

(1878) 05 CAL CK 0002

Calcutta High Court

Case No: None

Gossain Sudersan Das

APPELLANT

Vs

Terietput Singh and
Others

RESPONDENT

Date of Decision: May 17, 1878

Citation: (1879) ILR (Cal) 46

Hon'ble Judges: McDonell, J; Broughton, J

Bench: Division Bench

Judgement

Broughton, J.

The plaintiff in this case such for adjudication of right to, and confirmation of possession of, land. He bases his title on a deed of sale dated 16th Falgoon 1267 F.S., corresponding with the year 1860 of the Christian era, executed by the defendant, second party, in favour of the plaintiff, by setting aside the collusive Kobala executed by the same defendant in 1864 in favour of the father of the other defendants, who are minors.

2. The plaintiff based his claim in his written statement on the deed of sale of 1267, coupled with possession, and all the defendants repudiated that deed of sale, and denied the possession.

3. The Subordinate Judge found that the plaintiff never was in possession. He says: "It also clearly appears from all the evidence that the plaintiff's suit on the allegation of his having been in possession is false," and he dismissed the suit on this preliminary point, directing the plaintiff that if he was out of possession he should sue for recovery of possession, and ordered him to pay the costs.

4. It is said that the Subordinate Judge ought not to have dismissed the suit on a matter of form, but should have treated it as a suit to recover possession, and the Judge of Tirhoot took that view of the case when it was brought before him on appeal citing two cases: Moulvie Abdoollah v. Shaha Mujeesooddeen 15 W.R., 286;

s.c. on Appeal, 16 W.R., 27 on appeal from the decision of two Judges, and Kashee Nath Mookerjee v. Mohesh Chunder Goopto 25 W.R., 168.

5. On special appeal the respondent relies upon those two cases and also upon the case of Tacoordeen Tewary v. Syed Ali Hossain Khan L.R., J.I.A. 192. No doubt, when the plaintiff has a bond fide case which he has proved in substance, but not in form, there are circumstances under which the Courts assist him. Special circumstances existed in the two cases referred to by the Judge. In both the question of title had been gone into as the main question, and it was merely that the form of the suit was defective. There was a bond fide case in each instance. In the case before the Judicial Committee the whole question between the parties had, in like manner, been heard; the Principal Sudder Ameen found that the plaintiff was in possession; the High Court on appeal, and on a review of the evidence, did not agree with him on this point, but on the substance of the whole case came to the same conclusion,—namely, that certain documents on which the defendant relied had not been executed by a purdah lady. The plaintiff claimed the property as her heir, the defendant under the deeds. It was not contended before the Judicial Committee by the appellant that the suit ought to fail upon a matter of form, and it would have been a great hardship to send it back to India for a fresh trial on such a question.

6. But this is a different case; the plaintiff has put forward a distinct allegation of possession founded on a deed of sale. The Subordinate Judge found that his allegation of possession was false and also had before him a former case, in which the defendants had sued the cultivators for rent; the present plaintiff had on that occasion intervened, and the Munsif had decided against him. It appears to us, therefore, that this is not a case in which the general rule ought to be relaxed, and the plaintiff assisted to establish a case which he did not put forward; and even if the matter was one of discretion which, under the circumstances of the case, we are inclined to doubt, the Court of first instance having made a very proper exercise of its discretion, the lower Appellate Court was not justified in reversing the first Court's decision.

7. We, therefore reverse the order of the Judge remanding the case, and restore the order of the first Court.