

(1953) 08 CAL CK 0022
In the Calcutta High Court
Case No : Appeal No. 6 of 1951

Sri Bansi Gopal Jiu and Others		APPELLANT
	Vs	
Uday Chand Mahatab and Others		RESPONDENT

Date of Decision : 19-08-1953

Acts Referred:

Bengal Public Demands Recovery Act, 1913 — Section 36, 37, 7
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1954 Cal 113 : (1956) 1 ILR (Cal) 1

Hon'ble Judges : Chakravartti, C.J.; Lahiri, J

Bench : Division Bench

Advocate : Atul Chandra Gupta and Ranjit Kumar Banerjee, Gouri Sankar Mukherjee, for Bireswar Chatterjee and Purnendu Narayan Nath, for the Appellant; N.C. Sen Gupta and Purushottam Chatterjee, (for No. 2) and Sarat Kumar Mitra and Promode Kumar Ghose, (for No. 1), for the Respondent

Final Decision : Dismissed

Judgement

Chakravartti, C.J.—In this appeal under Clause 15 of the Letters Patent, two interesting points were canvassed before us, of which one was not considered by Mr. Justice Mookerjee, against whose decision the appeal is directed.

2. The appeal is on behalf of the plaintiffs. They and defendants Nos. 3 to 17 held a raiyati tenancy under the Maharaja of Burdwan, comprising fiftysix bighas of land and carrying an annual rent of Rs. 48-13-0. The rent of the tenancy for the Bengali years 1338 to 1341 having fallen into arrear, the Court of Wards, who were managing the Maharaja's estate at the time, started a certificate proceeding which was Certificate Case No. 857 of 1934-35 and ultimately brought the properties to sale on March 11, 1935. At the sale, the lands were purchased by the Court of Wards themselves for only three pies. The sale was confirmed on May 11, 1935, and delivery of possession was taken on July 20, 1937, but it was only symbolical possession.

3. In June, 1941, the Maharaja settled the lands with one Surendra Nath

Bhattacharjee, who is defendant No. 2 in this suit. The Maharaja was, however, unable to give possession to the lessee and therefore on June 9, 1942, he instituted Title Suit No. 135 of 1942 against the old tenants for recovery of possession, either directly or through his new lessee as his tenant. The present plaintiffs were defendants Nos. 4, 5 and 6 in that suit and the present defendant No. 2, who is the new lessee, was pro forma defendant No. 15. The present plaintiffs did not contest the suit, but some of their co-sharers did and the defence set up by them was, first, that the sale was bad, (sic) the relevant notices had been suppressed; second(sic) that, in any event, it had not passed the entire(sic) holding, inasmuch as some of the co-sharer-tenant(sic) had not been made parties; thirdly, that the plaintiff had never obtained delivery of possession and, fourthly, that the predecessor-in-interest (sic) the present Maharaja had resettled the lands with(sic) the old tenants or ratified the old tenancy (sic) cancelling the certificate sale. These defences were overruled by the trial COURT in the view that really the sale could no longer(sic) be challenged in that suit, but the Court also held that the notices had been duly served, that the Maharaja had obtained delivery of possession, that thereafter the old tenants had continued to be in(sic) actual possession, but only as holding under the "kut" system, which meant holding as "bhagchashis(sic) without any right of tenancy and that, therefore, the Maharaja was entitled to recover possession(sic) The actual decree made, however, was that the Maharaja would get possession only of a 5/6ths(sic) share of the tenancy through the new lessee, in(sic) as much as the tenants, holding the remaining interest, had not been represented in the certificate proceedings and that he would get possession of the remaining 1/6th through the old tenants holding that share, namely, defendants Nos. 12 and 13 of that suit who, by the way, are defendants Nos. 15 and 16 of the present suit. The decree of the trial Court was made on May 29, 1943.

