APPELLATE CIVIL

Before Mehar Singh, C. J., and R. S. Narula, J.

SWARAN SINGH AND ANOTHER,—*Appellants*

versus

RAMDITTA AND OTHERS,—*Respondents*

Regular Second Appeal No. 69 of 1957

January 11, 1968.

Code of Civil Procedure (Act V of 1908)—Order 22, rules 3, 4 and 11—Joint decree—Appeal against—Death of a respondent during pendancy— Appeal whether abates against the deceased only or in toto*—Circumstances under which surviving respondents can be proceeded against—Stated—Specification of shares or interest of the deceased respondent in the decree—Whether affects the nature thereof—Abatement of an appeal—Meaning of.*

Held, that in an appeal against a joint decree, if one of the respondents dies during its pendancy, on his death, the appeal abates only against him and not against other surviving respondents. But in certain circumstances an appeal on its abatement against the deceased respondent, cannot proceed even against the surviving respondents and in those cases the appellate Court is bound to refuse to proceed further with the appeal and must, therefore, dismiss it. This will depend on the facts and circumstances of each case and no exhaustive statement can be made. However some of the circumstances in which the Court would refuse to proceed further with the appeal against the surviving respondents on the abatement of the appeal against a deceased respondent are these:—

(a) if the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court, the Court will proceed with the appeal except;

(i) When the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellants and the deceased respondent and would, therefore, lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellants and the deceased respondent;

(ii) when the appellants could not have brought the action for the necessary relief against those respondents alone who are still before the Court; and

(iii) when the decree against the surviving respondents if the appeal succeeds, be ineffective, that is to say it could not be successfully executed;

(b) If the decree under appeal is joint and indivisible, the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent.

Held, that the view that the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents may be suitably dealt with by the appellate Court is incorrect. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the capacity of the joint decree-holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour.

Held, that abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also as a necessary corollary that the appellate Court cannot in any way modify that decree dirtctly or indirectly.

Case referred by the Hon'ble Mr. Justice Harbans Singh on 24th February, 1966, to a larger Bench for decision of the important question of law involved in it. The Division Bench consisting of Hon'ble the Chief Justice Mr. Mehar Singh and the Hon'ble Mr. Justice R. S. Narula, after deciding the question of law referred to them returned the case to the Single Judge for final disposal on 11th January, 1968. The case was finally decided by the Hon'ble Mr. Justice Harbans Singh on 16th April, 1968.

Regular Second Appeal from the decree of the Court of Shri Manohar Singh Bakhshi, District Judge, Hoshiarpur, dated the 5th day of November, 1956, affirming with costs that of Shri Hira Lal Jain, Sub-Judge, 1st Class, Hoshiarpur, dated the 30th August, 1955, granting the plaintiffs a decree for possession of the property mentioned therein.

G. P. Jain, A. L. Bahri and G. C. Garg, Advocates, for the Appellants.

D. N. Aggarwal, Advocate, for the Respondents.

ORDER OF THE DIVISION BENCH

NARULA, J.—The facts leading to this reference to the Division Bench on the question "whether on the abatement of an appeal (preferred by a sister's son against the dismissal of his suit for possession against the collaterals on the ground that the plaintiff was a preferential heir, the shares of the defendant-collaterals being known) against one collateral the appeal can or cannot proceed against the remaining defendant-respondents" have been given in substantial and requisite detail in order of Harbans Singh, J., dated February 24, 1966, and need not be repeated.

To recapitulate the relevant salient features which are necessary for deciding the question referred to us, it may be stated that Shrimati Banti inherited half the estate in question from her husband Jawala Singh and collaterally inherited the remaining estate from her husband's brother Kartar Singh (the estate comprises of agricultural land, a house and a Taur in village Gondpur, tahsil Garhshankar, district Hoshiarpur), that Banti made a gift of the said property to Darshan Singh (appellant No. 1 in Regular Second Appeal 68 of 1967, and respondent No. 65 in the other appeal), that 64 collaterals of Jawala Singh and Kartar Singh (respondents Nos. 1 to 64 in Regular Second Appeal 68 of 1957, including Jawala Singh respondent No. 40, since deceased), obtained a decree from the trial Court on November 7, 1951, for a declaration about the said allienation being not binding on them, that during the appeal by Darshan Singh defendant against the said decree, Banti having died on October 19, 1952, the suit was converted into one for possession, that by the appellate decree, dated February 10, 1954, of Additional District Judge, Hoshiarpur, Darshan Singh's appeal was dismissed and the plaintiffs (the 64 collaterals) were granted a decree for possession of 1186/1296th share in the property in dispute, that subsequently on August 11, 1954, Harnam Singh and Sansar Singh collaterals who had not joined the first suit for declaration filed a separate suit for possession of 60/1296th share in the property in question wherein they impleaded Darshan Singh donee and Sansar Singh collaterals who had not joined the first suit for declara- of 1957) (who are sister's sons of late Jawala Singh and Kartar Singh) as defendants, that the suit of Harnam Singh and another was contested by Darshan Singh as well as by the sister's sons, that the sister's sons, namely Shiv Singh and Swaran Singh, also instituted a suit for possession against Darshan Singh and all the collaterals of the last male holders relating to their entire estate and that by judgments and

