

RAJASTHAN HIGH COURT

Gautam Bhawan Nirman Sahkari Samiti Ltd

Vs.

Smt. Ramnik Kumari

S.B. Civil Revision Petition No. 225 of 2003

(Prakash Tatia, J.)

08.09.2003

JUDGMENT

Prakash Tatia, J.

1. Heard learned counsel for the parties.
2. This revision petition is against the order dated 3.12.1997 passed by the learned Additional District Judge No. 3 Jodhpur in Civil Original Suit No. 150/89 by which the trial court allowed the application submitted by the defendant under Order 22 Rule 4(3) C.P.C. and held that the suit of the plaintiff has abated.
3. Brief facts of the case are that the plaintiff filed the suit for specific performance of the contract on 1.5.1985 against the four defendants, namely, Virendra Singh, his wife Ramnik Kumari and son Harendra Singh. Defendant No. 1 Virendra Singh expired on 28.8.1991, upon which the plaintiff submitted an application under Order 22 C.P.C. without mentioning the relevant rule, but obviously it is Rule 4 of the Order 22 Civil Procedure Code with a prayer that the defendants Nos. 2 to 4, who are already party in the suit in their personal capacity, may be taken on record in the capacity of the legal representatives of defendant No. 1 also. The said application was dismissed by the trial court by order dated 27.11.1995 on the ground that the application has been filed after delay.
4. It appears from the facts that before the death of defendant No. 1 Virendra Singh, the suit was dismissed in default on 17.3.1990 which was restored on the application of the plaintiff by order dated 7.8.1993. Since no notice was given to the defendants before restoring the suit, therefore, notice intimating the date of the suit was issued by the court to the defendants which were served upon the non-petitioner defendant on or

about 27.5.1995 as stated by the learned counsel for the non-petitioner. The non-petitioner after two years thereof, on 25.5.1997 submitted an application before the trial court under Order 22 Rule 4(3) C.P.C. stating therein that after the death of defendant No. 1 Virendra Singh, the suit has abated because of the reason that the plaintiff had full knowledge of the death of defendant No. 1, still the plaintiff has not taken steps to bring on record the legal representatives of defendant No. 1. It is relevant to mention here that defendants No. 2 to 4 are also legal representatives of defendant No. 1, is an admitted fact, however, the case of defendants Nos. 2 to 4 non-petitioners is that there are two more sons of the defendant No. 1, namely, Kaushik Singh and Yashwant Singh. They have not been impleaded in this suit as parties despite the fact that after the death of Virendra Singh (defendant No. 1), the mutation has been opened and the name of these two persons are also entered in the revenue record as Katedar tenants of the land in dispute. It is also submitted that the names of the daughters of Virendra Singh were also entered in the revenue record.

5. The trial court, after hearing arguments, allowed the application under Order 22 Rule 4(3) C.P.C. and held that Kaushik Singh and Yashwant Singh are necessary parties. They have not been impleaded in the suit after the death of Virendra Singh, therefore, no effective decree can be passed for specific performance of the contract executed by the defendants, particularly defendant No. 1, and, therefore, the suit stands abated on the death of defendant No. 1 Virendra Singh.

6. The learned counsel for the petitioner vehemently submitted that the court below has committed serious illegality in holding that the suit has abated despite the fact that the estate of the deceased Virendra Singh was fully represented by defendants Nos. 2 to 4, who are not only parties to the agreement for sale of the property in dispute but are natural heirs, wife, son and daughter of Virendra Singh. It is also submitted that there was privity of contract between plaintiff and defendant Nos. 1 to 4 only and there was no privity of contract with Kaushik Singh and Yashwant Singh of the plaintiff, therefore, there was no need to implead them as parties. It is also submitted that the trial Court committed serious illegality in dismissing the application filed by the plaintiff under Order 22 Rule 3 C.P.C. by order dated 27.11.1995 and it is also submitted that even if the dismissal order dated 27.11.1995 remains as it is, still the fact remains is that the some of legal representatives of deceased Virendra Singh are already on record, therefore, they represent the estate of Virendra Singh and the suit cannot be held to be abated as held by the trial court. In the alternative, it is also submitted that suit for specific performance of contract to the extent of share in the

property of defendants Nos. 2 to 4 should not have been dismissed by the trial court.

