

## APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,  
and Mr. Justice Viswanatha Sastri.*

1925,  
August 28

PALANIAPPA CHETTIAR (SECOND LEGAL REPRESENTATIVE  
OF THE PLAINTIFF), APPELLANT,

v.

RAJAH OF RAMNAD AND 4 OTHERS (DEPENDANTS  
1 TO 3 AND 1ST AND 3RD LEGAL REPRESENTATIVES OF THE  
PLAINTIFF), RESPONDENTS.\*

*Malicious prosecution of plaintiff, suit for—Death of plaintiff—  
Abatement of suit—No right for legal representatives to  
continue suit even for costs of defence in the criminal  
prosecution—Act XII of 1855.*

A suit for damages for malicious prosecution of the plaintiff abates on his death. Act XII of 1855 (Legal Representatives Act) does not enable his legal representatives to continue the suit to recover at least the costs incurred by him in defending the prosecution as loss caused to his estate, the loss on the ground of costs being incidental to, and inseparable from other losses sustained on account of the main injury, viz., the prosecution; *Pulling v. Great Eastern Railway* (1882) 9 Q.B.D., 110, followed.

APPEAL against the decree of K. S. VENKATACHALA AYYAR, Subordinate Judge of Madura, in O.S. No. 20 of 1923.

The facts are given in the Judgment.

*V. Rajagopal Ayyar* for appellant.—The legal representatives are entitled to recover at least the costs of defending the criminal case as there has been wrongful loss to the estate. *Rustomji Dorabji v. Nurse*(1) does not deal with the right to recover costs. Section 1 of Legal Representatives Act (XII of 1855) is applicable to this case.

[CHIEF JUSTICE: *Krishna Behary Sen v. The Corporation of Calcutta*(2), *Josiam Tiruvengadachariar v. Sawmi Iyengar*(3) are against you.]

\* Appeal No. 131 of 1924

(1) (1921) I.L.R., 44 Mad., 357 (F.B.). (2) (1904) I.L.R., 31 Calc., 406.

(3) (1911) I.L.R., 34 Mad., 76.

*C. V. Anantakrishna Ayyar with S. Soundararaja Ayyangar* for respondents.—This suit abates and cannot be continued by legal representatives. The loss on the ground of costs is not separable from other losses which are not recoverable on account of abatement. *Pulling v. Great Eastern Railway*(1) and *London v. London Road Car Co.*(2)

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The JUDGMENT of the Court was delivered by

COUTTS TROTTER, C.J.—This is a point of some little interest. A man called Subrahmanya Chetti started a suit for damages for malicious prosecution and in his plaint he claimed a sum of money by way of general damages and he also claimed special damage under two heads. The first was vakil's fees and the second was travelling and other incidental expenses for securing the attendance of witnesses for the purpose of defending the prosecution which was launched against him. We will take it that that prosecution failed and had this unfortunate man lived, he would have got substantial damages against the defendant which would have included the special damage alleged to have been incurred by him. As a matter of fact he died while the suit was pending and when the suit actually came on for trial before the learned Subordinate Judge it was proposed to continue the action with his executor or legal representative substituted as the plaintiff. The learned Judge held that that could not be done and we agree with him.

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The thing can be put in two ways (1) on a narrower and (2) on a broader ground. The narrower ground is this; that his cause of action throughout is the tortious act of which he was the victim, and not the fact that he incurred out-of-pocket expenses, e.g., for getting himself cured by a doctor in case of personal injuries or getting himself defended by a barrister or a vakil in case of

(1) (1882) 9 Q.B.D., 110.

(2) (1888) 4 Times L.R., 448.

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malicious prosecution. That goes to swell the bill against the defendant but it is not a cause of action. The cause of action is that which was done to him by running him over or by prosecuting him maliciously as the case may be. When we come to the case of an executor or legal representative his cause of action on behalf of the estate is quite different. He can only sue for a tangible, measurable, pecuniary loss caused to the estate by reason of the tortious act so that it would follow on the narrower ground that although both the plaintiff if living and his legal representative after his death had a cause of action for the recovery of these out-of-pocket expenses caused by the wrong of the defendant nevertheless they would recover them in different rights and for different reasons. The living plaintiff will recover them as part of the damages for his general cause of action, i.e., malicious prosecution; while to the executor or administrator the expenditure would be the sole cause of action because to that alone would he be entitled to a judgment. It may be put as it was put in the English case of *Pulling v. Great Eastern Railway Co.*(1) on the broader ground that these expenses are not losses to the estate of the deceased within the meaning of the Act of Parliament (the wording of which is practically identical with that of the Indian Statute, Act XII of 1855), because they are so submerged and overtopped by the real cause of action which was the tortious injury (here malicious prosecution) that they must be treated as a mere incident of that cause of action and not as giving rise to a separate head of liability enuring after death to the legal representative. On that view the legal representative could not start an independent

(1) (1882) 9 Q.B.D., 110.

action for the expenses of the malicious prosecution as in the present case. We respectfully agree but in any event we think that the learned Judge was quite correct in holding in accordance with the authorities in Calcutta and Madras that the cause of action of the deceased man himself and that, if any, of his executors are so different that it would be impossible to permit his legal representatives to carry on a suit instituted by him to recover damages. That being so, there is no cause of action and this appeal will be dismissed. One set of costs to be divided.

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v.  
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COURTS  
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N.R.

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### APPELLATE CIVIL.

*Before Sir Murray Couetts Trotter, Kt., Chief Justice, and  
Mr. Justice Viswanatha Sastri.*

ACHUTARAMAYYA AND 2 OTHERS (DEFENDANTS 3 TO 5),  
APPELLANTS,

1925,  
October 22.

v.

RATNAJEE BHOOTAJI AND 2 OTHERS (PLAINTIFF AND  
DEFENDANTS 1 AND 2), RESPONDENTS.\*

*Hindu Law—Joint family—Debts—Commercial debts of father  
newly starting a trade—Liability of sons.*

The text of Gautama, Chapter XII, 41, to the effect that the undivided sons of a Hindu are not liable for their father's commercial debts has long become obsolete; and ever since *Girdharee Lall v. Kantoo Lall* (1874) 1 I.A., 321, sons are liable for all debts of their father which are neither illegal nor immoral.

A trade is none the less ancestral because it was started only by the father.

APPEAL against the decree of S. SUBBAYYA SASTRI, Additional Subordinate Judge of Rajahmundry, in Original Suit No. 25 of 1920.

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\* Appeal No. 436 of 1922.