

A minor point in the case relates to certain moveable property which appears to have been stolen after the commencement of litigation by Banno. The Courts below have concurred in thinking that Nanhu had the property in her possession, and therefore is responsible for the loss, and their Lordships consider that it would not be proper to disturb concurrent decisions on such a point. The result is that both appeals should be dismissed, and their Lordships will humbly advise Her Majesty to this effect.

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Appeals dismissed.

Solicitors for the appellants: Messrs. T. L. Wilson & Co.

MAHOMED RIASAT ALI (DEFENDANT) v. HASIN BANU (PLAINTIFF).

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[On appeal from the Court of the Judicial Commissioner of Oudh.] *June 28 and July 22.*

Mahomedan law—Succession of a Mahomedan widow by local custom to a life-interest in the estate of her husband—Cause of action in her suit for dower distinguished from that in her suit for such estate—Civil Procedure Code (Act XIX of 1882), s. 43—Limitation Act (XV of 1877), schedule II, articles 49, 120, 123.

A decree in a suit brought by a Mahomedan widow against the brother of her deceased husband, declaring her right to possess for life the estate of the latter in accordance with a proved local custom, with an order for possession, was affirmed. A decree in a suit previously brought by the widow against the same defendant for her dower gave no occasion for the application of section 43 of the Civil Procedure Code, having been made upon a cause of action distinct from that on which the present suit was founded. *Raja of Pithapur v. Venkata Mahipati Surya* (1) referred to, and followed.

Article 120, schedule II, Limitation Act, XV of 1877, was held applicable to this suit, which was not a suit for a distributive share of property within the meaning of article 123 of the same; and was not a suit for specific moveables wrongly taken within the meaning of article 49, nor was any other article of schedule II applicable.

APPEAL from a decree (26th March 1889) of the Judicial Commissioner, affirming, with a variation, a decree (27th February 1887) of the District Judge of Lucknow.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

(1) I. L. R., 8 Mad., 520; L. R., 12 I. A., 119.

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The suit out of which this appeal arose, was brought on the 1st September 1884 by Mussamat Hasin Banu, widow of Mosheraf Ali, a Mahomedan, who died in Lucknow on the 28th November 1880. The object of the suit was to obtain a declaration of the widow's proprietary right in the property left by her deceased husband, which she alleged to have been taken by his only brother the defendant, on the above date, and to obtain an order for the possession of it. The property consisted of a half share in the zamindari village of Saleh Nagar in the Lucknow district, fractional shares in other villages, interests in groves, gardens, and houses at Amethi and Lucknow, mortgage interest, and debts due to the deceased, cash, and personal effects: the whole valued at Rs. 35,788. This included a claim for mesne profits of half Saleh Nagar.

The plaint, amended on the 24th September 1884, alleged that Mosheraf Ali was a Sunni, and claimed "that the plaintiff according to the custom and the entries made in the settlement *wajib-ul-ars*, is entitled to the succession, and to inherit the entire property left by her deceased husband, and to hold proprietary possession thereof." The plaint added:—"The plaintiff according to Mahomedan law also is entitled to inherit one-fourth of the property of her husband." The settlement *wajib-ul-ars* was that of village Saleh Nagar: the material part of it is set forth in their Lordships' judgment where the facts appear. The defendant by his written statement claimed the whole of Saleh Nagar in virtue of a *sanad* from the Government, dated 30th October 1867. Neither he nor Mosheraf Ali were named therein, but the two brothers had signed the *khewat* of settlement, dated 22nd April 1868, which declared them to be the proprietors of the village. As to the other shares in villages, and portions of landed property claimed by the widow, the defendant asserted that some were purchased out of the income of the village Saleh Nagar, and were therefore his; that others were joint ancestral property to which by local custom the widow had no claim, except for maintenance, and that the mortgages represented his own advances, though taken in Mosheraf Ali's name. As to the moveable property, the defence was that the suit was barred by limitation. As to the entire claim, it was defended on the ground that it was barred by section 43 of the Civil Procedure

Code, inasmuch as it should have been included in a suit for the widow's dower brought by her against the same defendant, and decreed in 1881.