decrees, dated August 30, 1955, the trial Court decreed the suit of the two collaterals Harnam Singh and Sansar Singh, but dismissed the suit of the sister's sons. The decrees of the trial Court in the two suits were affirmed in appeal by the learned District Judge, Hoshiarpur, on November 5, 1956. It is not necessary to mention or go into the finding of the first appellate Court for the purpose of answering this reference.

Against the first appellate Court's judgment upholding the decree of the trial Court dismissing the suit of Swaran Singh and Shiv Singh, the plaintiffs preferred Regular Second Appeal 69 of 1957 on January 15, 1957. During the pendency of the appeal, Jawala Singh, son of Ganga Singh, respondent No. 40 (defendant No. 41 in the trial Court) died in 1960. No application to bring on record any person as his legal representative was made at any stage. When the case came up before the learned Single Judge, a preliminary objection was taken on behalf of the respondents that the appeal had abated against Jawala Singh and had thereafter become incompetent against the other respondents and was liable to be dismissed on that ground. The respondents relied on the judgment of the Supreme Court in *State of Punjab* v. *Nathu Ram* (1). In short, the question which has been referred to the Division Bench is whether this appeal falls within the four corners of the ratio of the judgment in *Nathu Ram's case* or not.

Shri Ganga Parshad Jain, the learned counsel for the appellant firstly contended on the authority of the judgment of the Supreme Court in *Dolai Maliko and others* v. *Krushna Chandra Patnaik and others* (2), that the omission to bring on record some of the heirs of a deceased is not fatal to the appeal and the appeal does not abate even against the deceased as his estate is already represented before the Court by at least some of his legal representatives. Counsel relied in this respect on an observation in the order of reference to the following effect:—

> "On behalf of the appellants it was conceded that Jawala Singh had died and though some of his legal representatives are there on the record already, yet some of his legal representatives have not been brought on the record....."

The above quoted observation in the order of the learned Single Judge relates to a statement made on behalf of the appellants themselves.

(1) A.I.R. 1962 S.C. 89.
(2) A.I.R 1967 S.C. 49.

If the factual position recorded therein were to be admitted by the respondents, there would probably have been no further difficulty if the law laid down in *Dolai Maliko and others* v. *Krushna Chandra Patnaik and others* (2) (*supra*) were found to apply to the facts of this appeal. It is needless to go further into this point as Shri D. N. Aggarwal, the learned counsel for the contesting respondents, submitted that Mr. Ganga Parshad was not correctly instructed to state that some of the legal representatives of Jawala Singh deceased were already on the record. According to Mr. Aggarwal no legal representative of the deceased already on the record. In this situation we asked Mr. Jain to point out to us as to who was the legal representative of Jawala Singh already on the record of this appeal. Learned counsel was unable to point out any such person and to show how he was the legal representative of Jawala Singh. In this situation Mr. Jain had to concede that this appeal against Jawala Singh deceased had abated.

Mr. D. N. Aggarwal then wanted to argue that the effect of the death of Waryam Singh respondent No. 19 on December 11, 1956, should also be considered. According to Mr. Ganga Parshad Jain on the other hand Waryam Singh's legal representatives have already been brought on record. Be that as it may, we are not concerned in this reference with Waryam Singh's death or its effect on the appeal either against his estate or against the other respondents as the learned Single Judge has made no reference about it.

