

APPELLATE CIVIL.

Before Mr. Justice Lenhaiguc, and Mr. Justice Carr.

MAUNG TUN YA

v.

MAUNG AUNG DUN AND ONE.*

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Apl. 11.

Suit for possession by legal owner—Plea of being put in possession as the result of a usufructuary mortgage, invalid for want of registration—Equitable doctrine of part performance—Purchaser of a part from the legal owner—Severance of the equity of redemption.

Held, that where the defendant had been put in possession of land as the result of a usufructuary mortgage, invalid for want of registration, he was in equity entitled to retain possession of the land until his debt has been repaid.

Held further, that where the plaintiff under the above circumstances, relied solely on his title and had not offered to repay the money, his suit should not be dismissed but a decree for possession on repayment should be passed.

Held also, that the purchaser of a portion of the land so put in possession of the defendant can obtain the area bought by him on repayment of a proportionate amount of the debt, and that the technical rules of severance of the equity of redemption do not apply to him.

Ma Hwe v. Maung Lun, 8 L.B.R., 334, *Royzuddi Sheik v. Kali Nath Mookerjee*, 33 Cal., 985—*referred to*.

Appana v. Chinnavadu, 36 M.W.N., 825; *Ashton v. Corrigan*, (1871) 13 Eq., 76; *Hermann v. Hodges*, (1873) 16 Eq., 18; *Holkar v. Dadabhoy*, 14 Bom., 353; *M. P. Currie v. M. Chatty*, 11 W.R., 520; *Maung Myat Tha Zan v. Ma Dun*, 2 Kan., 285; *Sreenath Roy v. Kally Dass Ghose*, 5 Cal., 82; *Taylor v. Eckerstey*, (1876) 2 Ch., 302—*followed*.

Bon Lon v. Po Lu, 8 L.B.R., 553; *Collector of Mirzapur v. Bhagwan Prasad*, 35 All., 164; *Debendra Chandra Roy v. Behari Lal Mukerjee*, 16 C.W.N., 1075; *Nabin Chaud Nasker v. Raj Coomar Sarkar*, 9 C.W.N., 1001; *Param Hans v. Randhir Singh*, 38 All., 461; *Samoo Patter v. Abdul Sammad Sahib*, 31 Mad., 337—*distinguished*.

Villa—for the Appellant.

Thein Maung—for the Respondents.

CARR, J.—This is an appeal under section 13 of the Letters Patent of this Court. The facts involved are as follows :—

Maung Tun Myaing and Maung Po Yun took a loan of over Rs. 200 from the respondent, Maung Aung Dun,

* Letters Patent Appeal No. 54 of 1923 against the decree of this Court in Special Civil Second Appeal No. 121 of 1922.

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and handed over the land in suit as security therefor, by way of usufructuary mortgage. But no registered deed was executed and there was therefore no valid mortgage.

Subsequently Tun Myaing and Po Yun agreed to sell the land to the appellant, Tun Ya, for Rs. 292. The money was paid. Subsequently Tun Myaing and Po Yun failed to complete the transaction and in Suit No. 29 of 1921 of the Township Court of Shwedaung Tun Ya sued for specific performance of the agreement. The suit was instituted on the 4th March, 1921, and was dismissed on the 3rd May. On appeal to the District Court the decision was reversed and a decree for specific performance was granted to Tun Ya on the 21st June, 1921.

On the 18th July, 1921, Tun Myaing alone executed a registered mortgage deed in favour of Aung Dun for Rs. 300.

On the 3rd September, 1921, both Tun Myaing and Po Yun executed a registered conveyance in favour of Tun Ya in compliance with the decree of the District Court.

Tun Ya then instituted the present suit to recover possession of the land from Aung Dun and Ma Min Si.

From the proceedings in Suit No. 29 it is clear that Tun Ya was aware of the transaction between his vendors and Aung Dun and that Aung Dun was also aware of their transaction with Tun Ya. In fact Tun Myaing after receiving the money from Tun Ya went and offered to redeem the land from Aung Dun but Aung Dun would not accept unless certain sums subsequently borrowed from him were repaid as well as the original mortgage debt.

When the present suit came up for framing of issues the plaintiff, Tun Ya, was questioned. He said

"Defendant Ko Aung Dun was working the land before I bought it. The owner, Maung Tun Myaing, told me that he had mortgaged it with Maung Aung Dun when he sold it to me."

