to the assessee, and surely no question of law can arise out of a concession made by the Commission to the assessee, to which concession in law the assessee was not entitled.

The result therefore is that we must answer the first question submitted to us in the affirmative and the second question in the negative. The applicant must pay the costs.

Attorneys for applicant: *J. P. Pandit.*

Attorneys for respondent: *N. K. Petigara.*

Answer accordingly.

P. M. P.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Vyas

KANJI KARSONDAS THAKKAR, AND OTHERS (ORIGINAL DEFENDANTS), PETITIONERS *v.* NATHUBHAI KHIMJI, (ORIGINAL PLAINTIFF), OPPONENT*

1952

Nov. 3

Civil Procedure Code (Act V of 1908), O. XXVI, r. 15—Expression "Expenses of the Commission"—Whether includes costs of the Opponent—Bombay Pleaders Act (XVII of 1920), Sch. III, r. VI—Civil Manual, Vol. I, ch., I, r. 53.†

The expression "expenses of the commission" occurring in O. XXVI, r. 15, of the Civil Procedure Code, 1908, is intended to provide for the deposit of the expenses of the Commissioner and other expenses directly attributable to the issue of the commission. The expression cannot be extended to include costs of the opponent's pleader or the expenses which the opponent himself may have to incur for travelling to the place where the Commissioner proposes to examine witnesses.

Saboora Bivi Ammal v. *Julaika Bivi Ammal*,[1] relied upon.

Abdurahiman Settu v. *Muhammad Kasam*,[2] and *Ghanshyam Das* v. *Kisturibala Debi*,[3] referred to.

Nripendra Bhushan v. *Raja Pramatha Bhushan*,[4] distinguished.

*Civil Revision Application No. 1212 of 1952.

† The rule is as follows:—

"53. The sum to be fixed by the Court for the expenses of the Commission should ordinarily provide for a fee to be paid to the Commissioner. If at any time the sum so fixed is found to be insufficient it may for special reasons be increased by the Court. When the commission is executed to the satisfaction of the Court, the full sum mentioned should be paid to the Commissioner but where the commission is not executed at all, or not fully or satisfactorily executed, or the work turns out to be less than was expected, it will be in the discretion of the Court to direct a smaller amount to be paid, or to make any other order in the matter which it thinks just and proper in the circumstances."

(1) [1950] A. I. R. Mad. 144.
(2) [1949] A. I. R. Mad. 490.
(3) [1936] A. I. R. Pat. 33.
(4) [1927] A. I. R. Cal. 90.

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The last clause in R. 53 in the Civil Manual, Vol. I, does not invest the Court with a wide discretion in making any orders regarding the expenses of the Commission but merely authorizes the Court to consider what expenses should be paid to the Commissioner if the Commission is fully executed, and it is only in that limited sense that power to make just and proper orders is given to the Court under the rule.

CIVIL REVISION APPLICATION against the decision of H. I. Bhatt, Joint Civil Judge (Senior Division), at Jalgaon.

The facts are set out in the Judgment.

B. N. Gokhale, for the petitioners.

B. G. Pradhan, for the opponent.

Gajendragadkar J. The short point which arises in this revisional application is what is the meaning and denotation of the expression "the expenses of the commission" used in O. XXVI, r. 15. A suit for dissolution of partnership and accounts, No. 2 of 1952, has been filed by the opponent against the petitioners in the Court of the Civil Judge, Senior Division, at Jalgaon, on February 20, 1952. On September 11, 1952, the plaintiff applied that a Commissioner should be appointed to examine five of his witnesses who reside at Bombay, which is at a distance of more than 200 miles from the Court. The learned Judge has allowed this application. At the time when this application was considered by him, it was argued by the defendants that before the commission was ordered to be issued, the plaintiff should be asked to deposit the costs which would be incurred by the defendants in going to Bombay before the Commissioner. This prayer has been rejected and in the present revisional application preferred by the defendants the only point which has been raised for our decision is that the learned Judge refused to exercise jurisdiction vested in him under O. XXVI, r. 15, in that he took the view that it was not open to him to call upon the plaintiff to deposit the costs of the defendants. Mr. Gokhale says that O. XXVI, r. 15, is wide enough to enable the Court to direct that the party applying for a commission should deposit the costs of the opponent before the commission is issued.

