

Padmaram and ors. Vs. Surja and ors.

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Court : Rajasthan

Decided On : Dec-17-1959

Reported in : AIR1961Raj72

Judge : I.N. Modi, J.

Acts : Rajasthan Revenue Courts (Procedure and Jurisdiction) Act, 1951 - Sections 36; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rules 3, 4, 9 and 11 - Order 41, Rules 4 and 33

Appeal No. : First Appeal No. 51 of 1957

Appellant : Padmaram and ors.

Respondent : Surja and ors.

Advocate for Def. : Chandmal, Adv.

Advocate for Pet/Ap. : M.M. Vyas, Adv.

Disposition : Appeal dismissed

Judgement :

I.N. Modi, J.

1. This is a regular first appeal by the defendants Padmaram and six others in a suit for partition and has come up for arguments before me on a question relating

to the abatement of the appeal in circumstances presently to be mentioned.

2. The parties are Jats and are descendants of a common ancestor. Nanak and Shriram were two brothers. Nanak brought the suit out of which this appeal arises for possession by partition of certain land situated in village Chhapawali, Tehsil Hanumangarh, in which he claimed a half share. Nanak having died is now represented by his five sons Surja and others in this appeal. The defendants in the suit were Padmaram and five others, sons of Shriram, and Gopi, a grandson of Shriram.

The suit was filed in a revenue court, namely, that of the Deputy Commissioner, Hanumangarh, and was later transferred to the court of the Collector, Ganganagar, who having been of the opinion that a question of proprietary title was raised in the case referred it to the District Judge, Ganganagar. The correct procedure for the Collector should have been to refer the specific issue or issues relating to proprietary title to the District Judge instead of referring the whole case to him.

Be that as it may, the learned District Judge decided the issues which fell within the scope of Section 36 of the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act (No. I) of 1951, and sent the case back to the Collector. Thereupon the latter held that the plaintiffs were entitled to get possession of half share by partition of the land measuring 1981 Bighas and gave certain directions for the actual partition of the land by metes and bounds with which we are not concerned for the purposes of the present appeal.

3. Aggrieved by this decree, the defendants appellants Padmaram and others filed the present appeal in this Court on the 17th October, 1957. Padmaram, however, died on the 1st November, 1958, during the pendency of the appeal in this Court. An application to bring the legal representatives of the deceased Padmaram was made here on the 4th July, 1959, long after the period of limitation of 90 days prescribed by Article 176 of the Limitation Act. This application is opposed by the respondents.

4. It may be mentioned here, before proceeding further that proceedings were in the meantime going on in the trial court for the passing of a final decree and in those proceedings the respondents Surja and others had made an application to the trial court on the 14th November, 1958 for substituting the legal representatives of Padmaram in his place, and this application was allowed on the 4th March, 1959, with the result that the widow and the only son of Padmaram, namely, Maniram, were brought on the record of the trial court.

The sole ground on which reliance was placed by the appellants for making their application for substitution of the legal representatives of the deceased Padmaram in his place so late as the 4th July, 1958, in his appeal was that in fact Padmarani's legal representatives had been brought on record in the trial court at the instance of the respondents themselves on the 4th March, 1959, and, therefore, it was merely a formal matter so far as their substitution in this appeal was concerned.

In the affidavit which was filed in support of this application by Maniram, son of Padmaram, it was stated that their counsel at Hanumangarh had advised the legal representatives of Padmaram that as their names had been brought on the record of the original suit at the instance of the respondents, it was not necessary for them to make any application in this appeal for bringing them on record in place of the deceased.

Later, however, when the appellant Momenram brother of Padmaram came to Jodhpur on the 30th June, 1959, in connection with the obtaining of a stay order in their appeal, their counsel who was in charge of the appeal advised the appellants that it would be better for them to make an application for bringing on record the legal representatives of Padmaram in this appeal also, and therefore, the application was made soon after on the 4th July, 1959.

5. The question to consider in these circumstances is whether this constitutes a sufficient reason within the meaning of Order 22, Rule 9 C. P. C. for setting aside the abatement. For, the law is indeed well established that if the right to sue does not survive to the remaining plaintiffs or appellants alone but to them and to the legal representatives of the deceased party, then an application must be made to

bring the legal representatives of the deceased party on the record within the time prescribed by law, and where no such application is made the suit or appeal, as the case may be, automatically abates so far as that deceased party is concerned and no specific order as to the abatement of the suit or appeal is as such necessary.

There is hardly any doubt that the right to sue in the present case did not survive only to the defendants who remained on the record after the death of Padmaram, inasmuch as the rights of Padmaram and other defendants were joint and indivisible and there was no question of any division, inter se, between them so far as the present litigation was concerned. The appeal, therefore, undoubtedly abated qua Padmaram deceased, and the further question which arises is whether this abatement should be set aside. Rule 9(2) of Order XXII C. P. C. provides for the setting aside of the abatement where it is proved that the applicant was prevented by any sufficient cause from continuing the suit or the appeal.

