

1961

May 1.

## THE STATE OF PUNJAB

v.

NATHU RAM

(K. SUBBA RAO and RAGHUBAR DAYAL, JJ.)

*Abatement of appeal—Joint decree in favour of respondents—Death of one of the respondents in appeal—Failure to bring legal representative on record—Whether the appeal abates as a whole—Test—Code of Civil Procedure, 1908 (V of 1908), O. 22, r. 4.*

The Punjab Government acquired certain parcels of land belonging to two brothers L and N who refused to accept the compensation offered to them and applied to the Government of Punjab under r. 6 of the Punjab Land Acquisition (Defence of India) Rules, 1943, to refer to arbitration their joint claim based on the allegation that the land belonged to them jointly. The State Government referred the matter to an arbitrator as required under r. 10 who passed an award in favour of both L and N ordering inter alia payment of an amount higher than what was offered to them by the Government. The Government appealed against the said award to the High Court. During the pendency of the appeal before the High Court respondent L died and as no application for bringing on record his legal representative had been made within the time limit, the High Court dismissed the appeal holding that the appeal had abated against L and that its effect was that the appeal against N also abated.

*Held*, that there can be no question of abatement of appeal against the co-respondents of the deceased respondent as Order 22 Rule 4 of the Code of Civil Procedure does not provide for the same but in certain circumstances the appeal cannot proceed against them and such a result depends on the nature of the relief sought in the appeal.

If the Court can deal with the matter in controversy so far as regards the rights and interest of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it; otherwise it will have to refuse to proceed further with the appeal and therefore dismiss it. Ordinarily, the consideration which will weigh with the court in deciding upon the question whether the entire appeal had abated or not will be whether the appeal between the appellants and the respondents other than the deceased respondent can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the court and the tests to determine this have been described thus: (a) when the success of the appeal may lead to the court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become

final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed.

The abatement of an appeal against the deceased respondent 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.

When the decree in favour of the respondents is joint and indivisible, the appeal against the respondents other than the deceased respondent cannot be proceeded with if the appeal against the deceased respondent has abated.

In the present case the appeal against N alone was not properly constituted when the appeal against L had abated and the State appeal against N alone could not proceed.

**CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 635 to 641 of 1957.**

Appeals from the judgment and decree dated September 8, 1954, of the Punjab High Court in Regular First Appeals Nos. 42, 43, 44, 45, 46, 47 and 48 of 1949.

*R. Gopalakrishnan, T. M. Sen and R. H. Dhebar*, for the appellants.

*Darya Dutt Chawla*, for the respondents.

1961. May 1. The Judgment of the Court was delivered by

**RAGHUBAR DAYAL, J.**—Civil Appeal No. 635 of 1957 is an appeal, by certificate, and raises the question regarding the effect of the abatement of the appeal, by the State of Punjab, against Labhu Ram, one of the respondents, on the State appeal against Nathu Ram, co-respondent.

Civil Appeals Nos. 636 to 641 of 1957 also raise the same question between the same parties.

The facts leading to the appeal are that the Punjab Government acquired on lease certain parcels of land belonging to Labhu Ram and Nathu Ram, for different military purposes, under the Defence of India Act,

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1939 (XXXV of 1939). Labhu Ram and Nathu Ram, brothers, refused to accept the compensation offered to them by the Collector and applied to the Punjab Government, through the Collector, under r. 6 of the Punjab Land Acquisition (Defence of India) Rules, 1943, hereinafter called the Rules, as amended by the Notification of the Punjab Government No. 1444-HM-44/19124, dated 10th March, 1944, and published in the Punjab Gazette, Part I, dated 17th March, 1944 (Home Department). The State Government referred the matter to an arbitrator as required under r. 10, who, after enquiry, passed an award ordering the payment of an amount higher than what was offered by the Collector and also ordered the payment of certain amount on account of income-tax which would be paid on the compensation received. The State Government appealed against the award to the High Court of Punjab. During the pendency of the appeal, Labhu Ram, one of the respondents, died. The High Court, holding that the appeal abated against Labhu Ram and that its effect was that the appeal against Nathu Ram also abated, dismissed the appeal. It also dismissed the cross-objections. The State Government applied for a certificate of fitness of the case for appeal to this Court and the High Court granted it, as questions of great private and public importance were involved.

