

from the first day of Jan. 1981, till the attainment by the plaintiffs of the age of 60 years.

3. The said Birendra Chandra Roy, the plaintiff No. 2, died intestate on July 10, 1984. The opposite parties Nos. 1 and 2, the heirs of the deceased plaintiff No. 2, made an application for their substitution in the suit in place of the deceased plaintiff No. 2. The said application was opposed by the defendants petitioners on the ground that the suit in so far as it was one for declaration and injunctions was a personal action and, accordingly, the right to sue for the said reliefs did not survive to the heirs of the deceased plaintiff No. 2. It was submitted that the application for substitution should be dismissed on that ground.

4. The learned Assistant District Judge overruled the contention of the petitioners. He took the view that there was also a prayer for damages in addition to the reliefs for declaration and injunctions and, therefore, the right to sue survived to the heirs of the deceased plaintiff No. 2. In that view of the matter, the learned Assistant District Judge allowed the application for substitution. Hence this revisional application u/s 115 of the Code of Civil Procedure.

5. Mr. Bhaskar Bhattacharjee, learned Advocate appearing on behalf of the petitioners submits that the learned Assistant District Judge was wrong in entertaining the view that a suit for damages for breach of contract was not a personal action. He has placed strong reliance upon the maxim "*actio personalis moritur cum persona*" and submits that the suit in so far as it is also a suit for damages is hit by the said maxim. In other words, his contention is that a suit for damages for breach of contract is a personal action, so that on the death of the plaintiff the right to sue does not survive to the heirs of the deceased plaintiff. It is submitted that the learned Judge exercised a jurisdiction not vested in him by law in allowing the application for substitution of the opposite parties Nos. 1 and 2, who are the heirs of the deceased plaintiff No. 2, holding erroneously that on the death of the plaintiff No. 2, the right to sue survived to his heirs.

6. The maxim "*actio personalis moritur cum persona*" embodies within it the English principle that a personal action dies with the plaintiff. The said maxim is inapplicable in India, except to the extent it has been adopted in the statutes. The exceptions to the non-applicability of the maxim are contained in Section 306 of the Indian Succession Act, 1925. Section 306 provides as follows :

"306. 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 enjoyed or granting it would be nugatory."

7. The first part of Section 306 clearly provides for the survival of the right to sue or defend in favour of or against the executors or administrators of a deceased party in an action. The second part of Section 306 has put a limitation on the survival of the right to sue or defend by recognizing and applying the said maxim only in an action 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 reliefs prayed could not be enjoyed or granting it would be nugatory. So, if an action is not one of the actions as specified in Section 306, the maxim will not have any application.

8. In this connection, we may refer to the following observation of Sadasiva Ayyar J. while referring an appeal to the Full Bench of the Madras High Court relating to the maxim "actio personalis moritur cum persona", as follows :

".....the maxim has been always considered as an unfair and even barbarous maxim, especially when applied to a case where the injured party is denied redress because the wrong-doer died. I may add that it seems to me to be based upon no principle of justice, equity or good conscience, and that the technical common law rules as to forms of action and the distinction between real and personal actions might have had much to do with the survival in modern days, notwithstanding that statutory exceptions have been drafted on it even in England."

9. It thus appears from the above observation that the maxim is devoid of any principle of justice, equity and good conscience. In a Bench decision of this Court in Piriska Rozario and Others Vs. The Ford Foundation and Another, , it has been observed by P. N. Mookerjee J., that the maxim "actio personalis moritur cum persona", although an ancient English maxim and a part of the English Common Law, has been subjected to severe criticism even in England; it has been called an unjust maxim, obscure in its origin, inaccurate in its expression and uncertain in its application, and it often causes grave injustice. Further, it has been observed that it is no part of our law except to the extent it has been recognised by statutes in this country.

10. Coming back to Section 306 of the Indian Succession Act, let us see whether the suit falls within the exceptions as provided in that section. The suit cannot be said to be an action for defamation or for assault as defined in the Indian Penal Code. It is, however, submitted on behalf of the petitioners that it comes within the purview of an action for "other personal injuries not causing the death of the party." It is contended that the expression "other personal injuries" not only includes bodily injuries, but also wrong done to a person or his property. In other words, it is submitted that the termination of service is a personal injury and comes within the expression "other personal injuries" in Section 306. We are unable to accept this contention. The words "causing the death of the party" following the expression "other personal injuries" clearly indicate that such injuries must be physical or bodily injuries not causing the death of the party. The illustration (i) u/s 306 removes all doubts, if at all, about the meaning of the

expression "other personal injuries". Illustration (i) is in the following terms :

"(i) A collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive."

11. In view of illustration (i) of Section 306, there is no room for doubt that the said expression relates only to physical or bodily injuries. The view which we take finds support from a Bench decision of this Court in *Krishna Behari Sen v. Corpn. of Calcutta* ILR 1904 Cal 993. In that case Maclean C. J. in delivering the judgment of the Bench observed : "But reading according to their natural and ordinary meaning the words "personal injuries, not causing the death of the party" appear to me to refer to physical injuries to the person, which do not cause death, as for instance physical injuries to the person resulting from a Railway accident."

12. In *Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury*, , it has also been observed by the Supreme Court that the maxim operates in a limited class of actions ex delicto such as actions 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 relief granted could not be enjoyed or granting it would be nugatory.

13. A learned single Judge of the Ajmer High Court in *Krishna Datta v. Dr. Dinanath* AIR 1952 Raj 37 has categorically held that in a suit for damages for breach of contract, the right to sue survives to the heirs of the deceased party. We respectfully agree with the learned single Judge of the Ajmer High Court in the view expressed by him in that case.

14. Before we part with the case, we may dispose of a short point argued by the learned Advocate for the petitioners. It is contended that on the failure of the prayers for declaration and injunctions the right to sue in respect of which does not survive, the same cannot also survive for the relief of damages for breach of contract inasmuch as it is a consequential relief. In other words, the contention is that on the failure of the main reliefs, the suit cannot survive only because of, the consequential relief. This contention proceeds on the assumption that in the instant case, the prayer for damages is by way of consequential relief which, in our opinion, it is not. The relief for damages for breach of contract cannot be treated as a consequential relief. It is really an alternative prayer to the prayers for declaration and injunctions. If one is granted damages for breach of contract, one cannot any more ask for reinstatement in service or for an injunction relating to such reinstatement. There is, therefore, no substance in the contention and it is rejected. No other point has been urged in this case.

15. For the reasons aforesaid, the application u/s 115 of the CPC fails and it is dismissed. There will, however, be no order for cost".

Jitendra Nath Chaudhuri, J.

16. I agree.