

(1921) 04 CAL CK 0008
In the Calcutta High Court

Madhab Charan Das and Another

APPELLANT

Vs

Rajani Mohon Das and Others

RESPONDENT

Date of Decision : 11-04-1921

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : 64 Ind. Cas. 583

Hon'ble Judges : Panton, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. The question involved in this case is whether the transaction between the parties was a sale out and out with a condition for re purchase, or a mortgage by conditional sale.

2. It appears that two brothers, Ram Govinda and Krishna Govinda, had each 8 annas share in certain properties, and each of them was indebted to one Labanya to the extent of Rs. 200. Ram Govinda executed a kobala in favour of Labanya in respect of his 8-annas share. Krishna Govinda similarly executed a kobala in respect of his 8-annas share to the latter. Subsequently Labanya's mother sold the entire 16 annas property to the predecessor of the defendant in 1294 under Exhibit 2, and there the vendor described the purchase of Labanya as being under a kat. The defendant also obtained conveyance from Krishna Govinda of the equity of redemption with regard to his 8-annas share. Having regard to these and other circumstances which will be presently noticed, the Court below came to the conclusion that the transaction was mortgage by conditional sale.

3. It has been contended before us on behalf of the appellant that the facts and circumstances stated above are not admissible in evidence u/s 92 of the Indian Evidence Act, more specially as the purchase of the equity of redemption by Labanya relates to the share of Krishna Gobinda and has nothing to do with the share of Ram Gobinda which is sought to be redeemed in this case. Reliance is placed upon the case of Maung Kyin v. Ma Shwe La 42 Ind. Cas. 642 : 45 C. 320 : 15 A.L.J. 825 : 83 M.L.J. 648 : 3 P.L.W. 185 : 6 L.W. 777 : 22 C. W.N.

257 : 23 M.L.I. 36 : 27 C.L.J. 175 : 20 Bom. L.R. 278 : (1918) M.W.N. 300 : 9 L.B.R. 114 : 11 Bur. L.T. 21 : 44 I.A. 236 (P.C.) (same case in ILR Cal. 320. It was held that Section 92 of the Evidence Act was not applicable to that case at all, because the section had application only as between the parties to the contract, and secondly, that evidence was admissible in that case under the first proviso, i.e., on the ground of fraud. There is an expression of opinion, however, in the judgment that as between the parties, Section 92, subject to its provisos, precludes the reception of any evidence relating to the acts and conduct of the parties.

4. But apart from the evidence referred to above, there are other circumstances bearing upon the question of the nature of the transaction. It is found that the price mentioned in the kobala was inadequate. It appears that no immediate possession was delivered to the vendee: that possession was delivered several years afterwards; and lastly that the stipulated period for payment was a term of 10 years. Ordinarily such a long term implies mortgage or security for loan.

5. Then it is clear from the document that it does not contain any condition for re-conveyance, it being only stated that on payment of the money the vendee will give up possession and return the deed.

6. The question whether the transaction was a mere mortgage in the form of sale must depend upon the intention of the parties which may be found in the deed itself, or gathered from the circumstances attending the transaction in each case.

7. We think, having regard to the circumstances mentioned above, that the Courts below are right in holding that the transaction amounted to a mortgage by conditional sale.

8. The appeal is accordingly dismissed with costs.