1916

EMPEROR v. SHAMBHU NATH.

they are indulging in feelings of hostility towards another body of persons. Man is a gregarious animal and apt to associate himself with friends, and, when he has got nothing else to do, to indulge his feelings of hostility towards his rival and his friends. These feelings are very much to be deplored; but they do not entitle a Magistrate to make orders wholesale under this section.

Order set aside.

APPELLATE CIVIL.

1916
May, 12.

Before Mr. Justice Piggott and Mr. Justice Lindsay.

GANGA DAHAL RAI AND ANOTHER (DEFENDANTS) *v.* MUSAMMAT GAURA (PLAINTIFF).*

Civil Procedure Code (1908), *Order XXXIII, rules* 10 *and* 11—*Stamp duty on a pauper's plaint—Decree for less than the amount claimed.*

In a suit brought *in forma pauperis*, the plaintiff succeeded only in part and failed as to the rest of the claim; the lower court ordered the defendant to pay the entire costs incurred by the plaintiff including the amount of court-fees which would have been payable on the plaint. *Held*, that the court-fees payable on the plaint should be apportioned under the provisions of rules 10 and 11 of Order XXXIII of the Code of Civil Procedure. *Chandraka* v. *Secretary of State for India*, (1) followed.

THE facts of this case were as follows:—

The plaintiff, a Hindu widow, brought a suit *in forma pauperis* for enforcement of her right of maintenance and for recovery of certain gold ornaments. She claimed maintenance at the rate of Rs. 40 per mensem and she valued the ornaments at Rs. 300. The court-fee which would be payable on the claim if it were not brought *in forma pauperis* was Rs. 264-8-0. The defendants totally denied the relationship upon which the plaintiff based her claim for maintenance. The court found this relationship proved, but held that the plaintiff had failed to establish her claim to the ornaments, and that having regard to the means of the defendants the rate at which the maintenance was claimed was excessive. The court gave the plaintiff a decree for maintenance at Rs. 5 per mensem only, but directed the defendants to bear the costs actually incurred by the plaintiff, and further

* First Appeal No. 88 of 1915, from a decree of Jotindra Mohan Basu, Subordinate Judge of Basti, dated the 16th of January, 1915.

(1) (1890) I. L. R., 14 Mad., 168.

1916

GANGA DAHAL RAI v. MUSAMMAT GAURA.

directed that the Collector should realise from the defendants the sum of Rs. 264-8-0, on account of court-fees payable on the claim.

The defendants appealed to the High Court.

Dr. *Surendra Nath Sen* (with him Munshi *Lakshmi Narain*), for the appellants.

The order of the lower court directing the defendants to bear the whole costs of the claim is improper, especially that portion of the order which renders the defendants liable for the payment of Rs. 264-8-0 as court-fees. By far the greater portion of the plaintiff's claim has failed, she has succeeded to the extent of only a very small fraction of her claim which was greatly exaggerated. Under these circumstances the court should have passed, in respect of the court-fees, an order under Order XXXIII, rule 11, of the Civil Procedure Code. At all events the court should not have burdened the defendants with any greater share of the court-fees than what is proportionate to the extent of the plaintiff's success.

Reference was made to *Chandraka* v. *Secretary of State*, (1).

Otherwise, there would be no check to a pauper grossly and recklessly exaggerating his claim and thereby penalising the defendants with the payment of the whole of the court-fees payable on such inflated claim. The only equitable rule is to apportion the court-fees among the parties in proportion to their success and failure.

Mr. *Jawaharlal Nehru*, for the respondent.