4. On July 5, 1943, the present suit was brought under Sections 36 and 37 of the Public Demands Recovery Act for setting aside the auction-sale. The plaintiffs sued as Sebaits of a certain deity on the basis that the tenancy was debutter property and had been so for over a century. It appears that on January 4, 1942, a registered Arpannama was executed in favour of the deity in which a debutter of ancient origin was recited and it was stated that the execution of the formal document had become necessary on account of the growth in the number of the descendants of the original donor. There were two defendants in the suit, the Maharaja of Burdwan being defendant No. 1, his new lessee, Surendra Nath Bhattacharjee, defendant No. 2.

5. The only case made in the plaint which requires to be mentioned is that the notice u/s 7 of the Public Demands Recovery Act had not been served. Of the defence, the only material points are that the suit was barred by limitation and also by "res judicata".

6. The trial Court held that the Arpannama was a fraudulent document, brought into existence for the purpose of defeating the rights of the Maharaja and his

new lessee. It held further that service of the notice u/s 7 of the Public Demands Recovery Act had not been proved, but, at the same time, no fraud had been established. The Court dismissed the suit on the finding that the plaintiffs were bound by the decree in Title Suit No. 135 of 1942 and the present suit was barred by "res judicata" and that it was also barred (sic) by limitation. As a suit u/s 36, it was (sic) barred under proviso (a) to that section, inasmuch as the suit had been brought after the expiry of more than a year from the date of delivery of possession and as a suit u/s 37, it was barred under Article 12(b) of the Limitation Act, because there had been no fraud and also because the plaintiffs had come to know of the sale in 1940 when the Maharaja had held repeated auctions for the purposes of a resettlement of the lands. In explanation of the latter finding, it may be stated that according to the decision both in the earlier suit and the present suit, after the delivery of possession, the tenants continued to hold the land under the "kut" system and made repeated applications to the Maharaja for a resettlement of the lands. At least one of the plaintiffs was concerned with such applications.

7. The decision of the trial Court was given on August 25, 1945. In the meantime, an appeal from the decision of the trial Court in Title Suit No. 135 of 1942 had been dismissed on July 29, 1944, and a further appeal to this Court had been dismissed on June 28, 1945.

8. In the present suit, the plaintiffs preferred an appeal in due course, which was dismissed on April 15, 1946. At the hearing of the appeal the plaintiffs abandoned the case that the property was debutter. The appellate Court held that the present suit was not barred by "res judicata", inasmuch as the plaintiffs could not have impugned the certificate sale as defendants in the earlier suit that notice u/s 7 had not been served and that the lands comprised in the holding were not all in the khas possession of certificate-debtors. The appeal was, however, dismissed on the finding that although only symbolical possession had been taken, proviso (a) to Section 36 nevertheless applied and the suit was barred under that proviso.

9. On a second appeal by the plaintiffs, Mr. Justice Mookerjee upheld the decision of the Courts below on the question of limitation and considered it unnecessary to discuss the question of "res judicata". Since the learned Judge was giving leave to appeal under the Letters Patent, it might have been better if he had considered the question of "res judicata" as well, so that the Appeal Court might have the benefit of his views.

10. Before us, it was urged by Mr. Gupta on behalf of the plaintiff-appellants that the suit was not barred by limitation and, indeed, no question of limitation arose in the case. On behalf of defendant No. 2, the new lessee, it was contended by Dr. Sen Gupta that the decision of the Courts below on the question of limitation was right and that the suit was also barred by "res judicata". The learned Advocate for the Maharaja supported Dr. Sen Gupta, while some of the minor respondents adopted the arguments advanced on behalf of the appellants.

11. On the question of limitation, the relevant findings are that notice u/s 7 of the Public Demands Recovery Act was not served and that in spite of the certificate sale, the certificate-debtors had continued to be and are still in possession of the lands. Of the fiftysix bighas of land comprised in the holding, they are in direct possession of fortytwo bighas and in possession of the remaining fourteen bighas through subtenants. The possession delivered on July 20, 1937, was only symbolical possession in respect of the whole of the lands.

