APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

PANDHARINATH KIKALAL, HEIR OF THE DECEASED SHAMKORBAI BHRATAR KIKALAL VANI (HEIR OF THE ORIGINAL PLAINTIFF), APPELLANT *v.* THAKORDAS SHANKARDAS VANI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1928
December 5

Civil Procedure Code (Act V of 1908), section 122 and Order IX, rule 9—Indian Limitation Act (IX of 1908), section 5, Schedule I, Article 164—Rule framed by High Court applying provisions of section 5 to application under Order IX, rule 9—Rule intra vires*—Retrospective effect of Rule—Procedure.*

The rule made by the Bombay High Court under section 122 of the Civil Procedure Code, 1908, applying the provisions of section 5 of the Indian Limitation Act, 1908, to applications under Order IX, rule 9, is *intra vires*.

The rule being one affecting practice and procedure only, should be given retrospective effect so as to apply to pending proceedings.

Manibhai v. *Nadiad City Municipality*[1]; *Institute of Patent Agents* v. *Lockwood*[2]; *Shankarlal* v. *Dakor Temple Committee*[3]; *Krishnamachariar* v. *Sriranyammal*[4]; *Gajanan* v. *Waman*[5]; *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa*[6]; *Shib Shankar Lal* v. *Soni Ram*,[7] referred to.

APPEAL under the Letters Patent against the order of Perceival, J., dismissing appeal from Order No. 37 of 1926 under Order XLI, rule 11 of the Civil Procedure Code, 1908.

The facts material for the purposes of the report are stated in the judgment of Mr. Justice Patkar.

H. C. Coyajee, with *J. R. Gharpure*, for the appellant.

W. B. Pradhan, for the respondents.

PATKAR, J. :—This is an appeal against the order of the Joint First Class Subordinate Judge of Dhulia rejecting an application to restore the suit to the file. The plaintiffs filed Suit No. 197 of 1918 to recover possession of the properties in suit. It is alleged that their pleader, Mr. Dev, compromised the suit without their consent and a decree was passed in terms of the compromise. The plaintiffs filed Suit No. 25 of 1922 to

*Appeal No. 45 of 1926 under the Letters Patent.

[1] (1926) 28 Bom. L. R. 1465.
[2] [1894] A. C. 347 at p. 365.
[3] (1925) 28 Bom. L. R. 309 at p. 313.
[4] (1924) 47 Mad. 824.
[5] (1910) 12 Bom. L. R. 881.
[6] (1883) 7 Bom. 459 at p. 462.
[7] (1909) 32 All. 33; on appeal to P. C. 35 All. 227.

1928

PANDHARINATH
v.
THAKORDAS
SHANKARDAS

Patkar J.

set aside the compromise decree on the ground that the pleader had no authority to compromise the suit, and, therefore, the decree was not binding on them. This suit was dismissed on January 15, 1923, as their pleader, Mr. Shidore, was absent, and on the advice of their pleader they filed an appeal against the order of dismissal. The appeal was dismissed on June 30, 1925, on the ground that the order was not appealable. The plaintiffs, therefore, made an application on June 18, 1925, to restore the suit to the file under Order IX, rule 9, of the Civil Procedure Code. The learned Subordinate Judge held that the application was beyond time under Article 164 of the Indian Limitation Act, and that under section 5 of the Indian Limitation Act the delay could not be excused. An appeal is filed against the order rejecting the application to restore the suit to the file.

The provisions of section 5 of the Indian Limitation Act, 1908, were made applicable to applications under Order IX, rule 9, by a rule made by this High Court under section 122 of the Civil Procedure Code and published in the *Bombay Government Gazette* on December 21, 1927.

It is urged on behalf of the respondents that the rule made by the High Court under section 122 of the Civil Procedure Code was *ultra vires*, that the High Court had no power to frame a rule modifying expressly or by necessary implication a rule of limitation prescribed by the Indian Limitation Act, and that the word "rule" in "by any enactment or rule" in section 5 of the Indian Limitation Act has been dropped by the amending Act X of 1922. The present rule does not alter expressly or by implication the period of limitation. The rule framed by the High Court applies a section of the Indian Limitation Act which itself provides for such an application. The existence of clause (3) in

rule 9 of Order XXII shows that the provision of extending section 5 of the Indian Limitation Act was deliberately placed in the first schedule of the Civil Procedure Code. The High Court has power under section 122 of the Civil Procedure Code to regulate the procedure of the Civil Courts subject to their superintendence, and has power by such rules to annul, alter or add to all or any of the rules in the first schedule. "Enactment" under section 3, clause (17), of the General Clauses Act, would include any provision contained in any Act. The words "by any enactment or rule" have been changed into "by or under any enactment." The words "by or under" are more extensive than the mere word "by". The words "under any enactment" would mean under any provision contained in any Act; and would not be covered by the words "by any enactment," and would cover the rule making power under any provisions of the Act, e.g., section 122 of the Civil Procedure Code: see *Manibhai* v. *Nadiad City Municipality*.[1] Such rules are to be as effectual as if they were part of the statute itself. See *Institute of Patent Agents* v. *Lockwood*[2] and *Shankarlal* v. *Dakor Temple Committee*.[3] Similar contentions were considered and overruled by the Madras High Court in the Full Bench decision in the case of *Krishnamachariar* v. *Srirangammal*,[4] where it was held that the rule framed by the High Court applying section 5 of the Indian Limitation Act to applications under Order IX, rule 13, of the Civil Procedure Code, is *intra vires*.

