

APPELLATE CIVIL.

Before Manohar Lal and Chatterji, JJ.

SRIMATI HEMANGINI DEVI

v.

ANIL KRISHNA BANERJEE.*

Annuity-payable under a Will—limitation—Limitation Act, 1908 (Act IX of 1908), section 10 and Schedule 1, Article 123—annuitant dying in interval between the times of payment—representative entitled to apportioned amount—terminus a quo.

A suit to recover the arrears of annuity under the provisions of a Will against an executrix is governed by Article 123 of the Limitation Act, 1908. Section 10 of the Act has no application.

Nistarini Dassi v. Nundo Lal Bose(1), *Benode Behari Bose v. Nistarini Dassi*(2), *S. K. Venkatasubramania Ayyar v. Sivagurunatha Chettiar*(3), *Saroda Pershad Chattopadhyaya v. Brojonath Bhattacharjee*(4), *Hurro Coomaree Dossee v. Tarini Charan Bysack*(5), *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh*(6) and *Chhatra Kumari Devi v. Prince Sri Mohan Bikram Shah*(7), discussed.

Where an annuitant dies in the interval between the times of payment, his representative would be entitled to recover an apportioned amount within twelve years of the date when the annuity was payable to the deceased annuitant.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of the Court.

Mahabir Prasad (with him *Chaudhuri Mathura Prasad* and *B. C. Sinha*), for the appellant.

*Appeal from Original Decree no. 47 of 1935, from a decision of Babu Nand Kishore Chaudhuri, Subordinate Judge at Patna, dated the 26th November, 1934.

(1) (1902) I. L. R. 30 Cal. 369.

(2) (1905) I. L. R. 33 Cal. 180, P. C.

(3) (1933) A. I. R. (Mad.) 60.

(4) (1886) I. L. R. 5 Cal. 910.

(5) (1882) I. L. R. 8 Cal. 766.

(6) (1921) L. R. 49 Ind. App. 37.

(7) (1931) 35 Cal. W. N. 953, P. C.

S. N. Bose and *S. S. Rakshit*, for the respondents.

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MANOHAR LALL AND CHATTERJI, JJ.—This is an appeal by the defendant against the judgment and decree of the learned Subordinate Judge of Patna, dated the 26th November, 1934, by which he decreed the plaintiff's suit which was instituted to recover certain arrears of annuity under the provisions of a Will executed by one Kedarnath Banerji on the 3rd of March, 1914, by which the plaintiff's father was given an annuity of Rs. 300 per annum descendible in the male line generation after generation.

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The case of the plaintiff is that on the death of the testator on the 25th of July, 1914, the probate of his Will was granted on the 6th February, 1915, to one Haridas Banerji who was another annuitant and executor named in the Will, that the father of the plaintiff received only one instalment of his annuity in or about the year 1916 but subsequently the annuity was altogether stopped. The appellant Hemangini Devi disputed the genuineness of this Will and applied for the revocation of the probate thereof but the matter was ultimately decided by the High Court in this manner that the lady was added as a co-executrix on the 16th of March, 1920. The plaintiff's father died on the 3rd of May, 1921, and the annuity having been in arrears for a considerable period the plaintiff has instituted this suit for realisation of the annuity from 24th of July, 1915, up to the 24th of July, 1933, the date of the action; there is also a claim for interest on the arrears at 6 per cent. the total claim being fixed at Rs. 5,004. The substantial defence to the action was that the Will did not create any charge for the payment of annuity to the plaintiff or to his father and that the defendant acquired a complete Hindu widow's estate on the death of the husband and any restriction or limitation over the enjoyment of that right was invalid in law. It was denied that any annuity was ever paid to the father of the plaintiff but on the other hand it was asserted that Annada Charan Banerji waived, disclaimed and

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relinquished all benefits arising out of the Will and the plaintiff himself acquiesced in the same. Limitation was also pleaded as a bar to the claim of the plaintiff. The learned Subordinate Judge has held that Annada Babu never gave up his right to the legacy under the Will of Kedarnath Banerji and the plaintiff's right is not barred by the principles of waiver, estoppel or acquiescence. He also held that Annada Babu received his legacy in 1916 and overruled the defence of limitation holding that the suit was governed by the provisions of Article 123 of the Limitation Act and in the result granted a decree to the plaintiffs for such of the sums which were recoverable within 12 years of the date of the action; that is to say, he gave a decree for 12 years' annuity making a total of Rs. 3,600 together with interest at 6 per cent. thereon and corresponding costs. He did not allow any future interest in this case and directed that the decretal amount should be realised from the income of the properties described in schedule II of the plaint. Hence the appeal by the defendant before us.

