[ORIGINAL CIVIL JURISDICTION.]

Suit No. 109 *of* 1872.

ABBA' HA'JI ISHMA'IL (PLAINTIFF) *v.* ABBA' THARA (DEFENDANT). JUDGE, APPLICANT. 1876. July 15.

Limitation—Act IX. of 1871, *Schedule II., Clause* 85—"*Suit*"—*Rule* 149 *of the Common Law Rules of the late Supreme Court—Attorney and client—Bill of costs.*

An application (under Rule 149 of the Common Law Rules of the Supreme Court of Bombay) by an attorney, that his client should show cause why he should not pay the balance shown by the Taxing Master's *allocatur* to be due in respect of his bill of costs, and why, in default of such payment, attachment should not issue against the person and property of the client, is not "a suit" within the meaning of the Limitation Act IX. of 1871.

Such an application as the above is not barred by any law of limitation now in force in British India.

THE applicant in this case obtained in chambers a summons, under Rule 149 of the Common Law Rules of the late Supreme Court, against the defendant, calling on him to show cause why he should not pay the balance due upon an *allocatur* of the Taxing Master, and why, in default of such payment, attachment should not issue against the person and property of the defendant.

Cause was shown before BAYLEY, J., in chambers on 22nd June 1876, when the defendant's attorney contended that the claim was barred by Clause 85 of Schedule II. of the Limitation Act (IX. of 1871).

The learned Judge intimated a wish to hear the point argued by counsel, and accordingly this was done on 7th and 15th of July 1876.

Purcell, for the defendant, showed cause:—The claim is barred by Clause 85 of Schedule II. of Act IX. of 1871. The present application is a proceeding in the nature of a suit. Clause 85 of Schedule II. of Act IX. of 1871 shows that it was the intention of the Legislature to fix a limit within which an attorney could recover the amount of his bill of costs; but, if Clause 85 does not apply in the present case, there is absolutely no limit to the time within which such an application as this can be made.

Marriott, Advocate General (Acting), for the applicant, in support of the summons:—The present application is not a suit

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within the meaning of the Limitation Act. It is made under a form of procedure prescribed by Rule 149 of the Common Law Rules of the late Supreme Court, which has never been abolished, but has been adopted as a part of the procedure of the present High Court. Such an application can be made at any time, as there is no law of limitation now in force applicable to it.

[He was stopped by the learned Judge.]

BAYLEY, J., after stating the summons and the cause shown, continued :—The point made by the applicant's counsel is a novel one, viz., whether the Indian law of limitation now in force applies in its three years' limit to an application made under Rule 149 of the Common Law Rules of the late Supreme Court. This rule is found amongst the first rules of the Supreme Court framed in 1825, and is in these words :—"In all cases whatsoever where costs for business done by solicitors, attorneys, or proctors, shall be due from a client, the solicitor, attorney, or proctor shall be at liberty to tax his bill of costs before the master, first duly serving a copy of the warrant to tax upon the client, and, on affidavit being made of the due service of the master's allocatur, a Judge's summons shall be issued that such client may show cause why he should discharge the same; and in case no good and sufficient cause shall be shown on the return of such summons, then, upon affidavit of the due service of the summons, an attachment shall forthwith issue against the party in contempt, which shall not be discharged but on payment of the amount of such allocatur, and of the costs of such contempt. But nothing in this rule contained shall prevent any attorney from bringing an action for his bill of costs, if he think fit"[1].

Then there is the 151st of the same rules[2], which obliges an attorney to get his bill of costs taxed before receiving the amount, in these words :—"The attorneys, solicitors and proctors shall not in any instance receive or demand the amount of any bill, or part thereof, except reasonable advances to be accounted for before the master, till the same shall have been taxed by the master, who shall after taxation register the same in books, to be kept by him for that purpose in his office, and shall be allowed to charge for the registering of such bills half a rupee per folio."