12. On those facts, It was contended by Mr. Gupta that time under proviso (a) to Section 36 had not even begun to run. He referred to the rules contained in Schedule n of the Act, which were to be treated as embodied in the Act itself by virtue of the provisions of Section 38, and pointed out that the mode of delivery of possession, in the case of immovable property in the possession of certificate-debtors, was prescribed by Rule 75 which required actual possession of such property to be taken. Delivery of symbolical possession of such property, Mr. Gupta contended, was delivery of no possession at all. It was further argued that the words "the property" in proviso (a) to Section 36 could only mean the whole of the immovable property sold at the certificate sale and that, consequently, time for a suit under the section could not begin to run against a certificate-debtor until possession of the whole property had been delivered. Since, in the present case, possession of the fortytwo bighas of land in the direct possession of the certificate-debtor had not been delivered at all, no question of limitation arose.

13. It appears that the identical point was argued before Mr. Justice Mookerjee who repelled it on the ground that as between the decree-holder auction-purchaser and the Judgment-debtor, delivery of symbolical possession amounted to delivery of actual possession under the CPC and that there was no ground why that principle, evolved under the Code, should not be applied to delivery of possession under the Public Demands Recovery Act. His Lordship thought that the object of making delivery of possession the starting point of the limitation for a suit u/s 36 might be to fix a point of time at which the certificate-debtors were bound to have come to know of the certificate proceedings and if that was so, there could be no reason to make a difference between delivery of actual possession and delivery of symbolical possession.

14. It was contended before us that the provisions of the Public Demands Recovery Act were so drastic that the principle relied upon by Mr. Justice Mookerjee and evolved under the CPC for the benefit of the decree-holder should not be imported into the Public Demands Recovery Act to the prejudice of the certificate-debtor. It was urged that the summary character of the provisions of the Act required that strict compliance with its provisions should be insisted on. It was also contended that Mr. Justice Mookerjee had not considered the difference between a case where the proper mode of delivery of possession was delivery of symbolical possession and such possession had been delivered and a case where symbolical possession had been delivered, although delivery of actual

possession was the proper mode of delivery.

15. I am unable to accept the contention of Mr. Gupta. Rule 75 corresponds to Order 21, Rule 95 of the CPC and is expressed in identical terms. So does Rule 76 correspond to Rule 96 of the Code. Both sets of rules deal with delivery of possession of property sold at an execution-sale. The Code contains another pair of rules in Rules 35 and 36 of Order 21 which deal with delivery of possession of Immovable property in execution of a decree for possession. In each case, the first rule deals with property in the possession of the judgment-debtor and prescribes delivery of actual possession and the second rule deals with property in the possession of tenants or some person other than the judgment-debtor for which delivery of symbolical possession is prescribed. The effect of the delivery of symbolical possession in execution of a decree for possession was considered by a Pull Bench of this Court in the case of -- "Juggobundhu Mukerjee v. Ram Chunder Bysack" 5 Cal 584 (PB) (A), & held to be equivalent to that of a delivery of actual possession as between the decree-holder auction-purchaser and the judgment-debtor. The same was held to be the effect of delivery of symbolical possession in the case of property sold at an execution sale in the next Full Bench case of -- "Joggobundhu Mitter v. Purnanund Gossami" 16 Cal 530 (B).

