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that he was to pay enhanced rent or quit the land on or before the 10th April, 1880. The defendant replied that he was not liable to pay enhanced rent, that he held the land on payment of the Government assessment only, and that he could not be ejected, and he refused to quit. He did not quit on the 10th April, 1880, and he has continued to hold on ever since, paying the assessment only.

The plaintiff's present suit was brought on the 6th July, 1892, that is, more than twelve years from the 10th April, 1880. The defendant, therefore, so far as the right of the plaintiff to enhance the rent and to evict the defendant in default of payment is concerned, has been holding adversely to the plaintiff for more than twelve years, and the plaintiff's right to enhance the rent and to recover the land in default of payment of such rent has become lost by operation of the law of limitation. Section 23 of the Limitation Act (XV of 1877) has no application to the present case. We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

1895. *December* 17.

BA'BA'JI (ORIGINAL PLAINTIFF), APPLICANT, *v.* MAGNIRA'M AND OTHERS (ORIGINAL DEFENDANTS), OPPONENTS.*

Mortgage—Redemption—Mortgagee—Mortgagee taking other land in exchange for mortgaged land—Land so taken in exchange is subject to the mortgagor's right to redeem—Forest Act (VII of 1878), Sec. 10, Cl. (d)—Land Revenue Code (Bom. Act V of 1879), Sec. 56.†

* Application No. 166 of 1895.

† Section 56 of the Land Revenue Code (Bom. Act V of 1879):—

56. 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 any wise 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.

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In 1876, one Bábáji mortgaged certain land(Survey Nos. 51 and 52) to Sangápa,who died, and his brother Gautápa succeeded him. The Forest Department being desirous of acquiring the mortgaged land entered into negotiations with Gautápa, who admitted that he was only a mortgagee. Báháji (the mortgagor) had left the village and could not be found. Under these circumstances it was arranged that Gautápa should allow the assessment to fall into arrear, upon which Government would forfeit the holding and that Gautápa should receive other land (Survey No. 105) in exchange. This arrangement was actually carried out; Gautápa received Survey No. 105 in exchange for the mortgaged land. In the order giving the land in exchange, Gautápa was styled mortgagee. The heir of Bábáji (the mortgagor) subsequently brought this suit to redeem Survey No. 105 from the mortgage of 1876. The defendant contended that this land was not subject to the mortgage and that by the exchange Gautápa had acquired the full ownership in it.

Held, that the plaintiff was entitled to redeem Survey No. 105. The mortgagee, Gautápa,had lost the mortgagor's equity of redemption in the mortgaged land by fraud, and the land (Survey No. 105) which he obtained in exchange was, therefore, subject to the mortgage. He held the equity of redemption in this land as trustee for the mortgagor.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of C. H. Jopp, Special Judge under the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) reversing the decree of Ráo Sáheb Rámchandra Vyankatesh Patki, Subordinate Judge of Sholápur.

In 1876, one Bábáji mortgaged certain land (Survey Nos. 51 and 52) to Sangápa. Sangápa died, and his brother Gautápa entered into possession of the land. The Forest Department subsequently desired to acquire the mortgaged land (Survey Nos. 51 and 52) and entered into negotiations with Gautápa, who admitted he was only the mortgagee. Bábáji, the mortgagor, had left the village and could not be found. Under these circumstances it was arranged between Gautápa and the Forest Department that Gautápa should allow the assessment to fall into arrear, upon which Government would forfeit the holding, and then Gautápa should receive other land (Survey No. 105) in exchange (Forest Act VII of 1878, section 10, clause (*d*)). This arrangement was carried out, and Survey No. 105 was given to Gautápa in exchange for the mortgaged land.

The present suit was brought by the heir of Bábáji (the mortgagor) to redeem the land so acquired by Gautápa (Survey No. 105) from the mortgage of 1876.

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The defendants (mortgagors) contended (*inter alia*) that Survey No. 105 was not subject to the mortgage, and that Gautápa had become absolute owner of the land obtained by him in exchange for the mortgaged land.

The Subordinate Judge allowed the claim. The defendant under section 54 of the Dekkhan Agriculturists' Relief Act applied for revision to the Special Judge, who reversed the decree and rejected the claim. The Special Judge framed six issues for decision, the fourth of which was as follows :—

"4. If Survey Nos. 51 and 52 were mortgaged by Bábáji to Sangápa, can plaintiff sue to redeem No. 105 ?"

On this issue the finding was—

"4. Even if Survey Nos. 51 and 52 were mortgaged by Bábáji to Sangápa, plaintiff cannot sue to redeem No. 105."

The plaintiff applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* requiring defendant No. 4 to show cause why the decision of the Special Judge should not be set aside.

Purushottam P. Khare appeared for the applicant (plaintiff) in support of the rule :—Gautápa, the mortgagee, could not defeat the rights of the mortgagor by any arrangement made with the Forest Department—*Bálkrishna* v. *Mádhavráv*[1]. The mortgagee must make over to the heirs of the mortgagor the property he acquired by way of compensation for the loss of mortgaged property.

