

1874. in regular and special appeals, a proceeding may be one in execution of the last decree (serving to bar limitation) though not expressly based upon it. In the present case, we are satisfied that while the execution sought, and in part obtained, of the one decree was objectively the execution of the other also, the intention of the judgment-creditor was to obtain what the High Court had awarded to him. This was understood by the Court and by the opposite party, and though, no doubt, there was an irregularity in not proceeding expressly upon the final decree, yet the defective intimation of his purpose by Mathurádás does not, under the circumstances, prevent our judicially recognizing that purpose as being to obtain satisfaction, according to the terms of the High Court's decree. The steps taken by him down to the year 1868, may thus, in our view, be regarded as proceedings taken to enforce the decree of the High Court. As such, they bar the operation of the Limitation Act to prevent further execution on the application of the 5th October 1869, and the order of the Subordinate Judge must be confirmed with costs.

Order confirmed.

[APPELLATE CIVIL JURISDICTION.]

July 27.

Special Appeal No. 73 of 1874.

GHELA'BHA'I BHIKA'RIDA'S *Appellant.*
 PRA'NJIVAN ICHHA'RA'M *Respondent.*

Property of purchaser at revenue sale—Registration—Tender of Government rent by defaulter's mortgagee—Collector's refusal to accept it.

The purchaser at a revenue sale, held in default of the payment of assessment, takes free of all incumbrances, although the revenue authorities, without otherwise depriving the defaulter of his right of occupancy, under Section 36 of the Bombay Survey Act I. of 1865, have only sold his right, title, and interest: *Abdul Gani v. Krishnáji Bhikáji* (10 Bom. H. C. Rep. 16) and *Gundo Shiddeshwar v. Mardam Sáheb* (*Id. Ib.* 419) followed

What operates to create the property recognized as a right of occupancy is the revenue sale and the consequent entry of the occupant's name in the Collector's books. A memorandum, therefore, declaring a person to be the successful bidder at the sale is not an instrument creating or declaring an

interest in immoveable property and requiring registration under Section 18 of Act XX. of 1866.

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The Collector may be responsible to the mortgagee of a revenue defaulter for refusing to accept the tender made by him of the Government rent, but if he does refuse it, and the land is sold, the title of the purchaser is unimpeachable.

THIS was a special appeal from the decision of H. Birdwood, Acting Judge of the District of Surat, reversing the decree of Shivilál Nathubháí, Subordinate Judge at Ankleshwar.

The facts of the case are as follows:—

One Dildárxhán, the occupant of a Government piece of land, mortgaged it without possession to the defendant Ghelábhái first in 1863 and again in 1865. Dildárxhán having made default in the payment of the assessment due on the land, it was sold in 1867, and one Husain became the purchaser. He, too, made default, and the plaintiff Pránjivan purchased the land on the 23rd of March 1871.

In the meantime the defendant Ghelábhái in 1867 obtained a decree against his mortgagor, Dildárxhán, and Husain, and in execution of it attached the land and became a purchaser at the court's sale in July 1871. Pránjivan, having unsuccessfully applied to remove the defendant's attachment, brought this suit in the Court of the Subordinate Judge of Ankleshwar.

The defendant answered that the plaintiff took the land subject to his mortgage lien, and that he had registered his certificate of sale, whereas the plaintiff had not registered the document which declared him to be the purchaser at the revenue sale.

The Subordinate Judge rejected the plaintiff's claim, holding that neither Husain nor Dildárxhán were actually deprived of their occupancy by the revenue officers, who simply sold such rights as they possessed, and placed the sale proceeds to their credit.

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✓ The District Judge in appeal reversed that decree, on the ground mainly that the defendant could not, under his purchase at the court sale, oust the plaintiff.

The special appeal was heard by WEST and LARPENT, JJ.

Chunilál Máneklál for special appellant :—The proclamation for sale issued by the Mámlatdár professed to sell only the right, title, and interest of the defaulter in the land in dispute. Under Section 36 of the Survey Act, the absolute right of occupancy might certainly have been sold; but as a matter of fact it was not. The fact that the sale proceeds were credited to the defaulter's account shows this beyond doubt. The plaintiff, who is the purchaser of this interest, simply stands in the place of the defaulter; and the mortgagee-defendant, is, therefore, entitled to maintain his possession till the satisfaction of his lien : *Abdul Gani v. Krishnáji Bhikáji (a)* and *Gundo Shiddheshwar v. Mardán Sáheb (b)* follow *The Secretary of State v. The Bombay Landing and Shipping Company (c)*.

That was a case on the Original Side applicable to the town and island of Bombay, and though the Regulations of 1827 have been referred to as authority for showing that land revenue has been made a charge upon land that is a mistake. Clause 3 of Section 5 of Regulation XVII. of 1827 enacts : " In all cases the revenue of the year, if not otherwise discharged, shall be recoverable, in preference to all other claims, from the *crop* of the land assessed." At any rate the decided cases do not apply, as the absolute right of occupancy of the defaulter, was never sold in this case.

