amended section 17(2)(vi) of this Act. The learned counsel for the appellant has further contended that, in any case, the application for compromise was never intended to be a document of title between the parties and it was merely a memorandum prepared for presentation to the Court of an oral agreement creating charge on the house previously arrived at between the parties. So it did not require registration. For this also, he seeks support from some of the cases already referred to above. Every document, obviously, must proceed on the parties agreeing to its terms before it is reduced to writing, but that does not mean that every such document is a recital of a past completed transaction. It depends upon the circumstances of a particular case whether a particular document is not by itself a document of title but is merely a memorandum of a title already orally created. For that, evidence is necessary. Here, just an argument has been urged not supported by any evidence. But even under the unamended section 17(2)(vi) of that Act, it was held by Sulaiman, J., in *Chhajju* v. *Gokul* (15), that an unregistered compromise has no binding effect as a document which purports or operates to create or extinguish any right or interest in immovable property worth rupees one hundred, for such a document is compulsorily registrable. So there is no substance in this argument on the side of the appellant.

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The consequence is that this appeal of the appellant fails and is dismissed with costs.

D. FALSHAW, C.J.—I agree.

Falshaw, C.J.

K.S.K.

APPELLATE CIVIL

Before D. Falshaw, C.J., and Mehar Singh, J.

DAULAT RAM,—*Appellant*

versus

MAHABIR PARSHAD AND OTHERS,—*Respondents*

Regular First Appeal No. 84-D of 1958

1965

March, 3rd.

Code of Civil Procedure (V of 1908)—Order 41, Rule 4 and Order 22, Rule 3—Joint decree in favour of plaintiffs-respondents—Shares of each not specified in the decree—Ratio of shares in the decree ascertainable—Appeal against the decree—

(15) A.I.R. 1923 All. 338.

One of the plaintiffs-respondents dying during pendency of the appeal—Legal representatives not brought on record—Appeal—Whether abates against all respondents—Joint decree-holders putting in a joint application for execution of the decree—Executing Court holding decree to be null and void—One of the decree-holders filing appeal impleading other decree-holders as respondents—One of the decree-holders-respondents dying during the pendency of the appeal—Legal representatives not brought on record—Appeal whether abates in toto.

Held, that the fact that in the joint decree in favour of the plaintiffs-respondents, the share of each plaintiff can be and is ascertainable is not a relevant matter. It is a joint decree and once it has abated in regard to one of the plaintiffs-respondents, who had died and whose legal representatives have not been brought on the record it cannot be modified directly or indirectly even with regard to the others. In other words, there can be no interference with the decree in the circumstances. So the consequence is that the whole of the appeal of the defendant abates.

Held, that when execution application of all the decree-holders is dismissed on the common ground that the decree which is sought to be executed has become null and void, the appeal against that order abates *in toto* because on the death of one of the decree-holders-respondents, the order of the executing Court becomes final so far as the deceased respondent is concerned. It follows that that order cannot be modified or varied in favour of the decree-holder-appellant and the second surviving decree-holder-respondent for obviously that will result in inconsistent orders with regard to the same decree which the decree-holder seeks to execute. So the appeal abates *in toto.*

Regular First Appeal from the decree of the Court of Shri Dev Raj Khanna, Sub-Judge, 1st Class, Delhi, dated the 6th day of August, 1958, *decreeing the suit of the plaintiffs for Rs.* 61,750 *as arrears against the defendants with costs.*

V. D. MAHAJAN, ADVOCATE, for the Appellant.

S. N. CHOPRA, ADVOCATE, for the Respondents.

ORDER

The following judgment of the Court was delivered by:—

Mehar Singh, J.

MEHAR SINGH, J.—In the suit, by three plaintiffs, Mahabir Parshad, Gunwanti Devi and Sarojni, to recover

Rs. 61,750 as arrears of rent or compensation for use and occupation of the land in suit, appellant Daulat Ram was a defendant, and with him the other two defendants were Jagi Ram and Duli Chand, who have been made respondents by this appellant in his appeal against the decree in the suit, which reads—"It is ordered that the defendants do pay to the plaintiffs the sum of Rs. 61,650 with costs with interest thereon at the rate of ..... per cent per annum from ..... to the date of realisation of the said sum and do also pay Rs. 3,015 the costs of this suit." The appellant has impleaded all the three plaintiffs as respondents.