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The District Judge settled issues raising questions as to the ownership of village Saleh Nagar, and as to the rights of the widow as heir, and (17th March 1885) recorded his judgment that the village Saleh Nagar was held jointly by the two brothers as admitted in the *khevat* signed by them; that by local custom as evidenced by the *wajib-ul-ars*, and the statements of the witnesses, a widow succeeded to the whole of her husband's proprietary estate in a zamindari village. He found that there was no evidence of usage excluding her from inheritance to other property. Afterwards (19th November 1885) a District Judge who succeeded him in office conducted the trial. The new District Judge recorded five additional issues, two of which raised the legal defences of limitation and previous decision, set up by the written statement, while others were for ascertaining the amount of property left by Mosheraf Ali, and the mesne profits since his death. He held (29th January 1886) that the whole claim was barred by section 43, Civil Procedure Code, because, when bringing her suit in 1881, the plaintiff had two grounds of title, *viz.*, dower on which she sued, and heirship on which she did not sue, but might have sued. But she was bound, in his opinion, to put forward both at the same time. As regards the moveable property, he held that the suit was barred as coming within article 49 of schedule II of Act XV of 1877, and not article 123, the period being three years from the death of the husband. The result was that he dismissed the suit. The plaintiff appealed to the Judicial Commissioner, the defendant filing objections to the decision of the first Judge. The judgment of the 29th January 1886 was reversed, and the suit was remanded for a decision upon the issues of fact as to the property left by the deceased. The widow then called witnesses to show that the lands which stood in Mosheraf Ali's name were really his, and the defendant attempted to show that they were held in trust for him, Riasat Ali.

The District Judge finally found as regards the lands that the alleged trust was not proved, and that Mosheraf Ali was the owner of the different properties, which stood in his name. He also found

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that the moveables and cash left in the house of the deceased belonged to him and not to the defendant. He assessed the mesne profits at Rs. 3,750. The defendant appealed from both the judgments of the 17th March 1886 and the 28th February 1887. The plaintiff filed objections in which she claimed more than had been awarded to her by the last decree.

The Judicial Commissioner refused to allow the point to be raised before him for the first time, that the widow was a Shia, and as such could not inherit the estate. He then affirmed the judgment of the District Judge of the 17th March 1886 as to the interest of Mosheraf Ali in Saleh Nagar, and as to the widow's right to succeed to that interest. He modified the decree by declaring that she only took a life-estate. He then dealt with the judgment on remand in which he agreed, being of opinion that there was no evidence on which he could rely to show that Mosheraf Ali was a mere manager for his brother. He also considered that there was no ground for holding that the claim for mesne profits was barred by limitation.

On this appeal

Mr. *E. V. Doyle*, for the appellant, argued that irrespectively of the question whether the suit was barred by limitation as regarded the claim for cash and moveables, the properties other than Saleh Nagar acquired in the name of Mosheraf Ali alone, should not have been held to belong to him, by reason only of their standing in his name. The Courts below had erred in holding that as those properties were not proved to have been acquired out of the appellant's exclusive funds, they therefore belonged to Mosheraf Ali. As to the moveables and mortgage interests, the first Court had awarded them to the plaintiff, but should have at most awarded to her a life-interest in them. As to mesne profits, the respondent was entitled to recover only those which accrued in the period of three years. He referred to article 109 of schedule II of Act XV of 1877.

Mr. *J. D. Mayne*, for the respondent, argued that the suit had rightly been held not to be barred, either wholly or in part, by limitation. On all material questions of fact there were concurrent judgments which could not now be disputed. He admitted the

limitation of the claim for mesne profits to those accrued within three years.

Mr. R. V. Doyne was heard in reply.

Afterwards, on the 22nd July 1893, their Lordships' judgment was delivered by

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SIR R. COUCH:—The plaintiff in the suit and present respondent is the widow of Mosheraf Ali, who died on the 24th November 1880, leaving, besides his widow, a brother, Riasat Ali, and two sisters. The amended plaint filed on the 24th September 1884, alleged that the plaintiff, according to the custom and entries made in the settlement *wajib-ul-arz*, was entitled to succession and to inherit the entire property left by her deceased husband, and alternatively that according to Mahomedan law she was entitled to inherit one-fourth of his property. It then alleged that on the 28th November 1880 the defendant, Riasat Ali, took possession of the entire property left by Mosheraf Ali, and prayed for a declaration of the right of inheritance and for possession of the immoveable property with mesne profits, or any other relief which the Court might deem proper to grant.

On the 27th October 1884 the plaintiff filed a list of the property claimed, both immoveable and moveable. The *wajib-ul-arz* referred to in the plaint was of a village, in form of a joint zamindari tenure, of which Mosheraf Ali had a half share. It contains in paragraph 4, relating to right of transfer and inheritance, the following statement: "A daughter, or her issue, does not get any share. If the deceased co-sharer have no male issue, but a female issue only, then indeed in that case the female issue can get a share. If all the wives be childless, they shall for their lifetime remain in possession of the deceased's inheritance in equal shares, with proprietary power." The allegation that the plaintiff was entitled to inherit the entire property left by her deceased husband was denied by the defendant's written statement.

The plaintiff had, on the 7th May 1881, brought a suit against the defendant, in which she claimed Rs. 30,000 for dower. On the 1st August 1882, a decree for Rs. 166 was made in that suit by the Judicial Commissioner in an appeal by the plaintiff from the order of the District Judge, who had dismissed the suit. The

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defendant in his written statement alleged that the plaintiff had in that suit relinquished the claim for inheritance, and that the present suit was barred by section 43, Act XIV of 1882.

