MAHOMED KOYA v. KASMI.

JUDGMENT:—The plaintiff's movable property had been attached in execution of a decree against the defendant No. 3, and his claim having been disallowed, he brought this suit to establish his right. The relief asked is a declaration that the property is not liable to be sold for the judgment-debt of defendant No. 3. The District Múnsif granted the declaration prayed for, but the District Judge has held in appeal that the suit, being one for personal property, ought to have been instituted in the Court of Small Causes.

A Small Cause Court is not entitled to make a declaration, and the District Judge's order cannot be supported on the ground upon which it has been put. On behalf of the respondent it has been contended that the appellant was dispossessed by the attachment, and, therefore, could not ask for a declaration without also seeking recovery of the property; if he had sought recovery of the property there is no doubt that the suit would be cognizable by a Court of Small Causes. But we do not think he was bound to sue for possession. Section 283 permits him simply to establish his right. The property is not in the possession of any private person, and he could not sue the Court which attached it. It is probable that, in framing s. 283 of the Code of Civil Procedure, the Legislature bore in mind that, if a suit for possession was required, the owner of property might be put to heavy expense in the way of institution fees upon his property being wrongly attached.

The decree of the District Judge is reversed, and the appeal remanded for disposal on the merits. The costs of this appeal will be paid by the respondent.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1885. September 18. 1886. January 6.

CHANDU (PLAINTIFF), APPELLANT,

and

KOMBI (DEFENDANT No. 1), RESPONDENT.*

Jurisdiction—Civil Courts' Act (Madras)—Court Fees Act, s. 7, cl. 9—Ejectment—Mortgage set up by defendant exceeding limit of jurisdiction.

In a suit brought in a District Múnsif's Court to recover several parcels of land from the defendant, plaintiff alleged that defendant held a valid mortgage of

* Appeal against Order 62 of 1885.

Rs. 206 on two parcels which he offered to redeem. As to the other parcels he alleged that if any charges had been created in defendant's favour over them by his predecessor in title such charges were invalid. The suit, as valued by the plaintiff, was within the pecuniary limit of the Múnsif's jurisdiction. Defendant pleaded that he held a mortgage for Rs. 3,000 over the land and therefore the Múnsif's Court had no jurisdiction to try the suit. The Mánsif tried the question of the validity of the defendant's mortgage and decreed possession to plaintiff on payment of Rs. 906 due on account of mortgages and Rs. 1,647-11-9 on account of improvements. On appeal the District Judge held that the Múnsif had no jurisdiction, reversed the decree, and ordered the plaint to be returned to be presented in the proper Court.

Held, that the Múnsif's Court had jurisdiction.

If a suit is brought in ejectment, and the defendant proves that he holds a mortgage, a decree for redemption cannot be made without his consent.

If, in such case, defendant consents to a decree for redemption, and the amount secured by the mortgage exceeds the limit of the pecuniary jurisdiction of the Court, the Court should not proceed further, but return the plaint to be presented in a superior Court.

THE facts and arguments in this case appear sufficiently, for the purpose of this report, from the judgment of the Court (Kernan and Muttusámi Ayyar, JJ.).

The Acting Advocate-General (Hon. Mr. *Shephard*) for appellant.

Srínivása Ráu for respondent.

JUDGMENT.—This is an appeal against an order of the Officiating District Judge of North Malabar (H. T. Ross), dated the 19th of December 1884, made in appeals 224 and 268 (in original suit 583 of 1883 on the file of the District Múnsif of Badagara), whereby the Officiating District Judge reversed a decree made for the plaintiff, and directed the plaint to be returned to the plaintiff for presentation in the proper Court. The Officiating District Judge held that the subject-matter of the suit exceeded Rs. 2,500.

In the plaint, plaintiff (Valathilathil Chandu), as holder of the stánam of the Kannambalath Náyar, sought to recover possession of several properties mentioned in the schedule to the plaint. He admitted that defendant No. 1 (Kombi Poker) held kánam on the properties Nos. 1 and 2 for Rs. 206, which he offered to redeem. He alleged in the plaint that defendant No. 1 and the other defendants under him got possession of the remaining properties from No. 3 inclusive, belonging in jenm to the plaintiff as stáni through means of one or other of his predecessors in the stánam, who had not delivered marupats (counterparts of

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lease) or documents to him by reason of existing enmity. But, in the plaint, it was alleged that defendants were not entitled to any charge except as before stated on the properties, or to possession of the properties, inasmuch as any kánams, except as above, were not granted by his predecessors for purposes binding on the family. He prayed for delivery of all the properties on payment of Rs. 206, and for rent of all the remaining properties from No. 3, from the institution of the suit, and further relief.

