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**(1897) 03 CAL CK 0027**

**Calcutta High Court**

**Case No:** None

Huri Mohan Shaha

APPELLANT

Vs

Baburali

RESPONDENT

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**Date of Decision:** March 16, 1897

**Citation:** (1897) ILR (Cal) 715

**Hon'ble Judges:** Knight, C.J; Francis William Maclean, J; Banerjee, J

**Bench:** Full Bench

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### **Judgement**

Maclean, C.J.

I think the Subordinate Judge in this ease is in error. He decided the case upon the authority of the case of Krishna Lall Dutt v. Radha Krishna Surkhel ILR 10 Cal. 402 but that case has been reversed by the decision in the case of Joggobundhu Mitter v. Purnanund Gossami ILR 16 Cal. 530 and the latter case is certainly consistent with the principle of the cases of Joggobundhu Mukerjee v. Ram Chunder Bysack ILR 5 Cal. 584 Lokessur Koer v. Purgun Roy ILR 7 Cal. 418 Seen v. Muttusami ILR 10 Mad. 53 and Shama Charan Chatterji v. Madhab Chandra Mookerji ILR 11 Cal. 93.

2. It is urged by the respondent's Vakil that this ease is distinguishable from those to which I have referred by reason of the fact that in some of those cases the tenants were in possession, in which case Section 319 of the CPC was the proper one under which to take or to give symbolical possession. He says that those cases are distinguishable from the present by reason of the fact that in this case the judgment-debtor was in possession, and therefore actual possession ought to have been given u/s 318 of the Code, and not symbolical possession u/s 319. But be that as it may, we have the fact which cannot be got over, that possession, call it symbolical possession if you will, was given by a Civil Court in this case (sic)the plaintiff, and in the ease of Lokessur Koer v. Purgun Roy ILR Cal. 418 it was laid down that the formal possession given by a Civil Court under an execution operates in point of law and of fact, as between the parties, as a complete transfer of possession from one party to the other. In this case, it seems clear that symbolical

possession which in law is possession, was given on the 8th November 1881. It may be that it was wrongly given by reason of the fact that actual possession ought to have been given u/s 318 of the Code, but still possession was given to the plaintiff by a Civil Court; and, under the circumstances, it seems to me that the period of limitation must begin to run from the date of that possession being given, which was the 8th November 1881, in which case the plaintiff is within time. I think the appeal must be allowed, and the case remanded to be tried on its merits. The costs will abide the result.

Banerjee, J.

3. I am of the same opinion. The learned Vakil for the respondent seeks to distinguish the present case from the case of *Joggo-mndhu Mitter v. Purnanund Gossami* ILR 16 Cal. 530 in this way, that whereas, in that case the property in dispute was in the possession of tenants, and could be taken possession of by the purchaser at the execution sale only u/s 319 of the Code of Civil Procedure, the property in dispute in the present case was in the actual possession of the judgment-debtor himself, and so possession of it should have been taken by the execution-purchaser, not u/s 319 but u/s 318 of the Code; and as the plaintiff, the execution-purchaser, did not proceed to take possession under the last mentioned Section as he ought to have done, formal or symbolical possession given to him u/s 319 must be treated as a nullity and as having no effect in giving him a fresh cause of action by reason of the judgment-debtor continuing in possession, so far as the law of limitation was concerned. But on referring to the case of *Joggo-mndhu Mitter v. Purnanand Gossami* ILR 16 Cal. 530 I find that neither the learned Judges, who referred the cases to a Full Bench doubting the correctness of the decision in the case of *Krishna Lall Dutt v. Radha Krishna Surkhel* ILR 10 Cal. 102 nor the learned Judges who composed the Full Bench, laid any stress, in their decisions, upon the distinction on which reliance is placed by the learned Vakil for the respondent. The correctness of the decision in the case of *Krishna Lall Dutt v. Radha Krishna Surkhel* ILR 10 Cal. 102 was doubted in the referring order, and the decision of the Full Bench accepts the view of the referring Judges as may be gathered from the following passage: "The case noticed by the Division Bench, which referred this question to the Full Bench, *Krishna Lall Dutt v. Radha Krishna Surkhel* ILR 10 Cal. 402 was decided without reference to the earlier Full Bench case, which was apparently not brought to the notice of the Judges." Moreover, in the cases of *Lokessur Koer v. Purgun Roy* ILR 7 Cal. 418 and *Shama Charan Chatterji v. Madhab Chandra Mookerji* ILR 11 Cal. 93 which were both cases in which symbolical possession had been taken by the decree-holder of property of which the judgment-debtor was actually in possession, and of which, therefore, actual possession could have been taken by the decree-holder, it was held, notwithstanding that fact, that the formal possession given to the decree-holder was sufficient possession as against the judgment-debtor. As for the case of *Lakshman v. Moru* ILR 16 Bom. 722 relied upon for the respondent, it is enough to say that it does not decide the present question.

Mr. Justice Telang points out at the conclusion of his judgment that for several reasons it was not necessary to determine the question now raised. I think the weight of authority is clearly in favour of the view contended for by the learned Vakil for the appellant. And reason also appears to me to be in favour