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authorities to which I have referred. But in doing so I must make it clear that I find the issue in the affirmative only on the record before me, and on the construction of clause 1 in the bill of lading; I express no opinion as to the proviso to that clause.

Mr. Daphtary argues that as the plaintiff is an endorsee of the bill of lading, he cannot rely on clause 1 and the proviso to it. In *Bank of Australasia* v. *Clan Line Steamers, Limited*,[1] the action was brought by an endorsee of a bill of lading and the principles as to the liability of a shipowner which I have summarised above were also laid down in that case. The point was not seriously pressed and there is nothing in it.

Attorneys for plaintiff : Messrs. *Payne & Co.*

Attorneys for defendants : Messrs. *Crawford, Bayley & Co.*

Findings accordingly.

J. S. K.

[1] [1916] 1 K. B. 39.

ORIGINAL CIVIL

Before Mr. Justice Rangnekar.

SADANAND PANDURANG MHATRE *v.* PARASHRAM PANDURANG MHATRE.*

1927

October 7

Solicitors' common law lien—Lien does not attach to immovable property—Is particular lien and does not extend to solicitors' general costs for all business done by them for client—Does not prevail against mortgagee who lends money to pay off prior incumbrances.

In Bombay, solicitors have a common law lien for their costs over property recovered or preserved or the proceeds of any judgments obtained for the client by their exertions. But this lien is a particular lien, and is not available for the general costs for all business done by them for the clients, but only extends to the costs of the suit in which the property has been acquired or preserved by their exertions.

Tyabji Dayabhai & Co. v. *Jetha Devji & Co.*,[1] followed.

This lien does not attach to immovable property but, with this exception, it applies to property of every description including costs ordered to be paid to the client.

*O. C. J. Suit No. 680 of 1926.

[1] (1927) 51 Bom. 855.

Kumar Krishna Dutt v. *Hari Narain Ganguly*,[1] dissented from.

The solicitors' lien does not prevail against the claim of a mortgagee who advances money to the client to enable him to pay off prior incumbrances on the property in suit.

THIS was a chamber summons taken out by Messrs. Bhagvat & Co., a firm of attorneys, for a declaration and an order that the right, title and interest of defendant No. 1 and his sons, defendants Nos. 2 to 4, in Suit No. 680 of 1926, in certain immovable property do stand charged with the payments of the costs of the applicants in the suits and other suits and matters in which they acted as solicitors for the said defendants.

The facts were as follows :—

One Sadanand Pandurang Mhatre filed suit No. 680 of 1926 against defendants Nos. 1 to 4 for a declaration that certain properties were his self-acquired properties or in the alternative for partition. Defendant No. 5 was made a party-defendant as he was the mortgagee of one of the properties situate at Dadar. Messrs. Sabnis and Goregaonkar were solicitors of the plaintiff. The applicants were originally employed by defendants Nos. 1 to 4 as their solicitors in the suit. The suit was filed on March 15, 1926, and on October 20, the defendants Nos. 1 to 4 discharged the applicants and employed Messrs. Ardeshir, Hormusji, Dinshaw & Co. as their solicitors. Prior to the discharge of the applicants, nothing important happened in the suit, except the appointment of Mr. Moos as Receiver. In April 1927, the parties to the suit arrived at certain consent terms. About that time the first defendant approached one Navalkar with a request for a loan of Rs. 25,000, on a mortgage of a property which he expected to get under the consent decree in the suit. The first defendant informed Navalkar that the moneys were required for paying off the secured debts on the said property under

[1] (1915) 43. Cal. 676.

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prior mortgages and for costs and charges in connection with the suit. On April 25, 1927, Navalkar entered into an agreement to advance Rs. 25,000 on the mortgage of the right, title and interest of defendants Nos. 1 to 4.

The applicants had acted as solicitors for the defendants in several other suits and in several other matters, and their costs of these suits and matters, including their costs of Suit No. 680 of 1926, had remained unpaid. The applicants coming to know of the proposed mortgage informed Navalkar about their claim for costs.

