

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.63 of 1993

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1. Hare Krishna Kumar Singh S/o Ganpati Prasad Singh
2. Sumit Kumar Singh S/o Pashupati Prasad Singh Both R/o Vill
+P.O. Bhit Bhagwanpur, P.S. Madhepur District Madhubani.
... .. Appellants

Versus

1. Raj Kumari Devi Wife of Chandra Shekhar Singh @ Mantun and Daughter of Mostt. Deokala Devi(Deceased) Deokala Devi being original plaintiff in the suit).
2. Shyam Devi wife of Devata Prasad Singh and Daughter of the aforesaid most. Deokala Devi(deceased), Both serial no. 1 and 2 are residents of Village and P.O. Sardiha, P.S. Sumri Bakhtiyarpur, District- Saharsa.
3. Paro Devi Wife of Kameshwar Singh and daughter of Tej Narain Singh (Deceased) (Original defendant No. 1) residents of Village and P.O. Sardiha, P.S. Sumri Bakhtiyarpur, District- Saharsa.At Present resident of Village and P.O. Harhacha, District- Darbhanga.
4. Prabhawati Devi Wife of Shri Hira Singh and daughter of Tej Narain Singh(Deceased) Resident of Village and P.O. Ratauli, P.S. Kumar Ganj, District- Saharsa.
5. Smt. Munia Devi Wife of Shri Jawahar Singh and daughter of Tej Narain Singh (deceased) Resident of Village and P.O. Tumaul, P.S. Biraul, District Darbhanga.
6. Smt. Gujia Devi@ Manju Devi Wife of Uday Shankar Singh and Daughter of Tej Narain Singh(Deceased) Resident of Village Dhankaul, P.O. Kumar Bajitpur, P.S.Mahua, District Muzaffarpur.
7. Narendra Narain Singh
8. Sailendra Narain Singh
9. Surendra Narain Singh
10. Amrendra Narain Singh All Serial No. 7 to 10 are sons of late Shri Tejnarain Singh
11. Ganpati Prasad Singh
12. Pashupati Prasad Singh Serial No. 11 and 12 are Sons of Birendra Narain Singh All Serial no. 11 and 12 are resident of Village- and P.O. Bhith Bhagwanpur, P.S. Madhepura, Distt. Madhubani, out of them respondent no. 7 at present resident of Village Harhacha, P.O. Harahacha, P.S. and District Darbhanga.
13. Vidya Rai Son of Nathuni Rai
14. Babu Devi Wife of Shri Birendra Narain Singh Serial no. 13 and 14 are Resident of Village and P.O. Bhith Bhagwanpur, P.S. Madhepur, Distt. Madhubani.
15. Gopi Raman Singh
16. Nirbhay Narain Singh
17. Deep Narain Singh All Serial no. 15 to 17 sons of Bishwanath Singh Resident of Villagew and P.O. Sukhasan, P.S. Madhepura, District Madhepura.

... .. Respondents

Appearance :

For the Appellants : Mr. Jitendra Nath, Advocate



For the Respondent No.10: Mr. Pankaj, Advocate
Mr. Vivekanand Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 23-01-2019

A judgment and decree dated 06.07.1993 passed by a learned single Judge of this Court in First Appeal No. 633 of 1970, whereby a judgment and decree passed by learned Additional Subordinate Judge-II, Darbhanga, in Title Suit No.28/13 of 1962/1963 has been affirmed, is put to challenge in the present appeal under Clause X of the Letters Patent of this Court.

