer be regarded as a plaintiff or defendant in the suit, and the rule does not state in terms that the decree may be reversed or varied in favour of all the plaintiffs or defendants or their personal representatives or representatives-in-

interest. The reversal or variation can only be made in favour of the plaintiffs or defendants and that suggests that it cannot be made in favour of the personal representatives of a deceased plaintiff or defendant. Order 22, Rule 3 and 4, Civil P.C., deal with cases of plaintiffs and defendants dying during the pendency of a suit, and Order 22, Rule 11 makes the provisions of Order 22, Rule 3 applicable to Cases of appellants dying during the pendency of an appeal. Order 22, Rule 3 reads as follows:

(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 an application made in that behalf, shall cause the legal representatives 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 of 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.

**9.** As I have stated, this rule has been made applicable to appeals and therefore where one of the appellants dies and the right to prosecute the appeal does not survive to the surviving appellant or appellants alone, the Court on an application made in that behalf shall cause the legal representatives of the deceased appellant to be made a party and shall proceed with the appeal. But where within the time limited by law no application is made to bring the names of the representatives of the deceased appellant on to the record the appeal shall abate so far as the deceased appellant is concerned. In the present case, the right to appeal did not survive to the surviving appellants alone. The representatives of the deceased appellant could undoubtedly have joined in the prosecution of the appeal.

**10.** This rule is therefore applicable to the present case and the appeal abated in so far as the deceased appellant was concerned. The decree which had been passed against him became final as the Court on application made to it refused to set aside the abatement. It is to be observed that Order 22, Rule 3 is silent as to the ultimate fate of the appeal. All it states is that the appeal abates in so far as the deceased appellant is concerned. It has however been laid down by all the Courts in India that the appeal will in these circumstances abate as a whole if the case is of such a nature that the appeal cannot proceed in the absence of the legal representatives of the deceased appellant. This Bench however is only concerned with the question whether the remaining appellants can successfully prosecute this appeal by reason of Order 41, Rule 4, Civil P.C. If that rule applies, it seems clear that the appeal will not abate as a whole. However, even if Order 41, Rule 4, Civil P.C., does not permit the appellants to continue to prosecute the appeal it does not follow that the appeal abates as a whole. The present reference is only concerned with the question whether Order 41, Rule 4, Civil P.C., allows the remaining appellants to prosecute the appeal and not with the question whether on other grounds the appeal can or cannot proceed. Order 22, Civil P.C., provides a complete code to deal with the questions which arise by reason of the death of one of the parties to an appeal.

**11.** That being so, it has been contended on behalf of the respondents that the rights of the parties in the present case must be governed solely by Order 22, Rule 3, Civil P.C. That Rule makes it clear that the appeal in so far as the deceased appellant is

concerned has abated. According to the respondents, if the remaining appellants are allowed to prosecute the appeal conflicting or contradictory decrees may result and therefore the whole appeal must be regarded as having abated. As I have stated, whether the whole appeal has or has not abated in such circumstances is not a matter for this Bench.

**12.** On behalf of the appellants, it is urged that even if the appeal in so far as it concerns the deceased appellant has abated, the surviving appellants can prosecute the appeal and the Court may, under Order 41, Rule 4, Civil P.C., reverse or vary the whole decree, that is reverse or vary it in favour not only of the surviving appellants but also in favour of the legal representatives of the deceased appellant. In short, it is contended that in this case the Court has power to reverse the decree of the Court below and dismiss the whole suit not only against the surviving defendant-appellants but also against the legal representatives of the deceased defendant-appellant against whom the decree has already become final by reason of the refusal of the Bench to set aside the abatement.

**13.** The appellants' contention is supported by considerable authority. The earliest case is Chandarsang v. Khimabhai (1898) 22 Bom 718. In that case one of several defendant-appellants died after appeal filed but before the hearing. An application to have the name of his heir entered on the record as an appellant was rejected as too late. The decree proceeded on a ground common to all the defendant-appellants. When the appeal came on for hearing, it was dismissed by the lower Appellate Court for want of parties. It was held in second appeal that any plaintiff or defendant has a right, to appeal without the concurrence of any of the parties to the suit and the mere fact of the death of one of several appellants could not affect the right of the other appellants to proceed with the appeal if they chose to do so.

