

CIVIL MISCELLANEOUS

Before Khosla and Falshaw, JJ.

PROVINCE OF EAST PUNJAB,—Appellant.

versus

LABHU RAM, etc,—Respondents.

Civil Miscellaneous No. 40/C of 1954 in R.F.A. No. 42
of 1949

1954

Sep., 8th

Abatement—Appeal—One of the respondents dead—His legal representatives not impleaded within Limitation—Abatement whether total or partial—Rule stated—Civil Procedure Code, Order 22, Rule 4.

Held, that where the interests of defendants are so inextricably mixed up that a suit could not have been brought against one of them, it is necessary to bring on record the legal representatives of the deceased defendant and failure to do so will result in the suit abating *in toto*. The same principle applies to appeals. Where a decree has been passed in favour of a number of persons jointly all of them must be made parties to the appeal preferred by the aggrieved party. If one of them dies and his legal representatives are not brought on record within the required time the appeal must abate *in toto*, otherwise two contradictory judgments will result in case the appeal is allowed. There will be one judgment in favour of the deceased person and a contrary judgment affecting the rights of the surviving persons. In some cases such contradictory judgments may in law be given, e.g., in those cases where the interests of the various persons are separate and distinct but where a common principle applies and where the interests of the various persons arise out of one common source. total abatement must result.

Cases discussed:—

Sant Singh v. Gulab Singh (1), *Khuda Bakhsh v. Vir Bhan* (2), *Municipal Committee, Gujranwala v. Prabhu Dial and another* (3), *Umrao Singh v. Kapuria and others* (4), *Dewan Chand v. Punjab and Kashmir Bank Limited* (5),

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- (1) I.L.R. 10 Lah. 7
 (2) A.I.R. 1931 Lah. 486
 (3) A.I.R. 1933 Lah. 556
 (4) A.I.R. 1935 Lah. 322
 (5) A.I.R. 1937 Lah. 220

Lachmi Narain v. Mussaddi Lal (1), *Jainath Kapur v. Danpal Singh* (2), *W. Lalajani v. Chhokram v. Cha'akhi* (3), *Ghulam Qadir v. Datta and others* (4), *Ajadhia Pershad-Ram Pershad v. Sham Sunder and others* (5), *Rameshwar Singh Bahadur v. Ram Charan Sahu* (6), *Kamala Prasad Sukul v. Chandra Nath Pramanik* (7), *Arjan Mirdha v. Kali Kumar Chakerbutty* (8), *Ghulam Abbas v. Prince Safdar Jah Zahid Ali Mirza* (9), *Hingra Lal v. Ahmed Ali Khan* (10), *Ram Jas Tewari v. Ram Lal Tewari* (11).

Petition under Order 22, rules 4, 9 and 11 and Order 32, rule 4, of Civil Procedure Code, praying that the abatement qua Labhu Ram, deceased respondent, be set aside and his legal representatives, i.e. his sons and widow above-named, may be brought on the record as his legal representatives; and that Shrimati Vidya Wanti, the widow of the deceased and real mother of the minor sons of the deceased, named Sudarshan Kumar and Ravinder Kumar, may be appointed their guardian ad litem.

D. R. MANCHANDA and S. M. SIKRI, Advocate-General, for Appellant.

C. L. AGGARWAL and PARTAP SINGH, for Respondents.

JUDGMENT

KHOSLA, J.—In the seven appeals filed by Government of the East Punjab against the awards of an arbitrator appointed under the Defence of India Act a common point of law is involved. The respondents in all these appeals were two brothers, Labhu Ram and Nathu Ram. Labhu Ram died on the 24th February, 1953, and no application to bring his legal representatives on record was made until the 12th April, 1954. Two points, therefore, arise:—

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- (a) whether the abatement of the appeal in so far as it relates to Labhu Ram should be set aside for good cause; and

(1) A.I.R. 1942 Oudh. 155
 (2) A.I.R. 1947 Oudh 164
 (3) A.I.R. 1931 Pat. 164
 (4) A.I.R. 1946 Lah. 184
 (5) A.I.R. 1947 Lah. 13
 (6) A.I.R. 1932 Pat 327
 (7) A.I.R. 1928 Cal 180
 (8) A.I.R. 1928 Cal. 294
 (9) A.I.R. 1941 Oudh 219
 (10) A.I.R. 1939 Oudh 241
 (11) A.I.R. 1936 Oudh 209

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(b) if the abatement against Labhu Ram is not set aside, whether the appeal so far as it relates to Nathu Ram survives.

