

(1962) 07 PAT CK 0011
In the Patna High Court
Case No : A.F.O.D. No. 229 of 1956

Jogindra Kuer and Others

APPELLANT

Vs

Jagdish Singh and Others

RESPONDENT

Date of Decision : 25-07-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3, Order 1 Rule 9, Order 22 Rule 1, Order 22 Rule 11
Motor Vehicles Act, 1939 — Section 96
Probate and Administration Act, 1881 — Section 89
Succession Act, 1925 — Section 306

Citation : AIR 1964 Patna 548

Hon'ble Judges : Tarkeshwar Nath, J;H. Mahapatra, J

Bench : Division Bench

Advocate : S. Anwar Ahmad and S.P. Jamuar, for the Appellant; A.K. Bose and Ramnandan Prasad, No. 1, for the Respondent

Final Decision : Partly Allowed

Judgement

Tarkeshwar Nath, J.—Sardar Wazir Singh (Plaintiff) instituted a suit for recovery of Rs 12,500/- on account of loss and damages sustained by him in the following circumstances :-

2. The plaintiff was the owner of a motor car Hindustan 14, Registration No. BRB 456 Defendants 1 and 2 were the owners of a public carrier motor truck BRA 5610 and defendant No. 3 was the driver of that truck being an employee of the first two defendants Defendant No 4 (The Standard General Assurance Company Limited) was the insurer of the truck under Commercial Vehicle Comprehensive Policy No. CV 9650/53 On the 9th January, 1954, the plaintiff was going in his car from Gaya to Patna via Nawada and Bihar with his wife, sons and daughters and he was driving the car himself very cautiously and slowly, adhering to the traffic rules. At about 3-30 p. m. the plaintiff reached near village Mahanandpur between mile post No. 52/II and 52/III. He saw defendant No. 3 driving motor truck BRA 5610 and coming from opposite direction at a very high speed.

Defendant No. 3 was driving the truck on the wrong side of the road and in spite of plaintiff's blowing his horn, the former did not take necessary precautions, with the result that there was a collision of the truck with the plaintiff's car. The plaintiff was thrown out of the car and fell down near a bridge sustaining severe Injuries. Defendant No. 3 was extremely careless and negligent while driving that truck and he was mainly responsible for the rash driving the body, chassis and other parts of the plaintiff's car were extensively damaged and the plaintiff having received grievous hurt became unconscious. He was disabled from carrying on his normal duties for a period of about five months and had to be confined to bed in hospital for a long time. The plaintiff's wife and children sustained injuries and all of them were in great agony. The car itself became unfit for use and was lying at his house in Gaya.

The plaintiff and other members of the family were taken to the hospital at Biharsharif at about 5 p. m. and later on they were removed to the Medical College Hospital at Patna the following morning. There was X-ray examination and the major portions of the plaintiff's body were plastered. The plaintiff was confined to bed for five months and he could not move his right leg freely even now. The car was examined by the Motor Vehicles Inspector, Patna, on the 14th January, 1954, and he found it completely smashed and heavily damaged. Another examination was by the engineer on the 29th January, 1954 who estimated the cost of repairs at Rs. 5000/-. The plaintiff incurred expenses in treatment to the tune of Rs. 4000/-, there was loss in business due to non-supervision to the extent of Rs. 10,000/-, and a sum of Rs. 10,000/- was needed as compensation for the injuries sustained by him. The plaintiff thus suffered damages to the extent of Rs. 29,000/-, including the cost of repairs of the motor car but on account of his inability to pay the Court-fee he gave up his entire claim of Rs. 10,000/- in respect of the loss in business due to non-supervision and a further sum of Rs. 6,500/- out of Rs. 10,000/- in respect of the claim for compensation regarding the injuries sustained by him. He thus confined his claim only to Rs. 12,500/- A in the present suit Defendants 1 and 2 being owners of the truck were liable to compensate the plaintiff and similarly defendant No 4 as well was liable in accordance with the terms of the Insurance Policy. The plaintiff gave the details of the injuries sustained by him and other members of his family in Schedule A" of the plaint and damage to the motor car was indicated in Schedule "B". On these, allegations he instituted the suit on the 29th November 1954.

