

APPELLATE JURISDICTION (a)

*Special Appeal No. 27 of 1862.*PAIDAL KIDAVU *Appellant.*PARAKAL IMBICHUNI KIDAVU..... *Respondent.*

Where a first kánam holder in his answer to a redemption-suit by a second kánam-holder, for the first time denied his own kánam and alleged an independent janmam right ; held that he had not thereby forfeited his right to rely upon the option to make a further advance, to which as kánam-holder he was entitled ; though the denial and allegation were false, and though his documents in support of such allegation were forged.

THIS was a special appeal from the decree of F. R. Pereira, the Principal Sadr Amin of Tellicherry, in Appeal Suit No. 219 of 1861. 1862.
September 22.
S. A. No. 27
of 1862.

The plaintiff in this suit was a second kánam-holder, and sought to obtain possession of a paramba alleged by him to be the janmam property of the fifth and ninth defendants, who had assigned it to him on a kánam mortgage of rupees 150, with authority to pay off a prior kánam of rupees 50 held by the first four defendants.

It was contended by the first, second, and fourth defendants—and in this contention they were joined by the seventh defendant—that their káranavans had acquired the janmam right in the premises; that such right had been sold to the sixth, and that it was now in possession of the seventh defendant, his younger brother. The seventh defendant endeavoured to support his case by certain documents marked I and II, which were found to be forgeries.

Both the lower Courts decreed in favour of the plaintiff, to whom, after payment by him of certain sums as the value of improvements, it was adjudged that the paramba should be restored. The decree of the Principal Sadr Amin contained the following passage:—

“The seventh defendant’s contention that even if his pretended jum right were considered unestablished, he

(a) Present Scotland C. J. and Phillips, J.

1862.
September 22.
S. A. No. 27
of 1862.

cannot be dispossessed of the land, as the fifth defendant was bound to assign it on a higher mortgage to him in preference to any other party, deserves not a moment's consideration. He has signally forfeited that right by his own misconduct in attempting to defraud the proprietor by means of documents, marked I and II, which are evident fabrications."

Against this decree the seventh defendant appealed.

Mayne for the appellant argued that the plaintiff's kánam was invalid as no demand for a fresh loan had been made on the prior kánam-holders. He also contended that the Principal Sadr Amin was wrong in holding that the appellant had been guilty of any misconduct which rendered a previous demand upon him unnecessary.

Karunagara Menavan for the respondent, the plaintiff.

The Court delivered a written judgment from which the following is an extract :—The Principal Sadr Amin has assumed the validity of the seventh defendant's argument, that considering the defendants from whom he derived his title to be only kánam-holders, it was nevertheless incumbent on the janman proprietor, under the usage and custom prevailing in respect of kánam mortgages, to afford to a prior kánam mortgagee in possession under a kánam of low amount, an opportunity of accepting or refusing a subsequent mortgage of higher amount, before dealing with and assigning the mortgaged land to an entirely new party. It is also to be inferred that but for the circumstances stated in his judgment, the Principal Sadr Amin would have recognized the first kánam-holders as possessing a right resting on such usage and custom.

We are of opinion that it was not legally competent to the Principal Sadr Amin to annul any right which the prior kánam-holder possessed, by way of punishment for the misconduct in the progress of the action, of which he considered the seventh defendant had been guilty; and as it has not been urged by or on behalf of the plaintiff or the janmi that there had been any refusal on the part of the first four defendants to make a further advance, and the contrary appears to be the fact; and as the janmi is not join

ed with the new kánam-holder in suing the parties in possession of the land sought to be recovered, we reverse the decisions of the Courts below with costs payable by the plaintiff.

1862.
September 22.
S. A. No. 27
of 1862.

NOTE.—If the first kánam-holder had denied the janmi's title before the date of the second kanam, *semble* that it would not have been necessary to give him the option of making the further advance.

As to the necessity of giving a first *otti* mortgagee the opportunity of making the further advance required by the mortgagor—see S. A. No. 17 of 1860, M. S. D. 1860, p. 249.

APPELLATE JURISDICTION (a)

Special Appeal No. 732 of 1861.

CUTENHO.....Appellant.

SOUZA.....Respondent.

The Court will not relieve against the forfeiture of a lease caused by non-payment of rent, although the lessor on previous occasions has waived the forfeiture.

THIS was a special appeal from the decision of Ganapaiyya, the Principal Sadr Amin of Mangalur, in Appeal Suit No. 79 of 1861, reversing the decree of the District Munsif of Mangalur in Original Suit No. 707 of 1859. In this suit the plaintiff sought to cancel a *mulgaini* lease of land to the defendant, which provided that the rent, thereby reserved should be paid within the third kist (March 31), and that the lease should be void in case the lessee should fail to pay the rent within the stipulated time, or act in violation of any of its terms, but that if he conformed to those terms, he should enjoy the land from generation to generation."

1862.
September 24.
S. A. No. 732
of 1861.

Srinivasachariyar for the appellant, the plaintiff.

The respondent did not appear.

The Court delivered the following judgment.

This suit was instituted with the view of cancelling a lease granted to the defendant, on the ground that the defendant had violated its terms by failing to pay the rent for

(a) Present Phillips and frere, J J.