

## APPELLATE CIVIL.

— Before Mr. Justice Heald and Mr. Justice Mya Bu.

## MAUNG SHWE AN

v.

## MA THE NU AND OTHERS.\*

1929

Feb. 13.

*Privy Council, leave to appeal to*—Settled principle of law in Burma—No decision of Privy Council on such principle of law—Material question of law—Law laid down by Privy Council and applicable to particular set of facts—Civil Procedure Code (Act V of 1908), s. 110—Defence of possession in virtue of an agreement to sell.

It is settled law in Burma that an agreement to sell immoveable property which is inherent in the execution of a conveyance which was not registered, or in a report of an outright sale made by the vendor to the Revenue authorities with a view to mutation of names, is a good defence to a suit for possession of the property brought by the legal owner.

*Ma Ok Kyi v. Ma Pu*, 4 Ran. 368; *Ma Ma E v. Maung Tun*, 2 Ran. 479; *Myat Tha Zan v. Ma Din*, 2 Ran. 285; *Maung Shwe Hmon v. Tha Byaw*, 11 L.B.R. 460; *Tun Byu v. Maung Kya*, 3 Ran. 608—referred to.

Where their Lordships of the Privy Council have clearly laid down the law, which is applicable to a particular set of facts, leave to appeal to His Majesty in Council under such circumstances would be refused.

*Mathura Kurmi v. Jagdeo Singh*, 50 All. 208—referred to.

But, as in the present case, where the law has never been laid down, and the precise effect of the provisions of s. 54 of the Transfer of Property Act, has not been stated by their Lordships of the Privy Council, leave to appeal to His Majesty in Council on such a material question of law would be given.

*Immudipattan v. Dorasami*, 24 Mad. 377; *Mahomed Musa v. Aghore*, 42 Cal. 801; *Maung Shwe Go v. Maung In*, 44 I.A. 15—distinguished.

*Ba Thein* (2) for the applicant.

*Anklesaria* for the respondent.

HEALD and MYA BU, JJ.—Petitioner applies for leave to appeal to His Majesty in Council against a judgment of a Bench of this Court, which on appeal from a decree of the District Court of Amherst dismissing petitioner's suit, affirmed the decision of the District Court.

\* Civil Miscellaneous Application No. 66 of 1928 arising out of Civil First Appeal No. 210 of 1927.

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Petitioner valued the property which is the subject matter of the suit at Rs. 10,000 when he first filed the suit and at Rs. 13,000 when he gave evidence, and it is not suggested by the respondents that the value of the subject matter in dispute in the suit and in the appeal to this Court and in the proposed appeal to His Majesty in Council is less than Rs. 10,000. Petitioner claims that the proposed appeal involves a substantial question of law because, as he alleges, the judgment of this Court recognised as valid an oral transfer of immoveable property and such recognition contravenes the provisions of section 54 of the Transfer of Property Act which provides that a sale of immoveable property worth Rs. 100 or more can be made only by registered instrument.

In his original plaint, a copy of which (Exhibit 12) is on the District Court's record petitioner alleged that in 1909 by registered deed he made a simple mortgage of the lands in suit in favour of one Ma Sou and her two sons San Ye and Tun Hlaing, that in 1917 he put the mortgagees into possession of the lands on an agreement that the rents and profits should be taken by them in lieu of interest, and that he was entitled to recover the lands from the mortgagees or their heirs and legal representatives on payment of the original mortgage money without interest.

The defence was that the transaction of 1917 was not, as petitioner alleged, a conversion of a simple mortgage into a possessory mortgage but was an outright transfer of the mortgaged properties to the mortgagees in satisfaction of the mortgage debt.

Petitioner admitted that profits of the lands were only sufficient or barely sufficient to pay the interest due on the mortgage and the Government revenue and that he allowed his brother Kya Baw to work the

lands taking nothing from Kya Baw by way of rent or profits. It appeared from the official Land Records registers that about 1915 a report of a transfer of the lands by petitioner to Kya Baw was made to the Revenue authorities and that in the registers for the year 1915-16 the lands were transferred from petitioner's name to Kya Baw's name as owner. It appeared also from the official registers that in 1917 the lands were transferred outright by Kya Baw to San Ye and Tun Hlaing for Rs. 4,000 the transaction being reported to the Revenue authorities as a sale, that being the usual form of report in this country when mortgaged properties are transferred to the mortgagees in satisfaction of the mortgage debt. There was some evidence that the petitioner himself took part in this transaction, and although the trial Court rejected that evidence it must be remembered that in his original plaint petitioner himself said that it was he who transferred the lands to the mortgagees. It seems clear therefore that petitioner took part in the transaction of 1917 and that that transaction instead of being, as he alleged, a mere putting of the mortgagees into possession under an agreement that they should take the rents and profits in lieu of interest was in fact intended to be an outright transfer of the lands to the mortgagees in satisfaction of the mortgage debt. The only difference between this case and many similar cases which come before this Court is that the person who made the transfer to the mortgagees in this case, as shown by the entry in the Land Records registers, was petitioner's brother Kya Baw and not petitioner himself. But petitioner had admittedly allowed his brother to deal with the lands as owner and had allowed them to stand in his brother's name as owner for several years, and on his own statement in the plaint he was a party to the transaction

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of 1917. In these circumstances the trial Court found that petitioner could not be allowed to repudiate the transaction of 1917 which was proved to be in intention though not in law an outright transfer of the lands to the mortgagees in satisfaction of the mortgage debt.