3. Defendants 1 and 2 alleged that they were not present at the time of the accident but they had learnt from defendant No 3 that the truck was moving in normal speed on the left side of the road and it was the plaintiff who drove his car on the wrong side at a very high speed. Defendant No. 3 was, no more in their employment and they did not know his whereabouts. They denied their personal liability and the extent of the damage claimed by the plaintiff. They averred that the truck having been insured, the Insurance Company (defendant No 4) was liable for the damage. There was no written statement by defendant

No. 3. Defendant No. 4 took up the plea that defendant No. 3 was licensed driver previously, but it was not known whether he had a licence on the date of the accident Defendants 1 and 2 had made a claim from the Insurance Company and they had alleged that the plaintiff's car was moving in a great speed and the driver of the truck was not to blame The truck in question was carrying a load of 90 to 180 mds and that being the position the Insurance Company was not liable to pay any amount inasmuch as the terms and conditions of the Policy had been violated. Besides that, defendant No. 3 was found to be intoxicated at the time of the accident and on that ground as well the plaintiff's claim was not maintainable. The plaintiff's claim was highly exaggerated.

4. On these pleadings, the Subordinate judge held that the plaintiff and the members of his family had sustained injuries and there was damage to the car as well, due to rash, negligent and wilful act of defendant No, 3 on the 9th January, 1954. As regards the amount of damages he found that the plaintiff was entitled to Rs. 2000/- only as compensation in respect of his injuries sustained by him; Rs. 1000/- in respect of the expeases incurred in his treatment and Rs. 2500/- as cost for the repairs of the motor ear He thus passed a decree for a sum of Rs. 3500/- against defendants 1 to 3 only and not against defendant No. 4, holding that the latter was not liable for the damages Being aggrieved by that decree, the plaintiff preferred this appeal as he wanted a decree for a sum of Rs 12,500/- against defendant No. 4 as well During the pendency of this appeal, the plaintiff died and his heirs have been substituted in his place as appellants

5. Learned counsel for the appellants submitted that the amount of damages ascertained by the trial Judge was extremely low and he placed before us the various items of claim made to the suit and the relevant evidence in this connection. It will be proper to deal with each item separately.

6-7. (After discussion of the evidence relating to the each item claimed His Lordship held that the plaintiff was entitled to a compensation of Rs. 3500/- on account of injuries sustained by him a sum of Rs. 1872/- on account of expenses incurred for his treatment and a sum of Rs. 2500 as the cost of repairs of his motor car. The judgment then proceeds.)

8. Learned Counsel for the appellants submitted that according to the terms of the insurance policy, defendant 4 was liable for the damage as the policy was comprehensive and the insurer was liable for the claim of the third party The limit of the claim in the policy (Ext. A) was up to Rs. 20,000/- but defendant 4 wanted to escape the liability an the ground that the terms of the agreement had been violated by defendants 1 and 2 it was urged that defendant 3 was not a licensed driver on the date of accident, he was intoxicated while driving the truck and lastly the truck itself was overloaded I would first deal with the question as to whether defendant 3 had a driving licence on the 9th January 1954. Defendant 4 admitted in the written statement that defendant 3 was a licensed driver previously but it was not known whether he had that license on the date of accident There was no clear denial that defendant 3 had no licence on the 9th

January, 1954 Defendants 1 and 2 made a claim and gave particulars of the motor accident, which have been marked Ext B. It was stated therein that Sardara Singh (defendant 3) was driving the truck and his licence was last renewed on the 7th January, 1953, and there was a further note that it was sent for renewal. Section 10 of the Motor Vehicles Act (Act IV of 1939) provides inter alia, that a driving licence issued or renewed under the Act, shall, subject to the provisions contained in this Act as to the cancellation of driving licences and the disqualification of holders of driving licences for holding or obtaining licences, be effective without renewal for a period of three years only, from the date of issue of the licence, or, as the case may be, from the date with effect from which the licence is renewed u/s 11, and the driving licence shall be deemed to continue to be effective for a period of thirty days after the date of its expiry. Previously, the period of currency of driving licences was one year but it has now been raised to three years by the Motor Vehicles (Amendment) Act 1956. We are, however, concerned as to what was period of currency before this amendment and at what time it was effective without renewal for a period of twelve months only from the date of issue or last renewal. Ext. B was signed by the insured Jagdish Singh (defendant 1) and is dated the 16th January, 1954. He made a statement (therein that the licence was sent for renewal. It is not known as to what happened after the licence was sent for renewal and what was position on the 9th January, 1954. Section 96 lays down the duty of insurers to satisfy judgments against persons insured in respect of third party risks. Insurance company can be made a party to the proceedings in order to enable it to safeguard its interest and it is open to it to defend the action on grounds mentioned in Sub-section (2) (a) and (b) of Section 96 of the Motor Vehicles Act, 1939. Clause (b) of Sub-section (2) of Section 96 provides that if there is a breach of the specified condition of the policy, that can be a valid defence in an action against the insurer for damages. One of the conditions is that the vehicle insured should not be driven by a person who was not duly licensed, vide Sub-clause II of Sub-section (2)(b) of Section 96. This defence was taken by defendant 4 in the present action but the company (defendant 4) did not satisfactorily prove that defendant 3 had 10 driving licence or was disqualified on the date of the accident i.e., 9th January, 1954. Turning however, to the commercial vehicle policy No. CV/D/ 9350, which has been marked Ext A, it appears that one of the terms of the policy was that the truck had to be driven either by the insured or by any person, provided he was an employee of the insured or was driving with his permission. There was a proviso in that term which runs as follows:

"Provided that the person driving holds a licence to drive the Motor Vehicle or has held and is not disqualified for holding or obtaining such a licence."

9. According to this proviso, even if a person held a licence and was not disqualified for holding or obtaining such a licence, he was competent to drive the vehicle in question. It was open to defendant 4 (Insurance Company) to make enquiries and ascertain as to whether defendant 3 had been disqualified from getting renewal of the licence but no step seems to have been taken in that

direction. The fact that defendant 3 held a licence and it was sent for renewal cannot be denied in view of Ext. B. But the question is, as to whether he was disqualified on the 9th January, 1954, for holding a licence. Defendant 4 having taken a plea with regard to the breach of the terms of the policy, onus lay upon it to establish that defendant 3 was disqualified but that onus has not been discharged. Proper materials in this respect are lacking and have not been produced before the Court, In such circumstances, it cannot be held that there was any breach of the term of the policy in this respect.

10. Another ground of attack was that defendant 3 was intoxicated at the time of driving the car. (After discussion of evidence His Lordship concluded). In these circumstances, the trial Judge rightly held that defendant 3 was not in a drunken state at the time of the accident

11. Learned counsel for the defendant 4 pointed out that at the time of accident, potatoes 90 to 100 mds were loaded on the truck, but according to the terms of the policy, loading capacity of the truck was not to exceed 3 tons. The Subordinate Judge held that 3 tons were equivalent to 81 or 82 mds and as such, the truck was overloaded and there was a violation of the terms of the policy. In Ext B it was stated that about 90 mds of potatoes were loaded on the truck. That statement by Jagdish Singh (defendant 1) was made on a rough estimate, but he has not been examined. It has thus not been possible to elicit, as to whether the potatoes were actually weighed before loading them on the truck. The Subordinate Judge referred to the weight of the potatoes "90 mds to 100 mds" having taken that from the written statement of defendant 4, but D W 1, the solitary witness for that defendant, has not said anything about the weight. The plaintiff cannot be pinned down to the statement made by Jagdish Singh (defendant 1) in Ext B with regard to the weight of the potatoes, given there on a rough estimate. I would, therefore, hold that there was no violation of the terms of the policy on any ground.

12. It may be mentioned that defendants 1 to 3 have not appeared to contest this appeal. Learned counsel for defendant 4 however, contested this appeal on another ground which is of great importance. He submitted that the plaintiff having died during the pendency of this appeal his right to seek any relief was at an end and his substituted heirs could not prosecute this appeal any further. He relied on the Common Law Maxim, "Action Personalis Moritur Cum Persona" and submitted that the right to recover damages came to an end with the death of the appellant in this appeal. This maxim means that "personal right of action dies with the person" in other words, "death destroys the right of action". A personal action is one which does not relate to immovable properties. As a general rule, an action in respect of tort should commence in the life time of the person injured, but if that person dies before an adjudication, the action abates and cannot be continued by his legal heirs and representatives. To put it in other words, the right to sue for tort is extinguished by the death of the person aggrieved. This rule has been whittled down by certain statutes such as Fatal Accident Act, 1846, the

Land Reform (Miscellaneous Provisions) Act, 1934. and other enactments. There being no specific statute in India on this topic that maxim of the English Common Law has been followed here to some extent. The matter was at one time governed by Section 89 of the Probate and Administration Act, and now by S 306 of the Indian Succession Act which runs thus:

"All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour 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 "

According to this section, all rights to prosecute or defend any action or special proceedings existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except certain causes of action including those for other personal injuries not causing the death of the party. In the present case plaintiff did not die on account of injuries sustained by him and as such it has been urged by learned counsel that the cause of action in respect of personal injuries did not survive after the death of the plaintiff.

