

as it is a petition *in forma pauperis*, but otherwise there will be no order as to costs.

C. S. S.

Solicitors for the petitioner: *Hy. S. L. Polak & Co.*

Solicitor for the respondent: *The Solicitor, India Office.*

1940

HORI RAM
SINGH
and
THE KING-
EMPEROR.

APPELLATE CIVIL.

Before Tek Chand and Ram Lall JJ.

SALIG RAM (JUDGMENT-DEBTOR) Appellant,

versus

CHARAN DAS AND ANOTHER (DECREE-HOLDERS)
Respondents.

1939

June 27.

Execution Second Appeal No. 231 of 1939.

Tort — Suit for compensation for malicious prosecution — decree passed in plaintiff's favour — who died pending his application for execution — his legal representatives — whether competent to execute the decree.

In a suit claiming compensation for malicious prosecution K. obtained a decree against S. During the pendency of his application for execution K. died and his sons were brought on the record as his legal representatives. The judgment-debtor raised an objection to the effect that the sons of the decree-holder had no right to continue the execution proceedings as the right to claim compensation for malicious prosecution was personal to K. and did not survive to his heirs and therefore the execution proceedings had abated.

Held, that it is well settled that the right to obtain compensation for malicious prosecution is personal to the person wronged and to such a right the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) applies and if such person dies before suing the wrong-doer, his heirs, executors or administrators cannot, after his death, maintain an action for the same relief against the wrong-doer.

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And it is equally well-settled that if the injured person had brought a suit in his life-time but had died *before* a decree had been passed in his favour, the suit would have abated and his legal representatives could not have continued the suit after his death for the "right to sue" in such a case being personal to the deceased did not "survive."

But when a suit has been decided in the plaintiff's life-time and decree passed in his favour granting him compensation, there is no longer an *actio personalis* in existence and it has become a part of the property of the decree-holder and on his death it devolves as a part of his estate, on his heirs, executors or administrators and they can execute it in the same manner as he would have done if he had been alive.

Muhammad Hussain v. Khushalo (1) and *Mussammat Ram Kaur v. Jiwan Singh* (2), followed.

Other case-law discussed.

CHIRANJIVA LAL AGGARWAL, for Appellant:—The right to claim damages for malicious prosecution is a right personal to the person wronged and therefore when such a person dies the right abates and does not survive to his legal heirs: *Actio personalis moritur cum persona*. Even if the person wronged has obtained a decree in his life-time, but he dies when execution proceedings are pending, such proceedings would also abate on the above principle and his legal representatives will have no right to realise the decretal amount after his death.

SHAMAIR CHAND, for Respondents:—Right to claim damages is not the same thing as a decree in favour of the plaintiff. When there has been a decree in favour of the person wronged in his life-time, there is no *actio personalis* in existence. The claim has merged in the decree and has become the property of the plaintiff which can be attached by a creditor of the

(1) I. L. R. (1887) 9 All. 131 (F. B.).

(2) I. L. R. (1921) 2 Lah. 189.

decree-holder and can also be assigned by him to a third party who can execute it. In such a case, therefore, the decree devolves on the legal representatives of the decree-holder who can continue the execution and realise the decretal amount: *G. I. P. Railway v. Ram Adhin* (1), *Muhammad Hussain v. Khushalo* (2) and *Mussamat Ram Kaur v. Jiwan Singh* (3).

CHIRANJIVA LAL, replied.

Second appeal from the order of Mian Mohammad Aslam, Senior Subordinate Judge, Gurdaspur, dated 28th October, 1938, affirming that of Sardar Mohindar Singh, Subordinate Judge, 1st Class, Pathankot, dated 26th July, 1938, rejecting the objection.

Order of Din Mohammad J., dated 19th May, 1939, referring the case to a Division Bench—

Three questions fall for determination in this case: (1) whether the appeal is time-bared; (2) whether the plea that the decree cannot be executed is barred by the rule of *res judicata* considering that in a previous application for execution a decision had been given on this point; and (3) if the plea can be raised, whether the decree can be executed seeing that the original decree-holder has died.

