In execution of the decree, it is alleged by the objectors, who are the wives and transferees of the second defendant, that a portion of the property, which, by the intervention of the second defendant, was excluded from the decree, has, in execution of the decree, been taken out of their possession. The decree-holder is not greatly interested to resist their claim, but the first defendant who, is the person principally interested, although he is not entitled to present possession, desires to contest it.

If there had been no transfer to the objectors and the title of the second defendant had been preserved, it is clear that the first defendant was not only entitled to dispute the claim in the execution department, but that, if he omitted to adopt that course, he could not have obtained relief by separate suit.

The objectors, as transferees, or representatives in interest of the second defendant, and, as between them and any party to the suit, the question—whether the land belongs to the village of the objectors or to the village which the decree directs must be taken out of the possession of the first defendant and delivered to the plaintiff for usufructuary possession—must be heard and determined by the Court executing the decree.

The order of the Judge should be set aside, and he should be directed to try the matter in dispute. Tha costs of this appeal will abide and follow the result.

NOTES.

[This decision was approved in (1883) 7 Mad. 255; (1888) 15 Cal. 437. *See* also 19 Cal. 683 at 689 **P.C.**]

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[287] APPELLATE CIVIL.

The 2nd August and 6th October, 1881.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Mupanagari Narayanan Nayar.....(First Defendant), Appellant
and
Virupatchan Nambudripad.....(Plaintiff), Respondent. } S. A. 642.*

Puvangara Narayanan Nayar.....(First Defendant), Appellant
and
Virupatchan Nambudripad.....(Plaintiff), Respondent. } S. A. 643.*

Malabar Law—Tenants' right to improvements prior to demise sued on—presumption Usage.

There is no universal usage in Malabar nor any presumption that a tenant is not entitled to compensation for improvements effected prior to the date of the kanom under which he holds and not specially reserved to him by the kanom deed.

* Second Appeal Nos. 642 and 643 of 1880 against the decrees of H. Wigram, Officiating District Judge of South Malabar, modifying the decrees of N. Sarvothama Rau, District Munsif of Nedunganad, dated 28th June 1880 (reported by order of the Court).

IN these cases the plaintiff sued to recover lands demised on kanom in 1866 (in renewal of former kanoms) to the defendants or their predecessors in title upon payment of the kanom amount together with the value of certain specified improvements made bythe defendants upon the lands demised.

In each case the defendants claimed to receive in addition to the sum tendered the value of improvements effected prior to the demises sued upon, and the District Munsif allowed the defendant's claim.

The plaintiff appealed to the District Court in both cases on the ground that the defendants were only entitled to improvements effected subsequent to the date of the demise sued upon.

The District Judge decided both appeals as follows :—

[288] " The rule is that each renewal forms a new contract, and that the tenant's right to improvements made prior to demise must be specially reserved. I see nothing in the present case to take the case out of the general rule. In the demise of 1886 now sued on, the jenmi's right to certain forest trees is reserved, and the proper construction no doubt is, that the other forest trees belong to the tenant, but the document is silent as to the improvements on the parambas, &c., and the buildings and tanks are specially mentioned in the demise."

Appeals were made in both cases to the High Court by the defendants.

The cases were heard together.

Ramachandrayyar for Appellants.

Mr. *Shephard* for Respondent.

At the first hearing the Court (INNES and MUTTUSAMI AYYAR, JJ.) referred the following issues for trial :—

" Is it the usage of Malabar for the kanom holder to require the adjustment of his claim to compensation for improvements on each renewal?

" Whether in fact, in the present case, there was any such adjustment at the renewal in 1866 ?"

The return of the District Judge was as follows :—

" The first defendant in each case was represented by the same Vakil. He has examined two witnesses, one of whom is a large, and the other a small, land owner in the neighbourhood, to prove that when compensation for improvement is paid to the tenant at the time of renewal the improvements are entered as the property of the jenmi, and that where the document is silent the presumption is that the claim to improvements has been allowed to lie over. This evidence is contrary to all my experience and I have no hesitation in saying that the *usage* is to adjust the tenant's claim to compensation on each renewal.

