APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, March 19, April 3, December, 11.

KOLANGERETH RAMAN NAIR AND THREE OTHERS, (PLAINTIFFS), APPELLANTS.

v.

KOLIMATAMULLATHIL MARIYOMMA AND FIVE OTHERS (DEFENDANTS NOS. 2 TO 7), RESPONDENTS.*

Landlord and tenant—Denial of landlord's title—Forfeiture of tenancy—Denial that landlord's title was subsisting—Adverse possession—Kudima tenure, nature of—Part of future services—Resumption of lands—Right to eject on denial of title.

A denial by the tenant of his landlord's title must, in order to work a forfeiture of the tenancy, be brought home to the knowledge of the landlord and it must be unequivocal and clear. The receipt and retention by the tenant of a document of sub-lease in which he is spoken of as the janmi of the lands demised, cannot operate as a denial of the landlord's title so as to cause a forfeiture of the tenancy.

If a tenant denies a subsisting title in the landlord and claims that the property became vested in him by adverse possession, such conduct amounts to denial of landlord's title prior to suit.

Lands granted on kudima tenure for past services are not resumable. But if granted for future services they are resumable on a refusal to perform service. A denial by such tenant of the landlord's title is tantamount to refusal to render service.

SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, the Temporary Subordinate Judge of Tellicherry, in Appeal Suit Nos. 465 and 477 of 1916 preferred against the decree of N. GOVINDAN NAYAR, the District Munsif of Kuttuparamba, in Original Suit No. 707 of 1913.

The plaintiffs, who are the Uralers of Tricharamannur devaswam, sued to recover three items of lands from defendants Nos. 1 to 4 who were members of a tarwad, and the other defendants, who were tenants in possession under the former defendants. Plaintiffs' case was that the devaswam granted the plaint properties to the tarwad of defendants Nos. 1 to 4 on kudima right, and that defendants Nos. 1 to 4 by denying the title of the devaswam long prior to suit had incurred forfeiture of

* Second Appeal No. 1325 of 1918.

their tenancy. The plaintiffs instituted the suit to recover the properties. The second defendant, to whose tavazhi the lands were claimed to belong, did not admit the kudima tenure alleged by the plaintiffs. In 1876, when item 1 was attached by a decree-holder in execution of a decree obtained by him against the devaswam, the predecessor-in-title of the second defendant filed a claim petition, Exhibit D, in which the claimant set up that the title of the plaintiff's devaswam in the suit properties had become extinguished, and that the property in these items had become vested in him by virtue of adverse possession against the devaswam. The material portions of Exhibit D, dated 19th June 1876, were as follows :—

EXHIBIT D.

In the Court of the Subordinate Judge of North Malabar.—
Petition presented under section 246 of the Code of
Civil Procedure by, etc.

In the matter of the decree debt in Original Suit No. 30 of 1863 on the file of this Court payable by the defendants Krishnan Nayar and three others to Krishna Pisharoti . . . nilom has been entered as items 1 and 7 in the Proclamation, as if they belonged to the judgment-debtors. Reasons are given hereunder for the release of these items from attachment. The said nilom has been acquired as jenm by our ancestors and the jenm has been confirmed by the Diary in Miscellaneous Petition No. 42 of 1871, on the file of the Tellicherry Munsif. Paramba No. 7 has been got by our ancestors more than sixty years ago *on kudima jenm from the devaswam* and is now held on kuzhikanums by tenants who have effected considerable kuzhikanum (improvements) and house and cattle-shed and others. On the western side of it there is a shop built by Kunhali and occupied by him with the permission of No. 1 petitioner, *and the jenm right of the devaswam on this paramba is barred by limitation.*

* * *

Therefore it is prayed that evidence may be taken and the two above properties may be released from attachment and our cost given.

The decree-holders referred to in the above petition not opposing, the claim petition was allowed by the order of the Subordinate Judge, dated 30th June 1876.

