ANDHRA PRADESH HIGH COURT

Cheladina Venkata Ram Rao

Vs.

Engu Narayana

Civil Misc. Petns. Nos. 6368 and 6369 of 1960

(P. Chandra Reddy, C.J., Jaganmohan Reddy and Narasimham, JJ.)

03.08.1962

JUDGMENT

Jaganmohan Reddy, J.

1. The following question has been referred to the Full Bench by our learned brothers Manohar Pershad and Munikannaiah, JJ. :

> "Has the appellate Court power to proceed with the hearing of the appeal and to reverse and vary the decree in favor of all the plaintiffs or defendants under Order 22 Rule 3 and Order 41, Rule 4 C. P. C. if all the plaintiffs or defendants appeal from the decree and one of them dies and no substitution is effected within time always assuming that the decree proceeds on a ground common to all the plaintiffs or defendants".

2. The aforesaid question appears to have arisen in the following circumstances :
The petitioner in C. M. Ps. 6368 and 6369/60 filed a suit against five defendants for a declaration, of his title to the suit properties as pattedar and for recovery of possession thereof. The trial Court decreed the suit, and against the judgment and decree the defendants filed A. S. No. 24/1 of 1954-55. After the appeal was filed in the High Court and during its pendency, the decree-holder took out execution proceedings for possession. Against this order also the judgment-debtors filed an appeal, being A. A. O. 127/1 of 1954-55. This appeal as well as the first appeal A. Section 24/1 of 1954-55 were heard together by the same Bench which has referred this question. It allowed A. Section 24/1 of 1954-55, set aside the judgment and decree, of the Court, below and remanded the case to the trial Court with a direction that it should, after giving an opportunity to the defendants to summon their witnesses and recalling the plaintiff's witnesses for cross-examination and also after recording the evidence of the plaintiff's witnesses, dispose of the case according to law. In this view, A. A. O. 127/1 of 1954-55 was also allowed. When the case went back to the Court of the Subordinate Judge, Karimnagar, and was posted for fresh trial, it was represented to it that defendants 2, 4 and 5 died even during the pendency of the appeals in the High Court. Thereupon, the Subordinate Judge adjourned the case for steps to bring the legal representatives of the deceased defendants on record. The plaintiff, however, filed

I. A. 144/60 stating that as defendants 2, 4 and 5 died during the pendency of the appeal and as the other appellants viz., defendants 1 and 3 did not report to the High Court about the death of those defendants prior to the hearing of the appeal, the appeal before the High Court abated in its entirety, especially so, as there was a joint decree against all the defendants. The Subordinate Judge sent a report on 9-12-1960 to the High Court praying for necessary directions. The plaintiff also filed C. M. P. Nos. 6368 and 6369 of 1960 for declaring the judgments passed respectively in A. A. O. No. 127/1 of 1954-55 dated 30-3-1960 and in A. S. No. 24/1 of 1954-55 dated 30-3-1960 as nullities.

3. The Bench, which heard the case, observed that the point involved was once referred for consideration by a Division Bench 10 a Full Bench; but when the matter came up before the Full Bench no final opinion was given as it was then considered that that question was not necessary for the determination of that appeal. As that point had remained without any authoritative pronouncement thereon, our learned brothers considered that, in the circumstances, as an important question of law has arisen directly in the case, it should be considered by a Full Bench.

4. In the question that has been referred, a reference to Order 22, Rule 3 seems to have been inadvertently made along with Order 41 Rule 4 C. P. C. We say that because Order 22 Rule 3 neither deals with the power of an appellate Court nor does it mention anything about reversing or varying the decree. The reference to this provision (Order 22 Rule 3) is more appropriate after the words "and no substitution is effected within time".

5. At the outset, we may state that there has been a divergence of opinion in the several High Courts in India as also in the same High Courts in respect of this question. Inasmuch as there is no Fall Bench decision of the Madras High Court before the formation of the Andhra High Court, we feel it incumbent to analyse and examine the question untrammelled and unfettered by the plethora of case-law of the several High Courts which has grown up in respect of this question over a period of more than sixty years and which has added greatly to the confusion rather than to contribute to its clarity.

6. Before we examine the question on first principles, we may state at once that the suit by the plaintiff was against all the five defendants alleging that they were in illegal occupation of the suit land without any legal title thereto and consequently, he prayed for a declaration of his title to and possession of the land and for mesne profits of Rs. 3444/- from all the defendants. All the five defendants had filed a joint written statement and averred that they have been in continuous possession for more than 12 years without any lease, and claimed title by adverse possession. A perusal of the decree in favor of the plaintiff does not, however, assist us as there is hardly any direction therein except to say that the suit is decreed in terms of the plaint. It is, however, conceded by the learned advocates for both the parties that the decree in the case against the five defendants proceeded on a ground common to them all.

7. Now coming to the main contentions, Sri Tej Raj Kapoor the learned advocate for the petitioner contends that since appellants 2, 4 and 5 died and no legal representative proceedings were taken within the time permitted, the appeal in respect of these appellants has abated, and since the decree appealed from proceeded on a ground common to all the defendants, the entire appeal abated and is a nullity. He relies on Order 22, Rule 3 which, if read with Rule 11 makes the provisions of Rule 3 apply mutatis mutandis to the case of the death of appellants.

