1927

EFARI DASYA v. PODEI DASYA.

been lost or mislaid *since* the testator's death. That being so she has failed to satisfy the terms of section 237 of the Indian Succession Act and is, therefore, not entitled to probate. The appeal must, therefore, be dismissed with costs.

ROY J. I agree.

G. S. *Appeal dismissed.*

APPELLATE CIVIL.

Before B. B. Ghose and Roy JJ.

ROHINI KUMAR PAL

v.

KUSUM KAMINI PAL.*

1927

July 5.

Pauper Suit—Court fees—Defendant, liability of—Maintenance—Hindu widow—Code of Civil Procedure (Act V of 1908), O. XXXIII, r. 10.

Where, in a pauper suit by a Hindu widow for maintenance for herself and her infant daughter, it was found that the income of her deceased husband's estate was Rs. 900 *per annum*, and there being only an adult son besides the widow and her infant daughter, the trial Court ordered the (defendant) son to pay court-fees on the entire maintenance claimed,

Held, that, as she could have thought that the maintenance for the widow and the daughter might have been much more than what had been allowed by the Court, it would be iniquitous to saddle the widow with the court-fees, especially as the defendant had resisted her entire claim and pleaded that she was not entitled to a single rupee for maintenance ;

Held, further, that the matter was entirely left to the discretion of the Court, which must make the appropriate order having regard to the facts of each particular case ; no hard and fast rule could be laid down with regard to the equities of such a case as this.

*Appeal from Original Decree, No. 264 of 1925, against the decree of Sashi Kumar Ghose, Subordinate Judge of Mymensingh, dated July 27, 1925.

Chandrarekha v. *Secretary of State for India* (1) distinguished.

It is not illegal to lay upon the defendant in such a pauper suit a larger proportion of the Court fee leviable from the plaintiff than would have been payable by the plaintiff if the claim had been limited originally to that portion which was successful.

Ganga Dahal Rai v. *Gaura* (2) dissented from.

The discretion given to the Court under rule 10 of Order XXXIII, C. P. C., is quite sufficient for the purpose; and the Court may, in the exercise of its discretion having regard to the circumstances of the case, mould its decree according to what the justice of the case requires with reference to the Court fees payable.

The words in that rule, that "such amount shall be recoverable by the "Government from any party ordered by the decree to pay the same", leave the discretion entirely with the Court to direct which of the parties should pay the Court fees due to the Government.

FIRST APPEAL by Rohini Kumar Pal, the defendant No. 1.

The facts of the case out of which this appeal arises are briefly as follows:—

One Ananda Mohan Pal, who lived in joint mess with his brothers (defendants Nos. 2 and 3) died in 1917 leaving him surviving a son (defendant No. 1) by his first wife (who had predeceased him), his widow (the plaintiff) and her infant daughter. The widow lived with her husband's family for about a couple of years, but owing to systematic ill treatment by the defendants she had to leave her deceased husband's house in 1919 and took shelter in her brother's house alongside. As the defendants refused to pay the plaintiff any maintenance she was compelled to bring a suit *in forma pauperis* for maintenance of herself and her infant daughter. The widow prayed for future maintenance of Rs. 30 *per mensem* for herself for her lifetime, and Rs. 15 *per mensem* for her daughter till her marriage, *i.e.*, for Rs. 540 *per annum*, to be declared a charge upon her deceased husband's estate. She also

(1) (1890) I. L. R 14 Mad. 163. (2) (1916) I. L. R. 38 All. 469, 473.

1927

ROHINI KUMAR PAL v. KUSUM KAMINI PAL.

prayed for a decree for Rs. 4,442 on account of arrears of her and her daughter's maintenance for six years and three months. For purposes of court-fees and jurisdiction her suit was valued at Rs. 5,400, being ten times the annual maintenance claimed, *viz.*, Rs. 540. In spite of the defendant's denial of the plaintiff's right to any maintenance whatsoever, the trial Court made a decree declaring her right to receive maintenance at Rs. 10 *per mensem* for life and her daughter at Rs. 6 till her marriage, both sums to be a charge upon her husband's properties. But the Court decreed past maintenance for six years for plaintiff alone, allowing her proportionate costs for the whole suit from the defendant No. 1 only (her step-son), who was further ordered to pay Government Rs. 840 being the court-fee the plaintiff would have paid on her entire claim if she had not been permitted to sue as a pauper. Thereupon the defendant No. 1 preferred the present appeal to the High Court for an order that the defendant could be liable for the court-fee only on the sum decreed in favour of the plaintiff, who also preferred a cross-objection, not claiming a higher rate of maintenance, but only seeking past maintenance for her daughter for six years and three months at Rs. 6 *per mensem* and for herself at Rs. 10 for the three months disallowed.

