

(1968) 06 GUJ CK 0009
In the Gujarat High Court
Case No : Second Appeal No. 715 of 1964

Madhavji Khatau Katira and Another APPELLANT
Vs
Trikamdas Narandas Tanna RESPONDENT

Date of Decision : 28-06-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, Order 20 Rule 15, Order 22 Rule 11, Order 22 Rule 2, Order 22 Rule 3
Partnership Act, 1932 — Section 33(1), 47

Citation : AIR 1969 Guj 205

Hon'ble Judges : J.M. Sheth, J

Bench : Single Bench

Advocate : B.J. Shelat, for the Appellant; N.V. Karlekar, for the Respondent

Final Decision : Dismissed

Judgement

J.M. Sheth, J.—The plaintiff-respondent filed a Regular Civil Suit No. 66 of 1962 against the appellants Nos. 1 & 2 (defendants) for the

following reliefs in the Court of the Civil Judge, Junior Division, Navsari at Navsari:

1. The plaintiff be declared to have continued as a partner in the firm of Vijay Sewing Machine Co., as constituted under the agreement, dated

23rd July, 1960 and 15th December, 1960;

2. It may be declared that the said firm of Vijay Sewing Machine Co. stood dissolved on 27th February, 1962 on or such date as the Court thinks

fit taking the evidence on record;

3. The affairs of the said firm of Vijay Sewing Machine Co. be wound up finally after taking all accounts under the direction of this Court and the

profits or loss whatever become due at the foot of final account be apportioned

between the suit partners according to their respective shares;

4. The defendants (appellants) be restrained from preventing the plaintiff from exercising his right as a partner of the said firm;

5. The defendants (appellants) be restrained from carrying on any business in the name of the said firm; and

6. That he (plaintiff) be awarded the costs of the suit.

2. The material allegations made in the plaint in brief were as under :--

3. The respondent, appellants, and one Dhirajlal Dhanjibhai Thakkar, as partners had agreed on 29th June, 1960 to constitute the firm in question

and to do business in the name of Vijay Sewing Machine Co. at Navsari on the terms referred to in the partnership-deed, dated 23rd July, 1960.

The partner Dhirajlal retired from it with effect from 7th December, 1960. On his retirement, a supplementary partnership-deed, dated 15th

December, 1960 was executed and the partnership business was continued between the appellants and the respondent on the same terms and

conditions as contained in the original partnership-deed, dated 23rd July, 1960, save and except the change in the shares of the parties. It was

alleged by the plaintiff-respondent that with a view to deprive him of his legitimate right in the assets of the suit firm, purporting to rely upon clause

25 of the said agreement, dated 29th June, 1960, by their attorney letter dated 15th July, 1961, without assigning any reason intimated to the

respondent that he had been expelled from the suit firm. He has been wrongfully expelled. It is a mala fide act of the appellants and it is in

contravention of the statutory provisions of the Indian Partnership Act. After the suit notice Ex. 28, the respondent was not allowed to take part in

the affairs of the suit firm by the appellants. The respondent tried to settle the dispute through arbitration but the appellants did not agree to it On

the contrary, he was served with a notice to pay Rs. 48,561.65 nPs. with interest without settling final accounts. In short, the allegations of the

respondent were that the expulsion was wrong and eventually he continued to be a partner of the said firm. He prayed for the aforesaid reliefs in

the suit.

4. The appellants, by their joint written statement, Ex. 57, contended inter alia that the firm had incurred loss due to the mismanagement of the

respondent. They have expelled the plaintiff-respondent in the bona fide exercise

of the power of expulsion vested in them in view of the provisions

of the partnership agreement referred to, in the plaint that the suit was misconceived and not maintainable. The suit should be dismissed.

5. The learned trial Judge found that the expulsion was wrong. It was not bona fide. Notice of expulsion was ultra vires, illegal and unenforceable.

Clause 25 of the partnership agreement is consistent with Section 33(1) of the Act provided it is exercised in good faith by majority of partners.

