

(2001) 07 DEL CK 0175

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 11/97 and C.M. (Cross Objections) No. 1225/97

E.I. Ltd. and Another

APPELLANT

Vs

Klaus Mittelbachert (deceased) through L.Rs.

RESPONDENT

Date of Decision : 30-07-2001

Acts Referred:

Succession Act, 1925 — Section 306

Citation : (2002) ACJ 549 : AIR 2002 Delhi 124 : (2002) 95 DLT 617 : (2002) 62 DRJ 476

Hon'ble Judges : Sanjay Kishan Kaul, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Rajiv Dhawan and Ravi Sikri, for the Appellant; Yakesh Anand, for the Respondent

Final Decision : Allowed

Judgement

Devinder Gupta, J.—This regular first appeal has been preferred against the judgment and decree passed on 3.1.1997 by learned Single Judge of this Court decreeing the suit of the plaintiff against defendant/appellants for recovery of Rs. 50 lacs. Cross objections have been filed by respondents 1 and 2 representing the estate of the deceased plaintiff.

2. Facts in brief are that on 11.8.1975 Klaus Mittelbachert, a national of the Federal Republic of Germany and employed as a Co-Pilot by Deutsche Lufthansa Aktiengesellschaft, a company organized under the laws of the Federal Republic of Germany filed a suit for the recovery of damages to the extent of Rs. 50 lacs against the defendants/appellants, inter alia, alleging that in the evening of 11.8.1972 he flew into New Delhi from Bangkok with flight Lufthansa 647 and was to continue to Frankfurt with flight Lufthansa 649 on 14.8.1972. The plaintiff checked in and stayed at the appellant's hotel. As a part of the hotel the residents were offered facility of a Swimming Pool equipped with a diving board. In the afternoon of 13.8.1972 the plaintiff visited the pool with the purpose of using it.

At about 6 p.m. he took from the diving board thereof a dive into it. However, he hit his head on the bottom thereof and became unconscious. He was pulled out of water. He was bleeding from the right ear and was admitted to Holy Family Hospital. He remained admitted and under treatment till 21.8.1972 on which day he was flown to Germany under medical escort. On 22.8.1972 the plaintiff was admitted for treatment at the Orthopedic Clinic and Polyclinic of the University of Hoidelberg. Treatment continued and ultimately on 24.3.1973 the plaintiff was discharged from the clinic. Though further treatment continued but the condition of the plaintiff did not improve. The plaintiff in the plaint narrated details of the physical sufferings he had to undergo. He also referred to the expert opinion about disability suffered by him stating that he had undergone immense pain and sufferings and been deprived permanently of enjoyment of life. In this back ground, the plaintiff alleged that the accident was caused by what in the circumstances amounted to a trap. The diving board being placed where it was, was a suggestion that there was proper depth of water into which to dive. However, this was not the case. The defendants owed the plaintiff a duty to ensure his safety and having failed therein have been guilty of negligence and are, Therefore, liable for the consequences of the said accident for which the plaintiff claimed Rs. 25,000/- on account of doctors services and hospitalisation in India along with DM 56,22,500.00 (equivalent to Rs. 1,91,24,150.00 at the rate of exchange prevailing at the time of filing of the suit) on account of damages and various other counts. The plaintiff, however, restricted his claim to Rs. 50 lacs as on the date of filing of the suit towards damages reserving his right to enhance the claim, should the value of the Indian rupee in relation to the Berman Mark deteriorate between the time of the filing of the suit and payment of damages.

3. The suit was resisted by defendants, who in their written statement denied their liability. The defendants/appellants pleaded that there was no negligence on their part and that it was the plaintiff who was negligent or in any case the plaintiff was equally negligent, Therefore, under the doctrine of contributory negligence the plaintiff was not entitled to damages at all. In addition to the suit being resisted on merits, the defendants also raised number of preliminary objections. On the basis of the pleadings of the parties on 4.1.1977 the following issues were framed:-

1. Whether defendants 2 and 4 were in control of the premises of Hotel Oberoi Inter-continental on 13th August, 1972? If not, whether the suit is not bad for misguide of parties?
2. Whether the plaintiff was a co-pilot of Lufthansa and what was his age at the time of the accident?
3. Whether the defendants were guilty of negligence? If so, to what extent and to what effect?
4. Whether the accident in the swimming pool of Hotel Oberoi Intercontinental on

13th August, 1972 was on account of any trap laid by the defendants?

5. Whether there was any failure on the part of the plaintiff to take reasonable care of himself in his own interest and who had the last opportunity of avoiding the accident?

6. Whether the suffering of the plaintiff was the direct result of his own negligence and injection?

7. Whether the disabilities attributed to the plaintiff were the direct result of the accident which took place at the swimming pool of the Hotel Oberoi Intercontinental on 13.8.1972?

