

1897.

MAHADEV

v.  
MAHADEV.

thus a discretion in the Court which was not properly exercised when it refused to interfere on more or less technical grounds. In the present case, the mortgaged property was also made over into appellant's possession at the time that he advanced the fresh loan. We accordingly think that this portion of the relief prayed for may be very properly awarded in the present case.

We reverse the decree of the lower Court, and direct that respondent do pass a mortgage-bond in terms of the *kabulāyat*, Exhibit 15, to the appellant. Respondent should pay appellant's costs throughout.

## APPELLATE CIVIL.

*Before Sir C. F. Harlan, Kt., Chief Justice, and Mr. Justice Conolly.*

1897.

July 20.

SAMBIHU (ORIGINAL PLAINTIFF), APPELLANT, v. KAMALRAO VITHALRAO DESHMUKHI (ORIGINAL DEFENDANT), RESPONDENT.\*

*Land Revenue Code (Bom. Act V of 1879), Sec. 3, Cls. (16), (17); Secs. 71, 79, 85, 86 and 87—Deshmukhi vatan—Alienated land—Registered occupant—Superior holder.*

In 1892, Vithalrao, a deshmukhi vatanādar, died leaving five sons—four by one wife, of whom Kamalrao was the eldest, and one son, Bhavanrao, by another wife. Kamalrao and Bhavanrao each claimed to be the eldest son of Vithalrao. On the 16th June, 1893, the Collector of Sātara in proceedings under section 71 of the Land Revenue Code (Bombay Act V of 1879) ordered Kamalrao's name to be registered in the revenue books in place of Vithalrao's. Prior to this, however, the plaintiff and other tenants paid Bhavanrao rents for 1892—94. Kamalrao then applied for and obtained from the Collector an order, under section 86 of the Code, rendering him assistance in recovering these rents. The plaintiff in August, 1894, brought this suit to restrain Kamalrao from recovering the rents and to avoid the order for assistance. The Subordinate Judge granted the injunction, but the District Judge reversed that decision and dismissed the suit on the ground that Kamalrao was the registered occupant of the land and that the order for assistance was valid, and that payment of rent to Bhavanrao did not discharge the tenants. On appeal to the High Court,

*Held*, reversing the decree of the District Judge and restoring that of the Subordinate Judge, that the lands in question being alienated land, section 71 of the Land Revenue Code (Bom. Act V of 1879) did not apply, and Kamalrao was not a registered occupant under the Code. The lands passed on Vithalrao's

\* Second Appeal, No. 26 of 1897.

death to his five undivided sons, unless a custom of primogeniture existed in the family, and payment by the plaintiff to Bhavanrao, a co-landlord, was a valid discharge.

SECOND appeal from the decision of S. Tagore, District Judge of Sâtára, reversing the decree of Ráo Sáheb S. B. Gadgil, Acting Subordinate Judge of Islámpur.

The plaintiff sued for an injunction restraining the defendant from collecting certain rents. One Vithalrao died in 1892, leaving five sons—four by one wife, of whom the defendant Kamalrao was the eldest, and one son, Bhavanrao, by another wife. There was a dispute between Kamalrao and Bhavanrao as to which of them was the oldest son of Vithalrao, and accordingly in Jannary, 1893, the Collector of Sâtára held proceedings under section 71 of the Land Revenue Code (Bombay Act V of 1879) to determine who was the heir of Vithalrao. In that month he made an *interim* order stating that Kamalrao had been administering the estate; that Vithalrao had left a will dividing the property which he thought should take effect, and postponing his decision under section 71 until the 15th June, 1893 added that if by that time the will was not brought into force, he would again hear argument and give his decision. Meantime Kamalrao should continue to administer the estate. In consequence of this *interim* order, the Mám-latdár in February, 1893, told the tenants to pay their rents to Kamalrao.

On the 16th June, 1893, the Collector without alluding to Vithalrao's will declared Kamalrao to be the principal of Vithalrao's heirs and ordered that his name should be registered in the revenue books.

Notwithstanding the above orders of the Collector and Mám-latdár, some of the tenants attorned to Bhavanrao and paid him rents for 1892—94. Kamalrao then applied to the Collector, under section 86 of the Land Revenue Code, for assistance in recovering these rents from the tenants.

The plaintiff, who was one of the tenants, thereupon brought this suit, praying for an injunction restraining Kamalrao from recovering these rents and to avoid the orders for assistance made under section 86 of the Revenue Code. He alleged that Kamalrao had no exclusive right to the rents; that the land be-

1897.

SAMBHU  
v.  
KAMALRAO.

1897.

