IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 3RD DAY OF JUNE 2015/13TH JYAISHTA, 1937

RSA.No. 1051 of 2006

AGAINST THE JUDGMENT IN AS 41/2000 of ADDL. DISTRICT COURT,PATHANAMTHITTA.
AGAINST THE JUDGMENT IN OS 348/1990 of MUNSIFF COURT,PATHANAMTHITTA.

APPELLANT(S)/APPELLANT/DEFENDANT:

VIJAYAMMA, D/O.KALLIYANI,
PUTHUPARAMBIL VEEDU, ELANTHOOR KIZHAKKUM MURI,
ELANTHOOR VILLAGE, KOZHENCHERRY TALUK.

BY ADV. SRI.M.NARENDRA KUMAR

RESPONDENT(S/RESPONDENTS/PLAINTIFFS:

1. SARASWATHI ANTHERJANAM,
   NARAYANA MANGALATHU, ELANTHOOR,
   KIZHAKKUM MURI,
   ELANTHOOR VILLAGE, KOZHENCHERRY TALUK.

2. KESAVAN NAMBOOTHIRI, DO. DO.

3. DEVAKI ANTHERJANAM, DO. DO.

4. SHYAMALA ANTHERJANAM, DO. DO.

BY ADV. SRI.M.V.S.NAMPOOTHIRY

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 03-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

\- - - - - - - - - - - - - - - - -

R.S.A. No. 1051 of 2006

\- - - - - - - - - - - - - - - - -

Dated this the 3rd day of June, 2015.

JUDGMENT

The short question is whether Ext.D2 document produced though styled as a ottikuzhikanam is a lease or mortgage.

2. The facts are not in dispute. The property originally belonged to one Kumaru Narayanaru who had mortgaged the property to the defendant as per Ext.D2. Subsequent transactions are effected which are not relevant for the present purpose. The suit was laid for redemption.

3. The defendant resisted the suit by pointing out that though styled as Ottikuzhikanam, it is actually a lease and he is entitled to fixity of tenure under Section 4A of the Kerala Land Reforms Act (in short 'the Act)'.

4. Since an issue regarding tenancy was raised, it was referred to the Land Tribunal under Section 125(3) of the Act. The Land Tribunal

returned the finding that the transaction is a mortgage and the defendant is not entitled to fixity of tenure. Left with no choice, the trial court has to accept the finding and decreed the suit. The aggrieved defendant appealed as A.S. 41 of 2000 before the District Court, Pathanamthitta and the said court confirmed the finding of the trial court and dismissed the appeal.

5. At the time of admission of this Second Appeal, the following substantial questions of law were formulated:

> (1) What is the effect of the order of the Land Tribunal in O.A. No. 126 of 1975 on the right of parties?
> (2) Is the finding of the Land Tribunal is that the appellant is not a tenant in accordance with law?

6. Shri. Narendrakumar, learned counsel appearing for the appellant pointed out that his main grievance is regarding the non-consideration of the evidence and materials placed before the

lower appellate court which has simply adopted the finding of the Land Tribunal without independently considering the issue involved in the suit and regarding the interpretation to be given to the document in question. Learned counsel went on to point out that the lower appellate court, being the final authority on facts, ought to have discussed the evidence in the case and should have construed the document in the proper perspective and should have reached an independent impartial conclusion. Having not done so, the lower appellate has abdicated its duty and that calls for interference.

7. Apart from the above contention taken by the learned counsel for the appellant, it is also pointed out that even the Land Tribunal has not considered the real issue that arose for consideration and had observed that the defendant has admitted that it is a mortgage. Learned counsel went on to point out that if that be so, he need not have prayed for reference to the Land

Tribunal at all. In short, the contention raised before the authority below was that though the document is styled as a mortgage, it is infact a lease.

8. Relying on the decisions reported in **Velayudhan Vivekanandan v. Ayyappan Sadasivan** (1975 K.L.T. 1), **Hussain Thangal v. Ali** (1961 K.L.T. 1033), and **Krishnan Nair v. Sivaraman Nambudiri** (1967 K.L.T. 78), learned counsel pointed out that a combined reading of these decisions and the document in question will clearly show that the transaction is a lease and not a mortgage. If the criterion laid down in the three decisions were taken together and applied to the document in question, it would reveal that security aspect is only a camouflage and the real transaction is a lease. That would be evident from the materials also. Learned counsel drew the attention of the court to the amount advanced and also contended

that on a reading of the deed as a whole, it can be seen that security offered is another plot and not the one stated in the earlier part of the deed. It is also pointed out that in the body of the document it is mentioned that the defendant has the right to effect improvements and enjoy the property. These are typical elements of a lease transaction and the Land Tribunal was in error in holding that it is a mortgage which was simply followed by the lower appellate court. On a fair and impartial reading of the document, it would clearly show that the transaction is a lease.

