Baij Nath And Anr. vs Ram Bharose And Ors. on 10 April, 1953

Equivalent citations: AIR1953ALL565, AIR 1953 ALLAHABAD 565

JUDGMENT

Sapru, J.

1. The question which has been referred by a learned single Judge of this Court to the Full Bench is as follows:

> " If, in a suit, a plaintiff makes a claim against a number of defendants on common grounds and all the defendants also contest the suit on common grounds and the suit is decided in favour of the plaintiff against all the defendants, can an appeal filed by all the defendants be heard in favour of the remaining defendants after one of the appealing defendants has died during the pendency of the appeal and his legal representatives have not been brought on the record so that his appeal has abated; and further, if the appeal of the remaining defendants can be heard, would the decision in it enure to the benefit of the legal representatives of the deceased defendant-appellant?"

2. In order to understand precisely how the point has arisen, it is desirable to give a few facts relating to these cases. The principal defendants in the suit out of which the two appeals arise were Braj Bhukhan (now dead), Baij Nath and Bhairon. The plaintiffs' suit was for possession of property alleged to have been taken wrongly into their possession by the defendants Braj Bhukhan, Baij Nath and Bhairon. The case put forward by the plaintiff-respondents was that in a partition the plots over which they were claiming possession were allotted to pattis Bhagwan Dutt and Dudhnath and that they were the proprietors of those pattis. Their case further was that in pursuance of that partition decree they obtained delivery of possession over the plots in the year 1937. Despite the decree in their favour at that time, however, some of these plots continued in possession of the defendants, so that the delivery of possession in respect of them was merely of a formal character. In these circumstances, the plaintiff-respondents had to bring a suit and in execution of the decree passed in that case, they were able to obtain actual possession over the plots over which delivery had actually not been given, some of the plots having been actually delivered at the time of delivery of possession in 1937. Thus their case was that after the decree in that suit had been executed in respect of some of the plots, they came into possession of all the plots in dispute. It is alleged by the plaintiffs that in June 1942 they were dispossessed from all these plots by the three defendants Braj Bhukhan, Baij Nath and Bhairon. Consequently the suit out of which these two appeals arise was brought by them for possession.

3. The suit was resisted by the defendants on grounds common to them all. A Joint written statement was filed. The first plea taken by them was that the plots appertained to patti Braj Bhukhan of which the three defendants were the proprietors and did not appertain either to patti Bhagwan Dutt or to patti Dudhnath. It may be pointed out that from para. 16 of their written statement it appears that their case was that they were holding possession of the plots separately and that their rights too were separate. In other words their case was that they were not joint tenants, but tenants in common, i.e. tenants with separate and separable interests in the property. The second line of defence was that the three defendants had, in any case, been in possession of them for more than 12 years before the institution of the suit and had for that reason perfected their title by adverse possession. A third line of defence was that the suit was barred by limitation as the plaintiffs had been dispossessed more than three years before the institution of the suit, the period of limitation for a suit for possession under Section 180, U. P. Tenancy Act, being only three years. On the question as to whether the defendant; were holding possession on the plots separately and their rights were separate, no issue seems to have been framed by the learned Munsif. On all the points raised the findings of the lower appellate Court were in favour of the plaintiff-respondents and against the defendants. Thereafter the present three defendants, viz, Braj Bhukhan, Baij Nath and Bhairon preferred the present appeals to this Court. During their pendency one of the defendant-appellants Braj Bhukhan died. An attempt was made by his heirs and legal representatives to have themselves brought on the record, but it proved abortive a, this Court held that their application for substitution had been filed beyond time, it having been further held that the legal representatives left by Braj Bhukhan were not on the record. On these findings this Court passed an order declaring the appeal in 10 far as it affected Braj Bhukhan to have abated.

