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that the village had been entered as a jagir in the accounts of the permanent settlement.

The plainiff appealed against this judgment.

We concur fully in the view which the Agent has taken of this case. The accounts of the permanent settlement clearly show that the peshkash payable by the zamindár was calculated not upon the entire revenue of the village in question, but upon the kattabadi or quit-rent only. We therefore affirm the Agent's decree and dismiss this appeal with costs.

Appeal dismissed.

APPELLATE JURISDICTION. (a)

Special Appeal No. 186 of 1862.

'ALI HUSAIN and others.....Appellants.

NILLAKANDEN NAMBUDIRI.....Respondent.

During the continuance of a first otti mortgage the janmi is in the same possession as regards his right to make a second otti mortgage to a stranger after, as he was before, the lapse of twelve years from the date of the first mortgage.

Where a janmi made an otti mortgage and more than twelve years after made a second otti mortgage to a stranger without having given notice to the first mortgagees so as to admit of the exercise of their option to advance the further sum required by the janmi:—Held that the second mortgagee could not redeem the lands comprised in the first mortgage.

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THIS was a special appeal from the decision of K. Kellu Náyar, the Principal Sadr Amin of Calicut, in Appeal Suit No. 534 of 1861, affirming the decree of the District Munsif of Ernád, in Original Suit No. 41 of 1859.

Mayne for the appellant, the second defendant.

Ramanuja Ayyangar for the respondent, the plaintiff.

The facts appear from the following

JUDGMENT :—This was a suit to redeem lands described in the plaint, and in the occupation of the first, second, third and fourth defendants, members of the same family, as otti mortgagees—the same lands having been recently assigned to the plaintiff by the janmi-proprietor, the fifth defendant, on a mortgage of the same description to a higher

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amount. The plaintiff accordingly sued for possession of the lands, on payment of the former mortgage of 1843-4 held by the first, second, third and fourth defendants.

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The second defendant denied the validity of the superior mortgage on which the plaintiff's claim was founded, and his legal right to redeem and dispossess him of the land.

The District Munsif passed judgment in the plaintiff's favour, on the ground that the term of twelve years during which a mortgage on otti tenure is entitled to continue in undisturbed possession, had elapsed before the date of the second mortgage to the plaintiff; and that after the lapse of the twelve years the janmi was at liberty to assign the lands on a superior otti mortgage to others, subject to the redemption of the land by payment of the debt to the first otti-holder. This decree was confirmed in appeal by the Principal Sadr Amin. It appears clearly that the twelve years under the first otti mortgage had expired before the second mortgage to the plaintiff and that the first mortgagees had not been given any notice of a further advance being required so as to admit of the exercise of their option to make such advance; and the question raised is whether the janmi proprietor was in a different situation as regards his right to make a second mortgage to a stranger after the lapse of the twelve years? We are of opinion that he was not. It has been frequently decided and is now well settled that an otti mortgage must, if the janmi proprietor is desirous of obtaining a further advance by way of mortgage on the property, be allowed as a matter of right the option of making the advance himself, before the lands can be offered on superior mortgage and be made a valid security for an advance by a stranger; and no distinction has been made between the rights of the first mortgagee before and after the lapse of the twelve years. In this case, however, it is contended that the right to exercise this option is not co-existent with the redemption of the original mortgage, but is limited to the term of twelve years from the date of that mortgage, during which the right to redeem is suspended. No authority has been referred to which in any way countenances this limitation of the right, nor is there any evidence of a custom or usage to that effect; and in reason and principle we can see no ground for the distinction. During the twelve years the

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otti-holder is a mortgagee, and so he continues until the land is redeemed, and the option in question is evidently in respect of his interest as mortgagee in almost the whole value of the land. The benefit to the mortgagee, too, does not really arise until after the twelve years, for during that period no advance can be obtained and applied so as to dispossess him of the land. Our opinion, then, clearly is that the right of the janmi proprietor as regards the option to which the otti-holder is entitled is the same after as before the expiration of the twelve years, and consequently that the decrees of the lower courts are not sustainable in law. In reversing the decree of the Principal Sadr Amin we direct that the plaintiff do bear all costs.

Appeal allowed.

APPELLATE JURISDICTION. (a)

Special Appeal No. 417 of 1862.

NARASU REDDI *Appellant.*

KRISHNA PADAYACHI *Respondent.*

Where the statute of limitations was not pleaded in the Original Court :—*Held* that it might be set up in the Appeal Court if evidence could be taken there in reply to such plea.

On special appeal the statute of limitations cannot for the first time be pleaded unless where the facts which raise the plea are admitted.

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THIS was a special appeal from the decree of George Ellis, the Civil Judge of Cuddalore, in Appeal Suit No. 4 of 1861, reversing the decree of the District Munsif of Vilupuram in Original Suit No. 293 of 1860. The plaintiff sued for rupees 504-8-0, the amount due to him on a mortgage-bond, dated the 21st of March 1840, and made by the first defendant's father. The Munsif decreed for the plaintiff. The first defendant appealed to the Civil Court, urging for the first time that the plaintiff's claim was barred by the law of limitation. The Civil Judge, considering that the statute applied, reversed the Munsif's decree with costs. The plaintiff now specially appealed.

Branson for the plaintiff, the appellant, contended that the statute of limitations could not be set up for the first time on appeal.

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