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**MAHABIR PRASAD**

v.

**JAGE RAM & ORS.**

January 6, 1971

[J. C. SHAH, C.J. AND K. S. HEGDE, J.]

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*Code of Civil Procedure (5 of 1908), O. 41, r. 4—Scope of.*

The appellant, his wife, and his mother held a joint decree. Against an order dismissing the application for execution of the decree, the appellant alone appealed joining the other two as party respondents. Pending appeal his wife died. The High Court dismissed the appeal holding that because the heirs and legal representatives of the appellant wife were not brought on record within the period of limitation the appeal abated in its entirety. The High Court was of the view that the power of the appellate court under O. 41, r. 4 Code of Civil Procedure may be exercised only in those cases where there is a decree which proceeds upon a ground common to more persons than one and the appeal is filed by one or more of them but not all and other persons who are interested in the result of the appeal are not made parties to the appeal. Allowing the appeal,

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**HELD:** (i) Power of the appellate court under O. 41, r. 4, C.P.C. to vary or modify the decree of a Subordinate Court arises when one of the persons out of many against whom a decree or an order had been made on a ground which was common to him and others, has appealed, and that power may be exercised when other persons who were parties to the proceeding before the Subordinate Court are either not impleaded as parties to the appeal or are impleaded as respondents. The power is not lost merely because the person who was jointly interested in the claim has been made a party respondent and on his death his heirs have not been brought on the record.

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*Ratan Lal Shah v. Firm Lalmandas Chhadammal & Anr.*, [1970] 1 S.C.R. 296, relied on.

*Rameshwar Prasad & Ors. v. M/s. Shyam Beharilal Jagannath & Ors.*, [1964] 3 S.C.R. 549, distinguished.

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(ii) Where in a proceeding a party dies and one of the legal representatives is already on the 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 the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate. On that ground also the order passed by the High Court cannot be sustained.

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**CIVIL APPELLATE JURISDICTION :** Civil Appeal No. 609 of 1967.

Appeal from the order dated March 3, 1965 of the Punjab High Court, Circuit Bench at Delhi in Execution First Appeal No. 192-C of 1961.

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*S. T. Desai* and *A. D. Mathur*, for the appellant.

*V. D. Mahajan*, for respondent No. 3.

The Judgment of the Court was delivered by

**Shah, C. J.** Jage Ram and two others—hereinafter collectively called the defendants—were lessees of certain property belonging to Mahabir Prasad, his mother Gunwanti Devi and his wife Saroj Devi (collectively referred to hereafter as ‘the plaintiffs’.) The plaintiffs commenced an action in the court of the Subordinate Judge, First Class, Delhi, for a decree for Rs. 61,750/- being the amount of rent due by ‘the defendants’. The Subordinate Judge, Delhi decreed the suit. Execution of the decree was resisted by the defendants on the plea *inter alia*, that the decree was inexecutable because of the provisions of the Delhi Land Reforms Act, 1954. The Subordinate Judge upheld the contention and dismissed the application for execution. Mahabir Prasad alone appealed against that order and impleaded Gunwanti Devi and Saroj Devi as party-respondents. Saroj Devi died in November, 1962, and Mahabir Prasad applied that the name of Saroj Devi be struck off from the array of respondents. The High Court made an order granting the application “subject to all just exceptions”.

The High Court dismissed the appeal holding that because the heirs and legal representatives of Saroj Devi were not brought on the record within the period of limitation prescribed by the Limitation Act the appeal abated in its entirety. Against that order, this appeal is preferred with certificate granted by the High Court.

The decree in favour of Mahabir Prasad, Gunwanti Devi and Saroj Devi was a joint decree. Order 41 r. 4 Code of Civil Procedure provides :

“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”.

Order 41 r. 4 Code of Civil Procedure invests the appellate court with power to reverse or vary the decree in favour of all the plaintiffs or defendants even though they had not joined in the appeal if the decree proceeds upon a ground common to all the plaintiffs or defendants. In the view of the High Court the power of the Appellate Court under O. 41 r. 4 Code of Civil Procedure may be exercised only in those cases where there is a decree which proceeds upon a ground common to more persons than one and the appeal is filed by one or more of them but not all, and other persons who are interested in the result of the

A appeal are not made parties to the appeal either as appellants or respondents. Where, such other persons are made parties to the appeal and one of them dies and his heirs are not brought on the record within the period of limitation prescribed by the Limitation Act, the appeal abates in its entirety. The High Court observed :

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“Appellant Mahabir Prasad has impleaded the remaining two decree-holders as respondents to the appeal. The execution application of all the decree-holders has been dismissed on a common ground that the decree which is sought to be executed has become null and void. The appeal abates so far as decree-holder Sarojni respondent is concerned because her legal representatives have not been brought on the record within time. The order of the executing Court has become final so far as this deceased respondent is concerned. It follows that that order cannot be modified or varied in favour of appellant Mahabir Prasad and the second surviving decree-holder respondent for obviously that may result in inconsistent orders with regard to the same decree. The order of the executing Court in so far as Sarojni deceased respondent is concerned has become final and if the same order is modified or interfered with so far as the other two decree-holders, namely, appellant Mahabir Prasad and respondent Gunwanti Devi are concerned, the apparent result will be two inconsistent orders with regard to the same decree which the decree-holders seeks to execute. So the appeal of appellant Mahabir Prasad also abates”.

