

idichandi Mathai Vs. Narayanan Unnithan

idichandi Mathai Vs. Narayanan Unnithan

SooperKanoon Citation : sooperkanoon.com/717644

Court : Kerala

Decided On : Aug-26-1960

Reported in : AIR1962Ker27

Judge : M. Madhavan Nair, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 58

Appeal No. : S.A. No. 565 of 1956 (E)

Appellant : idichandi Mathai

Respondent : Narayanan Unnithan

Advocate for Def. : K. Velayudhan Nair and; V.S. Moothathu, Advs.

Advocate for Pet/Ap. : Joseph M. Madathil, Adv.

Disposition : Appeal dismissed

Judgement :

M. Madhavan Nair, J.

1. The 1st defendant is the appellant. The suit is for redemption of an otti and kuzhikanom executed by the predecessor-in-interest of the plaintiff in favour of the predeces-sor-in-interest of the defendants, evidenced by Ext. A dated 14-12-1080. The only contention that was urged before the trial court by the defendants was

that Ext, A was a renewal of another mortgage of 1.061 and as such the defendants are entitled to the value of improvements effected on the property since 1061. The trial court decreed the suit assessing the value of improvements as S. Rs. 3,527, chakrams 9 and cash 3. The lower appellate court affirmed that decree with only a slight modification in the value of improvements enhancing the same to Rs. 3636, chakrams 5 and cash 9. In all other respects the decree of the court below was affirmed by the first appellate court. This Second Appeal is against the latter decree.

2. The main ground urged in this appeal before me by the learned counsel for the appellant is that the plaint transaction being an otti and kuzbikanom, is either an irredeemable kanom or a lease coming within the purview of Act 1 of 4957.

3. No such contention was raised either in the trial court or in the lower appellate court. Even in the memorandum of second appeal preferred in this court there is no contention that it is a lease. A ground is taken in the memorandum of Second Appeal that the courts below erred in overlooking 'the most important point raised as to the irredeemable kanom demise of the property'. Admittedly no such plea was ever raised in the courts below and therefore this accusation of non-consideration of the 'most important joint' by the courts below is absolutely unwarranted.

4. Even on the merits, the contention advanced by the learned counsel for the appellant cannot be accepted. An 'otti' as understood in this State is an anomalous possessory mortgage, It differs from a usufructuary mortgage as defined in the Transfer of Property Act, in that the mortgagor under it is personally liable for the mortgage amount and the mortgagee is to enjoy and 'appropriate all the profits of the property, without any liability to account. The learned counsel for the appellant strenuously contended that since there is no provision for a redemption in the document it cannot be construed as a mortgage at all. The recital in the suit document is to the effect that the suit property was being conveyed to the executee as 'otti and kuzbikanom' and as consideration thereof an amount of fanams 1576 was received by the executant and that the mortgagee may enjoy the property, with right to make plantations thereon, subject to a liability to pay an

annual micihavaram of 1-3/4 fanams to the mortgagor. The very description of the transaction as an 'otti and kuzhikanom' imports re-deemability. In a mortgage transaction it is not necessary that an express provision should be made for redemption Or surrender of the property on discharge of the mortgage amount It is an essential characteristic of the very nature of the transaction itself.

5. The learned counsel for the appellant contended also that the expression, 'kuzbikanom' would indicate that the transaction is a kanom demise. The expression 'kuzbikanom' is well known in these parts. It has nothing to do with the distinction between a mortgage and a lease. The expression 'kuzhikanom' may be attached either to an 'otti' or to a lease'. It literally means the Kanom (money) for Kuzhi (digging), that is, compensation for digging and planting the land. To enable the plantations to attain a reasonable maturity a term of 12 years was popularly understood to be implied in the very expression Kuzhikanom. The appendage of the expression Kuzhikanom to a possessory mortgage or a lease therefore connoted that the tenant under that document would be entitled to hold the property for a period of 12 years and to make improvements by way of plantations thereon and to claim compensation for such improvements at redemption. The appendage of the expression tuzhikanom' to an otti (possessory) mortgage does not in any way affect the essential nature of the demise as a mortgage. I hold that an 'otti and kuzhikanom' is a mortgage, and mortgage only.

6. It was then contended that the provision in the document for payment of an annual michavaram by the mortgagee to the mortgagor indicates that the transaction is in the nature of a lease. This too cannot be accepted. It is open to a mortgagor to provide in a mortgage deed for payment of a portion of the profits of the property annually to him. The essence of an 'otti' transaction is that the mortgagee may enter possession of the property in consideration of the advance of the mortgage amount and appropriate the profits of the property in lieu of the interest on the mortgage amount. If the profits of the property are such that they would leave an excess after appropriation of a reasonable interest on the mortgage amount it is open to the mortgagor to stipulate for payment of such surplus to him. The provision for michavaram which literally means surplus rent, in a mortgage document cannot therefore be deemed to convert it into a lease. It

follows therefore that the transaction under Ext. A is neither an irredeemable kanom nor a lease. Kerala Act I of 1957 has therefore no application to this suit.

7. A further ground was taken by the learned counsel for the appellant that the compensation for improvements awarded by the courts below is too low. Apart from the slight modification made by the lower appellate court in the amount of compensation the findings on this point by the courts below are substantially concurrent. The learned counsel would contend that, in view of the long lapse of time after the assessment of compensation for the improvements by a commissioner deputed for that purpose by the trial court, the improvements must have developed considerably entitling him to a larger compensation now and as such the suit must be remanded for a reassessment of the compensation. The question whether in such circumstances a reassessment can be ordered pursuant to the provisions of the Kerala Compensation for Tenants' Improvements Act is now pending before a Full Bench of this Court. But the disposal of this case need not be delayed till the decision of that case. It would suffice the interests of justice, if I make a direction that the trial court will reassess the value of improvements if the decision of the Full Bench which is expected to come soon is to the effect that such reassessment is permissible in the circumstances. The decision in this Second Appeal will not then be construed as in any way debarring the appellant from urging his claim in accordance with the Full Bench decision.

8. Subject to the direction made above, this Second Appeal is dismissed with costs.