APPELLATE CIVIL.

Before Rankin C. J. and C. C. Ghose J.

BIRENDRANATH MITRA

v.

SULTAN MUWAYYID ZADA.*

1930

March 7.

Costs—Security—Principles—Code of Civil Procedure (Act V of 1908), O. XXV ; O. XLI, r. 10.

An application for security for costs to be given by the plaintiff at the original trial stands on a different footing from such an application for security for costs to be given by the appellant in an appeal.

The Civil Procedure Code treats the two things as entirely different. In the case of an appeal it leaves the matter to the discretion of the court.

Exception may be made for special reason, but it is the settled practice if the respondent asks for it, to require security for costs to be given by an appellant, who would be unable through poverty to pay the respondent's costs of the appeal, if it should be unsuccessful.

Hall v. *Snowden, Hubbard & Co.* (1), *In re Ivory. Hankin v. Turner* (2), *Wightwick* v. *Pope* (3) and *Harlock* v. *Ashberry* (4) referred to

APPLICATION by the defendants, respondents.

The facts of the case, out of which this application arose, are briefly as follow :—

The appellant's husband, Jelaluddin-ul-Hossein, who hailed from Persia, was the editor and proprietor of a Calcutta newspaper printed in Persian, named "Hablul Matin," having a wide circulation in India, Persia and other foreign countries. But the appellant was a lady not possessed of any immoveable property within British India and exempt from arrest or detention in civil prison in execution of the decree directing costs to be paid by her in her previous suit, in which she was also appealing to the High Court. The respondent alleged that the appellant's husband was the real litigant in this case, the appellant being a mere puppet in his hands, and he was able to find the security for the appellant with

*Application in Appeal from Original Decree, No. 173 of 1929.

(1) [1899] 1 Q. B. 593.
(2) (1878) 10 Ch. D. 372.
(3) [1902] 2 K. B. 99.
(4) (1881) 19 Ch D 84.

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whom he had been living all along. His newspaper had once been proscribed by the Government of India and in July, 1926, he intimated in the "Englishman" and other newspapers his intention of going back to Persia: in consequence, the respondent apprehended that he might take the appellant with him out of British India at any time he liked. It also appeared that the appellant had not been at all diligent in the prosecution of the appeal: she filed it, on the 25th June, 1929, four months from the date of the judgment, but did not pay the process fee or take any steps for service of the notice of appeal on the respondents for nearly six months. The notice of appeal was served on the 19th December, 1929, and they entered appearance on the 20th December, 1929. In their application for security, the respondent alleged that the appeal was not *bona fide* at all, but mere fictitious proceedings set up by the appellant's husband to recover his properties, which had been sold in execution of their decrees to satisfy his mortgage debts secured by him on the properties now in dispute. The respondents, accordingly, prayed for an order requiring the appellant to furnish sufficient security for the costs decreed by the trial court against the present appellant as well as for the estimated costs of this appeal.

Saratchandra Basak, *Rishindranath Sarkar* and *Subodhchandra Datta* for the petitioner.

Sharatchandra Ray Chaudhuri and *Rakhalchandra Basu* for the opposite party.

RANKIN C. J. This is an application by certain respondents in a First Appeal for an order for security for costs. It appears that the suit was instituted in 1923. The plaintiff is the wife of the defendant No. 2, and her case is that certain mortgages, which have been executed over the properties by her husband, are invalid as against her in respect that the properties are not her husband's properties but are really her own. The suit was brought on the footing that the lady was in possession of her

