

APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

KANFARANKUTTI (PLAINTIFF), APPELLANT,

v.

UTHOTTI (DEFENDANTS), RESPONDENTS.*

1890.
July 21.
Aug. 5.

*Malabar law—Right of pre-emption under otti—Waiver—Limitation Act—
Act XV of 1877, s. 28.*

A jenmi having demised certain land in Malabar on otti to defendant No. 3 in 1869, sold the jenm title to the plaintiff and defendants Nos. 1 and 2 in 1886. In 1888 defendant No. 3 made a further advance to and obtained a renewed demise from defendants Nos. 1 and 2. The plaintiff now sued more than six years after the sale to recover his share (defendant No. 3 being in possession) on payment of one-third of the otti amount:

Held, that (whether or not the suit was maintainable as framed) the third defendant had a right of pre-emption as *ottidar*, which had not been waived by him and was not barred by limitation, and which constituted a good defence to the suit.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 478 of 1888, confirming the decree of V. Kelu Erati, District Munsif of Pynad, in original suit No. 176 of 1888.

Suit to recover a one-third part of a paramba demised on otti to defendant No. 3 on 28th January 1869.

It appeared that plaintiff and defendants Nos. 1 and 2 were the younger children of the jenmi, by whom the land in question was demised on otti to defendant No. 3 on the above date. The eldest son of the jenmi took the land on lease from defendant No. 3. Subsequently, in October 1886, the jenmi sold her right to the paramba now in question to the plaintiff and defendants Nos. 1 and 2 and sold the jenm of another paramba to the wife of her eldest son, reserving the otti of Rs. 300 due to defendant No. 3 equally on each of them. Defendant No. 3 brought original suit No. 277 of 1887 against his lessee and the vendees of the jenmi for recovery of both parambas under the otti and obtained a decree on the 15th of February 1888. After the decree, defendant No. 3

* Second Appeal No. 970 of 1889.

advanced a further sum of Rs. 50 to defendants Nos. 1 and 2 and a further sum to the wife of the lessee and obtained renewed demises of both parambas.

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The District Munsif dismissed the suit, holding that the plaintiff's purchase was invalid as against defendant No. 3, who, being the holder of the otti, had a right of pre-emption, which he held had not been waived. His decree was affirmed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellants.

Sankara Menon for respondents.

JUDGMENT.—The first point argued before us on second appeal is that third defendant's right of pre-emption, assuming it to exist, is no bar to this suit, inasmuch as it does not invalidate the sale to plaintiff and first and second defendants altogether, but only gives third defendant a right to have the sale transferred to him on offering to pay the price paid to the jenmi. In support of this contention *Ajudhia Bakhsh Singh v. Arab Ali Khan*(1) and *Vasudevan v. Keshavan*(2) are relied on. Neither of these cases appears to us to be in point. The case of *Ajudhia Bakhsh Singh v. Arab Ali Khan*(1) relates to the right of pre-emption among co-sharers under Muhammadan law, which is a very different thing from the right of pre-emption of an otti-holder under Malabar law. In *Vasudevan v. Keshavan*(2) all that was decided was that a holder of a veppu mortgage, which appears to carry with it the right of pre-emption and also the preferential right to make further advances, had no right to set aside the further mortgage, but was only entitled, on tendering the price, to claim that the further mortgage should be transferred to him. As to the right of pre-emption it was found in that case that an offer was made to the karnavan at the auction sale to purchase at the price offered by the highest bidder and the offer was refused, so that the question of pre-emption did not arise. On the other hand, *Oheria Krishnan v. Vishnu*(3) is a distinct authority that the right of pre-emption is a good defence to a suit to redeem.

Another point raised is that the third defendant's right of pre-emption is extinguished by section 28 of the Limitation Act, more than six years having elapsed since the sale; but section 28 only

(1) I.L.R., 7 All., 892. (2) I.L.R., 7 Mad., 309. (3) I.L.R., 5 Mad., 198.

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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 Srivilliputtur, 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.