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before the suit was filed, and once the suit is filed without obtaining leave, if leave is necessary, the defect cannot be remedied.

The order, therefore, which we make on the appeal is that the decree be amended by striking out the first declaration.

Costs of the appeal to be costs in the suit.

Solicitors for the appellants: Messrs. *Mansukhlal, Hiralal, Mehta & Co.*

Solicitors for the respondents: Messrs. *Mulla & Mulla.*

*Decree amended.*

G. G. N.

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FULL BENCH.

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APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah, and Mr. Justice Fawcett.*

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November 18.

DODDWA KOM PARSHYA AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3),  
APPELLANTS v. YELLAWA KOM MALLAPPA BENNI (ORIGINAL PLAINTIFF),  
RESPONDENT<sup>o</sup>.

*Limitation Act (IX of 1908), Article 118—Adoption—Suit to recover possession after displacing an alleged adoption—Limitation.*

*Held*, by Macleod C. J., and Fawcett J., (Shah, J. dissenting) (1) that Article 118 of the Indian Limitation Act, 1908, does not apply to a suit for possession where the plaintiff cannot succeed except by displacing an alleged adoption;

(2) that the decision of the Bombay High Court in *Shrinivas v. Hanmant*<sup>(1)</sup> is overruled by the decision of the Privy Council in *Thakur Tirbhuvan Bahadur Singh v. Raja Rameshar Bakhsh Singh*<sup>(2)</sup>.

<sup>o</sup> Letters Patent Appeal No. 91 of 1920.

<sup>(1)</sup> (1899) 24 Bom. 260.

<sup>(2)</sup> 906) L. R. 33 I. A. 156.

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THIS was an appeal under the Letters Patent from the decision of Macleod C. J., summarily dismissing an appeal from the decision of G. B. Deshmukh, Assistant Judge of Belgaum, which confirmed the decree passed by Sumitra A. H., Subordinate Judge at Bail Hongal.

Suit for partition.

One Mallappa had three wives: Yellawa (plaintiff), Yellawa (defendant No. 2) and Tayawa (defendant No. 3). He died in 1916 without male issue.

Tayawa alleged that Mallappa had before his death adopted defendant No. 1, who was her son by her first husband. The adoption was evidenced by a registered deed of sale, dated 6th December 1905.

On the 25th August 1917 the plaintiff sued to recover her one-third share by partition of Mallappa's estate.

The defendants pleaded the adoption of defendant No. 1.

The lower Courts held that the adoption of defendant No. 1 was not proved to have taken place; and decreed the suit on that ground. They also held further that the suit was not barred by limitation.

The defendants appealed to the High Court; but their appeal was summarily dismissed by Macleod C. J. There was a further appeal under the Letters Patent.

The Letters Patent appeal was heard by a Bench consisting of Pratt and Fawcett JJ. Their Lordships referred the case to a Full Bench and delivered the following judgments.

PRATT, J.:—The plaintiff is one of three co-widows of Mallappa who died in 1916.

She filed this suit in 1917 to recover possession by partition of one-third share of her husband's estate.

The other two co-widows, Yellawa (defendant No. 2) and Tayawa (defendant No. 3), contended that Purshya,

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a son of Tayawa by a former husband, had been adopted by Mallappa in 1905. Purshya was dead, and his widow was the first defendant claiming to be sole heir through her husband.

Both the lower Courts have found that Mallappa married Purshya's mother in 1903 prior to the deed of adoption which is dated 6th December 1905. If there had been an adoption it would have been invalid: *Panchappa v. Sanganasawa*<sup>(1)</sup>. But both the lower Courts have also found it a fact that no adoption ever took place and that the deed was a sham transaction secretly executed in order to please Tayawa.

The first Court found that the suit was not barred by limitation, as the plaintiff had no knowledge of the adoption and the lower appellate Court seems to have concurred in that view.

In this appeal it is contended that plaintiff is affected with the knowledge that Mallappa had of the apparent adoption.

Under Article 118 the period of limitation is six years from the time when the alleged adoption becomes known to the plaintiff.

Under section 2 of the Indian Limitation Act the word 'plaintiff' includes any person from or through whom a plaintiff derives his right to sue.

There can be no question but that plaintiff claims as heir of her husband and that her right to sue is derived from him. In the case of *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*<sup>(2)</sup> the holder of an hereditary office was held to derive his right of suit from or through his father. Similarly an adopted son was held to derive his liability to be sued, within the meaning of the definition of defendant, from his adoptive

<sup>(1)</sup> (1899) 24 Bom. 89.

<sup>(2)</sup> (1899) 23 Mad. 271.

mother: *Padajirav v. Ramrav*<sup>(1)</sup>. So also as to judgment-debtor and auction-purchaser: *Ali Saheb v. Kaji Ahmad*<sup>(2)</sup>.

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It follows, therefore, that if Article 118 applies, the suit is time-barred and plaintiff is deprived of her inheritance by reason of a deed of which she had no knowledge and which was never intended to be acted upon.

I think this conclusion is in itself sufficient to raise a serious doubt as to the correctness of the Full Bench ruling in *Shrinivas v. Hanmant*<sup>(3)</sup> applying Article 118 to suits for possession where the plaintiff cannot succeed without displacing an adoption.

This rule was first laid down by the Privy Council in *Jagadamba Chowdhurani v. Dakhina Mohun*<sup>(4)</sup> under Article 129 of the Indian Limitation Act of 1871. That Article was as follows:—

Description of suit.	Period of limitation.	Time when period begins to run.
129. To establish or set aside an adoption.	12 years ...	The date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father.

It was not very clear what was meant by the phrase "set aside an adoption" and the Article was absurd for a Hindu widow had only to live twelve years after the making of an adoption and the claim of the reversioner was barred unless he had taken the precaution of filing a declaratory suit in her life-time.

However in *Jagadamba's case*<sup>(4)</sup> the Privy Council held that this Article applied indiscriminately to suits for a declaration and to suits for possession.