(1) Rules and Orders of the Supreme Court of Judicature at Bombay, p. 29.

(2) *Idem* p. 130.

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It is to be noticed that this summary application under Rule 149 is one which did not exist in England at the time when that rule was made here. The concluding words of the rule, that "nothing in it contained shall prevent any attorney from bringing an action for his bill of costs, if he think fit," were doubtless introduced to show that it was not intended to prevent any solicitor suing on his bill. According to the Attorneys' Act then in force in England (2 George II., Cap. 23, Sec. 23,) no attorney could commence an action to recover the amount of his bill of costs till the expiration of one month after the delivery of the bill to his client, and upon application by the client the Judges were required to refer the bill to the proper officer for taxation. Upon taxation the client had to pay forthwith the amount of the taxed bill, and in default was liable to an attachment or process of contempt, or to such other proceedings at the election of the attorney as the client was before liable to.

Rule 149, therefore, introduced a novel practice here, and it has never been questioned down to the present time.

On the abolition of the Supreme Court its rules were continued so far as was practicable, first by Rule I. of Chapter II. of the High Court Rules,[1] and afterwards by the general rule, passed in substitution of the one last named on 1st August 1871, which is in these words—: "All rules which at the time of the abolition of the Supreme Court of Judicature at Bombay were in force for regulating the practice of the Court at its Plea and Equity sides, shall extend, so far as the same are applicable, and as nearly as may be to all matters of Ordinary Original Civil Jurisdiction in this Court, except in such respects as the same may be contrary to the Statutes 24 and 25 Victoria, Chapter 104, or to the Letters Patent continuing this Court, bearing date the 28th day of December in the 29th year of the reign of Her Majesty (A.D. 1865), or to the rules of this Court made, or which shall hereafter be made, under and in conformity with the 37th Section of the said Letters Patent, or to the provisions of Act VIII. of 1859, and of any subsequent law which has been made amending or altering the same by competent legislative authority for India, save so far as the said provisions of the said Act VIII. of 1859, and subsequent laws

(1) Rules of the High Court, p. 38.

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as aforesaid, have been or hereafter shall be, as regards this Court, duly modified by its rules which have been or hereafter shall be made as aforesaid, under and in conformity with the 37th Section of the said Letters Patent. And the practice of this Court, in all matters of Ordinary Original Civil Jurisdiction aforesaid, shall be likewise regulated by the provisions, so far as the same are applicable, of the said Act VIII. of 1859, and of any subsequent law which has been made, amending or altering the same by competent legislative authority for India, except so far as such provisions have been or shall hereafter be modified by this Court under and in conformity with the said 37th Section of the said Letters Patent granted by Her said Majesty in pursuance of the said Statutes 24 and 25 Victoria, Chapter 104, and the Statutes 28 and 29 Victoria, Chapter 15. Nothing hereinbefore contained shall affect Chapter XVIII. of the Rules of this Court made on the 25th day of November 1867, regulating proceedings in its Admiralty and Vice-Admiralty Jurisdiction, or the procedure of this Court in its Testamentary and Intestate Jurisdiction, which, as heretofore, shall continue to be the same as that of the said Supreme Court in its like jurisdiction at the time of its abolition." It follows, therefore, that Rule 149 of the Common Law Rules of the late Supreme Court is still in force. That the Supreme Court had the power to frame such a rule for the regulation of its own procedure, appears from the case of *Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*[1], an appeal from the Supreme Court of Bombay, where that power is discussed. No doubt the 149th Common Law Rule was framed by the Supreme Court, because it felt that it was desirable to give solicitors every facility for recovering their costs.

