Puzhakkal Kuttappu

Vs

C. Bhargavi and Others

Civil Appeal No. 1815 Of 1975

(Y.V. Chandrachud, P.K. Goswami, A.C. Gupta JJ)

22.09.1976

JUDGMENT

GOSWAMI, J. –

1. This appeal by special leave is directed against the judgment of the Kerala High Court out of a proceeding for apportionment of compensation under the Land Acquisition Act.

2. Certain property measuring 2 acres 21 cents in R.S. 299/1 of Chevayur village was acquired by the Government. The compensation which was awarded was a sum of Rs. 28591.88 including the solatium. There were five claimants clamouring for the compensation. While the first claimant (hereinafter to be described as the appellant) claimed the entire compensation after making allowance for a small sum of Rs. 437.50 in favour of the claimant 2 to 4 (hereinafter to be described as the respondents) the latter, on the other hand, claimed the entire amount minus a sum of Rs. 350 which, according to them, was the entitlement of the appellant. The acquired property originally belonged in janmam (freehold right) to one Vakeri Thannanone Raman Nair. After his death the same was inherited by his heirs and legal representatives. They assigned their janmam right to January 14, 1967, in favour of the appellant. Based on such a right the appellant is now claiming the aforementioned compensation.

3. The earlier history of the property shows that the 'otti' right in the land had been transferred to the predecessors-in-interest of the appellant and to those of the respondents by the daughter of Vakeri Thannanone Raman Nair and other heirs by a registered document of December 30, 1894, for a consideration of Rs. 650. The document is marked as Ex. A-2. The entire controversy between the parties will turn on the construction of the above deed (Ex. A-2) as to whether it is a mortgage or a lease. Although, prior to the assignment of the janmam right in favour of the appellant the parties, naturally, would have been sailing on the same boat as to their status under the deed, the acquisition of janmam right by the appellant in 1967 gave him an opportunity to part company with the respondents and to claim almost the entire compensation to the deprivation of the respondents on the acquisition of the larger estate into which the lesser estate had merged. The respondents, therefore, threw down their gauntlet taking the position that the document Ex. A-2 evidenced a transaction of lease and they acquired tenant-rights in the land. If they succeed in this plea, they will be entitled to almost the entire amount of compensation under the Kerala Land Reforms Act 1963 (Act 1 of 1964) and the appellant even with the janmam right will only get a pittance.

4. It may be noted that the appellant had already got his onefourth share of the otti Right by partition sometime in 1936 and there was a partition suit in 1949 when the appellant and the respondents divided this property by metes and bounds in the course of execution of a partition

decree in O.S. 32 of 1949.

5. We are required to construe the deed executed in the year 1894. The deed was not drafted by a lawyer conversant with the legal implications of a mortgage or a lease but by a bondwriter as perhaps was the usual practice in the fall of the last century and continuing even upto the present times. The deed was written in Malayalam and we have an agreed translation of the document before us. The learned Judge of the High Court being conversant with the language was naturally in a better position to appreciate the significance in the original document placed side by side with the translated exhibit.

6. In construing a document like the one before us it is always necessary to find the intention of the party executing it. The intention has to be gathered from the recitals and the terms in the entire document and from the surrounding circumstances. How the parties or even their representatives-in-interest treated the deed in question may also be relevant. It is also well settled that the nomenclature given to a document by the scribe or even by the parties is not always conclusive. The word "otti", as such, used in the document, is not, therefore, of much consequence.

7. Before we proceed further we may turn to the contents in the document. The deed is described as an "otti deed" executed by Nani Amma, janmam holder and manager and several other cosharers in favour of Kesavan Nambudiri. Next the document recites the various debts including the kanom of Rs. 100 in respect of seven items of nilams (wet lands). The debt owed by the executants on that date was Rs. 650 covering all the outstanding dues upto that date and Rs. 8-9-10 cash received on that date from the transferee. Having recited the consideration in the deed as above the document concludes as follows :

> The mambakkad paramba (dry land) described in the Schedule under, belonging to us in janm (absolute) right, with all the improvements therein has been demised and given to your possession for a period of 72 years, you may enjoy the paramba (dry land) with all the improvements on otti right and after adjusting the interest on otti consideration pay the purappad Rs. 3-15-5 fixed to be paid annually and also pay the revenue in our jema and obtain receipt therefor. On the expiry of the said period, when the otti amount is paid and the otti is redeemed we shall pay the value of improvements then found and fixed. We hereby assure you that to our knowledge and belief there is no other charge or liability on this property.

