

entry is an entry of a custom conclusively proved, and whereof notification has been demanded by the proprietary body, would have no further evidentiary value than if the column had been left blank. It would simply have indicated that no such demand for notification had been made, or no such custom had been conclusively proved to exist. I am of opinion, therefore, that the lower Courts have wrongly decided the preliminary point, the sole admissible evidence upon which establishes that a custom of pre-emption does exist in this village. I therefore concur in the proposed order.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decrees of the lower Courts set aside, and the case remanded to the lower appellate Court under the provisions of section 562 of the Code of Civil Procedure, with directions to re-admit the appeal under its original number in the register and dispose of the case on the merits. The respondents must pay the costs of this appeal.

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## PRIVY COUNCIL.

P. C.  
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June 11.  
November 12.

TASSADUQ RASUL KHAN AND ANOTHER (DEFENDANTS) v. KASHI RAM  
AND OTHERS (REPRESENTATIVES OF THE PLAINTIFF).

[Appeal from the Court of the Judicial Commissioner of Oudh.]

*Appeal to Privy Council—Civil Procedure Code (Act No. XIV of 1882), section 596—Affirmance of decision of lower Court—Decree of appellate Court that “appeal be dismissed” where decision on questions of fact is not the same.*

The word “decision” in section 596 of the Code of Civil Procedure means merely the decision of the suit by the Court, and cannot, like the word “judgment” be defined as meaning the statement of the grounds on which the Court proceeds to make the decree.

In order to “affirm the decision of the Court below” within the meaning of that section it is sufficient for the appellate Court to affirm the *decree*: it need not also affirm the grounds of fact on which the judgment was passed.

Where the decree of the appellate Court was that “the appeal be dismissed,” but the reasons given were not the same as those of the lower Court in respect of some matters of fact. *Held* that the appellate Court affirmed the decision of the lower Court within the meaning of section 596; and a certificate which granted leave to appeal to the Privy Council on the ground

*Present*:—Lord DAVEY, SIR FORD NORTH, SIR ANDREW SCOBLE, and  
SIR ARTHUR WILSON.

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that by its decree the appellate Court did not affirm the Court below, and which did not find that the appeal involved a substantial question of law was held not to comply with that section.

APPEAL from a decree (29th April, 1899) of the Judicial Commissioners of Oudh, affirming a decree (24th August, 1898) of the Subordinate Judge of Bara Banki by which the suit of the respondent was decreed.

The suit was one for specific performance. Both Courts came to the same conclusion; but their reasons for doing so as given in their judgments were different. The decree of the appellate Court was "that the appeal should be dismissed with costs."

The defendants applied for leave to appeal to the Privy Council, and the facts material to this report are sufficiently stated in the judgment given by the Judicial Commissioners on that application, which was as follows:—

"This is an application for leave to appeal to Her Majesty in Council. The subject-matter of the suit in the Court of first instance and in this Court amounts to more than Rs. 10,000. The suit was originally brought by Manik Chand against Nawab Kasim Ali Khan and Raja Tassaduq Rasul Khan, alleging that the former on the 31st August, 1897, had entered into a contract for the sale of certain property, that a draft conveyance was approved of by the parties on the 1st September, 1897, and that on the 3rd September, 1897, Kasim Ali Khan sold the property in bad faith to Raja Tassaduq Rasul Khan, who took with notice of the contract in favour of the plaintiff. The defendant Kasim Ali Khan propounded a draft conveyance, dated 31st August, and alleged that the plaintiff had put an end to the contract by attempting to introduce variations not authorized by the draft conveyance of the 31st August. The Court of first instance found that the contract of sale was proved, that the draft conveyance put forward by the plaintiff was proved, and that Nawab Kasim Ali Khan had failed to prove the draft propounded by him. It found that Raja Tassaduq Rasul Khan was not a *bond fide* purchaser without notice. It passed a decree in favour of the plaintiff on the draft conveyance put forward by him. The defendants appealed to this Court. This Court held that the contract for sale of the 31st August, 1897, was established, that the alleged approved draft conveyance put forward by the plaintiff was not proved, that that approved draft was not an essential portion of the plaintiff's case, and that, under the plaintiff's claim for general relief, he could obtain a decree for specific performance by the execution of any sufficient conveyance. The draft conveyance put forward by Nawab Kasim Ali Khan originally differed only on one point from the draft conveyance put forward by the plaintiff. It excepted from the sale a *devan-khana* belonging to the vendor, which exception finds no place in the draft conveyance put

forward by the plaintiff. Certain amendments in the interest of the vendor which do not appear in the plaintiff's draft appear on the face of Nawab Kasim Ali's draft. The plaintiff conceded that on the merits the amendments were proper amendments, and therefore the only material difference in the two drafts was the exception of a *dewan-ikhana* from sale to be found in Nawab Kasim Ali Khan's draft conveyance. This Court has therefore not affirmed the decision of the Subordinate Judge in so far as he held that the draft conveyance put forward by the plaintiff was established. It is, therefore, unnecessary in this case to enquire whether the appeal involves any substantial question of law. The case as regards value and nature fulfils the requirements of section 596 of the Code of Civil Procedure."

