The question then is what should be our order. Having regard to the fact that the petitioners are all minors, with the exception of one who is their guardian and who is said to be a *pardanashin* Mahomedan lady and who, as far as can be made out, is also illiterate, an application on their behalf under Order XXII, rule 9(2), Civil Procedure Code stands a good chance of succeeding. I would, therefore, treat the order for substitution as being one setting aside the abatement, and would set aside the order of the learned District Judge and remit the appeal to him to be dealt with on the merits. No order is made as to the costs of this Rule.

WALMSLEY J. I agree.

S. M. *Rule absolute.*

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J., and Richardson J.

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Feb 25

A. M. K. GOULDING, *In re.**

Security for Costs—Civil Procedure Code (Act V of 1908), O. XLI, r. 10—Appeal from an order made by a Judge in the Ordinary Original Civil Jurisdiction—Jurisdiction of Appellate Court to order appellant to give security.

On an application for security for costs in an appeal against judgment of a learned Judge sitting on the Original Civil Side of the Court, it was held that Order XLI, rule 10 of the Civil Procedure Code (Act V of 1908) applies to such appeals in the absence of any rule of this Court framed in the exercise of the power to regulate its own procedure in its Origina Civil Jurisdiction.

* Appeal from Original Civil No. 9 of 1924.

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Lakhypria Dasi v. *Rajkishori Dasi* (1); *Sabitri Thakurani* v. *Savi* (2) followed.

Sesha Ayyar v. *Nagarathna Lala* (3) not followed.

Nawab Behram Jung v. *Haji Sultan Shustry* (4) referred to.

APPLICATION.

This was an application by the respondent Avis Mary Kathleen Goulding (who is the wife of the appellant in Appeal No. 9 of 1924) that the appellant Christopher Charles Goulding do furnish security for the costs of the appeal to the satisfaction of the Registrar of the Court and that until such security be furnished, all proceedings in the appeal be stayed. The appeal was preferred against the judgment and order of GHOSE J. made in the Ordinary Original Civil Jurisdiction of the Court and dated the 21st December 1923, whereby the petitioner-respondent was appointed the guardian of her minor daughter. The petitioner stated that the appellant resided in England and outside the jurisdiction of this Court and that he had no immoveable or other property in British India and she apprehended that she would not be able to realise from the appellant the costs of the appeal should an order for costs be made in her favour. Learned counsel who appeared for the appellant stated that he was not in a position to deny the respondent's allegations.

Mr. A. A. Avetoom, for the petitioner-respondent, asked for an order in terms of the prayer of the petition.

Mr. C. Bagram, for the appellant. The Court had no jurisdiction to entertain the application or to adjudicate upon it. Order XLI, rule 10 of the Civil

(1) (1915) 20 C. W. N. 140.

(2) (1921) L. R. 48 I. A. 76; 25 C. W. N. 557.

(3) (1903) I. L. R. 27 Mad. 121.

(4) (1912) I. L. R. 37 Bom. 572.

Procedure Code applies only to appeals preferred to the High Court from subordinate Courts subject to its appellate jurisdiction and not to appeals preferred under clause 15 of the Letters Patent from the judgment of one of its own Judges in its Ordinary Original Civil Jurisdiction: *Sesha Ayyar* v. *Nagarathna Lala* (1). If Order XLI, rule 10, did not apply, there is no other provision which is applicable unless it be section 151. Even if this Court had inherent jurisdiction to make the order asked for, it could not exercise such jurisdiction in the absence of rules framed by this Court in the exercise of the power to regulate its own procedure on the Original Civil Side of the Court. In the Bombay High Court, there were rules governing the deposit of security by an appellant residing outside British India in an appeal from the Original Civil Side of the Court and it was held in *Nawab Behram Jung* v. *Haji Sultan Ali Shustry* (2) that the Court had power to make an order for security for costs if a case was made out.

Mr. Avetoom, in reply.