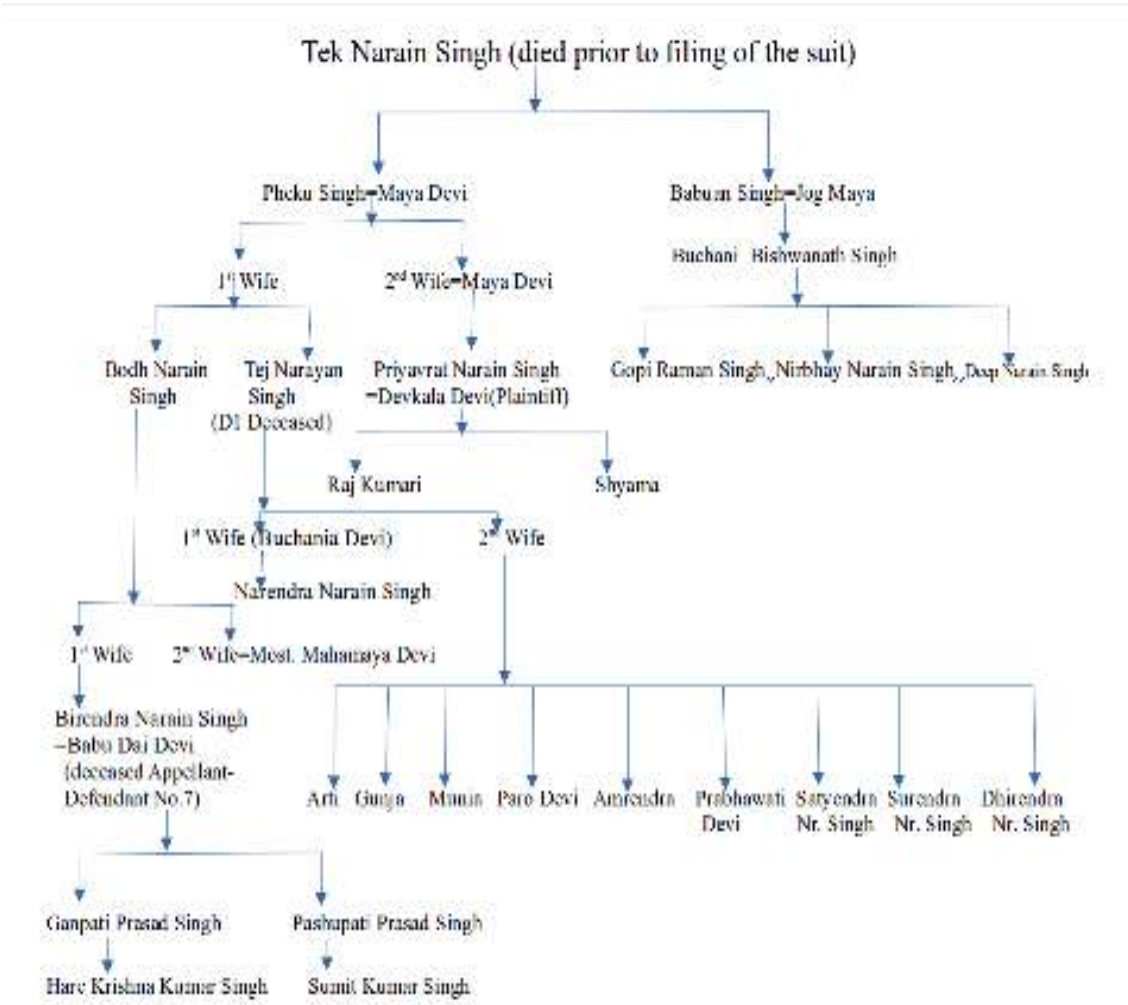
We have heard Mr. Jitendra Nath learned counsel assisted by Mr. Pankaj, learned Advocate for the appellants and Mr. Vivekanand Kumar, learned counsel for the respondents. Lower Court records had been called, which we have carefully perused.

The suit was instituted by one Devkala Devi seeking relief for partition of the properties enumerated in Schedule-I (Ka), II and III of the plaint. The original appellant, Birendra Narain Singh (Defendant No.7), died during the pendency of the appeal on 29.10.2003. The sons of the appellant, namely, Ganpati Prasad



Singh and Pashupati Prasad Singh are respondents No.12 and 13 herein, who have not sought for their transposition after death of Birendra Narain Singh, the appellant. The grandchildren of the appellant, Birendra Narain Singh, after having been substituted under the orders of this Court are pursuing the present second appeal.