7. The learned counsel for the petitioners relies upon the judgments of the Hon'ble Supreme Court delivered in the case of *Raghunath Keshava Kharkar v. Ganesh alias Madhukar Balakrishna Kharkar and others* ¹ *Mahaveer Prasad v. Jage Ram and others* ² and *Municipal Board, Lucknow v. Panna Lal Bhargava and others* ³

8. The learned counsel for the non-petitioner has raised preliminary objection about maintainability of the revision petition on the ground that the order under challenge is appealable order and regular first appeal lies against the order. The learned counsel for the non-petitioners relied upon the judgment reported in *Brij Jivan Lal and another v. Shiam Lal and others* ⁴ wherein it has been held that distinction must be drawn between the orders of abatement which are merely orders and those which amount to decrees. As per the said judgment, if the court decides that a suit abated entirely and dismissed it then the order amounts to decree and is appealable. Another judgment relied upon is *Achhar v. Koondi and others* ⁵ wherein it has been held that in case where formal adjudication made by the court determining the right of the appellants to continue the appeal against the surviving respondents, it amounts to a decree and is appealable. Bombay High Court in the case reported in *Anna Tatoba Jadhav and others v. Anna Bhau Chougule and others* ⁶ also held that when court holds that suit did not survive after death of original plaintiff, such an adjudication and final determination of right of the legal representatives amounts to a decree under Section 2(2) of the Civil Procedure Code and appeal is maintainable under Order 41 Rule 1 C.P.C.

9. On merits, according to the learned counsel for the non-petitioners, the plaintiff despite knowing, did not take any step to bring on record the legal representatives of deceased defendant No. 1 Virendra Singh, therefore, with the death of Virendra Singh, the suit abated so far as Virendra Singh is concerned. Since the property is jointly owned, therefore, no separable decree can be passed, consequently, the suit abated as a whole. It is also submitted that even if there was any chance of survival of the suit, it has come to an end when the trial court dismissed the application of the plaintiff filed under Order 22 Rule 3 C.P.C. for seeking relief of impleading defendants No. 2 to 4 in the capacity of legal representatives of deceased Virendra Singh in addition to their personal capacity in which they are already on record. After rejection of the application by the trial court by order dated 27.11.1995, the defendants cannot be said to be represented the estate of deceased Virendra Singh. The learned counsel for the non-petitioners also submits that even in case where some of the defendants are

already on record and the plaintiff deliberately did not choose to bring on record the remaining legal representatives then also the suit abates against the deceased defendant. The learned counsel for the non-petitioners relied upon the judgments of the Hon'ble Supreme Court reported in *Mukhtiar Singh and another v. Kishan Kaur (Smt.) and others* ⁷ *Municipal Council, Mandsaur v. Fakirchand and another* ⁸ . The learned counsel for the petitioner relied upon the judgment of the Patna High Court reported in *Ajit Kumar Singh v. Dinesh Prasad Singh & ors.*, ⁹

10. I considered the rival submissions. First of all, it is to be seen whether the impugned order passed by the trial court dated 3.12.1997 is appealable or does revision lie against this order. The order under challenge was passed on the application filed by the non-petitioners under Order 22 Rule 4(3) Civil Procedure Code. Admittedly, there is no provision in Order 43 of the Civil Procedure Code permits appeal against the order passed on application under Order 22 Rule 4(3), Civil Procedure Code. Only provision available in the Order 43 dealing with the subject of abatement is the sub-clause (k) of Rule 1 of Order 43 which only provides that an order under Rule 9 of Order 43 C.P.C. refusing to set aside the abatement or dismissal of a suit shall be appealable order. It is not in dispute that if order is not appealable, it can be challenged by way of filing revision petition, Hon'ble the Supreme Court in the case of *Madan Naik (dead by LRs.) and others v. Mst. Hansubala Devi & ors.* ¹⁰ held that when appeal abates, there is no decree and, therefore, (in that case) second appeal is incompetent. The facts of the above case are relevant. In above case, Hon'ble the Supreme Court referred the facts in Para No. 4 of which are as under :-

