

FULL BENCH (CIVIL).

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

1938

Jan. 26.

K.L.C.T. CHIDAMBARAM CHETTYAR

v.

AZIZ MEAH AND OTHERS.*

Mortgage by deposit of title-deeds—Documents of title—All or most material documents not necessary—Documents showing title in depositor—Deeds relating to property mortgaged—Intention of creating security—Grant from Government to mortgagor's transferor—Transfer of Property Act, s. 58 (f).

In order to create a valid mortgage by deposit of title-deeds, under s. 58 (f) of the Transfer of Property Act, it is not necessary that the whole, or even the most material, of the documents of title to the property should be deposited, nor that the documents deposited should show a complete or good title in the depositor. It is sufficient if the deeds deposited *bona fide* relate to the property or are material evidence of title, and are shown to have been deposited with the intention of creating a security thereon.

A deposit with the intention to create a security of a deed of grant of land by Government to the mortgagor's transferor is sufficient to create a mortgage, and this document coupled with a certificate by the revenue surveyor recording an oral transfer of the land from the original grantee to the mortgagor and a number of tax tickets showing revenue being paid by the mortgagor, all go to disclose an apparent title in the mortgagor to the land.

Dixon v. Muckleston, 26 L.T.R. 752 = 8 Ch. Ap. 155; *Bhupendra Nath v. Wajihunnissa Begum*, 2 Pat. L.J. 293; *Elizabeth Toomey v. Bose*, I.L.R. 7 Pat. 520; *Lacon v. Alien*, (1856) Ch. 3 Drewry 579; *Official Assignee, Madras v. Basudewadoss*, I.L.R. 48 Mad. 454; *Pranjivandas Mehta v. Chan Ma Phee*, 43 I.A. 122; *Roberts v. Croft*, 24 Beav. 223 = (1857) 2 De G & J. 1; *Surendramohan v. Banerji*, I.L.R. 59 Cal. 781; *V.E.A.R.M. Firm v. A.K.R.M.M.K. Firm*, I.L.R. 7 Ran. 28; *Ex parte Wetherell*, 11 Ves. J. 398, referred to.

V.E.R.M.A.R. Chettyar Firm v. Ma Joo Tean, I.L.R. 11 Ran. 239, *dicta* dissented from.

P. K. Basu for the appellant. The documents deposited with the appellant by the mortgagor were sufficient to create a mortgage within ss. 58 (f) and 59 of the Transfer of Property Act. There was a Government grant of the land in favour of the mortgagee's predecessor in title in 1903. The deposit of this title

* Civil Second Appeal No. 373 of 1936 from the judgment of the District Court of Amherst in Civil Appeal No. 58 of 1936.

deed alone is sufficient to create a mortgage. In 1918 the grantee sold the land to the mortgagor by delivery of possession. There is a record of the revenue surveyor (*pyatpaing*) of the oral sale reported to him by the parties. There are also revenue receipts showing that the mortgagor has been paying the revenue and that he is in possession of the land since the date of sale to him. The lower courts dismissed the suit on the preliminary ground that the documents were not documents of title within s. 58 (*f*) of the Transfer of Property Act relying on the decision of Page C.J. in *V.E.R.M.A.R. Chettyar Firm v. Ma Joo Tean* (1). The sole point for decision in that case was whether a tax receipt by itself was a document of title or not. The learned Chief Justice went on to criticize a number of English cases of high authority which lay down the law which is still good law in England and has not been overruled by any appellate tribunal. The law is the same in Burma. The observations of Page C.J. are *obiter*. It is not necessary that to create a mortgage all the title deeds in respect of the property should be deposited, or that they should show title in the mortgagor to the property. Both English and Indian authorities lay down the same law.

Ex parte Wetherell (2); *Lacon v. Allen* (3); *Roberts v. Croft* (4); *Dixon v. Muckleston* (5). The decisions in the last two cases were upheld on appeal. *Suren-dramohan Ray v. Mohendranath Banerji* (6); *Bhupendra Nath Basu v. Wajihunnissa Begum* (7); *Elizabeth Toomey v. B. N. Bose* (8); *Official Assignee of Madras v. Doss* (9); Halsbury's Laws of England, Vol. 23,

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(1) I.L.R. 11 Ran. 239.

(5) 26 L.T.R. 752.

(2) 32 E.R. 1141 = 11 Ves. J. 398.

(6) I.L.R. 59 Cal. 781.

(3) 106 R.R. 443 = 3 Drewry 579.

(7) 2 Pat. L.J. 293.

(4) 24 Beav. 223.

(8) I.L.R. 7 Pat. 520.

(9) I.L.R. 48 Mad. 454.

