

FULL BENCH (CIVIL).

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

MAUNG LU PE AND OTHERS

v.

MAUNG SAN MYA.*

1939

Mar. 6.

Suit for redemption—Oral mortgage—Suit for possession based on title, the proper course—Plea of possession based on oral mortgage not admissible—Transfer of Property Act, s. 59.

A suit for redemption of land arising out of an oral mortgage for Rupees one hundred or upwards must fail by reason of the provisions of s. 59 of the Transfer of Property Act. The proper course for the plaintiff in such a case is to sue for possession relying on his title and treating the defendant either as a trespasser or as a person who was not entitled to occupy in law the land. In such a suit it is not open to the defendant to plead or prove any rights under the oral mortgage.

Ma Kyi v. Ma Thon, I.L.R. 13 Ran. 274, followed.

U Thet Pan v. Ma Phu Saing, [1937] Ran. 442, mentioned.

An order of reference to be heard by a Bench or Full Bench was made in the following terms by

BAGULEY, J.—In this appeal an important point of law arises which, I think, is worthy of consideration by a Bench or a Full Bench.

1938

Nov. 12.

The suit is one to recover a piece of land, based on title. Really the plaintiff is out of possession on an oral mortgage but accepting the suggestion which is found in one of the reports that if he has a good title he may perhaps recover his land on his title when he cannot get it back by suing to redeem the mortgage the plaintiff filed the suit for recovery of possession on the title. The actual invalid mortgage dates from 1921, more than twelve years before the filing of the suit, but as a matter of fact the plaintiffs and their predecessors in title seem to have been out of possession for something like fifty years. It has been held that the defendant cannot successfully plead limitation by reason of *U Thet Pan v. Ma Phu Saing* (1), a ruling of a single Judge of this Court in which

* Civil 2nd Appeal No. 261 of 1938 from the judgment of the District Court of Myingyan in Civil Appeal No. 51 of 1937.

(1) [1937] Ran. 442.

1939
 MAUNG LU
 PE
 v.
 MAUNG SAN
 MYA.
 BAGULEY, J.

it is pointed out that although in the case of *Ma Kyi v. Ma Thon* (1) a large number of reported decisions were overruled by reason of the decision of the Privy Council in *Ariff v. Jadunath Majumdar* (2), the ruling of *Maung Sin v. Maung So Min* (3) was not overruled; and in that case it was held that evidence of the abortive mortgage might be given to explain the nature of the possession of the mortgagee.

Now, *Maung Sin v. Maung So Min* (3) is mentioned in the case of *Ma Kyi v. Ma Thon* (1) in the referring order by Dunkley J. and also seems to have been mentioned in argument but it is not mentioned once in the judgment which is a comprehensive one in which many cases are referred to as having been overruled in consequence of the decision of the Privy Council in *Ariff v. Jadunath Majumdar* (2).

It seems to me that if evidence of the abortive mortgage is allowed to be given we are in effect going to place the plaintiff in exactly the same way as if the mortgage had been a good one. The Transfer of Property Act says that a mortgage cannot be created except by a registered instrument. If we allow the plaintiff to get the same results as though the mortgage were a good one by allowing evidence of the abortive mortgage to be given we are in effect, and really in spirit, ignoring the law and that seems to me is what *Ariff v. Jadunath Majumdar* (2) expressly lays down, cannot be done. Equitable principles cannot be allowed to override the provisions of the statute and I find difficulty in seeing how the decision in *U Thei Pan v. Ma Phu Saing* (4) in its results is anything but "an obvious and substantial evasion of the law enacted under the Registration Act and the Transfer of Property Act"; I quote from the second paragraph of the head-note of *Ma Kyi v. Ma Thon* (1).

I refer this case to the Honourable the Chief Justice for orders as to whether it should be decided by an ordinary Bench or a Full Bench.

Maung Kyaw for the appellants. The suit is one for possession of the property in suit on payment of a certain sum. The sum was advanced to the plaintiffs on the security of the land in suit, that is to say the property was orally mortgaged to the defendants. Such

(1) (1935) I.L.R. 13 Ran. 274.

(2) (1931) 58 I.A. 91.

(3) (1930) I.L.R. 8 Ran. 556.

(4) [1937] Ran. 442.

a suit is competent by reason of the decision in *U Thet Pan v. Ma Phu Saing* (1).

1939
MAUNG LU
PE
v.
MAUNG SAN
MYA.

[ROBERTS, C.J. The plaint shows that the suit is really one for redemption of an oral mortgage. The proper remedy of the plaintiffs would have been to proceed as suggested in *Ma Kyi v. Ma Thon* (2).]

Kyaw Win for the respondent was not called upon.

ROBERTS, C.J.—This appeal arises out of a suit, which is described as a suit for recovery of possession but which is, when the plaint comes to be looked at, plainly a suit for redemption arising out of a mortgage.

The plaintiffs, in the plaint, say that a piece of *ya* land was “deposited as security” for a debt of Rs. 320 from the defendant to the plaintiffs and their mother, now deceased. The plaintiffs say that the defendant was anxious to retain the land and a further sum of Rs. 10 was accepted by the plaintiffs sometime in 1931, and they seek, as they put it, to recover possession of the land on paying the sum of Rs. 330 and stamp fee has been paid on Rs. 330.

Adopting the language of Page C.J. in *Ma Kyi v. Ma Thon* (3),

“The proper course for the plaintiff to have taken in the present case would have been to have sued for possession relying on her title which was not and could not be disputed. To such a suit there would have been no defence, for the only ground upon which the defendants could have claimed to remain in possession would have been based upon the alleged rights which they had acquired under the oral mortgage on which it was not permissible for them to rest their title and which could not be proved.”

In the present case other defences were raised, but they do not fall to be considered by reason of the fact that

(1) [1937] Ran. 442.

(2) I.L.R. 13 Ran. 274.

(3) [1935] I.L.R. 13 Ran. 274, 284.

1939
 MAUNG LU
 PE
 v.
 MAUNG SAN
 MYA.
 ROBERTS,
 C.J.

this suit, which should have been a suit for recovery of possession directed against the defendant as though he were a trespasser or someone who was not entitled to occupy in law, was directed against the defendant for return of lands pledged to him as security for a loan. By section 59 of the Transfer of Property Act,

“where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.”

In this case there was no registered mortgage: therefore, the plaintiff could not succeed in his suit, and this appeal must be dismissed with costs.

BAGULEY, J.—I agree. When I had this case before me for admission, from a perusal of the judgment of the lower appellate Court I was under the impression that it would be a suitable case in which to examine the correctness or otherwise of the decision in *U Thet Pan v. Ma Phu Saing* (1). On seeing the plaint in detail, however, I see that this is not a case in which that can be done.

BRAUND, J.—I agree that this appeal must be dismissed.