APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Napier.

1921, March 29.

S. T. M. R. MURUGAPPA CHETTIAR (DIED) AND ANOTHER (PLAINTIFFS AND LEGAL REPRESENTATIVE OF THE DECEASED PLAINTIFF), APPELLANTS,

v.

PONNUSAMI PILLAI (DEFENDANT), RESPONDENT.*

Order XLI, *rule* 22 (4), *Civil Procedure Code* (*V of* 1908)—*Death of an appellant who had sued for damages for malicious prosecution—Abatement of appeal by—Jurisdiction to hear Memorandum of Objections.*

Where a person sued for damages for malicious prosecution and obtained a decree but preferred an appeal claiming more damages than he had been awarded, and died pending the Appeal, the Appeal abates. *Rustomji Dorabji* v. *Nurse* (1921) I.L.R., 44 Mad., 357 (F.B.) and *Josiam Tiruvengadachariar* v. *Sawmi Iyengar* (1911) I.L.R., 34 Mad., 76, followed.

After such abatement any Memorandum of Objections filed by the respondent cannot be heard. *Alagappa Chettiar* v. *Chockalingam Chettiar* (1918) I.L.R., 41 Mad., 907 (F.B.), followed.

APPEAL against the decree of MUHAMMAD FAZL-UD-DIN, Subordinate Judge of the Subordinate Judge's Court of Trichinopoly, in Original Suit No. 57 of 1917.

This was a suit for recovery of Rs. 5,100, as damages for malicious prosecution. The defendant pleaded that there was just and probable cause for the prosecution and denied malice and stated that the damages claimed were excessive. The Subordinate Judge found the issues for the plaintiff and awarded Rs. 500 as damages. The plaintiff preferred an appeal claiming more damages and the defendant preferred a Memorandum of Objections objecting to the award of any damages. Pending the Appeal the appellant died.

S. Varada Achariyar with *T. V. Ramanatha Ayyar* for respondent.—The appellant having died the appeal abates: *Rustomji Dorabji* v. *Nurse*(1) and *Josiam Tiruvengadachariar* v. *Sawmi Iyengar*(2). There being a decree against the respondent

* Appeal No. 316 of 1919.

(1) (1921) I.L.R., 44 Mad., 357 (F.B.). (2) (1911) I.L.R., 34 Mad., 76.

his memorandum can be heard in spite of the abatement of the Appeal: *Phillips* v. *Hourfray*(1). In *Alagappa Chettiar* v. *Chockalingam Chettiar*(2) there was no valid presentation of the Appeal. After 1908 a Memorandum of Objections stands on the same footing as an Appeal. The two contingencies mentioned are not exhaustive.

K. V. Krishnaswami Ayyar with *R. Kesava Ayyangar* for appellants.—When an appeal abates the Memorandum of Objections also cannot be heard: *Alagappa Chettiar* v. *Chockalingam Chettiar*(2). Order XLI, rule 22 (4), mentions only two contingencies in which it could be heard even when the Appeal is not heard; and this is not one of them: compare section 561, old Civil Procedure Code.

The Court delivered the following JUDGMENT:—

Following the Full Bench decision in *Rustomji Dorabji* v. *Nurse*(3) we hold the appeal abates; and it is dismissed with costs.

In this case the plaintiff preferred an appeal from a decree in his favour in a suit for malicious prosecution on the ground that the damages awarded were insufficient, and the defendant who had not appealed from the decree, filed a Memorandum of Objections contesting the decree. The plaintiff having died subsequently his appeal abated, as we have just held on the authority of the Full Bench decision in *Rustomji Dorabji* v. *Nurse*(3) and *Josiam Tiruvengadachariar* v. *Sawmi Iyengar*(4).

The question then argued before us is whether the respondent in the appeal is none the less entitled to have his Memorandum of Objections heard and determined. Order XLI, rule 22 (4), Civil Procedure Code, gives him such a right when after the filing of his Memorandum of Objections the appeal has been withdrawn or dismissed for default but not when it has abated. If the legislature had intended that he should have such a right in cases of abatement also, it would have said so. Rule 22 (1) entitles a respondent, though he may not have appealed from any part of the decree, not only to support the decree on any of the grounds decided against him in the Court below, but,

(1) (1883) 24 Ch.D., 439.
(2) (1919) I.L.R., 41 Mad., 904.
(3) (1918) I.L.R., 41 Mad., 907 (F.B.).
(4) (1911) I.L.R., 34 Mad., 76.

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also, to take any cross-objection to the decree which he could have taken by way of appeal. The intention of the rule is not to give a respondent who has allowed his own right of appeal to become barred a fresh substantive right of appeal, but only to allow him to take cross-objections on the appeal filed by the other side, and, if that appeal goes, the right to take cross-objections goes with it. As however it would be a hardship to allow an appellant to prevent the Memorandum of Objections from being heard by withdrawing the appeal or allowing it to be dismissed for default, the legislature has thought fit to provide that in such cases the memorandum of objections may "nevertheless" be heard and determined. The use of the word "nevertheless" is significant, especially when read with the word "cross-objection" which has been substituted for "objection" which occurred in section 561 of the old Code. This language shows that the legislature did not intend to alter the law by which the entertainment of objections was made contingent and dependent upon the hearing of the appeal. Whatever may be the reasons for the omission in rule 22 (1) of the words "upon the hearing" which occurred in section 561, the rule is sufficiently plain as it stands as held by the Full Bench in *Alagappa Chettiar* v. *Chockalingam Chettiar*(1), in which it was ruled that where an Appeal is dismissed as barred by limitation the Memorandum of Objections cannot be heard.

The Memorandum of Objections is dismissed with costs.

N.R.

(1) (1918) I.L.R., 41 Mad., 904 (F.B.).