being, under the proviso to section 3 (*1*) of the Provincial Insolvency Act, concurrent with the jurisdiction of District Courts. When a District Judge has once taken an insolvency case on to his file and taken action thereon, he should not transfer it afterwards to the Assistant District Court because of some subsequent happening in the case.

I agree that, in the present case, the Assistant District Court had jurisdiction when the case was first transferred to it on 10th May, 1934, and that in view of the appellate order of the District Court, dated 8th August, 1935, in Civil Miscellaneous Appeal No. 5 of 1935, the Assistant District Court still retains jurisdiction, and that therefore this application in revision fails and must be dismissed.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.

MIRZA SAGHIRUL AND OTHERS

v.

THE RANGOON ELECTRIC TRAMWAY & SUPPLY CO., LTD.*

1936
Mar. 11.

Security for costs—Appellate Court's discretion—Rule of practice—Fettering Court's discretion—Appellant's poverty—Circumstances of each case—Civil Procedure Code (Act V of 1908), O. 41, r. 10.

Under O. 41, r. 10 of the Civil Procedure Code the Court has a discretion as to whether it will or will not make an order for security for costs, and the discretion of the Court ought not to be fettered by any rule of practice. A respondent is not entitled as of course to an order for security for costs merely because the appellant may through poverty be unable to pay the respondent's costs if the appeal fails. Each case turns on its own facts and it is neither right nor expedient to lay down any rule that would have the effect of regulating the discretion of the Court as to the circumstances

* Civil First Appeal No. 13 of 1936 from the judgment of this Court on the Original Side in Civil Regular No. 554 of 1934.

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under which it should make an order for security. It depends upon the circumstances whether an appellant who is without means ought to be ordered to furnish security for the costs of the trial and/or of the appeal.

Gulabrao v. *Vinayak*, 25 Bom. L.R. 195—*followed.*

Birendranath v. *Sultan*, I.L.R. 58 Cal. 117—*dissented from.*

P. K. Basu for the appellant.

Darwood for the respondents.

PAGE, C.J.—This is an application that the appellants be ordered to furnish security both for the costs of the trial and for the estimated costs of the appeal. The suit was brought by the children of a man who was struck down and killed by an omnibus belonging to the respondent company. The suit was brought on behalf of the plaintiffs by their next friend. It has been dismissed with costs, and the costs have not been recovered. Hence the present application.

In *Birendranath Mitra* v. *Sultan Muwayyid Zada* (1) Rankin C.J., in the course of a judgment with which Ghose J. agreed, stated :

"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."

Of course that is so, but the learned Chief Justice proceeds to cite some English authorities apparently with a view to support the opinion that there should be a settled practice in India such as that which is set out in the judgment in Jessel M.R. in *Harlock* v. *Ashberry* (2), namely, that

(1) (1930) 58 Cal. 117. (2) (1881) 19 Ch.D. 84.

"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."

I respectfully decline to subscribe to any rule of practice which would have the effect of fettering the discretion of the Court in respect of applications for security for costs under Order XLI, rule 10. In my opinion a respondent is not entitled as of course to an order for security for costs merely because the appellant may through poverty be unable to pay the respondent's costs if the appeal fails. Each case turns on its own facts, and I do not think that it would be right or expedient to lay down any rule that would have the effect of regulating the discretion of the Court as to the circumstances under which it should make an order for security. Of course, if the facts disclosed warrant it, an appellant may be required in the discretion of the Court to furnish security for the costs of the trial and/or of the appeal in a case in which he is without means to satisfy the costs if the appeal proves to be unsuccessful. It depends upon the circumstances; and no hard and fast rule can be laid down. I agree with the following observations of Macleod C.J. in *Gulabrao Manyaba Bhoite* v. *Vinayak Bapusaheb Kadam* (1):

"Where the Court has been given absolute discretion to make an order for security for costs, then in my opinion no Bench of Judges can lay down rules which purport to fetter the discretion of other Judges in any similar application which may be made thereafter. It is quite true that as a general rule a Court is loath to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each case must stand on its own facts, and there may be cases in

(1) (1923) 25 Bom. L.R. 195.

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which a party should be directed to give security, at any rate for the costs of the appeal, before he is allowed to go further."

In the present case the appellants are prepared to furnish security in cash to the amount of Rs. 250 as security for the costs of the appeal. In my opinion, in the circumstances an order to that effect ought to be passed. We therefore order that the appellants do furnish security in cash for Rs. 250 towards the respondents' costs of the appeal by Monday next, the 16th March. In default the appeal will stand dismissed with costs. The appeal will not be heard before Tuesday next, but will keep its place in the list.

BA U, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.

1936

Mar. 16.

AGA G. ALLY RAMZAN YEZDI AND ANOTHER
v.
BALTHAZAR & SON, LTD.*

Mortgage by deposit of title-deeds—Right to possession, rents and profits—Remedy of equitable mortgagee—Equitable right to sale proceeds from date of suit—Appointment of receiver—Allocation of rents and profits to mortgagee—Civil Procedure Code (Act V of 1908), O. 40, r. 1—Interest in arrear—Value of the property—Personal remedy barred—Rule of equity applicable in India—Sale proceeds less than mortgage debt—Allocation of rents collected by receiver—Grounds for allocation—Transfer of Property Act (IV of 1882 and XX of 1929), ss. 8, 58, 96.

Apart from express agreement a mortgagee by deposit of title-deeds (as also a simple mortgagee) does not possess as part of the interest that is transferred to him under the mortgage the right to possession of the property, or the right to the rents and profits accruing therefrom during the subsistence of the mortgage.

Crompton & Co., Ltd., In re, (1914) 1 Ch.D. 954; *Finck* v. *Tranter,* (1905) 1 K.B.D. 427; *Maharajah of Pittapuram* v. *Gokuldoss,* I.L.R. 54 Mad. 565;

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* Civil First Appeal No. 197 of 1935 from the order of this Court on the Original Side in Civil Regular No. 181 of 1934.