" This is done (1) either by paying him off in money or setting the claim off against the renewal fees, and in this case the permanent improvements such as tanks, wells, wet lands formed out of parambas, trees, &c., will be entered as the property of the jenmi and an enhanced rent reserved ; or (2) by adding the amount of the compensatton to the kanom ; or (3) by specially reserving the tenant's claim.

" The rule as stated by me in my judgment is based on a judgment of Mr. Holloway as Subordinate Judge of Calicut in 1856, which will be found reported at page 2 of the Decisions of Zila, Subordinate, and Assistant Courts of October 1856. In that case the tenant claimed compensation for improvements

prior to the [289] last demise. Mr. HOLLOWAY said: 'The objection made to the principle of the Munsif's assessment of improvements is clearly unsustainable. The renewal of a deed is not a continuation of an old contract, but the making of a new one, and it must be concluded that all rights accruing to the tenant under the former contract were then disposed of, otherwise there could be no termination to suits of this character. Reason, convenience, and the principle of the law, which forbids the varying of a contract reduced to writing by evidence of extrinsic matter, all point to the date of renewal as that from which improvements to be paid for on return are calculated. That is, in fact, so far as a Court can appreciate it, the commencement of the tenancy.'

"There may, of course, be cases in which the tenant has not taken the precaution to secure his rights trusting to the jenm's sense of justice to remunerate him if he has not done so at the time of renewal. In a case which came before me in 1876 (O. S. 8 of 1868, Civil Court), the tenants claimed compensation prior to the demise sued on, and no objection having been raised, it was awarded to them. I cannot find any recent case in which the question was raised and decided, but I have frequently followed the rule laid down by Mr. HOLLOWAY without demur. And, on the whole, it appears to be both just and expedient. My finding on the first issue is that it is the *usage* of Malabar for the jenm and kanamkar to adjust the tenant's claim to compensation on each renewal.

"In respect of the second issue no evidence has been adduced. In his deposition as witness plaintiff admits that he does not know whether compensation was paid to the tenants on the date of the last renewal. But he was not himself the grantor of the renewal. And it is clear from the document (A) that some adjustment of the tenant's claim took place, for the forest trees are declared to be the property of the jenm and the wet lands formed out of parambas for which the Munsif awarded compensation are also treated as the property of the jenm.

"In S. A. 642, the kanam is 850 fanams, but there is nothing to show whether this was higher than the original kanam or not.

"In S. A. 643, the kanam is 1,550 fanams, and there is an additional sum of 200 fanams advanced.

"My finding on the second issue is that there was certainly a partial adjustment of the tenant's claims at the date of the last renewal, but that there is no evidence whether the whole claim was adjusted."

Upon further argument, the Court delivered the following

Judgment:—The finding of the District Judge, now returned, proceeds upon his own experience and a judgment of Mr. Justice [290] HOLLOWAY when he was Subordinate Judge of Tellicherry and is contrary to the evidence brought forward by the defendant. Mr. Justice HOLLOWAY'S judgment proceeds not upon an investigation of the usage, but upon the reason of the thing.

The admission of plaintiff in his plaint of the existence of property in repect to which defendant is entitled to compensation and which is found by the Commissioners to have come into existence prior to the last renewal, shows that at all events in some instance the usage is not always that sugested by Mr. Justice HOLLOWAY and the District Judge.

In a matter of so much importance we think it right that there should be further evidence taken as to the usage, as now requested, by the defendant.

We shall therefore send down again, for a more general inquiry, the issue: "Is it the usage of Malabar for the kanam holder to require the adjustment of his claim to compensation for improvements on each renewal?"

It may be that though the usage throughout Malabar should turn out not to be uniform, there may be local usages, and then the local usage in the neighbourhood of the property now in question will have to be determined.

