Ramagya Prasad Gupta & Ors vs Murli Prasad on 3 April, 1972

Equivalent citations: 1972 AIR 1181, 1973 SCR (1) 63, AIR 1972 SUPREME COURT 1181, 1973 2 SCC 9, 1972 SCD 859, 1973 (1) SCJ 129, 1973 (1) SCR 63, ILR 1974 53 PAT 371

Author: D.G. Palekar

Bench: D.G. Palekar, C.A. Vaidyialingam, Kuttyil Kurien Mathew

PETITIONER:
RAMAGYA PRASAD GUPTA & ORS.

Vs.

RESPONDENT:
MURLI PRASAD

DATE OF JUDGMENT03/04/1972

BENCH:
PALEKAR, D.G.
BENCH:
PALEKAR, D.G.
VAIDYIALINGAM, C.A.
MATHEW, KUTTYIL KURIEN

CITATION:
1972 AIR 1181 1973 SCR (1) 63
CITATOR INFO :
RF 1974 SC1320 (5)
RF 1979 SC1383 (3)

ACT:
Appeal-Abatement-Legal 'representative of respondent not impleaded within period of limitation-Appeal when abates.

HEADNOTE:
An electricity undertaking was purchased by M (respondent No. 1 herein) and by a notification of the Bihar Government dated 13-4-1945 he was made the sole licensee. A partnership of five persons formed to purchase and run the said undertaking was in 1950 enlarged to consist of ten partners, P, who held a one-anna share in the partnership filed a suit in 1954 for dissolution of the partnership and rendition of accounts, impleading as defendants the other nine partners including M., He also impleaded as Defendant

No. 10 T to whom he had allegedly sold 3 pies share,out of his one-anna share. J and his two brothers share in P's one-anna share in the partnership. According to them Ps share was held on behalf of a Hindu joint Family of which they had been members. They challenged the alleged transfer of 3 pies share to T. The trial court impleaded and his brothers at Defendants 12 to 14. M consisted P's suit by claiming that he was the sole or proprietor and licensee of the concern, that the alleged partnership was in contra-vention of the Electricity Act and invalid, so that the plaintiff and the other defendants had no lawful claim to the assets of the partnership. The suit Was decreed and Defendants 12 to 14 were held entitled to a 6 pies share. M's own separate suit for a declaration that he was sole proprietor was dismissed by, the Court. M filed appeals against the decision in both the suits. The High Court allowed his appeals and held the partnership to be illegal and M to be the sole proprietor of the concern. The present appellants filed appeal, in this Court. J and his brothers were impleaded in the appeal arising out of P's suit. But after J's death in 1969 his legal representatives were not impleaded by the appellants within the period of limitation. M contended that the appeals had abated, not only against J but as a whole.

HELD: Per Vaidialingam and Palekar JJ :-The appeals could not be proceeded with and must be dismissed.

As pointed out by this Court in Nathu Ram's case it is' not correct to say that the appeal abates against the other respondents. Under certain circumstances the appeal may not be proceeded with and is liable to be dismissed. But that is not because of the procedural defect but, as Mulla has pointed out, it is part of the, substantive law. No exhaustive statement can be made as to the circumstances under which an appeal in such cases cannot proceed. But the courts, as pointed out in the above decision, have applied one or the other of three tests. The Court will' not proceed with an appeal (1) when the success of the appeal may lead to the court's coming to a decision 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 (2) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (3) when the

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decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed. These three tests as pointed out by this Court in Pandit Sri Chand's case are not cumulative tests. Even if one of them is satisfied the Court may dismiss the appeal. [69C-F]

The Slate of Punjab v. Nathu Ram [1962] 2 S.C.R., 636, applied. Ors., [1966] 3 S.C.R. 451 at 455, referred to.

At the time of filing his suit P was no longer the Karla of the family and could not represent the interest of Defendants 12 to 14. When in the suit Defendents 12 to 14 were made parties and after contest between them and P their share had been awarded to them as against P, it would be idle to say, as was contended on behalf of the appellants that for the purposes of the appeals Defendants 12 to 14 would not be necessary parties. In the present appeals the Court had to proceed on the footing that J had been declared to have a share in the partnership assets in his own right. It is settled law that a suit brought for partnership accounts after a necessary party defendant has been omitted, is liable to be dismissed. The same consideration applies to an appeal arising out of a-suit for dissolution of partnership and accounts. Having regard to the clear position of law in this respect the failure to bring on record the heirs or legal representatives of deceased J-one of the sharers in the subject matter of the suit-must inevitably lead to the dismissal of the appeal. That bring the case squarely in the second test referred to in the decision of this Court in Nathu Ram's case. [71D; 72E; 73B; D-E; 74C]

Ramdoyal v. Junmenjoy Coondoo, I.L.R. 14, Cal. 791, Amir Chand v. Baoji Bhai, A.I.R. 1930 Madras 714, Rai Chander Sen v. Gangadas Seal and others, 31 Indian Appeals 71 and Kunj Behari Lal v. Ajodhia Prasad, XXI I.L.R. Lucknow 453, referred to.