It is argued by Mr. Mahabir Prasad that upon a true construction of the Will it should be held that the appellant was declared by the Will to be the full owner of the property during her life-time and that the annuities which were mentioned in the Will were dependable upon the sweet will and the pleasure of the lady. He also argued that the right to realise any arrears of annuity was barred by reason of Article 123 of the Limitation Act and not merely the right to receive the arrears beyond 12 years from the date of the action. Upon a careful consideration of the terms of the Will it is clear that the annuity is payable under the express terms of the Will. Paragraph 6 makes the position quite explicit in these words

"That it is incumbent and obligatory upon my wife, Srimati Hemangini Devi.....to carry out the stipulations contained in this Will. Nobody shall have the right to resile from and evade the performance of the stipulations of this Will."

We also do not agree with the argument of the appellant that the claim is barred by limitation. The express words of Article 123 of the Limitation Act apply to this case and the plaintiff has a right to the payment of those arrears of annuity which were not paid within 12 years of the date of action. Mr. S. N. Bose for the respondent on the other hand argued that by the provisions of section 10 of the Limitation Act no claim for any arrears can ever be barred against the executor because the executor must be held to be an express trustee for the purpose of carrying out the provisions of the Will and that it was not open to the appellant who admittedly was an executrix in possession of the estate to urge that any claim for any arrears was barred. He relied upon the cases of *Nistarini Dassi v. Nundo Lal Bose*(¹), *Benode Behari Bose v. Nistarini Dassi*(²) and *S. K. Venkatasubramania Ayyar v. S. Sivagurunatha Chettiar*(³). Reliance is placed upon the decision in *Nistarini Dassi v. Nundo Lal Bose*(¹) which dealt with the question of limitation under section 10 in these words: "The property was vested in the executors in trust for a specific purpose, that purpose being to pay the legacies, the allowances and the debts. and to pay the residue of the income of the one-third share of the testator's estate to the plaintiff for life. There can be no doubt that the estate did vest in the executors, and it is difficult to say that the purpose for which it was so vested is not specific. Then it is said that the object of this suit is not for the purpose of following in the hands of the executors such property. We think it is: it is clear that the purpose of the suit was to follow the property, which came to the hands of the two executors, to make them account for it and to hand over to the plaintiff as the result of that account what may be found due to her. The case of *Saroda Pershad Chattopadhyya v. Brojonath*

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1938. *Bhattacharjee*⁽¹⁾ cited for the appellant is for the foregoing reason distinguishable from cases like the present as has been pointed out by Mr. Justice Wilson in *Hurro Coomaree Dossee v. Tarini Charan Bysack*⁽²⁾. But even if this were not so, so far as it is a suit which is based on the fraud of the defendant Nundo Lal, and virtually the whole suit is based upon that ground, the defendant's objection is met by article 95 of the Second Schedule of the Limitation Act'. In our opinion this case is no authority for the proposition as contended for by Mr. Bose. It will be noticed that the suit was instituted by the plaintiff, a childless Hindu widow against the executors of her late husband's Will in which she sought to have certain documents, viz., a deed of trust, an award and a decree, declared fraudulent and void as against her, to have the Will of her husband construed, for an account on the basis of wilful default, for the appointment of a receiver and other consequential relief. The present suit is of an entirely different character. In our opinion the true rule is laid down in the case of *Saroda Pershad Chattopadhyaya v. Brojonath Bhattacharjee*⁽¹⁾ where the learned Judges held: "To claim the benefit of section 10 a suit against a trustee must be for the purpose of following the trust property in his hands. If the object of the suit is not to recover any property in specie, but to have an account of the defendant's stewardship, which means an account of the moneys received and disbursed by the defendant on plaintiff's behalf, and to be paid any balance which may be found due to him upon taking the account, it must be brought within six years (the period fixed by the Act of 1877) from the time when the plaintiff had first a right to demand it". In other words, section 10 of the Limitation Act has no application to cases of the character which are the subject of consideration by us.

(1) (1880) I. L. R. 5 Cal. 910.

(2) (1892) I. L. R. 8 Cal. 766.

The next case relied upon is the case of *Benode Behari Bose v. Nistarini Dossi*(¹) which is a decision of their Lordships of the Judicial Committee affirming the decision of the Calcutta High Court but the question of limitation was neither argued before nor decided by the Privy Council.

In the case of *S. K. Venkatasubramania Ayyar v. S. Sivagurunatha Chettiar*(²) the suit was instituted on behalf of the trustees to recover the properties which belonged to the trust but which were in the unlawful possession of the various defendants under alienations made by one Suri Ayyar and in deciding the question of limitation Mr. Justice Stone (with whom Mr. Justice Ramesam agreed) distinctly held that upon the facts of that case "the executors were in all but name trustees. This is really enough to dispose of the matter, for it brings in Article 134. But assuming that I am wrong as to this.....I accordingly reject the conclusion arrived at in (V) and conclude that the alienation was void ab initio, the possession was adverse in 1898 and the suit is barred". In our opinion this case again does not bear out the contention of the appellant. On the other hand it seems to recognise that executors as such are not express trustees. In truth the matter is no longer open to discussion after the decision of the Judicial Committee in the case of *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh*(³) where Lord Buckmaster in delivering the judgment stated: "A specific purpose within the meaning of section 10 must be a purpose that is either actually or specifically defined in the terms of the Will or settlement, or a purpose which, from the specified terms can be certainly affirmed. The statement that was made on the

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authority of *Balwant Rao v. Puran Mal*⁽¹⁾ that the purpose of following the property in the hands of the trustees referred to at the end of the section must be the purpose of restoring it to the trust which is specified in the earlier part of the section, provides a sound and critical test by which to consider whether or not any particular trust is within the provisions of the section ”.

