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set aside the Munsif's decree and remanded the suit for disposal by him. Against this order the defendant appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellant.

Maulvi *Shafiuzzaman*, for the respondent.

CHAMIER and PIGGOTT JJ.—This is an appeal against an order of the Additional Subordinate Judge of Aligarh setting aside a decree passed by the Munsif of Bulandshahr and remanding the suit to the Munsif's court to be disposed of according to law. The Munsif had held that the suit was not cognizable by a Civil Court and had on that ground dismissed it. The plaintiff appealed to the District Judge, who transferred the appeal to the first Additional Subordinate Judge for disposal. The latter officer was of opinion that the suit had been rightly instituted in the Civil Court and remanded the case to the Munsif for trial on the merits. In appeal to this Court it is contended that the suit was not cognizable by the Civil Court and that the Subordinate Judge had no power to make the order of remand. It is conceded that if the order of remand had been made by the District Judge, the case would have been covered by section 197 of the Tenancy Act and no objection could have been taken to the order; but it is contended that the Subordinate Judge had no power to act under that section. The case is covered by the decision in the case of *Babu Nandan Prasad* v. *Changur* (1). On the authority of that ruling we must hold that the Additional Subordinate Judge had power to make the order of remand. The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Rafiq.

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February, 1.

AMINA BIBI AND OTHERS (DEFENDANTS) v. NAJM-UN-NISSA BIBI (PLAINTIFF) AND ROSHAN-UN-NISSA BIBI AND OTHERS (DEFENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 62—Limitation—Debt due to all the heirs of a deceased recovered by some of them—Suit by remaining heir for recovery of her share.

Some of the heirs of a deceased Muhammadan brought a suit upon a mortgage in his favour impleading as a defendant the remaining heir. The plaintiffs obtained a decree, and in execution thereof brought the mortgaged

* First Appeal No. 431 of 1912 from a decree of Hidayat Ali, Officiating Subordinate Judge of Gorakhpur, dated the 24th of August, 1912.

(1) (1894) I. L. R., 16 All., 363 F. B.

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property to sale on the 21st of May, 1906, and purchased it themselves for a sum slightly in excess of the amount of the decree and costs. The decree-holders auction purchasers paid in the excess and got possession. On the 1st of June, 1912, the remaining heir sued to recover her share in the mortgage money, or, in the alternative, a share in the property purchased.

Held that the plaintiff had no cause of action so far as the property was concerned, and that as to the money her suit was barred by article 62 of the first schedule to the Indian Limitation Act, 1908. *Mahomed Wahib* v. *Mahomed Ameer* (1) followed. *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (2) and *Mahomed Riasat Ali* v. *Hasin Banu* (3) referred to.

THE facts of this case were as follows :—

A mortgage was executed in favour of one Minnat-ullah in 1891. Minnat-ullah died leaving his widow, the plaintiff, and his father Khadim Husain as his heirs. Khadim Husain died leaving the defendants his heirs. The defendant Amina Bibi obtained a succession certificate in respect of the debt in question and together with the other defendants brought a suit on the mortgage of 1891 for sale of the property making the present plaintiff a defendant to that suit. A decree for sale was obtained, but before the property was sold the plaintiff applied to be made a decree-holder. The defendants opposed her application, but undertook to pay up her share (one-fourth) on recovery of the sale proceeds. The property was sold and purchased by the decree-holders on the 21st of May, 1906, and the sale was confirmed on the 15th of June, 1906. The sale price was set off against the decretal amount. The plaintiff brought this suit for recovery of one-fourth of the decretal amount together with interest on the 1st of June, 1912, and she prayed in the alternative for possession of a fourth share of the property purchased by the decree-holders. The court below decreed the suit for recovery of money. The defendants appealed.

The Hon'ble Dr. *Sundar Lal* (with him The Hon'ble Mr. *Abdul Rauf*), for the appellants :—

The court below has erred in holding that article 120 applied to this case. That article is applicable only when no other article is applicable. This is a suit for money had and received to the plaintiff's use and article 62 of the Limitation Act applies to this case. The article applies even to cases of constructive receipt. In this case, as the decree-holder purchased

(1) (1905) I. L. R., 32 Calc., 527. (2) (1896) I. L. R., 19 All., 169.
(3) (1893) I. L. R., 21 Calc., 157.

after obtaining the permission of the court and under section 294 of the Code of Civil Procedure, 1882, the amount of the purchase money was set off against the decree. The court entered satisfaction of the decree to that extent. This is in fact and substance a receipt of money by the decree-holder. The case of *Umardaraz Ali* v. *Wilayat Ali* (1) is not in point. In that case, even if article 120 applied, the suit was filed beyond time. It could be in time only if the 12 years' period given by article 123 was applicable. The appellant in that case sought to bring his case within that article and the court held that it was not governed by it. That is the only point ruled by that case.

