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shall be "so far as is possible" in the form prescribed, and that in filing a certificate he had made it clear in it that he had not received the amount in cash but had accepted a promissory note in lieu of the fee, and lastly that two District Judges of Budaun had interpreted the rule in his favour.

It has been held in this Court in *Bhagwant Singh* v. *Bhao Singh* (1), which view has now been accepted by the Full Bench, that the fee cannot be taxed unless it has been actually paid, and that the mere giving of a promissory note would not amount to an actual payment of the fee. There are other points also raised which were embodied in a written argument filed in this Court.

The question whether this is a fit case for appeal is no doubt a difficult one. We would not allow an appeal to be filed invariably in every case and no leave should be granted unless the advocate satisfies the Court that it is a fit case for appeal to His Majesty in Council. Having regard to the special circumstances of the case, we are of opinion that this is a case which should be certified as a fit one for appeal to His Majesty in Council under section 109(*c*) or at any rate under clause 30 of the Letters Patent. We, therefore, grant the necessary certificate.

Before Mr. Justice King and Mr. Justice Rachhpal Singh

SRINATHJI AND OTHERS (DEFENDANTS) *v.* PANNA KUNWAR (PLAINTIFF)*

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December, 5

Limitation Act (IX of 1908), article 123—Suit for a legacy—Maintenance bequeathed by will—Defendant not an executor or administrator but in possession of the estate—Limitation Act (IX of 1908), section 19—Acknowledgment—Interest—Interest Act (XXXII of 1839).

*First Appeal No. 309 of 1930, from a decree of Bhagwan Das Bhargava, Additional Subordinate Judge of Muttra, dated the 11th of March, 1930.

(1) (1932) I.L.R., 54 All., 490.

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Article 123 of the Limitation Act applies not only to suits against executors or administrators, but also to suits against persons in possession of the estate and bound to pay the legacies. A suit for the recovery of arrears of an annual maintenance allowance, bequeathed to the plaintiff by a will, from persons who are in possession of the estate and who are legally bound to pay the same is governed by article 123, and the plaintiff can recover arrears for the last twelve years.

A recital by the defendant that a maintenance had been fixed for the plaintiff under the will but that she had not accepted it and had laid claim to the whole estate, and that if she paid up the expenses of the consequent litigation the maintenance would be paid to her for the last three years as well as in future although by her conduct she had disentitled herself from claiming it, is not an acknowledgment within the meaning of section 19 of the Limitation Act of any liability in respect of maintenance for any period prior to the said three years.

As the plaintiff had challenged the will and had not accepted the maintenance, she was not entitled to any interest on the arrears prior to the date when, after losing her litigation in respect of the will, she agreed to accept the maintenance and requested payment thereof; from that date she was entitled to get interest, under the Interest Act, 1839.

Dr. *S. N. Sen* and Mr. *G. S. Pathak,* for the appellants.

Mr. *Harnandan Prasad,* for the respondents.

KING and RACHHPAL SINGH, JJ.:—This is a defendants' appeal arising out of a suit to recover a sum of money.

The facts which have given rise to this litigation between the parties may briefly be stated as follows. Mst. Panna Kunwar, the plaintiff respondent, is the daughter of one Pandit Baldeo Narain Singh who died on the 11th of January, 1912. He was the owner and in possession of considerable property. On the 5th of January, 1912, Baldeo Narain Singh executed a will in favour of one Keshab Deo, his nephew. Under the terms of the aforesaid will he directed Keshab Deo to pay a sum of Rs.500 yearly to Mst. Panna Kunwar and her son. On the death of Baldeo Narain Singh a dispute arose between the plaintiff on the one side and

Keshab Deo on the other as regards the estate left by the deceased. The plaintiff Mst. Panna Kunwar instituted a suit to recover possession over the entire estate left by the deceased, on the 11th of July, 1915, on the allegations that she was the sole heiress of her father and that the will set up by the defendant was a forgery. The suit was decreed by the first court, but that decree was reversed by the High Court, which decision was finally upheld by their Lordships of the Privy Council on the 16th of December, 1925. On the 10th of December, 1928, Mst. Panna Kunwar, plaintiff respondent, instituted a suit to recover the arrears of maintenance from the 5th of January, 1912, till the date of the suit, together with interest thereon. She claimed a sum of Rs.8,000 on account of principal and Rs.4,547-8-0 for interest, the total amount claimed being Rs.12,547-8-0. It appears that Keshab Deo had died before the date of the suit. He had on the 23rd of August, 1922, during the pendency of the appeal in the suit which the plaintiff had instituted for possession over the estate of her father, executed a will under which he left his entire estate which he had got under the will of Baldeo Narain Singh in favour Thakur Sri Nathji, an idol. The other defendants in the case before us are trustees of the temple in whose favour Keshab Deo had made a will.