As regards items 2 and 3, in the present suit, the denial of title relied on by the plaintiffs was said to consist of the statements made in three sub-leases executed to the predecessor-

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in-title of the second defendant in 1886, 1896 and 1904, by the sub-lessees. The three documents, were filed as Exhibits II, III and IV and were similar in their terms. The material portion of Exhibit II was as follows :—

"Marupattam, executed on 4th August 1886, to Biyyathamma and Kunhammad by Kandan, etc. I have taken charge from you for twelve years from this date on kuzhikana pattom kudiyiruppu tenure of Yogimadathel paramba described below which is *your jenmom* and was in your possession before and of which possession has now been given to me. The rent fixed to be paid annually, after defraying the expenses of the upkeep of melabhayans consisting of 96 coconut trees, etc., in the said paramba *belonging to you the jenmi*, the usufruct of which I shall enjoy, is Rs. 20. . .

. . . . . If without paying regularly every year the rent, etc., due, I keep arrears, or if within one year I fail to plant kuzhikana ubhayams or kuzhikhoors, etc., or if I cut away any tree *without the jenmi's permission* and thereby loss is incurred, it is agreed that I can be evicted even before the expiry of the term and that arrears of rent shall carry 12 per cent interest. . . . . The well also belongs to you.

(Signed) KANDAN."

The District Munsif held that the three items belonged in jenm to the plaintiff's devaswam, that there was forfeiture of the tenancy by reason of the defendants' denying the title of the landlord, and that the landlord's title was not extinguished by limitation, and he accordingly decreed the suit in favour of the plaintiffs. On appeal by the second defendant, the Subordinate Judge held that there was no denial of the landlord's title sufficient in law to cause a forfeiture of the tenancy, and he accordingly reversed the decree of the District Munsif and dismissed the suit. The plaintiffs preferred this Second Appeal.

K. P. M. Menon for the appellant.

Mir Zyn-ud-din for the first respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The first question in this case is whether there is a denial of title, and if so, does the denial cover all the items in the suit or only some. The second question is, supposing there is a denial, whether, having regard to the nature of the tenure, forfeiture is incurred. On the first question the

Subordinate Judge has made some obvious mistakes which have confused the issue. He is clearly wrong in saying that the denials in Exhibits II, III, and IV are only repetitions of the denial in Exhibit D. Exhibit D relates to item No. I. Exhibits II, III, and IV relate to items 2 and 3, and the nature of the denials in these two sets of documents is altogether different. Exhibit D will be considered later on. As regards the other documents we may first deal with Exhibit II, as observations with regard to one of them would apply to the others as well. Exhibit II is a sub-lease executed to the defendants. In that, the sub-lessee uses the expression with reference to the property demised, "belonging to you the jenmi". In another place the language used is, "without the jenmi's permission". Mr. Menon argued that as the defendant accepted these documents without raising objection to the language employed, he must be deemed to have tacitly assumed the role of a jenmi, and to have denied the title of the plaintiff. This seems to be a very far-fetched suggestion. It is well understood in this Presidency, that the denial must be brought home to the knowledge of the landlord and it must be unequivocal and clear. In *Kemalooti* v. *Muhamed*(1), and in *Rama Aiyangar* v. *Anga Gurusami Chetti*(2), this principle was distinctly stated. See also *Venkatachariar* v. *Narasimha Iyengar*(3). Here, the defendant did no act which can be said to amount to a denial of the title of his landlord. It has not been pointed out to us that the landlord was made aware of any denial of title by the defendant. Under these circumstances the receipt and retention of a document by the defendant in which he is spoken of as the jenmi could not operate as a denial of the plaintiff's title. Therefore, so far as items 2 and 3 are concerned, the decision of the lower Appellate Court should be confirmed, though not for the reasons given by it.