In order to appreciate the issues and controversies involved in the present appeal, we need to take note of first the admitted genealogical table, which is as under: -



Pheku Singh and Babuan Singh were the two sons of Tek Narain Singh. Pheku Singh had three sons; Bodh Narain Singh and Tej Narain Singh from first wife and Priyavrat Narain Singh from his second wife. Devkala Devi, the widow of Priyavrat Narain Singh, had instituted the suit. Bodh Narain Singh had one son Birendra Narain Singh, the appellant, from the first wife. Birendra Narain Singh had two sons, as has been noted, Ganpati Prasad Singh and Pashupati Prasad Singh. Whereas the appellant Hare Krishna Kumar Singh is the son of Ganpati Prasad Singh, appellant Sumit Kumar Singh is son of Pashupati Prasad Singh.

The widow (Devkala Devi) of one of the sons of Pheku Singh, namely, Priyavrat Narain Singh, who is said to have died in 1945, filed the suit seeking partition against the two stepbrothers of her deceased husband, viz. Bodh Narain Singh and Tej Narain Singh. Brother of Pheku Singh, namely, Babuan Singh had died in the year 1918. It was her case in the plaint that the suit properties as described in the Schedule of the plaint belonged to the joint family in which she with Tej Narain Singh and Bodh Narain Singh had share and since they had refused to partition the property on her demand, the property should be partitioned. She had stated in her plaint that Tej Narain Singh was adopted by Babuan Singh, who had no son of his own and the adoption was made sometimes



before 1918, when he died. She, however, subsequently deleted this assertion from her plaint by amendment, after written statement was filed by the appellant (Birendra Narain Singh) as defendant No.7 in the suit.

The original appellant (defendant No.7) had taken the stand in his written statement that Tej Narain Singh was never adopted by Babuan Singh as his *Kritrim/Karta Putra* and that Babuan Singh had died issue-less in 1918. In the written statement, filed on behalf of the defendant No.1 Tej Narain Singh, fact of adoption was asserted and evidence was led to prove the fact of adoption.

On the basis of what has been argued at length at the Bar and the pleadings and evidence available on record, it is manifest that the question as to whether Tej Narain Singh (defendant No.1) was adopted son (*Kritrim/Karta Putra*) of Babuan Singh or not was at the core of the controversy before the trial Court and the First Appellate Court. Another issue, which has been vehemently canvassed on behalf of the appellant is that defendant No.1, Tej Narain Singh was not of sound mind and guardian *ad litem* should have been appointed for him by the trial Court and without appointment of guardian *ad litem*, the suit could not have proceeded and maintained. There are concurrent findings,



however, on both these aspects by the trial Court as well as First Appellate Court. Both the Courts below have conclusively held, on analysis of evidence adduced at the trial that Tej Narain Singh was the adopted son of Babuan Singh and that there was nothing to hold that Tej Narain Singh was of unsound mind.

There is yet another aspect, which is worth being noted at this stage. Tej Narain Singh (defendant No.1) died during the pendency of the First Appeal on 04.05.1971, leaving behind his one son from the first wife, Buchani Devi, namely, Narendra Narain Singh, defendant No.2, who has been impleaded respondent No.7 in the present appeal and; daughters and other sons from his second wife, namely, Shailendra Narain Singh, Surendra Narain Singh and Amrendra Narain Singh, who are respondents No. 8, 9 and 10 respectively in the present appeal. The daughters of Tej Narain Singh from second wife are also there on record as respondents No. 3, 4, 5 and 6 of the present appeal.

