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AGHA
HAIDAR
v.
THE CITY
BOARD,
MUSSOORIE.

of rent from Mnhhammad Ayub and others through the civil courts. When the property has been let by one co-owner on behalf of the proprietary body and when the other co-owners are, on their own showing, in possession and actually realize their share of the rent from the co-owner who gives the lease, then the other co-owners must be held to be "lessors" within the meaning of section 149(2). Considering that Saiyed Agha Haidar and others have realized their share of rent for the years in suit, it would be anomalous and inequitable if they were not held liable to pay their share of the taxes.

We hold, therefore, that defendants Nos. 1—8 must be considered to be "lessors" within the meaning of section 149(2), and accordingly dismiss the appeal with costs.

Appeal dismissed.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Mukerji.*

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May, 26.

HET RAM (JUDGEMENT-DEBTOR) v. RAJA DUTT PRASAD SINGH (DECREE-HOLDER).*

Execution of decree—Costs—Mortgage decree—Whether costs payable out of the mortgaged property or by the judgement-debtor personally—Civil Procedure Code, order XXXIV, rule 10.

Costs incurred in proceedings in execution of the final decree in a mortgage suit are not chargeable against the mortgaged property, but are payable by the judgement-debtor personally.

THIS was an appeal under section 10 of the Letters Patent against a judgement of a single Judge of the Court. The facts of the case, so far as they

* Appeal No. 84 of 1925, under section 10 of the Letters Patent.

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are necessary for the purposes of this report, appear from the judgement below.

Babu *Benode Bihari Lal*, for the appellant.

Babu *Surendra Nath Gupta*, for the respondent.

MEARS, C. J., and MUKERJI, J. :—The question for determination in this appeal is whether the costs awarded in execution proceedings to the decree-holder are recoverable personally from the judgement-debtor or must be realized, along with the mortgage money, by sale of the property mortgaged.

Briefly the facts are these. A preliminary decree for sale was made on the 4th of March, 1910, and the final decree was passed on the 30th of April, 1915. In 1917 the decree was put in execution and on the 14th of December, 1920 the execution proceedings were struck off as being partially successful. The decree-holder was dissatisfied with this order striking off his application and he appealed to this Court. The appeal was successful and this Court awarded to the decree-holder a sum of Rs. 166-8-0 as the costs of appeal. It is this order for costs that is under execution now and the judgement-debtor has come up with the plea that the money should come out of the property mortgaged and not from him personally. The judgement-debtor has been unsuccessful throughout. His case is that under order XXXIV, rule 10 of the Code of Civil Procedure, the costs awarded against him ought to come out of the property mortgaged and not from him personally. It is perfectly clear to us, as it was to the learned single Judge against whose judgement this appeal has been filed, that rule 10 has nothing to do with the costs awarded in execution proceedings. It relates to costs that have been incurred by the mortgagee since the passing of the preliminary decree and before the final decree is made in the case.

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Order XXXIV does not deal with the execution of a decree, and the Code of Civil Procedure, in which order XXXIV finds a place, has provided distinct rules for execution of decrees. We think that the appeal has no force and we dismiss it with costs.

Appeal dismissed.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Mukerji.*

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May, 26.

ISHWARI PRASAD (DEFENDANT) v. SHEOTAHAL RAI
(PLAINTIFF).*

*Letters Patent, section 10—Appeal—Order of remand—
Suit for declaration of title or possession by a co-sharer.*

An appeal will lie under section 10 of the Letters Patent from a judgement of a single Judge of the High Court reversing the decree of the lower appellate court and remanding the suit for trial on the merits. *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee* (1), distinguished.

Plaintiff sued as a co-sharer in possession, whose possession had been disturbed, asking for a declaration of his title or in the alternative for recovery of possession. The defendant was in possession, but never denied the plaintiff's title as a co-sharer.

Held, that the plaintiff's suit should be dismissed.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case sufficiently appear from the judgement of the Court.

Babu *Shiva Prasad Sinha*, for the appellant.

Munshi *Janaki Prasad*, for the respondent.

MEARS, C. J., and MUKERJI, J. :—A preliminary objection has been taken that no Letters Patent appeal lies. It would be necessary to state the facts of the case in order to find whether an appeal lies or not.

* Appeal No. 60 of 1925, under section 10 of the Letters Patent.
(1) (1925) 23 A.L.J., 555.