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We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore that of the lower appellate court with costs of both hearings in this Court.

*Appeal allowed.*

## FULL BENCH.

*Before Justice Sir Pramada Charan Banerji, Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.*

JANG BAHADUR SINGH AND ANOTHER (DEFENDANTS) v. HANWANT SINGH (PLAINTIFF)\*

1921  
March, 18.

*Execution of decree—Limitation—Civil Procedure Code (1882), sections 318 and 319—Civil Procedure Code (1908), order XXI, rules 95 and 96—Formal possession not available to save limitation where actual possession could have been and ought to have been given.*

If, upon an execution sale, possession has been delivered to the auction purchaser in accordance with the provisions of the law, that is, in accordance with section 318 or 319 of the Code of Civil Procedure of 1882 as the case may be, having regard to the nature of the property, or under order XXI, rule 95 or rule 96, of the Code of 1908, as the case may be, in each case regard being always had to the nature of the property and the mode in which possession ought in law to have been delivered, and such possession has been delivered, the auction purchaser gets a fresh start for the computation of limitation. But where such possession has not been delivered, the mere fact of formal delivery of possession is not available to him for saving the operation of limitation.

THE facts of this case are fully stated in the judgment of the Court.

Babu Piari Lal Banerji, Munshi Vishan Nath and Munshi Beni Bahadur, for the appellants.

Dr. Surendra Nath Sen, Mr. Ibn Ahmad and Munshi Kanhaiya Lal, for the respondents.

BANERJI, MUHAMMAD RAFIQ and LINDSAY, JJ. :—This appeal arises out of a suit for possession of a house, and the question to be determined is whether the suit is barred by limitation. The house in question was sold by auction in execution of a decree against the first four defendants and the sale was confirmed on the 13th of January, 1903. Delivery of possession was obtained

\* Second Appeal No. 847 of 1918 from a decree of Shekhar Nath Banerji, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 2nd of April, 1918, confirming a decree of Sidheshwar Maithra, Munsif of Allahabad, dated the 17th of August, 1917.

on the 20th of November, 1903. If limitation be computed from that date the suit is just within time, but if the plaintiff cannot avail himself of the delivery of possession made on the 20th of November, 1903, as giving him a fresh start for the computation of limitation, the claim is admittedly time-barred. It was alleged in the court of first instance by the plaintiff that he got actual possession of the premises which he had purchased at auction, that the judgment-debtors had gone out of the house, but that he had subsequently permitted them to remain in the house and that the judgment-debtors and their sons had refused to vacate the house. This statement of the plaintiff was not believed by the court of first instance, which held that the plaintiff never got actual possession of the house. The finding of the court of first instance was affirmed by the lower appellate court and both courts held that the nature of the possession delivered on the 20th of November, 1903, was formal possession and not actual possession. Both the courts below have held that this delivery of possession was sufficient to save the operation of limitation. In our opinion this view is erroneous. If possession was delivered in accordance with law that undoubtedly would, as between the parties to the proceedings relating to delivery of possession, give a new start for the computation of limitation and the possession of the defendants would be deemed to be a fresh invasion of the plaintiff's right and a new trespass upon the property. But if possession was not delivered in the mode provided by law, that delivery of possession cannot in our opinion give a fresh start to the plaintiff for computing limitation. Under the Code of Civil Procedure which prevailed at the time when delivery of possession was made in the present case, two modes were provided for delivering possession to auction purchasers. One was the procedure laid down in section 318 of the Code of Civil Procedure, 1882, and the other was that prescribed in section 319. The section first named provided for the case in which the judgment-debtor was actually in possession and it directed that upon the application of the auction purchaser the court was to order delivery of possession to the auction purchaser

