mortgages is covered by section 17 of the Court-Fees Act, and the report of the Stamp Reporter is correct, and the plaintiff-mortgagee (respondent No. 4) must, therefore, deposit the deficit court-fee on the plaint.

REVISIONAL CIVIL.

Before Jwala Prasad and Ross, J.J.

SRIMOTI SAVITRI THAKURAIN

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

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June, 26.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXXIII, rule* 9(b)—"*means*"—*Suit* in forma pauperis—*receipt of* ad interim *maintenance by plaintiff—application to dispauper plaintiff.*

A plaintiff who has been permitted to sue *in forma pauperis* is not liable to be dispaupered merely on the ground that she has been granted a small *ad interim* maintenance allowance and that she has received various sums on account of such allowance which she had spent in meeting expenses incurred before the grant of maintenance and none of which sums was sufficient to pay the amount of court-fee leviable on the plaint.

Gadigi Muddappa v. *Gadigi Rudramma*(1), not followed.

Smith v. *Atkin*(2), referred to.

The facts of the case material to this report were as follows:—

The defendant having propounded a Will, alleged to have been executed by the plaintiff's husband, and having obtained a grant of letters of administration, the plaintiff instituted the present suit challenging the Will and praying for recovery of possession of her

* Civil Revision No. 80 of 1923, from an order of M. Ihtisham Ali Khan, Subordinate Judge of Monghyr, dated the 11th February, 1923.

(1) (1921) 61 Ind. Cas. 958. (2) (1900) 1 Ch. D. 471.

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husband's estate. Her application to sue *in forma pauperis* was contested by the defendants and the Secretary of State but was granted on the 25th August, 1920. The plaintiff then applied to the Court for *ad interim* maintenance which was eventually granted at the rate of Rs. 200 *per mensem*. On the 15th August, 1921, she received Rs. 2,100 on account of arrears of maintenance and up to the 25th April, 1922, she received various sums aggregating Rs. 5,538. On the 1st February, 1923, an application was made on behalf of the Secretary of State, under Order XXXIII, rule 9(*b*), Civil Procedure Code, to dispauper the plaintiff by reason of her having received the sum of Rs. 5,538 and of her being allowed the *ad interim* maintenance. The plaintiff stated that the sums paid to her were spent in personal expenses incurred before their receipt. She was, however, dispaupered and ordered to pay a court-fee of Rs. 3,000 on her plaint. The Court held that the court-fee should have been paid out of the money received by the plaintiff and found that she was not really in need of the maintenance allowance as she was living with her cousin, a vakil who was probably supporting her and carrying on this litigation on her behalf. The Court also relied on the fact that eminent counsel had appeared on behalf of the plaintiff.

K. B. Dutt (with him *Hasan Imam* and *Lakshmi Kant Jha*), for the applicant.

Sultan Ahmed (Government Advocate), for the Crown.

S. N. Palit, for the defendants opposite party.

JWALA PRASAD, J.—This is an application against an order of the Subordinate Judge of Monghyr, dated the 11th February, 1923, in Title Suit No. 103 of 1920, dispaupering the plaintiff under Order XXXIII, rule 9(*b*), Code of Civil Procedure.

The plaintiff's husband, Ugra Mohan Thakur, died some time in 1914, leaving a large estate yielding an annual income of Rs. 1,30,000, besides houses, *etc.*,

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worth rupees eight or nine lakhs. The opposite party (defendant) are now in possession of the estate, having obtained letters of administration of a Will said to have been executed by the deceased husband of the plaintiff-petitioner. She now disputes the Will and has brought a suit, in the Court of the Subordinate Judge of Monghyr, for recovery of possession of the properties belonging to her late husband. She applied to be allowed to sue *in forma pauperis* and after contest by the opposite party and the Government she was adjudged a pauper on the 28th August, 1920, and was allowed to sue as such. The order of the learned Subordinate Judge was upheld by this Court. The plaintiff applied in the Court below for an *ad interim* maintenance at the rate of Rs. 3,000 per month, and she based her claim for this amount upon a Will of her husband, said to have been executed in 1908, which purports to give her Rs. 500 a month as maintenance and a house in Calcutta yielding about Rs. 500 a month which subsequently was sold for Rs. 1,07,000 and another house in Benares. The Will which was probated and on the basis of which the opposite party is in possession of the properties, however, allowed her a maintenance allowance of Rs. 100 a month only. Taking all these circumstances into consideration, the learned Subordinate Judge allowed her a maintenance allowance of Rs. 200 a month during the pendency of the litigation. On the 12th August, 1921, in pursuance of this order, she received a sum of Rs. 2,100 probably on account of her arrears of the aforesaid maintenance. Between the 20th January, 1922, and the 25th April, 1922, she received Rs. 1,238-11-6. From May, 1922, to December, 1922, she got Rs. 1,600. Thus up to the 25th April, 1922, she had received in all Rs. 5,538. On the 1st February, 1923, a petition was filed on behalf of Government, under Order XXXIII, rule 9(*b*), to dispauper the plaintiff upon the ground that by reason of her having received the aforesaid sum of Rs. 5,538 and of her being allowed to receive in future Rs. 200 per month as her maintenance allowance

