ORIGINAL CIVIL.

Before Lort-Williams J.

1937

Nov. 16.

CELLULAR CLOTHING CO., LTD.

v.

SEN ABDUL & Co.*

Security for costs—Circumstances in which order is to be made—Discretion of the Court—Code of Civil Procedure (Act V of 1908), O. XXV, r. 1.

The power of the Court to make an order for security for costs under O. XXV, r. 1 of the Code of Civil Procedure, 1908, is discretionary. In exercising the discretion the Court must have regard to the circumstances of each case, and unless it be shown that an order for security for costs is necessary for the protection of the defendant, the Court ought not to make such an order.

In the goods of *Premchand Moonshee. Bidhatree Dassee* v. *Mutty Lall Ghose* (1) followed.

Calico Printers Association v. *Jeevan Ram Ganga Ram and Company* (2) discussed.

APPLICATION.

Facts material for the purpose of this application and arguments of counsel appear from the judgment.

K. B. Basu for the defendant applicants.

Clough for the plaintiff company.

LORT-WILLIAMS J. This is a petition asking that the plaintiff company do furnish security for costs. The suit is for an injunction to restrain the defendants from selling or offering for sale as "Aertex" cloth not of the plaintiff's manufacture.

The registered office of the plaintiff company is in England at No. 14, Moor Lane, London, and the plaintiff company has no immoveable property within British India. Therefore the case comes within the

*Application in Original Suit No. 996 of 1937.

(1) (1894) I. L. R. 21 Cal. 832. (2) (1936) I. L. R. 63 Cal. 897.

terms of O. XXV, r. 1 of the Code of Civil Procedure, 1908, which provides that the Court, in such circumstanes, "may" order the plaintiff to give security for costs.

It is clear, therefore, that the power of the Court is discretionary, and this was decided so far back as the year 1894, in a case entitled *In the goods of Premchand Moonshee. Bidhatree Dassee* v. *Mutty Lall Ghose* (1), in which Sale J. held that the power given to the Court was discretionary, and one which the Court ought or ought not to exercise according to the circumstances of each case, and that, unless it is shown that the exercise of the power is necessary for the reasonable protection of the defendant, the Court ought not to interfere, and he referred with approval to the case of *Degumbari Debi* v. *Aushootosh Banerjee* (2). In the last mentioned case Wilson J. had said that he would be very sorry to lay down a rule that the section was imperative on the Court, and that the Courts had no discretion.

My attention has been drawn to the case of *Calico Printers Association* v. *Jeevan Ram Ganga Ram & Co.* (3), in which Cunliffe J. arrived at the same conclusion, when he held that, under O. XXV, r. 1, the Court exercised an unfettered and unqualified discretion. Unfortunately, the cases to which I have referred were not cited to the learned Judge. Instead, the English case of *Ebrard* v. *Gassier* (4) was cited and a passage from the judgment of Bowen L. J. to the effect that where plaintiffs were abroad, they were *primâ facie* bound to give security for costs.

This citation was, in fact, irrelevant and was founded upon the fallacious arguments that the provisions of O. XXV, r. 1, are in principle the same as those in O. XXV, rr. 1 to 6 of the Rules of the

(1) (1894) I. L. R. 21 Cal. 832.
(2) (1890) I. L. R. 17 Cal. 610.
(3) (1936) I. L. R. 63 Cal. 897; 40 C. W. N. 511.
(4) (1884) 28 Ch. D. 232.

1937

Cellular Clothing Co., Ltd. v. *Sen Abdul & Co.*

Lort-Williams J.

Supreme Court in England, and that the passage in Bowen L. J.'s judgment referred to those rules. Each of these arguments was based upon a fallacy and was calculated to have misled the Court. The judgment of Bowen L. J. was given in 1884. At that time the rule in England was that where the plaintiff was resident abroad the rule was inflexible that he should be ordered to give security. The authority for that rule is to be found in the judgments of the learned Judges in the case of *Crozat* v. *Brogden* (1). Lopes L. J. in his judgment said that speaking for himself he certainly had always understood that to be the inflexible rule and the other learned Judges agreed. But the rules of the Supreme Court in respect of these matters were altered subsequently. The actual decision in the case of *Ebrard* v. *Gassier* (*supra*) was that the inflexible rule to which reference was made would not apply to a case where one of the plaintiffs was temporarily resident within the jurisdiction. The decision was made obsolete by the provision of O. LXV, r. 6A to the effect that a plaintiff ordinarily resident out of the jurisdiction may be ordered to give security though he is temporarily resident within the jurisdiction and rule 6B provides that in certain named cases the power to require the plaintiff to give security for costs is discretionary—thus, to that extent, rendering obsolete the decision in the case of *Crozat* v. *Brogden* (*supra*).

The note at the bottom of p. 512 in the report, to which I have referred, in 40 C.W.N., therefore, seems to be misleading. The portion of O. LXV, there quoted as relevant to the question then before the Court, was not relevant, because it was not a portion of the analogous English Rule. That portion of O. LXV, as I have already stated, only deals with a case where the plaintiff is ordinarily resident without the jurisdiction but is temporarily resident within.

(1) [1894] 2 Q. B. 30.

1937

Cellular Clothing Co., Ltd. v. Sen Abdul & Co.

Lort-Williams J.

The result is that the English cases and rules and the passage from Bowen L. J.'s judgment, all of which were referred to in the decision of Cunliffe J., are really irrelevant to the question which I have to decide and which has already been decided in the judgment of Sale J., to which I have referred. I agree with that learned Judge that, in deciding whether to exercise the discretionary power given under O. XXV, r. 1, the Court must have regard to the circumstances of each case, and that, unless it be shown that an order for security is necessary for the protection of the defendant, the Court ought not to order security to be taken.

Applying that principle to the circumstances of the present case, as set out in the affidavits, I am of opinion that there is no necessity for asking for security for costs from the plaintiff company.

The application is dismissed with costs.

Application dismissed.

Attorneys for applicants: *N. C. Mandal & Co.*

Attorneys for respondent: *Orr, Dignam & Co.*

P. K. D.