

(2023) 08 BOM CK 0004

Bombay High Court (Aurangabad Bench)

Case No: Civil Application No. 8775 Of 2023 In Family Court Appeal No. 35 Of 2021

Jayshree @ Pushpa And Others

APPELLANT

Vs

Satyendra

RESPONDENT

Date of Decision: Aug. 2, 2023

Acts Referred:

- Code Of Civil Procedure, 1908 - Order 22 Rule 1, Order 22 Rule 2
- Hindu Adoption And Maintenance Act, 1956 - Section 18
- Family Courts Act, 1984 - Section 19
- Indian Penal Code, 1860 - Section 50, 498A
- Indian Contract Act, 1872 - Section 37
- Transfer Of Property Act, 1882 - Section 52
- Indian Succession Act, 1923 - Section 306

Hon'ble Judges: Ravindra V. Ghuge, J; Y. G. Khobragade, J

Bench: Division Bench

Advocate: S. B. Ghatol Patil, S. S. Bora

Final Decision: Dismissed

Judgement

Y. G. Khobragade, J

1. Heard the learned counsel appearing for the applicant and the Non-applicant, at length.
2. The applicant who is married daughter of the original Appellant and Respondent has filed present application under Order 22 Rule 1 & 2 of Code of Civil Procedure seeking permission to bring her on record being legal heir of her deceased mother-appellant in an appeal for enhancement of maintenance.
3. The legal issue which falls for consideration is that, whether the right to sue survives/lies with the legal heirs of deceased appellant in the appeal for enhancement of maintenance under the personal law i.e. Hindu Adoption And Maintenance Act?

4. The learned counsel appearing for the applicant canvassed that the present applicant is a married daughter of the deceased Appellant and Respondent. The marriage of her mother/Appellant and her father/Respondent solemnized on 06.12.1977. Initially, the marital relations between the appellant and respondent were cordial, but subsequently said relations became strained. Therefore, her mother (Appellant) and father (Respondent) started residing separately. Her Mother (Appellant) had filed petition bearing Petition-C No. 11/2017 under section 18 of the Hindu Adoption and Maintenance Act, 1956 before the Family Court, Nanded and prayed for maintenance @ Rs.1.50 lakhs per month. After conclusion of the trial, on 4th February, 2021, the learned Family court was pleased to pass the judgment and order and partly allowed said petition, directing the present Respondent (husband) to pay Rs.10,000/- per month. Due to dissatisfaction with grant of meager amount of maintenance, the appellant filed appeal under Section 19 of the Family Courts Act and prayed for enhancement of maintenance to the tune of Rs.1.50 lakhs. However, during pendency of the appeal, the appellant died on 13.05.2023. Therefore, the cause of action survives and the applicant is having right to continue with the appeal. Hence, it is prayed for bringing the applicant on record being legal heir of the original appellant.

5. Per contra, the learned counsel appearing for the respondent (husband) canvassed that, the right to claim maintenance under the Hindu Adoption and Maintenance Act is restricted to legally wedded wife and children. The right to claim maintenance is in the personal nature and cause of action comes to an end on the death of the said person who had claimed maintenance under the statute. Therefore, in present case cause of action ceases on death of the original Appellant (wife) and no right accrues to the applicant-married daughter to continue with the cause for enhancement of the maintenance. Hence, prayed for rejection of the application.

6. The learned counsel appearing for the respondent relied on case the case of Annaduri v. Jaya, 2023 OnLine Mad 2604, wherein it has been held that claim of arrears of maintenance of deceased wife is heritable right of legal heirs, however, right of future is not transferable. He further relies on case of Yallawa Vs. Shantavva, (1977) 11 SCC 159, wherein it has been observed that, so far as the contention of maintainability of the application of respondent-wife is concerned, it must be kept in view that petition of divorce was moved by the husband for getting his marriage with the respondent dissolved by a decree of divorce on the ground that the respondent deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. It is also to be kept in view that such petition for divorce can be moved either by the husband or the wife, as the case may be. To that extent it is certainly a personal cause of action based on one or more matrimonial misconducts alleged in the petition against the erring spouse. Consequently, in such proceedings before any decree comes to be passed if either of the spouses expires pending the trial then the personal cause of action would die with the person. Such civil proceedings would not abate only if right to sue survives after the death of one or more of the parties to the proceedings as laid down by Order XXII Rule 1 of CPC.