In all such cases even the first test would be satisfied. There is a High Court decree which says that neither J nor anybody else was entitled to a share in the subject matter as against M who is held to be the sole proprietor of the business. If the present appellants were to succeed it would lead to the Court's coming to a decision. That the deceased J was entitled, to a share in the subject matter of the 'suit as against M and the other alleged partners-a decision which would be in conflict with the decision of the High Court and will be contradictory to it though it has become final with respect to the subject matter between M and the deceased respondent. [74D-E]

Per Mathew J., (dissenting)-

It was a fallacy to think that if, these appeals were allowed the only course open to this Court would be to pass a decree reversing the decree of the trial court which gave a share to J. This Court can very well pass an effective decree for dissolution of the partnership and declare the shares to which the partners are entitled in the partnership, leaving the legal representative of J and defendants 12 to 14 to a separate suit to work out their rights in the one anna share of P. Under Order 41 rule 33 of the Code of Civil Procedure this Court, as appellate Court, has power to pass any decree or make any order as the case may require The case therefore did not satisfy the first test mentioned in Nathu Ram's case. [79E-G]

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It is settled law that when the manager of a joint family becomes partner in a firm the other members of the family do not thereby become partners therein although they might have interest in his share in the partnership. The appellants could have brought an action for dissolution of partnership and for rendition of accounts and obtained an effective decree without J on the array of parties Defendants 12 to 14 had no right to a share in the partnership assets. It was the one anna share of P that was divided between them and P. That understanding must precede the process of judging whether J was a necessary party to the suit or to these appeals. Looked at in this manner the second test in Nathu Ram's case was also not satisfied in this case. [80A-81B]
Apart from the above consideration there was no abatement of the present appeals in view of the decision of this Court in Mahabir Prasad's case. [81C]
Mahabir Prasad v, Jage Ram and Others. [1971] 1 S.C.C. 265, applied.

JUDGMENT:

CIVIL APPELLATE JURISDICTION C.As. Nos. 1711 of 1967 and 1985 of 1968.

Appeals from the Judgment and Decree dated the May 7, 1965 of the Patna High Court in Appeal from Original Decree Nos. 160 and 161 of 1959.

S. N. Prasad for the appellants (In C.A. No. 1711 of 1967).

U. P. Singh, for the appellants (In C.A. No. 1985 of 1968).

S. T. Desai and M. B. Lai, for respondent No. 1 (In both the Appeals).

B. P. Singh, for respondent No. 2 (in both the Appeals). P. C. Bhartari, for respondent Nos. 9 ad 1 0 (In C.A. No. 1711 of, 1967).

S. C. Agarwala and V. J. Francis, for respondent No. 17 (In C.A. No. 1985 of 1968).

The Judgment of Vaidialingam and Plalekar, JJ. was delivered by Palekar J. Mathew, J. delivered a dissenting opinion. Palekar, J.-Civil Miscellaneous Petitions have been filed in the above appeals for an order that the appeals have abated. A few facts are necessary to be stated. The Chapra Electric Supply Works Limited had a licence from the Government of Bihar for the electrification of the Chapra town. In 1944 the Company went into voluntary liquidation and the concern was put up for sale by public auction by the Liquidator. On 15-9-1944 one Murli Prasad gave the highest bid and with the consent of the State Gover the concern was purchased by Murli Prasad. By a notification dated 13-4-1945 Murli Prasad became the sole, licensee.

The case was that for the purposes of purchasing the concern and to carry on the business some five persons entered into a partnership on 11-7- 1945. The partners were (1) Murli Prasad, (2) Ajodhya Prasad, (3) Parasnath Prasad, (4) Charbharan Sah and, (5) Nand Kishore Prasad.

In August 1950 the above partnership was dissolved and the business was taken over by a new partnership consisting of 10 partners. In the reconstituted partnership Nand Kishore Prasad was dropped and the remaining four partners of the old partnership were joined by (5) Ramsaran Sah Gupta, (6) Ramagya Prasad, (7) Brahmdeo Prasad, (8) Dharmidhar Prasad, (9) Chandreshwar Prasad and (10) Kamleshwar Prasad. On account of the reconstitution of the partnership the individual shares were also refixed. The above Ramagya Prasad was entrusted with the management of the concern. On 22-5-1954 Parasnath Prasad filed Suit No. 68/1954 for the dissolution of partnership and rendition of accounts. To this suit the remaining 9 partners or their heirs were made parties. Parasnath claimed that in his own right under the partnership agreement he was entitled to one anna share and that out of his share of one anna, a 3 pies share had been sold in a public auction and purchased by one Thakur Prasad. Thakur Prasad was, therefore, made a party to the suit as Defendant No. 10.

During the pendency of the suit, proceedings for the appointment of Receiver etc. were commenced, and seeing that the concern was not functioning in a proper manner the State Government ,stepped in, revoked the licence and took over the concern. The State Government also deposited in court Rs. 3/- lakhs as compensation. The suit, thereupon, virtually became a suit for rendition of account till the date of deposit of the amount and for determining the share of each of the partners in the amount so deposited. The suit was vehemently contested. Murli Prasad, who was defendant No. 8, claimed that he was the sole owner of the business and licensee from the Government and the rest of them had no lawful interest in the same in view of the provisions of the Electricity Act.

In the course of the suit three brothers viz. Kuldip Narain, Jagdish Narain and Kedarnath applied to the court that they had an interest in the partnership suit and should be made party defendants. They alleged that Parasnath, the plaintiff, was not entitled in his. own right to, the whole of the. share of 1 anna but that he was a partner on behalf of the joint family of which they also had been members. They alleged that Parasnath was entitled to only a 6 pies share while the, three of them were entitled to 2 pies share each They further contended that Thakur Prasad, defendant No. 10 had not really purchased the 3 pies share of the, plaintiff Parasnath and, therefore, the I anna share of Parasnath was liable to redivided only between Parasnath and themselves. Since a dispute was raised, they were added as defendants 12, 13 and 14. Jagdish Narain, with whom we are principally concerned, was defendant No.