The District Judge on receipt of this order returned a revised finding after taking evidence as follows :—

" On the evidence now recorded I can only return a finding that it is not the invariable usage of Malabar for the kanam holder to require the adjustment of his claim to compensation for improvements on each renewal. As the issue is framed the burden of proving the usage rests on plaintiff and he has failed to adduce satisfactory evidence. I did not sufficiently consider on whom the burden of proof lay in my former finding. It would have been more satisfactory if concrete instances had been brought forward in which compensation for improvements prior to demise had been paid by jenms although the tenant's right was not specially reserved. I alluded to one such instance in my former finding, but I have not been able to discover another. On the other hand, I am constantly coming across documents in which the tenant's right is specially reserved. In the case of an improving lease granted by the Eralpad or Second Raja of Calicut, which came before me yesterday, the following passage occurs : ' No payment having been made on account of reclamation expenses, this document provides for such payment on evicition.' I take it that it cannot be said that there is any fixed usage as to adjustment of claims one way or the other.

[291] " I should like to add a few words as to the construction of the documents in these suits. The general rule, of course, is that a contract which is reduced to writing cannot be varied by oral evidence. And I think that on this ground first defendant cannot succeed in respect of one item of his claim, *viz.*, the Vettuchamayom or cost of converting parambas into palliyals. The lands demised are described as palliyals and as the jenm of the Mana, and in such a case the evidence of the two Vakils is opposed to the right claimed by first defendant to go behind the document and claim compensation for past labour. If the lands had been described as palliyals formed out of parambas the case would have been different.

The District Munsif awarded in S. A. 642 of 1880—

	Rs.	A.	P.
For Vettuchamayom or cost of converting dry lands into wet	225	1	7
For Chamayom or permanent improvements such as buildings, tanks. ...	243	11	0
For Kuyikur or plantations	751	12	2
Total ...	1,220	8	9

And in S.A. 643 of 1880—

For Vettuchamayom	1,273	13	8
For Chamayom	524	15	6
For Kuyikur	637	15	0
Total ...	2,436	12	2

" I was at first inclined to think that on the same ground the compensation claimed for Chamayom ought to be excluded as one of the items demised in each

suit (No. 6 in S. A. 642 and No. 9 in S. A. 643),is the Kalum Kudiyiruppa. This is wrongly translated in S. A. 642 as 'Tank and dwelling.' The proper translation is probably that given in S. A. 643, *viz.*, 'Barn and dwelling paramba." This does not necessarily include the buildings and tanks.

"The Munsif disallowed under the head of Kuyikur the trees in the forest which are described as the property of Mana.

"With these observations I resubmit the records and revised finding."

[292] After another reference to the District Judge to ascertain the actual amount due to defendants, the High Court varied the decree in accordance with the findings of the District Judge.

NOTE.—In his finding as to the amount actually due for compensation in these cases the District Judge made the following request :—"As this case will be the leading case in all future disputes as to improvements I venture to express a hope that the High Court will definitely state their view.

"The rules which I have adopted since the High Court expressed their dissent from Mr. HOLLOWAY'S decision as Subordinate Judge of Calicut in 1856 are—

"(1) There is no general presumption that a tenant's improvements have been adjusted at the date of the last renewal. It is a question of fact to be determined in each case.

"(2) If any of the improvements made by the tenant are mentioned in the deed of renewal as the property of the jenm, it is not open to the tenant to prove by oral evidence that compensation has not been paid for such items."

In reply to this request the Court issued the following order :—

The District Judge in sending a finding in these second appeals desires the High Court will definitely state their view on certain points.

All that appears to have been found and decided is "that it is not the invariable usage in *Malabar* for the kanam holder to require adjustment of his claim to compensation for improvements on each renewal." There is, therefore, no presumption that there has been such adjustment.

No such rules could be laid down as the second of those drawn and apparently acted upon by Mr. Wigram. The fact of property being mentioned in the renewal as that of the jenm may be very strong evidence against a tenant's claim to adjustment of improvements upon it in a subsequent renewal, but it is not an estoppel, and if he saw fit to rubut the presumption against him by evidence, there is no reason why he should not give it.

NOTES.

[*See* also (1884) 8 Mad. 284.]