So far as the question of limitation is concerned, it is contended on behalf of the respondents that the memorandum of appeal was presented on the 91st day instead of the 90th, and even then it was incomplete as it was not accompanied by a copy of the judgment of the first Court. Reliance in this connection has been placed on *Dhanpat Mal v. Mela Mal* (4), *Molu Mal v. Sri Ram* (5) and *Dayala v. Hiru* (6). The authorities

(1) 1927 A. I. R. (All.) 762.

(2) I. L. R. (1887) 9 All. 13 (F. B.).

(3) I. L. R. (1921) 2 Lah. 189.

(4) 67 P. R. 1917.

(5) I. L. R. (1921) 2 Lah. 227.

(6) (1921) 3 L. L. J. 255.

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no doubt support the contention raised by the respondents' counsel but I am disposed to condone the delay as I am satisfied that the appellant had sufficient cause for not preferring the appeal within the prescribed period. The certified copy of the appellate judgment though ready on the 27th January was actually delivered on the 28th and if this day is also excluded, the appeal is well within time. Similarly, it is proved on the record that the appellant had put in an application for a copy of the first Court's judgment on the same day as the application for a copy of the appellate judgment was made but some how or other the Copying Department could not trace the record. This caused some delay and eventually the appellant had to put in a second application for obtaining a copy of the first Court's judgment. According to the endorsement made by the Copying Department that copy could not be made available for about three weeks. There is thus no such default on the part of the appellant as cannot be overlooked. I, accordingly, extend the benefit of section 5 of the Indian Limitation Act to the appellant and admit the appeal although presented after the expiry of the period of limitation. I may frankly confess that my main reason for taking this course is to have an authoritative pronouncement on the principal question involved in the case.

As regards the question of *res judicata*, there is ample authority in support of the proposition that a wrong decision on a question of law does not operate as *res judicata* in subsequent proceedings [see *Talia-mand v. Muhammad Din* (1) and *Jwala Debi v. Amir Singh* (2)]. I am not definite as to whether the decision was right or wrong and am not, therefore,

(1) I. L. R. (1931) 12 Lah. 52.

(2) 1929 A. I. R. (All.) 132.

prepared to hold that the plea was barred or not by the rule of *res judicata*. I leave it, therefore, to the Bench disposing of the case to determine this question as well.

The third question, as remarked above, is really the most important question in the case. Counsel for the appellant contends that Order 22, Civil Procedure Code, as it stands applies to execution cases as well as to original suits and that the only exception that is made in the case of execution proceedings is that contained in rule 12 of Order 22. Relying, therefore, on rule 1 of Order 22 he argues that as the original cause of action could not survive on the death of the plaintiff, the execution proceedings should also be held to have abated finally on the happening of that contingency. Counsel for the respondents, on the other hand, refers me to *G. I. P. Railway v. Ram Adhin* (1) where a Division Bench of the Allahabad High Court has observed that as soon as a personal action ends in a decree, the right to execute survives on the death of the decree-holder. This observation is not without force inasmuch as a decree when obtained becomes a part of the personal estate of the deceased and as such accrues to the benefit of the legal representatives; but as I am not clear as to whether Order 22, rule 1, does not apply to execution proceedings in such cases, I consider that a decision by a larger Bench should be obtained in this case.

I accordingly forward this case to the Hon'ble the Chief Justice for such action as he deems necessary.

THE JUDGMENT OF THE DIVISION BENCH.

TEK CHAND J.—The facts of this case are no longer in dispute, and fall within a narrow compass.

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Kirpa Ram, father of the respondents, instituted a suit against Salig Ram, appellant, for recovery of Rs.400 as compensation for malicious prosecution. The trial Judge granted Kirpa Ram a decree for Rs.100. Both parties appealed to the Senior Subordinate Judge who enhanced the amount of compensation to Rs.200. On second appeal this decree was upheld by Jai Lal J. on the 26th of November, 1936.

