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S.R.M.M.A. CHETTYAR FIRM v. MA PWA MAY AND ONE.

HEALD, J.

(ii) whether or not the mortgage was fraudulent and collusive.

On the first of these questions no authority has been cited in this Court which casts any doubt on the correctness of the ruling of the High Court of Calcutta in the case of *Sarda Nath Bhattacharya* v. *Gobinda Chandra Das* (1), and we are of opinion that the provisions of section 87 of the Registration Act cover the case. We hold therefore that the registration of the bond was not invalidated by the fact that it was written on a stamp of the wrong kind.

[On the evidence his Lordship held the mortgage to be a fraudulent and collusive transaction and set aside the mortgage decree.]

MYA BU, J.—I concur.

APPELLATE CIVIL.

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

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July 18.

MAUNG PWA AND OTHERS
v.
MAUNG PO SA AND OTHERS.*

Simple mortgage—Subsequent transfer of possession to mortgagee—Burden of proof to explain nature of possession.

In 1905 the owner of the land in suit effected a registered simple mortgage in favour of the 1st defendant-appellant and his wife (since deceased) to secure repayment of Rs. 1,500 and interest. A year later the mortgagor gave possession of the property to the 1st defendant-appellant. In 1926, respondents who are the heirs of the original mortgagor sued appellants for redemption of the property alleging that possession was given for securing interest. Appellants stated that the land was made over to them by way of sale in full satisfaction of the mortgage debt and interest. The trial Court placing the burden of proof on the appellants, decreed the suit.

Held, reversing the judgment, that the burden of proof, under the circumstances of the case, lay on the respondents to show the nature

(1) (1919) 23 C.W.N. 534.

* Civil First Appeal No. 285 of 1926.

of the possession, and they having failed to proof how possession passed, no presumption that the possession of the defendants was not adverse could be drawn.

Per RUTLEDGE, C.J.—Where land is mortgaged without possession and possession is subsequently given to the mortgagee, who alleges it to be in virtue of an outright sale, the onus of showing the nature of the transaction is on the party out of possession in cases of long possession. When possession has been less than 12 years and where the title of the previous owner is admitted, then the onus lies on the person in possession who alleges an outright sale.

A.T.A.R.M. Chetty Firm v. *M.A.M. Mahomed Kashim and thirteen*, 3 Ran. 367 ; *Maung Ok Kyi and four* v. *Ma Pu and two*, 4 Ran. 368—*referred to and explained.*

Maung San Min and one v. *Maung Po Hlaing and others*, 4 Ran. 1—*referred to.*

Ma Dun v. *Lu O and one*, 5 L.B.R. 40—*dissented from.*

Thein Maung—for Appellants.

Hay—for Respondents.

BROWN, J.—The land in suit originally belonged to one Ma Sa Pa. In the year 1905 Ma Sa Pa effected a simple mortgage of the land in favour of the appellant Maung Pwa and his deceased wife, Ma Shwe Hnit, by a registered deed. The principal amount secured by this registered instrument was Rs. 1,500 and the rate of interest Rs. 2-8-0 per cent. per mensem. About a year later Ma Sa Pa was unable to pay the interest on the mortgage and possession of the land was given to Maung Pwa.

The respondents, who are the children of Ma Sa Pa and her legal representatives, have sued for redemption of the mortgage of the land, and have been given a decree. Against this decree the appellants have now appealed.

The original simple mortgage is admitted and it is also common ground that possession of the land was given to Maung Pwa a year after the mortgage. The plaintiff-respondents say that, when possession of the land was made over, it was made over simply as security for payment of the interest under the

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mortgage, the annual rent for the land being accepted in lieu of interest. The defendant-appellants say that the land was made over to them outright by way of sale for the sum of Rs. 1,900 made up of the principal and interest due on the mortgage.

The trial Judge held that the burden of proving the outright transfer or rather the contract to transfer outright rested on the appellants and that the appellants had not discharged that burden.

It is contended on behalf of the appellants that the simple mortgage of 1905 is no longer in existence and that the suit is therefore not maintainable. If the simple mortgage was extinguished in 1906, then quite clearly there is no mortgage now in force, as at the time of the making over of the possession of the land section 59 of the Transfer of Property Act was in force and there is no suggestion that any registered deed was executed at the time of this transaction.

