

APPELLATE CIVIL.

Before Mr. Justice Hald and Mr. Justice Maung Ba.

1928

Mar. 12.

C.A.M.K.R. CHETTIAR

v.

MA KYAW AND OTHERS.*

Possession by usufructuary mortgage—Plea of subsequent sale in satisfaction of mortgage debt without registered instrument, whether valid defence in suit for redemption.

Held, that a defendant who was put into possession of the property as mortgagee may plead, by way of defence to a suit for redemption, that the mortgagor subsequently agreed to sell the property to him in satisfaction of the mortgage debt, and that if he proves that his present possession is of that of a purchaser in possession without a registered conveyance, he is entitled to succeed.

Ma Ma E v. Maung Tun, 2 Ran. 479; *Ma Pyone v. Ma U*, Special Civil Second Appeal 89 of 1923; *Maung Myat Tha Zan v. Ma Dun*, 2 Ran. 285; *Maung Ok Kyi v. Ma Pu*, 4 Ran. 368; *Maung Shwe Hmon v. Maung Tha Byaw*, 11 L.B.R. 462; *Mohamed Musa v. Aghore Kumar*, 42 Cal. 801; *Po Sin v. Ma Nyein*, Civil First Appeal 306 of 1926; *Po Thin v. Tha Hnaw*, Special Civil Second Appeal 104 of 1927—referred to

Ma Shwe Kin v. Ka Hoc, Civil Second Appeal 308 of 1923; *Myat Tun Aung v. Maung Lu Pu*, 3 Ran. 243—dissented from.

Doctor and Ganguli for the appellant.

Thein Maung for the respondent.

MAUNG BA, J.—This appeal under section 13, Letters Patent, is the outcome of a declaratory suit under Order XXI, rule 63 of the Code of Civil Procedure.

The appellant C.A.M.K. Chettiar firm obtained a simple money decree against one Ma Pwa Saing and in execution of that decree attached the suit paddy land.

The 1st respondent Ma Kyaw and her husband, Maung Nyo, since deceased, objected to the attachment and they succeeded in removing it.

* Letters Patent Appeal No. 92 of 1927.

The Chettiar firm brought the declaratory suit in the Township Court of Lewe for a declaration that the land was liable to be attached in execution of its decree against Ma Pwa Saing.

During the trial of that suit it transpired that Ma Pwa Saing had at first mortgaged the land with possession to Ma Kyaw and her husband, Maung Nyo, by a registered deed and had later sold it outright to the mortgagees by a *pyatpaing* and without any registered instrument. In the trial Court it was contended on behalf of the Chettiar firm that no oral evidence was admissible to prove the sale and in support of that contention the case of *Maung Myat Tun Aung and one v. Maung Lu Pu* (1) was cited. The Township Judge considered that that case was not applicable but that the case applicable was that of *Maung Myat Tha Zan and two v. Ma Dun and one* (2) and that oral evidence was admissible. On the evidence he found that Ma Kyaw and her husband were absolute owners of the suit land and dismissed the declaratory suit.

The Chettiar firm appealed to the District Court of Pyinmana and the learned District Judge disagreed with the Township Judge and, holding that *Maung Myat Tun Aung's* case applied, gave the Chettiar firm the declaration sought for. From that decree Ma Kyaw and her husband came up to this Court in Second Appeal.

The learned Judge who heard that appeal observed that *Maung Myat Tun Aung's* case had been overruled by the case of *Maung Ok Kyi and four v. Maung Pu and two* (3) and further that the case under consideration was parallel with that decided in *Ma Ma E and two v. Maung Tun* (4). He held that oral evidence was admissible and that Ma Kyaw and

1928

C.A.M.K.R.
CHETTIAR
v.
MA KYAW
AND
OTHERS.

MAUNG BA,
J.

(1) (1925) 3 Ran. 243.
(2) (1924) 2 Ran. 285.

(3) (1926) 4 Ran. 368.
(4) (1924) 2 Ran. 479.

1928
 C.A.M.K.R.
 CHETTIAR
 vs.
 MA KYAW
 AND
 OTHERS.
 MAUNG BA,
 J.

her husband, Maung Nyo, were entitled to continue in possession under the contract of sale. He accordingly set aside the decree of the District Court and restored that of the Township Court.

The Chettiar firm then applied to the learned Judge for a certificate that their case was a fit one for further appeal under the Letters Patent and the learned Judge granted them leave.

