HIGH COURT OF KERALA

Hon'ble Justice V R Krishna Iyer

Chacko Kochuvarghese (Died) ... vs Narayani Amma, Gouri Amma

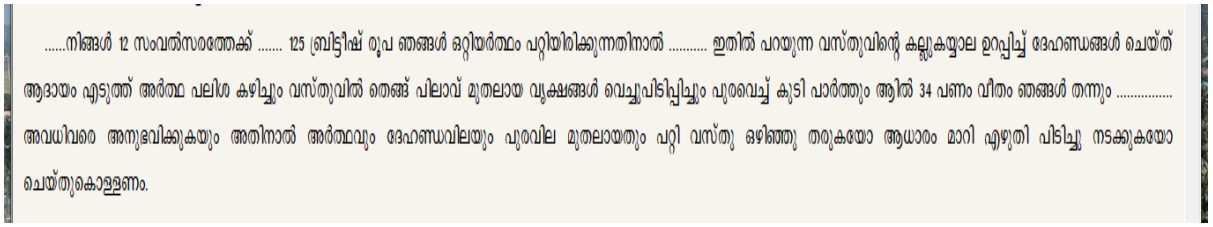
Citations: 1969 KLT 22: AIR 1970 Ker 267

JUDGMENT

1. A tenant --so I have eventually found him to be, in this appeal ---seeks to resist the execution of a decree for redemption of a mortgage, and in so doing, has raised the ancient and never finally resolved question of how to tell a mortgage from a lease. The clarification by Judges of the juridical ideas behind the two does not yet serve to give us simple litmus tests by which a given transaction may be said to be this or that. The legislature, by insensible degrees and sometimes by revolutionary leaps, has endeavoured to give protection to tenants and in that process has brought in categories, otherwise understood to be mortgages for classification as tenancies. The same legislature, in its compassion towards debtors, has attempted to save mortgagors in their unfortunate lot as debtors and allowed them to redeem their property on concessional terms from creditors figuring as mortgagees. This cross-ruff has produced provisions of law of which Section 2 (22) of The Kerala Land Reforms Act, 1963 (Act 1 of 1964) and Section 5 of The Kerala Agriculturists Debt Relief Act, 1958 (Act 31 of 1958) are excellent examples. Quite often, as in the case of Ext. P-I in this appeal, the transaction partakes of the character of a lease and of a mortgage and Courts, confronted with these mongrel deeds, have attempted to separate the ingredients and sometimes hair-split, with the result that the observations made by Ghosh several decades ago hold good even today. The learned author states:

"*On the question whether a transaction amounts to a mere lease or mortgage, or whether it partakes of the character of both, a crowd of cases has accumulated in the law reports which would require a catalogue as long as that in the second book of the Illiad, and I may add without offence, as dry as Homer's list. But I confess I have not been able to unearth any definite rules from the mass of case law in which the question is buried.*" (Law of Mortgages in India pp. 134-135 3rd Edn.) Even Full Bench rulings have attempted to simplify the law and to produce clear tests but the difficulty still persists. The traditional way to tackle the question is to itemise the features pro and con and find out the resultant force, whether in favour of a mort-

gage or of a lease. Let us proceed that way. The document describes the transaction as Otti, which bespeaks a mortgage, with an implied right of sale and therefore goes against the transaction being treated as a lease. The other features are evident from the following extracts from Ext. P-I:


.....നിങ്ങൾ 12 സംവത്സരത്തേക്ക് ..... 125 ബ്രിട്ടിഷ് രൂപ ഞങ്ങൾ ഒറ്റിയർത്ഥം പറ്റിയിരിക്കുന്നതിനാൽ ..... ഇതിൽ പറയുന്ന വസ്തുവിന്റെ കല്ലുകയ്യാല ഉറപ്പിച്ച് ദേഹണ്ഡങ്ങൾ ചെയ്ത് ആദായം എടുത്ത് അർത്ഥ പലിശ കഴിച്ചും വസ്തുവിൽ തെങ്ങ് പിലാവ് മുതലായ വൃക്ഷങ്ങൾ വെച്ചുപിടിപ്പിച്ചും പുരവെച്ച് കുടി പാർത്തും ആയിൽ 34 പണം വീതം ഞങ്ങൾ തന്നും ..... അവധിവരെ അനുഭവിക്കുകയും അതിനാൽ അർത്ഥവും ദേഹണ്ഡവിലയും പുരവില മുതലായതും പറ്റി വസ്തു ഒഴിഞ്ഞു തരുകയോ ആധാരം മാറി എഴുതി പിടിച്ചു നടക്കുകയോ ചെയ്തുകൊള്ളണം.

