(1971) 01 CAL CK 0004

In the Calcutta High Court

Case No : Suit No. 2944 of 1947

Diamond Sugar Mills Ltd. APPELLANT

Vs

Makhan Lal Murarka RESPONDENT

Date of Decision : 15-01-1971

Acts Referred:

Banking Companies Act, 1949 — Section 45A, 45B
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3(1), 2(11)
Probate and Administration Act, 1881 — Section 89
Succession Act, 1925 — Section 306

Citation : (1971) 2 ILR (Cal) 59

Hon'ble Judges : Ghose, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ghose, J.—This is an application, inter alia, for recording the death of the Defendant No. 2, Chunilal Murarka, and for getting the heirs and legal representatives of the said deceased Defendant substituted in this suit as Defendant Nos. 2(A) to 2(E) respectively and for consequential amendment of the plaint and cause title.

2. The suit was filed by the Plaintiff company, inter alia., for a decree for the sum of Rs. 16,81,776-1-6 on account of misappropriation and acts of misfeasance and malfeasance, amongst others, by the said Chunilal Murarka, one of the Joint Managing Directors of the Plaintiff No. 2.

3. It is contended on behalf of the Respondents that the suit is for damages for having committed acts of misfeasance. The cause of action does not survive, as against the Respondents mainly because it is a suit for damages for negligence. The Respondent relied on (1930) L.R. 57 I.A. 144 (Privy Council) ; Brahmayya & Company v. V.S. Ramaswami Aiyer (supra); Peoples Bank of Northern India Ltd. v. Desraj and Ors.; Bhupendra Narayan Sinha v. Chandramoni Gupta.

4. In the case of Adjai Coal Company Ltd. v. Pannalal Ghose and Ors. the owners

of a coal mine sued the lessees of a adjacent mine for damages for wrongful encroachment upon and removal of coal from their mine. One of the trespassers only was alive when the suit was brought. During the pendency of the suit the said trespasser also died. The suit was revived against his son and heir. The other Respondents were the" heirs and legal representatives of the deceased trespasser. It was contended that the cause of action was for damages and, as such, did not survive against any of the Defendants, Their Lordships of the Privy Council observed that the cause of action did survive in view of the fact that the action was for the recovery of property or its value after its conversion.

5. In the aforesaid case, Brahmayya and Co. Official Liquidators, Hanuman Bank Ltd. (In Liquidation) Vs. V.S. Ramaswami Aiyar and Another, , it was held by Sadasivam J. of the Madras High Court as follows:

The learned Advocate for the Respondents relied on the decision in Phillips v. Homfray (1883) 24 Ch. D. 439 and the maxim actio personalis moritur cum persona in support of his contention that the cause of action, if any, which the Official Liquidator had against Dewan Bahadur N. Swaminatha Iyer could not survive against the Respondents as the legal representatives. It was pointed out in the above decision that where the wrong-doer acquires no gain to himself at the expense of the sufferer as in the case of beating or imprisoning a man etc., the person injured has only a reparation for the delictum in damages but where besides the delicate property is acquired which benefits the wrong-doer, then an action for the value of the property shall survive against his heir.

6. The case of AIR 1935 705 (Lahore) . held that ''personal injury'' in Section 306 of Succession Act is used in the sense of bodily injury only. Cause of action against a Director of a company was held to survive against his legal representative for loss caused to the company for misfeasance. In Bhupendra Narayan Sinha Vs. Chandramoni Gupta, it was held by Cuming and Page JJ. that in India the doctrine of actio personalis moritur cum persona does not apply. It was observed after reciting from the judgment of Sadasiva Aiyer J. in Rustomji Dorabji v. Nurse AIR 1921 Mad. 1 by their Lordships that in any event the cause of action survived in view of special conditions of Section 89 of the Probate and Administration Act, 1881, and the Legal Representative''s Suits Act of 1885 so far as the same was not inconsistent with the previously mentioned Act.

