

Mangala Kunhimina Umma and Others

Vs

Puthiyaveettil Paru Amma and Others

Civil Appeal No. 980 of 1967

(G. K. Mitter, A. N. Ray JJ)

28.01.1971

JUDGMENT

RAY, J. -

1. This is an appeal by Special Leave against the judgment, dated 29th March, 1967 of the High Court of Kerala confirming the decree of the lower appellate Court declaring that the sum of Rs. 1,000/- is due to defendants Nos. 10 to 17 as legal representatives of defendant No. 2 on the mortgage mentioned in the plaint and that the plaintiffs having deposited the said sum of Rs. 1,000/- on the file of the Court of the Munsif, Cannanore, the defendants Nos. 10 to 17 do surrender quiet and peaceable possession of the property described in the plaint to the plaintiff No. 7 with all documents relating to the property in their possession and further that the defendants Nos. 10 to 17 do pay to the plaintiff No. 7 half of the mesne profits from 22nd December, 1953 till the date of surrender of possession.

The relevant documents are Ex. B-6 and Ex. A-1. Ex. B-6 is a Kanam-Kuzhikanam. Ex. A-1 is its counterpart. They are both, dated 1st December, 1941. The transaction thereunder is a composite one, a Kanam in respect of Taks 1 to 3 of Item 1 which constitute properties in suit and a Kanam-Kuzhikanam in respect of Take 4 of Item 1 and Item 2 which are not the subject-matter of this suit. The Kanamdars are defendants Nos. 1 and 2. In partition under Ex. 3 the rights under Ex. B-6 have been divided equally between the defendants Nos. 1 and 2 but the properties as such are not divided. The appellants being the legal representatives of defendant No. 2 had thus an undivided moiety in the properties in suit. The original plaintiff was an assignee of the Jenmi (the land owner) who granted Ex. B-6. On the death of the original plaintiff, her interest devolved on plaintiffs Nos. 2 to 6 who assigned the same to plaintiff No. 7. The suit is for redemption of the Kanam on the properties in suit. Subsequent to the institution of the suit, defendants Nos. 3 to 9 being the legal representatives of defendant No. 1 and being respondents Nos. 7 to 13 in this appeal surrendered their moiety in the suit Kanam, to plaintiffs Nos. 2 to 6 and thereafter the suit proceeded in regard to the moiety of the Kanam that belonged to defendant No. 2 and his legal representatives, namely, the appellants.

2. The only question in this appeal is whether the appellants are protected against eviction by reason of their contention that Ex. B-6 created a tenancy or whether the respondents were entitled to possession of the properties, by reason of their rival contention that Ex. B-6 was a mortgage transaction and the respondents were entitled to redeem the mortgage on the expiry of the stipulated period.

3. The Malabar Tenancy Act, 1929 was in force at the time of the institution of the suit but it is

common ground that rights and liabilities of the parties are to be judged under the Kerala Land Reforms Act, 1964 by reason of the provisions contained in Section 132(1)(a) thereof. The relevant provisions of Section 2(22) of the Kerala Act of 1964 which defines Kanam are as follows :

"(22) 'Kanam' means the transfer for consideration, in money or in kind or in both, by a landlord of an interest in specific immovable property to another person for the latter's enjoyment, whether described in the document evidencing the transaction as Kanam or Kanapattam, the incidents of which transfer include -

#(a)(b)##

(c) payment of Michavaram or customary dues, or renewal on the expiry of any specified period....."

4. It is indisputable that a Kanam within the above definition involves payment of Michavaram or renewal on the expiry of any specified period. In Ex. B-6 there is no provision for renewal or for payment of customary dues. The per-eminent question is whether there is a provision for payment of Michavaram. Broadly stated, Ex. B-6 executed by defendants Nos. 1 and 2 stipulated that they would pay the Kanam amount of Rs. 1,400/- charged on Taks 1 to 3 of item No. 1 in the Schedule to Ex. B-6 to the 7 person Narayani and others and their representatives and redeem the same and hold the said Taks 1 to 3 of item No. 1 as Kanam and Tak 4 and item No. 2 as Kanam-Kuzhikanam, paying the land revenue for the properties and enjoy them for interest on the Kanam, and after the term of 12 years when the Kanam of Rs. 2,000/- charged on Taks 1 to 3 of item No. 1 was offered the defendants shall receive and surrender the properties with basic documents by a registered release at their costs. No rent is stipulated for the property in consideration of advance of Rs. 2,000/- whereof Rs. 1,400/- was to be paid to the prior mortgagees on Taks 1 to 3 of item No. 1. The suit properties in Ex. B-6 were to be enjoyed by defendants Nos. 1 and 2 for interest on their advance after payment of the land tax to the State.

5. It therefore falls for consideration as to whether the provisions in Ex. B-6 for payment of land revenue for the properties by the appellants amounts in law to a stipulation as rent or Michavaram to the land owner. Counsel on behalf of the appellants relied on the decision of the Kerala High Court in Parameswaran Embranthiri v. Narasimha Nambudiri (1962 KLT 404.) and the earlier Bench division of the Madras High Court in Sankunni Variar and Others v. Neelakandhan Nambudripad and Others (ILR 1944 Mad 254.) in support of the proposition that payment of land revenue would amount to payment of rent.