The parties to Suit No. 680 of 1926 had arranged to take a consent decree on August 5, 1927, but the suit did not reach hearing on that day. On August 8, the first defendant obtained the sanction of the Chamber Judge to the proposed mortgage to Navalkar. On August 9, a consent decree was taken in Suit No. 680 of 1926. By this consent decree one of the two properties in the suit was given to the first defendant and his sons defendants Nos. 2 to 4 subject to the condition that they should pay off the mortgage on the said property and also pay certain costs. And in default of such payment the fifth defendant was given liberty by the consent decree to sell the Dadar property which was given to defendants Nos. 1 to 4.

After the passing of the consent decree, the mortgage of the fifth defendant was paid off and a reconveyance was executed by him in favour of defendants Nos. 1 to 4. On the same day, August 9, the mortgage in favour of Navalkar was executed. The sum of Rs. 25,000 raised on the mortgage was paid off by Navalkar in the manner set out in his affidavit. The applicants claimed priority to the mortgagee Navalkar to the extent of about

Rs. 1,000 and a charge against the mortgaged property to that extent.

Mulla, for Bhagwat.

Vachha, for defendant No. 1.

B. J. Desai, for Navalkar.

RANGNEKAR, J. :—[His Lordship after setting out the facts of the case proceeded :] The summons in the case asks for a declaration that the right, title and interest of defendants Nos. 1 to 4 in the Dadar property be charged with the payment of the costs of the applicants. Now although the matter was argued twice it did not strike any one as to what the summons was for. The summons does not ask for a declaration of priority as regards the applicants' costs over the claim of Navalkar under his mortgage. Yet in effect the argument from the commencement has been confined to such a claim, and in effect the contest is between the applicants and the mortgagee as to priority of charge. It is true that in the affidavit in support of the applicants' summons they claim priority for their costs over the mortgagee's claim, but they did not do so in the summons itself. Having regard to the arguments before me, I am willing to treat the summons as including the claim for priority but direct that the summons may be amended accordingly.

Mr. Desai for the mortgagee contends that there is no case made out by the applicants for any relief, and, secondly, that in any case the applicants are not entitled to have any lien on immovable property. Mr. Vachha supports the contention. Mr. Mulla contends that a solicitor's lien can attach to immovable property if the other conditions required for establishment of the right of lien exist, which he says is the case here. The first question, therefore, is whether the lien of a solicitor can be enforced against the immovable property of his client.

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Now the law as to solicitor's lien has been exhaustively discussed and laid down in a recent decision of the Appeal Court in *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.*[1] The learned Chief Justice at p. 1205 of the report para. 12 of his judgment, cites a passage from Halsbury, Vol. XXVI, para. 1334, p. 814, with approval as an accurate statement of the English law on the subject. This is what Halsbury states :—

"A solicitor is entitled to three kinds of lien to protect his right to recover his costs from his client, namely :—(1) a passive or retaining lien; (2) a common law lien on property recovered or preserved by his efforts; (3) a statutory lien enforceable by a charging order."

Obviously the claim in the summons is based on the second of the three kinds of lien mentioned by Halsbury. Then the learned Chief Justice at p. 1206 again refers to paras. 1342-43 in Halsbury at p. 820 as a correct exposition of the nature of the common law lien. This is what Halsbury says :—

"A solicitor has at common law, and apart from any order of the court or statute, a lien over property recovered or preserved or the proceeds of any judgments obtained for the client by his exertions. This lien is a particular lien; it is not, therefore, available for the general balance of account between the solicitor and the client, but extends only to the costs of recovering or preserving the property in question, including the costs of protecting the solicitor's right to such costs, and of establishing the lien....The lien does not attach to real property, but, with this exception, it applies to property of every description...including costs ordered to be paid to the client."

It follows from this that the claim of the applicants as to their lien for their costs in all matters other than Suit No. 680 must fail.

The common law lien does not extend to their general costs for all business done by them for defendants Nos. 1 to 4 but only to cost in Suit No. 680 in which the property has been acquired by defendants Nos. 1 to 4. This position has not been disputed by Mr. Mulla, and indeed he did not address any argument with regard to this part of the applicants' claim in the summons.