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she had ceased to be a pauper and consequently she ought not to be allowed to continue the prosecution of her suit as a pauper. The application of the Secretary of State for India was taken up on the 11th February, 1923. On that date the petitioner-plaintiff applied for time for filing her objection. This was refused by the learned Subordinate Judge on the ground that the application was not *bonâ fide*, and on that very day, the Court, after hearing the parties, passed its order allowing the petition of the Secretary of State and withdrawing its former order allowing her to sue as a pauper, and she was directed to pay the proper court-fees by the 10th March, 1923. The learned Subordinate Judge says that the amount of court-fees was the first charge and that the plaintiff was bound to pay the same and not to spend the aforesaid sum of Rs. 5,538 which was paid to her, for payment of debt or any other purpose and that she really did not stand in need of the aforesaid sum to meet her maintenance charges inasmuch as she was living with her cousin, Babu Ram Kishun Jha, a vakil of Darbhanga, who probably was supporting her and carrying on the litigation on her behalf. He also refers to the fact that she had appeared before him through eminent counsel. In this Court also, on her behalf, eminent counsel appeared, but there is nothing to show under what arrangement learned counsel appeared for her in the Court below and in this Court. No affidavit has been filed to show that she had incurred any expense on account of the aforesaid counsel. Therefore this consideration in itself is not sufficient to dispauper her. Similarly there is nothing to show that her cousin, Ram Kishun Jha, is financing her, either in supporting her or in defraying the cost of the litigation. There is no statement of the said vakil on the record. There is, therefore, nothing to show that the said gentleman is taking more interest in the lady than what he is naturally expected to take being a relation of hers. To have sympathy and to render assistance to a relation is different from incurring heavy expenses on behalf

of that relation. This circumstance also is, therefore, not sufficient to dispauper her. She had received the sum of Rs. 5,538 piece-meal and on different dates, long before the application of Government to dispauper her was filed. None of these payments, made at one time, approached Rs. 3,000, the sum necessary to pay the court-fee upon the plaint, so that she was not at any time in possession of the entire sum necessary to pay the court-fees. It is said that she should have accumulated the said sums until they reached Rs. 3,000 and then paid the court-fees and should not have spent the sums in paying her creditors on account of debts incurred for maintaining herself. Such a condition was not imposed upon her either on the date when the order allowing her *ad interim* maintenance allowance was passed or on the dates that the several payments were made by the opposite party and received by her. The said payments were made as her maintenance allowance with effect probably from the date of the death of her husband, which happened in 1914. It was, therefore, understood that she had already incurred expenses in maintaining herself, so that she was entitled to have the arrear allowance of the said maintenance. She, in her affidavit in this Court, says that the sums paid to her were spent:

> "on personal expenditure soon after they were received."

leaving her:

> "in the same straitened circumstances as before."

This statement does not seem to be unnatural or in any way untrue considering the circumstances in which she was placed on the death of her husband. Without going into the legal aspect of the question, to require her to have accumulated the aforesaid sum and to have paid the court-fees, is to give charity by one hand and to withdraw it by the other. The learned Subordinate Judge thinks that he was justified in doing so by reason of an application made by the lady on the 21st August, 1920. The learned Subordinate Judge says:

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"From the order sheet dated the 21st August, 1920, it appears that she had filed a petition that she was willing to pay the court-fees if Rs. 3,000 was paid to her and which she was willing to accept under protest.

"That in the course of her cross-examination the learned Government Pleader, in consultation with the pleaders for defendants Nos. 1, 5 and 6, and, your petitioner believes, with the consent of such pleaders, suggested to your petitioner as to whether or not, she was prepared to pay Rs. 3,000 for court-fees on getting the sum from defendant No. 1 on account of the allowance mentioned in (spurious) will propounded by defendant No. 1.

