

GNANAMBAL
v.
PARVATHI.

that neither could now sue to set it aside, the present defendant is not under the same disability. Though she attached it as the property of Subbayyan or his son, she did so, not as their privy or representative, but by virtue of a right inherent in her to attach what was really their property at the date of attachment. It would be open to her to show that Subbayyan and his son were in collusion with the plaintiff. There is nothing on the record to indicate that the notice of claim was served on Subbayyan's son. However this may be, the defendant is not their representative. This circumstance distinguishes this case from the cases cited by the District Judge.

I therefore concur in the order proposed by my learned colleague.

APPELLATE CIVIL.

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

AMMOTTI HAJI (PLAINTIFF), APPELLANT,

v.

KUNHAYEN KUTTI (DEFENDANT), RESPONDENT.*

Malabar law—Ottidar, right of pre-emption of—Waiver—Election not to purchase.

An ottidar in Malabar loses his right of pre-emption if he refuses to bid at a Court-sale of the land comprised in his otti, held in execution of a decree against the karnavan and senior anandravan of the tarwad, in which the jenm right is vested, after having been specially invited to attend and exercise that right, and makes no offer to take the property for a long time after the Court-sale.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 432 of 1891, affirming the decree of V. Kelu Eradi, District Munsif of Pynad, in original suit No. 163 of 1891.

Suit by an ottidar, alleging that the lands comprised in his otti had been purchased by the defendant for a sum of Rs. 161 at a sale held in execution of a decree against the jenmi, and praying for a declaration that the jenm right should vest in him on payment by him to the defendant of the sum of Rs. 161. It appeared that a notice had been sent to the plaintiff at the date of the sale, calling on him to exercise his right of pre-emption, and

* Second Appeal No. 1772 of 1891.

that the plaintiff attended the sale but did not make any bid. The Lower Courts passed decrees dismissing the suit.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Sankara Menon for respondent.

AMMOTT
HALL
v.
KUNHAYEN
KUTTI.

MUTTUSAMI AYYAR, J.—The question for decision in this appeal is whether an otti-holder in Malabar loses his right of pre-emption in consequence of his refusal to bid at a Court-sale on the invitation of the purchaser at such sale. The contention for the appellant is that he abstained from bidding, because he was under the apprehension that the junior members of the judgment-debtor's tarwad might contest the validity of the Court-sale on behalf of their tarwad. The decision must, I think, depend on the further question how far an invitation to bid at a Court-sale is equivalent to an offer to sell from the jenmi or the real owner. There is no reason to doubt that, if the decree is binding on the tarwad, the otti-holder is bound to elect either to bid at the Court-sale, or to relinquish his right of pre-emption. In the present case, the decree was one against the karnavan and the senior anandravan of the tarwad, and, as such, it was *prima facie* binding on the tarwad, and no valid ground of objection is shown by the appellant to have existed to the validity of the sale in its execution as against the tarwad. It is then said that appellant abstained from bidding, because he feared that some members of the judgment-debtor's tarwad might contend that the decree was not binding on it. The decree-holder had a right to bring the property to sale, and the otti-holder had a right of pre-emption. All that the former was bound to do was to give the latter an opportunity to elect either to exercise his right or not, and, if the latter did not choose to do so, he must be taken to have relinquished his right. The facts found do not indicate that he made any inquiry, or had a reasonable objection to the decree being treated as one binding on the tarwad. The case is one of election, and the Court-sale created a necessity for appellant's electing either to buy or not to buy, and, after once electing not to buy, he cannot again be permitted to change his mind and assert his right for pre-emption. I am of opinion that this second appeal must fail and be dismissed with costs.

BEST, J.—The question is whether the Lower Courts are wrong in holding that plaintiff has forfeited the right of pre-emption

AMMOTTI
HANI
v.
KUNHAYEN
KUTTI.

which he possessed as ottidar of the property which was purchased by the respondent on its being sold by Court in execution of a decree for money obtained by a third party against the jenmi.

The findings of the Lower Courts are (1) that notice was sent by the decree-holder to the appellant of the date of the sale, calling upon him to exercise his right of pre-emption if so minded, and (2) that appellant was himself present at the sale, but would not bid, saying that the otti to himself was given by nine persons of the tarwad, whereas the decree, under which the sale was being held, was against two only, and that he was afraid there might be a suit by the others to set aside the sale.

It was no doubt held in *Cheria Krishnan v. Vishnu*(1) that the mere fact that the *public notice* was given of the intended sale, at which therefore the ottidar might have come and bid was not sufficient to deprive him of his right of pre-emption. That does not appear, however, to be a case in point, for here there was something more than the public notice. There was special notice sent to the ottidar himself; and it is found, as a fact, that he was present at the sale and declined to bid for fear his doing so might involve him in litigation.

It appears that the validity of the sale is in fact disputed, but without success, and it is only after this that appellant comes into Court, offering to purchase the property in the exercise of his right of pre-emption.

It was held by the Calcutta High Court in *Abdul Jabel v. Khelat Chandra Ghose*(2) that, when property is sold by public auction at a sale in execution of a decree and the person having a right of pre-emption has the same opportunity to bid for the property as other parties present in Court, the law of pre-emption does not apply. This is certainly not quite in accordance with the *dictum* in *Cheria Krishnan v. Vishnu*(1) "that the pre-emptor is entitled to be fully informed what price he is to pay before he makes up his mind to pay and should not be driven to give any fancy auction price at an auction." But even taking this *dictum* to be authority for holding that appellant did not forfeit his right of pre-emption by not bidding at the auction, as soon as the auction sale ended, the price for which the property had been

(1) I.L.R., 5 Mad., 198.

(2) 1 B.L.R., A.C., 105.

knocked down was a "sum ascertained" for which he could have offered to take the property, instead of waiting for nearly a year without even making the offer.

AMMOTTI
HAJI
v.
KUNHAYEN
KUTTI.

No doubt the Limitation Act gives a period of one year for the purpose of *instituting a suit to enforce* a right of pre-emption, but the question before us is not whether the suit is in time, but whether, by his conduct, the appellant waived his right. Both the Lower Courts have found that he did, and I agree with them.

I therefore agrée in dismissing this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramanya Ayyar and Mr. Justice Best.

UKKANDAN (PLAINTIFF), APPELLANT,

1892.
February 12.

v.

KUNHUNNI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar law—Karnavan, disqualification for office of—Blindness.

A blind man sued, as the karnavan of a Malabar tarwad, to recover certain land. One of the defendants, who claimed but was not admitted to be a member of the tarwad, and who asserted a right as kanomdar to the land in question, pleaded that the plaintiff was not competent to act as karnavan, or consequently to maintain the suit by reason of his blindness:

Held, that the defendant was not entitled to raise this plea.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 303 of 1890, affirming the decree of V. Kelu Eradi, District Munsif of Pynad, in original suit No. 82 of 1890.

The facts of the case are stated above sufficiently for the purposes of this report. The Lower Courts dismissed the suit, holding that the plea of the defendant, above referred to, should prevail.

The plaintiff preferred this second appeal.

Ryru Nambiar for appellant.

Sankara Menon for respondents.

JUDGMENT.—The decision in *Kanavan v. Kunjan*(1) goes no farther than that a blind man is not a fit person to be karnavan

* Second Appeal No. 644 of 1891.

(1) I.L.R., 12 Mad., 307.