(1976) 01 AP CK 0001

Andhra Pradesh High Court

Case No: Civ. Rev. Petition No. 984 of 1974

C. Jayaprakash		APPELLANT
	Vs	
State of Andhra Pradesh and Others		RESPONDENT

Date of Decision: Jan. 31, 1976

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 1
- Contract Act, 1872 - Section 16

Citation: AIR 1977 AP 20

Hon'ble Judges: Jayachandra Reddy, J

Bench: Single Bench

Advocate: A. Hanumantha Rao, for the Appellant;

Final Decision: Dismissed

Judgement

Jayachandra Reddy, J.
The interesting question that falls for consideration in this civil revision petition is whether the legal representatives of a deceased tortfeasor can be brought on record in an action for damages for a personal wrong.

To decide this question it becomes necessary to consider the scope and applicability of the maxim actio personalis moritur cum persona.

2. For a better appreciation of the question the necessary facts may be stated. The Petitioner filed the suit against two doctors and the State of Andhra Pradesh, claiming a sum of Rs. 50,000 as damages alleging that the doctors were reckless and negligent in performing an operation on him for tonsillectomy. The 2nd Defendant was the surgeon and the 3rd Defendant was the anesthetist working in the Government General Hospital, Guntur. After the suit was partly tried the 3rd Defendant died on 16th April, 1973. The Petitioner filed the interlocutory application to bring the legal representatives of the 3rd Defendant, viz., the wife, two sons and

daughter, as parties to the suit. They opposed the application on the ground that the action being a personal one, the suit abated so far as the 3rd Defendant is concerned. The lower Court dismissed the application filed by the Petitioner applying the maxim and holding that the suit abated against the 3rd Defendant.

3. In this petition Mr. A. Hanumantha Rao, the learned Counsel for the Petitioner, has contended that a fiduciary relationship exists between a doctor and a patient and so the lower Court ought not to have applied the maxim actio pro Sonalis moritur cum persona to the facts of the case. He has also contended that there is an implied contract between the doctor and the patient and the legal representatives succeeding to the estate of the doctor should be made parties. Finally it is contended that a benefit accrues to the estate of the deceased from the wrongful act committed by him and as such his legal representatives must be made liable.

4. In Rustomji Dorabji Vs. W.H. Nurse and Parthasarathi Naidu, , it is held:

If a Defendant in a suit for malicious prosecution dies before judgment is given in the suit, the right to sue does not survive within the meaning of Order 22, Rule, 1, so as to prevent the abatement of the suit. ''Personal injuries'' means wrongs to the person which do not necessarily cause damage to the estate of the person wronged.

The learned Judges have also held that the common law rule was applied in all its strictness by Courts in India and the applicability of the maxim to India is recognised. In the same case Kumaraswami Sastri, J., in a separate but concurring judgment observed:

The maxim ''actio personalis moritur cumpersona'' is with certain limitation as old as the English Law, and the maxim has been inflexibly applied to actions essentially based on tort. The rule of Common law is that you could not sue executors for a wrong committed by the testator for which you could only recover un-liquidated and other damages The only case in which, apart from the question of breach of contract express or implied, a remedy for wrongful act can be pursued against the estate of a deceased person who has done the act, appears to be those in which property or the proceeds or value of property belonging to another have been appropriated by a deceased person and added to his own estate or moneys. In such cases whatever the form of action, it is in substance brought to recover property or its proceeds or value and the amendment could be made to suit in form as well as in substance. In such cases the action arising out of a wrongful act does not die with the person. The property or the proceeds or value which, in the lifetime of the wrong-doer, could have been recovered from him can be traced after his death to his assets and recaptured by the rightful owner then.

This decision clearly lays down that the applicability of the maxim to India is well recognised and that in general it applies to actions in respect of torts and the right to sue will be extinguished on the death of the either party to such action depending on certain circumstances.

