

FULL BENCH.

Before Sir Louis Stuart, Knight, Chief Judge, Mr. Justice Wazir Hasan and Mr. Justice Gokaran Nath Misra.

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March, 12.

GULAB KHAN (DEFENDANT-APPELLANT) v. ATAULLAH
AND ANOTHER (PLAINTIFFS-RESPONDENTS.)*

Limitation Act (IX of 1908), article 142—“Possession” under article 142 of the Limitation Act, whether includes constructive possession—Civil Procedure Code (Act V of 1908), order XXI, rule 95—“Possession” delivered according to order XXI, rule 95, whether a valid and effective delivery of possession—Suit for actual possession by a person who had obtained possession according to order XXI, rule 95 of the Code of Civil Procedure—Limitation, starting point of.

In a case where an auction-purchaser has purchased a share in a property sold and thereby becomes a co-sharer with other persons, the only way of his getting a valid and effective delivery of possession sufficient to give him a fresh start for limitation is by getting delivery under order XXI, rule 95 of the Code of Civil Procedure. Such a delivery of possession to the decree-holder amounts to a dispossession of the judgment-debtor, and if the auction-purchaser sues for recovery of actual possession the article of limitation governing the case would be article 142, and the date from which time began to run would be the date on which he obtained delivery of possession under order XXI, rule 95.

Per HASAN, J.:—On general principles “possession” for the purposes of rule 95 of order XXI of the Code of Civil Procedure must mean such possession as the nature of the property is capable of. This is the juristic conception of the word “possession” and there is no reason to make a departure therefrom for the purposes of interpreting the rules of procedure as laid down in the Code.

The word “possession” in article 142 of the Limitation Act should not be read to connote “occupation” or “deten-

*Second Civil Appeal No. 290 of 1927, against the decree of Bishwanath Hukku, Subordinate Judge of Partabgarh, dated the 21st of April, 1927, upholding the decree of Oudh Behari Lall Munsif of Kunda at Partabgarh, dated the 31st of January, 1927, decreeing the plaintiff's suit.

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tion" merely. It certainly includes constructive possession. So the word "possession" in article 142 should be given the meaning which that word can reasonably bear in relation to the nature of the property to which it is sought to be applied.

Jang Bahadur Singh v. Hanwant Singh (1), and *Mahadevappa Dundappa Hampiholi v. Bhima Daddapa Maled Kutarnahtti* (2), referred to. *Mahadev Sakharam Parkar v. Janu Namji Hatle* (3), dissented from.

Lake v. Dean (4), *Lyell v. Kennedy* (5), and *Lord Advocate v. Young* (6), referred to.

THE case was originally heard by MISRA, J., who referred it to a Full Bench consisting of three Judges. His order of reference is as follows :—

MISRA, J. :—This is an appeal arising out of a suit for recovery of possession of a half-share in certain underproprietary plots of land, situate in village Jagdish Garh, district Partabgarh. The facts of the case are that these plots, along with others, were owned by one Sitla Bakhsh. He transferred them to the defendant-appellant Gulab Khan, but prior to the transfer he had mortgaged them to one Mathura, the father of defendants Nos. 2, 3 and 4, who are no party to this appeal. Mathura, the mortgagee, instituted a suit on the basis of his mortgage and obtained a decree on the 13th of February, 1904 (exhibits 4 and 5), against Sitla Bakhsh, the original proprietor of the land and the present appellant Gulab Khan, who subsequently purchased the property. The decree was made absolute on the 12th of January, 1907 (exhibit 6). Mathura brought the mortgaged property to sale, and purchased a half-share in the plots in suit on the 20th of June, 1911. The sale was confirmed on the 12th of August, 1911. He applied for a sale certificate on the 17th of July, 1914, and it was issued to him on the 4th of August, 1914 (exhibit 1). After obtaining the sale certificate he applied for delivery of possession, and a warrant to that effect was issued under order XXI,

(1) (1921) I.L.R., 43 All., 520.