SANDERSON, C. J. This is an application by the respondent, Avis Mary Kathleen Goulding, who is the wife of the appellant, that the appellant do furnish security for the costs of the appeal to the satisfaction of the Registrar of this Court and that until such security is furnished all proceedings in this appeal be stayed.

It appears that an order was made by a learned Judge sitting on the Original Side of this Court that Mrs. Goulding should be the guardian of her infant daughter, Lydia Barbara Goulding, who is aged about 6½ years. The appellant, the father of the infant, has appealed to this Court against that decision.

(1) (1903) I. L. R. 27 Mad. 121. (2) (1912) I. L. R. 37 Bom 572.

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The petition, which has been filed by the respondent, states that the appellant resides in England, and is outside the jurisdiction of this Court and that he has no immoveable or other property in British India. No affidavit has been filed in reply and the learned counsel, who has appeared for the appellant, has stated that he is not in a position to deny the allegations to which I have referred.

The learned counsel for the appellant, however, has taken the point that this Court has no jurisdiction to make the order. His argument was to the effect that Order XLI, rule 10, Civil Procedure Code, does not apply in the case of an appeal from a learned Judge sitting on the Original Side of this Court but that its operation is confined to appeals from Courts outside Calcutta to this Court in its Appellate Jurisdiction; and, secondly, that even though this Court might have inherent jurisdiction to make the order, which has been asked for, it could not exercise such jurisdiction until a rule somewhat similar to that which appears to obtain in the Bombay High Court has been passed by this Court.

In my judgment, Order XLI, rule 10, Civil Procedure Code, does apply to an appeal from the judgment of a learned Judge sitting on the Original Civil Side, in the absence of any rule of this Court framed in the exercise of the power to regulate its own procedure in its Original Civil Jurisdiction. The only authority which was cited as being contrary to that view is the case of *Sesha Ayyar* v. *Nagarathna Lala* (1) which was the decision of a learned Judge of the Madras High Court sitting alone.

Our attention was drawn to the case of *Nawab Behram Jung* v. *Haji Sultan Ali Shustry* (2) and from that case it appears that the Bombay High Court

(1) (1903) I. L. R. 27 Mad. 121. (2) (1912) I L. R. 37 Bom. 572.

has a rule which prescribes that in an appeal from the judgment of a learned Judge on the Original Side the appellant is required to deposit with the memorandum of appeal a sum of Rs. 500, as security for the costs of the respondent in the appeal, or if more than one, for the costs of each respondent having different interests. In that case the learned Chief Justice and the other learned Judge who was sitting with him, came to the conclusion that, inasmuch as the appellant had complied with the rule as regards the deposit of Rs. 500, and, inasmuch as the respondent had abstained from applying for security of the costs of the original hearing, as he might have done, there was no reason why they should exercise their discretion by ordering that the appellant should give further security either for the costs of the original hearing or for the costs of the appeal; and the learned Chief Justice concluded his judgment by saying: "We have been referred to no reported case "in which such an order has been made, and we do "not think (although we do not doubt our power if it "were necessary in the interests of justice to make "such an order) that a case has been made out for "such an order at present."

It seems to me that that case is an authority against the contention which has been put forward by the learned counsel for the appellant. That case, as I read it, is not an authority that Order XLI, rule 10, Civil Procedure Code, does not apply to such a case, as that which we are now considering. It is an authority for the proposition that the rule which was made by the High Court for depositing Rs. 500, was inconsistent with Order XLI, rule 10: but, in my judgment, it is not necessary for us to consider the matter at any length, because, in my opinion, there is a decision of this Court which covers this matter.

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SANDERSON, C. J.