8. The contention of the learned counsel for the respondents, however, is that Order 41 Rule 4 C. P. C. limits the operation of Order 22, Rule 3 and can be pressed into service to sustain the decree, on the ground that the abatement should be limited to the case of the deceased appellants alone and that, in so far as the remaining appellants are concerned, it should be proceeded with unaffected thereby as if the appeal has been filed by only those surviving appellants against a decree which proceeded on grounds common to all of them. In determining this controversy, the very first principle that should be kept in mind is that a Court can pass no decree for or against a dead person, unless the law otherwise provides, such as for instance, Order 22, Rule 6, where it is provided that if either of the party dies between the conclusion of the hearing and the pronouncing of the judgment, whether the cause of action survives or not and notwithstanding anything contained in any rules specified therein, a judgment can be pronounced and shall have the same force and effect as if it had been pronounced before the death took place. This rule emphasizes by its exception the principle that there is an abatement of a suit or appeal on the death of a person in so far as that person is concerned unless the right to sue survives on the death of the plaintiff or defendant or appellant or respondent, as the case may be, under Rule 1 of Order 22 read with Rule 11.

9. We may now refer briefly to the relevant provisions in Order 22 of the Civil Procedure Code. Rule 2 provides the procedure where one of several plaintiffs or defendants dies and the right to sue survives. It says that in such cases there is no abatement in terms of Rule 1. Rules 3 and 4 prescribe the procedure in case of death of one of several plaintiffs or of sole plaintiff and the procedure in case of death of one of several defendants or of sole defendant. Rule 5 empowers the Court to determine the question as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant. Rules 7 and 8 lay down that the suit does not abate by reason of the marriage of a female plaintiff or defendant, or on the insolvency of the plaintiff unless the assignee or receiver declines to continue the suit or to give security for the costs thereof within such time as the Court may direct.
Sub-rule (1) of Rule 9 provides that where a suit abates or is dismissed under that Order, no fresh suit shall be brought on the same cause of action. Sub-rule (2) provides that the plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. Sub-rule (3) makes the provisions of Section 5 of the Indian Limitation Act, 1877, applicable to applications under sub-rule (2). Rule 10 lays down the procedure in case of assignment before the final order in the suit. Rule 11 provides that in the application of Order 22, 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. Rule 12 says that nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

10. Thus it will be seen that Order 22 C. P. C. provides a complete code to deal with questions which arise, by reason of the death of one of the parties to a suit or appeal. That these rules are mandatory can admit of no doubt, for, as has been pointed out earlier, the death of a person takes away the jurisdiction vested in the Court to pass a decree and, in terms of Rules 3 and 4 read with Rule 11 of Order 22, the suit or appeal abates, and, on abatement or on its dismissal under Rule 8, no fresh suit shall be brought on the same cause of action as provided in Rule 9(1) unless the

abatement is set aside on an application made under sub-rule (2) of the said rule within the period of limitation.

11. In this context, it will be appropriate to read Rules 3 and 4 of Order 22.
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 of 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.

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 defense 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".

The use of the word "shall" in both these rules is peremptory, requiring an application to cause the legal representatives of the deceased plaintiff or defendant to be made a party in those cases where the right to sue does not survive to the surviving plaintiff or plaintiffs or defendant or defendants, or where the sole plaintiff or sole surviving plaintiff or the sole defendant or the sole surviving defendant dies and the right to sue survives. It is further enjoined that if no such application is presented within the time limited by law, the suit shall abate so far as the deceased plaintiff or defendant is concerned.

12. The mandatory provisions of these rules require that a legal representative of the 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 suit can be avoided, which is also based upon the other principle, viz., that the Court has no jurisdiction to pass a decree for or against a dead man, unless, as already adumbrated above, it comes within the exception of Rule 6 of Order 22. If, however, the right to sue survives to the surviving plaintiffs or defendants, the Court is required to Cause an entry to that effect to be made on the record under Rule 2 and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs or against the surviving defendant or defendants. Where there is an abatement, no separate or specific order that the abatement has taken place is necessary at all. The abatement follows automatically were there is a non-compliance with Rule 3 or Rule 4, as the case may be, of Order 22. Though the appeal or suit abates automatically in respect of one of the several plaintiffs or

defendants, the question whether the appeal abates as a whole will, however, depend on the further question whether the appellate Court can proceed in the absence of the legal representatives of the deceased appellants or respondents. It is well settled and uniformly held by all the Courts in India that an appeal will abate as a whole if the case is of such a nature that the appeal cannot proceed in the absence of the legal representatives of the deceased appellant. The basis for this rule is that to decide an appeal without bringing the legal representatives on record in a case of that nature, will produce two inconsistent and contradictory decrees in the same litigation with respect to the same subject-matter. The abatement which is initially partial with respect to the deceased party only will result in abating the appeal in its entirety. If there is no such likelihood, then there is no abatement of the appeal as a whole. While no orders are necessary for an abatement resulting in non-compliance with Rule 3 or Rule 4 of Order 22, such orders would be necessary to declare the whole suit or appeal as having abated.