(2) (1922) I.L.R., 46 Bom., 710.

(3) (1912) I.L.R., 36 Bom., 373.

(4) 28 Beav., 207;

(5) 18 Q.B.D., 796.

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rule 95 of the Code of Civil Procedure by the Court on the 8th of August, 1914 (exhibit 7). On the 23rd of August, 1914, possession was delivered to Mathura, the auction-purchaser, by beat of drum. The endorsement on the back of the warrant of delivery of possession ran as follows :—

“*Waga tarikh 23 August 1914, ko ba-awaz dohal mushtahar manadi karke (arazi) mandarja warrant dakhil dehani ki Mathura mush-tari certificate ko dakhil hasb zabita dila-diya.*”

The translation of the above endorsement runs as follows :—

“On the 23rd of August, 1914, after making a proclamation by beat of drum the possession of the property mentioned in the warrant of delivery of possession was handed over to Mathura, the purchaser entered in the certificate of sale, in accordance with the rules (*hasb zabita*).”

It appears that although Mathura obtained possession through court, yet he did not succeed in getting actual possession over the plots in suit. Mathura died sometime in 1924, and after his death, his sons at first executed a deed of lease in favour of the respondents Nos. 1 and 2 (exhibit 3) and then subsequently sold the property to them under a registered sale-deed, dated the 16th of December, 1925 (exhibit 2). It is on the basis of this sale-deed that the present suit was brought on the 3rd of August, 1926, by the plaintiffs-respondents for possession of the property in suit.

The defence raised in the case consisted principally of the plea of limitation. It was urged by the appellant that the plaintiffs-respondents not having obtained actual possession over the property in suit, their claim for possession was barred by limitation.

This plea has been overruled by both the courts below. They have held that Mathura having obtained delivery of possession through court on the 23rd of August, 1914, the period of limitation should be considered to run from that date; and the plaintiffs' suit, having been brought within twelve years from that date, is within limitation. The lower appellate court has distinguished the Full Bench ruling reported in the case of *Jang Bahadur Singh v. Hanwant Singh* (1), on the ground that it was not possible in the present case for the auction-purchaser to get actual possession of the plots in suit since he had purchased only a half-share in them; and consequently the possession which was delivered to him through court, though a possession merely by beat of drum was quite enough in law to constitute a valid delivery of possession in order to give him a fresh start for limitation.

The defendant-appellant has now appealed to this Court, and the main point for decision is whether the possession which was delivered to the auction-purchaser on the 23rd of August, 1914, by beat of drum was the only possession which could be delivered in the circumstances of the case, and should be deemed to be such as to give a fresh start for the period of limitation in favour of the auction-purchaser. The argument urged on behalf of the appellant is that the warrant for delivery of possession issued by the court, being one under order XXI, rule 95 of the Code of Civil Procedure, the auction-purchaser should have been delivered actual possession over the property purchased by him; and if no such possession was delivered, the proceedings taken in August, 1914, would not have the effect in law of giving to the purchaser a fresh start for limitation. The limitation, it was contended, should run from the date of the confirmation of the sale, namely, the 12th of August, 1911, and the suit

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having been brought more than twelve years after the said date, is barred by limitation. Reliance was placed on a Full Bench decision of the Bombay High Court in *Mahadev Sakharam v. Janu Nanji Hatle* (1), and the Full Bench decision of the Allahabad High Court quoted above.

