Rule 5 of the Code. Under that Rule, therefore, we refer to the Court of first instance the dispute as to the amount or value of the property which must be involved directly or indirectly by the decree or final order in this appeal. It is conceded that the Sutarel property is no part of the property in suit which is concerned only with the property at Derol. The Court of first instance will take evidence and report on the question referred to it.

SHAH, J. :—I entirely agree.

Order accordingly.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt. Chief Justice and Mr. Justice Heaton.

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February 15.

CHHITA BHULA (ORIGINAL DEFENDANT No. 3), APPELLANT *v.* BAI JAMNI, DAUGHTER OF BHIMA BHULA (ORIGINAL PLAINTIFF), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879)—Redemption suit—Tagavi advance by Government, nature of—Auction sale for non-payment of the advance—Benami purchase by the mortgagee—Advantage gained in derogation of the rights of the mortgagor—Purchase enures for the benefit of the mortgagor—Indian Trusts Act (II of 1882), section 90—Transfer of Property Act (IV of 1882), section 76, clause (c)*—Land Revenue Code (Bom. Act V of 1879) sections 56, 153—Land Improvement Loans Act (XIX of 1883), section 7.*

One B passed a San mortgage of the properties in suit in favour of N on the 20th September 1894. After B's death his widow K, for herself and on behalf of her minor daughter, the plaintiff, executed a fresh possessory mortgage in favour of defendant No. 1. in 1903 and put him in possession. Before the date of this mortgage K had obtained a *tagavi* advance from Government on Survey No. 311 which was included in the mortgage. In 1905 Survey No. 311 was sold by public auction for the arrears of *tagavi*

* Second Appeal No. 41 of 1915.

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and was purchased by defendant No. 1 through his gumasta defendant No. 2. On the 4th August 1909 defendant No. 1 assigned his mortgage rights to defendant No. 3 and on the same day defendant No. 2 sold Survey No. 311 to defendant No. 3. In 1912 the plaintiff sued to redeem the survey number along with the other mortgaged property under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The defendant No. 3 contended that since the sale the plaintiff had no right left in Survey No. 311 and was not entitled to redeem it. On these pleadings the question arose for consideration whether the *tagavi* dues were a charge of public nature which the mortgagee was bound to pay and whether the sale having taken place the provisions of section 56 of the Land Revenue Code would apply so as to leave no room for the application of section 90 of the Indian Trusts Act with reference to the conduct of the mortgagee.

Held, that the *tagavi* advance was a charge of a public nature within the meaning of clause (*c*) of section 76 of the Transfer of Property Act, 1882. It was a Government demand accruing due in respect of the land while it was in possession of the mortgagee.

Held also, that the sale having taken place owing to the default of the mortgagee, section 90 of the Indian Trusts Act applied.

Held, further, that section 56 of the Land Revenue Code did not apply as it was held as a fact that there had been no forfeiture such as would be a necessary condition precedent under section 153 of the Land Revenue Code to the application of the provisions of section 56 for the purposes of recovering dues as arrears of land revenue.

SECOND appeal against the decision of P. T. Taleyar-Khan, District Judge of Broach amending the decree passed by B. H. Desai, Subordinate Judge at Ankleshwar.

Suit for redemption.

The properties in suit were originally mortgaged in San by one Bhima (plaintiff's father), to defendant No. 1's grandfather Narotum on the 20th September 1894.

After Bhima's death his widow, Kohili, for herself and on behalf of her minor daughter, the plaintiff, executed a fresh possessory mortgage in favour of defendant No. 1 in 1903, and put him in possession. Before the date of this mortgage Kohili had obtained

a *tagavi* advance from Government on Survey No. 311 which was included in the mortgage.

In 1905 the Survey No. 311 was sold by public auction for the arrears of the *tagavi* amounting to Rs. 26-10-0, and was purchased by defendant No. 1 through his gumasta defendant No. 2 for Rs. 27-10-9.

On the 4th August 1909, defendant No. 1 assigned his mortgage rights to defendant No. 3 and on the same day defendant No. 2 also sold Survey No. 311 to defendant No. 3.

In 1912 the plaintiff brought a suit to redeem and to recover possession of the plaint properties under the provisions of the Dekkhan Agriculturists' Relief Act, 1879.

The defendant No. 3, who was the plaintiff's paternal uncle and also the mortgagee's tenant of the mortgaged property, contended *inter alia* that since the auction sale the plaintiff had no right left in Survey No. 311 and was not entitled to redeem it; that the claim in regard to the land was barred by limitation.

The defendants Nos. 1 and 2 did not appear at the trial.

The Subordinate Judge held that the purchase by the mortgagee had enured for the plaintiff's benefit; that defendant No. 3 was not a *bona fide* purchaser without notice and was in the same position as the mortgagee; that the claim in regard to the Survey No. 311 was not time-barred as contended. A decree was, therefore, passed allowing the plaintiff redemption of all the properties including Survey No. 311.