The certificate granting leave to appeal is set out in their Lordship's judgment.

At the hearing of the appeal—

Mr. *Mayne*, for the respondents, took a preliminary objection to the appeal being heard on the ground that, on the proper construction of section 596 of the Civil Procedure Code, the Judicial Commissioners had no power to grant leave to appeal to the Privy Council, unless the appeal involved, and was certified by the Court as involving, a substantial question of law. The Judicial Commissioners had, it was submitted, "affirmed the decision" of the Court below; and, as the appeal involved no substantial question of law, no appeal to His Majesty in Council would lie. On the essential questions of fact in the case there were practically concurrent judgments of both Courts. The cases of *Karuppanan Servai v. Srinivasan Chetti* (1), *Banarsi Pershad v. Kashi Krishna Narain* (2), *Radha Krishna Das v. Rai Krishn Chand* (3), *Beni Rai v. Ram Lakhan Rai* (4), *Thompson v. Calcutta Tramways Co.* (5), and *Ashghar Reza v. Hyder Reza* (6) were referred to.

Mr. *DeGruyther* for the appellants contended that where the Courts took different views of the facts the appellate Court could not be said to affirm the "decision" of the lower Court. The word "decision" in section 596 of the Civil Procedure Code does not mean "decree". That is the view taken by the Courts in India. The word "decision" means the reasons given by the Courts for the conclusion they come to, and was used so as not to

- (1) (1901) L. R., 29 I. A., 38; I. L. R., 25 Mad., 215. (3) (1901) L. R., 28 I. A., 182; I. L. R., 23 All., 415.  
 (2) (1900) L. R., 28 I. A., 11; I. L. R., 23 All., 227. (4) (1898) I. L. R., 20 All., 367.  
 (5) (1894) I. L. R., 21 Calc., 523.  
 (6) (1889) I. L. R., 16 Calc., 287.

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shut out an appeal under circumstances like the present. It is submitted, therefore, that a right construction has been put upon section 596, and that the appeal has been properly granted. It was also contended that the appeal involved substantial questions of law—*viz.* (a) whether a Court can decree specific performance of an agreement by execution of a conveyance which is at variance with the terms of the agreement; (b) whether a Court can give specific performance on terms different from those alleged in the plaint; and (c) whether a Court can give findings on points on which there is no evidence. The appellant might be allowed to amend the certificate by stating that these questions of law arise.

Mr. *Mayne* was heard in reply.

1902, *June 11th.*—The judgment of their Lordships was delivered by—

**LORD DAVEY** :—A preliminary objection has been taken by Mr. *Mayne*, on behalf of the respondents, to the hearing of this appeal by their Lordships, on the ground that the order giving leave to appeal was not in accordance with the Code of Civil Procedure.

The certificate is in these terms :—

“Certified that the above case fulfills the requirements of section 596, Act XIV of 1882, as regards value and nature, inasmuch as the value of the subject-matter of the suit in the Court of first instance was upwards of Rs. 10,000, and the value of the matter in dispute on appeal to Her Majesty’s Privy Council also exceeds that amount, and as the decree appealed from does not affirm the Court immediately below.”

Mr. *Mayne* contends that the statement that the decree appealed does not affirm the decision of the Court immediately below is erroneous, or can only be made correct by showing that the learned Judges who gave the certificate in that form misinterpreted the words of section 596 of the Civil Procedure Code. He points out that in this suit, which was a suit for specific performance of an agreement, the Court below decreed specific performance. There was an appeal by the defendants (the present appellants), and the only order of the appellate Court, the decree which is in fact appealed from, is

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one which simply dismisses the appeal. It says :—" It is ordered and decreed that this appeal be dismissed, and the respondent's costs of this appeal, amounting to Rs. 412 only as noted below, are to be paid by Nawab Kasim Ali Khan and Raja Tassaduq Rasul Khan, appellants, to Babu Manik Chand, respondent."

