

1883  
 GOVINDA  
 DASS  
 v.  
 DULALL  
 DASS.

inability of the accused, a police officer, to attend, it was postponed, the complainant and witnesses being bound over to attend on the day to which the trial had been postponed. On that day the accused alone appeared, and the Magistrate dismissed the case. Having regard to the terms of s. 259 we are of opinion that in warrant cases not coming within that section, except under the last clause of s. 253, which is not applicable, a Magistrate is not competent to pass an order of dismissal, or discharge in consequence of the absence of the complainant. The Magistrate should, in the case before us, have admitted the accused to bail, and as the complainant and his witnesses had given recognizances for their appearance, he should have enforced their attendance.

The case must, therefore, be tried.

### APPELLATE CIVIL.

*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.*

1883  
 May 21.

MODUN MOHUN CHOWDHRY AND ANOTHER (DEFENDANTS)  
 v. ASHAD ALLY BEPAREE AND OTHERS (PLAINTIFFS.)\*

*Limitation Act (IX of 1871), Sch. II, Arts. 135, 145—(Act XV of 1877), Sch. II, Art. 135—Possession under mortgage.*

Under a mortgage deed, which by its express terms allows the mortgagee a right to take possession upon default by the mortgagor in payment of the mortgage money, the mortgagee, as absolute owner of the property, has twelve years from the time at which his right to possession commences, in which he may bring his suit for possession.

But where there is no such stipulation in the mortgage, the right of the mortgagee to take possession does not accrue until after the expiration of the year of grace.

Baboo *Rash Behary Ghose* for the appellant.

Baboo *Chunder Madhub Ghose* for the respondent.

THE sole question in this case was one of limitation, and the facts sufficient for the purposes of the report will be found set out

\* Appeal from Appellate Decree No. 420 of 1882 against the decree of Baboo Nobin Chunder Gangooly, Second Subordinate Judge of Dacca, dated 27th December 1881, reversing the decree of Baboo Ravati Churn Banerjee, Second Munsiff of Dacca, dated 14th February 1881.

in the judgment of the Court (GARTH, C.J., and MACPHERSON, J.), which was delivered by

1888

---

MODUN  
MOHUN  
CHOWDHRY  
v.  
ASHAD ALLY  
BEPARRE.

GARTH, C.J.—The plaintiffs in this case sue for possession of certain immovable property. They claim under a deed executed by the defendant on the 13th Falgoon 1261 (28th February 1855), which is called in the plaint a kutkabalā, but which, upon the face of it, appears to be an absolute sale to the plaintiffs, for the sum of Rs. 275.

It seems, however, that there was a verbal arrangement between the parties that the transaction should really be a mortgage, and that the money advanced should be paid off with interest at the rate of one per cent. per mensem in Bysakh 1262 (April 1855). The acts and conduct of the parties appear to have been entirely in favor of that view, and both the lower Courts concur in finding that the transaction was a mortgage and not a sale.

That being so, the question comes to be one of limitation, and it arises in this way:

It appears that in the year 1263 (1856), the plaintiffs took the usual proceedings to foreclose the mortgage, and after the year of grace had expired, they brought a suit to recover possession, but they were then defeated on account of some irregularity in the foreclosure proceedings.

They then, on the 27th Pous 1285 (13th January 1879), took fresh foreclosure proceedings, and at the expiration of the year of grace from that date they have again brought this suit for possession.

The first Court held, that the plaintiffs were barred by limitation, upon the ground that limitation began to run against them from Bysakh 1273 (April 1866), when the first foreclosure proceedings came to an end.

The Subordinate Judge has reversed that decree, and has given the plaintiffs a decree for possession.\*

On appeal to this Court it has been contended that, assuming the transaction to have been a mortgage, (about which there is no question), the plaintiffs' right to possession accrued at the time when default was made in payment of the mortgage money,

\* Deciding that the case was governed by Article 135 of Schedule II of Act XV of 1877, but that under the Act of 1871, the suit was not barred.

1868  
 MODUN  
 MOHUN  
 CHOWDHRY  
 v.  
 ASHAD ALLY  
 BEFARBE.

that is to say, in *Bysakh* 1263 (April 1856), and that if it accrued then, the plaintiffs' right of action was barred in 1275 (1868), and that no subsequent foreclosure proceeding could revive their right.

In support of that contention, we were referred to the case of *Deonath Gangooly v. Nursingh Proshad Doss* (1), decided by Justices Markby and Mitter.

In that case the mortgage was by conditional sale, and there was a stipulation in the deed, that if default should be made in payment of the mortgage money, the mortgagee should be at once entitled to possession without any foreclosure proceedings.

The mortgagor failed to pay on the day named, and foreclosure proceedings were taken more than twelve years after default. Then, after the expiration of the year of grace, a suit was brought by the mortgagee for possession, and it was held by this Court that the plaintiff was barred, because he ought to have brought his suit for possession within twelve years from the time when his right to possession accrued.

