CIVIL RULE.

Before N. R. Chatterjea and Cuming JJ.

BHAIRABENDRA NARAIN DEB

v.

UDAI NARAIN DEB AND OTHERS.*

1923

Feb. 28.

Security for Costs—Parties—Plaintiff, transferred to defendants—Co-plaintiff's liability to defendants—Costs, past and future—Inherent power of Court—Code of Civil Procedure (Act V of 1908) O. I, r. 10 ; O. XXV, r. 1 ; O. XLI, r. 10.

Per CURIAM : (CUMING J. *dubitante* as to inherent power of the Court). When one of the plaintiffs is transferred to the category of defendants, the latter can, in the absence of any special circumstances, call upon the co-plaintiff to furnish security for past costs only, but not for future costs, as it is really a case of amendment.

In re Mathews, Oates v. *Mooney* (1) explained.

Ram Coomar Coondoo v. *Chunder Canto Mookerjee* (2) referred to.

CIVIL RULE obtained by Kumar Bhairabendra Narain Deb, by his mother and next friend Srimati Lankeswari Debi, plaintiff No. 1.

On the 22nd September 1919 the plaintiff No. 1, Kumar Bhairabendra Narain Deb, jointly with the plaintiff No. 2, Kumar Udai Narain Deb brought a suit against the Raja of Bijni, Kumar Jogendra Narain Deb, a lunatic, represented by his Curator, Mr. R. C. Sen, defendant No. 1, and against a number of other persons for declaration of their title in the alternative and for possession of the Bijni Raj, an extensive estate in the Goalpara district of the Province of Assam valued at nearly 100 lacs of rupees. After some time

* Civil Rule No. 55 of 1923, from orders of N. K. Bose, Subordinate Judge, 24-Parganas, dated 19th September 1922 and 3rd January 1923.

(1) [1905] 2 Ch. 460. (2) (1876) I. L. R. 2 Calc. 233, 259.

1923

BHAIRABENDRA NARAIN DEB
v.
UDAI NARAIN DEB.

the two plaintiffs fell out, and the plaintiff No. 2 transferred his interest to Prince Victor Narain of Cooch Behar, whose application to be substituted for the plaintiff No. 1 on the record was rejected.

As it was apparently impossible for the two plaintiffs to prosecute the suit conjointly, after various other applications, an application was made by the present petitioner, the plaintiff No. 1, that plaintiff No. 2 should be transferred to the category of defendants. The plaintiff No. 2 also made a similar application regarding the plaintiff No. 1. On the 19th September 1922 the learned Subordinate Judge, 1st Court, Alipore, decided that the plaintiff No. 1 should be allowed to conduct the suit, and the plaintiff No. 2 should be transferred to the category of defendants, and that the plaintiff should give security to the extent of Rs. 40,000 to cover the defendants' past as well as future costs. Against these orders the petitioner, plaintiff No. 1, moved the High Court under section 115 of the Code of Civil Procedure.

Dr. S. C. Basak (with him *Babu Prokash Chandra Pakrasi*), for the petitioner. The learned Subordinate Judge has virtually denied the petitioner justice by ordering him to furnish security for so heavy an amount. Whatever may be said as to the past costs, the Court had no jurisdiction to pass any order as to future costs. This case does not come under Order I, rule 10 of the Code of Civil Procedure and there is no other provision in the Code for such a matter. The decision in *In re Mathews, Oates* v. *Mooney* (1), relied on by the Court below, clearly supports my contention. The cases cited in that ruling clearly show that security for future costs cannot be called for. In this connection I cite further

(1) [1905] 2 Ch. 460.

Lloyd v. *Makeam* (1), *Drake* v. *Symes* (2) and *Brocklebank & Co.* v. *The King's Lynn Steamship Co.* (3). Further, the petitions filed by the defendants in the lower Court are not supported by affidavists and give no indication of the costs already incurred by the defendants. Before the learned Subordinate Judge the following points were taken—The security to be furnished for defendants' costs should be limited to past costs only; next as to the amount thereof, pleaders' fees as per scale only should be allowed; further, there should be no separate set of costs for the different sets of defendants as their expenses were in common.

