

(2012) 04 GAU CK 0031

Gauhati High Court (Agartala Bench)

Case No: CM Application No. 112 of 2012 in MAC App. No. 45 of 2011 and CRP No. 85 of 2010

Sri Swapan Paul and Others

APPELLANT

Vs

The New India Assurance
Company Ltd., Shri Adyut
Debbarma and Shri Anup Kumar
Roy
 The New India
Assurance Company Ltd. Vs Shri
Shyamal Paul, Shri Adyut
Debbarma and Shri Anup Kumar
Dey

RESPONDENT

Date of Decision: April 25, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 1, Order 22 Rule 3, 151
- Constitution of India, 1950 - Article 226, 227
- Motor Vehicles Act, 1988 - Section 165(1), 166
- Succession Act, 1925 - Section 306

Hon'ble Judges: Swapan Chandra Das, J

Bench: Single Bench

Advocate: A.L. Saha and Mr. S. Saha, for the Appellant; P. Gautam, Advocate and Mr. A. Sengupta, for the Respondent

Judgement

S.C. Dass

1. This is a petition under Order XXII Rule 3 read with Section 151 of CPC, praying for substitution of the petitioners as appellants in place of deceased Shyamal Paul in MAC Appeal No.45 of 2011. Brief fact is that Shyamal Paul, since deceased, brother of petitioner Nos.1, 2, 3, 4, 8 and 9, brother in-law of petitioner No.5 and uncle of petitioner Nos.6 and 7, suffered injury due to motor vehicle accident occurred on 13.05.2006 and he preferred a motor accident claim case in the Tribunal at Agartala

bearing case No. TS(MAC) 498 of 2006. The Tribunal by judgment and award dated 14.05.2010 awarded compensation of Rs.16,07,247/- (rupees sixteen lakhs seven thousand two hundred forty seven). The claimant, Shyamal Paul (since deceased), being dissatisfied with the amount of compensation awarded by the Tribunal, filed MAC Appeal No.45 of 2011 before this Court, and while pendency of the appeal, the claimantappellant died on 02.06.2011.

After the death of appellant, Shyamal Paul, the present petitioners filed an application, praying for substituting them as appellants in place of the deceased appellant Shyamal Paul, stating that the deceased was under continuous treatment and that his fractured left leg was amputated on 18.05.2011 and after amputation of the leg his condition deteriorated and died on 02.06.2011. There is direct nexus between the injury sustained due to the motor vehicle accident and the cause of death, and therefore, the petitioners, being the legal representatives, have a right to proceed with the appeal with enhanced compensation.

2. Heard learned counsel, Mr. A.L. Saha for the petitioners and learned counsel, Mr. P. Gautam for the respondent-Insurance Company.

3. In course of hearing of this petition, learned counsel Mr. Saha has submitted that challenging the judgment and award passed in TS (MAC) No. 498 of 2006 the respondent, New India Assurance Company also preferred Civil Revision Petition No.85 of 2010 against the deceased Shyamal Paul, which is also pending before this Court. Learned counsel, therefore prays for taking up that case along with the present Misc. case and the MAC Appeal. Learned counsel, Mr. P. Gautam for the Insurance Company has no objection in the submission and, so, that revision petition being CRP No.85 of 2010 is also taken up for hearing along with this petition.

4. The core question, which has arisen for decision is whether the present petitioners have got right to sue and to proceed with the appeal further after the death of the claimantappellant.

Learned counsel, Mr. Saha submits that the deceased Shyamal Paul suffered severe fracture injury in left femur and was under prolonged treatment. The injury developed with infection and ultimately the leg was amputated on 18.05.2011, and thereafter, he died on 02.06.2011. Since Shyamal Paul died as a result of the injury sustained by him due to the accident, the present petitioners, being the legal representatives of the deceased, have got the right to proceed with the appeal for adequate compensation. Learned counsel relied on a decision of this Court in the case of [Smt. Maharani Dey and Others Vs. Debabrata Bardhan and Another,](#).

On the other hand, learned counsel Mr. Gautam submits that deceased Shyamal Paul was a bachelor. The petitioners are all brothers, sisters and brother's wife and children, etc. They cannot be accepted to be the legal representatives of the deceased. Secondly, the accident occurred on 13.05.2006 and the deceased died on

02.06.2011 i.e. after five years of accident. The claim case was disposed of awarding adequate compensation and, now, the petitioners claiming to be the legal representatives of the deceased Shyamal Paul cannot further continue with the appeal in view of the provisions prescribed in Section 306 of Indian Succession Act and in view of the decision of this Court in the case of Smt. Pravabati Ghosh & Ors. vs. Gautam Das & Ors. reported in 2006(Supp.) 1 GLT 15 and another decision of this Court in MAC Appeal No.64 of 2000, Smt. Sipra Bhowmik & Anr. vs. Sri Soumendra Ch. Saha & Ors.

