

(1961) 11 CAL CK 0008
In the Calcutta High Court
Case No : Appeal No. 290 of 1959

Sm. Gita Rani Debi

APPELLANT

Vs

Administrator General of West Bengal

RESPONDENT

Date of Decision : 30-11-1961

Acts Referred:

Administrator Generals Act, 1963 — Section 40(2)
Civil Procedure Code, 1908 (CPC) — Section 52
Limitation Act, 1908 — Article 120, 123, 62
Succession Act, 1925 — Section 173

Citation : AIR 1962 Cal 513 : 66 CWN 240

Hon'ble Judges : R.S. Bachawat, J;K.C. Sen, J

Bench : Division Bench

Advocate : B.C. Mitra and M. Banerjee, for the Appellant; M. Sen and S. Ghosh, for the Respondent

Final Decision : Partly Allowed

Judgement

Bachawat, J.—This is an appeal from a decree dismissing a money suit. One Raja Jyot Kumar Mukherjee of Uttarpara died on February 10, 1921, possessed of considerable properties both moveable and immovable. He left behind him surviving his only son Kumar Sanat Kumar and his grandson Prosad Kumar, Prosad Kumar was the son of Sanat Kumar by his first wife. Before his death Raja Jyot Kumar made and published a Bengali Will dated Poush 15, 1326 B. S. corresponding to December 31, 1919. By Clause 6 of this Will Raja Jyot Kumar bequeathed to his son Sanat Kumar several named items of immovable properties as also all other immovable properties which had not been disposed of by the Will and given to Prosad Kumar. By Clause 7 of the Will the testator bequeathed several named items of immovable properties to his grandson Prosad Kumar and provided that during the life time of Sanat Kumar the properties would remain under the possession and superintendence of Sanat Kumar and that Prosad Kumar would get on account of the profits of those properties a net yearly sum of Rs. 15,000/-. By Clause 8 of the will the testator directed that

Sanat Kumar would during his life time pay to Prosad Kumar a sum of Rs. 1,000/- yearly out of the income of lot Kumirmora. It may be mentioned that lot Kumirmora was given by Clause 6 of the will to Sanat Kumar absolutely. Sanat Kumar was one of the executors of this will. He along with the other executors duly obtained probate of the will. By an agreement in writing dated December 18, 1928 by and between Sanat Kumar and Prosad Kumar, the parties entered into an arrangement as to the mode of payment of the total yearly sum of Rs. 16,000 by Sanat Kumar to Prosad Kumar. The agreement recites that at the properties given to Sanat Kumar and Prosad Kumar by the will of Raja Jyot Kumar had been made over to them absolutely. The executors to the estate of Raja Jyot Kumar duly assented to the legacies given by his will and the properties mentioned in Clauses 6 and 7 of the Will were vested in Sanat Kumar and Prosad Kumar respectively. Sanat Kumar and Prosad Kumar thereafter entered into a supplementary agreement in writing dated September 13, 1931 which inter alia, provided that accounts should be kept clearly by Sanat Kumar with regard to the profits realised by him from the properties which were subject to the yearly payment of the total sum of Rs. 16,000-. From time to time certain arrangements as to rebates of the yearly sum of Rs. 16,000 were entered into between Sanat Kumar and Prosad Kumar. Subsequently a consent decree was passed in a suit No. 1194 of 1943 filed by Prosad Kumar against Sanat Kumar which inter alia provided that the arrangement regarding rebate would lapse after a certain period. On September 13, 1944 Prosad Kumar Mukherjee executed a registered Deed of Trust whereby he transferred all the properties given to him under the will by Raja Jyot Kumar as also his right to receive the annual sum of Rs. 1,000 under Clause 8 of the Will, to certain trustees upon trust for himself for life, and thereafter to his wife Sm. Monira Debi for life and thereafter, failing sons or any other daughter or daughters, to the plaintiff, Sm. Gitarani Debi absolutely. Prosad Kumar died on March 23, 1947. Sm. Monira Debi died on August 9, 1949. It is common case before us that on the death of Sm. Monira Debi the plaintiff became absolutely entitled to all those properties as also to all rights to the annuity of Rs. 1,000 given to Prosad Kumar by the will of Raja Jyot Kumar. Sanat Kumar died testate on January 15, 1953 corresponding to Magh 1, 1359 B. S. leaving a will whereby he had appointed the Administrator General as executor. The Administrator General duly obtained probate of the will of Sanat Kumar. The plaintiff Gitarani Debi instituted this suit on July 2, 1956 claiming from the Administrator General of West Bengal as executor to the estate of Sanat Kumar two sums of Rs. 17,055 and Rs. 8,431-4-2. This claim is comprised of the following items, namely (1) a sum of Rs. 2,750 on account of the annuity payable under Clause 8 of the will for 1357 B. S., 1358 B. S. and Baisakh to Foush 1359 B. S., (2) a sum of Rs. 11,250 being the proportionate amount of the yearly sum of Rs. 15,000 payable to Prosad Kumar under Clause 8 of the Will, (3) a sum of Rs. 6,982-7-4 on account of compensation money for part of the Mouza Makhla given to Prosad Kumar under Clause 7 of the aforesaid will and received by Sanat Kumar during his life time and (4) interest on the aforesaid three items of claim. The learned trial Judge has dismissed the

