
(2018) 03 UK CK 0027

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 3360 of 2017

AJAY BAHADUR ARORA

APPELLANT

Vs

SMT RASHMI HANDA AND OTHERS

RESPONDENT

Date of Decision : 13-03-2018

Acts Referred:

Constitution of India, — Article 227
Indian Penal Code, 1860 — Section 120, 420
Code of Civil Procedure, 1908 — Order 1 Rule 9, Order 22 Rule 4(3), Order 22 Rule 4, Order 22 Rule 3(1), Order 22 Rule 3(2), Order 22 Rule 4(4), 22 Rule 9, Order 24 Rule 4 (4), Order 41 Rule 4, Order 41 Rule 5, Section 105, Section 115

Citation : (2018) 03 UK CK 0027

Hon'ble Judges : SHARAD KUMAR SHARMA, J

Bench : Single Bench

Advocate : Neeraj Garg

Final Decision : Dismissed

Judgement

Â Sharad Kumar Sharma, J.

1. This is a defendant's writ petition. The petitioner in this present writ petition has sought the relief for quashing the order dated 6.12.2017 as

passed by the III Additional District Judge, Dehradun in Civil Revision No.163/2015 â??Ajay Bahadur V/s Rashmi Handaâ?, as well as part of the

judgment/order dated 30.9.2015 as passed by III Additional Civil Judge (S.D.) Dehradun in O.S. No. 414/1993 â??Vipin Handa V/s Rao Rani Priya

Kumariâ?, so far it relates to refusing to accept the plea of defendant/petitioner for dismissing the suit having being abated as a whole and further also

against an observation made in the impugned order to the effect that the cause of action as against the other defendants No. 2 and 3 i.e. the petitioner

will survive and will not come to an end with the death of defendant No. 1, or

due to the non substitution of heirs of defendant No. 1.Â

2. The brief facts leading to filing of the present writ petition are that there happens to be a property called and more particularly described in the

municipal records as Plot no.174, Block A, measuring 500 sq.yd situated at Rajendra Nagar Colony Kaulagarh Road, Dehradun Mauza Chaibagh,

District Dehrdaun forming part of Khasra Plot no.20-M measuring 0.11 acres i.e. equivalent to 0.045 hectares. and the construction existing thereof, it

is said to have been bounded, in the North by a 20 feet wide road, in South lies Plot no.173, in East Plot no.175 and in West by 20 feet wide road

(herein after to be referred as â??the property in disputeâ??)

3. The plaintiff, respondent nos.1 to 5 had instituted a Suit on 15.6.1993 before the Civil Judge, Dehradun, registered as Suit no.414/1993 â??Vipin

Handa and others V/s Smt. Rao Rani Priya Kumari and othersâ?? for the following relief:-Â

â??A. That a decree for eviction and delivery of possession be passed in favour of the Plaintiffs and against the defendants evicting the defendants

no. 3 and 4 from Plot No. 174, BlockA measuring 500 sq.yds. situated in Rajendra Nagar Colony, Mauza Chai Bagh, Kaulagarh Road, Dehradun

forming part of Khasra plot No. 20(M) measuring 0.11 acres of 0.045 hect. Situated in Chai Bagh, Kaulagarh, Pargana Central Doon, Distt. Dehradun

formerly known as Sirmaur Tea Estate, Dehradun (more fully described in the schedule given at the foot of this plaint)

B. That a decree for Mandatory Injunction be passed in favour of the Plaintiffs against and defendants directing them to remove all constructions

standing on Plot No. 174 Block A measuring 500 sq. yds situated in Rajendra Nagar Colony, Mauza Chai Bagh, Kaulagarh Road, Dehradun, forming

part of khasra plot No. 20 (M) measuring 0.11 acres or 0.045 hect. situated in Chai Bagh, Kaulagarh, Pargana Central Doon, Distt. Dehradun

formerly also known as Sirmaur Tea Estate, Dehradun within such time as may be fixed by the learned court and on their failure to do so the plaintiffs

be allowed to remove the same through the assistance of the learned court at the cost and expenses of the defendants.

C. That full costs of the suit and any other reliefs to which the plaintiffs are found entitled be also granted in their favour against the defendants.â??

In the said suit the present petitioner has been impleaded as defendant no.3.Â

4. The suit thus filed on 15.6.1993 the plaintiff/respondent Nos. 1 to 5 had sought a decree of eviction and decree of possession to be passed in their favour and as against the respondents/defendant no.3 & 4 from the property in dispute, and further a decree of mandatory injunction against the defendants to remove all the construction existing on the property in dispute and in an event of failure to remove the said construction, the same may be removed through the assistance of learned court at the cost and expenses of the defendants.Â

5. In the suit thus filed the basic contention raised by the plaintiffs for the decree was that the property initially belonged to Lt. Colonel H.H. Maharaja Rajendra Prasad Bahadur who through his registered attorney holder, Sri Durga Ram Agarwal had sold the property in dispute to Sushila Handa vide sale deed dated

24.8.1964, which was registered before sub registrar on 13.11.1964. It was the contention of the plaintiffs that in pursuance to the sale deed dated 24.08.1964 as registered on 13.11.1964, the possession was transferred and their late mother Sushila Handa continued to be in possession and her name was mutated in the revenue records.Â

6. Records shows that Sushila Handa is said to have expired on 28.3.1981, leaving behind herself her husband Indrajeet Nath Handa and the plaintiffs as the legal heir(s) and representative(s) of late Sushila Handa. On account of the fact that the plaintiffs remained out of Dehradun on most of the occasions due to their service exigencies, it was contended in the plaint that the property was looked after by Mr. Indrajeet Nath Handa, the father of the plaintiffs. According to the plaint allegations the father of the plaintiffs Mr. Indrajeet Nath Handa when he visited his plot on 9.12.1989, he was shocked to find that the aforesaid plot as purchased by Sushila Handa on 24.8.1964 by the sale deed registered on 13.11.1964, the said plot has been divided into two parts and on the western portion of the property there exists a construction.Â

7. The father of the plaintiffs Mr. Indrajeet Nath Handa on making further enquiry and probe came to know that defendant no.2 A. Singh acting as an attorney of defendant no.1 Rao Rani Priya Kumari has sold the western portion of the plot to defendant no.3 i.e. the present petitioner and the other portion was sold by the same person in same capacity to defendant no.4 i.e.

Vinod Janwani. It is the case of the plaintiffs that after having learned about the said sham transaction of sale being made by defendant no.2 in favor of defendant no.3 & 4, without any authority and title vested in defendant No. 1, the father of plaintiffs Shri Indrajeet Nath Handa lodged an F.I.R. before the S.S.P. Dehradun on 11.12.1989 under Section 420, 120-B I.P.C. The said F.I.R. was registered as complaint case before the Additional Chief Judicial Magistrate Dehradun as Case Crime No.294/1990 â??Indrajeet Nath Handa V/s A. Singh and othersâ??.Â

8. Plaintiffâ??s case is that Mr. Indrajeet Nath Handa, the father of the plaintiffs died on 21.5.1993 and thereafter an advice was extended to the plaintiffs to institute the suit for the relief of eviction, possession and for mandatory injunction against defendant no.3 & 4 who are said to have purchased the property in dispute from the attorney holder of defendant no.1. In the meantime, plaintiff no.1 died and consequently the respondent no.1 2 & 3 were substituted before the court below.Â

9. The defendant no.3 i.e. the present petitioner in the written statement admits to have derived his rights from the sale deed executed in his favor by defendant no.2 as an attorney holder of defendant no.1 on 23.2.1984 wherein he categorically admits that the western part of the property was sold to him and he was placed in possession on which he has raised a construction after getting due sanction from the competent authorities on 10.7.1987.

