Privy Council Appeal No. 1 *of* 1959

Radhakrishen M. Khemaney – – – – – – – *Appellant*

v.

Lachabai Murlidhar – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1960

Present at the Hearing :

LORD TUCKER

LORD DENNING

MR. L. M. D. DE SILVA

[*Delivered by* MR. DE SILVA]

This action was brought in the Supreme Court of Kenya by the respondent who is the widow of one Murlidhar Doulatram Mahbubani on behalf of herself and other dependents of her deceased husband under the Fatal Accidents Ordinance 1946 of Kenya. She claimed damages on the ground that her husband's death was caused by the appellant's negligence. The appellant admitted the allegation. The Supreme Court awarded her £6,625 as general damages. It dismissed a claim for special damages. There was an appeal and a cross-appeal to the Court of Appeal for Eastern Africa. That Court (Corrie, Justice of Appeal with whom Briggs Vice-President and Forbes J.A. agreed) ordered a re-trial in the following terms :—

> "I would therefore order that the judgment and decree of the Supreme Court, so far as it relates to the assessment of the total sum of general damages, be set aside ; and that issue be re-tried. The dismissal of the claim for special damages should stand, and also the order for apportionment of general damages in the sense that, that whatever sum is awarded on the re-trial, should be divided in the same proportions and between the same persons as previously ordered."

For reasons which follow their Lordships are of opinion that this order should stand. It also made an order as to costs which will be dealt with later.

No question has arisen on this appeal with regard to the dismissal of the claim for special damages and the apportionment of the general damages.

The fatal accident occurred on the 1st July, 1956, when the deceased was being carried as a passenger in a car owned and driven by the appellant. The deceased was thirty-seven years old at the time and employed as the manager of the Mombasa branch of a firm trading under the name of B. Choitram.

The learned trial judge has traced in detail the progress made by the deceased since he first entered the employ of Choitram in 1945 at their Nairobi branch on a salary of Shs. 4,500 per year plus 25 per cent. of the profits of another branch of which he was a partner. It is sufficient here to say that he served at various branches and after a series of rises in salary at the time of his death in 1956 he was receiving Shs. 60,000 a year and the profits from a share of the partnership business of the firm at Dar-es-Salaam estimated by the learned judge to bring him an income of £1,200 a year.

The learned trial judge found upon the evidence that at the time of his death " the basic figure expended by the deceased exclusively upon his dependents was in the order of £2,150 per annum ". This finding was affirmed by the Court of Appeal. He then proceeded to assess the present value of the benefit of this allowance by adopting a multiplier of 15 and arrived at the figure of £32,250. As to assets he took the view that " the only asset from which his dependents are likely to benefit is his interest in the Dar-es-Salaam partnership " and proceeded to assess the value of that asset thus :—

> " In the year 1955 the Dar-es-Salaam partnership earned approximately £6,000. His income from that source in the year 1955 would therefore have been approximately £960. In the year 1956, however, the earnings of that partnership were approximately £9,000 and his income from that source would therefore in that year have been £1,440. Taking these figures, which are the only figures available to me it would therefore appear that his average annual income from the Dar-es-Salaam partnership was round about £1,200. The capital value of this income must in accordance with the principles already set out, be deducted from the capital sum which would otherwise form the basis of the computation of damages. It seems to me not unreasonable to take 15 years purchase as representative of the capital value of an annual income from this source, the more especially having regard to the wide fluctuation which is shown between the year 1955 and the year 1956. On this basis the basic capital of £32,250 must be reduced to £14,250."

The " principle " referred to in this passage was that in estimating the damage suffered by the respondent a deduction had to be made from the sum of £32,250 (mentioned above) " in respect of any benefit accruing to the dependents consequent upon the death of the deceased ". He then deducted a further £1,000 for " the benefit which the dependents will receive from having a lump sum rather than an annual income " and also for certain considerations relating to income tax which he discussed.

