APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1900. *April 2.*

BAROT NARAN (ORIGINAL DEFENDANT), APPELLANT, *v.* BAROT JESANG AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Adoption—Reversioner—Limitation Act (XV of 1877), Arts. 118 and 141—Suit by a reversioner for possession of immoveable property.

A suit by a Hindu reversioner to recover possession of immoveable property after the death of a childless widow is barred by article 118 of the Limitation Act (XV of 1877) if the claim to such possession cannot be established without setting aside the defendant's adoption of which the plaintiff had become aware more than six years before suit.

Raiji Khoda, a Hindu, died in 1869 leaving behind him a childless widow. In 1884 plaintiffs applied for a certificate of heirship to the deceased's estate under Regulation VIII of 1827. The widow opposed the application alleging that the deceased had adopted a son (defendant No. 1) in 1863-64. The certificate was refused, and both parties were referred to a suit for the purpose of determining the question of the alleged adoption. But neither party filed a suit.

In 1897 the widow died and thereupon plaintiffs, as reversionary heirs, sued to recover possession of the deceased Raiji's property.

The defendant pleaded that he was the adopted son of Raiji, and that the suit was barred by limitation.

Both the lower Courts held that the adoption was not proved, and that the suit was not time-barred.

Held, on second appeal, that though the defendant's adoption was not proved, yet as he had all along asserted his adoption to the knowledge of the plaintiffs since 1884, plaintiffs' suit was barred by article 118 of the Limitation Act (XV of 1877).

SECOND appeal from the decision of Ráo Bahádur Lalshanker Umiashanker, Additional First Class Subordinate Judge, A. P., at Ahmedabad.

Suit by Hindu reversioners for possession of property to which they claimed to be entitled after a childless widow's death.

One Raiji Khoda died in 1869, leaving behind him a childless widow, Bai Datar.

Plaintiffs were the *pitrais* (paternal kinsmen) of the deceased.

In 1884 plaintiffs applied under Regulation VIII of 1827 for a

* Second Appeal, No. 795 of 1899.

certificate of heirship to Raiji. Bai Datar resisted the application on the ground that Raiji had adopted a son (the defendant), who as such adopted son had inherited his estate.

The Assistant Judge to whom the matter was referred for inquiry, held that the defendant's adoption was not proved.

The District Judge finding that the question of adoption was too complicated to be determined in a summary inquiry, passed an order in May, 1885, directing both parties to have the matter decided in a regular suit. But neither party filed a suit during Bai Datar's lifetime.

In January, 1897, Bai Datar died having made a will in 1890 bequeathing all her *stridhan* property to the defendant as her adopted son.

Thereupon plaintiffs brought this suit, as reversionary heirs of the deceased Raiji, to recover possession of his property both moveable and immoveable.

Defendant pleaded (*inter alia*) that he had been adopted by Raiji in 1863-64; that the fact of his adoption had become known to the plaintiffs in 1884; and as plaintiffs had not filed a suit to set aside his adoption within six years from the time they became aware of the adoption, the suit was barred by limitation.

The Court of first instance held that the defendant's adoption was not proved and on the authority of *Fannyamma* v. *Manjaya*[1] held also that the case was governed by article 141 and not by 118 of the Limitation Act (XV of 1877) and was not barred. It passed a decree for the plaintiff.

This decision was upheld, in appeal, by the District Judge.

Against this decision defendant now appealed to the High Court.

L. A. Shah for appellant.

Branson (with *G. S. Rao*) for respondents.

PARSONS, J.:—The plaintiffs sued to obtain possession of the estate of Raiji, who died in 1869, to which they became entitled on the death of his widow Bai Datar. Article 141 of the Limit-

(1) (1895) 21 Bom., 159.

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ation Act, 1877, gives them twelve years from the date when the widow died within which to bring their suit. She died in 1897, and they filed the present suit in the same year. On the face of the plaint, therefore, the suit is well within time. The defendant, however, alleged that he had been adopted by Raiji in 1863 and he pleaded that the plaintiffs were barred by prescription from disputing the fact and validity of his adoption, because they had not brought a suit to obtain a declaration that his alleged adoption never, in fact, took place within six years from the date when his alleged adoption became known to them.

There is no doubt that the defendant has all along asserted the fact of his adoption and that the plaintiffs in 1884 knew that he did so. It is also clear that the defendant, if he is the adopted son of Raiji, is the owner of his estate, so that the plaintiffs cannot succeed in the suit without disturbing the adoption. I should, however, have thought that there was no obligation upon the plaintiffs to have sued to have it declared that an adoption which was merely alleged to have taken place had never taken place, because the mere parol assertion of a status could not give rise to a cause of action or create a status that had no existence at all, and because the right to property is not declared to be extinguished under section 28 of the Limitation Act except at the determination of the period limited to any person for instituting a suit for possession of that property.

It has, however, been held that this is not the correct view to take in the case of an alleged adoption. The Limitation Act, article 118, enacts that a suit to declare that an alleged adoption never took place must be brought within six years from the date when the alleged adoption became known to the plaintiff, and a Full Bench of this Court has decided that, unless such a suit has been brought within the prescribed period, the plaintiff is barred by that article from disputing the fact of the adoption—*Shrinivas Murar* v. *Hanmant Chavdo* [1]. That is the case here. Although the defendant is found never to have been adopted, yet he said that he was, and because the plaintiffs did not sue within six years of their coming to know that he said so, the defendant must be held to have been legally adopted. We reverse the

(1) (1899) 24 Bom., 260.

decree of the lower Appellate Court and order plaintiffs' suit to be dismissed with all costs on them.

