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of Rs. 25,665-8-3. The respondent will retain the costs awarded to him in the Court below, but must pay the costs of the appellant in this Court.

Attorneys for the appellant;—Messrs. *Crawford, Burder and Co.*

Attorneys for the respondent:—Messrs. *Brown and Moir.*

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Before Mr. Justice Starling and, on appeal, before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

JIJIBHOY MUNCHERJI JIJIBHOY AND OTHERS, (*Plaintiffs*), *v.* BYRAMJI JIJIBHOY AND OTHERS (*Defendants*).* [13th and 16th October. 1893.]

Costs—Taxation—Attorney and client—Trustees—Bills of costs paid by majority of trustees—Right of dissenting trustee to have bills taxed even after payment.

In a suit relating to a charitable trust the decree directed that the costs of all parties thereto, when taxed, should be paid out of the trust fund. Certain bills of costs were subsequently furnished to the trustees by the attorneys. Two of the trustees thought the bills reasonable and agreed that they should be paid. The third trustee objected to the amount of the bills as exorbitant, and desired that they should be taxed. Notwithstanding his protest, however, the other trustees paid the bills without taxation. He, thereupon, took out a summons calling upon his co-trustees and the attorneys to show cause why the bills should not be taxed and why they should not refund any sum which had been overpaid.

Held, that the dissenting trustee was entitled to have the bills taxed, although they had been paid, and that the High Court had jurisdiction to order taxation to be made.

BY the decree made in this suit on the 5th January, 1889, it was ordered that a scheme should be prepared for the management of certain charities called the Jijibhoy Dadabhoy Trusts. The scheme was subsequently settled in chambers, and an order was made directing (*inter alia*) that the costs of all parties to the suit when taxed as between attorney and client should be paid out of the Trust Fund.

[190] The trustees of the charities were the plaintiffs in the suit, and were three in number, *viz.*, Jijibhoy Muncherji Merwanji, Rustomji Nanabhoy Byramji and Dadabhoy Bomanji Jijibhoy. In the month of September, 1890, the trustees changed their solicitors, and the suit and matters connected with it were transferred to Messrs. Ardesir Hormasji and Dinsha, who, on the 12th April, 1893, by request sent in their bills of costs for work done from September, 1890 to the end of March, 1893. There were two bills of costs sent in, one for Rs. 11,329-13-0 and the other for Rs. 842-2-0. These bills less (an abatement of Rs. 500) were paid by the two first mentioned trustees on the 21st June, 1893.

On the 21st August, 1893, the third trustee, Dadabhoy Bomanji Jijibhoy, took out a summons calling on his co-trustees and the solicitors (Messrs. Ardesir Hormasji and Dinsha) to show cause why the said bills of costs should not be taxed by the Taxing Master, and why such sums as might be taxed off should not be refunded to the charities by the solicitors.

The objecting trustee (Dadabhoy Bomanji Jijibhoy) in his affidavit stated that the bills sent in appeared to him to be exorbitant, and that he had called upon his co-trustees to get them taxed before settling them, but

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that notwithstanding his repeated protests the bills had been paid on the 21st June. On the 13th July, 1893, he requested his co-trustees (through his solicitor) to get the bills taxed, and on the same day enquired of Messrs. Ardesir Hormasji and Dinsha if they were prepared to get them taxed; otherwise he would bring the matter before the Court. He set forth in his affidavit the items in the bills to which he objected.

The co-trustees also filed an affidavit, in which they stated that the bills of costs had been carefully examined and found to be reasonable; that the solicitors had rendered very valuable services to the charities, and that many charges which they might have made had been omitted by them from these bills. They said that these facts being brought to their knowledge they (*i. e.* the two co-trustees) had met and passed a resolution for payment of the bills. Their affidavit contained the following statements:—

[191] "5. We, Jijibhoy Mancherji Merwanji Jijibhoy and Rustomji Nanabhoy Byramji Jijibhoy, say that, having regard to the provisions of the trust-deed and the practice hitherto observed by the trustees, we were justified in passing the resolution aforesaid and paying the solicitors' costs without taxation.

"6. Several days after the aforesaid resolution we were informed that Mr. Dadabhoy objected to the bills being paid without taxation, but it is not true that he alleged the same to be exorbitant or improper. As it was competent to us to pay solicitors' costs without taxation, we made payment. A large portion of such costs had previously been paid pursuant to a resolution passed by the trustees, including the said Dadabhoy, on the 30th day of April, 1892.