9. Countering the above argument, learned counsel for the respondents pointed out that the document is nomenclatured as Ottikuzhikanam, though it may not be conclusive in nature, it cannot be ignored. The parties entered into the transaction with open eyes and they knew what was the transaction that is being entered into by them. It is not correct to say, according to the learned

counsel, that another property has been offered as security. A fair reading of the document would reveal that by way of caution if the security offered becomes inadequate, another property belonging to the plaintiff is also be offered as security.

10. The question is regarding the interpretation of Ottikuzhikanam deed in the case on hand, i.e., whether it is a lease or mortgage. Even though the three decisions cited by the learned counsel for the appellant read together should normally be the answer, still the issue is debated with much vehemence on each occasion, for, it is usual that no two documents are always the same and the transaction has to be determined on the basis of the interpretation to be given to the document and if the terms of the document are ambiguous, the court has to look into the conduct of the parties subsequent and prior to the document. If, on the other hand, the terms of the

document are clear, then that determines the issue.

11. The issue as to whether the document is to be treated as Ottikuzhikanam is settled by the decision reported **Velayudhan Vivekanandan v. Ayyappan Sadasivan** (1975 K.L.T. 1). It is only necessary to refer to paragraphs 5 and 12 of the said decision which read as follows:

> "5. If the transaction is a mortgage within the meaning of the Transfer of Property Act, it will not be an 'Ottikuzhikanam' as defined in the section. There can of course be a combination of a mortgage and a lease in that the elements of both may be present in a transaction. In most cases transactions styled as 'Ottikuzhikanam' would at least be an anomalous mortgage as defined in S.58 (g) of the Transfer of Property Act from the usual terms embodied in such documents. If there is a lease element also present and the transfer is for the dual purposes of security and enjoyment, the further question whether the transferee would be a tenant under S.2 (57) of the Act can arise and when that question arises it will have to be resolved on the basis of the

principles which, I think, are fairly well settled by the decisions in Hussain Thangal v. Ali 1961 KLT 1033 and in Krishnan Nair v. Sivaraman Nambudiri 1967 KLT 78. I am unable to agree, with respect, that the expression 'Ottikuzhikanam', whether it was used as the appellation given to the document, or when employed in the operative portion of the document as in "ഒറ്റിയും കുഴിക്കാണവുമാകെ എഴുതിതന്നു".can be conclusive in determining the nature of the transaction. I would therefore overrule the decision in Rev. Fr. Victor Fernandez v. Albert Fernandez 1971 KLT 216.

....

12. I shall sum up the principles to be applied in transactions of a composite nature under the following heads:

(1) In examining such a transaction there are two stages. At the first stage the document must be read as a whole and in its entirety giving due weight to every term in it and the nomenclature of the document, and keeping in mind the surrounding circumstances.

(2) If on a reading of the document in the manner indicated under (1) above, it is evident that there has been a transfer for enjoyment for rent or other consideration, then the transaction is a lease and no

further question arises.

(3) Such cases, where it is possible at the first stage, to reach the conclusion that the transaction is a lease, are very rare, and occur but seldom. I may add that those are the cases that arise from transactions akin to that evidenced by the document construed in the order staying S. A. No. 88 of 1963 under S.5 of Act 7 of 1963.

(4) Para.5 and 6 of the judgment in Krishnan Nair v. Sivaraman Nambudiri 1967 KLT 78 refer only to transactions such as that evidenced by the document contained in the order referred to above. The expressions "to any extent a lease" or "whether a lease at all' occurring ia those paragraphs will be applicable only to those transactions of the kind mentioned above and not to other composite transactions.

(5) In the case of 'other composite transactions' which are referred to in Para.15 of the judgment in Hussain Thangal v. Ali 1961 KLT 1033 and again in Para.10 of the judgment in Krishnan Nair v. Sivaraman Nambudiri 1967 KLT 78, that is, transactions other than those where it is evident that the transfer was for enjoyment already referred to, the question whether the transaction

> evidences a lease or a mortgage will have to be determined by taking into consideration all the factors which are pertinent and by applying the tests detailed in Para.6 of the judgment in Hussain Thangal v. Ali 1961 KLT 1033, read in the light of the modifications made in Para.9 of the judgment in Krishnan Nair v. Sivaraman Nambudiri 1967 KLT 78 in regard to the fourth test, and bearing in mind the observations in Para.8 of the same judgment in regard to the second test.
>
> (6) On applying the procedure indicated above if it is found that the elements of a lease predominate so as to justify the inference that the dominant intention was to transfer the property for enjoyment, the transaction must be held to be a lease. On the other hand, if the predominant elements indicate a transfer by way of security, then the transaction must be held to be a mortgage."

