

and the provisions contained in Part XVIII of the Constitution. This contention also fails.

It now remains to notice three points that were urged during the course of arguments on behalf of the appellants, namely, (i) s. 4 (1) of the Ordinance is hit by Art. 20 (1) of the Constitution, (ii) s. 11 (1) is hit by Art. 22 (1) of the Constitution, and (iii) the Special Judge has no jurisdiction to try an offence under the Explosive Substances Act. Apart from the fact that these points not having been raised by the appellants in their writ petition or urged before the High Court, we should be reluctant to permit them to raise these points for the first time in this Court, we may, in passing, point out that the offences for which the appellants are being prosecuted are said to have taken place in June 1957 and that they have been allowed to engage lawyers of their choice. They can therefore have no grievance so far as the first two points are concerned and we leave them to be decided in a case where there is grievance. There is no substance in the third point.

There is no force therefore in this appeal and it is hereby dismissed.

Appeal dismissed.

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v.

MALLAPPA TUKARAM BORGAVI AND OTHERS

(S. R. DAS, C.J., M. HIDAYATULLAH and
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Occupancy, relinquishment of—Registered occupant surrendering occupancy—Such surrender, if and when can bind other occupants—Bombay Land Revenue Code, 1879 (Bom. V of 1879), s. 74.

The suit out of which the present appeal arose was one for redemption of some occupancy lands, owned and mortgaged by two brothers, S and A, the Khata of the lands standing in the name of S as the registered occupant under s. 74 of the Bombay Land Revenue Code, 1879. The mortgage, which was a usufructuary one, was executed by S and A in 1888 in favour of the predecessors-in-interest of the appellants. By a Rajinama filed under s. 74 of the Code in 1900, S made an unconditional

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surrender of the occupancy. On the same day the mortgagees by a Kabuliyat prayed that the occupancy in the mortgaged property might be granted to them. Both the Rajinama and the Kabuliyat were granted by the Mamlatdar. By the Rajinama S did not, however, purport to relinquish the occupancy on behalf of A. After the death of S, A applied to the Mamlatdar for the cancellation of the transfer in favour of the mortgagees and registering the mortgaged property in his name. That application was rejected. The heirs of S, claiming also to be the heirs of A, brought the suit for redemption. The defence of the appellants was that the plaintiffs were not the heirs of A and that the right of redemption in the entire occupancy had been extinguished by the Rajinama. The administrators of the estate of A were then added as defendants but were later on transposed to the category of co-plaintiffs. The courts below found against the appellants. Hence this appeal by special leave. The question for determination was whether the surrender by S amounted to a relinquishment of the entire occupancy including the share of A.

Held, that the Rajinama could in no way affect the right of A to his share in the occupancy and the right of redemption in respect of his share still subsisted.

Under s. 74 of the Bombay Land Revenue Code, 1879, rightly construed, the registered occupant had no inherent or independent right, in the absence of any authority, express or implied, which must be clearly pleaded and strictly proved, to give a notice of relinquishment so as to affect the interest of other occupants as well. Although the section conferred certain rights and imposed certain obligations on the registered occupant, it was not intended to take away the rights of other occupants.

Lalchand Sakharam Marwadi v. Khendu Kedu Ugbade, 22 Bom. L.R. 1431, referred to.

Held, further, that even though A's application to get the mortgaged property registered in his name had failed, there could be no question of adverse possession since the possession of the mortgagees had a lawful origin in the usufructuary mortgage. Nor could a mere assertion of adverse title affect the subsisting equity of redemption or shorten the prescribed period of limitation for the suit.

Khiarajmal v. Diam, I.L.R. 32 Cal. 296, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 24 of 1955.

Appeal by special leave from the judgment and decree dated March 11, 1949, of the Bombay High Court, in Letters Patent Appeal No. 22 of 1945, arising out of the judgment and decree dated August 3, 1944, of the said High Court in Second Appeal No. 754 of 1942.

M. S. K. Sastri, for the appellants.

Naunit Lal, for respondents.

