

Anyaba does not apply and was not intended to apply to the former kind of obligations. It would be straining the language of section 80 of the Code of Civil Procedure beyond legitimate limits and defeating its object, if we were to apply that principle to actions sounding substantially in tort, merely because by operation of law those actions, for certain purposes, are treated as actions *ex contractu*.

On these grounds the decree in appeal must be confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

CHINTAMAN VYANKATRAO GHADGE (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMCHANDRA VYANKATRAO GHADGE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1910.

July 25.

Limitation Act (XV of 1877), sections 5 and 7—Application to file an appeal in formâ pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Res judicata—Civil Procedure Code (Act V of 1908), section 11.

A suit filed in *formâ pauperis* was decided on the 10th February 1908. An application for leave to appeal in *formâ pauperis* was presented to the High Court on the 13th April 1908; but as it was beyond time it was rejected. On an application to excuse the delay, it was excused on the ground that the applicant having been a minor, section 7 of the Limitation Act, 1877, applied. At the hearing, it was objected that the application for permission to appeal in *formâ pauperis* must be treated as an appeal, and that section 5, and not section 7 of the Limitation Act, applied to it.

Held, overruling the contention, that whether the application was treated as falling under section 5 or under section 7 of the Limitation Act, 1877, the result was the same. If it fell under section 5, as an appeal, then under the second paragraph of that section, which applied to appeals, the Court had jurisdiction to excuse delay, after the period of limitation prescribed for the presentation of an appeal had expired. If, on the other hand, it be treated as an application and fell under section 7 of the Limitation Act, it was clearly

* First Appeal No. 46 of 1909.

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within time and there was no need of excusing delay because the section provided that a minor could apply after he had attained the age of majority within a certain period.

The probate is conclusive only as to the appointment of executors and the validity and the contents of the will; and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition.

APPEAL from the decision of V. V. Tilak, First Class Subordinate Judge at Satara.

Suit for declaration and possession of certain property.

The property in dispute belonged to one Vyankatrao, who died on the 4th June 1905. Some time before his death, he had made a will, dated the 26th May 1905, whereby he had bequeathed all his property in favour of Ramchandra (defendant No. 1) who was his *dasiputra* (a son by a mistress).

The plaintiff alleged that on the 31st May 1905, Vyankatrao had revoked the will and adopted him as his son.

The defendant No. 1 applied to the District Court for probate of the will. The plaintiff objected to the grant on the grounds that the will was revoked and he was adopted by Vyankatrao. The District Court granted probate holding that the will was genuine and that the adoption was doubtful.

The plaintiff next filed a suit in *forma pauperis* to have it declared that he was the adopted son of Vyankatrao and to recover possession of property belonging to Vyankatrao from defendant No. 1.

The defendant No. 1 pleaded *res judicata* on the ground that the plaintiff had failed to establish his claim in the probate proceedings. The defendants Nos. 2 and 3 claimed under defendant No. 1.

The Subordinate Judge dismissed the plaintiff's claim on the 10th February 1908. He held that it was barred by *res judicata* on the following grounds:—

“Having regard to sections 55 and 83 of the Probate and Administration Act, 1881, I am of opinion that grant of probate in a contentious case is not in the nature of a summary proceeding which can be contested in a regular suit in a Civil Court.

Plaintiff's remedy seems to be to apply for a revocation or annulment of the grant under section 50 of the Act: I. L. R. 4 Cal. 360. A refusal to grant probate does not operate as a judgment *in rem* but the grant of a probate does: I. L. R. 21 Bom. 563."

On the 13th April 1908, the Plaintiff presented to the High Court an application for leave to appeal in *formâ pauperis* from the decree passed by the Subordinate Judge. The application was dismissed as having been presented beyond the time allowed by law.

The plaintiff, who was a minor, then applied for excuse of delay caused in presenting the aforesaid application. It was heard *ex parte* and granted by the Chief Justice on the 2nd of October 1908. But subsequently it was brought to his Lordship's notice that he had no jurisdiction to excuse the delay; the former order was thereupon cancelled on the 20th of November 1908.

An appeal against this last mentioned order was preferred under the Letters Patent. It was allowed by Chandavarkar and Heaton, JJ., on the 26th February 1909.

The original appeal was placed for final disposal.

