

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1976 of 2015

IN

Civil Writ Jurisdiction Case No. 21857 of 2011

- =====
1. Most. Devanti Devi Widow of deceased sole petitioner, Lata Rana Pratap Singh, resident of village Nasrina, P.S.- Kurtha, District- Jehanabad
 2. Rahul Kumar, son of the deceased sole petitioner, Lata Rana Pratap Singh, resident of village Nasrina, P.S.- Kurtha, District- Jehanabad

.... Appellants

Versus

1. The State of Bihar, through the Principal Secretary, Human Resources Development Department, Government of Bihar, New Secretariat, Vikash Bhawan, Patna
2. The Director, Primary, Human Resources Development Department, Government of Bihar, New Secretariat, Vikash Bhawan, Patna
3. District Education Officer, Gaya
4. Block Education Extension Officer, Dumaria, Jehanabad

.... Respondents

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Appearance :

For the Appellants : Mr. Shivendra Kishore, Senior Advocate
Mr. Bimlendu Shekher Thakur, Advocate
For the Respondents : Mr. S. Raza Ahmad, AAG-9
Mr. Vishwambhar Prasad, AC to AAG-9

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: **05-04-2016**

Having been appointed, on compassionate ground, by the District Superintendent of Education, Gaya, as an Assistant Teacher on 21.08.1991, the original writ petitioner, namely, Rana Pratap Singh (since deceased), continued to serve as an Assistant Teacher, in Urdu Primary School, Madarpur, Dumaria, Gaya, with effect from 07.09.1991. The original writ petitioner remained absent from duty from April, 1997, until the time he presented his joining



report, on 23.02.2008, with a medical certificate, whereby he was certified to be medically fit to resume his duty. The original writ petitioner's joining report was not accepted nor was any formal rejection order passed; but the original writ petitioner was not allowed to rejoin his service. No departmental or disciplinary proceeding was initiated against the original writ petitioner for having remained absent from duty in the manner as indicated hereinbefore.

2. Having not been able to rejoin his service, the original writ petitioner filed a writ petition, under Article 226 of the Constitution of India, which gave rise to C.W.J.C. No. 21857 of 2011. By his writ petition, the original writ petitioner sought for, *inter alia*, a direction to the respondents to accept his joining report, dated 23.02.2008, and allow him to discharge his duties as an Assistant Teacher, in Urdu Primary School, Madarpur, Dumaria, Gaya, and also a direction to the respondents to regularize the period of his absence from duty with effect from May, 1997, till 22.02.2008. By his writ petition, the original writ petitioner further sought for the relief of being declared entitled to all the service benefits, which he would be entitled to receive on regularization of the period of his absence from duty.

3. However, while the writ petition was pending, the



original writ petitioner died on 26.12.2011. Upon death of the original writ petitioner, the widow, namely, Most. Devanti Devi, came to be substituted, along with her son, namely, Rahul Kumar, as legal representative, on 08.07.2015, the widow being petitioner No. 1, and the original writ petitioner's son, as petitioner No. 2.

4. By the judgment and order, dated 28.08.2015, a learned single Judge has dismissed the writ petition on the ground that the employer was justified in not accepting the joining report of the original writ petitioner (since deceased) and, therefore, the question of payment of salary did not arise making it, however, clear that the respondents may consider the other claims of the family, in accordance with law, preferably, within a period of six months, on an application being filed by the substituted petitioners (i.e., the appellants herein). Aggrieved by the judgment and order, dated 28.08.2015 aforementioned, this Letters Patent Appeal has been preferred.

5. We have heard Mr. Shivendra Kishore, learned Senior Counsel, appearing for the appellants, and Mr. S. Raza Ahmad, learned Additional Advocate General No.9, appearing for the respondents.

6. While considering the present appeal, what needs to be noted is that the original writ petitioner (since deceased)



remained, admittedly, absent from duty from May, 1997, to 22nd February, 2008, and submitted his joining report, on 23.02.2008, on the ground that he had become mentally sick and, on being declared fit, he had come forward to join his service. This joining report was neither accepted nor rejected. The joining report, therefore, remained pending and, in the meanwhile, the original writ petitioner died without being allowed to rejoin his service.

7. While considering the present appeal, what needs to be pointed out is that merely because a person is legal representative, he or she cannot be allowed to be substituted in a proceeding against a party, who may have died after the institution of the proceeding. The right to sue must survive in favour of the legal representatives in order to enable him or her claim for substitution in place of a party to a legal proceeding, who dies.

8. Section 306 of the Indian Succession Act, 1925, being relevant in the case at hand, reads as under:

“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, (45 of

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.”