Our attention was drawn at the end of the argument to the case of *In the matter of Goberdhone Seal*, (an insolvent) *Sm. Lakhypriya Dassi* v. *Sm. Raj Kishori Dassi* (1), which was a decision of Mr. Justice Woodroffe, Mr. Justice Mookerjee and myself and the judgment which was appealed from was delivered by Mr. Justice Chaudhuri sitting on the Original Side. The learned Judge held that the sale, which was the subject of the enquiry, by the insolvent to his wife was a fictitious sale and he also held that the transfer by Sarbosundari in the name of Lakhypriya—the appellant—was a fictitious one; and he held that both the transfers were void as against the Official Assignee. Against that Lakhypriya preferred an appeal. My learned brother, Mr. Justice Woodroffe, delivered the judgment of the Court. An application was made for security for the costs of the appeal, and in that case the learned counsel, who appeared to oppose the application, relied upon the case in the Madras Court, on which the learned counsel in this case relied and Mr. Justice Woodroffe said as follows:—"The application is "opposed both on grounds of law and fact. As regards "the first question the point is whether Order XLI, rule "10, applies to the case of an appeal from an order passed "by a Judge in Insolvency under Act III of 1909. "Section 8 (*b*) of that Act states that an appeal shall "lie in the same way and be subject to the same "provisions as an appeal from an order made by a "Judge in the Ordinary Original Civil Jurisdiction. "The question then is, does the order apply to the "latter case. No doubt the case of *Sesha Ayyar* v. "*Nagarathna* (2) answers this question in the negative. This case was decided prior to the present "Code and has not been referred to nor followed so "far as we are aware in this Court where the previous

(1) (1915) 20 C. W. N. 140. (2) (1905) I. L. R. 27 Mad. 12.

"practice has been to entertain such applications. "Under section 117 of the Code its provisions apply "to the High Courts save as provided in Parts IX "and X. I am of opinion, therefore, that we have "power to entertain and adjudicate this application "under section 117 and Order XLI, rule 10 of the "Code. This conclusion is in conformity with the "previous practice under which such applications "have been adjudicated. It cannot be reasonably "held that this Court when sitting in appeal from a "decision on the Original Side is deprived of powers "necessary to an effective jurisdiction admittedly "existent on the Appellate Side of the same Court. "For, if Order XLI, rule 10, does not apply, there is no "other provision applicable and in such a case it "would be necessary to invoke the provisions of "section 151."

The learned Judge concluded by saying that on the facts of that case security should be required.

In view of these decisions, especially in view of the case to which I have referred and which is reported in 20 Calcutta Weekly Notes, page 140, I have no doubt that this Court has jurisdiction to entertain this application and, if it thinks fit, to make an order in respect of it.

We direct that security to the extent of Rs. 500 for costs of the appeal be furnished by the appellant on or before the 1st June, 1924 to the satisfaction of the Registrar. The appeal will not be heard until the security is furnished; and if the security is not furnished by the 1st June, the appeal will stand dismissed with costs.

The appellant must pay the respondent's costs of this application.

Since the delivery of judgment, my attention has been drawn to the case of *Sabitri Thakurani* v.

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Savi (1), which is a decision of the Judicial Committee of the Privy Council and which confirms the opinion which I have already expressed.

RICHARDSON J. I agree.

The question is, in my opinion, one of procedure; and even if the view were taken that Order XLI, rule 10, Civil Procedure Code, does not of its own accord apply to appeals from the Original Side and even in the absence of any rule on the subject made by this Court under the powers conferred by section 129 of the Civil Procedure Code, I should have been disposed to say that a Court having the general powers of this Court would have ample jurisdiction to demand in proper cases security from an appellant for the costs of the appeal. It appears, however, that it has been decided by this Court in the case to which the learned Chief Justice has just referred, that Order XLI, rule 10, does apply to appeals from the Original Side; and, that being so, there is nothing further to be said in the matter. Since judgment was delivered our attention has been called to the decision of their Lordships of the Privy Council in *Sabitri* v. *Savi* (1) which puts the question beyond doubt.

A. P. B.

(1) (1921) L. R. 48 I. A. 76; 25 C. W. N. 557.