APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1901. September 13, 18.

VEDAPURATTI (PLAINTIFF), APPELLANT,

v.

AVARA AND OTHERS (DEFENDANTS NOS. 23 TO 26), RESPONDENTS.*

Malabar Law—Liability of improvements made by sub-tenants of kanomdar for rent due by kanomdar to jenmi—Transfer of Property Act—Act IV of 1882, *s.* 85—*Appeal—Parties—Practice.*

A jenmi having sued the kanomdar and his sub-tenants, obtained a decree for redemption and possession on certain terms. The sub-tenants, objecting to some of the terms, appealed, but they did not join the kanomdar, to whose prejudice the terms were modified on the appeal:

Held, that the kanomdar was a necessary party and that the decree made by the Appellate Court in his absence must be set aside, as no reasonable excuse was forthcoming for the omission to make him a party.

Ramunni Panikar v. *Sankara Panikar*, (Second Appeal No. 1476 of 1889 *infra*) and *Vedapuratti* v. *Govinda Menon*, (Second Appeal No. 51 of 1892 *infra*) followed.

Whether improvements made by the sub-tenants of a kanomdar are liable for rent due by the kanomdar to the jenmi.—*Quære.*

Achuta v. *Kali*, (I.L.R., 7 Mad., 545) and *Eressa Menon* v. *Shamu Patter*, (I.L.R., 21 Mad., 138), referred to.

SUIT to recover land devised on kanom, together with arrears of rent. The District Munsif gave plaintiff, the jenmi, a decree for possession on his paying to certain sub-tenants of the kanomdar compensation for improvements made by them. The kanomdar was also made liable for a balance of rent, due after deducting the kanom amount and the value of the improvements made by him. This decree was subsequently amended by the Munsif on plaintiff's application, so as to render the amount due to the sub-tenants as compensation for improvements liable for the arrears of rent due to the jenmi by the kanomdar. The sub-tenants appealed to the Subordinate Judge, but omitted to make the kanomdar a party. They made only the plaintiff, the jenmi,

* Second Appeal No. 488 of 1900 against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in Appeal Suit No. 32 of 1899, modifying the decree of P. P. Raman Menon, District Munsif of Angadipuram, in Miscellaneous Petition No. 1357 of 1898, in Original Suit No. 341 of 1897.

respondent. The Subordinate Judge, treating the appeal as one preferred from the amended decree, said :—"The question is whether the value of improvements due to under-tenants is liable to be set off against the arrears of rent due from the mortgagee to the mortgagor. No authority is cited in support of the contention that the amounts due for improvements belonging to a sub-tenant are liable to be set off against the arrears of rent due to the mortgagor from the mortgagee. It has been held that such set off is allowable when the improvements belong to a kanomdar (*Achuta* v. *Kali*(1)) or a tenant (*Eressa Menon* v. *Shamu Patter*(2)), but these rulings do not apply in a case where the improvements are not the property of the person who is liable to pay the rent. There is not a contract expressly or impliedly allowing a right to such set off and it would manifestly be unjust to charge the arrears of rent due by a mortgagee as against a third party who held the land on an independent simple lease granted by the mortgagee." He held that the amount due as compensation to the sub-tenants was not liable to be set off against the arrears of rent due from the kanomdar to the jenmi, and modified the decree so that it stood in its original form. The effect of this was to reimpose on the kanomdar, in his absence, the liability for arrears of rent, part of which had been removed by the amended decree.

Plaintiff preferred this second appeal.

