

CHERUMANALIL LAKSHMI AND ORS.

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v.

MULIVIL KUNNINAMKANDY NARAYANI AND ORS.

September 12, 1966

[K. N. WANCHOO, J. C. SHAH AND R. S. BACHAWAT, JJ.]

Kerala Land Reforms Act (1 of 1964), s. 2(23)—Malabar Land Tenures—Difference between usufructuary mortgage and kanam-kuzhikanam.

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The suits, lands, together with the fruit-bearing trees standing thereon, were demised for a period of 24 years under two documents which specified the *kanaritham* (*kanam* amount). The documents did not contain any recital that they created security for repayment of a debt nor purported to be transactions for securing debts such as a mortgage, *otti*, *panayam* or *kyyasampanayam*. The transferees were entitled to enjoy the lands with the standing trees, plant other fruit-bearing trees thereon, appropriate the income of the lands in lieu of interest on the *kanam* amounts, and to hold the lands even after the expiry of 24 years until payment of the *kanam* amounts and the value of trees planted. The documents were styled *kanam* deeds and one of them explicitly stated that the demises were in *kanam-kuzhikanam* right. Subsequent documents also all recited that the transactions were *kanam-kuzhikanam* transactions.

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HELD: The transactions were *kanam-kuzhikanam* and were not usufructuary mortgages. [316 B-C]

A *kanam-kuzhikanam* and a usufructuary mortgage have many common features. Both of them involve transfer of possession on payment of money by the transferee, set off profits against interest, and retention of possession until repayment of the money. The essential distinction between them is that the *kanam-kuzhikanam* is a lease, and is, therefore a transfer of a right to enjoy the property, whereas, a mortgage is a transfer of an interest in the property for securing the repayment of a debt. [316 B-C]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 567 of 1964.

Appeal by special leave from the judgment and decree dated June 22, 1961 of the Kerala High Court in A. S. No. 243 of 1955(M).

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H. R. Gokhale and A. G. Puddiserry, for the appellants.

P. Ram Reddy, K. P. Madhava Menon and A. V. V. Nair, for respondents Nos. 2 to 13.

The Judgment of the Court was delivered by

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Bachawat, J. The question in this appeal is whether Ex. A-1 dated March 26, 1900 and Ex. B-1 dated March 27, 1900 were *kanam-kuzhikanam* transactions, or whether they created usufructuary mortgages. The appellants sued for redemption and recovery of the suit lands alleging that Exs. A-1 and B-1 created usufructuary mortgages. The respondents claimed that they were *kanam-kuzhikanamdars* and entitled to fixity of tenure under s. 21 read with s. 3 (15) of the Malabar Tenancy Act, 1929 (Madras Act 14 of 1930). The trial Court upheld the respondents' conten-

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- A tion and dismissed the suit. On appeal, the Kerala High Court affirmed this decree. The appellants now appeal to this Court by special leave. During the pendency of this appeal, the Kerala Land Reforms Act, 1963 (Act 1 of 1964) came into force. It is common case before us that the appeal must be disposed of in accordance with the provisions of Act 1 of 1964. In this appeal, B the respondents claim that they are the holders of kanam-kuzhikanam within the meaning of s. 2(23) of this Act.

Section 13 of Act 1 of 1964 gives to every tenant fixity of tenure in respect of his holding and forbids resumption of the holding except as provided in ss. 14 to 22. Section 2 is the definition section. By s. 2(57), a tenant means any person who has paid C or has agreed to pay rent or other consideration for his being allowed by another to possess and enjoy the land of the latter and includes *inter alia* a kanam-kuzhikanamdar. Section 2(23) reads :

- D “kanam-kuzhikanam” means and includes a transfer by a landlord to another person of garden lands or of other lands or of both, with the fruit-bearing trees, if any standing thereon at the time of the transfer, for the enjoyment of those trees and for the purpose of planting such fruit-bearing trees thereon, the incidents of which transfer include

- E (a) a right in the transferee to hold the said lands liable for the consideration paid by him or due to him; which consideration is called ‘kanartham’; and

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

- F Provided that a usufructuary mortgage as defined in the Transfer of Property Act, 1882 (Central Act 4 of 1882), shall not be deemed to be a kanam-kuzhikanam;”

- G Exhibits A-1 and B-1 demised the suit lands together with the fruit-bearing coconut, arecanut and jack trees standing thereon for a period of 24 years. The transfer was for the enjoyment of the lands with the standing trees and for the purpose of planting fruit-bearing trees thereon. The kanam amount or the kanartham under Ex. A-1 was Rs. 5,000/- and under Ex. B-1 was Rs. 600/-. The transferees were entitled to appropriate the income of the lands in lieu of interest on the kanam amounts and to hold the lands even after the expiry of 24 years until payment of the kanam amounts and the value of the trees planted by them. Thus, H all the conditions of a kanam-kuzhikanam mentioned in the main part of s. 2(23) were satisfied. Nevertheless, in view of the proviso

to s. 2(23), the transactions would not be kanam-kuzhikanam if it is shown that they were by way of usufructuary mortgages as defined in s. 58(d) of the Transfer of Property Act, 1882. A kanam-kuzhikanam and a usufructuary mortgage have many common features. Both the transactions involve or may involve transfer of possession on payment of money by the transferee, set-off of profits against interest and retention of possession until repayment of the money. In spite of their close resemblance, the essential distinction between the two types of transactions must not be overlooked. A kanam-kuzhikanam is a lease, and is, therefore, a transfer of a right to enjoy the property. A mortgage is a transfer of an interest in the property for securing the repayment of a debt. The purpose of one is to enable enjoyment of the property by the transferee, that of the other is to secure the debt. On the question whether a transaction is a kanam-kuzhikanam or a usufructuary mortgage, the name given to it by the parties is a relevant, though not always a decisive, consideration. If the parties described the transaction to be a kanam-kuzhikanam it is a valuable indication that they intended it to be such and not a usufructuary mortgage. If the document purports to be a mortgage, s. 12 of the Act allows the parties to prove that it is, in substance, a kanam-kuzhikanam or other lease. But if the document purports to be or is, on its true construction, a kanam-kuzhikanam or other lease, s. 12 has no application and full effect must be given to the document according to its tenor.

Both Exs. A-1 and B-1 were styled kanam deeds. Exhibit A-1 stated that the demise was in Kettiyadakkam kanam right. "Kottiyadaki" means "took possession". The expression "kettiyadakkam kanam" may mean a usufructuary mortgage, but this is not its necessary or invariable meaning. Exhibit B-1 explained Ex. A-1. Exhibit B-1 explicitly stated that the demises under Ex. A-1 and B-1 were in kanam-kuzhikanam right. Exhibits A-1 and B-1 read together show that both the transactions were kanam-kuzhikanam. The subsequent documents, Exs. B-2, B-5, B-8, B-9, and B-10 executed between 1921 and 1944 all recited that Exs. A-1 and B-1 were kanam-kuzhikanam transactions. Exhibits A-1 and B-1 did not contain any recital showing that they created security for repayment of a debt. Significantly, the parties did not describe the transactions to be a mortgage, *otti panayam* or a *kyvasam panayam*. Instead, they described the transactions as kanam-kuzhikanam and the amounts paid to the transferees as kanartham. Exhibits A-1 and B-1 did not purport to be and were not transactions for securing debts. We agree with the Courts below that the transactions were kanam-kuzhikanam and were not usufructuary mortgages.

In the result, the appeal is dismissed with costs.

V.P.S.

Appeal dismissed.