

(1994) 03 GUJ CK 0027
In the Gujarat High Court

Gujarat State Road Transport Corporation APPELLANT
Vs
Amishkumar Vinodbhai and Others RESPONDENT

Date of Decision : 24-03-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Fatal Accidents Act, 1855 — Section 1A
Industrial Disputes Act, 1947 — Section 2A
Motor Vehicles Act, 1988 — Section 166, 166
Succession Act, 1925 — Section 306, 306

Citation : (1996) 3 GLR 212

Hon'ble Judges : J.M. Panchal, J

Bench : Single Bench

Judgement

J.M. Panchal, J.—Whether on the death of injured claimant, claim petition filed by him abates or right to sue survives to his heirs and legal

representatives, is the question which arises for consideration in this revision application.

Deceased Vinodbhai Mangaldas Patel filed a Claim Petition being M.A.G.P. No. 86 of 1988 before the Motor Accident Claims Tribunal No. 11

(Aux.), Ahmedabad u/s 110-A of the Motor Vehicles Act. 1939. claiming compensation against the applicant, i.e., Gujarat State Road Transport

Corporation Ltd., and opponent No. 5, i.e., Shri Laljibhai Keshavbhai Chaudhari, who was driving the offending bus belonging to the applicant. In

the said application, Vinodbhai Patel claimed compensation of Rs. 15 lakhs on account of personal injuries sustained by him as a result of vehicular

accident which took place on December 28, 1987 due to rash and negligent driving of S.T. bus by the opponent No. 5.

2. During the pendency of the claim petition, the original claimant Shri Vinodbhai

expired on November 11, 1989. Thereupon opponents Nos. 1 to 4 herein submitted an application Exh. 14 praying that they be impleaded in the claim proceedings before the Tribunal in their capacity as heirs and legal representatives of the original claimant. In the said application Exh. 14, the opponents Nos. 1 to 4 averred that the deceased expired on November 11, 1989 due to the injuries sustained by him in the vehicular accident. It was mentioned in the said application that though the deceased expired on November 11, 1989 and post-mortem was performed at V.S. Hospital on November 12, 1989, they were awaiting the report from the authorities indicating the cause of death and, therefore, the application could not be filed in time. It was further stated in the said application that, till the date of filing of the application, the post-mortem report was not received by them and that two days before the date of filing of the application they were informed that the report would not be made available to them. It was also claimed by them that they were given to understand that for the purpose of being impleaded as heirs and legal representatives, it was not necessary to have the report indicating cause of death the deceased and on being informed that the death of the deceased was caused because of the injuries sustained in the accident, they were presenting the application for bringing them on the record of the claim petition as heirs and legal representatives of the original claimant. After pointing out the fact that they suffered mental shock due to the tragic death of the deceased claimant, they prayed that the delay, if any, in bringing them on the record of the case as heirs and legal representatives of the deceased claimant be condoned. The said application was presented on September 4, 1990. By passing an order on November 15, 1990, the learned Judge fixed the application for hearing and reply. The application was contested by the applicant.

3. The Tribunal heard both the parties and has granted the application vide order dated February 4, 1992, giving rise to the present revision application which is filed u/s 115 of the Code of Civil Procedure.

4. The learned Counsel for the petitioner submitted that, with the death of the original claimant who was suing in his personal capacity the applicant and the opponent No. 5 for compensation for the injuries sustained by him in the accident, the cause of action did not survive and as the cause of

action died with the claimant, the application Exh. 14 submitted by the opponent Nos. 1 to 4 ought to have been dismissed by the Tribunal.

Elaborating the said argument further, it was contended that Section 306 of the Indian Succession Act in terms provides that, all demands

whatsoever and all rights to prosecute for any action or special proceedings in favour or against person at the time of his death survive to and

against executors or administrators except cause of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries

not causing the death of the parties, and as right to sue for personal injuries sustained by the deceased claimant did not survive, the revision

application deserves to be allowed by this Court. It was pleaded that the original proceedings were the proceedings claiming compensation for

personal injuries sustained by the deceased which had not resulted into his death and. therefore, the right to sue would not survive in favour of the

opponent Nos. 1 to 4 so as to entitle them to continue the proceedings initiated by the original claimant and in view of the common law maxim

actio personalis moritur cum persona, the impugned order deserves to be set aside. Lastly, it was claimed that as no separate application for

condonation of delay was filed by the opponent Nos. 1 to 4, the Tribunal had no jurisdiction either to condone the delay caused in filing the

application for bringing the opponent Nos. 1 to 4 on the record of the case or to set aside the abatement and, therefore, also, the impugned order

should be set aside and the revision application should be allowed.