From the genealogical table submitted by learned counsel for the appellant in course of hearing, we notice that Narendra Narain Singh (respondent No.7) has been described as traceless for more than seven years. Respondent No.9 has also been described as traceless. Respondent No.6, Dhirendra Narain Singh, another son of Tej Narain Singh is said to have died on



02.07.1994 and accordingly his name has been expunged. Satyendra Narain Singh (respondent No.8) died in 2008. Prabhawati Devi, respondent No.4, died on 21.02.1988. No substitution petition has, however, been filed for substituting the legal heirs of the deceased respondents, who were heirs of Tej Narain Singh. This has to be kept in mind that the entire case of the appellant as canvassed in the present appeal is against the share which Tej Narain Singh has been found entitled both by the trial Court and by the First Appellate Court, treating him to be adopted son of Babuan Singh.

A plea has been taken on behalf of respondents that the present appeal has abated as a whole in the absence of steps having been taken for substitution of the legal heirs of the aforesaid deceased respondents, who were admittedly successors of Tej Narain Singh (defendant No.1). In response to the aforesaid submission, Mr. Nath has relied on a Full Bench decision of this Court in case of *Jagannath Singh Vrs. Smt. Singhashan*, reported in (1984 BBCJ 163 (F.B.)) and in case of *Mahmud Mian (Dead) through LRs. and Another v. Shamsuddin Mian(Dead) through LRs. and Others*, reported in (2005) 11 SCC 582, to submit that a suit or appeal will not abate if one or more out of several heirs are on the record as they would represent the estate of the deceased.



He has contended that in a partition suit, death of one of the parties does not cause abatement. Mr. Nath has further argued that non-compliance of the provisions under Order XXXII Rule 15 of the Code of Civil Procedure inasmuch as the Court failed to appoint a guardian *ad litem* for defendant No.1 Tej Narain Singh, who was of unsound mind, also renders the impugned decisions unsustainable as the suit itself deserved to be dismissed. With considerable vehemence, he has argued that the very fact that defendant No.1 kept himself away from the Court and did not choose to appear as witness was enough indication for the trial Court to have concluded that he was not capable of looking after his own interest and appointment of guardian *ad litem* was imperative.

In support of his submission of non-compliance of Order XXXII Rule 15 of the Code of Civil Procedure, Mr. Nath has relied upon a judgment of Madras High Court in case of ***Rathinasabapathy Pillai and Another v. Saraswathi Ammal*** (AIR 1954 Madras 307) and another of Delhi High Court in case of ***B.K.Khanna v. K.N. Khanna and Others*** (AIR 1978 Delhi 48).

On the point of the findings recorded by the trial Court and the First Appellate Court holding Tej Narain Singh to be the adopted son of Babuan Singh, he contends that the evidence



adduced have not been duly appreciated by both the Courts. He has submitted that the plaintiff had initially pleaded in her plaint that Tej Narain Singh was adopted son of Babuan Singh, but later she herself withdrew the said assertion made in her plaint by way of amendment. The very foundation in the pleading in respect of adoption of Tej Narain Singh by Babuan Singh in the plaint having become nonexistent, there was no occasion either for the trial Court or the First Appellate Court to have concluded that Tej Narain Singh was the adopted son of Babuan Singh.

Mr. Kumar, learned counsel appearing on behalf of respondent No.10 on the other hand has relied on a decision in case of *State of Punjab v. Nathu Ram* (AIR 1962 SC 89) to bolster his contention that in the absence of substitution of the deceased respondent who are the descendants of Tej Narain Singh, this appeal abates as a whole.

We would first deal with the submission advanced on behalf of the appellants with reference to Order XXXII Rule 15 of the Code of Civil Procedure. There is no gainsaying that the Order XXXII Rule 15 of the Code of Civil Procedure shall have an application only if one or more of the parties is/are found by the Court, on enquiry to be incapable, “by reason of any mental infirmity, of protecting their interest with suing or sued”. We find



from the materials on records that in none of the written statements nor in the plaint there was any specific assertion made that Tej Narain Singh was of unsound mind. The trial Court and the First Appellate Court on appreciation of evidence including the evidence of DW14 have concluded that Tej Narain Singh was of sound mind and capable of protecting his own interest and that there was no necessity, therefore, of appointment of guardian *ad litem*.

