

In *Damodar Prasad v. Masudan Singh* (1) a single Judge of the Patna High Court has expressly held that no court fee is chargeable upon a memorandum of objections filed under order XLI, rule 26. I agree to his reasoning and conclusion. No authority to the contrary has been shown to me.

Following the ruling cited I hold that no court fee is chargeable upon a memorandum of objections filed under order XLI, rule 26, of the Code of Civil Procedure.

### APPELLATE CIVIL.

*Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Young.*

KIRPA RAM (DEFENDANT) *v.* KUNWAR BAHADUR  
(PLAINTIFF).\*

1932  
January, 4.

*Limitation Act (IX of 1908), articles 36, 48, 49—Attachment before judgment—Misappropriation of attached goods by a claimant in collusion with custodian—Plaintiff decree-holder's suit for compensation—Limitation.*

Certain goods were attached before judgment in a suit. A third party claimant brought a suit for a declaration of his title to the attached goods; this suit failed. But during the pendency of that suit the claimant obtained a stay order and managed to misappropriate the goods in collusion with the custodian thereof. The plaintiff who had obtained the attachment then brought a suit against the claimant in respect of the misappropriation. *Held* that articles 48 and 49 of the Limitation Act did not apply to the suit, and that article 36 applied to it.

Articles 48 and 49 are intended to apply to cases where the plaintiff has a right to the possession of the movable property, which is lost or stolen or wrongfully taken or misappropriated. In the present case the plaintiff had merely attached the goods and had no right to the possession

\*First Appeal No. 63 of 1931, from an order of P. C. Plowden, District Judge of Bareilly, dated the 19th of January, 1931.

(1) A. I. R., 1928 Pat., 85.

1932

KIRPA RAM  
v.  
KUNWAR  
BAHADUR.

of the goods themselves. His right was confined to getting the goods sold through the court and realising his decretal money out of the sale proceeds.

Mr. G. S. Pathak, for the appellant.

Mr. P. M. L. Verma, for the respondent.

SULAIMAN and YOUNG, JJ.:—This is a defendant's appeal from an order of remand. The plaintiff alleged that he had brought a suit against Sewa Ram and got certain sugar and treacle belonging to his debtor attached before judgment. The present defendant, Kirpa Ram, filed an objection to the attachment of the sugar and treacle, claiming them as his own property; but his objection was dismissed in April, 1926, and the plaintiff's suit was decreed. Thereupon the present defendant filed another suit for a declaration of his title to the properties attached; but that suit failed. According to the plaintiff, the defendant obtained a stay order during the pendency of his declaratory suit, and in collusion with the custodian of the property, who had been appointed by the court, and the judgment-debtor he dishonestly removed the sugar, sold the same and misappropriated the sale proceeds. This misappropriation was alleged to have taken place in May or June, 1926. The plaintiff filed a complaint in the criminal court on the 27th of July, 1926, which however proved infructuous. He then filed his suit on the 29th of July, 1929, the 27th and the 28th of July being holidays.

The claim was resisted on the merits, as well as on the ground of limitation and absence of cause of action. The trial court, without going into the facts, dismissed the suit on the plea of limitation alone, holding that article 49 of the Limitation Act applied and the claim was more than three years after the misappropriation.

On appeal the lower appellate court has come to the conclusion that neither article 48 nor 49, nor even article 36, of the Limitation Act applies, but that the

residuary article 120 applies and the claim was within time. It has accordingly sent the case back to the trial court for decision on the remaining issues.

It is well settled that the residuary article 120 cannot be applied where there is any other special article applicable to the facts of the case. If, therefore, the suit falls under any of the other articles, this omnibus article would be inapplicable.

As observed by their Lordships of the Privy Council in the case of *L. P. E. Pugh v. Ashutosh Sen* (1), articles 48 and 49 are intended to apply to suits for recovery of specific movable property or for compensation for the same. Article 48 is more special, whereas article 49 is more general. Article 48 is confined to cases where the movable property has been lost or acquired by theft or dishonest misappropriation or conversion, and for compensation for wrongfully taking or detaining the same. Article 49 applies to other specific movable properties or for compensation for wrongfully taking or injuring or wrongfully detaining the same. If we had to look to nothing but the first column in article 48, the present case, being one of dishonest misappropriation or conversion, might be thought to fall under it. But in the last column it provides that time begins to run from the date when the person having the right to the possession of the property first learns in whose possession it is. The article is accordingly intended to apply to cases where the plaintiff having the right to the possession of the property learns of the acquisition by theft or dishonest misappropriation or conversion. In the present case the plaintiff was a mere attaching creditor and had no right to the possession of the property itself. His only remedy was to put it up for sale after the decree had been obtained and realise his decretal amount, although he might himself have purchased the property in lieu of it. It, therefore, seems

1932

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 KIRPA RAM  
 U.  
 KUNWAR  
 BAHADUR.

1932

KIRPA RAM  
 v.  
 KUNWAR  
 BAHADUR.

to us that article 48 cannot apply to the facts of the present case. Article 49 is a more general article and applies to other cases of specific movable property being wrongfully taken, injured or detained. The difference between articles 48 and 49 is that while the former refers to cases where the property has been lost, acquired by theft or dishonest misappropriation or conversion, the latter applies to other cases of wrongfully taking, injuring or detaining movable property. No clear authority directly in point either way has been brought to our notice, but we think that having regard to its language, article 49 also is intended to apply to cases where the plaintiff had a right to possession of the movable property which was wrongfully taken from him, injured or wrongfully detained. The plaintiff's remedy is to sue for the recovery of the specific movable property or in the alternative for its compensation for wrongfully taking, injuring or wrongfully detaining. In such a case the period begins to run from the time when the property was wrongfully taken or injured, or the defendant's possession became unlawful. In the present case the plaintiff was a mere attaching creditor. He had no right to possession of the goods. His right was confined to get the goods sold through the court and realise his decretal money out of the sale proceeds. His attachment took precedence over any private transfer made by the judgment-debtor pending the same. But this right did not entitle the plaintiff to take possession of the goods direct. Article 49 accordingly is not applicable.

Article 36 is a more general article. It is applicable to suits for compensation for any malfeasance, misfeasance, or non-feasance independent of contract. It refers to action which may be on account of the commission of some act which is in itself unlawful, or being the improper performance of

some lawful act, or the omission of some act which a person by law is bound to do. It is a general article for suits for compensation for all acts and omissions amounting to torts which are not provided for elsewhere. It, therefore, follows that as neither article 48 nor article 49 applies, article 36 must apply.

1932

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 KIRPA RAM  
 v.  
 KUNWAR  
 BHABHUE.

Accordingly, the residuary article 120 cannot apply. But article 36 gives only two years' time to the plaintiff. The suit was brought more than three years after the day when the property was wrongfully taken. The claim is obviously barred by time.

Even if we assume in favour of the plaintiff that owing to a fraudulent act of the defendant he was prevented from knowing the fact of the misappropriation of the goods, and therefore the knowledge of his right to sue for compensation was withheld from him by the defendant, and that he can get the benefit of the provision of section 18 of the Limitation Act, the claim is hopelessly beyond time. He admitted that he came to know of the misappropriation on the 27th of July, 1926, and the period of two years would begin to run from that day. The suit was filed on the 29th of July, 1929, and was therefore beyond time.

We are accordingly of opinion that the plaintiff's claim would fail on the ground of limitation. We allow the appeal and setting aside the order of the court below restore the decree of the first court dismissing the suit, with costs in all courts.