

**Sis Ram Vs. Asa Ram and ors.**

**Sis Ram Vs. Asa Ram and ors.**

**SooperKanoon Citation :** [sooperkanoon.com/456113](http://sooperkanoon.com/456113)

**Court :** Allahabad

**Decided On :** Nov-20-1961

**Reported in :** AIR1963All306

**Judge :** S.S. Dhavan, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rules 4 and 11

**Appeal No. :** Second Appeal No. 2327 of 1952

**Appellant :** Sis Ram

**Respondent :** Asa Ram and ors.

**Advocate for Def. :** R.R. Agarwal, Adv.

**Advocate for Pet/Ap. :** K.C. Mital, ;N.S. Singhal and ;S.N. Chatterji, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**S.S. Dhavan, J.**

1. This is a plaintiff's second appeal against the decision of the First Civil Judge of Saharanpur dismissing their suit for possession of the site of a house in the abadi of village Gangnoli in the district of Saharanpur. The plaintiffs alleged that they were the zamindars of the plot and the defendants their riyaya, and contended that

the village being an agricultural one, a riyaya has no right to sell the malba (material) of the house in which he is permitted to reside nor can he transfer his right of residence. They further alleged that the second defendant had illegally sold the house and the land in dispute to the first defendant and this entitled the plaintiffs to resume possession. The first defendant alone contested the suit and denied that the village was agricultural. He relied on a custom permitting a riyaya to sell the malba of his residential house together with his right of residence.

2. The trial court held that there was no right of transfer in this village and consequently the plaintiffs were entitled to resume possession. It decreed the plaintiffs' suit. In appeal the learned Judge took a contrary view and held that there was a custom entitling the riyaya to make a transfer and, therefore, the defendants had acquired the house and the land lawfully. He further held that after the passing of the Z. A. and L. R. Act during the pendency of the appeal before him the zamindar had been divested of his estate and the property in dispute must be deemed to have been settled, under Section 9 of the Act, with the first defendant. Accordingly, he allowed the appeal and dismissed the suit of the plaintiffs one of whom came to this Court in Second Appeal.

3. The appeal was filed only by Sisrani. For some reason his brother and co-plaintiff Bhagwana did not join in the appeal and was arrayed as a pro forma respondent. During the pendency of this appeal Bhagwana died and an application for substituting his son was made. On 6-11-1954 this Court dismissed the application on the ground that the appellant had failed to disclose the exact date of Bhagwana's death in spite of repeated opportunities given to him. The Court declared the appeal to have abated against Bhagwana and directed that this fact should be brought to the notice of the Bench hearing the appeal.

4. Mr. R. R. Agarwal, learned counsel for the respondents, has raised a preliminary objection that this appeal cannot be heard in the absence of the heirs of Bhagwana and must be deemed to have abated as a whole. On the other hand, learned counsel for the appellant contends that Bhagwana was merely a pro forma respondent who in fact supported the appeal, and his death does not affect the present appellant's right to press the appeal on his own behalf.

I have heard learned counsel for the parties at considerable length and a large number of authorities have been cited on both sides. To decide whether this appeal can be heard in the absence of Bhagwana's heirs it is necessary to consider the nature of the plaintiffs' suit and of the decree passed by the courts below. The appellant Sisrani and Bhagwana are brothers who were co-plaintiffs in the suit. They alleged in the plaint that they were the zamindars and joint owners of abadi khasra no. 24 in mauza Ganganol and that the second defendant Bishambar Das was residing in the house in dispute as their riyaya. They complained that Bishambhar Dass had transferred this house illegally by a sale deed in favour of the first defendant Asa Ram, and asked for a decree for possession against the first defendant. It is, therefore, clear that the suit was based upon a joint and indivisible right. The trial court passed a joint decree in favour of both the plaintiffs. The appellate court reversed this decision and dismissed the plaintiffs' suit for possession with costs. Thus there was a joint decree against both the plaintiffs, but one of them appealed to this Court, making the other co-plaintiff a respondent. The present position, therefore, is that the suit of the plaintiff Bhagwana has been dismissed by the appellate court and this decision has become final as against his heirs. The question is whether the other plaintiff can be allowed to prosecute his appeal in the absence of the heirs of a co-plaintiff whose suit has already been dismissed.

Mr. S. N. Chatterji who holds the brief of Mr. N. S. Singhal contended that the appeal should be heard and a decree passed in favour of the surviving plaintiff, if necessary. He argued that the presence or absence of Bhagwana's heirs makes no difference as they would in any case support this appeal. He relied upon a number of decisions of this and other High Courts which tend to lay down that the omission to substitute the heirs of a pro forma respondent does not affect the right of the plaintiff to prosecute his appeal. *Mahadeo Singh v. Talib Ali* : AIR1928 All345 *Abdul Rahman v. Girjesh Bahadur* : AIR1938 All235 ; *Mt. Shyamrathi Kunwar v. Dharam Deo* : AIR1951 All428 ; *Rameshwar Prasad v. Satya Narain* : AIR1954 All115 ; '*Ram Raj v. Ram Oudh* A.I.R. 1934 Oudh 496; *Shyamoo Laxman v. Bhaojee Tukaram* A.I.R. 1952 Nag 250; *Muthuraman v. Adaikappa* : AIR1934 Mad730 ; *Raghbar Dial v. Ram Chandar* A. I. R. 1927 Lahore 779.

