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[422] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

THE SECRETARY OF STATE FOR INDIA (*Original Defendant*), *Appellant v.* BALVANT RAMCHANDRA NATU (*Original Plaintiff*), *Respondent.** [20th July, 1892.]

Local Funds Act (Bombay), III of 1869, *s.* 8—*Local Fund cess*—Inamdar—*Superior holder*—*Liability of* inamdar *to pay the cess.*

An *inamdar* is a "superior holder" within the definitions of Reg. XVII of 1827 and Bombay Acts I of 1865 and V of 1879. He is, therefore, the person primarily liable to pay the Local Fund cess under s. 8 of Bombay Act III of 1869.

There is no provision of law entitling an *inamdar* to charge for his expenses in collecting the cess.

[R., 26 B. 504 (516); 28 B. 74 (80).]

APPEAL from the decree of W. H. Crowe, District Judge of Poona, in suit No. 12 of 1889.

The plaintiff was the *inamdar* of the village of Kudus. He sued to recover back the sum of Rs. 10-8-0 paid by him to the Collector under protest as the remuneration of the village officers for collecting the Local Fund cess in his *inam* village.

The defendant pleaded *(inter alia)* that the plaintiff as *inamdar* was liable to pay the cost of collecting the cess.

The District Judge held that the plaintiff was a superior holder, and as such was not liable, under Bombay Acts III of 1869 and V of 1879, to pay any remuneration to the village officers for collecting the cess. He, therefore, awarded the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for appellant:—The provisions of ss. 6, 7 and 8 of Bombay Act III of 1869 show that the Local Fund cess falls, in the first place, on the *inamdar*, who is a superior holder. He is, therefore, liable to pay the cost of collecting the cess. Under s. 136 of the Bombay Land Revenue Code, the superior holder is primarily responsible for the land revenue, and he is entitled, under s. 86 [423] of the code, to receive assistance from the revenue authorities in recovering the revenue from the inferior holders. When he is entitled to this benefit, it is but fair that he should pay all reasonable charges incidental to the collection of the revenue. Refers to *Ranga* v. *Suba Hegde* (1); *Ram Tukoji* v. *Gopal* (2).

Phirozeshah M. Mehta (with him *Mahadev C. Apte*), for respondent:—The *inamdar* is not liable to pay the cess at all. The last clause of s. 8 of Bombay Act III of 1869 shows that the tenants are liable for the cess. If they do not pay it, the landlord is entitled to the assistance of the village officers in recovering the cess from them: see ss. 85 and 86 of the Bombay Land Revenue Code (Act V of 1879). Section 136 of the Code no doubt makes superior holders primarily responsible for the land revenue. But, as the *inamdar* pays no revenue, he cannot be called a superior holder. He is a mere intermediary of the Government, and as such is entitled to deduct the cost of collecting the cess from the total cess

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* Appeal No. 91 of 1890.

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collected. Moreover, the village officers are bound to give assistance to the *inamdar*. They are agents of Government, and cannot claim any remuneration for the assistance they render.

JUDGMENT.

JARDINE, J.—In this case the plaintiff, who is the *inamdar* of a wholly alienated village, claims from the Government a sum of money which he paid to the village officers as remuneration for their collecting from the plaintiff's tenants the amount of the cess levied under Bombay Act III of 1869, s. 8, last clause.

It is argued by Mr. Mehta, who appears for the plaintiff, that this cess does not fall upon the *inamdar* at all. But, in our opinion, ss. 6 and 7 of the Act impose it, in the first instance, as a charge on the aggregate village assessment and thus upon the land. Section 8 requires that the cess be levied in the same manner and under the same provisions of law as the ordinary land revenue. The *inamdar* is a "superior holder" within the definitions of Reg. XVII of 1827, s. 3, Bombay Act I of 1865, s. 2, cl. (*k*), and Bombay Act V of 1879, s. 3, cl. 13, and was under Reg. XVII of 1827, s. 30, and is under Bombay Act V of 1879, s. 136, [424] the person primarily responsible for the payment of land revenue. We think, therefore, s. 8 of the Act of 1869 justifies the levy of the cess from him, and we may refer to *Ranga* v. *Suba Hegde* (1) and *Ram Tukoji* v. *Gopal* (2) as showing that this view has been accepted by this Court.

