APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1920, August 20 and September 2.

KANDIYIL PARKUM VANIA PUTHUKKUTTI KANNA KURUP (THIRD DEFENDANT), APPELLANT,

v.

SANKARA VARMA RAJAH AVERGAL AND SEVEN OTHERS (PLAINTIFFS 1 TO 3 AND LEGAL REPRESENTATIVES OF FIRST DEFENDANT AND DEFENDANTS NOS. 2, 37, 154 AND 112), RESPONDENTS.*

Malabar Law—Kanom—Lease or mortgage—Deed of taraga, construction of—Attestation of deed, necessity for—Transfer of Property Act, sections 59 and 98—Anomalous mortgage—Civil Procedure Code (V of 1908), O. 1, rule 9—Non-joinder of parties—Decree against parties in appeal.

A kanom is an anomalous mortgage falling under section 98 of the Transfer of Property Act, with certain well-known incidents attached to it under the customary law of Malabar; and a kanom-deed, to be valid, must be attested as a mortgage-deed under section 59 of the Act.

The fact that the document is described as a taraga or royal grant or that the kanom amount is exceedingly insignificant does not alter the nature of the transaction.

SECOND APPEAL against the decree of K. V. KARUNAKARA MENON, Additional Temporary Subordinate Judge of North Malabar, in Appeal Suit No. 175 of 1919, preferred against the decree of P. M. ANANTANARAYANA AYYAR, Principal District Munsif of Badagara, in Original Suit No. 273 of 1917.

The first defendant, who was the jenmi and the Valia Rajah of Kadathnad, executed a kanom deed, dated 30th April 1904, in favour of the third defendant. Subsequently, the first defendant executed a melkanom under Exhibit B, dated 23rd June 1913, in favour of the first plaintiff. The first plaintiff granted a sub-demise to the second and third plaintiffs and the second defendant. The other defendants are sub-mortgagees and other demisees under the third defendant. The suit is to redeem and recover possession of the lands from the defendants. The plaintiffs instituted this suit on 20th July 1916 on their title as Melkanomdars, under Exhibit B. The defendants pleaded, inter alia, that Exhibit B was a mortgage and as it was not attested by

* Second Appeal No. 1478 of 1919.

witnesses, it was invalid in law, and no title could be based on it. The terms of Exhibit B were as follows:

EXHIBIT B.

Taraga executed as per orders.

No. 116 of 1888.

To Mr. Sankara Varman Tampan of Aylancheri Kovilagam of Puramsi Amsam and Desam, Kurumbranad taluk.

The shops, fairs and other portion of Badagara Kottaparamba excluding the Munsif Court, the travellers' khana and bungalow, stable and kitchen, which is the Jenm of an Kuttiprath Kovilagam and the boundaries, measurements and particulars of which are described in the subjoined schedule, (2) the portion of the land to the north-west of the Kotta, and (3) the waste land to the east of the Kotta, known as Puthiavalappa paramba, having been thus granted under a taraga, you are to have trade carried on there, and have sufficient number of trees planted on the open space, you are to enjoy the Melbhagam (the upper produce) on these properties, and exclusive of the old kanom of Rs. 3 on these items, the interest on that, the Government revenue of Rs. 5-2-0 and the Local Fund dues thereon, you are to pay 45 fanams free of revenue in respect of Kottaparamba, six fanams, etc. Fifty-two fanams equivalent to Rs. 10-6-5. This amount of Rs. 10-6-5 should be paid every year in the month of September-October at Kuttiprath Kovilagam and a receipt taken therefor. In default of paying the aforesaid revenue according to kist at the amsam and taking a receipt therefor, it should be paid with interest at the rate of 12 per cent.

Yadasth.—It is agreed that under the Marupats obtained from Kandale Pooleri Kannan as 112 of 1879 in respect of paramba item No. 1, etc., the properties are to be recovered by direct suit at Tamban's expense after paying kanom and the value of Kushikoor and Chamayams; that future porapad to be paid by Tampan and the same is to be realized from the tenants; and the taraga is this day issued accordingly.

