

Bhairavendra Kumar Vs. Vth Additional District Judge and ors.

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Court : Allahabad

Decided On : Sep-05-2008

Reported in : 2008(4)AWC3971

Judge : Sabhajeet Yadav, J.

Appellant : Bhairavendra Kumar

Respondent : Vth Additional District Judge and ors.

Advocate for Def. : Sri. AJai Kumar Singh

Advocate for Pet/Ap. : Sri. Manish Goel

Disposition : Petition allowed

Judgement :

Sabhajeet Yadav, J.

1. By this petition, the petitioner has challenged the order dated 15.1.2001, passed by Vth Additional District Judge, Varanasi contained in Annexure-6 of the writ petition, whereby misc. appeal filed by the petitioner has been dismissed as abated in its entirety.

2. The brief facts leading to the case are that the petitioner filed Suit No. 375 of 1981 in the Court of Civil Judge, Varanasi for cancellation and declaration that

sale deed dated 14th September, 1979 registered on 16th October, 1979 alleged to have been executed by Rajesh Kumar Agrawal son of the petitioner in favour of defendant Nos. 1 and 2 in respect of half share in house No. CK-16/45-46 Sewak Ram Sadawarti Gali, Varanasi for a sum of Rs. 48,000 is absolutely null and void and invalid and defendant Nos. 1 and 2 do not get any right or title of any kind in the half portion of the said house in question and information of the said fact be sent to the Registrar, Varanasi.

It is stated that the aforesaid suit was filed with the allegation that Rajesh Kumar Agrawal son of the petitioner had executed the sale deed in question in favour of the defendants No. 1 Rajendra Kumar and defendant No. 2 Smt. Puspa Devi wife of Rajendra Kumar without any sale consideration allegedly for Rs. 48,000, therefore, it is absolutely forged, illegal and void. It was also stated in the plaint that the aforesaid house was self acquired property of petitioner's father late Prahlad Das and that the plaintiff petitioner and Smt. Shrimani Devi and Smt. Kamla Devi who had joined as co-plaintiffs No. 2 and 3 respectively in the suit with the petitioner, being sisters of the petitioner, were co-owners of the house in dispute, in which no partition has yet been taken place.

3. In the said suit the vendee Sri Rajendra Kumar was impleaded as defendant No. 1 and another vendee Smt. Pushpa Devi wife of Rajendra Kumar as defendant No. 2 and Rajesh Kumar Agrawal son of the petitioner who had executed the sale deed in favour of defendants No. 1 and 2 was also impleaded as defendant No. 3. The aforesaid suit was dismissed in default vide order dated 27.4.1984. Against the said dismissal, application for setting aside the order of dismissal in default was moved under Order IX, Rule 9, C.P.C. which was dismissed vide judgment and order dated 27.7.1990. Feeling aggrieved against the aforesaid order dated 27.7.1990 a misc. appeal under Order XLII1, Rule 1 was filed by the petitioner in the form of first appeal from order before this Court which was numbered as F.A.F.O. No. 1063 of 1990. In the said appeal Smt. Shrimani Devi (plaintiff No. 2) and Smt. Kamla Devi (plaintiff No. 3) had not joined the petitioner as co-appellants reason best known to them, as such the petitioner has impleaded them as proforma respondent Nos. 4 and 5 respectively.

4. The aforesaid appeal remained pending in this Court from 1990 to 1996. Subsequently on enhancement of pecuniary jurisdiction of lower court, the said appeal was transferred and remitted back to the District Judge, Varanasi which was made over for disposal to Vth Additional District Judge, Varanasi on 1.12.1997.

It is stated in the writ petition that the parties appeared in the Court of Vth Additional District Judge, Varanasi in response to the notices issued for appearance. During pendency of the said appeal defendant-Rajesh Kumar Agrawal (respondent No. 3 in appeal) died on 13.7.2000 and an application for substitution of his heirs was filed on 4.9.2000, which was within time, as such the said substitution application was allowed by the court below.

5. Thereafter defendant Nos. 1 and 2 filed Paper No. 19 Kha on 22.11.2000 stating therein that Smt. Shrimani Devi, who was impleaded as proforma respondent No. 4 in the misc. appeal referred above, who was real sister of petitioner plaintiff had died in the year 1994 and the plaintiff petitioner had full knowledge of her death but no application for substitution of her heirs and legal representatives has been filed within time, accordingly the said appeal should be dismissed as abated.

Against the aforesaid application the plaintiff petitioner filed Paper No. 20 Kha on 29.11.2000 for substitution of heirs of deceased Smt. Shrimani Devi respondent No. 4 in the said appeal supported by an affidavit. Later on an application under Section 5 of the Limitation Act supported by an affidavit was also filed for condoning the delay in filing substitution application on 1.12.2000 for substituting the heirs and legal representatives of Smt. Shrimani Devi who was impleaded as proforma respondent No. 4 in said misc. appeal.

6. The respondent Nos. 2 and 3 here in this petition, who are defendant Nos. 1 and 2 in the suit, filed objection against the said substitution application. The aforesaid applications and affidavits are on record as Annexures-1, 2, 3, 4 and 5 of the writ petition. Thereafter Vth Additional District Judge, Varanasi rejected the application for substitution of heirs of deceased Smt. Shrimani Devi respondent No. 4 and also dismissed the entire appeal as abated vide impugned order dated

15.1.2001. The impugned order is on record as Annexure-6 of the writ petition. Thereafter the petitioner filed review application but the same was dismissed as not pressed, as the instant writ petition is filed challenging- the said order.

7. While assailing the judgment of court below, the learned Counsel for the petitioner Sri Manish Goel has submitted that in facts and circumstances stated in the affidavit filed in support of delay condonation application moved with the substitution application to bring the heirs and legal representatives of Smt. Shrimani Devi on record, the delay ought to have been condoned and abatement ought to have been set aside by the court below but instead of doing so, the court below fell in error in dismissing the. appeal as abated in its entirety.

8. He further submitted that even if the heirs and legal representatives of Smt. Shrimani Devi are not substituted and are not brought on record, even then the entire appeal could not have been dismissed in-toto as abated, for the simple reason that in the suit in question the petitioner as one of the plaintiffs has Joined Smt. Shrimani Devi and Smt. Kamla Devi as co-plaintiffs No. 2 and 3 merely for the sake of convenience, although their rights are independent, distinct and separate. However, when they did not join as co-appellants at the time of filing of misc. appeal, the petitioner has impleaded them as proforma respondent Nos. 4 and 5 respectively in the misc. appeal, while elaborating his arguments, he has further submitted that although the petitioner has independent and distinct right from respondent Nos. 4 and 5 in the said appeal but because of similarity of claims he has joined them in a single litigation to vindicate their rights as plaintiff Nos. 2 and 3 respectively in the suit.

