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Decree for the plaintiff for rent from 1st July 1919, to 31st August 1921, at the rate of Rs. 45 per mensem, less a sum of Rs. 403-0-8, and for rent and compensation at the same rate per mensem from 1st September 1921, till possession given. Liberty to plaintiff to recover this amount from the amount paid into Court by the defendant. Decree for plaintiff for possession on or before 30th July 1922. No order as to costs.

Solicitors for the plaintiff: Messrs. *Mulla and Mulla.*

Solicitors for the defendant: Messrs. *Ferreira and Vallabhdas.*

Suit decreed.

G. G. N.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

1923.

March 28.

V. V. KANEMAR VENKAPAIYA, APPELLANT AND DEFENDANT *v.* NAZERALLY TYABALLY SINGAPOREWALLA, RESPONDENT AND DEFENDANT*.

Limitation—"Application"—Notice of motion filed in proper office of the Court within time—Motion brought on in Court after expiry of the period of limitation—Whether application within time—Bombay Rent (War Restrictions) Act (Bombay Act II of 1918), section 10A—Practice.

Where an "application" is to be made to the Court within the period of limitation prescribed by any Act, it is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court.

In re Gallop and Central Queensland Meat Export Company(1), referred to and applied.

APPEAL from the order of Pratt J. in an application made by way of motion.

*O. C. J. Appeal No. 110 of 1922; Suit No. 2676 of 1921.

(1) (1890) 25 Q. B. D. 230.

The applicant was the defendant in a rent Suit No. 2676 of 1921 brought under the Bombay Rent Act, 1918. He was evicted by the plaintiff (respondent) by a decree dated 9th September 1921 on the ground that the plaintiff, his landlord, required the premises "reasonably and *bona fide*" for his own use and occupation. The decree directed that possession be given on or before the 31st of December 1921. The plaintiff obtained possession on that date but the defendant complained that the plaintiff had not occupied the premises in suit within the period of six months from that date, i.e., on or before the 30th of June 1922. The defendant accordingly moved the Court under section 10A of the Rent Act for an order that the plaintiff should be made to re-instate him in the occupation of the premises on the terms and conditions of his original lease and to pay him compensation at the rate of Rs. 156 per month.

The notice of motion was filed by the defendant in the office of the Prothonotary on 25th August 1922 (i.e., within 2 months provided for by section 10A of the Rent Act), giving notice that the Court would be moved on 31st August 1922 for an order as prayed for in the notice. On the same day, the notice was served on the plaintiff's attorneys. On 30th August 1922, the defendant's attorneys pointed out to the plaintiff's attorneys that they had not received the plaintiff's affidavit in reply. The plaintiff's attorneys replied that they had no instructions from their client or his *munim* who were both out of Bombay and that they would apply for adjournment. The defendant's attorneys wrote back stating that they would oppose any application for adjournment and added that the motion would be brought on before Pratt J. on 11th September 1922 as the learned Judge would be sitting on the Original Side on that day. Pratt J. however did not revert

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to the Original Side till the end of September 1922. On 29th September 1922, the defendant's attorneys informed the plaintiff's attorneys that the motion would be brought on before Pratt J. on 4th October 1922. On 4th October 1922, the plaintiff's attorneys sent a copy of their client's affidavit in reply which they stated "will be used in showing cause against the notice of motion".

The motion was duly brought on before Pratt J. on 4th October 1922 but was adjourned to 6th October 1922. On 6th October, the motion was heard by the learned Judge when the plaintiff urged that the application was barred by limitation as it was not "made" within nine months from 31st December 1921 when the plaintiff obtained possession. Pratt J. upheld the plaintiff's contention and dismissed the motion with costs, giving reasons as under :—