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or to any one appointed on his behalf to receive possession, and if need be, to remove the judgment-debtor from the occupation of the premises. The other mode of delivering possession related to property which from its nature was not capable of being actually delivered to the auction purchaser. In the case of such property the mode for delivering possession is laid down in the section and possession would be delivered by proclaiming the sale certificate and by beat of drum. In the present case the property was in the occupation of the judgment-debtor and therefore the only mode in which possession could be delivered was that prescribed in section 318. According to the finding of the courts below to which we have referred, this kind of possession was not delivered to the auction purchaser, the present plaintiff. Therefore in our opinion the delivery of possession made to the plaintiff in 1903 could not be of any avail to him for computing limitation for the purposes of the present suit. Our attention was drawn to the judgment of this Court in *Mangli Prasad v. Debi Din* (1). To that judgment one of us was a party. That was a case in which possession could only be formally delivered and was not a case in which actual possession could be delivered to the auction purchaser, and it was held that the delivery of possession made to the auction purchaser was sufficient to give him a new start for calculating limitation. It was never intended to be held in that case and in our opinion it was not held that whether possession was delivered under section 318 or 319 any delivery of possession would be sufficient to save limitation. What was intended to be held was that where possession is delivered in the mode appropriate to the particular case and in compliance with the law which applied to that case, such delivery of possession would save the operation of limitation. This was explained in the later case of *Rajendra Kishore Singh v. Bhagwan Singh* (2). A ruling of a learned Judge of this Court has also been cited to us in which it is said that a wider view of the provisions of the law was taken. That is the case of *Rahim Baksh v. Muhammad Hafiz* (3). On a

(1) (1897) I. L. R., 19 All., 499.

(2) (1917) I. L. R., 39 All., 460.

(3) (1911) 10 Indian Cases, 319.

cursorily reading of that judgment it may be considered that it supported the contention of the respondent, but it seems to us that if we look into the facts of that particular case it was a case in which possession was properly delivered in the mode in which the auction purchaser had obtained it. Having regard to the nature of the property, possession could not be delivered by actually removing the judgment-debtor from the property. The Full Bench decision of the Bombay High Court in *Mahadev Sakharam Parkar v. Janu Namji Hatle* (1) supports the view which we have enunciated above. It is urged that this decision of the Bombay High Court runs counter to the later decision of their Lordships of the Privy Council in *Thakur Sri Sri Radha Krishna Chanderji v. Ram Bahadur* (2). We do not agree with this contention. The property in the case which was before their Lordships of the Privy Council was land in the occupation of tenants and possession had been delivered in accordance with the provisions of the law relating to delivery of possession in respect of such land. Their Lordships held that such possession gave, as between the parties to the proceedings relating to delivery of possession, a new start for the computation of limitation. In so holding their Lordships approved of the decision of a Full Bench of the Calcutta High Court in *Juggobundhu Mukerjee v. Ram Chunder Bysack* (3). That also was a case relating to zamindari property which was in the possession of tenants and of which actual possession could not be delivered.

On behalf of the respondent much reliance has been placed on the decision of the Calcutta High Court in *Lokessur Koer v. Purgun Roy* (4), which was followed in *Hari Mohan Shaha v. Baburuli* (5). These two cases no doubt support the contention of the respondent and go the length of holding that whatever may have been the mode in which possession was delivered the delivery of possession would, as between the parties to the case, be a starting point for computing limita-

(1) (1912) I. L. R., 33 Bo n., 373 (3) (1830) I. L. R., 5 Calc., 584.

(2) (1917) 16 A. L. J., 33 (4) (1881) I. L. R., 7 Calc., 418.

(5) (1897) I. L. R., 24 Calc., 715.

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tion. We have considerable hesitation in following the learned Judges in that case and their opinion is contrary to the view held by the same Court in *Shoteenath Mookerjee v. Obhoy Nund Roy* (1). The case of *Koherlakota Venkatakristna Row v. Vadrevu Venkappa* (2) is distinguishable from the present case having regard to the facts and circumstances of that case. The same remark applies to the case of *Dhansingh v. Ganpat* (3). In these cases possession had been delivered in the right mode having regard to the nature of the property. In this view we hold that where possession has been delivered in accordance with the provisions of the law, that is, in accordance with section 318 or 319 of the Old Code, as the case may be, having regard to the nature of the property, or under order XXI, rule 95 or rule 96, in each case regard being always had to the nature of the property and the mode in which possession ought in law to have been delivered, and such possession has been delivered, the auction purchaser gets a fresh start for the computation of limitation. But where such possession has not been delivered, the mere fact of formal delivery of possession is not available to him for saving the operation of limitation. In the present case possession was not delivered in the manner required by law and therefore the delivery of possession which took place on the 20th of November, 1903, could not be of any help to the plaintiff as regards the saving of limitation. We, therefore, allow the appeal, set aside the decree of the courts below and dismiss the plaintiff's suit with costs.

*Appeal allowed*

(1) (1879) I. L. R., 5 Cal., 331.      (2) (1903) I. L. R., 27 Mad., 262.

(3) (1913) 24 Indian Cases, 250.