APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

KRISHNA MENON (PLAINTIFF), APPELLANT,

v.

KESAVAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1897. March 15, 16, 17, 18. April 29.

Limitation Act—Act XV of 1877, *s.* 28, *sched. II, art.* 10—*Civil Procedure Code—Act XIV of* 1882, *s.* 214—*Right of pre-emption asserted by one in possession under an otti mortgage in Malabar.*

Land in Malabar was in the possession of the defendants and was held by them as otti mortgagees under instruments, executed in August 1873 and January 1876. The plaintiff having purchased the jenm right under instruments executed and registered in May and June 1877, now sued in 1893 for redemption:

Held, that the defendants' right of pre-emption was not extinguished under Limitation Act, section 28, and that they were not precluded from asserting it by article 10 owing to the lapse of time, and that Civil Procedure Code, section 214, was inapplicable to the case, because the persons asserting a right of pre-emption were in possession.

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of Palghat, in Original Suit No. 31 of 1893.

Suit brought to redeem an otti mortgage. The facts of the case were as follows:—

"The 45 parcels of land in suit belonged to the Naduvakat tar-"wad (the members of which have since been made parties to the "suit as defendants Nos. 36 to 63). Nos. 1 to 21 were passed by "Naduvakat Kunjunni Nair to the first defendant on a panayom of "Rs 7,000 under a deed, dated 16th August 1873, and Nos. 22 "to 45 under a similar deed, dated 26th January 1876. The "defendants Nos. 2 to 11 are members of the first defendant's "illom. Under two deeds, dated 14th May 1877 and 10th June "1877, the plaintiff purchased jenm title to the plaint lands, "excepting Nos. 19 and 21 from the Naduvakat tarwad."

The mortgagees asserted their right of pre-emption, and on this ground, among others, resisted the plaintiff's suit to redeem.

The Subordinate Judge dismissed the suit.

Plaintiff appealed.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Sankaran Nayar* and *Raman Menon* for appellant.

* Appeal No. 33 of 1896.

KRISHNA MENON v. KESAVAN.

Sundara Ayyar for respondents Nos. 4 and 6.

ORDER.—The plaintiff, as the purchaser of the jenm right in a number of plots of land including those in suit under exhibit B, dated 14th May, and exhibit C, dated 10th June 1877, sues to redeem from the defendants those held by them on mortgage under exhibits I and II, dated 6th August 1873 and 26th January 1876, respectively. In the Court below the parties were at issue, as to whether the mortgages were such as, according to the usage of Malabar, carried with them the right of pre-emption. But that is no longer disputed.

The principal question for determination is whether the defendants are precluded from asserting their right of pre-emption for all or any of the reasons urged on behalf of the plaintiff.

First, exhibits A and III, executed on the 10th June 1877 by the plaintiff and the first defendant, are relied on on behalf of the plaintiff as disentitling the defendants from insisting upon the right in question. Exhibit III is only a counterpart of exhibit A. After reciting the abovementioned mortgages to the defendants and the purchase of the jenm right by the plaintiff, the documents merely state that on the one part the first defendant agreed to receive in January-February 1878 from the plaintiff Rs. 17,000 due to him and the value of improvements at certain specified rates and to surrender the mortgaged property, and on the other part the plaintiff agreed to pay the mortgage amount and the value of improvements when the first defendant surrenders the lands. The plaintiff's case is that there were disputes between himself on the one side and the first defendant and his deceased younger brother Thuppan Nambudri on the other in respect of the actual amount due under exhibits I and II, as also about the period for which the defendants were entitled to hold the lands and that exhibits A and III were executed in settlement of those disputes.

The defendants' case is as follows:—No disputes existed, and no settlement was made as alleged for the plaintiff. But the plaintiff had entered into an agreement with his vendors to advance funds for carrying on certain litigation connected with the alienation of their family property made by their Karnavan, the consideration being that the plaintiff was to receive a share of the property. The sale-deeds B and C were executed in pursuance of the said arrangement. The plaintiff anticipated difficulties in getting the

tenants in possession of the lands purchased to recognize the sales. On the day exhibits A and III were executed, the plaintiff informed the first defendant that if the latter (he being the holder of a considerable portion of the lands) signed a document like those in question, that would facilitate the plaintiff getting other tenants to recognize the plaintiff's purchase. The plaintiff distinctly assured the defendant that nothing would be done under the documents to the prejudice of the defendants' rights to the lands held by them, and the defendants' family would not be deprived of the possession thereof especially as they were situated right in front of their family house and therefore of special value to them. Relying upon such representation the first defendant signed the documents in question. The story told by the four witnesses, who support the version put forward on behalf of the plaintiff, is that, on the morning of the 10th June 1877, the first defendant, and his deceased brother Thuppan, of their own accord, met the plaintiff who was then staying in one Malliseri Nambudri's house and that the plaintiff, who had been till then contending that no more than Rs. 8,000 were due to the defendants, was induced by the plaintiff's second witness to agree to pay the whole amount and exhibits A and III were executed then and there. The Sub-Judge did not believe these witnesses. None of them is independent and the story itself in some material details is not very probable. In agreeing with the Sub-Judge's view that the evidence is not reliable, it is sufficient to advert to a few circumstances which throw discredit upon the testimony. Now, a very material part of the story told by the plaintiff's witnesses is that exhibit C was executed in the same place and about the same time as exhibits A and III. This is put forward obviously for the purpose of making the alleged settlement of disputes between the plaintiff and the defendant look a little probable inasmuch as in exhibit C, not only the validity but the reality also, of the debt of Rs. 10,000 due to the defendant under exhibit II is denied. But notwithstanding that the documents bear the same date, viz., 10th June 1877, it is certain that exhibit C was not executed as alleged by the witnesses who support the plaintiff. This is directly proved by another of his witnesses, viz., Nilukutti, an executant of exhibit C. For she says it was executed not in Malliseri Nambudri's house but in Naduvakat house, the residence of the vendors. Next some of the provisions in exhibit C itself point to the same conclusion. For, as already stated, the mortgage for Rs. 10,000, exhibit II,

