

(1962) 08 CAL CK 0031

In the Calcutta High Court

Case No : Full Bench Ref. No. 1 of 1960 in A.F.A.D. No. 723 of 1954

Santosh Kumar Mondal and Others

APPELLANT

Vs

Nandalal Chakrapani and Others

RESPONDENT

Date of Decision : 17-08-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 9, Order 41 Rule 33

Citation : AIR 1963 Cal 289 : (1963) 1 CALLT 371

Hon'ble Judges : R.S. Bachawat, J;P.M. Mookerjee, J;G.K. Mitter, J;D.N. Sinha, J;C.N. Laik, J

Bench : Full Bench

Advocate : Bhupal Chandra Roy Choudhury and Chittatosh Mookerjee, for the Appellant; Jitendra Nath Guha, Nirmal Chakravarty and Kashi Kanta Maitra, for the Respondent

Final Decision : Dismissed

Judgement

Bachawat, J.—In the suit out of which this reference arises, plaintiffs claimed declaration of their title to c.s. plot No. 105 of mouza Gournagar, for recovery of possession of the suit land and for damages for cutting and taking away peas and bamboos grown on it. Defendants filed written statements denying plaintiffs' title to the suit land, and alleging that by amicable partition amongst defendants Nos. 1 to 6 collectively referred to as Chakrapani defendants, the suit land was allotted exclusively to defendant No. 3 who thereafter sold it to defendants Nos. 7 to 10. The trial Court found that plaintiffs were entitled to the suit land and that defendants had jointly dispossessed plaintiffs and were liable to pay Rs. 192/- as damages and on these findings decreed the suit. The decree of the trial Court proceeded on grounds common to all the defendants. All the defendants appealed from the decree impleading plaintiffs as respondents to the appeal. During the pendency of the appeal, on July 26, 1953, defendant appellant No. 2 Bato Krishna Chakrapani died, but his legal representative was not brought on the record, and his death was not brought to the notice of the appellate Court.

On December 4, 1953 the appellate Court held that plaintiffs had failed to prove their title to or possession of the suit land, and on this finding set aside the decree of the trial Court, and dismissed the suit. Plaintiffs have appealed to this Court impleading as respondents to the appeal all surviving defendants as also the legal representative of Bato Krishna. On the merits there is no ground for interference with the decision of the lower Court. But plaintiffs urge that in view of the death of Bato Krishna, and the omission to bring his legal representative on the record the appeal abated as far as he was concerned, and that as he was a necessary party, the appeal as a whole abated, and consequently the appellate decree is void and without jurisdiction. Having regard to conflict of Judicial opinion on the point, the Division Bench has referred the appeal to the Full Bench and has formulated, the following question of law:

"(1) Where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants and all or several of the plaintiff or defendants appeal against the decree, can the appellate Court in view of the provisions of Order 41, Rule 4, C. P. C, proceed with the appeal and reverse the decree of that trial Court in spite of the omission to bring on the record the heirs of one of the appellants who dies during the pendency of the appeal?"

"(2) Were the cases *Baloram Paul v. Kanysha Mashi*, AIR 1919 Cal 410 and *Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others*, , correctly decided?"

2. Before us Mr. Guha representing some respondent contended that (1) on the death of Bato Krishna the right of appeal survived to the surviving appellant alone and in view of Order 22 and Rules 2 and 11 C. P. C. the appeal did not abate either wholly or in part, (2) even if It be held that the appeal abated so far as Bato Krishna was concerned the appellate Court could in view of Order 41 Rule 4 C. P. C. set aside the whole decree appealed from, and (3) assuming that the entire decree could not be set aside the appellate Court could set aside the decree so far as it affected the surviving appellants, in my Judgment the first contention ought to be rejected, but the second contention ought to succeed, and accordingly the this contention does not arise for consideration.

3. Under Order 41, Rule 4, C. P. C. any one of the defendants alone may appeal from the whole decree, and not merely from that part of the decree which affects him alone where, as in this case, the decree proceeds on grounds common to all the defendants, and in such an appeal the appellate Court may reverse or vary the decree appealed from in favour of all the defendants. Order 41, Rules 4 and 33 C. P. C. read together empower the Court to reverse or vary the decree in favour of a defendant who is not a party to the appeal, see *Dasarathi Patel v. Brojo Mohan*, 18 Cal LJ 621, *Kamalakanta Debnath Tamijuddin Kamalakanta Debnath and Others Vs. Tamijaddin and Others*, *Mt. Parwati Kuer and Others Vs. Manna Lal Khetan and Others*, .

4. I think that this power may also be exercised in favour of the legal representative of a deceased defendant who is not a party to the appeal. The expression "parties" in Order 41, Rule 33 C. P. C. covers the legal representative of a deceased party to a suit, though he is not party to the appeal. Similar interpretation has been given to the expression "any person who was a party to the suit" in Order 41, Rule 20 C. P. C. see, *Ramesh Chandra Das v. Anthony Penheiro* AIR 1916 Cal 690. It follows that the non-appealing defendants, and if some of them are dead, their legal representatives are not necessary parties to the appeal preferred by one of the defendant under Order 41 Rule 4 C. P. C. The appellate decree should be passed in favour of a living party or, if the party is dead, in favour of his legal representative. But if the decree is passed in favour of a deceased party in ignorance of his death, the Court is not bound to treat it as a nullity, and to vacate it at the instance of a party who has been fully heard, see *Vellyan Chetty v. Jothi Mahalinga Aiyar* AIR 1916 Mad 574 : ILR 39 Mad 386, *Noai Chowkidar and Others Vs. Official Trustee of Bengal*, , *Radha Mohan Singh Vs. Shree Kishun Gir and Others*, .

5. Let us now consider the case where two or more defendants appeal from the decree and one of them dies during the pendency of the appeal. Though two or more defendants join as co-appellants, each of them severally has the right to maintain the appeal from the whole decree under Order 41 Rule 4 C. P. C. it, as in this case, on the death of one of the appellants the right of appeal survives, the death, of itself, does not cause the appeal to abate, see Order 22, Rules 1 and 11 C. P. C, and Section 306 of the Indian Succession Act, 1925. Since the right of appeal from the whole decree was vested in each appellant severally, the right survives to each of the surviving appellants, and also to the legal representative of the deceased appellant. The right does not survive to the surviving appellants alone. "Alone" means to the exclusion of others. The case comes within Order 22, Rules 3 and 11 C. P. C.; and not within Order 22, Rules 2 and 11 C. P. C. The fact that the surviving appellants have the right to maintain the appeal from the whole decree does not mean that the right of appeal survives to them alone to the exclusion of the legal representative of the deceased appellant. I do not think that the case of *Maung Byaung v. Mg. Shwe Baw* AIR 1924 Rang 376 : ILR 2 Rang 486 decided the contrary, but if it did I would respectfully dissent from it. Consequently on the omission to implead the legal representative of the deceased appellant within the time allowed by law the appeal abates so far as he is concerned.

6. On such abatement, by the combined effect of Order 22, Rules 3, 9 and 11 C. P. C., the appeal ceases or terminates so far as the deceased appellant is concerned and no fresh appeal can be brought on the same cause of appeal, but the abatement does not preclude the continuance of a pending appeal on the same cause. The pending appeal of the surviving appellants from the entire decree including the decree against the deceased appellant is not arrested by his death and by the abatement of his appeal. During the pendency of this appeal, the decision of the trial Court does not operate as *resjudicata* against him, the

entire subject matter of the appeal is then sub judice and is subject to the decision of the appellate Court. The entire decree appealed from is still liable to be set aside. The reversal or variation of the decree appealed from does not result in inconsistent and contradictory decrees.

7. The abatement of the appeal does not operate as a judgment of the appellate Court on the merits of the case, nor does it extinguish the title of the legal representative of the deceased appellant to the subject matter of the appeal. It is to be observed that in the case of abatement of a suit also the bar of Section 391 of the Code of 1882 corresponding to Order 22, Rule 9 C. P. C. 1908 did not either operate as *res judicata* or preclude the defence or extinguish the title of the legal representative of the deceased plaintiff to the subject matter of the suit, see *Jayasingh Lalchand v. Gopal Yeshwant*, 6 Bom LR 638, see also in this connection *Mt. Chand Kour v. Pratab Singh*, 15 Ind App 156 (PC) which decided that the similar bar of Section 103 of the 1882 Code corresponding to Order 9, Rule 9 C. P. C. 1908 did not operate as *res judicata* and AIR 1939 110 (Privy Council) , where it was held that the similar bar of Order 23 Rule 1 Sub-rule (3) C. P. C. 1908 did not extinguish the debt sued upon. Indeed in the absence of a provision corresponding to Section 371 of the Code of 1882 or Order 9, Rule 9 C. P. C. 1903, the abatement of the suit would not even preclude a fresh suit on the same cause of action, see *Pallikanth Ramen Menon v. Mullankaji Srikumaran Nambdri*, ILR 3 Mad 31. The conclusion that the abatement of a suit does not operate as a judgment on the merits does not clash with the rulings that an order u/s 366 of the Code of 1882 that the suit do abate was tantamount to a judgment or a decree, and as such was appealable, see *Bhikaji Ramchandra v. Purushottam*, ILR 10 Bom 220, and should not be passed *ex parte* without notice to the party affected, see *Brij Inder Singh v. Kanshi Ram* AIR 1917 PC 156 : 44 I A 218. Besides under the present Code the abatement is automatic and an order that (he suit do abate is not required to be passed. But I cannot agree with the broad dicta in *Rahimunnissa Began v. M. A. Srinivasa Ayyangar* AIR 1920 Mad 580, suggesting the bar of Order 22, Rule 9 C. P. C. operates as a judgment on the merits, and is conclusive on the question as to the right of the deceased to the suit property.

8. The abatement of the appeal so far as the deceased appellant is concerned does not therefore preclude the appellate Court from exercising its powers-under Order 41, Rules 4 and 33 C. P. C. and from reversing or varying the decree appealed from in favour of his legal representative, the exercise of this power is not repugnant to the provisions of Order 22, Rules 3, 9 and 11 C. P. C.

9. I have therefore come to the conclusion that where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on a ground common to all the plaintiffs or to all the defendants, and two or more of the defendants appeal from the decree, the death of one of the appellants does not affect the right of the other appellants to proceed with the appeal from the whole decree, and the appellate Court may reverse or vary the entire decree in

favour of all the surviving plaintiffs or defendants and the legal representative of the deceased plaintiff or defendant as the case may be. This conclusion is supported by the decisions in *Upendra Nath Ghosh and Others Vs. Bhusan Sahana and Others*, , *Krishnabandhu Pal Vs. Brajendrakumar Shaha and Others*, , *Karimannessa Bibi v. Guran Mondal*, 59 Cal LJ 318, *Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh*, , *Nibaran Chandra v. Pratap Chandra*, 44 Cal WN 141, *Sarat Chandra Narayan v. Fezuram Nath* CWN 281, *Halima Khatun and Others Vs. Sashi Kumar Banik*, , and many decisions of other High Courts and is also in conformity with the interpretation given to the corresponding Section 544 of the 1882 Code, see *Chintaman Nillkanth v. Gangabai*, ILR 27 Bom 284, *Ram Sewak v. Lambar Pande* ILR 25 All 27. I respectfully agree with these decisions though not with all their reasonings. This conclusion is at variance with the decisions in *Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others*, , *Harendra Nath Chaudhury Vs. Dwijendra Nath Banerji and Others*, , *Ramphal Sahu v. Satdeo Jha*, AIR 1940 Pat 346 : ILR 19 Pat 370 (FB) *Baij Nath and Another Vs. Ram Bharose and Others*, , and other cases with which I respectfully disagree.