4. When the appeal of the other two defendant, came up before this Court, a preliminary objection was taken to the effect that the order of abatement in the appeal filed by Braj Bhukhan affected the rights of the other appellants to prosecute their appeal. Thereupon the learned single Judge decided to refer the question mentioned above to a Pull Bench. The learned single Judge in his referring order went into the question whether in this particular case the right claimed by all the three defendant, was a joint right or not. His conclusion was that all the three defendants were co-sharers and that the right claimed by them had been acquired in their capacity as co-sharers in patti Braj Bhukhan. He did not address himself to the question whether the right claimed by them as co-sharers and owners was a right of joint tenancy or tenancy in common. In his judgment he has emphasised that the possession which was claimed to be adverse possession leading to perfection of title in these plots was claimed by all the three defendants in their capacity as co-sharers in patti Brai Bhukhan. He has further emphasised that the third ground, viz., that of dispossession more than three years before the institution of the suit was also a common ground of all the three defendants, the suggestion being that they had dispossessed the plaintiffs jointly. The difficulty in which the learned single Judge found himself was that if the findings against Braj Bhukhan as a result of the abatement of his appeal have to be treated as having become final between Braj Bhukhan and the plaintiff-respondents, an entertainment of the appeal of Baij Nath and Bhairon could possible result in inconsistent findings with the findings which have acquired finality between Braj Bhukhan and the plaintiff-

respondents. He noticed that the question of the applicability of Order 41 Rule 4 was not free from difficulty as it had given rise to a divergence of view between Courts in this country. In particular he found that the views taken by a Bench of this Court in -- 'Ram Sewak v. Lambar Pande', 25 All 27 (A), though accepted as correct in -- 'Shahzad Singh v. Ram Ugrah Singh', AIR 1930 All 211 (2) (B) and approved of in --'Thakur Prasad v. Ram Khelawan', AIR 1944 All 240 (C), and by a learned single Judge of this Court in -- 'Mst. Krishna Dei v. Governor-General in Council', AIR 1950 All I (D), were inconsistent with the views expressed by a Bench of this Court in -- 'Ambika Prasad v. Jhinak Singh', AIR 1923 All 211 (E), and a Bench of the Calcutta High Court in -- 'Balaram Pal v. Kanysha Mashi', AIR 1919 Cal 410 (F). In particular the learned Judge found that the opinion exprssed by the Full Bench of the Patna High Court in -- 'Ramphal Sahu v. Batdeo Jha', AIR 1940 Pat 346 (FB) (G), was irreconcilable with that taken in -- '25 All 27 (A)', and needed to be fully considered by a Full Bench. On his reference this Full Bench was constituted to express its opinion on the points referred to it by him.

5. Learned counsel for the parties have argued this case with commendable thoroughness and we now propose to state our views on the various points which have been raised in this case. Before coming to the exact scope of Order 41, Rule 4 we would like to refer to Order 22, Rule 4 (1) which lays down as follows:

> "Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."

Sub-rule (2) of this rule enables the legal representative of the deceased defendant to make any defence appropriate to his character. Sub-rule (3) lays down:

> "Where within the time limited by law no application is made under sub-r. (1), the suit shall abate as against the deceased defendant." Now it is well known that the right to sue includes the "right to appeal" when a party dies pending appeal vide -- 'Ram Sarup v. Jagdish Narain', AIR 1934 All 1029 (H). On a proper reading of the rate, the position seems to be that on the death of one of the defendants, the question of bringing his legal representatives on record will arise only if the right to sue survives. That is to say if the rights of the decea3ed were personal to him, the right to sue will not survive to or against his legal representatives on the maxim 'actio personalis moritur cum periona' --a personal right of action dies with the person. If, however, right to sue survives, then we have to find out whether the surviving defendants are such persons as could represent the deceased or in other words, whether the rights of the dying defendant vest in the surviving defendants. If the right to sue vests in them, no question of any abatement arises. Only the name of the deceased defendant is deleted and the case or appeal proceeds. Where the surviving defendants do not represent the deceased, the necessity of bringing his legal representatives arises, and as laid down in Sub-rule 3, if the legal representatives are

> not brought on record within the time limited by law, the suit or appeal shall abate only as against the deceased defendant. In this case as Brij Bhukhan's legal representatives were not brought on record within time, the appeal has abated, and the decree of the lower Court has become final as against Brij Bhukhan. This partial abatement gives rise to the question whether a partial abatement can render the whole appeal ineffective and if so in what circumstances. The question in other words is whether partial abatement can ever operate as an abatement of the whole appeal. It is to this question that I propose to confine myself at present.