Taraga granted by Kuttiprath Kovilagam.

The District Munsif decreed the suit in favour of the plaintiffs, directing the defendants severally to deliver possession of the lands in their possession on payment by the plaintiff of the value of improvements due to them in respect of the lands delivered by them. The third defendant preferred an Appeal to the District Court, and impleaded only defendants Nos. 1, 2, 37, 112 and 154 and the three plaintiffs as party-respondents to his Appeal. The Subordinate Judge, who heard the Appeal, confirmed the decree and dismissed the Appeal. He agreed with the Munsif in holding that the document of melcharth (Exhibit B) was an improvement lease and not a kanom-mortgage and did not require to be attested as a mortgage. The third defendant preferred this Second Appeal. The further facts and contentions are set out in the judgment of SADASIVA AYYAR, J.

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C. Madhavan Nayar for appellant.

K. P. M. Menon, C. V. Anantakrishna Ayyar and *K. Govinda Marar* for respondents.

SADASIVA AYYAR, J.—The third defendant whom I shall call the mortgagee is the appellant before us. The plaintiff is a melkanomdar and he got his melkanom from the jenmi, the first defendant, who was then the stanom-holder of a desam. The suit was for redemption of the third defendant, the mortgagee under the kanom deed Exhibit A, dated 1904, and all the sub-mortgagees and other demisees under the third defendant were also made parties. The second and third plaintiffs and the second defendant may be treated as claiming under sub-mortgages created by the plaintiff. The first Court held that the melcharth or melkanom to the first plaintiff granted by the first defendant was not a kanom, but an improvement lease and that it did not require therefore to be attested by two witnesses (as a mortgage is required to be attested by section 59 of the Transfer of Property Act). Then it found the value of improvements due to the third defendant and his sub-mortgagees and lessees and gave an elaborate decree from which I shall make the following extracts:

"This Court doth order and declare that the amount due to the third defendant on account of kanom is Rs. 1-8-0 and the value of improvements is Rs. 4,047-3-11; to the fourth defendant is Rs. 204-7-6"

and so on up to the hundred and seventh defendant; and then the decree says that

"if the plaintiffs pay into Court the amount so declared due on or before 12th February 1919, the defendants shall deliver up to the plaintiffs all documents in their possession or power relating to the mortgaged properties and shall put the plaintiffs in possession of the properties."

This decree means that each of the particular defendants mentioned in the first portion of the decree to whom a specified amount is declared to be due by the plaintiffs shall put the plaintiffs in possession of the particular properties in his possession. Then, the third defendant preferred an appeal and he made only the defendants Nos. 1, 2, 37, 112 and 154 and the three plaintiffs, party-respondents to his appeal. The main points taken by him in the appeal were (1) that the melcharth Exhibit B, in favour of the first plaintiff, was invalid for want

of proper attestation; (2) that Exhibit B was a mortgage and ought to be attested as a mortgage and not as a mere lease.

These were the two principal contentions in the Appeal before the Subordinate Judge.

The plaintiffs-respondents did not take the objection before the Subordinate Judge that the appeal was bad for non-joinder of the other defendants who had been parties in the first Court. The learned Subordinate Judge held that Exhibit B might be considered as an improvement lease and not a kanom and that therefore it did not require attestation as a mortgage and hence he dismissed the appeal.

In Second Appeal before us the same points are taken, namely, that Exhibit B was a kanom document and therefore was not properly attested and was wholly invalid; and then there is also a point taken about compensation for a well in plot B, and for tank and well in plot D. The first defendant (the stanomdar who granted the melcharth and the original kanom, Exhibit A) died after the date of the decision of the lower Appellate Court, and the third defendant brought the next stanomdar on record in this Second Appeal as the legal representative of the first defendant.

