

(1972) 10 MP CK 0008
In the Madhya Pradesh High Court
Case No : F.A.O. No. 68 of 1968

Amalgamated Coal Fields Ltd.

APPELLANT

Vs

Mst. Chhotibai and Others

RESPONDENT

Date of Decision : 09-10-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 11, Order 44 Rule 1
Fatal Accidents Act, 1855 — Section 2
Limitation Act, 1908 — Article 21, 6, 7

Citation : (1973) ACJ 365 : (1978) ILR (MP) 60 : (1973) JLJ 276

Hon'ble Judges : Shiv Dayal Shrivastava, J; J.S. Verma, J

Bench : Division Bench

Advocate : C.P. Sen, for the Appellant; J.P. Dwivedi and R.C. Rai, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Dayal, J.—This appeal arises from a judgment and decree of the Additional District Judge, Chhindwara, awarding Rs. 9,000/- as damages to the Plaintiffs. Cross objections have been filed by the Plaintiffs for enhancing the amount of damages.

2. Respondent No. 1, Mrs. Chhotibai, is the widow, and Respondents 2 to 6 are the daughters of deceased Laxmiprasad, who was employed as Line Mazdoor in the Datla West Colliery belonging to the Appellant Company. He was suffering from acute anemia. He was admitted to the Barkuhi hospital which is managed by the Appellant Company. He died on or about June 2, 1962 in suspicious circumstances. The post-mortem examination revealed that he died of poisoning. Dr. Grewal (Respondent No. 7) is the Chief Medical Officer of that hospital.

3. The Plaintiffs' case was that Laxmiprasad died due to utter negligence of the Barkuhi hospital authorities. Garib Khan (P.W. 1) who was an indoor patient in the hospital stated that on the morning of June 2, 1962, Waghmare, an employee of the hospital, administered some medicines to some patients after

taking which Laxmiprasad died. He and Premchand felt tingling sensation in hands and feet. Ramtahal also complained some sensation in hands and feet and had burning in the throat. Premchand fell from his cot and died. Laxmiprasad also died. Ramtahal (P.W. 2) corroborated him. Dr. Grewal admitted that symptoms disclosed that the death of Laxmiprasad was due to poisoning. An autopsy was performed by Dr. K.P. Sengupta who found that death was due to ingestion of toxic material and poisoning. There was a faint suggestion from the Appellant that since Laxmiprasad had taken tea in the morning, there was some possibility that poisoning was due to it. But this was rightly rejected by the learned trial Judge as baseless.

4. The trial Court found that death of Laxmiprasad was due to negligence of the hospital staff. It awarded Rs. 9000/- as damages to his heirs.

5. It is first contended for the Appellant that the suit was barred by time as it was instituted on August 27, 1963 while the death of Laxmiprasad occurred on June 2, 1962. Article 21 of the Limitation Act, 1908 applies. This objection was not taken in the written statement nor in the memorandum of appeal in the Court. However, it being a question of law, we permitted the Appellant to raise that question inspite of the Respondents' opposition.

6. It is true that the suit was instituted after the expiry of one year from the date of Laxmiprasad's death, but on the date of the suit, all the five daughters of the deceased were minors, being between 6 to 17 years. Thus Section 7 of the Limitation Act is attracted.

7. Learned Counsel for the Appellant contends that Section 7 has no application inasmuch as Mrs. Chhotibai (Respondent No. 1) could alone bring the suit on behalf of all the legal representatives of the deceased. Reliance is placed on Section 2 of the Fatal Accidents Act, 1855 which reads thus:

Provided always that not more than one action or suit shall be brought for, and in respect of the same subject matter of complaint.

The argument is that since only one suit is permissible and, such a suit could be brought by Mrs. Chhotibai, the Plaintiffs were not entitled to the benefit of extension of time u/s 7 of the Limitation Act. Mr. Sen relied on *Johnson v. The Madras Railway Company* ILR 28 Mad. 479, In our opinion, this contention is not tenable. The main Section 7 of the Limitation Act has two parts. We will reproduce them separately as follows:

Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and (a) a discharge can be given without the concurrence of such person, time will run against them all;

but, (b) Where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Clearly enough, Section 7 is a proviso to Section 6. It extends the period of limitation prescribed in the First Schedule of the Limitation Act on the ground of disability of one or more of several persons who are jointly entitled to sue, (or apply execution). The first requisite of the section, therefore, is that there must be more than one person who are "jointly entitled" to institute the suit, which expression refers to cases in which the cause of action is common to them. In other words it applies when the procedural right to sue is joint, irrespective of whether the substantive right is or is not joint.

8. Now, it is the requirement of Section 2 of the Fatal Accident Act, 1855, that only one suit can be brought although the legal representatives of the deceased may have distinct interest. Thus, in the present case, on the death of Laxmiprasad, the Plaintiffs-Respondents, who are his heirs, have different and distinct interests. They are tenants-in-common, not joint tenants.

9. Once it is found that Section 7 of the Limitation Act applies to a suit because one of several persons jointly entitled to institute a suit is under any such disability as is described in Section 6 of the Limitation Act, the next and significant question to be asked is whether one of such persons, who is not under a disability can give a discharge without the concurrence of the person or persons under disability. If the answer is in the affirmative, the first part of Section 7 will apply; but, if the answer is in the negative, the second part of that section will apply. In other words, under this section, limitation is either extended with reference to the entire body of persons jointly entitled to sue, or limitation is not extended at all. Limitation is not extended merely with reference to persons under disability. For the purposes of this section all swim together; either they cross through together, or sink together. If a discharge can be given by a claimant, who is free from disability without the concurrence of those who are under disability, then time runs against all of them, and limitation is not extended with reference to any of the joint claimants. On the other hand, if such discharge cannot be given, the second part of the section comes into play and limitation will be extended with reference to all the joint claimants.