The case which I have just cited, shows that the law of limitation then (in 1852) in force in the towns of Calcutta, Madras, and Bombay was the English Statute 21 Jac. I., Cap. 16, and that statute continued to be in force here till it was repealed, as I shall presently mention. The Statute 21 Jac. I., Cap. 16, is intituled "An Act for limitation of *actions*, and for avoiding *suits* in law," and the words used in Section 3 are "that all *actions* of account," "all *actions* of debt," &c., are to be brought within six years next after the cause of such *actions*. It would be a ques-

(1) 5 Moore Ind. Ap. 234. See pp. 262 *et seqq.*

tion, then, whether the term *action* used in that section could be held to apply to such an application as the present.

The statute of James I. remained in force in the three towns above mentioned till the passing of Act XIV. of 1859[1]. That is intituled "An Act to provide for the limitation of *suits*," and the preamble recites that "it is expedient to amend and consolidate the laws relating to the limitation of *suits*."

In *Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy*[2] the questions raised for the decision of the Privy Council are thus stated in the judgment by Sir James Colvile:—"1st, is the execution of a decree of the High Court made on appeal from one of the Courts in the Mofussil to be governed by the 20th or by the 19th Section of Act XIV. of 1859? 2ndly, what is the effect of a decree of the High Court? And, 3rdly, had there been in that case anything done within three years of the date of the application for execution sufficient to keep the decree to be executed in force within the meaning of the 20th Section of Act XIV. of 1859?" At p. 486 of the report the judgment continues thus:—"The powers and jurisdiction of the Supreme Court, with some slight modification of the latter, were transferred to the High Court, to be exercised by it as a Court of original jurisdiction; and the powers and jurisdiction of the Appellate Mofussil Courts were transferred to it to be exercised by it as an Appellate Court. But the law to be administered by it as a Court of original jurisdiction was substantially that previously administered by the Supreme Court; whilst that to be administered by it on appeal from the Mofussil Courts was necessarily that of those Courts. The Code of Procedure (Act VIII. of 1859) was, indeed, made the procedure of the Court in its original as well as in its appellate jurisdiction, and superseded the procedure which had previously obtained in the Supreme Court. But that Code did not touch the subject of limitation, which continued to be regulated by Act XIV. of 1859."

Now, I do not find anything in Act XIV. of 1859 which embraces an application, such as this, under Rule 149 of the Common Law Rules of the Supreme Court. Clause 16 of Section 1 of that Act provides a period of six years for all *suits* for which no other limitation is expressly provided elsewhere in the Act.

(1) See Reg. V. of 1827; Act XIV. of 1840; and Act XXVI. of 1841.

(2) 14 Moore Ind. Ap. 465; S. C. 10 Beng. L. R. 101; 17 Calc. W. R. 292 Civ. Rul.

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Then we come to Act IX. of 1871, which is intituled "An Act for the limitation of *suits and for other purposes*," and the preamble of which recites that "it is expedient to consolidate and amend the law relating to the limitation of *suits, appeals, and certain applications to Courts*." These words are more comprehensive than those used in Act XIV. of 1859, which, no doubt, is to be accounted for by the fact that, when Act IX. 1871 was passed, the Civil Procedure Code was in force, and the High Courts had been established. We should, therefore, naturally expect to find greater reference to the phraseology of the Civil Procedure Code in Act IX. of 1871 than in Act XIV. of 1859, and so we find reference to "suits, appeals, and applications," in the preamble, and again in Section 4. Thus, again, the second schedule of the Act embraces three distinct divisions, viz., suits, appeals, and applications. The first division contains 150 descriptions of suits. It was argued on behalf of the defendant that the time from which the period of limitation commenced to run against Mr. Judge was 23rd March 1873, and I will assume, without admitting, that is so. It was also argued that the present application falls under Clause 85 of the 1st division of the second schedule, being by an attorney for his costs of a suit, and there being no express agreement as to the time when such costs are to be paid.