9. Similarity of claims cannot be justification in law to treat their claims as single and inseparable or indivisible for all the purposes. The suit itself is pending and no hearing has taken place, in that view of the matter, it cannot be said that omission to bring the legal representatives and heirs of deceased Smt Shrimani Devi on record, the decree to be passed therein would be rendered of such a conflicting nature, which cannot be possibly executed. According to him, the approach of court below is wholly erroneous and is also otherwise contrary to law inasmuch as contrary to the recent Constitution Bench decision rendered in S. Amarjit Singh

Karla and Ors. v. Smt. Pramod Gupta and Ors. AIR 2003 SC 2588.

10. While placing reliance upon the various observations made in the aforesaid decision he has further submitted that laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of Justice and not meant to hamper the cause of justice or sanctify miscarriage of Justice. He urged that mere fact that the petitioner has Joined Smt. Shrimani Devi and Smt. Kamla Devi as co-plaintiffs, his claim cannot be said to be inseparable or inseverable from the aforesaid co-plaintiffs.

11. His rights are distinct from them, though similar or identical in nature and he has no common right with them, even if assuming for sake of arguments, their rights and claims are common, the Court can make declaration about their rights and claims jointly in general and restrict the relief confined to the parties before the Court and lastly he urged that since Smt. Shrimani Devi has been impleaded as proforma respondent No. 4 in appeal in question, therefore, at any rate omission to bring her heirs and legal representatives on record could not be fatal to the proceedings with the said appeal.

12. But while deciding the case in question, learned court below was misconceived about the true nature of rights and claim asserted by the petitioner vis-a-vis other co-plaintiffs and while dismissing the appeal as abated against the respondent No. 4 Smt. Shrimani Devi, the court below has erroneously and illegally abated the appeal in its entirety against other defendants respondents also, as such impugned order passed by the court below cannot be sustained.

13. Contrary to it the submission of the learned Counsel for the respondents Sri Ajay Kumar Singh is that as per allegation in the plaint itself the suit property was under joint ownership of petitioner, Smt. Shrimani Devi and Smt. Kamla Devi respondents No. 4 and 5 in appeal giving rise cause of action to instant writ petition and the property was not separated by partition. Therefore, the submission of learned Counsel for the respondents is that the property in question was undivided property of joint owners who had inherited it from their father. On

account of death of one of the joint owners during pendency of appeal and omission to substitute the legal representatives of deceased joint owner of such Joint property in suit, the appeal would stand abated in its entirety and not against only the deceased respondent No. 4 but against other respondents also because of possibility of resulting two contradictory decrees impossible of execution.

14. In support of his submission he has placed reliance upon Ramagya Prasad Gupta and Ors. v. Murli Prasad and Ors. : [1973]1SCR63 ; Municipal Council Mandsaur v. Fakirchand and Anr. : AIR 1997 SC1251 and Badni v. Siri Chand : AIR 1999 SC1077 and other reported decisions of this Court.

15. Heard Sri Manish Goel. learned Counsel for the petitioner and Sri AJai Kumar Singh, learned Counsel for the respondents.

In view of rival submissions of the learned Counsel for either parties, the questions which arise for consideration of this Court are that as to whether in given facts and circumstances of the case, the delay caused in moving substitution application by the petitioner to substitute the heirs and legal representatives of deceased Smt. Shrimani Devi respondent No. 4 was liable to be condoned or not? If not; whether the appeal filed by the petitioner was liable to be dismissed as abated against the respondent No. 4 only and could be proceeded with against the remaining respondents or was liable to be dismissed in its entirety on account of such abatement against respondent No. 4

16. In order to answer the aforesaid questions, I would deal the last question first. But before I proceed to deal with it, I must extract the relevant provisions of Order XXII, Rule 3, Rule 4 and Rule 11 of the Code, which have some material bearing with the question in issue as under:

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.- (1) When one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representatives of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

4. Procedure in case of death of one of several defendants or of sole defendant.-

(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendant alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representatives of the deceased defendant.

(3) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing: and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where-

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representatives of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he

had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

the Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved.

11. Application of order to appeals.- In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal.

17. Now I proceed to examine the Constitution Bench decision of the Hon'ble Apex Court rendered in *S. Amarjit Singh Karla and Ors. v. Smt. Pramod Gupta and Ors.* AIR 2003 SC 2588, wherein while dealing with the joint appeal arisen out of reference proceeding for compensation under the Land Acquisition Act in para 27 of the decision Hon'ble Apex Court has held that Order XXII, C.P.C. contains provisions dealing with the procedure and procedure is meant to aid effective adjudication of substantial rights of citizens on merits under personal, property and other laws. The procedure contained under Order XXII, C.P.C. has never been intended to foreclose the adjudication of substantial rights of citizens on merits.

18. The procedure has always been viewed as handmaid of justice and not meant to hamper the cause of Justice or sanctify miscarriage of justice. The pertinent observations made in this regard are as under:

27. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of Justice. A careful reading of the provisions contained in Order XXII of C.P.C. as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination into an effective adjudication and not to retard the further progress of the proceedings and thereby nonsuit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other

in the proceedings. The provisions contained in Order XXII are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice.... Viewed in the light of the fact that each one of the appellants had an independent and distinct right of his own not inter-dependent upon the one or the other of the appellants, the dismissal of the appeals by the , High Court in their entirety does not constitute a sound, reasonable or just and proper exercise of its powers. Even if it has to be viewed that they had a common interest, then the interests of justice would require the remaining other appellants being allowed to pursue the appeals for the benefit of those others, who are not before the Court also and not stultify the proceedings as a whole and nonsuit the others, as well.

