

(1966) 12 KL CK 0005
In the High Court Of Kerala
Case No : Second Appeal No. 173 of 1962

Krishnan Nair

APPELLANT

Vs

Perumbalath Kizhakkiniyakath Manakkal Karnavan and
Another

RESPONDENT

Date of Decision : 23-12-1966

Acts Referred:

Evidence Act, 1872 — Section 91
Kerala Land Reforms Act, 1963 — Section 12, 13, 2(22), 2(49), 2(57)

Citation : AIR 1967 Ker 270

Hon'ble Judges : P.T. Raman Nayar, Acting C.J.; V.P. Gopalan Nambiyar, J; T.C. Raghavan, J

Bench : Full Bench

Advocate : V.R. Krishna Iyer and K. Raghavan Nair, for the Appellant; V.R. Venkitakrishnan, for the Respondent

Final Decision : Allowed

Judgement

Raman Nayar, Ag. C.J.

1. ID Hussain Thangal v. Ali, 1961 Ker LT 1033 I had occasion to enumerate the tests generally adopted by the Courts to tell a kanam from its twin brother a possessory mortgage, the essential difference between the two, of the one being a transfer for securing a debt and the other a transfer for enjoyment, being rarely an apparent feature and being largely a matter for Inference. I then said that a provision in the deed effecting the transfer enabling the transferee to insist on repayment of the consideration advanced by him otherwise than as a condition for resumption of the property transferred (whether the provision be in the shape of a promise to repay by the transferor, or in the shape of a right of recovery by sale given to the transferee) was a sure means of telling a possessory mortgage from a kanom. Or words to that effect. For, it seemed to me that this emphasis on recovery at the transferee's will would put it beyond doubt that the advance was by way of loan and not by way of price or deposit,

refundable (whether by actual payment or adjustment) on retransfer. And if that be so, the inference would follow that the transfer was for the purpose of securing the repayment of the loan rather than for the transferee's enjoyment of the property. For, if enjoyment were to be determined for the sake of recovering the money paid, the latter must have been the real object of the transfer.

The same view was taken by Madhavan Nair, J. in *Ammukutty Amma v. Ahammad* 1961 KL T 758 by Velu Pillai J. In *Thangappan v. Amrinalu Neithiramma* 1961 K L T 762 and it was affirmed (though perhaps in terms less categorical), by Velu Pillai and Mathew, JJ. in *Ayyappan v. Venkedeswara Naicken* 1982 K LT 733 : AIR 1963 Ker 809 and again by Velu Pillai and Raghavan JJ. in *Subramania Iyer Pattar and Others Vs. K.R. Anantanarayana Iyer and Another*, the correctness of this view has however been doubted and that is why this case where the question has been raised whether the transfer under which the appellant defendant holds is a lease entitling him to fixity u/s 13 of Act 1 of 1964, or whether it is only a mortgage entitling the plaintiff respondent to the decree for redemption and possession which though denied by the first Court has been granted to him by the lower appellate Court, is before us.

2. It is on the strength of the decisions in *Sankaran Nambudiripad v. Moideen* 1964 K LT 842 *Kalliani v. Kunhalikutty Haji*, SA No. 41 of 1959 (Ksr) and *Kochakkan v. Abdun-ni S. A.* No. 804 of 1961 (Ker) that (the view stated above, seemingly so well-supported by authority, has been questioned. But, it seems to me that, whether the view be right or wrong, these decisions provide little basis for questioning it. In the first of these decisions it was observed:

"Section 2 (22) of Kerala Act 1 of 1964 defines an incident of kanom to be "a right in the transferee to hold the said property liable for the consideration paid by him or due to him, which necessarily connotes a right of sale of the property for realisation of the amount, it must then follow that a right of sale in enforcement of the amount advanced cannot be a decisive factor, that being, by the very definition, an incident of a Kanom which is admittedly a transaction of tenancy only".

According to this observation then, a right of sale far from being inconsistent with the kanam is an essential feature of a kanam. But a like contention had already been convincingly repelled in *Panangat Unneeran's son Ayyappan and Another Vs. Pozhankevil Thekkemadathil Venkedeswara Naikkan and Another*, which is referred to by the learned Judge but this aspect of which was apparently not brought to his notice.

In support of the observation it is said that "a right in the transferee to hold the said property liable for the consideration paid by him or due to him" means that there is a charge on the property and that from this it necessarily follows that then; is a right of sale of the property to recover the amount advanced. This argument steps from a failure to distinguish between a charge in the ordinary sense of the word as meaning a burden on property and a charge in the technical

sense of Section 100 of the Transfer of Property Act, carrying with it a right of sale. To hold property liable for consideration paid or due is no doubt to make the property security for the consideration advanced and therefore to make it a charge on the property in the popular sense of that word. But, it does not follow that the consideration advanced can be recovered from the property by bringing it to sale. The words, "consideration paid by him or due to him" do not necessarily imply the existence of a loan. And, even where there is a loan, carrying with it an obligation to repay, it can well be that the lender cannot sue to recover the money but can only hold the security until repayment.

