MANU/BH/0076/1962

Equivalent Citation: AIR1962Pat285

IN THE HIGH COURT OF PATNA
FULL BENCH

Appeal No. 404 of 1952

Decided On: 15.02.1962

Appellants: **Baijnath Ram and Ors.**
Vs.
Respondent: **Tunkowati Kuer and Ors.**

Hon'ble Judges/Coram:
Vaidynathier Ramaswami , C.J., R.K. Choudhary and Kanhaiya Singh , JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: A.B.N. Sinha and B.P. Rajgarhia, Advs.

For Respondents/Defendant: S.N. Datta and Umesh Chandra Sharma, Advs. and Bindabashini Prasad Sinha, Adv. through Brishketu Saran Sinha, Adv.

JUDGMENT

Kanhaiya Singh, J.

1. This case has been referred to a Full Bench because of the important question of law involved in it.

2. The material facts are these. The plaintiffs instituted Partition Suit 5 of 1934 in the Court of the Subordinate Judge, Monghyr. A preliminary decree was passed, and on 30th March, 1943, a final decree was drawn up. In February 1944, the plaintiffs obtained delivery of possession pursuant to the final decree. Thereafter, they instituted the present money suit on 20th September, 1943, claiming mesne profits from the defendants first party for the years 1345 to 1350 fasli (1938 to 1943). On 20th January, 1945, a preliminary decree was passed holding that the defendants were liable for mesne profits and directing an enquiry into the mesne profits by a pleader commissioner appointed by Court. From this preliminary decree the defendant took an appeal to this Court, numbered as First Appeal 98 of 1945, which was eventually dismissed on 19th January, 1948. Thereafter, a pleader commissioner was appointed to assess mesne profits, and he, in due course, submitted his report on 14th April, 1949.

The parties preferred objection, and, after disposal of their objections, a final decree was passed On 28th July, 1952. Against that decree the present appeal was filed by the defendants on 24th October, 1952, challenging the quantum of mesne profits and the basis of calculation. There were four appellants, of whom Baijnath Ram and Brijmohan Ram, appellants 1 and 2 respectively, are brothers. During the pendency of this appeal, Brijmohan Ram was murdered on 20th December 1960. He left behind him his son Keshwardev Marwari and two grandsons named Sajjan Kumar and Shiva Kumar. No application for substitution of his heirs, as contemplated by Rule 3 of Order 22 of the Code of Civil Procedure was filed. An application was however, filed under Rule 10 of the said Order on 25th September, 1961, for bringing on record the

heirs and legal representatives of the deceased appellant; but this application, it will be seen, was filed long after the expiration of the period of limitation prescribed by Article 171 of the Limitation Act for presentation of an application under Rule 3 aforesaid.

3. The question mooted in this appeal is whether the application for substitution of the heirs of the deceased appellant is governed by Rule 10 or Rule 3 of Order 22 of the Code. Learned counsel for the appellants maintained that Rule 10 applied, whereas Mr. S. N. Datta representing the respondents urged that Rule 3 governed it. If Rule 10 applies, there is no question of abatement at all; on the other hand, the appeal will abate respecting the interest of appellant No. 2, if Rule 3 is held to be applicable. Learned counsel for the appellants relief on a Bench decision of this Court "in Lal Behari Gorain v. Ishwar Gorain AIR J956 Pat 376. It fully supports his contention. There is, however, a contrary Bench decision of this Court in Jamuna Rai v. Chandradip Rai MANU/BH/0046/1961 : AIR 1961 Pat 178. In the latter case, the decision in the case of Lal Behari Gorain MANU/BH/0094/1956 : AIR 1956 Pat 376 was not followed. There is an apparent conflict between these two decisions of this Court, and, in fact, it is for the resolution of this conflict and for an authoritative opinion, on the applicability of Rule 3 or Rule 10 in the light of the facts of this case that the present Full Bench has been constituted.