K. R. Subrahmania Sastri, for appellant, contended that by the customary law of Malabar the improvements, no matter by whom effected, are security for rent, and are subject to the lien of the jenmi. That is an incident of the relation of kanomdar to jenmi. A jenmi's right of set off extends to rent that has become barred; *Eressa Menon* v. *Shamu Patter*(2); *Kanna Pisharodi* v. *Kombi Achen*(3) followed in *Unnian* v. *Rama*(4); *Vasudeva Shenoi* v. *Damodaran*(5). He also cited *Achuta* v. *Kali*(1), where a creditor was only allowed to proceed against the net amount of improvements. In this case, the rent owing to the jenmi exceeded the value of the improvements both of the kanomdar and of the tenants. He referred to Wigram's 'Malabar Law.' He also took the point that in the appeal to the Subordinate Judge the

(1) I.L.R., 7 Mad., 545 at p. 546.
(2) I.L.R., 21 Mad., 138.
(3) I.L.R., 8 Mad., 381.
(4) I.L.R., 8 Mad., 415.
(5) I.L.R., 23 Mad., 86.

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kanomdar had not been made a party, as he should have been, under section 85 of the Transfer of Property Act. He referred to *Vasudeva Nambudripad* v. *The Collector of Malabar*(1) and *Kesavan* v. *Sankaran Nambudri*(2).

Govinda Menon, for respondents, argued that the cases only go so far as deciding that the improvements due to a mortgagee are liable to a set-off of the amount due by him for rent. There was no case which went the length of deciding that the improvements of a tenant of a kanomdar are so liable. With regard to the omission to make the kanomdar a party to the appeal, he submitted that the Court might add him as a respondent, and failing that he asked for leave to do so.

JUDGMENT.—We must allow this appeal. The suit was for redemption, and in the Munsif's Court the rights of all the parties were adjusted. The plaintiff, the jenmi, got a decree for possession on paying compensation for improvements made by them to three sub-tenants of the kanomdar who was himself made liable to the jenmi for a balance of rent due after deducting the kanom amount

(1) Second Appeal No. 459 of 1898 (unreported). The judgment in this case was delivered, on 20th January 1899, by SUBRAHMANIA AYYAR and DAVIES, JJ., as follows :—"We cannot agree with the Subordinate Judge in holding that the appeal before him could proceed after the original mortgagees (defendants Nos. 1 to 9) had been struck off from the array of parties to the appeal, on the application of the appealing plaintiff himself. The plaintiff's case was that plot A was part of the mortgaged property which the Subordinate Judge says the defendants Nos. 1 to 9 had not denied. They as the mortgagees thereof were therefore necessary parties, being interested therein. In their absence the appeal should not have been heard and determined, but dismissed. We therefore reverse the decree of the Subordinate Judge passed in the appeal and restore that of the District Munsif with appellant's costs in this and in the lower Appellate Court. Time for redemption is extended to 20th April next."

(2) Second Appeal No. 1423 of 1895 (unreported). The judgment in this case was delivered on 10th February 1897, by SUBRAHMANIA AYYAR and BENSON, JJ., as follows :—"The mortgagees were not made parties to the appeal either in this Court or in the lower Appellate Court, though section 85 of the Transfer of Property Act expressly requires that they should be made parties. The appellant's vakil applies that they may now be made parties and explains that he was not able to make them parties to this second appeal as they had not been made parties in the lower Appellate Court. He is, however, unable to give any satisfactory reason for the omission in that Court. In these circumstances we think we are bound to follow the ruling of this Court in *Vedapuratti* v. *Govinda Menon*, (Second Appeal No. 51 of 1892 (unreported)), and *Ramunni Panikar* v. *Sankara Panikar*, (Second Appeal No. 1476 of 1889 (unreported)), and dismiss the second appeal with costs, on the ground that the appellant has not complied with the requirements of section 85 of the Transfer of Property Act."

and the value of improvements made by him. After the decree of the Munsif was passed the plaintiff, the jenmi, applied to him to amend it, by making the value of the improvements due to the sub-tenants liable for the arrears of rent due to the plaintiff, and the decree was amended in this way. The three sub-tenants then appealed to the Subordinate Judge making only the plaintiff, the jenmi, a respondent. The Subordinate Judge held that the appeal was an appeal against the amended decree, allowed the appeal and set aside the amendment, thereby, in appeal, re-imposing on the kanomdar in his absence the liability for arrears of rent part of which had been removed by the amended decree. It is objected that the kanomdar was a necessary party to the appeal under section 85 of the Transfer of Property Act, and not having been made a party to the appeal the decree made in his absence must be set aside as no reasonable excuse was forthcoming for leaving him out in the lower Appellate Court. This was held to be the rule of practice in *Ramunni Panikar* v. *Sankara Panikar*(1) and this decision has been approved and followed continuously ever since (see *Vedapuratti* v. *Govinda Menon*(2)) and we think rightly.

