FULL BENCH.

APPELLATE CIVIL.

Before Mr. Justice Russell, Acting Chief Justice, Mr. Justice Chandavarkar, Mr. Justice Heaton and Mr. Justice Knight.

1907. *August 27*

CHUNILAL JETHABHAI AND OTHERS, APPLICANTS, *v.* BAROT DAHYABHAI AMULAKH, OPPONENT.*

Bombay High Court Rules, Chapter V, Part V, Rules 17, 18 and 25(1)—Civil Procedure Code (Act XIV of 1882), section 653—Limitation Act (XV of 1877), section 12—Presentation of memoranda of appeals, applications and appeals in execution proceedings—Accompaniments extraneous.

The accompaniments directed under Rule 25 of the Bombay High Court Rules are extraneous to the memoranda of appeals, applications and appeals in execution and the rule expressly does not fix any time at which the documents mentioned in clauses (2) and (3) are to accompany the memoranda, etc. An appeal, etc., if presented in time, is validly presented for the purposes of the Limitation Act (XV of 1877) if it is accompanied by the copies required by the Civil Procedure Code (Act XIV of 1882).

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* Civil Application No. 389 of 1907.

(1) Bombay High Court Rules, Part V, Chapter V, Rules, 17, 18 and 25 :—

17. The Registrar shall admit to the register all memoranda of appeal which are duly stamped, are in the form, and contain the particulars, required by law, are accompanied by the necessary copies, and are presented within the period prescribed for the same. No appeal shall be considered pending within the meaning of section 546 of the Code of Civil Procedure, until it has been admitted to the register.

The Registrar shall decide all questions under this rule and, if he returns a memorandum of appeal, the appellant may apply to a Judge to direct registration.

18. The Registrar may reject or return for amendment any memorandum of appeal for the reasons specified in section 543 of the Code of Civil Procedure. In so doing the Registrar shall be deemed to be performing a quasi-judicial act within the meaning of section 637 of the Code, and his proceedings shall be subject to revision by a Judge on the motion of the party aggrieved.

25. (1) * * * * * *

(2) Memoranda of second appeals or applications for the revision of appellate rees or orders must be accompanied by copies of the decrees and judgments or rs of both the lower Courts.

Appeals in execution proceedings must be accompanied by copies of the sought to be executed as well as by copies of the orders of the lower Courts.

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Per CHANDAVARKAR, *J.* :—No rule of the High Court can add to or modify the conditions and limitations laid down in the Limitation Act (XV of 1877). It is true that the Court has the power of making certain rules given by section 652 of the Civil Procedure Code (Act XIV of 1882) and those rules must be "consistent with" the Code. But there is no power to frame a rule modifying any rule or mode as to computation of limitation prescribed, expressly or by necessary implication, in the Limitation Act (XV of 1877).

APPLICATION against the order of P. E. Percival, Registrar of the Appellate Side of the High Court of Bombay, returning as time-barred a second appeal against the decision of the District Court at Ahmedabad in Appeal No. 399 of 1905.

The applicants (original plaintiffs-appellants) filed a second appeal against the decision of the District Court at Ahmedabad, dated the 20th December 1906, in Appeal No. 399 of 1905 of the file of the District Court arising in an execution proceeding. The second appeal was filed on the 6th April 1906, that is, within the prescribed time, and was accompanied with all the necessary copies excepting the order of first Court in the execution proceeding, the decree of the Court of appeal and the decree of the High Court in second appeal in the original suit. The certified copies of the order of the first Court and the decrees of the Appellate Courts were filed on the 10th June 1907. The Registrar, thereupon, treated the second appeal as having been presented on the day on which the said copies were filed, that is, on the 10th of June 1907, and treating it as time-barred directed that it should be returned. The applicants, thereupon, filed the present application, questioning the correctness of the Registrar's order on the grounds that (*a*) the rule of the High Court requiring copies of the decrees under execution as well as the order of the first Court to be filed does not lay down any rule of limitation and should not be construed as controlling the provisions of the Limitation Act, (*b*) the said certified copies were only accompaniments of the appeal—extraneous to it—and did not render t presentation of the appeal without them in any way defec under the Limitation Act or the Civil Procedure Code, (*c*) h regard to the purpose and scope of Rule 25 of the High Rules, Part V, Chapter V, the Registrar was not justi treating the second appeal as time-barred, and (*d*) the se

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was *ultra vires* as affecting the provisions of the Limitation Act. A *rule nisi* was therefore issued, requiring the opponent (original defendant-respondent) to show cause why the order of the Registrar should not be set aside. The question was argued before a Full Bench consisting of Russell, C. J. (Acting), and Chandavarkar, Heaton and Knight, JJ.

