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is forthcoming, such as to justify the insolvency court in taking possession, either of the shop in the Kuli Bazar or of the property purporting to be dealt with by the deed of gift of 1908, as assets belonging to Nand Kishore at the time when he was declared insolvent, and therefore available for the satisfaction of his creditors, it may be that the question of subjecting Nand Kishore to punishment for his dealings in this connection may require further consideration. Unless and until something of the sort occurs, I am not of opinion that the facts which were before the courts below were such as to justify the application of section 43 of the Provincial Insolvency Act in this case. My order is that the order of the court below is set aside and that the security which I understand Nand Kishore has furnished for his attendance, if required, is hereby discharged. I make no order as to costs.

Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

ABDUL GHAFAR (DEPENDANT) v. NUR JAHAN BEGAM (PLAINTIFF) AND MUMTAZ-UD-DIN AND OTHERS (DEPENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 62—Limitation—Succession certificate obtained by one of the heirs of a deceased person—Suit by remaining heir for recovery of her share.

A certain Mohammedan in the year 1903 obtained a succession certificate to realise debts due to his deceased uncle and realised some of those debts. In the year 1913, the widow of his brother, who had died subsequent to the death of his uncle, brought the present suit for her husband's share of the money realised. *Held*, that article 62 of the first schedule to the Indian Limitation Act, 1908, governed the suit, and as no money had been realised by the holder of the succession certificate within three years of the suit it was barred by limitation. *Amina Bibi v. Najm-un-nissa Bibi* (1), *Parsotam Rao Tantia v. Radha Bai* (2), *Masik-uddin v. Imtiaz-un-nissa Bibi* (3), *Mahomed Wahib v. Mahomed Ameer* (4), followed. *Umardaras Ali Khan v. Wilayat Ali Khan* (5) distinguished.

* First Appeal No. 2 of 1915, from an order of Srish Chandra Basu, District Judge of Budaun, dated the 18th of November, 1914.

- (1) (1915) I. L. R., 37 All., 233. (3) (1915) I. L. R., 37 All., 40.
 (2) (1915) I. L. R., 37 All., 318. (4) (1905) I. L. R., 32 Calo., 527.
 (5) (1896) I. L. R. 19 All., 169.

THE facts of this case were as follows :—

One Najm-ud-din died in the year 1901, leaving among his heirs two nephews Abdul Ghaffar and Zahir-ud-din. Abdul Ghaffar obtained in March, 1903, a succession certificate entitling him to realise certain debts due to Najm-ud-din, deceased. Zahir-ud-din died in December, 1906, and his widow, Musammat Nur Jahan Begam, succeeded to his property. In July, 1913, she brought a suit against Abdul Ghaffar for rendition of account of all sums collected by him, on the authority of the succession certificate, on behalf of all the heirs and for recovery of her deceased husband's share of those sums. In the suit it was found that Abdul Ghaffar had not received any sum within three years of the suit, and applying article 62 of the Limitation Act, the Subordinate Judge dismissed the suit as barred by limitation. On appeal the District Judge holding that article 120 applied to the case remanded the suit. The defendant appealed to the High Court.

Mr. S. A. Haidar, for the appellant :—

The case is governed by article 62 of the Limitation Act. Any sum of money received by the appellant by virtue of the succession certificate was money received by him for the use of all the heirs entitled to a share in it; in other words, the suit is in the form of an action for money had and received and is governed by article 62 of the Limitation Act.

[PIGGOTT, J.—What do you say to the applicability of article 123 to this case?]

It was held in the case of *Umardaraz Ali Khan v. Wilayat Ali Khan* (1) that article 123 did not apply to a case like the present, where the defendant was not a person who either as an executor or an administrator represented the estate of a deceased person and was not under a legal obligation to distribute the shares to those entitled to them. Section 10 of the Limitation Act applied to express trusts and had no application to this case. Admittedly there was no express trust. The mere fact of a man's obtaining a succession certificate did not make him a trustee. The case of *Amina Bibi v. Najm-un-nissa Bibi* (2) was in all respects similar to the present case. Reference was made to *Kundan Lal v. Bansī Dhar* (3),

(1) (1896) I. L. R., 19 All., 169. (2) (1915) I. L. R., 37 All., 233.

(3) (1880) I. L. R., 3 All., 170.

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Mahomed Wahib v. Mahomed Ameer (1), *Masih-ud-din v. Imtiaz-un-nissa Bibi* (2).

The plaintiff had treated the defendant as an agent on her behalf. No relation of principal and agent existed between Zahir-ud-din, the husband of the plaintiff and the defendant. By obtaining the succession certificate the defendant did not become an agent on behalf of the other heirs. Even assuming for argument's sake that an implied agency was created that agency terminated, under section 201 of the Contract Act, on the death of Zahir-ud-din which took place more than three years prior to this suit and therefore it is barred by article 89 of the Limitation Act. There was no renewal of agency, much less a fresh agency, between the widow of Zahir-ud-din and the defendant.

