

Doorga Konwari (1). The observations to which I refer are these: "It is, I think, to be collected, that the rule against re-agitating matter adjudicated is subject generally to this restriction, that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object."

For these reasons I think the case ought to go back for retrial.

S. G. G.

Appeal allowed. Case remanded.

*Before Sir Francis William Maclean, Knight, Chief Justice,
and Mr. Justice Banerjee.*

HARI MOHAN SHAHA (PLAINTIFF) vs. BABURALI (DEFENDANT)*

Limitation Act (XV of 1877), Schedule II, Article 144—Suit for possession of land by an auction-purchaser, who obtained symbolical possession—Code of Civil Procedure (Act XIV of 1882), sections 218 and 319—Limitation Act, article 138.

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March 16.

In a suit for possession of land by an auction-purchaser (who had obtained symbolical possession, the defendant objected that the suit was barred by limitation, it not having been brought within twelve years from the date of the auction purchase.

Held, that article 144, schedule II of the Limitation Act (XV of 1877) applied to the case, and that as the suit was brought within twelve years from the date when the auction-purchaser obtained symbolical possession it was not barred by limitation.

THIS appeal arose out of an action for declaration of title to, and for possession of, a piece of land. The plaintiff's allegation

* Appeal from Appellate Decree No. 773 of 1895, against the decree of Baboo Gopal Chandra Chaki, Subordinate Judge of Dacca, dated 23rd of January 1895, affirming the decree of Babu Romosh Chandra Bose, Munsif of Dacca, dated the 23rd of April 1894.

(1) L. R., 5 I. A., 149 (158) : I. L. R., 4 Calc., 190 (200).

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was that he had purchased the property in dispute at an execution sale, and having obtained symbolical possession had gone to take actual possession when he was obstructed by the defendant, and hence the suit. The defendant mainly contended that the suit was barred by limitation, inasmuch as it was not brought within twelve years from the date of the auction purchase. The Munsif dismissed the suit, holding that it was barred by limitation under article 138, schedule II of the Limitation Act. On appeal, the learned Subordinate Judge affirmed the decision of the lower Court.

Against this judgment the plaintiff appealed to the High Court.

Babu Saroda Churn Mitter for the appellant.

Moulvie Mustafa Khan for the respondent.

Babu Saroda Churn Mitter.—The lower Appellate Court relies upon the case of *Krishna Lall Dutt v. Radha Krishna Surkhal* (1), which has been overruled by the Full Bench case of *Joggobundhu Mitter v. Purnanund Gossami* (2), which follows the Full Bench case of *Joggobundhu Mukerjee v. Ram Chunder Bysack* (3). Symbolical possession gives the plaintiff in this case a fresh start for limitation, see *Lokessur Koer v. Purgun Roy* (4), *Shama Charan Chatterji v. Madhub Chandra Mookerji* (5) and *Sevu v. Muttusami* (6).

Moulvie Mustafa Khan for the respondent.—The present case is distinguishable from the cases of *Joggobundhu Mitter v. Purnanund Gossami* (2), and *Joggobundhu Mukerjee v. Ram Chunder Bysack* (3), and the distinction has been authoritatively recognized in the case of *Lakshman v. Moru* (7). Both the Full Bench cases of the Calcutta High Court are cases in which only symbolical possession could have been given, and do not cover a case of this kind where the property in dispute is a house occupied by the judgment-debtor. The *ratio decidendi* of the Full Bench case of *Joggobundhu Mitter v. Purnanund Gossami* (2) is that

(1) I. L. R., 10 Calc., 402.

(2) I. L. R., 16 Calc., 530.

(3) I. L. R., 5 Calc., 584.

(4) I. L. R., 7 Calc., 418.

(5) I. L. R., 11 Calc., 93.

(6) I. L. R., 10 Mad., 53.