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On behalf of the respondents it is contended that the rule of law laid down in the said decision of the Allahabad High Court cannot apply to the present case since the property purchased at the auction-sale was only a half-share in the plots in suit, and it was not, therefore, possible for the purchaser to take actual possession of the plots purchased. The auction-purchaser, it was contended, could at best obtain only a joint possession over the plots in suit, and that possession should be deemed to have been delivered to him under the warrant of delivery of possession on the 23rd of August, 1914. It was, therefore, urged that the possession which was delivered to the purchaser was the only one which could only be delivered in the circumstances of the case, and, therefore, the delivery of possession on the 23rd of August, 1914, should give the plaintiffs a fresh start for limitation. Reliance was placed on a Privy Council decision in *Radha Krishna Chanderji v. Ram Bahadur* (2), a decision of the Calcutta High Court in *Bhulu Beg v. Jatindra Nath Sen* (3), and a decision of a Bench of this Court in *Ali Husain v. Mohammad* (4). It was also urged on behalf of the respondents that as the finding of the courts below was to the effect that the auction-purchaser had not succeeded in getting actual possession over the property in suit, the suit brought by the plaintiffs could not be considered to be governed by article 142 of the Indian Limitation Act. It was argued that the only article which could be considered to be applicable in the cir-

(1) (1912) I.L.R., 36 Bom., 373.

(2) (1918) 16 A.L.J., 33; s.c.
20 Bom., L.R., 502.

(3) 27 C.W.N., 24.

(4) (1927) 4 O.W.N., 1005.

cumstances of the case, was article 144. Under that article a plaintiff's suit if brought within twelve years of the date when the possession of the defendant becomes adverse to the plaintiff, is fully maintainable. The argument was that the possession of the defendant-appellant could become adverse only after the 23rd of August, 1914; and the suit having been brought within twelve years from that date, was within limitation.

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As the point involved in the case is one of great importance and frequently arises, I refer it for decision to a Full Bench of this Court, under section 14 of the Oudh Courts Act (IV of 1925). The point which I refer is as follows :—

“(a) Whether the delivery of possession by means of beat of drum under order XXI, rule 95 of the Code of Civil Procedure to an auction-purchaser, who has purchased a share in a property sold, can be considered to be a valid and effective delivery of possession sufficient to give to the auction-purchaser a fresh start for limitation.

(b) Whether article 144 of the Indian Limitation Act would be applicable in a case where the auction-purchaser of only a share in a certain property sues for recovery of possession on the ground that he has not obtained actual possession; and if so whether the possession of the judgment-debtor who has remained in actual possession in spite of the formal delivery of possession through court, should be deemed to have become adverse only from the date of such formal delivery.”

Mr. *Ali Zaheer*, for the respondents.

Mr. *Radha Krishna*, for the respondents.

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STUART, C. J. :—The question raised in the reference before us is a question of considerable importance. Before I state my views upon it, I state the facts with which we are concerned. Two brothers of the name of Sheomangalpal and Narsingh Bahadur owned 19 bighas, 13 biswas, 15 biswansis of under-proprietary land in a village in the Partabgarh district. It appears that Sheomangalpal executed a deed of simple mortgage in respect of his interest in this property in favour of a certain Mathura. He appears then to have transferred the remainder of his interests in a moiety of 6 bighas, 2 biswas and 5 biswansis out of this total area to a certain Gulab Khan. His rights in the remainder appeared to have passed through the hands of various people in execution of decrees against him, and we finally find that Mathura in the year 1910 instituted a suit on the basis of his mortgage-deed and obtained a decree against the mortgaged property. He put this decree in execution, and himself purchased a moiety in the 19 bighas, 13 biswas, 15 biswansis. The sale was confirmed on the 12th of August, 1911. Now we have it that Gulab Khan was in physical possession of 6 bighas, 2 biswas and 5 biswansis. On the 23rd of August, 1914, Mathura obtained possession through the court over a half-share in this 6 bighas, 2 biswas and 5 biswansis, which was in the physical possession of Gulab Khan. Subsequently Mathura sold his interests in these plots to Ataulla and Ebadullah Khan, and Ataulla Khan and Ebadullah Khan instituted a suit for possession over the half-share in these plots against Gulab Khan. This suit was instituted on the 3rd of August, 1926. It has been decreed by the courts below. The question which is now raised in second appeal is whether such a suit is or is not time-barred and a learned Judge of this Court, before whom the matter had come in second appeal, has referred the questions of law involved under the provisions of sec-

tion 14 of the Oudh Courts Act (IV of 1925) for a decision by a Full Bench.

