

(1956) 08 MAD CK 0026

In the Madras High Court

Case No : Civil Revision Petition No's. 1728, 1729 and 1730 of 1954 and 57 of 1955

Rajappa and Others

APPELLANT

Vs

Andalammal and Others

RESPONDENT

Date of Decision : 31-08-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 4, 115, 50, 51
Motor Vehicles Act, 1939 — Section 96, 96(2)

Citation : AIR 1957 Mad 236 : (1957) 70 LW 89

Hon'ble Judges : Basheer Ahmed Sayeed, J

Bench : Single Bench

Advocate : V. Thyagarajan, V.N. Srinivasa Rao, C.S. Rajappa, P. Chakrapani Iyengar and A. Nagarajan, for the Appellant; S. Ramachandra Iyer, for the Respondent

Final Decision : Allowed

Judgement

Basheer Ahmed Sayeed, J.—These revision petitions arise out of an order made by the learned City Civil Court Judge rejecting the

applications of the petitioners made under Order 22, Rule 4, C. P. C. for bringing the sons, daughters and the widow of the deceased first

defendant in the suits on record as his legal representatives. O. S. Nos. 51 of 1952, 1888 of 1951, 1898 of 1951 and 130 of 1952 were filed

against the deceased first defendant by various plaintiffs claiming damages for injury done to them while they were travelling in the motor vehicle

plied by the first defendant between Madras and Kalavai and by reason of an accident which occurred during their sojourn on 24-12-1950.

2. The deceased first defendant was the owner of a fleet of buses carrying passengers for hire between Madras and Kalavai and other places

under permits granted by the Government of Madras. One of his buses was plying for hire between the places mentioned above. The case of the

plaintiffs was that the bus in question on the date referred to above was plying with overload of passengers and was being driven rashly and

negligently by the driver at the time when the accident occurred.

It is stated that the driver, when he was driving at full speed, was trying to avert a bullock cart and swerved suddenly to the north of the road and

that the vehicle went off the road and dashed against the tree in a violent manner and with great force. The impact, was so great that the two front

wheels of the bus tore off from the chassis. The bus was seriously damaged and rendered unfit for further use. As a result of the accident, the

passengers were seriously injured and some also died on the spot.

3. Each of the plaintiffs who suffered injuries bodily and mentally by reason of the paid accident claimed various sums by way of damages against

the first defendant after due notice to the first defendant. They also stated in their plaints that the motor vehicle was insured with Messrs.

Viswabarathi Insurance Company carrying on business at No. 37 Errabalu Chetti St., G. T. Madras, as required under the Motor Vehicles Act

(Act IV of 1939) and for that reason the insurance company was also made a party defendant.

4. The defendants resisted the suits and after issues were framed, the first defendant died. On his death, the plaintiffs sought by applications out of

which these revision petitions have arisen to bring on record the legal representatives of the deceased first defendant namely his sons, daughters

and widow. These applications were resisted by the heirs of the deceased as being incompetent and the learned City Civil Court Judge upheld the

contention of the respondents and refused to allow the plaintiffs their applications to bring on record the legal representatives of the first defendant.

Against this order the present civil revision petitions have been preferred.

5. Mr. Ramachandra Aiyar learned counsel for the respondents at the outset has raised a preliminary objection that as the learned City Civil Court

Judge had held that the suits had abated by reason of the death of the first defendant the remedy of the plaintiff was only to prefer an appeal against

the order and that no civil revision petition lay against the same. I do not think that there is much force in this preliminary objection raised by the

learned counsel. The very point that was decided against the plaintiffs in the petitions is still being agitated through these civil revision petitions and

until these civil revision petitions are finally disposed of it cannot be said that the suite have aborted for the mere reason that the learned City Civil

Court disallowed the prayer of the plaintiffs to bring on record the legal representatives of the deceased first defendant. The point raised by Mr.

Ramachandra Aiyar would become relevant only after the point raised by them in the present civil revision petitions had been decided finally and

not otherwise. Therefore the point raised by Mr. Ramachandra Aiyar has to be overruled as not being tenable.

