

(1868) 11 CAL CK 0011

Calcutta High Court

Case No: Regular Appeal No. 142 of 1868

Bibi Roushan Jan

APPELLANT

Vs

Nurunnissa

RESPONDENT

Date of Decision: Nov. 23, 1868

Judgement

Glover, J.

The first objection appears to us untenable. It is clear from the record, that the plaintiff did endeavour to be made a party to the original suit against Kurban Ali, u/s 73 of Act VIII of 1859, and failing in that, her only course was to do as she now has done, and to sue for her share of the money received under the decree. She might, no doubt, as insisted upon by the appellant, have brought the suit to have herself declared a sharer in the decree; but as the principal of the debt under the decree has been realised by the sale of the debtor's property, her present form of action raises all the necessary issues between the parties, and gives the defendant every opportunity of refusing her claim to partnership; and we think the objection raised to the form of action is merely technical. As to the cause of action not having accrued, because the decretal money had not been all paid, it appears that the entire sum due on Kurban Ali's bond, together with the penal-interest of Rs. 2-4 per cent. per mensem, up to date of decree, has been recovered; and that the only balance is for interest subsequent to decree and costs. So that the plaintiff's cause of action, quoad the bond, has fully and completely accrued; but even were it otherwise, we think that, under the circumstances of the case, the plaintiff would be entitled to maintain an action for a share of such sums as had been recovered under the decree, inasmuch as she had been prevented by the defendant from being included amongst the original parties to the suit. With regard to the second objection, we think that the plaintiff can only recover her share of the monies actually recovered, and cannot insist on the defendants paying her what they may never get from the judgment-debtor's estate; should anything be hereafter realised in shape of costs, the plaintiff will be entitled to share therein, but not until then.

2. We have, moreover, no doubt that, in this case, she can only recover to the extent she has declared herself interested; and that the share of her two daughters, who have not been made parties to the suit, cannot be added to her own and that of her two sons who have been made parties. The plaintiff, we observe, had every opportunity given her of making her daughters co-plaintiffs, but deliberately refused to do so on account of a possibility of having to pay their costs, and she must take the consequence of her own laches. Moreover, the Court has no knowledge as to the status of these ladies whether or no they are minors, married or unmarried. The Subordinate Judge's decree will, therefore, be amended. The plaintiff will recover a third share of the amount collected under Ala Baksh's decree, minus the share of her two daughters, which amount will be ascertained and determined in the execution of this decree. The amount so recovered from the plaintiff will be returned to the Collector, and added to the sum already in deposit on account of Ala Baksh's decree. The costs of this appeal will be assessed proportionately.