13. It would appear from the judgment of the Trial Court (see paragraphs 12 and 70 to 74) that Parasnath, the plaintiff, had contended in the first instance that defendants 12 to 14 had no interest in the share of I anna owned; by him, though,, later, at the time of the hearing he admitted that they were entitled to a 6 pies share. He, however, insisted that the sale of 3 pies share in favour of defendant No. 10, Thakur Prasad, was not nominar and thus supported Thakur Prasad's case that he was entitled to a 3 pies share. Defendants 12 to 14, however, contested this. In other words, there was a real contest in the suit between the plaintiff Parasnath and, defendant No. 10 Thakur Prasad,

on the one hand, and defendants 12 to 14, on the other. Having regard to the above contest the Trial Court raised issue No, 11 which is as follows "What is the share of plaintiff and defendants 1 to 15 in the partnership ?

On a detailed consideration of the evidence the Trial Court negatived the contention of Murli Prasad that he was tile sole proprietor of the concern'. The court held that the business was owned by a partnership. Accordingly,, a preliminary decree wag passed on February 10, 1959 in which the respective shares of the various partners or their heirs were declared and an account was ordered. The plaintiff Parasnath was declared to be the owner of a 6 pits share and defendants 12 to 14 were held to be entitled to the remaining 6 pies share out of the I anna share claimed by Parasnath. Thakur Prasad's claim to; the 3 pies share was negatived.

From the above judgment and decree it. was Murli Prasad alone who appealed to the High Court. That was, Civil Appeal, No.. 161/1959. To this appeal Parasnath and the rest of the defendants were made respondents. The High Court accepted Murli Prasad's contention that he was the sole licensee of the business and the partner should not claim a lawful interest in the same. Accordingly, the decree of the Trial Court was set aside and the suit of Parasnath was dismissed.

Parasnath did not come in appeal to this Court. But two other, partners have filed two separate appeals. Civil Appeal 17ll of 1967 is filed by Ramagya Prasad to whom the Trial Court had given 4 annas and 3 pies share in the partnership. Civil Appeal No. 1885 of 1968 is filed by Brahamdeo Prasad to whom the Trial Court had given a 2 annas share. These appeals were filed in 1967 and 1968 respectively and it is to be noted that Jagdish Narain. who was defendant No. 13 in the Trial Court, was made a party.

Jagdish Narain who is respondents Nos. 17 and 19 respectively in the above two appeals died on 8-12-1969. His legal heirs have not been brought on record and it is the case of Murli Prasad, who is one of the respondents in these appeals, that the appeals have abated as a whole or are otherwise incompetent.

In order to make the statement of relevant facts complete we may also refer to certain other proceedings though the question now involved does not arise in those proceedings. When Civil Suit No. 68/1954 was pending, Murli Prasad filed a suit for a declaration that he was the sole proprietor of the concern and the others could not claim any legal interest. That suit was suit No. 94/1956. Since the suit involved the same issue as in Civil Suit No. 68/1954, that suit was heard along with suit No. 68/1954. Since the Trial Court held that the partnership was legal, it decreed suit No. 68/ 1954 and dismissed Murli Prasad's suit No. 94/1956. Murli Prasad, therefore, had to file two appeals-one from the Order passed in suit No. 68/1954 and the other from the Order of dismissal of suit no. 94/1956. The appeal to the High Court from suit No. 68/1954 was Civil Suit 161/1959 already referred to and the appeal from suit No. 94/1956 was Civil Appeal No. 160/1959. Since the High Court accepted Murli Prasad's contention, the trial court's decree in Suit No. 68/1954 had to be set aside and Murli Prasad's suit for declaration, suit No. 94/1956, that he was the full owner decreed. From the latter decree two appeals have been filed-one by Ramagya Prasad and the other by Brahamdeo Prasad. No. 1986/68 is by Brahamdeo Prasad. We are not concerned with those two

appeals at this stage because Jagdish Narain had not been made a party to the Original Suit filed by Murli Prasad nor had he applied to be made a party. Consequently Jagdish Narain does not and did not figure in the appeals from the decree passed in Suit No. 94/1956.

It is the contention of learned counsel for Murli Prasad who is a respondent in the two appeals (Civil Appeal No. 1711/67 and 'Civil Appeal No. 1985/68 arising out of Suit No. 68/54 and High ,Court Appeal No. 161 of 1959) that Jagdish Narain who was ;declared to have a share in the partnership assets had been made a party in these appeals and yet after his death on 8-12-1969 no attempt was made in time to bring his heirs on record. Consequently the appeals not only abated against the deceased Jagdish Narain but that the, two appeals abated as a whole.