[1] (1927) 29 Bom. L. R. 1196 : 51 Bom. 855.

It will be clear from the statement of the law on the subject cited above from Halsbury that the common law lien did not attach to real property, but with that exception it applied to property of every description including costs ordered to be paid to the client. The point arose for a decision in the well-known case of *Shaw* v. *Neale*,[1] in which it was held that a solicitor's lien for his costs did not extend over real estate recovered for a client, and that he had a lien only on the papers in his hands. The reason of the rule is well put by the Lord Chancellor at p. 601 in this case :—

"I think that doubt is very well founded, because to hold that a solicitor obtaining a real estate for his client could be entitled to a lien upon it for his costs and charges, would be entirely contrary to the principle upon which the doctrine of lien proceeds. There can be no lien upon any property unless it is in the possession of the party who claims the lien. But if an estate is recovered by a solicitor, or if through a solicitor it is conveyed to the client, the solicitor is not in possession of the estate but his client is in possession of it. All that the solicitor has are the deeds and documents. He has a lien upon them. He may render them available for the purpose of establishing his claim. But it is quite clear that he cannot say that he has any such lien upon the estate as, within the principle of the doctrine which I have suggested, can entitle him to maintain it as a charge upon the property."

The case was first heard before the Master of Rolls and his judgment is reported in 20 Beav. 157. Mr. Mulla relies on the grounds on which it was held by the Master of the Rolls that the lien did not attach to real property. The Master of the Rolls stated in his judgment that the claim would not be supported as it would be a species of champerty. Later on whilst delivering his judgment on other points involved in the case the Master of Rolls observed that the lien did not attach to real property as it would evade the Statute of Frauds. Mr. Mulla then argued that as the law of champerty and maintenance does not apply to India nor the Statute of Frauds,—which is true,—the reason of the rule laid down by the Master of Rolls should be disregarded and the rule given effect to. But as pointed above that is not the

[1] (1858) 6 H. L. C. 581.

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ground on which in appeal from the judgment of the Master of Rolls the House of Lords put the law, and the principle on which the House based their decision was, what I have stated above, and the three other Law Lords concurred not only in the decision but the grounds on which it was put.

That being the position, I do not think that any particular importance could be attached to the grounds assigned by the Master of Rolls in coming to the conclusion to which he did in which the House of Lords concurred but on a different ground.

It is clear, therefore, that the common law lien of a solicitor does not in England attach to real property. In 1860 the Solicitors' Act came into force and by section 28 of that Act the solicitor's rights against property recovered for his client in a suit were extended and in particular a solicitor was given a lien upon real estate recovered by him for his client. It is well known that this Act was passed to meet the decision in *Shaw* v. *Neale*.[1]

Turning to the position in India, the Courts in Bombay and Calcutta have held that solicitors have a lien such as existed in English common law before the Solicitors' Act, 1860. Undoubtedly, the practice in Bombay has been to give effect to this lien for the last many years. The earliest case reported in Bombay is the case of *Devkabai* v. *Jefferson, Bhaishankar and Dinsha*.[2] Sir Charles Sargent in that case at p. 253 observed as follows :—

> "It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vic., cap. 127, by which that lien was very much extended. By that law the solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in the suit."

The latest case is the one to which I have already referred to. But just before this last case, there was a

(1) (1858) 6 H. L. C. 581.

(2) (1886) 10 Bom. 248.

decision by Mr. Justice Taraporewala in *Ved and Sopher* v. *Wagle & Co.*[1] The head-note runs thus :—

" ... the solicitors were entitled to enforce their lien in priority to the attaching creditors, so long as the moneys attached remained within the jurisdiction of the Court."

Later on after pointing out that more rights were given to solicitors by the Solicitors' Act, 1860, and that the lien given by the statute as regards personal property was not different from the common law lien, the learned Judge at p. 510 observes as follows :—

" To my mind the effect of making a charging order under the statute is nothing more than to provide for enforcing the solicitor's lien which existed in respect of personal property prior to the statute and which was for the first time given in respect of the real property of the client by the statute. The solicitor's lien at common law has been the lien which has been given effect to and enforced by the High Court of Bombay and Calcutta. There is no statutory provision in India as regards the solicitor's lien."