But while filing the written statement in its para 30 and 31 respectively, the defendant no.3 had raised a plea to the effect that the defendant no.1 Rao

Rani Priya Kumari and defendant no.4 Vinod Janwani had died during the pendency of the suit. It is the case of the petitioner/defendant no.3 in the

writ petition that taking note of the fact of the death of defendant No. 4 from the contents of written statement paper no.42-A, the plaintiffs had

moved an application Paper no.66-C on 28.1.2015. In the application thus filed by the plaintiffs they have sought a prayer for exempting the plaintiff

from substituting the legal representative of deceased defendant no.1 & 4 on the premise that since despite the notices they have not put in

appearance, no written statement has been filed by them and also because of the fact that defendant No. 1 since has sold property to defendant No. 3

i.e. the petitioner, all rights over the property has been transferred to him after

the admitted purchase on 23.02.1984, hence the plaintiffs sought to invoke the provisions under Order 22 Rule 4 (4) of C.P.C. The provisions of Order 22 Rule 4 (4), were invoked on the ground that the whereabouts of the legal heirs of defendant no.1 & 4 is not known to the plaintiff. For the purposes of brevity Order 22 Rule 4 (4) is quoted hereunder:-

4.Â Procedure in case of death of one of several defendants or of sole defendantÂ

(1) â?|â?|â?|â?|â?|â?|â?|â?|â?|.

(2) â?|â?|â?|â?|â?|â?|â?|â?|â?|.

(3) â?|â?|â?|â?|â?|â?|â?|â?|â?|.

(4) The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who

has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing, and judgment may, in such case, be

pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been

pronounced before death took place.â??Â

10. On reading of Order 22 Rule 4(4), it partakes the shape of an enabling provision to be applied at the wisdom of the Court where defendant does

not appear or appears but avoids participation in the proceedings. This provision has twin objective to be achieved at one to avoid delay of proceedings

of suit and secondly to act as a deterrent for defendant who avoids participation, intending to delay suit with oblique motive that is why it enables the

Court to proceed and pass judgment on merits. Further, it intends to give legal enforceable states of such judgments as to have been passed before

death of defendant and being unaffected by the fact of death.

11. In the present case as the defendant No. 1 has sold property to petitioner on 23.02.1984, and that the sale deed dated 23.02.1984 remained intact,

un-assailed either by defendant No. 1 or his heirs or anyone else, and when the petitioner derives his rights from the sale deed dated 23.02.1984,

which he admits to be executed by defendant No. 1 through attorney holder defendant No. 2, the petitioner has derived and has independent right

which would not affect right of defendant No. 1 or any of his heirs. As a matter of fact, they were not necessary to be continued in the suit. So far as

defendant No. 4 is concerned, if at all he or his heirs had any grievance against

application under Order 24 Rule 4(4), it would be they who would be treated to be aggrieved and petitioner cannot agitate their cause by virtue of present writ petition, if the plaintiff chooses not to substitute the heirs, because its effect will follow consequences from Order 22 Rule 3 (1) and (2) of CPC vis-à-vis the non substituted heirs of defendant No. 4.

12. The application was filed by the plaintiff by invoking Order 22 Rule 4 (4) on the premise that apart from the fact that defendant no.1 & 4 have not

filed their written statement, it has also to be seen from the view point that the defendant no.1 who has sold the property through defendant no.2 to

defendant no.3 i.e. the present petitioner by sale deed dated 23.02.1984, she has lost her interest to contest the suit because the factum of execution of

the sale deed dated 23.02.1984 in favour of defendant no.3 stands admitted and claims who admits to be a valid purchaser from defendant no.1 as

would be apparent from the pleadings raised in Para 5 of the writ petition.Â

13. The application thus filed by the plaintiff on 28.1.2015 under Order 22 Rule 4 was opposed by defendant no.3 on the ground, that the fact of the

knowledge of death of defendant no.4 was well with the plaintiff's knowledge but they themselves have chosen not to substitute the heirs of

defendants.Â

14. The learned trial court by virtue of an order dated 16.3.2015 rejected the plaintiff's application paper no.66-C on the ground that since the suit

stood decreed exparte against all the defendants on 28.07.1997, and also because of the fact that it was only defendant no.3 i.e. the petitioner who has

sought to set aside the exparte decree. The ex parte decree dated 28.07.1997 would continue to operate against defendant Nos. 1 and 4. But since as

it would be revealed from the order dated 18.7.2014 as passed in Misc. Civil Appeal No.23/2010 which was allowed and consequently the effect of

judgment dated 18.07.2014 was that the exparte judgment and decree dated 28.07.1997 itself was set aside in its totality against all the defendants thus

has held that the benefit under Order 22 Rule 4 (4) cannot be extended, because according to the findings recorded by the trial court in its order dated

16.3.2015 while setting aside ex parte decree dated 28.07.1997, was that the effect of the order of setting aside the exparte decree would be that the

suit would be restored back to its original number as if there exists no decree at all and hence Order 22 Rule 4 (4) would not apply at that stage.Â

15. The learned trial court while considering application 72C(2) and the impact of the exparte decree 28.7.1997 which was sought to be set aside at

the behest of defendant no.3 i.e. the petitioner only inferred that it would be deemed that the exparte decree would stand to exist as against other

defendants i.e. defendant nos. 1 and 4 and would attain finality against them thus was of view as against defendant No. 1 and 4 was not surviving.

The Trial Court further held that looking to the decree which was passed it was of such a nature that it could not be set aside only against defendant

no.3 i.e. the petitioner who has sought to set aside the decree by filing an application under Order 9

Rule 13, and thereafter Misc. Appeal under Order 43 Rule 1(d), hence it would be deemed that the learned trial court while passing an order on

16.03.2015 had set aside the exparte decree dated 28.07.1997 only against defendant no. 3, thus which considering application Order 22 Rule 4 held

that it is not available to plaintiff to file substitution application, as decree has attained finality against defendant nos. 1 and 4. This was contrary to

findings of order dated 16.03.2015 because decree was set aside in its totality.

16. The learned court of Additional Civil Judge (S.D.) Dehradun while passing Order dated 16.03.2015 had not considered the aspect and arguments

extended by the respondents/plaintiff that since defendant no.1 had transferred the property to defendant no.3 i.e. the petitioner the benefit of Order

22 Rule 4(3) ought to have been extended to the plaintiffs in choosing their defendants as there would have been no cause serving against heirs of

defendant No. 1 and 4. However the learned Trial court directed that the plaintiff should take steps for substituting the legal heirs of defendant no.1

& 4 in the said suit.

