1886

DEBENDRA KUMAR MANDEL v. RUP LALL DASS.

In this view we think that the plaintiffs are entitled to enforce the lien created by the two bonds as against the immoveable property specified in those instruments.

The appeal will be dismissed with costs, and the cross-appeal will be decreed without costs, the learned Advocate General consenting to this.

Appeal dismissed.
Cross-appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

1886 *March* 11.

GARDEN REACH SPINNING AND MANUFACTURING CO., LD., (PLAINTIFFS) *v.* EMPRESS OF INDIA COTTON MILLS CO., LD., (DEFENDANTS).*

Practice—Costs—Attorney and Client—Taxation—Refreshers to Counsel—Fees—Counsel's fees—Rules of Court 707, 708.

Refreshers are not, as a general rule, to be allowed on motion heard by affidavit; but the Court hearing the motion can, in its discretion, and if applied to for the purpose, give special directions allowing costs as on the hearing of a case. In the absence of such special directions refreshers should not be allowed.

OBJECTIONS made by plaintiffs' attorney to the decision of the taxing master, disallowing the plaintiffs as against the defendant Company the amount of certain fees paid to counsel charged in plaintiffs' bill of costs, taxed on the 11th February 1886 under a decree made with the consent of the defendant Company on the 11th December 1885, and thereby directed to be paid as between attorney and client.

It appeared that in the above case two briefs were delivered to the plaintiffs' counsel for the argument of a rule calling on the defendants to show cause why an injunction should not issue against them; one of such briefs (the senior) was marked with a fee of five gold mohurs, and the other (the junior) with a fee of four gold mohurs. The hearing of the rule occupied from 2-30 P.M. to 5 P.M. on the first day, and from 4-30 P.M. to 5-30 P.M. on the second day. On the second day additional fees

*Suit No. 290 of 1885.

1886

GARDEN REACH SPINNING AND MANUFACTURING CO. v. EMPRESS OF INDIA COTTON MILLS COMPANY.

were paid to counsel equal in amount to the fees paid on the first day. Subsequently to the hearing of this rule by Mr. Justice Wilson, and the granting of an *ad-interim* injunction which virtually decided the suit, the defendant consented to a decree on the 11th December 1885, making the injunction perpetual and directing payment to the plaintiffs of the sum of one thousand and forty-one rupees as damages and costs of the suit to be taxed as between attorney and client. On the 18th February 1886 the plaintiffs' bill of cost was taxed, and at such taxation the attorney for the defendant Company objected to the additional fees paid to counsel on the second day being allowed as against his client, on the ground that additional fees to counsel could not properly be paid on the hearing of a motion or rule on affidavits. The taxing master allowed the objection, making the following remarks :—

"It is the practice, unless otherwise ordered by the Court, not to allow an additional fee to counsel in any matter where no oral evidence is taken. This practice is in accordance with the rule laid down in *Harrison* v. *Wearing* (1), and *Brown* v. *Sewell* (2). As to whether on a taxation between attorney and client, payable by one party to another, a fee not properly chargeable can be allowed, *see* the rule laid down in *In re Blyth* v. *Fanshawe* (3), which was followed in *Broad* v. *Broad* (4)."

The plaintiffs' attorney on the 1st February 1886, under rule 708 of the Rules of Court, filed his objections to the decision of the taxing master on the ground that fees for the second day's hearing should have been allowed; and applied to the Court for re-taxation.

The matter came up for argument before PIGOT, J., on the 1st March 1886.

Mr. *Sale* for the plaintiffs.

The principle laid down in *In re Blyth* v. *Fanshawe* (3) and in *Broad* v. *Broad* (4) applies only to unusual and exceptional expenses; that principle is not applicable to all cases where costs are allowed as between attorney and client, but not as

(1) L. R., 11 Ch. D., 206.
(2) L. R., 16 Ch. D, 517.
(3) L. R., 10 Q. B. D., 207.
(4) L. R., 15 Q. B. D., 252.

between party and party—*Foster* v. *Davies* (1). Refreshers as a matter of practice are usually paid when the hearing of a motion, such as this is, goes over into a second day; they cannot be said, therefore, to be unusual expenses, nor are they necessarily unreasonable. In this motion the whole point in dispute was decided, and it could not be said that refreshers were unreasonable. Motions for injunctions stand on a different footing from other motions; if reasonable the Court will allow the refreshers. In *Harrison* v. *Wearing* (2) the taxation seems to have been ordered as between party and party. The rule there laid down has never expressly been extended to taxation between attorney and client.

Mr. *Holdar* for the defendants relied on *Harrison* v. *Wearing* (2).

The order of the Court was as follows :—

PIGOT, J.—I think the objection must be disallowed. There is no rule of this Court similar in terms to rule 48 order LXV under the Judicature Act; but by the 707th rule of the Rules of this Court on the Original Side, it is laid down that "in all cases in which the rules of the Supreme Court do not sufficiently declare what business or proceedings may be charged for in the bills of fees and costs, or in what manner, and by what steps any part of the business or proceedings ought to be conducted the taxer of costs is directed to take the rules and practice of the Superior Courts in England as his guide."

The English rule is clear, that refreshers are not as a general rule to be allowed on motion heard by affidavit, and this general rule should be followed, as was done by the taxing officer in the present case. It is competent, of course, for the Judge, before whom the motion may be heard, to give special directions with respect to the costs to be allowed of any motion heard before him; such special directions I myself gave in disposing of the motion in the case of *Kristoromoney Dossee* v. *Khetter Paul Sreeteerutno*, but in the absence of such special directions, the taxing officer should follow the general rule.

The principle on which a different rule is applicable to motions and to hearings in which *viva voce* cross examination

(1) 34 Beav., 624. (2) L. R., 11 Ch. D., 206.

1886

GARDEN REACH SPINNING AND MANUFACTURING CO. v. EMPRESS OF INDIA COTTON MILLS COMPANY.

takes place, is laid down in *Blyth* v. *Fanshawe* (1). I think I ought to follow it.

In the present case the suit was disposed of on the motion; it may well be that in such a case as this, in which, as I understand, a good deal of discussion necessarily took place as to the hearing of the authorities respecting the similarity or identity of trade marks used by the contending parties on the facts disclosed on affidavit, the Judge before whom the matter came would, had he been asked to do so, have directed that costs should be allowed as on a hearing of a case; I apprehend it would have been quite within his power to do so.

So in the case before me to which I have referred, the hearing was a protracted one, the facts complicated, and the questions at issue of great importance to the parties who ultimately succeeded. In a case of that nature it would be difficult for the solicitor to estimate beforehand the length of time which the hearing might fairly be expected to take; were he to overestimate it, the fee paid by him might be disallowed as excessive; and were his calculation defective in under-estimating the amount of time and labour required from counsel, either his client or his counsel might unduly suffer.

It seems, therefore, that the power of the Court to make special orders must sometimes (though no doubt rarely) be exercised. No special order was made in this case; whether it is still competent for the Court to make such an order, I do not enquire; if so, it should be obtained from the learned Judge who heard the motion; the taxing officer having no special order before him was right; the objection is disallowed with costs.

Objection disallowed.

T. A. P.

Attorney for plaintiffs: Messrs. *Barrow & Orr.*

Attorney for defendants: Messrs. *Watkins & Co.*