[CHATTERJEA J. On what ground did you obtain this Rule?]

That if the Court below had power to order security to be furnished, he could not exercise it arbitrarily, *i.e.*, he has acted illegally in the exercise of his jurisdiction. While purporting to follow the decision, *In re Mathews, Oates* v. *Mooney* (4), the learned Subordinate Judge has misapplied it, for the costs therein meant *past* costs. In *Brown* v. *Sawyer* (5) the order was made for security for costs of suit already incurred. *Vide* Order LXV, rule 6(*a*) of the English Act.

[CHATTERJEA J. So far as this class of cases is concerned there is no express provision here as in England.]

Yes. Such an order can be made in British India only in exercise of the inherent powers of the Court, *Vide* section 151 of the Code of Civil Procedure.

The Senior Government Pleader (*Babu Dwarka Nath Chakravarti*) [with him the *Assistant Government Pleader* (*Babu Surendra Nath Guha*) and *Babu*

(1) (1801) 6 Ves. Jun. 145.
(2) (1861) 3 DeG. F. & J. 491.
(3) (1878) 3 C. P. D. 365.
(4) [1905] 2 Ch. 460.
(5) (1841) 3 Beav. 598.

1923

BHAIRABENDRA NARAIN DEB v. UDAI NARAIN DEB.

Atul Chandra Dutt], for the opposite parties Nos. 2, 6 & 7. I submit that the Court below had jurisdiction to make the order complained of which had been rightly made in the circumstances of the case. Further, this Court should not interfere in revision. Besides, the provisions of Order I, rule 10 and Order XXV, rule 1 of the Code of Civil Procedure apply to this case, and the Court below had ample powers to pass such an order even as to security for future costs in the exercise of its inherent powers: *Ramsing Bhagawan* v. *Balubhai*(1), *Chandra Kanta Ganguly* v. *Srimati Sarojini Debi* (2), *Hari Nath Sing* v. *Ram Kumar Bagchi* (3). I further rely on the observations of their Lordships of the Judicial Committee in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (4).

Babu Atul Chandra Dutt (with him *Babu Bhupendra Nath Ghose*), for the opposite party No. 3, followed and adopted the arguments of the learned Senior Government Pleader.

Babu Ambika Pada Chowdhuri, for the opposite parties Nos. 4 and 5, followed doing likewise.

Cur. adv. vult.

CHATTERJEA J. The question involved in this Rule relates to security for costs, and arises in this way—

The petitioner before us was the plaintiff No. 1 in a suit relating to succession to the Bijni Estate which is pending in the Subordinate Judge's Court at Alipore. The opposite party No. 1 was originally the plaintiff No. 2 in the suit. The plaintiff No. 1 and the plaintiff No. 2 claimed the estate under different rights. It appears that there was an agreement between them that in the event of success of the one, the other would participate in it. The suit was conducted

(1) (1903) 5 Bom. L. R. 661.
(2) (1916) 32 Ind. Cas. 786.
(3) (1913) 18 C. W. N. 119.
(4) (1876) I. L. R. 2 Calc. 233, 259.

jointly by both the plaintiffs until the 14th February 1922 when the plaintiff No. 2 transferred his interest to Prince Victor Nityendra Narain of Cooch Behar. Since then the two plaintiffs fell out. An application was made on behalf of Prince Victor Nityendra Narain to be substituted in place of the opposite party No. 1, which, however, was ultimately withdrawn. There were various other proceedings which need not be stated.

In September 1922, there was an application by the plaintiff No. 1 that he might be allowed to proceed with the suit and that the plaintiff No. 2 might be made a defendant. There was a similar application on the part of the plaintiff No. 2 that he might be allowed to prosecute the suit, and the plaintiff No. 1 might be made a defendant. The question was decided in favour of the plaintiff No. 1, and the plaintiff No. 2 was transferred from the category of plaintiffs to that of defendants on the 19th September 1922. The concluding portion of the order was as follows:—"Considering all the circum- "stances of the case, I think I should give the conduct "of the action to plaintiff No. 1 and make an order "that the name of plaintiff No. 2 should be struck "out and added as defendant upon security being given "by plaintiff No. 1 for the costs of the original "defendants within six weeks from this date."

