
(1877) 04 PRI CK 0001

Privy Council

Case No: None

Baron Forester and
Wife (Widow of D. O.
Dyce Sombre) and
Another

APPELLANT

Vs

Secretary of State For
India In Council

RESPONDENT

Date of Decision: April 18, 1877

Citation: (1877) 4 IndApp 137

Hon'ble Judges: James W. Colville, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

James W. Colville, J.

1. These appeals arise out of proceedings taken in the Chief Court of the Punjab to give effect to an Order of Her Majesty in Council made, on the 5th day of February, 1873. That order was designed to determine finally a litigation which had subsisted for a great many years, first, between the committee of the late Mr. Dyce Sombre, and, after the death of that gentleman, between his representatives and the Government of India, touching the liability of the Government for a seizure of certain arms and military stores effected upon the death of the Begum Sumroo. It was a peculiar order, because, after reversing the decisions of the Indian Courts, declaring the seizure to have been wrongful, and ascertaining the value of the arms and munitions of war, and the amount of the damages to be paid by the Defendants to the Plaintiffs, it proceeded, with the consent of the counsel on both sides, to direct payment of that sum to be made in this country, leaving nothing to be carried out in India except the final direction as to costs, which was, " that the costs of the Appellants in the Chief Court of the Punjab, and in the Court of the Commissioner at Hissar and in the Court of the Deputy Commissioner of Delhi, be taxed and ascertained by the proper officers of those Courts respectively, and that the amount of the costs of the Appellants in all the Courts in India be paid to the Appellants in India by the Respondent."

2. After various proceedings had in the Chief Court of the Punjab the order under appeal was made. The following are the material passages in it: " The costs taxed and ascertained to have been incurred in India by the Plaintiffs, Appellants, which shall be payable by the Defendant, Respondent, amount as per memorandum at foot to Rs. 12,354 12a., but no interest is allowed on such costs." And, " The Court further orders and decrees that the Defendant shall refund to the Plaintiffs the sum of Rs. 1014, with interest thereon, from the 11th of September, 1849, to date of payment, at the rate of 12 per cent, per annum, and a further sum of Rs. 5309, with interest thereon, from the 4th of August, 1865, to date of payment, at the rate of 12 per cent, per annum."

3. Against this order the appeal and the cross appeal have been brought. The appeal of the Plaintiffs is in effect that interest ought to have been allowed upon the Rs. 12,354 12a. in a certain way. The Judges of the Chief Court of the Punjab had held that, in executing the order of Her Majesty in Council, they were not at liberty to give any interest upon the costs, because the order contained no direction for the payment of interest in respect of such costs; and it may further be observed that the mode in which the Plaintiffs in the Court below sought to have the interest which they claimed computed was a very peculiar one. They asked to have the gross principal amount of the Plaintiffs' costs, viz., the Rs. 12,354 12a., divided into four sums, and to have interest computed on each of such sums from the date of the decree of the Court wherein the costs which it represented had been incurred. So far as their Lordships are aware, there is no instance of such a course having been adopted, certainly none has been brought before them during the somewhat lengthy argument which has taken place upon these appeals. The committee that made the report to Her Majesty upon which the Order in Council was made, if it had intended to place, by means of some such direction, the parties in the situation in which it considered they would have stood if everything had been done rightly in the lower Courts, would of course have been competent to do so; but that a subordinate Court executing an Order in Council which is silent upon interest, is at liberty to interpolate such a very special direction into that order is a proposition which seems to their Lordships to be wholly unsustainable. It is not necessary for their Lordships to consider from what other date interest should be calculated, because they are of opinion that the Chief Court of the Punjab is right in its conclusion; that where the Order in Council is silent as to interest upon the costs decreed, the Judge of the Indian Court which has to execute the decree has no power to direct payment of those costs with interest.