It is true that, in both these cases, the property was in the possession of tenants and therefore, by themselves, the decisions do not go beyond holding that where the proper and the only mode of delivery of possession prescribed by law is delivery of symbolical possession, delivery of such possession will take effect as delivery of actual possession as against the judgment-debtor. But by subsequent decisions in the cases of -- "Lokessur Koer v. Purgun Boy" 7 Cal 418 (C), -- "Hari Mohan Shaha v. Baburali" 24 Cal 715 (D), & -- "Bhulu Beg v. Jatindra Nath Sen" AIR 1923 Cal 138 (E), the principle has been extended to cases where symbolical possession was delivered, although the proper mode was delivery of actual possession. The reasons given in the second of the above decisions have generally been accepted as the justification of that view and may, therefore, be referred to. "We have the fact," observed Maclean, C. J., "which cannot be got over, that possession, call it symbolical possession if you will, was given by a civil Court in this case to the plaintiff. * * * It may be that it was wrongly given by reason of the fact that actual possession ought to have been given u/s 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."

A fuller statement of the reason is to be found in the judgment of Banerjee, J., who agreed with the Chief Justice. "I think," observed his Lordship, "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 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."

The learned Judge concluded by observing that the period of limitation should be reckoned from the date of delivery of symbolical possession.

16. In view of such being the reason for accepting delivery of symbolical possession as equivalent to actual possession, even when possession of the latter kind ought to have been taken, I can find no reason for excluding the principle from certificate sales. In such proceedings too, the certificate debtor is a party to the proceedings for delivery of possession and, therefore, if he is given a further year in which to bring a suit u/s 36, I do not see that he is unreasonably treated, or that the summary character of the antecedent proceedings furnishes any reason for making an exception in his case. Indeed, to give the certificate-debtor a longer period in such cases and to permit him to wait till the auction-purchaser takes out another proceeding for delivery of possession or obtains a decree in a suit, will be to punish the debtor for the policy of the law for which he is not responsible. Since I do not find that, at the execution stage, the position of a certificate-debtor is in any way worse than that of a judgment-debtor, however summary the antecedent proceedings may be, I do not find any sufficient reason for excluding the principle evolved under the CPC from delivery of possession under the Public Demands Recovery Act.

17. Mr. Gupta contended that to accept symbolical possession as an equivalent of actual possession was to accept a fiction for a fact. The fiction, he proceeded to argue, should rest where it had been fixed by the decisions to which I have referred, and should not be allowed to move forward to other cases and should not be extended. He submitted that, as a matter of fact, it had not been extended and referred, by way of an illustration, to the decision in -- Jagadish Nath Roy Vs. Nafar Chandra Paramanik and Others, . There it was held by Rankin, C. J., and Mukerji, J., that if the peon wrongly delivered symbolical possession in a execution of a writ which directed him to deliver actual possession and the auction-purchaser did not protest at the time, he would not be entitled to make a second application for delivery of possession, but would have to bring a suit. In the course of the judgment, reference was made to the decisions which I mentioned a few moments ago, and it was observed that those decisions did not mean that if symbolical possession was delivered to an auction-purchaser when he was entitled to actual possession he would not be entitled to protest and ask for actual possession to be given to him in the same execution

case.

Mr. Gupta's contention, so far as I understood it, was that if the symbolical possession first given had been equivalent to actual possession, there could be no occasion for asking for actual possession a second time and that inasmuch as the learned Judges had said that the auction-purchaser could make a second application in the same execution proceeding, they had obviously declined to hold that the delivery of symbolical possession had completed the delivery and they had, therefore, not extended the principle laid down in the decisions cited. In answer to this argument it has only to be pointed out that while the learned Judges had said that the auction-purchaser, when he found that the peon was giving him only symbolical possession, would be entitled to insist by a second application that actual possession should be given to him, they had also held that after the execution case had terminated, the auction-purchaser would not be entitled to make a second application for execution for the purpose of having delivery of actual possession. They could not have so held, unless they thought that delivery of symbolical possession on the previous occasion had completed the delivery or exhausted the remedies available in execution and if the matter be regarded from that point of view, it will be clearly seen that their Lordships were, in fact, extending the principle laid down in the earlier cases.