7. In RM. P. KP. AR. Arunachalam Chettiar Vs. V.S. alias S.V.V. Subramanian Chettiar (died) and Veerappa Chettiar brought on record as L.R. of deceased, it has been held that the maxim actio personalis moritur cum persona is part of the law of the land except insofar as it has been modified by statute e.g. Section 89 of the Probate and Administration Act, 1881, mentioned above. The said Madras case (6), however, was a suit for damages simpliciter for malicious prosecution and the observations were made in the facts and circumstances of the said case. It is contended in the instant case that the cause of action does not survive as there is no administrator or executor to the estate of Chunilal Murarka, the deceased.

8. The second contention on behalf of the Respondent was that the grandsons of Chunilal Murarka, being Raj Kumar Murarka, Bijoy Kumar Murarka, Ajoy Kumar Murarka and Shri Kumar Murarka cannot be legal representatives or heirs of Chunilal Murarka under the Hindu Succession Act and, as such, they cannot in any event be substituted in the place and stead of Chunilal Murarka.-

9. Paragraphs 5 to 11 of the plaint state as follows:

5. The claim of Plaintiff No. 1 is against, the Defendant No. 2 and the said Radheylal Murarka and the said Chunilal Murarka for money, properties and assets wrongfully misappropriated and not accounted for and for loss and damages caused to it by the wrongful acts as hereunder stated.

6. Defendant No. 2 the said Radheylal Murarka and the said Chunilal Murarka paid or advanced or gave credit for la g> sums of money belonging to Plaintiff No. 1 to certain alleged firms, amongst others, Shewsankar & Company, Durga & Company and Agarwalla & Company etc. After giving credit for moneys repaid or returned by the said alleged firms there are still due and owing from the said alleged firms Rs. 10,38,601-1 0, Rs. 75,224-6-6 and Rs. 7,947-10-0 respectively to Plaintiff No. 1.

7. The said Radheylal Murarka and the said Chunilal Murarka opened or caused to be opened agencies of Plaintiff No. 1 at Shewrathgarh and Uskabazar in the name of Diamond Sugar Mills Agency, Uskabazar. The said Defendant No. 2, the said Radheylal Murarka and the said Chunilal Murarka paid or caused to be paid large sums of money to the said agencies. Neither the said agencies nor the Defendant No. 2 and the said Radheylal Murarka and Chunilal Murarka have accounted for the sums paid or caused to be paid or advanced.

8. The Defendant No. 2 and the said Radheylal Murarka aid the said Chunilal Murarka purporting to act on behalf of Plaintiff No. 1 carried on business in grain with an alleged firm, namely Lakshmi Narain & Company, and allowed the said alleged firm a credit of about Rs. 60,000 for alleged loss in respect of the said grain business. The Plaintiffs deny that there was any loss. They state that the alleged loss was fictitious and was manufactured for the purpose of squaring up of the accounts-of the said alleged firm for moneys of the Plaintiff No. 1 received by it. The alleged loss was set up as a devise or cloak for the purpose of misappropriating the moneys of the Plaintiff No. 1.

9. The Defendant No. 2 and the said Radheylal Murarka and the said Chunilal Murarka removed or caused to be removed large quantities of stores, electric fittings, furniture and other articles belonging to the Plaintiff No. 1 and have wrongfully appropriated the same for their own use. The value of such materials will exceed Rs. 5,00,000.

10. Plaintiff No. 1 claims to recover from the Defendant No. 2 and the Defendants Nos. 1(A) to 1(H) as heirs and legal representatives of the said Radheylal Murarka deceased and the Defendants Nos. 2(A) to 2(E) as heirs and

legal representatives of the said Chunilal Murarka deceased the said sum of Rs. 10,38,604-1-0, Rs. 75,224-6-6, Rs. 60,000,'' Rs. 7,947-10-0 and Rs. 5,00,000 aggregating to Rs. 16,81,776-1-6 besides damages and other sums that may be found due on accounting.

