

Jitendra Kumar Pal Vs. Debendra Chandra Saha and ors.

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Court : Kolkata

Decided On : Mar-04-1938

Reported in : AIR1939Cal50

Appellant : Jitendra Kumar Pal

Respondent : Debendra Chandra Saha and ors.

Judgement :

1. This appeal is on behalf of defendant 124 and relates to the greater portion of plot No. 2, the eastern portions of plots Nos. 3 and 4 which are to the east of what has been shown in the commissioner's map as a silted up khal and to plots Nos. 10 and 26 of the plaint. There is also a memorandum of cross-objection by the plaintiffs-respondents, which relates to plot No. 1 of the plaint. The suit is a suit for khas possession in respect of 82 plots of land described in detail in the plaint, and the principal defendants 190 in number. The plaintiffs-respondents are the heirs of one Dianatram Saha and one Sitaram Saha, two important names in these proceedings. The basis of their claim is that Dianat and Sitaram, whose heirs the plaintiffs-respondents are, were assignees from the purchasers at a revenue sale of the residuary share of Taluk Hamid Raja, touji No. 54730-2 of the Sylhet Collectorate. The plaintiffs-respondents accordingly say that they are entitled to have the said estate free from all encumbrances and in the same state in which it was at the time of the permanent settlement, and that the defendants can no longer retain possession of the parcels of land which are in their respective possession. The defendants fall into several groups, each group being in

possession of specific plots of land independently of the others. One suit has been brought on the allegation that the defendants in conspiracy and in collusion with each other have kept the plaintiffs out of possession. No such conspiracy or collusion was however proved; and the Court below has held that as common questions of fact and law were involved, the suit could not be thrown out on the ground of misjoinder of parties and causes of action. This part of the judgment has not been challenged before us.

2. While the suit was pending in the Court of first instance, many of the defendants compromised with the plaintiffs and only some contested the suit. In this appeal, we are only concerned with the claims of defendant 124, and in the connected appeal No. 22 of 1934 with the claims of defendants 71 to 73. The lands of Taluk Hamid Raja No. 54730/2 are distributed over 33 mouzas, one of them being Sultan Mahmudpur, the village with which we are concerned in this and the connected appeal. This village was surveyed by the Thak Amins in 1860. The lands of many other Taluks, e.g. Kaim Raja, Madan Raja, are also included in this village and shown as separate Chaks in the Thak map, the residuary Chaks of the map representing the lands of Taluk Hamid Raja No. 54730/2. On the basis of an application made on 17th July 1882, by Hara Kumar Pal represented by his guardian (Ex. 3 H, p. 11, part 2) a separate account being separate account No. 7, was opened in respect of a small parcel of land, and the rest of the lands of Taluk Hamid Raja No. 54730/2 thereafter came to be known as Taluk Hamid Raja No. 54730/2 (residuary) which for brevity's sake would hereafter be called Taluk Hamid Raja (residuary). Taluk Hamid Raja (residuary) was sold for arrears of revenue on 10th September 1913. After an unsuccessful attempt to set it aside, the sale was confirmed on 8th December 1914, and possession was delivered by the Collector to the auction-purchasers on 15th January 1915. The ostensible purchasers at the aforesaid revenue sale were 7 in number. Their names and the shares which they had, according to the plaintiffs, are as follows:

Rs. Brojanath Das	...	...	...	6	Kunjamohan Roy	...	...	...	2	Jogendra Kishore
Chakrabarti	...	...	...	4	Kamini Kumar Bhattacharya	...	...	...	1	Nandakishore Roy
1	Baikontha Nath Das	...	...	...	1	Prakash Chandra Deb	...	...	...	1

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3. Between the years 1915 to 1917 Dianat and Sitaram purchased, either directly or through an intermediary, the rights of the aforesaid purchasers at the revenue sale. The admitted facts are these : The total area of Taluk Hamid Raja (residuary) in Mouza Sultan Mahmudpur is 38 hals odd. This area was originally owned by two ladies, Lakshi Dasi and Bishaka Dasi, the former having 12 annas share and the latter 4 annas share. On 11th May 1901, out of Lakshmi's 12 annas share an 8 annas share therein was sold to three groups of persons, namely

(1) Dianatram Saha and Sitaram Saha,

(2) Ram Charan Saha and Hridoy Saha and

(3) Prokash Chandra Saha (Ex. O, p. 29, part 2). Ram Chandra's representative was Rajani and Prokash was a member of a Hindu family with Sarat and Kamini and in this purchase Prokash purchased for Sarat and Kamini also. It is also admitted that by this purchase Sitaram and Dianat acquired 3 annas, Ram Chandra and Hridoy 3 annas and Prokash the remaining 2 annas share. In the year 1905, on different dates these three groups of proprietors created patnis in respect of their respective shares over 24 1/2 hals of land in the said village, Dianat and Sitaram granted a patni of their 3 annas share to Sarat, Prokash and Kamini. A2 annas and 4 pies share of this patni came back by purchase to Dianat and Sitaram and the remaining 8 pies share passed by transfer to one Sukdeb Namasudra, who was a party defendant to the suit but is not a party to the appeal before us. We shall hereafter call this patni created by Dianat and Sitaram as patni No.

1. Hriday and Rajani gave their share in patni to one Sarat Chandra Deb. This patni vested by transfer in Dianat and Sitaram. This patni we shall hereafter call patni No.

2. Likewise, Sarat, Kamini and Prokash gave a patni of their share to Dianat and Sitaram. This patni we shall hereafter call patni No. 3.

