

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maulean, K.C.I.E., Chief Justice, Mr. Justice Harrington and Mr. Justice Fletcher.

MAKHAM LAL MUKERJEE

v.

NALIN CHANDRA GUPTA.*

1907
Nov. 21.

Attorney and Client—Solicitor's costs, suit for—Limitation—Order for taxation—Limitation Act (XV of 1877), s. 15, Sch. II, Art. 84—Practice.

An order for taxation of a solicitor's costs does not, under s. 15 of the Limitation Act, stay the institution of any suit by him for his costs. Art. 84, Sch II of the Limitation Act is applicable to such a case.

Per HARRINGTON, J. An order for taxation can only affect the right to institute a suit if it relates to something which is a condition precedent to the bringing of a suit.

APPEAL by the defendants, Makham Lal Mukerjee and Khagendra Nath Mukerji, from the judgment of SALE, J.

The plaintiff, Nalin Chandra Gupta an attorney of the High Court, instituted a suit on the 27th May 1905 for the recovery of his costs amounting to Rs. 5,955-14. He acted for the defendants, Makham Lal and Khagendra Nath, in a suit instituted in 1899 until the 1st May 1902, when by an order of that date one Krishna Kishore Dey was appointed attorney for the defendants in his place, and the Court directed that Nalin Chandra Gupta's costs should be taxed. The amount due by the defendants to the plaintiff, Nalin Chandra, amounted to Rs. 5,955-14, and the plaintiff demanded payment of this sum from the defendants who neglected to pay the amount demanded, whereupon the plaintiff instituted a suit against them for recovery of his bill of costs.

The defendants at the hearing of the suit contended that the order of the 1st May 1902 was made without direction for payment of costs to the plaintiff, and simply contained a direction for taxation of costs due to the plaintiff as between attorney and

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lient, and that the order was completed and served on him on the 8th May 1905. They further contended that the suit was barred by Art. 84 Sch. II of the Limitation Act.

The suit came on for trial before SALE J., and his Lordship, on the 11th April 1906, delivered the following judgment:—

“This is a suit by an attorney to recover the amount of sums due upon various allocaturs. The only question is as to whether this suit is barred to any and what extent by limitation. It appears that the plaintiff acted for the defendant in the partition suit of Poresh Nath Mukerji v. Parbutty Churn Mukerji, and the costs in respect of which the allocaturs were issued were payable under various orders made in that suit. The orders for payment of these costs would not have been enforceable ordinarily until the determination of the suit. It appears however that there was an order made for change of attorney on the 1st May 1902. At that time the attorney for the plaintiff had ceased to act as the attorney for the defendant, and it is contended that time began to run against the claim in the allocaturs from the 1st May 1902.

Article 84 of the Limitation Act provides as follows regarding the date from which the time is to run:—“The date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance.”

Prima facie therefore the time in this case would begin to run from the period the plaintiff's attorney discontinued business on account of the defendant, that is, the time would run from the 1st May 1902. The suit itself was filed, instituted on the 27th May 1905, more than three years from the date of such discontinuance. But then on turning to the order directing the change of attorney and which operated so as to effect a discontinuance of the plaintiff's services, it provides as follows:—

‘It is ordered that Babu Kristo Kissore Dey, one of the attorneys of this Court, be appointed the attorney for the said defendants, Makham Lal Mukerjee, Khagendra Nath Mukerji, Kumudindu Mukerji and Mohun Lal Mukerji, in the place and stead of the said Babu Nalin Chandra Gupta, the attorney on record for the said defendants: and it is further ordered that the costs due to the said Babu Nalin Chandra Gupta in this suit, including the costs of, and incidental to, this application (including the fee to counsel), be taxed by the Taxing Officer of this Court as between attorney and client on scale No. 2.’

The result of the latter part of the order is that the plaintiff is unable to enforce his claim as regards costs until the same has been taxed in pursuance of this order.

Now, section 15 of the Limitation Act provides:—“In computing the period of limitation prescribed for any suit the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.”

The effect of the order directing the attorney to have his costs taxed is therefore to stay any suit or proceeding for the purpose of enforcing payment of his

costs and until such costs should be taxed, and therefore it seems to me that the period between the submission of the bill of the attorney for taxation and the issue of the allocatur in respect of such bills, would be the period which the plaintiff was entitled to have excluded under the operation of section 15.

