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QUEEN-EMPRESS v. BHAGWANTIA.

of witnesses to a statement, but there is nothing to compel a witness to sign, and we very much doubt whether any of the by-standers would drag themselves into a case by signing a statement made under s. 161 of the Code of Criminal Procedure, 1882. We set aside the order of acquittal of the Sessions Judge, and we convict Musammat Bhagwantia of the offence charged under s. 193 of the Indian Penal Code, and, taking into account the fact that she has already been imprisoned for over two months, we sentence her to be rigorously imprisoned for fourteen days for the offence of which we have convicted her.

APPELLATE CIVIL.

1892.
July 12.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

IN THE MATTER OF PETITION OF SITA RAM KESHO AND OTHERS.*

Act I of 1868, *s.* 3, *cl.* (1)—*Act X of* 1877, *s.* 599—*Civil Procedure Code, s.* 599—*Act VII of* 1888, *s.* 57—*Act XV of* 1877, *ss.* 2 *and* 5: *sch. ii, arts* 177 *and* 178—*Application for leave to appeal to Her Majesty in Council—Limitation.*

Section 599 of Act No. XIV of 1882 was not inconsistent with article 177 of the second schedule of Act No. XV of 1877 as read in conjunction with the provisions contained in the sections of that Act which are applicable to article 177. The limitation therefore for an application for leave to appeal to Her Majesty in Council is six months from the date of the decree to appeal from which leave is sought.

The provisions of the second paragraph of s. 5 of Act No. XV of 1877 do not extend to applications for leave to appeal to Her Majesty in Council.

Fazal-un-nissa Begam v. *Mulo* (1), *Burjore* and *Bhawani Pershad* v. *Bhagana* (2), *Lakshmi* v. *Ananta Shanbaga* (3), and *Ganga Gir* v. *Balwant Gir* (4) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. H. S. Reid*, for the applicants.

The Hon'ble Mr. *Spankie*, for the opposite party.

EDGE, C. J., and TYRRELL, J.—This application under ss. 598 and 600 of the Code of Civil Procedure was presented to this Court on the 19th of February 1891 by the plaintiffs in the suit,

* Application No. 4 of 1892 for leave to appeal to Her Majesty in Council.

(1) I. L. R., 6 All. 250.
(2) L. R. 11, I. A. 7, s. c. I. L. R. 10, Calc. 557.
(3) I. L. R. 2 Mad. 230.
(4) Weekly Notes 1881, p. 130.

who were the respondents to the appeal in this Court, in which the decree from which they desire to appeal to Her Majesty in Council was made. The decree is dated the 30th of July 1890. The application was presented twenty days after the expiration of the period of limitation prescribed, if art. 177 of the second schedule of the Indian Limitation Act, 1877, applies. If art. 178, and not art. 177, applies the application was presented within time.

Mr. *Spankie*, who appeared for the opposite party, who had notice to show cause why a certificate should not be granted, objected on the ground that the application was when presented barred by limitation. It is not disputed that if the application was not barred by limitation, it is one which should be granted. Mr. *Reid* for the applicants contended that art. 177 of the second schedule of the Indian Limitation Act, 1877 (Act No. XV of 1877), had been repealed by the Code of Civil Procedure (Act No. XIV of 1882). He also relied upon an affidavit filed with the application as showing that the applicants were under the impression that the time necessary for obtaining a copy of the judgment of this Court would be excluded in computing the time prescribed for the presentation of such an application, and further formally contended that the second paragraph of s. 5 of Act No. XV of 1877 may be applied by us in case art. 177 has not been repealed, although he admitted that the construction placed by the Courts in India upon that paragraph was opposed to his contention. In support of his contention that art. 177 has been repealed Mr. *Reid* relied upon a passage in the judgment of Sir Robert Stuart, C. J., in *Fazal-un-nissa Begam* v. *Mulo* (1), upon s. 599 of Act No. XIV of 1882, and upon s. 599 of Act No. X of 1877 the first paragraph of s. 2 of, and the first schedule to, Act No. XV of 1877, as showing that the Legislature considered that art. 177 of the second schedule of Act No. XV of 1877 was inconsistent with s. 599 of Act No. XIV of 1882 and by s. 599 intended to repeal art. 177. In support of his contention that art. 178 applies, Mr. *Reid* further relied upon s. 57 of the Civil Procedure Code Amendment Act, 1888 (Act No.

(1) I. L. R. 6, All. 250.

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VII of 1888), by which s. 599 of Act No. XIV of 1882 was repealed, and upon clause (1) of s. 3 of the General Clauses Act, 1868 (Act No. 1 of 1868). Although the course of legislation on this subject is confusing and can only be explained by an oversight on the part of the Legislature when Act No. XIV of 1882 was passed, we would not have thought that there could be any reasonable doubt that s. 599 of Act No. XIV of 1882 did not effect a repeal of art. 177 of the second schedule of Act No. XV of 1877, if it had not been for the expressed opinion of Sir Robert Stuart, C. J., upon which Mr. *Reid* relied. That opinion was merely an *obiter dictum* of that learned Chief Justice, and consequently is not binding upon us. The question before the Full Bench in *Fazal-un-nissa Begam* v. *Mulo* (1) related to the construction of s. 602 of Act No. XIV of 1882, and was decided in accordance with the interpretation put upon the corresponding section, s. 602 of Act No. X of 1877, by their Lordships of the Privy Council in *Burjore* and *Bhawani Pershad* v. *Bhagana* (2) in which they held that s. 602 of Act No. X of 1877 which enacted that "If the certificate be granted, the applicant shall within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date, (*a*) give security, &c.," was directory only and not peremptory. The Full Bench case and that decision of their Lordships of the Privy Council which was referred to by Sir Robert Stuart, do not, as it appears to us, bear upon the questions before us. It is also to be noticed that the other Judges, Straight, Oldfield, Brodhurst and Tyrrell, JJ., who took part in that Full Bench case confined themselves to holding that the question before them was concluded by the Privy Council ruling.