A mortgagee holding under a usufructuary mortgage or a mortgage by conditional sale is an example. He holds the mortgaged property liable for the consideration paid by and due to him, but, notwithstanding that the payment was by way of loan, he cannot sue for the money or bring the property to sale for its recovery. All that the incident defined in Clause (a) of Section 2(22) of the Act means is that the transferee can keep the transferred property against the consideration paid by him or due to him. It in no way implies that he can recover the consideration by bringing the property to sale. A right to sue for the money and recover it by sale has never been regarded as an incident of a kanam--see *Sridevi v. Virarayan*, (1899) ILR 22 Mad 350, and it would appear that since that case no one has thought of bringing a suit for the money due on a kanam although the definition of a kanam in the Malabar Tenancy Act, 1929 embodies the incident defined in Clause (a) of Section 2 (22) of Act 1 of 1964-

3. In the remaining two decisions, namely, S. A. No. 41 of 1959 (Ker) and S. A. No. 804 of 1961 (Ker) it was no doubt held (as in the first 1964 KLT 842 that the transaction in question was a lease notwithstanding that the deed embodying the transaction conferred a right of sale on the transferee for the recovery of the money advanced by him. But that was by express resort to section 22 of the Malabar Tenancy Act (Section 12 of Act 1 of 1964), and such resort though not express!) proclaimed seems to me the true basis of the decision in 1964 K LT 842. In each of these cases the result was not reached by a construction of the deed for ascertaining its purport; it was reached by getting rid of the purport, in other words, or the deed itself, by resort of the provision in Section 22 of the Malabar Tenancy Act (now embodied in Section 12 of Act 1 of 1984) enabling a defendant to prove by evidence aliened (the provisions of the Evidence Act notwithstanding) that a transaction was different from what the deed embodying it makes it out to be, by showing that, although from the purport of the deed it is a mortgage: it was in truth and substance a lease. But, it was in the context of construing the deed for ascertaining its purport that the test of the right to sale was propounded, and it was never suggested that it should prevail once you had rent the mask of the deed with the aid of provisions like Section 12 of Act 1 of 1964 and exposed the true features of the transaction for a lease.

4. There are logically two stages in the process of ascertaining whether a transaction embodies a lease within the meaning of Act 1 of 1964 or is only a

mortgage. The first stage (in compliance with Section 91 of the Evidence Act) is to construe the document effecting the transaction in the light of the surrounding circumstances and find out its purport, in other words, what it really means. If the document makes out a lease, there the matter ends and it would be unnecessary to proceed to the second stage. But, if it makes out a mortgage, then if the Court is invited to do so by the defendant, it would be necessary to proceed to the second stage and find out whether the transaction was in substance other than what, from the document, it appears or purports to be and was, in truth, a lease. This is the second stage authorised by Section 12 of Act 1 of 1964, the provisions of the Evidence Act -- Section 91 in particular -- notwithstanding. It was in the context of the first stage that the test was propounded. It has no relevance to the second stage which, in logical sequence, is reached only after the purport of the document has been ascertained. The two stages are however, often telescoped -- it is in most cases difficult to keep them in separate watertight compartments -- and, it is, I am afraid, as a result of this that the validity of the test has been doubted.

5. I should have thought that the words prefacing the formulation of the tests for telling a kanam 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. Of the several kinds of leases defined in the Act, it is a kanam that most closely resembles a possessory mortgage and is therefore likely to be mistaken for one. A transfer of possession for consideration secured on the property transferred is an essential feature of both transactions; liability on the part of the transferor to pay interest on the consideration advanced, with the corresponding right in the transferee to appropriate profits towards such interest, is a common feature of both transactions; and a periodical payment by the transferee to the transferor which is an essential incident of a kanam is by no means uncommon in a possessory mortgage. The only true difference between the two transactions is that while a kanam is a transfer for enjoyment of the property transferred a mortgage is a transfer for securing money advanced by way of loan.