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I find at the beginning that on the 23rd of August, 1914, the whole of the seven plots of an area of 6 bighas, 2 biswas and 5 biswansis were in physical possession of Gulab Khan. Gulab Khan was undoubtedly a judgment-debtor under the decree.

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When Mathura obtained delivery of possession over a moiety of these plots, he obtained delivery clearly under the provisions of order XXI, rule 95. Ordinarily if Mathura had brought a suit for possession the limitation would have been under article 138 of the First Schedule of Act IX of 1908, but this is not a suit by a purchaser at a sale in execution of his decree, when the judgment-debtor was in possession at the date of the sale, for the property transferred by the sale. It is a suit brought by the vendee of a person who, the plaintiff declares, had obtained possession of the property on the 23rd of August, 1914, and the article of limitation which, in my opinion, is applicable is article 142. According to the findings of the courts below, Mathura obtained possession on the 23rd of August, 1914, under the order of the court. He did not obtain physical possession. The courts below found that he failed to obtain such possession. He did not obtain enjoyment of the property. But if he obtained effective possession on the 23rd of August, 1914, the suit is within limitation. If he did not obtain effective possession, the suit is not within limitation.

In support of the argument that he did not obtain effective possession the learned Counsel for the appellants, who has argued the case with great skill, has laid stress upon a decision of the Full Bench of the Allahabad High Court in *Jang Bahadur Singh and another v. Hanwant Singh* (1), and also on the decision of a Bench of the

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Bombay High Court in *Mahadev Sakharam Parkar v. Janu Namji Hatle* (1). The decision of the Full Bench of the Bombay High Court appears to have been questioned in a subsequent decision of the Bombay High Court in *Mahadevapa Dundappa Hampiholi v. Bhima Daddapa Maled Kutarnahatti* (2). In the Bombay decision great stress was laid upon a distinction between symbolical possession and non-symbolical possession. I am not disposed myself to found a decision upon a distinction between the delivery of possession which is symbolical, and the delivery of possession which is non-symbolical. In a very large number of instances it is only possible to grant symbolical possession and the question, as it appears to me, has little to do with the distinction between what is symbolical and what is non-symbolical. The question is: Is the delivery effective in the circumstances of each particular case? It is admitted that on the 23rd of August, 1914, Gulab Khan was in actual physical possession of this 6 bighas, 2 biswas, 5 biswansis and at that season of the year ploughing would ordinarily have taken place and some young crops would be standing on the ground. If Mathura had obtained a sale certificate for the whole of the plots the matter would have been simple. He could have taken physical possession over the crops, continued to tend them, could have reaped them when they were ready, and utilized the land afterwards as he wished; but his sale certificate only gave him a right to an unspecified moiety, and it is clear to me that at the time that possession was given in terms of that sale certificate the officer of the court granting possession had no authority to delimit specific portions of the plots and award them to Mathura. In these circumstances to my mind the only sort of possession which could have been granted was a constructive possession which would have enabled Mathura either to obtain partition over the plots

(1) (1912) I.L.R., 36 Bom., 373. (2) (1922) I.L.R., 46 Bom., 710.

or to obtain a share of the profits, and on my understanding of what happened such possession was granted and that possession was effective. I would, therefore, reply to the reference before us that the article of limitation governing the case would be article 142, and that the date from which the time began to run was the 23rd of August, 1914.

HASAN, J. :—I have very little to add. Two admitted facts are of outstanding importance. Mathura at the auction-sale obtained a right of ownership under the purchase to a one-half share in seven specified plots. This is the first fact. The second fact is that the other half share in the same plots has all along legally vested in the defendant-appellant Gulab Khan. Now when Mathura proceeded to obtain possession of the property, which he acquired under the auction-sale, he took proceedings under order XXI, rule 95 of the Code of Civil Procedure, and not under rule 96 of the same order. The court through its proper officer put him in possession of the purchased property under the same rule of procedure under which Mathura had applied. In my judgment that was the only procedure which could reasonably and properly be availed of in the circumstances of the case.