This takes us to the main question to be answered by us. In order to apply to this case the law on the subject, it is necessary to take notice of two more facts. The first fact is that the estate of Jawala Singh and Kartar Singh was never partitioned by metes and bounds between the collaterals who had succeeded in obtaining a decree for possession against Darshan Singh. Nor is there anything on the record of this case to show that even the 1186th/1296th share in the estate was actually separated by metes and bounds from the remaining estate left in the hands of Darshan Singh. What the plaintiff-appellants claimed in substance in their suit was their right to inherit the estate of their maternal uncles against any number of collaterals. The right or title on which the claim was based was the same and joint and indivisible against all the defendants. The second relevant fact in this connection is the frame of the suit from which this appeal has arisen. The original plaint is in Urdu. The sister's sons (two) were the plaintiffs. Respondents 1 to 64 were the collaterals. Respondent No. 65 was Darshan Singh donee. Respondent No. 66 is another Darshan Singh who is a transferee from one

of the collaterals. Translated into English paragraph 3 of the plaint and the prayer clause therein would read as below:—

"Mst. Banti died on the 19th October, 1952, and defendant Nos 1 to 66 are in possession of land in dispute mentioned in the heading of the petition of plaint. Defendants Nos. 1 to 65 show themselves as collaterals of the husband of Mst. Banti from about 12-13 degrees although the plaintiffs do not admit it and state their total ancestral shares to be 1296. Out of these defendants Nos. 1 to 7, 9 to 11, 13 to 17, 19 to 47, and 49 to 59 state their ancestral shares to be 1280 (1186 written in pencil over it). Other defendants Nos. 8, 12, 18, 48, 60 to 65 state their ancestral shares to be 110. Defendant No. 66 states himself to be in possession of these 110 shares. The detail of these 110 shares is stated as under:—

Defendant No. 8, 24/1296th share, defendant No. 12, 36/1296th share, defendant No. 18, 3/1296th share, defendant No. 48, 9/1296th share, defendants Nos. 60 to 62, 16/1296th share, defendant No. 63, 12/1296th share, defendant No. 65(64), 3/1296th share and defendant No. 65 3/1296th share."

"The plaintiffs pray that a decree for possession of land measuring 31 Kanals and 12 Marlas, bearing Khasra Nos. 1394/1 (0-6), 1394 (0-18), 1395 (1-16), 1391 (8-0) 1392 (8-0), 1393 (6-8), 1400 (1-8), 1396 (1-2), 1397 (0-18), 1399 (1-8), and 1398 (1-8), entered at Khewat Nos. 231, 235, 271, 272 to 297 Khatauni Nos. 412, 398, 449 and 470 to 475 Khatauni Paimash papers for the year 1951-52 situate in the area of Gondpur, P. S. Mahilpur, houses shown red in plans Nos. 1 and 2, situate in the Abadi of Gondpur, P. S. Mahilpur boundaries whereof are given in the heading of the petition of plaint; recovery of Rs. 445 on account of the price of trees, standing on the land measuring 60 Kanals and 16 Marlas and possession of the shares in the land measuring 9 Kanals and 13 Marlas mentioned in paragraph No. 2 of the petition of plaint may be passed in favour of the plaintiffs against defendants Nos. 1 to 7, 9 to 11, 13 to 17, 19 to 47 and 49 to 59 with costs of the suit or in the alternative a decree for any other relief to which the plaintiffs are found entitled by the court against the defendants may be granted."

The argument advanced on behalf of the appellants was that they had filed suit against all the respondents collectively on account of the enabling provision of Order 1 rule 3 and Order 2 rule 3 of the Code of Civil Procedure, and that they could if they so liked, have filed 66 separate suits against each of the respondents; and that being so, the abatement of the suit at the second appellate stage against any one of the defendant-respondents would only amount to no suit having been filed in respect of the share of that particular respondent, particularly when the shares are said to have been specified in paragraph 3 of the plaint. The argument appears to us to be misconceived for two reasons. Though the provisions of Order 1 rule 3 and Order 2 rule 3 of the Code are no doubt enabling and not mandatory, it would depend on the facts of each case whether a plaintiff is bound to file one suit or may file separate suits for similar relief against different persons. In this particular case the property had not been partitioned and all the defendant-collaterals were co-sharers in defined shares. Everyone of the collaterals had, therefore, interest to the extent of his share in every inch of the estate. We do not, therefore, think that the plaintiff-appellants could have, in this situation, filed a separate suit against each one of the collaterals in respect only of the share of that particular collaterals in the estate of Jawala Singh and Kartar Singh. But even if we were to assume that such a course could have been adopted by the plaintiffs successfully, we are not concerned with it at this stage. What we are concerned with is that the plaintiffs in fact filed one composite suit against all the defendants for a joint decree for possession against all the defendants. Even a prayer had not been made in the plaint for specifying the shares of the estate from which Jawala Singh defendant No. 41 had to be dispossessed. In fact the plaintiffs did not admit any shares of the collaterals in the property in question. This was not by mistake. In the circumstances in which they filed the suit, they were not admitting the collaterals to be the heirs of Jawala Singh and Kartar Singh. According to the plaintiffs they were the only heirs to the estate of their maternal uncles and the collaterals had no interest in the property. That being so, the question of the collaterals having any particular share in the property in question could not have been admitted as a fact by the plaintiffs.