Mr. S. M. Mir (with him the Hon'ble Dr. *Sundar Lal*), for the respondent.—

The present case was covered by the ruling in *Umardaraz Ali Khan v. Wilayat Ali Khan* (3) which lays down that article 120 of the Limitation Act, and not article 62 was applicable to a case like the present. That ruling was founded on the authority of the Privy Council ruling in the case of *Mahomed Riasat Ali v. Hasin Banu* (4). In that case the Privy Council laid down that there was no article of the Limitation Act, applicable to cases of this nature except article 120. It must be taken, therefore, that their Lordships of the Privy Council considered the question of the applicability of article 62 and held it to be inapplicable, although no express reference was made to it. The fact that the defendant, as one out of several heirs entitled to share in the assets of Najm-ud-din, obtained a succession certificate and realised monies belonging to all the heirs by virtue of it made him, to all intents and purposes, a trustee of those monies for the benefit of those heirs; and no period of limitation could bar a suit against him. He realised the monies while holding a fiduciary character. The defendant's position was at least that of an agent with regard to the other heirs, and among them, Zahir-ud-din. His position of agency continued after the death of Zahir-ud-din, with regard to the

(1) (1905) L. L. R., 32 Calc., 527.

(3) (1896) I. L. R., 19 All., 169.

(2) (1914) I. L. R., 37 All., 40.

(4) (1893) I. L. R., 21 Calc., 157.

latter's representative, namely, the plaintiff. *Gurudas Pyne v. Ram Narain Sahu* (1). The case in I. L. R., 3 All., 170, relied on by the appellant was not followed in the case in I. L. R., 19 All., 169.

Mr. S. A. *Haidar*, was heard in reply.

CHAMBER and PIGGOTT, JJ.:—This is an appeal against an order of remand passed by the District Judge of Budaun. The facts are that one Najm-ud-din died in July, 1901, leaving a widow Zeb-un-nissa, a brother Hamid-ud-din, and two nephews Abdur Ghaffar and Zahir-ud-din. In March, 1903, Abdur Ghaffar obtained a succession certificate in respect of the debts due to the deceased. Zahir-ud-din died in 1906, and his rights devolved directly or indirectly upon the plaintiff-respondent Nur Jahan Begam, who in July, 1913, brought the present suit against Abdur Ghaffar claiming an account of all sums received by him as holder of the succession certificate, and payment of what might be found due to her. The Subordinate Judge dismissed the suit, holding that it was governed by article 62 of the first Schedule to the Limitation Act, and was barred by that article, inasmuch as it was proved that no sum had been received by Abdur Ghaffar within three years of the suit. On appeal the District Judge held that the suit was governed not by article 62, but by article 120 and remanded the suit for trial on the merits.

The District Judge has relied upon the decision of this Court in *Umardaraz Ali Khan v. Wilayat Ali Khan* (2). The facts of that case do not differ in essential particulars from the facts of the present case, except that the defendant in the present case obtained a succession certificate, whereas the defendant in that case does not seem to have done so. The court was disposed to follow the decision in *Kundan Lal v. Bansidhar* (3), but considered itself bound by the decision of the Privy Council in *Mahomed Ryasat Ali v. Hasin Banu* (4), to hold that the suit was governed by article 120. It seems to us that the decision of the Privy Council in the case mentioned had no application to the facts of the case of *Umardaraz Ali Khan v. Wilayat Ali Khan* (2). The case before the Privy Council was

(1) (1884) I. L. R., 10 Cal., 860.

(3) (1886) I. L. R., 3 All., 170.

(2) (1896) I. L. R., 19 All., 169.

(4) (1893) I. L. R., 21 Cal., 157.

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one in which the widow of one Mosheraf Ali claimed the moveable and immoveable property of her husband from a brother of the deceased who had taken possession. Their Lordships held that the claim to cash and moveables was governed by article 120. Article 62, which of course had no application to the claim for moveables, does not seem to have been mentioned at all. The cash in question had not been received from any one, but had been seized by the defendant upon his brother's death. We do not think that the decision of the Privy Council obliges us to hold that such a case as this is governed by article 120. In the recent case of *Amina Bibi v. Najm-un-nissa Bibi* (1), it was held that a suit like the one before us was governed by article 62. In his judgement in that case TUDBALL, J., referring to the case of *Umardaraz Ali Khan v. Wilayat Ali Khan* (2), said that article 62 was not mentioned at all in the judgement in that case, but he must have overlooked the last paragraph of the judgement at page 172 of the report, where article 62 was mentioned and was held to be inapplicable on the strength of the decision of the Privy Council. The decision in the case of *Umardaraz Ali Khan v. Wilayat Ali Khan* (2) is a direct authority in favour of the respondent's contention, but for the reason already stated we think that the court was wrong in supposing that the point was covered by the decision of the Privy Council.

We prefer the latter decision in the case of *Amina Bibi v. Najm-un-nissa Bibi* (1), which is supported by the decisions in *Parsotam Rao Tantia v. Radha Bai* (3), *Masih-ud-din v. Imtiaz-un-nissa Bibi* (4), and *Mahomed Wahib v. Mahomed Ameer* (5). The circumstance that the defendant-appellant held a succession certificate does not appear to us to differentiate the case from cases in which one of several heirs receives payment of a debt due to the deceased though he does not hold a succession certificate. In our opinion the Subordinate Judge was right in holding that the suit was barred by limitation. We allow this appeal, set aside the order of the District Judge and dismiss the suit with costs throughout.

Appeal decreed.

(1) (1915) I. L. R., 37 All., 233.

(3) (1915) I. L. R., 37 All., 318.

(2) (1896) I. L. R., 19 All., 169.

(4) (1915) I. L. R., 37 All., 40.

(5) (1905) I. L. R., 32 Cal., 527.