
(1973) 01 MAD CK 0009

In the Madras High Court

Case No : Appeal Against Order No. 94 of 1966

C.P. Kandaswamy and Others

APPELLANT

Vs

Mariappa Stores and Others

RESPONDENT

Date of Decision : 22-01-1973

Acts Referred:

Probate and Administration Act, 1881 — Section 89
Succession Act, 1925 — Section 306

Citation : AIR 1974 Mad 178 : (1973) ILR (Mad) 218

Hon'ble Judges : N.S. Ramaswami, J; Kailasam, J

Bench : Division Bench

Judgement

N.S. Ramaswami, J.—A preliminary objection regarding the maintainability of this Civil Miscellaneous Appeal is raised by the contesting

respondents and we think that the objection has to be upheld and the appeal dismissed. The appeal arises out of a claim of Rs. 25,000/- made by

one Mr. C. P. Kandaswami, an Advocate practising at Coimbatore, for injuries sustained by him in a motor accident that occurred on 1-11-1962

on the Perundurai-Erode Road. He was travelling in a Fiat Taxi bearing registration No. MDE 5747 and proceeding from Perundurai to Erode,

when the Ambassador car bearing registration No. MDY 7077 belonging to the 1st respondent to the petition and driven by the 1st respondent's

driver Senniappan came in the opposite direction in a rash and negligent manner, dashed against the Fiat Taxi and thereby caused several injuries

to Mr. Kandasami, the petitioner. The petitioner claimed in all a sum of Rs. 25,000/- made up of Rs. 1,000/- towards medical expenses, Rs.

4,000/- towards loss of professional income Rs. 10,000/- for shock, pain and suffering and another sum of Rs. 10,000/- for the permanent partial

disability suffered by him on account of the accident.

2. The four respondents impleaded in the petition are the owner of the Ambassador car (1st respondent). The owner-driver of the Fiat taxi (2nd

respondent), the insurer of the Ambassador car (3rd respondent) and the insurer of the Fiat taxi (4th respondent). The Motor Accidents Claims

Tribunal, Coimbatore found that the accident was as a result of rash and negligent driving of the Ambassador car MDY 7077 belonging to the 1st

respondent and that therefore the compensation payable to the petitioner should come out of the 3rd respondent, the insurer of the said

Ambassador car. Though the petitioner claimed a total sum of Rs. 25,000/- the Tribunal awarded only a sum of Rs. 5,000/- made up of Rs.

1,000/- towards medical expenses, Rs. 2,000/- towards loss of professional income during the period when the petitioner was unable to attend to

his professional work and another sum of Rs. 2,000/- towards shock, pain and suffering as a result of the injuries sustained. The Tribunal negated

the rest of the claim. Respondents 1 and 3, against whom the above said compensation was awarded by the Tribunal, accepted the award by

the Tribunal, accepted the award and they have not filed any appeal against the same. The petitioner (claimant) filed this appeal in respect of the

disallowed portion of the claim. After the filing of the appeal, the petitioner died. His legal representatives have now come on record as appellants.

But even when they were impleaded as legal representatives, it has been made clear that such impleading was only subject to the question whether

the cause of action survived after the death of Mr. Kandasami, the petitioner-appellant.

3. Now, the preliminary objection raised by the contesting respondents is that after the death of Mr. Kandasami, the cause of action did not

survive on the maxim *actio personalis moritur cum persona*. There are two aspects to this question. The first is whether the physical injuries

sustained by the petitioner come under the clause "other personal injuries not causing the death of the party" excepted u/s 306 of the Indian

Succession Act. The second aspect is, the claim having been filed by the injured himself and the same having been partially allowed, after which the

injured himself filed the present Civil Miscellaneous Appeal, whether on his death during the pendency of the appeal, the appeal should abate.

4. A plain reading of Section 306 of the Indian Succession Act would undoubtedly go to show that the cause of action regarding the injuries

sustained by the petitioner in this case would not survive on his death. We will extract Section 306 and it is as follows:--

All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favor of or against a person at the time

of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal

Code, or other personal injuries not causing the death of the party; and except also cases whether, after the death of the party, the relief sought

could not be enjoyed or granting it would be nugatory.

Illustrations

(i) A collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to

cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(ii) A sues for divorce. A dies. The cause of action does not survive to his representative.