That the respondent was not expelled by the appellants in good-faith. The firm is dissolved from 27th February, 1962 as contended by the

plaintiff-respondent. In view of his findings, the learned trial Judge made the following decretal order:

1. It is hereby declared that the proportionate shares of the suit parties in the partnership are as follows:

The plaintiff: Re. 0/31 nP. in rupee of 100 nPs. defendant No. 1: Re. 0.50 nPs, in a rupee of 100 nPs. in the profit and losses of the company while

in the goodwill of the company share of the defendant No. 1 is 63 nPs. in a rupee of 100 nPs. and of the plaintiff at Re. 0.37 in a rupee of 100

nPs. as per deed, Ex. 26.

2. It is further declared that the suit partnership shall stand dissolved from 27-2-1962 and it is ordered that the dissolution thereof as from that date

be advertised in the gazette of Gujarat State,

3. It is further ordered that Shri A. A. Usmani the pleader is hereby appointed as Commissioner-cum-receiver of the partnership estate and effects

and he is ordered to go into possession of this estate forthwith and to get in all the outstanding book debts and claims of the partnership.

And it is further ordered that the following accounts be taken from the defendants:

1. An account of the credits, properties and effects now belonging to the said partnership.

2. An account of the debts and liabilities of the said partnership.

3. An account of all dealings and transactions of this partnership from 29-6-1960 till the management of the company taken over by the

Commissioner be taken from the defendants in view of the accounts being never settled between the suit parties from its inception.

4. And it is hereby ordered that goodwill of the business hereto be carried over

by the defendants as mentioned in the plaint and the stock-in-trade

be sold on the premises and the commissioner may on the application of any of the parties fix a reserved bidding for all or any of the lots at such

sale and that either of the parties is to be at liberty to bid at the sale.

5. And it is ordered that the above accounts be taken and all other acts required for effective winding up of the company be completed on or

before 31st November, 1963 (sic) and that he do certify the results of the accounts and that all other acts are completed and have his certificates in

that behalf ready for the inspection of the parties.

And the commissioner is further ordered to submit his final report determining the final liabilities of suit parties inter se proportionate to their shares

in partnership as already found on or before 31-11-1964 (sic).

6. That the defendants are restrained forthwith from carrying on any business in the firm, name and style of "Vijay Sewing Machine Co." or from

disposing of any of its assets, business or properties or accounts books, vouchers, etc.

7. That the plaintiff is ordered to deposit Rs. 750/- at present for expenses of the Commissioner. Remuneration of Commissioner will be fixed later

on.

8. That the defendants shall bear their own costs and do pay to the plaintiff. Separate order regarding the costs of the Commissioner, future costs

of the suit etc. will be passed at the final decree.

9. And lastly it is ordered that this suit shall stand adjourned for making a final decree on 31-11-64 (sic) or on such date as may be found by the

Court later on.

10. Preliminary decree be drawn accordingly under Order 20, Rule 15, of the C. P.C,

6. Against that decree which was passed in favour of the plaintiff-respondent by the trial Court, the appellants-defendants filed a Regular Civil

Appeal No. 73 of 1964 in the Court of the District Judge, Bulsar at Navsari. That appeal has been dismissed by the learned District Judge, Bulsar

on 20th October, 1964. It, therefore, means that a preliminary decree that came to be passed in favour of the respondent and against the

appellants by the trial Court has been confirmed by the District Court. Against

that appellate decree, the present second appeal is filed by the appellants-defendants.

7. The appellant No. 1, who was the original defendant No. 1, Madhavji Khatav Katira, died during the pendency of this appeal on 9th June

1966. In spite of the fact brought to the notice of the parties to this appeal, that the appellant No. 1 had died on 9th June, 1960, the legal

representatives of the deceased-appellant No. 1 have not been brought on the record. The legal representatives of the deceased-appellant No. 1

having not been brought on the record, so far as the deceased-appellant No. 1 was concerned, the appeal has abated. The matter was placed

before the Registrar of this Court to consider the question whether the appeal abated partly or there was total abatement. As there was contest on

that question, the matter has been placed before the Court.

