

AD-39
Ct No.10
07.07.2025
TN

SAT 83 of 2025
IA No: CAN 1 of 2025
Md. Habibullah Khan and others
Vs.
Ajijullah Khan

Mr. Kumar Jyoti Tewari, Ld. Sr. Adv.,
Mr. Manas Kumar Das,
Mr. Aritra Kumar Thokdar

....for the appellants

1. Leave is granted to the learned Advocate for the appellants to carry out the necessary rectifications in the memorandum of appeal by introducing the names of the respondent nos.2 to 5 of the First Appellate Court and to delete the surplus mentions of the decree signing date from the preamble of the memorandum of appeal during the course of the day.
2. The appeal is taken up for hearing under Order XLI Rule 11 of the Code of Civil Procedure.
3. The present second appeal has been preferred by the defendant in a suit for eviction of licensee, against a judgment of affirmance, whereby eviction was granted only against the defendant no.1/appellant.
4. Learned counsel appearing for the appellants submits that the impugned judgment of the First Appellate Court is vitiated inasmuch as despite the factum of death of the proforma defendant no.3 having been pointed out during pendency of the suit to the trial court, a decree was passed in the name of a dead person and the First Appellate Court affirmed such

judgment. Learned counsel submits that a decree passed against a dead person is a nullity and cites for such proposition *Gurnam Singh (Dead) Through Legal Representatives and others vs. Gurbachan Kaur (Dead) By Legal Representatives*, reported at (2017) 13 SCC 414.

5. Learned counsel further submits that the Appellate Court relied *inter alia* on *Vidur Impex and Traders Private Limited and others vs. Tosh Apartments Private Limited and others*, reported at (2012) 8 SCC 384, which was passed in respect of a suit for specific performance and, as such, does not operate as a binding precedent insofar as the facts of the present case are concerned. It is thus submitted that the impugned judgments and decrees of the courts below being nullities, being passed against a dead person, the present second appeal should be admitted on such ground alone.
6. Upon a careful perusal of the judgments of both the courts below and the facts of the case, we find that there is a distinction between a decree being rendered a nullity as a whole and the abatement of a suit only in respect of the one of the parties.
7. In *Gurnam Singh* (supra), cited by the appellants, the Supreme Court was considering the provisions of Order XXII Rule 3(2) and Order XXII Rule 4(3) which pertain to the abatement of a suit as against the deceased defendant.

8. In such context, it was held that in the said case, the appellant and two respondents had expired during pendency of the second appeal but no application was filed to bring their legal representatives on record. As such, according to the Supreme Court, the appeal could be revived for hearing only when the proposed legal representatives of the deceased persons had filed an application for substitution of their names and secondly they had applied for setting aside of the abatement under Order XXII Rule 9 of the Code and made out a sufficient cause for setting aside of abatement and condonation of delay.
9. In such perspective, the Supreme Court observed that it is a fundamental principle of law that a decree passed by the Court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings, whenever such decree is sought to be enforced by the decree holder.
10. However, in the context of the present case, the said proposition is not applicable.
11. A comprehensive perusal of the plaint, a copy of which is handed over by learned counsel for the appellants in Court today, shows that the entire relief has been sought in the suit only against the defendant no.1/present appellant. The defendant nos. 2 to 4, who were styled as proforma defendants, were impleaded merely as proper parties, as per the plaint,

since they did not join with the plaintiff/respondent no.1 in filing the suit.

12. From the judgments of both the courts below, we find that the impugned decrees have been passed only against the defendant no.1/appellant. Thus, the proforma defendant nos. 2 to 4 were at best proper parties and surplusages, inasmuch as not a single relief was sought against them. Apparently, the stimulus behind adding those proforma defendants was that a previous suit had been filed by the proforma defendants along with the defendant no.1 for declaration that a Hibinama (deed of gift) executed in favour of the plaintiff/respondent no.1 was a nullity/not binding. Such suit was dismissed and the decree of dismissal was affirmed in first appeal and has attained finality.
13. However, in the present subsequent suit, from which the current second appeal arises, the relief sought was only that a licence was given to the defendant no.1/appellant which was subsequently terminated but the defendant no.1 refused to budge from the suit premises. Since no relief was sought at all against the proforma defendants, even if the proforma defendant no.3 met her demise during pendency of the suit, nothing hinges on the same, since the suit could at best have abated against the proforma defendant no.3, which could not vitiate the entire decree, which

revolves around the defendant no.1/appellant, as a nullity.

14. The appellants' argument that there is no concept in law distinguishing a "defendant" and a "proforma defendant" is accepted. However, it has been the established practice in Courts to arraign parties as "defendants" where relief has sought against them and they are deemed to be necessary parties, and as "proforma defendants" where they are perceived to be proper parties but no relief is sought against them. Hence, even without going into the basis of such distinction, we find that the demise of the deceased proforma defendant no.3 did not vitiate the decree as a whole, since no relief was sought against her in the first place and even if the suit abated as against her, the decree against the defendant no.1 solely could not have been tainted in any manner by such demise.
15. In such view of the matter, we do not find that any substantial or arguable question of law has been made out in the appeal.
16. Accordingly, SAT 83 of 2025 is dismissed under Order XLI Rule 11 of the Code of Civil Procedure.
17. CAN 1 of 2025 is dismissed accordingly as well.
18. There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)