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using reasonable diligence to enforce his claim than he would have been if he had lain by and done nothing.

No doubt, as said by Mr. Justice Pontifex in the case in 19 W. R., "an attachment under a money decree on a mortgage bond and the mortgage lien cannot co-exist separately in the property hypothecated and the attachment must be treated as an attachment enforcing the lien." But when this enforcement is not carried on to a sale in execution of the decree under which such attachment was made, it is difficult to understand how the lien is lost. Under clause (*b*) of s. 295 of the Code of Civil Procedure the Court had a discretionary power to sell, in execution of defendant No. 2's decree, the moiety of Jote Gokul mortgaged to plaintiff free from his mortgage, if he was never asked for his assent; and the Court did not exercise its discretionary power. I do not see how we can now deal with the plaintiff, as if the Court had exercised its discretionary power with his assent.

I am, therefore, of opinion that plaintiff is entitled to enforce his lien against the moiety of the property mortgaged to him, and that this appeal should be dismissed with costs.

MCDONELL, J.—I concur in holding that plaintiff is entitled to enforce his lien against the moiety of the property mortgaged to him, and generally for the reason stated by my learned brother.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

SHEO SOHYE ROY AND OTHERS (DEFENDANTS) *v.* LUCHMESHUR SINGH (PLAINTIFF.)*

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March 4.

Limitation (Act XV of 1877), ss. 45, 140, 142—Suit for possession—Dispossession during unexpired ticca by plaintiff's predecessor—Limitation—Expiry of lease.

In a suit brought by the plaintiff in 1880 to recover possession of certain lands from which his predecessor in title had been dispossessed, in which suit the Court of first instance found that the defendant had dispossessed

* Appeal from Appellate Decree No. 52 of 1883, against the decree of A. W. Cochran, Esq., Officiating Judge of Tirhoot, dated 12th of September 1882, reversing the decree of Baboo Koylash Chunder Mukerji, Second Subordinate Judge of that district, dated 23rd of August 1881.

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the plaintiff's father in 1860, during the unexpired term of a lease granted by the plaintiff's father to a ticcadar.

Held, that the preponderance of authority in India was in favor of the view that limitation ran from the date of the expiry of the ticca, and not from the time when the defendant had been held by the Court of first instance to have dispossessed the plaintiff's father.

THIS was a suit brought on the 31st December 1880 by the Maharajah of Darbunga to recover possession of 80 bighas of land which he alleged to be part of his permanently settled village of Ram Bhaddurpur, and from which he alleged he had been dispossessed by the defendants, who were the proprietors of the contiguous village Purwana, in 1277 (1870), and that the dispossession complained of occurred in the following manner, *viz.*, that one Moni Dut Roy, one of the proprietors of mouzah Purwana, took a kutkina of mouzah Ram Bhaddurpur from the ticcadar of the said mouzah during the minority of the plaintiff, and whilst so in possession settled the land with one Kishen Jha who ceased to pay rent in 1277, and that on this the dispossession took place.

The defendants contended that the whole of the disputed land belonged to their settled estate Purwana, the settlement having been made with them by Government in the year 1860, in the presence of the plaintiff's father, when an objection of the ticcadar of plaintiff's father to the settlement had been rejected, and that therefore the plaintiff's claim was barred by limitation under Arts. 45 and 142 of Act XV of 1877.

The Munsiff found that the plaintiff had proved his title to the land in suit up to 1849, but that the Collector's award made in April 1860 settling the land with the defendants and rejecting the claim made thereto by the ticcadar of the plaintiff's father bound the plaintiff's father, no steps having been taken to set it aside, that the defendants had therefore obtained possession in 1860 (prior to the death of the plaintiff's father, who died in October 1860), and throwing the onus on the defendant of proving that they had a right to hold the land by showing a 12-year's adverse possession, held that they had succeeded in so doing, and therefore dismissed the plaintiff's suit.

The plaintiff appealed to the Subordinate Judge, who held that

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the plaintiff had clearly shown that he had both possession and title in 1849, and therefore it was for the defendants to show that some time after that date and before the date of the Maharajah's death, in October 1860, their adverse possession began; that (for certain reasons given by him, which are unnecessary for the purposes of this report) dispossession by the defendants did not take place in 1860, but that it took place in 1870. He therefore reversed the decision of the Munsiff and gave the plaintiff a decree. In deciding that the lower Appellate Court had rightly placed the burden of proof on the defendants, the Subordinate Judge relied on the cases of *Radha Gobind Roy Saheb* v. *Inglis* (1); *Kali Churn Sahu* v. *Secretary of State* (2); *Monmohun Ghose* v. *Mothura Mohun Roy* (3), remarking that he did not agree with the argument advanced by the defendants' pleader, that these cases applied only to cases where possession could not for one reason or another be visibly exercised.

The defendants appealed to the High Court.

The *Advocate-General* (Mr. *Paul*), (with him Mr. *Gregory* and Baboo *Rajendro Nath Bose*) for the appellant, contended on the second branch of the cases, that possession adverse to a lessee was also adverse to the lessor—*Prosunnomoyi Dasi* v. *Kali Das Roy* (4).

Baboo *Ram Charan Mitter* for the respondent, on the question as to whether limitation ran from the expiry of the tiesa lease or from the date of dispossession, cited *Krishna Gobind Dhur* v. *Hari Churn Dhur* (5); *Womesh Chunder Goopto* v. *Raj Narain Roy* (6).

MITTER, J.—The only point upon which we called upon the respondent to answer this appeal is the question of limitation. The Court of first instance found that the dispossession of the plaintiff's predecessor in title took place in the year 1860. There was no appeal against that finding by the defendant. There was an appeal by the plaintiff-respondent before us, and the District Judge throwing

(1) 7 C. L. R., 364.
(2) I. L. R., 6 Calc., 725; 8 C. L. R., 90
(3) 8 C. L. R., 126.
(4) 9 C. L. R., 347.
(5) I. L. R., 9 Calc., 367; 12 C L. R., 19.
(6) 10 W. R., 15.

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the onus of proof upon the defendant, came to the conclusion that it was not made out by him that the dispossession took place earlier than 1870. The District Judge in throwing the onus of proof on the defendant followed certain decisions cited by him, but these decisions have been since considered in a Full Bench case, *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (1), and they have been explained as referring to certain peculiar circumstances which distinguished them from ordinary cases where limitation is pleaded. In the Full Bench decision it was laid down as a general rule that the burden is on the plaintiff to make out that his claim is not barred by limitation. Therefore, if, upon another ground, we could not uphold the decision of the lower Appellate Court, it would have been necessary to remand this case to that Court for a finding upon the question of limitation, but it seems to us that, accepting the finding of the first Court, that the dispossession took place in 1860 which finding was not questioned by the defendant, the plaintiff's claim is not barred by limitation. It is an admitted circumstance in this case, that in that year the mouzah in which the land is alleged to lie was not in the khas possession of the plaintiff's predecessor in title, but was in the possession of a ticcadar. It is also not disputed that if the 12 years be counted from the date when the term of the ticca came to an end, the plaintiff would not be barred by limitation. On the other hand, if the period prescribed by the law of limitation is to be computed from the date of dispossession as found by the first Court, the claim of the plaintiff would be barred by limitation. Upon this point, *viz.*, whether the one or the other period of time is the proper point from which limitation is to run, there is a conflict of authority. They have all been placed before us, and we are of opinion that the preponderance of authority is in favor of the proposition that the claim is not barred by limitation. As we agree in that view we dismiss this appeal with costs.

Appeal dismissed.

(1) I. L. R., 9 Calc., 744.