plaintiff's claim in its entirety. The plaintiff being aggrieved by this decree has appealed from the decree passed by the learned Judge. I shall deal with each of the several items of claim separately.

2. The first item of claim relates to the annuity of Rs. 1,000 payable under Clause 8 of the will. Clause 8 of the will provided that as long as Sanat Kumar would remain alive he would pay a sum of Rs. 1,000 to Prosad Kumar out of the income of Lat Kumirmora. On behalf of the plaintiff it is contended that this annuity was payable to the annuitant Prosad Kumar during his life time notwithstanding the fact that he had died before the death of Sanat Kumar. On the other hand, the defendant contends that the annuity ceased to be payable as soon as Prosad Kumar died, and consequently Sanat Kumar was not liable to pay any annuity for 1357 B.S., 1358 B.S. or any portion of 1359 B. S. The defendant relies upon Section 173 of the Indian Succession Act which reads as follows:

"Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it."

The defendant contends that by virtue of Section 173 of the Succession Act, Prosad Kumar was entitled to receive the annuity for his life only. On the other hand the plaintiff contends that the positive direction in Clause 8 of the will with regard to the duration of the annuity shows a contrary intention and having regard to that direction the annuity must be paid during the life time of Sanat Kumar and is not limited to the life of the annuitant Prosad Kumar. On behalf of the plaintiff appellant reliance was placed upon *Reid v. Coggans* or *Reid* 1944 AC 91 at p. 95. In that case the House of Lords had occasion to construe a bond whereby the father undertook gratuitously to pay his son an annuity "during my life". The son predeceased the father. The House of Lords held that the annuity was not limited to the life time of the annuitant and the right to payment of the annuity was transmitted to the son's estate. The decision in that case applied the well-settled English rules of construction relating to wills creating an annuity to a bond granting an annuity. On the other hand, the defendant respondent relies upon the decisions in *Narendra Nath v. Kamalabasini Dasi* 23 IA 18 at p. 26 (PC) and *Bhagabati Barmanya v. Kali Charan Singh*, 38 Ind App 54 at p. 64 (PC), to show that technical English rules of construction should not be applied in the case of Indian wills. The first case points out that it is absurd to cite cases on wills encumbering English law reports with a view to understand and interpret will of people speaking a different tongue, trained in different habit and thought and brought up under different conditions of life. In the second case it was pointed out that the rules established in English Courts for construing English documents are not as such applicable to transactions between Indians. These cases were applied and followed by Allsop, J. in *Sarnath Sanyal Madhusudan Bagchi and Others through A.P. Bagchi Vs. Hrishikesh Sanyal*, where the learned Judge pointed out that each case of a will creating an annuity must be