All that they meant was that the auction-purchaser could, while the execution proceeding was still going on, insist that actual possession should be delivered to him, but they did not hold that he would be bound to do so. If the auction-purchaser did not actually protest against the delivery of symbolical possession and the execution proceeding came to an end, the symbolical possession would, for the purposes of any subsequent possessory suit, give a fresh start to limitation. The learned Judges in the case in -- Jagadish Nath Roy Vs. Nafar Chandra Paramanik and Others, (F) said nothing to throw doubt on that proposition.

18. I agree with Dr. Sen Gupta that for practical purposes insistence on literal compliance with rule is and Rule 70 is not possessor and that there must be some compromise in any event. Both the rules are self-contained and, therefore, when the possession of the certificate-debtor is of a mixed kind, a portion or the property being in his direct possession and a portion in the possession of tenants, neither of the rules would, strictly speaking, apply. Rule 75 would not apply, because the whole property would not be in the possession of the certificate-debtor and Rule 76 would not apply, because the whole property would not be in the occupation of a tenant or some other person, insistence on strict observance of the rules would, therefore, mean that in such cases there could be no delivery of possession at all.

Mr. Gupta's reply was that if the possession was of a mixed character, the delivery of possession should also be by the mixed method and actual possession should be taken of the portion in the possession of the certificate-debtor and symbolical possession of the portion in the possession of tenants. Even if that be

done, I am of opinion that great complications may arise and the procedure will not always work. For instance, delivery of actual possession may be taken on a particular date and delivery of symbolical possession may be taken subsequently, but since a certificate-debtor has to sue u/s 36 within one year from the date of the delivery of possession and sue for setting aside the sale, he cannot sue for setting aside the same sale twice.

It may, however, be said that the certificate-debtor need not bring any suit at all, till delivery of possession of the last inch of land has been given in the proper manner. But I am not sure that if he does so wait and brings a suit after delivery of both symbolical and actual possession has been given, he will not find himself confronted with a difficulty. It may then be said that since the portion in his actual possession was also "the property sold" and since possession of that portion also was delivered, he was bound to bring a suit at least in respect of that portion within one year from the date of the delivery of possession. I am not deciding whether a contention of that kind would succeed, but I am referring to the complications simply to point out that there is no reason to introduce them and not to apply the simple working rule which has been evolved under the Code of Civil Procedure.

19. There is one other reason which appears to me to take away the foundation from Mr. Gupta's argument. According to the finding in Suit No. 135 of 1942, which was a suit between the same parties before a competent Court, what had passed at the certificate-sale was not the entire tenancy, but only a five-sixths share. It is nobody's case that the tenants, holding the five-sixths share were in separate possession of a corresponding portion of the lands of the tenancy. In that state of the facts, the property sold was obviously in the joint possession of the certificate-debtors & of some co-sharers of theirs who were not bound by the certificate-sale, and to the delivery of possession of such a property Rule 75 could not obviously apply.

It is true that there is no provision in the rules framed under the Public Demands Recovery Act for the delivery of possession of undivided shares sold at a certificate-sale, but so there is no such provision in Order 21 of the Code of Civil Procedure. Between Rules 95 and 90 of Order 21, there is no provision like Rule 36 (2) which occurs between Rules 35 and 36. Similarly, there is no provision prescribing the mode of delivery of possession in the case of property, jointly held, between Rules 75 and 76 framed under the Public Demands Recovery Act. But it has nevertheless been held under the Code that in such cases, delivery of possession of undivided shares sold at execution sales should be given in the manner prescribed in Rule 35(2) of Order 21, that is to say, symbolical possession should be delivered, and I see no reason why the same principle should not apply to delivery of possession of properties jointly held in the case of certificate-sales.