8. Apart from the document neither party adduced any evidence before the court. From the contents of the document it is clear that the consideration was predominantly past debt and only a small sum of cash was received on the date of its execution. Possession of the land was made over to the transferee giving him the right to "enjoy" the land. The transferee was required to appropriate the income of the property to the interest on the amount advanced. The transferee was also to pay the land revenue to the credit of the transferor. A fixed amount of Rs. 3-15-5 was to be paid by the transferee to the transferor annually as "purappad". This word "purappad" means "the net produce or net rent payable to the janmi after deducting interest on advances made by the tenant and the government tax". The debt of Rs. 650 will remain unpaid even after the expiry of 72 years when the said otti amount has to be repaid. There is also an indication in the recitals that the property will return to the transferor who "shall pay the value of improvements then found and fixed". There is nothing in the recitals to show that the land was given as security for the amount of loan. There is no right of sale of the land delivered to the transferee in case the debt is not discharge. On the other hand, there is a clear recital about the payment of annual rent by the transferee to the transferor.

9. The trial Court held the document to be a mortgage whereas the High Court held it to be a lease. It is enough to point out that the trial Court was wrong in holding that the transferee was to utilise the amount of Rs. 3-15-5 for paying the land revenue. On the other hand, the document stated that this amount of fixed rent was to be paid annually in addition to the government revenue which the transferee was required to pay. This feature of payment of rent, in this case, tills the balance in favour of construing the document as a lease, coupled with the fact that the essence of a mortgage being the transfer of immovable property as security for the debt is conspicuous by its absence in the detailed enumeration of the terms. Further, as stated earlier, there is no right to sell the property in case the debt is not repaid. There is also nothing to show that the enjoyment of the usufruct was intended to wipe out the debt in the long period of occupation.

10. We find that after the expiry of the period of 72 years mentioned in the document the appellant purchased the janmam right of the entire property in 1967 for a sum of Rs. 1000 which included the sum of Rs. 650 which was the consideration in Ex. A-2. The Kerala Land Reforms Act, 1963 (Act 1 of 1964) had already been passed by then. It would, therefore, appear crystal clear that whoever be the janmi would be able to get only an infinitesimal sum of compensation for the property acquired and the major share would go to the tenants in possession under the aforesaid Act. It is not disputed that the appellant got his one-fourth share of compensation of the acquired property in terms of the earlier partition to which we have already adverted. It was, therefore, a clever act on the part of the appellant to manage to acquire the janmam right of the transferor in the year 1967, when perhaps the proposal for acquisition of the land had already been in the air, in order that he was able to claim the remaining three-fourth share of compensation to which he would otherwise be not entitled except to an insignificant extent. The transferors, themselves, would be in no better position after the Kerala Land Reforms Act. When, therefore, the appellant offered to the transferors some money which the latter would not otherwise have obtained, in view of the provisions of law, the assignment of the janmam right was made in favour of the appellant. The transferors thus walked out of the field leaving the future contest amongst the transferees out of whom the appellant came to be the janmi. It is apparent that after the partition the appellant would not stand to gain with regard to the three-fourth share of the property, which is in dispute, by accepting the document as a lease since the respondents are the transferees in possession of this particular property. The appellant, therefore had cast his lot in a gamble by purchasing the janmam right from the transferors in 1967. There is sufficient force in the contention of the respondents that the transferors themselves treated this document as a lease for else it cannot be explained why they would have parted with their janmam right of the entire property for Rs. 1000, inclusive of the otti debt, if they themselves had regarded this document as an instrument of mortgage.

11. There is another significant feature that while there was arrangement to pay a fixed annual "purappad" to the transferor, such a sum was not intended to be utilised towards reduction of the principal debt. It is, therefore, not possible to say that the High Court is wrong in holding that the consideration of Rs. 650 in the deed was intended as a premium for the lease. There is also no evidence whatsoever to indicate as to what the price of the land was to determine the proportion between the amount advanced and the value of the property. The document taken as a whole lacks the most essential ingredient of a mortgage, namely, that the transfer of the property has to be made as a security for the debt.

12. The High Court has also noted that since the document was of a composite character disclosing features of both mortgage and lease it must be taken as a lease. We do not think that the High Court is correct in this view. Indeed the High Court in a later Full Bench decision has not accepted this view. (See Velayudhan Vivekanandan v. Ayyappan Sadasivan [ILR (1975) 1 Ker 166].)

13. We are of opinion that when there are some mixed elements in an instrument disclosing features of mortgage as well as of lease, the court will have to find out the predominant intention of the parties executing the document viewed from the essential aspect of the reality of the transaction.

14. Human transactions cannot be tied to textual definitions. They have to respond to variable requirements under different situations and often to the dictates of the party at an advantage in the bargain. Mortgages are not always simple, English or usufructuary or such other types as define in the Transfer of Property Act. They are anomalous too and sometimes more anomalous than what is defined in the said Act. Even so, there is one most essential feature in a mortgage which is absent in a lease, that is, that the property transferred is a security for the repayment of debt in a mortgage whereas in a lease it is a transfer of a right to enjoy the property. We have seen that this essential feature of a mortgage is missing in the document in question. We are, therefore, unable to come to the conclusion that it is a mortgage and not a lease.

15. In view of the foregoing discussion, we are not able to hold that the High Court is not right in holding that the document in question is a lease and not a mortgage. In the result the appeal is dismissed. We will, however, make no order as to costs.

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