In view of the submissions advanced on behalf of the applicant, the point which arises for determination is whether right to sue survives to

opponent Nos. 1 to 4 on death of Vinodbhai Patel who had filed petition claiming compensation for personal injuries sustained by him in the

vehicular accident?

5. The common law maxim is *actio personalis moritur cum persona* - a personal right of action dies with the person. At common law, if an injury

were done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person

to whom, the wrong was done. As regards all actions essentially based on tort, the principle was inflexibly applied. It is not known when this

principle came into being, for its genesis is hidden in the mists of antiquity. From

time to time, it had been severely animadverted on by Judges for it is neither based upon justice nor common sense. In *Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (Dead) by Lrs. and Others*, the Supreme Court pointed out that the maxim was "an invention of English common lawyers" and observed: "It seemed to have resulted from the strong quasi-criminal character of the action for trespass." The maxim, with its extension, was criticised by Winfield and found to be pregnant with a good deal of more mischief than was ever born of it.

6. The first legislation in India on this subject was enacted in 1855. In that year, an Act was passed called the Legal Representatives' Act, being Act XII of 1855. It was assumed by the Legislature that the maxim *actio personalis moritur cum persona* applied in India, for the Preamble to the Act says: "Whereas it is expedient to enable executors, administrators or representatives in certain cases to sue and be sued in respect of certain wrongs which, according to the present law, do not survive to or against such executors, administrators or representatives". The Act then proceeds to provide for actions by the representative of a deceased person, and actions against the representative of a deceased person.

7. Under the Act XII of 1855 an action may be maintained by the executors, administrators or representatives of a deceased person for any wrong committed in the lifetime of the deceased which has occasioned pecuniary loss to the estate of such person and for no other wrong committed within one year before his death.

8. Then came the Indian Succession Act, 1855. and the Probate and Administration Act, 1881. Both these Acts contained a section which is now reproduced as Section 306 of the Indian Succession Act. 1925. The material portion of that section is as follows:

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....

9. Section 1A of the Fatal Accidents Act, 1855 provides that whenever the death of a person shall be caused by wrongful act, neglect or default, the party who would have been liable if death had not ensued shall be liable to

an action for damages, and such action shall be for the benefit of the wife, husband, parent and child, if any, of the deceased person; and in every such action, the Court may give such damages as it may think

proportioned to the loss resulting from such death to the parties respectively for whose benefit such action shall be brought.

10. Section 306 as well as the provisions of Order 23 Rule 3 came to be considered by the Supreme Court in *M. Veerappa Vs. Evelyn Sequeira*

and Others, . The Supreme Court has quoted with approval a passage occurring in *Melepurath Sankunni Ezhuthassan Vs. Thekittil Geopalankutty*

Nair, and held that, "though Section 306 speaks only of executors and administrators, Order 22 Rule 3 of the CPC sets out the right of legal

representatives to continue the proceedings instituted earlier by a deceased plaintiff if the right to sue survives, the Courts have taken the view that

the legal representatives stand on par with executors and administrators regarding their right to seek impleadment in order to complete the suit." In

the said case, the Supreme Court pointed out that the maxim *actio personalis moritur cum persona* is inapplicable in those cases where the injury

caused to the deceased person has tangibly affected his estate or has caused an accretion to the estate of the wrongdoer or where the cause of

action arises out of breach of contract. Therefore, in view of the aforesaid decision of the Supreme Court of India, it becomes evident that the

maxim *actio personalis moritur cum persona* would not apply to the cases where the injury caused to the deceased person has tangibly affected his

estate and to that extent, right to sue survives.

11. The Supreme Court in a different context while considering the question of survival of a claim for rendition of accounts, after the death of the

party against whom the claim was made, in *Girja Nandini Devi v. Bijendra Narain Choudhury* observed as under:

The maxim "*actio personalis moritur cum persona*" - a personal action dies with the person - has State of Mysore Vs. Guduthur Thimmappa and

Son and Another, a limited application. It 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. An action for account is not an action

for damages ex delicto and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could not be enjoyed after death, or granting it would be nugatory.

12. In *Hazari and Others Vs. Neki and Others*, : while dealing with the question of devolution of the right of pre-emption on the legal

representatives of the deceased-plaintiff, the Supreme Court explained the scope of Section 306 of the Succession Act, 1925 and observed that

this section expresses a qualification of the maxim *actio personalis moritur cum persona* to the extent that amongst causes of action which survive

are included some actions of a personal nature, that is to say, personal actions other than those expressly excluded by the section itself. From

these observations, it is evident that the provisions of the said section not only provide that causes qua property would devolve on the legal heirs of

the deceased-plaintiff but also saves some of the actions of personal nature except those expressly excluded therein.