Ganesh S. Daudavate appeared for the opponent (defendant) to show cause :—The mortgaged lands were forfeited to Government and Government now stands in the place of the mortgagee. The plaintiff should sue Government for redemption. He has no claim against Survey No. 105.

PARSONS, J. :—The finding of the Special Judge on his fourth issue would be right if Gautápa transferred to Government his rights as mortgagee only in Survey Nos. 51 and 52 and if Government were now in the position of mortgagee. The Judge has not found this. The history of the case shows the contrary.

(1) I. L. R., 5 Bom., 73.

The Survey Nos. 51 and 52 had been mortgaged by Bábáji to Gautápa's deceased brother. The Forest Department wanted to acquire these lands and entered into negotiations with Gautápa. Gautápa admitted he was only the mortgagee. The mortgagor had left the village and could not be found. Under these circumstances, it was arranged between Gautápa and the Forest Department that Gautápa should allow the assessment to fall into arrears, upon which of course Government would forfeit the holding, and that then Gautápa should receive Survey No. 105 in exchange. Such compensation could be given under section 10, clause (*d*), of the Forest Act, 1878. This arrangement was actually carried out. Gautápa did not pay the assessment. Under section 56 of the Land Revenue Code, Survey Nos. 51 and 52 were entered as Government waste land, and Survey No. 105 was given to Gautápa. It is to be noted that in the order giving him the land he is styled the mortgagee Gautápa. Under these circumstances, it is impossible to hold otherwise than that Gautápa received Survey No. 105 as compensation for his own rights as mortgagee of Survey Nos. 51 and 52 and for the rights of the mortgagor, their occupant. By non-payment of the assessment, the whole holding became liable to forfeiture, and the forfeiture that ensued extinguished the rights of the mortgagor who could no longer maintain his equity of redemption against Government in whom the land became vested. Had the holding been sold, the purchaser would have taken an absolute title. If, however, Gautápa had been the purchaser, as the forfeiture was the result of his own fraud and default, he could not have claimed to hold as other than trustee for the mortgagor. See *Bálkrishna* v. *Mádhavráv*[1]. The fact that there was no sale but that the Government took the land itself and gave Gautápa Survey No. 105 in lieu thereof does not, in our opinion, alter the position of Gautápa. He is a trustee for the mortgagor of the latter's equity of redemption which he had caused to be lost out of his hands by his own fraud. He obtained Survey No. 105 as the compensation or price of Survey Nos. 51 and 52, and as the rights of the parties in the latter numbers are transferred to the former he obtained the

(1) I. L. R., 5 Bom., 73.

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former to hold just as he held the latter, *viz.*, as mortgagee for the occupant Bábáji and his heirs. See *Virarágava* v. *Krishnasami* (1). The Special Judge, therefore, acted illegally in reversing the decree of the Subordinate Judge on his finding on his 4th issue, and we must reverse his order and remand the case to him in order that he may dispose of the other points at issue before him. The opponent must pay the costs of this rule.

Order reversed.

(1) I. L. R., 6 Mad., 344 at p. 347.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

1895 December 12.

NAVAZBA'I (ORIGINAL DEFENDANT No. 1), APPLICANT, *v.* PESTONJI RATANJI (ORIGINAL PLAINTIFF), OPPONENT.*

Executor—Executor de son tort—What constitutes an executor de son tort—Liability of such executor to creditors of deceased—Intermeddling with estate after order for probate made but before issue of probate—Receipt of assets with consent of person appointed executor—Indian Succession Act (X of 1865), Sec. 255—Act XL of 1858.

Probate is necessary to complete the title of a rightful executor, and until it is actually taken out, a person intermeddling with the assets constitutes himself executor *de son tort*.

The executrix appointed by the will of one Jamsetji Jehángir applied to the High Court for probate of the will, and Navazbai, the widow of Jamsetji, entered a caveat. By a consent decree, dated 25th February, 1892, it was ordered that probate should issue to Ratanbai, and by the same decree it was declared that Ratanbai as executrix was not entitled to a sum of Rs 4,178-10 or any other sum or sums of money to be received from the B. B. and C. I. Railway Company. In that same year Navazbái obtained payment from the Railway Company of the said sum of Rs. 4,178-10 and of another sum of Rs. 166 due to the deceased. On the 3rd February, 1893, probate was issued to Ratanbai. In 1894 the plaintiff sued Navazbái and Ratanbái for Rs. 165 due to him by the deceased Jamsetji. He claimed against Navazbái as executrix *de son tort*.

Held that probate not having actually issued to Ratanbai at the time that Navazbái received the money from the Railway Company although an order for probate had been made, she had by receiving it constituted herself executrix *de son tort* and was, therefore, liable to the plaintiff, and could be joined as co-defendant with Ratanbái in the suit.

* Application No. 81 of 1895 under the extraordinary jurisdiction.