LETTERS PATENT APPEAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

1938

Mar. 8.

MAUNG OHN AND ANOTHER

v.

MAUNG PO KWE AND OTHERS.*

Transfer of Property Act, s. 53A—Contract in writing—Writing referring to previous oral agreement—Writing embodying previous oral agreement.

The mere production of a writing from which can be ascertained matters referring to a pre-existing oral contract is not sufficient to come within the protection of s. 53A of the Transfer of Property Act. The contract itself must be in writing, and not a writing merely referring to some part or parts of a prior oral contract.

There is a distinction between a writing, which is a reduction into writing of an oral agreement, which would fall within the provisions of s. 53A, and a writing in which there is a mere reference to a previous oral agreement.

Ma Thet v. *Ma Se Mai*, I.L.R. 13 Ran. 17, distinguished.

Letters Patent Appeal arising out of Special Civil Second Appeal No. 117 of 1937 from the judgment of the Assistant District Court of Bassein in Civil Appeal No. 65 of 1936 (27th Dec. 1936) reversing the decree of the Township Court of Bassein West in Civil Suit No. 57 of 1936 (8th Oct. 1936).

The document (Exhibit 1) relied upon by the appellants read as follows :

"At an auction sale held by the Court in Execution Case No. 199 of 1934 of the Township Court of Bassein West, in execution of the mortgage decree passed in Civil Regular Suit No. 172 of 1932 of the said Court, against Ko Po Sein and his wife Ma Lay Yauk, cultivators of Ma-nyein-hla-gon, Bassein, the decree-holder N.A.S.R.M. Firm has purchased the mortgaged property, together with the revenue receipt (for) holding No. (29) for this year—1934-35, as well as a 3-posted, 2-roomed, plank-walled, corrugated iron-roofed house standing on the said land, in adjustment with the decretal amount in the above-mentioned

* Letters Patent Appeal No. 5 of 1937 arising out of Special Civil Second Appeal No. 117 of 1937 of this Court.

suit ; and as such (the property) belongs (to the said firm). According as it has already been agreed to sell the said house and land for Rs. 350 outright to Ko Maung Ohn, cultivator of Ma-nyein-hla-gon, Bassein, the above-mentioned house and land are sold for Rs. 350 on the 3rd *lazan* of *Nayon*, 1297 B.E., corresponding to the 3rd June, 1935 ; and, having received, in cash, Rs. 300 out of the said sum (Rs. 350), from Ko Maung Ohn, Ramasami, holder of general power of attorney for the above-mentioned decree-holder Firm, writes and gives a receipt (signs) to that effect."

24th Aug. 1937. Mya Bu Offg. C.J. who heard the Special Civil Second Appeal held that Exhibit 1 did not satisfy the requirements of s. 53A of the Transfer of Property Act and that the reoccupation of the house by the appellants (respondents in the second appeal) was not on account of any part performance of the alleged contract. His Lordship reversed the decision of the lower appellate Court in favour of the appellants and at their request granted a certificate for a Letters Patent Appeal. In the course of his judgment His Lordship said :

In the present case the document, exhibit 1, was tendered and admitted in evidence on the footing that it was a receipt. It sets out the terms necessary to constitute the transfer, but the setting out of such terms is referable to the object of describing the account in reference to which Rs. 300 was paid. The document itself states " As it has already been agreed to sell the said house and land ", and does not of itself purport to be the contract of sale. A contract of sale is nothing more or less than an agreement to sell and section 53A requires such an agreement to be in writing signed by the party whom it is sought to bind, or its agent. An agreement or contract to sell immoveable property need not be in writing but such oral agreement or contract does not satisfy the requirement of the section which lays down definitely and advisedly that it is to be in writing—I say advisedly, because, to meet the objection that a mass of perjured evidence would be introduced if oral agreements were allowed to be proved, it was enacted that the agreement should be in writing. Therefore, to satisfy the requirement of the section,

1938

MAUNG OHN v. MAUNG PO KWE.

there must be *inter alia* an agreement in writing which, under article 5 of the Stamp Act, requires payment of a duty. That the document, exhibit 1, was given and given only as a receipt is shown by the fact that it was stamped as a receipt and not as an agreement. Therefore, in my opinion, the defendants have failed in this case to produce an agreement in writing which is essential to the validity of the defence under section 53A of the Transfer of Property Act.

