FULL BENCH

Before S. B. Capoor, Inder Dev Dua and H. R. Khanna, JJ.

MESSRS DHARAMDAS GOKALDAS AND ANOTHER,— *Appellants*

versus

MESSRS KRISHAN CHAND HARI CHAND,— *Respondents.*

Regular Second Appeal No. 970 of 1957.

1965

March, 25th.

Code of Civil Procedure (Act V of 1908)—Order 30 Rules 1 and 4—Suit instituted by a firm in the firm name through its managing partner—Suit decreed and appeal filed against the firm through its managing partner—Managing partner dying during the pendency of the appeal and his legal representatives not brought on the record—Appeal—Whether abates.

Held, that where a suit is filed by two or more persons carrying on business as a firm in the firm name as provided in Order 30 Rule 1 of the Code of Civil Procedure and during the pendency of the appeal arising out of that suit the managing partner through whom the firm had sued dies and his legal representatives are not brought on the record, the appeal does not abate as is clearly provided in rule 4 of Order 30 of the Code of Civil Procedure.

Case referred by the Hon'ble Mr. Justice D. K. Mahajan on 30th October, 1964, to a Full Bench, for decision of an important question of law involved in the case. The Full Bench, consisting of the Hon'ble Mr. Justice S. B. Capoor, the Hon'ble Mr. Justice Inder Dev Dua and the Hon'ble Mr. Justice H. R. Khanna, after deciding the question referred to them returned the case to the learned Single Judge on 25th March, 1965, for final disposal.

Regular Second Appeal from the decree of the Court of Shri Ishar Singh, Senior Sub-Judge, Ambala (with Enhanced Appellate Powers), dated 3rd July, 1957 reversing that of Shri Om Parkash Aggarwal, Sub-Judge 1st Class, Jagadhri, dated 26th June, 1956, accepting the appeal and granting the plaintiffs a decree for recovery of Rs. 672 and proportionate costs throughout against the defendants.

BAL RAJ TULI, SENIOR ADVOCATE WITH S. K. TULI, ADVOCATE, for the Appellants.

G. P. JAIN AND B. S. GUPTA, ADVOCATES, for the Respondents.

ORDER OF THE FULL BENCH

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DUA, J.—This case has been placed before the Full Bench in pursuance of the order, dated 30th October, 1964 of D. K. Mahajan, J., who felt that there was a conflict between two Division Bench decisions of this Court, one of them reported as *Messrs Ghaki Mal Hukam Chand* v. *Punjab National Bank, Ltd.* (1) and the other as Union of *India* v. *Radha Kishan-Sohan Lal* (2). I was a party to both of them, the judgment in the first case having in fact been prepared by me.

In order to appreciate the point which we are called upon to decide, the relevant facts may briefly be stated. Messrs Krishan Chand Hari Chand (Registered) Metal Merchants at Jagadhri had instituted the suit, out of which this second appeal arises, for the recovery of Rs. 780 through Krishan Chand. This suit was dismissed by the trial Court but on appeal the judgment and decree of the court of first instance were reversed and the plaintiff-firm was granted a decree for the recovery of Rs. 672, with proportionate costs throughout against the defendants by the learned Senior Subordinate Judge, on 3rd July, 1957. The present regular second appeal was presented in this Court in August, 1957 and at the hearing before the learned Single Judge an objection was raised on behalf of respondent-firm Krishan Chand Hari Chand that, Krishan Chand having died and his legal representatives having not been impleaded within the prescribed period of limitation the appeal must be considered to have abated. This objection was met on behalf of the appellants by relying on the decision of this Court in the case of *Messrs Ghaki Mal Hukam Chand* and urging that the death of a partner of a firm does not cause a suit or an appeal to abate irrespective of the fact whether the partnership is a contractual partnership or a Joint Hindu Family firm. *Purshottam & Co.* v. *Manilal & Sons* (3), *Ram Kumar* v. *Dominion of India* (4) and *Mohammad Ali* v. *Abraham George* (5), were also cited in support of this view. Shri Ganga Parshad Jain, on

