

The Indian Law Reports

APPELLATE CIVIL

Before Gurdev Singh, J.

SAT PAL AND ANOTHER,—*Appellants*

versus

BUDHA AND OTHERS—*Respondents*

Second Appeal from Order No. 15 of 1964

Treated as C. R. 343 of 1967

February 1, 1967

Code of Civil Procedure (V of 1908)—Order 43 Rule 1(k)—Order 22 Rules 9 and 11—Order refusing to set aside abatement of an appeal—Whether appealable.

Held, that under the Code of Civil Procedure an appeal lies only if an order is covered by any of the clauses of rule 1 of order 43 of the Code. The words of clause (k) of rule 1 are clear and unambiguous and refer to an order refusing to set aside the abatement or dismissal of the suit and not to an order refusing to set aside abatement or dismissal of an appeal or any other proceedings. The legislature, while enacting Order 43, was fully conscious of the fact that rule 9 of Order 22 applies not only to suits but to appeals as well, and under that rule a Court may accept or dismiss an application for setting aside an abatement of a suit as well as of an appeal. All the same, the legislature did not provide an appeal, while making the provision in clause (k) of rule 1 of order 43 of the Civil Procedure Code, against every order passed under order 22 rule 9 of the Civil Procedure Code, but explicitly confined the right of appeal in that clause against an order refusing to set aside the abatement or dismissal of a suit as distinct from an appeal. Hence an order refusing to set aside abatement of an appeal is not appealable.

Second Appeal from the order of the District Judge, Sangrur, camp at Narnaul, dated 22nd October, 1963, affirming that of Shri Gyan Dass Jain, Senior Subordinate Judge, Narnaul, dated 12th June, 1961, dismissing the application of the petitioners and leaving the parties to bear their own costs.

R. N. MITTAL, ADVOCATE, for the Appellants.

R. N. SANGHI, ADVOCATE, for the Respondents.

JUDGMENT

GURDEV SINGH, J.—This appeal is directed against the order of the District Judge, Sangrur, dated 22nd October, 1963, whereby he rejected the application of the appellant under Order 28 rules 4, 9 and 11 of the Civil Procedure Code for setting aside the abatement of the appeal between the parties and holding that the appeal had partially abated qua Hazari Lal, deceased as well s Niranjn Lal and Banwari Lal, respondents. Shri R. N. Sanghi, one of the respondents, has taken a preliminary objection that no appeal lies against the impugned order. He argues that the order refusing to set aside abatement of an appeal is not one of the orders against which appeal is provided under Order 43 of the Civil Procedure Code or any other provisions of law. Referring to clause (k) of rule 1 of Order 43 of the Civil Procedure Code, Shri Sanghi contends that the right of appeal under this clause is against an order made under Order 22 rule 9 of the Civil Procedure Code refusing to set aside the abatement or dismissal of a suit only and not against an order refusing to set aside abatement or dismissal of an appeal. Shri R. N. Mittal, appearing for the appellants, has, however, urged that clause (k) of rule 1 of Order 43 of the Civil Procedure Code applies to orders passed in appeal as well under Order 22 rule 9 of the Civil Procedure Code as Order 22 rule 9 has been expressly made applicable to questions of abatement in appeal by virtue of that specific provision contained in rule 11 of Order 22, which provides:—

“In the application of this Order to appeals, so far as may be, the word ‘plaintiff’ shall be held to include an appellant, the wrd ‘defendant’ a respondent, and the word ‘suit’ an appeal.”

He argues that since an application for setting aside an abatement or dismissal of an appeal has to be dealt with by the Court under Order 22 rule 9 of the Civil Procedure Code, any order passed under that rule would obviously be covered by clause (k) of rule 1 of Order 43 of the Civil Procedure Code, which reading with the opening words of rule 1 of Order 43 provides:—

“An appeal shall lie from the following orders under the provisions of section 104, namely:—

(a)

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(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit.”

