The mere fact that the Indian Limitation Act unlike the English law prescribes a period of limitation even in respect of suits for obtaining equitable relief does not entitle the plaintiff to obtain the relief, because the suit itself is not barred by limitation if his conduct in the matter otherwise is such as to make it inequitable for the Court in the exercise of its discretion to grant to him a mandatory injunction. On this ground we uphold the decree of the lower Court so far as the mandatory injunction prayed for was refused. As regards the prayer for an injunction in respect of future additional buildings on the holding we think that the plaintiff is entitled to such relief. It is however represented that there is every likelihood of the parties coming to an agreement to the effect that the defendants are to pay an enhanced rent, six times the existing rate, from the date of plaint for the entire holding and to be at liberty to erect further buildings. If the matter is thus adjusted and intimation thereof given to this Court within three weeks from this date, there will be a declaratory decree in accordance with such adjustment and the appeal will stand otherwise dismissed. If no such adjustment be made and the matter communicated to the Court as aforesaid, the decree appealed against will be modified by issuing a permanent injunction restraining the defendants from commencing and erecting any additional buildings on the holding and the decree confirmed in other respects.

In either case each party will bear his costs throughout.

APPELLATE CIVIL.

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

VYTHILINGAM PILLAI AND OTHERS (SECOND DEFENDANT AND LEGAL REPRESENTATIVES OF THE SECOND DEFENDANT), APPELLANTS,

v.

KUTHIRAVATTAH NAIR AND OTHERS (PLAINTIFF AND DEFENDANTS NOS 1, 3 TO 7), RESPONDENTS.*

1906 March 19, 20, 28.

Malabar Law—'Anubhavam' grants, meaning of—Whether the use of the word creates an irredeemable tenure depends on the particular instrument in each case—Limitation Act XV of 1877, art. 134—Applies only when absolute property sold.

A stipulation in a kanom deed that a certain amount in grain or money is granted to the mortgagee as anubhavam does not necessarily create an irredeemable tenure. The word 'Anubhavam' will create an irredeemable tenure only when used with reference to the tenure itself but when used with reference to the allowance such allowance will be perpetual but not the tenure.

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* Second Appeal No. 3056, of 1903, presented against the decree of M.R.Ry. S. Raghunataiya, Subordinate Judge of Palghat, in Appeal Suit No. 877 of 1902, presented against the decree of P. J. Itteyerah, Esq., District Munsif of Palghat in Original Suit No. 408 of 1901.

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Whether, in any particular case, the word creates an irredeemable tenure or only a perpetual rent charge in respect of the allowance must be decided on the language of the document.

If the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as 'Anubhavam,' an irredeemable tenure will be created; but, otherwise, if the amount of the grant is fixed and the rest is reserved as rent.

Theyyan Nair v *The Zamorin of Calicut*, (I.L.R., 27 Mad., 202), referred to and distinguished.

Article 134 of schedule II of the Limitation Act applies only to cases where the vendor purports to sell the property as his absolute property and the vendee purchases it as such.

Radanath Doss v. *Gisborne*, (14 M I A., 1 at p. 19), referred to and followed.

SUIT to redeem two items of land demised on kanom by the plaintiff to the first defendant under kaichit, exhibit A, dated 8th February 1866, which was as follows:—

"You have this 27th day of Makaram 1041 granted us a renewed demise on stamp paper worth one rupee bought from the Palghat Munsif's Court on 14th December 1865, in respect of the following properties belonging to your Cherikkal.

"The rent due by us for holding the land on lease, is 55 paras of paddy. The prior kanom and the value settled for the reclamation effected hitherto in the said properties and credited to our account amounts to 700 fanams. The amount allowed for interest thereon (on the said 700 fanams) is 35 paras of paddy and the amount allowed for Anubhavam is 5 paras of paddy. Total amount of the two items is 40 paras of paddy. The balance left after deducting these 40 paras of paddy from the aforesaid rent of 55 paras of paddy is 15 paras of paddy. The amount due at 2 per 10 thereof after payment of the revenue is 3 paras of paddy, and the amount due for paravasi (deficiency in measure) is 3 idangazhis of paddy. Total amount of the two items is 3 paras and 3 idangazhis of paddy. We shall annually pay the said 3 paras and 3 idangazhis of paddy dried, winnowed and cleaned at the Cherikkal and take a receipt."

