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right of lien in the agent for all his commissions, expenditures, advances, and services in and about the property or thing entrusted to his agency." With s. 221 must be read s. 171 of the Contract Act, which limits the right to a general lien,—that is to say, the right of parties to retain all goods [322] in their possession as a security for a general balance of account, to "bankers, factors, wharfingers, attorneys, and policy-brokers," and the section further declares that "no other person has such a right unless there is a special contract."

Both English and Indian law, therefore, confine the lien claimable in this case to commission, disbursements, and services in respect of certain specific property or things. I have already said the advances now claimed cannot be held to be disbursements or the services in respect of either the goods or the papers or the mill of the company. They were "loans made on behalf of this company," and for the purposes of the whole concern, not specially assigned to the mill or other property. There is, therefore, no lien. In the absence of any special agreement the claimants can only rank as ordinary creditors for these advances, and *a fortiori* for money paid on the guarantees given.

In this view of the case I need not consider the question of possession, which would be difficult to decide without oral evidence, as the affidavits (*e. g.* the last of Mr. Ryrie) throw a doubt on its continuous character. The claim of lien must be dismissed.

As regards the costs, I think Messrs. Ewart, Latham & Co., who are the unsuccessful litigants, should pay costs, but only one set of costs. If the liquidators had attended the hearing, and actively resisted the claim, I would have thrown their costs on the claimants, and would have left the creditors to have borne the expense of all unnecessary appearance. But the creditors really were the resisting party and most essential to the matter, and they must have their costs, one set, against the unsuccessful claimants. The liquidators' costs arising out of this motion must come out of the estate.

Attorneys for the liquidators:—Messrs. *Macfarlane, Edgelow, and Hemming.*

Attorneys for creditors:—Messrs. *Chalk, Walker, and Smetham.*

Attorneys for Messrs. Ewart, Latham & Co.:—Messrs. *Craigie, Lynch, and Owen.*

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[323] APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

JAMESDJI SORABJI (*Original Defendant*), Appellant *v.* LAKSHMIRAM RAJARAM (*Original Plaintiff*), Respondent.\* [19th June, 1888.]

*Landlord and tenant—Non-payment of rent—Forfeiture, relief against—Co-sharer—Lease from one of several co-sharers—Denial of lessor's title—Estoppel.*

A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment.

The plaintiff sued to eject the defendant, his tenant, for failure to pay rent on the ground that such failure operated as a forfeiture under the terms of the

\* Second Appeal, No. 219 of 1886.

lease. The defendant pleaded (1) that he had paid rent to plaintiff's co-sharer and (2) that the plaintiff alone could not sue without joining his co-sharer. The Subordinate Judge disallowed both these pleas, and passed a decree declaring the plaintiff entitled to eject the defendant, unless the latter paid up all arrears of rent up to date of decree, together with interest and costs of suit within three months. This decree was reversed by the District Judge on appeal, who awarded possession of the land to the plaintiff, on the ground that the defendant, having in his written statement denied the plaintiff's exclusive title, was not entitled to be relieved against the forfeiture clause in the lease.

*Held*, reversing the decree of the lower appellate Court, that the plaintiff's alleged cause of action being, not a disclaimer or denial of his title, but merely non-payment of rent, forfeiture for breach of such a covenant in the lease could be relieved against by a Court of Equity.

[F., 6 Ind. Cas. 927=6 N.L.R. 83 (85); R., 15 B. 407 (412); 33 B. 96=10 Bom. L. R. 1190 (1194).]

SECOND appeal from the decree of S. Hammick, District Judge of Surat, in cross appeals Nos. 12 and 13 of 1885 of the District File.

The plaintiff sued to eject the defendant from the land in dispute, alleging that he had let it to the defendant by a registered lease dated 9th July, 1866, which provided that the defendant should hold the land permanently at a yearly rent of Rs. 25, and that he should be liable to eviction if he failed to pay the rent. The plaintiff alleged that the defendant had not paid rent for three years before suit, and had thereby forfeited his right to the continuance of the tenancy.

The defendant pleaded that the plaintiff could not sue alone, as the lease was executed for the joint benefit of the plaintiff and his co-sharer Fakirbhat; that he had paid rent to Fakirbhat; and that according to the terms of the lease the plaintiff was not entitled to eject the defendant.