On the 26th October 1922 the plaintiff No. 1 applied for fixing the security. The principal defendant stated that the security for his costs should be for one lac of rupees, and the three other sets of defendants between them wanted security for another lac of rupees. The learned Subordinate Judge on the 3rd January 1923 directed the plaintiff No. 1 to furnish security to the extent of Rs. 40,000 with liberty to the defendants to apply to the Court for increasing the amount of

1923

BHAIRABENDRA NARAIN DEB
v.
UDAI NARAIN DEB.

CHATTERJEA J.

security. As against the orders of the 19th September 1922 and the 3rd January 1923, the present Rule was obtained by the plaintiff No. 1.

Now, the case does not come under Order I, rule 10, Civil Procedure Code as the plaintiff No. 2 was not struck out on the ground that he had been improperly joined. The order transferring the plaintiff No. 2 to the category of defendants must therefore be taken to have been made under the inherent power of the Court. The order for security does not come under Order XXV, rule 1, which no doubt provides for security being taken for costs incurred as also those which are likely to be incurred by any of the defendants. That rule refers to a case where the plaintiff is out of jurisdiction of the Court or where the plaintiff does not possess any sufficient property within British India other than the property in suit.

As stated above, Order I, rule 10 does not apply to the present case. There are no other provisions in the Civil Procedure Code for taking security for costs. Order XLI, rule 10 applies to the power of the Appellate Court to take security for costs when an appeal has been preferred.

It is accordingly contended on behalf of the petitioner that the Court had no power to direct security to be given for future costs.

The opposite party contends that the Court can do so in the exercise of its inherent power, and that the discretion exercised by the Court below cannot be interfered with by this Court.

The learned Subordinate Judge in making the order relied upon the case of *In re Mathews, Oates* v. *Mooney* (1), where it was observed that in the case of a difference between co-plaintiffs, the proper course is to make an order that the name of one of them be

(1) [1905] 2 Ch. 460.

struck out as plaintiff and added as a defendant, but that such an order "will be made only on security "being given for the defendants' costs." It is upon this observation that the Court below relied in ordering the plaintiff No. 1 to furnish security for future as well as past costs.

From the passage quoted above it does not appear that it was meant to apply to future as well as past costs, as the learned Judge referred to the case of *Brown* v. *Sawyer* (1), where there was no order for security for future costs. In that case two plaintiffs duly instituted a suit, and one of them by notice to his solicitor withdrew from the suit, and the other co-plaintiff moved for liberty to amend the plaint by striking off the name of the co-plaintiff who had revoked his authority as plaintiff, and to add him as a defendant. The Master of the Rolls allowed the amendment on security being given for the original defendants' costs but there was no order for future costs. On the contrary, it was stated that the amendment should be allowed by "securing the costs of suit already incurred."

In *Lloyd* v. *Makeam* (2), an application to amend the bill by striking out the names of 2 out of 4 plaintiffs who had executed releases to the other plaintiffs was allowed upon giving security for costs, but it does not appear whether it was for past costs only or also for future costs. It appears however that certain cases were brought to the notice of the Court where security for costs up to the time of striking out the names (of some of the plaintiffs) was allowed.

In *Drake* v. *Symes* (3), it appears that one of several co-plaintiffs obtained an order giving the plaintiffs leave to amend their bill by striking out

(1) (1841) 3 Beav. 598. (2) (1801) 6 Ves. Jun. 145.
(3) (1861) 3 DeG. F. & J. 491.

1923

BHAIRABENDRA NARAIN DEB v. UDAI NARAIN DEB.

CHATTERJEA J.

his name on his giving security for the costs of the suit up to and including the summons. It is to be observed that in that case it was the plaintiff, whose name was struck out, and who was ordered to pay the costs.