The properly, a waste land 6 acres in extent, was transferred in 1080, on Otti. The recitals, notwithstanding the label, eloquently testify to the transaction being a tenancy, in large part or predominantly. For, the primary purpose of the transaction is to make over possession of a waste land to another for the purpose of making improvements, . after protecting the holding with stone-walls, he is asked to take the income, plant it with cocoanut trees, jack trees and other like trees, presumably fruit-bearing trees, and construct a homestead. He is to pay a small rent after adjusting the interest of the ottiyartham. There is the further provision that at the expiry of the 12 years (which is the customary period in a lease, and may not be incompatible, I must say, with a mortgage) either a renewal or surrender of possession is lo follow. The object, as I understand it, was to enable a cultivator to get into possession of a waste land and to enjoy it by planting it up and making a homestead there for himself and continue, after the customary period of 12 years, by getting renewals thereof. It is true that there is an advance of Rs. 325/- and the transaction styles itself an Otti. But it is difficult to say that it is a borrowing and not an advance being received by the landlord. It is equally difficult to say that the name of the deed is fatal to its complexion as a lease. However, in the light of the fairly elaborate arguments advanced, it is only proper to consider, in a brief way, the recent rulings relevant to the point.

2. Raman Nayar J., who wrote the leading judgment in both the Full Bench decisions cited before me, reported in Kunhiparan v. Venki teswara Naickan, 1967 Ker LT 616 = (AIR 1968 Ker 38) (FB) and Krishnan Nair v. Sivaraman Nambudiri, 1967 Ker LT 78 = (AIR .7067 Ker 270) (FB) as also the judgment in the oft-cited ruling in Hussain Thangal v. Ali, 1961 Ker LT 1033 --had to consider in C.M.A. 135 of 1063 a transaction of Otti, with fairly comparable terms as Ext. P-l in our case. It must however be remembered that his Lordship pronounced judgment in that case as early as 6th November, 1963, while the Kull Bench decisions were rendered a few years later. After setting out the terms of the transaction, Raman Nayar, J., observed:

"Undoubtedly we have here a transfer for consideration by a landlord of an interest in specific immovable property, the incidents of which transfer include --

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

(b) the liability of the transferor lo pay the transferee interest on such consideration; and

(c) payment of micliavaram and renewal on the expiry of a specified period.

(I regard the annual payment of 3 1/2 fanams by the transferee to the transferor as michavaram, none the less so for this being for the proportionate michavaram due from transferor to the jenmi as a charge on the properly. It is residual rent --see the definition of 'rent' in Section 3 (25) of Act 7 of 1963. But I must confess that it seems to me that in specifying the payment of michavaram as an incident of a kanarn both Act 4 of 1961 and Act 7 of 1963 like their forbear, the Malabar Tenancy Act, really beg the questions. For they define michavaram as what is agreed to be paid periodically by a kanomdar so that to find that a particular payment is michavaram you have first to find that the transaction is a 'kanom'.) The only other requirement necessary to make the transaction a kanom within the meaning of the first part of the definition in Section 3 (8) of Act 7 of 1963 is that the transfer should be for the transferee's enjoyment. Of that there can be, I think, little doubt notwithstanding that the consideration of Rs. 140 must have been very nearly the market value of the land --although the land is 3 acres in extent it was only Cherikkal land and the transaction was in 1905 when land was cheap; and practically the whole of the income was to be appropriated for interest. For, the recitals in the document indicate that the transfer was, so that the transferee may improve and enjoy the land rather than that he should hold it as security for a loan; else it was not necessary to specify that he was to enclose and terrace the land, plant fruit trees thereon and live in it. It would have sufficed to say that he was to be in possession.

Another circumstance which shows that the transaction was a kanom rather than a mortgage is the provision for renewal which though perhaps not altogether inconsistent with a mortgage is characteristic of a lease.

That the transaction is called an Otti and not a kanom or kanapattom is of no significance since the definition says that the document may describe the transaction as kanom or kanapattom or by any other name."