The decree-holder then took out execution of the decree. While the application was pending he died, and his sons (the present respondents) were brought on the record as his legal representatives, on their application made within 90 days of his death. The judgment-debtor raised an objection that the respondents had no right to continue the execution proceedings. He urged that the right to claim compensation for malicious prosecution was personal to Kirpa Ram, that on his death it did not "survive" to his heirs and, therefore, the execution proceedings had abated. The executing Court overruled the objection holding that the proceedings to execute the decree had not abated. On appeal the Senior Subordinate Judge upheld this order, relying upon a decision of the Allahabad High Court reported as *G. I. P. Railway v. Ram Adhin* (1). The judgment-debtor preferred a second appeal to this Court, which came up for hearing before Din Mohammad J. sitting in Single Bench. A preliminary objection was raised on behalf of the respondents that the appeal was time-barred, but the learned Judge held that in the circumstances, there was sufficient cause for not presenting the appeal within the prescribed period and he extended the time under

(1) 1927 A. I. R. (All.) 762.

section 5 of the Limitation Act. He then referred the case to a Division Bench for decision of the main question, as there was no ruling of this Court directly bearing on the point and the correctness of the Allahabad ruling, relied upon by the Senior Subordinate Judge, had been impugned before him.

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The contention for the judgment-debtor appellant is that as the original cause of action for a claim for malicious prosecution was personal to Kirpa Ram, which could not have survived to his legal representatives if he had died *before* the decision of his suit by the trial Court, it follows that the right to execute the decree, obtained by him in his life-time on the same cause of action, was also personal to him, and that it was extinguished on his death, even though that event occurred *after* the passing of the decree. The argument is fallacious and I have no hesitation in overruling it.

It is no doubt true that the right to get compensation for malicious prosecution is personal to the person wronged, and to such a right the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) fully applies. If, therefore, such person dies before suing the wrong-doer his heirs, executors or administrators cannot, after his death, maintain an action for the same relief against the wrong-doer. In such a case, clearly, there is a "discharge of the tort" by the death of the person wronged, and the wrong-doer is released from all liability for his tortious act. It is equally clear that if the injured person had brought a suit in his life-time, but had died *before* a decree had been passed in his favour, the *suit* would have abated and his legal representatives could not have continued the suit after

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his death, for the "right to sue" in such a case being personal to the deceased did not "survive" (O. XXII, r. 1, Civil Procedure Code). The position, however, is different when the suit had been decided in the plaintiff's life-time and a decree passed *in his favour* granting him compensation. On the passing of the decree, there is no longer an *actio personalis* in existence; it has passed into a judgment and become a matter of record (*transit in rem judicatum*). The original personal claim has merged in the decree of the Court and as such its character has entirely changed. The *quondam* plaintiff, as the decree-holder, has acquired the right to realize the amount decreed from the judgment-debtor, and this is a right of an entirely different character. He may enforce it himself by process of law, or (unlike the original claim) he may assign it to a third party, who can execute the decree. Further, the decree itself (also unlike the original claim) is liable to attachment by a creditor of the decree-holder. It has, to all intents and purposes, become a part of the "property" of the decree-holder and, on his death, it devolves, as a part of his estate, on his heirs, executors or administrators, and they can execute it in the same manner as he would have done, if alive.

It will be seen that the distinction is real and well-founded on principle and has been recognized in numerous cases in India. In the case relied upon by the lower Appellate Court *G. I. P. Railway v. Ram Adhin* (1), a suit for compensation against the Railway Administration, brought under Act XIII of 1855 (Fatal Accidents Act) by the father of a person, who had been killed in an accident, had been decreed

by the trial Court. The Railway had appealed and during the pendency of the appeal the decree-holder had died. It was contended on behalf of the Railway that the appeal should be accepted and the decree reversed on the short ground that the action was personal to the father (decree-holder) and the decree passed in his favour could not enure for the benefit of his sons, who were the brothers of the deceased and as such not among the persons entitled to compensation under the Act. This contention was rejected by the Court, on the ground that "the action having merged into the decree, the benefit of the decree passed to the heirs of the decree-holder on his death."

