

(2010) 05 GAU CK 0069

In the Gauhati High Court

Case No : Misc. Case No. 549 (SH) of 2009 and Regular First Appeal No. 3 (SH) of 2009

New India Assurance Co. Ltd.

APPELLANT

Vs

Waitilian I. Nongbet

RESPONDENT

Date of Decision : 04-05-2010

Acts Referred:

Succession Act, 1925 — Section 306

Workmens Compensation Act, 1923 — Section 22, 30

Citation : (2010) 3 GLT 83

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Advocate : V.K. Jindal, S. Jindal and S. Dey, for the Appellant; H. Nongkhlaw and K. Sharon, for the Respondent

Final Decision : Dismissed

Judgement

T. Vaiphei, J.—The sole question which falls for consideration in this application is whether the original claim petition, which gives rise to the connected appeal, will stand abated following the death of the original claimant on 28.8.2009. The facts material for disposal of the application may be noticed at the outset. On 18.2.2007 at about 8.30 P.M., while the deceased was driving a truck bearing No. ML 05 E 8373, he met with an accident at 4th Mile, Upper Shillong, which resulted in causing injuries on his left leg. He was initially admitted to Civil Hospital, Shillong on 18.2.2007, but was transferred to K.J.P. Hospital, Shillong on 22.2.2007. He was discharged from that hospital on 23.4.2007. The injuries sustained by in the accident were diagnosed as "Deglouting Injury on Left Leg". The deceased then filed the claim petition u/s 22 of the Workmen Compensation Act, 1923 ("the Act" for short) for payment of compensation under the head of loss of future income, medical and hospital bills, special food and attendance, cost of future treatment and pain and suffering. The petition was registered as W.C. Case No. M 18/1/2008. Both the employer and the applicant-insurer contested the claim petition. After completion of the hearing, the learned

Commissioner awarded a compensation of Rs. 3,43,163/- on account of medical expenses, loss income and special food and attendance. Aggrieved by the award, the applicant-insurer preferred the connected appeal u/s 30 of the Act. The appeal was admitted and the execution of the impugned award stayed on deposit of Rs. 1,00,000/- by the applicant-insurer. The appeal had been duly contested by the deceased. However, when , the appeal came up for order on 7.11.2009, the learned Counsel for the deceased informed this Court that the deceased, who was arraigned therein as Respondent 1, had died on 28.8.2009. This Court accordingly directed the applicant to take step for substitution of the deceased by his legal representatives. Instead of filing an application for substitution, the applicant-insurer filed this application for declaration that the original claim petition stands abated.

2. It is the contention of Mr. V.K. Jindal, the learned Senior Counsel for the applicant, that upon the death of the deceased-claimant on 28.8.2009 during the pendency of the connected appeal, the cause of action for the claim petition does not survive on the principle of "actio personalis cum moritur persona", which is incorporated in Section 306 of the Indian Succession Act, 1925. The learned Senior Counsel further submits that once the claim petition stands abated, the legal representatives or heirs of the deceased cannot step into the shoes of the deceased and have no right to be substituted as his legal representatives/heirs. He places heavy reliance on the decision of the Delhi High Court in *E.I. Ltd. and Another Vs. Klaus Mittelbachert (deceased)* through L.Rs., to fortify his submissions. Mr. H. Nongkhaw, the learned Counsel for the opposite parties, however, contends that a claim petition under the Workmen Compensation Act, 1923 cannot be treated as ordinary suits which will stand abated on the death of injured-claimant, and his legal representatives/heirs have every right to continue the proceeding and claim the compensation on his death.

3. The maxim "actio personalis cum moritur persona" embodies within it the English principle that a personal action dies with the Plaintiff. This maxim is inapplicable in India except to the extent that it has been adopted in the statutes. The exception to the non-applicability of the maxim is contained in Section 306 of the Indian Succession Act, 1925, which is reproduced below:

306. Demands and rights of action of or against deceased survive to and against executor and administrator.- 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.

Under this section, no action can be maintained by or against the legal representatives of a deceased person in respect of the following actions:

(1) Action for defamation. Cause of action for defamation does not survive the death of the Plaintiff.

(2) Action for assault or other personal injuries not causing death. The words "personal injuries" means bodily or physical injuries as opposed to property or reputation and are ejusdem generic with the word "assault" and not with "defamation". Therefore, a cause of action in respect of injury to the credit and reputation of the Plaintiff caused by the wrongful acts of the deceased Defendant does not fall within the exception but survives against the executor or administrator.

(3) Actions where relief sought could not be enjoyed or granting it would be nugatory (see Illust (ii)).

