As regards the second contention advanced on behalf of the appellant, namely, that the plaintiffs are not entitled to a decree for damages, I am of opinion that it is well founded and must prevail. The plaintiffs base their claim for damages upon the ground that under the zurpeshgi leases, if the mortgagors redeemed the property within the term, the mortgagee would be entitled to continue in possession and enjoy the profits subject to the payment of a specified rent and that they have been deprived of their share in such profits by reason of the appellant restoring possession to the mortgagors as soon as the redemption was effected. This contention appears to me to be clearly untenable on two grounds ; in the first place as the plaintiffs were not parties to the zurpeshgi deeds, they were not entitled as against the mortgagors to claim possession after redemption ; in the second place as between themselves and their co-mortgagee, they have neither alleged nor proved any agreement under which they could compel the appellant to avail himself of this provision in the deeds and to continue in possession as lessees after the mortgagors had redeemed the properties comprised in the security. I must hold therefore that the plaintiffs have no just ground of complaint against the appellant by reason of his surrendering possession to the mortgagors at the time the redemption was effected.

In this view of the matter, I am of opinion that the decrees made by the Court below ought to be discharged and the suit dismissed with costs in all the Courts.

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32 C. 537.

[537] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

RAHIM BUX *v.* ABDUL KADER.*
[13th December, 1904.]

Limitation—Claim to attached property—Investigation of claim—Limitation Act (XV of 1877), Sch. II Art. 11—Civil Procedure Code (Act XIV of 1882) ss. 278, 281 and 283—Waqf property.

Where a Court rejects a claim to attached property by reason of the claimant having failed to adduce any evidence in support of his claim, notwithstanding that he was allowed an opportunity to do so, the order rejecting the claim is one properly made under section 281 of the Civil Procedure Code, and is conclusive as between the parties, if no suit is brought within one year to establish the claim, as contemplated by Art. 11, Sch. II to the Limitation Act (XV of 1877).

Kallar Singh v. *Toril Mahton* (1) distinguished.

Zardhari Lal v. *Ambika Persad* (2) referred to.

[**Ref.** 11 O. C. 180 ; **Doubted:** 6 C. L. J. 362 ; 8 A. L. J. 626=10 I. C. 401 ; **Dist.** 34= Cal. 491= 11 C. W. N. 487; 64 I. C. 713 ; **Fol.** 17 M. L. T. 223=1915 M. W. N. 188=28 I. C. 244.]

SECOND APPEAL by defendants Rahim Bux and others.

This appeal arose out of an action brought by the plaintiff on the 22nd September 1902 to recover possession of certain waqf properties, and

* Appeal from Order, No. 185 of 1905, against the order of Upendra Chandra Ghosh, Subordinate Judge of Dacca, dated March 16, 1904, reversing the order of Mahim Chandra Sarkar, Munsif of Dacca, dated March 9, 1903.

(1) (1895) 1 C. W. N. 24.
(2) (1881) I. L. R. 16 Cal. 521 ; L. R. 15 I. A. 123.

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a declaration of title thereto. In execution of a decree for money against a joint matwalli, the said waqf properties were attached, and the plaintiff, the other matwalli, preferred a claim, which was rejected on the 3rd June 1899, and the properties were sold and purchased by defendants Nos. 1, 3, 4 and 5 in the name of defendant No. 2 in June 1899. The order rejecting the claim was as follows :—

" The claimant has adduced no evidence, and this is due entirely to laches on the part of the claimant. He presented his petition very late, and it would not have been registered had not the petitioner's pleader undertaken to produce evidence to-day at all hazards. It appears, however, that the petition was filed on the 25th, but boat hire was not deposited till six days after ; that is on the 31st. Hence summons to witness could not be served in time. Claim rejected with costs. "

[538] The defence, *inter alia*, was that the plaintiff had no right to sue, and that the suit having been brought more than a year after the claim of the plaintiff had been disallowed, it was barred under Article 11, Sch. II to the Limitation Act.