There can be no hard and fast rule as to the apportionment of the costs between the parties. It is a matter which is within the discretion of the court. The plaintiff having succeeded, although, partially, in the suit, Order XXIII, rule 10, applies to the case. That rule says that the court-fees shall be recoverable from any party ordered by the decree to pay the same. It impliedly if not expressly, leaves it to the discretion of the court to order which of the parties is to pay the court-fees. Where the pauper entirely fails in the suit, rule 11 leaves no option or room for discretion; it directs that the court-fees must be paid by the plaintiff. In the present case, in view of the fact that the defendants denied even the existence of any relationship

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

and thus cast a slur upon the character of the lady, the court rightly exercised the discretion allowed it under Order XXXIII, rule 10, in burdening the defendants with the whole of the court-fees. In the present case it cannot be said that there was any reckless or *mala fide* exaggeration of the claim, for the plaintiff was not in a position to be able to correctly judge the financial position of the family.

The ruling in I. L. R., 14 Mad., 163, does not say that in all cases of partial success of a pauper suit the court-fees must necessarily be apportioned according to success and failure of the parties. The circumstances of that case were peculiar.

Further, it would be very hard upon the plaintiff, who has got a decree for a monthly allowance of Rs. 5 only, to be burdened with the payment of Rs. 219-8-0 for court-fees.

Dr. *Surendra Nath Sen*, replied.

PIGGOTT and LINDSAY, JJ. :—The plaintiff in the suit out of which this appeal arises was a Hindu widow seeking to enforce her right of maintenance against the surviving members of the joint family to which her late husband had belonged. She claimed at the rate of Rs. 40 per mensem, and she added a further claim in respect of gold ornaments valued at Rs. 300, said to be her property in the hands of the defendants. She was met by a denial of the relationship on which her claim was based. In the opinion of the learned Subordinate Judge, she succeeded in proving that relationship. She failed to support her claim in respect of the gold ornaments by any reliable evidence, and with regard to the amount of the maintenance claimed by her, the court below held, that her claim was altogether excessive in view of the evidence as to the means possessed by the defendants. In the result the learned Subordinate Judge gave the plaintiff a decree for maintenance at the rate of Rs. 5 per mensem and dismissed the rest of her claim. The appeal before us is by the defendants. The first two paragraphs of the memorandum of appeal challenge the findings of fact on which the decree in favour of the plaintiff is based. It has been frankly conceded before us in argument that, in view of the evidence led in the court below, and accepted as true by the learned Subordinate Judge, these pleas cannot be pressed. A third plea in the memorandum of appeal before

1916

GANGA DAHAL RAI v. MUSAMMAT GAURA.

us assails the order of the court below on the question of costs, and this deserves consideration. It is apparent from the facts already stated that on a mere paper estimate of the value of the claim as brought and the amount of the claim decreed the plaintiff has succeeded only to a comparatively small extent. Nevertheless she has succeeded in proving her case against the defendants on the principal issue of fact involved. The learned Subordinate Judge was therefore of opinion that this was a case in which costs could not be apportioned strictly in accordance with the result of the litigation. He has, however, carried this principle very far in favour of the plaintiff by laying the entire costs of the suit on the defendants. It is to be noticed further that this is not a case which merely raises the question of the discretion of a court in the matter of apportionment of costs. The fact is that the plaintiff sued as a pauper under the provisions of Order XXXIII of the Code of Civil Procedure, and the costs of the court-fee stamp which would have been payable on the plaint require to be apportioned under the provisions of rules 10 and 11 of the aforesaid order. The learned Subordinate Judge has directed the defendants to bear the costs actually incurred by the plaintiff in the litigation, and he has added a direction, purporting to be made under Order XXXIII, rule 11, of the Code of Civil Procedure, to the effect that a sum of Rs. 264-8-0 being the amount of the court-fee which would have been payable on the plaint, shall be realised by the Collector of the district from the defendants. It is this portion of the order which is principally challenged in the present appeal.

