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relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction might have been had therein, may be had in the Court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit."

The suit in the section referred to is a Small Cause Court suit, and the proceeding in the section is a proceeding in the Small Cause Court suit. The result is, according to our construction of the section, that when, by reason of a Small Cause Court ceasing to exist a suit is transferred to another Court, the proceedings still continue to be Small Cause Court proceedings, and for this purpose the Court to which the transfer is made must be treated as if it was a Court of Small Causes having jurisdiction to hear the suit transferred to it. In other words, whatever the intention of the Legislature was, we read s. 35 of Act IX of 1887 in the same sense that we read the concluding paragraph of s. 25 of the Code of Civil Procedure. With this expression of opinion the record will be returned to the Court of the Subordinate Judge of Saháranpur.

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February 11.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF) *v.* BHAGWANTI BIBI AND OTHERS (DEFENDANTS).*

Suit in formâ pauperis—Appeal—Right of Government to appeal in respect of Court-fee on portion of plaintiff's claim dismissed—Civil Procedure Code, ss. 411, 412.

In a suit *in formâ pauperis* the District Judge decreed the plaintiff's claim in part and dismissed it in part, but omitted to make any provision for payment to Government of the court-fee on the portion which was dismissed. The Secretary of State, not having been a party to the litigation in the Court below, then preferred an appeal in respect of the court-fee on that portion of the plaintiff's claim which had been dismissed.

Held that such an appeal would lie; though the more suitable procedure would have been for the Government to have applied, through the Collector, to the Court of

* First Appeal No. 125 of 1889 from a decree of W. T. Martin, Esq., District Judge of Mirzapur, dated the 16th March 1889.

first instance to review its judgment and to repair the omission in its decree. *Janki v. The Collector of Allahabad* (1) referred to.

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THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BHAGWANTI BIBI.

Musammat Bhagwanti Bibi brought a suit *in formâ pauperis* against Hardeo Das, Ram Kishan, Murlidhar and Binda Prasad, three brothers and a nephew of her deceased husband, for the recovery of certain ornaments which she alleged to have been wrongfully retained by the defendants, and also for maintenance at the rate of Rs. 20 per mensem, the same being interest on a sum of Rs. 2,000, which, according to the plaintiff, had been left for her use in the defendant's shop under the will of her father-in-law, Sohan Lal. She also claimed Rs. 812 as arrears of interest on the said sum. The defendants denied the right of the plaintiff to bring her suit *in formâ pauperis*. They also pleaded that the will set up by the plaintiff was not binding on them, that they never had possession of any of the plaintiff's ornaments, and that the plaintiff had forfeited her rights to maintenance by reason of her unchastity, or if she was entitled to any, interest at the rate of 6 per cent., was sufficient. The Court of first instance found in favor of the validity of the will, and, fixing the rate of interest at 9 per cent. gave the plaintiff a decree for maintenance from the date of suit at the rate of Rs. 15 *per mensem*, dismissing the claim for arrears of maintenance and for recovery of the jewels. In framing its decree, however, the Court omitted to provide for the payment to Government of the court-fee on that part of the plaintiff's claim which had been dismissed.

An appeal was accordingly filed on behalf of Government to recover the court-fee on such portion of the plaintiff's claim.

Munshi *Ram Prasad* for the appellant.

The respondent was not represented.

STRAIGHT, J.—This appeal is of a very unusual character, the Secretary of State, appellant, having been no party to the litigation below and his right to appeal only constructively arising under the terms of ss. 411 and 412 of the Code of Civil Procedure. The respondent, Musammat Bhagwanti, who does not appear and is not

(1) I. L. R., 9 All., 64.

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represented, brought a suit against Hardeo Das, Ram Kishan, Murlidhar and Binda Prasad for recovery of arrears of maintenance amounting to Rs. 812, for restoration of ornaments withheld from her, valued at Rs. 4,600, and for a declaration of her right to future maintenance at the rate of Rs. 15 per mensem. The suit was instituted by the plaintiff as a pauper on the 2nd May 1888, and the learned Judge, having dismissed the first two items of the plaintiff's claim, gave her Rs. 172-8-0, being maintenance at the rate of Rs. 15 per mensem from the date of the suit to the date of the decree, and declared her right to maintenance thereafter at the rate of Rs. 15 per mensem. The decree, to be precise, was expressed thus :—"That Rs 172-8-0, due to the plaintiff on account of the maintenance from the 2nd April 1888, the date of the suit, to this day, be allowed to the defendants as the costs due to them in proportion to the amount dismissed, or Rs. 5,412, but that the defendants do pay out of the plaintiff's costs such amount as is payable by the plaintiff to the Government. Or in other words, a decree be passed in favor of the plaintiff for recovery of maintenance from this day at Rs. 15 per mensem, defendants being entitled to no costs. The defendants shall pay the plaintiff's costs in proportion to the amount decreed."

