

determine the suit, section 208 empowers the appellate Court either to remand the case under section 562 of the Code of Civil Procedure or to frame and refer issues for trial under section 566, or require additional evidence under section 568. As in this case there were no materials before the Court for the trial of the suit, the Court was justified in remanding the case under section 562. We shall treat the order of remand of the lower appellate Court as an order under section 208, and, that being so, we cannot entertain the contention that the Court of first instance, to which the case has been remanded, was not competent to entertain the suit. We therefore uphold the order of remand. We deem it necessary, however, to observe that when the case goes to the Court of first instance, that Court will have to determine, in trying the question of limitation raised by the defendant, whether the limitation applicable to the suit is that provided by the Indian Limitation Act of 1877, or the limitation provided by Act No. XII of 1881. It may be necessary for the determination of that question to consider whether the suit was one of the nature cognizable by a Civil Court or a Court of Revenue, but in doing so the Court of first instance should keep out of view the conclusion arrived at by the learned District Judge upon the question of jurisdiction. In our opinion it was not necessary for the learned District Judge, having regard to the view we have taken of the case, to consider that question at all.

We dismiss the appeal with costs.

*Appeal dismissed.*

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KHAN  
v.  
ABU JAFAR.

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March 9.

*Before Mr. Justice Banerji and Mr. Justice Aikman.*

NARAIN DAS (DEFENDANT) v LALTA PRASAD AND OTHERS  
(PLAINTIFFS).\*

*Execution of decree—Civil Procedure Code, section 319—Possession—Formal possession—Effect of formal possession as against a third person other than the judgment-debtor—Limitation.*

*Held*, that whatever might be the effect of the delivery of formal possession under section 319 of the Code of Civil Procedure as against the judgment-

\* First Appeal No. 107 of 1898 from an order of Maulvi Syed Muhammad Tajammul Husain, Subordinate Judge of Farrukhabad, dated the 7th September 1898.

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debtor himself, such formal delivery of possession will not take effect as actual possession as against a purchaser of the rights of the judgment-debtor who has previously obtained actual possession. *Mangli Prasad v. Debi Din* (1) referred to.

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

Pandit *Moti Lal*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen, was one for possession of mortgage rights in certain zamindari properties. Those rights originally belonged to one Shankar Lal. He mortgaged them to the father of the present plaintiffs, and the father of the plaintiffs obtained a decree on his mortgage in September 1883. In execution of that decree he purchased Shankar Lal's rights on the 20th August 1884. On the 4th of May 1885, formal possession was delivered to him, apparently under section 319 of the Code of Civil Procedure. At that time, it is admitted, the present appellant, Narain Das, was in possession by virtue of an auction-purchase in execution of a decree held by him against Shankar Lal. His purchase was made on the 21st of April 1884, and he obtained delivery of possession in January, 1885. It was found by the Court of first instance, and that finding was not questioned in the lower appellate Court, that the plaintiffs never obtained actual possession, that their allegation of an ouster in 1886 was untrue, and that since January 1885, the defendant has been in possession. The present suit was brought on the 27th of April 1897, that is a week before the expiry of twelve years from the date of the delivery of possession to the plaintiffs' father. The Court of first instance held the claim to be barred by limitation, applying article 138 of the second schedule of Act No. XV of 1877, and dismissed the suit. The lower appellate Court has set aside that decree. It was of opinion that the delivery of possession to the plaintiffs' father on the 4th of May 1885, gave a fresh start to the plaintiffs for the computation of limita-

tion. It accordingly remanded the case to the Court of first instance under section 562 of the Code of Civil Procedure. From that order of remand the present appeal has been preferred, and the only question which we have to determine is whether the claim was brought within time. The question is not by any means free from difficulty. There can be no doubt that had the suit been brought against the plaintiffs' judgment-debtor, it would have been within time, as held in *Mangli Prasad v. Debi Din* (1). But here we have the case of another person, namely, the purchaser of the rights of the judgment-debtor, who is in possession. Had the judgment-debtor been in possession, the delivery of formal possession, whether under section 318 or 319 of the Code of Civil Procedure, would have amounted to an ouster of the judgment-debtor and an entry into possession by the purchaser. If subsequently to this delivery of possession the judgment-debtor remained in possession, his possession would amount to an ouster of the purchaser, and would be adverse possession from the date of the ouster; but in the case of a third person who had already purchased the property and obtained actual possession, delivery of possession, as against the judgment-debtor alone, cannot amount to an ouster of the person in possession. Therefore it cannot be said that such delivery of possession gave the subsequent auction purchaser a new cause of action, so as to make the possession of the person other than the debtor, who was already in possession, adverse possession from the date of delivery of possession to the auction purchaser. The possession of such person commenced on the date on which he obtained possession, and from that date must be regarded as adverse to the debtor or to the auction purchaser. As in the present case the defendant was in possession for more than twelve years anterior to the institution of the suit, the claim was barred by limitation, either under article 138 or 144. Mr. *Baldeo Ram* on behalf of the respondents relied on the doctrine of *lis pendens*. There can be

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(1) (1897) I. L. R., 19 All., 499.

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no doubt that the title of the plaintiffs is superior to that of the defendant, but the question is whether the plaintiffs have come into Court in time to assert and enforce that title. In the view which we have taken of the case, their claim was beyond time and was rightly dismissed by the court of first instance. The plaintiffs are themselves to blame for having lost through their own laches the title which they acquired under their auction purchase. We allow the appeal, set aside the order of the lower appellate court, and dismiss the appeal to that Court with costs. The appellant will get his costs of this appeal.

*Appeal decreed.*

1899  
March 13.

*Before Mr. Justice Banerji and Mr. Justice Aikman.*

MUHAMMAD NIAMAT ALI KHAN (PLAINTIFF) v. GHAFFAR MUHAMMAD KHAN AND OTHERS (DEFENDANTS).\*

*Mortgage—Suit for sale—Pleadings—Purchaser of mortgaged property paying off prior incumbrances.*

The purchaser of a portion of certain mortgaged property paid off certain prior mortgages on the property. The subsequent mortgagee brought a suit for sale on his mortgage and made the purchaser a defendant, but did not offer to redeem the prior mortgages. *Held*, that the suit would not for that reason necessarily fail, but the plaintiff ought to be given an opportunity of redeeming the defendant's prior mortgages. *Salig Ram v. Har Charan Lal* (1), distinguished. *Kali Charan v. Ahmad Shah Khan* (2), followed.

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

Mr. *Abdul Raoof* and Pandit *Sundar Lal* for the appellant.

The respondents were not represented.

BANERJI and AIKMAN, JJ.—The plaintiff-appellant brought the suit, which has given rise to this appeal, for sale upon a mortgage, dated the 1st of November 1890, made in his favour by the first defendant Ghaffar Muhammad Khan. The second defendant Maulvi Nazir Hasan purchased a part of the mortgaged property, which he sold to the third defendant, his wife. The

\* First Appeal No. 137 of 1897 from a decree of Rai Shankar Lal, Subordinate Judge of Saharanpur, dated the 4th March 1897.

(1) (1890) I. L. R., 12 ALL., 548.

(2) (1894) I. L. R., 17 ALL., 48.