

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Sale and Mr. Justice Bodilly.

KRISHNA BEHARI SEN

v.

THE CORPORATION OF CALCUTTA.

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July 14.

Malicious prosecution—Damages, Suit for—Death of plaintiff before trial—Legal representatives—Cause of action, survival of—Probate and Administration Act (V of 1881) s. 89.

It is unnecessary to deal with the English authorities upon the question whether or not a cause of action survives to the representatives of a deceased plaintiff for malicious prosecution.

The law on the subject has been codified by s. 89 of the Probate and Administration Act, which says: "All demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favor of or against a person at the time of his decease, survive to and against his executors and administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party."

A suit for malicious prosecution falls within the general words of s. 89 of the Probate and Administration Act and not within any of the exceptions.

THE plaintiffs Krishna Behari Sen and Bepin Behary Sen, the heirs and legal representatives of the deceased Kedar Nath Sen, appealed.

This was a suit originally brought by Kedar Nath Sen to recover Rs. 5,000 by way of damages for the wrongful conduct of the defendant Corporation under the following circumstances:—

Kedar Nath Sen was the owner of an undivided fourth share in certain premises, which were subsequently divided. In the month of April 1897 he applied by petition to the Corporation for sanction to make certain alterations and additions to the portion of the property allotted to him. This was refused on the 27th April 1897, and though plans were submitted from time to

* Appeal from Original Civil No. 23 of 1904 in suit No. 814 of 1900.

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time shewing compliance with the requisitions of the Corporation, they were returned each time unsanctioned on fresh grounds. Finally, Kedar Nath Sen, not being able to obtain sanction, completed his additions and alterations without further reference to the Corporation.

Kedar Nath Sen in his plaint alleged that such refusal to sanction was made without any just and reasonable cause and was made maliciously at the instance of one Abinash Chunder Roy, an employee of the Corporation.

The Corporation on the 23rd March 1900 caused a summons to be issued against Kedar Nath Sen under s. 319 of Act II of 1888, Bengal Code, from the Court of the Presidency Magistrate at Calcutta, calling upon him to shew cause why an order should not be passed prohibiting him the use of the premises on the ground that they were unfit for human habitation. Pending the prosecution under the above summons, Act II of 1888, Bengal Code, under which the then existing Corporation was constituted was repealed, and Act III of 1899, Bengal Code, came into operation.

The Corporation continued the prosecution with the result that Kedar Nath Sen was discharged on the 19th July 1900. Kedar Nath Sen then instituted this suit, but before it came on for hearing he died. His sons were then entered upon the record in his stead and at the hearing of the suit a preliminary objection was taken by the Corporation that the suit did not survive to the legal representatives of the deceased.

Mr. Justice Henderson on the 25th February 1904 delivered the following judgment :—

In this case the plaintiff sues for damages, which are laid at Rs. 5,000, for malicious prosecution.

The grounds upon which the damages are based are:

- (1) that he suffered pecuniary loss in consequence of having to spend money upon his defence in the prosecutions, and
- (2) that he had been put to great annoyance and trouble of mind and loss of time.

The suit was filed on the 19th November 1900, and the plaintiff died on the 8th September 1902, pending hearing of suit. Upon his death an application was made on behalf of his sons and legal representatives to have their names substituted in place of his upon the record, and that was done under an order of the 17th February 1903.

It is now said that the present plaintiffs are unable to maintain this suit on the ground that the cause of action did not survive to them.

So far as the claim for damages is based upon the injury to the plaintiff's reputation, and upon the annoyance and trouble of mind caused to him, it is admitted that the plaintiffs are not entitled to pursue their claim. It is said, however, that the claim in respect of the pecuniary loss is an injury to the estate of the deceased, and that therefore the plaintiffs are entitled to go on with the suit as if it had been a suit by the original plaintiff himself, to recover the loss he had been put to by reason of defending himself against the prosecution. It is not contended that a suit for malicious prosecution is not a personal action. It is a personal action, and it appears to me that the common Law Rule of *actio personalis moritur cum persona* applies. In case of a malicious prosecution it has been said that there are three sorts of damages, which may result:

(1) damages to a man's fame as if the matter of which the man is accused is scandalous:

(2) damages where a man is put in danger of losing his life, limb or his liberty;

(3) damages to a man's property, as where he is forced to spend money in necessary charges to acquit himself of the crime of which he is accused—and that, according to the circumstances, he may sue for all or any of these different kinds of damages—but in each case the cause of action is the malicious prosecution.

