APPELLATE CIVIL

Before P. C. Pandit and S. S. Sandhawalia, JJ.

Baldev Singh, etc.—Appellants.

versus.

Hira, etc.—*Respondents.*

Regular Second Appeal No. 75 of 1965.

May 18, 1971.

Code of Civil Procedure (Act No. V of 1908)—Order 22, rule 4—Party to a suit or appeal dying during the pendency of the proceedings—Legal representatives of the deceased brought on record—One of such representatives dying when the proceedings are still pending—His Legal representatives not brought on record—Suit or appeal—Whether abates— Decree passed in ignorance of the death of a party to the appeal—Whether a nullity.

Held, that there is a patent difference between two distinct classes of cases. Firstly those in which the original party to an action dies and his legal representatives are not brought on record though there may be others already on the record having a common interest with the deceased. Secondly those cases in which the original party to the action dies and a number of his legal representatives are brought on record but during the pendency of the action one of such legal representatives again dies and the latter's legal representatives are not brought on record. To the second group of cases the doctrine of the representation of the estate applies fully. Therefore there is no lack of representation of the estate of the original party in the presence of some of his legal representatives because the estate continues to be represented by them. In this group of cases the rights and liabilities of the original party are in issue in the suit and the appeal arising therefrom. Hence where a party to a suit or appeal dies and a number of his legal representatives are on record but out of them one of such legal representatives subsequently dies (and his legal representatives are not brought on record) then the suit or appeal does not abate either wholly or partially.

Held, that a decree passed after the death of a party to the suit or appeal in ignorance of such death is not an absolute nullity. Such a decree is not void *ab initio* nor it is open to collateral attack; but it is erroneous and viodable and hence liable to be aside. **(Para 9 and 11)**

Case referred by Hon'ble Mr. Justice D. K. Mahajan, on 22nd May, 1970, to a larger Bench for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble Mr. Justice Prem Chand Pandit and Hon'ble Mr. Justice S. S. Sandhawalia, finally decided the case on 18th May. 1971.

Regular Second Appeal from the decree of the Court of Shri Surinder Singh, 1st Additional District Judge, Ludhiana, dated 25th August, 1964,

affirming that of Shri Bhishma Kumar Agnihotri, Sub Judge III Class, Samrala, dated 28th February, 1958, holding that one sixteenth share of the land in dispute is non-ancestral and so the suit is dismissed regarding that portion and regarding the remaining land in suit, passig a decree in favour of the plaintiff and against the defendants for a declaration to the effect that the sale shall be void and shall not effect the revertionary rights of the plaintiff except to the extent of Rs. 3,410 after the death of Ugar Singh defendant No. 9 and leaving the parties to bear their own costs.

BAHADUR SINGH, ADVOCATE, for the appellant.

INDERJIT MALHOTRA, AND H. R. BANSAL, ADVOCATES, for the respondent.

JUDGMENT

S. S. SANDHAWALIA, J.—Whether proceedings abate because of a failure to implead the legal representatives of one of a number of legal representatives already brought on record after the death of the original party to the proceedings—is the ticklish question that has been referred by the learned Single Judge for decision by a larger Bench. Learned counsel for the parties (who also represented them before the referring Judge) agree that only the question of law on the point of abatement stands referred and the case would, therefore, go back for decision on merits.

(2) The point at issue arises from the following set of facts which are not in dispute. One Uggar Singh (also referred to in the record as Ujaggar Singh) had effected 7 mortgages of the disputed land and subsequently sold the same by a registered deed dated 4th October, 1954, to Ralla Singh. Hira a reversioner of Uggar Singh brought the suit for a declaration that the mortgages and the sale in favour of Ralla Singh would not affect his reversionary rights as these were without consideration and legal necessity and that the land was ancestral *qua* him and Uggar Singh. During the pendency of this suit, Ralla Singh died and his five sons Baldev Singh, Sukhdev Singh, Gurdev Singh. Tarlochan Singh and Santokh Singh were brought on record as his legal representatives. The trial Court found that 1/16th share of the land in dispute was non-ancestral and the remaining was ancestral and further that the bulk of the sale consideration was without legal necessity. Accordingly it decreed the suit in favour of Hira plaintiff-respondent *qua* the ancestral land and dismissed the same *qua* the non-ancestral part thereof. The five sons and legal representatives of Ralla Singh then filed an appeal before

