

## KERALA HIGH COURT

Kaniyankandiyil Kunhiraman Nambiar

Vs

Pairu Kurup of Mannukandiyil Tarwad

Second Appeal No. 1047 of 1965, Badargara in A. S. No. 164 of 1962

(M.S. Menon, C.J., P. Govindan Nair and T.S. Krishnamoorthy Iyer, JJ.)

06.08.1968

### JUDGMENT

#### **Krishnamoorthy Iyer, J.**

1. The second appeal filed by the 4th defendant arises out of a suit instituted by the plaintiff for redemption of Ext. A1 dated 2-2-1936 executed by the karanavan and the three senior anandiravans of the Valia Pathirikot tarwad in favour of the first defendant and for recovery of possession of the plaint properties. Ext. A2 is the marupat of the same date executed by the first defendant in favour of the executants of Ext. A-1. The plaintiff is the Court auction-purchaser of the rights of Valia Pathirikot tarwad under Ext. A-3, sale certificate in O. Section 513 of 1929 on the file of the Munsiff's Court, Payyoli. The suit was instituted in 1953 when the Malabar Tenancy Act was in force. In view of the repeal of the said enactment it is not necessary to state the contentions of the parties based on the same. The suit was decreed by the trial court after overruling the contention of the defendants that Ext.A-1 is a kanom under Act 4 of 1961. Trial Court took the view that Ext. A-1 evidences a mortgage. The appeal filed by defendants 3 and 4 was disposed of by the lower appellate Court after coming into force of Kerala Land Reforms Act, 1963 (Act 1 of 1964). The appellate Judge also took the view that the transaction evidenced by Ext.A1 is not a kanom under Act 1 of 1964 but only a mortgage. The decree of the trial court allowing recovery of possession was therefore confirmed.

2. The main question to be considered in the second appeal is whether the transaction evidenced by Ext.A-1 is a kanom defined in the Kerala Land Reforms Act, 1963 (Act 1 of 1964) or whether it is a mortgage entitling the plaintiff to recover possession of the plaint properties. The answer to this question depends upon the interpretation of Ext. A1. The guiding, rule in such cases is furnished by their Lordships of the Supreme Court in *Ramdhan Puri v. Bankey Bihari*<sup>1</sup>, in the following words :

"The point to be first decided is whether the transaction is a lease as contended by the contesting respondents. The only guiding rule that can be extracted from the cases on the subject is that the intention of the parties must be looked

<sup>1</sup> AIR 1958 SC 941

into and that 'once you get a debt with security of land for its redemption, then the arrangement is a mortgage by whatever name it is called' (See Ghosh on Mortgages, Vth Edition, Volume I, page 102)."

3. As Lord Greene, M. R., said in *Booker v. Palmer*<sup>2</sup>,

"There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

4. The definition of 'kanom' contained in Section 2(22) of Act 1 of 1964 in so far as it is applicable to the area of Malabar where the plaint items are situate reads thus :

" 'Kanom' 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 includes -

(a) a right in the transferee to hold the said property liable for the consideration paid by him or due to him;

(b) the liability of the transferor to pay the transferee interest on such consideration unless otherwise agreed to by the parties; and

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

Explanation :- For the purposes of this clause, where there has been no stipulation in the document evidencing the transaction for renewal on the expiry of any specified period, but there has been a renewal or payment of renewal fees, it shall be deemed that there has been a provision for such renewal in the document;"

5. In interpreting Ext. A1 the learned appellate Judge relying on Section 12(1) of Act 1 of 1964, has made use of the oral evidence adduced in the case to prove the intention of the parties to Ext. A1. The submission on behalf of the appellant was that the said provision cannot apply and the finding of the learned Judge is therefore vitiated.

6. Section 12, sub-section (1) of Act 1 of 1964 reads thus :

"Notwithstanding anything in the Indian Evidence Act, 1872 (Central Act 1 of 1872), or in any other law for the time being in force, any person interested in any land may prove that a transaction purporting to be a mortgage, otti, Karipanayam, Panayam or nerpanayam, of that land is in substance a transaction by way of kanam, Kanamkuzhikanam, kuzhikanam, verumpattam or other lease, under which the transferee is entitled to fixity of tenure in accordance with the provisions of Section 13 and to the other rights of a tenant under this Act."

