

*Before Sir Francis W. Maclean, K. C. J. E., Chief Justice, and  
Mr. Justice Geidt.*

MAFIZUDDIN

v.

KORBAD ALI CHOWDHURI.\*

1908  
Sept. 3.

*Revenue—Sale for arrears of Revenue—Encumbrance, avoidance of—Revenue Sale  
Law (Act XI of 1859) ss. 37, 53.*

A, purchased an estate, at a sale for arrears of revenue in the name of his servant. Thereupon, one of the defaulting proprietors brought a suit against the said servant and other persons, for setting aside the sale and obtained a decree for reconveyance on certain terms.

Owing to this litigation another default occurred in payment of revenue and the estate was again put up for sale and re-purchased by A.

*Held*, in a suit by A to recover *khas* possession by annulling certain alleged incumbrances, that he was not entitled to do so, as the second sale was owing to his default and the case fell within section 53 of Act XI of 1859.

SECOND APPEAL by the defendants, Mafizuddin Mian and others.

This appeal arose out of an action brought by the plaintiffs as auction-purchasers at a sale for arrears of revenue to recover *khas* possession of certain immoveable property on declaration of title. The plaint set out that the defendants Nos. 2 to 7 had a *putni* *taluk* in fourteen annas share of Taluk Ramganga Sen, and that the other two annas share was in *khas* possession of the *talukdars*. Four annas of the said *taluk* belonged to one Bhabani Charan Roy and twelve annas to one Erfanuddin Kaji, and it was sold for arrears of Government revenue on the 23rd September 1889, which they (the plaintiffs) purchased in the name of their servant.

\* Appeal from Appellate Decree, No. 706 of 1901, against the decree of J. H. Temple, Additional District Judge of Backergunge, dated Feb. 1, 1901, affirming the decree of Bejoy Keshub Mitra, Munsif of Bhola, dated March 9, 1900.

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Erfanuddin Kaji brought a suit to set aside the sale, and in that suit it was ordered that, if Erfanuddin Kaji paid into Court  $\frac{2}{3}$ ths of the purchase-money, he would get a decree conveying to him twelve annas share of the said *taluk*, and on account of that decree interfering with the plaintiff's right and for other causes they were unable to pay the Government revenue in time. The *taluk* was again put up to auction under Act XI of 1859 for arrears of September kist, 1891, and they (the plaintiffs) again purchased it in the name of their agent Sashi Bhusan and subsequently obtained a deed of release from him; a suit was brought against the defendant Nos. 2 to 7 for avoiding the *putni taluk*, which was decreed by the Subordinate Judge of Backerganj, and the plaintiffs attempting to collect rent from the *raiyats* of the property in dispute, defendant No. 1 prevented them from doing so, alleging that he had an *Osat taluk* right under the *putni taluk*, aforesaid. Hence this suit was brought for a declaration that the defendant No. 1 had no such right. The defence was *inter alia* that the plaintiffs were not the real purchasers, but only *benamdar*s of the defendants Nos. 2 to 7, and that the alleged auction sale was fraudulent and collusive; that the plaintiffs were not purchasers of an entire estate; that, even if the plaintiffs were the real auction-purchasers, they were not entitled to avoid the undertenure, as they were themselves defaulters; that the *Osat taluk* was in existence from the time of the permanent settlement; that the garden and the tank described in the plaint were laid out and dug by the predecessor in interest of the defendant No. 1, and therefore the plaintiffs could not get *khas* possession of the same. The Court of First Instance having overruled the objections of the defendant decreed the plaintiff's suit. On appeal, the District Judge of Backerganj affirmed the decision of the First Court.

Aug. 26.

*Babu Harendra Narayan Mitter* for the appellant. Upon the facts admitted in the case, the plaintiffs were really the defaulting proprietors, who repurchased the estate at the second sale, and took the estate subject to all the incumbrances existing at the time of the second sale, and therefore they are not entitled to avoid the undertenure held by the defendants. Section 53 of Act

XI of 1859. *Abdool Bari v. Ramdass Coondoo*(1). At any rate, 1908  
 as regards the tank and the gardens existing on the lands in MAFIZUDDIN  
 suit, the defendants are entitled to protection under section 37, v.  
 clause (4) of Act XI of 1859. See *Bhago Bibee v. Ram Kant* KORBAD ALI  
*Roy Chowdhury*(2), *Ajgur Ali v. Asmut Ali*(3), *Gobind Chundra* CHOWDHURI.  
*Sen v. Joy Chundra Dass*(4).

*Dr. Ashutosh Mukherjee* (with him *Babu Monmatha Nath Mukherjee* and *Babu Amarendra Nath Chatterjee*) for the respondent. There was no finding as to the existence of any under-tenure held by the defendants. Even assuming that there was any such under-tenure the estate vested in plaintiffs free from all incumbrances by the first sale. As to the garden and the tank, there being no lease, the defendants are not protected under section 37, clause (4) of Act XI of 1859.

*Babu Harendra Narayan Mitter* in reply. See *Titu Bibi v. Mohesh Chunder Bagehi*(5). The estate did not become free from all incumbrances by the mere fact of the first sale. The under-tenure was only voidable.

MACLEAN C.J. This is a suit by the plaintiffs to avoid certain under-tenures held by the defendant-appellant. The property was sold under Act XI of 1859, for arrears of Government revenue, and the defence is two-fold: *First*, that the plaintiffs were defaulters and so were responsible for the sale; and, *secondly*, that the lands were of such a nature that the case falls within the fourth exception to section 37 of Act XI of 1859. The facts lie within a narrow compass. On the 23rd of September 1889, the *taluk* was put up for sale by auction for the realization of arrears of revenue, and purchased by the plaintiffs in the name of their servant; after their purchase, the plaintiffs were unable to pay the Government revenue, when it became due, and the *taluk* was again put up to auction for the arrears of revenue for the September *hist* of 1891, and the plaintiffs again purchased it in the name of their am-mukhtear. They now seek

(1) (1878) I. L. R. 4 Calc. 607.

(3) (1881) I. L. R. 8 Calc. 110.

(2) (1877) I. L. R. 3 Calc. 293.

(4) (1885) I. L. R. 13 Calc. 327.

(5) (1883) I. L. R. 9 Calc. 683.

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to avoid the undertenure of the present appellant. It is not open to them to do so. The second sale was owing to their own default, they were the defaulters—and the case falls within section 53 of Act XI of 1859. It has been argued that, inasmuch as in the case of the first sale the plaintiffs were not defaulters, upon that sale the estate vested in the purchasers free from all encumbrances. I do not think this is the true view of section 37: and, in my opinion, the estate does not by the mere sale become in the hands of the purchasers free from all encumbrances, but it is open to the purchaser to avoid and annul all undertenures with the exceptions mentioned in the section. In other words, before the estate becomes free from encumbrances, the purchaser must avoid them. But as the plaintiffs were themselves the defaulters on the second sale, it is not open to them to avoid the undertenure of the appellant; and they took the estate subject to existing encumbrances. In this view, the second point becomes unimportant:

The appeal must be allowed with costs, and the suit dismissed with costs in both the lower Courts.

GEIDT J. I concur.

*Appeal allowed.*

S. C. G.