10. The question whether a claimant, who is free from disability, can or cannot give a discharge without the concurrence of those who are under disability depends upon the substantive law applicable to the case. One of several co-heirs, who are in the position of tenants-in-common, cannot, generally speaking, give such discharge. The reason is plain enough. In the case of tenants-in-common, the interest of each one of them is separate and distinct. Therefore, one person can give discharge in respect of his own right, but he cannot give discharge in respect of the right of any other. The case of joint tenants may be different. For instance, in the case of Mitakshara Hindu joint family, the manager may be entitled to give discharge in respect of a claim on behalf of the entire family. The word "discharge" when used with reference to a legal obligation means a release from such obligation. The power must be to release a person from liability.

11. It is equally clear that the discharge contemplated by Section 7 of the Act is

one which can be given by a joint claimant in his own right as such joint claimant. The power, therefore, which a joint claimant has, as a guardian of another claimant, to give a discharge on the latter's behalf is not sufficient for the purpose of this section.

12. Section 7 of the Act makes a clear distinction between a joint substantive right of the parties and a joint right to sue. There may be three kinds of cases:

(i) Where there is a joint substantive right based on the substantive law, but the right to sue is not joint.

(ii) Where the substantive right is joint and the right to sue is also joint; and

(iii) Where the substantive right is not joint but the right to sue is joint.

In the first case, Section 7 will have no application because of its opening words. In the second case, the first part of Section 7 may apply. In the third case, it is the second part of Section 7 which will apply. Judged by these propositions in the present case, since the Plaintiffs-Respondents who are co-heirs, as tenants-in-common, having distinct shares, and since Mrs. Chhotibai could not under the Hindu Law give a discharge in her own right in respect of the rights of her daughters, the third proposition applies so that the second part of Section 7 comes into play. Therefore, limitation was extended in favour of the entire body of the Plaintiffs who had a joint right to sue. It must, therefore, be held that the suit was within limitation.

13. It is next contended before us that the Appellant Company who runs and manages the hospital is not liable for negligence of the staff. All that the Appellant Company could do was to employ competent hospital staff. Reliance is placed on Charlesworth on Negligence, third edition, paragraph 768, and the decision in *H. Ulyer v. St. Bartholomew's Hospital* (1909) 2 K B 820 where Kennedy L.J. said:

I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient that the hospital authority makes itself liable to damages if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal.

14. It is clear to us that the above passage from the judgment of Lord Kennedy, L.J. is not apposite to the present case. A distinction was drawn by the Lord Justice between professional duty and administrative or ministerial duty. In the same case, the Lord Justice observed as follows:

It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards,

the summoning of medical aid in cases, of emergency, the supply of proper food, and the like.

See also per Lord Sankty in *Lindsey C.C. v. Marshall* (1937) A.C. 97, 114 The latter observations apply to the present case. It was negligence of Waghmare which caused the death of Laxmiprasad, and not of the surgeon. The negligence was in performance of a purely ministerial duty. That is sufficient for the present case, although, as stated in the following paragraph (771) in Charles-worth's treatise:

The distinction drawn by Kennedy L.J. between professional duties and ministerial or administrative duties has been disapproved, and the law now is that hospitals are liable for the negligence of the members of the hospital staff whether they are nurses or doctors.

15. This matter has been considered by their Lordships of the Supreme Court in *Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Another*, who have laid down thus:

The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care.

Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires: (cf. Halsbury's Laws of England, 3rd Ed. Vol. 26, p. 17). The doctor no doubt has a discretion in choosing treatment which he purposes to give to the patient and such discretion is relatively ampler in cases of emergency.... In our view, there is no reason to think that the High Court was wrong in its conclusion that death was due to shock resulting from reduction of the fracture attempted by the Appellant without taking the elementary caution of giving anesthetic to the patient. The trial Court and the High Court were, therefore, right in holding that the Appellant was guilty of negligence and wrongful acts towards the patient and was liable for damages.

The second contention must also be rejected.

16. It is then contended that the quantum of damages awarded by the trial Court is excessive. The age of the deceased at the time of his death was 30 years. He was drawing Rs. 68.79 paise per month. The trial Court assessed the expectation of the life of the deceased at 45 years, so that the loss of earning was for 15 years. The deceased would have earned Rs. $68.79 \times 12 \times 15 = 12,382.20$ paise. Out of this amount, the deceased would have spent at least Rs. 2,382.20 paise

during the above period. Thus the loss of earning was estimated at Rs. 10,000 out of which a lump sum amount of Rs. 9,000 was awarded, as the Plaintiffs could deposit that amount and earn Rs. 1,000 by way of interest. Learned Counsel for the Appellant contends that the deceased would have spent on himself much more than was estimated by the trial Court. We are of opinion that he would have spent at least Rs. 38.79 paise for himself so that for his heirs he could spare not more than Rs. 30 per month.

17. Cross-objections have been filed by the Plaintiffs. They challenge the assessment of the trial Court that the deceased could have lived only upto the age of 45 years. We accept this contention and it would be only fair to estimate that he would have lived for at least 25 years more. A fresh calculation on this basis would be as follows. $\text{Rs. } 25 \times 30 \times 12 = \text{Rs. } 9,000$.

18. In the result, we have reached the same figure which was allowed by the trial Court. Therefore, the appeal and the cross objections are both dismissed. The Appellant shall pay to the Plaintiffs-Respondents all costs of this appeal. Since the Plaintiffs-Respondents were allowed to file the cross-objections as paupers, court-fee due on the cross-objection, that is Rs. 553.30 p. would be recovered from them by virtue of the provisions of Order 44, Rule I, read with Order 33, Rule 11 of the Code of Civil Procedure.