The learned single Judge, based on the points taken in the memo of Appeal, the evidence and pleadings on record and the submissions advanced on behalf of the parties, has noted the following points which arose for consideration :

“(i) Whether the finding of the learned court below holding that Tej Narain Singh (since deceased) was of sound mind and so there was no necessity of appointing guardian ad-litem for him and the suit, therefore, was maintainable, is improper and unjustified in view of the materials on the record.

(ii) Whether the finding of the learned court below holding that Tej Narain Singh was a Kirtrimputra of Babuan Singh can be held to be improper and unjustified on the evidence on record?

(iii) Whether the property of village Bhaja that was alleged by appellant-defendant no.7 to be joint and enumerated in Schedule I of his written statement but was claimed by Deokala was wrongly held to be not joint but separate property of Deokala Devi?”



As has been noticed, the learned single Judge has dealt in detail the evidence on record with reference to the point No.(i), a noted above. It is easily evincible that the Civil Surgeon was examined as PW 16 on the point of unsoundness of mind of Tej Narain Singh. He deposed that though he was found to be suffering from some ailments because of which he was not in a position to speak distinctly and his limbs and fingers were trembling, he was found to be capable of understanding whatever was being uttered to him. Based on his findings, while Tej Narain Singh was under observation, the said Civil Surgeon had prepared a report which specifically recorded that though his mental faculty appeared to be dull, he was capable of understanding the risk of his non-appearance in Court and all the complaints seemed to be related to his high blood pressure. The learned single Judge noticed the evidence of defendant No.7 himself as DW 46, wherein he had not stated about insanity of Tej Narain Singh. He, on the other hand, alleged that Tej Narain Singh was a clever person, who got certain facts inserted in a document for betterment of his interest. He did not say anything about his insanity. The learned single Judge has also noticed that neither in the plaint nor in the written statement there was any specific clear assertion that Tej Narain Singh was of unsound mind. In that background, the



learned single Judge approved the decision of the trial Court refusing to accept the plea of insanity of defendant No.7. The finding to this effect, it can be easily seen, is based on appreciation of evidence on record and could not be said to be erroneous from any angle.

In such view of the matter, reliance placed by Mr. Nath on decisions of Madras High Court in case of *Rathinasabapathy Pillai* (supra) and Delhi High Court in case of *B.K.Khanna* (supra) loses its significance. The said judgments will apply only if a person is found to have been of unsound mind. In the present case, the findings being otherwise, neither Order XXXII Rule 15 of the Code of Civil Procedure nor decisions of Madras High Court in case of *Rathinasabapathy Pillai* (supra) and Delhi High Court in case of *B.K.Khanna* (supra) can have any application.

Mr. Nath's contention that the said finding is incorrect and, therefore, this Court should interfere in present Letters Patent Appeal cannot be accepted by us. It has to be kept in mind that this Letters Patent Appeal is in the nature of Second Appeal after the judgment and decree of the trial Court, which has been affirmed by learned single Judge in first appeal, by the impugned judgment and decree. Such appeal shall have all limitations which apply to a Second Appeal under Section 100 of the Code of Civil Procedure.



The Court cannot entertain a Second Appeal unless it involves a substantial question of law.

Mr. Nath, in order to make out his case that the present Appeal involves a substantial question of law has contended that the impugned judgments are unsustainable as the Courts have failed to take note of the fact that even if Tej Narain Singh was assumed to be adopted by Babuan Singh, Babuan Singh having died in the state of jointness with the other coparceners, right of survivorship in favour of other coparceners operated and the adoptee on that ground could get nothing since Babuan Singh did not die leaving behind anything inherited. He contends that the learned single Judge missed to consider the difference between coparcenership and inheritance. He contends that in case of inheritance, the property devolves on death and it survives in case of coparcenership. He has argued that on inheritance, physical rights are acquired and on survivorship enjoyment of existing rights increase by the removal of one, from the body of co-sharers. He has contended that the finding recorded by learned single Judge that on the death of Babuan Singh, right and interest in the coparcener property can be taken to have devolved by survivorship and not by inheritance, but nonetheless Tej Narain Singh would be treated as his son and whenever partition would take place, he