17. It is the case of the petitioner that after the order dated 16.3.2015 the learned trial court had framed issues on 9.3.2016 and in particular the issue

relating to petitioner pertaining to the effect of devolvement of rights on the present petitioner by the sale deed dated 23.2.1984 executed by defendant

no.1 and further in particular the issue in relation to as to whether the plaintiff who derives his rights and title from Sushila Handa is entitled to retain

possession as the sale deed dated 23.2.1984 according to the plaintiffs was a sham transaction.

18. For deciding all the issues as a matter of fact there was no need of

continuance of defendant No. 1 or his heirs to be brought on record in the suit as they were not a necessary party, as the defendant No. 3 had stepped into the shoes of defendant No. 1 after purchase. As soon as the learned trial court has observed that the defendant no.1 was a paramount title holder and defendant no.3 & 4 admittedly being a purchaser from defendant no.1, the defendant no.3 i.e. the petitioner and defendant no.4 would be deemed to have stepped into the shoes of defendant no.1 and since the veracity of the sale deed dated 23.2.1984, on the basis of which the defendant no.3 i.e. the petitioner claims his rights has not been questioned by anyone claiming under defendant no.1 the purpose of continuance of defendant no.1 as a party to the suit becomes irrelevant and on her death the suit would only abate as against the heirs of defendant no.1 because right to sue to heirs of defendant No. 1 also ceased by the sale deed of defendant no. 3, as the issue and the theory of paramount title holder loses its significance vis-à-vis the defendant no.3 i.e. the petitioner who now holds an independent status as a title holder of the property on the basis of an un-assailed sale deed dated 23.2.1984 on the basis of which he contends that he has been placed in possession raised construction and is recorded in the revenue records.

19. It is the case of the petitioner that instead of filing a substitution application in compliance of order passed by the trial court on 16.3.2015 the plaintiffs/respondents are said to have filed yet another application paper no.72-C, wherein the plaintiff in Para 5 has submitted that since there happens to be unequivocal transfer of the property to defendant no.3 i.e. the petitioner, coupled with the fact that since the defendant no.1 & 4, having lost their interest have not filed their written statement to contest the suit though part of the property was transferred by late defendant No. 1 to defendant no.4 he sought a permission in the application Paper no.72-C to write the word "since deceased" in front of defendant no.1 & 4.

20. Under the principles of dominus-litus it is always the prerogative and choice of the plaintiff to choose his defendant seeking a prayer for not substituting the heirs of defendant nos. 1 and 4 as it would always be the choice of the plaintiff as he would bear the consequence of dismissal of suit as abated against the defendant whose heirs are chosen by the plaintiff not to be brought on record because it will amount to that he was withdrawing his relief of decree of possession and eviction as against defendant nos. 1 and 4

for which at least the defendant no.3 i.e. the petitioner, cannot have the grievance.Â

21. As far as invocation of sub Clause (4) of Rule 4 of Order 22 for the purpose of an exemption from substituting the heirs of defendant no.1 as she

has failed to file the written statement the same could not have been opposed by defendant no.3 i.e. the petitioner for the reasons:-Â

i. She has sold her property to defendant no.3 & 4.

ii. Defendant no.1 despite of notices has not filed any written statement.Â

iii. Defendant no.1 since has failed to appear and contest the suit at the hearing stage because she has lost her interest over the subject matter of the property after the sale to defendant no.3 i.e. the petitioner.Â

iv. Because of invocation of Order 22 by the plaintiff for inserting the word â?? since deceasedâ? before defendant no.1 & 4 would not prejudice any

right allege to have been vested with the petitioner i.e. defendant no.3, its effect would be only against plaintiff.

v. Because admittedly he derives his independent rights by the sale deed dated 23.2.1984 i.e. much prior to the institution of the suit hence theory of

defendant No. 1 being paramount title holder loses its significance.

vi. Under the principle of dominus-litis its choice of plaintiff to choose his defendant, if plaintiff gives away right to substitute the heirs of a co-

defendant, it will be the plaintiff himself, who has to endure the consequence of effect of abatement of suit against defendant. The other co-defendant

has no right to enforce the substitution of heirs of other co-defendant. There would be no abatement against other co-defendants.

22. During the course of the argument, learned counsel for the petitioner, in support of his contention has relied upon catena of judgments, which he

contends that would be applicable in the present case. It would be unjust on the part of this Court, if the judgments as relied upon by the learned

counsel for the petitioner are not taken into consideration. But, before advertng to each judgments, what is revealed from these judgments are, that

invariably all the judgments deal with a situation, where the controversy about the impact of Order 23 Rule 4, regards total abatement of proceedings

came into consideration at the stage when the controversy was being considered by the various High Courts and Honâ??ble Supreme Court, which

was arising either at a first or second appellate stage, which the courts were more concerned as to what bearing would it have on the decree and

divisibility of decree in an event it is put to executed which dealt and determined the rights in common, which is not the case at hand. Invariably, in all

the judgments, which have been relied by the learned counsel for the petitioner for the purposes of considering the applicability of the abatement of the

proceedings in its totality, as a consequence of death of one of the defendants has to be considered by taking into consideration the following aspects :-

(i) The interest of a surviving party to the dispute whether it could be decided on merits without substituting the heirs of the other party;Â

(ii) As to whether the decree which is in the nature of a joint decree could be separated at the stage of execution;

(iii) Whether the deceased-defendant and his heirs are necessary party to the suit in whose absence the suit is bound to fail;

(iv) As to whether the plaintiff could not have brought the suit for necessary relief against those defendants alone who are still before the Court.

(v) The partial abatement of any suit or the proceedings would be dependent upon the facts of each case and there cannot be a straight jacketed

formula for abating a suit in its totality.

(vi) The test, which is to be applied for the purposes of abating the suit in its totality, on the death of one of the defendant would depend upon as to

whether there would be two contradictory decrees in an event of the suit being decreed.Â

(vii) The principle of complete abatement of the proceedings would also be dependent upon the subject matter of the suit when it is indivisible. In such

an eventuality, where the subject matter or the decree is indivisible, it may result into abatement of the proceedings as a whole, but the same would

depend upon the facts of each case;

(viii) The principles of Order 22 Rule 4 (4) would only be applicable in a situation, where there happens to be a specific claim raised separately in

relation to the subject matter of the suit that means to say that a specific allegation in respect of the defendant with regard to the claim, right, title, or

possession has been pleaded or not;

(ix) If the result is conflicting and contradictory decrees, only in that eventuality, the suit would abate as a whole;

23. Learned counsel for the petitioner firstly places reliance on judgment as reported in AIR 1963 Allahabad 306 in *Sis Ram Vs. Asa Ram and*

others, and, he to support his arguments refers to its para 7, 8 and 9. This was a judgment, which was rendered in Second Appeal and the learned

Single Judge, while considering the impact of the judgment of the Hon^{ble} Apex Court as reported in AIR 1962 SC 89 *State of Punjab Vs.*