6. It may be pointed out at the very outset that the words "as against the deceased defendant" were introduced in Sub-rule (3) of Rule 4 of Order 22 by the new Code of Civil Procedure in 1908, as there had been some controversy due to the absence of these words in the corresponding Section 398 of the Code of 1882 as regards the question whether the suit or appeal would abate not only against the deceased defendant or respondent but as a whole. The relevant portion of Section 368 of the old Code ran as follows:

> "When the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period. "

7. Reference may be made on this part of the case to the Full Bench case of -- 'Sant Singh v. Gulab Singh', AIR 1928 Lah 572 (I).

8. The facts of the Lahore case were that a suit was instituted by the vendor's sons on the basis of a registered deed of sale for a declaration to the effect that the sale had not affected their reversionary rights after the death of the vendor, namely one Kharak Singh. During the pendency of the appeal one of the vendees died and no application having been made to bring his representatives on the record within the time allowed by law, on the expiry of 90 days the appeal automatically abated. An application to set aside the abatement by the plaintiffs on the ground of want of knowledge of the plaintiff's death having been rejected, the order of abatement against one of the vendees became final.

On these facts it was contended on behalf of the respondents who were the plaintiffs in the suit that the appeal must be dismissed in its entirety. The contention put forward was that the sale impugned was joint in favour of the four vendees and that in case the appeal was accepted against the remaining defendants, there would be two contradictory decrees on the record of the Court with regard to the same sale. On these facts the view taken by the Pull Bench of the Lahore High Court was that the appeal had not abated in toto, but could proceed against the remaining defendants. The principle laid down in the case was that where the interest of the deceased respondent in the subject-matter of the appeal was separate from those of the surviving respondents (the shares having been defined in the sale-deed), it could not be said that the decree of the lower appellate Court, if in favour of the appellant, would prove ineffective or inconsistent with that part of the lower Court's decree which had become final upon the abatement of the appeal qua the deceased. It was held that the appeal did not abate in its entirety but could proceed against the surviving

respondents. In the words of Shadi Lal, C. J.:

> "Whether the appeal can, or cannot, proceed in, the absence of the legal representative of the deceased respondent must depend upon the nature of each case; and it is not possible to formulate a rule of general application. It is obvious that if the action, which has given rise to the appeal, could have been brought without impleading the person who has died his death affects only the interest, if any, which he had in the litigation, but it cannot prevent the determination of the rest of the claim."

Shadi Lal C. J. went on to observe: "The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter. It is a matter of common-sense that the Court should not be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decree; the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to such a result, there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it." A large number of authorities appears to have been cited in that case but the learned Chief Justice did not consider it necessary to go into them, though they are reviewed by the other learned Judges who constituted the Bench.

9. So far there is no difficulty and it is conceded even by Harries C. J. in -- 'AIR 1941) Pat 346 (PE) (G), that Order 22, Civil P. C., provides a complete code to deal with the questions which arise by reason of the death of one of the parties to an appeal and that the appeal will abate only as a whole 'If the case is of such a nature that the appeal cannot proceed in the absence of the legal representatives of the deceased appellant."