6. Even at the outset Mr. Thiagarajan appearing on behalf of the petitioners stated that the prayer, so far as the impleading of the daughters of the

deceased was concerned, was not proper and it was misconceived. He conceded that he would not press any more the question of bringing on

record the daughters of the deceased and the petitions would be confined only to bringing on record the sons and the widow of the deceased.

7. The question that arises for consideration in these, petitions is whether the right to sue survives after the death of the first defendant and whether

on the death of the first defendant the doctrine of *actio personalia moritur cum persona* applies to this case. It has been vigorously argued by Mr.

Thiagarajan that Section 102 of the Motor Vehicles Act has the effect of making the right to sue and the cause of action against the first defendant

survive to the plaintiffs, notwithstanding the fact that the first defendant died pending suits and the action was one for damages against him, for a

personal injury.

8. Before Section 102 of the Motor Vehicles Act could be considered, it would be useful to consider that the insurance company is not a

necessary party to the suit and the Act does not contemplate any decree being obtained or passed against the insurance company as such. u/s 94

of the Motor Vehicles Act (Act IV of 1839) it has been provided:

94(1). No person shall use except as a passenger or cause or allow any other person to use a motor vehicle in a public place unless there is in

force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the

requirements of this chapter.

Section 95 provides for the requirements of policies and limits of liabilities. Section 96 of the same Act lays down the duty of insurers to satisfy

judgments against persons insured in respect of third party risks. It also provides a right to the insurance company to be made a party to the

proceedings and to defend the action on the grounds prescribed under Sub-section (2) of Section 96 of the Act. Section 97 does not arise for

consideration in this case but 8. 98 prescribes the duty to give information as to insurance. Though the insurance company is not a necessary party

to any suit that may be laid against the owner of any vehicle for damages suffered by any passenger by reason of any personal injury or otherwise

still the insurance company may be made a party to the proceeding in order to enable that company to watch its interest and to see that there was

no collusion between the plaintiffs and the assured or to plead that the insurance policy is liable to be avoided on the grounds mentioned in Sub-

section (2) (a) and (b) of Section 96.

9. The main point that has to be kept in view in this is that after a decree is passed against the assured, the insurer that is the insurance company is

bound to satisfy the decree unless it is otherwise made ineffective. A further point to be noticed is that so far as the Motor Vehicles Act is

concerned, it does not contemplate a decree being passed against the insurance company and it will not be correct to say that the injured person

could proceed against the insurance company alone for enforcing the third-party risk undertaken by the company, leaving out the assured or his

heir's and legal representatives, and without seeking to enforce his remedies against the assured whose vehicle and whose employees were

responsible for the accident and damage suffered by the Passengers.

In this view it does not appear to be correct on the part of the learned City Civil Court Judge to have held in the course of his judgment that the

plaintiffs should proceed against the insurance company alone in order to enforce their claim for damages without seeking the legal representatives

of the deceased first defendant to be brought on record. Though certain rights and privileges are given to the insurance company, the insurance

company is not made strictly liable to the plaintiffs or the passengers who might be injured in a motor accident unless and until there is a decree

passed against the owner of the vehicle who is really the assured person under

the Motor Vehicles Act or in his absence against his legal representatives or executors or administrators as the case may be.

10. The material question therefore to be decided in these civil revision petitions is whether the cause of action has survived in favour of the plaintiffs against the legal representatives of the deceased or whether it has ceased with the demise of the first defendant. It is contended on behalf of the respondents that the suit being one in tort, the liability in the first instance was against the driver, and in the next instance against the owner, of the vehicle, and that the owner having died it cannot be said that an action in tort still survives in favour of the plaintiffs against the legal representatives of the deceased.

If it is found actually that the right to sue survives, then the next question would be, as against whom does the right survive and the third question would be who are the legal representatives of the deceased. In this case, there is little doubt that the sons and the widow would be the legal representatives" of the deceased. But then the other question would be whether the right of the plaintiffs to sue had survived against these legal representatives and whether the right of the type that has formed the subject-matter of the suits could really survive at all. The decision on these questions will depend upon the inter-relation, in the main of Section 102 of the Motor Vehicles Act.

11. according to the law of England, the doctrine of *actio personalis cum persona* was in force in all matters until 1934. The general rule of the common law in England was that on the death of the party to an action in tort, the doctrine of *actio personalis cum persona* came into operation.