8. The learned Advocate Mr. N. V. Karlekar, appearing for the plaintiff-respondent, contended that looking to the nature of the suits, all the

partners of the suit firm were necessary parties to the suit. The deceased-appellant No. 1 and the appellant No. 2 (Defendant No. 2) had

wrongfully expelled the plaintiff-respondent from the firm. The plaintiff-respondent, had, therefore, brought the suit stating that he continued to be a

partner of the firm as the expulsion was wrong and illegal. He prayed for a declaration in that regard. He also prayed for an injunction. He also

prayed for the dissolution of the firm and for accounts. According to him, the firm came to be dissolved from 27th February, 1962, the date of the

notice. He succeeded and the preliminary decree came to be passed in his favour against the appellants-defendants. The appeal against that

decree, filed by the appellants in the District Court came to be dismissed. The result was that the trial Court's preliminary decree came to be

confirmed. All the partners being necessary parties, this second appeal cannot be proceeded with further in the absence of the legal representatives

of the appellant No. 1. The surviving appellant did not choose to bring them on record. The consequence was that the appeal has automatically

abated so far as the deceased-appellant No. 1 is concerned. In view of the nature of the suit and the decree that came to be passed, the right to

appeal does not survive to the surviving appellant No. 2. He urged that if this appeal is proceeded with further and the appeal is allowed, the result

would be that there would be two conflicting inconsistent decrees. The appeal having abated against the appellant No. 1, the preliminary decree

that has been passed by the trial Court and confirmed by the District Court will survive in favour of the respondent so far as appellant No. 1 is

concerned. The position, therefore, would be that the respondent would be a person who has been wrongfully expelled from the partnership and

eventually he continues to be a partner in the firm. He would, therefore, continue to have rights as a partner in the firm. A relief for dissolution of the

firm was prayed for and the date of dissolution was shown to be 27th February, 1962. That relief has been granted to him. The two defendants, i.

e. the two appellants are made liable to render accounts. The accounts are ordered to be taken. Several directions have been given by the trial

Court in the preliminary decree which has been referred to by me, in the earlier part of the judgment. He, therefore, contended that if the appeal is

allowed, the net result would be that there would be two conflicting inconsistent decrees. He, therefore, contended that that being the position, the

right to appeal does not survive to the surviving appellant No. 2, Such an. appeal cannot be proceeded with further in the absence of legal

representatives of the deceased appellant No. 1. In support of his argument, he invited my attention to several decisions to which I will make

reference at an appropriate stage.

9. In reply to these arguments, the learned Advocate Mr. Shelat, who originally appeared for the appellants and who could now appear as an

Advocate for the appellant No. 2 urged that in view of the alteration in the relevant Rule No. 3 of Order 22 of the Civil Procedure Code, an

appeal would abate only against the appellant No. 1 (the deceased appellant). It cannot abate against the appellant No. 2. In brief, his argument

was that there would not be a total abatement of the appeal. He contended that if such an appeal was not proceeded with further, it is likely that

the respondent may suffer for no fault of his. He laid stress on the reliefs claimed by the plaintiff-respondent in regard to a declaration and

injunction. He urged that in any case, so far as those two reliefs are concerned, the appeal can be proceeded with further even though the legal

representatives of the deceased appellant No. 1 are not brought on the record.

10. Before I advert to the authorities cited at the Bar and refer to the comments

made by the learned author Mr. Mulla in his book -- Code of Civil

Procedure, 13th Edition, Volume (II,) pages 1233 to 1235, I first propose to refer to Order 22, Rule 3 of the Code of Civil Procedure, 1908,

which is material for our purposes. It runs as under :--

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or

sole surviving plaintiff dies and the right to sue survives, the court, on an application made in that behalf shall cause the legal representative of the

deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned,

and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered

from the estate of the deceased plaintiff." Order 22, Rule 11 states;

In the application of this Order to appeals, so far as may be, the word ""plaintiff"" shall be held to include an appellant, the word ""defendant"" a

respondent, and the word ""suit"" an ""appeal.

We have, therefore, to read these two Rules 3 and 11 of Order 22 of the CPC together as we are dealing with a question in appeal. Admittedly, in

the present case there are two appellants and one of them, namely; the appellant No. 1 has died and his legal representatives have not been

brought on the record within the time limited by law.