In looking however into these bills, it appears possible, if not probable, that a certain portion of that period would not necessarily fall within the spirit of section 15 of the Limitation Act, because I observe that after the bills have been taxed they are not passed until the attorney satisfies the Taxing Officer that certain fees included in the bill have been paid, and on various occasions I find that a very long period has elapsed between the date of the taxation of the bill's and the passing of the bills by reason of the attorney failing, during that period, to satisfy the Taxing Officer that the sums had been so paid. It seems to me necessary, therefore, to ascertain the correct period which the plaintiff is entitled to have excluded from the general period of limitation. The plaintiff should show what those periods really consist of, because I am of opinion that he was not entitled to have the benefit of those periods which were attributable to his own delay in satisfying the Taxing Officer that the sums due in respect of the fees alleged to have been paid to counsel or otherwise had been in fact paid. It may be of course that the periods in respect of which the plaintiff would be entitled to the benefit of the operation of section 15, would of themselves be sufficient to take the present case out of limitation. It is necessary to have the calculation made. For that purpose I must set this case down in order that the plaintiff should have an opportunity of proving what those periods are."

From this judgment the defendants appealed.

Mr. Garth (*Mr. N. Chatterjee* with him), for the appellants. The effect of an order directing an attorney to have his costs taxed does not stay any suit by him for enforcing payment of his costs: *Lumley v. Brooks* (1) and *Coburn v. Colledge* (2). The latter case is very much stronger than the present. Section 15 of the Limitation Act does not apply here at all, but Art. 84, Sch. II of that Act does. The attorney in this case ceased to act when he refused to act for his client and when a change of attorney was made. I submit, therefore, that the decision of the lower Court is wrong, and the appeal should be allowed.

Mr. Asghar, for the respondents. Until the amount of the costs was ascertained we could not tell where we should bring our suit. The order, I submit, operates as a stay of the institution of the solicitor's suit for costs. The provisions in s. 15 of the Limitation Act do not exist in England. Therefore, I submit, the English cases cited do not apply. Section 15 of that

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(1) (1889) 41 Ch. D. 323.

(2) [1897] 1 Q. B. 702.

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Act governs this case, and further my submission is that unless a solicitor's costs are paid, there is no change of attorney.

MACLEAN, C.J. This is a suit by an attorney for the recovery of his costs; and the only question is whether the suit is barred by the statute of Limitation.

The facts are these: The plaintiff acted as solicitor for the present appellants in a certain suit. On the 1st of May 1902, an order was made in the suit for a change of solicitors; and another gentleman was appointed as solicitor for the appellants in the place of the present plaintiff; and it was ordered that "the costs due to the plaintiff in this suit, including the costs of, and incidental to, the application (including the fee to counsel) be taxed by the Taxing Officer of this Court as between attorney and client on scale No. 2." That was, as I have said, on the 1st of May 1902; the suit was not instituted until the 27th of May 1905. The defendants say that the suit is out of time.

The article of the Indian Limitation Act applicable to the case is admittedly Article 84, which relates to a suit by an attorney or vakil for his costs of a suit or a particular business there being no express agreement as to the time when such costs are to be paid. The period allowed is three years, and the time from which the period begins to run is the date of the termination of the suit or business or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance. It is conceded that that Article applies, and that in the face of that Article, the suit, upon the facts stated, would be barred, unless there is some exception which takes the case out of that article. It is said that the case falls within section 15 of the Limitation Act; and this was the view taken by the learned Judge of the Court of first instance. That section runs as follows:—"In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded." The learned Judge considered that this order, which is a common order for taxation

of costs, was an order amounting in effect to an order staying the institution of a suit by the solicitor. I do not think the case falls within this section. The order of the 1st May 1902 did not stay, by injunction or order, the institution of any suit by the solicitor: it is simply an order for the taxation of his costs. The solicitor—it does not affect the legal question we are discussing—seems to have been very dilatory in the matter, and has only himself to blame for the result. I cannot, however, see that this order was an order by which the institution of any suit by the solicitor was stayed. There was nothing to prevent the solicitor instituting a suit to recover his costs.

I, therefore, think that the appeal must succeed, and the suit must be dismissed with costs, and as the defendants offer to accept out-of-pocket costs throughout, they will get only such costs.

HARRINGTON, J. I agree. The order could only affect the right to institute a suit, if it was an order relating to something which was a condition precedent to the bringing of the suit. All the authorities show that the taxation of costs is not a condition which must be performed before an action on an attorney's bill may be brought. If that is so, an order for taxation cannot affect the plaintiff's right to bring his action. For these reasons, I agree that this appeal should be allowed.

FLETCHER, J. I also agree. In England there are two forms of order regarding the solicitor's costs. The first is an order for taxation and for payment of costs; and the second is an order for taxation only. It has never been held that an order for taxation only is a bar to the institution of a suit; and, I think, that is right on principle. I think the appeal should be allowed.

*Appeal allowed.*

Attorney for the appellant: *Manmatha Nath Ganguli.*

Attorneys for the respondents: *Shamal Dhons Dutt and Shashi Shekhar Banerji.*