It is further urged on behalf of the respondents that Suit No. 197 of 1918 having been dismissed, the change effected by the rule should not be given retrospective effect as it affected the rights of the defendants under the decree, and reliance is placed on the decisions in

(1) (1926) 28 Bom. L. R. 1465 at p. 1475.
(2) [1894] A. C. 347 at p. 365.
(3) (1925) 28 Bom. L. R. 309 at p. 313.
(4) (1924) 47 Mad. 824.

1928

PANDHARINATH v. THAKORDAS SHANKARDAS

Patkar J.

Ramakrishna Chetty v. *Subbaraya Iyer*[1] and *Girish Chundra Basu* v. *Apurba Krishna Dass.*[2] In *In re Joseph Souche & Co., Limited,*[3] it was held by Jessel M. R. (p. 50) :—

"It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. [But] there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, ..."

But there is no vested right in procedure or costs. See Craies on Statute Law, p. 332. In *Gajanan* v. *Waman*[4] Beaman, J., expressed a doubt (p. 883) "whether it is strictly accurate to say that the law of limitation is always a law of procedure, that is to say, a purely adjective law, for, amongst its other consequences, it certainly has the creation of rights by prescription and if those rights have vested in individuals under one law of limitation", it cannot be "seriously argued that they can be divested by the introduction of a new law of limitation." It was, however, held in *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa*[5] that the law of limitation applicable to proceedings in execution is not the law under which the suit was instituted but the law in force at the date of the application for execution, and that Acts of Limitation like other laws relating to procedure apply immediately to all steps taken after they have come into force except when some provision is made to the contrary. The same view was taken in *Shib Shankar Lal* v. *Soni Ram,*[6] which went up to the Privy Council in *Soni Ram* v. *Kanhaiya Lal,*[7] where it was held that the law of limitation applicable to a suit or proceeding is the law in force at the date when the suit or proceeding is instituted unless there is a distinct provision to the

[1] (1912) 38 Mad. 101.
[2] (1894) 21 Cal. 940.
[3] (1875) 1 Ch. D. 48.
[4] (1910) 12 Bom. L. R. 881.
[5] (1883) 7 Bom. 459 at p. 462.
[6] (1909) 32 All. 33.
[7] (1913) 35 All. 227.

contrary. The extension of the provisions of section 5 of the Indian Limitation Act to an application under Order IX, rule 9, is not an enactment of a new period of limitation. If there had been an alteration in the law of limitation, different considerations would have prevailed. The change effected by the rule under section 122 of the Civil Procedure Code related to the procedure governing applications to restore suits, dismissed for default, to the file. The application was governed by Article 164 of the Indian Limitation Act, and it continued to be governed by the same Article. The application filed beyond 30 days, as required by Article 164, was beyond time. The new rule relaxes the rigour of the law by extending the provisions of section 5 to applications under Order IX, rule 9. The application was beyond time, but the procedure of the Court was amended by enabling the Court to excuse the delay in such an application. Section 5 of the Indian Limitation Act was not in any way amended or repealed. It was extended by the rule under section 122 of the Civil Procedure Code to an application under Order IX, rule 9.

In *Republic of Costa Rica* v. *Erlanger*[1] Mellish, L. J., held that (p. 69) " no suitor has any vested interest in the course of procedure ". In *Warner* v. *Murdoch*[2] it was held by James, L. J., that (p. 752) " no one has a vested right in any particular form of procedure," and in *Wright* v. *Hale*[3] it was held by Pollock, C. B., that (p. 231) " when an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, . . . it does apply to such actions." The general principle seems to be that alterations in the procedure are always retrospective unless there be some

[1] (1876) 3 Ch. D. 62. [2] (1877) 4 Ch. D. 750.
[3] (1860) 6. H. & N. 227.

