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PANDIT SRI CHAND AND ORS.

v.

M/S. JAGDISH PARSHAD KISHAN CHAND AND ORS.

February 4, 1966

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[J. C. SHAH, S. M. SIKRI AND V. RAMASAWAMI, JJ.]

Code of Civil Procedure (Act V of 1908), O. 41 r. 4—Abatement of Appeal with respect to one appellant—When operates as abatement of entire appeal—Supreme Court Rules, 1950, O. 16 r. 14.

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The 1st respondent filed a suit against the 2nd respondent for recovery of money and in pursuance of an order of the Court directing the 2nd respondent to furnish security for satisfaction of the decree that may be passed against him, the three appellants and two others stood sureties agreeing jointly and severally to satisfy the decree. After the suit was decreed the first respondent applied for execution of the decree against the sureties. The sureties raised the pleas that the surety bond was not enforceable because it was not registered, and that the decree holder had committed acts by which the remedy of the sureties against judgment debtor was impaired, but the pleas were negatived by the executing court and the High Court. After the three appellants preferred an appeal to this Court, one of them died and since his legal representatives was not brought on record, the appeal abated, as far as he was concerned.

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On the question whether the appeal in so far as the other two appellants were concerned also abated,

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HELD : Applications to bring on record legal representatives of a deceased appellant or respondent were governed by O, 16, r. 14 of the Supreme Court Rules, 1950, and the rule applied to all classes of appeals including appeals arising from orders in execution. Because the representatives of the deceased appellant were not brought on record within the time permitted by the rule and the delay in filing the petition to bring the representatives on record was not condoned, the appeal of the deceased appellant abated. Since the Liability of the sureties was joint and several, if this Court proceeds with the appeal of the other two sureties and holds that the High Court was in error in rejecting their contentions, there would be two inconsistent orders—one passed by the High Court holding that the surety bond was enforceable, and the other—of this Court that it was not enforceable. Therefore, the appeal must be held to have abated in its entirety. [454 D; 456 B; 457 B]

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State of Punjab v. Nathu Ram, [1962] 2 S.C.R. 636 and *Rameshwar Prasad and others v. Shanbehari Lal*, [1964] 3 S.C.R. 549, followed.

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CIVIL APPLATE JURISDICTION : Civil Appeal No. 425 of 1963.

Appeal by special leave from the judgment and order dated April 14, 1960 of the Punjab High Court (Circuit Bench at Delhi) in L.P.A. No. 17-D of 1960.

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Gopal Singh and Amar Singh, for appellant No. 1.

J. M. Lal, E. C. Agarwala and P. C. Agarwala, for appellant No. 3.

Bishan Narain, K. Rajendra Chaudhury and K. R. Chaudhury,
for respondent No. 1. A

Mohan Behari Lal, for respondent No. 3.

S. K. Mehta and K. L. Mehta, for respondent No. 4.

The Judgment of the Court was delivered by

Shah, J. Messrs Jagdish Pershad Kishan Chand—hereinafter called 'the first respondent'—commenced suit No. 265 of 1952 in the Court of the Senior Subordinate Judge, Delhi, against the second respondent for a decree for possession of goods hypothecated to them by Messrs. Mudgal Motors Ltd.,—second respondent in this appeal. The first respondent filed another suit No. 43 of 1952 for a decree for Rs. 42,914/10/- being the amount due at the foot of the hypothecation account, and for sale of the goods in satisfaction of the amount due. The two suits were consolidated for trial. In suit No. 43 of 1952 the first respondent applied for appointment of a receiver and the Court directed the second respondent to furnish security in the sum of Rs. 50,000/-. Pursuant to this order five persons stood sureties for satisfaction of the decree. It was recited in the surety bond dated April 21, 1953, that the five sureties mortgaged the properties specified in the Schedule annexed thereto and jointly and severally agreed that if any decree was passed against the second respondent they shall comply with the same and in default the amount payable under the decree but not exceeding Rs. 50,000/- shall be realized from the properties mortgaged. This surety bond was not registered. Out of the five sureties, Sri Chand, Basant Lal and Debi Ram are appellants in this appeal. B C D E

On January 14, 1955, the second respondent was ordered to be wound up in a petition presented by the first respondent to the District Court, Delhi. Suit No. 265 of 1952 was thereafter withdrawn and in suit No. 43 of 1952 a decree was passed against the second respondent for Rs. 42,914/10/- with costs and future interest at six per cent per annum. The first respondent then applied to execute the decree against the sureties. The sureties objected to the execution of the decree against them on the grounds, *inter alia*, that the surety bond not being registered as required by law, the application for execution must fail, and that since the first respondent had committed acts by which the remedy of the sureties against the second respondent had been impaired the sureties stood discharged. The Commercial Subordinate Judge, First Class, Delhi, rejected the objections raised by the sureties, and the order of the Subordinate Judge was confirmed by Grover, J., in appeal to the High Court of Judicature, Punjab. Appeals against the order of Grover, J., under the letters patent of the High Court were dismissed *in limine*. With special leave granted on August 12, F G H

A 1962, Sri Chand, Basant Lal and Debi Ram—three of the sureties—have appealed to this Court.

