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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

AHMED BIN SHAIK ESSA KALIFFA AND OTHERS (*Plaintiffs and Appellants*) *v.* SHAIK ESSA BIN KALIFFA AND OTHERS (*Defendants and Respondents*).* [7th September, 1888.]

Practice—Appeal—Security for costs—Civil Procedure Code (Act XIV of 1882), *s.* 549—*Costs of the appeal—Costs of Court below—Poverty of appellant—Appellant not in contempt—Rule* 190, *High Court Rules* 1885.

The rule (190 of the High Court Rules, 1885) that an appellant shall, with the memorandum of appeal, deposit in Court the sum of Rs. 500 as security for the costs of respondent in the appeal, is one which, though possibly not without exception, is generally applicable to all cases independently of any consideration as to what the costs of the appeal will amount to.

[459] An appellant (residing within the jurisdiction) who has been ordered to pay the costs of the original hearing and has not done so, cannot be required to furnish security for such costs before he be allowed to prosecute his appeal, unless his conduct be shown to be vexatious—that is, such as indicates a wilful determination on his part not to obey the order of the Court. His not paying, if it be caused by inability to pay, is not vexatious.

[R., 37 B. 572=14 Bom.L.R. 1106=17 Ind. Cas. 739; U.B.R. (1892—96) 279.]

MOTION in an appeal against an order by Bayley, J., made on the 17th April, 1888, discharging a rule *nisi* for an injunction and receiver.

The suit was brought to establish a right to participate in certain valuable properties, moveable and immoveable, in the hands of the defendants. The argument of the rule occupied twelve days, and the taxed costs of the defendants, which by the order discharging the rule the plaintiffs were ordered to pay, amounted to Rs. 14,989-12-11. None of these costs had been paid.

The plaintiffs had, on filing their appeal, deposited Rs. 1,000 as security for costs, as required by Rule 190 (1) of the High Court Rules, 1885, the defendants claiming to have different interests, and having appeared by two sets of attorneys.

The defendants now moved for an order requiring the plaintiffs to furnish further security, in the sum of Rs. 7,000, to meet the further costs of the appeal herein, and also for security to the extent of Rs. 15,000 to meet the taxed costs of the defendants in the lower Court.

The defendants' affidavits stated that the second and third plaintiffs were permanent residents of Linga, in the Persian Gulf, and that the first plaintiff, who was always as much in Arabia as in Bombay, had, about two months previously, absconded from Bombay and was now in Arabia, and that none of the plaintiffs had any immoveable or other property in Bombay; that the plaintiffs' attorneys had been served with the *allocatur* in respect of the costs ordered to be paid by the plaintiffs, but none of

* Suit No. 303 of 1880, Appeal No. 612.

(1) Rule 190. "With the memorandum of appeal, the appellant shall, unless allowed to appeal as a pauper, or a wife in a divorce case, deposit in Court the sum of Rs. 500 as security for the costs of the respondent in the appeal, or if more than one, for the costs of each respondent, having different interests and appearing by different attorneys, and shall obtain from the Prothonotary a certificate of such deposit having been made."

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such [460] costs had been paid; that the further costs of the suit would be about Rs. 12,000, and the costs of this appeal Rs. 8,000; and that there were no means of recovering any of the same from the plaintiffs, or any of them.

On behalf of the first plaintiff it was denied that he had absconded from Bombay. He had only gone on a short visit to his native place on business; and was on the point of returning to Bombay to prosecute his appeals. A later affidavit showed that plaintiff had actually returned to Bombay.

Latham (Advocate-General), for first defendant and respondent.—Two of the appellants reside permanently outside the jurisdiction, the third admittedly is sometimes in Arabia, sometimes here. If by s. 549 of the Code of Civil Procedure (Act XIV of 1882), the matter is left in the discretion of the Court, this is just such a case as calls for the Court's protection. The costs of this appeal must be heavy: the case occupied twelve days in the Court below, and must occupy, at least, three or four days here. On the admitted facts of the case it is only too clear that we have no security whatever for our costs—neither those already incurred, nor those about to be incurred, and that, if successful, we shall never recover them. I ask for security for Rs. 22,000—Rs.15,000 costs already incurred, and Rs. 7,000 additional costs of appeal.

Stărling, for the second and third respondents.—I endorse the application of the first respondent, but so far only as relates to the costs of the appeal. The plaintiffs are in contempt of the order of 17th April, 1888, ordering them to pay the costs of the rule; and a party in contempt is not allowed to take any further proceedings until he has purged his contempt by obedience to the order—*In re Wickham*; *Marony* v. *Taylor* (1).