Section 75 of the Code refers to the power to issue commissions, and under s. 75 (*a*) commission can be issued to examine any person. O. XXVI deals with several commissions exhaustively. Commissions to examine witnesses are dealt with in rules 1 to 8 of this Order. The present case falls under r. 4 (*1*) (*a*) which provides that a Court may in any suit issue a

commission for the examination of any person resident beyond the local limits of its jurisdiction. Rules 15 to 18 of O. XXVI contain general provisions as to the issue of such commissions. Rule 15 deals in particular with the expenses of the commission to be paid into Court and it is with this rule that we are concerned in the present revisional application. This rule provides that before a commission is issued under O. XXVI, the Court may order such sum, if any, as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued. Mr. Gokhale contends that the expression "the expenses of the Commission" should be liberally construed and it should be held that the Court has the power in a fit case to direct the party applying for commission to deposit not only the expenses of the Commissioner but also the costs of the opponent. That is how the only point which we have to consider in the present revisional application is as to the proper denotation of the expression "the expenses of the commission."

The words used are "the expenses of the commission" and not "the costs of the commission." Section 35, for instance, refers to the costs of the suit and in exercising its jurisdiction under s. 35 it would no doubt be competent to the Court to make an order as to the costs not only of the suit as such, but other costs incidental to the suit. Rule 15 of O. XXVI does not, however, use the word "costs"; but it speaks of "the expenses of the commission". In our opinion this expression has been deliberately used because in the context r. 15 is intended to provide for the deposit of the expenses of the Commissioner and other expenses directly attributable to the issue of the commission. It is not all costs resulting from the issue of the commission which are intended to be deposited by the party under r. 15 of O. XXVI. It is only the expenses of the commission which have to be deposited by him. These expenses would normally be the fees to be paid to the Commissioner and the other out of pocket expenses which may have to be incurred to secure the presence of the witnesses before the Commissioner. In other words, this expression cannot, in our opinion, be extended to include costs of the opponent's pleader or the costs which the opponent himself may have to incur to go to the place where the Commissioner is going to examine the witnesses in question. It is true as Mr. Gokhale has pointed out that under the Bombay Pleaders Act, XVII of

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1920, Sch. III, rule VI, does enable the pleaders to charge fees for attending to the work of their clients in connection with commissions. Incidentally, it may be pointed out that rule VI (*b*) (*i*) of Sch. III of the Bombay Pleaders Act gives jurisdiction to the Court in its discretion to direct that no fees shall be allowed for appearing before a Commissioner if the Court while issuing the commission certifies that the presence of a pleader before the Commissioner is not necessary. Except in cases falling under this class a party would be entitled to engage the services of a pleader to appear before a Commissioner and Sch. III, r. VI, lays down the mode in which such fees would ultimately be taxed. But the fact that pleader's fees could be taxed at the end of the suit in regard to the work done by him by appearing before the Commissioner would not necessarily mean that such costs have to be deposited by the party applying for a commission under O. XXVI, r. 15. Ordinarily the costs follow the result and when the bills of costs are prepared the party that loses the suit has to pay the successful party's costs all told. When a commission is ordered to be issued the only liability imposed upon the party applying for the commission under O. XXVI, r. 15, is that he would have to deposit the expenses of the commission within the time specified by the Court. Therefore, in our opinion, the expenses of the commission must be distinguished from the costs resulting from the issue of the commission, and in the context these expenses must denote only the fees to be paid to the Commissioner and other expenses directly incidental to the issue and the execution of the commission.