The authorities relied upon by the opposite parties do not refer to cases of transfer of the plaintiff to the category of defendants.

In *Massey* v. *Allen* (1), the plaintiff went out of the jurisdiction of the Court, and security for past as well as future costs was allowed. But in such a case Order XXV, rule 1, of the Civil Procedure Code, also provides for security for future costs.

The case of *Wilmot* v. *Freehold House Property Co.* (2) also was not a case of transfer, and as a matter of fact, the security for costs ordered by the Court of Appeal did not include future costs.

In the case of *Brocklebank & Co.* v. *The King's Lynn Steamship Co.* (3), it was held that security for costs, where the plaintiff had become bankrupt and had filed a petition for liquidation, was not necessarily confined to future costs but might, when applied for promptly, be extended to costs already incurred in the suit.

The cases relied upon by the opposite party, therefore, were not cases where there had been a transfer of a person from the category of the plaintiff to that of defendants. The authorities, which have been cited before us on behalf of the petitioner, go to show that security for costs up to the date of making the order for transfer of the party was ordered; and we have not been referred to any decision in which it has been held that in a case of transfer of one of the plaintiffs to the category of defendants the remaining

(1) (1879) 12 Ch. D. 807.
(2) (1885) 33 W. R. (Eng.) 554.
(3) (1878) 3 C. P. D. 365.

1923

BHAIRABENDRA NARAIN DEB v. UDAI NARAIN DEB.

CHATTERJEA J.

co-plaintiff is required to furnish security for future costs.

The learned pleader for the opposite party referred to two cases in support of the contention that security for future costs might be demanded on the analogy of the provisions of section 380 of Act XIV of 1882 (corresponding to Order XXV, rule 1, clause 3, Civil Procedure Code.) The cases of *Ramsing Bhagwan* v. *Balubai* (1), and *Chandra Kanta Ganguly* v. *Srimati Sarojini Debi* (2), which are relied upon, however, related to security for costs of appeal.

We were also referred to the case of *Hari Nath Singh* v. *Ram Kumar Baychi* (3). It was not a case of transfer of the plaintiff to the category of defendants and the order for security was made by the lower Court on the ground that the plaintiff would be unable to pay the costs if he lost the suit, and that some other person was financing him. The learned Judges of this Court observed: "The order now "before us was not made and cannot be supported "under Order XXV; but the question is whether the "Court has inherent power to make it. That the Court "has some such power seems to be certain." So in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (4), Sir Montagu Smith in delivering a judgment of the Privy Council says: "It is ordinary practice, if the "plaintiff is suing for another, to require security for "costs, and to stay proceedings until it is given." . . . . The question which should determine the granting of an order for security thus seems to be,—Has the plaintiff got a substantial interest in the suit, or is he suing for another, in the capacity of what Trevelyan J. describes as a "puppet"—, and

(1) (1903) 5 Bom. L. R. 661.
(2) (1916) 32 Ind. Cas. 786.
(3) (1913) 18 C. W. N. 119.
(4) (1876) I. L. R. 2 Calc. 233, 259.

1923

BHAIRABENDRA NARAIN DEB
v.
UDAI NARAIN DEB.

CHATTERJEA J.

the order for security for costs made by the Court below was set aside on revision.

In the absence of any provisions in the Civil Procedure Code or any authority of the Courts in India, the question must be decided upon some principle. I do not see how, in the absence of any special circumstances, such as are referred to in the case cited above, the mere fact, that one of the plaintiffs is transferred to the category of defendants, would entitle the defendants to call upon the co-plaintiff to furnish security for future costs. It is really a case of amendment; and costs in such cases are allowed up to the date of amendment.

The opposite party produced affidavits in this Court stating circumstances and grounds as to why the plaintiff No. 1 should furnish security. These matters, however, were not before the Court below nor considered by it. If the opposite party can show that the circumstances are such that the plaintiff No. 1 should be called upon to furnish security for future costs, an application may be made in the Court below. But the Court below in directing the plaintiff No. 1 to furnish security for future costs has proceeded upon a misapprehension of the case of *In re Mathews, Oates* v. *Mooney* (1).

