

**Mt. Anganyan and ors. Vs. Gurdat Singh and ors.**

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**Court :** Allahabad

**Decided On :** Mar-30-1950

**Reported in :** AIR1952All313

**Judge :** P.L. Bhargava, J.

**Acts :** Limitation Act, 1908 - Schedule - Articles 142 and 144; [Code of Civil Procedure \(CPC\), 1908](#) - Order 21, Rules 35 and 36

**Appeal No. :** Second Appeal No. 1551 of 1946

**Appellant :** Mt. Anganyan and ors.

**Respondent :** Gurdat Singh and ors.

**Advocate for Def. :** Ishaq Ahmad, Adv.

**Advocate for Pet/Ap. :** M.L. Chaturvedi, Adv.

**Disposition :** Appeal allowed

**Judgement :**

P.L. Bhargava, J.

1. This appeal arises out of a suit instituted by Gurdat Singh, the plaintiff-respondent, against Chiranji and others, the defendants-appellants, and another set of defendants, who are arrayed as pro forma respondents in the appeal to recover possession over certain land by demolition of the house constructed thereon by the appellants.

2. The respondents were owners of the land in dispute; and, as a result of partition among them, Gurdat Singh, the plaintiff-respondent, had become owner of the land. Before the partition, the respondents had instituted a suit against Durga, the predecessor-in-title of the appellants, to obtain possession over the same land by removal of the constructions made thereon by him. Durga died during the pendency of the suit; and the appellants were substituted in his place. That suit was decreed against the appellants on 10th December 1936. In execution of the decree, a warrant for delivery of possession in terms thereof was issued, and on 2nd November 1938, the pairokar of the respondents executed a dakhnama, wherein he stated that he had obtained actual possession over the land.

3. It has been admitted before me that, un-less the delivery of possession on 2nd November 1933, can give a fresh start for computation of limitation, the present suit would be carried by time. The main question for consideration in this appeal,

therefore, is the effect of the delivery of possession aforesaid.

4. In his plaint, the plaintiff-respondent had alleged that, in execution of the decree in the former suit, the respondents had obtained and retained actual possession over the land for about two months; and that the appellants had thereafter dispossessed them from the land and made new constructions thereon. The appellants, on the other hand, asserted that their possession was not disturbed at any time; and that they had never dispossessed the respondents, nor had they made any new constructions on the land.

5. The Courts below have found that, in execution of the decree in the previous suit actual possession was never delivered to the respondents and that the constructions on the land in dispute were old. They further held that, on 2.11-1938, there was merely a formal delivery of possession. The trial Court expressed the view that the plaintiff could not fall back upon formal delivery of possession and his suit was bound to fail. Accordingly, it dismissed the suit. The lower appellate Court decreed the suit on the ground that the formal delivery of possession was sufficient to save limitation.

6. In order to be effective, and to give a fresh start for computation of limitation, the delivery of possession, under a decree for possession over immovable property, must have been effected in the manner provided by law; that is, in accordance with Rules 35 and 36 of Order 21, Civil P. C. Sub-rule (i) of Rule 35 prescribes the mode of delivery of possession under a decree for possession of immovable property, which may be in the occupation of judgment-debtor or someone on his behalf and provides for delivery of possession over such property to decree-holder or any person appointed by him to receive delivery on his behalf, if necessary, by removal of judgment-debtor or any person occupying it on his (judgment-debtor's) behalf; which means delivery of actual possession over the property, capable of such possession. In the present case, the judgment-debtors (appellants) were in actual possession and occupation of the land and the house standing thereon; the decree in favour of the respondents was for delivery of possession over the land by removal of the materials of the house; and having regard to the nature of the property covered by the decree, the delivery of possession could have been effected by removal of the judgment-debtors (appellants) as well as the materials of the house. Consequently, the respondents could have obtained actual possession over the land in suit, and any delivery of possession to them, in order to be effective to save limitation, must have been by delivery of actual possession in the manner provided by Rule 35 (1).

7. The learned Civil Judge, on the one hand, found that there was no actual delivery of possession in terms of the decree, and, on the other hand, assumed that there was actual delivery as the pairakar of the respondents had admitted in the dakhnama. He further found that there was formal delivery of possession and, in the circumstances of the case, such delivery was effective and sufficient to give a fresh start for computation of limitation.

8. A decree for delivery of possession over property which is in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy is to be executed in the manner provided by Rule 36 of Order 21 of the Code. In such a case, actual delivery of possession over the property is not possible, and the delivery of possession is merely formal or symbolical. Such a delivery to be in accordance with law must be effected in the manner provided by Rule 36. A delivery of possession under Rule 35 (i) which does not amount to transfer

of actual possession may be loosely described as 'formal'--as the Courts below have done--but, strictly speaking, in the eye of law, it cannot be so described or treated as such.

9. In the present case, an application for delivery of actual possession was made by the respondents; a warrant for the delivery of actual possession to the respondents was issued and the Amin went to the spot for the purpose; and a dakhlanama was executed by the pairokar of the respondents, saying that he had obtained actual possession, but there was no actual delivery of possession, and the structures which stood at the time of the institution of the previous suit still stand on the land.

