

## APPELLATE CIVIL.

*Before Mr. Justice Dunkley.*MA THET *v.* MA SE MAI.\*

1934

June 26.

*Part-performance—Mortgagee's agreement to buy mortgaged property in satisfaction of debt and further payment—Mortgagee in possession—Part-payment of additional price—Receipt by vendor—Suit for redemption—Transfer of Property Act (IV of 1882 and XX of 1929), s. 53A.*

Where an usufructuary mortgagee resists the suit of the mortgagor for redemption on the ground that, the mortgagor having agreed to sell the land to the mortgagee in full satisfaction of the mortgage debt and for an additional payment of a sum in cash by the mortgagee, the mortgagee remained in possession of the land as the purchaser thereof, he must prove that (1) the agreement for the sale of the land was in writing signed by the mortgagor, (2) from the writing the terms of the contract of sale can be ascertained with reasonable certainty, (3) the mortgagee has continued in possession of the land in part performance of the contract of sale, and (4) has done some act in furtherance of the contract of sale.

Where the vendor gives a receipt for part-payment of the purchase money, which receipt includes a description of the land sold, the purchase price, and the fact that the property was previously mortgaged to the purchaser, it is sufficient to satisfy the requirements of s. 53A of the Transfer of Property Act as to the terms of the transfer, and the part-payment in such a case is an act in furtherance of the contract.

*Sanyal* for the appellant.

*Khan* for the respondent.

DUNKLEY, J.—The suit brought by the plaintiff-appellant was a suit for redemption of an usufructuary mortgage, and the facts found by both the lower Courts are that the defendant-respondent was in possession of a holding of land belonging to the plaintiff-appellant as usufructuary mortgagee, but that in March, 1933, the plaintiff-appellant agreed

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\* Special Civil Second Appeal No. 197 of 1933 from the judgment of the District Court of Kyaukse in Civil Appeal No. 16A of 1933.

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to sell this land to the defendant-respondent for a further sum of Rs. 150, over and above the mortgage amount, and that after this agreement had been concluded the defendant-respondent remained in possession of the land in suit. On these facts the learned Township Judge decreed the suit for redemption on the ground that the redemption of a mortgage and a contract for the sale of the mortgaged land are entirely distinct transactions, and that the plaintiff-appellant was entitled to redeem the mortgage and the remedy of the defendant-respondent was a suit for specific performance of the contract of sale. On appeal to the District Court of Kyaukse the learned Additional Judge correctly realized that the question whether redemption ought to be allowed or not must be decided on a consideration of the principles of the doctrine of part performance ; but he failed to realize that the principles of this doctrine, as applicable in British India, are now contained in the new section 53A of the Transfer of Property Act, which was added by the Amending Act of 1929, and that the decisions of this Court which he has quoted are, in consequence of the enactment of this section, no longer good law.

Section 53A of the Transfer of Property Act, so far as the present case is concerned, is in the following terms :

“Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed

or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, \* \* \* the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract."

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Consequently, in order that the defendant-respondent should be able to resist the plaintiff-appellant's suit for redemption of the mortgage, it is necessary for the defendant-respondent to establish, first, that the agreement for sale of the land to her was made in writing signed by the appellant and that from this writing the terms of the contract of sale can be ascertained with reasonable certainty; and, secondly, that she has continued in possession of the suit land in part performance of this contract and has done some act in furtherance of the contract.

The allegation set up on behalf of the respondent is that there was such a writing, that in pursuance of the agreement for sale she paid a further sum as earnest money of Rs. 50 out of the additional sum of Rs. 150 due, and that at the time that the contract was entered into the terms of the agreement were reduced to writing and were signed by the appellant. This writing, which is written in Burmese and is contained in an exercise book, has been produced and has been duly proved by the witnesses who were present when it was written and signed. It is in the following terms:

"On 5th *lazan* *Tabaung* 1294, I, Ma Thet, residing at Sulegon village, had mortgaged to Ma Se Mi, residing in the same village, the holding No. 67, situate in *Pauktaw kwin*, and when I sell it outright to Ma Se Mi by asking from her the further sum of Rs. 150, Ma Se Mi, having agreed to buy the

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land from Ma Thet for Rs. 350, three hundred and fifty rupees, paid to me this year the earnest money Rs. 50, fifty rupees only, in the presence of the following witnesses, and I, Ma Thet, sign this receipt as having received the money."

