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We would only wish to add that though we have raised an issue as to when the matter first became known to the plaintiffs, it does not mean that we now decide that the case falls within Article 96, Schedule II, of the Limitation Act, or that if it does, and the plaintiffs did become aware more than three years prior to the application, we will necessarily disallow the amendment. It is a matter which we leave open for discussion when the case again comes before the Court.

Issues sent down.

G. B. R.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

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February 23.

AMOLAK BANECHAND AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS,
v. DHONDI VALAD KHANDU BHOSLE AND ANOTHER (ORIGINAL DE-
FENDANTS), RESPONDENTS.*

*Land Revenue Code (Bom. Act V of 1879), sections 56, 57, 153†—Arrears of
assessment—Forfeiture by Government—Mortgage—Land in possession of*

* Second Appeal No. 43 of 1905.

† Sections 56, 57, 153 of the Land Revenue Code (Bom. Act V of 1879).

56. Arrears of land revenue due on account of land by any holder shall be a paramount charge on the holding and every part thereof, failure in payment of which shall make the occupancy or alienated holding, together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land, or permanently fastened to anything attached to the land, liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy or alienated holding, freed from all tenures, incumbrances and rights created by the occupant or holder or any of his predecessors-in-title, or in anywise subsisting as against such occupant, or holder, or may otherwise dispose of such occupancy or alienated holding under rules or orders made in this behalf under section 214.

57. It shall be lawful for the Collector, in the event of the forfeiture of a holding through any default in payment or other failure occasioning such forfeiture under the last section or any law for the time being in force, to take immediate possession of the land embraced within such holding and to dispose of the same by placing it in the possession of the purchaser or other person entitled to hold it according to the provisions of this Act or any other law for the time being in force.

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 sections 56 and 57, and credit the proceeds, if any, to the defaulter's account.

the occupant—Re-grant by Government to the occupant—Suit by mortgagee to recover possession—Equities arising out of the conduct of the parties.

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Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation.

When arrears of assessment are levied by sale, then section 56 of the Land Revenue Code (Bom. Act V of 1879) in pursuance of an obvious policy, empowers the Collector to sell "freed from all tenures, incumbrances and rights created by the occupant.....or any of his predecessors-in-title or in anywise subsisting against such occupant." Should the Collector otherwise dispose of the occupancy, the section affords no such protection, and the legal relations must be determined by reference to the ordinary law. So judged, the effects of a forfeiture and the subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties.

Balkrishna Vasudev v. Madhavrao Narayan⁽¹⁾ followed.

SECOND Appeal from the decision of C. D. Kavishvar, First Class Subordinate Judge of Násik, with appellate powers, reversing the decree of K. G. Kittur, Subordinate Judge of Pimpalgaum.

The land in suit belonged to the defendant who mortgaged it with possession to the plaintiff and himself continued in possession under a kabulayat. On the expiry of the kabulayat the plaintiff having brought a suit for the recovery of possession and mesne profits for three years, the defendant denied the rent-note (kabulayat) and contended that the land was forfeited for arrears of Government assessment, that the Government having re-leased the land to the defendant, the plaintiffs' rights as mortgagee were extinguished, that the defendant held the land free of the mortgage-debt and that the plaintiff had no right at all.

The Subordinate Judge found that the kabulayat to the plaintiff was proved, that under the rulings in *Ganparshibai v. Timmaya*⁽²⁾ and *Mulchand v. Shapurji*⁽³⁾ the defendant was not freed from liability because the land was forfeited by Government and re-leased to him and that as between Government and the occupant, the latter was in the first instance liable to pay the assessment and that as between the plaintiff and the occupant, the former was liable to pay it. He, therefore, allowed the claim for possession and mesne profits.

(1) (1880) 5 Bom. 73.

(2) (1899) 24 Bom. 34.

(3) (1898) P. J., p. 8.

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On appeal by the plaintiff the Judge reversed the decree and dismissed the suit on the following grounds :—

