LETTERS PATENT APPEAL.

Before Jenkins, C.J., and Mookerjee, J.

KHETRAMANI DASEE

v.

DHIRENDRA NATH ROY.*

1913

June 28.

Residuary Legatee—Limitation—Accounts, how far residuary legatee can claim—Limitation Act (IX of 1908), Sch. I, Art. 123.

A residuary legatee is entitled to such an account as is necessary for the purpose of ascertaining what the residuary share is, to which he became entitled under the will.

A suit by a residuary legatee to recover his legacy is governed by Art. 123 of the Limitation Act, 1908, and is within time if it is instituted within 12 years from the time when the share became payable.

Bissell v. *Axtell*(1), *Khitish Chandra Acharya Chowdhury v. Osmond Beeby*(2) referred to.

LETTERS PATENT APPEAL by Khetramani Dasee, the plaintiff, from the judgment of Richardson, J.

The plaintiff brought a suit as heiress of the late Shibaram Roy, calling upon the defendant No. 1 to render an account of the money received and disbursed by his deceased father, Ashutosh Roy, in the course of his administration as executor of the said estate under the will of Shibaram. It was stated in the plaint that after obtaining probate, the defendant No. 1's father, the said Ashutosh, administered the estate from the time of the testator's death till his own death which took place on the 1st January, 1904; that he died without rendering any account; that the plaintiff believed that the said Ashutosh had subjected the estate to great loss and made some

*Letters Patent Appeal No. 87 of 1910, in Appeal from Appellate Decree, No. 111 of 1909.

(1) (1688) 2 Vern. 47.

(2) (1912) I.L.R. 39 Calc. 587.

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defalcations which he was liable to make good, and that if he had rendered an account before his death a large sum of money would have been found due from him; and that he having died without rendering such account, the present defendant, who is his son and owner of the assets left by him, is liable to render accounts and make good the loss.

The defendant contended, *inter alia*, that the suit as framed was not maintainable, that it was barred by limitation, that his father who was liable to render accounts to the District Judge had already rendered accounts to him.

The Court of first instance dismissed the plaintiff's suit on the ground that the defendant's father having done all that was imposed upon him by law under section 98 of the Probate and Administration Act and there being no act of *devastavit*, the executor was not liable to render any more accounts. The Court of appeal below dismissed the appeal on the same view of the law. On appeal to the High Court, Richardson, J. sitting singly, while holding that such a suit for account need not necessarily be on the footing of wilful default as the Courts below thought, dismissed the same on the ground that in the present case the plaintiff had failed to show that she was entitled to the relief she sought.

The plaintiff, thereupon, preferred this appeal under s. 15 of the Letters Patent.

Babu Provash Chandra Mitter (with him *Babu Surendra Madhab Mallik*), for the appellant. The law clearly gives me a right to ask for accounts from the executor or his legal representative : see *Khitish Chandra Acharya Chowdhury* v. *Osmond Beeby* (1) and the cases referred to therein. See also in this connection section 10 of the Limitation Act, the

(1) (1912) I. L. R. 39 Calc, 587.

language of which clearly implies the maintainability of such suits. *Kumeda Charan Bala* v. *Ashutosh Chatterjee* (1) is not really against me. Accounts submitted by the executor under the testamentary jurisdiction do not absolve him from the liability to render accounts to the residuary legatee: see section 98 of the Probate and Administration Act. In the present case, as the will shows, some express trusts were created. The executor was therefore an express trustee as well. In this view, the question of limitation does not arise. In any view, the period of limitation is 12 years under Article 123: see *Barada Proshad Banerjee* v. *Gajendra Nath Banerjee* (2) and *Phillips* v. *Homfray* (3).

Babu Bipin Chandra Mallik, for the respondents. The right to demand accounts did not survive as against the heir. The executor also was not bound to render any accounts to the residuary legatee, such accounts as he was bound by law to render to the District Judge having been already submitted by him.

JENKINS C.J. Much time, and I fear expense, has been wasted on this litigation, for I cannot help thinking that the true nature of the suit has been misunderstood. Though I would not hold the plaint up as a model of good drafting, still I think it is clear what its purpose is. The plaintiff is the widow of a deceased testator. Her case is that she obtained under her husband's will a share in his residue for the interest indicated in the will. The executor of that will, according to her, was one Ashutosh Roy who died on the 2nd of January 1904, leaving the present first defendant his sole heir. The

(1) (1912) 16 C. L. J. 282. (2) (1909) 13 C. W. N. 557, 576
(3) (1883) 24 Ch. D. 439.