The learned advocate for the appellant urges that because the document sets out the terms necessary to constitute the transfer and, consequently, such terms can be ascertained from this document with reasonable certainty, it satisfies the requirement for an agreement in writing, and this contention cannot be upheld for the reason that if it were so any scrap of paper, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, would do without its being a valid agreement in writing. A contract or an agreement in writing or a written agreement is a *sine-qua-non*. Such written agreement may of course be the embodiment of what has already been orally agreed upon and may also refer to payment by the purchaser and receipt by the vendor of part of the purchase money, but it must essentially be a written agreement.

A document bearing much similarity to exhibit 1 in the present case was brought to the notice of my learned brother Dunkley J. in *Ma Thet* v. *Ma Se Mai* (1). That document ended with the words " I, Ma Thet, sign this receipt as having received the money " and was stamped with a one-anna stamp and the Courts below had admitted that document in evidence. The learned Judge on second appeal pointed out that " 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." Whether that document had been admitted merely as a receipt, or as an agreement, I am not in a position to say ; but in the case before me exhibit 1 was tendered as a receipt and was admitted and treated all along as a receipt and nothing more by both the Courts below. Further, from its wording it is clear that the agreement, which is relied on as the contract, had taken place on a different occasion prior to the drawing up of exhibit 1. Therefore, in the present case, there does not appear to be any just ground for acting upon this document as the contract pleaded in support of the defence in

(1) (1934) I.L.R. 13 Ran. 17.

suit. Nor has exhibit 1 been put forward as an unregistered sale deed. In these circumstances, I do not think it will be just and fair to the appellants to have the exhibit 1 impounded and admitted in evidence as an agreement or contract for sale in this case.

The lower appellate Court, however, treated it as a document which set out an agreement and from which the terms necessary to constitute the transfer could be ascertained with reasonable certainty, and thus accepted the document as being sufficient to satisfy the requirements of section 53A of the Transfer of Property Act. In my opinion, unless the document, exhibit 1, can be held to be an agreement or contract of sale it will not, by the mere fact that from it the terms necessary to constitute the transfer can be ascertained with reasonable certainty, be sufficient to satisfy the requirements of the section, as what the section requires is not a document from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty but a contract or an agreement in writing from which such terms can be so ascertained.

Furthermore, both the Courts below have discredited the evidence adduced on behalf of the defendants to show that on the day of the execution of the document, exhibit 1, Ramasami went and delivered possession of the property to Maung Ohn and Ma Thein Yin. Therefore, the ingredient of the transferee having taken possession of the property in part performance of the contract has not been established in this case.

It is true that Maung Ohn and Ma Thein Yin have all along been living in the house since some time before the alleged payment of Rs. 300 to the Chettyar Firm, but considering the relationship between them and the defendants Maung Po Sein and Ma Lay Yauk, their residence at the house both before and after the alleged payment of Rs. 300 to Ramasami Chettyar, is traceable to their residence there as the members of the family of Maung Po Sein and Ma Lay Yauk, and not in their own right ; and therefore their continuance in residence after the payment of Rs. 300 cannot be traced particularly to taking possession in part performance of the contract. Since N.A.S.R.M. Firm became the purchaser of the property at the auction sale the defendants Maung Po Sein and Ma Lay Yauk had no right to continue in their residence in the house and Raman Chettyar explains that the house had been leased to them, and that they were in occupation of the house as his

1938

MAUNG OHN v. MAUNG PO KWE.

tenants. The probability of the truth of the statement lies in the fact that they were allowed to continue in peaceful possession of the house all along. Maung Ohn and Ma Thein Yin were admittedly living with them all along, and therefore their continuance in residence in the house must undoubtedly have been in pursuance of the right of Maung Po Sein and Ma Lay Yauk as tenants of the house. Their continuance in residence, if there was no delivery of possession which they attempted to establish by evidence in the case, is therefore traceable to their residence under Maung Po Sein and Ma Lay Yauk, and not as continuance in possession on account of part performance of the contract.