Nathu Ram, has taken into consideration the said judgment from the viewpoint that before the Hon^{ble} Apex Court in the case of *Nathu Ram*

(*Supra*), the Hon^{ble} Apex Court was dealing with an award, which was passed in an acquisition proceedings. The said award was jointly made in

favour of the two persons namely Labhu Ram and Nathu Ram. Accordingly, in para 8 of the said judgment, the Allahabad High Court has laid down

the following modalities for the purposes of attracting Order 22 Rule 4 (4) of the Code of Civil Procedure. The Court held that in the circumstances as

it prevailed in said case, it would be resulting into decreeing a suit in favour of one plaintiff, while dismissing it for the other, despite the fact that they

both were entitled for compensation under the Acquisition Act. Hence, since it was resulting into two conflicting decrees/awards in a same suit

between the same party based on the joint cause of action, the court held that the suit would abate as a whole.Â

24. The said situation is not prevailing in the instant case, which at this stage of proceedings is based on different situation the suit is at the stage of

trial and subject matter has no relation to the divisibility of property on suit being decreed. As such the said ratios do not support the contention of the

petitioner at all. 9. Applying it to the facts of the present case, the Court is faced with a situation which may be summarised thus. The two

plaintiffs filed a suit in the basis of a joint and indivisible right, and their suit was dismissed by the appellate court which held that the defendants had a

right to transfer the property in dispute under a local custom. An appeal was filed against this decree by one of the plaintiffs who made the other co-

plaintiff of respondent. If both of them were before this Court, their rights against the defendants could be decided in this appeal. But the respondent

plaintiff died during the pendency of appeal and his heirs have not been brought on record. Therefore, the appeal which he supported has abated as far

as he was concerned, and the decree dismissing his suit has become final and the reasons for the dismissal have become final too. If in the absence of

the heirs of the deceased plaintiff the appeal of the surviving plaintiff is heard and allowed, the result will be that the suit of one plaintiff will be

decreed while that of the other stands dismissed. The reasons of this Court for allowing the appeal will, necessarily conflict with the reasons of the

lower appellate court for dismissing the deceased plaintiff's appeal. There will be two conflicting decisions in the same suit between the same parties

based on a joint cause of action. The Court cannot create a situation which may lead to two contradictory decisions in the same suit. If the Courts of

law speak with contradictory voices in the same dispute, it will lead to confusion and judicial chaos.â??

25. Another judgment, on which the reliance has been placed by the learned counsel for the petitioner is a judgment as reported in AIR 1985 HP 30

â??Netar and Ors. Vs. Jagtaâ?. In the said judgment, too the High Court of Himachal Pradesh, while referring to AIR 1928 Lah 572 Full Bench

â??Sant Singh and Anr. Vs. Gulab Singh and othersâ? held that it would be appropriate to dismiss the suit as having abated as a whole when there

would be a possibility of two contradictory decrees in the same litigation and with regard to the same subject matter because under law the court

should not be called upon to make two inconsistent decrees about the same subject between the same parties. In the Full Bench judgment (supra), the

Court was dealing with a situation, where an undivided immovable property was sold to various purchasers by a common sale deed and based on

equal shares without there being any specific demarcation. This backdrop is not the situation which is prevailing in the instant case, because in the sale

deed which has been executed in favour of the petitioner admittedly according to him itself the un-assailed sale deed is his favour a specific set of

property was sold to him by one of the defendants through her attorney holder.Â

26. Learned counsel for the petitioner refers to another judgment reported in AIR 1995 Orissa 237 â??Dinabandhu Behera and Ors. Vs. Kalandi

Charan Mishra and Another.â? This case too was considering the impact of Order 22 Rule 4 (4) at the stage when the judgment under challenge was

passed by the trial court and was under scrutiny before the Appellate Court, was consciously considering the effect of divisibility of decree pertaining

to the un-divisible property, as in plaint case, no separate share was claimed.Â

27. This Court, in the said judgment too in its para 6 held that since in the plaint

the plaintiff has not made any specific claim, pertaining to a separate share against anyone of the defendants over the suit and coupled with the fact that according to the plaintiff, the defendants were "Joint Tortfeasors", the Court held that since there was no claim pertaining to separate or specific share, if at all the suit abates as a consequence of death of any of the party, it would abate as a whole because the decree under appeal in the said case was a joint decree and was indivisible. Hence this judgment too, under the factual backdrop, under which it was passed is not applicable in the present case.Â

28. Learned counsel for the petitioner refers to a judgment reported in AIR 1964 Orissa 39 "Lakshmi Charan Panda and another Vs. Satyabadi

Behera and others", in its para 7, while dealing with the controversy which was prevailing in the said case, where the plaintiff was claiming his rights

by virtue of being in an adverse possession over the property in dispute, the court has held that only on the death of a party to the proceedings, there

are two recourses available; either to file an application for substitution or to file an application praying for invoking the Court's power to exempt

the parties to the suit from substituting the legal representatives of the defendants. It has further held that it is due to this reason that the legislature has

incorporated the Order 22 Rule 4(4), as not to be the part of the Order 22 Rule 9, which specifically deals with the effect of the abatement

independently.

"7. Even assuming that Sub-rule (4) would have application, the order of the Court dispensing with substitution in circumstances coming within the

purview of Sub-rule (4), must be passed before actual abatement takes place. It is well settled that abatement takes place automatically and does not

wait for the passing of actual order by the Court. Once abatement takes place, the discretion given to the Court to invoke the provisions of Sub-rule

(4) cannot be exercised. The words "whenever the Court thinks fit" in the context must mean when the Court thinks fit within 90 days from the date

of death and before abatement takes place. Within the period of 90 days, two courses are open to the appellants -- either to file an application for

substitution or to file an application praying for invoking the Court's power for exempting them from the necessity of substituting the legal

representatives of the deceased respondent-9 if the conditions are otherwise

fulfilled. This is the reason why the sub-rule has been incorporated in Order 22, Rule 4 and not under Order 22, Rule 9 which lays down the effect of abatement. This view has also been taken by a Division Bench of the Calcutta High Court reported in Nani Gopal v. Panchanan 59 Cal WN 304. Mr. Rath's contention is not acceptable. The Court's power to exempt under Order 22, Rule 4(4) can be exercised only before an abatement takes place and not after.â??

This judgment too, would not apply in the instant case would not support the case of the petitioner at all.

29. In another judgment on which the reliance was placed, reported in AIR 1954 Allahabad 786 â??Onkar Singh and another v. Rameshwar minor

and otherâ??. The said case was dealing with the proceedings u/s 8 of the Encumbered Estates Act, wherein in the said case the defendants had filed a joint written statement and they claimed that they were the owner of the village and were in joint possession of property, and hence they could not be

attached and sold in the satisfaction of debt of the landlord. It is during the pendency of the appeal, that one of the plaintiffs died and his

representatives were not brought on record. The issue came for consideration as to whether the appeal would fail as a whole or only to the extent of

interests of the deceased plaintiff. The Allahabad High Court held that taking into consideration the pleadings of the defendants to the suit and the

claim of the plaintiff since there was no specification of share of several decreeholders, and where the decree is one and indivisible, the entire appeal

would fail, if one or more of the parties to the appeal die. In this case too, Allahabad High Court had applied the test pertaining to the indivisibility of

the decree and the indivisibility to the subject matter of the suit too, and if the appeal is abated in part against the deceased-defendant, in that situation,

it would lead to passing of inconsistent decrees and furthermore, in such a situation, it would lead to the decree to be ineffective and incapable of

execution. Para 10 and 11 of the said judgment is reproduced herein below:-

â??10. The next case is of -- 'Raghunath Das v. Shah Durga Prasad AIR 1930 All 369 (G). In this case the plaintiff brought a suit for a declaration

that he was the owner of a certain property and the names of the defendants against that property were fictitiously entered in the revenue papers.