The question then arises, is an application under Rule 149 of Common Law Rules of the Supreme Court a "suit" within the meaning of Clause 85 of Schedule II. of Act IX. of 1871? I am of opinion clearly that it is not. The present application is one to the Court in the exercise of its ordinary original civil jurisdiction; and when Act IX. of 1871 wishes to allude to such applications it does so in a clear and unmistakeable manner, for we find in the third division of the second schedule each particular kind of application intended to be comprised in that division specifically described. Again, in Section 6 of the Act reference is thus made to an order of the High Court in the exercise of its original jurisdiction:—"When, by any law not mentioned in the schedule hereto annexed, and now or hereafter to be in force in any part of British India, a period of limitation differing from that prescribed by this Act is specially prescribed for any suits, appeals, or applications, nothing herein contained shall affect such law. And nothing

herein contained shall affect the periods of limitation prescribed for appeals from, or applications to review, any decree, order, or judgment of a High Court in the exercise of its original jurisdiction." It is clear, therefore, that when the Legislature wished to refer to an order of the High Court in its original civil jurisdiction, it did so in proper words; and, looking at Section 6 and at Clause 169 in the third schedule, it appears impossible to hold such an application as the present a "suit" within the meaning of Clause 85 of the second schedule. Nor does it appear to me that this application comes under Clause 115 "for the breach of any contract, express or implied, not in writing registered, and not herein specially provided for," because that, again, is a clause in the first division of the second schedule, and refers to "*suits*." For the same reason I think the 118th Clause does not apply, the proceeding there being described as a "*suit* for which no period of limitation is provided elsewhere in this schedule." If the words at the head of the 1st column of the second schedule had been "Description of suit, or other proceeding or application," the case might have been different; but as the Legislature has used only the word "suit," and the only suits specifically mentioned in the second schedule are those under the Civil Procedure Code, it must be taken that those only are the suits meant. The Court, of course, cannot extend the meaning of the word "suits" so as to include such applications as the present, but must "read the word in its popular, natural, and ordinary sense"(1). So, too, in *Abley* v. *Dale* (2), Jervis, C.J., in delivering judgment in a case turning on the construction of a statute, said "If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it does lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."

(1) Per Byles, J., in *Birks* v. *Allison*, 13 C. B. N. S. 23. Broom's Leg. Max. 569 (5th edn).

(2) 11 C. B. 378, see p. 391.

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I have communicated with the Chief Justice with regard to the question of limitation involved in the present application, and I may say that his opinion coincides with my own; but, of course, no one except myself is responsible for the reasoning of this judgment. I find there is a case, *Govind* v. *Narayan*[1], in which the Chief Justice himself delivered judgment on the Appellate Side of this Court on 18th June 1874, and which appears to me to be not without weight. It was there held that an application for execution of a decree was not a suit within the meaning of the Indian Limitation Act, IX. of 1871. I hold that such an application as the present, by a solicitor to compel a defaulting client to pay the costs incurred, is not a suit within the meaning of that Act.

No doubt words of limitation have been construed by the Courts in such a way as to make them bear a meaning very different from that which they actually express, but that was in consequence of a long course of decisions. In the case from Bombay which I have before cited[2], it was held by the Lords of the Judicial Committee, after two arguments, that the words "beyond the seas" in the Statute of Limitations, 21 Jac. I., Cap. 16, Section 7, were not to be construed literally. Sir John Jervis in the course of the judgment, says, "To construe the 7th Section literally would be to withhold the benefit of a saving from India, which it was intended by the Legislature should prevail where the statute was contemplated to operate at all—that is, in England, and it would be contrary to reason and justice to hold, that the Legislature should be deemed to have intended that the statute should become operative in any place where, by a due construction of the 7th Section, the saving could not apply. A necessity that the words 'beyond the seas' should be construed literally, would create a great doubt of the correctness of the decisions which hold the statute to be applicable to India."

It is not necessary for me, in disposing of this case, to express an opinion as to what was the state of the law with regard to the point now before me at the time when the Statute of James I. was still in force. Act XIV. of 1859 did not expressly repeal that

(1) 11 Bom H. C. Rep. 111.