The only reason adduced in the present case on behalf of the defendants is that the legal representatives of the deceased Padmaram had been brought on the record of the trial court during the course of the proceedings for the final decree at the instance of the respondents themselves, and, therefore, the legal representatives of the deceased Padmaram were advised by their legal adviser at Hanumangarh that it was not necessary for them to make any application for being substituted in place of the deceased Padmaram, and, therefore, they had not made the application earlier and decided to make it later when learned counsel in charge of their appeal in Jodhpur later impressed upon them the desirability of making an application in this Court also.

This, in my opinion, does not constitute any sufficient reason for the defendants' failure to make the application for the substitution of the legal representatives of the deceased Padmaram at the proper time. I am unable to accept that because the legal representatives of the deceased Padmaram had been substituted in, his place in the trial court, this was enough for the purposes of the present appeal also.

There is authority for the view that where there are two independent cross-appeals pending in the same court and one appeal has been filed by the plaintiff and the other by the defendant and where the appeal by the defendant appellant abates, he having not brought on record the legal representatives of the deceased respondent in time, the defendant appellant cannot claim the benefit of the fact that the legal representatives of the deceased plaintiff respondent in the appeal filed by him had been brought on the record within the time allowed by law, on the fallacious assumption that because the plaintiff's legal representatives were added in the appeal filed on his behalf that would automatically ensure for the benefit of the defendant appellant also for the purposes of his appeal. See *Shambhu Nath v. Mt. Ralli*, ILR 1919 Lah. 318 and *Saralaya v. Laxmi Hengsu*, AIR 1931 Mad 277. The case in hand is a far worse one. Here we are concerned with two proceedings not in the same court but in two different courts. The suit wherein the legal representatives of the deceased defendant Padmaram were brought was pending in the trial court for the purpose of a final decree and had been instituted by Nanak. The appeal was pending in this Court and had been brought by the defendants Padmaram and others and the two proceedings cannot possibly be allowed to be confused with each other, and, therefore, the bringing in of the legal representatives of the deceased Padmaram in the suit cannot enure for the benefit of the defendants so far as the present appeal is concerned. I hold accordingly.

6. Then again, the name of the lawyer who advised the legal representatives of the deceased Padmaram at Hanumangarh was not mentioned in the first affidavit filed in this Court on the 4th July, 1959, in support of the application for setting aside the abatement. Thereafter, a further affidavit was however filed by Mr. Birbaldas Gupta, a pleader practising at Hanumangarh, who has sworn that he had advised defendant Momenram, and Maniram, a brother and the son of the deceased Padmaram respectively, that no application need be filed in the High Court to bring the legal representatives of Padmaram in the appeal as they had already been brought on the record of the trial court at the instance of the plaintiffs themselves.

Be that as it may, I am definitely of the opinion that the defendants or the legal representatives of the deceased Padmaram had no business to consult their lawyer at Hanumangarh in preference to their learned counsel at Jodhpur who was

in charge of the appeal, and I have no doubt that if the latter had been consulted at the proper time as he should have been in ordinary diligence, he would not have failed to give the advice earlier which he gave when he was consulted. In my opinion, this is a case of gross negligence, and I am far from satisfied that it discloses sufficient reason within the meaning of Order 22, Rule 9(2) C. P. C.

7. The result must inevitably be that the appeal, so far as the defendant Padmaram is concerned, abated, as soon as the statutory period of 90 days to bring in his legal representatives of record expired without their being so brought, and that abatement does not deserve to be set aside.

7a. The further question which is however both interesting and intricate is whether the abatement of the appeal, in so far as Padmaram is concerned, should be confined to him in the circumstances, or it results in the total abatement of the appeal. On the side of the respondents it is strenuously urged that the decree having become final against the deceased Padmaram and his legal representatives and the interests of Padmaram and the other defendants being joint and indivisible, the abatement of the appeal qua Padmaram must inevitably result in the total abatement of the appeal so far as the other defendants appellants are concerned, because, assuming that this Court were to allow the appeal of the remaining defendants, two inconsistent and contradictory decrees would come into existence, the one against Padmaram and his legal representatives having become final as passed by the trial court, and another decree which should be a varying one so far as the remaining defendants would be concerned.

With equal strenuousness, it was contended on the side of the defendants appellants that the abatement in this case should be limited to the case of the deceased Padmaram only, and that, that notwithstanding, the appeal of the remaining defendants could and should be proceeded with unaffected thereby. It is further submitted in this connection that it was open to each of these defendants to have filed their appeals separately without impleading the rest of the defendants as parties thereto, and that that being so, if one of the defendants died and his appeal abated, it would be scarcely just and proper to hold that the appeals of the

other defendants should also abate.

Developing this argument, it is further urged that where the decree appealed from proceeds on grounds common to all the plaintiffs or defendants, the law is that any one of the plaintiffs or 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. Strong reliance is placed in support of this contention on Rule 4 of Order 41 C. P. C.