During the pendency of the suit one of the defendants died and his legal

representatives were not brought on the record within the period of limitation.

One of the questions which arose in the case was whether the entire suit had abated or whether it had abated only against the heirs of defendant 4 who had died.

The case of AIR1928All172 (E)' cited above was referred to in this case. It was held by their Lordships that the whole basis of the decision in

AIR1928All172 (E)' was that the consequence of holding that the whole suit did not abate or the whole appeal did not abate would be that there would

be two contradictory decrees. Their Lordships did not dispute the above proposition and rather affirmed that in case there was a possibility of two

inconsistent decrees in the same case in case the appeal was allowed against the respondents other than the deceased one the entire appeal should be dismissed.

On the contrary, they found that in case the appeal was allowed there was no possibility of two contradictory decrees and the learned counsel for the

respondents had not been able to show how there could be two contradictory decrees in case the appeal were allowed; the plaintiffs would get a

decree for a declaration against the respondents who were on the record though that would not in any way affect the rights of the heirs of the

deceased defendant 4 against whom the suit had been dismissed.

11. After a consideration of the above authorities we are of the opinion that in a case of joint decree where there is no specification of shares of the

several decree-holders and where the decree is one and indivisible the entire appeal should fail if one or more of the decree-holders dies during the

pendency of the appeal and his heirs are not brought on the record within the period of limitation. If, however, there is any admission of the deceased

decree-holder, on the record indicating the extent of his share in the disputed property or there is anything in the judgment describing his share in the

property then in that case the appeal would abate only to the extent of his interest so admitted or described. We do not think that it is open to the

appellate Court to determine the extent of the share of the deceased respondent in the absence of his legal representatives. We are also of the opinion

that where the legal representatives have not been brought on the record during the period of limitation for the heading of the appeal they could not be

so brought later on for the determination of the share of the deceased

respondent in the disputed property.

Another test which has to be applied in order to determine whether the appeal fails as a whole or only to the extent of the interest of the deceased

respondent is whether in case the appeal is allowed against the respondents who are already on the record there would be two inconsistent decrees in

the same case with respect to the same subject matter or not. In case there will be two inconsistent decrees which will be infructuous the appeal

should fail as a whole because it would be fruitless to pass a decree which will be ineffective and incapable of execution in view of the decree in

favour of the deceased respondent which has become final. Where, however, there is no likelihood of two inconsistent decrees in case the appeal is

allowed against the respondents who are on the record and the decree passed in appeal can be executed then in that case the appeal does not fail as a

whole.â??

30. This situation yet again is not prevailing in the instant case and is of no help to the petitioner, for the reason, in the suit which was under

consideration before the court below, the petitioner, admittedly, was defending his exclusive rights in relation to a specific share of property purchased

by him, which was divested to him by an un-assailed sale-deed in his favour. Hence, the consequential effect of death and non-substitution of a co-

defendant will have no effect on the proceedings of the suit and too, more particularly, the defendant No. 1 who had already parted off her right over

the property to the petitioner, and was not claiming any relief adverse to him.Â

31. Learned counsel for the petitioner has also places reliance on a judgment reported in AIR 1963 Orissa 140 â??Damodar Patra and others Vs.

Kanchan Sahuani and othersâ?. In the said judgment, the High Court of Orissa was dealing with a situation, where the legal representatives of the

defendants No. 1 of the said suit which was filed by the plaintiff for declaration of title and recovery of the possession of the property described in the

plaint and further for a declaration of the proceedings u/s 145 to be illegal and not binding on the plaintiff was all together under a different factual

backdrop. The said suit is said to have abated on account of the death of one of the defendant i.e. defendant No. 4 and the contention of the

defendant in the said suit at an appellate stage was that the suit became totally incompetent on account of the partial abatement. The Orissa High

Court in its para 6 held as under:-

6. I would proceed now to examine if the suit becomes incompetent against defendant No. 5 on account of its abatement against the legal

representatives of defendant No. 4. Under Order 22, Rule 4 (3) C. P. C. where within the time limited by law no application is made under Sub-rule

(1), the suit shall abate as against the deceased defendant. There is no further provision in Order 22 as to what would happen so far as the other

defendants are concerned. It is however well settled that whether the suit would proceed against the other defendants or not would depend upon the

nature of the cause of action and the relief sought. Order 1, Rule 9 C. P. C. throws certain light on the question also. It prescribes that no suit shall be

defeated by reason of the mis-joinder 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. The question would be whether the court can deal with the matter in controversy between

defendant No. 5 and the plaintiffs regarding their rights and interests. This will depend upon the facts and circumstances in each case and no

exhaustive tests can be laid down. Some tests generally followed are -- (1) Is the deceased defendant a necessary party to the suit in whose absence

the suit is bound to fail, and the plaintiffs could not have brought the suit for necessary relief against those defendants alone who are still before the

court? and (2) Can the decree in favour of the plaintiffs be effectively executed in the absence of the legal representatives of the deceased

defendant?

The said judgment provide:-

(i) The suit would proceed against the surviving defendants or not would exclusively be depending upon the cause of action and relief sought;

(ii) The High Court was dealing with the impact of provisions under Order 1 Rule 9 CPC which provides that there would be no abatement of suit due

to mis-joinder or non-joinder of parties; and

(iii) The Court should deal with the matter in controversy so far as regards the rights or interests of the parties actually before it, if it survives and have

affect on the divisibility of subject matter of the suit.

32. But there is a rider attached for applying the above principles, when it comes to the consideration of the impact of Order 22 Rule 4 (4) of CPC.

The test which has been laid down by the Orissa High Court for applying the said principles is:-

- (i) The deceased defendant was necessary for the purposes of determination of the controversy vis-avis the rights of the other co-defendant
- (ii) Whether the suit would fail and could not have brought the suit to a necessary consequences against the relief claimed; and
- (iii) Whether the decree could be effectively executed.

33. With all profound respect, this judgment, too do not commensurate to the controversy at hand which is involved in the present case. Learned

Counsel for the petitioner places reliance on yet another judgment as reported in AIR 1981 Allahabad 37 *Sita Ram v. Fatingan and others*. This

judgment too, the Allahabad High Court was dealing with the impact of Order 22 Rule 4 of CPC, at an appellate stage in its para 13, 14 and 15 held as

under:-

13. Apart from this decision, learned counsel for the plaintiffappellant also relied upon a Full Bench decision in *Ghulam Abbas v. Safdar Jah Zahid*

Ali Mirza AIR 1941 Oudh 219 (FB) which was a case under Section 4 U. P. Encumbered Estates Act. The facts of that case briefly were that an

application was given under Sections 4 and 49 of that Act by some landholders. It was opposed by some of the creditors on the grounds that the

applicants were not land-holders within the meaning of the Act. That object ion prevailed with the Court, the Applicants, thereafter filed an appeal.