4. Before addressing ourselves to the questions raised, it would be necessary to notice some of the relevant provisions of Order 22 of the Code. This Order deals with the creation, assignment or devolution of interest of a party to the suit by his death, his marriage, his insolvency, or otherwise, during the pendency of the suit. I may state here that by virtue of Rule 11 the provisions of this Order apply to appeals also. Therefore, wherever the word 'plaintiff' or defendant is mentioned, the word 'plaintiff' shall be deemed to include an appellant and the word 'defendant' a respondent, and the word 'suit' an appeal. Rule 1 of this Order provides that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Where the right to sue does not survive, there is an end of the suit. If the plaintiff or the defendant dies and if the right to sue survives, then the procedure laid down in Rule 2, 3 or 4, as the case may be, has to be followed for an effective trial of the suit.

5. Rule 2 lays down the procedure to be followed in cases where one of several plaintiffs or defendants dies and the right to sue survives to the remaining plaintiffs or defendants. It provides that 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 plaintiff, or against the surviving defendant or defendants.

In the cases falling under Rule 2, no application for substitution by any party is necessary; it is the duty of the Court to make necessary entry in the record on receipt of the information of the death of the plaintiff or the defendant. The Court will simply record that the heirs and legal representatives of the deceased plaintiff or defendant are on the record and the representation is complete. There is no abatement of the suit or appeal falling under Rule 2. The essential condition for the application of this rule is that the right to sue fully vests in the surviving plaintiffs or is available against the surviving defendants. If the rights to sue is not fully represented by the surviving plaintiff or defendant without bringing on record some persons, then the procedure laid down in rules 3 and 4 will have to be followed.

6. Rule 3 lays down the procedure in case of death of one of several plaintiffs or of sole plaintiff, and similarly Rue 4 deals with the case of death of one of several defendants or of sole defendant. These rules taken together provide that where one of two or more plaintiffs or defendants dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone or a sole plaintiff or a sole defendant or sole surviving plaintiff 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 plaintiff or deceased defendant, as the case may be, to be made a party and shall proceed with the suit. They further enact that where within the time limited by law an application is made for substitution of the legal representatives of the deceased plaintiff or defendant, as the case may be, the suit shall abate so far as the deceased plaintiff is concerned or as against the deceased defendant.

7. Rule 5 empowers the Court to determine as to who is the legal representative of a deceased plaintiff or a deceased defendant.

8. Rule 6 provides as follows:-"Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing: of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place." This is an important provision and affords, in my opinion, a clue to the interpretation of the entire Order 22. Under this rule, there is no abatement by reason of the death of the defendant or the plaintiff after the conclusion of the hearing and before the pronouncement of the judgment and a judgment pronounced within that period shall have the same force and effect as if it had been pronounced before the death, took place. This rule comes into play only when the hearing had been concluded before the death.

9. Rule 7 lays down that the marriage of a female plaintiff or defendant shall not cause the suit to abate.

10. Rule 8 provides for cases where the plaintiff (not defendant) becomes insolvent during the pendency of a suit. It enacts that the insolvency of a plaintiff (not the insolvency of a defendant) in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within Such time as the Court may direct.

11. Rule 9 deals with the effect of abatement or dismissal of a suit.

12. Then comes another important provision in Rule 10 which lays down as follows:

> "10 (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.
>
> (2) .. . ."

It is plain that it is a residuary rule and applies to cases not specified in the rules that precede it. The words "other cases'" in this rule signify that it provides for cases of

assignment, creation and devolution of interest other than those mentioned in Rules 2, 3, 4, 7 and 8. This is exactly what has been laid down by their Lordships of the Judicial Committee in Mahindra' Chandra v. Ram Kumar AIR 1922 PC 304. They have observed as follows:

> "The order (Order 22) contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon someone else. The more ordinary cases are death, marriage, insolvency and then come the general provisions of Rule 10 for all other cases".