That is to say the death of the party Or the wrong doer put an end to the cause of action, and consequently a suit cannot be instituted or continued by Or against his representatives. There was an exception to this general rule and that was that an action would lie against the representative of a wrong doer whose estate had been added to or benefited by the appropriation of another's property.

This was the ratio decidendum in *Phillips v. Homfray*, 1883 24 Ch D 439 (A), and the series of decisions which followed that decision. There were also certain other exceptions made to this rule in England which it is not necessary to traverse now and the rule was enforced as already

stated for several centuries in regard to actions for torts and was finally abrogated in England only in 1934 by the passing of the Law Reform

(Miscellaneous Provisions) Act, 1934, and that law provided for certain exceptions.

It declared that on the death of any person all causes of action subsisting against or vested to him shall survive against or for the benefit of his estate

except causes of action for defamation, seduction, inducing one spouse to leave the other and claims for damages for adultery. Subject to these

exceptions after 1934 a suit filed by or against a person in tort might be continued by or against his representative. There were also certain

limitations as to time imposed. It is stated in the Law of Torts by Section Ramaswami Aiyar, 4th Edn. 1950, that the doctrine of *actio personalis*

moritur cum persona was modified by legislation very much earlier than in 1934 in India (vide pages 650 to 652).

The original Indian Succession Act, 1925, enacted that all causes of action in favour of or against a person survives except those for defamation,

assault as defined in the Indian Penal Code and other personal injuries not causing the death of the party. The learned author also referred to the

Legal-Representatives Suits Act, 1855, which allowed an action against the representatives of a person for any wrong committed by him in his life-

time and within one year before his death and that the Act did not apply to a suit Instituted against him in his lifetime for such a suit would be

governed by narrower rule of the Succession Act (vide page 652).

12. Apart from the Indian Succession Act, Section 102 of the Motor Vehicles Act, also, it is contended on behalf of the plaintiffs has the effect, of

modifying the operation of the doctrine of *actio personalis moritur cum persona* in matters which arise under the said Act. Section 102 of the

Motor Vehicles Act lays down:

Notwithstanding anything contained in Section 306 of the Indian Succession Act. 1925, the death of a person in whose favour a certificate of

insurance had been issued, if it occurs after the happening of an event which has given rise to a claim under the provisions of this Chapter, shall not

be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer.

Under this section, it is argued by the learned counsel for the petitioners that the

legislature has definitely provided that the cause of action should survive in the case of the death of a person in whose favour a certificate of insurance had been issued, if such death occurs after the happening of an event which has given rise to a claim under the provisions of Chapter VIII of the Act, and that it specifically provided that such death shall not be a bar to the survival of any cause of action arising out of the said event against the estate of the deceased or against the insurer.

The effect of this section it is contended, goes beyond Section 306 of the Succession Act, as can be gathered from the opening words of Section

102 of the Motor Vehicles Act, viz., "notwithstanding anything contained in Section 306 of the Indian Succession Act, 1925. Section 306 of the

Indian Succession Act provides that the causes of action to sue survive to and against the executors or administrators of the deceased person with

certain exceptions, the exceptions being causes of action for defamation, assault, as defined in the Indian Penal Code or other personal injuries not

causing the death of the party. The terms of Section 306 of the Indian Succession Act do not have the effect of making the right to survive against

the "heirs-at-law" but only against the executors or administrators of the deceased person.

It is urged by the learned counsel for the petitioners that Section 102 of the Motor Vehicles Act extends the right in favour of the injured persons

against the legal representatives of the deceased person so long as there is an insurance certificate issued in favour of the deceased person; so

much so Section 102 has the effect of overriding Section 306 of the Succession Act in so far as the right to sue in favour of the injured person is

made to survive against the legal representatives of the deceased person

13. Mr. Ramachandra Aiyar, however, contends that the language of Section 102 of the Motor Vehicles Act does not warrant the construction or

the interpretation put upon it by the learned counsel for the petitioners. His point is that what the section says is that the death of a person in whose

favour a certificate of insurance has been listed shall not be a bar to the survival of any cause of action arising out of such event against his estate or

against the insurer. He points out that a cause of action can survive only against the executors or administrators or legal representatives of a

deceased person but there can be no meaning if it is stated that the right to sue

shall survive against the ""estate"" of a deceased person.