Under Rule 4 (3) r/w Rule 11 of Order XXII C.P.C. the appeal abates as against the deceased respondent where within the time limited by law no application is made to bring his heirs or legal representatives on record. As pointed out by this Court in The State of Punjab v. Nathu Rain(4) it is not correct to say that the appeal abates against the other respondents. Under certain circumstances the appeal. may not be proceeded with and is liable to be dismissed. But that is so not because of the procedural defect but because, as Mulla has pointed out, it is part of the substantive law. (See Mulla C.P.C. Vol. I Thirteenth Edition p. 620 under note Non-.joinder of- Parties). No exhaustive statement can be made as to the- circumstances under which an appeal in such cases cannot proceed. But the courts, as pointed out in the above decision, have applied one or the other of three tests. The courts will not proceed with an appeal (1) when the success of the appeal may lead to the court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the court's 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 decree against the surviving respondents, if the appeal succeeds, be in- effective that is to say it could not be successfully executed. These three tests, as pointed out by this Court in Pandit Sri Chand and Ors. v. Mls. Jagdish Parshad Kishan Chand and Ors.(2) are not cumulative tests. Even if one of them is satisfied, the Court may dismiss the appeal. It is contended by learend counsel for Murli Prasad that this case is covered by the first two tests. His client Murli Prasad has now obtained a decree from the High Court holding that lie is entitled to the whole of the subject matter of the suit and no one else, including the deceased Jagdish Narain, is entitled to claim any share in the same against him. This is a decree which is passed in his favour so far as deceased Jagdish Narain is concerned and it has become final as the heirs of Jagdish Narain are not on record in these appeals. On the other hand, if the present appellants were to succeed and be entitled, as. they claim, to the decree of the Trial Court being restored, it will have to be said that the deceased Jagdish Narain was entitled to a share as awarded by the Trial Court. And since the various parties in these appeals and the suit (1) [1962]2S.C.R.636.

(2) [1966] 3 S.C.R, 451 at 455.

stand both in the position of a plaintiff and a defendant the decision will lead to deceased Jagdish Narain being given a share in the subject matter of the spit which would be in conflict with the

decree passed by the High Court and has become final as between himself and deceased Jagdish Narain. It is further co contended that the second test is also satisfied because the two appellants before us could not have brought an appeal for the relief claimed by them .against only the surviving sharers to the exclusion of, deceased Jagdish Narain in view of the fact that Jagdish Narain has been declared to be owner of a share along with other partners.

In this rejection attention is invited to the, following passage in Nathu Ram's case at page 640:

"The abatement of an appeal means not only that the decree between die appellant and the deceased respondent has become final, but also as necessary corollary, that the appellate Court cannot in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondants the appellate court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken."

These observations have, been made, with reference, to the appellant and the deceased respondent but the are equally applicable where a decree is passed between a respondent and a deceased respondent in a partnership suit. Murli Prasad the, respondent has obtained a decree, from the High Court to the effect that deceased Jagdish Narai can him go share against him and if the appellants were to succeed in these appeals it will inevitably lead to the conclusion that deceased Jagdish Narain would have a share against Murti Prasad and the appellate court would not be in a position to modify the High Court decree directly or indirectly since that decree has b6come fineil as between Murli Prasad and the deceased Jagdish Narain.

It Was contended on behalf of the appellants that there is no bar to proceeding with the appeals in spite of the legaj heirs of deceased Jagdish Narain not having been brought on record. In the first place it was contended that though Jagdish Narain is dead be, is fully ropresented because he, was a member of the joint family of which Parasnath was the Managpr and since Parasnath is a respondant in these appeals it was not necessary to bring the personal heirs of Jagdish Narain on record. Secondly it was contended that Jagdish Narain was not himself a partner in the partner-

ship and since a stranger to the partnership is not entitled to join as a party to the suit his omission in appeal is not fatal. Admittedly Jagdish Narain was not a party to the partnership deed of 1950 and whatever interest he had as a member of the joint family of which Parasnath was the Manager lie could look up only to Parasnath for his interest. It may be that lie was permitted to be made a defendant in the suit. He was merely a proper party to the suit and not a necessary party and since he was not a necessary party to the suit, it was submitted, he cannot claim to be a necessary party to the appeal. We do, not think that there is any substance in either of the two contentions. So far as the first contention is concerned it is true that Parasnath represented the joint family when the partnership had come into existence but much water had flown under the bridge thereafter. Jagdish Narain and his two brothers Kuldip and Kedar had applied to be made parties to the suit on the ground that they had separated not only amongst themselves but also from Parasnath. There was an award dated 30-4-1949 and on the basis of the, award a compromise decree was passed on 20-9-

1951. The suit had been filed in 1954 and at the time of the suit, Parasnath the plaintiff in the suit, was no longer the karta of the family and could not represent the interest either of Jagdish Narain or his two brothers Kuldip and Kedar. As a matter of fact, as already shown in the narrative of facts, they raised a serious contest to the suit of Parasnath on the ground of conflict of interest and the Trial Court had held in their favour. Parasnath did not appeal against the decree and even in the present appeals the share of Jagdish Narain and his two brothers as awarded by the Trial Court is not challenged. In fact they-have asked that the decree in favour of Murli Prasad given by the High Court be set aside and the decree of the Trial Court be restored. Under these circumstances, it will be wrong to say that in the present appeals the interest of deceased Jagdish Narain is fully represented by Paras nath or anybody else.

As to the second contention that Jagdish Narain was not a necessary party to the suit and, therefore, to the appeal, it is enough to say that such a contention is no longer permissible. Jagdish Narain and his two brothers contested the suit filed by Paras nath for dissolution and rendition of accounts. Initially they were not made parties but they applied to the court and were made par-ties as defendants 12 to 14. Parasnath did not admit, in the first instance, that defendants 12 to 14 had any interest in the subject in matter of the suit. He claimed that he had supplied his own funds to the partnership and had, therefore, become a sharer in the partnership to the extent of 1 anna. At the hearing, however, be agreed that the other members of the family, namely, defendant,; Nos. 12 to 14 were together equally entitled with him to a share.

