
(2006) 09 DEL CK 0187
In the Delhi High Court
Case No : CRP No. 352 of 2004

Shri Aan Singh (Since dead represented through proposed
LRs.) APPELLANT

Vs

Municipal Corporation of Delhi and Others RESPONDENT

Date of Decision : 28-09-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, Order 22 Rule 3(1), 115
Succession Act, 1925 — Section 306

Citation : (2006) 09 DEL CK 0187

Hon'ble Judges : J.P. Singh, J

Bench : Single Bench

Advocate : Subodh K. Pathak, for the Appellant; Tarun Sharma, for Respondents
No. 1 and 2 and Maheshwar Dayal and K.P. Mavi, for the Respondent

Final Decision : Disposed Off

Judgement

J.P. Singh, J.—This petition u/s 115 of the CPC is directed against the order dated 16.7.2003 passed by the Civil Judge, Delhi. Vide the impugned order an application under Order XXII Rule 3 CPC for impleading the legal heirs of the deceased was dismissed holding that the suit being based on the allegation of tort stood abated.

2. I have heard Mr. Subodh K. Pathak, Advocate learned Counsel for the petitioners, Mr. Tarun Sharma, Advocate learned Counsel for respondents No. 1 and 2 and Mr. Maheshwar Dayal, Sr. Advocate learned Counsel for respondent No. 3.

3. Briefly the facts are that late Mr. Aan Singh (hereinafter referred to as plaintiff), filed a suit against Municipal Corporation of Delhi (Defendant No. 1), Hindu Rao Hospital (Defendant No. 2) and Dr. Ramakant Gupta (Defendant No. 3) of the same Hospital (hereinafter referred to as defendants), claiming Rs. 1 lakh, due to willful negligence in conducting a minor operation. The plaintiff pleaded that he was employed as 'Daftri' in Delhi University and was getting a

carry home salary of Rs. 500/- per month. He had to maintain a family comprising wife, three daughters and a son. One daughter was married and other children were studying. The plaintiff averred that he had a swelling in his right upper arm. He was examined at Hindu Rao Hospital and was advised minor surgery, by defendant No. 3. Requisite pre-operation tests were conducted. He was operated upon by associates of defendant No. 3. After the operation he felt that his right forearm was not functioning. It was brought to the notice of the doctors who said that it was due to temporary effect of anesthesia. He was discharged but his right forearm was still not functioning. Despite treatment it could not be cured. It became a permanent disability due to cutting of nerve during operation. He alleged that the disability was caused due to negligence of doctors of the Hospital.

4. It is pleaded that doctors of All India Institute of Medical Sciences and WHS (Health), University of Delhi opined that disability was caused due to negligence and willful default of the persons who operated. Because of disability he was unable to perform his duties.

5. In the written statement on behalf of defendant No. 3 preliminary objections were raised that defendant No. 3 was not at all responsible, the suit was barred by limitation and no statutory notice was given. The allegations were stated to be vague. The suit was said to be bad for non-joinder and mis-joinder of parties. On merits the allegations of negligence were denied.

6. Final arguments were heard by the trial court. Only some judgments remained to be cited. Meanwhile the learned presiding officer was transferred, so the matter was again fixed for final arguments. Unfortunately the plaintiff expired. An application under Order XXII Rule 3 CPC was moved for bringing on record the legal representatives of the deceased. In the reply filed by the defendants the main objections was that right to sue did not survive because it was merely a claim of the deceased and did not relate to his estate or property.

7. The learned Counsel for the petitioner has argued that it was an obligation on the part of the respondents to perform the operation cautiously and if they have not done so they must compensate the plaintiff and on his death his legal representatives/heirs should receive the amount that may be allowed. The learned Counsel has submitted that Section 306 of the Indian Succession Act has not been properly applied. The other issues should be decided after allowing the application under Order XXII Rule 3 CPC.

8. On the other hand, learned Counsel for the respondents have submitted that it was a case of tort and not contract. The plaintiff expired after several years of the operation and Therefore it was not a personal injury causing his death. The defendant No. 3 was not at all concerned, the cause of action did not survive and the suit stood abated.

9. At this stage I may refer to Section 306 of the Indian Succession Act which is as under:

Demands and rights of action of or against deceased survive to and against executor or administer ? All demands whatsoever and all rights to prosecute or defend any action or special proceedings existing in favor of or against a person at the time of his ?decease?, survive to and against his executors or administrators, except cause 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