The case as regards item 1 is different. The alleged denial is contained in Exhibit D. That was a claim petition presented in the year 1876 by the defendants' predecessor-in-title. The occasion for this claim was an attempted sale of the property in execution of a decree against the plaintiffs' predecessor-in-title. In the claim it was stated that the property should not be sold

(1) (1918) I.L.R., 41 Mad., 629. (2) (1918) 8 L.W., 109.
(3) (1918) M.W.N., 846.

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as the "jenm right of the dewaswam on this paramba is barred by limitation". This is in effect denying the title of the jenmi to the property. In Foa on Landlord and Tenant, it is stated that the setting up of a prescriptive title would amount to a denial of the landlord's title. The decision in *Neall* v. *Beadle*(1) is referred to. Although that judgment is not quite explicit on the point, it stands to reason that where a tenant impeaches the title of the landlord on the ground that there is no subsisting title as the property vested in him by virtue of adverse possession, such an attitude should be regarded as amounting to a denial of title.

Now comes the important question, whether having regard to the nature of the estate in the possession of the defendants such a denial would entail forfeiture. It is now well established in this Presidency, following the Privy Council ruling in *Abhiram Goswami* v. *Shyama Charan Nandi*(2), that a perpetual lease can be forfeited by the tenant denying the title of the landlord. In the present case the defendants' claim that they have been in possession of the property for a very long time and that they have made improvements upon the property. The plaintiffs' allegation is that the properties in suit belong to the devaswam, of which the plaintiffs are Uralers, and that they were leased to the tarwad of the defendants on *kudima jenmam*. As to when it was so leased, and whether it was within the memory of man, does not appear. The findings of the Court below, which may be accepted, are that the property belonged originally to the plaintiffs' devaswam and that the first defendant's predecessors must have come into possession at some time under the devaswam. The contention of the respondents is that a kudima or adima right is not resumable under any circumstances. There are no considered decisions upon the point. In *Thunkunni Achan* v. *Manchu Nair*(3), it was held that an assertion of jenmam right by the kudima will not work a forfeiture so as to enable the landlord to eject him. The decision cited by the learned judges is not applicable to the present case. On the other hand in *Mahomed Hussain Sahib* v. *Nagaratnam Pillai*(4) BENSON and KRISHNASWAMI AYYAR, JJ., confirmed a judgment of Mr. PHILLIPS

(1) (1912) 107 L.T., 646.
(2) (1909) I.L.R., 36 Calc., 1003.
(3) (1915) 2 L.W., 102.
(4) S.A. No. 1413 of 1918 (unreported).

as District Judge in which he held that an adima right can be forfeited by denial of title. The judgment of the High Court simply says: "We think it is a perpetual lease. The second Appeal is dismissed with costs". In *Kunhambu Vazhunavar* v. *Kunhi Moya*(1) BENSON and WALLIS, JJ., upheld the decision of Mr. VENKATRAMANA PAI, District Judge, who refused to disturb the kudima tenant from his holding, although there had been a denial of title. In the judgment of the High Court there was no discussion of the question.

A consideration of the nature of the tenure suggests that this case cannot be disposed of without further inquiry. In Graem's Glossary an adima grant is described thus:—

"The adima grant of a paramba or garden was also often conferred by a superior lord, or tala Udaya Tamburan, upon his own Adiyan or vassal; but here it was in the nature of an Inam or gift, no consideration having been received for it by the proprietor. An annual trifling tribute of superiority is, however, reserved to the proprietor to prevent the garden being entirely alienated. The garden reverts to the proprietor on failure of heirs on the part of the adiyan, and if the adiyan takes part with the enemies of his patron, the latter may resume the property. Under any other circumstances the adiyan cannot be dispossessed, and he has the right of burial within the garden."