8. This at once brings me to the question of the proper interpretation of Order 41, Rule 4 C. P. C. and Order 22, Rule 3 read with Rule 11 thereof, in relation to each other. I am indebted to learned counsel on both sides for the thoroughness and ability with which they supported their respective cases by relying on numerous authorities of the various High Courts which unfortunately show that there is a considerable divergence of judicial opinion between the various High Courts on this question and occasionally one finds divergence of opinion on this question within one and the same High Court also.

Strong reliance was placed by learned counsel for the defendants appellants on *Chandarsang v. Khimabhai*, ILR 22 Bom 718, *Chintaman v. Gangabai*, ILR 27 Bom 284, *Ram Sewak v. Lambar Pande*, ILR 25 All 27, *Piyare Lal v. Chura Mani*, AIR 1918 Lah 227, *Jamna Bhagat v. Oudh Behari Mal*, AIR 1933 All 733, *Chenchuramayya v. Venkatasubbayya*, AIR 1933 Mad 655, *Satulal v. Asiraddi*, AIR 1934 Cal 703, *Guruprasad v. Tarini Charan*, AIR 1938 Cal. 634, *Sakkarai Chettiar v. Chellappa Chettiar*, AIR 1938 Mad 374, *Mahadeo v. Baleshwar Prasad*, AIR 1939 All 626 and *Dhondo Khando v. Waman Balwant*, AIR 1945 Bom 126; while learned counsel for the respondents placed equally strong reliance on *Balaram v. Kanysha Mashi*, AIR 1919 Cal 410, *Naimuddin Biswas v. Maniruddin Lashkar*, AIR 1928 Cal 184, *Amin Chand v. Baldeo Sahai*, AIR 1934 Lah 206, *Pir Bakhsh v. Kidar Nath*, AIR 1935 Lah 478, *Ramphal Sahu v. Satdeo Jha*, AIR 1940 Pat 346 (FB), *Malobi v. Gaus Mohamad*, AIR 1949 Nag 91, *Sonahar Ali v. Mukbul Ali*, AIR 1956 Assam 164 and *Reghu Sutar v. Nrusingha Nath*, AIR 1959 Orissa 148.

9. I am of opinion that no useful purpose can be served by discussing each one of these cases in detail, and I would, therefore, not undertake this stupendous task, but would instead endeavour to address myself to the controversy before me more or less on first principles.

10. Now what is the principle behind the rules relating to abatement of suits and appeals and the setting aside thereof? I think it can be premised without any fear of contradiction that, broadly speaking, the principle is two-fold. The first is that the Court has no jurisdiction to pass a decree for or against a dead man unless the law has by a special provision provided otherwise. (See Rule 6 of Order 22, for instance). The second is that the legal representatives of a party who is dead, and whose presence may be essential for a proper decree to be passed, must be substituted for him so that the possibility of two contradictory decrees in the same proceeding be avoided.

It seems to me that the principal provisions enacted in Order 22 with which we are concerned can be basically traced to the aforementioned two principles. Let me illustrate this by a simple example. A sues B. B dies during the pendency of the suit. The right of suit does not according to the law applicable end with the death of B, but survives against the legal, representatives of B. No decree can be passed against B, he being a dead man. B's legal representatives must, therefore, be brought on record within the time allowed by law.

If that is not done, the suit must abate and abate entirely for there is no person against whom it can be proceeded with, Let us now take another example. A sues both B and C. The suit is dismissed. A files an appeal against both B and C. B dies during the pendency of the appeal. The right of suit does not survive against C alone. B's representatives must, therefore, be brought on record within the period of limitation. But suppose they are not substituted. Then no decree can be passed against a dead man and so the appeal abates against B. The effect of the abatement is that no fresh appeal can thereafter be brought against the legal representatives of B against the decree of the trial court.

On the abatement of the appeal against B, however, a further question may arise whether the appeal abates against C also. The answer to this question depends

upon the facts and circumstances of a given case. Thus, where in the event of a decree being passed against C by the appellate court, two contradictory decrees would come into existence, the one being the decree of the trial court ensuring in favour of the legal representatives of the deceased respondent B, the appeal having failed owing to abatement, and the other being a decree against C to be passed by the appellate court, both relating to the same subject-matter, the entire appeal must abate.

The usually accepted test is that if two mutually contradictory decrees is the resultant effect of the situation that has developed, then the whole appeal must abate on the principle that law does not favour any such incongruous result. The two decrees militating against each other could only result in a futility or to put it differently they would, as it were, virtually cancel themselves.

Such a situation may result, for example, where the rights of B and C are joint and indivisible and to touch the rights of C would be inevitably to touch the rights of the other. But where these rights are distinct and separate or even separable, the abatement would be partial only, that is, qua B only and not against C. This to my mind is the general effect of the Rules 1, 2, 3, 4, 9 and 11 of Order 22 of the Code of Civil Procedure.