The land was forfeited and taken possession of by Government (Exhibit 31) and it was again let to the defendant, the Khatedar, on his paying the assessment for the previous year and the year that was going, and passing a fresh kabulayat. Exhibit 27 shows that it was forfeited and Exhibit 28, the order of the Mamlatdar of Chandwad to Patil Kulkarni, dated 27th November, 1900, shows that the land was given again. The new kabulayat passed by the defendant to Government was not produced in the lower Court, but a copy of it is put in here (Exhibit 11). It shows that the land was lying waste, after forfeiture and it was let to Dhondi on fresh conditions that he should return the land to Government in case he did not want to cultivate it; that he shall not mortgage or sell it to anybody, nor should he transfer it to anybody's name, and that in case the land be sold in future for the recovery of any Government dues and if any balance be left after deducting the dues, that balance must go to Government and should not be claimed by Dhondi. Thus the land was let to Dhondi under fresh contract and several conditions which were not in existence during the previous holding. Government has not returned the land to Dhondi unconditionally on his paying assessment for 2 years, but it is released from 7th December, 1900. Thus the plaintiff's mortgage right is extinguished and his right as mortgagee is not in existence now, and consequently he has no right to obtain possession of the land, nor is he entitled to recover any rent which became due in 1901 and subsequent years. The ruling published at I. L. R. 24 Bombay, page 34, quoted by the lower Court, does not apply here. Here the land is given under a fresh lease with conditions that the Khatedar should not mortgage, sell or transfer the land to any other person. Thus the plaintiff lost his right under his mortgage as soon as Government ordered forfeiture of the land and leased the land again as Government waste land free from any former right of anybody and granted him a qualified right as a tenant of Government. The plaintiff has no right to recover possession of the land under the kabulayat sued on, nor any rent for the period subsequent to forfeiture of the land.

Plaintiff having died pending the appeal, his sons and heirs were brought on the record and they preferred a second appeal. While the second appeal was being argued the Court (Jenkins, C. J., and Batty, J.) recorded the following interlocutory judgment on the 13th October, 1905 :—

We think this case should be argued after the Government have had an opportunity, if they so desire, of being present; seeing that the appellants question the right of the Government to dispose of property where there has been a declaration of forfeiture followed by a disposition of the property in favour of the former occupant with a restriction on alienation.

If the Government desire to appear on this second appeal waiving any objection to the fact that the suit was not instituted in the District Court, and also under the Revenue Jurisdiction Act, then we would be willing to add the Secretary of State as a party, and to hear any argument he may have to advance on the point.

We came to this conclusion because a careful examination of the cases leads us to doubt how far there is any binding authority that a declaration of forfeiture has no legal effect under the Code.

The Secretary of State having expressed his willingness to be a party to the second appeal, the Collector of Nasik was joined as respondent 2.

S. R. Bakhle appeared for the appellant (plaintiff):—Under section 56 of the Land Revenue Code, default in the payment of land revenue involves liability to forfeiture. After the declaration of forfeiture the Collector is entitled under the section to recover the arrears of revenue by sale of the occupancy or holding, and it is when such sale is held that the occupancy passes to the purchaser freed from all tenures, incumbrances and rights created by the occupant or holder. Mere order of forfeiture has not the effect of extinguishing previous incumbrances or rights. The section provides that the Collector may dispose of the holding in any other way under the rules framed under that section and section 214. Before the amendment of the Land Revenue Code there was no rule in it under which a holding could be re-granted to the defaulter freed from all incumbrances. It was the sale alone which could bring about the extinguishment of prior incumbrances and rights: *Ganparshibai v. Timmaya*.⁽¹⁾ It has been held that a mere declaration of forfeiture has no effect in law under the Land Revenue Code: *Narayan v. Parshotam*⁽²⁾, *Mulchand v. Shapurji*⁽³⁾. We, therefore, contend that notwithstanding the order of forfeiture our rights as mortgagee and landlord still subsist.

R. R. Desai appeared for the respondent (defendant):—The plaintiff mortgagee was to pay the assessment under the terms of the mortgage and he was called upon by the Mamlatdar to do so. On his failure to pay, the Collector declared forfeiture. The

(1) (1899) 24 Bom. 34.

(2) (1896) 22 Bom. 393.

(3) (1898) P. J., p. 8.

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plaintiff is, therefore, estopped from contending that the order of forfeiture did not extinguish his rights. The Collector seems to have acted under section 57 of the Land Revenue Code because he took immediate possession and seems to have taken further action under Rule 59 of the rules framed under section 214 of the Code. After the Collector takes possession of a forfeited holding all prior rights come to an end. That is the effect of the ruling in *Ganparshibai v. Timmaya*⁽¹⁾. Further we paid the arrears of revenue, therefore, in equity we are entitled to be in possession.

Raikes (Acting Advocate General with *Rao Bahadur V. J. Kirtikar*, Government Pleader) appeared for respondent 2 (Collector of Nasik who was joined as a party in the second appeal):—The Collector acted under Rules 59 and 62. The land was, after forfeiture, entered in the revenue records as unoccupied waste land and was subsequently dealt with as provided in Rule 62.

Bakhe in reply:—Exhibit 28 shows that the land was not treated as waste or unoccupied and Government did not take possession. The notice issued by the Mamlatdar calling on the defendant to pay the arrears and take up the land shows that it was intended that defendant should take up the land under the new restricted tenure in derogation to our rights.