The section, according to him, does not provide for the right to sue or the cause of action to survive against the legal representatives of the

deceased person. On the other hand, the express language is to the effect that the death of a person sued shall not be a bar to the survival of the

cause of action ""against the estate"" of the deceased. He however concedes that by statute the cause of action in tort can be made to survive but his

point is that this particular statute. i.e., 8. 102 of the Motor Vehicles Act does not bring out that result which is claimed by the petitioners.

A right to sue can survive against human beings or against a person who represents the deceased. But what the statute lays down here is that the

cause of action survives ""against the estate"". There can be no such thing in law and the statute is meaningless and absurd in its conception. In

support of his contention he has taken me through all the relevant portions of the observations made by the learned Judges of this Court in

Kanchamalai Pathar v. Shahaji Rajah, ILR 59 Mad 461: AIR 1936 Mad 205 (B), where it has been held in very unmistakable terms that the

theory that, on the death of a person proceedings for the recovery of a debt due by him are taken only against his ""estate"" and not against his ""legal

representative"" is not justified either by legal"" history or by the language of the Civil P.C. Varadachariar J. observes however:

In discussing the development of the law relating to the heir's liability for debts due by the ancestor, Mr. Justice Holmes (Common Law, Ch. X)

refers to the rule of the Roman law making the heir (if he enters on the inheritance) liable for all the debts of the ancestor (whatever may be the

extent of assets received by him) and states that this rule was adopted even in England at the time of Glanville but modified by the time of

Bracton.....It is thus clear that the liability is that of the taker and riot of the estate (as an entity) though the "estate" furnishes the measure of

liability.

14. At P. 481 (of ILR): at pp. 209 and 213 (of AIR) Varadachariar J. has further observed:

As regards the general principle, it was declared by Lord Hardwicks so long ago in Nugent v. Gifford, (1738) 1 Atk 463: 26 EH 294. (C), that

the demand of a creditor is only a personal demand against the executor in

respect of the assets come to his hands but there is no lien on the assets.

At p. 482 (of ILR): at p. 210 (of AIR) he again observes that ""In the Civil P. C. of 1859, Section 210 provided that on the death of a judgment-

debtor application for execution of the decree may be made "against the legal representative or the estate of the person so dying" and in *Danput*

Singh Bahadoor v. Ranee Rajeessuree, 15 Suth WR 476 (D) stress was laid on this alternative form of the provision; but this was modified in

1877, and since then execution is to be had only against the "legal representative"; see observations in 15 Suth WR 476 (D) and in *Chathkelan v.*

Govinda Karumiar ILR 17 Mad 186 (E)."" Relying on these observations Mr. Ramachandra Aiyar contends that the statute, viz., the Motor

Vehicles Act, and Section 102 thereof, does not achieve the purpose of saving the cause of action against the legal representatives of the deceased

when it merely states that it survives against the estate and there cannot be any right of suing or cause of action against an estate in the light of the

observations made in the above decision.

15. Mr. Ramachandra Aiyar has further relied upon *Baboolal v. Ramlal*, AIR 1952 Nag 408 (F), where it was held by Deo J. that if an injury were

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

person to whom, of by whom, the wrong was done except where a remedy is given to, or against, the personal representatives by the statute law.

While applying this decision, Mr. Ramachandra Aiyar's contention is that the statute law relied upon by the petitioners does not give any remedy

to, or against, the personal representatives of the deceased so far as the language of Section 102 is concerned.

His further point is that Section 102 of the Motor Vehicles Act only incorporates Section 306 of the Indian Succession Act and therefore, so long

as the effect of Section 306 of the Indian Succession Act is restricted to executors and administrators, the heirs-at-law of any deceased person do

not come within its purview. He relied further on *Cassim v. Sara Bibi*, ILR 13 Rang 385: AIR 1936 Rang 17 (G). In that decision, it was held that

u/s 306 of the Indian Succession Act, the cause of action survives against an executor and administrator of a tort-feasor but not against his heirs

and that the latter term is not included in the former under the Act.