11. The second point to note is that the rules, relating to abatement though procedural are mandatory and therefore they must be obeyed. That they are mandatory is, to my mind, obvious from the combined effect of Rules 3 and 4 read with Rule 9 of Order 22. Rules 3 and 4 are in these terms:

'Rule 3. (1) Where 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 representative 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.

Rule 4 (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants 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 representative 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 representative 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.'

Thus Rules 3 and 4 unmistakably lay down that where there are more than one plaintiff and one defendant, and one of them dies and the right of suit does not survive in favour of or against the remaining plaintiffs or defendants by themselves, as the case may be, then an application has to be made within the time allowed by law to bring on record the legal representative or representatives of the deceased party and they must be made parties to the suit.

Then come Sub-rule (2) of Rule 3 and Sub-rule (3) of Rule 4 which further provide that where within the time limited by law such application is not made under Sub-rule (1) of either rule respectively as the case may be, the suit shall abate so far as the deceased plaintiff or defendant is concerned and costs may also be awarded under Sub-rule 3(2) on an application to that effect by the opposite party. It may be as well to point out here that under the old Code a specific order of abatement was necessary and it was also held that such an order ought not to be passed without notice to the opposite party.

It is well settled however that under the present Code no separate or specific order that abatement has taken place is necessary at all and once a failure of compliance with the provisions of Order 22, Rule 3 or 4, as the case may be, comes about, the suit abates against the deceased party forthwith or

automatically. Put in plain language, this means that the suit stops dead or comes to an end so far as the deceased party is concerned.

12. The next important provision to note in this connection is Rule 9, Order 22 C. P. C. which provides that where a suit abates or is dismissed under Order 22, no fresh suit shall be brought on the same cause of action. This means that the abatement cannot but have the effect of a judgment in favour of the opposite party, and unless the abatement is set aside on an application to that effect, it must be held to be conclusive of the rights of the parties as determined by the court below.

13. The combined force of Rules 3 and 4 and 9 of Order 22, in my opinion, clearly is that they are mandatory. Not only the word 'shall' has been used in all these rules, but the consequence of the failure of compliance with the requirements thereof has been mentioned, and, that being so, there cannot be two opinions on the question that the rules are mandatory.

14. It may also be pointed out in this connection that although the rules discussed above are primarily worded so as to apply to suits, they have been made applicable as well by virtue of Rule 11, which provides that, 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.

Therefore, a decree passed without impleading the legal representatives of a sole appellant who may have died during the pendency of the appeal is a nullity and so also where there are more than one appellant or respondent in an appeal and one of them has died during the pendency of the appeal, the result of not impleading in time the legal representatives of the deceased party, generally speaking, will be to cause an abatement of the appeal so far as he is concerned.

It must also be pointed out here that where the nature of the case is such that the appeal cannot proceed against the remaining respondents in the absence of the legal representatives of the deceased respondent on the ground that if the appeal is allowed as against the remaining respondents, there would be two contradictory decrees in the same litigation with respect to the same subject-matter, then the abatement which was initially partial with respect to the deceased party only is

bound to lead to the abatement of the appeal in its entirety. Where, however, there is no likelihood of two inconsistent decrees coming into existence with reference to the same subject-matter, the appeal would not fail as a whole and should be proceeded with against the remaining respondents.

15. This brings me to the question where the appeal is by several plaintiffs or defendants on a ground common to all of them and one of them dies and his legal representatives have not been impleaded within time, does the appeal abate only with respect to the appellant whose legal representatives have not been brought on record or it abates as a whole? Order 41, Rule 4 C. P. C. immediately arises for consideration in this connection. This rule reads as follows:

'Rule 4. 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.'

The plain effect of this provision is that where the decree appealed from is founded on a ground common to all the plaintiffs or all the defendants, it is open to any one of the plaintiffs or the defendants by himself to appeal from the whole decree, and it is not necessary for all of them to join in the appeal and when such an appeal has been filed by one of the plaintiffs or the defendants, as the case may be, thereupon the appellate court would have power to reverse or vary the decree in favour of all the plaintiffs or all the defendants even though they may not have appealed.

It seems to me that in such a case, an appeal by one is virtually treated as an appeal on behalf of all, although they may not have joined in the appeal. This rule appears to be based primarily on the consideration that if there are more plaintiffs or defendants than one in a suit and they are aggrieved or affected by a decree passed for or against them, such a decree being based on a ground common to all of them, then it should be enough if one of such parties files the appeal from the whole decree, the reason being that some of the persons whether on the side of the plaintiffs or defendants as the case may be may not be willing to appeal at all.

But on that account alone, the party wishing to appeal need not be deterred from doing so. And it is further provided that on such an appeal having been filed it should be open to the appellate court in its discretion to reverse or vary the decree in favour of all the plaintiffs or all the defendants, as the case may be, irrespective of the consideration that the other plaintiffs or defendants have not appealed..

