

(1899) 07 CAL CK 0029
In the Calcutta High Court

Azgar Ali Mia

APPELLANT

Vs

Aman Ali

RESPONDENT

Date of Decision : 07-07-1899

Acts Referred:

Citation : (1900) ILR (Cal) 185

Hon'ble Judges : Wilkins, J; Macpherson, J

Bench : Division Bench

Judgement

Macpherson and Wilkins, JJ.—The plaintiff respondent brought this suit for foreclosure of a mortgage by way of conditional sale, and for possession of the property mortgaged, alleging that he had been put into possession by the mortgagor, and that he had been dispossessed some two or three years before the suit. The Subordinate Judge held that the claim for foreclosure was barred by the law of limitation, but that the respondent was entitled to possession as mortgagee of the property from which he had been ejected. This appeal is preferred by" one of the defendants against the order giving the respondent possession of the mortgaged property.

2. It seems to us that the decision of the Subordinate Judge is right. The property was conveyed to the respondent for a consideration of 80 rupees, and under the deed he was entitled to possess and enjoy the property. There was this condition, however, that, if the consideration money was repaid within eight years, the deed would be returned and possession restored; and that, failing such repayment, the plaintiff would be entitled to foreclosure and make this title absolute. The mere fact that the plaintiff's claim for foreclosure was found barred by limitation cannot, it seems to us, deprive him of the possession to which he was entitled under the deed. It was held in the case of *Khelut Chunder Ghose v. Tara Churn Koondoo Chowdhry* that a mortgagee under a deed such as this, who is entitled to possession on default of payment of the mortgage debt, can maintain a suit for possession without asking for foreclosure; and that the right which he has to possession is not affected by the right which he has to

foreclose. He has the double right. It seems to us that a mortgagee who was put into possession from the first, and is entitled under the deed to hold possession, is in no worse position than a mortgagee who is only entitled to possession on default of payment by the mortgagor of the mortgage debt. It has been found that the respondent was wrongfully deprived of possession, and that the suit to recover possession was within time. On the facts as set out in the plaint, we think that the Subordinate Judge was justified in giving the respondent a decree for possession, although his claim for foreclosure fell through. The possession, as stated by the Subordinate Judge, is of course possession as mortgagee subject to the right of redemption.

3. This appeal is dismissed with costs.