10. In support learned Counsel for the respondents have cited the following judgment:

E.I. Ltd. and Another Vs. Klaus Mittelbachert (deceased) through L.Rs., . Brief facts in the said case were that the plaintiff, who was a national of Federal Republic of Germany, stayed in appellant's hotel on 11.8.1972. The hotel had provided the usual facilities including the swimming pool with a diving board. The plaintiff went to the swimming pool and took a dive, his head struck the bottom and he became unconscious. He was treated at the hospital. He pleaded that he was permanently deprived of the enjoyment of life, because the depth of water was not enough and filed a suit for Rs. 50 Lacs as damages reserving his right to enhance his claim. Issues were framed. Evidence was also recorded. Unfortunately, the plaintiff expired on 27.9.1985 due to cardiac arrest. Application was moved for brining his legal heirs on record. It was opposed on the ground that the cause of action did not survive, so additional issues were framed. The Single Bench of the High Court passed a decree in favor of the plaintiff in the sum of Rs. 50 Lacs with costs and interest at the rate of 6% per annum. The defendants filed appeal which came up before the Division Bench. The question before the court (DB) was as to whether the suit was found on torts or on contract or partly on torts and partly on contracts. The Division Bench examined Section 306 of the Indian Succession Act. The learned Single Judge had held that it was the liability of the defendant under the contract. The Division Bench did not agree with the Single Bench, holding that there was no foundation in the plaint regarding the alleged contract and that the suit was based solely on torts and relying upon the judgment titled M. Veerappa Vs. Evelyn Sequeira and Others, held that the suit abated on death of the plaintiff and did not survive, Therefore, the legal heirs had no right to be substituted. The appeal was allowed and it was opined that no other issues needed to have been decided by the Single Bench

11. However, in conclusion, it has been recorded that the appellants as a gesture of goodwill and without admitting their liability have agreed to pay a sum of Rs. 86,21,700/- deposited by them in the court along with interest accrued thereon and the same shall be paid to the respondents (legal heirs of the plaintiff) if they agree not to claim anything in future because of death of the plaintiff. The judgment ended on this happy note.

12. In my view, it will be better to go through the judgment titled M. Veerappa

Vs. Evelyn Sequeira and Others, , to see as to whether the facts and circumstances of the present case are different from the facts and circumstances of the M. Veerappa's case (supra) and the case of Klaus Mittelbachert (supra).

13. The brief facts in M. Veerappa's case were that a tenant Mr. Sequeira had lost a case in High Court of Karnataka. He was directed to be evicted from his business premises. He wanted to prefer an appeal in the Supreme Court and met Mr. M. Veerappa, Advocate, for the said purpose and engaged him for filing the special leave petition. On 22.11.1971 the petition was 'dismissed as withdrawn'. Mr. Sequeira then filed an original suit in the court of District Munsif Mangalore against Mr. M. Veerappa for damages and compensation alleging that learned Advocate was negligent in rendering professional services and had misconducted himself by filing the appeal after considerable delay and giving him misleading information about filing of the appeal and furthermore in withdrawing the appeal instead of canvassing for its admission. Because of withdrawal of appeal Mr. Sequeira was evicted from business premises and incurred losses of income as he had not been able to secure alternative place for business. In addition he suffered mental agony, worry and loss of reputation. He claimed a sum of Rs. 20,000/- towards loss sustained by him but restricted the amount to Rs. 4,500/-. He claimed Rs. 500/- as refund, Rs. 500/- as court fee and misc. expenses and Rs. 500/- spent by him for engaging another advocate for obtaining certified copy of order of the Supreme Court and also claimed some other misc. expenses. During the pendency of the suit the plaintiff died.

14. The legal heirs filed an application under Order XXII Rule 3 (1) CPC for substitution and for prosecuting the suit. It was opposed on the ground that suit was for damages for personal injuries and Therefore it abated as per maxim action personalis cum moritur persona. The District Munsif dismissed the suit having abated but the High Court held otherwise and declared the legal representatives to be entitled to get imp leaded and continue the suit. The said order was challenged in the Supreme Court. Section 306 of Indian Succession Act and Order XXII CPC were examined. The interpretation and application of 'personal injuries' was dealt with and it was opined that the words have to construe ejusdem generis not merely with the last preceding word 'assault' but with the two preceding words 'defamation' and 'assault'. After examining the entire law on the controversy before the court and the facts of the case, finally the Supreme Court held that the question whether the suit had abated or not can be answered only after the nature of the suit is determined on the basis of the material placed and the evidence adduced by the parties and remanded the case back to the trial court for disposal in accordance with law and in the light of guidelines given by the court.

15. The Supreme Court left the matter open for the trial court to decide whether the suit was founded entirely on tort or on contract or partly on tort and partly on contract and to deal with the matter according to law, if the entire claim was found on tort the suit would abate, if the action was found partly on tort and

partly on contract then such part of claim as relates to tort would stand abated and other part would survive.

