

(2011) 03 MAD CK 0350
In the Madras High Court
Case No : CMA MD No. 1321 of 2010

New India Assurance Company Ltd.

APPELLANT

Vs

S. Pooranam and M. Raju

RESPONDENT

Date of Decision : 16-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 1
Probate and Administration Act, 1881 — Section 89
Succession Act, 1925 — Section 306

Citation : (2011) 03 MAD CK 0350

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : A.K. Baskara Pandian, for the Appellant; S. Elangovan, for R1 and A. Haja Mohideen, for R2, for the Respondent

Final Decision : Dismissed

Judgement

T. Mathivanan, J.—Challenge is made in this appeal to the award of Rs. 75,000/- dated 26.04.2010 and made in MCOP. No. 912 of 2006 on the file of the Motor Accident Claims Tribunal, III Additional Sub Court, Madurai by the second Respondent/Insurance Company.

2. The facts which giving rise to the memorandum of civil miscellaneous appeal may be summarised as under.

2.1. That on 17.02.2006 at about 07:55 am., the injured G. Sithivinayagam, was knocked down by an autorickshaw bearing registration No. TN 58 B 2898, opposite to Devika Scans on Theni Road, when he was proceeding in his two wheeler Bajaj M 80 bearing registration No. TN 59 D 9426 and as a result of which he had sustained grievous injuries at the bottom of his right leg which resulted in communitied fracture of both bones right leg mid 1/3 lower 1/3. Hence the injured, Sithivinayagam had filed a claim petition in MCOP No. 912 of 2006 on the file of the Motor Accident Claims Tribunal, (III Additional Sub Court), Madurai claiming a sum of Rs. 3 lakhs.

2.2. The first Respondent being the owner of the autorickshaw has not chosen to contest the claim petition. On the other hand the second Respondent, who is the Appellant Insurance Company has alone contested the claim petition on various grounds. In order to substantiate their respective cases the parties to the claim petition went for trial.

2.3. During the pendency of the claim petition the injured Sithivinayagam, had died and hence, the second Petitioner being the wife of the injured claim Petitioner got impleaded in the claim petition and prosecuted the proceedings. Three witnesses which includes the second Petitioner Tmt.S. Pooranam were examined on behalf of the claimant and during the course of their examination Ex.P1 to P7 were marked. On the other hand one Jalaluddin, who has been working as Junior Assistant in the Regional Transport Office in Dhindigal was examined as RW 1, and during the course of his examination Ex.R1 was marked. On appraising the evidences both oral and documentary and on considering the related materials, the Motor Accident Claims Tribunal had proceeded to find that the first Respondent, driver was at fault for the accident. As the injured Sithivinayagam, had died during the pendency of the claim petition, the Motor Accident Claims Tribunal, had also found that the death of the injured Sithivinayagam, did not have any proximate cause to the accident and therefore, it had concluded that the second Petitioner being the wife of the injured Sithivinayagam was entitled to have a sum of Rs. 75,000/- towards compensation under the following heads;

1. Loss of love and affection Rs. 50,000/-
2. Towards consortium for loss of marital life Rs. 25,000/-

Total Rs. 75,000/-

2.4. Ultimately, the second Respondent was directed to pay the compensation amount of Rs. 75,000/- within a period of two months with interest at the rate of 7.5% per annum from the date of petition. Being aggrieved by the impugned order the second Respondent, Insurance Company has chosen to file this appeal.

3. The learned Counsel appearing for the Appellant, Insurance Company has projected his arguments on two grounds;

1. The cause of action does not survive to the first Respondent/second claimant being the wife of the injured Sithivinayagam, when the death of the injured Sithivinayagam was not due to the accident injury and that the first Respondent/second claimant is entitled only for the actual expenses if any incurred by the deceased being loss of estate.

2. The driver of the autorickshaw was not having valid license on the date of accident as per the evidence of RW 1 Junior Assistant From Regional Transport Office, Dhindigal and therefore the claim petition as against the Appellant/insurance company ought to have been dismissed and if any award has to be passed it ought to have been passed only against the owner of the autorickshaw,

as he had violated the terms and conditions of the policy by entrusting the vehicle to a person who had no valid license on the date of accident.

4. It is not disputed that the original claimant viz., injured Sithivinayagam, had passed away during the pendency of the claim petition. The prime question to be considered in this appeal is as to whether the cause of action to maintain the claim proceedings would survive to the first Respondent/second claimant who is the wife of the injured Sithivinayagam. In so far as this question is concerned, the maxim "action personalis moritur cum persona" can be applied here. This maxim embodies within it, the English Principle that a personal action dies with the injured. Though the above said maxim has been inbuilt with English principle, it may be given effect to India to the extent it has been recognised in Section 306 of Indian Succession Act 1925. English Common Law is applied to India in the absence of any statutory provision and on its consonance with principles of justice, equity and good conscience. In England the maxim has been criticised as harsh, unconscionable, and unjust. Therefore, by reason of the principles underlying the provision u/s 306, a cause of action based on personal injuries causing the death of the deceased survives to his heirs and they can be substituted in his place in the claim petition preferred by the deceased before the Motor Accident Claim Tribunal. This dictum is laid down in *Prisca Rozario v. Ford Foundation* reported in 1969 Cal 394.