16. A question arises in this connection whether even in such a case the parties who are not willing to appeal should have been impleaded as respondents to the appeal. It seems to me that it would always be better to do so to make the array of parties complete, although I confess that there is a difference of opinion on this point also and it has been held in some cases that this rule applies to a case where only one or some of the plaintiffs or defendants appeal without impleading the other plaintiffs or defendants as parties to the appeal while in other cases the view has been taken that this rule would have no application where the non-appealing plaintiff or defendant has not been impleaded in the appeal at all.

See *Haidar Husain v. Md. Subhan Khan*, AIR 1940 All 428, *Girija Prasanna Deb v. N. M. Khan*, AIR 1942 Cal 257, *Harbans Singh v. Ram Chandra*, AIR 1943 Oudh 139, and *Mukandi Ram v. Asaram*, (S) AIR 1955 Pepsu 73 in support of the first view, and AIR 1919 Cal 410, *Jitendranath Chatterji v. Jaku Mandar*, AIR 1922 Pat 4, *Ambika Prasad v. Jhinak Singh*, AIR 1923 All 211 and *Nanak v. Ahmad Ali*, AIR 1946 Lah 399, (FB) in favour of the other view. The preponderance of opinion, however, appears to be in, favour of the earlier view and I would leave the matter here at that.

17. The second question which arises in connection with the interpretation of Order 41, Rule 4 is whether this rule also applies where an appeal has been filed by all or some of the plaintiffs or the defendants and one or some of them have died during the pendency of the appeal and their legal representatives have not been brought on the record within the time allowed by law, so that in such a case it may not be necessary at all to comply with the provisions of Order 22 and the appeal may still be proceeded with, the ground being that the appeal has been filed from a decree which was founded on grounds common to the deceased party and those who were with him and, therefore, the absence of the legal

representatives of the deceased appellant or appellants becomes immaterial.

In other words, the question is whether the provision contained in Rule 4 of Order 41 can legitimately govern the provisions contained in Order 22 relating to the abatement of suits and appeals on account of the death of one of the parties therein. The answer to this question is not free from difficulties. It may be said on the one hand that if in an appeal from a decree which proceeds on a ground common to all the plaintiffs or all the defendants, the law of procedure provides that it is open to one of the plaintiffs or one of the defendants by himself to file an appeal, and thereupon the appellate court will be within its bounds to reverse or vary the decree in favour of all the plaintiffs or all the defendants as the case may be, no rule of principle is violated if one of such parties having appealed subsequently dies and his legal representatives are not somehow brought on record within the time permitted by law and consequently an abatement of the appeal with respect to him has occurred; but, that notwithstanding, the appeal can be proceeded with, and it would still be possible for the appellate court to reverse or vary the decree in favour of all the plaintiffs or all the defendants as the case may be.

Putting the matter in another way, the propounders of this view would have it said that the position is, as if, the party who died had not appealed at all, and even then the appeal would have been competent and a proper decree could have been passed in the case in favour of all the appellants including such party who may not have appealed. This argument has a degree of plausibility about it and has found acceptance in a number of cases. Nevertheless, on a balance of all the considerations, I am far from satisfied that it is sound.

It seems to me important to bear in mind in this connection that Rule 4 of Order 41 is really an enabling one and all it does, after everything is said and done, is to vest a discretion in the court in cases falling within the scope of that provision to reverse or vary the decree in favour of all the plaintiffs or all the defendants, as the case may be. But the court is not bound to do so. Fully recognising, therefore, that the rule is a permissive one and it invests the court with a discretion to reverse or modify a decree in favour of all the appellants (including those who may have not

appealed) where the circumstances of the case so warrant, it cannot be overlooked that all judicial discretions have got to be exercised on certain well-recognised principles and not on the mere fancy or caprice of the deciding court.

It is a serious question whether an enabling provision like this can be allowed to govern and indeed outweigh the specific provisions of Order 22 which deal with the consequences of the death of a party or one of the parties to a suit or appeal during the pendency thereof. And it is further well to bear in mind in this connection, as I have discussed above, that these rules are mandatory in character judging by their very language and the effect of the failure to comply with the requirements thereof laid down in Order 22 itself.

It is very important to remember further that Order 41, Rule 4 by its very language is properly applicable to that class of cases where all the plaintiffs or all the defendants, as the case may be, who are appellants, are alive at the time the appellate court passes its decree, though the appeal may have been actually filed by only one or more of them. Indeed it seems to me that if it is held to be applicable in the case of an appellant who may have appealed and died during the pendency of an appeal, it is bound to render nugatory the provisions of Order 22 in a large class of cases falling within Order 41, Rule 4 which in my opinion could have hardly been intended by the Legislature.