"On this application, the first point that arises is one of limitation. Under section 10 (*a*) the application must be made within 9 months of the date when the plaintiff obtains possession. The application ought therefore to have been made on or before the 30th of September 1922. The motion however was not made till 4 days later, i.e., 4th October 1922. Mr. Talyarkhan contends that the application is in time, because notice of motion was given on the 25th of August 1922 returnable on the 31st of August 1922 and a copy of that notice of motion was lodged with the Prothonotary as required by *Rule* 322 *on* the day in which it was given, that is, on the 25th of August 1922. He contends that that is the day from which limitation should run, and that the mere fact that the notice of motion was not brought on was due to the solicitor's impression that as the Rent Suit Judge was not sitting on the Original Side, the bringing on of the motion might be deferred. That is of course a mistake; for the motion could have been brought on before any Judge. But the real point is whether the date on which the copy of the notice of motion was lodged with the Prothonotary should be taken as the date of the application or the date on which the motion was brought on in Court. On this point, I feel no hesitation in deciding that the date of the application is the date on which the motion was brought on. It is only when the motion is brought on that an application can be said to be made to the Court. The notice of motion is not a proceeding in Court, it is merely an expression of an intention to apply to the Court given to the other party for his information.

Similarly, the copy of the notice of motion lodged with the Prothonotary does not amount to an application, it is only an intimation to the Court that an application is intended to be made. I am fortified in this construction of the rule by the case of *Hinga Bibee* v. *Munna Bibee* reported in 31 Cal. 150.

Mr. Talyarkhan draws my attention to the case of *Kuttayan Chetty* v. *Manamma Ellappa Chetty*, 17 Madras Law Journal, page 215. There the plaintiff's vakil applied to the Registrar for an issue of the notice of motion according to the rules of that Court, and a notice of motion was accordingly issued by the Registrar. The Madras High Court held that the date of the application to the Registrar for the issue of the notice of motion was the *terminus a quo* for the purpose of limitation. But the distinction is obvious, for under the Madras High Court's Rules, it is the Court that issues notice of motion. Therefore an application to the Court to issue notice pre-supposes that an application has been made to the Court. Under the rules of this Court no application is made to the Court for issuing notice of motion and the Court is not moved until the day on which the motion is brought on."

The applicant appealed.

Sir Thomas Strangman, for the applicant (defendant):—Rule 322 of the High Court Rules does not apply to an application of the present nature. It applies to "injunctions, receivers and other interim relief in a cause". Notice of motion filed in Court is commencement of application. See *In re Gallop and Central Queensland Meat Export Company*[1] and the observations of Denman J., regarding "application" at page 231. Section 10A of the Bombay Rent Act requires an "application" merely. When the applicant invokes the aid of the Court by filing a notice of motion and serving the same on the opponent within the period of limitation, he must be deemed to have made an application. The rules of the High Court do not prescribe a special form for application. See *Gopalji Kallianji* v. *Chhaganlal Vitthalji*[2].

Kanga, Advocate General, for the respondent (plaintiff):—The case of *In re Gallop and Central Queensland Meat Export Company*[1] is clearly distinguishable.

[1] (1890) 25 Q. B. D. 230. [2] (1920) 45 Bom. 1071.

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There, the application was to set aside an award for which provision is made by the English Order LXIV, Rule 14. Besides in England motions are listed; and if a party's motion is not listed by the Court Officer on a particular day he cannot bring on the motion. It is on that account that notice of motion filed in Court is held to be an application. *Hinga Bibee's case*[1] decided in 1903 affords complete answer to the defendant's contention. The applicant should have obtained a rule *nisi* from the Court, instead of filing a notice of motion which is not like the filing of a plaint for which provision is made in the Limitation Act.

MACLEOD, C. J:—By Act XIV of 1920, section 10A was directed to be inserted after section 10 of the Bombay Rent (War Restrictions) Act No. II of 1918. On December 31, 1921, the defendant in Suit No. 2676 of 1921 was evicted by the plaintiff under a decree passed on September 9, 1921, on the ground that the plaintiff, his landlord, required the premises reasonably and *bona fide* for his own use and occupation. The defendant, alleging that the plaintiff had not occupied the premises within the period of six months from December 31, 1921, moved the Court under section 10A of the Rent Act for an order that the plaintiff should be made to re-instate him in the occupation of the premises described in the plaint, on the original terms and conditions of his lease and to pay him compensation for the loss suffered during the period he was kept out of possession of the said premises.