(1) I.L.R. 1959 Punj. 1565.
(2) A.I.R. 1962 Punj. 493.
(3) A.I.R. 1961 S.C. 325.
(4) A.I.R. 1952 All. 695.
(5) A.I.R. 1953 T.C. 209.

behalf of the respondents relied on the later Bench decision of this Court in the case of *Radha Kishan Sohan Lal* and also some other decisions of other High Courts for the proposition that the death of a partner does cause abatement unless the legal representatives of the deceased are impleaded within the period prescribed. Although the learned Single Judge thought that the observations of the Supreme Court in the decision mentioned above lent support to Mr. Tuli's contention, nevertheless, seeing a conflict between the two Division Bench decisions of this Court, it was considered desirable to have this conflict resolved by a larger Bench.

It would thus be obvious that the controversy is confined within a very narrow compass, namely, whether the death of the partner through whom the firm had instituted the suit would cause abatement of this appeal when his legal representatives had not been impleaded within the prescribed period. The arguments at the bar have proceeded on the assumption that the suit had been instituted by a Joint Hindu Family trading partnership. In the plaint, however, I find that in the very first paragraph there is a positive averment that the plaintiff-firm is a duly registered contractual partnership carrying on the business of manufacturing metal utensils at Jagadhri and Krishan Chand is a Managing Partner thereof and thus entitled to sue. In the written statement this para has been admitted to the extent that the plaintiff-firm carries on metal business at Jagadhri. The rest of the para has not been admitted. It would thus be obvious that the plaintiff-firm in the instant case is not a Joint Hindu Family Trading partnership and, therefore, the question of the applicability of the explanation added by this Court to rule 1, Order 30 of the Code of Civil Procedure does not arise.

Order 30, rule 1, of the Code, on which reliance has been placed on behalf of the appellants, is in the following terms:—

> "1. (1) Any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm (if any) of which such persons were

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partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

"(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

Explanation.—This rule applies to a Joint Hindu Family trading partnership."

The explanation has been added by this High Court. Rule 4 of this Order which, according to Mr. Tuli, furnishes a complete answer to the respondents' objection, may also be reproduced:—

"R. 4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

"(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors."

In the case of *Messrs Ghaki Mal Hukam Chand*, a Division Bench of this Court, after considering various decisions cited at the Bar, observed as follows:—

"The firm as such has no separate existence in the eye of law; it is merely an abbreviated name for the partners of which it consists and it has no

separate legal entity like that of a corporation. When a suit is brought against a firm in the name of the firm its effect is precisely as if it has been brought in the names of all the partners and the effect of using the firm's name is merely to bring all the partners before the Court. The procedure as laid down in Order 30, Code of Civil Procedure, is only adopted as a convenient mode for denoting persons constituting the firm and a decree against a firm in its name has the same effect as a decree against all the partners has."

Our attention has also been drawn to a Single Bench decision of the Calcutta High Court in *Bal Kissen Das* v. *Kanhya Lal* (6), which notices the conflict before the introduction of Order 30, in the Code of Civil Procedure in 1908, on the question whether in a suit by a surviving partner for the recovery of a partnership debt which became due during the life of a deceased partner, the representatives of such deceased partner, having regard to section 45 of the Contract Act (IX of 1872), are necessary parties. Order 30, rule 4 of the Code of Civil Procedure, however, according to this decision, contains a modification to section 45 of the Contract Act, with the result that after the enactment of Order 30, rule 4, in a suit brought by or against a firm carrying on business under a name other than their own, if it happens that one of the partners is dead, it is not necessary to join any representatives of the deceased partner as a party to the suit. Other decisions, on which Shri Tuli has relied in support of his contention, may merely be stated without considering them in detail. They are—*Mool Chand and others* v. *Mul Chand and others* (7), *Hari Singh* v. *Firm Karam Chand Kanshi Ram* (8), *Ch. Atma Ram* v. *Umar Ali* (9), *Firm Nand Gopal* v. *Firm Mehnga Mal Kishore Lal* (10), *Messrs Ram Kumar-Ram Chandra* v. *The Dominion of India* (4), *Purshottam and Company* v. *Manilal and Sons* (3), *Utanka Lal Mookerji* v. *Tarak Nath Seal and others* (11), *Bhadreswar Coal*

(6) 21 I.C. 509.
(7) A.I.R. 1923 Lah. 197.
(8) A.I.R. 1927 Lah. 115.
(9) A.I.R. 1940 Lah. 256.
(10) A.I.R. 1940 Lah. 425.
(11) A.I.R. 1929 Cal. 11.

