

(2013) 05 JH CK 0063

In the Jharkhand High Court

Case No : Writ Petition (S) No. 3810 of 2002

Neelam Dubey

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 10-05-2013

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Criminal Procedure Code, 1973 (CrPC) — Section 377, 378, 394

Citation : (2013) 3 AJR 185 : (2013) 3 JLJR 108

Hon'ble Judges : S. Chandrashekhar, J

Bench : Single Bench

Advocate : Rajeeva Sharma, for the Appellant; Prashant Kumar Singh, G.P.I. for the State and Mr. S. Srivastava, Advocate for the A.G., for the Respondent

Judgement

S. Chandrashekhar, J.—The writ petition has been filed seeking following reliefs:

(a) To pay the excess amount of Rs. 1,83,030.86/- deducted from the retirement dues of the deceased-husband of the petitioner as the respondents have deducted Rs. 1,92,000/- instead of Rs. 8,969/-.

(b) To pay all the balance dues including G.P.F. amount etc. of the deceased husband of the petitioner alongwith statutory interest for the period of suspension i.e. from 4.8.1989 to 3.11.1995.

(c) To hold and declare that the show-cause served on the son of the deceased employee by the respondents after death/superannuation is wholly illegal, improper, unjust, irrational and not sustainable in the eye of law in the facts and circumstances of this case.

(d) To hold and declare that the recovery of Rs. 1,92,000/- by the respondents from the retirement dues of the deceased husband of the petitioner is in complete violation of the principle of natural justice as the employee has not availed the opportunity of hearing or filing show-cause.

(e) To hold and direct that show-cause served by the respondents on the son of the deceased employee on 24.10.1996 for the alleged defalcation of Government fund for the period 84-85, 88-89 and 89-90 is belated allegation showing the malafide intention of the respondents.

The brief facts of the case as disclosed in the writ petition are that, the husband of the petitioner was appointed in the year 1965 and at the relevant time he was posted as Nazir. He took over the charge of Nazir in the Barhet block on 10.06.1982 and he was transferred on 18.07.1988. However, as he did not hand over the charge, on 4.8.1989 he was suspended and a charge memo dated 30.07.1990 on the allegation of defalcation of Rs. 2,53,258.19/- and for misconduct in not handing over the charge etc., was served upon the husband of the petitioner. In the meantime, a report was submitted by the Block Development Officer, Barhet on 8.10.1999 seeking permission for registration of a criminal case against the husband of the petitioner for defalcation of Rs. 2,53,258.19/-. Initially one Siyaram Sinha was appointed as Inquiry Officer by order dated 10.12.1993 and he submitted his report indicating various discrepancies in cash book, ledger etc. It was found that an amount of Rs. 5,72,665.20/- remained unexplained on account of unadjusted advance. He did not find any record with respect to an amount of Rs. 1,51,741.96/-. In the meantime, an order dated 16.02.1996 was passed for recovery of Rs. 8,969.14/- from the gratuity of late Umanath Dubey, the husband of the petitioner.

2. As the earlier Inquiry could not be completed, another Inquiry Officer namely, Anil Kumar, District Land Acquisition Officer was appointed on 6.6.1996 and he submitted his report on 05.02.1997. Thereafter, the matter was verified by a team of officers comprising District Accounts Officer, Sahibganj and an Executing Magistrate and a report was submitted on 5.8.1998, based on which order dated 9.10.1998 was passed for realising an amount of Rs. 1,92,982.85 from the retiral dues of late Umanath Dubey. Aggrieved by the order of recovery of Rs. 1,92,982.85/-, the petitioner has approached this Court by filing the present writ petition seeking various reliefs as noticed above.

3. The husband of the petitioner died during the pendency of the inquiry on 3.11.1995 and a notice was served upon the son of the petitioner on 24.10.1996 for completing the pending inquiry. After the death of the husband of the petitioner, her son was appointed on compassionate ground. As the retiral dues of the husband of the petitioner were withheld, the petitioner moved Hon'ble Patna High court in C.W.J.C. No. 8509 of 1997 which was disposed of on 2.11.1998 with a direction to the respondents to pay the retiral dues of the husband of the petitioner.

