

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Mussummat Walihan and others v. Jogeshwar
Narayan and another, from the High Court
of Judicature at Fort William in Bengal,
delivered the 20th November 1907.*

Present at the Hearing :

LORD ROBERTSON.

LORD COLLINS.

SIR ARTHUR WILSON.

[*Delivered by Lord Robertson.*]

Their Lordships are of opinion that this action ought to have been dismissed with costs, and that therefore this Appeal should be allowed.

The suit was one of the simplest and most plainsailing character, alike in the ground of action and the decree sought. The plaintiffs (the present Respondents) claimed to have possession of their mother's property on the ground that she was dead. The Courts held that it was not proved that the lady had died (and indeed there was positive evidence that she was alive). The inevitable inference would seem to be that the suit should be dismissed. The Court which tried the case, however, had, very naturally, tried the whole case at once and had to deal with some questions as to the paternity of the plaintiffs, and also as to the validity of certain gifts by the mother. These, however, were merely argumentative steps towards the only decree sought, viz., possession; they were not presented by the plaintiffs as separate and substantive questions affecting rights other than that of possession of their (alleged) deceased mother's estate. As regards one of those questions, it is plain that the validity

of the gifts, the lady being alive, could only be determined with her as a party to the suit. Again, the Court might quite well have first tried the issue whether the mother was dead; and, reaching as it did, the conclusion that this essential fact was not proved, it is impossible to suggest that it could then have gone on to take up and try the other questions. Yet the present is really the same question. It appears to their Lordships that the circumstance that some of the *media concludendi* might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action. It is not surprising that no proposal was made in India to amend the record, and the record presents its original plain simplicity.

Their Lordships will therefore humbly advise His Majesty that the Appeal ought to be allowed, that the Decrees in both Courts below ought to be discharged and that instead thereof the Suit ought to be dismissed with costs in both Courts to be paid by the Respondents.

The Respondents will pay the costs of the Appeal.