But, as explained in 1961 Ker LT 1033 this difference though real and critical is largely an abstraction, rarely discernible from the language usually employed in document effecting such transactions. Indeed, the traditional view of a kanam was that it was a combination of a usufructuary mortgage and a lease --- it was often described as an anomalous mortgage. But, after the statutory definition, first made in the Malabar Tenancy Act, of a kanam as a transfer for enjoyment, a kanam can no longer be regarded as, in any sense, a mortgage. For, a mortgage is a transfer for the purpose of security not a transfer for enjoyment, and,

although it is conceivable that the same transiter may serve both purposes so as to embody both a kanam and a mort-gage, the kanam aspect of it can only be a lease and not a mortgage. 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 kanam 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 affect of ridding it of the kanam and making it purely a mortgage. Possibly, the risk or the statement as to the conclusive nature of the test being read free of the qualifications imposed by the context, could have been avoided by saying that a right of sale, or other provision for recovery by the transferee of the money advanced by him otherwise than on redemption, would be strongly suggestive of a loan and therefore of a mortgage instead of saying that it would put it beyond doubt that the transaction was a loan and not a lease and therefore a mortgage and not a kanam.

6. The question usually asked in case like the present is whether the transaction is a kanam or a mortgage, a kanam 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 ,1 of 1964 gives fixity to every kind of tenant, not merely to a kanam tenant, and it would appear that the Act does not treat a kanam tenant differently from other tenants. Moreover, as in the instance noticed in the order D/- 8-11-1963 staying the hearing of S. A. No. 88 of 1983 (Ker) u/s 5 of Act 7 of 1963, a transaction can be a composita 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 u/s 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. If 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.

7. The following are the provisions of the Act relevant to the decision of the case:

"2. Definitions -- In this Act, unless the context otherwise requires, --

(22) Kanam means the transfer for consideration, in money or in kind or in both, by 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 kana-pattam, the incidents of which transfer include -

(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 to 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, and, in areas in the State other than Malabar, includes such transfer of interest in specific immovable property which is described in the document evidencing the transaction as otti, karipanayam, panayam, nerapanayam or by any other name and which has the incidents specified in Sub-clauses (a) and (b) above and also the following incidents:--

(i) renewal on the expiry of any specified period; and

(ii) payment of customary dues;

Provided that kanapattam or any other demise governed by the Travancore Jenmi and Kudiyan Act of 1071 or the Kanam Tenancy Act, 1955, shall not be deemed to be a kanam.

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 or renewal fees, it shall be deemed that there had been a provision for such renewal in the document:

(36) "michavaram" means whatever is agreed by a kanamdar to be paid periodically as residual rent, in money or in kind or in both to, or on behalf of the landlord, but does not include customary dues:

xxxxx

(49) "rent means whatever is lawfully payable in money or in kind or in both by a person permitted to have the use and occupation of any land to the person so permitting. and includes michavaram, but does not include customary dues;

x x x x x

(57) "tenant" means any person who has paid or has agreed to pay rent or other consideration, for his being allowed by another to possess and to enjoy the land of the latter, and Includes -

(a) an intermediary, (b) a kanamdar,

(c) a kanam-kuzhikanamdar,

(d) a kuzhikanamdar,

(e) a mulgonidar,

(f) a verupattamdar of any description (including a customary vemmpattam-dar),

(g) the holder of a chalgoni lease, (h) the holder of a kudlyiruppu,

(i) the holder of a vaidegeni lease, and

(j) a person who is deemed to be a tenant u/s 4, Section 5, Section 8, Section 7, Section 8, Section 9 or Section 10.

Explanation - -- For the purposes of this clause, --

(i) "holder of a chalgeni lease" means a lessee or sub-lessee of specific Immovable property situate in the taluk of Hosdrug or Kasa-ragod in the district of Cannanore, who has contracted either expressly or impliedly to hold the same under a lease, whether for a specified period or not;

(ii) "mulgent" means a tenancy in perpetuity at a fixed invariable rent created in favour of a person called mulgenidar;

(iii) Valdageni lease means a lease for term or years;

12. Right to prove real nature of transaction : --

(1) 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 of nerpanayam of that land is in substance a transaction by way of kanom, kanamlcuzhika-nam, 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".

8. To this may be added for purposes of comparison the definitions of a mortgage and of a lease in the Transfer of Property Act:

"58 (a). A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

x x x "

106. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

x x - x x x x"

A comparison of the definitions will bear out what I have already stated, namely that the only essential difference between a lease and a mortgage with possession is that in the former the purpose of the transfer is that the transferee may enjoy the property, whereas, in the case of the latter, the purpose is that the property may serve as security for the money advanced by him by way of loan. That does not take us much farther than what was stated by Ghose in his book on the Law on Mortgage in India (Fifth Edition, Vol. 1. Page 102) in dealing with the distinction between a lease and a mortgage:

"The only guiding rule that can be extracted from the cases on the subject is, that the intention of the parties must be looked into, and that when "once you get a debt with the security of land for its repayment, then the arrangement is a mortgage by whatever name it is called".