<sup>(1)</sup> (1888) 13 Bom. 160.

<sup>(3)</sup> (1899) 24 Bom. 260.

<sup>(2)</sup> (1891) 16 Bom. 197.

<sup>(4)</sup> (1886) L. R. 13 I. A. 84.

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In 1877 the Specific Relief Act was passed and section 42 gave the Courts power to make declaratory decrees. Illustration (f) is as follows:—

“A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.”

The Limitation Act of 1877 was passed in the same year and for Article 129 of the Act of 1871 were substituted two Articles as follows:—

Description of suit.	Period of limitation.	Time from which period begins to run.
118. To obtain a declaration that an alleged adoption is invalid, or never in fact took place.	Six years ...	When the alleged adoption becomes known to the plaintiff.
119. To obtain a declaration that an adoption is valid.	Six years ...	When the rights of the adopted son as such are interfered with.

I think the effect of the legislation was to restrict the operation of Articles 118 and 119 to purely declaratory suits such as those described in illustration (f). The period was reduced to six years in deference to a passage in the judgment of *Jagadamba's case*<sup>(1)</sup> suggesting that a moderate time should be allowed for litigation of the delicate and intricate questions involved in adoptions. But suits for possession even where adoptions are involved do not fall under these Articles but must be governed by the twelve years rule under Article 141. Alienations by Hindu widows give rise to questions as delicate and as intricate as adoptions. Nevertheless a suit for possession by a reversioner is governed by Article 141 even though a reversioner has filed no declaratory suit in the life-time of the widow under Article 125 corresponding to illustration (e) to section 42 of the Specific Relief Act.

(1) (1886) L. R. 13 I. A. 84.

After the passing of the Limitation Act, 1877, the case of *Mohesh Narain Moonshi v. Taruck Nath Moitra* <sup>(1)</sup> was decided by the Privy Council in 1892. The facts were simple. Shib Narain died in 1850. His widow made an invalid adoption in 1850 and died in 1884. The suit was brought in 1885 by a validly adopted son for possession of the estate. It was held following *Jagadamba's case* <sup>(2)</sup> that the suit was barred twelve years after 1851, i.e., in 1863. Then as to the contention that the suit having been brought in 1885 limitation should be decided with reference to the Act of 1877, Lord Shand held that the right of suit barred under the Act of 1871 was not revived by the Act of 1877; and that even if the latter Act were applicable it was more than doubtful whether the plaintiff would derive any advantage.

The same points arose again in the case of *Thakur Tirbhuvan Bahadur Singh v. Raja Rameshar Bakhsh Singh* <sup>(3)</sup> decided by Privy Council in 1906. The Taluka which was the subject-matter of the suit had become the property of a lady, the Thakurain Daryao Kunwar, who made the apparent adoption of the defendant in 1858 and died in 1893. The heir was the lady's brother's grandson and he filed a suit in 1899. Lord Macnaghten said (p. 163) :—

“ Mr. Cohen, who argued the case with great ability, relied entirely on the Act of 1871. He contended that the Limitation Act of 1877 did not apply because the appellant relied on title acquired before the passing of the Act of 1877, and his rights were therefore saved by section 2 of that Act. He admitted that if the Act of 1877 applied, his client was out of Court. Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the *Jagadamba's case* <sup>(2)</sup> and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of title within the meaning of section 2 of the Act of 1877.”

<sup>(1)</sup> (1892) L. R. 20 I. A. 30.

<sup>(2)</sup> (1886) L. R. 13 I. A. 84.

<sup>(3)</sup> (1906) L. R. 33 I. A. 156.

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The *obiter dictum* in *Mohesh Narain's case*<sup>(1)</sup> that the Act of 1877 did not alter the period of limitation was treated as an *obiter dictum* and ignored.

Then as to section 2 of the Limitation Act of 1877, that section is as follows:—

"All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

It refers (1) to plaintiffs' right of suit, and (2) to title acquired by the defendant.

Lord Shand had said that as plaintiff had not filed a suit, which must have been a suit for declaration, his suit for possession was barred under the Act of 1871 and not revived by the Act of 1877.

Lord Macnaghten did not refer to the plaintiff's right of suit but said that defendant could not acquire title by the plaintiff's omission to file a suit for a declaratory decree. But the necessary implication is that the right to sue for a declaration is distinct from the right to sue for possession, and this is directly contradictory to the *ratio decidendi* of Lord Shand in *Mohesh Narain's case*<sup>(1)</sup>.

I think the only conclusion from this judgment is that the Privy Council do not mean to follow *Jagadamba's case*<sup>(2)</sup> and that they do not regard suits for possession and suits for declaration where an adoption is disputed as subject to the same period of limitation. Indeed their Lordships seem to have made an express declaration to that effect in the case of *Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan*<sup>(3)</sup> in the following passage:—

"Although their Lordships consider that the question of an adoption was an immaterial issue, they think it is advisable to say that the omission to

<sup>(1)</sup> (1892) L. R. 20 I. A. 30.

<sup>(2)</sup> (1886) L. R. 13 I. A. 84.

<sup>(3)</sup> (1911) L. R. 39 I. A. 19 at p. 25.

bring within the period prescribed by Article 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property."

Now *Shrinivas v. Hanmant*<sup>(1)</sup> was based largely on *Jagadamba's case*<sup>(2)</sup>, the *obiter dictum* of Lord Shand in *Mohesh Narain's case*<sup>(3)</sup> and the other *obiter dictum* of the same Judge in *Luchmun Lal Chowdhry v. Kanhya Lal Mowar*<sup>(4)</sup>.

I think *Shrinivas v. Hanmant*<sup>(1)</sup> has been overruled by *Tirbhuwan Bahadur Singh's case*<sup>(5)</sup>.

But the Division Bench of this Court ruled in *Shrinivas Sarjerav v. Balwant Venkatesh*<sup>(6)</sup> that *Shrinivas v. Hanmant*<sup>(1)</sup> was not overruled.