The defendant's certificate of sale is registered, and takes precedence over the unregistered memorandum of the plaintiff's sale.

The defendant as mortgagee had offered to pay the assessment due by his mortgagor, and the Collector was bound to

(a) 10 Bom. H. C. Rep. 416.

(b) 10 Bom. H. C. Rep. 419.

(c) 5 Bom. H. C. Rep. 23 O. C. J.

receive it. The courts below having refused to inquire into this matter, the case should at least be remanded.

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Nagindás Tulsidás for the respondent :—Section 36 of the Survey Act of 1865 is imperative, and absolutely forfeits the right of occupancy on failure to pay the assessment. The Government have no power to deal with a defaulter in a different manner. The practice of crediting a defaulter with the sale proceeds is founded on expediency, see Government Resolution No. 1170, of 12th March 1872, at page 113 of Nairne's Hand-Book. The cases cited by the appellant exactly resemble this case, and govern it. The plaintiff's right of occupancy was perfected by the sale itself and the registry of his name by the Collector. The document in which he was declared the highest bidder need not, therefore, be registered. As to the defendant's offer to pay the assessment, he did not ask for any issue.

PER CURIAM :—We are of opinion that this case is substantially governed by the decisions in *Abdul Gani v. Khrishnáji Bhikáji* and *Gundo Shiddeshwar v. Mardan Sáheb*. These establish that "the land revenue is the paramount charge on the land," and that by selling the occupancy right, the Collector, as the agent of Government, exercises at the moment of sale the right of forfeiture or deprivation vested in the revenue authorities by Section 36 of the Bombay Survey Act. The occupancy, which was taken as a conditional one, is thus brought to an end, and with it fall interests carved out of it.

It was argued, and with much ingenuity, by Mr. Chuniálál, that albeit the revenue officers had the power to declare the occupancy rights of Husain forfeited, yet they did not in fact avail themselves of this power. They elected rather according to the rule prescribed by Government Resolution No. 1170, dated 12th March 1872, to treat Husain's occupancy right as an existing property, and to sell it as such under the rules of Regulations XVII. and IV. of 1827. But having been sold as a subsisting property, it must be re-

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garded, it was contended, as sold subject, like other property, to all charges and liens legally created by the owner so as to affect it. It was further urged that only "the right, title, and interest of Husain were sold, not any absolute proprietorship. But when land becomes subject to sale in order to realize a paramount charge, all charges subsequently created must ordinarily be extinguished in order to give effect to the sale, and nothing has been pointed out to us in the rules made by Government under the Survey Act, or Regulation XVII. of 1872, which indicates that any intention was ever entertained by Government of selling a defaulter's land subject to incumbrances created by him. Such a course would be in almost every case injurious either to the defaulter, or to Government, or to both, by the doubt it would create as to the title taken by the purchaser, and was, in all probability, never contemplated. The "conditional occupancy" fails when the property is sold, and having been essentially *conditional* all through, has made all subordinate rights, depending on it, conditional also. The notice follows the usual form of those prescribed by the Code of Civil Procedure and the forms based on it, but as these are held sufficient to give to the purchaser under a sale in execution of a decree on a mortgage a right dating back to a time prior to all subsequently created incumbrances, so the purchaser's right in this instance must date back to the beginning of the "conditional occupancy," Government's right to deal with which on a default arose at the same moment as Husain's tenancy.

As to the question of registration, we think that the document No. 3 is not an instrument which creates or declares an interest in immoveable property within the meaning of Section 18 of Act XX. of 1866. What operates to create the property recognized as a right of occupancy is the entry of the name of the occupant in the Collector's books. The revenue authorities can recognize no other, and what they have to deal with is solely the right of occupancy. The paper No. 3 is a mere memorandum from the Mámlatdár that Pránjivan has been the successful bidder at the auction.

It does not, therefore, come into competition, under Section 50 of the Registration Act of 1866, with Ghelábhái's certificate as purchaser at an execution sale. Pránjivan's title had already been fully acquired, not by means of a conveyance or any other document passed to him, but by the revenue sale and consequent change of names in the *khátá* or account and by the effect given to this change by the law before Ghelábhái bought the conditional occupancy, which by the fulfilment of the condition of forfeiture had become extinct when he purchased.

But Ghelábhái, it is said, being mortgagee tendered the Government rent of Husain's fields. If he did this in the proper way, the rent ought to have been received. The Subordinate Judge gave no finding on the point. The District Judge considered that it could not be raised unless the Collector were made a party. But Section 48 of the Survey Act directs that the dues leviable under it shall be collected according to the provisions of the Regulations, and Regulation XVII. of 1827, Section 12, cl. 7, says that the Collector's order for the realization of the revenue shall occupy "in all respects the place of a judicial decree." This is sufficient to give to Pránjivan an unimpeachable title, although, if the Collector wrongly refused Ghelábhái's tender of the rent under circumstances which made it his duty to accept the tender, he may be responsible for the injury thus done to Ghelábhái.

For these reasons, we confirm the decree of the District Court with costs.

Decree confirmed.

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