And this was the test adopted by the Supreme Court in Mahant Ramdhan Puri Vs. Bankey Bihari Saran and Others, . But, it is very rarely that the purpose or ultimate object of the parties in entering into a transaction is expressly disclosed in the document embodying it; enjoyment is ordinarily an incident of possession and possession normally carries with it the legal if not the beneficial title to enjoy; the words "possession" and "enjoyment" like their Malayalam equivalents, "kalvasam and "anubhavam" are therefore commonly regarded as synonymous and are in combination often used to indicate transfer of possession, enjoyment being mentioned not so much to indicate the purpose of the transfer but to emphasise that there has been a transfer of actual or kbas possession; hence it is very seldom that the underlying purpose can be gathered from the words used in the document; and therefore, more often than not, the purpose, like intention in a criminal case, is a matter for inference. That is why Courts have had to formulate other tests for determining whether a transfer is for enjoyment or by way of security.

The more important of these tests have been enumerated by me in 1961 K LT 1033 and I do not think that there is anything that I can usefully add to that enumeration. But, as a variation of second test there enumerated, namely, the ratio which the consideration advanced bears to the value of the property transferred, a higher ratio being indicative of a loan and therefore of a mortgage and a lower ratio of security for rent and therefore of a lease, I might mention the ratio which the amount periodically payable to the transferor bears to the rental value of the property a higher ratio being indicative of a lease and lower of a mortgage. If the property transferred is much more than is necessary for securing the amount advanced, ordinarily the income from the property will be much more than the interest payable on the money advanced so that the balance payable to the transferor after appropriating the interest would bear a high ratio to the income. That much more was transferred than was necessary for securing repayment of the money advanced or ensuring realisation of the interest accruing due thereon, would be an indication that the transfer was not for those purposes but so that the transferee may enjoy the property -- a borrower generally transfers no more than is necessary to obtain the loan.

However, it must, at the same time, be remembered that a kanam 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 used 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 is a low ratio is in favour of a kanam lease.

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 have at once a debt with the security of the property for its repayment and the arrangement is a mortgage by whatever name it is called. If the transferee can have the property sola 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.

10. Apart from a composite transaction of the kind already mentioned, where a transfer of possession for enjoyment may be accompanied by a transfer of some other interest (in the instance mentioned, of the remainder after the lease created by the former transfer) by way of security for the loan advanced, it is theoretically possible for the same transfer to be for concurrent purposes, both for the purpose of enjoyment and for the purpose of security. In such a case, it might be necessary to find out the dominant or essential purpose; the other purpose would then be merely incidental, constituting an incident of the transfer rather than its purpose. But, generally speaking, if there is, in truth, a loan and a transfer of possession by way of security, that would be the real purpose of the transfer, and the enjoyment on the part of the transferee which this necessarily involves would be but an incident and not the purpose of the transfer. However, where the amount advanced is comparatively speaking insignificant, that would be an indication that the advance was not, in truth, by way of loan. In that event, a promise to repay, or a provision for recovery by sale, would not make it a loan, and the Courts would probably ignore such a provision even without resort to Section 12 of the Act,

11. With regard to the scope and purpose of Section 12 of the Act I have little to say apart from what I have already said in 1961 K LT 1033 with reference to the like provision in Section 9 of Act 4 of 1861 and in Section 22 of the Malabar Tenancy Act. I might, however, repeat that, while the name given to a transaction in the document effecting it might be a valuable indication of what the parties intended it to be, in other words, of the purport of the document, it has never been regarded as conclusive and is to be ignored where the terms of the document spell out a different transaction. Thus Courts have often construed what professes to be a will as a settlement deed, what professes to be a maintenance arrangement as a partition, what professes to be a mortgage as a kanam, and what professes to be a lease as a licence, to give only a few examples. And vice versa. The word used in Section 12 is "purporting", not

"professing" so that the real purpose of that section is to get rid of the purport of a document rather than the label it gives to the transaction it effects though the label is, among other things, to be considered in ascertaining the purport.

But, as we shall presently see so far as a kanam is concerned, the general definition of a kanam in Section 2(22) of the Act applicable to the entire State, as distinguished from the special additional definition applicable only to the non-Malabar area, makes the label an essential ingredient of the transaction. A transaction, it would appear, cannot be a "kanam in accordance with this general definition unless it is described in the document evidencing it as a kanam or kanapattam. If that be so, and if it be of the very substance of a kanam that the document evidencing the transaction should describe it as a kanam or kauapattam, then Section 12 of the Act would be of no avail to make out a kanam in cases where the label, "kanam" or "kanapattam" is not used. For, if that label is not, in fact, used there can be neither the appearance nor the substance of a kanam since such use, in the document itself, is, by definition, necessary to make a kanam. The transaction can never be a kanam. Section 12 of the Act notwithstanding, although that, of course, would not preclude it from being some other form of lease carrying with it the fixity conferred by Section 13.

12. The definition of a kanam in Section 2(22) of the Act is in two parts, the first applicable to the entire State and the second (which is an additional definition adding to the content of the first but in no way qualifying it) applicable only to the non-Malabar area. The definition is, word for word, the same as in Section 2(18) of Act 4 of 1961 but there was a slight variation in the definition in Section 3(8) of Act 7 of 1963. I have had occasion to consider the scope and meaning of the definitions in Act 4 of 1961 and Act 7 of 1969 in a number of cases. 1961 KLT 1038 Lakshmi Amma Bhargavi Amma v. Narayanan Sankara, S. A. No. 5 of 1962 (Ker), Mohammed Mohammed v. Raman Nair Narayanan Nair, S. A. No. 548 of 1962 (Ker) and Damodaran v. S. Namboothiripad 1964 KLT 25 are a few of them. This is what I said in S. A. No 5 of 1962 (Ker), with regard to the definition in Act 4 of 1961 which, as I have already said is word for word the same as in Act 1 of 1964:

"It will be noticed that the definition is in two parts. The first applies to the whole of the State while the second part applies only to what I might call the non-Malabar area of the State. If a transaction falls within the first part it is a kanam in whichever area of the State the property lies. The second part of the definition which applies only to the non-Malabar area enlarges the definition given in the first part so as to include also transactions coming within that part but not within the first so that a transaction in the non-Malabar area can qualify to be a kanam even if it does not fall within the first part provided that it falls within the second part. The result then is that for a transaction to be a kanam it is sufficient for it to come within either part so far as the non-Malabar area is concerned, but, in the Malabar area, it must come within the first part and cannot have the benefit of the inclusive definition in the second part.

If I compare the two parts we find that both parts require a transfer for consideration in money or in kind or in both, by a landlord of an interest in specific immovable property to another for the latter's enjoyment all this is attracted by the words "such transfer" in the second part -- as also the incidents mentioned in Clauses (a) and (b) of the first part. So far as Clause (c) is concerned, it will be noticed that there are three incidents mentioned there, namely, *michavaram*, customary dues and renewal on the expiry of any specified period. But in the first part these are in the alternative, "*michavaram*, or customary dues or renewal on the expiry of any specified period" so that the existence of any one of the three will satisfy the requirements of the definition in that part. (I might here mention that no attempt has been made before me to press the contention put forward in the lower appellate Court that the "or" of Clause (c) must be read as "and", a contention for which there appears to be no warrant whatsoever). But the second part requires two of the three items of Clause (c) to be present, namely, customary dues and renewal on the expiry of any specified period (Clauses (ii) and (i) respectively of that part) so that, unlike as in the case of the first part, the existence of any one of the three items of Clause (c) is not sufficient to satisfy the definition.

The reason for this more stringent requirement of the second part is not far to seek. It is to be found in the words, "whether described in the document evidencing the transaction as *kanam* or *kanapattam*" occurring in the first part as against the words, "which is described in the document creating the transaction as *otti*, *karipalayam*, *panayam*, *nerpanayam* or by any other name occurring in the second part. Therefore, to satisfy the definition in the first part it is necessary that the transaction should be described in the document itself as a *kanam* or *kanapattam*, whereas that is not necessary to satisfy the definition in the second part. So far as the second part is concerned it does not matter what the transaction is called in the document, and it would appear that the words, *otti*, *karipalayam*, *panayam* and *nerpanayam* are mentioned only as illustrative of the names commonly used to describe such transactions. If the document itself calls a transaction a *kanam* or *kanapattam*, that is some indication that the transaction conforms to that description, and hence the less stringent requirement of the first part of the definition. But, if the document describes the transaction by some name other than *kanam* or *kanapattam* that is some little indication to the contrary, namely, that a *kanam* was not intended and hence the more stringent requirement of the second part of the definition requiring, in addition to incidents (a) and (b) of the first part, the second and third items in Clause (c), unmistakably manifesting a *kanam*. It is true that a transaction described by the document as a *kanam* or *kanapattam* would come within the words, "which is described in the document creating the document as *otti*, *karipalayam* *panayam*, *nerpanayam* or by any other name" appearing in the second part or the definition, but It would come also within the first part, and, for qualifying to be a *kanam*, it need pass only the less rigorous test of the first part and need not satisfy the more rigorous test of the second part. The

argument that every transaction in the non-Malabar area must pass the test in the second part of the definition to be a kanam. It ignores the fact that the second part, applicable only to the non-Malabar area, only adds to what is included in the definition in the first part and that the first part applies to the Malabar as well as to the non-Malabar area. And to say that the nomenclature is of no importance, that the first part does not require that the document should necessarily call the transaction a kanam or kanapattam and that both parts apply whatever be the name given in the document, would be to render the second part of the definition otiose and meaningless. For, it would mean that what is included by the second part is already in the first. The second part requires both renewal and the customary dues so far as that three items of Clause (c) are concerned, whereas either of these is sufficient to satisfy the first part.

