

THE  
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ORIGINAL CIVIL.

Before Mr. Justice Davar.

WADIA, GANDHY & Co. (PLAINTIFFS) v. PURSHOTAM  
SIVJI (DEFENDANT).

1907  
April 15.

*Limitation Act (XV of 1877), Art. 178 - High Court Rule 859 - Application for enforcement of payment of costs by a solicitor against his client is not an application under the Civil Procedure Code—Art. 178 applies only to applications under Civil Procedure Code (Act XIV of 1882).*

There is no period of limitation provided for an application by an attorney for payment of his costs under rule 859 of the High Court Rules. Article 178 of the Limitation Act applies only to applications under the Civil Procedure Code.

*Bai Manekbai v. Manekji Kavasji* (1) followed.

This was a summons taken out by Messrs. Wadia, Gandhi & Co., a firm of solicitors, on 11th March 1907, against Purshotam Sivji, calling upon him to show cause why he should not pay the balance of their taxed costs in the three suits mentioned in the summons. The said Purshotam Sivji by his affidavit claimed that as the items in two of the bills were dated March and April 1900, respectively, the bills were time-barred.

*Invararity* for Purshotam Sivji showed cause. He relied on Article 178, Limitation Act.

*Scott*, Advocate General, for Messrs. Wadia, Gandhi and Co.:—

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In *Abba Haji Ishmail v. Abba Thara* <sup>(1)</sup> it was held by Bayley, J., and confirmed by the Appeal Court, that the Limitation Act applies to a suit only and not to an application by a solicitor calling upon a party to a suit to show cause why he should not pay his solicitor's costs, and he also held that there was no limitation prescribed for such a summary application. It has been held in *Bai Manekbai v. Manekji Kavasji* <sup>(2)</sup> that Article 178 applies to applications under the Civil Procedure Code only. The present application is under the High Court Rules: see rule 869 under which an attorney can apply for an order like the present after getting his costs taxed, and it has been ruled in *Ramhari Sahu v. Madan Mohan Mitter* <sup>(3)</sup> that the law of limitation does not apply to an application under the rules of the Court.

This case was overruled on the main issue in *Fatimunnissa v. Deoki Pershad*, <sup>(4)</sup> but the point of the Limitation Act not affecting High Court Rules was left untouched.

DAVAR, J.—This is a summons obtained by Messrs. Wadia, Gandhi & Co., attorneys of this Court, on the 11th of March 1907, against their client Purshotam Sivji, calling upon him to show cause why he should not pay to them the sum of Rs. 1,761-2-0 being the balance of taxed costs payable by him in respect of three suits in which he employed them as his attorney. This application is made under rule 859. The sum claimed is due by the respondent Purshotam Sivji to his attorneys under three allocaturs, copies whereof are annexed to the affidavit of their clerk Paul Phillip Pereira.

Mr. Inverarity, on behalf of Purshotam Sivji, resisted this application on two grounds. He contended that the applicants were not entitled to proceed by one summons in three different suits and that the claim was barred by the law of Limitation.

I see no force in the first objection. Although the sum claimed is made up of three smaller sums due in three suits, the respondent is not prejudiced by the applicants consolidating their claim and applying by one summons instead of taking out three

(1) (1876) 1 Bom. 253.

(2) (1880) 7 Bom. 213.

(3) (1895) 23 Cal. 339.

(4) (1896) 24 Cal. 350.

separate summonses, and I think this procedure is manifestly for the advantage of the respondent as the result is a great saving in costs. I can see nothing objectionable in the procedure adopted by the applicants and I hold that the form of procedure adopted is perfectly proper.

