

13 B. 368.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

1889

APRIL 18.

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NARROTTAM VIZHOOKANDAS AND OTHERS (*Plaintiffs*) v. HARICHAND
RAMCHAND AND OTHERS (*Defendants*).* [13th April, 1889.]

*Practice—Commissioner's report—Application to vary, time for—Extension of time—
High Court Rules, cap. VI, rule 6.*

A party desiring to move to vary a report made by the Commissioner must not only file his exceptions to such report, but must also make his motion to vary it; within twenty days after the filing of the report; or, if the Judge or the Court have allowed him further time for such application, then within the further time so allowed.

[R., 16 B. 263 (266).]

SUIT for partition. The case came on for hearing on the 5th March, 1886. A decree was made for partition, and the suit was referred to the Commissioner to take the necessary accounts. The Commissioner's report was filed on the 5th February, 1889. The plaintiffs desired to except to the commissioner's report, and finding that the period of twenty days allowed for that purpose [369] by the rules of the High Court(1) was too short, they obtained in chambers a Judge's order, dated 22nd February, 1889, extending the time for filing exceptions to the report for one week from the 25th February, 1889. The exceptions were duly filed within the extended period, viz., on the 4th March, 1889. The case now appeared on the day's board set down as "for further directions."

Kirkpatrick, for plaintiffs, said he was instructed to move to vary the Commissioner's report, and to argue the exceptions which had been filed, and that the case was set down by mistake "for further directions." He contended that the motion might now be made.

Telang (with *Jardine*), for defendants, objected that the motion to vary the report was too late, and relied on the rule.

JUDGMENT.

SCOTT, J.—This case has been set down for further directions on the Commissioner's report. That report was signed by the Commissioner and filed in the Prothonotary's office on the 5th February. The plaintiff now asks to vary the report on grounds of objection which he filed on the 4th of March. He is met with the answer that he is out of time under rule VI of chap. VI at p. 52 of the High Court Rules. That rule has been given judicial interpretation by Westropp, C. J., in *Sumar Ahmed v. Haji Ismail*

* Suit No. 33 of 1885.

(1) *Rule 6, chap. VI, (p. 52 of High Court Rules)*:—"When any report of the Commissioner for taking accounts or local investigations hereafter made in pursuance of any order of the Court shall have been signed by him, the same shall be forthwith transmitted by him to the Prothonotary, and the report shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied, either at chambers or in open Court, according to the nature of the case, upon application by summons or motion, within twenty days after the filing thereof, or such further time as a Judge or the Court shall allow. No person shall be allowed to appear in support of the report, or take any proceeding in the suit founded upon it, until the fee for filing it shall have been paid to the Prothonotary. The present practice, according to which the Commissioner by issuing a warrant to sign report gives notice of his being about to sign it, shall be continued."

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Haji Habib(1), who says that "the parties should move to vary the Commissioner's report on a memorandum of objections filed in the Prothonotary's office, and upon the evidence before the Commissioner * * *. The application [370] to vary the report should be made within the twenty days required by Rule VI." To this, I think, should be added "or within such additional time as a Judge or the Court has allowed for the application to vary the report." In the present case there has been no application to vary the report at all. But a memorandum of objections has been filed, and Mr. Kirkpatrick argues that this memorandum must be taken to be equivalent to the application, or to include, or necessarily imply, an application, to vary the report. It may appear a harsh decision, but I cannot yield to this argument. There are two steps to be taken according to the rule—one to file the objections, the other to apply to vary the report. This second step was never taken. The plaintiff in all probability honestly mistook the rule, but such a mistake has been repeatedly held to be no ground for interfering with the limitation of time established in favour of a person who has obtained a decree or a decision—*Craig v. Phillips* (2); *In re Mansel*; *Rhodes v. Jenkins*(3). As Sir, G. Jessel, M. R., said in the latter case, "no reason has been given but that the solicitors' clerk made a mistake as to the meaning of the rule. If that is to be allowed as a sufficient reason for relaxing the rules, they might as well be repealed."

But it was further argued that the order for extension of time granted by the Judge in chambers on the 22nd February, although in words it was only an extension of time for filing the exceptions, was intended to be an extension of time with the object of preserving the plaintiff's right to vary the report. I have consulted the learned and experienced Judge who granted the order, and he says its object was to keep the plaintiff in possession of all his rights up to the 4th March. We must, therefore, see what he did after that date. As he only filed his exception on that date, and did not then, or subsequently, apply to vary the report, as the late Chief Justice says should be done, I cannot hold that he has done enough to be within the rule. He is beyond the twenty days given for applying to vary or discharge the report; he has obtained no extension for that object. [371] no extension can be given at this stage. I must, therefore, hold that the report is final, and must be confirmed.

Attorneys for plaintiffs:—Messrs. *Burder and Bayley*.

Attorneys for defendants:—Messrs. *Mansukhlal and Damodhar*.

(1) 1 B. 158, 161.

(2) L. R. 7 Ch. Div. 249.

(3) L. R. 7 Ch. Div. 711 (713).