APPELLATE JURISDICTION (*a*)

Special Appeal No. 468 of 1870.

KOITAL UPPI.....*Special Appellant.*

EDAVALATH THATHAN NAMBUDIRI...*Special Respondent.*

Third defendant, purchaser of the interest of 1st and 2nd defendants held certain lands under the terms of a permanent kánam (A) which contained the following condition—"And (I have also agreed) that on failure to pay the said quantity of paddy the kánam amount of 550 fanams shall be received by me, and the land restored." In a suit by the kánamdár to recover possession for non-payment of rent: *Held*, that this condition of redemption was intended as a penalty to secure regular payment of the rent, and that, such being the original intention of the parties, the penalty was one which ought to be relieved against.

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THIS was a Special Appeal against the decision of K. R. Krishna Menon, the Principal Sadr Amin of Tellicherry, in Regular Appeal No. 50 of 1869, modifying the Decree of the Court of the District Munsif of Chavacheri in Original Suit No. 18 of 1867.

The suit was brought to recover one parcel of land and one paramba, alleged to have been demised on a permanent kánam of 550 fanams, by plaintiff's father to 2nd defendant on 7th Makarom 1031 (19th January 1856).

Plaintiff alleged that the tenant's right to enjoy the lands for ever was dependant upon his regularly paying the rent, and that he having failed to do so, the cause of action arose.

1st and 2nd defendants stated that the counterpart (A) sued upon was a forgery; that the land and paramba were first demised in a perpetual lease by plaintiff's father to 2nd defendant, subject to an annual rent of 25 dangalies of paddy; that on receipt of a further sum of 150 fanams, plaintiff's said father passed a kudima jenm right to 1st defendant, reducing the rent to one fanam, and that this right had been mortgaged to 3rd defendant by the 1st and 2nd defendants.

The 3rd defendant admitted the truth of the statements of 1st and 2nd defendants, and further stated that he instituted a suit and obtained a decree for the repayment of the mortgage amount, and that when the property was sold in

(*a*) Present: Innes and Kindersley, JJ.

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execution of the said decree, he purchased it, and that it was not liable to be returned to plaintiff.

The following is a translation of Exhibit A :—

"As the land known by the name of "Kángileri Kovil," which is your jenm property, was formerly assigned on kánam of 550 fanams to one Ayyalur Ahonod, and as you have executed a karár to me authorizing me to pay the said amount of kánam, to obtain the document, to render the said waste land cultivable, to hold and to cause to hold and enjoy it permanently (for ever) by myself and by my heirs on jenm koyu kánam right ; I have agreed to pay you from 1032 (1856-57) for the space of 10 years at the rate of 25 seers of paddy annually out of the produce of the said land, and after the expiry of 10 years, 10 seers of paddy shall be added to it, and at the rate of 35 seers the paddy shall be carried over to the jenmi's Edavalath Illom, and there it shall be measured and given and receipt obtained. And I have also agreed that, on failure to pay the said quantity of paddy, the kánam amount of 550 fanams shall be received by me and the land restored."

The District Munsif disallowed a portion (the paramba B) of the ground included in the plaint, and otherwise decreed as sued for.

Plaintiff appealed against that portion of the Munsif's decree which disallowed the paramba B.

The judgment of the Principal Sadr Amin contained the following :—

"The sole question for consideration is whether the piece of ground marked B in the plan prepared by the Commissioner deputed by the Lower Court to institute a local enquiry, is a portion of the plaint land, or that of another paramba, permanently alienated by the plaintiff's father to 2nd defendant on the same day on which the plaint demise was made by him to the same defendant. The Exhibit I evidences the permanent alienation, while the Exhibit II and its counterpart A evidence the demise upon which this suit is brought. Whether the piece of ground B is included in the document I, or in II, is the sole question for

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determination. If it were included in the document I, it is clear that the plaintiff cannot recover it, seeing that the right on which the paramba was alienated is a kudima jenm (perpetual lease.) If it be shown on the other hand that it is a part and parcel of the land demised as per the document II, the plaintiff is entitled to recover it, as the right of perpetual enjoyment under it is to be repealed by the non-payment of rent."

Upon the facts he found that there was "sufficient to prove that the ground B is a portion of the plaint land and not that of the paramba alienated under the document I, and I therefore reverse so much of the Munsif's decree as disallows the piece of ground marked B in the Commissioner's plan and decree as sued for."

The 3rd defendant preferred a Special Appeal on the ground, amongst others, that the plaintiff was not entitled to evict for mere non-payment of rent.

Sanjiva Rau, for the special appellant, the 3rd defendant.

The *Acting Advocate-General*, for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—The 3rd defendant not having appealed against the decree of the District Munsif, any relief which we may grant to him on this Special Appeal will extend only to the paramba B, which was decreed to the plaintiff by the Principal Sadr Amin.

It has been found that the paramba B, together with the other land claimed in the plaint, was mortgaged or let to the 2nd defendant by plaintiff's father on a perpetual kanam of 550 fanams, or Rs. 110, subject to the payment of a porapad, or annual rent of 25 seers of paddy, to be increased after ten years to 35 seers. The 2nd defendant has executed counter-deed A, which is found to be a genuine document and which contains the following condition—"And (I have also agreed) that on failure to pay the said quantity of paddy the kánam amount of 550 fanams shall be received by me, and the land restored."

The defendants having made default in the payment of rent, the plaintiff seeks to enforce this condition, and to re-

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cover the land on payment of the kánam amount. The 3rd defendant, who has purchased the interest of the 1st and 2nd defendants, contends that the Court should relieve him against this forfeiture. And the point reserved for consideration was whether we ought to grant such relief.

Where the parties have not come to any express agreement on the point, an ordinary kánam tenure for twelve years is not forfeited by non-payment of rent (1 M. H. C. Reps., 112), and the same rule of non-forfeiture would, we conceive, hold good in the case of a perpetual kánam. But here we have a perpetual kánam with an express condition for the redemption of the land in case of non-payment of rent. And in determining whether such condition should be enforced, we think that we should consider whether it was intended by the parties to be a penalty for the purpose of securing the payment of rent. It has been laid down in *Peachy* v. *The Duke of Somerset*, 1 Strange, 447, which will be found also in Tudor's Collection of Leading Cases in Equity, that the true ground of relief against penalties is from the original intent of the case where the penalty is designed only to secure money, and the Court gives all that was expected or desired.

What, then, was the intention of the parties in this case? It was certainly their intention to create a perpetual tenure. The land appears to have been to some extent waste; and it was agreed that the 2nd defendant was to render the said waste land cultivable, to hold and to cause to hold and enjoy it permanently (for ever) for himself and his heirs. This being the principal intention of the parties, it could hardly have been anticipated that the 2nd defendant, having laid out capital and labour on the property, would be content to forfeit his improvements on account of the trifling rent payable on the land. The intention, clearly, was that the rent should be regularly paid, and the condition of redemption was intended as a penalty to secure such regular payment. To enforce such a penalty would in many cases be productive of hardship. We are, therefore, of opinion that as regards the paramba B we ought to decree only arrears of rent with interest at 12 per cent. We think, also, that the plaintiff should bear the costs of this Special Appeal.