13. It now remains to be considered whether Order 41, Rule 4 which is only limited in its application to appeals can be brought in aid in cases where the plaintiffs or defendants, against whom a decree on a ground common to all of them has been passed, have applied and one or several of them die and his or their legal representatives have not been brought on record within the time, would have the effect of abating the appeal as a whole or only with respect to the appellant or appellants whose legal representatives have not been brought on record.

14. In interpreting statutory provisions, one essential principle which has always to be borne in mind is that unless the Legislature so enacts, either expressly or by necessary intendment, each provision which provides for a specific situation must be allowed to have its full play and scope without in any way impinging upon the scope or ambit of the other. Where, however, there is some difficulty, construction should be placed which will harmonise those provisions which may apparently seem contradictory. At any rate, unless forced as a necessary consequence of the spelling out of the intention of the Legislature, one section cannot be used to defeat another section unless it is impossible to effect a reconciliation between them. In *Mohammed Sher Khan v. Raja Seth Swami Dayal*[1], their Lordships of the Privy Council dealing with the interpretation of Section 60 of the Transfer of Property Act, observed at page 19 that

> "the section is unqualified in its terms, and contains no saving provisions as

[1] AIR 1922 PC 17

> other sections do in favor of contracts to the contrary and that there is no sufficient reason for withholding from the words of the section their full force and effect," and that "even if it (i.e., the mortgage) were an anomalous mortgage, its provisions offend against the statutory right of redemption conferred by Section 60. and the provisions of one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them".

To the same effect are the observations of the Supreme Court in *Raj Krushna v. Binod Kanungo*[2], *Bengal Immunity Co. v. State of Bihar*[3], and *Siraj-Ul-Haq v. Sunni Central Board of Waqf, U. P*[4]. In the latter case, which is the latest, Gajendragadkar, J., while considering the U. P. Muslim Waqfs Act, said at page 204 :

> "It is well settled that in construing the provisions of a statute Courts should be slow to

adopt a construction which tends to make any part of the statute meaningless or ineffective; an attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute".

In two recent Full Bench decisions of this Carat, *Anandu v. Acharyulu*[5], and *Agaiah v. Mohd. Abdul Kareem*[6], both delivered by Hon'ble the Chief Justice, the provisions of the Code of Civil Procedure - in the first case O. 41 Rules 20 and 33 and in the latter case O. 47 and O. 43 - were considered. In the first case Hon'ble the Chief Justice observed : "When the powers of a Court are derived under a statute, a Court cannot travel beyond the provisions thereof". In the latter case it was observed thus :

"It is a well settled canon of construction of statutes that the provisions of a statute should be so read as to harmonise one with the other and not to read a repugnancy into them. Even if two enactments appear to be inconsistent, it must be seen that one is a qualification of the other".

15. Keeping these well-known and well-established principles in view, we will now read Rule 4 of Order 41, which is as under :

"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".

An analysis of this provision would indicate the following conditions for the exercise of the power vested in the Court, viz., (1) there should be an appeal;

(2) it must be by one of the plaintiffs or of the defendants from the whole decree; and (3) the decree appealed from proceeds on any ground common to

[2] AIR 1954 SC 202
[3] AIR 1955 SC 661
[4] AIR 1959 SC 198
[5]1958-2 Andh WR 196 : AIR 1958 And Pra 743)
[6]1960-2 Andh WR 416 : (AIR 1961 And Prad 201 (FB)

all the plaintiffs or of the defendants. If these three conditions are satisfied, the appellate Court may reverse or vary the decree in favor of the plaintiffs or the defendants, as the case may be.

It is clear that the rule does not require that the decree should proceed on every ground common to all the plaintiffs or to all the defendants, as long as it proceeds on any ground common to all the plaintiffs or to the defendants. Nor will the requirements of the rule be satisfied where the appeal so filed omits to join a necessary respondent. There is nothing in the rule to suggest that it deals with a case where all the defendants or the plaintiffs, against whom there is a decree which proceeds on any ground common to all, have appealed and one or some of them have died during the pendency of the appeal. In other words, there is no indication in the rule for treating