4. A counter affidavit has been filed on behalf of respondent nos. 3 and 6 contesting the claim of the petitioner. It has been stated that though the inquiry was initiated during the lifetime of late Umanath Dubey, it could not be completed as he sought time on one pretext or the other and in the meantime he died on 3.11.1995. Therefore, a notice was served upon his son on 24.10.1996

for completing the departmental proceeding which was pending against his father since 1990.

5. It has also been stated that orders dated 16.02.1996 and 09.10.1998 were never challenged by the petitioner and recoveries were effected from the retiral benefit of late Umanath Dubey and as such those orders have been accepted by the petitioner. This petition has been filed in the year 2002, i.e., about a lapse of four years since the order for recovery was passed on 9.10.1998 and therefore, the writ petition is liable to be dismissed on the ground of delay and laches. It has further been stated that the petitioner has been paid 90% of the family pension, gratuity, encashment of unutilised earned leave and G.P.F. amount as per the order passed by the Hon'ble Patna High Court after realising the defalcated amount. It has also been asserted that after full verification and inquiry, the order for recovery of the defalcated amount has been passed by the respondent no. 3 who is the appointing authority of late Umanath Dubey.

6. A rejoinder affidavit has been filed by the petitioner to the counter filed on behalf of respondent nos. 3 and 6 reiterating the stand taken in the writ petition that Inquiry against a dead person could not have continued and no order of recovery of the alleged defalcated amount be passed. A copy of Inquiry report dated 21.12.1993 has been brought on record to contend that it has been found during the Inquiry that an amount of Rs. 1,51,741.96/- only remained to be adjusted.

7. Heard learned counsel appearing for the parties and perused the documents on record.

8. The learned senior counsel Mr. Rajeeva Sharma has vehemently argued that the order of recovery passed against the husband of the petitioner is null and void because it has been passed against a dead person. He has further submitted that notice dated 24.10.1996 issued to son of the petitioner to reply the charges levelled against late Umanath Dubey is also arbitrary and illegal and cannot be sustained in law, and therefore, the orders dated 16.02.1996 and 09.10.1998 are liable to be quashed. Learned senior counsel relied on the decisions reported in Kashinath Dikshita Vs. Union of India (UOI) and Others, and 2001 (2) JCR 165 (Jhr.).

9. As against this, the learned counsel appearing for the respondents has contended that the husband of the petitioner was accused of misappropriation of the government money and therefore, a criminal case was also registered against him. During the inquiry, the husband of the petitioner did not co-operate and therefore, the inquiry which was initiated in the year 1990 could not be completed and the inquiry remained pending for six years and in the meantime, her husband died on 4.11.1995. The learned counsel appearing for the respondents has submitted that the orders dated 16.02.1996 and 09.10.1998 had been passed after proper verification and examination of the official records and therefore, final order passed even after the death of the husband of the

petitioner cannot be said to be illegal or without jurisdiction.

10. Replying to the contentions of the respondents, learned senior counsel appearing for the petitioner submitted that it is wrong to say that inquiry could not be completed because of the delaying tactics of the husband of the petitioner rather, the husband of the petitioner was not granted proper opportunity and in spite of repeated letters written by the husband of the petitioner a copy of the inquiry report of Sri S.N. Jha, Executing Magistrate, Sahibganj, copy of audit report of the Barhet block and other documents, were ultimately never supplied to the husband of the petitioner. He has further submitted that copies of relevant documents have not even been supplied to the son of the petitioner and straightway a show-cause notice dated 24.10.1996 has been issued to reply the charges levelled against the husband of the petitioner which is illegal. On these grounds, he has submitted that the present writ petition requires interference by this Court.

