

(*Empress v. Lester*⁽¹⁾) or to discuss the question whether the point arising in that case was or was not rightly decided.

Apart from the confession which is now excluded, we think that there is no evidence upon this record which could sustain the conviction of the 1st accused.

[His Lordship here discussed the evidence, and reversed the conviction and sentence passed on accused No. 1, but confirmed the conviction of accused No. 2 and reduced the sentence passed on him to one of transportation for life.]

SHAH, J.:—I am of the same opinion.

Order accordingly.

R. R.

⁽¹⁾ (1895) 20 Bom. 165.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Beaman.

KHEMRAJ SHRIKRISHNADAS (RESPONDENT-PLAINTIFF) APPLICANT *v.*
KISANLALA SURAJMAL MINOR NOW STYLING HIMSELF AS RAMA-
NOVAS GANGAVISHNU BY HIS GUARDIAN SURAJMAL JOHARMAL
(APPELLANT-DEFENDANT) OPPONENT.*

Security for costs—Appeal in forma pauperis—Civil Procedure Code (Act V of 1908), Order XLI Rule 10, not applicable to pauper appeals—Security should not be demanded.

The plaintiff having obtained a decree in the lower Court, the defendant appealed and applied for leave to appeal in *forma pauperis*. The application was granted. The defendant-appellant, however, resided out of British India and was not possessed of sufficient immoveable property in British India.

* Civil Application No. 103 of 1917.

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The plaintiff-respondent having demanded security for costs incurred in the lower Court and costs of the appeal under Order XLI, Rule 10 of the Civil Procedure Code, 1908,

Held, that the general provisions relating to appeals in Order XLI, Rule 10, Civil Procedure Code, 1908, did not apply to pauper appeals so as to impose upon the Court the duty of demanding security from a pauper appellant, who having been found to be a pauper *ex hypothesi* could not give security.

Wille v. St. John⁽¹⁾, followed.

CIVIL application praying that security may be taken from the opponent for his costs both in the lower Court and in the High Court in First Appeal No. 209 of 1915.

The plaintiff brought a suit for a declaration that the minor defendant was not the adopted son of the deceased brother of plaintiff and that the plaintiff as the heir of his deceased brother be awarded possession of the property in suit. The First Class Subordinate Judge of Thana who tried the suit found the factum of adoption proved but held the adoption to be illegal and awarded the plaintiff's claim.

The minor defendant appealed by his natural father and applied for leave to appeal in *forma pauperis*. The application was granted. The minor appellant, however, resided out of British India and was not possessed of any sufficient immoveable property within British India other than the property in suit.

The plaintiff-respondent, thereupon, made the present application praying that the appellant be ordered to furnish security for costs incurred in the lower Court and to be incurred in appeal.

Jayakar with *P. B. Shingne* for the applicant.—We submit that our application falls under Order XLI, Rule 10, Civil Procedure Code, 1908, and that as the

⁽¹⁾ [1910] 1 Ch. 701.

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opponent is residing out of British India and is not possessed of any sufficient immoveable property within British India other than the property to which the appeal relates, we are entitled to have security ordered to be taken from the opponent in respect of our costs of the suit as well as of the appeal. The wording of the proviso to Rule 10 is imperative and the Court has no discretion in the order of security in cases falling under the said proviso.

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A. G. Sathaye for the opponent.—I submit that Order XLI, Rule 10 is not applicable to pauper appeals. Orders XLI to XLV of the Civil Procedure Code (Act V of 1908) relate to appeals. Order XLI relates to appeals in general while the other orders relate to appeals in special cases. Order XLII deals with appeals from appellate decrees and by Rule 1 of that Order, Rules of Order XLI are made to apply as far as possible to appeals from appellate decrees. Order XLIII deals with appeals from orders and by Rule 2 of that Order, the Rules of Order XLI are also made applicable to appeals from Orders. Order XLIV, however, does not contain any such rule making Rules of Order XLI applicable, under any circumstances, to pauper appeals; and therefore I submit that Rule 10 of Order XLI cannot be held to lay down any procedure for taking security in pauper appeals.