6. In the Madras Bench decision in Sankunni's case (supra) the Kanam deed was for 36 years and the deed provided that the Jenmi should receive inter alia an annual rental of 411 Paras, 4 Idangalis and one Nazhi of paddy and gingelly oil to the value of six rupees. The Kanamdars were required by the deed in Sankunni's case (supra) to pay out of the gross rent to the Government what became due by way of land revenue. The actual words in the Kanam deed were that the Pattam (gross rent) of the property demised was 2,507 Paras of paddy and the Kanamdars were to hold the properties in their possession and enjoyment and pay to Jenmi a Pattam (rent) of 411 Paras, 4 Idangalis, 1 Nazhi of paddy, of the money value of Rs. 138/- inclusive of Paras Vasi (allowance for difference of measurement) duly dried, winnowed, cleaned, conveyed to the Jenmi's residence and measured out by their 40 Nazhis Para, after deduction of the interest due on the mortgage amount and the assessment on the properties due to Government from the said rent together with sundry payment of one Para, two Idangalis of gingrelly oil of the value of Rs. 6, within the 30th Makaram (10th

February) of each year commencing with the year 1069 M.E. (1893-94) and duly take receipt therefor.

7. In Sankunni's case (supra) the land revenue was increased as a result of resettlement. The question was whether the burden of the increased revenue fell upon the Jenmi. It was contended in Sankunni's case (supra) that inasmuch as there was reference in the deed to gross yield of the land and the Jenmi was to receive his rent after deduction of the interest due on the mortgage and the Government revenue, the intention was to fix the Kanamdars' liability on the basis of the revenue payable to the Government on the date of the Kanam. If the revenue payable was to be increased it was said in that case that the Jenmi was to be responsible for the payment of the additional amount.

8. The entire ratio in Sankunni's case (supra) was first that the liability of the Jenmi was for the revenue and secondly, the Kanamdar was to deduct from the rent the interest on the mortgage amount and the assessment on the properties due to the Government.

The decision of the learned Single Judge of the Kerala High Court in Parameswaran's case (supra) was that recital in the deed that the defendant was to be in possession of the properties and was to pay the revenue out of the income and appropriate the balance towards interest on the amount of the advance amounted to a stipulation for payment of revenue as Michavaram or rent. In Sankunni's case (supra) the direction to pay revenue out of the rent of the property which was due to the landlord was justifiably held to be a payment on behalf of the landlord because it was a part of the Michavaram. That reasoning could not apply to Parameswaran's case (supra) because in that case there was neither any fixation of rent nor any stipulation for payment of rent or Michavaram to the landlord.

9. This Court in *Charumanalil Lakshmi and Others v. Mulivil Kunninamkandy Narayani and Others* ((1967) 1 SCR 314.) considered as to when a transaction would be Kanam-Kuzhikanam and when a usufructuary mortgage. In each case it manifestly depends entirely on the terms of the transaction. In Lakshmi's case (supra) there was a demise of land with fruit bearing trees for 24 years. The transfer was for the enjoyment of land with trees. The Kanam amount was Rs. 5,000/- in one case and Rs. 600/- in the other. The transferees were entitled to appropriate the income of the land in lieu of interest on the Kanam amount and to hold the land even after the expiry of 24 years until the payment of the Kanam amount and the value of the trees planted by them. It was therefore found that all the ingredients of Kanam-Kuzhikanam were satisfied. The test to be applied is whether the purpose of the transaction is enjoyment of the property by the transferee or whether it is intended to secure the re-payment of debt by transfer of interest in the property.

The mere description of the deed as Kanam-Kuzhikanan will not be decisive of the essence of the transaction. The description of deed by itself isolated from the terms and provisions may be misleading or a misnomer.

10. Counsel for the respondents relied on the Bench decision of the Kerala High Court in *Kunhiparan v. V. Naicken and Others* (1967 KLT 646.) in support of the proposition that payment of perquisite would indicate that the relationship was that of landlord and tenant and the name of the document would not be sufficient to displace the real terms. In Kunhiparan's case (supra) the transaction was described as a Kudiyruppu to have the flavour of a mortgage but the Court found the transaction by the terms, provisions and intention of the parties to be a lease and not a mortgage.

11. The circumstances and the conduct of the parties are always a very useful guide in ascertaining

the true character and content of the transaction. Counsel for the respondents relied on the Full Bench decision of the Kerala High Court in *Kunhirama Nambiar v. Pairu Kurup* (1969 KLT 62.) where the document was a Kanayadharam and in spite of its nomenclature it was held to be a mortgage and not a Kanam.

