

let into possession by the plaintiff's gardener Bhairon, on her behalf and by her direction, and he regularly paid rent to her and applied to her to do all the necessary repairs; he has never given up possession to her although he duly received notice to quit, and he has denied her title. Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. The Subordinate Judge was clearly right on this point. The High Court appears to have been under some misapprehension, and counsel for the respondents have not attempted to support their judgement on this point. Their Lordships are of opinion, and will humbly advise His Majesty, that the decree of the High Court should be reversed and that of the Trial Judge should be restored, and that the respondents should pay all the costs here and below.

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*Appeal allowed.*

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Ranken Ford, Ford & Chester.*

*J. V. W.*

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## APPELLATE CIVIL.

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*Before Mr. Justice Chamier and Mr. Justice Piggott*

DAMODAR DAS AND OTHERS (JUDGEMENT DEBTORS) v. BIRJ LAL  
(DEBEE HOLDER)\*

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*Civil Procedure Code (1908), order XLV, rule 15—Privy Council—Restoration of property alienated pending appeal to the Privy Council—Procedure.*

The word 'execution' as used in order XLV, rule 15, was intended to cover a case of restitution as well as a case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council, and a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply in the first instance to the court indicated by rule 15.

A decree was passed by the High Court against B, who appealed to the Privy Council. During the pendency of the appeal D and others obtained possession of the property in suit from B. The Privy Council reversed the decree and B applied to the Subordinate Judge to restore him to possession of the property and filed a copy of the printed judgement of their Lordships of the

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\* First Appeal No. 135 of 1914, from a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 9th of April, 1914.

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Privy Council in proof of the fact that the judgement of the High Court had been reversed.

*Held*, that the application should have been made to the High Court and the Subordinate Judge could not entertain it.

*Held* further that the Subordinate Judge was not entitled to take any action on the printed copy of the judgement of their Lordships of the Privy Council without proof that an order in Council had followed thereon.

THE facts of this case were as follows :—

Het Ram and others brought a suit for possession of certain property. The suit was dismissed on the 27th of November, 1907. On appeal the High Court decreed the claim on the 8th of March, 1910, and the plaintiffs executed the decree and obtained possession. The principal defendant Birj Lal appealed to the Privy Council, which, on the 9th of February, 1914, dismissed the suit and directed the plaintiffs respondents to pay the costs incurred by Birj Lal appellant in the court of the Subordinate Judge and further directed the costs of the High Court and of the Privy Council to be borne by the parties. On the 13th of March, 1914, Birj Lal made an application, purporting to be under section 144 of the Code of Civil Procedure, to the court of the Subordinate Judge for restoration of possession of the property.

With the application he filed a printed unsealed copy of the judgement of their Lordships of the Privy Council, dated the 6th of February, 1914, containing their recommendation in the usual form as to the order which should be passed in the case. Het Ram and others objected, *inter alia*, that the application seeking execution of the Privy Council decree could not be made to the court of Subordinate Judge, but that the proper course was to apply to the High Court under order XLV, rule 15, of the Code of Civil Procedure, for an order transmitting the decree to the lower court for execution; and that the printed copy of the judgement filed by Birj Lal was inadmissible in evidence and that a sealed copy of the order passed by His Majesty in Council must be filed. The Subordinate Judge overruled the objections and granted the application for restoration. Hence the appeal.

Mr. M. L. Agarwala, for the appellants—

The court in executing a decree of His Majesty in Council is not warranted to proceed merely on a printed judgement of the Privy Council. The printed judgement is not legal evidence;

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*Joy Narain Giree v. Gobuck Chunder Mytee.* (1). The printed judgement upon which the court has acted was not a copy of the order passed by His Majesty in Council, but of the recommendations of their Lordships of the Privy Council to the King. It is the final order passed by His Majesty in Council that has to be enforced and a certified copy of which is required by order XLV, rule 15, to be filed.

[PIGGOTT, J., mentioned *Juggernath Sahoo v. Judoo Roy Singh.* (2).

