

(1910) 02 MAD CK 0015
In the Madras High Court

Josiam Tiruvengadachariar and Another	APPELLANT
Vs	
Sawmi Iyengar alias Venkatachariar and Others	RESPONDENT

Date of Decision : 10-02-1910

Acts Referred:

Citation : (1911) ILR (Mad) 76

Hon'ble Judges : Krishnaswami Ayyar, J;Benson, J

Bench : Division Bench

Judgement

1. This is a second appeal by the plaintiffs against the second defendant. The latter having died pending the second appeal, his widow has been brought upon the record. She raises the preliminary objection that the second appeal has abated on the ground that the right to sue did not survive after the death of the original second defendant. The suit was brought for an injunction against the second defendant restraining him from preventing the plaintiffs standing at a particular place in the Srirangam temple. It is conceded by the appellant's vakil that he has no right to prosecute the appeal as regards the injunction after the death of the second defendant but he contends that the Courts below have dismissed his suit with costs, that his estate has lost and the estate of the second defendant has gained to the extent of the costs awarded, and that he is therefore entitled to continue the second appeal against the second defendant's representative to get rid of the liability imposed upon him by the action of the Courts below. We think the preliminary objection is well founded.

2. The case has to be decided with reference to the provisions of the repealed code as the second defendant died in 1908. It is provided by

Section 361 that the death of a plaintiff or defendant shall not cause the suit to

abate if the right to sue survives. Section 582 authorizes in the case of appeals the substitution of "Appellant" for "Plaintiff," "Respondent" for "Defendant" and "Appeal" for "Suit". Making the necessary changes then we may read the section as follows:

The death of an appellant or respondent shall not cause the appeal to abate if the right to sue survives." Section 582 does not, in terms, authorise

the substitution of the verb Appeal for the verb "Sue" and therefore, strictly speaking, we have no warrant for reading the section as it ran, "The

death of the appellant or a respondent shall not cause the appeal, to abate if the right to appeal survive." It was, however, held by this Court in

Paramen Chetty v. Sundararaja Naick ILR (1903) Mad. 499, where in an action for malicious prosecution a decree for damages had been passed

by the Court below and the defendant had appealed against the decree: for damages and the plaintiff-respondent died pending the appeal, that the

defendant could continue his appeal as the right to appeal survived against the representative of the plaintiff. The ground of decision was that after

the judgment for damages the estate of the respondent was liable to be enriched by the amount of the decree for damages and that the appellant

was entitled to get rid of the liability imposed upon him although an action for malicious prosecution was a personal action that would not survive

the death of the parties suing or sued, In deciding as above, this Court followed the view of the majority of the Bombay High Court in Gopal v.

Ramchandra ILR (1902) Bom. 597. In Phillipp v. Homfray (1883) 24 Ch. D. 439., it was observed by Bowen, Lord Justice. "It is of the essence

of the rule, viz., action personalis moritur cum persona, that claims which are indeterminate in their character shall not be pursued against the estate

of a person after his death: If the claim is one for unliquidated damages and has not been perfected by judgment at the time of the death of the

defendant, the rule applies." This observation of the learned Lord Justice would; seem to lead to the inference that if in an action for libel, or

malicious prosecution, a decree for damages had been made, the defendant aggrieved by the decree and appealing against it would be entitled to

continue it notwithstanding the death of the plaintiff-respondent. To the same effect are the remarks of Edge, C.J., in Muhamad Husain v. Khushalo

ILR (1886) All. 131. But it does not appear to follow from, these decisions that a

plaintiff mulcted in costs in such an action dismissed and incompetent to prosecute his appeal for damages, would be entitled to maintain an appeal for the setting aside of the decree for costs which was consequent on the dismissal of the action. In *Pulling v. Great Eastern Railway Company* (1882) 9 Q.B.D 110 which was an action for damages for personal injuries sustained by the plaintiff's husband who was run over by an engine, it was held that there was no right of action to the representative of the deceased merely because there was damage to the estate of the deceased, arising from expenses for medical attendance. It was pointed out by Denman, J., that none of the authorities go so far as to say that where the causa of action is, in substance, an injury to the person the personal representative can maintain an action merely because the person as injured incurred in his life-time some expenditure of money in consequence of the personal injury. In *Krishna Behary Sen v. The Corporation of Calcutta* ILR (1901) Cal. 406. Mr. Justice Henderson held that an action for damages for malicious prosecution could not be continued after the death of the plaintiff because of the pecuniary loss sustained by reason of the expenses of defending the criminal prosecution. Applying the principle of these cases which we take to be that if the action fails what is, incidental to it must fail also, it appears to us that if the appeal abates because the appellant can no longer claim, the injunction prayed for against the deceased second defendant, the costs he was made liable to pay as a consequence of the dismissal of his suit could not form the subject-matter of a continuing appeal. It was said that an appeal might be preferred for costs alone. But this is not as of course, for no such appeal on a mere question of costs is ever entertained unless there is a legal principle involved. And if the appellant cannot prosecute his appeal for the injunction, he cannot be allowed to show that the decree refusing the injunction was wrong for the mere purpose of getting rid of the direction as to costs. We must therefore hold that the appeal abates.

3. The representative of the second defendant is entitled to her costs against the appellant.