SAMBIHU  
v.  
KAMALRAO.

longed to all the five brothers jointly; and that he (the plaintiff) had paid the rent to Bhavanrao, and was, therefore, no longer liable.

The defendant Kamalrao contended that his name having been entered in the revenue books as representative vatandar he alone had the right to collect the rents, and that the plaintiff might recover from Bhavanrao the rents he had improperly paid him.

The Subordinate Judge granted the injunction, holding that the plaintiff having paid the rent to Bhavanrao was discharged. Bhavanrao was entitled to receive it, the land in question belonging not to the defendant Kamalrao exclusively, but to all five brothers.

The District Judge reversed the decree and dismissed the suit, holding that Kamalrao was the registered occupant of the land; that the order for assistance made in his favour under section 86 was valid; and that the payment of rent by the plaintiff to Bhavanrao did not discharge the plaintiff.

The plaintiff preferred a second appeal.

*Branson* with *Manekshah J. Taleyarkhan* for the appellant (plaintiff):—We paid rent to Bhavanrao, who is defendant's co-sharer, and such payment is a good discharge—*Krishnarav v. Manaji*<sup>(1)</sup>. The defendant relied upon his right as the person recognized by the Collector. But recognition by the Collector is only for fiscal purposes. It cannot effect a change in the rights of the parties. Further, the Collector's order recognizing the defendant was *ultra vires*. The land in dispute is alienated land, and there is no provision, in the Land Revenue Code, applicable to the case of an alienated holding. Section 71 of the Code only applies to registered occupants. Section 3 (16) of the Code defines who is a registered occupant. Section 71 consequently cannot be applied to a holder of alienated lands.

*Macpherson* with *Balaji A. Bhagwat* for the respondent (defendant):—The land in dispute is sheri land and, therefore, it cannot be said that it is an alienated holding. Next, we base our right on the recognition by the Collector. The Collector's recognition enables a person to apply for assistance under section 86. The

(1) 11 Bom. H. C. Rep. 106.

Collector has power under that section to make an arrangement pending a decision by a Civil Court. See Sathé's Land Revenue Code, p. 102. Kamalrao was managing the lands during Vithalrao's lifetime and the Collector has continued that arrangement. We submit that the arrangement would not act prejudicially to the plaintiff. If, notwithstanding the arrangement, he paid rent to Bhavanrao, he has himself to blame. The Collector's order is not *ultra vires*. Payment of rent is to be made through the village officers. Section 85 of the Land Revenue Code imposes a penalty for recovering rents directly from tenants.

CANDY, J. :—The facts may be thus stated :—

The land in suit which the plaintiff held as a tenant or inferior holder from Vithalrao, the superior holder, is alienated land. It was urged, in second appeal, that the land is a "sheri thikan." This point was not taken in the lower Courts, and whether the land be "sheri" or not, and whether it was part of Vithalrao's private property as distinguished from his deshmukhi vatan land, the fact remains that the land is *alienated*.

Vithalrao died in 1892, leaving five sons—four by one wife, of whom Kamalrao (present defendant) is the eldest, and one son, Bhavanrao, by another wife. Kamalrao and Bhavanrao each claimed to be the eldest son of Vithalrao.

On the 20th January, 1893, the Collector of Satara held what is termed a "proceeding under section 71 of the Land Revenue Code in the matter of determining the heir to the deceased Vithalrao Deshmukh of Kokrud."

Section 71 of the Land Revenue Code provides that "on the death of a registered occupant the Collector shall cause the name of his eldest son, or other person appearing to be his heir, or the principal of his heirs, to be registered in his stead, and the said heir shall thereafter be deemed the registered occupant." And by section 3 (16) of the Land Revenue Code, "occupant signifies a holder of *unalienated* land," and (17) "registered occupant" signifies a sole occupant or the eldest or principal of several joint occupants, whose name is authorizedly entered in the Government records as holding *unalienated* land. It is obvious, therefore, that section 71 was inapplicable as regards any private or

1897.

SAMBHU  
v.  
KAMALRAO.

1897.

SAYIBHU  
v.  
KAMALRAO.

deshmukhi alienated land belonging to Vithalrao, and on Vithalrao's death (unless the custom of primogeniture exists in the family) belonging to his five undivided sons.