Petitioner appealed to this Court on the ground that the lower Court should not have recognised the transfers of the lands by him to Kya Baw and by Kya Baw to San Ye and Tun Hlaing because ~~these~~ transfers were not effected by registered deed.

This Court said that petitioner's admission that he was a party to the transaction of 1917, which was proved to have been an outright transfer in satisfaction of the mortgage debt, debarred him from alleging that he was not bound by that transaction, and that although that transaction did not convey a good title to San Ye and Tun Hlaing, nevertheless it was a good defence to petitioner's suit to redeem the property. That decision was based on a long line of decisions of this Court that an agreement to sell, which is inherent in the execution of a conveyance which was not registered, or in a report of an outright sale made by the vendor to the Revenue authorities with a view to mutation of names, is a good defence to a suit for possession of the property brought by the legal owner. That view of the law is settled, so far as this Court is concerned, by the Full Bench cases of *Myat Tha Zan v. Ma Dun* (1) and *Ma Ok Kyi v. Ma Pu* (2), and has been adopted in numerous cases of which the following are examples, namely *Shwe Hmon v. Tha Byaw* (3), *Ma Ma E v. Maung Tun* (4) and *Tun Byu v. Maung Kya* (5).

(1) (1924) 2 Ran. 285.

(3) (1922) 11 L.B.R. 460.

(2) (1926) 4 Ran. 368.

(4) (1924) 2 Ran. 479.

(5) (1925) 3 Ran. 608.

Petitioner's learned advocate asks us to give leave to appeal to His Majesty in Council on the ground that all these cases have been wrongly decided in that they recognise as valid transfers which are declared by section 54 of the Transfer of Property Act to be invalid.

Respondent's learned advocate refers us to the case of *Mathura Kurmi v. Jagdeo Singh* (1) as laying down that the application of well-defined legal principles to a particular set of facts does not raise any question of law which can fairly be described as substantial, but in quoting that case the learned advocate has omitted certain important words. The Bench qualified the generality of the statement quoted by the words "in these circumstances" the circumstances in that case being that the matter had been agitated time and again before their Lordships of the Privy Council, who had repeatedly laid down the law in the sense in question. In the present case the law does not seem ever to have been laid down by their Lordships of the Privy Council. There are certain cases in which their Lordships have dealt with somewhat similar points, namely, the cases of *Immudi-pattan v. Peria Dorasami* (2), *Mahomed Musa v. Aghore Kumar Ganguli* (3), and *Shwe Go v. Maung In* (4), but in those cases, as was pointed out in the case of *Myat Tha Zan v. Ma Dun* (5), the question of precise effect of the provisions of section 54 of the Transfer of Property Act was not material to the decision. In these circumstances we are unable to hold that the decision in *Mathura Kurmi's* case applies to the facts of the present case.

The question whether the cases in this Court mentioned above and similar cases decided in the

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(1) (1927) 50 All. 208.

(3) (1914) 42 Cal. 801.

(2) (1900) 24 Mad. 377.

(4) (1916) I.A. 15.

(5) (1924) 2 Ran. 285.

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other High Courts of India were rightly decided is clearly a question of law and in view of the number of such cases occurring in this country and the importance of the legal principles involved it seems to us to be a material question of law.

We therefore grant a certificate that as regards amount or value and nature the case fulfils the requirements of section 110 of the Code.

Costs in respect of this application will abide the final decision of the appeal, advocate's fee in this Court to be five gold mohurs.

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he applicant failed to furnish security within the requisite time, the appeal was rejected.]

## APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

P.L.T.A.R. CHETTYAR FIRM

v.

MAUNG KYAING AND ANOTHER.\*

1929

Feb. 18.

*Government leasehold land—Transfer by lessee by registered instrument—Transferee's neglect to obtain possession, mutation of names, and lease document—Lower Burma Town and Village Lands Act (Burma Act IV of 1898), ss. 29, 34—Default of Registering Officer to inform Revenue Officer, no excuse for negligence of purchaser—Transfer by original lessee as ostensible owner—Purchaser from original lessee, how far put on inquiry—Transfer of Property Act (IV of 1882), s. 41.*

Where a purchaser by a registered instrument of Government leasehold land from the original lessee allows (a) such lessee to remain in possession of the land, (b) the land to stand in the name of the lessee in the Government records, (c) the title-deed, viz., the document of lease to remain with the lessee, he acts negligently and must be taken to consent to the original lessee being the ostensible owner. Such negligent purchaser cannot throw the blame on the Registering or the Revenue Officers for default on their part to notify the transfer. It is the purchaser's business to see to the mutation of names. A

\* Letters Patent Appeal No. 108 of 1928 from the judgment of the High Court in Civil Second Appeal No. 732 of 1927 reported at 6 Ran. 643.