10. In conclusion I must point out that if a plaintiff respondent in whose favour the decree was passed dies, the appeal abates so far as he is concerned on the omission to implead his legal representative within the time allowed by law and if he was a necessary party to the appeal, the entire appeal becomes incompetent and cannot be proceeded with, see *The State of Punjab Vs. Nathu Ram*, , *Kali Dayal v. Nagendra Nath*, 24 Cal WN 44 : (AIR 1920 Cal 264), *Bishnu Bijoy Srimani Vs. Chandra Bijoy Srimany and Others*, and other cases. Order 41, Rule 4 C. P. C. is not attracted to such a case. The appellate Court cannot reverse or vary the decree appealed from in the absence of the party in whose favour the decree was passed or if he is dead in the absence of his legal representative, see *Manindra Chandra Nandi Vs. Bhagabati Devi Chowdurani and Others*, . These cases are distinguishable. In the instant case all the plaintiffs in whose favour the decree of the trial Court was passed were parties to the appeal before the lower appellate Court. It is not contended that the discretionary power under Order 41, Rules 4 and 33 C. P. C. was wrongly exercised in this case. There is no merit in the appeal.

11. The order of this Court is as follows:

12. The answers to the questions referred to the

Full Bench are :

Question 1 -- Yes.

Question 2 -- No.

13. The appeal be and is hereby dismissed. There will be no order as to the costs of the appeal and of the reference.

Sinha, J.

14. The facts in this case are shortly as follows : The plaintiffs-appellant, instituted a suit being Title Suit Ns. 23 of 1952 before the Munsif at Ranaghat, for a declaration of their title to C. S. plot No. 105 of mouza Gournagarr and recovery of possession thereof. The case of the plaintiffs-appellant was that in or about the year 1932 they had obtained the plot by exchange with the Chakrapani defendants and had possessed the plot for over 12 years, but that on 19th February, 1950, they were dispossessed by the defendants. They claimed occupancy right. On the 25th February, 1953 the Munsiff Ranaghat decreed the suit in favour of the plaintiffs. The defendants appealed on the 30th May 1953. On the 20th July, 1953 Batakrisna Chakrapani, the defendant Appellant Mo. 2 died, leaving his widow Basibala as his only heir. She was not substituted in the place of her deceased husband, but the Appeal was successful and on the 4th December, 1953 the Subordinate Judge Nadia, reversed the decision of the lower Court. Against this there was a second appeal to the High Court. On the 19th May 1954 an application was made before the High Court for addition of Basibala as a party and this was allowed. The appeal came up for hearing before Banerjee J. Before him it was contended that upon the death of one of the appellants in Title Appeal No. 35/25 of 1953, and no substitution of his heir and legal representative having been made, the appeal must be taken to have abated as a whole. Banerjee J. referred the appeal to a Division Bench. The Division Bench, presided over by Sen J., found that there were conflicting decisions upon a point involved In the appeal and has referred the matter to a Full Bench, having formulated two questions:

"1. Where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, and all or several of the plaintiffs or defendants appeal against the decree, can the appellate Court, in view of the provisions of Order 41, Rule 4, C. P. C. proceed with the appeal and reverse the decree of the trial Court in spite of the omission to bring on the record the heirs of one of the appellants who dies during the pendency of the appeal?

2. Were the cases *Balaram Pal Vs. Kanysha (Kangsha) Majhi and Others*, and 32 Cal WN 299, correctly decided?"

15. Before proceeding to consider these points, it would be necessary to recall the relevant provisions in the Code regarding abatement. Order 22, Rule 1 provides that the death of the plaintiff or the defendant shall not cause the suit to abate if the right to sue survives. Rule 2 lays down that where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiffs or the plaintiff alone, or against the surviving defendants or the defendant alone, the Court shall cause an entry to that effect to be made in the record and shall proceed at the instance of the surviving plaintiffs or plaintiff and against the surviving defendants or defendant. Rule 3 provides that where one of two or more plaintiffs dies and the right to sue does not survive in the surviving plaintiffs or plaintiff alone, then the Court on an

application made on that behalf shall cause the legal representatives of the deceased plaintiffs to be made a party and proceed with the suit. If however no application is made within the time specified for that purpose, the suit shall abate so far as the deceased plaintiff is concerned. Similarly under Rule 4, where one of two or more defendants dies and the right to sue does not survive against the surviving defendants or defendant alone, then on an application being made in that behalf, the Court should substitute the legal representative of the deceased defendants.. Where such substitution has not been done within the time limited by law, the suit shall abate against the deceased defendant. Under Order 22, Rule 11, the provisions of Order 22 apply to appeals. u/s 107 of the Code, the Appellate Court shall have the same power and performs as nearly as may be the same duties as are conferred and imposed by the Code, on the Courts of original jurisdiction. Order 41, Rule 4 provides as follows:

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be."

16. The normal or general rule is that, on an appeal by one of several plaintiffs or defendants, the Appellate Court can reverse or vary the decree of the trial Court only in favour of the party appealing. Rule 4 and Rule 33 of Order 41 are the exceptions thereto and give the Court power to make the appropriate order needed in the interests of justice. Where the appeal is with regard to part only of a decree, Rule 33 applies where the appeal is with regard to the whole decree, Rule 4 applies.

17. There are however certain conditions imposed for the application of Order 41, Rule 4 and they are as follows:

(a) This rule only applies to appeals.

(b) In the suit, in which a decree has been passed and against which the appeal has been preferred, there must have been more than one plaintiff or more than one defendant, and only one of them should be the appellant.

(c) The decree appealed from must proceed on any ground common to all the plaintiffs or defendants.

18. If these conditions are satisfied, then any one plaintiff or defendant may file an appeal against the decree and the Court can give relief, not only to the appealing plaintiff or defendant, but may reverse or vary the entire decree, so as to benefit even a non-appealing plaintiff or defendant. A simple illustration is as follows: A and B sue X for possession of land. The suit is dismissed as time-barred. A alone appeals and the appeal Court reverses the decree, holding that it is not timebarred. The Court can reverse the decree against B as well as A. *Kundan v. Mam Raj* AIR 1922 Lah 57 (58). The next question is as to whether it

is absolutely necessary that in such an appeal, B must be made a party respondent, in order to grant him relief. There is a conflict of decision, but the view of the Calcutta High Court *Gopesh Chandra Aditya Vs. Benode Lal Das and Others*, and *Fazal Rahaman v. Abdul Rashid* 43 Cal WN 15 is that even if B has not been impleaded as a party, the court can still grant relief. This is also the Bombay view, *Gurunath v. Venkatesh Lingo*, AIR 1937 Bom 101 (103), *Abdul Rahiman v. Maidin Saiba*, ILR 22 Bom 500,

19. The next question to be considered is as to what happens if one of the appellants in such a case dies, but his heirs and legal representatives are not brought on record. I have already stated that by Order 22 Rule 11, the provisions of Order 22 apply also to appeals. If the right of appeal does not survive to the surviving appellants alone, then the appeal will abate so far as the deceased appellant is concerned. In such a case, can the surviving appellant or appellants maintain the appeal and get a decree under Order 41, Rule 4 which will also benefit the dead appellant, or his heirs and legal representatives? This is the problem which arises in this case.

20. I shall first of all proceed to consider the decisions mentioned in the referring judgment. The first decision is a Bench decision of this Court *Balaram Pal Vs. Kanysha (Kangsha) Majhi and Others*, . The facts in that case were as follows Six plaintiffs brought a suit for recovery of possession of a homestead on declaration of their title thereto. On 29-11-1915 the Munsif dismissed the suit. Against that dismissal all the plaintiffs jointly preferred an appeal to the District Judge of Jessore. On 1-1-1917 one of the plaintiffs appellants died. The other parties had no information about the death. On 2-2-1917 the appeal was disposed of and a decree was passed in favour of all the plaintiffs appellants. Against that decree the sole defendant appealed, making all the plaintiffs as they appeared on record, as respondents. The notice on the dead respondent was returned unserved with the report of his death. The appellant then made the heirs of the dead plaintiff as parties. It was contended that by virtue of Order 41, Rule 4 the surviving plaintiffs could have carried on the appeal and there was no question of abatement. This contention was repelled. The Court said as follows:

"It is contended that Order 41, Rule 4, Civil P. C. operates in favour of the surviving plaintiffs. But we think that when a plaintiff prefers an appeal in which other plaintiffs are interested, that section does not authorise him to proceed with the appeal without making the other plaintiffs parties to the appeal. In the present case, all the plaintiffs, are necessary parties. It is further contended that as the heirs of Kailash are now before this Court, the appellant-defendant cannot say the appeal has abated. But the effect of allowing the appeal to be heard and the decree passed by the lower appellate Court in ignorance of the death of one of the joint plaintiffs was that that judgment and decree became a nullity. The heirs of Kailash might have applied, within six months from the date of their father's death, to have the decree set aside and the appeal reheard, but they having taken no action, the whole appeal must be held to have abated. The

result is that the decree of the lower appellate Court being a nullity, the original judgment of the first Court must stand and the suit must be dismissed in accordance with that decree."

21. The next case referred to is a Bench decision of this Court Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, . In that case, the facts were as follows: A suit was brought by the tenants of a holding against their landlords u/s 106 of the Bengal Tenancy Act, for correction of an entry in the record of rights. The suit was dismissed. There was an appeal to the Subordinate Judge, who allowed the appeal. Against the order of the Subordinate Judge the landlords preferred an appeal to the High Court. During the pendency of the appeal in the High Court, the appellant No. 4 died, but no steps were taken to bring his heirs on the record. A preliminary abjection was taken that the appeal had abated and therefore could not proceed. It was contended that Order 41, Rule 4, did not apply because of the following reasons:

1. It does not empower an appellate Court to reverse or vary a decree in favour of all the defendants where the appeal which is preferred by all of them cannot be continued by all on account of the death of one of them during the pendency of the appeal.

2. Persons who have not joined in the appeal, but in whose favour the appellate Court may reverse or vary a decree must be either plaintiffs or defendants. The terms "Plaintiffs" and "defendants" can refer only to persons who are alive. The deceased appellant No. 4 had, by reason of his death, ceased to be an appellant. His heirs, who had not been brought on record were not "defendants". Therefore, the position was not saved by Order 41, Rule 4.

Cuming J., said as follows:

" So far as the 4th Defendant is concerned, he is no longer a Defendant, for he is dead. Possibly he has some heirs but they are not on the record and so are obviously not parties. Order 41, Rule 4 can have no application therefore. A dead person is no longer a party to a suit in any capacity. No doubt the death of an Appellant does not cause the appeal to abate if the right to appeal survives, but this does not mean that any decree can be passed in favour of the dead person. It merely provides that his heir or representative may carry on the litigation if they so desire and have themselves duly made a party. There is a further consideration which I think also makes it clear that Order 41, Rule can have no application an order of abatement is virtually a decree as it disposes of the plaintiff's (in this case the Appellant's) claim as completely as if the suit has been dismissed..... So long as the order of abatement remains it must be considered to have determined the rights between the parties To allow an Appellant whose appeal has abated to gain the advantage of Order 41, Rule 4 would result in the anomaly that so far as that Appellant was concerned there would be two decrees in the same suit in existence at the same time; one in his favour and one against him. The conclusion to which I have no difficulty in

coming is that Order 41, Rule 4 cannot be applied to the case of an Appellant whose appeal has abated by his death."

22. The next case to be considered is *Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh*, . In that case, the facts were as follows: The suit out of which the appeal arose was brought by the plaintiffs for a declaration of their title to certain lands and for recovery of khas possession. The first Court granted a declaration of the plaintiffs' title to a fractional share in the land but dismissed the claim for khas possession. " On appeal to the Lower Appellate Court, this decision was set aside and the plaintiffs' suit was decreed in full. During the pendency of the appeal in the Lower Appellate Court one of the plaintiffs appellant Fedu Sheikh, died and his two sons, Asiruddin and Mobarak, were substituted as his heirs in the records of the appeal. The appeal in the High Court was tiled on behalf of both Asiruddin and Mobarak. Mobarak died during the pendency of the appeal in the High Court and his heir was not brought on the record within the time allowed by law. The result was that the appeal abated so far as the appellant Mobarak was concerned. It was then argued that the whole appeal had abated. This contention was repelled. Mitter J., said as follows:

"We are of opinion that this case is governed by the provisions of Order 41, Rule 4, which runs as follows: "Where there are more plaintiffs or more Defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the Defendants, any one of the Plaintiffs or of the Defendants may "appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or Defendants, as the case may be. The suit of the present plaintiffs for ejectment was resisted by the two sons of the original Defendant No. 1., on common grounds, and it seems to us that the present rule enables one of the two heirs of the Defendant to maintain the appeal from the whole decree, and it is competent to the Appellate Court to reverse or vary the decree in favour of all the plaintiffs or all the Defendants as the case may be, although one of the Defendants or one of the Defendants" heirs did not join in the appeal. It is contended that the rule only provides for a case where the appeal has been preferred by one of the Defendants, in which case although the other Defendants had not joined in the appeal, he is entitled to get the benefit of the Judgment. We are of opinion that that would be putting a limited construction to the provisions of R, 4, Order 41".

