

**Devilal Vs. Himat Ram and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/751342](http://sooperkanoon.com/751342)

**Court :** Rajasthan

**Decided On :** Oct-03-1971

**Reported in :** AIR1973Raj39

**Judge :** C.M. Lodha, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rules 2 and 4; [Partnership Act, 1932](#) - Sections 47; [Contract Act, 1872](#) - Sections 44

**Appeal No. :** Second Appeal No. 277 of 1963

**Appellant :** Devilal

**Respondent :** Himat Ram and ors.

**Advocate for Def. :** P.C. Bhandari and; M.L. Panwar, Advs.

**Advocate for Pet/Ap. :** M.C. Bhandari, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**C.M. Lodha, J.**

1. This Order may be treated as one in continuation of my order dated 21-9-71 whereby I held that the appeal has abated aua the interest of the respondent Himmatram deceased, who died during the pendency of this appeal. The case

was then adjourned to enable the parties to argue the question whether the appeal has abated as a whole

2. It may be observed that it is the admitted case of the parties that all the defendant-respondents had jointly taken a contract for construction of a Town Hall of Udaipur as partners even though the contract was sanctioned by the City Corporation of Udaipur in the names of defendants Himmatram and Narottam Swaroop only. It is further borne out from the allegations contained in the plaint and admitted by the defendants that while entering into a subcontract with the plaintiff-appellant Devilal, the defendant Kanaiyalal acted as an agent for the rest of the partners. It further appears from para No. 12 of the plaint that the partnership was for a single venture only, namely construction of the Town Hall of Udaipur. In the relief clause the plaintiff claimed that a decree for Rs. 6,500/- be granted against the defendants jointly and severally. The trial Court decreed the plaintiff's suit against all the defendants jointly and severally for a sum of Rs. 5375.99 paise. In appeal the learned District Judge, Udaipur reduced the decretal amount to Rs. 1673.09 paise and awarded interest pendente lite at 6% per annum on the said amount. The plaintiff Devilal, therefore, filed this second appeal.

3. The surviving respondents were undoubtedly the partners of the deceased respondent Himmat Ram. The contention of the learned counsel for the appellant is that the right to sue or for the matter of that, to prosecute the appeal survives against the surviving defendants alone and consequently the appeal is not liable to be dismissed on account of not bringing on record the legal representatives of the deceased Himmat Ram. In support of his contention he has relied upon the provisions of Order 30, Rule 4, Civil P. C.. and a Bench decision of this Court Gajjanand v. Sardarmal, 1962 Raj LW 65 = (AIR 1961 Raj 223).

Order 30, Rule 4. Civil P. C. provides as follows:--

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

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

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

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

4. The defendants So the present case have not been sued in the name of the firm. In fact there is nothing on the record to show that they carried on the partnership business in any firm name. There is a conflict of opinion as to whether this rule applies where the suit is not brought in the name of the firm, but by one or more partners in respect of the partnership firm. So far as this Court is concerned it has been held in the Bench decision referred to above 1962 Raj LW 65 = (AIR 1961 Raj 223) that Order 30 is meant for application to suits by or against the firm and that Rule 4 is applicable only when the suit is brought in the name of the firm. As stated above there is nothing on record in the present case whether the firm had any name at all. Accordingly the plaintiff-appellant cannot succeed on the ground that under Order 30, Rule 4. Civil P. C. the legal representatives of Himmatram need not have been brought on the record.

5. There is, however, another aspect of the question and it is whether under Order 22, Rule 2, Civil P. C. the plaintiff's right to sue or, to be more precise, to prosecute this appeal survives against the surviving defendants? The surviving defendants were incontrovertibly partners of the deceased respondent. It is not clear from the record as to what were the terms of the partnership. However, as already stated above, it is borne out from the allegations contained in the plaint that the partnership was for a single venture, namely, construction of a Town Hall, Udaipur, which had been indisputably completed. One of the partners, namely, Himmat Ram has died during the pendency of this appeal. In these circumstances it may be reasonable to presume that the partnership among the defendants and the deceased respondent Himmatram stands dissolved. The question then arises whether after the dissolution of the partnership the surviving defendants effectively represent the interest of the deceased partner Himmatram? In this connection attention may be invited to Section 47 of the Indian Partnership Act of 1932 which lays down that after the dissolution of a firm the authority of each partner to bind

the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

6. In Gajanand's case, 1962 Raj LW 65 = (AIR 1961 Raj 223) it was held that after the dissolution of the firm by the death of a partner the remaining partners can give a valid discharge for the purpose of winding UP the business and the legal representatives of the deceased partner cannot dispute it, unless they have acted mala fide. Bhandari, J., speaking for the Court, further observed that 'this much can be deduced from Section 47 that after the dissolution of a firm, the remaining partners may represent the dissolved firm including the interest of the deceased partner to recover any debt due to the firm. This being the position, they may be taken to represent the deceased partner in a suit for the recovery of any amount due to the firm'. It may be pointed out that in that case all the three partners Sardarmal Mangilal and Raimal filed a suit for recovery of a certain sum of money due to them while they were carrying on business in partnership in the name of Hajarilal Ganeshilal. Mangilal died during the pendency of the case and it was held that the surviving two plaintiffs Sardarmal and Rajmal could continue the suit and there was no necessity of the legal representatives of Mangilal to be brought on the record. Thus it was held that the legal representatives of a deceased partner were not necessary parties for the recovery of debt which accrued due to the partnership in the lifetime of the deceased partner. In the present case the suit has been filed against the partners for the amount due from the partnership. Here the partners individually have been sued for recovery of a debt due from the partnership. This distinction is no doubt there, in the present case, but I fail to see why the principle of representation laid down in Gaja Nand's case should not be applied to the present case also? The moment, the theory of representation by the surviving partners of the interest of the deceased partner for the purpose of winding up the affairs of the firm, even after dissolution, is recognised. the principle laid down in Gajanand's case would, in my opinion, have full application even when the erstwhile partners are being sued. The case may not be literally covered by Section 47 of the Indian Partnership Act, but regard being had to the principle contained therein, there should be no difficulty in holding that the surviving

partners even after dissolution represent the interest of the whole partnership including that of the deceased partners so far as it may be necessary to wind up the affairs of the partnership and to complete the transactions unfinished at the time of dissolution. Looked at from this angle. I am inclined to hold that the interest of the deceased Himmat Ram is sufficiently represented by the surviving partners who are on the record as respondents.

7. There is yet another aspect of the question which deserves to be noticed. Taking the present case to be one of joint promisors simpliciter, the plaintiff has claimed a money decree against all the defendants jointly and severally for the amount which may be found due to the plaintiff from the partnership. It has been held in *Chhotelal Ratanlal v. Rajmal Milapchand*, AIR 1951 Nag 448 that each of several joint promisors is liable to the promisee, and the abatement of appeal against one of them does not result in abatement of the appeal as a whole. The same view was taken in *Jwala Prasad v. Kopaya Munda*, AIR 1920 Pat 801 and *Maung Mu v. Maung Kan Gvi*. AIR 1924 Rang 127. It may be pointed out that under Section 44 of the Indian Contract Act where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; nor does it free the joint promisor so released from the responsibility to the other joint promisor or joint promisors. In view of this provision the release of one of joint promisors does not discharge the other joint promisors. Consequently, in the present case there is no impediment in the way of the appellant proceeding against the remaining respondents even though Himmatram has died and his legal representatives have not been brought on the record.

8. Consequently, I hold that the present appeal does not abate as a whole as a result of the abatement of the appeal against Himmatram.