As there has been a difference of opinion regarding the applicability or otherwise of the rulings above cited, it becomes necessary to examine the trend of judicial opinion on this point.

The earliest case appears to be that of *Maung Shree Hmon and two v. Maung Tha Byaw and one* (1) decided in 1922 by Pratt, J. A simple mortgagee was put into possession of the mortgaged land under an invalid sale as there was no registered instrument. In the suit by the mortgagors for redemption the learned Judge refused to allow redemption on the ground that the mortgagors could not be allowed to take advantage of their failure to give a conveyance, because to give them a decree would be in effect to assist them in perpetrating a fraud on the vendee. The learned Judge cited with approval the case of *Venkatesh Damodar v. Mallappa Bhimappa* (2), where it was held that, when the plaintiff agreed to sell certain property to the defendants who were already in possession and the defendants paid up the purchase money but omitted to take a registered conveyance, the plaintiff was not entitled to recover possession even though the right to obtain specific performance of the agreement to sell had become time-barred. In this Indian case it may be noted that the defendants were already in possession when the alleged sale took place.

(1) (1922) 11 L.B.R. 462.

(2) (1921) 46 Bom. 722.

In 1923 Duckworth, J., dealt with a similar case, viz., Special Civil Second Appeal No. 89 of 1923 *Ma Pyone and two others v. Ma U and two others* where the mortgagees resisted a suit for redemption relying upon an invalid sale. The learned Judge recognised the validity of a plea of possession under a contract of sale.

In 1924 the same principle was adopted by a Full Bench of five Judges in the case of *Maung Myat Tha Zan and two v. Ma Dun and one* (1). The Bench held: "It is a valid defence that the defendant was given possession of the property by the legal owner in a transaction which purported to be a sale and which would be a sale but for the fact that no registered instrument was executed as required by section 54 of the Transfer of Property Act.

Three months later Duckworth, J., dealt with a case, *Ma Ma E and two v. Maung Tun* (2), where the mortgage with possession was followed by an invalid sale. The learned Judge followed *Maung Shwe Hmon's* case as well as *Venkatesh Domodar's* case and decided that the plaintiff could not be allowed to take advantage of his omission to give a registered conveyance and that the defendants were entitled to retain possession.

A fortnight later Carr, J., disposed of a similar case, namely *Ma Shwe Kin v. Ka Hoe and one* in Civil Second Appeal No. 308 of 1923. There is also a mortgage with possession was followed by an invalid sale. He came to an opposite decision and allowed redemption. He did not follow *Maung Myat Tha Zan's* case and observed that to apply the doctrine of part performance laid down in that case it was essential that possession must have been given under a contract of sale and should be referable to no other title.

1928

C.A.M.K.R.
CHETTIAR
v.MA KVAW
AND
OTHERS.MAUNG BA,
J.

(1) (1924) 2 Ran. 235.

(2) (1924) 2 Ran. 479.

1928
 C.A.M.K.R.
 CHETTIAR
 v.
 MA KYAW
 AND
 OTHERS.
 MAUNG BA,
 J.

In 1925 Lentaigne, J., in the case of *Myat Tun Aung and one v. Maung Lu Pu* (1), dealt with a simple mortgage followed by an invalid sale. The learned Judge held that the possession by a mortgagee being ordinarily referable to his mortgage or to his influence over the mortgagee by reason of such mortgage, the possession in the present case could not be relied upon as part performance of an agreement to sell. He further held that the mortgage being by a registered deed, evidence of a subsequent oral agreement of sale would be inadmissible under section 92 (4) of the Evidence Act.

In 1926 a Full Bench of four Judges dealt with a similar case, namely a case where a simple mortgage was alleged to have been converted into a sale without any registered deed. The Bench held that the invalid sale can be proved in equity and as a shield. It overruled *Myat Tun Aung's* case decided by Lentaigne, J.

The above Full Bench dealt with a simple mortgage and not with a mortgage with possession as in the present case. As regards a mortgage with possession we have cited two single Judge cases namely *Ma Ma E's* case decided by Duckworth, J., and *Ma Shwe Kin's* case decided by Carr, J. Those two cases were decided in the same month with an interval of about a fortnight and curiously enough they were contrary to each other. One of them recognises the validity of plea of possession under a contract of sale while the other refuses to recognise such plea. Of these two opposite views we with due respect to our learned brother Carr disagree with his view.