10. The complication is introduced by Order 41, R. 4 which in sequence comes after Order 23, Rule 4, Order 41, Rule 4 lays down:

> "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 tha appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

Obviously, this rule does not apply to different appeals on a common ground unless they have been consolidated. See -- 'Amarsangji v. Desai Umed', AIR 1925 Bom 290 (J). But It does apply to a case where the decree proceeds on any ground common to all the plaintiffs or to all the defendants. It does lay down a discretionary rule for the guidance of the Court that, where, for example, the Court of first instance finds in favour of the possession of a party and that party was dispossessed by three persons who were defendants in the suit and who put up a joint defence and only one of them appeals from the decree, the decree may be reversed not only in favour of the party who has appealed but also in favour of those defendants who have preferred no appeal.

Wide as the terms of Order 41, Rule 4 are, and important as it is for the Courts not to cut down the vast discretion with which it vests them, it strikes us that the power of the appellate Court under this section is restricted to reversing or varying decree in favour of only those who are plaintiffs or defendants, as the case may be. In cases where there are more plaintiffs or defendants in the suit and the decree is passed against the defendants, the appealing defendant or defendants are looked upon as representatives of all the defendants. This rule would seem to be similar in principle to Order 1, Rule 8. It strikes us, however, that it cannot be said that the defendant who appeals and after the preferment of the appeal dies and against whom on the failure of his co-appellants or of his heirs or legal representatives to apply within the time allowed for substitution, an order of abatement has been passed, can by any fiction of law be treated on a par with a defendant who has not appealed at all. The fact cannot be got over that he joined in preferring a common appeal, that thereafter he died, that thereafter his legal heirs or representatives and the other defendants-appellants did not choose to have his heirs and legal representatives brought on the record. It is clear that a decree obtained after the death of a deceased respondent cannot bind the representatives of the deceased unless they have been made parties to the suit in which it was pronounced. We do not think Order 41 Rule 4 can have any application to a case where one of the defendants has ceased to exist and his heirs and legal representatives are not on the record and indeed the Court has declared on a belated application by them that the suit has abated as against him.

11. From the very wordings of Order 41, Rule 4 it would seem that this rule was intended to be applicable to only such cases where all the plaintiffs or defendants were alive and only one or more of them had cared to appeal from the decree. To go further than this would be 'to hold that Order 41 either overrides or creates an exception to Order 22, Rules 3 and 11 and authorises the Court in effect to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant. It is obvious that Order 41, Rule 4 does not in express terms override Order 22, Rules 3 and 11. We cannot understand how it can be said that it overrides them by necessary implication. It is fair to assume that had the legislature intended that it should override the rules referred to above, it would have expressed itself in clear terms to that effect. On this part of the case we are unable to agree with the proposition that there is no difference in principle between a case where only some of the defendants have appealed and the case where all had originally appealed and one had died during the pendency of the appeal and no steps had been taken to bring the names of the heirs or personal representatives of the deceased appellant on to the record.

12. We may on this part of the case quote Harries C. J -- 'AIR 1940 Pat 346 at p. 347 (G)': "The wording of Order 41, Rule 4, Civil P. C. suggests that the rule was intended to apply to cases where all the plaintiffs or defendants were alive and that only one or more of such plaintiffs or defendants had appealed from the decree. The rule lays down that in such a case the Court may reverse or vary the decree in favour of all the plaintiffs or defendants in the suit as the case may be provided that the decree appealed from proceeded on any ground common to all the plaintiffs or defendants. The words 'and thereupon the appellate Court' may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be' suggest that all the plaintiffs or defendants are alive at the time when the decree of the appellate Court is passed. The wording of the rule does not appear to me to be appropriate to a case where one of the plaintiffs or defendants appellants has died

during the pendency of the appeal. A plaintiff or defendant-appellant who has died during the pendency of the appeal can no longer be regarded as a plaintiff or defendant in the suit, and the rule does not state in terms that the decree may be reversed or varied in favour of all the plaintiffs or defendants or their personal representatives or representatives in Interest. The reversal or variation can only be made in favour of the plaintiffs or defendants and that suggests that it cannot be made in favour of the personal representatives of a deceased plaintiff or defendant."

