

(1880) 02 CAL CK 0010

Calcutta High Court

Case No: None

Gocool Chunder
Gossamee and Others

APPELLANT

Vs

The Administrator
General of Bengal

RESPONDENT

Date of Decision: Feb. 5, 1880

Citation: (1880) ILR (Cal) 726

Hon'ble Judges: Richard Garth, C.J; Pontifex, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

The only question in this case is, whether the plaintiffs have taken the proper course in bringing a fresh suit, instead of reviving the former one.

2. The former suit was brought on the 4th of June 1869 by Gobind Chund Gossamee, the father of the plaintiffs, and the trustee named in the will of Kassinauth Mullick, against Rungomoney Dossee, the executrix of the will, for the purpose of having the trusts of that will declared and carried into execution.

3. A decree was made in that suit, by which the will was established, and directions were given for the purpose of having a scheme settled, by which the trusts were to be carried out. Before this scheme was finally settled and approved, and whilst the proceedings were pending, the case was struck out of the board, upon the ground that the plaintiff was not prosecuting it with due diligence; and he and the defendant, executrix, have since died. The property is in the hands of the Administrator-General, and this suit has been filed by the present plaintiffs, claiming to be the trustees of the will in the place of their father, and virtually for the same purposes as the former suit.

4. Mr. Phillips contends that this is a supplemental suit to the other, but praying for certain necessary additional relief; and that the plaintiffs, upon whom has devolved

the interest of the original trustee, were bound to bring this now suit, because the language of Section 372 of the CPC did not admit of their reviving the old suit under that section.

5. That the plaintiffs (if they are in fact trustees of the will) are entitled, and bound to take some proceedings to have the trusts carried out, I have not the slightest doubt. The only question is, in what form these proceedings should be taken.

6. The difficulty Mr. Phillips points out in reviving the old proceedings u/s 372 is this:

7. The section says, that "in other cases of devolution of any interest pending the suit, the suit may, with the leave of the Court given either with the consent of all parties, or after service of notice in writing upon them and bearing their objections, if any, be continued by or against the person to whom such interest has come."

8. Mr. Phillips contends that this case does not come strictly within the terms of the section;--firstly, because the old suit is no longer pending; and secondly, because all the parties to it were dead, and the consent or notice mentioned in the section could not be given.

9. No doubt, the strict language of the enactment does create this difficulty; but I think that a case of this kind is within the spirit of the section, and that if, was never intended that persons in the position of the plaintiffs should be put to the expense of a fresh supplemental suit; convenience is certainly much in favour of that view.

10. The original suit, though no longer upon the board, is, I think, capable of revival, and if no persons are living whose consent may be obtained, or to whom notice may be given, I consider that the Court may give leave without any such consent or notice.

11. Then, considering that the difficulty has arisen from the language of section, and that it was clearly right and necessary for the plaintiffs to take some proceeding to enforce the trusts, I do not think we ought to dismiss the suit, but that the proper course will be to allow the plaintiffs to amend their plaint by putting it into the form of a petition u/s 372.

12. They should be allowed to make such amendments as may be necessary for that purpose, and the defendant should have liberty to put in any answer, which he might have done if the proceeding had been by petition in the first instance.

13. Then if the plaintiffs can show that they are entitled to revive the suit, both parties should get their costs of these proceedings, so far as they have gone, out of the estate; but, if they fail to do so, they (the plaintiffs) must pay the costs in both Courts.

Pontifex, J.

14. I wish to add a few words with regard to Section 372. I am of opinion that the words "pending the suit," in Section 372, relate to a suit in which no final order has been made. In the former suit respecting this will, there was a decree that a scheme should be settled. That decree was not proceeded with, and no scheme was settled, and no final order has been made in the suit. I am of opinion, therefore, that proceedings in that suit have not terminated, and for the purposes of Section 372 it must be still treated as a pending suit.