

advantage of his own wrong in order to get his marriage with the respondent dissolved. The facts of his case make it abundantly clear that no impropriety or illegality was ever committed by the wife who at all times was anxious and willing to live with him as his wife and has been imploring him, to take her back which he did not do and for no justifiable reason. She had never deserted him but was driven out of the house. There is convincing evidence, direct and circumstantial showing that the husband was taking advantage of his own wrongful acts and wanted to get rid of his wife and resorted to the legal proceedings with that objective. I agree with the conclusion arrived at by the trial court. I find the appeal devoid of merit and I consequently dismiss it with costs.

R. N. M.

APPELLATE CIVIL

Before Daya Krishan Mahajan, J.

BANARSI DASS, AND OTHERS,—*Appellants*
versus

RAJ KUMAR AND OTHERS,—*Respondents*

Civil Misc. No. 2147 of 1967

R. S. A. No. 147 of 1968

January, 11, 1968.

Code of Civil Procedure (Act V of 1908)—Order 22 Rule 4 and Order 30 Rule 4—Suit by a firm for rendition of accounts—One of the partners of the plaintiff firm dying before preliminary decree—His legal representatives brought on record—One of such legal representatives dying—His legal representatives not brought on record—Suit—Whether abates in toto.

Held, that the principle that in suit by a firm, the death of a partner will not cause abatement of the suit, will not apply where the partner had died and his legal representatives had been brought on the record, some of whom died subsequently. The rule is that the personal representatives of a deceased partner are entitled to an account from the surviving partners. Therefore, moment the legal representatives were brought on the record they were clothed with a legal right to demand accounts from the partner who may ultimately be held to be accounting partner. Each of the parties to a suit for rendition of accounts for a partnership holds a

dual capacity—that of a plaintiff as well as of a defendant. It is of no consequence that the partner or his legal representative is a defendant or plaintiff. Their rights get crystallised only at the time of the final decree. A preliminary decree rights of be split, as a final decree may be capable of, because in a final decree rights of each of the partners are crystallised and it is not necessary to decide whether the death of any one of them, after a final decree does or does not cause total abatement. This position does not arise, so far as preliminary decree is concerned, inasmuch as the preliminary decree passed by the Court must stay *qua* the legal representatives, because in their absence, the decree cannot be varied, as they cannot be brought on the record after the period of limitation for impleading them had expired. And if the appeal against that decree is allowed, the result would be that the preliminary decree will go over board and there will thus be two sets of decrees—one the decree appealed against so far as the heirs of deceased are concerned and second, the reversed decree. Where the order of the Courts results in two contradictory decrees, the abatement is total.

Second Appeal from the decree of the Court of Shri J. S. Chatha, Senior Sub-Judge, Patiala, dated the 2nd November, 1961, reversing that of Shri J. D. Jain, Sub-Judge, 1st Class, Patiala, dated the 6th March, 1961, and granted the plaintiffs a preliminary decree for accounts.

J. V. GUPTA, ADVOCATE, for the Appellants.

K. N. TEWARI, ADVOCATE, for the Respondents.

JUDGMENT

MAHAJAN, J.—This appeal was posted earlier before Gurdev Singh, J., when an objection was taken that the appeal abated by reason of the death of two respondents, namely, Shrimati Maya Devi and Shrimati Shanti Devi. The learned Judge did not decide the question of abatement because, in his opinion, it was necessary to go into the merits of the matter. That is how, the appeal has been placed before me.

I have heard the learned counsel for the appellants on the preliminary objection of the learned counsel for the respondents that the appeal has abated by reason of the death of the two respondents, Shrimati Maya Devi and Shrimati Shanti Devi.

In order to appreciate the decision on the question of abatement, it will be proper to set out a few necessary facts. A firm known as Chanan Mal-Achhru Mal composed of Raj Kumar, Parkash Chand, Prem Chand, Ajit Kumar, Ishwar Kumar, Achhru