11. In view of the provisions of Sub-rule (2) of Rule 3 of Order 22, read with Rule 11 of Order 22 of the Code of Civil Procedure, it is evident

that so far as the deceased-appellant No. 1 is concerned, the appeal has abated. Further question that arises for consideration is whether in this

case where one of the two appellants has died, the right to appeal survives to the surviving appellant No, 2 or not.

12. The learned Author Mr. Mulla in the aforesaid book of his, in para 5 under the Caption -- The suit shall abate -- so far as the deceased-

appellant No. 1 is concerned, has made the following comments at pages 1234 and 1235:

Sub-rule (2) provides that where no such application is made the suit shall abate "so far as the deceased plaintiff is concerned." The words

italicized (underlined (here in " ") above mean that the suits shall primarily abate so far as the deceased plaintiff is concerned but they do not mean

that the suit shall in no case abate as a whole. If the suit is of such a nature that it can proceed in the absence of the legal representative of the

deceased-plaintiff, it will abate so far only as the deceased plaintiff is concerned. A suit by the partners of a firm to recover a partnership debt is a

suit of this nature so that if one of the partners dies pending the suit, and his legal representative is not brought on the record, the suit will abate only

so far as the deceased partner is concerned.

The present suit is not a suit of that nature.

13. It is further commented by the learned Author Mr. Mulla:

""But if it is of such a character that It cannot proceed in the absence of the legal representative, it will abate as a whole. A suit by some of the

partners of a firm against the other partners for dissolution and for accounts is a suit of this character so that if one of the plaintiffs for defendants)

dies, and his legal representative is not brought on the record, the suit will abate as a whole. (See notes above, ""alterations in the rule"" No. 1).

These comments made by the learned Author Mr. Mulla clearly indicate that in a suit like the present suit, so far as it is a suit for dissolution and

accounts, the suit will abate as a whole if one of the plaintiffs or one of the defendants has died and the legal representatives are not brought on the record.

14. The learned Advocate Mr. Shelat, for the appellant No. 2 urged that the learned Author has specifically referred to ""Alterations in the rule

No. 1 and referred to Note No. 1. That alteration in the rule is that the words in Sub-rule (2) at present are :--

the suit shall abate so far as the deceased plaintiff is concerned.

The learned Author pointedly invited the attention of the readers to it by making that reference. Mr. Shelat, therefore, contended that the comments

made by the learned Author by referring to the decisions which may have been given prior to this alteration in the rule, will not be good decisions.

In my opinion, this argument is not well founded. The learned Author has referred to these very wordings in the beginning in this para 5 and

thereafter made the comments that in a suit like the present suit, the suit will abate as a whole- The learned Author has in clear words stated that

the words italicized (herein "" "") namely: ""the suit shall abate so far as the deceased plaintiff is concerned"" mean that the suit will primarily abate so

far as the deceased plaintiff is concerned. ""But that does not mean that the suit shall in no case abate as a whole.

15. The learned Author Mr. Mulla, in para 6 under the caption -- This rule applies to appeals -- has made the following comments at page 1235:

The provisions of this rule apply not only to the case of a deceased plaintiff, but to the case of a deceased appellant (see Section 107 and Rule 11

below). Therefore, where one of two or more appellants dies and the right to appeal does not survive to the surviving appellant alone, the legal

representative of the deceased appellant ought to be brought on the record. If this is not done, the appeal will abate so far as the deceased

appellant is concerned. But the appeal will abate as a whole, if the case is of such a nature that the appeal cannot proceed in the absence of the

legal representative of the deceased appellant.

