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ROWE & CO. v. TAN THEAN TAIK.

LENTAIGNE, J.

the plaintiff from commencing can technically be described as a suit. If the plaint had specifically alleged that the defendant was an undischarged insolvent, and that the suit related to a debt provable in the insolvency, I think that it would have been the duty of the Court to reject the plaint under Order II, Rule 11, as a suit barred by the provisions of the Insolvency law.

As the plaintiff has been granted permission to withdraw, I think that it will be sufficient if I pass an order rejecting the plaint. I direct that the plaintiff shall pay the defendant a fee of five gold mohurs as the condition of the withdrawal.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Bagnley.

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Aug. 11.

MA HTAY
v.
U THA HLINE.*

Gift of immoveable property—Transfer of Property Act (IV of 1882), section 123, equitable relief from—Buddhist Law—Partition on re-marriage of father—Suit for declaratory decree—Fraudulent suit—Discretion of Court—Specific Relief Act (I of 1877), section 42.

Where immoveable property was transferred with possession orally as a gift and the donor had allowed the donees in possession to deal with it as their absolute property such as mortgaging it, re-mortgaging it and purchasing other properties with the proceeds of the mortgages, *held* that the donor should not be allowed to take advantage of the provisions of the Transfer of Property Act, as to permit him to do so would be to permit the Act to be used to perpetrate a fraud.

Held also, that on the re-marriage of a Burmese Buddhist father, it is open to him to satisfy the claims of his children by the first marriage at once and to effect a partition of his properties so that the children of the first marriage may have no claim to inherit on his death.

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* Civil First Appeal No. 166 of 1923 against the judgment and decree of the District Court of Hanthawaddy passed in its Civil Regular Suit No. 49 of 1922.

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Held further, that the grant of a declaratory decree is discretionary and the Court should exercise its discretion against a plaintiff whose intention is clearly fraudulent.

This was a first appeal against the judgment and decree of the District Court of Hanthawaddy (A. G. Mosely, Esq., I.C.S.) passed in the Respondent U Tha Hline's suit for relief under the provisions of section 42 of the Specific Relief Act. The learned District Judge held that the transfer by U Tha Hline of certain lands by way of a gift to the children of his first marriage was invalid inasmuch as the provisions of section 123 of the Transfer of Property Act had not been complied with and that therefore U Tha Hline was entitled to take back the lands. The learned District Judge holding that U Tha Hline's object in instituting the suit was clearly fraudulent, gave him the decree prayed for but without costs and at the same time ordered him to pay the Defendant-Appellant's costs. Both parties therefore appealed to the High Court with the result reported below.

M.P.L.M.P. Chetty firm v. *Ma Ngwe Sin*, 1 Ran. 665—*referred to.*

Dantra—for the Appellant.

E Maung for *Kyaw Din*—for the Respondent.

ROBINSON, C.J., and BAGULEY, J.—The respondent, U Tha Hline, was twice married. By his first wife, Ma Ein Gywe, who died in 1270 B.E., he had two sons and three daughters. The appellant is the widow of his younger son by Ma Ein Gywe. By his second marriage U Tha Hline had four children. After his second marriage, he began to partition his property, which consisted of about 700 acres of paddy land, between the children of the two marriages. He began by making over possession of 201 acres to the five children of

Ma Ein Gywe. No document was executed, but they were put into possession, and he had mutation effected in their names. It is noted that the transfer was by way of inheritance. Later, he transferred 288 acres to these five children by registered deed, and, finally, he transferred the balance of his lands to the children of the second marriage.

It is not denied that the 201 acres were mortgaged by the children to a Chetty with the knowledge of U Tha Hline. The five children had executed a power of attorney in favour of the eldest son, Tha Dun E, and he managed these lands, which were still held jointly, on behalf of all of them. When the 288 acres were transferred, two Chetties were present, and, on the same day, mortgages of both sets of lands were executed, the money being used to redeem the prior mortgage on the 201 acres, and the balance used in buying other lands. There is no doubt that U Tha Hline was aware of these facts.

Tha Dun E managed the lands for some time, and then, after San Shwe's death, disputes arose between his widow, Ma Htay, and the other heirs. She brought a suit for partition and for accounts. By consent of all the parties, a decree for partition and for accounts was passed, and a Commissioner appointed to take the accounts.

