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 & Co.
 v.
 MAYAPPA
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be little or nothing more than the cost of the coal that would have been consumed, if the steamer had made its intended voyage to Tuticorin.

The proportionate part of these expenses to be deducted from the freight must be ascertained by estimating [as a jury would do] the amount of tonnage which would have been occupied by the 680 bags of rice as compared with the amount of tonnage which the ship could carry.

If the parties cannot agree upon the sum to be deducted, it will be necessary to refer the case back to the Small Cause Court to ascertain the amount. As the plaintiffs have succeeded substantially in maintaining their claim in this Court, we think that they ought to have one-half of their usual costs from the defendant.

Attorneys for the plaintiffs: Messrs. *Orr and Harriss*.

Attorney for the defendant: Mr. *Hart*.

FULL BENCH.

*Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson,
 Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice McDonell.*

1880
 Feb. 2.

JUGGOBUNDHU MUKERJEE AND OTHERS (PLAINTIFFS) v. RAM
 CHUNDER BYSACK (DEFENDANT).*

*Limitation—Formal Possession—Fresh Period of Limitation—Act VIII of
 1869, s. 224.*

Delivery of possession by going through the process prescribed by s. 224 of Act VIII of 1869 is the only way in which the decree of the Court awarding possession to the plaintiff can be enforced; and as, in contemplation of law, both parties must be considered as being present at the time when the delivery is made, such delivery must, as against the defendant, be deemed equivalent to actual possession. As against third parties such symbolical possession is of no avail, because they are not parties to the proceedings. But if the defendant subsequently dispossesses the plaintiff by receiving the rent and profits, the plaintiff will have twelve years from such dispossession to bring another suit.

* Appeal from Appellate Decree, No. 1775 of 1878, against the decree of C. B. Garrett, Esq., Judge of Dacca, dated the 30th April 1878, affirming the decree of Babu Gunga Churn Sircar, Subordinate Judge of that district, dated the 27th August 1877.

THIS was a suit brought on the 25th May 1876 to recover possession of a four-anna share in a certain mouza.

The facts of the case, so far as are sufficient for the purposes of this report, were, that the property in question, after passing through several hands, was mortgaged to certain persons, who obtained a decree against the mortgagors, and sold their right and interest in the same to one Somi Dewan. The latter mortgaged his right and interest in the property to one Abdul Gunni, who, on the 16th May 1864, obtained, after foreclosure, a decree for possession. Abdul Gunni disposed of his right and interest under that decree to one J. P. Wise, who, after taking out execution, was put into possession by the Court, and on the 18th Magh 1279 (30th January 1873), sold the property to the plaintiffs, who endeavoured to take possession, but were prevented by the defendant, who alleged that he had purchased the property in 1272 (1865), and denied that either the plaintiffs or their vendors had been in possession within twelve years before the institution of the present suit.

The Subordinate Judge held, that the suit was barred by limitation.

The plaintiffs appealed to the District Judge, who decided the case on this point, in the following words: "Except the bare act of taking formal possession, and causing an ameen to be sent to calculate the mesne profits, Mr. Wise did not take any actual possession of the land; and I, therefore think that the case of *Pearee Mohun Poddar v. Jugobundhoo Sen* (1) shows, that that cannot be considered any possession at all. I, therefore, find that the plaintiffs' suit is barred by limitation."

The plaintiffs appealed to the High Court.

Baboo Nulhit Chunder Sen for the appellants.

Mr. Branson and *Baboo Lal Mohun Das* for the respondent.

The Court composed of Mr. Justice JACKSON and Mr. Justice McDONELL referred the case to a Full Bench, with the following remarks:—

JACKSON, J.—In this case a question arises in regard to which there is a conflict of decisions.

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The same question arose at the hearing of the case of *Umbica Churn Gupto. v. Madhub Ghosal* (1), and I venture to think that, at the time of the hearing of that case, the learned Judges who heard it, found themselves in the presence of some conflict, or at any rate by their decision constituted a conflict of opinion.