the District Judge who found that the entire land in dispute was non-ancestral and therefore dismissed Hira's suit *in to to.* Hira respondent then preferred a second appeal to this Court to which the five sons of Ralla Singh deceased were parties as the former's legal representatives and were jointly represented by one counsel. During the pendency of the appeal in this Court one of the five sons, namely. Sukhdev Singh died. The appeal came up for decision before Mahajan J. and the appellant was unaware of the death of Sukhdev Singh, and the fact of his death was not brought to the notice of the Court nor any objection to the appeal proceeding on merits was taken. The legal representatives of Sukhdev Singh had not been brought on the record. The appeal was argued on merits by the learned counsel for the parties and by his order dated the 18th of November, 1963, the learned Judge remanded the case to the District Judge to determine which portion of the land was ancestral and which was non-ancestral. Subsequently a review application was moved in this Court that the appeal had abated because of the death of the Sukhdev Singh and therefore the order of remand should be set aside. This review application was dismissed by Mahajan J. as being barred by time. Another application was made before the District Judge in the course of the rehearing of the appeal consequent on remand, for bringing the legal representatives of Sukhdev Singh deceased on the record but this was not done. The District Judge decided the appeal on merits and affirmed the decision of the trial Court. The remaining four sons of Ralla Singh along with the legal representatives of Sukhdev Singh deceased have now come up in the present appeal to this Court.

(3) Before the learned Single Judge the contention was raised that the earlier decree of the lower appellate Court had become final and the second appeal directed against it had abated by reason of the fact that Sukhdev Singh had died and his legal representatives had not been brought on record. In reply, however, it was contended on behalf of the respondents that Ralla Singh deceased was well represented by his other four sons who had an identical interest in contesting the appeal and that the estate of Ralla Singh deceased was fully represented in that appeal. The learned Single Judge after referring to a number of authorities noticed that the decision and observations in *Muthuraman Chettiar* v. *Adaikappa Chetty & others.* (1) supported the contention raised on behalf of the respondents.

(1) A.I.R. 1934 Mad. 730.

However, finding the principle laid down in that case being slightly at variance with the rule that no decree can be passed against a dead person. the learned Single Judge has referred the point for decision to a larger Bench and that is how it is before us.

(4) The facts above-said which have not been disputed before us and give rise to the issue of abatement are not unusual and in fact are of common occurrence. Nevertheless there appears to be an acute paucity of authority bearing directly on the point. In view of this at the request of counsel we had given a second opportunity of hearing to them but if I may say so they have not been able to add materially to their earlier submissions both on the point of principle or authority.

(5) To my mind the decision that directly governs the present point at issue is the judgment of Vardachariar J., *in Muthuraman's case* (1) and which stands affirmed in appeal by the Letters Patent Bench in *Muthuraman Chettiar* v. *Adaikappa Chetty and others*, (2). The facts therein which bear a close similarity to those in the present case deserve notice in some detail. A suit for partition and separate possession of his half share was brought by the plaintiff-coparcener in 1918 against one Muthu Ram Chetty who was the first defendant in that suit. Muthu Ram Chetty died during the trial and his sons Adaikappa and Palaniappa were brought on the record as his legal representatives. The suit was dismissed on the 24th of February, 1923. The plaintiff appealed and when the matter was pending before the appellate Court Palaniappa died in or about January, 1924. No legal representatives were brought on record in his place and the appellate Court reversed the lower Court's decree perhaps in ignorance of the death on the 28th of August, 1925. A second appeal to the High Court having been dismissed on the 27th of February, 1926, the trial Court after having divided the land gave the plaintiff a decree. Adaikappa and Palaniappa remained on record as legal representatives of the deceased and they had a common defence and appeared through the same counsel. Subsequently in 1937 a suit was brought by the minor son of Palaniappa seeking a declaration that all proceedings subsequent to the death of his father and the first decree of the trial Court should be declared null and void because after the death of his father his legal representatives had not been brought on the