13. The question for consideration is, as to what is the effect of the death of the plaintiff-appellant and whether his substituted heirs have a right to press their claim against defendant 4 or for any higher sum against defendants 1 to 3. A similar question arose in this Court as early as in 1919, in the case of Punjab Singh v. Ramautar Singh 4 Pat LJ 676: AIR 1920 Pat 841. Plaintiff Khublal in that case had filed a suit for recovery of Rs. 2521/- and odd as damages for malicious prosecution. The trial court dismissed the suit but after that decree, Khublal died. His legal representatives preferred an appeal before the lower appellate court and it decreed the plaintiff's claim to the tune of Rs. 1000/- Being aggrieved by that decree, defendants preferred a second appeal and took up the point that the cause of action died with Khublal and it did not survive to his legal representatives. Reference was made to the provisions of Section 89 of the Probate and Administration Act, which are substantially the same as those of Section 306 of the Indian Succession Act barring slight addition in Section 306 and it was held that the cause of action for malicious prosecution did not survive to the legal representatives of Khublal. The ultimate result was that the defendant's appeal was allowed and the plaintiff's suit was dismissed. The situation here is exactly the same, with this difference that in that case, the appeal was before the lower appellate court and in the present case the appeal is before this Court now by the substituted heirs of the deceased plaintiff. That, however, is of no consequence and that decision governs this case as well.

14. In AIR 1931 9 (Nagpur) the plaintiff had instituted a suit for damages for false and malicious prosecution. His suit and appeal were dismissed by the lower courts and the plaintiff had then preferred a second appeal. After filing of the

appeal, he died and there was an application by his widow and his mother to be brought on the record as his legal representatives. On the case coming up for hearing, an objection was raised by the respondent that the appeal abated, on the ground, that in a personal action of that kind, the right to sue did not survive. It was urged on behalf of the respondent that in a suit in tort for personal injury, the cause of action did not survive after the death of person, who had suffered the injury. Reference was made to the provisions of Section 89 of the Probate and Administration Act (Act V of 1881) and Section 306 of the Indian Succession Act, and it was held that the cause of action did not survive. The appeal thus abated upon the death of the appellant and it was dismissed.

In AIR 1934 119 (Nagpur) the plaintiff got a decree for Rs. 1307/- and odd as damages for malicious prosecution. The rest of his claim was dismissed. Defendant preferred an appeal and the plaintiff filed a cross-objection with respect to the portion of the claim, which was dismissed. Before the hearing of the appeal and the cross-objection, plaintiff died and his legal representatives filed an application for substitution. In the memorandum of cross-objection, Defendant opposed that application and contended that the entire claim had abated on account of the death of the plaintiff. It was held that on account of the death of the plaintiff, the cross-objection abated.

15. Similar question arose in the case of Ramaswamy Naicker Vs. Manickka, . The plaintiff had filed a suit to recover the expenses incurred by him in prosecuting the defendant for an offence punishable u/s 500, Penal Code. The first court dismissed the suit on the ground of limitation and on appeal the District Judge found that the suit was not maintainable and even if it was maintainable, it was barred by limitation. The plaintiff preferred a second appeal but later on he died. His heirs filed a petition to be brought on the record as legal representatives. The respondent opposed the application on the ground that the cause of action did not survive and, therefore, the appeal abated. It was held that the cause of action did not survive, the appeal abated and the heirs were not entitled to be substituted as legal representatives in the second appeal.

There is another case of the Madras High Court Irulappa Konar and Others Vs. Madhava Konar (died) and Others, In that case, a suit for damages for malicious prosecution was filed and it was decreed by the trial court with costs. On appeal by the defendants, the decree of the trial court was reversed and the suit was dismissed with costs. The plaintiff died and his legal representatives preferred a second appeal to the High Court. After institution of the second appeal, the defendant also died and his heirs were substituted in his place. To the hearing of the second appeal, a preliminary objection was taken by the respondents relying on the rule *actio personalis moritur cum persona*. It was held that "the right to sue" occurring in Rule 1 of Order 22, Civil Procedure Code, meant the right to seek relief. It was observed that with the decree of the lower appellate court in reversal of that of the trial Court, the plaintiff lost in appeal which he had gained in the trial court. It was "at if he were thereafter to agitate the matter with A

clean slate, so to say, if he should file a Second Appeal and if before he could file it he died, his legal representatives could not file it after his death because with his death the cause of action personal to him died too."

