ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

R.F.A. No.177 of 2017

Mohammad Ali Tariq

Vs.

Thai Airways International and others

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	13.11.2023.	**Barrister Suleman Khan for the Appellant.** **M/s Shafaq Abid and Maria Ahmed, Advocates for the Respondents.**

SAMAN RAFAT IMTIAZ, J.

1. This appeal is directed against the Judgment and Decree dated 27.09.2017 ("**Impugned Judgment and Decree**") passed by the learned Civil Judge 1st Class, West-Islamabad whereby the Suit filed by the Appellant was dismissed.

2. The brief facts of the case are that the Appellant filed a Suit for Recovery of Rs.280,885,000/- as general and special damages against the Respondents before the learned Civil Judge 1st Class, West-Islamabad which was dismissed vide the Impugned Judgment and Decree. Being aggrieved of the Impugned Judgment and Decree the Appellant preferred the instant appeal.

3. The learned counsel for the Appellant apprised this Court that the Appellant has expired on 24.04.2021 and he sought permission to implead the legal heirs.

4. The learned counsel for the Respondents objected by stating that the alleged cause of action has abated upon the death of the Appellant as the claim of damages was based on tort.

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5. Whereas according to the learned counsel for the Appellant the Appellant was not seeking damages only on account of tort but also under the contractual duty of care enshrined in the General Conditions of Carriage of Thai Airways made part of the contractual relationship between the parties by operation of the terms of the Ticket and also under the provisions of the Warsaw Convention as amended by the Hague, 1955 and transposed into Pakistani law by the Carriage by Air (International Convention) Act, 1996 ("Carriage by Air Act"). In this regard he referred to Section 17 of Chapter III contained in the First Schedule to the Carriage by Air Act which provides that the carrier will be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The learned counsel for the Appellant relied upon *Zahid Hussain Awan Vs. United Bank Limited*, 2018 MLD 1369, and *A. Majid Sama Vs. The Asbestos Cement Industries, Ltd.*, 1996 MLD 803 to argue that the 'right to sue' arising from contract and/or under statute survives death.

6. On the other hand, the learned counsel for the Respondents submitted that any right to damages for personal injury provided in contract is also based in tort. The learned counsel for the Respondents relied upon *Mir Shakeelur Rehman Vs. Yahya Bakhtiar,* PLD 2010 SC 612, *Ali Muhammad Mirza and others Vs. Mst. Sardaran and others,* PLD 2004 SC 185, *Mst. Nasri Begum*

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Vs. Virgil L. Moore, Consular for Administration, Embassy of the United States of America, 1989 CLC 511, *Mercantile Co-operative Bank Ltd. Vs. Messrs Habib & Co. and others*, PLD 1967 Karachi 755, and *Sardar Muhammad Ali Vs. Pakistan*, PLD 1961 (W.P.) Karachi 88.

7. Arguments advanced by the learned counsel for the parties have been heard and the file has been perused with their assistance.

8. Under Order XXII, Rule 1, C.P.C., the legal heirs of a deceased plaintiff succeed him/her in the suit if the "right to sue survives". The learned counsel for the Appellant concedes that the 'right to sue' does not survive death as far as the claim based in tort is concerned. However, he argued that 'right to sue' does survive in respect of claims based on contract or statute and as such the suit will not abate upon death.

9. In order to consider the argument made on behalf of the Appellant that the 'right to sue' has survived and the Appellant's suit has not abated to the extent of the claim based in contract and/or statute we must understand the nature of cases that survive death of the plaintiff. To this end we rely upon *Ali Muhammad Mirza and others Vs. Mst. Sardaran and others*, PLD 2004 SC 185 wherein the Honourable Supreme Court held as follows:

> *"So long as a right is referable to the individuality of a person, it does not survive at the death of that person.* ***The general rule is that all causes of action and all demands whatsoever existing in favour of or against a person at the time of his death survive to or against his legal representatives.*** *This principle is found enacted in the Succession Act as well, with* ***the only exception that rights intimately connected with the individuality of the deceased will not survive based on the famous maxim***

