CASE NO.:
Appeal (civil) 4156 of 1998

PETITIONER:
AMBA BAI AND OTHERS

Vs.

RESPONDENT:
GOPAL AND OTHERS

DATE OF JUDGMENT: 08/05/2001

BENCH:
U.C. Banerjee & K.G. Balakrishnan

JUDGMENT:

Balakrishnan, J.
L...I...T.....T.....T.....T.....T.....T.....T..J

This appeal is directed against the Order passed by the learned Single Judge of the Rajasthan High Court in Civil Revision Petition No. 599/1996. One Laxmi Lal filed a suit for specific performance against one Radhu Lal. The suit was dismissed by the Trial Court. Plaintiff Laxmi Lal filed an appeal and the Appellate Court allowed the same and decreed the suit. Aggrieved by the same, defendant Radhu Lal preferred a Second Appeal in the High Court against the decree granting specific performance. During the pendency of the Second Appeal, plaintiff Laxmi Lal died and his legal representatives were brought on record as respondents in the Second Appeal. It is admitted by the parties that while the Second Appeal was pending, Radhu Lal died on 14.12.1990 and this fact was not brought to the notice of the Court and the appeal was dismissed on 23.5.1991. The legal heirs of the deceased Radhu Lal did not take any steps to have the judgment in the Second Appeal set aside. The legal representatives of the decree-holder Laxmi Lal filed Execution Case No. 3/93 against the legal representatives of the deceased Radhu Lal. They resisted the execution application and contended that the decree under execution was one passed by the High Court in the Second Appeal and as the appellant had died prior to the passing of the Judgment, the decree and the judgment passed against the dead person was a nullity and hence, it could not be executed. The Subordinate Judge declined to accept this contention and held that the execution proceedings had been initiated in accordance with the decree which was passed by the First Appellate Court and the High Court had not carried out any amendment in the decree and, therefore, the question of merger of the decree of the First Appellate Court with the decree passed by the Second Appellate Court did not arise and the Second Appeal preferred by the deceased Radhu Lal had abated as no legal heirs were brought on record within a period of 90 days.

This order of the Subordinate Judge was challenged before the High Court in Revision and the learned Single

Judge of the High Court held that the decree passed in the Second Appellate Court was a nullity as it had been passed against the dead person and this decree had merged with the decree passed in the First Appellate Court. Therefore, it was held that the decree under execution was a nullity in the eye of law, and the execution proceedings were liable to be dismissed. This finding of the learned Single Judge is challenged before us.

We heard the learned senior Counsel for the appellant Mr. Tapas C. Ray and also the Counsel for the Respondent, Mr. Ashok Mathur. The Counsel for the appellant contended that the learned Single Judge committed a serious error of law in holding that there was a merger of the decree passed by the High Court in the Second Appeal with that of the decree passed in the First Appeal. It was argued that as the second appellant Radhu Lal died while the appeal was pending and no steps were taken by his legal heirs to come on record as appellants, the Second Appeal should be treated to have abated and when the Second Appeal had abated, there was no question of any merger of the First Appellate decree with the order, if any, passed in the Second Appeal. According to the appellants' Counsel, there was no decree at all in the Second Appeal and the judgment passed in the Second Appeal is a nullity as it had been passed against a dead person. The Counsel for the respondents, on the other hand, contended that the Second Appeal was dismissed by the learned Single Judge at a time when the appellant was already dead and such a judgment being a nullity in the eye of law, it was argued that the Second Appeal being a continuation of the proceedings of the suit and that the final order having been passed by the learned Single Judge being a nullity in the eye of law, there is no decree as such which is capable of being executed. The Counsel for the respondents submitted that the execution proceedings are without any basis and thus, he supported the impugned judgment.

Order 22 Rule 3 of the Civil Procedure Code prescribes the procedure in case of death of one of several plaintiffs or of sole plaintiff. It states that where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole-surviving plaintiff dies, and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Rule 3(2) of Order 22 says that 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 of Order 22 says that the provisions contained in Order 22 shall be applicable to appeals and so far as the word "plaintiff" shall be held to include an appellant, the word "defendant" shall be held to include respondent and the word "suit" an appeal.

Rule 9 of Order 22 states about the effect of abatement or dismissal. Rule 9 is to the following effect:-

"(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit."

The various provisions contained in Order 22, CPC, explain the consequences of death of parties in a civil litigation. If one of the plaintiffs dies and if the cause of action survives his legal representatives have got a right to come on record and to continue the proceedings. If the sole plaintiff dies and if the legal representatives are not brought on record, the suit will abate and Rule 9 of Order 22 CPC specifically prohibits the filing of a fresh suit on the same cause of action. The only remedy available to the legal representatives is to get themselves impleaded and continue the proceedings, if the suit is already not abated, and if abated, they have to file an application to set aside abatement also.

In the instant case, deceased Radhu Lal, the second appellant died on 14.12.1990 and his death was not brought to the notice of the Court and the learned Single Judge disposed of the appeal on merits by dismissing the Second Appeal on 25.3.1991. As the Judgment in the Second Appeal was passed without the knowledge that the appellant had died, the same being a judgment passed against the dead person is a nullity. When the second appellant Radhu Lal died on 14.12.1990, his legal representatives could have taken steps to get themselves impleaded in the Second Appeal proceedings and as it was not done, the Second Appeal should be taken to have abated by operation of law. Therefore, the question that requires to be considered is that when there was abatement of the Second Appeal, can there be a merger of the same with the decree passed by the First Appellate Court?