We have been referred to the decision of a Full Bench of this Court in the case of *Maung Ok Kyi and four* v. *Ma Pu and two* (1). The facts of that case were very similar to those of the present case. In that case also there had been a simple mortgage of land by a registered deed and possession had been made over to the mortgagee about a year after the mortgage. The original owner of the land sued for redemption of the mortgage and the defendants pleaded that the land had been made over to them outright; but there was admittedly no registered instrument for the subsequent transaction. It was held that in such circumstances it was open to the defendants to plead the invalid sale to them

(1) (1926) 4 Ran. 368.

as a defence to the mortgage claim. That point is not now in dispute. Nor did the trial Judge take a contrary view. His view was that the burden of proof in such circumstances lay on the defendants. But in the course of the judgment in the case of *Maung Ok Kyi*, the learned Chief Justice expressed the view that the onus of proving what the subsequent transaction was lay on the person whs was not in possession. A somewhat similar point was considered by us in the case of *A.T.A.R.M.M. Chetty Firm* v. *M. A. M. Mahomed Kasim and thirteen* (1). In that case we accepted the law as laid down in *Ma Dun* v. *Lu O and one* (2), that when land was mortgaged without possession and possession subsequently passed to the mortgagee, the burden of proving that the transfer in which possession was given was an outright sale lay on the person alleging it. We held, however, that, in considering whether the burden of proof had been discharged, all the circumstances of the case including the conduct of the parties must be borne in mind. The result of that case was that we held the outright sale to have been proved. Our decision accepting the view as to the burden of proof taken in *Ma Dun's* case was therefore merely *obiter* and I feel doubtful whether that decision was correct. But it is unnecessary now to pronounce definitely on the general proposition. In the present case the plaintiff Maung Po Sa says as to the subsequent transaction : "U Pwa and Ma Hnit agreed to reduce Rs. 50 out of interest Rs. 450 and agreed to keep the suit land with them for Rs. 1,900 by way of (ငွေပေး ထယ်ဝင်ပေး) usufructuary mortgage." This alone suggests the entering into a new contract. As pointed out by the learned Chief Justice in *Maung Ok Kyi's* case, the outstanding characteristic of a

(1) (1925) 3 Ran. 367. (2) (1909) 5 L.B.R. 40.

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simple mortgage is that possession remains with the mortgagor. And if possession subsequently passes to the mortgagee that possession is not explained or accounted for by the simple mortgage instrument.

The land in dispute in the present case has been in the possession of the defendant for 20 years and the principal point in dispute in the present case is as to the possession of this land. An action for recovery of possession could not possibly arise on the contract of a simple mortgage. We think it is clear that what the plaintiffs are really suing on is not a simple mortgage at all but the alleged usufructuary mortgage and that, whatever the nature of the transaction in 1906, it had the effect of extinguishing the previous simple mortgage. That being so, it follows that there is now no legal mortgage in effect and in accordance with the ruling of a Full Bench of this Court in the case of *Maung San Min and one* v. *Maung Po Hlaing and others* (1), the suit, as framed, for redemption of the land will not lie. The plaintiffs might have been able to sue for possession based on title. But even if they were allowed now to change the suit and sue on the title, I do not think that they can be held to have succeeded. There is no mortgage of the land and the defendants have been in possession for 20 years. The suit, if based on title, must be a suit under the provisions of Article 142 of the Limitation Act and in suits under that Article the burden of proving that the possession of the defendant is not adverse lies on the plaintiff. In this case the defendants clearly plead that their possession was adverse from the first. In order to succeed in the case, it was therefore clearly necessary that the plaintiffs should

(1) (1926) 4 Ran. 1.

show how the defendants came into possession of the land and that that possession was not adverse. It follows from this that the burden of proof as to the nature of the original transaction rests on the plaintiffs. If they cannot prove how possession passed, no presumption that the possession was not adverse can be drawn.