The same decision also held that if the language used in a statute is precise and unambiguous all that the Court is called upon, or entitled to do, is to

consider the statute, according to its plain meaning; but where the terms of a statute are not clear and certain words therein are capable of more

than one interpretation, Page C. J. said he did not understand Lord Sinha's observations to preclude the Court from having recourse to the

previous state of the law and the surrounding circumstances for the purpose of ascertaining which meaning the legislature intended the ambiguous

terms to bear. This decision, it must be observed, cannot be considered to be of much assistance to Mr. Ramachandra Iyer for the reason that the

statute which is under consideration starts with the clause ""notwithstanding anything contained in Section 306 of the Indian Succession Act"" and if

any effect is to be given to that saving clause, the terms used in the section that ""the death of a person shall not be a bar to the survival of the

action"" will have to be given some meaning.

Otherwise there would have been no necessity at all for the insertion of a saving clause in these terms in Section 108. The legislature was fully

conscious that Section 306 applied only to executors and administrators in so far as saving the cause of action in actions in tort was covered and

that is the reason why it brought in the saving clause in order to extend the scope of the doctrine of the survival of cause of action in torts even as

against the heirs-at-law of a deceased person.

16. Mr. Ramachandra Aiyar also commented upon the difficulty in understanding the term used in Section 102 to the effect that the cause of action

shall survive against an insurer as well, notwithstanding the death of the person who caused the tort and against whom the action in tort lay. He

referred to Section 97 of the Motor Vehicles Act where the insurer is made liable and there was no necessity for Section 102 to state that the

cause of action survives against an insurer as well, though the person might have died.

When it is made clear that the insurer is merely to give effect to the decree that might be passed against the assured or against his legal

representative as the case may be so provided for u/s 87, there can be no meaning in saying that the cause of action shall survive against the insurer

as well. The statute does not provide by the sections that have been enacted earlier than Section 102 of the Motor Vehicles Act that there is any

cause of action against the insurer at all. If the unliquidated damages claimed by the injured person have become a decree of Court, then certainly

the insurer comes in to honour that decree and obey its terms and not until then. Looked at from this point of view, the contention of Mr.

Ramachandra Aiyar is"" that there can be no meaning in saying that a claim for unliquidated damages shall survive against the insurer, when already

specific sections under which liability has been imposed upon the insurer have been enacted.

Therefore the point that is stressed by Mr. Ramachandra Aiyar is that when the statute has failed in its object by reason of its inappropriate

language, it is not open to the Court to give a different meaning in order to vest rights in parties which have not been created or assured by the

express language of the statute itself. On this point, he has invited my attention to Craze on Statute law, page 68, 1952 Edn. The learned author

observes at page 68 as follows:

No case can be found to authorise any Court to alter a word so as to produce a *casus omissus* said Lord Halsbury in *Mersey Docks v.*

Henderson 1888 13 AC 595 at p. 602 (H). In *Crawford v. Sponer*, 1846-6 Moo PC 1 at pp. 8, 9 (I), the Judicial Committee said "We cannot

aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there"." ""In

other words"" the author goes on to observe:

the language of Acts of Parliament, and more especially of modern acts, must neither be extended beyond its natural and proper limits in order to

supply omissions or defects, not strained to meet the Justice of an individual case. "If said Lord Brougham in *Gwynne v. Burnell*. 1940 7 Cl & Pin

572 (J), "we depart from the plain and obvious meaning on account of such views (as those pressed in argument on 43 Geo 3 C. 99) we do not to

truth construe the Act, but, alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect which the

legislature could easily have supplied, and are making the law, not interpreting it. This becomes peculiarly improper in dealing with a modern statute

because the extreme conciseness of the ancient statutes was the only ground for

the sort of legislative interpretation frequently put upon their words by the Judges. The prolixity of modern statutes, so very remarkable of late, affords no grounds to justify such a sort of Interpretation.