5. Shyamal Paul set the law in motion praying for granting him compensation for the injury suffered by him due to motor vehicle accident. The Tribunal decided the claim case in his favour and awarded compensation. He was not satisfied with the amount awarded, and therefore he filed the appeal. During pendency of the appeal he died.

6. In course of argument, learned counsel Mr. Saha submitted a computer generated discharge summery of "Fortis Hospitals", Kolkata, which shows that Shyamal Paul was admitted in that Hospital on 15.05.2011 and was discharged on 23.05.2011. The history, in the said discharge certificate, so far recorded, is that his left leg was amputated above the knee on 18.05.2011. He was diagnosed to have chronic osteomyelitis of left femur with fracture nonunion of middle 1/3rd of left femur with multiple previous operations and Taenia cruris. The history of complaints was also recorded with a note of previous operations following injury due to RTA. It is also noted that the patient was suffering from hypertension, impaired renal function and diabetics. Though the discharge certificate is not under the signature of any authority but still it is examined since produced before the Court. It is submitted by learned counsel, Mr. Saha that after the death of deceased Shyamal Paul no postmortem examination was done, but it is to be presumed that the death was as a result of the injury sustained by him due to motor vehicle accident occurred on 13.05.2006.

7. There is no material before us to examine the actual cause of death of Shyamal Paul. Under such circumstances, it is difficult to arrive at a conclusion that because of the injury sustained by the deceased-claimant on 13.05.2006, he died on 02.06.2011. The question, therefore, arises whether his legal heirs/representatives have got a right to continue with the claim case/appeal after the death of the deceased.

8. Section 166 of the M.V. Act has prescribed that an application for compensation arising out of an accident of the nature specified in Sub-Section(1) of Section 165 of the Act may be made by-

- (a) by the person who has sustained the injury; or
- (b) by owner of the property; or

- (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or
- (d) by any agent duly authorized by the person injured or all or any of the legal representative of the deceased, as the case may be.

It is thus clear from the contents of Section 166 that if a person, who suffers bodily injury in a motor vehicle accident, chooses not to make any claim for compensation during his life time, Section 166 does not recognize the rights of the legal representatives of such a person to institute proceedings claiming compensation if the injured dies without having instituted a proceedings for compensation in a claims Tribunal constituted u/s 165 of the M.V. Act.

The above provision further makes it clear that an injured may present his/her petition claiming compensation himself/herself, or through any duly authorized agent. In the present case, the injured himself presented the petition claiming compensation, which has been disposed of and he has presented the appeal and while the appeal was pending he died. Unfortunately, the cause of death has not been brought clearly on record. In the circumstances of the case, we have to consider whether the principles enunciated in the legal maxim "Actio personalis Moritur-cum-Persona" is applicable and whether the claim through the appeal presented by the injured has been abated. According to law, a personal claim for the personal injury is liable to be abated in the event of death of the person.

9. Keeping the above principle in mind, let us now see Section 306 of Indian Succession Act, 1925. This section reads as follows:

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, 1860, 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.

Illustrations

- (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.
- (ii) A sues for divorce. A dies. The cause of action does not survive to his representative.

10. This issue was considered in the case of Pravabati Ghosh & Anr. Vs. Gautam Das & Ors. by the Single Bench of this Court, reported in 2006(Suppl) 1 GLT 15 , and the learned Single Judge, relying on the ratio laid down by the apex Court in the case of Melepurath Sankunni Ezhuthassan Vs. Thekittil Geopalankutty Nair, , and the case of M. Veerappa Vs. Evelyn Sequeira and Others, , has held in paragraph 8 of the judgment thus:-

What logically follows from the observations made above, in Melepurath Sankunni(supra), is that when an injured sues or makes an application to a Claims Tribunal seeking compensation, the right to sue does not survive if, during the life-time of the injured, proceedings do not culminate into an award in his favour. If the claim for compensation results into an award in favour of an injured and an appeal is preferred by the person, who is directed to pay compensation awarded to such an injured, the appeal against such an award would not abate and the legal representatives of such an injured can be substituted, for, the award, rendered in favour of such an injured-claimant, forms part of the estate left behind by the deceased. If, however, the claim for compensation is not awarded by the Claims Tribunal and the injured-claimant, having preferred appeal, dies during the pendency of the appeal, the right to sue will not survive in favour of his representatives, for, in such an appeal, what the legal representatives of such a claimant would be doing is to ask for compensation and the right to ask for compensation to be awarded does not survive if the claimant dies before the claim for compensation is awarded or decreed in his favour, the cause of death not being the injuries sustained by the deceased claimant.