This is stamped with a one-anna stamp; and, of course, as an agreement for sale it is insufficiently stamped, but as it has been admitted in evidence by both the lower Courts its admissibility cannot be questioned by me now: see on this point *Maung Po Htoo and three v. Ma Ma Gyi and one* (1) and *Ma Nyun v. Maung San Mya and another* (2). However, steps ought to be taken to impound this document and forward it to the Collector for action.

The first point which has been raised before me on behalf of the appellant in this appeal is that this document does not embody the terms of an agreement for sale of the land, but that it is a mere receipt for a sum of Rs. 50, and that therefore it does not comply with the provisions of section 53A of the Transfer of Property Act, which requires a writing from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. In my opinion, this contention cannot be upheld, for in this document are mentioned, first, the specification of the land to be sold, and, secondly, the purchase price, and also the fact that it had been previously mortgaged to the purchaser. These facts do, in my opinion, include the essential terms of the contract for sale, and are sufficient to form the basis of a suit for specific performance of this contract. It has further been pointed out that, although the mortgage was in favour of the respondent and her daughter, yet this document refers to

the respondent only, but the fact that the purchaser is one person and the mortgagees were two persons does not seem to me to be of any moment whatever.

The second point which has been raised on behalf of the appellant is that, although the respondent has continued in possession of the land and although this possession may be referred to the agreement for sale, yet the purchaser has done no act in furtherance of the agreement for sale, as required by the last words of the second clause of section 53A. The answer to this contention is that the purchaser paid the sum of Rs. 50 towards the purchase price. But it is contended on behalf of the appellant that payment of the purchase money is not an act of part performance of the contract, on the grounds that payment of money is an equivocal act, and that a mere payment of money does not change the relative position of the parties though it may give rise to a claim to recover it. The decisions of the English Courts on which this contention is based refer, of course, to the part performance of an agreement to sell when the purchaser is not already in possession of the property sold, and, in my opinion, they have no reference to a case such as that which is now before me, where the purchaser is already in possession of the property as mortgagee and then continues in possession after the agreement to sell has been concluded. In such a case the payment of part of the purchase money as an addition to the amount already due on the mortgage, in respect of which the purchaser is already in possession, is an unequivocal act which cannot be referred to any other matter than the agreement for sale, and as such, therefore, is sufficient to satisfy the requirement of section 53A of the Transfer of Property Act that some act must be done in furtherance of the contract.

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Consequently I must hold that the decision of the learned Additional Judge of the District Court of Kyaukse, that the defendant-respondent was entitled to resist the plaintiff-appellant's suit for redemption, is correct. This appeal fails and is dismissed with costs, advocate's fee in this Court three gold mohurs.

### CIVIL REVISION.

*Before Mr. Justice Dunkley.*

1934  
 July 10.

### MAUNG BA KYAW AND ANOTHER v. NANIGRAM JAGANATH.\*

*Loan by registered instrument—Extension of time and mode of payment—Oral agreement—Admissibility of evidence of—Tender of debt—Stoppage of interest—Money at the disposal of creditor—Creditor's refusal to take proposed payment—Tender unnecessary.*

The time and mode of repayment of a loan are material and essential parts of the contract of loan, and an oral agreement altering the time and mode of repayment cannot be proved where all the terms of the loan are contained in a registered instrument.

*Abdulla Khan v. Husain*, 40 I.A. 31 ; *Sadar-ud-din Ahmad v. Chajju*, I.L.R. 31 All. 13 ; *Tika Ram v. Deputy Commissioner of Bara Banki*, 26 I.A. 97—*referred to*.

A proper tender of money due will stop the running of interest, but after such tender, whilst the debtor must be ready to pay the money whenever the creditor demands it, he is not bound to keep the tendered amount apart for the creditor to take it when he desires.

*Jagat Tarini Dasi v. Chaki*, I.L.R. 34 Cal. 305—*referred to*.

If a creditor unequivocally refuses a proposed payment of the amount due the debtor is not bound to make a formal tender thereof.

*Chatikani v. Zamindar of Tunj*, 50 I.A. 41—*referred to*.

*Hay* for the applicants.

*N. N. Burjorjee* for the respondent.

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\* Civil Revision No. 184 of 1934 from the judgment of the Small Cause Court, Rangoon, in Civil Regular No. 1409 of 1933.