On the application of article 62 the following cases were cited:—*Sobbanna Bhatta* v. *Kunhanna* (2), *Banoo Tewary* v. *Doona Tewary* (3), *Gaya Din* v. *Raj Bansi Kunwar* (4), *Thakur Prasad* v. *Partab* (5), *Sundar Lal* v. *Fakir Chand* (6), and *Mahomed Wahib* v. *Mahomed Ameer* (7).

Mr. *B. E. O'Conor* (with him Maulvi *Iqbal Ahmad*), for the respondent:—

The possession of the defendant who had obtained a certificate to collect debts was that of a trustee. Section 25 of the Succession Certificate Act (VII of 1889) indicates the position of the certificate-holder. This is the legal effect of that section. He is permitted to give a discharge and receive money on behalf of all the heirs of the deceased and thereby undertakes to hold the money for them as a trustee.

Maulvi *Iqbal Ahmad* followed :—

There was no receipt of money in this case and article 62 therefore does not apply.

The Hon'ble Dr. *Sundar Lal*, in reply, relied on the case of *Standish* v. *Rosse* (8), and pointed out that in that case too the money was set off against the price of the property. This was held to be a receipt of money in law. The action was held to be one for money had and received.

(1) (1896) I. L. R., 19 All., 169.
(2) (1907) I. L. R., 30 Mad., 298.
(3) (1896) I. L. R., 24 Calc., 309.
(4) (1880) I. L. R., 3 All., 191.
(5) (1884) I. L. R., 6 All., 442
(6) (1902) I. L. R., 25 All., 62.
(7) (1905) I. L. R., 32 Calc., 527.
(8) (1849) 3 Ex. R., 527.

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In any case the defendants were entitled to possession of the property; *Kesri* v. *Ganga Sahai* (1). The plaintiff is not entitled to recover any share of the property purchased. It was purchased not only for the mortgage money, but also for costs and a further sum of money paid in cash in which plaintiff had no share. In this case the decree-holders in reply to the plaintiff's application to be made co-decree-holder opposed the application, and said that they would pay the plaintiff only her share of the money. The plaintiff was not bound to take the property in lieu of the decretal money. She was entitled to say that it was a bad bargain and too much had been paid. The decree-holder purchasers could not force a sale on to the plaintiff. There was no mutuality. The case referred to was one in which a decree-holder was executing for himself and his co-decree-holder under section 231 of the Code of Civil Procedure. In such case the executing decree-holder is able to bind the other decree-holders. The plaintiff was entitled to money only as to which she has allowed the claim to be time-barred. She cannot fall back and claim the property.

TUDBALL and RAFIQ JJ.—This and the connected appeal, No. 436 of 1912, arise out of one suit, being cross-appeals from the same decree. The main facts are not in dispute and are as follows:—

Sheikh Minnat-ullah died, leaving as his heirs, his widow, the present plaintiff, and his father, Khadim Husain. Under Muhammadan Law, the widow inherited a one-fourth share in his estate and the other three fourths went to the father. The latter died subsequently, leaving the present six defendants as his heirs.

Under a mortgage-deed, dated the 14th of February, 1891, Nasratullah and Musammat Karamat Bibi borrowed Rs. 7,296 from Minnat-ullah. After the death of Khadim Husain, the first defendant, Musammat Amina Bibi, his widow, obtained a succession certificate in regard to this debt due from the mortgagor. Then she and the remaining defendants jointly sued to recover the mortgage-debt, impleading the present plaintiff as a *pro formâ* defendant admitting that she was entitled to a one-fourth share:

(1) (1911) I. L. R., 33 All., 536.

but alleging that she refused to join as plaintiff. On the 14th of May, 1903, they obtained a decree for the recovery of Rs. 17,168-8-0 plus future interest at 9 per cent. per annum from the date of suit up to the date of payment. In addition to this they were awarded their costs. They put the decree into execution. Thereupon the present plaintiff applied to the court to be added to the proceeding as a decree-holder. To this the decree-holders naturally objected, as she was not a decree-holder, and stated that they would pay her one-fourth of the amount recovered after deducting the costs of the suit and execution proceedings. Her application was disallowed on the 19th of February, 1904. The mortgaged property was put to sale and sold for Rs. 23,590. The decree-holders obtained sanction to bid at the auction.