11. It is admitted position that the husband of the petitioner died on 3.11.1995 during the pendency of the departmental proceeding initiated against him by issuing charge memo dated 30.07.1990. It is also not denied that the orders of recovery from the retiral dues of the husband of the petitioner were passed after the death of the husband of the petitioner. After the death of late Umanath Dubey, a show-cause notice dated 24.10.1996 was issued to his son and recoveries ordered vide orders 16.02.1996 and 09.10.1998, have been effected by the respondents from retiral dues of late Umanath Dubey and balance amount has been paid to the petitioner. I further find that though orders dated 16.02.1996 and 09.10.1998 have not been specifically challenged by the petitioner in the present writ petition, however, since the very basis of recovery made from the retiral dues of late Umanath Dubey and show-cause notice issued to his son have been challenged by the petitioner, it would not make much difference for the reasons that if the recoveries made and show-cause notice issued to the son of the petitioner are held to be without jurisdiction, the orders dated 16.02.1996 and 09.10.1998 would also not survive.

12. In *Most. Sumitra Devi Vs. State of Jharkhand and Others*, , the issue before the Court was whether any recovery of excess payment made to an employee can be made from the legal representative of the deceased-employee and the Full Bench of this Court relying on a decision of the Hon"ble Supreme Court in *N.D.P. Namboodripad (Dead) by LRs. Vs. Union of India (UOI) and Others*, held that it is not permissible. I find that recently the Hon"ble Supreme Court in *Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others*, , has held that even if no fraud or misrepresentation was alleged against the employee, the excess payment made to an employee can always be recovered because if that is not done it would amount to unjust enrichment of the concerned employee. In view of the decision rendered in the "*Chandi Prasad Uniyal*" (supra) and the fact that the issue involved before the Court in "*Most. Sumitra Devi*" (supra) was entirely different from the issue involved in the present case, the decision of the

Full Bench in the said case does not lend any support to the case of the petitioner in the present case.

13. The decision of the Patna High Court in *Gopal Singh Vs. State of Bihar and Others*, , deals with the issue of non-furnishing of copy of report on which the action was taken against the employee and thus, the facts of the said case are entirely different from the facts of the present case. In *Kashinath Dikshita Vs. Union of India (UOI) and Others*, , the Hon"ble Supreme Court found that the copies of statement of witnesses and copy of documents relied upon by the disciplinary authority were not supplied to a delinquent employee, and therefore, it was held that the order of dismissal was violative of Article 311(2) of the Constitution of India.

14. In "*Chandri Devi Vs. State of Bihar and others*" reported in 1999 (2) PLJR 372, a learned Judge of the Hon"ble Patna High Court held that when an employee dies in course of employment and if any dues in official record exists against him, such dues can be adjusted without resorting to the provisions of Rule 43(b) of the Bihar Pension Rules. It has further been held that if there is any disputed claim against an employee, after the death of the employee such claim can be adjudicated in a civil proceeding and not by the department itself.

15. As it would appear from the narration of the fact made hereinabove, the claim of the department is based on the preliminary report and the inquiry reports which were further verified by team of officials, and therefore, the reliance placed by the learned senior counsel appearing for the petitioner to buttress his contention that this case is squarely covered by the decision rendered by the learned Single Judge of the Patna High Court in the case of "*Chandri Devi*" (supra) is not tenable, rather this decision permits the department to recover the undisputed claims based on official record.

16. In *Jayanti Devi Vs. State of Bihar and Others*, , the petitioner, a widow was denied the benefit of death-cum-retirement benefits on the ground of the order of dismissal after the death of the husband of the petitioner. A learned Single Judge of this Court held that the order of dismissal which was passed after the death of the husband of the petitioner and which was passed pursuant to a departmental proceeding initiated after 6 years of the order of suspension and which had been proceeded ex-parte against the deceased employee, could not have been made the basis for denying the claim of the widow for death-cum-retirement benefits. The judgments relied upon by the learned counsel for the petitioner do not lend any support to the case of the petitioner.

17. Now, advertent to the contentions of the learned senior counsel appearing for the petitioner that the order of recovery passed against a dead person is null and void, I am of the opinion that it is not true in every circumstance. There are various provisions in law, even in the Code of Criminal Procedure which entitles even the near relatives of a convict to contest the matter on behalf of the deceased-convict. Section 394 of the Cr.P.C. permits any of the near relative of a

convict who had preferred appeal, to apply for leave to continue the appeal and if leave is granted, the appeal would not abate. Section 394 of the Cr.P.C. is extracted below:

394. Abatement of appeals - (1) Every appeal u/s 377 or Section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

18. Under the Motor Vehicle Act, 1988 the parent/dependent of the person who died in an accident is entitled to institute and contest the case for compensation. Under other statutes such as, Fatal Accidents Act, 1855, Code of Civil Procedure, Industrial Disputes Act, Workman's Compensation Act, 1923 etc. the L.Rs are permitted to continue and contest the claim.

