

(1879) 05 CAL CK 0016

Calcutta High Court

Case No: None

Bhoyrub Dass Johurry

APPELLANT

Vs

Doman Thakoor

RESPONDENT

Date of Decision: May 12, 1879

Acts Referred:

- Limitation Act, 1963 - Article 171, 178

Citation: (1880) ILR (Cal) 139

Hon'ble Judges: Wilson, J

Bench: Single Bench

Judgement

Wilson, J.

The first question, whether I have power to make either of the orders asked for, is important. Section 363 of the Code provides, that if there be more plaintiff's than one, and any of them dies, and the cause of action does not survive to the surviving plaintiff or plaintiffs alone, but survives to him or them and the legal representative of the deceased plaintiff jointly, the Court may, on the application of such legal representative, enter his name on the record in place of such deceased plaintiff, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs and such legal representative. Section 365 provides that, "in case of the death of a sole plaintiff, or sole surviving plaintiff, the Court may, where the cause of action survives, on the application of the legal representative of the deceased, enter his name in the place of such plaintiff on the record, and the suit shall thereupon proceed." Article 171 of the Limitation Act says, that the period of limitation for applications under these sections, shall be sixty days from the date of the plaintiff's death. The result is, that as to the first part of the present application, which is to revive u/s 365, the applicants are barred. Sections 366 of the Code provides that "if no such application (that is, no application u/s 365) be made to the Court, by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate and award to the defendant the costs

which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff; or the Court may, if it thinks proper, on the application of the defendant, and upon such terms as to costs or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both those purposes." When the order is made under the first part of this section, the suit abates. Section 371 says, that when a suit abates or is dismissed under this chapter, no fresh suit shall be brought on the same cause of action. But the person claiming to be the legal representative of the deceased bankrupt, or insolvent plaintiff may apply for an order to set aside the order of abatement or dismissal; and if it can be proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal, upon such terms as to costs, or otherwise as it thinks fit." No period of limitation is specifically provided for applications under the last two sections, and the period of limitation, therefore, must come under Article 178 of the Limitation Act, which gives three years from the time when the right to apply accrues. Under these two sections there is, I think, power to deal with such cases as the present, by declaring the suit abated u/s 366, and at the same time reviving it u/s 371. The question then is, whether the applicant was prevented by any sufficient cause from continuing the suit. I think that he was. Mr. Gracknall says sufficient cause was not shown, because the applicant might have applied for limited administration, but his omission to apply for such an administration, which might or might not have been granted, was not, I think, such neglect as should disentitle him to relief.