(2) A.I.R. 1936 Mad. 336.

record. The claim was negatived and the trial Court held that the appeal had not abated because of the death of Palaniappa. The appellate Court also confirmed this view but on somewhat different grounds. A second appeal was taken which came up for decision by Vardachariar J. The learned Judge did not entirely agree with the reasoning of the Courts below and formulated the real question at issue in the following terms :—

> "The position in the present case was that the suit had been originally instituted against the plaintiff's grandfather as one of the defendants and all that was required for the purpose of upholding the jurisdiction of the Court to deal with the matter to the end was that the estate of the grandfather should continue to be duly represented. As stated already on the death of the grandfather, his two sons were brought on record, that is, the estate was represented by two persons as legal representatives. The question for consideration is, when one of them dies and his legal representative is not brought on record, does the original estate that was at first represented by two persons as legal representatives and is later on represented by one of them only cease to be represented, for the purpose of that litigation."

The learned Judge then proceeded to answer the question in categorical terms as follows :—

> "In dealing with these cases it seems to me, though Mr. Krishnaswami Iyer for the appellant maintains the contrary, that a difference has to be kept in view, between cases in which the original party to the action dies and his legal representative is not brought on record, though there may be others having common interest with them and cases in which only one of several legal representatives brought in as such during the pendency of an action dies and the estate continues to be represented by the remaining legal representatives. Whatever the position may be as regards the first group of cases, I am of opinion that in the second group there is no lack of representation of the estate, that the remaining representatives can as well represent the estate as the original group did, and that the

principle applicable to this class of cases is to be gathered from those decisions which uphold the doctrine of representation of an estate by some of the heirs of a deceased person when such heirs are sued as defendants in the first instance."

The above enunciation of the law was challenged by way of appeal and came up for decision before Chief Justice Beasley and Stodart J. in *Muthuraman* v. *Adaikappa,* (2). The Division Bench after expressly noticing the above paragraph categorically said as follows :—

"In that view we have no hesitation in concurring."

The Bench then proceeded to consider the argument directed against the view above-said and repelled it in the following terms :—

"The answer to this argument is twofold. By the decree, while it was still under appeal. Palaniappa acquired no final right in the property. Secondly the subject of the litigation was not the title of Palaniappa in the property but the title of his father Muthuraman Chetty. What the Courts were then deciding was whether Muthuraman had acquired a title in the property in deafeasance of the suit claim. And if plaintiff had been brought on the record it would not have been in substitution of his father Palaniappa but of his grandfather Muthuraman Chetty."

I am in respectful agreement with the above-said principle enunciated by Vardachariar J., and approved by the Bench. The narrow issue in the present case is whether the estate of Ralla Singh, deceased, the original party to the suit continued to be well represented after the death of one of his five sons who had been duly and validly brought earlier on the record as his legal representatives. It has been succinctly observed by the Bench in *Gulli* v. *Sawan,* (3) that—

"When a party to a suit dies a legal representative is appointed merely in order that the suit might proceed and a decision be arrived at. It is the original parties' right and disabilities that have to be considered and the mere fact

(3) A.I.R. 1924 Lah. 45

that Gulli could not have brought a suit to set aside these alienations on the ground of limitation is not, in our opinion, sufficient to render the suit by Nigahia liable to dismissal."