the appeal in such a case as if it had been filed by only one of the plaintiffs or the defendants, as the case may be. This rule is an enabling provision empowering the appellate Court alone to reverse or vary the decree for the benefit of all including those who have not appealed. But it does not deal with a case of persons who have in fact appealed and have died during the pendency of the appeal. This provision, in our view, deals with the living and not the dead. The raison d'etre for this rule is that some of the plaintiffs or the defendants who are aggrieved or affected by a decree passed, - the said decree having been based on any ground common to them all,- may not be willing to appeal at all. If so, any one of them is enabled to appeal from the whole decree. The question naturally arises whether in such circumstances, did the Legislature intend to create an exception to the application of Order 22 in cases governed by Order 41, Rule 4 where all the plaintiffs or the defendants have appealed and one or some of them died during the pendency of the appeal. It is argued that in cases where the provisions of Order 41 Rule 4 are applicable, if any one or some of them die and no legal representatives are brought on record within the time permitted, the appeal should be deemed as if it had been filed by one of them alone. This argument overlooks the essential fact that once an appellant dies, Order 22, Rule 3 comes into play and, if no legal representatives are brought on record within the time prescribed, that appeal abates so far as he is concerned. There cannot, in our view, be any justification in applying Order 41, Rule 4 in such a case, particularly when it is borne in mind that the rule is an enabling one vesting a discretion in the Court to exercise its powers in certain contingencies to reverse or vary a, decree. But that is tar from saying that such an enabling provision vesting a discretion was intended to override or limit the specific provisions of Order 22. In our view, there is no warrant for placing such a construction on Rule 4 of Order 41, for there is nothing in that rule which conflicts with the provisions of Order 22, Rule 3 much less has any inconsistency even remotely been suggested for our having to place a construction harmonizing these rules. If one of the appellant dies, there is the provision for bringing the legal representatives on record, and if those legal representatives are not brought on record within the time, there is the further provision of applying to set aside the abatement under Rule 9 of Order 22 read with Rule 11. Even on grounds of ex debito justitiae there is no justification to support a construction of the nature suggested. To do so would be tantamount to saying that Order 22 does not apply to cases envisaged in Rule 4 of Order 41, which, without any further indication that the Legislature had intended otherwise, is unsupportable.

At any rate, if we are to hold that Order 22 does not apply in the cases of the death of a plaintiff or appellant or a defendant, or respondent we must equally hold that it will also not be applicable in cases where the only appellant dies or all the appellants who have filed an appeal die, which would be a negation of the very principle that the Court has no jurisdiction to pass a decree for or against a dead man unless the law has specifically provided in respect of death of the appellants who have filed the appeals in cases coming within the purview of Order 41, and consequently, Order 22 has to apply either in all cases or not at all. There is no warrant for its partial exception in the case of death of only a few of the appellants and not to all the appellants or the sole appellant.

16. The contention of the learned advocate for the respondents, Sri V. Madhavarao, is no doubt supported by a good deal of authority just in the same way as the petitioner's contention. The earliest case in favor of the respondents' contention is *Chandarsang v. Khimabhal*[7], In that case, an appeal was filed by all the defendants and the decree proceeded on a ground common to them all. But, during the pendency of the appeal, one of the several appellants and one of the respondents died. When the appeal came on for hearing, it was dismissed by the lower appellate

Court as defective for want of parties. In second appeal, it was held that since any plaintiff or defendant has a right to appeal without the concurrence of any of the other parties of the suit, the mere fact of the death of one of the appellants cannot affect the right of the other appellants to proceed with the appeal if they choose to do so. It was held that the proper course for the appellate Court was to have proceeded under the provisions of Section 368 of the Code of Civil Procedure (corresponding to Order 22 Rule 4) and to have either declared that the appeal has abated as to him and proceeded against the rest of the respondents, under Section 544 (corresponding to Order 41 Rule 4) C. P. C. It was held that under any circumstances, the order dismissing the appeal was wrong. Except for this statement, there is no reference to the provisions of the section or the conditions or limits of its applicability. At any rate, it was specifically held that the appeal abated in so far as the deceased appellant was concerned. As pointed out by Harries, C. J. in *Ramphal Sahu v. Satdeo Jha*[8]*,*

> "the Court however did not expressly hold that the lower Appellate Court could reverse or vary the decree not only in favour of the surviving appellants but also in favour of personal representatives of the deceased appellant who were not on the record". The decision in ILR 22 Bom 718 was merely followed in *Chintaman v. Gangabai*[9]*,* and we derive no assistance from it.

Dhondo Knando v. Waman Balwant[10]*,* which followed ILR 27 Bom 284 was a case which essentially dealt with the validity of a decree on the basis of partial representation of the estate. The appellant, a Hindu coparcener, filed suit against the respondent and two others for partition of his alleged half share in land and for mesn profits. The suit was dismissed with costs. He preferred an appeal to the District Court against the decree. But pending that appeal, he died. His younger son Waman and his elder son Chintaman were brought on record as his legal representatives and that appeal also was dismissed. Both of them filed a second

[7] ILR 22 Bom 718
[8] AIR 1940 Patna 346 (FB)
[9] ILR 27 Bom 284
[10] AIR 1945 Bom 126

appeal, and during the pendency of this appeal in the High Court, the elder son, Chintaman, died. That fact, however, was not brought to the notice of the Court, and the appeal was allowed and the suit was decreed with costs. Thereafter Waman and the son of the deceased appellant Chintaman, filed an application for partition of the suit property in accordance with the decree of the High Court. That application was opposed by the judgment-debtor, who contended that the decree passed by the High Court in the second appeal was a nullity, inasmuch as the heir and legal representative of the deceased Chintaman had not been brought on record before the decree of the High Court was passed and that therefore no execution of that decree could be taken out. It was held that on the death of Chintaman, the next succeeding managing member of the family, viz., Waman, should be regarded as representing the estate of the original plaintiff. Secondly, that

> "even assuming that after the death of Chintaman, some other persons, including Waman were entitled to come on record as the legal representatives of Chintaman, it does not follow that because these other persons had not come on record the decree obtained by Waman alone was a nullity. Waman was one of the two appellants and was a joint owner of the land in suit and was in joint possession of it. As joint tenant he had interest in every part of the estate and was owner along with others, of the whole estate. It cannot,

> therefore, be said that there was no representation at all of the estate of Chintaman when Chintaman died". In those circumstances, the Bench held that
> "even a partial representation of the estate of the deceased appellant is sufficient to validate the appeal and to preclude the decree obtained in that appeal from being regarded as a nullity".