19. While dealing with the question as to when proceeding becomes or rendered impossible to be proceeded with after it had partially abated on account of death of one or other party on either side, in paras 31 and 32 of the decision, the Hon'ble Apex Court has held that it depends upon the fact as to whether decree obtained is a joint and severable one or such decree is a combination of many decrees or it is joint and inseverable decree. The pertinent observations made in this regard in paras 31 and 32 of the decision are as under:

31. The question, therefore, as to when a proceeding before the Court becomes or rendered impossible or possible to be proceeded with, after it had partially abated on account of the death of one or the other party on either side has been always considered to depend upon the fact as to whether the decree obtained is a joint decree or a severable one and that in case of a Joint and inseverable decree if the appeal abated against one or the other, the same cannot be proceeded with further for or against the remaining parties as well. If otherwise, the decree is a joint and several or separable one, being in substance and reality a combination of many decrees, there can be no impediment for the proceedings being proceeded with among or against those remaining parties other than the deceased. As observed in Nathu Ram's case (supra) itself, the Code does not itself provide for the abatement of the appeal against the other respondents even where, as against one such it has abated but it is only the Courts which have held that in certain circumstances the appeal also would abate against a corespondent as a result of

abatement against the deceased-respondent. The same would be the position of an appeal vis-a-vis the appellants, as in the other cases. Order XXII, Rule 4 also was' considered not to provide for abatement of the appeal(s) against the co-respondents of the deceased-respondent and it was specifically observed therein that to say that the appeals against them also abated in certain circumstances is not a correct statement. It was held that the appeals against such other respondents cannot be proceeded against and, therefore, had to be dismissed, in certain circumstances.

32. But, in our view also, as to what those circumstances are to be, cannot be exhaustively enumerated and no hard and fast rule for invariable application can be devised. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really serve as handmaid, make it workable and advance the ends of justice, technical objections which tend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law, inevitably necessitates it. Consequently, having regard to the nature of the proceedings under the Act and the purpose of reference proceedings and the appeal therefrom, the Courts should adopt a liberal approach in the matter of condonation of the delay as well as the considerations which should weigh in adjudging nature of the decree, i.e., whether it is joint and inseverable or joint and severable or separable. The fact that the reference court has chosen to pass a decree jointly in the matters before us is and should be no ground by itself to construe the decree to be joint and inseparable. At times, as in the cases on hand, the Court for its convenience might have combined the claims for joint consideration on account of similar nature of the issues in all such cases and for that reason the parties should not be penalized, for no fault of them. *Actus curiae neminem gravabit* (an act of Court shall prejudice no one) is the maxim of law, which comes into play in such situations. Number of people, more for the sake of convenience, may be counselled to join together to ventilate, all their separate but similar nature of claims and this also should not result in the claims of all such others being rejected merely because one or the other of such claims by one or more of the parties abated on account of death and consequent omission to bring on record the legal heirs of the deceased party. At times one or the other

parties on either side in a litigation involving several claims or more than one, pertaining to their individual rights may settle among themselves the dispute to the extent of their share or proportion of rights are concerned and may drop out of contest, bringing even the proceedings to a conclusion so far as they are concerned. If all such move is allowed to boomerang adversely on the rights of the remaining parties even to contest and have their claims adjudicated on merits, it would be a travesty of administration of justice itself.

20. In paras 33 and 34 of the decision, the Hon'ble Apex Court has held that the question as to when a decree would be joint and severable or joint and inseverable or of contradictory nature impossible of execution seems to have been adjudged in different cases, depending upon the nature/source of rights, the cause of action and the manner they were asserted by the parties themselves. Therefore, no hard and fast rule having invariable application in all sort of cases can be devised in this regard. It was further held that in a set of similar or identical nature of case two different type or nature of decrees was necessitated is no ground to treat them to be inconsistent or contradictory decrees so long as both can be executed and enforced without either of them being destructive of the other. Contradictory or inconsistent decrees consequently could be held to have resulted only in a given case when the relief granted in one cannot be enforced without denying the relief in the other or totally nullifying the relief granted in the other and in no other cases. The pertinent observations made by Hon'ble Apex Court are as under:

33. The area of differences in the catena of decisions brought to our notice is not so much with reference to the principles to be applied to different nature of decrees but only as to which of the decree(s) falls, when or under what circumstances under one or the other of the classification, i.e., joint and inseverable or joint and severable or separable. This aspect seems to have been adjudged in different cases depending upon the nature/source of rights, the cause of action, the manner they were asserted by the parties themselves and the contradictory nature of decrees impossible of execution, likely to result when considered differently. It is for this reason any standardised formula was avoided and matter left for the consideration of Courts, on the peculiar nature of the cases

coming for determination. Having regard to the peculiar facts and circumstances noticed by us that the claimants appellants have each their own distinct, separate and independent rights, the principles enumerated in Harihar Prasad's case (supra) and Indian Oxygen Ltd. case (supra) squarely apply with all force. The appeals even de hors the claims of the deceased and others who have not chosen to approach the High Court or this Court, were neither rendered incapable of consideration nor impossible of according any relief or could be held difficult to enforce the decree that may be passed, in favour of the remaining appellants without suffering the vice of inconsistency. Even if it is likely to result in two different sets of judgments of varying content, purport or reason, as long as the enforcement of the decrees passed therein are not rendered impossible due to mutual contradiction in terms of self-destructive nature, there is no justification whatsoever to assume them to be inconsistent or contradictory decrees, at all. The mere fact that in a set of similar or identical nature of cases two different nature or type of decrees was necessitated is no reason to treat them to be inconsistent or contradictory decrees, so long as both can be executed and enforced without either of them being destructive of the other. Contradictory or inconsistent decrees, consequently, could be held to have resulted only in a given case when the relief granted in one cannot be enforced/realized without denying the relief in the other or totally nullifying or setting at naught the relief granted in the other, and in no other class of cases.

34. Even assuming that the decree appealed against or challenged before the higher forum is joint and several but deal with the rights of more than one recognised in law to belong to each one of them on their own and unrelated to the others, and the proceedings abate in respect of one or more of either of the parties, the Courts are not disabled in any manner to proceed with the proceedings so far as the remaining parties and part of the appeal is concerned. As and when it is found necessary to interfere with the judgment and decree challenged before it, the Court can always declare the legal position in general and restrict the ultimate relief to be granted, by confining it to those before the Court only rather than denying the relief to one and all on account of a procedure lapse or action or inaction of one or the other of the parties before it. The only exception to this course of action should be where the relief granted and the decree

ultimately passed would become totally unenforceable and mutually self-destructive and unworkable vis-a-vis the other part, which had become final. As far as possible Courts must always aim to preserve and protect the rights of parties and extend help to enforce them rather than deny relief and thereby render the rights themselves otiose, 'ubi jus ibi remedium' (where there is a right, there is a remedy) being a basic principle of jurisprudence. Such a course would be more conducive and better conform to a fair, reasonable and proper administration of justice.

21. After aforesaid discussion in para 35 of the decision the Hon'ble Apex Court has summarised the legal position as under:

35. In the light of the above discussion, we hold:

(1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the Court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the Courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, as so to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decrees passed in the proceedings vis-a-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other.

