

ORIGINAL CIVIL.

Before McNair J.

BIPINBIHARI SHAHA

v.

BANBIHARI SHAHA.*

1934
Aug. 29.

Practice—Exception to Report—Notice—Limitation—High Court (Original Side) Rules, Chap. XXVI, r. 89.

An application to discharge or vary a report must be brought within the time prescribed by rule 89 of Chapter XXVI of the High Court (Original Side) Rules. It is not sufficient merely to serve the notice of motion within that period.

Further, the notice should be accompanied with the grounds of exception relied on by the party objecting to the report.

Lutchmee Narain v. Byjanauth Lahia (1) followed.

APPLICATION.

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

A. B. Guha and *Maiti* for the plaintiff-applicant.

N. N. Bose for the defendants, *Pulinbihari Shaha* and *Bijaykrishna Shaha*.

B. N. Ghosh for the defendant, *Banbihari Shaha*.

J. N. Majumdar for the *Thākur's* next friend.

McNAIR J. There are two applications before the Court, one by the defendants, *Pulinbihari Shaha* and *Bijaykrishna Shaha*, for an order that the report of the commissioner of partition appointed herein be confirmed subject to a slight variation as to costs, the other by the plaintiff that the report of the commissioner may be varied or modified and be remitted for reconsideration.

*Application in Original Suit, No. 436 of 1929.

(1) (1897) I. L. R. 24 Calc. 437.

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The defendants at the outset have taken the objection that the report cannot now be varied, because it has been confirmed by the effluxion of time, and they refer to Chapter XXVI, rule 89, which is in the following words:—

An application to discharge or vary a certificate or report shall be made by motion, upon notice to be given within 14 days from the date of the filing thereof, or within such further time as may be obtained for that purpose, but in that case the notice shall mention that it has been given with the leave of the Court. An application for further time may be made by petition in Chambers without notice.

The contention on behalf of the defendants is that an application to discharge or vary a certificate or report must be made by motion within 14 days upon notice. They refer in support of their contention to two cases which have been decided in this Court on the old rule 565, which is in the same terms as the present rule. The first case is that of *Lutchmee Narain v. Byjanauth Lahia* (1), a decision of Mr. Justice Sale. In that case, the report was dated 1st February, 1896, and was filed on the 8th July, 1896. On the 17th July, the defendant obtained three weeks further time to file exceptions to the report. Exceptions were filed on the 10th August, *i.e.*, within the extended period, but no further steps were taken till the 15th March. No notice of motion was given by the defendants to discharge or vary the report.

The learned Judge, when the matter came before him, caused an enquiry to be made from the Registrar as to the practice which prevailed in this Court in regard to this matter, and Mr. Belchambers, the then Registrar, furnished a report, which, the learned Judge says, shows that there has been no uniform course of practice. He then said:—

As it is desirable that there should be a uniform practice, I thought it right to consult my learned colleague, Mr. Justice Jenkins, and our opinion is that the procedure laid down in rule 565 (which corresponds to our present rule 89 of Chapter XXVI) **should be strictly adhered to.

He continues :—

It is necessary that notice should be given within the time required by the rule, or such further time as the Court may allow, and that such notice should be accompanied with the grounds of exception relied on by the party objecting to the report.

In the absence of any such notice, given in the manner now indicated, the report will be regarded as confirmed by effluxion of time.

The other case which has a bearing on this question is the case of *Royal Insurance Company v. Aukhoy Coomar Dutt* (1). The learned Chief Justice, Sir Francis Maclean, in his judgment said :—

To say that the filing of the exceptions is to be taken as a compliance with the terms of rule 615 is an absurdity. Such a result would amount to an absolute abrogation of the rule. The rule prescribes what is to be done, and that rule must be complied with, and if a party desires to discharge or vary a report he must adopt the procedure laid down by the rule, and he must apply by motion upon notice to be given within the time prescribed by the rules, *i.e.*, fourteen days from the date of the filing of the report, or within such further time as may be obtained for that purpose.

The matter was there considered by three Judges, and Mr. Justice Prinsep and Mr. Justice Hill agreed with the opinion of the learned Chief Justice.

Learned counsel for the plaintiff points out that, in the present cases, the strict wording of the rule is not complied with. He says that the rule provides that notice must be given, and that, in each of these cases, no notice at all had been given, therefore, it cannot be said that there was a compliance with the rule. The notice, which was given by him, actually on the 14th day, was a notice that on Monday, the 12th day of November (*i.e.*, after the long vacation), an application will be made for an order that the return of the commissioner of partition be modified. His contention is, and he said so quite frankly, that, provided he has given notice of motion, it is immaterial when the motion be tried; on my putting it to him that this might mean "Take notice that on the 12th November, ten years hence, an application will be made," he submitted that a notice in that form would be a good compliance with the rule.

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On the other hand, it is contended that the rule must be taken to be reasonable, and that the practice of the Court, as shown from the two cases, above referred to, indicates that what must be done is that the motion must be brought upon notice within fourteen days. Provided the notice has been given within fourteen days it would appear that the actual provision in the rules has been complied with.

A further point has been taken on behalf of the defendant that the notice must be accompanied by grounds, and he relies on the judgment of Mr. Justice Sale in *Lutchmee Narain v. Byjanauth Lahia* (1), to which I have already referred, where his Lordship says :—

It is necessary that notice should be given within the time required by the rule, * *and that such notice should be accompanied with the grounds of exception relied on by the party objecting to the report.

The learned Judge considered that it was very desirable that there should be a uniform practice, and he laid down what was to be the practice of the Court. In the present instance, the practice, which has been laid down in interpretation of this rule, has not been complied with, for the grounds were not given with the notice.

When the matter came before me yesterday afternoon, I suggested that in order that I might deal more fully with the matter were it necessary to hear the exception, the plaintiff should put in his grounds, but, at the same time, this was to be without prejudice to any contention which might be raised by the defendant as to the actual validity of the notice, which was not accompanied by the grounds of exception relied on. I am satisfied that the defendant's contention is correct, and the practice laid down by the rules has not been complied with.

In the circumstances, the plaintiff's motion cannot be heard.

The *Thâkur's* costs will be paid out of the *debattar* estate.

With regard to the defendant's application, objection has been taken by the plaintiff that the manner in which the commissioner has dealt with the costs should be varied. He contends that counsel's fees should not be permitted, and that costs of those meetings which were prolonged owing to the action of certain parties, should be paid for by the parties themselves. It is very difficult for me to decide this question, at this stage, and I consider that the discretion which has been exercised by the commissioner should not be interfered with. In the circumstances, I confirm the order that he has made and make the following order:—

That the report of the commissioner of partition appointed herein be confirmed, subject to the following variation, *viz.*, that costs of the meeting of the 23th September, 1932, shall be treated as costs of partition and be paid out of the estate, but the costs of the meeting of the 30th September, 1932, shall be payable as recommended by the commissioner.

There will also be an order in terms of clauses 2 and 3 of the notice of motion.

Costs of the guardian-*ad-litem* of the *Thâkur* defendant shall be paid out of the *debattar* estate by the *shebâit* including costs of this application.

Report confirmed with a variation.

Attorney for plaintiff: *M. H. Huq.*

Attorneys for defendants: *N. L. Mullick;*
A. C. Dey.

G.K.D.

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