(7) I. L. R., 16 Bom., 722 (728).

the only mode in which the Court can give the purchaser possession as against the judgment-debtor is symbolical possession, and it is effective for all purposes. In that case the property in dispute was not in actual possession of the judgment-debtor, and therefore the possession obtained by the auction-purchaser under section 319 of the Code of Civil Procedure was considered sufficient to save limitation. In the present case the judgment-debtor, being in actual possession of the property, the symbolical possession obtained by the auction-purchaser under section 319 of the Code of Civil Procedure was no possession according to law. That being so, the suit is barred by limitation.

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The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

MACLEAN, C. J.—I think the Subordinate Judge in this case is in error. He decided the case upon the authority of the case of *Krishna Lall Dutt v. Radha Krishna Surbhel* (1), but that case has been reversed by the decision in the case of *Joggobundhu Mitter v. Purnanund Gossami* (2), and the latter case is certainly consistent with the principle of the cases of *Joggobundhu Mukerjee v. Ram Chunder Bysack* (3), *Lokessur Koer v. Purgun Roy* (4), *Sevu v. Muttusami* (5), and *Shama Charan Chatterji v. Madhab Chandra Mookerji* (6).

It is urged by the respondent's Vakil that this case is distinguishable from those to which I have referred by reason of the fact that in some of those cases the tenants were in possession, in which case section 319 of the Code of Civil Procedure was the proper one under which to take or to give symbolical possession. He says that those cases are distinguishable from the present by reason of the fact that in this case the judgment-debtor was in possession, and therefore actual possession ought to have been given under section 318 of the Code, and not symbolical possession under section 319. But be that as it may, we have the fact which cannot be got over, that possession, call it symbolical possession if you will, was given by a Civil Court in this case

(1) I. L. R., 10 Calc., 402.

(2) I. L. R., 16 Calc., 530.

(3) I. L. R., 5 Calc., 584.

(4) I. L. R., 7 Calc., 418.

(5) I. L. R., 10 Mad., 53.

(6) I. L. R., 11 Calc., 93.

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to the plaintiff, and in the case of *Lokessur Koer v. Purgun Roy* (1) it was laid down that the formal possession given by a Civil Court under an execution operates in point of law and of fact, as between the parties, as a complete transfer of possession from one party to the other. In this case, it seems clear that symbolical possession which in law is possession, was given on the 8th November 1881. It may be that it was wrongly given by reason of the fact that actual possession ought to have been given under section 318 of the Code, but still possession was given to the plaintiff by a Civil Court; and, under the circumstances, it seems to me that the period of limitation must begin to run from the date of that possession being given, which was the 8th November 1881, in which case the plaintiff is within time. I think the appeal must be allowed, and the case remanded to be tried on its merits. The costs will abide the result.

BANERJEE, J.—I am of the same opinion. The learned Vakil for the respondent seeks to distinguish the present case from the case of *Joggobundhu Mitter v. Purnanund Gossami* (2), in this way, that whereas in that case the property in dispute was in the possession of tenants, and could be taken possession of by the purchaser at the execution sale only under section 319 of the Code of Civil Procedure, the property in dispute in the present case was in the actual possession of the judgment-debtor himself, and so possession of it should have been taken by the execution-purchaser, not under section 319 but under section 318 of the Code; and as the plaintiff, the execution-purchaser, did not proceed to take possession under the last mentioned section as he ought to have done, formal or symbolical possession given to him under section 319 must be treated as a nullity and as having no effect in giving him a fresh cause of action by reason of the judgment-debtor continuing in possession, so far as the law of limitation was concerned. But on referring to the case of *Joggobundhu Mitter v. Purnanund Gossami* (2) I find that neither the learned Judges, who referred the cases to a Full Bench doubting the correctness of the decision in the case of *Krishna Lal Dutt v. Radha Krishna Surkhel* (3), nor the learned Judges

(1) I. L. R., 7 Calc., 418.

(2) I. L. R., 16 Calc., 530.

