

Under the circumstances clause (a) does not apply. Clause (c) applies, and the plaintiff-appellant has a right to claim compensation from her lessor, defendant No. 1. The measure of that compensation has been fixed in the remand inquiry, and though no objection has been taken to it, we find that the lower Appellate Court has calculated the amount on a wrong principle which it calls capitalized value. It obviously means present value of future payments. The amount for nine years at the correct calculation would be Rs. 574-12-0, out of which we must deduct the two famine years. That would leave a balance of Rs. 378-4-0. Adding Rs. 98-4-0 for 1894-95, the total sum is Rs. 476-8-0. This sum may be recovered by the appellant from the respondent No. 1. The other respondents are clearly not responsible to the plaintiff.

We accordingly vary the decree of the Court below by substituting Rs. 476-8-0 in place of the sum awarded by it, together with costs to be paid by respondent No. 1 to plaintiff. The other respondents should bear their own costs.

Decrees varied.

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

GOPAL AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v. KRISHNA-
RAO AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1900.

October 9.

Limitation Act (XV of 1877). sch. II, arts. 136, 138 and 144 — Symbolical possession—Auction-purchaser—Suit for possession from judgment-debtor—Limitation.

Where an auction-purchaser at a court sale has obtained symbolical possession, he or his assigns may sue the judgment-debtor for actual possession within twelve years from the date of obtaining such symbolical possession. Article 144 of the Limitation Act (XV of 1877) applies.

Articles 136, 137 and 138 of schedule II of the Limitation Act (XV of 1877) refer to cases where no possession, formal or actual, has been obtained through the Court.

Article 136 applies to a private purchaser from a person not in possession.

* Second Appeal, No. 335 of 1900.

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Article 137 applies to an auction-purchaser of the rights of a person not in possession.

Article 138 applies when the actual purchase is made of the rights of a judgment-debtor, who is in possession at the date of the sale.

When an auction-purchaser or his assign has obtained formal possession, but is disturbed by the judgment-debtor or his heirs who have continued in actual possession, article 144 applies.

SECOND appeal from the decision of R. Knight, District Judge of Sátára, confirming the decree of Ráo Sáheb Harilal Kirparam, Second Class Subordinate Judge at Karád.

One Swamirao and Ramkrishna (defendants' father) were members of an undivided Hindu family.

Swamirao had a half share and Ramkrishna a one-eighth share in the house in dispute.

On the 18th of April, 1885, in execution of a money decree passed against them, the shares of both were put up to auction and purchased by one Appaji. The sale was confirmed by the Court on 7th July, 1885, and he obtained symbolical possession on 29th July, 1887.

On 10th July, 1889, Appaji sold his interest in the house to plaintiff's father, Vasudev.

On 30th June, 1897, plaintiffs filed this suit to recover by partition their five-eighth share in the house, alleging that they had been dispossessed by defendants in February, 1895.

Defendants contended (*inter alia*) that they had been all along in possession and that the claim was barred by limitation.

The Court of first instance held that the suit was not barred; that it was governed by article 136 of the Limitation Act (XV of 1877), and that time began to run from 7th July, 1885, when the sale was confirmed. The plaintiffs' claim was therefore awarded.

This decision was confirmed, in appeal, by the District Judge, who, however, held that the suit was governed by article 138 of the Limitation Act (XV of 1877).

Against this decision defendants preferred a second appeal to the High Court.

B. A. Bhagwat for appellants (defendants).

Bhaishanker Nanabhai for respondents (plaintiffs).

RANADE, J.:—The only point raised in this appeal relates to the question of limitation.

The original suit was brought for possession after partition of a five-eighth share in a house said to have been owned, one-eighth share by Ramkrishna and four-eighth share by Swamirao. Ramkrishna was the father of the present appellants, defendants in the original suit. These two shares were purchased at an auction-sale by one Appaji on 18th April, 1885. The sale was confirmed on 7th July, 1885, and Appaji obtained formal possession on 29th July, 1887. He subsequently sold his interest to plaintiffs' father on 10th June, 1889, and the present suit was brought by plaintiffs on 30th June, 1897, on the ground that, after the death of their father, the plaintiffs were dispossessed by defendants who are Ramkrishna's sons, in February, 1895.

The principal defence was that the defendants had been all along in possession from the time of their ancestors, and that therefore there had been no dispossession, and plaintiffs' claim was time-barred.

