

(1926) 08 MAD CK 0063
In the Madras High Court

Chirapath Thamasikkum Kolathayi Kunhi Krishnan Nambiyar	APPELLANT
Vs	
Puthiyottil Kunhi Pennu and Others	RESPONDENT

Date of Decision : 12-08-1926

Acts Referred:

Citation : AIR 1927 Mad 189

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—The plaintiff's suit is for the redemption of a kanom and it is sought to set off the decree amount obtained by him against the 1st defendant for arrears of rent against the kanom amount due by him to the 1st defendant. Defendants Nos. 2 and 3, who were the original kanomdars from the plaintiff, have taken a kanom from the 1st defendant. The District Munsif gave a decree to set off the decree amount due by the plaintiff to the 1st defendant. Defendants Nos. 2 and 3 appealed against the decree of the District Munsif. The District Judge has upheld the contention that the plaintiff could not set off the decree amount due from the 1st defendant against the kanom amount.

2. Defendants Nos. 2 and 3 obtained a kanom under Ex. IV from the plaintiff. The plaintiff gave a melcharth to the 1st defendant the marupat of which is Ex. A. Defendants Nos. 2 and 3 have taken a kanom from the 1st defendant under Ex. VI. The 1st defendant as kanomdar had to pay rent to the plaintiff, and as he defaulted to pay rent the plaintiff brought a suit against him, Original Suit No. 224 of 1920, and obtained a decree. He did not execute the decree but seeks to set off in this suit the decree amount against the kanom amount. The learned District Judge held that inasmuch as the claim for rent had become merged in the decree and the only remedy open to the plaintiff was to execute the decree and not to set it off against the kanom amount. It is conceded that if the plaintiff had not filed a suit and obtained a decree for rent, he could have set off the rent due from the 1st defendant against the kanom amount. The question is whether he has lost the right by obtaining a decree. The decree was alive on the date of

the plaintiff. If the decree had become barred on the date of the plaintiff no doubt he could not set off a barred debt under a decree against the kanom amount. The rent was a charge on the property. That being so, it is difficult to see why the plaintiff could not set off the decree amount against the kanom amount merely by reason of his having obtained a personal decree against the 1st defendant.

3. It was held by Krishnan, J., in *Mangeshwar Naraina Rao v. Shiva Rao* [1918] 41 Mad. 1043 that a mortgagor could set off against the mortgage amount the amount due by the mortgagee to him. It is consonant with principle that when a mortgagor has to pay a certain amount for redemption he should be allowed to deduct from that amount what is due to him from the mortgagee when it is also charged on the land. The contention of Mr. Balakrishnan for Defendants Nos. 2 and 3 is that his clients are, under the Malabar Tenants' Improvements Act, entitled to be paid compensation for improvements, and that the amount should not be lessened by what is due to the plaintiff from the 1st defendant. It must be remembered in this connexion that Defendants Nos. 2 and 3 claim their title from the 1st defendant. Though they may have paid rent due by them to the 1st defendant if the 1st defendant has not paid the rent due to the plaintiff and made default, the plaintiff, as mortgagor, is entitled to set off against the mortgage amount which he has to pay to the 1st defendant, the amount which the 1st defendant is bound to pay to him, and, therefore, though Defendants Nos. 1 and 2 were exonerated in Original Suit No. 224 of 1920 on the ground that the plaintiff had no cause of action against them, in this cause the plaintiff is entitled to deduct the amount due to him from the kanom amount and has to pay only the balance. It is only when the 1st defendant becomes unable to pay the amount due by him to the plaintiff whatever may remain after setting off the kanom amount should be deducted from the amount due to Defendants Nos. 2 and 3 for improvements effected by them.

4. It is urged by Mr. Balakrishnan that by allowing the plaintiff to set off the amount due to him from the 1st defendant against the kanom amount due by him to the latter, this Court will be modifying the decree passed in O. S. No. 224 of 1920 and he also adopts the argument of the learned District Judge that any question relating to the satisfaction of the decree in O. S. No. 224 of 1920 should not be gone into in this case. It is not suggested that the decree in O. S. No. 224 of 1920 has been satisfied by the 1st defendant. In the absence of any such plea on the part of the 1st defendant it is not necessary to consider whether any enquiry in this case was directed towards the satisfaction of the decree, in O. S. No. 224 of 1920. The Court by allowing the set-off does not modify the decree for though the plaintiff was unable to obtain any relief against Defendants Nos. 2 and 3 in the other suit, yet indirectly he is obtaining the same result in this suit. That is not by reason of his having a cause of action against the Defendants Nos. 2 and 3, but by reason of his having mortgaged his land to the 1st defendant under whom they claim. I, therefore, hold that the plaintiff is entitled to set off the decree amount in O. S. No. 224 of 1920 against the kanom amount and the value of improvements that he may have to pay. I think the decree passed by

the Disirict Munsif meets the ends of justice in this case. I, therefore, allow the appeal, set aside the decree of the District Judge and restore that of the District Munsif.

5. The appellant will have his costs both in this Court and the lower appellate Court from the 1st defendant.