

must go back to the lower appellate Court in order that it may determine the mortgagee's liability with respect to the lands mentioned in para. 3 of the judgment. It will then be in the mortgagee's interest to arrange with the persons who are in possession to restore possession to the plaintiff. But if those persons do not restore possession, then certainly the mortgagee will be liable. The Court will return its findings to this Court within six months.

The plaintiff must get his costs of the appeal here and in the District Court.

Case remanded.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

VINAYAK DATTATRAYA JOSHI AND OTHERS (ORIGINAL DEFENDANTS NOS. 6 TO 9), APPELLANTS *v.* GANESH ANANT HASABNIS AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 5), RESPONDENTS^o.

Land Revenue Code (Bombay Act V of 1879), section 81†—Non-payment of assessment by registered occupant—Co-sharer of the occupant paying up arrears of assessment—Transfer of khata to co-sharer's name—Transfer does not affect occupancy rights of defaulter.

^oSecond Appeal No. 835 of 1918.

†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 continuance of the occupancy or that a sale (or other disposal) 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 (or otherwise disposing of) the occupancy to forfeit only the said registered occupant's interest in the same and to substitute the name of 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 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.

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In 1904, the plaintiff, a registered occupant of certain land, was dispossessed by defendant No. 1. On the plaintiff's failure to pay assessment on the land in the year 1904-05, the Collector took action under section 81 of the Land Revenue Code, when the plaintiff's co-sharer paid up the arrears due and the Khata of the land was transferred to his name. The plaintiff having sued in 1914 to recover possession of the lands the defendants contended that he had no title to sue upon, as his interest in the land was forfeited by the Collector :—

Held, negating the contention, that the plaintiff had a title to sue upon and his suit was within time, because the result of the action of the Collector under section 81 was that, though the registered occupant's interest of the plaintiff was gone, his occupancy rights in the land remained unaffected.

THIS was an appeal from the decision of J. H. Bettigiri, First Class Subordinate Judge, A. P., at Satara, confirming the decree passed by C. D. Pandya, Subordinate Judge at Islampur.

Suit to recover possession of land.

There was an award-decree between the plaintiff and the father of defendant No. 1 under which the former became entitled to the land in dispute. In execution of the decree the plaintiff obtained possession of the suit land in 1895.

On the 22nd July 1895, the plaintiff leased the land to one Dnyanu. The tenant having failed to deliver up possession at the termination of the tenancy, the plaintiff filed a possessory suit and obtained a decree in 1897. In 1898, the plaintiff again leased the land and received rent up to 1904.

In 1904, the plaintiff was dispossessed of the land by the defendants.

The plaintiff failed to pay assessment on the land for the year 1904-05. The Collector took action apparently under section 81 (now repealed) of the Land Revenue Code. One Shahaji, a co-sharer of the plaintiff, paid up the arrears of assessment due, and the Khata of the land was transferred to his name.

In 1914, the plaintiff filed the present suit to recover possession of the land from the defendants.

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The Subordinate Judge, who tried the suit, decreed it.

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On appeal the decree was confirmed by the lower appellate Court, on the following grounds:—

I am pressed to hold that the said order was passed under section 81 of the Land Revenue Code, since the plaintiff lands happen to be unalienated lands and not alienated lands as in the case in I. L. R. 20 Bom. 747. Granting this contention to be sound, I am clearly of opinion that what was forfeited by the Collector under section 81 above, was only *the registered occupant's interest of plaintiff* in plaintiff lands and not his ordinary occupancy rights in them. I am fortified in this view by the fact that sections 80 and 81 of the Land Revenue Code appear under a section of Chapter VI, bearing the title or heading "Remedies against forfeiture of occupancies." It is thus abundantly clear that what is and can be forfeited under section 81 above is only the privilege of the *khatedar* as such and not his ordinary occupancy rights in the lands of his *khata*.

Defendants Nos. 6 to 9 appealed to the High Court.

K. N. Koyajee, for the appellants:—The lower Courts erred in holding that only the registered occupant's interest of plaintiff was forfeited, and not his ordinary occupancy rights, under section 81 of the Bombay Land Revenue Code. A "registered occupant" has all the occupancy rights, only his name is entered in Government records as sole or eldest or principal occupant. The mere registry of his name is no right at all. The right is the occupancy right and that right is *forfeited* and transferred to his co-sharer under section 81. The plaintiff had, therefore, no interest left in the property and could not sue. *Bhau v. Hari*⁽¹⁾ has no application here as in that case there was no forfeiture. The lower Court erred in thinking that the order of forfeiture was passed under no section of the Bombay Land Revenue

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Code. The order was obviously passed under section 81. The heading "Remedies against Forfeiture of Occupancies" meant remedies for the relief of co-sharers, tenants, mortgagees or other persons interested, and not for the relief of the defaulting party whose occupancy was absolutely forfeited.

S. R. Bakhale, for respondent No. 1, not called upon.

P. B. Shingne, for respondent No. 5, not called upon.

MACLEOD, C. J.:—A curious point arises in this second appeal upon which there does not appear to be any authority. The facts are that the plaintiff's father obtained possession of the plaint lands on the 5th March 1895 in execution of an award decree. He then obtained a registered rent-note from one Dnanu Aba on the 22nd July 1895. In July 1897 he brought a possessory suit against Dnanu and got a decree for possession in August 1897. The plaintiff remained in possession of the land until 1904 and paid assessment. Then the Judge says that the plaintiff was dispossessed by the first defendant in 1904. How he was dispossessed does not appear. But in 1904-05 the Collector took action under section 81 of the Bombay Land Revenue Code as the plaintiff failed to pay assessment for that year. There was a mutation of the Khata of the plaint lands into the name of Shahaji Gondaji who was the plaintiff's co-sharer in the property, on his paying up the arrears due. It was not mentioned in the order that the Collector was acting under the powers granted to him by section 81, but it seems fairly obvious that he was acting under that section. The learned Judge held that the Collector then forfeited the registered occupant's interest and not his ordinary occupancy rights in the land.

The present appellants, defendants Nos. 6 to 9, who claim through the original first defendant, claimed

that the plaintiff's interest in the land was entirely forfeited in 1904, and, that, therefore, as they are in possession, the plaintiff not being able to sue on title must fail. But it must be admitted that the plaintiff had title in 1904, and we cannot find anything in section 81 to show that, if the Collector takes action under that section, and instead of selling or otherwise disposing of the occupancy rights, forfeits only the registered occupant's interest, the occupancy rights are also forfeited. Where do they go to? The Collector does not sell or otherwise dispose of them. He merely removes the registered occupant's name from the Khata and substitutes the name of somebody else who was already interested in the occupancy. In this case Shahaji Gondaji, the co-sharer of the plaintiff, became the Khatedar responsible to the Government for the assessment. He will be entitled to collect the proper share of assessment from the plaintiff, and if the plaintiff fails to pay, then he can take action under section 86. But the plaintiff's title remained. It was not sold, it was not disposed of; and, therefore, it is a case of a trespasser coming into possession of land, the owner of which would have twelve years within which to sue to assert his title and recover possession. We think the judgment of the lower appellate Court was right and the appeal must be dismissed with costs.

Appeal dismissed.

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