It is only after disposing of the case on those two points the Bench considered the applicability of Order 41, Rule 4, and rejected the contention of the learned advocate Mr. Gajendragadkar (as he then was) that Order 22 Rule 3 must be applied to that case and that if it is applied, it would not be open to the Court to act under Order 41 Rule 4. In this connection, several decisions were considered, including some of the cases already referred to which, if applied, makes Order 22 Rule 3 nugatory. In the end Rajadhyaksha J., pronouncing the judgment of the Court observed, "with all respect..... we prefer to follow the view of our own High Court as embodied in ILR 27 Bom 284" to that of the Lahore High Court in *Amin Chand v. Baldeo Sahai Ganga Sahai*[11], which has been approved by several High Courts in India. The further contention of Mr. Gajendragadkar that before the provisions of Order 41 Rule 4 could be invoked, there must be consciousness on the part of the Court that one appellant is dead, and it is only after that Court comes to have knowledge of this fact that the power under that rule can be exercised and the order enures for the benefit of the deceased appellant, was also brushed aside on the ground that in ILR 27 Bom 284 and *Appanna v. Gavarappadu*[12], the learned Judges who allowed the appeal were not aware of the death of one of the appellants, and even so it was held that the successful appeal would enure for the benefit of the deceased appellant. In the course of the examination of the case law, the observations of Varadachariar, J. in *Muthuraman Chettiar v. Adaikappa Chetty*[13], were considered and approved. Those observations

[11] AIR 1934 Lah 206 [13] ILR 58 Mad 407 at page 414 (of ILR Mad) : (at pp. 732-733 of AIR)
[12] AIR 1925 Mad 910

would show that Varadachariar, J., was not expressing any opinion on the first group of cases, viz., where the original party to the action dies and his legal representatives were not brought on record though there may be others having common interest with him, but only on the second group of cases in which only one of the several legal representatives brought in as such during the pendency of the action dies and the estate continues to be represented by the remaining legal representatives. Varadachariar, J., observed thus :

> "Whatever the decision may be as regards the first group of cases, I am of opinion that in the second group there is no lack of representation of the estate, that the remaining representatives can as well represent the estate as the original group did and that the principle applicable to this class of cases is to be gathered from those decisions which uphold the doctrine of representation of an estate by some of the heirs of a deceased person when such heirs are sued as defendants in the first instance".

17. Coming to Madras cases, *Ranga Srinivasachari v. Gnanaprakasa Mudaliar*[14], is a case of failure of an appellant to bring on record the representative of the deceased respondent within the time prescribed. It was there held that in spite of it the appeal did not abate. No reasons have been given, and, at any rate, that decision cannot be held to be good law having regard to the recent judgment of the Supreme Court in *State of Punjab v. Nathu Ram*[15], which is a case where

one of the respondents to the appeal to which Order 22 Rule 4 applied died and no legal representatives were brought on record. It was held that in the absence of one joint decree-holder, the appeal is not properly framed and that the appeal against the remaining joint decree-holder alone cannot proceed. *Dhuttaloor Subbavva v. Paidigantam Subbayya*[16], is a case which properly falls within Rule 4 Order 41. The only controversy in that case was whether the decree should deal with all the grounds common to all or would it be sufficient if there is any one ground common to all. It was held that all that was necessary under the terms of Section 544 (corresponding to Order 41 Rule 4) is that the decision appealed against should have proceeded on any ground common to all. That decision has no application to the present enquiry. In *Somasundaram Chettiar v. Vaithilinga Mudaliar*[17], Wallis, C. J., and Burn J., merely followed ILR 27 Bom 284. In that case defendants 20 and 22 died after the appeal had been preferred and their legal representatives have not been brought on record. At page 868 (of ILR Mad) it was observed that

> "the grounds of appeal in which the appellants succeeded are common to all the appellants and we think that the terms of Order 41 Rule 4 of the Civil Procedure Code are wide enough to cover this case - ILR 27 Bom 284 - and enable this Court to set aside the decree as regards the whole of the plaintiff's claim and not merely in respect of the interest of those appellants whose appeals have not abated. Any other conclusion would lead to 'incongruity in judicial decisions on the same facts', vide ILR 30 Mad 470 (FB)."

