APPELLATE CIVIL.

Before Mr. Justice Pratt.

1927

June 30.

MA SAW
v.
MAUNG BA.*

Stamp Act (II of 1899 and I of 1879)—Evidence Act (I of 1872), s. 91—Secondary evidence of unstamped document whether admissible—Executed and unexecuted documents.

Where a mortgage transaction has not been reduced to the form of a document within the meaning of section 91 of the Evidence Act and where the Transfer of Property Act did not apply, then secondary evidence of a note thereof and oral evidence of the transaction of mortgage which was itself oral is admissible. And where a formal deed of mortgage is drawn up on an unstamped palm leaf, so long as the mortgagor has not signed it, secondary evidence of its contents will be admissible, but if the deed has been executed by signing, secondary evidence is inadmissible for lack of stamping.

In re Chet Po, 7 L.B.R. 77 ; *Ma Ein U* v. *Maung Aung Hmwe* 2, U.B.R. (1897-01) 365 ; *Ma Hla U* v. *Ma Hla*, L.P. Ap. 131 of 1926 ; *Maung Net* v. *Maung Hmo Zan*, 2 U.B.R. 367—*followed.*

Mi Ta v. *Nga Scin*, (1907-09) U.B.R. 5—*dissented from.*

Sanyal—for Appellant.
Mukerjee—for Respondent.

PRATT, J.—Plaintiff sued for redemption of certain lands. He asserted that at the time of the mortgage which was in 1891 or 1892, some record had been made on a palm leaf of the original mortgage and subsequent advances. He called upon the 1st defendant in whose custody he alleged it to be to produce the document, but the latter declined to do so and denied its existence.

He produced a copy or précis, it was not clear which, made by him of the original record and subsequent memoranda and asked to be allowed to give secondary evidence of the contents of the document.

* Civil Second Appeal No. 210 of 1926 (Mandalay.

Both Courts have held that secondary evidence of an unstamped document is inadmissible and the suit has been dismissed.

In the Upper Burma cases of *Ma Ein U* v. *Maung Aung Hmwe* (1) and *Maung Net* and *Maung Hmo Zan* (2), Thirkell White, J.C., undoubtedly held that secondary evidence of a document not produced, which ought to have been stamped, but was not, is inadmissible.

In the later case of *Mi Ta* v. *Nga Sein* (3), Shaw, C.J., went further and held that a *parabaik* mortgage dated 1894-95, though not signed, was executed within the meaning of the Stamp Act of 1879 then in force, and that secondary evidence of the unstamped *parabaik* document which defendant was alleged to be withholding was not admissible.

The correctness of this view was not accepted by a Bench on which I sat in Rangoon last year. (Vide *Ma Hla U* v. *Ma Hla*, Letters Patent Appeal No. 131 of 1926).

In *Chet Po's* case (4), it was held by a Full Bench of the Chief Court that as under section 2 of the Indian Stamp Act, 1899, 'Execution' means signature, an instrument which becomes chargeable with stamp duty only on being executed is not liable to stamp duty until it is signed.

It was further pointed out that in accordance with universal custom formal documents on palm leaf and *parabaik* have hitherto been treated by Upper Burma Courts as completed documents and admitted as evidence as such though not signed. The judgment concludes "Our decision that these unsigned documents are not liable to stamp duty does not necessarily imply that they must henceforward be regarded as incomplete. The effect of the present decision is only

(1) U.B.R. (1897-01) II 365.
(2) U.B.R. (1897-01) II 367.
(3) U.B.R. (1907-09) Execution 5.
(4) (1913) 7 L.B.R. 77.

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that the Courts cannot refuse to admit any such document in evidence merely on the ground that it is unstamped."

With this ruling I wholly agree.

At the time of the palm leaf document now in question the Stamp Act of 1879 was in force.

That Act contains no definition of execution, and I am unable to agree with the view taken in *Mi Ta's* case (1) by the learned Judicial Commissioner that an unsigned *parabaik* document was liable to stamp duty under the law in force prior to the introduction of the Stamp Act of 1899.

I have no doubt that 'execution' under the old Stamp Act ordinarily connoted signature, though there may have been special instances where a document was executed other than by signature.

From the extract or copy taken from the palm leaf document in the suit under appeal, however, it does not appear to have been an instrument of mortgage at all, but merely a note that a mortgage had taken place.

Unless the extract is extremely meagre, it seems clear that the mortgage transaction has not been reduced to the form of a document within the meaning of section 91 of the Evidence Act.

If that is so, then secondary evidence of the note and oral evidence of the transaction of mortgage, which was itself oral, is admissible.

It will therefore be necessary to take evidence for plaintiff as to the actual form of the so called mortgage document and whether it amounts to an instrument of mortgage.

If there is evidence that a formal deed of mortgage was drawn up on a palm leaf, then secondary evidence of its contents will be admissible, unless it was signed by the mortgagor, which is not alleged.

(1) U.B.R. (1907-09) Execution 5.

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If it should transpire that a formal deed was drawn up and executed by signing, then secondary evidence will be inadmissible for lack of stamping.

I set aside the finding of the lower Courts on the preliminary issue of law and remand the suit for disposal on its merits in view of these considerations.

Costs to follow final disposal.

Appellant is entitled to a refund of the court-fees in this and the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Brown.

1927

July 4.

AH CHOON
v.
T.S. FIRM.*

Contract Act (IX of 1872), ss. 15, 72—"Coercion"—Suit to recover moneys paid to remove wrongful attachment.

The Chettyar firm obtained a money decree against two persons personally though they were described in the plaint as partners of a firm. In execution of the decree the Chettyar firm attached the goods of the appellant as partnership property of its judgment-debtors and alleged that appellant was also a partner, but the procedure laid down in Civil Procedure Code, Order 21, Rule 50 (2) was not observed. Appellant paid the decretal amount to prevent his goods being seized and, on failing to remove the attachment, filed a suit for the recovery of his money against the Chettyar firm to whom it had been paid.

Held, that the word "Coercion" in section 72 of the Contract Act is used in its general sense and that if a third party was coerced into paying the money in satisfaction of a decree against a judgment-debtor and was not himself liable for the money, the money was paid by him under coercion within the meaning of section 72 of the Act, and a suit did lie to recover that money.

Seth Kanhaya Lall v. *The National Bank of India, Ltd.*, (1913) 40 I.A. 56 P.C.—*followed.*

Janab Ali—for Appellant.

Ekambaram—for Respondents.

BROWN, J.—The respondent T.S. Firm in Civil Regular No. 122 of 1924 of the Township Court,

* Special Civil Second Appeal No. 657 of 1926.