It is admitted on both sides that of the plaintiffs-respondents Sarojni died sometimes in November, 1962. No application has been moved to implead her legal representatives in the appeal of Daulat Ram, defendant. The appeal has apparently abated. No application for setting aside abatement has been made either within time.

The plaintiffs in the plaint stated that the land of which arrears of rent or compensation for use and occupation was claimed against the defendants was the property of Mahabir Parshad, plaintiff, who on June 6, 1952, transferred specific field numbers of it, some in the name of his mother Gunwanti Devi plaintiff and others in the name of his wife Sarojni, plaintiff. The rest of the land in suit remained in the ownership of Mahabir Parshad, plaintiff. So each one of the three plaintiffs was the owner of definite and specific field numbers of the land of which arrears of rent or compensation for use and occupation was claimed by them against the defendants. So that it is possible to know the definite proportion of their shares in that land. The plaintiffs claimed a decree in the amount sued for in favour of Mahabir Parshad, plaintiff or in favour of all the plaintiffs. Decree in their favour was passed in the form as narrated above. It is obviously a joint decree in favour of all the three plaintiffs. Their shares are not specified in it. As has been pointed out, from the ratio of the shares of ownership of the plaintiffs in the land, the ratio of their shares in the decretal amount in the decree can be ascertained.

In the circumstances the appeal having abated against plaintiff-respondent Sarojni, the question is whether it has also abated against the remaining two plaintiffs-respondents ?

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The answer is provided by the dictum of their Lordships of the Supreme Court in *State of Punjab* v. *Nathu Ram* (1), which was later followed in *Rameshwar Prasad* v. *Shambehari Lal-Jagannath* (2), in which, at page 91, it was observed—

> "The difficulty arises always when there is a joint decree. Here again, the consensus of opinion is that if the decree is joint and indivisible, the appeal, against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent. Different views exist in the case of joint decrees in favour of respondents whose rights in the subject-matter of the decree are specified. One view is that in such cases, the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents can be suitably dealt with by the appellate Court. We do not consider this view correct. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the capacity of the joint decree-holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour. The abatement of the appeal 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. The reason is plain. It is that in the absence of the legal representatives of the deceased respondent, 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

(1) A.I.R. 1962 S.C. 89.

(2) A.I.R. 1963 S.C. 1901.

which the Court will do is one to which exception can or cannot be taken."

In the light of this observation of their Lordships it is now evident that the fact that in the joint decree in favour of the plaintiffs-respondents, the share of each can be and is ascertainable is not a relevant matter. It is a joint decree and once it has abated in regard to one of the plaintiffs-respondents, it cannot be modified directly or indirectly even with regard to the others. In other words, there can be no interference with the decree in the circumstances. So the consequence is that the whole of the appeal of defendant Daulat Ram abates and thus stands dismissed. In these circumstances there is no order in regard to costs in that appeal.

The three plaintiffs, as decree-holders, put the same decree in execution by an application to the executing Court. The judgment-debtors (defendants) filed objection to the execution application on the ground that the decree in favour of the decree-holders had become null and void in view of section 21 of the Delhi Land Reforms (Amendment) Act of 1959. On April 1, 1961, this objection prevailed with the executing Court which, holding that the decree between the parties has become null and void in view of the said provision, dismissed the execution application. Against that order appeal has been filed by Mahabir Parshad decree-holder alone and the respondents in that appeal are the three judgment-debtors and the remaining two decree-holders, including Sarojni decree-holder. It has already been pointed out that Sarojni decree-holder died some time in November, 1962. No application was moved within time to bring her legal representatives on the record in the appeal by Mahabir Parshad decree-holder. On July 11, 1963, an application was moved by appellant Mahabir Parshad decree-holder that as decree-holder Sarojni respondent was only a *pro forma* respondent in the appeal and no relief has been claimed against her by him, so her name be struck off from the array of respondents. The order on this application was granting it subject to just exceptions. An objection is now raised on the side of the judgment-debtors-respondents that the appeal having abated *qua* decree-holder Sarojni respondent, it has also abated as a whole