As stated above, the suit for a joint decree for possession against all the defendants was filed. The suit was dismissed by both the Courts below. The joint and indivisible decree of the first appellate Court is to the effect that "the appeal be dismissed with costs and the

decree, dated August 30, 1955, of Shri Hira Lal Jain, Subordinate Judge Ist Class, Hoshiarpur, under appeal, be and the same is hereby affirmed". The decree of the trial Court which was affirmed in first appeal was to the effect that "the plaintiff's suit be and the same is hereby dismissed in its entirety." The claim in the suit was described in the decree of the trial Court in the following words:—

> "Claim for possession of land measuring 31 Kanals 12 Marlas bearing Khasra Nos. 1394/1/6-Mls, 1394/18 Mls, 1395/1 Kl 16 Mls, 1391/8 Kls, 1392/8 Kls, 1393/6 Kls 8 Mls, 1400/1 Kl 8 Mls, 1396/1 Kl 2 Mls, 1397/18 Mls, 1399/1 Kl 8 Mls, 1398/1 Kl 8 Mls, Khewat No. 231, 235, 271, 292 to 297, Khatauni No. 412, 398, 449, 470 to 475 entered in the Khatauni Paimash 1951-52 of village Gondpur, police station Mahilpur, house shown in red colour in the plan attached with the plaint situated at Gondpur Police-station Mahilpur detailed as (1) residential house shown red in the plan No. 1 bounded as East : House of Dalip Singh, son of Faqir Singh Terkhan, West: House of Hussan Lal, North : passage Galli, South : passage (Galli) and vacant site shown red in the plan No. 2."

The question with which we are concerned in these circumstances is whether the appellants could have preferred a proper and competent regular second appeal against the above mentioned decree of the first appellate Court by leaving out Jawala Singh, or any one or more of the respondents. Mr. Ganga Parshad had to argue that it would have been open to him to do so. We do not think this contention to be legally correct. Mr. Ganga Parshad Jain conceded that if an appeal filed by the unsuccessful plaintiffs against only some of the respondents would not have been competent, it cannot possibly be argued that this appeal continues to be competent after it has abated against one of the respondents. In support of his contention Mr. Jain referred to two cases. The first is the judgment of a learned Single Judge of this Court (Khanna, J.) in *Mst. Sama Kaur and another* v. *Teku and others*. The learned Judge held in that case that not impleading the legal representatives of Teku defendant No. 1 as parties to the second appeal did not have any effect on the appeal against the remaining defendants (defendants Nos. 2 to 6) who were

(3) R.S.A. 191 of 1959 decided on 30th August, 1962.

in possession of 3/11th share in the land in dispute and in the appeal against defendants Nos. 7 to 12 who had 8/11th share therein. The argument of the counsel for the appellants to the effect that non-impleading of Teku's legal representatives would result in the abatement of the appeal so far as 3/11th share was concerned which was in the possession of defendants Nos. 1 to 6, was accepted. From a perusal of the judgment of Khanna, J. it appears that different sets of defendants were in possession of different defined portions of the property, though it was observed in the judgment that the appeal against the remaining respondents was saved in view of the specification of shares of the respondents. Reliance was placed by the learned Judge on the Full Bench judgment of the Lahore High Court in *Sant Singh and another* v. *Gulab Singh and others* (4). After quoting a passage from the judgment of Shadi Lal, C.J. in that case, the learned Judge proceeded to hold as below:—

> "In view of the specification of shares of the respondents in the abovesaid case, the appeal, as already stated, was held not to abate *in toto*. The observations in the above cited case have a direct bearing on the present case."