5. In Jogindra Kuer and Others Vs. Jagdish Singh and Others, the scope and applicability of this maxim was considered and the learned Judges observed:

This maxim means that ''personal right of action dies with the person'' in other words, ''death destroys the right of action.'' Personal action is one which does not relate to immovable properties. As a general rule, an action in respect of tort should commence in the lifetime of the person injured, but if that person dies before an adjudication, the action abates and cannot be continued by his legal heirs. and representatives. To put it in other words, the right to sue for tort is extinguished by the death of the person aggrieved.

In the course of the judgment the learned Judges have also pointed out thus:

The right to claim further relief has come to an end in view of the maxim referred to above. But so far the tort relates or affects the property belonging to the Plaintiff the maxim actio personalis morituf cum persona will not apply and the right to sue will survive to the legal representative of the Plaintiff.

Winfield on Tort, 8th Edition has pointed out that at common law there are two chief exceptions to the rule and they are:

(a) Actions on contract:

This was recognised to be law at least as early as 1611. ''For death is no discharge of...debt; and it would be a great defect in our law, that no remedy should be given for it.

(b) Enrichment of tortfeasor''s estate:

Where property, or the proceeds or value or property, belonging to the Plaintiff have been propitiated by a person since deceased and have been added to his own estate or moneys, the Plaintiff can sue the deceased''s personal representatives (executors or administrators) for the recovery of such property, its proceeds or value.

6. In Kakumanu Peda Subbayya and Another Vs. Kakumanu Akkamma and Another, their Lordships while considering the scope of Order 22, Rule 1, Code of Civil Procedure, observed thus:

The maxim actio personalis moritur cum pefsona has application '' only when the action is one for damages for a personal wrong.

7. From the above discussion it is clear that the meaning of this maxim is that a personal action dies with the person, and the effect is that the death extinguishes the liability in tort. In other words the death of the party wronged or the wrong-doer brings an end to the cause of action and the right to sue gets extinguished. But this is subject to a qualification viz, where a tonsil lector estate is benefited by the wrong done, an action would lie against the representative of a wrong-doer. The essence of

the maxim applies to an action brought for damages for a personal wrong.

8. In the instant case, undoubtedly the action is brought by the Plaintiff on the foot of a personal wrong of the deceased 3rd Defendant and the 2nd Defendant. Unless it is shown that the estate of the deceased 3rd Defendant wrong-doer was benefited by the tortious act committed by him, the right to sue does not survive because the personal action is said to die with the person. The learned Counsel in somewhat a strained argument tried to point out that the relationship between the Plaintiff and the 3rd Defendant was one of fiduciary nature and so it must be inferred that the estate of the 3rd Defendant got benefited by the wrong done by the 3rd Defendant and consequently the maxim becomes inapplicable. He invited my attention to a judgment of the Supreme Court in Subhas Chandra Das Mushib Vs. Ganga Prosad Das Mushib and Others, In that case their Lordships while considering the scope of Section 16 of the Contract Act of 1872, observed thus:

The Court trying a case of undue influence must consider two things to start with, viz., (1) are the relations between the donor and the done such that the done is in a position to dominate the will of the donor, and (2) has the done used that position to obtain an unfair advantage over the donor?....

Thus their Lordships were primarily concerned with a case of undue influence arising from the relationship of the parties and while considering the same observed thus:

Merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. Generally speaking the relations of solicitor and client, trustee and cestui quo trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises.

From this observation it is contended that the relationship between the medical attendant and patient is of fiduciary nature, and as such it must be inferred that the estate of the third Defendant was benefited by the personal wrong done by the 3rd Defendant. I am unable to agree with this contention. Their Lordships only considered the question of relationship between a medical attendant and the patient from the point of undue influence but their Lordships did not say anything in respect of the liability arising from personal wrong committed by a medical attendant. The question of considering the scope and applicability of the maxim did not arise in that case. So this case is of no assistance to the learned Counsel.