On the date of the sale in favour of Mathura of the half-share in the seven plots, Gulab Khan was in possession of the entire area of those plots. This being so, rule 96 was inapplicable. The difference between the two rules is substantial. Rule 95 clearly relates to cases where the delivery of possession in favour of a purchaser is to take place in respect of property in the occupancy of the judgment-debtor. In the present case, as I have just now said, the property in its entirety including the share purchased by Mathura was in the occupancy of Gulab Khan. Rule 96 on the other hand applies to cases where the property sold is "in the occupancy of a tenant or other person entitled to occupy the same." Therefore on

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the facts of the case, rule 96 was inapplicable. Delivery of possession under rule 95 may take place in two modes: one by putting the purchaser "in possession of the property" simply, and (2) if need be "by removing any person who refuses to vacate the same." In the present case the second mode could not be resorted to, the reason being that Gulab Khan being a co-sharer to the extent of one-half was in lawful possession of the whole, *per my et per tout*. He, therefore, could not be made to vacate the possession. I am unable to read in the rule words which would restrict its application only to cases where actual physical delivery of possession is to be given to the purchaser of immoveable property. It seems to me that on general principles, possession for the purposes of rule 95 must mean such possession as the nature of the property is capable of. This is the juristic conception of the word "possession," and I see no reason to make a departure therefrom for the purpose of interpreting the rules of procedure as laid down in the Code.

I now come to the question as to which article of the Indian Limitation Act is applicable to the suit out of which the reference has arisen. So far as the nature of the suit is disclosed by the allegations made in the plaint, there can be no two opinions that it is a suit for recovery of possession of immoveable property caused by dispossession of the plaintiff. This being so, *prima facie* the article applicable is article 142 of the Indian Limitation Act; but it is argued on behalf of the appellants that having regard to the finding that the possession which the auction-purchaser obtained in proceedings subsequent to the grant of certificate in his favour, did not amount to actual possession in the sense that Gulab Khan was not made to vacate the plots, it should be held that the auction-purchaser never obtained possession and, therefore, there was no dispossession within the meaning of article 142 of the Indian Limitation Act. It seems to

me that this argument begs the whole question at issue. It assumes that "possession" in article 142 can mean nothing less than actual possession of one person by ousting another person who holds possession of a similar nature. I am unable to accept this assumption as well founded in law. Courts in India are familiar with cases which may fall under article 142 and yet there may not be possession actual and physical either on the part of the plaintiff or on the part of the trespasser. Two instances will suffice. Take the cases of possession of a zamindar in an undivided mahal and possession of a landlord over any other immoveable property, not zamindari property, in which the zamindar or the landlord is a co-sharer with other persons and the actual possession is in the hands of a third party with the consent of the entire body of the proprietors. I think in the state of law as administered in the courts of British India it would amount almost to an absurdity to contend that the zamindar or the landlord as the case may be, is not in possession of the immoveable property within the meaning of article 142 of the Second Schedule of the Indian Limitation Act. Discontinuance and dispossession are equally very familiar incidents of immoveable property in this country. Dispossession may properly ensue only by realizing rent from persons in actual possession of the property of another or by merely obtaining atornment from such persons. It seems to me equally absurd to contend that such realization of rent or atornment is not dispossession of the other within the meaning of article 142 of the Second Schedule of the Limitation Act. The word used in article 142 is "possession." It should not be read to connote "occupation" or "detention" merely. It will be agreed that it certainly includes constructive possession. As was observed by ROMILLY M. R. in *Lake v. Dean* (1), "there is, perhaps, no legal conception more open to a variety of meanings

