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duty to the sureties (under the agreement) required him to do, whereby the eventual remedy of the sureties themselves against the principal debtors must necessarily have been impaired. We are also of opinion that by allowing his decree to become incapable of enforcement, the respondent deprived the sureties of the benefit of the decree, which was a subsisting security in his hand at the time when the contract of suretyship was entered into, and the loss of this security, to the benefit of which the sureties were entitled, through the act of the creditor, would operate to the discharge of the sureties to the extent of the value of that security (s. 141, *id.*). In this view of the facts of the agreement and of the law applicable to them, we must set aside the decree of the lower appellate Court, and, allowing this appeal, dismiss the respondent's suit with all costs.

Appeal allowed.

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April 28.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

RAM SAHAI AND OTHERS (DECREE-HOLDERS) v. THE BANK OF BENGAL (JUDGMENT-DEBTORS).*

Execution of decree—Costs—Reversal of decree—Refund of costs recovered by execution—Interest.

A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed, at the rate of Rs. 6 per cent. per annum. The respondent objected to paying interest on the refund.

Held that the appellant was entitled to the interest claimed on the refund of costs. *Forester v. The Secretary of State for India in Council* (1) referred to.

ONE Gur Prasad sued for the sale of mortgaged property, impleading the mortgagor and the Bank of Bengal, which had purchased the mortgaged property at an execution-sale. The Subordinate Judge of Cawnpore, by whom the suit was tried, dismissed the claim for the sale of the property, awarding the Bank its costs, with interest. The Bank recovered these costs, amounting to Rs. 642, that is, Rs. 633 principal and Rs. 9 interest, in execution of the decree. The plaintiff appealed from the decree of the

* First Appeal No. 41 of 1886, from an order of Munshi Rai Kulwant Prasad, Subordinate Judge of Cawnpore, dated 14th December, 1885.

(1) I. L. R., 3 Cal., 161.

Subordinate Judge to the High Court, which, on the 4th May, 1885, gave the plaintiff a decree for the sale of the property, and awarded him costs. The heirs of the plaintiff applied to obtain in execution of the High Court's decree the refund of the sum paid to the Bank under the decree of the Court of the Subordinate Judge on account of costs—that is to say, of the sum of Rs. 642, together with interest at the rate of Rs. 6 per cent per annum. The Bank objected to paying interest on the refund claimed, and this objection was allowed by the lower Court. The decree-holder appealed to the High Court.

Pandit *Nand Lal* and Pandit *Moti Lal*, for the appellants.

Pandit *Nand Lal* relied on *Jaswant Singh v. Dip Singh* (1) and *Forester v. The Secretary of State for India in Council* (2).

• Mr. G. T. *Spankie*, for the respondent, referred to *Rodger v. The Comptoir d'Escompte de Paris* (3) as expressly deciding the point whether interest should be granted on refund of costs. The cases cited for the appellant are not in point. The first does not relate to costs, and in the second *Rodger v. The Comptoir d'Escompte de Paris* is distinguished.

BRODHURST and TYRRELL, JJ.—Apart from authority, which is strong and clear on the general question of restitution, we are satisfied that, in common justice and fairness, the appellants are entitled to the moderate interest they claim on their money, which has now to be refunded to them by the respondent.

This consists of a principal sum of Rs. 642, of which Rs. 9 were interest, recovered wrongfully in a former stage of the litigation by the respondent from the appellants as compensation for the respondent's costs. The Court below has not understood the rule laid down in *Forester v. The Secretary of State* (2). It is of course true that a Court executing a decree for costs cannot award interest on those costs not given by the decree. But the case before us is quite different. The question is not of awarding interest to the successful appellant on the costs given him by the decree under execution, such interest being not awarded on the decree. The question is, whether interest may or not be given on the sum

(1) I. L. R., 7 All. 432.

(2) I. L. R., 3 Calc., 161.

(3) 7 Moo. P. C. C., N. S., 314; L. R., 3 P. C. 465.

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wrongly obtained, as described above, by the respondent from the appellant, restitution of which is now secured by the operation of the final decree in the case. We allow the appellant's claim and decree his appeal with costs.

Appeal allowed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1886
April 30.

JUGAL KISHORE (PLAINTIFF) v. HULASIRAM AND ANOTHER (DEFENDANTS)*.

Partnership—Joint Hindu family—Suit by one member for debt due to family firm.

In a suit for money lent, brought by the father of a joint Hindu family who carried on jointly an ancestral money-lending business, the plaintiff stated, in examination, that he had ceased to take an active part in the management of the affairs of the firm, and that the control of its business was in the hands of his sons, whom he described as "maliks (1)."

Held that, under the circumstances, the plaintiff could not maintain the suit in his individual capacity, and without joining his sons as plaintiffs with him, his sons being his partners in the ancestral business, and he not being the managing member or proprietor.

THE plaintiff in this case, Jugal Kishore, and his five sons were members of a joint Hindu family, and carried on jointly an ancestral money-lending business. The plaintiff sued the defendants for money lent by the firm to them. The plaintiff was examined, and stated that he had made his sons the owners of the firm, retaining his interest in it to profits and losses, and that by reason of increasing infirmities he had ceased to take an active part in the management of the affairs of the firm, and that the active partners were his sons. Upon this the defendants objected that the plaintiff was not competent to sue alone, and his sons should have been joined as plaintiffs, and not having been so joined, the suit should be dismissed. The Court of first instance disallowed this objection, and trying the suit on the merits, dismissed it. The plaintiff appealed, and the defendants contended in support of the decree that the suit ought to have been dismissed, "because, on the showing of the plaintiff, the contract was made with his firm, and his partners were not parties to the litigation."

* Second Appeal No. 1350 of 1885, from a decree of T. R. Redfern, Esq., District Judge of Agra, dated the 4th May, 1885, affirming a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Agra, dated the 24th December, 1884.

(1) "Proprietors."