8. Whether the plaintiff is guilty of contributory negligence? If so, to what extent and to what effect?

9. Whether the plaintiff cannot be indemnified for the injuries suffered by him on 13th August, 1972?

10. To what amount, if any, is the plaintiff entitled?

11. Whether the plaintiff is entitled to any interest? If so, at what rate and what amount?

12. Relief.

4. Parties led oral and documentary evidence. Unfortunately, the plaintiff expired on 27.9.1985 due to acute cardiac arrest. Mrs. Edda Mittelbachert and Ms. Katja Mittelbachertt, the two legal representatives filed IA. 6166/85 seeking their substitution in place of the deceased. Application was vehemently opposed by the defendants, inter alia, on the ground that the cause of action did not survive to the proposed legal representatives as it was personal to the plaintiff and the suit had abated on his death.

5. On 17.2.1996 the following additional issues were framed:-

1. Whether the injury suffered by the deceased plaintiff on 13th August, 1972 caused his death on 27th September, 1985?

2. If above issue is held in favor of the defendants, does the right to sue still survive?

3. Relief.

6. Evidence on the additional issues was led by affidavits by the parties. Learned Single Judge thereafter heard arguments and on 3.1.1997 proceeded to pass a decree in favor of the respondent against the appellants for recovery of Rs. 50 lacs with cost of suit and interest at the rate of 6% p.a. with effect from 27.9.1985 till payment.

7. Aggrieved by the judgment and decrees, this first appeal was preferred by the appellants. In addition to challenging the judgment and decree on merits, the

appellants have also challenged the findings of learned Single Judge on additional issues No. 1 to 3 stating that the suit had abated on the death of the plaintiff and the legal representatives could not have been ordered to be brought on record. As noticed above, cross objections have also been filed by the legal representatives of the deceased plaintiff seeking further enhancement in the amount of damages.

8. We have heard learned counsel for the parties and been taken through the entire record.

9. Before considering the other questions, we would like to take up the prime question that whether the findings recorded by learned Single Judge on additional issue No. 2 are sustainable in law or in other words, whether the suit abated on the principle of *actio personalis cum moritur persona* or the cause of action survived to the legal representatives for prosecuting the suit.

10. Learned Single Judge after referring to the provisions of Section 306 of the Indian Succession Act, 1925 and to the judgment of Supreme Court in *M. Veerappa Vs. Evelyn Sequeira and Others*, held that the said provision would be attracted to the facts of case at hand since it was a claim arising on account of personal injuries sustained by the plaintiff. Submissions made on behalf of learned counsel for the plaintiff that the plaintiff's claim was founded both on tort as also on contract was accepted and the submissions made on behalf of the defendants that the claim was based purely on torts was turned down observing that once a guest enters the hotel premises and the hotel agrees to accommodate the guest, the hotel impliedly enters into a contract with the guest for his safety in the hotel. He further observed that five star hotel charges are not only the price but fancy price for providing luxurious stay and various services, which makes the stay not only comfortable but enjoyable also. Therefore, liability of owner of the hotel will be liability under the contract towards safety of the guests. Action seeking enforcement of liability under contract would not abate by the death of the injured plaintiff and cause of action would survive to the legal heirs. Submission of learned counsel for the defendants that in case the plaintiff was choosing to enforce liability arising out of contract, the claim had to be dismissed at its threshold as the hotel's contract was with Lufthansa and not with the plaintiff. The plaintiff being a third party to the contract was not entitled to sue. This submissions was also turned down on the ground that the doctrine of privity of contract is subject to many exceptions, one of which being that a beneficiary can sue on a contract for enforcement of the benefit intended to confer on him by the contract.

11. We have duly considered the submissions made at the bar on the findings recorded on additional issued No. 2. The maxim *actio personalis moritur cum persona* literally means that a personal action dies with the party to cause of action. This maxim has been applied to those cases where a plaintiff dies during the pendency of the suit filed by him for damages for personal injuries sustained by him. This maxim is applicable in India only to the extent it is recognised by

Section 306 and the principles underlying it. Section 306 of the Indian Succession Act reads as under:-

"306. Demands and rights of action of or against deceased survive to and against executor or administrator. - 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 where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

12. The object of Section 306 is to protect suits for wrongs done to the property of deceased but it does not extend that protection to compensation for personal injury, the right to which dies with the death of the person injured. Personal injuries not causing death are excluded from the operation of the section. In *M. Veerappa's case* (supra) it was held that "personal injuries" do not mean injuries to the body alone but all injuries to a person other than those which cause death and the relevant words must be read ejusdem generis with the words "defamation and assault" and not with the words "assault" alone. It was further held that if the claim is founded entirely on torts, the suit would abate on the plaintiff's death but such a suit would survive if the claim is based entirely on contract. In case action is founded partly on contract and partly on torts, then such part of the claim as it relates to contract would survive and the other part based on torts would stand abated. In para 10 of the report the Supreme Court held:-

