and taking such evidence as may be necessary, and to submit the same within six weeks from the date of the receipt of this order.

In compliance with the above order, the Subordinate Judge submitted findings, and on receipt of which the High Court gave judgment as follows:—

JUDGMENT.—The result of the further finding is that Rs. 11,133-0-1 is due to the plaintiff. That sum will have to be substituted for Rs. 9,543-9-9. To the extent of the difference between these two sums the plaintiff's appeal is allowed, and he will have or pay proportionate costs of that appeal accordingly. In the other appeal No. 40, the defendants have failed, except as to the form of the decree, which must be amended by relieving them from personal liability. Substantially the defendants have failed in their appeal and must pay the cost of it.

There will be a decree for the plaintiff for the first-mentioned sum with interest at 6 per cent. from date of plaint till date of payment with a direction that, if the sum with interest thereon is not paid within six months from this date, the property will be sold.

The decree must also be amended by giving interest on costs allowed from date of decree.

APPELLATE CIVIL.

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

SANKARAN (DEFENDANT No. 1), APPELLANT,

1885. October 15.

v.

PARVATHI AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 6), RESPONDENTS.*

Civil Procedure Code, s. 13, Explanation 2, s. 43—Ground of defence not raised in previous suit—Relief not asked for in previous suit—Circumstances giving right to such relief not known at date of previous suit.

The plaintiffs, who were the junior members of a Malabar edom of which

* Second Appeal No. 39 of 1895.

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defendants Nos. 3 to 5 were the senior members, sued to recover with mesne profits possession of certain property offering to pay the amount of a kanom advanced by defendant No. 1. It appeared that the land had been the subject of a kanom demise in 1865, that defendant No. 3, the then karnavan, had obtained in 1878 a decree for its redemption, the right to execute which he assigned to a stranger, who executed it, and took possession of the property, taking from the karnavan a new kanom deed. Subsequently defendants Nos. 4 and 5 obtained a decree for possession and the cancellation of both the assignment and the kanom deed; but this decree was attached in execution proceedings in another suit and purchased by defendant No. 1, who executed it, purchased the property, deposited the kanom amount and took possession on 8th March 1884. The plaintiffs, who had meanwhile taken abortive proceedings to defeat the first defendant's title, instituted a suit in August 1884, praying for a decree that the sale to him be set aside, without praying for possession. It was now found that the plaintiffs at that time were not aware that defendant No. 1 was in possession and he did not plead that fact as a defence to the suit for a declaration merely:

Held (1) that the plaintiffs were not affected by constructive notice of the defendant's possession in 1884 by reason of the fact that their karnavan, with whom they were not acting, was aware of the defendant's previous application for execution, and that the suit was not barred by Civil Procedure Code, s. 43;

(2) that, defendant No. 1 was not a trespasser merely, and the plaintiffs were entitled to a deduction of the profits for the whole period during which he was in possession in computing the amount payable by them before they recovered the land.

Semble, that, apart from the question of the plaintiffs' notice of the first defendant's possession, since he had not pleaded possession in the suit of 1884, he could not fall back upon the fact that his possession dated from March 1884 as a ground of defence to the present action.

SECOND APPEAL against the decree of R. S. Benson, District Judge of South Malabar, in appeal suit No. 174 of 1893, modifying the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 8 of 1891.

The plaintiffs sued to recover with mesne profits certain land to which they claimed to be entitled on paying, as they declared themselves ready and willing to do, a kanom amount deposited by defendant No. 1.

The property in question was the jenm of an edom, of which the plaintiffs and defendants Nos. 3 to 6 were members. In January 1865, the then karnavan of the edom demised the land on kanom to certain persons against whom the present defendant No. 3, his successor in the office of karnavan, obtained a decree for redemption, in 1878. The right to execute that decree was assigned to one Echu Menon, a new kanomdar, and he executed it and obtained possession, and also obtained a demise on kanom

from his assignor. The assignment was not approved of by defendants Nos. 4 and 5, who set themselves up as the managers of the edom, and in 1882 they obtained a decree whereby both the assignment and the kanom were set aside and the properties ordered to be surrendered to them. The present defendant No. 1 was the assignee of a personal decree against defendants Nos. 3 and 4, and in execution thereof he attached the decree of 1882, which was brought to sale in execution and purchased by him. Meanwhile the plaintiffs having objected without avail to the attachment, filed a plaint praying that it be released and subsequently added a prayer for the cancellation of the sale also. Their suit was ultimately dismissed on the ground that it was beyond the pecuniary jurisdiction of the Court in which the plaint was filed. The plaintiffs then filed a suit in August 1884 in the Subordinate Court and obtained a decree setting aside the sale which was the relief asked for no prayer for possession being added. Before the last-mentioned suit was instituted, defendant No. 1 had taken possession of the property on 8th March 1884, as purchaser at the Court sale in execution of the decree of 1882 having deposited Rs. 3,688 being the kanom amount.

The Subordinate Judge passed a decree that the plaintiffs be put in possession on their paying the amount of the kanom together with arrears of porapad for nine years and compensation for improvements. The District Judge on appeal modified this decree by increasing the amount payable by the plaintiffs to the defendants before they should take possession. With reference to a plea that the plaintiffs were not entitled to a decree for possession in the present suit by reason of their having omitted to ask for it in the suit of 1884, the District Judge held that that circumstance did not constitute a defence, because it was not proved that the plaintiffs or their edom were aware of the fact of the first defendant's possession. He found that defendants Nos. 3 to 5 were both in 1884, and at the date of the present suit the karnavan and the managers of the edom of which the plaintiffs were junior members.

The first defendant and the plaintiffs respectively filed a second appeal and a memorandum of objections against this decree.

Sundara Ayyar for appellant.

Bhashyam Ayyangar and *Govinda Menon* for respondents.

JUDGMENT.—It was open to the first defendant to plead in original suit No. 37 of 1884 that he was already in possession

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and therefore that a suit for a declaration would not lie. He did not choose to do this, and therefore cannot fall back upon the fact that his possession dates from March 1884 as a ground of defence to the present action (section 13, Code of Civil Procedure, Explanation 2). Independently of this, however, it is found as a fact that plaintiffs did not actually know that first defendant had obtained possession. We cannot infer that they had constructive knowledge, because their karnavan had notice of the application for execution in December 1883. The plaintiffs are not acting with their karnavan, whose conduct has necessitated their acting independently of him, and therefore they are not affected by his knowledge if such knowledge be proved. We do not think the decision in *Kunhiamma* v. *Kunhunni*(1) expresses dissent from the ground on which *Ambu* v. *Kettilamma*(2) was decided, *i.e.*, that section 43 only applies to cases in which the plaintiff had knowledge of the claim he was entitled to make; the only dissent expressed was to the view of the late Sir T. Muttusami Ayyar, J., that section 283, Code of Civil Procedure, gives a special right to sue in opposition to the provisions of section 42 of the Specific Relief Act.

The only other ground taken is as to mesne profits, and it is said that not more than three years' mesne profits could have been awarded. We do not think, however, that first defendant can really be regarded as a trespasser. He stood in the shoes of Echu Menon and was entitled to possession until redeemed. The plaint has deducted the arrears of michavaram from the kanom amount due, and thus the calculation has proceeded on the right basis, though the relief has been erroneously described as mesne profits. The second appeal therefore fails and the memorandum of objections is not pressed. The second appeal and memorandum of objections are dismissed with costs.

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(1) I.L.R., 16 Mad., 140. (2) I.L.R., 14 Mad., 23.