

[246] APPELLATE CIVIL.

The 20th July, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE
KINDERSLEY.

Kunhamu and another.....(Defendants) Appellants.

versus

Attapureth Illath Keshavan Nambudri.....(Plaintiff), Respondent.*

Otti and kanom tenures—Prior right of tenant to make further advances.

The prior right of an Ottidar to make further advances is established by authorities, but there is no authority to support a Kanomdar's claim to a similar privilege.

An Ottidar may redeem a prior kanom.

IN this case the plaintiff, as the holder of an otti mortgage granted to him by the jenmi in 1880, sued to recover the lands mortgaged, on payment of the value of improvements, from the defendants, to whom the lands had been demised on kanom in 1862 by the jenmi. The jenmi had directed the defendants to attorn to the plaintiff.

The defendants pleaded *inter alia* that the grant of an otti when lands are outstanding on kanom is invalid as against the kanom-holder.

The Munsif upon this point ruled as follows : "A kanom does not carry with it the right of pre-emption, and the jenmi has full liberty to grant to a stranger a similar or a superior tenure on the lands, only that the Kanari's right to hold for twelve years from the date of the original demise is not interfered with." He found, however, that there had been a promise to renew the kanom and dismissed the suit.

Upon appeal the Subordinate Judge found that the agreement to renew was not proved, and decreed for the plaintiff.

The defendants appealed to the High Court.

Mr. Wedderburn for Appellants.

The defendants as first mortgagees were not allowed to exercise their right to make a further advance, and consequently the plaintiff's subsequent mortgage is invalid as against them. [247] *Padinjare Kovilagath Valia Tamburatti v. Konduvetti Kadiaragatha* (M.S.D., 1860, p. 249).

There is no apparent reason why a kanomdar should not stand in the same position as an ottidar. The High Court in *Paidal Kidavu v. Parakat Imbichuni Kidavu* (1 M.H.C.R. 13) did not dissent from the view of the Sadr Amin that a kanom mortgagee in possession possessed the right to make a further advance.

A. Ramachandrayyar for the Respondent.

The right to make further advances belongs to an ottidar but not to a kanomdar, who is merely a lessee. In the collection of *Malabar tenures* compiled by order of the Sadr Court in 1856, an ottidar's right to make further

* Second Appeal, No. 154 of 1881, against the decree of the Subordinate Judge of South Malabar, reversing the decree of the District Munsif of Ernad, dated 4th November 1880.

advances is mentioned specifically, but not that of a kanomdar, and in *Kuminiana v. Parkam Kolusheri* (1 M.H.C.R., 262), an otti is distinguished from a kanom in that the ottidar possesses the right of pre-emption should the jenmi wish to sell the premises. Major *Walker's* Report on the land tenures of *Malabar*, 1801, also draws a distinction between otti and kanom.

The **Judgment** of the Court (TURNER, C.J., and KINDERSLEY, J.) was delivered by

Turner, C.J.—The appellants fail to establish that by the custom of *Malabar*, the holder of a kanom is entitled to the right asserted by the respondent. This point was not decided in *Kaidal Kidavu v Parakat Imbichuni Kidavu* (1 M.H.C.R., 13) and in *Kuminiana v. Parkam Kolusheri* (1 M.C.R., 262) the right is recognized as appertaining to the holder of an otti, and in this respect distinguishing him from the holder of a kanom.

The Proceedings of the Sadr Adalat, 5th August 1856, also recognize the prior right to make any further advance as residing in the otti-holder, and are silent as to the possession of such a right by a kanom-holder. So far as there is authority, it is adverse to the claim of the appellants. It is not shown that the holder of an otti may not redeem a kanom, and we could not deprive him, without proof of custom, of the right which ordinarily attaches to a holder of the immediate reversion.

The appeal fails and is dismissed with costs.

NOTES.

[See (1889) 6 Mad. 140 where this case was followed.]

[248] APPELLATE CIVIL.

The 29th July, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND
MR. JUSTICE TARRANT.

Puyikuth Ithayi Umah.....(Plaintiff).

versus

Kairhirapokil Mamodⁿ and another.....(Defendants).*

Muhammadan minor, capacity to contract—Act IX of 1875, Section 2—Capacity to sue—Civil Procedure Code, Chapter XXXI.

Section 2 of Act IX of 1875 (Indian Majority Act)† refers only to the capacity to contract, which is limited by Section 11 of the Contract Act, and not to the capacity to sue, which is purely a question of procedure and regulated by the Civil Procedure Code, Chapter XXXI.

*Referred Case No. 6 of 1881.

†[Sec. 2 :—Nothing herein contained shall affect—

(a) the capacity of any person to act in the following matters (namely),—Marriage, Dower, Divorce, and Adoption ;

(b) the religion or religious rites and usages of any class of Her Majesty's subjects in India, or