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no application in a case like the present, in which the defendants are not called upon to defend their title. The question of title, as between the plaintiff and the defendants who are bound by the decree of 1869, has already been determined, once and for all, in the plaintiff's favour. If the plaintiff has not exacted all which he might have recovered under that decree, his omission to do so has been a distinct gain to the defendants; but it affords no answer to the plaintiff's claim to recover arrears which have admittedly accrued due to him within the last twelve years. It might no doubt be unfair to call upon the defendants to meet a claim for arrears of older date; but that is only because it is likely that the evidence of payments made by them is no longer available to them. On this principle, and to this extent only, the statute of limitation operates in their favour.

We think that the Acting Assistant Judge was right in holding the defendant Vullubhbhai to be bound by the decree of 1869. The decree purports to declare his liability; and though he was not sued by name, yet it is clear that he was not prejudiced by the omission, for in a deposition made by him in the suit he himself admitted his liability.

The cross objections taken by the plaintiff are not, we think, sustainable. The Acting Assistant Judge has found, as a fact, that the emoluments of the "vatan," have been diminished by [73] one-half since 1866, and it has not been shown to us that this conclusion is not supported by the evidence. Under these circumstances the Acting Assistant Judge was justified in holding that the plaintiff was entitled to no more than Rs. 25 from 1866 to 1873.

We, accordingly, confirm the decrees of the Courts below with costs.

*Decree confirmed.*

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APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice, and  
Mr. Justice F. D. Melville.*

BALKRISHNA VASUDEV (*Original Plaintiff*), *Appellant v.*  
MADHAVRAV NARAYAN (*Original Defendant*), *Respondent.\**

[15th June, 1880.]

*Sale of land for arrears of assessment—Fraudulent purchaser—Trustee for the owner in equity—Act X of 1876, s. 4, cl. (c)—Clims to set aside a revenue sale—Forfeiture of tenancy—Jurisdiction.*

Whenever the land revenue is in arrear, Government is entitled to sell the land and to realize its due, whoever is the defaulter.

The plaintiff sued to recover possession of certain land and prayed to set aside the sale of it by the Revenue authorities for arrears of assessment due on the land. He alleged that he had let the land to the defendant, on condition of the latter paying the Government assessment and certain rent in cash and kind to the plaintiff; that the defendant having intentionally made a default in payment of the assessment, fraudulently caused the land to be sold by the Revenue authorities and purchased it himself. The defendant traversed the plaintiff's allegations and stated that he was in possession of the land as purchaser at the revenue sale. The Subordinate Judge rejected the plaintiff's claim, holding that he failed to prove either the defendant's liability to pay the assessment or any fraud on his part, with respect to the sale of the land, and that the sale could not be set

\* Second Appeal No. 88 of 1880.

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aside. His decree was affirmed on appeal by the Assistant Judge on the sole ground that the sale could not be set aside. He did not go into the merits of the case. On appeal to the High Court

*Held*, that the plaint ought not to have contained any prayer for setting aside the sale, but that, as it contained a prayer for possession, it might be read as praying (or at least that the plaintiff might have been permitted to amend it so that it might simply pray) that the defendant should, under the circumstances alleged by the plaintiff, be declared a trustee of the land for the plaintiff.

[74] *Held*, also, that if the plaintiff's allegations were true, the plaintiff would be entitled to such a declaration, and the defendant would be discharged of his sub-tenancy in consequence of his conduct which worked a forfeiture of any right to be continued as tenant.

Section 4, cl. (c) of Act X of 1876 excepts from the jurisdiction of the Civil Courts claims to set aside, on account of irregularity, mistake, or any other ground except fraud, sales for arrears of land revenue.

*Quere*—Whether the exception of fraud in the above enactment is confined to fraud on the part of officers conducting sales for arrears of land revenue.

[R., 21 B. 396 (399); 22 B. 271 (275); 30 B. 466 (473) = 8 Bom. L. R. 360; 3 Bom. L. R. 92 (93); D., 12 B. 595 (612).]

