

KANHARAN-
KUTTI
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applies to suits for possession of property. Third defendant has no need to bring any suit for possession of the property in question. He has already obtained a decree for such possession. The only suit he would have to bring to assert his right of pre-emption would be a suit to set aside the sale to the plaintiff and the first and second defendants and to compel them to convey the property to him on his paying the price they had paid, and, even if such a suit is barred, the right is not extinguished by section 28.

It has been found by both Courts that third defendant's right of pre-emption has not been waived, and, that being so, it is a good defence to this suit and it is unnecessary to consider the other ground upon which the District Munsif decides against plaintiff, viz., that he cannot redeem one-third of the paramba on paying one-third of the otti amount due on it, though that appears to us equally fatal to plaintiff's suit as framed. The second appeal fails and must be dismissed with costs.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Weir.*

SUNDARAM (PLAINTIFF), APPELLANT,

v.

ANNANGAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, s. 561—Act VII of 1888, s. 48—Time
allowed for memorandum of objections.*

An appeal cannot definitely be posted until the Court has ascertained that notice of the appeal has been served on the respondent and a date must then be fixed not less than one month from the date of service.

SECOND APPEAL against the decree of W. F. Grahame, District Judge of Tinnevely, in appeal suit No. 1691 of 1888, modifying the decree of C. Srirangachariar, District Munsif of Srivilliputur, in original suit No. 335 of 1887.

Suit for Rs. 300 for damages for defamation. The District Munsif passed a decree that the plaintiff do recover from all the defendants, other than the defendants Nos. 9 and 14, Rs. 10.

* Second Appeal No. 903 of 1889.

On appeal against this decree, which appeal was disposed of less than a month after the date of the service of notice on the plaintiff, the District Judge modified the decree of the District Munsif by decreeing the plaintiff four annas damages with proportionate costs.

The District Judge said :—“For plaintiff, as respondent, I have been told that I ought not to take up the appeal until a month has elapsed from the date of plaintiff receiving notice, because he is ‘thinking’ of fling a cross-appeal in the shape of a memorandum of objections under section 561, Civil Procedure Code, and that, under section 561, as amended by Act VII of 1888, respondent can file a memorandum of objections within a month from the date of receiving notice. No petition was filed informing me of plaintiff’s intention or asking for an adjournment, and I was not asked in so many words to adjourn the appeal to enable plaintiff to put in a memorandum of objections. I was merely told that the pleader would like the hearing to be put off, because plaintiff is ‘thinking whether he will put in a memorandum of objections or not.’ Plaintiff signed his pleader’s vakalat on 16th instant just a fortnight ago and he is not, in my opinion, entitled to have an appeal kept pending merely to enable him to make up his mind. I am the less inclined to put off the hearing, inasmuch as I find that plaintiff is entitled to no more than four annas damages for his wounded feelings.”

The plaintiffs preferred this second appeal.

Parthasaradhi Ayyangar for appellant.

Sankaran Nayar for respondents.

JUDGMENT.—The law—section 561, Civil Procedure Code, as amended by Act VII of 1888, s. 48—allows a respondent to file a memorandum of objections within one month from the date on which notice has been served on him or on his pleader. The right so conferred is an absolute right and the hearing of the appeal cannot be advanced so as to defeat this provision. The District Judge in this case was made aware that the respondent contemplated, but had not quite decided on filing a memorandum of objections; but this circumstance was, we think, immaterial. Whether the District Judge knew of the respondent’s intention or not, the respondent had a month’s time within which to file his memorandum of objections, and the appeal could not be definitely

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posted, we consider, until the Court or its officer had ascertained that notice had been served. It should then have been posted for some date not less than a month from the date of service on the respondent.

We must, therefore, allow this appeal, and, reversing the District Judge's judgment, we remand the appeal for rehearing, after giving due notice to the parties and allowing to the respondent the time prescribed by law for filing a memorandum of objections.

The second appellant will have his costs in this appeal. The costs in the Courts below must abide the event.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VENKATRATNAM (DEFENDANT No. 3), APPELLANT,

v.

REDDIAH AND OTHERS (PLAINTIFF AND DEFENDANTS
Nos. 1 AND 2), RESPONDENTS.*

Evidence Act—Act I of 1872, s. 92—Collateral evidence to show that an apparent sale-deed was a mortgage—Variance between pleading and proof.

In a suit by an attaching creditor to set aside an order (which allowed an objection made to his attachment by one claiming under a sale-deed from the judgment-debtor,) and for the declaration of the judgment-debtor's title, the sole issue framed was whether the sale-deed was *bonâ fide* and supported by consideration :

Held, that the plaintiff was entitled to show by collateral evidence that the sale-deed was really a usufructuary mortgage and that the mortgage had expired.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 745 of 1888, reversing the decree of M. B. Sundara Rau, District Munsif of Masulipatam, in original suit No. 42 of 1888.

In original suit No. 669 of 1885 in the Subordinate Court of Cocanada, the present plaintiff obtained a decree against defendant No. 1 and in execution attached the land in question in the present suit. The son, since deceased, of defendant No. 3, intervened in execution, claiming title under a registered instrument, dated 24th May 1877, and executed to him and defendant No. 2 by defendant

* Second Appeal No. 830 of 1889.