would take the interest of Babuan Singh as one of the coparcener's property to be divided *per stirpes* and not *per capita* is contrary to the Supreme Court's view expressed in case of ***M.N.Aryamurthi and Another v. M.L.Subbaraya Setty (dead) through L.R. and Others*** (AIR 1972 SC 1279). Learned counsel though, with all vehemence, has argued that finding recorded by the learned single Judge and the trial Court that Tej Narain Singh was the adopted son of Babuan Singh is erroneous and for that reason too the impugned judgment and decree requires interference by this Court, we are not inclined to accept this submission since upon going through the evidence on record and other materials, we do not find the concurrent finding to the aforesaid effect to be without evidence or contrary to evidence. Since the said concurrent finding cannot be said to be suffering from perversity, we are of the view that the findings recorded by the First Appellate Court concurring with the finding recorded by the trial Court is binding on this Court.

We have also kept in mind the limitations of *intra*-Court appeal under Letters Patent of the High Court by a Division Bench against judgment/order of a learned single Judge. A finding of fact recorded by a learned single Judge, unless perverse, should not be interfered with on the ground that other view is possible, which is



better. Reference in this regard can be made to a Supreme Court's decision in case of *The Management of Narendra and Company Private Limited Vs. The Workmen of Narendra and Company* reported in **(2016) 3 SCC 340** (paragraph 5).

Once we reach this conclusion, we may now advert to the judgment of the learned single Judge. The submission made by Mr. Nath that Babuan Singh died leaving nothing to be inherited by Tej Narain Singh, even if he was assumed to be *Kritrim Putra/Karta Purta* of Babuan Singh is a preposterous submission and deserves to be rejected at the very threshold. As a matter of fact, this plea was not even taken and could not have rather been taken in the memo of Appeal before the learned single Judge. The plea, which was taken in the memo of Appeal, was that Tej Narain Singh could not claim more than 1/3rd share in the properties acquired by the family after death of Babuan Singh even if the plea of adoption was found to be valid in law. There was also a plea taken that Tej Narain Singh was not entitled to claim any share as adopted son in respect of property acquired after the death of Babuan Singh.

From the judgment of learned single Judge we find that it was contended on behalf of the appellant that even if Tej Narain Singh was held to be *Kritrim Putra/Karta Putra* of Babuan Singh,



he could not have inherited Babuan Singh's interest in the joint suit property on the death of Babuan Singh. It was also contended that since Babuan Singh had died in the state of jointness with the sons of Pheku Singh, who was his brother, all his interest in the joint family property devolved by the rule of survivorship on surviving coparceners and only separate property of Babuan Singh could have been inherited by his *Kritrim Putra/Karta Putra* Tej Narain Singh. It was the case of the appellants before the learned single Judge as has been explained in paragraph 20 of the judgment impugned that the view taken by the trial Court that plaintiff Devkala Devi had interest to the extent of 1/6th in the joint family property and Tej Narain Singh (defendant No.1), who took half ($\frac{1}{2}$) share of Babuan Singh as well as his own share to the extent of 1/3rd of the half ($\frac{1}{2}$) was erroneous. Dealing with the said submission advanced on behalf of the appellants, the learned single Judge, relying on following decisions of this Court :-

(i) ***Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*** (AIR 1927 Patna 61), and

(ii) ***Gokhul Rai v. Mt. Janki Kuer and Another*** (AIR 1955 Patna 487),

concluded that a person adopted in *kritrim* form continues to have right in his natural family and he also inherits



the property of the person who adopts. The learned single Judge has accordingly held that although Tej Narain Singh was a coparcener when he was adopted by Babuan Singh, his right as coparcener in the joint property would continue because a *Kritrim Putra* does not lose his right in the natural family.