16. Perusal of the trial court file shows that the suit was initially filed as an application for permission to sue in forma pauperis (as an indigent person), in the year 1989. The applicant had stated that he had no other assets and he was getting only Rs. 500/- per month after deductions and was unable to pay court fee. Perusal of the order-sheets shows that the suit was dismissed in default due to lapse on the part of the learned Counsel for the plaintiff. It was, thereafter, restored. The defendants were proceeded ex-parte on 23.4.1993. Then the matter was transferred to the court of civil judge, due to enhancement of jurisdiction. Court notices were issued to the parties. Meanwhile, the main file stood consigned to the record room on 11.4.1994. Later on only a part of the case file was received from the record room (order dated 6.8.1996). Several times the cases was adjourned and finally after about three years the complete file was received from the record room on 20.5.1997 and the matter was adjourned for further proceedings. Defendant Nos. 1 & 2 were proceeded ex-parte. It seems that at some stage due to objection by contesting defendant or voluntarily the applicant-plaintiff paid the court fee (orders dated 5.11.97 and 17.11.97) and thereafter the matter was treated as a regular suit and again summons were issued to defendants on 8.1.1998. Despite opportunities written statements were not filed by defendants No. 1 & 2 and final opportunity was given to the defendants to file written statement on 1.12.98 mentioning in the order sheet that if the written statement was not filed the defense shall be deemed to be struck off. However, one more opportunity was granted to defendants No. 1 & 2 subject to cost of Rs. 300/- and again it was clarified that if written statement was not filed by defendants No. 1 and 2 the defense shall be struck off. Even on the next date neither cost was paid nor written statement was filed. Therefore, defense of defendants No. 1 and 2 was struck off on 5.4.1999 and issues were framed on 2.9.1999.

17. The plaintiff filed evidence by way of affidavit on 22.8.2001. It seems that despite opportunities the plaintiff was not cross-examined. Therefore, plaintiff's evidence was closed/concluded. On the next date arguments were heard and the matter was adjourned at the request of learned Counsel for citing some case law. On the next date (23.4.2002) learned Presiding Officer was transferred then the matter was adjourned again for arguments on 2.8.2002. The plaintiff expired on 25.6.2002 at St. Stephen's hospital and thereafter the application under Order XXII Rule 3 CPC was moved on 24.7.2002.

18. The above facts and circumstances show that even arguments had been heard and only judgments were to be cited when the learned Presiding Officer was transferred. The matter was ripe for decision when the plaintiff expired. The journey of the above suit is a classic example of the procedural delays so much so that the issues were framed after 10 years of filing of the suit.

19. Perusal of the plaint shows that plaintiff was employee of a Delhi University.

Because of prima facie negligence on the part of the hospital and its doctors he had suffered a permanent disability affecting his official duties and possibly his promotions. Needless to say that during pendency of this suit he must have received usual increments, and must be contributing to his household expenses, specially because he has specifically referred to his family in the plaint. His family comprised wife and three school going children besides one daughter who was married. Had the decision come quickly and had he succeeded, the amount of compensation would have added to his estate or property and in any case would have benefited his family but because of the procedural delays, he expired before knowing the judgment whether for or against him.

20. The provisions of Section 306 also refer to except cause 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 .

21. After reading the entire Section 306 of Indian Succession Act and exceptions construed ejusdem generis, I may interpret the exception part by giving an example : like a qualified engineer files a suit against his non selection/ appointment after his interview and he expires during pendency of the suit, in my opinion his legal representatives/heirs can neither enjoy the success of his suit because only deceased was qualified to be appointed and enjoy the relief and granting appointment to the deceased would obviously be nugatory.

22. I am of the view that granting relief in the present case would not be nugatory because it will be damages/compensation which otherwise also was to be enjoyed jointly by the deceased and his family or he might have bought an Immovable property immediately with the amount so received, which property would have passed on to his family, as his estate.

23. One can visualize the torture, agony and harassment that the plaintiff and the members of his family must have undergone during all that period of his treatment and resulting disability and the consequential additional liabilities and duties of the family. Such additional burden was thrust upon the family because of the negligence on the part of the defendants. In this light, in my view, it was not a personal injury only to the deceased.

24. Needless to say that there is a fiduciary relationship also i.e., a relationship of mutual trust between the patient and the doctor and public confidence and faith about the discharge of duties by the doctors sincerely and devotedly towards the patient/public and more so because the employees of a Government hospital receive their salaries from the public exchequer. So there is an obligation based on oath and trust not to be negligent and careless while discharging medical duties.

25. The issues have already been framed. The findings on the issues are yet to come. In my view considering all the facts and circumstances of this case there

cannot be abatement of the suit in question even after applying the above mentioned judgments.

26. I am, Therefore, of the opinion that the trial court has acted illegally and with material irregularity in the exercise of its jurisdiction. The impugned order is, Therefore set aside. The application under Order XXII Rule 3 CPC which is supported with affidavits of all the legal representatives is allowed. Amended memo be filed in the trial court and be taken on record. The matter is remanded for disposal on merits, in accordance with law. The parties are directed to appear before the trial court on 20th October, 2006.

27. Nothing said herein will tantamount to expression of opinion on the merits of the case.