The crucial test in my opinion is whether looking to the nature of appeal, could it be said that the right to appeal survives to the surviving appellant

No. 2. The question, therefore, that is posed for consideration is whether the case is of such a nature that the appeal cannot proceed in the

absence of the legal representatives of the deceased appellant No. 1. In my opinion, looking to the nature of the case, one has to answer that this

appeal cannot proceed in the absence of the legal representatives of the appellant No. 1, In my opinion, that is not the position only so far as the

relief of dissolution and accounts is concerned, as contended by the learned Advocate Mr. Shelat. The appellants had expelled the respondent

from the partnership relying upon Clause (25) of the partnership agreement. The respondent made a grievance about it and said that this expulsion

was wrong and he continued to be a partner in the firm. He had, therefore, sought for a declaration and he succeeded. The result was that he

continued to be a partner of the firm in spite of that expulsion notice. He, therefore, claims certain rights as a partner. A preliminary decree came to

be passed in his favour. He further succeeded in getting a preliminary decree that the firm is dissolved from 27th February, 1962. Accounts

between the partners were to be taken accordingly. Rights and liabilities in favour of the partners would ensue accordingly. If the argument of the

learned Advocate Mr. Shelat is accepted and it is held that the appeal can proceed even though the legal representatives of the deceased appellant

No. 1 are not brought on the record, there would be two conflicting inconsistent decrees. As the appeal has abated against the appellant No. 1,

the decree passed in favour of the respondent against him has become final. Expulsion order is found to be illegal and wrong and eventually the

respondent continues to be a partner in the firm, his rights flow as a partner and the firm is dissolved from 27th Feb. 1962. He is entitled to

injunction. If now the appeal is allowed and the expulsion is found to be legal, the result would be that he would cease to be a partner in the firm

and would have no right after that expulsion and the question regarding dissolution and taking of accounts would not survive. It cannot, therefore,

be gainsaid that the two inconsistent decrees will come into existence if this argument of the learned Advocate Mr. Shelat is accepted. In my

opinion, therefore, on both these grounds, this appeal cannot be proceeded with further in the absence of the legal representatives of the deceased

appellant No. 1.

16. This conclusion of mine gets support from the decisions cited by the learned Advocate Mr. Karlekar in support of his argument.

17. In the case of Yakub Ibrahim v. A. Gulamabbas, : AIR 1958 Bom 51. S. T. Desai J., as he then was has made the following instructive

observations:--

The subject matter of a partnership suit generally is the severance of the jural relationship and the determination of the mutual rights of the partners.

There being mutual agency and mutual obligation to render accounts the position of parties in a partnership suit is in some particulars different from

that of parties in an ordinary suit. Each of the partners, in a partnership suit, is really in turn plaintiff and defendant and in both capacities comes

before the Court for the adjudication of his rights or liability relatively to the other partners which the Court endeavours to determine by its decree.

In such a suit it is well established that a decree can go either in favour of the plaintiff against the defendant or in favour of any defendant or

defendants against any other party or parties to the suit. In a partnership suit all the partners or their legal representatives must be made parties

because all the parties necessary for the disposal of the subject-matter of the

suit including taking of accounts must be before the Court or the suit will fail. Proper and complete accounts cannot be taken as between some only of the partners. The necessary corollary of this is that if a necessary party has been omitted and added at a time when the suit against him is barred, the whole suit will be dismissed. The same consideration must apply where in a partnership action by a partner against his other partners, the claim is barred against some of those partners but the bar of limitation is saved against some other or other partners by virtue of any acknowledgment and this is for a simple reason that when accounts are taken in any such suit, all the partners would not be before the Court. This decision lays down that in a partnership suit all the partners or their legal representatives must be made parties because all the parties necessary for the disposal of the subject-matter of the suit including taking of accounts must be before the Court or the suit will fail.

18-19. In an unreported decision of this Court in Second Appeal No. 996 of 1960, D/- 14-3-1967 (Guj), Bakshi J., had to deal with a similar

question. It was contended before Bakshi J. by Mr. S. N. Patel:--

Respondent No. 4, original defendant No. 4 was dead during the pendency of this appeal and the appellant had taken no steps to join the legal

representatives of defendant No. 4. He also stated that respondent No. 7, original defendant No.7 was also deleted as a party to this appeal by

the appellant and that the appeal could not proceed in absence of the legal representatives of respondent No. 4 and in absence of respondent No.

1.

