

(1983) 08 KAR CK 0038
In the Karnataka High Court
Case No : Misc. First Appeal No. 1218 of 1978

S. Muniyappa

APPELLANT

Vs

H.L. Narasimhaiah and Others

RESPONDENT

Date of Decision : 25-08-1983

Acts Referred:

Motor Vehicles Act, 1939 — Section 110 A, 120
Succession Act, 1925 — Section 306

Citation : (1984) 1 ACC 85 : (1984) ACJ 299 : AIR 1984 Kar 63 : (1984) 1 KarLJ 41

Hon'ble Judges : R.S. Mahendra, J;G.N. Sabhahit, J

Bench : Division Bench

Advocate : K. Channabasappa, for the Appellant; C. Srinivasa Iyengar, for the Respondent

Judgement

1. This appeal by the claimant is directed against the judgment and award dated 7th July, 1978 passed by the District Judge and Member, Motor Accidents Claims Tribunal-1, Bangalore in Miscellaneous (MVC) Case No. 99 of 1975 on his file, awarding compensation of Rupees 15, 430.03 p., along with interest and costs in favour of the injured claimant.

2. It is the case of the claimant that he is a building contractor and that he earns annually not less than Rs. 16,368/-. On 26-11-1974 at about 1.30 P.M. he was going on his scooter bearing Registration No. MYB 3689 from east to west along N.S. Iyengar Street, on the left side of the road. A car bearing Registration No. MYM 5530 came from north to south driven in a rash and negligent manner and hit against the scooter. The scooter-rider was thrown to a distance of about 8 or 10 feet on the left side. He sustained fracture of his left leg and one of his arms and other parts of the body sustained injury. Scooter was damaged. One Kempanna, who was nearby, removed this in an auto-rickshaw to the Victoria Hospital. He remained an in-patient in Victoria Hospital for a long time. On these averments, he claimed compensation of Rs. 1,00,000/- from the respondents.

3. Respondents 1 and 2, by their written statement, resisted the claim. According to them, it was the petitioner who was driving the scooter in a rash and negligent manner. The car was going on its proper side and with moderate speed. It was not the car that hit the scooter. It was vice versa. As a result of the scooter listing against the car, the car was damaged. They denied this liability.

4. The third respondent, insurance Company, contended similarly,

5. The Tribunal raised the following issues as arising for its consideration:

(1) Whether the petitioner proves that he sustained injuries due to the negligence of the driver of Car MYM 5530?

(2) Whether the petitioner is entitled to any compensation? If so, to what amount and from whom ?

6. During hearing, the claimant examined himself and five other witnesses on his behalf and got marked Exhibits P-1 to P-53. As against that, the respondents examined two witnesses, including the driver of the car, and got marked one document, namely, the certified copy of the judgment passed by the Criminal Court against the, driver of the car.

7. The Tribunal, appreciating the evidence on record held that the accident was the result of rash and negligent driving of the car by its driver and, in that view, it awarded compensation of Rs. 15,430.03 ps., in all to the claimant. Aggrieved by the said judgment and award, the claimant instituted the present appeal before this Court claiming enhanced compensation.

8. During the pendency of the appeal, however, the claimant died on 7th July 1978 and a preliminary objection is raised before us submitting that the appeal does not survive the death of the injured claimant as the appeal is for enhanced compensation for personal injuries.

9. The point therefore that arises for our consideration in this appeal is: "Whether the appeal instituted by the injured claimant for enhanced compensation survives his death during the pendency of the appeal?"

10. Actio personalis Moritur cum Persona (Personal right of action dies with the person) is a maxim in common law in England which is also accepted in India. At common law, in England, if an injury were done either to the person or property of an, other for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done. As regards all actions essentially based on tort, the principle was inflexibly applied. The origin of this doctrine is lost in antiquity. It is needless to point out that this principle is pernicious in its working. In England, the Law Reforms (Miscellaneous) Act, 1934, has since abolished it altogether except for statutory exceptions.

11. In India, the first legislation on this subject was enacted in 1855. In the year, the Legal Representatives' Suits Act, (Act No. XII of 1855), was passed.

12. It is seen from the preamble to that Act that the Legislature assumed that the maxim "Actio Personalis Moritur cum Persona" applied in India, for the preamble states :

"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; It is enacted as follows:

xxx xxx xxx 13. The Legal Representatives" Suits Act then proceeds to provide for action by the representative of a deceased person and against the representative of a deceased person.

Section 1 of the Act states :

"Executors may sue and be sued in certain cases for wrongs committed in lifetime of deceased. An action may be maintained by the executors, administrators or representatives of any person deceased for any wrong committed in the lifetime of such person which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death; and the damages, when recovered, shall be part of the personal estate of such person; And further, an action may be maintained against the executors or administrators or heirs of representatives of any person deceased for any wrong committed by him in his lifetime for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death; and the damages to be recovered in such action shall, if recovered against an executor or administrator bound to administer according to the English Law, be payable in like order of administration as the simple contract debts of such person."

14. Section 2 provides "Death of either party not to abate suit". It states:

"No Action commenced under the provisions of this Act shall abate by reason of the death of either party, but the same may be continued by or against the executors, administrators or representatives of the party deceased."

This Act obviously provides for action against a dead person or in favour of a dead person if the tort complained of was committed within one year of the death of the concerned person. The suit contemplated is to be brought after the death of the concerned person. It is thus clear that S. 1 of this Act does not apply to a suit against a wrong-doer in his lifetime but only to actions commenced against his representatives on his death, (Vide: ILR (1905) Mad 487 and ILR 1889 13 677 (Bom.)

15. Similarly, Section 2 applies only to action commenced under the provisions of the Act.

16. Thus, the Legal Representatives" Suits Act does not save the cause of action

if the suit is instituted for damages for personal injury during the lifetime of the person injured and he dies later during the pendency of the suit.

