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which has not been challenged, his 1/4th share in the tenancy right would also continue to be evacuee property, despite the fact that the portion of the order of the Deputy and Additional Custodian dealing with the tenancy right has been quashed by me. The respondents to pay the costs of the petitioners.

Attorneys for petitioners: *Gagrat & Co.*

Attorneys for respondents: *Little & Co.*

Rule-made absolute.

A. J. P.

ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Bhagwati.

1951
 March 27

RANGNATH KHEMRAJ, APPELLANT v. BAI THAKOREBAI WIDOW AND OTHERS, RESPONDENTS.*

The Code of Civil Procedure (Act V of 1908), O. 41, r. 10—Security for costs of the suit to the Court of Appeal—Principle on which such security would be ordered.

Although under O. 41, r. 10 of the Civil Procedure Code, it is in the discretion of the Court of Appeal to order the appellant to give security for the costs of the trial Court, that discretion should only be exercised provided the Court of Appeal is satisfied that there is a vexatious determination on the part of the appellant not to pay the costs of the suit ordered by the trial Court or that the appellant has contumaciously or wilfully failed to pay those costs. But, where the appellant is unable to pay the costs of the suit through poverty or through other inability and not due to his fault but due to misfortune, security for the costs of the suit should not be ordered.

Ahmed Din Shaik Essa Kaliffa v. Shaik Essa Din Kaliffa,⁽¹⁾ followed.

Birendranath Mitra v. Sultan Muwayyid Zada,⁽²⁾ explained.

Pratapgir Narsingirji v. Official Liquidator, Prahlad Mills, Ltd.,⁽³⁾ distinguished.

Notice of motion for security for costs of the trial Court and of the appeal.

The appellant-plaintiff was adjudicated an insolvent in September 1930, and his properties vested in the official assignee (defendant and respondent No. 6).

* App. No. 92 of 1950. Suit No. 265 of 1949.

⁽¹⁾ (1889) 13 Bom. 458.

⁽²⁾ (1931) 58 Cal. 117.

⁽³⁾ (1938) 40 Bom. L. R. 470.

On February 22, 1949, the appellant filed a suit against the respondents being the widow of his brother Shrinivas and her three sons and the official assignee for a declaration that the decree passed against him in suit No. 1808 of 1930 was null and void.

SHAH J. dismissed the suit with costs and ordered the appellant to pay the taxed costs of the 6th respondent the official assignee.

The appellant thereupon appealed. The appellant was an undischarged insolvent and so the official assignee (respondent No. 6) took out a notice of motion before the Court of Appeal for an order against the appellant to deposit a sum of money, as security for the costs of the suit and also an adequate sum for the costs of the appeal.

M. L. Maneksha, for respondent No. 6.

M. R. Parpia, for the appellant.

CHAGLA C. J. This is a notice of motion taken out by the sixth respondent requiring the appellant to deposit in Court the sum of Rs. 2,750, being the amount of the costs of the original suit as settled and paid by the Official Assignee of Bombay, the sixth respondent, to his attorneys, and such further amount as to this Hon'ble Court may seem adequate for the costs of the Official Assignee of this appeal. It appears that the suit from which this appeal is preferred was dismissed by Mr. Justice Shah on August 3, 1950. The learned Judge directed the appellant, who was the plaintiff in the suit, to pay the costs of the sixth respondent who is the assignee of his estate. It is from that judgment that the appellant has come in appeal.

The order for costs made by the learned Judge was that the plaintiff should pay the taxed costs of the sixth respondent. The costs have not yet been taxed, and, needless to say, as the costs have not been taxed, no attempt has been made or could be made by the sixth respondent to execute that order against the appellant. Therefore, it cannot be said in this case that the appellant has failed to comply with the order of costs passed against him or is in any way in contempt in not carrying out that order of costs. What is urged against the appellant is that he is an undischarged insolvent, that if this appeal is prosecuted he will not be able to pay the costs of the suit, and that even the costs of the appeal which he has deposited, viz. Rs. 500, under the High Court Rules are not adequate, and, therefore,

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further security for the costs of the appeal should be ordered against the appellant.

