

Before Mr. Justice Norris.

RAMNARAIN KALLIA v. MONEE BIBEE;

AND

RAMNARAIN KALLIA v. GOPAL DOSS SING.

1888
February 22

Practice—Rule nisi to show cause why a person should not be made a party defendant—No grounds stated in or served with the Rule—Rule granted during hearing of suit—Civil Procedure Code (Act XIV of 1882), s. 32.

During the hearing of a suit for recovery of immovable property it appeared from the evidence and certain documents put in, that the plaintiff had mortgaged his right title and interest to a third person, by whom the suit was practically being carried on. On an application by the defendant for the mortgagee to be added as a party defendant, under the provisions of s. 32 of the Civil Procedure Code, the Court directed a rule to issue calling on him to show cause why he should not be added as a party defendant or give security for costs. The rule was not applied for on petition or affidavit and set out no grounds for the application at all. On an objection taken by the mortgagee at the hearing of the rule,

Held, that the grounds should have been stated on affidavit or have appeared on the face of the rule, and that the mortgagee was entitled to know what he had to answer, and consequently, the rule being informal, it was discharged with costs.

THE plaintiff instituted these suits, which were heard together, to recover possession of certain properties held by the defendants. Prior to the institution of the suits the plaintiff mortgaged his right, title, and interest in the properties to one Russick Lall Mitter. Some of the defendants in their written statements alleged that the plaintiff was a man of no means, and that the suits were being carried on and maintained by Russick Lall Mitter, and that the plaintiff had executed an agreement and a mortgage of his right, title, and interest over the properties in suit, besides other property, in favour of the said Russick Lall Mitter. In the course of the cross examination of the plaintiff by Mr. *Palit*, who appeared for Monee Bibee, the above facts were proved, and the two deeds were put in as exhibits in the suit. It also appeared, on the face of these documents, that Mr. *H. H. Remfry*, who was acting as attorney for the plaintiff in the suit, had acted as attorney for Russick Lall Mitter in the matter of the execution of those two documents.

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On these deeds being proved and put in, Mr. Pugh, who appeared for Gopal Doss Sing, applied, under s. 32 of the Civil Procedure Code, to have Russick Lall Mitter added as a party to the suit, and in support of his application cited *Chunder Kant Mookerjee v. Ramcoomar Kundu* (1); and the same case on appeal to the Privy Council, *Ramcoomar Kundu v. Chunder Kant Mookerjee* (2), and contended that being a mortgagee he was a necessary party.

The Court thereupon granted a rule, calling on Russick Lall Mitter to show cause why he should not be made a party, or why he should not give security for costs; and directed that service of the rule on Mr. H. H. Remfry should be deemed to be good service on Russick Lall Mitter.

The following rule was accordingly issued and served:—

“This Cause coming on this day for final disposal before the Hon’ble John Freeman Norris, one of the Judges of this Court, in the presence of Mr. Kennedy, Advocate for the plaintiff in the above mentioned suits, of Mr. Phillips, Advocate for the defendants Monee Bibee Sreemalinee and Woonee Bibee, of Mr. Pugh, Advocate for the defendant Gopal Doss Sing, and of Mr. Sale for Mr. Hill, Advocate for the defendant Rakhall Dass; and upon the application of the Advocate for the said Gopal Doss Sing, it is ordered that Russick Lall Mitter, being served with the order, do, on Monday, the fifth day of February instant, show cause before this Court why he should not be added as party defendant to these suits, or why he should not give security for the costs of the defendants in the abovementioned suits: and it is further ordered that service of this order on Mr. H. H. Remfry, the Attorney for the said Russick Lall Mitter, be deemed good service on the said Russick Lall Mitter. Dated this second day of February in the year of our Lord one thousand eight hundred and eighty-three.”

On the 5th an application was made for the postponement of the hearing of the rule, on the grounds of the illness of Russick Lall Mitter and of his inability to instruct Counsel to show cause against the rule.

(1) 13 B. L. R., 530.

(2) I. L. R., 2 Calc., 233.

The Court granted the postponement asked for, on the understanding that if the order *nisi* were made absolute it would take effect from that date. Pending the hearing of the rule, the suits had been dismissed with costs. Subsequently affidavits were filed by Russick Lall Mitter, and the rule came on for hearing on February 22nd.

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Mr. T. A. *Apear* showed cause against the rule, and without referring to his affidavits contended that there was no ground for the rule, and nothing for him to answer. No grounds whatever were stated on the face of the rule, and it had not even been applied for on petition or affidavit, so that Russick Lall Mitter could not possibly be expected to know what he had to answer. As the proceeding was one in the same nature as that for contempt of Court, he submitted that he was absolutely entitled to have the materials upon which the rule was granted before him, and so be able to know what he had to answer before he could be called on to show cause. There was no rule contained in Belchambers' Rules and Orders bearing on the question; and as this was an entirely novel proceeding he submitted the rule should be discharged with costs. In support of his contention he cited Archbold, Vol. II, p. 1257, and Tidd's Practice, p. 479.

Mr. *Pugh*.—The application was merely one under s. 32 of the Civil Procedure Code, and, had he been in Court at the hearing, Russick Lall Mitter might have been added at once as a party defendant. [NORRIS, J.—Yes; if a substantive application was made, but then he would be cognisant of all that transpired, and I should always be inclined to hear what he had to say before adding him as a party.] I don't wish to prejudice him now in any way, but the rule was granted in its present form not at my instance, but at that of the Court, for I merely asked the Court to proceed under s. 32, and not to call on him to show cause why he should not give security for costs. [NORRIS, J.—I think every one on whom a rule is served should, unless he is in Court when the matter is heard, be furnished with the grounds on affidavit, and I will postpone the hearing of this rule for that purpose.]

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Mr. *Apcar*.—The rule being informal can only be discharged with costs. [Mr. *Pugh*.—But Russick Lall Mitter has filed affidavits in reply]. Your Lordship can't look at anything further than the terms of the rule, and there being nothing for him to answer you cannot go into my affidavits.

NORRIS, J.—I think this rule must be discharged. It states no grounds whatever, and in granting the rule I did not intend that it should be drawn up as it has been. If it had been properly drawn up I should have been in a position to hear it, but as it stands now it must be discharged, and under the circumstances discharged with costs. I will grant liberty to apply, on affidavit, for a fresh rule, and I direct that the decree in the suit be not drawn up until the rule is disposed of as I shall give Mr. *Pugh* every facility for bringing this matter to a hearing.

Rule discharged with costs.

Attorney for the plaintiff: Mr. *H. H. Remfry*.

Attorneys for the defendants: Mr. *E. J. Moses* and Baboo *Bolye Chand Dutt*.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

1883
 April 11.

GOUR HARI SANYAL (DEFENDANT) v. PREM NATH SANYAL AND OTHERS (PLAINTIFFS).*

Practice—Right of respondent, who has filed cross objections, to appeal, where appellant withdraws his appeal.

No leave to appeal should be granted to a respondent who has filed cross objections, unless the Court is thoroughly satisfied upon affidavit that he was ready to appeal, and would have appealed within the proper time if the other side had not done so.

THIS was an application to withdraw an appeal on payment of the respondents' costs; the respondents, who had filed cross objections, submitted that if the appellant's application were granted, they (the respondents) ought to be allowed to appeal.

* Appeal from Original Decree No. 89 of 1861, against the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of Mymensingh, dated the 18th January 1861: