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capacity he is not shown to have been entitled to possession. The decree must be varied in that respect.

We can see no reason why the plaintiff should not be entitled to the interest payable under his mortgage. Interest at the contract rate must be allowed up to date of decree of the Subordinate Judge and from that date at six per cent. The decree must also be amended by directing that any surplus after paying both mortgages be paid to the defendants 3 to 6.

The memorandum of objections is disallowed with costs.

Respondents must pay appellant's costs of appeal.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

1896. October 30. November 11.

KRISHNA PATTER (PETITIONER), APPELLANT,

v.

SRINIVASA PATTER (COUNTER-PETITIONER), RESPONDENT.*

Mortgage—Malabar kanom—Redemption—Improvements—Depreciation of, between decree and date of redemption.

A decree for the redemption of a kanom in Malabar was passed in December 1894, when there were on the land improvements in the form of trees, &c., to the value of Rs. 1,429. Within the six months limited by the decree for redemption the mortgagor applied for execution, and it appeared that the value of improvements had diminished by the loss of trees to the value of Rs. 157. The loss was the result of want of water and was not attributable to neglect on the part of the mortgagee:

Held, that the loss should fall on the mortgagee.

APPEAL against the order of the District Judge of South Malabar, in civil miscellaneous appeal No. 49 of 1895, reversing the order of A. Annasami Ayyar, District Munsif of Themmalapuram, in execution petition No. 211 of 1895.

This was an application in execution of a redemption decree. At the time of the decree on the 4th December 1894, improvements to the value of Rs. 1,429-11-3 were found payable to the mortgagee by the mortgagor, who was allowed six months within which to

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* Appeal against Appellate Order No. 5 of 1896.

redeem after paying for the improvements and the mortgage amount. The mortgagor applied for execution on 3rd April 1895 and stated that mortgagee had done damage to the improvements since the date of decree. It was found that trees to the value of Rs. 157-14-3 had withered since the date of decree owing to want of water. There was no proof that the mortgagee was responsible for the loss, and it was found by the Courts to have been caused by *vis major*. The question then was, as stated by the District Judge, who was to bear the loss, the mortgagee, as being still in possession because the mortgage money and compensation for improvements had not been paid or the mortgagor who had the right to possession under his decree for redemption but delayed to redeem.

The District Munsif held that the loss should fall on the mortgagee. The District Judge was of the contrary opinion and ordered that the mortgagor should pay the sum of Rs. 157-14-3.

The mortgagor preferred this appeal.

Sundara Ayyar for appellant.

Ryru Nambiar for respondent.

JUDGMENT.—On the 4th December 1894 a decree was passed in favour of the appellant enabling him to redeem certain lands mortgaged to the respondent by way of kanom. At the time of the decree improvements to the value of Rs 1,429-11-3 were on the land. But when, on the 3rd of April 1895, *i.e.*, within the six months' time allowed by the decree for the redemption, the appellant applied for execution, it appeared that of the improvements which had existed at the date of the decree, trees to the value of Rs. 157-14-3 had withered owing to want of water.

The question is whether the appellant is bound to pay to the respondent the said sum of Rs. 157-14-3. It does not appear that the kanom instruments, on which the decree was obtained, contained any agreement as to compensation for improvements. The claim for it rests therefore upon the local custom, and the covenant implied according to that custom is to pay for all 'unexhausted improvements' (Wigram's *Malabar Law and Custom*, page 137). In other words, the basis on which the liability in question stands is, of course, that the mortgagor would, when he redeems, enjoy the benefit of the improvements effected by the mortgagee. Consequently when no such advantage accrued to the former, he cannot, on principle, be called upon to pay.