In the case of *Chhatra Kumari Devi v. Prince Sri Mohan Bikram Shah*⁽²⁾ Sir George Lowndes when delivering the judgment of the Privy Council pointed out that “ Indian law does not recognize legal and equitable estates.....By that law, therefore, there can be but one “ owner ”, and where the property is vested in a trustee, the “ owner ” must, their Lordships think, be the trustee. This is the view embodied in the Indian Trusts Act, 1882..... It is clear that such a trust as is relied upon in the present case would not fall within section 10 of the Limitation Act, as it would be impossible to hold that the properties which vested in the appellant under the terms of the Wills which have been proved were so vested for the specific purpose of making them over to the respondent: *see per Lord Buckmaster in Khaw Sim Tek v. Chuah Hooi*⁽³⁾”. We, therefore, overrule the contention of Mr. Bose and hold that the provision of section 10 of Limitation Act has no application to the facts of the present case. The suit, therefore, is rightly governed by the provisions of Article 123 of the Limitation Act. The plaintiff has sued for the recovery of the annuities which belonged to him in his own right on the death of his father on the 3rd of May, 1921, and for the arrears of annuities which were due to his father up to the date of his death. The annuities in this case were payable to the father on the 24th of July each year

(1) (1883) I. L. R. 6 All. 1, P. C.

(2) (1931) 35 Cal. W. N. 953, P. C.

(3) (1921) L. R. 49 Ind. App. 37, 43.

starting from the 24th of July, 1915, which was the anniversary of the death of the testator. The plaintiff's right to receive the annuities accrued to him on the 4th of May, 1921, in his own right and the first annuity would be payable to him on the 4th of May, 1922, and therefore this claim is well within the period of limitation applicable to such a case. Regarding the annuities which remained unpaid to Annada Babu on the date of his death the plaintiff would be entitled to recover only such annuities as were not paid within 12 years of the date of the action. Now the only annuity which was payable to Annada Babu within this period would be the annuity which was running in 1921 and which was payable to him on the 24th of July, 1921. We usefully call attention here to the express provision of section 340(2) of the Succession Act which provides that

"If the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative."

Therefore the annuity payable to Annada Babu must be apportioned up to the 3rd of May, 1921, and this portion should be paid to the plaintiff as the representative of Annada Babu. The due date of payment of this portion would be the 24th July, 1921. The result is that no part of the claim of the plaintiff as decreed is barred by limitation.

It was next argued that the learned Subordinate Judge should not have allowed interest at the rate of 6 per cent. because the plaintiff himself waited for all these years before he came to court. But this is no ground for refusing interest as the plaintiff has a statutory right to recover interest at the rate of 6 per cent. under section 353 of the Indian Succession Act if his claim is within time. No mistake has been pointed out in calculation on this basis. The respondent in dealing with the question of interest in the cross-objection pointed out that the subordinate court did not give any reason whatever for disallowing pendente lite and future interest and submitted that

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the same should have been allowed to him. It is true that no reasons are assigned in the judgment but the learned Subordinate Judge has expressly stated that

"I allow no future interest in this case."

The question of interest pendente lite and future interest is entirely in the discretion of the court, and although the court has not given any reasons whatsoever in the judgment, the circumstances in this case do not justify our interference with the discretion of the learned Subordinate Judge. It appears that it is difficult to make full realisations from this estate, and the learned Subordinate Judge himself has directed the money to be realised from the income of the properties which are in the possession of the lady. We, therefore, do not think that we would be justified in interfering with the discretion of the learned Subordinate Judge when we are going to direct that a receiver should be immediately placed in possession of the estate to pay over the various legacies as well as the arrears due to the plaintiff. The result is that the appeal and the cross-objection must both be dismissed without costs.

Appeal and cross-objection.

dismissed.

J. K.

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Before Wort and Varma, JJ.

BANSI SINGH

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CHAKRADHAR PRASHAD.*

Landlord and Tenant—lease for homestead or residential purposes granted before the passing of the Transfer of Property Act, 1882 (Act IV of 1882), whether is transferable—estoppel.

* Appeal from Appellate Decree no. 774 of 1935, from a decision of Babu Nidheshwar Chandra Chandra, Subordinate Judge of Patna, dated the 27th of July, 1925, reversing a decision of Babu Kamini Kumar Banerji, Munsif of Bihar, dated the 27th of November, 1933.

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