23. Referring to the case of *Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others*, , the learned Judge said that the question as to whether an appeal could be heard in the absence of one of the appellants depended on the nature of the suit and the decree made. There was no rule of universal application. It being a suit for ejectment, it was held that Order 41 Rule 4 could be applied. The next case to be considered is *Halima Khatun and Others Vs. Sashi Kumar Banik*, . The facts in that case were as follows : A suit was brought for the specific performance of a contract for sale of certain lands. The plaintiff was Sasi Kumar Banik and the defendant was Arsad Ali. The suit was decreed in

the Court of the first instance. The original defendant having died, his heirs were substituted and preferred an appeal. The appeal was dismissed by the District Judge. The substituted defendants preferred a second appeal. At the hearing of the second appeal a preliminary objection was taken by the respondent that pending the appeal two of the appellants had died and their heirs had not been brought on record within the period of limitation. It was contended that the appeal had abated and was no longer competent. The surviving appellants relied on the provisions of Order 41, Rule 4 and contended that the surviving appellants were entitled to prosecute the appeal without bringing the heirs of the deceased appellants on the record, the learned judges said as follows :

"The respondent relied on the decision in Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, wherein it was clearly held that when one of the parties to the appeal died and the heirs were not brought on the record, Order 41, Rule 4 had no application. But in a number of subsequent cases, viz. 59 Cal LJ 318, Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh, and Sarat Chandra Narayan Chaudhury and Another Vs. Fezuram Nath and Others , it has been held that this rule applies in such cases.

Order 41, Rule 4 is silent on the question whether when some only of a number of defendants or plaintiffs prefer an appeal, the remaining defendants or plaintiffs are necessary parties to the appeal. The reasons given for the decision in 32 CWN 299 : (AIR 1923 Cal 184) (supra) have not been considered in the subsequent decisions. But in view of the number of subsequent decisions all to the same effect, we hold, with some hesitation, that the surviving appellants are entitled to prosecute this appeal without bringing on the record the heirs of the deceased appellants."

24. Since the learned Judges hesitated to come to the decision above mentioned, I will consider two other decisions mentioned in their judgment. In Nibaran Chandra Ghose v. Pratap Chandra Chaudhuri, 44 CW N 141 , the facts were as follows: The plaintiff sued the seven defendants in respect of a silted up bed of a tank, alleging that the defendants were trespassers who had not come on the land under any right, or alternatively, that the right had been annulled under the provisions of the Bengal Tenancy Act. The suit was decreed in the Lower Court as also the Lower Appellate Court. The defendants thereupon preferred a second appeal. A preliminary objection was taken on behalf of the plaintiffs as to the maintainability of the appeal. It was pointed out that the appellant No. 3, Pran Krishna Ghose, died pending the appeal and that his legal representatives had not been substituted in his place. It was urged that the appeal as against the heirs of Pran Krishna Ghose had abated and that the whole appeal should be considered as having abated inasmuch as a decree could not be passed in favour of the other appellants in the absence of the heirs of Pran Krishna Ghose. This preliminary objection was overruled. Reliance was placed on the Bench decision of Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh, and it was held that there was no difficulty in passing a decree in favour of the appellants by reason

of the fact that one of the appellants had died and his heirs had not been brought on record. The next case is 16 CWN 281. In that case, the facts were as follows : The plaintiffs were the tenants and the defendants were the landlords. The defendants took recourse to certificate proceeding against the plaintiffs in respect of rent, ine plaintiffs instituted the suit for a declaration that the rent payable was Rs. 5/- per annum and for other reliefs, the trial Court decreed the plaintiffs" suit. On appeal, the District Judge reversed the decision and dismissed the suit. There was a second appeal to the High Court which Set aside the decree of the District Judge and remanded the appeal for hearing. While the appeal on remand was pending, the defendants discovered that one of the plaintiffs appellant had died while the appeal was pending in this Court and that his heirs had not been substituted, they then applied and obtained a rule upon the plaintiffs to show cause why it should not be held that the appeal in this Court had abated so far as the deceased plaintiff was concerned, and why as a consequence, the whole appeal should not be dismissed. Sen, J., first of all considered the provisions of Order 22 of the Code of Civil Procedure, the relevant provisions being Rules 3 and 11. The learned Judge came to the conclusion that there could be no question that by virtue of Rule 3 read with Rule 11 the appeal had abated so far as the deceased plaintiff appellant was concerned, inasmuch as the right to sue did not survive in the surviving appellants alone. The learned Judge then proceeds to state as follows :

"The CPC makes no exception to this general rule so far as suits are concerned. The position is, however, different in an appeal. Order 41, Rule 4, creates an exception to this general rule the Appellate Court, therefore has the power to pass a decree In favour of a person who is not before it in the circumstances stated in the Rule. In the present case the decree in the Court below has proceeded on a ground common to all the plaintiff-tenants. Although Order 41, Rule 4 does not in terms apply to the present set of circumstances inasmuch as the deceased plaintiff had in fact appealed and had died pending the appeal, nevertheless, I think, that as the Appellate Court has the power to reverse or vary the decree in favour of all the plaintiffs, including a plaintiff who has not been made a party to the appeal, it can exercise the same power in favour of the heirs of a plaintiff who was an Appellant and who had died pending the appeal, although such heirs have not been made parties to the appeal. The position is essentially the same as if that deceased plaintiff had not appealed at all. The cases of Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh, and the case of Somasundaram Chettier v. Vaithilinga Mudaliar ILR 40 Mad 846 : (AIR 1918 Mad 794(2)) support the view taken by me, but a different view seems to have been taken in the case of Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, and Harendra Nath Chaudhury Vs. Dwijendra Nath Banerji and Others, . In the circumstances I respectfully follow the decision first cited and hold that the appeal has not abated as a whole."

I respectfully agree with the reasoning and conclusions reached by Sen J. In Upendra Nath Ghosh and Others Vs. Bhusan Sahana and Others, , a similar view

was expressed by Walmsley J. There, the defendants had appealed, and while the appeal was pending, one of the defendants appellants died and his heirs had not been brought on the record, with the result that the appeal abated as against him. Yet, it was held that the remaining defendants appellants could proceed with the appeal and obtain a decree for the benefit of all. Walmsley J. said as follows :

"I think the case is one to which the principle of Order 41, Rule 4 is applicable. The appeal proceeds on grounds common to all the defendants and one of them might have appealed and secured a modification of the decree in favour of all. Surely therefore it is unreasonable to hold that the absence of one must disqualify the others from carrying on the appeal."

Before I proceed further, I would like to cite a Bench decision of the Allahabad High Court. Abdul Rahman and Others Vs. Girjesh Bahadur Pal and Others . It was held there that where the suit had proceeded on a ground common to all the plaintiffs and some only of the plaintiffs had appealed and impleaded the non-appealing plaintiffs as respondents and some of the respondents died during the pendency of the appeal and their heirs were not substituted, the provisions of Order 41, Rule 4 were applicable. The reasoning was that if the plaintiffs appellants had appealed without impleading the dead respondent then the appeal would have been competent. Therefore it did not matter if they had been respondents but had died pending the appeal and their heirs were not brought on record.

25. It is by now evident that there are two conflicting groups of decisions. One group holds that if one of several appellants dies and his heirs are not brought on record the appeal abates as a whole and is not saved by Order 41, Rule 4. The other group, and this is the preponderant group, holds that in such a case the appeal may abate against the deceased appellant, but the Court is entitled to pass a decree in favour of all the plaintiffs or the defendants appellants as the case may be, by virtue of the provisions of Order 41, Rule 4. The question is as to which group we should prefer and follow.

26. Before I consider the matter further, I might mention the arguments that have been advanced before us. It was argued that under Order 41, Rule 4, provided that the preconditions exist, any one of the plaintiffs or the defendants as the case may be, may appeal from the whole decree. In a case where there are more than one appellant and one of them dies, there cannot be said to be any abatement under Order 22, Rule 3 because the right to sue survives by virtue of Order 41, Rule 4 itself. In my opinion, this is not a correct argument. In order to avoid abatement under Order 22, Rule 3, the right to sue should survive in the surviving plaintiffs alone or in the surviving defendants alone as the case may be. I will give an example. In an Allahabad decision, Mahadeo Singh and Others Vs. Talib Ali and Others , three persons brought a suit for preemption. The suit was dismissed and an appeal was filed. Pending the appeal one of the appellants died and his legal representatives were not brought on record either

as appellants or as respondents. The question was whether the whole appeal had abated. Mukerji J., said as follows:

"A preemptor's right to pre-empt the whole of the property sold is independent of a similar right enjoyed by another person who stands in the same degree as regard the right of pre-emption as the other claimants. The fact, therefore, that two or more such claimants to a right of pre-emption join in one suit, instead of bringing separate suits of their own, cannot convert the separate rights of the several plaintiffs into a joint right, Order 1, Rule 1, Civil Procedure Code, permits the plaintiffs in such cases to join in bringing one suit The reasons given above will clearly establish that the surviving decree-holders were entitled to enforce the whole decree for pre-emption."

27. It was held that there was no abatement of the appeal. The position in law may be, therefore, summarised as follows:

1. In order that Order 41, Rule 4 may apply in a particular case, the first thing is to see that the pre-conditions mentioned above have been satisfied.
2. It must be remembered that Order 41, Rule 4 is applicable in the case of an appeal and not in the case of an original suit.
3. Order 41, Rule 4 does not in terms deal with the situation where one of the appellants dies during the pendency of the appeal.
4. Where in an appeal, all the pre-conditions mentioned above are satisfied, and one of the appellants dies during the pendency of the appeal, then the provisions of Order 22, Rule 3 read with Rule 11 have to be applied in finding out whether there has been an abatement, if the right to sue has survived in the surviving appellants, then no question of abatement arises. If however the right to sue does not survive in the remaining appellants, then the appeal would abate in respect of the deceased appellant unless his heirs and legal representatives are brought on the record within the permissible period.
5. Even where the appeal has abated in respect of one or more of the appellants in such a case, it does not follow that the appeal has abated as a whole. It may be saved by the provisions of Order 41, Rule 4, where it applies.
6. In such a case, although the appeal has abated against one or more of the appellants the Court has power under the provisions of Order 41, Rule 4 to grant relief to the surviving appellants and the heirs and legal representatives of the dead appellant or appellants although they are not made parties to the appeal. The Court has jurisdiction to do so, also under Order 41, Rule 33, See *Radha Mohan Singh Vs. Shree Kishun Gir and Others*, .

28. I will now come to the facts of the present case and apply the principles adumbrated above. There is no dispute that the decree in the first Court was in favour of more plaintiffs than one and proceeded on a ground common to all the plaintiffs. Against the decree, there was an appeal. The decree was reversed by

the Lower Appellate Court, but during the "pendency of the said appeal one or the defendants appellant died and his heirs were not brought on record. The question is whether as a result of such action, the whole appeal had abated. In my opinion, it had not. At best it may be said that the appeal had abated against the deceased appellant. But the court had power under Order 41, Rule 4 to pass a decree in favour of all the appellants and this would enure for the benefit of the heir and legal representatives of the dead appellant, although she was not made a party to the appeal. It appears however that since then she has been made a party, and is before the Court. So far as the two questions are concerned, the first question should be answered in the affirmative. With regard to the second question I am of the opinion that the cases of Balaram Pal Vs. Kanysha (Kangsha) Majhi and Others, and Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, were not correctly decided.

29. I agree with the form of the order made by Bachawat, J.

P. N. Mookerjee, J.

30. This is 3 short Reference, arising out of a suit for declaration of title and recovery of possession, the suit was decreed by the learned trial Judge, but, on appeal, his decision was reversed and the plaintiffs suit was dismissed by the learned Subordinate Judge. From this appellate decree of dismissal, the plaintiffs came up on second appeal to this Court.

