1895

RADHA PERSHAD SINGH v. BUDHU DASHAD.

inability to perform the services as *gorait*, and that the defendant No. 1, the real holder of the service tenure, had no notice of the determination of the service, or of the action on the part of the zemindar in settling the lands with plaintiff No. 2.

It seems to us, therefore, that the plaintiff cannot recover possession in this action, for he can only do so by determining the service tenure held by the defendant No. 1. Upon the judgments of the Courts below, and upon the case of the plaintiff himself, that tenure has not yet been determined ; the plaintiff has not given to the contending defendant any notice to quit, nor is there any allegation, much less evidence on his part, that the defendant has declined to perform the services for which the tenure was created ; though no doubt the defendant by his written statement has clearly indicated that he is not willing to render any services to the plaintiff. In this view of the matter, we are of opinion that the claim for ejectment fails. We, however, think that, as the question of the character of the tenure held by the defendant No. 1 was raised in issue between the parties and dealt with by the Courts below, it may be declared, as has already been expressed, that the tenure in question is a service tenure created in lieu of private services to be rendered to the zemindar, and that the tenure is not of a permanent character.

Each party will bear his own costs throughout this litigation.

S. C. C. *Appeals dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice Hill.

M. M. WATKINS AND OTHERS *v.* N. FOX AND OTHERS.*

1895 *May* 20.

Limitation Act (XV of 1877), Art. 84—Taxed costs of an attorney, Suit for—Suit or particular business, Meaning of.

Subsequent proceedings taken in connection with the taxation of an opponent's costs are not part of the suit or application itself.

Where a firm of attorneys brought a suit against their clients to recover the costs of an application to the High Court :

Held, that limitation began to run from the date of the judgment in the

* Suit No. 195 of 1891.

1895

WATKINS v. FOX.

application. *Balkrishna Pandurang* v. *Govind Shivaji* (1) and *Rothery* v. *Munnings* (2), approved.

Items of an attorney's bill for work done, subsequently to the judgment, in opposing the taxation of the opponent's costs, although done on his client's instructions, will not take the matter out of the Limitation Act. Such items do not form part of the costs of the original application.

THIS suit was brought by the widow and sole executrix of the will of Mr. Algernon Watkins, and the other partners in the firm of Messrs. Watkins and Co., attorneys of the High Court of Calcutta, to recover the sum of Rs. 6,186-9-10, the balance of an account due to them from defendants as their costs in certain proceedings in which they acted as the attorneys of the defendants. The costs were incurred in connection with an application by the defendants under Act XV of 1859, section 24, to the High Court for an order, declaring that a certain patent in a sugarcane crushing machine owned by Messrs. Thomson and Mylne was null and void, and that Messrs. Thomson and Mylne had acquired no exclusive privileges in respect thereof. The plaintiff's firm first received instructions to act for the defendants in January 1887, and the petition was presented on 26th of May 1887.

The order was made by the High Court on the 30th January 1888, dismissing the application with costs.

The plaint was filed on 7th April 1891.

The defendants, in their written statement, now raised the defence that the suit was barred by limitation under Article 84 of the Second Schedule of the Limitation Act, but they did not appear at the trial.

Subsequently to the order dismissing the application, Messrs. Watkins and Co. continued to act as attorneys for the petitioners (the defendants in this suit), opposing on their behalf various applications for the taxing of their costs made from time to time by Messrs. Sanderson & Co., who were the attorneys for Messrs. Thomson and Mylne in the original application.

Mr. *Garth* and Mr. *Dunne* for the plaintiffs.

