

with criminal force; and, *secondly*, that a person has been dispossessed of immovable property by the use of such force. In the present case there was no evidence that in resuming possession of the fields, Churaman used criminal force as defined in section 350 of the Indian Penal Code, and there is no finding in the judgment of the Magistrate that criminal force was used. Section 522 of the Code of Criminal Procedure had therefore no application, and the Magistrate was not competent under that section to order possession to be restored. This view is supported by the ruling of the Calcutta High Court in *Ram Chandra Boral v. Jityandria* (1) and *Ishan Chandra Kalla v. Dina Nath Budhak* (2). I accordingly set aside so much of the order of the Magistrate as purports to have been made under section 522 of the Code of Criminal Procedure for restoration of possession.

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APPELLATE CIVIL.

1900
March 2.

Before Mr. Justice Blair and Mr. Justice Banarji.

HAR DIN SINGH (OPPOSITE PARTY) v. LACHMAN SINGH AND ANOTHER
(PETITIONERS).*

Execution of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), Schedule II, Article 165—Application by judgment-debtor dispossessed of immovable property disputing the right of the decree-holder to be put into possession.

Held that article 165 of the second schedule to the Indian Limitation Act, 1877, is wide enough to include the case of a judgment-debtor who has been dispossessed of immovable property, and who disputes the right of the decree-holder to be put into possession. *Assan v. Pathwama* (3) referred to.

THE facts of the case out of which this appeal arose are as follows. On the 25th of July, 1894, one Thakur Singh executed a conditional sale in favour of Sheo Narain. On the 18th of March 1895 he made a usufructuary mortgage of the same property in favour of Lachman Singh. Subsequently he sold his equity of redemption to the same Lachman Singh and to one

* Second Appeal No. 246 of 1901 from a decree of Babu Ramdhan Mukerji, Subordinate Judge of Gorakhpur, dated the 21st of December, 1900, reversing a decree of Pandit Bishan Lal Sarma, Munsif of Basti, dated the 28th of September, 1900.

(1) (1897) I. L. R., 25 Calc., 434. (2) (1899) I. L. R., 27 Calc., 174
(3) (1899) I. L. R., 22 Mad., 494.

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Gauri Dat. On the 5th of March 1898 Sheo Narain brought a suit for foreclosure of his mortgage of the 25th of July, 1894, against the mortgagor and the two transferees of the equity of redemption, namely, Lachman Singh and Gauri Dat, and obtained a decree on the 30th of March, 1898. The decree fixed the 30th of September, 1898, as the date upon which payment of the mortgage-money should be made. Payment not having been made on or before that date, one Har Din Singh brought a suit for pre-emption in respect of the foreclosure of the conditional sale, and obtained a decree on the 14th of March, 1899. To this suit Sheo Narain Singh, his mortgagor Thakur Singh, as well as Lachman Singh and Gauri Dat were made parties. Har Din Singh took out execution of his decree, and on the 3rd of June 1899 possession of the property was delivered to him, and Lachman Singh and Gauri Dat were deprived of possession. On the 8th of June, 1899, Lachman Singh and Gauri Dat deposited in the foreclosure suit of Sheo Narain the amount of the mortgage-money, neither Sheo Narain nor Har Din Singh having at that date obtained an order absolute for foreclosure, and on the 9th of August, 1899, they applied in virtue of this payment to be restored to possession of the property of which they had been deprived by the proceedings held in execution of the pre-emption decree obtained by Har Din Singh.

The Court of first instance (Munsif of Basti) dismissed the application, holding that it was not maintainable under section 244 of the Code of Civil Procedure. On appeal the lower appellate Court (Additional Subordinate Judge of Gorakhpur) set aside this order and remanded the case to the Court of first instance. That Court again dismissed the application holding that it was beyond time under article 165 of the second schedule to the Indian Limitation Act, 1877. The lower appellate Court set aside this order of the Court of first instance and ordered possession to be delivered to the applicants. From this order Har Din Singh appealed to the High Court.

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram*), for the appellant.

Babú *Jogindro Nath Chaudhri* and Babu *Sital Prasad Ghosh*, for the respondents.