(3) I. L. R., 10 Calc., 402.

who composed the Full Bench, laid any stress, in their decisions, upon the distinction on which reliance is placed by the learned Vakil for the respondent. The correctness of the decision in the case of *Krishna Lal Dutt v. Radha Krishna Surkhel* (1) was doubted in the referring order, and the decision of the Full Bench accepts the view of the referring Judges as may be gathered from the following passage : "The case noticed by the Division Bench, which referred this question to the Full Bench, *Krishna Lal Dutt v. Radha Krishna Surkhel* (1) was decided without reference to the earlier Full Bench case, which was apparently not brought to the notice of the Judges." Moreover, in the cases of *Lokessur Koer v. Purgun Roy* (2) and *Shama Charan Chatterji v. Madhab Chandra Mookerji* (3), which were both cases in which symbolical possession had been taken by the decree-holder of property of which the judgment-debtor was actually in possession, and of which, therefore, actual possession could have been taken by the decree-holder, it was held, notwithstanding that fact, that the formal possession given to the decree-holder was sufficient possession as against the judgment-debtor. As for the case of *Lakshman v. Moru* (4), relied upon for the respondent, it is enough to say that it does not decide the present question. Mr. Justice Telang points out at the conclusion of his judgment that for several reasons it was not necessary to determine the question now raised. I think the weight of authority is clearly in favour of the view contended for by the learned Vakil for the appellant. And reason also appears to me to be in favour of the same view. For though actual possession might have been taken by the execution-purchaser in this case, still as he obtained possession in some form, through an officer of the Court, and by process of law, and as the judgment-debtor was, and must be taken to have been, a party to the proceeding relating to the taking of possession, it is not open to the judgment-debtor to say that the whole proceeding should be taken as a nullity, and that the execution-purchaser should still be treated as one who has never obtained any possession at all. If, after the date on which symbolical possession was given to the auction-purchaser, the

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(2) I. L. R., 7 Calc., 418. (3) I. L. R., 11 Calc., 93.

(4) I. L. R., 16 Bom., 722.

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judgment-debtor continued in possession, his possession became that of a trespasser from that date, and gave the execution-purchaser a fresh cause of action, a suit upon which should be governed by article 144 of schedule II of the Limitation Act. And reckoning the period of limitation from the date of delivery of symbolical possession, this suit is quite in time.

S. C. G.

Appeal allowed. Case remanded.

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

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 April 2.

KISHORI MOHUN ROY CHOWDHRY AND OTHERS (PLAINTIFFS) v.
 NUND KUMAR GHOSAL AND OTHERS (DEFENDANTS).*

Landlord and tenant—Notice to quit—Suit for ejectment—Tenancy reserving an annual rent—What notice a raiyat holding an annual tenancy is entitled to.

In a tenancy created by a *kabulyat* with an annual rent reserved, the tenant is entitled to six months' notice expiring at the end of a year of the tenancy before he can be ejected.

THIS appeal arose out of an action brought by the plaintiffs' to obtain *khas* possession of land by pulling down a *pucca poshta* and a *ghat* built by the defendants without the plaintiffs, consent and permission. The allegation of the plaintiffs was that the predecessor in title of the defendants took a settlement of the land by giving a registered *kabulyat* on the 14th Pous 1294 B. S., and since his death the defendants have been in possession of the said land as *karsa raiyats* or tenants-at-will; that the defendants without the knowledge and consent of the plaintiffs built *pucca* structures on the land, and having thus altered its condition, made themselves liable to be ejected; that a notice was served in the month of Joist last directing the defendants to demolish the *poshta* and the *ghat*, and to give up the land in the month of Assar last, and they having failed to do so, the present suit was brought. The defendants *inter alia* pleaded that there was no relationship of landlord and tenant, that there was no sufficient notice, that the *poshta* and the *ghat* were built openly and with the knowledge of the plaintiffs, and therefore the suit ought to fail.

* Appeal from Appellate Decree No. 998 of 1895, against the decree of S. J. Douglas, Esq., District Judge of Dacca, dated the 7th of March 1895, reversing the decree of P. N. Banerjee, Esq., Subordinate Judge of that district, dated the 31st of July 1893.