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the whole debt. The erroneous view taken by the Subordinate Judge is not rendered binding upon us by section 11, because we are not now deciding whether or not he had jurisdiction, but whether an appeal lies to this Court. The case *Vydinatha* v. *Subramanya*(1) has no reference to a suit for redemption of a mortgage.

The appeal lies to the District Court. We order therefore that, on payment of the deficient stamp duty, the appeal be returned for presentation in the proper Court. If the deficient stamp duty be not paid within one month from this date, the appeal will stand dismissed.

The respondents are entitled to their costs in this Court.

APPELLATE CIVIL.

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

1892.
August 15.
October 5.

KONNA PANIKAR (PLAINTIFF), APPELLANT,

v.

KARUNAKARA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Evidence Act—Act I of 1872, *s.* 114—*Estoppel—Transfer of Property Act—Act IV of* 1882, *s.* 60—*Partial redemption—Indivisibility of mortgage—Civil Courts Act—Act III of* 1873 (*Madras*), *s.* 14.

The karnavan of a Malabar tarwad, having the jenm title to certain land and holding the uraima right in a certain public devasom to which other land belonged, demised lands of both descriptions on kanom to the defendants' tarwad, and subsequently executed to the plaintiff a melkanom of the first-mentioned land and purported to sell to him the jenm title to the last-mentioned land. In a suit brought by the plaintiff to redeem the kanom, and to recover arrears of rent:

Held, (1) that, for the purposes of determining the jurisdiction of the Court of appeal, the value of the subject-matter of the suit was the aggregate value of the two heads of relief;

(2) that the defendants were not estopped from denying the plaintiff's right to redeem on the ground that he did not represent the devasom;

(3) that the plaintiff who had denied the title of the devasom in the Court of first instance, was not entitled to redeem the kanom as a whole, by virtue of his admitted title to part of the premises comprised in it.

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(1) I.L.R., 8 Mad., 235.

* Appeal No. 79 of 1891.

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar at Calicut, in original suit No. 26 of 1889.

Suit by the plaintiff as the karnavan of his tarwad to redeem a kanom comprising 26 parcels of land and recover arrears of purapad.

The plaintiff claimed title for his tarwad to some of the parcels of land as purchaser and to the others as holder of a melkanom from the jenmi, viz., the Kolathill illom. Most of the defendants were the members of a tarwad of which defendant No. 1 was karnavan, namely, the kanomdars under the kanom sought to be redeemed, and their tenants. The other defendants were members of the Kolathill illom. This illom held the uraima right in a public devasom to which belonged part of the property in suit, viz., those parcels of which the plaintiff claimed to be jenmi by right of purchase.

The Subordinate Judge held that since the alleged purchase by the plaintiff passed to him no title to the last-mentioned parcels, he could not redeem them, and that since the kanom was indivisible, he could not redeem the other parcels alone, and accordingly he dismissed the suit.

The plaintiff preferred this appeal.

Bhashyam Ayyangar and *Govinda Menon* for appellant.

Sankaran Nayar for respondents Nos. 1 to 4.

JUDGMENT.—Mr. Sankaran Nayar for respondents raises the preliminary objection that the appeal lies to the District Court and not to this Court, as the value of the subject-matter of the suit does not exceed Rs. 5,000.

We consider that there are two distinct causes of action in the suit, namely, the claim for redemption and that for the arrears of rent, and that, therefore, the value of the subject-matter of the suit is the aggregate value of these two heads of relief, *i.e.*, Rs. 5,000 for the suit to redeem and Rs. 122 for the claim for arrears of rent.

We, therefore, overrule the objection and hold that this Court has jurisdiction to try the appeal. This is a suit brought by plaintiff as karnavan of his tarwad to redeem 26 parcels of land demised on kanom to the tarwad of which first defendant is the karnavan and defendants Nos. 2 to 67 are members by the karnavan and two members of the Kolathill illom, and to recover arrears of purapad.

