ORIGINAL CIVIL.

Before McNair J.

RANENDRA NATH DATTA

v.

MANIK LAL MITRA*.

1940

June 3, 4, 5.

Report—*Time for making application to discharge or vary report—Extension of time after expiration of fourteen days—Rules and Orders of the Original Side, Ch. XX, rr. 3, 4; Ch. XXVI, rr. 87, 89; Ch. XXXVIII, r. 46.*

An application for time to make the necessary motion under r. 89 of Ch. XXVI to discharge or vary a report may be made after the expiration of fourteen days from the date of the filing of the report.

Lutchmee Narain v. *Byjanauth Lahia* (1); *Royal Insurance Company* v. *Aukhoy Coomar Dutt* (2) and *Renu Bala* v. *Maha Maya Dasee* (3) considered.

Moni Sethani v. *Radha Kissen Chamaria* (4) relied on.

An application to discharge or vary a report shall be made on notice to all the parties affected by it even though such parties have not appeared in the reference.

APPLICATION to vary a report of the Official Referee.

Facts material for this report and the arguments of counsel appear from the judgment.

H. C. Majumdar and *P. C. Basu* for the applicant.

S. B. Sinha for the plaintiff respondent.

McNAIR J. This is an application for variation and discharge of the report by the Official Referee dated August 30, 1938, that the petitioner's claim for over Rs. 8,000 be allowed to the extent of two-thirds against the estate of Khoka Lal and Sourendra Nath Mitra, and that the petitioner's claim of nearly Rs. 22,000 be allowed against the estate of Sourendra Nath Mitra.

*Application in Original Suit No. 2208 of 1933.

(1) (1897) I. L. R. 24 Cal. 437.
(2) (1901) I. L. R. 28 Cal. 272.
(3) I. L. R. [1937] 1 Cal. 293.
(4) (1937) 42 C. W. N. 601.

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The reference was made in a suit by a creditor against Manik Lal Mitra, Samarendra Nath Mitra, Mukul Kumar Mitra and the Official Trustee, who is trustee of the estate of the infant defendant, Manik Lal Mitra, and also receiver of the Hooghly Mitters' Estate including the shares of the minor.

The order referred to was made on August 10, 1934. The order was for the taking of accounts and directed that advertisements should be published directing the creditors of Khoka Lal Mitra and Sourendra Nath Mitra to come in and prove their claims. The present applicant was one of the creditors, who preferred a claim, which was rejected. Two preliminary points have been taken, challenging the validity of the application.

The report was filed on February 21, 1940. An application for discharge or variation of a report must be made by motion upon notice given within fourteen days from the filing of the report. Therefore, the time for the filing of the report and for giving notice expired on March 6.

On March 19, the present petitioner applied for leave to file an application to discharge or vary the report and that application was allowed by an order of March 19. This application is opposed by the plaintiff in the suit. It is not clear what is the extent of the estate of Khoka Lal and Sourendra Nath, but it is possible that the estate will not be sufficient to meet the demands of all creditors and, in that event, there will be rateable distribution, and, if the report were varied to the extent of allowing the claims of the present applicant, the plaintiff might suffer.

Learned counsel on behalf of the plaintiff contends that the report became confirmed on March 6, 1940 by effluxion of time under r. 89 of Ch. XXVI of the

Rules and Orders of this Court on the Original Side. Rule 89 provides:—

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 is the procedure adopted on this occasion. The application for further time was made by petition in Chambers without notice and the time was enlarged.

Rule 90 provides:—

A report, unless discharged or varied, will be taken as conclusive evidence of the facts found therein.

Rule 91 provides:—

Where the facts are correctly stated in a certificate or report, questions of law may be raised at the hearing of the suit on further consideration. An application to discharge or vary a certificate or report as to such question need not be made.

Then comes r. 92, upon which Mr. Sinha relies. Rule 92 provides:—

A certificate or report after it has become binding will not be reopened, except on the ground of fraud, surprise or mistake, or such other special ground as may be allowed by the Court, on an application to the Court by motion which may be granted on such terms and conditions as to costs and otherwise as to the Court shall seem fit.

It is argued that, under r. 89, the report becomes binding or is confirmed when the fourteen days allowed by that rule have expired. It is further contended that r. 92 then comes into operation, and the report can only be reopened on the ground of fraud, surprise or mistake, or such other special ground as may be allowed by the Court. In support of this argument Mr. Sinha has relied on the decision of Sale J. in *Lutchmee Narain* v. *Byjanauth Lahia* (1). In that decision it was held that in making an application to discharge or vary a report notice must be given within the time required by the rules and

(1) (1897) I. L. R. 24 Cal. 437, 439.