The defendants resisted the claim and alleged *inter alia* that the suit was not within limitation, that it was barred by the rule of *res judicata* and was not maintainable and that the plaintiff was not entitled to recover interest; all these pleas have been decided against the defendants and it has been held by the Subordinate Judge that the claim is within limitation and that the plaintiff is entitled to recover the amount for which she sued. The present appeal has been preferred against the decree made by the Subordinate Judge.

The plea that the suit of the plaintiff was barred under section 11 of the Code of Civil Procedure was

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abandoned in this Court. Only two pleas have been urged in this appeal before us; one is that of limitation and the other relates to interest.

We proceed to consider the plea of limitation first. The Subordinate Judge has held that either article 132 or article 123 of the first schedule of the Indian Limitation Act is applicable. We are of opinion that article 132 is not applicable to the case before us. That article applies to a case where the plaintiff seeks to enforce payment of money by enforcing his charge upon an immovable property. In the case which we are hearing, the respondent did not ask for the enforcement of any charge but simply asked for a money decree against the defendants . . . As the plaintiff asked for a money decree only, it must be held that article 132 of the Indian Limitation Act would not apply to the case. This article would apply only where the claim is to realize the money by a sale of the property upon which it is charged.

The next question for our consideration is whether article 123 of the Indian Limitation Act is applicable. Article 123 enacts that in 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, the period of limitation is 12 years from the time when the legacy or share becomes payable or deliverable. The contention which has been raised by the learned counsel for the appellants is that the suit of the respondent is governed by article 120 and not by article 123. This question came up for consideration in a case before a Full Bench of the Madras High Court in *Parthasarathy Appa Rao* v. *Venkatadri Appa Rao* (1). There the court held that a suit of this description would be governed by article 123. SCHWABE, C. J., dealing with the question made the following observations on this point which are to be found at page 205: "But it is contended that this article only applies to actions against

(1) (1922) I.L.R., 46 Mad., 190.

executors and administrators and that neither the defendants nor their fathers were either. But, in my judgment, this article applies to any one in possession of the estate and bound to pay the legacies." COUTTS TROTTER, J., at page 210, dealing with this question remarked: "I agree, further, with my Lord in thinking that article 123 applies to such a case as the present even where the person sued is not an executor but a person who is, in fact, in possession of the estate in circumstances which render him accountable in equity to those having claims upon the estate." KUMARASWAMI SASTRI, J., at page 246 in the same ruling remarked as follows: "Whatever doubts there may be as regards cases of intestacy, I do not see any reason for holding that a suit for a legacy or for a share of a residue bequeathed by a testator can fall under article 123 only if it is against an executor and not if it is against one in possession of assets which are liable for payment of the legacies. The wording of article 123 is general. It refers to a suit for a legacy or for a share of a residue bequeathed by a testator, and if the legatee has a cause of action against the person in possession of the assets of the testator, I do not see why there should be a further qualification that the person in possession of the assets should be an executor or administrator. I think it will be reading into the article words which are not there, namely, that the suit should be for a legacy or for a share of a residue against an executor or administrator."

In the case before us, the suit of the respondent is one against persons who admit that the estate in their possession is liable for the legacy. The very fact that the defendants appellants concede their liability for the payment of the maintenance for six years prior to the date of the suit goes to show that they are persons who admit their liability for the maintenance claimed by the respondents. It may be remarked that the Full Bench case of the Madras High Court mentioned above

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went in appeal before their Lordships of the Privy Council, and the judgment in appeal is to be found in the case of *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao* (1) in which the decision of the Full Bench was affirmed. The learned counsel for the appellants has however contended that the case of *Ghulam Muhammad* v. *Ghulam Husain* (2), which is a Privy Council case, supports his contention. In that case, at page 109 their Lordships of the Privy Council made the following observations: "Before the Board it was for the first time suggested that the suit in reality falls under article 123, which applies to 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'. The period of limitation in such a case is 12 years from the date when the legacy or share became payable or deliverable." A perusal of that ruling will show that in fact it does not support the contention of the appellants. The argument raised before their Lordships of the Privy Council was based on the assumption that the owner of the property must be deemed to have died intestate and that what the appellants were claiming was a distributive share in the estate. It was on this assumption that the contention was put forward that to a case of that nature article 123 of the Indian Limitation Act would be applicable. Their Lordships of the Privy Council were of opinion that this contention was not well founded, because in a long series of rulings of various High Courts in India it had been settled that in a case between several co-heirs of an intestate the article applicable would be 144 and not 123. It will be seen that most of the cases referred to by their Lordships in that judgment were cases between co-heirs and the question which had to be considered in those cases was whether a period of limitation under article 123 should be applied or the cases should be governed by article 144. The courts were of opinion that if article 123 of

(1) (1925) I.L.R., 48 Mad., 312. (2) (1931) I.L.R., 54 All., 93.

the Indian Limitation Act was made applicable, then it would be in conflict with the rule of law under which the possession of one co-heir is to be deemed as possession of the other co-heirs. It was under those circumstances that their Lordships of the Privy Council held that in suits between co-heirs the article of limitation applicable would be 144 and not 123. The decision in *Ghulam Muhammad* v. *Ghulam Husain* (1) has no application to a case in which the plaintiff claims a legacy, and that is why we find that there is no mention of the Madras Full Bench ruling in it.