The first defendant was *ex parte*.

The second and third defendants contended *inter alia* that under exhibit A the properties belonged to the first defendant's Tarward on Anubhavam rights. The second defendant also contended that the plaintiff's suit was barred by Limitation under article 134, schedule II of the Act, as the items were sold by the

Tarward of the first defendant to one Rengiyan in 1877, from whom the second defendant purchased them in 1896.

The District Munsif passed a decree for redemption in favour of the plaintiff. His decree was confirmed on appeal.

The second defendant preferred this second appeal.

Dr. S. *Swaminadhan*, *V. Krishnaswami Ayyar* and *A. Nilakantaiyar* for second to fifth appellants.

P. R. Sundara Ayyar for eighth respondent.

JUDGMENT.—This is a suit for redemption of certain land. The plaintiff is the Kuthiravattah Nair. The second and the third defendants are the present appellant and third respondent. They are in possession and they alone contest the plaintiff's right to redeem. They claim under exhibit IV which is an assignment obtained by them in 1896 from certain persons who had obtained an assignment in 1871 under exhibit I from the Tarward (family) of the first defendant. The first defendant's family held the land under an instrument which is not produced, but of which exhibit A is the kaichit on counterpart. It was executed by the first defendant and another member of his family in favour of the plaintiff in 1866. The defendants also relied on exhibit II which purported to be a grant from the Zamorin in 1862. The Zamorin claimed to have an undivided half share in the land, but this claim was negatived in recent litigation between the plaintiff and the Zamorin and exhibit II has been held by both the Courts below in the present suit to be a forgery. The second and third defendants' title, then, depends on exhibit A, and the chief question in this suit is as to the extent of the grant evidenced by it. The second and third defendants contend that it evidences a permanent irredeemable tenure, while the plaintiff contends that it is nothing more than an ordinary Malabar kanom redeemable on the expiration of the usual kanom period of twelve years. It recites that the plaintiff grants to the first defendant's family "a renewed writing," on a stamp paper of one rupee in respect of certain land and adds "The rent due by us (first defendant's family) for holding the land on lease is 55 paras of paddy. The prior kanom and the value settled for the reclamation effected hitherto in the said property and credited to our accounts is 700 fanams. The amount allowed for interest thereon (on the said 700 fanams) is 35 paras of paddy, and the amount allowed for anubhavam is 5 paras of paddy. The total amount of the two items

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is 40 paras of paddy. The balance left after deducting these 40 paras of paddy from the aforesaid rent of the 55 paras of paddy is 15 paras of paddy " and the tenant agrees to pay rent calculated in the usual way on this 15 paras. Now this instrument has all the elements of a kanom. The reference to " the prior kanom " of which this is " a renewed writing " the addition of the value of reclamations by the tenant to the prior kanom amount so as to make up the new kanom amount, and the manner in which the rent is calculated, all indicate that it is a kanom demise and the Courts below have construed it as an ordinary kanom, neither more nor less.

The defendants however, contend that the words " the amount allowed for *anubhavam* is 5 paras of paddy " have the effect of converting the kanom into a perpetual tenure. We cannot for a moment accede to this argument. The word *anubhavam* or *anubhogam* is a Sanskrit word, and literally means " enjoyment." In grants, however, it ordinarily implies hereditary, and therefore, perpetual enjoyment; and when used as descriptive of a tenure of land it implies an hereditary tenure; but the word may also be used with reference to an allowance of money or grain which is to be deducted from the rent due to the grantor. In such a case though the allowance may be perpetual or may operate as a rent charge on the land, it by no means follows that the tenure is irredeemable. Whether the word implies an irredeemable tenure or only a perpetual rent charge of grain or money must depend on the language of each document. This two-fold use of the word is supported by authority, and it is sufficient, we think to explain and reconcile the several cases that have been relied on by either side in the argument before us. In Greeme's Glossary, which is a standard authority with regard to the meaning of legal and revenue words and phrases in Malabar, this two-fold use of *anubhavam* is clearly stated. It is defined as " A deed of gift of land as a reward for services performed, answering, perhaps, to inam land. The holder cannot be dispossessed, and the right is hereditary; but if the grantee or any of his descendants die without heirs, the land reverts to the janmi, and on the succession of heirs the janmi is entitled to purushantaram. In some instances a trifling payment of one or two fanams is made by the grantee to the janmi in token of acknowledgment of proprietorship. "