19. In *The Hindustan Times Ltd., New Delhi Vs. Their Workmen*, , the Hon''ble Supreme Court has held that where an employee is dismissed for misconduct which has resulted in financial loss to the employer, the amount lost can be deducted from the amount of gratuity due.

20. In *Neki Vs. Satnarain and others*, , even after the death of the General Power of Attorney (G.P.A.) holder, the proceedings for ejectment of tenant initiated by the G.P.A. on the basis of power given by the principal - landlord was held to have not abated even though the L.Rs. of the G.P.A. holder were not substituted. The Hon''ble Supreme Court held that death of the agent would not cause any impediment in the way for disposal of the appeal and the appeal would not abate.

21. In *V. Veeramani Vs. Management of Madurai district Cooperative Supply and Marketing Society Ltd. and Anr.*, (1995) Suppl. 3 SCC 557 , the Hon''ble Supreme Court has held that the industrial dispute raised by a workmen with respect to an order of dismissal, would neither abate nor otherwise come to an end merely because the workmen died pending the adjudication of the dispute.

22. In *Rameshwar Manjhi (Deceased) through his son Lakhiram Manjhi Vs. Management of Sangramgarh Colliery and others*, , the Hon''ble Supreme Court has held:

11. We do not agree with the viewpoint of Delhi and Orissa High Courts to the effect that the claim for computation under sub-section (2) of Section 33-C of the Act dies with the death of the workman. It is difficult to understand why a claim of money which became payable to the deceased workman should not be claimable, upon satisfaction of other relevant conditions, by the heirs of the

deceased workman by making a claim under sub-section (2) of Section 33-C of the Act. Having regard to the well-established principle that all causes of action -- except those which are known as dying along with the death of a person -- must survive to his heirs, the cause of action created in favour of workman under sub-section (2) of Section 33-C of the Act should in normal circumstances survive to the heirs. We approve the reasoning of the Bombay High Court in Sitabai case.

.....

13. It is thus obvious that the applicability of the maxim "actio personalis moritur cum persona" depends upon the "relief claimed" and the facts of each case. By and large the industrial disputes u/s 2-A of the Act relate to the termination of services of the concerned workman. In the event of the death of the workman during pendency of the proceedings, the relief of reinstatement, obviously, cannot be granted. But the final determination of the issues involved in the reference may be relevant for regulating the conditions of service of the other workmen in the industry. Primary object of the Act is to bring industrial peace. The Tribunals and Labour Courts under the Act are the instruments for achieving the same objective. It is, therefore, in conformity with the scheme of the Act that the proceedings in such cases should continue at the instance of the legal heirs/representatives of the deceased workman. Even otherwise there may be a claim for back wages or for monetary relief in any other form. The death of the workman during pendency of the proceedings cannot deprive the heirs or the legal representatives of their right to continue the proceedings and claim the benefits as successors to the deceased workman.

18. We, therefore, hold that on the death of the workman, even when the reference is of an individual dispute u/s 2-A of the Act, the Tribunal does not become functus officio or the reference does not abate merely because, pending adjudication, the workman concerned dies. It is open to the heirs and legal representatives of the deceased workman to have the matter agitated and decided.

23. In N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, , it has been held by the Hon"ble Supreme Court that death of the plaintiff after arguments in appeal is heard and judgment reserved, would not abate the appeal and the judgment pronounced notwithstanding, the death of the plaintiff would not be a nullity.

