

(1913) 05 CAL CK 0013
In the Calcutta High Court
Case No : Lellers Patent Appeal No. 43 of 1910

Shazadi Bibi

APPELLANT

Vs

Sheikh Jamal and others

RESPONDENT

Date of Decision : 28-05-1913

Acts Referred:

Citation : (1913) 05 CAL CK 0013

Final Decision : Dismissed

Judgement

Jenkins, C.J.—This case comes before us by way of appeal from a judgment of Mr. Justice Digambar Chatterjee who has restored the decree of the Munsif reversing that of the Subordinate Judge. The suit is one for redemption and is based on a transaction of the 17th Asar 1283. Both the lower Courts considered the transaction to be a mortgage, and the only reason why the lower Appellate Court withheld relief was that it considered that there was the bar of limitation. Mr. Justice Chatterjee too considered the transaction to be a mortgage. The argument before us has been that it was not open to him to regard the transaction as a mortgage. I designedly use the word transaction because that with which we have to deal is not contained in one document but in two, and what we have to consider, in the circumstances, is, whether there is anything in sec. 92 of the Evidence Act or in *Balkishen v. Legge* I. L. R. 22 All. 149 (1899),—which is an opposition of that section—that would compel us to hold that the decision of Mr. Justice Chatterjee is erroneous. We would certainly not willingly infringe the provisions of sec. 92 or fail to follow what was laid down by Lord Davey in *Balkishen Das* case I. L. R. 22 All. 149 (1899) and in order to be sure as to this we have listened with all possible attention to the argument that has been addressed to us. A great deal of that argument has been directed to showing that *Balkishen Das* case I. L. R. 22 All. 149 (1899) has been differently regarded in different Courts, and while there is a strong tendency in one direction in the Courts of Bombay and Madras, there is a current, perhaps a sluggish one, in the other decision in Calcutta But it appears to me that all these authorities to which allusion has been made are beside the point in this case, for

I cannot find that the learned Judge of this Court has relied on any evidence of oral agreement or statement or of intention, with a view to coming to the conclusion at which he arrived. He took the transaction as it is expressed in the documents. He also took into consideration those facts which may legitimately be proved with a view to showing in what manner the language of the documents was related to the existing facts, and on a consideration of all those facts he has come to the conclusion, as did the two lower Courts, that the transaction really was a mortgage. It has been urged against this that the transaction on the face of it was an out-and-out sale. This is not so: on the face of it, what I would call the principal document is expressed in qualified terms, and it is only open to the suggestion that it is an out-and-out sale, if and so far as it can be said that the express terms of the deed must be disregarded in obedience to the rule against perpetuities. The principal document is expressed to be a qualified transfer: it is accompanied by a further document which throws considerable light on the nature and purpose of that qualification, and in the document we have facts which justified the Court in holding that without reference to any oral agreement or oral statement the transaction was a mortgage and not a sale. In saying this, I do not forget that the learned Judge referred to the contrast between what he took to be the value of the property and the consideration that passed in money, but in so doing he was not infringing the provisions of sec. 92 or disregarding anything that was laid down in *Balkishen Das's* case I. L. R. 22 All. 149 (1809). On the contrary, at p. 161 in the report of that case, it appears that there, too, there was evidence which pointed to a contrast between the value of the property and the consideration that passed. It is true that their Lordships did not place much reliance on that: but it was not suggested that it was evidence which was legitimately a matter for consideration within the provisions of sec. 92. The conclusion, then, to which I come is that I do not think we can hold that there were not legitimate materials on which Mr. Justice Chatterjee in agreement with the Courts below, was entitled to say that the transaction was a mortgage. The further points that were urged before us necessarily fail as a result of that conclusion. One of them was that the rule against perpetuities stood in the way of the Plaintiffs' redemption: but a mortgagor's right of redemption is exempt from the operation of that rule. Similarly the omission of the word "assigns" in the principal document does not appear to me to have any force when it is established that the transaction was a mortgage.

2. For these reasons I think; the judgment of Mr. Justice Chatterjee should be affirmed and this Appeal dismissed with costs.

Mookerjee, J.

I agree.