Now, a very salutary rule was laid down as far back as 1883 by Chief Justice Sargent in *Ahmed Din Shaik Essa Kaliffa v. Shaik Essa Din Kaliffa*,⁽¹⁾ There also an application was made for further security for costs of the appeal and also the costs of the original hearing. Mr. Inverarity who appeared for the appellants pointed out to the Court that as for security for the costs of the trial Court the application was unprecedented. We have asked Mr. Maneckshaw, who appears for the appellant in this case and who is a very senior member of the Bar, whether he has any recollection of any such application having been made to the Court of appeal, and Mr. Maneckshaw very fairly concedes that he is not aware of any such application. Neither I nor my brother is aware also of any such application having been made to this Court, or, if made, having resulted in an order being made for security for costs of the hearing in the lower Court. Now, the principle that the learned Chief Justice laid down was that while accepting the fact that under O. 41, r 10 it is entirely in the discretion of the Court to order the appellant to give security for the costs of the lower Court, that discretion should only be exercised provided the Court of appeal was satisfied that there was a vexatious determination on the part of the appellant not to pay the costs of the suit already ordered. The learned Chief Justice thought that that was a very exceptional circumstance which indicated a wilful determination on the part of the appellant not to obey the order of the Court. In that particular case the learned Chief Justice came to the conclusion that the plaintiffs-appellants were unable to pay the costs ordered. If so, according to the learned Chief Justice, there was nothing vexatious in their not obeying the order; it was their misfortune, not their fault; and, therefore, he refused to order security for the costs of the Court below. In this case we have not even reached the stage of the appellant refusing or failing to pay the costs ordered. As I just pointed out, as the costs have not been taxed, no question at this stage arises of a failure on the part of the appellant to pay the costs ordered. With regard to the further costs of appeal, the learned Chief Justice held that the sum of Rs. 500 fixed by the High Court Rules as security for costs of the appeal should be the only security which should ordinarily be ordered. Only in exceptional cases that rule should be departed from, and

⁽¹⁾ (1889) 13 Bom. 458.

the learned Chief Justice said that as far as he was concerned he had never departed from that ordinary rule. We do not see anything exceptional in this particular appeal which would induce us to depart from that rule.

Mr. Maneckshaw has relied on a judgment of the Calcutta High Court in *Birendranath Mitra v. Sultan Muwayyid Zada*.⁽¹⁾ The headnote on which Mr. Maneckshaw relies does not really do justice to the judgment of Chief Justice Rankin, and the headnote is this: "Exception may be made for special reason, but it is the settled practice, if the respondent asks for it, to require security for costs to be given to an appellant, who would be unable through poverty to pay the respondent's costs of the appeal, if it should be unsuccessful." As the headnote clearly indicates, this principle applies to costs of the appeal, and the learned Chief Justice in his judgment discusses the English cases which relate to security being given for the costs of the appeal and it is from those judgments that this principle is deduced. The headnote suggests as if the learned Chief Justice applied this principle to security for costs of the original suit. But when we actually turn to the judgment at p. 121 where the learned Chief Justice gives his decision after setting out the English cases, the learned Chief Justice says: "In these circumstances, it appears to me that this is prima facie a case in which security for costs should be ordered"; and when we turn to the facts of the case we find that in this case costs had been directed to be paid by the appellant, the appellant had failed to pay the costs, execution proceedings had been taken out in respect of certain taxed costs, and they had not been realised. Therefore, it cannot be said that in this particular case the principle laid down by Chief Justice Sergent was departed from. It would certainly not be a true or a sound principle to lay down that wherever an appellant, through poverty or through other inability, is unable to pay the costs of the trial Court or might be unable to pay even the costs of the appeal, he should be ordered to give security for the costs which he has been ordered to pay of the Court below. The better and sounder principle seems to be the one enunciated by Chief Justice Sergent.

Mr. Maneckshaw has also relied on a recent decision of Beaumont C. J. in *Pratapgir Narsingirji v. Official Liquidator, Prahlad Mills, Ltd.*⁽²⁾ But that decision does not help

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Mr. Maneckshaw because that was a case where the appellant was residing out of British India. The position would have been very different if in this case the appellant was also residing out of British India. We are dealing with a case where the appellant is residing within the Dominion of India, and we are called upon not to enforce a mandatory provision of the Code but a provision which is purely discretionary, and the question is on what judicial principle we should exercise the discretion. It seems to me that the proper principle is that if we are satisfied that the appellant is liable to pay certain costs ordered by the Court below and the appellant has contumaciously or wilfully failed to pay those costs, then the Court of appeal would certainly exercise its discretion against the appellant and order him to deposit the costs of the trial Court.

Mr. Maneckshaw says that the present appeal is a vexatious appeal and the appellant should not be allowed to get away with it. But whether the appeal is vexatious or not can only be decided after the appeal has been heard. The appellant has a right to appeal from the judgment of the lower Court. He has exercised that right, and we see no reason why we should compel him to give security for the costs of the sixth respondent of the suit in the Court below.

The result is that the motion fails and is dismissed with costs.

Attorneys for appellant: *Benjamin & Co.*

Attorneys for respondents: *Daphtary Fereira & Diwan; Dikshit, Maneklal & Co. Hiralal M. Mehta & Co.*

Motion dismissed with costs.

A. J. P.

ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Tendolkar.

1951
 April 20

A. R. SARIN, PETITIONER v. B. C. PATIL AND ANOTHER, RESPONDENTS.*
Payment of Wages Act (IV of 1936), ss. 2, 15—Extent of Jurisdiction of the Authority under the Act—Jurisdiction confined to deciding claims arising out of deductions from wages and delay in payment of wages—No jurisdiction to decide if contract of service is validly terminated or not—Constitution of India, art. 227—High Court's power of superintendence—Whether petitioner entitled to relief by writ of certiorari.

* Misc. Appln. No. 67 of 1951.