<sup>2</sup>(1942) 2 All ER 674 at p. 677

7. It was contended by the appellants' learned counsel that the above provision is not applicable to prove that a document styled a kanom is a mortgage and relied on the decision in *Lekshmi v. Narayani*<sup>3</sup>, where their Lordships of the Supreme Court considered the applicability of Section 12(1) of Act 1 of 1964 to prove that a transaction styled kanom-kuzhikanom is a usufructuary mortgage and the importance to be given to the nomenclature kanom-kuzhikanom in a document. Their Lordships on the first aspect observed :

"If the document purports to be a mortgage, Section 12 of the Act allows the parties to prove that it is, in substance, a kanam-kuzhikanam or other lease. But if the document purports to be or is, on its true construction, a kanam-kuzhikanam or other lease, Section 12 has no application and full effect must be given to the document according to its tenor." and on the latter said :

"On the question whether a transaction is a kanam-kuzhikanam or a usufructuary mortgage, the name given to it by the parties is a relevant, though not always a decisive consideration. If the parties described the transaction to be a kanam-kuzhikanam it is a valuable indication that they intended it to be such and not a usufructuary mortgage."

8. Section 12(1) of Act 1 of 1964 only removes the trammels imposed by the provisions of the Indian Evidence Act, 1872 especially Sections 91 and 92 thereof in the interpretation of documents. In those cases to which Section 12(1) of Act 1 of 1964 will not apply, a document has to be interpreted subject to Sections 91 and 92 of the Indian Evidence Act. It is unnecessary for us to decide about the applicability of Section 12(1) of Act 1 of 1964 to the instant case in view of the stand taken by the learned counsel for the respondent, that he does not want to rely on any evidence coming within the ambit of Section 12 of Act 1 of 1964 to prove that Ext. A1 is only a mortgage. It is well settled that Section 92 of the Indian Evidence Act forbids the admission or consideration of evidence to prove the intentions of the parties and the nature of the transaction will have to be decided "on a consideration of the contents of the documents themselves with such extrinsic evidence of the surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts." According to the learned counsel for the respondent Ext. A1 furnishes intrinsic evidence that it is a mortgage and for that purpose it is not necessary to rely on any extraneous evidence. We shall therefore decide the nature of the transaction evidenced by Ext. A-1 from its terms.

9. Ext. A-1 is described as a "kanyadharam". Though its nomenclature may not be conclusive, yet it is a valuable indication in interpreting Ext. A-1 which cannot be overlooked. Ext. A1 also contains the elements required by Section 2, sub-section (22) clauses (a) and (b) of Act 1 of 1964. Clause (c) of sub-section (22) of Section 2 of the Act is also satisfied as Ext. A1 contains a provision for payment of michavaram. But even then as indicated by their Lordships of the Supreme Court in AIR 1967 SC 876 already quoted it is necessary to decide whether Ext. A1 involves a transfer of a right to enjoy the property or is a transfer of an interest in the property for securing the payment of a debt.

<sup>3</sup> AIR 1967 SC 876

10. It is necessary at this stage to dispose of a contention raised by the counsel for the appellant that because of the execution of the marupat Ext. A2, the transaction is a lease. It is not possible to accept this contention because as was pointed out by Raman Nayar, J. in *Hussain Thangal v.*