So far as security for past costs is concerned, the petitioner does not dispute the order, and having regard to the English authorities on the point, that order seems to be right; but so far as the order for future costs is concerned, I think the order should be set aside.

As the amount of past costs has not been ascertained, the matter will go back to the Court below which will assess such amount and will call upon the plaintiff No. 1 to furnish security to that extent.

(1) [1905] 2 Ch. 460.

As regards the costs of this hearing, the petitioner will be entitled to costs three gold mohurs.

1923

BHAIRABENDRA NARAIN DEB v. UDAI NARAIN DEB.

CUMING J. I agree with the order my learned brother proposes to make.

The facts of this case so far as they are material are as follows:—

The present applicant, Kumar Bhairabendra Narain Deb, whom I may describe as plaintiff No. 1, in conjunction with Kumar Udai Narain Deb, who may be described as plaintiff No. 2, brought a suit against a number of persons for the declaration of their title in the alternative and for possession of a large property in Goalpara District in Assam valued, it is stated, at a crore of rupees. This suit was instituted so long ago as 22nd September 1919. As far as can be seen the suit is not very far advanced at present. After some time the two plaintiffs fell out, plaintiff No. 2 apparently having transferred his interest to a third party and, as it appeared impossible for the two plaintiffs to prosecute the suit jointly, after various other applications, an application was made by the present applicant, plaintiff No. 1, that plaintiff No. 2 should be transferred to the category of defendants. Plaintiff No. 2 made a similar application regarding plaintiff No. 1. On 19th September 1922 the learned Subordinate Judge decided that plaintiff No. 1 should be allowed to conduct the suit and plaintiff No. 2 should be transferred to the category of defendants. The terms of the order were as follows:—

"Considering all the circumstances of the case "I think I should give the conduct of the action "to the plaintiff No. 1 and make an order that the "name of plaintiff No. 2 should be struck out and "added as defendant upon security being given by

1923

BHAIRABENDRA NARAIN DEB v. UDAI NARAIN DEB.

CUMING J.

"plaintiff No. 1 for the cost of the original defendants "within 6 weeks from this day.

Under what section of the Code this order was made is not clear. It has been suggested it was made under Order 1, rule 10, though looking at Order I, rule 10 it is somewhat doubtful if the order contemplated an order of this kind. I shall return to this point later on.

Plaintiff No. 1 then asked the Court to fix the amount of the costs and the learned Judge then on 3rd January 1923 fixed a total amount of Rs. 40,000 as the amount of security which the plaintiff No. 1 should furnish for the past and future costs of the defendants other than plaintiff No. 2. Against this order the plaintiff No. 1 moved this Court contending that the amount had been fixed in an arbitrary manner, that the Court had gone behind the order of 19th September 1922 in asking the plaintiff to give security for future costs and that he should give security only for the costs already incurred and that he could not be asked to give security for the costs of the whole suit.

The order of the learned Judge cannot, I think, be supported. The only section of the Code which makes any provision for taking security from the plaintiff for the defendants' cost is Order XXV, rule 1. It is only necessary to read Order XXV, rule 1 to at once see that on the facts alleged, on which the order was made, the present case does not fall within the purview of Order XXV, rule 1, neither indeed is it contended, that it does. It has however been argued that the Court has an inherent power to order a plaintiff to give security for costs and three authorities have been cited in support of the proposition. The first is a decision of the Privy Council, *Ram Coomar Coondoo* v. *Chunder Canto Mukherjee* (1).

(1) (1876) I. L. R. 2 Calc. 233, 259.

The decision was under the old Code of 1859. Their Lordships remark in the course of their judgment that it is ordinarily the practice if the plaintiff is suing for another to require security for costs and to stay proceedings until it is given.

In the old Code of 1859 there was no provision at all for giving security for costs by a plaintiff and in the suit in question it does not appear that the particular point had to be decided. This authority has obviously no bearing therefore on the present case.