4. The remaining 4 annas of Lakhi Dassi devolved on her death on her son, Sashi Mohan Das, who mortgaged his proprietary interest to Rajani and Hriday. The

latter purchased the same in execution of their mortgage decree, and thereafter granted a patni of the same to Dianat and Sitaram on 24th May 1913. This patni we shall hereafter call patni No. 4. Bishakha's 4 annas share in Taluk Hamid Raja (residuary) devolved in the following manner : On 3rd January 1913 she granted a patni of the said share to one Baikuntha Nath Dutt. This we shall call patni No. 5. It subsequently came by transfer to Dianat and Sitaram. Now Dianat and Sitaram acquired the patni interest in some shares in the aforesaid patnis Nos. 1 to 5 before the revenue sale of the taluk referred to above, and in some shares after the sale. The details of their purchases are set out at pp. 233 and 235 of the judgment of the lower Court, and need not be repeated. The result was that at the time of the said revenue sale as well as at the time of the default in payment of revenue which led to the sale, Dianat and Sitaram were unrecorded proprietors of Taluk Hamid Raja (residuary) to the extent of 3 annas share in the lands of the said estate in village Sultan Mahmudpur and they also held some shares in patnis Nos. 1 to 5 in respect of specific lands of the mouza. Before the suit was filed on 29th June 1925, Dianat who was plaintiff 1 (and who died during the pendency of the suit) and the heirs of Sitaram who were the remaining plaintiffs acquired more shares of the said patnis. If the effect of the revenue sale be not taken into account, the position at the date of the suit would thus be this: the plaintiffs were unrecorded proprietors of the Taluk Hamid Raja (residuary) their share being 3 annas in the lands of Mouza Sultan Mahmudpur appertaining to the said estate, and they were owners of the whole of the patni interest in patnis Nos. 2 to 5 and part owners of patni No. 1 the remaining patni interest in patni No. 1 being vested in Sukdeb Namasudra.

5. Subsequent to the revenue sale, Kamini Kumar Bhattacharji, who as already stated had acquired a one anna share by reason of his joint purchase with others at the said sale and who is defendant 68 in the suit granted in September 1916 a patni to one Baikuntha Nath Das, reserving a rent of Rs. 52 per annum. This patni will be called patni No. 6. Later, he sold whatever he had acquired at the revenue sale to Dianat and Sitaram, who by their purchase thus acquired the said one anna share of Kamini Kumar Bhattacharji subject to the patni created in favour of Baikuntha Nath Das. On 11th August 1917 Baikuntha Nath Das sold a major portion of his patni to Kamal Chandra Deb, an officer and benamidar of Dianat and

Sitaram, retaining only a fractional share of the said patni himself. The kobala is Ex. 1-F printed at page. 66, part 2. There were other patnis created by others, but they are not material in this appeal, and would be detailed in the connected appeal in which they are relevant.

6. Before we deal with the contentions raised before us by the appellant who is defendant 124, it is necessary to notice the substance of the defence put forward by the said defendant-appellant and to state the material findings of the learned Subordinate Judge and the relief which he granted to the plaintiffs. Defendant 124 is the owner of separate account No. 21 of Taluk Syed Muhammad Batir, touji No. 1050 of Sylhet Collectorate. Appertaining to the said Taluk is a village called Natirabad No. 2. He is also the owner of separate account No. 7 of Taluk Hamid Raja and owner of separate account No. 63 of Taluk Kaim Raja. He claims the whole of plot No. 1 and some portions of plots Nos. 3, 4 and 5 of the plaintiffs as parts of village Natirabad No. 2, and the whole of plot No. 2 of the plaintiff as part of the separate account No. 7 of Taluk Hamid Raja. He says that plots Nos. 10 and 26 are parts of Taluk Kaim Raja. He also pleads that Dianat and Sitaram who were the proprietors of Taluk Hamid Raja (residuary) had intentionally committed default and had purchased at the revenue sale in benami with the fraudulent object of ejecting persons who had already perfected their rights by adverse possession against the proprietors of the Taluk. At the trial however, his case was that, of the several persons who had purchased at the revenue sale, only Jogendra Kishen Chakravarty, who had acquired four annas share at the said sale, was a benamidar of Dianat and Sitaram. The said defendant further pleaded that in any event the plaintiffs had not the rights and privileges of purchasers at a revenue sale and could not in law disturb his possession, that at any rate his possession was adverse to the patnidars of patnis Nos. 1 to 5, that those patnis subsisted even after the revenue sale, that they have been treated as still subsisting by Dianat and Sitaram, they purchasing shares of the said patnis after the revenue sale, and that the existence of the said patnis prevented the said plaintiffs from claiming khas possession or any relief whatsoever against him. At the trial defendant 124 gave up his defence regarding plot No. 5, and his claim with regard to the same has not been pressed before us.

7. Inasmuch as the first contention raised the question as to whether the lands which were in the possession of defendant 124, as also the lands which were in the possession of the other contesting defendants, most of whom are not before us, appertain to the Taluk Hamid Raja (residuary), it was felt by both parties that a local investigation by a commissioner was necessary. The Thak maps of the villages Sultan Mahmedpur and of Natirabad No. 2 were accordingly put in evidence and marked as Exs. 10 and NN(1) and the first mentioned map was directed to be relayed. As the learned Subordinate Judge has held, and his findings in this respect have been accepted by both sides as correct, both these maps are valuable evidence of possession by the different proprietors at the time of their preparation, and there cannot in fact be any doubt that the maps represented the state of affairs at that time, for, as appears from the maps themselves, they were prepared in the presence of the agents of the proprietors of other estates who had lands on the boundaries of or within Moujas Sultan Mahmudpur and Natirabad No. 2.

8. The task of relaying the thak map of mouza Sultan Mahmudpur in the locality was first entrusted to a commissioner named Babu Bimala Charan Ganguly. This gentleman submitted his report with a map on 13th November 1928. Defendant 124 preferred objections in due course where, upon the learned Subordinate Judge, with, out superseding the report of Bimala Babu, thought it fit to appoint another Commis. sioner, Babu Suratan Bhattacharji. After a fresh local investigation, this commissioner filed his report and map on 4th August 1931. Defendant 124 again preferred objections. These objections were carefully considered by the learned Subordinate Judge, and he came to the conclusion that the map and the report of the Commissioner Babu Suratan. Bhattacharji were substantially correct, that is to say that he had correctly relayed the thak map of mouja Sultan Mahmudpur. In the result, basing his judgment on the report of Suratan Babu, the learned Subordinate Judge found that a greater portion of plot No. 2 and nearly the whole of the eastern portion of plots Nos. 3 and 4, which had been claimed by defendant 124, as also plots Nos. 10 and 26, were the lands of Taluk Hamid Raja (residuary), and relying upon the report of Babu Bimala Charan Ganguli, he came to the conclusion that the whole of plot No. 1 appertained to the separate account No. 7 to Taluk Hamid Raja and so belonged not to the plaintiffs

but to defendant 124. The learned Subordinate Judge also held that Jogendra Kishore Chakravarti was not the benamidar of Dianat and Sitaram, but of his father Naba Kishore Chakravarti; that the defendant had not established fraud on the part of Dianat and Sitaram; and that although Dianat and Sitaram were unrecorded proprietors of the Taluk Hamid Baja (residuary) at the time of the revenue default and the revenue sale, they had by their purchase from the purchasers at the revenue sale acquired the estate free from all encumbrances; that by adverse possession for more than 12 years, defendant 124 had become in law a joint proprietor of the Taluk Hamid Raja (residuary) and his interest had passed along with the interest of other proprietors of the taluk to the purchasers at the revenue sale; and that even if the interest which he had acquired by adverse possession were an incumbrance, that was annulled by the revenue sale.