Applying the aforesaid principle, it becomes manifest that it is the rights and disabilities of the original party, namely. Ralla Singh, which were in issue in the suit and the appeals arising therefrom. The focal point, therefore, is whether the estate of Ralla Singh deceased was well represented on the record or not at the time of decision. The principle which hence must govern the case in such a situation is the doctrine of the representation of the estate of the original party. This rule is now well-established and it is unnecessary to burden this judgment with earlier authorities. It would suffice to refer to the lucid enunciation by Madhavan Nair J., whilst speaking for the Bench in *Chaturbhujadoss Kushaldoss and Sons and another* v. *Rajamanicka Mudali and others,* (4).In this case the debtor died leaving a will bequeathing his estate to his nephew. In ignorance of the will and *bona fide* believing that the widow was the proper legal representative, a creditor of the deceased brought a suit against her alone and obtained a decree *ex-parte* for statisfaction of the debt out of the husband's estate and to satisfy his claim by sale of certain items of the estate in her hands. The nephew of the deceased who was, the devisee under the will sued to set aside the decree and the sale in execution thereof and the point at issue was whether the said decree and sale was binding on the plaintiff (i.e. the nephew) who was the residue legatee under the will even though he was not a party to the suit. The learned Judge after adverting to the mass of case law on the point and placing reliance on the Privy Council's decision in *The General Manager of the Rag of Darbhanga* v. *Maharaja Coomar Ramaput Singh,* (5) summed up the position as follows :—

"In my opinion there is no justification for confining the principle enunciated in this decision only to those cases where a wrong representative is brought on record in the course of execution proceedings. The question to be considered, whether it arises in the course of execution proceedings or in the course of the suit, is this whether the estate of

(4) A.I.R. 1930 Mad. 930.
(5) (1870—79) 14 Moor. I.A. 605.

the deceased person was sufficiently represented by the legal representative who has been actually brought on record. I think the same principle should govern all cases where a wrong representative has been brought on record where such representative has been added in the course of the suit or in the course of the execution proceedings. The same consideration should apply also to a case where the suit itself is instituted against the wrong legal representative at the very commencement."

and ultimately decided in the following terms :—

"In these circumstances it must be held that according to the decisions of this Court the widow sufficiently represented the estate of the deceased in C.S. 81 of 1921 and that the decree obtained in it and the execution proceedings are binding on the plaintiff in respect of all the four items of property involved in the present suit."

Though it would involve a slight deviation from the chronological order of the authorities noticed hereafter, it may forthwith be noticed that the ratio of the above-said Madras decision has received express approval by the Supreme Court. In *N. K. Mohd. Salaijman Sahib* v. *N. C. Mohd. Ismail Saheb and others,* (6) their Lordships quoted some of the observations of Madhavan Nair J., and after referring to other authorities as well, even extended the doctrine of the representation of the estate. Therein it has been expressly held that there is no difference in principle, where the debtor dies after the institution of the suit and some of the legal representatives are brought on record and in cases where after diligent enquiry the creditor sues certain heirs alone in the first instance and it has been observed as follows :—

"In either case, where after due enquiry certain persons are impleaded after diligent and bona fide enquiry in the genuine belief that they are the only persons interested in the estate, the whole estate of the deceased will be duly represented by those persons who are brought on the record or impleaded and the decree will be binding upon the entire estate."

(6) A.I.R. 1966 S.C. 792.

Even more directly in point is the case of *Daya Ram and others* v. *Shyam Sundri and others* (7), where the plea of abatment was expressly raised but was repelled. In this case two of the legal representatives of the deceased-respondent in the appeal had not been brought on the record and the issue was debated before their Lordships as to whether in the absence of these two legal representatives, the appeal would abate or not. After holding that the real question in such cases is whether the estate of the deceased is properly and sufficiently represented for the purpose of defending the appeal and whether in law the estate can be so represented even when some of the heirs without fraud or collusion were omitted to be brought on the report, it has been laid down in the following terms:—

> "The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and *bona fide* enquiry ascertains who the representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record."