B. N. Bhajekar for the appellants.

K. H. Kelkar for the respondents.

CHANDAVARKAR, J.:—This appeal was filed at first in the form of an application for leave to appeal in *formâ pauperis* from the decree passed on the 10th of February 1908 by the Subordinate Judge, First Class, at Satara, in Civil Suit No. 354 of 1907. The application, presented on the 13th of April 1908, was beyond time, having been made more than 30 days after the period prescribed by the Limitation Act, and the appellant, a minor, by his guardian prayed that the delay might be excused. The application for the excusing of delay came on for *ex parte* hearing before a Division Court on the 2nd of October 1908 and it was allowed. But it having been brought to the Court's notice that it had no jurisdiction to excuse delay, it cancelled the order on that ground on the 20th of November 1908. An appeal against that order, presented under the Letters Patent, was allowed on the ground that, the applicant being a minor, section 7 of the Limitation Act of 1877 applied and the case was

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governed by the principle of the Privy Council ruling in *Mussumat Phoobas Koonwur v. Lalla Jogeshur Sahoy*⁽¹⁾. Leave to appeal in *formâ pauperis* was granted.

Mr. Kelkar, appearing for the respondents, argues that an application for permission to appeal in *formâ pauperis* must be treated as an appeal, and that, if it is so treated, section 5, and not section 7 of the Limitation Act, must apply here. Whether we treat the application as falling under section 5 or under section 7, the result is the same. If it falls under section 5 and is an appeal, as contended by Mr. Kelkar, then, under the second paragraph of that section, which applies to appeals, the Court has jurisdiction to excuse delay.

If, on the other hand, it is treated as an application and falls under section 7 of the Limitation Act, it is clearly within time and there is no need of excusing delay, because the section provides that a minor can apply after he has attained the age of majority within a certain period prescribed.

Dealing with the appeal on the merits, the suit was brought to recover possession on the ground that the plaintiff was the adopted son of one Vyankatrao. The defendant resisted the claim upon the ground that Vyankatrao had left the property to him by a will; that he had proved the will and obtained probate. Issues were raised involving the question of title and of *res judicata*.

The Subordinate Judge has disposed of the case only on the ground of *res judicata*. He has held the claim barred, because, in his opinion, the grant of probate concludes the parties as to title. That is clearly an error in law. The probate "is only conclusive as to the appointment of executors and the validity and the contents of the will: Williams on Executors, p. 452, (4th Edition): and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition": *Hormusji Navroji v. Bai Dhanbaiji, Jamsetji Dosabhai*⁽²⁾. See also *Barot Parshotam*

(1) (1875-76) L. R. 3 I. A. 7 at p. 25.

(2) (1887) 12 Bom. 164.

Kalu v. Bai Muli⁽¹⁾. As the suit was wrongly disposed of on a preliminary point, we reverse the decree and remand the case for disposal on the merits according to law.

All costs including those of the Court-fees of this pauper appeal, in which Government are interested, must be costs in the cause.

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Decree reversed.

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(1) (1893) 18 Bom. 749.

CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR v. RAMCHANDRA BHASKAR MANTRI.*

1910.

July 20.

City of Bombay Municipal Act (Bombay Act III of 1888), section 305†—Municipal Commissioner—Notice, disobedience of—Private streets—Levelling and draining of—Liability of owners of several premises—Owners of building sites—Buildings constructed by lessees on the sites—Premises, what are—Construction of statutes.

The owner of a large plot of land sub-divided it into a number of building sites, which he arranged on either side of a private street which was projected to run through the plot. Those building sites were let to lessees (of whom the applicant was one) for a period of thirty years; at the end of the period the lessee was to remove the building put up by him unless the lessor purchased it. Under the terms of the lease the lessee was to contribute rateably to the expenses of making, repairing, etc., all ways, roads, etc. The applicant was one of those lessees. He built a house upon one of those sites, and let it to tenants from whom he received rent. The Municipal Commissioner of Bombay issued a notice to the applicant, under section 305 of the City of Bombay Municipal

* Criminal Application for Revision No. 175 of 1910.

† The City of Bombay Municipal Act (Bombay Act III of 1888), section 305, runs as follows:—

If any private street be not levelled, metalled or paved, sowered, drained, channelled and lighted to the satisfaction of the Commissioner, he may, with the sanction of the Standing Committee, by written notice, require the owners of the several premises fronting or adjoining the said street or abutting thereon to level, metal or pave, drain and light the same in such manner as he shall direct.