(2) *H. H. Ruckmaboye* v. *Lulloobhoy Mottichund*, 5 Moore Ind. Ap. 234. See p. 259.

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statute. In fact, Act XIV. of 1859 does not contain a repealing clause at all, unless Section 18 can be so called, which says that all suits to which the Act is applicable instituted after the expiration of the period of two years from the date of the passing of the Act "shall be governed by this Act, and no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding." Therefore where the provisions of Act XIV. of 1859 are different from those of the former law, the latter must be taken to have been indirectly repealed.

When we come to Act IX. of 1871, the first Act totally repealed by it is the Statute 21 Jac. I., Cap. 16. It would, therefore, seem that if the present were a *casus omissus*, no reliance could be placed on the Statute of James I., and consequently it is not necessary for me to give an opinion whether such an application as the present is "an action" within the meaning of the Statute of James I. Section 2 of the new Limitation Act (IX. of 1871), which is the repealing section and repealed Act XIV. of 1859 so far as it relates to limitation, is itself repealed by the General Repealing Act (XII. of 1873). Thus, we see that the Statute of James I., if it ever applied to such a case as the present, is repealed, and Act XIV. of 1859, if it ever applied, which I think it did not, is also repealed. The question, therefore, is narrowed to a consideration of Act IX. of 1871. The only clause embracing this application, to which the defendant's counsel could refer me, was Clause 85 in the second schedule, which, as I have already held, does not apply to the present case.

My opinion, therefore, is that there is no limitation to an application under Rule 149 of the Common Law Rules of the Supreme Court; consequently the answer set up on behalf of the defaulting client to the claim of his attorney fails, and I must order that the summons be made absolute with costs, and certify for costs of counsel.

August 8.

The defendant subsequently presented a petition against this order by Bayley, J., to the Appellate Court, WESTROPP, C. J., and SARGENT, J., in which he stated that he was advised and believed that the order of Bayley, J., was not appealable, but prayed for the intervention and assistance of the Appellate Court to aid him in procuring the reversal of that order.

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WESTROPP, C.J., on 11th August 1876, in disposing of the petition, said :—The defendant is right. There is no appeal from that order, but we do not in the least degree sympathize with him in his struggle to deprive his attorney of his costs. I may also add that we are of opinion that Mr. Justice Bayley's order was perfectly right.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 91 *of* 1876.

July 27.

NA'RA'YANA'CHARYA (DEFENDANT, APPELLANT) *v.* NARSO KRISHṄA AND ANOTHER (PLAINTIFFS, RESPONDENTS).

Hindu Law—Sale of ancestral property by Court—Son's interest in ancestral estate.

Under the Mitákshara and Mayukha, the son takes a vested interest in ancestral estate at his birth. But that interest is subject to the liability of that estate for the debts of his father and grandfather.

The ancestral property of a Hindu father may be sold either by himself or by a Civil Court having jurisdiction, in satisfaction of his debts, not contracted for illegal or immoral purposes, and such sale will bind sons *in esse* at the time of the sale.

Girdháree Lall v. *Kantoo Lall* and *Muddun Thakoor* v. *Kantoo Lall* (L. R. 1 Ind. Ap. 321 ; S. C. 14 Beng. L. R. 187 ; 22 Calc. W. R. 56 Civ. Rul.) followed.

THIS was a special appeal from the decision of W. Sandwith, District Judge of Dharwar, affirming the decree of A. M. Cantem, Subordinate Judge at the same place.

This action was brought by Narso and his brother Svájiráv against Náráyanácharya for the purpose of establishing their right to and recovering possession of two-third parts in the half share of a house. The plaintiffs alleged that the house was the ancestral property of their father Krishnápá and his brother Sinápá, and that it had been sold to the defendant in execution of two decrees, the one obtained against Sinápá alone, and the other against Sinápá and Krishnápá jointly, and that as the