As will be observed in a later part of this judgment, the mere specification of shares of the parties has now been held by the Supreme Court in *Nathu Ram's case* (*supra*) to be not enough to save the appeal against the surviving respondents. The judgment of this Court in *Province of East Punjab* v. *Labhu Ram and others* (5) (which matter went up to the Supreme Court and was finally decided by their Lordships in the judgment reported in *State of Punjab* vs. *Nathu Ram* (1) was referred to by Khanna, J., but was distinguished on the ground that in case of grant of an appeal against the joint award for compensation in *Nathu Ram's case*, there would have been two rates of compensation for the same land and as such there would have been two contradictory judgments, which result would not have followed in *Mst. Sama Kaur's case* (*supra*). It was in that situation that Khanna, J. held that because of non-impleading of the legal representatives of Teku, the appeal before him did not able *in toto*, but had abated so far as 3/11th share was concerned, which was in the occupation of defendants Nos. 1 to 6. It has also been brought to our

(4) I.L.R. (1929) 10 Lahore 7=A.I.R. 1928 Lahore 573.
(5) A.I.R. 1955 Punj. 225.

notice that though Khanna, J. granted a certificate of fitness of the case for appeal to the Letters' Patent Bench against the learned Judge's judgment, dated August 30, 1962 the letters' patent appeal having been dismissed by the Division Bench in *limine* on November 9, 1962, Zila Singh and others obtained special leave to appeal to the Supreme Court on February 25, 1963, in petition for special leave to appeal (civil) No. 124 of 1963, and thus the judgment of Khanna, J. went up for consideration to the Supreme Court. Appeal to the Supreme Court is stated to be pending. If the effect of the judgment of Khanna, J. is properly analysed it would appear that it cannot help the appellants even if the law laid down therein were deemed to be good after the pronouncement of the Supreme Court in *Nathu Ram's case*. The appeal in that case held to abate against defendants Nos. 1 to 6 though only defendant No. 1 died and defendants Nos. 2 to 6 were alive. This was because defendants Nos. 1 to 6 were jointly in possession of 3/11th share in the land in dispute. That is not the case in the present appeal. As already observed all the defendants are jointly in possession of the entire estate in dispute, and only their shares are defined. Even otherwise, it appears that the observations in the Full Bench judgment of the Lahore High Court in the case of Sant Singh and another (supra) on which reliance was placed by Khanna, J. cannot now be said to be a good law after the pronouncement of the Supreme Court in *Nathu Ram's case*.

The next case on which Mr. Jain relied is the judgment of a Division Bench of this Court (Falshaw, C.J., as he then was, and D. K. Mahajan, J.) in *Subedar Jiwan Singh* v. *Ram Kishan and others* (6). What happened in that case was this. During the pendency of the letters' patent appeal filed by Subedar Jiwan Singh plaintiff (the other two plaintiffs having been impleaded as respondents Nos. 5 and 8) against the decision of the learned Single Judge whereby their suit (suit filed by Subedar Jiwan Singh and respondents Nos. 5 and 8) for possession of land in pursuance of a declaratory decree already obtained by them to the effect that a particular alienation was not binding on them, had been dismissed, Achhar Singh and Sadhu Ram respondent Nos. 5 and 8 died. Application for bringing on record their legal representatives was dismissed as barred by time. The Division Bench held that the death of the two plaintiff-respondents mentioned above had no effect whatever on Subedar Jiwan Singh's

(6) 1966 P.L.R. 626.

appeal. Mahajan, J. (with whom judgment Falshaw, C.J. concurred) observed in this connection as follows:—

> "In spite of the death of the two respondents mentioned above, we are of the view that their death has no effect whatever on plaintiff Subedar Jiwan Singh's appeal. The plaintiffs are entitled to, according to the law of inheritance, the estate of deceased Biroo in equal shares. They have only a right to the possession of the property left by him which falls to their share. Each plaintiff has an independent right to his share alone. He has no right to the share of the other plaintiff. In such circumstances, all the plaintiffs could have filed separate suits for possession to the extent of their share in the inheritance. The mere fact that they have filed one suit will not in any manner affect the question of abatement. In such circumstances it will be taken for granted that the plaintiffs have filed separate suits and the decree in their favour are really separate decrees. Subedar Jiwan Singh can only succeed to the extent of his share. If he had filed a separate suit, the death of his co-plaintiffs, that is, respondents Nos. 5 and 8, would not have caused abatement of his suit. The mere fact that his co-plaintiffs are parties to the suit will not in any manner affect his suit because some of his co-plaintiffs have died. *The position might have been different if one of the defendants had died and his legal representatives had not been impleaded within the period of limitation.* Therefore, we are clearly of the view that the death of the other co-plaintiff does not in any manner effect Jiwan Singh's appeal, which has got to be decided on the merits. The preliminary objection is, therefore, repelled."