I would, however, point out that the words "other cases" in this rule do not exclude from its operation all cases of death, but only such cases of death as come within the purview of Rules 2, 3 and 4. These rules, read with Rule 6, show that they deal with death occurring before the conclusion of the hearing in a suit. Therefore, Rules 2, 3 and 4 do not govern all cases of death if death occurs between the conclusion of the hearing and the pronouncement of the judgment or after the judgment, it falls outside the scope of these rules, and naturally enough such cases of death are comprehended by the expression "other cases" and come within the ambit of Rule 10. Another thing to notice in connection with this rule is that a party on whom the interest of the deceased plaintiff or defendant devolves is not entitled to continue the suit or appeal as a matter of right, it is essential to obtain the leave of the Court The granting of leave is within the discretion of the Court. The Court, however, is to exercise its discretion judicially and according to well-established principles. "Further, unlike Rules 3 and 4, no limitation is prescribed for presentation of an application under this rule and no penalty is laid down for failure to substitute the person on whom the interest of the deceased plaintiff or defendant has devolved. Therefore, the right to make an application under this rule is a right which accrues from day to day and can be made at any time during the pendency of a suit. There is no abatement under this rule.

13. The gist and effect of the said rules, as are apparent on the plain language thereof, may be stated thus : The provisions of Order 22 come into play when an assignment, creation or devolution of any interest, by reason of death or transfer inter vivos such as sale, mortgage, lease or gift occurs during the pendency of a suit. The word 'suit' has not been defined in the Code. Used in a comprehensive sense, it is generally taken, to include appeal, which is only a continuation of suit In Order 22, however, it has been given a restricted meaning. It means only such proceedings as are antecedent to the passing of a decree. It does not apply when the assignment, creation or devolution, by death or otherwise occurs after the passing of the decree. This is sufficiently manifest from the provisions of Rule 6 which further limits the meaning of 'suit' to the conclusion of the hearing. Under this rule, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncement of the judgment, and a judgment pronounced within that period by virtue of the fiction laid down therein shall have the fame force and effect as if it had been pronounced before the death took place.

If there is no abatement in such a case, a fortiori, there is no abatement of suit if the death occurs after the decree has been passed. It is not to say that Order 22 does not apply to appeals. By virtue of Rule 11 of the said Order, the provisions thereof apply to appeals also, but not on the theory that an appeal is simply a continuation of suit. Therefore, for application of Rules 3 and 4 or, for the matter of that, other provisions a suit and an appeal have to be considered separately. It is now well-settled that there is no abatement under Rule 2, and Rules 3 and 4 have no application if the

death of the plaintiff or the defendant, as the case may be, occurred after the decree. The question of, abatement of a suit arises only when the death takes place prior to the conclusion or the hearing of the suit. The reason is furnished by the pronouncement of their Lordships of the Judicial Committee in Lachhmi Narain V. Balmakund MANU/PR/0059/1924 : AIR 1924 PC 198.

The principles laid down by their Lordships are;

> "After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside; after a decree any party can apply to have it enforced".

In that case, a preliminary decree by consent was passed by the High Court on appeal in a suit for partition. The suit was thereupon remitted to the Subordinate Judge in order that the necessary step for effecting the partition of the undivided property, pursuant so the directions of the High Court, might be taken. The Subordinate Judge, accordingly fixed a date for hearing the parties and gave them notice. But when the day came, neither the plaintiff nor his pleader appeared. The defendants or some of them were represented but took no steps. Eventually, the Subordinate Judge dismissed the suit for want of further prosecution. The order of the Subordinate Judge was set aside by the High Court, and the order of the High Court was upheld by their Lordships of the Judicial Committee on the aforesaid observations.

That was a case in which a preliminary decree for partition was passed and it was held that the suit could not be dismissed for a subsequent default of the plaintiff. The question of substitution arises when the right to sue survives, but the right of action is determined by the decree, and, therefore, Rules 3 and 4 are not strictly applicable. It is thus settled beyond controversy that death after judgment does not cause abatement of the suit. It is worthy of note that Rule 6 makes no distinction between the preliminary decree and the final decree. Having regard to the provisions of this rule, it seems futile to make a distinction between a suit where final decree has been passed and a suit wherein there is only a preliminary decree. The legal position in either case is the same. Rule 6 applies to the judgment based on arguments which have been concluded before the death, and it is plain that such judgment may be the judgment founding either a preliminary decree or a final decree.