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so far as the appeal of Mahabir Parshad appellant is concerned. On the side of this appellant the argument by the learned counsel is that the appeal has been initially a competent appeal of Mahabir Parshad, appellant, even though the other decree-holders have not joined him as appellants, according to rule 4 of Order 41 of the Code of Civil Procedure, which rule reads—"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be." There is no doubt that under this rule Mahabir Parshad appellant's appeal as initially instituted is a competent appeal and it would still have been a competent appeal even if he had not impleaded the remaining two decree-holders as respondents to the appeal. It is an appeal against an order which proceeds on a ground common to all the decree-holders as also to all the judgment-debtors inasmuch as the learned Judge in the executing Court has dismissed the execution application of the decree-holders on the ground that the decree has become null and void under a statutory provision. In *Rameshwar Prasad's case* their Lordships pointed out the basis for rule 4 of Order 41 in these words—"Further, the principle behind the provisions of rule 4 seems to be that any one of the plaintiffs or defendants, in filing such an appeal, represents all the other non-appealing plaintiffs or defendants as he wants the reversal or modification of the decree in favour of them as well, in view of the fact that the original decree proceeded on a ground common to all of them." So the appeal of Mahabir Parshad appellant is not only on his own behalf but also representing the two non-appealing decree-holders and he wants the reversal of the order of the executing Court not only *qua* himself but also with regard to the non-appealing decree-holders because the order proceeds on a ground common to all of them that the decree in their favour has become null and void in consequence of a subsequent statutory amendment. In such a situation the argument of the learned counsel for Mahabir Parshad appellant that decree-holder Sarojni respondent was merely a *pro forma* respondent because that appellant claims no relief against her and and his reference

to *Brij Mohan Lal-Murli Dhar* v. *Raj Kishore and another* (3), cannot possibly prevail because here the appeal by Mahabir Parshad appellant was, as pointed out, not only on his own behalf but as also representing the non-appealing decree-holders, whom in fact he has made party respondents to his appeal. The substance of his claim in appeal is reversal of the order of the executing Court not only in his favour, but also in favour of the non-appealing decree-holders, party respondents to the appeal. Such respondents, in the circumstances, cannot be described as merely *pro forma* respondents not interested in the result of the appeal or whose rights are not affected by the result of the appeal. Decree-holder Sarojni respondent being thus not a *pro forma* respondent only, if in appeal the order of the executing Court against her cannot be reversed because she has died and no legal representatives of her having been brought on the record within time the appeal has abated in so far as she is concerned, it follows that the appeal has also abated so far as Mahabir Parshad appellant is concerned because it is an appeal against an order jointly against all the three decree-holders proceeding on one common ground that the decree in their favour has become null and void consequent upon a subsequent statutory amendment. The learned counsel for Mahabir Parshad appellant presses that the appeal having been initially properly constituted, it does not abate because a party has been made a party respondent to it, which party need not have been impleaded for the proper and valid constitution of the appeal. It has been pointed out that in view of rule 4 of Order 41, Mahabir Parshad appellant could have filed the present appeal without citing the other decree-holders as respondents, but that is what he has not done. He has cited the other two decree-holders as respondents, and what he seeks is the reversal of the order of the executing Court not only for himself but also as representing the remaining two decree-holders, who are respondents to the appeal. So the fact that decree-holder Sarojni was made a party respondent to the appeal has the effect that in consequence of her death and her legal representatives not having been impleaded within time, the appeal abates. The nearest case to which a reference has been made

(3) I.L.R. 1959 Punj. 1417=A.I.R. 1959 Pb. 555.

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during the hearing is *Thakur Ram Janki and others* v. *Jago Singh and others* (4). In that case after the decree and before the filing of the appeal two defendants 3 and 4 in the trial Court had died. The remaining defendants filed an appeal against the decree and on an objection having been taken on behalf of the plaintiffs that the appeal was incompetent because the legal representatives of two deceased defendants had not been impleaded as parties, the appealing defendants relied on rule 4 of Order 41 because the decree proceeded on a ground common to all the defendants, and this contention on the side of the appealing defendants was maintained by the learned Judges pointing out that they were not compelled to keep track of the non-appealing defendants whether they continued to live and no duty was cast upon them to implead their legal representatives as parties to the appeal immediately as those two defendants died. On facts of course the case is not parallel, but the learned Judges considered a situation as in the present appeal of Mahabir Parshad appellant and at page 134 of the report observed—"Order 22 of the Code of Civil Procedure provides for substitution of the heirs and legal representatives of a person who is already a party either in a suit or in the appeal. If defendants 3 and 4 were impleaded as respondents or as appellants in this appeal, undoubtedly Order 22 would have been attracted and, failure of substitution of their legal representatives in their place and absence of an order setting aside the abatement, would have led the appeal to abate against these defendants, namely, defendants 3 and 4 and their heirs and legal representatives. In that case, it would have been for consideration of the Court if the whole appeal would abate against all. When defendants 3 and 4 not being parties to the appeal died, the defendants-appellants could not have invoked the aid of Order 22 to implead the legal representatives of the deceased in the appeal as respondents." The learned counsel for Mahabir Parshad, appellant, points out that this observation of the learned Judges is *obiter dictum*, which is correct, because the facts of that case were not as the facts in the present appeal of Mahabir Parshad appellant. There is, however, another case *Abdul Rahman* v. *Girjish Bahadur Pal* (5), which supports the argument

