
(1919) 07 CAL CK 0026
In the Calcutta High Court

Soudamini Ghose

APPELLANT

Vs

Teniram Mahaldar and Others

RESPONDENT

Date of Decision : 07-07-1919

Acts Referred:

Probate and Administration Act, 1881 — Section 82, 92

Citation : 54 Ind. Cas. 755

Hon'ble Judges : Newbould, J

Bench : Single Bench

Judgement

Newbould, J.—This Rule arises out of a suit for rent which has been dismissed by both Courts on the ground that the plaintiff as one of two executors who obtained probate can not sue alone No Indian case bearing on this point has been cited by either party. The Court of first instance relief on the decision of the Allahabad Court in Lachman Das v. Chaturbhuj Das 28 A. 252 : 3 A.L.J. 49 : A.W.N. (1906) 16 and the lower Appellate Court relied on the case of Stays Prashad Pal Chowdhry v. Motilal Pal Chowdhry 27 C. 683. But neither of these cases is relevant to the point that arises in this case. Section 82 of the Probate, and Administration act provides: "After any grant of probate...no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit or otherwise act as representative of the deceased." Section 92 of the same act provides: "When there are several executors...the powers of all may, in the absence of any direction to the contrary in the Will...be exercised by any one of them who have proved the Will."

2. For the petitioner it is contended that Section 82 empowers one of two persons to whom the probate has been granted to bring a suit and Section 92 also empowers one such person to exercise the powers" of all u/s 82. For the opposite party it is contended that Section 82 means that where more persons than one have taken probate, no person other than those persons can bring a suit and that Section 92 is only applicable to the case where several executors have been appointed and only one of them has proved the Will. Reference has

been made to the English Law on the subject and we find in Williams on Executors, 10th Edition at page 725, that if there are several executors appointed by the Will they must all join in bringing actions at Law: if one of several executors will prove the Will and sue alone the defendant may apply to the Court to order that the other executor or executors should be joined as co-plaintiffs. But in a footnote it is pointed out that this rule is subject to showing that the party whose joinder is claimed is alive and within the jurisdiction. In the present case evidence has been given, and it is not disputed on behalf of the opposite party, that the co-executor is in the service of the Nepal Government that is to say, he is out of the jurisdiction of the Court in which the suit was brought.

3. Having regard to this fact and also that the provisions of Order XXXI, Rule 2, had been complied with, since the other executor has been made a party to the suit and joined as a defendant, I am of opinion that there is no flaw in the frame of the suit on the ground that the two executors did not both join as plaintiffs.

4. The result is that this Rule is made absolute and the decree of the lower Appellate Court is set aside and the case remanded to him for hearing on the other points that arise in the appeal before him and disposal according to law.

5. Cost of this Court will abide the result. Hearing fee is assessed at one gold mohur.