JENKINS, C. J.:—The defendant mortgaged a survey number to the plaintiff, and passed a *kabulayat* in his favour. The plaintiff now sues the defendant for possession of the land.

The defence is that since the mortgage and *kabulayat* the land has been forfeited by the Government for non-payment of assessment in arrear; that all prior rights in it were thereby destroyed; and that it was then leased to the defendant free from all incumbrances.

The defence has prevailed in the lower appellate Court, from whose decree the present appeal has been preferred.

The point is one of importance in which the Government are interested, and on their consenting to waive all objections, we

(1) (1899) 24 Bom, 34,

have, in accordance with their desire, added the Secretary of State as a party.

Section 56 of the Land Revenue Code provides that arrears of land revenue due on account of land by any landholder shall be a paramount charge on the holding and every part thereof, failure in payment of which shall make the occupancy or alienated holding, together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land, or permanently fastened to anything attached to the land, liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy or alienated holding, freed from all tenures, incumbrances and rights created by the occupant or holder or any of his predecessors in title, or in anywise subsisting as against such occupant or holder, or may otherwise dispose of such occupancy or alienated holding under rules or orders made in this behalf under section 214.

And by section 57 it is declared that it shall be lawful for the Collector, in the event of the forfeiture of a holding through any default in payment or other failure occasioning such forfeiture under the last section or any law for the time being in force, to take immediate possession of the land embraced within such holding, and to dispose of the same by placing it in the possession of the purchaser or other person entitled to hold it according to the provisions of this Act or any other law for the time being in force.

Under section 153 the Collector may declare the occupancy 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 sections 56 and 57, and credit the proceeds, if any, to the defaulter's account.

The lower appellate Court has found that "the land was forfeited and taken possession of by Government, and it was again let to the defendant, the Khatedar, on his paying the assessment for the previous year and the year that was going, and passing a fresh kabulayat."

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What, then, is the legal consequence of this finding ?

Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation, and thus we find it said by Blackstone in Chapter XVIII of his Commentaries⁽¹⁾ that "Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured as a recompense for the wrong which either he alone, or the public together with himself, hath sustained."

In support of his contention that the forfeiture had no legal consequences, the appellant principally relies on *Ganparshibai v. Timmaya Shivappa Halepai*⁽²⁾.

But while it is there said of the landlord, the plaintiff in that suit, that "the forfeiture *per se* did not destroy the relations existing between him and his tenant," it is in the preceding sentence conceded that "so it may have done as between him and Government."

Other cases were cited to us, but they seem to us to go no further in the direction for which the plaintiff contends.

No doubt in *Mulchand Bhagwanji v. Shapurji Dadabhai*⁽³⁾ it is said that "forfeiture in itself has no direct legal consequences under the Code", but it is conceded in *Ganparshibai's* case by Candy, J., who was a party to the decision in *Mulchand Bhagwanji v. Shapurji Dadabhai*, that the cases on which this statement is based "may not have been quite apposite". We agree with this comment, and, therefore, refrain from discussing those cases.

If, by the phrase we have cited, it is meant that the Code does not define the consequences of a "forfeiture in itself", then no exception can be taken to it, but we see in that no reason for withholding from the word *forfeiture* its ordinary legal significance.

When the arrears are levied by sale, then section 56, in pursuance of an obvious policy, empowers the Collector to sell "freed from all tenures, incumbrances and rights created by the

(1) Book II, p. 267.

(2) (1899) 24 Bom. 34.

(3) (1893) P. J. p. 8.

occupant or any of his predecessors-in-title or in any-wise subsisting as against such occupant". Without such protection no one would buy except at a price fixed to meet the risks involved.

Should the Collector otherwise dispose of the occupancy, the section affords no such protection; and the legal relations must be determined by reference to the ordinary law. So judged, the effects of a forfeiture and subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties, and for this proposition there is the sanction of Sir M. Westropp's decision in *Balkrishna Vasudev v. Madhavrav Narayan* (1). (Cf. section 90 of the Indian Trusts Act).

And, in our opinion, it is by reference to that principle that this case must be decided.

This aspect of the case has not been considered by the lower appellate Court, and we must, therefore, remand the case for the determination of the following issues:—

1. Has the defendant, by availing himself of his position as Khatedar, gained an advantage in derogation of the rights of the plaintiff or otherwise by his conduct created an equity in favour of the plaintiff?
2. If so, is the plaintiff entitled to any, and what, relief?

Parties may adduce further evidence. Return in two months.

Issues sent down.

G. B. R.

(1) (1880) 5 Bom. 73.