**14.** The proper course for the Appellate Court to adopt was to order that the appeal had abated so far as the deceased defendant-appellant was concerned, and to proceed with the hearing so far as the remaining appellants were concerned. The Court expressly held that Section 544, (corresponding to present Order 41, Rule 4) permitted the surviving appellants to prosecute the appeal against the whole decree in the absence of the personal representatives of the deceased appellant. The Court however did not expressly hold that the lower Appellate Court could reverse or vary the decree not only in favour of the surviving appellants but also in favour of the personal representatives of the deceased appellant who were not on the record.

**15.** This case was followed by another Bench of the Bombay High Court in Chintaman Nilkant v. Gangabai (1903) 27 Bom 284. That suit was for partition and the lower Court passed a decree in favour of the plaintiffs. Two of the defendants who denied the plaintiffs' right and claimed the property as their own, filed a joint appeal. Pending the appeal one of them died, and her representatives were not brought on the record. The surviving appellant however proceeded with the appeal and, at the hearing, the decree of the lower Court was reversed and the plaintiffs' suit was dismissed. The plaintiffs filed a second appeal to the High Court and contended that the lower Appellate Court ought not to have heard the appeal inasmuch as it had abated, or at all events that that Court had no power to reverse the lower Court's decree so far as it related to the deceased appellant.

**16.** It was held that as the two defendants had appealed on grounds common to them both, the lower Appellate Court had power to hear the appeal and to deal with the whole suit under the provisions of Section 544, (corresponding to the present

Order 41, Rule 4), Civil P.C.) This case expressly lays down that in such a case the Court may not only reverse or vary the decree in favour of the surviving appellant, but also may do so in favour of the legal representatives of the deceased appellant. A similar view was taken by a Bench of the Allahabad High Court in *Ram Sewak v. Lambar Panda* (1902) 25 All 27 in which it was expressly held that where several plaintiffs or defendants jointly appeal against a decree to which Section 544 (corresponding to present Order 41, Rule 4), Civil P.C., applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought upon the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant was concerned.

**17.** It cannot have the effect of causing the appeal as a whole to abate. The Madras High Court took a similar view in *Arthorama Pahu v. Arthapadhi* MANU/TN/0070/1912 : (1913)25MLJ248 and in *Somasundaram Chettiar v. Vaithilinga Mudaliar* AIR (1918) Mad 794 and again in *Chenchuramayya v. Venkatasubbayya Chetty* MANU/TN/0284/1933 : AIR (1933)Mad 655. The Ean-goon High Court has also adopted this view in *Maung Byaung v. Maung Shwa Baw* AIR (1924) Ran 376. The view is supported by two early cases of the Punjab Chief Court, *Med Singh v. Mt. Kabir-un-Nisea* AIR (1914) Lab 382 and *Piyare Lal v. Chura Mani* AIR (1918) Lah 227. In *Upendra Nath v. Bishun Sahana* MANU/WB/0710/1925 : AIR (1926)Cal 462 *Walmsley J.* adopted the same view and in the recent case in *Satulal Bhattacharjya v. Asiruddin Shaikh* MANU/WB/0072/1934 : AIR1934Cal703 a Bench of the Calcutta High Court took the same view and disapproved of an earlier case of that Court, *Naimuddin Biswas v. Maniruddin Lashkar* MANU/WB/0068/1927 : AIR1928Cal184 . There is also a very recent decision of this Court to the same effect, *Prahlad Chandra Singh v. Bhim Mahto* MANU/BH/0247/1939 : AIR (1940) Pat 341.

**18.** On the other hand, there is considerable authority for the view that Order 41, Rule 4, Civil P.C., does not apply to a case where one appellant has died. In *Protap Chandra v. Durga Charan* MANU/WB/0319/1905 : 9 CWN 1061 it was held that when one of the several plaintiffs who had appealed against a decree which proceeded on grounds common to them all, died during the pendency of the appeal and substitution was not made with-in time, the surviving appellants were not entitled to the benefit of Section 544 (now Order 41, Rule 4), Civil P.C.

**19.** In this case the point, however, is not discussed in any detail in the judgment. The point was, however, considered at length in *Naimuddin Biswas v. Maniruddin Lashkar* MANU/WB/0068/1927 : AIR1928Cal184 in which it was held that Order 41, Rule 4 gave no power to the Court to vary or reverse a decree in favour of a person who is dead but whose legal representatives have not been brought on the record and in respect of whom the appeal has abated. The order of abatement is virtually a decree and, so long as it stands, must be considered to have determined the rights between the parties. Consequently, when an appeal has abated in respect of one of several appellants and the right to appeal does not survive to the remaining appellants alone, the whole appeal becomes incompetent. At page 302 Cuming J. observed as follows:

His counsel contends that the three appellants on the record have appealed from the whole decree on grounds which are common also to appellant 4 and that therefore the Court can reverse or vary the decree in his favour also.