"7. We say that we, the present trustees and our predecessors in office for four years past, have paid solicitors' bills without taxation, and that Mr. Dadabhoy is a party to payment of costs of other solicitors connected with this suit without taxation."

The solicitors (Messrs. Ardesir Hormasji and Dinsha) also filed an affidavit denying that their charges were exorbitant and alleging that they were reasonable and proper charges according to the scale in the Taxing Master's office. They stated that between the 12th April, 1893 (the day on which the bills were sent in) and the 21st June, 1893 (on which day they were paid) the objecting trustee had not communicated with them directly or indirectly, and that they had no intimation that he required the bills to be taxed, or that he considered them "heavy" until they received his letter of the 13th July. They stated that the trustees had full opportunity of examining the bills and getting them taxed if they so desired before payment, and they further alleged that they had caused enquiries to be made in the office of the Taxing Master and had ascertained that within the previous twenty-two years there was no precedent for a reference for taxation after payment, and they submitted that the Court had not the power to direct taxation after payment on a summary proceeding by summons.

The summons was argued on the 2nd September, 1893.

Lang (Acting Advocate General), for Dadabhoy Bomanji Jijibhoy in support of the summons.

Inverarity, for the two co-trustees, showed cause.

Macpherson, for Messrs. Ardesir Hormasji and Dinsha, also showed cause.

[192] 26*th March*, 1893. STARLING, J.—This matter arises out of a suit which was brought for the settlement of a proper scheme for the

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management of the Jijibhoy Dadabhoy Trust Charities, in which, by the decree directing a scheme to be prepared and by a subsequent order approving the scheme, the costs of all parties to the suit when taxed as between attorney and client were ordered to be paid out of the Trust Funds.

After September, 1890 Messrs. Ardesir, Hormasji and Dinsha acted as solicitors for the trustees of the Charity Funds, and a large amount of costs became due to them in respect of the preparation of the scheme and other matters connected with the carrying out of the decree of this Court. The solicitors had received, on account of their costs, a sum of Rs. 7,000. In April, 1893, they sent in their bills of costs to the trustees which, by the secretary to the Trust Funds, were circulated among the trustees for their orders. The balance then appearing to be due to the solicitors was Rs. 5,482-15-0. Two of the trustees minuted "should be paid off." The third trustee, Dadabhoy Bomanji, wrote a long minute in which he said the amount of the bills was exorbitant and that they should be taxed as ordered by the Court, and thereafter the proper balance should be paid to the solicitors. Subsequently, the two trustees got a deduction of Rs. 500 from the solicitors and paid the balance without taxation.

On the 21st August, 1893, the dissenting trustee obtained a summons calling upon the other two trustees and the solicitors to show cause why the bills should not be taxed and why they should not repay any sum which had been overpaid. I think the two trustees were rightly made parties to the summons under the circumstances of the case, but I do not think I could in this summary proceeding make them repay any portion of the Trust Funds which they may have improperly expended.

I treat the summons as one by a trustee who is dissatisfied with a payment of costs made by his co-trustees asking that the bills of the solicitors to whom the payment was made may be taxed, and joining his co-trustees as defendants, because they will not take any part in the matter.

[193] Now it was argued that the Court has no jurisdiction to order costs to be taxed after payment, on the ground that such jurisdiction is in England given by statute, and that there is no statute applicable here. It is true that various Acts have been passed in England regulating the admission, duties and liabilities of attorneys there, and that by them the Courts in England have to be guided in their decisions; it seems also that the first Act so passed was in 1729. Consequently none of these Acts are in force in this country. What the practice was before 1729, I am unable to say, and I know of no treatise from which the information could be obtained. It is also true that there are no such Acts in India, and the only rules we have are rules of the High Court regulating the admission of attorneys and their right to recover their costs in a summary manner, but that to my mind is no reason why the Court should not exercise a jurisdiction of this kind over its officers according to equity and good conscience guided by the general principles laid down by English cases. Consequently, I am of opinion that, upon a proper case being made out, the Court can in a proper manner call a solicitor to account in respect of the amount of his bill even after it has been paid.