And I would add with all respect that if that was its intention, one should have expected it to say that in plain words and not left it to be inferred. It seems to me in these circumstances that to hold that Order 41, Rule 4 can be resorted to even in cases where the application of Order 22 by reason of the death of one of the parties to the Suit or the appeal is attracted would be to subordinate the positive and specific provisions of Order 22 which embody in themselves a complete Code on the subject dealt with by it to an enabling provision like the one contained in Rule 4 of Order 41.

Again the correct approach where two provisions of a statute would appear to conflict with each other, is on the well-settled principles of the interpretation of statutes to harmonise them and not to subordinate the one to the other, if that can be done. It was held by their Lordships of the Privy Council in *Md. Sher Khan v.*

Swami Dayal, AIR 1922 PG 17 that one provision of a statute ought not to be used to defeat another provision, unless it is impossible to effect a reconciliation between them. The same view has been approved by our own Supreme Court in *Raj Krushna v. Binod Kanungo*, AIR 1954 SC 202, where their Lordships have laid down that it is the duty of the courts to construe provisions which appear to conflict so that they harmonise whenever it is possible to do so.

18. Looking at the provisions of Order 22 and Order 41, Rule 4 in this way, it seems to me, with all respect, that the application of Order 41, Rule 4 should be confined to that category of cases where the parties appealing whether plaintiffs or defendants, are alive at the date of the decision of the appeal, and should not be allowed to be resorted to where one of the parties appealing has died during the pendency of the appeal in which event the provisions of Order 22 are immediately attracted into application. Order 41 deals with appeals from original decrees.

Rule 1 lays down how an appeal should be preferred and what the memorandum of appeal must contain. Rule 2 deals with the grounds which may be taken in appeal. Rule 3 deals with the consequences of non-compliance with Rule 1, or 2. Then comes Rule 4, the interpretation of which has led to a good deal of trouble. What this rule provides in effect is an exception to the general rule that the appellate court can vary or reverse the decree of the trial court only in favour of the party appealing.

Rule 33 of Order 41 is another such exception. Leaving aside the last-mentioned rule, with which we are not really concerned in this case, what Rule 4 provides as an exception to the general rule which has been referred to above is that where the decree under appeal proceeds on a ground common to all the plaintiffs or 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 all the defendants as the case may be.

Having regard to the setting in which this rule appears, therefore, I am disposed to think that it was not at all dealing with those cases where all the plaintiffs or all the defendants appealing were not alive and some of them may have died during the pendency of the appeal. This rule has not been couched in a language to indicate

what would be the effect where one or some of the parties appealing may have died.

On the other hand, Order 22, as already stated, provides a complete Code dealing with the questions which may arise on account of the death of one of the parties to an appeal with which questions Order 41 has no concern. Consequently, it would be going too far, in my humble judgment, to interpret Order 41, Rule 4 in such a way as to over-ride the peremptory provisions of Order 22. In my view, therefore, the correct approach to the interpretation of these two sets of provisions is not to interpret them in such a way that the one impinges on the other but to give them a meaning where each may have its full scope within its proper limits without adversely affecting, the provision contained in each one of them.

To interpret Order 41, Rule 4 so as to govern the provisions contained in Order 22 would, therefore, appear to me, with all respect, really born out of a confusion as to the object and intendment of both these sets of provisions, and that should not be allowed. If the contrary view as to the impact of Order 41, Rule 4 on appeals, where one of the appellants has died and there has been no substitution of his legal representatives on the record within the time allowed by law, is accepted as correct and taken to its logical conclusion, then it seems to me that it would be absolutely futile to say that the suit has abated as respects even the deceased appellant and that the appeal was put an end to because of abatement, inasmuch as where Order 41, Rule 4 might come into play on account of the decree appealed from having been passed on a ground common to all the appellants including the deceased, it would be open to the appellate court to pass such decree as it thought fit against all the defendants or plaintiffs including the deceased as the case may be.

I should also like to add here that I have very considerable hesitation in accepting the view that special provisions contained in Order 22 which are at once attracted into application on the death of a party to a suit or an appeal should be held to be more or less rendered ineffective in that class of cases which fall within the scope of Order 41 Rule 4 by reason of a general enabling rule contained therein.

19. Summing up the position at which I have arrived from the discussion made above, I would say that the two sets of provisions contained in Order 22 and Order 41, Rule 4 C. P. C. having regard to the objects behind the rules relating to abatement of suits and appeals and the necessity for setting them aside and the rules contained in Order 22 being mandatory in character and again having regard to the consideration that the rule contained in Order 41, Rule 4 is an enabling general provision empowering the appellate court in its discretion to vary or reverse a decree under appeal which was based on grounds common to all the plaintiffs or all the defendants and wherein all of them may not have appealed should be interpreted in such a way that they receive their due effect and force within their respective ambit without the one impinging upon the other, and the proper method to do so is to hold that where one of the appellants has died even where the judgment under appeal is founded on a ground common to all the appellants, the application of Order 22 cannot be brushed aside in subordination, as it were, to the provision contained in Rule 4, and that the latter provision would not be attracted into application in such a case as it should really be limited to those cases where all the appellants are alive at the date of the decision by the appellate court and not where one or more of them have died and their legal representatives have not been brought on record in accordance with the requirements of Order 22. I hold accordingly.