"That your petitioner has been advised and she accordingly submits that if the defendant No. 1 pays your petitioner a sum of Rs. 3,000 on condition that the said sum will be deducted from any sum decreed payable to your petitioner in this suit on account of mesne profits, maintenance or otherwise she is prepared to receive the sum without any way admitting expressly or impliedly the genuineness or validity of the said will or that she is bound by any provision appearing in the said will for her and is willing to pay court-fee out of such sum as full court-fee on her plaint.

"That as the said suggestion was made with the consent of the pleaders of defendant No. 1 your petitioner has reason to believe that defendant No. 1 will be found willing to pay the said sum of Rs. 3,000 on the conditions hereinbefore mentioned.

"It is accordingly prayed that the court will be pleased to direct the defendant No. 1 to state whether he is willing to pay a sum of Rs. 3,000 to your petitioner through her pleaders for payment of court-fee on the conditions hereinbefore stated, within a reasonable time, and if he shows his willingness, he may be directed to pay the sum at an early date."

The Court referred the petition to the pleader of the opposite party by its order of the 21st August to intimate to the Court if he was willing to pay the said sum of Rs. 3,000 on the condition mentioned in the petition to the lady. On the 27th August, 1920, the opposite party (defendants in the case) filed a petition stating that he was:

"unable to pay the sum of Rs. 3,000 for payment of court-fee as he holds a decree for costs amounting to a very large amount against her."

The terms of the aforesaid petition were mentioned to the lawyers representing the opposite party in this Court and they intimated that they were not willing to accept the terms proposed by the lady in the said petition.

It is obvious that there was not the faintest suggestion in the application made by the lady that the sum of Rs. 3,000 would be paid as court-fee by her out of her *ad interim* maintenance allowance. She suggested the payment of the court-fees out of the sum paid by the defendants on condition that the said sum would be deducted from any sum decreed payable to her in the event of her succeeding in the suit on account of mesne profits, maintenance or otherwise. No legitimate inference, therefore, can be drawn from the petition in question as to any obligation on her part to pay the court-fee of Rs. 3,000 out of the sum of Rs. 5,538 received by her as maintenance allowance on different dates.

Now, has she under the law, ceased to be a pauper? "Pauper" has been defined in rule 1 of Order XXXIII, thus:

> "A person is a pauper when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or where no such fee is prescribed when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit."

On the 28th August, 1920, the Court below, after hard contest on the part of the defendant and Government, held that she was a pauper: in other words, that she was "not possessed of sufficient means to enable her to pay the fee prescribed by law for the plaint," that is Rs. 3,000 as court-fee. Clause (*b*) of rule 9 empowers the Court to dispauper her and to withdraw the original order allowing her to sue as a pauper when, as the clause says, it appears that her means are such that she ought not to continue to sue as a pauper. The word "means" in this clause is to be interpreted with the help of the definition of pauper referred to above. To apply clause (*b*) of rule 9 to this case, therefore, the Court could dispauper her when her means were such as to enable her to pay the court-fee of Rs. 3,000 upon the plaint. On the 1st February, 1923, when the application of Government was made

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or on the 11th February, 1923, when the Court dispaupered the plaintiff, there is nothing to show that she had with her Rs. 3,000 to pay the court-fee, or that she had the means to pay the same. The sums previously paid to her were, as she says, not in her hands at the time as they were spent just after they had been received.

The learned Government Advocate argues that she ought not to have paid off her debts incurred on account of her personal maintenance, but ought to have saved out of the sums received by her, Rs. 3,000, in order to pay the court-fees and that her means, which were not sufficient at the time when the order of the 20th August, 1920, was passed, had considerably improved on account of her being allowed a maintenance allowance of Rs. 200 a month and that, therefore, her means in February were such that she ought not to be allowed to continue to sue as a pauper. In support of this contention the learned Government Advocate quotes the case relied upon by the Court below, *viz.*, *Gadigi Muddappa* v. *Gadigi Rudramma* (1). The learned Subordinate Judge says :

> " No doubt this ruling was not on an application made under Order XXXIII, rule 9, Civil Procedure Code, but the principle to my mind should be the same for an application under Order XXXIII, rule 9, also."