5. But in the instant case on hand, evidently it is established through the materials available on record that the death of the injured is not proximate to the injury sustained by him in the alleged accident. When such being the case an action for personal injury not causing death of the injured Sithivinayagam, does not survive to the first Respondent/second claimant who is none other than the wife of the original claimant Sithivinayagam. This ratio has been laid down in *Jogindra Kuer and Others Vs. Jagdish Singh and Others*, . In this case a question as to whether the right to sue in personal actions survives the death of the Plaintiff was arisen. In order to answer this question a full bench of Patna High Court has taken the assistance of the proviso to Order 22 Rule 1 and 11 as well as Order 1 Rule 3 and 9 of CPC Code. While writing the judgment Mr. Justice Tarkeshwar Nath, has observed that;

The common law maxim "action personalis moritur cum persona" means that "personal right of action dies with the person". In other words "death destroys the right of action". 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. 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 Section 306 of the Indian Succession Act. According to this section, 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 executor or administrator except certain causes of action including those for other personal injuries not causing the death of the party.

6. Similar view was taken in *Ratanlal Bhannalal Mahajan Vs. Baboolal Hajarilal Jain and Others*, . In this case it is observed that;

though Section 306 speaks of right to prosecute or defend any action surviving to the executors or administrators still it indicates the limits within which the maxim "action personalis moritur cum persona" should be confined and those limits should be held equally applicable to legal heirs.

7. It is also observed that;

the expression "personal injuries" in Section 306 is not confined to physical injuries but would include mental injuries as well. Therefore, a claim for compensation for loss of reputation or mental agony would not survive to the legal representative after the death of the party injured.

8. In this connection it may be relevant to extract the proviso to Section 306 of Indian Succession Act 1925. "Section 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 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.

Illustration;

(i) A collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

9. It may also be relevant to refer the proviso to Order 1 Rule 1 of Code of Civil Procedure;

"Order 1 Rule 1 - Who may be joined as Plaintiffs - All persons may be joined in one suit as Plaintiffs where -

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and

(b) if such persons brought separate suits, any common question of law of fact would arise.

10. Reference to the proviso to Order 22 Rule 1 of Code of Civil Procedure, may

also add an extra strength to this issue. "Order 22 Rule 1 - No abatement by party"s death, if right to sue survives - The death of a Plaintiff or Defendant shall not cause the suit to abate if the right to sue survives."

11. From the proviso to Order 1 Rule 1 and Order 22 Rule 1, it is thus made clear that if any person wants to continue the suit or claim, it is very much essential that the right to sue must survive to him. In the given case on hand admittedly the injured Sithivinayagam had died during the pendency of the claim petition. Subsequently, the first Respondent/second claimant has been impleaded as his legal representative. As rightly argued by the learned Counsel for the Appellant, the cause of action to continue the claim proceedings does not survive to the first Respondent/second claimant. In this regard this Court consider that the decision in *The Managing Director, Pandiyan Roadways Corporation, Madurai Vs. S. Rajalakshmi and four others*, will throw more light on this issue.

12. In the above case a similar question was arisen as to whether the legal representatives are entitled for the entire compensation, awarded in favour of the claimant. Similar to the present case after the filing of the claim petition, the claimant had died during the pendency of the proceedings and subsequent to his death, the legal representatives of the claimant were impleaded as parties. It was contended on behalf of the Appellant that the death of the claimant was not due to the accident and as such the legal representatives of the claimant were not entitled to be compensated in respect of the personal injuries suffered by the deceased claimant. Reference was made to a judgment in *Pushpam v. Nirmala and Anr. C.R.P. No. 2307 of 1988, dated 03.01.1991*. In that case the learned judge had made a distinction between a case of death over which the legal representatives could maintain a claim for compensation and the case of the personal injuries suffered by the claimant after referring the decision viz., *Melepurath Sankunni Ezhuthassan Vs. Thekittil Geopalankutty Nair, and M. Veerappa Vs. Evelyn Sequeira and Others, .*

13. The learned single judge of this Court has held that in the case of an injured claimant the cause of action will not survive in respect of the legal representatives of the claimant. He has also held that in all the above decisions, the Division Bench as well as the Supreme Court have taken note of Section 306 of the Indian Succession Act and have held that claim for compensation in respect of personal injuries will not be availed for the legal representatives provided the death was not caused as a result of the accident.

14. On coming to the instant case on hand as discussed in the foregoing paragraphs, the death of the injured claimant was not caused as a result of the accident and hence this Court without any hesitation holds that the first Respondent/second claimant being the wife of the injured is not entitled to any relief as the cause of action does not survive to her. Though the arguments in this connection was put forth before the Motor Accident Claims Tribunal, unfortunately, the Tribunal has lost sight upon it and proceeded to pass an award of Rs. 75,000/-without any justifiable cause. Under this circumstances, the award

of the Tribunal is liable to be set aside.

15. Where the claims Tribunal has not justified its award, the other ground with regard to non possession of valid driving licence by the driver of the autorickshaw has become pale into insignificance.

In the result, the appeal is allowed. The award dated 26.04.2010 passed by the Motor Accident Claims Tribunal, III Additional Sub Court, Madurai, is set aside and the claim petition in MCOP. No. 912 of 2006 is dismissed. No order as to costs.