

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

BHA'U BIN BA'LI PA'TIL (ORIGINAL PLAINTIFF), APPELLANT, v. HARI BIN VITHU, DECEASED, BY HIS SON AND HEIR NA'RA'YAN (ORIGINAL DEFENDANT), RESPONDENT.*

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Land Revenue Code (Bom. Act V of 1879), Secs. 81 and 153 (1)—Default in paying assessment—Payment of assessment by another—Order of Collector transferring lands into, name of person paying assessment—Forfeiture—Subsequent suit by defaulter to recover the land—Jurisdiction of Civil Court—Act X of 1876, Secs. 4 (c) and 5 (b).

An order made by a Collector removing A.'s lands from his kháta and transferring them to B.'s kháta, on the ground that A. had allowed the assessment thereof to fall into arrears and that B. had paid the assessment, does not by itself amount to forfeiture of A.'s interest in the lands.

A suit by A. to recover such land from B. being simply a suit between private parties for the purpose of establishing a private right, section 4 (c) of Act X of 1876 does not bar the jurisdiction of the Civil Court.

SECOND appeal from the decision of T. Hamilton, District Judge of Sholápur, reversing the decree of Ráo Bahádur K. N. Kher, First Class Subordinate Judge.

The plaintiff sued in the year 1891 to recover from the defendant certain lands, alleging that they formed part of his *pátelki vatan*, and that in 1882-83, while he was a minor, the defendant had wrongfully taken possession of them, as the plaintiff's mother was unable to cultivate them and pay the assessment, and that the defendant had ever since remained in wrongful possession.

The defendant alleged that the assessment of the lands having fallen into arrear, the Collector sold them by auction; that

* Second Appeal, No. 225 of 1894.

(1) 81. If it shall appear to the Collector that a registered occupant has failed to pay land revenue, and has thus incurred forfeiture with a view to injure or defraud his co-occupants or other persons interested in the continuation of the occupancy, or that a sale of the occupancy will operate unfairly to the prejudice of such co-occupants or other persons, it shall be lawful for him, instead of selling the occupancy, to forfeit only the said registered occupant's interest in the same and substitute the name any such co-occupant or other person as registered occupant thereof in the revenue records, on his payment of all sums due on account of the land revenue for the occupancy; and such person so becoming the registered occupant shall have the rights and remedies with respect to all other persons in occupation provided for by section 86.

153. The Collector may declare the occupancy or alienated holding in respect of which an arrear of land revenue is due, to be forfeited to Government, and sell or otherwise dispose of the same under the provisions of section 56 and 57, and credit the proceeds, if any, to the defaulter's accounts.

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his (the defendant's) father paid the arrears of assessment, and the Collector in 1876-77 had made over the lands to him as owner, and that he had ever since then been in possession. He contended that the claim was barred by limitation.

The Subordinate Judge found that the lands had not been purchased by the defendant at a revenue sale as alleged by him, that the assessment of the lands having fallen into arrears in 1881-82, the defendant agreed to pay it and the lands were transferred to his name; that as there was no declaration by the Collector as required by section 153 of the Land Revenue Code, (Bom. Act V of 1879), there was no forfeiture of the lands to Government, and that the plaintiff consequently had not lost his rights unless time-barred. He held that the claim was within time, the suit being within twelve years of the defendant's adverse possession. He, therefore, allowed the claim.

On appeal by the defendant, the Judge reversed the decree, holding that the Collector must have taken action under section 81 of the Land Revenue Code, and that the transfer of the land to the defendant's name was proof that the Collector had forfeited the lands.

The plaintiff preferred a second appeal.

Gangáram B. Rele, for the appellant (plaintiff):—Section 80 of the Land Revenue Code is applicable to the case. Section 81 is not applicable. It refers to injury to other co-occupants. There is neither allegation nor evidence of any such injury in the case. Further, section 81 contemplates forfeiture, and there is no evidence of forfeiture. Mere transfer of the kháta to the defendant's name cannot operate as forfeiture, because forfeiture must precede all other proceedings—*Dasharatha v. Nyághálchand* ⁽¹⁾.