It is true that, before the Agrarian Relations Act, the law was not that, in the Malabar area, for a transaction to be a kanam it must be so called in the document affecting it. As pointed out by me in (1981) 2 Ker LR 658, in this as in the construction of all documents the nomenclature is only an indication of the purport and is to be ignored if the terms of the document clearly spell a different transaction. Thus a transaction described in the document as a kalvasapanayam, would, if the terms made out a kanam, be construed as a kanam, and the purpose of Section 22 of the Malabar Tenancy Act was not to get rid of the name used in the document, but to get rid of its purport. But, as I observed, in enacting the first part of the definition in Section 2(18) of the Act, the Legislature seems to have laboured under the misapprehension that, in the Malabar area, for a transaction to be a kanam it should have been so described in the document, and that it was only by reason of Section 22 of the Malabar Tenancy Act (in place of which Section 9 of the present Act was enacted) that a transaction not so described could be proved to be a kanam".

In the definition in Act 7 of 1963 the legislature added the words, "or by any other name" in the first part of the definition after the words, "whether described in the document evidencing the transaction as kanam or kanapattam" and this is what I had to add when considering that definition in S. A. No. 548 of 1962 (Ker).

All I wish to add is that the legislature, by the addition of the words, "or by any other name" in the first part of the definition has rendered the second part otiose and meaningless, for unless we read the words "or by any other name" ejusdem generis with kanam or kanapattam, which I am very doubtful if we can, it would follow that the document evidencing the transaction need not describe it as kanam or kanapattam in order to qualify under the first part of the definition. The document can call the transaction by any name, and, if that be so, it would follow that there can be no transaction coming within the second part of the definition which does not come also within the first part. So what is included by the second part which applies only to the non-Malabar area is only what already comes within the first part which applies to the whole State".

The legislature has now in Act 1 of 1964 reverted to the definition in Act 4 of 1961; and so it is clear that to satisfy the definition in the first part it is necessary that the transaction should be described in the document itself as a kanam or kanapattam. In other words, a transaction in the Malabar area cannot qualify to be a kanam unless the document effecting it describes it as a kanam or kanapattam -- see in this connection *Raman Pillai v. Narayanan Namboori* 1966 KLT 692 where the same view has been taken by Madhavan Nair J.

13. 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 kanam tenants, so that it is a matter of no consequence that a transaction fails to qualify as a kanam 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 "falls to come within what I might call the inclusive limb of the definition if it comes within that I might call the body of the definition.

14. A definition which first tells us what a thing means and then goes on to say what it includes, can use the inclusive device for three entirely different purposes. First, by way of illustration or of enumeration of the forms the thing defined commonly assumes, by naming things that clearly come within the meaning given. Secondly, for roping in things that, either partly or in whole, would not come within the meaning. Thirdly, by way of abundant caution, so as to put it beyond doubt that certain things do come within the meaning. In Section 2(57) the device seems to be used for all three purposes. Clauses (e), (f), (g) and (i) of the inclusive portion of the definition are instances of the first; Clause (j) of the second; and, I think. Clauses (a) to (d) of the third.

A kanamdar who is included by Clause (b) would, I think, come within the body of the definition -- at any rate a kanamdar of land if not of other immovable property -- for, the essential ingredient of a Kanam, namely, a transfer for consideration for the purpose of enjoyment would straightway make the transferee, namely, the kanamdar a tenant within the body of the definition. He seems "to find place in the inclusive portion only by way of abundant caution lest the great apparent resemblance of a kanam to a mortgage and the presence of the incident of an advance secured on the property transferred, more suggestive of a mortgage than of a tenancy, should lead to the mistaken view that it is not a tenancy. It is true that a kanam being only a transfer of a specific interest in immovable property need not necessarily carry with it actual possession though in the vast majority of cases it does, but then that the word, "possess" in the definition of tenant need not necessarily mean actual possession is implied by the definition of "cultivating tenant" in Section 2(8). It would thus appear that the absence of actual possession in a particular case of a kanam would not prevent it from coming within the body of the definition of "tenant" so that it has

to depend on the inclusive portion.

15. With regard to the body of the definition of, "tenant" in Section 2(57) and the definition of rent in Section 2(49) I have this to observe. The permission implied by the word, "allowed" in the former and by the word, "permitted" in the latter, is to the initial entry on the property and all it means is that that entry was by consent. It does not mean that the continuance in possession and enjoyment is, in any sense, permissive. A tenant's possession is in his own right and is not permissive possession and it would appear that it is only the words, "the land of the latter" Occurring in the body of the definition of, "tenant" that prevents a buyer from coming within the definition. Therefore, the circumstance that a kanamdar is in possession as of right and not by permission is not a circumstance that can be depended upon to contend that he does not come within the body of the definition of, "tenant".

