section 117 it may well be inferred that leases for agricultural purposes stand on a different footing from mortgages. This is also apparent from reading section 10, cl. 2, and section 31 of Act No. II of 1901 together. The case before us is of a mortgage such as is contemplated and understood by "mortgages" in Act No. IV of 1882. Were we to grant a decree in this case, the decree would be intended to operate in the direction of transferring the interest of the occupancy tenant mortgagor from the prior mortgagee and into the hands of the plaintiff appellant. This would be in direct conflict with the provisions of section 20, which, as already pointed out, enacts that the interest of an occupancy tenant is not transferable in execution of a decree of a Civil or Revenue Court, and it is not for us to grant a decree which could not afterwards be executed, but would remain infructuous. Our attention has been drawn to the case of *Madan Lal* v. *Muhammad Ali Nasir Khan* (1) in which the same view was held by our brother Richards. For these reasons we hold that the view taken by the lower appellate Court was the right view, and we dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Rustomjee.

1906 *August* 15.

BHADDAR (DEFENDANT) *v.* KHAIR-UD-DIN HUSAIN (PLAINTIFF) AND BHOLA (DEFENDANT).*

Land-holder and tenant—Site in abadi occupied by non-agricultural tenant—Adverse possession—License—Act No. V of 1882 *(Indian Easements Act), section* 60.

A person who was neither an agricultural tenant nor a village handicraftsman was found in possession of a house in the abadi which he and his predecessors in title had held for a period of considerably more than twelve years, without paying rent or acknowledging in any way the title of the zamindar to the site upon which it was built. *Held* that such person had acquired the absolute ownership of the site.

IN execution of a decree against one Parai the decree-holder Bhaddar caused to be attached and advertised for sale certain houses, situated in Mustafabad, a hamlet of Daraganj, a suburb of

* Second Appeal No. 910 of 1905, from a decree of W. J. D. Burkitt, Esq., officiating District Judge of Allahabad, dated the 23rd of June 1905, modifying the decree of Pandit Raj Nath, Subordinate Judge of Allahabad, dated the 16th of December 1904.

(1) Weekly Notes, 1906, p. 182.

1906

BHADDAR v. KHAIR-UD-DIN HUSAIN.

Allahabad, together with the sites of these houses. Thereupon the plaintiff Khair-ud-din Husain instituted the present suit as zamindar of the land upon which the houses stood asking for a declaratory decree that he was the owner and possessor of the houses in question and that they were not liable to be sold in execution of Bhaddar's decree. He further prayed that, in case of the sale of the materials of the houses being allowed, he should be declared entitled to "dhik" at the rate of Rs. 10 per cent. on the sale proceeds. He relied mainly on the following condition entered in the wajib-ul-arz:—"No tenant can build a new house without the permission of the zamindar, and after his abandoning the village, the zamindar is the owner of the materials of the house. In case of his presence (in the village) the tenant will be entitled to sell the materials (of the house) provided the house has been built at his own expense, and at the time of sale of the house the tenant shall pay a royalty, called *dhik*, to the zamindar at the rate of Rs. 10 per cent."

The Court of first instance (Subordinate Judge of Allahabad) dismissed the plaintiff's suit. On appeal by the plaintiff the District Judge set aside the decree of the first Court and decreed the claim of the zamindar so far as the sites of the houses were concerned. The defendant decree-holder appealed against this decree to the High Court.

Dr. *Tej Bahadur Sapru* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the appellant.

Pandit *Moti Lal Nehru* (for whom Babu *Jogindro Nath Chaudhri*) for the respondent (zamindar).

RUSTOMJEE, J.—The facts in this case arose as follows. Defendant No. 1 had obtained a decree against the father of defendant No. 2, a minor. Under this decree certain houses, situated in mohalla Daraganj of the city of Allahabad, were attached and advertised for sale, *with their site*, for the 17th September, 1904. Upon this the plaintiff, who is entered in the Government papers as zamindar of the land on which the houses were built, brought a suit for a declaratory decree that he was the owner and possessor of the houses in question, and that they were not liable to be sold in execution of that decree. He further prayed that, in case of the sale of the materials of the houses being allowed,

he should be declared entitled to *dhik* at the rate of Rs. 10 per cent. on the sale proceeds. He relied mainly on a condition which was entered in his wajib-ul-arz (record of rights); this is set out *in extenso* in paragraph 6 of the plaint and runs as follows:—"No tenant can build a new house without the permission of the zamindar, and after his abandoning the village, the zamindar is the owner of the materials of the house. In case of his presence (in the village) the tenant will be entitled to sell the materials (of the house) provided the house has been built at his own expense, and at the time of sale of the house the tenant shall pay a royalty, called *dhik*, to the zamindar at the rate of Rs. 10 per cent."