11. At all material times Defendant No. 2 and the said Radheylal Murarka and the said Chunilal Murarka occupied fiduciary position in relation to Plaintiffs, their assets and properties and were trustees and, as such, were and are liable to account in Calcutta within the aforesaid jurisdiction.

The prayer (2) in the plaint claims return of articles mentioned in para. 9 of the plaint belonging to the company and, alternatively, the value thereof. In the said case of Brahmayya and Company v. Ramaswami (Supra) a distinction was made between negligence simpliciter which is purely tortuous and breach of some special duty, as has been noted in the earlier part of the judgment.

10. The said observations were made in an application u/s 45A and 45B of" the Banking Companies'' Act against the legal representatives of a deceased Director, who died pending an application for misfeasance against him for recovery of monies misapplied or alleged to be lost to the bank by negligence. It was held that the liabilities of a Director as in the said case was not merely a liability in tort but a liability in quasi-trust.

11. It was held in Bireswar v. Sris Chandra (1945) 49 C.W.N. 765 that where parties are exempt u/s 212(2) of the Succession Act from applying for Letters of Administration, in suits involving cause of action affecting property not only the heirs but all ascertainable heirs of a deceased Plaintiff or Defendant should be substituted. In the said cases it was observed by Khundkar J. as follows:

It is plain that to extend Section 306 of the Succession Act to all causes of action, including those which themselves affect property, would be to stultify in large measure the provisions of Section 212(2), which exempt a Hindu, Mohammedan, Buddhist, Sikh, Jaina or an Indian Christian from applying for Letters of Administration in cases of intestacy. Moreover, such a construction" of Section 306 would raise a direct conflict with procedural provisions. These are contained in Order 22, Rule 3(1) which is in the following terms:

Where one of two or more Plaintiffs dies and the right to sue does not survive to the surviving 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.

The term ''legal representative'' is defined in the Code itself and is wider than the term ''executor'' or ''administrator'', for Section 2(11) states it to denote a person who in law represents the estate of a deceased person. This definition is wide enough to include the heirs of a deceased Plaintiff or Defendant. Indeed, even before the definition was incorporated in the Code, it was held that the term ''legal representative'' included heirs (see Dinomoni Chaudhurani v. Elahadut Khan).... It seems to me that the true doctrine is that whenever you find that the deceased person has by his wrong diverted either property or the proceeds of the property belonging to someone else into his own estate, you can then have to recourse to that estate through his legal representative when he is dead, to recover it, subject to the limitation that the decree will be limited to the assets of the deceased wrong-doer''s estate. Further, whenever, there is a relationship based on contract, quasi-contract, some fiduciary relation or a failure to perform a duty, there is no abatement of the* suit on the death of the wrong-doer.

12. The suit here is for recovery of money and property wrongfully misappropriated by the Director who stood in a fiduciary relationship. Therefore, the ratio in Brahmayya of Company v. V.S. Rama-swami Aiyer (Supra) and Bireswar v. Sri. Chandra (supra) will apply.

13. It should be noted, however, that Chunilal Murarka who was a Hindu governed by Mitakshara school of Hindu law died intestate. The presumption of Hindu law is that a Hindu governed by the Mitakshara school of Hindu law lives jointly in a joint family with his sons and grandsons unless the contrary is proved. Nothing has been stated in the instant case against the aforesaid presumption of facts. If Chunilal Murarka lived in a joint family with sons and grandsons and the monies and ''moveable alleged to have been misappropriated were accretions to the joint estate, then certainly the joint estate represented by both the sons and grandsons of Chunilal Murarka would be liable to refund the same. In that event grandsons also would be included in the word ''legal representative''s'' as defined in the Code of Civil Procedure, Section 2(11), according to which legal representative means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased.

14. The said definition is a very wide one and would include in my opinion the grandsons in the circumstances mentioned above.

15. For the reasons stated above this application must succeed and there shall be an order in terms of Clause (a), (b), (c), (d), (f), (g) and (h). The substituted Defendants will be at liberty to file additional written statement within a fortnight of the service upon them of an amended copy of the plaint.

16. Certified for counsel.