1928

PANDHARINATH v. THAKORDAS SHANKARDAS

Patkar J.

good reason against it: See Maxwell's Interpretation of Statutes, p. 401. Acts which take away vested rights ought not to be construed as having retrospective operation, but the case is different with regard to Acts regulating practice and procedure. The cases relied on on behalf of the respondents affected vested rights. The case would be different where an amendment of the law takes away any vested rights or affects a right of appeal. A right of appeal is not a mere matter of procedure. See *Colonial Sugar Refining Company* v. *Irving*[1] and *Delhi Cotton Co.* v. *Income Tax Commissioner.*[2]

In *Hajrat Akramnissa Begam* v. *Valiulnissa Begam,*[3] where in considering the question whether section 4 of Act VI of 1892, which declared section 647 of the old Civil Procedure Code corresponding to section 141 of the present Code inapplicable to applications in execution, deprived a party of the remedy under section 103 of the old Civil Procedure Code, corresponding to Order IX, rule 9, for restoring to file an application for execution which has been dismissed for default, it was held that alterations in forms of procedure are retrospective in effect and apply to pending proceedings. A similar view was taken in *Fateh Chand* v. *Muhammad Bakhsh.*[4] Further, under section 122 of the Civil Procedure Code, the rule was framed for regulating the procedure of the Civil Courts subordinate to the superintendence of the High Court. Having regard to the object for which the rule was enacted, namely, to relieve the rigour of the law without affecting any period of limitation or interfering with vested rights, we think that the rule made by the High Court effected a change in procedure and should be given retrospective effect so as to apply to pending proceedings.

(1) [1905] A. C. 369.
(2) (1927) 30 Bom. L. R. 60 P. C.
(3) (1893) 18 Bom. 429.
(4) (1894) 16 All. 259 F. B.

It follows, therefore, that the rule is *intra vires* and would apply to pending proceedings. The rule was made applicable during the pendency of an appeal. A suit and all appeals made therein are to be regarded as one legal proceeding. See *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*[1] and *Deb Narain Dutt* v. *Narendra Krishna*.[2] In *Chinto Joshi* v. *Krishnaji Narayan*[3] West, J., observes that (p. 216) "the legal pursuit of a remedy, suit, appeal, and second appeal, are really but steps in a series of proceedings connected by an intrinsic unity". The rule, therefore, framed by the High Court would apply to the application made by the plaintiffs to set aside the decree under Order IX, rule 9.

We would, therefore, reverse the order of the lower Court and remand the case for disposal on the merits. Costs costs in the application.

MURPHY, J. :—The applicants in this proceeding had sued to have set aside the decree in Special Regular Suit No. 197 of 1918 of the Dhulia Court, on the ground that that suit had unauthorizedly been compromised by the pleader representing them. This, applicants' second suit, was dismissed for default on January 15, 1923. They next appealed against the order of dismissal, but their appeal was rejected by the District Court as mistakenly undertaken. Their next step was to apply to have their suit restored to file.

The learned First Class Subodinate Judge decided that their application was not in time, and that the delay could not, in the circumstances, be excused. Their appeal to this Court, against this order was dismissed summarily, and hence the present appeal under the Letters Patent.

[1] (1869) 6 Bom. H. C. (A. C. J.) 166. [2] (1889) 16 Cal. 267 at p. 278 F. B.
[3] (1879) 3 Bom. 214.

1928

PANDHARINATH v. THAKORDAS SHANKARDAS

Murphy J.

The learned Subordinate Judge held that section 5 of the Indian Limitation Act did not apply to an application made under Order IX, rule 9, and that the delay could therefore not be excused, under that section. The real point is that at the hearing of the appeal under the Letters Patent on admission, the Bench of this Court which heard it held that in view of the ruling in *Mahadeo* v. *Lakshminarayan*,[1] section 5 of the Indian Limitation Act could not be held to apply to an application made under Order IX, rule 9, but suggested that a rule applying it should be made, and meanwhile admitted the appeal.

The rule has since been made by this Court on December 21, 1927, under the powers conferred on it by section 122 of the Civil Procedure Code. It has been objected at the hearing, that :—

(1) The new rule is *ultra vires* of the powers of this Court; and,

(2) that it cannot in any case operate retrospectively.

On the first point, I think Mr. Pradhan's objection is not arguable. Under section 122 of the Civil Procedure Code, this Court has power to annul, alter or add to any of the Rules in Schedule I of the Code; and the amendment has been made after previous publication in accordance with that power. A similar amendment to Order IX, rule 13, made by the High Court at Madras, was challenged in the case of *Krishnamachariar* v. *Srirangammal*,[2] and it was held not to be *ultra vires* of the power given by section 122 of the Code of Civil Procedure. The additional proviso to the rule does not, in itself, purport to give retrospective effect to the change it makes, and the next question consequently arises, whether as a mere alteration in a rule of procedure, it should be deemed to have retrospective effect; or if, as a

[1] (1925) 27 Bom. L. R. 1150. [2] (1924) 47 Mad. 824.

substantial alteration of the law affecting existing rights, it should be confined in its operation to matters arising since it was madè.

