

1925

MEHER
BANO
KHANUMv.
SECRETARY
OF STATE
FOR INDIA.

C. C. GHOSE J. I agree with my learned brother, Mr. Justice Greaves, in the view which he has taken.

B. B. GHOSE J. I agree in the opinion expressed by my learned brother, Mr. Justice Greaves.

MUKERJI J. I also agree in the judgment delivered by my learned brother, Mr. Justice Greaves.

S. M.

APPELLATE CIVIL.

Before Suhrawardy and Duval JJ.

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May 5.

NARESH CHANDRA BOSE

v.

KRISHNA BHABINI DASÍ.*

Interest—Decree making no provision for interest—Execution Proceedings—Interest on arrears, if can be awarded.

Where in a decree for maintenance no provision for interest was made :—

Held, that in proceedings taken in execution of the decree, the decree-holder was not entitled to claim interest and his proper remedy was to bring a suit for damages for the detention of the decretal amount.

Seth Gokul Das Gopal Das v. Murli and Zalim (1), Mohamaya Prosad Singh v. Ram Khelwan Singh Thakur (2) referred to.

APPEAL by Naresh Chandra Bose, the judgment-debtor.

This appeal arose out of an application for the execution of a decree obtained by one Krishna Bhabini Dasi on account of maintenance allowance

* Appeal from Order No. 125 of 1923, against the order of Asutosh Pal, Subordinate Judge of 24-Parganas, dated March 2, 1923.

(1) (1878) I. L. R. 3 Cal. 602. (2) (1911) 15 C. L. J. 684.

due to her. The decree did not make any provision for payment of interest in case of arrears but the executing Court allowed interest at 6 per cent. per annum and also directed the maintenance to be calculated from a date prior to the institution of the suit, the judgment-debtor thereupon preferred the present appeal.

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Babu Karunamoy Ghose, for the appellant. It was not competent for the executing Court to allow interest; the decree having dismissed all claim for maintenance prior to the suit, the calculation should have been made from the date of suit. *Mosoodun Lall v. Bheekaree Singh* (1), *Seth Gokuldas v. Murli and Zalim* (2).

Babu Abinash Chandra Ghose, for the respondent. The decree holder is entitled to interest, at least in equity, for the money being wrongfully withheld, the maintenance for Chait 1322, actually fell due in Baisakh next, that is after the suit was instituted, and the Court rightly allowed it: *Mohamaya Prosad Singh v. Ram Khetawan* (3), *Lala Chahjmal v. Brij Chukan* (4).

SUHRAWARDY AND DUVAL JJ. This appeal by the judgment-debtor is directed against an order of the lower Court dated the 2nd March 1923. The decree-holder obtained a decree in respect of maintenance due to her from the estate of the judgment-debtor's father. The decree was for a certain sum but there was no mention in it that the plaintiff was entitled to interest on the sum decreed. The lower Court on the application of the decree-holder allowed her interest at the rate of 6 per cent. per annum on the arrears from the time they fell due and has also directed the

(1) (1866) (Misc. R.) 6 W. R. 109. (3) (1911) 15 C. L. J. 684.

(2) (1878) I. L. B. 3 Calc. 602. (4) (1895) L. R. 22 I. A. 199

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maintenance to be calculated from the 1st Chaitra 1322. The maintenance was fixed at Rs. 275 a month. The judgment-debtor had already before suit paid Rs. 200 on account of the month of Chaitra. The execution therefore related to Rs 75 for that month. The appellant contends that the order of the lower Court allowing interest on the decretal amount and allowing maintenance from the beginning of the month of Chaitra is bad in law.

With regard to the first point, it is hardly necessary to examine the law on the point as it has been settled by their Lordships of the Privy Council in the case of *Seth Gokul Das Gopal Das v. Murli and Zalim* (1). There their Lordships have said that where a decree is silent as to future interest, interest cannot be recovered by proceedings in execution of the decree, but it may be recovered as damages by a separate suit. It cannot be disputed that an execution Court is not entitled to go behind the decree and to vary it in execution proceedings. The right of a person standing in the position of the decree-holder to recover damages on account of detention of the money to which he is entitled is fully discussed in the case of *Mohamaya Prosad Singh v. Ram Khelawan Singh Thakur* (2). Mookerjee J. following certain decision of the Judicial Committee has held that where a certain sum of money is due to the plaintiff by way of malikana he is not entitled to claim interest but is entitled to claim damages in lieu of interest. The question arose in a suit. The plaintiff claimed interest on the principal money due to him as malikana. If a plaintiff is not entitled to claim interest on the sum due to him under claim similar to the decree-holder's claim even in a suit, it cannot be maintained that he is entitled to claim interest in

(1) (1878) I. L. R. 3 Calc. 602.

(2) (1911) 15 C. L. J. 684.

execution proceedings. The decree-holder must pursue the proper remedy which is by bringing a suit for damages for detention of the decretal amount. This question must therefore be decided in favour of the appellant.

The next objection to the order of the Court below is that the decree-holder is not entitled to maintenance from the month of Chaitra. It appears from an examination of the record that the husband of the decree-holder died some time on the 28th Chaitra 1316, and presumably she is entitled to maintenance from the date of his death month by month. In the decree passed the plaintiff claimed maintenance for the period before suit as well as for future maintenance. The decree disallowed the plaintiff's prayer for maintenance before suit and granted her a decree for future maintenance at the rate of Rs. 275 a month. The suit was instituted on the 10th April 1916 (28th Chaitra 1322). According to the reading of the decree the plaintiff is entitled to maintenance from the date of the institution of the suit namely, the 28th Chaitra 1322. She is accordingly entitled to maintenance for 3 days of Chaitra which will come to about Rs. 10. The order of the lower Court will therefore have to be modified. The decree-holder's claim for interest is disallowed and she will get her maintenance from the 28th Chaitra which we assess at Rs. 10. The appeal is accordingly allowed with costs, which we assess at two gold mohurs.

A. S. M. A.

Appeal allowed.

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