On this the Township Judge dismissed the suit. He seems to have held that the registered mortgage was valid. He held that the plaintiff had acquired nothing more than the right to redeem the land from Aung Dun.

On appeal the District Judge held, rightly I think, that the registered mortgage was not effective as against the plaintiff. He accordingly gave the plaintiff a decree for possession. He does not appear to have considered the effect of the first unregistered transaction between Tun Myaing and Po Yun on the one part and Aung Dun on the other.

On second appeal to this Court the learned Judge held that the appellants (Aung Dun and Ma Min Si) had a charge on the land and that Tun Ya was not entitled to recover possession without paying off the debt. He accordingly set aside the judgment and decree of the District Court and restored those of the Township Court. He has certified the case as a fit one for appeal.

As I have already said I think that in the circumstances disclosed Aung Dun's registered mortgage cannot be held good as against the appellant. The sole question therefore is what is the effect of the oral mortgage.

In *Bon Lon v. Po Lu* (1), Maung Kin, J., held that a transaction similar to this one did not create a charge. He found on the facts that there was clearly a usufructuary mortgage which was invalid for want of a registered deed. It may be noted also

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that that case differed from the present one in that the mortgagee sued for a mortgage decree. The Judge quoted a number of decisions of the Calcutta, Madras and Bombay High Courts to this effect. These I do not propose to recapitulate. There are also the following cases :—

Nabin Chand Naskar v. Raj Coomar Sarkar (2) ;
Debendra Chandra Roy v. Behari Lal Mukerjee (3) ;
Samoo Patter v. Abdul Sammad Saheb (4) ;
Collector of Mirzapur v. Bhagwan Prasad (5) ;
Param Hans v. Randhir Singh (6).

In all these cases the same view was held. They were all cases in which there was a registered mortgage deed which was invalid for want of due attestation. But they were also all cases of simple mortgages on which the mortgagees sued for mortgage decrees. Thus there had been no delivery of possession to the mortgagee.

In *Ma Htwe v. Maung Lun* (7), a full bench of the Chief Court of Lower Burma held that a plaintiff suing to redeem an oral usufructuary mortgage could not be allowed to prove the mortgage and must therefore fail. It was suggested (page 335) that had she sued for possession on her title only she might have been entitled to a decree without paying anything. The point, however, did not arise and was not decided.

Against this there is the case of *Appana v. Chinnavadu* (8) in which two Judges of the Madras High Court (a third Judge *dissenting*) held that a suit to redeem a usufructuary mortgage is in substance a suit for possession. The effect of this decision is that a plaintiff can sue to redeem an unregistered usufructuary mortgage.

(2) (1905) 9 C.W.N., 1001.

(5) (1913) 35 All., 164.

(3) (1912) 16 C.W.N., 1075.

(6) (1916) 38 All., 461.

(4) (1908) 31 Mad., 337.

(7) (1916) 8 L.B.R., 334.

(8) (1923) 36 Mad. W. N., 825.

And this view seems to receive support from the doctrine of part performance which in its application to sales has now been universally accepted in India as enabling a purchaser in possession under an invalid sale to resist a suit for possession by his vendor. This has very recently been discussed and accepted by this Court in *Maung Myat Tha Zan v. Ma Dun* (9) and it is not necessary to go through it again.

In this connection I would refer to *Royzuddin Sheik v. Kali Nath Mookerji* (10), which was quoted by Maung Kin, J., where Mookerjee, J., said: "It is an established doctrine that equity will not contravene the positive enactments or requirements of law, and defeat its policy by supplying, under the guise of amending defective instruments, those deficient elements of form without which the agreement is absolutely void, even as between the parties to it." This dictum I am unable to reconcile with the application of the doctrine of part performance referred to above. But that application is now firmly established and if the doctrine of part performance is applicable to sales I can see no reason why it should not be equally applicable to usufructuary mortgages. If it is so applicable then it would seem that a mortgagee in possession under an invalid mortgage is entitled to retain possession until the mortgage debt is paid off. He can therefore resist a suit for possession, based merely on title, by his mortgagor. But if the mortgagor sues to recover possession offering to repay the debt then he is suing to redeem an invalid mortgage and on the authority of *Ma Htwe's* case (7) he must fail. The mortgagor therefore has no legal remedy open to him and unless his mortgagee

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(9) (1924) 2 Ran, 285.

