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5, 1960

IN THE PRIVY COUNCIL No. 1 of 1959

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA

B E T W E E N:

RADHAKRISHEN M. KHEMANEY (Defendant) Appellant

- and -

LACHABAI MURLIDHAR (Plaintiff) Respondent

CASE FOR THE RESPONDENT

UNIVERSITY OF LONDON
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LEGAL STUDIES

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- and -

LACHABAI MURLIDHAR (Plaintiff) Respondent

CASE FOR THE RESPONDENT

Record

10 1. This is an appeal from an Order, dated the 23rd May, 1958, of the Court of Appeal for Eastern Africa (Briggs, V.P., Forbes and Corrie, JJ.A.), setting aside so far as it related to the assessment of general damages a decree, dated the 30th July, 1957, of the Supreme Court of Kenya (Mayers, J.), awarding the Respondent damages amounting to Shs. 132,500 for the negligence of the Appellant which had caused the death of the Respondent's husband. The Court of Appeal ordered a retrial
20 limited to the question of damages. pp.51-52 pp.27-28

2. Liability was admitted by the Appellant at the trial. The only issue before the Court of Appeal was that of damages, and that is also the only issue arising in this Appeal. p.16, Ll.20-24

3. The Respondent's Plaint was dated the 15th August, 1956. So far as relevant to the issues now arising, it stated that the Respondent brought the action on behalf of herself as the widow of Murlidhar Doulatram Mahbubani (hereinafter called
30 'the deceased'), and on behalf of his following dependants: three sons, aged respectively 9½, 6½ and 1½, a daughter, aged 8½, his mother and father, aged respectively 57 and 60, and his grandfather, aged 80. The Plaint also stated that the deceased had been the sole support of the Respondent and of pp.1-3

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	these dependants. He had been 38 years old at the time of his death, and had been employed as the Manager of the Mombasa Branch of Messrs. B. Choitram at an average yearly salary of Shs. 60,000. The
pp.4-5	Appellant, by his Defence, put the Respondent to proof of these allegations.
p.7, Ll.1-8, 27-28	4. Certain evidence was given relevant to the question of damages. The Respondent said that the deceased had supported his parents and his grandfather, who lived in India, by sending to them (10)
p.7, Ll.9-15	about Shs. 500 per month. He had been a healthy man. He had come to Kenya about 1945, and ever since had worked for Messrs. Choitram. He had first been in the Nairobi Branch, had been transferred to Dar Es Salaam in about 1947, in 1951 had returned to Nairobi as Manager, and in 1955 had
p.7, Ll.16-20	become Manager of the Mombasa Branch. His salary in 1955 had been Shs. 4,000 per month and in 1956 had been increased to Shs. 5,000 per month. His employers had also provided a furnished flat, worth (20)
p.7, Ll.21-40	about Shs. 300 per month. The deceased had given the Respondent Shs. 3,500 per month for household expenses, and of this about Shs. 400 or Shs. 500
p.9, Ll.12-14	had been spent on him. When his salary had been Shs. 4,000 per month he had given her about Shs. 2,500, and had still been sending Shs.500 per month
p.9, Ll.30-31 p.9, L.1	to India. He also had a share in the Profits of the firm. He had left no savings.
p.12, Ll.32-36	5. Mr. Doulatram Bharoomar, a partner in the firm of Choitram, said that the deceased had entered the (30) service of the firm at Nairobi in 1945. His salary had then been Shs. 4,500 per year, plus a share of
p.13, Ll.1-17	25% of the Nakuru business of the firm. In 1947 he had been transferred to Dar Es Salaam as Branch Manager, at a salary of Shs. 9,000 per year plus a share of 16% of the Dar Es Salaam business. He had been sent back to Nairobi as Manager in 1951, still at the salary of Shs. 9,000 per year. His share in the Nakuru business had come to an end on the 31st December, 1955 but he had retained his (40) share of the Dar Es Salaam business up to his death.
p.13, Ll.18-28	He had started working at Mombasa on the 1st April, 1955 at a salary of Shs. 4,000 per month, which had been increased on the 1st January, 1956 to Shs.
p.13, Ll.29-39	5,000 per month. His total drawings in 1954 had been Shs. 96,863, and at the end of that year his account in the firm's books had been overdrawn to the extent of Shs. 43,355. In 1955 he had drawn Shs. 75,119, and at the end of that year his account

had been overdrawn to the extent of Shs. 8,013. At the time of his death the account had been Shs. 74,000 overdrawn. His capital interest in the Dar Es Salaam business at the date of his death had been Shs. 75,000. He had had no other property in Dar Es Salaam. His estate had not been assessed for death duties, but Mr. Bharoomar thought that when his interest in the firm, his debt to the firm and his income tax liability had all been taken into account, his estate would not be in credit. The deceased had had very good prospects and been well respected in the firm. Under the partnership deed, the deceased's share of 16% in the Dar Es Salaam business devolved upon his heirs.

