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a construction of the will of a Hindu testator as would give to his widow unqualified control over his property. By the use of such expression as "my wife is the owner after me" or "my wife is the heir" it is usually understood that the testator is providing for the succession during the life-time of the widow and not altering the line of inheritance after her death. In the present case the testator is no doubt very emphatic in his declarations that his wife is to be the owner after his death, in one passage stating that just as he is the owner so she is to be the owner. The phrase is, however, ambiguous. It may mean that he intended emphatically to protect her peaceable possession and management during her life-time against the claims of the husbands of his daughters and their own: or it may be intended to confer as full ownership and power over the property as he had. The latter construction did not, however, occur to the parties or to the Court below. It is suggested here for the first time in appeal. If it were the clear and only construction of the will we should have been forced to give effect to it even now, but it is not. We entertained during the argument and still entertain doubts as to what the testator really intended, but the appellant's pleader has failed to convince us that the construction put upon the will by the lower Court is erroneous. We confirm, therefore, its decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

GANPATI (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGA'RA'M AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Land Revenue Code (Bom. Act V of 1879), Secs. 56, 57, 150 and 153—Sale for arrears of assessment—Confirmation of sale by Collector—Forfeiture—Declaration of forfeiture—Sale not invalid although no declaration of forfeiture.

A sale of a holding for default of payment of assessment is not invalid although prior to the sale there has been no declaration of forfeiture by the Collector. The declaration is not so essentiallya necessary preliminary of a sale that without it the sale is illegal and invalid. The fact that a sale has taken place is *primâ facie* evidence that forfeiture had been declared.

* Second Appeal, No. 780 of 1894.

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SECOND appeal from the decision of A. Steward, District Judge of Ahmednagar, confirming the decree of Ráo Sáheb G. N. Kelkar, Subordinate Judge of Sangamner.

On the 21st February, 1880, certain land of which one Mukta Vithu was the registered occupant was sold for arrears of assessment due to Government. Mukta was then in possession of part of the land; the rest was in the possession of other persons who were apparently not the registered occupants. At the sale one Yeshvant became the purchaser and he afterwards resold one-third of it to Mukta and assigned the remaining two-thirds to the plaintiff.

In 1892 the plaintiff sued the defendants to recover possession of the two-thirds share assigned to him, alleging that they were in possession, but he did not know under what title.

The defendants answered (*inter alia*) that their land was never sold to their knowledge; that they had never been out of possession, and that they had no knowledge of the assignment by Yeshvant to plaintiff. The Subordinate Judge dismissed the suit.

On appeal by plaintiff the Judge raised only one issue, *viz.*, as to the validity and binding effect of the revenue sale. He held that the sale was invalid and not binding on the defendants and he confirmed the decree. The following is an extract from his judgment:—

"This sale took place in 1880, and Government Resolution No. 4000, dated 31st July, 1879, the last day of the revenue year, directs that failure in payment of land revenue makes the occupancy liable to forfeiture. The Collector is empowered to declare the occupancy forfeited at any time after the arrears is due. Forfeiture takes place when the Collector declares it. He can declare it at the end of the period named in the notice. There is nothing to show that in this case the holding was forfeited before it was sold for default in payment of assessment; there was no declaration of forfeiture by the Collector. I agree with the Subordinate Judge in holding that the sale is not valid or binding on respondents. Assuming, however, that the sale was valid and binding, it rather appears to me, as it does also to the Subordinate Judge, that there was some collusion between Mukta and Yeshvant Sonwani, the purchaser at the revenue sale. I think that Yeshvant Sonwani was merely the nominal purchaser, and this would appear to be the case from the fact that the *status quo ante* remained, and that no attempt was made for eleven years to oust those who had occupied the land before the revenue sale. Yeshvant Sonwani afterwards disposed of his right such as it was under the revenue sale to the present plaintiff. What his object in doing this was does not appear, more especially as he admits

having resold to the khatedár Mukta his share of the land in dispute, though it was included in the revenue sale. This lends belief to the theory that at the revenue sale the purchase by Yeshvant Sonwani was collusive, at any rate as regards Mukta. The plaintiff brought this suit in the twelfth year to recover possession, if possible, of his two-thirds share in the land which was conveyed to him by Yeshvant Sonwani. He could not gain more by his assignment than Yeshvant had gained in his purchase at the revenue sale and that was nothing, as the sale was invalid. This fact also renders the suit time-barred, for the adverse occupation of defendants extended back for some time before the revenue sale and for eleven years afterwards; the defendants have clearly been in possession of the land in their own right for more than twelve years. As I agree with the Subordinate Judge in considering the sale invalid, because prior to it there was no declaration of forfeiture by the Collector, I confirm the decree."