He valued his suit at—

	RS.	A.	P.
(1) Value of kánam admitted	206	0	0
(2) Five times the income of the properties from No. 3	221	5	2
(3) The rent of the properties	425	0	0
In all ...	852	5	2

Defendant No. 1 pleaded that the suit was not properly valued, and if it was, it would be beyond the jurisdiction of the Múnsif, as his kánam and other claims amounted to Rs. 3,000, besides other items. Some of the other defendants set up separate defences as to property in their possession, which it is not necessary to refer to in detail.

The issues framed were (so far as is important to the present question)—

(6) Whether the sale set up by defendant No. 1 in respect to properties Nos. 1, 2, and 17 sued for is true, and valid, or not?

(7) Whether the plaint kánam grants are true, or not?

(8) Whether the kánam set up by defendant No. 1 is true and valid and binding upon the plaint properties concerned, or not?

(9) Whether the Court-sale set up by defendant No. 1 in respect to properties Nos. 7, 11, 17, and 21 sued for is true and valid, or not?

The Múnsif having heard the case, made a decree directing restoration to the plaintiff of all the properties on payment of Rs. 906, kánam amount due to defendant No. 1, and Rs. 1,647-1-9 due for improvements due to all the defendants. Defendant No. 1 appealed on many grounds, of which one only

need be referred to, viz., the ground that he held a kánam for 2,500 rupees and other claims, and that the suit is not within the jurisdiction of the Múnsif. On appeal, the Judge decided that the suit was beyond the Múnsif's jurisdiction and was not properly valued. He says that the Múnsif treated the suit as one to redeem kánam, and went on trying whether the kánams set up by the defendant were valid or not, and valued the suit according to the result. This, moreover, the Judge says, is unsound, and he considers this proved by supposing the case that the kánams set up by the defendants were found valid, and he asks, what then would become of the Múnsif's jurisdiction, and says, the mere accident that he found some of them not valid cannot affect the principle.

He decided that treating the suit as one to redeem kánam, the proper valuation of the suit for jurisdiction was the amount of the mortgage set up by the defendant, on whom plaintiff relied to show how the properties were held. He also decided that the proper valuation for Court fees was, under s. 7, cl. 9, Act VII of 1870, according to the amount specified in the instrument of the mortgage, and not the amount ultimately found due. He then refers to exhibits 1, 5, 8, 9, 10, 11, and 14 which are kánams set up by the defendant, and the sums expressed in these amount, in the whole, to Rs. 2,740, which is beyond the jurisdiction of the Múnsif. He also says that the plaintiff alleged he did not know what kánams there were, and that he threw on the defendant the *onus* of proving what kánams were outstanding to be redeemed. We are of opinion that the suit should not have been valued then and there on the mortgages disclosed by defendant No. 1, before going into the question of their validity or otherwise. We do not agree that the plaintiff was bound to accept the principal amount stated in the mortgages produced by the defendant as the value of the subject-matter of the suit, unless so far that plaintiff may have admitted that the mortgages, or any of them, were binding on him, and were valid charges on the land.

If a plaintiff was bound to value the subject-matter according to the amount specified in mortgages produced by the defendant, whether he admitted them or not, the result would be to give the defendant the selection of the Court in which the suit should be brought, if he chose to set up unfounded claims on invalid

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kánams. Moreover, if a plaintiff filed his suit in the District Court merely because the defendant alleged kánams binding upon plaintiff which were over Rs. 2,500, and if it was found they did not bind plaintiff, then he might be in the difficulty of having his plaint returned to have the suit filed in the Múnsif's Court.

In the present case, as we understood, several documents set up by the defendant were not admitted by the plaintiff and were found not to be binding on him. Why then should plaintiff accept the amount of any of such documents as any part of the value of the subject-matter of the suit. The Court Fees Act refers to suits to redeem mortgages, that is when the mortgage is admitted.

It was contended for the defendant that the mortgages produced by Defendant No. 1 did bind the plaintiff as they were made by a predecessor in office of the plaintiff, and that he could not avoid redeeming them if he claimed possession. We are not prepared to admit this, as the plaintiff, not having executed any of the documents, was not bound to file a suit to set them aside. He would be entitled, as admitted jenmi, to possession, if the defendant does not establish any title, and such title he could only establish by proving mortgage and the validity and binding effect of it on the plaintiff. If the defendant failed in so doing, as he did in some instances in this case, his alleged mortgage, even though registered, would not stand in the way of a decree for possession which plaintiff would be entitled to.