It is significant that the learned Judges saw a distinction belween the case of the abatement of an appeal against a contesting defendant and that of the death of one of the plantiffs during the pendency of an appeal by his co-plaintiff, where the rights of each of the plaintiffs were separate and independent. Even if the law laid down by the Division Bench in *Subedar Jiwan Singh's case* could be said to still hold the field, the same would be clearly distinguishable from the case before us as it was a contesting defendant-respondent who has died in the appeal before us. It has also been argued that the abatement of the appeal of Subedar Jiwan Singh against respondents Nos. 5 and 8 could not possibly lead to inconsistent decrees as no relief had either

been or could possibly be claimed by Subedar Jiwan Singh against respondents Nos. 5 and 8 who were also collaterals of the last male holder along with the appellant. Moreover, we are not quite certain as to what would have been the decision of the Division Bench in Subedar Jiwan Singh's case on the question of effect of the death of the co-plaintiff-respondent if the unreported judgment of the Supreme Court, *Jhanda Singh and others* v. *Gurmukh Singh (deceased) and others* (7) had been brought to its notice. The case of *Jhanda Singh and others arose* from the following facts. One Labhu, son of Ram Ditta died possessed of some agricultural land leaving behind him his widow Mst. Radhi. On the death of Radhi, two grandsons of a paternal uncle of Ram Ditta, viz., Jiwa and Gurmukh Singh, filed a suit against Labhu's brother Gurdas for a declaration to the effect that they were in proprietary possession of an half-share in the land left by Labhu and in the alternative for possession of the same. They based their title on the allegation that Gurdas having been adopted to one Mihan ceased to have any interest as a brother of Labhu, and, therefore, Jiwa and Gurmukh Singh along with Gurdas were entitled to succeed to Labhu's estate in equal shares. The suit was decreed by the trial Court. The defendant's first appeal was dismissed. Defendant's second appeal to this Court was accepted by a learned Single Judge (J. L. Kapur, J., as he then was), and the suit of Jiwa and Gurmukh Singh was dismissed. The plaintiffs' letters' patent appeal against the judgment of Kapur, J. was, however, allowed and the decree of the trial Court and that of the first appellate Court in favour of the plaintiffs was restored declaring the plaintiffs to be entitled to an half-share in the property left by Labhu. After the disposal of the appeal by the Letters' Patent Bench of the High Court, Jiwa the first plaintiff died. Appeal against the Division Bench judgment of the High Court was preferred to the Supreme Court by the sons of Gurdas (Gurdas having died after the decision of the first appellate Court and before the institution of the appeal in the High Court, the said appeal having been filed by his three sons as his legal representatives) alone. Gurmukh Singh, the second plaintiff, and the three sons of Jiwa the first plaintiff) were made respondents. During the pendency of the appeal in the Supreme Court, Gurmukh Singh plaintiff-respondent died. No proper steps for bringing on record the legal representatives of Gurmukh Singh were token within the time allowed by law. The Court refused to condone the delay. At the hearing of the appeal an

(7) C.A. 344 of 1956 decided on 10th April, 1962.

objection was taken by the counsel for the surviving respondents to the effect that the appeal having abated against Gurmukh Singh and the decree of the High Court which was under appeal to the Supreme Court being a joint one in favour of all the plaintiffs, the entire appeal had abated, i.e. even in respect of the other respondents. While considering the impact of the order refusing to set aside the abatement of the appeal against Gurmukh Singh plaintiff-respondent on the rest of the appeal, the learned Judges of the Supreme Court referred to their earlier judgment in *State of Punjab* v. *Nathu Ram* (supra) (1) and held as follows:—

> "Here, as in that case, there is a joint decree. The suit was for a declaration to the effect that the plaintiffs were in proprietary possession of an half-share in the land described in the schedule to the plaint. The plaintiffs did not claim separate share in the said property. They asserted an undivided half-share in the said property. The defendant denied their right to the said share. The learned Subordinate Judge decreed the plaintiffs' claim to an half-share in the property and that was finally confirmed by the High Court. The position, therefore, is that the present appeal is filed by the defendant's legal representatives for the purpose of vacating the joint decree. If the appeal was dismissed against Gurmukh Singh on the ground that it had abated and was allowed against the 1st plaintiff, there would be two inconsistent decrees : there would be a joint decree in favour of Gurmukh Singh for an half-share in the suit property along with the 1st plaintiff, while the suit of the 1st plaintiff would be dismissed....."