It was then argued that, if the Court has such a power, it will not exercise it summarily, but only on a proper suit being filed. That may have been the case in former years, but in the latest case reported, where an alleged agreement between the attorney and client was in question—

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In re Frape (1)—Lindley, L.J., says: "Upon this appeal it was argued that if there is reason to suppose the agreement is unfair or unreasonable, yet you cannot impeach it on such a summons as this, but that some kind of formal proceeding—which, I suppose, according to the present practice, would be an action to set it aside—must be instituted. The language of the Act seems rather to favour that view. But when you consider it carefully, it appears to me there is really nothing in the argument; because so long as the solicitor has a proper opportunity of resisting taxation, it cannot matter whether the application to tax is by writ, or by a special petition to tax, or a summons to tax, as in this case. The [194] client may say. "I want an order to tax, notwithstanding the agreement." The agreement can be no answer to that, if he can show reasons why there ought to be a reference to the Taxing Master to enquire into that agreement." That was, in my opinion, a much stronger case for not going into the matter on a summons in chambers than the present one, and I shall follow the spirit of that ruling and hold that the present matter can be enquired into under the present summons.

Has, then, a case been made out for referring these bills to the Taxing Master? "The old rule that you must show either gross, fraud or pressure or overcharge, does not obtain as an absolute rule. A decision in the Court of appeal *In re Boycott* (2) intimates that it is not an absolute rule;" per Kay, L.J., *In re Frape*. Of course under ordinary circumstances I should not think of making an order to tax a bill, if it had been paid by a client who was *sui juris*, and dealing with his own money, after he had had an opportunity of examining it, and especially after he had discussed the matter with his solicitor and obtained from him a reduction in the amount. But that is not the case in the present instance. Messrs. Ardesir, Hormasji and Dinsha were solicitors for trustees, and they knew that the Court had ordered that certain costs taxed as between attorney and client were to be paid out of the Trust Funds, and they must have known that, if the trustees' accounts were called in question, no proof of the correctness of the payments to them would be accepted except the *allocatur* of the Taxing Master. Consequently, it was their duty to have so advised their clients, and it was their duty also to have had their bills taxed before they demanded payment of the balance. The fact that none of these things was done seems to me to be a very sufficient reason why the amount of the bills should be inquired into.

It was further argued that as two out of three trustees agreed to pay the bills without taxation, their action binds the third, and that he, consequently, cannot now ask to have the bills taxed. I don't think so, especially as the funds were Trust Funds and could only be dealt with in carrying out the trust or under an [195] order of this Court. It is quite clear that on the 12th June, 1893, the present applicant, whatever might have happened before, expressed his opinion that the costs ought to be taxed. In spite of this, the other two trustees on the 21st June, without obtaining the consent of their co-trustee or giving him any notice, paid the costs without taxation. On the 13th July, the applicant asked for an explanation from Messrs. Ardesir, Hormasji and Dinsha and again on the 7th August, but to neither of these letters did he get any reply, though as one of their clients, I think, he was by courtesy entitled to some explanation. Was he, then, to let the matter drop and run the risk at some future time of being called to an account for this payment at a time possibly when his

(1) L. R. (1893) 2 Ch. 295. (2) 29 Ch. D. 571.

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means of proving it was proper payment even on taxation might be absent? In my opinion, he was not bound to do so, but was entitled to bring the matter before the Court and prevent himself being hereafter harassed by a suit.

I, therefore, hold that these bills of costs must be taxed, and I refer them to the Taxing Master for that purpose, and I direct Messrs. Ardesir, Hormasji and Dinsha within fourteen days from this day to lodge the bills in question with the Taxing Master for the purpose of taxation. The remainder of the summons, including the question as to who is to pay the costs of taxation and costs of and incidental to this summons up to this time, to stand over till the *allocatur* of the Taxing Master is produced.

The two consenting trustees and the solicitors appealed.

The appeal came on for hearing before Sargent, C. J., and Bayley, J., on the 13th October, 1893.

Macpherson, for the two trustees and *Scott*, for the solicitors (Messrs. Ardesir, Hormasji and Dinsha) in support of the appeal. They referred to Statute 2 Geo. II, c. 23, s. 23; 1 Chitty's Practice (14th Ed.), p. 139; Stat. 6 and 7 Vict., c. 73, s. 41; Daniell's Chancery Practice (6th Ed.), p. 1993 *et seq.*; *Ibid.*, p. 2023; *Farhall* v. *Farhall* (1); the Supreme Court Charter, [196] cl. X; the amended Letters Patent, 1865, cls. 19, 20, 21; High Court Rules No. 183 (p. 42); *Assur Purshotam* v. *Ruttonbai* (2); Supreme Court Rules No. 326; *In re Jackson &c.* (3); Lewin on Trusts, (9th Ed), p. 275; *Massie* v. *Drake* (4); *In re Cheesman* (5).