It will be seen that the decisions recognising the validity of such plea are based on consideration

(1) (1925) 3 Ran. 243.

of equity, part performance, prevention of fraud and the fiduciary aspect of the vendor's position. It seems immaterial whether or not any change in actual possession took place at the time of sale. As regards the doctrine of part performance their Lordships of the Privy Council in *Mohamed Musa v. Aghore Kumar Ganguli* (1), observed that the acts relied on must be unequivocally referable to the contract and productive of alteration of circumstances, loss or inconvenience though not irretrievable.

The plea in the present case was that the possession of a mortgagee had been converted into that of a vendee under a contract of sale. Applying the above principle we hold that oral evidence can be offered of facts which are referable to the contract of sale and productive of a change in the nature of possession. We do not think that it is correct to say that to apply the doctrine of part performance possession must have been given under the contract of sale, and can be referable to no other title. This being our view the decision now appealed against must be considered to be correct. The mortgagees could continue in possession under the subsequent contract of sale. This appeal must therefore fail and it is dismissed with costs.

HEALD, J.—I agree and would add a reference to two more recent cases in which a similar view has been taken. Those cases are *Po Sin v. Ma Nyein* (2), which was decided by a Bench and *Po Thin v. Tha Hnaw* (3), which was decided by a single Judge.

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(1) (1914) 42 Cal. 801.

(2) (1928) 6 Ran. 276.

(3) Special Civil Second Appeal
No. 104 of 1927.

1928
C.A.M.K.R.
CHETTIAR
v.
MA KYAW
AND
OTHERS.
MAUNG BA,
J.

The judgment of Mr. Justice Heald with Mr. Justice Darwood, in **Maung Po Sin and one v. Ma Nyein and six** * referred to in the above judgment is as follows :—

1927
Aug. 10.

HEALD and DARWOOD, JJ.—The 1st respondent is the widow and the rest of the respondents are the children of one Maung Kin. Their case was that about the year 1900 or 1901 the 1st respondent and her husband Maung Kin mortgaged the land in suit with possession to one Maung Tun and his wife Ma Hlaing for Rs. 600, that that mortgage was still subsisting, and that they were entitled to redeem the land, which they now value at Rs. 8,000, for Rs. 600 from appellants who are in possession as representatives of the original mortgagees, now deceased.

The defence was that the transaction, which took place in 1907 and not in 1900 or 1901, was a sale and not a mortgage, but when the first appellant gave evidence he said that Maung Tun, who was his father-in-law had told him that he had first received the land in mortgage and then got it by outright sale for Rs. 600 the sale being duly reported to the Revenue authorities.

The lower Court held that because the alleged sale took place after 1905, when the Transfer of Property Act came into force in Lower Burma, it could not be proved and that because the 1st appellant admitted the original mortgage respondents were entitled to a decree for redemption for Rs. 600.

Appellants appeal and it seems clear that the learned Judge in the lower Court was not familiar with the rulings of this Court in the cases of *Ok*

* Civil First Appeal No. 306 of 1926.

Kyi v. Ma Pu (1), *Po Cho v. Paw Saing* (2) and *Myat Tha Zan v. Ma Dun* (3) or with the ruling of the Chief Court in the case of *Karanath Khan v. Latchmi Achi* (4).

In the last of those cases it was held by a Full Bench of the Chief Court that a defendant may plead by way of defence to a suit for eviction by an owner that he is in possession under a contract to sell and that if he can prove the contract it will be a valid defence however valuable the property may be and whether he has a registered deed of transfer or not, or, as others of the learned Judges put it, the defendant would have a complete answer to the suit if he pleaded successfully that the contract for sale had not been terminated and that he was ready to complete his part of it if required, since so long as the contract subsists the owner can exercise his rights of ownership only so far as they are consistent with his obligations under the contract. In that case the plaintiff had agreed to sell the land and had given possession to the defendant. It was assumed for the purposes of the decision that the defendant had not paid the price and the decision was in effect that when once the contract for sale was established the owner's sole remedy against the purchaser was to sue for the price and that he could not recover the land, because the purchaser had a right to claim specific performance of the plaintiff's agreement to convey the land to him on his paying the price.

In the case of *Myat Tha Zan v. Ma Dun* (3), heirs of a person who had admittedly been owner of the land in dispute sued the persons who were in possession of that land to recover possession of

1927

MAUNG PO
SIN
AND ONE

v.
MA NYEIN
AND SIX.