4. This provision came up for consideration before the Delhi High Court in Klaus Mittelbachert (supra). That was a case where Klaus Mittelbachert, a national of Federal Republic of Germany and employed as a copilot by Deutsche Lufthansa Aktiengesellschaft, a company organized under the laws of the Federal Republic of Germany, instituted a suit for recovery of damages to the extent of Rs. 50,00,000/- against the Defendants, inter alia, alleging that in the evening of 11.8.72, he flew into New Delhi from Bangkok with Lufthansa flight No. 647 and was to continue to Frankfurt with Lufthansa flight No. 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 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 6.00 P.M., he leapt from the diving-board, but hit his head on the bottom of the pool and became unconscious. He was pulled out of the 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 Heidelberg. Treatment continued and ultimately on 24.3.1973, he was discharged from the clinic. Though further treatment continued but the condition of the Plaintiff did not improve. Due to the injuries sustained by him, the suit was instituted by him for recovery of Rs. 25,000/- on account of doctor's services and hospitalization in India along with DM 56,22,500 (equivalent to Rs. 1,91,24,150 at the exchange rate prevailing at the time of filing the suit) on account of damages and various other counts. The Plaintiff, however, restricted his claim to Rs. 50,00,000/- as on the date of filing the suit towards damages reserving his right to enhance the claim, should the value of Indian rupee in relation to the German mark deteriorate between the time of filing the suit and payment of damages. During the pendency of the suit, the Plaintiff expired on 27.9.1985 due to acute cardiac arrest whereupon Edda Mittelbachert and Katja Mittelbachert, claiming to be his legal representatives, filed an application for substituting the deceased by them. This application was stoutly resisted by the Defendants on the ground that the cause of action did not survive to the

proposed legal representatives as the suit was personal to the Plaintiff and the same stood abated. This led the learned Single Judge to frame additional issue on this point. After the completion of the trial, the learned Single Judge passed a decree in favour of the Plaintiff for recovery of Rs. 50,00,000/- with cost and interest at the rate of 6 per cent per annum with effect from 27.6.1985 till payment. The Defendants preferred an appeal against the decree on merits and also challenged the findings of the learned Single Judge on the issue of abatement of the suit.

Allowing the appeal, the Division Bench of the Delhi High Court held that:

The object of Section 306 is to protect suit for wrong done to the property of deceased but it does not extend 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 Vs. Evelyn Sequeira and Others*, 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 generic with the words "defamation and assault" and not with the word "assault" alone. It was further held that if the claim is founded entirely on torts, the suit would abate on the Plaintiffs 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 "*actio 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 if the first appellate Court or the second appellate Court against the dismissal of the 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, the Plaintiff stands relegated to his original position before the trial Court. Vide the decisions in *Punjab Singh v. Ramautar Singh* AIR 1920 Patna 841; *Irulappa Konar and Others Vs. Madhava Konar (died) and Others*, ; *Maniramala v. Mt. Chattibai*. AIR 1937 Nag 216; *Baboolal v. Ram Lal* AIR 1952 Nag 408 and *Melepurath Sankunni Ezhuthassan v. Thekittil Gopalankutty Nair* 1986 ACJ 440 (SC). *Palaniappa Chettair Vs. B. Rajarajeswara Sethupathi Pathi alias Muthuramalinga Sethupathi Avergal, Rajah of Ramnal and Others*, and *Motilal Satyanarayan Vs. Harnarayan Premasukh*, , it was held that a suit or an action which has abated cannot be continued thereafter even for the limited purpose of recovering costs suffered by the injured party.

5. I have carefully considered the judgment of the Delhi High Court in the light of the decisions of the Apex Court in *Melepurath* case (supra) and *M. Veerappa* case (supra). In order to appreciate the decision in *Melepurath* case, it will be

pertinent to refer to paragraphs 7, 8 and 9 of the judgment, which read thus:

7. Where a suit for defamation is dismissed and the Plaintiff has filed an appeal, what the Appellant-Plaintiff is seeking to enforce in the appeal is his right to sue for damages for defamation and as this right does not survive his death, his legal representative has no right to be brought on record of the appeal and stand in place of the Appellant if the Appellant dies during the pendency of the appeal. The position, however, is different where a suit for defamation has resulted in a decree in favour of the Plaintiff because in such a case the cause of action has merged in the decree and the decretal debt forms part of his estate and the appeal from the decree by the Defendant becomes a question of benefit or detriment to the estate of the Plaintiff-Respondent which his legal representative is entitled to uphold and defend and is, therefore, entitled to be substituted in place of the deceased Respondent-Plaintiff.

8. Section 306 further speaks only of executors and administrators but on principle the same position must necessarily prevail in the case of other legal representatives, for such legal representatives cannot in law be in better or worse position than executors and administrators and what applies to executors and administrators will apply to other legal representatives also.

9. The position, therefore, is that had the Appellant died during the pendency of the suit, the suit would have abated. Had he died during the pendency of the appeal filed by him in the district Court, the appeal would have equally abated because his suit had been dismissed by the trial Court. Had he, however, died during the pendency of the second appeal filed by the Respondent in the High Court, the appeal would not have abated because he had succeeded in the first appeal and his suit had been decreed. As, however, the High Court allowed the second appeal and dismissed the suit, the present appeal by special leave must abate because what the Appellant was seeking in this appeal was to enforce his right to sue for damages for defamation. This right did not survive his death and his legal representatives acquired no right in law to be brought on record in his place and stand.

