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suit had incurred that liability by reason of their having set up any false defence. On the other hand, we think the case of *Vayangara Vadaka Vittil Manja v. Pariyangot Padingara Kurup-path Kadugocher Nayar* (1) is much more in point upon this question. In that case it was held that where the plaintiffs colluded with the defendant in a former suit to endeavour to defeat the plaintiffs there, and were made liable for costs, no suit for contribution in respect of such costs would lie. Following this decision of the Madras High Court, which in our opinion lays down a wholesome rule, we think the case ought to be remanded to the first Court for the determination of the question stated above and of any other question relative to the apportionment of liability that may be found necessary.

The costs will abide the result.

F. K. D.

Case remanded.

Before Mr. Justice Banerjee and Mr. Justice Gordon.

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 November 28.

JATRA MOHUN SEN (PLAINTIFF) APPLICANT v. AUKHIL CHANDRA CHOWDHRY (DEFENDANT NO. 1) AND OTHERS, OPPOSITE PARTIES.*

Sale for arrears of Revenue—Right of Auction-Purchasers to annual increments—Act XI of 1859, section 37—Suit to cancel under-tenures—Parties—Review—Civil Procedure Code (Act XIV of 1882), section 680.

The right that is given by section 37 of Act XI of 1859 to the auction-purchaser of an entire estate in the permanently-settled districts of Bengal, Behar, and Orissa, sold for arrears of revenue, to avoid and annul an under-tenure is a right that must be exercised by all the purchasers jointly where there are more purchasers than one.

THE plaintiff brought a suit to recover possession of some land comprised in two schedules appended to the plaint as appertaining to a *taluk* held and owned by him. The defendant No. 1 resisted the claim upon the ground chiefly that he, the defendant, being one of the purchasers of the entire estate within which the *taluk* set up by the plaintiff was situated, at a sale for arrears of Government revenue, the plaintiff was not entitled as against him to enforce his right as *talukdar*. The other defendants did not appear. The Court of first instance decreed the claim

* Civil Rule No. 883 of 1896 and Application for Review in Appeal from Appellate Decree No. 1757 of 1894.

(1) I. L. R., 7 Mad., 89.

in part, and the lower Appellate Court affirmed that decree so far as it was in favour of the plaintiff, and gave him a decree for a portion of that part of the claim which was dismissed by the first Court. The lower Appellate Court held that the plaintiff was entitled to enforce his decree as *talukdar* against the defendant auction-purchaser on the ground that section 37 of Act XI of 1859 gives the right to avoid incumbrances only to the purchaser of an entire estate, and that the defendant No. 1, who was merely one of several purchasers of the estate, was not the purchaser of an entire estate and was not therefore entitled to avoid incumbrances. The defendant No. 1, in appeal to the High Court, contended that the right to avoid incumbrances belongs to the purchaser or purchasers at a sale for arrears of Government revenue whenever an entire estate is sold, quite irrespective of fact whether the purchase is made by one or more persons, quite irrespective also of the fact whether, where the purchase is made by more persons than one, only one of them or all of them seek to avoid the same. This contention was held to be
 ct.

The following was the judgment of the Court (BANERJEE and GORDON, JJ.) so far as it is material for the purposes of this report :—

“The provisions of section 37 of Act XI of 1859 are intended as a safeguard for the realization of Government revenue, and are intended to prevent any proprietor for the time being from so incumbering the estate, and thereby reducing its value, as to diminish the security afforded by the estate for the realization of Government revenue. The right in question attaches to the purchaser or purchasers at a sale for arrears of Government revenue, whenever what is sold is an entire estate, as distinguished from a share of an estate which may under certain circumstances be in the first instance brought to sale for arrears of Government revenue due from the sharer in whose name it is recorded ; but the law does not require that, in order to exercise the right to avoid incumbrances, the purchasers, when there are more than one, should all unite in a body to bring a suit or take other steps necessary for the purpose. Of course when some only of several purchasers seek to avoid an

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incumbrance it will be avoided only to the extent of their shares, and with regard to the shares of the other co-sharers, the incumbrancer will be left undisturbed.”

The plaintiff then applied for a review and obtained this rule calling upon the opposite party to show cause why the application should not be granted. The Court (BANERJEE and GORDON, JJ.) granted the application on the ground that in their judgment in the appeal under review they had omitted to consider two decisions of the High Court, one in the case of *Dwarkanath Pal v. Grish Chunder Bandopadhyaya* (1), and the other in the case of *Bungo Chunder Mozoomdar v. Brojo Mohan Wataadar* (2). The case was then at once reheard under section 630 of the Civil Procedure Code.

Mr. Woodroffe, Babu Akhoy Kumar Banerjee, and Mr. Percival for the petitioner.