The District Judge, in appeal, confirmed the decree on the following grounds :—

"All these facts taken together warrant the conclusion that in allowing the land to be sold for the *tagavi* dues and buying it himself through defendant No. 2, the first defendant had availed himself of his position as mortgagee

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to gain an unfair advantage in derogation of the rights of the plaintiff who was then a minor. That being so, section 90 of the Indian Trusts Act applies and the purchase must be held to have enured for the benefit of the plaintiff, subject to repayment by her of the money expended by defendant No. 1 in purchasing the property. It is, however, contended that section 56 of the Land Revenue Code precludes the application of section 90 of the Indian Trusts Act to the facts of the present case. Section 56 of the Land Revenue Code is construed by the appellant's pleader to mean that where land is forfeited for arrears of land revenue (or *tagavi*) and then disposed of by sale, no person can claim any equity against the purchaser unless the Collector otherwise directs. In the first place, however, there is nothing on the record to show the sale in the present case was preceded by forfeiture. On the contrary, it appears from the sale certificate, Exhibit 14, that the land was sold as the property of the defaulter, Kohili, and not as Government land. It is, however, urged that the sale must have been preceded by forfeiture as sections 150, 153 and 155 of the Code, show that the land in respect of which arrears of revenue are due cannot be sold without forfeiture in the first instance, though other land of the defaulters cannot be sold without such preliminary ; and under section 7 (*c*) of the Land Improvement Loans Act (XIX of 1883), a loan granted under the Act is recoverable 'out of the land for the benefit of which the loan has been granted—as if they were arrears of land revenue due in respect of that land.' It may, however, be that the expression 'out of the land' was understood to mean that arrears of *tagavi* could, unlike arrears of land revenue, be recovered by sale of the land in respect of which they were due without the preliminary process of forfeiture. Having regard to the wording of the sale certificate and the absence of any evidence that the sale was preceded by forfeiture, I must take it that the land was, in fact, sold without any such preliminary. But even if it was otherwise it could, in my opinion, make no difference in the application of section 90 of the Trusts Act to the facts of this case. For all that section 56 of the Land Revenue Code lays down is that the land when disposed of by sale or otherwise 'shall, unless the Collector otherwise directs, be deemed to be freed from all tenures, rights, incumbrances and equities theretofore created in favour of any person other than Government in respect of the land.' This evidently refers to tenures, rights, incumbrances and equities created by the owner of the land in favour of third persons previous to the disposal of the land by the Collector. It is these, and these only, which cease to subsist on the land being sold or otherwise disposed of. The equity, however, which the plaintiff claims in this case, had arisen in favour of the owner of the land, and it had arisen on the land being purchased by defendant No. 1 at the auction sale and did not subsist before. The equity that had arisen was that the purchase had enured for the benefit of the plaintiff, or to use the words of section 90 of the Indian Trusts Act, the

plaintiff was entitled to the benefit of the advantage which defendant No. 1 had gained in derogation of her rights by availing himself of his position as mortgagee. It may further be noted that the proviso to section 7 of the Land Improvement Loans Act supersedes the provisions of section 56 of the Land Revenue Code in the case of sale of land for the realization of arrears of *tagavi*.

The defendant No. 3 appealed to the High Court.

T. R. Desai, for the appellant :—The following questions arise on the facts: (1) Whether *tagavi* advances granted to the mortgagor by the Government are charges of a public nature which the mortgagee is bound to pay under section 76 of the Transfer of Property Act, 1882 ; (2) what is the effect of sale of equity of redemption of the mortgagor for default in payment of *tagavi* advances under section 56 of the Land Revenue Code, 1879.

As to the first point we submit that the *tagavi* advances are neither arrears of rent nor are charges of a public nature within the meaning of section 76, clause (*c*) of the Transfer of Property Act, 1882. They are not arrears of land revenue and though they may be recovered as such, that does not make them "public charges:" see section 5, Agricultural Loans Act (XII of 1884), and section 7, Land Improvement Loans Act (XIX of 1883). The *tagavi* was an advance to the mortgagor and if there was default in payment on his part there was no liability on the mortgagee to pay. If so, the mere fact that the mortgagee's man purchased at the revenue auction sale could not bring the case within section 90 of the Indian Trusts Act (II of 1882). The mortgagee could not be said to have availed himself of his position as such, as contemplated by that section. There was no gain in derogation of mortgagor's rights when the mortgagor deliberately committed default.

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Secondly, in any case, section 56 of the Land Revenue Code, 1879, bars any right whatever of the mortgagor. There was a forfeiture for default followed by sale. As held in *Vedu Shivlal* v. *Kalu Ukhardu* [1] the property sold goes to the purchaser free of all incumbrances.

B. F. Dastur, for the respondent :—Defendant was uncle of the minor. He knew all the facts. He was thus in the position of a trustee and not a mere outsider. Besides the mortgage deed should be read in a broad comprehensive sense. The term "Government dues" in that deed would include *tagavi* advances ; so there was a covenant to pay and section 90 of the Indian Trusts Act would apply. In that case it would be a finding of fact, for, the lower Courts held that defendant No. 1 took advantage of his position and sought to make profit by *benami* purchase in the name of his clerk. The defendant No. 3 stands in the shoes of his alleged vendors and cannot resist the redemption suit as to Survey No. 311.

