solicitor's employment terminated and which of their bills or what portion of their bills of costs are barred. 1907

WADIA, GANDHY & Co. v. PURSHOTAM.

After a careful consideration of all the arguments addressed to me I have come to the conclusion that there is no period of limitation provided for an application under rule 859, that Article 178 of the Limitation Act applies only to applications under the Civil Procedure Code, that the application before me is *not an application* under the Code of Civil Procedure, and that Article 178 does not bar the claim made in the summons.

I make the summons absolute and direct the respondent Purshotam Sivji to pay the applicant's costs of the summons. I certify that this was a fit case for the employment of counsel.

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1907 *August 7.*

LAXMANA KOM BASAPPA AND OTHERS (ORIGINAL DEFENDANTS NOS. 3, 4 AND 5), APPELLANTS, *v.* RAMAPPA BIN YALLAPPA KUCHRADDI-YAVAR AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 2), RESPONDENTS.*

Limitation Act (XV of 1877), schedule II, article 119—Adoption—Period of Limitation applicable to suits where factum *and also validity of adoption is denied.*

Suits in which either the *factum* or validity of an adoption is denied are governed by the provisions of article 119 of schedule II to the Limitation Act (XV of 1877).

The observtions to the contrary in *Ningawa*, v. *Ramappa* (1) and *Shivram* v. *Krishnabai* (2) dissented from.

Shrinivas v. *Hanmant* (3) followed and applied.

APPEAL from an order passed by T. D. Fry, District Judge of Dharwar, reversing the decree passed by, and remanding the suit to, V. G. Kaduskar, Subordinate Judge at Haveri.

* Appeal No. 8 of 1907, from order.

(1) (1903) 28 Bom. 94; 5 Bom. L. R. 708. (2) (1906) 31 Bom. 80; 8 Bom. L. R. 897.

(3) (1849) 24 Bom. 260.

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LAXMANA v. RAMAPPA.

Suit by the plaintiff, as the adopted son of one Yellappa, to recover property belonging to the latter.

Yellappa had two wives at his death: Dyavakka (defendant No. 1) and Yallawa (defendant No. 2). The plaintiff alleged that after Yellappa's death, his widow Yallawa adopted the plaintiff in 1890. The widows then changed their mind and divided the property between themselves in 1894.

The plaintiff filed this suit in 1904.

The defendants denied the fact of plaintiff's adoption.

The Subordinate Judge dismissed the plaintiff's claim on the ground that it was barred by limitation. His reasons were as follows:—

"Plaintiff's aboption is alleged to have taken place in 1890 and he has dated his cause of action in his plaint to have occurred in 1894 He evidently urges that the two widows ignoring his adoption divided the property among themselves in 1894 and began to enjoy the property separately. Subsequently when he applied for the transfer of the khata to his name defendant No. 1 openly denied the right of the plaintiff to the transfer of the khata disputing his adoption, and the revenue authorities did not allow his application saying that the plaintiff's adoption is disputed. That was in March 1897, and the plaintiff did not bring his suit within six years from that time even. His adoption to his knowledge as is evident from the revenue proceedings was disputed in 1893 and his claim now to have the adoption established and to have the property given to him is clearly time-barred. It is evident he cannot succeed except through his adoption which he ought to have established in six years from the time it was disputed. The claim is clearly beyond time."

On appeal this decree was reversed by the District Judge. The learned Judge remanded the case to the Subordinate Judge for its disposal on merits. He stated his grounds as follows:—

"The Subordinate Judge dismissed the suit as time barred on the ground that the plaintiff had failed to sue within six years of the denial of his adoption in 1893. In dismissing the suit on this ground the Subordinate Judge appears to have applied article 119 of schedule II of the Limitation Act, but that article does not apply to a case where (as in the present suit) the *fact* as opposed to the *validity* of an adoption has been denied (*Ningawa* v. *Ramappa*, 28 Bom. 94; *Shivram* v. *Krishnabai*, 8 Bom. L. R. 897). The suit is, therefore, not barred by this article"

The defendants appealed to the High Court, contending *inter alia* that the cases relied upon by the lower appellate Court

merely expressed an *obiter dictum* on the question and were therefore not binding.