Both the contentions of Mr. Patel must be upheld. The suit was a suit for dissolution of partnership and in proceedings relating to partnership, all

partners or their legal representatives must be made parties as all the parties necessary for the disposal of the subject-matter of the suit must be

before the Court. If, therefore, such a necessary party as a partner) has been omitted, the proceedings against him would be barred and the whole

suit would be liable to be dismissed. In a suit for dissolution and for taking accounts of partnership, the shares of each of the partners have to be

determined and the accounts of each of the partners would require to be settled. It is possible that a partner might be found to be a creditor or a

debtor according to the result of the accounts when they are settled and if

anyone who is such a necessary party as a partner has not been brought before the Court, such a suit in the absence of the partner, cannot legitimately be proceeded with. In the case before us, respondent No. 4 who was a partner is dead and his legal representatives have not been joined. Similarly, respondent No. 7 was also a partner in the firm and his name has been deleted from the parties to the appeal. The decision of the learned District Judge cannot therefore, be disturbed so far as they are concerned. In the circumstances, it would not be possible to take accounts of the partnership even if the appellant succeeded in this appeal. This appeal, therefore, cannot legitimately be proceeded with in the absence of the legal representatives of the respondent No. 4 and in absence of respondent No. 7. The appeal must, therefore, be dismissed for that reason.

With great respect, I agree with the principle enunciated in this decision and by Desai J, in the aforesaid Bombay decision.

20. In *State of Punjab Vs. Nathu Ram*, the Supreme Court had to deal with a similar question. No doubt, it was not a case of partners. The facts of that case which the Supreme Court had to deal with were as under :--

""Certain land belonging to two brothers L and N jointly was acquired for military purposes and on their refusal to accept the compensation

offered by the Collector, the State Government referred the matter for inquiry to an arbitrator under Rule 10 of the Punjab Land Acquisition

(Defence of India) Rules, 1943. The arbitrator passed a joint award granting a higher compensation and also certain sum on account of Income

Tax. The State Govt. appealed against the award to the High Court. During the pendency of appeal L died and as his legal representatives were

not brought on record, the appeal abated against him. The question was whether the appeal also abated as against N.

It was held that the appeal against N alone could not proceed. To get rid of the joint decree it was essential for the appellant State to implead both

the joint decree-holders and in the absence of one the appeal was not properly constituted. The subject-matter for which the compensation had

been awarded was one and the same land and the assessment of compensation, so far as L was concerned having become final, there could not be

different assessments of compensation for the same parcel of land. The mere

record of specific shares of L and N in the revenue records was no guarantee of their correctness and the appellate Court would have to determine the share of N and that of L in the land in absence of L's legal representatives which was not permissible in law

The only question is whether the appeal can proceed against them. The provisions of Order 1, Rule 9, C. P. C. also show 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 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 reliefs

against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents if the appeal succeeds,

will be ineffective, that is to say, it could not be successfully executed.

Keeping in mind the tests laid down in the aforesaid decision of the Supreme Court, the present case will be covered by the test No. (a), namely,

the Courts will not proceed with an appeal 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. In the instant case, if the appellant No. 2 succeeds in this appeal the decision arrived at by the Court will be in conflict with the decision between the deceased appellant No. 1 and the respondent. The decree that will be passed, if the appeal is allowed, will be a decree which will be contradictory to the decree which has become final with respect to the same subject-matter between the deceased appellant No. 1 and the present respondent. Furthermore, as said earlier, in a suit like the present suit, which is a suit between the partners for reliefs referred to earlier, all the partners are necessary parties and in case one of the partners is dead, his legal representatives are the necessary parties. The present case is a case where that question is to be considered.

21. In Second Appeals Nos. 270 and 271 of 1960 with C. A. Nos. 1898 of 1965 and 1234 of 1960, decided on 9th and 10th of January, 1967

(Guj). Mehta, J. had to deal with this question regarding conflicting decrees: Mehta J. has referred to the decision of the Supreme Court in The

State of Punjab Vs. Nathu Ram, and also a later decision of the Supreme Court in Sri Chand v. Jagdish Prasad AIR 1966 SC 1427. The relevant

observations quoted by him are at page 1430 and they are as under :--

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; 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 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"".

Further proceeding, their Lordships pointed out that the three tests suggested by Raghobar Dayal J., in Nathuram's case were not cumulative tests.