According to the statements in the plaint and the written statement in this suit, the property was purchased by the defendants Nos. 1 to 3, but it is stated before us that the property was knocked down to all the defendants, and that then the other defendants withdrew, saying that the defendants Nos. 1 to 3 were the purchasers. This is of little consequence.

The amount of the debt due under the decree, inclusive of interest, up to the date of sale, was Rs. 22,205-13-0, so that the purchase was for a sum of Rs. 1,384-13-0, in excess of this. The costs of the suit and execution proceedings amounted to a little less than Rs. 1,384-13-0. The purchasers applied under order XXI, rule 72, that the purchase money and the amount due under the decree might be set off against each other and satisfaction of the decree entered up. This was allowed by the court, and they paid into court the small amount which was due on their bid, over and above the total amount of the decree.

The sale was confirmed on the 15th of July, 1906. The present suit was brought by the plaintiff on the 1st of June, 1912, against all the defendants. She sued in the alternative for two reliefs. Primarily she sought to recover Rs. 8,562-3-6, (being Rs. 5,551-7-4, her one-fourth share of Rs. 22,205-13-0) *plus* Rs. 3,010-12-2, interest from 21st of May, 1906, the date of the auction sale up to the date of suit. The date on which the cause of auction arose was given as the 15th of July, 1906, the date of the confirmation of the sale.

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Apparently in apprehension that the date on which the cause of action arose might be taken to be the date of the sale (21st of May, 1906), she alleged that the defendants 1 to 3 had been absent from India on a pilgrimage to Mecca from September, 1911, to March, 1912, (some six months) and that this period should be allowed to her for the purpose of calculating the period of limitation. In the alternative she pleaded that if the first relief could not be granted then she might be awarded possession of a one-fourth share in the property valued at Rs. 5,897-8-0 and be granted mesne profits.

The defendant among other pleas urged—

(1) That the suit for a one-fourth share of the money was barred by limitation.

(2) That the plaintiff was not entitled to recover a share in the property purchased.

(3) That the defendants Nos. 4 to 6 were in any case not liable as they had neither recovered the money nor purchased the property.

The court below held—

(1) That the money claim was not barred by limitation.

(2) That the defendants Nos. 4 to 6, not having received the plaintiff's share of the decretal money or purchased the property in lieu of the decretal money, were not liable to pay anything to the plaintiff.

It came to no decision in regard to the claim for a share in the property. It gave the plaintiff a simple money decree disallowing a part of the claim for interest. The defendants Nos. 1 to 3 have appealed and the point pressed is that the suit for money is barred by limitation as article 62 applies.

The plaintiff has also appealed as against all the defendants, and the sole point she takes is that she is entitled to all the interest she claimed. She does not on her appeal claim that she is entitled to a decree for possession of the one-fourth share in the property.

We take first the question of limitation. The plea taken is that article 62 of the Limitation Act applies, and not article 120 as applied by the court below, to the money claim. In our opinion article 62 clearly applies. The suit is clearly on the face of it, one for money had and received by the defendants for the plaintiff's

use. The court below based its decision that article 120 applied on the authority of the ruling in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1). The head note in the report is we think misleading. In that case one heir of a Muhammadan recovered a debt due to her deceased husband. The other heirs sued to recover their shares thereof from the widow. In respect to this claim the court of first instance, applying article 120, held that the suit was barred by limitation, it having been brought more than six years after the cause of action arose. The plaintiff appealed and urged that article 123 applied. This article governs 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 and allows a period of twelve years. A Bench of this Court repelled this. It held 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, and that the suit before them was not one of such a nature. They quoted the ruling in *Sithamma* v. *Narayana* (2). They then observed:—"In a recent case decided by their Lordships of the Privy Council, *Mahomed Riasat Ali* v. *Hasin Banu* (3), 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."

Nowhere in the judgement did the Judges who decided this case say that article 120 was the proper article to apply, though perhaps this might be inferred to be their opinion from the passage quoted above. Article 62 was not mentioned in the judgement nor apparently was the question now before us discussed at the hearing. For the purpose of that appeal it was unnecessary to discuss or decide whether article 62 or article 120 applied. In either case the suit was barred by limitation as having been brought more than six years after time. The only point decided was that article 123 did not apply.