"The maxim "action personalis cum moritur persona" has been applied not only to those cases where a plaintiff dies during the pendency of a suit filed by him for damages for personal injuries sustained by him but also to cases where a plaintiff dies during the pendency of an appeal to the Appellate Court, but it the First Appellate Court or the Second Appellate Court against the dismissal of suit by the Trial Court and/or the First Appellate Court as the case may be. This is on the footing that by reason of the dismissal of the suit by the Trial Court or the First Appellate Court as the case may be, the plaintiff stands relegated to his original position before the Trial Court. Vide the decisions in *Punjab Singh v. Ramautar Singh* AIR 1920 Pat 841 (supra), *Irulappa Konar and Others Vs. Madhava Konar (died) and Others*, , AIR 1938 216 (Nagpur) , AIR 1952 408 (Nagpur) and *Melepurath Sankunni Ezhuthassan v. Thekittil Gopalankutty Nair* (supra). In *Palaniappa Chettair Vs. B. Rajarajeswara Sethupathi Pathi alias Muthuramalinga Sethupathi Avergal, Rajah of Ramnal and Others*, and *Motilal v. Harnarayan* (supra) it was held that a suit or an action which has abated cannot be continued thereafter even for the limited purpose of recovering the costs suffered by the injured party."

13. In view of what has been laid down in *M. Veerappa's case* (supra), what now falls for consideration is whether the suit filed by the plaintiff was founded on

torts or on contract or partly on torts and partly on contract.

14. As noticed above, learned Single Judge held that it was a liability under the contract. With due respect such a conclusion on the basis of the case set up by the plaintiff is not at all possible. Whether the suit is based on tort or on contract has to be found out from the averments made in the plaint, which is the foundation of the claim. On careful reading of the plaint, no other conclusion is possible than the one that the foundation of the claim was an action in torts wherein the plaintiff alleged that the accident was caused because of the negligence on the part of the defendant by not taking due care and caution since the defendant owed to the plaintiff a duty to ensure the safety to which the defendant failed and thus is guilty of negligence, Therefore, liable for consequences of the accident. As a matter of fact, learned Single Judge proceeded to make out a totally new case for the plaintiff by coming to a conclusion that it was an action founded on contract for which no foundation was laid in the plaint or even in the application, which had been moved by the two legal representatives seeking their substitution. Being an action solely based on torts, the suit on the ratio of the decision in M. Veerappa's case (supra) abated on the death of the plaintiff and did not survive for consideration. In a suit, which had abated the heirs had no right to seek their substitution as legal representative of the deceased. Findings of learned Single Judge that it was a liability under the contract are erroneous in law and on facts and without any foundation and the same are liable to be set aside. As a consequence thereof, the appeal deserves to be allowed and the judgment and decree deserves to be set aside. In this view of the matter, we are not going into the other question of law and fact decided by learned Single Judge. In a suit, which had abated, learned Single Judge also ought not to have recorded findings on the other issues and for that reason alone decision of learned Single Judge on the other questions of fact is liable to be set aside thereby leaving the decisions on questions of law open in view of our coming to the conclusion that the entire judgment and decree is liable to be set aside and suit is liable to be dismissed as having abated. In view of the dismissal of the suit as having abated, the cross objections filed by the respondents are also liable to be dismissed.

15. On abatement of the suit filed by the plaintiff, what would be the consequences as regards the claim of the two legal representatives who had sought their substitution in place of the deceased that whether they would be entitled to claim damages against the appellants by filing a separate suit or by laying any other claim on the ground that they had been bonafide prosecuting their remedy are questions, which need not be decided by us as the same have not arisen for decision. In order to avoid unnecessary and any other possible litigation, it has fairly been conceded at the bar on behalf of the defendant/appellants and purely as a gesture of good will that irrespective of the result of the appeal and without admitting their liability to pay, the appellants will have no objection in case the amount of Rs. 86,21,700/- deposited by the appellants in this Court pursuant to the decree passed along with interest accrued thereon, is

paid to the respondents on their agreeing not to lay any claim in future arising out of the death of the plaintiff. Learned counsel for the respondents frankly and rightly so states that he has instructions to say that on receipt of the amount no claim of any nature will be laid against the appellants.

16. Consequently, the appeal is allowed. Judgment and decree passed by learned Single Judge is set aside including the findings recorded on various issues and leaving the questions of law open. Cross objections filed by the respondents are also dismissed. The parties are left to bear their respective costs. It is directed that the amount deposited in this Court along with interest accrued thereon be released in favor of the plaintiff/respondent. As the deceased was a national of Federal Republic of Germany and so are the legal representatives, it will be for them to seek appropriate permission from the Reserve Bank of India or any other authority in India permitting the amount to be transferred to their account in Federal Republic of Germany and in case such a request is made, the authorities will ensure that requisite permission in accordance with law is accorded, as expeditiously as possible.