In our view, the finding recorded by the learned single Judge affirming the finding of the trial Court that Tej Narain Singh was *Kritrim Putra/Karta Putra* of Babuan Singh cannot be said to be erroneous. In that view of the matter, coming back to the genealogical table, there being no dispute that Babuan Singh died in the state of jointness with the sons of his brother, the interest in the joint family property would have devolved on surviving coparceners and not by inheritance. Nevertheless, for the purpose of determination of respective shares, Tej Narain Singh was to be treated as his son whenever a partition was to take place, he taking the interest of Babuan Singh as one of the coparceners. It has been rightly held by the learned single Judge that since Pheku Singh and Babuan Singh were full brothers, both of them had half ($\frac{1}{2}$) share in their ancestral property, which they inherited from their forefathers, so long as they were alive. The descendants, on partition of the joint family property would have been entitled to get shares according to their branches and not equally per head.



We do not find any infirmity in the view taken by the learned single Judge in view of the finding that Tej Narain Singh was *Kritrim Putra/Karta Putra* of Babuan Singh.

This is, however, not the end of the matter. We have already noticed that no substitution has been filed on behalf of the appellants in this appeal, consequent upon death of many of the respondents including the descendants of Tej Narain Singh. In our opinion, non-substitution of large number of respondents, who were descendants of Tej Narain Singh and respondents in the appeal, renders the appeal incompetent and the whole appeal, in our view, abates. Our opinion finds support from decision of the Supreme Court in case of *S. Amarjit Singh Kalra (dead) by Lrs. and Ors. Vs. Pramod Gupta (dead) by Lrs. and Ors.*, reported in **(2003) 3 SCC 272**, which has taken a view that where a decree is a joint one and a part of the decree has become final by reason of abatement, entire appeal must be held to have abated. In this case, the decree cannot be altered in respect of the descendants of those respondents, who have not been substituted and in that case, if the appeal is allowed, it will amount to passing inconsistent decrees. Paragraph 30 and 31 of the said decision are relevant and are being reproduced hereinbelow:

“30. The question, therefore, as to when a proceeding before the Court becomes or rendered



impossible or possible to be proceeded with after it had partially abated on account of the death of one or the other party on either side has been always considered to depend upon the fact as to whether the decree obtained is a joint decree or a severable one and that in case of a joint and inseverable decree if the appeal abated against one or the other, the same cannot be proceeded with further for or against the remaining parties as well. If otherwise, the decree is a joint and several or separable one, being in substance and reality a combination of many decrees, there can be no impediment for the proceedings being proceeded with among or against those remaining parties other than the deceased. As observed in Nathu Ram's case (supra) itself, the code does not itself provide for the abatement of the appeal against the other respondents even where, as against one such it has abated but it is only the Courts which have held that in certain circumstances the appeal also would abate against a co-respondent as a result of abatement against the deceased respondent. The same would be the position of an appeal vis-a-vis the appellants as in the other cases. Order 22, Rule 4 also was considered not to provide for abatement of the appeal(s) against the co-respondents of the deceased respondent and it was specifically observed therein that to say that the appeals against them also abated in certain circumstances is not a correct statement. It was held that the appeals against such other respondents cannot be proceeded against and, therefore, had to be dismissed, in certain circumstances.

31. But, in our view also, as to what those circumstances are to be cannot be exhaustively enumerated and no hard and rule for invariable application can be devised. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really serve as handmaid, make it workable and advance