"An hereditary grant of Anubhavam of the purapad, or residue of purapad after deducting mortgage interest, which remains in the hands of a mortgagee, is sometimes made to the mortgagee himself, or to some other person not connected with the land to whom the mortgagee is required to pay it."

In *John Pillai* v. *The Collector and Agent to the Court of Wards, Kavalapara Estate*(1), Muthusami Ayyar and Wilkinson, JJ., had to consider a document very similar in its essential terms to the present, and they then said: "The main question to be determined is whether the kanom created by exhibit VII is perpetual and irredeemable. The material words in the document to which our attention is drawn are these 'the balance of micharam due to me, namely, 118 paras and 6½ edangalies of paddy I make over to you and your sons to be enjoyed as anubhavam for ever and ever with a liability to pay me 2 fanams a year as anubhavam kacha.' The document is termed ubhayapattola karanam which means, as explained by Greeme, a kanom deed. This view of the deed is strengthened by the expression used in the instrument 'interest on the kanom amount advanced to me.' The contention that the terms 'anubhavam' 'you and your sons' and 'for ever and ever' operate to render the kanom irredeemable cannot be supported. The deed must be looked at as a whole. The primary intention of the parties was to create a mortgage and we are not at liberty to ignore it and to treat the document as if it evidenced a sale, the consideration for which consisted of the kanom amount and past services. Reading the document as a whole the intention appears to us to have been to combine in one instrument two independent transactions, viz., a mortgage and a gift of a certain amount of purapad to the demisee and his sons. In this view the gift cannot in any way operate in restraint of the right of redemption any more than if the kanom were granted to one party and the anubhavam right to another."

In *Ittappan* v. *Lakshmi*(2), Collins, C.J., and Shephard, J., stated that the instrument was not unlike that in the case just quoted [*John Pillai* v. *The Collector and Agent to the Court of Wards Kavalapara Estate*(1)] and that it must receive a like construction,

(1) S.A. No. 1877 of 1891 (unreported).

(2) S.A. No. 867 of 1893 (unreported).

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and did not operate to give the lessee a perpetual right to the land lent only to the 30 paras of paddy.

In *Kovilkattilunniri* v. *Ittirarichan Nair*(1), Collins, C.J., and Parker, J., held that a document similar to the present "is clearly a renewal of a previous kanom document and the contention of the defendants that the land No. 1 is held by their Tarwad on anubhavam right is untenable. The real question is whether defendants have a perpetual anubhavam right in 30 paras of paddy from that land. The contention that plaintiff cannot redeem the kanom is untenable," and after a reference to the District Judge, the learned Judges held that the defendants had an "irredeemable anubhavam right to 30 paras of paddy from the land." It will be observed that in all these cases the Court held that an anubhavam grant of paddy did not create an irredeemable tenure of the land in favour of the grantee. The vakil for the defendants however strongly relies on the observations of this Court in the case of *Theyyan Nair* v. *The Zamorin of Calicut*(2). But the decision in that case, if rightly understood, is in no way inconsistent with the decisions already referred to. In that case the words of the document were "The rent of 29 items is 160 paras of paddy, being the rent due exclusive of allowance for *Adimayavana* as heretofore." The Court there explained that *Adima* meant a "servant" and *yavana* "enjoyment," the whole expression implying an allowance given for service and it added that there was judicial authority for holding that when it applied to a tenure of land it *primâ facie* imported a permanent tenure, just as *anubhavam* implied a permanent tenure. It further pointed out that in that case there were reasons why the grant must be held to have been made for services already rendered and that the amount of the grant, not being specified, must be the produce of the land after deducting the rent settled as reserved for the landlord. The Court therefore held that the instrument created an irredeemable tenure in favour of the grantee. That conclusion is, we think, obviously correct. The grantor reserved a rent of 160 paras of paddy for himself and it had been paid without alteration from time immemorial. He granted the rest of the produce as a permanent allowance for the services rendered. That is just the converse of the present case where the allowance in favour of the grantee is fixed at so many paras of

(1) S.A. No. 1169 of 1894 (unreported). (2) I.L.R., 27 Mad., 202.

paddy, and the land is held on kanom tenure, implying the right to redeem the land after twelve years, or to renew the kanom with a readjustment of the rent.