L. A. Shah appeared for the applicants (original plaintiffs-appellants) in support of the rule:—We presented the second appeal in time, that is, on the 6th April 1907, with the certified copies of the judgment and decree of the lower appellate Court and of the decree under execution. A certified copy of the order of the first Court in execution and the certified copies of the decrees of the two appellate Courts in the original suit were filed on the 10th June 1907 as required by clauses (2) and (3) of Rule 25 of the High Court Rules. The Registrar directed the second appeal to be returned as time-barred under Rule 17, treating it as presented on the 10th June 1907 when the remaining copies were filed. The Registrar's endorsement is in accordance with the long-standing practice of the office. The question is whether the non-compliance with the said rule within the time prescribed by the Law of Limitation involves the consequence that the appeal is time-barred. The question is raised in view of the recent decision in *Ramchandra* v. *Laxman*[1]. Under Article 152, Schedule II, of the Limitation Act the period prescribed for the presentation of an appeal is ninety days. The term "appeal" is not defined anywhere. But it can at the most be taken to mean a memorandum of appeal with the accompaniments required by the Civil Procedure Code. Section 541 of the Code requires only a copy of the decree and a copy of the judgment of the appellate Court to be produced. The Limitation Act of 1877, which was passed about the time when the Code of 1877 came into force, should be taken to refer to the appeal as contemplated by the Civil Procedure Code. Sections 5 and 12 of the Limitation Act refer to copies as required by the Code and provide for the deduction of time spent in obtaining copies of the judgment and decree under appeal. The rule in question, though

(1) (1906) 31 Bom. 162.

it does not purport to have been made under any specific power, must be taken to have been framed under section 652 of the Civil Procedure Code or under clause 37 of the Amended Letters Patent. The High Court can frame rules to regulate the proceedings coming before it, and Rule 25 provides for the production of certain copies in certain appeals and other proceedings, but it does not provide for the consequences arising from the non-compliance with it. The rule occurs in the chapter containing rules for the guidance of the Registrar's office. There are some rules in that chapter which are in imperative terms, but the non-observance thereof does not entail any consequences. There is nothing to show that the non-observance of this particular rule was intended to have such serious consequences as the Registrar has attributed to it. There is nothing to show that it was ever intended by that rule to supplement the provisions of the Civil Procedure Code so as to affect the rule of Limitation laid down by the Code. The Registrar may refuse te register the appeal under Rule 17 unless and until the copies required by the High Court Rules are produced, but he has no power under the rule to treat the appeal as time-barred if the appeal as contemplated by the Limitation Act and Civil Procedure Code is in time even without the copies required by the rules. Apart from the rule it is clear that section 587 of the Civil Procedure Code, which renders the provisions of Chapter XLI regarding appeals from original decrees applicable as far as may be to second appeals, would not affect the matter in any way. The ruling in *Pirathi Sing* v. *Venkatramanayyan*[1] is clear on the point. The words "as far as may be" cannot be so construed as to give to section 541 of the Code an extended meaning. In fact, it is just because the copies now in question would not be necessary under the Code, the High Court framed the rule. The object of section 587 of the Civil Procedure Code is to avoid repeating some of the provisions relating to first appeals in the chapter relating second appeals. We rely upon the ruling in *Ramchandra* v. *L man*[2], the *ratio decidendi* of which is applicable to the pre case. Though that ruling was under Article 179 of the Limit

(1) (1881) 4 Mad. 419.

(2) (1906) 31 Bom. 162.

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Act, and the present case falls under Article 156, still the principle that extraneous accompaniments should not be treated as forming part of the principal documents contemplated by the said articles applies to both of them, and so far we submit that the said decision is an authority in our favour.