Yet again the issue of abatement was raised in *Dolai Maliko and others* v. *Krushna Chandra Patnaik and others* (8), and after referring to a number of authorities Wanchoo, J., repelled the same and summed up the position as follows:—

> "We are of opinion that these cases have been correctly decided and even where the plaintiff or the appellant has died and all his heirs have not been brought on the record because of oversight or because of some doubt as to who are his heirs, the suit or the appeal, as the case may be, does not abate and the heirs brought on the record fully represent the estate unless there are circumstances like fraud or collusion to which we have already referred above."

(7) A.I.R. 1965 S.C. 1049.
(8) A.I.R. 1967 S.C. 49.

(6) An analysis of the above-quoted authorities discloses that the doctrine of the representation of the estate now stands authoritatively affirmed by the Supreme Court and has been applied in diverse situations. It has been attracted to bind the rightful heir to the estate. even though he was not a party to the suit, where the ereditor had *bona fide* sued the wrong heir and obtained a decree against the estate. Equally within the ambit of the doctrine is the legal heir who had been omitted from being brought on the record due to an error or oversight but was held bound by the decree against the estate despite the fact that he was not a party to the proceeding. Similarly where some of the legal representatives of the deceased party had not been brought on the record they were nevertheless on this principle held to be bound by the decree against the estate if it had remained well represented. The contention of abatement in these cases has been expressly repelled and as noticed above they are even cases pertaining to the legal representatives of the original party. If that be so the present case which involves the bringing on the record of the legal representatives of one of the legal representatives already representing the estate of the original party is on a much stronger footing and would be well within the role of representation. The principle enunciated by Vardachariar, J., *in Muthuraman's case* (1), (and affirmed by the Letters Patent Bench) is unexceptionable and has in fact received authoritative approval by the passage of time. Following the above-said view the contention that the appeal abated on the death of Sukhdev Singh in the present case must hence be rejected.

(7) In fairness to Mr. Bahadur Singh, learned counsel for the appellant, I must notice that he sought to place reliance on *State of Punjab* v. *Nathu Ram* (9). A perusal of that judgment. however, would show that it cannot possibly be of any aid to the learned counsel. The facts are wholly different and distinguishable. It is obviously not a case where a legal representative of the original party brought on the record had died and there was any failure to bring the legal representatives of such a legal representative on record. It is further of interest that this judgment along with *Kadir Mohideen* v. *Muthukrisnd Ayyar* (10), (which was also referred to by the learned counsel for the appellant) was distinguished and explained in *Daya Ram's case* (7), and has. therefore, to be read in the

(9) A.I.R. 1962 S.C. 89.
(10) A.I.R. 1963 S.C. 553.

light of the observations made therein. Learned counsel had also made a reference to the *Union of India* v. *Shree Ram Bohra and others* (11), but I find that neither the facts nor the law laid down therein appear to have any application in the present context.

(8) It was then faintly argued on behalf of the appellants that in the present case the appellate order passed by Mahajan, J., on 18th of November, 1963, having been pronounced at a time when Sukhdev Singh one of the five sons of Ralla Singh brought on record as his legal representative had died, and by that fact alone the judgment pronounced in the appeal was hence a nullity. This contention first is oblivious of the glaring fact that in these proceedings the rights and liabilities of Ralla Singh, the orignal party to the proceedings are primarily in issue and his sons had come in merely to represent his estate after his death. It is not the rights and duties of the legal representatives which fall for determination. One has only to recall the observations in *Gulli's case* (3), already quoted above on the point. The decree and the order in these proceedings would govern the estate of Ralla Singh who admittedly had been fully and duly represented on the record after his death. Reference has already been made to the observations of their Lordships of the Supreme Court earlier enumerating the exceptions to the general rule which would make a judicial determination binding upon a person who may not have been impleaded as a party *eo nominee* in the proceedings at any stage. The decree in the present case was to be in favour or against Ralla Singh or his estate. There is no dispute that on his death his estate was fully represented by his five sons. Therefore the rule of a decree against a dead man has not the remotest application because Ralla Singh's legal representatives had undoubtedly been brought on the record.