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> ***actio personalis moritur cum personal--a personal right of action dies with the person.*** *A right to sue, other than intimately connected with the individuality of the deceased, will always, survive to or against his legal representatives." [Emphasis added].*

10. Thus the distinguishing factor between a 'right to sue' that survives death and one that does not is whether the right was a personal right of action. A right immediately connected with the individuality of the deceased does not survive. The Appellant has not cited any case law whereby a personal right of action arising from tort has been distinguished from such right arising out of contract and/or under statute for the purposes of surviving death. The liability of the carrier in the event of wounding of a passenger or any other bodily injury suffered by passenger pursuant to Section 17 of Chapter III contained in the First Schedule of the Carriage by Air Act is also a personal right connected with the passenger and as such dies with such passenger.

11. Without prejudice to the foregoing, the right would have survived if the suit been decreed in favour of the Appellant. Reference may be made to *Ali Muhammad Mirza (Supra)* wherein it was held that suit for damages falls under the category of cases where the plaintiff's suit with regard to some claim which is associated with or vests in their individuality. The Honourable Supreme Court held that if the plaintiff succeeds in getting a decree for damages and dies during the pendency of his opponent's appeal the right would of course survive to his legal representative. This is not the case as far as the appeal before us is concerned. The suit filed by the Appellant was dismissed and he died during

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pendency of the instant appeal. Since the damages claimed by him were intimately connected with the individuality of the deceased Appellant therefore the right to sue has not survived.

12. The reliance upon *Zahid Hussain Awan* and *A. Majid Sama (Supra)* by the legal counsel for the Appellant is misconceived as the said case law does not support his contention. The counsel appears to rely upon *Zahid Hussain Awan (Supra)* to the extent that it holds that the principle embodied in the maxim *actio personails moritur cum persona* i.e. personal rights of action die with a person is recognized as law in Pakistan and is enforced on the grounds of justice, equity and good conscience except where it is otherwise provided by statute. However, the words *'except where it is otherwise provided by statute'* do not signify that where the personal right of action has been provided by statute it will survive death. Rather what is meant is that the principle that personal rights of action die with a person is enforced except where statute provides that it will not be enforced.

13. This becomes clear by the exception discussed in the said case contained in Order XXII, Rule 6, CPC whereby there is no abatement upon death between the conclusion of the hearing and the pronouncing of the judgment. In other words, if death occurs after conclusion of the hearing but before pronouncement of judgment it may nevertheless be pronounced irrespective of whether the cause of action survives or not. This is an example of where no abatement takes place upon death even when the right to sue does not

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survive as the same has been provided for expressly by statute.

14. The learned counsel for the Appellant has not shown us any statute whereby the right to sue on account of bodily injury sustained by a passenger on board the aircraft or during embarking or disembarking survives the death of the said passenger or that such suit would not abate irrespective of whether the right to sue survives or not.

15. The case of *A. Majid Sama (Supra)* does not support the case of the Appellant's legal heirs at all as the court in such case held that suit for defamation had abated upon death of the plaintiff as such cause of action being personal in nature does not survive death. Apparently the learned counsel was relying upon the said case to the extent of the discussion contained therein regarding *Syed Gayoor Hussain Shah Vs. Gharib Alam*, PLD 1990 Lahore 432 wherein it was held that an act of the court shall not prejudice anyone and that the situation would not have arisen but for the delay in the disposal of the appeal. However, in such case, suit had been decided in favour of the plaintiff while the first appeal reversed the judgment of the trial court. The plaintiff filed a second appeal but died during pendency thereof. We have already observed hereinabove that as per *Ali Muhammad Mirza* if the plaintiff succeeds in getting a decree for damages and dies during the pendency of his opponent's appeal the right would of course survive to his legal representative. However, in the instant case the suit filed by the deceased Appellant was dismissed. Therefore, no benefit

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can be drawn from the aforementioned judgments.

16. For what has been discussed above the instant RFA is hereby **dismissed**.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(SAMAN RAFAT IMTIAZ)
JUDGE

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Approved for reporting

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