The facts briefly are that property belonging to the two brothers was requisitioned by Government for military purposes. The property was owned by the two brothers jointly in equal shares. No partition of the property had so far been effected and therefore not only the ownership but also the possession was joint at the time the property was requisitioned. Compensation payable to the owners was determined but the owners being dissatisfied with it made a joint application for determination of the compensation by an arbitrator who in this case was the Senior Subordinate Judge of Ferozepore. The Government objected to a joint application being made, but this objection was overruled on the ground that for a more expeditious disposal of the matter a joint application was to be preferred. There were seven different awards in respect of the different properties requisitioned by Government.

The Government being dissatisfied with the awards of the arbitrator appealed to this Court, and in all the seven appeals, the two owners, Labhu Ram and Nathu Ram, were impleaded. Labhu Ram, as I have said above, died on the 24th February, 1953, and so on the expiry of 90 days from this date the appeal against him abated. The statutory period of 60 days during which an application to set aside an abatement could be made expired on the 23rd July, 1953. The appellant (Punjab Government) learnt of Labhu Ram's death on the 19th June, 1953, i.e., before the period of 60 days had expired, but no application under Order XXII, rule 4, Civil Procedure Code, was made until the 12th April, 1954.

I shall first consider the point whether the abatement in so far as it relates to Labhu Ram should be set aside or not. No good ground has been made out by the appellant for the long delay in making an application to bring Labhu Ram's legal representatives on record. Labhu Ram's death came to the knowledge of the appellant on the 19th June, 1953, and an application should at once have been made to have the abatement set aside and to have Labhu Ram's legal representatives brought on record. The application gives no satisfactory reason for the inordinate delay, except that enquiries were being made by the Deputy Commissioner. This, in my view, is not a satisfactory explanation and no good grounds for setting aside the abatement have been made out. I would therefore decline to set aside the abatement of the appeal in so far as it relates to Labhu Ram.

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The second question to consider is whether the abatement is partial or total. It is alleged on behalf of the appellant that Nathu Ram's interest is specified and separable. He is entitled to exactly half the total compensation for the land requisitioned by Government, and, therefore, despite the death of Labhu Ram, the appeal against Nathu Ram survives.

Under the provisions of Order XXII, rule 4, Civil Procedure Code, the legal representatives of a deceased defendant must be brought on record whenever the right to sue (and also the right to appeal) does not survive against the remaining defendants. Therefore where the interests of defendants are so inextricably mixed up that a suit could not have been brought against one of them, it is necessary to bring on record the legal representatives of the deceased defendant; and failure to do so will result in the suit abating

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in toto. The same principle applies to appeals. Where a decree has been passed in favour of a number of persons jointly all of them must be made parties to the appeal preferred by the aggrieved party. If one of them dies and his legal representatives are not brought on record within the required time the appeal must abate *in toto*, otherwise two contradictory judgments will result in case the appeal is allowed. There will be one judgment in favour of the deceased person and a contrary judgment affecting the rights of the surviving persons. In some cases such contradictory judgments may in law be given, e.g., in those cases where the interests of the various persons are separate and distinct, but where a common principle applies and where the interests of the various persons arise out of one common source, total abatement must result. The principles governing this matter have been well recognised and stated in a number of decisions, but as pointed out by Tek Chand, J. in *Sant Singh v. Gulab Singh* (1), it is the application of these principles to particular cases which presents a difficulty. The following passage from the judgment of Tek Chand, J., enunciates the principle very clearly:—

“If the suit is of such a nature that it cannot proceed without the representatives of the deceased person (e.g. suit relating to partnership) the Court will find itself powerless to deal with it any further and it must necessarily dismiss it. If, however, the rights of the surviving defendants in the subject matter of dispute can be determined without affecting the rights of the deceased person, the suit shall proceed. Again if the question

(1) I.L.R. 10 Lah 7

arises in appeal another principle has to be borne in mind. In such a case the Court has to see that it does not pass a decree, which it may find itself incapable of executing, owing to the circumstances that the lower Court's decree in favour of the deceased respondent has become final in consequence of the partial abatement of the appeal against him. If the result of the acceptance of the appeal is to have on the rolls of the Court two absolutely contradictory decrees relating to the same subject-matter it will stay its hands and refuse to proceed with the hearing of the appeal, but if the rights of the deceased and the surviving respondents are separate or separable and there is no real likelihood of a conflict between the decrees passed as to their respective right, the appeal shall be heard."

