APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

MAUNG KIN LAY AND ONE
v.
MAUNG TUN THAING AND ONE.*

1927
July 18.

Suit to recover possession of land based on title maintainable—Suit to redeem a usufructuary mortgage without registered instrument not maintainable—Evidence Act (I of 1872), s. 90—Evidence not to prove mortgage but to negative evidence of contract of sale admissible—Pyatpaing *whether a document recording terms of a contract.*

In 1917 respondents received Rs. 500 from appellants and made over possession of their land to appellants. No registered document was executed, and in the revenue registers the transaction was entered as a sale, the parties having signed a *pyatpaing*. Seven years later the respondents sued appellants to recover possession of their land as the land was agreed to be returned on repayment of Rs. 500. Appellants pleaded that they were in possession of the land by virtue of a contract of sale, that the respondents' suit was virtually for redemption of an usufructuary mortgage and that it should fail for want of a registered instrument, and that as the terms of the contract between the parties were contained in their report to the revenue surveyor (*pyatpaing*), oral evidence to contradict the terms of the report was inadmissible.

The trial Court and the Appellate Courts held that the respondents' version was correct and gave them a decree.

Held, that had the suit of the respondents been one for redemption of an usufructuary mortgage, it would have failed, but the suit as framed was one for recovery of possession based on title and, there being no allegation of the existence of an usufructuary mortgage in the plaint, was therefore maintainable

Held, also, that the respondents were entitled to bring rebutting evidence to negative the evidence produced by the appellants as to the existence of a contract of sale. Such evidence is not in contravention of section 91 of the Evidence Act nor for the purpose of proving the terms of a mortgage. A *pyatpaing* is a report of an actual sale, and does not purport to record the terms of a contract or sale, and is therefore not a document within the meaning of section 91 of the Evidence Act, so as to bar the production of oral evidence.

Maung San Min and one v. *Maung Po Hlaing and others*, 4 Ran. 1 ; *Ma Htwe* v. *Maung Lun*, 8 L.B.R. 534—*referred to.*

Kyaw Myint—for Appellants.

S. M. Bose—for 1st Respondent.

* Letters Patent Appeal No. 62 of 1926.

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BROWN, J.—The land in suit was admittedly at one time the property of the respondents. In the year 1917, they made over possession of the land to appellants and received from the appellants the sum of Rs. 500. The transaction was entered in the land revenue registers as a sale, but it is admitted that no registered document was executed. The respondents say that the Rs. 500 was given by way of loan on the understanding that the land would be returned when the loan was repaid. The appellants say that the land was made over under a contract of sale.

The trial Court held that the respondents' account of the transaction was the true one and decreed the suit, which was a suit for recovery of possession of land on payment of Rs. 500. The trial Court's judgment was confirmed in appeal by the District Court and was subsequently again confirmed by a single Judge of this Court in second appeal. The appellants have been given a certificate under section 13 of the Letters Patent to file a further appeal before a Bench of this Court and it is this appeal which is now before us.

It is not seriously contended that on the question of fact we can go behind the concurrent finding of all the three Courts which dealt with the case. But this appeal is argued on two grounds: *firstly*, it is urged that the suit was in fact a suit to redeem a mortgage and must fail because of the want of any registered document; and, *secondly*, it is contended that even if it be held that the suit should not fail on this ground, the terms of the contract between the parties were reduced to the form of a document in their report to the revenue surveyor and therefore no oral evidence contradicting the terms of that report was admissible.

As regards the first point, reference has been made to the ruling in *Maung San Min and one* v. *Maung Po Hlaing and others* (1), by a Full Bench of which I was a member. In that case we held that when a plaintiff alleges that possession of immovable property has been given to a defendant as security for a loan of Rs. 100 or upwards but without the execution of any registered instrument, oral evidence is not admissible to prove the transaction. In that case we were following a previous decision of the late Chief Court of Lower Burma in the case of *Ma Htwe* v. *Maung Lun* (2). It had been found by the learned Judge who made the reference to the Bench that the plaint in *Maung San Min's* case was based on a usufructuary mortgage, and it was on that assumption that we came to our finding in the case. In his judgment the late Chief Justice remarked "Had the plaintiff brought a suit merely alleging that she was the owner of the land and that the defendant was in wrongful possession thereof and claiming a decree for possession based on her title alone there would be no objection to such a suit lying." That was, of course, merely an *obiter dictum* but it was an *obiter dictum* with which I expressed agreement in my judgment and which still seems to me to be correct. The same view was suggested in *Ma Htwe's* case also. The question for decision is therefore whether the suit in the present case was a suit for recovery of possession based on title; or whether it was, in fact, a suit for redemption of the usufructuary mortgage. The plaint in the suit is headed "Suit for recovery and confirmation of possession of land." It then goes on to recite that the plaintiffs are the owners of the land and that in 1917 they borrowed

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Rs. 500 from the defendants and delivered possession of the land to them on the condition that they should pay Government revenue and enjoy rents and profits of the same in lieu of interest and that they would deliver possession of the same back to them on payment of the said sum of Rs. 500 but that the transaction was not effected by registered instrument. They finally ask for a decree for possession on payment of Rs. 500. It is true that the giving to them of a decree in the terms they ask would have the same effect as a decree for redemption of a usufructuary mortgage. But it is clear that the plaintiffs do not allege in the plaint the existence of any usufructuary mortgage. They definitely say that there was no registered instrument and it follows from that that no mortgage was effected.