It is, however, argued by Mr. DeGruyther, on behalf of the appellants, that that is an erroneous reading and interpretation of the 596th section, and that the interpretation put upon that section by the learned Judges is the correct one. The words of the section are these :—" And where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law." Mr. DeGruyther says, and it appears from the learned Judges' judgment that they took the same point, that "decision" does not mean the decision of the Court, or the decree made by the Court, but means the reasons given by the Court for their decree, although the decision in each case may be different. If the reasons are not the same in respect of some matter of fact, say the learned Judges, and says Mr. DeGruyther, the decree appealed from does not affirm the decision of the Court immediately below.

The facts of this case, as stated by the learned Judges, are these. They say the Court of first instance found that a certain contract of sale was proved, and that a certain draft conveyance put forward by the plaintiff was also proved. Then they say it was found by the appellate Court that the contract was established, but "that the alleged approved draft conveyance put forward by the plaintiff was not proved, that that approved draft was not an essential portion of the plaintiff's case, and that under the plaintiff's claim for general relief he could obtain a decree for specific performance by the execution of any sufficient conveyance." They, therefore, dismissed the appeal and affirmed the decree and the decision of the suit by the Court below.

Now, there is no definition of the word "decision" in the Civil Procedure Code, but there is a definition of the word "decree." It says "decree" means the formal expression of an adjudication upon any right claimed or defence set up

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in a civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal." Then, "judgment" is defined as meaning "the statement given by the Judge of the grounds of a decree or order." Therefore their Lordships have two things: they have a decree which decides the suit, and they have the word "judgment," meaning the statement of the grounds upon which the learned Judge or the Court proceeds to make the decree.

Mr. DeGruyther appears to wish to give the word "decision" the same meaning as the word "judgment", and he says that it is necessary that the appellate Court should not only affirm the decree made by the Court below but should also affirm the grounds of fact upon which that judgment was passed. Their Lordships cannot come to that conclusion. They think that the natural, obvious, and *prima facie* meaning of the word "decision" is decision of the suit by the Court, and that that meaning should be given to it in the section.

It was said that there was some practice in India which puts a different meaning on the section; but their Lordships are not satisfied that that is so; they feel themselves free to decide in the way that has been mentioned. They will, therefore, hold that this certificate, understood and interpreted by the light of the judgment given by the Judges, does not comply with section 596, because it appears that the decree appealed from does affirm the decision of the Court below, and the certificate does not find that the appeal involved any substantial question of law.

It was suggested by Mr. DeGruyther that he might amend the certificate in that respect, and he stated to the Court what were the questions of law which in his opinion arose. Their Lordships think that that course would be irregular, and that the proper course would have been, if the parties intended to appeal on that ground, to have obtained a certificate from the Court of the Judicial Commissioner that there was some substantial question of law.

Their Lordships therefore think that the preliminary objection succeeds, and that the appeal ought to be dismissed, and they

will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

NOTE.—On the conclusion of the judgment their Lordships intimated that they would withhold their report to His Majesty for three months, to enable the appellant to apply to the Court of the Judicial Commissioner for a certificate that the appeal involved a substantial question of law. The appellant having failed to obtain such certificate, their Lordships, on the 12th November, 1902, intimated that their report would be submitted to His Majesty at the next meeting of the Privy Council.

E. S. HOPE,

Registrar of the Privy Council.

*Appeal dismissed.*

Solicitors for the appellant—Messrs. *Watkins & Lemprière.*

Solicitors for the respondents—Messrs. *T. L. Wilson & Co.*

J. V. W.

NIDHA SAH AND ANOTHER (DEFENDANTS) v. MURLI DHAR  
AND OTHERS (PLAINTIFFS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

*Mortgage—Mortgage with possession for a term certain—Mortgagee unable to obtain possession of part of property mortgaged and consequently failing to recoup money advanced—Suits by mortgagor on expiry of term to recover possession.*

The plaintiff representing himself to have absolute proprietary right in certain villages, and in consideration of advances which had been made to him by the defendant, executed what purported to be a mortgage of the villages with possession to the defendant for 14 years, the deed providing that, on "the expiration of the term the mortgagor shall come into possession of the mortgaged villages without settlement of account, that on the expiration of the term the mortgagee shall have no power whatever in respect of the said estate which, after the expiration of the term of this mortgage-deed, shall be returned to the mortgagor without his paying the mortgage money secured under this document." When the term had expired the mortgagee refused to give up possession of such of the villages as he had been able to get possession of on the ground that owing to the misrepresentation of the mortgagor he had not received the full benefit purported to be given him by the mortgage, and had consequently been unable to recoup himself the money he had advanced, and he claimed the right to hold the property until he had so recouped himself. In a suit by the mortgagor to recover possession the above ground was held by both the lower Courts to be well founded; and it was contended that the plaintiff, having broken his part of the contract by failing to give the defendant possession of the entirety of the premises comprised

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December 3.