1890.

RINDÁBAI v. ANÁCHÁRYA.

says that as to the mode in which sisters take it appears by analogy that they take as daughters, and in *Tuljárám* v. *Mathurádás* [1] this view is extended to all females who do not become members of the family by marriage. Lastly, in *Bágirthibái* v. *Báya* [2] it seems, from the form of the decree made in that case, that it was assumed that sisters take as coparceners with right of partition. In the argument at the Bar allusion was made to a remark in West and Bühler, 494, "that sister's sons have no right so long as a sister survives, but take before sister's daughter;" but on referring to the case cited in 2 Borr., 515, it appears that the above statement has reference to the right of immediate succession to a brother as between a sister's son and another sister, and has no application to the present case. Mr. Mayne in his work states it to be definitely settled in this Presidency that there is no difference—and no ground for drawing any such difference has been suggested before us—between daughters and sisters in the nature of their right to succeed to their father and brother respectively.

We must, therefore, hold that Tárábái took an absolute one-fourth share, and that the plaintiffs became entitled to this share as her heirs, and we confirm the decree of the Court below with costs.

Decree confirmed.

(1) I. L. R., 5 Bom., 662. (2) I. L. R., 5 Bom., 268.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

THE GOCULDA'S BULABDA'S MANUFACTURING COMPANY, LIMITED, (PLAINTIFFS), *v.* JAMES SCOTT AND ANOTHER (DEFENDANTS.)*

1890. *August* 16; *September* 19.

Taxation—Practice—Certificate to review taxation—Commission to England to take evidence—Costs of such commission—Party and party taxation, principle of—Onus of proof in respect to item objected to—Production of vouchers in case of commission to England—Costs of obtaining transcript of evidence given and of perusing it—Allowances to witnesses—Commissioner's fees.

Where, in a suit in India, a commission to take evidence has been issued to England, the bill of costs with respect to such commission is to be taxed by the Taxing Master of the Court in India, and not in England. It is to be taxed on

*Suit No. 107 of 1887.

1890.

THE GOCULDÁS BULABDÁS MANUFACTURING COMPANY, LIMITED, v. JAMES SCOTT.

the same scale and on the same principle as would be adopted in England, and if the Taxing Master finds any difficulty, he must refer to England for information.

Where an item is objected to in taxation, the Taxing Master should reconsider and review his taxation, and in doing so he should throw the *onus* of proof, as to the necessity of the item, upon such party as, having regard to its particular nature, he considers ought to bear it.

As to the production of vouchers in case of commissions to England, no rule can be laid down. Upon objections being brought in, it is in the discretion of the Taxing Master, either on his own motion or on the application of the party objecting, to require vouchers for, or further proof of, all or any of the items objected to, and, failing the production of the vouchers or proof which he may require, to disallow the item.

Quære—Whether in taxation as between party and party the costs of obtaining a transcript of the evidence given and of perusing it ought to be allowed.

Payments made to witnesses are discretionary allowances, and the Court is averse to reviewing such allowances.

The Court in appointing a commissioner to take evidence in England expects that the fees of such commissioner will not exceed those which the Supreme Court in England would allow to a special examiner or commissioner acting in England under its orders. If the parties desire that higher fees should be allowed to the commissioner whom they name, they should obtain an order from the Judge appointing the commissioner.

IN chambers. Certificate to review taxation.

The plaintiffs sued to recover Rs. 40,000 from the defendants "for loss occasioned to the plaintiffs by reason of certain machinery supplied by the defendants not being of the kind which they ought to have supplied;" also a sum of Rs. 2,00,000 "for compensation and damages sustained by the plaintiffs by reason of machinery, stores and other articles supplied by the defendants not being in accordance with the agreement and arrangements made with them and for breach of the defendants' guarantee for the period of two years for efficient working and profits, &c., &c."

The case having been heard and decided on 12th August, 1889, the defendants' bill of costs was taxed by the Taxing Master. On the 19th July, 1890, the Taxing Master at the instance of the plaintiffs' attorneys issued his certificate to review the taxation.

The points of importance raised on review appear from the judgment.

1890.