Lastly, Rule 25 does not provide for the deduction of time taken up in obtaining copies required under it. Under section 12 of the Limitation Act a party would be entitled to the deduction of time only in respect of the copies required by the Civil Procedure Code. If the High Court intended to attribute any such consequence to the non-production of the copies required by Rule 25 as the Registrar has attributed to it, it would have taken care to provide for the deduction of time taken up in obtaining the said copies. Thus, by treating our second appeal as time-barred the rule is so interpreted as to affect the provisions of the Limitation Act, for which there is no warrant. We, therefore, submit that the rule is *ultra vires* of the High Court. The High Court has no power to frame rules which would in any way modify or affect the provisions of the Limitation Act or the Civil Procedure Code.

G. N. Thakore appeared for the opponent (defendant-respondent) to show cause:—Section 652 of the Civil Procedure Code confers upon the High Court the power to frame rules to regulate any matter connected with its procedure. Section 587 of the Code modifies the applicability to second appeals of the provisions of Chapter XLI of the Code, the qualification being indicated by the words "as far as may be" occurring in the section. Section 632 again enacts that the provisions of the Code will apply to the High Courts "except as provided in section 652." From the language of these sections it is clear that the Legislature contemplated that any of the provisions of Chapter XLI of the Code ...uld be modified or even new provisions substituted by a rule ...med by the High Court under section 652. The provisions ...tained in such a rule acquiring by section 652 of the Code the ... of law it becomes in effect a provision of the Code itself.

... to the objection that section 12 of the Limitation Act ...es for the exclusion of time only in reference to a copy of

the decree appealed against and the judgment on which it is founded, we submit that in practice the time taken up in obtaining other copies is invariably excluded. The High Court Rules would, no doubt, have been more perfect if they had expressly provided for such an exclusion, but owing to the existence of the practice parties are not prejudiced by the operation of the rule; see *Fazal Muhammad* v. *Phul Kuar*(1), *Gopal Chandra* v. *Preonath Dutt*(2).

The ruling in *Pirathi Sing* v. *Venkatramanayyan*(3) has been relied on, but we submit that it has no application, it being evident that it did not proceed to construe the effect and operation of a rule as in the present case. The decision in *Sadashiva* v. *Ramchandra*(4), than which the present case is even stronger, lays down the correct interpretation.

The rulings in *Ramchandra* v. *Laxman*(5) and *Pachiappa Achari* v. *Poojali Seenan*(6) are distinguishable, and the former ruling requires to be reconsidered. In the first place, these cases relate to the construction of provisions in the circulars issued for the Subordinate Courts. Secondly sections 587 and 632 not being applicable to such circulars the latitude, which the operation of these sections leaves to the High Court in framing rules for itself, may not be deemed to be open to it when framing rules for the Subordinate Courts. Thirdly, they are decisions upon the wording of Article 179 of the Limitation Act which the Courts have in a series of decisions construed with a peculiar regard for the interests of the executing decree-holders.

Further, the reasoning of the cases relative to accompaniments being regarded as extraneous to the appeal or application, etc., would equally apply to cases under section 541 of the Civil Procedure Code, as regards which the authorities are all agreed.

It was argued that if Rule 25 be so construed as to affect th provisions of the Limitation Act, it is *ultra vires*. We subr that the rules framed under section 652 of the Civil Proced Code have to satisfy two conditions, namely, they must be

(1) (1879) 2 All. 192.
(2) (1904) 32 Cal. 175.
(3) (1881) 4 Mad. 419.
(4) (1903) 5 Bom. L. R. 394.
(5) (1906) 31 Bom. 162.
(6) (1905) 28 Mad. 557

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sistent with the Code, and they must be connected with the Court's procedure. Rule 25 is admittedly not inconsistent with the Code. The second condition is to be satisfied in the sense in which the Civil Procedure Code satisfies it, the language of the preamble of the Code being almost similar to the language of section 652. It was conceded by implication that the provisions of the Code can affect limitation, section 541 of the Code being an instance. How can it be said then that because Rule 25 similarly affects the question of limitation incidentally, it was *ultra vires* of the High Court to have framed it?

Clause 37 of the Amended Letters Patent is wider. The term employed there is "proceedings" instead of "procedure" which occurs in section 652. The rule is therefore not *ultra vires* even if it be deemed to have been framed under the said clause.

Further, the rules framed by the High Court are to be assumed to possess a legal origin even where the ultimate origin cannot be traced: *Naubat Ram* v. *Harnam Das*[1]. Therefore, every presumption should be made in favour of giving effect to the present rule.