5. The question is whether the clause "'other personal injuries not causing the death of the party'" would take in the physical injuries sustained by the

petitioner in this case. We have no doubt that the present case would come under the above said clause which means that the cause of action

would not survive after the death of the injured. The learned counsel for the present appellants (the legal representatives of the petitioner),

however, contends that the above said clause, viz., "'other personal injuries not causing the death of the party'" should be construed *enjusdem*

generis and as the earlier clauses, which relate to causes of action which would not survive the death of the wronged, do not relate to physical

injuries, the above said clause, viz., "'other personal injuries not causing the death of the party'" should also be construed as relating to injuries other

than physical injuries. This contention is undoubtedly fallacious. The earlier clauses which enumerate the causes of action which do not survive after

the death of the wronged include not only defamation, but also assault as defined in the Indian Penal Code. We are unable to agree with the

contention of the learned counsel that assault does not involve any physical

injury. A perusal of the definition of the word "assault" in the Indian Penal Code would go to show that it is a physical injury which falls short of criminal force. Therefore, even on the principle of ejusdem generis, it is not possible to accede to the contention of the learned counsel that the clause "other personal injuries not causing the death of the party" does not take in causes of physical injuries. In fact, the very clause in question gives an indication that it relates to physical injuries as well, for it speaks of injuries not causing the death of the party. Unless the clause relates to physical injuries, there is no question of death of the party being linked with them. If physical injuries are so serious as to cause the death of the party concerned, then the cause of action is with the dependents as defined under the Fatal Accidents Act and there would be no question of the cause of action not surviving. But, if the physical injuries are not so serious as to cause the death of the man, the cause of action is available to the injured himself, and if he dies later (not due to the physical injuries suffered), the cause of action would not survive to his legal representatives. That is the effect of Section 306 of the Indian Succession Act. As a matter of fact. Illustration (i) to Section 306 makes it abundantly clear that the clause in question does relate to cases of physical injuries. That illustration says that in a case where a railway passenger is severely hurt (physical injury), but not so as to cause death, due to neglect or default on the part of railway officials, the cause of action would not survive after his death. This illustration would squarely apply to the present case.

6. On the second aspect of the question also, we are clear that the fact that the claim had been partially allowed by the Tribunal and an appeal regarding the disallowed portion had been filed by the injured himself, does not make any difference and that the appeal abates because, on the death of the injured pending the appeal, the cause of action regarding the disallowed portion of the claim does not survive. If the claim merges into a decree and the decree itself is being challenged by the opposite party, then the maxim action personalis moritur cum persona has no application. For instance, in the present case, if the insurance company has filed an appeal against the award of the sum of Rs. 5,000/- made by the Tribunal below, the death of the petitioner pending such appeal would not affect the rights of the legal representatives to contest the appeal as respondents

therein. But that is not the case here. the appeal is one by the injured in respect of the disallowed portion of the claim. The injured having died

subsequently, the cause of action regarding the disallowed portion of the claim, which has not so far fructified into a decree, would not survive as

per the terms of Section 306 of the Indian Succession Act.

7. Let us look at the case law on this question. *Paramen Chetty v. Sundararaja Naick*, ILR (1903) Mad 499 is a case of a suit for damages for

malicious prosecution. The suit had been decreed and an appeal to the District Judge had also been dismissed. The defendant filed a second

appeal to this court, but during the pendency of the second appeal, he died. His legal representatives prosecuted the second appeal. The objection

raised was that the legal representatives of the defendant to the suit cannot maintain the second appeal. The objection raised was that the legal

representatives of the defendant to the suit cannot maintain the second appeal on the ground that the cause of action for damages for malicious

prosecution could not survive after the death of the defendant. That was negated by a Bench of this Court. That is so, because the claim has

already merged into a decree and when the decree was being challenged in appeal, there is no question of the cause of action not surviving after

the death of the defendant-appellant. It was pointed out that the final judgment having been given against the defendant during his lifetime and the

cause of action having merged in the decree, the legal representative of the defendant is entitled to prosecute the appeal in order to get rid of the

decree which otherwise must be satisfied out of the estate of the deceased. As we said, in the present case, the appeal is not against that portion of

the claim that has been allowed. But, it is in respect of the disallowed portion of the claim. Therefore, the above decision would have no application

to the present case.