1959. September 11. The Judgment of the Court was delivered by

DAS C. J.—This appeal by special leave has arisen out of Original Suit No. 582 of 1937 filed in the Court of the Subordinate Judge of Chikodi by one Tukaram Shidappa Borgavi *alias* Teli (since deceased) and his son Mallappa Tukaram Borgavi *alis* Teli (1st respondent herein) against the appellants for the redemption of certain mortgaged property and possession thereof free from encumbrances and for other ancillary reliefs. The mortgaged property consists of R. S. No. 301 which is Devasthan Inam Lands burdened with the obligation to supply oil for Nand Deep, i.e., keeping a lamp always burning before Shri Tholaba Deity in the village of Nipani. The said property originally belonged to two brothers Shiddappa and Annappa. The khata of the land, however, stood in the name of Shiddappa as the registered occupant under s. 74 of the Bombay Land Revenue Code, 1879 (Bombay Act V of 1879).

The facts material for our present purpose may now be stated. On January 23, 1888, Shiddappa and Annappa executed a usufructuary mortgage (Ex.D-51) in favour of Lalchand Bhavanchand Gujar and Tuljaram Bhavanchand Gujar for Rs. 1,300 made up of Rs. 1,100 due under a previous mortgage and Rs. 200 presently advanced in cash. That deed provided that the mortgage money would be repaid within a period of three years and that the mortgagors would pay the judi and incur the expenses of the Nand Deep and that on failure of the mortgagors to meet the said outgoings, the mortgagees would incur the said expenses and add the same to their claim on the mortgage. On March 10, 1900, Shiddappa alone executed a simple mortgage (Ex. D-52) for Rs. 600 in favour of the same mortgagees. A part of the consideration for this simple mortgage consisted of moneys borrowed by both the brothers on bonds executed by both of them. This simple mortgage deed provided

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that the mortgagees would bear the expenses of the Nand Deep and debit the same to the mortgagors in the mortgage account. On March 22, 1900, before the simple mortgage deed was presented for registration, Shidappa, who was the registered occupant, gave a Rajinama under s. 74 of the Bombay Revenue Code recording his desire to submit an unconditional surrender of the abovementioned khata of R. S. No. 307 from the end of the then current year. On the same day, the mortgagees by a Kabuliyat prayed that the occupancy in the mortgaged property may be granted to them. Both the Rajinama and the Kabuliyat were sanctioned by the Mamlatdar on May 5, 1900. Shiddappa having died, Annappa in 1905 applied to the Mamlatdar alleging that the mortgaged property was Devasthan Inam and praying for the cancellation of the transfer in favour of the mortgagees and for placing the mortgaged property in his name. This application was rejected. In 1907 Shiddappa's son Tukaram (the original first plaintiff herein) and Annappa, the brother of Shiddappa, filed suits against the mortgagees for accounts to be taken under the Deccan Agriculturists' Relief Act. That suit having been dismissed, they appealed to the District Court, Belgaum, but that appeal was dismissed on March 15, 1909. Annappa again applied for the lands being put in his possession, but that application also was rejected on August 4, 1910. Thereafter, in 1911 Annappa and Tukaram, the brother and son respectively of Shiddappa, filed C. S. No. 362 of 1911 under the same Deccan Agriculturists' Relief Act for the same reliefs. That suit was also dismissed and the appeal therefrom met with a like fate on March 17, 1914. In 1922 Annappa died without any issue. The mortgagee Lalchand died issueless and the mortgagee Tuljaram died leaving a son named Lilachand Tuljaram who became entitled to the entire mortgage securities. On November 1, 1937, Tukaram and his son Ganpat, alleging that they were the legal representatives of both Shiddappa and Annappa, filed Original Suit No. 586 of 1937, out of which this appeal arises, against the appellants Lilachand and his three sons for the redemption of the mortgages. In the

written statement the defendants-appellants pleaded that the deceased Shiddappa having sold the mortgaged property to the mortgagees, the equity of redemption became extinguished and that as Shiddappa alone was the registered occupant, the Rajinama given by him was valid and binding on Annappa. They further alleged that the plaintiffs were not the heirs of the deceased Annappa, for the latter had died after having transferred his interests in the mortgaged properties to others. It transpires that Annappa died in 1922 after having made and published his last will and testament bequeathing his interest in the mortgaged properties to one Krishna Kallappa, that Krishna Kallappa applied for Letters of Administration in respect of Annappa's estate and that in spite of the opposition of Tukaram, Letters of Administration with a copy of the will annexed was granted to Krishna Kallappa. Krishna Kallappa having died, his four sons were added as party defendants to this suit and then on their own application they were transposed to the category of plaintiffs.