Inverarity, for the plaintiffs (appellants).—The application is made under s. 549 of the Code of Civil Procedure (Act XIV of 1882), but that does not apply to an appeal from an interlocutory order, such as this is. "The costs of the original suit" evidently presupposes that the suit is over in the Court below. But, apart [461] from that ground, the Court will not make the order asked for. The plaintiffs come, it is true, of an Arab family, but one which has been resident in Bombay for years, have traded here extensively, built mills, and owned valuable landed properties here; and the first plaintiff, at all events, is a resident of Bombay, though at times absent from it. The plaintiffs claim to be part owners of some of this property. The Court is asked to deny them the opportunity of proving their claim, unless security to the extent of Rs. 22,000 is first lodged. They cannot lodge such security; so the application, if granted, will amount to a complete denial of justice. Poverty of the appellants is the only ground established for this application; but that is no ground—*Sokabai* v. *Lakshmibai* (2), *Maneckji Limji Manchirji* v. *Goolbai* (3), and many other cases. If the insufficiency of the amount lodged, under the rules, as security for the appeal is a good ground for asking for more, a similar application to this might be made in almost every case; for Rs. 500 is scarcely ever sufficient to cover the costs of any appeal. There is nothing at all exceptional in this case; it cannot occupy more than two or, at the outside, three days in hearing, and very probably less. As for security for the costs below, the application is unprecedented. It is not even asserted that plaintiffs can pay and do not do so, wilfully

(1) L. R. 35 Ch. Div. 272. (2) 12 B. H. C. R. 9. (3) 3 B., 241.

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and vekatiously. They do not pay, because they cannot. There is no precedent for saying they are in contempt under these circumstances. The motion should be refused with costs.

JUDGMENT.

SARGENT, C.J.—This application raises the question, what is the construction to be given to s. 549 of the Code of Civil Procedure (Act XIV of 1882)? That section is somewhat general in its terms; and it is very desirable that, in applying it, the Court should proceed on some definite general principles; otherwise litigants will be encouraged to make applications, under this section, in the great majority of cases.

The respondents' application is twofold. I will deal first with that portion of it which has reference to the costs of the appeal. The rule observed in this Court is to require security to the extent of Rs. 500 for the respondent's cost of appeal. We [462] are now asked to sanction further security to the extent of Rs. 7,000, so as to cover the respondents' estimated costs of the appeal. Now, it is not the practice here to require security commensurate to the anticipated costs of the appeal. Rs. 500 is, speaking generally, the rule for all cases, although we know of course, as a matter of fact, that that amount is rarely, if ever, a complete protection to a respondent. That being the established rule it is not lightly to be departed from. Before the Court is asked to depart from the ordinary rule, something very exceptional should be shown. These is nothing so exceptional in this case; the hearing may, it is said, last two days, or three days, or it may even last four days; but whether it last the shorter period or the longer, we think, is immaterial. The period of hearing within such narrow limits affords no sufficient reason, in our opinion, for a departure from the ordinary rule. I may say, speaking for myself, that I cannot at this moment recollect any case of an appeal to this Court in which the ordinary rule was departed from—appeals to the Privy Council are, of course, on a different footing—and though we do not for a moment say it would never be done, we think a very strong case ought to be made out before the Court is asked to do it.

Then as regards the costs of the original hearing. Here, as the cases show, the applicant must make out either that the appellants are residing out of the jurisdiction, or that the conduct of the party complained of, in not paying the costs ordered to be paid, is vexatious—that is, such as indicates a wilful determination on his part not to obey the order of the Court. In such a case as that this Court would not allow a party to proceed further while he was—as then he would be—in contempt of an order of the Court. There can be no doubt, for instance, that if a vexatious determination not to pay costs ordered to be paid, were shown in any case, that would be a good ground on which to found such an application as the present. But that is far from being shown here. It seems that the plaintiffs are unable to pay the costs ordered; if so, there is nothing vexatious in their not obeying the order; it is their misfortune, not their fault. Under neither [463] head, therefore, do we think the present application should succeed, and it is accordingly refused with costs.

Attorneys for the plaintiffs:—Messrs. *Little, Smith, Frere and Nicholson.*

Attorneys for the defendants:—Messrs. *Payne, Gilbert and Sayani.*