(1869) 12 CAL CK 0015

Calcutta High Court

Case No: Special Appeal No. 1537 of 1869

Tufani Sing		APPELLANT
	Vs	
Mussamat Durgaban		RESPONDENT

Date of Decision: Dec. 7, 1869

Judgement

Kemp, J.

The plaintiff is the special appellant. This is a suit in right of pre emption as sufee shurikh, or partner in the thing sold. The plaintiff alleged that he had purchased in 1260 B.S. (1853), from one of the coparceners her share in the property, and that the defendant who has purchased the share of Amirunnissa, one of the six co-sharers, is a stranger, and therefore that he (the plaintiff), being a partner in the thing sold, has a preferential right. The plaintiff''s vendor intervened, and applied to be admitted as a party to the suit; she disputed the fact of the sale to the plaintiff, and was made a party to the suit. The first Court, looking into the long possession of the plaintiff which extended over 17 years, and to the fact that he had paid the Government revenue of the share purchased by him, gave the plaintiff a decree, holding further (on the question of the performance of the ceremonies required by the Mohammedan law), that be had fulfilled the requirements of that law. The Judge has not looked into the question of possession at all. The Judge says that the plaintiff based his claim "Upon the deed of sale; and as that deed was set aside by the decision of the Moonsiff, although it appears that an appeal was preferred against that decision, the plaintiff not being able to show, as alleged by him, that the decision of the Munsiff has been reversed, his suit for pre-emption must fail without reference to the question of possession. The circumstances of this case are somewhat peculiar. It is admitted that the Munsiff did pass a decision setting aside the conveyance of the plaintiff, which is the basis of the plaintiff''s claim, and it also appears that an appeal was preferred against that decision, but the result of that appeal cannot be known, inasmuch as the records of that time were burnt during the mutiny. Certainly it must be said that the Judge is right so far, in Baying that, until it is shown that a decree of Court has been set aside, it must be presumed that

that decision was correct; but looking to the circumstances of this case, and to the fact that the plaintiff was precluded from showing the result of the appeal by causes beyond his control, we think that he was entitled to a finding on the question of possession. namely, whether his possession was that of a proprietor or that of a farmer, as contended by the special respondent. The possession of the plaintiff is not denied by the special respondent, and it is also shown that be has paid the Government revenue for many years. We, therefore, think that the real point for trial in this case was what the nature of that possession was, namely, whether it was that of a proprietor, as asserted by the plaintiff, or that of a lessee, as asserted by the defendant. If that possession, which is admittedly a long and uninterrupted possession, is found to be that of a proprietor, we see no reason why the plaintiff should not succeed in this case; but if, on the other hand, it should be found to be the possession of a lease, his case must necessarily fail. The case is, therefore, remanded for the Judge to re-try it with reference to these remarks. Costs to follow the result.