

I prefer to look upon the case as falling under article 144, and to hold that the mortgagees have acquired by prescription as against the beneficiaries a right *pro tanto* adverse so as to entitle them to retain possession of the property until they are redeemed. The ruling relied on by the learned counsel for the respondent, *Piran v. Abdool Karim* (1), is in his favour, but it appears to me that the learned Judge who decided that case has overlooked the fact that the *ratio decidendi* of the Privy Council decision in *Jewan Dass Sahoo v. Shukh Kabeer-ood-deen* (2), has disappeared with the enactment of Act No. XX of 1863.

For the above reasons I concur in the decree proposed.

By THE COURT.—The order of the Court is that the appeal is decreed with cost. The decrees of the lower appellate Court is set aside with costs, and that of the Court of first instance restored.

Appeal decreed.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

MUL CHAND AND OTHERS (DECREE-HOLDERS) v. RAM RATAN AND ANOTHER
(JUDGMENT-DEBTORS).*

Civil Procedure Code, section 544—Decree proceeding upon ground common to several defendants—Decree upset in appeal but restored on appeal by one only of the defendants—Execution for costs by other defendants—Appeal—Decree to be executed where there has been an appeal.

A suit brought against several defendants was dismissed with costs. The plaintiffs appealed, and the case was remanded to the Court of first instance under section 562 of the Code of Civil Procedure. One of the defendants appealed against the order of remand to the High Court, which set aside the order of remand and restored the decree of the first Court.

Held, that, the decree of the first Court being restored in its entirety, the defendants who had not appealed were entitled to take out execution of that decree for the costs awarded to them by it, notwithstanding that they were not

* Second Appeal No. 551 of 1896, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 22nd April 1897, reversing an order of Maulvi Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 23rd January 1897.

(1) I. L. R., 19 Calc., 203.

(2) 2 Moo. I. A., 390.

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parties to the decree of the High Court. *Muhammad Sulaiman Khan v Muhammad Yar Khan* (1), distinguished. *Shohrat Singh v. Bridgman* (2), referred to.

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

Munshi *Gobind Prasad*, for the appellants.

Babu *Satish Chandra Banerji*, for the respondents.

BANERJI, J.—This appeal arises out of an application for execution and raises a question not free from difficulty. The facts are these. The respondents brought a suit in the Court of the Subordinate Judge of Agra against several defendants, among whom were the present appellants. The suit was dismissed by the Court, and the present appellants were awarded their costs. The plaintiffs to the suit, now respondents, preferred an appeal to the District Judge. The appeal was allowed, the decree of the Court of first instance was set aside, and the case was remanded to that Court under section 562 of the Code of Civil Procedure. The present appellants did not appeal from the order of remand, but another defendant, Puran Chand, preferred an appeal to this Court, with the result that his appeal was allowed, the order of the District Judge was set aside, and the decree of the Court of first instance was restored with costs. The present appellants thereupon applied for execution for the recovery of the costs awarded to them by the Court of first instance. To this application the respondents, original plaintiffs, took objection. The Court of first instance disallowed the objection and granted execution. The lower appellate Court has set aside that order and has dismissed the application for execution. The present appellants question the propriety of this order of the lower appellate Court.

It is contended on behalf of the appellants that as the decree of this Court restored that of the Court of first instance, and as the Courts below had proceeded upon a ground common to all the defendants, the decree of this Court inured to the benefit of all

(1) I. L. R., 11 All., 267.

(2) I. L. R., 4 All., 376.