I must however point out that there is a crucial change --so the Full Bench rulings have said --in Act I of 1964, in defining kanom in that "or by any other name" has been deleted now, while these words were present in the corresponding provisions viz., Section 3 (8) of Act 7 of 1963. Although I am not quite convinced that the Legislature deliberately wanted to insist on the document describing transactions as kanom or kanapattorn, I am bound by the Full Bench ruling. But the argument that because the document calls a transaction an Otti, therefore Section 2 (22) cannot, in its first paragraph, take in such a transaction and cannot, in the second paragraph relating to the non-Malabar area, take it in either because there is no payment of customary dues contemplated in the deed, becomes unavailing, when we remember that what does not become a kanom under Section 2 (22) of the Act may still become a tenancy under Section 2 (57) of the Act, as the Full Bench ruling in 1967 Ker LT 78 = (AIR 1967 Ker 270) (FB) has convincingly pointed out.

3. Many decisions, reported and unreported, have adopted approaches to the question of mortgage or lease which sometimes conflict with one another and often turn upon the particular facts of each case. To distil principles of general application, one has to study the two recent Full Bench rulings reported, in 1967 Ker LT 78 = (AIR 1967 Ker 270) (FB) and 1967 Ker LT 646 = (AIR 1968 Ker 38) (FB). The propositions laid down there are binding, and even if sometimes too abstruse, abstract and recondite, are the most comprehensive and fruitful judicial effort in this field of law, if I may say so with great deference. A few later rulings seeking to annotate the observations of the Full Bench were brought to my notice by respondent's counsel but I prefer to go by the Full Bench decisions themselves.

4. By way of preface to the formulation of tests Banian Nayar Ag. C.J., in the ruling in 1967 Ker LT 78 = (AIR 1967 Ker 270) (FB) very significantly, makes some observations which have relevance to our case "I should have thought", says his Lordship "that the words prefacing the formulation of the tests for telling a kanom from a mortgage in paragraph 6 of the report in 1961 Ker LT 1033 made it clear that the tests were formulated only for cases of difficulty and doubt, where the language used in the document did not disclose the true nature of the transaction effected, in other words, whether the transfer was for enjoyment or for the purpose of security. Statements such as that a particular test is conclusive must be read subject to this Inherent qualification, namely, that where from the language used, it is clear that the transfer is for enjoyment, the test, far from being conclusive, has no application whatsoever."

5. The key to the whole decision is contained in para 6 which runs:

"*The question usually asked in cases like the present is whether the transaction is a kanoin or a mortgage, a kanom being, as we have already seen, the form of lease which*

is most likely to be mistaken for a mortgage. But Section 13 of Act I of 1964 gives fixity to every kind of tenant, not merely to a kanom tenant, and it would appear that the Act does not treat a kanom tenant differently from other tenants. Moreover, as in the instance noticed in the order dated 8-11-1963 staying the hearing of S.A. No. 88 of 1963 under Section 5 of Act 7 of 1963, a transaction can be a composite transaction embodying both a mortgage and a lease. If it is at least in part a lease, no matter how small a part, the person holding under it would be a tenant entitled to fixity under Section 13 so that redemption of the part which is a mortgage, no matter how predominant a part, would not entitle the mortgagor to obtain possession which is what a plaintiff suing for redemption normally wants. Therefore, the proper question to be asked in such cases is whether the transaction is, to any extent, a lease. It it is, then by reason of the fixity given by Section 13 of the Act the transferor cannot recover possession even if the transaction be at the same time a mortgage which he is entitled to redeem. The question would not be whether the transaction is predominantly a lease or predominantly a mortgage but whether it is a lease at all."

Therefore, ask whether the transaction is, to any extent, though small, a lease and not even whether it is predominantly a lease or not. This is a clear guide-line. Similarly, a little earlier in the judgment. His Lordship observes:

"However, if it is quite clear from the language of the deed effecting the transfer, that the transfer is at least partly if not wholly for enjoyment, the transfer embodies a kanom whatever else it might embody at the same time, and the existence of an inconsistent incident like a right of sale in the transferee for the recovery of the money advanced by him cannot have the effect of ridding it of the kanom and making it purely a mortgage."