9. He also held that patnis Nos. 2 to 4 had merged into the proprietary interest of Dianat and Sitaram, and that in respect of those plots which were included in patni No. 1 and patni No. 6, the plaintiffs were entitled to khas possession but jointly with Sukhdeb Namasudra and Baikuntha Nath Das. On the question as to which of the plots in suit were included in the said two patnis, he recorded his findings in two tabular statements which are to be found at pages 252 and 259 of the paper-book. With regard to the plots which are the subject-matter of the appeal before us, those findings can be summarized thus plots Nos. 2, 3, 4, 10 and 26 are within patni No. 6 and plots Nos. 10 and 26 only are within patni No. 1. The decree which the learned Subordinate Judge made against defendant 124 is to the following effect: that the right of the plaintiffs to plots Nos. 2, 3, 4, 5, 10 and 26 be declared, but subject to one anna share as appertaining to the patni of Baikuntha Nath Das (patni No. 6) in plots Nos. 2, 3 and 4 and subject to 6 1/4 gandas as share as appertaining to the said patni in plots Nos. 10 and 26 and to eight pies share as appertaining to the patni of Sukhdeb Namasudra in plots Nos. 10 and 26, and that the plaintiffs do recover khas possession jointly with Baikuntha Nath Das to the extent of 15 annas share in respect of plots Nos. 2, 3 and 4 and to the extent of 15 annas 13 3/4 gandas share in plots Nos. 10 and 26, and that they do recover joint khas possession with Sukdeb Namasudra to the extent of 13 annas share of maliki interest exclusive of other patni interest therein, if subsisting, out of which Sukdeb Namasudra retains eight pies share.

10. Dr. Basak who appears for the appellant raises five questions before us which are as follows:

(a) That it should have been held that the plaintiffs have failed to prove that plot No. 2 and eastern portions of plots Nos. 3 and 4 which lie to the west of the thak line as plotted by the second Commissioner, and plots Nos. 10 and 26 are within Taluk Hamid Raja (residuary). This involves a question as to whether the thak map has been correctly relayed by the second Commissioner or not. Dr. Basak's contention is that the work of the Commissioner is unreliable, and should be set aside, and that there is no necessity for a further local investigation, as the case can be disposed of on the evidence of possession, from which title can be inferred. In dealing with this point we shall have to go into the details of the argument which Dr. Basak had advanced for inducing us to hold that the work of the said Commissioner is unreliable.

(b) That even if it be held that the said Commissioner's relay of the thak is correct the plaintiffs have not in any way acquired the rights and privileges of revenue purchasers as defined in Para. 1 of Section 71 of the Assam Land and Revenue Regulation (Act 1 of 1886). The position which he takes up is that as Dianat and Sitaram were admittedly unrecorded proprietors of taluk Hamid Raja (residuary) at the time of the default and the revenue sale, they could not in law claim to have the right of avoiding incumbrances on the said estate which had come into existence either by their action or inaction or by that of the old proprietors. The substance of this contention is that Proviso (3) of Section 71 of the said Regulation applies.

(c) That the interest which defendant 124 and his predecessor acquired by adverse possession against the old proprietors, that is to say the proprietors of the estate before the revenue sale, is an incumbrance within the meaning of Section 71 and that the said defendant did not become joint proprietor or co-proprietor of the estate.

(d) That patnis Nos. 1 to 5 were protected by reason of Proviso 2 (b) of Section 71 of the Regulation and the possession of defendant 124 and of his predecessors was really adverse to the patni interest and that consequently the plaintiffs cannot

turn out defendant 124; and

(e) that the learned Subordinate Judge has decided wrongly the question of merger.

(a). We will now take up the first point urged by Dr. Basak. (Their Lordships then discussed the evidence and concluded as follows) : The result of our findings on this part of the case is that plots Nos. 2, 3, 4, 10 and 26 which have been shown, by the second Commissioner to be within the red line of his map appertain to Taluk Hamid Raja No. 54730/2 (residuary) and plot No. 1 as shown within red lines appertains to separate account No. 7 of the said taluk.

(b) and (c). We will now take up the second and third points urged by Dr. Basak. Section 70 of the Assam Land and Revenue Regulation (1 of 1886) authorizes the Deputy Commissioner to sell revenue paying estates for arrears of revenue, either the whole estate or a share for which a separate account has been opened, as the case may be, and unlike what is found in the provisions of Act 11 of 1859 (which we will hereafter call the Bengal Act); the effect of such sale in both cases is the same whether the property sold is an entire estate or a share comprised in a separate account. This follows from the words of Section 71 of the Assam Regulations, as construed by this Court : Muhammad Nasim v. Kashinath Ghosh (1899) 26 Cal. 194. The enacting part of Section 71 says that:

Property sold under Section 70 shall be sold free of all incumbrances previously created thereon by any other person than the purchaser.

11. Then follow three provisions the first being sub-divided under two Clause (a) and (b), Clause (a) being in two parts. For the purpose of this case, Clause (b) of Proviso 1 and Proviso 3 are important, the former providing that nothing in the Section shall apply to

tenure created bona fide and at a rent not less than the full amount of the revenue fairly payable in respect of the land.

12. The consideration of this Proviso will come up in connexion with the fourth point urged. Proviso 3 runs as follows:

Nothing in this Section shall apply when the purchaser is a recorded or unrecorded proprietor or settlement holder of the estate.