Mal and Bhagwanti; entered into partnership with Banarsi Dass, Chiranji Lal and Lachhmi Chand. In this agreement of partnership, the share of the firm was two-fifths and that of the remaining three partners, namely, Banarsi Dass, Chiranji Lal and Lachhmi Chand was one-fifth each. The new firm was styled as Achhru Mal-Raj Kumar. The new firm has been dissolved. This led to a suit by firm Chanan Mal-Achhru Mal and its partners against the defendants, Banarsi Dass, Chiranji Lal and Lachhmi Chand for rendition of accounts of a dissolved firm. It is not necessary to state the chequered career of this suit and I come straight to the date when Achhru Mal died on 26th of June, 1959. An application was made to implead his legal representatives. His widow and sons were mentioned in the application, as already on the record and prayer was made for impleading his five daughters including Shrimati Maya Devi and Shanti Devi. This application was allowed. Ultimately the trial Court dismissed the suit. On appeal by the plaintiffs, the lower appellate Court has passed a preliminary decree for rendition of accounts. Against this decree, the defendants have preferred a second appeal to this Court. This appeal was filed on 20th of January, 1962. During the pendency of this appeal, Shrimati Maya Devi and Shrimati Shanti Devi died. The limitation for impleading their legal representatives has long since expired. No application was made to implead their legal representatives. On the other hand, an application was made that their names be deleted as they are not necessary parties. It is in this context that the preliminary objection to the abatement of the appeal raised by Mr. K. N. Tewari has to be determined.

The contention of Mr. J. V. Gupta, learned counsel for the appellants, is that there is no abatement. His contention may now be noticed: It is argued that the suit is by a firm and by reason of order 30, rule 4, Civil Procedure Code, the death of a partner will not cause abatement of the suit; and in support of this contention, the learned counsel relies upon the decision in *M/s Dharamdas-Gokaldas and another v. M/s Krishanchand-Harichand, Metal Merchants, Jagadhri* (1). This contention is completely devoid of force because it is not a case where a partner has died. The partner, Achhru Mal died long time back and his legal representatives had been brought on the record. It is now the legal representatives' death, which is pressed into service for the purposes of abatement. The rule is well settled that the personal representatives of a deceased partner

(1) A.I.R. 1966 Punj. 40.

are entitled to an account from the surviving partners. This rule has received legislative recognition in section 9 of the Indian Partnership Act, which is reproduced below:—

“9. Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.”

Therefore, moment the legal representatives were brought on the record, they were clothed with a legal right to demand accounts from the partner who may ultimately be held to be the accounting partner. It is also a well known proposition of law that each of the parties to a suit for rendition of accounts for a partnership holds a dual capacity—that of plaintiff as well as of a defendant. It is of no consequence that the partner or his legal representative is a defendant or a plaintiff. Their rights get crystallised only at the time of the final decree. In the present proceedings, we are at the stage of a preliminary decree; and a preliminary decree cannot be split, as a final decree may be capable of, because in a final decree, the rights of each of the partners are crystallized and it is not necessary to decide whether the death of any one of them, after a final decree, does or does not cause total abatement. This position does not arise, so far as a preliminary decree is concerned; inasmuch as the legal representatives of the deceased defendants, Smt. Maya Devi and Smt. Shanti Devi, are entitled to claim that the preliminary decree passed by the Court must stay because in their absence, the decree cannot be varied, as they cannot be brought on the record after the period of limitation for impleading them had expired. And if the appeal is allowed, the result would be that the preliminary decree will go overboard and there will thus be two sets of decrees, one the decree appealed against so far as the heirs of Smt. Maya Devi and Smt. Shanti Devi are concerned and second, the reversed decree. It is now beyond the plea of controversy that in such cases, where the order of the Court will result in two contradictory decrees, the abatement will be total. There is no escape from this conclusion. A similar view was adopted by a Division Bench of the Rajasthan High Court in the case of a preliminary decree in a partition suit. See in this connection the decision in *Padmaram and others v. Surja and others* (2). This view also finds support from the decision of the Supreme Court in *State of Punjab vs. Nathu Ram* (3).

(2) A.I.R. 1961 Rajasthan 72.

(3) (1962) 2 S.C.R. 636.

For the reasons recorded above, I allow the preliminary objection and hold that the appeal has abated *in toto*. However, there will be no order as to costs.

R.N.M.

APPELLATE CIVIL

Before Daya Krishan Mahajan and Gurdev Singh, J.

BRAHMANAND AND ANOTHER,—*Appellants*

versus

SHIV KUMAR AND OTHERS,—*Respondents*

Civil Misc. 182/C of 1967

R. S. A: 64 of 1967

January 15, 1968.

Limitation Act (XXXVI of 1963)—S. 5 and 12—Regular Second Appeal—Filing of—Time spent in obtaining the copy of the judgment of the Trial court—Whether to be excluded—Such time—Whether can be condoned under section 5—Reasons for condonation not given—Each day's delay not explained—Condonation—Whether can be granted—Grant of condonation—Circumstances under-stated.

Held, (per D. K. Mahajan, J.)—that the time spent in obtaining the copy of the judgment of the Trial court for filing Regular Second Appeal cannot be excluded under section 12 of the Limitation Act, 1963.

Held, that in some cases, the delay in filing the judgment of the Trial Court out of limitation can be condoned under section 5 of the Act. But when in the