Babu Prafulla Chandra Chakravarti, for the appellant.

Babu Bimal Chandra Das Gupta, for the principal respondent (plaintiff).

The Assistant Government Pleader (*Babu Surendra Nath Guha*), for the Secretary of State for India in Council, respondent.

GHOSE J. This appeal is by the defendant No. 1 against a portion of the decree of the Subordinate

Judge and arises out of a suit for maintenance brought by the plaintiff, a Hindu widow, out of the estate left by her deceased husband. Defendant No. 1 was the son of her husband by another wife. There were other defendants in the suit who were joint in mess with her husband, but they have no concern with the appeal as the suit was dismissed against them. The plaintiff sued as a pauper and her claim was for future maintenance at the rate of Rs. 30 per month for herself and at the rate of Rs. 15 per month for the minor daughter she had by her husband. There was also a claim for arrears of maintenance for six years and three months which was valued at Rs. 4,444 odd. The future maintenance was valued at Rs. 5,400. All the defendants contested the suit. The plaintiff brought another suit for some ornaments alleged to have been kept with the defendants. We are not concerned with that suit in the present appeal, which was dismissed by the lower Court. The suit with which we are concerned was defended on various grounds and a large number of issues were framed on the defence set up by the defendants. It is not necessary to mention all of them. But it may be stated that the defence was that the plaintiff's claim for maintenance was barred on the grounds of estoppel, acquiescence and waiver, and as regards the past maintenance it was barred by limitation. Then it was urged that the plaintiff was not entitled to separate maintenance apparently on the ground that her husband at the time of his death made some injunction to that effect. It was also stated in defence that the arrears of maintenance could not be charged against the property and so forth. The learned Subordinate Judge decided all the issues against the defence and held that the plaintiff was compelled to leave the dwelling house of her deceased husband on account of

1927

ROHINI KUMAR PAL v. KUSUM KAMINI PAL.

GHOSE J.

quarrels and oppressions on her by another lady, her husband's elder brother's wife, and that the defendant No. 1 who was at the time a student, connived at the oppressions exercised by that lady upon the plaintiff. The result was that the plaintiff had to leave her house and to take shelter under her brother. Under these circumstances, she asked for maintenance from out of the estate left by her husband. The next question which the learned Subordinate Judge took up for decision was what should be the rate of the maintenance. He considered no doubt upon the evidence given by one of the plaintiff's witnesses that the cost for plaintiff's board per month might be Rs. 8 or Rs. 9 and he took into consideration the fact that Re. 1 only would be the cost per month for her clothing and Re. 1 per month for her *Bratas* and the other religious rites. Taking all these into consideration, he fixed the maintenance at the rate of Rs. 10 per month and also the maintenance on account of her infant daughter at Rs. 6 per month. The annual income of the property left by the husband has been found to be approximately Rs. 900 per year. The maintenance, therefore, allowed to the widow and to her infant daughter, amounts to Rs. 192 per year, only a small fraction of the total income. The Subordinate Judge, however, in considering the question of the arrears reduced this amount at the rate of Rs. 10 per month and gave only a decree for six years to the extent of Rs. 720. But in making the order for costs, the Subordinate Judge directed that the plaintiff would recover proportionate costs for the suit from defendant No. 1 only and Government would recover court-fees from defendant No. 1 which the plaintiff would have paid, if she were not permitted to sue as a pauper. The appeal of defendant No. 1 is directed against that part of the decree which makes him liable