4. The learned Counsel for the Appellants relied upon what they , said had been the course of practice in India. In determining what is the existing practice in India, their Lordships think they ought first to consider what are the statutory provisions which govern the present procedure of the Courts in India, Those which are material to the present question are to be found in the 10th and 11th sections of Act XXIII. of 1861. The words of the 10th section are, " When the suit is for a sum of money due to the Plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on

the principal sum, adjudged from the date of suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of suit, with further interest on the aggregate sum so adjudged, and on the costs of the suit from the date of the decree to the date of payment." This clause seems to give the Courts a discretionary power to allow interest on costs, rather than to make it imperative upon them to do so. The learned Counsel for the Plaintiff's, however, relied on certain decisions of the High Court of Bengal, which they said established that an order for costs necessarily implied that the party in whose favour they were decreed might take out execution for them, with interest from the date of the decree to the date of payment. It appears, however, that the more recent and authoritative decisions upon the 11th section of Act XXIII. of 1861 are the other way. It is sufficient to mention the case reported in the 6th Weekly Reporter at page 109, which was a decision of the Full Bench of the High Court of Bengal; and that before Mr. Justice Bittleston, which is reported in the 3rd Madras High Court Reports, page 421. Those cases seem to have established as to decrees of Indian Courts that the Judges of the subordinate Courts executing those decrees have no right to allow interest unless the decree which is to be executed has specifically directed the allowance of that interest. It was said that these cases or some of them related to the principal moneys decreed, or to mesne profits; but so far from there being tiny authority in favour of a distinction between these and costs, the case of *Rodger v. The Comptoir d'Escompte de Paris* 7 Moo. P.C. (N.S.) 331 : Low Rep. 3 P.C. 465, is an authority for the proposition that a claim for interest on costs in that respect is less favoured than a claim for interest on the principal money decreed. Since the before-mentioned cases have been determined as to the practice of the Courts of India and the powers of the Judges executing decrees of those Courts, the power of a subordinate Court executing an order of Her Majesty in Council has also been considered in the two cases cited from the Weekly Reporter, in which judgment was given by Mr. Justice Mitter; and it appears that as to Orders in Council, as well as to decrees of the Indian Courts, the existing practice is that interest cannot be given in execution unless it is specially directed to be given.

5. It appears to their Lordships that the principle of the decisions which have established this practice is sound, and that the Plaintiffs have failed to shew that the order made by the Chief Court of the Punjab is erroneous, in that it has refused to allow interest on the sum of Rs. 12,354 12a.

6. Their Lordships have now to consider the cross appeal. The first point taken on that appeal is that the Defendants have been erroneously charged so much of the Rs. 12,354 12a. as consists of costs which were incurred in the Delhi Court before Mr. Gubbins, and were dealt with by the Order in Council of the 3rd of February, 1858. Now, that prior Order in Council came about in this way: When the suit was first brought in the Zillah Court of Delhi by the committee of the lunatic, Mr. Dyee Sombre, Mr. Gubbins, the Judge of that Court, dismissed it on the ground that the claim was barred by the Statute of Limitations. His decision was confirmed on appeal by the Sudder Court of Agra. Against

both decrees there was an appeal to Her Majesty in Council. The Judicial Committee thought that the decisions were erroneous; reversed them; and directed that the costs of the suit, so far as they had been occasioned by the improper plea of the Statute of Limitations, should be paid by the Defendants to the Plaintiffs. That order for payment was never wholly carried out. It was partially carried out, because the costs incurred in the Appellate Court were paid; but the costs incurred in the Court of first instance--the Court of Mr. Gubbins--do not appear to have been paid; and it is contended on the part of the Defendants now that those costs cannot properly be given as part of the costs payable under the Order in Council of 1873.