THE GOCULDÁS BULABDÁS MANUFACTURING COMPANY, LIMITED, v. JAMES SCOTT.

Inverarity for the plaintiffs.

Anderson for the defendants.

The following authorities were cited:—*In re Brown* [1]; *Attorney-General* v. *Drapers' Company* [2]; *Cousens* v. *Cousens* [3]; *Betts* v. *Cleaver* [4]; *Yglesias* v. *The Royal Exchange Assurance Corporation* [5]; *Turnbull* v. *Janson* [6]; *Croomes* v. *Gore* [7]; *Wells* v. *Mitcham Gas Light Co.*[8]; *Kirkwood* v. *Webster*[9]; *Wentworth* v. *Lloyd* [10].

August 16th. FARRAN, J.:—This is a certificate to review (*inter alia*) the taxation of the costs of a commission issued to England to take evidence in the suit. The plaintiffs have been ordered to pay the defendants' costs of the commission, or part of them, and the Assistant Taxing Master has accordingly taxed the bill brought in by the defendants as between party and party, and the plaintiffs have taken out this certificate to review his taxation.

The first question which arises is as to the principle upon which the bill should be taxed. This is, I conceive, correctly laid down in *Wentworth* v. *Lloyd*[11], from which I deduce the rule that the bill is to be taxed by the Taxing Master of this Court, and not in England. It is to be taxed on the same scale as would be adopted in England; and, if the Taxing Master finds any difficulty, he must refer to England for information. The rule extends to the principle, as well as to the scale. The bill should be taxed on the same scale and principle as would be adopted in England.

The principle of party and party taxation in England is "that the successful party shall receive only such costs as were necessary to enable him to conduct the litigation"—Daniell's Chancery Practice, Vol. II, p. 1298 (5th ed.); *Smith* v. *Buller*[12]; Morgan on Costs, p. 4 (2nd ed.) The same principle is amplified in Rule 29

(1) L. R., 4 Eq., 464.
(2) L. R., 9 Eq., 70.
(3) L. R., 7 Ch. App., 48.
(4) L. R., 7 Ch. App., 513.
(5) L. R., 5 C. P., 141,
(6) L. R., 3 C. P., 264.
(7) 1 H., & N., 14.
(8) L. R., 4 Ex. D., 1.
(9) L. R., 9 Ch. D., 239.
(10) 13 W. R., 486.
(11) 13 W. R., at p. 487.
(12) L. R., 19 Eq., at p. 475.

1890.

THE GOCULDAS BULABDAS MANUFACTURING COMPANY, LIMITED, v. JAMES SCOTT.

of Order LXV of "The Rules of the Supreme Court, 1883," which is as follows:—

"As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the Taxing Officer to have been necessary or propor for the attainment of justice or defending the rights of the party or which appear to the Taxing Officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party"[1].

For an application of the rule see *Simmons* v. *Storer* [2]. The rule was stated rather too broadly by the Assistant Taxing Master, Mr. Cooper, in the unreported case of *Hussunbhoy Hossein* v. *Wallis*, where he said: "I consider that I ought to allow all reasonable expenses of the commission, and will disallow all unreasonable and extravagant items in the bill." The rule thus stated is said to have been approved by the Chief Justice Sir Charles Sargent, but I apprehend that the learned Chief Justice can only have given his opinion as between the conflicting contentions of the parties in that case; on the one side that the English solicitor's bill of costs was in taxation to be allowed as it stood; and on the other side that it was to be taxed as it would be taxed in England. Sir Charles Sargent thought that the latter contention was correct, but is not responsible for the wording of the principle of taxation enunciated by the Assistant Taxing Master. For "reasonable" the words "necessary and proper" and for "unreasonable and extravagant" the word "unnecessary" should be substituted, and then the Assistant Taxing Master's statement of the principle will not be incorrect. The Assistant Taxing Master in that case was also wrong in generally throwing any particular *onus* on the party objecting to items in the bill. When an item is objected to, the Master is to reconsider and review his taxation, and in doing so he will throw the *onus* as to the necessity of the item upon such party as having regard to its particular nature, he considers ought to bear it. The Chief Justice with whom I have conferred, considers the above principle of taxation to be the correct one to adopt.