In these circumstances whether the appeal has or has not abated as a whole will depend upon considerations other than the provisions of Order 41, Rule 4, Civil P. C.

13. It must further be pointed out that the words of Order 22 Rule 3 (2), Civil P. C. are of a mandatory character, Order 41, Rule 4 cannot be held to enunciate a principle which governs other rules or provisions in the Code. Under Order 41, Rule 4, the Court has been given certain powers only. They cannot be extended beyond those contemplated by the legislature. To do so would in effect amount to legislation. There is no reference to abatement in Order 41, Rule 4. That is a separate matter which has been dealt with in a separate part of the Code. Order 41, Rule 4 cannot, therefore, be applied in such a manner as to negative the very specific provisions which have been laid down in the Code regarding abatement. Reference may be made on this part of the case to the case of -- 'Amin Chand v. Baldeo Sahai-Ganga Sahai', AIR 1934 Lah 206 (K), where a later provision of a statute is intended to override an earlier portion, the legislature takes care to state it clearly. This has not been done and we cannot by implication hold that Order 41, Rule 4 was intended to be used for purposes of setting aside orders of abatement validly passed. It further strikes us that where a valued right has accrued the provisions of Order 41, which enable a Court in appeal to add new parties, should not be applied. Whether the interests of the three defendants were separate or separable, (though they claim to be tenants in common of a patti), was a question on which no specific issue was framed and on which we do not think it proper in this case to express any opinion.

14. Having stated the conclusion at which we have arrived, we shall now proceed to review briefly some of the more important cases which were cited at the Bar. We shall first deal with the cases of our own Court. The first case to which attention may be drawn is that of -- '25 All 27 (A)'. In considering this case it has to be remembered that Sub-rule (3) of Rule 4 of O. 22, Civil P. C. is not exactly in the same words as was Section 368 of the old Code. Sub-rule (3) of the present Code runs as follows: "Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant." In the old Code the words "as against the deceased defendant" did not occur. The sub-rule as it stood in the old Code merely provided that where no such application is made, the suit shall abate. It was the absence of these words in Section 368 that led to the contention in numerous cases that where no application is made to bring the legal representatives of a deceased defendant or respondent on the record within the period of limitation, the suit or appeal abated not only against the deceased defendant or respondent, but as a whole. This contention did not find favour with the Courts which were inclined to hold that a distinction should be made between cases in which a suit or appeal could proceed in the absence of the legal representatives and those in which it could not. The view was held that in the former class of case the suit would abate only as against the deceased defendant or respondent. In the latter case it would abate as a whole. Sub-rule 3 has clarified the position and makes it plain that where no

application is made to bring the legal representatives on the record within the time limited by law, the suit shall abate only against the deceased defendant or respondent and not necessarily as a whole. Sub-rule (3) was enacted to give legislative recognition to the current of authority at the time when the Code came to be revised. The consistent trend of authority is in the direction of the view that where the suit is of such a nature that it can proceed without the legal representatives of the deceased defendant or respondent being brought on the record, the suit or appeal shall abate only against the deceased defendant or respondent.

It is in this context that the decision in --'25 All 27 (A)', must be viewed. It was in these circumstances that the aid of Section 544 which corresponds to Order 41, Rule 4 was invoked at the time when -- '25 All 27 (A)', came to be decided. It may further be mentioned that the view of this Court in a number of cases used to be that the provisions of Section 368 had application only to the case of the death of a respondent who was a defendant in the Court and it was not incumbent on the legal representatives of the ceased defendant to implead the legal representatives of a deceased plaintiff-respondent. The settled view now is that the rule applies both in cases of death of a respondent whether a plaintiff or defendant in the original suit. The position, therefore, is that the question whether the abatement is partial or total will be dependent on the nature of the right claimed in the suit. In the case of an appeal the decision will have to be with reference to the nature of the decree appealed against.