There was, however, a second point of contest and that had to be decided on merits. Parasuath had alleged that a 3 pies share out of his I anna share had been sold in public auction and purchased by Thakur Prasad, defendant No. 10 and hence Thakur Prasad was entitled to a 3 pies share. Defendants 12 to 14 challenged this sale alleging that the sale was nominal in favour of Thakur Prasad and that, as a matter of fact, the 3 pies share which was sold in auction had been purchased on behalf of the joint family itself. This plea was accepted by the Trial Court which negatived the case of Parasnath and Thakur Prasad that the latter was entitled to a 3 pies share out of Parasnath's I anna share. The whole share of I anna of Parasnath in the partnership was divided between Parasnath, the plaintiff, and defendants 12 to 14 half and half. From this finding after contest, Parasnath did not appeal at all. Therefore, the decree passed by the Trial Court as to the share of Parasnath, on the one hand, and defendants 12 to 14 including Jagdish Narain, on the other, became final and in these circumstances would be impossible to say that Jagdish Narain was just a proper party to the suit. Indeed if Jagdish Narain and his two brothers (defendants 12 to 14) had not applied to the court to be made party defendants there could be no doubt at all that Parasnath would have been entitled to claim the full one anna share in the partnership suit and it would have been open to defendants 12 to 14 to make their claim against Parasnath in an independent suit or proceedings But when in the suit defendants 12 to 14 were made parties and after contest between them and Parasnath their share has been awarded to them as against Parasnath it would be idle to say that for the purposes of the appeal defendants 12 to 14 would not be necessary parties. There are two ways of looking at it: (1) would it be possible to defendants 12 to 14 to file a separate suit against Parasnath for the sub-share in the partnership ? and (2) could Murli Prasad whose claim to the whole of the subject matter of the suit had been negatived have filed an appeal without making defendants 12 to 14 parties to the appeal ? The answer could only be in the negative. Having

successfully claimed relief against Parasnath in the partnership suit and obtained it from the court, the decision would be final between them and defendants 12 to 14 would not be able to claim the same relief against Parasnath in a separate suit. Similarly Murli Prasad who was a co- defendant with defendants 12 to 14 could not have obtained relief without filing an appeal to which defendants 12 to 14 were made parties. Therefore, it is quite clear that though in theory it may be possible to contend that, as a. matter of law, defendants 12 to 14 including Jagdish Narain need not have been made parties in the partnership suit, the very fact that their claim to relief against Parasnath in the partnership suit has been granted with a view to make a complete adjudication between the parties to the suit would make defendants 12 to 14 necessary parties in any appeal filed by a party aggrieved by the decision of the Trial Court. In fact they were made co-respondents in Appeal No. 161/1959 to the High Court filed by Murli Prasad and even in the present appeals. That was on the basis that they were necessary parties to the appeal. in view of the Trial Court's decree which gave them a substantial share in the subject matter of the partition suit. For the purpose of the appeals (Civil Appeal 1711/67 and Civil Appeal 1985/68 arising out of Parasnath's Civil Suit 68/1954) we must proceed on the footing that Jagdish Narain (Original Defendant No. 13) had been declared to have a share in the partnership assets in his own right.

And now the question is whether the appellants who, in these appeals, have asked for the restoration of the decree of the Trial Court can be peemited to proceed with these appeals without deceased Jagdish Narain being represented. We think that the law on the point is quite clear. It was held as far back as in 1887 that a suit brought for partnership accounts after a necessary party defendant has been omitted, is liable to be dismissed. See : Ramdoyal v. Junmenjoy Coondoo(1). The above decision was followed in Amir Chand v. Raoji Bhai(2) with the observation that no dissent had ever been expressed from the above decision. It was held that a suit for accounts cannot be maintained between some only of the partners of the firm but every partner must be made a party. The same consideration applies to an appeal arising out of a suit for dissolution of partnership and accounts. See : Raj Chunder Sen v. Gangadas Seal and others (3). In that case A sued his partners B, C, D & F for dissolution and for accounts of ,the partnership. A decree was passed in the suit by which it was ordered that a sum of Rs. 9,000/- should be contributed by A, B & C and that out of that sum Rs. 1,740/- should be paid to D and the rest to F. A appealed from the decree making B, C-, D & F party respondents. B & C also appealed from the decree making A, D & F party-respondents. Pending the appeal D died. No application was made by the appellants in either appeal to bring on the record the legal heirs of D within the period of limitations It was held that the appeal was not competent for as the suit was for partnership accounts, it was not one in which the appellants could proceed in the absence of the legal representatives of D. Their Lordships olyserved that in the absence of the legal representatives of one of the partners the court had no option and the appeals were perfectly idle. This decision of the Privy Council along with several others of High Courts in this, country were followed in Kunj Behari Lal v. Ajodhia Prasad (4) wherein the headnote is as follows :

(1) I.L.R. 14, Cal. 791. (3) 31 Indian Appeals 71. (2) A.I.R. 1930 Madras 714.

(4) XXT T.L.R. Lucknow 453.

