

611-6-9

5,1960

Appeal No.1 of 1959

IN THE PRIVY COUNCIL

O N A P P E A L

FROM HER MAJESTY'S COURT OF APPEAL FOR
EASTERN AFRICA

UNIVERSITY OF LONDON
W.C.1.

- 7 FEB 1961

INSTITUTE OF ADVANCED
LEGAL STUDIES

50307

B E T W E E N

RADHAKRISHNEN M. KHEMANEY
(Defendant) ...

Appellant

- and -

10 MRS. LACHABAI MURLIDHAR
(Plaintiff) ...

Respondent

CASE ON BEHALF OF THE APPELLANT.

1. This is an appeal from an Order dated the 23rd day of May 1958, of the Court of Appeal for Eastern Africa, (Briggs, V.P., Forbes and Corrie, J.J.A.'s) made upon an appeal by the Appellant and a cross-appeal by the Respondent from a judgment of the 30th day of July 1957 of the Supreme Court of Kenya (Mayers, J.) whereby it was ordered (inter alia) that the said judgment so far as it related to the assessment of the total sum of general damages be set aside and that that issue should be retried but that upon retrial the order for apportionment of general damages should stand.

pp.51-52

pp.27-28

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2. The Respondent's Plaint was issued in the Supreme Court of Kenya on the 15th day of August 1956. By it she alleged that she was the widow of one Murlidhar Doulatram Mahbubani deceased (hereinafter called "the deceased") and that on the

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1st day of July 1956 the said deceased met his death owing to the negligence of the Appellant in and about the Appellant's driving of a Ford Consul motor car in which the deceased was travelling as a passenger along the road from Mariakani to Voi known as the Mombasa Road in Kenya. The Respondent alleged that she and other dependants of the deceased had suffered special damage by his death in a total sum of Shs. 14,200/-. In the particulars of the names of persons upon whose behalf the Respondent had brought the action pleaded in pursuance to Ordinance the Respondent named 8 persons including herself of whom four were children of herself and the deceased, two were the parents of the deceased and one was a grandfather of the deceased. She alleged that the deceased was a healthy man immediately before his death, aged 38, employed at an average yearly emolument of Shs. 60,000/- and that he was the sole support of herself and the other seven dependants who by his death had lost such support. The Respondent therefore claimed the said sum of Shs. 14,200/- and general damages.

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pp.4-5

3. By his Defence (so far as material) the Appellant denied that he had been guilty of negligence and alleged that the deceased had been guilty of contributory negligence. He denied that the Respondent had suffered the alleged special damage and that the persons specified as dependants were related to the deceased. At the trial however liability ceased to be disputed and the only issue in contest was as to damages, general and special.

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pp.6-10

4. On the 28th day of May 1957 the evidence of the Respondent was taken on commission before A.E. Hunter Esq. She gave the following evidence:-

p.6, ll.21-31.

She was the widow aged about 35/36 of the deceased who at the time of his death was Manager of the firm of Messrs. B. Choitram at Mombasa. She had married her husband in India 17 years previously, since when he had been her only means of support. He was about 37 years old when he met his death. There were four children of her marriage between the ages of $9\frac{1}{2}$ and $1\frac{1}{2}$ years.

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p.6, ll.32-36.

p.7, ll. 1-8

In addition to supporting her and the said children the deceased has supported his parents, his father being aged 60 and unemployed and his mother being aged 57, and also his grandfather aged 80. The deceased had been a healthy man and had brought her

p.7, ll. 9-15.

to Kenya 12-13 years previously. In Kenya he had always worked in the firm of B. Choitram. He had started in the Nairobi branch of that firm; had been transferred in 1947 to Dar-es-Salaam; and transferred back as Manager to Nairobi in 1951. From 1955 until his death he had been Manager of the Mombasa branch.