As the case now stands, it appears to me that we have no choice but to refer the matter for the decision of a Full Bench.

The question is, whether the plaintiff, having obtained a decree for possession of immoveable property, which is in the occupation of ryots, and having obtained the kind of delivery prescribed by the Code in such cases, *viz.*, by proclamation, and not having, in any other mode, obtained actual possession, obtains thereby a fresh period of limitation,—that is to say, is entitled to maintain a suit for the recovery of the same land within twelve years from the date of such proclamation.

The cases out of which the conflict may be said to arise are these:—

For the appellants:—*Gunga Gobind Mundul v. Bhoopal Chunder Biswas* (2), *Rabia Khanum v. Wise* (3), *Koonjo Mohun Dass v. Nobo Coomar Shaha* (4), *Umbica Churn Gupto v. Madhub Ghosal* (1).

For the respondent:—*Sreemutty Nubo Doorga v. Sreemutty Seeta Monee* (5), *Pearee Mohun Poddar v. Jugobundhoo Sen* (6), *Mahomed Wali v. Noor Bulsh* (7), *Sreemutty Manoka v. Juggut Chunder Kulkhit* (8).

And the material point for consideration in connection with these cases is, whether the words contained in the judgment of the Judicial Committee of the Privy Council in what is called the Mundul's case—*Gunga Gobind Mundul v. Bhoopal Chunder Biswas* (2)—are to be taken as an exposition of the law generally, or are to be considered with reference to the facts on the record of that case.

It will be observed that Mr. Justice Markby considered that case in *Pearee Mohun Poddar v. Jugobundhoo Sen* (6), and

(1) I. L. R., 4 Calc., 870; S. C., (5) 23 W. R., 407.
 4 Cal. Rep., 55. (6) 24 W. R., 418.

(2) 19 W. R., 101. (7) 25 W. R., 127.

(3) 23 W. R., 329. (8) 2 Shome's Rep., 131.

(4) I. L. R., 4 Calc., 216.

quired into the facts of it, and came to the conclusion that the judgment must be interpreted with reference to the facts so appearing.

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Baboo *Nullit Chunder Sen* for the appellants.—The possession of a purchaser at a sale in execution of a decree runs from the proclamation and publication of the sale-certificate, and such possession gives a fresh period of limitation: *Asudoolah v. Shaik Abkur Ali* (1), *Bindoo Bashimee Dossie v. J. R. Rainey* (2), *Rabia Khanum v. J. P. Wise* (3), *Koonjo Mohun Dass v. Nobo Coomar Shaha* (4), *Umbica Churn Gupto v. Madhub Ghosal* (5), and *Gunga Gobind Mundul v. Bhoopal Chunder Biswas* (6).

Mr. *J. D. Bell* and Baboo *Lal Mohun Dass* for the respondent.—The foundation for the statement that a new period of limitation runs from symbolical possession seems to be the case of *Gunga Gobind Mundul v. Bhoopal Chunder Biswas* (6); so far as the defendant is concerned, limitation runs from the date of decree; but as against the ryots from the date of the proclamation. The decree is notice to the judgment-debtor of the plaintiff's possession; the proclamation is notice to persons holding under the judgment-debtor. If the plaintiff does nothing more than post bamboos, &c., there is no delivery of possession: *Sreemutty Nobo Doorga v. Sreemutty Seeta Monee* (7), *Mahomed Wali v. Noor Buksh* (8), *Pearce Mohun Poddar v. Jugobundhoo Sen* (9), and *Sreemutty Manoka v. Juggot Chunder Rukhit* (10).

The judgment of the Full Bench was delivered by

GARTH, C. J.—If we were satisfied that, in the *Mundul's case* (6) their Lordships of the Privy Council intended to decide the question which is now referred to us, it would, of course, have been unnecessary to consider the matter further. But, upon a

(1) 7 W. R., 60.

(6) 19 W. R., 101.

