

## Kanhaiyalal vs Rameshwar And Ors. on 17 February, 1983

**Equivalent citations: AIR1983SC503, 1983(1)SCALE242, (1983)2SCC260, AIR 1983 SUPREME COURT 503, 1983 UJ (SC) 340, 1983 2 CIV LJ 348, (1983) JAB LJ 420, (1983) MAH LJ 801, (1983) MPLJ 614, 1983 (2) SCC 260, (1983) SIM LC 176, (1983) ALL WC 394**

**Bench: D.A. Desai, V. Balakrishnan Eradi**

### ORDER

1. Special leave granted.

2. We heard Mr. Naunit Lai, learned Counsel for the appellant and Mr. H. K. Puri, learned Counsel for "respondent No. 1. We are of the opinion that the High Court was clearly in error in holding that the appeal preferred by the present appellant had abated on account of the death of the judgment debtor, who was one of the respondents.

3. A few facts will immediately focus the attention on the question involved in this appeal.

4. The decree holder, respondent No. 1, Rameshwar, obtained a decree for Rs. 8500/- plus interest against respondents Nos. 2, 3 & 4. One Bhikaji father of the appellant and respondents Nos. 6 & 7 and husband of respondent No. 5 stood as surety for the judgment debtors. After the decree was put into execution certain objections were raised by the judgment debtors which were overruled and a revision petition against the order failed. In the meantime a house of the judgment-debtors was attached. Subsequently, the execution was set in motion against the surety Bhikaji and he raised certain objections. Pending the execution proceedings Bhikaji died and his heirs and legal representatives were substituted. They include appellant and respondent Nos. 5 to 9. The substituted heirs raised certain objections. These objections were overruled, whereupon the present appellant and respondents Nos. 5 to 9 preferred an appeal being Civil Appeal No. 8 of 1977. When the appeal was pending in the High Court it was brought to the notice of the Court that the judgment debtor No. 2 Hukam Chand had died. Appellant and respondents Nos. 5 to 9 moved an application for substitution. On behalf of the executing decree holder a contention was raised that as the heirs and legal representatives of the deceased Hukam Chand judgment-debtor were not substituted in time, the appeal has abated. By a short cryptic order, the High Court accepted the contention of the decree holder and disposed of the appeal, as having abated.

5. It is this order which is in appeal before us.

6. Mr. Naunit Lai raised two contentions. But we propose to examine second of the two contentions. The first contention is that the provisions of Order XXII, Rules 3, 4 & 8 of the C. P. C. do not apply to the execution proceedings. The question is not whether the heirs were not impleaded in execution proceedings but whether the appeal has abated on account of the failure of appellant to seek

substitution of the deceased respondent No. 2 pending the appeal. We do not propose to examine the first contention. But the second contention which we are inclined to accept is sufficient to dispose of this appeal. Mr. Naunit Lai submitted that the appellant is the heir of the surety, contesting surety's liability and the appellant was not seeking any relief against the original judgment-debtor who was a proforma respondent. It was urged that the failure to implead the legal representatives of a proforma respondent against whom no relief is claimed would not have the effect of abating the appeal preferred by the present appellant. The heir of secretly was contesting his liability to satisfy the decretal debt. The appellant claimed no relief against the pro-forma judgment-debtor. The judgment-debtor is contesting his liability with which we are not concerned. By the death of proforma respondent, judgment-debtor, right to sue does not revive against him or his heirs and their presence was unnecessary and the appeal can proceed in their absence. Therefore, the High Court was clearly in error in holding that the appeal would abate on the sole ground that the heirs of the deceased judgment-debtor proforma respondent No. 2 were not substituted in time. No substitution was necessary and appeal could have been proceeded with in the absence of the deceased judgment-debtor and disposed of on merits.

7. On this short ground we allow the appeal and set aside the order of the High Court disposing of the appeal as having abated and remand the matter to the High Court to dispose it of on merits as expeditiously as possible because it is a matter in execution and decree under execution is a very old one.

8. There will be no order as to costs.