10 His salary in 1955 was Shs. 4,000/- per month which was increased to Shs. 5,000/- per month in 1956. He was provided with a free flat by his employers worth Shs. 300/- per month. He gave the Respondent Shs. 3,500/- per month for household, living, clothing and schooling expenses out of which she could sometimes save Shs. 100/- per month. He sent Shs. 500/- per month to his parents and grandfather in India. p.7, ll.16-26.
p.7, ll. 27-28

20 He retained Shs. 1,000/- per month for his own expenses. He was generous to her. He did not spend much of his time drinking. Out of the sum of Shs. 3,500/- about Shs. 400/- or Shs. 500/- would be the deceased's share. She would have saved that amount if he had not been there. p.7, ll. 29-30
p.7, ll. 31-33
p.7, ll.34-40

Under cross-examination she said:-

In 1953 or 1954 the deceased's salary was Shs.750/- per month. They had a free flat then. He gave her Shs. 500/- per month. There was a big increase in their standard of living between 1954 and 1955 but apart from the birth of a baby there were no particular increased expenses. p.7, l. 42
p.8, l. 6
p.8, ll. 9-10
p.8, ll. 25-29

30 The deceased had no savings or estate when he died. He wore a diamond ring and clothes worth Shs. 1,000/-. In 1955 the deceased gave her Shs. 2,500/- per month when he was earning Shs. 4,000/- at a time when he sent Shs. 500/- per month to India. He kept Shs. 1,000/- per month for himself. She did not know how he paid his income tax or whether it amounted practically to Shs. 1,000/- per month. He did not have a car. In 1953 he was not saving nor did he save when his salary was Shs. 5,000/- per month. p.9, ll. 1-2
p.9, ll. 3-5
p.9, ll. 12-14
p.9, ll. 15-18
p.9, ll. 26-28

40 He also had a share in the profits of the firm in addition to Shs. 750/- per month. p.9, ll. 30-31

5. The action was tried by Mayers, J. on the 29th and 31st days of May 1957. The evidence of the Respondent was read. p.12

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The following evidence was given for the Respondent:-

- p.12, l.28. (a) Doulatram Bharoomar, a partner in the firm of B. Choitram and a brother of the Respondent.
- p.12, l.36
p.12, ll.31-35
p.13, ll. 1-4
p.13, ll. 5-7
p.13, l. 7.
p.13, ll.12.13.
p.13, ll. 18-19
p.13, ll. 15-17
p.13, ll. 25-28.

p.13, ll. 29-31.
p.13, ll. 32-34.
p.13, ll. 35-38.
p.13, ll. 38-40.
P.13, ll. 43-44.

P.13, l. 46.
p.14, ll. 6-8.
p.14, ll. 9-9.
p.14, ll. 10-13.
p.14, ll. 14-20.
- The deceased had worked in the firm since 1945. He first worked in Nairobi where he held a 25% interest in the Nakuru shop and received a salary of Shs. 4,500/- per annum. In 1947 he was transferred to Dar-es-Salaam as branch manager. He was a partner, his salary being Shs. 9,000/- per annum, his share in the business being 16%. In 1951 he was transferred to Nairobi as Manager at a salary of Shs.9,000/- per annum. He also received board, lodging and medicine free. His salary of Shs. 9,000/- per annum continued until March 1955. He had a 25% interest in the business at Nakuru until 31st December 1955. From 1st April 1955 until 1st January 1956 he had a salary of Shs. 4,000/- per month. At the date of his death he was still the owner of a 16% interest in the Dar-es-Salaam business. For the 6 months before his death he received a salary of Shs. 5,000/- a month.
- The total of actual drawings by the deceased in 1954 was Shs. 96,863/-Cts.63. At the end of December 1954 his account in the firm's books was in debit. He had overdrawn Shs. 43,355/-. In 1955 he drew Shs. 75,119/-. At the end of 1955 he was overdrawn in the firm's books to the extent of Shs. 8,013/- including the balance carried forward from previous years. When he died in 1956 he was Shs. 74,000/- overdrawn. Those debit balances arose after crediting him with his salary. Income tax returns for the years 1954 and 1955 were recorded in these figures and had been paid. His liability for income tax for 1955-1956 was still outstanding.
- He produced the balance sheets of the firm for 1954 and 1955 which excluded the business at Dar-es-Salaam. He stated that the deceased's capital interest in the latter business was Shs. 75,000/-. He had drawn interest on that amount for the year prior to his death. The deceased had a credit at Dar-es-Salaam for 1956 up to the 1st June of Shs.10,389/-cts.44. He had no other property in Dar-es-Salaam and the

deceased's estate was not expected to be in credit when income tax was taken into account. The p.14, ll. 21-22.
deceased behaved like a lord and spent like a lord. p.14, ll. 23-25.
He was healthy, had good prospects and was well respected.