13. The meaning is plain : if the whole estate or the share forming a separate account of an estate is sold for arrears of revenue, the purchaser will take it free from all incumbrances, but if the purchaser was already a proprietor, recorded or unrecorded, at the date of the sale, he will take it subject to incumbrances. Dr. Basak says : (i) that the interest acquired by his client by adverse possession is an incumbrance within the meaning of the Section, (ii) The plaintiffs cannot avoid it, because (a) the purchase at the revenue sale held on 10th September 1913 was by unrecorded proprietors, one of the ostensible purchasers, Jogendra Kishore Chakravarty, being the benamidar of Dianat and Sitaram Shaha, (b) that even if the case of benami be not established, the word 'purchaser' used in the enacting part of the Section as also in Proviso 3 means and includes an assignee of the person or persons purchasing at the revenue sale. He says that even if Jogendra Kishore had purchased for himself, Dianat and Sitaram who subsequently purchased from him and his co-purchasers would not be entitled to avoid any encumbrance which had subsisted at the date of the revenue sale, because at that date Dianat and Sitaram were admittedly unrecorded proprietors. The effect of this part of his argument is that by a process of interpretation of Section 71, the Assam Legislature in enacting Regulation 1 of 1886 must be taken to have laid down the same law as is enacted in express terms in Section 53 of the Bengal Act (the second case therein mentioned). In dealing with this part of the argument we shall proceed upon the assumption that the interest acquired by adverse possession completed before the revenue sale is an encumbrance within the meaning of Section 71 of the Regulation, although our view is, for reasons which we will hereafter formulate, that such an interest is not an incumbrance as used in the Section.

14. The first question of fact that has to be considered is whether Jogendra Kishore Chakravarty was the benamidar of Dianat and Sitaram. In the written statement defendant 124 makes a general statement to the effect that the plaintiffs who were some of the proprietors had made intentional default and purchased at the revenue sale in benami. The suggestion there is as if all the seven persons,

Brajanath Dass and others who appeared as purchasers at the revenue sale, were benamidars of Dianat and Sitaram. When however evidence was led, defendant 124 adopted the position that six out of the said seven auction-purchasers had purchased for themselves and only the seventh, Jogendra Kishore Chakravarty, was benamidar of Dianat and Sitaram and benamidar not for the whole of the four annas share he represented, but only in respect of three annas thereof. The plaintiff's case also was that Jogendra was a benamidar but for his father Nabakishore who is admittedly a man of means. The defendant's case as finally developed rests entirely upon the oral testimony of Baikuntha Nath Dutt, Kamini Kumar Bhattacharjee and Prokash De. These witnesses are speaking from memory of events which had occurred about 20 years ago. Kamini Bhattacharjee admits that he had no personal knowledge as to whether Jogendra was benamidar for Dianat and Sitaram, but came to know of it from talks he had with his other co-purchasers, one of them being Prokash. Prokash inferred benami, because at the time of payment of the purchase money in the Collectorate, Jogendra paid for one anna share and Dianat's nephew for the remaining three-annas share. In cross-examination he is materially shaken. He did not see what amount Dianat's nephew paid. He did not know at the time of sale that Dianat and Sitaram had a share in the purchase but he suspected that they had some share, and very probably he came to know from another co-purchaser Kunja Roy that they had shares. Kunja has not been examined and this evidence is mere hearsay. This evidence is materially different from the evidence of Baikuntha Dutt who says that even before the sale the shares were fixed. The evidence on the point in our judgment is meagre and unreliable and on such evidence we cannot disturb the findings of the learned Subordinate Judge on the point. The story told by the appellant's witnesses is inherently improbable.

15. It follows therefore that the seven purchasers at the revenue sale acquired the property free from encumbrances under Section 71 of the Regulation. Assuming for the moment that the interest acquired by defendant 124 by adverse possession, is an encumbrance it would still be not an encumbrance created by act or default of these seven purchasers or of any of them; and none of them were recorded or unrecorded proprietors of the estate that was sold. The rights and privileges that they acquired, including the right to eject encumbrance-holders,

could be transmitted by them to their heirs, or transferred to any person purchasing the estate from them. The right to annul or avoid encumbrances is not a right or privilege personal to the purchaser at the revenue sale. It is a right of property appertaining so to say to the estate purchased at the revenue sale. An assignee from the purchaser at a revenue sale, whoever he may be, would accordingly acquire the right or privilege to annul encumbrances which his assignor had. By a revenue sale under Section 70 of the Regulation there is no transmission or transference of title from the old proprietors to the purchasers at such a sale. Such a purchaser's title springs from a new root altogether. On these principles, apart from statutory enactments, it would appear to us to follow that if a purchaser at a revenue sale, who was not a recorded or unrecorded proprietor and who was not responsible for the encumbrance on the estate, later on sells his rights to one who was a recorded or unrecorded proprietor at the time of the revenue sale, the latter would step into the shoes of the former, and would be entitled to exercise all the rights, including the right to avoid or annul encumbrances, which the former had acquired by his purchase.

16. This position is sought to be met by Dr. Basak in the following way : His argument is that two fundamental principles must be kept in view. One is that the state must have security for the revenue charged on the estate and the other, that contract of parties must be respected. The first is secured by recognizing the principle that the estate when sold for arrears of revenue shall pass to the purchaser in the same state or condition in which it was when the first engagement was made with the proprietor, and this the Legislature has expressly enacted. He says that on principle sanctity of contracts should be touched only when the security of the state for its demands is at stake and not otherwise. The Bengal Act, says he, brings out these principles in Sections 37 and 53 and the Assam Regulation in Section 71. When a defaulter, says he, purchases an entire estate in Bengal at a revenue sale, or purchases it later from a stranger purchaser at such sale he does not get the right to annul encumbrances. When a purchaser who was not a proprietor purchases an estate or the share forming a separate account in Assam, he cannot avoid encumbrance created by him. As for instance, when a patnidar purchases at such a sale, he cannot avoid a darpatni created by him before the revenue sale (para. 1 of Section 71) or when a recorded or unrecorded

proprietor purchases at such a sale he cannot avoid or annul encumbrances (Prov. 3). Such being the indication of the Assam Regulation, says he, it would follow that when a recorded or unrecorded proprietor gets by purchase the estate from a stranger revenue sale purchaser he must take the estate subject to all encumbrances, or interests which he could not have avoided at a time when he was proprietor before the revenue sale.