During the pendency of the appeal one of the opposing creditors died and his legal representatives were not brought on record within the time allowed

by law. It was held that inasmuch as the interest of the creditors were joint and indivisible and they could not be separated from those of the rest and

the heirs of the deceased creditors were necessary ""parties, the appeal must be deemed to have abated as a whole for otherwise it would lead to

conflicting and inconsistent decisions with regard to the same subject-matter.

The tests laid down in the case were :--

(1) Whether the interests, of the defendants in the suit are joint and indivisible so that the interest of the deceased cannot be separated from those of

the rest and

(2) Whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two inconsistent and

contradictory decrees in the same case with respect to the same subject-matters.

14. If these tests are applied to the present case, it would be seen that the plaintiff-appellants had claimed relief of permanent injunction and damages

against all the defendants. The defence of the defendants was that the plaintiff was not entitled to any such relief. The trial Court decreed the suit. In

respect of damages, it was a joint and indivisible decree. In other words the liability of the defendants-respondents under that decree was joint and

several. The plaintiff could realize the amount of damages from any one of the defendants and in that event that defendant could have taken steps to

reimburse himself to the extent of the amount paid by him for and on behalf of the other defendants, from those defendants. Now, all those defendants

preferred an appeal against that decree. One of them; died during the pendency of the appeal and his legal heirs and representatives were not brought

on the record within the time allowed by law as a result of which the appeal abated as against him. In other words the decree of the trial Court

became final as against the heirs of the deceased defendant. Now as a result of the decision in the appeal the trial Court's decree, both for injunction

and damages has been set aside. Despite the appellate Court's judgment the decree for damages can be executed by the plaintiff against the heirs of

the deceased defendant. It would be seen, therefore, that as a result of the decision in the appeal two inconsistent and contradictory decrees in the

same case with respect to same subject-matter have come into existence and certainly this is not countenanced by Order 22, Rule 4 C. P. C. In my

opinion, therefore, it has to be held that the appeal filed by the defendants-appellants from the judgment and decree of the trial Court abated as a

whole.

15. The view taken in Baij Math's AIR1953All565 in regard to the respective scope of Order 41, Rule 4 and Order 22, Rules 3 and 11 and approved

by the Supreme Court. In Rameshwar Prasad v. Shambhari Lal Jagannath: [1964]3SCR549 , nine persons had instituted a suit for a decree in

ejectment and for recovery of rent against two defendants and obtained a decree. In appeal the District Judge set aside the decree against one of the

defendants. Thereafter the plaintiffs filed a second appeal in the High Court and when the appeal was pending one of them died. No application for

bringing his legal representatives on the record was made within the prescribed

time. The defendants respondents raised an objection that the entire appeal had abated because the interests of the surviving appellants and the deceased appellant were joint and indivisible and that in the event of the success of the appeal there would be two inconsistent and contradictory decrees. The surviving appellants claimed that the appeal was maintainable on the ground that without impleading the plaintiff who had died they could have appealed against the entire decree in view of the provisions of Order 41, Rule 4 C. P. C. and as such they were competent to continue the appeal even after the death of the joint decreeholder and abatement of the appeal so far as he was concerned, and the Court had power to hear the appeal and to reverse or vary the whole decree. The view taken by the Supreme Court on these facts was that Order 41, Rule 4 C. P. C. was not applicable for the second appeal in the High Court was filed by all the plaintiffs jointly, and the surviving appellants could not be said to have filed the appeal as representing the deceased appellant. It further held that the appellate Court had no power to proceed to hear the appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under Order 41, Rule 4 C. P. C. when the decree proceeded on a ground common to all the plaintiffs or defendants, if all the plaintiffs or defendants appealed from the decree and any of them died and the appeal abated in so far as he was concerned under Order 22. Rule 3 C. P. C. The decision in Baij Nath's case (supra) was approved.â??

34. On a precise reading, the said judgment too, has broadly laid down the following principles to be considered by the Court for abating the suit as a whole or partial, in an event to death of one of the defendants.Â

- (i) On a consideration of the various aspects, the Allahabad High Court has held that whether the interest of the parties to the suit was jointly or individually is the basic consideration for abating suit as a whole;
- (ii) As to whether subject matter and decree passed or probable decree could be separated or not, as against the rest of the defendants and the heirs of the deceased-defendant.Â

35. Yet again, the said judgment has postulated that for considering the total abatement of a suit due to death of any party to the suit. The precaution which is to be taken by the Court is the consideration as to the consequential decree likely to be executed, should not be inconsistent and contradictory

and has laid down that the principle of total abatement of a proceedings would only apply in those cases, where it is a joint decree, which cannot be

executed in isolation and the subject matter i.e. the property was indivisible and there was specifications claimed in the plaint.Â

36. A reference was also made to the judgment as reported in AIR 1962 SC 89 â??State of Punjab V. Nathu Ram.â? Though on the broad principle

the reference of the impact of the said judgment has already been dealt with in the above case; but this too was a case, where the two brothers

refused to accept the compensation the offer of which was made to them by the Collector under the Rules 6 of Punjab Land Acquisition (Defence of

India) Rules 1943. In para 5 of the judgment, rather the Court has held that the suit should not be defeated by reason of mis-joinder or nonjoinder of

the parties, and the Court should deal with the matter in controversy as regards to the rights and interest of the surviving heirs of the

deceaseddefendants. It only provides that when it is not possible for the Court to deal with such matter, it will have to refuse to proceed in the matter.

Para 5, 6 and 8 of the said judgment are quoted herein below:

â??5. 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-joiner 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.

6. 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 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.

8. 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.â??

37. This judgment too is altogether based on distinct footing to the factual

backdrop as under consideration in the present suit, which has been filed by the respondent.Â

38. Lastly, the learned Counsel for the petitioner has placed reliance on a judgment, reported in AIR 1973 SC 655 â??Dwarka Prasad Singh and

others v. Harikant Prasad Singh and others.â? The facts of the said case was that one Saroda Charan Guha is said to have executed an agreement

for sale in 1931 in favour of the defendant No. 1 i.e. Babu Ambika Prasad Singh, but before the agreement of 1931 could have been executed,

defendant No. 1 sold the property to defendant No. 2. The contention was that defendant No. 2, the purchaser, could not have purchased the property

because he had the full knowledge of the earlier agreement for sale, executed by Saroda Charan Guha in favour of defendant No. 1. The Honâ??ble

Apex Court in its para 6 and 7 of the said judgment, while attracting the provisions of Order 41 Rule 4 of CPC has laid that on account of the death of

defendant No. 1 against whom a suit for specific performance was instituted since the defendant No. 1, who entered into an agreement for sale in

favour of the plaintiff, and subsequently sold the property to defendant No. 2, as a matter of fact the joining of the subsequent purchaser was because

of the fact that title has passed over to him by defendant No. 1. This judgment too, will not be of any help to the petitioner as based upon altogether a

different set of facts and circumstances. Para nos. 6 and 7 of the said judgment is quoted herein below:-

â??6. Counsel for the appellants has relied on two points in support of the argument that the appeal cannot fail because of the non-impleadment of the

legal representatives of Guha deceased. The first is that he was not a necessary party being the vendor and the second is that the case would be

covered by the provisions of Order 41, Rule 4 of the Civil Procedure Code. There appears to be Some divergence between the High Courts on the

question whether in a suit for specific performance against a purchaser with notice of a prior agreement of sale the vendor is a necessary party or not.