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testator died on the 21st January, 1895, and probate of the will was taken out by Ashutosh Roy on the 14th of November, 1895. The plaintiff says that there were considerable assets, that the estate remained in the hand of the executor Ashutosh up to his death, and was not handed over to her or her co-residuary legatee even on his death. It is in these circumstances that she has instituted this suit. The lower Courts have unanimously rejected her claim. There seems to be an idea running through the judgments that a residuary legatee cannot obtain an account for the purpose of recovering her legacy unless there is some allegation of misappropriation or devastation or something of that sort. But it is clear that a residuary legatee is entitled to recover her legacy or her share in it, and in the generality of cases, that would involve an account for the purpose of ascertaining what that share was, and that is all that the plaintiff really seeks in this case. The learned vakil, who appeared for the plaintiff, conceded that on her plaint, as it is framed, the plaintiff cannot ask for an account on the footing of wilful default, but maintained that she is entitled to get such an account as is necessary for the purpose of ascertaining what the residuary share is, to which she became entitled under her husband's will. This for some reason that I do not appreciate, all the Courts have rejected. There has been some suggestion that the executor is discharged from all liability to account because he has filed certain accounts in the testamentary jurisdiction, but that is not a sufficient answer to a suit brought against an executor for the purpose of enforcing a right to the residue under a will. In support of this I need only refer to *Bissell* v. *Axtell* (1) to which attention was drawn in *Khitish Chandra Acharya Chowdhury* v. *Osmond Beeby* (2).

(1) (1688) 2 Vern. 47 ; 23 E. R. 641. (2) (1912) I. L. R. 39 Calc. 587.

It has been suggested before us that perhaps there might be the bar of limitation. But this suit is one which comes within Article 123 and so is within time, for it was instituted within twelve years from the time when the share became payable.

We accordingly reverse the judgment of Richardson J. and the decrees of the lower Courts and send back the case that it may be determined whether the plaintiff is entitled to the legacy, that is to say, the share of the residue which she alleges was bequeathed to her by the testator. If accounts are necessary for the purpose of ascertaining that residue, those accounts must be directed. It is true that the executor is dead, but his estate which would be liable at least to the extent to which it was enriched, is represented by the presence before the Court of his sole heir and representative. That does not mean that the heir, or representative is personally liable for his father's breach of obligation, if breach there was, but that he is liable to the extent of the assets received from the father's estate. It is an unfortunate feature in this case that the plaintiff is a *purdanashin* lady and the defendant is a minor who has as his guardian his mother, also presumably a *purdanashin* lady, and, in taking the account the Court will of course have regard to the fact that it is the father of the minor and not the minor himself who had direct knowledge of events, and will give such effect to that circumstance as may be required by the justice of the case. But at the same time the plaintiff is entitled, as far as possible, to have the residue ascertained and have her right to it established in this suit. The matter in dispute is not large. I have indicated what the position of the several parties is, and I venture to express the strong hope that when this case goes back to the Court of first instance, some arrangement

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may be made between the parties, which will do away with the necessity of further litigation.

There has been such misconception of the position that we think the proper order for costs will be that each party will bear his own costs up to this stage of the litigation.

MOOKERJEE J. I agree.

S. M. *Appeal allowed.*

APPELLATE CIVIL.

Before Richardson and Newbould JJ.

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July 1.

RADHA CHARAN DAS
v.
SHARFUDDIN HOSSEIN.*

Revenue Sale—Revenue Sale Law (Act XI of 1859) ss. 6, 33—Publication of notification of sale in the Vernacular Government Gazette, if necessary—Omission thereof is irregularity and not illegality—Bengal Land-Revenue Sales Act (Beng. VII of 1868.) s. 8.

Where the Subordinate Judge of Cuttack decided that it was absolutely necessary that the notification of a revenue sale should be published in the *Vernacular Gazette in Uriya*, and that its non-publication had made the sale null and void apart from any consideration as to inadequacy of price :—

Held, that the publication of a notification of sale in the *Calcutta Gazette* only was sufficient compliance with a provision of law (Act XI of 1859, s. 6) requiring the publication of such notification in the "Official Gazette."

Held, further, that even if it had been necessary to publish the notification in the *Uriya Gazette*, the omission to do so would not have rendered the sale null and void in the absence of any proof of substantial injury by

* Appeal from Original Decree, No. 118 of 1911, against the decree of Narendra Kishore Dutt, Subordinate Judge of Cuttack, dated March 30, 1911.