The effect of this decree is that the measure of the plaintiff's costs was declared to be the amount payable by the plaintiff to Government, and the measure of the defendants' costs was declared to be Rs. 172-8-0 arrears of maintenance decreed. It will thus be seen that in the decree of the learned Judge no provision was made for payment by any person to the Government of the court-fee on that portion of the plaintiff's claim which was dismissed, namely, Rs. 5,412, on which the court-fee would be Rs. 250. It is this omission in the decree of the learned Judge which is the subject of complaint in this appeal by the Secretary of State. I am constrained to say that in my opinion a most inconvenient course has been adopted, and that, instead of coming to this Court with an appeal, the proper method would have been for the Secretary of State, through the Collector of Mirzapur, to apply to the learned

Judge who passed the judgment and decree, to review his judgment and reframe the decree in such a way as to effect the object at which this appeal is aimed. Looking to the language of s. 411 of the Code of Civil Procedure, read with s. 412, I am not prepared to say that the Secretary of State cannot properly be regarded as a party to the litigation so as to be in a position to prefer such an appeal as that which is before us. In the case of *Janki* v. *The Collector of Allahabad* (1) my brothers Brodhurst and Tyrrell held that in execution-proceedings arising out of a pauper suit the Secretary of State who has obtained an order under s. 411 may be regarded as a party to the suit within the meaning of s. 244. I am not prepared to hold that that was an erroneous view, and, adopting the principle therein enunciated, it seems to me therefore that it was open to the Secretary of State, as being a party aggrieved by the decree below, to prefer this appeal.

When, however, I come to deal with the policy and propriety of such an appeal, I can only remark that I think we might well have been spared it. Musammat Bhagwanti apparently is a Hindu widow with such small means that she was constrained to come as a pauper to obtain the assistance of the Court for the purpose of wresting from the hands of the male members of her husband's family the small allowance of maintenance which has been decreed to her. The amount involved is, after all, to Government a very trifling one, and all the delay and expense that has been incurred in preferring this appeal might well have been avoided. However, we have no alternative but to administer the law as we find it. The terms of s. 412 are, in my opinion, mandatory, and it was obligatory upon the learned Judge below when he passed his decree to provide in that decree for payment by the plaintiff of the court-fees upon that portion of her claim which was dismissed, namely, Rs. 250. The result of this view is that the plaintiff will have to pay many months of her small maintenance allowance of Rs. 15 a month before she is quit of her liability to Government. Looking to her pauper position, I cannot help saying that I think the case was one

(1) I. L. R. 9 All. 64.

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in which the Government might have refrained from preferring this appeal. The appeal is decreed, and the judgment and decree of the Court below are modified in this way that a declaration must be inserted in the decree to the effect that the sum of Rs. 250, court-fee payable in respect of that portion of the plaintiff's claim which was dismissed, is due from the plaintiff, Bhagwanti, to the Secretary of State, who will recover it in the same manner as the costs of suit are recoverable under a decree. The other defendants to the suit have been cited here as respondents for no earthly purpose or reason that I can see, because under s. 412 no power existed in any Court to order them to pay the costs of that portion of the claim of the pauper plaintiff which was dismissed. The appeal is decreed in part, *quâ* Musammat Bhagwanti, but without costs, and the decree will be amended in the manner I have indicated. As to the other respondents, the appeal is dismissed with costs.

TYRRELL, J.—I concur.

Appeal decreed quâ *Musammat Bhagwanti.*

Appeal dismissed quâ *the other respondents.*

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March 11.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SRI NIWAS RAM PANDE (PLAINTIFF) v. UDIT NARAIN MISR AND ANOTHER (DEFENDANTS). *

Mortgage-bond—Interest post diem—Damages—Act IV of 1882 (*Transfer of Property Act*) *ss.* 67 *and* 86.

Interest *post diem* on a mortgage-bond for a term certain and containing no express provision as to the payment of *post diem* interest is nothing else than damages for the breach of a contract.

Such interest cannot be regarded as a mere continuance of the *ad diem* interest due on the mortgage-bond, and, as such, as forming an integral part of the mortgage-debt, nor even as resembling such interest and forming a "charge" upon the property, though nominally damages. In respect of *post diem* interest given by way of damages no distinction is to be drawn between simple bonds and mortgage-bonds. *Mansab Ali* v. *Gulab Chand* (1) and *Bhagwant Singh* v. *Daryao Singh* (2) followed; *Cook*

* First appeal No. 203 of 1888 from a decree of Babu Brij Pal Das, Subordinate Judge of Gorakhpur, dated the 7th September 1888.

(1) I. L. R. 10 All. 85. (2) I. L. R. 11 All. 416.