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p. 234 ; Fisher's Law of Mortgage, 7th Ed. pp. 18, 19 ; Coote, Law of Mortgages, p. 93. Sir Dinshah Mulla's Transfer of Property Act, p. 348. In *Pranjivandas Mehta v. Chan Ma Phee* (1) the legality of the mortgage was never questioned though the title deeds deposited showed the title of the mortgagor's parents and not of the mortgagor. There is also a Bench decision of this Court binding upon Page C.J. but which was not brought to his notice. *V.E.A.R.M. Firm v. A.K.R.M.M.K. Firm* (2).

Eunoose for the respondents. There is a dispute as to whether the documents relate to the land in suit. The case must be remanded for evidence.

DUNKLEY, J.—The suit out of which this second appeal arises has been brought on an alleged mortgage by deposit of title deeds, by the plaintiff-appellant against the defendants-respondents. The first and second defendants-respondents are the alleged mortgagors. The third defendant-respondent is a subsequent mortgagee by a registered deed. Admittedly, the first and second respondents executed a promissory note in favour of the appellant and handed over to him certain documents, but they deny that any mortgage by deposit of title deeds was thereby created, and all three respondents contend that the documents in question are not "documents of title" within the meaning of section 58 (f) of the Transfer of Property Act.

The suit was dismissed by the Subdivisional Court of Moulmein on the preliminary issue that the documents relied upon by the plaintiff-appellant in support of his mortgage are not documents of title to immovable property, within the meaning of that expression as used in section 58 (f) of the Transfer of Property Act. This

(1) 43 I.A. 122.

(2) 1 L.R., 7 Ran. 28.

decision has been upheld on first appeal to the District Court. It is against these concurrent decisions on this point of law that the present appeal has been filed.

Both Courts relied upon the judgment of Page C.J. in *V.E.R.M.A.R. Chettyar Firm v. Ma Joo Tean and others* (1). The question for decision in that case was whether a receipt for payment of revenue, commonly called a "tax receipt", is a document of title, within section 58 (f) of the Transfer of Property Act, and that case is authority only for the proposition that a "tax receipt" by itself is not such a document of title. In the course of his judgment Page C.J. further made observations which appear to dissent from the judgments in certain English cases of high authority, and he concluded (at page 256) that the document, or documents, of title deposited must not only relate to the mortgagor's title to the property, but must disclose an apparent title in the mortgagor to the property or to some interest therein. It is upon this conclusion that the lower Courts have relied.

These observations were *obiter*, as being unnecessary for the decision of the point before the learned Chief Justice, and from these *dicta* we are compelled with the greatest respect to express our dissent. In our opinion, the correct statement of the law is that in order to create a valid mortgage by deposit of title deeds, under section 58 (f) of the Transfer of Property Act, it is not necessary that the whole, or even the most material, of the documents of title to the property should be deposited, nor that the documents deposited should show a complete or good title in the depositor. It is sufficient if the deeds deposited *bona fide* relate to the property or are material evidence of title, and are shown to have been deposited with the intention of

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(1) (1933) I.L.R. 11 Ran. 239.

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creating a security thereon. The law in regard to these "equitable" mortgages is precisely the same in England as it is in India, and there is ample English authority for this view. See, *Ex parte Wetherell* (1), *Lacon v. Allen* (2), *Roberts v. Croft* (3) and *Dixon v. Muckleston* (4). The decisions in *Roberts v. Croft* (5) and *Dixon v. Muckleston* (6) were upheld on appeal to the Lord Chancellor. In these appeals it was pointed out that if the mortgagee was guilty of negligence in allowing the mortgagor to retain in his possession some of the documents of title and thereby enabled the mortgagor to commit a fraud by holding himself out as unincumbered owner of the property, although the mortgage would still be good, the mortgagee's interest might be postponed to an interest vested in another by a later transaction (*per* Lord Seiborne L.C. in *Dixon v. Muckleston*), but that point does not arise for decision in the present case. The correctness of these decisions have never been questioned in the English Courts, and they have been impliedly followed by their Lordships of the Privy Council in *Pranjivandas Mehta v. Chan Ma Phee* (7), an appeal from the Chief Court of Lower Burma, where the legality of a mortgage by deposit of title-deeds was not even questioned although the documents deposited sufficed to show an apparent title to the mortgaged property in the mortgagor's parents only and not in the mortgagor. They have been followed by several Indian High Courts, *Surendra-mohan Ray Chaudhuri v. Mahendranath Banerji* (8), *Bhupendra Nath Basu v. Mussamat Wajihunnissa Begum* (9), *Miss Elizabeth May Toomey v. Bhupendra*

(1) (1805) 11 Ves. J. 398.

(5) (1857) 2 De G & J. 1.

(2) (1856) Ch. 3 Drewry 579.

(6) (1872-73) 8 Ch. Ap. 155.

(3) (1857) 24 Beav. 223.

(7) (1916) 43 I.A. 122 ; I.L.R. 43 Cal. 895.

(4) (1872) 26 L.T.R. 752.

(8) (1931) I.L.R. 59 Cal. 781.

(9) 2 Pat. L.J. 293.