7. The learned counsel for the Respondent further relied on case of Gangabai Vs Bhagwn, (2007) Mh. L.J. 223 , wherein it has been held that object and social purpose of sec. 125 of Cri. P. C., is not only against husband but it is against husband's property also. Merely because husband has died, one cannot say that now the wife is not entitled to recover the amount of maintenance out of the assets of the husband.

8. In the case in hand, the appellant/original applicant who is wife of the respondent filed the application under section 18 of the Hindu Adoption and Maintenance Act before the learned Family Court on the ground that she is legally wedded wife of the Respondent. Out of marital relations, she was blessed with a female child i.e. present applicant Sumedha. The appellant alleged that, her husband/ Respondent was addicted to bad vices and was womanizer. Her husband/Respondent started subjecting her to mental, physical cruelty. Her husband/Respondent developed illicit relation with another woman and deserted her. Therefore, she lodged a report under section 498-A of the Indian Penal Code, in which the respondent was convicted by the trial Court. Her daughter i.e the present applicant-Sumedha had filed a special Civil Suit No. 23 of 2015 which came to be decreed and she received 1/5 share in the property of the respondent. But no maintenance was given to her. Therefore, she prayed for maintenance of Rs.1.50 lakh per month.

9. It is a matter of record that, on 04.12.2021, the learned Family Court passed judgment and order and directed the respondent (husband) to pay Rs.10,000/- per month towards maintenance of the appellant. According to the appellant, the maintenance amount is meager, therefore, she filed the present appeal under section 19 of the Family Court Act and prayed for enhancement of the maintenance.

10. It is submitted that the "right to claim maintenance" is an individual prerogative right granted under the personal law Hindu Adoption and Maintenance Act and said right is not a proprietary right which devolves to the legal heirs of the wife or the husband.

11. Order 22 Rule 1 provides that death of the plaintiff or defendant would not cause the suit to abate, if right to sue survives. Therefore, on plain reading of the said provision, it appears that the provisions of Order 22 Rule 1 & 2 would apply only to the case of creation, transfer or devolution of interest in the nature of property and if the right to sue does not survive, there can be no question of bringing the legal representatives on record.

12. The phraseology "right to sue survive " used under Order 22 Rule 1 means right to seek relief. The general rule is that cause of action whatsoever existing in favour or against a person at the time of his death survives to or against his legal representatives.

13. In the case of Goutami Devi Sitamony Vs. Madhavan Sivrajan (AIR 1977 (Ker) 83), the Full Bench held that the rights intimately connected with the individuality of the deceased would not survive.

14. Needless to say that right to claim maintenance under the personal laws viz., Hindu Adoption and Maintenance Act, Muslim Law, Christian Law is in the personal nature. It is an individual privilege of a person who is governed under the Personal Law. The right to maintenance is a right in personam or jus-in-personam. Under Section 18 of the Hindu Adoption and Maintenance Act, a Hindu married woman, minor children are entitled for maintenance. The right in-personam is an individual prerogative right governed under the Specific Statute, give rise to a cause of action against the another individual person. The right in personam confers legal right on a specific/single person. Right of maintenance is in the nature of personam and it is not a right-in-Rem or proprietary right.