In the case of *Riasat Ali* v. *Hasin Banu* (3) the plaintiff sued to recover the estate of her deceased husband from the latter's brother Riyasat Ali who had taken possession of it. She based her

(1) (1896) I. L. R., 19 All., 169. (2) (1889) I. L. R., 12 Mad., 487.

(3) (1893) I. L. R., 21 Calc., 157.

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title on a special custom. The estate consisted of both movable and immovable properties. Their Lordships of the Privy Council held, in regard to the cash and movables wrongfully seized by the defendant, that neither article 123 nor article 49 applied, but that article 120 applied. In regard to article 49 their Lordships remarked:—"This latter article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person." It is obvious that the present suit is not one to establish a right of inheritance.

The plaintiff's right to a one-fourth share in the money in suit has not at any time been disputed. On the contrary, it has always been openly admitted by the defendants, who, in the execution proceedings, when they objected to the plaintiff being brought on the record as a decree-holder, stated that they would pay to the plaintiff her one-fourth share in the amount recovered from the judgement-debtor after deduction of costs.

When the amount of the decretal debt was set off in part against the amount of the defendants' bid at the auction, this was done as a matter of convenience, and it was as if the defendants Nos. 1 to 3 had paid in the amount of their bid and had then with defendants 4 to 6 recovered the amount due under the decree, and we have no hesitation, on the facts of the suit before us, in holding that article 62 applies. The money was received by the defendants for the plaintiff's use. The decision in *Mahomed Wahib* v. *Mahomed Ameer* (1) supports us.

It is urged that section 10 of the Limitation Act applies, and that there is really no period of limitation for such a suit as the present. It is clear, however, that section 10 only applies to express trusts and not to circumstances such as those of the present suit.

It is also pleaded that if the money claim be held barred by time, then the court ought to give the alternative relief, i.e. possession of a one-fourth share in the property. In the first place we must point out that, though the plaintiff has appealed, she has not appealed on this point at all. In the next place we fail to see that she is equitably entitled to a one-fourth share in the property. She was not a co-decree-holder, nor did the defendants Nos. 1 to 3 put the decree into execution to recover only a sum of money in

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

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the whole of which the plaintiff had a one-fourth share. The money recoverable by the decree included the costs of the suit and execution proceedings. The property was purchased for a sum of money greater even than the full amount of the decree. Moreover, in equity the defendants were entitled to recoup to themselves the costs incurred in obtaining the succession certificate. Moreover, the amount due under the decree was set off only in part against the money due from the defendants, purchasers, under their bid at auction. The purchase was made on behalf of only three of the decree-holders and not on behalf of all.

We, therefore, hold that the plaintiff has no cause of action to recover a one-fourth share in the property.

The plaintiff was entitled to recover a one-fourth share in the decretal debt after deduction of all expenditure incurred legitimately by the defendants in recovering the debt. She waited for six years and nine days after the date of the sale before she sued, though her right had been admitted, and has only herself to blame for the result of her own delay.

The suit is barred by limitation. We allow the appeal and dismiss the suit with costs in both courts.

Appeal allowed.

Before Mr. Justice Tudball and Mr. Justice Rafiq.

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February, 2.

HAR PRASAD (DEFENDANT) *v.* SUKHDEVI KUNWAR (PLAINTIFF)*.

Will—Construction—Bequest in favour of two brothers—Legatees to take in equal shares—Tenancy in common or joint tenancy.

A Hindu who had been adopted made a will authorizing his wife to make an adoption, and in case she failed to do so, leaving his property to his two own brothers "in equal shares." *Held* that the brothers took as tenants in common and not as joint tenants. *Gopi* v. *Jaldhara* (1) followed. *Mankamna Kunwar* v. *Balkishan Das* (2) distinguished. *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (3) referred to.

THE facts of this case were as follows :—

One Anand Behari Lal had three sons, Har Prasad, Ganga Prasad and Gur Prasad. Gur Prasad was adopted by a cousin of

*First Appeal No. 242 of 1913 from a decree of Jotendra Mohan Bose, Additional Subordinate Judge of Mainpuri, dated the 17th of May, 1913.

(1) (1910) I. L. R., 33 All., 41. (2) (1905) I. L. R., 28 All., 38.

(3) (1886) I. L. R., 23 Calc., 670.