They contended that the solicitors' account was settled and could not be opened—*Blagrave* v. *Routh* (6); *Staniar* v. *Evans* (7); *Re Massey* (8); *Re Whalley* (9); *In re Whalters* (10); *In re Thompson* (11).

Lang (Acting Advocate General), *contra*, referred (*inter alia*) to the Supreme Court Rule No. 151 (see Rules and Orders of High Court by Jamaitram Nanabhoy, p. 190) which is as follows:—

"The attornies, 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 bill half a rupee per folio."

JUDGMENT.

SARGENT, C. J.—We think that the order made by Mr. Justice Starling must be affirmed. The decree in the suit directed that the costs should be paid out of the funds of the charity when taxed. It is clear, then, that in paying bills which have not been taxed, the trustees have not observed the direction contained in the decree. The payment appears to have been made notwithstanding the protest of one of the trustees, who, in requiring taxation, was acting strictly within his right and his duty. Even if other bills have been paid without taxation to his knowledge, we do not think that he thereby lost his right to have these bills taxed. A trustee of a charity cannot in such a case waive his right to require the taxation of bills of costs connected with the charity. The solicitors in

(1) 7 Ch. Ap. 123 (126). (2) 16 B. 152. (3) 40 Ch. D. 495.
(4) 4 Beav. 433. (5) L. R. (1891), 2 Ch. 289. (6) 26 L. J. (Ch.) 86.
(7) 34 Ch. D. 470 (476). (8) 34 Beav. 463. (9) 20 Beav. 576.
(10) 9 Beav. 299. (11) 30 Ch. D. 441 (450).

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acting for the trustees in this case must be regarded as acting for the charity, and we think the Court has jurisdiction in the matter.

[197] We have also been referred to the rule by which it is ordered that all bills of costs are to be taxed. The existence of this rule no doubt adds force to the argument for the respondent; but, quite independently of that rule, the Court in a case like the present would, in our opinion, have power to enforce taxation.

We are asked to add words to this order to the effect that it is made without prejudice to the rights of the solicitors to claim in respect of certain items of charge which they have omitted from these bills of costs. I do not think we ought to add anything to this order. No case of error or omission has been argued before us, and the affidavits which have been filed do not deal with the subject. Under these circumstances we shall leave the order as it stands.

Order affirmed.

Attorneys for the appellants :—Messrs. *Ardesir, Hormasji and Dinsha.*
Attorneys for the respondent :—Messrs. *Chalk, Walker and Smetham.*

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APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KRISHNABAI (*Original Defendant*), *Appellant v.* KHANGOWDA (*Original Plaintiff*), *Respondent.** [27th February, 1893.]

Hindu law—Partition—Minor—Partition effected without taking into account a minor co-parcener—Such partition invalid—Limitation.

A partition effected without reserving any share for a minor member of the family, and without the consent of some one authorized to act on his behalf, is invalid as against the minor.

Three brothers S. L. and K. were members of a joint Hindu family. In 1862, S. and L. divided the whole of the family property between them without reserving any share for their brother K. who was then a minor. K. lived with L. as a member of his family. L. died in 1867 leaving a childless widow with whom K. continued to live till his death in 1876. K. left an infant son (the plaintiff), only a year old. Subsequently S. died in 1887, leaving two widows without issue. In 1889 the plaintiff, being still a minor, sued by his next friend to recover either [198] the whole or one-third of the family property in the possession of the widows of L. and S. The principal defences to this suit were (1) that it was time-barred, and (2) that the plaintiff was not entitled to claim more than one-third of the property in suit.

Held, that the partition made by S. and L. in 1862 was invalid, as it was made without reserving any share for their minor brother K. and without taking him into account. K's son was, therefore, entitled to recover the whole of the ancestral property as the sole surviving male member of the family.

Held, also, that the suit was not barred by limitation either under Act IX of 1871 or Act XV of 1877 in the absence of any evidence showing that K. ever demanded partition and was refused, or that he was excluded to his knowledge from all participation in the family property.

[F., 22 B. 259 (261); Appr., 31 C. 262 (P.C.)=6 Bom.L.R. 1=8 C.W.N. 146=31 I.A. 10=14 M.L.J. 8 (12).]

APPEAL from the decision of Rao Bahadur Gopalrao Vinayek Bhanap, First Class Subordinate Judge of Belgaum, in suit No. 416 of 1889.

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* Appeal No. 24 of 1891.