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personal properties and the properties purchased after the death of Chuttoorbhoj, the amount of maintenance must be still more considerably reduced. Having regard to the status of the parties and the value of the immoveable property of the appellant's husband for which the respondents will obtain a decree, and taking into consideration that under our decree the appellant will be entitled to not an inconsiderable portion of the estate left by Chuttoorbhoj, I am of opinion that Rs. 25 should be fixed as the monthly maintenance to be allowed to the appellant out of the estate of her husband which has devolved upon the respondent.

We accordingly modify the decree of the lower Court. The respondents will get a decree for the properties claimed with the exception of a moiety of the personal properties and the properties purchased in the benami of Jugger Nath Pershad and Gopi Lal; the suit must also fail as regards the money (Rs. 30,000) paid by the Maharajah of Bettea, and consequently the money covered by the bond executed by Mr. Hudson. The maintenance of Birajun Koer will be fixed at the rate of Rs. 25 per month. Costs of all the parties to this appeal will come out of the estate. The order as to costs in the decree of the lower Court will stand.

Appeal allowed and decree modified.

Before Mr. Justice Tottenham and Mr. Justice Norris.

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KRISHNA LALL DUTT (PLAINTIFF) v. RADHA KRISHNA SURKHEL
 AND OTHERS (DEFENDANTS)*

Limitation Act (XV of 1877), Sch. II, Art. 138—Possession, Suit for—Auction purchaser, Suit by, for possession.

Where it was shown in a suit by an auction-purchaser at an execution sale that the formal possession obtained by him through the Court had not been followed by any act of possession, and consequently that it had been infructuous, *Held* that the purchaser was entitled to bring a suit to obtain actual possession, but was bound to bring it within twelve years from the date of the sale, the period prescribed by Art. 138, Sch. II of the Limitation Act (Act XV of 1877).

* Appeal from Appellate Decree No. 145 of 1883 against the decree of S. H. C. Tayler, Esq., Judge of Beerbhoom, dated the 10th October 1882, affirming the decree of Baboo Manu Lail Chatterjee, Subordinate Judge of that district, dated the 7th June 1882.

The decisions in *Kristo Gobindo Kur v. Gunga Pershad Surmah* (1) and *Lalit Coomar Bose v. Ishan Chunder Okuckerbutty* (2) require such purchaser to obtain possession through the Court before bringing his suit, but they do not preclude him from enforcing his right by suit, when the formal possession given by the Court has failed to put him in actual possession.

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THIS was a suit by a purchaser at an execution sale for a declaration of his title to the property, for ejection of the defendants, and for *khaz* possession to be given him.

The property in suit had been the subject of three separate sales, *viz.*, one on the 25th January 1864, the second on the 30th March 1864, and the third on the 11th February 1869. The plaintiff was filed in the first instance on the 1st July 1881 in the Court of the Munsiff of Bolepur, but the subject-matter being undervalued it was returned to the plaintiff on the 10th February 1882 for want of jurisdiction. The plaintiff then filed the plaintiff on the 11th February 1882 in the Court of the Subordinate Judge, and amongst other matters contended that the time during which the suit was on the file of the Munsiff should be excluded from the period during which limitation was to be calculated. He further alleged that after having obtained symbolical possession through the Court of the properties purchased by him, he had given the defendants permission to reside on the properties, and he claimed that the period during which the defendants so held under his permission should also be deducted from the period during which the limitation was running.

Both the lower Courts, however, found that the fact of the plaintiff having given the defendants permission to reside on the properties had not been proved, and as both plaintiff and defendants relied on Art. 138, Sch. II of Act XV of 1877 as the one which governed the case, they held that the suit was barred even when it was instituted in the Munsiff's Court and consequently the suit was dismissed with costs.

Against the decision of the lower Appellate Court the plaintiff appealed to the High Court, and contended that the lower Courts were wrong in holding that the possession taken by him had no bearing upon the time allowed by limitation, and that

(1) 25 W. R., 372.

(2) 10 C. L. R., 258.

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the suit being brought within twelve years from the date on which such possession was taken it was not barred. It was further contended that Art. 138 of Sch. II of Act XV of 1877 had no application to the suit.

Baboo *Mohiny Mohun Roy* appeared for the appellant.

Baboo *Troyluokho Nath Mitter* for the respondent.

The judgment of the Court (TOTTENHAM and NORRIS, JJ.) was delivered by

TOTTENHAM, J.—At the hearing of this appeal we were disposed to think that the Courts below had committed an error in applying to the case Art. 138 of the Limitation Act, although both parties had admitted that the case must be governed by it. And if it had been shown that the formal possession awarded to the plaintiff on the 2nd of July 1869 had been followed by any Act of possession, such as the grant of permission to the defendants which is alleged in the plaint, we should hold that this took the case out of the scope of Art. 138. But we observe that the Court has negatived the plaintiff's allegation in this respect; and has found that there was nothing but the formal publication of plaintiff's possession. It seems to us, therefore, that the formal possession obtained through the Court having been infructuous, the plaintiff was entitled to bring a suit to obtain actual possession, but was bound to bring it within the period prescribed by Art. 138, *viz.*, twelve years from the date of purchase.

The rulings cited, *viz.*, *Kristo Gobindo Kur v. Gunga Pershad Surma* (1) and *Lalit Coomar Bose v. Ishan Chunder Chuckerbutty* (2) would require a purchaser to obtain possession through the Court before bringing such a suit as the present one, but would not, we think, preclude him from enforcing his right by suit when the formal possession given by the Court has failed to put him in absolute possession.

But we think the suit was out of time, and this appeal must be consequently dismissed with costs.

Appeal dismissed

(1) 25 W. R., 372.

(2) 10 C. L. R., 258.