15. The phraseology "Right in rem and right in personam" is considered by the Hon'ble Supreme Court in para 17 in the case of R. Viswanathan Vs. Syed Abdul Wajid, 1963 AIR 1 and held that wherein it has been held that, a right was recognized by Roman lawyers as either Jus in Rem or Jus in Personam. Jus in Rem is a right in respect of thing, and Jus in Personam is a right against or in respect of a person, according to its literal meaning. A right in Rem presupposes a duty to recognize the right imposed on all people in general. In contrast, a Right in Personam presupposes a duty imposed on a specific person or\ class of persons. For the sake of brevity para 17 of said judgment reproduced as under:

"17. The Roman lawyers recognised a right either as a jus in rem or a jus in personam. According to its literal meaning 'jus in rem' is a right in respect of a thing, a 'jus in personam' is a right against or in respect of a person. In modern legal terminology a right in rem, postulates a duty to recognise the right imposed upon all persons generally, a right in personam postulates a duty imposed upon a determinate person or class of persons. A right in rem is therefore protected against the world at large; a right in personam against determinate individuals or persons. An action to enforce a jus in personam was originally regarded as an action in personam and an action to enforce a jus in rem was regarded as an action in rem. But in course of time, actions in rem and actions in personam acquired different content. When in an action the rights and interest of the parties themselves in the subject-matter are sought to be determined, the action is in personam. The effect of such an action is therefore merely to bind the parties thereto. Where the intervention of the Court is sought for the adjudication of a right or title to property, not merely as between the parties but against all persons generally, the action is in rem. Such an action is one brought in the Admiralty Division of the High Court possessing Admiralty jurisdiction by service of process against a ship or cargo within jurisdiction. There is another sense in which an action in rem is understood. A proceeding in relation to personal status is also treated as a proceeding in rem, for the judgment of the proper court within the jurisdiction of which the parties are domiciled is by comity of nations admitted to recognition by other courts. As observed by Cheshire in his Private International Law, 6th Edn. at p. 109, 'In Roman law an action in rem was one brought in order to vindicate a jus in rem i.e. a right such as ownership available against all persons, but the only action in rem

known to English law is that which lies in an Admiralty court against a particular res, namely, a ship or some other res, such as cargo, associated with the ship?: Dealing with judgments in rem and judgments in personam. Cheshire observed at p. 653, "It (judgment in rem) has been defined as 'a judgment of a court of competent jurisdiction determining the status of a person or thing (as distinct from the particular interest in it of a party to the litigation); and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided.... A judgment in rem settles the destiny of the res itself and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence?; a judgment in personam, although it may concern a res, merely determines the rights of the litigants inter se to the res. The former looks beyond the individual rights of the parties, the latter is directed solely to those rights...."

16. Therefore, as is held in *R. Viswanathan* (supra), it is clear that, the rights may be either in personam or in rem. A claim-right in personam co-relates to a duty of a person, while claim-rights in rem co-relate to duties in principle incumbent on everyone. A right enjoyed by one thus co-relates to a duty cast on the part of others.

17. In the case of *Daljit Singh and others Vs. Yogeshwar Prasad*, reported in MANU/DE/8489/2006, the Delhi High Court observed in Paragraph Nos. 15 to 18 as under:

"15. Under the Roman law, a distinction was made between claims based upon dominium and an obligation. A claim based upon an obligation of the other side was described as "chose in action" or "a thing in action", a proprietary right in personam. Other claims based upon proprietary rights were described as "chose in possession". The origin of a "chose in possession" was a thing or a right that was accompanied by possession. However, this distinction between "choses in possession" and "chose in action" has got blurred with the complex and intricate commercial transactions. For example, originally shares and equities were classified as "choses in possession" but are now regarded as "choses in action". Similarly, land and chattels are now "choses in possession" even if the owner is not in actual physical possession of the said chattel or land. Similarly, earlier a distinction was made between real and personal property. This distinction between real and personal property was based upon "actions in rem" and "actions in personam". This distinction between real and personal property no longer finds favor and is regarded as arbitrary and based upon no scientific or logically distinction.

16. I may here refer to the judgment of the Supreme Court in the case of *M. Veerappa* (supra) wherein after examining the maxim 'actio personalis cum moritur persona' it was held that in such cases where the plaintiff dies during the pendency of the suit or an appeal, the plaintiff stands relegated to his original position before the Trial Court. However, it was held that this doctrine would not apply where injury caused to the deceased person had tangibly affected his estate or had caused an accretion to the

estate of the wrongdoer. In this regard the Supreme Court approved of the observations made by the Madras High Court and the Madhya Pradesh High Court in *Rustomji Devabji v. W.H. Nurse* reported in AIR 1921 Mad 1 and *Ratanlal v. Baboolal*.