The proceedings of the District Judges before whom the case came may be briefly noticed. The first, Mr. Blonnerhassett, made an order which was cancelled by his successor, Colonel Newbery, who framed additional issues and then dismissed the suit on the ground that it was barred by section 43 of Act XIV of 1882, and also as to the moveable property that it was barred by the law of limitation, applying to it art. 49 in the schedule to Act XV of 1877.

The Judicial Commissioner on appeal reversed this dismissal and remanded the case for trial on other issues which had not been decided. He held that the suit was not barred by section 43, and that art. 123, and not art. 49, applied. Thereupon Colonel Newbery made a decree that the defendant should deliver to the plaintiff possession of the immoveable property, specifying it, and should pay to the plaintiff Rs. 14,725-8-9 as detailed, that is—"Moveables to value of Rs. 764-12—Cash Rs. 8,910-3-3—Deposit money Rs. 1,300—Mesne profits Rs. 3,750-9-6."

The defendant appealed from this decree to the Judicial Commissioner, and the plaintiff filed objections to it. On this appeal the Judicial Commissioner made a decree, declaring the plaintiff to possess a life interest in the immoveable property of her late husband, *viz.*, in the half of Saleh Nagar and in the other immoveable property decreed to her by the District Judge, and ordering that possession should be given to her of the moveables to the value of Rs. 764-12 as decreed by the Lower Court, of the cash Rs. 8,910-3-3, and deposit money Rs. 1,300. Mesne profits were also allowed by the decree, amounting, after deductions on account of dower and funeral expenses, to Rs. 3,643-9-6.

The first objection taken in the present appeal is that the suit is wholly barred, under sections 42 and 43 of the Civil Procedure Code of 1882, by the decree in the dower suit. Section 42 is clearly not applicable. The suit for dower was properly framed. Section 43 says, "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause

of action . . . If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." The dower suit did include the whole of the claim in respect of the cause of action in the suit, *viz.*, the right to dower and the non-payment of it. No portion of that claim was either relinquished or omitted. It cannot be said that the claim of the plaintiff as heir of her husband to the whole of his property was a portion of her claim to dower. The causes of action in the dower suit and in the present suit are distinct, and it was pointed out by this Committee in the case of *Rajah of Pittapur v. Venkata Mahipati Surya* (1) that the corresponding section in Act, VIII of 1859 does not say that every suit shall include every cause of action or every claim which the party has, but every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought. The finding of the District Judge on this issue was rightly reversed by the Judicial Commissioner.

The next objection was that the claim to cash and moveables was rightly held by the first Court to be barred by limitation. Their Lordships do not agree with either the Judicial Commissioner or the District Judge as to the article in the schedule to the Limitation Act which is applicable. This is not a suit for a distributive share of property (art. 123), nor a suit for specific moveable property wrongfully taken (art. 49). This latter article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person. Art. 120 provides a period of limitation of six years for a suit for which no period of limitation is provided elsewhere in the schedule. Their Lordships think this article should be applied, unless it is clear that the suit is within some other article, which in their opinion it is not, and consequently the suit as regards the moveable property is not barred.

Another objection was that mesne profits are given for Saleh Nagar for four years, and art. 109 limits them to three years from when they are received. It was agreed that on this account Rs. 700 should be deducted from the balance of Rs. 3,643-9-6,

(1) I. L. R., 8 Mad., 520; L. R., 12 I. A., 119.

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and the decree of the Judicial Commissioner should be amended by making that deduction. Lastly, it was objected that the decree of the Judicial Commissioner was erroneous in not including the moveable property in the declaration that the plaintiff had a life interest, as the custom stated in the *wajib-ul-arz* applied to moveable property as well as to immoveables. This is so, and the decree should be amended by making the declaration apply also to the moveables and the cash and deposit money. Their Lordships will humbly advise Her Majesty to order the decree of the Judicial Commissioner to be amended accordingly. The parties will bear their own costs of this appeal.

Decree varied.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.

Solicitors for the respondent: Messrs. Young, Jackson & Beard.

C. B.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

ANNOPURNA DASI (PETITIONER) v. KALLAYANI DASI
(OPOSITE PARTY).*

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August 11.

Letters of Administration—Probate and Administration Act (V of 1881), ss. 23, 41—Power of Court to associate another person with applicant in grant of letters of administration.

On an application for letters of administration to which the applicant is legally entitled under section 23 of the Probate and Administration Act, the Court has no power to order, under section 41 of the Act, that another person who has no present interest in the estate, should be associated with the applicant in the grant.

Section 41 applies to a case where, for some just cause, the person who is legally entitled to letters of administration ought to be superseded, and the grant made to another person.

THIS was an application by one Annopurna Dasi for letters of administration to the estate of her late husband Boroda Prosad

* Appeal from Original Decree No. 201 of 1892, against the decree of C. B. Garrett, Esq., District Judge of 24-Parganas, dated the 29th of June 1892.