

BLAIR, J.—This, is a petition for revision. I am invited to lay down the general proposition that a Magistrate having before him formally and categorically evidence which discloses a case for trial in some court to which such Magistrate might in his discretion commit, is bound so to commit, and that he is wrong in point of law in exercising a discretion and considering the sufficiency of the evidence. The proposition is dangerously large. It is not the practice of Magistrates within the range of my experience, nor I have heard the law so laid down in England. That is the only question I have to answer, for it is not in this case suggested that the Magistrate who refused to commit did not exercise a judicial discretion when he found that there were not sufficient grounds for commitment. The petition is dismissed.

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 IN RE THE  
 PETITION  
 OF KALYAN  
 SINGH.

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 APPELLATE CIVIL.
 

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 1899  
 March 1.
 

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

BHOLAI KHAN (DEFENDANT) v. ABU JAFAR (PLAINTIFF)\*

*Jurisdiction—Civil and Revenue Courts—Appeal—Suit not tried on the merits in the Court of first instance—Act No. XII of 1881 (N.-W. P. Rent Act) section 208.*

*Held*, that the application by an appellate court of the provisions of section 208 of Act No. XII of 1881 is not precluded by the fact that the Court of first instance has dismissed the suit on a preliminary point without any trial of it on its merits.

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

Mr. W. M. Colvin for the appellant.

Pandit Sundar Lal and Maulvi Muhammad Ishaq for the respondent.

BANERJI and AIKMAN, J.J.—The appellant, who is a tenant at fixed rates, erected a building on land held by him for agricultural purposes. Thereupon the plaintiff, one of the zamindars of the village, brought the suit, out of which this appeal has

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\* First Appeal No. 125 of 1898 from an order of L. Marshall, Esq., District Judge of Jaunpur, dated the 16th August 1898.

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arisen, for the demolition of the building, and for the restoration of the land to its former condition. The Court of first instance was of opinion that the suit was one which came within the purview of clause (cc) of section 93 of Act No. XII of 1881, and held that it was not cognizable by the Civil Court. In this view the Munsif ought to have returned the plaint for presentation in the proper Court, but instead of doing so he dismissed the suit. The plaintiff appealed to the District Judge and the learned District Judge was asked to apply section 208 of Act No. XII of 1881 to the case, and to remand it for trial to the Court of first instance. The learned Judge was of opinion that as the suit had not been tried by the Court of first instance on the merits, section 208 was not applicable. He then proceeded to consider whether the suit was or was not cognizable by a Civil Court, and, coming to the conclusion that it was cognizable by a Civil Court, remanded the case to the Court of first instance under section 562 of the Code of Civil Procedure. From this order of remand this appeal has been preferred, and the contention on behalf of the appellant is that the suit is cognizable by a Court of Revenue. If section 208 of Act No. XII of 1881 is applicable to the case, the last paragraph of that section precludes the appellant from raising the contention urged on his behalf. We have therefore to determine whether section 208 is or is not applicable. We are clearly of opinion that the learned Judge of the lower appellate Court is wrong in thinking that sections 206, 207 and 208 would not apply to a case which has not been tried on the merits. The policy of those sections was to protect a suitor from being bandied about from Court to Court. If the question of jurisdiction was raised in the Court of first instance, sections 207 and 208 would, in our opinion, undoubtedly apply. Section 207 applies to a case in which all the materials necessary for the determination of the suit are before the appellate Court. If such materials are not before the appellate Court, or if the materials before that Court are so imperfect that the appellate Court is not in a position to

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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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.