In *Shrinivas Sarjerav v. Balwant Venkatesh*<sup>(6)</sup> Chandavarkar J. distinguishes *Tirbhuwan's case*<sup>(5)</sup> on two grounds.

(1) The plaintiff was a minor until 1896 and brought his suit within three years of attaining majority and no knowledge could be imputed to him during his minority.

(2) The Thakurain was owner in her own right and there was no title in the adopted son till her death in 1893.

With all respect I venture to think that the first reason overlooks the fact that plaintiff claimed through his father and grandfather and must therefore be affected with their knowledge. And the second reason practically admits that the Act of 1877 has superseded *Jagadamba's case*<sup>(2)</sup>. It made no difference that the

(1) (1899) 24 Bom. 260.

(2) (1886) L. R. 13 I. A. 84.

(3) (1892) L. R. 20 I. A. 30.

(4) (1894) L. R. 22 I. A. 51.

(5) (1906) L. R. 33 I. A. 156.

(6) (1913) 37 Bom. 513.

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Thakurain was full owner for the next heir could still have sued for a declaration. If the Act of 1871 had been law in 1896 plaintiff could not have sued in that year to dispute an adoption of 1858. But he succeeds under the Act of 1877 because the suit he could have filed in the life-time of the widow could only have been declaratory and the defendant had acquired no title by lapse of time. Granted—but what about plaintiff's right to sue? His right to challenge the adoption barred already according to *Jagadamba's case*<sup>(1)</sup> and not revived according to *Mohesh Narain's case*<sup>(2)</sup>? The Privy Council do not deal with this because they consider that Article 129 of the Act of 1871 is limited to declaratory suits only.

It is true that in *Malkarjun v. Narhari*<sup>(3)</sup> decided by the Privy Council in 1900 *Jagadamba's case*<sup>(1)</sup> was quoted with approval with reference to the applicability of Article 12 (a), to suits for possession. This Article uses the same phrase "setting aside" with reference to sales that Article 129 of the Limitation Act, 1871, did with reference to adoptions. This identity of expression made a reference to *Jagadamba's case*<sup>(1)</sup> inevitable. But there is a distinction, for in the first place Courts are reluctant to disturb judicial sales and in the second place a sale without jurisdiction is null and void and does not affect limitation—*Khiarajmal v. Daim*<sup>(4)</sup>—while the same principle cannot be applied to an adoption.

I venture respectfully to express dissent from Chandavarkar J. that an *obiter dictum* of the Privy Council is binding on this Court (*Shrinivas Sarjerav v. Balwant Venkatesh*<sup>(5)</sup>, supra at page 531). An *obiter dictum* is but an *obiter dictum* and has no authority

<sup>(1)</sup> (1886) L. R. 13 I. A. 84.<sup>(3)</sup> (1900) L. R. 27 I. A. 216.<sup>(2)</sup> (1892) L. R. 20 I. A. 30.<sup>(4)</sup> (1904) 32 Cal. 296 at p. 315.<sup>(5)</sup> (1913) 37 Bom. 513 at p. 531.

however exalted the tribunal that utters it. There are *obiter dicta* on the one side in *Mohesh Narain's case*<sup>(1)</sup> and in *Luchamun Lal Chowdhari's case*<sup>(2)</sup> and in *Malkarjun v. Narhari*<sup>(3)</sup> and on the other side in *Muhammad Umar Khan's case*<sup>(4)</sup>. But *Tirbhuvan Bahadur Singh's case*<sup>(5)</sup> involves a decision that the right to sue for a declaration that an adoption is invalid is a different right from the right to sue for possession of property affected by the adoption.

I would, therefore, refer to a Full Bench the question whether in view of the Privy Council decision in *Tirbhuvan Bahadur Singh's case*<sup>(6)</sup>, the decision in *Shrinivas v. Hanmant*<sup>(7)</sup> is still good law and whether suits for possession where the plaintiff cannot succeed except by displacing an alleged adoption are governed by Article 118 of the Indian Limitation Act.

FAWCETT, J. :—I agree with the proposed reference to Full Bench. I think there are good grounds for such a reference, even though in *Bharma v. Balaram Sakharam*<sup>(8)</sup> a Division Bench took the same view as that taken in *Shrinivas Sarjerav v. Balwant Venkatesh*<sup>(9)</sup>.

I was at first inclined to think that a distinction might be made between Mallappa's right to sue to obtain a declaration that the alleged adoption was invalid and the right of the plaintiff, his widow. If Mallappa sued, he did so because the setting up of the adoption was an infringement of Mallappa's rights, as a sole owner : see *Chinnasami Mudaliar v. Ambalavana Mudaliar*<sup>(10)</sup>. The plaintiff as his wife with contingent rights in the property had, so to speak, an independent right to sue to set aside the adoption

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(1) (1892) L. R. 20 I. A. 30.

(5) (1906) L. R. 33 I. A. 156.

(2) (1894) L. R. 22 I. A. 51.

(6) (1899) 24 Bom. 260.

(3) (1900) L. R. 27 I. A. 216.

(7) (1918) 43 Bom. 63.

(4) (1911) L. R. 39 I. A. 19.

(8) (1913) 37 Bom. 513 to p. 531.

(9) (1905) 29 Mad. 48 at p. 49.