In other words the conflict has arisen on the question whether the decree in a suit for specific performance when the property in dispute has been sold

to a third party should be to only direct the subsequent purchaser to execute a conveyance or whether the subsequent purchaser and the vendor

should both execute a conveyance in favour of the plaintiff : See Gourishankar

and Ors. v. Ibrahim Ali and Kafiladdin and Ors. v. Samiraddin and Ors.: AIR1931Cal67 . This Court has, however, held in Lala Durga Prasad and Anr. v. Lala Deep Chand and Ors. [1954]1SCR360 . that in a suit instituted by a purchaser against the vendor and a subsequent purchaser for specific performance of the contract of sale the proper form of the decree is to direct specific performance of the contract between the vendor and the plaintiff and further direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. This was the course followed by the Calcutta High Court in the above case and it appears that the English practice was the same. Thus according to this decision, the conveyance has to be executed by the vendor in favour of the plaintiff who seeks specific performance of the contract in his favour and the subsequent transferee has to join in the conveyance only to pass his title which resides in him. It has been made quite clear that he does not join in any special covenants made between the plaintiff and his vendor. All that he does is to pass on his title to the plaintiff. In a recent decision of this Court in R. C. Chandiok and Anr. v. Chuni Lal Sabharwal and Ors.: [1971]2SCR573 . while passing a decree for specific performance of a contract a direction was made that the decree should be in the same form as in Lala Durga Prasad's [1971]2SCR573 . case. It is thus difficult to sustain the argument that the vendor is not a necessary party when, according to the view accepted by this Court, the conveyance has to be executed by him although the subsequent purchaser has also to join so as to pass on the title which resides in him to the plaintiff. It must be remembered that if there are any special covenants and conditions agreed upon in the contract for sale between the original purchaser and the vendor those have to be incorporated in the sale deed although it is only the vendor who will enter into them and the subsequent purchaser will not join in those special covenants. But without the vendor joining in the execution of the sale deed special covenants, if any, between him and the original purchaser cannot be incorporated in the sale deed. The whole idea and the purpose underlying a decree for specific performance is that if a decree for such a relief is granted the person who has agreed to purchase the property should be put in the same position which would have obtained in case the contracting parties, i.e. vendor and the purchaser had, pursuant to the agreement, executed a

deed of sale and completed it in every way. Therefore, it is essential that the vendor must join in the execution of the sale deed. If that be so, it is not possible to comprehend how he is not a necessary party. At any rate, in the presence of the relief for a decree for refund of the amount paid by way of part consideration the vendor would be a necessary party. No such relief could be granted in his absence nor can it be granted now even if the appeal succeeds and the decree for specific performance is set aside.

7. The second limb of argument of the appellants is based on Order 41, Rule 5, Civil Procedure Code. According to that rule 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 all the defendants any one of the plaintiffs or 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. As the appeal had been filed by defendants second party, it has been contended, that it remained complete and competent in spite of the death of Guha, defendant first party, for the reason that the decree proceeded on a ground common to all the defendants. It appears that there was conflict of judicial opinion on the question whether the said rule could be invoked when one of the several appellants had died and his legal representatives had not been brought on the record with the result that the appeal had abated against him. But this matter stood concluded by the decision of this Court in Rameshwar Prasad and Ors. v. Shyam Beharilal Jagannath and Ors [1964]3SCR549 . In that case the appeal had been filed in the High Court not by any one or some of the plaintiffs against the whole decree but had been filed by all the plaintiffs jointly. One of the appellants died and his legal representatives were not impleaded. It was laid down by this Court that Order 41, Rule 4 could not be invoked because the appellate court had no power to proceed with the appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under that rule because if all the plaintiffs or defendants had appealed from the decree and any one of them had died the appeal had abated so far as he was concerned under Order 22, Rule 3. The appeal of the surviving appellant could also not be heard because of the rule laid down in the State of Punjab v. Nathu Ram [1962]2SCR636. According to that rule the abatement of an appeal means not only that the decree

between the appellant and the deceased respondent becomes final but also, as a necessary corollary, the appellate court cannot in any way modify

that decree directly or indirectly. The decision in Nathu Ram's case (supra) was referred to in Pandit Siri Chand and Ors. v. Jagdish Parshad Kishan

Chand and Ors. [1966]3SCR451 where the decision was somewhat similar to Rameshwar Prasad's case (supra). It was also emphasised that in a

situation where two inconsistent orders or decrees would result the rule in Nathu Ram's case would be applicable. It may be mentioned that in that

case an award had been made for payment of compensation in favour of two brothers L. & N. The State appealed against the award to the High

Court. During the pendency of the appeal respondent L died and no application was made for bringing on record his legal representatives within the

requisite period of limitation. The question was that since the appeal had abated against L what was its effect in appeal against N. It was observed

that the consideration which would weigh with the court in deciding whether the entire appeal had abated or not would be whether the appeal between

the appellants and the respondents other than the deceased respondent could be said to be properly constituted or could be said to have all the

necessary parties for the decision of the controversy before the court. Another main test was whether the success of the appeal would lead to a

decision which would be in conflict with the decision between the appellant and the deceased respondent. Thus the court will have to pass a decree

contradictory to the one which had already become final with respect to the same subject matter between the appellant and the deceased respondent.

It is arguable that the present case is distinguishable from the decisions in Rameshwar Prasad and Pt. Siri Chand (supra). Here the appellate court

could, under Order 41, Rule 4 of the Civil Procedure Code reverse the decree for specific performance since the defendants second party filed the

appeal and Guha, the vendor who died, had not joined in the appeal. The decree for specific performance proceeded on a ground common to both sets

of defendants. It could, therefore, be set aside in terms of the above provision. Put there is a joint decree in favour of both sets of defendants for the

receipt of Rs. 77,000/-. If the decree for specific performance is set aside that part of the decree will also have to go. It is not possible to understand

how that can be done in the absence of the legal representatives of the deceased, Guha. Moreover, the plaintiffs had claimed against Guha, in the

alternative, a decree for substantial amount consisting of the part consideration paid and certain other amounts. If Guha had been alive or if his legal representatives had been impleaded in time the court could, while setting aside the decree for specific performance, grant the alternative prayer which was only made against Guha. This cannot be done now. In these circumstances we are of the view that Order 41, Rule 4 of the CPC cannot be of any avail to the appellants. The abatement of the appeal, so far as Guha was concerned, will prove fatal to the entire appeal as either inconsistent and contradictory decrees will have to be passed or proper reliefs cannot be granted in the absence of a necessary party against that party or his legal representatives.â??