Mahádeo B. Chaulbal, for the respondent (defendant):—Section 4 (c) of the Revenue Jurisdiction Act (X of 1876) is a bar to the present suit. Civil Courts are debarred from exercising jurisdiction in matters relating to the realization of land revenue.

[PARSONS, J.:—But the present suit is not one for the realization of land revenue. It is a suit between private persons to

(1) I. L. R., 16 Bom., 126.

recover possession of lands. Therefore, section 4 (c) of the Revenue Jurisdiction Act is not applicable.]

Next we contend that the plaintiff is not entitled to succeed, because his case was that we had wrongfully dispossessed him, but no wrongful-dispossession is proved. The Judge found that we got possession, because the Collector gave it to us. The case of the plaintiff has, therefore, failed.

Section 80 of the Land Revenue Code is not applicable, because it does not empower the Collector to transfer the lands. The Collector must have acted under sections 56 and 57 of the Land Revenue Code. We submit that section 81 is applicable, because it provides for the substitution of the name of any other co-occupant. The defendant is a co-occupant with the plaintiff. The Judge has found that he is a *bhauband* of the plaintiff. The plaintiff ought to have sought redress under section 214 (c) of the Land Revenue Code.

CANDY, J. :—The plaintiff Bháu bin Báli stated in his plaint that during his minority in 1882-83 the deceased defendant Hari had wrongfully taken possession of his lands, portion of the *pátelki* inám land, his mother being at that time unable to cultivate them and pay the *judi*.

Defendant, Hari's son, replied that as the *judi* was in arrear, the lands were sold by auction in 1876-77, and Hari purchased and took possession of the same. Both parties overstated their case. Defendant, called as a witness by plaintiff, admitted that the lands were never sold by the revenue authorities. Plaintiff, called as a witness by defendant, admitted that the lands had been taken over by Hari, who paid the *judi* which was in arrear.

Extracts from the revenue records, which were put in evidence in the Subordinate Court and in the District Court on appeal, show that this took place in 1882. No section of the Land Revenue Code was apparently quoted in the orders then given, but it was simply directed that as Bháu had not paid the *judi*, but the *bhauband* Hari was willing to pay the same, there was no objection to transfer the *kháta* to Hari's name.

The Subordinate Judge held that as there was no declaration by the Collector, as required by section 153 of the Land Re-

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venue Code, of the forfeiture of the lands to Government, there was no forfeiture—*Dasharatha v. Nyádhálehani* (1).—and thus plaintiff's suit being brought within twelve years from the commencement of Hari's possession the claim was not time-barred.

The District Judge held, in appeal, that the Collector must have taken action under section 81 of the Land Revenue Code, and that in that case the rights of the defaulter were extinguished, and so Hari became owner of the lands in 1882.

Plaintiff has now made a second appeal to this Court, urging that there was no forfeiture or extinguishment of his rights, in 1882.

Mr. Chaubal for respondent has raised the preliminary objection that the jurisdiction of the Civil Court is barred under section 4 (c) of Act X of 1876, which provides that no Civil Court shall exercise jurisdiction as to "claims connected with or arising out of any proceedings for the realization of land revenue or the rendering of assistance by Government or any officer duly authorized in that behalf to superior holders or occupants for the recovery of their dues from inferior holders or tenants; claims to set aside on account of irregularity, mistake or any other ground except fraud, sales for arrears of land revenue."

