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trial Court was right in awarding one-third share in the property to the plaintiff.

We accordingly reverse the decree of the lower appellate Court and restore that of the trial Court with costs in this Court and in the lower appellate Court on the original defendants Nos. 2 to 5 who are respondents Nos. 2 to 5 in this Court.

The cross-objections are dismissed with costs.

Decree reversed.

R. R.

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and
Mr. Justice Fawcett.*

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July 30.

KRISHNAJI *alias* BANDO GOVIND JOSHI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* SITARAM HANMANT RAMDASHI (ORIGINAL PLAINTIFF), RESPONDENT².

Lease—Permanent tenancy—Two defaults in payment of rent—Forfeiture—Court's power to relieve against forfeiture—Equity—Transfer of Property Act (IV of 1882), section 114.

The land in suit had been leased to the defendant permanently under an agreement that if rent was not paid within three months of the time fixed, the landlord was to recover possession. The defendant having committed two defaults, the lease was forfeited and the plaintiff landlord sued to recover possession. The Subordinate Judge made an order relieving the defendant against forfeiture under section 114 of the Transfer of Property Act. The appellate Judge set aside the order as in his opinion the forfeiture which was to come into operation not immediately but three months after the rent became payable could not be relieved against. On appeal to the High Court,

Held, reversing the decision of the lower appellate Court, that under the circumstances of the case, the order made by the Subordinate Judge was a correct order as the general principle of equity was that the Court would relieve against forfeiture unless the tenant had done something to forfeit his right to bring himself within the principles of equity.

² Second Appeal No. 82 of 1920.

SECOND appeal against the decision of N. S. Lokur, Assistant Judge, with A. P., reversing the decree passed by V. G. Gupte, Joint Subordinate Judge at Karad.

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Suit to recover possession.

In 1870, the land in suit was given by the plaintiffs' ancestor to the defendant's grandmother on a permanent lease for a rent of Rs. 17-12-0 per annum. The lease stipulated that if the rent was not paid within three months of the time fixed, landlord was to recover possession. The defendants failed to pay rent due for the shake years 1838 and 1839 (i.e. 1916 and 1917 A. D.). The plaintiff thereupon forfeited the lease and sued to recover possession of the property and arrears of two years rent.

The Subordinate Judge held that the defendants had been on the land since 1870 and it would be a hardship if the land which they had been cultivating for so many years should be taken away from them for two defaults in payment. He, therefore, passed an order relieving them against forfeiture under section 114 of the Transfer of Property Act, provided they paid the arrears of rent with interest and costs within 15 days.

On appeal, the Assistant Judge was of opinion that forfeiture could not be relieved against as under the terms of the lease the rent was to be paid annually by end of the month of Falgun, and a further grace period of three months was allowed and the forfeiture was to accrue only after the efflux of this period of grace and therefore in such a case the forfeiture clause could not be regarded as penal: *Naraina Nailka v. Vasudeva Bhatta*⁽¹⁾.

The defendants appealed to the High Court.

J. R. Gharpure, for the appellant:—It was an error to hold that the Court could not relieve the appellant

(1) (1903) 28 Mad. 389.

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and prevent forfeiture. The ground on which the decision is based is not sustainable under section 114 of the Transfer of Property Act and is not recognised by English Law; and, moreover, the Madras High Court has in a subsequent case not approved of the *ratio* underlying the decision in *Naraina Naika v. Vasudeva Bhatta*⁽¹⁾.

P. B. Shingne, for the respondent :—There is reason for the distinction drawn by the lower Court. The relief under section 114 is by way of indulgence and when the agreement between the parties evidently contains a provision of grace, the defaulting party, that is, the lessee cannot at law and in equity ask the Court to show indulgence to him. Hence the decision in *Naraina Naika's case*⁽¹⁾ is based on a sound reason, which has not been disapproved of in any reported case. This is not the first time that the appellant made default.

MACLEOD, C. J. :—In this case the plaintiff sued to recover possession of the suit property together with Rs. 35-8 as arrears of rent. Admittedly there had been a default. The learned Judge in the trial Court said that it would be a hardship if the land which the defendants had been cultivating for so many years should be taken from them for two defaults in payment. He therefore passed an order relieving them against forfeiture under section 114 of the Transfer of Property Act provided they paid the arrears of rent with interest and costs within 15 days. That was a perfectly correct order to make and an order within the powers of the Judge to make. But in appeal the learned appellate Judge relying on the decision in *Naraina Naika v. Vasudeva Bhatta*⁽¹⁾ appeared to think that the forfeiture could not be relieved against.

⁽¹⁾ (1903) 28 Mad. 389.

The learned Judges said : "the exercise of the discretion [of the Court] to relieve against forfeiture may depend upon the circumstance whether the lease allowed a period of grace or not, and...whether the period of grace is a reasonable period having regard to the nature and terms of the lease". Each case must depend upon its own facts. It may be that if a period of grace is allowed and yet the tenant does not pay rent within that period, the Court will not relieve against forfeiture. There can be no hard and fast rule and the general principle of equity is, that the Court will relieve against forfeiture unless the tenant has done something to forfeit his right to bring himself within the principles of equity. We do not think this is such a case.

The decree of the trial Court must be restored.

Appellants will get their costs in this Court and in the Court below.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and
Mr. Justice Fawcett.*

RAMA RANCHHOD, MIER, BY HIS NEXT FRIEND HIS MOTHER BAI JIVI, WIDOW OF RANCHHOD PARBHUDAS (ORIGINAL DEFENDANT), APPELLANT *v.* SAYAD ABDUL RAHIM ALIAS HAJIMIA WALAD ABDUL RASUL BADESAHEB, BY HIS SOLE ATTORNEY ATMARAM GHELABHAI (ORIGINAL PLAINTIFF), RESPONDENT^o.

Land Revenue Code (Bom. Act V of 1879), section 83—Landlord and tenant—Ejectment—Plea of permanent tenancy—No disclaimer of landlord's title—Notice necessary—Antiquity of tenancy—Fixity of rent—Rent note by tenant—Presumption of permanent tenancy—Burden of proof

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