(Underlined for emphasis)

6. The aforesaid observations of the Apex Court in Melepurath case (supra) has been relied on by the subsequent decision of the Apex Court in M. Veerappa case (supra). With due respect, the Division Bench of the Delhi Court did not reproduce paragraph 9 in its entirety and the contents of paragraph 10 of M. Veerappa case (supra), which could have thrown light to the correct position of the law laid down by the Apex Court. They are as under:

9. In a slightly different context, the matter came to be considered by this Court in Melepurath Sankunni Ezhuthassan v. Thekittil Gopalakutty Nair. A Plaintiff's suit for damages for defamation was decreed by this appellate Court but dismissed by the High Court in second appeal. There was an appeal to this Court by the Plaintiff by special leave and during its pendency the Plaintiff died. This Court

declined to allow the legal representatives of the Plaintiff to come on record and prosecute the appeal on the ground that by reason of the dismissal of the suit by the High Court, the Plaintiff stood relegated to his original position and, therefore, the proceedings abated on his death. The decision pointed out that the position would have been different if the Plaintiff had subsisting decree in his favour because then the cause of action would get merged in the decree and the decree would form part of the estate of the deceased which his legal representatives are entitled to uphold.

10. The maxim "actio personalis cum 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, be it the first appellate Court or the second appellate Court against the dismissal of the 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, Irulappa v. Madhava, Maniramlala v. Mt. Chattibai, Baboolal v. Ramlal and Melepurath Shankunni Ezhuthassan v. Thekittil Gopalankkuty. In Palaniappa Chettiar v. Rajah of Mamnad, and Motilal v. Hamarayan, it was held that a suit or an action which has abated cannot be continued thereafter even for the limited purpose of recovering the cost suffered by the injured party. The maxim of actio personalis cum moritur persona has been held inapplicable only in those cases where the injury caused to the deceased person has tangibly affected his estate or has caused an accretion to the estate of the wrong doer vide Rustomji Dorabji v. W.H. Nurse and Ratanlal v. Baboolal as well as in those cases where a suit for damages for defamation, assault or other personal injuries sustained by the Plaintiff had resulted in a decree in favour of the Plaintiff because in such a case the cause of action becomes merged in the decree and the decretal debt forms part of the Plaintiffs estate and the appeal from the decree by the Defendant becomes a question of benefit or detriment to the estate of the Plaintiff which his legal representatives are entitled to uphold and defend (vide Gopal v. Ramchandra and Melapurath Shankunni v. Thekittil).

7. Reading the afore-cited decisions in juxtaposition, it is obvious that the maxim "actio 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 but also to cases where the Plaintiff dies during the pendency of an appeal filed by him to the appellate Court or even to second appeal filed by him to the second appellate Court on the principle that an appeal is a continuation of the original suit, which has been dismissed. For example, if the Plaintiff dies during the pendency of the suit, the suit stands abated. Similarly, if a suit is dismissed, but the Plaintiff files an appeal and he dies during the pendency of the appeal, then the appeal is hit by Section 306 of the Indian Succession Act, 1925 and will stand abated. Similarly, if he files a second appeal against the dismissal of the suit by

the trial and he dies during the pendency of the second appeal also, the appeal will stand abated. The reason is that he stands relegated to his original position as the Plaintiff whose suit has been successively dismissed. If he died during the pendency of the first appeal filed by the Defendant the appeal would not abate because he succeeded in the suit. Take another instance, if he died during the pendency of the second appeal filed by the Defendant in the High Court, the appeal would not abate because he has succeeded in the first appeal. Therefore, it can now be taken to be the law that in those cases where a suit for damages, assault or other personal injuries sustained by the Plaintiff had resulted in a decree in his favour, the cause of action becomes merged in the decree and the decretal debt forms a part of his estate and the appeal from the decree by the Defendant becomes a question of benefit or detriment to the estate of the deceased which his legal representatives are entitled to uphold and defend. It is a settled proposition of law that grant of compensation arising out of an accident is within the realm of torts. [See Reshma Kumari and Others Vs. Madan Mohan and Another, , In the instant case, the deceased succeeded in his claim petition and was awarded a compensation of Rs. 3,43,163/-. It is the Appellant-insurer, which preferred an appeal against the said award passed in favour of the deceased. An award is in the nature of a decree. On the principle laid down by the Apex Court, there is, therefore, no difficulty in holding that the maxim "actio personalis cum moritur persona" does not apply in this appeal and that the appeal does not abate and can be defended by the legal representatives of the deceased. Incidentally, no application appears to have been filed so far by the legal representatives of the deceased for substitution.

8. For what has been stated in the foregoing, there is no merit in this application, which is accordingly dismissed. Let the appeal be heard on merit. In the meantime, it shall be open to the opposite party to file an application for substituting the deceased by her if permissible by the law of limitation. No order as to costs.