In *Chengama Naidu v. Gangulu Naidu*[18], Spencer, O. C. J.,

[14] ILR 30 Mad 67 [16] ILR 30 Mad 470 (FB) [18] AIR 1925 Mad 235
[15] AIR 1962 SC 89 [17] ILR 40 Mad 846:AIR 1918 Mad 794

followed ILR 40 Mad 846 (2)), *Ram Sevuk v. Lambar Pande*[19], In *Chenchu Ramayya v. Venkata Subbayya*[22], after referring to ILR 40 Mad 846 : (AIR 1918 Madras 794 (2)) it was pointed out that the Calcutta High Court in *Naimuddin Biswas v. Mamiruddin Laskar*[20], dissented from ILR 40 Mad 846 : (AIR 1918 Madras 794 (2)) while in *Hari Charan v. Kalipada*[21], it did not refer either to Order 41 Rule 4 or any of the decisions noted by them. It was observed at page 656: "We think therefore that judicial opinion is fairly agreed upon this point, and that the absence of a legal representative on the record does not incapacitate us from dealing with the appeal as a whole". In S*akkarai Chettiar v. Chellappa Chettiar*[23], Burn, J., after referring to AIR 1934 Lahore 206; *Ambika Prasad v. Jhinak Singh*[24], *Balaram Pal v. Kanysha Majhi*[25], and *Saru Khan v. Jan Muhammad*[26], observed that whatever may be the views of other High Courts upon this question the view of this High Court is against the contention of the respondent viz., that the whole appeal must be held to have abated. He referred to ILR 40 Mad 846 : (AIR 1918 Madras 794 (2)) and the judgment of Spencer, O. C. J. in AIR 1925 Madras 235 and AIR 1933 Madras 655. It will be observed that the two Madras cases which merely followed ILR 22 Bom 718 and ILR 27 Bom 284 and the other cases of that Court where there is hardly any discussion or an attempt at an examination of the provisions of Order 41, Rule 4 vis-a-vis Order 22, do not assist us.

18. In the Calcutta High Court, the earlier view was against the application of Order 41 Rule 4 C. P. C. : Vide *Pratap Chandra v. Durga Charan*[27], This view was adopted rejecting the view of the Bombay High Court in ILR 27 Bom 284 and of the Madras High Court in ILR 40 Mad 846 : (AIR 1918 Madras 794(2)). But the latter decisions, viz., *Satulal Bhattacharjee v. Asiruddin*[28],

Karimannessa Bibi v. Juran Mondal[29]*, Nibaran Chandra v. Pratap Chandra*[30]*, Sarat Chandra v. Fezuram Nath*[31]*,* and *Halirna Khatun v. Sashi Kumar*[32]*,* took a contrary view. In ILR 61 Cal 879 though dissenting from the dictum in AIR 1928 Calcutta 184 and holding that Order 41 Rule 4 applied to the facts of that case, nonetheless it was observed at page 882 (of ILR Cal) thus :

> "Whether an appeal can be heard in the absence of one of the appellants will depend on the nature of the suit and decree made. The present suit is a suit for ejectment and the defendants in appeal can contend on grounds common to the other defendants that the whole suit should be dismissed. We do not see any reason to hold why the provisions of Order 41, Rule 4 should not cover a case of this kind".

In *Mritunjoy Das v. Sabitrimoni Dasi*[33]*,* however, the earlier view seems to have been adopted.

19. The Patna High Court in AIR 1940 Patna 346 (F. B.) took the view overruling *Prahlad Chandra v. Bhim Mahto*[34]*,* that Order 41 Rule 4 cannot be called in aid to

[19] ILR 25 All 27 and ILR 22 Bom 718 [21] AIR 1929 Calcutta 519
[20] AIR 1928 Calcutta 184 [22] AIR 1933 Madras 655
[23] AIR 1938 Madras 374 [25]53 Ind Cas 548 : (AIR 1919 Cal 410)
[24] ILR 45 All 286 : AIR 1923 All 211 [26]106 Ind Cas 313 : AIR 1928 Lahore 43
[27]9 Cal WN 1061 and AIR 1928 Cal184 [29]59 Cal LJ 318 [31]46 Cal WN 281 [33] AIR 1950 Cal 59
[28] ILR 61 Cal 879 [30]44 Cal WN 141 [32] AIR 1947 Cal 453 [34] AIR 1940 Pat 341

reverse or vary the decree in favor of the plaintiffs or defendants where some of the plaintiffs or defendants die and an abatement takes place by reason of their legal representatives not being brought on record. Harries, C. J. with whom Wort, J., and Manohar Lall, J., concurred, during the course of the judgment pointed out that the words in Order 41 Rule 4 "and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be", suggest that all the plaintiffs or defendants are alive at the time when the decree of the Appellate Court is passed. The wording of the rule in his view is not appropriate to a case where one of the plaintiffs or defendant-appellants had died during the pendency of the appeal. He further points out that a plaintiff or defendant-appellant who has died during the pendency of the appeal can no longer be regarded as a plaintiff or defendant in the suit, and the rule does not state in terms that the decree may be reversed or varied in favor of all the plaintiffs or defendants or their personal representatives or representatives-in-interest. After a review of the cases the learned Chief Justice observed thus :

> "In my judgment, there is nothing in Order 41 Rule 4 C. P. C., which permits the Court to disturb that finality of the decree as against the deceased appellant. To hold that Order 41, Rule 4 C. P. C. applies to a case such as the present one is to hold that a Court can reverse or vary a decree in favor not only of a person who is not before the Court but in favor of a person who is no longer in existence. It appears to me that before a Court can vary a decree in favor of the representatives of the deceased-appellant such representatives must be brought on to the record. The Court could, of course, do so if a rule expressly empowered it; but in my judgment, Order 41 Rule 4 C. P. C. does not give such a power. As I have stated earlier, that the rule is framed on the assumption that all the plaintiffs or defendants in the suit are alive at the date of the passing of the appellate decree, Order 41