"4. Plaintiffs succeeded in the trial Court. Defendants preferred first appeal in the court of Sub-Judge, Hazaribagh. In fact, when the appeal was pending in the first appellate court, the first respondent filed (died ?) on July 10, 1955. No one brought this fact to the notice of the Court and the learned Judge disposed of the appeal on September 24, 1955. The appeal by the defendants was dismissed and the decree of the trial court was confirmed. When the matter was before the High Court at the instance of the defendants, in the second appeal, the defendants-appellants before the High Court became wise to the fact that the 1st respondent in the first appellate court had died, At that stage, an application for substitution accompanied by an application for condoning the delay in making the application and praying for setting aside the abatement of the appeal was moved, by the defendants-appellants. A learned single Judge of the High Court accordingly allowed the second appeal on the narrow ground that the

application merits consideration by the first appellate court and remitted the matter to the first appellate court with a direction to decide the application for substitution in accordance with law. The first appellate court did not accept the submission of the defendants-appellants that they were prevented by sufficient cause from moving the application for substitution in time and accordingly declined to condone the delay and rejected the application for substitution as time-barred and disposed of the appeal as having abated a whole. So far there is not difficulty. But the Court drew up a decree showing appeal having been dismissed on merits."

11. Hon'ble the Supreme Court observed that Order 22 Rule 11 C.P.C. read with Order 22 Rule 4 C.P.C. makes it obligatory to seek substitution of heirs and legal representatives of deceased if the right to sue survives. Such substitution has to be sought within the time prescribed by law of limitation. If no substitution is sought, the appeal (or suit) will abate. Sub-rule (2) of Rule 9 of Order 22, C.P.C. enables the parties, who is under obligation to seek substitution to apply for setting aside the abatement, upon which the court may set aside the abatement. If the court feels not satisfied by the reasons disclosed by the applicant for not moving the application within time, the court may refuse to set aside the abatement resulting into disposal of the suit having abated. Hon'ble the Supreme Court further held that no specific order is envisaged under Order 22 and abatements take place on its own force by passage of time. It is also held in para 5 of the said judgment that in fact specific order is necessary under Order 22 Rule 9 C.P.C., for setting aside the abatement. Hon'ble the Supreme Court in para No. 8 observed that :-

"If abatement implied adjudication on merits, Section 11, C.P.C. would be attracted. Abatement of an appeal does not imply adjudication on merits and hence a specific provision has to be made in Order 22 Rule 9(1) C.P.C. that no fresh suit could be brought on the same cause of action."

12. Hon'ble the Supreme Court, thereafter, held as under :-

"Therefore, when the appeal abated, there was no decree disposing of the first appeal, only course open is to move the court for setting aside abatement. An order under Order 22 Rule 9(2) C.P.C. refusing to set aside the abatement is specifically appealable under Order 43 Rule 1(k). Such adjudication, if it can be so styled would not be a decree as defined in Section 2(2) C.P.C."

13. Hon'ble the Supreme Court thereafter made it absolutely clear that an order under

Order 22 Rule 9 C.P.C., appealable as an order, would not be a decree and, therefore, no second appeal (as it was a case of abatement of first appeal) would lie against that order. Such an appeal is liable to be rejected as incompetent. In view of the law laid down by the Hon'ble Supreme Court, now it is settled that even order passed after adjudication whether the suit has abated or not, it cannot be treated as decree as defined under Section 2(2) C.P.C. and no regular appeal lies against the said order. In view of the above, the contention of the learned counsel for the non-petitioner that the order under challenge though passed on application filed by the defendant and not on any application filed by the plaintiff, that too under Order 22 Rule 4(3) C.P.C., and not under Rule 9 of Order 22 C.P.C. the order under challenge is appealable, has no force in view of the judgment of Hon'ble Supreme Court in the case of Madan Naik (supra).