22. Now it is necessary to test the facts of the case in hand in the light of law laid down hereinbefore. It is not in dispute that a suit for cancellation of sale deed was filed by the petitioner against the respondent Nos. 2 and 3 herein this petition (defendant Nos. 1 and 2 in suit i.e., respondent Nos. 1 and 2 in appeal) by Impleading respondent No. 3 in appeal as defendant No. 3 in the suit. In the said suit respondent Nos. 4 and 5 (in appeal) have joined the petitioner as co-plaintiff Nos. 2 and 3 respectively. Said suit was filed with the allegation that the property in question was inherited by the petitioner with respondent Nos. 4 and 5 (in appeal) from their father and remained under joint ownership and possession with them and no partition has taken place between the petitioner and respondent Nos. 4 and 5 (in appeal). Respondent No. 3 was son of the petitioner, had executed a sale deed in respect of the half of the property in favour of respondent Nos. 2 and 3 here in this petition [i.e., defendant Nos. 1 and 2 in suit) without any sale consideration allegedly for Rs. 48,000, as such sale deed is liable to be cancelled inasmuch as to be declared null and void and inoperative. However, hearing of suit did not take place, meantime the said suit was dismissed in default. The application for setting aside the order of dismissal under Order IX, Rule 9, C.P.C. moved by the petitioner was rejected by the court below, as such the petitioner has filed misc. appeal under Order XLIII, Rule 1, C.P.C. In misc. appeal when the plaintiff Nos. 2 and 3 did not join with the petitioner as co-appellants, he has impleaded them as respondent Nos. 4 and 5 respectively in the said appeal as proforma respondents. The aforesaid misc. appeal was dismissed in its entirety on

account of partial abatement of appeal against the respondent No. 4 (in appeal) due to the reason that delay caused in moving the substitution application for bringing the heirs and legal representatives of deceased respondent No. 4 (in appeal) on record was not condoned by the court below and her heirs and legal representatives were not substituted in the said misc. appeal.

23. In aforestated backdrop of the case, which is also revealed from the averments of plaint in suit (Annexure-R.A.-1), there can be no scope for doubt to hold that all the plaintiffs in suit have their own distinct and specific share in the joint property in suit. They have their distinct and independent rights of their own and only for the sake of convenience they joined together in single litigation to vindicate their rights, therefore, the decree which has not yet been passed by the trial court, as the suit itself was dismissed in default, if to be passed in favour of one or other parties at this stage cannot be held to be joint and inseverable or contradictory or inconsistent decrees, impossible of execution. In my opinion, as held by the Hon'ble Apex Court in S. Amarjit Singh Karla's case (supra) mere fact that the claims or rights asserted or sought to be vindicated by more than one person are similar or identical in nature or by joining together of more than one of such claimants of particular nature, by itself would not be sufficient in law to treat them as Joint claims so as to render the Judgment and decree passed thereon a joint and inseverable one impossible of execution.

24. Similarity of claims cannot be justification in law to treat them as single and indivisible claim for any or all purposes. As held by Hon'ble Apex Court in para 27 of the decision that even if it has to be viewed that they had a common interest, then the interest of justice would require the remaining other appellants being allowed to pursue the appeals, for the benefit of others who are not before the Court also and not stultify the proceedings as a whole.

25. Apart from it as observed by Hon'ble Apex Court in para 32 of the decision that number of people, more, for the sake of convenience may be counselled to join together to ventilate all their separate but similar nature of claims and this also should not result the claims of all such others being rejected merely because one or other of such claims by one or more of the parties abated on account of death

and consequent omission to bring on record the legal heirs of deceased party. At times one or other parties on either side in a litigation involving several claims or more than one pertaining to their individual rights may settle among themselves the dispute to the extent of their share or proportion of rights are concerned and may drop out to contest, bringing even the proceedings to a conclusion so far as they are concerned.

26. If all such move is allowed to adversely affect the rights of remaining parties even to contest and have their claims adjudicated on merits it would be travesty of administration of justice itself. In my opinion, the aforesaid observations of Hon'ble Apex Court lend support to the view that even if the respondent Nos. 4 and 5 In appeal some how or other had settled their dispute to the extent of their shares or proportion of rights with respondent Nos. 1 and 2 in the said appeal and drop out to contest, the same cannot adversely affect the rights and interest of the petitioner to be adjudicated on merits and proceedings cannot be foreclosed at their instance either on account of their such action or Inaction or on account of omission to bring the heirs and legal representatives of deceased respondent No. 4 in appeal on record, otherwise, in my opinion, as held in para 26 of the decision.

27. would amount to applying the principle of vicarious liability to penalise someone for no fault of his and denial of ones own right for mere default or refusal of others to join or contest likewise before the Court; It is also because of another reason as held in para 34 of the said decision that as and when it is found necessary to interfere with the judgment and decree challenged before the Court, the Court can always declare the legal position in general and restrict the ultimate relief to be granted by confining it to those before Court only, rather than denying the relief to one and all on account of procedural lapse or action or inaction of one or either of the parties before it. The only exception to this course of action should be where the relief granted and decree ultimately passed would become totally unenforceable mutually self destructive and unworkable vis-a-vis the other part of which had become final.

27. Further question as to whether in a given case, the decree is joint and Inseverable or Joint and separable or severable has to be decided for the purpose

of abatement or dismissal of the entire appeal as not being properly or duly constituted for being further proceeded with, requires to be determined only with reference to the fact as to whether judgment/decree passed in proceeding vis-a-vis remaining parties would suffer from the vice of contradictory or inconsistent decrees. But before examining this aspect of the matter at this Juncture I would make it clear that the appeal preferred by the petitioner was not against any decree passed by the trial court, it was merely misc. appeal under Order XLIII. Rule 1, C.P.C. against the judgment and order passed on the application of the petitioner, whereby the trial court has refused to set aside the order of dismissal of suit in default.

28. Such order cannot be regarded as 'decree' as defined under Section 2(2) of the C.P.C. Such an order is merely judgment and order as defined under Section 2(9) and 2(14) of the C.P.C. which read as under:

2. (2) 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication-completely disposes of the suit. It may be partly preliminary and partly final:

2. (9) 'Judgement' means the statement given by the Judge on the grounds of a decree or order;

2. (14) 'Order' means the formal expression of any decision of a civil court which is not a decree.