It is not disputed that in view of O. XXII, r. 4, Civil Procedure Code, hereinafter called the Code, the appeal abated against Labhu Ram, deceased, when no application for bringing on record his legal representatives had been made within the time limited by law. The Code does not provide for the abatement of the appeal against the other respondents. Courts have held that in certain circumstances, the appeals against the co-respondents would also abate as a result of the abatement of the appeal against the deceased respondent. They have not been always agreed with respect to the result of the particular circumstances of a case and there has been, consequently, divergence of opinion in the application of the principle. It will serve no useful purpose to consider the cases. Suffice it to say that when O. XXII, r. 4 does

not provide for the abatement of the appeals against the co-respondents of the deceased respondent, there can be no question of abatement of the appeals against them. To say that the appeals against them abated in certain circumstances, is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore to be dismissed. Such a result depends on the nature of the relief sought in the appeal.

The same conclusion is to be drawn from the provisions of O. I, r. 9, of the Code which provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It follows, therefore, that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it.

The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to

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the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.

There has been no divergence between the Courts about the Court's proceeding with the appeal between the respondents other than the deceased respondent, when the decree in appeal was not a joint decree in favour of all the respondents. The abatement of the appeal against the deceased respondent, in such a case, would make the decree in his favour alone final, and this can, in no circumstances, have a repercussion, on the decision of the controversy between the appellant and the other decree-holders or on the execution of the ultimate decree between them.

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 an 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 respondents, 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 which the Court will do is one to which exception can or cannot be taken.

It is therefore necessary to determine, on the facts of this case, whether the State appeal could proceed against Nathu Ram. The award of the arbitrator in each of these cases was a joint one, in favour of both the respondents Labhu Ram and Nathu Ram. To illustrate the form of the award, we may quote the award for the year 1945-46 in the proceedings leading to Civil Appeal No. 635 of 1957. It is:

“On the basis of the report of S. Lal Singh, Naib Tehsildar (Exhibit P. W. 9/1) and Sheikh Aziz Din, Tehsildar, Exhibit P. W. 9/2, the applicants are entitled to a sum of Rs. 4,140 on account of rent, plus Rs. 3,872-8-0 on account of Income-tax etc., due to the inclusion of Rs. 6,193-8-0 in their total income, plus such sum as the petitioners have to pay to the Income-tax Department on account of the inclusion of Rs. 4,140 in their income as awarded by this award.”

The result of the abatement of the appeal against Labhu Ram is therefore that his legal representatives are entitled to get compensation on the basis of this award, even if they are to be paid separately on calculating their rightful share in the land acquired, for which this compensation is decreed. Such calculation is foreign to the appeal between the State of Punjab and Nathu Ram. The decree in the appeal will have to determine not what Nathu Ram's share in this compensation is, but what is the correct amount of compensation with respect to the land acquired for which this compensation has been awarded by the arbitrator. The subject matter for which the compensation is to be calculated is one and

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the same. There cannot be different assessments of the amounts of compensation for the same parcel of land. The appeal before the High Court was an appeal against a decree jointly in favour of Labhu Ram and Nathu Ram. The appeal against Nathu Ram alone cannot be held to be properly constituted when the appeal against Labhu Ram had abated. To get rid of the joint decree, it was essential for the appellant, the State of Punjab, to implead both the joint-decree holders in the appeal. In the absence of one joint-decree holder, the appeal is not properly framed. It follows that State appeal against Nathu Ram alone cannot proceed.