In the result the Court of first instance dismissed the plaintiff's suit on the ground that as the minor defendant and his predecessor in title did not come in the category of cultivators, or *riyaya*, of the plaintiff, the terms of the wajib-ul-arz could not apply to them. It also held that the defendants had "proved by very reasonable oral and documentary evidence that along with the site, the houses in Daraganj had been constantly sold within 35 years before this day, and the zamindar never obtained any right in respect of the site of the old houses." Upon this the plaintiff preferred an appeal to the Court of the District Judge. That officer agreed with the Court of first instance in holding that the custom entered in the wajib-ul-arz could not apply to the houses in question. He, however, came to the conclusion that the plaintiff was entitled to the declaration sought by him as regards the site of the houses, and hence he gave him a qualified decree declaring that the site was not saleable. This has led to the present second appeal of defendant No. 1, who was decree-holder in the original case. The portion of the District Judge's judgment which deals with this question of the site runs as follows:—"With regard to the site other considerations come in. There is no proof how the houses came to be built. The site is admittedly in the zamindari of the plaintiff. In the absence of evidence I must assume that the houses were built with the expressed, or implied, consent of the plaintiff or without his knowledge. Had he objected, and the defendant's predecessors persevered in spite of his objection, a question of adverse possession

1906

BHADDAR v. KHAIR-UD-DIN HUSAIN.

might arise. But the burden of the proof of such objections would lie with the defendant. Proceeding under this assumption I cannot find how the plaintiff has lost or the defendant acquired proprietary rights in the site." I am unable to agree with the proposition set down here. It seems to me that the question regarding the site of the houses stands on the same footing as that of any other land, which has been continuously in the possession of a man for twelve years or more. If the proprietor of such land sleeps over his rights and allows a stranger to continue in undisturbed possession of it for twelve or more years without exercising any of his rights of a landlord, then that man undoubtedly obtains an indefeasible title to the land. In the present case it is admitted before us that defendant No. 2 and his predecessors in title have been in continuous possession of the site of the houses for considerably over twelve years as owners. I am of opinion then, that this possession must be looked upon as adverse and that it has given the defendant an absolute title to the land. I consider, therefore, that the site of the houses is legally capable of sale under the decree obtained by defendant No. 1. This appeal might accordingly be allowed and the decree of the appellate Court might be set aside, that of the Court of first instance being restored.

STANLEY, C.J.—I agree in the conclusion at which my brother Rustomjee has arrived. The question before us, it appears to me, must be determined upon the proper inferences to be drawn from the facts, which are not in dispute. It is admitted that the site of the house in dispute lies within the ambit of the plaintiff's zamindari. It is also admitted that the house was built many years ago and that neither the owner of it nor any of his predecessors in title ever paid any rent for it, nor gave any acknowledgment of his title to the zamindar, nor carried on any trade, such as that of carpenter, blacksmith, etc., for the carrying on of which sites in the *abadi* of a village are usually granted by the zamindar free of rent. It is also admitted that the property lies within the Municipal limits of the city of Allahabad. It seems to me that the reasonable inference from the long uninterrupted possession and enjoyment of the property by Bhola and his predecessors in title is that they acquired the absolute

1906

BHADDAR v. KHAIR-UD-DIN HUSAIN.

ownership of the site. If they did not acquire it by a grant from the zamindar, they have acquired it by adverse possession. I would further point out that if we may presume that a license merely was granted by the zamindar to the predecessors in title of Bhola to build the house in question and they acting upon that license built the house, which is admittedly one of a permanent character, the zamindar, in view of section 60 of the Indian Easements Act could not revoke the license so granted. He could not revoke the license and require that the house be removed. I would, therefore, allow the appeal, set aside the decree of the District Judge and restore the decree of the Court of first instance.

BY THE COURT.—The order of the Court is that the decree of the lower appellate Court be reversed and the decree of the Court of first instance restored with cost in all Courts.

Appeal decreed.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

1906
October 25.

BHAGWAN SINGH *v.* HARMUKH AND ANOTHER.*

Criminal Procedure Code, section 250—Frivolous complaint—Jurisdiction—Complaint dismissed without issue of process.

Held that section 250 of the Code of Criminal Procedure is not applicable to a case in which a complaint is dismissed without any process being issued for the attendance of the person against whom such complaint is made.

IN this case Bhagwan Singh laid a complaint against Harmukh and Baldeo in the Court of a Magistrate of the first class, charging them with the commission of an offence under section 457 of the Indian Penal Code. The Magistrate, after making an inquiry under section 202 of the Code of Criminal Procedure, but without issuing any process against Harmukh and Baldeo, dismissed the complaint. At the same time he directed the applicant to pay to Baldeo and Harmukh Rs. 50 each to "compensate them for their illegal arrest." Bhagwan Singh applied in revision against this order to the Sessions Judge, who, being of opinion that an order under section 250 of the Code could not legally be passed under the circumstances of the case, made this reference to the High Court.

* Criminal Reference No. 574 of 1906.