KRISHNA MENON v. KESAVAN.

was questioned in exhibit C; yet the evidence of the witnesses supporting the plaintiff implies that all disputes between the parties had been settled before exhibit C was executed. What necessity was there, then, for inserting in exhibit C an elaborate protest against the debt which the plaintiff had, according to his witnesses, just then agreed to treat as perfectly good and valid? The clear inference is that exhibit C had come into existence before exhibits A and III, which were antedated as stated by the defendant, and that the present story that all were executed about the same time in the Malliseri house is false. Again in consenting, as the witnesses say, to pay so large a sum as Rs. 10,000 over and above what he supposed to have been really due, the plaintiff would surely have insisted upon an explicit statement being made in A and III, that the right of pre-emption possessed by the defendant was waived. Not only is that not the case but strangely enough the witnesses do not even say that the slightest allusion to the subject was made during the negotiations for the settlement of the disputes or at the settlement.

Lastly, though the first defendant was the senior member in his family, the evidence abundantly shows that the actual manager was the deceased Thuppan. It is said that this man was present at the execution of exhibits A and III. Why then was his attestation at least not secured? It is impossible to believe that so shrewd a man as the plaintiff would have failed to secure such evidence of Thuppan's assent, if Thuppan was really there. These few circumstances are enough to show that the witnesses supporting the plaintiff's case are not truthful. Turning to the evidence in support of the defence, the first defendant was examined as the first witness in the suit on behalf of the plaintiff himself, and distinctly supported the defence. The plaintiff had thus the fullest opportunity to contradict the defendants' statements, but he abstained from going into the box. There is, therefore, no good reason to question the uncontradicted evidence of the defendant supported as it is by that of his sixth witness, who also is an apparently trustworthy witness, and considering the position of the parties at the time the defendants' account is not improbable. The first defendant was then comparatively young about 25 or 26 years of age and, as his deposition shows, inexperience in business. The plaintiff however occupied the important position of a Sub-Judge (though he was not then employed as such) in the very district where the defendant was a resident. The representations and assurances given by a person of the

plaintiff's circumstances in life to one in the first defendant's position would not have then appeared necessarily fraudulent. The informal character of exhibits A and III, each of which is self-styled a 'Memorandum,' coupled with the fact that no schedule of property was originally attached to the documents, would have made the plaintiff's statement that he did not intend to get the documents registered wear an appearance of truth, and naturally would have led the defendant to believe that the documents were meant to be used only for the purpose of facilitating plaintiff's dealing with the other tenants. We must therefore find upon this point in favour of the defendants and hold that they are not precluded by exhibits A and III from setting up their right of pre-emption. The second contention was that the defendants having failed to sue to enforce their right within the year prescribed by article 10 of the Limitation Act, the right was extinguished under section 28 of that enactment and could not therefore be set up as a defence in the suit. This contention is unsustainable. Now the defendants as 'otti' mortgagees have since the dates of the mortgages admittedly held possession of the lands to which the right of pre-emption attaches. If the defendants had as *plaintiffs* to enforce their right of pre-emption, it was absolutely unnecessary for them to pray for any possession. All they could have claimed was a decree directing that, on payment of the proper price, the right to redeem which the jenmis had and of which the plaintiff had become the assignee, be transferred to them.

But a mere right to redeem is not capable of possession within the meaning of section 28. That section contemplates suits, which a person who is kept out of property, admitting of physical possession, could have brought for such possession. It is true that the language employed in some of the decided cases in describing the nature of the right to redeem is not quite uniform. For example in *Chathu* v. *Aku*(1) it was stated to be a right of action only, while the leading case of *Casburne* v. *Scarfe*(2) lays down perhaps more correctly that the right was not a mere right of action, but an estate in the land. Nevertheless in a case like this, where the mortgage in a measure partakes of the nature of a lease, even an English lawyer would, in accurate modern technical language, only say the mortgagor was *seized of the right to redeem* while the mortgagee was in *possession of*

(1) I.L.R., 7 Mad., 26. (2) 2 W. & T.L.C., 1035.