In view of this decision it is not necessary for us to decide the important question which was argued before us of the liability of sub-tenants, improvements for rent due by the kanomdar to the jenmi. We may, however, say that we are much inclined to doubt the correctness of the view taken by the Subordinate Judge that they are not liable. His decision seems to us to be *prima facie* opposed to the principle of the cases quoted by him, viz., *Achuta* v. *Kali*(3) and *Eressa Menon* v. *Shamu Patter*(4).

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(1) Second Appeal No. 1476 of 1889 (unreported). The judgment in this case was delivered, on 13th August 1890, by SHEPHARD and WEIR, JJ., as follows :— " On the ground that in the appeal as brought in the lower Appellate Court the mortgagees not having been made parties, no effectual relief could have been decreed to the appellant, sixth defendant, we uphold the decree of the Subordinate Judge and dismiss the second appeal without entering on a consideration of the questions of law raised on behalf of the second appellant. The appeal is dismissed with costs ".

(2) Second Appeal No. 51 of 1892 (unreported). The judgment in this case was delivered, on 6th February 1893, by PARKER and SHEPHARD, JJ., as follows :— " The mortgagees were not made respondents in the lower Appellate Court, nor are they made respondents here. No effectual relief can be given. Following the decision in *Ramunni Panikar* v. *Sankara Panikar* (Second Appeal No. 1476 of 1889 (unreported)), we dismiss the second appeal with costs ".

(3) I.L.R., 7 Mad., 545. (4) I.L.R., 21 Mad., 138.

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We allow the appeal with costs in this and in the lower Appellate Court and reverse the decree of the Subordinate Judge and restore that of the Munsif.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

1901. October 4, 10.

CHINNASAMI MUDALI (PLAINTIFF), APPELLANT,

v.

TIRUMALAI PILLAI AND THE RIGHT HONOURABLE THE SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT. *

Land Improvement Loans Act—Act XIX of 1883, s. 7, cl. 1 (a)—Revenue Recovery Act—Act II of 1864 (Madras), s. 42—Advance to owner on two pieces of land—Security taken on one alone—Sale of the other piece in respect of advance—Validity.

N held two pieces of land on patta and obtained a loan from Government, under Act XIX of 1883, for the improvement of one of them, namely, No. 315. The other piece, namely, No. 105-B, was not made collateral security for the loan. Default having been made in repayment of the loan, piece No. 315 was in 1894 attached and put up for sale and (as there were no bidders) bought in by Government. In 1895, N sold the other piece of land, No. 105-B, to plaintiff, but the patta was not transferred. In 1896, No. 105-B was attached by Government in respect of N's unpaid loan. Plaintiff objected to its sale, claiming title to it as purchaser, and in 1897, both N and plaintiff applied for a transfer of the patta to plaintiff. The transfer was not made as the loan to N had not been repaid. The land was ultimately sold by Government to first defendant, whereupon plaintiff brought this suit for a cancellation of that sale:

Held, that plaintiff was entitled to the relief claimed.

SUIT for a declaration that a sale of certain land by Government was null and void, and for an order directing its cancellation. Muthu Annathai Naick held two pieces of land on patta, namely, No. 315 and No. 105-B. He obtained a loan on the security of land No. 315, for the purpose of digging a well thereon, under Act XIX of 1883. Land No. 105-B was not included as collateral security for the loan. Default having been made in

* Second Appeal against the decree of R. D. Broadfoot, District Judge of South Arcot, in Appeal Suit No. 164 of 1899 presented against the decree of C. Sriranga Charlar, District Munsif of Tindivanam, in Original Suit No. 367 of 1898.