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p.14,Ll.6-8
p.14, Ll.14-20
p.14, Ll.23-25
p.15, Ll.7-12

6. The action was tried by Mayers, J. on the 29th, 30th and 31st May, 1957, and Judgment was delivered on the 30th July, 1957. The learned Judge said that in assessing damages under the Fatal Accidents Ordinance, it was necessary first to determine the annual sum devoted by the deceased to his dependants, then to capitalise this by multiplying it by a certain number of years. A deduction had then to be made for any benefit accrued to the dependants consequent upon the death of the deceased, and a further deduction consequent upon the accelerated payment to them of a lump sum. Allowance might also have to be made for the possibility of a widow's remarriage and of variations in the income of the deceased. In this case it had also, he said, to be borne in mind that the deceased had been living in excess of his income and, unless either his income had been increased or he had reduced his expenditure, he would inevitably in time have become insolvent. The learned Judge said that little attention need be paid to the deceased's earnings before 1956, since the starting point of the calculation was the provision made in fact by the deceased to his dependants just prior to his death. At that time the deceased had allowed the Respondent Shs. 3,500 per month for household expenses. To this sum had to be added the value of the deceased's free flat, but a deduction had to be made from that for the deceased's own occupation of the flat, for the food consumed by him and for the servants' wages. Mayers, J. accepted the Respondent's evidence that the deceased had sent about Shs. 500 to his parents and grandfather in India. He considered that the basic figure spent by the deceased exclusively on his dependants was of the order of £2,150 per annum. The proper multiplying

pp.18-27
pp.20-21
p.21, Ll.16-28
p.22, Ll.7-13
p.22, Ll.28-49
p.23, Ll.1-31

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p.23, L.32 - p.24, L.17	factor he found to be 15 years, so that the capitalised sum amounted to £32,350. The learned Judge said that as the deceased's account with his employers had been overdrawn to the amount of Shs. 74,000 and his income tax for 1955/56 had not been paid, the only asset likely to benefit his dependants was his interest in the Dar Es Salaam partnership. The average annual income of this was £1,200, which at 15 years purchase amounted to £18,000. This reduced the basic sum to £14,250.
p.24, Ll.17-35	For acceleration of payment the learned Judge deducted £1,000, leaving £13,250. He then proceeded to consider what effect should be given to the fact, as he found it, that the deceased had been
p.25, Ll.18-31	living greatly beyond his income. His drawings during 1954 and 1955 had, the learned Judge thought, been considerably in excess of his earnings and his share of profits, and the increase between 1954 and his death of his indebtedness to the firm indicated
p.25, L.48 - p.26, L.5	that his expenditure exceeded his income by about £1,500 per annum. On the other hand, during the first 6 months of 1956 his indebtedness to the firm had been reduced by about £250, which might indicate that he had begun to curb his expenditure.
p.26, Ll.5-29	The learned Judge thought the probability was that, even if the deceased had become bankrupt, he would subsequently in due course have regained a sub-
p.26, Ll.29-45	stantial position in the commercial world. He finally reduced the damages on account of the de-deceased's extravagance by 50% and awarded the Respondent £6,625, which he apportioned between the dependants in a manner set out in his Judgment.
pp.29-30	7. The Appellant appealed to the Court of Appeal for Eastern Africa. By his Notice of Appeal, dated the 12th October, 1957, he contended that the damages awarded had been excessive, and the learned Judge erred in not appreciating that the deceased's allowance to the Respondent would in all probability have had to be reduced to a figure not exceeding the annual value of the share in the Dar Es Salaam business, which share vested in the Respondent and her children. The Respondent cross
p.31	appealed, and by Her Notice, dated the 19th August, 1957, contended that the damages had been wholly inadequate and ought to be increased, and the learned Judge had been wrong in reducing the damages to £6,625.
	8. The Appeal was heard on the 23rd April, 1958