Shah in reply:—Section 373 of the Civil Procedure Code of 1859 (Act XIV of 1859) required copies of both the judgments and decrees to be produced in second appeals. That provision is clearly modified by the Code of 1877 (Act X of 1877). Thus, the intention of the Legislature is quite manifest that these copies were not required under the Code. Section 632 of the Civil Procedure Code only lays down that the rules shall have the force of law, but it does not say that they will be treated as a part of the Code itself.

The decision in *Gopal Chandra* v. *Preonath Dutt*[2] has no bearing whatever on the present case.

RUSSELL, Ag. C. J.:—In this case it appears that the petitioners have filed a second appeal against the order, dated 20th December 1906, in Appeal No. 399 of 1905 on the file the District Court of Ahmedabad on the 6th of April 1907 all the necessary copies except the certified copies of the of the first Court and of the decree of the appellate

(1) 9 All. 115. (2) (1904) 32 Cal. 175.

Court and of the decree of the High Court in the original suit. The said certified copies of the order of the first Court and of the appellate decrees in the original suit were filed on the 10th June 1907.

The Registrar, however, directed the appeal to be returned as being beyond time.

The appeal, as presented on the 6th of April 1907, was in time, but the Registrar treated it as having been presented on the day on which the remaining copies were filed and has treated it as time-barred.

The question referred to us is whether he was right in so doing.

By Rule 17, Chapter V, Part V, of this High Court, Appellate Side, the Registrar shall admit to the register all memoranda of appeal which

(*a*) are duly stamped,
(*b*) are in the form,
(*c*) contain the particulars required by law,
(*d*) are accompanied by the necessary copies, and
(*e*) are presented within the time prescribed for the same.

The Registrar shall decide all questions under this rule, and, if he returns a memorandum of appeal, the appellant may apply to a Judge to direct registration.

Rule 18 provides that the Registrar may reject or return for amendment any memorandum of appeal for the reasons specified in section 543 of the Code of Civil Procedure.

Rule 25 (2) says: "Memoranda of second appeals or applications for the revision of appellate decrees or orders must accompanied by copies of the decrees and judgments or or of both the lower Courts."

(3) "Appeals in execution proceedings must be accom by copies of the decrees sought to be executed as well copies of the orders of the lower Court or Courts."

Now, in Rule 17, it will appear, there are five necessa set out above, and by the latter part of it the Regist

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decide all questions thereunder. It is obvious, therefore, that it rests with him to decide one or more of the points, stated in the said five points.

Rule 25 expressly does not fix any time at which the documents mentioned in clauses (2) and (3) are to accompany the memoranda, applications and appeals in execution proceedings thereunder specified.

Therefore it appears to us that, for purposes of limitation, the Registrar may accept the memoranda, applications or appeals in execution proceedings but may return them for the requirements of Rule 25 (2) and (3) to be complied with.

In our opinion the accompaniments directed under Rule 25 are extraneous to the memorandum of appeal, application or appeal in execution, and, of course, it must be remembered that the Limitation Act being an enactment of a restrictive character must be strictly construed.

We are of opinion that the case of *Ramchandra* v. *Laxman*[1] is *in pari materia*, and accordingly we make the rule herein absolute and direct each party to pay their own costs.

This decision will govern the various other cases in which the same point is involved.

CHANDAVARKAR, J. :—Rule No. 25, clause (2), of this Court, the legality and construction of which for the purposes of limitation are now in dispute, requires that "memoranda of second appeals . . . . must be accompanied by copies of the decrees and judgments or orders of both the lower Courts."

Ever since the rule came into force in 1882, it has been the ...form practice of this Court to construe it as laying down that ...ond appeal, presented within the period prescribed in Article ...n Schedule II to the Limitation Act, but accompanied only ...ies of the decree and judgment appealed against and not ...ies of the decree and judgment of the Court of first ..., shall be rejected as not having been presented in time, ...he latter copies having been subsequently produced, the ...ms fit to excuse the delay.

(1) (1906) 31 Bom. 162.