decided on its own merits and in the light of Section 173 of the Indian Succession Act. In that case the will provided for payment of a monthly allowance to a legatee till such time as the legatee's sons, would attain majority and her daughters would be married. The will showed that the legatee would not receive the allowance unless she lived in the testator's house. On a construction of the will before him the learned Judge held that the annuity was for the life of the annuitant and no contrary intention had been shown by the will. We must, therefore, construe the Bengali will before us in the light of Section 173 of the Indian Succession Act. On behalf of the appellant it was argued that Clauses 2 and 7 of the will should throw light on the meaning of the expression "as long as my son Sanat Kumar remain alive" under Clause 8 of the will. It was argued that where the testator Intended that the annuity would be for the life time of the annuitant he said so specifically, as in Clause 2 of the will which provided for payment of an annuity to the wife of the testator "as long as she lives". Again Clause 7 of the will provides for payment of a yearly sum of Prosad Kumar "as long as my son Shriman Sanat Kumar will remain alive". It is common case before us that this yearly sum continued to be payable after the death of Prosad Kumar, that the words "as long as my son Shriman Sanat Kumar will remain alive" in Clause 7 of the will mean was long as Sanat Kumar lives even though Prosad Kumar has in the meantime died." It was therefore argued that there is no reason why the same meaning should not be attributed to the same words in Clause 8 of the will. We are not impressed by these arguments. Clause 2 of the will contains a specific direction for payment of an annuity to the annuitant during her life time. With regard to Clause 2 no question arises as to any intention contrary to the statutory implication arising from Section 173 of the Indian Succession Act. The yearly sum payable under Clause 7 of the will bears no analogy to the annuity payable under Clause 8 of the will. The yearly sum payable under Clause 7 is on account of the income of properties given absolutely to the person entitled to receive the yearly sum and is not strictly an annuity as commonly understood. We must, therefore, construe Clause 8 of the will in the light of its own language. Clause 8 of the will is as follows:

"As long as my son Sanat Kumar will re-main alive, he will go on making payment of Rs. 1000/- one thousand rupees per annum to my grandson Prosad Kumar out of the income from Lat Kumirmora. If my son Sanat Kumar does not pay Patni rent and Collectorate revenue in respect of the said Lat Kumirmora 3 (three) days prior to the date fixed for (such) payment in "that case my grandson Prasad Kumar shall pay the said revenue in time and shall be entitled to realise the said amount together with interest (thereon) from my said son."

3. The first sentence of Clause 8 of the original Bengali will reads thus: [Here omitted]

4. The will clearly provides that the annuitant Prasad Kumar would be entitled to receive the annuity as long as Sanat Kumar would remain alive. The annuitant was therefore entitled to receive the annuity not for his life time only but during

the life time of Sanat Kumar. Had Sanat Kumar died during the life time of the annuitant, the annuity would have ceased to be payable. And when the annuitant died during the life time of Sanat Kumar the annuity continued to be payable to the annuitant the annuitant had a vested interest in the right to receive payment of the annuity during the life time of Sanat Kumar and when he had died before that time the right to receive the annuity at the proper time passed to his assigns under the deed of Trust executed by him. Section 173 of the Indian Succession Act lays down the prima facie rule of construction of a will creating an annuity, Prima facie the annuitant is entitled to receive the annuity for his life only. But if the will shows a contrary intention, effect must be given to such intention. The will shows a contrary intention whereas in this case it provides that the annuity should be paid during a period other than the life time of the annuitant.

5. On behalf of the defendant it was argued that in view of Section 173 of the Indian Succession Act the annuity was payable for the life time of the annuitant and the effect of the expression "as long as my son Sanat Kumar will remain alive" is that the annuitant would remain entitled to receive the annuity during his life time only, if Sanat Kumar would continue to live during that period. In other words it was argued that the will gave an annuity for the life time of the annuitant with the condition superadded that it would cease to have effect in case Sanat Kumar would die during the life time of the annuitant. I am unable to accept this contention. The will created an annuity payable for the life time of Sanat Kumar and not for the life time of the annuitant. The words "as long as my son Sanat Kumar will remain alive" are words of limitation showing the period for which an annual sum is to be paid to the legatee. They do not impose a condition that the legacy will cease to have effect if Sanat Kumar died.