L1208 Sup CI/72 during the pendency of the appeals, and his legal representatives were not brought on record within the period of limition pres-

cribed. So the question question is raised by Murli Prasad that the appeals have abated.

in a suit for dissolution of a partnership and: for account, the partners, are necessary parties,but not persons who might be claimmg some right under. one partner. Jagdish Narain was not a partner in the firm sought to be dissolved. He was not, therefore, a necessary party to the suit. 1n fact, he was not made a party to the suit when it was instituted. Kuldip Narain (12th defendant), Jagdish Narain (13th defendant) and Kedar Nath Shah (14th defendant) were members of the joint family of which Parasnath Prasad, the plaintiff, was the manager and they' claimed that each of them was entitled to a share in the one anna share of Parasnath Prasad in the partnership. They were allowed to be impleaded not because they were necessary parties to the suit but only to avoid multiplicity of-suits as other 'wise they `ould have had to file another suit for declaration of their rights, in the One an share of Paras- nath Prasad and for partition thereof. In other words, they were impleaded not because the suit, as instituted, was defective for nonjoinder of necessary parties, but only for adjudication of their rights vis-vis Parasnath Prasad, the, plaintiff, and to. avoid another suit. The other partners, namely, defendants 1 to 9 were not interested in the, question that arose for consideration as between Jagdish Narain and defendants 12, and 14 on the one hand, and the Plaintiff on the other.

In the State of Punjab v. Nathu Ram(1) this Court explained the tests applicable in considering whether an appeal abates in its entirely when it has abated quaone 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 'arid therefore dismiss if. Ordinarily, the consideration which will weigh with the court in deciding upon the question whether the entire a 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 (1) [1966] 2 S.C.R. 636.

Supply Works" constituted under an agreement dated August 31, 1950. There were 10 partners in the firm including the plaintiff. Parasnath Prasad, the plaintiff, had- one anna share and defendants 1 to 9 had the remaining 15 annas share in the partnership. After; the institution of the suit, defendants 12 to 14 were impleaded on the basis that Parasnath Prasad, the plaintiff was the Manager of a joint family and that those defendants, being members of the family, were also entitled to a share in the one anna share of Parasnath Prasad in the partnership. During the pendency of this Suit Murli Prasad, one of the partners and defendant No. 8 in Suit No. 68 of 1954, filed a suit (Suit No. 94 of 1956) for a declaration that he was the sole licencee and the owner of the electrical undertaking and not the partnership and, therefore, he was entitled to the money payable by the Government for the acquisition of the electrical undertaking. In this Suit, the partners in the firm alone were parties. Defendants No. 12 to 14 in Suit No. 68 of 1954 were not made parties.

Since Suit No. 68 of 1954 and Suit No. 94 of 1956 were units in respect of the assets of the same undertaking viz.,"Chapra Electric Supply Works", the two suits were tried together. Issue No. 11 in Suit No. 68 of 1954 was, "What is the share of the plaintiff and defendants 1 to 15 in the share of the partnership ?"

The Court passed a preliminary decree in Suit No. 68 of 1954 dissolving the partnership and declaring the shares of the plaintiff and defendants 1 to 9 and 12 to 14. Suit No. 94 of 1956 was dismissed. Against these decrees, Murli Prasad filed two appeals before the High- Court of Patna : appeal No. 160 of 1959 against the decree in Suit No. 94 of 195 and appeal No. 161 of 1959 against the decree in Suit No. 68 of 1954. In appeal No. 160 of 1959 also, defendants 12 to 14 in Suit No. 68 of 1954 we not parties. His contention in appeal No, 161 of 1959 was that Suit No. 68 of 1954 was incompetent as the partnership which was sought to be dissolved was illegal and, therefore, no suit for dissolution of it lay, and that in appeal No. 160 of 1959 was that he was the sole owner of the undertaking and as such he was entitled to get the compensation amount for the acquisition of tile undertaking. The High Court allowed both the appeals and dismissed the suit for dissolution of the partnership (Suit No. 68 of 1954) and decreed Suit No. 94 of 1956.

The two appeals in question were filed by two partners of the firm and arise from the decree passed in appeal No. 161 of 1959 by the High Court from the decree of the trial Court No. 68 of 1954. In these appeals, Jagdish Narain, the' 13th defendant in during the pendency of the appeals, and his legal representatives were not brought on record within the period of limitation prescribed. So, the question is raised by Murli Prasad, that the appeals have abated. In a suit for dissolution of a partnership and for account, the partners are necessary parties but not persons who might be claiming some right under one partner. Jagdish Narain was not a partner in the firm sought to be dissolved. He was not, therefore, a necessary party to the suit. In fact, he was not made a party to the suit when it was instituted. Kuldip Narain (12th defendant), Jagdish Narain (13th defendant) and Kedar Nath Shah (14th defendant) were, members of the joint family of which Parasnath Prasad, the plaintiff, was the manager and they claimed that each of them was entitled to a share in the one anna share of Parasnath Prasad in the partnership. They were allowed to be impleaded not because they were necessary parties to the suit but only to avoid multiplicity of suits as otherwise they would have had to file another suit for declaration of their rights in the one man share of Parasnath Prasad and for partition thereof. In other words, they were impleaded not because the suit, as instituted, was defective for non- joinder of necessary parties, but only for adjudication of their rights vis-a-vis Parasnath Prasad, the plaintiff, and to avoid another suit. The other partners, namely, defendants 1 to 9 were not interested in the question that arose for consideration as between Jagdish Narain and defendants 12 and 14 on the one hand, and the Plaintiff on the other.