We further submit that section 56 of the Land Revenue Code cannot apply. It cannot over-rule section 90 of the Indian Trusts Act. The circumstances in *Vedu Shivlal* v. *Kalu Ukhardu* [1] were different.

SCOTT, C. J. :—From the year 1894 to 1903 the 1st defendant was a San mortgagee of certain lands mortgaged to him by the plaintiff's father. In 1900, the mortgagor died, and in the following year his widow Kohili for the benefit of those interested in the property took an advance by way of *tagavi* from the Mamlatdar, and gave a charge upon one of the survey numbers, namely 311, as collateral security for payment of the loan. In June 1903, acting on behalf of herself and the plaintiff, her minor daughter, she executed a mortgage

[1] (1913) 15 Bom. L. R. 827.

deed with possession in favour of the 1st defendant, and put him in possession of all the property previously charged under the San mortgage including the Survey No. 311. The plaintiff has brought this suit in 1912 to redeem, she being entitled to the benefit of the Dekkhan Agriculturists' Relief Act.

The only question in the appeal is with reference to Survey No. 311. That survey number was sold in or about 1906 to satisfy the claim of Government in respect of the *tagavi* advance, and it was purchased ostensibly by the 2nd defendant who was the *gumasta* of the 1st defendant, mortgagee. From him it was subsequently purchased by the 3rd defendant who is the uncle of the plaintiff and who had for many years been cultivating the land as tenant under the mortgagee, and prior to the mortgage under the mortgagor. The 3rd defendant claims to be entitled to hold Survey No. 311 free from any liability to be redeemed by the mortgagor. Upon the findings of the lower Court he must be held to have had notice of everything that occurred in connection with the property, and cannot claim the position of a *bona fide* purchaser without notice of Survey No. 311, if there were in fact any claims enforceable against the vendor with reference to that plot. It must also be taken on the findings of fact of the lower Courts that the 2nd defendant, purchaser, was a *benamidar* for the 1st defendant, mortgagee.

It is contended on behalf of the plaintiff that the mortgagee has in effecting the purchase availed himself of his position as mortgagee to gain an advantage in derogation of the rights of the mortgagor. If the sale took place at the instance of the Mamlatdar in consequence of some wilful default on the part of the mortgagee, it may fairly be said that in acquiring the property through his *benamidar* at such sale he has availed himself of his position as mortgagee to gain an advantage of

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the kind spoken of in section 90 of the Trusts Act. The question therefore is whether the sale took place owing to his default. Section 76 of the Transfer of Property Act lays down that "when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, and all other charges of a public nature accruing due in respect thereof during such possession." So far from there being no contract to the contrary in the mortgage deed, the mortgagee agrees henceforth to pay all Sarkari claims in relation to the property. The expression which we have translated "claims" is an expression which is not usual to describe merely Government revenue. The point has been dealt with by the learned District Judge as follows:—"Are *tagavi* dues 'a charge of a public nature' within the meaning of clause 76 (*c*). I think they are. I think that the clause should be liberally construed, as it has for its object the protection of the land from forfeiture or sale for default in payment of Government demand accruing due in respect of the land while it is in the possession of the mortgagee." It is clear, therefore, that he had in his mind the question whether this was a Government demand accruing due in respect of the land while it was in the possession of the mortgagee, and he comes to the conclusion that it was. It is argued that as the *tagavi* advance preceded the mortgage with possession, it would not be a Government demand accruing due in respect of the land while in the possession of the mortgagee. That is a question which might have been settled by evidence, if it had been put in issue in the lower Court: the learned Judge feels no doubt as to what the answer should be, and we are not prepared in Second Appeal to entertain any doubt as to the correctness of his finding. That being so, section 90 of the

Trusts Act would apply, because the sale has taken place owing to the default of the mortgagee. But it was said that once the sale takes place the provisions of section 56 of the Land Revenue Code would apply, and, if so, there would be no room for the application of section 90 with reference to the conduct of the mortgagee, as such, because *ex-hypothesi* the operation of section 56 of the Land Revenue Code would have extinguished all rights of the mortgagee. We are of opinion that section 56 of the Land Revenue Code does not apply, as it has been held as a fact that there has been no forfeiture such as would be a necessary condition precedent under section 153 of the Land Revenue Code to the application of the provisions of section 56 for the purpose of recovering dues as arrears of land revenue. The argument also appears to us to be slightly circuitous, because *ex-hypothesi* it is by reason of his default as mortgagee, and by his improperly availing himself of his position as mortgagee that the sale has taken place. How then can it be said that he is to obtain immunity from his breach of trust by reason of the extinction of his position as mortgagee through his fraudulent action as mortgagee? This it appears to us is also the answer to a point which we do not think was appreciated by the learned District Judge, a point of the same nature as that argued under section 56 of the Land Revenue Code, and based upon the words of the proviso to section 7 of the Land Improvement Loans Act, which by implication would put an end, upon the sale by the Collector for recovery of a Government loan, to the interest of the borrower and of the mortgagee of that interest. For these reasons we think that the decree of the lower appellate Court was right and should be affirmed with costs.

Decree confirmed.

J. G. R.