Rule 4 cannot override or create an exception to Order 22 Rules 3 and 11, and in the case of one or more appellants dying even where a decree proceeds on a ground common to all, the matter must be governed solely by the provisions of those latter rules. To hold otherwise is to hold that Order 41, Rule 4 C. P. C. gives the Court power to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant. Whether in such circumstances the appeal has or has not abated as a whole will depend upon consideration's other than the provisions of Order 41 Rule 4".\

20. This decision was followed by several High Courts including the Nagpur High Court : Vide *Lilawatibai v. Gangadhar*[35], and earlier cases, *Ramchandra Ramkisan v. Narayanadas Sundarlal*[36], *Ghanaram v. Balbhadrasai*[37], and *Malobi v. Gous Mohamad*[38], Hidayatullah, J., (as he then was) and Choudhuri, J. held at page 121 (of ILR Nag) : \

"Order 41 Rule 4, Code of Civil Procedure, was not meant to negative the

[35] ILR 1953 Nag 116 : AIR 1953 Nag 12 [37] ILR 1938 Nag 370 : AIR 1938 Nag 42

[36] ILR 1937 Nag 423 : AIR 1936 Nag 292

[38] ILR 1948 Nag 509 : AIR 1949 Nagpur 91. In ILR 1953 Nag 116 : AIR 1953 Nag 12

provisions of Order 22. It cannot be said that the failure to make an application under Order 22 can be made good by resorting to Order 41 Rule 4, because to say that would make the provisions of Order 22 otiose in most cases, if not all, in which an appellant dies and no application for substituting his legal representatives has been made within time, or an application for setting aside the abatement has been rejected".

21. A doubt, however, seems to have been expressed about the correctness of the above decisions of the Patna High Court by the same High Court in later decisions. In *Ambika Prasad v. Thakur Prasad*[39], it was held that the decision of the Full Bench in AIR 1940 Patna 346 (FB) was wrong, but however, it would be advisable to maintain the authority of long established decided cases. In *Ram Janki v. Jago Singh*[40] the Full Bench decision was distinguished. But, at any rate, it did not purport to expressly dissent from the Full Bench judgment, as that would not have been permissible for it without a reference to a Fuller Bench. In AIR 1958 Patna 399 Untwalia, J., who spoke for the Division Bench, though ultimately coming to the conclusion that the whole appeal failed following the Full Bench judgment; observed that though on the death of plaintiff or defendant the suit or appeal abates in respect of the deceased person, it does not abate as a whole unless the Court passes an order. The partial abatement does not end up in a decree. It is the order of the Court that the whole appeal abated is that which results in a decree. The view expressed under the old Code which provided for a specific order to be made that the suit or appeal abated against a particular person, had been accepted even subsequently by several High Courts, and, in the view of the learned Judge, though the process of abatement was automatic, it does not operate as a decree. What operates as a decree is the final order in the suit, by which order the suit or appeal is finally disposed of, and having regard to the facts of that case, he came to the conclusion following the Full Bench judgment that the whole appeal has become incompetent and has got to be dismissed on that ground.

22. The Allahabad High Court was taking a similar view as that taken by the Madras High Court : ILR 25 All 27; *Shahzad Singh v. Ram Ugrah Singh*[41], *Abdul Rahman v. Girjesh Bahadur Pal*[42],

Thakur Prasad v. Ram Khelawan[43], and *Mst. Krishna Dei v. Governor-General in Council*[44], But in the Full Bench case of *Baijnath v. Ram Bharose*[45], a contrary view has been taken, which adopted the reasoning of the Full Bench decision in AIR 1940 Patna 346 (FB) holding that whether an appeal has or has not abated as a whole will depend upon considerations other than Order 41 Rule 4.

23. The Lahore High Court in a Full Bench case of *Sant Singh v. Gulab Singh*[46], took the view that the death of one of the respondents does not necessarily result in the abatement of the appeal in its entirety and that it would depend entirely upon the nature of the suit, and if the suit, having regard to its frame and character, could proceed in the absence of the deceased defendant, there is no reason why the appeal should not ordinarily proceed against the surviving respondent or respondents. Sri Shadi Lal, C. J., observed thus (at page 575) :

[39] AIR 1958 Pat399 [41] AIR 1930 All 211 [43] AIR 1944 All 240
[40] AIR 1962 Pat 131 [42] AIR 1938 All 235 [44] AIR 1950 All 1
[45] AIR 1953 All 565 (FB)
[46] AIR 1928 Lah 572 (FB)

> "There is no real difficulty in adopting in the (present case the rule against total abatement, which has the advantage of enabling the Court to adjudicate upon the merits of the case and does not compel it to dismiss it upon a technical ground. The Courts exist for determining the merits of the dispute between litigants, and it is their duty to avoid, if they can legally do so, a result which causes hardship".

