

mentioned in the will. In our judgment the Court below has rightly decreed the claim in respect of these two properties. This disposes of the appeal, which we dismiss with costs.

*Appeal dismissed.*

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WILAYAT  
ALI KHAN  
v.  
UMARDARAZ  
ALI KHAN.

*Before Mr. Justice Banerji and Mr. Justice Aikman.*

UMARDARAZ ALI KHAN AND OTHERS (PLAINTIFFS) v. WILAYAT ALI KHAN AND ANOTHER (DEFENDANTS).<sup>2</sup>

*Limitation—Act No. XV of 1877 (Indian Limitation Act) Schedule ii, Article 120—Suit to recover from the widow of a deceased Muhammadan money realized by her on account of a debt due to the deceased—Muhammadan law—Shias—Succession—Rights of widow.*

*Held* that a suit, brought by the other heirs to recover from the widow of a deceased Muhammadan a sum of money said to have been realized by her on account of a mortgage debt due to her deceased husband, was a suit to which the limitation applicable was that prescribed by Art. 120 of the second schedule to the Indian Limitation Act, 1877. *Mahomed Riasat Ali v. Hasin Banu* (1), *Sithamma v. Narayana* (2), and *Kundun Lal v. Bansidhar* (3), referred to.

*Held* also, following *Mussumat Toonanjan v. Mussumat Mehndee Begum* (4), that the childless widow of a Shia Muhammadan, though she takes nothing out of her deceased husband's land, inherits a share of the buildings left by him.

THIS appeal is connected with F. A. No. 252 of 1894, being an appeal by the plaintiffs from the same decree. The facts of the case are stated above at p. 166 in connection with that appeal.

Munshi *Ram Prasad* for the appellants.

Pandit *Moti Lal Nehru* and Pandit *Baldeo Ram Dave* for the respondents.

BANERJI and AIKMAN, J.J.—This is the plaintiffs' appeal in the suit out of which appeal No. 252, which we have just now decided, arose. The first plea taken in the memorandum of appeal is that the Court below has erred in holding the claim in respect of item No. 3 of list C attached to the plaint to be barred by limitation. This was an item of Rs. 530 realised from a mortgagor, by whom the amount was due to the deceased Mansab Ali. The

\* First appeal, No. 271 of 1894, from a decree of Maulvi Muhammad Abdul Ghafur, Officiating Subordinate Judge of Meerut, dated the 27th August 1894.

(1) I. L. R., 21 Calc., 157.

(3) I. L. R., 3 All., 170.

(2) I. L. R., 12 Mad., 487.

(4) N.-W. P., H. C. Rep., 1868, p. 13.

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lower Court has held that this part of the claim is governed by article 120 of schedule II of the Indian Limitation Act, 1877. It is contended that the article which is applicable to such a claim is article 123, which provides a limitation of twelve years for a suit for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate. It is contended that this is a claim for a distributive share of the property of the deceased. This contention is, in our judgment, untenable. We think that article 123 refers to a suit in which a plaintiff seeks to obtain his share from a person who, either as an executor or an administrator, represents the estate of a deceased person and is under a legal obligation to distribute shares to those entitled to them. This has been held in several cases, of which it is enough to refer to *Sithamma v. Narayana* (1). In a recent case decided by their Lordships of the Privy Council, *Mahomed Riasat Ali v. Hasin Bannu* (2), which was a suit of a nature similar to the present, their Lordships refused to apply article 123, and held the claim to be governed by article 120.

The second plea raised on behalf of the appellants is that the Court below has wrongly held land No. 75 to be *waqf* property under the will. Mansab Ali by his will included amongst the *waqf* property a plot of land which he describes as the land of *Mukallam*. The Court below has held that plot No. 75 is proved to be the land Mansab Ali referred to in his will. The plot No. 75 is in the cultivation of one Jai Kishen, who was called as a witness in this case. He swore that his grand-father was *Mukallam*, and that the plot was known after the name of his grand-father. The plaintiffs have entirely failed to show that there is any other plot of land which would answer the description in the will, if plot No. 75 is not that land. As to this plot of land the conclusion of the lower Court was, in our opinion, right.