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even during Mallappa's life-time. This is on the principle that any person having right in property, whether present or contingent, is entitled to come to a Court of Equity to complain of any attempt which may be made by a person having no authority to do so, to deal with the property in a mode which may ultimately harm him in the matter of his title : see *Beharee Lall v. Modho Lall*<sup>(1)</sup>. This is recognized in illustrations (d) to (f) of section 42 of Specific Relief Act. Even before the Act was passed Westropp C. J. laid down that the Legislature had recognised the right of a person to bring a suit to set aside an adoption as a substantive proceeding independent of any claim to property : see *Kalovakom Bhujangrav v. Padapavalad Bhujangrav*<sup>(2)</sup>. But in so far as the plaintiff derives her right to sue from the fact of her having married Mallappa, it is difficult to say that the plaintiff in this case did not derive her right to sue from Mallappa within the meaning of clause (b) of section 2 of the Indian Limitation Act. This view is strengthened by the decision in *Bhagwanta v. Sulchi*<sup>(3)</sup> that, where there are several reversioners entitled successively under the Hindu law to an estate held by a Hindu widow, no one of them derives his right to sue from the other, even though that other happens to be his father, but each derives his title from the last full owner. No doubt the definition in section 2 only applies "unless there is anything repugnant in the subject, or the context". But I do not think there is anything in Article 118 which brings the case under this exception. Accordingly it seems to me that the appellants are right in their contention that the plaintiff is affected by the knowledge of Mallappa, and a case like this shows the absurdity that can arise from the view taken in *Shrinivas v. Hanmani*<sup>(4)</sup>.

(1) (1874) 21 W. R. 430.

(2) (1876) 1 Bom. 248.

(3) (1899) 22 All. 33.

(4) (1899) 24 Bom. 260.

THE reference to the Full Bench was heard by Macleod C. J., and Shah and Fawcett JJ.

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*Coyajee*, with *Nilkanth Atmaram*, for the appellants :—The question for decision by the Full Bench is whether in view of the Privy Council decision in *Thakur Tirbhuwan Bahadur Singh v. Raja Rameshar Bakhsh Singh*<sup>(1)</sup>, the case of *Shrinivas v. Hanmant*<sup>(2)</sup> is good law. We submit it is. It is so held by two different benches of our High Court: *Shrinivas Sarjerav v. Balwant Vankatesh*<sup>(3)</sup> and *Bharma v. Balaram Sakharam*<sup>(4)</sup>.

When considering *Tirbhuwan's case*<sup>(5)</sup> it is essential to note a distinction between (1) an adoption by a widow to her husband, and (2) an adoption by her to herself, i.e., nominating a person as heir. In the first case, the adopted son at once becomes entitled to the property: in the other case, the adopted son would succeed to his adoptive mother's estate on her death.

In *Tirbhuwan's case*<sup>(5)</sup> the facts were that the widow had become absolute owner of the estate on the death of her husband, but she was recognised as a Talukdar by Government in her own independent right. She then made an adoption. The right of the adopted son would come into being on the widow's death and not on the so-called adoption (see pp. 738 and 739). In this case, the case of *Shrinivas v. Hanmant*<sup>(2)</sup> was cited at the bar; and their Lordships threw no doubt either on *Jagadamba's case*<sup>(6)</sup> or on *Shrinivas v. Hanmant*<sup>(2)</sup>.

In *Jagadamba's case*<sup>(6)</sup> the difficulty now suggested has been answered: see the observations at p. 321.

(1) (1906) L. R. 33 I. A. 156.

(4) (1918) 43 Bom. 63.

(2) (1899) 24 Bom. 260.

(5) (1906) L. R. 33 I. A. 156.

(3) (1913) 37 Bom. 513.

(6) (1886) 13 Cal. 308.

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These observations were repeated in *Malkarjun v. Narhari*<sup>(1)</sup>.

The word "plaintiff" in the third column of Article 118 of the Indian Limitation Act 1877 has an extended meaning. It includes the person from or through whom the plaintiff derives his right to sue. The plaintiff here claims from or under Mallappa, who did possess knowledge of the adoption. One reversioner does not derive his right from the other reversioner. Each reversioner takes in his own independent right: *Govinda Pillai v. Thayammal*<sup>(2)</sup>; see *Yemunabai v. Balshet*<sup>(3)</sup> and *Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan*<sup>(4)</sup>.

I adopt the reasoning in the two Bombay cases of *Shrinivas v. Balwant*<sup>(5)</sup> and *Bharma v. Balaram*<sup>(6)</sup>.

*G. N. Thakor*, with *H. B. Gumaste* and *J. G. Rele*, for the respondent:—All the Indian High Courts are agreed that Article 118 of the Indian Limitation Act, 1877, does not apply to suits for possession.

The Allahabad High Court has all along held that Article 118 does not apply to suits for possession: *Basdeo v. Gopal*<sup>(7)</sup>; *Ganga Sahai v. Lekhraj Singh*<sup>(8)</sup>; *Ghandharap Singh v. Lachman Singh*<sup>(9)</sup>; *Natthu Singh v. Gulab Singh*<sup>(10)</sup>; and *Lali v. Murlidhar*<sup>(11)</sup>. The Bombay High Court had at first held similarly: *Padajirav v. Ramrav*<sup>(12)</sup>; *Fannyamma v. Manjaya*<sup>(13)</sup> and *Harilal v. Bai Rewa*<sup>(14)</sup>; but it changed its view after: *Shrinivas v. Hanmant*<sup>(15)</sup>. The Madras High

(1) (1900) 25 Bom. 337 at p. 352.

(8) (1886) 9 All. 253 at p. 267.

(2) (1904) 28 Mad. 57.

(9) (1888) 10 All. 485.

(3) (1903) 5 Bom. L. R. 584.

(10) (1895) 17 All. 167.

(4) (1911) L. R. 39 I. A. 19.

(11) (1901) 24 All. 195.

(5) (1913) 37 Bom. 513.

(12) (1888) 13 Bom. 160.

(6) (1918) 43 Bom. 63.

(13) (1895) 21 Bom. 159.

(7) (1886) 8 All. 644.

(14) (1895) 21 Bom. 376.

(15) (1899) 24 Bom. 260.

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Court at first applied Articles 118 and 119 to suits for declaration as well as for possession: *Ratnamasari v. Akilandammal*<sup>(1)</sup>; yet it changed its view after *Thakur Tirbhuwan Bahadur Singh's case*<sup>(2)</sup> and limited the Articles to suits for declaration: *Velaga Mangamma v. Bandlamudi Veerayya*<sup>(3)</sup>. The Calcutta High Court has consistently held that Article 118 does not apply to suits for possession: *Lala Parbhu Lal v. Mylne*<sup>(4)</sup>; *Jagannath Prasad Gupta v. Runjit Singh*<sup>(5)</sup> and *Ram Chandra Mukerjee v. Ranjit Singh*<sup>(6)</sup>.

