APPEAL FROM ORIGINAL CIVIL.

Before Costello and Panckridge JJ.

RENU BALA

v.

MAHA MAYA DASEE.*

1936

June 12.

Motion—Notice of motion—Reports, Applications to vary or discharge—Exceptions—Copy of grounds—Practice and Procedure—Rules and Orders of the Original Side (1930), Ch. XX, r. 9 and *Ch. XXVI, r. 89.*

Under Chap. XX, r. 9, of the Rules and Orders of the Original Side a notice of motion should, in the note at the foot thereof, apprise the opposite party of the materials which the applicant intends to use; and then, if the opposite party so wishes, he can obtain a copy of those materials on payment of the usual charges.

The procedure prescribed by Chap. XX applies to applications to vary or discharge reports by reason of the provisions of r. 89 of Chap. XXVI of the Rules.

It is, therefore, unnecessary for the applicant to serve his notice accompanied by copies of the grounds of exception used in support

Bipinbihari Shaha v. Banbihari Shaha (1) and *Lutchmee Narain v. Baijnauth Lahia* (2) dissented from.

APPEAL from an order of McNair J.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

J. N. Mazumdar (*H. S. Suhrawardy* with him) for the appellant.

P. C. Ghose and *S. K. Basu* for the respondent Maha Maya Dasee.

J. N. Banerji for the respondent Kishori Mohan Datta.

P. P. Chatterji for the respondent Prasanna Kumar Das.

*Appeal from Original Order, No. 22 of 1935, in Original Suit, No. 1935 of 1932.

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PANCKRIDGE J. This is an appeal from the order of McNair J. dismissing the application of the appellant for an order that a report made by the Registrar should be varied so far as she is concerned.

The suit in which the application was made is a suit on a mortgage. The appellant is a party as being the heir of her mother, one of the original mortgagors. There are three mortgages covered by the suit, which was instituted in 1932. In due course, a preliminary decree was made, and it was referred to the Registrar to enquire and report as to the sum due from the mortgagors on the basis of the three mortgages.

The Registrar made his report on September 11, 1934, and it was filed on December 20, 1934. The Registrar found that certain sums of money were due on the mortgages—sums which are very much in excess of the moneys originally advanced. In the course of the Reference, the appellant contended that she was entitled to the benefit of the law of *damduput*. If this law is applicable to the mortgage debt as far as it concerns her, it is beyond question that her liability will be considerably decreased. The Registrar, however, was of opinion that the law of *damduput* did not apply in the circumstances of the case, and he calculated the amount due without reference to it.

On January 2, 1935, the appellant through her guardian-*ad-litem* served notice of motion upon the respondents asking for variation of the report, and obtained special leave to serve the notice for January 3, 1935. The matter was adjourned, and came on for disposal before McNair J. on January 17, 1935. When it was called on, Mr. Kanjilal for one of the respondents took the preliminary objection that, although the notice was served within the time prescribed by the rules, the notice was bad inasmuch as it was not accompanied by copies of the grounds. The Court accepted Mr. Kanjilal's objection and dismissed the application.

No formal judgment was pronounced, but it is admitted that the learned Judge followed a considered judgment of his own in *Bipinbihari Shaha* v. *Banbihari Shaha* (1). A reference to that judgment shows that the learned Judge was there following a judgment of Sale J. in *Lutchmee Narain* v. *Baijnauth Lahia* (2).

The rule dealing with applications to discharge or vary reports is r. 89 of Chap. XXVI of the Rules and Orders of the Original Side of the Court. The rule runs as follows :—

> An application to discharge or vary a certificate or report shall be made by motion, upon notice to be given within fourteen 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.

This rule is the same word for word as a former rule No. 565, which was considered by Sale J. in *Lutchmee Narain* v. *Baijnauth Lahia* (2). The passage in Sale J.'s judgment which McNair J. followed in *Bipinbihari Shaha* v. *Banbihari Shaha* (1) runs as follows :—

> 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.

It was the failure of the appellant to serve the respondents with the grounds of exception, on which she relied, at the same time as she served the notice that led to the dismissal of her application. In *Lutchmee Narain* v. *Baijnauth Lahia* (2) exceptions to a report had been filed. No notice of motion to vary the report was given by the defendants, but when the matter came on the list for further directions, the defendants desired to have the report varied in accordance with their exceptions. The plaintiffs objected to

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this and drew attention to the terms of r. 565. On enquiry from the Registrar, the learned Judge came to the conclusion that the practice had not been uniform, and that it was desirable to lay down a settled course of practice, and after consultation with Jenkins J. he purported to lay down the practice in the words, which I have set out. The judgment ends :—

> In the absence of any such notice, given in the manner now indicated, the report shall be regarded as confirmed by effluxion of time. The rule should not be applied strictly to exceptions already filed. As regards such exceptions, the alternative course may, I think, be permitted, namely, the hearing and disposing of them merely on the requisition of the parties.