With regard to the other two authorities I take first the case of *Anandamoi Chaudhurani* v. *Gokul Chandra Roy* (1). On the facts of that case the learned Judge held that the case on its facts fell within the purview of Order XXV, rule 1, clause (*3*). This authority hardly supports the contention of the opposite party. The next authority relied on is the case of *Hari Nath Singh* v. *Ram Kumar Bagchi* (2). The learned Judges remark that the order before them could not be supported under Order XXV, but the question was whether the Court had inherent power to make it, and that the Court had some such power seemed to be certain. The reason for this would appear to be the case of *Ram Coomar Coondoo* v *Chunder Canto Mukherjee* (3). I have already discussed this authority.

With great respect it seems to me that it is very doubtful if the inherent power of the Court can be called in aid in the present case. Had the Code been entirely silent on the point, then possibly the inherent power of the Court might have been invoked, but when the Code does make certain provisions for the taking of security for costs from the plaintiff, it seems

(1) (1912) 16 C. W. N. 763.
(2) (1913) 18 C W. N. 119.
(3) (1876) I. L. R. 2 Calc. 233, 259.

1923

BHAIBABENDRA NARAIN DEB
v.
UDAI NARAIN DEB.

CUMING J.

to me that in those cases and those cases only may costs be taken from the plaintiff, and that for security for costs to be demanded from the plaintiff the case must fall within the purview of Order XXV, rule 1.

We find in other parts of the Code, as for instance, Order XLI, rule 10, where provision is made for taking security for costs from the appellant, instances where the Code deals with the question of taking security from parties. In Order XXV the Legislature was dealing with the subject of security for costs by the plaintiff and there set forth the cases in which security can be taken. Had the Legislature intended that in other cases also security for costs could be taken from the plaintiff it would have, I presume, said so.

I do not think the inherent power of the Court can be invoked in matters for which the Code does actually provide. The Legislature possibly deliberately did not allow security to be asked for from a plaintiff except in the exceptional cases given in Order XXV, rule 1. To hold otherwise would be to render the enactment of the Code superfluous. Even if it be held that the Court has that inherent power, this does not seem to me to be a case for the exercise of it, for the sole reason apparently for demanding the security for costs is that one plaintiff has been transferred to the category of defendants. Can it be for one moment suggested that this is of itself a good reason for demanding such security?

It is then apparently suggested that the case falls under Order 1, rule 10, and that under this rule the Court may order, on such terms as it thinks fit, one plaintiff to be transferred to the category of defendant and that in the present case the terms were security for Rs. 40,000. Even if Order I, rule 10 covered the case, which I do not think it does, the terms imposed

would, on the facts set forth in the learned Judge's order, be uncalled for. The learned Judge does not suggest in his order that the plaintiff is a man of straw or that he is not the real plaintiff. As I have noted before, the only reason given apparently is that one plaintiff has been transferred to the category of defendants.

It has been contended that the petitioner has not challenged the order of the learned Judge so far as it concerns the giving of security for the costs already incurred and that his only grievance is as regards future costs. That that is so would appear from the grounds of his application, and I would not therefore propose to interfere with the order of the lower Court so far as it relates to costs already incurred but with regard to the order for security for future costs I would set it aside.

G. S. *Rule absolute.*

CRIMINAL REVISION.

Before C. C. Ghose and Cuming JJ.

HALFHIDE

v.

HALFHIDE.*

1923

April 25.

Maintenance—Arrears—Husband adjudged an insolvent but not discharged—Protection order passed in his favour by Insolvency Court—Wilful neglect—Criminal Procedure Code (Act V of 1898), s. 488 (3)—Provincial Insolvency Act (V of 1920) ss. 27 and 44.

The fact that a husband, who is in arrears of maintenance, has been adjudicated an insolvent, under s. 27 of the Provincial Insolvency Act (V of 1920), is conclusive, as long as the order of adjudication stands, that he is unable to pay the amount due, and he is not, therefore, guilty of wilful neglect within s. 488(3) of Criminal Procedure Code.

* Criminal Revision No. 305 of 1923, against the order of D. Swinhoe, Chief Presidency Magistrate of Calcutta, dated March 7, 1923.