the defendants, including the present appellants, under section 544 of the Code of Civil Procedure, and entitled them to recover the costs which the Court of first instance had awarded to them. On the other hand, it is urged on behalf of the respondents that the decree in the cause which was capable of execution was the decree of the High Court, and as that decree did not in terms award the costs of the first Court to the present appellants the latter were not entitled to take out execution for those costs. This is the view which the learned Judge of the lower appellate Court has adopted, and in support of it he has relied upon the ruling of this Court in *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (1). All that was held in that case, so far as it has any bearing upon the present question, is that the decree of an appellate Court supersedes the decree of the first Court even where the decree merely affirms the original decree. One of the reasons for this conclusion was stated in the judgment of Edge, C. J., to be that it was clear from section 579 of the Code of Civil Procedure that "in any case the decree executed, not for the costs of the appeal but for the costs of the suit, is the decree of the appellate Court, and of that Court only." In that case the Court was dealing with a decree of an appellate Court in an appeal to which all the parties to the suit were parties. In this respect it was unlike the decree now under consideration. As I understand section 579 of the Code of Civil Procedure, when it provides that the decree of the appellate Court should state by what parties and in what proportion the costs incurred in the appeal and the costs in the suit are to be paid, it refers to the parties who are parties to the appeal and not to parties who were not arrayed either as appellants or as respondents in the appeal, but who, under section 544 of the Code of Civil Procedure, might take the benefit of the decree. This ruling therefore does not afford any help in the decision of the question now before us. It is true that the decree which a party should execute is, as held by the Full Bench in *Shohrat Singh v. Bridgman* (2), the final decree obtained by him

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in appeal. But in this case, as the appellants were not parties to the appeal to this Court and no decree was formally made by this Court in their favour, they were not bound to take out execution of the decree of this Court. In fact, not being parties to that decree they were not competent to apply for its execution, and even if they did apply for its execution, they could not recover anything under it, as it did not award them in terms the costs of the first Court. The learned Judge of the lower appellate Court is of opinion that the appellants should apply for an amendment of the decree of the High Court and get their costs embodied in it. As they were no parties to that decree, and as they are not the representatives of any of the parties to that decree, they are not entitled under section 206 of the Code of Civil Procedure to apply for its amendment. This is not the case of a decree formally granted to the appellants by an appellate Court. In my opinion it is in the case of such a decree only that the decree of the appellate Court is the decree to be executed. In this case the lower appellate Court having proceeded upon a ground common to all the defendants, the High Court was competent, under section 544 of the Code of Civil Procedure read with section 587, to reverse the decree of the lower appellate Court in favour of all the defendants upon the appeal of any one of them. That section does not direct that in such a case the appellate Court should pass a decree in favour of the persons who are not before it in appeal, but the effect of that section is to make a decree passed in favour of one only of the defendants or plaintiffs under the circumstances mentioned in it operate in favour of all the plaintiffs or defendants, as the case may be. When, therefore, a decree is made under that section upon the appeal of one only of the defendants, and that decree restores the decree of the Court of first instance it inures to the benefit of all the defendants, although some of them were not parties to the appeal. Upon a decree of this description being passed the defendants other than those who preferred the appeal become entitled to take the benefit of the decree to this extent only that they acquire the right to enforce

the decree of the Court of first instance which has been restored by the decree of the appellate Court. In this view the present appellants were competent to apply for execution of the decree of the Court of first instance which was restored by the decree of this Court. The decree of this Court had, in my opinion, the effect of wiping away the order of remand of the lower appellate Court and relegating the parties back to the position in which they were before the order of remand was made. The lower appellate Court therefore erred in disallowing the application of the appellants for execution. I allow the appeal, and, setting aside the decree and order of the lower appellate Court with costs, restore that of the Court of first instance. The appellants will get the costs of this appeal.

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*June 27.**Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Burkitt.*
 THE N.-W. P. CLUB THROUGH G. B. GOYDER, HONORARY SECRETARY
(DEFENDANT) v. SADULLAH (PLAINTIFF).*

Club—Contract—Liability of the Secretary of a Club in respect of a contract entered into for the benefit of the members of the Club.

Held that the secretary of a Club could not, unless he specially accepted a personal liability, be sued personally on a contract entered into on behalf of the members of the Club by his predecessor in office; nor could the members of a Club collectively be sued through their secretary as their representative.

IN this case one Sadullah, who, on instructions from a previous secretary, had done certain work for the North-Western Provinces Club, sued the then secretary of the club for payment for labour and materials. The Court of Small Causes gave the plaintiff a decree. The defendant thereupon applied to the High Court in revision, not contesting the amount of the decree, which had been satisfied, but on the ground that the suit would not lie against the secretary in respect of a contract for the benefit of the members of the club at large, the club being an unregistered and unincorporated society.

Mr. W. Wallach, for the applicant.

KERSHAW, C.J., and BURKITT, J.—In this case an action was brought by Sadullah, the present respondent, against the

 * Civil Revision No. 25 of 1898.