Mr. Justice Mitter explains the ground upon which that case was decided in this way. He says "from the terms of the conditional sale set forth above, it is evident that, on default of payment within the stipulated time, the mortgagee was entitled to take possession of the properties sold, unless restrained by any legislative enactment. It is said that he was so restrained by Regulation XVII of 1806. This argument entirely proceeds from a misapprehension of the provisions of that law. It is quite clear that parties are ordinarily bound by the terms of their contract, unless by legislative interference one or both of them are set at liberty to modify or annul any of its provisions to which they have mutually consented. The *kutkabala* in question expressly reserved to the mortgagee the right of entry upon the mortgaged premises on default of payment within the stipulated time. Regulation XVII of 1806, or any other law, does not render such a stipulation inoperative between the parties. I am, therefore, of opinion that the mortgagee in this case, immediately on default of payment which occurred on the 9th of July 1855, was entitled to take possession of the properties mortgaged."

(1) 14 B. L. R., 87; 22 W. R., 90.

And Mr. Justice Mitter further goes on to say that, although the mortgagee took proceedings for foreclosure and so became entitled to the property as absolute owner, those proceedings gave him no fresh right to sue for possession.

1883

MOHUN  
MOHUN  
CHOWDHRY  
v.  
ASHAD ALLY  
BEFARRE.

That case was followed by another to the same effect—*Lall Mohun Gungopadhya v. Prosunno Chunder Banerjee* (1) decided by Mr. Justice Jackson and Mr. Justice McDonell, and both decisions were reviewed in a case which occurred in this Bench—*Noonoo Opadhya v. Lalla Gourea Churn* (2), in which we agreed with the law laid down by Mr. Justice Mitter.

It will be observed that, in order to make these decisions applicable in any case, the mortgagee must, *by the express terms of the mortgage, have a right to take possession upon default by the mortgagor in payment of the mortgage money*, and unless there is that express provision in the deed, it has been held over and over again that the right of the mortgagee to take possession does not accrue until after the expiration of the year of grace.

It has been contended that the Subordinate Judge did not understand those cases; and from the fact of his saying that they have been dissented from by Mr. Justice Pontifex and other Judges in two cases—*Ghinaram Dobey v. Ram Monarath Ram Dobey* (3); and *Bronhomoyi Dasi v. Jugobundhu Ghose* (4), we think it very possible that he did not comprehend their true meaning.

The first of these cases—*Ghinaram Dobey v. Ram Monarath Ram Dobey* (3)—was decided by Justices Pontifex and McDonell; and it will be found not to conflict in any way with the authorities to which I have referred.

In that case no doubt the mortgagee had a right, by the terms of the deed, to take possession upon default of payment by the mortgagor. He did not take possession upon default, but he took proceedings for foreclosure; and *the year of grace expired within twelve years from the time of default.*

Within twelve years after the expiration of the year of grace, he brought his suit for possession, *not as mortgagee, but as absolute*

(1) 24 W. R., 433.

(3) 7 C. L. R., 580.

(2) 1 Shome, 21.

(4) Id., 583.

1888  
 MODUN  
 MOHUN  
 CHOWDHRY  
 v.  
 ASHAD ALLY  
 BEPAREE,

owner of the property; and it was held that he was entitled to recover.

The case was governed by the Limitation Act of 1871; and as explained by Mr. Justice Pontifex, the plaintiff, if he had sued as mortgagee, had twelve years (under Article 35) from the time when, as mortgagee, his right to possession accrued.

Before this period had expired, he had, by the foreclosure proceedings, clothed himself with a new character, that of absolute owner, and Article 145 gave him twelve years from the time when his title accrued to sue *in that character*.

The other case—*Bromhomoyi Dasi v. Jugobundhu Ghose* (1), which was heard by Justices McDonell and Broughton,—was decided upon precisely the same principle, so that neither of these cases conflict in any way, as the Subordinate Judge seems to think they do, with the authorities to which we have referred.

But whether he quite understood the distinction between the cases or not he appears to be quite right in his conclusions.

It is clear that limitation did not run, as the Munsiff says it did from Bysakh 1273 (April 1866), because the first foreclosure proceedings were void for irregularity; nor could the cases of *Denonath Gangooly v. Nursingh Proshad Doss* (2), and *Lall Mohun Gungopadhyā v. Prosunno Chunder Banerjee* (3), apply here, because there was no stipulation in this case that the mortgagee should be entitled to possession on default of payment by the mortgagor.

The only time, therefore, from which limitation could run was the expiration of the year of grace, after the foreclosure proceedings in 1879.

The appeal must, therefore, be dismissed with costs.

*Appeal dismissed.*

(1) 7 C. L. R., 583.

(2) 14 B. L. R., 87; 22 W. R., 90.

(3) 24 W. R., 433.