

one and the same transaction. This case is therefore distinguishable from the unreported ruling relied on by the counsel for the appellants, and it is more in accordance with the case of *Baghelin v. Mathura Prasad* (1).

The pleas raised in the appeal therefore fail. As was the case in the other appeals between the same parties decided to-day, the amount decreed should be reduced by Rs. 7,099-4-0, which the plaintiffs included in their claim by reason of the judgment of the Subordinate Judge in the suit out of which First Appeal No. 254 of 1894 arose.

The result is that we vary the decree below by making a decree in favour of the plaintiffs under section 88 of Act No. IV of 1882, for the sale of the mortgaged property in the event of the defendants failing to pay to the plaintiffs or into Court on or before the 3rd of November, 1897, Rs. 64,771-2-0, together with interest at the rate of twelve annas and a half per cent. per mensem on Rs. 30,000, the principal amount of the mortgage, from the 30th of May, 1895, to the 3rd of November, 1897, aforesaid, or to the date of payment, if sooner made, together also with the plaintiffs' costs in the Court below, proportionate to the principal and interest now decreed, less Rs. 41-6-0 allowed to the defendants as their costs in that Court, and together also with the plaintiffs' costs of this appeal.

Decree modified.

Before Mr. Justice Banerji.

MANGLI PRASAD (PLAINTIFF) v. DEBI DIN (DEFENDANT)*

Execution of decree—Limitation—Suit for possession of property purchased at auction sale in execution of a decree—Effect of formal possession in saving limitation—Civil Procedure Code sections 318, 319.

Where possession of property purchased at auction sale in execution of a decree is formally given by the Court under section 318 or section 319 of the Code of Civil Procedure, although the actual possession may remain with the

* Second Appeal No. 350 of 1896, from a decree of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farukhabad, dated the 26th February 1896, reversing a decree of Munshi Bakhtawar Lal, Munsif of Fatchgarh, dated the 2nd June 1895.

(1) I. L. R., 4 All., 430.

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judgment-debtor, the date of the granting of such formal possession forms as against the judgment-debtor a fresh starting point for limitation in respect of a suit for possession of the property sold brought by the auction purchaser or his representative. *Juggobundhu Mukerjee v. Ram Chunder Bysack* (1) and *Jogobundhu Mitter v. Purnanand Gossami* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Munshi *Gobind Prasad*, for the respondents.

BANERJI, J.—The only question which arises in this appeal is that of limitation. The plaintiff brought his suit for possession of a share of zamindari. That share originally belonged to the defendant, and was sold by auction as his property in execution of a decree on the 21st of August, 1880. It was purchased by one Ganesh Rai, whose successor in title is the plaintiff. It was alleged by the plaintiff that he obtained formal possession through the Court on the 14th of July, 1884; that he remained in possession for two years, and that subsequently he was dispossessed by the defendant. It was on this allegation that he brought the present suit on the 29th of May, 1895. The Court of first instance found that, although Ganesh Rai had obtained formal possession through the Court, he had never obtained actual possession of the property, and that ever since the auction sale the property has remained in the possession of the defendant. That Court, however, gave the plaintiff a decree, being of opinion that the delivery of formal possession on the 14th of July, 1884, gave to the plaintiff a fresh start for the computation of limitation, and as the suit had been brought within twelve years from that date it was within time. The lower appellate Court has concurred with the Munsif in holding that the plaintiff never obtained actual possession. It, however, seems to have been of opinion that the fact of the delivery of formal possession through the Court was immaterial for the purposes of limitation, and it held that as the defendant had been in possession since the date of the auction sale and the period of his possession had exceeded twelve years, the plaintiff's claim was

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

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

barred by limitation. That Court accordingly dismissed the suit. It is against the decree of the lower appellate Court that the plaintiff has preferred this appeal, and it is contended on his behalf that limitation should be computed from the date on which formal possession was delivered to Ganesh Rai.

In my opinion this contention must prevail. If possession was delivered to the auction purchaser through the Court in the manner required by section 318 or 319 of the Code of Civil Procedure, that delivery of possession gave to the auction purchaser, as against the judgment-debtor whose rights were purchased by him, a conclusive title, and must, as observed by the Calcutta High Court in the case of *Juggobundhu Mukerjee v. Ram Chander Bysack* (1), be deemed to be equivalent to actual possession. On the date of delivery of possession the auction purchaser must be held to have obtained actual possession as against the judgment-debtor, and it is only during the period following that date that the possession of the judgment-debtor, if he continued in possession, could be regarded as adverse. This view is supported by the Full Bench ruling of the Calcutta High Court in the case of *Joggo-bundhu Mitter v. Purnanund Gossami* (2), in which it was held that limitation should be computed in a suit for possession against the judgment-debtor from the date of delivery of formal possession. No ruling has been cited on behalf of the respondent to support the contrary view, except the ruling in *Krishna Lall Dutt v. Radha Krishna Sarkhel* (3), which was overruled by the subsequent Full Bench ruling to which I have referred. The decisions of the Bombay High Court in *Lakshman v. Moru* (4), *Harjivan v. Shivram* (5), and *Nandev v. Ramchandra Gomaji Marwadi* (6), relied upon by the learned vakil for the respondent have no bearing upon the present question, as the person in possession in those cases was not the judgment-debtor, but a third party who was unaffected by the proceedings relating to delivery of possession. I am of opinion that the lower Court has erred in

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

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

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

(5) I. L. R., 19 Bom., 620.

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

(6) I. L. R., 18 Bom., 37.

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holding that limitation should be computed from the date of the auction purchase by Ganesh Rai, the plaintiff's predecessor in title. As I have said above, if possession was delivered to the auction purchaser in the mode prescribed by section 318 or 319 of the Code of Civil Procedure, the date of such possession would give to the plaintiff a fresh start for the computation of limitation. In this case section 319 was the section applicable. The learned Subordinate Judge has not clearly found whether possession was delivered in accordance with the provisions of that section. I therefore refer to him the following issue under section 566 of the Code of Civil Procedure for a clear finding:—"Was possession delivered to Ganesh Rai in the manner prescribed by section 319 of the Code of Civil Procedure, and if so, on what date?" The Court below will receive such evidence as may be tendered on the above question, and on the receipt of its finding ten days will be allowed for filing objections.

Issue referred.

MISCELLANEOUS CRIMINAL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

QUEEN-EMPRESS v. SHAKIR ALI AND OTHERS.*

Procedure—Criminal Procedure Code section 211—Witnesses—Right of accused to have witnesses summoned in his defence when he has refused to give in a list in the Magistrate's Court.

If an accused person, on being called upon under section 211 of the Code of Criminal Procedure to give orally or in writing a list of the persons whom he wishes to be summoned to give evidence on his trial, declines to give in such list, he cannot compel the Magistrate after committal to issue any summonses for witnesses on his behalf. Neither under such circumstances will the Sessions Judge be obliged to issue summonses for the attendance of such witnesses unless he is satisfied that their evidence may be material. *Queen-Emress v. Har Gobind Singh* (1) referred to.

THE facts of this case sufficiently appear from the order of the Court.

* Criminal Miscellaneous No. 34 of 1897.

(1) I. L. R., 14 All., 242.