(4) A.I.R. 1062 Patna 131.
(5) A.I.R. 1939 All. 235.

urged by the learned counsel for the appellant and the case was parallel on facts to the present appeal of Mahabir Parshad appellant. There is this difficulty with that case that it proceeds to base the decision on four cases referred to at page 239 of the report in which all the aggrieved parties, whether plaintiffs or defendants, had filed appeal and on the death of one, without impleading his legal representatives, the remaining were held entitled to continue the appeal under Order 41, rule 4 because the decree had proceeded on a ground common to them. After making reference to those four cases the learned judges proceed—"We are in agreement with the view expressed in the last mentioned four cases. Where the suit has proceeded on a common ground, as contemplated by Order 41, rule 4, Civil Procedure Code, and the Court is asked to apply that rule, we can see no essential difference between (1) the case where some only of the plaintiffs or defendants, as the case may be have appealed without impleading the others, (2) the case where all the plaintiffs or defendants have appealed and one of them dies and his heirs are not substituted and (3) the case, as here, where some only of the plaintiffs have appealed and have impleaded the non-appealing plaintiffs and the *pro forma* defendants having the same interest as the plaintiffs and of the non-appealing plaintiffs or *pro forma* defendants died and his heirs are not brought on the record. In the case before us it is admitted that the suit proceeded on a ground common to all the plaintiffs within the meaning of Order 41, rule 4. If, therefore, the plaintiffs-appellants had appealed without impleading Mst. Karmdani and Bhagwati Prasad and if the Court being aware of the absence of the two deceased respondents, consciously decided to apply Order 41, rule 4, it would have been competent to it to reverse the decree of the trial Court in favour of the plaintiffs and also in favour of the defendants third party for whom relief was prayed and whose interests were identical with those of the plaintiffs." This case proceeds on the basis of the consideration which has been expressly over ruled by their Lordships in *Rameshwar Prasad's case*, in which it has been held that an appellate Court has no power to proceed with the appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under Order 41, rule 4, when the decree proceeds on a ground common to all the plaintiffs or

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defendants, if all the plaintiffs or the defendants appeal from the decree and any of them dies and the appeal abates so far as he is concerned under Order 22, rule 3. It is apparent that the basis on which the learned Judges proceeded to their decision in *Abdul Rahman's case* no longer subsists in view of the decision of their Lordships in *Rameshwar Prasad's case.* So even *Abdul Rehman's case* does not advance the argument on the side of the appellant Mahabir Parshad.

Appellant Mahabir Parshad has impleaded the remaining two decree-holders as respondents to the appeal. The execution application of all the decree-holders has been dismissed on a common ground that the decree which is sought to be executed has become null and void. The appeal abates so far as decree-holder Sarojni respondent is concerned because her legal representatives have not been brought on the record within time. The order of the executing Court has become final so far as this deceased respondent is concerned. It follows that that order cannot be modified or varied in favour of appellant Mahabir Parshad, and the second surviving decree-holder respondent for obviously that may result in inconsistent orders with regard to the same decree. The order of the executing Court in so far as Sarojni deceased respondent is concerned has become final and if the same order is modified or interfered with so far as the other two decree-holders, namely, appellant Mahabir Parshad and respondent Gunwanti Devi are concerned, the apparent result will be two inconsistent orders with regard to the same decree which the decree-holder seeks to execute. So the appeal of appellant Mahabir Parshad also abates. There is no order in regard to costs in this appeal either.

K.S.K.

APPELLATE CIVIL

Before Mehar Singh, J.

RAMPARTAP,—Appellant

versus

INDIA ELECTRIC WORKS LTD.,—*Respondent.*

S.A.O. 24-D of 1964.

1965

March, 5th.

Code of Civil Procedure (V of 1908)—Order 23—Rule 1(3)—Whether a rule of substantive law or a rule of procedure—Delhi