

APPELLATE CIVIL.

Before Mr. Justice Baguley.

1932
Dec. 20.

MA HME AND OTHERS

v.

MA PON.*

Mortgage debt, satisfaction of—Transfer by co-mortgagor of entire property in full satisfaction of debt—Transfer ineffective regarding other co-mortgagor's share—Revival of debt and security—Burmese Buddhist husband and wife, mortgage by—Parties to mortgage suit.

Where a mortgagor purports to convey the whole interest of himself and his co-mortgagor in the mortgaged property to the mortgagee in full satisfaction of the mortgage debt, but is legally entitled to convey his own interest only in the property, the mortgage debt is proportionately revived in respect of the co-mortgagor's interest which he has failed to convey to the mortgagee.

Where a Burmese Buddhist husband has mortgaged the joint property of himself and his wife with her knowledge and consent, the mortgagee must implead both of them in his suit, and if he omits to sue either spouse, the mortgage decree will be inoperative as against the share of that spouse in the mortgaged property.

N.A.V.R. Chettyar Firm v. Maung Than Daing, I.L.R. 9 Ran. 524—followed.

Ma Nyun v. Teixeira, 10 L.B.R. 36—approved.

Kyaw Din for the appellants.

Thein Maung for the respondent.

BAGULEY, J.—The facts of this case are clearly set out in the judgment of the lower appellate Court with most of which I am in entire agreement, so it is unnecessary to recapitulate them at length.

The first point which was argued before me was that the sale deed executed by Ma Ma Gyi † alone completed the extinguishing of the mortgage debt as there had been a novation of the contract, and in support the ruling in *Scarf v. Jardine* (1) was quoted. This case was on entirely different facts and really has no application to the case now before the Court.

* Civil Second Appeal No. 70 of 1932 from the judgment of the District Court of Magwe in Civil Appeal No. 105 of 1931.

† Ma Ma Gyi and her brother, Maung Ye, were the co-mortgagors.—*Ed.*

(1) 7 Ap. Ca. 345.

To quote from Gour on the Law of Transfer, paragraph 2253 :

“The charge created by the mortgage can only be destroyed by payment or discharge of the debt, or by a release of the mortgage. Even where the new security comprises fresh debts and added property and the mortgagee intended to take it in extinguishment of the old mortgage, the security created by the latter would revive if the new mortgage proves invalid. So if the purchase made by the mortgagee was found to convey no title, the mortgagee can fall back on his mortgage.”

And I would hold this to apply in a case like the present one where owing to a mistake it was found that Ma Ma Gyi was unable to convey the interest in the properties which she undoubtedly intended to convey. The idea of the parties was that Ma Ma Gyi was conveying to the plaintiff the whole interest, and, as it turns out that she can only convey her partial interest, I hold that the plaintiff is entitled to take Ma Ma Gyi's interest as regards one-third of the debt and revive the mortgage on the interest of the deceased Maung Ye.

The other point argued was that in any event the interest of Ma Hme * cannot be sold in execution of the mortgage decree because Ma Hme in her personal capacity is not a party to this suit. This contention, I think, is correct. The learned Judge has relied upon certain dicta in *N.A.V.R. Chettyar Firm v. Maung Than Daing* (1) to justify the contention that in similar circumstances the husband can alienate the property of the wife, it being a question of fact whether in a particular transaction the husband and wife were parties or not. In following the dicta he was, of course, correct and most probably in executing the mortgage Maung Ye

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* The widow of Maung Ye, deceased.—*Ed.*

(1) (1931) I.L.R. 9 Ran. 524.

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was acting as agent for his wife because she was a party to the promissory notes which formed the basis of the consideration for the mortgage; but he has overlooked the fact that Ma Hme in her personal capacity is not a party to this suit. This is clear from the plaint. It is true that Ma Hme, Maung Hmi and Ma Paik are entered on the heading of the plaint as defendants, but the first paragraph of the plaint recites that Ma Ma Gyi and Ko Ye executed a mortgage bond, and the second paragraph of the plaint states that Ko Ye died leaving his wife Ma Hme, his son Maung Hmi and his daughter Ma Paik "who are impleaded being heirs and legal representatives of the deceased Ko Ye." Had the plaintiff wished to sue Ma Hme in her personal capacity as well as legal representative of the deceased Maung Ye there was nothing to prevent her from doing so but she has chosen to sue collectively "the estate of Ko Ye, deceased, represented by his legal representatives." It must, therefore, be held that Ma Hme in her personal capacity is not a party to the suit. The respondent relies upon the case of *Ma E Mya v. The Japan Cotton Company and 3 others* (1), which in terms appears to support the plaintiff's case. This, however, appears to have been a judgment on the particular facts of the case, and it must be remembered that this case was decided prior to *Ma Paing's* case (2). *Ma Paing's* case explicitly overruled *Ma Nyun v. Miss E. E. Teixeira* (3); but *Ma Paing's* case has been definitely overruled in *N.A.V.R. Chettyar Firm v. Maung Than Daing* (4), and therefore, *primâ facie*, the cases overruled by *Ma Paing's* case must be regarded as not having been overruled. On page 536 of this Report

(1) 5 B.L.J. 218.

(2) (1927) I.L.R. 5 Ran. 478.

(3) (1919) 10 L.B.R. 36.

(4) (1931) I.L.R. 9 Ran. 524.

it is definitely stated by the learned Chief Justice "I am further of opinion that in cases where it is sought to execute a decree against the joint property of the husband and wife it is not permissible to execute the decree by attachment of the interest in the joint property of a party to the marriage unless such party had duly been impleaded in the suit, and was bound by the decree," and a reference is given to several cases of which *Ma Nyun v. Teixeira* (1) is one, and it must, therefore, I think, be considered that *Ma Nyun v. Teixeira* (1) is now to be regarded as good law. The headnote of this case shows that it was held by three of the four Judges who decided it

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"that even if a Burmese Buddhist mortgages the joint property of himself and his wife with her full knowledge and consent, he cannot be considered to be the *benamidar* of his wife in regard to her share, and that therefore in a suit on the mortgage it is necessary to join the wife as a party. Failure to join her as a party to the suit renders the mortgage decree inoperative against the wife's share."

This being the case the appeal must be allowed in part.

There is no dispute to the contention that Ma Hme's personal interest in the oil well is 2/9, and to this extent, therefore, the decree must be invalid. The respondents will therefore get a mortgage decree in the usual form against a four-ninths share in the oil-well site, being No. 3209 at Bè-mè, Yenangyaung, against Ma Hme, Maung Hmi and Ma Paik as legal representatives of Maung Ye, deceased. So far as the costs are concerned, the plaintiff can add to the claim on the mortgage her costs in the trial Court and the lower appellate Court, but both parties will bear their own costs in this Court.

(1) (1919) 10 L.B.R. 36.