

**(1932) 02 AHC CK 0006****Allahabad High Court****Case No:** None

Mohammad Ahmad Saeed Khan

APPELLANT

Vs

Kishori Lal and Another

RESPONDENT

**Date of Decision:** Feb. 18, 1932**Citation:** AIR 1932 All 375**Hon'ble Judges:** Sulaiman, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

Sulaiman, J.

This is a defendant's appeal arising out of a suit for sale on the basis of a mortgage deed dated 13th April 1923 executed by the defendant in favour of the plaintiffs. It appears that by the year 1922 the defendant was indebted to various creditors to the extent of about Rs. 52,000. On 1st October 1922 he executed a deed of wakf which was a settlement in favour of his descendants, but made provision for the payment of the outstanding debts. The wakif laid down that he would discharge his previous liability, and reserved the right to transfer a part of the dedicated property in order to pay off the previous debts, if he was not able to discharge them otherwise. Such a power was expressly reserved in Clause 8(2) of the deed. Apparently he was not able to pay off the previous debts, and accordingly executed the mortgage deed in suit with a view to satisfy those debts. It is to be conceded that there was no fresh advance made by the mortgagees, but the deed was executed in order to pay off the previous debts, the payment of which had been provided for in the deed of wakf.

2. Under this deed of mortgage the mortgagor undertook to pay to the creditors the entire mortgage money on demand with interest at the rate of 10 annas 6 pies per cent per mensem. It was further provided that interest would be paid by him half yearly, but if there was default, it would be added, to the principal and would itself carry interest.

3. The claim was resisted on two grounds only. First, that in view of the previous dedication, the mortgage deed was not valid. Secondly, that there was a private agreement between the parties that the mortgage would be a usufructuary mortgage and not a simple mortgage.

4. There is obviously no force in the first contention. The wakif expressly reserved to himself the right to transfer the property in order to pay off the previous debts, and it was merely in exercise of that power that he mortgaged a part of the wakf property. We can see no ground for holding that the mortgage deed was invalid.

5. The second contention amounts to a plea that although, according to the terms of the registered mortgage deed, the whole of the mortgage money was payable on demand with interest, there was a contemporaneous oral agreement between the parties that the amount would not be payable on demand, but shall be accepted in instalments. The learned Subordinate Judge has rightly held that the defendant cannot be allowed to prove any such contemporaneous oral agreement.

6. The learned advocate for the defendant puts forward two grounds on which such evidence, according to him, would have been admissible. He first urges that it is open to a party to prove the subsequent conduct of the opposite party, and Section 92, Evidence Act, does not prevent such evidence. But subsequent conduct can only be circumstantial evidence of some fact which he wants to prove. The fact which he wants to prove is that of an alleged contemporaneous agreement and not a subsequent oral agreement.

7. The second ground urged is that such evidence comes within the scope of Prov. 3, Section 92. It must however be noted that the plea is not that the mortgage transaction itself was to be wholly inoperative and ineffective, unless a condition precedent was fulfilled; but the plea is that one of its terms was modified by the oral agreement entered into between the parties. The case therefore does not fall under Prov. 3, nor does it fall under Prov. 4, because it is not a case of a subsequent oral agreement. Even if it had fallen under Prov. 4, the fact that the terms were entered in a registered document would preclude the defendant from proving a subsequent oral agreement. In our opinion, the case is covered by the express provisions of the substantive part of Section 92, under which it is not open to a party to a written contract to lead evidence to prove any oral agreement for the purpose of varying, adding to or subtracting from its terms.

8. The learned Subordinate Judge therefore was perfectly justified in refusing to admit evidence of this sort. The defence accordingly fails, and the appeal is dismissed with costs. We however extend the time for payment by six months.