8. In *Rustomji Dorabji Vs. W.H. Nurse and Parthasarathi Naidu*, a Full Bench of this court has held that where in a suit for malicious prosecution

the defendant dies after the institution of the suit but before judgment is given, the right to sue does not survive within the meaning of Order XXII,

Rule 1 of the Code of Civil Procedure. In that case, it seems to have been contended that the term ""personal injuries not causing the death of the

party"" in Section 89 of the Probate and Administration Act (corresponding to

Section 306 of the Indian Succession Act) would relate only to bodily injuries and not to injuries such as malicious prosecution. Such a contention had been negatived by this court. What the learned counsel for the appellants in the present case contends is the converse position. As already noticed, he would say that the term "other bodily injuries not causing the death of the party" would not take in injuries to the body but only injuries such as defamation, malicious prosecution, etc. We have already pointed out that such a contention is wholly baseless. The observation of the Full Bench in the above case, *Rustomji Dorabji Vs. W.H. Nurse and Parthasarathi Naidu*, indicates clearly that the said clause would take in cases of bodily injuries as it is pointed out there that it would take in not only cases of bodily injuries but all other injuries, In *R. Kandaswami and Others Vs. R. Thirugnanasambandam and Others*, Anantanarayanan, C. J., has followed the above decision.

9. There is another Full Bench decision in *S.T.M.R. Murugappa Chettiar and Another Vs. Ponnuswami Pillai*, . That is exactly a similar case as the present one regarding the question whether an appeal would abate on the death of the injured in cases whether the cause of action does not survive as per the terms of Section 306 of the Indian Succession Act. That was a case where a person sued for damages for malicious prosecution and obtained a decree but preferred an appeal claiming more damages than he has been awarded and died pending the appeal. The Full Bench held that the appeal abates. That squarely applies to the present case, as in this case also the appeal is in respect of the disallowed portion of the claim and the appellant having died, the appeal should abate.

10. The learned counsel for the appellants referred to *Piriska Rozario and Others Vs. The Ford Foundation and Another*, which is a case of a claim before the Motor Accidents Claims Tribunal for injuries sustained in the motor accident. The man died after instituting the claim. But the death was due to injuries sustained in the motor accident itself. Therefore there was no question of the cause of action not surviving, for the dependants of the deceased who ultimately succumbed to the injuries had a right to claim compensation for the death of the man. Therefore, the decision has no application here. *State of Andhra Pradesh v. Godavarthi Kasiviswanadham* AIR 1970 A.P. 80 is a case under the Andhra

Pradesh General Sales Tax Act. It was pointed out there that the principle action personalis moritur cum persona has no application where the law

clearly provides for the survival of the liability after the death of the concerned person. We do not see how this has any application to the present

case. *Margarida Gomes and Another Vs. Mackinnor Mackenzie and Co. Pvt. Ltd.*, is a case arising under the Workmen's Compensation Act.

The workman who was injured died during the claim proceedings. The court held that Section 306 of the Indian Succession Act does not apply on

the ground that the compensation payable under Workmen's Compensation Act does not arise out of any tort or wrong-doing by the employer,

that the liability is an absolute one and that the liability to pay compensation is created immediately on the accident occurring and the workman

suffering injury and must amount to a debt payable to the workman and passes on the heirs of the workman on his death. It was under such

circumstances it was held that the claim does not abate on the death of the workman during the pendency of the claim proceedings and Section

306 of the Indian Succession Act has no application to such a case. That decision would have no application at all to the present case.

Undoubtedly, the claim in the present case arises out of tort and not a statutory liability as one under the Workmen's Compensation Act resulting

in liability to pay compensation being created immediately on the accident and the compensation amounting to a debt payable to the workman

immediately on such accident,. All that the learned Judge of the Bombay High Court in the above case has said is that on the principle of *ejusdem*

generis the words "'other injuries'" occurring in Sec. 306 of the Indian Succession Act must be confined to the injuries of the nature referred to

earlier in the said Section and that the said clause would not take in injury to a workman resulting in compensation under the Workmen's

Compensation Act, as such compensation is not born out of any tort. This decision of the Bombay High Court cannot be construed as saying that

all cases of bodily injuries are outside the purview of the clause "'other personal injuries not causing the death of the party'". As already pointed out,

the very illustration to Section 306 makes it abundantly clear that bodily injury caused due to the tortious act of the wrong-doer is taken in by the

clause "'other personal injuries not causing the death of the party.

11. We have no doubt that the cause of action relating to the disallowed portion of the claim, which is the subject-matter of the appeal before us,

does not survive after the death of the petitioner and that therefore the appeal abates. The result is, the appeal is dismissed. But under the

circumstances, there would be no order as to costs.

12. Appeal dismissed.