In the case of *London v. London Road Car Company* (1) the question as to survival of an action for the personal injuries after the death of the plaintiff before trial, arose. The personal injuries were the result of an accident, and it was admitted that, under the general rule of law, an action for personal injury died with the person. There the plaintiff had claimed damages for loss of earnings and for various sums paid for medical expenses. In his judgment Lord Coleridge said, that the action was for personal injuries, that is, for injuries to the person, and the heads of damages relied upon (except as to one matter) resulted directly from those personal injuries. He went on to say: "No case shewed that an action for personal injuries causing pecuniary loss could be continued after the death of the party injured, and the case of *Pulling v. The North Eastern Railway Company* shewed just the contrary."

In the case referred to by Lord Coleridge it was said, "None of the authorities go so far as to say that, where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury," and further on, "there is no decision which supports the proposition that, because, in consequence of such injury, the person injured is put to expense, the case is brought within the category of cases to which the Statute of Edward III applies. Medical expenses are almost always made an element of damage in actions for injury to the person, but it has never before been suggested that the personal representative could maintain an action on the strength of such expenses."

Act XII of 1855 has been referred to, but it is admitted that that Act which deals with the maintenance of cases by executors, administrators or representatives

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(1) 4 T. L. R. 448.

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of a deceased person for recovery of certain moneys, applies to cases where the person injured might in his life-time have maintained, but had not instituted an action.

Section 89 of the Probate and Administration Act has also been referred to. That section declares that, "all demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party." Now the matter complained of in this case is clearly a personal injury covered by that section. That being so, the right of suit, or rather the cause of action did not survive to the representatives of the plaintiff and therefore the suit must be dismissed with costs.

The plaintiffs appealed.

Mr. R. C. Sen for the appellant. There are three sorts of damages resulting from an action for malicious prosecution, all of which would be sufficient to support an action, namely (a) damages to a man's reputation, (b) where a man is put in danger of losing life, limb or liberty, and (c) damage to a man's personal property. By the Statute of IV Edward III, which has in substance been embodied in this country in Act XII of 1855, the Succession Act, and Probate and Administration Act, an executor or administrator can maintain an action for an injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to the executor or administrator. It has been held that if by any wrong the value of the personal estate of the deceased is diminished, the action survives: *Twycross v. Grant*(1), *Mellish v. Cary*(2), and *Potter v. Metropolitan District Railway Company*(3) referred to. In no other personal wrong can a separate action be maintained for damages done to property: *London v. London Road Car Company*(4) and *Pulling v. The Great Eastern Railway*(5), referred to in the judgment of the lower Court, are cases where even during the lifetime of the deceased no separate cause of action could have been maintained for medical expenses incurred. Actions for the infringement of copyright and trade-marks are analogous cases, and they have been held to survive to executors or administrators: *Oakey and Sons v. Dulton*(6) and

(1) (1878) 4 C. P. 40.

(4) (1888) 4 T. L. R. 448.

(2) (1793) 4 Leach's Mod. 408.

(5) (1882) L. R. 9 Q. B. D. 110.

(3) (1874) 30 L. T. (N. S.) 765.

(6) (1837) L. R. 35 Ch. D. 700, 702.

Hatchard v. Meade(1). Under s. 89 of the Probate and Administration Act, an action for malicious prosecution survives. This section is limited to physical injuries and does not cover an action for malicious prosecution. The common law rule "*Actio personalis moritur cum persona*" does not apply to such an action, Brooms Legal Maxims, 6th edn., p. 863.

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Mr. Caspersz and Mr. J. E. Bagram for the respondent. The cause of action here is in respect of proceedings which terminated in the Police Court. Act XII of 1855 provides for the institution of suits by or against executors and administrators in respect of personal injuries. There is the Bombay case of *Haridas Ramdas v. Ramdas Mathuradas*(2) on this point. The argument of the other side is that part of the cause of action has gone and part has survived. If the injury here is an injury to the deceased's property, that must be so stated in the plaint.

[MACLEAN C.J. I want you to consider section 89 of the Probate and Administration Act.]