31. So far as the merits are concerned, the instant second appeal appears to be concluded by findings of fact. The plaintiffs founded their claim of title on an alleged oral exchange and on adverse possession for the prescribed or requisite period. The learned trial judge did not come to any specific finding on the story of exchange but held that, even if there was any oral exchange, as alleged by the plaintiffs, it was ineffective in law to pass title of the disputed land, which was comprised in an occupancy raiyati holding and so could not be transferred except by a registered document (Vide Section 26-C of the Bengal Tenancy Act). This position appears to have been accepted by the plaintiffs before the learned Munsif, the suit, however, was decreed by the said learned trial judge on the ground of adverse possession. The learned subordinate Judge, on appeal, agreed with the learned Munsif, that, in view of Section 26C of the Bengal tenancy Act, the plaintiffs acquired no title to the disputed land even on their own story of oral exchange. He, however, went further and held that, even his story of oral exchange had not been proved and, in that context, he rejected also the plaintiffs' case of adverse possession. In short, the lower appellate Court has disbelieved the plaintiffs' story of exchange and of possession or adverse possession too and, upon those findings this second appeal to this Court, so far as merits are concerned, appears to be concluded by findings of fact. That notwithstanding, this appeal would have succeeded, had the plaintiffs' objection to the effect that the appeal before the lower appellate Court had abated as a whole and become incompetent by reason of the alleged abatement of the appeal, so far appellant No. 2 was concerned, on account of the letter's death

during the pendency of the said appeal in that Court and non-substitution of his heirs in time, was held to be one of substance and, accordingly, this point, which was specifically taken in ground No. V of the Memorandum of appeal here and which has been described as a preliminary point in the instant Order of Reference, was urged strongly before the learned Judges Sen and N. K. Sen JJ., before whom this second appeal originally came up for final hearing and, as, upon this part of the case, their Lordships were faced with conflicting Bench decisions of this Court, they made the instant Reference, formulating, in particular, the following points:

"(1) Where there are more plaintiffs or more defendants than one in a suit and the decree, appealed from, proceeds on any ground, common to all the plaintiffs or to all the defendants, and all or several of the plaintiffs or defendants appeal against the decree, can the appellate Court, in view of the provisions of Order XLI, Rule 4, OF the Code of Civil Procedure, proceed with the appeal and reverse the decree of the Trial Court, in spite of the emission to bring on the record the heirs of one of the appellants, who dies during the pendency of the appeal?

(2) Where the cases Balaram Pal Vs. Kanysha (Kangsha) Majhi and Others, , and 32 Cal WN 299 : (AIR 1928 Ca! 184), correctly decided?"

and, in view of the relevant rules of this Court (Vide Chapter VII, Rule 2 of the Appellate Side Rules, their Lordships (Sen and N. K. Sen JJ.) referred the whole second appeal to the Full Bench.

31a. As I have said above, but for the so-called preliminary point, to which reference has been made, this second appeal was liable to be dismissed on the ground that it is concluded by findings of fact. This, indeed, it not disputed by the appellants" learned Advocate but no urges, -- and urges very strongly, -- that the said preliminary point ought to succeed and his appeal ought to be allowed on that ground. He realises that, to succeed as above, he has to contend against a host of decisions but he is not without support and he banks upon the decisions to the contrary, which, in his submission, are correct and should be accepted.

32. The point, thus arising, is one of innate difficulty and far-reaching consequence. It is also one, which often comes before the Court and on which there is scope for accute difference of opinion. The weight of authority is, no doubt, against the appellants but their learned Advocate can certainly rely upon-- and he has actually relied on--decisions, which it is impossible to dismiss at once as without reason or substance.

33. Analysing the different decisions on the point, the important amongst them, may be classified and arranged as follows:

34. Krishnabandhu Pal Vs. Brajendrakumar Shaha and Others, , and Radha Mohan Singh Vs. Shree Kishun Gir and Others, , which support an affirmative answer to the first of the above two points under reference and, necessarily, a negative answer to the second, and Naimuddin Biswas and Others Vs.

Maniruddin Lashkar and Others, and Baij Nath and Another Vs. Ram Bharose and Others, , which support the contrary.

35. Besides the above, the decision in AIR 1924 Rang 376, Sankru Mahto v. Bhoju Mahato, AIR 1936 Pat 548 : ILR 15 Pat 326; Mt. Parwati Kuer and Others Vs. Manna Lal Khetan and Others, and Ambika Prasad Singh and Others Vs. Thakur Prasad Singh and Others, , though not directly on the point or points, here at issue, or, not strictly, deciding the same, throw considerable light and offer sufficient help in the solution of the above conflict.

36. Impressive, as they are, to stress upon one's mind the importance and intricacies of the point or points under reference, I do not deem it necessary, for purposes of my present decision, to discuss the above cases out I will proceed at once to an examination of the underlying basic principles, as deducible from the relevant statutory provision, which bear upon the present question, and decide, in the light thereof, which view is correct and should be accepted.

37. The statute, to be considered, is the Code of Civil Procedure, or, more precisely, Order XXII, Rules 2, 6 and 11 and Order XLI, Rule 4, thereof, and, to some extent, Order XLI, Rule 33, of the Code too. In the course of argument, reference was also made to Order XLI, Rule 20, of the Code of Civil Procedure. But I do not think that it has strictly speaking, any relevance or bearing on the point or points, now before us.

38. Order XXII, Rules 2, 3 and 11 of the Code are in these terms:

"Rule 2, Procedure where one or several plaintiffs or defendants dies and right to sue survived, Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the Instance of the surviving plaintiff or plaintiffs or against the surviving defendant or defendants."

"Rule 3. Procedure in case of death of one of several plaintiffs or a sole plaintiff.

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

"Rule 11. Application of Order to appeals.

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.

* * * * * and Order XLI, Rules 4 and 33, lay down respectively the following:

Rule 4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on any ground common to all.

Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of the plaintiffs or defendants, as the case may be." "Rule 33. Power of Court of appeal.

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order, as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection....."

39. Order XXII, Rule 11, as quoted above, makes the Order (Order XXII) applicable to appeals. There is nothing in Order XLI, Rule 4 or anywhere else in the Code to the contrary. Prima facie, therefore, Rule 3 of Order XXII would apply also to appeals under Order XLI, Rule 4 of the Code, unless the case is covered by Rule 2 of Order XXII which would exclude the application of the said rule (Rule 3).

40. The first question, therefore, is whether the case falls under Rule 2 or Rule 3 of the above Order XXII. If the answer be that Rule 2 covers the case, the first point under reference would at once answer itself in the affirmative, there being no question of any abatement whatsoever, with the further result that, to point No. 2 under reference, a negative answer will have to be returned. If, however, it be held that Rule 2 will not apply, the case would fall under Rule 3 and, in that event, there would be abatement of the appeal, so far as the deceased appellant is concerned. The point would, then, arise whether such abatement would render the appeal, -- the whole appeal, -- incompetent or ineffective by reason of the possibility of inconsistent decrees or otherwise and would do so in spite of Order XLI, Rule 4, of the Code. In other words, whether such abatement would affect the powers of the appellate Court under the said provision (Order XLI, Rule 4, of the Code) and compel dismissal of the whole appeal on the ground of incompetency, and, upon the answer to this point, would depend the answer to this Reference.

41. Now, Order XLI, Rule 4 is, obviously, an enabling provision and does, on its

terms, clearly permit one or more of the aggrieved plaintiffs or defendants, under the stated circumstances, to appeal from the whole decree. By virtue of this provision, therefore, this light to appeal from the whole decree in question is in each of the aforesaid parties, that is, in each of the appellants and this individual right of each of them is independent of the others, I do not think that, under these circumstances, it would be inappropriate to hold that the right of appeal in such a case, which is the same right, inhering in each of the appellants, survives, in the case of death of any of them, in the surviving appellants and in each of them and survives in them or him alone, that is, apart from and independently of the others, including the heirs of the deceased appellant. In that sense, the right survives alone or exclusively in the surviving appellants and in each of them, although not in the sense that such survival is only in them and not in any others, for example, the heirs of the deceased appellant. This difference is due to the possible dual meaning of the word "alone" one of its connotations being "to the exclusion of others", the other emphasising the sufficiency of the particular thing or person, that is, without the joinder or presence of others. In view of this ambiguity I would prefer the connotation, which would support, and not destroy, the pending appeal and protect, and not defeat, legal rights. On that interpretation Rule 2 would cover the case and Rule 3 would, on its own terms, be excluded. The result would be that there would be no abatement and, consequently, Order XLI, Rule 4 of the Code will have full play and will not be affected in any way.

42. Even on the other interpretation, I would hold that the abatement in question would not affect the Court's power under Order XLI, Rule 4 of the Code. If the decree under appeal was separate and divisible, so far as the affected parties are concerned, each had an individual right to appeal from the decree, so far as it concerned or affected him. Each had also a joint right to appeal, jointly along with the others, from the whole decree. This is on general principles and apart from and irrespective of Order XLI, Rule 4 of the Code. This particular provision however, gives each of the aforesaid parties, an additional right to appeal from the whole decree, when the same has proceeded on a ground, common to all of them. If, again, the decree under appeal was joint and indivisible, the position would change only to this extent that the first of the aforesaid rights, that is, the separate right of each of the above affected parties, to appeal from the decree, so far as it concerned him, would be affected but not the other two.

43. In either case, therefore, if Order XLI, Rule 4 applies, each of the parties affected would have a joint right, along with the others, to appeal from the whole decree and also a separate and individual or several right in that behalf. This joint and several right, to the extent that is joint, would, no doubt, be affected and would lapse by reason of the abatement in question. But the several right of each of the above parties to appeal from the whole decree under Order XLI, Rule 4, of the Code would remain unaffected and intact, it being independent of the other parties, including the deceased party or appellant and, on the strength of this several or individual right, the appeal would still remain and retain its

competency and would enable the appellate Court to exercise its powers under Order XII, Rule 4 of the Code. Indeed, it is well known that, where a decree is joint and several, so far as certain parties are concerned, death of one of them does not affect or destroy the appeal by the consequent abatement, if any. On the same principle, a several right of appeal would not be affected by cesser or extinction of a joint right. Looked at from this point of view, the separate or several (severable) right of each of the appellants under Order XLI Rule 4, of the Code to appeal "from the whole decree would not be affected by the death of one of them and consequent abatement, if any, in respect of the deceased and that will affect only their Joint right in that behalf. Indeed, as already stated, this rule (Order XLI, Rule 4) enables each of the appellant to file an appeal from the whole decree. It thus gives them, to wit, each of them, a separate and several individual right to appeal from the whole decree as distinguished from and in addition to their joint right in that behalf and the former is independent of the latter and would not be affected by its (the latter's) extinction by reason of the death of any of its joint holders and consequent abatement, if any. The statute, again, nowhere compels the other appellants to be made parties in such an appeal by any one or more of the appellants. This is sufficiently confirmed by Order XLI, Rule 33 of the Code, which, even in a case, where Order XLI, Rule 4, may not apply, enables the appellate Court to reverse or vary the decree in favour of a non-appealing party, be he a respondent or even a non-impleaded party. The deceased appellant was, thus, an unnecessary party and his death could have had no effect on the pending appeal, indeed, it may well be said that, in essence. Order XXII, Rule 3 of the Code will be controlled by Order XLI, Rule 4. In this view too, the Court's power under Order XLI, Rule 4, of the Code would remain unaffected.

44. In some of the decisions, which support the contrary view, a point was made that, under circumstances like the present, abatement operates as a decree and bars the granting of relief, inconsistent with the same, so far as the deceased appellant is concerned, and thus renders order XLI Rule 4 of the Code ineffective in the case. There are two short answers to the above proposition. In the first place, the same will be opposed to Section 2(2) and Order XXII Rule 9, of the Code of Civil Procedure, the principles, underlying which, would rule out the idea of a decree and also of res judicata. Effect of abatement would, in essence, be dismissal of the appeal for default, which would not be a decree in view of clause (b) of the above definition Section 2(2). It cannot also operate as res judicata, as otherwise, there would have been no necessity of Order XXII, Rule 9. Indeed, on principle, res judicata cannot apply, as there is no decision on the merits, either expressly or even by implication, the effect being, merely, as already observed, a dismissal for default. That was why Order XXII, Rule 9, was enacted, the underlying principle whereof would be Inconsistent with and would rule out res Judicata, in substance, the position is similar to cases under Rule 8 of Order IX (Old Section 102) of the Code which does not attract res Judicata (Vide 15 Ind App 156 (PC).)