14. The contention of the learned counsel for the non-petitioners is that distinction is required to be sought between the orders, one by which the court only holds the suit abated and other order where the court adjudicates about devolution of interest and decided that the suit has abated, it amounts to decree and cannot be treated as an order at par with the order where there is an order of abatement of the suit simplicitor. The thrust of the argument is on "adjudication of abatement", "or adjudication of survivals or devolution of interest" and mere holding of abatement of the suit". The argument of the learned counsel for the non-petitioners appears to be on the basis of the reasons given in the judgments of the Patna High Court in the cases of Brij Jivan Lal (supra), Achhar (supra), Anna Tatoba Jadhav (supra), and in the case of Ajit Kumar Singh. The distinction projected gives an impression that court if after hearing objection and claims of the parties to suit or after hearing the legal representatives passes then determines rights of the parties but if court passes an "order simplicitor", it does not decides rights of the parties. The argument ignored the basic principle of law that the orders of the court are not passed as "mere order". If the argument as advanced by learned counsel is accepted then it will result into holding that in cases where plaintiff concedes or court found that steps have not been taken by the plaintiff to bring on record the legal representatives of any party to suit, the court can declare abated without finding whether right to sue survives upon any one or not and whether suit can proceed without impleading the legal representatives or not. The legal position is otherwise, Order 22 Rule 1 Civil Procedure Code says that suit shall not abate if the right to sue survives, meaning thereby court can declare the suit abated in two situations, one when right to sue not survives and second, as per sub-rule (2) of the Rule 3 or Order 22 Civil Procedure Code applicable in the case of death of the plaintiff and in case of death of defendant as per sub-rule (3) of Rule 4 of Order 22

Civil Procedure Code, no step is taken within time allowed for bringing legal representatives of the deceased. Order of the court only declares that suit abated, either by detailed order or by short order, either after determination of allegations and objections or without contest, it is order only under Order 22 Civil Procedure Code.

15. When the Hon'ble Supreme Court held that adjudication about the abatement of the suit under Order 22 Rule 9 C.P.C. cannot be treated as decree as defined in Section 2(2), C.P.C. then how an adjudication on the application of the defendant under Order 22 Rule 4(3) C.P.C. can be treated as decree, has not been explained by the learned counsel for the non-petitioners. I do not find any reason for holding that such an adjudication about the devolution of interest or survival of the cause of action after the death of the plaintiff in the suit, can be treated as adjudication of any controversy in the suit on subject matter of the suit. The nature of proceeding under Order 22 Rule 9 C.P.C. are taken up on the application of the plaintiff after the abatement takes place. After the suit having abated, the court is called upon to look into the facts which prevented the applicant from moving application within time for bringing legal representatives of the defendants or the plaintiff, as the case may be. It can be said that the proceeding under Order 22 Rule 9 C.P.C. so far as it relates to the deceased and his heirs, it is a proceeding after the end of the suit by abatement without determination of rights of the parties with regard to the subject matter in controversy in the suit and, therefore, any adjudication on application under Order 22 Rule 9 C.P.C. is not treated as adjudication of the rights of the parties so as to make it decree in the suit and, therefore, also cannot be *res judicata* under Section 11 C.P.C. and, therefore, since it is not the decree, hence, not appealable as decree, therefore, a specific provisions has been made under Order 43 Rule 1(k) C.P.C. to make the order appealable and also it required framing of the sub-rule (1) of Rule 9 of Order 22 C.P.C. in a manner so that though, after abatement of the suit, the suit is not barred by principles of *res judicata*, still no fresh suit is maintainable on the same cause of action.

16. Net result of above discussion is that the order passed, holding that the suit abated by saying "simplicitor" that suit has abated or by the order of the court that right of the suit does not survive in the applicant or it has not devolved upon any person after the death of defendant or plaintiff or any order passed on application filed by the defendant pointing out that the suit has abated or an order passed by the court *suo motu*, after getting information about the death of parties to the suit, the nature of the order remains the same and it only determines the point whether the suit has abated or

not. The result of abatement of the suit is the same in all above contingencies. Once the court comes to the conclusion that the suit abated due to death of any party or it has abated against any of the parties, who expired, then is a declaration of the abatement of the suit and which has taken place resulting into disposal of the suit by abatement. The date of order is not relevant for abatement though passed in the suit but date of abatement is the death of the party.

