

MADHYA PRADESH HIGH COURT

Pyarelal

Vs.

Modi Sikharchand

First Appeal No. 75 of 1950

(Sen and Bhutt, JJ.)

31.12.1956

JUDGMENT

Sen and Bhutt, JJ.

1. This is plaintiffs' appeal against the dismissal of a part of their claim for damages by the 2nd Civil Judge, 1st Class, Sagar, in civil suit No. 11-B of 1947.
2. The suit was instituted by Pyarelal and Pannalal, sons of Jankiprashad, Babulal, and Narayandass and Bhagwandass, sons of Babu Surajdin. They were carrying on business of purchase and sale of grain as partners of a registered firm styled Durga Prashad Ganesh Dass, shortly called Durga Ganesh. They entered into a contract with the defendant on 6-7-1947 for purchase of his stock of linseed at Satna. Out of this stock, a lot of 2500 bags was lying in the godown of the defendants' commission agent, Ramchand Rampratap, which was sold to the plaintiffs F. O. R. Satna at Rs. 44/13/9 per bag of 90 seers net, after packing them in new gunny bags. The lower Court has found that the defendant broke the contract and was liable in damages to the plaintiffs. It has, however, determined the damages at the rate prevailing at Satna, and not at Lillosh (Calcutta) on 28-7-1947 when the contract was broken. In this view, it awarded to the plaintiffs, Rs. 1914/1/- for damages instead of Rs. 9524-9-0 as claimed. This appeal was accordingly filed by the plaintiffs for claiming the balance of Rs. 7610/8/-.
3. During the pendency of the appeal, Pannalal died on 17-2-1954 and his legal

representatives were duly brought on record. Pyarelal meanwhile also died on 17-10-1954. An application for substitution of his legal representatives was filed on 20-1-1955 after the period of limitation. Another application for setting aside the abatement was filed on 25-2-1955. These applications were dismissed by an order of this Court on 28-3-1955, and a Letters Patent appeal from the order was also dismissed on 18-7-1955 in motion hearing. The appeal has thus abated so far as Pyarelal is concerned. The question is if it has abated as a whole.

4.

4. There appears no doubt that the suit is governed by section 45 of the Indian Contract Act, (Act No. IX of 1872), which is reproduced below :

"45. Devolution of joint rights.-When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly."

The plaintiffs were joint promises, and therefore, had a joint right of suit, and consequently of appeal. Accordingly, on the death of one of them, the right to continue the appeal vested jointly in the survivors and the legal representatives of the deceased. In this connection, *Ganeshmull v. Sohanlal*,¹ which was relied upon by the learned counsel for the appellants, has no application as it deals with the case of joint promises and not of joint promises. Therefore, the legal representatives of Pyarelal were necessary parties to the appeal.

5. It was, however, contended that the matter is governed by Order 30, Rule 4 of the Code of Civil Procedure as the plaintiffs were partners, and although they had instituted the suit in their own names, the firm as such was really the plaintiff. This contention was also raised in *Hari Singh v. Karam Chand Kanshi Ram*,² in which it was negatived on the ground that Order 30, Rule 4 of the Code of Civil Procedure did not apply as the suit was not instituted in the name of the firm. Whether or not, this view may be correct, it appears that Order 30, Rule 4 only deals with the form of suits and does not affect the question as to

whether the representative of the deceased (party) was or was not a necessary party to the suit.

6. An attempt was also made to bring the case within the four-corners of O. 41, Rules 4 and 33 of the Code of Civil Procedure. In *Malobi v. Gous Mohmad*,³, it was observed, following *Ramphal Sahu v. Satdeo Jha*,⁴ and *Ghulam Muhammad v. Sherdilkhan*⁵ that Order 41, Rule 4 suggests that the rule was intended to apply to cases where all the plaintiffs or defendants were alive and only one or more of such plaintiffs or defendants had appealed from the decree. In this case *Abdul Rahman v. Girjesh Bahadur Pal*,⁶ was not considered, in which it was observed that in applying Order 41, Rule 4 of the Code of Civil Procedure, there is no essential difference between –

(i) the case where some only of the plaintiffs or defendants, as the case may be, have appealed without impleading the others,

(ii) the case where all the plaintiffs or defendants have appealed and one of them dies and his heirs are not substituted, and

(iii) the case where some only of the plaintiffs have appealed and have impleaded the non-appealing plaintiffs and the pro forma defendants having the same interests as the plaintiffs and one of the non-appealing plaintiffs or pro forma defendants dies and his heirs are not brought on the record.

Similar view was held in *Mt. Krishna Dei v. Governor General in Council*,⁷ and *Halima Khatun v. Sashi Kumar Banik*,⁸ although in the latter case, it was doubted whether the rule would apply to cases where the persons who were not joined were necessary parties to the appeal. It appears to us that where it is impossible to proceed with the appeal in the absence of the legal representatives of the deceased, the appeal abates in toto despite the provisions in Order 41, Rule 4 or R. 33 of the Code of Civil Procedure: See *Mohammad Faruq v. Azizul Hasan*,⁹ and *Dhondo Khando v. Waman Balwant*,¹⁰

7. If another view is held, it would exclude from the Code of Civil Procedure, Order 22, Rule 3. Therefore, while, as held in *Sheo Govind v. Zahur Mohammad*,¹¹ it would not be proper to read Order 41, Rule 4 out of the Code and nullify its effect, it would also not be proper to read it in a manner so as to exclude the operation of Order 22, Rule 3. The two provisions can be reconciled if Order 41, Rule 4, or for the matter of

that, Rule 33, is held to apply only to cases where the legal representatives of the deceased are not necessary parties to the lis. As in the instant case, the legal representatives of the deceased appellant, Pyarelal, were necessary parties to the appeal and were not brought on record in his place, the abatement of the appeal as a whole cannot be saved on the basis of Order 41, Rule 4 or R. 33 of the Code of Civil Procedure.

8. The appeal accordingly is dismissed. There shall, however, be no order as to costs.

Appeal dismissed.

Cases Referred.

1. ILR 1955 Nag 33: AIR 1956 Nag 111
2. ILR 8 Lah 1: AIR 1927 Lah 115
3. ILR 1948 Nag 509: AIR 1949 Nag 91
4. ILR 1940-19 Pat 870 (FB)
5. ILR 1942 Kar 435
6. ILR 1938 All 350: AIR 1938 All 235
7. AIR 1950 All 1
8. AIR 1947 Cal 453
9. AIR 1935 Oudh 329
10. AIR 1945 Bom 126
11. ILR16 Luck 382