KRISHNA MENON v. KESAVAN.

the land. Compare 'Pollock and Wright on Possession,' page 47, where it is pointed out that where a tenant occupies a close under a lease for years, the tenant has possession of the close, so that not only a stranger but the free-holder himself may be guilty of a trespass against him, but the free-holder is still seized of the free-hold. It is thus clear, apart from authority, that the right in question is not capable of possession within the meaning of section 28, and that the extinctive prescription referred to therein is inapplicable in the present instance. And *Chathu* v. *Aku*(1) already cited and *Kanharankutti* v. *Uthotti*(2) are clear authorities on the point. In the former case, it was held that where the equity of redemption of a certain estate became on the death of the mortgagor the property of two divided branches of a Malabar tarwad, and the rents and profits of the land paid by the mortgagee were enjoyed by the representative of one branch for fifteen years to the exclusion of the other branch, such enjoyment was not adverse possession within the meaning of section 28. In the second case cited above, Handley and Weir, JJ., dealt with a contention similar to the present thus: "But section 28 only "applies to suits for possession of property, third defendant has "no need to bring any suit for possession of the property in ques- "tion. 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."

Section 214 of the Civil Procedure Code was strongly relied on on behalf of the plaintiff. But that section contemplates cases where the party seeking to enforce a right of pre-emption is out of possession, and consequently it is inapplicable to instances like the present in which parties setting up such a right are already in possession. And it is to be borne in mind that the form of the decree to be given in the latter class of cases is not what is mentioned in section 214 relied on, but that adopted in *Ukku* v. *Kutti*(3).

The third contention was that, even if the right was not extinguished under section 28, yet, as it became barred under

(1) I.L.R., 7 Mad., 26. (2) I.L.R., 13 Mad., 490. (3) I.L.R., 15 Mad., 401.

article 10 on the expiry of a year from the registration of exhibits B and C, the right cannot be urged by way of defence. This contention is manifestly untenable. For, if, notwithstanding that an otti mortgagee's right to sue to enforce his right of pre-emption has become barred, that right of pre-emption, owing to the inapplicability of section 28 to the case, is still unextinguished, it is difficult to see on what principle such right is to be held to be unavailable by way of defence. That there is nothing in the Limitation Act to support the present contention of the appellant is fully and clearly pointed out by the learned Chief Justice and Shephard, J., in *Orr* v. *Sundra Pandia*(1). In the Privy Council case in *Janki Kunwar* v. *Ajit Singh*(2) and the other similar cases cited for the plaintiff the parties affected by the law of limitation were out of possession, and these authorities are, therefore, not in point here.

The fourth and last contention was that the defendants should be held to have waived their right by long delay and inaction. But this contention is not supported by the facts of the case. Exhibit 53 shows that, so far back as 1878, the defendants openly repudiated the plaintiff's right under his purchase; and this circumstance is totally inconsistent with any intention on the part of the defendants to give up their right in favour of the plaintiff. As to exhibit A.T., the karar, which was executed in 1891 between the members of the first defendant's family and which was relied on as supporting the above contention, it is clearly against it. For the document distinctly provides that any claim that might be preferred in respect of the redemption of the lands in question should be resisted, and certainly one ground upon which such resistance could have been based was their right of pre-emption.

Lastly under exhibit II, some rent was payable though the amount was very small. But the defendants never paid any of this rent to the plaintiff. These circumstances apart, how could the defendants be held to have waived their right by mere inaction and delay, they being in possession and the price payable in respect of the lands in question not having been ascertained and fixed at any time? It is scarcely necessary to say that the ascertainment of the price is an essential preliminary to the defendan being put to their election—see *Cheria Krishnan* v. *Vishnu*(3).

(1) I.L.R., 17 Mad., 255. (2) I.L.R., 15 Calc., 58. (3) I.L.R., 5 Mad., 198.

KRISHNA MENON v. KESAVAN.

Now, in the first place, it is admitted that, before the plaintiff concluded the sales he relies on, neither he nor his vendors called upon the defendants to exercise their option to buy. In the next place, the plaintiff purchased under exhibits B and C, not only the lands under mortgage to the defendants but others also for two lump sums. It is not alleged that any agreement was entered into between the plaintiff and his vendors as to how much of those lump sums was to be taken as the proportionate price for the lands in question, and subsequent to his purchases the plaintiff did not make any proposal to the defendants as to the proportionate price or require *them* to make an offer on the point. Nor was any step taken for obtaining an adjudication by the Court of the amount which the defendants would have to pay if they decided to buy. In these circumstances the defendants were not bound to move in the matter unless called upon to do so by some act of the plaintiff; subsequent to his purchase and in the absence of any such act, they were entitled to await the demand for surrender of the property, and then assert their right of pre-emption. Consequently no presumption of waiver could be raised on the ground of delay and inaction in this case.

For the above reasons, we must hold that the defendants are entitled to rely on their right of pre-emption. But before a proper decree can be passed, it is necessary to determine what the proportionate price payable by the defendants Nos. 1 to 11 is. We therefore call upon the Sub-Judge to submit a finding on the point within two months after the recess. Fresh evidence may be taken on either side. The Sub-Judge should also submit a finding on the eighth issue on the evidence on record. Seven days will be allowed for filing objections after the findings have been posted up in this Court.