The general rule touching the point in question is, that every statute which takes away or impairs vested rights, acquired under the previously existing law, must be presumed to be intended not to have retrospective operation. But this presumption is not applicable to enactments affecting procedure, or practice; for no one has a vested right in procedure and practice. Alterations in procedure, therefore, are held to be retrospective, unless a good reason to the contrary is forthcoming. But the right of appeal is a vested right, and it is on this ground that section 154 of the Code has been enacted.

Now, the present applicants had no vested right in any appeal. When their second suit was dismissed for default, they could either have applied in time to have the order set aside; or have prayed for a review. They adopted neither of these courses, but appealed to the District Court. No appeal lay to that tribunal, and the appeal necessarily failed; and since by then the time within which the remedies open to them could be prosecuted was past, the decree in their suit became final, and they are precluded from bringing a fresh suit on the same cause of action. The consequence is, that the decree in Suit No. 197 of 1918, and the compromise it affected, will stand, unless the new rule has a retrospective effect.

But from the point of view of the decree-holder in Suit No. 197 of 1918, the result is different. His decree was not appealed against and was final, subject to being set aside in a suit framed for that purpose. Such a suit was framed, and ended as already stated, and in a way it may be said that the effect of the new rule, if it is given retrospective effect to, will be to deprive his decree

1928

PANDHARINATH
v.
THAKORDAS
SHANKARDAS

Murphy J.

of the finality it would have had as not being susceptible of again being challenged in another suit.

This is more or less the situation envisaged in the remarks of Beaman, J., in *Gajanan* v. *Waman*,[1] though it has been held in some reported cases that the law of limitation is adjective law.

The real test appears to me to be, whether the new rule is essentially an alteration of the procedure of the Court, or one of a rule of limitation, or affecting a right of appeal.

This alteration, though it may possibly have the effect of granting the applicants' prayer to have the order of dismissal set aside, if they can show sufficient ground, does not appear to me to affect any vested right in the decree-holder on the other side. It does not alter the law of limitation, or that of appeal. All it does is to invoke the general exception contained in section 5 in cases falling within Order IX, rule 9, enabling an order of dismissal to be set aside on sufficient cause being shown.

Even if looked at in its aspect of affecting the law of limitation, there is some authority for the view that alterations in it are matters of procedure. I refer to the cases reported in *Shib Shankar Lal* v. *Soni Ram*.[2] Again, strictly speaking, the new rule is not an alteration in the law of limitation itself, but in the application of one of the general exceptions to be found in that law to it.

I think, looking at all the circumstances, the change really amounts to one of procedure, and if so, there can be no vested right in it.

I agree with my learned brother Patkar, J., that, in the first place, the rule made by this Court, applying section 5 of the Indian Limitation Act to proceedings

(1) (1910) 12 Bom. L. R. 881. (2) (1909) 32 All. 33.

under Order IX, rule 9, is not *ultra vires*; and also in his view that, since these proceedings are still pending and that the new rule is one affecting practice and procedure only, it applies retrospectively to the application which this appeal is about, and to the order proposed by him that the lower Court's order be reversed and that the matter be remanded to the original Court for a decision on the merits, and that the costs should be costs in the application.

1928

PANDHARINATH *v.* THAKORDAS SHANKARDAS

Murphy J.

Decree reversed and case remanded.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

ANANT GOVIND JOG (ORIGINAL PLAINTIFF), APPELLANT *v.* TUKARAM KUSHABA SHINDE (ORIGINAL DEFENDANT No. 3), RESPONDENT.*

1928 *December* 12

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 22—Decree against father—Execution of decree against son—Rents of land inherited from father—Rents liable for satisfaction of father's debts—Hindu Heirs' Relief act (Bom. VII of 1866), section 2.

Although under section 22 of the Dekkhan Agriculturists' Relief Act, 1879, the immoveable property inherited by a Hindu son as the representative of his father, cannot, where the son is an agriculturist and the property has not been specifically mortgaged, be sold in execution of a decree, the rents of that property, though they did not come into the son's hands at the time of his father's death, are liable for satisfaction of the father's debts to the extent of the property so inherited but not duly applied for the payment of those debts.

Nature of the liability of a son under the Hindu Heirs' Relief Act, 1866, discussed.

Unnopoorna Dassea v. *Gunga Narain Paul*[1]; *Jamiyatram Ramchandra* v. *Parbhudas Hathi*[2]; *Keval Bhagavan Gujar* v. *Ganpati Narayan*,[3] referred to.

SECOND appeal against the decision of G. S. Rajadhyaksha, District Judge of Satara, modifying the decree passed by B. H. Desai, Subordinate Judge of Islampur.

Proceedings in execution.

*Second Appeal No. 148 of 1927.

[1] (1865) 2 W. R. 296.

[2] (1872) 9 Bom. H. C. 116.

[3] (1883) 8 Bom. 220.