10 In 1954 and 1955 the deceased drew sums from the firm amounting in aggregate to £8,600. The p.14, ll. 30-32.
witness did not know what the deceased had done with it. In 1954 the deceased lived with him but p.14, ll. 37-39.
he did not know how the deceased spent £4,500 in that year. He did not acquire any assets with it.

20 The witness referred to a partnership deed governing the Dar-es-Salaam partnership of the p.15, ll. 7-12
deceased which he said was with his (the witness's) advocate in Dar-es-Salaam. It was never produced. Its provisions he said were that on the death of a partner the heir of the deceased would continue in the partnership. When the deceased died his share devolved on the heir. The balance sheets showed p.15, ll. 21-24.
that the earnings of the Dar-es-Salaam branch for 1956 was £9,000 and for 1955 was £6,000. They were p.15, ll. 26-29.
not produced. According to Exhibit 2 at 31st March 1955 the Nairobi branch was indebted to the Dar-es-Salaam branch in the sum of Shs. 208,265/-cts.73. p.15, ll. 31-32.
The deceased owned no motor car. He owned a diamond ring worth Shs. 6,800/-. The value of his p.15, ll. 34-37.
clothes worn at his death was Shs. 800 - 1,000/-. p.15, l. 37 &
He had two lots of clothes. He had no bank account. 43.

30 (b) Morghanbhai Dayabhai Patel, the Manager of M.D. Patel & Co., provision merchants, gave p.16, l. 4.
evidence as to the price of certain foodstuffs in 1955.

The foregoing was the whole of the evidence in the case relevant to the issue of damages.

40 6. Mayers, J. delivered his judgment on the 30th day of July 1957. He outlined the facts and the contentions of the parties. He dealt with the claim for special damages. He observed that in accordance with sub-section 1 of Section 4 of the Fatal Accidents (Amendment) Ordinance 1956, No.49 of 1956 and following the judgment of Bowen, L.J. in Brunsdon v. Humphrey (1884) 14 Q.B.D. 141 at page 151 loss resulting from the accident as distinct from the death could not be recovered. He dismissed the claim for funeral expenses for lack of evidence to support it. In the result the claim pp. 18-27
p.18.
p.18. l.36.
p.19, ll. 35-40

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for special damages wholly failed.

p.19, ll. 41-44
& p.20 ll.1-32.

He then stated the principles applicable to the question of general damages under sub-section (1) of Section 4 of the said Ordinance. These were that the Court was required to determine the annual sum spent by the deceased upon the maintenance of and for the benefit of his dependants. This sum should be multiplied by the number of years during which such provision could reasonably be expected. From the capital sum so obtained a deduction should be made (exclusive of certain benefits set out in sub-section (2) of Section 4 of the said Ordinance) for any benefits accruing to the dependants upon the death of the deceased and further deductions made to offset their advantages in obtaining an accelerated payment of a capital sum.

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p.20, ll. 33-49
& p.21, ll. 1-15.
p.21, ll. 16-28.

Regard must be had to the possibility of the remarriage of the Respondent and to any possible future fluctuations in the deceased's income. Also regard must be had to the fact that for some time the deceased had been living considerably beyond his income so that unless his income had become substantially increased or he had effected considerable retrenchments upon his expenditure upon himself and his dependants the time would inevitably have come when he would have become hopelessly insolvent.

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p.21, ll. 29-49
& p.22, ll. 1-6

In 1945 the income of the deceased had been Shs. 4,500/- per annum rising by various increases until in 1956 it reached Shs. 60,000/- per annum at which time he was living rent free in a flat worth Shs. 300/- per month and when he had in addition an income from his interest in the Dar-es-Salaam partnership of approximately £1,200 per annum.

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p.22, ll. 7-49.

Little attention needed to be paid to the earnings of the deceased prior to 1956 because the evidence showed that he was respected by his employers and a further advancement would not have been unlikely. A calculation of the figures spent by the deceased on his dependants afforded the conclusion that the basic figures expended by him exclusively on his dependants was in the order of the sum of £2,150 per annum.

