

## APPELLATE CIVIL.

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

1929

Feb. 18.

MAUNG PO KYWE AND OTHERS

*v.*

MAUNG PO TIN AND OTHERS.\*

*Specific performance—Limitation—Possession by purchaser without registered instrument, a valid defence to suit by legal owner for eviction—Remedy of specific performance of contract of sale barred by limitation—No bar to defence of possession under contract of sale.*

Though the provisions of the Limitation Act may prevent a person from suing for specific performance of a contract of a sale of immoveable property, they do not debar him from setting up his contract as a defendant in defence to a suit to recover possession by the original legal owner.

*Maung Myah Tha Zan v. Ma Dun*, 2 Ran. 285—*referred to*.

*Maung Po Tha v. Maung Ba Din*, 4 U.B.R. 179 ; *Salamat v. Masha*, 40 All-187 ; *Sandu v. Bhtikchaud*, 47 Bom. 621 ; *Visagapatam Company v. Muthurama-reddi* 46 Mad. 919—*followed*.

*Kalipada v. Ford Ltd.*, 31 C.W.N. 348—*distinguished*.

*Ba Han* for the appellants.

*E Maung* for the respondents.

BROWN, J.—The plaintiff-appellants sued the defendant-respondents for possession of certain land. The defence was that the defendants had been put into possession under an oral contract of sale by the predecessor in interest of the plaintiffs. The trial Court found that the defendants did obtain possession in this way and that the plaintiffs had obtained the purchase money, and the suit was accordingly dismissed. The District Court on appeal concurred with the trial Court in its finding on the facts and dismissed the appeal. The appellants then came to this Court in second appeal, and it was urged that the defendants were not entitled to rely on their

\* Letters Patent Appeal No. 127 of 1928 from the judgment of the High Court in Civil Second Appeal No. 372 of 1928.

possession under the contract in view of the fact that at the time the suit was brought a suit by the mortgagees for specific performance of the contract of sale was barred by limitation. The appeal was heard by a single Judge of this Court who decided against the contention put forward by the appellants but who subsequently granted a certificate under section 13 of the Letters Patent for further appeal on the ground that the point had not perviously been decided specifically by this Court.

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In the case of *Maung Myat Tha Zan and one v. Ma Dun and one* (1), it was held by a Full Bench of this Court that to a suit by the legal owner for possession of immoveable property of a value of Rs. 100 or upwards it was a valid defence that the defendant was given possession of the property by the legal owner under a contract for sale as defined in section 54 of the Transfer of Property Act. It has not been suggested that we are not bound by this decision. But it is contended that the decision had reference only to cases in which a suit by the person in possession for specific performance of a contract of sale was not barred by limitation. Although the answer to the reference in that case was made in general terms, it is clear that in making that answer two at least of the Judges of the Bench had in mind the fact that in that particular case a suit for specific performance was not barred. I agree therefore with the contention put forward by the appellants that *Maung Myat Tha Zan's* case does not decide definitely the point now at issue between the parties. I am however of opinion that the principle approved in *Maung Myat Tha Zan's* case must be held to be applicable whether a suit for specific performance of a contract of sale is or is not barred by limitation.

(1) (1924) 2 Ran. 285.

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I dealt precisely with this point as an Additional Judge of the late Judicial Commissioner's Court, Mandalay, in the case of *Maung Po Tha v. Maung Ba Din* (1). The view I took in that case was that although the provisions of the Limitation Act would prevent the defendant from suing for specific performance of a contract, they did not debar him from setting up his contract in defence to a suit for possession by the plaintiff. At the time I wrote that judgment there were ~~conflicting~~ decisions on the point, and the view of the High Court of Madras was that unless there was a registered document in the circumstances to which section 54 of the Transfer of Property Act applied, the person in possession under a contract of sale could not resist a suit for possession brought by the owner. But the previous decisions to that effect have since been overruled by a Full Bench of that Court in the case of *Vizagapatam Sugar Development Company v. Muthuramareddi and two others* (2). In that case the plaintiff had agreed to sell all lands worth more than Rs. 100 to the defendant, had received consideration and had put the defendant in possession but had not executed a conveyance. It was held by the Full Bench that part performance by way of delivery of possession and an enforceable right on the defendant's part to specific performance were each good defences to the action; and when the same case came up for decision on a further point before a Bench of two Judges, that Bench held that the plea of part performance was not limited to cases where the right to sue for specific performance was not barred on the date of the subsequent suit.

