

ORIGINAL CIVIL.

Before Panckridge J.

SAGARMALL NATHANI

v.

J. C. GALSTAUN.*

1935

Mar. 6.

Appeal—Exception to Report, if in the nature of an appeal—Limitation—Cross objections—Rules and Orders of the High Court (Original Side), Ch. XXVI, r. 89—Code of Civil Procedure (Act V of 1908), Sch. I, O. XLI, r. 22.

A report of the Assistant Referee is neither an order, nor a decree, and no appeal lies from it. Order XLI, rule 22 of the Code of Civil Procedure does not govern an application to discharge or vary such report under chapter XXVI, rule 89 of the Rules of this Court and the opposite party is therefore not entitled to file cross objections.

APPLICATION.

The relevant facts of the case and arguments of counsel appear fully from the judgment.

P. N. Sen and *G. K. Mitter* for the applicant.

J. N. Mazumdar for the respondent.

PANCKRIDGE J. To understand the situation which has arisen, it is necessary to set out certain dates. Under an order of the Privy Council, dated May 15, 1930, this Court was ordered to give directions for the taking of certain accounts. Directions were accordingly given in the two consolidated suits, to which the order of the Privy Council related, that the enquiries and accounts should be taken by the Assistant Master and Referee. That officer entered upon the reference and signed his report on May 21, 1934. The report was filed on December 21, 1934.

Under rule 89 of chapter XXVI of the Rules of this Court, an application to discharge or vary a certificate or report must be made by motion upon

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notice to be given within fourteen days from the date of filing thereof.

The respondent before the Privy Council, on January 2, 1935, served the appellant with notice of motion for varying the report of the Assistant Referee in the manner set out in the notice. As grounds in support of the motion the respondent gave notice that he intended to use a petition verified by himself and dated January 2, 1935. On January 12, 1935, the appellant filed an affidavit to be used in opposition to the application of the respondent and sworn on January 11. That affidavit was confined to the matters set out in the respondent's petition.

The respondent's application has appeared from time to time in the Special Peremptory List under the heading "Exceptions to Report." I have heard it to-day and have reserved judgment. From the list it appears that there is another application in the two consolidated suits on the part of the appellant. This was duly called on, but before the appellant's counsel, Mr. Sen, had opened it, Mr. Mazumdar for the respondent intimated that he desired to take a preliminary point which, if successful, was fatal to the appellant's application.

Mr. Mazumdar has drawn my attention to the fact that the respondent's application was initiated by a notice, dated January 12, 1935, to the effect that an application would be made on January 21 by way of cross objections on behalf of the appellant for an order that the report of the Assistant Referee should be varied in the manner therein set out. He points out that in the reference rules there is nothing corresponding to Order XLI, rule 22 of the Code of Civil Procedure to enable a party who desires to challenge a report to do so by way of cross objections. The only remedy provided by the Rules is an application to discharge or vary the report made by notice of motion to be given within fourteen days of the filing of the report.

It cannot be disputed that by the date on which the appellant gave notice of motion the fourteen days provided by the Rules had long expired. Under the Rules the Court has power to extend the time on the application of the party desiring to discharge or vary a report, in which case it is provided that the notice shall mention that time has been granted by the Court. In this case no time was asked for or granted, so there is no need to consider that part of the rule.

Mr. Sen has argued that Order XLI, rule 22, applies to these proceedings, and he points out that an application to vary or discharge a report is in practice tantamount to an appeal against the findings of the officer making the report.

I am clear, however, that the report of the Referee is not a matter which is susceptible of appeal. It is not a decree, because in itself it is of no effect until it has been embodied in a formal decree of the Court. It is certainly not an order nor does it purport to be so.

It is true that the Rules provide specifically for appeals to a Judge in the case of orders made by certain officers such as the Master.

There are also special provisions in the Insolvency Act for appeals from orders of the Registrar in Insolvency. There is no need to enquire how far Order XLI of the Civil Procedure Code applies to such appeals. However that may be, it is clear that there is no appeal from the report of a Referee under chapter XXVI of the Rules.

As I have said, the remedy open to the party aggrieved by the report is not to appeal against it, but to apply to discharge or vary it, and I do not think it is possible to import into the machinery provided by the Rules the provisions of Order XLI, rule 22 of the Code of Civil Procedure.

It follows, therefore, that I must treat the appellant's application as one to vary the Referee's

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report made under the Rules. As such, it is out of time under the Rules, and no further time has been obtained for making it.

In the circumstances there is no course open to me but to dismiss the application with costs.

Application dismissed.

Attorney for applicant: *C. C. Bosu.*

Attorneys for respondent: *Sandersons & Morgans.*

P.K.D.