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p.23, ll. 1-28.

A proper period during which the dependants

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of the deceased might reasonably have expected support was that of 15 years. When capitalised a total figure of £32,250 was reached.

p.23, ll.28-31.

At his death the deceased's only assets were two trunks full of clothes, a capital account in his favour in the books of the Dar-es-Salaam branch in the sum of Shs. 75,000/- and Shs. 10,789/- in respect of profits up to 1st June 1956. His partnership interest devolved upon his heirs, and would produce an annual average income of £1,200. That sum capitalised for a term of 15 years equals £18,000 which when subtracted from the total sum of £32,250 leaves £14,250. From this sum he further deducted the sum of £1,000 on the grounds that the income tax payable on the lump sum when apportioned would be much lower than that payable on a single annual income, leaving £13,250.

p.23, l.32.

p.24, ll. 3-7.

p.24, ll. 7-18.

p.24, ll. 34-35.

From that sum a further deduction should be made by reason of the deceased having lived above his income. The question of his extravagances is only material in so far as it might have effected his ability to continue to provide for his dependants on the scale which he maintained before his death. If it be shown that his extravagances would inevitably lead to a substantial and permanent reduction in his ability to provide for his dependants it would be quite unrealistic to assess damages upon the basis that he could continue to provide for them on the former scale.

p.24, ll. 36-51
& p.25 ll. 1-17.

From the evidence it was impossible accurately to assess the amount by which the deceased exceeded his income each year. It would appear to be by about £1,500 per annum. There was no evidence to show how this money had been spent. Had the deceased continued to overspend at this rate he would inevitably have become bankrupt. The fact that he had reduced his indebtedness to the firm in the first months of 1956 by the sum of £250 was capable of bearing the inference that he had begun to curb his personal expenditure. Even a bankrupt in his position would be capable of rehabilitation. The appropriate reduction to be made from the capital sum already determined consequent upon the deceased's extravagances was at the rate of 50%. He therefore awarded on general damages the total sum of £6,625. He apportioned the damages as follows:-

p.25, ll.18-39.

p.25, ll. 27-31.

p.25, ll.48-49
& p.26, ll. 1-5.

p.26, ll. 29-34.

p.26, ll. 34-45.

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To the grandfather of the deceased	£125
To the father and mother of the deceased.	£250 each.
To the Respondent.	£3,500
To each of the children of the deceased.	£625

pp 29-30.

7. The Appellant appealed to the Court of Appeal for Eastern Africa. In his Memorandum of Appeal dated the 12th day of October 1957 he submitted that the learned Judge was wrong in that his award of damages was excessive; that in calculating the damages he adopted an incorrect principle of law; that he erred in holding that the deceased would have continued to make provision to his grandfather and parents for a further 15 years from the date of his death; that he erred in law in not appreciating that the allowances made by the deceased to his family were lavish and could only have been maintained by the deceased grossly overspending his income and that in all probability the allowances would soon have been reduced to an extent not in excess of £1,200 per annum, being the value of the interest from his partnership which would vest in the Respondent and her children. He erred in holding that little attention need be paid to the earnings of the deceased prior to 1956 and failed to appreciate that the allowance paid by the deceased to the Respondent and her said children had only been paid for a relatively short period.

p.31

8. By a Notice of Cross Appeal dated the 19th day of August 1957 the Respondent cross-appealed. She submitted that the learned Judge's estimate of the damages was wholly erroneous and ought to be increased; that he followed the wrong principle of law in reducing the damages to £6,625 and that the damages he awarded were wholly and grossly inadequate.

pp. 32-44
pp. 44-51

p.45, ll.16-47
& p.46, ll. 1-2
p.46, ll. 11-36

9. The Appeal was heard on the 23rd day of April 1958 and the judgment of the Court of Appeal was delivered on the 23rd day of May 1958. Corrie, J.A. referred to the grounds of appeal upon which both parties relied. He then quoted from a passage in the judgment of the learned Chief Justice of Eastern Africa in

Hayes and others v. Patel and others, Civil Case No. 173 of 1953, where the principles to be applied were stated. These were that the Court should find the age and expectation of working life of the deceased and consider the expectation of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. The annual value of the dependancy must be multiplied by a figure representing so many years purchase. The capital sum so reached should be discounted to allow for the possibility of remarriage and of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A reduction must also be made for the value of the estate of the deceased. He approved of the contents of that passage.