Learned counsel on both sides have also invited my attention to the definition of the term "estate" in order to show that "estate" is an inanimate object and there cannot be any survival of a cause of action against the estate. Both Stroud's Judicial Dictionary and Webster's Oxford English dictionary have been pressed into service for the definition of the term "state" as obtains in those two works. I do not think it is necessary for me to go into a detailed examination of the meaning of the term "'estate'" and what it signifies and stands for when it is used in statutes. It is beyond doubt that "estate" means what it has been defined to be in Stroud's Judicial Dictionary as also in the Webster's English dictionary. The decision in *Josiem Thiruvengadachariar v. Swami Aiyangar*, ILR 34 Mad 76 (K) has also been relied upon by Mr. Ramachandra Aiyar in support of his contention that if the claim remains to be one for unliquidated damages and has not become perfected by Judgment, at the time of the death of the defendant, the rule of *actio personalis moritur cum persona* would apply in actions against tortfeasors.

There it has been observed that the rule is not interfered with merely because the person injured incurred in his lifetime some expenditure of money in consequence of the personal injury. That was a case where, in a personal action for an Injunction, a decree was given to the defendant with costs. The plaintiffs appealed. During the pendency of the appeal, the defendant-respondent died. It was held that the right to prosecute the appeal against the respondents' legal representative does not survive to the appellants. In that connection the observation referred to earlier was made. I do not think that this decision is of much relevancy to the point at issue.

17. In spite of the able arguments of Mr. Ramachandra Aiyar that the Motor Vehicles Act, and Section 102 thereof do not give the right to the Injured persons to continue their remedy against the legal representatives of the deceased person and in spite of the authorities that he has cited before me. I am unable to agree with him when he says that the Motor Vehicles Act does not have the effect of saving the right of the injured person to sue against the legal representatives of the deceased owner of the

vehicles which caused the accident and the injuries to the plaintiffs. It is no doubt true that the language of this section is not happily worded.

It could have been framed in better form had the legislature cared to do so. But that by itself in my opinion does not warrant the inference that

Section 102 of the Act has become otiose or has failed in its object. The object of that section plainly seems to be to enable the injured party to

proceed against the legal representative of the deceased person whose vehicle or driver was responsible for the injuries and also to proceed

against the estate in the hands of his legal representative.

It is true that the language merely is to the effect that the death of the person is not a bar to the survival of the cause of action against the estate. But

in order to see what exactly is the import and meaning of this term we shall have to take into consideration the intention of the legislature and the

purpose with which this section has been enacted under the Motor Vehicles Act. The scheme of the Act seems to be that there should be third

party risk insurance and that if a party has been insured for purposes of such third party risk and if after the event and pending the suit the

defendant dies, the injured persons who have been the victims of an accident shall not be deprived of their right to enforce their remedy against the

legal representatives of the deceased defendant in whose hands the estate of the deceased might vest on his death.

The language no doubt is clumsily worded but still if we are to keep in view the purpose and the object underlying this enactment, we shall have to

follow the rule of interpretation that has been referred to in Maxwell on Interpretation of Statutes, 10th Edn. page 68 and give effect to the intent

and purpose of this enactment, The chapter is headed as ""Beneficial Construction"" and the subheading is ""To suppress the mischief and advance

the remedy"". It is there stated by the learned author:

It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy. Even where the

usual meaning of the language falls short of the whole object of the legislature, a more extended meaning may be attributed to the Words, if they

are fairly susceptible of it. The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words.

For instance, the repealed Sunday Closing (Wales) Act, 1881 (c. 61) Section 1,

which required that public houses should be closed at certain hours on Sundays, was held incapable of being construed as extending to Christmas day." Even so at p. 69, it is stated:

If, however, there are circumstances in the Act showing that the phraseology is used in a larger sense than its ordinary meaning, that sense may be

given to it; and where the object of a statute is the public safety, its wording may be interpreted widely to effect that object. Thus, the legislature

having intended when passing the Workmen's Compensation Act, (1897) (C, 37) that every workman in the prescribed trades should be entitled

to compensation, it was held that the Act ought to be construed, so far as possible, to give effect to its primary provisions.

In considering Section 102 of the Motor Vehicles Act, I am not prepared to reduce it to an absurdity as Mr. Ramachandra Aiyar, would like it to

be. The clear intention of the legislature, in my view, seems to be that the benefit of the action should survive against the deceased person's legal

representatives and be made available to the injured persons and not merely that the cause of action should survive against the "estate" of the

deceased. The estate of the deceased must remain in the hands of the legal representatives of the deceased and it is definitely contemplated that

notwithstanding the fact that the person against whom the action was laid had died pending the suit, the injured party must be able to recover

damages from out of the estate that may remain with the legal representatives.