As to the production of vouchers in cases of commissions to England, it is impossible to lay down any particular rule. To

(1) Wilson's Judicature Acts (5th ed.) p. 589. (2) L. R., 14 Ch. D., 154.

require them in all cases in the first instance, would often occasion an unnecessary increase of costs in the proceedings. To rule that they should never be called for, would be to establish a dangerous precedent, which unscrupulous practitioners might readily avail themselves of. Upon the objections being brought in, it should be in the discretion of the Taxing Master, either of his own motion or on the application of the party objecting, to require vouchers for, or further proof of, all or any of the items objected to, and, failing the production of the vouchers or proof which he may require, to disallow the item. This, I learn, is, in fact, the practice of the office, and I see no reason why it should not be adhered to. Vouchers for out-of-pocket expenses would under this rule usually be called on, or their absence accounted for by affidavit. To go further would be to fetter the discretion of the Taxing Officer. Each case must be decided on its own merits. The Chief Justice also thinks that the practice, as I have described it, may properly continue to be followed.

In the present case the latter rule of practice does not seem to have been departed from, and the principle I have laid down, rather than that enunciated in *Hassunbhoy* v. *Wallis*[1], has been, in effect, followed. I shall not, therefore, return the whole bill for review, but shall here the rest of the objections which have been made to it, and give judgment upon all at the same time.

On the 19th September the following judgment was given with reference to the objections.

FARRAN, J. :—I now proceed to dispose of the specific objections to the bill of costs.

First, as to the Bombay bills, I disallow all the objections, and for the reasons which I have orally assigned.

As to the English bill—that of Mr. Rycroft, the defendants' solicitor in England—I will consider the items in detail. I have given my decision as to the principle involved. My decision on the detailed items is intended to be in accordance with the principles which I have laid down.

[His Lordship then stated his decision with regard to various items of the bill, and continued :—]

(1) Unreported.

1890.

THE GOCULBÁS BULABDÁS MANUFACTURING COMPANY, LIMITED, v. JAMES SCOTT.

Objections 56, 57, 60, 61, 64, 65, 82 and 146 raise the question whether Mr. Rycroft ought to be allowed, as between party and party, the costs of obtaining a transcript of the evidence given, and perusing it. The English authorities show that this charge would not be allowed in England. I refer to the cases of *Croomes* v. *Gore*[1]; *Wells* v. *Mitcham Gas Light Co.*[2], which were approved in *In re Blyth and Fanshawe; Ex-parte Wells*[3]. These cases show that the costs of the transcript ought not to be allowed. As to the costs of perusing the transcript, I am not aware of any authority for allowing it. If it had not been obtained, the solicitor and his clerk would have made notes, but I am not aware of any authority which shows that a solicitor is entitled to charge for reading his own notes, or those taken by his clerk, of each day's proceedings. He has been allowed by the Taxing Officer a large sum for attendance, after the proceedings each day, to consider the evidence with his client, and I have not reviewed the discretion of the Taxing Master on that head. In the absence of authority there is a difficulty in allowing him, in addition, the costs of perusing the evidence. On these items I must refer the bill back to the Taxing Master for reconsideration in reference to these remarks. This concludes the original bill of Mr. Rycroft.

The next items for consideration are the payments allowed to witnesses. I am informed that, as to some of these payments there are no vouchers. How far that is so I have not been shown. There is, however, the proved fact that these witnesses were examined; and the affidavit of Mr. Rycroft, on information and belief, that they have been paid, was before the Taxing Master, and under these circumstances I do not feel constrained to yield to the argument on this head. As to the amount allowed by the Taxing Master to each witness, it does not seem extravagant, but at all events the Taxing Master has exercised his discretion in allowing these sums, and the Court is averse to reviewing allowances such as these, which are discretionary—*Turnbull* v. *Janson*[4]; *Smith* v. *Buller*[5].

(1) 1 H & N., 14.
(2) L. R., 4 Ex. D., 1.
(3) L. R., 10 Q. B. D., 207.
(4) L. R., 3 C. P. D., 264.
(5) L. R., 19 Eq., 475.