RANADE, J. :—The original suit was brought by the respondent-plaintiffs, as reversionary heirs on the death of one Bai Datar, widow of Raiji Khodidas, to recover possession of two houses, certain moveable property, and books of Vahivancha, from the appellant-defendant, who claimed to be Raiji's adopted son. Raiji was a barot, and he kept the genealogies of certain people, and followed the profession of a bhâta. He brought the defendant-appellant to live with him in his house as his son about 1864. Raiji died in 1869, and his widow Bai Datar and the defendant lived together as mother and son. In 1884 the respondent-plaintiffs applied for a certificate of heirship to Raiji. Bai Datar and the defendant resisted the claim on the ground that defendant was Raiji's adopted son. The District Court refused to grant the application, and referred the parties to a regular suit in May, 1885. Bai Datar died in January, 1897, and thereupon in 1898 the present suit was brought to recover possession of the houses and the books and to obtain an injunction against the defendant not to receive the dues from the yajmans of Raiji.

The defence was that Raiji adopted the defendant in 1863; that the plaintiffs had knowledge of the alleged adoption in the certificate proceedings of 1884; that the two houses had been in defendant's possession as heir, and also under Bai Datar's will made in July, 1890; that as no suit had been brought for more than twelve years from 1884, the plaintiffs' claim was time-barred; and that the injunction could not be granted.

The Court of first instance held that the alleged adoption was not proved; that the claim was not time-barred, as it was brought shortly after Bai Datar's death, when the cause of action arose; and that the respondent-plaintiffs were entitled to claim the property in dispute as reversionary heirs except one of the houses, which was held to be Bai Datar's *stridhan*, and, as such, was transferred to the defendant by her will. In appeal the District Court held that the other house, also included in the will, was built by Bai Datar, and was her *stridhan*. The claim for

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both houses was, therefore, disallowed, and in other respects the decree of the first Court was confirmed.

The original defendant preferred this second appeal chiefly in respect of the books of genealogy, and the injunction in respect of the dues collected from the yajmans. The appellant's contention was that the claim for the whole property of the plaintiffs was time-barred, and, therefore, should have been dismissed throughout.

The principal point for consideration, therefore, relates to the question of limitation, and that again turns on the enquiry when the cause of action accrued. The original plaintiffs urged that it accrued to them on the death of Bai Datar, while the defendant-appellant's contention was that it accrued when he claimed to be the adopted son in the certificate proceedings brought by plaintiffs in 1884, that is, more than twelve years before the date of the suit. In the Court of first instance, the question of limitation was decided in respondent-plaintiffs' favour on the ground that, as the claim was for the recovery of property, it was not necessary for the plaintiffs to set aside the defendant's alleged adoption under article 118 within six years from the certificate proceedings in which the plea of adoption was first raised; that article 141 of the Limitation Act applied; that this enlarged period of limitation was not curtailed by the results of the certificate proceedings, which, it was further urged, had decided adversely the claim for adoption. This view was accepted by the Judge of the lower Appellate Court, who held that the plaintiffs had no cause of action as long as Bai Datar was alive, and that defendant's possession was not adverse to plaintiffs, as he lived with Bai Datar till her death. These decisions were obviously based on the ruling in *Fannyamma* v. *Manjaya* [1] and the cases noted in that judgment. The correctness of this ruling was questioned in *Shriniwas Murar* v. *Hanmant Chavdo* [2] which was a Full Bench decision, when the whole subject was considered by five Judges, and it was held that the shorter period of limitation under article 118 governed a claim for recovery of the possession of immoveable property, wherever the

(1) (1895) 21 Bom., 159. (2) (1899) 24 Bom., 260.

claim to the property could not be established before setting aside an alleged adoption. It is not necessary, therefore, to consider the earlier authorities which are noticed in the Full Bench case. The respondent-plaintiffs cannot possibly succeed in their claim as reversionary heirs to the property in dispute, which has come into the possession of the appellant-defendant before the alleged adoption set up in 1884 in the certificate proceedings could be set aside, and as more than twelve years have passed since that claim was set up, it is clear that the present suit, though it does not expressly contain a prayer for setting aside the adoption, cannot be maintained merely because the claim is made for the recovery of the possession of the property.

It was indeed urged that the decision in the certificate proceedings was against the validity of the adoption; and that, therefore, the respondent-plaintiffs had no occasion to move in the matter till the death of Bai Datar, whose possession as Raiji's widow inured to her as a life interest till her death, and that as reversioners the respondents were entitled to bring their suit soon after Bai Datar's death. It appears, however, from the decision in the certificate proceedings that the adoption was not held invalid. The report of the Assistant Judge, no doubt, contains an expression of opinion to that effect, but the final order of the District Judge did not decide the question, and referred the parties to a regular suit. It was, therefore, incumbent on the respondent-plaintiffs to have removed this objection, within six years, and they were not entitled to wait during Bai Datar's lifetime. As they failed to take any action for more than twelve years, their claim was clearly time-barred. I would, therefore, reverse the decree of the Courts below, and reject the claim with costs.

Decree reversed.