9. The learned Counsel also relied on another judgment of the Supreme Court in Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (Dead) by Lrs. and Others, in support of his contention that where a tortfeasor''s estate had benefited from a wrong done the maxim would not be applicable. There is no dispute about this proposition. But the question is in what manner can it be said that the estate of the 3rd Defendant had been benefited from a wrong done by him. In the said judgment

their Lordships pointed out as under:

Where a cause of action is based on breaches of fiduciary duties by a deceased Director of a Company or where his personal conduct is fully enquired into and the only question for determination, on an appeal is the extent of liability incurred by him, the appeal does not abate because of his death during its pendency. Such liability necessarily remains confined to the assets or estate left by the deceased.

In can thus be seen that this judgment does not deal with a case of a personal wrong of the deceased. On the other hand in the same judgment it is pointed out that application of the maxim was generally confined to actions for damages for defamation, seduction, including a spouse to remain apart from the other, and adultery; The learned Counsel could not cite any decision wherein the legal representatives of a doctor were made liable for a personal wrong committed by the doctor in discharge of his duties. It is rather farfetched to-state that the estate of the deceased 3rd Defendant, who was the anesthetist, got benefited by his negligent act said to have been committed in the course of an operation" performed on the Plaintiff; who was a consenting party for the operation.

10. A passage in Winfield on Toft, Eighth Edition, at page 607, may usefully be referred to in this context:

Survival of causes of action: All causes of action subsisting against or vested in any person on his death shall survive against or, as the case may be, for the benefit of his estate. But this does not apply to causes of action for defamation, seduction, inducing one spouse to leave or remain apart from the other, or damages for adultery.

In the same book at page 740 another passage occurs thus:

Consent, volenti non fit injuria: There are many occasions on which harm sometimes grievous harm may be inflicted on a person for which he has no remedy in tort, because he consented, or at least assented, to the doing or the acting which caused his harm. Simple examples are the injuries received in the course of a lawful game or sport, or in a lawful surgical operation. The effect of such consent or assent is commonly expressed in the maxim volenti non fit injuria which is certainly of respectable antiquity.

11. A case of a lawful surgical operation in general negatives the liability. But in a case where actionable negligence is committed by the doctor which amounts to a personal wrong done by him, he may be liable for damages. But his death extinguishes his liability in tort and the right to sue also gets extinguished. So, I see no force in the contention that the 3rd Defendant''s estate was benefited by the wrong done by him.

12. In addition to the above contentions, another last contention advanced by the learned Counsel is that the law recognizes the theory of contribution among joint

tort favors for injury caused by negligence and that the legal representatives of the 3rd Defendant must be brought on record and must be sued along with the 2nd Defendant. According to the learned Counsel if a decree is passed against the 2nd Defendant, he would be entitled to recover the contribution from the co-tortfeasor, viz., the 3rd Defendant who would have been liable for the damages in case he was alive and hence the legal representatives of the 3rd Defendant become necessary parties to the suit. In support of this contention that learned Counsel relies on a judgment of the Allahabad High Court in Dharni Dhar and Others Vs. Chandra Shekhar and Others, . In that case, the learned Judges, while considering the question whether there could be contribution among joint tortfeasors and joint wrong-doers, observed thus:

After a decree has been obtained against two or more tortfeasors, which imposes a joint and several liability upon each one of the judgment-debtors, of one of them is made to pay the entire amount of the decree, justice and fair play require that he should be able to share the burden with his compeers, i.e., the other joint judgment-debtors. Further, tortfeasor may recover contribution from any other tortfeasor who is, or would, if sued, have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise.

The Full Bench of the Allahabad High Court was concerned only with the question whether a tortfeasor can recover contribution from any other tortfeasor, if sued in respect of the same damage, as a joint tortfeasor or otherwise, and the learned Judges held that such a contribution is recoverable. It is no doubt true, in the present case the 3rd Defendant has been sued along with the 2nd Defendant, but after the death of the 3rd Defendant, in the view I have taken above, the suit abates against him and the right to sue him got extinguished and the 2nd Defendant remains in the picture and the extent of his liability is a matter to be decided finally in the suit The ratio decidendi in the above case has no application to the question to be resolved in this revision petition.

13. For all these reasons the civil revision petition is dismissed with costs.