Nath Bose (1) and *The Official Assignee of Madras v. Basudevadoss Badrinarayan Doss* (2). Furthermore, our conclusion is in accordance with the decision of a Bench of this Court in *V.E.A.R.M. Firm v. A.K.R.M.M.K. Firm* (3), a decision which was binding upon Page C.J. [*King-Emperor v. Nga Lun Thauing* (4)], but which does not appear to have been brought to his notice.

Now, for the purpose in hand, we must assume that the documents deposited with the plaintiff-appellant relate to the land in suit, although this is denied by the defendants-respondents and is a fact which will fall to be decided by the original Court. The documents consist of a deed of grant of the land, dated the 28th May, 1903, in favour of one Ne Kyaw, a record by the revenue surveyor of a report, made to him by the parties on the 2nd October, 1918, of an oral sale by Ne Kyaw to the first respondent, Aziz Meah, and a series of tax receipts showing that Aziz Meah has paid the land revenue on the land transferred since 1918, and, therefore, raising a presumption that Aziz Meah has been in occupation of the land since the date of the oral sale. The deed of grant is plainly a document which is material evidence of title. A deposit of this document alone with the requisite intention to create a security would, therefore, be sufficient to create a mortgage by deposit of title-deeds. But I am prepared to go further in the present case and to say that when all these documents are considered together (and they must be so considered) they suffice to disclose an apparent title in the mortgagor to the property. The judgments and decrees of the Subdivisional Court of Moulmein and of the District Court of Amherst on first appeal therefrom are, therefore, reversed, and the suit

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(1) (1928) I.L.R. 7 Pat. 520.

(3) (1928) I.L.R. 7 Ran. 28.

(2) (1924) I.L.R. 48 Mad. 454.

(4) (1935) I.L.R. 13 Ran. 570.

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(No. 31 of 1936) is restored to the file of the Sub-divisional Court to be heard and decided on the merits on the remaining issues. These issues will, of course, include *inter alia* issues on the questions of fact (1) whether the documents in question relate to the property in suit, and (2) whether the documents were deposited with the intention of creating a security thereon. For the former issue the Subdivisional Judge may, with the consent of parties, treat as evidence in the suit the evidence recorded by him on the remand order of this Court, dated the 4th May, 1937. The plaintiff-appellant is entitled to an order for refund of the Court fees paid by him on the memorandum of first appeal to the District Court and also on the memorandum of second appeal to this Court. The costs of both appeals will follow the result of the suit, advocate's fee of the appeal to this Court ten gold mohurs, which will include the sum of eight gold mohurs awarded by the remand order of the 4th May, 1937.

ROBERTS, C.J.—I agree, and I have nothing to add.

MYA BU, J.—The documents enumerated in my learned brother's judgment, in my opinion, show *prima facie* or apparent title of the mortgagors to the land covered by those documents. The grant shows that the original owner of the property was the mortgagors' vendor. The certificate of transfer shows the factum of the transfer having taken place about fourteen years before the alleged mortgage. Although it is not a valid document of conveyance, yet it is useful as showing that a transfer as a matter of fact had taken place. Then there were tax tickets, or revenue receipts, which showed that during the years that elapsed between the transfer and the alleged mortgage the mortgagors were

paying the revenue as persons who owned the land. All these facts put together show, in the absence of anything to the contrary, that, under section 28, read with Article 144, of the Limitation Act, the original grantee's right of recovery of the land had been extinguished by lapse of time at the time the alleged mortgage was made. In these circumstances, in my opinion, the documents enumerated in my learned brother's judgment are sufficient to show that there was *prima facie* title in the mortgagors to the property mentioned in the documents. For these reasons, I agree with the orders proposed by my learned brother.

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Before Mr. Justice Braund.

U BA THAUNG v. DAW U AND OTHERS.*

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Burmese customary law—Keittima adoption—Residence of adopted child with adoptive parents—Residence not essential for adoption—Adoption of minor child of tender years—Lack of evidence of fact of adoption—Evidence of residence to prove adoption.

Among Burman Buddhists an adopted child usually resides with the adoptive parents, but that is not essential for a valid adoption.

Ma Mu v. U Nyun, I.L.R. 12 Ran. 634, referred to.

On the other hand in case of minor children of tender years, where other evidence of adoption is lacking, the actual taking of the child by the adoptive parent into his or her home is almost essential for proving adoption.

Conditions of a keittima adoption stated.

Ma Than Nyun v. Daw Shwe Thit, I.L.R. 14 Ran. 557; *Ma Than Than v. Ma Pwa Thit*, I.L.R. 1 Ran. 451; *Ma Ywee v. Ma Me*, 36 I.A. 192, referred to.

Maung Ni (with him *Leong*) for the plaintiff.

E Maung (with him *Kyaw Din* and *Kyaw Myint*) for the 1st and 2nd defendants.

J. B. Sanyal for the minor defendants.

* Civil Regular Suit No. 130 of 1936 and Civil Misc. No. 37 of 1936.