6. On behalf of the defendant it was also argued that the fact that the annuity was payable out of the income of lat Kumirmora which was given to Sanat Kumar absolutely shows that the annuity was payable for the life time of the annuitant Prosad Kumar. I am unable to accept this contention. It is true that lat Kumirmora was given to Sanat Kumar absolutely by the will. But the absolute bequest was subject to the onerous condition that Sanat Kumar would pay an annuity out of its income. The question is--what is the extent of the burden so imposed upon Sanat Kumar. The answer must be found in the words of the will which imposed this burden. The fact that the obligation was to be discharged by Sanat Kumar out of the income of a property which was given to him by the will does not indicate that the obligation would cease on the death of Sanat Kumar and not on the death of Prosad Kumar.

7. I have therefore come to the conclusion that the annuity under Clause 8 of the will continued to be payable during the life time of Sanat Kumar notwithstanding the death of Prosad Kumar. The learned trial Judge accepted the defendant's contention that the annuity ceased to be payable on the death of Prosad Kumar. I am unable to agree with the learned trial Judge on this point. It follows that the

plaintiff's claim in respect of the annuity must succeed.

8. I will now deal with the second head of the claim, namely, the sum of Rs. 11,250/- payable under Clause 7 of the will for nine months of 1359 B. S. Clause 7 of the will reads as follows:

"My grandson Sriman Prasad Kumar Mukhopadhyaya shall get in absolute right the -/8/- annas share allotted to me of my Zamindary Lat Ghar Basini included in Touzr No. 6 of Hughli Collectorate which is under Patni settlement to late Bijoy Krishna, Mukhopadhyaya resident of Uttarpara the said entire property and my Patni Taluk Lat Aibakuri alias Mamla and Dar Patni Taluk Lat Bainchi included within the district of Hooghli and Lat Rakhalgachi and Patni Taluk lat Aima Chak Harinarayanpur included in Touzi No. 88 in the district of Hooghli Collectorate but as long as my son Sriman Sanat Kumar will remain alive my Grandson Prasad Kumar will go on getting as income from the said properties, a net sum of 15,000/- fifteen thousand rupees per annum from my son Sanat Kumar and all those properties shall remain in the possession and control of my son Sriman Sanat Kumar Mukhopadhyaya as long as my son Sriman Sanat Kumar Mukhopadhyaya will live. If my son the said Sanat Kumar Witness Satyaniranjan Chakrabarty Ranjit Kumar Banerji (4th page) fails to pay, for one year, my grandson Prasad Kumar the aforesaid net amount of 15,000/- fifteen thousand rupees in four equal instalments in that case my grandson Prasad shall be entitled to take over the said properties under his control and Khas possession and from the time my grandson Prasad Kumar will take over the aforesaid Mahals in his possession and control he shall not be entitled to claim any longer from my son Sanat Kumar Mukhopadhyaya the amount of 15,000/- fifteen thousand rupees per annum on account of (illegible) revenue, Cess etc. in respect of all those properties of my grandson Prosad Kumar remaining under the control of my son Sanat Kumar be not paid in time for any reason by my son Sanat Kumar and on that ground the said properties are sold off in that event Sanat Kumar shall remain liable for the same."

9. Under Clause 7 of the will several immovable properties were given to Prasad Kumar absolutely. Nevertheless, the Clause provided that those properties would remain in the possession and control (expression in Bengali omitted) of Sanat Kumar during his lifetime, and that Sanat Kumar during his lifetime would pay to Prasad Kumar a net yearly sum of Rs. 15,000/- per annum, in four equal instalments on account of the income of those properties (expression in Bengali omitted). The clause provided by implication that Sanat Kumar would be entitled to retain for his own use and benefit the entire net yearly income in excess of Rs. 15,000/-. Since Sanat Kumar died on the 1st Magh 1359 B. S. he became liable to pay the sum of Rs. 11,250/- being three-fourths of the sum of Rs. 15,000/- in terms of Clause 7. It is true that Rashbehari Singha Mahapatra, an employee of the defendant, in answer to Q. 28 had said that Sanat Kumar collected a sum of Rs. 2965/5/11 only until 30th Pous 1359 B. S. But it should be remembered that the defendant has not disclosed the relevant books of account kept by Sanat