In the Court of first instance it was held that the suit was governed by article 136, and the bar of limitation commenced from 7th July, 1885, when the sale was confirmed, and that therefore the claim was not time-barred. The Subordinate Judge relied chiefly on *Mohima Chunder v. Nobin Chunder Roy*.⁽¹⁾ But for this ruling he would have been himself inclined to hold that article 138, and not article 136, would have governed the case. In appeal the District Judge held that article 138, and not 136, governed the case, but he held that in applying article 138, the limitation commenced to run, not from the date of sale, 18th April, 1885, but from the confirmation of the sale, 7th July, 1885. He accordingly confirmed the decree of the first Court.

In second appeal Mr. Bhagwat argued that as article 138 applied to the case, the lower Appellate Court was in error in holding that the limitation commenced to run from the confirmation of the sale, and not from the date of the sale. Mr. Bhaishankar, who appeared for the respondents, did not seek to support the decree appealed from on the grounds stated in the

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(1) (1895) 23 Cal. 49.

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judgment. He took up his stand on the independent ground that neither article 136 nor 138 applied to the case. As formal possession had been given to the purchaser, article 144 applied, and limitation against the judgment-debtor's sons, the present appellants, commenced to run, not from the date of the sale or of the confirmation, but from the time when formal possession was given.

It seems to us that this contention of the respondents' pleader is correct, and that the decree of the Courts below must be upheld, but on grounds different from those urged in the judgments of those Courts. The Court of first instance no doubt referred to *Umbica Churn v. Madhub Ghosal* ⁽¹⁾ and *Juggobundhu v. Purnanund* ⁽²⁾ as authorities which suggested the view that as the auction-purchaser, Appaji, got formal possession, a fresh starting point of limitation was furnished to Appaji and from Appaji to his assignee the plaintiffs. It may be noted that in *Umbica Churn v. Madhub Ghosal* ⁽³⁾ it was held that when formal possession had been given to a decree-holder in execution, he and his assigns might sue the judgment-debtor for possession within twelve years from the time when such formal possession had been given. The Judges who decided this case distinguished *Pearee Mohun v. Jugobundhoo Sen*, ⁽⁴⁾ as in that case formal possession had not been given, and they followed the Privy Council ruling in *Gunga Gobind v. Bhoopal Chunder*, ⁽⁵⁾ because in that case formal possession had been given in the only manner in which it could be given. In *Juggobundhu v. Ram Chunder* ⁽⁶⁾ it was held that symbolical delivery of possession was good against the defendant, and if he still continued in actual possession, he might be turned out by separate suit within twelve years from dispossession. As against third persons, formal possession was of course of no avail. In *Lokessur Koer v. Purgun Roy*, ⁽⁷⁾ it was held that as between the parties formal possession effects a transfer of right. In *Krishna Lall v. Radha Krishna* ⁽⁸⁾ the circumstances were somewhat peculiar. The formal possession was not followed up by any

(1) (1879) 4 Cal. 870.

(2) (1889) 16 Cal. 530.

(3) (1879) 4 Cal. 870.

(4) (1875) 24 Cal. W. R. 415.

(5) (1872) 19 Cal. W. R. 101.

(6) (1880) 5 Cal. 584.

(7) (1881) 7 Cal. 418.

(8) (1884) 10 Cal. 402.

act, and it was therefore held that it was infructuous, and the case was held to be governed by article 138. But this ruling was overruled in *Juggobundhu v. Purnanund*.⁽¹⁾ The ruling in *Gossain Dalmar Puri v. Bepin Behary*⁽²⁾ shows how symbolical possession was held not to avail against a third party, who in that case was a permanent lessee.

This brings us to the ruling on which the first Court has relied, viz., *Mohima Chunder v. Nobin Chunder Roy*,⁽³⁾ but that case is clearly not applicable, because the auction-purchaser had never obtained possession, and article 136 was properly applied to the circumstances of the case which was brought in right of private purchase from the auction-purchaser. Where the auction-purchaser had obtained formal possession, but defendant continued in actual possession, it was held in *Hari Mohan v. Bahurabi*⁽⁴⁾ that article 144 applied, and the limitation commenced from the date of the symbolical possession. It is clear from this review of the Calcutta authorities that the Court of first instance was wrong in holding that the present case fell under article 136, and that the ruling in *Mohim Chunder's* case applied.

For other reasons the District Court in applying article 138 appears to have misconceived the proper nature of this suit. The District Judge was right so far as he held, following *Arumuga v. Chockalingam*⁽⁵⁾; *Pullayya v. Ramayya*⁽⁶⁾; *Govind v. Gangaji*⁽⁷⁾; and disapproving *Mohima Chunder v. Nobin Chunder Roy*⁽⁸⁾; that article 136 did not apply, but when he thought that article 138 applied, he seems to have lost sight of the fact that formal possession had been given to the auction-purchaser in this case, which gave him a new start for limitation as against the judgment-debtors, and the defendants who are his sons. This view was set forth distinctly in *Agarchand v. Rakhma*,⁽⁹⁾ where formal possession had been given, and it was held that the limitation commenced with dispossession. The effects of giving formal possession were considered in *Lakshman v. Moru*,⁽¹⁰⁾ and Mr. Justice Telang laid

(1) (1889) 16 Cal. 530.