45. It is true that, in the instant case, the appellate Court, acting under Order XLI, Rule 4, of the Code, would be giving relief also to the deceased appellant, that is, to his legal representatives, to whose benefit the same will enure, although they are not on record, but, when Order XLI, Rule 4, as already seen, like Order XLI Rule 33, permits granting of relief to a non-impleaded party and when, on principle, a decree in favour of a dead person is not a nullity no legitimate objection can be taken to the above exercise of power by the appellate court. The position would undoubtedly, have been different, if any decree had to be made against a deceased party or his legal representatives, who have not been or could not be brought on record, both on principle and on authority, but no such consideration arises in the instant case or under Order XLI Rule 4, of the Code, which enables the appellate Court to grant relief to or in favour of -- and not against, -- a non-appealing or non-impleaded party, or under Order XLI, Rule 33, to the extent, it permits such relief.

46. In the premises and for the reasons given above, I would agree in the answers, proposed by my Lords, and, as, upon them, the present appellants" so-called preliminary objection (which is their only point in this Court) would fail and the instant second appeal would also, necessarily, fail. I would agree, further, in answering this Reference as a whole by dismissing the appeal under Reference without cost, as proposed by my Lords, and in making no order for costs in this Reference.

G.K. Mitter, J.

47. The plaintiffs who are the appellants before this Court had filed a suit in the Court of the Munsif at Ranaghat for declaration of their title to and for recovery of possession of a plot of land against several defendants, Their case was that they had got C. S. plot No. 105 of Mouza Gauranagar originally belonging to one Mohendra Chakrapani in exchange for another plot belonging to them in or about the year 1932 and had possessed the same for over 12 years. They alleged to have been dispossessed by the defendants on February 19, 1950. The learned Munsif decreed the suit on February 25, 1953. The defendants' appeal preferred on March 30, 1953, was allowed by the Subordinate Judge of Nadia on December 4, 1953. During the pendency of the appeal Batokrisna Chakrapani, a defendant-appellant, died on July 28, 1953. His heirs, however, were not brought on the record during the pendency of the appeal before the subordinate Judge and no application in that behalf was made at that stage. On March 7, 1954 in second appeal to this Court an application was presented for addition of Basibala Dassi, widow of Bato Krishna Chakrapani, The said application was allowed and an order for addition of party made on May 19, 1954. One of the points taken in the memorandum of appeal filed in this Court by the plaintiffs was that the appellant No. 2 (Batokrishna Chakrapani) before the lower appellate Court having died before the passing of the decree by the said Court and the heirs of the said deceased not having been brought on the record the whole appeal before the lower appellate Court had abated and the decree passed therein was invalid and

without jurisdiction. The appeal was, however, admitted on December 22, 1954. Banerjee, J. sitting singly referred it to a Division Bench in July 1959. The Division Bench consisting of Sen and N.K. Sen JJ., referred the matter to a Full Bench on April 7, 1960. The specific questions referred are as follows:

(1) "Where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants and all or several of the plaintiffs or defendants appeal against the decree, can the appellate Court in view of the provisions of Order 41 Rule 4, C. P. C. proceed with the appeal and reverse the decree of the trial Court in spite of the omission to bring on the record the heirs of one of the appellants who dies during the pendency of the appeal ?

(2) Were cases of AIR 1919 Cal 410 and 32 Cal WN 299: (AIR 1928 Cal 184) correctly decided?

48. In this case the plaintiffs alleged dispossession jointly by the Chakrapani defendants. In the case or death of any one of them the right to sue did not survive against the surviving defendants alone. Applying Order 22 Rule 11 to Order 22 Rule 3 it was necessary that an application should be made to the Court to cause the legal representatives of the deceased appellant to be made parties to the appeal. The application had to be made within 90 days from the date of the death of the appellant. Under Sub-rule (2) of Order 22 Rule 3 the appeal abated so far as the deceased appellant was concerned. Order 22 does not contain any provision to show whether a suit or appeal abates as a whole when one of the plaintiffs or the appellants dies. It is clear however that if the suit cannot proceed in the absence of one of the plaintiffs it must abate as a whole. Normally the same result should follow in the absence of one of several appellants where the decree appealed from proceeds on a common ground. Leaving aside the case of the death of one of the plaintiffs or the appellants the absence of any one of them from the record would lead to the same conclusion. If several persons were jointly entitled to a relief a suit by some of them in the absence of the others would fail. Similarly several appellants jointly affected by a decree would have to be on the record before relief could be given to any of them. In the case of an appeal however Order 41 empowers the Court to set aside the whole decree notwithstanding that the appeal was not preferred by all the persons prejudicially affected thereby. If the case had to be decided under the provisions of Order 22 alone the result of the decision of the appeal in favour of the defendants appellants before the subordinate Judge of Nadia would be the passing of two inconsistent decrees: that of the trial Court for possession against all the defendants and that of the appellate Court in favour of all the defendants appellants excepting the deceased defendant. If however the provisions of Order 41 Rule 4 are taken into consideration along with the provisions of Order 41 Rule 33 it would be open to some of the defendants to appeal from the whole decree where it proceeds on any ground common to all the defendants and it would be within the power of the appellate Court to set aside the whole decree

notwithstanding that some of the defendants had not appealed from the decree. The question is whether there is any conflict between the provisions of Order 22 and Order 41 and if there be any which provision is to prevail.

49. The effect of abatement under Order 22 Rule 3 and Order 22 Rule 11 is that the heirs of a deceased plaintiff are precluded from filing another suit and the heirs of a deceased appellant are debarred from filing another appeal. This however should not prevent the Court from exercising powers under Order 41 Rule 4 in a proper case where several plaintiffs filed a suit and claimed relief on a ground common to all of them and the suit was dismissed as against all of them. No injustice would result if only some of them preferred an appeal without making the co-plaintiffs respondents thereto. If the ground of appeal be common to all the plaintiffs including those who had not appealed the parties interested in resisting the same do not suffer any prejudice if the Court thinks fit to set aside the dismissal of the suit as a whole, if the Court finds that the defendants have no right to the land in their possession I see no injustice being done to them merely because all the persons who claimed to be entitled to the land have not gone up in appeal. So far as the defendants are concerned they are given a proper hearing and the merits of their defence adjudicated upon. Similarly if the suit is decreed against several defendants on a ground common to them all and only some of them prefer an appeal the appellate Court can consider the merits of the respondents' case, all of whom must be parties to the appeal and dispose of the same as justice and law demand. It would hardly be right to allow the respondents to contend that the appeal should fail because all the parties interested in setting aside the decree are not before the Court. It is enough that the respondents' claims to be on the land are examined and rejected and whether the appeal is preferred by some only of their opponents cannot prejudice them in any way. It would be different if one of the respondents to the appeal had died during the pendency thereof and his legal representatives were not brought on the record. If such an appeal was to be allowed the result would be that the legal representatives of the deceased respondent would be condemned unheard and there might be two conflicting and inconsistent decrees; that by the trial Court would be in their favour while that of the appellate Court be against them. Order 41 Rule 4 avoids such a situation by providing that it is only in the case of persons who figure as appellants and are affected by the decree who can get the benefit of this rule.

50. Order 41 Rule 4 read with Order 41 Rule 33 clearly show that the absence of some persons from the roll of appellants is immaterial when the decree appealed from proceeds on a ground common to all the plaintiffs or to all the defendants not all of whom go up on appeal. Thus even though some of the persons against whom a decree has been made do not choose to prefer an appeal therefrom the Court can in a proper case give them the benefit of the appeal filed by other persons. It may be argued that the persons who do not choose to complain against a decree which operates to their prejudice should be held to be bound by the same. To allow the decree to stand against the persons who have not

appealed even when the Court finds after hearing all the respondents that the decree appealed from is wrong would lead to an unjust result. It would mean that although the trial Court or a lower appellate Court had decided wrongly the wrong should be allowed to be continued merely because the entire body of persons affected by the wrong conclusion was not before the Court of Appeal. Justice would demand that the wrong be set right and that even though some of the persons who should have complained against the wrong had not appealed they should be given the benefit of the appeal preferred by the others. If such persons can be (given) the benefit of an appeal preferred by some one who was not content to take the decree as binding on him, I can see nothing in justice which would prevent the legal representatives of a deceased party against whom a decree has been passed from having the same benefit.

51. The course of decisions on this point does not seem to have been uniform either in this Court or in the other Indian High Courts. So far as this Court is concerned, the case of *Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh*, seems to be the first reported decision in which it was held that notwithstanding the death of one of the appellants pending the appeal and the non-substitution of his legal representatives it was open to the Court under the provisions of Order 41 to set aside the decree appealed from giving the benefit of the same to all affected by the decree. In this case a suit was brought by several plaintiffs for a declaration of their title to certain lands and for recovery of khas possession in respect of the same. The trial Court granted the declaration with regard to a fractional share in the lands in the suit but dismissed the claim for khas possession. On appeal to the lower appellate Court the plaintiffs' suit was decreed in full. During the pendency of this appeal one of the defendants died and his two sons were substituted as his heirs on the record. Both of them figured as appellants in the appeal before the High Court. One of them however died during the pendency of the appeal and his heirs were not brought on the record within the time limited by law. It was argued that the abatement of the appeal by reason of the death of one of the appellants resulted in the abatement of the whole appeal. Patterson, J. before whom the appeal was first heard negatived this objection relying on Order 41, Rule 4. The Division Bench consisting of Mitter and McNair, JJ. took the same view. The Bench preferred the reasoning given by Sir John Wallis in ILR 40 Mad 545 : (AIR 1918 Mad 794 (2)) to that of a decision of a Division Bench of this Court in *Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others*, . Reliance was also placed on the unreported judgment reported later in 59 Cal LJ 313.

52. *Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh*, was followed in 44 Cal WN 141 by Sen, J. Here the plaintiffs sued a number of defendants for "ejectment alleging that they were trespassers who had not come on the land under any right. Another point u/s 167 of the Bengal Tenancy Act was also raised with which we are not concerned. The defendants' plea was that they were not trespassers but were under-tenants under a raiyati jote. Both the Courts below decreed the plaintiffs' suit. During the pendency of the appeal to the High Court

the appellant No. 3 Pran Krishna Ghose died but his legal representatives were not brought on the record. It was agreed that the appeal had abated as a whole inasmuch as a decree could not be passed in favour of the other appellants in the absence of the heirs of Pran Krishna Ghose. This was negated by the learned Judge who Held that if any one of the defendants succeeded in establishing that he was a tenant, the plaintiff's suit for khas possession must necessarily fail. Relying on *Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh, Sen, J.* said that "there would be no difficulty in passing a decree in favour of the appellants who are now before this Court by reason of the fact that one of the appellants has died and his heirs have not been brought on the record."