There is now a unanimity of judicial opinion that in a suit requiring a preliminary decree and a final decree, there can be no abatement of the suit on account of the death of a party after preliminary decree and before final decree. Where, therefore one of two or more plaintiffs or defendants dies after the conclusion of the hearing and before, delivery of judgment in a suit, it is not at all necessary to substitute the heirs and legal representatives of the deceased plaintiff or defendant. If no appeal is preferred, the decree becomes final, and the execution of the decree may be taken out by or against the legal representative of the deceased party. If appeal is preferred, it is again not necessary to file application for substitution, as required by Rules 3 and 4 before presentation of the appeal. All that the appellant has to do is to mention the name of the legal representative in place of the deceased plaintiff or defendant, as the case may be, in the memorandum of appeal itself and continue the appeal with the leave of the Court.

The same considerations apply to an appeal. When once an appeal has been

preferred, the question, of right to appeal surviving becomes necessary, and in case of death during appeal, the provisions of Rule 2, 3 or 4 or, for the matter of that, other provisions of Order 22 apply, according to the circumstances of the case. Thus, in a case falling under Rule 6, there is no abatement of the appeal at all. These principles govern an appeal either from the final decree or from the preliminary decree. There? is, therefore, no abatement of a suit if the death occurs between the passing of the decree and the presentation of the appeal whether the decree is preliminary or final. In case of a suit requiring a preliminary decree and a final decree, there is however, one additional consideration. The parties may be satisfied with the preliminary decree and may not appeal against that decree. Nevertheless, the preliminary decree will have to be made final according to the directions contained therein. If, therefore, an application is made for making the preliminary decree final, then it will be necessary to implead the heirs and legal representatives of the party who died after the preliminary decree and before the application for final decree was made, or as is well known, the decree against a deceased person is a nullity.

It is evident, therefore, that if the death occurs between the pronouncement of a judgment and the presentation of an appeal, no matter whether the decree is preliminary or final, Rule 10, and not Rules 3 and 4, governs the matter. After appeal is preferred and one of the appellants or respondents dies during appeal, and the representation is incomplete in the absence of his heirs, then Rule 3 or Rule 4, as the case may be, will apply, and the appeal will abate, either partially or wholly, as the case may be, if the legal representatives are not brought on the record within the period allowed by law, in the same way as a suit will abate on identical grounds and in application of these principles, there is no distinction between an appeal from a preliminary decree and an appeal from a final decree. These problems do not arise where the devolution of interest of a party to the suit or appeal takes place not by reason of death, but by operation of law or transfer inter vivos during the pendency of the suit or appeal. In that case, the suit or appeal may, by leave of the Court be continued by or against the person to or upon whom such interest has come or devolved.

If the person, on whom the interest of the plaintiff or respondent had so devolved, does not obtain the leave of the Court under Rule 10 for the continuance of the suit or appeal by or against him, the suit or appeal may be continued by the original party, but he would still be bound by the result of the litigation, whether for of against him. When the' devolution takes place by reason of death, for the application of Rule 3, Rule 4 or Rule 10 it becomes essential to determine whether the death took place before or after judgment or before appeal was filed, or after the preliminary decree or final decree. It is, however, noteworthy that if the matter falls under Rules 3 and 4, application of Rule 10 is ousted and resort cannot be had to it to circumvent the mandatory provisions of Rules 3 and 4.