It had not been suggested that the Respondent might remarry. But the Court had to take into account that the deceased had been living an extravagant life and that he might be compelled in the future to reduce his allowances to his wife and family. The learned Judge had found that the basic figure expended by the deceased exclusively upon his dependants was in the order of £2,150. There was no substance in the Appellant's assertion that the learned Judge erred in not taking account of the deceased's income before 1956. The evidence showed that the deceased's income was rapidly rising and he was also receiving from his interest in the business approximately £1,200 per annum. The learned Judge was entitled on the evidence to assess the deceased's allowances to his relatives at £2,150. No objection was taken to a capitalisation of the sum for 15 years at a basic capital of £32,250.

On the question of the deceased being compelled to reduce his allowances to his dependants in order to live within his income it was not until after the learned Judge had dealt with all the other factors in the case that he assessed the appropriate reduction for extravagances at 50%. The learned Judge misdirected himself and should have taken the deceased's extravagances into account immediately after calculating the actual allowances to the dependants. The learned Judge was entitled to hold that the deceased would have been compelled to reduce his allowances to his dependants but

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p.49, ll. 12-17	his assessment of the appropriate reduction was not entirely justifiable and if it had been made at the proper stage it might not have been so high. No objection was taken to the reduction of the sum of £1,000 for accelerated payment of the lump sum.	
p.49, l.18.	There must be a deduction from the basic capital of the value of the deceased's estate.	
p.49, ll. 20-24.	Clearly a sum equivalent to 15 years purchase at the rate of £1,200 a year was incorrect.	10
p.49, ll. 25-28.	It was doubtful whether the dependants would continue to receive £1,200 a year from the partnership for any period at all. The capital value of the deceased's estate was the rough equivalent of his debt to the firm. It is not unreasonable to conclude that the deceased's interest in the firm would have to be realised in order to discharge the debt.	
p.49 ll. 34-36.	If this were done it was difficult to see how any interest in the partnership could survive to the dependants. The evidence was unsatisfactory because the partnership deed was not produced and partly because the administration of the deceased's estate was not complete.	20
p.49 ll. 36-38.	But the evidence was that the deceased's estate was not expected to be in credit. The learned Judge erred in treating the share of the partnership separately from the remainder of the deceased's estate. He should have tried to ascertain the value of the estate as a whole which would pass to dependants after discharge of the deceased's liabilities. There was no justification in the assumption that the dependants would continue indefinitely to receive £1,200 from the Dar-es-Salaam partnership. This matter should be remitted for further consideration.	
p.49, ll. 42-47		
p.49, ll. 47-48		
p.50, ll. 1-2		
p.50, ll. 2-5.		30
p.50, ll.6-9.		
p.50, ll. 9-10.		
p.50, ll. 11-20.	The judgment should be set aside and the case be remitted for retrial.	
p.50, ll. 21-27.	There was no substance in the objection that the learned Judge erred in holding that the deceased would have continued to make an allowance to his parents and grandfather for a further fifteen years from his death. There was no evidence of the amount of the individual allowances made by the deceased to those persons and under sub-section (1) of Section 4 of the said Ordinance the amount recovered is to be divided amongst the dependants in such shares as the Court shall	40
p.50, ll. 27-35.		50

find and direct.

The judgment and decree of the Supreme Court should be set aside in so far as it related to general damages and that issue retried. The dismissal of the claim for special damages should stand as should the apportionment of the general damages in like proportion to that previously ordered upon whatever sum might be awarded upon retrial.

p.50, ll. 36-39

p.50, ll. 40-45.

10 10. Briggs, V-P. and Forbes, J.A. agreed with the judgment of Corrie, J.A. p.51

11. The Appellant respectfully submits that the Court of Appeal for Eastern Africa was wrong in ordering a retrial. Its stated reasons for so doing were four-fold namely, (a) It was not satisfied that the learned Judge's assessment of the appropriate deduction for the deceased's extravagances were entirely justified, (b) The deduction for extravagances had been made at the wrong stage in the calculation, (c) The evidence as to the value of the deceased's estate was not satisfactory, and (d) It was open to great doubt whether the dependants would continue to receive the sum of £1,200 from the Dar-os-Salaam partnership.

p.49, ll. 1-11.

p.48, ll. 18-23.

p.49, ll. 38-47.

p.50, ll. 14-17.

p.50, ll. 6-9.

