

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Wassoodew.

RAJA PRATAPGIR NARSINGIRJI, APPELLANT v. THE OFFICIAL LIQUIDATOR OF THE PRAHLAD MILLS, LTD. AND OTHERS, RESPONDENTS.*

1938
February 10

Practice—Civil Procedure Code (Act V of 1908), s. 129, O. XLI, r. 10—Bombay High Court rules, 1936, O. S. rule 788—Appeal—Security for costs of the original hearing.

In the expression "original suit" in O. XLI, r. 10, the word suit is not restricted to a proceeding commenced by a plaint. It includes original applications.

Where security under the standing orders of the Court is given the mandatory provisions in O. XLI, r. 10, are complied with and the Court is not bound to direct further security for the costs of the appeal.

The provisions of O. XLI, r. 10, apply to appeals on the Original Side.

Ratanchand v. Damji,⁽¹⁾ followed.

Behram Jung (Nawab) v. Haji Sultan Ali Shustry,⁽²⁾ explained.

APPLICATION for security for costs of the hearing and appeal.

The Prahlad Mills Ltd. a company of which the appellant held all but 11 shares, which were held by his friends, was on a petition of the creditors of the company ordered to be wound up. The appellant by petition applied to the Chamber Judge on December 7, 1937, for a stay of the winding up. The petition was dismissed by Kania J. and the appellant was ordered to pay respondent No. 2 the costs of the petition. The appellant appealed against the said order dated December 14, 1937, and under rule 788 of the High Court Rules furnished the usual security of Rs. 500 for the appeal.

* O. C. J. Appeal No. 88 of 1937; I. C. No. 18 of 1935.

⁽¹⁾ (1923) 25 Bom. L. R. 468.

⁽²⁾ (1912) 37 Bom. 572.

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The appellant had on January 8, 1938, taken out a notice of motion for an order restraining the official receiver from proceeding with the sale of the properties. The costs of the motion were made costs in the appeal.

The respondents in the appeal applied by notice of motion against the appellant—who was resident outside British India and was not possessed of sufficient immoveable property within British India—asking for security in the sum of Rs. 1,000 for the estimated costs of the hearing of the petition before Kania J. and for a sum of Rs. 1,000 for the costs of the appeal.

M. C. Setalvad, Advocate General, for the appellant.

F. J. Colman, for the respondents.

BEAUMONT C. J. This is a motion asking for security for costs of the original hearing and additional security for the costs of the appeal. The original application from which the appeal arose was an application to set aside an order in winding up, which was refused, and the appeal is against such refusal. The applicants ask for further security, and contend that the Court is bound to direct further security to be given, since the appellant is residing out of British India and is not possessed of sufficient immoveable property within British India, and, therefore, it is argued that the proviso to O. XLI, r. 10, of the Civil Procedure Code, applies. On the other hand, the Advocate General for the respondent contends that O. XLI, r. 10, has no application to appeals from decrees or orders made on the Original Side, and for that proposition he relies on a decision of this Court in *Behram Jung (Nawab) v. Haji Sultan Ali Shustry*.⁽¹⁾ I confess to feeling some difficulty in understanding that decision. The learned Chief Justice, Sir Basil Scott, did undoubtedly express the view that r. 725 of the Original Side Rules, which

⁽¹⁾ (1912) 37 Bom. 572.

corresponded to the present r. 788 requiring a deposit of Rs. 500 to be made on the filing of any appeal, was inconsistent with O. XLI, r. 10, and that accordingly, applying s. 129 of the Code, O. XLI, r. 10, had no application to Original Side appeals. But the learned Chief Justice, having expressed that opinion, then went on to say (p. 575) :

“ . . . We see no reason why we should exercise our discretion by ordering that the appellant do now give security for the cost of the original hearing.”

But the only discretion which the Court could exercise was that conferred by O. XLI, r. 10. In my opinion, all that that decision really amounts to is that the mandatory provision in the proviso to the rule does not apply to the case of Original Side appeals where security has been given under the Original Side Rules. I agree in substance with that decision, because in my opinion the mandatory provisions in the proviso are sufficiently complied with if the Court orders security to be given for the costs of appeal, and it is not compulsory to order security for the costs of the suit as well. Where, therefore, the appellant has already, under the standing orders of the Court, given security in Rs. 500, the provisions of the rule have been complied with, and the Court is not bound to direct further security. But I cannot accept the view, which was not, I think, necessary for the decision in that case, that O. XLI, r. 10, does not apply to appeals on the Original Side. Sir Norman Macleod C. J. seems to have taken the same view as I do in *Ratanchand v. Damji*.⁽¹⁾

A further contention is raised by the Advocate General that O. XLI, r. 10, does not apply to this case, because the rule only deals with the costs of the appeal and of the original suit, and it is said that in this case there was no original suit, the application being a petition. In my opinion, however, in the expression “the original suit”

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in O. XLI, r. 10, the word "suit" is not used in the technical sense of a proceeding commenced by plaint as provided in s. 26 of the Code. The context seems to me to shew that in O. XLI, r. 10, the word is used to cover the original application on which the judgment appealed from was given, whatever its nature. The fact that under O. XLIII, r. 2, the rules of O. XLI apply, so far as may be, to appeals from orders tends to confirm this view.

In my opinion, we are not bound to order any further security, seeing that some security has already been given. But I think that we have a discretion to order further security for the costs of the appeal, and, if we think fit, security for the costs of the original hearing.

I am satisfied on the affidavits that the respondent resides out of British India and has not sufficient immoveable property in British India. On the evidence the whole of his property is subject to mortgages and attachments. I think, therefore, on the merits there is a case for directing security to be given. We think that the amount claimed in the notice of motion is reasonable, that is to say the respondent be ordered to give security in the sum of Rs. 1,000 for the costs of the original hearing, and an additional sum of Rs. 500 for the costs of the appeal making a total of Rs. 1,500.

Costs will be costs in the appeal. Security to be given within a fortnight. Appeal to stand over for a week.

WASSOODREW J. I agree.

Attorneys for appellant : Messrs. *Raghavayya, Nagindas & Co.*,

Attorneys for respondents : Messrs. *Madhavji & Co.*

Order accordingly.

N. K. A.