On that basis, it would appear that the only possible form of possession was symbolical possession on the facts of the present case and it was such

possession that had been taken. Mr. Gupta contended that at the time the certificate-sale was held, it was the entire property which was purported to be sold and the defect of parties came to be discovered only later. In my view, the point of time at which the defect came to be discovered is not at all material, but what is material is that the property which was actually sold was merely an undivided five-sixths share, held jointly with the remaining one-sixth, and that being so, the only mode of delivery of possession which was capable of being given, was delivery of symbolical possession. It may be that the decree-holder auction-purchaser, though not knowing the real facts, had yet blundered into seeking the proper mode of delivery, but the fact remains that it was the proper mode which he had sought and if that be so, possession of the entire fiftysix bighas of land was delivered in accordance with law on July 20. 1937. The plaintiffs' suit would, therefore, be clearly barred by time.

20. As regards Dr. Sen Gupta's contention that the suit was also barred by "res judicata", I do not think that the contention is correct. The plaintiffs did not contest Title Suit No. 135 of 1942 and Dr. Sen Gupta could therefore only invoke the principle of constructive "res judicata". Relying on the decision in -- Ananda Chandra Nandy and Another Vs. Jhulon Singh and Others, , the first appellate Court held that the plaintiffs could not have, as defendants in the earlier title suit, challenged the validity of the sale on the ground of non-service of notice u/s 7 and that, therefore, there could be no question of their own suit being barred by "res judicata". Dr. Sen Gupta contended that the proposition relied upon had not been laid down in the case cited and that there were also certain differences in the facts.

In my opinion, the first appellate Court read the decision correctly & although there are certain differences in the facts, the decision is still undistinguishable. What their Lordships kept open in that case was only whether the certificate-debtor could set up as a defendant the plea that no arrears were due at all, in view of the fact that Section 35 of the Act prescribed a suit for such a contention. But their Lordships did clearly hold that so far as the sale might be impugned on the ground that notice u/s 7 of the Act had not been served, it could be done by the certificate-debtor only by bringing a suit for the purpose and could not be done by way of setting up a defence. The provisions of Section 36 seem to me fully to warrant that view. The section says that a certificate-sale shall not be held to be void on the ground that the notice required by Section 7 has not been served, but immediately proceeds to say that a suit may be brought to set aside such sale on that very ground. The effect of the section, so expressed, seems to me to be that a certificate-sale, without service of notice u/s 7, is not void but only voidable and that until it is avoided by the certificate-debtor by a suit brought for the purpose, it must be taken to be a good sale and cannot be either attacked collaterally in other suits as a void sale, nor held by the Court in other suits to be void. It is, therefore, not possible to say that the plaintiffs might and ought to have urged the ground of non-service of notice u/s 7 in the earlier suit.

Dr. Sen Gupta pointed out that the ground had, in fact, been taken by some of the cosharers of the plaintiffs and had been rejected, but I do not see how the consequence can be to bar the suit of the plaintiffs who did not themselves urge the ground and could not properly have done so. It was lastly contended by Dr. Sen Gupta that at least the finding that the certificate-holder auction-purchaser had obtained possession was "res judicata", because the finding is that after the delivery of possession on July 20, 1937, the old tenants ceased to be in possession of their own account and became "kut" cultivators under the Maharaja. I cannot agree that the plaintiffs are barred even as to that issue, inasmuch as whether the kind of possession delivered to the Maharaja was effective in law, was by no means a question in issue in the previous case and was certainly not decided.

21. As regards the difference in facts, it is true that in the case of -- Ananda Chandra Nandy and Another Vs. Jhulon Singh and Others, (G)", the suit had been brought by a third party purchaser, whereas in the present case it was brought by the certificate-holder who was himself the purchaser. It also appears that at the date the defence was taken in that case, the period of limitation for a suit u/s 36 had not expired. These differences in the facts, however, do not seem to me to affect the main principle that under the provisions of Section 33, truly construed, a certificate-sale can be impugned on the ground of non-service of notice only by means of a suit brought for the purpose.