15. In -- '25 All 27 (A)', the suit out of which the appeal arose was one for a partition of certain immoveable property belonging Jointly to the parties. The claim was decreed by the Court of first instance on a ground common to all the defendants. Prom that decree only six of the defendants appealed. While the appeal was pending one of them died. Thereupon an application was made by his widow on behalf of her minor children that they should be made parties to the appeal as his legal representatives. That application was rejected on the ground that it was made after the period of limitation had expired, the learned Judges holding that tine appeal against the deceased appellant had abated. On these facts it was observed that the decision of the case turned upon the question whether the right to appeal survived to the surviving appellants. It was pointed out that inasmuch as each of the surviving appellants could have appealed separately, the surviving appellants were competent to appeal, notwithstanding the death of one of the parties, who joined them in making the appeal. It is further to be noticed that it was on the basis that as each of the several plaintiffs or defendants could have preferred an appeal if he had so chosen. The mere fact that they had joined together in filing one appeal would not result in the abatement of the appeal as a whole if upon the death of any one of them the right of appeal survived to the other appellants. No doubt Section 544 which corresponds with Order 41, Rule 4, was invoked in aid. The argument that the obligation to implead the legal representatives was greater in this case inasmuch as the suit was one for partition was not accepted, though the observation was made that the Court has always the power to direct that persons interested in the result of the appeal who have not been made parties to the appeal be ad ed as respondents. The decision is based on the assumption that the death of one of the appellants, if no legal representative of the deceased appellant is brought upon the record within limitation, can only have the effect of causing, the appeal to abate so far as the deceased appellant was concerned. This in effect is what Order 22, Rule 4 as enacted by the Civil Procedure Code in 1903 enables a Court to do and for this reason we cannot look upon this case now as an authority for

the proposition that in allowing the suit or appeal to proceed in the event of the suit or appeal having abated against one of the defendants where the right to sue survives, the Court was exercising the power given to it under Section 544 which corresponds, as has already been stated, with Order 41 Rule 4. There is, in our opinion, no real conflict between the view that we are taking and that which found favour with the Bench deciding the case in --'25 All 27 (A)'.

16. The second case to which attention may be invited is that reported in -- 'AIR 1930 Ail 211 (2) (B)'. In this case the plaintiff had sued for the recovery of possession of certain lands which had been leased to him by certain persons who were the defendants to the suit. In this case,

-- '25 All 27 (A)', was referred to with approval by a learned Single Judge of this Court. The more important point about it, however, is that, in the short judgment which was delivered by the learned Single Judge, reference was made to the enactment by the legislature of Order 22, Rule 3(2), viz. that where within the time limited by law no application is made under Sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned. The learned Judge pointed out that

-- '25 All 27 (A)', had been decided prior to the passing of the present Civil Procedure Code.

17. The third case to which reference may be made is the one reported in -- 'AIR 1944 All 240 (C). In this case there had been a failure on the part of the defendant to implead the legal representatives of a co-defendant who was a pro forma defendant in the appeal. Malik J. (Now Malik C. J.) observed that he knew of no provision in the Civil Procedure Code which makes it obligatory for a defendant to implead his co-defendants as pro forma respondents in an appeal. We may say that we agree with this proposition. There is no reference in this case to the case reported in -- '25 All 27 (A)', for the obvious reason that this was a case of a pro forma defendant and it was unnecessary for the learned single Judge to consider whether that case had or had not been rightly decided.

18. The fourth case to which attention may be drawn is that of -- 'AIR 1950 All 1 (D)'. This is a single Judge decision of this Court. 'From the judgment it appears that the plaintiffs sued for recovery of possession over two small plots of land marked in the map attached to the plaint. The common defence of all the three defendants to the suit was that the land did not belong to the plaintiffs at all, that indeed it was the property of defendant 1, he having acquired it by a sale deed in 1934. It further appears that adverse possession was earlier pleaded in the case. One of the respondents, having died and his legal representatives not having been brought on the record within the time allowed by law, it was pleaded that the appeal had abated as a whole. The learned Judge repelled this contention as in his opinion the two persons had derived their interest in the property, i.e., possession through defendant 1 and all the three defendants had contested the claim of the plaintiffs on one common ground, namely that the plaintiffs had no title. The learned Judge held on these facts that the provision's of Order 41, Rule 4 Civil P. C. applied and that defendant 1 alone was competent to appeal from the whole decree.