I need not refer to other cases of our Court or of the Calcutta High Court. All these cases are referred to by the learned Chief Justice in *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.*[2] It is clear on a careful consideration of the judgment of the learned Chief Justice that solicitors in Bombay have a common law lien of solicitors in England, and this lien can only attach to what may be called personal property recovered or preserved for the client by his solicitor. Then would I be justified in extending to the solicitor the benefit of section 28 of the Solicitors' Act, 1860, an Act which clearly is not applicable to this country?

The limits of jurisdiction which I have are concisely laid down by the learned Chief Justice in *Tyabji Dayabhai's case.*[2] At p. 1205 of the report the learned Chief Justice observes as follows :—

" In the first place it must be clearly understood that the rights and duties of attorneys are in no way part of the indigenous law or practice in India. Their profession originates from England; it grew up under the English common law; and it is clear that it was the common law which governed their rights

[1] (1925) 49 Bom. 505. [2] (1927) 29 Bom. L. R. 1196 ; 51 Bom. 855.

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and duties in the King's Courts established by the Supreme Court Charter of 1823, to which Courts our present High Court is the successor.

We have recently in two important cases had to consider in this Court the jurisdiction which we inherit from the Supreme Court. It is clear, as has already been pointed out in *Hirabai* v. *Dinshaw*[1] and in the recent Special Bench case of *Hatimbhai* v. *Framroz Dinshaw*,[2] that the jurisdiction of the Court of King's Bench in England and that of the Courts of Equity in England were conferred upon the Supreme Court by, *inter alia*, clauses 5 and 36 of the Supreme Court Charter of 1823, counting those clauses from the operative part and neglecting the recitals."

Later, whilst discussing the law on the subject applicable to this Court the Chief Justice at p. 1208 says :—

"Turning next to the law in India, in my opinion, it is equally clear, for, subject to any statute to the contrary, we should naturally follow the common law of England on this particular point."

After an exhaustive review of the principles and case law bearing on the subject, he comes to the conclusion that it is the English common law that governs the rights and duties of attorneys in Bombay.

In an interesting argument Mr. Mulla contends that the rule being a beneficent rule intended for the protection of solicitors who are officers of the Court, no arbitrary limits consequent upon the distinction existing under English law between real and personal estate should be imposed in this country and invites me to disregard the same. He further argues that the Privy Council has held that there is no distinction in India between real and personal property and refers to *Norendra Nath Sircar* v. *Kamalbasini Dasi*.[3] As to this I decline to enter into this discussion for the simple reason that the case of *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.*[4] decides that solicitors in Bombay have the same rights which the solicitors in England had under the common law prior to the passing of the Solicitors' Act, 1860. But I may point out that the case in *Norendra Nath Sircar* v. *Kamalbasini Dasi*[3] was one under the

(1) (1926) 28 Bom. L. R. 1334 ; 51 Bom. 167. (3) (1896) L. R. 23 I. A. 18 at p. 27.
(2) (1927) 29 Bom. L. R. 498 ; 51 Bom. 516. (4) (1927) 29 Bom. L. R. 1196 ; 51 Bom. 855.

Indian Succession Act, and the observations of their Lordships of the Privy Council must be held to be limited to the position under that Act. Mr. Mulla further refers by way of analogy to the view taken by this Court under the Indian Insolvency Act in *Alimahmad Abdul Hussein* v. *Vadilal Devchand*,[1] where it was held that the property, moveable and immoveable, acquired by an insolvent after the adjudication order, but before his final discharge, can be transferred by him, provided the transaction is *bona fide* and for value and is completed before the intervention of the Official Assignee. In that case the plaintiff argued that the rule in *Cohen* v. *Mitchell*[2] applied to the facts of that case. That rule undoubtedly was held in England to apply to personal property and not to real estate of a bankrupt, and the Bankruptcy Act in England was amended in 1913 and 1914 so as to make the principle of the rule applicable to all kinds of property. But in *Alimahmad Abdul Hussein* v. *Vadilal Devchand*[1] Shah Ag. C. J. proceeds in his judgment to state that the rule as it stands was in general terms, and further long before the rule in *Cohen* v. *Mitchell*,[2] the Courts in India did apply the principle enunciated in the rule to immoveable property under the Indian Insolvency Act. It is on these grounds that the learned Judge came to the conclusion that the rule ought to be made applicable to all kinds of property.