The respondent's application was in its nature one to obtain execution of the order of His Majesty in Council. The provisions of order XLV, rule 15, apply to all applications to obtain enforcement of such an order, whether by way of restitution or otherwise. The lower court has purported to act under section 144 of the Code of Civil Procedure. But in the case of orders passed by His Majesty in Council that section can come into play only after the course of action prescribed by order XLV, rule 15, has been followed. The whole of the Code of Civil Procedure does not apply to appeals to the Privy Council. It is only certain particular provisions thereof that are specially made applicable. When an application has been made under order XLV, rule 15, and the order has been transmitted to the court of first instance for execution, then, and only then, the rest of the provisions of the Code relating to execution, and among them section 144, comes into play. Section 144 cannot, therefore, be invoked in aid until the procedure laid down by order XLV, rule 15, has been complied with. *Garurdhuj Prasad Singh v. Baiju Mal* (3). In that case, too, the relief sought to be obtained was of the nature of restoration as in the present case.

Dr. *Satish Chandra Banerji* (with him Mr. *A. E. Ryves*), for the respondent. The order passed by His Majesty in Council was that the suit be dismissed and that the plaintiffs do pay the costs incurred by Birj Lal in the first court. The only matter respecting which Birj Lal could execute that order was that of the costs. If he wanted to recover those costs it would, no doubt, be necessary for him to apply under order XLV, rule

(1) (1873) 20 W. R., 444.

(2) (1879) I. L. R., 5 Calc., 329.

(3) (1906) I. L. R., 28 All., 337 (339).

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15, but there is no prayer about those costs in his application of 13th of March, 1914. Apart from the matter of the costs there is no decree or order which can be executed against the plaintiffs by Birj Lal, or in respect of which an application under order XLV, rule 15, can or ought to be made. The relief now sought by him is purely by way of restitution, he seeks to have the possession restored to him. There is no part of the Privy Council decree by applying to execute which Birj Lal can get possession from the plaintiffs. Section 144 of the Code of Civil Procedure clearly applies to such circumstances. Clause (2) of that section shows that the only procedure prescribed under such circumstances is an application under section 144. Applying for restoration is quite distinct from executing an appellate decree, although it may be that the applicant is entitled to restoration only by reason of that decree. Under section 583 of the former Code of Civil Procedure, no doubt, an application for restitution was treated as an application in execution of a decree. But the scope of that section has been made wider and the language altered by section 144 of the present Code so as to embrace all cases of restitution and so as to make it clear that an application for restoration is not at all an application for execution of a decree. The word "execution" does not occur at all in section 144. Order XLV, rule 15, therefore, does not apply to the case. Then, as to the non-production of a certified copy of the order in Council, it is submitted that the provisions of order XLV, rule 15, requiring the production of such copies are not mandatory but only directory; *Hurrish Chunder Chowdhry v. Kalisunderi Debi* (1). The object is that proper information regarding the order in Council should be supplied to the courts in India. In the present case the fact is not disputed that the decree of the High Court was upset and the suit dismissed by the Privy Council. There was no real doubt about what the order in Council was. The copy filed was one issued by His Majesty's printers in England and forwarded by Birj Lal's solicitors in England. There could be no doubt of its genuineness. The judgement of the judicial committee of the Privy Council, of which the copy was filed, was for

all practical purposes the order in Council. Even if it be held that the court ought not to have acted on an informal copy, the proceedings have been merely irregular and nothing more. Both parties were agreed as to the Privy Council having upset the High Court decree; and no failure of justice had resulted. The decree of the lower court should not be interfered with on a mere technicality like that. The provisions of section 99 of the Code of Civil Procedure applied to the case.

Mr. *M. L. Agarwala*. was not heard in reply.

CHAMIER and PIGGOTT, JJ. :—This appeal and the connected appeals Nos. 246, 263, 264 and 359 of 1914 arise out of proceedings taken by Birj Lal, one of the parties to the case of *Birj Lal v Inda Kunwar* in connection with the order of His Majesty in Council in that case. As the report shows, there were two suits, of which one (No. 62 of 1907) was brought by Inda Kunwar for possession of a ten biswas share in a village, and the other (No. 63 of 1907) was brought by Het Ram and others for possession of the other 10 biswas share in the village. The court of first instance in suit No. 62 gave Inda Kunwar a decree for a two biswas share on certain terms and dismissed her claim for the remaining 8 biswas. Suit No. 63 was dismissed by the Subordinate Judge. On appeal this Court passed decrees in favour of the plaintiffs in both suits. Birj Lal, a defendant in both suits, appealed to His Majesty in Council. The two appeals were consolidated in an order by His Majesty in Council, dated the 9th of February, 1914. On the 13th of March, 1914, Birj Lal presented an application to the court of first instance in suit No. 62 praying that he might be restored to possession of the ten biswas share pending the taking of certain accounts ordered by their Lordships of the Privy Council. In the same suit he presented two applications for repayment of costs which had been recovered from him by Inda Kunwar and a third application, the nature of which need not be specified. In suit No. 63 Birj Lal applied to the Subordinate Judge to restore him to the possession of the ten biswas share, inasmuch as the suit of Het Ram and others had been dismissed by their Lordships of the Privy Council. Birj Lal presented with his application a printed copy of the judgement of their Lordships of the Privy Council containing their recommendation in the usual form as to the order which