In that case, it appeared and in fact the plaintiff admitted that subsequent to the date of the application for leave to sue as a pauper, she had received a large sum of money from the persons against whom she intended to file the suit, but that she had paid away that amount to a creditor. Napier, J., says : " There was no dispute that at the date of her application she was a pauper. The point taken is that having been in possession of funds after her application, the plea would fail and that she could not revive it, by paying the money away. There is no authority on this point but I think the contention is well-founded and that the Court had no jurisdiction to make the order, once

(1) (1921) 61 Ind. Cas. 958.

it had ascertained that she had ceased to be a pauper after the date of the application." We have not got any further detail of the case; we do not know what sum was required to pay the court-fee and what sum she came into possession of before her application for leave to sue as a pauper was disposed of. All that we know is that a large sum was received—probably much larger than was needed for her maintenance and bare subsistence. We also do not know whether the sum received was for her maintenance or a gift or such as she was entitled to, making that receipt as an asset in her hands wherewith she could pay the court-fee. It is not safe to apply the decision in that case when the facts are not sufficiently mentioned therein in order to find out the reasons which weighed with the learned Judge in arriving at his conclusion. It may also be possibly passingly mentioned that this was a decision of a single Judge. I do not think that that case applies to the present case.

The next case is one which my learned brother got hold of and for which I am very much indebted to him. It is *In re. Atkin's Trust. Smith* v. *Atkin* (1). In that case the lady who obtained leave to prosecute her claim in the action *in forma pauperis* was entitled as tenant for life to have an income amounting to £52 a year under the very settlement which was the foundation of the action. Eve, J., held that the "lady, being entitled to this annuity, although subject to the qualified restraint which I have mentioned, cannot establish that she is not worth £25." Mr. Luxmoore, who appeared for the lady, contended that she only had £52 5*s*. 5*d*. *per annum* payable quarterly and after providing for her maintenance it would not be possible to save £25 before the action would come on for trial. The learned Government Advocate, in this case, says that such an argument would not be of avail to the plaintiff in withholding payment of the court-fee payable upon the plaint and in asking to be

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allowed to continue to sue as a pauper. The argument of Mr. Luxmoore does not seem to have been expressly met in the case, but it seems not to have been impliedly accepted inasmuch as the lady in that case was dispaupered. The decision of Eve, J., was under the Supreme Court rules in England in force at the time when his decision was passed under which the applicant had to show that she was not worth a sum exceeding £25 a year excluding wearing apparel and the subject-matter of such proceedings. The annuity allowed to the lady in that case was £52 5*s.* 5*d.*, that is, almost double the amount required to disallow her to continue her action as a pauper. The limit of £25 was subsequently raised to £50. That was the law of 1922. But in 1923 the law of England seems to have undergone further modification. It now requires that the applicant's means should exceed £50 and also that his income is *at least £2 a week, and in some special cases at the discretion of the Judge, £4 a week.* Now, this modification is in favour of an applicant applying for leave to sue as a pauper. It means that besides possessing an income of £50 he must also have £2 a week, or in some cases £4 a week. The latter additional circumstance is probably with a view to secure maintenance charges, the minimum of which is prescribed to be £2 a week for a man in England and according to the circumstances of a particular case £4 a week. The argument of Mr. Luxmoore in the aforesaid case based upon the maintenance charges being not taken into consideration in disposing of the application for leave to sue as a pauper would perhaps have received better consideration if the present rule had been in force at the time when Eve, J., pronounced his judgment. The decision in that case, therefore, to my mind is not applicable to the present case. There is another reason—and perhaps a stronger one—why the case in England should not apply to the law in this country. No court-fee is payable upon a bill or plaint in England and only the costs of conducting the litigation, such as, payment of fees to

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lawyers, *etc.*, has to be incurred and that alone is excused. That circumstance has been taken into consideration in the latter portion of the exception to rule 1 of Order XXXIII, which says that where no such fee is prescribed, the pauper must show that he is not entitled to property worth one hundred rupees. In England he will have now to show that he has not property worth £50 *plus* a weekly income of £2 or £4, as the case may be. The present case is not covered by the latter part of the exception to rule 1. It is equally not governed by the law in England. Here the plaintiff was required to pay at one time a sum of Rs. 3,000 as court-fee upon her plaint, and the Court had to see whether she had the means to do so. In my opinion the monthly allowance of Rs. 200 a month, allowed to her, is not a sufficient means to enable her to pay the said court-fee. She can never at one time receive Rs. 3,000 unless the arrears of the allowance accumulated to that extent. She could not be expected to raise any loan on the strength of the monthly allowance which is only *ad interim* and not a sufficient security for Rs. 3,000 which would cover fifteen months' allowance, assuming that she starved herself all that time.

Therefore I do not agree with the view taken by the Court below or with the argument of the learned Government Advocate in the case that the means of the lady in February, 1923, was such as to withdraw the order already granted to her to sue as a pauper, or not to allow her to continue her suit *in forma pauperis*. Mr. Palit has been heard on behalf of F. A. Savis who applied to be made a party.

The application is, therefore, allowed with costs. The order of the Court below is set aside.

ROSS, J.—I agree.

Application allowed.