Kumar. The best materials from which the Court could ascertain how much Sanat Kumar collected during his lifetime on account of the income in 1359 B. S. has been withheld from the Court. In the circumstances we are inclined to think that the claim for payment of Rs. 11,250/- cannot be defeated on the ground that Kumar Sanat Kumar had not collected a sum of Rs. 11,250/- out of the income of the properties for the nine months ending with the 30th Pous 1359 B. S. But it is clear enough that Sanat Kumar and after his death the defendant did not collect the entire profits of the properties payable for those nine months. The plaintiff took charge of the properties shortly after the death of Sanat Kumar. Though it was then arranged between the plaintiff and the defendant that the defendant would continue to collect the arrears and current dues up to 30th Pous 1359 B. S. and the plaintiff would make collections of the rent payable as from 1st Magh 1359 B. S. that arrangement was not carried out by the plaintiff. The letter dated December 16, 1955 read in the light of the answer of Lokmohan Chatterji to Q. 45 shows that the plaintiff's case was that Sanat Kumar as also the defendant had collected some part of the profits payable for the period after 30th Pous 1359 B. S. No such claim is however made in the plaint. Before us it is nobody's case now that either Sanat Kumar or the defendant had collected any portion of the profits accruing as from the 1st Magh 1359 B. S. But the question is whether the plaintiff has realised any portion of the profits for the period Baisakh to Pous 1359 B. S. This charge though not made in the correspondence was definitely made in the written statement and a pointed issue was raised at the trial to the following effect:

"Did the plaintiff realise any arrears of rent for the period between the 1st Baisakh, 1359 B. S. and 30th Pous, 1359 B. S. in respect of the properties bequeathed to Pro-sad Kumar Mukherjee by Raja Jyot Kumar Mukherjee?"

10. On this issue, the books of account of the plaintiff are very material. Nevertheless, the plaintiff did not choose to disclose those books of account. The plaintiff was of course entitled to collect and to appropriate for her sole and absolute use one-fourth of the net profits payable for 1359 B. S. If however she collected any sum in excess of one-fourth of those annual profits, that sum must be appropriated towards the discharge of the liability of Kumar Sanat Kumar to pay the sum of Rs. 11,250/- on account of income for the nine months of 1359 B. S. There is good ground for believing that the plaintiff had collected sums much in excess of the one-fourth of the net annual profits. Lokmohan, the husband of the plaintiff gave evidence on her behalf. In his answer to Q. 63 Lokmohan said that the plaintiff started collecting the rent in February or March 1953 i.e., a month after the death of Sanat Kumar and that the plaintiff had appointed one of the defendant's tahasildars as her tahasildar. He added that the collections were meagre but in his answers to questions 90 to 98 he admitted that collections would appear in the books of account maintained on behalf of the plaintiff and that those books had not been disclosed. He later said that the total annual demand in respect of the properties would be about Rs. 35,000/-. In his answers to Qs. 134-138 he admitted that the plaintiff had collected more than Rs.

15,000/- to Rs. 20,000/- on account of 1359 B. S., but he later wanted to retract this admission and said that the collections were much less. The learned trial Judge asked Counsel for the plaintiff whether the plaintiff was prepared either to disclose those books of account or to go to a reference where the Reference could examine those books of account. Strangely enough, the learned Counsel for the plaintiff declines either to disclose the books of account or to go to a reference. We have no doubt in our mind that the plaintiff deliberately withheld the books of account. In the circumstances, we draw against her the adverse inference that if the relevant entries in the books of account were disclosed the entries would have been unfavourable to her. We are satisfied that the plaintiff in fact collected on account of the profits of 1359 B. S. a sum much in excess of what she was entitled to collect and retain for herself for three months of that year, namely, for the period Magh to Chaitra, 1359 B. S. We are satisfied that the excess collection is sufficient to pay and discharge the liability of Sanat Kumar for the sum of Rs. 11,250/- in respect of the period Baisakh to Pous, 1359 B. S. The learned trial Judge rightly dismissed the plaintiffs claim on this point

