

CIVIL REVISION

Present : The Hon'ble Mr. Justice Prasenjit Mandal

Judgment on 27.08.2010

C.O. No. 508 of 2009

Basudeb Dey.

Versus

Swati Dey & ors.

Points:

**Substitution**-Suit for damages for malicious prosecution and for defamation- On the death of the plaintiff whether his heirs can be substituted-Code of Civil Procedure 1908-O22 R 3

Facts:

The original plaintiff filed the suit for damages for malicious prosecution and also for defamation. During pendency of the suit, the original plaintiff died. By the impugned order, substitution has been effected.

Held:

In the instant case, the suit has been filed for nothing but the personal claim of the plaintiff. Therefore, the personal action dies with the death of the party and so the doctrine of actio personalis shall apply. Therefore, the decision referred to by Mr. Talukdar is not applicable in the instant case. Rather the decision of Puran Singh & Ors (supra) will be appropriate in the instant case. Therefore, the learned Trial Judge was not justified in allowing the application for substitution. The order impugned cannot be sustained.

Para 8 and 10

Cases cited:

Puran Singh & Ors. Vs. State of Punjab and ors. (1996) 2 SCC 205;  
Girijanandini Devi & ors. Vs. Bijendra Narain Choudhary AIR 1967 SC  
1124; Executive Director of Usha Sewing Machine Works Ltd. & anr. Vs.  
Sujata Roy & ors. AIR 1986 Cal 224

For the Petitioner: Mr. Amallesh Roy.

For opposite parties: Mr. Satyajit Talukdar.

**Prasenjit Mandal, J. :** This application is at the instance of the defendant and is directed against the order no.28 dated August 13, 2008 passed by the learned Civil Judge (Senior Division), Siliguri in Money Suit No.44 of 2005 thereby allowing an application under Order 22 Rule 3 of the Code of Civil Procedure.

2. The short fact is that the original plaintiff filed the Money Suit No.44 of 2005 for damages for malicious prosecution and defamation. In that suit, the plaintiff contended that the defendant filed a petition of complaint which contained certain allegations which were false and incorrect and that the defendant filed the said petition of complaint maliciously and to defame the plaintiff in the eyes of the public, his colleagues and friends. The plaintiff filed the said money suit claiming Rs.50,00,000/- for damages / compensation for defamation of the plaintiff by instituting a false case maliciously. Subsequently, the plaintiff died on June 22, 2008 leaving the opposite parties as his legal heirs. Thereafter, the opposite parties filed an application under Order 22 Rule 3 of the C.P.C. for substitution of the names of the plaintiffs in place of the deceased original plaintiff. In the said suit, that application having been filed within the time limit, was allowed by the

learned Trial Judge. Being aggrieved, the defendant/opposite party has preferred this application.

3. The point that arises for decision is whether the impugned order can be sustained.

4. After hearing the submission of the learned Counsel of both the parties and on perusal of the materials on record, I find that the original plaintiff and the defendant are the two brothers and the original plaintiff filed the suit for damages for malicious prosecution and also for defamation. During pendency of the suit, the original plaintiff died. By the impugned order, substitution has been effected. The contention of the learned Advocate for the petitioner is that the claim of the original plaintiff abated with his death and so substitution cannot be allowed in consideration of the nature of the suit.

5. In support of his submission, he has referred to the decision of Puran Singh & Ors. Vs. State of Punjab and ors. reported in (1996) 2 SCC 205 and Girijanandini Devi & ors. Vs. Bijendra Narain Choudhary reported in AIR 1967 SC 1124.

6. In the case of Puran Singh & Ors. (supra) it has been stated in para 4 that a personal action dies with the death of the person on the maxim *actio personalis moritur cum persona*. It has also been clearly stated therein that this doctrine applies 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. The decision referred to in Girijanandini Devi & ors. (supra) also lays down the same doctrine of *actio personalis*.

7. Mr. Talukdar, learned Advocate appearing on behalf of the opposite party, has referred to the decision of Executive Director of Usha Sewing Machine Works Ltd. & anr. Vs. Sujata Roy & ors. reported in AIR 1986 Cal 224 and he has submitted that this decision refers to the decision of AIR 1967 SC 1124 and it has been clearly stated that right to sue for damages is not personal to deceased. His legal representatives can be substituted. This decision of Usha Sewing Machine Works Ltd. & anr. (supra) relates to some employees of Jay Engineering Works praying for certain declaratory relief, permanent injunction, etc. and during pendency of the suit, one of the employees died and then his heirs were substituted. This decision relates to the service benefits and so this Hon'ble Court held that right to sue survives.

8. In the instant case, the suit has been filed for the purpose, as stated above and it is, I hold, nothing but the personal claim of the plaintiff. Therefore, the personal action dies with the death of the party and so the doctrine of actio personalis shall apply. Therefore, the decision referred to by Mr. Talukdar is not applicable in the instant case. Rather I am of the view that the decision of Puran Singh & Ors (supra) will be appropriate in the instant case.

9. Under the circumstances, upon giving due consideration of the relief sought for by the original plaintiff, I am of the view that the relief sought for is nothing but the personal action of the original plaintiff and so the doctrine of actio personalis shall apply.

10. Therefore, I am of the view that the learned Trial Judge was not justified in allowing the application for substitution. The order impugned cannot be sustained.

11. Therefore, the application is allowed. The impugned order no.28 dated August 13, 2008 passed by the learned Civil Judge (Senior Division),

Siliguri is hereby set aside. The application under Order 22 Rule 3 of the C.P.C. filed by the plaintiff stands rejected. The learned Trial Judge shall take necessary steps in accordance with law with regard to the suit.

12. Considering the circumstances, there will be no order as to costs.

13. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocate for the parties on their usual undertaking.

**(Prasenjit Mandal, J.)**