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It is instructive to examine how this principle has been applied in the various cases which have from time to time come up before the High Courts of this country. The learned counsel for the appellant cited no less than eight cases. Of these five were decided by the Lahore High Court, one by the Patna High Court and two by the Oudh Chief Court. On the other hand the respondent cited nine cases. Of these three relate to the Lahore High Court, three to the Oudh Chief Court, two to the Calcutta High Court and one to the Patna High Court.

I shall first examine the cases cited by the appellant. The earliest case of the Lahore High

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Court is the one mentioned above, *Sant Singh v. Gulab Singh* (1). In this case one 'X' sold some property jointly to 'A', 'B', 'C' and 'D'. The reversioners of 'X' brought a suit to challenge the alienation. This suit was dismissed. The reversioners appealed and in the meantime 'A', one of the vendees, died. His legal representatives were not brought on record within the required time. A Full Bench of five Judges held that there was a partial abatement only, because the shares of the vendees were specified and separable although not separate. This case no doubt supports the appellant's contention to a large extent, but as I shall presently show the weight to be attached to this decision is considerably modified by two other Full Bench decisions of the same Court.

Another case which supports the appellant's contention is *Khuda Bakhsh v. Vir Bhan* (2). In this case the *adna maliks* sued for a declaration that their rights in the land which had submerged in the river had not been lost. They obtained a decree subject to the payment of a sum of money to the *ala maliks*. The *ala maliks* appealed and pending the appeal one of the *adna malik*-plaintiffs died. It was held that there was only a partial abatement as the shares of the *adna maliks* were separable.

Similarly in *Municipal Committee Gujranwala v. Prabhu Dial and another* (3), it was held that there was only a partial abatement. In this case out of two joint vendees of Municipal land who had brought a suit for the refund of money deposited by them because the sale had not been completed one died pending an appeal by the Municipal Committee. Although the decree in favour

(1) I.L.R. 10 Lah. 7

(2) A.I.R. 1931 Lah. 486

(3) A.I.R. 1933 Lah. 556

of the vendees was a joint decree, it was held that their shares were separable and therefore the appeal against the surviving vendee could be heard.

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Umrao Singh v. Kapuria and others (1), is a case in which a number of persons sued for a declaration that they were entitled to riparian rights in a water channel. A decree was passed granting each plaintiff a certain share in the water. An appeal was filed and pending the appeal one of the plaintiffs-respondents died. His legal representatives were not brought on record. It was held that the appeal abated only as against the deceased respondent because the suit was not for enforcing a joint right.

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In *Dewan Chand v. Punjab and Kashmir Bank, Limited* (2), two persons holding separate decrees against a judgment-debtor attached the property of the judgment-debtor in execution of their decrees. One 'R' objected and when his objections were dismissed he filed a suit claiming that the property belonged to him and was not liable to attachment and sale in execution of the decree against 'C'. The suit was dismissed and he filed an appeal. The suit as well as the appeal were against both the decree-holders. One of them died and his legal representatives were not brought on record. It was held that the appeal did not abate against the surviving decree-holder. In that case there were two separate decrees and the interests of the two decree-holders were therefore not separable but separate.

Another case of partial abatement was *Lachmi Narain v. Mussaddi Lal* (3). In this case

(1) A.I.R. 1935 Lah. 322

(2) A.I.R. 1937 Lah. 220

(3) A.I.R. 1942 Oudh. 155

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a decree-holder in execution of his decree attached certain property belonging to the judgment-debtor. Two other persons also held decrees against the same judgment-debtor and they also applied for rateable distribution. A suit was brought by Lachhmi Narain against the three decree-holders and the judgment-debtor claiming that the property belonged to him. The suit was dismissed and Lachhmi Narain filed an appeal. One of the decree-holders died and his legal representatives were not brought on record. It was held that there was only a partial abatement. This case is, therefore, similar to the last-mentioned Lahore case, *Dewan Chand v. Punjab & Kashmir Bank, Ltd.*, (1).