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Plaintiff claims as melkanomdar of items 4, 5, 9, 16, 20, 23, and 24 and purchaser of the jenm right in the other plaint items. Defendants Nos. 68 to 91 are persons in possession under first defendant and the ninety-second defendant was added as defendant as claiming that item 1 was the jenm of her Vennayur Devasom. Items 1, 2, 3 and 26 are admitted to be jenm of the Kolathill illom. The main defence raised by defendants Nos. 1 to 4, who were the principal contesting defendants in the Lower Court, and on appeal, was that items 6 to 8, 10 to 15, 17 to 23 and 25 were the property of the Pisharikovil Bhagavati Devasom of which the Kolathill illom held only the uraima right, and therefore the sale of the jenm of these items to plaintiff's family was invalid and conferred no right to redeem. It is admitted that items 4, 5, 9, 16, 20, 23 and 24 are the property of the last-named devasom. Upon these items plaintiff acquired only a melkanom right, which, it is conceded, would, subject to the question of splitting the kanom, entitle him to redeem and place himself in the place of the kanomdar. Plaintiff denied the title of the devasom to the other items, and the issues chiefly fought in the Lower Court were the first and second relating to items 6, 7, 8, 10 to 15, 17 to 23 and 25.

Defendants Nos. 1 to 4 also set up an agreement to renew evidenced by a document (exhibit I), but this was found by the Subordinate Judge to be a forgery. Upon the first two issues the Subordinate Judge found that the items to which they relate were the property of the devasom which was a public or *quasi* public devasom, and therefore the sale of the jenm right in these lands to plaintiff was invalid and gave plaintiff no right to redeem them. As the mortgage debt, which was a charge upon all the items, could not be split and plaintiff could not redeem these items, he could not redeem at all and the suit was, therefore, dismissed.

In appeal the findings of the Subordinate Judge as to the items the subject of the first issue being the property of the devasom and as to the nature of devasom were not disputed, nor was the finding as to the falsity of the document (exhibit I), appellant's vakil, in support of the appeal, relied chiefly on the following grounds:

(1) That defendants who claim by mortgage under the Kolathill illom cannot dispute their right, and the right of plaintiff as their assignee to redeem, whether their title be that of jenmis or uralars of the devasom.

(2) That plaintiff being admittedly entitled to redeem some of the items subject to the kanom has a right to redeem the whole kanom.

(3) That the purchase by plaintiff was *bonâ fide* and for the benefit of the devasom and is therefore binding upon it.

We shall deal with these three points in order. As to (1) the kanom deed to the first defendant (exhibit V) describes all the 26 items as the property of the devasom. First defendant had therefore notice that the Kolathill illom was merely trustee for the devasom, and was bound to see that the person seeking to redeem the property represented the devasom. Had he not done so he might be liable at the suit of the devasom to account over again for the arrears of purapad. It is argued that as the members of the Messad family, who represented the Kolathill illom, could have themselves brought a suit to redeem, so can plaintiff as their assignee. The answer to this is that the Kolathill illom could have sued to redeem, because they represented the devasom, whereas plaintiff not only does not represent the devasom, but denies the title of the devasom as to the items of property the subject of the first issue. We think defendants were entitled to question the right of plaintiff to redeem on the ground that he did not represent the devasom.

As to (2), we observe that the point does not appear to have been argued before the Lower Court and is not distinctly raised in the grounds of appeal to this Court. The argument is this: plaintiff is admittedly owner of the items 1, 2, 3 and 26, which were the jenm property of the Kolathill illom. He is also entitled to redeem the items 4, 5, 9, 16, 20, 23 and 24 by virtue of the melkanom. He cannot redeem these items without offering also to redeem all the other items subject to the kanom (Transfer of Property Act, s. 60). He is, therefore, entitled to redeem all the items subject to the kanom. In support of this position appellant's Vakil relies on the case of *Hall* v. *Heward*(1). In that case real and personal estates were mortgaged together and the mortgagor died, leaving a will as to his personal estate, but intestate as to his real estate. It was not known who was the heir-at-law, and the mortgagee took possession. The executrix of the

(1) L.R., 32 Ch. D., 430.