properties and required a mere declaration from the court. It appears that large sums of money have been advanced on these properties and that the lady and her husband have had certain remarkable transactions one with the other. The case is that she had a large fortune in the shape of ornaments, gold coins and cash, when she married the defendant No. 2, that this defendant induced her to advance money to him and that she became a co-partner with him in a business named Bhagat & Company and then became the sole proprietor of that business in consideration of the payments made to her husband to release his interest. She says that, in that way, she acquired a great deal of money, which was under the control of her husband, and that her husband executed collusive leases and other documents in fraud of her. There appear to be not only the petitioner mortgagees, but also a certain puisne mortgagee, and the suit appears to have been brought at the time when the puisne mortgagee was taking action to enforce his security. The case took a very long time when it actually came on for trial and a great many proceedings appear to have taken place both in this Court and elsewhere during the course of the suit. The hearing lasted for thirty-eight days and in the result the suit was dismissed with costs—the learned Subordinate Judge taking the view that the plaintiff's allegations were entirely false and that the properties mortgaged by her husband were his own properties as between himself and the appellant. The costs which the plaintiff has been directed to pay to the petitioner in the lower court amount to Rs. 2,499 and it appears that neither the petitioner nor the puisne mortgagee has been able to recover the same or any portion thereof. There have been costs awarded in respect of a revision application and those costs have not been recovered. Further, it is proved that the puisne mortgagee took out execution in respect of certain taxed costs in 1926 and nothing has been realised. It is not disputed that the lady appears to have no property which, in the event of her being unsuccessful,

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could with any certainty be discovered. The view taken by the Subordinate Judge is that the husband is really putting forward the wife for his own purposes in the suit. In all these circumstances, we have to consider whether this is a case in which security should be ordered as a condition of the plaintiff being allowed to prosecute the appeal.

I gather from the cases in India that there appears to be some confusion arising out of a failure to realise the great distinction between an application for security for costs to be given by the plaintiff at the original trial in the first instance and such an application in connection with an appeal. The Civil Procedure Code is perfectly clear and treats the two things as entirely different. But it may perhaps be advisable to refer, in view of the fact that the Civil Procedure Code in the case of an appeal leaves the matter to the discretion of the court, to the principles upon which this matter is determined in the English courts. I refer, first, to the case of *Hall* v. *Snowden, Hubbard & Co.* (1). That was the case of an appeal by the child of a deceased workman in a case under the Workman's Compensation Act of 1897 and A. L. Smith L. J., even in that case, applied the following rule: "The "ordinary rule of this Court is that, except in "applications for new trials, when the respondent "can show that the appellant, if unsuccessful, would "be unable through poverty to pay the costs of the "appeal, an order for security for costs is made." Again, *In re Ivory. Hankin* v. *Turner* (2), Cotton L. J. said: "I think that the insolvency of an "appellant is *primâ facie* a sufficient reason for "ordering him to give security for costs, though in "some cases the Court may not order him to do so." In *Wightwick* v. *Pope* (3), the exception previously made in respect of costs of an application for a new trial, that is to say, an appeal from a trial by a jury, was reconsidered and it was decided that no exception would be made in that class of cases, as had hitherto

(1) [1899] 1 Q. B. 593.

(2) (1878) 10 Ch. D. 372, 377.

(3) [1902] 2 K. B. 99.

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been done. And again in *Harlock* v. *Ashberry* (1), Sir George Jessel M. R. said this: "For sometime "past, it has been the settled practice, if the "respondent asks for it, to require security for costs "to be given by an appellant who would be unable "through poverty to pay the respondent's costs of the "appeal if it should be unsuccessful."

In these circumstances, it appears to me that this is *primâ facie* a case in which security for costs should be ordered; and, having regard to the nature of the suit and the findings of the Subordinate Judge, whose lengthy judgment I have perused, I am clearly of opinion that there is no ground in this case for taking this case out of the general rule. It appears to me, therefore, that we ought to order that the appellant, within six weeks from the receipt of this order by the lower court, do furnish security to the satisfaction of that court in the sum of Rs. 2,499-4-0, being the costs of the court below, and in a further sum of Rs. 1,500 in respect of the costs of the appeal in this Court.

Costs of this application will be costs in the appeal. The hearing-fee is assessed at five gold mohurs.

GHOSE J. I agree.

Application allowed.

G. S.

(1) (1881) 19 Ch. D. 84.