17. So far as the judgment of the Hon'ble Supreme Court delivered in the case of Madan Naik's case (AIR 1983 Supreme Court 673 supra) that case further fully supports the petitioner and also does not convey by any point for declaring abatement of suit or appeal. In that case there was an application for setting aside of the abatement filed by the plaintiff upon which the order was passed. Therefore, the Hon'ble Supreme Court held that the order passed was appealable obviously as per the provisions of Order 43 Rule 1(k) Civil Procedure Code and not as decree. Apart from it Rule (1) of Order 43 read with Section 104 C.P.C. makes it clear that appeal is permissible only in case where appeal is expressly provided by the Civil Procedure Code itself or by any law which is in force and, therefore, when there is no provision for filing appeal against the order passed under Order 22 Rule 4(3) C.P.C. in the Order 43 Rule 1 C.P.C. then no miscellaneous appeal is also maintainable.

18. Here is not end of the controversy involved in this revision petition. Here in this case, the plaintiff admittedly has not moved any application for setting aside of the abatement after the death of one of the defendant Virendra Singh. The case of the plaintiff in reply to objection raised by the defendant by moving application under Order 22 Rule 4(3) Civil Procedure Code is that, the suit has not abated. Suit was going on even after death of defendant No. 1 Virendra Singh on 28.8.1991. The trial court even after rejection of the application filed by the plaintiff under Order 22 Rule 4 Civil Procedure Code for treating the defendants No. 2 to 4 as in the capacity of legal representative of deceased Virendra Singh also, the suit was not dismissed by the trial court, when the defendant raises objection by filling application under Order 22 Rule 4(3) Civil Procedure Code then question arose for determination before the trial court was whether due to the death of Virendra Singh defendant No. 1, the suit has abated or not. There was no point involved for setting aside of the abatement of the suit before the court below. The trial court could have passed the order holding the suit has abated as held by the court by the impugned order or the court could have held that the suit has not abated. Both the orders do not determine any of the right of any of the party with respects to the subject matter involved in the suit. The order is

admittedly not appealable as per any of the provisions of the Order 43 Civil Procedure Code. Therefore, in these circumstances, the appeal was not maintainable against the impugned order.

19. Coming on the merits, it is clear from the facts of the case mentioned above that the plaintiff filed the suit for specific performance of the contract against four defendants. Admittedly, defendants Nos. 2 to 4 are legal representatives and successors of defendant No. 1. They are already on record. The Hon'ble Supreme Court in the case of *Daya Ram and others v. Shyam Sundari & others*¹¹ *Mahabir Prasad v. Jage Ram and others* (AIR 1971 Supreme Court 742) (supra) and *Municipal Board, Lucknow v. Pannalal Bhargava and others* (AIR 1976 Supreme Court 1091) (supra) has held that if any or some of the legal representatives of the deceased, though in different capacity, is already on record then the suit does not abate even if no application to bring said legal representative on record is moved. This view was followed by this Court also as the law laid down by the Hon'ble Supreme Court is final and binding upon this Court. It will be relevant to mention here that Hon'ble Supreme Court in another case held that the theory of sufficient representation of the estate is not dependent upon the personal law of the parties and it applies in all cases even where death is of a Mohammedan.

20. Faced with this situation, the learned counsel for the non-petitioners tried to submit that the plaintiff's application under Order 22 Rule 3 C.P.C. filed after inordinate delay for bringing on record defendants Nos. 2 to 4 as legal representatives of defendant No. 1, has been rejected by the trial court by order dated 27.11.1995, therefore, defendants Nos. 2 to 4 are not on record representing the estate of defendant No. 1. Advancing this argument further, the learned counsel for the non-petitioners relied upon the various judgments of the Hon'ble Supreme Court. One of the judgments is delivered in the cases of *Municipal Council Mandsaur v. Fakirchand and Anr* ,¹² wherein the Hon'ble Supreme Court held that when suit for permanent injunction filed by three brothers as co-owners of the joint family property against the Municipal Council was decreed and during pendency of appeal, one of the three brothers died, heirs of deceased not brought on record despite knowledge and it was found from the suit that all the co-owners intended to exercise their right as co-owners and they had not authorized any of them to represent the property as a Karta of joint Hindu Family. Therefore, the court below rightly held that appeal abated. The said judgment has no application to the facts of this case simply because of the reason that brothers cannot be treated and were not treated as one or some of the legal

representatives of the deceased plaintiff. It appears from the fact that there was no other legal heir on record and the Hon'ble Supreme Court finding that even if theory of sufficient representation is extended to joint family, Karta might have represented the estate. It is nobody's case that the suit cannot abate simply because brothers or some relations are on record as co-plaintiff or as co-defendant as the case may be. Among the brothers, one may be Karta Khandan of the joint Hindu Family but Hon'ble the Supreme Court held that none of the plaintiff is Karta of Joint Hindu Family property. Therefore, this judgment cannot be said to be a judgment laying down that even if one or some of the legal representatives are on record, still the suit can be declared as abated.