Before considering the question of merger, we have to consider the effect of abatement. When the Second Appeal had abated and the legal representatives of the appellant were not brought on record, the decree, which was passed by the First Appellate Court, would acquire finality. A similar matter came up before this Court in Rajendra Prasad and another Vs. Khirodhar Mahto and Others 1994 Supp. (3) SCC 314 wherein it was held that as a consequence of the abatement of the appeal filed against final decree in a partition suit, the preliminary decree would become final. In that case, the appellants and Tapeshari Kuer filed a suit for partition of immovable properties, including plaint 4 & 5 properties. The property originally belonged to one Bishni Mahto. He had two sons namely Sheobaran Mahto and Ramyad Mahto. Tapeshari Kuer was the daughter of Ramyad Mahto. Plaint 4 & 5 properties were not partitioned between these two sons of Bishni Mahto. Ramyad Mahto, the father of Tapeshari Kuer died and she succeeded to the one half of the undivided share of the two sons of Bishni Mahto. Tapeshari Kuer had executed a gift deed in favour of the appellants bequeathing her undivided interest inherited from her father in respect of plaint item no. 4 property. The Trial Court decreed the suit declaring the half share of Tapeshari Keur in plaint 5 of the property. Appellants who had joined as

plaintiffs 1 & 2 were held to have half share in plaint item no. 4 by virtue of the gift deed executed by her. The defendants in the suit filed an appeal and pending appeal, Tapeshari Kuer died. Her legal heirs were not brought on record. The Appellate Court gave a finding that Tapeshari Keur was not the daughter of Ramyad Mahto and the appellant did not acquire any interest in the undivided share. The suit was dismissed. The original plaintiffs 1 & 2 filed the Second Appeal before the High Court. The Second Appeal was dismissed, as the heirs of Tapeshari Keur were not brought on record. The original plaintiffs 1 & 2 carried the matter to this Court by special leave. It was contended that the plaintiffs 1 & 2 were entitled to the benefit of preliminary decree. Ultimately, this Court held that whether Tapeshari Keur was the daughter of Ramyad Mahto or not was required to be gone into only when her legal representatives were brought on record. It was held that the decree against a dead person was a nullity and, therefore, the declaration by the First Appellate Court that Tapeshari Keur was not a daughter of Ramyad Mahto was not valid in law. The High Court had held that the decree of the Appellate Court was a nullity and the respondent did not file any appeal against that part of the decree, the result was that the preliminary decree became final.

In Rahmani Khatoon Vs. Harkoo Gope AIR 1981 SC 1450, this Court held at page 1453 at para 10 as under:-

"The concept of abatement is known to civil law. If a party to a proceeding either in the trial court or any appeal or revision dies and the right to sue survives or a claim has to be answered, the heirs and legal representatives of the deceased party would have to be substituted and failure to do so would result in abatement of proceedings. Now, if the party to a suit dies and the abatement takes place, the suit would abate. If a party to an appeal or revision dies and either the appeal or revision abates, it will have no impact on the judgment decree or order against which the appeal or revision is preferred. In fact, such judgment, decree or order under appeal or revision would become final."

The learned Single Judge of the High Court in the impugned order held that the order passed in the first appellate decree merged into the order passed in the Second Appeal and hence there is no executable decree. "The doctrince of merger arise only when there are two independent things and the greater one would swallow up or may extinct the lesser one by the process of absorption.

" ["Law Lexicon" by P. Ramanatha Aiyar - page 1224, 2nd Edition].

If the Judgement or order of an inferior Court is subjected to an appeal or revision by the superior court and in such proceeedings the order or judgment is passed by the superior court determining the rights of parties, it would supersede the order or judgment passed by the inferior court. The juristic justification for such doctrine of merger is based on the common law principle that there cannot be, at one and the same time, more than one operative order governing the subject matter and the judgment of the inferior court is deemed to lose its identity and merges with the judgment of the superior court. In the course of time, this concept which was originally restricted to

appellate decrees on the ground that an appeal is continuation of the suit, came to be gradually extended to other proceedings like Revisions and even the proceedings before quasi- judicial and executive authorities.

This Court in State of Madras Vs. Madurai Mills co. Ltd. AIR 1967 SC 681, observed as under:-

"The doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction."

In a recent decision in Kunhayammed vs. State of Kerala 2000 (6) SCC 359, this Court held that an order dismissing special leave petition, more so when it is by a non-speaking order, does not result in merger of the order impugned into the order of the Supreme Court.

In the instant case, there is no question of the application of the doctrine of merger. As the second appellant Radhulal died during the pendency of the appeal, and in the absence of his legal heirs having taken any steps to prosecute the Second Appeal, the decree passed by the First Appellate Court must be deemed to have become final. By virtue of the order passed by the First Appellate Court, the plaintiff’s suit for specific performance was decreed. Failure on the part of the legal heirs of Radhulal to get themselves impleaded in the Second Appeal and pursue the matter further shall not adversely affect the plaintiff-decree holder as it would be against the mandate of Rule 9 of Order 22, Code of Civil Procedure. The impugned order is, therefore, not sustainable in law and the same is set aside and the appeal is allowed. The Executing Court may proceed with the execution proceedings. Parties to bear their respective costs.