The Privy Council decision in *Thakur Tirbhuwan Bahadur Singh v. Raja Rameshar Bakhsh Singh*<sup>(7)</sup> is based on a different Act of Limitation in which the Article is quite differently worded. The decision does not at all come in the way. In *Mohesh Narain Moonshi v. Taruck Nath Moitra*<sup>(8)</sup> the question was by what Act of Limitation the suit was governed, and the Board held that the Act of 1871 applied. In *Luchmun Lal Chowdhry v. Kanhya Lal Mowar*<sup>(9)</sup> the Privy Council applied Article 141 in preference to Article 118 of the Indian Limitation Act, 1877.

In *Muhammad Umar Khan v. Muhammad Niazud-din Khan*<sup>(10)</sup> their Lordships held that the question of adoption was an immaterial issue, and definitely laid down that Article 118 of the Indian Limitation Act was no bar to a suit for possession of property. The question as to the applicability of Article 118 was argued before their Lordships because the trial Court, following the ruling in *Shrinivats v. Hanmant*<sup>(10)</sup> had held that the suit was governed by Article 118, but with this view their Lordships did not agree. The ground on which their Lordships'

(1) (1902) 26 Mad. 291.

(2) (1906) L. R. 33 I. A. 156.

(3) (1907) 30 Mad. 308.

(4) (1887) 14 Cal. 401 at p. 416.

(5) (1897) 25 Cal. 354.

(6) (1899) 27 Cal. 242.

(7) (1892) L. R. 20 I. A. 30.

(8) (1894) L. R. 22 I. A. 51.

(9) (1911) L. R. 39 I. A. 19.

(10) (1899) 24 Bom. 260.

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decision proceeded was that under the general Mahomedan law an adoption could not be made, and an adoption if made in fact by a Mahomedan could carry with it no right of inheritance.

*Muhammad Umar Khan's case*<sup>(1)</sup> proceeded from the Punjab and in a recent Full Bench decision of the Punjab High Court *Arjan Singh v. Lachhman Singh*<sup>(2)</sup> on the question of applicability of Articles 118 and 144, the Court, while considering the effect of their Lordships' decision observed: "The language used by their Lordships.....shows.....that their Lordships, in view of the conflict of decisions cited in the judgment of this Court on the true nature and scope of Article 118 of the Limitation Act, 1877, desired to express their opinion clearly and definitely on the point of limitation involved so as to put an end to that conflict."

*Coyajee*, in reply :—The only question for consideration now is whether *Shrinivas v. Hanmant*<sup>(3)</sup> is good law. In *Shrinivas Sarjerav v. Balwant Venkatesh*<sup>(4)</sup> Scott C. J. has considered all cases and come to the conclusion that it is good law. This view derives great strength if Articles 118 and 119 are read together. The adoption referred to there is an adoption under Hindu law.

C. A. V.

MACLEOD, C. J.:—One Mallappa Tammappa died in 1916, leaving three widows and no children. The plaintiff, one of the widows, sued her co-widows for partition. They were made defendants Nos. 2 and 3. The 1st defendant was the son of defendant No. 3 by her first husband. The defendants' answer was that Mallappa had adopted the 1st defendant in 1905 before

(1) (1911) L. R. 39 I. A. 19.

(3) (1899) 24 Bom. 260.

(2) (1914) P. R. No. 81 of 1914 F. B.

(4) (1913) 37 Bom. 513, at p. 537.

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he married defendant No. 3. The widows therefore were not the heirs of Mallappa. Defendant No. 1 had died after suit leaving a widow. The suit being brought more than six years after the adoption was barred by limitation. The issues in the trial Court were :

(1) Is it proved that the deceased 1st defendant was adopted by Mallappa ?

(2) Is it proved that this adoption was before the remarriage of defendant No. 3 to Mallappa ?

(3) If not, is the adoption valid ?

(4) Is the suit in time under Article 118 of the Limitation Act ?

The Trial Judge decided—

(1) that though Mallappa executed an adoption deed, no adoption took place,

(2) that defendant No. 3 was married to Mallappa in 1903 ;

(3) that the adoption, if it had taken place in 1905, was invalid ;

(4) that as no adoption was proved and the passing of the adoption deed was kept secret, the plaintiff had no knowledge of any claim by the adopted son more than six years before suit.

Accordingly a decree for partition was passed.

In first appeal the learned Judge agreed with the trial Judge that no adoption had taken place. He thought that the issue of limitation was unnecessary, and, if it was, he was prepared to agree with the trial Judge. A second appeal was dismissed under Order XLI, Rule 11, but an appeal under the Letters Patent having been admitted, it came on for argument before Pratt and Fawcett JJ.

Those learned Judges were of opinion that as under section 2 of the Indian Limitation Act the word 'plaintiff' included any person from or through whom a plaintiff derived his right to sue, and the plaintiff claimed as heir of her husband, she was affected with the knowledge of the alleged adoption.

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It would follow that if Article 118 of the Indian Limitation Act applied, the suit was barred, because Mallappa had executed an adoption deed which he never intended to be acted upon and of which plaintiff had no knowledge.

That such a conclusion would be possible would follow from the Full Bench decision of this Court in *Shrinivas v. Hanmant*<sup>(1)</sup> and the learned Judges were of opinion that so startling a result necessarily raised in their minds the doubt whether that decision was correct.

It would be all the more startling considering the peculiar facts of this case, for it has been found that Mallappa pacified the demands of defendant No. 3 that provisions should be made for her son by her first husband by secretly executing a deed purporting to evidence an adoption, which had never taken place, and which he must have known would be invalid if it had been made.

The decision in *Shrinivas v. Hanmant*<sup>(1)</sup> was to this effect that where a plaintiff in a suit for possession of property is met by the claim of a defendant setting up a title as an adopted son, the plaintiff's suit is barred unless it is brought within six years of the date when the alleged adoption became known to the plaintiff.

