

such inquiry as may be necessary to ascertain the truth and cause the record to be amended accordingly. This section in our judgment does not confer upon the Collector of the District or Assistant Collector any greater powers than what a settlement officer would have under section 64 of that Act. By section 63 the settlement officer is to specify in the record of rights all particulars relating to tenants of every description. By section 64 all entries in the record made under section 63 shall be founded on the basis of actual possession, and all disputes regarding such entries shall be investigated and decided on that basis. The inquiry referred to in section 102 is, in our opinion, the inquiry which in the case of disputes a settlement officer is competent to make under section 64 on the basis of actual possession. That section further provides that persons not in possession, but claiming a right to be so, shall be referred to the proper Court. The proper Court mentioned in the section evidently must be, as observed in *Dukhna Kunwar v. Unkar Pande* (1), a Court other than the Court of the settlement officer, and where the Revenue Court would not have jurisdiction to afford relief it must be the Civil Court. An adjudication on the basis of possession, which an adjudication under section 102 must necessarily be, cannot, in our opinion, operate as *res judicata* on a question of title. In our judgment this appeal is untenable. We dismiss it with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Louis Kershaw, Kt., Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt, and Mr. Justice Aikman.

MAQBUL FATIMA (JUDGMENT-DEBTOR) *v.* LALTA PRASAD AND ANOTHER
(DECREE-HOLDERS)*

Execution of decree—Construction of decree—Act No. IV of 1882 (Transfer of Property Act), section 88—Civil Procedure Code, Sections 219, 206—Costs—Decree apparently awarding costs twice.

A decree drawn up under section 88 of the Transfer of Property Act, 1882, was properly framed in accordance with the requirements of that section, but,

* First Appeal No. 251 of 1897, from an order of Babu Madho Das, Subordinate Judge of Bareilly, dated the 7th August 1897.

(1) I. L. R., 19 All., 452.

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in addition to the prescribed contents of such a decree, contained a clause to the following effect:—"It is further ordered, that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court."

Held, that this latter clause was merely a formal compliance with the provisions of the Code of Civil Procedure, and was not intended to be a direction for the recovery of costs personally from the judgment-debtor. *Chiranji v. Moti Ram* (1) on this point over-ruled.

IN this case the respondents decree-holders had obtained a decree under section 88 of the Transfer of Property Act, 1882, on the 27th August 1894, which decree was confirmed by the High Court on appeal on the 22nd of April 1897. The decree thus confirmed was, as to the main portion of it, drawn up in strict accordance with the terms of section 88 of the Transfer of Property Act; but, in addition to the matters provided for by that section, contained a further order to the effect that "defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8-0, the amount of costs incurred by them in this Court." The decree-holders caused the mortgaged property to be sold by auction, and, the proceeds of the sale being insufficient for the realization of the whole of the decretal amount, they subsequently applied for a decree under section 90 of the Transfer of Property Act, 1882, that application was dismissed. The decree-holders subsequently applied for execution of their decree as to costs by realization of the costs awarded to them from the person of the judgment-debtor. The Court of first instance (Subordinate Judge of Bareilly) disallowed the judgment-debtor's objections and made an order granting execution for the costs of both Courts against the judgment debtor personally. Against this order the judgment-debtor appealed to the High Court.

Maulvi *Ghulam Mujtaba* for the appellant. The decree-holders claim to recover their costs from the judgment-debtor personally is concluded by the order of the Subordinate Judge on their application for a decree under section 90 of Transfer of Property Act. The decree-holders in that application

asked for a personal decree as to costs and it was refused them: they cannot therefore now get a personal decree for costs.

Further the award of Rs. 876-8-0 as costs by the decree of the High Court, which is now the only decree in the suit, was made "as awarded in the decree of the lower appellate Court," that is to say the costs were made a portion of the mortgage money as required by section 88 of the Transfer of Property Act.