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Supply Co. v. *Satis Chandra* (12), *and Motilal Jasraj* v. *Chandmal* (13).

In so far as the decision of this Court in the case of *Radha Kishan Sohan Lal* is concerned, the learned counsel for the appellants has tried to distinguish it on the ground that in that case the suit had been instituted by the *karta* of the Joint Hindu Family in his own name alone and not in the name of the Joint Hindu Family trading partnership firm and that, therefore, Order 30 of the Code was not attracted. That case, according to the counsel, thus falls in the third category suggested by Tek Chand, J., in the case of *Firm Nand Gopal* at page 427, column 1 of *Firm Nand Gopal* v. *Firm Mehnga Mal Kishori Lal* (10). This submission appears to me to be misconceived and contrary to what is apparent even from the heading of the case. The body of the judgment also does not support the submission. It has, in the alternative, been suggested that it was not a case in which the suit had been instituted by a Joint Hindu Family trading partnership, and, therefore, Order 30, rule 1 of the Code, as amended by this Court, did not apply. This again does not seem to be quite correct, because the nature of the transaction in controversy in that suit is clearly suggestive of the fact that the plaintiff Joint Hindu Family firm, suing through its *karta*, was a trading firm, though from the judgment it is not clearly discernible if the firm was a trading partnership. The nature of the transaction is obvious from the judgments of the Courts below, which I had sent for from the records of this Court for perusal. In any case the judgment of this Court quite clearly does not proceed on the basis suggested by the learned counsel. The distinction sought on this ground is, therefore, difficult to accept.

The counsel has next submitted that before the Bench no reliance was placed on behalf of the appellants on the Explanation added by this Court to Order 30, rule 1, and on Order 30, rule 4 of the Code, with the result that the Bench in that case was not called upon to consider the question of the applicability of these provisions of law to the question of abatement of the appeal raised on behalf of the

(12) A.S.R. 1936 Cal. 353.
(13) A.I.R. 1924 Bom. 155.

respondents in this Court. This seems to be correct, and indeed it is apparent that even the earlier decision of this Court in the case of *Messrs Ghaki Mal Hukam Chand* was not cited on behalf of the appellants. It is undoubtedly true that in spite of the fact that on behalf of the appellants in the case of *Radha Kishan Sohan Lal* reliance was not placed on Order 30, rule 4 of the Code, construed in the light of the Explanation added by this Court to rule 1 of this Order, the Bench hearing the appeal could itself have *suo motu* drawn the attention of the counsel appearing to the effect of this provision of law on the plea of abatement raised by the respondents, but it appears that the appeal was disposed of solely on the basis of the arguments addressed. Whether the appellants' learned counsel in that case felt that the Explanation to rule 1 was not attracted to the facts found or established or whether he did not notice the existence of the Explanation, the fact remains that, for some reason or the other, on behalf of the appellants no attempt was made to seek assistance from rule 1, as amended by this Court, and rule 4 of Order 30 of the Code. It would not be out of place to observe that the appellants were represented in this Court by two very senior and eminent counsel, one of them being the learned Additional Advocate-General himself. May be that it was partly for this reason that it did not strike the Bench hearing the appeal *suo motu* to suggest to the appellants' counsel to consider the applicability of these rules to the facts of that case. We are, however, not concerned with and are not entitled to consider the correctness or otherwise of the final conclusion on the question of the abatement of the appeal in the reported case, on the basis of new points of fact or law not raised and considered in the judgment. That is the function and privilege of the appeal Court, and subsequent Court while trying to discern the *ratio decidendi* of that decision may not appropriately concern itself with that aspect. Had reliance been placed on Order 30, rule 4, read with the amended rule 1, or had the attention of the Bench been drawn even to the earlier decision for considering the question of abatement, the conclusion of this Court might well have been different, but that is scarcely helpful in determining the rule of law laid down and followed in that case, and the fact remains that the effect of Order 30 was not argued before the Court and, therefore, not considered in the judgment. It may in the

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circumstances be not quite correct to say that there is any clear conflict between the *ratio decidendi* of the aforesaid two Division Bench decisions of this Court.