17. The paramount concern of the state since the Decennial Settlement was for adequate protection of its demands. The security is afforded by giving the purchaser at the revenue sale a much greater right than the old proprietor. All encumbrances created, imposed or suffered to grow since the time of the first settlement of the estate, are wiped out or can be wiped out by such a purchaser, with certain exceptions which, are made not on the principle of respecting sanctity of contracts even to a limited, extent, but on other principles which may conveniently be called principles of policy. This is apparent on an examination of the third and fourth exceptions and the Proviso to Section 37 of the Bengal Act, and Prov. 1(a) and Proviso 2 of the Assam Regulation. The disability that is imposed on an old co-proprietor in the matter of avoiding encumbrances, if he purchased at the revenue sale, as imposed by Section 53 of the Bengal Act and by Proviso 3 of the Assam Regulation, cannot be justified on the basis of contract, for the encumbrance may not be the result of a juristic act at all or may not be the result of his contract but of that of his other cosharers. Such purchasers have, in our judgment, been placed by the Legislature in a position different from and less favoured than that of a stranger purchaser not on the ground that sanctity of contracts is to be respected so far as they do not interfere with the state's public demand but on grounds of policy. In *Sham Kunwari v. Rameswar Singh* (1904) 32 Cal. 27 it was argued before the Privy Council that the first part of Section 53 was enacted for the purpose of preventing defaulters reaping the benefit of a revenue sale, but Sir Arthur Wilson in delivering the judgment of the Board overruled the same saying that that part has not such a limited operation and the Section must be construed as it stands : *Sham Kunwari v. Rameswar Singh* (1904) 32 Cal. 27. This decision indicates that it would not be right to imagine principles of a like nature in construing the plain words of the statutory provisions defining the rights, privileges and disabilities of a purchaser at a revenue sale.

18. If we are right in holding that the exceptions made in Sections 37 and 53 of the Bengal Act, and those made in Section 71 of the Assam Regulation have been made solely because the Legislature thought that they should be made on grounds of policy as to how far and to what extent the rights of others in the estate should be protected on a revenue sale the omission of that part of Section 53 of the Bengal Act, which provides that a recorded or unrecorded proprietor or co-proprietor or co-partner who by re-purchase or otherwise may recover possession of the estate sold for arrears of revenue takes subject to all encumbrances in the Assam Regulation puts an end to Dr. Basak's contention. The Bengal Act was in force in Sylhet till 1886, when it was supplanted by the Regulation of that year (1 of 1886). Its omission signifies that the Legislature was not prepared to extend that rule of policy to Assam. A detailed comparison of Sections 37, 53 and 54, Bengal Act, with Sections 70 and 71 of the Assam Regulation would show that the Legislature was not prepared to respect in Assam the rights of other persons on a revenue sale to such an extent as was recognized in Bengal. The next line of argument of Dr. Rasak is that the word 'purchaser' in the first sentence of Section 71 and in Prov. 3 must be construed to include an assignee of the purchaser who actually bids at the revenue sale. The enacting part of Section 71 would, according to his contention run as follows:

The property sold under Section 70 shall be sold free of encumbrances previously created thereon by any person other than the purchaser (the person whose bid was accepted at the revenue sale) and his assignees,

and the Proviso would run as follows:

Nothing in this Section shall apply when the purchaser (the person whose bid was accepted at the revenue sale) or his assignee is a recorded or an unrecorded proprietor.

19. He says that the word 'purchaser' has been construed in statutes *pari materia* to include his assign. He develops this argument by saying that it has been held that the power that has been given by Section 37, Bengal Act, to a purchaser of an entire estate at revenue sale to annul encumbrances can be availed of by his assignee and that by holding that the word 'purchaser' used in Section 37 of the

said Act includes his assignee. In support of his contention he refers to the decisions in *Narayan Chandra v. Kashiswar Roy* (1905) 1 C.L.J. 579 and *Moizuddin Biswas v. Ishan Chandra Das* (1911) 15 C.W.N. 706. The question in the last mentioned case was whether the beneficial owner who has purchased in the name of a benamidar who was mentioned in the sale certificate as the purchaser, could claim to exercise the right of annulling encumbrances, the contention of the defendant being that it was only certified purchaser who could do so. That contention was overruled. Mookerjee J. first examined different Sections of Act 2 of 1859 and came to the conclusion that where the Legislature had in view only the certified purchaser it mentioned him as such, but in Section 37 the word used was simply purchaser and not certified purchaser. In the course of his judgment however he used the following sentence which has supplied the argument of Dr. Basak.

We may here observe that Section 37 has, in this respect, been always liberally construed as shown by the case in *Narayan Chandra v. Kashiswar Roy* (1905) 1 C.L.J. 579, where the expression 'purchaser' in Section 37 was interpreted to include a transferee, a sub-lessee as also a person, who has succeeded to the estate of the purchaser by inheritance.

20. When we look to the judgment in *Narayan Chandra v. Kashiswar Roy* (1905) 1 C.L.J. 579 we find however that the word 'purchaser' in Section 37 was not construed or interpreted to include an assignee, a sublessee, etc. of the purchaser. What was held was that the right which the purchaser has to annul encumbrances is not a right personal to him only. It can be passed to an assignee or sub-lessee of the estate or any portion thereof and is also a heritable right. The position is made clear by the language used by Banerjee J. and also on the fact that the case in *Koylash Chunder Dutt v. Jubur Ali* (1874) 22 W.R. 29 was expressly relied upon by him, a case which had held that that right was a vendible subject. Even if in these decisions that result was arrived at by construing the word 'purchaser' in that manner, we do not think that they could be invoked by way of analogy to the case before us, the effect of which would be to add to the statute not only some words but also to extend the scope of the limitation. The plain words of Section 71 of the Regulation indicate that the Legislature had in contemplation

only the time of the revenue sale and not a date posterior thereto. The effect of revenue sale is to be determined by the character of the person who purchases at it. We accordingly hold that Dianat and Sitaram and thereafter the plaintiff's, who are their heirs, had the same rights and the privileges which the seven I revenue sale purchasers had and these rights and privileges were not abridged by the estate coming by re-purchase to the unrecorded proprietors. Under the Bengal Act, the matter would be different because there is an express statutory provision on the subject. This view of ours renders superfluous the decisions of the question as to whether the interest acquired by a person by adverse possession by remaining in occupation for 12 years or more before the revenue sale adversely to the old proprietors is an incumbrance or not. But as the matter has been argued at some length before us we may briefly state our views and reasons in support thereof.