29. In view of aforesaid legal position, in given case, since the suit in question was dismissed in default and application of the petitioner for restoring the suit was also dismissed on the merit of the application only, therefore, there can be no formal expression of an adjudication by the Court, which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, as such aforesaid orders passed by the trial court cannot be termed as decree. Moreover, an order dismissing the suit in default is expressly excluded from the purview of the decree under Clause (b) of Section 2(2), C.P.C. And an order refusing to set aside the order of dismissal in default is appealable under Order XLIII. Rule 1 (c) of the Code, as an appeal from an order, which is also excluded from the purview of decree under Section 2(2)(a) of C.P.C.

30. Therefore, in my opinion, the order passed by the trial court under challenge in the aforesaid misc. appeal is merely a judgment and order as defined under the Code and the same cannot be regarded as decree, thus, in given facts and circumstances of the case at this stage, it cannot be said that on account of partial abatement of misc. appeal against the respondent No. 4 (in appeal), there would be possibility of resulting contradictory or inconsistent decrees impossible of execution. In my view, such question does not necessarily arise in case in hand, nevertheless I would proceed to decide as to whether the court below could be justified in dismissing the entire appeal on account of its partial abatement against the respondent No. 4? In other words, question arises for consideration is that as to whether in absence of impleadment of Smt. Shrimani Devi (deceased) respondent No. 4 (in appeal) or omission to bring the heirs or legal representatives of respondent No. 4 (in appeal) on record, the appeal in question before the court below can be held to be properly and duly constituted so as to be proceeded with or not?

31. In this connection it is to be noted that the suit in question was filed by all the plaintiffs jointly on the same grounds which was dismissed in default vide order dated 27.4.1984. The application for setting aside the said order was rejected vide judgment and order dated 27.7.1990, which was under challenge In misc. appeal, therefore, the judgment and order under challenge in the misc. appeal was proceeded on the ground common to all the plaintiffs. In such facts and

circumstances of the case, the issue can be examined in the light of the provisions of Order XLI, Rule 4 and Rule 33 of C.P.C. to find out as to whether the said misc. appeal having been properly and duly constituted so as to be proceeded with without impleading the respondent No. 4 in the said appeal and as to whether the appellate court has power to decide such appeal and to pass appropriate order thereon even on omission to substitute the heirs of respondent No. 4 in the said appeal

32. For ready reference the provisions of Order XLI, Rule 4 are extracted as under:

4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all- Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

33. The question in issue has received consideration of Hon'ble Apex Court and various High Courts on several occasions. In Mahabir Prasad v. Jage Ram and Ors. : [1971]3SCR301 , while placing reliance upon Ratan Lal Shah v. Firm Lalmandas Chhadammalal : [1970]1SCR296 of the decision Hon'ble Apex Court has observed as under:

In a later judgment of this Court in Ratan Lal Shah v. Firm Lalmandas Chhadammalal : [1970]1SCR296 , the plaintiffs obtained a Joint decree against two persons Ratan Lal and Mohan Singh. Against the decree Ratan Lal alone appealed to the High Court of Allahabad. Mohan Singh was impleaded as a party-respondent to the appeal. Notice of appeal sent to Mohan Singh was returned unserved, and no steps were taken to serve him with notice of the appeal.

34. The High Court dismissed the appeal holding that there was a joint decree against Ratan Lal and Mohan Singh in a suit founded on a joint cause of action and the decree against Mohan Singh had become final. The appellant could not,

on that account claim to be heard in his appeal, if he was heard and his claim was upheld. The High Court observed that there would be two conflicting decisions between the same parties and in the same suit based on the same cause of action. This Court set aside the Judgment of the High Court observing that even though Mohan Singh was not served with notice of appeal, the appeal filed by Ratan Lal was maintainable, in view of the provisions of Order XLI, Rule 4, Code of Civil Procedure. In Ratan Lal Shafts case : [1970]1SCR296 , this Court allowed the appeal to be prosecuted, even though one of the joint decree-holders impleaded as a party-respondent had not been Served with the notice of appeal.

35. In the present case one of the respondents had died and his heirs have not been brought on the record. No distinction in principle may be made between Ratan Lal Shah's case : [1970]1SCR296 , and the present case. Competence of the appellate court to pass a decree appropriate to the nature of the dispute in an appeal filed by one of several persons against whom a decree is made on a ground which is common to him and others is not lost merely because of the person who was jointly interested in the claim has been made a party-respondent and on his death his heirs have not been brought on the record. Power of the appellate court under Order XLI, Rule 4 to vary or modify the decree of a subordinate court arises when one of the persons out of many against whom a decree or an order had been made on a ground which was common to him and others has appealed. That power may be exercised when other persons who were parties to the proceeding before the subordinate court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to the appeal or are impleaded as respondents. The view taken by the High Court cannot therefore be sustained.

36. Similar view has been taken Dy Hon'ble Apex Court in Lal Chand and Ors. v. Radha Kishan and Ors. : [1977]2SCR522 , wherein a joint eviction decree against several defendants was passed. The question in consideration was that on account of death of one defendant as to whether the appeal filed by remaining defendants against whole decree is maintainable or not. While answering the said question the Hon'ble Apex Court in para 8 of the decision observed as under:

8. Not only was it erroneous to treat the appeal as having abated on the death of Lal Chand but the first appellate court as well as the High Court ought to have applied the provisions of Order XLI, Rule 4, Code of Civil Procedure, under which where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be. In the earlier suit for eviction filed by the respondent under the Delhi and AJmer Rent Control Act, Lal Chand and his alleged subtenants were all impleaded to the suit as defendants. The decree for eviction was eventually passed in that suit in favour of the respondent and against the defendants jointly. All of these defendants contested the proceeding before the competent authority under the Slum Clearance Act and they succeeded in obtaining an order therein that it was not open to the respondent to execute the decree in respect of the premises on the ground floor. In order to overcome the effect of that order respondent brought the present suit and in the very nature of things he had to implead Kesho Ram and Jhangi Ram to that suit as party-defendants alongwith Lal Chand. On the death of Lal Chand during the pendency of the first appeal the other appellants, who were as much interested in the success of the appeal as Lal Chand, were before the Court and the appeal could not have been dismissed for the mere reason that Lal Chand had no longer any interest or estate in the property. The eviction decree being joint and indivisible, the dismissal of the appeal in so far as Lal Chand was concerned could not conceivably result in inconsistent decrees being passed in the event of the appeal of Kesho Ram and Jhangi Ram being allowed. Therefore, the first appellate court ought to have heard the appeal *mertis* and decided the question whether the provisions of the Slum Clearance Act operated as a bar to the maintainability of the suit brought by the respondent.