On behalf of the respondents, however, great stress has been laid on the later Bench decision and it has been argued that this decision lays down the correct rule of law. The submission apparently proceeds on the assumption that the later decision has laid down a rule of law different from the one enunciated in the earlier decision. This assumption, as discussed above, is scarcely justified, with the result that the principle of law actually enunciated and acted upon in the case of *Radha Kishan Sohan Lal* would seem to be of little assistance to the respondents, Order 30, rules 1 and 4 of the Code having not been canvassed and, therefore, no opinion on their applicability having been expressed in that decision. But as the point has been argued before us, I propose to deal with the arguments advanced. Reliance has also been placed on a decision of the Madhya Pradesh High Court in *Pyarelal* v. *Modi Sikharchand* (14), and indeed the respondents' counsel has focussed his contention principally on some observations in this judgment, which lays down that where plaintiffs are joint promisees, they have a joint right of suit, and consequently of appeal, and accordingly on the death of one of them the right to continue the appeal vests jointly in the survivors and the legal representatives of the deceased, with the result that the legal representatives of the deceased are necessary parties to the appeal. The observation in this judgment, from which assistance is sought, is that Order 30, rule 4 of the Code only deals with the form of suits and does not affect the question as to whether the representatives of the deceased party were or were not a necessary party to the suit. Shri Ganga Parshad Jain has tried to deduce from it and seek support for the contention that once a suit is filed in the name of the firm, then the subsequent death of a partner does not preclude the operation of the rule of abatement contained in Order 22 of the Code. With this submission, I am wholly unable to agree. The observation relied upon, for one thing, appears to me to be *obiter*, because the suit in that case had been found to have been instituted by joint promisees as such and not in the name of a firm, and the question of the scope

(14) A.I.R. 1957 M.P. 89

and effect of rule 4 of Order 30, could scarcely arise, the case being governed by section 45 of the Contract Act. It is true that even an *obiter dicta* may legitimately demand serious consideration from subsequent Courts, but I am inclined to think, with the utmost respect, that this observation does not seem to harmonise with the express language of Order 30, rule 4. I accordingly find it difficult to subscribe to this view. I may incidentally point out that even in the Madhya Pradesh High Court, different view has been taken in later decisions: *See Radhakishan* v. *Sankalchand Mohanlal Firm* (15) First Appeal No. 43 of 1959, decided on 1st of May, 1962, and *Messrs Gulabchand-Shikharchand, Jabalpur* v. *Bhagchand Gulabchand, Katangi, Civil Revision No.* 137 *of* 1963, *decided on* 1st *of* October, 1963 (16). Both these cases followed the decision in the case of *Utanka Lal Mookerji* v. *Turak Nath Seal and others* (11). I have, therefore, little hesitation in repelling the respondents' contention.

Shri Jain has next taken pains to distinguish some of the decision relied upon by the appellants. In the case of *Messrs Ghaki Mal Hukam Chand,* it is argued, all members of the Joint Hindu Family were parties to the litigation, with the result that no question of abatement could possibly arise. All that need be said in this connection is that the question of abatement was most seriously canvassed and a rule of law enunciated and acted upon in that case; the distinction sought by Shri Jain, does not seem to detract from the quality, as a precedent of the principle of law laid down there. Same is the answer to the distinction sought to be urged on behalf of the respondents in regard to some other cases on the ground that the partner concerned had died before the institution of the suit. This circumstance would clearly by inconsequential if the firm's name is construed as an abbreviation of the names of all the existing partners. Besides, Order 30, rule 4, in express terms applies to both types of cases, whether a person dies before the institution of a suit or during its pendency. This distinction is thus wholly misconceived and unacceptable. The respondents' counsel has, while developing his argument, also referred us to the Supreme Court decision in *Rameshwar Prasad* v. *Shambehari Lal Jagannath* (17), which lays down

(15) 1962 M.P.L.J. (Notes of Cases, No. 273, page 122).
(16) 1964 M.P.L.J. (Notes of Cases, No. 53, page 23).
(17) A.I.R. 1963 S.C. 1901.

