

MELEPURATH SANKUNNI EZHUTHASSAN

v.

THEKITIL GOPALANKUTTY NAIR

NOVEMBER 29, 1985

[D.P. MADON AND G.L. OZA, JJ.]

Abatement of Appeal - Maxim "Actio Personalis Moritur cum persona" (A personal action dies with the person), applicability of - Right to sue/prosecute appeal whether survives on the death of the appellant in an appeal arising out of a defamation case - Right to be represented by Legal Representatives, application maintainability of - Code of Civil Procedure, 1908 Order XXII Rules 1 and 11 read with section 306 of the Indian Succession Act, 1925 and Order XV Rules 32 and 33 of the Supreme Court Rules, 1966.

The appellant filed a suit in the Court of the Subordinate Judge, Ottappalam against the Respondent claiming a sum of Rs. 5500 as damages for defamation. The Trial Court dismissed the suit with costs. In First appeal preferred by the appellant, the District Judge allowed the appeal, decreed the suit and awarded Rs. 500 as damages and proportionate costs both of the said appeal and suit. In the Second appeal filed by the Respondent, the High Court of Kerala reversed the decree of the District Judge and dismissed the cross objections filed by the appellant. Against the said judgment with no order as to costs throughout Special Leave was granted by the Supreme Court in 1972 and during the pendency of the Civil Appeal, the appellant died leaving behind him surviving two grandsons and two grand daughters. On November 4, 1985 one grandson and one grand-daughter moved two applications-one to bring the grand-sons and grand-daughters on record as Legal Representatives and the other to condone the delay in filing the said application and to set aside the abatement of the Appeal.

Dismissing the petitions and the appeal, the Court

HELD: 1.1 Reading section 306 along with Rules 1 and 11 of Order XXII of the Code of Civil Procedure, 1908, it is clear that a cause of action for defamation does not survive the death of the appellant. [810 C-D]

A 1.2 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 the record of the appeal in his place and stead 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. [810 D-F]

D 1.3 Though section 306 speaks only of executors and administrators, 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. [810 G-H]

E 2.1 Rule 1 of Order XXII of the Code provides that "the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives." Thus, if the right to sue does not survive, the suit will abate on the death of the plaintiff. Under Rule 3 of Order XXII, where a sole plaintiff dies and the right to sue survives, the court on an application made in that behalf will cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. If, however, no application in that behalf is made within the time prescribed by law, the suit will abate. Under Rule 9(2), the court may set aside the abatement of the suit on the application of the person claiming to be the legal representative of the deceased plaintiff if he proves that he was prevented by any sufficient cause from continuing the suit. Rule 11 further provides the applicability of Order XXII to appeals as well substituting the words "plaintiff", "defendant" and suit by "appellant", "respondent" and "appeal" respectively. Thus, reading Rule 1 and Rule 11 of Order XXII together, in the case of an appeal Rule 1 would read "the death of an appellant or respondent shall not cause the appeal to abate if the right to sue survives." Thus, where there is only one appellant and he

dies during the pendency of the appeal, if his right to sue does not survive, the appeal will abate and his legal representative will have no right to be brought on the record to continue the appeal. [808 F-H; 809 A-D]

2.2 In the present case, if the Appellant's right to sue had survived on his death, his right to prosecute the present appeal would also survive, but if the right to sue would not have survived on his death, this appeal also would not have survived and would abate. [809 D-E]

2.3 The position, therefore, is that had the appellant died during the pendency of his 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 accordingly the appeal abated automatically on his death and his legal representatives acquired no right in law to be brought on the record in his place and stead. [811 A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 91 of 1972.

From the Judgment and Order dated 12.2.1971 of the Kerala High Court in S.A. No. 21 of 1966.

A.S. Nambiar for the Appellant.

T.T. Kunhitkanan for the Respondent.

The Judgment of the Court was delivered by

MADON, J. On May 16, 1983, the Appellant died during the pendency of this Appeal by Special Leave granted by this Court, leaving behind him surviving two grand-sons and two grand-daughters as his only heirs and legal representatives. On November 4, 1985, one grand-son and one grand-daughter filed Civil Miscellaneous Petition No. 43065 of 1985 to bring themselves and the other grand-son and grand-daughter on the record

A of the Appeal in place of the Appellant. As the said application was filed beyond time, they filed another Civil Miscellaneous Petition, namely, Civil Miscellaneous Petition No. 43066 of 1985, to condone the delay and to set aside the abatement of the Appeal. The question which falls to be determined is whether by reason of the very fact of the death of the Appellant the Appeal has abated, because if it has, the question whether the delay in
B filing the two applications for substitution and for setting aside the abatement of the Appeal by reason of the expiry of time should be condoned will not arise.