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should be passed in the case. But he did not file any copy at all of the order in Council. His opponents at once objected that he was not entitled to apply to the Subordinate Judge without first presenting an application to this Court under order XLV, rule 15, of the Code of Civil Procedure, and they professed complete ignorance of the terms of the order of their Lordships of the Privy Council. They pleaded that the printed copy produced by Birj Lal could not be admitted in evidence and, even if admitted, could afford no justification for disturbing their possession. The Subordinate Judge threw out all their objections. Hence these appeals.

Order XLV, rule 15, provides that whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the court from which the appeal to His Majesty was preferred, and such court is required to transmit the order of His Majesty in Council to the court which passed the first decree appealed from, or to such other court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same. It is contended, first, that order XLV, rule 15, does not apply at all to the case of a person who is entitled to restitution of the kind described in section 144 of the Code, and, secondly, that even if a person entitled to such restitution may make an application under order XLV, rule 15, he is not obliged to do so, and he may go direct to the court of first instance under section 144. We are unable to accept either of these contentions. It appears to us that in the absence of order XLV, rule 15, there would be nothing to show what court in India is to carry out an order of His Majesty in Council. We think that the word, 'execution' in order XLV, rule 15, is intended to cover execution of any kind, that is to say, that it covers the case of [restitution as well as the case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council, and that a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply, in the first instance, to the court indicated by rule

15. In the present case that was this Court. Further, we are of opinion that the Subordinate Judge was not entitled to take any action on the printed copy of the judgement of their Lordships of the Privy Council without proof that an order in Council had followed thereon; for what has to be enforced or executed is not the judgement or recommendation of their Lordships, but the order in Council. The result is that appeals Nos. 135, 363 and 264 are allowed and Birj Lal's applications are dismissed with costs in both courts. Appeals Nos. 246 and 359 are dismissed with costs.

We have been informed that, since the disposal of the applications referred to above by the Subordinate Judge, an application was made by Inda Kunwar to this Court under order XLV, rule 15, Civil Procedure Code, and on her application the order of His Majesty in Council has been transmitted to the court of the Subordinate Judge in order that it may be executed. We may point out that, as the order in Council has now reached the court of the Subordinate Judge, it is open to all parties to apply to the Subordinate Judge for such relief as they may be entitled to without making any further application to this Court under order XLV, rule 15, of the Code of Civil Procedure.

*Appeal decreed.*

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*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball,*  
 KHAYALI RAM AND ANOTHER (DEPENDANTS) v. KALI CHARAN  
 AND OTHERS (PLAINTIFFS.) \*

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May, 28.

*Pre-emption—Wajib-ul-arz—Partition of village—Right of co-sharers in different mahals to pre-empt inter se.*

A certain village prior to 1873 consisted of one mahal which was sub-divided into two *pattis*. The *wajib-ul-arz* of that year recorded a custom of pre-emption first, with near relations, then with co-sharers in the *patti* and lastly with co-sharers in the village. Subsequently the village was divided into a number of different mahals, and at the last settlement a new *wajib-ul-arz* was drawn up for each of the new mahals in similar terms. The plaintiff, a proprietor in the village though not a co-sharer in the mahal, brought a suit for pre-emption. *Held* that the plaintiff was no longer a co-sharer with the vendor

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\* Second Appeal No. 1284 of 1914, from a decree of G.C. Badhwar, District Judge of Mainpuri, dated the 18th of July, 1914, confirming a decree of Laddi Prasad, Subordinate Judge of Mainpuri, dated the 15th of May, 1913.