Plaintiff's case on the plaint was that he did not admit any mortgage held by defendant was binding on him except what he offered to redeem. We think the Múnsif had jurisdiction. In argument of the appeal some matters were referred to, and to which, it may be of use to the parties in a future trial, that we should refer.

In the course of the trial, inquiry was made whether other kánams set up by defendant No. 1 were binding on the plaintiff. The Judge says, the Múnsif varied the value of the suit according to the result. But the plaintiff could not take from the defendant possession of any land on which the latter proved a valid kánam, unless he offered to redeem. It is quite intelligible therefore that plaintiff, whenever a mortgage (not admitted) was proved and its amount fixed, to propose (*if the defendant did not object*) to redeem that mortgage. In this way, the amount of the subject-matter might become increased in value, and then further duty

should be payable. If the amount in value of the subject-matter at the conclusion of the trial or before that appeared to be more than Rs. 2,500, then the Judge should not proceed further in the suit, but should give back the plaint to be filed in the proper Court. It is contended that the Civil Courts' Act does not contemplate an increase in the value of the subject-matter in the course of the suit, but I do not see any objection on principle to such increase arising on the construction of the Civil Courts' Act, or the Court Fees Act. It is not always possible, before filing a suit, to fix the exact value for jurisdiction in the Múnsif's Court. It is enough if it is below Rs. 2,500. If the subject-matter is valued for duty under the Court Fees Act at a fixed amount, that amount may be increased under ss. 9 to 12 in the cases there mentioned, if the amount proved exceeds the original value stated in the plaint, and thereupon the excess duty becomes payable and is directed to be levied. It does not appear that the defendants denied the right of the plaintiff to redeem any of the kánams proved, or relied on any right to continue in possession under any of them. The only question in respect of such kánams set up by the defendant was whether they bound the plaintiff, and what sum was due on foot of them. We think, therefore, that there was no objection to the course adopted by the Múnsif in allowing the amount of the subject-matter to be valued at an increased amount, if defendant did not object. The question, however, of more importance, is whether the plaintiff should, in the course of this suit, be allowed to redeem any kánam proved, which he had not offered either specially or under general terms in the plaint to redeem, if the kánam-holder *objected*. We think he should not have been so allowed. The plaintiff did not admit any kánam except as specified in the plaint. Defendant No. 1 set up others; and there was an issue, whether they were true or not.

The plaintiff did not, in the plaint, offer to redeem any of those others, but insisted on his title to the lands discharged of them. At the hearing, the Múnsif treated the suit as one to redeem any kánam proved. Defendant No. 1, it is stated by the Judge, *objected* to that course. The objection, if made, was a good one, inasmuch as whether the Múnsif at the hearing altered the plaint so as to make it appear that the suit was for redemption of all kánams proved, or whether without alteration he treated the

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suit as one for such redemption, he altered the nature of the suit so as far it prayed for possession irrespective of defendant's kánams, to one for redemption of the kánams proved by the defendant. If on, appeal, the kánams set up by the defendant No. 1 are held to bind the plaintiff, he may be able to say that he did not offer to redeem them, and then the defendant would lose the advantage of the decree which, if the suit was a redemption suit, he would have been entitled to, viz., that if plaintiff did not redeem within a given time his right should be barred.

The plaintiff ought to decide for himself, while framing his plaint, whether he is to sue to redeem or to eject, and value his suit accordingly. It is certainly irregular without defendant's consent, to allow a suit to eject to be treated as a suit to redeem, without amending the plaint. The right to amend ceases with the first hearing, and it was again irregular to treat the plaint as amended according to the result of the findings at the conclusion of the trial.

We reverse the order of the Officiating District Judge, dated the 19th December 1884, and direct the appeal to be restored to the file of the District Judge to be disposed of *de novo*.

The costs of this appeal will be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1885. October 27.

VENKATANÁRÁYANA (PLAINTIFF), APPELLANT,

and

SUBBARÁYUDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Regulation XXIX of 1802—*Karnam—Incapacity of next heir—Minority—Appointment by landholder of successor without proof before Zila Court of incapacity of heir.*

A karnam in a zamíndárí village having died leaving a minor son, the landholder appointed the brother of the late karnam to the office.

In a suit brought by the son, after attaining majority, to establish his right to the office and to recover its emoluments:

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* Appeal 54 of 1885.