Mr. *Dunne*.—The present suit to recover our costs is not barred by Article 84 of the Limitation Act. The bill of costs shews that

(1) I. L. R., 7 Bom., 518. (2) 1 B. & Ad., 5

instructions were given by the defendants to their attorneys to delay as much as possible the taxing of the costs of the other side. This they did, and the doing so would bring them within the period of three years required by the section of the Limitation Act. The opposing of the taxing of the costs of the other side was done on instructions received from the defendants (our clients), and was, if not part of the suit, at any rate part of the particular business in which they acted as attorneys. This would bring the matter down to September 1888, the last item in the bill of costs being "attending the taxation of the costs of the other side" on the 7th September 1888. The attorneys, acting for a party in a suit, cannot refuse to go on with the taxation of the other side's costs. It is part of the regular business connected with the suit, and contemplated by section 84 of the Limitation Act. *Narayana Chetti* v. *Champion* (1), *Balkrishna Pandurang* v. *Govind Shivaji* (2), *Harris* v. *Quine* (3). The warrant of attorney continues, until all proceedings in the suit are ended, so far as regards the client; section 39 of the Civil Procedure Code.

The proceedings in this application are on the same footing, although it is an application and not a suit. There has been no discontinuance by the attorneys of the business they were conducting for the defendant, nor has that business terminated. Belchamber's Rules and Orders, section 94; *Hearn* v. *Bapu Saju Naikin* (4).

[HILL, J.—It is significant that the Act does not use the words "judgment or decree."] Yes, and it does not define when the suit is determined, nor am I aware of any definition of what is a suit. The business cannot have terminated until the costs of the other side were taxed, and the liability of the present defendants, the plaintiff's clients, reduced to a certainty.

HILL, J.—This is a suit by a firm of solicitors carrying on business under the style of Watkins and Co., and the legal representative of Mr. Algernon F. N. Watkins, a deceased member of the firm, for the recovery of the costs of certain proceedings in

(1) I. L. R., 7 Mad., 1.
(2) I. L. R., 7 Bom., 518.
(3) L. R., 4 Q. B., 658.
(4) I. L. R., 1 Bom., 505.

1895

WATKINS v. FOX.

this Court, under section 24 of Act XV of 1859. The object of those proceedings was to effect the revocation of a patent held by two persons, named Thomson and Mylne, for a sugar-crushing machine.

The plaintiffs' case is that the first defendant, Mr. Neil Fox, consulted their firm so far back as the year 1885, with respect to the revocation of Messrs. Thomson and Mylne's patent, representing that he did so, not only on his own behalf, but also on behalf of other persons, who were interested in getting the patent set aside, and that in pursuance of his instructions the proceeding mentioned above was instituted on the 26th May 1887. In consequence, however, of the circumstance that Mr. Neil Fox was himself a licensee under the patent it was considered unadvisable that he should be made a party to the proceeding, and it was arranged accordingly that the name of the third defendant, Mr. Moses, should be used instead of his. This was done. The warrant of attorney authorizing Watkins and Co. to act was signed by Mr. Moses, and the proceeding was conducted in his name, and, as is alleged, on his account, as well as on that of Mr. Neil Fox.

The second defendant, Mr. George Fox, a brother of the first defendant, it is said, was one of the persons interested in the revocation of the patent, on whose behalf Mr. Neil Fox had instructed Messrs. Watkins and Co., and on that ground, as well as upon a personal undertaking given by him after the proceeding under the Patent Act had ended, guaranteeing the payment of the costs, he has been included in this suit. With respect to this undertaking, the plaintiff's case is that on the 9th March 1888, the application under the Act of 1859 having been dismissed with costs on the 20th January 1888, Mr. George Fox had an interview with Mr. Algernon F. N. Watkins, at which he promised that, if time was given to his brother for the payment of the costs, he would see that they were paid, and he promised also that he would himself remit at once to Messrs. Watkins and Co. a sum of Rs. 2,000 then due for Counsel's fees. At the same interview he further instructed Messrs. Watkins and Co. to delay the taxation of the respondents' costs as much as possible. Mr. George Fox, it is said, having given these

undertakings and instructions to Mr. Watkins, was referred by the latter to Mr. Farr, at that time a member of the firm of Messrs. Watkins and Co. and in charge of the particular case, to whom they were repeated and who accepted them. Time was, it is stated, accordingly given to Mr. Neil Fox, but nothing has since been paid by any of the defendants. Mr. Neil Fox has not entered an appearance to this action. Mr. Moses has entered an appearance, but has not filed a written statement. Mr. George Fox has filed a written statement, but no one appeared at the hearing, either on his behalf or on that of his co-defendants.