22. Dr. Sen Gupta also referred us to the first part of Section 37 and pointed out that, under that section, all questions relating to execution, discharge or satisfaction of a certificate were to be determined by orders of the Certificate Officer & not by a separate suit. His contention was that delivery of possession was a matter concerning the execution or satisfaction of a certificate & since the plaintiffs had brought a suit, they must be taken to have accepted the position that possession had already been delivered. The simple answer to that contention is that Section 37 begins with a reservation which is "except as otherwise provided in this Act" and Section 36 is a clear provision authorising a suit. Although the time limit for such a suit under proviso (a) to Section 36 is to be computed from the date of delivery of possession, it does not follow that a suit can be brought only after possession has been delivered and cannot be brought earlier. The institution of a suit u/s 36, therefore, does not involve an admission that possession in pursuance of the certificate sale has already been given. The contention of Dr. Sen Gupta cannot, therefore, be accepted.

23. But although the plaintiffs' suit may not be barred by "res judicata", it appears to me that the decree passed in Title Suit No. 135 of 1942 is binding on the plaintiffs in the sense that it can be executed against them and so long as that decree stands, no relief can be given in the present suit. There is no prayer in the present suit for setting aside the earlier decree. I find it impossible to see how a decree in favour of the plaintiffs in the present suit and a decree against the plaintiffs in the earlier suit can stand together. Mr. Gupta contended that the right in which the Maharaja had brought the earlier suit was his right as the

auction-purchaser at the certificate-sale, but since the section entitled the plaintiffs to bring a suit for setting aside that very sale, no rights arising out of the sale and no decree giving effect to them could avail against a decree in the present suit in the plaintiffs' favour, if such a decree was passed.

I do not find it possible to accept that contention. It appears to me that although, in the absence of anything else, no right acquired by an auction-purchaser at a certificate sale can survive, if the sale itself is set aside in a suit u/s 86, still the position is entirely different when the auction-purchaser has already brought a suit and obtained a decree for possession against a certificate-debtor before a suit u/s 36 is brought. Section 36 appears to me to be primarily addressed to a state of facts in which all that have taken place are only the certificate proceedings under the Public Demands Recovery Act, but if an independent decree for possession passed in a suit brought for the purpose has intervened, I cannot see how the plaintiff can get any practical relief in a suit u/s 36, unless the earlier decree is got out of the way. Mr. Gupta appeared in the end to agree that the position was indeed so, but he contended that it was not necessary to have the earlier decree specifically set aside, since the effect of a decree in favour of the plaintiffs in the present suit would be to supersede the earlier decree and the executing court would be able to go into the matter in the course of execution. In support of that contention Mr. Gupta referred to the Full Bench decision in -- Taleb Ali and Another Vs. Abdul Aziz and Others, .

24. I cannot, however, see that If a decree be passed in the plaintiffs' favour in the present suit, the earlier decree can be regarded as a decree subordinate to it in the same sense as a final decree is subordinate to a preliminary decree in a mortgage or a partition suit. A final decree is only the preliminary decree made final and it can thus be properly said that if what is to be made final itself disappears or is modified, there is nothing left to be finalised and consequently the final decree would automatically fall to the ground in case the preliminary decree is reversed or modified. I am unable to agree that the relation between the decree in Suit No. 135 of 1942 and a decree in the plaintiffs' favour in the present suit would be of the same character. It was then contended by Mr. Gupta that, in any event, the plaintiffs could be allowed to amend their plaint even at this stage, because setting aside the earlier decree would be more or less a formal matter. If our decision had not been against the plaintiffs on the question of limitation, this prayer would have to be considered, but I do not know whether, in view of the conduct of the plaintiffs, we would have felt disposed to accede to it. As however my decision on the question of limitation is against the plaintiffs, it is not necessary to consider ways and means by which the earlier decree could be got rid of.

25. For the reasons given above, this appeal must fail and is dismissed with costs, to be divided equally between the two respondents Nos. 1 and 2. The Deputy Registrar's costs have already been paid.

Lahiri, J.

26. I agree.