the ends of justice, technical objections which tend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law, inevitably necessitates it. Consequently, having regard to the nature of the proceedings under the Act and the purpose of reference proceedings and the appeal therefrom, the Courts should adopt a liberal approach in the matter of condonation of the delay as well as the considerations which should weigh in adjudging nature of the decree, i.e., whether it is joint and inseverable or joint and severable or separable. The fact that the Reference Court has chosen to pass a decree jointly in the matters before us is and should be no ground by itself to construe the decree to be joint and inseparable. At times, as in the cases on hand, the Court for this convenience might have combined the claims for joint consideration on account of similar nature of the issues in all such cases and for that reason the parties should not be penalized for no fault of them. *Actus curiae neminem gravabit* (an act of Court shall prejudice no one) is the maxim of law, which comes into play in such situations. Number of people, more for the sake of convenience, may be counseled to join together to ventilate, all their separate but similar nature of claims and this also should not result in the claims of all such others being rejected merely because one or the other of such claims by one or more of the parties abated on account of death and consequent omission to bring on record the legal heirs of the deceased party. At times one or the other parties on either side in a litigation involving several claims or more than one, pertaining to their individual rights may settle among themselves the dispute to the extent of their share or proportion of rights are concerned and may drop out of contest, bringing even the proceedings to a conclusion so far as they are concerned. If all such move is allowed to



boomerang adversely on the rights of the remaining parties even to contest and have their claims adjudicated on merits, it would be a travesty of administration of justice itself.”

In our considered view, if this appeal could be allowed as against the surviving respondents and decrees were to be passed accordingly, such decrees would be mutually self-destructive; enforcement of one decree would negate or render impossible the enforcement of the other. The Supreme Court in case of ***S. Amarjit Singh Kalra (dead) by Lrs. and Ors.*** (supra) has laid down the law very clearly in paragraph 34, in the following terms: -

34. In the light of the above discussion, we hold:-

(1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights the decree passed by the Court thereon is to be viewed in substance as the combination of several decrees in favour of the one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the Courts



concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decreed passed in the proceedings vis-a-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other.”

In our view, the present case comes within the ambit of sub-paragraph (4) of paragraph 34 of Supreme Court's decision in case of *S. Amarjit Singh Kalra (dead) by Lrs. and Ors.* (supra). In the present case, the entire focus of the appellants is against the share of deceased defendant No.7, Tej Narain Singh, whose heirs



have not been substituted. In such circumstances and in view of the law laid down by the Supreme Court in case of *S. Amarjit Singh Kalra (dead) by Lrs. and Ors.* (supra), as noted above, this appeal has become incompetent, which is, in our opinion, another reason for dismissal of the present appeal.

This is not yet the end of matter. The appellant Birendra Narain Singh died during the pendency of the appeal on 29.10.2003. His sons Ganapati Prasad Singh and Pashupati Prasad Singh, respondents No. 12 and 13 in the present appeal, did not choose to get themselves transposed as appellants to pursue this appeal. The present appellants are sons of said Ganapati Prasad Singh and Pashupati Prasad Singh, who have been substituted under the orders dated 11.07.2018 passed in I.A. No. 787 of 2014. While allowing the substitution petition, following observation was made by this Court in the order dated 11.07.2018 :

“We make it very clear that our order on the substitution petition is no indication on the issue whether or not, the cause survives on the death of the sole appellant. The survival of cause of action and its persuasion by the legal heirs are two different issues which goes to the root of the matter and shall be considered when the matter comes up next, for hearing.”

Be it noted that substitution was allowed only in the background of permission granted by this Court to the two



grandsons (appellants) of the original appellant to get substituted for restoration petition for restoration of the appeal, which had stood dismissed for default. This substituted appellants were not impleaded as parties in the first appeal. None of the defendants in the suit except defendant No.7 had questioned the correctness either of the judgment and decree of the trial Court. Upon death of the sole appellant, since their sons, who were already on record, chose not to be transposed, in our view, there was no cause of action, which survived for these appellants to pursue.

For the reasons noted above, we do not find any merit in this appeal, which is accordingly dismissed.

The parties shall bear their own costs.

(Chakradhari Sharan Singh, J)

Jyoti Saran, J : **I Agree.**

(Jyoti Saran, J)

Pawan/-

AFR/NAFR	A.F.R.
CAV DATE	N/A
Uploading Date	28.01.2019
Transmission Date	N/A