Mr. Mulla also relies on a decision of the Calcutta High Court in *Kumar Krishna Dutt* v. *Hari Narain Ganguly*.[3] It is true that in that case Mr. Justice Chaudhari came to the conclusion that the common law lien of a solicitor attaches to immoveable property. I find, however, that no reasons are given for coming to

[1] (1919) 43 Bom. 890. [2] (1890) 25 Q. B. D. 262 at p. 267.
[3] (1915) 43 Cal. 676.

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that conclusion beyond a reference to the case in *Norendra Nath Sircar* v. *Kamalbasini Dasi*.[1] But it appears from what the learned Judge says that in Calcutta no distinction appears to have been made between real and personal property as regards lien of a solicitor (see p. 682). Whatever that may be, in view of the clear pronouncement of the Appeal Court in *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.*[2] to the effect that the rights of solicitors are governed by the common law of England, I am unable to follow the decision in *Kumar Krishna Dutt* v. *Hari Narain Ganguly*.[3] I am, therefore, of opinion that the solicitor's lien cannot attach to immoveable property. It is a matter for consideration as to whether the benefit of the Solicitor's Act, 1860, should not be extended to solicitors here, and whether the Legislature should not pass a statute similar to section 28 of the Solicitor's Act, 1860.

I now come to the second question, which is, assuming that I can give the declaration sought for by the summons, whether I should do so.

The applicants acted as solicitors in the suit for a certain time on behalf of defendants Nos. 1-4. As to what they actually did, or whether it can be said that the Dadar property is the fruit of their exertion, unfortunately the materials before me are meagre, and I am not able definitely to say that the Dadar property was recovered or preserved by them for their clients. I find from the correspondence annexed to some of the affidavits that a Receiver was appointed, but that may mean nothing unless it is made out that there was any danger to the property. This being a partition suit a Receiver would as a matter of course be appointed. If so, and if there was no danger, then, as pointed out in *Devkabai's case*,[4] that it itself would not give any right to the

(1) (1896) L. R. 23 I. A. 18.
(2) (1927) 51 Bom. 855.
(3) (1915) 43 Cal. 676.
(4) (1886) 10 Bom. 248.

applicants. In *Devkabai's case*[1] at p. 254 the learned Chief Justice observes as follows :—

"But the mere fact, that the appointment of a receiver in the suit would preserve the fund now in Court from a possible danger in the future, cannot certainly bring it within the ordinary rule as to the solicitor's lien, even if it could, which we much doubt, by the existence of the word 'preserved' which is introduced into the English Act 23 and 24 Vic., cap. 127. In *Baile* v. *Baile*,[2] where the lien was allowed, the rents due to the estate were considered to be in actual danger of being lost when the suit was brought. In *Pinkerton* v. *Easton*[3] it was held that, as the administration suit had resulted in nothing, the solicitor was not entitled to a lien."

But apart from this, in my opinion, the applicants cannot get any priority over the mortgagee under the peculiar facts of the case. It appears that as part of the consent decree the defendants had to pay off prior mortgages in regard to which the applicants claim no priority. It was contemplated by the parties before the consent decree was taken that the first defendant should raise the moneys on a mortgage of the Dadar property, there being no other property in his hands or otherwise available to pay off prior incumbrances. As his sons were minors, the sanction of the Court to the mortgage was obtained, and it was after the consent decree that the mortgagee advanced Rs. 25,000. The particulars in para. 7 of the mortgagee's affidavit show how this money was utilised, and it will be seen that the whole of the money was really applied towards payment of the prior mortgages and costs which clearly under the consent decree were payable by the defendants with the exception of a very small sum of costs of the mortgagee's solicitors amounting to not more than Rs. 100 and a sum of Rs. 24 only which was the balance paid by the mortgagee to the mortgagors. I am unable to see why the mortgagee should not get his interest agreed upon from the time fixed because parties delayed obtaining the consent decree, or why the brokerage in the transaction should not be paid.