Under these circumstances, in my opinion, the defence falls to the ground.

I set aside the judgment and decree of the lower appellate Court and restore that of the Court of first instance with costs throughout.

A. N. Basu for the appellants. S. 53A of the Transfer of Property Act does not require an agreement of sale in a legal form. An oral agreement subsequently reduced to writing satisfies the provisions of s. 53A.

[ROBERTS, C.J. A mere reference to an oral agreement in a written document does not satisfy the statute.]

The purchasers have paid the price and that is their act in performance of the contract. The agreement is very similar to the one in *Ma Thet* v. *Ma Se Mai* (1).

K. C. Sanyal for the respondents was not called upon.

ROBERTS, C.J.—In my opinion, this appeal must be dismissed. The respondents in this case bought the property in suit on the 4th of February, 1936, by registered deed from the N.A.S.R.M. firm. Prior to the date of this sale the N.A.S.R.M. firm had agreed to sell the property to the appellants, it is said, on the 3rd of June, 1935, and the sum of Rs. 300 out of the price of Rs. 350 had been paid. They permitted the

(1) I.L.R. 13 Ran. 17.

appellants to remain in occupation throughout the period, and the appellants continued in possession of the premises until the first and second respondents brought a suit for possession relying upon their registered deed.

In defence to this suit the appellants produced a document which they described as an agreement, and valid under section 53A of the Transfer of Property Act, to afford protection to them against the suit brought by the respondents for possession. And the learned Judge of the High Court who tried this case on second appeal, looking at it, has found that it is not an agreement within the meaning of section 53A of the Transfer of Property Act.

That section says that 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 has satisfied certain other requirements, then though the contract be unregistered he shall have the protection to which I have referred.

It has been urged upon us that the mere production of a writing from which can be ascertained matters referring to a pre-existing oral contract is sufficient to come within the protection of the section : but in my opinion the section clearly contemplates that the contract itself shall be in writing, and not that there shall be a writing referring to some part or parts of a contract which may previously have been oral.

I am not prepared, therefore, to dissent in any way from the finding of the learned Judge on second appeal in this respect.

But there was a further question, which was whether the appellants had continued in possession of these properties in part performance of the contract

1938

MAUNG OHN v. MAUNG PO KWE.

ROBERTS, C.J.

and whether they have done some act in furtherance of the contract. It is contended that they have. But their continuance in possession and the acts which they did must, in order to bring their case within the benefit of the statute, be exclusively referable to a pre-existing contract of sale. In my opinion no kind of ground has been shown for supporting such a contention. In fact, before the receipt ever came into existence the N.A.S.R.M. firm permitted the appellants to remain in possession of the property, and although there is no doubt that at some time or another they might have objected, I cannot find the continuance in possession of the appellants is referable to the contract of sale between them and the N.A.S.R.M. firm. One can think of many other reasons for continuance in possession : one which would readily occur to mind would be under a contract of tenancy, but it is not necessary to go into these considerations.

In my opinion, this appeal ought to be dismissed ; advocate's fee three gold mohurs.

DUNKLEY, J.—I agree.

A distinction must be drawn between a writing which is a reduction into writing of a previous oral agreement, which would fall within the provisions of section 53A, and a writing in which there is a mere reference to a previous oral agreement.

In reference to my own decision in *Ma Thet* v. *Ma Se Mai* (1) if the second clause of the headnote were read alone it would appear to be too broadly stated, but if the whole headnote is read it is clear that the reference to a receipt in the second clause means a receipt which must be construed as an agreement, or, what is the same thing, the reduction in writing of a previous oral agreement.

(1) (1934) I.L.R. 13 Ran. 17.