11. We shall now deal with the third head of claim. This claim is on account of a sum of Rs. 6,982/7/4 being compensation money for a portion of Mouza Makhla which had been given absolutely to Prosad under Clause 7 of the will. A portion of Mouza Makhla had been acquired by the Government by and under a Notification dated November 23, 1946. A copy of the relevant award in Land Acquisition Case No. V-17 of 1946-47 is Ext. B in the case. It shows that two sums of Rs. 1,281/15/10 and Rs. 5,700/7/5 were awarded to Sanat Kumar in respect of this property. The 4th column of the Award states that the amount awarded was paid and the 5th column states that payment was made by cheque. The award is in the standard form No. 13 prescribed by Rule 60 of the Rules issued by the Government of Bengal u/s 55 of Act 1 of 1894. The first three columns of the Award are filled up when the Award is made. The fourth and fifth columns are filled up later when the payment is made. Rule 64 of these Rules shows that an Award statement is sent out by the Collector at the time of the making of the Award and that later as soon as the compensation money is disbursed, a subsidiary statement is issued by him. The fourth and fifth columns record the subsidiary statements relating to the payment. Rule 98 says that the payment may be made by cheque. The relevant Rules and the standard form of the Award are to be found at pages 67-68, 85 and 143 of the Bengal Land Acquisition Manual 1917. The entries in the fourth and fifth column are relevant evidence showing that Sanat Kumar had received the compensation money awarded in respect of the portion of Lat Makhla. The entries in these columns are clearly admissible u/s 35 of the Indian Evidence Act. Besides, by a letter dated February 10, 1956 the plaintiffs Attorney definitely asserted that the compensation money had been withdrawn either by Sanat Kumar and/or by his authorised agent during his life time. No reply was sent to this letter. There was no denial of the assertion that the money had been withdrawn by Kumar Sanat Kumar or his agent. There is sufficient evidence on the record to show that

Kumar Sanat Kumar had Actually obtained payment of the compensation money. The defendant has chosen not to call any rebutting evidence. We are therefore satisfied that Sanat Kumar received payment of the compensation money. The compensation money now stands substituted in place of a portion of the immovable property given to Prasad Kumar by Clause 7 of the will. All rights and obligations which attached to the immovable property now attach to the compensation money. Just as Sanat Kumar could keep trader his control and management the immovable properties during his lifetime, so also he could keep the compensation money under his control and management during his lifetime. Just as Sanat Kumar could keep and retain for himself all sums in excess of the yearly income of Rs. 15,000/- in respect of all the immovable properties, so also he could keep and retain for himself the income, if any, arising from the compensation money as also the income from the other immovable properties which had not been compulsorily acquired by Government provided he paid annually a sum of Rs. 15,000/- in terms of Clause 7. The assignees of those properties under the deed of trust executed by Prasad Kumar were entitled to possession or the compensation money after the death of Sanat Kumar just as they were then entitled to possession of the immovable properties. Sanat Kumar could keep and retain under his control the compensation money during his lifetime. When he died, his estate became bound to hand over this sum to Prasad Kumar's assigns. The liability to hand over the compensation money attached to the estate of Sanat Kumar as soon as he died. There is no evidence to show that the estate of Sanat Kumar ever discharged this liability. We are satisfied that the plaintiff's claim in this respect is not barred by the law of limitation. Sanat Kumar died on January 15, 1953. The suit was instituted sometime in July 1956. Mr. Sen contended that the claim in this respect was governed by article 62 of the Indian Limitation Act. We do not accept this argument. Article 62 of the Limitation Act provides that the period of limitation for a suit far money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use would be three yeans from when the money was received. The money was not received by Sanat Kumar for the plaintiff's use. He could retain the money during his lifetime for his use also. The money became payable for the first time after the death of Sanat Kumar.