The same learned Judge examined the Question in greater detail in the case of 46 Cal WN 281. In this case the plaintiffs filed a suit for declaration that the rent payable by them to their landlords was Rs. 57/- per annum and for recovery of the difference between Rs. 9/- per annum realised by the landlords and the sum of Rs. 57/- alleged to be due according to them. The trial Court decreed the plaintiffs' suit. This was reversed by the district Judge and a second appeal was preferred to this Court. The decree of the District Judge was set aside and the matter was remanded to him with certain observations. While the appeal on remand was pending before the District Judge, the defendants discovered that one of the plaintiffs had died while the appeal was pending before this Court and that his heirs had not been substituted, they then applied to the High Court and obtained a Rule on the plaintiffs to show cause why it should not be held that the appeal had abated as a whole. Examining the relevant provisions of Order 22 and Order 41 the learned Judge held that the death of one of the plaintiffs before the passing of the decree and non-substitution of his heirs and legal representatives would operate as an abatement of the whole suit because a finding that Rs. 57/- was the proper rate or rent in favour of some of the plaintiffs would be in conflict with the record of rights which went to show that Rs. 9/- was the rent in respect of another plaintiff who was dead but whose rights were in no way different from those who had succeeded in the suit. The learned Judge however pointed out that the position was different in an appeal by reason of Order 41, Rule 4. According to his lordship although Order 41, Rule 4 did not in terms apply to the set of circumstances before him inasmuch as the deceased plaintiff had in fact appealed and had died pending the appeal, the appellate Court had the power to reverse or vary the decree in favour of all the plaintiffs, including one who had not been made a party to the appeal and Court could exercise the same power in favour of the heirs of a plaintiff who was an appellant and who had died pending the appeal although such heirs had not been made parties to the appeal. His Lordship relied on *Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh*, and the earlier decision of 59 Cal LJ 318 and the case of ILR 40 Mad 846 : (AIR 1918 Mad 794 (2)) preferring this line of cases to that of 32 Cal WN 299 : (AIR 1928 Cal 184) and *Harendra Nath Chaudhury Vs. Dwijendra Nath Banerji and Others*, .

53. In 59 Cal LJ 318 the plaintiff had instituted a suit for declaration of title to

certain lands and for confirmation of possession therein on a finding that the settlement records in which the defendants' possession had been recorded were wrongly made. The Munsif decreed the suit but his decision was reversed by the Subordinate Judge. On a further appeal to this Court one of the grounds taken was that during the pendency of the appeal before the Subordinate Judge one of the two defendants appellants had died and no substitution of his heirs had been made and the Court had recorded expressly that the appeal in so far as the deceased appellant was concerned had abated. Mukerji J. rejected this contention on the ground that the decision of the trial Court had proceeded upon a ground common to all the defendants appearing as well as not appearing and it was entirely within the competency of one of the defendants to challenge that decision in an appeal taken by him even though the other defendants were not parties thereto. His Lordship said

"this is clear from the provisions of Order 41, Rule 4 of the Code and in any event the appellate Court has also got the power under Order 41, Rule 33 of the Code to deal with the case in such a manner as to adjust the rights of the parties concerned in it".

No decisions seem to have been cited at the bar and the learned Judge went by the wording of Order 41, Rule 4 and Rule 33 although these Rules do not in express terms refer to the death of one or more of the appellants pending the appeal. With respect, I may add there is good logic behind the decision. As already pointed out if the legislature thought that a party who had not appealed from a decree passed against him could have the benefit of the appeal by another if the decree proceeded on a ground common to him and that other I can see no reason why the heirs and legal representatives of a deceased appellant should not be entitled to the benefit of the appeal if the appellate Court took the view that the decree of the Court below had been wrongly made and ought to be set aside. If this were not done the result would be two inconsistent decrees in respect of the same right asserted by one set of parties who had appealed and another set content to take it as binding on them.

54. In AIR 1919 Cal 410 the appeal arose out of a suit filed by six plaintiffs for recovery of possession of a homestead on declaration of their title therein. The suit was dismissed by the Munsif and an appeal was preferred therefrom by all of them. Before the hearing of the appeal one of the plaintiffs appellants died but information of his death was not given to the District Judge who heard the appeal. No application was made by the other plaintiffs to have the legal representatives of the deceased made parties to the appeal. The District Judge decreed the appeal and passed a decree in favour of all the plaintiffs in ignorance of the death of one of them. The sole defendant appealed against that decree making all the plaintiffs as they appeared on the record, respondents. It was then found out that one of them was dead. His heirs were then made parties to the appeal before the High Court, the learned Judges Newbould and Duval, JJ. rejected the contention that Order 41, Rule 4 authorised the hearing of the

appeal even in the absence of one of the appellants. They held that the decree of the District Judge was a nullity and as such the original judgment of the first Court must stand and the suit be dismissed in accordance with that decree.

55. In AIR 1935 Cal 24, Nasim Ali, J. had to interpret Order 41, Rule 4 and Order 41, Rule 33. In this case there was no death pending the appeal. The learned Judge however rejected the contention put forward that the word "parties" in Rule 33 meant parties to the appeal. According to his Lordship the power under Order 41, Rule 33 could be exercised in favour of persons who were parties to the suit even though they were not parties to the appeal. His lordship went on to observe that Order 41, Rule 33 authorised the appellate Court to pass a decree in favour of a party who had not been heard but it did not authorise the Court to pass a decree against a person who was not a party to the appeal. According to his lordship

"a person who has been heard in appeal, cannot object to a decree being passed in favour of a person merely because that person is not a party to the appeal and has not been heard."

56. Halima Khatun and Others Vs. Sashi Kumar Banik, was a case in which the heirs of the original defendant appealed after a decree had been passed against their predecessor in interest by the Court of first instance. The District Judge dismissed the appeal and the substituted defendants preferred a second appeal. A preliminary objection was taken by the respondent that two of the appellants having died and their heirs not having been brought on the record within the period of limitation the appeal was no longer competent, the surviving appellants relied on Order 41, Rule 4. The respondent cited the case of Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, . The learned Judges Lodge and Akram, JJ. referred to the decisions taking a contrary view and said

"but in view of the number of subsequent decisions ail to the same effect, we held, with some hesitation, that the surviving appellants are entitled to prosecute this appeal without bringing on the record the heirs of the deceased appellants."

It will be noticed that the learned Judges seem to have guided themselves more by the number of decisions than by the reasoning behind them.

57. One of the earliest cases in which a contrary view was taken was that of 24 Cal WN 44 : (AIR 1920 Cal 264). In this suit the plaintiffs asked for declaration that the disputed lands appertained in zamindari right and right acquired by adverse possession to their property Known as Thal Chur. The trial Court decreed the suit am an appeal was preferred to this Court by the defendants. It was found during the hearing of the appeal that one of the plaintiffs respondents had died sometime back and no steps had been taken to revive the appeal as against his representatives in interest. The learned Judges went into the question of abatement and found that the appeal had abated as regards Lal Mohan Pakrashi and the application to revive the appeal against his representatives had failed. With regard to the points under Order 41, Rule 20 and . Rule 33 they said that

"we are clearly of opinion that assuming that the Court is competent to take action under the rules mentioned, this is a case in which the powers should not be exercised, for the benefit of the appellants and to the detriment of the legal representatives of the deceased respondent. The appellants obtained an ex parte order against some of them on a misrepresentation of fact, that order has been cancelled. As regards the other representatives of the same respondent, the omission to proceed against them was due solely to negligence. We feel no doubt that it will be wrong to allow the appellants to invoke the aid of the rules in question in these circumstances."

58. It will be seen that the Court did not state expressly that the powers under Order 41 could not be exercised where one of the appellants had died pending the appeal but they disposed of the argument summarily on the ground of negligence and of misrepresentation of fact on the part of the appellants who were on the record, their Lordships referred to the decisions in the case of *Bejoy Gopal v. Umesh Chandra*, 6 Cal WN 196 and *Tarip Datadar v. Khotejannessa Bibi*, 10 Cal WN 981. In the first case the learned Judge merely observed that the decree being a joint decree in favour of the plaintiffs the defendant was bound to bring before the Court all the parties affected by that decree and an appeal could not proceed in the absence of all the parties. This decision was followed in the later case of *Tarip Dafadar* without reference to the provisions corresponding to Order 41, Rule 4 and Rule 33 in the Civil Procedure Code.

59. In *Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others*, a suit was brought by some tenants u/s 106 of the Bengal Tenancy Act on the allegation that the rent payable by them was Rs. 7/- and that the entry in the record or rights showing rent due as Rs. 10/- should be corrected, The suit was dismissed by the assistant settlement officer but decreed in appeal by the Subordinate Judge. The landlords came up in appeal to this Court, One of them died during the pendency of the appeal and his heirs were not brought on the record. The argument before this Court on the part of respondents was that if the appeals were to be allowed to be proceeded with and decided in favour of the remaining appellants the result would be that the rate of rent would be Rs. 7/- with regard to the landlord who was dead and as regards the others it would be Rs. 10/-. The appellants contended that this might be avoided by the exercise of power under Order 41, Rule 4. Cuming J. felt that there were two difficulties in the way of accepting this contention. First, Order 41, Rule 4 could have no application to persons like the heirs of the deceased defendant who were not parties to the suit and the decree could not be reversed in favour of one who was dead and no longer in existence. Secondly, the appeal having abated as regards the defendant No. 4 the rights between him and the respondents had crystallised. His Lordship went on to observe that an order of abatement was virtually a decree and so long as it remained it should be considered to have determined the rights between the parties and to allow an appellant whose appeal had abated to gain the advantage of Order 41, Rule 4 would result in the anomaly that so far as he was concerned there would be two decrees in the

same suit in existence at the same time; one in his favour and the other against him. The other learned Judge Mallik, J. held that although Order 41, Rule 4 might help parties who had not appealed it could have no application where the appeal had abated by reason of the death of one of the appellants as the order of abatement operated as a judgment as between him and the respondents to the same extent as a judgment on merits. He also agreed with the conclusion of Gunning J. that allowing the appeal to be heard in the absence of one of the appellants might result in two inconsistent decrees.

60. With all respect, I cannot see how an order of abatement can have any greater force than a judgment on merits. If a decree against several defendants proceeds on a ground common to them all and only one or some of them go up in appeal the position is in no way worse because of the death of one of them who had appealed but had died before the final hearing thereof. By exercise of power under Order 41, Rule 4 read with Order 41, Rule 33 the court in effect sets aside a decree which is not being questioned by one or more of the parties affected thereby although they are alive. I do not see why an inactive party should be more favourably dealt with than the heirs and legal representatives of a deceased party. It is true that Order 41, Rule 4 in terms does not speak of the heirs and legal representatives of a party but I can see no reason why the Court should be powerless to give the benefit of an appeal preferred by a party who did not live till the hearing of the appeal when somebody else equally affected by the decree appealed from complained against it and when the respondents are all before the Court and can make their submission as to why the decree of the lower Court should not be disturbed. With regard to the first difficulty mentioned by Cuming, J. it is true that the Court ought not to vary or reverse a decree in favour of a person who was dead if his legal representatives were not brought on the record and given a hearing. This would result in condemning a person or his legal representatives unheard. But the position is different when the decree is not in favour of but against the deceased person. I see no difficulty in his heirs being given the benefit of an appeal which is pressed by persons having the same interest as the deceased person had in his lifetime.

61. In *Harendra Nath Chaudhury Vs. Dwijendra Nath Banerji and Others*, , a similar suit was filed which was decreed by the assistant settlement officer and the appeal therefrom was dismissed. The subordinate Judge further found that the appeal had abated as there had been no substitution of the legal heirs of one of the co-sharer landlords. The only decision referred to in this judgment is that of *Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others*, .

62. Whether the whole appeal became incompetent on the death of one of several appellants and non-substitution of his representatives came up for consideration in *Hari Charan Moulik and Others Vs. Kalipada Chakravarty and Others*, . Here three plaintiffs brought a suit in ejectment against several defendants on the allegation that they were occupying the lands in suit by erection of huts and living therein with the permission of the plaintiffs. It was

further alleged that the main defendants had procured an entry to be made in the record of rights to the effect that they were tenants of the defendant No. 3. The first court dismissed the plaintiffs' suit holding that the defendant had been in possession adversely to the plaintiffs for a long period. During the pendency of the appeal one of the plaintiffs died and no steps were taken to have his representatives added as parties. On behalf of the respondents Kalidyal's case 24 Cal WN 44 : (AIR 1920 Cal 264) and Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, were cited to show that the appeal had become incompetent. Rankin C. J. who delivered the judgment of the Court referred to these cases and said

"that not one of them is a case where one of the plaintiffs-appellants died pending the appeal from a decree of simple dismissal of the suit. It is a very different matter when complaint has to be made that the party has not impleaded one of his adversaries. In all the cases to which I have referred, except, I think, in the case of Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, the defendants were appealing and one of the plaintiffs-respondents had died without his heirs being substituted. In my judgment, it is not necessary or desirable that the law should regard the appeal as incompetent unless there is sound reason in principle."

His Lordship felt that the appeal should be allowed to proceed as a case where the claim was not for Khas possession but for joint possession.