It is however contended for the State that according to the entries in the village records, Labhu Ram and Nathu Ram had equal shares in the land acquired and that therefore the appeal against Nathu Ram alone can deal with half the amount of the award. We do not agree. The mere record of specific shares in the revenue records is no guarantee of their correctness. The appellate Court will have to determine the share of Nathu Ram and necessarily the share of Labhu Ram in the absence of his legal representatives. This is not permissible in law. Further, the entire case of Labhu Ram and Nathu Ram, in their application to the Government for the appointment of an arbitrator, was that the land jointly belonged to them and had been acquired for military purposes, that a certain amount had been paid to them as compensation, that they received that amount under protest and that they were entitled to a larger amount mentioned in the application and also for the income-tax they would have to pay on account of the compensation received being added to their income. Their claim was a joint claim based on the allegation that the land belonged to them jointly. The award and the joint decree are on this basis and the appellate Court cannot decide on the basis of the separate shares.

The State objected before the arbitrator, and urges before us, that under the rules, the joint application of Labhu Ram and Nathu Ram should have been

treated as separate applications with respect to the correctness of the compensation payable to each of them respectively and that the arbitrator should have made separate awards with respect to such separate claims of Labhu Ram and Nathu Ram. The necessary corollary of such a contention for the State is that the abatement of the appeal against Labhu Ram will not make infructuous the appeal against Nathu Ram.

The respondent urges that the Punjab Land Acquisition (Defence of India) Rules, do not contemplate separate applications by the persons interested in the compensation on account of the acquisition of a particular parcel of land.

The arbitrator did not agree to deal with the claims of Labhu Ram and Nathu Ram separately. He, however, did not decide the question on the basis of the land belonging jointly to the two brothers as members of the joint Hindu family. He however held that the expression 'a person interested' in r. 3, included all persons claiming an interest in the compensation to be paid on account of the acquisition of the land and that r. 18 permitted the joinder of applications for joint enquiry when each case rested on the same and similar basis and each of the applications included land included in a larger part of land acquired at one time. He also took into consideration that the separation of the applications of Labhu Ram and Nathu Ram would involve various difficulties in matters of income-tax. He therefore used his discretion and ordered the application to be proceeded with jointly.

In view of our opinion on the main point, we do not consider it necessary to interpret the rules and decide whether the joint application was maintainable or not. The fact remains that Labhu Ram and Nathu Ram made a joint claim and got a joint decree against the State for compensation. The frame of the appeal is to be with reference to the nature of the decree challenged.

We therefore see no force in this appeal and dismiss it with costs. This order will govern the other

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connected appeals, viz., Civil Appeals Nos. 636 to 641 of 1957.

*Appeal dismissed.*

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INSTALMENT SUPPLY (P.) LTD. AND  
 ANOTHER

v.

THE UNION OF INDIA AND OTHERS

(B. P. SINHA, C. J., S. K. DAS, A. K. SARKAR,  
 N. RAJAGOPALA AYYANGAR and  
 J. R. MUDHOLKAR, JJ.)

*Sales Tax—Hire-purchase agreement—Transaction on such agreement, if liable to tax—Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi State, s. 2(g).*

Section 2(g) of the Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi State, provided as follows,—

“Sale’ means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge.

Explanation 1....A transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale.”

The hire-purchase agreement entered into by the petitioner company provided that after all the monthly instalments had been paid, “the hiring shall come to an end and the vehicle shall, at the option of the hirer, become his absolute property; but until such payments as aforesaid have been made, the vehicle shall remain the property of the owners. The hirer shall also have the option of purchasing the vehicle at any time during the currency of this agreement by paying in one lump sum the balance of all the hire hereinbefore mentioned and any other expenses incurred by the owners relating to the transaction.” The question for determination was whether the agreement was a transaction of mere hiring or one of hire-purchase within the meaning of Explanation 1 to s. 2(g) of the Act.