12. The elements which are usually considered relevant to find out the intention of the parties, are first, the proportion of the amount advanced to the value of the security; secondly, the rate of interest payable on the sum advanced; thirdly, the absence of a provision for making improvements and the proportion of the rent or 'Purapad' to the income reserved for appropriation towards interest and fourthly, the surrounding circumstances at the time of the transaction, namely, that the Tarward was at the time of the execution of the document in dire need of money to discharge debts to indicate that the transaction was intended to be a mortgage and not a lease. It will always be a significant feature in a document as to whether the Jenmom right of the Tarwad in the properties has been secured for the Kanartham by way of mortgage.

13. The first and foremost element to be found for a lease is whether there is the intrinsic intention in the written document for enjoyment of the property by the transferee in lieu of rent or perquisites. Secondly, the term of renewal of the enjoyment would indicate the feature of a lease. Thirdly, it has to be found out whether there is any provision for payment of customary dues. The learned Single Judge in the decision of the Kerala High Court in *Hussain Thangal v. Ali* (1961 KLT 1033.) rightly said that the use of words like 'Pattam' meaning profits would be a strong indication of the transaction to be a lease and not a mortgage.

14. The dominant features of a mortgage transaction on the other hand would be the ascertainment of the ratio of the value of land to the amount advanced. If the ratio of the amount advanced bears a substantial proportion to the value of the property transferred it would be a strong piece of intention and circumstance to indicate loan and a mortgage. A provision entitling the transferee to ask for a return of money by sale of the property would be a very important feature to indicate that the transaction is a loan and a mortgage and not a lease. The absence of such a provision, however, would not totally repel the transaction to be a mortgage. The execution of counter-part is sometimes a common feature in the case of possessory mortgage though the existence of a counter-part by itself will not be conclusive of the question.

15. The deed understood in the light of surrounding circumstances will provide the answer in the facts and circumstances of each case. In the present case, emphasis was placed by counsel for the appellants on the payment of Government revenue by the transferee. This Court in *Patel Bhuder Mavji, etc., v. Jat Mamdaji Kalaji (deceased) through Legal Representatives Jat Saheb Khan Mamdaji, etc.,* ((1969) 3 SCR 690.) said that payment of revenue and other dues to the State would not clothe the occupants with the right of the tenants. Ordinarily, mortgagees under Section 76(c) of the Transfer of Property Act in the absence of a contract to the contrary pay out of the income of the property the Government revenue and all other charges of a public nature during their possession of such land. The High Court in the present case correctly said that stipulation in the deed of payment of Government revenue by the transferee was "that by virtue of the grant the liability to pay revenue is transferred to the grantee and the grantee who had accepted the grant and the liability, when he pays the revenue, pays it on his own behalf". The High Court also correctly held that a mere direction to pay the revenue of the property by the grantee, particularly when no payment is stipulated to be made to the grantor or when the payment is not directed to be made out of anything which is due or payable to the grantor, cannot be construed as a payment or rent or Michavaram to the grantor.

16. The proportion between the amount advanced and the value of the property is one of the important tests to be taken into consideration in deciding the nature of the transaction. Where the amount advanced bears a substantial proportion to the value of the property it is an important element indicating that the intention was the creation of a mortgage and not a tenancy. In the present case, the amount for which the properties included in Ex. B-6 were sold to the first plaintiff under Ex. A-2 was Rs. 5,000/- out of which Rs. 2,500/- was to go in discharge of the amount under Ex. B-6. The advance, therefore, bore a substantial proportion to the value of the property. This feature when considered along with the fact that the document did not provide payment of any annual Purapped to the Jenmi and that the annual amount was directed to be paid as revenue of the property which came to Rs. 10-4-0, a paltry recurring annual liability would be an additional reason to support the intention of the parties that the transaction was a mortgage and not a tenancy.

17. It is significant that after the execution of Ex. B-6 defendants Nos. 1 and 2 entered into a partition agreement evidenced by Ex. A-3. The partition deed included transactions called Kanam other than the disputed one forming the subject-matter of the suit. In almost all the properties held under Kanam there was division by meters and bounds, but with regard to Ex. B-6 and the amount of Rs. 2,000/- there was no division by metes and bounds. This would also point to the conclusion that the defendants Nos. 1 and 2 never treated Ex. B-6 as creating a tenancy.

18. In the present case the features which favour the construction of the transaction to be a mortgage and not a lease are; first, that there is no provision for renewal; secondly, there is no provision for payment of customary dues; thirdly, the property was to be enjoyed by the defendants by way of interest on their advance after payment of land tax to the State; fourthly, the payment of land tax is not a deduction from rent or perquisites; fifthly, there is a provision for surrendering the property with a registered release at the cost of the transferees on the receipt of the consideration of Kanam and the balance amount; sixthly, when the consideration is paid back the counter-Pattam deeds and prior deeds would be returned; and finally, there is liability to pay interest on the advance and possession and enjoyment of profits of the property is in lieu of interest.

19. For these reasons we are of opinion that the High Court was correct in its conclusion as to the nature of the transaction being a mortgage and not a lease. The appeal fails and is dismissed with costs.

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