For these reasons I am of opinion that the trial Judge was wrong in placing the burden of proof in the case on the defendants; and it is clear from his judgment that his decision in favour of the plaintiffs was not based on any special belief in the plaintiffs' evidence but on the view that the defendants had not satisfactorily proved their case. As is only to be expected after so many years, the oral evidence as to what took place when handing over the land is not satisfactory on either side.

The defendants have produced an unstamped and unregistered deed, which is certainly not on the face of it convincing. What is, however, quite clear and is not denied by the plaintiffs is that in the year 1907 the Deputy Commissioner gave a certificate that they had acquired the status of landholders in respect of the land to Maung Pwa and his deceased wife. The defendants have tried to prove that Ma Sa Pa had notice of the proceedings and agreed to the grant of this certificate. The oral evidence on this point may not be very satisfactory but the undoubted fact remains that this certificate was issued and that no objection was taken to its issue at the time. In the ordinary way notice should have issued and the plaintiffs should have heard of the proceedings before the certificate was granted. The fact that this certificate was issued to Maung Pwa without objection does lend strong support to his story that he was in possession as owner of the land.

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I do not think it necessary to discuss in detail the oral evidence adduced by the plaintiff on which the trial Judge obviously did not place any great reliance. Some of the witnesses are related to the plaintiffs and they are all Burmans as are the plaintiffs themselves; whereas the defendant is a Karen.

I do not consider that the evidence is convincing or in any way sufficient to establish the claim for possession of the suit land worth about Rs. 10,000 on payment of Rs. 1,900 from persons who have been in peaceful possession for 20 years.

I am of opinion that the suit must fail. I would set aside the decree of the trial Court and pass a decree dismissing the suit of the plaintiff-respondents with costs in both Courts.

RUTLEDGE, C.J.—I have had the advantage of reading the judgment of my learned brother and I entirely agree with his conclusions. I only add these observations in respect of certain *obiter dicta* in a joint judgment of his and mine in Indian Law Reports, III Rangoon, page 367, and in my judgment in Indian Law Reports, IV Rangoon, page 368. In *Ma Dun's* case (1), Mr. Justice Irwin stated that he was bound by the decision of a Bench in *Ko Po Win's* case (2), the effect of which was that, when land is mortgaged without possession and possession is subsequently given to the mortgagee, the burden of proving that the transaction in which possession was given was an outright sale lies, in the first instance, on the mortgagee. I am not prepared to accept this statement as correct, as, in cases of long possession, I am clearly of opinion that the onus should be on the party out of possession. In cases, however,

(1) (1909) 5 L.B.R. 40. (2) 11 B.L.R. 37.

where the possession has been less than twelve years and where the title of the previous owner is admitted, the onus may properly be put on the person in possession who alleges an outright sale. I add this by way of qualification of the remark made in my judgment in Indian Law Reports, IV Rangoon, at page 372.

The appeal is allowed and the suit dismissed with costs in both Courts.

APPELLATE CIVIL.

Before Mr. Justice Maung Ba.

K.K.S.A.R. FIRM
v
MAUNG KYA NYUN AND ONE.*

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July 19.

Civil Procedure Code (Act V of 1908), *O.* 47, *r.* 1—"*Any other sufficient reason,*" *meaning of*—"Ejusdem generis," *meaning of.*

The words "any other sufficient reason" occurring in O. 47, rule 1 of the Civil Procedure Code, mean a reason sufficient on grounds at least analogous to those specified immediately previously. The Latin phrase "*ejusdem generis*" which means "of the same kind" is more restricted than the word "analogous."

Chhajju Ram v. *Neki and others,* 3 Lah. 127 (P.C.)—*followed.*

Ganguli—for Appellants.

Basu—for Respondents.

This is an application for a certificate under Clause 13 of the Letters Patent that it is a fit case for appeal.

As the point involved is one of construction to be put upon the phrase "any other sufficient reason" used in Rule 1 of Order 47, Civil Procedure Code, I have allowed both sides to argue that point. The applicant Chettyar firm brought a suit against the respondents on a promissory-note, and the respondents denied execution of that note. In the evidence

* Civil Miscellaneous Application No. 58 of 1927.