

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Date of decision: 30<sup>th</sup> August, 2012*

+ **CM (M) 1070/2011**  
**NATHO DEVI & ORS**

..... Petitioner

Through: Mr. K.R. Chawla, Adv.

versus

**NAND KISHORE**

..... Respondent

Through: Nemo.

**CORAM:**

**HON'BLE MR. JUSTICE G.P.MITTAL**

**J U D G M E N T**

**G. P. MITTAL, J. (ORAL)**

1. None appears on behalf of the Respondent despite pass over.
2. A suit for damages (for Rs.10 lacs) for malicious prosecution was filed by the Respondent (before the District Judge) against Yad Ram (his deceased father-in-law), on the ground that a false case under Section 302 IPC was got registered by him (Yad Ram) against the Respondent.
3. Respondent No.1 expired on 08.11.2010. An Application under Order XXII Rule 1 & 4 read with Section 151 CPC of the Code of Civil Procedure (the Code) was moved by the Respondent. Without issuing its notice to the proposed LR's, the application was allowed and thereafter a notice was ordered to be issued to the LR's by an order dated 16.07.2011.
4. On 10.08.2011, the legal representatives of the deceased (Yad Ram) through their counsel wanted to file a reply to the Application under Order XXII Rule 4 of the Code. The said prayer was rejected on the ground that the application had already been disposed of.

5. Thus, apart from the procedural illegality committed by the learned Additional District Judge (ADJ) the law is well settled that the legal heirs would be entitled to be substituted in place of the deceased Plaintiff or Defendant only when the right to sue survives. It is well settled that in personal action, that is, in suits for defamation, assault, etc. the right to sue does not survive and thus the legal heirs have no right or liability of substitution.
6. In *RM P. KP. AR. Arunachalam Chettiar v. V.S. @ S.V.V. Subramanian Chettiar (dead) & Anr.* AIR 1958 Mad. 142, a Division Bench of Madras High Court held that in a suit for malicious prosecution the right to sue did not survive. Para 2 of the report is extracted hereunder:-

*“(2) It is now well established that the maxim action personalis moritur cum persona is part of the law of this country except in so far as it has been modified by statute. In Rustomji Dorabji v. Narse, ILR 44 Mad 357 : (AIR 1921 Mad 1) (A), a Full Bench of this Court ruled that in a suit for malicious prosecution, when a defendant dies, the right to sue does not survive. The principle of this Full Bench ruling will certainly apply to the present case as it is a suit for damages for malicious arrest. So far as we are aware, this decision of our Full Bench has never been doubted in this Court; nor has Mr. Kesava Aiyangar, learned counsel for the appellant, been able to cite any decision of any other High Court or of a higher Court in which doubt has been expressed as to the applicability of this doctrine to India. Page C.J., who was apparently personally inclined to an opposite view said in D.K. Cassim and Sons v. Sara Bibi, ILR 13 Rang 385; (AIR 1936 Rang 17 (B)).”*

7. In *Puran Singh & Ors. v. State of Punjab*, (1996) 2 SCC 205, the Supreme Court held that a personal action such as action for damages for defamation, assault or personal injuries not causing the death of the party, and other action the death of the party the granting of the relief would be

nugatory dies with the death of the person. Para 4 of the report is extracted hereunder:-

*“4. A personal action dies with the death of the person on the maxim actio personalis moritur cum persona. But this operates only in a limited class of actions ex delicto, such as action for damages for defamation, assault or 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. (Girja Nandini Devi v. Bijendra Narain Choudhury AIR 1967 SC 1124). 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 with the death of the person concerned and does not 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. In view of Rule 4 of Order 22 where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant dies and the right to sue survives, the Court, on an application being made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit. If within the time prescribed by Article 120 of the Limitation Act, 1963 no application is made under sub-rule (1) of Rule 4, the suit shall abate as against the deceased defendant. This rule is based not only on the sound principle that a suit cannot proceed against a dead person, but also on the principle of natural justice that if the original defendant is dead, then no decree can be passed against him so as to bind his legal representative without affording an opportunity to them to contest the claim of the plaintiff. Rule 9 of*

*Order 22 of the Code prescribes the procedure for setting aside abatement.”*

8. In *M. Veerappa vs Evelyn Sequeira & Ors*, AIR 1988 SC 506, the Supreme Court laid down that in any action for damages if the claim is found entirely on torts, the suit would abate and it would survive only if the claim is based entirely on contract.
9. In the instant case, the action is based only on torts. In *Melepurath Sankunni Ezhuthassan v. Thekittil Geopalankutty Nair*, AIR 1986 SC 411, the Supreme Court made a distinction where a decree is passed in a suit for damages on account of defamation and where an Appeal is filed where a suit is dismissed. It was held that if the Plaintiff on dismissal of the suit files Appeal and the Respondent/defendant dies, the Appeal would abate on the death of the Plaintiff. But where a suit had been decreed and a party dies during pendency of the Appeal the right to sue would survive.
10. Thus, it stands settled that the right to sue does not survive against the Petitioners herein.
11. The learned ADJ committed illegality in ordering substitution of the Petitioners in place of deceased Yad Ram and that too even without issuing notice to them.
12. The impugned order dated 16.07.2011 is set aside. The Petition is allowed and the Suit stands dismissed.

**(G.P. MITTAL)**  
**JUDGE**

**AUGUST 30, 2012/vk**