

(1904) 07 CAL CK 0022
In the Calcutta High Court

Krishna Behari Sen

APPELLANT

Vs

The Corporation of Calcutta

RESPONDENT

Date of Decision : 14-07-1904

Acts Referred:

Probate and Administration Act, 1881 — Section 89

Citation : (1904) ILR (Cal) 993

Hon'ble Judges : Francis W. Maclean, C.J.; Sale, J.; Bodilly, J

Bench : Full Bench

Judgement

Francis W. 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 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.

2. 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,"

3. 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.

4. 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.

5. 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 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 with in the exception. I concur in the order made by the learned Chief Justice.

Bodilly, J.

6. I am of the same opinion.