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In support of his second contention Mr. Inverarity relies on Article 178 of the Limitation Act and contends that the present application comes under the provisions of that article. Article 178 of the present Limitation Act (XV of 1877) provides a period of limitation for applications for which "no period of limitation is provided elsewhere in this schedule or by the Code of Civil Procedure, section 230." There is no specific provision in the Limitation Act or anywhere else fixing a period of time within which an application for enforcement of payment of costs by a solicitor against his client by the summary method provided by rule 859, and Mr. Inverarity contends that this application comes within the article he relies on. The question for consideration therefore is whether the present application falls under Article 178 of the Limitation Act. Article 84 provides a period of limitation for suits by an attorney for his costs. Rule 859 provides a method of recovering costs from a client quite independently of a suit and it gives discretion to the Judge hearing the summons to refer parties to a suit. This rule came into operation on the 1st day of January 1902, but it is by no means a new rule, for the same rule, though in a different form, has been in existence ever since 1825, as appears from the report of certain proceedings in Chambers before Mr. Justice Bayley in the case of *Abba Haji Ishmail v. Abba Thara* (1).

It appears from the report that Mr. Judge, who had acted as attorney for the defendant in that suit, applied for and obtained a summons in Chambers under rule 149 of the Common Law Rules of the Supreme Court of Bombay, calling upon his client 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 an attachment should not issue against his person and property. The defendant's attorney pleaded limitation and

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the learned Judge seems to have deemed the point of some importance, for he intimated to the parties his desire to have the point argued before him by counsel. This was done and in the result his Lordship has delivered a considered judgment wherein he held that the application, such as was before him, was not a suit within the meaning of the Limitation Act IX of 1871, which was then in force, and that the application was not barred by any law of Limitation then in force in British India. It is important to note here, as appears from the last paragraph of the report, that Mr. Justice Bayley's judgment came before the Appeal Court consisting of Westropp, C. J., and Sargent, J., and they expressed an emphatic opinion endorsing the correctness of Mr. Justice Bayley's order. The wording of rule 149 of the Common Law Rules of the late Supreme Court is very similar to the wording of our present rule and the judgment of Mr. Justice Bayley was delivered on the 15th of July 1876. The present Limitation Act came into force on the 1st of October 1877. Article 178 is new and Mr. Inverarity argued that the new article was intended to apply to an application such as the present one and was in all probability introduced into the new Act in consequence of the judgment of Mr. Justice Bayley.

It seems to me, however, more probable that if the attention of the Legislature was called to this judgment, and if it was thought necessary to provide a period of limitation for applications of this description, the Legislature would have made specific provision and would not have been content merely to introduce an article making a general provision for applications for which no period of limitation is provided elsewhere in the schedule or by the Civil Procedure Code, section 230. If the matter had merely rested here, the question now before me may have been arguable or open to some doubt. That Article 178 does not apply to the present application, but is limited to applications under the Civil Procedure Code, as contended by the Advocate General who appeared for the applicants, is established by the ruling of the Appellate Court consisting of Chief Justice Sir Michael Westropp and Mr. Justice Melvill in the case of *Bai Manekbai v. Manekji Karasji* (1). The learned Judges there express their

(1) (1880) 7 Bom. 213.

opinion in clear and unmistakeable terms that Article 178 of schedule II, Act XV of 1877, is limited to applications made under the Code of Civil Procedure.

It cannot, I think, with any show of reason be contended that this is an application under the Civil Procedure Code. There is no provision whatever in the Code entitling the applicants to adopt the summary proceedings they are authorised by rule 859 to adopt for the purpose of enforcing their claim for costs against their client. The proceedings are not akin to a suit. It is an application based on the authority of the taxing master's allocatur and is dealt with usually in a summary manner by the Judge in Chambers. The rule itself makes a distinct provision for referring the parties to a suit and this course the Judge in Chambers would, I apprehend, adopt if the client set up some special contract or arrangement with his solicitor which the solicitor denied or where, for instance, the client pleaded payment or satisfaction which was not admitted or where, generally speaking, the client disclosed a defence in showing cause which would necessitate the taking of oral evidence.