The rules framed by this Court in regard to the issue of such commissions also support this conclusion. Rule 53 in the Civil Manual, Vol. I, lays down that the sum to be fixed by the Court for the expenses of the commission should ordinarily provide for a fee to be paid to the Commissioner, and then it goes on to add that if at any time the sum so fixed is found to be insufficient it may for special reasons be increased by the Court. The rule then deals with how the fees should be paid according as the commission is fully carried out or not. If the commission has not been fully carried out, the rule authorises the Court to direct a smaller amount to be paid to the Commissioner or to make any other order in the matter which it thinks just and proper in the circumstances. Mr. Gokhale says that this last clause seems to indicate that the Court has a wide discretion in making any orders that it deems to be

just and proper in the circumstances of the case. We do not think that this last clause can reasonably bear this construction. In the context the last clause merely authorises the Court to consider the question as to what money should be paid to the Commissioner if the commission has not been fully executed, and it is only in that limited sense that the power to make just and proper orders is given to the Courts under r. 53. Therefore, in our opinion, rule 53 also seems to suggest that the primary object of r. 15 of O. XXVI is to secure the payment of the Commissioner's fees and to obtain beforehand an amount which would besides cover the expenses directly concerned with the execution of the commission.

Mr. Gokhale has himself very fairly invited our attention to r. 372 of the Original Side Rules and r. 209 of the City Civil Court Rules, which also seem to support the view that when commissions for examination of witnesses are issued, the only amount which the party applying for the issue of the commission has to deposit in Court is the fees payable to the Commissioner for his work.

Mr. Gokhale has, however, relied upon the observation made by Halsbury that in allowing the examination of witnesses out of Court, the Court may impose such terms upon the applicant as appear to it to be just (Halsbury's Laws of England, Second Edition, Vol. 13, page 773, para. 850). But this observation is based upon the provisions of O. XXXVII, r. 5, and when we examine r. 5 itself we find that this rule in terms empowers the Court to allow the examination of witnesses outside the Court on such terms, if any, as the Court or the Judge may direct. In other words, r. 5 expressly confers jurisdiction upon the Court to impose such terms as the Court may deem fit before granting a party's request to examine witnesses out of Court. It appears that examination of witnesses outside the Court is becoming obsolete in England; but apart from that, since the rule itself gives wide discretion to the Court to impose any terms that the Court deems reasonable, the statement of Halsbury would not assist us in interpreting the expression "the expenses of the Commission" used in O. XXVI, r. 15.

In the present case there is no doubt that the application was properly made by the plaintiff for examination of his witnesses in Bombay. It is a *bona fide* application and the learned Judge has, therefore, granted it. In fact, when the defendants asked for their costs to be included in the order

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for deposit under O. XXVI, r. 15, they did not make any written application as such and they did not set out any special circumstances under which they felt that a request of this kind was justified. Therefore, the only ground which it is open to Mr. Gokhale to take up before us in the present revisional application is that even without the proof of special circumstances it would be open to the Court to direct the plaintiff to deposit the costs of the defendants in addition to the costs of the Commissioner before a commission is issued. Since, in our opinion, r. 15 seems to give jurisdiction to the Court to order a deposit of the expenses of the Commissioner alone, we do not see how on the facts as they appear in the present case we could hold that the learned Judge failed to exercise jurisdiction vested in him under O. XXVI, r. 15. On the facts as they stand we do not think we are called upon to consider the question as to whether it would be open to the Court to impose any further condition while granting a commission under O. XXVI, r. 15, in exercise of its jurisdiction under s. 151 read with s. 94 of the Code of Civil Procedure. We are dealing with the point solely by reference to the provisions of O. XXVI, r. 15, and these provisions, we hold do not authorise the Court to ask the plaintiff to deposit the defendant's costs before commission is issued to examine his witnesses in Bombay.

No reported judgment of this Court on this point has been cited before us; but Mr. Gokhale has invited our attention to the decisions of some other Courts and we might as well deal with those decisions at this stage. In *Saboora Bivi Ammal* v. *Julaika Bivi Ammal*,[1]. Mr. Justice Govind Menon has construed the provisions of O. XXVI, r. 15, in the same manner that we have done. He held that the phrase "expenses of the commission" in ordinary parlance would mean only what the Commissioner has to spend for summoning witnesses and for other incidental expenses relating to the examination of the witnesses before him, and cannot be construed to include expenses of the other parties to the litigation. A contrary view had been taken by Mr. Justice Mack in *Abdurahiman Settu* v. *Muhammad Kasam*.[2] But Mr. Justice Govind Menon held that the view as expressed by Mr. Justice Mack was not justified by the provisions of O. XXVI, r. 15. Besides, we may add that the said view was clearly *obiter*. It appears from the report that the learned trial Judge had refused to accept

[1] [1950] A. I. R. Mad. 144. [2] [1949] A. I. R. Mad. 490.