By his written statement Mr. George Fox denies all personal interest in the proceeding under the Patent Act. He denies also having given any undertaking to pay his brother's costs, and he pleads that the suit is barred by limitation.

To deal in the first place with the case of the first defendant. As against him the suit is based (excepting two trifling items) upon a bill of costs taxed by the taxing officer of this Court, and there is no reason for supposing that any of the charges which it contains are unreasonable. Mr. Farr, who was at the time a member of the firm of Messrs. Watkins and Co., though he has since then severed his connection with it, deposes to their correctness, and Mr. Neil Fox has himself, in certain letters which he wrote to the plaintiff's firm in relation to their claim, admitted his liability. So that, unless the suit is barred by limitation, there can be no question but that he ought to pay.

With respect to that question, the following particulars are material: The present suit was instituted on the 7th April 1891, judgment was delivered in the proceeding under the Patent Act on the 20th January 1888. On the 20th February 1888 the latest act in relation to the preparation of the orders of the Court in that proceeding seems to have been performed by Messrs. Watkins and Co. On the 9th March 1888 Mr. George Fox's interview with Mr. Watkins took place, at which he is said to have given the undertaking on which it is now sought to make him liable, and instructed Messrs. Watkins and Co. to do what they could to delay the taxation of the costs of his brother's opponent.

In pursuance of these instructions Messrs. Watkins and Co.

1895

WATKINS v. FOX.

did attend the taxation for the purpose mentioned, and succeeded apparently in prolonging the taxation considerably. The last item in their bill of costs for services so rendered is dated the 17th September 1888.

The question is whether the period of limitation by which this suit is governed began to run from the date of judgment in the Patent Act proceeding, or from the date upon which Messrs. Watkins and Co. performed their latest act of service in relation to the taxation of the respondent's costs.

The question is governed by Article 84 of the 2nd Schedule of the Limitation Act, and if the former date be the proper one, the suit is, so far as Mr. Neil Fox is concerned, barred; if the latter, it is within time.

The material part of the article in question provides that a suit by an attorney for his costs of a suit or a particular business must be brought within three years from the date of the termination of the suit or business. The first point for determination then is under which category, that of "a suit" or of "a particular business," the proceeding now in question falls.

I am not aware that the first of these terms has been defined by the Legislature, although it is no doubt provided by the third section of the Limitation Act, that in that Act (unless there be something repugnant in the subject or context) "suit" does not include an appeal or an application, but this distinction must, I think, be confined in its effect to the immediate purposes of the Act, and has no bearing upon the point now under consideration.

The separation of suits in the article from business of other kinds might seem at first sight to suggest that it was intended to draw some general distinction between litigious and non-litigious business. But numerous examples of litigious business might be mentioned, to which it would, without an obvious misapplication of language, be improper to apply the word "suit," and I think that the term ought to be confined to such proceedings as under that description are directly dealt with by the Code of Civil Procedure, or such as by the operation of the particular Acts which regulate them are treated as suits.

It is unnecessary now, if the term be employed in that sense, to attempt further to determine its scope. But it seems to me that so used it does not include a proceeding under section 24 of the Act of 1859. There are differences with respect to the mode of institution, the procedure for conducting them and their ultimate result, which create a substantial distinction, I think, between such a proceeding and a suit in the above acceptation. The Act of 1859 itself, moreover, maintains throughout the distinction between the action for infringement for which it provides and the "proceeding" under section 24. I think, then, that a proceeding under that section falls under the second category of article 84, and that what has to be determined in the present case is, when the business for which Mr. Neil Fox retained the plaintiffs' firm when he engaged them to conduct this proceeding terminated.