Similar view has been taken in the case of *Ratanlal Bhannalal v. Baboolal Hajarilal*. AIR 1960 Madh Pra 200. In that case, the plaintiffs suit for damages for loss caused to his salt bags was decreed in part by the trial court but entirely dismissed by the lower appellate court. The plaintiff preferred a second appeal, but died during its pendency. His legal representatives were already brought on record, but the respondents took a preliminary objection that as the claim in that case was based For personal action, it should come to an end by the death of the plaintiff, the cause of action no longer surviving to the legal representatives of the deceased plaintiff. It was held that after dismissal of the plaintiffs suit in a personal action, the plaintiff was relegated to the same position in which he was before the judgment was rendered by the court of first instance. It made no difference that the plaintiff had succeeded in the trial court, though wholly lost in the first appellate court and his position as regards his right to sue was the same at the second appellate stage as it was in the court of first instance before any judgment was given. It was further observed that if the claim of the plaintiff became untenable In case of his death during the pendency of the suit, ft would equally become un-tenable during the pendency of the second appeal, inasmuch as his claim was entirely dismissed by the first appellate court. A distinction was made with regard to the claim for compensation for damages caused to the plaintiff's goods by the for lions act of the defendant and it was held that the cause of action for that claim would survive to the legal representative of (he deceased plaintiff.

16. Order XXII, Rule 1, of the CPC lays down that the death of a plaintiff or defendant shall not cause the suit to abate, if the right to sue survives. In the present case, the plaintiff having preferred an appeal, it can be reasonably said that he wanted to seek relief in this appeal and enforce his claim to the full extent as against all the defendants. He had a decree for a sum of Rs. 5500/- in his favour, but he was not content with it and the appeal was preferred with a view to get a decree for Rs. 12,500/- even us against defendant 4 The plaintiff thus sought or a relief to that extent fn this appeal. That claim of Rs. 12,500/- can be split up in two broad leads, one was in respect of the cost of repairs of he motor car and the other one was in respect of the expenses incurred in treatment and for compensation for the injuries sustained by the plaintiff. The last two claims did not relate to any property and on the other hand, the cause of action in respect of these claims accrued to the plaintiff alone, inasmuch as it was he, who had sustained injuries. The plaintiff has got a decree o a certain extent in ins favour with regard to these two items, but his claim for a higher sum is no longer maintainable in this appeal on account of his death. The right to claim further relief has come to an end in view of the maxim referred to above. But so far the tort relates or affects the property belonging to the plaintiff, the maxim *actio personalis moritur cum persona*" will not apply and the right to sue

will survive to the legal representatives of the plaintiff. The car may be belonging to the plaintiff alone, but after his death, his heirs and legal representatives are entitled to that property and it may be said in other words, that on account of rash and negligent act of defendant 3 there was damage to the property owned by the deceased plaintiff which had come to the hands of his heirs and legal representatives, In this view of the matter, the present appellants, who are heirs of the deceased plaintiff, can neither get a decree for higher sum against any of the defendants, nor can they enforce their claim in respect of any item other than the one relating to the cost of repairs of the motor car, against defendant 4.

17. Learned counsel for defendant 4 pointed out that Messrs, Motor and General Finance Limited also were among the insured, but they were not impleaded in the present action and as such, the suit was not maintainable. It may be mentioned that the other two, who also were insured, have been impleaded as defendants 1 and 2 and Section 96 Clause (1) of the Motor Vehicles Act mentions inter alia the word "person" by whom a policy had been effected Defendants 1 and 2 also happened to be the persons, who took the policy and the omission of the limited concern will not make the suit defective. No issue was framed that on account of the omission of that Limited Company the suit was not maintainable. I, thus, find no merit in this objection.

18. I have no doubt held that the plaintiff was entitled to claim Rs. 3500/- on account of compensation for the injuries sustained by him and Rs. 1872/- as expenses incurred in his treatment, but the amount decreed by the Subordinate Judge cannot be increased and a decree for higher sum cannot be now passed in view of the death of the plaintiff appellant during the pendency of this appeal, the cause of action not surviving to the heirs of the plaintiff. The position, therefore are that the appellants are entitled to a decree for Rs. 3000/- against defendants 1 to 3 and a further decree for Rs. 2500/- in respect of the cost of repairs of motor car against all the defendants i.e. defendants 1 to 3 and defendant 4 as well the latter being liable to satisfy the decree u/s 90(1) of the Motor Vehicles Act.

19. In the result, the appeal is allowed in part and the judgment and decree of the trial court are modified to this extent that the suit is decreed to the extent of Rs. 3000/- against defendants 1 to 3 only and Rs. 2500/- against all the defendants. The appellants- will be entitled to proportionate costs of the trial Court on contest against defendants 1 and 2 and ex parte against defendant 3 in respect of the claim of Rs. 3000/- and further cost in respect of the claim of Rs. 2500/-. against all the defendants. This appeal not having been contested by defendants 1 to 3 and the success of the appellants being partial, parties will bear their own costs of this appeal.

Mahapatra, J.

20. I agree