When the appeal was admitted in *forma pauperis*, the High Court saw reason to think that the decree appealed against was contrary to law or to some usage having the force of law and demanding security from my client, who is *ex hypothesi* a pauper, would be tantamount to preventing him from prosecuting his appeal. Order XXXIII relates to suits by pauper and as it contains no provision for security to be taken from a pauper plaintiff for costs of the defendant, I submit

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that by a parity of reasoning the Legislature never contemplated taking any security from a pauper even when appealing. The following cases were referred to: *Seshayyengar v. Jainulavadin*⁽¹⁾; *Nusseerooddeen Biswas v. Ujjul Biswas*⁽²⁾; *Mussamat Hafizan v. Abdul Karim*⁽³⁾; *Wille v. St. John*.⁽⁴⁾

SCOTT, C. J.:—This is an application for security for costs of an appeal. The applicant is the successful plaintiff who obtained a decree against the defendant on the ground that an adoption under which the defendant obtained certain property was invalid. The defendant appealed by his natural father, he being a minor, and applied for leave to appeal in *forma pauperis*. This application was granted, and his appeal is accordingly governed by Order XLIV of the Code which provides that “any person...may be allowed to appeal as a pauper, subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable.” The provisions relating to suits by paupers are contained in Order XXXIII. Rule 11 of that Order provides that “where the plaintiff fails in the suit...the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.” That is the only statutory provision expressly imposing a liability upon a pauper plaintiff, and similarly upon a pauper appellant, to pay any portion of the costs of the litigation.

It is, however, contended that an order for security should be made against the pauper, and that he should give security for both the costs incurred in the lower Court and the costs of the appeal, because Order XLI,

(1) (1880) 3 Mad. 66.

(2) (1871) 17 W. R. 68.

(3) (1907) 12 Cal. W. N. 163.

(4) [1910] 1 Ch. 701.

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Rule 10 provides that "the appellate Court may in its discretion...demand from the appellant security for the costs of the appeal, or of the original suit, or of both: provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates."

That provision is in accordance with the rule of practice prevailing in England, namely, that security for costs will generally be ordered where the appellant is out of the jurisdiction. But it is in a more imperative form, because it deprives the Court of any discretion. In such a case as the present the question is whether that general provision relating to appeals in Order XLI applies also to pauper appeals, so as to impose upon the Court the duty of demanding security from a pauper appellant, who *ex hypothesi* having been found to be a pauper cannot give security. In my opinion it does not apply. The maxim is *generalia specialibus non derogant*; a general rule does not weaken a special rule. Here the special rule is the rule regarding pauper appeals and pauper suits. That rule is stated by the Master of the Rolls on behalf of the Full Court of appeal in England as an established proposition. He says: "I start with the proposition, established centuries ago by statute and since developed by judicial decisions and now embodied in rules, that a person disabled by poverty is entitled to assert or defend his assumed rights without the liability to pay costs." That proposition was enunciated by the Master of the Rolls in a case in which the appellant had actually been ordered to give security for costs within a certain time, but before that time elapsed obtained leave to appeal in *forma pauperis*, and it was held that being allowed to appeal in *forma pauperis*, the order for

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security no longer operated. In my opinion we ought to follow the ruling of the appeal Court in England (*Wille v. St. John*⁽¹⁾), and accordingly this application should be dismissed with costs.

BEAMAN, J.:—I entirely concur.

Application dismissed.

J. G. R.

⁽¹⁾ [1910] 1 Ch. 701.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.

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July 20.

ZIPRU VALAD TALHOO AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS
v. HARI SUPDUSHET VANI AND ANOTHER (ORIGINAL PLAINTIFF),
RESPONDENT.^o

Civil Procedure Code (Act V of 1908), Order XXI, Rules 100, 101 and 103—Application made under Rule 100—Order dismissing the application under Rule 101—Whether such an order is an order “made under Rule 101” within the meaning of those words in Rule 103—Conclusive nature of the order.

An order made against an applicant refusing him relief under Rule 101 of Order XXI of the Civil Procedure Code, 1908, is as much an order under that Rule, as an order granting him relief would be and the order would be conclusive under Rule 103 subject to the result of a separate suit.

SECOND appeal against the decision of S. J. Murphy, District Judge of Khandesh confirming the decree passed by D. R. Dalal, Subordinate Judge of Chalisgon.

Execution-proceedings.

The suit out of which these proceedings arose was originally filed by one Taniram against some members of a joint family for specific performance of a contract to sell certain lands to him. Three of the joint defendants admitted the contract and the other three disclaimed all part in it. The first three defendants were

^o Second Appeal No. 1223 of 1916.