The learned trial Judge then proceeded " It remains only to determine the extent to which, if at all a further deduction must be made consequent upon the fact that the deceased was living at a rate greatly in excess of his income ", a fact which had emerged from the evidence. He said quite correctly " It seems to me that his extravagance can only be material if and in so far as it may be regarded as affecting the likelihood of his having been able, had he survived, to continue to provide for his dependents, or the scale upon which he would have so continued to provide." He then said :—

> " The Plaintiff's brother-in-law in cross-examination said that during the years 1954 and 1955 the deceased's aggregate drawings from the firm were £8,600, an amount very considerably in excess of his earnings, and his profits from the firm, although in the absence of evidence as to the profits made by the Nakuru Branch during those years, it is impossible for me accurately to compute the amount by which the deceased's drawings exceeded his income in those years. Between 1954 and the date of his death his indebtedness to the firm increased by some Shs. 31,000/- and therefore it would seem that his expenditure exceeded his income by somewhere about £1,500 per annum. Apart from the evidence that he 'lived like a lord and spent like a lord', there was no material before me at all to indicate what the deceased had done with these very considerable sums of money, as he had no car and according to his widow did not spend a lot upon drink or clubs, and according to his brother-in-law had neither a bank account nor investments of any description other than his interest in the firm."

With regard to the reference to the " Nakuru Branch " it should be explained that the deceased was entitled to a share of the profits to the end of 1955 of a branch of the business at Nakuru. There was no

evidence of the amount made as profits at that branch. Weighing such meagre material as had been placed before him he finally concluded :—

> " I therefore assess the appropriate deduction to be made from the capital sum, as already determined, consequent upon the probable effects of the deceased's extravagance upon his future ability to provide for his dependents at 50 per cent. I therefore award as damages in this suit the sum of £6,625."

The Court of Appeal set aside the judgment and ordered a new trial chiefly on two grounds. The first related to the question of extravagance. It will have been noticed that the learned trial judge made a deduction of 50 per cent. for extravagance from a sum arrived at after giving effect to all the other factors found by him to be relevant. With regard to this the Court of Appeal said :—

> " I am clear that in adopting this procedure the learned Judge misdirected himself ; and that the time when he should have taken into account the future effect of the deceased's extravagance was immediately after he had calculated the actual allowance to the dependents at £2,150."

Their Lordships agree. The Court of Appeal further observed :—

> " At the same time, in view of the evidence that the deceased's income had been rising rapidly, I am not satisfied that the learned Judge's assessment of the deduction appropriate to the deceased's extravagance was entirely justifiable, nor am I satisfied that if the learned Judge had dealt with the question of the deceased's extravagance at the point at which I have held he should have done, he would have made so great a reduction as 50 per cent. I am therefore of opinion that this matter should go back for further consideration."

Their Lordships are of opinion that these observations are of great weight and that the questions involved need careful consideration at the next trial.

On the question of extravagance the Court of Appeal said that it was " satisfied that on the evidence the learned Judge was entitled to hold that the deceased would have been compelled to make a reduction in his scale of living and that would affect his allowance to his dependents ". Their Lordships agree. It is however to be observed that as stated by the learned trial Judge (see above) there was no material before him to indicate what the deceased had done with the money overdrawn by him. Counsel for the respondent suggested in the argument before their Lordships that at the trial the question of extravagance arose only after she had given evidence and that she had not been asked whether she could throw any light on the question. She may at the second trial give evidence on this point and other evidence may be forthcoming which would help to arrive at a conclusion whether the expenditure was likely to recur or not. The accounts produced indicate that in the first six months of 1956 the deceased did not increase his indebtedness to the firm but actually reduced it by a small amount ; but this is only one out of many points which will have to be considered. There was evidence which appears to have impressed the Courts in Kenya that " he lived like a lord and spent like a lord ". This may have accounted in whole or in part for the " extravagance ". If so the question would arise, to be answered with such degree of certainty as the evidence would permit, whether this mode of living would have been persisted in.

A second ground which influenced the Court of Appeal to order a new trial was the manner in which an assessment of the assets possessed by the deceased at the date of his death had been made. It said :—

> " I am of opinion that the learned Judge erred in treating the share of the partnership separately from the remainder of the deceased's estate, and consider that he should have endeavoured to ascertain the value of the estate as a whole which would pass to the deceased's dependents after discharge of the deceased's liabilities. Certainly he was not justified in assuming that the dependents would

continue indefinitely to receive £1,200 a year from the Dar-es-Salaam partnership. This matter also in my opinion must go back to the Supreme Court for further consideration ".