The decree, moreover, as drawn up is ambiguous, and, that being so, it must be construed, if possible, as a decree in accordance with law. As the judgment directs a decree to be drawn up in accordance with the terms of section 88 of the Transfer of Property Act the decree must be construed as a good decree under that section and as awarding costs in the matter prescribed thereby, namely, payable out of the mortgaged property and not by the judgment-debtor personally.

Mr. *D. N. Banerji* (with whom Mr. *W. K. Porter*) for the respondents. The sole question is whether the court executing the decree can go behind it. The language of this decree is plain, and whether rightly or wrongly the decree has awarded costs separately. There is nothing in the law to show that the Court cannot award costs separately, *i.e.*, without including them in the mortgage money, and in any case the Court has done so. The judgment-debtor never appealed from the decree of the first Court on the point of costs, and the High Court has now no power to prevent execution of that decree according to its terms which are not ambiguous.

The Judgment of the majority of the Court (*KERSHAW C. J., BLAIR, BANERJI AND AIKMAN JJ.*), was delivered by *BANERJI, J.*:-

This appeal arises out of an application for the execution of a decree presented in the Court of the Subordinate Judge of Bareilly by the respondents decree-holders. They brought a suit for sale on a mortgage, and a decree was made in their favour under section 88 of the Transfer of Property Act on the 27th of August 1894. An appeal was preferred from that decree to this Court, which was dismissed on the 22nd of

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April 1897. The decree-holders caused the mortgaged property to be sold by auction, and the proceeds of the sale being insufficient for the realization of the whole of the decretal amount, they subsequently applied for a decree under section 90 of the above-mentioned Act. That application was dismissed. Their present application, which has given rise to this appeal, was one for the realization of the costs awarded to them by the decree of the Court of first instance and of the appellate Court from the person of the judgment-debtor. As regards the costs of the appellate Court, there is no controversy in this appeal. As for the costs of the Court of first instance, it is contended on behalf of the judgment-debtor appellant that, under the terms of the decree passed in favour of the respondents, they are not entitled to realize the costs of that Court otherwise than out of the mortgaged property. The Court below has over-ruled that objection, and it has been repeated in the appeal before us. No doubt a Court executing a decree is bound to give effect to the decree as it finds it. We have therefore to see whether in this case the decree awards to the decree-holders the costs of the suit against the defendant personally. The decree, as we have said above, is one under section 88 of the Transfer of Property Act. Under the terms of that section, read with section 86, the decree should order, that an account be taken of what would be due to the mortgagee for principal and interest on the mortgage and for his costs of suit, if any, awarded to him, on the date to be fixed in the decree, and in the event of failure of payment of such amount of principal, interest and costs, that the mortgaged property should be sold. A decree drawn strictly in accordance with the provisions of section 88 cannot direct the costs of the suit to be recovered otherwise than out of the mortgaged property. The first portion of the decree in this case was in strict compliance with the requirements of section 88 of the Transfer of Property Act. It declared that on the 27th of February 1895, Rs. 11,866-8 was to be payable to the plaintiffs, *viz.*, Rs. 10,990 on account of principal and interest, and Rs. 876-8 on account of costs. The decree, however,

contains a further direction in the following terms :—" It is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court." It is contended that the second direction in the decree to which we have referred is independent of the order contained in the first portion of the decree as to the inclusion of costs in the amount on failure to pay which the mortgaged property could be sold, and it is urged that under this last clause the mortgagees plaintiffs are entitled to recover the costs over again from the defendants personally. We are unable to accede to this contention. We do not think that we should be justified in construing this decree in a manner which would make it an inequitable decree, which the decree in this case must be if, as is contended, it directs the same amount of costs to be paid twice over. In our opinion there is no ambiguity in the decree, and the second provision in it as to payment of costs is only a repetition of what is already contained in the first portion of the decree about the realization of costs out of the mortgaged property. Section 219 of the Code of Civil Procedure provides that the judgment shall direct by whom the costs of each party are to be paid, and by section 206 it is directed that the decree shall state the amount of costs incurred in the suit, and by what parties and in what proportions such costs are to be paid. In our opinion the clause in the decree relied on by the decree-holders is only a formal compliance with the provisions of the Code of Civil Procedure. It was never intended to be a direction for the recovery of costs personally from the debtor. In this view we are unable to agree with the observations contained in the judgment of this Court in *Chiranji v. Moti Ram* (1). Even if there were any ambiguity in the decree, it would be the duty of the Court to construe the decree by the light of the judgment. The judgment in this case does not in the slightest degree indicate that the Court intended to award costs against the defendant personally. The claim in the plaint was only for a decree for the