7. It appears to their Lordships wholly unnecessary to consider the arguments which have been addressed to them touching the plea set up in the Courts of the Punjab, that the claim for these unpaid costs was barred by the Statute of Limitations, or the orders passed upon it. Whether it would have been proper for their Lordships in any case to express an opinion as to the merits or effect of those orders, in such a proceeding as this, is very questionable; but it appears to their Lordships that those orders, taking them at their highest, could only bar the remedy given by the Order in Council of 1858 for the recovery of those costs; and that upon the true construction of the order of 1873, it was the intention of this Committee to give the Plaintiffs the whole costs of the suit, so far as they had not been paid, whether incurred in the three Courts in which they are directed to be taxed, or in the Court of Mr. Gubbins. The ordering part of the Order in Council directs, not only that the costs in the three specified Courts are to be taxed, but that the amount of the costs of the Appellants in all the Courts in India are to be paid to the Appellants in India by the Respondents; and the judgment of the Committee on which this order was drawn generally expresses that the Plaintiffs were to receive their costs of the suit. It also appears that when this matter was discussed in the Court below, Mr. Plowden, who appeared for the Defendant, consented to the costs in question being ascertained in that Court, and that thereupon the Court made an order that they should be included in the Rs. 12,354 12a. and paid by the Defendant to the Plaintiffs. This seems to their Lordships to have been a very proper concession on the part of Mr. Plowden; inasmuch as it was equitable that these costs should be paid to the successful party; and reasonable that there should be one order made for the payment of all the costs of the suit, instead of leaving open any questions touching the rights of the Plaintiffs under the Order in Council of 1858.

8. Their Lordships, therefore, feel no doubt in affirming the judgment of the Chief Court of the Punjab upon this point.

9. The next question raised by the cross appeal was with reference to the refund of the sum of Rs. 1014. There were three points made upon this item: one, that the principal had already been repaid; another, that it was subject to the same objection as that which has just been disposed of with respect to part of the Rs. 12,354; and the third, that it ought not to have been ordered to be refunded with interest. Of the supposed repayment there is no evidence whatever. The Senior Judge of the Chief Court of the Punjab, says: "

The Court, referring to annexure D., has now before it a sealed copy of the order of Mr. Gubbins, dated the 11th of September, 1849, shewing that the sum of Rs. 1014 was paid by the Plaintiffs for the Defendant's costs in that year;" and no suggestion that it had ever been refunded seems to have been made before him. As to the second point, it is sufficient to say that the general obligation of Government to refund whatever they had received in respect of the costs awarded by the erroneous decrees, although there was no positive direction for a refund in the Order in Council, having been admitted, and properly admitted, the objection that this particular sum was paid for costs incurred in Mr. Gubbins' Court, cannot, for the reasons already given, be allowed to prevail.

10. Upon the question whether this sum, and the further sum of Rs. 5309, ought to have been ordered to be refunded with interest, their Lordships are of opinion that this case stands clear of what is ruled in the final part of Lord Cairns' judgment in *Rodgers v. The Comptoir d'Escompte de Paris* 7 Moo. P.C. (N.S.) 331 : Law Rep. 3 P.C. 465, because they find that in the proceedings of the Chief Court of the Punjab there was a submission to the discretion of the Court, whether interest on these sums should be allowed or not. With the exercise of that discretion in the particular case their Lordships are not disposed to interfere, considering that it is but equitable that the party who has received money under a decision afterwards found to be wrongful should account for that money with interest.

11. It has, however, been admitted at the Bar, that there has been an error in the mode in which the interest on the Rs. 5309 has been directed to be computed, by reason of that sum having been received in three different portions, and at three different dates. It will be necessary to correct this error, but as it ought to have been pointed out to the Court below, the variation in the order will not affect their Lordships' order as to the costs of the appeal.

12. Their Lordships will therefore humbly advise Her Majesty to vary the order under appeal so far as it directs interest at the rate of 12 per centum per annum on the sum of Rs. 5309, to be computed and paid from the 4th of August, 1865, by directing that as to Rs. 3159, part of the said sum of Rs. 5309, such interest be computed and paid from the 27th of August, 1867; that as to Rs. 1150, other part of the said sum, such interest be computed and paid from the 27th of August, 1867; and that as to the further sum of Rs. 1000, being the remainder of the said sum, such interest be computed and paid from the 4th of August, 1865; but, subject to such variations, to confirm the said order under appeal, and to dismiss both the appeal and cross appeal. Both parties being thus found to be in the wrong, there will be no costs of the appeals on either side.