63. The point seems to have come up before the Patna High Court in quite a number of cases. For the sake of convenience the starting point to be taken is the judgment of the Full Bench of that Court in Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another, . Here the question referred to the Full Bench was practically the same as the first question in the reference before us. Harries, C. J. there observed that

"the wording of Order 41, Rule 4, Civil Procedure code, suggests that the rule was intended to apply to case where all the plaintiffs or defendants were alive and that only one or more of such" plaintiffs or defendants had appealed from the decree".

His Lordship seemed to think that this followed from the power given to the appellate Court to reverse or vary the decree in favour of all the plaintiffs or defendants and ordinarily a decree can only be made in favour of a person who is alive. The case of the death of an appellant, according to His Lordship, was covered by Order 22, Rule 3 read with Order 22, Rule 11. His Lordship recognised the force of the appellant's contention in favour of the exercise of power under Order 41, Rule 4 which was supported by considerable authority namely, Chandarsang v. Khimabhai ILK 22 Bom 718, ILR 27 Bom 284, ILR 25 All 27, Arthorama Pahu v. Artha Padhi 25 Mad LJ 248 ILR 40 Mad 846: (AIR 1918 Mad 794 (2)), (Kompalli) Chenchuramayya and Others Vs. Dama Venkatasubbayya Chetty, . His Lordship also referred to the cases against this

line of authority including those of this Court mentioned above and of the Lahore High Court in *Amin Chand v. Baldeo Sahai* ILR 15 Lah 667 : (AIR 1934 Lah 206) and *Pir Bakhsh v. Kidar Nath* AIR 1935 Lah 478. This second line of cases was supported by a decision of the Patna High Court itself in *Badri Narain and Others Vs. East Indian Railway and Another*, . The learned Chief Justice preferred the former line of cases as in view there was nothing in Order 41, Rule 4 which permitted the Court to disturb the, finality of the decree as against the deceased appellant and added " "to hold that Order 41, Rule 4 C. P. C. applies to a case such as the present one is to hold that a Court can reverse or vary a decree in favour not only of a person who is not before the Court but in favour of a person who is no longer in existence. It appears to me that before a Court can vary a decree in favour of the representatives of the deceased appellant such representatives must be brought on the record. The Court could, of course, do so if a rule expressly empowered it; but in my judgment Order 41, Rule 4, C. P. C., does not give such a power. * * To hold otherwise is to hold that Order 41, Rule 4, C. P. C. gives the Court power to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant."

64. The reasoning in the above judgment has not however commended itself to different division benches of the same Court. In *Radha Mohan Singh Vs. Shree Kishun Gir and Others*, one of the defendants appellants before the Subordinate Judge died during; the pendency of the appeal : on an application made for expunction of his name from the record it was prayed that no substitution was necessary as the heir of the deceased was already on the record. An order was made as suggested, Meredith, J. delivering the judgment of the Court said that there was no abatement in the case before the Court as on the expunction of the name of the deceased appellant there was no appeal by him. His Lordship found himself unable to support the reasoning given in *Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another*, and said

"once it is conceded that it is not necessary to implead the non-appealing party or his representatives as respondents, then, so far as I can see, it makes absolutely no difference whether there has been a death or not. For if the legal representatives have not replaced the deceased in the little world of the Court they have done so in the world outside; and if a decree can be passed in favour of a man who has not been on the record, I see no reason why that cannot be done in favour of his legal representatives when he dies."

65. In *Mt. Parwati Kuer and Others Vs. Manna Lal Khetan and Others*, , the facts were, as follows:

One Suraj Prasad Shah was a mortgagee of certain properties. A portion of these properties were put up to sale by creditors of the mortgagors and purchased by X. Suraj Prasad Shah filed a mortgage suit impleading the auction purchaser. There was a preliminary decree passed in his favour which was later made final. X sold her interest in the mortgaged properties to Y and Z by two registered sale deeds. In the mortgage sale the properties were purchased by one Jainarain

Prasad. The plaintiffs the purchasers from X deposited Rs. 5,291/5/6 i.e. the amount for which the properties had been sold plus the statutory compensation under Order 21, Rule 89 and the sale was set aside. The plaintiffs claimed that by deposit of the decretal amount they had acquired by subrogation the rights of the prior mortgagee Suraj Prasad Shah and prayed for a mortgage decree for the amount deposited. The Subordinate Judge decreed the suit in favour of the plaintiffs and granted them a preliminary decree. During the pendency of the appeal to the High Court it was found that there was a discrepancy in the name of the appellant No. 3. who was described as Jainarain Ram in the memorandum of appeal and as Jainarain Prasad in the trial Court decree. On failure to reconcile the discrepancy, the name of the appellant No. 3 was expunged from the memorandum of appeal. A preliminary point was taken in the appeal at the hearing that the appeal had become incompetent because of the expunction of the defendant No. 13 from the record. It was argued on behalf of the respondents that the appeal against the preliminary mortgage decree had abated so far as the defendant No. 13 was concerned, and consequently the whole appeal had abated. It was also argued that the appellate Court was not competent to reverse or vary the decree in favour of a person who was not impleaded as a party respondent or as a party appellant. The first question which was referred to Full Bench was

"has the Appellate Court power to reverse or vary a mortgage decree for sale passed In favour of the plaintiff respondents in the absence of any of the defendants. whose interest in the mortgaged properties is bound by that decree?"

Ramaswami J. who delivered the leading judgment of the Court held that the appellate Court had power under the provisions of Order 41, Rule 4 read with Order 41, Rule 33 to vary or reverse the mortgage decrees granted by the Subordinate judge in favour of defendant No. 13 who had not been impleaded either as a party appellant or as a party respondent but whether the Court should exercise its power in the case before them was a matter for the first appeal bench to decide. None of the learned Judges went into the question as to whether Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another, had been correctly decided because on the facts there could be no question of abatement of the appeal.

66. In Ambika Prasad Singh and Others Vs. Thakur Prasad Singh and Others, , the matter was dealt with at length and it was said that the exercise of power under Order 41, Rule 4 had found favour throughout India although there were decisions to the contrary and In such a situation, the law should be left as it stood and so far as the Patna High Court was concerned the view of the Full Bench given in Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another, should prevail.

67. The situation, however, so far as Calcutta High Court is concerned, is not identical. Here there is no Full Bench judgment and it is only proper that the matter should be set at rest for the future guidance of Courts.

68. In ILR 40 Mad 846 : (AIR 1918 Mad 794 (2)), relied on by Mitter and Mcnair, JJ. in Satulal's case two defendants had died after the appeal had been preferred but their representatives had not been brought on the record. It was argued that as the appeal had abated as regards these appellants the decree of the lower Court could not be modified so far as their interests were concerned. This was summarily disposed of by the bench consisting of Wallis, C. J. and Burn, J. on the ground that Order 41, Rule 4 of the CPC was wide enough to cover such a case and any other conclusion would lead to "incongruity in judicial decisions on the same facts." The quotation is from the case of D. Subbayya v. P. Subbayya ILR 30 Mad 470 (FB). I do not think much useful purpose will be served by examining the decisions of the other High Courts. In my view, the reasoning given in the case of Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh, etc. is to be preferred to that in the case of AIR 1919 Cal 410 and Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, . In addition I have tried to give my own view of the matter irrespective of the decisions referred to.

69. In my view, question 1 should be answered in the affirmative and question 2 in the negative.

Laik, J.

70. This reference involves the determination of the fate of appeals on the death of an appellant when there are two or more appellants but whose heirs were not brought on the record.

71. The facts lie in a narrow compass. In the instant Second Appeal, out of which this reference arises, the plaintiffs are the appellants. In the trial Court (Munsiff), the plaintiffs succeeded and the suit for title and possession was decreed in their favour. Against the said decree, the defendants preferred an appeal to the lower appellate Court (Subordinate Judge's). During the pendency of the said appeal, one of the defendants (No. 2) appellants died and the only legal representative of the deceased appellant (widow) was admittedly not brought on the record. The appeal was, however, allowed in favour of the defendants appellants. In the instant Second Appeal, the plaintiffs as appellants took a preliminary point that on the death of one of the defendants appellants the appeal must be deemed to have abated as a whole in the lower Appellate Court. In this Court the appeal was in the first instance heard by Banerjee J., who referred the same to the Division Bench and S. K. Sen and N. K. Sen JJ. were confronted again with the said preliminary point. Accordingly, their Lordships made the instant Full Bench reference as there are conflicting decisions though they are inclined to accept the view expressed in Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh, and in Halima Khatun and Others Vs. Sashi Kumar Banik, and not the view expressed in AIR 1919 Cal 410 and in Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, .

72. First let us see the relevant provisions of the CPC which has been quoted by P. N. Mookerjee J. Order XXII of the Code deals with death, Marriage and

insolvency of parties. Rule 2 of that Order deals with procedure where one of several plaintiffs or defendants dies and the right to sue survives. It is clear from the said Rule 2, that if the right to sue survives to the surviving plaintiffs or defendants alone, no question of abatement arises. Only, the Court shall cause an entry to the effect mentioned in Rule 2 on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs or against the surviving defendant or defendants. But under the provisions of Rule 3 of Order 22, where the right to sue does not survive to the surviving plaintiff or plaintiffs alone when one of two or more plaintiffs dies, the suit shall abate, so far as the deceased plaintiff is concerned, if no application is made within time to bring the legal representative of the deceased plaintiff on record. Under the provisions of Rule 4 of Order 22, if the right to sue does not survive against the surviving defendant or defendants alone, the legal representative of the deceased defendant will have to be made a party on an application to the Court. But if no such application is made within the time allowed by law, the suit shall abate as against the deceased defendant.

73. Now, the question is whether on the death of one of the plaintiffs or defendants, when there are more than one, the whole suit will abate if the legal representative of the deceased plaintiff or defendant, as the case may be, is not brought on the record within time.

74. So far as the provisions of Rules 3 and 4 of Order 22 of the CPC are concerned, it is clear, that only where the right to sue does not survive against the surviving plaintiff or plaintiffs or against the surviving defendant or defendants as the case may be, the suit will abate so far as the deceased plaintiff is concerned or against the deceased defendant. The said two Rules do not provide for the abatement of the entire suit. But it had been contended that the said two Rules contemplate a suit which is of such a nature that it can be proceeded with in the absence of the legal representative of the deceased plaintiff or the defendant, as the case may be. In that case only the suit shall abate so far as the deceased plaintiff is concerned or against the deceased defendant. But if the suit is of such a nature that it cannot proceed in the absence of the legal representative, it will abate as a whole. But it may be pointed out that Rules 2 and 3 do not mention the nature of the suit. There cannot be any doubt that Rules 2 and 3 apply to all suits irrespective of their nature or kind. In this connection, it may be pointed out that in the corresponding provisions of the old Code of 1882 (Sections 363, 365, 366 and 368) the words "so far as the deceased plaintiff is concerned, in Sub-rule (2) of Rule 3 and the words "as against the deceased defendant" in Sub-rule (3) of Rule 4 of Order 22 of the present Code were not there. The said words were added in the Code of 1908. The addition of the said words in the present Code is, in my opinion, very important. It cannot be said that those words in rules 3 and 4 in Order 22 have been added without any purpose. Previously when these words were not there in the Code, the whole suit would necessarily abate. Because it was clearly provided that "the suit shall abate". Therefore under the provisions of

the old Code, it was clearly intended by the legislature that on the death of one of two or more plaintiffs or on the death of one of two or more defendants, the suit shall abate, if the legal representative of the plaintiff or the defendant as the case may be, is not brought on the record. Accordingly, if the legal representative of a deceased plaintiff or defendant, where There were more than, one plaintiff or defendant, was not brought on the record, there was no escape from the consequence, namely, the, abatement of the entire suit. It might be that the suit could be proceeded with, in the absence of the legal representative of the deceased plaintiff or the defendant, as the case may be, but the provisions in the old Code in that regard were mandatory and the consequence, namely the abatement of the whole suit, was inevitable. In the present Code however, instead of the words "the suit shall abate" the words "the suit shall abate so far as the deceased plaintiff was concerned" or "the suit shall abate as against the deceased defendant" have been substituted for the words "the suit shall abate", in Rules 3 and 4 respectively of Order 22. Therefore, it is clear from the addition of the said words that the legislature made the consequence, which was inevitable under the old Code, less stringent. It was clearly intended that the whole suit which was to abate under the old Code, in a case where the legal representative of the deceased plaintiff or defendant, where there were more than one, was not brought on record, will not abate in its entirety but will abate only so far as the deceased plaintiff is concerned or against the deceased defendant, as the case may be.