20. In this view of the whole matter, I do not feel persuaded with all respect to accept the view taken in ILR 22 Bom 718, ILR 27 Bom 284, ILR 25 All 27, AIR 1918 Lah 227, AIR 1933 All 733, AIR 1933 Mad 655, AIR 1934 Cal 703, AIR 1938 Cal 634, AIR 1938 Mad 374, AIR 1939 All 626, and AIR 1945 Bom 126, as sound.

It may be pointed out, however, that the Allahabad High Court in its Full Bench decision in Baij Nath v. Ram Bharose, AIR 1953 AH 565, veered round to the other view with which, if I may say so, I am in respectful agreement and which I have propounded above. Similarly the Lahore High Court refused to follow the view taken in AIR 1918 Lah 227 cited above in AIR 1934 Lah 206 and in AIR 1935 Lah 478.

It also seems to me that the Calcutta High Court had earlier taken the same view in AIR 1919 Cal 410 and AIR 1928 Cal 184. But these cases do not appear to have been brought to the notice of the learned Judges who decided, AIR 1934 Cal 703 & AIR 1938 Cal 634, although it must be admitted that the trend of the Calcutta decisions is definitely the other way about.

Again, the view which I have felt persuaded to accept as correct has found favour with a Full Bench of the Patna High Court in AIR 1940 Pat 346. Curiously enough, this has been strongly criticised in some of the later decisions of the Patna High Court but has nevertheless held the field for all these years in that court and is the accepted view there at this date. The same view has been upheld by the Nagpur High Court in AIR 1949 Nag 91, and by the Assam High Court in AIR 1956 Assam 164 and in AIR 1959 Orissa 148 by the Orissa High Court.

21. It is only fair to conclude in these circumstances that the view which I have accepted as sound is the view which has been accepted by the majority of the various High Courts in our country and on the whole seems to me to be the view which should be preferred on first principles as discussed above.

22. The upshot of the entire discussion made above is that the appellants cannot legitimately be allowed to take advantage of Order 41, Rule 4 C. P. C. in the controversy which has arisen around the question whether this appeal has only abated as respects the deceased defendant Padmaram or it abates as a whole. Now learned counsel for the appellants has not questioned the abatement of the appeal so far as Padmaram is concerned.

23. The further question which, therefore, falls for determination on the principles discussed above is whether the contention of learned counsel for the respondents that this appeal has abated entirely is correct.

24. Now, it seems to me to be well established that one test which has been almost universally accepted by the courts to decide a question like this is whether it is possible to decide the entire appeal in the absence of the legal representatives of the deceased defendant appellant Padmaram without producing two inconsistent decrees in this very litigation. See in this connection AIR 1949 Nag

91, AIR 1953 All 565 (FB), Arjun Singh v. Matukdhari Singh, AIR 1955 Pat 391 and AIR 1956 Assam 164.

25. Now let us look at the nature of the controversy in this litigation. The plaintiffs sued the defendants for a half share of certain land by partition. It may also be pointed out that the defendants' share inter se was not in controversy at all. The latter resisted the suit on the ground that the plaintiffs were not entitled to any share for certain reasons into which it is not necessary to go; but it is sufficient to say that the defence was common.

The trial court eventually held that the plaintiffs were entitled to half share of a portion of the land sued. Aggrieved by this decision, the defendants Padmaram and others came in appeal to this Court. The appeal so far as Padmaram is concerned has abated as held above, and no sufficient reason has been adduced to set aside that abatement. It is also beyond dispute that the share of Padmaram along with the other appellants in the suit land is joint and indivisible. The appeal by Padmaram having abated, the decree of the trial court so far as he is concerned became final and can no longer be questioned.

Now let us suppose that the appeal of the remaining defendants is heard and allowed and the plaintiffs' suit dismissed. There is no doubt that this would result in two inconsistent decrees, the one against Padmaram standing intact as passed by the court below and the other in favour of the surviving appellants. As I understand the law, it is well established that no court of law can allow such an incongruous situation to develop, or, in other words, to allow two inconsistent decrees to emerge out of one and the same litigation.

It would have been another matter if the rights of Padmaram in the suit land were separate and divisible in which case the abatement would have occurred only with respect to his share. But that is unquestionably not so. Therefore, the conclusion seems to me to be inevitable that the partial abatement qua Padmaram cannot but result in the abatement of the appeal as a whole even so far as the remaining appellants are concerned, it being impossible to proceed with the appeal in the absence of the legal representatives of the deceased appellant Padmaram without producing two inconsistent decrees. I therefore have no alternative but; to come to

the conclusion that the appeal abates as a whole,

26. An argument which was forcefully advanced on behalf of the appellants at the bar of this Court may be briefly noticed at this juncture. That argument is that it would have been open to each of the appellants to file a separate appeal against the decree of the trial court and in that appeal although all the plaintiffs would have been necessary parties the remaining defendants would be only proper parties and need not have been impleaded as parties to the appeal at all.