12. Some argument was made before us that Article 123 of the Indian Limitation Act might apply to the case. We are satisfied that the suit is not a suit for recovery of a legacy. The executors to the estate of Raja Jyot Kumar assented to the legacies given by Clause 7 of the will. On the date of the acquisition of a portion of Lat Makhla by the Government, the property was vested in Prasad Kumar. The suit is for recovery of the compensation money awarded in respect of those properties which were received by Sanat Kumar and which have become payable after his death to Prasad Kumar's assigns. We are satisfied that such a suit is not governed by Article 123 of the Indian Limitation Act. No specific article of the Indian Limitation Act is applicable to the suit. The suit is therefore governed by Article 120 of the Indian Limitation Act. The right to sue accrued on

the death of Sanat Kumar. Consequently the suit is not barred by the law of limitation.

13. Nevertheless, it is urged that the claim in this respect should be defeated on other grounds. It was urged, firstly, that the plaintiff has not proved that this amount had been utilised by Sanat Kumar for the benefit of Manira Devi or for the plaintiff. There is no trace of this plea in the written statement or in the correspondence. If the defendant wished to establish this plea, it was for him to adduce evidence on this point. It was urged, secondly that there is no evidence to show that the Administrator General came into possession of this compensation money. In our opinion, it is not necessary for the plaintiff to establish this fact. The plaintiff has proved that Sanat Kumar came into possession of the compensation money. If the selfsame money which Sanat Kumar obtained from the Collector can no longer be traced, an equivalent sum of money must be paid by the defendant out of the general assets of Sanat Kumar in his hands. Thirdly it was urged that there was no proof that Sanat misapplied the money. In our opinion no such proof is necessary. Sanat Kumar was entitled to keep the money in his hands during his lifetime. On his death the defendant as his executor has become liable to pay the money out of the assets of Sanat Kumar in his hands. Lastly, it was urged that the defendant is not liable to pay the money because the liabilities of Sanat Kumar exceed his assets. There is no substance in this contention. The decree which would be passed in this case would not be against the Administrator General personally but as provided for in Section 52 of the Code of Civil Procedure, the decree would be for payment of money out of the property of the deceased. Section 40 (2) of the Administrator General's Act provides that if a suit brought by a creditor against the Administrator General is decreed in favour of the creditor, the creditor shall nevertheless, unless he is a secured creditor, be only entitled to payment out of the assets of the deceased equally and ratably with the other creditors. The Administrator General will, therefore, be liable under the decree which would be passed in this case to pay to the plaintiff only equally and ratably with the other creditors of the estate of Sanat Kumar. In our information, the defendant has made out no defence to the plaintiff's claim in respect of the compensation money. We think that the learned trial Judge erred in dismissing this head of claim.

14. The next head of claim relates to interest. It was conceded that the award of interest is largely a matter of discretion of the Court. In all the circumstances of this case we think that we ought not to award any interest in this case.

15. We, therefore, think that the plaintiff is entitled to a decree for (1) the sum of Rs. 2,750/- on account of the claim of annuity under Clause 8 of the will for the period 1357 B. S., 1358 B. S. and for Baisakh to Pous 1359 B. S., (2) the sum of Rs. 6,982/7/4 on account of the compensation money for a portion of the Mouza Makhla. The plaintiff is, therefore, entitled to a decree for the total sum of Rs. 9,732/7/4.

16. We therefore, pass the following order:

The appeal is allowed in part. The judgment and decree of the trial Court in so far as it dismisses the plaintiff's claim for the aforesaid sums of Rs. 2,750/ and Rs. 6,982/7/4 be and is hereby set aside. We hereby pass a decree in favour of the plaintiff against the defendant for the sum of Rs. 9,732/7/4 in respect of the aforesaid claims. The decretal amount shall be paid by the defendant out of the property of the deceased Sanat Kumar Mukherjee in his hands. Interest will run on this decree at the rate of 6 per cent from today. The rest of the decree passed by the trial Court be and is hereby affirmed. In view of the divided success and in all the circumstances of the case, we direct that each party will pay and bear his or her own costs in this Court. We further direct that the defendant respondent will retain his costs as between Attorney and client out of the estate of Sanat Kumar Mukherjee in his hands.

17. Certified for two Counsel.

K.C. Sen, J .

18. I agree.