17. Then came the Indian Succession Act of 1865 and the Probate and Administration Act of 1881. Both these contained a section, which is later reproduced as Section 306 of the Indian Succession Act of 1925. It reads :-

"Demands and rights of action of or against deceased survive to and against executor or administrator.- 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."

18. Thus, this section makes it. very clear that a suit for damages for personal injuries, not causing the death of the party, would not survive and the cause of action abates with the death of the person injured, (Vide: Ramaswamy Naicker Vs. Manickka, : Herbert Archibald Pocock and Another Vs. The Delhi and London Bank Limited and Others, ; Bhupendra Narayan Sinha Vs. Chandramoni Gupta, and Piriska Rozario and Others Vs. The Ford Foundation and Another, .

19. In the case of injuries resulting in death of a person, the Fatal Accidents Act, (Act No. XVIII of 1855), provides for cause of action for damages surviving in favour of the legal representatives, An action can be maintained for damages Although death is caused under such circumstances as amounting in law to felony or other crime.

20. Thus, as the law stands in India, it is obvious that a suit for damages for personal injury does not survive the death of the injured. An appeal stands on the same footing as an original suit. So, when an appeal is filed against a decree dismissing a suit for malicious prosecution but the tortfeasor dies during the pendency of the appeal, the appeal abates, (Vide: Maniram v. Chalti Bai ILR (1938) Nag 280 : AIR 1937 Nag 216. Where a decree is passed for damages against the tortfeasor and he filed an appeal but (lies during its pendency, the appeal or the suit will not abate, (Vide: Paramen v. Sundarraja ILR (1902) Mad 499; Gopal v. Ramachandra ILR (190) 26 Bom. 597; Haridas v. Jagannath Das ILR (1940) Nag 63). Where an appeal is filed by the tortfeasor and cross-objections are filed by the plaintiff and the appellant dies then, though the appeal does not abate, the cross-objections would abate, for if the plaintiff had appealed the same would have abated. (Vide : Bhimsain v. Muhammad Ali ILR (1929) Lah. 1 : AIR 1929 Lah 807).

21. Thus, it is clear that the appeal filed by the victim for enhancement of compensation does not survive the death of the injured, as the law stands in India today. Therefore, the appeal, without more, has to be dismissed. The decree that is already passed by the trial Court in favour of the injured enures to

the benefit of the, legal heirs as representing the estate of the deceased and they would be, entitled to defend it in case that is challenged by the other side by filing an appeal, for the legal heirs have the right to defend the estate of the deceased. But, the appeal in this case would not survive, for the appeal was instituted by the injured claimant himself for enhancement of compensation and that right dies with him.

22. It is no doubt true that the doctrine "Action Personalis Moritur cum Persona" is criticised even in England as harsh, unconscionable and unjust. In fact, as stated above, the Law Reforms (Miscellaneous) Act, 1934, has since abolished the maxim altogether in England, except for statutory exceptions. Hence, it is true that it is not necessary to follow it in India on the basis of justice, equity and good conscience. But, the real difficulty is the statutory provision made in Section 306 of the Indian Succession Act, quoted above.

23. It is true that a law should no doubt respond to the felt needs of the Society. It is equally true, however, that a Court of law cannot under the guise of interpretation amend the existing law usurping the power of the Legislature.

24. Some judges are no doubt restive. They feel it necessary to do justice in the instant case rather than to respect the established principles of law. They are not prepared to wait for Parliament to remedy the defects in the Legislation. But, that clearly amounts to usurping the functions of the Legislature.

25. The correct Scope for judicial technique is indicated by Lord Devlin in his Book "The Judge." He distinguishes between judicial activism on the one hand and judicial creativity or dynamism on the other. The former is operation within the consensus and is proper. The latter is operation in advance of the consensus and is not proper. A judge, who is in any doubt about the support of the consensus, should not advance at all in relation to Statute law. It is his duty to interpret the law. To administer justice is to administer law. To usurp the functions of the Legislature in the name of developing jurisprudence is surely unwarranted.

26. It is no doubt true that in *Piriska Rozario and Others Vs. The Ford Foundation and Another*, a Division Bench of the Calcutta High Court, speaking through his Lordship Mookerjee, J., has ruled that the legal heirs of Rozario could apply for compensation when Rozario died as a result of injury sustained in the motor accident on 10-10-1965 though he received the injuries in the motor accident on 2-3-1965 as a direct result of the accident and his legal heirs sought for permission to continue the action on his death. The Calcutta High Court held that the legal heirs were entitled to be substituted in place of the deceased claimant in the pending proceeding before the Tribunal. But it is necessary to recall that case the death was due to injury sustained in the accident and in such case the cause of action survives in favour of the legal heirs, as pointed out above and the legal heirs could bring the petition u/s 110-A of the Motor Vehicles Act, for compensation.

27. It is no doubt true that the mischief is partially annulled by Section 120 of the Motor Vehicles Act. The Legislature has to still further amend the law by specifically amending Section 306 of the Indian Succession Act enabling the cause of action in the case of personal injuries to survive by dropping in the section the exception with regard to action for damages for personal injuries. That is the desideratum of the day in view of the fact that thousands of persons are killed and lakhs of them are maimed in motor accidents every year in the country.

28. The appeal, for the foregoing reasons, stands dismissed as the cause of action does not survive the death of the injured-claimant.

29. Forward a copy of this judgment to the Chairman, Indian Law Commission, the Secretary for Law & Parliamentary Affairs, Government of Karnataka, and the Secretary for Law & Parliament Affairs, Government of India, New Delhi, for kind perusal and for suggesting the necessary amendment in law.

30. Appeal dismissed.