The first difficulty I have in accepting this contention is that I cannot imagine that the Court can vary or reverse a decree in favour of a person who is dead

and no longer has any existence. So far as defendant 4 is concerned, he is no longer a defendant, for he is dead. Possibly he has some heirs but they are not on the record and so are obviously not parties. Order 41, Rule 4, can have no application therefore. A dead person is no longer a party to a suit in any capacity. No doubt the death of an appellant does not cause the appeal to abate if the right to appeal survives, but this does not mean that any decree can be passed in favour of the dead person. It merely provides that his heir or representatives may carry on the litigation if they so desire and have themselves duly been made party. There is a further consideration which I think also makes it clear that Order 41, Rule 4 can have no application. The appeal having abated so far as appellant 4 is concerned, the rights between him and the respondents have been determined.

**20.** This view was also taken by another Bench of the Calcutta High Court in *Rai Harendra Nath v. Dwijendra Nath* AIR (1938) Cal 787 which expressly approved of the decision in *Naimuddin Biswas v. Maniruddin Lashkar* MANU/WB/0068/1927 : AIR1928Cal184 .

The Lahore High Court in recent decisions have also taken the view that Order 41, Rule 4, Civil P.C., has no application to cases such as the present. In *Amin Chand v. Baldeo Sahai Ganga Bahai* AIR (1934) Lah 206 a Bench of that Court held that the mandatory words of Order 22, Rule 3(2), Civil P.C., are not qualified by the words used in Order 41, Rule 4, and therefore the provisions of the latter rule, which does not deal with abatement, cannot be applied to negative to a very large extent, the provisions of the very specific Rule 3(2) in Order 22, which deals expressly with abatement; consequently, that where one of several appellants, appealing on a ground common to all, died after the institution of the appeal, and his legal representatives were not brought on the record in time, the appeal abated. A very similar view was taken by another Bench of that Court in *Pir Bakhsh v. Kidar Nath* AIR (1935) Lah 478.

**21.** In that case, a contract was entered into by defendant 1 in favour of two persons named 'P and K who were the plaintiffs in a suit for specific performance of the contract to-sell certain land and both of them had preferred the appeal jointly. During the pendency of the appeal, P died and no application was made within the prescribed period to bring his legal representatives on the record. It was held that the right of appeal on the death of P vested in the legal representative of P along with K and not in IT alone and the appeal abated according to the provisions of Rule 3 and Rule 11 of Order 22, Civil P.C., at least so far as P was concerned. It was further held that since the agreement between the parties did not specify any shares and it was impossible to say in what shares the consideration was to be paid by or the land to be divided between the two plaintiffs, the right to enforce-the contract vested on the death of P in his legal representatives along with K and' not in K alone and therefore no relief could be given to E when the legal representatives of P had not been brought on the record and his share could not be ascertained. Consequently, the whole appeal abated.

**22.** There is also a decision of this Court which supports this latter view, *Badri Narayan v. East Indian Railway* MANU/BH/0132/1926 : AIR (1927)Pat 23. A joint decree was passed in favour of seven plaintiffs and the defendants preferred an appeal to the District Judge but impleaded some only of the plaintiffs as respondents. At the hearing of the appeal it was objected on behalf of the respondents that the appeal was incompetent: but the District Judge acting under the provisions of Order

41, Rule 20, Civil P.C., added the omitted defendants as parties and dealt with the appeal. It was held that the order of the District Judge was without jurisdiction inasmuch as the appeal being against some only of the joint claimants, it was incompetent and the effect of the order was to give power to the appellants to present the appeal although it was time-barred at the time the particular order was passed. Das J. at p. 758 observed:

As was pointed out in *Manindra Chandra Nandi v. Bhagwati Debi Chaudhurani* Reported in MANU/WB/0663/1925 : AIR (1926)Cal 335 'it,' that is to say Order 41, Rule 20, 'is not intended to override the provisions of Order 22, Civil P.C. The right obtained by a respondent when the appeal abates as against him is a valuable right and should not be lightly treated.' The right of those respondents who were not made parties to the appeals is a valuable right, because they were not made parties to the appeals and the appeals against them would be barred by limitation at the date when they were added.