Lastly, there is the question of the fees paid to the commissioner, Mr. Chew. The Master has allowed his bill practically in full. Mr. Chew though named by the defendants was appointed commissioner under the order of this Court, and in taking the examination acted as an officer of this Court. This Court has not laid down any rule determining the amount of his fees. The Supreme Court in England allows special examiners, whom it appoints, fees upon a fixed scale. It is not the fault of the defendants that the commissioner whom they have named has not limited himself to these fees. In the future it should be understood that this Court in appointing a commissioner to take evidence in England will expect that his fees shall not exceed those which the Supreme Court in England would allow to a special examiner or commissioner acting in England under its orders; and parties should choose their commissioners with reference to this understanding. If they desire that higher fees should be allowed to the commissioner whom they name they should obtain an order from the Judge appointing the commissioner. For the past, I am unable to hold that the Taxing Master was wrong in allowing Mr. Chew's charges as set out in his account. He had before him the affidavit of Mr. Chew, and no evidence on the other side. He held that it was not unreasonable in the defendants to employ, in a case of this magnitude, a gentleman in the position of Mr. Chew who estimates his services at the value of seven guineas *per diem*. The case very much resembles that of *Yglesias* v. *Royal Exchange Assurance Corporation*[1] where ten guineas *per diem* and his expenses were allowed to a commissioner as between party and party. The Master allowed that sum, and the Court refused to review his discretion. Under these circumstances, and in the absence of a rule of this Court limiting the fees to be paid to a commissioner, to disallow these charges would be, in effect, to fine the defendants the amount disallowed. I must support the Master's decision on this head.

The result is that the plaintiffs have succeeded in one set or class of items only. They will have to pay the defendants' costs of the rest of the review, and the defendants will pay the plaintiffs' costs as to these. As far as the actual hearing is concerned, each

(1) L. R., 5 C. P., 141.

1890.

THE GOCULDÁS BULABDÁS MANUFACTURING COMPANY, LIMITED, *v.* JAMES SCOTT.

party will bear their own costs of one day's (the first) hearing and of hearing judgment. The plaintiffs must pay the defendants their costs of the hearing of the summons on the other two days.

Attorneys for the plaintiffs, :—Messrs. *Ardasir, Hormusji and Dinshá.*

Attorneys for the defendants :—Messrs. *Craigie, Lynch and Owen.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1890. *December* 18, 22.

HA'JI MUSA' HA'JI AHMED, (PLAINTIFF), *v.* PURMA'NAND NURSEY, (DEFENDANT).

Decree—Execution—Civil Procedure Code (*Act XIV of* 1882), *Secs.* 229 *A and B—Foreign judgment—Execution in British India of foreign judgment—Decree of Native State—Execution of such decree in British India—Decree obtained without jurisdiction and by fraud—Civil Procedure Code* (*Act XIV of* 1882), *Secs.* 229 B, 245 B—*Foreign judgment—Jurisdiction.*

The plaintiff obtained a decree against the defendant in the Zillá Court of Angikármal, in the State of Cochin. The defendant was a resident in Bombay, and the plaintiff sought to execute the decree against him in Bombay. Notice under section 245 B of the Civil Procedure Code (Act XIV of 1882) was served upon the defendant, calling upon him to show cause why he should not be committed to jail in execution. The plaintiff relied upon section 229 B of the Civil Procedure Code (Act XIV of 1882). The defendant, as cause against the execution of the decree, alleged that the decree was passed by the Cochin Court without jurisdiction, and that it had been fraudulently obtained by the plaintiff. The Court refused to commit the defendant ;

Held, on the facts as presented in the affidavit, that the Court in Cochin had no jurisdiction over the defendant, and that the plaintiff obtained the decree by misrepresentation and concealment of essential facts ;

Held, also, that the Court was entitle to exercise a judicial discretion as to whether it would put into force the provisions of section 229 B of the Civil Procedure Code (Act XIV of 1882). No duty is cast upon the Court to execute a decree which can be shown to have been passed without jurisdiction or obtained by fraud.

Section 229B of the Civil Procedure Code (Act XIV of 1882) does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely alters the procedure by which such a judgment can have