

APPELLATE CIVIL.

1911
December 16.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

LACHMI NARAIN (DEFENDANT) v. TURAB-UN-NISSA (PLAINTIFF).^{*}
Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 116, 120, 131, 132—Suit to recover arrears of annuity charged on immovable property—Claim for personal decree only—Limitation.

Held that article 132 of the first schedule to the Indian Limitation Act is applicable only to suits in which the plaintiff claims to recover money charged upon immovable property to raise it out of that property, and not to a claim in which merely personal decree is asked for. *Ramdin v. Kalka Prasad* (1) followed.

Held also that the words of article 131 'to establish a periodically recurring right' are altogether inapplicable to a suit to recover arrears of payments due under a registered contract. *Dost Muhammad Khan v. Sohan Singh* (2) followed. A suit of such a nature is governed by either article 116 or article 120 of the first schedule to the Indian Limitation Act.

THE facts out of which this appeal arose were as follows.

In February, 1866, one Maujud Ali Shah executed a document, whereby, after reciting that a large sum of money was due to his wife on account of dower, he undertook to pay her Rs. 12 per mensem during her life, and agreed she should receive that amount out of the income of certain immovable property. In 1870, he mortgaged that and other immovable property to Lachman Singh and Madho Singh for Rs. 22,700, by a deed which provided that the mortgagees should pay annually out of the profits of the property for the illumination of the *dargah* of which he was *sajjada-nashin*, and that, of this sum, Rs. 12 a month should be paid to his wife, Abadi Begam, and the remaining Rs. 13 a month were to be paid to him. In August, 1874, the mortgagees sub-mortgaged their rights to Asa Ram, the father of the defendant to the present suit. The original mortgagees and after them Asa Ram continued to pay the money to Abadi Begam and Maujud Ali Shah and their heirs until 1898 or 1899, when Asa Ram stopped payment. In the present suit, instituted in 1909, the plaintiff respondent claimed arrears of the sums of Rs. 12 and Rs. 13 per mensem, from 1899 to the date of suit, and

^{*} Second Appeal No. 1803 of 1910, from a decree of Mohammad Ishaq Khan, District Judge of Farrukhabad, dated the 12th of September, 1910, confirming a decree of Daya Nath, Subordinate Judge of Farrukhabad, dated the 16th of December, 1909.

(1) (1885) I. L. R., 7 All., 502. (2) Punj Rec., 1906, p. 803.

interest thereon at the rate of 6 per cent. per annum. The court of first instance decreed the claim, and this decree was affirmed in appeal by the District Judge. The defendant appealed to the High Court.

Mr. *W. K. Porter* (for Mr. *B. E. O'Connor*) and *Munshi Gulzari Lal*, for the appellant.

Dr. *Tej Bahadur Supru* (with him Dr. *Satish Chandra Banerji*) for the respondent.

KARAMAT HUSAIN and CHAMIER, JJ.—In February, 1866, one *Maujud Ali Shah* executed a document whereby, after reciting that a large sum of money was due to his wife on account of dower, he undertook to pay her Rs. 12 per mensem during her life, and agreed that she should receive that amount out of the income of certain immovable property. In 1870, he mortgaged that and other immovable property to *Lachman Singh* and *Madho Singh* for Rs. 22,700, by a deed which provided that the mortgagees should pay annually out of the profits of the property for the illumination of the *dargah* of which he was *sajjada-nashin*, and that, of this sum, Rs. 12 a month should be paid to his wife, *Abadi Begam*, and the remaining Rs. 13 a month were to be paid to him. In August, 1874, the mortgagees sub-mortgaged their rights to *Asa Ram*, the father of the defendant to the present suit. The original mortgagees and after them *Asa Ram* continued to pay the money to *Abadi Begam* and *Maujud Ali Shah* and their heirs until 1893 or 1899, when *Asa Ram* stopped payment. In the present suit, instituted in 1909, the plaintiff respondent claims arrears of the sums of Rs. 12 and Rs. 13 per mensem, from 1899 to the date of suit, and interest thereon, at the rate of 6 per cent. per annum. The courts below have decreed the claim. The questions for decision in this appeal are, whether the suit is within time, and whether the plaintiff has established her title to recover the amount claimed. On the question of limitation the courts below have held that the claim is governed by article 132 of the first schedule of the Limitation Act. But that article, as held by their Lordships of the Privy Council in *Ram Din v. Kalka Prasad* (1), is applicable only to suits in which the plaintiff claims to recover money charged upon immovable property to