That section contemplates a general right subject to exceptions, and these are generally costs to the person, injuries to the person, under which must be included malicious prosecution. [MACLEAN C.J. Why?] It is clear that that section contemplates defamation. Loss of earnings or medical expenses are not matters upon which the cause of action survives. In the lower Court no attempt was made by the other side to argue that there was damage to the premises. The judgment of the lower Court absolutely represents what was argued there. The sole question is whether the plaintiff is entitled to any damages in respect of legal costs. I submit he is not so entitled.

Mr. R. C. Sen in reply.

MACLEAN C.J. This is a suit for malicious prosecution. The original plaintiff is dead. He died intestate. The present appellants have been substituted in his place as his heirs. They have not taken out administration to his estate. The case came on for

(1) (1887) L. R. 18 Q. B. D. 771, 776.

(2) (1889) I. L. R. 13 Bom. 677.

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trial in the Court below and an objection was taken that the cause of action did not survive. The learned Judge in the Court below upheld that objection and has dismissed the suit with costs, and hence the present appeal.

We have been referred to various authorities in the Courts of England upon the question, in cases of this description, of whether or not the cause of action survives to the representatives of the deceased plaintiff; but it seems unnecessary to go into those cases because the law in India on the subject has been codified by section 89 of the Probate and Administration Act, and all we have to look to is the law as so codified. Now what does section 89 of the Probate and Administration Act say? It says:—"All demands whatsoever, and all rights to prosecute . . . any suit . . . existing in favour of . . . a person at the time of his decease." Pausing there for a moment, one notices how general the language is. Undoubtedly there was a right in the original plaintiff to prosecute the present suit. The section then goes on:—"Survive to . . . his executors or administrators." If we stop there, it could not be reasonably contended that in the present case the right to prosecute would not survive to the executors or administrators of the deceased plaintiff. But then there are certain exceptions: "(i) except causes of action for defamation." The present suit does not fall within that definition, "(ii) assault as defined in the Indian Penal Code;" the present suit is not of that nature, "(iii) or other personal injuries not causing the death of the party."

It is contended for the defendant Corporation that a malicious prosecution is a "personal injury not causing the death of the party" within the meaning of the section, and consequently that the present action is within that exception. I do not think that that is the meaning of the words "other personal injuries." The word "other," if to be read as referring to personal injuries *ejusdem generis*, is satisfied by being regarded as attributable to the "assault" previously mentioned, for an assault may well result in personal injury in the ordinary and natural acceptation of the term. It is hardly reasonable to say that "defamation" is a "personal injury not causing death." But reading the words according to their natural and ordinary meaning the words

“personal injuries not causing the death of the party” appear to me to refer to physical injuries to the person, which do not cause death, as for instance physical injuries to the person resulting from a Railway accident. This seems to me the class of action arrived at by this exception, and this view is fortified by the illustration to the section now under discussion. To place upon the words “other personal injuries,” the construction for which the learned Counsel for the respondents contends, viz., that it includes a case of malicious prosecution would, to my mind, be straining the language used by the legislature, and placing upon it an unnatural and forced construction. I, therefore, think that the case falls within the general words of the section and not within any of the exceptions.

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But the present action has not been revived at the instance of the administrators of the original plaintiff, and it may be said, therefore, that the case does not fall within the section. The present appellants, however, are willing to take out letters of administration, and I think we should be taking too narrow a view of the situation if we were to shut them out altogether from further continuing the action. If the Court below had taken the same view of section 89 as we have done, it could have ordered the trial to stand over to enable the appellants to take out administration, and then continue the suit, on terms of course. And this we can also do. Counsel for the appellants has expressed the willingness of his clients to take out administration to the estate of the original plaintiff. We, therefore, direct that upon the appellants obtaining such letters of administration and an order substituting them, as such administrators, as plaintiffs within one month from this date, and paying all the costs which have been thrown away in the Court below and which necessarily include the costs of the hearing in the Court below, within a fortnight after taxation, the decree now under appeal be discharged and the case be sent back to the Court below for trial on the merits. The costs of this appeal will be costs in the action. In default of the appellants complying with the above terms, the appeal will stand dismissed with costs.

SALE J. I agree. I would only say that it appears to me that the exception to section 89 ought to be strictly read, and that it

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would be putting too great a strain upon the language of the section if we were to hold that an action such as the present fell within the exception. I concur in the order made by the learned Chief Justice.

BODILLY J. I am of the same opinion.

Attorneys for the appellants : *B. N. Basu & Co.*

Attorneys for the respondents : *Sanderson & Co.*

R. G. M.