21. Two views have been taken in the past in revenue sale cases by this Court. One view is that such an interest is an incumbrance. The other view is that such an occupant acquires by the length of his possession a title in the defaulting estate. If his possession extended for the requisite period over whole of the lauds or the separate share of an estate and was adverse to all its lawful proprietors, he becomes the sole proprietor of that estate or of the separate share, as the case may be, but if his possession extended over a portion or if he had excluded only some of the lawful proprietors, he becomes a part proprietor or co-proprietor of the estate and on a sale for arrears of revenue his right is gone. The difference in these two views has no importance or significance in cases where the purchaser at revenue sale acquires the estate from free incumbrances or with power to annul incumbrances and sues for possession within 12 years of the confirmation of his sale, but where such a purchaser acquires subject to incumbrances or where his suit is brought beyond 12 years of the confirmation of the sale but within 12 years of the obtaining possession from the collectorate, the matter assumes great significance. In Bengal, where a share recorded in a separate account is sold for arrears of revenue the purchaser purchases the share subject to incumbrances (Section 54).

22. If title acquired by adverse possession against the old proprietor be an incumbrance, the occupant cannot be turned out by the purchaser, but if the former had become a proprietor or co-proprietor of the separate share so sold, by his adverse possession, he can be turned out, the purchaser having got by his purchase the title of all persons in the separate share so sold. In cases where the entire estate has been sold with power to the purchaser to annul incumbrance, the matter also assumes importance in connexion with limitation. If such an interest is an incumbrance, it must be avoided under Article 121, Limitation Act, within 12 years from the date of the confirmation of the sale but if the other view is taken the suit to turn out the occupant would be in time if instituted beyond 12 years of the confirmation of the sale but within 12 years of the date when the revenue authorities delivered symbolical possession to the purchaser, an event which must necessarily occur at a date subsequent to the date of the confirmation of the sale, Article 142, Limitation Act, or possibly Article 144 being applicable. Much weight therefore cannot be given to such expression - that adverse possession is an incumbrance - used in judgments in cases where an entire estate in Bengal was sold at a revenue sale to a stranger purchaser and where suit for possession was brought within 12 years of the confirmation of the sale.

23. The first reported case relating to a revenue sale is *Lukhmeer Khan v. Collector of Rajshahi* (1851) 7 S.D. 116. The revenue sale law in force was then Act 12 of 1841. The question there was whether lapse of time had barred the revenue sale purchaser from recovering possession from a person who had been in adverse possession for more than 12 years. Although Section 27 of the Act was cited at the bar the case was decided upon the ground that even if adverse possession had conferred upon the occupant

a positive title by prescription the property, privileges, and rights which the first engaging proprietor had at the time of his engagement and which was hypothecated for Government revenue would be in that event mere words, not of any substance.

24. In the next case *Rao Ram Sankar Roy v. Bijoy Govinda Boral* (1852) 8 SD 824, also the question of limitation arose. It was held that as the revenue sale

purchaser by his purchase got a right which was much in excess of the rights possessed by the old proprietors, for whose default the sale was held, a new cause of action accrued against the occupant on the date of the revenue sale and the suit for possession would be in time if instituted within 12 years of that date. The same question was raised and answered on the same principle in *Goluck Monee Dossee v. Hurro Chander Ghose* (1867) 8 W.R. 62 which revenue sale was held under Act 11 of 1859. The two Sadar Dewani Adalat cases were relied upon but the languages used by the Judges would seem to suggest that encroachment by neighbours were not encumbrances as used in Act 11 but that same principles as are applicable to incumbrances or under-tenures created by the old proprietors would be applicable to such encroachments. Just after this, a decision which has been treated as a leading case on the subject was pronounced by Sir Barnes Peacock C.J. in *Woomesh Chunder Gupta v. Raj Narayan Roy* (1868) 10 W.R. 15. A critical examination of that case is necessary. A transferable under-tenure, loosely called patni, was sold for arrears of rent under Section 105 of Act 10 of 1859 and purchased by the landlord who then sued for possession. On the question of limitation, Phear and Bayley JJ. differed. The defendant was in occupation for more than 12 years before Suit which was however brought within 12 years of rent sale. Phear J. held that the suit was not barred, as the plaintiff could not sue the trespasser before his auction purchase; he was then only entitled to receive rents from the under-tenure holder. Consequently, the cause of action upon which the plaintiff was then suing did not accrue to him till by his auction-purchase the under-tenure was put to an end. His cause of action on which he was suing accordingly first accrued at the date of the auction-sale. Bayley J. held that the landlord could have during the subsistence of the tenure in the hands of the defaulting tenant sued for declaration. He admitted that if the purchaser at the rent sale had been any other person than the landlord, the cause of action for a suit for possession against the trespasser would have accrued at the date of the sale. This concession had to be made because such has been the course of decisions before, the matter being first decided in that manner in the case of a sale of a patni, so far back as *Bolakee Kumaree v. Lakhimonee* (1850) 6 S.D. 349. The matter was carried further and was finally heard by a Bench presided over by Sir Barnes Peacock. The Chief Justice held that the cause of

action first accrued at the date of the rent sale because the purchaser at such sale acquired the under-tenure free from incumbrances and for that he relied upon *Bolakee Kumaree v. Lakhimonee* (1850) 6 S.D. 349:

'If the grantor', said he, 'was entitled to make the under-tenure answerable for arrears of rent in the state in which he created it, and to sell it for that purpose free from incumbrances, the purchasers' right to have it in the state in which it was created accrues when he purchases it.'

25. He pointed out that notwithstanding adverse possession for more than 12 years by the trespassers the land so occupied by him would still be a part of the under-tenure sold, for the landlord could distrain the crops grown by him under Section 112 of Act 10 of 1859. The answer which Bayley J. had given that the landlord could sue for declaration while the trespass was continuing and had not ripened into right by prescription is then dealt with and it is pointed out that the cause of action in the suit was quite different. Then he pointed out the danger if the failure of the grantor to sue for declaration be held to bar his right to possession when the under-tenure later on fell into his possession by his purchase and rent sale. Then follows the passage that how could the grantor of an under-tenure sell the under-tenure in the estate in which he created it if the purchaser is to be barred by limitation against persons who have encroached upon the under-tenant.