24. In a given case offence/misconduct committed by an employee may automatically be dissolved on account of his death however, in certain offences/misconduct alleged to have been committed by the employee during his service would not dissolve him of the liability due to his death. In a case where an employee is alleged to have misappropriated funds and before the conclusion of the inquiry he dies, the legal representatives of the employee are entitled to defend the case and if it is found that any amount is due from the employee, the

employer can recover the same from the estate left by the deceased employee. Similarly if the misconduct is not proved, the legal representatives of the deceased employee would be entitled for the retiral benefits of the deceased employee. The effect of the proceeding initiated after the retirement or dismissal of an employee is different from the proceeding that can be initiated for misconduct during the lifetime of the employee before his retirement. In cases of inquiry initiated during the lifetime of the employee before his retirement, the employer would be at liberty to complete the inquiry even after the death of the employee in presence of the legal representatives of the deceased employee and recover the loss from the retiral dues of the deceased employee.

25. It cannot be said that if any money has been misappropriated by an employee who dies during the pendency of inquiry, the monetary liability thereto cannot be determined after the death of the delinquent employee. The employer would be at liberty to assess the financial loss and recover the same from the retirement dues of the deceased employee, after giving due notice to the legal representatives of the deceased employee.

26. In *Rameshwar Manjhi (Deceased) through his son Lakhiram Manjhi Vs. Management of Sangramgarh Colliery and others*, , commenting on the applicability of the maxim of "*actio personalis moritur cum persona*", the Hon'ble Supreme Court has observed as under:

12. The maxim "*actio personalis moritur cum persona*" though part of English Common Law has been subjected to criticism even in England. It has been dubbed as unjust maxim, obscure in its origin, inaccurate in its expression and uncertain in its application. It has often caused grave injustice. This Court in a different context, in considering the survival of a claim for rendition of accounts, after the death of the party against whom the claim was made, in *Girja Nandini Devi v. Bijendra Narain Choudhury* observed as under:

The maxim "*actio personalis moritur cum persona*" -- a personal action dies with the person -- has a limited application. It operates in a limited class of actions *ex delicto* such as actions for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory. An action for account is not an action for damages *ex delicto*, and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could not be enjoyed after death, or granting it would be nugatory.

27. In view of the provisions in various legislations which permit the legal heir/dependent/near relatives of a person to institute/continue suit/case/appeal, I am of the view that in certain circumstances a departmental proceeding can be continued even after the death of an employee provided:

(I) All the necessary materials have been supplied to the L.Rs;

(II) The person who has been given notice, has been afforded sufficient

opportunity to defend the case on behalf of the deceased-employee; and

(III) The proceeding for recovering the monetary loss is based on undisputed official records.

28. In view of the aforesaid discussions, I am of the opinion that the inquiry which was initiated against the husband of the petitioner can continue even after the death of her husband and the show-cause notice issued to the son of the petitioner is neither arbitrary nor illegal and it is permissible in law.

29. Coming back to the facts of the case, I find that as many as three inquiries were conducted however, the financial loss which has been caused due to alleged misconduct of the husband of the petitioner, are assessed for different amounts. This may be because many records were not available and some amount was kept in double lock, as has been found by the Executive Magistrate who was member of the team which verified one of the inquiry reports. It is therefore, not possible to record the finding whether the claim of financial loss on account of the deceased employee is based on official records or it involves disputed questions of fact.

30. In the result, I hereby hold that the recovery of Rs. 1,92,000/- made by the respondents from the retirement dues of the deceased-husband of the petitioner is not sustainable in law, because reasonable opportunity was not given to the L.Rs. of the deceased employee. However, it is made clear that the respondents would be at liberty to continue the inquiry after giving a fresh show-cause notice to the petitioner or her son for recovering the alleged amount misappropriated by the husband of the petitioner from his retiral dues. Needless to say that the respondents can continue with such inquiry only for the amount which is appearing from the official records. Copies of such records would be supplied to the legal representatives of the deceased employee and sufficient opportunity would be granted to him/her for contesting the case. Any inquiry, if initiated, should be completed within a period of six months from the date of this order. It is further clarified that the department would be also at liberty to recover the alleged misappropriated amount which are not based on undisputed official records, by ordinary civil proceeding. The writ petition is disposed of in the aforesaid terms and with the aforesaid directions.