The plaintiff preferred a second appeal.

Ghanashám N. Nádkarni for the appellant (plaintiff):—The Judge did not raise proper issues. There is no dispute as to the sale having taken place for arrears of assessment. The first question that ought to have been determined is whether the entire holding was sold, or whether only a share therein was sold. We contend that as the sale was effected against Mukta, the registered occupant of the holding, the entire holding was sold free of incumbrances. Even if there be nothing on the record to show that there was declaration of forfeiture prior to sale, still as the sale did actually take place, forfeiture must be presumed. But we submit that there is no provision of the Land Revenue Code which makes it incumbent upon the Collector to declare a forfeiture in the case of every sale. The Code provides for forfeiture, but does not lay down that a sale without forfeiture shall be invalid. Whether there was a forfeiture or no, the property having been sold for crown-debt, the purchaser acquired title to it.

Gangárám B. Rele for the respondents (defendants):—Under the provisions of the Land Revenue Code forfeiture prior to revenue sale is necessary. The provision as to forfeiture in the Code would be nugatory if sales without prior forfeiture were upheld. We rely on *Govind* v. *Bhiwa*[1]. The Judge has found that the sale was collusive.

PARSONS, J.:—The Judge of the lower Court evidently is of opinion that a sale duly confirmed by a Collector of a holding

(1) P. J. for 1895, p. 70.

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for default of payment of assessment is invalid if prior to the sale there was no declaration of forfeiture by the Collector. I can find no authority for such a proposition. The cases cited, *Venktesh* v. *Mhál Pai*[1] and *Dasharatha* v. *Nyáhálchand*[2], do not decide this. Section 56 of the Land Revenue Code enacts that a failure to pay arrears of land revenue makes the holding liable to forfeiture, whereupon, that is to say in which case, the Collector may sell the holding. Section 153 enacts that the Collector may declare the holding to be forfeited to Government and sell or otherwise dispose of the same. A declaration of forfeiture may be necessary for some purposes, *e. g.*, it was admitted, I will not say whether rightly or wrongly, to be necessary to extinguish existing incumbrances in *Govind* v. *Bhiwa*[3], but I cannot hold that it is so essentially a necessary preliminary of a sale that a sale without it would be altogether illegal and invalid.

Again, the only reason why the lower Court has held that there was no declaration of forfeiture is because there is no written declaration of such filed among the sale proceedings. This is quite insufficient to justify a finding in the negative on a point that was not taken by the defendants and on which there was no issue. It is nowhere said in the Act that the declaration must be in writing, and I think that evidence ought to have been taken by the Court before the point was decided in the negative. The fact that a sale has taken place is to my mind strong *primâ facie* evidence that forfeiture had been declared. The Division Bench in *Govind* v. *Bhiwa*[3] apparently was of a contrary opinion. The point is not one of any importance, since by proper enquiry it can be definitely determined in each case whether a forfeiture has been declared or not. In the present case such a determination is unnecessary. Had it been necessarary I should have ordered further enquiry.

The decision, then, of the District Judge as to the invalidity of the sale being wrong, his decree must be reversed and the appeal remanded for disposal on the merits. I do not wish in any way to prejudge those merits; but the remarks that he has made

(1) I. L. R., 15 Bom., 67. (2) I. L. R., 16 Bom., 134.
(3) P. J. for 1895, p. 70 at p. 72.

oblige me to say that the chief point for determination is whether the whole occupancy holding or only Mukta's rights in it were sold, and this has to be found from the sale proceedings. Unless the sale was brought about fraudulently by the collusion of Mukta and Yeshvant, collusion between them at the sale or afterwards would hardly affect the position of the plaintiff, who is apparently a *bonâ fide* purchaser for value from Yeshvant. Then as to limitation, it seems to me that the plaintiff clearly has twelve years from the date of the sale within which to bring his suit, and that the possession of the defendants prior to the sale cannot possibly be added to their possession after the sale.

We reverse the decree of the lower appellate Court and remand the appeal for disposal on the merits with reference to the above remarks. Costs to be costs in the cause.