26. This case decides that a new cause of action to recover possession accrues to the auction-purchaser at the rent sale, time running from the date of sale and the ground is that the continuance of the possession of the trespasser constitutes an infringement of his right, the right which he acquired at the sale. The cases following thereafter, be those cases of rent sales under the Patni Regulation or under the Bengal Tenancy Act or other rent law or of revenue sales under Act 11 of 1859,' treat adverse possession as an incumbrance. The matter was left open by the Privy Council in *Bipradas Pal v. Kamini Kumar* (1922) 9 A.I.R. P.C. 48 and cannot be said to have been determined by the said tribunal in *Katyani Debi v. Uday Kumar* as the judgment of Lord Salveson only approves that part of passage of Sir Barnes Peacock's judgment in *Woomesh Chunder Gupta v. Raj Narayan*

Roy (1868) 10 W.R. 15 where he pointed out the difficulties and dangers to which zamindars would be put to if they were bound at their peril to sue for declaration whenever any trespass was committed against their tenants. In the majority of these cases decided by the High Court which are collected at the foot-note at p. 1473 of Mitra on Limitation, Edn. 6 and in *Ishan Chandra v. Safatullah* (1922) 9 A.I.R. Cal. 331 in which language was employed to indicate that adverse possession was an incumbrance; it would have mattered little whether the occupant's interest be treated as merely diminishing or curtailing the right of the old tenant or proprietor as the case may be or treated as absolutely extinguishing it. In a few cases, and these arising under the revenue sales law either under Act (11 of 1859) or the Assam Regulation (1 of 1886) the distinction became material and at once a clear-cut line of reasoning was adopted. Only two cases really, as we will show later on, strike a discordant note, namely *Musurah Bibi v. Brojendra Kishore* (1914) 1 A.I.R. Cal. 666 and *Prosanna Kumar v. Jnanendra Kumar* (1916) 3 A.I.R. Cal. 612 and in one, there is obiter, *Shyam Sunder Das v. Ivans* : AIR1933 Cal590 , in tune with the same.

27. The first case of importance of a sale under the Assam Regulation is *Muhammad Nasim v. Kashinath Ghose* (1899) 26 Cal. 194. The plaintiff had purchased a shares for which a separate account had been opened for arrears of revenue and sued for possession within 12 years of his purchase. The defendant stated that the lands in his possession were parts of a shikmi haziran taluk which had existed at the time of the present settlement, and claimed protection under Proviso 1(a) of Section 71 of the Regulation. The findings were that the shikmi taluk had existed from the time of the permanent settlement of the estate, but it comprised only a portion of the lands in suit. The rest was outside the shikmi taluk but the defendant had possessed the same for more than 12 years before the sale as part of the said taluk. The question raised is whether the interest thus acquired by adverse possession was an incumbrance within the meaning of Section 71 or not, the contending views of advocates centred round the words 'created' and the contention of the defendant was that an interest to be an incumbrance must be one actively created by the old proprietor and that an interest acquired through his inaction or laches was not an incumbrance. This argument was sought to be supported by drawing a distinction between the word 'creat' used in the Assam

Regulation and the word 'impose' used in the Bengal Act, but it was held that the difference in the language was not material and the interest of the defendant was an incumbrance.

28. It is to be seen that the defendant by his adverse possession only claimed a limited interest, namely of an interest subordinate to the proprietor. His assertion was not hostile to the proprietary interest. According to his assertion he became, so to say, a tenure-holder under the proprietor by the fact of his possession and since his possession began after the creation of the estate, the tenure right thus acquired was an incumbrance. His possession had not extinguished the proprietary right to the lands in his possession and he never claimed to have extinguished those rights. In *Musurah Bibi v. Brojendra Kishore* (1914) 1 A.I.R. Cal. 666 however which was also of a revenue sale purchase held under the Assam Regulation, the defendant was in adverse possession but of the proprietary interest, he having claimed to have remained in possession of the land as part of an adjoining estate (we have examined the paper-book of S.A. No. 1686 of 1910). *Muhammad Nasim v. Kashinath Ghose* (1899) 26 Cal. 194 was applied without much critical examination and the interest so acquired by him was treated as an incumbrance on the estate sold at the revenue sale. *Karmi Khan v. Brojonath* (1895) 22 Cal. 244, which was of the same types *Muhammad Nasim v. Kashinath Ghose* (1899) 26 Cal. 194, where also the claim by adverse possession was not of a right co-extensive with the right of the old proprietor whose estate was sold under Act 11 of 1859, was also relied upon. *Musurah Bibi v. Brojendra Kishore* (1914) 1 A.I.R. Cal. 666 was decided in the year 1914, but two earlier decisions passed in the years 1908 and 1909 respectively, *Kumar Kalanand Singh v. Sarafat Hossain* (1908) 12 C.W.N. 528 and *Rahimudi Munshi v. Nabin Kanta* (1909) 13 C.W.N. 407 which we will presently notice, were not considered at all. In both the cases, *Kumar Kalanand Singh v. Sarafat Hossain* (1908) 12 C.W.N. 528 and *Rahimudi Munshi v. Nabin Kanta* (1909) 13 C.W.N. 407, a share in respect of which a separate account had been opened with the Collector, was sold for arrears of revenue under Act 11 of 1859 and purchased by the plaintiff. The sale passed the share sold but subject to incumbrances (Section 54). The defendant was in adverse possession for more than 12 years of some lands appertaining to the share before the revenue sale, asserting a right not subordinate but co-

extensive with the right of the old proprietor. If his interest was an incumbrance on the share sold at the revenue sale his possession could not be disturbed by the purchaser, but if he had become by this adverse possession a co-proprietor with the rightful owner of the share so sold the title acquired by him had passed to the auction-purchaser. The later view was adopted and the plaintiff got a decree. *Prosanna Kumar v. Jnanendra Kumar* (1916) 3 A.I.R. Cal. 612 was distinguished on the ground that adverse possession then gave to the occupant an interest subordinate to the old proprietor. In 1915 two reported judgments were delivered: the first in point of time is in *Aftar Ali v. Brojendra Kishore* (1917) 4 A.I.R. Cal. 326. An unrecorded proprietor had purchased at a revenue sale held under Section 70 of the Assam Regulation. By reason of Proviso (3) of Section 71 he purchased subject to incumbrances. He was resisted by the defendant who had been in long possession on an assertion that the lands were parts of his adjoining estate. It was held that the defendant by his occupation had become a co-proprietor of the estate sold for arrears of revenue which he was bound to pay under Section 63 and so his interest had passed to the plaintiff on sale and he could not resist the latter's claim to possession. No previous decision is considered in this judgment.