(10) (1906) 33 Cal., 985.

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will allow redemption he loses his property altogether. The result is obviously inequitable.

It may be noted that in this case the plaintiff admittedly had notice of Aung Dun's claim and so stands entirely in the shoes of his vendors.

Whether the doctrine of part performance should be applied to a transaction of the nature of an usufructuary mortgage seems to depend on the answer to the question whether the agreement to mortgage is specifically enforceable. The rule appears to be that when the loan has actually been made the agreement will be specifically enforced by compelling the borrower to execute a valid deed of mortgage, though, of course, it is open to him to elect to repay the loan. See Ghose on the Law of Mortgage in India, 5th edition, pages 74-75. English cases in support of this view are *Taylor v. Eckersley* (11), *Ashton v. Corrigan* (12) and *Hermann v. Hodges* (13). Indian cases are *Sreenath Roy v. Kally Dass Ghose* (14), *M. P. Kurrie v. M. Chatty* (15) and *Holkar v. Dadabhoy* (16).

I would hold, therefore, that while the respondent Aung Dun has not a charge on the land within the meaning of section 100 of the Transfer of Property Act yet he is equitably entitled to retain possession of the land until his debt has been repaid. But I do not think that it follows that the plaintiff's suit should be dismissed because he has relied, solely on his title and has not offered to repay the money. The effect of the finding is that the plaintiff is entitled to possession on fulfilling a certain condition and he should be given a decree accordingly.

(11) (1876) 2 Ch., 302.

(12) (1871) 13 Eq., 76.

(13) (1873) 16 Eq., 18.

(14) (1875) 5 Cal., 82.

(15) (1869) 11 W.R., 520.

(16) (1890) 14 Bom., 353.

It appears that Aung Dun's mortgage covered more land than was bought by the plaintiff. Since there is in fact no legal mortgage the technical rules relating to partial redemption of a mortgage are not applicable and in my view the plaintiff should be required to repay only in proportion to the area bought by him. Moreover, it is not clear what the actual amount of the mortgage debt was at the time of the plaintiff's purchase.

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So far as Aung Dun is concerned, therefore, I would remand the case to the Court of First Instance with a direction that the Court do proceed to determine the amount of the debt due at the time of the plaintiff's purchase and the portion of it payable by the plaintiff in proportion to the area bought by him and do then proceed to pass a decree in favour of the plaintiff for possession on his paying, within a time to be fixed by the Court, the sum so found payable by him.

There remains the defendant Ma Min Si. Throughout all the earlier proceedings it appears to have been assumed that the interests of Aung Dun and Ma Min Si are the same. At any rate I cannot find in any of the judgments any reference to a difference.

But their cases are in fact different. The plaintiff merely alleges that the defendants are in possession of the land and will not give it up. Ma Min Si's written statement, summarised, is as follows:—That on the 10th lazan of Tabodwe, 1282 (the day before the alleged agreement by Tun Myaing and Po Yun to sell to the plaintiff) she gave these two a piece of her own land and received from them in exchange a part of the land in suit, measuring 0'35 acres and entered upon it. Later defendant Aung Dun said that Tun Myaing and Po Yun had mortgaged the land to him, and would not allow her to work

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this piece. Now Tun Myaing and Po Yun have included in the registered conveyance to the plaintiff the land which they received from her in exchange, with the result that she has lost possession of both pieces of land.

It would seem on this statement that there is probably a misjoinder of parties and causes of action but since no enquiry has been made into the facts it is not possible to decide this question definitely at present.

I would therefore in remanding the case add a direction that the Court of First Instance do also enquire into Ma Min Si's defence. If it is found that there is a misjoinder of parties, she should be struck off the record, being given such costs as the Court may find justly due to her.

The final order I propose is therefore that the judgment and decree appealed from be set aside and that the suit be remanded to the Court of First Instance for decision on its merits, having regard to instructions given above.

I would give the appellant a certificate for the refund of the Court-fee paid on this appeal and direct that the other costs of this appeal and all the costs in the two earlier appeals—in the District Court and in this Court—be costs in the suit and be apportioned by the Township Court in its decree.

LENTAIGNE, J.—I concur.