The distinction does not, however, in this instance appear to me to affect the result very materially; for I think that the analogy of an ordinary suit ought to apply.

There are, apparently, two cases in the Indian Law Reports, in which it has been decided when a suit terminates for the purposes of the Limitation Act, and they unfortunately do not agree. One of these is *Narayana Chetti* v. *Champion* (1) and the other is *Balkrishna Pandurang* v. *Govind Shivaji* (2). In the former it was ruled that, until costs are taxed and inserted in the decree and the decree has issued, a suit has not terminated within the meaning of article 84 of the Limitation Act. In the latter it was held, following what was said in *Harris* v. *Quine* (3), that a suit terminates with the judgment of the Court in which it is commenced. Whether the learned Judges who decided these cases had section 39 of the Code of Civil Procedure before their minds does not appear from anything said in their judgments. But I must, I think, assume that they had, and the cases seem therefore to show that, although there may be proceedings in the suit subsequent to the judgment or decree, and the suit may therefore still, in that sense, subsist (for that, I take it, may be inferred from section 39), the point at which for the purposes of

(1) I. L. R., 7 Mad., 1. (2) I. L. R., 7 Bom., 518.
(3) L. R., 4 Q. B., 653.

1895

WATKINS v. FOX.

the Limitation Act the suit is to be taken to terminate is the issue of the decree (according to the Madras Court), or the giving of judgment (according to the Bombay Court). By "judgment" in the decision of the latter Court I presume is meant the judgment of the Court in the sense in which the term is used in the Code of Civil Procedure. But whether the issue of the decree or the giving of judgment be the proper starting point for the running of the period of limitation, would not make any practical difference in the present instance, for neither of these things (taking the order of the Court to be equivalent to a decree) appears to have taken place within three years before the institution of this suit. It was not, indeed, contended that they had done so, but the learned Counsel for the plaintiffs argued that the later items of their bill attached to the earlier, and in this way brought the whole of the claim within the period of limitation.

The later items are concerned only, however, with the taxation of the costs of Mr. Neil Fox's opponent. In support of his contention Mr. Dunne relied upon the Madras case cited above for the purpose of showing that, while the taxation of costs was proceeding, the suit could not be said to have ended. But while I doubt with much deference whether the rule laid down in that case can be supported on principle, I think at all events that it is inapplicable to the practice prevailing on the Original Side of this Court and that I ought rather to follow the rule laid down in Bombay.

The present case, indeed, seems to me to be very like that of *Rothery* v. *Munnings* (1), the effect of which is thus stated in "Darby and Bosanquet's Statutes of Limitation" at p. 39: "But when judgment has been given, and there is no appeal, the Statute begins to run, and subsequent items within the six years incidental to the business of the action will not take the earlier items in the bill out of the Statute." In that case the subsequent item was in respect of the taxation of an opponent's costs. So that I do not think that the plaintiffs here can successfully rely on the later items of their bill as an answer to the Statute.

Having arrived at this conclusion I thought it desirable under all the circumstances of the case to suspend my judgment

(1) 1 B. & Ad., 5.

in order to enable the plaintiffs, if they thought fit, to amend their plaint by claiming exemption from the operation of the Statute on the ground of acknowledgments of his liability made by Mr. Neil Fox in certain letters, which were before me for another purpose. I refer to his letters to the plaintiffs' firm of the 12th May and 1st June 1889. These letters contain clear admissions of liability for the costs, not only of the proceeding, but of the work subsequently done by Messrs. Watkins and Co, and bring the suit as a whole within the statutable period. The plaint has since been amended accordingly, and I think, therefore, that there ought to be a decree with costs on the usual scale as against the first defendant for the full amount claimed. I should, perhaps, add that, although the amendment referred to was made in deference to my opinion, the learned Counsel for the plaintiffs did not desire to give up his contention that the suit was otherwise within time.