A reading of the above decision takes us to two of the decisions referred to therein, namely, the decisions in **Hussain Thangal v. Ali** (1961 K.L.T. 1033) and **Krishnan Nair v. Sivaraman Nambudiri** (1967 K.L.T. 78). In the decision in **Hussain**

Thangal's case (supra), the relevant passage reads as follows:

> "6. Considering first the definition of "kanam" (as it applies in the Malabar area) it will be noticed that the ingredient of a transfer for consideration of an interest in specific immovable property and incidents (a) and (6) namely the right of the transferee to hold the property liable for the consideration, and his liability to pay interest on the consideration, are essential features of a possessory mortgage. And with regard to incident (c) [leaving out the alternatives of payment of customary dues or the incident of renewal on the expiry of any specified term which do not obtain in the present case and which perhaps would stamp a transaction as a kanam, and confining ourselves to the first incident of payment of michavaram], a periodical payment [of excess profits] is quite consistent with a possessory mortgage, in fact, is a common incident of such a mortgage. Whether this periodical payment is michavaram and whether the transferor is a landlord will depend on whether the transfer is a kanam. These features then do not help us to tell a kanam

from a possessory mortgage though, of course, the absence of incident [c] would stamp the transaction as a mortgage. The essential difference between a kanam and a possessory mortgage is clear from a comparison of the definition of a kanam with the definition of a mortgage in S. 58 of the Transfer of Property Act and the definition of a lease in S. 105. It is that while both a kanam and a possessory mortgage involve putting the transferee in possession of the property transferred, a kanam is predominantly a lease, the transfer being for the transferee's enjoyment of the property, whereas a possessory mortgage is essentially a loan, the transfer being for the purpose of securing repayment. This is what all the decisions bearing on the question say. But, enjoyment is normally an incident of possession and the two words are commonly regarded as synonymous. Both kanam and a possessory mortgage involve transfer of possession and a appropriation of profits towards interest and hence the distinction of a kanam being a transfer for enjoyment and a mortgage being a transfer for purposes of security is largely an abstraction, of little use as a test for discovering from the words employed in the deed itself whether a

> particular transaction is a kanam or a possessory mortgage. Whether the transfer is a kanam or a possessory mortgage, the "words "kaivasam" or "anubhavam" are indiscriminately used in the deeds to indicate the transfer of possession and enjoyment. Courts have therefore been driven to formulate other tests for determining whether a transfer is for enjoyment or by way of security, in other words, whether the transaction is essentially a lease or a loan."

The decision in **Velayudhan Vivekanandan's** case (supra) stipulates that the 4th test in the decision in **Hussain Thangal's** case (supra) as modified by the decision in **Krishnan Nair's** case (supra) shall govern the issue. Therefore, it is necessary to emphasis the 4th test in the decision in **Hussain Thangal's** case (supra) to the extent to which it is referred to in **Velayudhan Vivekanandan's** case (supra). In the decision in **Krishnan Nair's** case (supra), the relevant paragraph is paragraph 9 which reads as follows:

> "9. With regard to the controversial fourth test which has occasioned this reference to a full bench, I have little to add to what I have already said. A right in the transferee to enforce repayment of the money advanced by him at his will, otherwise than on the transferor asking for the return of the property, would show that the advance was by way of loan, and, if the property transferred is to be held liable for the money advanced, you ave at once a debt with the security of the property for its repayment and arrangement is a mortgage by whatever name it is called. If the transferee can have the property sold to recover his money, or if as a result of his enforcement of the transferor's promise to pay, he has to give up the property, it seems to me to follow, not merely that the advance was by way of loan but also that the purpose of the transfer could not have been that the transferee may enjoy the property. It must have been that he may hold the property as security for the money lent by him."

12. A combined reading of the above decisions leaves one in no doubt that essentially the matter has to be determined by the

interpretation of the document and on the basis of the terms contained therein. No single factor is determinative of whether it is a mortgage or lease. The document will have to be read as a whole and various aspects mentioned in the document will have to be taken into consideration.

13. First of the contentions raised by the learned counsel for the appellant regarding another property being offered as security cannot be accepted at all. On a reading of the deed, it is clear that what is meant is if the property initially offered as security is found insufficient, other property of the mortgagor is also offered as security.

14. Coming to the more important contention, it cannot be said that it is without force. It requires consideration.

15. Emphasis is laid on the fact that the mortgage amount is only Rs.200/- and extent of property is 36 cents. It is also pointed out that

the mortgagee is allowed to make improvements in the property and enjoy the property also. These are typical characteristics of lease and there is no reason why, according to the learned counsel, the document should be held to be a mortgage.