It was argued before me that even assuming that Article 178 applied only to applications under the Civil Procedure Code, this was an application under the Code because the rules were framed under the power conferred on the High Court by section 652 of the Civil Procedure Code. Section 652 empowers the High Court to "make rules consistent with this Code to regulate any matter connected with its own procedure or the procedure of the Courts of Civil Judicature subject to its superintendence" and the third paragraph of the section empowers a High Court established under Statute 24 & 25 Vic., c. 104, "to make such rules consistent with the Letters Patent establishing it, to regulate its own procedure in the exercise of its Original Civil Jurisdiction, as it shall think fit." Clause 37 of the Amended Letters Patent of the High Court of Judicature for the Presidency of Bombay, However, confers on the High Court much larger and wider powers, for it ordains that "it shall be lawful for the said High Court of Judicature at Bombay from time to time to make rules and orders for the purpose of regulating *all* proceedings in Civil cases which may be brought

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before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Intestate, and Matrimonial Jurisdiction respectively" and the High Court in making such rules and orders is directed to be guided *as far as possible* by the provisions of the Code of Civil Procedure.

A glance at the Table of Contents of our Rule Book would show I think that the rules made by the High Court are made under the larger power to make rules and orders conferred on the High Court of Bombay by clause 37 of its Amended Letters Patent.

Rule 859 is one of the rules under Chapter 38 which is headed "Miscellaneous Matters." It is not a rule merely "to regulate any matter connected with its own procedure" as contemplated by section 652 of the Civil Procedure Code. It provides a speedy and summary procedure in favour of an officer of this Court against the party who employs him and it empowers the Judge in Chambers to give effective relief to the applicant by making an order which operates as a decree for money without going through all the formalities of a suit. This is a rule quite outside the provisions of the Civil Procedure Code, and I am of opinion that an application under this rule is not an application under the Civil Procedure Code.

On the day following the day on which the summons was argued before me by counsel the applicant's solicitor drew my attention to a case—*Ranhari Sahu v. Madan Mohan Mitter* <sup>(1)</sup>. In that case it was held that the law of limitation did not apply to an application under the rules. The respondent's solicitor drew my attention to the report of a judgment of the Full Bench of the Calcutta Court in a subsequent case—*Fatimunnissa v. Deoki Pershad* <sup>(2)</sup>, wherein they overruled this case so far as the main point in the case was concerned, but the Full Bench has expressed no dissent from the view taken by the Judges as to the non-applicability of the law of limitation to applications under the rules of the Court.

In the view I take of this matter it is quite unnecessary to discuss the other questions argued before me as to when the

(1) (1875) 23 Cal. 339.

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solicitor's employment terminated and which of their bills or what portion of their bills of costs are barred. 1907

After a careful consideration of all the arguments addressed to me I have come to the conclusion that there is no period of limitation provided for an application under rule 859, that Article 178 of the Limitation Act applies only to applications under the Civil Procedure Code, that the application before me is not an application under the Code of Civil Procedure, and that Article 178 does not bar the claim made in the summons. WADIA, GANDHY & Co. PUNSHOTAM.

I make the summons absolute and direct the respondent Purshotam Sivji to pay the applicant's costs of the summons. I certify that this was a fit case for the employment of counsel.

B. N. L.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

LAXMANA KOM BASAPPA AND OTHERS (ORIGINAL DEFENDANTS NOS. 3, 4 AND 5), APPELLANTS, v. RAMAPPA BIN YALLAPPA KUCHRA DDI-YAVAR AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 2), RESPONDENTS.\* 1907 August 7.

*Limitation Act (XV of 1877), schedule II, article 119—Adoption—Period of Limitation applicable to suits where factum and also validity of adoption is denied.*

Suits in which either the *factum* or validity of an adoption is denied are governed by the provisions of article 119 of schedule II to the Limitation Act (XV of 1877).

The observations to the contrary in *Ningawa, v. Ramappa* (1) and *Shivram v. Krishnabai* (2) dissented from.

*Shrinivas v. Hanman* (3) followed and applied.

APPEAL from an order passed by T. D. Fry, District Judge of Dharwar, reversing the decree passed by, and remanding the suit to, V. G. Kaduskar, Subordinate Judge at Haveri.

\* Appeal No. 8 of 1907, from order.

(1) (1903) 28 Bom. 94; 5 Bom. L. R. 708. (2) (1906) 31 Bom. 80; 8 Bom.

L. R. 897.

(3) (1899) 24 Bom. 260.