The question referred to us is whether in view of the decision of the Privy Council in *Thakur Tirbhuwan Bahadur Singh v. Raja Rameshar Bahksh Singh*<sup>(2)</sup> the decision in *Shrinivas v. Hanmant*<sup>(1)</sup> is still good law, and whether suits for possession where the plaintiff cannot succeed except by displacing an alleged adoption are governed by Article 118 of the Indian Limitation Act.

<sup>(1)</sup> (1899) 24 Bom. 260.

<sup>(2)</sup> (1906) L. R. 33 I. A. 156.

It is necessary, therefore, to consider the facts of *Tirbhuvan's case*<sup>(1)</sup>, since *Shrinivas v. Hanmant*<sup>(2)</sup> was not mentioned in the judgment, and it can only be said to have been overruled if at all by implication. Thakur Basant Singh was the last male owner of the Taluqua, of Samarpaha. He died in November 1857 leaving his widow as his next heir. Thereafter a Sanad was granted to the widow and she became Taluqdar in her own right. She died intestate in 1893. The estate was claimed by Thakur Sher Bahadur as her son adopted after her husband's death. The plaintiff who attained majority in 1896 filed the suit in 1899 claiming to succeed as the grandson of the widow's eldest brother. Both the lower Courts held in favour of the plaintiff. On appeal to the Privy Council it was argued that in any event there was an apparent adoption, sufficient to satisfy the provisions of the Limitation Act of 1871 as interpreted by the Privy Council in *Jagadamba Chowdhvani v. Dakhina Mohun*<sup>(3)</sup>. It was admitted that if the Act of 1877 applied, the appellant defendant had no case but it was argued that as the appellant relied on title acquired before the Act of 1877 was passed, his rights were saved by section 2 of the Act of 1877.

That section is as follows :

"All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

Their Lordships said at p. 163 :—

"Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the *Jagadamba case* and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of title within the meaning of section 2 of the Act of 1877."

(1) (1906) L. R. 33 I. A. 156.

(2) (1899) 24 Bom. 260.

(3) (1886) L. R. 13 I. A. 84.

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To appreciate the full meaning of the decisive passage of the judgment it will be necessary to follow the history of the case in the lower Courts and the arguments of counsel before the Privy Council.

In the trial Court it was argued that the suit was barred by Article 118, Schedule II of the Limitation Act of 1877 as the adoption of the defendant became known to the plaintiff and his ancestors more than six years before the institution of the suit. After referring to *Jagadamba's case*<sup>(1)</sup> and *Mohesh Narain Moonshi v. Taruck Nath Moitra*<sup>(2)</sup> the learned Judge said (p. 158): "the above decisions were given with reference to Article 129 of the old Act of 1871...It is contended on behalf of the defendant that the principle enunciated in the above rulings is applicable to cases governed by the existing law". Then after referring to *Parvathi Ammal v. Saminatha Gurukul*<sup>(3)</sup> and *Shrinivas v. Hanmant*<sup>(4)</sup> which adopted that view, and the numerous decisions to the contrary, he continued (p. 159) "there seems to be a consensus of opinion in most of the High Courts that Article 118 of the present Act does not apply to suits for possession and I do not think we are justified in departing from it without the distinct authority of the Privy Council". The Court of the Judicial Commissioner of Oudh concurred in this view. Before the Privy Council Mr. Cohen argued for the appellant that Act IX. of 1871 applied, and as no suit had been filed within the time fixed by Article 129 of the schedule to that Act the validity of the adoption could not be questioned in the plaintiff's suit. The principle laid down in *Jagadamba's case*<sup>(1)</sup> that when a suit to set aside an adoption was barred, so also was any suit which in order to succeed must first get

(1) (1886) L. R. 13 I. A. 84.

(2) (1896) 20 Mad. 40.

(3) (1892) L. R. 20 I. A. 30.

(4) (1899) 24 Bom. 260.

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rid of the adoption applied equally to Article 118 of the Schedule II to the Act of 1877. Mr. De Gruyther for the respondent argued that the suit was governed by Article 144 of Schedule II of Act XV of 1877. Article 118 differed in its terms from Article 129 of the earlier Act and did not apply to a suit for possession. There had been no acquisition of title by the appellant in virtue of an apparent adoption within the meaning of section 2 of the Act of 1877. Nor could it be laid down under Act XV of 1877 that a plaintiff must sue for a declaratory decree before suing for possession, and that his suit for possession was barred if a declaratory action was barred.

It will be seen, therefore, that the appellant, though he mainly relied on the contention that he had acquired a title under the Act of 1871, and that title was preserved by section 2 of the Act of 1877, also contended that the principle laid down in cases under Article 129 of the Act of 1871 applied to cases under Article 118 of the Act of 1877 and that the suit was barred on that ground, *Shrinivas v. Hanmant*<sup>(1)</sup> being relied upon in Mr. Cohen's reply: No doubt the suggestion that the immunity gained by the appellant by the lapse of six years, without a declaratory suit being filed, amounted to acquisition of title was too fanciful to demand any attention. It would seem, therefore, obvious to me that their Lordships, having before them all the arguments which have been raised before us in this reference on behalf of the appellant, deliberately adopted the contrary view as contended for by the respondents.

And as if that had not been made sufficiently clear in the judgment, their Lordships in *Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan*<sup>(2)</sup>

(1) (1899) 24 Bom. 260.

(2) (1911) L. R. 39 I. A. 19.

