

1878
 BHUGWAN
 CHUNDER
 DASS
 v.
 SUDDER ALLY.

was held to be essential to the validity of the sale; and that the provisions which are considered as non-essential are those relating merely to the mode of proving or verifying that service. It seems to us that it would be very dangerous to leave it open to the Court in each instance to say whether what has been done is equivalent to the mode of service prescribed by the Regulation.

But assuming, for the sake of argument, that the law admits of any equivalent for actual service of the notice, we consider that in this case there was no such equivalent.

There were here three persons whose names were entered in the zemindar's sherista as owners of the tenure. Upon one of these there was personal service effected, another was served through one of his servants, and the third was not served at all. The only thing that can be said with regard to the third is, that he admits some service having been effected upon some one some time in the month of Kartick.

It also appears that there were other persons interested in the tenure who were never served with any notice; so that what Mr. Justice Mitter considered equivalent to a service at the catcherry has not been effected here.

The appellants has, therefore, failed to make out any case, even assuming the truth of his evidence.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice McDonell and Mr. Justice Broughton.

1878
 May 17.

TERIETPUT SINGH AND OTHERS (DEFENDANTS) v. GOSSAIN SUDERSAN
 DAS (PLAINTIFF).*

Suit for Confirmation of Possession—Change in form of Suit—Special Circumstances—Recovery of Possession.

The plaintiff sued for an adjudication of his right to, and confirmation of possession of, certain lands, on the allegation that they had been conveyed to him by one of the defendants and that he was in actual possession thereof, and

* Special Appeal, No. 1619 of 1877, against the decree of R. J. Richardson, Esq., Judge of Zilla Tirhoot, dated the 28th of June 1877, reversing the decree of Baboo Ram Prosad, Second Subordinate Judge of that district, dated the 15th April 1876.

that his title thereto had been impeached by the subsequent sale of the same lands by his vendor to the other defendant. The Court of first instance found that the plaintiff's allegation of possession was false, and dismissed the suit. *Held* on appeal, that the suit was rightly dismissed, for though a plaintiff who brings forward a *bonâ fide* case, which he proves in substance, though not in form, would be assisted by the Court, in the absence of such special circumstances no such assistance would be afforded.

Moulvie Abdoolah v. Shaha Mujeesooddeen (1) and *Tacoordeen Tewary v. Nawab Syed Ali Hossein Khan* (2) distinguished.

THIS was a suit brought by one Gossain Sudersan Das, praying for the adjudication of his right to, and for confirmation of possession of, certain lands purchased, as alleged by him, from the second defendant, under a deed of sale dated the 23rd February 1860, and for the setting aside of a second deed of sale purporting to convey the same lands, the subject of the first deed of sale, executed by the second defendant in favour of the father of the first defendant on the 24th March 1864. The plaintiff alleged that the first defendant had brought suits for rent against tenants of the land in dispute; that the plaintiff had successfully intervened in one of such suits; and that the plaintiff had continued to be, and was at the time of suit, in actual possession of the said lands. The defendants contested the validity of the plaintiff's alleged deed of sale, and denied his allegation of possession, and submitted that whatever right the plaintiff might possibly be entitled to with respect to these lands, they could not be adjudicated upon in the suit in its present form.

The Court of first instance, finding as a fact that the plaintiff's allegation of possession was false, dismissed the suit on the ground taken by the defendants.

The lower Appellate Court, on the authority of *Moulvie Abdolah v. Shaha Mujeesooddeen* (1) held, that the present suit should be treated as a suit for recovery of possession, and allowed to proceed, although the plaintiff had failed to prove satisfactorily his allegation of possession, and remanded the case to the Court below for trial as a suit for recovery of possession of the land, the subject of dispute.

(1) 15 W. R., 286; S. C. on appeal, 16 W. R., 27. (2) L. R., 1 I. A., 192.

1878

TERIETPUT
SINGH
v.
GOSSAIN
SUDERSAN
DAS.

1878

The defendants thereupon appealed to the High Court.

TERIETPUT
SINGH
v.
GOSSAIN
SUDHRSAN
DAS.

Baboo *Mohesh Chunder Chowdhry* and *Grish Chunder Chowdhry* for the appellants. — *Moulvie Abdoolah v. Shaha Mujeesooddeen* (1), quoted by the Subordinate Judge, is distinguishable from the present case. Proof of possession is a necessary antecedent to a suit for confirmation of possession: *Ram Churn Pattuck v. Khor Pandey* (2), *Shib Chunder Bhuttacharjee v. Juggut Tara Chowdrain* (3). It is only under special circumstances that the Court will alter the form of a suit.

Baboo *Kally Kishen Sen* for the respondents relied on the following cases: *Moulvie Abdoolah v. Shaha Mujeesooddeen* (1), *Tacoordeen Tewarry v. Nawab Syed Ali Hossein Khan* (4), and *Kashee Nath Mookerjee v. Mohesh Chunder Goopto* (5). [McDONELL, J.—It is only in very special circumstances that this Court will allow a suit to be altered in form; in the case above cited—*Tacoordeen Tewarry v. Nawab Syed Ali Hossein Khan* (4)—all the allegations made by the plaintiff were fully proved; but in the present case the plaintiff has proved nothing.]

The judgment of the Court was delivered by

BROUGHTON, J.—The plaintiff in this case sues 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.

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.

(1) 15 W. R., 286; S. C. on appeal, 16 W. R., 27.

(2) 10 W. R., 176.

(3) 6 W. R., 64.

(4) L. R., 1 I. A., 192.

(5) 25 W. R., 168.

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.

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 Abdoolah v. Shaha Mujeesooddeen* (1) on appeal from the decision of two Judges, and *Kashee Nath Mookerjee v. Mohesh Chunder Goopto* (2).

On special appeal, the respondent relies upon those two cases and also upon the case of *Tacoordeen Tewarry v. Syed Ali Hossein Khan* (3). No doubt, when the plaintiff has a *bonâ 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 *bonâ 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 plaintiffs 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.

(1) 15 W. R., 286; S. C. on appeal, (2) 25 W. R., 168.
16 W. R., 27.

(3) L. R., 1 I. A., 192.

1878

TRIPUR
SINGH
v.
GOSSAIN
SUDHANSU
DAS.

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.

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

Appeal allowed.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878
April 5
and
May 9.

PURRAN CHUNDER GHOSE (PLAINTIFF) v. MUTTY LALL
GHOSE JAHIRA (DEPENDANT).*

*Limitation—Suit for Arrears of Rent—Close Holiday—Date of Filing
Plaint—Beng. Act VIII of 1869, s. 29.*

A rent suit under Beng. Act VIII of 1869 must be brought strictly within the term of three years prescribed by s. 29 of that Act, which contains the only law of limitation applicable to the case. Where, therefore, the last day of the term so fixed was a close holiday, and the plaint in such a suit was filed on the following day,—*Held*, that inasmuch as s. 29 contains no provision for relaxing the term fixed by it, such as is contained in the general law of limitation, the suit was barred.

THIS was a suit for arrears of rent instituted under Beng. Act VIII of 1869. The last day upon which the suit could have

* Special Appeal, No. 771 of 1877, against the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Zilla Nuddea, dated the 10th of January 1877, affirming the decree of Baboo Anundo Kumar Surbadhikari, Munsif of Ranaghat, dated the 20th April 1876.