37. While dealing with the contents and scope of Order XLI, Rule 4 and Rule 33 of the C.P.C., a Full Bench of Patna High Court in *Mt. Parwati Kuer and Ors. v. Manna Lal Khetan and Ors.* : AIR1956 Pat414 of the decision observed as under:

7. It was, however, objected on behalf of the plaintiff respondents that Order XLI, Rule 4 and Order XLI, Rule 33 cannot be applied unless defendant 13 Jai Narain Prasad was on the record either as appellant or as respondent. It was contended that the appellate court is not competent to reverse or vary the decree in favour of a person who is not impleaded as a party respondent or as a party appellant.

The argument was addressed that appellant 3 Jai Narain Prasad should have been added as a party respondent to the appeal and the appellate court would thereafter be competent to reverse or vary the decree in his favour. The question at issue turns upon the right interpretation of the language used in Order XLI. Rule 4 and Order XLI. Rule 33. Order XLI. Rule 4 provides that:

Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs, or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

From this provision of law it is clear that any one of the defendants can appeal from the whole decree if the decree appealed from proceeds on any ground common to all the defendants and thereupon the appellate court can vary the decree in favour of all the defendants. The rule, however, is not clear on the question whether the other defendants and plaintiffs who have not appealed should be made party respondents to the appeal, but Order XLI, Rule 33 states:

The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or 'parties', although such respondents or parties' may not have filed any appeal or objection.

If Order XLI, Rule 4 is read alongwith Order XLI, Rule 33, it is clear that if one of the defendants prefers an appeal and the appeal proceeds on a ground common to all the defendants, the appellate court is competent to pass such decree as the

case may require and this power may be exercised in favour of all or any of the respondents 'or parties', though such respondents or 'parties' may not have filed any appeal.

It is clear from the language of Order XLI, Rule 33 that the exercise of this power by the appellate court is not confined only to the case of respondents who are parties to the appeal, but the power can be exercised in favour of persons who are parties to the suit. If Order XLI, Rule 4 and Order XLI, Rule 33 are read together, there can be no doubt that one of the defendants can file an appeal without impleading the other defendants as respondents, and if the appeal proceeds on a ground common to all the defendants, the appellate court may exercise the power of varying the decree in favour of the non-appealing defendants, though they have not been made parties to the appeal.

The effect of these two rules, therefore, is that the appellate court is authorised to pass a decree in favour of a party who has not been heard, but the appellate court is not authorised to pass a decree against a person who is not a party to the appeal. It is clear that wide powers conferred on the appellate court by Order XLI, Rules 4 and 33 cannot be exercised to the prejudice of a person who has not been given a hearing.

38. The aforesaid view also stands fortified by a decision of Hon'ble Apex Court rendered in *Karam Singh Sobti and Anr. v. Sri Pratap Chand and Anr.* : [1964]4SCR647, wherein a suit for ejectment by landlord was decreed against the lessee and his sub-lessee. It was held that the sublessee alone can maintain the appeal against the decree and the decree can be reversed, though such reversal may operate in favour of the lessee, who has not appealed. The pertinent observations made by Hon'ble Apex Court in para 23 of the aforesaid decision are extracted as under:

23. The next question is as to the rights of the appellant in the absence of an appeal by the Association from the decision of the trial court. This question does not present any real difficulty. The suit had been filed both against the tenant and the sub-tenant, being respectively the Association and the appellant. One decree had been passed by the trial Judge against both. The appellant had his own right

to appeal from that decree. That right could not be affected by the Association's decision not to file an appeal. There was one decree and, therefore, the appellant was entitled to have it set aside even though thereby the Association would also be freed from the decree. He could say that that decree was wrong and should be set aside as it was passed on the erroneous finding that the respondent had not acquiesced in the sub-letting by the Association to him. He could challenge that decree on any ground available. The lower appellate court was, therefore, quite competent in the appeal by the appellant from the joint decree in ejectment against him and the Association, to give him whatever relief he was found entitled to, even though the Association had filed no appeal.

39. In view of law down by Hon'ble Apex Court and Full Bench of Patna High Court on joint interpretation of the provisions of Order XLI, Rule 4 and Rule 33, C.P.C., there can be no scope for doubt to hold that Order XLI, Rule 4, C.P.C. provides that where there are more plaintiffs or defendants than one in a suit, and decree appealed from proceeds on any ground common to all plaintiffs, or to all defendants, any one of the plaintiffs or defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of plaintiffs or defendants, as case may be. Thus, if such appeal is filed by one of the plaintiffs or defendants without impleading other plaintiffs or defendants, it cannot be said that the appeal is incompetent or is not being properly and duly constituted so as to be proceeded with and the appellate court is quite competent to vary or reverse the decree in favour of all the plaintiffs or defendants as case may be. Under the provisions of Order XLI, Rule 33, C.P.C. the appellate court have power to pass any decree and make any order as the case may require and the exercise of power by appellate court under this Rule is not confined to the case of respondents who are parties to the appeal or to the case of appellant who has filed appeal but this power can be exercised in favour of persons who are not even parties to the appeal or not even filed the appeal though they were parties to the suit

40. However, such power cannot be exercised by the appellate court against a person who is not party to the appeal.

On application of aforestated legal position in the case in hand, I find that since the judgment and order under challenge in the said misc. appeal filed by the petitioner proceeded on the grounds common to all the plaintiffs, therefore, there can be no scope for doubt to hold that the petitioner alone could file said misc. appeal against the whole Judgment and order without even impleading other co-plaintiffs who were impleaded as proforma respondent Nos. 4 and 5 in the said appeal and appellate court could vary or reverse the judgment and order under challenge in favour of co-plaintiffs No. 2 and 3 also alongwith the petitioner without impleading them even as proforma respondent Nos. 4 and 5 in the said appeal and such appeal could not be held to be defective or incompetent as having been not properly and duly constituted so as to be proceeded with. In view of the provisions of Order XLI, Rule 33, C.P.C., the appellate court was quite competent to pass such an order in favour of respondent No. 4 also without confining it to the case of the petitioner, who has filed the aforesaid appeal because of the reason that the respondent No. 4 was party in the suit.

41. The only restriction upon the appellate court in exercise of power under the said rule was that the appellate court could not pass any order against the respondent No. 4. Therefore, in my opinion said appeal filed by the petitioner has to be held maintainable even without impleading the respondent No. 4 in the said appeal in view of Order XLI, Rule 4, C.P.C. and cannot be held to be incompetent as not being properly or duly constituted so as to be proceeded with. Accordingly omission to bring heirs and legal representatives of the respondent No. 4 (in appeal) on record, within prescribed time, in the said appeal cannot be held to be fatal for further prosecution of the said appeal.