Otherwise, we shall be committing the fallacy of *reductio ad absurdum*, if we are to construe the section in the manner the learned counsel for the

respondents wants to have it and it would be far from giving any beneficial construction in order to effectuate the purpose and intent underlying the

statute. There cannot be a decree against an estate; an estate cannot face any litigation or satisfy any decree unless it is held by some owner or his

representatives in his absence. Therefore, survival of cause of action can be only against representatives of the deceased who hold the estate and

not against the estate as such.

The section cannot be construed to mean that the legislature intended that the action should survive against the "estate", which estate is not a person

nor a legal representative of a person but only an inanimate object denoted as an inheritance or as assets and properties combined, of the deceased

person, which may be available to any creditor to enforce his rights in order to recover what he is entitled to under any decree passed in his favour.

If that were not the intention the legislature need not have enacted this section at all, though it is couched in loose language lacking precision and exactness.

18. Mr. Thiagaraja Aiyar has in this connection invited my attention to *Bradshaw and wife v. Lancashire and Yorkshire Ry. Co.*, 1875 44 LJ CP

148 (L), where the principle of the application of *actio personalis moritur cum persona* has been discussed. It was action by an executor and there

was injury to the personal estate of the testator. There was a breach of contract whereby bodily harm was inflicted upon the testator. In these

circumstances it was held that the action was maintainable for the right to sue in respect of the breach of contract survived to the executrix. The

maxim actio personalis moritur cum persona did not apply and none of the provisions of the Statutes 9 and 10 Vict. c. 93 took away the cause of

action.

Relying on this decision Mr. Thyagaraja Aiyar argued that in this case there was a breach of the contractual liability between the passenger and the

owner of the vehicle, the contract being the safe journey for the passenger until he reached his destination and if that contract to see that the

passenger reaches his destination safely without any injury to his person is breached, certainly the passenger would be entitled to enforce his claim

for damages for his breach of contractual obligation.

As between the carrier and the passenger, it cannot be disputed that there is a contractual liability that on payment of the passage money the

passenger shall be safely deposited at his place of destiny and if in the course of such journey there is any injury the carrier will certainly have to

bear the consequences. It may not therefore be in such a case a mere action in tort but one based on contract between passenger and carrier. In

my view the present case can be treated also as a case based on contract for its breach.

19. Mr. Thyagaraja Aiyar also invited my attention to *Workmen's Compensation Board v. O. P. Rly. Co.*, AIR 1919 PC 71 (M). which is a case

decided under the Workmen's Compensation Act, and was not one which arose out of any tort. The liability under the Workmen's Compensation

Act is created by virtue of the statute and on the Game analogy Section 102 of the Motor Vehicles Act and the sections preceding there to create a liability on the part of the owner of the vehicle. It will not be proper therefore to say that decisions under the workmen's Compensation Act are not of much assistance for the construction of a clause under the Motor Vehicles Act. I think, by way of analogy, the principles of any decision under the Workmen's Compensation Act would apply, for holding that the statute saves the cause of action on the death of the person causing the damage.

20. In Royal Insurance Co. Ltd. Vs. Abdul Mahomed Meheralli, , the purpose and object of Section 96(2) of the Motor Vehicles Act has been discussed and I do not think it is necessary for me to deal with that decision at length. It Is relevant for the purpose of showing that though rights are given to the Insurance company u/s 96, no decree 18 contemplated to be passed against the insurance company. It has merely to give effect to the decree against the insured or his legal representatives.

21. A further point that was raised in the Court below was that the legal representatives sought to be brought on record are not in possession of any estate of the deceased and therefore they were not liable to be impleaded in the suit and they also contended that though the statute gives the right and the remedy to the injured person to proceed against the legal representatives of defendants even in cases Of tort, still in view of the fact that the estate of the deceased had not been benefited or augmented, the legal representatives cannot be proper or necessary parties to the suit. It is difficult to agree with this contention.

