1910.

EMPEROR v. KALEKHAN SARDARKHAN.

The accused, therefore, has infringed the law laid down in the section, and we must reverse his acquittal and convict him under section 96, sub-section 5. It is not desired to inflict any severe punishment upon the accused, the object of the present appeal being merely to establish the principle. We direct that the accused pay a fine of one (1) rupee.

Acquittal set aside.

R. R.

APPELLATE CIVIL.

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

1911.
January 11.

BALAMBHAT BIN RAVJIBHAT AND OTHERS (JUDGMENT-DEBTORS), APPELLANTS, *v.* VINAYAK GANPATRAV PATVARDHAN (JUDGMENT-CREDITOR), RESPONDENT.*

Landlord and tenant—Forfeiture clause contained in a decree—Execution proceeding—Power of the Court to grant relief.

The principle that Courts of equity will not forego their power to grant relief against forfeiture in the case of non-payment of rent where the relations of the parties are those of landlord and tenant, merely on the ground that the agreement between them is embodied in a decree of the Court, applies alike to a suit to enforce a decree and to proceedings in execution.

Krishnabai v. *Hari*(1), explained.

SECOND appeal from the decision of V. N. Rahurkar, First Class Subordinate Judge of Satara with appellate powers, confirming the order passed by G. G. Nargund, Subordinate Judge of Tasgaum, in an execution proceeding.

Plaintiff Vinayak Ganpatrav brought a suit against his tenants Balambhat bin Ravjibhat and others to recover possession of certain lands. A decree was passed on the 24th September 1896 in accordance with the terms of a compromise arrived at between the parties and contained the following provisions:—

1. As to the lands in dispute, namely, * * * the defendants are to do the vahivat thereof as stated below in perpetuity from generation to generation

* Second Appeal No. 230 of 1910.

(1) (1906) 31 Bom. 15.

1911.

BALAMBHAT v. VINAYAK GANPATRAY.

by the right of 'Miras' and for that, they should give to the plaintiff Rs. 100 from the year 1896-97 every year in perpetuity agreeably to what is stated below in proportion to the lands held by each person. As regards the above-mentioned sum of Rs. 100 which are to be paid by the defendants to the plaintiff, they may pay the same either to the plaintiff himself and send it through Post Office by money order to be paid to him or pay the same into Court.

2. Agreeably to what is stated in the map of the lands produced with application No. 73 and in the schedule annexed thereto the defendants should carry on the vahivat of their respective lands and pay the respective amounts written against their names to the plaintiff.

* * * * * * *

The defendants abovenamed are to carry on the vahivat of the pieces of land written against their respective names and pay in two instalments respectively the Government assessment amount written against their respective names to the plaintiff and pay the 'Swamitwa' (*i. e.*, ownership) dues in the month of August.

3. Should the defendants fail to pay the Government assessment amounts and the 'Swamitwa' amounts to the plaintiff agreeably to what is stated in clause 2, the plaintiff must wait till the end of August and if the defendants or their heirs fail to pay the moneys even within that time, the plaintiff shall take into his possession the lands written against the names of those defendants who may not have paid the amounts and make the vahivat thereof himself.

* * * * * * *

8. Should the defendants fail to pay the Government dues in time, the Government will take the same from the plaintiff on account of the Government not having received it in time; if the plaintiff is required to pay more moneys, the same should be paid by the defendants Nos. 1, 4, 5, 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 20 to the plaintiff.

The defendants having made a default in the payment of the assessment, namely, Rs. 64-13, and rent, namely, Rs. 35-3, in all Rs. 100 for the year 1905-06 by the end of August 1906, the plaintiff sought to recover possession of the lands in execution of the decree.

The defendants answered that as there was famine in the year 1905-06 they applied to the Court to grant them time and the application was granted by the Subordinate Judge so far as the amount of the assessment was concerned, that in appeal by the plaintiff the order of the Subordinate Judge was reversed and that the defendants, thereupon, immediately paid the amount in

Court. The plaintiff was, therefore, not entitled to recover possession.

The Subordinate Judge found that the default in payment at the time fixed for it by the decree worked forfeiture under the terms of the decree and that the plaintiff was entitled to recover possession. He, therefore, disallowed the defendants' contention and ordered warrants to issue for the delivery of possession to the plaintiff. In his order the Subordinate Judge cited the following rulings: *Krishnabai* v. *Hari Govind*[1], *Balprasad* v. *Dharnidhar*[2], *Balkrishna Bhalchandra* v. *Gopal Raghunath*[3], *Shirekuli Timapa* v. *Mahablya*[4].

The defendants appealed and while the appeal was pending, the plaintiff refunded to the Court of the Subordinate Judge all the amounts which he had received for payments for the year 1905-06 and subsequent thereto on the ground that the said amounts were withdrawn from the Court under some misunderstanding. The Appellate Court found that the plaintiff did not waive the forfeiture by acceptance of overdue rent and that the forfeiture could not be relieved against in execution proceeding. The Court, therefore, confirmed the order on the following grounds:—

The assessment portion of the rent for 1905-06 was not paid in August 1906 and hence the plaintiffs filed their application on 11th February 1908 to enforce the forfeiture.

On the 16th July 1906 the defendants applied to the Court of first instance for an enlargement of the time for payment of the assessment and the application was allowed (exhibit 4). Plaintiff appealed against that order and the District Court reversed the order on 5th July 1907 (exhibit 5).

During the pendency of the appeal the defendant paid sums into Court and these were accepted by the plaintiff (exhibit 9 in appeal).

These payments were more than sufficient to pay off the assessment portion of the rent for 1905-06. All these sums with further deposits made by the defendants and received by the plaintiffs were refunded by the plaintiff during the pendency of this appeal (exhibit 9 in appeal).

Mere receipt of an overdue amount does not amount to a waiver (P. J. for 1888, p. 381). As plaintiff appealed against the order (exhibit 4) the payments

(1) (1906) 31 Bom. 15.
(2) (1886) 10 Bom. 437 F. N. (1).
(3) (1875) 1 Bom. 73.
(4) (1886) 10 Bom. 435.

1911.

BALAMBHAT v. VINAYAK GANPATRAV.

accepted by him must be presumed to have been accepted under protest. Such acceptance cannot amount to a waiver. * * *

The case of Krishnabai *v.* Hari (31 Bom. 15) is not in point. It can be distinguished. In that case the forfeiture was enforced by an original suit based on the compromise decree. In the present the enforcement of forfeiture is sought in execution. The case is governed by the principle laid down in Balprasad *v.* Dharnidhar (10 Bom. 437).

Defendants preferred a second appeal.

G. S. Rao and *D. A. Tuljapurkar*, for the appellants (defendants).

P. P. Khare, for the respondent (plaintiff).

SCOTT, C. J.:—In this case we think that the Subordinate Judge with appellate powers was in error in thinking that the case in *Krishnabai* v. *Hari*[1] is not in point. The *ratio decidendi* in that case is that Courts of equity will not forego their power to grant relief against forfeiture in the case of non-payment of rent where the relations of the parties are those of landlord and tenant, merely on the ground that the agreement between them is embodied in a decree of the Court.

We think that the ruling applies alike to a suit to enforce a decree and to proceedings in execution.

Upon the materials before us we think it is a case in which the Court in the exercise of its discretion should have refused to award forfeiture in favour of the plaintiff having regard to the fact that he had already accepted payment of sums more than sufficient to discharge the obligations of the defendants under the decree.

We set aside the decree of the lower Court and dismiss the application of the judgment-creditor with costs throughout.

Decree reversed.

G. B. R.

(1) (1906) 31 Bom. 15.