16. If one were to read the recitals relied on by the appellant in isolation, contention is correct. But as already stated, the document has to be read as a whole and the intention of the parties would be gathered therefrom. The relevant portion of the document reads as follows:

> "ഒന്നാം നംബെർ എ അടയാളമായി തിരിച്ചിട്ടുള്ള വസ്തുക്കളിൽ നിന്നും പട്ടികയിൽ വിവരിക്കുന്നതും എൻെറ കൈവശത്തിലും ഭരനത്തിലും ഇരിക്കുന്നതുമായ വസ്തുവേ നിങ്ങൾക്കു ഇതിനാൽ പന്ത്രണ്ടു കൊല്ലത്തേക്കു ഒറ്റികുഴിക്കാണമായി എഴുതിതരുന്നു. പെരുവം തേവരുടെ ജീർണോദ്ധാരണ വകയ്ക്കായി നിങ്ങളോടു മുൻപേറായി വാങ്ങിച്ചിരിക്കുന്നതു വകവെച്ച് ഒറ്റിയർത്ഥം പറ്റുരൂപ 200. ഈ രൂപ ഇരുന്നൂറിനും പട്ടിക വസ്തു ഇന്നുമുതൽ നിങ്ങൽ കൈവശം വച്ചു നട്ടു ദേഹണ്ടങ്ങൽ ചെയ്തും കെട്ടിടം വയ്പിച്ചും കിണറുകുഴിപ്പിച്ചും അതിരുകയ്യാല നന്നാക്കിയും സർക്കാരുകരം നിയമപ്രകാരം തീർത്തും ഒറ്റികുഴിക്കാണമായി അനുഭവിച്ചു കൊള്ളുന്നതിന്ന് സമ്മതിച്ചിരുക്കുന്നതും അവധി

കഴിയുമ്പോൾ അർത്ഥവും നിങ്ങളുടെ ദേഹണ്ഡവിലയും തന്ന് വസ്തു ഒഴിപ്പിച്ചു കൊള്ളാവുന്നതും ആകുന്നു. പട്ടികവസ്തുവിൽ യാതൊരു മുൻബാദ്ധ്യതയും ജപ്തിയും ഇല്ലെന്നും ദേവകാര്യത്തിനുവേണ്ടി അർത്ഥം വാങ്ങി ഈ ആധാരം എഴുതി തരുന്നതാകയാൽ ഇതേ സംബന്ധിച്ചു യാതൊരു ദൂഷ്യത്തിനും ഇടയില്ലെന്നും ഉറപ്പായി പറഞ്ഞു വിശ്വസിപ്പിച്ചിരിക്കുന്നതിനു വിപരീതമായി വന്നോ മറ്റു വിധത്തിലോ നഷ്ടമോ അർത്ഥ ദോഷമോ സംഭവിക്കുന്നതായാൽ അതിനു ടി ഭാഗ ഉടം ബടിയനുസരിച്ച് ബി അടയാളമായി തിരിച്ചുകിട്ടി സ്വാതന്ത്ര്യപ്പെട്ടതുമായ വസ്തുക്കളിൽ നിന്നും അടിയിൽ വിവരിക്കുന്ന ജാമ്യവസ്തുക്കളും ഒറ്റിതന്നിരിക്കുന്നതിൻെറ ജന്മാവകാശവും ഞാനും എനിക്കുള്ള സകലസ്വത്തുക്കളും ഉത്തരവാദിത്തം ചെയ്തുകൊള്ളാവുന്നതും വസ്തുവിവരപട്ടിക വിശദപ്പെടുത്തി ഇതിനോടനുബന്ധിച്ചു ചേർത്തിരിക്കുന്നതും ആകുന്നു.”

True, the amount advanced is Rs.200/-. But it is for spiritual purpose of the debtor. It is also true that possession is handed over and the mortgagee is allowed to make improvements in the property. However, these two aspects cannot be taken in isolation. It is very clearly stated that after the period of mortgage is fixed as 12 years.

If the mortgage amount is paid and the value of improvements is also given, the property shall be returned to the mortgagor. These two stipulations reserving equity of redemption and also obligation to pay value of improvements negative the contention of the learned counsel for the appellant that it is a lease and not a mortgage. Of course, once the possession is given, naturally the mortgagee is entitled to make improvements in the property. From what is stated in the document, it is clear on its terms that the property is offered as security for the mortgage amount taken from the mortgagee.

15. Even though there is much substance in the grievance voiced by the learned counsel for the appellant that neither of the courts have considered this aspect in detail, it is felt that the remand for that purpose is unnecessary for, the suit is of the year 1990 and 26 years have elapsed and a remand may not serve any purpose at all.

Further, the terms of deed are so clear and no other view appears possible.

This appeal is without merits and it is dismissed.

P. BHAVADASAN,
JUDGE

sb.