"17. The maxim '*actio personalis cum moritur persona*' has not been accepted in India as one of universal application. It operates in a limited class of actions *ex delicto* and not every action where on death of a party relief cannot be claimed or granting the same would be futile. There are also exceptions to the said maxim even in cases of personal injuries (See Section 37 of the Contract Act, 1872, Section 52 of the Transfer of Property Act, 1882 and Section 50 of the Code). Care must be taken not to extend this maxim beyond what is specified in Section 306 of the Indian Succession Act, 1923 to actions founded on an obligation, contract, debt, covenant or any other duty to be performed.

18. Section 306 of the Indian Succession Act, 1923 provides that all rights to prosecute or defend any action in favor of or against a person shall survive inspite of death of any of the parties except where cause of action are for defamation, assault or other personal injuries not causing death of a party or cases where after the death of a party, relief cannot be enjoyed or granting it would be negatory. The term 'personal injury' has been construed as *adjudem generis* and therefore takes its colour and meaning from the earlier two words : 'defamation and assault'. In *Margarida v. Neckintu* , Section 306 of the Indian Succession Act, 1923 was examined and it was held that the term 'other personal injuries' must be construed with reference to the preceding words, namely, defamation and assault. However, it may be clarified that the term 'personal injury' need not refer only to physical injuries but also mental injuries as it happens in the case of defamation (See *Mahajan v. Baboolal* reported in AIR 1960 MP 666). In the case of *Margarida* (supra) the Bombay High Court that the legal representatives of a plaintiff are entitled to continue with a suit filed for compensation of damage caused to goods as it was a case of damage caused to the estate and not merely a personal right that perished and corroded with the death of the original plaintiff."

18. We may here refer to the judgment of the Supreme Court in the case of *M. Veerappa .vs. Evelyn Sequeira and ors.*, AIR 1988 SC 506, wherein after examining the maxim "*Actio personalis cum moritur persona*" it has been held that in cases where the plaintiff dies during the pendency of the suit or an appeal, the plaintiff stands relegated to his original position before the Trial Court. However, it was held that this doctrine would not apply where injury caused to the deceased person had tangibly affected his estate or had caused an accretion to the estate of the wrongdoer. In this regard the Supreme Court approved of the observations made by the Madras High Court and the Madhya Pradesh High Court in *Rustomji Devabji v. W.H. Nurse* reported in AIR 1921 Mad 1 and *Ratanlal v. Baboolal*.

19. In case of *Krishan Singh .vs. Mathura Ahir*, AIR 1980 S.C. 707, it is held that right to sue means the right to bring a suit asserting a right to the same relief of which the

deceased plaintiff ascertained at the time of his death.

20. Since the present applicant prayed for bringing her on record as legal representative of the deceased appellant, who claimed for enhancement of maintenance under the Hindu Adoption and Maintenance Act and as such right of maintenance of wife against her husband is in personam and not in rem, therefore, the right to sue does not survive in favour of the applicant, who is married daughter of the deceased Appellant and Respondent. Nevertheless, when the Appellant (Deceased) had filed proceedings under Section 18 of the Hindu Adoption and Maintenance Act, the present applicant was not minor and she was not dependent on income of the Appellant. Therefore, taking into consideration of provisions of Order 22 Rule 1 & 2 of C.P.C., no right to sue survives to the married daughter to claim for enhancement of maintenance in respect of deceased Appellant.

However, the applicant being a legal heir of the deceased appellant, therefore, she has right to recover arrears of maintenance granted under Judgment and Order dated 4th February, 2021 against her father/ Respondent after obtaining succession certificate from the competent court of law.

21. In view of the above discussion present application rejected.

22. Accordingly, the appeal is abated.