

APPELLATE CIVIL.

Before Mr. Justice Carr.

1927

Sep. 2.

MAUNG THAN GYAUNG

v.

MAUNG PYU AND ONE.*

Evidence Act (I of 1872), s. 92—Operation of section limited to parties to an instrument—Transaction with a third party not governed by this section.

Plaintiff sold his land outright to P by a deed in satisfaction of a debt of Rs. 450. He alleged a contemporaneous oral agreement that P promised to return the land on payment of this sum. P thereafter sold the land to the respondents who agreed with the plaintiff to be bound by his agreement with P. On plaintiff suing the respondents on the agreement to reconvey the property, the lower Courts held that the evidence was barred by section 92 of the Evidence Act.

Held, reversing the judgments, that section 92 would have applied if the suit was between plaintiff and P but it had no application when the plaintiff was not suing P and when plaintiff was no party to the sale deed between P and the respondents against whom he was entitled to prove his agreement with them.

Maung Kyin v. Ma Shwe La, 9 L.B.R. 114 (P.C.)—*followed*.

Thein Maung—for Appellant.

Ba Tun (2)—for Respondents.

CARR, J.—The plaintiff-appellant sued to enforce performance of an agreement to reconvey land to him. His case, as set out in the plaint, is that in the year 1276 B.E., he conveyed the land to one Po Thaw by a deed which in terms was one of absolute sale, in satisfaction of a debt of Rs. 450. But at the same time Po Thaw agreed that he would at any time resell the land to the plaintiff at the same price. In 1280 B.E. Po Thaw sold the land to the defendants, who are the nephew and niece of the plaintiff for Rs. 450. Plaintiff alleges that at that time the defendants agreed to be bound by the same terms as Po Thaw and to reconvey the land to him at any time for Rs. 450.

* Civil Second Appeal No. 161 of 1927.

Both Courts below have held that this agreement would modify the terms of the conveyance and that therefore the plaintiff is barred by section 92 of the Evidence Act from giving evidence to prove it and have for that reason dismissed his suit.

Looking at the terms of paragraph 3 of the plaint I think that the allegations made there, if established would amount to a substantial variation of the terms of the sale deed. The plaintiff there sets out that Po Thaw asked him to transfer the land absolutely but promised that there should "be no interest on the money and no rent for the land and that at any time on payment of Rs. 450 he would give back the land." These terms make the transaction indistinguishable from an usufructuary mortgage as ordinarily entered into in this province. There would perhaps be a distinction in the fact that the agreement apparently does not create the relation of debtor and creditor and that it would confer no right of suit on Po Thaw either for reconvey of his debt or to compel sale of the mortgage property. But it is evident that the plaintiff alleges that this agreement was a part of his transaction with Po Thaw, another part of which was his conveyance of the land to the latter. If the question related to the conveyance to Po Thaw only I should uphold the decision of the Courts below.

But the plaintiff has not sued Po Thaw. His claim is against the defendants, who are transferees of Po Thaw's interest, and it is based on an agreement alleged to have been made by them with him at the time of their purchase from Po Thaw. What the plaintiff really wishes to prove is what he alleges in paragraph 4 of his plaint and not what is alleged in paragraph 3, which is essentially only explanatory. The plaintiff was not a party to the sale deed executed by Po Thaw in favour of the defendants, and therefore section 92 of the

1927

MAUNG THAN
GYAUNGv.
MAUNG PEE
AND ONE.

CARR, J.

1927

MAUNG THAN
GMAUNG
v.
MAUNG PYU
AND ONE.

CARR, J.

Evidence Act does not apply and does not debar him from proving the agreement that he sets up.

The case is in fact very similar to that of *Maung Kwin v. Ma Shwe La* (1), which was decided by the Privy Council and on the authority of that case I think that the decisions of the Courts below are wrong.

I therefore set aside the judgments and decrees of the Courts below and remand the case to Township Court for disposal on its merits. Appellants will be granted a certificate for the refund of the court-fee paid on this appeal. The other costs of this appeal and all the costs in the District Court will be costs in the suit and will follow the result.

APPELLATE CIVIL

Before Mr. Justice Heald and Mr. Justice Cunliffe.

MA CHON

v.

MAUNG MYINT *

1927

Mar. 3.

Civil Procedure Code (Act V of 1908), s. 2 (2) (b), O. 17, rr. 2 and 3—Order of dismissal for default—When order is appealable as a decree.

In the absence of appellant and her witnesses, her advocate applied for an adjournment on the day the case was peremptorily fixed for hearing. The trial Court refused the adjournment and dismissed the suit. Appellant appealed against the dismissal of her suit.

Held, that appeal lies against the dismissal of a suit under the provisions of Order 17, Rule 3, of the Civil Procedure Code, but that rule only applies when time has been expressly granted for a specific purpose and the party to whom time has been so granted has failed to do what was necessary for that purpose which was not the case in this suit. No appeal lies against an order of dismissal for default. But in the appellant's case it was a decree, since it was the final expression of an adjudication which so far as regards the Court expressing it conclusively determined the rights of the parties with regard with to the matters in controversy in the suit, hence appeal lies.

* Civil First Appeal No. 241 of 1925.

(1) (1917) 9 L.B.R. 114.