According to the submission of Mr. Mittal's this clause (k) of Order 43 rule 1 of the Civil Procedure Code must cover all orders under Order 22 rule 9 whether passed in appeal or in a suit. In support of his submission, he has relied upon the decisions of the Patna High Court in *Hari Saran Singh v. Saiyid Mohommad Eradat Hussain* (1), *Wajid Ali v. Fagoo Mandal* (2) and *Ram Ranbijaya Prasad Singh v. Madho Turha and others* (3), besides the decision of the Nagpur High Court in *Ganpat Bapuji v. Shri Maruti Deosthan* (4). These authorities certainly support his submission that the present appeal is competent under Order 43 rule 1(k) of the Civil Procedure Code. The decision of this Court in *Shrimati Chando Devi v. Municipal Committee, Delhi* (5), to which Shri Mittal has also referred, is not directly in point. There the question for consideration before the Bench was whether an appeal under clause 10 of the Letters Patent of this Court lay against an order refusing to set aside the abatement of an appeal pending before a learned Single Judge of this Court. The Bench held that no such appeal was competent. The decision proceeded primarily on the finding that an order refusing to set aside an abatement was not a judgment against which an appeal under clause 10 of the Letters Patent could lie. In dealing with this matter Chopra, J., who delivered the judgment of the Court, however, observed as follows:—

“There is yet another reason which supports the view that I take and it is this. Under Order XLIII, rule I, Civil Procedure Code, no appeal shall lie against an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit. Read with section 104, it means that an appeal shall lie against an order setting aside the abatement of a suit or an appeal. It would certainly be anomalous to hold that no appeal is competent if an order setting aside the abatement of a suit or an appeal is made by a Subordinate Court, but if a similar order is made by a

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- (1) A.I.R. 1925 Pat. 162.
 - (2) A.I.R. 1938 Pat. 125.
 - (3) A.I.R. 1939 Pat. 623.
 - (4) A.I.R. 1952 Nag. 181.
 - (5) A.I.R. 1961 Punj. 424.

Single Judge of the High Court in exercise of its original or appellate jurisdiction the order is appealable under the Letters Patent."

These observations upon which Shri Mittal has relied, however, do not help us in resolving the controversy that has arisen before us. There is nothing in these observations to indicate that their Lordships of the Division Bench even expressed an inclination that an appeal against an order refusing to set aside an abatement of an appeal is competent.

As against the authorities to which the learned counsel for the appellants has referred Mr. Sanghi has relied upon *Akkas Mia and others v. Abdul Aziz Bepari* (6), *Mahboob Husan Khan and others v. Syed Bashir Hussain and others* (7) and *Patel Dahyabhai Mathurbhai v. Dolia Bhaishanker Pitamber and others* (8), in which it has been held that clause (k) of rule 1 of Order 43 of the Civil Procedure Code is confined to orders passed in suit and does not provide an appeal against an order refusing to set aside abatement of an appeal. It is true that the relevant observations in the Gujarat case (*Patel Dahyabhai's case, supra*) are in the nature of *obiter dicta* as the learned Judge had himself found that there was no order of abatement in that case and thus there was no question of setting it aside. The other two authorities of the Calcutta and the Allahabad High Courts, however, support the contention that an order refusing to set aside abatement of an appeal does not fall under clause (k) of rule 1 of Order 43 of the Civil Procedure Code. The authorities cited before me disclose conflict of judicial opinion regarding the scope of clause (k) of rule 1 of Order 43 of the Civil Procedure Code, but after having gone through these decisions, I find, speaking with respect, that the view taken by the Calcutta and the Allahabad High Courts embodies the correct position of law. The Patna decisions and the Nagpur case, to which reference has been made earlier, proceed solely on the fact that Order 22 rule 9 of the Civil Procedure Code is not confined to orders made on application for setting aside abatement or dismissal of a suit, but by virtue of rule 11 of Order 22, it also applies to applications made for setting aside abatement of an

(6) A.I.R. 1929 Cal. 532(2).

(7) A.I.R. 1961 All. 527.

(8) A.I.A. 1963 Gujarat 258.

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appeal. In holding that the appeal provided under clause (k) of rule 1 of Order 43 of the Civil Procedure Code must include an appeal against an order refusing to set aside abatement of an appeal as well, it is emphasized that such an order refusing to set aside the abatement of an appeal would still be an order made under rule 9 of Order 22, which is expressly referred to in clause (k) of rule 1 of Order 43 of the Civil Procedure Code. It is no doubt true that an application for setting aside the abatement of an appeal would be made under Order 22 rule 9 of the Civil Procedure Code read with rule 11 of the same Order, and an order dismissing an application for setting aside the abatement of an appeal must be taken to have been passed under rule 9 of Order 22 of the Civil Procedure Code. This is because of the express provision contained in rule 11 of Order 22. No such provision is, however, found in Order 43, which relates to appeals against orders nor is there anything in Order 22, or rule 11 of that Order itself, which provides that an order made under Order 22 rule 9 of the Civil Procedure Code shall be taken as an order passed in a suit for the purpose of an appeal under clause (k) of rule 1 of Order 43 of the Civil Procedure Code. It is well-settled, and has not been disputed before me, that an appeal is a creature of the Statute, and unless the right of appeal is specifically conferred, no appeal shall lie against an order. Here we are dealing with an order and not a decree. Section 104 of the Civil Procedure Code lays down that "an appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other order." Apart from a few orders mentioned in this section, the provision relating to appeals against other orders are contained in Order 43 and the orders passed under the Civil Procedure Code from which appeals are provided by the legislature are set out in rule 1 of that Order. Here we may turn to section 105, which provides:—

"105(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal..."

