

1927

MIRZA
MUHAM-
MAD SADIQ
ALI KHAN
v.
SAJJAD
MIRZA
alias
MUNNEY
AGHA.

find that the application in execution of Nawab Sadiq Ali was within time and a valid application. The appeal, therefore, succeeds. The judgment-debtor will pay his own costs and those of the decree-holder.

Appeal allowed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.

ALI HUSAIN (PLAINTIFF-APPELLANT) v. AFZAL HUSAIN
AND OTHERS (DEFENDANTS-RESPONDENT).*

*Civil Procedure Code (Act V of 1908), order XXI, rule 36—
Auction purchaser obtaining symbolical possession over
property in actual possession of mortgagee—Limitation,
starting of, from the date of symbolical possession.*

Held, that if upon an execution sale possession has been delivered to the auction-purchaser in accordance with the provisions of the law, the auction-purchaser gets a fresh start for the computation of limitation from the date of delivery of such possession. [*Jang Bahadur Singh and another v. Hanwant Singh* (1), followed.]

Where the property was in the possession of a mortgagee and the auction-purchaser had obtained possession against the mortgagor and his right was subordinate to the right of the mortgagee in possession, and he had obtained the same possession to which the mortgagor was entitled, that is to say, symbolical possession, the actual persons in physical possession remaining in physical possession and a proclamation being made by beat of drum as to the plaintiff's possession, he actually obtained possession under order XXI, rule 36 of the Code of Civil Procedure, and in these circumstances his possession was good in law.

Mr. *M. Wasim*, for the appellant.

Mr. *Bishambhar Nath Srivastava*, holding brief of
Mr. *Bisheshwar Nath Srivastava*, for the respondents.

*Second Civil Appeal No. 216 of 1926, against the decree of Syed Ali Hamid, Subordinate Judge of Bara Banki, dated the 3rd of February, 1926.

STUART, C.J., and RAZA, J. :—The plaintiff-appellant obtained a decree for possession of certain property on the 12th of November, 1912. In execution he was placed in possession over certain property in the following manner. The property was at that time in the possession of a mortgagee. He had obtained possession against the mortgagor and his right was subordinate to the right of the mortgagee in possession. Thus all that he had obtained was the same possession to which the mortgagor was entitled, that is to say symbolical possession. The papers in the execution proceedings show clearly, in our opinion, that he obtained symbolical possession, the actual persons in physical possession remaining in physical possession and a proclamation being made by beat of drum as to the plaintiff's possession. He sued on the 29th of April, 1924, for possession over certain plots on the ground that he had been subsequently dispossessed. The trial Court found that these plots were not covered by his decree and dismissed the suit accordingly. He appealed. The lower appellate court found that the plots were covered by his decree but dismissed the suit on the ground that it was time-barred because he had not obtained possession in law over the plots in question. The learned Judge arrived at this conclusion on the ground that he had obtained possession under order XXI, rule 35, when he should have obtained possession under order XXI, rule 36 of the Code of Civil Procedure. But we are clearly of opinion, after having gone through the papers, that he actually obtained possession under order XXI, rule 36, and in these circumstances his possession was good in law. The decision which the learned Judge has quoted in *Jang Bahadur Singh and another v. Hanwant Singh* (1) is in favour of the plaintiff-appellant, not as the learned Judge would have it against him. This is a decision of a Full Bench

1927

ALI
HUSAIN
v.
AFZAL
HUSAIN.

(1) (1921) I.L.R., 48 All., 520.

1927

ALI
HUSAIN
v.
APZAL
HUSAIN.

Stuart, C. J.
and Raza, J.

of the Allahabad High Court which lays down that if upon an execution sale possession has been delivered to the auction-purchaser in accordance with the provisions of the law the auction-purchaser gets a fresh start for the computation of limitation from the date of the delivery of such possession. This is the view of the law which we take. But on this view of the law the plaintiff obtained possession on the 15th of December, 1912, in accordance with the provisions of the law over the property in suit and this property, according to finding of fact, which cannot be questioned in second appeal, was covered by the terms of his decree. In these circumstances the suit was not time-barred. There is no necessity to send the case back under the provisions of order XLI, rule 23 of the Code of Civil Procedure as the whole of the facts necessary for decision are before us and we are competent under the provisions of section 103 to dispose of the case finally. Under the powers which we possess under section 103 we grant the plaintiff-appellant a decree for possession over plots Nos. 3276, 3277 and 3278 with three years mesne profits prior to the date of suit and mesne profits up to the date of delivery of possession. We direct the trial court to make an inquiry as to the amount of the mesne profits in question. That amount, when so decided, will be incorporated in the decree. The defendants will pay their own costs and those of the appellant in all courts.

Appeal allowed.