And it was further forcefully urged that in that case if in the appeal filed by Padmaram he had died and his legal representatives had not been brought on the record within time, it is Padmaram's appeal alone which could have abated and the appeals of the, other appellants need not have been affected on account of the abatement of Padmaram's appeal only. The contention is that that is good enough ground for the view that the abatement against Padmaram in a Case like the present should not possess a larger effect than that it would have if Padmaram had brought a separate appeal and therefore this appeal should be capable of being proceeded with even though Padmaram's appeal had abated.

This argument is indeed attractive and seems at first sight 'plausible to a degree. But on careful consideration I do not think that it should really affect the conclusion at which I have arrived above in the present case. My reasons are these. In the first place, the view that Padmaram alone could file an appeal in such a case without impleading his co-defendants either as appellants or respondents is, to my mind, a highly doubtful view, and, in any case is not a view that should be preferred.

If I may say so, with all respect, it is the adoption of the view favouring this kind of procedure which is bound to be productive of a good deal of confusion and unnecessary complications. If the plain view that necessary parties to the suit are as a rule necessary parties to the appeal in the sense that all parties to the suit who are or would in all likelihood be affected by the decree under appeal should be made parties to the appeal, whether as appellants or respondents, is accepted as sound, this would save the courts lot of judicial time and energy in deciding questions relating to abatement which in my experience, some times consume frightfully more time than the decision of an appeal on the merits and for no

appreciable advantage whatever.

On this view one of the appellants may appeal because he cannot compel the others to join in filing the appeal with him (and this is all Order 41 Rule 4 precisely says) but, all the same, there can be nothing in the way of his impleading, as the case may be, the co-plaintiffs or co-defendants as respondents in the appeal. And if this view is accepted as a correct exposition of the meaning and intendment of Order 41 Rule 4, then all parties which are to be affected by a decision of the appeal one way or the other must be made parties to the appeal, as respondents, if not, as appellants, and no complication is likely to arise in matters of abatement because all the parties would be parties to the appeal.

27. Again if I may say so, the argument that separate appeals can be filed by the various aggrieved parties in this type of cases is as a matter of practicality, more or less a theoretical possibility, because the filing of separate appeals would involve separate payment of court fees and other incidental expenses, and, may be, separate counsel's fees by each one of the appellants and rarely parties would or should be found so foolish as to adopt such a course.

Assuming, however, that such appeals may be filed and that in any case the filing of such appeals is permissible, and one of the appellants alone files such an appeal then this hypothetical position cannot in my opinion affect the correct position in a case where all the appellants have joined in filing the appeal and the application of Order 22 in such case cannot possibly be avoided merely on the ground that if the appeals had been filed in another way then the question of abatement could not have arisen.

This Court is concerned to decide a case which has arisen on its own facts and not on other facts which might have been but are not. And it seems to me that any opinion I may express on such a hypothetical state of facts would be in the nature of obiter dicta and I would, therefore, leave the matter at that. What I wish to say, however, is that in this case all the appellants had joined in filing the appeal and then one of them had died and his legal representatives had not been brought on the record as prescribed by law.

Therefore the application of, the relevant provisions of Order 22 cannot legitimately be resisted, and, therefore, the appeal qua Padmaram unquestionably abated. Furthermore, when the doctrine of abatement does come into play and the allowance of the appeal of the surviving defendants is bound to be productive of two mutually contradictory decrees, the appeal of the surviving defendants also cannot but abate or in other words the appeal abates in its entirety. I therefore overrule this contention also.

28. Before concluding this judgment, I may briefly refer to the controversy which arose in this Court at the last stage as to the applicability of Rule 33 of Order 41 in this case. I may mention at once that this ground was not raised by learned counsel in his application for setting aside the abatement or even in his opening address. In these circumstances, the point may be disposed of very briefly. Order 41. Rule 33 C. p, C. is a very special provision and can be exercised under exceptional circumstances only and not as a matter of course.

Again, broadly speaking, it should not be exercised in cases where a party has been guilty of negligence and an important and valuable right thereby has accrued in favour of the other party. I may also add that no special circumstances have been shown to me why the very extraordinary power embodied in this rule should be exercised in favour of the appellants. Reference may be made in this connection to *Chokalingam Chetty v. Seethai Ache*, AIR 1927 PC 252 and *Ramdhari Singh v. Rambharosa Singh*, AIR 1955 Pat 237. No case has, therefore, been made out for giving the appellants the benefit of Order 41 Rule 33 C. P. C., and I consider it enough to say that I should leave the matter at that.

29. For the reasons mentioned above, this appeal abates as a whole and is dismissed accordingly. The respondents will be entitled to one set of costs from the appellants.