No reasons are given for this view and it is obvious that the learned Judge's view in that particular case was that the right to sue had survived. The learned Judge does not seem to have considered the applicability of Order 22, Rule 2.

19. The fifth case of -- 'AIR 1923 All 211 (E)'. where a contrary view appears to have been taken is distinguishable on the ground that the suits out of which the appeals arose were preemption suits and it is well-known that a right of pre-emption is a joint right exercisable not by any single person but all the pre-emption jointly. This case lays down that where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, Rule 4 of Order 41, Civil P. C. does not authorise the cause to proceed with the appeal without making the other plaintiff parties thereto. The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity.

This ruling, however, has no application where the legal representatives of a pro forma respondent are not brought on the record. No reference was made in this case to -- '25 All 27 (A)'. Reliance was, however, placed upon a case reported in -- 'AIR 1919 Cal 410 (P), which is a decision of the Calcutta High Court, and in which it was held by the Bench delivering it that where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, Rule 4 of Order 41, Civil P. C., does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. In this case the appeal arose out of a suit brought by six plaintiffs for recovery of possession of a homestead on declaration of their title thereto. The plaintiffs had pleaded a joint title, it being contended that the right to sue was one which did not survive to the surviving plaintiffs. One of the plaintiffs died during the pendency of the appeal and his heirs were not brought on the record within the time allowed by law. The right being a joint right it was held that the right to sue was one which could not survive to the surviving plaintiffs separately. The suit having abated under Rule 3 of Order 22, the other plaintiffs could not be authorized under Order 41 Rule 4 to proceed with the appeal.

20. We may also in this connection refer to the Full Bench case -- 'Ghulam Abbas v. Safdar Jah Zahid All Mirza', AIR 1941 Oudh 219 (FB) (L). which was a case under Section 4, Encumbered Estates Act. What appears to have happened in this case is that an application was presented to the Court under Section 4, Encumbered Estates Act. It was opposed by some of the creditors, the ground being that the applicants were not landholders within the meaning of the Encumbered Estates Act. This objection prevailed with the Court. An appeal was filed thereafter by the applicants. While the appeal was pending one of the opposing creditors died. His legal representatives not having been brought on the record within the time allowed by law, it was held that inasmuch as the interests of the creditors were joint and indivisible and they could not be separated from those of the rest and the heirs of the deceased creditor were necessary parties the appeal must be deemed to have abated as a whole for otherwise it would lead to conflicting and inconsistent decision with regard to the same subject-matter. The case of -- 'Ramjas Tewari v. Ram Lal Tewari', AIR 1938 Oudh 209 (M). was quoted with approval and the tests laid down were these:

> "Whether the interests of the defendants in the suit are joint and indivisible so that the interest of the deceased cannot be separated from those of the rest and (2) whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two inconsistent and contradictory decrees in the same case with respect to the same subject-matter."

These are the tests, which we have indicated should be applied in this case and we agree with the line taken by the learned Judges in that Full Bench. It may be mentioned that the first test laid down by it is in harmony with the view which found favour in -- '25 All 27 (A). On the second question -- '25 All 27 (A)', is silent for the simple reason that that point did not arise in that case.