30 The Court of Appeal for Eastern Africa are bound by the East African Court of Appeal Rules 1945 and more specifically Rules 74 and 76 thereof and in any case not provided for in those Rules by the practice and procedure of the Court of Appeal in England (Rule 52). The grounds upon which a new trial was ordered find no support in the Rules or established practice. Neither party applied, either in their memorandum of appeal or notice of cross appeal or at the hearing of the appeal either for a new trial upon any single issue or matter or for the introduction of any fresh evidence before the Court of Appeal, nor did that Court seek further evidence to be given before it.

40 The Appellant respectfully submits that the learned Judges of the Court of Appeal erred in not interfering by way of correction with the learned trial Judge's findings as they could have done upon the evidence.

The Appellant respectfully submits that there was ample evidence concerning the effect

pp. 12-15.

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of the deceased's extravagances upon the dependancy. The evidence clearly disclosed the rate of the deceased's expenditure in excess of his income. If the Court of Appeal regarded the learned Judge's assessment at 50% as not entirely justifiable upon the evidence they should have substituted for that percentage such figures as they thought justifiable.

The Appellant supports the view of the Court of Appeal that the appropriate deduction 10 on the score of the extravagances of the deceased fell to be made against the assessment dependancy on the basic capital sum and not after the deduction was first made. If made at the proper stage it would then appear that the true amount of the dependancy was exceeded by the amount which the heirs would receive from the Dar-es-Salaam partnership.

p.13, 11.16-18 On the question of the 16% interest of 20
the deceased in the Dar-es-Salaam partnership
p.15, 11.21-24. the evidence was that he was the owner of that
interest at the date of his death, that the
average income for the previous two years from
that interest was £1,200 per annum which had
accrued to him when a sleeping partner, that
p.15, 11. 9-12. the terms of the partnership deed provided
that on the death of a partner his heir would
continue in the partnership and that when the
deceased died his share devolved upon his heir. 30
There was no suggestion that his heirs were
any but the Respondent and there was no
evidence whatsoever to support the suggestion
that this share would have to be liquidated to
satisfy his debt nor upon the evidence would
the interest of the deceased terminate with
his death. The Appellant respectfully submits
that the learned trial Judge was correct to
draw the inference from the evidence that the
income from this partnership would continue as 40
before and that as the deceased had held this
interest for approximately 9 years that an
income of £1,200 per annum would continue to
be derived from it for a period equivalent to
that during which the deceased's dependancy
would continue. Although a retrial might
furnish more evidence upon this point includ-
ing the production of the partnership deed
such evidence could and should have been
produced at the trial. By the time of the 50
retrial it would be open to the heirs to make

arrangements with a view to depreciating the apparent continuing value of the interest. The Appellant respectfully submits that upon these grounds the learned Judges of Appeal erred in not dealing with the case upon the evidence as it stood and in giving the Respondent an opportunity of recasting her evidence in order to derive the greatest benefit from the expressions of judicial opinion elicited in two
10 Courts.

On the question of the evidence as to the deceased's estate being unsatisfactory, the Appellant respectfully submits that the mere question of evidence being unsatisfactory does not justify an order for retrial. The Respondent could have called additional evidence on this point especially that of an accountant to deal with the value of the deceased's interest in the partnership, but she did not.
20 That evidence could have been called or tendered before the Court of Appeal, but it was not. The Appellant respectfully submits that the Court of Appeal erred in holding that a new trial was necessary merely for the Respondent to prove facts which might rebut inferences properly drawn from the evidence called by her at the trial. The Appellant emphasises that the burden of proving damages and the extent thereof lay upon the Respondent and should have
30 been discharged at the trial.

Finally the Appellant respectfully submits that the Court of Appeal should have reached a definitive conclusion on the evidence before them whether or not to disturb the decision of the learned trial Judge and, if so, to what extent. The effect of the order of the Court of Appeal is to permit the introduction of fresh evidence upon the retrial when in
40 accordance with established principles it would not have received such evidence itself.