[1] (1886) 10 Bom. 248. [2] (1872) L. R. 13 Eq. 497.
[3] (1873) L. R. 16 Eq. 490.

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The position, therefore, is that the moneys advanced by the mortgagee were, as Mr. Desai rightly argues, the means by which the fruit, namely, the Dadar property, was preserved or obtained by the client. If the mortgage had not been entered into, the prior mortgagee would have sold off the Dadar property by public auction. He was threatening to do so and had obtained a preliminary decree, and the consent decree itself provided that if the amount due to him was not paid off he should be at liberty to sell off the property. There is no allegation of fraud against the mortgagee, and it is nobody's case that he advanced moneys to deprive the applicants of their costs or that the moneys obtained from the mortgagee were disbursed fraudulently to deprive the applicants of their costs. The orders to pay the costs and prior charges were made by consent, and it is to carry out that consent decree that the mortgage became necessary and the mortgage money was applied in accordance with the terms of the consent decree. The terms of the consent decree were such that until they were carried out it could not be said that there would be any fruit of the litigation on which the applicants' lien could attach.

I discharge the summons with costs. Counsel certified.

One set of costs to be allowed between the defendants Nos. 1 to 4 and the mortgagee. The costs of defendants Nos. 1 to 4 to be set off against the costs due by them to the applicant.

After I delivered my judgment Mr. Mulla stated that the Receiver in the case was appointed on the application of the plaintiff and defendants Nos. 1-4 did not appear on that application.

Attorneys for plaintiff: Messrs. *Sabnis, Goregaonkar & Senjit.*

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Attorneys for defendants Nos. 1-4 : Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for defendant No. 5 : Messrs. *Matubhai, Jamietram & Madan.*

Summons discharged.

J. S. K.

APPELLATE CIVIL

Before Mr. Justice Fawcett and Mr. Justice Mirza.

1928

January 13

RAOJI BIN BHAGU MORE (ORIGINAL DEFENDANT), APPLICANT *v.* RAGHUNATH VITHAL KATHALE (ORIGINAL PLAINTIFF), OPPONENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 53, 74—Revision—District Judge—Power of District Judge to call for additional evidence—Procedure—Civil Procedure Code (Act V of 1908), section 115, and Order XLI, Rule 28.

Under section 53 of the Dekkhan Agriculturists' Relief Act, 1879, the District Judge can exercise his discretion in allowing a plaintiff an opportunity of calling an expert witness in order to enable him to ascertain whether the view taken by the Subordinate Judge that the thumb impression on a promissory note differed from the thumb impression on the summons and on another document where the thumb-impression had admittedly been made by the defendant was correct or not; and it cannot be said that in calling in this aid to the determination of that point the District Judge would be exercising his jurisdiction illegally or with material irregularity, so as to enable the High Court to interfere under section 115 of the Civil Procedure Code. The mere fact that section 53 does not give him express power to call for additional evidence such as an appellate Court has under Order XLI, Rule 28, of the Civil Procedure Code, 1908, is not a sufficient basis for holding that the District Judge has no such power.

Babaji v. *Babaji*,[1] *Ramsing* v. *Babu Kisansing*[2] and *Gurubasaya* v. *Channalappa*,[3] discussed.

Held, further, that regarding the point whether the consideration of the promissory note was proved, the District Judge acted illegally and with material irregularity inasmuch as he reversed the decree and allowed the plaintiff's claim without discussing that point at all.

CIVIL Revision Application against the order of K. Barlee, the District Judge at Satara, reversing the decree passed by B. R. Mehendale, First Class Subordinate Judge at Satara.

Suit to recover money.

*Civil Revision Application No. 275 of 1926.

[1] (1891) 15 Bom. 650.

[2] (1893) 19 Bom. 116.

[3] (1894) 19 Bom. 286.