"In this (describing a kudima grant) the land is made over in perpetuity to the grantee, either unconditionally as a mark of favour, or on condition of certain services being performed. The terms adima and kudima mean a slave, or one subject to the landlord, the grant being generally made to such persons. A nominal fee of about two fanams a year is payable to the landlord to show that he still retains the proprietary title. Land bestowed as a mark of favour can never be resumed; but where it is granted as remuneration for certain services to be performed, the non-performance of such services, involving the necessity of having them discharged by others, will give the landlord power to recover the land. The non-payment of the annual fee will form no ground for ousting the grantee, but it will be recoverable by action. The hereditary property of Native Princes cannot be conferred on this tenure, the ruling Prince having only the right of enjoyment during life without power to alienate. (Proceedings of the Court of the Sadder Adalat No. 18, dated 5th August 1856.)"

(1) S.A. No. 987 of 1904 (unreported).

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Logan in his Malabar Law accepts the above description as correct. In the report submitted by the Malabar Land Tenures Commission the above quotation is accepted as correctly defining the kudima and adima tenures. The question in this case is whether the grant was made for past services or for future services. If the former, apparently the tenure cannot be resumed. If the latter, there can be no question that for failure to perform the services the lands can be resumed. It may be taken that the denial of title is tantamount to a denial to render services. Therefore, before finally deciding the case, it is necessary to call for a finding whether the devaswam granted the lands in question to the defendants' tarwad for past services or for future services.

A further question must also be considered by the lower Court. Exhibit D is dated 1876. Since its date, it was suggested, the devaswam has received the prescribed rent and has therefore waived its right to enforce the forfeiture. There is no finding whether the devaswam was aware of its right to eject the defendants' tarwad on account of forfeiture for denial of title. The difficult question whether the landlord is entitled to enforce the forfeiture after a considerable period of time, even though he was aware of it and acquiesced in the tenant holding on as if there had been no forfeiture, need not be discussed at this stage. The lower Appellate Court must be asked to return findings on these questions on fresh evidence, if any, tendered within three months from this date. Seven days are allowed for objections.

In obedience to the order contained in the above judgment, the Temporary Subordinate Judge of Tellicherry submitted findings on the following three issues :—

(1) Whether the devaswam granted the lands in question to the defendants' tarwad for past services or for future services.

(2) Whether the devaswam has received the prescribed rent and has thereby waived its right to enforce the forfeiture.

(3) Whether the devaswam was aware of its right to eject the defendants' tarwad on account of forfeiture for denial of title.

His finding on issue (1) was as follows :—

"That the grant in question is not one made for future services and that there is no evidence to show that it is one made for past services."

His findings on issues (2) and (3) were as follows :—

"I, therefore, find issue (2) in the negative and on issue (3), I find that the devaswam became aware of its right to eject on account of forfeiture of the denial of title only in 1912."

This Second Appeal coming on for final hearing after the return of the findings of the lower Appellate Court the Court delivered the following

JUDGMENT.

We accept the finding and dismiss the Second Appeal with costs. (One set.)

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Spencer.

SRIMAN MADABHUSHI GOPALACHARYULU (TENTH DEFENDANT), APPELLANT,

v.

EMMANI SUBBAMMA AND SEVENTEEN OTHERS (DEFENDANTS NOS. 3, 6, 7 TO 9, 11, 12, 14, 15 AND LEGAL REPRESENTATIVES OF SECOND DEFENDANT AND PLAINTIFF'S LEGAL REPRESENTATIVES), RESPONDENTS.*

1919, November 25 and December 16.

Civil Procedure Code (Act V of 1908), section 11, Explanation V and O. I, r. 8—Res judicata—Private right claimed in common by several persons—Suit by some, others being impleaded as defendants—Bona fide litigation—Decision, whether binding on representative of deceased defendant, not brought on record.

Explanation V to section 11, Civil Procedure Code, applies not only to cases where leave of Court has been granted under Order I, rule 8, but also to cases where some of the persons claiming a private right in common with others litigate bona fide on behalf of themselves and such others.

A decision in a suit, instituted and conducted bona fide by some only of agraharamdars of a village against the zamindar and the other agraharamdars

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* Second Appeal No. 465 of 1918.