of *shuffa*, as has been repeatedly observed in this Court, is a very peculiar right, weak in its nature, and one which requires for the comfort of the community to be enforced by proper observance of all its essentials. One of those essentials is the performance of the ceremony called *tullubeh ist shehad*. Now, it seems to us that, on this part of the case, and we think also to some extent as to the respective rights of the plaintiff and the defendant on the question of pre-emption, the Subordinate Judge has looked rather in the light of what he thought just and equitable than in strict accordance with the express provisions of the Mahomedan Law. There is, it seems, at least in so far as is shown to us, only one witness, *viz.*, Jonab Ali, who has deposed to the express terms in which the ceremony called *tullubeh ist shehad* is made. We are willing to concede, if that witness could be entirely and absolutely believed, that the words to which he deposes may be accepted as a compliance with the terms of the law, regard being had to the parties claiming the right in this instance, who are persons of an inferior class, and not acquainted with the Arabic language, and for whom some allowance must be made; but it seems to us to be a very serious question whether this witness is to be believed. The Moonsiff, as we have already said, expresses himself in very strong terms as to the credibility of the plaintiff's witnesses, and the Subordinate Judge, before he overrules that conclusion, ought to give the very fullest weight to the opinion of the Judge who heard the witnesses. It is not competent to us, sitting here in special appeal, to determine finally whether this witness or that witness is to be believed. We think, therefore, that the case must go back to the Lower Appellate Court in order to determine carefully whether the witness, Jonab Ali, is to be believed in the statements that he makes, and whether the words, which he describes as having been used by the purchaser on this occasion, were words really intended to meet the requirements of the Mahomedan Law, or only ordinary expressions of a disappointed Bengalee purchaser. As the case is going back to the Lower Appellate Court, we think there ought to be a further direction to the Lower Appellate Court to consider and determine the question whether, under the Mahomedan Law, the plaintiff was entitled to a right of pre-emption over all, or at least over one, of the defendants.

The costs of this appeal will follow the result.

The 23rd April 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Ex-parte Decree—Act VIII. of 1859, s. 119—Appeal—Notice under s. 216.

Case No. 2060 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 11th June 1873, reversing a decision of the Moonsiff of Magoorah, dated the 16th July 1872.

Bimola Soondaree Dassee and another (two of the Defendants), *Appellants,*

versus

Kalee Kishen Mojoomdar (Plaintiff), *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellants.

Baboo Bungshee Dhur Sen for Respondent.

An *ex-parte* decree of June 1865 kept alive by successive applications for execution was subsequently set aside on an application of 14th August 1871 (within 30 days after attachment in execution) made under Act VIII. of 1859, s. 119, and a judgment was passed on the merits. The Lower Appellate Court reversed the order setting aside the *ex-parte* decree:

HELD that, in so far as the Moonsiff had decided that the application was in time, he did not come under s. 119, and therefore his order was not final, and the Lower Appellate Court had jurisdiction to inquire into his proceedings.

A notice under s. 216 stands upon a different footing from a summons or other notice which a party is bound to serve, and it must be presumed that a Court, until the contrary is proved, has duly issued such notice where required by law to do so.

Jackson, J.—THIS is a special appeal from the decision of the Additional Judge of Jessore, who reversed the decision of the Moonsiff of Magoorah, by which decision a suit by the plaintiff, Kalee Kishen Mojoomdar, commenced in or before the year 1865, was dismissed by a final order of the 16th July 1872. The plaintiff, it seems, got an *ex-parte* decree against the defendant on the 12th June 1865. An application was made, on the 17th May 1868, for execution of that decree, but the proceedings on that occasion did not go beyond notice to the debtor. A further application was made on the 14th June 1871. Notice was issued, and some property was attached on the 29th July, and, about 16 days afterwards, that is, on the 14th August 1871, the defendant made an application, under

section 119 of the Code of Civil Procedure, to set aside the *ex-parte* judgment. The judgment of the Moonsiff, which is before us, is one upon the merits of the case, but it was preceded by a decision in favour of the defendant, by which he set aside the *ex-parte* judgment. The case coming on regular appeal before the Additional Judge, he entered into a consideration of the correctness of the Moonsiff's order setting aside the *ex-parte* judgment, and he held that the order of the Moonsiff in that respect was open to appeal, and that, on the grounds which he states, the order was improper. He therefore decreed the appeal, and reversed the decision of the Moonsiff.

It is contended before us in the first place that the Lower Appellate Court had no jurisdiction to reverse the order of the Moonsiff, it being declared by section 119 that, in all cases in which the Court shall pass an order under that section for setting aside a judgment, the order shall be final; and, secondly, if the propriety of the order under section 119 is to be considered, the defendant was in time, inasmuch as he applied to the Court within 30 days of the process attaching his property in execution. With regard to the first of these objections, it appears to us that the Lower Appellate Court was competent to go into the question of the regularity of the Moonsiff's proceedings. The section says: "In all cases in which the Court "shall pass an order under this section for "setting aside a judgment, the order shall "be final." Therefore, if it appears that the Court had passed an order otherwise than under this section, there would be no finality, and it has been held in a matter very much analogous to this, *viz.*, where an application to review a judgment has been admitted, and where a decision afterwards takes place on re-hearing, and that decision comes to the Lower Appellate Court on appeal, that the Lower Appellate Court is competent to look into the question whether the admission of the review has been in accordance with the restrictions imposed by the law. Now, in so far as the Moonsiff appears to have decided that the defendant was in time, when he applied within 30 days of the date of attachment, we consider the Moonsiff did not come under section 119, and so far the Judge was right in setting his order aside, that is, assuming that the previous process for enforcing the judgment had been executed. The previous process of course would be the notice, and upon that matter it does not seem that the Moonsiff has come to a proper decision. He says that the service of notice is not proved by the decree-holder. In saying this, the Moonsiff appears to have lost sight of the law. A notice under section 216 stands upon quite a different footing from the summons or other notice which a party is bound to serve, because, under that section, where an interval of more than one year has elapsed between the date of the decree and the application for its execution, "the Court *shall* issue" a notice to the party against whom execution may be applied for. Now, in such a matter as this, the well-known maxim, that all things must be presumed to have been done in accordance with rule, will, we think, apply, especially when a Court is dealing with its own process, as the Moonsiff did in the present instance. We are entitled to presume that the Court had issued notice, and it clearly lay upon the defendant to prove, to the satisfaction of the Court, that the notice did not, in fact, issue. It is a very serious matter that a plaintiff should be called upon, after the lapse of six or seven years from the date when he obtained a decree, not only to prove all those matters which it is the business of the Court to look to, but also to prove *de novo* the case originally set up. The witnesses might all be dead, the documents might all disappear, and one might feel the utmost difficulty in proving a matter which he might very easily have done seven years before. We think, therefore, that the Court ought to be very cautious after the lapse of a considerable time in making any assumption in favour of the judgment-debtor, which he was not entitled to at the time when judgment was passed against him. The case therefore must go back to the Lower Appellate Court for a distinct finding whether or not any notice issued first in 1868, and afterwards in 1871. In finding upon that question, the Lower Appellate Court must give proper weight and consideration to the maxim *Omnia presumuntur rite esse acta*, by which all acts done by the Court must be presumed to have been done in accordance with law and practice.

We may add that the Judge, in dealing with the question of the service of notice in 1868, has left the case in a position which, we think, he was not justified in doing. He says that the defendants are in a dilemma in respect of that notice, because, if the notice was served, then the defendants were barred; if it was not served, then the decree was dead by lapse of time, and there would be no need for setting it aside. That may be true,

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.