12. The Appellant respectfully submits that the learned trial Judge was correct in deciding that the appropriate deduction in respect of the deceased's extravagances upon the value of his dependancy was 50%.

The evidence disclosed that during the six months (only) of the deceased's life he enjoyed an income at an annual rate of £4,200. It was contended for the Appellant in the

p.13, ll. 25-28.
p.13, ll. 15-17.
p.15, ll. 21-24.

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Court of Appeal that income tax would be payable on this income at the rate of approximately £1,000 per annum; and there was no contrary assertion. An analysis of the figures given in evidence shows that during 1954 and 1955 the deceased after making allowances to his dependants drew such sums from the business as would indicate that he spent the sum of £6,875 on himself at a time when he acquired no assets. He was thus spending upon himself a total of approximately £3,437 per annum drawn from Nairobi in addition to his share of profits derived from Dar-es-Salaam. His earnings for 1955 (apart from Dar-es-Salaam) were only £1,912. During that period the Respondent testified that he paid to her and to his relatives in India a total of £1425. The evidence showed that the deceased behaved like a lord and spent like a lord and at the date of his death he was overdrawn to the extent of Shs. 74,000/- after being credited with his salary and before payment of income tax. This overdraft was an increase of Shs. 65,987/- over his position at the end of 1955. The Appellant therefore submits that the figure of 50% adopted by the learned trial Judge was justified by and borne out by the evidence.

p.13, ll. 5-8.
p.13, ll. 18-19.
p.9, ll. 9-14.

p.14, ll. 21-22.

p.13, ll. 38-40.

13. The Appellant respectfully submits that the learned trial Judge erred in taking into account the deduction in respect of the deceased's extravagances only after he had deducted an amount in respect of the expected income from the Dar-es-Salaam partnership. The Appellant further respectfully submits that in this respect the Court of Appeal was correct. If the deceased was habitually and excessively overspending his income the effect of such extravagances would inevitably and directly have borne upon his ability to continue to provide support for his family upon the scale existing immediately before his death or anything approaching it.

pp. 55, 56.

14. Final leave to Appeal to her Majesty in Council was granted by the Court of Appeal for Eastern Africa on 15th December 1958.

15. The Appellant respectfully submits that this appeal ought to be allowed, the order of the Court of Appeal for Eastern Africa for a

new trial set aside and either an assessment and award of damages (if any) be pronounced at the determination of this appeal or alternatively the decree of the Supreme Court of Kenya restored or in the further alternative the said decree restored with certain emendations or additions or qualifications, for the following (amongst other).

R E A S O N S

10 1. BECAUSE the Court of Appeal for Eastern Africa should not have granted a new trial in the circumstances of the case but should have substituted their award for that of the learned trial Judge if they considered him to have erred.

20 2. BECAUSE the learned trial Judge was acting correctly upon the evidence in holding that the deceased's share in the partnership at Dar-es-Salaam was likely to provide an income of approximately £1,200 a year for his dependants.

3. BECAUSE the learned trial Judge was acting correctly upon the evidence in holding that the said income of £1,200 was reasonably likely to continue for a period of 15 years.

30 4. BECAUSE the learned trial Judge was acting correctly upon the evidence in holding that the extravagance of the deceased was such that it would have effected his power to provide for his dependants to the extent of 50 per cent.

40 5. BECAUSE the Court of Appeal for Eastern Africa were correct in holding upon the evidence that the appropriate time to assess the effect of the deceased's extravagances was immediately after the total assessment for the value of his dependency when capitalised had been reached.

6. BECAUSE in the circumstances it had not been shown that the Plaintiff and the

RECORD

other dependants of the deceased
had suffered damage.

J.T. MOLONY

E.H. LAUGHTON-SCOTT

Appeal No.1 of 1959.

IN THE PRIVY COUNCIL

O N A P P E A L
FROM HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA

B E T W E E N :-

RADHAKRISHN M. KHEMANEY
(Defendant) Appellant

- and -

MRS. LACHABAI MURLIDHAR
(Plaintiff) Respondent

C A S E
ON BEHALF OF THE APPELLANT

WALTONS & CO.,
101, Leadenhall Street,
London, E.C.3.