On behalf of the appellants in the Supreme Court a distinction was sought to be drawn between the facts of *Nathu Ram's case* and the facts of the appeal before their Lordships. While repelling the said contention the learned Judges observed as below:—

> "If the present joint decree could be split up into a decree for two different shares in the suit land, the decree in that appeal could also be treated as one for two moieties in the amount decreed. Indeed, *this Court definitely held that even specification of shares does not affect the nature of the decree.* The principle accepted in the said decision directly applies to the present case and we cannot distinguish it in the manner suggested by learned counsel for the appellants."

In the face of the above mentioned authoritative pronouncement of the Supreme Court in the case of Jhanda Singh and others, the correctness of the judgment of this Court in *Subedar Jiwan Singh* v. *Ram Kishan and others* (6) on this point appears to be doubtful.

The last case on which Mr. Ganga Parshad Jain relied is the judgment of a learned Single Judge of this Court (P. C. Pandit, J.) in *Jeon Singh* v. *Chanan Singh and others* (8). The learned judge held in that case that when the shares of the defendants in the land in suit are specified, the suit does not abate *in toto* when one of them dies, but it abates only to the extent of the share of the deceased. With the greatest respect to the larned Judge, we are constrained to hold that the said view which was based on certain observations in the Full Bench judgement of the Lahore High Court in *Sant Singh and another Gulab Singh and others* (supra) (4), cannot be considered to be consistent with the law laid down by the Supreme Court in *Nathu Ram's case* (supra), which was unfortunately not brought to his Lordship's notice.

I think Mr. Jain has not been able to get out of the hurdle placed in his way by the judgment of the Supreme Court in Nathu Ram's case, which when analysed, has laid down the following propositions of law:—

(I) On the death of a respondent, an appeal abates only against the deceased, but not against the other surviving respondents;

(II) In certain circumstances an appeal on its abatement against the deceased respondent, cannot proceed even against the surviving respondents and in those cases the appellate Court is bound to refuse to proceed further with the appeal and must, therefore, dismiss it;

(III) The question whether a Court can deal with such matters or not will depend on the facts and circumstances of each case and no exhaustive statement can be made about those circumstances;

(8) 1963 P.L.R. 449.

(IV) Some of the circumstances in which the Court would refuse to proceed further with the appeal against the surviving respondents on the abatement of the appeal against a deceased respondent are these:—

(a) if the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court, the Court will proceed with the appeal except:

(i) When the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellants and the deceased respondent and would, therefore, lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellants and the deceased respondents;

(ii) When the appellants could not have brought the action for the necessary relief against those respondents alone who are still before the Court; and

(iii) When the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say it could not be successfully executed;

(b) If the decree under appeal is joint and indivisible, the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondents;

(V) The view taken by the Courts in some cases previously to the effect that the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents may be suitably dealt with by the appellate Court is incorrect. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the capacity of the joint decree-holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour;

(VI) The abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also as a necessary corollary that the appellant Court cannot in any way modify that decree directly or indirectly.

The contention of the State of Punjab, who was the appellant to the Supreme Court in *Nath Ram's case* (supra) to the effect that the appeal against the surviving respondent could be heard because according to the entries in the village records. Labhu Ram and Nathu Ram had equal shares in the land acquired and the Court could deal with half the amount of the award was repelled by their Lordships of the Supreme Court on the ground that the mere mention of specific shares in the revenue record was no guarantee of their correctness and that the appellate Court would have to determine the share of the deceased which could not be done in the absence of his legal representatives.

In *Ram Sarup and others* v. *Munshi and others* (9), it was held that in an appeal from a pre-emption decree preferred by the vendees, the appellants fell into two groups constituted respectively by the first and second appellants who were brothers and by appellants Nos. 3, 4 and 5, and that on the death of appellant No. 5 and on his legal representatives not having been brought on the record, the whole appeal had to be dismissed as the sale was not of any separate item of property in favour of the deceased-appellant but of one entire set of properties to be enjoyed by two sets of vendees in equal shares. The Supreme Court followed its earlier pronouncement in *Nathu Ram's case* to the effect that the decree under appeal was a joint one and as a part of the decree had become final by reason of the abatement, the entire appeal must be held to have become incompetent.