The first question for consideration is whether Exhibit A is a mortgage document and whether it ought to be attested as such to have legal validity. The plaint is worded as a suit for redemption of the kanom mortgage, and Court fees have been paid on the principal mortgage amount as in a suit for the redemption of mortgage. The document of which Exhibit A is a counter-part, and the document Exhibit B are no doubt called *Taragas or Royal grants*, but that should make no difference in their construction. What we have to look to is not the form but the substance of the documents. The contention that they are not kanoms but leases is based on the circumstance that the kanom amount is only Rs. 3 and that reference is made to the planting of trees on some vacant sites forming portions of the demised premises. Reliance is placed on two decisions of this Court in support of the above contention, and especially on *Meppatt Kunhamad* v. *Chathu Nair*(1). That was a case in which the document was described as a kanom deed, but it is also recited in the document that "kanom and kuzhikanom

(1) (1904) I.L.R. 27 Mad. 373.

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right" was granted of the Neettukotta mala (that is hill) and the grounds included therein. The amount of the kanom was only Rs. 5, and the full yearly rent was to be given to the demisor, and the demisee was asked to reclaim the aforesaid forest sites and make improvements thereon. The property demised was evidently forest jungle land, whose measurements even could not be entered in the deed. The learned judges held that the transaction must be regarded in substance as a lease having regard to the small amount of the kanom. Reliance was again placed upon *N. V. Silapani* v. *V. M. Ashtamurti Nambudri*(1). The Full Bench decision states that for purposes of limitation

"the object for which the tenure was created must be regarded." "In some cases it may be a mere lease, a sum being advanced as security for the rent or for proper cultivation to be repaid on the expiry of the term. In other cases, and *most frequently*, it is created as a lease *by way of mortgage to secure a loan advanced to the jenmi* (proprietor)."

This is a very old case decided before the Transfer of Property Act came into force. I think the principle to be deduced from the decisions pronounced after the Transfer of Property Act came into force is that a kanom partakes of the nature of a usufructuary mortgage and a lease, and that it is an anomalous mortgage falling under section 98 of the Transfer of Property Act. I do not think it either convenient or even practicable to embark in each case on an enquiry as to whether the amount advanced is so insignificant having regard to the necessities and position of the grantor of the kanom that the transaction should be viewed only as a lease and not as a mortgage. In *Gopalan Nair* v. *Kunhan Menon*(2), BENSON, J., states that where the document on the face of its recitals purports to evidence a kanom demise, it is an anomalous mortgage within the meaning of section 98 of the Transfer of Property Act "with certain well-known incidents attached to it by the customary law of Malabar." I think that this is the only safe ground on which to determine the character of such a document. If *Meppatt Kunhamad* v. *Chathu Nair*(3) (the judgment in which is very short) intended to lay down a different proposition, I respectfully dissent therefrom. Holding therefore that Exhibit B,

(1) (1880) I.L.R., 3 Mad., 382 (F.B.). (2) (1907) I.L.R., 30 Mad., 300.
(3) (1904) I.L.R., 27 Mad., 373.

the melcharth relied on by the plaintiff, is a mortgage, it requires for its legal validity to be attested in the manner provided for in section 59 of the Transfer of Property Act. On the finding that it has not been so attested, it is wholly invalid and the plaintiffs have no right to sue for redemption.

It was however contended that the Appeal by the third defendant to the lower Appellate Court ought to have been dismissed for non-joinder of most of the defendants and the Second Appeal to this Court ought also to be dismissed on the same ground. The objection as to non-joinder was not taken in the lower Appellate Court. I agree with the appellant's counsel that under Order I, rule 13, the objection not being taken at the earliest possible opportunity, namely, in the lower Appellate Court, it cannot be allowed to be taken here. Of course, if non-joinder is fatal to the consideration of a suit or appeal, say where a sharer is not joined in a partition suit, the objection will be an attack on the maintainability of the suit itself against some persons only. Also, perhaps under the old Code, whenever there is an imperative provision of law as to the necessity for the joinder of certain parties and such an imperative provision is not complied with, the suit might be liable to be wholly defeated for non-joinder of such necessary parties even though the rights as between the parties on record can be determined. Section 31 of the old Civil Procedure Code provided that no suit shall be defeated by reason of mis-joinder of parties and did not specifically provide for cases of non-joinder. Order I, rule 9, however, states that "no suit shall be defeated by reason of mis-joinder or *non-joinder* of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." Hence, though the (alleged) legal representative of the first defendant and the defendants Nos. 2, 37, 154 and 112 and the plaintiffs have alone been made respondents in this Second Appeal by the third defendant, I think that we are entitled to deal with the rights of the parties before us leaving the decrees of the lower Courts intact so far as possession is decreed to the plaintiffs of the lands in possession of those defendants who are not parties to the Second Appeal, and as regards the amounts made payable to those defendants as a condition to the plaintiffs' obtaining possession from them. On the finding, that the plaintiffs have no right to redeem the third