to pay the court-fees with regard to the suit. The matter then stands thus. The total court-fees payable on the claim as made by the plaintiff in her suit was Rs. 817-8. The amount decreed for arrears is Rs. 720 only and the valuation of the future maintenance allowed by the Subordinate Judge would amount to Rs. 1,920 only. The court-fees payable with regard to this amount would be Rs. 268-8. What the defendant No. 1 complains against is that the difference between the court-fees payable on the plaint, that is, Rs. 817-8, and the amount of court-fees on the sum decreed to the plaintiff, which is Rs. 268-8, should not be imposed on him. This amount is Rs. 549. In support of this contention, the learned vakil for the defendant No. 1 relies upon two cases, the earliest of which is the case of *Chandrarekha* v. *Secretary of State for India* (1). In that case the plaintiff was the brother of the defendant and sued her for partition of properties which were alleged to be worth Rs. 34,000. He brought the suit as a pauper. The defence was that the ancestral property was worth very little and that all the property that the plaintiff claimed was acquired by the defendant herself who was a prostitute by profession. It was found by the trial Court that the ascentral property was only worth Rs. 200 and upon that finding made a decree in favour of the plaintiff to the extent of Rs. 100. But in making the order as to the payment of the court-fees, the Judge observed : "Both the plaintiff and the first defendant "have lived disreputable lives—the first defendant "being a prostitute, while the plaintiff was the hanger-"on of a prostitue. Yet himself is a pauper, and the "first defendant has acquired comparatively great "wealth; in the undefined state of the law, this "induced the plaintiff to attempt to get a share, he

(1) (1890) I. L. R. 14 Mad. 163.

1927

ROHINI KUMAR PAL v. KUSUM KAMINI PAL.

GHOSE J.

"has failed, and she has succeeded in resisting his "claim by setting up a disreputable defence. There is "a large sum due to Government for stamp duty. In "these circumstances, I think it right to direct that "the first defendant, considering the nature of her "defence, be ordered to pay her own costs and the "stamp duty due to Government." Under these circumstances the learned Judges of the High Court held that the order of the trial Court was erroneous. As Muttusami Ayyar, J. puts it: "Notwithstanding "her profession, she (appellant) has rights "of property, and is entitled to the protection "of law, and no penalty can lawfully be imposed "upon her for pleading what is found to be substan- "tially true to entitle her to such protection." To my mind there cannot be any analogy to the case before us with reference to the case in the Madras High Court. In my judgment, the District Judge in that case quite wrongly made the order in the exercise of his discretion, simply because the defendant acquired the property by her disreputable mode of life. This case, therefore, can be of no assistance to us in deciding the present question which has been raised by the learned vakil for the appellant. But that cannot be said with regard to the other case—*Ganga Dahal Rai* v. *Musammat Gaura* (1) on which the learned vakil relies. In its facts the Allahabad case bears a great resemblance to the case before us. There the plaintiff had to bring a suit for maintenance claiming Rs. 40 per month. The Court allowed only Rs. 5 per month, but directed the defendant to bear the costs actually incurred by the plaintiff and further directed the Collector to realise from the defendant the whole amount of the court-fees payable on the claim. The learned Judges on appeal held that the principle laid down in

(1) (1916) I. L. R. 38 All. 469, 473.

the case, *Chandrarekha* v. *Secretary of State for India* (1), was applicable to the case before them; and they further held that in that case it was decided that it was illegal to lay upon the defendant in such a suit a larger proportion of the court-fee leviable from the plaintiff than would have been payable by the plaintiff if the claim had been limited originally to that portion which was successful. With great respect, it seems to me that no such general rule was laid down by the learned Judges of the Madras High Court. They decided the case upon its facts, and they were of opinion that the reason for which the District Judge in that case made the defendant liable for the court-fees could not be supported on the ground on which she was made so liable. The learned Judges of the Allahabad High Court observed (at page 473): "The "question of the discretion of the Court in dealing "with a matter of this sort, *i.e.*, with a case in which "a pauper plaintiff has partially succeeded and parti-"ally failed, is perhaps one which deserves to be "dealt with by a special rule." I must again observe with very great respect that the discretion given to the Court under rule 10, Order XXXIII, C. P. C., is quite sufficient for the purpose, and the Court may, in the exercise of its discretion having regard to the circumstances of the case, mould its decree according to what the justice of the case requires with reference to the court-fees payable. The words in the last portion of the rule run thus: "Such amount shall be recover-"able by the Government from any party ordered by "the decree to pay the same." This, to my mind, leaves the discretion entirely with the Court to direct which of the parties should pay the court-fees due to the Government. Dealing with the equities of the case the learned Judges of the Allahabad High Court

(1) (1890) I. L. R. 14 Mad. 163.