In January, 1893, the Collector wrote:—

“As a matter of fact the son Kamalrao carries on the administration of the estate, the son Bhavanrao having been separated from his father for ten years during which time he has been given Rs. 300 from the estate yearly. He also has a portion of the wada assigned to him. The father has left a will in which he has divided the whole of his estate of immoveable property, assigning to each son, his two widows, and daughter what lands they should enjoy. I am of opinion that the will should take effect, and I, therefore, order that I shall not pass a decision under section 71, Land Revenue Code, until the 15th June, 1893. The son Kamalrao should continue to administer the estate as in his father's lifetime, and Bhavanrao should receive his allowance as before. If by the 15th June the will is not brought into force, and no decree of a competent Court is promulgated, I shall proceed to hear once more the arguments of both parties and shall give a decision under section 71 of the Land Revenue Code.”

As a consequence of this *interim* order of the Collector, in February, 1893, the Māmlatdār told Vithalrao's tenants to pay their rents to Kamalrao. On the 16th June, 1893, the Collector did not allude further to the alleged will or partition (of which there is no mention in the present suit), but proceeded to declare Kamalrao to be the principal of Vithalrao's heirs, because he was apparently the eldest and was selected by his father to manage the estate, and the Collector, therefore, ordered that the name of Kamalrao should be registered in the revenue accounts in the stead of Vithalrao.

As between Government and the heirs of Vithalrao for fiscal purposes this may be a perfectly valid order, but as between the tenants of Vithalrao and the five sons of Vithalrao who, in the absence of any custom of primogeniture, on Vithalrao's death became the landlords of the tenants, it can have no force. There is no allegation now that Bhavanrao was separated from his father, and it is obvious that Kamalrao's management for his father in his father's lifetime would have no effect after Vithalrao's death, unless it was the custom of the family for the eldest son to manage, or unless Vithalrao's sons consented that Kamalrao's management should continue. No such custom or consent is alleged in the present case. Notwithstanding the Collector's

1897.

SAMBHAR  
v.  
KAMALRAO.

and the Māmlatdār's orders certain of the tenants attorned to Bhavanrao and paid him their rents for 1892-93 and 1893-94. Kamalrao then applied under section 86 of the Land Revenue Code for assistance for the recovery of rent from those tenants. An order (the exact date of which has not been stated in this suit and it is immaterial) for rendering assistance was passed. Then the tenants brought several suits against Kamalrao to avoid that order. The present suit was one of them and was brought first in the District Court on 15th August, 1894, and on the plaint being returned for presentation to the proper Court was then brought in the Subordinate Judge's Court on 12th August, 1895.

The plaintiff claimed (*inter alia*) that an injunction should issue restraining Kamalrao from recovering rent on the strength of the abovementioned order for assistance. The Subordinate Judge granted the injunction; but the District Judge reversed that decision and dismissed the plaintiff's suit, on the ground that it was admitted that Kamalrao is the registered occupant of the land, and that the order for assistance given by the Revenue authorities was perfectly valid, and that the payment of rent by plaintiff to Bhavanrao did not operate as a valid discharge.

It has been shown above that the defendant Kamalrao is not the "registered occupant" of the land. He is a superior holder of the land; so is Bhavanrao; so are Kamalrao's brothers superior holders. There is nothing in section 86 of the Land Revenue Code requiring an applicant under that section to be a "registered superior holder." The term is unknown in the Land Revenue Code. The nearest approach to it is in section 70, under which the Collector is not bound to recognize any person to whom any interest in any alienated holding has been *assigned*, unless the *transfer* has been recorded in the revenue records. But Vithalrao's interest in his deshmukhi vatan or sheri lands has not been assigned or transferred to his five sons, whose full interest has accrued on succession. Kamalrao gains no advantage over his brothers under section 86, because his name is recorded in the revenue records as representing the estate. The order for assistance in the present case may be perfectly good, and one which a Civil Court cannot cancel, though from the provisions

1897.

SAMBHU  
v.  
KAMALRAO.

of the second clause of section 87 it would seem that the Legislature intended that in disputes of this nature the tenants, having already paid the rent to one of the co-proprietors of the estate, the Collector should, in his discretion, refuse the assistance demanded for recovering that rent again. But the order though good in its inception may be incapable of taking legal effect. A superior holder having no co-holders may obtain an order for assistance, and subsequently the rent may be paid to him. It would be manifestly unjust for him under those circumstances to proceed to enforce the order, and a suit would lie by the tenant for an injunction restraining the superior holder from enforcing the same. If this be so, and if in law a payment of rent to one co-landlord by the tenant is a valid discharge--*Krishnarao v. Manaji*<sup>(1)</sup>, then the Subordinate Judge's decree in the present suit is right. The District Judge relied on section 85 of the Land Revenue Code, and remarked that the tenants should have paid their rents to the village officers, "and if they have now to pay twice over they are themselves to blame." But section 85 does not provide that tenants must pay their rents to the village officers, or that any rents not so paid will have to be paid twice over. No doubt it imposes a penalty on certain superior holders demanding or receiving payment from their inferior holders otherwise than through the village officers; but there is no corresponding penalty or duty imposed on the inferior holders. Here the rent has been admittedly paid to Bhavanrao. The provisions of section 85 do not make that payment invalid.