The trial Court held that the Rajinama executed by Shiddappa did not extinguish the title of the mortgagors in the mortgaged property, that the plaintiffs were agriculturists, that they were bound to pay the amount also under the simple mortgage and that on taking accounts the mortgages had redeemed themselves. Accordingly the trial court passed a decree for possession declaring that both the mortgages had been satisfied. The mortgagees, defendants 1 to 4, appealed to the District Court, Belgaum, in Regular Civil Appeal No. 322 of 1940. The District Court held that by the Rajinama, Shiddappa intended to convey the title in the suit land to the mortgagees and hence Shiddappa's heirs, the plaintiffs 1 and 2, could not claim redemption of Shiddappa's one half share in the suit land. As regards Annappa's share, the learned Judge held that the Rajinama had not the effect of transferring the interest of Annappa to the mortgagees and that inasmuch as the mortgages were subsisting, the defendants could not acquire title by adverse possession. In this view he allowed the appeal in part with the result that

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the suit was dismissed so far as the claims of plaintiffs 1 and 2 were concerned but the claims of plaintiffs 3 to 6 as the legal representatives of Annappa were upheld and they were allowed to redeem Annappa's one half share of and in the mortgaged property on payment of one half of the amounts due under the two mortgages. The mortgagee-defendants 1 to 4 appealed to the High Court in Second Appeal No. 754 of 1942 against that part of the decree which rejected their claim to Annappa's share and the plaintiffs 1 and 2 also filed Second Appeal No. 1011 of 1942 against the dismissal of their claim for redemption of one half share of Shiddappa in the mortgaged property. Both the appeals were disposed of by a common judgment by Weston, J. The learned Judge held that, so far as Shiddappa's share was concerned, the Rajinama was a complete relinquishment of his interest, but as regards Annappa's share, he agreed with the District Judge's conclusion that Shiddappa could not bind Annappa's share by the Rajinama and in this view of the matter he dismissed both the appeals. Against this decree both the parties preferred Letters Patent Appeals, namely, L.P.A. No. 22 of 1945 which was filed by defendants 1 to 4 and L.P.A. No. 16 of 1945 which was filed by plaintiffs 1 and 2. The Division Bench dismissed both the appeals. The present plaintiff No. 1, the son of Tukaram (the deceased son of Shiddappa who was the original plaintiff No. 1) has not come up to this Court and, therefore, the decision of the Division Bench has become final so far as he is concerned. The High Court having refused to grant leave to appeal to this Court, the mortgagees-defendants 1 to 4 applied to and obtained from this Court special leave to appeal against the decision of the Division Bench in so far as it upheld the rejection of their claims to Annappa's half share in the mortgaged property. Hence the present appeal. The plaintiffs-respondents, who are the legal representatives of Annappa and against whom the present appeal is directed, have not entered appearance in this appeal.

Learned advocate appearing in support of the appeal urges that the Rajinama and the Kabuliyat taken

together evidenced a transfer of title from the mortgagors to the mortgagees and, therefore, operated to extinguish the equity of redemption not only of Shiddappa but also of Annappa, for there is sufficient evidence on record that Shiddappa was the manager and *karta* of the joint family and that in the matter of passing the Rajinama he had acted in that capacity and, therefore, the Rajinama was binding on his brother Annappa. As pointed out by the Division Bench in their judgment in the Letters Patent Appeal, this case of Shiddappa having acted as *karta* was nowhere made by the defendants-appellants in their written statement and, in agreement with the High Court, we declined to allow learned advocate for the appellants to make out such a new case. This case being thus out of the way, learned advocate for the appellants urges that under s. 74 of the Bombay Land Revenue Code, as Shiddappa was the registered occupant, the Rajinama filed by him operated upon the entire occupancy and amounted to a relinquishment of the rights of both the brothers Shiddappa and Annappa. Section 74 of the Bombay Land Revenue Act, as it stood at all material times, ran as follows:—

“An occupant may, by giving written notice to the Mamlatdar or Mahalkari, relinquish his occupancy, either absolutely or in favour of a specified person; provided that such relinquishment applied to the entire occupancy or to whole survey numbers, or recognized shares of Survey Numbers.

An absolute relinquishment shall be deemed to have effect from the close of the current year, and notice thereof must be given before the 31st March in such year, or before such other date as may be from time to time prescribed in this behalf for each district by the Governor in Council.

A relinquishment in favour of a specified person may be made at any time.

When there are more occupants than one, the notice of relinquishment must be given by the registered occupant; and the person, if any, in whose favour an occupancy is relinquished, or, if such

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occupancy is relinquished in favour of more persons than one, the principal of such persons, must enter into a written agreement to become the registered occupant, and his name shall thereupon be substituted in the records for that of the previous registered occupant."