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referred to *Tirbhuwan's case*<sup>(1)</sup> as laying down that the omission to bring, within the period prescribed by Article 118 of the 2nd Schedule of the Indian Limitation Act of 1877, a suit to obtain a declaration that an alleged adoption was invalid or never in fact took place was no bar to a suit for possession of property. A Division Bench of this Court in *Shrinivas Sarjerav v. Balwant Venkatesh*<sup>(2)</sup> came to the conclusion that the decision in *Shrinivas v. Hanmant*<sup>(3)</sup> had not been overruled by the Privy Council. The referring judgment of Pratt J. analyses the reasons given for that conclusion and points out the fallacies which underlie them. As a matter of fact when the Court was of opinion that the adoption of the defendant was valid the question of limitation became academical. I shall not discuss in detail the reasons given by the learned Judges, for I agree with what has been said by Pratt J. I have already pointed out that their Lordships of the Privy Council, having all the arguments before them which have been from time to time raised in this Court, came to a conclusion absolutely inconsistent with those reasons, and I see no object in referring to various passages in the judgments in other cases as showing that their Lordships could not have meant what they said in *Tirbhuwan's case*<sup>(4)</sup>. What their Lordships did mean is clearly enunciated in *Muhammad Umar Khan's case*<sup>(4)</sup>. Whatever the nature of the adoption in that case and whatever its effect might be on the status of the person adopted, it was an adoption within the meaning of the word in Article 118 of Act XV of 1877, and if it was set up as a defence to a suit for possession, the omission to bring a declaratory suit within six years was no bar to the suit for possession. I think the question can also

<sup>(1)</sup> (1906) L. R. 33 I. A. 156.<sup>(3)</sup> (1899) 24 Bom. 260.<sup>(2)</sup> (1918) 37 Bom. 513.<sup>(4)</sup> (1911) L. R. 39 I. A. 19.

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be considered from another point of view. -The Limitation Act is an Act for the limitation of suits, prescribing the period within which suits asking for various reliefs can be brought. In a suit for possession or title, the only answer by the defendants which can be successful is a better title than that proved by the plaintiff, and such a title may be obtained by adverse possession. An adoption may be the origin of such a title being acquired, but the defendant may succeed in his title by adverse possession and not by virtue of his adoption. But if his title depends on adoption apart from the question of adverse possession, he may succeed by proving his adoption and the question of the limitation of plaintiff's suit does not arise, provided it is brought within the period prescribed for the particular suit he has brought. For the plaintiff is in the position of a defendant when he is resisting a claim by adoption and there is no bar of limitation to a defence. The mere fact that an adoption alleged to have taken place is not challenged does not set time running in favour of the adopted son, so that he may acquire a title, unless he is in possession. Then if he is sued he can either say "I have been in possession for twelve years" or "I am an adopted son and I have a better title than the plaintiff". It is then open to the plaintiff to say "your adoption as a matter of fact never took place or, if it did, it is invalid".

Lastly, I may refer to the following decisions of High Courts of Calcutta, Madras and Allahabad: *Ram Chandra Mukerjee v. Ranjit Singh*<sup>(1)</sup>; *Natthu Singh v. Gulab Singh*<sup>(2)</sup>; *Velaga Mangamma v. Bandlamudi Veerayya*<sup>(3)</sup> which are opposed to the view taken by this Court in *Shrinivas v. Hanmani*<sup>(4)</sup>. The judgment

(1) (1899) 27 Cal. 242.

(3) (1907) 30 Mad. 308.

(2) (1895) 17 All. 167.

(4) (1899) 24 Bom., 260.

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in *Velaga Mangamma v. Bandlamudi Veerayya*<sup>(1)</sup> shows that the learned Judges were clearly of opinion that the Privy Council in *Tirbhuwan Bahadur Singh's case*<sup>(2)</sup> overruled the view that a suit for possession where the validity of an adoption has to be determined is governed by Article 118 of the Act of 1877.

I would, therefore, answer both parts of the question referred to us in the negative.

SHAH, J.:—The question referred to the Full Bench is whether, in view of the Privy Council decision in *Tirbhuwan Bahadur Singh's case*<sup>(2)</sup>, the decision in *Shrinivas v. Hanmant*<sup>(3)</sup> is still good law and whether suits for possession where the plaintiff cannot succeed except by displacing an alleged adoption are governed by Article 118 of the Limitation Act.

My answer is that *Shrinivas v. Hanmant*<sup>(3)</sup> is not overruled by *Tirbhuwan Bahadur Singh's case*<sup>(2)</sup>, that it is still good law in this Presidency, and that Article 118 would apply to suits for possession where there is a title by adoption to be displaced to the extent indicated in *Shrinivas' case*.<sup>(3)</sup>

We are not concerned on this reference with the questions whether on the finding of the lower appellate Court the rule in *Shrinivas v. Hanmant*<sup>(3)</sup> is applicable to the present case and whether on those facts the suit would be barred under Article 118. I express no opinion thereon as they are points for the Division Bench to decide.

I desire to state briefly my reasons for the answer to the question referred to us.

In the first place in *Thakur Tirbhuwan Bahadur Singh v. Raja Rameshar Bakhsh Singh*<sup>(2)</sup> their

<sup>(1)</sup> (1907) 30 Mad. 308.

<sup>(2)</sup> (1906) L. R. 33 I. A. 156.

<sup>(3)</sup> (1899) 24 Bom. 260.

Lordships do not in terms purport to overrule *Jagadamba Chodhrani v. Dakhina Mohun*<sup>(1)</sup> and the other cases which followed it, among which the case of *Shrinivas v. Hanmant*<sup>(2)</sup> must be included. That case was decided on the ground taken by the counsel for the appellant whether the alleged adoption was or was not an apparent adoption to which the ruling in *Jagadamba's case*<sup>(1)</sup> would apply if the Act of 1871 were then in force. Their Lordships hold in that case that, giving full effect to *Jagadamba's case*<sup>(1)</sup> and the other cases which followed it they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption, amounts to acquisition of title within the meaning of section 2 of the Act of 1877. That is the point which they decided and I am slow to accept the view that if their Lordships meant to overrule *Shrinivas v. Hanmant*<sup>(2)</sup> they would have left it to implication as to which there is so much doubt and difficulty. In other words unless the implication is clear, I think that it would not be right to treat the decision in *Shrinivas v. Hanmant*<sup>(2)</sup> as overruled.

