

(1930) 08 CAL CK 0028
In the Calcutta High Court

Hari Charan Bhunya and Others

APPELLANT

Vs

Sm. Kamal Kumari Dasi

RESPONDENT

Date of Decision : 13-08-1930

Acts Referred:

Limitation Act, 1963 — Article 123, 62
Succession Act, 1925 — Section 353

Citation : AIR 1931 Cal 670

Judgement

1. This appeal has arisen out of a suit for recovery of arrears of maintenance from the year 1327 A. S. to 1332 A. S. at the rate of Rs. 180 a year. The plaintiff alleges that her father executed a will under which the plaintiff and her deceased sister were each to get Rs. 180 a year from the income of the properties that defendants 1 and 2 and the father of defendant 3 are in possession of the property, under the will, and that she is therefore entitled to recover this amount of maintenance which has not been paid. She also claims interest at the rate of 12 per cent per annum. The trial Court decreed the suit and the appeal was dismissed by the lower appellate Court.

2. The main point raised in this appeal is the question of limitation. It is urged that Article 62, Limitation . Act, [applies and under that article a portion "of the claim is barred. On the other hand it is urged by the respondent that the proper article that, is applicable is Article 123 which is applicable in the case of a legacy and under which the period of limitation is 12 years from the time when the legacy becomes payable. It appears to us that this article applies to the present case. The amount under claim in this case is recoverable and the findings of the Court below is that the defendants were in possession of the properties left by the testator. The finding is that defendants 1 and 2 and the father of defendant 3 got the properties and the will probated. It is urged that in fact a large portion of the properties was sold away. But the finding of the lower appellate Court is that the income is sufficient for the purpose of paying Rs. 180 annually to the plaintiff. It is urged for the appellants that the applicability of Article 123, Limitation Act, was not raised in either of the Courts below. But it appears to us

that, the defendants were not prejudiced by the fact that the question of applicability of this article was not raised earlier. We would therefore hold that the claim is not barred by limitation.

3. The next point urged is that the suit should have been framed as a suit on the charge of the property left by the will. We think that there is no substance in this point, as under the terms of the will the amount is payable from the income of the property and in any case the defendants as executors or representatives, of the deceased would be liable personally, and also the" assets will be made liable for the amount due to the plaintiff. So that the suit has not been wrongly framed.

4. As to the question of interest we think that there is . no reason why interest should be at the rate of 12 per cent per annum. u/s 353, Succession Act, the plaintiff is entitled to interest at the rate of 6 per cent per annum. The respondent also does not press for more than 6 per cent per annum. We think that the decree of the Court below should be modified to the extent that the interest should be reduced to 6 per cent per annum.

5. With this modification the appeal is dismissed with costs.