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Now, can the fact that a valuation of the improvements has been made and embodied in a decree alter the case? It is difficult to see how it can. According to the course of decisions here, it is established that, notwithstanding the passing of a decree for redemption, the relation of mortgagor and mortgagee fully subsists, if the decree be not executed and therefore the right to redeem can be again asserted and enforced, provided it had not been lost by lapse of time or otherwise. Suppose a mortgagor, having obtained a decree for redemption, does not execute it, but allows the property to remain in the hands of the mortgagee for a considerable time and the latter during that period makes more improvements. Surely, his right to the value of those cannot be denied, whether the question arises in execution proceedings or in a separate suit; nay, according to *Ramunni* v. *Shanku*(1) even in respect of improvements referred to in a decree which the mortgagor does execute, the mortgagee can, in such execution proceedings, claim a re-valuation if he can show that, since the passing of the decree, the value of the improvements has increased. How then can the mortgagor, with any justice, be held to be disentitled to obtain a reduction of the amount mentioned in the decree if he can prove that any part of the improvements assessed therein, has since ceased to exist? That the final adjustment of the amount of compensation must be made with reference to the state of things at the time of the actual redemption, is also shown by the practice followed by the Courts prior to July 1880 according to which the question used to be reserved for execution. The present system of holding an enquiry into the matter before decree, no doubt, originated with this Court's Circular order, dated the 14th July 1880 (Weir's Rules of Practice, page 197). But all that the circular lays down is that Courts should, before passing a decree, decide in respect of what improvements the party in possession is up to the date of the decree entitled to compensation; and the amount of compensation. The circular, therefore, does not and cannot affect the right of the mortgagor to ask for a revision of the amount awarded by the decree, if such revision is rendered necessary by events that have occurred since the decree. Accordingly, if, during execution, improvements as ascertained and awarded by a decree, be not found on the land or were destroyed

(1) I.L.R., 10 Mad., 367.

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by the tenant, the Courts have, in acting under section 244, Civil Procedure Code, been in the habit of ascertaining the amount of the loss and deducting it from the sum originally fixed.

The pleader for the respondent next urged that a loss like that under discussion, if it is not due to any act or default of the mortgagee, should fall on the mortgagor, as the property in the improvements was, at the time of the loss, in him. This assumption about the property being in the mortgagor even before compensation is paid by him, is not only not supported by any authority, but is directly contradicted by the Fifth Report where it is stated, "The buildings and plantations are in fact the property "of the tenant; and he can mortgage or sell them, in the same "manner, as the jenmkar mortgages or sells his own property in "the land" (Higginbotham's edition, Vol. II, p. 82). Moreover, if the above contention were well founded, a person, who mortgages by way of kanom, would be liable for every improvement once effected, though it had disappeared before the decree. But no one has as yet ventured to put forward such a manifestly unreasonable claim. In support of the above contention on behalf of the respondent, it was urged that the holder of a kanom is, by the usage of the district, prohibited from cutting, without the mortgagor's consent, trees on the land, though they had been planted and grown by the mortgagee himself; and *Changaraan* v. *Chirutha*(1) was relied on. Without entering into the question whether the actual decision there is sound or not, which we are not called upon to consider, we may say that it is quite clear that the case cannot be treated as establishing the proposition for which it was cited. For, curiously enough, the District Munsif's judgment opened with the observation:—"It is now admitted that the trees "belonged to the first defendant having been planted by him as "kanom tenant of the plaintiff," and referring to this observation, BEST, J., pointed out that the District Munsif's opinion that the kanom tenant was not entitled to cut the trees without the permission of the plaintiff—the landlord—was open to question.

In the present case no evidence was adduced as to the alleged custom prohibiting a kanom tenant from removing trees which had been planted by him. We cannot, therefore, express any opinion as to whether such a custom exists or not. But, assuming for

(1) Civil Revision Petition No. 445 of 1895 unreported.

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argument's sake that a usage of the kind does prevail, that does not necessarily prove that the property in improvements, not yet paid for, vests in the mortgagor. For the alleged usage would be perfectly consistent with the view that in such a case the property is in the mortgagee until the payment of compensation; the restriction on his power to remove such improvements as trees being explained as imposed on grounds of policy, similar to that which underlies the provision in section 63 of the Transfer of Property Act relating to an accession, made at the expense of the mortgagee to preserve the property from destruction, &c., but which accession is not capable of being separately possessed or enjoyed by the mortgagee. Considering that the mortgagor in cases like the present is bound to pay compensation for improvements even when the contract between the parties is silent on the point, the above view as to the relative rights of the parties would seem to be a more reasonable interpretation of the alleged local usage than that suggested on behalf of the respondent.

The conclusion, therefore, to be arrived at appears clearly to be that the appellant is bound to pay only for such improvements as at the time of the redemption, are on the land in a reasonably good condition (compare *Gubbins* v. *Creed*(1), and therefore he is not liable for the amount in dispute. To hold otherwise would certainly tend to incline mortgagees to neglect between the date of the decree and that of its execution, the duty of properly looking after the improvements, compensation for which has been assessed, and in some cases even to destroy them to the injury of the mortgagors.

The order of the Lower Appellate Court must be reversed and that of the District Munsif restored.

The respondent will pay the appellant's costs in this and in Lower Appellate Court.

(1) 2 Sch. & Lef., 225.