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such notice should be accompanied with the grounds of exceptions.

The question for decision there was with regard to the practice which had been adopted in hearing exceptions to reports. In that particular case exceptions were filed within an extended time allowed by the Court, but no notice was given to discharge or vary the report.

The practice appeared to vary. In some cases exceptions had been heard on notice of motion to vary or discharge the report. In other cases exceptions had been set down for disposal on requisition and were heard although no notice had been given under the rules.

Sale J. after making enquiries of the Registrar and of his learned colleague, Jenkins J., held :—

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.

Then come the words on which Mr. Sinha relies: "In the absence of any such notice" says the learned Judge "given in the manner now indicated, the "report will be regarded as confirmed by effluxion of "time". Those words are in any event *obiter*, for the question which the learned Judge was dealing with was the question whether exceptions could be heard without notice having been given under the rules.

In *Royal Insurance Company* v. *Aukhoy Coomar Dutt* (1) the question again came up of the construction of the Rules and Orders of the High Court which were then referred to as "Belchambers Rules and "Orders". These are the same rules which were interpreted by Sale J. in the previous case. There the Registrar had reported on October 28, 1899. On March 9, 1900 the defendants' solicitors were informed of the filing of the report, and on March 15 they filed objections but did not serve with the

(1) (1901) I. L. R. 28 Cal. 272, 277-8.

objections any notice of motion. The defendants' solicitors explained that the failure to serve the notice was due to a *bona fide* mistake. An application was made on March 28 to a Judge on the Original Side asking for further time within which to apply by motion upon notice to discharge or vary the report. That application was refused. The defendants then applied for a Rule against the plaintiffs to show cause why the filing of the exceptions should not be taken and deemed to be due notice of motion, or alternatively a Rule against the plaintiffs to show cause why the report should not be reopened on the ground of surprise or mistake, or such other special ground as may appear, following the wording of rule 92 of Ch. XXVI of the present rule. Sir Francis Maclean who delivered the judgment of the Court refused to accept the argument that the filing of the exceptions was sufficient compliance with the rule which corresponded with the present rule 89. The learned Chief Justice said :—

> 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 rule, that is fourteen days from the date of the filing of the report, or within such further time as may be obtained for that purpose.

The learned Chief Justice then deals with the alternative argument that the report should be reopened on the special ground appearing on the facts that are stated in the solicitor's affidavit. He pointed out :—

> The words "fraud, surprise or mistake, or other special ground" refer to fraud, surprise or mistake or some other special ground incident to, or connected with, or which has resulted in the making of, the certificate or report itself; and not to something which has occurred quite outside and independent of the certificate or report.

The learned Chief Justice then refers to the application which had been made for further time (an application which, it appears from the dates, had

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been made after the fourteen days had elapsed) and he says :—

> The mistake in this case might have been rectified by the Court allowing further time to make the necessary motion under r. 615, (corresponding with our r. 89 of Ch. XXVI) which the Court, in its discretion, did not think fit to do but I am wholly unable to accede to the view that mistake in not complying with the procedure laid down in r. 615 is a special ground for reopening the report under r. 617.

It is clear then on these cases that no application will lie in the present circumstances under r. 92, but it is by no means clear that an application may not be made for further time under r. 89 even after the fourteen days had elapsed. That is suggested, as I have pointed out, by Sir Francis Maclean in his judgment as reported at p. 278, where he says that the mistake of the attorney "might have been rectified by "the Court allowing further time".

Mr. Sinha further relies on the language of the judgment of the appeal Court in *Renu Bala* v. *Maha Maya Dasee* (1) where Panckridge J., who gave the leading judgment, with which Costello J. agreed, considered the provisions of r. 89 of Ch. XXVI of the Rules and Orders of the Original Side of this Court, but with respect to the question whether the applicant when he served his notice should also accompany it with copies of the grounds used in support of his application.

In the course of his judgment, Panckridge J., in referring to the case of *Lutchmee Narain* v. *Byjanauth Lahia* (*supra*) and the judgment of Sale J., stated that some of the observations of Sale J. on which reliance had been placed were *obiter*, and he continues :—

> 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.

Panckridge J. is merely quoting the words of Sale J. in *Lutchmee Narain* v. *Byjanauth Lahia (supra)*.