A Division Bench of this Court (Grover and Jindra Lal JJ.) went into this question in *Puran Singh Basawa Singh and others* v. *Hazara Singh Punjab Singh and others* (10) and after referring to the judgment of the Supreme Court in *Nathu Ram's case* in *Ram Sarup's case* and in the case of *Jhanda Singh and others*, their Lordship held that though the right of collaterals to succeed is not a single indivisible

(9) A.I.R. 1963 S.C. 553.
(10) A.I.R. 1966 Punj. 312.

right so as to give each collateral a right of action for the whole estate and each collateral is entitled only to his own share, in the case before their Lordships, the plaintiffs claiming to be collaterals of the deceased did not sue for their individual shares but sought a joint decree for possession and once such a course had been adopted, it was no longer open to them to later on contend that they were suing for their individual shares, nor was the suit founded on those allegations or filed in that manner.

The observations of the Division Bench in the case of *Puran Singh and others* (supra) are fully applicable to the present appeal even if it could be successfully argued that it was open to the plaintiffs to have filed 66 separate suits, which proposition by no means appeals to us in the circumstances of this case. The fact remains that they filed one suit for a joint decree for possession against all the defendants and having done so they cannot now argue that the suit should be deemed to be for separate decrees for possession of undivided specified shares in the property in question for the purposes of deciding the question of abatement.

Infairness to Mr. Jain it may be noticed that reference was made by the learned counsel to a Division Bench judgment of this Court (Dua and Jindra Lal JJ). in *Punjab State* v. *Jasbir Singh and others* (11), wherein the appeal was held not to have abated against the surviving respondents after a consideration of the judgment of the Supreme Court in *Nathu Ram's case* on the ground that the decree under appeal in that case was not a joint one. As already stated, each case depends on its own facts and since all the relevant facts of *Jasbir Singh's case* (supra) are not before us, it is impossible to deal with that judgment. On the findings recorded by the Bench, however, the judgment is consistent with the pronouncement of the Supreme Court inasmuch as an appeal does not become incompetent against the surviving respondents on its abatement against one particular respondents if the decree against the two sets of respondents is not joint, unless there is some other reason for the Court's declining to proceed with the appeal. The same learned Judge (Dua J.) who prepared the judgment of the Court in the case of *Jasbir Singh and others* (supra) (11), wrote the judgment of the Division Bench (with which S. B. Capoor, J. agreed) in *Om Sarup* v. *Gur Narain and others* (12),

(11) 1964 P.L.R. 763.
(12) 1965 P.L.R. 634.

and clearly held that the Court should not be called upon to make two inconsistent decrees against the same property and that the appeal in that case had abated *in toto* as a consequence of its abatement against one of the respondents on the ground that the decree under appeal in *Om Sarup's case* was joint against all the defendants.

After a careful consideration of the entire law referred to above, we are of the opinion that this case falls clearly within instances Nos. IV (b) V and VI in the analysis of the judgment of the Supreme Court in *Nathu Ram's case* (made in an earlier part of this judgement) read in the light of the pronouncements of that Court in *Ram Sarup's case* and in the case of *Jhanda Singh and others* and that this appeal, after having abated against one of the collaterals, has become incompetent and cannot now be proceeded with against even the surviving respondents. We make this answer to the reference and direct that this appeal will now go back to the learned Single Judge for being disposed of in accordance with law in the light of this decision. In the circumstances of the case we make no order as to costs of the proceedings before us.

MEHAR SINGH, C.J.—I agree.

K.S.K.

CIVIL MISCELLANEOUS

Before Tek Chand, J.

RASHPAL SINGH,—*Petitioner*

versus

THE PANJAB UNIVERSITY,—*Respondent*

Civil Writ No. 95 of 1968

March 27th, 1968.

Panjab University Calendar (1966)—*Vol. I Part D(ii), Regulation* 13(*b*)—*Candidate receiving help not from "another candidate" but from another source—Whether guilty under the Regulation—Receiving help in a University examination—Whether includes hearing of answers to the questions—"Copying' and "Receiving help"—Distinction between.*