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than possession." Similar observations were made in *Lyell v. Kennedy* (1). I am, therefore, of opinion that the word "possession" in article 142 of the Second Schedule of the Limitation Act should be given the meaning which that word can reasonably bear in relation to the nature of the property to which it is sought to be applied. The opinion that the word "possession" generally means possession as the nature of the property is capable of was expressed in the decision of the House of Lords in the case of *Lord Advocate v. Young* (2). As regards the cases which the learned Counsel for the appellant has quoted before us I need say no more than what the Hon'ble the CHIEF JUDGE has said. To my mind the reference can best be answered on the lines on which I have tried to answer it. Generally my answer therefore to the reference is that the suit out of which this reference has arisen is not barred by limitation and is governed by article 142 of the Second Schedule of the Limitation Act.

MISRA, J. :—I am in full agreement with the judgment just delivered by my brother Mr. Justice HASAN. The two points which have been referred to us are as follows :—

"(1) Whether the delivery of possession by means of beat of drum under order XXI, rule 95 of the Code of Civil Procedure to an auction-purchaser, who has purchased a share in a property sold, can be considered to be a valid and effective delivery of possession sufficient to give to the auction-purchaser a fresh start for limitation.

(2) Whether article 144 of the Indian Limitation Act would be applicable in a case where the auction-purchaser of only a share in a

(1) 18 Q.B.D., 796.

(2) 12 A.C., 544.

certain property sues for recovery of possession on the ground that he has not obtained actual possession; and if so whether the possession of the judgment-debtor who has remained in actual possession in spite of the formal delivery of possession through court, should be deemed to have become adverse only from the date of such formal delivery.''

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As to the first point I am clearly of opinion that in a case, where an auction-purchaser has purchased a share in a property sold and thereby becomes a co-sharer with other persons, the only way of his getting a valid and effective delivery of possession sufficient to give him a fresh start for limitation is by getting delivery under order XXI, rule 95 of the Code of Civil Procedure as was obtained in this case. From the facts already given it is clear that when Mathura purchased half the share in the plots in dispute the appellant Gulab Khan was in possession of these plots in entirety, and it was not possible for Mathura to have ousted him from possession of those plots. The only thing to which he was entitled was a right to possess those plots jointly with Gulab Khan to the extent of one-half. This right he may have enforced either by partition or by a suit for profits. In order to vest him with such a right, the possession which was delivered to him in the present case under order XXI, rule 95, was, in my opinion, an effective delivery of possession. To meet such cases the Legislature has expressly provided in order XX, rule 35, that where a decree is for the joint possession of immoveable property such possession is to be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree. The difficulty is that no such provision has been made in the case of auction-purchasers.

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The rule relating to auction-purchasers is contained in order XXI, rule 95, and it appears to me that where the judgment-debtor is in possession of the property and the auction-purchaser has purchased only a share in that property the only way in which he can obtain possession is by the way indicated by the Legislature in order XXI, rule 35, just now referred to. I am, therefore, of opinion that the possession delivered in the present case was a valid and effective delivery of possession and amounted to the dispossession of the judgment-debtor Gulab Khan to the extent of half the share in the plots in dispute.

As to the second question which relates to the applicability or otherwise of article 144 of the Indian Limitation Act to a case like the one which we have at present before us, I am in entire agreement with my learned brother Mr. Justice HASAN that in a case like the present the article which would clearly apply would be article 142, and not article 144. If the delivery of possession such as was effected in the present case was a sufficiently effective delivery of possession to the decree-holder and would amount to a dispossession of the judgment-debtor, article 142 would be the only article which could be considered to be applicable in the case. In such a case the period of limitation for the auction-purchaser commences from the date when he would take possession through court, and he would be justifiably entitled to treat his not actually getting possession subsequently as his dispossession. I am, therefore, in entire agreement with the way how the reference has been answered by my two learned brothers. I would also answer it in the same way and hold that the suit in the present case was quite within limitation.

BY THE COURT.—The reference is answered accordingly.

Appeal dismissed.