

## APPELLATE CIVIL.

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

UKKU (PLAINTIFF), APPELLANT,

1892.  
Feb. 25.

v.

KUTTI AND ANOTHER (DEFENDANTS NOS. 1 AND 2), RESPONDENTS.\*

*Malabay law—Ottidar's right of pre-emption—Suit to redeem kanom.*

In a suit to redeem a kanom of 1874, it was found that the plaintiff's predecessor in title had purchased the jenm title to the land in question at a sale, held in execution of a decree which was binding on the jenm's tarwad; but it appeared that the defendant (the kanomdar) held an otti on the land, dated 1870, and had not waived his right of pre-emption as ottidar. A decree was passed providing for payment by the defendant of the purchase money to the plaintiff and the execution by the latter of a conveyance, and in default for redemption by the plaintiff on his paying to defendant the amount of the otti :

*Held*, that the decree was right.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 479 of 1890, reversing the decree of V. Kelu Eradi, District Munsif of Pynad, in original suit No. 168 of 1890.

Suit to redeem a kanom, dated 1874. It was alleged in the plaint that the land subject to the kanom was the jenm of one Ramothy Kitavu who demised it on kanom for Rs. 100 to the defendant in 1874, and that the interest of Ramothy Kitavu was sold in execution of a decree passed against him in 1880 and purchased by the anandravan (since deceased) of the plaintiff. The defence was that the land was the jenm of the tarwad of Ramothy Kitavu who demised it to the defendant on otti for Rs. 325 in 1870, a further sum of Rs. 400 being then advanced by the defendant; that the decree above referred to was not binding on the tarwad of the judgment-debtor, and that the purchase by the plaintiff's anandravan was not binding on the defendant who had the right of pre-emption as an ottidar.

The District Munsif held that the execution sale was binding on the tarwad of the judgment-debtor, but he found that the defendant held an otti on the land as alleged by him and held that

\* Second Appeal No. 961 of 1891.

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the plaintiff had accordingly obtained no valid title against him since he had not waived his right of pre-emption as *ottidar*. Upon these findings the District Munsif dismissed the suit.

On appeal the District Judge who expressed no dissent from the findings of fact recorded by the District Munsif reversed his decree. He said —

“I find that defendant is entitled to receive the *otti* amount, Rs. 325, and the amount of further charge, viz., Rs. 100.

“The equitable course to pursue under these circumstances seems to be to allow defendant an opportunity to pay to plaintiff the auction price and take a conveyance, and on his failing to do so, to allow plaintiff to redeem the suit land on payment of Rs. 425, and I accordingly reverse the Lower Court’s decision and decree that on defendants paying to plaintiff in two months from this date Rs. 96, the auction price of item No. 2 in exhibit A, plaintiff shall convey his interest to defendant and that on defendants failing to pay the above amount in the time specified, plaintiff shall recover the suit land on payment to defendant within four months from this date of Rs. 425, with interest at 6 per cent. on Rs. 100 from 6th March 1869 till date of payment.”

The plaintiff preferred this second appeal and the defendant filed a memorandum of objections to the decree so far as it was against him.

*Sankaran Nayar* for appellant.

*Narayana Rau* for respondent No. 1.

JUDGMENT.—The Judge finds that the sale is valid, but that the purchaser is under an obligation to convey the property to defendant on the latter paying the purchase money in the exercise of his right of pre-emption. This is in accordance with the principle laid down in *Vasudevan v. Keshavan*(1).

It is then argued that though the defendant may enforce his right of pre-emption by instituting a suit, he cannot resist a suit for redemption on this ground. This is opposed to the decision in *Kanharankutti v. Uthotti*(2) and *Cheria Krishnan v. Vishnu*(3).

Whatever right he can assert as plaintiff is also available to him as a ground of defence.

The appeal therefore fails and is dismissed with costs.

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(1) I.L.R., 7 Mad., 309. (2) I.L.R., 13 Mad., 490. (3) I.L.R., 5 Mad., 198.

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As regards the memorandum of objections it is argued that the suit should have been dismissed and that the decree passed by the Judge is bad in law. But the decree passed appears to us to be just and proper. It gives effect to the right of pre-emption and in case of this right not being exercised within a given time allows redemption. In *Vasudevan v. Kesharan*(1) this point was raised and considered.

We also disallow the objections with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.*

CHATHAPPAN (COUNTER-PETITIONER), APPELLANT,

v.

PYDEL (PETITIONER), RESPONDENT.\*

1891.  
April 6.

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*Civil Procedure Code, ss. 13, 206—Res judicata—Amendment of decree—  
Subsequent execution.*

In a suit for money against the karnavan and two anandravans of a Malabar tarwad, the judgment directed a "decree for the plaintiffs as prayed," but the decree ordered payment by one anandravan only. Property of the tarwad was attached and sold. The decree was then amended and brought into conformity with the judgment. Other members of the tarwad sought to have the sale set aside, but it was found that the judgment debt had been contracted for proper tarwad purposes, and that suit was dismissed. Application was now made for the attachment of other property of the tarwad in further execution of the amended decree:

*Held*, that the members of the tarwad were not entitled to contend that the decree was not binding on them that matter being *res judicata*.

*Quære*:—Whether the rule in *Sundara v. Subbanna*(2) as to the amendment of decrees is correct.

APPEAL against the order of J. P. Fiddian, Acting District Judge of North Malabar, on civil miscellaneous petition No. 536 of 1889, reversing the order of A. Chatu Nambiar, District Munsif of Nadapuram, on miscellaneous petition No. 1272 of 1889.

The facts of the case are stated above sufficiently for the purposes of this report.

The petitioner before the District Munsif was the decree-holder and he applied for the attachment and sale of property of the

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(1) I.L.R., 7 Mad., 309.

\* Appeal against appellate order No. 26 of 1890.

(2) I.L.R., 9 Mad., 354.