9. In *Pravabati Ghosh and another vs Gautam Das and others*, reported in, **2006 Supp(1) GLT 15**, one of us, Ansari, J., had the occasion to examine the scope of Section 306 of the Indian Succession Act, 1925, and observed and held as follows :

“ A careful reading of the provisions of Section 306 shows that the right to sue, ordinarily, survives to and against every person except when the cause of action is, inter alia, for defamation, assault-or other personal injuries not causing death of the party. What also follows from a careful reading of Section 306 is that though in a claim application, the claimant may seek reliefs of not only compensation for the injuries sustained by him. but also for the expenses incurred for his treatment, loss of income, future expenses to be incurred, etc., the fact remains that all these reliefs would be available to such a claimant provided that the claimant is found entitled to receive compensation for the personal injuries sustained by him. Hence, when a claimant's claim for compensation arises out of personal injury sustained by him, the right to sue does not survive in favour of his legal representatives, if the injured-claimant dies not because of the injuries sustained by him, but for some other reason. A



reference may, in this regard, be made to **Melepurath Sankunni Ezuthassan v. Thekittil Geopalankutty Nair, (1986) 1 SCC 118 : AIR 1986 SC 411**. In **Melepurath Sankunni** (supra), the Supreme Court, on considering Section 306 of the Succession Act, 1925, held that action personal is mortur-cum-persona (a personal action dies with the person) applies if the plaintiff dies during the pendency of the suit; but if the plaintiff dies, after the suit is decreed, the right to sue survives, for, in such a case, the cause of action has merged in the decree and the decretal dues forms part of the estate left behind by the deceased. This, in turn, will mean that when a suit for personal injury is decreed, the legal representatives can put such a decree to execution and may, if an appeal is pending against such a decree, be substituted, for, the right to sue or be sued survives if the suit already stands decreed in favour of the injured before the injured, died. In **Melepurath Sankunni** (supra), it has also been made clear that Section 306 of the Succession Act speaks of an action and not of an appeal, the effect being that if the plaintiff dies without the suit having been decreed, the legal representatives cannot be substituted. Clearly, therefore, when such a suit fails and the plaintiff or the claimant has preferred an appeal, the right to sue does not survive, for, the suit abates on the death of such a plaintiff or claimant.

Explaining this position of law, the Supreme Court, in **Melepurath Sankunni** (supra), observed,

“6. ...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.

7. 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.

8. 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 representatives also.

9. 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.”

*8. 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.

9. In *M. Veerappa v. Evelyn Sequeria and Ors., (1988) 1 SCC 556*, the suit filed by the plaintiff against an advocate claiming compensation was held to have abated by the trial court on the ground that the plaintiff had died during the pendency of the suit. On appeal, the first appellate court reversed the order of dismissal against which the defendant successfully appealed and the cross-objection filed by the heirs of the deceased plaintiff was dismissed. In the backdrop of these facts, their Lordships of the Supreme Court has held that if the suit is based on

tort, the suit abates if the plaintiff dies during the pendency of the suit; but if the suit stands decreed before the plaintiff dies, it becomes a debt to which the heirs succeed. Their Lordships have also held that if the suit is based on tort, the right to sue abates; but if the suit is based on contract, it survives and when a suit is based partly on tort and partly on contract, the suit abates to the extent that it relates to tortious liability, but the right to sue still survive so far as the contractual liability is concerned.

10. In **M. Veerappa** (supra), the Apex Court, taking note of the law laid down in **Melepurath Sahkunni** (supra), observed, thus:

“10. The maxim 'actio personalis-cum-moritur persona' has been applied not only to those cases where a plaintiff dies during the pendency of a suit filed by him for damages for personal injuries sustained by him but also to cases where a plaintiff dies during the pendency of an appeal to the appellate court, be it the first appellate court or the second appellate court against the dismissal of the suit by the trial court and/or the first appellate court as the case may be.

*This is on the footing that by reason of the dismissal of the suit by the trial court or the first appellate court as the case may be, the plaintiff stands relegated to his original position before the trial court. Vide the decisions in **Punjab Singh v.***



*Ramautar Singh, (1919)4 Pat. LJ 676 : AIR 1920. Pat. 841; Irulappa v. Madhciva, AIR 1951 Mad. 733; Maniramlala v. Mt. Chattibai, ILR 1938 Nag. 280 : AIR 1937 Nag. 216; Baboolal v. Ramlal AIR 1952 Nag. 408 and Melepurath Sankunni Ezhuthassan v. Thekittil Geopalankutty, AIR 1986 SC 411. In Palaniappa Chettiar v. Rajah of Ramnad, ILR 49 Mad. 208 and Motilal v. Harnarayan, AIR 1923 Bom. 408 : 25 Bom. LR 435 : ILR 47 Bom. 716, it was held that a suit or an action which has abated cannot be continued thereafter even for the limited purpose of recovering the costs suffered by the injured party. The maxim of actio personalis cum moritur persona Has been held inapplicable only in those cases where the injury caused to the deceased person has tangibly affected his estate or has caused an accretion to he estate of the wrong-doer vide **Rustomji Dorabji v. W.H. Nurse, ILR 44 Mad. 357 and Ratanlal v. Baboolal, AIR 1960 MP 200** as well as in those cases where a suit for damages for defamation, assault or other personal injuries sustained by the plaintiff had resulted in a decree in favour of the plaintiff because in such a case the cause of action becomes merged in the decree and the decretal debt forms part of the plaintiff's estate and the appeal from the decree by the defendant becomes a question of benefit or detriment to the estate of the plaintiff which his*