I do not think that the implication is by any means clear. The suggested implication is based upon the consideration that it was conceded in the argument by counsel for the appellant in that case that the Act of 1877 did not apply, and admitted that he was out of Court if the Act of 1877 applied. The difficulty of inferring from this circumstance that their Lordships meant to overrule *Shrinivas v. Hanmant*<sup>(2)</sup> is clear from the judgments in *Shrinivas Sarjerav v. Balwant Venkatesh*<sup>(3)</sup> followed in *Bharma v. Balaram Sakharam*<sup>(4)</sup>. I do not for the moment say anything

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<sup>(1)</sup> (1886) L. R. 13 I. A. 84.<sup>(3)</sup> (1913) 37 Bom. 513.<sup>(2)</sup> (1899) 24 Bom. 260.<sup>(4)</sup> (1918) 43 Bom. 63.

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as to the correctness of the view accepted in these two decisions as regards the effect of the decision of the Privy Council in *Tirbhuwan Bahadur Singh's case*<sup>(1)</sup>. But the implication, such as it is, is by no means so clear as to give rise to no doubt or difficulty. Where that is the case I do not think that it is right to treat a Full Bench decision or any decision as overruled by implication.

Secondly, on the merits I feel by no means clear that their Lordships meant to overrule *Shrinivas v. Hanmant*<sup>(2)</sup>. The adoption in that case was not the ordinary adoption which, according to the Hindu law, gives title but it was really a nomination of an heir and an adoption only in the popular sense. It is possible that that circumstance may have influenced the counsel for the appellant in taking up the position with reference to the Act of 1877 that he did. Then the facts in that case were so special that I think it is entirely unsafe to hold that, because it was admitted in that case that, if the Act of 1877 applied, the defendant was out of Court, their Lordships meant to overrule *Shrinivas v. Hanmant*<sup>(2)</sup>. It is possible to attribute that admission to other grounds and after giving the point my best attention, I am unable to hold that, in view of *Tirbhuwan Bahadur Singh's case*<sup>(1)</sup>, *Shrinivas v. Hanmant*<sup>(2)</sup> should be treated as overruled.

I do not think that the observations in *Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan*<sup>(3)</sup>, which have been relied upon, have any such effect. Those observations were made in a case in which the parties were Mahomedans and their Lordships distinctly point out that under the general Mahomedan law an adoption cannot be made; an adoption if made

<sup>(1)</sup> (1906) L. R. 33 I. A. 156.

<sup>(2)</sup> (1899) 24 Bom. 260.

<sup>(3)</sup> (1911) L. R. 39 I. A. 19.

in fact by a Mahomedan could carry with it no right of inheritance. The preceding observations relating to Article 118 are applicable to a suit for possession like the one which their Lordships had to deal with in that case in which an alleged adoption carried with it no right of inheritance; at least the observations are capable of being read in that sense, and were read in that sense in *Shrinivas Sarjerav v. Balwant Venkatesh*<sup>(1)</sup>. It is significant that in *Tirbhuwan Bahadur Singh's case*<sup>(2)</sup> their Lordships had to deal with an adoption in the popular sense and not one which would carry with it any title to property, and the reference to that case in *Muhammad Umar Khan's case*<sup>(3)</sup> when looked at in the light of the context is capable of being read in that sense.

Thus, on the whole, it is clear to my mind that *Shrinivas v. Hanmant*<sup>(4)</sup> cannot be treated as overruled and must be accepted as good law.

As regards the second part of the question I admit that it is desirable that there should be uniformity in the decisions on a point of this character as far as possible in different High Courts and it is clear that the other High Courts have not accepted the view taken in *Shrinivas v. Hanmant*<sup>(4)</sup>. That, however, is a general consideration of importance but necessarily of limited application. I do not think that it would be right to disturb a rule of limitation affecting titles to property, deliberately laid down so far back as 1899, and consistently followed during all these years in this Presidency, on such a general ground. It seems to me that the main purpose of this reference is to settle the question as to whether *Shrinivas v. Hanmant*<sup>(4)</sup> is overruled by the decision in *Tirbhuwan Bahadur*

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(1) (1913) 37 Bom. 513.

(3) (1911) L. R. 39 I. A. 19.

(2) (1906) L. R. 33 I. A. 156.

(4) (1899) 24 Bom. 260.

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*Singh's case*<sup>(1)</sup> and not to invite a reconsideration of the decision of the Full Bench in that case. It seems to me that the final word on this point must come either from the Legislature or from the Privy Council. We are informed that the question as to the correctness of *Shrinivas v. Hanmant*<sup>(2)</sup> arises in an appeal from this Court to the Privy Council, which has been admitted, and in which the point is likely to be decided. The present state of the decisions is embarrassing to those whose rights are affected by the application of the rule in *Shrinivas v. Hanmant*<sup>(3)</sup>.

I do not consider it necessary to re-examine the whole subject with a view to consider whether *Shrinivas v. Hanmant*<sup>(2)</sup> has been rightly decided. Under the circumstances I think that the rule in that case should be applied so far as it may be applicable to the facts of any particular case.

FAWCETT, J. :—I agree with the learned Chief Justice that both parts of the question referred to the Full Bench should be answered in the negative. I concur generally in his reasons and will abstain from adding to the great quantity of literature on the point, in which the arguments *pro* and *con* are fully stated. In brief, I believe that the Privy Council *did* intend in *Tirbhuwan Bahadur Singh's case*<sup>(1)</sup> to decide the point that had been fully argued before them, whether the principle of *Jagadamba's case*<sup>(2)</sup> was applicable to cases governed by the Limitation Act of 1877, Article 118. I think, therefore, that we should fall into line with all the other High Courts in India, and cease to give effect to the view taken in *Shrinivas v. Hanmant*<sup>(3)</sup>.

*Answers accordingly.*

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(1) (1906) L. R. 33 I. A. 156. (2) (1899) 24 Bom. 260.

(3) (1886) L. R. 13 I. A. 84.