42. There is yet another aspect of the matter that where a party is proforma or unnecessary party no question for substituting his/her heirs and legal representatives arises. This view also finds support from a joint reading of the provisions of Order XXII, Rule 4 (4) and Rule 11. C.P.C. quoted herein before. Order XXII, Rule 4 (4). C.P.C. provides that the Court whenever it thinks fit, may exempt the plaintiff from necessity of substituting the legal representatives of any such defendant who has failed to file written statement or who having filed it. has failed to appear and contest the suit at the hearing and Judgment may in such

case be pronounced against the said defendant, notwithstanding the death of such defendant and shall have the same force and effect as if has been pronounced before death took place. By virtue of Order XXII, Rule 11, the legal status of proforma respondent in appeal cannot be better than such defendant who either has failed to file written statement or has failed to appear and contest the suit at hearing, in such eventuality if the Court is under legal obligation to exempt the plaintiff from necessity of substituting the heirs and legal representatives of such deceased defendants, for the same analogy, there can be no reason to deny such exemption to appellant from necessity of substituting the heirs and legal representatives of deceased proforma-respondent No. 4.

43. In this view of the matter, in my opinion, there appears no Justification for the lower appellate court to deny exemption to the petitioner from necessity of substituting the legal representatives or heirs of deceased respondent No. 4 in the said appeal.

In somewhat similar circumstances in Smt. Rani and Anr. v. Smt. Santa Bala Debnath and Ors. : [1971]2SCR603 , Hon'ble Apex Court has held that omission to substitute heirs or legal representatives of one defendant against whom no relief was claimed in a suit filed against several defendants cannot be fatal for continuation of proceedings.

44. The pertinent observations made in para 15 of the decision are extracted as under:

15. It was urged before us that because the 10th defendant died before the certificate was given by the High Court for appeal to this Court, and. the heirs of the 10th defendant were not brought on the record, the appeal abates in its entirety. There is, however, no clear evidence whether the 10th defendant died before or after the judgment of the High Court. Again, the plaintiffs had in the suit only claimed a relief for declaration that the alienation in favour of defendants 1 and 2, i.e., Chapalabala and Banikana made on March 13, 1942, was without legal necessity and was not binding upon them, and for a declaration of their title to the disputed land. The alienees from defendants 1 and 2 were, it is true, impleaded as parties, but no relief was claimed against them. Nor was any averment made in

the plaint about the reasons for and the circumstances in which they were so impleaded. Since the plaintiffs only claimed relief against defendants 1 and 2, and that relief cannot be granted to the plaintiffs, we think, the circumstances that the heirs of the 10th defendant are not impleaded in this appeal does not affect the right of the defendants to claim that the appeal must be dismissed.

45. Now before proceeding further it is necessary to deal with the decisions cited by the learned Counsel for the respondents in support of their case. The first case upon which reliance was placed is Ramagya Prasad Gupta and Ors. v. Murli Prasad and Ors. : [1973]1SCR63 , wherein while dealing with the issue of abatement of appeal on account of omission to substitute the heirs and legal representatives of a party died during the pendency of appeal, three Judges Bench of Hon'ble Apex Court has laid down three propositions on the question in issue but expressed different opinion in respect of application of proposition of law in case before the Hon'ble Apex Court.

46. The majority judgment was given by Hon'ble Justice D.G. Palekar, (as he then was) whereas Hon'ble Justice K.K. Mathew (as he then was) has expressed his dissenting opinion in his separate decision. In para 16 of the majority opinion three propositions were laid down to determine under what circumstances the appeal may not be proceeded with on account of omission to bring the legal representatives and heirs of deceased party on record and is liable to be dismissed, as under:

16. Under Rule 4(3) r/w Rule 11 of Order XXII, C.P.C. the appeal abates as against the deceased respondent where within the time limited by law no application is made to bring his heirs or legal representatives on record. As pointed out by this Court in the State of Punjab v. Nathu Ram (1962} 2 SCR 636: AIR 1963 SC 89, it is not correct to say that the appeal abates against the other respondents. Under certain circumstances the appeal may not be proceeded with and is liable to be dismissed. But that is so not because of the procedural defect but because, as Mulla has pointed out, it is part of the substantive law. (See Mulla C.P.C. Vol. 1 Thirteenth Edition p. 620 under note Non-joinder of Parties). No exhaustive statement can be made as to the circumstances under which an

appeal in. such cases cannot proceed.

47. But the Courts, as pointed out in the above decision, have applied one or the other of three tests. The Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would 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 appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed.

48. These three testes, as pointed out by this Court in *Sri Chand v. Jagdish Pershad Kishan Chand* : [1966]3SCR451 , are not cumulative tests. Even if one of them is satisfied, the Court may dismiss the appeal.

Next case upon which reliance has been placed by the respondents is *Municipal Council, Mandsaur v. Fakirchand and another* : AIR 1997 SC1251 , wherein three plaintiffs being brothers claiming to be owners of the joint Hindu family property filed a suit against the Municipality Council for permanent injunction by asserting their title to property. The suit was decreed by the trial court, thereafter Municipality preferred appeal before the lower appellate court. During the pendency of said appeal one of the three brothers had died.

49. The Municipality did not bring the Heirs and legal representatives of the deceased brother on record, despite knowledge of such death but made an application that the name of deceased brother should be deleted from the array of parties. The question thereafter was raised by the remaining plaintiffs that the appeal had abated as a whole because heirs and legal representatives of one of the co-owners had not been brought on record. The aforesaid contention was upheld by the High Court. While dismissing the appeal in para 6 of the decision, the Hon'ble Apex Court has held as under:

6. We are, however, unable to accept such contention of Mr. Gambhir for the reason that from the statement made in the plaint it cannot be definitely held that the property was coparcenary property which could be represented by a karta. It has been alleged in the plaint that after the death of the father, all the three brothers became owners of the said joint Hindu family property. It may be indicated here that if it was a coparcenary property then the son would have been coparceners even before the death of the father and there was no necessity to wait till the death of the father to get ownership of the property. The averments in the plaint really means that the disputed property was the undivided property of the said three joint owners who had Inherited the father's interest after his death. That apart, even it is assumed that it was coparcenary property there is nothing on record to indicate that any one member of the eldest male member of the family was acting as a karta of the joint family. On the contrary, it appears that all the co-owners filed the said suit for injunction, which on the face of it, only indicates that all of them intend to exercise their right as co-owners of the property and they have not authorised any one of them to represent the property as a karta of the joint Hindu family property. In the aforesaid circumstances, the decision of the High Court cannot be said to be erroneous for which any interference by this Court is called for. The appeal, therefore, fails and is dismissed without any order as to costs.