To the same effect is the decision of a Full Bench of five Judges in *Muhammad Hussain v. Khushalo* (1) where it was held that "in those cases in which an action would abate upon the death of the plaintiff before judgment, the action would not abate if final judgment had been obtained before the death of the plaintiff, in which case the benefit of the judgment would go to his legal representative." This case was followed by a Division Bench of this Court in *Mussamat Ram Kaur v. Jiwan Singh* (2) where the facts were similar.

The distinction is very well brought out in cases which are the converse of those just referred to. Thus, where the plaintiff's claim for compensation for a personal wrong has been dismissed *in its entirety* by the Court of first instance and the plaintiff has appealed, but has died before the decision by the Appellate Court, there is an abatement of the appeal, as the relief sought in appeal is the enforcement of the original "right to sue" which had been rejected by

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(1) I. L. R. (1887) 9 All. 131 (134) (F. B.).

(2) I. L. R. (1921) 2 Lah. 189.

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the trial Court and had not matured in a decree *Bhagwant Singh v. Pandit Joti Sarup* (1) at pages 14-15, and *Manirammlala Balirammlala v. Mst. Chhattibai* (2).

This distinction becomes clearer still in cases in which the plaintiff's claim for compensation for a personal wrong is *decreed in part*, and the defendant appeals praying that the suit should have been dismissed *in toto* while the plaintiff appeals or files cross-objections to enhance the damages, and during the pendency of the appeal the *plaintiff* dies. In such cases it has been held that the defendant's appeal to get rid of the partial decree obtained by the plaintiff does not abate, for the decree enures for the benefit of his sons; but the cross-appeal or cross-objections for grant of a further sum of damages filed by the plaintiff, abate, as to this extent the claim had been refused by the trial Court and the plaintiff's prayer before the Appellate Court for enhancement is based on the original right to sue, which being personal to the plaintiff has abated on his death *Muzaffar Khan v. Ghulam Muhammad Khan* (3).

In *Bhim Sain v. Muhammad Ali* (4) the facts were the same as in the case last cited, except that the defendant (and not the plaintiff) had died during the pendency of the appeal, and it was held that the defendant's appeal could be continued by his sons; but the plaintiff's cross-objections for enhanced damages had abated. See also to the same effect *Paramen Chetty v. Sundararaja Naick* (5) and *Josiam Tiruvengadachariar v. Swami Iyengar* (6).

(1) 4. P. R. 1897.

(2) 1937 A. I. R. (Nag.) 218.

(3) 62 P. R. 1915.

(4) I. L. R. (1930) 11 Lah. 1.

(5) I. L. R. (1903) 26 Mad. 499.

(6) I. L. R. (1911) 34 Mad. 76.

Reference may also be made to *Gopal v. Ram-chandra* (1) where the identical argument now addressed to us was raised but rejected. At page 607 the case of *Chapman v. Day* (2) was cited, where Pollock B. said "we are not dealing with a right of action. Plaintiff brought his action and succeeded by a judgment of the Court." Lopes J., said: "it is said that the defendant having died, the maxim of *actio personalis Moritur cum persona* applies. I think it does not apply in such a case as this, I think 'action' means right of action, and if that is the true way of looking at it, the right of action here *had been determined before the death of the defendant.*" It was accordingly held that "there was no abatement after judgment."

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The learned counsel for the appellant has not been able to support his contention by any valid argument nor cite any case in which the view put forward by him had been taken.

The appeal fails and is dismissed with costs.

RAM LALL J.—I agree and have nothing to add.

RAM LALL J.

A. K. C.

Appeal dismissed.

(1) I. L. R. (1902) 26 Bom. 597

(2) (1883) 48 L. T. 907.