21. Another judgment is delivered by the Hon'ble Supreme Court in the case of *Mukhtiar Singh and another v. Kishan Kaur (Smt.) and others*¹³ In this case, the suit was filed by the plaintiffs on the basis of a Will dated 14.3.1968 executed by one Kishan Singh. The suit was for declaration of title and injunction and in the alternative for possession in respect of the lands belonging to said Kishan Singh. It appears that the suit was filed after the death of Kishan Singh. The defendants in the suit were the natural heirs of Kishan Singh in whose favor mutation has been made in the revenue records. During the pendency of the suit one of the defendants Lal Singh died on 14.4.1974. The appellants moved application for setting aside abatement and for bringing on record the legal representatives of Lal Singh in the trial court on 10.10.1974. The Sub-Judge, Zira disposed of the application by order dated 3.6.1976 holding that there is no question of abatement of the proceeding in the case inasmuch as the suit could proceed as far as other defendants were concerned. A revision against the said order was filed by the legal representatives of deceased Lal Singh as well as some other defendants and the same was allowed by the High Court after holding that after the death of Kishan Singh, mutation has been made jointly in the names of all the defendants as heirs of Kishan Singh and that the said mutation order could not be split up, therefore, the suit could not proceed as against the other defendants and should be treated to have abated as a whole. The said order of the High Court was affirmed by the hon'ble Supreme Court.

22. The facts referred above itself completely distinguish the case in hand. In the said case of Mukhtiar Singh, this was not the case of the plaintiff that any one of the defendants is also legal representatives of the deceased Lal Singh and represents the estate of deceased Lal Singh. The suit was for declaration of title and also for the possession of the land in dispute. The unity in title cannot make the co-owner, a legal

heir of other co-owners unless there are reasons available. When there was no question of representation of estate of Lal Singh by other defendants in the case of Mukhtiar Singh, referred above, then it also has no application to the facts of the present case. It appears that the court below found similarity of fact of this case from the fact of mutation in favor of successors of deceased Lal Singh and in this case also mutation has been in favor of other legal heirs of Virendra Singh. The trial court ignored that mutation or even entry of names in revenue record during the pendency of the suit is of not much consequence in the fact of this case and in the case referred above, the mutation must have opened before filing of suit as the basis of suit was the Will of Kishan Singh, ancestor of even Lal Singh.

23. It will be worthwhile to mention here that in the case of *Ajit Kumar Singh v. Dinesh Prasad Singh & ors. the Patna High Court*,¹⁴ after finding that omission to bring on record the legal representatives of the respondent by the appellant is a deliberate omission amounting to *mala fide* act on the part of the appellant, held that the appeal was rightly declared abated. So far as the *bona fides* of the plaintiff is concerned, it will be relevant to mention here that if the plaintiff, under impression that the other legal representatives of defendant No. 1, like defendants Nos. 2 to 4 are the legal heirs of defendant No. 1 and suit can proceed because of their presence as defendant Nos. 2 to 4 in the suit and this stand is having support of the earlier judgments of the Hon'ble Supreme Court and of this court providing that suit can proceed even after death of one of the defendants, if one or some of the legal representatives are on record, though in different capacity, the plaintiff's *bona fides* cannot be doubted the consequence of dismissal of the application filed by the plaintiff under Order 22 Rule 4 C.P.C. by the trial court by order dated 27.11.1995 is only that the trial court refused to entertain the application of the plaintiff on the ground of delay only. The consequence cannot be worst than not moving application for treating defendants Nos. 2 to 4 as legal representatives of defendant No. 1. The consequence of the said order dated 27.11.1995 cannot make the legal representatives of defendant No. 1 already on record as not the legal representatives of defendant No. 1 on record.

