

APPELLATE CIVIL.

Before Mr. Justice Chari.

MAUNG SAN DA

v.

MAUNG CHAN THA AND ANOTHER.*

1929

Aug. 22.

Benamidar, right of, to sue for possession—Real owner's unwillingness to sue, a bar to such claim.

Held, that whilst a *benamidar* may, as against a stranger, maintain suits in respect of immoveable property, he may not do so when the real owner is not willing to maintain the suit to enforce the claim.

Kyaw Htoon for the appellant.

So Nyun for the respondents.

CHARI, J.—Maung San Da, the appellant before this Court, filed the suit out of which this appeal arises for specific performance of a contract entered into by the defendants and Maung San Da (Exhibit A). By that agreement the defendants admitted having sold a house to Maung San Da and stated that they entered into the agreement because at that time they were unable to go to effect registration. There is, therefore, a clear implication that the defendants should execute a registered deed of conveyance whenever called upon to do so.

The defence was that the defendants never intended to contract with Maung San Da but with his mother, Daw Me Ya, and that they signed a piece of blank paper which was afterwards filled in without their knowledge and Maung San Da's name put in as the purchaser instead of Ma Me Ya's with whom they intended to treat. It was also alleged that in

* Special Civil Second Appeal No. 115 of 1929 from the judgment of the District Court of Pegu in Civil Appeal No. 113 of 1928.

1929

MAUNG
SAN DA
v.
MAUNG
CHAN THA.
CHARI, J.

any event Maung San Da was only a *benamidar* of Ma Me Ya.

The first of the two defences raised need not be considered at all because it is an incredible statement, in view particularly of the fact that the agreement was attested by two witnesses.

The second defence was not put in as clearly as it might have been, but what was meant is clear enough. The learned Judge of the trial Court gave a decree in favour of the plaintiff, but in appeal this decree was reversed by the District Judge.

It is urged in this Second Appeal that even if Maung San Da is a *benamidar*, the defendants cannot resist his suit. On the question whether Maung San Da was or was not as a matter of fact the *benamidar* of his mother, the evidence is perfectly clear. The money paid to one of the old lady's daughters, to whom the two executants of the agreements were themselves indebted was, at their request, borrowed from a Chettyar on a promissory note signed by Maung San Da and his mother. The mother states in evidence that she intended to borrow the money; that the money was her own; and that she, as a matter of fact, discharged the promissory note. She produced the discharged promissory note, and it may be assumed that she was the one who paid the money to the Chettyar. She also states in evidence that Maung San Da joined in the execution of the promissory note because the Chettyar insisted on his doing so. It is, therefore, clear that the money paid to Ma Saw Nyun was the money of the mother, Daw Me Ya.

It is possible to argue that Daw Me Ya, though she paid the money, intended that the benefit of the agreement should accrue to her son, but this presumption is rebutted by Exhibit 1 filed in Criminal

Regular Trial No. 84 of 1928, in which Maung San Da admits not only that the money was his mother's, but that his own name was put in as a temporary measure, that is in effect, that he was a *benamidar* of his mother.

1929
 MAUNG
 SAN DA
 v.
 MAUNG
 CHAN THA.
 CHARI J.

The only point for consideration is whether the defendants could resist the suit if Maung San Da was, as he undoubtedly was, a *benamidar* of his mother.

The rights of a *benamidar* to enforce claims in respect of contracts entered into by him have been recognized by all the Courts in India; except that in respect of immoveable property, some of the High Courts did not recognize the *benamidar's* right to recover possession.

This matter has been set at rest by the Privy Council, and, as the law now stands, a *benamidar* can maintain a suit in respect of contracts and can maintain suits in respect of immoveable property though he is merely a *benamidar*. This, however, does not dispose of the question now before me. When all the parties to the transaction know that the person appearing as a party to the contract is not the real party, and when a defence is raised that the party suing is a *benamidar*, the real meaning of that defence is that the real owner, or the person really entitled to the benefit of the contract, is not willing to maintain the suit to enforce his claim, and that the *benamidar* is maintaining it in spite of the unwillingness of the real owner to do so.

In this case, though the mother who gave evidence for the defendants does not say so in so many words, it is perfectly clear that she was not a willing party to the plaintiff's enforcing performance of the contract entered into on her behalf.

The defence raised, therefore, is a good one, and, in the circumstances of this case, the plaintiff's suit is on that account bound to fail.

1929
 MAUNG
 SAN DA
 v.
 MAUNG
 CHAN THA.
 CHARI, J.

I, therefore, confirm the judgment and decree of the lower appellate Court though not for the reasons actually stated by the learned Judge.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Benjamin Heald, Kt., Officiating Chief Justice, & Mr. Justice Chari.

1929
 Aug. 26.

SULAIMAN

v.

TAN HWI YA.*

Amendment of Pleadings—Court's discretion—New issue of fact and of law—Civil Procedure Code (Act V of 1908) O. 6, r. 17.—Stifling a criminal prosecution, what is—Agreement resulting in withdrawal of a criminal prosecution, not necessarily void—Agreement to pay debt due without knowledge of pending criminal prosecution.—Contract Act (IX of 1872) s. 23.

Under the provisions of Order 6, r. 17 of the Civil Procedure Code leave to amend pleadings is a matter in the discretion of the Court. It would ordinarily refuse to allow a party to raise new issues of fact long after the other party has called all his evidence and has closed his case. But if on the evidence a new issue of law arises, that can be raised.

Where a criminal prosecution for a non-compoundable offence has been withdrawn as a result of an agreement it does not necessarily follow that the agreement itself is void under s. 23 of the Contract Act. Where a person guaranteed the payment of a debt that was due without any knowledge that a criminal prosecution was pending in respect of it between the creditor and the debtor and which was thereafter withdrawn, the guarantor was bound by his contract.

Dwijendra v. Gopiram, 53 Cal. 51; *Harjas v. Tek Chand*, A.I.R. 1927 Lah. 465; *Nagappa Chetty v. Ma U*, 3 L.B.R. 42; *Shanti v. Lal Chand* A.I.R. 1927. Lah. 530—*referred to*.

Kya Gaing for the appellant.

Ba Marw for the respondent.

HEALD, OFFG. C.J.—Respondent sued appellant, as one of the three signatories of a mortgage bond

* Civil First Appeal No. 30 of 1929 from the judgment of the District Court of Pegu in Civil Regular Suit No. 47 of 1926.