

## CIVIL RULE.

*Before Mr. Justice Beverley and Mr. Justice Ameer Ali.*

1894

Jan. 8.

HEWETSON (PLAINTIFF) v. DEAS AND OTHERS (DEFENDANTS)\*

*Security for costs—Civil Procedure Code (Act XIV of 1889), s. 549—Poverty of appellant—Ground for ordering security for costs of appeal.*

Under the circumstances of this case the Court refused an application that the appellant, on the ground that he was a person without means, should give security for the costs of the appeal.

THIS was a rule granted by PETHERAM, C.J., and RAMPINI, J., on the application of the respondents, that the appellant might be required to furnish security for the costs of the appeal as well as for those decreed in the lower Courts. The suit was one brought by a sub-contractor against his employers, who were themselves contractors, for an account. Both the Court of first instance and the first Appellate Court held that such a suit would not lie, and the suit was dismissed in both Courts with costs.

The plaintiff appealed to the High Court, and the appeal was admitted under section 551 of the Civil Procedure Code. The respondents then applied upon affidavits under section 549, alleging, among other things, that payment of the costs decreed in the lower Courts, although demanded, had not been made, that the appellant was an undischarged insolvent and was not possessed of sufficient means to pay either these costs, or such costs as were likely to be incurred on second appeal, and that the appeal was not one which was likely to succeed.

Babu *Srinath Das* and Babu *Rajendra Nath Bose* showed cause.

Mr. *Donogh* in support of the rule.

Babu *Srinath Das* :—It is not denied that the appellant is a poor man, or that he is an insolvent. But poverty is not a ground for requiring security for costs from a plaintiff: see *Jivan Ali Beg*.

\* Civil Rule No. 1864 of 1893 against the order of T. D. Beighton, Esq., District Judge of 24-Parganas, dated 22nd of May 1893.

v. *Basu Mal*(1) which was decided by a Full Bench of the Allahabad High Court; nor is insolvency—*Rhodes v. Dawson*(2).

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v.

DEAS.

Mr. *Donogh* in support of the rule:—This is not the case of a plaintiff who might be debarred from his right to sue by such an order. The appellant has already exercised his right in two Courts, both of which have held that such a suit will not lie, and there can be no doubt the appeal is one which is not likely to succeed ultimately, because a suit for account will only lie, when a fiduciary relation can be established, as by a principal against his agent, certainly not as between sub-contractor and his employer.

The affidavits show that the appellant is an undischarged insolvent, that he has not paid the costs already incurred in the lower Courts, and that he is, so far as can be ascertained, not possessed of property exceeding Rs. 20 in value. He does not pretend to deny these facts. The result will be, if security is not taken, that the respondents will be put to the expense of defending the suit a third time, and, in the event of their succeeding, there is not the slightest prospect of their recovering any costs.

This is itself a sufficient ground for requiring security from an appellant—see *Harlock v. Ashberry*(3). Insolvency has been held to be *prima facie* a sufficient reason for ordering security to be given by an appellant: *In re Ivory-Hunkin v. Turner*(4).

The judgment of the Court (BEVERLEY and AMBER ALI, JJ.) was as follows:—

We think that, having regard to the fact that the insolvency alleged took place so long ago as in 1873, and that the second appeal in this case has been admitted by a Bench of this Court under section 551 of the Code, we ought not to call upon the plaintiff, appellant, to furnish security. The rule will, therefore, be discharged, but without costs.

*Rule discharged.*

J. V. W.

(1) I. L. R., 8 All., 203.

(3) L. R., 19 Ch. D., 84.

(2) L. R., 16 Q. B. D., 518.

(4) L. R., 10 Ch. D., 372.