

KERALA HIGH COURT

Panangat Kunhiparan

Vs

Pozhangavil Thekkemadathil

(P R Nayar, C.J. T Raghavan and V G Nambiyar, JJ.)

14.03.1967

JUDGMENT

P R Nayar, C.J.

1. This Second Appeal was referred to a full bench, as it was claimed that there was conflict of opinion between two division bench rulings, *Ayyappan v. Venkiteswara Naicken*¹, and *Subramania Iyer v. Ananthanarayana Iyer*², on the one hand, and a Division Bench ruling *Valiyaparambath Kalliani v. Achambath Kunhalikutty Haji*³, and other decisions by single Judges, like *Sankaran Nambudiripad v. Moideen*⁴, and *Kuttuparambil Kochak-kan v. Ponnampadikkal Abdunni*⁵, on the other. The former Division Bench rulings held that a provision in a document to bring to sale the property transferred to realise the money advanced by the transferee was a strong indication that the parties intended a mortgage and not a kanam (or any other lease). The latter set of rulings held that such right of sale was by no means a conclusive indication that the transaction was a mortgage. We have held in *Krishnan Nair v. Sivaraman Nam-budiri*⁶, that there is really no conflict between the aforesaid two sets of decisions and that the alleged conflict stems from the mistaken impression that the former set of rulings laid down that the test was a conclusive test. We have considered therein in fair detail the principles to be applied in a case where the question is whether a transaction embodies a lease or is a mortgage pure and simple.

2. Two items of properties, a garden land (paramba) having an extent of 1 acre 6 cents and a wet land of 35 cents, are being held by the appellant 1st defendant under the respondent plaintiff under Ext. A-1 (kaivasam panaya kychit) of the 28th October 1945 In answer to the plaintiffs' suit for redemption and possession, the appellant claimed before the trial court firstly that the transaction was a kanam; secondly, in the alternative, that at the least the property constituted a kudiyruppu. He claimed the first both on the language of Ext. A-1 and under Section 22 of the Malabar Tenancy Act (corresponding to section 12 of Act 1 of 1964), and, on that basis, claimed fixity of tenure. Both the lower courts have held that the transaction was a mortgage. However, the trial court held that the appellant was entitled to fixity of tenure over plot A in item 1 of Ext.

A-1 (a little over one acre) as a kudiyruppu, because he was a holder of a kudiyruppu, which meant a tenant of a kudiyruppu -- this was before the lull bench decision in *Raghavan Naicken v. Ayvappankutty*⁷, pointing out that you must first be a tenant before you can claim fixity under Section 21 of the Malabar Tenancy Act as the tenant of a kudiyruppu. Accordingly it allowed redemption of the mortgage subject to the first defendant retaining possession of plot A as his kudiyruppu. The lower appellate court on appeal by the plaintiffs -- the defendants did not appeal against the first court's decree -- also agreed with this conclusion, but modified the decree by confining the kudiyruppu right to 25 cents and declaring the plaintiffs' right to redeem and obtain possession of the rest of the property. This Second Appeal by the 1st defendant is against this decision and, not having appealed against the first court's decree, he has, in effect, asked only for a restoration of that decree.

3. However, pending second appeal, Act 1 of 1964 came into force; and the appellant, who is still in possession of the entire property, has filed C. M. P. No. 8610 of 1965 under Section 132(31) (a) of the Act to reopen even the decree for possession made by the first court (and confirmed by the lower appellate court which, as we have seen decreed a larger extent) in respect of plot A and to decide the entire case under the Act, his contention being that Ext- A-1 embodies a lease and that the courts below were wrong in holding that it was purely a mortgage. This prayer is opposed by the respondents. Under Section 132(3)(a) of Act 1 of 1964, even if a decree is passed and that has become final-still, if eviction in pursuance of the decree has not taken place, the judgment-debtor may by application claim to have the decree reopened and the matter disposed of under the Act. The Act does not specify the court to which the application is to be made, but, it is argued that, since the decree for possession of the rest of property after excluding plot A was not appealed against and is therefore not before us, the application can be made only to the trial court. We are unable to agree. Section 13(1) of the Act confers fixity of tenure on a tenant in respect of his holding, notwithstanding anything to the contrary contained in any law, custom, usage or contract, or, in any decree or order of court. It is therefore clear that if the appellant is a tenant, as we shall presently show he is, he cannot be evicted from any portion of his holding in spite of there existing a decree for eviction from a portion of the holding against which he has not appealed, since the fixity of tenure relates to the entire holding. The only question is whether he can make an application under Section 132(3)(a) to the court before which an appeal from a part of the decree is pending, or whether his right to apply can be exercised only before the trial court. In a case where the entire decree for eviction is challenged in appeal the appeal has to be disposed of under the Act. In a case where no portion of the decree for eviction is challenged in appeal (the subject-matter of the appeal being some other incidental matter) it is possible to argue that the application to reopen the decree may be only to the trial court and not to the appellate court. But, in a case like this, where at least a portion of the decree for eviction is challenged in appeal, an application under Section 132 (3) (a) will we think lie before the appellate court, since the fixity of tenure under Section 13 relates to the entire holding and the decree for eviction from a part of the holding at least is the subject-matter of the appeal. Therefore, we are of opinion that the application lies to this court and it has to be allowed and the entire case disposed of under Act 1 of 1964. The objection to our entertaining the application is,