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 head note 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 (1) [1966] 2 S.C.R. 636.

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 tile, deceased respondent and therefore which would lead to the Court's 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 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 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 can-not be proceeded with if the appeal against the deceased respondent has abated."

The principle of this judgment was affirmed in Rameshwar Prasad and Others v. M/s. Shyam Beharilal Jagannath and Others(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 in Nathu Ram's case are not cumulative tests. Even if one of them is satisfied, the Court may, having regard to all the circumstances, hold that the appeal has abated in its entirety.

Let us take the two tests which are said to apply to this case and see whether any one of them is satisfied. The matter in controversy before the High Court was whether the partnership was a legal partnership and a suit for dissolution of it and for rendition of account would lie. The High Court

held that the partnership was illegal and, therefore, Suit No. 68 of 1954 was incompetent. I The question in controversy in these appeals, therefore, is whether (1) [1964] 3 S.C. R. 549.

(2) C.A. No. 563 of 1963 decided on Dec. 14,1964.

the partnership was legal and liable to be dissolved and if so what is the share of the respective partners ? Can these, questions be decided by this Court without the presence of the legal representatives of Jagdish Narain ? Now, one test to decide whether Jagdish Narain was a necessary party in these appeals, is, whether there will be inconsistent decrees if the appellants were to succeed in the appeals and that will lead this Court to pass a decree contradictory to the decree which has become final with respect to the subject matter between the appellants and Jagdish Narain. In other words, the question to be asked and answered is, whether, if these appeals were to succeed, would this Court have to pass a decree contradictory to the decree which has become final as between the appellants and Jagdish Narain ? Since the High Court dismissed suit No. 68 of 1954 by allowing appeal No. 161 of 1959, even if this Court were to reverse the. decree of the High Court, there will be no conflicting decrees. This Court will not have to pass a decree contradictory to any decree passed in favour of Jagdish Narain and which has become final as between the appellants and Jagdish Narain, even it this Court were to allow the appeals and set aside the decree of the High Court, for, no decree in favour of Jagdish Narain was passed by the High Court as Suit No. 68 of 1954 was dismissed by that Court. But it is said that the High Court passed a decree in appeal No. 161 of 1959 which declared that Murli Prasad alone is the owner of the subject matter of the suit to the exclusion of Jagdish Narain and others and that that decree will be inconsistent with the decree which this Court will have to pass if the appeals were to succeed, namely, to restore the decree of the trial Court giving a share to Jagdish Narain. For one thing, the decree of the High Court in appeal No. 161 of 1959 is only a decree dismissing Suit No. 68 of 1954 for dissolution of the partnership. It is the decree of the High Court in appeal No. 160 of 1959 which declared that Murli Prasad alone was entitled to the subject matter of the suit and not the partnership. It is that decree which negatived the claim' of Parasnath Prasadand the other partners in the undertaking. Jagdish Narain was not a party to that decree and Murli Prasad. got no declaration under the decree that he was sole owner of the undertaking as against Jagdish Narain. The appeal to this Court against that decree is Civil Appeal No. 1710 of 1967 and it is still pending and, therefore, that decree has not become final. Even assuming that by the dismissal of Suit No. 68 of 1954 in Civil Appeal No. 161 of 1959, the High Court passed a decree in favour of Murli Prasad as against Jagdish Narain that Murli Prasad is the sole owner of the undertaking, and that the decree has become final, as Jagdish Narain did not appeal from the decree, it is a decree in favour of Murli Prasad and against Jagdish Narain. How then is the test satisfied, if the test to be applied is that, if appellants in these appeals were to succeed, that must necessarily lead this Court to pass a decree contradictory to the decree which has become final as between the appellants and Jagdish Narain ?

Quite apart from this, if the appeals were to succeed, this Court will not have to pass a decree declaring the share of Jagdish Narain in the assets of the partnership, or, to restore the decree of the trial court and thus pass a contradictory decree, even if it be assumed that the High Court passed a decree in Suit No. 68 of 1954 in favour of Murli Prasad, that Jagdish Narain had no interest in the undertaking and that is the decree which has become final with Narain for the purpose of the test.

For one thing, the suit for dissolution of the partnership stands dismissed by the reversal of the decree of the trial court in Suit No. 68 of 1954 by the High Court. Jagdish Narain did not appeal to this Court and the decree of the High Court has become final so far as he is concerned and thiS Court will not be bound to pass a decree declaring his share even if the appeals were to succeed, although it might be competent for this Court to do so under Order 41, rule 4 of the Code of Civil Procedure. To put it differently, if this Court were to hold that the partnership was legal and, therefore, the suit for dissolution competent this Court need not pass a decree declaring the share of Jagdish NArain as he did not appeal from the decree- of the High Court. It is, therefore, a fallacy to think that if these appeals are allowed, the only course open to this Court is to pass a decree restoring the decree of the trial court which gave a share to Jagdish Narain. This Court can very well pass an effective decree for dissolution of the partnership and declare the shares to which the partners are entitled in the assets of the partnership, leaving the, legal representatives of Jagdish Narain and defendant 12 and 14 to a separate suit to work out their rights in the one anna share of Parasnath Prasad. That was the sort of decree which the trial court should have passed. Merely because the appellants have prayed for the restoration of the decree of the trial court, it would not follow that this Court is deprived of its power to pass the decree which the justice of the case requires. Under Order 41, rule 33 of the Code of Civil Procedure, this Court, as appellate Court, has power to pass any decree or make any order which ought to have been passed or make such further decree or order as the case may require. From- whatever angle the matter is looked at, there is no foundation for the assumption that the only decree which this Court can pass in case the appeals are allowed by this Court is a decree restoring the decree of. the trial court and that that decree will be inconsistent with the decree of the High Court which has become final as between the appellants and Jagdish Narain.