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that the provision of Order 41 rule 4 of the Code does not override the provision of Order 22 rule 9; because the two deal with different stages of an appeal. From the ratio of this decision it is sought to seek assistance for the contention that Order 30 of the Code also only deals with the stage of institution of suits and it does not control the operation of Order 22; which is concerned with abatement of suits, etc. on account of omission to implead within time the legal representatives of a party dying after the institution of the suit. This argument leaves me unimpressed, because the analogy does not seem to be apt. In the first place, Order 41, rule 4, merely enables one of several plaintiffs or one of several defendants to file appeal against the whole decree, in case the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, and when an appeal has been so filed then also it merely empowers the Court to reverse or vary that decree in favour of all the plaintiffs or defendants, as the case may be. Secondly this rule does not provide for a contingency like the death of a partner such as is expressly in terms provided in Order 30, rule 4.

The respondents' counsel has referred us to *Kedarnath Kanoria and others* v. *Khaitan Sons and Co.* (18), *Darshanlal Agarwalla* v. *Happy Valley Tea Company Ltd., and others* (19), *Chhagyan Lal Hiralal* v. *Firm Swaroopchand Hukamchand and others* (20), *Shop of Bhai Ganeshram Balbhadra and another* v. *Firm Mangilal Balkishan and others* (21), and *Atma Ram* v. *Banku Mal and another* (22), in support of the proposition that in case of a suit by *Karta* as representing a Joint Hindu Family on his death either the successor *Karta* or all the members of the Joint Hindu Family should be impleaded in time to avoid abatement. This proposition of law has in my view nothing to do with Order 30, rules 1 and 4 of the Code and can have little relevance to the problem which concerns us. *Mathuradas Canji Matani and others* v. *Ebrahim Fazalbhoy* (23), is equally unhelpful to the respondents because, that

(18) A.I.R. 1959 Cal. 368.
(19) A.I.R. 1958 Cal. 691.
(20) A.I.R. 1962 M.P. 305.
(21) A.I.R. 1952 Nagpur 390.
(22) A.I.R. 1930 Lah. 561.
(23) A.I.R. 1927, Bom. 581.

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decision deals with the institution of a suit against a partnership firm which, to the plaintiffs' knowledge, has been dissolved prior to the institution of the suit, and lays down that if it is sought to fix liability on the private estate of the deceased partner, apart from his interest in the partnership assets, then his legal representative must be added. This decision plainly does not touch the point arising before us. Incidentally I find that in this judgment the purpose and object of enacting Order 30, rule 4, is noticed which, if anything, seems to go against the respondents.

Lastly Shri Ganga Parshad Jain has faintly argued that a firm gets dissolved on the death of a partner, suggesting thereby that on its dissolution the suit ceases to be by or against a firm as the case may be. It is, however, not shown how this aspect can help the respondents in face of the express language of Order 30, rule 4; and then the present suit would seem to relate to the rights and liabilities arising out of the partnership dealings. In fairness to the learned counsel, however, it must be said that he did not pursue this argument and dropped it without developing it.

As a result of the foregoing discussion, it appears, that the decision in the case of *Messrs Ghaki Mal Hukam Chand* enunicates the correct legal position. In so far as the later decision in case of *Radha Kishan Sohan Lal* is concerned, the scope and effect of Order 30, rules 1 and 4 were not canvassed at the Bar and, therefore, no opinion was expressed on this point. It, therefore, cannot be said that the legal principle enunciated and acted upon in that case deserves to be overruled being in conflict with the law as laid down in the earlier decision. In case, however, the later decision is capable of being construed as an authority for the proposition that a Joint Hindu Family trading partnership is not covered by Order 30, rule 1 as amended by this Court then that would be an incorrect view.

In the final conclusion, the respondents' preliminary objection fails and is repelled. The case will now go back to the learned Single Judge for decision of the second appeal on the merits. Costs would be costs in the cause.

S. B. CAPOOR, J.—I agree.

Mahajan, J.

H. R. KHANNA, J.—I also agree.

B.R.T.