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the opponent's prayer that his costs should be ordered to be deposited by the party applying for a commission, and Mr. Justice Mack had in fact confirmed the said order. Therefore, it is clear that the observations made by the learned Judge were no better than *obiter*.

Mr. Gokhale has relied upon a decision of Mr. Justice Agarwala in *Ghanshyam Das* v. *Kasturibala Debi*.[1] In this case, when an application was made by a party to a suit for examination of witnesses on commission, the Court directed the applicant to file interrogatories which he intended should be put to the witnesses; and after these interrogatories were filed, the opposite party was directed to file cross-interrogatories within four days. The opposite party failed to comply with this order. Thereupon the trial Court ordered that a commission should issue only on condition that the applicant paid Rs. 200 to the opposite party as his costs in attending the commission. When this order was challenged before Mr. Justice Agarwala, he was content to follow an unreported precedent in which a similar order had been made by the lower Court and had been confirmed by Bucknill C. J., and the only observation which Mr. Justice Agarwala made was that the view taken in the said earlier case did not appear to have been subsequently overruled and so he had decided to follow it. We do not see any discussion as to the effect of the provisions of O. XXVI, r. 15, and so not much assistance can be derived from this judgment.

The last decision to which Mr. Gokhale has invited our attention is the decision of the Calcutta High Court in *Nripendra Bhusan* v. *Raja Pramatha Bhusan*.[2] But this decision is clearly distinguishable on the facts. It was found that the application for a commission was not *bona fide* and as a concession commission was allowed on certain terms. When the order imposing these conditions was challenged before the Calcutta High Court, their Lordships of the Calcutta High Court upheld the finding of the learned trial Judge that the application was not *bona fide* and they observed that if it was open to the Court to refuse a local investigation on the facts disclosed by the application, it would clearly be open to the Court to determine that the local investigation should be allowed only on certain conditions. In other words, the party applying for local investigation had not made out a case for the issue of a commission. He was, however, shown indulgence

[1] [1936] A. I. R. Pat. 33. [2] [1927] A. I. R. Cal. 90.

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and commission was issued in his favour on certain conditions. Therefore, in our opinion, this decision does not deal with the question as to what powers the Court has under O. XXVI, r. 15, but it proceeds more upon the inherent powers of the Court to grant a concession in favour of a party subject to certain conditions.

Therefore, we are of the opinion that the view taken by the learned Judge as to his jurisdiction under O. XXVI, r. 15, was right. The revision application accordingly fails and the rule must be discharged with costs.

Rule discharged.

K. B. S.

APPELLATE CIVIL

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice Dixit.

1952

Nov. 10

NARAYAN MARUTI MOHAKAR *v.* DISTRICT JUDGE, KOLABA AND OTHERS.*

Bombay District Municipal Act (Bom. III of 1901), ss. 15, 13, 22—Person below twenty-one years of age elected councillor—Election petition to District Judge—District Judge setting aside election and declaring petitioner to be duly elected—Decision of District Judge beyond jurisdiction—Sole authority of Collector to declare seat vacant and order fresh election—Scheme of s. 15—Order of District Judge challenged—Constitution of India, art. 226.

Where a person having been elected a councillor is disqualified under s. 15 (*1*) (c) of the Bombay District Municipal Act, 1901, by reason of his being less than twenty-one years of age, the only competent authority which can declare that he is so disqualified is the Collector and not the District Judge. The District Judge has no jurisdiction to decide whether any disqualification attaches to the councillor under s. 15; his jurisdiction is confined to dealing with election petitions. An election petition by its very nature must be restricted to bringing before the Court either a male-practice or a corrupt practice or an irregularity that takes place in the course of the election. If there is no irregularity in the conduct of the election, and a question arises whether a councillor properly elected is disqualified by reason of s. 15, then the jurisdiction to decide the question is conferred solely upon the Collector. If the Collector holds that the councillor is disqualified, he must declare the seat to be vacant and thereupon a by-election takes place under s. 18.

On the petitioner being declared to be the duly elected councillor of the Panvel Municipality, the opponent filed an election petition

* Special Civil Application No. 1528 of 1952.