

[57] APPELLATE CIVIL.

The 12th January, 1880.

PRESENT :

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

Palliagatha Ummer Kutti.....(First Defendant) Appellant.

versus

Abdul Kader and another.....(Plaintiff and second Defendant)
Respondents.*

*Malabar Law—Kanom—Subsequent lease to grantor of kanom by kanom-holder—
Payment of rent—Limitation.*

Where a kanom was granted in 1858 for five years to secure repayment of a loan, and a lease made in 1861 to the grantor of the kanom by the kanom-holder and rent paid under the lease until 1871 :

Held, that a suit brought in 1877 to recover the kanom amount and arrears of rent for seven years was barred by limitation except as to three years' arrears of rent.

IN this case the plaintiff, younger brother of second defendant, sued in September 1877 to recover from the defendants personally, and by sale of the property mortgaged, Rs. 1,394-10-1, being his half share of the estate of his deceased father *Malikamed*, consisting of (1) a "kanom porankadom" debt of Rs. 1,700 (loan of 1,000 rupees in 1858 and further advance of 700 rupees in 1862), due to *Malikamed* by first defendant, secured by a mortgage with possession of land granted by the first defendant and his deceased brother; and of (2) the amount due by the first defendant for rent of the same land for seven years under a lease from *Malikamed*, dated 25th April 1861.

The first defendant contended that the kanom debt was only 1,000 rupees; that the kanom was granted in 1858; that no further advance of Rs. 700 was ever made; that the lands were never made over to *Malikamed* or leased by him; and that the plaintiff's claim was barred by limitation.

The Munsif found that the further advance of 700 rupees was made, and the land leased to first defendant as alleged by plaintiff. *Held* that it lay on the first defendant to show that he had been in adverse possession for 12 years prior to suit; found that rent [58] was paid by first defendant down to 1870: *held* that plaintiff's claim under the mortgage and for three years' rent prior to suit was not barred by limitation, and decreed accordingly.

The first defendant appealed.

The District Judge on the question of limitation held as follows: "As regards the question of limitation the kanom deed A was executed on the 22nd April 1858. The term of five years for which it was to run expired on the 22nd April 1863. The 12 years' term of limitation commenced from the

* Second Appeal, No. 541 of 1879, against the decree of S. T. McCarthy, Acting District Judge of North Malabar, modifying the decree of the District Munsif of Chavacheri, dated 21st July 1879.

latter date and expired in 1875. But under Section 21³ of Act IX of 1871 it is laid down that 'when interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt, a new period of limitation shall be computed from the time the payment was made.' I am of opinion that proof has been adduced of the payment of rent on behalf of the mortgagee until 1046 (1870-71), and that such payment of rent must be deemed a payment for the purposes of the section above quoted. Though this is expressly stated for the first time in the corresponding Section 20 of the new *Limitation Act XV* of 1877 (*vide* last clause of the section), it does not follow that such was not the proper meaning of the law previously in force. There is little doubt that it must have been, and that the additional clause in the new Act only states in more express terms what was law before. I do not think, therefore, that the Munsif has misconstrued Section 21 of Act IX of 1871, and I find that the suit was not barred by the law of limitation.' The District Judge also found that no further advance had been made in 1862, and modified the Munsif's decree accordingly.

The first defendant appealed to the High Court on the ground that the suit was barred by limitation, and that there was no payment of interest, as such, within the meaning of Section 21 of Act IX of 1871.

Mr. *Shephard* for Appellant.

A. *Ramachandrayyar* for Respondent.

The arguments appear in the judgment of the Court (TURNER, C.J., and KINDERSLEY, J.).

Judgment:—This suit is governed by the provisions of Section 21, Act IX of 1871. It appears that in 1858 land was mortgaged to the plaintiff with possession for a term of five years, and that in [59] 1861 the first defendant, the mortgagor, took a lease of the land from the plaintiff's father, under which he paid rent until 1870-71. The mortgage debt was repayable on the expiry of the term. The plaintiff now sues to recover the debt from the mortgagor personally and by a sale of the property. It is pleaded the suit is barred by limitation, to which the plaintiff replies that the receipt of rent was in fact a payment of interest, and that from the date of the payment of rent a new period of limitation is given for the recovery of the debt. Under the present law this may be so if it be held that payment of rent by the mortgagor is such a receipt of produce in virtue of a usufructuary mortgage as is to be deemed equivalent to a payment of interest; but this provision is not to be found in Act IX of 1871, and although, if the payment of the rent had, as part of the original agreement or otherwise, been agreed as a provision for the interest in the debt, we might have held it fell within the narrower terms of Act IX of 1871, yet, in the circumstances of the present case, it is impossible, in our judgment, to hold that the payment of rent under an agreement, entirely

Effect of payment of interest as such. *[Sec. 21.—When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent generally or specially authorized in this behalf,

Effect of part-payment of principal. or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent generally or specially authorized in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made :

Provided that, in the case of part-payment of principal, the debt has arisen from a contract in writing and the fact of the payment appears in the handwriting of the person making the same, on the instrument, or in his own books, or in the books of the creditor.]

independent of the original mortgage, can be regarded as a payment of interest as such. The appeal is in part allowed: the decrees of the Courts below, so far as they decree the claim, must be reversed, except in so far as they award the claim for arrears of rent for three years. Proportionate costs in all Courts.

[3 Mad. 59.]

APPELLATE CIVIL.

The 27th January, 1880.

PRESENT :

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

Monji Premji Set.....(Plaintiff) Appellant.

versus

Maliyakel Koyassan Koya Haji.....(Defendant) Respondent.*

Decree in form of award—Error in procedure—Appeal—Review.

Applications for the extension of the period for the submission of an award and orders thereon should be made in writing and recorded.

When a party has been prejudiced by having the time allowed for taking objections to an award curtailed by the Court, no appeal lies, but a review should be granted by the Court of First Instance.

[60] IN this case appellant and respondent filed suits against each other, each claiming a balance due against the other on settlement of accounts.

By mutual consent the matters in dispute were referred to arbitration, and a majority of three out of five arbitrators submitted their award, rejecting both suits and saddling each party with his own costs.

The Subordinate Judge, after stating that applications made by the parties to set aside the award had been refused by the Court, gave judgment according to the award.

The appellant raised the following objections in appeal:—

- (1) That the award was invalid, having been made after the time fixed for its publication.
- (2) That there was neither application nor order on record extending the time for the submission of the award.
- (3) That the parties, having ten days' time to state their objections to the award, had been allowed only a few hours, although appellant objected and had no time even to get a copy of the award.

Anundacharlu and Sundaram Sastri for Appellant.

Mr. Normandy and A. Ramachandrayyar for the Respondent.

The Court (TURNER, C.J., and INNES, J.) delivered the following

Judgment:—We are of opinion that, except in the cases mentioned in the Act, there is no appeal from a decree which is passed in terms of the award; and therefore, although the appellant had apparently not the full time allowed him wherein to take exception to the award, we cannot interfere.

*R.A. 101 of 1879 against the decree of the Subordinate Judge of South Malabar, dated 16th June 1879.