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In support of their view the High Court relied upon the judgment of this Court in *Rameshwar Prasad and Others v. M/s Shyam Beharilal Jagannath and Others.*<sup>(1)</sup> That was a case in which nine persons instituted a suit for a decree in ejection and for recovery of rent against two defendants and obtained a decree. In appeal the District Judge set aside the decree, against one of the defendants. The plaintiffs filed a second appeal in the High Court and when the appeal was pending one of the plaintiffs (appellants in the High Court) died. No application for bringing his legal representatives on the record was made within the prescribed time. The respondents objected that the entire appeal had abated because the interest of the surviving appellants and of the deceased appellant was joint and indivisible and that in the event of the success of the appeal there would be two inconsistent and contradictory decrees. The surviving appellants claimed that the

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

the appeal was maintainable on the ground that without impleading the plaintiff who had died they could have appealed against the entire decree in view of the provisions of O. 41 r. 4 of the Code of Civil Procedure, and on that account they were competent to continue the appeal, even after the death of one or the joint decree-holders and abatement of the appeal so far as he was concerned, and the Court had power to hear the appeal and to reverse or vary the whole decree. This Court held that the provisions of O. 41 r. 4 of the Code of Civil Procedure were not applicable, for the second appeal in the High Court was filed by all the plaintiffs jointly, and the surviving appellants could not be said to have filed the appeal as representing the deceased appellant. The Court further held that the appellate court had no power to proceed to hear the appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under O. 41 r. 4 of the Code of Civil Procedure, when the decree proceeded on a ground common to all the plaintiffs, or defendants, if all the plaintiffs or the defendants appealed from the decree and any of them died, and the appeal abated in so far as he was concerned under O. 22 r. 3, of the Code of Civil Procedure. *Rameshwar Prasad's case*<sup>(1)</sup> is obviously distinguishable from the present case. In *Rameshwar Prasad's case* all the plaintiffs whose suit had been dismissed had filed an appeal and thereafter one of them died and his heirs were not brought on the record. In the present case there is an order against the decree-holders but all the decree-holders did not appeal: only one of them appealed and other two were joined as party respondents.

In a later judgment of this Court in *Ratan Lal Shah v. Firm Lalmandas Chhadammalal & Anr.*<sup>(2)</sup> the plaintiffs obtained a joint decree against two persons—Ratan Lal and Mohan Singh. Against the decree Ratan Lal alone appealed to the High Court of Allahabad. Mohan Singh was impleaded as a party-respondent to the appeal. Notice of appeal sent to Mohan Singh was returned unserved, and no steps were taken to serve him with notice of the appeal. The High Court dismissed the appeal holding that there was a joint decree against Ratan Lal and Mohan Singh in a suit founded on a joint cause of action and the decree against Mohan Singh had become final. The appellant could not, on that account claim to be heard in his appeal: if he was heard and his claim was upheld. The High Court observed that there would be two conflicting decisions between the same parties and in the same suit based on the same cause of action. This Court set aside the judgment of the High Court observing that even though Mohan

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

(2) [1970] 1 S.C.R. 296.

- A** Singh was not served with notice of appeal, the appeal filed by Ratan Lal was maintainable, in view of the provisions of O. 41 r. 4 Code of Civil Procedure. In *Ratan Lal Shah's* case<sup>(1)</sup> this Court allowed the appeal to be prosecuted, even though one of the joint decree-holders impleaded as a party-respondent had not been served with the notice of appeal.
- B** one of the respondents had died and his heirs have not been brought on the record. No distinction in principle may be made between *Ratan Lal Shah's* case<sup>(1)</sup> and the present case. Competence of the appellate court to pass a decree appropriate to the nature of the dispute in an appeal filed by one of several persons against whom a decree is made on a ground which is common to
- C** him and others is not lost merely because of the persons who was jointly interested in the claim has been made a party-respondent and on his death his heirs have not been brought on the record. Power of the appellate court under Order 41 r. 4 to vary or modify the decree of a Subordinate Court arises when one of the persons out of many against whom a decree or an order had
- D** been made on a ground which was common to him and others has appealed. That power may be exercised when other persons who were parties to the proceeding before the subordinate court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to the appeal or are impleaded as respondents. The
- E** view taken by the High Court cannot therefore be sustained.

- Even on the alternative ground that Mahabir Prasad being one of the heirs of Saroj Devi there can be no abatement merely because no formal application for showing Mahabir Prasad as an heir and legal representative of Saroj Devi was made. Where in a proceeding a party dies and one of the legal representatives
- F** is already on the 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 the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the
- G** proceeding will not abate. On that ground also the order passed by the High Court cannot be sustained.

- The appeal is allowed and the proceeding remanded to the High Court to be dealt with and disposed of according to law. Defendants will pay the costs of this appeal. Costs in the High Court will be the costs in the appeal.

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K.B.N.

*Appeal allowed.*

(1) [1970] 1 S.C.R. 296.