

APPELLATE JURISDICTION (a)

*Special Appeal No. 157 of 1862.*SHAIKH RAUTAN.....*Appellant.*KADANGOT SHUPAN.....*Respondent.*

A kánam mortgagee does not forfeit his right to hold for twelve years from the date of the kánam by allowing the porapád to fall into arrear.

1862.
December 11.
S. A. No. 157
of 1862.

THIS was a special appeal from the decree of H. D. Cook, the Civil Judge of Calicut, in Appeal Suit No. 757 of 1860.

The plaintiff sued for the redemption of lands in Malabar which, on the 12th July 1854, he had demised to the first and second defendants on a kánam mortgage. The porapád was paid down to 1856-1857, but not subsequently, and the plaintiff also sued for the arrears of this porapád. The defendants pleaded that they could not be ousted until after the lapse of twelve years from the date of the mortgage. The Mnfti Sadr Amin and the Civil Judge both decreed for the plaintiff.

Tirumalachariyar for the appellant, the first defendant.

Sadagopacharlu for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—We do not concur in the opinion of the courts below that by falling into arrears of porapád or net-rent the defendants forfeit their tenure of twelve years under the kánam mortgage obtained by them, a tenure which, by the established usage of Malabar, is their right. The non-payment of such rent is a circumstance not affecting this tenure, as the mortgagor can have an independent remedy, either by suing for the rent, or debiting the sum thereof against the mortgage.

We therefore, being of opinion that the defendants cannot be ejected until after the lapse of twelve years from the 12th of July 1854, the date of their mortgage, modify the decrees of the lower courts, in this respect, and dismiss

(a) Present Strange and Frere, J J.

the plaintiff's claim so far as it relates to the ejectment of the defendants. The award of rent to the plaintiff, for which these decrees also provide, will remain undisturbed. All the costs of the suit will be paid by the plaintiffs.

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NOTE.—The same point was decided in the same way on March 7, 1863, by Frere and Holloway J J, in Special Appeal No. 84 of 1862, *Kunju Velan* and others, appellants, *Manavikrama Zamorin Raja* and another, respondents, from the decree of H. D. Cook, the Civil Judge of Calicut, in Appeal Suit No. 613 of 1860.

Sadagopacharlu for the appellants, the 2d, 3d, 4th and 5th defendants, referred to *Special Appeals* Nos. 48, 131 and 157 of 1862.

Tirumalachariyar for the respondents, the 2nd and 3d plaintiffs.

Miller for the 2d plaintiff.

The following is an extract from the judgment :—

The decree of the Civil Judge in this case is founded on the supposed rule that a jannam proprietor is entitled to oust a kánam mortgagee simply for non-payment of porapád or net rent. This opinion has, however, been declared by the High Court to be erroneous. The mortgagee in such cases is entitled to the occupation of the property for the usual period of twelve years from the date of the mortgage, notwithstanding such default ; and the proprietor in the meantime may recover the arrears by suit, or take credit for the amount on paying off the kánam mortgage after the lapse of twelve years.

So in Special Appeal, No. 111 of 1862, *Krishna Mannadi* and others appellants, *Shankara Manaven* and another respondents, heard on Jan 15, 1862, present Strange and Frere, J J., the Court affirmed Special Appeal No. 157 of 1863, and observed :—“ We have now again referred to the written opinions of those best qualified by experience and otherwise to form a judgment on the subject, and find that they fully support this view. And from a statement transmitted by the late Madras Sadr Court with their proceedings of the 5th August 1856 for revision by the judicial authorities of Malabar, it appears that the officers now occupying respectively the position of Civil Judge and Principal Sadr Amin of Calicut fully assented to the doctrine then expressed in the statement, which was identical with that now held by the High Court. The injustice of an opposite rule can scarcely be made more apparent than by the facts of the present case, in which the kánam mortgage advanced by the mortgagee now represented by the sixth defendant, amounts to the large sum of rupees 618-13-9, with the addition of a further claim for value of improvements ; but the arrears of porapád, for non-payment of which the Civil Judge has declared the sixth defendant to be liable to ejectment, amount to the sum of rupees 3-11-6 only ; and the sixth defendant has throughout declared his willingness to pay this sum, if the plaintiff will consent to receive it.”