
(1938) 02 BOM CK 0003

In the Bombay High Court

Case No : I.C. No. 18 of 1935 and O.C.J. Appeal No. 88 of 1937

Raja Pratapgir Narsingirji

APPELLANT

Vs

The Official Liquidator, Prahlad Mills Ltd.

RESPONDENT

Date of Decision : 10-02-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 10, 26

Citation : AIR 1938 Bom 351 : (1938) 40 BOMLR 470

Hon'ble Judges : Wassoodew, J; John Beaumont, J

Bench : Division Bench

Judgement

John Beaumont, Kt., 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 Immovable property within British India, and, therefore, it is argued that the proviso to Order XLI, Rule 10, of the Civil Procedure Code, applies. On the other hand, the Advocate General for the respondent contends that Order XLI, Rule 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 ILR (1912) Bom. 572 : 14 Bom. L.R. 1106. I confess to feeling some difficulty in understanding that decision. The learned Chief Justice, Sir Basil Scott, did undoubtedly express the view that Rule 725 of the Original Side Rules, which corresponded to the present Rule 788 requiring a deposit of Rs. 500 to be made on the filing of any appeal, was inconsistent with Order XLI, Rule 10, and that accordingly, applying Section 129 of the Code, Order XLI, Rule 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 Order XLI, Rule 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 the 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 Order XLI, Rule 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 Dayachand Vs. Damji Dharsey*, .

2. A further contention is raised by the Advocate General that Order XLI, Rule 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" in Order XLI, Rule 10, the word " suit" is not used in the technical sense of a proceeding commenced by plaint as provided in Section 26 of the Code. The context seems to me to shew that in Order XLI, Rule 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 Order XLIII, Rule 2, the rules of Order XLI apply, so far as may be, to appeals from orders tends to confirm this view.

3. 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.

4. I am satisfied on the affidavits that the respondent resides out of British India and has not sufficient Immovable 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.

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

Wassoodew, J.

6. I agree.