14. Turning to the question canvassed before us, if the said principles are kept in view, its solution presents no difficulty at all. To recall the material fads, the present appeal has been preferred by the defendants against the final decree passed in the suit for mesne profits, which arose out of a final decree for partition. During the pendency of the appeal, appellant No. 2 died. On the principles above-stated, there is no doubt whatsoever that Rule 3 governs the matter, and the appeal abated so tar as the deceased appellant No. 2 is concerned. Rule 10 does not come into operation when death takes place during the pendency of the appeal. A contrary view has, however, been taken, by a Bench of this Court in MANU/BH/0094/1956 : AIR 1956 Pat 376, which no doubt supports the appellants' contention. A preliminary decree

was passed in a partition suit, and an appeal was filed in this Court against the preliminary decree. During the pendency of the appeal one of the appellants died. An application for substitution of his legal representatives was filed after the period of limitation prescribed therefore had run out.

Learned counsel for the appellant contended that Rule 10 applied. Their Lordships gave effect to that contention. They took the view that where a preliminary decree has been made the rights between the parties have been determined and the question of the right to sue surviving does not arise. They purported to base their decision upon two previous rulings of this Court--Shanti Devi v. Khodai Prasad Singh MANU/BH/0112/1942 : AIR 1942 Pat 340 and Raghunandan Sahu v. Badri Pandey MANU/BH/0060/1945 : AIR 1945 Pat 380. With the greatest deference to their Lordships, the provisions of Order 22, as will appear from above, do not warrant such a view and the said two decisions do not support it. For the application of Rule 3 or 4 it is wholly immaterial whether the decree is preliminary or final. A preliminary decree, if not set aside, is final for all practical purposes. The final decree is merely a part of the procedure necessary to enforce the rights conferred on the plaintiffs by the preliminary decree. It simply works out in detail the principles laid down and determined therein, in short, a final decree is a decree intended to perfect the preliminary decree.

There is, therefore, no legal foundation for the view that in an appeal from a preliminary decree the question of the right to sue surviving does not arise. When an appeal has been preferred, on the death of one of the appellants or respondents, the question of the right to sue surviving does arise, whether the appeal is from preliminary decree or final decree. When once an appeal is filed, the entire matter passes into the seisin of the appellate Court Right to appeal or right to oppose it, is a vested right, which, in consequence of death of a deceased appellant or respondent devolves on his legal representative who if not already on the record, will have to he substituted and accordingly, for the determination as to whether one or the other rule applies, the question of the right to sue surviving assumes importance.

The words "right to sue" cover a right to appeal, and, interpreted in their ordinary meaning, mean the right to obtain relief by means of legal procedure (vide Irulappa Konar v. Madhava Konar MANU/TN/0221/1951 : AIR 1951 Mad 733; Sarat Chandra Banerjee v. Nani Mohan Banerjee ILR Cal 799; and Gopal v. Ramchandra ILR 26 Bom 597. The expression "the right to sue survives, or does not survive" means only this that the right to sue is transmitted or passes, or is not transmitted or does not pass to the plaintiffs or against the defendants (see Mt. Hifsa Khatoon v. Mohammad Salimar Rahman MANU/BH/0069/1959 : AIR 1959 Pat 254 (FB)). The expression has the same meaning in appeals also. When appeal has been preferred, the appellant's right to sue means the right to have the decree of the lower court set aside. For the application of Order 22, the proceedings in appeal are taken to be quite distinct from the proceedings in the suit, and the provisions of Order 22 apply as much to a suit as much to an appeal. Therefore, a right to sue which, in case of the death of a party during the pendency of a suit, would have survived will survive also on such death occurring during appeal from the decree in the suit. Thus, on a true and correct interpretation of the provisions of Order 22, the, view expressed in that case cannot be accepted as correct.

15. As to the earlier cases, what happened in the case of Shanti Devi MANU/BH/0112/1942 : AIR 1942 Pat 340 is this. A preliminary decree in a mortgage suit was passed, which became final as no appeal against it was filed. One of the

defendants died after the preliminary decree. Thereafter, the plaintiff applied for preparation of final decree and applied to substitute the legal representative of the deceased defendant long after the expiry of the period of limitation prescribed by law. The defendant put in her objection urging that no final decree should be prepared, because the suit had abated and no application had been made for setting aside the abatement within the time prescribed by law. Their Lordships overruled the objections of the defendant holding that Rules 3 and 4 of Order 22 do not apply in case of death of a party after a preliminary decree and before a final decree. They have observed that the rules seem to be that on the one hand, no final decree can be passed without the representative of the deceased party, being brought on the record; but, on the other hand, that Rule 10 and not Rules 3 and 4 of Order 22, is to be regarded as governing the procedure for making the necessary substitution.