**23.** The cases to which I have referred are the principal cases dealing with the respective contentions of the parties in this case. In my judgment, the latter cases to which I have referred express the correct view. Order 22, Rule 3 and 11, Civil P.C., deal with cases in which one of a number of appellants has died. By reason of the provisions of those Rules, the appeal in so far as it concerns the deceased appellant abates and as the abatement, if not set aside, has the force of a decree, the matter becomes final as against the deceased appellant. In my judgment, there is nothing in Order 41, Rule 4, Civil P.C., which permits the Court to disturb that finality of the decree as against the deceased appellant. To hold that Order 41, Rule 4, Civil P.C., applies to a case such as the present one is to hold that a Court can reverse or vary a decree in favour not only of a person who is not before the Court but in favour of a person who is no longer in existence. It appears to me that before a Court can vary a decree in favour of the representatives of the deceased appellant such representatives must be brought on to the record.

**24.** The Court could, of course, do so if a rule expressly empowered it; but in my judgment Order 41, Rule 4, Civil P.C., does not give such a power. As I have stated earlier, that rule is framed on the assumption that all the plaintiffs or defendants in the suit are alive at the date of the passing of the appellate decree, Order 41, Rule 4, Civil P.C., cannot override or create an exception to Order 22, Rule 3 and 11, and in the case of one or more appellants dying even where a decree proceeds on a ground common to all, the matter must be governed solely by the provisions of those latter rules. To hold otherwise is to hold that Order 41, Rule 4, Civil P.C., gives the Court power to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant. Whether in such circumstances the appeal has or has not abated as a whole will depend-upon considerations other than the provisions of Order 41, Rule 3.

**25.** It was also contended by Mr. P. R. Das who argued the case for the appellants with his usual ability that this Court could not now take a different view from that which had been taken by many High Courts in the past. Some of the earlier cases which, are in favour of Mr. Das's contention were decided on Section 544, Civil P.C. of 1882. This-Section was re-enacted in Order 41, Rule 4 of the-Code of 1908. Mr. Das contended that it-must be assumed that the Legislature when re-enacting the Code of 1908 well knew the construction which had been placed on, Section 544 of the old Code and that by re-enacting that Section in precisely similar terms the

Legislature expressly recognize the meaning which had been placed on the old Section. Accordingly, he argues that Order 41, Rule 4 must now be given the meaning, which had been attributed to the words of Section 544 of the old Code. In support of this contention Mr. Das relied upon *Empress v. Burah* (1879) 4 Cal 172 and *Commissioners for Special Purposes of the Income Tax v. J.F. Pemsel* (1891) AC 531 of the. latter case Lord Maonaghten observed:

I cannot help reminding your Lordships, in conclusion, that the Income Tax Act is not a statute which was passed once for all. It has expired, and been revived, and re-enacted over and over again; every revival and re-enactment is a new Act. It is impossible to suppose that on every occasion the Legislature can have been ignorant of the manner in which the tax was being administered by a department of the State under the guidance of their legal advisers, especially when the practice was fully laid before Parliament in the correspondence to which I have referred.

It seems to me that an argument in favour of the respondent might have been founded on this view of the case. The point of course is not that a continuous practice following legislation interprets the mind of the Legislature, but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive re-enactment.

**26.** In my judgment the principle enunciated by Lord Macnaghten can have no application to this case. During the period under consideration the Code of Civil Procedure was only re-enacted on one occasion and previous to 1908 there had been a very few decisions on Section 544 of the old Code. The Legislature may or may not have been aware of the interpretation given to the words of that Section by the Bombay and Allahabad High Courts; but, even if they were aware of that interpretation, it in no way follows that they adopted such interpretation when they re-enacted the Section in Order 41, Rule 4. In my judgment the rule laid down in *Empress v. Burah* (1879) 4 Cal 172 and *Commissioners for Special Purposes of the Income Tax v. J.F. Pemsel*, (1891) AC 531 has no application to the present case before the Court. For the reasons which I have given, I am satisfied that the appellants in the present case are not entitled by reason of Order 4.1, Rule 4, Civil P.C., to prosecute the appeal and to obtain a reversal or variation of the decree in favour of all the plaintiffs and defendants. If they are entitled to prosecute the appeal and to obtain such reversal or variation, it is by reason of matters other than those contained in Order 41, Rule 4, Civil P.C. I would therefore answer the question submitted to the Full Bench in the negative. I would direct that the costs of this reference abide the event.

**Wort, J.**

**27.** I agree.

**Manohar Lall, J.**

**28.** I agree entirely with the reasons given by my Lord the Chief Justice and would answer the question in the negative.

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