The Court of first instance gave effect to the objections, and dismissed the plaintiff's suit. On appeal, the learned Subordinate Judge, holding that the suit was not barred by limitation, reversed the decision of the first Court and remanded the case for trial on the merits. Against this decision the defendants appealed to the High Court.

Babu *Sarat Chunder Basak*, for the appellants. The facts of the case of *Kallar Singh* v. *Toril Mahton* (1) have no application to the present case. When a claim has been preferred and a date has been fixed for hearing, if the plaintiff does not bring his witnesses and if the claim be dismissed, it will have the same effect as a case decided upon hearing evidence : see *Karsan* v. *Ganpatram* (2). Even if the claimant does not adduce any evidence, it is within the jurisdiction of the Court to pass an order, and it is an order under s. 281 of the Code of Civil Procedure. The onus is upon the claimant to show that the property is not in the possession of the judgment-debtor. I rely upon s. 279 of the Code of Civil Procedure. The case of *Ibin Hosein* v. *Haidar* (3) and *Kalu Mal* v. *Brown* (4) are distinguishable. In the Full Bench case of *Lachmi Narain* v. *Martindell* (5) the earlier Allahabad case was not followed. The following cases support my contention: *Sadut Ali* v. *Ramdhone Misser* (6); *Tripura Soonduree* v. *Ijjutoonnissa Khatoon* (7); *Gooroo Dass Roy* v. *Sona Monee Dossia* (8); *Sreemunto Hajrah* v. *Syud Tajooddeen* (9). In the case of *Kallar Singh* v. *Toril Mahton* (1), the party failed to appear, but in the present case the party did appear, but failed to adduce evidence and therefore it is distinguishable from that case.

[539] Babu *Horendra Narayan Mitter*, for the respondent. There being no investigation under s. 281 of the Civil Procedure Code, Article 11, Sch. II to the Limitation Act would not apply. That section is intended to apply to a case where parties are willing to adduce evidence. The case of *Kallar Singh* v. *Toril Mahton* (1) contemplates that the Court must investigate the case, and supports my contention that an order under s. 281 of the Code presupposes some investigation regarding the merits of the case.

(1) (1895) 1 C. W. N. 24.
(2) (1897) I. L. R. 22 Bom. 875.
(3) (1885) I. L. R. 12 Cal. 109.
(4) (1881) I. L. R. 3 All. 504.
(5) (1897) I. L. R. 19 All. 253.
(6) (1882) 12 C. L. R. 43.
(7) (1875) 24 W. R. 411.
(8) (1873) 20 W. R. 345.
(9) (1874) 21 W. R. 409.

PRATT AND MITRA, JJ. The plaintiff and defendant No. 9 were Mutwallis in respect of a Mahomedan endowment. There was a personal decree for money against defendant No. 9, and the decree-holder attached the land now in dispute. The plaintiff, as Mutwalli, put in a claim under section 278 of the Code of Civil Procedure. He was allowed an opportunity of adducing evidence, but he failed to do so, and an order was made rejecting the claim on the 3rd of June 1899. He instituted a suit shortly after: but that suit was dismissed in the absence of both sides, under the provisions of section 98 of the Code. He waited for years, and instituted the suit now under appeal on the 22nd of September 1902.

The question, which has been raised and argued before us, is whether the suit is not barred under Article 11 of the Second Schedule to the Limitation Act.

That the order of the 3rd June 1899 purported to have been made under section 281 of the Code cannot be doubted. The only question is whether the order was one properly made under that section. If it was, section 283 of the Code makes that order conclusive as between the parties, if no suit be brought within one year as contemplated by Article 11 of the Second Schedule to the Limitation Act.