The second Oudh case is *Jainath Kapur v. Danpal Singh* (2). This case arises out of a suit for the possession of ancestral property by reversioners. Each reversioner claimed in his own right and the shares of the various plaintiffs were set out in detail in the plaint. A joint decree in favour of the plaintiffs was passed and when the defendants appealed one of the plaintiffs died. His legal representatives were not brought on record, and it was held that there was only a partial abatement because even if one of the reversioners had refused to join as plaintiff the others could have sued for their shares.

The last case relied upon by the appellant is *Walayatunnissa Begum v. Chalakhi* (3). This was a case arising out of a mortgage and it was held that where a decree dismissing a suit based on a mortgage is passed and during the pendency of the appeal one of the respondents dies the appeal abates against him only.

It will be seen therefore that in many of these cases the original suits or proceedings could have been started without the deceased person being one

(1) A.I.R. 1937 Lah. 220
(2) A.I.R. 1947 Oudh. 164
(3) A.I.R. 1931 Pat. 164

of the parties. This is true of the suit by the reversioners *Jainath Kapur v. Danpal Singh* (1) and also of the suits brought under Order XXI, rule 63, Civil Procedure Code: *Dewan Chand v. Punjab & Kashmir Bank, Ltd.* (2) and *Lachhmi Narain v. Mussaddi Lal* (3). Similarly the suit by the *adna maliks Khuda Bakhsh v. Vir Bhan* (4), could have been instituted even if all the *adna maliks* had not consented to join as plaintiffs. In *Umrao Singh v. Kapuria and others* (5), it was held that this was not a case for the declaration of a joint right and that the decree gave each of the plaintiffs a specified right in the water channel. There are, however, only two cases which appear to support the appellant's contention, namely two Lahore cases, *Municipal Committee, Gujranwala v. Prabhu Dial and another* (6), and *Sant Singh v. Gulab Singh* (7). Against these two cases, however, there is overwhelming authority to the contrary.

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In the first place we have the two Lahore Full Bench cases *Ghulam Qadir v. Ditta and others* (8), and *Ajudhia Pershad-Ram Pershad v. Sham Sunder and others* (9). The first case arose out of a pre-emption suit. One of the vendees died and his legal representatives were not brought on record. It was held that the suit had abated *in toto* because it was not possible to proceed with the suit in the absence of the legal representatives of the deceased vendee. It was held that the interest of the vendees was joint and indivisible even though their shares were specified. In the other case three persons held decrees against the

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- (1) A.I.R. 1947 Oudh. 164
 (2) A.I.R. 1937 Lah. 220
 (3) A.I.R. 1942 Oudh. 155
 (4) A.I.R. 1931 Lah. 486
 (5) A.I.R. 1935 Lah. 322
 (6) A.I.R. 1933 Lah. 536
 (7) I.L.R. 10 Lah. 7
 (8) A.I.R. 1946 Lah. 184
 (9) A.I.R. 1947 Lah. 13

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same judgment-debtor. The judgment-debtor's interest in the partnership business was sold in execution of the decree of one of the decree-holders. The sale-proceeds were distributed rateably among the three decree-holders. The judgment-debtor objected and his objections were repelled. He then filed an appeal and pending the appeal one of the decree-holders died. His legal representatives were not brought on record. It was held that the appeal abated *in toto* because—

- (a) the deceased-decree-holder was a necessary party to the appeal in which the question of the maintainability of the objection to sell was raised; and
- (b) the sale-proceeds had been distributed *pro rata* and no order could be made for refund against any other decree-holder unless notice was issued to him and he was given opportunity of being heard. The deceased-decree-holder, had not been brought on record and no notice could issue to him.

* The principles laid down in this case, in my view, apply with full force to the case before us.