BLAIR and BANERJI, JJ.—This appeal arises out of an application made by the respondents purporting to be under section 244 of the Code of Civil Procedure. The circumstances under which the application was made were these:—One Thakur Singh executed a conditional sale in favour of Sheo Narain on the 25th of July, 1894. On the 18th of March, 1895, he made a usufructuary mortgage of the same property in favour of Lachman, respondent. Subsequently he sold his equity of redemption to the same Lachman and to one Gauri Dat. On the 5th of March, 1898, Sheo Narain brought a suit for foreclosure of his mortgage of the 25th of July, 1894, against the mortgagor and the two transferees of the equity of redemption, namely, Lachman and Gauri Dat, and obtained a decree on the 30th of March, 1898. The decree fixed the 30th of September, 1898, as the date upon which payment of the mortgage-money should be made. Payment not having been made on or before that date, the present appellant, Har Din Singh, brought a suit for pre-emption in respect of the foreclosure of the conditional sale, and obtained a decree on the 14th of March, 1899. Sheo Narain Singh, his mortgagor Thakur Singh, and the respondents, Lachman Singh and Gauri Dat, were parties to the suit. Har Din Singh took out execution of the decree, and on the 3rd of June, 1899, possession was delivered to him in respect of the property, and the present respondents, Lachman Singh and Gauri Dat, were deprived of possession. On the 8th of June, 1899, Lachman Singh and Gauri Dat deposited in the foreclosure suit of Sheo Narain the amount of the mortgage-money, Sheo Narain or Har Din Singh not having at that date obtained an order absolute for foreclosure under section 87 of Act No. IV of 1882. On the 9th of August, 1899, Lachman and Gauri Dat made the application which has given rise to this appeal, and prayed that as they had paid the mortgage-money, they should be restored to possession of the property of which they had been deprived by the proceedings held in execution of the pre-emption decree obtained by Har Din Singh. The Court of first instance held that the application was not maintainable under section 244 of the Code of Civil Procedure, and upon that ground dismissed it.

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Upon appeal this order of the Court of first instance was set aside by the lower appellate Court, and the case remanded to the Court of first instance. That Court again dismissed the application, holding that it was beyond time under article 165, schedule II of the Limitation Act. The lower appellate Court has set aside this order of the Court of first instance, and ordered possession to be delivered to the respondents. From this order of the lower appellate Court the present appeal has been preferred. A preliminary objection has been taken to the hearing of this appeal, on the ground that if the application made by the respondents to the Court of first instance was not an application under section 244 of the Code of Civil Procedure, no appeal lay to the lower appellate Court, and that consequently no second appeal lies to this Court. In our opinion this objection has no force. We think that the application of the respondents of the 9th of August, 1899, was in substance, as it was in form, an application under section 244 of the Code of Civil Procedure. The application purported to be made in the pre-emption suit of Har Din Singh, No. 92 of 1899. There was a reference, it is true, in that application to the foreclosure suit of Sheo Narain, No. 109 of 1898. But from the whole context of the application it appears that this reference was made with a view to explain the title under which the applicants claimed to be restored to possession. As the application was, in our opinion, one under section 244, the present appeal is maintainable.

The first objection raised in appeal on behalf of the appellant is, that the application referred to above was beyond time, and that the lower appellate Court has erred in holding that article 165 is inapplicable to the case. In our judgment this objection must prevail. Article 165 provides a limitation of 30 days for an application under the Code of Civil Procedure by a person dispossessed of immovable property and disputing the right of the decree-holder to be put into possession. The article is wide enough to include the case of a judgment-debtor who has been dispossessed of immovable property, and who disputes the right of the decree-holder to be put into possession. The same view was held by the Madras High Court in *Assan v. Puthumma* (1).

As the application in question was admittedly made after the expiry of the period prescribed by article 165, it was beyond time, and should have been rejected. This ground alone is sufficient for the disposal of the appeal.

But we are also of opinion that on the merits the appeal must succeed. As the respondents were parties to the pre-emption suit in which Har Din Singh obtained his decree, and as that decree directed delivery of possession to be made to Har Din Singh, the respondents are precluded from contesting his right to obtain possession in execution of that decree. The suit by Har Din Singh was for pre-emption of the sale, which he alleged had become an absolute sale by reason of the non-payment of the mortgage-money within the time fixed in the decree for foreclosure obtained by Sheo Narain Singh. If the respondents wished to contend that the conditional sale had not become absolute, they ought to have raised that contention in the pre-emption suit, and it is too late for them now to urge that the conditional sale has not become absolute. Such a contention would have gone to the whole root of the cause of action in the pre-emption suit. Having allowed a decree for possession to be passed, it is no longer open to them to question the right of the decree-holder to obtain possession by virtue of that decree. Upon this ground also the application of the respondent ought to have been dismissed. The result is that we allow the appeal with costs, set aside the decree and order of the lower appellate Court with costs, and restore that of the Court of first instance.

Appeal decreed.

Before Mr. Justice Blair and Mr. Justice Banerji.

LACHMI DAYAL (DEFENDANT) v. HAR DANNI LAL AND ANOTHER (PLAIN-
TIFFS) AND SHIB DAYAL AND ANOTHER (DEFENDANTS).*

Execution of decree—Rights of attaching creditor—Suit by one attaching creditor for declaration that property cannot be attached by another creditor on the ground that the second creditor's decree was bad in law—Cause of action.

The plaintiffs, as judgment-creditors who had attached under a decree for money certain immovable property of their judgment-debtors, sued another

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1903

March 3.

* Second Appeal No. 732 of 1902 from a decree of L. Stuart, Esq., District Judge of Fatehgarh, dated the 4th of September 1902, reversing a decree of Maulvi Syed Muhammad Tajammul Husain, Subordinate Judge of Fatehgarh, dated the 31st of July 1902.