1927

ROHINI KUMAR PAL v. KUSUM KAMINI PAL.

GHOSE J.

make this observation. "In an ordinary litigation "the defendant has some protection against any extra- "vagant exaggeration of his claim on the part of a "plaintiff who knows that he has a good case for some "relief, in the fact that the plaintiff is bound to pay "out of his own pocket, in the first instance, the whole "of the court-fee leviable on the plaint as drafted. It "is otherwise in the case of a suit brought by "a pauper plaintiff, and it would not be equitable to "permit such a plaintiff to penalise the defendant by "exaggerating his claim." I have nothing to add with reference to this observation to what I have already stated that the Court has been given ample discretion in the matter by the rule I have already cited and the equities of a particular case must be considered by the Court in making the order. No hard and fast rule can be laid down with regard to the equities of such a case as this. Take, for an example, the case of a person in the position of the plaintiff. The widow of a member of the joint family has no means whatsoever of knowing what is the annual income of her husband's share in the property. When all the people were living together, she was probably in affluent circumstances. During the life-time of her husband, all her wants had been met; but when she had to leave the family house, she has been held to be bound to maintain herself on the paltry sum of Rs. 10 per month. How is she to know that the claim which she made of Rs. 30 was unduly exaggerated? The income of the husband's estate being Rs. 900 per year, and he having left only an adult son besides herself and her infant daughter, she could reasonably have thought that the maintenance for the widow and her daughter might have been much more than what has been allowed by the Court, and in such a case as this, to my mind, it would be iniquitous to saddle her with

the costs of the court-fees. The defendant resisted her entire claim and pleaded that she was not entitled to a single rupee for maintenance. It is unnecessary for me to dilate further on this point and I can only repeat, that in my judgment the matter is entirely left to the discretion of the Court which must make the appropriate order having regard to the facts of each particular case. With great respect I am, therefore, unable to agree in the decision of the learned Judges of the Allahabad High Court in the case referred to above.

It is next urged by the learned vakil for the appellants that in this case the Subordinate Judge has not given any reasons for the exercise of his descretion and his order is, therefore, liable to be set aside on appeal. It is true that the discretion of the Court must be exercised with reference to the facts of each particular case, as I have already stated, but no materials have been given to us in this case in order to enable us to decide that the discretion has been wrongly exercised. The evidence with regard to the case has not been printed; and we are, therefore, unable to say that the Subordinate Judge has not exercised his proper discretion in making defendant No. 1 liable for the court-fee. The appeal must therefore be dismissed with costs.

We have been referred to the cross-objection preferred by the plaintiff-respondent. Although in the course of his argument the learned vakil for the respondent stated that the amount of the maintenance for the plaintiff and her daughter had been fixed at a low figure, we are unable to give her any assistance as the cross-objection is not directed against the future maintenance allowed by the Court. The only objection that is preferred is with regard to the disallowance of maintenance for the arrears of Rs. 6 per month

1927

ROHINI KUMAR PAL v. KUSUM KAMINI PAL.

given to the minor daughter. The reason given by the Subordinate Judge does not commend itself to me, as he says that the lady was maintained by her brother in his family during the period for which the arrears of her past maintenance are claimed. We are not aware of the circumstance of the brother; and because she had to live with her brother, there is no reason for disallowing the full rate allowed for maintenance or cutting it down to six years only. In my opinion, she ought to be allowed the past maintenance for six years and 3 months, that is, the period of the claim at the rate of Rs. 16 per month. The cross-objection to the extent of Rs. 480 is, therefore, allowed with costs. The court-fees for this has been paid by the respondent and she is entitled to recover it from the appellant.

Hearing fee both in the appeal and the cross-objection is assessed at three gold mohurs each.

ROY J. I entirely agree.

G. S.

Appeal dismissed ; cross-objection allowed.