

Hamdu Mia and ors Vs. Ramdhan Dhar and ors

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Court : Kolkata

Decided On : Aug-28-1917

Reported in : 43Ind.Cas.461

Judge : N.R. Chatterjea and ;Richardson, JJ.

Appellant : Hamdu Mia and ors

Respondent : Ramdhan Dhar and ors

Judgement :

1. The plaintiff respondent, as purchaser of an entire estate at a sale held under Act XI of 1859 in the year 1909, sued to recover possession of the lands in dispute, which formed part of that estate, from the defendants who have been in possession of the lands for more than 12 years from before the date of the sale. It is found that the plaintiff was the proprietor of the estate at the time when the above sale took place, having previously purchased the same from the former owners in the year 1908 in the benami of one Baroda Charan. He defaulted to pay the Government revenue and himself purchased the estate when it was sold in 1909. The plaintiff thus was in the position, of a proprietor who had purchased his own estate. The case, therefore, clearly falls under Section 53 of Act XI of 1859, and his purchase of the estate was 'subject to all its incumbrances existing at the time of the sale.' The defendants having been in adverse possession for more than 12 years before the sale, the question is whether such adverse possession is an incumbrance within the meaning of Section 53 of the Act. Now, it has been held

since the days of the Sudder Dewani Adawlat that 'adverse possession' is an 'incumbrance' within the meaning of Section 37 of the Act. It is contended, however, on behalf of the plaintiff on the authority of certain recent cases [Kumar Kalanund Singh v. Syed Sarafat Hussein 12 C.W.N. 528, Rahim-ud-din v. Bhabangana Debya 1 Ind. Cas. 81 : 13 C.W.N. 407, Bilas chandra v. Akshay Kumar Das 14 Ind. Cas. 219 : 16 C.W.N. 587 : 15 C.L.J. 436] that adverse possession against the defaulter, whether for the statutory period or for a lesser period, is not an incumbrance. It is unnecessary to consider the correctness of these decisions in the present case, as those cases arose under Section 54 of the Act relating to the purchase of a share in an estate. Different considerations arise with regard to the purchase of a share of an estate, and it has been held in several cases that at a sale of a share under Section 13 of the Act, it is not merely the rights of the recorded proprietor that pass, but the share itself.

2. As stated above, adverse possession has always been held to be an incumbrance within the meaning of Section 37, and we do not see sufficient reasons for holding that the words have not the same meaning in a Section 53, If the respondents' contortion is correct, the proprietor of an estate, who has lost some lands of his estate by adverse possession for the statutory-period, has only to fall into arrears of revenue and purchase the estate in order to get rid of such adverse possession, although the section (Section 53) expressly lays down that a purchase by the defaulting proprietor himself shall be subject to all incumbrances existing at the date of the sale.

3. It is said that the position of the defendants by virtue of their adverse possession of the lands for 12 years was that of an unrecorded co-sharer of the estate, and that their interest passed by the sale at which the plaintiff purchased. But the defendants never held the lands as part of the estate purchased by the plaintiff. They held them as part of another estate and although the lands are found to be part of the plaintiff's estate, the right acquired by defendants to the land must be treated as an incumbrance subject to which the plaintiff purchased the estate. We are not pressed by the contrary view taken in some of the cases, as they were decided with reference to the provisions of Section 54 of the Act.

4. The appeal is accordingly allowed, the decree of the lower Appellate Court is set aside and that of the Court of first instance restored with costs here and in the Court below.

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