5. On the other hand Mr. Agarwal relies on a decision of a Full Bench of this Court reported in *Baij Nath v. Ram Bharose* : AIR1953 All565 , which, after an exhaustive review of a large number of authorities, held that where a plaintiff files a suit against a number of defendants on common grounds which is contested by all the defendants on common grounds and the suit is decreed against all of them, and an appeal is filed during the pendency of which one of the defendants dies and his legal representatives are not brought on record so that his appeal abates, the appeal of the surviving defendants can be heard only if their rights and interests were not joint and indivisible with those of the deceased defendant and if the success of the appeal will not lead to two inconsistent and contradictory decrees.

6. The Full Bench further held that the powers of the appellate court under Order 41 Rule 4 C. P. C. to make a decree in favour of all the plaintiffs or the defendants, including even those who did not join in the appeal, extend only to those cases where the non-appealing plaintiffs or defendants were alive but had not cared to join the appeal, but the rule did not give, the appellate court any power to reverse or vary a decree which had become final against a deceased appellant.

7. The question was considered by the Supreme Court in a recent decision in *State of Punjab v. Nathu Ram* : [1962]2SCR636 , not yet published in the law reports. The facts of that case were different but their Lordships enunciated certain principles of law which will control the decision of this case. The State of Punjab filed an appeal before the High Court of the Punjab against an award made jointly in favour of two persons, Labhu Ram and Nathu Ram. During the pendency of the appeal Labhu Ram died and the appeal against him abated. The High Court held that as a result of this abatement the appeal against Nathu Ram also abated and dismissed it. The State obtained a certificate of fitness and appealed against this decision to the Supreme Court.

8. The Court observed that it was not strictly correct to say that the appeal against the surviving respondent abated, and pointed out that Order 22 Rule 4 C. P. C. did not provide for the abatement of the appeals against the co-respondents but only against the deceased respondent, and therefore there could be no question of

the abatement of the appeal against them. But, apart from the question of abatement, the Court might find itself in a position where it was impossible for it to hear the appeal against the surviving respondents on merits and, therefore, there was no option for it but to dismiss it. The Court shall not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision in conflict with the decision between the appellant and the deceased respondent and thus lead to a decree which will contradict another decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent (b) when the appellant could not have brought an action for relief against the surviving respondents alone; and (c) when the decree against the surviving respondents, on the success of the appeal, may be ineffective -- that is, incapable of execution. Where a decree is not joint, these difficulties do not arise, for the abatement of the appeal against the deceased respondent would make the decree in his favour alone final, and this fact cannot affect the decision of the controversy between the appellant and the surviving decree-holders.

But the difficulty arises in a case where a joint decree is appealed against. If it is joint and indivisible, the appeal against the surviving respondents cannot be heard and must be dismissed after the abatement of the appeal against the deceased respondent. But a joint decree in favour of respondents whose rights in the subject-matter of the decree are specified is in a different category, and the Supreme Court commented upon the difference of opinion between the various High Courts on the question whether in such a case the appeal against the surviving respondents can be heard. According to one view, the abatement of the appeal against the deceased respondent finalises the decree affecting his specific interest only and the rights of the surviving respondents can be decided in the appeal. Their Lordships decisively overruled this view and held, that the fact that the share or the interest of the deceased respondent had been specified in the joint decree is irrelevant, for it does not affect the joint nature of the decree nor the capacity of the decree-holder to execute it or to defeat the attempt of the other party to interfere with the joint right decreed in his favour. The entertainment of the appeal against the deceased respondent makes the decree in his favour final and prevents the appellate court from modifying that decree directly or indirectly, for the simple reason that in the absence of the legal representatives of the deceased

decree holder, the court cannot determine any controversy between the surviving parties which may affect the rights of these representatives under the decree. This in brief is a para-phrase of the law declared by the Supreme Court.

9. Applying it to the facts of the present case, the Court is faced with a situation which may be summarised thus. The two plaintiffs filed a suit on the basis of a joint and indivisible right, and their suit was dismissed by the appellate court which held that the defendants had a right to transfer the property in dispute under a local custom. An appeal was filed against this decree by one of the plaintiffs who made the other co-plaintiff a respondent. If both of them were before this Court, their rights against the defendants could be decided in this appeal. But the respondent plaintiff died during the pendency of appeal and his heirs have not been brought on record. Therefore, the appeal which he supported has abated as far as he was concerned, and the decree dismissing his suit has become final and the reasons for the dismissal have become final too. If in the absence of the heirs of the deceased plaintiff the appeal of the surviving plaintiff is heard and allowed, the result will be that the suit of one plaintiff will be decreed while that of the other stands dismissed. The reasons of this Court for allowing the appeal will, necessarily conflict with the reasons of the lower appellate court for dismissing the deceased plaintiff's appeal. There will be two conflicting decisions in the same suit between the same parties based on a joint cause of action. The Court cannot create a situation which may lead to two contradictory decisions in the same suit. If the Courts of law speak with contradictory voices in the same dispute, it will lead to confusion and judicial chaos.

10. Therefore, I am afraid that the plaintiff's appeal cannot be heard after the abatement of the appeal against the supporting respondent. It is accordingly dismissed.

11. Counsel for the appellant asks for leave to appeal. Ordinarily I would have granted leave, but the law has been declared by the Supreme Court and there is no scope for an appeal. Leave is refused.