CANDY, J.:—Mukta was the registered occupant of a certain survey number. He was in possession of part of the land, the rest being in possession of other persons, but these other persons were apparently not registered occupants or recognised in the village records. The occupancy was sold by the revenue authorities on 21st February, 1880, for arrears of assessment due for 1878-79. The sale certificate (3) and Exhibit 31 show that the Mámlatdár reported that owing to disputes among the sharers the assessment had not been paid. One Yeshvant purchased the occupancy, and the sale was confirmed by the Assistant Collector. Yeshvant did not attempt to take possession of his purchase, but conveyed to Mukta for consideration the one-third share of the field which Mukta was cultivating. Yeshvant assigned his rights in the remaining two-thirds to plaintiff, who filed this suit in January, 1892, to recover possession of the two-thirds.

The Subordinate Judge dismissed the suit for several reasons. Plaintiff appealed to the District Judge, who framed one issue only, *viz.*, whether the revenue sale in 1880 was valid and binding. He found that it was invalid and not binding. He also made some remarks on other points in the case, assuming that the sale was valid and binding. But he gave no finding on those points.

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Plaintiff has made a second appeal to this Court; and the only point argued before us was whether the District Judge was wrong in holding that the revenue sale in 1880 was invalid and not binding because there was nothing to show that the holding was forfeited before it was sold for default in payment of assessment. He found, in short, that Yeshvant bought "nothing, as the sale was invalid." In my opinion the District Judge was wrong.

Under sections 150, 153 of the Land Revenue Code the Collector may recover an arrear of land revenue by forfeiture of the occupancy in respect of which the arrear is due, and selling the same under the provisions of sections 56, 57. Here the revenue records show that the "occupancy" of Mukta was sold for default of payment of assessment due on that occupancy. It could not be sold without forfeiture, because it was the occupancy in respect of which the arrear was due. Under section 155, Mukta's occupancy of any other land could have been sold without forfeiture. But when the occupancy of the defaulting occupant in the land in respect of which the arrear was due was sold, then *ex hypothesi* the occupancy was forfeited. There is no provision in the Land Revenue Code that in the case of such a sale of an occupancy there must be a formal written declaration of forfeiture, and there is no form for such in the Act or in the Rules under the Act. It is not analogous to attachment under the Civil Procedure Code, which is necessary to render a sale valid. By section 56 failure in payment of arrears of land revenue makes the occupancy liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy. In the present case the District Judge does not deny the liability to forfeiture of the occupancy, whereupon the sale of the occupancy has taken place. But because there is not on the record a declaration of forfeiture by the Collector, the sale is held not valid.

I cannot agree with that view. Mr. Rele referred us to the decision of this Court in *Govind* v. *Bhika*[1]. No doubt in that case the purchaser of an occupancy which was sold for arrears of assessment and given into the possession of the purchaser was ejected by the Court at the suit of an incumbrancer of the pre-

(1) P. J. for 1895, p. 70.

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vious occupant, on the ground that in the absence of evidence of an actual forfeiture the Court was bound to hold such forfeiture unproved. But it is to be noted that the Judges in that case did not express any opinion as to the presumption to be drawn from a sale taking place subsequent to the liability to forfeiture. They said that the existence of forfeiture "could not properly be assumed as a fact from the mere legal consequence of failure to pay arrears of assessment." But they did not say that forfeiture could not be presumed to have taken place when the Collector proceeded to sell the occupancy, his right to do so being founded on the liability of the occupancy to forfeiture and sale. Of course if in any case there is direct evidence that the Collector omitted or refused to declare a forfeiture, and yet proceeded to sell, the validity of the sale and of the consequences, which would follow from a valid sale, may well be questioned. But I have confined myself to the present case, and for the reasons given am of opinion that we cannot hold the sale invalid simply because there is no written declaration of forfeiture. I have not touched upon the several important questions raised by the Subordinate Judge. These no doubt will be duly considered by the District Judge when he rehears the appeal.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Strachey.

1895.
December 11.

VISHNU GANESH JOSHI AND ANOTHER (ORIGINAL PLAINTIFFS), APPLICANTS, *v.* YESHAVANTRA'O AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

Small Cause Court—Jurisdiction—Provincial Small Cause Courts Act (IX of 1887*), Sec.* 25, *Sch. II, Arts.* 4 *and* 13*—Hereditary allowance—Immoveable property—Registration Act (III of* 1877*), Secs.* 3 *and* 17*—General Clauses Act (Bom. Act III of* 1886*)—Civil Procedure Code (Act XIV of* 1882*), Sec.* 252.

Plaintiffs sued in the Court of Small Causes at Poona to recover Rs. 400 for arrears alleged to be payable to them under an agreement by the defendant's father to pay Rs. 150 per annum, of which Rs. 50 were for maintenance of plaintiffs' mother and the residue was to be applied towards defraying the expenses of a temple. The terms

* Application No. 191 of 1895 under the extraordinary jurisdiction.