It would appear, therefore, that the observations of Sale J. were *obiter*, because, as I read the report, he considered the exceptions, which the defendants had filed, on their merits. With regard to what he laid down as to the necessity of proceeding by notice of motion, that is clearly required by the express terms of the old rule and the present rule. Further, if notice of motion is not given within the time specified by the rule, the report becomes confirmed by effluxion of time.

The part of the judgment, however, which appears to me questionable, is that which lays down that the notice should be accompanied with the grounds of exception relied on by the party objecting to the report. Even if the proper practice were for the grounds of exception to accompany the notice, it does not necessarily follow that failure to serve the grounds with the notice would involve the dismissal of the application. However, as I interpret the rules the whole ground is covered, and there is no room for invoking any practice of the Court, because there is no gap in the rules which necessitates such a course. Rule 89 of Chap. XXVI, which provides that application is to be made by motion, obviously attracts the provisions of Chap. XX, which deals with Motions and Rules Nisi; and it is to that Chapter one should look, to see what the proper practice is, when a party

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desires to have a report varied, since the only way in which it is possible to vary a report is to proceed by notice of motion. Rule 3 of that Chapter requires notice to parties affected by the motion. Under r. 4, the notice is to state the time and place of application and the nature of the order asked for, with a note at the foot specifying the grounds in support of the application. In this case, the notice, which was admittedly served within the time prescribed by Chap. XXVI, r. 89, had a note at the foot to the following effect:—

Grounds: Petition of Mahammad Dilwar Hosain, the guardian-*ad-litem* of the said minor defendant and the records and proceedings had in the above suit and the Reference No. 217 of 1934 had herein.

No objection was taken by the respondents to the effect that this form of note is not a "note at the foot specifying the grounds" within the meaning of r. 4. Learned counsel, however, argued before us that what is intended by the words "a note specifying the grounds" is some sort of summary of the points of law and other points, which the applicant is proposing to urge, and he suggests that in the present case the note of the grounds should have been in some such form as this:—"For that the learned Registrar was wrong in "not applying the law of *damduput* in taking the "accounts." Though the rules are not as happily worded as they might be, we consider that what they contemplate is something like the note at the foot of the notice of motion in this case. We say this, because by r. 9 of Chap. XX it is provided that notice shall be given of all the grounds intended to be used, and copies of such grounds other than of proceedings already filed shall be supplied to any party requiring the same on payment of the usual charges. No party could possibly require a copy of the grounds in the sense in which the learned counsel submits that the term is used in the rules, because he has already notice of the grounds in the note at the foot of the notice of motion. It is clear, therefore, that what the rules contemplate is that the notice of motion should apprise

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the opposite party of the materials which the applicant intends to use, and then, if the opposite party so wishes, he can obtain a copy of those materials under r. 9 by asking the applicant to supply it on payment of the usual charges. From this it follows that, in the case of notice of motion, it is not necessary, nor is it right, for the applicant to serve his notice accompanied by copies of the grounds to be used in support. The observations of Sale J. on this point are, in my opinion, at best, recommendations as to what the most satisfactory practice would be, and cannot possibly override the specific procedure prescribed by the motion rules, which, as I have said, applies to applications to vary or discharge reports by reason of the provisions of Chap. XXVI, r. 89.

In our opinion, therefore, McNair J. was wrong in *Bipinbihari Shaha* v. *Banbihari Shaha* (1), when he held that the observations of Sale J. in *Lutchmee Narain* v. *Baijnauth Lahia* (2) were statements of law, which he was bound to follow; and as a consequence his dismissal of the application on this preliminary point cannot be supported.

The question then arises whether, having set aside the order of dismissal, we should deal with the appeal on the merits, or whether the matter should be sent back to the Original Side for the merits to be dealt with there. My own inclination in the circumstances is to dispose of the matter finally; and I understand that the parties before us would not object to our taking such a course. If it goes back to the Original Side, there will probably be an appeal against whatever order is made, and the parties will thus be involved in extra expense. However, the situation is complicated by the fact that one of the parties to the suit, who has not appeared in the suit or on the reference, has died. He is the heir of one of the original mortgagors, and in such circumstances it appears to us

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that his interest might be affected by our decision. Therefore, we are not disposed in his absence to deal with the matter on the merits.

The order accordingly is that this appeal be allowed with costs, and that the application do appear in the Motion List of the Judge on the Original Side taking Motions on July 13 next.

COSTELLO J. I agree.

Appeal allowed.

Attorneys for appellant: *Mitter & Baral.*

Attorneys for respondents: *S. K. Ganguli & Co., N. R. Banerji* and *R. Sur.*

G.S.