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sale of the mortgaged property, and the judgment directed that a decree should be prepared according to section 83 of the Transfer of Property Act. In our opinion the judgment, so far from indicating, negatives an intention to make the defendant personally liable for the amount of the costs. We may observe that the decree of the appellate Court does not in any way affect the question before us, as it provides that the costs of the Court of first instance should be paid in the manner awarded in the decretal order of the said Court. We are in full accord with the opinion expressed by our brother Burkitt in his judgment in First Appeal No. 54 of 1894, decided on the 10th of August, 1894, which dealt with a decree couched in similar terms. For the above reasons we are of opinion that the decree-holders are not entitled to realize the costs awarded by the decree of the Court of first instance from the judgment-debtor personally, and we hold that this appeal must prevail.

BURKITT, J.—This case was referred to a Full Bench at my request, because, being one of the Judges responsible for the judgment in the case of *Chiranji v. Moti Ram* (1) I felt dissatisfied as to the correctness of the rule therein laid down. I now desire to say that I fully concur in the judgment which has just been delivered. On consideration I am of opinion that in that case we were wrong in holding that the lower appellate Court took a portion of the main decree of the Court of first instance out of its proper position, and in a way constituted it a subsidiary decree for costs capable of execution against the persons of the mortgagors. I think we were wrong on that point, and that all that was intended to be done was to fill up as a matter of routine certain columns in the printed form of decree, and not in any way to modify the meaning or effect of the actual decree.

BY THE COURT.—The order of the Court is, that this appeal be allowed, and that the order of the Court below be varied to this extent that the application of the decree-holders for the

recovery of the costs of the Court of first instance is dismissed.
The appellant will get her costs of this appeal.

Appeal decreed.

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Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Aikman.

QUEEN-EMPRESS v. BRIJ NARAIN MAN.*

Criminal Procedure Code, section 339—Pardon—Tender of pardon by Magistrate inquiring into a Criminal case—Pardon withdrawn after some of the witnesses for the prosecution had been examined—Effect of withdrawal of pardon at that stage.

A Magistrate inquiring into a charge of dacoity tendered a pardon to one of the accused persons. The pardon was accepted, and the person to whom it was tendered was examined as a witness for the prosecution. Subsequently, and after certain other witnesses for the prosecution had been examined the Magistrate, being of opinion that the person to whom pardon had been tendered had not made a full disclosure of the facts of the case, withdrew the pardon, put the person to whom it had been tendered back in the dock, and ultimately committed him along with the other accused to the Court of Session. *Held*, that the commitment of the person whose pardon had been withdrawn must be quashed, inasmuch as he had had no opportunity of cross-examining the witnesses for the prosecution who were examined before his pardon was withdrawn; but that it was not necessary that, if a fresh commitment could be made in time, his trial before the Court of Sessions should be postponed until the trial of his co-accused had been completed. *Queen-Empress v. Sudra* (1) and *Queen-Empress v. Mulua* (2) referred to.

THE facts of this case sufficiently appear from the order of the Court.

Mr. S. S. Singh and Pandit Madan Mohan Malaviya, for the applicant.

The Officiating Government Advocate (Mr. A. E. Ryves) for the Crown.

KERSHAW, C. J. and AIKMAN, J.—This is an application asking this Court to quash a commitment. The applicant Brij Narain Man was implicated in a dacoity: a pardon was tendered

* Criminal Revision No. 345 of 1898.

(1) I. L. R., 14 All., 336.

(2) I. L. R., 14 All., 502.