24. The submission of the learned counsel for the non-petitioners is that defendants Nos. 2 to 4 never submitted application or disclosed that they are representing the estate of deceased Virendra Singh or they are representing the interest of the other legal heirs of the deceased Virendra Singh, therefore, it cannot be held that the defendants Nos. 2 to 4 are representing the estate of the deceased Virendra Singh completely. After the dismissal of the application under Order 22 Rule 3 C.P.C. by

order dated 27.11.1995, the defendants Nos. 2 to 4 are party in the suit in their own individual capacity and not as the legal heirs and representatives of the deceased Virendra Singh. The learned counsel for the non-petitioners also relied upon the judgment in the case of *Mahaveer Prasad v. Jage Ram and others* (AIR 1971 Supreme Court 742) (supra) and submits that it is necessary that such legal representatives of deceased should file an application that he is also on record as an heir and legal representatives of the deceased.

25. I do not find any force in the submission of the learned counsel for the non-petitioners. The trial court itself did not choose to dismiss the suit of the plaintiff as abated even after dismissing the application filed by the plaintiff under Order 2 Rule 4 C.P.C. by order dated 27.11.1995. Admittedly defendant No. 1 Virendra Singh expired on 28.8.1991. The notice of the date of the suit was served upon the defendant on 27.5.1995 after restoration of the suit which was dismissed in default on 17.3.1990. The defendant No. 3 submitted application before the trial court under Order 22 Rule 4(3) C.P.C. on 22.5.1997 after almost about two years of service of the notice upon the defendant. Though it is true that abatement was not dependent upon the moving of the application by the defendants and it is also true that no order of the court is required declaring the abatement of the suit and abatement takes place in accordance with the law automatically and the pendency of the suit itself or not moving application by the defendants pointing out that the suit has abated, may not have much relevance, but to find out the conduct of the parties, it may be relevant. The abatement of the suit precludes the plaintiff from instituting the fresh suit on the same cause of action and is a serious matter. When the other legal representatives of defendant No. 1 were already on record and Hon'ble the Supreme Court in various judgments held that the suit cannot abate in case when one or some of the legal representatives of deceased are already on record though in different capacity, therefore, in this case also, even if it is held that the defendants Nos. 2 to 4 are on record in the suit in different capacity, still they represent the estate of the deceased Virendra Singh, therefore, the learned first appellate court has committed illegality in holding that the suit has abated.

26. There is no force in the submission of the learned counsel for the non-petitioners that in the case of *Mahaveer Prasad* (supra), Hon'ble the Supreme Court has held directly or indirectly that moving an application by the legal representatives of deceased that they are on record as heirs and legal representatives of the deceased is necessary. In the said case, Hon'ble the Supreme Court set aside the order of the High Court by which the High Court dismissed the appeal as abated because the heirs and

legal representative Saroj Devi were not brought on record within limitation. The Hon'ble Supreme Court even after observing that where in a proceeding the party dies and one of the legal representatives is already on record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on record as an heir and legal representative, held that even if there are no heirs and legal representatives and no application for impleading them is made within period of limitation, prescribed by the Limitation Act, the proceeding will not abate, if anyone of the heirs is already on record. In the said case of Mahaveer Prasad also, an application appears to have been filed for bringing legal representatives of deceased Saroj Devi and the Hon'ble Supreme Court held that even if there is no application of impleading legal representatives, still the appeal cannot abate.

27. The result is that the order under challenge cannot be allowed to stand. Hence, the revision petition of the petitioner is allowed and the order of the trial court dated 3.12.1997 is set aside. No order as to costs.

Revision allowed.

Cases Referred.

1. (AIR 1964 SC 234)
2. (AIR 1971 SC 742)
3. (AIR 1976 SC 1091)
4. (AIR 1950 All 57)
5. (AIR 1958 Jammu and Kashmir 53)
6. (AIR 1982 Bom 174)
7. (1996(7) SCC 299)
8. 1997(2) RCR (Civil) 279 (SC): (1997(1) CCC 408 (SC))
9. (1992(3) CCC 146 (Patna))
10. (AIR 1983 SC 676)
11. (AIR 1965 SC 1049)
12. 1997(2) RCR (Civil) 279 (SC): (1997(1) CCC 408 (SC))
13. (1996(7) SCC 299)
14. (1992(3) CCC 146)