21. Attention may also be drawn to the case of -- 'Mahamangal Rai v. Kishun Kandu', AIR 1927 All 311 (N), in which a learned single Judge of this Court held that the power vested in an appellate Court by Order 41, Rule 4 to reverse or vary the decree appealed from in favour of all the plaintiffs or all the defendants is not restricted to cases in which the plaintiffs or defendants who have not appealed are made parties to the appeal. It was held that the power could be exercised by the appellate Court even if the plaintiffs or defendants who had not appealed were not made parties to the appeal. We have pointed out that the words of Order 41, Rule 4 are of the widest character possible, but can it be inferred from the language employed that the legislature deliberately empowered the appellate Court to reverse or vary the decree in favour of all the plaintiffs or all the defendants, even where one of appealing defendant had died and the suit against him had abated. It is obvious that every party to a suit has a right to appeal against a decree by which he is aggrieved and the mere omission of other parties to the suit, who are equally aggrieved, not to join hands with him in preferring an appeal cannot debar an appellate Court to grant an appropriate relief to the party who has appealed. But can it be said that a defendant who appealed and died during the pendency of the appeal, his heirs not having been brought on the record, continues to be a party at all. Obviously he has ceased to be a defendant and his heirs and legal representatives, assuming he has any, cannot be treated as if they were parties to the appeal or the suit.

22. In the case of -- 'Hafijul Hoque v. Altaf Hossain', 43 Cal WN 1088 (O), the position was that the sole defendant having died during the pendency of the appeal and only some of his heirs having been brought on the record, the appeal was deemed to have abated as a whole. The basis of this decision was the interpretation of the term "legal representative" in Order 22, Rule 3. Term legal representative was meant to mean all the legal representatives. Order 41, Rules 4 and 33 were not held to apply as obviously it was meant for cases where there were more plaintiffs or more defendants than one in a suit and where the decree appealed from proceeded on any ground common to all the plaintiffs or all the defendants. This case, therefore, has no bearing on the present case.

23. Another case which was relied upon was that of -- 'Mritunjoy Das v. Sm. Sabitrimoni Dasi', AIR 1950 Cal 59 (P). Here again it may be noted that it was held that where there is an order of abatement already on record, Order 41, Rule 4 cannot be attracted. Reliance was placed on -- 'Protap Chandra v. Durga Charan', 9 Cal WN 1081 (Q) and -- 'Naimuddin Blswas v. Maniraddin', AIR 1928 Cal 184 (R).

24. We may further add that in -- 'Malobi v. Gous Mohamad', AIR 1949 Nag 91 (S), the observation was made by Sen J.: "that the wording of Rule 4 of Order 41, Civil P. C., 1908, suggests that the rule was intended to apply to cases where all the plaintiffs or defendants were alive and that only one or more of such plaintiffs or defendants had appealed from the decree. The rule does not state in terms that the decree may be reversed or varied in favour of all the plaintiffs or defendants or their

personal representatives or representatives in interest. The rule cannot override, or create an exception to Order 22, Rules 3 and 11, and in the case of one or more appellants dying, even where a decree proceeds on a ground common to all, the matter must be governed solely by the provisions of those latter rules."

> "Order 41, Rule 4 does not empower the appellate Court to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant."

We may say that we are in agreement with this statement of the law.

25. We have invited attention to some important cases cited before us. It is unnecessary in our opinion to refer to other cases. We are clearly of the opinion that the answers to the questions postulated by the learned single Judge are as follows:

> 1. If, in a suit, a plaintiff makes a claim against a number of defendants on common grounds and all the defendant also contest the suit on common grounds and the suit is decided in favour of the plaintiff against all the defendants, an appeal filed by all the defendants can be heard in favour of the remaining defendants after one of the appealing defendants has died during the pendency of the appeal and his legal representatives have not been brought on record so that his appeal has abated, only if the rights and interests of the surviving defendants were not joint and indivisible with those of the deceased defendant, and in the event of the success of the appeal, it does not lead to two inconsistent and contradictory decrees.
>
> 2. While the appeal of the remaining defendants can be heard, the decision in it will not enure to the benefit of the legal representatives of the deceased defendant-appellant.

26. We direct that our opinion should be sent to the learned single Judge, who will now proceed to apply it to the facts of this particular case.