We are of opinion that this objection is not good. This is simply a suit between private parties for the purpose of establishing a private right (section 5 (b) of Act X of 1876). As will be presently shown, no proceedings were taken for the realization of the land revenue. Further, it is evident that no proceedings could have been taken by the Collector under section 81 of the Land Revenue Code, for that section is part of Chapter VI of the Land Revenue Code, which treats "of the occupation of unalienated lands and the rights of occupants" (*viz.*, holders of unalienated land). The land in suit in 1882 was *pátelki inám* paying *judi* to Government, that is, the rights of Government to payment of the rent or land-revenue were transferred partially to the ownership of the *watandár*. Section 81 relates to "registered occupants" and "occupancies" which do not include holders of alienated lands. It is thus clear that the Collector

(1) I. L. R., 16 Bom., 136.

could not have taken action under section 81 of the Land Revenue Code; and it is unnecessary to determine the question whether action taken under that section entirely extinguishes the rights of the previous registered occupant.

Section 56 relates to arrears of land revenue due on account of land by any land-holder, failure in payment of which shall make the occupancy or alienated holding liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy or alienated holding free from all incumbrances or may otherwise dispose of such occupancy or alienated holding under rules or orders under section 214, and by section 57 in the event of such forfeiture the Collector can take immediate possession of the land and dispose of the same by placing it in the possession of the purchaser, or other person entitled to hold it. In the present case there is nothing to show that the Collector declared any forfeiture or took possession of the land. All that appears is that the plaintiff's mother and guardian failed to pay the *judi* or cultivate the land. Hari thereupon took possession and paid the arrears of *judi*. The Collector directed that there was no objection to take the *judi* from Hari and enter the land in Hari's *kháta*. If it were necessary to determine the section or sections of the Land Revenue Code (Bombay Act V of 1879) under which the Collector must be taken to have acted, then a reference might be made to section 137, which provides that land revenue may be recovered from the co-sharer of alienated land, and to section 37 which empowers the Collector to dispose of lands subject to the rights of individuals legally subsisting. It is not clear under which (if any) of the rules under sections 56 and 214 the action of the revenue authorities may be said to have been taken. These rules are Nos. 58—64, pages 30 to 33, in the General Rules of the Revenue Department. Rule 59 relates to forfeited alienated holdings, and provides that the Collector shall cause the land comprised in any forfeited alienated holding to be entered in the records as unoccupied unalienated land, and may dispose of it in accordance with the rules and orders in force relating to land of that description. It is evident, from the facts in this case, that no action was taken under that rule. It is not pretended that the land was entered in the records as un-

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occupied unalienated land. All that was apparently done was to take the arrear of land revenue from a co-sharer (bhauband) of the holder, and to enter the lands in the kháta of the said co-sharer. We can find no authority for holding that in such a case the previous holder's rights are extinguished.

We, therefore, reverse the decree of the District Judge and restore that of the Subordinate Judge, but vary it to this extent that plaintiff is bound in equity before he can recover possession to repay defendant the Rs. 12 which Hari paid for *judi* on the land. Parties to bear their own costs in the Subordinate Court. All the rest of the costs to be borne by defendant.

PARSONS, J.:—I concur. The evidence on the record does not show under what provision of law the revenue authorities professed to act when they transferred the land to the defendant's name in 1882, neither does it show that the land or the plaintiff's interest in it was ever forfeited. Had there been a suggestion that any evidence was forthcoming to prove a forfeiture, I should have been inclined to remand the case, seeing that no issues were framed by the District Judge. The defendant, however, was allowed to produce evidence in the lower Appellate Court, and I presume that he produced all that was available. Whether the revenue authorities acted under section 81 of the Bombay Land Revenue Code, as the District Judge thinks they did, or whether, as is more probable, they did what they thought just and right in the circumstances of the case so that the land should not be entirely lost to the plaintiff, the result is the same; the plaintiff's interest in the land has never been forfeited, and, therefore, still subsists. The defendant, in my opinion, holds a somewhat analogous position to that of a sharer who has redeemed a mortgage and thus obtained possession. See *Rám-chandra v. Sadáshiv* ⁽¹⁾; *Faki Abas v. Faki Nurudin* ⁽²⁾. On repaying the money the defendant has paid for him, the plaintiff can, I think, be allowed to recover the possession of what is still his own land.

Decree reversed.

(1) I. L. R., 11 Bom., 424.

(2) I. L. R., 16 Bom., 191.