(1957) 02 KL CK 0010

In the High Court Of Kerala

Case No : S. A. No. 161 of 1956

Ammukkutti Amma and Another APPELLANT

Vs

Aryan Karunakaran Nair and Others RESPONDENT

Date of Decision : 04-02-1957

Acts Referred:

Citation : (1957) KLJ 323

Hon'ble Judges : N. Varadaraja Iyengar, J

Bench : Single Bench

Advocate : P. Vasu, for the Appellant; A. Krishna Menon, for the Respondent

Final Decision : Allowed

Judgement

N.V. Iyengar, J.—This second appeal is by the defendants 1 and 3 against an appellate order of the court below, in execution of the decree, that the defendants are not entitled to the benefit of the Holdings (Stay of Execution Proceedings) Act VIII of 1950, though the execution court had held otherwise. The question depends on the proper construction of the deed, filed in the trial side as Ex. B and incorporated among the execution records, under which the defendants came into possession. The Munsiff was of the opinion that it embodied a kanapattom transaction while the Judge held that it was more or less a usufructuary mortgage. Having gone through the records and heard arguments of learned counsel, I am inclined to agree with the Munsiff and hold the transaction to be in the nature of a kanom, that the respondent-decree-holder is not entitled to get delivery in execution accordingly.

2. Ext. B is styled as a Pattupanayam. It mentions that the property is handed over under the panayam for enjoyment for a period of ten years to be returned on payment by the mortgagor-lessor of the advance of Rs. 25 and also the value of improvements effected on the property. During all this interval the mortgagee-lessee was to appropriate the usufruct towards the interest on his investment and also the tax due on the property and further pay 1/4 fanam to the jenmi and

a similar 1/4 fanam for Yakshi Pooja. It was recited that a sum of 3? fanams had been levied from the tenant-mortgagee towards adukkuvathu for the document. The property consisted of 31 cents (not 15 cents as the Judge observed), in which, there was one yielding cocoanut tree and another non-bearing which the transferee was called on to look after. It may be added that the improvements effected on the property was valued at 2637 and odd fanams in the decree for eviction passed in the case, and consisted of plantations and also a shed for purpose of residence.

3. There are a number of cases in the books which deal with the distinction between a lease with a premium and a usufructuary mortgage and make it turn on the aspect, whether the money paid is a loan advanced or price paid and whether possession of property is transferred for the purpose of securing the repayment of the loan. "If the money paid is loan advanced and the transfer of possession is for the purpose of securing the payment of such loan, the transaction would be a usufructuary mortgage. But if the money is paid as a price and not as loan and there is no intention to provide any security for the repayment of a loan, the transaction would be a lease". See the cases collected at pp. 1896 & 1697, Chitaley T. P. Act, 3rd edn. vol. 3. It is on this basis that the learned Judge approached the matter and held that the transaction reflected more the relationship of lender and borrower, the interest on the loan being secured by the transfer of possession, the loan itself being repayable after a certain number of years. The Judge seems to have been impressed by the fact that the reference to the transferee''s possession was made as under the panayam or mortgage and there was no reference to the pattom or rent of the property as such in any portion of the document. But it seems to me that the distinction here is not between a lease with premium and a usufructuary mortgage but what aspect predominates, lease or mortgage when the document participates in the characteristics of both. The expression Pattupanayam indicates not a pattom or panayam transaction exclusively but a combination, as in the case of kanom. If the main object of the transaction is the transfer of possession for purposes of enjoyment and not merely a borrowing and provision for due payment of the loan concerned, then the lease aspect may be taken to predominate and the transaction will be held to fall within the beneficent provisions of the Act. That is to say where otherwise the transaction is shown to be a lease, the fact that the lessor is a debtor of the lessee and the rent payable by the latter is to be adopted to the interest payable by the lessor will not alter the nature of the transaction. See Chotey Lal Vs. Mt. Mohanian and Another, . Here the property had been outstanding under a panayam redeemed with help of money advanced by the transferee and it was in consideration of this and other advance totaling Rs. 25 that Ext. B was executed. The distinction between mere panayam and pattupanayam was not thus unknown to the parties. And besides and beyond these considerations there are here the extra provision for Yakshi Pooja reminiscent of the customary dues in kanom transaction and also adukkuvathu another characteristic feature of the kanom holding. The long term

of 10 years and the provision for improvement of an almost bare plot rather confirm the aspect of grant for purpose of possession.

I therefore set aside the order of the court below and restore that of the Munsiff and so allow the appeal. There will be no order for costs however.