In the case of *Bai Jivi* v. *Bai Bibanboo* (2) it was held by a Bench of two learned Judges that "The word 'distribution' has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. Article 144 and not article 123 therefore applies to a suit to recover a share by a Muhammadan heir from a person in management of the property." In dealing with this point the following observations were made:

"On the first question as to whether article 123 applies, we think that article 123 is restricted to suits where a share is sought to be recovered as such from a person who legally represents the estate of the deceased either as executor, administrator or otherwise, and who is bound by law as such representative to pay or deliver the share. The appellants rely on the decision in the case of *Shirinbai* v. *Ratanbai* (3), and particularly on the remarks of MACLEOD, J., at pages 860 and 861, and the ruling of the Privy Council in *Maung Tun Tha* v. *Ma Thit* (4), and the decision of the Madras High Court in *Parthasarathy Appa Rao* v. *Venkatadri Appa Rao* (5). In the subsequent decisions of this Court in *Kallangowda* v. *Bibishaya* (6) and *Nurdin Najbudin* v. *Bu Umrao* (7) Sir NORMAN MACLEOD was of opinion that article 144 would apply where a suit is brought by a Muhammadan sharer to recover his share of the immovable property from the person in possession of such property. FAWCETT, J., in *Nurdin Najbudin* v. *Bu Umrao* expressed the view that the decision of the Privy Council in *Maung Tun Tha* v. *Ma Thit*, which related to the right of succession of the eldest son under the Burmese

(1) (1931) I.L.R., 54 All., 93.
(2) A.I.R., 1929 Bom., 141.
(3) (1918) I.L.R., 43 Bom., 845.
(4) (1916) I.L.R., 44 Cal., 379.
(5) (1922) I.L.R., 46 Mad., 190.
(6) (1920) I.L.R., 44 Bom., 943.
(7) (1920) I.L.R., 45 Bom., 519.

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Buddhist law to be asserted not within a certain limited period of time but within the period of limitation, did not really decide the point as to whether article 123, Limitation Act, applied to a case of a Muhammadan suing to recover his share from a person in possession or management of the property, and preferred to follow the earlier Privy Council decision in *Mahomed Riasat Ali* v. *Hasin Banu* (1) and held that the word "distribution" has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. The Madras case of *Parthasarathy Appa Rao* v. *Venkatadri Appa Rao* and *Venkatadri Appa Rao* v. *Parthasarathy Appa Rao* refers to a suit to recover a legacy, and to such a suit article 123 would clearly apply. The view of the Madras High Court in the earlier Full Bench decision in *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa* (2) was followed by this Court in *Makhtumawa* v. *Allama* (3), and is consistent with the decision of this Court in *Keshav Jagannath* v. *Narayan Sakharam* (4). The same view was taken by the Calcutta High Court in *Ahidannessa Bibi* v. *Isuf Ali Khan* (5). The decision in *Nurdin Najbudin* v. *Bu Umrao* was followed by this Court in *Malek Fatemiya* v. *Malek Sardarkhan* (6). We think, therefore, that we should follow the decision in *Nurdin Najbudin* v. *Bu Umrao* and hold that article 123 would not apply to a suit such as the present to recover a share by a Muhammadan heir from a person in management of the property. It would, therefore, follow that article 144 would apply."

It may be pointed out that in the case of *Ghulam Muhammad* v. *Ghulam Husain* (7) it was held by their Lordships of the Privy Council that article 123 applied not only to suits against executors or administrators, but also in suits against persons legally charged with the distribution of the estate. We are therefore of opinion that the case before us, which is one for the recovery of a legacy by the respondent from persons who are in possession of the estate and who are legally bound to pay the same, is governed by article 123 of the Limitation Act.

The plaintiff's suit for the recovery of maintenance for a period of 12 years would be within limitation.

(1) (1893) I.L.R., 21 Cal., 157.
(2) (1910) I.L.R., 34 Mad., 511.
(3) Unreported.
(4) (1889) I.L.R., 14 Bom., 236.
(5) (1923) I.L.R., 50 Cal., 610.
(6) Unreported.
(7) (1931) I.L.R., 54 All., 93.