39. The records reveal that the application dated 03.09.2015 thus preferred by the plaintiff Paper no.72-C which was filed after the order of Trial

Court dated 16.03.2015 would be under Order 22 Rule 3, as plaintiff has sought to add the words â??since deceasedâ? after name of deceased

defendant No. 1 and defendant No. 4, the same was opposed by defendant no.3 i.e. the petitioner by filing an objection paper no.73-C.Â

40. The learned trial court by virtue of the impugned order dated 30.9.2015 has rejected the application paper no.72-C of the plaintiff and has abated

the suit against defendant no.1 & 4. However the learned trial court declined to abate the suit against defendant no.2 & 3. The operative portion of the

order reads as under:-

vkns'k

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la[;k 1 o 4 ds fo#) vkns'k 22 fu;e 4 mifu;e Â¼3Â½ flfoy izfdz;k lafgrk ds varxZr okn dks mi'keu fd;k tkrk gSA 'ksâ??k izfroknhx.k ds fo#) oknhx.k

dk okn dkj.k lekIr ugh gqvk gS bl dkj.k okn dh dk;Zokgh izfroknh la[;k 2 o 3 ds fo#) ;Fkkor xfreku jgsxA

11- oknhx.k }kjk foxr yxkrkj dbZ frfFk;ksa ls izfroknh la[;k 2 gsrq iSjoh ugh dh tk jgh gSA okn izkphu gS rFkk oâ??kZ 1993 ls yafcr gS bl dkj.k

oknhx.k dks iSjoh gsrq volj iznku fd;k tkrk gSA oknhx.k izfroknh la[;k 2 gsrq iSjoh Hkhrj rhu fnu vko';d #i ls mHk; izdkj ls djsaA i=koyh okLrs

tokcnkok izfroknh la[;k 2@okn fcanq fnukad 13-10-2015 dksÂ izLrqr dh tk;sA

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r` rh; vij flfoy tt Â¼lh0 fM0Â½ nsgjknwuÂ

41. On simple reading of Para 10 of the impugned judgment dated 30.9.2015 as a matter of fact Paper no.72-C-2 preferred by the plaintiff under

Order 22 Rule 4 (4) was rejected and the suit was abated against defendant no.1 & 4 by invoking Order 22 Rule 4 (3) of the Code of Civil Procedure

and since the defendant no.2 & 3 i.e. the attorney holder who sold the property and the petitioner who is the purchaser the suit was directed to be

continued.Â

42. It is the case of the petitioner that being aggrieved against the order dated 30.9.2015 whereby the trial court has declined to abate the suit in its

totality and proceeded to continue the same against defendant no.2 & 3 he is said to have preferred a revision under Section 115 of the Code of Civil

Procedure registered as Civil Revision No. 163 of 2015 â??Ajay Bahadur Arora Vs. Smt.Rashmi Handa and others.â??Â

43. Apparently the effect of the order dated 30.9.2015 whereby the learned trial court has directed to continue with the suit against defendant no.2 &

3 and only abating the suit against defendant no.1 & 4, and where the petitioner defendant no.3 challenges only part of the order passed by the trial

court declining to abate the suit against defendant no.2 & 3 will not amount to be a case decided because the effect of the order would be that only

the suit would continue against petitioner it will not amount to be a lis decided against the petitioner as there would be no adjudication of any right of

the petitioner, thus would not amount to be case decided and hence the revision would not be maintainable because otherwise also the interest of the

defendant i.e. the petitioner is safeguarded byÂ the provisions contained under Section 105 of the Code of Civil Procedure.Â

44. The revision preferred by the petitioner has been dismissed by the impugned order dated 6.12.2017. Hence the writ petition.Â

45. On scrutiny of the grounds and the factual backdrops under which this writ petition has reached while the petitioner challenges the orders dated

30.9.2015 & 6.12.2017 this court finds that both the courts below have not committed any apparent error of law for enabling the petitioner to invoke

Article 227 of the Constitution of India. The rationale behind is that the effect of abatement of suit as against the defendant no.1 would have no

bearing on the claim of the petitioner/defendant no.3 because the effect of

abatement of suit against defendant No. 1 would be that its rather the plaintiff who gives away the relief sought against defendant No. 1 due to non substitution of heirs after her death, there is no prejudice cause to petitioner, because his liability or any right was yet to be determined by learned trial Court after adjudication of suit on its merits, and also because by the time the death of defendant no.1 has chanced the right of the property already stood unequivocally transferred to the petitioner by the sale deed dated 23.2.1984 rather all rights in relation to the property vis-à-vis against defendant no.1 & 2 stood vanquished hence the theory of the paramount title holder which was sought to be argued by the counsel for the petitioner would not be applicable more particularly when he has candidly accepted the propriety of the sale deed which still validly holds good according to him.

46. Even on perusal of the records what is revealed is that defendant no.1 & 4 since having being noticed have not appeared before the court below nor had filed their written statements the provisions of Order 22 Rule 4 (4) ought to have been invoked and they are said to have died during pendency of suit at the most the effect of non substitution would be an abatement of suit against defendant Nos. 1 and 4 under Order 22 Rule 4(3).

47. The view taken by the Revisional court was that since no substitution was filed by the plaintiff for bringing on record the heirs of defendant no.1 despite of the fact of deriving the knowledge of their death from the pleadings in para 30 and 31 of written statement filed by defendant no.3 i.e. the petitioner, at the most suit was rightly abated against defendant no.1 & 4 by invoking the provisions contained under Order 22 Rule 4 (3) of the Code of Civil Procedure the legal corollary which follows is that the consequential effect of abatement of the suit against defendant Nos. 1 and 4 would have no bearing as far as the proceedings or rights against defendant no.2 & 3 is concerned as suit would only be dismissed as abated only against the deceased defendant.

48. The revisional court while interpreting the impact of the provisions contained under Order 22 Rule 1 & 2 has held that if the cause of action to continue with the suit subsists against the heirs or the other defendants the suit would not abate as a whole. Herein in the instant case the cause of action as against defendant no.3 i.e. the petitioner, continued to survive because

according to petitioner himself as a matter of fact he was the purchaser who was in possession at the time when the suit itself was instituted and if at all the decree was to be executed it would be against defendant no.3, who at the time of filing of suit was owner of the property.Â

49. The courts further rightly held that where a plaintiff in a suit pleads cause of action against number of defendants and the cause of action against the surviving defendant subsists the suit will not abate as whole and would continue to survive against the surviving codefendant. Thus the reasoning which has been assigned by the trial Court as well as by revisional court in Para 10 of the judgment that when the cause of action survives against one of the co-defendant the suit as a consequence of death of other defendant and failure to substitute the heirs of the deceased defendant will not abate against the surviving defendant against whom the cause of action survives.Â

50. Thus for the reasons assigned above this Court finds no merit in the writ petition. Hence the same is dismissed in limine. No order as to costs.Â