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	and Judgment was given on the 23rd May, 1958. Corrie, J.A. said it was clear from the evidence that the deceased's income had been rising rapidly, so that the learned Judge had been entitled to assess the amount allowed by him to his relatives at £2,150 per annum. The learned Judge had then gone on to deal with all the other factors in the case, and had finally reduced the sum of damages by 50% because he considered that the deceased had been	p.47, Ll.5-30
10	living beyond his income. Corrie, J.A. said that this had been a wrong procedure, and the learned Judge ought to have taken into account the effect of the deceased's extravagance immediately after calculating the annual allowance of £2,150. The	p.48, Ll.7-23
	Appellant had argued that this sum, if reduced by 50%, would have given an income of £1,075 per year, which was less than the £1,200 per year which the learned Judge had found to be the income of the share of the Dar Es Salaam business inherited by	p.48, Ll.24-34
20	the deceased's dependants. Corrie, J.A. held that the learned Judge had been right in thinking that the deceased would have been compelled to make a reduction in his scale of living, but in view of the finding that his income had been rising rapidly, he was not satisfied that, if the question of his extravagance had been considered at the proper point in the calculation, the learned Judge would have made so great a reduction as 50%. He therefore thought that that matter should go back for	p.48, L.40 - p.49, L.11
30	further consideration.	p.49, Ll.12-17
	No objection had been made to the deduction of £1,000 for acceleration. The learned Judge had deducted a sum equivalent to 15 years purchase of the income of £1,200 per annum derived by the deceased from the Dar Es Salaam partnership. This clearly had been incorrect. It	p.49, LL.18-24
	was very doubtful whether his dependants would continue to receive £1,200 per year from the partnership. The capital value of the deceased's share was approximately equal to his debt to the firm.	p.49, L.25 - p.50, L.14
40	Since the share was his only substantial asset, it was a reasonable conclusion that it would have to be realised in order to discharge the debt. If this were done, it was hard to see how any interest in the partnership could survive for the dependants. The partnership deed had not been produced, and the administration of the estate was not complete, but Mr. Bharoomar had said that he did not expect the deceased's estate to be in credit. The learned Judge had erred in treating the share of the part-	
50	nership separately from the rest of the estate, and had not been justified in assuming that the	

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p.50, Ll.14-20

dependants would continue to receive £1,200 per year. This matter also should go back to the Supreme Court for further consideration. Accordingly, the Judgment ought to be set aside and the case remitted for retrial. The evidence before the Judge about the value of the estate had been unsatisfactory, and it might be that its value would be an ascertained fact of which evidence could be given at the new trial.

p.51

9. Briggs, V.P. and Forbes, J.A. agreed with this judgment. 10

pp.51-52

10. The Order of the Court of Appeal directed that the judgment and decree of the Supreme Court so far as it related to the assessment of general damages be set aside and that issue retried, but the proportions of the general damages awarded to the various dependants should stand.

11. The Respondent respectfully submits that the Court of Appeal was right in holding the learned Judge's reduction of the damages by 50% on account 20 of the deceased's supposed extravagance to have been excessive. Mayers, J. remarked that the deceased's aggregate drawings in 1954 and 1955 amounted to £8,600; but he did not observe that the separate figures for 1954, 1955 and the first six months of 1956 were £4,853, £3,750 and £1,200 respectively. These figures shew that the deceased had already reduced his expenditure, and after 1954 it exceeded only by a very little, if, indeed, it exceeded at all, the salary of £3,000, plus a 16% 30 share of the Dar Es Salaam business, which he was receiving at the time of his death. There is therefore, in the Respondent's submission, no reason to suppose that the deceased would have been obliged to reduce his annual expenditure of £2,150 on his dependants. Moreover, Mayers, J. failed to take into account the fact that the deceased's income had been rising steadily for some years, and the likelihood that it would continue to rise. The Respondent also submits that it is reasonable to 40 suppose that, if the deceased had been obliged to reduce his expenditure, his payments for the benefit of his dependants would not have been the first to be reduced; and the learned Judge ought to have given some weight to this consideration in deciding whether the damages ought to be reduced by reason of the deceased's alleged extravagance.

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12. The Respondent respectfully submits that the Court of Appeal was right in rejecting the learned Judge's reduction of the damages by £18,000 on account of the deceased's share of the Dar Es Salaam business. The learned Judge assumed that this share would descend to the deceased's heirs. He did not observe that whether it would in fact do so depended upon the solvency of the deceased's estate. The evidence of the value of the estate
10 before Mayers, J., although incomplete, shewed that in all probability, while the deceased's assets would suffice to pay his debts, in order to pay the debts it would be necessary to sell the share of the business. There would thus be no share left to descend to the heirs.

13. The Respondent respectfully submits that the rest of the learned Judge's conclusions as to damages were right, but, in view of the matters mentioned above, the Court of Appeal exercised its discretion
20 rightly in ordering a retrial limited to the question of damage. She accordingly submits that the order of the Court of Appeal for Eastern Africa was right and ought to be affirmed, for the following (amongst other)

R E A S O N S

1. BECAUSE the learned Judge failed to take into consideration certain matters relevant to the question of the deceased's alleged extravagance:

30 2. BECAUSE the learned Judge was wrong in taking into account the assets of the deceased's estate but not its liabilities:

3. BECAUSE the damages awarded by the learned Judge were inadequate:

4. BECAUSE of other reasons set out in the judgment of Corrie, J.A.

FRANK SOSKICE.

J.G. LE QUESNE.