10. Learned counsel for the respondents has contended that as soon as the dakhlanama, showing actual delivery of possession, was executed, there was delivery of possession in the manner provided by law. I am prepared to uphold this contention. The decree being for actual possession over landed property by removal of structures standing thereon and a process having been issued for that purpose, unless there was actual delivery of possession in terms of the decree, the execution of the process was not complete, and, unless the execution of the process was complete, there could be no delivery of possession under the decree.

11. Consequently, on 2-11-1938, there was no delivery of possession in the manner provided by law ; in other words, the appellants' possession over the land in dispute was not disturbed ; and the respondents never obtained possession thereof, and they were not dispossessed again as alleged by them.

12. There being no delivery of possession in the manner provided by law, the 'formal' delivery--in the sense of an Amin going to the spot for effecting delivery and the execution of a dakhlanama--was not at all effective and did not give a fresh start for the computation of limitation. This was the view expressed by the Full Bench of this Court in Jang Bahadur v. Hanumant Singh, 19 ALL. L. J. 469. In that case a house was sold by auction in execution of a decree. The sale was confirmed and delivery of possession was obtained ; but actual possession was not obtained. In a suit for recovery of possession, it was held by the trial Court that the formal delivery of possession was sufficient to save the operation of limitation. This view was negated and it was held by this Court that the delivery of formal possession could not save limitation. At p. 472 it was observed :

'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 21, 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.'

A similar view was taken by a Division Bench of this Court in Ram Sukh Lal v. Ashraf Ali, 1931 ALL. L. J. 12.

13. The lower appellate Court has attempted to distinguish the above cases on the ground that, in the present case, the dakhlanama shows that there was actual delivery of possession. The recital in the dakhlanama was wrong. In the Full Bench

case, as would appear from the underlined (here in italics) portion in the above quotation, the principle laid down was that the delivery of possession to be effective must be in accordance with law. The wrong recital in the dakhlanama could not render the delivery of possession effective or legal. The principle of the Full Bench decision was fully applicable to the present case.

14. Learned counsel for the respondents has placed strong reliance upon a decision of a learned single Judge of this Court reported in Harpal Kurmi v. Mohan Kurmi A. I. R. (11) 1924 ALL. 844, where the Full Bench ruling was distinguished. The lower appellate Court has also relied upon this case. The plot in dispute in that case originally formed part of an agricultural holding. The defendants of that suit had taken it on lease from the Maharaja of Banaras to whom it belonged. During the currency of the lease the defendants built a house for agricultural purposes and they subsequently converted it into a residential house. The Maharaja ejected the defendants and obtained delivery of possession. The dakhlanama purported to convey actual possession. It was found that notwithstanding the delivery of possession the defendants continued in possession of the house. On these facts, it was held that the delivery of possession interrupted adverse possession and gave a fresh point for limitation.

15. The learned Judge distinguished the Full Bench decision on the ground that it was a case in which the mode of delivery of possession appropriate to the circumstances was not resorted to, and, therefore, the delivery of possession did not interrupt adverse possession. A reference to the Full Bench case, however, shows that in that case possession was obtained and instead of actual possession, which could have been obtained under the sale certificate, merely formal possession was obtained. There is nothing in the body of the ruling to show that the mode of delivery of possession appropriate to the circumstances was not resorted to.

16. In my opinion, it is not possible to distinguish the Full Bench case on the ground given in his judgment by the learned Civil Judge or for the reasons stated in A. I. R. (11) 1924 ALL. 844

17. Learned counsel for the respondents has also relied upon a Division Bench ruling of this Court in Jagan Nath v. Milap Chand, 28 ALL. 722. In that case the learned Judges referred to two decisions of the Calcutta High Court, reported in Shama Charan v. Madhub Chandra, 11 Cal. 93 and Hari Mohan v. Baburali, 24 Cal. 715, and pointed out that those cases were rightly decided. They also referred to a decision of this Court in Mangli Prasad v. Debi Din, 19 ALL. 499, and to certain observations made therein by Banerji J., and then proceeded to observe :

'It appears to us that the delivery of formal possession, although the defendant continued in actual possession, effected a complete transfer of the property and furnished a good foundation for a suit when the defendant refused to deliver up actual possession '

This view was overruled by the Full Bench case cited above.

18. In my opinion, therefore, the lower appellate Court was wrong in holding that the formal delivery of possession, on 2-11-1938, was effective and gave a fresh start for computation of limitation. The formal delivery of possession, when actual possession could have been delivered in terms of the decree in the previous suit, could not save

limitation. The suit filed by the plaintiff respondent was, therefore, barred by limitation and ought to have been dismissed on that ground.

19. In the end, learned counsel for the respondents contended that the appellants were estopped from contending that actual possession had not been delivered. But, there appears to be no force in this contention. In order to decide the question of limitation it is necessary to see whether there was delivery of possession in accordance with law and if there was no such delivery of possession, the delivery of formal possession, which was not in the manner provided by law, could not save limitation.

20. The appeal is, therefore, allowed. The decree passed by the Court below is set aside and the plaintiff's suit is dismissed with costs in all the Courts.

21. Leave for filing further appeal was asked and refused.

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