From this, it is apparent that under the Code of Civil Procedure an appeal shall lie only if an order is covered by any of the clauses

of rule 1 of Order 43 of the Civil Procedure Code and not otherwise. It further follows that unless there is an express provision conferring the right of appeal, no such right can be deduced or claimed by implication. Keeping this in mind, let us turn to clause (k) of rule 1 of Order 43 of the Civil Procedure Code, which provides an appeal from "an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit. The words are clear and unambiguous. This clearly refers to an order refusing to set aside the abatement or dismissal of the suit and not to an order refusing to set aside abatement or dismissal of an appeal or any other proceedings. The fact that in rule 11 of Order 22 of the Civil Procedure Code the legislature had specifically provided that the provisions of Order 22 including rule 9 thereof under which orders for setting aside abatement can be passed, would apply to appeals as well far from strengthening the argument of the appellant's counsel, in my opinion, undermines it. The legislature, while enacting Order 43, was fully conscious of the fact that rule 9 of Order 22 applies not only to suits, but to appeals as well, and under that rule a Court may accept or dismiss an application for setting aside an abatement of a suit as well as of an appeal. All the same, the legislature did not provide an appeal, while making the provision in clause (k) of rule 1 of Order 43 of the Civil Procedure Code, against every order passed under Order 22 rule 9 of the Civil Procedure Code, but explicitly confined the right of appeal in that clause against an order refusing to set aside the abatement or dismissal of a suit as distinct from an appeal. Admittedly, under Order 43, no appeal lies against an order setting aside abatement or dismissal of a suit, but only against the refusal to set aside such abatement or dismissal. If the intention of the legislature was that the right of appeal should be available even against orders refusing to set aside abatement or dismissal of appeals as distinct from suits, it could have very well stated so in clause (k) by adding the words "or appeals" at the end of this clause. If it did not do so, the intention obviously was not to provide an appeal against the order refusing to set aside abatement of an appeal. It is again significant that there is no provision in Order 43 similar to the one contained in rule 11 of Order 22 of the Civil Procedure Code, by which the reference to suits in this Order can be deemed to include appeals nor is there anything in Order 11 rule 22 itself which can extend the operation of that order to appeals for the purpose of Order 43 of the Civil Procedure Code. I would, accordingly, follow the decisions of the Calcutta, Allahabad and Gujarat High Courts in preference to the view expressed by the

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Patna and the Nagpur High Courts, and hold that the appeal is not competent.

Shri R. N. Mittal has prayed that this appeal be treated as a petition for revision as apart from going into the question of sufficient cause for abatement, the learned District Judge has acted illegally in exercising his jurisdiction in holding that the appeal had abated not only against the deceased respondent Hazari Lal, but against two others Niranjana Lal and Banwari Lal, who admittedly were still parties to the suit. This prayer, in my opinion, is justified, and I do not agree with Shri Sanghi, that even a petition for revision does not lie against the impugned order of the District Judge. I, accordingly, direct that this matter be treated as a petition for revision under section 115 of the Civil Procedure Code.

As the records will be necessary to appreciate the contention with regard to the extent of abatement of the appeal, I direct that the same be obtained for an early date. It has been brought to my notice that some of the actual-date notices issued by registered post have not yet been received. Though the presumption is that they must have been served, yet in order to avoid any further difficulty, I think it is proper that these respondents whose notices have not been received back should be served by publication of the notices in the daily Hindi Milap of Delhi for an actual date.

K.S.K.

CIVIL MISCELLANEOUS

Before D. K. Mahajan and R. S. Narula, JJ.

M/S BHAJAN LAL-SARAN SINGH & CO.,—*Petitioner*

versus

THE STATE OF PUNJAB AND OTHERS,—*Respondents*

Civil Writ No. 538 of 1966

February 6, 1967

Punjab Excise Act (I of 1914)—Ss. 36 and 38—Punjab Liquor Licence Rules (1956)—Rule 36(23-A)—Whether offends Entry 51 in list II of the Seventh