The third plea in the memorandum of appeal relates to shops 4, 7 and 8 specified in list B attached to the plaint. Those three shops are admittedly situated in the old Bazar of the city of Meerut.

(1) I. L. R., 12 Mad, 487.

(2) I. L. R., 21 Calc., 157.

Now under the will shops situated in the new Bazar were declared to be *waqf* property. On the face of the will, therefore, the shops in question are not the shops referred to in it. It was certainly open to the defendants to prove that Mansab Ali owned no shop in the new Bazar, and, if they had given evidence to that effect, they might well have contended that the shops situated in the old Bazar were the shops which Mansab Ali declared to be *waqf*. In this case there is not a particle of evidence to show that Mansab Ali had no shops in the new Bazar. The learned counsel for the appellants states that he is instructed that Mansab Ali had shops in the new Bazar which would answer the description of the property mentioned in the will. Had the defendants been able to prove that Mansab Ali did not own any such shops, the conclusion of the Court below, that the word "new" as used in the will was a clerical mistake, might have been supported. But, in the absence of such evidence, we cannot hold that the shops in the old Bazar were the shops meant by the testator. This objection of the appellants must prevail, and the claim in respect of the shops 4, 7 and 8 must be decreed.

The last ground in the memorandum of appeal questions the correctness of the ruling of the lower Court, that the widow of Mansab Ali was entitled to a one-fourth share of the buildings left by her husband. Mansab Ali was a *Shia*. According to the best authority on the *Shia* law, a childless widow takes nothing out of her deceased husband's land, but she inherits a share of the buildings left by him. (Baillie's Digest of Moohummudan Law, Imameea Code, p. 295). This view was adopted by this Court in *Mussumat Toonanzan v. Mussumat Mehndee Begum* (1). We, therefore, overrule the fourth plea of the appellants.

Objections under section 561 of the Code of Civil Procedure have been taken by the respondents, of which the first only has been argued before us. That objection relates to item No. 2 in list C attached to the plaint. It was an item of Rs. 450 realized by the respondent on account of a mortgage debt due to Mansab Ali.

(1) N.-W. P., H. C. Rep., 1868 p. 13.

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The lower Court has held that the claim in respect of that item is governed by article 120. The contention before us is that, when the amount of the mortgage debt was realised by the widow of Mansab Ali, it became money received by her to the use of the plaintiff, and therefore the claim in respect of such money was governed by article 62 of the second schedule to Act No. XV of 1877. In support of his contention Mr. *Ghulam Mujtaba* cited the case of *Kundun Lal v. Bansidhar* (1). That case is entirely in favour of his contention, and we should have followed it had it not been for the ruling of the Privy Council in the case of *Mahomed Riasat Ali v. Hasin Baru* above referred to. In that case the plaintiff, as the widow of the deceased owner, claimed among other properties certain cash and deposit money received and appropriated by her husband's brother, but their Lordships held that for a suit of this description there was no article in the schedule which was clearly applicable, and therefore article 120 governed the case. We are unable to distinguish that case from the present, and, following the ruling in that case, we disallow the objection under section 561. We allow the appeal to the extent indicated above, that is to say, we decree the claim in respect of the shops No. 4, 7, and 8 in list B attached to the plaint. *Quoad ultra* the appeal is dismissed. The parties will pay and receive costs in proportion to their failure and success.

*Decree modified.*

*Before Mr. Justice Burbitt.*

RAM SARAN SINGH AND OTHERS (DEPENDANTS) v. BIRJU SINGH  
(PLAINTIFF).\*

*Zamindar—Rights of zamindar in respect of waste lands—Wajib-ul-arz—  
Provisions of wajib-ul-arz as to rights of pasturage.*

Held that a general provision contained in a *wajib-ul-arz* that village cattle might graze on the waste lands of the village could not be construed, in the absence of any definite covenant to that effect, as depriving the zamindar of his right to reclaim such waste lands.

\* Second Appeal, No. 538 of 1895, from a decree of Rai Sanwal Singh, Subordinate Judge of Azamgarh, dated the 7th March 1896, modifying a decree of Babu Chajju Mal, Munsif of Azamgarh, dated the 10th September 1894.

(1) I. L. R., 3 All., 170.

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