

they allege, they must make it the subject of another suit; and we think we ought to allow them an opportunity of doing so.

We, therefore, give them leave to bring another suit of that nature, though of course we say nothing as to their prospect of success.

This appeal will be dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

GOVINDA DASS v. DULALL DASS AND OTHERS.*

Magistrate, Powers of—Dismissal of Complaint—Discharge of accused—Code of Criminal Procedure, Act X of 1882, ss. 253, 259.

A Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant in warrant cases not coming within s. 259 of the Code of Criminal Procedure, except in cases coming within the last clause of s. 253 of the same Code.

IN this case a complaint was made before the Magistrate of Rungpore, on the 13th of July 1883, charging a police constable with extortion. The hearing of the complaint was first fixed for the 23rd July, and afterwards postponed till the 3rd of August. On the latter day, neither the complainant nor his witnesses appeared, and the Magistrate discharged the accused on that ground. The case was then referred to the High Court under s. 438 of the Code of Criminal Procedure, by the District Judge of Rungpore, who was of opinion that the course taken by the Magistrate was contrary to the provisions of s. 259 of the Code of Criminal Procedure, the case not being a compoundable one.

No one appeared to argue the case.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was as follows:—

We think that the Magistrate was not competent in this case—a warrant case not compoundable—to dismiss it because the complainant was absent.

It appears that on the day first fixed for the trial the complainant attended with his witnesses, but in consequence of the

* Criminal Reference No. 117 of 1883 and letter No. 417S, from J. R. Hallett, Esq., Sessions Judge of Rungpore, dated the 23rd August 1883.

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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.