But it may be pointed out that it is doubtful whether the provisions of section 85 have any application to the present case. They apply to the superior holder of an alienated village or of an alienated share of a village. It appears from the Collector's proceeding of 20th January, 1893, that "there are 45 villages in which the name of Vithalrao stood as occupant." The Collector apparently meant "recorded holder of alienated lands" though of course it is quite possible that Vithalrao was also the "occupant" of certain unalienated survey numbers. In any case, it would appear that Vithalrao was not the holder of alienated villages, or alienated shares of villages, but of various survey

(1) 11 Bom. H. C. Rep., 106.

1897.

---

 SAMBHU  
 v.  
 KAMALRAO.

numbers in 45 different villages. If this be so, then section 85 may have no application. And support is given to this view by the fact stated above that on the 21st February, 1893, (Exhibit 31) the Mámlatdár, in consequence of the Collector's above quoted directions, told the tenants of the various pieces of land to pay their rents to Kamalrao. This he presumably would not have done had they been bound by law to pay their rents to the village officers. Of course, legally no revenue officer can, under the Bombay Land Revenue Code, tell a tenant of a superior holder of alienated lands that he should pay his rent to such and such a person.

I have discussed the case at greater length than perhaps the nature of the case itself required, my object being to emphasize the provisions and limitations of certain sections of the Land Revenue Code, which are sometimes imperfectly understood. Possibly it might conduce to better revenue administration if the Collector were empowered to hold an inquiry and determine who should be the "recognized" holder of alienated lands to whom tenants should attorn until the decree or order of a competent Court is produced. But such at present is not the law. Any one acquainted with the Deccan and Southern Marátha Country must be aware that in the case of large estates, such as deshmukhi and desaigiri vatans, there is a prevalent idea that on the death of the holder the eldest son should manage the estate, even though the rule of primogeniture may not be strictly in force, and that the right to recognize the eldest son as the representative and manager of the family is vested in the Revenue authorities. And that idea has not been eradicated by the tendency of the decisions of our Courts, which require strict proof to give effect to a custom which is in any way opposed to the ordinary rules as to devolution of property according to Hindu law. As to whether there is any such valid custom in Vithalrao's family I offer no opinion, for Kamalrao's brothers are not parties to the suit, and no issue was raised on the point. And as to whether such right to recognize the management of the eldest son should not be vested in the Revenue authorities—as apparently is the case in other provinces, see *e. g.*, North-West Provinces Land Revenue Code, sections 94, 95, 98, 101,—the



1897.

matter is one for the consideration of Government and the Legislature.

SAMBHU

v.

KAMALRAO.

In my opinion, the decree of the District Judge should be reversed, and that of the Subordinate Judge restored. All costs throughout on defendant.

FARRAN, C. J. :—I entirely concur in the judgment which my learned colleague has delivered and in the reasons upon which he has based his decision. I wish, however, to be understood as not expressing any opinion upon the applicability of section 85, Land Revenue Code, to Vithalrao's holdings, as the question has not been fully argued and the judgments of the lower Courts do not set out their nature; and I have, therefore, not considered the matter. I am also not sufficiently conversant with the subject to offer an opinion as to the propriety or otherwise of extending the provisions of section 71 of the same Code to alienated holdings or otherwise altering the law upon this subject.

*Decree reversed.*

---

## FULL BENCH.

---

### APPELLATE CIVIL.

---

*Before Sir C. F. Farran, Kt., Chief Justice, Mr. Justice Parsons and Mr. Justice Ramade.*

1897.

July 20.

NILKANTH GANESH NAIK (ORIGINAL APPLICANT), APPELLANT, v.

THE COLLECTOR OF THANA (ORIGINAL OPPONENT), RESPONDENT.\*

*Land Acquisition Act (X of 1870) and Act I of 1891—Award of compensation—Payment of compensation awarded how enforced—Appeal from an order irregularly made—Practice—Procedure.*

The Land Acquisition Act (X of 1870) did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceedings, and there is no general law which enables a Civil Court to enforce such a statutory liability, when imposed upon a Collector or other civil officer, by means of execution proceedings without a suit. The ordinary mode of enforcing such an obligation is by suit, unless the Legislature when it creates the obligation prescribes such other means of enforcing it.

\* Appeal, No. 121 of 1896.