Even if one of them was satisfied, the Court might, having regard to all the circumstances, hold that the appeal had abated in its entirety.

In view of these settled tests, we will have to consider in the present case as to whether there would be two inconsistent decrees. The appeal

having abated in so far as the deceased appellant Khumaji Kasuji was concerned and his legal representatives had not been brought on the record,

the decree of the trial Court dismissing the suit for ejecting the defendants had become final. The necessary corollary of this was that it was not

thereafter open to the appellate Court to allow the appeal of the surviving appellants and pass an inconsistent decree by decreeing their claim of

ejectment based on the same title. Test (a) laid down in Nathu Ram's case would be clearly fulfilled and so, if the appeal abated against the

deceased appellant Khumaji Kasuji, it could not be proceeded with even by the surviving appellants because they had all made a joint claim in the

trial Court for ejecting the defendants and the decree which had been passed in the suit was a joint and indivisible decree"".

In the instant case also, the test (a) is satisfied. If the appeal is allowed, there will be two inconsistent decrees. Furthermore, as said earlier, the

present suit is of such a nature that in the suit the partners or the legal representatives of the deceased-appellant are the necessary parties for the disposal of the present appeal. The present appeal, therefore, in the absence of the legal representatives of the deceased-appellant No. 1, cannot be proceeded with further.

22, The learned Advocate Mr. Shelat invited my attention to a decision of Rajasthan High Court in the case of Gajanand Vs. Sardarmal and

Another, and urged that the present appeal could be proceeded with further. It was a case where the suit was not instituted in the name of the firm

but in the name of individual partners, the firm being at the time a foreign firm. After the institution one of the plaintiffs died and his legal

representatives were not brought on the record. A question arose as to what has to be considered under Order 22, Rule 2. What has to be

considered is whether the right to sue survives to the surviving plaintiffs alone, i. e. whether the surviving plaintiffs were competent to carry on the

suit in the absence of the deceased plaintiff without joining the legal representatives of the deceased as plaintiffs or defendants or whether the

remaining plaintiffs were entitled to represent the deceased plaintiff for purpose of prosecuting the suit. The suit was a suit to recover the debt due,

to the firm. It was, therefore, observed:

Under Section 47, Partnership Act after the dissolution of a firm, the remaining partners may represent the dissolved firm including the interest of

the deceased partner to recover any debt due to the firm. This being the position, they may be taken to represent the deceased partner in a suit for

the recovery of any amount due to the firm.

It is, therefore, evident that it was a suit by the partners to recover the debt. In the present case the suit is not of that nature. It is a suit by the

plaintiff-respondent for a declaration that the expulsion of his from the partnership by the two appellants was wrong and he continued to be a

partner of the firm. He sought for that declaration. He also sought for an injunction and asked for a relief of dissolution of the firm, stating that the

firm was dissolved from 27th February, 1962 and for accounts. The rights and liabilities of the partners were to be decided. As said earlier the

decree became final so far as the deceased appellant No. 1 is concerned. If the appeal is proceeded with further and the appeal is allowed, the

result would be that there would be two conflicting decrees, Taking into consideration the nature of the case, therefore, this appeal cannot be

proceeded with further in the absence of the legal representatives of the deceased-appellant No. 1. The appeal should, therefore, be dismissed for

that reason. A question as to what would happen to the suit does not arise for a decision before me.

23. The learned Advocate Mr. Karlekar invited my attention to the commentary made by the learned Author Mr. Mulla in his aforesaid book of

CPC in para 16 under the Caption--Death of plaintiff after preliminary and before final decree--and submitted that the suit cannot abate as the

death of the appellant No. 1 has taken place after the preliminary decree was passed in favour of the respondent by the trial Court and the decree

had been confirmed by the appellate Court. I need not enter into that question as that question does not arise before me.

24. The question for consideration is only whether this appeal can be proceeded with further in the absence of legal representatives of the

deceased appellant No. 1. It cannot be proceeded with further for the reasons given above.

25. The result is that the appeal abates as a whole and eventually for that reason the appeal stands dismissed. The appellant No. 2 to pay the costs

of the respondent in this appeal.