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defendant, I would modify the decrees of the lower Courts by dismissing the suit so far as the redemption of the properties in possession of the defendants Nos. 3, 37, 154 and 112 is concerned.

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As regards the first defendant's alleged legal representative, who is the fourth respondent before us, I would declare that the question whether he is liable under any transaction entered into by his predecessor in the stanom is not determined, nor his rights to question any such transaction affected by his having been made a party to this Second Appeal or by anything which has occurred in this litigation.

The parties to this Second Appeal will bear their respective costs of this Second Appeal. On the question of the nature of a kanom, I shall add the following observations. I have no doubt that in very old times a Malabar Jenmi (who was originally of course a Numbudri Brahman) would consider himself to be insulted if he was considered a borrower who was under a necessity to resort to a creditor and to give security for the loan wanted, simply because he graciously accepted a kanom perquisite from a non-Brahman dependent of his and allowed him to enjoy his land as a kanomdar (the etymology of the word "Kanom" is interesting in this connexion). But it is too late to decide such questions on such ancient history, and I think a kanom ought to be treated by Courts in modern days always as a mortgage of land secured for the amount borrowed, however small it may be.

NAPIER, J.

NAPIER, J.—I agree. I wish to add only a few words on the question of the construction of this document. The proposition contended for by Mr. Anantakrishna Ayyar, that the Court should in every case examine the terms of the document and the surrounding circumstances for the purpose of ascertaining whether the transaction is a mortgage or a lease, is certainly attractive. But I agree with my learned brother that it would lead the Court into inquiries which might in many cases be perfectly fruitless and introduce an element of uncertainty as to the effect of these documents. It is most important to my mind that people who are in the habit of executing these documents should be thoroughly assured of the results of the transactions which they enter into, and I cannot imagine anything more dangerous than a feeling that many years after their execution

Courts might be led into an inquiry for the purpose of determining whether the document was a mortgage or a lease. It may be that the decisions of this Court compel us to hold that, where the transaction has reference to the reclaiming of absolutely waste land and the amount of the kanom is very small, we are compelled to hold that the transaction is a lease. I express no final opinion on that point. But I am clear that where such a condition does not exist it is advisable that a rigid and standard rule should be enunciated for the guidance of persons who wish to put their transactions in this form, that such documents are mortgages. With regard to the present case no inference can be drawn from the fact that the document was intentionally not witnessed, because it appears that this style of expression is due not to any doubt as to the necessity of witnessing, but to some absurd pretentions to semi-royal prerogatives which cannot of course be allowed to derogate from the provisions of statutes and should, I think, be now recognized by such persons to be out of date.

I entirely agree with my learned brother in his decision on the other points raised.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Odgers.

KALINADHABHOTLA BRAHMAYYA (FIRST DEFENDANT), APPELLANT,

v.

MARLA APPAYYA SASTRI, MINOR BY GUARDIAN VENKATARATNAM AND TWO OTHERS (PLAINTIFFS AND SECOND DEFENDANT), RESPONDENTS.*

1920, October 6.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 90 and 92, cl. (3)—Application to set aside sale for material irregularity or fraud, dismissed as barred—Sale confirmed prior to application—Suit to set aside sale on same grounds, whether maintainable.

Where a judgment-debtor failed to file an application to set aside the sale under Order XXI, rule 90, Civil Procedure Code, within the time allowed by

* Civil Miscellaneous Appeal No. 65 of 1920.