Reliance is placed on the concluding paragraph of the section which provides that when a relinquishment is made in favour of more persons than one the principal one of such persons must enter into a written agreement to become the registered occupant and his name shall thereupon be substituted in the records for that of the previous registered occupant. This provision, it is said, makes it clear that so far as the revenue authorities are concerned, it is the registered occupant who represents the entire occupancy and the fact that the notice of relinquishment must, under the section, be given by the registered occupant also supports the contention that the Rajinama passed by the registered occupant binds all the occupants. We are unable to accept this argument as correct. The concluding paragraph of the section clearly recognises that a relinquishment may be in favour of more persons than one. It is true that the principal one of such persons must enter into a written agreement to become the registered occupant. This is for facilitating the purpose of the Code but it does not mean that the other persons in whose favour the occupancy is relinquished cease to have any right. That their right as occupants remains is clearly recognised by the opening paragraph of the section which gives an occupant a right to relinquish his occupancy either absolutely or in favour of a specified person. This right is given to all occupants, if there are more than one, for the singular includes the plural. It is true that where there are more occupants than one, the notice of relinquishment on behalf of any occupant must be given by the registered occupant. That does not mean, in the absence of any specific pleading and cogent proof, that a notice of relinquishment given by the registered occupant must necessarily be a notice on behalf of all occupants or any particular occupant other than the

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registered occupant, or that the registered occupant has the right to give such a notice without reference to the other occupants so as to effect their interest in the occupancy. Turning to the Rajinama, it is clear that Shiddappa did not purport to file the same on behalf of Annappa nor had he any right to do so; by reason only of his being the registered occupant. In *Lalchand Sakharam Marwadi v. Khendu Kedu Ughade* ⁽¹⁾ one out of four brother mortgagors, who was the registered occupant of the mortgage land, passed a Rajinama of the land in favour of the mortgagee, who executed a Kabuliyat for the same. The remaining three mortgagors sued to redeem the mortgage alleging that the Rajinama passed by their brother conveyed only his interest and nothing more. It was held that though the conveying brother was a co-mortgagor with the plaintiffs, he had no right to sell their interest in the equity of redemption and that, so far as they were concerned, he was in the same position as an outsider. It is true that no specific reference was made in the judgment to s. 74 of the Bombay Land Revenue Code, but the actual decision in that case, the facts of which are very similar to those of the instant case, quite clearly indicates the court's understanding of the law applicable to those facts and that law was nothing but the provisions of s. 74 of the Code. In our opinion, on a correct interpretation of s. 74, where there are more occupants than one in respect of the same occupancy each occupant has his own rights and the fact of registration of one of them as the registered occupant attracts the operation of the Code and confers certain rights or imposes certain obligations on the registered occupant as laid down in the Code but does not take away the rights of other occupants. It is true that if any of the occupants other than the registered occupant desires to relinquish his occupancy, he cannot himself give a notice of relinquishment but must give it by and through the registered occupant. Nevertheless the registered occupant, in the absence of any authority, express or implied, to be clearly pleaded and strictly proved, has no inherent or independent

(1) 22 Bom L.R. 1431.

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right to give any such notice so as to affect the interests of the other occupants. In our opinion the Rajinama passed by Shiddappa did not affect the right of Annappa and his equity of redemption subsisted at all material times. In our judgment the conclusion of the Division Bench of the High Court in the Letters Patent Appeals was correct and the principal contention urged before us must be repelled.

Learned Advocate for the appellant then faintly urges that Annappa's interest in the property was extinguished by reason of the adverse possession exercised by the mortgagees since at least 1905 when the claim of the Annappa to get the mortgaged property registered in his name failed. It should be remembered that the mortgagees came into possession of the property pursuant to the usufructuary mortgage. Therefore their possession had a lawful origin. A mere assertion of an adverse title on the part of the appellants cannot affect the subsisting equity of redemption of the mortgagors or operate to shorten the period of limitation prescribed for a suit for redemption. In view of the observation of the Judicial Committee in *Khizarajmal v. Daim* (1), the learned advocate for the appellants did not seriously press the point of limitation any further.

No other point having been urged before us in this appeal, the appeal must, for reasons stated above, be dismissed. As the respondents did not appear, there will be no order as to costs.

Appeal dismissed.

(1) (1904) L. R. 32 Ind. App. 23.