13. The scope of the maxim "*actio personalis moritur cum persona*" has been examined by the Supreme Court in case of *Shri Rameshwar Manjhi*

(Deed.) Through his *Rameshwar Manjhi (Deceased)* through his son *Lakhiram Manjhi Vs. Management of Sangramgarh Colliery and others*,

while considering the question whether an industrial dispute survives when the workman concerned dies during its pendency. The Supreme Court

has held that "The maxim "*actio personalis moritur cum persona* though part of English Common Law has been subjected to criticism even in

England. It has been dubbed as an unjust maxim, obscure in its origin, inaccurate in its expression and uncertain in its application. It has often

caused grave injustice." After holding that the applicability of the said maxim depends upon the reliefs claimed and the facts of each case, it has

been held that on the death of the workman, even when the reference is of an individual dispute u/s 2-A of the Industrial Disputes Act, the Tribunal

does not become functus officio or the reference does not abate merely because, pending adjudication the workman concerned dies and it is open

to the heirs and legal representatives of the deceased workman to have the matter agitated and decided. The Supreme Court has ruled that in the

event of the death of the workman during the pendency of the proceedings, the relief of reinstatement cannot be granted but there may be a claim

for back wages or for monetary relief in any other form and the said cause of action created in favour of the workman under the provisions of the

Act should be in normal circumstances survive to his heirs.

13.1 Since the aim of award of damages is to compensate the person wronged, there is no reason why measure of damages pertaining to estate

should be in any way affected or limited by the death of the original victim of the accident. In my view, the maxim *actio personalis moritur cum*

persona is considerably abrogated by the judicial pronouncements. The scope of the provisions of Section 306 of the Succession Act and the

maxim "*actio personalis moritur cum persona*" appears to be well settled and the claim of damages on account of loss to the estate of the injured

would not abate on his death. The claim regarding loss caused to the estate would include several items such as medical expenses, miscellaneous

expenses, actual loss of income from the date of injuries till the death of the injured etc. But for the injuries sustained, the injured would not have

been required to incur the said expenses nor would have suffered actual loss of income. Therefore, even after the death of the injured, the claim

petition does not abate and right to sue survives to his heirs and legal representatives.

14. Coming to the facts of the case, this Court finds that the case of the opponent Nos. 1 to 4 is that the deceased Vinodbhai Patel died due to the

injuries suffered by him in the accident. They could have filed a substantive claim petition for compensation u/s 166 of the Motor Vehicles Act,

1988 following the death of the injured victim. However, since the injured victim had already filed a claim petition for compensation for injury

before his death, the opponent Nos. 1 to 4 are seeking to be brought on the record of the case instead of filing separate claim petition. If, at the

trial, they succeed in proving that the death of the deceased was due to the injury sustained by him in the accident, they will get the compensation

accordingly. If they fail to do so, they will get compensation for such claims as survive to the heirs and legal representatives u/s 306 of the Indian

Succession Act, 1925. What is sought to be done by the impugned order is to permit the opponent Nos. 1 to 4 to be brought on record as heirs

and legal representatives of the deceased claimant and nothing more than that. In my view, therefore, it cannot be said that any jurisdictional error is

committed by the Tribunal in permitting the opponent Nos. 1 to 4 be brought on record of M.A.C.P. No. 86 of 1988 as right to sue survives to them on the death of the original claimant Vinodbhai Patel.

15. So also, the submission that because a separate application, for condonation of delay in filing application for bringing the opponent Nos. 1 to 4

on the record of the case as heirs and legal representatives of the deceased claimant and setting abatement, was not filed, the impugned order

deserves to be set aside has no substance. In my view, the provisions of Section 5 of the Limitation Act do not warrant an interpretation that an

application in writing must be filed before the relief under the said section can be granted. The filing of a formal application for excusing delay is not

sine qua non for the exercise of power under the said section and it is always open to the Tribunal to condone the delay if the person concerned is

able to convince it that there were justifiable grounds for the delay in presenting the appeal or application. In this case, prayer for condonation of

delay is made in application Exh. 14 itself and as held by the Tribunal, sufficient cause is made out for condonation of delay caused in filing the

application for bringing the heirs and legal representatives on record and setting aside the abatement. It was not incumbent upon the opponent Nos.

1 to 4 to file a separate application for condonation of delay caused in filing the application for bringing them on record and setting aside

abatement. In my view, such a technical plea should not have been raised by the applicant, i.e., Gujarat State Road Transport Corporation, which

a "State" within the meaning of Article 12 of the Constitution of India.

16. In view of the above discussion, it cannot be said that the impugned order has been passed without jurisdiction or in excess of jurisdiction. No

ground is made out by the petitioner for interfering with the impugned order in the present revision application which is instituted u/s 115 of the

Code of Civil Procedure. The revision application, therefore, fails. Rule is discharged with no order as to costs. Ad-interim relief granted earlier is

hereby vacated.