It is also contended, that the plaintiff as a mere intermediary of the Government is entitled to charge for his expenses in collecting the cess. There is no provision of law so entitling him: and as he is primarily liable to pay the cess, we are not aware of any reason, equitable or otherwise, which would impose on the Government the burden of paying him any expenses which he may incur under the legislative permission to him to recover the amount of the cess for his own benefit from his tenants.

In support of the first contention Mr. Mehta argued that the last clause of s. 8 of the Act of 1869, where the words "recovery of this cess" appear, shows that the Legislature intended the cess to fall in its first incidence on the tenants, and that the first clause of s. 8 applied to the levy of the cess from them. But it is clear that this first clause refers to the cess described in ss. 6 and 7; and this is not a cess leviable from under-tenants, but one leviable on the aggregate village assessment, and, therefore, from the *inamdar*, the superior holder. In the last clause of s. 8 the words "recovery of this cess" really mean "recovery of the *amount* of the cess described in ss. 6 and 7." The Act does not deal with two sorts of cesses: what the landlord recovers from the tenant is not, in strict language, a cess.

Another argument used for the plaintiff is that the *inamdar* has a right to the unpaid services of the village officers in the collection of the cess from the tenants by virtue of s. 8 of the Act of 1869 and the requirement of s. 85 of the Revenue Code of 1879 that the payments of the tenants shall be made through the village officers and not otherwise. It is unnecessary for us to determine this question of law. If the plaintiff's contention is right, he might have refused the demand of the village [425] officers. They are not parties to this suit; and no order of the

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Collector has been shown us, nor any evidence from which we can infer that the payment to the village officers was made under compulsion used by the Collector.

For these reasons we reverse the decree of the District Court, and reject the plaintiff's claim with costs throughout.

Decree reversed.

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17 B. 425.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

MAHADAJI (*Original Defendant*), *Appellant v.* JOTI (*Original Plaintiff*), *Respondent.** [25th July, 1892.]

Mortgage—Simple mortgage usufructuary—Right to have the property sold—Distinct covenant to pay the principal—Possession in lieu of interest—Sale to recover principal only—Construction.

A merely usufructuary mortgage will confer no right to have the mortgaged property sold. But where there is a distinct covenant to pay the principal, and the land is security for the same, the intention of the parties is that the property should be sold. Such a transaction is a simple mortgage usufructuary, and carries with it the right to have the property sold in default of payment of the principal.

A mortgagee, who is entitled to possession in lieu of interest and who does not take possession, loses his right to interest, and cannot ask that the property be sold for default in payment of interest, the property being security for the principal only.

[**F.**, 34 B. 128=11 Bom. L.R 1315 (1320)=4 Ind. Cas. 595; 34 B. 462=12 Bom. L.R. 491=7 Ind. Cas. 446; **R.**, 17 Ind. Cas. 329=16 O. C. 56 (66); 9 O. C. 144 (145); **D.**, 22 B. 440 (446); 10 O. C. 29 (31); 11 O.C. 323 (325).]

THIS was a second appeal from the decision of M. H. Scott, District Judge of Satara.

The plaintiff sought to recover from the defendant personally, and on his default from the mortgaged property, Rs. 1,000 (Rs. 500 principal and Rs. 500 interest), due upon a mortgage-bond dated the 27th March, 1873, which ran as follows :—

Bond for debt, the 14th of *Falgun Vadya*, *Shak* 1794—the cyclical year, name thereof being *Angira*—corresponding with the English year 1873. On this day the bond is given in writing to the creditor named Rajashri Joti bin Raju Patil Yadav, by caste Maratha, occupation agriculture * * inhabitant of mauje Yeravle, taluka Karad, as follows :—I have received from you this day principal Rs. 500 (five hundred) of the *gadi* Surat currency. As for the interest of the said amount, I have given (the produce of) my own land which is in my [426] own enjoyment situate at mauje Yeravle * * called Sarkari Dale Vihiriche, Survey No. 22 (measuring), acres 1-31 and assessed at Rs. 9. The four boundaries thereof are * * * (The produce of) the land as comprised within the above four boundaries I have given in liquidation of the interest on the said amount. Therefore, you are to receive interest on the said amount from the produce of the said land. You are to do all (that is), bestow labour on the said land and

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* Second Appeal No. 7 of 1891.