*Ali*<sup>4</sup>, the execution of a counterpart is a very common feature in Malabar areas even in the case of possessory mortgage and hence its existence is normally not an indication either way. We shall therefore examine the terms of Ext. A1. Ext. A1 is in favour of a junior member of Valia Pathirikot tarwad. The consideration for Ext. A1 is ₹ 1100/- and it is stated therein that the sum of ₹ 1098 is for discharging two mortgage debts of the years 1926 and 1934 charged upon the properties included in Ext. A1, and also to pay off the balance of the decree amount in O. Section 203 of 1923 on the file of the Panyoli Munsiff's Court for which the properties comprised in Ext. A1 were attached and proclaimed to be sold in court auction on 3-2-1936. Ext. A1 was executed on the previous day, namely 2-2-1936. It is thus clear that the purpose of the execution of Ext. A1 is to raise money for discharging the debts of the tarwad. At the time of the execution of Ext. A1 the properties therein were outstanding under a kanom of the year 1929 granted by the first executant of Ext. A1 to two junior members of Valia Pathirikot tarwad. The marupat executed by the lessees is Ext. A1. It shows that the properties were given on kanom for enjoyment for a period of 6 years on receipt of a kanom amount of ₹ 2 and ₹ 48 'kozhumanu shyam' and the pattom payable was 1500 edangazhies of paddy per annum. The 1st defendant has been directed under Ext. A1 to pay the kanom amount of ₹ 2 to the lessees under Ext. A4 and recover possession of the properties from them. The sum of ₹ 2/- also has been given credit in Ext. A-1. Ext. A-1 is for a term of 12 years and the 1st defendant is directed to pay every year 50 edangazhies of paddy towards 'pattom or purapad' to the transferor, after appropriating 1450 edangazhies of paddy towards interest on the sum of ₹ 1100/- advanced under Ext. A1 and for payment of revenue. The executants also undertook in Ext. A1 to hand over to the 1st defendant the receipt for the discharge of the decree debt and also the two mortgage deeds with the endorsements of discharge. There is no provision in Ext. A1 authorising the executants to redeem the property or authorising the 1st defendant to demand the sum advanced and in default to realise the same by the sale of the plaint properties after the expiry of the term. As in Ext. A4, no manushyam was paid to the executants of Ext. A1.

11. There are a number of decisions of this Court and the Madras High Court which take the view that a kanom in Malabar has got the incidents of a usufructuary mortgage and a lease. In a case in *Nellaya Variyathsilapani v. Vadakipat Manakal Ashtamurti Nambudri*<sup>5</sup>, which arose before the Transfer of Property Act came into force, a Full Bench of the Madras High Court in considering the question whether a kanom is to be regarded as a lease or a mortgage for the purpose of limitation said :

"the object for which the tenure was created must be regarded. In some cases it must be a mere lease, a sum being advanced as security for the rent or for

<sup>4</sup>1961 Ker LT 1033 at p. 1045

<sup>5</sup>(1881) ILR 3 Mad 382

proper cultivation to be repaid on the expiry of the term. In other cases, and most frequently, it is created as a lease by way of mortgage to secure a loan advanced to the jenm (proprietor)." Even after the passing of the Transfer of Property Act, there are decisions of the Madras High Court that a kanom partakes of the nature of a usufructuary mortgage and lease and that it is an anomalous mortgage under Section 98 of the Transfer

of Property Act.

In *Gopalan Nair v. Kunhan Menon*<sup>6</sup> Benson, J., pointed out that where the document on the face of its recitals purports to evidence a kanom demise it is an anomalous mortgage within the meaning of Section 98 of the Transfer of Property Act, "with certain well known incidents attached to it by the customary law of Malabar." These decisions therefore establish the principle that even though a document is styled as a kanom it has to be considered and treated as a mortgage in some cases and has to be construed and treated as a lease in other cases. Section 21 of the Malabar Tenancy Act, 1929 as amended by Act 33 of 1951, Act 7 of 1954 and Act 22 of 1956 conferred fixity of tenure on certain classes of tenants including kanamdar. But the second proviso to the section stated that in the case of a kanamdar whose kanartham exceeds in South Malabar sixty per cent of the value of the jenmi's rights in the holding, and in other places forty per cent of the value of such rights, the kanamdar shall not have fixity of tenure. This provision was introduced for the first time by the Amendment Act 33 of 1951. The reason for the proviso stated above is discussed by Sri C. Govindan Nair in his Commentary on the Malabar Tenancy Act, 1929 thus:

"That there is a well-marked distinction between the kanom tenure of North and South Malabar has been recognized by all concerned. They are different in their genesis, growth and development. In South Malabar the kanom is a cultivating lease, the kanartham is small compared with the extent of the holding, the rent reserved is a substantial amount, the transaction is regarded as the creation of a tenure between a landlord and a tenant and the renewal thereof is the rule. In North Malabar, kanoms are really mortgages, the kanartham is heavy, little or no rent is payable, as the interest quite covers the value of the produce, the transaction is regarded as one between a lender and borrower without any notion of tenancy or tenure attached to it and the adherence to the twelve years' term and the exaction of renewal fees every twelve years is the exception and not the rule. Dewan Bahadur (then Sir) Krishnan Nair, therefore, excluded kanams of North Malabar altogether from the scope of his Bill. The Raghavayya Committee considered it to be a wrong way of dealing with the situation as there were similar kanoms in the nature of mortgages in South Malabar also. According to the Committee, the logical method was to exclude from the scope of legislation all kanoms which are essentially mortgages, whether in North or South Malabar. The Committee, therefore, recommended the exclusion of all kanoms wherein the kanartham exceeded 60 per cent of the junmam value of the holding both in North and South Malabar on the basis that the proportion of 60 per cent indicated a real security under Section 66 of the Transfer of Property Act. The Legislative Council considered that some discrimination was necessary and hence varied the percentage in the two districts."

<sup>6</sup>(1907) ILR 30 Mad 300

12. The above is a sufficient answer to the contention of the learned counsel for the appellant that "Since the parties labelled Ext. A1 as 'Kanayadharom' after the commencement of the Malabar Tenancy Act, 1929 it is conclusive to show that the parties intended the same only as a tenure as even under the Amendment Act of 1951 documents called kanoms are considered as mortgages depending upon its terms. Ext A1 is from North Malabar and the kanartham is heavy and the rent

payable is very little.

13. A kanom and a mortgage with possession have therefore many features in common and the only way by which a conclusion can be reached is to find out the object for which the transaction was entered into, namely whether it is the transfer of a right to enjoy the property or it is only a transfer of interest in property for securing the repayment of debt.

14. It is therefore necessary to examine the elements of the transaction embodied in Ext. A-1 to find out whether the parties intended the creation of a lease or debtor and creditor relationship. In interpreting Ext. A1 it will be profitable to bear in mind the rule in *Davies v. Elsby Brothers Ltd*<sup>7</sup>, stated thus :

"It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document has in mind when he brings it into existence is not material. In that we differ from many Continental systems. In English law as a general principle the question is not what the writer of the document intended or meant but what a reasonable man reading the document would understand it to mean;"

15. The elements which are usually considered relevant to find out the intention of parties namely the proportion of the amount advanced to the value of the security, the rate of interest payable on the sum advanced, the absence of a provision for making improvements and the proportion of the 'rent' or 'purapad' to the income reserved for appropriation towards interest taken with the fact that the tarwad on the date of Ext. A1 was in dire need of money to discharge debts only indicate that a reading of the document in a reasonable manner will show that Ext. A1 was not intended as a lease but a mortgage with possession. On the date of the execution of Ext. A1 the interest on the amount advanced thereunder would work out at about 12 per cent per annum. The michavarom or pattom payable to the transferors being only 50 edangazhies of paddy per annum represents a very insignificant portion of the amount directed to be appropriated towards interest. To add to this, the usual provisions, one would find in a kanom intended as a transfer of property for enjoyment, for payment of customary dues and renewal fees are absent. Apart from the above the following recitals in Ext. A1 prominently bring out that Ext. A-1 is only a mortgage. (Here follow the recitals in Malayalam) - Ed.) The above recitals show that the jenmom right of the tarwad in the properties have been secured for the kanartham by way of mortgage. The clause "(recital in Malayalam)" is very significant and will be a conclusive pointer to the intention of the parties to Ext. A1 to create a mortgage. Though several decisions were placed before us enumerating the different factors to be taken into account in the matter of interpretation of documents they can only be an aid and the decision of this

<sup>7</sup>(1961) 1 WLR 170 at p. 176

case should depend solely on the interpretation of Ext. A1. It is not therefore necessary to discuss those decisions.

16. We are therefore of the view, that Ext. A1 is a mortgage and not a kanom under Act 1 of 1964. In view of our finding that Ext. A1 is a mortgage it is not possible to contend that Ext. A1 is a lease under Act 1 of 1964 even though it may not be kanom within the meaning of the Act.

17. No other point was raised before us. In confirmation of the judgment and decree of the Court

below we dismiss the second appeal but we make no order as to costs.  
Appeal dismissed.