Next as to the defendant Mr. Moses. I cannot say that I am satisfied as to his liability when the manner in which he was brought upon the scene is considered. The mere statement of Mr. Neil Fox that Mr. Moses was a person who was interested in the revocation of the patent, and on whose behalf he consulted the plaintiffs' firm, is not in my opinion sufficient to charge him. The application under the Patent Act was, I understand, dismissed on the ground that it was in reality the application of Mr. Neil Fox, a licensee, and not that of Mr. Moses, and Mr. Moses has all along apparently repudiated any "moral liability" for these costs, by which I understand him to mean that they were not incurred for him. I can find no evidence that the proceeding was conducted with reference to him or in his interests, and I think that, as in reality he was not a party to the proceeding, but only so in name, it was never intended by him or them that he should incur any liability to Messrs. Watkins and Co. as a consequence of the employment of his name. I think, therefore, that, as against Mr. Moses, the suit ought to be dismissed.

Then with regard to Mr. George Fox. I do not think that the statement that he was concerned in the retainer of Messrs. Watkins & Co. has been established by evidence. His first introduction to them seems to have been on the 9th March 1888, when he came to them to ask time for his brother, and to offer

1895

WATKINS v. FOX.

them his guarantee, and he certainly does not seem to have been treated by them then as a principal But in respect of his guarantee, although he now denies it in his written statement, I can see no reason to doubt Mr. Farr's evidence. All that there is to oppose to it is the denial contained in the written statement and the somewhat tardy repudiation of "any express promise" in his letter to Messrs. Watkins and Co. of the 26th May 1889. On the other hand, Messrs. Watkins and Co., from the earliest stage of their correspondence relative to their claim, asserted this undertaking, and for a period of some six months after Mr. George Fox's interview of the 8th March no application whatever appears to have been made to his brother by Messrs. Watkins & Co. for payment, although their out of pocket costs amounted to a very substantial sum.

What I understand Mr George Fox to have guaranteed was the payment by his brother of *the costs, not only of the proceeding*, but also such costs as might be incurred in retarding the taxation of the costs of the other side in the proceeding, and his undertaking was to pay those costs in the event of his brother failing to pay them after Messrs. Watkins and Co. had given him time, that is, as I take it, reasonable time for payment. Messrs. Watkins and Co. did in my opinion give him a reasonable time, their first demand after the 8th March having been made at the end of August following; and it was then, I think, on his brother's failure to pay, that the liability of Mr. George Fox arose. His plea of the statute of limitation, therefore, seems to me to fail, and the suit ought in my opinion, as against him as well as against his brother, to be decreed in full with costs on the usual scale (1).

Attorney for the plaintiff: Babu *Lallit Madhub Mullick*.

C. E. G.

1893
Dec. 21.

(1) ADMINISTRATOR-GENERAL OF BENGAL *v.* CHUNDER CANT MOOKERJEE. *

This was a suit brought by the Administrator-General of Bengal as executor of the will of Charles Delmar Linton, deceased, Attorney of the High Court of Calcutta, to recover the sum of Rs. 5,178-8-0, alleged to be owing by the defendant for costs for work done by the attorney in connec-

* Suit No. 502 of 1892.

1895

WATKINS v. FOX.

tion with certain suits, from April 1881 to July 1888. The bill of costs was taxed on the 10th December 1891 and passed on the 2nd May 1892.

In the plaint, the plaintiff admitted that certain payments had been made towards the amount, and that the last payment was made on 13th June 1891.