16. It might well be asked why if the first essential of a kanam is a transfer for enjoyment, and that would straightway, without anything more, make a kanamdar a tenant within the body of the definition in Section 2 (57), the Act should go to the trouble of giving such an elaborate definition of, "kanam" with its nonessential incidents, non-essential, that is for making a tenant of the transferee. And since the Act does not appear to treat a kanam tenant differently from other tenants it might be said that the only purpose served is the entirely gratuitous purpose of including a kanamdar within the inclusive portion of the definition of, "tenant". The answer, if I may venture one, seems to be this. If the purpose of a transfer is not discernible, but otherwise the transfer satisfies the definition of both a kanam and a mortgage, then it may be presumed that the purpose is enjoyment and that the transfer is a kanam and therefore a tenancy. But if the transfer does not satisfy the definition of, "kanam" then it may be presumed that the purpose was to secure a loan and that the transfer is a mortgage and not a tenancy.

In other words, if a transaction clearly satisfies the definition of "kanam" in all other respects and the only element remaining positively to be established is the essential element of the transfer being for the purpose of enjoyment, then, unless the contrary is shown, that element must also be regarded as satisfied and the transfer held to be a kanam. Thus, if the document evidencing the transaction calls it a kanam or kanapatlam and incident (c) of the incidents in the definition in Section 2(22) obtains, it may safely be assumed, till the contrary is shown, that the transfer is for enjoyment and that the transaction is at kanam. In the non-Malabar area, notwithstanding that the transaction is not labelled, "kanam" or, "kanapattom", it could be safely assumed that the transaction is a kanam if two of the three alternative incidents in Clause (c), namely payment of customary dues, and renewal on the expiry of a specified period, are present. Apparently the legislature insisted on the label of "kanam" or, "kanapattam" so far as the Malabar area was concerned because it thought that in that area where, for over 30 years, the rights of a kanamdar have been so different from

those of a mortgagee, parties would not ordinarily call a kanam, if that is what they intended, by any other name. But, in the non-Malabar area, where the difference between these two classes of transactions has, until recently been of no practical significance, that is possible, and hence the non-insistence on the label if the incidents of renewal and customary dues indicative of a tenure are present.

Thus the legislature seems to have negatived the extreme position canvassed from time to time (but never it would appear seriously enough to gain judicial notice) that, by reason of the Malabar Tenancy Act, there could be no possessory, mortgage in the area to which that Act applied if there was a stipulation for a periodical payment by the transferee to the transferor. The moment there was such a stipulation, the transaction ceased to be a mortgage and became a kanam tenure resumable only under certain circumstances -- the transfer of possession involving, as it does, enjoyment, must be presumed to be for that purpose. The definition of, "kanam" in Section 2(22) of Act 1 of 1964 seems to imply that such a presumption can be drawn only if the document evidencing the transaction calls it a kanam or kanapattam or, in the non-Malabar area the incidents of customary dues and renewal are both present.

17. The case on hand presents little difficulty. The counterpart, Ext. A-I dated 17-3-1948, evidencing the transfer (the original effecting of it is not before Court) runs thus according to the agreed translation furnished by the parties :

"Panayakychit dated 1123 (M. E.) Meenom 4th corresponding to 17th March 1948 executed by Nenmin Purath Kalliani Amma's son Krishnan Nair residing in Kolath Valappu amba, Anakara Amsom, Perumbalam Desom of Ponnani Taluk in favour of Perumbalath Kizhakkinyakath Manakkal Neelakantan Nam-boodiri's son, Manager, Sivaraman Nambudiri bearing Honorific of "Kandan Kotha". The five items of paddy fields described in the schedule hereto belonging to the Mana in lenm and in its possession and fetching a rent 85 paras of paddy by the 60 nazhi para, 1 bunch of bananas for Onam, 500 sheaves of straw of the 2nd crop (mundakan) which have been by document No. 6 of 1123 today given to me in mortgage with possession for Rs. 200 and as per the stipulation in the said mortgage deed, the paddy fields mentioned in the schedule shall be kept by me in my possession and out of the above rent shall be deducted 10 paras of paddy towards the interest of the mortgage amount and the balance 75 paras of paddy which is of a value of Rs. 150 at the rate of Rs. 2 as at present, along with a bunch of bananas of the value of Rs. 2, and the five hundred sheaves of straw of the value of Rs. 25 shall be delivered at the Mana every year and receipt obtained, the bunch of Bananas at the time of Onam in the month of Chingom this year, the paddy after removing the chaff in the months of Kanni and Makaram 1124 and the 500 sheaves of straw within 30th Makaram 1124- After 4th Meenom if the mortgage amount is given to me by the Mana or demanded by me I shall take it and without any demur I shall surrender the paddy fields at my expense. If I keep the Purappad in arrears I shall pay interest at the rate of two