Broadway, J., concurred and Tek Chand, J., in a separate judgment agreed that the answer to the reference should be, that on the facts stated the abatement of the appeal against one of the parties does not result in the automatic dismissal of the appeal in its entirety and that it can proceed against the others. Jai Lal, J., while considering the objection that if as a result of the hearing of the appeal the Court set aside the decree of the trial Court and decreed the suit as against B, C and D, the decree so passed would be in fructuous and ineffective, said that it is certainly an answerable objection to the hearing of the appeal as against B, C and D if it can be established that the decree against B, C and D would be in fructuous, because it is a well-recognized rule of law that no Court shall pass an in fructuous and ineffective decree - a decree which it cannot enforce. Agha Haidar, J., also, in a separate judgment, concurred with the answer of the Chief Justice to the reference. But in the later Full Bench case of *Nanak v. Ahmad Ali*[47], the Lahore High Court adopted the view of the Full Bench of the Patna High Court in AIR 1940 Patna 346 (FB).

The High Courts of Assam, Madhya Pradesh, Rajasthan and Orissa have also taken the same view as that of the Full Bench of the Patna High Court in AIR 1940 Patna 346 (FB); *Sonahar Ali v. Mukbul Ali*[48], *Pyarelal v. Modi Sikharchand*[49], *Reghu Sutar v. Nrusingha Nath*[50], *Padmaram v. Surja*[51], and *Ghaki Mal Hukam Chand v. Punjab National Bank*[52], In AIR 1961 Rajasthan 72 Modi, J., sitting singly, has considered the matter in great detail and has accepted the view of the Patna High Court in the Full Bench case. In AIR 1961 Punjab 91 the decision turned on the question of the representation of the estate by the eldest son of a Hindu joint family-firm who, on the death of the father, became automatically the manager or karta of the firm. Dua, J., said at page 96 that

> "although the decision on this point alone is sufficient to overrule the objection raised on

behalf of the respondents, I am also inclined to agree with the contention of the learned counsel for the appellant on the construction placed by him on Order 41 Rule 4 C. P. C. and that it is clearly open to the Court to grant relief to the widow of the deceased although she has not been impleaded within time on the ground that the decree against her and against her sons proceeds on grounds common to all of them".

This was a mere passing observation.

24. We have discussed above cases in support of two views to indicate the force of the cleavage on this aspect of the matter. By and large, the majority view seems to accord with the view we have taken on the respective orders (Order 22 and Order 41)

[47] AIR 1946 Lah 399 (FB) [49] AIR 1957 Mad Pra 89 [51] AIR 1961 Raj72
[48] AIR 1956 Ass 164 [50] AIR 1959 Ori 148 [52] AIR 1961 Pun 91

applying the principles of well-established rules of construction. We have shown that the provisions of Order 22 Rules 3 and 4 are mandatory, that there is nothing to indicate either in this Order or Order 41 that the provisions of Order 22 Rule 3 are to be read subject to any exception of subject to Order 41 Rule 4 that there is no justification for applying the provisions of Order 41, Rule 4 on grounds of analogy or on pari materia considerations when the language of the rule is unambiguous and specific and made expressly applicable to certain contingencies and that Order 41. Rule 4 is merely an enabling provision empowering the Court to exercise the discretion to vary or reverse the decree under appeal which was passed on any ground common to all and that it cannot be interpreted to exceed the scope and ambit of that discretion. To hold that Order 22, Rule 3 does not apply to a case coming under Order 41. Rule 4 would be tantamount to negativing those provisions and making them otiose.

In our view, abatement of suits or appeals as contemplated in the Civil Procedure Code forfeits the rights of a party who is guilty of laches or negligence by visiting him with the penalty of abatement if that party fails to take prompt steps to implead the legal representatives of the deceased party on record so as to effectually adjudicate upon the proceedings. While no doubt the appeal abates only qua the deceased respondent, the question whether partial abatement leads to abatement of the appeal in its entirety, depends upon general principles. In our view, the cases which arose under the Hindu Law or on a set of facts where an estate which is the subject-matter of the litigation is partially represented even after the death of one of the coparceners or joint owners, while holding that the whole appeal or suit does not abate accept the principle that a partial abatement has taken place. In other words, it is on the facts of a particular case or the nature of the litigation that the determination of the question whether the. whole suit has abated or not has to be considered. There is also no doubt that a partial abatement does not by itself abate the whole suit, unless the Court determines that the decree appealed from proceeds on a ground common to all and that in the circumstances the suit or appeal cannot go on and must be declared to have abated as a whole. This is quite a different thing to say that since the Court has to consider the effect of partial abatement it could apply Order 41, Rule 4 on purely analogous grounds. It may, however, be stated that we are only concerned with the question whether the remaining appellants can successfully prosecute this appeal by reason of Order 41, Rule 4, C. P. C. Even in cases where Order 41, Rule 4 does not permit the appellants to continue to prosecute the appeal, it does not follow that the appeals abate as a whole. There may be cases in which, notwithstanding the non-application of Order 41, Rule 4 the appeal does not abate as a whole.

The present reference only poses the question whether Order 41, Rule 4 allows the remaining appellants to prosecute the appeal in cases where a decree proceeds on a ground common to all the plaintiffs or defendants and not with the question whether on other grounds the appeal cannot proceed.

25. In our view, therefore, the reference must be answered in the negative, and it is accordingly so answered.

26. Before we conclude,