

allowed to challenge the finding on the preliminary question in appeal on the merits of the suit. The intention of the Legislature was clearly to prevent preliminary questions being raised in the form of an appeal after the case had been decided upon the merits.

Now, here the preliminary decree having become extinct by reason of the final decree, and the appellants not having exercised their right of presenting an appeal to this Court from that decree, in the present appeal it is not open to the appellants to challenge the finding on the question whether they are agriculturists or not. The appellants' pleader, however, asks this Court to give them time to ask the lower Court to frame a preliminary decree in order to enable them to appeal against it. The Subordinate Judge has remarked in his judgment that this is an old case, and that it ought not to be allowed to linger on for nothing. We think that the appellants have been guilty of laches, and no further indulgence ought to be granted to them.

For these reasons the decree appealed from must be confirmed with costs.

*Decree confirmed.*

R. R.

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## APPELLATE CIVIL.

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*Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.*

GURBASAPPA BIN SANGAPPA KUNCHAGNUR (ORIGINAL DEFENDANT No. 3),  
APPELLANT, v. RANGO VENKATESH KHUSNIS AND ANOTHER (ORIGINAL  
PLAINTIFF), RESPONDENTS.\*

1912.

*February 20.*

*Forfeiture by Government of Deshgat Inam lands—Effect of forfeiture on prior mortgage—Payment of assessment to Government by mortgagee in possession—Suit to redeem by mortgagor—Mortgagee cannot deny mortgagor's title.*

The plaintiffs' ancestors mortgaged their Deshgat Inam lands to the defendant's ancestor with possession in 1855. The lands were in 1856 forfeited by Government; but the mortgage was continued in possession and paid assessment in respect of

\* Second Appeal No. 832 of 1910.

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the lands to Government. In 1901, the plaintiffs sued to redeem the mortgage. The defendant contended that the order of forfeiture deprived the plaintiffs of all right to the lands and that the title thereafter became vested in the defendant:—

*Held*, that the order of forfeiture had merely the effect of converting the lands from a service tenure into lands liable to pay assessment to Government; and that it did not deprive the plaintiff of all right and title to the lands, and extinguish the relation of mortgagor and mortgagee which existed between the parties.

*Vishnoo Trimback v. Tatia*(1) and *Gangabai v. Kalapa Dari Mukrya*(2), followed.

*Held*, also, that the defendant who came into possession of the lands as mortgagee of the plaintiffs could not turn round after the order of forfeiture and take the benefit of it and challenge the validity of the mortgage in virtue of which his title to the land as mortgagee had begun.

SECOND appeal from the decision of T. D. Fry, District Judge of Dharwar, amending the decree passed by V. V. Kalyanpurkar, Additional Subordinate Judge at Gadag.

Suit to redeem a mortgage.

In 1855, one Rango, an ancestor of the plaintiff, executed a usufructuary mortgage in favour of Rudrappa, an ancestor of defendant, of certain lands which were the Deshgat Inam lands. The mortgagee was placed in possession of the lands which consisted of three Survey Nos. 139, 64 and 66. The lands were confiscated by Government in 1856. The mortgagee, however, continued to pay assessment to Government for the lands. The plaintiffs brought a suit in 1901 to redeem the mortgage.

The defendant contended *inter alia* that the lands in question were confiscated by Government; and that the plaintiffs were not owners of the lands and had no right to sue.

The Subordinate Judge tried first a preliminary issue, "Is plaintiff owner of the lands in suit?"; found it in the negative and recorded no findings on the remaining issues. On appeal, the District Judge reversed the finding and remanded the suit to the first Court for trial on the merits. On remand it was held that mortgage relied on by plaintiffs was proved; that the plaintiffs' right to redeem the mortgage was not extinguished; that the defendant was in adverse possession

(1) (1863) 1 Bom. H. C. R. 22

(2) (1885) 9 Bom. 419.

of Survey Nos. 64 and 66 for more than 12 years before suit; and that the plaintiffs were entitled to redeem Survey No. 139.

Against this decree both parties appealed. The District Judge varied the decree by holding that the plaintiffs were entitled to redeem all the three survey numbers.

The defendant appealed to the High Court.

*Jayakar*, with *P. M. Vinekar*, for the appellant.

The following cases were cited: *Dasharatha v. Nyahalchand*<sup>(1)</sup>; *Bhau v. Hari*<sup>(2)</sup>; *Bhima v. Raghavendracharya*<sup>(3)</sup>; and *Amolak Banachand v. Dhondi*<sup>(4)</sup>.

*D. A. Khare*, for the respondent, was not called on.

CHANDAVARKAR, J.:—The lands in dispute were Deshगत Inam held by plaintiffs' ancestors as Desais for service. Those ancestors mortgaged the Inam lands to the grandfather of defendant No. 3, with possession. Thereafter, that is, in 1856, the Inam lands were made *Khalsa*, *i. e.*, declared forfeited by an order of Government communicated by the Mamlatdar (see Exhibit 114) to the mortgagee who was in possession under the usufructuary mortgage. The mortgagee, however, after the forfeiture continued in possession and went on paying assessment in respect of the lands to Government. The plaintiffs, as mortgagors, brought the suit, which has led to this appeal, to redeem, and the action was resisted by the defendant upon the ground mainly that the order of forfeiture in 1856 deprived the plaintiffs of all right to the lands and that the title thereafter became vested in the defendant by reason of the fact that he (the defendant) was allowed by the Collector to continue in possession and pay the assessment.

Now, the question is whether the order of forfeiture in Exhibit 114 had the legal effect of depriving the plaintiffs, who were then Desais, of all right and title to the lands, and of extinguishing the relation of mortgagor and mortgagee which had existed between the plaintiffs and the defendant. It has been

(1) (1891) 16 Bom. 134.

(2) (1895) 20 Bom. 747.

(3) (1900) 24 Bom. 482.

(4) (1906) 30 Bom. 466.

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held by this Court in *Vishnoo Trimback v. Tatia*<sup>(1)</sup> and *Gangabai v. Kalapa Dari Mukrya*<sup>(2)</sup> that when an Inam land is resumed, the resumption has merely the effect of converting the land from a service tenure into land liable to pay assessment to Government. In *Vishnoo Trimback v. Tatia*<sup>(1)</sup>, it was said by Sausse, C. J. :—

“The estate, then, which an Inamdar, in occupation by himself or his creditors, has in the lands, is a right to hold them exempt from payment of land revenue during the period or upon the conditions mentioned in the grant; and upon failure of either, a right to hold the lands to him and to his heirs so long as he or they shall pay the land revenue. This latter right is in the nature of a lease forever rendering rent, and is clearly a valuable interest, which can be made the subject of mortgage or sale by the party in possession.”

Then in *Gangabai v. Kalapa Dari Mukrya*<sup>(2)</sup>, it was said :—

“When an Inam is resumed, the Inamdar's right to exemption from the payment of the Government assessment ceases. He thereafter becomes liable to pay such assessment; but all his other rights remain unaffected.”

Therefore, defendant No. 3 who came into possession of this property as mortgagee of the plaintiffs, the original Desais, could not turn round after the order of forfeiture and take the benefit of it and challenge the validity of the mortgage in virtue of which his title to the land as mortgagee had begun. That title remained unaffected by the resumption of the Inam.

On these grounds the decree of the lower appellate Court must be confirmed with costs.

*Decree confirmed.*

R. R.

(1) (1863) 1 Bom. H. C. R. 22.

(2) (1885) 9 Bom. 419.