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mortgagor sued to redeem the whole property mortgaged, and it was held that she was entitled to a decree subject to the equities of the other persons interested. The Court, however, distinctly held that the heir-at-law, if known, ought to have been made a party. We think that the principle laid down in this case, and that of *Pearce* v. *Morris*(1) which it followed, has no application to the present case. Plaintiff did not frame his suit as owner of part of the mortgaged property and therefore entitled to redeem the whole. If he had done so, he must have made some person party to represent the devasom which has been found to be the owner of part of the property. He could not have so framed his suit, for to do so would have been inconsistent with his case which was a denial of the title of the devasom as to the items the subject of the first issue.

It is not a case of unknown persons interested in the equity of redemption as in the English cases, but of a known person interested in the equity of redemption, whose title plaintiff denies; to allow plaintiff, having failed in his case as originally set up, to fall back upon his right to redeem as part-owner of the mortgaged property would be to allow him to succeed on a case different from and inconsistent with that set up in his plaint. It is urged that some persons representing the devasom might now be made a party. Plaintiff never applied for this to the Lower Court, indeed he could not well have done so considering what his case was, and we do not think this indulgence should be granted to him at this stage of the suit. As he failed in his case as originally put forward in his plaint, the Subordinate Judge was, in our opinion, right in dismissing the suit. It is to be noted that plaintiff does not mention the devasom in the plaint even as owner of the items subsequently admitted to be its property. He must have known of the title of the devasom at least to these items, for his melkanom deed (exhibit D) recites it. This and other circumstances in the case point rather to a collusive attempt between him and his vendors to defraud the devasom.

As to the third point taken by appellant's Vakil it is open to the same objection that it was not raised in the Court below and is inconsistent with plaintiff's case. No issue was raised upon it, and the case was fought out in the Lower Court upon entire-

(1) L.R., 5 Ch. App., 227.

different questions. We must decline, at this stage, to allow the question to be raised.

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No good reason has been shown for interfering with the decision of the Lower Court, and we confirm it and dismiss the appeal with costs.

Defendants Nos. 1 to 4 put in a memorandum of objections against the disallowance of their costs. They set up a deed of agreement, to renew which was found to be a forgery, and the Subordinate Judge was quite right in disallowing their costs.

The memorandum of objections is dismissed with costs.

APPELLATE CIVIL.

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

RAMACHANDRA (DEFENDANT No. 1), APPELLANT,

v.

NARAYANASAMI AND ANOTHER (PLAINTIFF'S REPRESENTATIVE AND DEFENDANT No. 2), RESPONDENTS.*

1892. September 2.

Irrigation channels—Power of Collector to regulate water-supply.

In a suit between raiyats holding lands under Government, in which the Collector of the district was joined as second defendant, it appeared that the first defendant, in pursuance of an order of the Sub-Collector, made on a petition preferred by him, had opened a new irrigation channel, thereby materially diminishing the supply of water necessary for the cultivation of the plaintiff's land and causing damage to him. The Lower Court passed a decree for damages and issued an injunction directing that the channel be closed:

Held, that the order of the Sub-Collector was in excess of his powers.

SECOND APPEAL against the decree of T. Ramasami Ayyar, Subordinate Judge of Kumbaconam, in appeal suit No. 331 of 1890, confirming the decree of A. Kuppusami Ayyangar, District Munsif of Kumbaconam, in original suit No. 312 of 1886.

Suit for an injunction and damages. The plaintiff and defendant No. 1 were raiyats holding land under Government. The plaintiff alleged that he had suffered loss by reason of the act of defendant No. 1 in making an irrigation channel and diverting of water from his land to that of defendant No. 1. It appeared

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* Second Appeal No. 1488 of 1891.