

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

1895.
October 11.

PAYA MATATHIL APPU (PLAINTIFF), APPELLANT;

v.

KOVAMEL AMINA (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 32, 55, 537—Addition of parties on appeal—Transfer of Property Act—Act IV of 1882, s. 91—Right to redeem.

A verumpattom tenant in Malabar claiming under a lease from the ottidar is entitled to redeem the prior kanom.

The Court on second appeal is competent to bring on to the record persons who had been originally joined in the suit but were not joined in the Lower Appellate Court.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 331 of 1893, reversing the decree of S. Subbayyar, Subordinate Judge of Tellicherry, in original suit No. 7 of 1893.

The plaint sets forth that the properties described in the plaint schedule which were once the Jenm of Chikkikalath Illath Govindan Nambudiri, are now according to a Jenm deed granted by his heirs on the 22nd February 1891 the Jenm of the first defendant; that one Kovamel Muthan the father of defendants 3 to 5 and grandfather of defendants 6 and 7 had held the properties under the said Nambudiri on a kanom of Rs. 600 and 3 puramkadamms of Rs. 200, 142 and 250 under deeds granted by him in Kumbhom 1027 (February-March 1852), 25th Tulam 1030 (9th November 1855), 12th Makaram (23rd January) and 25th Kadakam 1034 (8th August 1859) respectively; that after the death of the said Muthan, the defendants 4 to 7 transferred their right to the third defendant, that the latter is now in possession of the properties by virtue of the said transfer deed dated Vrichigom 1068 (November-December 1892) or thereabouts as mortgagee, and that defendants 8 and 9 are occupants of the properties, that the said Govindan Nambudiri having received a further sum of Rs. 158 from the second defendant's predecessor, the deceased Udaya Varma Rajah of Edavalath Kovilagam, executed to him in 1031 (1855-1856) a deed

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demising these properties on an otti for Rs. 900 including the amount of prior charges and authorizing him to recover possession from the tenants; that on the strength of this otti deed the said Udaya Varma Rajah and Govindan Nambudiri jointly instituted O.S. No. 119 of 1856 in the Munsif's Court of Kadathanad against the said Muthan and others for recovery of these properties, and on the 6th February 1861 obtained a decree ordering restoration of the properties on payment to them of the kanom and puramkadam amounts, that the properties were, subsequent to the decree, leased to plaintiff by the second defendant on 27th Dhanu 1068 (9th January 1893) on a Parapad of 10 dangalies of paddy and that on the strength of this deed the plaintiff is now entitled to recover those properties on payment of the said kanom and puramkadam amounts.

The Subordinate Judge held that the plaintiff's averments were established overruling an objection that the instrument of the 7th August 1856 was, on its right construction, a deed of conditional sale, finding that it was a puramkadam deed merely and he passed a redemption decree on the terms that the plaintiffs should pay the kanom and puramkadam amounts. The District Judge reversed this decree on the ground that the plaintiff was not entitled to redeem. He referred on this point to Transfer of Property Act, section 61, and to *Radha Pershad Misser v. Monohur Das*(1) and *Kasumunnissa Bibee v. Niratna Bose*(2). He also referred to Transfer of Property Act, section 98, and observed that a Malabar kanom is an anomalous mortgage and that the local Malabar usage afforded no justification of the plaintiff's claim to redeem.

Plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Sankara Menon* for appellant.

Santharan Nayar and *Kannan Nambiar* for respondents.

JUDGMENT.—We think it is competent to the Court to add parties who were defendants in the Court of First Instance though not joined as respondents in the Lower Appellate Court. In the case referred to, *Raman Nambiar v. Kapali*(3), the party was not added by the Court, but by the appellant himself. Section 559 occurs in the chapter of the Code relating to appeals from original decrees, and it is by section 587 that this section is so far as may

(1) I.L.R., 6 Calc., 317.

(2) I.L.R., 8 Calc., 79.

(3) S.A., 165 of 1894 unreported.

be made applicable to second appeals. We do not think it was intended to preclude the Court from adding in second appeal persons who had been originally joined in the suit. We are unable to follow the decision in *Chunni v. Lala Ram*(1).

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The Judge considers that a verumpattom tenant claiming under a lease executed by the ottidar is not in a position to redeem the prior kanom. He observes that the lessee is not mentioned specifically in section 91 of the Transfer of Property Act as belonging to the class of persons entitled to redeem, and that under a lease, as defined in section 105, he is not described as taking an interest in the property, but only a right to possession.

In our opinion the word 'interest' is not necessarily confined to right of ownership, but is sufficiently large to include any minor interest such as that of a tenant or a person having a charge.

No doubt there has been no precedent for this suit in Malabar; but that circumstance is not conclusive. The general principle is laid down by Fry, L.J., in *Tarn v. Turner*(2). "According to the general law of the land a person who claims as lessee under a mortgagor after the mortgage, and has thereby derived an interest in the equity of redemption, has the right to redeem." The Calcutta cases only illustrate the rule and do not form any exception. So long as the plaintiff has an interest validly entitling him to possession, he is in a position to redeem.

We must therefore reverse the decree and remand the appeal for disposal.

Respondents are to pay costs of this appeal. The other costs will follow the result.

(1) I.L.R., 16 All., 5.

(2) I.L.R., 39 Ch. D., at page 468.