The facts material for deciding the above question may be briefly stated. The Appellant filed a suit in the Court of the Subordinate Judge, Ottappalam, against the Respondent claiming a
C sum of Rs. 5,500 as damages for defamation. The Trial Court dismissed the suit with costs. The Appellant thereupon filed an appeal in the District Court of Palghat. The District Judge allowed the appeal and passed a decree awarding to the Appellant Rs. 500 as damages and proportionate costs both of the said appeal and suit. The Respondent then filed a second appeal against the decree of the District Judge and the Appellant filed
D his cross-objections thereto. The High Court of Kerala allowed the second appeal, reversed the decree of the Appellate Court and dismissed the Appellant's cross-objections as also the suit directing the parties to bear their own costs throughout. It is against this decree and judgment of the Kerala High Court that the present Appeal is directed.

E Order XXII of the Code of Civil Procedure, 1908, deals with death, marriage and insolvency of parties. As in the suit filed by the Appellant there was only one plaintiff and one defendant, we are not concerned with the provisions of Order XXII other than those relating to a sole plaintiff or a sole defendant. Rule 1 of
F Order XXII of the Code provides that "the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives". Thus, if the right to sue does not survive, the suit will abate on the death of the plaintiff. Under Rule 3 of Order XXII, where a sole plaintiff dies and the right to sue survives, the court on an application made in that behalf will cause the
G legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. If, however, no application in that behalf is made within the time prescribed by law, the suit will abate. Under Rule 9(2), the court may set aside the abatement of the suit on the application of the person claiming to be the legal representative of the deceased plaintiff if he proves

H

that he was prevented by any sufficient cause from continuing the suit. Clause (11) of section 2 of the Code defines "legal representative" as meaning inter alia "a person who in law represents the estate of a deceased person". Rule 11 of Order XXII provides as follows :

"11. Application of Order to appeals. -

In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal."

Thus, reading Rule 1 and Rule 11 of Order XXII together, in the case of an appeal Rule 1 would read "The death of an appellant or respondent shall not cause the appeal to abate if the right to sue survives." Thus, where there is only one appellant and he dies during the pendency of the appeal, if his right to sue does not survive, the appeal will abate and his legal representative will have no right to be brought on the record to continue the appeal.

In the present case, if the appellant's right to sue had survived on his death, his right to prosecute the present Appeal would also survive, but if the right to sue would not have survived on his death, this Appeal also would not have survived and would abate. The question, therefore, is whether in a defamation action the right to sue survives if the plaintiff dies.

Under the common Law, the general rule was that death of either party extinguished any cause of action in tort by one against the other. This was expressed by the maxim "*Actio personalis moritur cum persona*" ("A personal action dies with the person"). However, by the Law Reform (Miscellaneous Provisions) Act, 1934, all causes of action vested in a person survive for the benefit of his estate except causes of action for defamation or seduction which abate on the death of such person. As the Law Reform (Miscellaneous Provisions) Act, 1970, abolished the right of action for seduction of a spouse or a child from January 1, 1971, the only cause of action which would abate in England on the death of a person suing would be now a cause of action for defamation.

So far as this country is concerned, which causes of action survive and which abate is laid down in section 306 of the Indian Succession Act, 1925, which provides as follows :

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

B 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
C enjoyed or granting it would be nugatory."

Section 306 speaks of an action and not of an appeal. Reading section 306 along with Rules 1 and 11 of Order XXII of the Code of Civil Procedure, 1908, it is, however, clear that a cause of action for defamation does not survive the death of the appellant.

D 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 the record of the appeal in his place and stead if the appellant dies during the pendency of the appeal. The position, however, is different
E 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
F question of benefit or detriment to the estate of the plaintiff-respondent which his legal representatives is entitled to uphold and defend and is, therefore, entitled to be substituted in place of the deceased respondent-plaintiff.

G 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
H representatives also.

The position, therefore, is that had the Appellant died during the pendency of his 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 accordingly the Appeal abated automatically on his death and his legal representatives acquired no right in law to be brought on the record in his place and stead.

For the above reasons, the Appeal is dismissed as having abated. The Civil Miscellaneous Petitions, namely, Civil Miscellaneous Petitions Nos. 43065 of 1985 and 43066 of 1985 are also dismissed as being not maintainable. There will be no order as to the costs of the Appeal and the Civil Miscellaneous Petitions.

The amount deposited by the Appellant as security for the Respondent's costs will be refunded to the petitioners in the Civil Miscellaneous Petitions for themselves and on behalf of the two other heirs and legal representatives of the Appellant mentioned in the Civil Miscellaneous Petitions.

S.R.

Appeal dismissed.