A similar view of the law has been taken by the High Court of Bombay in the case of *Sandu*

(1) (1921-22) 4 U.B.R. 179.

(2) (1923) 46 Mad. 919.

*Walji and another v. Bhikchand Surajmal and others* (1).

We have been referred on behalf of the appellants to the case of *Kalipada Basu and others v. Fort Gloster Jute Manufacturing Co., Ltd.* (2). It is suggested that this is an authority for holding that the defence raised in this case cannot be put forward when the claim for specific performance would be barred by limitation. I notice however that in the Calcutta case it was the plaintiff who was seeking to recover title on the strength of his possession and the present question was not therefore directly in issue.

I referred to and followed the Allahabad case of *Salamat-uz-Zamin Begam v. Masha Allah Khan and others* (3) in my judgment in *Maung Po Tha's* case (4). I see no reason for altering the opinion I expressed in that case, and for the reasons set forth therein I held that the defence that the defendant has been put into possession under a contract of sale after paying the purchase money can be raised in a suit to recover possession by the original owner, even though the right to sue for specific performance of the contract of sale may be barred by limitation.

It is contended that the ordinary rule should not be followed in this case because it is in evidence that the defendants knew at the time of the contract that a registered document was necessary in order to convey a valid title. But we are unable to see how these facts can affect the principle applicable. It is suggested that the defendants deliberately refrained from obtaining a registered deed in order to save stamp duty and thereby defraud the revenue. This argument appears to me to be somewhat far-fetched, and if there were any

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(1) (1922) 47 Bom. 621.

(3) (1917) 40 All. 187.

(2) (1926) 31 C.W.N. 348.

(4) (1921-22) 4 U.B.R. 179.

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fraud at all it was not against the plaintiffs. I am of opinion that this appeal should be dismissed with costs.

RUTLEDGE, C.J.—I agree that this appeal must be dismissed with costs. While *Maung Myat Tha Zan's* case does not expressly decide the point at issue in the present case, I am also of opinion that the principles therein approved must be held applicable irrespective of a suit for specific performance lying or not. The cases cited by my brother Brown show that a large preponderance of Indian Judicial opinion is in favour of the view we take.

## APPELLATE CIVIL.

Before Mr. Justice Otter.

ABDULLAKIN

v.

MAUNG NE DUN AND ANOTHER.\*

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*Evidence Act (I of 1872), s. 92—Character of consideration, evidence to prove—Rent set out in a lease document—Part of rent a time-barred debt—Contract Act (IX of 1872), s. 25 (3)—Specific reference to barred debt unnecessary.*

A party is not debarred by anything in the Evidence Act from showing the real character of the consideration fixed between the parties. What is not allowed by by s. 92 is to contradict the *terms* of a document.

It is therefore open to a party to show that part of the consideration as to rent payable in terms of a lease represented a past debt for rent and not a future liability arising under the contract. To satisfy the terms of s. 25 (3) of the Contract Act it is not necessary that the agreement should in terms refer to the barred debt.

*Appa Rao v. Suryaprakasa*, 23 Mad. 94; *Ganapathy v. Munisawmi*, 33 Mad. 159; *Kumara v. Srinivasa*, 11 Mad. 213; *Lal Mahomed v. Kallanus*, 11 Cal. 519; *Vasudeva v. Narasamma*, 5 Mad. 6—referred to.

\* Special Civil Second Appeal No. 428 of 1928 from the judgment of the District Court of Henzada in Civil Appeal No. 24 of 1928.