50. Another decision upon which . learned Counsel for the respondents has placed reliance is *Badni v. Siri Chand* : AIR 1999 SC1077 , wherein dismissal of appeal by the High Court as abated in its entirety was upheld by the Hon'ble Apex Court holding that otherwise there would be contradictory and conflicting decrees between the parties.

51. In this connection, it is to be pointed out that the aforesaid decisions cited by learned Counsel for the respondents are distinguishable on facts and were of the earlier in point of time and of smaller Benches of Hon'ble Apex Court than the decision relied upon by the learned Counsel for the petitioner rendered in *S. Amarjit Singh Karla's case* (supra), which is later and of Constitution Bench of Hon'ble Apex Court. Besides this, in my opinion, none of the three tests under which appeal may not be proceeded with and is liable to be dismissed on account

of omission to bring the legal representatives or heirs of deceased party on record pointed out in Nathu Ram's case and Ramagya Gupta's case, is attracted in case in hand. Moreover, the aforesaid decisions cited by learned Counsel for the respondents cannot be construed at variance to the aforesaid Constitution Bench decision of Hon'ble Apex Court, accordingly can be of no assistance to the case of the respondents. Even the later decisions of Smaller Bench of Hon'ble Apex Court cannot be construed at variance to the earlier larger Bench decisions as held by the Hon'ble Apex Court in Union of India and Ors. v. K.S. Subramaniam : (1977)ILLJ5SC and N. Meera Rani v. Government of Tamil Nadu and Anr. : [1989]3SCR901 .

52. In view of the aforesaid discussion, there can be no scope for doubt to hold that misc. appeal referred hereinabove filed by the petitioner alone before the court below could not be dismissed in its entirety on account of abatement against the respondent No. 4 (in appeal) due to omission to substitute her heirs and legal representatives in the said appeal, as held hereinbefore. In my opinion, the aforesaid misc. appeal filed by the petitioner ought to have been heard by the lower appellate court below on merits, without dismissing the same on account of omission to bring the heirs and legal representatives of deceased respondent No. 4 on record.

53. The view taken by court below contrary to it, in my considered opinion, is contrary to law stated hereinbefore, therefore, cannot be sustained.

In view of my conclusion referred hereinbefore although it is not necessary to decide the issue as to whether in given facts and circumstances of the case the delay caused in moving the substitution application to bring the heirs and legal representatives of deceased-respondent No. 4 (in appeal) on record was liable to be condoned or not and the substitution application filed by the petitioner was liable to be allowed by setting aside abatement of said misc. appeal or not but still I would like to deal with this¹ issue also hereinafter.

54. It is not in dispute that against me Judgment and order dated 27.7.1990, passed by trial court rejecting the application moved by the petitioner for restoration of suit in question, dismissed in default, the petitioner preferred Misc.

Appeal No. 1063 of 1990 as an appeal from order before this Court. The same was pending before this Court from 1990 to 1996. It is also not in dispute that the proforma respondent No. 4 Smt. Shrimani Devi had died on 30.12.1994 during the pendency of appeal before this Court leaving behind her husband Sri Chandra Prakash, two sons SUresh Chandra and Rajesh Chandra, five daughters Smt. Prabha Swaroop, Smt. Vibha Agrawal, Smt. Uma Gupta, Smt. Rama Bhattacharya and Smt. Kimi Sharma. The petitioner was under the impression that his Counsel in the High Court might have taken steps for substitution of heirs and legal representatives of Smt. Shrimani Devi and the same are brought on record before this Court but he came to know that the legal representatives and heirs of deceased Smt. Shrimani Devi respondent No. 4 have not been brought on record only when the respondent Nos. 2 and 3 here in this petition (defendant Nos. 1 and 2) have moved an application dated 22.11.2000 before the lower appellate court.

55. Then immediately thereafter he moved application for substitution of heirs and legal representatives of deceased Smt. Shrimani Devi respondent No. 4 on record on 29.11.2000 and subsequently on 1.12.2000 the petitioner has also filed an application under Section 5 of the Limitation Act supported by an affidavit for condoning the delay in moving said substitution application. In the affidavit filed in support of delay condonation application in moving the aforesaid substitution application the petitioner has explained the situations under which he was prevented to move substitution application within the prescribed period of limitation and prayed for setting aside of abatement of said misc. appeal against respondent No. 4 of said appeal and for substituting her heirs in her place by condoning the delay caused in moving said substitution application.

56. In given facts and circumstances of the case and in view of law laid down by Hon'ble Apex Court in S. Amarjit Singh Karla's case (supra), I am of the considered opinion that the court below ought to have liberal approach in the matter and ought to have condoned the delay in moving belated substitution application for bringing the heirs and legal representatives of deceased respondent No. 4 on record. In my view, cause shown by the petitioner was sufficient and he could not be punished for negligence of his Counsel in the High Court.

57. There is nothing on record to show that he did not take step for filing substitution application knowingly and negligently. The court below has taken too technical view in the matter and wrongly rejected the delay condonation application moved by the petitioner. The view taken is contrary to the settled legal position on question in issue, therefore, the order passed by court below in this regard, cannot be sustained and the impugned order is liable to be quashed on this ground alone.

58. Thus, in view of the foregoing discussions, the impugned order dated 15.1.2001, passed by Vth Additional District Judge, Varanasi in F.A.F.O. No. 1063 of 1990 is hereby quashed. The delay caused in moving the substitution application is condoned and abatement of misc. appeal against the respondent No. 4 is hereby set aside. The matter is remitted back to the lower appellate court with direction to decide the aforesaid misc. appeal on merit after hearing the parties and after substituting the legal representatives and heirs of deceased respondent No. 4 as there is no dispute of heirs and legal representatives of deceased respondent No. 4 as pointed out hereinbefore. Such appeal shall be decided within a period of two months from the date of production of certified copy of the order passed by this Court before the concerned court below.

59. hope and trust that the concerned court shall decide the appeal within the aforesaid period in view of law laid down hereinbefore without granting any undue adjournment to either of the parties.

60. In given facts and circumstances of the case, I am also of the considered opinion that respondent Nos. 2 and 3 here in this petition (defendant Nos. 1 and 2) should be restrained from alienating or creating third party interest in the suit property during the pendency of original suit. Therefore, they are restrained accordingly.

61. With the aforesaid observations and directions, writ petition succeeds and is allowed to the extent Indicated hereinabove.

There shall be no order as to cost.