It is now contended that such a construction of the rule is opposed to the language and spirit of the material sections, both of the Code of Civil Procedure and the Limitation Act. And in support of the contention the decision in *Ramchandra* v. *Laxman*[1] is relied upon. That decision, in my opinion, has no bearing and cannot be cited as an authority on the question now before us. It deals with the construction of the words "in accordance with law" in Article 179 of Schedule II of the Limitation Act; and those words contemplate a certain elasticity and power of variation and mean that the law is to be followed not *verbatim et literatim* but substantially. The words in fact allow a certain degree of latitude in the observance of the law: see *Thomas* v. *Kelly*[2]. The question now before us is entirely different, turning as it does upon certain sections of the Civil Procedure Code and the Limitation Act with different wordings.

Dealing first with the Code, section 541, which applies to an appeal from an original decree, requires that such appeal "shall be accompanied by a copy of the decree appealed against and (unless the appellate Court dispenses therewith) of the judgment on which it is founded." That is, an appeal is to be regarded as presented if it is tendered with the two copies specified in the section. Otherwise it cannot be said to be presented at all.

Having special regard to this essential condition laid down in the Code for the due presentation of an appeal, the Limitation Act by section 12 studiously prescribes that "the time requisite for obtaining a copy of the decree appealed against" and "the time requisite for obtaining a copy of the judgment on which it is founded" shall both be excluded "in computing the per of limitation prescribed for an appeal."

The necessary implication of this is that for the purpos limitation an appeal is presented within time, if, being panied by copies of the decree appealed against and th ment on which it is founded, it has been presented wit period resulting from the mode of computation specified.

(1) (1906) 31 Bom. 162. (2) (1888) 13 App. Cas. 5

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Now, section 587 of the Code makes section 541 applicable to a second appeal as well. Besides, in section 12 of the Limitation Act the term "appeal" is used so as to comprehend both "appeals from original decrees" and "appeals from appellate decrees." It follows from that that the necessary implication in section 12 of the Limitation Act abovementioned applying to both appeals without distinction, there is a due presentation of a second appeal if it is accompanied by copies of the decree and the judgment appealed against. The Limitation Act, read with the Code of Civil Procedure, requires no more in the case of such an appeal. It puts it on the same footing for the purposes of limitation as an appeal from an original decree. Had the intention of the Limitation Act been otherwise, had the Legislature meant that in the case of a second appeal the period of limitation must be computed by treating it as *duly presented* only when and if it is accompanied by copies of the decree and judgment of the first Court as well as by those of the second Court, there would have been express provision made for deduction of the time requisite for obtaining a copy of the decree and of the judgment of the first Court. *Expressio unius est exclusio alterius.*

To put it shortly, the solution of the question before us depends on the intention of the Legislature as it is expressed or necessarily implied in the Limitation Act. And such intention must be discovered from the words actually used, and, where they are ambiguous, from surrounding circumstances, including other laws *in pari materia.* The Code of Civil Procedure is one of such laws. Applying this test, it is plain that section 12 of the Limitation Act, with which section 541 of the Code of Civil edure, made applicable to a second appeal by section 587 of e same Code, must be read, treats an appeal from an al decree and a second appeal as the same for the purposes entation within the time prescribed for it.

t is so, no rule of this Court can add to or modify the s and limitations of the law laid down in the Limita- It is true that the Court has the power of making les given it by section 652 of the Code of Civil

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Procedure and those rules must be "consistent with" the Code. But there is no power given to frame a rule modifying any rule or mode as to computation of limitation prescribed, expressly or by necessary implication, in the Limitation Act.

Enough and legitimate room is left for the operation of the rule now under discussion after excluding it as *ultra vires* for the purposes of the due presentation of a second appeal within the period prescribed by the Limitation Act. Under rule 17 the Registrar is competent to refuse the admission of such an appeal to the register, if it is not accompanied by all the copies required by Rule 25. Though the copies of a decree and judgment of the Court of first instance are not necessary for the purpose of the presentation of a second appeal within the period prescribed in the Limitation Act, they may be and very often are necessary for other purposes. For instance, they may be required for the purpose of correctly ascertaining the amount of Court-fee leviable on a memorandum of second appeal, or they may be required for the purpose of determining whether the second appeal should be dismissed under section 551 or admitted under section 552 of the Code of Civil Procedure. Rule No. 25 must be regarded as providing for such contingencies and so far it is *intra vires* and obligatory. That being its scope, its operation must be limited to such purposes.

On these grounds I am of opinion that the rule must be made absolute.

HEATON, J.:—I agree in the conclusion arrived at.

KNIGHT, J.:—I concur.

Rule made absolute.