(2) 15 W. R., 307.

(7) 23 W. R., 407.

(3) 23 W. R., 329.

(8) 25 W. R., 127.

(4) I. L. R., 4 Cal., 216.

(9) 24 W. R., 418.

(5) I. L. R., 4 Cal., 870; S. C., (10) 2 Shome's Rep., 131.

4 Cal. Rep., 55.

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careful perusal of their Lordships' judgment, and on referring to the facts as they appear in the copy of the printed book, we much doubt whether the point was really raised in that case, or whether their Lordships intended to express any opinion upon it.

We have, therefore, now to decide the matter without reference to their Lordships' judgment; and having considered the sections of the Code which bear upon it, and the somewhat contradictory decisions to which we have been referred during the argument, we have come to the conclusion, that the question of law referred to us should be answered in the affirmative.

Sections 223 and 224 of the Code point out the mode of executing decrees in suits for immoveable property; s. 223 applies, where the land is in the actual possession of the defendant; s. 224, where it is in the occupation of ryots.

In the one case, the delivery of the land is to be made by placing the plaintiff in direct possession. In the other, the delivery is effected by the officer of the Court by going through a certain process prescribed by s. 224, and proclaiming to the occupants of the property that the plaintiff has recovered it from the defendant. This is the only way in which the decree of the Court, awarding possession to the plaintiff, can be enforced; and as, in contemplation of law, both parties must be considered as being present at the time when the delivery is made, we consider that, as against the defendant, the delivery thus given must be deemed equivalent to actual possession.

As against third parties, of course, this symbolical possession (as it is called) would be of no avail; because they are no parties to the proceeding. But if the defendant should, after this, again dispossess the plaintiff by receiving the rents and profits, we think that the plaintiff would have twelve years from such dispossession to bring another suit.

One very conclusive test, as it seems to us, that the delivery thus effected under s. 224 does really, in the eye of the law, place the plaintiff in possession as against the defendant, consists in this; that if mesne profits are awarded to the plaintiff, he is only entitled to them up to the time when delivery is given. This can only, of course, be explained upon the ground,

that, at that time, the defendant's possession is considered at an end, and the transfer to the plaintiff becomes complete.

We think, therefore, that the judgment of the lower Appellate Court, upon the question of limitation, must be reversed, and that the case should be remanded to that Court to be tried upon its merits.

The costs in this Court will abide the result.

Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice Priusep.

MOHAMED ELAHEE BUKSH AND OTHERS (DEFENDANTS) v. KALLY
MOHUN MOOKHOPADHYA AND ANOTHER (PLAINTIFFS).*

1879
Dec. 4.

Money paid under conditional Decree—Application to recover, on failure of Contingency—Superseded Decree.

A obtained against *B* a decree for arrears of rent at enhanced rates for the year 1871. Pending an appeal from this decree, *A* obtained a second decree against *B* for arrears of rent at enhanced rates for the succeeding year. This decree, however, made the payment of so much of the rent calculated at enhanced rates contingent on the event of the Appellate Court affirming the decree in the former suit. *A* executed this last decree, and obtained payment of the rent at enhanced rates. On the reversal of the decision in the former case by the Appellate Court, *B* applied for a refund of so much of the money paid *A* as represented the rent calculated at enhanced rates.

Held, that the portion of the second decree, relating to enhanced rent, being merely conditional, was virtually superseded by the order made by the Appellate Court in the previous suit, and that such moneys were, therefore, recoverable.

PREVIOUS to this application, the present plaintiffs sued the defendants for the recovery of arrears of rent at enhanced rates for the year 1278 (1871); this suit was dismissed by the Court of first instance as being barred by limitation. This decision was in turn reversed by the lower Appellate Court, and the defendants thereupon appealed to the High Court. Pending the

* Appeal from Orders, Nos. 102 and 101 of 1879, against the order of F. H. McLaughlin, Esq., Officiating Judge of Zilla Noakhali, dated the 8th February 1879.