Under rule 10 of Order XXXIII of the Code of Civil Procedure, the Legislature deals with the case of a pauper plaintiff who succeeds in the suit and under rule 11, with the case of a pauper plaintiff who fails in the suit. There is no separate provision for a case like the present, in which a pauper plaintiff has partly succeeded and partly failed. Presumably the court is intended to deal with such a case by combining the provisions of the two rules. In the case somewhat similar to the present, *Chandraka* v. *Secretary of State for India* (1), the learned Judges of the Madras High Court held, under the analogous provisions of the

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

former Civil Procedure Code (Act XIV of 1882), 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 said plaintiff if the claim had been limited originally to that portion which was successful. On this principle the correct order in the present case would be that a sum of Rs. 45 on account of the court-fee stamp will be realisable from the defendants in the manner directed by the court below, and that the balance of Rs. 219-8-0 is recoverable from the plaintiff under the provisions of Order XXXIII, rule 10. 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 partially failed, is perhaps one which deserves to be dealt with by a special rule. But certainly, on the provisions of Order XXXIII, rules 10 and 11, of the Code of Civil Procedure as they stand, it is difficult to arrive at any conclusion other than that laid down by the Madras High Court, without some apparent straining of the language of the rules.

With regard to the equities of the case there is this much to be said:—In an ordinary litigation the defendant has some protection against any extravagant 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. The present case illustrates this principle to a certain extent, and it would be still more obvious if the plaintiff had claimed maintenance at the rate of, say Rs. 400, instead of Rs. 40 per mensem. The injustice in such case of laying the entire burden of the court-fee on the defendant would be apparent. We think therefore that the proper way to deal with the present case is to follow the principle laid down by the Madras High Court in the case already quoted. We accordingly modify the order of the court below on the question of court-fees. We direct that a sum of Rs. 45 be recoverable from the defendants as directed by the court below, and with regard to the balance of Rs. 219-8-0, we

1916

GANGA DAHAL RAI v. MUSAMMAT GAURA.

can only deal with the same in the manner laid down by Order XXXIII, rule 10, of the Code of Civil Procedure, that is to say, we must make a formal order that this sum is recoverable by the Government from the plaintiff, and is the first charge on the subject matter of the suit, that is to say, on the annuity which has been decreed in favour of the plaintiff. We must leave it to the proper authorities to consider whether the interests of Government require that it should stand on its extreme rights in a matter of this sort. After all no actual loss has been suffered by Government by reason of the plaintiff's over-estimate of her claim and it will no doubt receive due consideration in the proper quarter whether it is equitable to insist upon realising this sum out of the small pittance decreed in favour of the plaintiff. We accordingly allow this appeal to the extent stated and otherwise dismiss it. We leave the parties to bear their own costs in this Court.

Decree modified.

1916

May, 13.

Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

GOSWAMI SRI RAMAN LALJI AND ANOTHER (JUDGEMENT-DEBTORS) *v.* HARI DAS (DECREE-HOLDER)*.

Act No. VII of 1889 *(Succession Certificate Act), section 4—Letters of administration—Assignment of debt by holder of letters of administration of debt covered by the certificate—Rights of assignee.*

A decree for possession of certain property and for mesne profits was passed in favour of *A* and his wife. The wife died after the date of the decree. *A* obtained letters of administration in respect of the estate of his wife, and then transferred his own rights under the decree, as also those of his wife to *H*. *H* applied for execution of the decree. The judgement-debtors objected, *inter alia*, that the decree could not be executed without letters of administration or a succession certificate being obtained by the transferee.

Held that *H* could execute the decree without taking out fresh letters of administration.

Per WALSH, J.—A person claiming as an assignee of a debt which was due to the estate of a deceased person is not claiming "the effects of the deceased." From the date of assignment, the debt due to the deceased ceases to be part of the deceased's effects.

The claim contemplated by sub-section 1 of section 4 of the Succession Certificate Act is a claim made by a person in the capacity of, and as a personal representative of a deceased person.

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*First Appeal No. 182 of 1915, from a decree of B. G. Forbes, Subordinate Judge of Muttra, dated the 30th of April, 1915.