75. Now, the further question is that even though the suit does not abate as a whole in view of the provisions of Rules 3 and 4 of Order 22, whether it still abates as a whole, where the nature of the suit is such that it cannot proceed, in the absence of legal representative. Before I proceed to consider the said question, I propose to refer to some other provisions of the Code of Civil Procedure. I have already said that Order 22 deals with death, marriage and insolvency of parties. Under Rule 11 of that Order, the provisions of the said order including Rules 3 and 4 shall apply to appeals. The provisions of appeal have been dealt with under Order 41 of the Code. Of course, in Order 41, there is no provision as to the effect of the death of the appellant or the respondent, still, some of the provisions of Order 41, to wit, the provisions of Rules 4 and 33, require consideration.

76. Order 41, Rule 4 deals with cases where one of several plaintiffs or defendants may obtain reversal of the whole decree where it proceeds on ground common to all. Order 41, Rule 33 deals with the power, of the Court of Appeal. Rule 33 is new in the Code of 1908. Prima facie, the provisions of Order 41, Rules 4 and 33 have no direct bearing on the death of one of the appellants where there are more than one appellant, but they are important on the question as to the prosecution of the appeal in the absence of one of the plaintiffs or defendants. Rule 4 provides that even though there are more plaintiffs or more defendants In a suit, any one of the plaintiffs or defendants may appeal from the whole decree where the decree appealed from proceeds on any ground common

to all the plaintiffs or to all the defendants. In such an appeal, the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

77. When one of the plaintiffs or defendants (dies), the appeal becomes an appeal by the surviving plaintiffs or the defendants, if the legal representative of the deceased plaintiff or the defendant is not brought on the record --that is a case contemplated by the provisions of Rule 4 of Order 41. The only distinction, however, is in my view that in the case of death of one of the plaintiffs, or defendants, the deceased plaintiff or the defendant and his legal representative completely go out of the picture, if the legal representative is not substituted, whereas in the case of appeal by some of the plaintiffs or defendants, the non-appealing plaintiff or defendant is generally made a party to the appeal as a pro forma respondent and as such all the parties are before the Court of appeal. It is however a distinction without a difference. Suppose, the non-appealing plaintiff or defendant is not made a party to the appeal, will the appeal be held to be incompetent and not maintainable in the absence of the non-appealing plaintiff or the defendant? The answer would depend on the answer to the question whether the non-appealing plaintiff or defendant is a necessary or a proper party. It is a well established principle of law that neither a suit nor an appeal can fail for the non-joinder of a proper party. But it may fail in case of non-joinder of a necessary party. Necessary parties are parties who ought to have been joined, that is, parties necessary to the constitution of that suit without whom no decree at all can be passed. Proper parties are those whose presence enables the Court to adjudicate more effectually and completely. Furthermore, no relief is claimed against a proper party. In the case of a pro forma respondent in an appeal who should have appeared, but actually did not, is a proper party as the appealing plaintiff or defendant cannot claim any relief against the pro forma respondent where the appeal proceeds on any ground common to all the plaintiffs or to all the defendants. So even if the non-appealing plaintiff or the defendant is not joined in the appeal as a party respondent, the appeal cannot fail. In effect, it is the same as in the case of an appeal where one of the appellants dies and his legal representative is not brought on the record within time. In that case, it may be taken that the appeal has been preferred by some of the plaintiffs or the defendants, as the case may be, without making the non-appealing plaintiff or the defendant a party respondent in the appeal, provided however, the appeal proceeds on any ground common to all the plaintiffs or defendants, as the case may be.

78. If we now turn to the provisions of Order 41, Rule 33, we find that wide power has been given to the appellate Court and it has been given for the purpose of doing complete justice between the parties. Order 41, Rules 4 and 33 give the Court ample power to make the order appropriate to the ends of justice. Under the former rule, upon an appeal by one of the parties on a ground common to all, the decree may be varied in favour of all; under the latter rule, the Court has power to make the proper decree notwithstanding the fact that the

appeal is as to part only of the decree and such power may be exercised In favour of all or any of the parties, even though they may not have filed an appeal or objection. Cases constantly occur, where some persons appeal and others do not and the Court is put in a position of having to make impossible or contradictory or unworkable decrees or orders. Accordingly, it has been given power to make a decree in favour of persons who have not even approached it. This power may be exercised by the Court In favour of any of the parties who may not have filed any appeal or objection. The appellate Court, way, under Rule 33, vary the decree of the lower Court, though the variation may benefit a plaintiff or a defendant, as the case may be, who has not appealed from the decree. Those are established principles of law and no authority is needed to be cited.

79. So, it is clear that under the provisions of Rule 4 and Rule 33 of Order 41, the appellate Court has been empowered to make any decree, or pass any order for the ends of justice. The fact that one of the parties has not preferred an appeal, which he ought to have preferred, will not stand in the way of the appellate Court to do complete justice to the parties, if necessary, even by varying the decree in favour of the non-appealing party. That power of the appellate Court is consistent with the doctrine that rules of procedure are not made to hinder justice but are made in furtherance of justice.

80. It has, however, been contended that the abatement of the suit or appeal under Order 22 Rules 3 and 4 arises independently of the provisions of Order 41 Rules 4 and 33. As I have already said, the provisions of Order 41 have nothing to do with the abatement of the suit which is provided for in the provisions of Rules 3 and 4 of Order 22. But that does not matter in the least. As the provisions of Order 41 relate to the procedure to be followed in an appeal, one of them being the decree or order the appellate Court would make or pass, it cannot be said that the said procedure is subject to and is governed by the provisions of Order 22 Rules 3 and 4. If that had been so, the very object of doing justice to the parties under rules 4 and 33 of Order 41 would be frustrated. The contention that the case when there is a death of one of the appellants and the legal representative of the deceased appellant is not brought on record and the case when one of the parties does not appeal stand on two different footings, cannot be accepted. I see no difference between those two cases and if any such difference is sought to be made, it would only be to curtail the power of the appellate Court for doing justice to the parties which the legislature never intended.

81. Turning now to some of the decisions on the question whether the suit will abate as a whole or in part in respect of the deceased party, it is found that they are not uniform, some favouring the view that it would abate as a whole and others expressing a contrary view, in *Jivandas Khimji Vs. Smt. Narbada Bai*, , *Ranhin C. J. and Mukherji J.* held that the suit would not abate as a whole if the absence of the legal representative of the deceased appellant. One fact is patent,

that neither the Judgment delivered by Rankin C. J. nor in the argument advanced by Dr. Bijan Kumar Mukherjee (as he then was), there is any mention of the provisions of Order 41 Rules 4 and 33 of the Code. The case of Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, along with other cases, was noticed in the judgment. The next decision is that of Mallik and Jack JJ. in Benoda Charan Chakravarty and Others Vs. Ramani Kishore Chakravarti and Others, which held, accepting the argument of Mr. Atul Chandra Gupta, that the appeal had not become incompetent and a decree could be made in favour of the deceased respondent also. The provisions of Order 41 Rules 4 and 33 were in the back of their mind in deciding the case though no reference was made in the judgment. Walmsley J, dealt with a case Upendra Nath Ghosh and Others Vs. Bhusan Sahana and Others, , the facts of which are almost identical with the Instant case before us, and expressed the view applying the principle of Order 41 Rule 4 that it would be unreasonable to hold that the absence of one must disqualify the others from carrying on the appeal. Mitter and Mazumdar JJ. were of the same view in Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh, and approved the observations of Sir John Wallis made in ILR 40 Mad 846: (AIR 1918 Mad 794 (2)) that any other conclusion would lead to "incongruity in judicial decisions on the same facts", based on the decision of ILR 30 Mad 470 (FB). Sen J. followed Satulal in Nibaran Chandra Ghose v. Pratap Chandra Chaudhuri, 44 CW N 141 and reiterated that the whole appeal did not abate in view of the provisions of Order 41 Rule 4 C. P. Code. Nasim Ali J. in Kamalakanta Debnath and Others Vs. Tamijaddin and Others, held that the decree could be reversed or varied in favour of the non-appealing defendants under Order 41 Rules 4 and 33. In the facts of the case of Maharaja Bir Bikram Kishore Vs. Munshi Tafazzal, Hussein and Others, decided by Mitter and M.C. Ghosh JJ. cited at the bar, there was no question of abatement of the suit or the appeal upon the death of any of the parties thereto. Lodge and Akram JJ. in Halima Khatun and Others Vs. Sashi Kumar Banik, noticed Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, but followed the subsequent decision of Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh, and other decisions but not without hesitation,

82. It is, therefore, seen that the provisions of Order 41 Rules 4 and 33 were made applicable to cases where one or more of the appellants died without his or their legal representative or representatives being brought on the record and it was held in those cases that the appeal did not abate as a whole and the appellate Court had ample power to reverse or vary the decree in favour of the deceased appellant or his representatives.

83. There are of course decisions which take a contrary view, some of which are noticed below. In the case of AIR 1919 Cal 410 (supra), Newbould and Duval JJ. could not accept the contention that the provisions of Order 41 Rule 4 could operate in favour of the surviving plaintiffs and held that a decree passed in ignorance of the death of one of the joint plaintiffs is to render the Judgment and decree a nullity. I fail to appreciate the reasons therein and I respectfully beg to differ with the views of their Lordships. The contention, of the abatement of the

appeal as a whole, made by Dwarka Nath Chakrabortti, was accepted by Mookerjee and Pant on JJ. in 24 CWN 44: (AIR 1920 Cal 264) on the ground that though under Order 22 Rule 4 of the Code the appeal abated as against the heirs of the deceased plaintiff only, the result of such abatement was that the appeal was imperfectly constituted, and, in the absence of necessary parties, the Court could not proceed to decide the appeal on merits. The said view, I must admit with regret, does not commend to me. Following the said decision in Kali Dayal's case 24 CWN 44: (AIR 1920 Cal 264) and the decision of Maclean C. J. and Pratt J. in the Letters Patent Appeal of Protap Chandra v. Durga Charan, 9 Cal WN 1061, which was a decision under the old Code containing no reasons whatsoever, Cuming and Mallik JJ. decided in Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, that in such circumstances the whole appeal would abate and Order 41 Rule 4 gives no power to the Court to vary or reverse the decree in favour of the deceased party. It is difficult for me to follow the above view.

84. Two other decisions might also be noticed. On Is Mritunjoy Das Vs. Sm. Sabitrimoni Dasi, where Rule P. Mukherjee J. held that Order 41 Rule 4 was not applicable to the facts of the said case and the other points affecting the applicability of the said provision were not gone into. The other is Bishnu Bijoy Srimani Vs. Chandra Bijoy Srimany and Others, where the facts are somewhat different from the instant case. There the appeal arose out of an execution proceeding and during the pendency of the appeal in this Court, one of the respondents died. Chakravarti C. J. and Lahiri J. seemed to have overruled the contention that the provisions of Order 22 did not apply to the execution proceeding and concluded that appeals from orders passed in execution case should abate wholly if one of the parties died, as no Court would ever make an inconsistent order. The provisions of Order 41 Rule 4 and 33 were not considered by their Lordships. Neither it appears as to whether any argument was advanced on the said provisions at the bar. However, I am unable to persuade myself to agree with the view expressed by their Lordships. As my learned brethren referred to other cases in details, I do not propose to consider the same.

85. My opinion is that on the death of one of the appellants, be he a plaintiff or a defendant, the appeal does not abate as a whole, in the absence of the legal representative of the deceased appellant in view of the provisions of Rules 4 and 33 of Order 41 of the Code of Civil Procedure. The cases of Baloram Pal, AIR 1919 Cal 410 and Naimuddin Biswas and Others Vs. Maniruddin Lashkar and Others, are incorrectly decided. I agree therefore in answering this Reference as proposed by my Lords.