[324] The Subordinate Judge held, on the authority of *Jethu Jadhavi v. Ganpatrav* (1), that the defendant was estopped from disputing the plaintiff's exclusive title to the rent; that the alleged payment to Fakirbhat was unjustifiable; and that the defendant had committed a breach of the covenant that failure to pay rent should put an end to the permanent tenancy. He passed a decree declaring that the plaintiff was entitled to eject the defendant unless the latter paid within three months all arrears of rent with simple interest at 9 per cent. and costs to the plaintiff.

On appeal the District Judge was of opinion that the defendant had by his written statement distinctly disputed the plaintiff's title as sole landlord, and had, therefore, lost any equitable right which he might otherwise have possessed to retain the land on payment of arrears of rent. He, therefore, reversed the decree of the Subordinate Judge, and ordered that the plaintiff should receive possession of the land sued for.

Against this decision the defendant preferred a second appeal to the High Court.

*Manekshah Jehangirshah*, for appellant.—The lease creates a perpetual tenancy. We admit that we cannot dispute our lessor's exclusive title, and we are willing to pay up all arrears of rent, with interest and costs of suit. Under such circumstances a Court of Equity will relieve us against the forfeiture clause—*Story's Equity Jurisprudence*, ss. 1304 and 1316; *Timmarsd Puranik v. Badiya Kuppagouda* (2); *Vishwanath Apaji v. Yakub* (3).

*Goverdhanram M. Tripati*, for respondent.—The forfeiture clause should be strictly enforced, especially as the defendant denies our exclusive

(1) Printed Judgments for 1884, p. 286.

(2) 2 B. H. C. R. 66.

(3) Printed Judgments for 1883, p. 104.

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title in his written statement : White and Tudor's Leading Cases, Vol. 2, p. 728 ; *Gopalrao Ganesh v. Kishor Kalidas* (1).

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## JUDGMENT.

The judgment of the Court (BIRDWOOD and PARSONS, JJ.) was delivered by

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BIRDWOOD, J.—The plaintiff sued to eject the defendant, his tenant, on the ground that he had failed to pay rent for three [325] years. Under the lease, such failure operated as a forfeiture. The defendant pleaded that he had paid rent, either to the plaintiff's co-sharer, or to the plaintiff and the co-sharer jointly. The Courts below rightly disregarded this plea, as it was not open to the defendant to set it up after taking a lease from the plaintiff alone—*Sayad Fatulla v. Bola* (2) ; *Jethu Jadhavji v. Ganpatrav* (3). The Subordinate Judge relieved against the forfeiture for non-payment of rent by allowing the defendant to pay the five years' rent due at the date of the decree, with interest and costs, within three months. The District Judge, however, awarded possession of the land to the plaintiff, because the defendant's plea in his written statement amounted to a denial of the plaintiff's exclusive title—*Jethu Jadhavji v. Ganpatrav* (3); and he ordered the defendant to pay costs throughout. We think that this decree is wrong, because the plaintiff's alleged cause of action was not any disclaimer of his title by the defendant, but merely the non-payment of rent ; and forfeiture for such a breach of the covenants in a lease can be relieved against by a Court of Equity—*Timmarsa Puranik v. Badiya Kuppagouda* (4) ; (Woodfall's Landlord and Tenant, 13th ed., p. 326). The question whether there had been such a disclaimer and denial of the plaintiff's title as would entitle him to a decree for possession, was not dealt with at all by the Subordinate Judge. Indeed, such a cause of action could not well have been considered, as it was not alleged in the plaint—*Prannath Shaha v. Madhu Khulu* (5)—and any question regarding it ought not, we think, to have been raised in the appeal. We, therefore, amend the District Judge's decree by restoring that of the Subordinate Judge. The period of three months therein provided is to date from to-day. Each party to bear his own costs in the District Court and here.

*Decree reversed.*

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## [326] APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

NARO BALVANT (*Original Plaintiff*), *Appellant v. RAMCHANDRA TUKDEV AND OTHERS (Original Defendants), Respondents.\**

[11th July, 1888.]

*Civil Procedure Code (Act XIV of 1882), s. 43—First suit to redeem—Second suit to eject—Causes of action in the two suits not identical.*

A. filed a suit against B. to redeem the land in dispute, alleging that it had been mortgaged to B. and that the mortgage-debt had been more than paid off.

\* Second Appeal, No. 346 of 1886.

(1) 9 B. 527.

(2) Printed Judgments for 1884, p. 33.

(3) Printed Judgments for 1884, p. 286.

(4) 2 B.H. C. R. 66.

(5) 13 C. 96.