29. The second case of the year is *Prosanna Kumar v. Jnanendra Kumar* (1916) 3 A.I.R. Cal. 612. The revenue sale was under the Assam Regulation and the suit was brought by the purchaser within 12 years from the date when he obtained possession through the revenue authorities but beyond 12 years of the date of confirmation of the sale. The defendant was in adverse possession on a claim that the lands were his absolutely. If the interest acquired by him was an incumbrance the suit was barred under Article 121, Limitation Act. The plaintiff contended, Article 142 was applicable and time ran against him from the date when symbolical possession was delivered to him by the revenue authorities. His contention was overruled and on applying Article 121 the suit was dismissed. *Kumar Kalanand Singh v. Sarafat Hossain* (1908) 12 C.W.N. 528 and *Rahimudi Munshi v. Nabin Kanta* (1909) 13 C.W.N. 407 were cited by the plaintiff but not followed, and reliance was placed on *Karmi Khan v. Brojonath* (1895) 22 Cal. 244, a case of a quite different type, and on *Nuffer Chandra Pal v. Rajendra Lal* (1898) 25 Cal. 167, a case of a sale under the Patni Regulation where the acceptance of any of the two view points already indicated would have made no material difference to the

result. The case in *Prosanna Kumar v. Jnanendra Kumar* (1916) 3 A.I.R. Cal. 612 was of the same type as the case in *Mohim Chandra v. Pyari Lal* (1917) 4 A.I.R. Cal. 213, which was decided the next year, and the case in *Baikuntha Nath v. Azidulla* : AIR1928 Cal870 . In none of these two cases however, *Prosanna Kumar v. Jnanendra Kumar* (1916) 3 A.I.R. Cal. 612 was considered. The decisions in these cases however were in clear conflict with *Prosanna Kumar v. Jnanendra Kumar* (1916) 3 A.I.R. Cal. 612, Article 142 and not Article 121 having been applied, and the suits held to be in time. In *Mohim Chandra v. Pyari Lal* (1917) 4 A.I.R. Cal. 213 the position was examined in greater detail than in *Aftar Ali v. Brojendra Kishore* (1917) 4 A.I.R. Cal. 326 and the same conclusion was reached. The next case in which the interest acquired by adverse possession, the occupant claiming by such possession a proprietary and not a subordinate interest, was said to be an incumbrance on the estate sold for arrears of revenue under the Assam Regulation is the case in 60 Cal 1287,16 but the observation is an obiter and the earlier cases noticed above which had taken contrary views were not noticed in the judgment.

30. In this state of the case law, we would have referred the point to a Full Bench but as our decision on the other points dealt with before makes the point not very much material, we do not follow that course. Our view however is that the view expressed in *Mohim Chandra v. Pyari Lal* (1917) 4 A.I.R. Cal. 213 and the cases which have taken the same view is the correct view to take. Section 28, Limitation Act, extinguishes the right of a rightful owner but as title to land cannot remain suspended, it vests in the wrongdoer the moment the title of the rightful owner is extinguished and that right so acquired by adverse possession is equal in orbit to that extinguished. Mr. Gupta says that the acquisition of title by adverse possession is in effect the result of a statutory conveyance so to say. That was the view taken in some old English decisions collected at p. 117 in *Lingwood's Time Limit of Actions*, but as has been pointed out by the learned author by reference to later authorities that view is no longer accepted as sound. Although, we cannot go to the length of accepting Mr. Gupta's contention, we agree with the view propounded in *Mohim Chandra v. Pyari Lal* (1917) 4 A.I.R. Cal. 213 on the grounds we have stated above.

31. (d) and (e). There now remains the consideration of the 4th and 5th points raised by Dr. Basak. He cannot now be allowed to make a case under Prov. 2, Clause (b) of Section 71 and say that the different points are protected thereunder. No such case was made by his client either in his written statement or before the lower Court. The protection afforded by that Proviso depends upon whether the patni rents are not less than the proportionate revenue fairly payable for the lands covered by the patni pattas. That raises a question of fact on which no evidence was led. We cannot allow the appellant to raise a new point for the first time here, a point which would require a remand for taking additional evidence at this stage. The position that the possession of defendant 124 was adverse to the patnidars of patnis Nos. 1 to 5 and not to the proprietors of the estate cannot be maintained. The earliest of these patnis was created in 1905 and the evidence led by the appellant is that he and before him, his father and grandfather were in possession for more than 30 years before the revenue sale. Their possession therefore began before the creation of any of these patnis and had ripened into right before any of the patnis was created. Their adverse possession therefore was against the proprietors of the estate. Even if such possession began before and the twelve years' were completed after the creation of the patnis, their possession would be considered as adverse against the proprietors of the estate on the principle formulated by the Judicial Committee in *Bipradas Pal v. Kamini Kumar* (1922) 9 A.I.R. P.C. 48 and the title thus acquired by him and his predecessors' possession would not on the principles we have already discussed be of any avail in resisting the plaintiff's claim for possession.

32. Regarding the question of merger we do not see how it furthers the case of any of the parties; if the interest of the appellant), could not otherwise be avoided by the plaintiffs we do not see how the fact of the, merger of the patnis or any of them in. their proprietary right acquired from the purchasers at the revenue sale would enable, them to do so. This position has been made, clear by Sir Barnes Peacock in *Woomesh Chunder Gupta v. Raj Narayan Roy* (1868) 10 W.R. 15, As however the patnis were acquired after the Transfer of Property Act, those patnis in which the plaintiffs became 16 annas, owners would merge in their proprietary, right, under the law as enacted in Section 111(d), T.P. Act, the question of intention? being wholly immaterial. Patnis Nos. 2 to 5, would thus merge in the

plaintiffs' property right but patni No. 1 would not, as the plaintiffs did not acquire the whole of it. The learned Subordinate Judge granted to the plaintiffs a decree for joint possession, with Baikuntha Nath Dass and Sukdeb. Namasudra. The plaintiffs in their memorandum of cross-objections attacked this part of the decree but Mr. Gupta feeling the difficulty created by the fact that Baikuntha Nath Das and Sukdeb Namasudra are not parties to the appeal, has not pressed his cross-objections, which is accordingly dismissed but without costs. The result of our decision is that both the appeal and the cross-objections are dismissed. The appellant must pay to the plaintiff-respondents the costs of this appeal. We assess the hearing fee at Rs. 250.

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