

but then the result of the Judge's order setting aside the decision of the Moonsiff, who dismissed the plaintiff's suit, will be to restore the first *ex-parte* judgment of the Moonsiff. The Judge ought not to have left the question of the service of notice undetermined in that way. He was bound to come to a definite finding on that point.

The 23rd April 1874.

*Present :*

The Hon'ble J. B. Phear and G. G. Morris,  
*Judges.*

**Ejectment—Damages—Specific Performance.**

Case No. 1327 of 1873.

*Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 25th March 1873, reversing a decision of the Moonsiff of Begoosurai, dated the 28th August 1872.*

Bujrungee Dutt Pattuck (one of the Defendants), *Appellant,*

*versus*

Shaikh Moorad Ali and another (Plaintiffs),  
*Respondents.*

*Moonshee Mahomed Yusuf* for Appellant.

*Moonshees Abdool Baree and Serajul Islam*  
for Respondents.

D, after having given a kutkina pottah of a certain village to M, granted another kutkina pottah of the same land to R, who obtained possession under his pottah. M then sued D and K for ejectment, and to recover possession :

HELD that M's remedy lay in an action for damages, and that he could not claim specific performance unless R raised no objection to giving up possession.

*Phear, J.*—HAVING regard to the peculiar way in which this case has come before us, we think there is not sufficient ground for our interfering with the decision of the Lower Appellate Court upon special appeal.

The plaintiff says that the first-named defendant, Bujrungee Dutt, granted him a kutkina pottah of a certain village on the 26th May 1871, and that the defendant afterwards granted another kutkina pottah of the same property to Mr. Rainey on the 21st July 1871. And he says that Mr. Rainey obtained possession under his pottah, and that he, the plaintiff, has not been able to get possession. He states the reason which led to the delay in his getting possession; and he seeks in this suit to eject Mr. Rainey, and to recover possession of the property himself.

Now, it appears to us, on the facts stated by the plaintiff, that the suit is, to a considerable degree, misconceived. If the first defendant, after executing a kutkina pottah to the plaintiff, but before giving the plaintiff possession of the property according to its terms, had granted another pottah to Mr. Rainey, and given Mr. Rainey actual enjoyment of the property thereunder, it would then no longer be in the power of the first defendant to carry out the contract which was involved in the pottah which he first granted to the plaintiff. And the plaintiff's remedy, if he was entitled to a remedy under the circumstances of the case, would be in the shape of damages. He could not get specific performance of his contract, but he would have a right to be compensated for the loss of the benefit which he would have derived from the contract, had the contract been duly carried into effect. However, this defence is, strictly speaking, not set up either by the first-named defendant, the lessor Bujrungee Dutt, or by Mr. Rainey. Indeed, Mr. Rainey does not appeal at all, and therefore we must take it that he has no objection to the decree which the plaintiff has obtained in the Court below. The only person who appears against the decree of the Lower Appellate Court to this Court is Bujrungee Dutt, the lessor; and he could make no answer to the plaintiff's claim other than that which we have suggested, if it is founded in fact, namely, that he has put some one else into the possession of the property, and is unable to carry out the contract with the plaintiff. But, as long as Mr. Rainey declines to defend this suit, it is difficult to see how Bujrungee Dutt can take up this line of defence. Under these circumstances, we understand that Mr. Rainey raises no objection to giving up possession of the property to the plaintiff, and, therefore, there is no reason in law why the first-named defendant, Bujrungee Dutt, should not specifically perform the contract which he made with the plaintiff.

On the whole, then, it seems to us that, on the facts as they now appear, the decree of the Lower Appellate Court is substantially right, and that this appeal fails. Accordingly we dismiss the appeal with costs.

In the view we have taken it is not necessary for us to express any opinion as to the merits of the case. The merits seem to depend entirely upon questions of fact, and those have been determined by the Lower Appellate Court in favour of the plaintiff.