(2) (1891) 18 Cal. 520.

(3) (1895) 23 Cal. 49.

(4) (1897) 24 Cal. 715.

(5) (1892) 15 Mad. 331.

(6) (1894) 18 Mad. 144.

(7) (1898) 23 Bom. 246.

(8) (1895) 23 Cal. 49.

(9) (1888) 12 Bom. 678.

(10) (1892) 16 Bom. 722.

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down that there was no difference between symbolical and actual possession where the contest was between the auction-purchaser or his assigns, who had obtained formal possession, and the judgment-debtors or his heirs. It was also held that article 138 did not apply, but article 144 applied, and the time commenced from dispossession. In *Shankar Bisto v. Narsingrav*⁽¹⁾ the right of an auction-purchaser, who obtained symbolical possession, to bring a suit was affirmed. In *Gopal Das v. Than Singh*⁽²⁾ the same view was upheld.

It will thus be seen that the present case does not fall under article 138 for the sufficient reason that formal possession had been given to the auction-purchaser, and the dispute was between the judgment-debtor's son and the assignee the auction-purchaser. Articles 136, 137, 138 obviously refer to cases where no possession, formal or actual, had been obtained through the Court. Article 136 applies to a private purchaser from a person not in possession. Article 137 applies to an auction-purchaser of the rights of a person not in possession, while article 138 applies when the auction-purchase is made of the rights of a judgment-debtor who is in possession at the date of the sale. None of these articles contemplate the case of an auction-purchaser or his assign who has obtained formal possession, and is disturbed by the judgment-debtor or his heirs who continue in actual possession, as was the case in the present dispute. In such a case all the Courts agree in holding that article 138 does not apply, but article 144 applies.

It is not necessary in this view to consider the position taken up by the lower Appellate Court in its judgment that, though article 138 applied, the limitation commenced to run, not from the date of sale, but from the date of the confirmation of the sale. This view is clearly opposed to the ruling in *Govind v. Gangaji*,⁽³⁾ and is inconsistent with the express wording of the Act. The reasons given by the Judge, based as they are on section 316, Civil Procedure Code, were considered by the Madras High Court in *Venkatalingam v. Veerasami*.⁽⁴⁾ The District Judge does not

(1) (1897) 22 Bom. 667.

(2) (1880) 4 All. 184.

(3) (1898) 23 Bom. 246.

(4) (1893) 17 Mad. 89.

appear to have noticed the fact that in article 138, the judgment-debtor is in possession at the time of the sale, and he is not in possession under the two previous articles. This accounts for the difference in the wording of that section and the two previous sections. It is, however, not necessary to discuss this point further. While differing thus from the reasons given by the Courts below, we are satisfied that they have arrived at a correct decision as regards respondent-plaintiff's right to maintain the suit. We dismiss the appeal with costs.

Appeal dismissed.

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ORIGINAL CIVIL.

*Before Mr. Justice Crowe; and on Appeal before Sir L. H. Jenkins,
Chief Justice, and Mr. Justice Tyabji.*

VALLABHDAS JAMNADAS AND ANOTHER (ORIGINAL DEFENDANTS),
APPELLANTS, v. SAKARBAI AND ANOTHER (ORIGINAL PLAINTIFFS),
RESPONDENTS.*

1900.
March 25.

*Hindu law—Inheritance—Brother's grandson preferred to widow of a
daughter's son.*

The widow of a daughter's son is not entitled to succeed to the estate of her husband's maternal grandfather in preference to the maternal grandfather's separated brother's grandson.

APPEAL from Crowe, J.

The question raised in the suit was one of succession to the estate of a deceased Hindu.

The property in dispute was the estate of one Narotamdas Narrondas, who died in 1872, leaving a widow (Dewkabai) and three grandsons (Mathuradas, Nensey and Jeewandas), the sons of a predeceased daughter (Deoli), him surviving.

The first plaintiff Sakarbai was the widow of Nensey, one of the said grandsons, and the second plaintiff was her father-in-law Lakhmidas Kimji, husband of the deceased Deoli.

The first defendant Vallabhdas was the grandnephew of Narotamdas Narrondas, being the son of Jamnadas, who was the son of Devidas, the separated brother of Narotamdas Narrondas.

* Suit No. 384 of 1899; Appeal No. 1089.