They relied upon an earlier decision of this Court in Mt. Bhatia v. Abdus Shakar MANU/BH/0179/1930 : AIR1931 Pat 57, wherein also it has been laid down that Rules 3 and 4 do not apply to cases of death of parties after the passing of a preliminary decree, and, therefore, where a decree has once been made in a suit, the suit cannot be dismissed unless the decree has been reversed in appeal and no question of abatement arises in such case, even though one of the parties dies after the preliminary decree is passed and no representative is brought on record. This view is in complete accord with the principles I have ventured to enunciate above. A preliminary decree, as any other decree, settles the rights of the parties for all purposes and the death of a party thereafter does not cause abatement of the suit, even though no representative is brought on record. It is noteworthy that in both the cases their Lordships based the decision on the principles enunciated by the Privy Council in the case of Lachhi Narain MANU/PR/0059/1924 : AIR 1924 PC 198 referrec to above.

The case of Shanti Devi MANU/BH/0112/1942 : AIR 1942 Pat 340 is thus clearly distinguishable. It is not a case of an appeal from the preliminary decree. In this case, an application had been made to make a final decree pursuant to the preliminary decree which had become final. This case therefore, does not support the wide proposition of law laid down in the case of Lal Behari Gorain MANU/BH/0094/1956 : AIR 1956 Pat 376 that the procedure to be followed in the case of the death of deceased appellant or respondent in an appeal from preliminary decree is the one laid down in Rule 10. On the contrary, it lends support, of course indirectly, to the view I have expressed above. If the substitution of the legal representatives of a deceased party at the time of passing the final decree is imperative to save it from the vice of nullity, it is all the more necessary in the appeal from the preliminary decree, because the preliminary decree which is the foundation of final decree is itself being impugned.

16. In the case of Raghunandan Sahu MANU/BH/0060/1945 : AIR 1945 Pat 380 also, the same principle was again applied to a preliminary decree passed in a partition suit. In that case, a preliminary decree for partition was passed which, not having been appealed from, became final. A pleader commissioner was appointed to effect partition, who in due course submitted a report. As no objection was raised by any party to the report, the of one of the defendants on the ground of the lack of opportunity to raise objection to the report of the commissioner the court vacated the final decree. During the hearing of this objection of the defendant to set aside the final decree it transpired that one of the defendants had died after the preliminary decree, but no steps had been taken to bring his heirs on the record. While vacating the final decree the Court directed that the heirs of the deceased defendant should be

brought on the record by the date fixed by it.

As no steps for substitution were taken by the said date, the Court ordered that "the suit would abate as regards the deceased defendant ....." The plaintiff filed a petition to set aside the abatement, to which the defendant objected.

The Court fixed a date for hearing, but neither party appeared. In the absence of both the parties on that date, the Court rejected the plaintiff's application for vacating the abatement order and passed a final decree. the plaintiff filed an application in revision to this Court. Their Lordships set aside the order of abatement and relying mainly on the aforesaid Privy Council decision, and after a review of different decision of this Court and other High Courts, made to quote the placitum, the following observation:

> "The provisions of abatement in Order 22 do not apply in cases of death of a party after the passing of a preliminary decree in a partition suit, the rights of the parties having been determined by that decree. Therefore, when after the preliminary decree in a partition suit one of the defendants dies and no steps are taken by the plaintiff to bring the heirs of the deceased defendant on record within time the suit does not abate against the heirs of the deceased. In such a case the Court should adjourn the proceedings sine die with liberty to the plaintiff to continue the proceedings for final determination of the allotment to all parties including the heirs of the deceased on payment of costs which have been thrown away".

