

**(1901) 12 CAL CK 0001**

**Calcutta High Court**

**Case No:** Appeals from Appellate Decrees Nos. 139 and 140 of 1899

Modhu Sudan Das

APPELLANT

Vs

Rhidoy Moni Baistabi

RESPONDENT

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**Date of Decision:** Dec. 18, 1901

**Final Decision:** Dismissed

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### **Judgement**

1. The Plaintiff in this suit sold a certain area of land to the Defendant by a deed, dated the 27th January 1886. On the same date, the Defendant executed an agreement promising to reconvey the land to the Plaintiff, if the latter repaid the amount of the purchase-money with 12 per cent, interest within the period of three years. This suit was instituted on the 21st July 1897. The Plaintiff seeks in it to have the land reconveyed to him, though the period of three years has long expired, on the ground that the deed of sale was not a deed of absolute sale but a deed of conditional sale and mortgage.

2. The Subordinate Judge has laid down the law very correctly. He has enumerated the criteria by which in cases of this nature it is to be decided whether a deed is one of sale or of mortgage. He points out that nearly all the indicia are in favour of the inference that the deed was one of absolute sale and only one is in favour of the contrary conclusion. He finds (1) that the price paid was a fair and proper price for the land : (2) that the Defendant was let into immediate possession : (3) that the Defendant received the entire profits for her own benefit : (4) that the cost of preparing the deed was borne by the Defendant : (5) that there is no provision in the deed, giving the Defendant power to recover the sum named as the price for the repurchase, and (3) that the period stipulated for a repayment was a short one, viz., three years. The only stipulation that favours the conclusion that the deed is one of mortgage is that contained in the clause providing for the payment of interest on repayment.

3. In these circumstances the Subordinate Judge has decided that the deed was a deed of absolute sale.

4. The learned pleader for the Appellant contends in the first place that the Subordinate Judge has drawn a wrong inference on this point. He urges that he has not given sufficient weight to the fact that interest was payable on repayment of the purchase-money, which shows he says that the relation between the parties was one of debtor and creditor. He cites the cases of Bhagwan Sahai v. Bhagwan Din I. L. R. 12 All. 387 (1890), Ali Ahmad v. Bahamtullah I. L. R. 14 All. 195 (1892) and Bai Motivahu v. Mannu Bai I. L. R. 21 Bom. 709 (1897) in support of his contention.

5. We are, however, unable to see that the Subordinate Judge has not drawn a proper inference from the terms of the deed and the facts of the case. As he has pointed out, the majority of the criteria by which it is usually decided whether a deed is one of absolute sale or of mortgage are in favour of the conclusion he has arrived at. Only one is against it. As far as we can see, it is nowhere laid down that when interest is payable on the repayment of the purchase-money, then the transaction is necessarily one not of sale but of mortgage. And the Subordinate Judge has explained why in his opinion interest was made payable in this case, viz., that the Defendant's daughter was the mistress of the Plaintiff, and so the father agreed to allow the Defendant interest on repayment, notwithstanding the fact that the Defendant was put in possession of the property. The learned pleader for the Appellant admits that the relations which previously existed between the Plaintiff and the Defendant's daughter have been broken off. This seems to afford an explanation why this suit has been instituted so long after the expiry of the period within which repayment might have been made. However this may be, the cases cited by the learned pleader for the Appellant do not help him. On the contrary, the first of the abovementioned cases would seem to be against him, for in the judgment in this case it is said :--"It does seem contrary to all principles of equity and good conscience that when it was stipulated that the money should be repaid within the period of the term years from 1835 the representatives of the vendors could lie by until the year 1884 and then claim that they had a right which was not barred by limitation to redeem that which they call a mortgage at any time within the period of 60 years." The other cases only lay down that a stipulation regarding the payment of interest is material as tending to shew that a transaction is not a sale but a mortgage. But they do not establish that such a stipulation in a deed is conclusive.

6. The learned pleader for the Appellant further urges that the Subordinate Judge has arrived at his finding that the price was a fair one in a wrong way. There are two deeds in the present and its analogous appeal. In one of the deeds the consideration is Rs. 163-8 ans. odd. In the other, the price of the other half of the same property is Rs. 408-7 ans. odd. The Subordinate Judge explains that "the latter consideration was formed of a previous debt which was really due by both the Plaintiffs to the Defendant, but which was included in the kobala of Plaintiff Modhu Sudan, because the mortgage deed which secured that debt was executed by Modhu Sudan above." The pleader for the Appellant objects that the Subordinate

Judge was not justified in admitting evidence to contradict the terms of the deed. We do not think he has done so. He has only admitted evidence which explains why the terms of the two deeds are apparently inconsistent and why the consideration of one deed is apparently inadequate but really is not so. We accordingly see no reason to interfere with the lower Court's judgment. We dismiss the appeal No. 139 of 1899 with costs. For the same reason we dismiss the analogous appeal No. 140 of 1899 with costs.