at best, technical. For, the plea of fixity in respect of the portion of the property in respect of which the decree of the first court has become final is a plea which the appellant can take in an application made to the proper court (whichever it is) or before the executing court and these courts would be bound to decide the matter in accordance with our finding here with regard to Ext. A-1. Even without an application under Section 132 of the Act, our powers under Order XLI Rule 33 are probably wide enough to enable us to give the appellant the relief he seeks if he is entitled to it; and the circumstance that if we do not give him the relief he would be entitled to get it on application made under S, 132 of the Act or from the executing court would certainly persuade us to exercise our discretion in his favor

4. The further argument that since there was no appeal even to the lower appellate court against the finding that Ext. A1 was a mortgage, that finding has become final, at least in so far as the part of the property of which possession was decreed by the first court is concerned, has no force. When a decree is reopened the findings on which it is based go, and there is little point in the argument, based on a comparison of the two statutes, that if, as found by the courts below, Ext. A1 is not a lease according to the provisions of the Malabar Tenancy Act it cannot be a lease according to the provisions of Act 1 of 1964.

5. The first item (the paramba) was being held under an earlier arrangement of 1933, when Ext. A1 replaced it in 1945. The amount advanced under the earlier arrangement was Rs. 300 and there was no further advance under Ext. A1. The annual income of item 1 fixed under Ext. A1 is Rs. 91 out of which a sum of Rs. 18 is deducted for the interest on the sum advanced leaving a balance of Rs. 73 to be paid to as michavarapurappad For the wet land, 11 paras of paddy valued at Rs. 16-8-0 is fixed as the annual payment. In addition, perquisites like a bunch of bananas worth Rs. 2-8-0, one chothana of coconut oil worth Rs. 3-6-0 and six bundles of cadjan leaves of 25 each worth Rs. 4-8-0 have also to be given. Thus the michavaram payable is Rs. 73 for item 1 and 11 paras of paddy or Rs. 16-8-0 for item 2 and perquisites like bananas, coconut oil and cadjan leaves. There is a recital in the document that the second item was included at the request of the transferees. Another provision is that the expenses of the surrender deed have to be met by the transferees. The transferees are given a right to claim their money and recover it by sale of the properties; and they are also given the right to improve the properties and get value for the improvements at the time of surrender. These are the material provisions of the document.

6. Even without the aid of Section 22 of the Malabar Tenancy Act (section 12 of Act 1 of 1964) it can be successfully argued that what the parties intended by the transaction was an arrangement for enjoyment of the properties rather than for securing the amount advanced. Counsel for the respondents has argued that the second item was included as additional security in 1945. This argument has no force, because even the income of the first item was Rs. 91 out of which only a sum of Rs. 18 was to be deducted for the interest of the money advanced thus leaving an excess of Rs. 73. This shows that even the first item was at least three or four times more valuable than was necessary to secure the amount advanced. To that the second item was also added, for which 11 paras of paddy (Rs. 16-8-0) were also to be paid. Evidently, the arrangement could not have

been to secure the sum of Rs 300 advanced; it could only have been with a view to the enjoyment of the transferees. The payment of perquisites would also indicate that the relationship was that of landlord and tenant. The provision that the transferees should meet the expenses of the surrender also points to the same direction. The two indications in the document that can be claimed to be in favour of the respondents are the right of sale conferred on the transferees to realise the amount advanced by them, and the name of the document, kaivasom panayam. We have clearly indicated in S. A. No. 173 of 1962 = (reported in AIR 1967 Ker 270 FB) that neither of them is conclusive that the transaction is purely a mortgage and does not embody a lease. As stated by us in that decision, the real test is whether the transfer was intended by the parties for the enjoyment of the property by the transferee or whether it was intended solely to secure the amount advanced by him. It is clear from the facts of this case that the real purpose of the transfer could only have been the enjoyment of the property by the transferees, in other words the transaction embodies a lease and the conclusion of the lower courts that the transaction was purely a mortgage cannot stand. It follows that the appellant is entitled to fixity in respect of the entire property covered by Ext. A1 and that the plaintiffs are not entitled to recover any portion thereof.

7. We allow the second appeal and dismiss the suit. Since we have reopened the decree and dismissed the suit, we direct both parties to bear their respective costs throughout.

8. The plaintiff respondents have filed a memorandum of cross-objection in respect of the 25 cents of land of which the lower appellate court has denied them possession. It follows from what we have held that this has to be dismissed and it is accordingly dismissed but without costs.

Cases Referred.

11962 Ker LT 733

21962 Ker LT 888=(AIR 1963 Ker 261)

3S. A. No. 41 of 1959 (Ker)

41965 Ker LJ 16

5S. A. No. 804 of 1961 (Ker)

6S. A. No. 173 of 1962 = (reported in AIR 1967 Ker 270 FB)

71964 Ker LT 65 (FB)