(1) I. L. R. [1937] 1 Cal. 293, 296.

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In my opinion, those words must be qualified both by the words of r. 89 themselves and also by reference to r. 46 of Ch. XXXVIII of the present Original Side Rules and Orders. Now r. 89 provides that "the application must be made by motion upon notice "to be given within fourteen days or within such "further time as may be obtained for that purpose", so that r. 89 undoubtedly contemplates that further time may be obtained, and there is nothing to show that the application for further time may not be made after the fourteen days have elapsed.

As I have already pointed out, Sir Francis Maclean in his judgment in *The Royal Insurance Company* v. *Aukhoy Coomar Dutt* (*supra*) suggests that the Court could in that case have extended the time even after the fourteen days had expired.

In Belchamber's Rules and Orders, which Sale J. and Sir Francis Maclean C. J. were considering, there is no provision, so far as I am able to discover, of the nature of r. 46 of Ch. XXXVIII. That rule provides :—

> The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

As I read this rule, the intention is that, although the time may have expired, an applicant may yet come before the Court or a Judge, and if the justice of the case requires, he may obtain further time in order to make his application, although the time appointed or allowed has already expired.

It seems to me quite clear that this rule would give the present applicant an opportunity of coming to the Court for enlargement of the time even though the fourteen days contemplated by r. 89 of Ch. XXVI had already expired. I am fortified in this view by a decision of this Court in *Moni Sethani* v. *Radha Kissen Chamaria* (1). There the learned Judge held

(1) (1937) 42 C. W. N. 601.

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that the Court had power under Ch. XXXVIII, r. 46, to extend the time for filing a written statement, although r. 2 of Chapter IX, which deals with the filing of the written statement, provides that "no "written statement of the defendant shall be filed "after the time has expired except under an order "obtained by summons in Chambers taken out prior "to the expiry of such time."

The expressions which have been used to the effect that at the end of the fourteen days allowed by r. 89 the report becomes confirmed by effluxion of time must be subject to the exception which is mentioned in r. 89 itself, namely, on the occasion when the applicant has applied to the Court and obtained an extension of time as contemplated by the rule. Such extension was granted in the present case for good reasons. There were already two notices of motion for varying or discharging the report, and the applicant had small pox in his family and was unable to move from his house or take any part in this litigation during the important period.

Turning now to the other preliminary objection raised by Mr. Sinha, this is to the effect that the notice of motion is bad even if it is within time, because it is only addressed to the plaintiff and has only been served upon him. There are defendants who are infants. It is their estate which is affected by the report and will be affected adversely if the report is varied or discharged in the manner in which the applicant prays. The Official Trustee is also in charge of the estate as the receiver. The plaintiff admittedly is the creditor who was principally concerned in the reference and who opposed the claim of the applicant, but there were other creditors.

It also appears from the report of the Assistant Registrar that neither the defendants nor the Official Trustee appeared either in person or by attorney or advocate during the course of the reference. Admittedly, neither the defendants nor the Official Trustee need be served with notice when the certificate

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or report is settled, for r. 87 of Ch. XXVI provides that only parties who have appeared on the reference need have notice of the settlement of the report.

Mr. Sinha argued, however, that the application to vary the report must be made by motion and that the provision of Ch. XX deals with motions, and r. 3 provides that "motions shall be made after notice to "the parties affected thereby". Rule 4 also provides that a notice of motion shall be addressed to the party or parties intended to be affected by it and their attorney or attorneys (if any). He argued with justice, it appears to me, that this is a notice of motion and that both the defendants and the Official Trustee, and in fact the other creditors whose claims have been allowed or disallowed, may also be affected by it, and that the rules under Ch. XX are mandatory and direct that all persons who will be affected by the application must be served. It is true that the defendants have not taken any part in the reference, but that does not, in my opinion, absolve the applicant from the necessity of abiding by the rules.

This preliminary objection is therefore upheld and the application is dismissed.

Mr. Majumdar applies that he should be given an opportunity now of serving notice upon the Official Trustee and the defendants and any other parties who may be affected by the motion. The objection is essentially technical, and it appears to me that in the interests of justice such leave should be granted, but in as much as this matter has been argued on the preliminary points, the applicant must in any event pay the costs of this application up to the present.

The time will be further extended for a fortnight in order to enable the notices to be served.

Application dismissed.

Attorneys for application: *G. C. Chunder & Co.*

Attorneys for respondent: *H. N. Dutt & Co.*

A.C.S.