It will be observed that this case also is not an authority for the proposition that Rule 10 applies in case of death of a party during appeal from a preliminary decree. When death occurred after the passing of the preliminary decree and an application is made for a final decree Rule 10 will obviously apply, as at the stage of final decree there was no survival of any right to sue. The above criticisms apply to this case also with equal force.

17. It will be observed that the two cases on which reliance was placed in Lal Behari Gorain's case MANU/BH/0094/1956 : AIR 1956 Pat 376 were distinguishable on facts and did not support the general proposition of law laid down therein. Further, that decision is contrary to the decision of the Privy Council in the case of Raj Chunder Sen v. Gangadas Seal 31 I A 71 (PC) and also to the earlier Bench decisions of this Court and the decisions of other High Courts.

18. In the case of Raj Chunder Sen 31 I A 71 (PC) a preliminary decree for taking the accounts and winding up the affairs of a partnership which had subsisted between the plaintiff and the several defendants to the suit was passed and was followed by a final decree. Two of the defendants and the plaintiff respectively appealed to the High Court from the final decree. One of the defendant-appellants died during the pendency of the appeal. An application for substitution of his legal representative was made, but it was out of time, and since sufficient cause had not been shown for the delay, it was rejected. The substantive appeals came on for hearing in due course, when the Court held that the appeals had abated and could not, therefore, proceed. From those: decrees, appeals were taken to the Privy Council. The question raised before their Lordships of the Privy Council was whether the appeals had abated. This suit arose under the old Civil Procedure Code, and their Lordships had to consider the effect of Section 368 of the said Code which corresponds to Rule 4 of Order 22.

After quoting the said Section, their Lordships made the following pregnant

observations:-"It is not disputed that the right to Sue did not; survive against the either defendants alone, nor could it be successfully contended that the appeals could proceed in the absence of a representative of Abhoy Churn Chowdhry. But applications to substitute his legal representative for the deceased respondent were not made until after the expiration of the period of six months from that respondent's death. The legal representative of Abhoy Churn Chowdhry was constituted nearly two months before the expiration of the period, and there was no apparent difficulty in making the application in proper time. The only question, therefore, could be whether the Court was satisfied that the appellants had sufficient cause for not doing so. No serious attempt way made for this purpose. In the circumstances, therefore, the Court had no option, and the present appeals are perfectly idle."

I should think that this decision is conclusive on the question involved in this appeal. As in the instant case, the appeal before the High Court was an appeal from the final decree and one of the defendants died during the pendency of this appeal in the High Court and their Lordships of the Privy Council ruled that the appeal had abated if the view expressed in the case of Lal Behari Gorain AIR 1956 Pat 576 that death after preliminary decree does not bring about abatement of the suit and Rule 10 applies in all proceedings subsequent to the preliminary decree, whether there is an appeal from it or from final decree, were correct, the decision of their Lordships of the Privy Council would have been different. This decision is an authority for the proposition that in case of death, Rule 10 applies only when it occurs after the decree preliminary or final, and before an appeal is preferred therefrom and if death occurs during the pendency of an appeal either from preliminary decree or final decree the appeal will abate if it falls under Rule 3 or 4.

19. A Bench decision of this Court in Daroga Singh v. Raghunandan Singh 6 Pat LT 451 : (MANU/BH/0101/1925 : AIR 1925 Pat 590) also furnishes a direct authority on this point. In this case, the plaintiffs who were members of a joint family obtained a decree in a mortgage suit against the defendants. One of the defendants preferred an appeal to the High Court and one of the plaintiffs respondents died during the appeal leaving two minor sons'. No steps were taken to bring his sons on the record who certainly were interested in the decree obtained on behalf of their father as one of the members of the joint family. No application even was made for setting aside the abatement. On these facts, their Lordships held that as that was a mortgage suit and the plaintiffs were all jointly interested in the decree the whole appeal abated as all the parties were not brought upon the record. This is in direct opposition to the rule laid down in Lal Behari Gorain's case MANU/BH/0094/1956 : AIR 1956 Pat 376.

