APPELLATE CIVIL.

Before Mr. Justice Mosely.

1937

June 22.

U THET PAN AND ANOTHER
v.
MA PHU SAING.*

Mortgage—Abortive or invalid usufructuary mortgage—Redemption suit—Suit for delivery of possession—Factum of abortive mortgage as evidence—Collateral purpose of showing character of possession—Adverse possession—Evidence open to both parties.

A person cannot sue for redemption of his land on the strength of an abortive or invalid usufructuary mortgage, but he can sue for delivery of possession of the land and he is entitled to give evidence of the factum of the abortive mortgage, though not of its terms, for the collateral purpose of showing the character of defendant's possession, *viz.*, that it was not adverse to the plaintiff. It is open to the defendant also to give such kind of evidence to show that his possession is adverse.

Ma Kyi v. *Ma Thon*, I.L.R. 13 Ran. 274; *Maung Sin* v. *Maung So Min*, I.L.R. 8 Ran. 556, followed.

Chhotalal v. *Bai Mahakore*, I.L.R. 41 Bom. 466; *Varada Pillai* v. *Jeevarathnammal*, I.L.R. 43 Mad. 244, referred to.

Maung Kin Lay v. *Maung Tun Thaing*, I.L.R. 5 Ran. 679, dissented from.

Ba Maung for the appellants.

Thet Tun for the respondent.

MOSELY, J.—The plaintiff-respondent sued for delivery of possession of a certain piece of land on repayment of the amount borrowed from the defendants and obtained a decree accordingly in the trial Court which was upheld on appeal by the lower appellate Court. The case, of course, is the familiar case of an abortive or invalid usufructuary mortgage, which in this case dates from 1283 (1922), or over 12 years before the institution of this suit. The lower appellate Court remarked that the plaintiff was entitled to give evidence of the factum of the abortive mortgage, (though not of

* Civil Second Appeal No. 404 of 1936 from the judgment of the District Court of Sagaing in Civil Appeal No. 43 of 1936.

its terms, *vide* section 91, Evidence Act), for the collateral purpose of showing that the defendants' possession was not adverse. The learned District Judge overlooked the fact that one of the cases he relied on—*Maung Kin Lay* v. *Maung Tun Thaing* (1)—was overruled in *Ma Kyi* v. *Ma Thon* (2); but the case on which he principally relied—*Maung Sin* v. *Maung So Min* (3)—a decision of a Bench of this Court, has not been overruled and is still, in my opinion, good law. This case lays down that evidence of such an abortive mortgage may be given by the plaintiff for the collateral purpose of showing the nature of the defendants' possession, *i.e.*, that it is not adverse to the plaintiff.

Maung Sin v. *Maung So Min* (3) was based on *Varada Pillai* v. *Jeevarathnammal* (4), a decision of their Lordships of the Privy Council, and I might add that *Chhotalal Aditram Travadi* v. *Bai Mahakore* (5) is to the same effect. Those were cases where it was held that a deed of gift or a deed of partition which was unregistered might be adduced in evidence by the defendant to prove the nature of his or her possession and the fact that they had been in adverse possession under these deeds. I agree with what was said by Otter J. in *Maung Sin* v. *Maung So Min* (3) that no distinction can be drawn between the cases where the plaintiff and where the defendant seek to give such evidence. In the present case it is not a case of the plaintiff relying on the mortgage or seeking to prove it: she was relying on the fact that there was an abortive mortgage to show the character of the defendants' possession.

It is immaterial whether section 144 or section 142 of the Limitation Act be held to apply in the present

(1) (1927) I.L.R. 5 Ran. 679, 683.
(2) (1935) I.L.R. 13 Ran. 274, 286.
(3) (1930) I.L.R. 8 Ran. 556.
(4) (1919) 46 I.A. 285; I.L.R. 43 Mad. 244.
(5) (1917) I.L.R. 41 Bom. 466.

1937

U THET PAN
v.
MA PHU SAING.

MOSELY, J.

case, that is to say it is immaterial whether the burden was on the plaintiff to prove that she did not discontinue her possession by effecting this mortgage, or whether the burden was on the defendants to show in a suit based merely on title that they were in adverse possession. In the present case the defendants' claim that they had cleared the land themselves 20 years ago and had never come into possession through the plaintiff was clearly untrue and disproved by the plaintiff's evidence.

For these reasons the decisions of the lower Courts will be upheld and this appeal dismissed with costs.

CIVIL REVISION.

Before Mr. Justice Baguley.

1937

June 28.

TRIBENI MISSER
v.
JAGARNATH BHAGWANDAS.*

Master and servant—Wages due periodically—Leaving service without notice—Wages accrued due—Wages for a broken period—Suit for wages accrued due—Master's claim for damages—Set off—Court-fee.

If a servant employed on a monthly wage leaves his master's service without notice, he cannot claim wages for that portion of the time during which he has served since wages were last due. But where he has completed his period of service for which a periodical payment of his wages has accrued due, he is entitled to such payment. In the latter case, if the servant files a suit to recover his wages, the master can only claim to retain as damages the wages or a portion thereof by way of set off or as damages for leaving without notice and on paying the court-fee thereon.

Raja Shew Bakhsh v. *Pirumal*, (1904-06) 2 U.B.R., Master and Servant, p. 1; *Ripley* v. *Vaithanatha*, 8 B.L.J. 15, referred to.

Ahmed for the applicant.

Rauf for the respondent.

---

* Civil Revision No. 60 of 1937 from the judgment of the Small Cause Court of Rangoon in Civil Regular Suit No. 2461 of 1936.