for ten per year in the case of paddy, in the case of the bunch of bananas and sheaves of straw at the rate of 1 per hundred per month and I also undertake to compensate for any damage caused by any shifting of the boundary bunds of the paddy fields or disappearance of the survey stones by lack of attention and the mortgage amount along with any crops raised in the property shall be charged for any arrears of purappad with interest and for any damages and I hereby charge the mortgage amount as well as the crops raised in the property for the realisation of such amounts for which I shall also be personally liable if the paddy lands described in the schedule is left in my possession after 1124 Meenam 4th. I shall pay every year the purappad pattom as described above and when this mortgage amount is given to me I shall surrender possession of the paddy lands mentioned in the schedule at my expense. If after 1124 Meenom 4th I demand return of the mortgage amount and It is not returned, I shall realise the same by bringing to sale all rights of the Mana in the paddy lands described in the Schedule and mortgaged to me".

18. It will be seen that the document evidencing the transaction does not describe it as a kanom or kanapattom. Therefore the transaction does not satisfy the definition of "kanam" in the first part of Section 2(22) of the Act which part alone applies since the transaction is of the Malabar area, and, as we have already seen, Section 12 of the Act can be of no avail to show that it is in substance a kanam. But that is not an end of the matter. For, if the transfer was for the enjoyment of the land by the transferee, and the transferee has agreed to pay rent or other consideration for being allowed to possess and enjoy the land, he would come within the body of the definition of, "tenant" in Section 2(57) and would be entitled to fixity u/s 13.

19. From the very terms of the deed read in the light of the surrounding circumstances, without resort being made to Section 19 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 this 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

20. The annual rental value of the property transferred is, at the prices mentioned !n the document itself, Rs. 197/-. The sum advanced by the transferee is only Rs. 200 Out of the rent of Rs. 197, only Rs. 20 (10 paras of paddy)is to be retained by the transferee as interest on the money advanced by him, the interest working out to 10 per tent per annum-The balance of Rs. 177 is to be paid as purappad every year to the transferor so that it would appear that the advance of Rs. 200 representing roughly one year's purappad was, in truth,

by way of security for the due payment of the purappad. Having regard to the ratio that the sum of Rs. 20 deductible by way of interest on the advance, bears to the rental value of roughly Rs. 200, it would appear that the property transferred was worth at least ten times the money advanced. Indeed, it must be much more than ten times, since, while 10 per cent is a reasonable rate of interest to be charged on munpattam, the value of wet land is generally speaking more than 20 times its, annual rental value.

The transferor in this case is a Namboodiri Illom and the evidence of its Kariasthan, Pw. 1, is that the property would be sufficient security for a loan of Rs. 1,700. No one would give such excessive security, especially by way of possessory mortgage, and it seems to me obvious that the purpose of the transfer could only have been that the transferee should enjoy the property and pay rent therefor. It could not have been that the transferee should hold the property as security for money lent. That, and the deduction of interest from the rent, could only have been incidents of the transfer.

21. Resort to Section 12 of the Act would show that, notwithstanding that the document attempts to make out a loan with the security of the property for its repayment and therefore a mortgage, there was, in truth and substance, no loan and no mortgage. The transferor Illom is a very rich Illom paying, according to the evidence of Pw. 1, Rs. 2,500, a year as agricultural Income Tax and getting an income of as much as 7500 per acre of paddy per year by way of rent. It is impossible to believe that such an Illom would have been driven to the necessity of borrowing a paltry sum of Rs. 200 by executing a possessory mortgage of property worth much more than 10 times that sum, and the evidence of the manager Pw. 2, that he was borrowing small sums on the security of large extents of property to pay off the debts of the Illom of amounts between Rs. 10,000 and Rs. 15,000, is on the face of it, absurd,

His further evidence that, properties transferred at the same time to other persons on possessory mortgages were now being enjoyed by them as tenants goes to show that the transfer in this case was but one particular instance of a systematic grant of leases in the guise of mortgages. That the land transferred was right in front of the family house, that it had been previously held by the transferee's father on lease, that the transferee's father surrendered possession to the Illom and that the Illom kept the land in its own possession for two years before transferring it to the transferee, are all quite in keeping with this scheme and show that the transaction was cast in the form of a mortgage against a possible claim of fixity by the transferee, a possibility that has now materialised.

22. The first Court was right in holding that the transaction was a lease and not a mortgage and the lower appellate Court was wrong in holding that it was a mortgage. Therefore I allow this appeal, set aside the decree of the lower appellate Court, and restore that of the first Court with costs both here and in the Court below.

Raghavan, J.

23. I agree.

Nambiyar, J.

24. I too agree.