APPELLATE CIVIL.

Before Mr. Horace Owen Compton Beasley, Chief Justice, and Mr. Justice Krishnan Pandalai.

VASTEVA HOLLA AND ANOTHER (DEFENDANTS), APPELLANTS, 1929, December 18.

v.

MAHABALA RAO (PLAINTIFF), RESPONDENT.*

Usufructuary mortgage of warg lands to which kumki lands are attached—Mortgagee put in possession of warg and kumki lands—Improvements made by mortgagee on both lands—Right to compensation for value of improvements made on kumki lands as well as on warg lands—Suit for redemption.

When a usufructuary mortgagee of certain warg lands in South Kanara, to which the right of holding kumki lands was attached, was put in possession of both warg and kumki lands and he effected improvements on both, he could, on redemption, claim the value of improvements on both the lands.

Although the mortgage deed did not contain a description of the kumki lands, yet as possession of such lands was given to the mortgagee, the kumki lands should be regarded as part of the security under the mortgage for the purposes of redemption and for claiming the value of improvements made on such lands.

APPEAL under clause 15 of the Letters Patent against the judgment of PHILLIPS, J., in Second Appeal No. 711 of 1924.

K. Y. Adiga for appellant.

B. Sitarama Rao for respondent.

The JUDGMENT of the Court was delivered by

KRISHNAN PANDALAI, J.—The point for decision in this appeal is whether in the case of a usufructuary mortgage of warg lands in South Kanara to which the right of holding kumki lands is attached, when the warg lands and kumki lands are both put in possession

KRISHNAN PANDALAI, J.

* Letters Patent Appeal No.25 of 1926.

VASTEVA HOLLA v. MAHABALA RAO.

KRISHNAN PANDALAI, J.

of the mortgagee and he effects improvements on both, he can on redemption claim the value of improvements on the kumki lands as well as those on the warg lands. The Courts below have held that he is entitled only to the second but not to the first. Hence this appeal.

The facts are as follows:—In 1868 some warg land was usufructuarily mortgaged by the plaintiff's predecessor-in-title to the defendants' predecessor-in-title. Possession was given to the mortgagee not only of this warg property which belonged to the mortgagor but also of an adjacent area of kumki land (which belonged to the Government) the possession of which is, according to the rules made for that purpose by Government and which are found in Board's Standing Orders, Vol. II, pages 61 and 62, given to the owner or occupant for the time being of the warg land for the more advantageous cultivation and enjoyment of the warg land. The mortgagee has been for more than 50 years in possession and enjoyment under the mortgage of both the warg and the kumki lands. The suit was for redemption and the plaintiff sued for the possession of both the properties on the footing that the mortgagee was put in possession of both under the mortgage and was bound to restore both to the mortgagor. The mortgagee (defendant) did not, as indeed he could not, question the right of the plaintiff to recover, along with the warg property, the kumki property attached to it and a decree has been passed accordingly. But while the Courts have awarded the mortgagee the value of improvements on the warg property, they have held that he is not entitled to the value of improvements, such as trees planted, etc., on the kumki.

The right of mortgagees and other subordinate holders of property to the value of improvements effected by them on their holding in the course of prudent husbandry is a customary right in South Kanara

as indeed it is throughout the West Coast of this Presidency, including the States of Travancore and Cochin, *Daramma* v. *Mariamma*(1). In the District of Malabar, the matter is now governed by the Malabar Tenants' Improvements Act and forms an important aspect of the Tenancy legislation now pending. Besides, in this particular case, the mortgage deed, Exhibit V, contains a specific clause whereby the mortgagor agrees to pay the mortgagee on redemption the value of the improvements effected by him on the mortgaged property as fixed by grihasthars (panchayatdars). It was argued for the respondent that we should read this specific agreement as confined to the warg property which alone, according to him, is the mortgaged property and as implying a contract that no compensation was payable for the improvements on the kumki. We cannot accede to either of the two propositions, either that the kumki is not to be deemed part of the mortgaged property or that the agreement, even if it were confined to the warg property, implies a contract to the contrary in respect of the kumki. As to the former, it was undoubtedly the case that possession of the kumki was handed over to the mortgagee as part of his security, and the mortgagor has got a decree for redelivery to him of both on the footing of the mortgage. It has been held that the right of a wargdar over the attached kumki is in the nature of an easement and the two cannot be separated or separately alienated, see *Matilda Fernandez Bai* v. *Alex Pinto*(2). We need not now decide whether the right of the wargdar which entitles him to be in possession of the kumki, to plant trees, etc., on it and cut and remove them, subject to Government regulations, is not something higher than an easement. But it is clear that, as

(1) (1898) 24 M.L.J., 397. (2) (1912) 15 I.C., 278.

VASTEVA HOLLA v. MAHABALA RAO.

KRISHNAN PANDALAI, J.

between the mortgagor and mortgagee of the warg, possession and enjoyment of the kumki is a valuable adjunct of the security and therefore a part of it, that the two cannot be separated and that the mortgagor, having given possession of the kumki to the mortgagee, has now got a decree for its recovery. In these circumstances, the argument that the kumki was not part of the mortgaged property (which found favour in the second appellate Court and which is correct only to the extent that the mortgage deed did not contain a description of the kumki for the reason that, being Government land, the mortgagor was not entitled to create a valid charge on it so as to bind the Government), cannot be of any avail to the mortgagor as between him and the mortgagee. The kumki is, for the purposes of redemption and the rights of the parties on redemption, to be regarded as part of the security. If so, the defendants are entitled to compensation for improvements on the kumki as well as on the warg.

Secondly, we are quite unable to imply from an express agreement as to the warg a contract to the contrary in respect of the kumki. There is nothing to show that the defendant, who had been let into possession of the kumki under the mortgage, agreed to give up his right to the value of improvements to which under the customary law he was entitled.

A short consideration will show the unfairness of a contrary opinion. According to Government rules, the pattadar of the warg has a preferential right, which in practice is never denied, of getting the attached kumki registered in his own name, and thereby becoming its owner, and also to be exempted from payment of the value of the trees which would be charged to a stranger. The plaintiff, therefore, on redemption gets the valuable right of having the kumki registered as his property,

and the result of depriving the defendant of compensation for trees or other improvements on the land is simply to compel him to make a present of that amount to the plaintiff. We see no ground for enforcing this unfair arrangement.

In the result, we vary the decree of the lower Court by declaring that the defendant is entitled to the value of improvements made by him or his predecessors-in-title after the mortgage on the kumki property, Survey No. 111-B/1. The case will be remitted to the Court of the Subordinate Judge of South Kanara for fixing the additional amount that may be due to the defendant after obtaining, if necessary, a finding on the point from the District Munsif and for making a decree accordingly. The appellants will have proportionate costs of this appeal and of the second appeal. In other respects this appeal is dismissed.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

AHMED SAIT AND TWO OTHERS (DEFENDANTS), APPELLANTS,

v.

THE BANK OF MYSORE, LIMITED, BY ITS MANAGER, P. W. O'BRIEN (PLAINTIFF), RESPONDENT.*

1930, January 22.

Bank—Precluded by Memorandum from lending on mortgages—Yet money lent on mortgage—Right of Bank to sue and realize.

Though under its Memorandum of Association a Bank is precluded from lending money on mortgages, yet, where money has been lent by the Bank on a mortgage, it is entitled to sue for and realize the money so lent.

* Original Side Appeal No. 41 of 1929.