If s. 599 of Act No. XIV of 1882 was inconsistent with art. 177 of the second schedule of the Indian Limitation Act, 1877, and the sections of that Act which must be read in conjunction with art. 177, Mr. *Reid's* contention that art. 178 prescribes the period of limitation applicable in this case would in our opinion be sound.

(1) I. L. R. 6 All 250.
(2) L. R. 11, I. A. 7, S. C. I. L. R. 10, Cal 557.

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Section 599 of Act X of 1877 and s. 599 of Act No. XIV of 1882 were in precisely the same terms. They were as follows :—

"599. Such application must ordinarily be made within six months from the date of such decree.

But if that period expires when the Court is closed, the application may be made on the day the Court re-opens."

The second paragraph of s. 599 was to the same effect, so far as an application of this kind is concerned, as the first paragraph of s. 5 of Act No. XV of 1877.

Article 177 of the second schedule of Act No. XV of 1877 prescribes *six months from the date* of the decree appealed against as the period of limitation, but art. 177 must be read as subject to the provisions contained in certain sections in the Act, as for instance s. 7, which extends in cases of legal disability the period of limitation as prescribed in the articles contained in the second schedule. Consequently, it would be correct to say that an application for the admission of an appeal to Her Majesty in Council must, in order to be within the limitation prescribed by Act No. XV of 1877, ordinarily be made within six months from the date of the decree appealed against, which is what s. 599 of Act No. XIV of 1882 said.

We see no inconsistency between s. 599 of Act No. XIV of 1882 and art. 177 of the second schedule of Act No. XV of 1877 as read in conjunction with the provisions contained in the sections of that Act which are applicable to art. 177.

It is true that s. 599 of Act No. X of 1877 was repealed by s. 2 and the First Schedule of Act No. XV of 1877, that s. 599 of Act No. XIV of 1882 was in precisely the same terms as s. 599 of Act No. X of 1877, and that by s. 57 of Act No. VII of 1888 s. 599 of Act No. XIV of 1882 was repealed; but we do not infer from that peculiar course of legislation that the Legislature considered that art. 177 of the second schedule of Act No. XV of 1877 was inconsistent with s. 599 of Act No. XIV of 1882, or intended to repeal art. 177, or to limit its application, or to extend the period of limita-

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tion for the presenting of an application for the admission of an appeal to Her Majesty in Council to three years from the date of the decree appealed against. We are consequently of opinion that art. 177 of the second schedule of Act No. XV of 1877 has not been repealed or its application limited.

Now as to the questions raised by the affidavit which was filed with the application. In that affidavit it was stated as follows :—

"1.—That your petitioners were under the impression that the time necessary for obtaining a copy of the judgment of this Honorable Court would be excluded from the period prescribed for this application.

"2.—That when your petitioners learned their mistake the period prescribed for this application had expired.

"3.—That your petitioners had been advised to make this application in the hope that under the circumstances this Honorable Court will be pleased to grant them a certificate in spite of the lapse."

That was a misleading affidavit. It implied that the applicants had, as was the fact, applied for a copy of the judgment of this Court, and that the time necessary for obtaining such copy, if allowed to them in the computation of time for the purposes of limitation, would make their application under ss. 598 and 600 of the Code of the Civil Procedure within time, it having been presented otherwise twenty days beyond time. The fact is that the applicants having on the 1st of August 1890, applied for a copy of the judgment of this Court received the copy on the 13th of August 1890. Consequently if the applicants were allowed those thirteen days their application would still have been beyond time.

As we have said, Mr. *Reid* formally contended that we had power under the second paragraph of s. 5 of Act No. XV of 1877 to admit the appeal after the expiration of the prescribed period of limitation. That paragraph relates only to appeals and applications for review of judgment, and does not relate to applications for leave to appeal, as was held on an application for leave to appeal

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as a pauper by the Madras High Court in *Lakshmi* v. *Ananta Shanbaga* (1) and by this Court in *Ganga Gir* v. *Balwant Gir* (2) and in subsequent cases. Further, art. 177 is in the third division of the second schedule to Act No. XV of 1877. The third division contains the articles which relate to applications.

The articles which relate to appeals, as distinguished from applications for leave to appeal, are contained in the second division of the second schedule and none of those articles apply to appeals to Her Majesty in Council.

Further, even if the second paragraph of s. 5 of Act No. XV of 1877 applied to the application in question here, no sufficient cause has been shown for the applicants not having presented this application within the prescribed period of limitation. No copy of the judgment of this Court was required as a preliminary to the presentation of this application, and, if it had been, the time actually occupied in obtaining the copy was thirteen and not twenty days.

We have no power to extend the period of limitation in this case. We must apply art. 177 of the second schedule of Act No. XV of 1877, and doing so we dismiss this application with costs.

Application rejected.

APPELLATE CRIMINAL.

1892
July 27.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

QUEEN-EMPRESS v. NATHU AND OTHERS.*

Act XLV of 1860, *s.* 148—"*Deadly weapon*"—*Lathi.*

The question whether or not a *lathi* is a "deadly weapon" within the meaning of s. 148 of the Indian Penal Code is a question of fact to be determined on the special circumstances of each case as it arises.

The facts of this case sufficiently appear from the judgment of the Court.

Mr. *C. C. Dillon* and Mr. *Roshan Lal*, for the appellants.

(1) I. L. R. 2, Mad. 230. (2) Weekly Notes 1881, p 130.