The defendant filed his notice of motion in the office of the Prothonotary on August 25. 1922, giving notice that the Court would be moved on Thursday, August 31, for an order that the defendant might be re-instated. The notice of motion bears an endorsement that it had been served on the plaintiff's attorneys on August 25.

[1] (1903) 31 Cal. 150.

On August 30, the defendant's attorneys wrote to the plaintiff's attorneys to note that they had not received the plaintiff's affidavit in reply to the notice of motion. The plaintiff's attorneys answered, on August 30, 1922, as follows :—

"Please note that neither our client nor our client's Munim is in Bombay to give us instructions for showing cause against the notice of motion. We shall, therefore, apply for an adjournment of the hearing of the motion for a month. We beg to send you herewith a copy of our client's clerk's affidavit in support of our application for adjournment."

The defendant's attorneys replied, on August 31, that they would oppose the application for adjournment. On September 6, they wrote again in answer to the plaintiff's letter of August 31 that the plaintiff had then had sufficient time to get his affidavit in reply made, and that there was no justification whatever for their client's proposed application for postponement. The letter added that the motion would be brought on before Mr. Justice Pratt on September 11 as Mr. Justice Pratt would be sitting on that day on the Original Side. Defendant's attorneys wrote on September 8 that the motion would not be brought on September 11 as Mr. Justice Pratt would not be sitting on the Original Side. They again pointed out that they had not received the plaintiff's affidavit in reply. Nothing happened until September 29 when the defendant's attorneys wrote :—

"We understand that the Honourable Mr. Justice Pratt will be sitting on the Original Side on October 2. Please note that we shall bring on the motion on October 4."

On October 4, the plaintiff's attorneys wrote sending a copy of the affidavit of their clerk which would be used in showing cause against the notice of motion.

The matter eventually was brought on before Mr. Justice Pratt on October 6, when the plaintiff contended that the defendant's application was barred by

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limitation as it had not been made within nine months from the date when the plaintiff obtained possession.

The question was whether it could be said that the defendant made the application to the Court when he filed his notice of motion in the office of the Prothonotary. Then it was in time according to the provisions of section 10 A of the Rent Act.

The learned Judge in holding to the contrary relied upon the decision in *Hinga Bibee* v. *Munna Bibee*[1], where it was decided that an application for restoration of a suit to the Board must be made within thirty days of the dismissal of a suit, and that a notice that the application would be made on a future date did not prevent limitation from running. Mr. Justice Sale said (p. 154):—

"The notice of motion which was given on August 29, 1903, does not prevent the Law of Limitation from applying. That is laid down in the case of *Khetter Mohun Sing* v. *Kassy Nath Sett*[2]; and inasmuch as the thirty days expired within the period of the vacation, the only course open to the plaintiff to avoid limitation was to mention the matter to the Court on its reopening day, which, as I have said, was not done."

The learned Judge was, therefore, constrained to follow the decision in *Khetter Mohun Sing* v. *Kassy Nath Sett*[2], which was a decision by the Appeal Court to the effect that the taking out of a summons calling upon another to attend a Judge in Chambers on the hearing of an application, was the act of the applicant and not of the Court taking cognizance of the application, and was not sufficient to save the application from being barred if the hearing of the application came on after the time allowed by the Indian Limitation Act for the application had expired. The Chief Justice said (p. 902):—

"The summons to attend the hearing of the application is the act of the applicant only and is merely a notice, signed by the Registrar at his request, that the application will be made on the day mentioned, i.e., December 5th,

[1] (1903) 31 Cal. 150. [2] (1893) 20 Cal. 899.

and is not the act of the Court receiving or taking cognizance of the application as would perhaps be the case if it were a rule *nisi* to show cause issued by the Court after hearing the statement of the applicant...Under these circumstances we think that no application was made to the Court until the application of December 5th which was made in pursuance of the notice given by the summons, and as that was more than three years from the time when the right to make it accrued the learned Judge was right in rejecting the application."

The learned Chief Justice, therefore, considered that an application could not be said to be made to the Court until the applicant had actually appeared before the Court.