The defence is that the intention of the parties was to effect a sale and that the plaintiffs had agreed to execute a registered instrument of sale. The position on the admitted facts was, therefore, this :—

The plaintiffs were the owners of the land and no title has passed either by way of sale or by way of mortgage because no registered instrument has been effected. The title therefore vests in the plaintiffs and ordinarily the person who owns land is entitled to possession thereof. On the facts alleged no mortgage was effected ; the plaintiffs could not sue for redemption of the mortgage but they could sue for possession of the land based on title and I do not consider that the mere fact that they stated in their plaint what they allege to be the true facts can debar them from enforcing their title. It may be that they could have sued for possession of the land without any mention as to the claim of Rs. 500 and have treated that sum merely as a personal debt. They have however

expressed their willingness to pay Rs. 500 as a condition precedent before obtaining their decree. If the present suit is bound to fail then it is difficult to see how any plaintiff who had made over his land to a defendant on similar terms could ever recover possession of that land. In my view of the case, on the pleadings of the parties, the plaintiffs were owners of the land and the defendants were in possession and the plaintiffs were therefore entitled to possession unless the defendants could show that they had a good right to resist their claim. The transaction took place only about seven years before the suit was filed, and no question of limitation therefore arises. In such a case I consider that the position is as indicated by me in my judgment in *Maung San Min's* case ; that is to say it was open to the defendants to bring evidence to show that they were in possession under a contract of sale. But if they failed to prove this then the plaintiffs would be entitled to a decree.

The District Court in appeal held that the plaintiffs were entitled to plead a contract of mortgage ; but in my opinion it is quite unnecessary to decide that point. The burden of proof lay on the defendants and on the defendants' bringing evidence of a contract of sale the plaintiffs were clearly entitled to bring rebutting evidence to show that no such contract was entered into. By doing this they would in no way be contravening the provisions of section 91 of the Evidence Act, as their evidence could not be produced to prove the terms as to a contract of mortgage but simply to negative the evidence produced by the other side as to the existence of a contract of sale. There has been a clear finding by the Courts that the defendants failed to prove their contract of sale and that being

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so, I am of opinion that the plaintiffs were entitled to a decree.

It remains to consider the second point raised, which is to the effect that the parties having admittedly signed on a *pyatpaing* that *pyatpaing* contains the terms of their contract and that no oral evidence is admissible to contravene the written document. This is a somewhat revolutionary doctrine which, if accepted, would have a far-reaching effect. These reports to the revenue authorities are of almost daily occurrence, but so far as I know, no such claim has been made with regard to them before.

Section 91 provides that when the terms of a contract have been reduced to the form of a document no other evidence shall be given of these terms except the document itself. Now in the first instance what the plaintiffs desired to prove in this case was not a sale —that they cannot possibly prove—but a contract of sale. Looked at in that light it is clear that the *pyatpaing* relied on is evidence of no such contract. It purports to be a report of an actual sale. Further, I do not consider that in the *pyatpaing* the terms of the contract have been reduced to the form of a document within the meaning of section 91. A document is described in section 3 of the Evidence Act as any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used or which may be used, for the purpose of recording that matter. The *pyatpaing* is signed not for the purpose of recording a contract but for the purpose of reporting to the revenue authorities for revenue purposes what has been done. It is true that such documents are referred to as evidence of what actually has taken place. But they do not purport to record in a formal manner the terms of the contract. In the present case all that the *pyatpaing*

suggests is that the land is sold outright for Rs. 500. No terms of a contract beyond this are given in the *pyatpaing*, and admittedly the statement in the report is not legally correct.

In these circumstances I do not consider that the *pyatpaing* can be considered as a document recording the terms of the contract. In my opinion the contents of the *pyatpaing* in the present case do not bar the production of any oral evidence. And if it had debarred such evidence then it would have been fatal to the appellant's case.

I therefore think that no good reason has been made out for interference in this appeal and I would dismiss it with costs.

RUTLEDGE, C.J.—I concur. The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Carr.

M. E. MOOLLA and M. E. MOOLLA & SONS, LTD.
v.
CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA.*

1927
Aug. 1.

Conditions regarding decree to be passed not embodied in the decree cannot be considered by executing Court — Valuation of a secured creditor of his security under Presidency Towns Insolvency Act (III of 1909), s. 12 (2); service of notice of prohibitory order on agent of managing director of a private company whether sufficient — Compromise between adjudicating creditor and debtor no ground for withdrawing adjudication petition — Companies Act (VII of 1913), ss. 162, 163, 174—Grounds for winding up a company.

Held, that an alleged agreement between parties, prior to the passing of the decree and relating to the execution of that decree and not embodied in the decree cannot be entertained by the executing Court.

* Civil First Appeal No. 185 of 1927 and Civil Miscellaneous Appeals Nos. 112, 127, 128, 129 of 1927 from the Original Side.