HEALD AND
DARWOOD,
JJ.

(1) (1926) 4 Ran. 368.

(3) (1924) 2 Ran. 285.

(2) Civil Second Appeal 299 of 1924. (4) (1920) 10 L.B.R. 241.

1927

MAUNG PO
SIN
AND ONE
v.
MA NYEIN
AND SIX.

HEALD AND
DARWOOD,
JJ.

it on the strength of that owner's title. The defence was that the owner had agreed to sell the land to the defendants, had received the price, and had put the defendants into possession, and it was held that proof of a valid agreement for sale was a good defence to a suit for possession brought by the seller against the purchaser in a case where owing to failure to execute and register an instrument there had been no legal conveyance of title, and where a suit for specific performance of the agreement for sale would not be barred by limitation.

In the two cases mentioned above there was no question of a mortgage of the property but in the case of *Ok Kyi v. Ma Pu* (1), there was a mortgage and a subsequent agreement for sale of the mortgaged property to the mortgagee. The mortgage in that case was a simple mortgage and possession of the mortgaged property was given as a result of the agreement for sale. The Court in that case also held that proof of the agreement for sale was a good defence to a suit by the mortgagee to recover possession of the property by redemption of the mortgage. The learned Chief Justice however expressly limited his decision in that case to cases where the mortgage was non-possessory and said that for obvious reasons different considerations might apply in the case of usufructuary mortgages.

The case of *Po Cho v. Paw Saing* (2) was a case of a usufructuary mortgage followed by an agreement for sale in favour of the mortgagees, but part of the consideration for the subsequent sale was rent for the mortgaged property which the mortgagors had worked as tenants of the mortgagees. In that case also it was held that proof of the agreement to sell was a good defence to the mort-

(1) (1926) 4 Ran. 368.

(2) Civil Second Appeal 299 of 1924.

gagor's suit for redemption. A substantial portion of the judgment in that case was cited with approval in the case of *Ok Kyi v. Ma Pu* (1), and if the decision in that case was correct it would seem to follow that in the present case, if the alleged agreement to sell the property in suit to the mortgagees was established, that agreement would be a good defence to respondents' suit for redemption.

Appellants are admittedly in possession of the property, but the possessory mortgage which respondents set-up would if established explain that possession and would put on appellants the burden of proving the agreement for sale which they allege.

It is necessary to consider therefore (1) whether respondents established the mortgage, and if they did establish it, (2) whether appellants proved the agreement to sell.

[The evidence was as follows :—The respondents gave oral evidence of the mortgage, and of the entry in the Revenue Register No. 1 for 1900-01. That note stated that the land was mortgaged by Maung Kin and Ma Nyein to Maung Tun with possession to Maung Tun for Rs. 600. The note was repeated in the registers till 1907-08, where a note of sale of the land by Maung Kin and Ma Nyein to Maung Tun and Ma Hlaing was substituted. This corroborated the story of the 1st appellant that his father-in-law Maung Tun told him that he first received the land in mortgage and then got it by outright sale for Rs. 600.

Appellants produced the original counterfoil of an entry in Register No. 9 by the Circle *Thugvi* dated 12th February 1907 that the land was sold by Maung Kin to Maung Tun and his wife for

1927

MAUNG PO
SIN
AND ONEv.
MA NYEIN
AND SIX.HEALD AND
DARWOOD,
JJ.

(1) (1926) 4 Ran. 368.

1927
 MAUNG PO
 SIN
 AND ONE
 v.
 MA NYEIN
 AND SIX.
 HEALD AND
 DARWOOD,
 JJ.

Rs. 600 and that the transfer was reported by both parties. They also produced a certified copy of the entry as to the sale in Register No. 5, the official register of transfers of land, and an extract from Register No. 1, showing mutation of names. An eye witness corroborated the report entered in Register No. 9.]

It is perfectly clear on the evidence that Po Kin sold the land to Maung Tun and Ma Hlaing outright in 1907, and that the mortgage set up by the respondents came to an end at that time. It is true that there was no transfer of the legal title at that time because there was no registered deed, but on the rulings cited above the agreement to sell would be a good defence to respondents' suit for redemption, and apart from those rulings it seems clear that appellants' possession has been adverse to respondents for much more than 12 years and that they have acquired title as against respondents by prescription.

The judgment and decree of the lower Court must therefore be set aside and the respondents' suit must be dismissed with costs for appellants in both Courts.