(9) Even adverting to the contention on behalf of the appellants entirely for the sake of the argument it appears that the adage that a decree against a dead man is a total nullity is not a rule of universal application. In *Goda Co-opooramier* v. *Soondarammall* (12), the Bench held that a decree passed after the death of the plaintiff was not an absolute nullity and at best may be validable at his instance.

(11) A.I.R. 1965 S.C. 1531.
(12) (1910) 33 I.L.R. Mad. 167.

The Bench expressly approved the following statement of the law from "Black on Judgments"—

> "The great preponderance of authority is to the effect that, where the Court has acquired jurisdiction of the subject-matter and the persons during the life-time of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack."

The ratio of the decision above-said was accepted and followed by Chief Justice Shadi Lal whilst speaking for the Bench in *Tota Ram and others* v. *Kundan and others* (13), where he laid down as follows:—

> "I do not think that the decree can be treated as a nullity in the sense that it can be ignored altogether. As pointed out in *Goda Coopooramier* v. *Soondarammall* (12), a decree passed after the death of a party to the suit or appeal is not an absolute nullity. Such a decree is not void nor is it open to collateral attack, but it is erroneous and liable to be set aside."

Similarly in *Abdul Aziz and others* v. *Lakhmi Chandra Mujumdar and others* (14), one of the respondents had died during the pendency of the appeal but the fact was known to none, and the appeal was heard and disposed of on merits. Mookerjee, J., observed as follows in this context:—

> "The fact of the death of one of the respondents to the appeal did not destroy the jurisdiction of the Court. If this Court had been apprised of the true state of facts, no doubt, the Court would have made an order of a different description. That very circumstance shows that the jurisdiction of this Court was not ousted by reason of the death of one of the respondents. We are of opinion that the District Judge should not have regarded the order of this Court as if it were null and void, but should have reported the matter to this Court for such action as might be deemed necessary in the events which had happened."

(13) A.I.R. 1928 Lah. 784.
(14) A.I.R. 1923 Cal. 676.

In view of the above authorities it is not possible to subscribe to any inflexible rule that the death of a party in a civil proceeding would make the judgment given therein a total nullity.

(10) In elaborating the doctrine of the representation of the estate, their Lordships of the Supreme Court in *Mohd. Sulaiman* v. *Mohd. Ismail* (6), made reference to certain exceptions thereto. It has been laid down that where there has been fraud or collusion or where there is a clear indication by circumstances that there has not been a fair or real trial between the parties, or that the absent heir had a special defence, then in such cases the rule of representation of the estate may well not apply. It is significant that in the present case neither of these exceptions have even been remotely suggested. Obviously there arises no issue of fraud or collusion in the present case. The five sons of Ralla Singh deceased were represented by the same counsel and he argued the same on merits before Mahajan, J., It has not even been suggested that Sukhdev Singh deceased had any special defence or a case even slightly at variance from that of his brothers. There is not even a hint of any circumstances or fact which would suggest that there has not been a fair or real trial of the issues involved.

(11) In appreciating the argument raising an objection of total abatement, one cannot be unmindful of the weighty observations of Shadi Lal, C.J., in the Full Bench case of *Sant Singh and another* v. *Gulab Singh and others* (15),

> "There is no real difficulty in adopting in the present case the rule against total abatement, which has the advantage of enabling the Court to adjudicate upon the merits of the case and does not compel it to dismiss it upon a technical ground. The Courts exist for determining the merits of the dispute between litigants, and it is their duty to avoid, if they can legally do so, a result which causes hardship."

I would accordingly hold that despite the death of one of the legal representatives of Ralla Singh deceased, his estate continued to be fully represented by the remaining four legal representatives existing on the record and no question of total or partial abatement would arise in the appeal.

P. C. PANDIT, J.—I agree.

B.S.G.

(15) (1929) 10 I.L.R. Lah. 7.