Whether the legal representatives are in possession of the estate of the deceased Or not does not arise at the present stage when the decree is sought to be obtained against them and when the question that is involved is just whether the right to sue has survived or not. If there is no estate in which the deceased was interested, the Injured persons, the plaintiffs, may not be able to derive any benefit from any decree that might be obtained against them in the suits, for the legal representatives may be made liable to pay only to the extent of the estate that might be in their hands and which once belonged to the deceased and not otherwise.

That, as has been rightly contended by the learned counsel for the petitioners,

will be a Question which will have to be decided when the stage of execution arises and not in advance of the grant of a decree, or execution of a decree. Whether the estate that is actually in the hands of the legal representatives is a joint family estate, or it was a personal estate of the deceased also, does not arise for consideration at present stage when all that has to be decided is the Question as to whether the right to sue survives and if it does survive against whom it survives. Surely it cannot survive against the "estate" as such but it does survive only against persons who have inherited that estate as the legal representatives of the last owner of that estate or of the person who is last interested in that estate.

If the estate is an estate of the joint family, then it is for the decree-holders to seek their remedies against the Joint estate. It is not open to the legal representatives at this stage to contend that the estate is a joint one or a separate one or otherwise, and therefore no decree should be passed against them. The learned City Civil Judge has misdirected himself when he based his decision on the fact that there was no estate and therefore the legal representatives could not be brought on record. He has fallen in the very error which has been argued against as being enacted by Section 102 by the learned counsel for the respondents, which one cannot subscribe to.

There cannot be a survival of a cause of action against the estate, and it is not necessary that there should be a estate for a decree being passed against the legal representatives of the deceased defendant It can be only against some persons who are the representatives of the deceased holding the estate of the deceased and in whose hands the estate of the deceased has vested. Even if it were Joint family estate which has come to the legal representatives of the deceased by virtue of survivorship and not by inheritance, still the plaintiffs could not be said to be without any remedy for if it is a Hindu Joint family, the decree-holders can still have recourse to Sections 50 to 53 C P. Code. This remedy, which is vested by law in the decree-holders to enforce a decree against the legal representatives or the sons of a deceased father in a joint Hindu family, cannot be lost eight of as the learned City Civil Judge has done when he held that because there is no separate estate of the deceased there cannot be any legal representatives of the deceased brought on record.

22. It is needless for me to repeat the observations of the learned Judges of this

Court and also of the Calcutta High Court which has characterised the doctrine of *actio personalis moritur cum persona* as archaic and barbarous and that it cannot be allowed to operate in this country when things have changed to a very large extent and when statute has come in to take away the effect of the operation of that doctrine. Nor is it necessary for me to go into the question that in so far as we follow the principles of Justice, equity and good conscience, wherever circumstances justify and also the principles of English Common law as part of the law of this country, the decisions of Courts are to be in accordance with justice, equity and good conscience.

That the Common Law of England, in so far as it is not abrogated, is part of the law of India in so far as it is not inapplicable to conditions that prevail in India has been held in *Sundermull Vs. Ladhuram Kaluram*, and *Bireswar Ghose v. Panchcouri Ghose*, AIR 1923 Cal 638 (P), which has also held that the principles of English law should be followed if decisions are to be in accordance with the principles of justice, equity and good conscience. It is also to be observed that the decision relied upon by the learned City Civil Judge in *Rustomji Dorabji v. Nurse*, ILR 44 Mad 357: AIR 1821 Mad I (FB) (Q) has no relevancy to the facts that were before him and it is not necessary in the view that I have taken to go into that decision at any great length.

23. Therefore on a consideration of all the circumstances in this case and the purpose for which the Motor Vehicles Act was enacted and the object for which Section 102 seems to have been inserted in that Act, I am of the opinion that the plaintiffs-petitioners will be entitled to an order directing that the legal representatives of the deceased first defendant be brought on record and the order of the learned City Civil Judge is not sound. It is, therefore, set aside and these petitions are allowed with costs--one set in all the petitions except the one in which Mr. A. Nagarajan appears. In the petition Mr. Nagarajan will be entitled to separate costs. The advocate's fee for the petitioners is fixed at Rs. 150. So far as Mr. Nagarajan is concerned his fee will be Rs. 35/-.