It also said :—

" The evidence before the learned Judge was not satisfactory, partly because the partnership deed was not produced and partly because the administration of the deceased's estate was not complete."

Their Lordships agree. As stated by the learned trial Judge " the only figures available " to him for estimating the share of profits derivable from the partnership were the profits for 1955 and 1956. These themselves differed widely. Much more material should be available upon which a better estimate could be made.

The appellant, while arguing before their Lordships that the amount of damages awarded should be reduced, contended that in any event the order for a new trial should not be allowed to stand. It was submitted that the order for a new trial was very similar to an order for fresh evidence and that an order for a new trial frequently provided, and would provide in this case, a party with judicial advice on which he could remedy such defects as existed in his case as originally presented. There is much force in the submission and a Court of Appeal should bear it in mind when considering whether an order for a new trial should be made. Another general observation to be borne in mind is the remark made by Lord Loreburn L.C. dealing with a case in which a rehearing had been ordered. In *Brown* v. *Dean* ([1910] A.C. 373) he said " When a litigant has obtained a judgment in a Court of Justice whether it be a County Court or one of the High Courts he is by law entitled not to be deprived of that judgment without very solid grounds ". But their Lordships have no reason to think that these considerations were not present in the mind of the Court of Appeal. Rule 76 of the Eastern African Court of Appeal Rules 1954 is in the following terms :—

" 76. (1) Except as hereinafter provided the Court shall have power to order that a new trial be had of any cause or matter tried by a Superior Court in the exercise of its original jurisdiction."

Then follow two sub-rules which have no bearing on the present case.

There is here an unfettered discretion vested in the Court which of course must be judicially exercised. In this case both the appellant and the respondent appealed to the Court of Appeal. Neither side wanted the judgment as it stood to be affirmed. The Court of Appeal was convinced that the judgment should not stand but had not the material before it upon which it could itself come to sound conclusions. It was argued that the Court should have come to the best conclusions of fact possible upon the inadequate material, however unsound those conclusions might possibly be. Their Lordships do not agree. In each case it is for the Court, bearing in mind the general undesirability of a new trial, to decide what in the particular circumstances it should do. There is nothing in this case which convinces their Lordships that the discretion of the Court of Appeal has not been judicially exercised.

Upon a review of the case as a whole their Lordships are of opinion that the fresh trial which has been ordered should not be limited in any way. Parties should be free to lead whatever evidence they wish to place before the Court and to raise all points they desire to make. What has to be found is the present value of the future benefits which the dependents would have received during the lifetime of the deceased if he had not been killed less the value of the benefits the dependents have received as a result of the death which they would not otherwise have received. This case would appear to fall into the category of cases in which, in the words of Lord Watson in *Grand Trunk Railway Company of Canada* v. *Jennings* (13 App. Cas. 800 at p. 804) " the extent of the loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture ". But in order that conjecture may be reduced to a minimum all available relevant material should be placed before the Court of trial

including if possible the evidence of an "actuarial nature" referred to by the learned Trial judge.

It is unfortunate that a new trial has become necessary through the lack of sufficient material for a sound decision. Their Lordships are of opinion that the order as to costs of the first trial should be set aside and that the trial judge at the second trial should make an order not only as to the costs of the trial before him but also of the first trial after considering how the absence of relevant material came to arise.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed subject to a variation in the orders for costs. The order as to the costs of the hearing before the Court of Appeal will stand. The order for costs of the hearing before the Supreme Court of Kenya will be set aside and a fresh order will be made with regard to those costs by the next court of trial. The appellant must pay the costs of this appeal.

(W9028) Wt. 8079—37 100 2/60 D.L.

In the Privy Council

RADHAKRISHEN M. KHEMANEY

v.

LACHABAI MURLIDHAR

DELIVERED BY MR. DE SILVA

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