Rameshwar Singh Bahadur v. Ram Charan Sahu (1), and *Kamala Parsad Sukul v. Chandra Nath Pramanik* (2), arose out of suits for mesne profits against trespassers. On the death of one of the trespassers it was held that the right against the other did not survive because the liability of the trespassers was joint and undefined.

(1) A.I.R. 1932 Pat. 327

(2) A.I.R. 1928 Cal. 180

In *Arjan Mirdha v. Kali Kumar Chakerbutty* (1), a suit was brought by several plaintiffs for the joint possession of land. A decree was passed and the defendants appealed. One of the plaintiffs died and his legal representatives were not brought on record. It was held that the appeal abated *in toto*. Walmsley, J., who delivered the judgment, observed that the mere specification by the plaintiffs that each individual plaintiff's share is so much does not alter the nature of the decree. The decree remains a decree for joint possession and, therefore, indivisible.

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Ghulam Abbas v. Prince Safdar Jah Zahid Ali Mirza (2), is a decision by a Full Bench of the Oudh Chief Court. In this case an application was made by the debtors under the U.P. Encumbered Estates Act against the landlords. The application was dismissed on the ground that the debtors had no *locus standi*. They appealed and during the pendency of the appeal one of the landlord-creditors died. His legal representatives were not brought on record and it was held that the appeal abated *in toto* because the interest of the creditors in defeating the debtor's application were joint and indivisible.

Hinga Lal v. Ahmed Ali Khan (3), is a case which arose out of a case for the recovery of land revenue by two joint owners on the ground that the land revenue had already been paid. A joint decree was passed in favour of them and when an appeal was preferred by the defendant one of the owners died. His legal representatives were not brought on record within the required time. It was held that the appeal abated *in toto* because 'A' and 'B' were both liable to pay the whole land revenue to the Government.

(1) A.I.R. 1928 Cal. 294

(2) A.I.R. 1941 Oudh. 219

(3) A.I.R. 1939 Oudh. 241

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The last case relied upon by the learned counsel for the respondents is *Ram Jas Tewari v. Ram Lal Tewari* (1). In this case a joint decree was passed in favour of a number of persons and during the pendency of the appeal by the defendants one of them (the plaintiffs) died. It was held that the appeal abated *in toto*.

From this case it is quite clear that where a suit could not have been brought without the deceased party being on record the suit or the appeal abated *in toto* if his legal representatives were not brought on record within the required time. Another principle which emerges from these cases is that where the interest of the respondents springs from the same source or rests on the same basis all of them must remain parties until the end. To put it in different words where the appellant challenges the principles governing the rights of the respondents he cannot prosecute his appeal in the absence of one or more of them.

Applying this principle to the present case we find that the land requisitioned by Government belonged jointly to Labhu Ram and Natnu Ram. Their shares were no doubt specified as half and half, but the shares were not separate. Each of them had an interest in every square inch of the land requisitioned. The Government could not have requisitioned any portion of this land without paying compensation to both the brothers. It was, therefore, necessary to have both the brothers as parties to these proceedings from the very beginning. A certain basis for computing the compensation was determined by the arbitrator and this basis or rate applied to the shares held by both the brothers. The arbitrator could not

(1) A.I.R. 1936 Oudh. 209

have fixed one rate for one brother and another rate for the other brother. Therefore when the Government filed an appeal against the award of the arbitrator both the brothers had to be made parties. In fact both of them were made parties and since the appeal in so far as it relates to Labhu Ram has abated the rate determined by the arbitrator must hold good so far as his share is concerned. If the appeal of the Government were allowed the compensation payable to Nathu Ram would be assessed at a lower rate. This means that there would be two contradictory judgments in respect of the same piece of land. By one of these judgments the rate fixed by the arbitrator would be the correct rate and another rate would be fixed by this Court in appeal. Had the lands of Labhu Ram and Nathu Ram been partitioned before they were requisitioned the case would have been otherwise.

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I must, therefore, hold that these proceedings could not have been instituted against one of the brothers only. The entire land was held jointly by the brothers and one of the inevitable results would be two contradictory decisions in respect of the same matter. I would therefore hold that these appeals have abated *in toto* and are liable to be dismissed. I would accordingly dismiss them but make no order as to costs. The cross objections are also dismissed.

FALSHAW, J.—I agree.

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