*legal representatives are entitled to uphold and defend (vide **Gopal v. Ramchandra**, ILR 26 Bom. 597 and **Mclepurath Sankunni v. Thekittil**, AIR 1986 SC 411 : (1986) 1 SCC 118.*

*11. What further follows from the observations made in **M. Veerappa** (supra) is that a suit for personal injury cannot survive even for the limited purpose of recovering the cost suffered by the injured. In other words, even for the limited purpose of recovering the expenses incurred by the injured-claimant for his treatment, the right to sue will not survive in favour of such an injured-claimant's legal representatives if the injured-claimant dies without any decree or award having been rendered in his favour entitling him to receive such an amount."*

10. In the case at hand, the original writ petitioner had sought for issuance of a writ, in the nature of *mandamus*, commanding the respondents to accept his joining report, dated 23.02.2008, and to allow him to discharge his duties as an Assistant Teacher, Urdu Primary School, Madarpur, Dumaria, Gaya. The said demand for acceptance of the joining report was based on personal right, if any, of original writ petitioner. The said right cannot be said to have been inherited by the substituted writ petitioners. No right to sue can be held to have survived in favour of the substituted writ petitioners to demand that the joining report of the original writ

petitioner (since deceased) be directed to be accepted.

11. No different is the situation with regard to second prayer made in the writ application, namely, that direction be issued to the respondents to regularize the period of original writ petitioner's absence from duty from May, 1997 till 22.02.2008. The right to seek regularization of the period of absence of the original writ petitioner was a personal right and the same cannot be said to have been inherited by his legal representatives. The right to sue having not survived, in favour of the substituted writ petitioners, the substituted writ petitioners cannot claim that the original writ petitioner's absence from duty be directed to be regularized.

12. Both the reliefs, which the original writ petitioner had sought for, arose out of his personal rights and cannot be said to have been inherited.

13. Any monetary benefit, which would have been received by the original writ petitioner, upon acceptance of his joining report and regularization of his period of absence, could have been made available to the present appellants, as substituted writ petitioners, only when the joining report of the original writ petitioner could have been directed to be accepted and the period of his absence could be regularized at the instance of the appellants as substituted writ petitioner. Since the right to demand acceptance of



joining report and/or regularization of the period of absence from service were personal right of the original writ petitioner, these rights cannot be said to have been inherited by the present appellants. Necessarily, therefore, the present appellants are not entitled to any consequential benefit either.

14. Admittedly, when there is no provision as regards automatic removal from service of an employee, who remained absent, it logically follows that the original writ petitioner remained in service until the time he died. He did not, however, work between May, 1997, and 22.02.2008 and, for this period, since he had not been on duty and his service was not regularized, he would not have been entitled to any monetary benefit. Thus, technically, though the original writ petitioner remained in service, he was not entitled to payment of salary and allowances from May, 1997, to 22.02.2008 and since his right to demand acceptance of his joining report and/or regularization of the period of absence of duty were his personal rights, these rights cannot be said to have survived in favour of the substituted writ petitioners.

15. Allegation of absence from duty, which could have led to disciplinary proceeding and dismissal from service, cannot be wiped out and, therefore, the cause of action, being a right in *personem*, of the original writ petitioner, would not survive in favour

of his legal representatives and the legal representatives, who must, in these circumstances, be deemed to be a third party, cannot be said to be aggrieved person, who could seek relief under Article 226 of the Constitution of India.

16. The right to continue with the writ petition depends upon whether right to sue survives. If the acceptance of joining report and the regularization of period of service are hurdles in the way of receiving any monetary claim, then, unless these rights can be enforced, the question of payment of money does not arise. In order to enable a decision on the question as to whether a particular right of action survives to the legal representatives or not, the correct approach is to consider what right was claimed in the writ proceeding and if the right is purely personal in nature, then, the right to sue cannot survive.

17. The issue of a writ, commanding the respondents to accept the joining report and to regularize the period of absence, are the steps, which are necessary for the purpose of enabling substituted writ petitioners to claim monetary relief, but since the right to demand regularization of service for the period of absence were personal rights, these rights died with the original writ petitioner and cannot be said to have survived to his legal representatives, i.e., the appellants herein.

18. This appeal is, therefore, misconceived, untenable
and is, accordingly, dismissed.

(I. A. Ansari, ACJ)

Chakradhari Sharan Singh, J: I agree.

(Chakradhari Sharan Singh, J)

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