The point to be borne in mind with regard to "*anubhavam*" is that it may be used with reference to tenure of land, and it will then *primâ facie* import an irredeemable tenure, or it may be used with reference to a specified money on grain rent charged on the land and in that case it will not imply any tenure in favour of the grantee. But if the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as "anubhavam" or "yavana," then it may well be that the Court will treat it as creating an irredeemable tenure, so as to secure to the grantee the benefits intended for him by the grant.

In the present case we hold that no irredeemable tenure was created, but that defendants Nos. 2 and 3 are still entitled to receive 5 paras of paddy annually from the land if the plaintiff redeems the kanom.

The defendants Nos. 2 and 3 further rely on article 134 of the Limitation Act as a bar to the whole suit. We, however, agree with the Courts below that that article has no application to the present case. In order to have the benefit of that article the purchaser must show that he is the purchaser of an absolute title, but exhibit I under which defendants Nos. 2 and 3 claim refers to the title of the first defendant's family as a kanom and anubhavam right, and hands over the title deeds on which that right was claimed. Exhibit A was therefore no more than an assignment of those rights. To borrow the language of the Privy Council in *Radanath Doss* v. *Gisborne*(1) when dealing with the corresponding provision of the land under the Act of 1859 "we can find in this deed no evidence of a statement on the part of the vendor or of any belief on the part of the purchasers that the property was a property which the vendor claimed to hold by what we should call in this country a fee simple title," and we therefore think that "the first requisite in the law of limitation is not made out, and that the appellants have not shown that they are purchasers of this specific property as an absolute property in contradistinction to a mortgage property upon a contract

(1) 14 M.I.A., 1 at p. 19.

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by the vendor to convey the property to them as an absolute property."

We therefore dismiss the second appeal with costs. The decree will be without prejudice to the right of the defendants Nos. 2 and 3 to their charge on the land.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran Nair.

1906. April 18, 20.

DOSE THIMMANNA BHUTTA (PLAINTIFF), APPELLANT,

v.

KRISHNA TANTRI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 52—Lis pendens—Suit for maintenance by widow praying it to be charged on immoveable property—Right to immoveable property in dispute in such suit.

A suit in which a widow claims to get her maintenance made a charge on immoveable property is one in which a right to such immoveable property is directly and specifically in question within the terms of section 52 of the Transfer of Property Act; and any transfer of the property during the pendency of the suit, not effected for the purpose of paying off any debt entitled to priority over the claim for maintenance will be affected by the *lis pendens* created by the suit.

Bazayet Hossain v. *Dooli Chund*, (I.L.R., 4 Cal., 402 at p. 409), referred to and followed.

SUIT to recover the amount due on a mortgage bond executed on the 23rd January 1889 by D, the wife of the first defendant in favour of the plaintiff, under a power of attorney executed by the first defendant in favour of D. One Y, the widow of the first defendant's brother, filed a suit—Original Suit No. 17 of 1888—on the 10th January 1888 for maintenance against the first defendant and D and prayed that the decree amount should be made a charge on the two properties mortgaged to the plaintiff. A decree was passed for maintenance charging the properties on the 31st January 1889. In execution of the decree, Y attached the properties and the first defendant applied to the Court for a certificate

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* Second Appeal No. 356 of 1904, presented against the decree of M.R Ry. U. Achutan Nair, Subordinate Judge of South Canara, in Appeal Suit No. 221 of 1902, presented against the decree of M.R.Ry. T. V. Anantan Nayar, District Munsif of Mangalore, in Original Suit No. 188 of 1901.