The plaintiff, however, has sued to recover maintenance for a much longer period, that is, from the 5th of January, 1912. The contention of the plaintiff which has found favour with the Subordinate Judge is that there was an acknowledgment of liability by Keshab Deo in the will which he had executed in favour of the idol Thakur Srinathji which would bring her claim for maintenance for the prior period also within limitation. Reliance is placed in support of this contention on a statement made by Kehsab Deo in the will executed by him on the 23rd of August, 1912, and this statement runs as follows: "Under the will made by him, my younger maternal uncle wished that Rs.500 a year should be paid to his daughter Musammat Panna Kunwar during her lifetime, but she did not accept it, and, at the instigation of my adversaries, entered into litigation with me. If she wants to take it now, it shall, after deducting the expenses which I have defrayed in the case against her, be paid to her for three years preceding the date of payment and also in future annually till so long as she is alive, although on account of the improper litigation and also for the reason that she did not abide by the will and gave it out to be false, she is not entitled to it according to law and justice."

It was contended by the respondent that this statement amounted to an acknowledgment of liability in respect of the maintenance which was due before that date. We are of opinion that this contention cannot be accepted, and the statement referred to above would not in our opinion attract the consequences of section 19 of the Limitation Act. After reciting the fact that a maintenance has been fixed for the plaintiff, Keshab Deo goes on to say that if she wanted to take it now, it shall, after deducting the expenses which he had defrayed in the case against her, be paid to her for three years preceding the date of the suit, and also in future annually. He does not admit his liability for the payment of past maintenance. All that he says is that

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if she agrees to certain conditions, then the maintenance for three years before the date on which he made the will would be paid to her. He does not admit any legal liability on his part but says that as a matter of grace it might be paid to her. Under these circumstances we do not agree with the view taken by the court below on this point.

The next question for our consideration is whether the plaintiff respondent should have been awarded any interest at all on the amount claimed by her. We are clearly of opinion that no interest should have been awarded to the plaintiff till the 25th of August, 1927. After the execution of the will by her father, the plaintiff declined to accept its genuineness. On the other hand, she instituted a suit challenging the validity of the will. When she adopted that attitude, it could not be expected that the defendants would make any payment to her for her maintenance, nor was it likely under those circumstances that she would have accepted even if she had been offered the same. It appears that in 1927 a notice was sent by the defendants to the plaintiff asking her to pay the costs incurred by them in the litigation which was started by her. The plaintiff in reply to that notice sent a letter, dated the 25th of August, 1927, in which she said: "I would request you to ask your clients, the decree-holders, to deduct their proper dues from the aforesaid sum and remit the balance to me per money order." This statement may be taken to be a request for the payment of maintenance which was due to the plaintiff at that time; and, as no payment was made after this demand, it would be quite reasonable to allow the plaintiff interest under the provisions of Act XXXII of 1839, Indian Interest Act. Under these circumstances we are of opinion that the plaintiff should get simple interest at the rate of 6 per cent. per annum.

The result of our finding is that the plaintiff is entitled to a decree for a sum of Rs.6,000 for 12 years'

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maintenance. She will also get interest in the manner which will be indicated in our order.

For the reasons given above we allow this appeal and modify the decree of the court below and grant the plaintiff a decree for Rs.6,000. On the amount which was due to the plaintiff on the 26th of August, 1927, she will get interest at the rate of 6 per cent. per annum from that date. She will further get interest on the subsequent instalments at the above-mentioned rate, as they fall due. The parties will pay and receive their costs in both the courts, in accordance with their success and failure.

REVISIONAL CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

NARAIN GIR (DEFENDANT) *v.* RAM LAKHAN GIR (PLAINTIFF)*

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Arbitration—Agreement of reference nominating an arbitrator and, in case of his refusal, a second arbitrator—Court's power to appoint a third arbitrator on refusal by both—Civil Procedure Code, Schedule II, paragraph 5(2)*—Revision—Civil Procedure Code, section* 115*—"Case decided"—Suit between rival mahants for possession of a* math*—Arbitration whether competent in such cases—Public trust of a charitable nature —Jurisdiction—Public policy.*

Where the parties to a suit agreed that the case should be decided by arbitration and nominated an arbitrator and, in case of his refusal to act, a second arbitrator, but they did not mention what was to happen in case of refusal by the second arbitrator as well, and there was no express provision that the suit was thereupon to be decided by the court, it was *held* that the power conferred upon the court under paragraph 5(2) of schedule II of the Civil Procedure Code to appoint an arbitrator existed, and the appointment of a third arbitrator by the court was valid.

Where the suit related to the rival claims of two persons to the mahantship of a *math*, and it appeared that the *math* was not a public trust of a charitable nature, and that both the parties

*Civil Revision No. 542 of 1932.