The defendant in his written statement pleaded that the suit was barred by the Limitation Act, and denied that any payments had been made on the 13th June 1891, or on any other day, but stated that he had already paid the attorney Rs. 19,371 by way of costs, and that there were no further sums due to him. He also stated that the 6th December 1887 was the last date on which any work was done for him by the deceased as his attorney, and that that was the date on which the last suit came to an end. In the course of the hearing, the following letter was put in on behalf of the plaintiff, written by Babu Prannath Pal on behalf of Chunder Cant Mookerjee to the Administrator-General of Bengal :—

"As my client the defendant Babu Chunder Cant Mookerjee is, I am informed, seriously ill, and it is impossible to get from him instructions now to proceed with the taxation of the bill of costs in the above, I beg to request the favor of your kindly granting my client six weeks' time, within which either to settle the matter of the said bill of costs, or if that cannot be done, to proceed with the taxation of the said bill of costs of the said attorney, Mr. C. D. Linton, deceased. I herewith remit the sum of Rs. (72) seventy-two, which you had to pay as fee for taxing the said bill. I beg in conclusion that you will kindly direct your clerk, who has charge of this buisness, to consent to my application for postponement of the taxation for six weeks."

The present suit was instituted on the 12th August 1892.

TREVELYAN, J.—The only question in this case is whether the suit is barred by the law of limitation.

The suit is brought on an attorney's bill of costs. The last work done by the attorney for the client was admittedly more than three years before suit. The bill is in respect of a suit brought against the client. The attorney acted in the appeal which concluded the suit. The last work he did was making a copy of the taxing summons, which was taken out by the other side and sending it to his client. There was nothing more to be done in the suit, except that the other side, which had obtained a decree for costs, was entitled to execute such decree. It was contended that, for the purpose of the Limitation Act, the suit had not terminated as the attorney might have to appear in the execution proceedings. This contention, if correct, would postpone the attorney's remedy for twelve years.

In my opinion a suit can ordinarily be said to have terminated, when there is nothing more to be done in it, except execution.

It was also contended that the plaintiff was entitled to a fresh period of

1895

WATKINS v. FOX.

limitation on the ground of (1) a part payment, (2) an acknowledgment of liability.

The so-called part payment was clearly made to pay off a sum which was paid by the Administrator-General after Mr. Linton's death. It was not a part payment of the bill.

What is suggested to have amounted to an acknowledgment of liability is to be found in a letter written by the defendant's attorney. It is as follows: (reads letter *ante*, p. 953). It is remarkable that the framer of the plaint did not put this letter forward as taking the case out of the Act.

The plaintiff relied upon several English cases, the last being a decision by Mr. Justice North in *Curwen* v. *Milburn* (1).

This case went to the Court of Appeal, but was there decided on other grounds. The cases cited all depend upon the terms of the several letters. If the present letter can be construed as an acknowledgment of liability the plaintiff is entitled to recover. I think that it does not bear such a construction.

The letter shows, on the face of it, that the attorney had no instructions at all. He asks for a postponement, and adds that, during the time either the matter would be settled or the case would go on. There is no promise of any kind to settle the bill in the sense of paying a portion of it.

If one attorney were to write to the attorney of the opposite side in a suit which was coming for trial, asking him to consent to a postponement in order that the parties might settle the suit, and if they would not settle, the case would go on. Could this in any sense be treated as an acknowledgment of liability to pay the whole or any portion of the amount claimed in the suit? I think not. In the present case the attorney is not doing anything more. I think that the suit must be dismissed.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Gordon.

1895 *August* 16.

MAHOMED AKRAM SHAHA AND OTHERS (PLAINTIFFS) *v.* ANARBI CHOWDHRANI AND ANOTHER (DEFENDANTS.) *

Limitation Act (XV of 1877), Schedule II, Article 127—Joint family property—Suit by Mahomedan for possession of share by inheritance.

Article 127 of Schedule II of the Limitation Act (XV of 1877) does not apply to a suit by Mahomedans for possession by right of inheritance of shares in the property of their deceased ancestor.

* Appeal from Appellate Decree No. 1521 of 1894, against the decree of S. N. Hudda, Esq., District Judge of Dinajpur, dated the 25th June 1894, reversing the decree of Babu Kally Prosunno Mukerjee, Subordinate Judge of Dinajpur, dated the 5th of February 1894.

(1) L. R., 42 Ch. D., 424.