In appeal we have been referred to a decision of the Divisional Court in *In re Gallop and Central Queensland Meat Export Company*[1] which was not cited in the trial Court. Under Order LXIV, Rule 14, of the Supreme Court Rules, an application to set aside an award might be made at any time before the last day of the sitting next after such award had been made and published to the parties. By Order LII, Rule 1, where by the rules any application was authorized to be made to the Court or a Judge, such application if made to a Divisional Court or to a Judge in Court, should be made by motion. An award was made and published on February 27. Notice of motion to set it aside was served on May 20. The motion did not appear in the day's list for hearing during the Easter sittings, which ended on May 23, but came on to be heard afterwards. It was held that the notice of motion having been given before the last day of the sittings next after the award, the 'application' was within the time prescribed by Order LXIV, Rule 14, and the motion was, therefore, not too late. Mr. Justice Denman said (p. 231) :—

"The notice of motion was given on May 20, and therefore within the time allowed by Order LXIV, Rule 14, for an application to set aside an award. If the notice was an 'application' within the meaning of Rule 14, it was in

[1](1890) 25 Q. B. D. 230.

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time. Applying the *ratio decidendi* of *Smith* v. *Parkside Mining Co.*[1], and *In re Corporation of Huddersfield and Jacomb* [2], I think that in this case the 'application' really was the commencement of the complaint. That is, in my opinion, what was intended in Order LXIV, Rule 14, as the 'application'. The only difficulty in putting this construction on Rule 14 arises from Order LII, Rule 1, which provides that, 'where by these rules any application is authorized to be made to the Court or a Judge such application, if made to a Divisional Court or to a Judge in Court, shall be made by motion'. It might seem, at first sight, from the terms of that rule, that the 'application' and 'motion' were one. But it is not necessary so to decide. Order LII, Rule 1, does not say that for all purposes the words 'application' and 'motion' shall be identical, and mean the same thing. The 'application' may be 'made by motion', and yet be complete enough within Order LXIV, Rule 14, and a sufficient 'complaint' within the meaning of the cases on the old Act for the purpose of launching a motion to set aside the award. I think that the two sections, although not easy to reconcile, may, perhaps, be reconciled in that way, viz., by deciding that the step had been taken before the last day of the sitting which is the first step which can be reasonably called an 'application' to set aside the award. I think, therefore, no extension of time was necessary."

Now in this case it was open no doubt to the defendant to apply direct to the Court for a rule *nisi* calling upon the plaintiff to show cause why the relief prayed for should not be given under section 10A of the Rent Act. But the usual procedure, where a party wishes to obtain a relief of an interlocutory nature, is by motion, and necessarily the first step which has to be taken is to file a notice of motion in Court, and following the decisions in the above-mentioned case that may reasonably be called 'an application'. There is no reason, therefore, why the filing of the notice of motion in this case should not be called 'the application' which the applicant desired to make. Apart from that I may mention that, on the facts of this particular case, the equities are all in favour of the defendant. The plaintiff put off the hearing of the motion from time to time, and did not even serve his affidavit in opposition until after the period of limitation had expired. The

[1] (1880) 6 Q. B. D. 67. [2] (1874) L. R. 10 Ch. 92.

notice of motion was filed on August 25 more than a month before the period of limitation expired, and it was not suggested in correspondence that time was of importance, or that it was necessary to appear in Court before September 30, 1922, if the application was not to be time-barred. However that may be, I am prepared to hold that when an application is to be made to the Court, it commences to be made when a notice of motion is first filed in the proper office of the Court.

The appeal, therefore, succeeds, and the application must go back to the trial Court to be decided on the merits.

The appellant should get his costs of the appeal.

Costs in the lower Court to be costs in the application.

Solicitors for appellant: Messrs. *Judah and Solomon.*

Solicitors for respondent: Messrs. *Payne & Co.*

Appeal allowed.

G. G. N.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

DAGADU GOVIND BODAKE AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* SAKHUBAI NANA BODAKE (ORIGINAL PLAINTIFF), RESPONDENT*.

1923. *February 23.*

Hindu law—Partition—Division of joint property—A portion of property left undivided—Co-parceners are tenants-in-common with respect to property left undivided.

* Second Appeal No. 229 of 1922.