Babu Hari Mohan Chuckerbutty for the opposite party.

The judgment of the Court (BANERJEE and GORDON, JJ.) was as follows :—

The main question raised at this rehearing is whether the right that is given to the auction-purchaser of an entire estate in the permanently-settled districts of Bengal, Behar and Orissa, sold for arrears of revenue, under section 37 of Act XI of 1859 to avoid and annul an under-tenure, is a right that must be exercised by all the purchasers jointly, where there are more purchasers than one, or whether it is open to any one of a number of co-purchasers to enforce that right. The lower Appellate Court has taken the former view as being the one that is in accordance with the true meaning of the section, and it has accordingly held that it was not competent to the defendant No. 1, who was only of a body of purchasers by whom the estate had been purchased, to defeat the plaintiff's right as *talukdar*. Against that judgment this second appeal was preferred; and in our former judgment we held that the view taken by the Subordinate Judge was wrong, and that under section 37 of Act XI of 1859 any one of several purchasers of an entire estate sold for arrears of revenue was competent to avoid an under-tenure subordinate

(1) I. L. R., 6 Cal., 827.

(2) Appeal from Appellate Decree No. 1772 of 1892.

to the estate, although the other co-purchasers might not join him. We held that the object of section 37 was simply to protect the public revenue, and that to secure that object it gave to the purchaser of an entire estate as distinguished from a purchaser of a share of an estate sold for arrears of revenue as provided in section 53 of the Act, the right to avoid incumbrances and under-tenures, and to take the estate in the condition in which it was at the time of the Permanent Settlement. In taking that view, we omitted to take into consideration one other wholesome purpose that the language of section 37 was intended to serve, *viz.*, the purpose of preventing hardship to holders of incumbrances and under-tenures such as they would be subjected to, if where more persons than one purchase an estate, it was competent to any one of them to set aside an incumbrance or an under-tenure notwithstanding that his co-purchasers might be unwilling to join him in doing so. This matter was taken into consideration in the unreported case to which we have referred, *viz.*, *Bungo Chunder Mozoomdar v. Brojo Mohan Watahar* (1), in which there occurs the following passage in the judgment: "If we could feel sure that the only object of section 37 was that referred to above, we should be bound to attach the greatest possible weight to this argument. But it is not unreasonable to suppose that, besides the one mentioned above, which is no doubt its primary object, the section has been intended to secure also certain other objects, such as the prevention of undue inconvenience and hardship which might arise from subjecting the holders of incumbrances to a multiplicity of suits by different purchasers at one sale, or to suits for partial cancellation of incumbrances at the instance of some out of several co-purchasers when the others are unwilling, or (as in this case) incompetent, to effect such cancellation. And if that is so, we must hold that the language of the section has advisedly been made what it is and we must construe it literally." The same view has been taken in the case of *Dwarka Nath Pal v. Grish Chunder Bundopadhya* (2), and it has our full concurrence. We may add that stringent provisions like that laid down in section 37 of Act XI of 1859 have always been construed strictly and in favour of holders of

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incumbrances and under-tenures so as to prevent hardship as much as possible. We need only refer to the decision of the Judicial Committee in the case of *Surnomoyee v. Suttees Chunder Roy Bahadur* (1).

Babu Hari Mohun Chuokerbutty for the appellants-
 No. 1 contended that, though this may be true for those cases where an auction-purchaser is the plaintiff and seeks to avoid a tenure, the same rule ought not to hold good where the auction-purchaser is not a plaintiff seeking to cancel an under-tenure, but is only a defendant resisting the claim of an under-tenure-holder to recover possession. We are unable to accept this contention as correct. It has been found in this case that the plaintiff-respondent before us owned a *taluk*, and that his right as proprietor of that *taluk* has not been affected by the law of limitation. His right as *talukdar* must, therefore, be held to be a subsisting right, unless it is shewn to have been avoided by the revenue sale at which the appellant became one of the purchasers. The appellant failed to show that he was the sole purchaser or that defendants Nos. 7 and 8 who, according to the plaintiff, were some of the purchasers, have not acquired any right as auction-purchasers; in other words, he has failed to show that he represents the entire body of auction-purchasers. The defendant No. 1 has also failed to show that anything was done by the entire body of auction-purchasers to avoid the plaintiff's *taluk*. That being so, in the view we have taken of section 37, that *taluk* must be held to be a subsisting *taluk*, and the plaintiff must be held entitled to recover upon the strength of his title as a proprietor of that *taluk*. The result then is that the decree of the lower Appellate Court will be affirmed and this appeal dismissed with costs.

F. K. D.

Appeal dismissed with costs.

(1) 10 Moo. I. A., 123.