Together read, if a transaction is clearly, though only partly, for the purpose of enjoyment, it can be stamped a kanom. But a kanom, by definition, must be described in the document as a kanom or kanapattoin and 'if that label is not, in fact, used" a transaction cannot be a kanom because it is, the Full Bench says, 'of the veiy substance of a kanom that the document evidencing the transaction should describe it as a kanom or kanapattorn". This conclusion, which excludes many a transferee for enjoyment from becoming a kanomdar for nominalistic reasons, is a matter for the legislature to consider. But this requirement does not hurt, for reasons set out at para. 13 of the Full Bench judgment:

"*But, as I have already pointed out more than once, the fixity conferred by Section 13 of the Act is conferred on all tenants, not merely kanom tenants, so that it is a matter of no consequence that a transaction fails to qualify as a kanom if it can otherwise qualify as a tenancy within the meaning implied by the definition of 'tenant' in Section 2 (57). This definition first tells us what, 'tenant' means and then goes on to say that it includes the persons described in Clauses (a) to (j) thereof. That being so, it is obvious that the,*

'includes' of the section cannot be construed as 'means and includes' so that it matters not that a transaction fails to come within what I might call the inclusive limb of the definition if it comes within what I might call the body of the definition."

To sum up once again, the crucial question is whether the transaction is, in part, for enjoyment. Nor need we be confused by the factum of an advance having been made by the transferee to the landlord, for it may not always be as a loan. The learned Judge cautions that "*a kanom or other lease may be a means of raising money and that it would not be right to presume that any transfer, short of a sale, for the purpose of raising money necessarily implies a borrowing. Raising money to the hilt need not necessarily be a borrowing to the hilt --for example there can be a lease for a premium which amounts very nearly to the value of the property --so that a high ratio borne by the consideration advanced to the value of the property is not so strong a circumstance in favour of a mortgage as a low ratio is in favour of a kanom lease*".

At page 91 a variant of this argument is developed:

"*From the very terms of the deed read in the light of the surrounding circumstances without resort being made to Section 12 of the Act, it seems to me clear that notwithstanding that the deed calls the transaction a mortgage, and that the provision for the recovery of the money advanced by the sale of the property bespeaks a loan, the purpose of the transfer could only have been that the transferee should enjoy the property, not that the property should be security for a loan advanced by the transferee. If in truth and substance, there was a loan and the property was to serve as security for that loan, then that would be only an incident and not the purpose of the transfer. And resort to Section 12 of the Act would expose the loan for the mask that it is and reveal beyond any manner of doubt the true features of the transaction for a lease.*"

6. Be it a composite or a single transaction, be it accompanied by advance of money or not, the core of the matter is that the purpose, in part or whole, should he to enjoy the land and not merely to possess it as security; for, a tenant enjoys land, by whatever name you call him; a mortgagee holds it as security and may take the income incidentally. And although sometimes possession and enjoyment coalesce, it is possible to imagine land being in one's possession but is incapable of enjoyment by him either because it is unenjoyable like a field flooded with lava or radio-active fall-out or because he is unable to enjoy it like a gold mine in the hands of one who has not even a copper to exploit it. Possession means the capacity for keeping exclusive control over a thing. While enjoyment is not an essential element of possession, enjoyment is impossible without possession --when we are dealing with leases of land.

7. The ratio of the decision in 1967 Ker LT 78 = (AIR 1967 Ker 270) (FB) is brought out in the later Full Bench ruling reported in 19S7 Ker L,T 646 = (AIR 1968 Ker 38) (FB). The following excerpt is enough for our purpose:

"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."

if it is not solely to secure a loan, the transfer is a lease.

8. With all this, I must confess that each document may contain terms leaning both ways and uncertainty of construction may still exist. This frailty of the law is' largely eliminated by the elaborate tests set out in the Full Bench Judgment; and the benefit of the doubt perhaps goes, in matters of construction", in furtherance of the beneficial object of the statute viz., the protection of lessees and quasi-lessees, from eviction.

9. I hold that Ext. P-l, from its terms' tenor and tone, is a tenancy, notwithstanding its name and implied conferment of a right of sale and so the further question based on Section 4-A of Act I of 1964 does not fall to be considered. Even on the defendant's case that it was agreed between the parties that the land should be sold to him --a case found against--it would only strengthen the object being to enjoy and not to hold it as security.

10. I dismiss the execution petition in allowance of the appeal so far as it relates to recovery of possession; no costs.