20. A similar view has been expressed by another Bench of this Court in Churaman Mahto v. Bhatu Mahto, AIR 1935 Pat 241 in a partition suit. A suit for partition was dismissed. The plaintiffs took an appeal to the High Court during the pendency of the appeal one of the defendant-respondents died and no substitution of his heir was made within the time allowed by the law. The appeal obviously abated so far as that respondent was concerned. The question before the High Court was whether the entire appeal had abated. Relying upon the previous decision in the case of Daroga Singh 6 Pat LT 451 : MANU/BH/0101/1925 : AIR 1925 Pat 590 their Lordships have laid down that where the death of one of the respondents does not make the representation of the interests involved incomplete, there is no abatement and the appeal can proceed; but when such death makes the representation incomplete, the abatement of the appeal takes place. They have further observed that since in a partition suit no decree can be passed for partition in the absence, of a single co-sharer, the entire appeal abated.

21. Subsequent to the decision in the case of Lal Behari Gorain MANU/BH/0094/1956 : AIR 1956 Pat 376 a Bench of this Court has expressed a contrary view in MANU/BH/0046/1961 : AIR 1961 Pat 178. In this case, an appeal was preferred to the High Court from a preliminary decree for partition. During the pendency of the appeal, one of the appellants died and heirs and legal representatives were not substituted in his place within the statutory period. They made an application under Rule 10 of Order 22 for their substitution. On the strength of the decision in Lal Behari Gorain's case MANU/BH/0094/1956 : AIR 1956 Pat 376, it was urged on their behalf that there was no question of abatement of the appeal from the preliminary decree because, when a preliminary decree is made, the rights between the parties have been determined, and the question of the right to sue surviving or not surviving does not arise, and, therefore, in such a case Rules 3 and 4 have no application and on the contrary, Rule 10 applies. Their Lordships declined to accede to this argument, and relying upon the earlier Bench decisions referred to above, they have held that if an appellant dies during the pendency of an appeal from the preliminary decree, the right to sue exists and continues a, long as the appeal is not finally disposed of, and to such a case Rule 3, and Rule 10, of Order 22 would apply.

They felt bound by the previous Bench decisions, because, in their opinion, in face of those decisions the ruling given in the case of Lal Behari Gorain MANU/BH/0094/1956 : AIR 1956 Pat 376 had no binding force. As observed by their Lordships of the Supreme Court in Mahadeolal Kanodia v. Administrator General of West Bengal MANU/SC/0294/1960 : AIR 1960 SC 936, in view of conflict of decisions, the Division Bench should not take upon itself to say that an earlier Division Bench ruling of the same High Court cited before it is wrong but should follow the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger Bench. Therefore, the more appropriate course for the Bench to adopt was to refer the matter to a Full Bench. Any way, the decision in the case Of Jamuna Rai MANU/BH/0046/1961 : AIR 1961 Pat 178 is correct.

22. I do not propose to examine the decisions of other High Courts, because there is no divergence of judicial opinion. All the High Courts are agreed that even an appeal from preliminary decree will abate if the heirs of the deceased appellant or respondent are not substituted within the time limited by law.

23. The correct view appears to be that where there is an appeal from a decree, preliminary or final, and during the pendency of the appeal one of the appellants or respondents dies and the, right to sue does not survive to the remaining appellants or against the remaining respondents, then Rule 3 or 4, as the case may be, applied and not Rule 10, and the appeal will abate if the legal representatives are not brought on the record, within the time limited by law as, provided in Sub-rule (2) of Rule 3 and Sub-rule (3) of Rule 4. Therefore, the case of Lal Behari Gorain MANU/BH/0094/1956 : AIR 1956 Pat 376 was not correctly decided and must be overruled. It must be held that the present appeal abated as against the deceased appellant No. 2. The case will be referred back to the Division Bench with that opinion.

Vaidynathier Ramaswami, C. J.

24. I agree.

R.K. Choudhary, J.

25. I agree.