Basant Lal, one of the appellants died on October 18, 1962. As he died before the record of the appeal was transmitted to this Court, his heirs and legal representatives applied on July 24, 1963, to the High Court for an order under O. 16, r. 12 of the Supreme Court Rules, 1950, certifying that they were proper parties to be impleaded as legal representatives on the record of the appeal. They also applied for condonation of delay in moving the application. The High Court held that there was no adequate explanation justifying an order condoning the delay in making the application for bringing the heirs on record and accordingly the application for condonation of delay and the application for certifying the heirs were dismissed. A petition submitted to this Court for impleading the heirs and legal representatives in the appeal was also dismissed by an order made in chamber on February 9, 1965. Thereafter a petition was filed on May 7, 1965 for special leave to appeal against the order passed by the High Court refusing to bring on record the legal representatives of Basant Lal. By order dated January 20, 1966 we have rejected this petition.

Counsel for the first respondent contended that the appeal had abated in its entirety because the heirs of Basant Lal had not been brought on record, and the ground on which the judgment of the High Court proceeded was common to all the sureties. In our view this objection must be upheld. The appeal of Basant Lal has abated since the legal representatives to his estate have not been impleaded and the record of the appeal is defective. That is not denied by the appellants. But it is urged that this Court is competent to set aside an order of the High Court in its entirety on the ground that it is not sustainable in law and in any event to set aside the order in so far as it affects the claim of appellants 1 & 3 and the third respondent. Support was sought to be derived for the first contention from O. 41, r. 4 of the Code of Civil Procedure and it was urged that even if the decree be assumed to have proceeded on a ground common to all the sureties, it is open to any one or more of the sureties to appeal from the order and the appellate Court may reverse or vary the decree in favour of all the sureties. This plea stands refuted by the judgment of this Court in *Remeshwar Prasad and Others v. Shambahari Lal Jagannath and another.*⁽¹⁾ It was held by this Court in *Rameshwar Prasad's case* (1) that an appellate Court has no power to proceed with an appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under O. 41, r. 4 when the decree proceeds on a ground common to all the plaintiffs or defendants, if all the plaintiffs or the defendants appeal from the decree and any of them dies and the appeal abates so far as he is concerned.

(1) [1964] 3 S.C.R. 549.

The two principal pleas raised before Grover, J., were that the surety bond was not enforceable because it was not registered and that the decree-holders had committed an act by which the remedy of the sureties against the judgment-debtor had been impaired and therefore the sureties stood discharged. The learned Judge negatived both the pleas. The decision of the Court obviously proceeded on grounds which were common to all the sureties.

Basant Lal died after the order of the High Court under appeal. He had preferred an appeal, but since the legal representatives to his estate have not been brought on record, his appeal has abated. The order of the High Court holding that the sureties are liable to satisfy the claim notwithstanding the objections raised by Basant Lal has become final. In the appeal filed by the appellants 1 & 3 if this Court holds that the High Court was in error in deciding that the surety bond was not enforceable because it was not registered, or that the first respondent has done some act which has discharged the sureties from liability under the bond, there would unquestionably be two inconsistent orders—one passed by the High Court holding that the surety bond was enforceable, and the other, the view of this Court that it is not enforceable.

This Court has on more occasions than one considered whether in circumstances similar to these, an appeal should stand abated in its entirety. In the *State of Punjab v. Nathu Ram* (1) this Court explained the tests applicable in considering whether an appeal abates in its entirety when it has abated *qua* one of the respondents. The headnote of the case reads :

"If the Court can deal with the matter in controversy so far as regards the rights and interest of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it : otherwise it will have to refuse to proceed further with the appeal and therefore dismiss it. Ordinarily, the consideration which will weigh with the court in deciding upon the question whether the entire appeal had abated or not will be whether the appeal between the appellants and the respondents other than the deceased respondent can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the court and the tests to determine this have been described thus : (a) when the success of the appeal may lead to the court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's

(1) [1962] 2 S.C.R. 636.

A passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the
 B decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed.

The abatement of an appeal against the deceased respondent means not only that the decree between the appellant and the deceased respondent has become final, but
 C also as a necessary corollary that the appellate court cannot in any way modify that decree directly or indirectly.

When the decree in favour of the respondents is joint and indivisible, the appeal against the respondents, other than the deceased respondent cannot be proceeded with if the appeal against the deceased respondent has
 D abated."

The principle of this judgment was affirmed in *Rameshwar Prasad's case* (1) and later in an unreported judgment in *Kishan Singh and others v. Nidhan Singh and others* (2). It may be pointed out that the three tests suggested by Raghubar Dayal, J., in *Nathu Ram's case* (3) are not cumulative tests. Even if one of them is satisfied, the Court may, having regard to all the circumstances, hold
 E that the appeal has abated in its entirety.

But counsel for the appellants has contended that the rules laid down by this Court in *Nathu Ram's case* (3) and other cases has no application to this appeal, firstly, because this appeal arises from an order in execution proceeding and rules as to abatement
 F by the express provision contained in O-22, r. 12 Code of Civil Procedure have no application to appeals in an execution proceeding, and secondly, that in cases in which the order or decree appealed against gives rise to a liability which is joint and several it is open to one of the persons declared so liable to prosecute an appeal in so far as he is concerned, notwithstanding abatement
 G of the appeal of a co-obligee. Order 22, r. 12 of the Code of Civil Procedure provides that nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order. On the true interpretation of this rule there is conflict of opinion in the High Courts. In some cases the view has prevailed that appeals from orders in execution proceedings are not subject to rules 3, 4 and 8 of O-22.
 H Code of Civil Procedure and failure to implead heirs and legal

(1) [1964] 3 S.C.R. 549.

(2) C.A. 563 of 1963 decided on Dec. 14, 1964.

(3) [1962] 2 S.C.R. 636

representatives of a deceased party in such an appeal will not be visited by an order of abatement. In other cases it has been held that an appeal against an order in execution is not "a proceeding in execution of a decree" and that such an appeal will abate if the heirs are not brought on record within the period of limitation, and that r. 12 has no application to appeals. In this appeal it is not necessary to resolve this conflict, for, appeals to this Court are governed by the rules contained in O.16 of the Supreme Court Rules, 1950, and by r. 14 thereof it is provided :

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"An application to bring on record the legal representative of a deceased appellant or respondent shall be made within ninety days of the death of the said appellant or respondent :

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Provided that in computing the said period the time taken in obtaining a certificate from the High Court shall be excluded."

The rule is explicit and makes no exemption in favour of any class of appeals. It is true that r. 14-A of O 16 of the Supreme Court Rules, 1950, provides that :

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"The provisions of Order XXII of the Code relating to abatement and of Article 171 in the First Schedule to the Indian Limitation Act, 1908 (IX of 1908), shall, so far as may be applicable, apply to appeals and proceedings under rule 12 and rule 13 in the High Court and in the Supreme Court."

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and thereby the provisions of O. 22 relating to abatement of appeals are attracted. But there is no warrant for holding that any class of appeals filed in this Court is exempt from the operation of r. 14.

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Liability of the sureties is under the law joint and several. If a creditor seeks to enforce the surety bond against some only of the joint sureties, the other sureties will not on that account be discharged : nor will release by the creditor of one of them discharge the other : *vide* ss. 137 & 138 of the Contract Act. But the fact that the surety bond is enforceable against each surety severally, and that it is open to the creditor to release one or more of the joint sureties, does not alter the true character of an adjudication of the Court when proceedings are commenced to enforce the covenants of the bond against all the sureties. We are not concerned in this appeal with the privilege which a creditor may exercise, but with the effect of an adjudication which the Court has made in a proceeding to enforce the covenant of the bond. The mere fact that the obligation arising under a covenant may be enforced severally against all the covenantors does not make

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A the liability of each covenantor distinct. It is true that in enforcement of the claim of the decree-holder the properties belonging to the sureties individually may be sold separately. But that is because the properties are separately owned and not because the liability arises under distinct transactions.

B It must therefore be held that the appeal has abated, because the representatives of the second appellant—Basant Lal—have not been brought on record within the time permitted by r. 14 of O. 16 of the Supreme Court Rules, 1950, and the delay in filing the petition to bring the representatives on record has not been condoned.

C The appeal must therefore fail and is dismissed. Having regard to the circumstances, there will be no order as to costs in this appeal.

Appeal dismissed.