S. R. Bakhale, for the appellant.

K. H. Kelkar, for the respondent.

CHANDAVARKAR, J.—There are no doubt observations in the judgments of this Court in the two cases *Ningawa* v. *Ramappa* (1) and *Shivram* v. *Krishnabai* (2) referred to by the District Judge which support the view that article 119 of schedule II to the Limitation Act does not apply to a suit in which the *fact* as opposed to the *validity* of an adoption has been denied. But those observations in each of the judgments in question are mere *obiter dicta* and, having reconsidered them more carefully, we have come to the conclusion that there is no difference in point of principle between articles 118 and 119 and the considerations that have been held by the Full Bench in *Shrinivas* v. *Hanmant* (3) to apply to the former article apply equally to the latter. We agree with the decision to that effect of the Madras High Court in *Ratnamasari* v. *Akilandammal* (4). One of the learned Judges who decided that case (Bhashyam Ayyangar, J.) dissented from the rest upon the ground that both articles 118 and 119 applied only to suits for a bare declaration and not to suits for prossession. But he and they were all agreed on the point that the difference in language between the two articles, on which the observations in the judgment in *Ningawa Ramappa* (1) proceed, made no difference between them in point of suits for a bare declarations and suits for possession, and that the same cosiderations should apply to both in that respect. As pointed out by Bhashyam Ayyangar, J., in his judgment in the Madras case just referred to, "unlike article 118, article 119 does not separately provide for a suit to obtain a declaration that an alleged adoption in fact took place, for the simple reason that the more *factum* of adoption will not entitle one to a legal cheracter unless the adoption is also valid. A plaintiff, therefore, will have to sue for a declaration that his adoption is valid, whether the *factum* itself is denied or the *factum* is admitted but the validity is challenged." (5)

(1) (1903) 28 Bom. 94.
(2) (1906) 31 Bom. 80; 8 Bom. L. R. 897.
(3) (1899) 24 Bom. 260.
(4) (1902) 26 Mad. 291.
(5) (1902) Ibid. p. 311.

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We must, therefore, reverse the order of the District Court and remand the appeal to that Court for disposal according to law. Costs to abide the result.

Order reversed.

R. R.

CRIMINAL REFERENCE.

1907
August 22.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

EMPEROR *v.* HAJI SHAIK MAHOMED SHUSTARI.*

Emigration Act (XXI of 1883), section 107—Servant offending under the Act in the course of his master's employment for his master's benefit—Master's liability—Artizan—Engine Driver on board a steamer.

If a servant having been appointed as an agent for a particular business by his master, enters into an agreement in connection with that business every thing which he does within the scope of his employment for that purpose will be binding upon the master and the master will be criminally liable for such act of the servant under the Indian Emigration Act (XXI of 1883). In such a case the master's express knowledge of or consent to the act is not necessary, because by the very fact of the appointment of the servant as an agent in such a business, the master's knowledge of or consent to every act done by the servant or agent within the scope of his employment is implied by law.

A person engaged to drive an engine on board a steamer is an artizan within the meaning of the term as used in section 107 of the Indian Emigration Act, 1883.

THIS was a reference made by A. H. S. Aston, Chief Presidency Magistrate of Bombay, under section 432 of the Criminal Procedure Code (Act V of 1898).

The facts as stated by the Magistrate in his letter of reference were as follows:—

The accused was charged with an offence made publishable by section 111 of the Indian Emigration Act (XXI of 1813), in that he without having first obtained the consent of the Protector of Emigrants, on or about the 26th May 1907, did cause two natives

* Criminal reference No. 51 of 1907.