

Present : Pereira J. and De Sampayo A.J.

1914.

SCOTT v. MOHAMADU.

130—D. C. Ratnapura, 2,323

Plaintiff residing out of the jurisdiction of the Court—Order as to costs should not be made as a matter of course—Appeal against an ex parte order—Civil Procedure Code, ss. 416 and 417.

An order under section 416 of the Civil Procedure Code requiring a plaintiff in an action who resides out of the jurisdiction of the Court to give security for the payment of the defendant's costs may be made on an *ex parte* application.

An appeal lies from an *ex parte* order, although such an appeal is not to be encouraged, and the Court may in its discretion refuse to entertain it.

An order for security under section 416 or section 417 of the Code should not be made as a matter of course. The Court in the exercise of its discretion should be satisfied that the aid of either section is not being oppressively invoked by the party moving.

THE facts appear from the judgment.

Hayley, for plaintiff, appellant.

Bawa, K.C., and *A. St. V. Jayewardene*, for defendant, respondent.

Cur. adv. vult.

November 29, 1914. PEREIRA J.—

This is an appeal from an order of the District Judge requiring the plaintiff to give security in Rs. 3,000 for the defendant's costs. The order has been made under section 416 of the Civil Procedure Code. The defendant's counsel has argued that the order was made *ex parte*, and that no appeal lay from such an order, the remedy of the party aggrieved being to apply to the Court below in the first instance to vacate the order and to appeal from any adverse order that might be made by the Court on such application. On the other hand, the plaintiff's counsel, maintaining the position that the order was an *ex parte* order, has argued that the Court had no power to make an *ex parte* order under section 416. I am not sure that the order can be said to be an *ex parte* order. The plaintiff's proctor was present in Court representing the plaintiff as a party to this case when the application for security was made. But, assuming that the order was an *ex parte* order, I am not prepared to say that the Court had no power to make such an order under section 416. That section gives the power to the Court to make an order for security " either of its own motion or on the application of any

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defendant," and there is nothing that I can see in the terms in which the section is expressed to indicate that the order cannot be made on an *ex parte* application. As regards the right of a party aggrieved to appeal from an *ex parte* order, it seems to me that it is not open to the defendant to take his objection at this stage of the proceedings. There was an application before this Court by the plaintiff for leave to appeal notwithstanding lapse of time. The objection in question was then pressed by the defendant, and considered and disposed of by this Court. I may, however, say that in support of the objection certain local cases were cited. Those cases turned more or less on the decision of the case of *Vint v. Hudspeth*.¹ In that case Cotton L.J. observed: "I am far from saying that this Court cannot entertain an appeal from a judgment made by default, but in a case like the present it is important to prevent the Court of Appeal from being flooded by having to hear cases in the first instance"; and Bowen L.J. said: "I should be sorry to decide that the Court has not jurisdiction to entertain an appeal from a judgment given by default; but it is equally clear that it is a bad practice to encourage parties to come here without having the cause in the first instance tried by the Court below." It is, if anything, clear from this case that this Court has the power to entertain the present appeal. It may, of course, in its discretion refuse to entertain it, but the expediency of entertaining the appeal has already been decided upon, and it is not open to question now.

As regards the merits of the appeal, the order of the District Judge does not appear to be what may be called a considered order, because he has given no reasons for it. Indeed, the respondent's counsel expressed his belief that orders under sections 416 and 417 of the Code were usually made by District Courts as a matter of course. If that is the practice, the sooner it is discontinued the better. The provision of section 416 or 417 may in many cases be oppressively invoked by a defendant. A discretion no doubt is given to the Court, but the exercise of it should be sound and reasonable. In the present case the plaintiff does not appear to have selected the District Court of Ratnapura for the institution of this case in order to harrass the defendant or to render the recovery of costs by him difficult. The case was instituted there because the tort complained of was committed within the jurisdiction of the Ratnapura Court. It has not been shown that the mere fact of the plaintiff being resident out of the territorial limits of the jurisdiction of the Court would place the defendant at a greater disadvantage in the recovery of his costs than he would have been had the plaintiff been resident within those limits. I do not think that this is a suitable case for an order for security under section 416, nor do I think that the amount of the security ordered is reasonable. The appellants' counsel has said that he would in this appeal be

content with an order reducing the security required to Rs. 250, and I would therefore order accordingly. In the circumstances, I would direct that each party do bear the costs of the present contention in both Courts. It appears that the plaintiff failed to give security required by the District Court, and his claim was therefore dismissed. We are now asked to vacate this order dealing with it in revision. I would allow this application and vacate the order.

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DE SAMPAYO A.J.—I agree.

Varied.