During the course of the proceedings before the Commissioner, U Tha Hline gave evidence on behalf of Tha Dun E. After the first day of his examination he says that he was advised that the gift of the 201 acres being invalid, because there was no registered deed, he could take back these lands, and that he decided to do so. He says that Tha Dun E gave him possession, and that he, therefore, brings the present suit for a bare declaration that he is the

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sole owner against Ma Htay and does not implead the other four children.

There can be no question whatever that this action was taken for the benefit of his children against his daughter-in-law, who had quarrelled with them.

The learned District Judge has granted him a decree with a considerable amount of reluctance, and he has, in view of his conduct, deprived him of his costs, and directed that he do pay Ma Htay's costs, although she had lost the suit. Ma Htay appeals, and there is a cross-appeal on the question of costs.

It has been held that the transfer of the 201 acres was by way of a gift; that it was invalid; that, therefore, U Tha Hline was entitled to take back the lands, and that he was entitled to the declaration he sought.

In our opinion, this view is wrong. There is no doubt that, on a second marriage, it is open to the father to satisfy the claims of his children by the first marriage at once, and that the transfer of these lands was not by way of gift, but was, in part, effecting a partition of his properties, so that the children of the first marriage should have no claim to inherit on his death. It was done to avoid disputes and litigation hereafter; it was not a mere gift, but was by way of partition.

If that be the correct view to take, no registered deed was required to transfer this property. U Tha Hline did all that was necessary; he gave possession; he effected mutation; and he recorded that the transfer was by way of inheritance. Moreover, he was fully aware that his children were dealing with the property as if it was their absolute property. He allowed them to mortgage it; he allowed them to re-mortgage it; he allowed them to purchase other properties with the proceeds of the mortgages, and

to recognize that, after all this, he should be allowed to take advantage of the provisions of the Transfer of Property Act, admittedly to defeat the just claims of Ma Htay, because she had fallen out with her brothers and sisters-in-law, would be to permit the Act to be used to perpetrate a fraud in a manner which could not be recognized.

It was held by our brother May Oung in *M.P.L.M.P. Chetty* v. *Ma Ngwe Sin*, (1) that equity would not allow the provisions of the Act to be invoked to enable fraud to be committed. But a further question arises, namely, whether, as a matter of fact, U Tha Hline was, at the time of suit, in possession of these lands, so as to permit of his bringing a suit for a bare declaration, without any prayer for possession. There is, as to this, but his own bare word, coupled with a half-hearted admission to that effect by Tha Dun E, his eldest son. U Tha Hline was aware of the previous suit; he was aware that his children had consented to a preliminary decree being passed, and it was only when it was seen that the taking of the accounts might be very much against the children that he suddenly conceived the idea of taking back these lands, putting forward his present pleas, in order to save the necessity for paying Court Fees.

Tha Dun E is supposed to have given him possession. It is clear that, if any such possession was given, it was done without notice to Ma Htay and in fraud of her rights by the person who was her attorney to look after and manage these lands. Tha Dun E in his evidence states that he has been managing these lands for the last three years, including the present year, that is 1923, for his five

(1) (1923) Indian Law Reports, I Rangoon, 665.

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brothers and sisters. He states that he had engaged coolies for the current year. He was examined in May, and these coolies must have been engaged for the year 1923-24. After saying this, he adds that he had engaged the coolies for the four of them, excluding Ma Htay.

The statement that he had made over possession to his father comes in at the very end of his evidence. He says that he did so in 1284, which is certainly not true; that he did so for himself and his three brothers and sisters; and that he did not inform Ma Htay or obtain her consent.

On this evidence, it is clear that there is every reason to believe that no possession was given to U Tha Hline; that, therefore, his suit for a bare declaration would not lie; and that his suit should have been dismissed.

The grant of a declaratory decree is discretionary, and there is ample reason in this case for that discretion having been exercised against U Tha Hline. The whole suit is clearly fraudulent.

The appeal will, therefore, be accepted, and the suit dismissed with costs throughout.

The order as to costs made by the learned District Judge will stand, and we allow, as advocate's fees in this Court, twenty gold mohurs.

The cross-appeal as to costs is dismissed.