

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Maung Ba.

1928

Mar. 27.

MA MI

v.

MAUNG AUNG DUN AND TWO.

Evidence Act (I of 1872), s. 92—Contemporaneous oral agreement between actual parties to conveyance to repurchase and such agreement with a person not a party to the conveyance, distinction between—Inadmissibility in evidence of former agreement and admissibility of the latter agreement.

As between the actual parties to an outright conveyance a contemporaneous oral agreement to allow repurchase cannot be proved, but if the party who alleges the contemporaneous oral agreement was not actually a party to the conveyance (although the conveyance was given on his behalf) he can prove that there was such an agreement.

Maung Kyin v. Ma Shwe La, 9 L.B.R. 114 (P.C.); *Shwe Phoo v. Tun Shin*, 5 Ran. 644—referred to.

Maung Pu for the appellant.

S. Ganguli for the respondents.

HEALD, J.—The 1st and 2nd respondents sued appellant and her deceased husband whom she now represents for specific performance of an agreement to sell a certain plot of land to them. Their case was that they raised Rs. 1,000 on the land from one Shwe Kin by a conveyance of the land to him with an agreement on his part to resell to them, that when they needed more money they agreed with Shwe Kin that they should similarly raise Rs. 3,500 from appellant and her husband and should pay Shwe Kin his Rs. 1,000, and that in pursuance of that agreement Shwe Kin executed a conveyance of the land to appellant and her husband, who agreed to sell it back to them on certain terms.

* Civil Second Appeal No. 263 of 1927 from the judgment of the District Court of Myaungmya in Civil Appeal No. 176 of 1926.

Errata.

In Volume V, (1927) I.L.R. Rangoon at page 644 and in its general index at page xxix, in the fifth line of the headnote of the case of **Maung Shwe Phoo v. Maung Tun Shin**, *delete* the words "or unregistered."

Appellant and her husband denied that there was any such arrangement and said that the transaction was an outright sale.

Both the lower Courts have found that as a matter of fact appellant and her husband did agree to allow respondents to buy back the land, and have passed a decree directing appellants to reconvey the land to respondents for Rs. 4,450.

Appellant appeals mainly on the ground that evidence to prove the alleged oral agreement to allow repurchase was inadmissible by reason of the provisions of section 92 of the Evidence Act.

The case of *Shwe Phoo v. Tun Shin* (1) seems at first sight to support this contention. But in that case the parties to the conveyance and to the alleged oral agreement were the same while in this case the actual parties to the conveyance were Shwe Kin and appellants, and the parties to the alleged agreement were appellants and respondents. It might be argued that in reality the parties to the conveyance were appellants and respondents since Shwe Kin merely represented respondents, so that in effect the parties to the conveyance and the alleged agreement were the same, but in a somewhat similar case, namely the case of *Maung Kyin v. Ma Shwe La* (2), their Lordships of the Privy Council held that section 92 of the Evidence Act did not apply. In that case one Maung Myaing, the owner of certain lands, took money from one Maung Kyin and gave Maung Kyin what purported to be an outright conveyance of the lands. Later he took money from one Shwe Pe and paid back the money which he had taken from Maung Kyin, and Maung Kyin gave to Shwe Pe what purported to be an outright conveyance of the lands. Maung Myaing who had remained in possession of the lands and regarded

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the transaction with Shwe Pe as a mortgage of the lands by him to Shwe Pe sold his "equity of redemption" to Maung Kyin, and put Maung Kyin into possession of the lands. So far as the equity of redemption and the possession of the lands were concerned, Maung Kyin thus stepped into the shoes of Maung Myaing. Shwe Pe having died, his widow and children claimed possession of the lands as against Maung Kyin. Part of Maung Kyin's defence was that the transaction with Shwe Pe was in fact a mortgage and not a sale. Their Lordships of the Privy Council said that in their opinion "section 92 (of the Evidence Act) does not apply because the evidence, the admissibility of which is in question, is evidence going to show what were the rights of a third person, namely Myaing, in the property, and there are concurrent findings to the effect that the property was in that owner and not in the Kyins, who to the knowledge of Shwe Pe never purported to dispose of it as theirs."

It would appear that their Lordships held that Maung Kyin, who was in fact a party to the outright conveyance although he was not being sued as such party was entitled to prove that the transaction was in fact a mortgage and not a sale, because the evidence which would show that the transaction was a mortgage was evidence going to show what were the rights of a person who was not actually a party to the deed, namely Maung Myaing. On the basis of that decision it would appear that because respondents were not actually parties to the conveyance in this case, they are entitled to show that there was an oral agreement to allow repurchase attached to the conveyance, the position being that if, as I think, their Lordships regarded Maung Kyin as merely representing Maung Myaing and therefore as not being a party to the conveyance, then respondents are

in the same position as Maung Kyin, not being actual parties to the conveyance which was executed by Shwe Kin for them just as the conveyance in the other case was executed by Maung Kyin for Maung Myaing, while if their Lordships regarded Maung Kyin as a party to the conveyance and nevertheless allowed him to prove that the transaction was a mortgage and not a sale, then respondents are in a better position than Maung Kyin was, since they are not actually parties to the conveyance.

The law as at present laid down would seem to be that as between the actual parties to an outright conveyance a contemporaneous oral agreement to allow repurchase cannot be proved, but that if the party who alleges the contemporaneous oral agreement was not actually a party to the conveyance (although the conveyance was given on his behalf) he can prove that there was such an agreement. This does not seem to be a very satisfactory result, and it seems possible that the decision in the case of *Shwe Phoo v. Tun Shin* should be reconsidered.

However that may be it is quite clear that in this case section 92 of the Evidence Act does not in terms apply because the respondents were not actual parties to the conveyance, and I would hold that respondents were entitled to prove the agreement to allow repurchase.

I would therefore dismiss the appeal with costs.

MAUNG BA, J.—I concur.

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