

(1898) 08 CAL CK 0007
In the Calcutta High Court

Kasi Nath Ghose and Another

APPELLANT

Vs

Mahomed Nasim

RESPONDENT

Date of Decision : 26-08-1898

Acts Referred:

Citation : (1899) ILR (Cal) 194

Hon'ble Judges : Pratt, J;Ameer Ali, J

Bench : Division Bench

Judgement

Ameer Ali and Pratt, JJ.—This is an appeal from the decision of the Additional Subordinate Judge of Sylhet, affirming the judgment of the Munsif of Moulavi Bazar, by which the plaintiffs' suit has been in part dismissed and in part decreed. The suit was brought by the plaintiffs upon the allegation that they had purchased a taluk called Rai Gour Hari Singh at a revenue sale, and that they were consequently entitled to set aside the shikmi haziran taluk alleged by the defendants to be held by them under the said taluk Gour Hari Singh.

2. The defendants contended that their shikmi haziran taluk had been in existence from the time of the Permanent Settlement.

3. The area held by the defendants amounted to 2 hudas, 6 khadas odd. Without entering into a detailed statement of all the facts of the case, we may mention that the Munsif found that the defendants had succeeded in establishing that they held a shikmi haziran taluk within taluk Gour Hari Singh from the time of the Permanent Settlement in respect of 7 kanis odd of the lands in their possession, but inasmuch as they failed to show that the remaining portions of the land included in plots Nos. 1 to 13 had been in their possession as part and parcel of their said shikmi haziran taluk from the time of the Permanent Settlement, he made a decree in respect of those plots in favour of the plaintiffs, dismissing their suit with respect to plots Nos. 14 to 16 which comprised 7 kanis odd.

4. The plaintiffs as well as the defendant appealed to the Subordinate Judge, who

dismissed both the appeals.

5. The defendant No. 8, Mahomed Nasim, has preferred a second appeal to this Court from the judgment of the Subordinate Judge, and Dr. Ashutosh Mookerjee has taken three points on his behalf. He contends, in the first place, that the plaintiffs, who were admittedly the purchasers, not of the entire estate but only of a part thereof, were not entitled to maintain this action in respect of the lands of the taluk which the defendants failed to show had been in their possession by virtue of shikmi haziran rights from the time of the Permanent Settlement; secondly, that, upon the words of Section 71 of the Assam Land and Revenue Regulation, the plaintiffs were not entitled to a decree in respect of the lands covered by plots Nos. 1 to 13, inasmuch as the right under which the defendants claim to hold them does not amount to an incumbrance created by any person other than the purchaser; and, thirdly, that the defendants had, at least, acquired an occupancy right in respect of these lands.

6. With reference to the first contention, it is to be observed that there is a great difference in the language of the Act in force in Bengal and the Assam Regulation. Chapter V of the Assam Land and Revenue Regulation (I of 1886) declares the joint and several liability of all persons in possession of an estate or any part thereof for land revenue. Section 65 provides that when there are several recorded proprietors of a permanently-settled estate, any one of them, whether he is entitled to a share of the estate or to particular lands comprised therein, may, by a written application to the Deputy Commissioner specifying his share of the estate or the particular lands therein to which he is entitled, get his revenue apportioned. Section 68 declares what is to be done when an arrear has accrued, and Section 70 proceeds to provide that, when an arrear has accrued in respect of a permanently-settled estate or of an estate in which the settlement-holder has a permanent heritable right of use and occupancy, the Deputy Commissioner may sell the estate by auction. Sub-section 2 of that section runs as follows: "If the arrear has accrued on a separate account opened u/s 65, only the shares or lands comprised in that account shall in the first place be put up to sale, and if the highest bid does not cover the arrear, the Deputy Commissioner shall stop the sale and direct that the entire estate shall be put up for sale at a future date, to be specified by him; and the entire estate shall be put up accordingly and sold." Sub-section (3) says: "No property shall be sold under this section for any arrear which may have become due in respect thereof while it was under the management of the Court of Wards." From Sub-section (3) it would appear that the word "property" was used intentionally to cover both the entire estate as well as the shares or lands in respect of which separate accounts had been assigned.

7. Section 71 provides that property sold u/s 70 shall be sold free of all incumbrances previously created thereon by any person other than the purchaser. It will be noticed that, in Act XI of 1859, the word used is "estate." In Section 71 of the Assam Regulation the words used are property sold u/s 70,"

and the property to which reference is made in Section 70 includes both an estate as well as a share in respect of which revenue has been separately apportioned. In view, therefore, of the express term "property" used in Section 71, we are unable to accede to the contention put forward by Dr. Ashutosh Mookerjee that the purchaser of a part of a permanently-settled estate is not entitled to the benefit of Section 71. In this particular case, what seems to have happened is that revenue in respect of certain lands had been separately apportioned, arrears fell due in respect of the remaining portion of taluk Gour Hari Singh, and the taluk minus those lands was put up to sale and purchased by the plaintiff's. Having regard to the terms of Section 71, it seems to us that the view taken by the lower Court is correct, and that the plaintiffs are entitled to maintain this action.

8. We now come to the second contention, namely, that the right, under which the defendants hold the lands in respect of which their claim has been disallowed, does not come under the expression "incumbrances previously created thereon by any other person than the purchaser." This contention proceeds upon the difference in the language of Section 37, Act XI of 1859, and of Section 71, Regulation I of 1886. Section 37 of Act XI of 1859 says that "the purchaser of an entire estate, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all incumbrances which may have been imposed upon it after the time of settlement." In Section 71 of the Assam Regulation the words are "incumbrances previously created thereon." It is contended that as it has been found in this case the defendants had obtained possession of these extra lands over and above what they held from the time of the Permanent Settlement as their shikmi haziran taluk, by adverse possession against the owners of the taluk, it could not be said that it was an incumbrance created thereon. Now, in considering this matter, we have to keep in view the purpose of the provision that an auction-purchaser at a revenue sale shall get the estate free from incumbrances. The object as we understand it, is that he should get the estate in such a condition that he may be able to pay the Government revenue assessed thereon at the time of the settlement, and that no act on the part of the holders of the property or estate after the settlement by which the estate becomes deteriorated or rendered incapable of yielding the revenue fixed upon it at the time of the settlement, should be allowed to affect him. The words of Act XI of 1859 and of Regulation I of 1886 cannot be said to have different meanings. If we were to hold that the incumbrance which could be set aside u/s 71 must be an incumbrance actively created by the previous holder, it would amount to this, that any acquiescence or laches, either wilful or arising from pure negligence on the part of the holder, by which the taluk or estate becomes incapable, in the hands of the purchaser, of yielding the Government revenue, would be outside the scope of this section. As at present advised, it seems to us that we cannot acquiesce in that view. We think that the conclusion of the Subordinate Judge was right and we must accordingly overrule this contention.

9. As regards the occupancy right claimed by the defendants, it is to be observed that this claim was never put forward in their written statement, nor, so far as we can gather, at any previous stage of this suit. They claimed to hold the lands covered by plots Nos. 1 to 13 as part and parcel of their shikmi haziran taluk, and not as cultivating raiyats. It seems to us therefore that it would not be right to allow them to change their ground in this Court. Such a contention requires to be dealt with upon evidence, and it does not seem that there is any fact shown in the case which would enable us to come to the conclusion that the defendants hold or cultivate these lands as raiyats. We accordingly dismiss the appeal with costs.