

**Kula Miah Vs. Nazu Miah and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/885678](http://sooperkanoon.com/885678)

**Court :** Kolkata

**Decided On :** Feb-22-1922

**Reported in :** AIR1923Cal195,68Ind.Cas.449

**Judge :** Greaves and ;Ghose, JJ.

**Appellant :** Kula Miah

**Respondent :** Nazu Miah and ors.

**Judgement :**

1. This is an appeal by the plaintiff against a decision of the Additional Subordinate Judge of Chittagong modifying a decision of the Munsif. The plaintiff, as appears from the plaint, sued for a dealaration that he had a sadar patni taluqa interest in the disputed land and he asked for khas possession of the land free from all insumbrances by virtue of the provisions of Act XI of 1859 under which the land was sold and he also asked for a declaration that the defendants had no protested interest in the disputed tauk land. Defendants Nos. 19, 23 and 24 are all taluqdars and defendants Nos. 2, 3 and 6 are raiyats under the taluqdars. We are told that the defendants Nos. 5, 12 and 22 are under-raiyats but there is no finding as to this. It is stated that these defendants Nos. 5, 12 and 22 are dead and that their heirs have not been brought on the record. Accordingly, it may be that if the plaintiff cucseeds in this appeal the heirs of these parsons may be entitled to remain on the land as under-raiyats if in fact they are such. A question arose as to whether defendant No. 6 had in fact been served, but it appears that a report has

been made that service was effected on this defendant. The Munsif decreed the plaintiff's suit but the lower Appellate Court said that, as the suit was one for a portion only of the taluq, it was not maintainable but the plaintiff's title to the land was declared. The finding of the learned Subordinate Judge with regard to the suit being for a portion only of the taluq is as follows: 'It appears from Exhibits B and C that this taluq does not consist of any Maghi Survey Plot No. 5342 but there are many other Maghi Survey Plots in it.' Later, he says: 'upon the evidence I find that, besides the disputed tank and the bank, these taluqa pottas include several other daygs of the taraf. A suit for annulment of a portion of a taluq is not maintainable.' It was urged before us on behalf of the appellant that the suit was maintainable, and, secondly, that the learned Judge was wrong in holding that defendants Nos. 2, 3 and 6 had occupancy rights in the land, and lastly, it was contended that the fact that a portion of the land, that is a part of the bank of the tank, was used as a graveyard could not protect the whole of the land under the provisions contained in the Fourth Exception to Section 37 of Act XI of 1859. In the view that we take of the Section, all the other questions which have been argued at some length before us do not arise and it is not necessary that we should express any opinion with regard to these pointr. But we think that the learned Judge in the Court below was right upon the facts before him in coming to the conclusion which he did, namely, that, inasmuch as the plaintiff only held a portion of the under-tenure it was not open to him in this suit to obtain khas possession. Now, Section 37 of Act XI of 1859 provides that the purshaser of an entire estate sold under the Act for recovery of arrears due on account of the same shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of Settlement, and that he shall be entitled to avoid and annul all undertenures and forthwith to eject all under-tenants with certain exceptions which ara named. It is stated that what defendant (sic) No. 3 purchased at the auction sale was an entire estate and that he must be taken to have avoided the under-tenures when he aerated the patni in favour of the plaintiff and also patnis in respect of the other portions of the under tenure in favour of other persons, and this being so, it is said that as no suit is required under Section 37 for the purpose of annulling an under tenure, this suit is maintainable because it is merely a suit by a potnidar for khas possession of that portion of the under-tenure which has been leased to him under

the patni, and it is accordingly stated that the decision in *Jaira Mohun Son v. Aukhil Chandra* (3) has no application, for it is suggested that that was a suit to avoid and annul a tenure and that it was rightly held that in a suit of that nature all the purchasers must join to protect the under-tenure holders from multiplicity of suits. Now there is no doubt that there is considerable force in the argument addressed to us but, unfortunately, neither the plaintiff himself in the plaint nor either of the Courts below, have approached the case from this point of view with the result that there is no evidence that defendant No. 3, the auction-purchaser, has in fact annulled all encumbrances of the under tenure. If there had been evidence before us that this had been done, we think the case in *24 Calcutta Jatra Mohun Sen v. Aukhil Chandra* (3) would very likely have been distinguishable and the plaintiff's contention might have prevailed. In the absence, however, of evidence that the auction purchaser had annulled all incumbrances on the under-tenure it is not possible for us to say that this is anything but a suit in similar form to that in *24 Calcutta Jatra Mohun Sen v. Aukhil Chandra* (3), that is, a suit to annul encumbrances.

2. So far as it is urged that the creation of the patni was an overt act which would amount to an avoidance by the auction. Purchaser of an under-tenure, we think that this by itself would not be sufficient, for the mere creation of the patni, would not by itself be an indication to the under-tenure holders that the option to annul the under-tenure had in fact been exercised.

3. For these reasons, we think that the appeal must fail, and it is not possible for us, in the mode in which the case came before us, to remand the case for a finding as to whether the auction-purchaser has in fact annulled the under-tenure prior to the creation of the patni.

4. The appeal, accordingly, fails and must be dismissed with costs.