THIS was a second appeal from the decision of C. E. G. Crawford, Assistant Judge of Thana, in appeal, affirming the decree of Narayan Balwant, Second Class Subordinate Judge of Alibag.

The plaintiff, Balkrishna, brought this suit to recover possession of two portions of a certain cart, situate at Chaul in the taluka of Alibag, together with two years' arrears of rent. He alleged that the said two portions of the land belonged to him and were let to the defendant in November 1875, the latter agreeing to pay the Government assessment and Rs. 1-8 and two jack-fruits as rent to the plaintiff; that the defendant was in possession of the remaining third portion of the cart as mortgagagee from one Govind Gangadhar; and that the defendant, having purposely made a default in payment of the assessment for the year 1875-76, fraudulently caused the land to be sold by the Revenue authorities and purchased it himself on the 29th June 1876. The plaintiff, therefore, prayed that the sale should be set aside and the land put in his possession and for arrears of rent and costs.

The defendant denied the truth of the plaintiff's allegations and stated that he had purchased the whole cart at the sale by the Revenue authorities for arrears of assessment, and that he was in possession of it as such purchaser.

The Subordinate Judge held that the plaintiff failed to prove the defendant's liability to pay the Government assessment or any fraud on his part with respect to the sale of the land and refused to set aside the sale. He accordingly rejected the plaintiff's claim on the 29th June 1878.

In appeal, the Assistant Judge raised only one issue, *viz.*, whether the sale could be set aside. He found it in the negative [75] and, without going into the merits of the case, affirmed the decree of the first Court (30th October 1879). He observed: "Under s. 4, cl. (c) of Act X of 1876, sales for arrears of land revenue cannot be set aside except on the ground of fraud, that is, fraud in the conduct of the sale by the officers conducting it. Supposing, therefore, that plaintiff (appellant) succeeded in proving the fraud he alleges on the part of defendant, the purchaser, he could not get what he prays for in the plaint, namely, the setting aside of the sale. It would, therefore, be waste of time to consider whether he has proved, or should be allowed to produce further evidence of the alleged fraud. It is still open to him to bring a suit against defendant for the

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damages caused him by the alleged fraud. I confirm the decree of the Subordinate Judge, with all costs of this appeal upon appellant."

The plaintiff appealed to the High Court.

*Pandurang Balibhadra*, for the appellant.—The lower Courts ought to have held the defendant to have purchased the land at the revenue sale on behalf and for the benefit of the plaintiff for whom he, the defendant, is a trustee in equity. The Assistant Judge ought to have gone into the merits of the case and considered whether the sale had been brought about by the defendant's fraud so as to entitle the plaintiff to have it set aside.

*Ghanasham Nilkant*, for the respondent.—The land revenue is a paramount charge on the land, and the sale of it for arrears of assessment cannot be set aside, as rightly held by the Courts below.

#### JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—The plaint in this case has been ill-drawn. It seeks to recover possession of the land from the defendant, and it also, quite unnecessarily as it seems to us, prays that the sale for arrears of land revenue should be set aside. Whether Govind Gangadar, or the plaintiff, or the defendant, or any other person was bound to pay the land revenue, and omitted to do so, Government was entitled to sell the land for the purpose of realizing that revenue which is the paramount charge on the land (see the authorities cited in the case of *The Secretary of State for [76] India v. Bombay Landing and Shipping Company* (1); see also *Abdul Gani v. Krishnaji Bhikaji* (2), *Gundo Siddheswar v. Mardan Saheb* (3) and *Ghellabahi Bhikaridas v. Pranjivan Ichharam* (4), authorities which govern this case, the sale having been in 1876. Subsequent sales would be governed by Bombay Act V, 1879, ss. 56, 136 to 138, 153, 181, 182). We think that the plaint ought not to have contained any prayer to set aside the sale. Comprising, however, as it did, a prayer that the plaintiff should recover possession of the property, we think that the plaint might have been read as praying (or at least that the plaintiff might have been permitted to amend it so that it may simply pray) that the defendant should, under the circumstances in which the plaintiff alleges the defendant to have purchased, be declared a trustee of the land, the subject of the suit, for the plaintiff. This would avoid any difficulty arising on s. 4, cl. (c) of Act X of 1876, if that portion of that Act has under the first section of the Act be notified by the Governor-General in Council as yet in force. Section 4, cl. (c) excepts from the jurisdiction of the Civil Courts "claims to set aside, on account of irregularity, mistake, or any other ground except fraud, sales for arrears of land revenue." The Assistant Judge regards the exception of fraud as confined to fraud in the conduct of the sale by the officers conducting it. Whether or not the Assistant Judge is right in that view, we do not give, or think it now necessary to give, any opinion. On the assumption that the revenue was in arrear (and the plaintiff states it to have been so) Government was entitled to sell the land, whoever was the defaulter, and thus to realize its due. But if the defendant were as between him and the plaintiff bound to pay the land revenue to Government, and either wilfully or negligently omitted to pay, and thereby occasioned the sale, and became himself the purchaser,