Take the second test: Could the appellant have brought an action for dissolution of the partnership and for accounts against those respondents alone who are still before" the Court ? In other words, could an action for dissolution of the partnership and for rendition of account have been brought by the appellants and an effective decree obtained without Jagdish Narain on the array of parties ? As I said, the appellants, as partners in the firm, were really unconcerned as to who-were all interested in the share of Parasnath Prasad, the plaintiff. Whether he was the manager of a joint family, whether the other members of his family were interested in his one-anna share in the partnership, whether he had formed a sub-partnership, or whether he had entered into an agreement with defendants 12 to 14 as regards his share in the partnership, were all questions in which the appellants were not concerned for the simple reason that Parasnath Prasad alone was a partner in the firm. It is settled law that when the manager of a joint family becomes a partner in a firm, the other members of the family do not thereby become partners therein although they might have interest in his share in the partnership. "If a partner has agreed to share his profits with a stranger, and the latter seeks an account of those,-profits, he should bring his action against that one partner alone, and not make the others parties"(1). The reason is that there is no privity of contract between the other partners and the stranger. Like-wise, for the same reason, when a partner files a suit for dissolution of the partnership and for account, the stranger in whose favour there is an agreement by a partner should not be made a party. It is, no doubt, true that the trial court, by its decree, declared shares of Jagdish Narain and defendants 12 and 14 in the partnership assets. But that was not because they were partners entitled to share in the assets of the partnership but because the Court though that if

their-shares are declared, it would avoid, another litigation between them and Parasnath Prasad. In other words, Jagdish Narain had no right to a share in the partnership assets in any independent capacity but be, derived his right only through the plaintiff in the suit. IT is a mistake to suppose that Jagdish Narain had been declared, entitled to, a share.. in the partnership assets in his own right. That, Jagdish Narain and defendants No. 12 and 14 derived their right to share in the, partnership assets through Parasnath Prasad, the plaintiff, and that their shares were carved out from the one anna share of Parasnath Prasad is clear from para 11 and the decretal portion of the judgment of the trial court in Suit No. 68 of 1954. It was the one anna share of Parasnath Prasad that was divided between Parasnath Prasad and defendants 12 to 14 half and half. A mechanical reading of the decree will not throw any light on this question. As justice Brandeis said, "Knowledge is essential to understanding and under-

standing should precede judging"(1). Knowledge of the reason why the trial court impleaded Jagdish Narain as a party to the Suit can be obtained only by reading the judgment of the trial court. That knowledge alone will lead to an understanding of the reason why the Court passed a decree declaring that Jagdish Narain was also entitled to a share in the partnership and the character in which or the basis on which he was declared entitled to a share in the partnership assets. That understanding must precede the process of judging whether he was a necessary party to the suit or to these appeals.

Leaving aside all these considerations let me assume that Jagdish Narain was interested in the assets of the partnership jointly with the other partners, even so, I should think, these appeals have not abated. If under Order 41, rule 4 of the Code of Civil Procedure, it was open to the appellants to appeal to this Court from the whole decree, for the reason that the decree proceeded on a ground common to all the respondents before the High Court, namely, that the partnership was illegal and, therefore, no suit for dissolution of it lay, and, for this Court to reverse or vary the decree in favour of a non-appealing respondent and, therefore, set aside the decree against Jagdish Narain passed by the High Court, then it would be clear from the ruling of this Court in Mahabir Prasad v. Jage Ran? and Others(1) that there will be no abatement of these appeals, even if the legal representatives of Jagdish Narain were not impleaded in the appeals. The facts of that case were, one Mahabir Prasad. his mother Gunwanti Devi and his wife Saroj Devi (plaintiffs) got a decree against Jage Ram and two others (defendants) for the amount of rent due from them. Their application for execution was dismissed by the learned Subordinate Judge, Delhi. Mahabir Prasad alone preferred an appeal to the High Court against the order and impleaded Gunawati Devi and Saroj Devi as party respondents. Saroj Devi died and the legal representatives were, not brought on record within the period of limitation and her name was struck off from the array of respondents "subject to all just exceptions". The High Court dismissed the appeal on the ground that it abated in its entirety. Mahabir Prasad appealed to the Supreme Court. Shah, C.J., speaking for the Court, after observing that the power of the Appellate Court under Order 41, rule 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 been made on a ground which was common to him and others has appealed, said :

> "Competence of the Appellate Court to pass,a decree appropriate to the nature of the dispute in an appeal filed (1) 264 LJ.S. 504, at 520 (Jay Burns Baking Company et al

v. Charles W. Brayn).

(2)[1971] 1 S.C.C. 265.

by one of several persons against whom a decree is made Al on a ground which is common to him and others is not lost merely because of the person who was jointly interested in the claim has been made a part respondent and on his death his heirs have not been brought on the record."

I would hold that the appeals have not abated. ORDER In accordance. with the judgment of the majority the appeals are dismissed. There will be no order as to costs. G.C.