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raise it out of that property. In the present case the plaintiff claims only a personal decree against the defendant. She does not seek to recover the money out of the property. In this Court it has been contended that if article 132 does not apply, then the proper article to apply is article 131, and two cases decided by the Madras High Court (1) have been referred to in which it has been held that the words "to establish" in article 131 are not confined to a declaration of title but include the recovery of arrears due to the plaintiff in respect of a periodically recurring right. The Punjab Chief Court, on the other hand, in *Dost Muhammad Khan v. Sohan Singh* (2), have held that the words "to establish" in article 131 do not extend and cannot be extended to cases in which the plaintiff seeks to recover specific sums of money due to him in respect of a recurring right. We prefer the view taken by the Punjab Chief Court. It seems to us that the language of article 131 "to establish a periodically recurring right" is altogether inapplicable to a suit to recover arrears of payment due under a registered contract such as we have in the present case. We are of opinion that the suit is governed either by article 116 or article 120, and that in either case no more than six years' arrears or a sum equivalent thereto can be recovered. There remains the question whether the plaintiff has established a right to recover any sum under the deed. The defendant pleaded that the plaintiff was not entitled to sue as she could not be appointed *mutawalli* of the shrine, and that only a lawfully appointed *mutawalli* could recover it, and that the money payable under the deed had nothing to do with the inheritance. It is quite clear that the income of the mortgaged property could not be constituted *waqf*, and there is no indication whatever that the *corpus* of the property has been constituted *waqf*. It seems to us that it is no answer to the plaintiff's claim to say that she is not a *sajjada-nashin* or *mutawalli* of the property. She is entitled to recover on the deed, if she can show that she is the heir of Maqsd Ali Shah who died in 1899. The plaintiff propounded a pedigree according to which she is clearly the next heir of Maqsd Ali Shah. The defendant pleaded that

(1) *Ramnal Zamindar v. Dorasami*, (1884) I. L. R., 7 Mad., 341, 343, and *Ratnamasari v. Akilandiymmal*, (1905) I. L. R., (2) Punj. Rec., 1906, p. 303, 26 Mad., 291, 314.

the pedigree was incomplete and he gave in his written statement a pedigree in which Fazal Ali Khan is shown to have a daughter, Dargahi Begam, in addition to the two sons and daughter shown in the plaintiff's pedigree. If Dargahi Begam was alive at the death of Maqsud Ali Shah, she was entitled to the property in preference to the plaintiff. It has been contended on behalf of the plaintiff that if the defendant had intended to plead that Dargahi Begam was entitled to succeed in preference to the plaintiff, this would have been put forward specifically in the court below. There is a good deal to be said for this argument. But at the same time the defendant distinctly pleaded that Fazal Ali Shah had a daughter, Dargahi Begam, and it was the business of the plaintiff to prove either that Dargahi Begam was not the daughter of Fazal Ali Shah, or that she died in the life-time of Maqsud Ali Shah, or to show that, although Dargahi Begam was entitled to succeed Maqsud Ali Shah in 1899, she, the plaintiff, was entitled to the property at the date of the suit. The point seems to have been overlooked, and we think that the proper course is to order further inquiry on the subject. We, therefore, remit to the lower appellate court for trial the question whether the plaintiff is entitled to the *malikana*. Both parties may adduce further evidence. On return of the findings ten days will be allowed for objections.

Issue remitted.

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