(1) 5 B.H.C.R. O.C.J. 23 (48 to 50).  
(2) 10 B.H.C.R. 419.

(3) 10 B. H. C. R. 416.

(4) 11 B. H. C. R. 218.

he is in equity liable to be declared a trustee of the land so purchased, for the plaintiff, and, moreover, we think, discharged of his (the defendant's) sub-tenancy in consequence of his conduct which worked a forfeiture to any right to be continued as tenant. In such a state of facts as above assumed, the defendant is in conscience bound to [77] hold the purchased land in trust for the plaintiff, and on demand to make it over to the possession of the latter. The Assistant Judge has not come to any finding whether such or any equivalent state of facts exists in the case, and looking at the plaint as we do, *viz.*, as substantially seeking to have the defendant declared a trustee for the plaintiff, and, as such, bound to make over the land to him, we are of opinion that the Assistant Judge's decree must be reversed, and that there must be a new trial by the Assistant Judge for the purpose of ascertaining how far, if at all, the allegations of the plaintiff are true—a question upon which we do not give any opinion. The plaint may be amended by striking out the prayer to set aside the sale and by more distinctly praying than it now does, that the defendant may be declared a trustee for the plaintiff and bound to make over the land to him. The decree of the Assistant Judge is reversed and the cause remanded for re-trial by him with reference to the observations hereinbefore made. Costs throughout must depend on the final result of the new trial.

*Decree reversed and case remanded.*

5 B. 77.

APPELLATE CIVIL.

*Before Mr. Justice M. Melvill and Mr. Justice Kembal.*

BHAI SHANKAR (*Appellant*) v. THE COLLECTOR OF KHAIRA  
(*Respondent*).\* [3rd August, 1880.]

*Narva—Bhag—Alienation previous to Bombay Act V of 1862—Attachment—Dismemberment of Bhag.*

The principal object of Bombay Act V of 1862 is to prevent the further dismemberment of bhags or shares in bhagdari villages: it renders null and void any future alienation of any portion of a bhag, other than a recognized sub-division, but it does not invalidate previous alienations. A sale of a portion of a bhag, previously to the passing of Bombay Act V of 1862, amounts to a dismemberment of the bhag, and what remains in the bhagdar's hands continues to be a complete bhag, when the portion separated from it becomes a new bhag.

[D., 8 B. 596.]

THIS was an appeal from the order of S. H. Phillpotts, Judge of Ahmedabad.

[78] The material facts of the case are as follows:—

In a village in the Ahmedabad District there was Narva holding consisting of several fields of which the Narvadar Bapuji Bhagwandas in 1816 sold one field, No. 501, to certain persons who at the time of this suit were represented by Daji Dhanji. In 1878 the whole bhag was attached in execution of decree against the said Bapuji in favour of the appellant Bhai Shankar. Daji Dhanji intervened and got the attachment raised from field No. 501. The Collector thereupon made the present application for the removal of the attachment on the remaining bhag, contending, that the effect of the raising of the attachment on a part of the

\* Appeal No. 1 of 1880 under Bombay Act V of 1862.