We have been referred, during the course of the argument, to a large number of cases, and there is an undoubted conflict with reference to the principle that underlies them. But the Judicial Committee in the case of *Sardhari Lal* v. *Ambika Pershad* (1) has laid down that the question as to the nature of the investigation is, in substance, a question to be decided on the evidence **[540]** adduced in each case. Their Lordships say: "But besides that, the Code does not prescribe the extent to which the investigation should go ; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him." "The order," their Lordships go on to say, "is not conclusive ; a suit may be brought to claim the property notwithstanding the order ; but then the Law of Limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought."

The investigation in the present case, as we have said, was that the case was fixed for hearing, an opportunity was given to the claimant to adduce what evidence he had; he had put in a list of witnesses, but no processes could be issued as he had not put in the necessary fees for the purpose. On the day of hearing he was present in Court and asked for time ; the Court refused to grant him time ; the case thereupon went as if the claimant had failed to adduce any evidence. This, we think, is an investigation sufficient to bring the case within section 281 of the Code.

In one of the latest cases decided on the point (Appeal from Original Decree No. 28 of 1902, decided on the 28th June 1904), it was held by

(1) (1888) I. L. R. 15 Cal. 521; L. R. 15 I. A. 123.

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this Court under similar circumstances that such an order made by the Court was one under section 281, and therefore Article 11 of the Second Schedule to the Limitation Act applied. It is unnecessary for us to go into the other cases cited by the learned vakils. They have all been discussed in Appeal from Original Decree No. 28 of 1902, to which we have referred.

The learned vakil for the respondent has relied mainly on *Kallar Singh* v. *Toril Mahton* (1). In that case there was no appearance for the claimant ; the decree-holder was present. The [541] Court ordered that the claim should be disallowed. That case is distinguishable from the present one, and without saying that we agree with the learned Judges with reference to some of the observations made therein, we are of opinion that the decision of the Privy Council, which has been referred to and the latest case decided by this Court, are in favour of the contention raised by the appellant. The plaintiff omitted to bring the suit within the period of one year, and the suit ought to fail.

We are, therefore, of opinion that the order of the Subordinate Judge must be set aside, and that of the Munsif restored with costs.

Appeal allowed.

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32 C. 542 (=9 C. W. N. 487.)

[542] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

NIBARAN CHANDRA CHOWDHRY *v.* CHIRANJIB PRASAD BOSE.*
[24th February, 1905.]

Sale—Sale for arrears of revenue—Separate shares—Notification of sale—Specification of share—Residue—Material irregularity—Substantial injury resulting, proof of—Evidence—Revenue Sale Law (Act XI of 1859) *ss.* 6, 10, 11, 33—*Act VIII (B. C.) of* 1876, *s.* 70.

Where separate accounts had been opened under ss. 10 and 11 of Act XI of 1859 and s. 70 of Act VII (B. C.) of 1876, and the sale notification did not specify the share to be sold as required by s. 6 of Act XI of 1859 but merely described it as the residue, and stated the amount of the revenue of the entire estate and that of the share to be sold.

Held, that, as the amount of revenue would not correspond with an *aliquot* share of the lands in the estate, the sale notification was insufficient, and the non-specification was a material irregularity.

Ram Narain Koer v. *Mahabir Pershad Singh* (2), *Dil Chand Mahto* v. *Baij Nath Singh* (3), *Ismail Khan* v. *Abdul Aziz Khan* (4) distinguished.

Annada Charan Mukhuti v. *Kishori Mohan Rai* (5), *Hem Chandra Chowdhry* v. *Sarat Kamini Dasya* (6) followed.

The question whether the relation of cause and effect between an irregularity and a substantial injury is proved, is essentially one of fact. The connection must be established by evidence. The presumption of cause and effect from

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* Appeal from Original Decree, No. 301 of 1903, against the decree of Hari Nath Roy, Subordinate Judge of Dacca, dated May 30, 1903.

(1) (1895) 1 C. W. N. 24.
(2) (1886) I. L. R. 13 Cal. 208.
(3) (1903) 8 C. W. N. 337.
(4) ante p. 509.
(5) (1892) 2 C. W. N. 479.
(6) (1902) 6 C. W. N. 526.