11. In the case of Smt. Sipra Bhowmik(supra) the Single Bench of this Court, presided over by myself in paragraph 11 held thus:

11.An appeal is a continuation of a suit. In the event of death of the injured appellant, the present appeal, which was filed for compensation for the personal injury suffered by the appellant, is also liable to be abated and the present appellants, being the wife and son of the deceased, have got no right to continue with the appeal. The right to sue and/or to continue with the appeal, by the present appellants does not survive. Since the appeal has been abated and the appellants have got no right to proceed with the appeal, discussion on other point regarding quantum of compensation has become redundant. The appeal, therefore, stands dismissed.

12.I have meticulously gone through the decision of this Court in Smt. Maharani Dey and Others Vs. Debabrata Bardhan and Another . In that reported case, during pendency of the claim petition the claimant-petitioner died as a result of the injury sustained by him, which was *prima facie* brought on record and considering that aspect the legal representatives were allowed to be substituted in place of the claimant-petitioner since the legal representatives were having with a right to claim compensation, not only of the income which the deceased would afford to them but

also the cost of treatment, etc, which the legal representatives were entitled to get. The fact of that reported case is clearly distinguishable to the fact of Pravabati Ghosh(supra) and Sipra Bhowmik(supra) as well as the fact of the present case at hand. Here the claim of compensation of the injured claimant was decided by the Tribunal including that of the cost of treatment and so the amount which has already been awarded since has become an asset in the name of the deceased, the petitioners are definitely entitled to that amount already awarded by the Tribunal, but the petitioners cannot claim further compensation for the death of the deceased towards loss of income.

Besides the law laid down by the Apex Court in the case of Melepurath Sankunni(supra) and M.Veerappa(supra), which has been considered by the Single Bench of this court in the case of Pravabati Ghosh(supra), I have further examined the case of Puran Singh and others Vs. State of Punjab and others, , wherein the maxim "Actio personalis Moritur-cum-Persona" has been considered and the Apex Court has held-

A personal action dies with the death of the person on the maxim "action personalis moritur cum persona". But this operates only in a limited class of actions ex delicto, such as action for damages for defamation, assault of other personal injuries not causing the death of the party, and in other actions where after the death of the party the granting of the relief would be nugatory. But there are other cases where the right to sue survives in spite of the death of the person against whom the proceeding had been initiated and such right continues to exist against the legal representative of the deceased who was a party to the proceeding. Order 22 of the Code deals with this aspect of the matter. Rule 1 of Order 22 says that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. That is why whenever a party to a suit dies, the first question which is to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which is extinguished devolve on the legal representatives or successors, then it is an end of the suit. Such suit, therefore, cannot be continued. But if the right to sue survives against the legal representative of the original defendant, then procedures have been prescribed in Order 22 to bring the legal representative on record within the time prescribed.

13. In the present case in hand, no doubt, the deceased Shyamal Paul received injury due to the accident. He died on 02.06.2011 after five years of accident. There is nothing before us regarding the cause of death, and under such circumstances, I think, the ratio of the decision of this Court in the case of Pravabati Ghosh(supra) and Sipra Bhowmik(supra) shall apply and the present petitioners have no right to be substituted as legal representatives of the deceased in the appeal and the appeal therefore abates. Further it appears that petitioner Nos.1, 2, 3, 4, 8 and 9 are all brothers and sisters of deceased Shyamal Paul and petitioner No.5 is the sister-in-law (brother's wife) and petitioner Nos.6 and 7 are the son and daughter of

petitioner No.5. They may be terms as legal representatives, but can in no way be said to be dependents of the deceased, who died bachelor. The petition, accordingly, stands dismissed.

14. CRP No.85 of 2010 filed by the New India Assurance Company Limited is also not maintainable in view of the decision of the Apex Court in the case of [Sadhana Lodh Vs. National Insurance Company Ltd. and Another](#), wherein the Apex Court has held that the right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premises that the injured has limited grounds available for challenging the award given by the Tribunal. In view of the above law laid down by the Apex Court, CRP No.85 of 2010 filed by the Insurance Company challenging the award made in TS (MAC) No.498 of 2006 also stands dismissed