

## APPELLATE CIVIL.

*Before Mr. Justice Mosely.*

## MAUNG BA

v.

## MAUNG THA KYU AND ANOTHER.\*

1938  
Apl. 5.

*Usufructuary mortgage—Loan less than one hundred rupees—Mortgage by unregistered instrument and delivery of possession—Suit for redemption—Proof of terms of mortgage—Evidence Act, s. 91—Transfer of Property Act, ss. 4, 59, 53A—Registration Act, ss. 17, 49.*

A mortgagor who seeks to redeem an usufructuary mortgage for a loan of less than one hundred rupees must prove the terms of the contract. If the terms are embodied in a document, in view of s. 91 of the Evidence Act, they can only be proved by the document itself, though there is delivery of possession of the property. If such document has not been registered it is inadmissible in evidence under s. 49 of the Registration Act to prove the transaction.

S. 4 of the Transfer of Property Act lays down that s. 59 of the Act shall be read as supplemental to the Registration Act. S. 49 of the Registration Act provides that no document required by s. 17 of that Act or by any provision of the Transfer of Property Act to be registered shall be received as evidence of any transaction affecting such property unless it has been registered.

*Dawal v. Dharma*, I.L.R. 41 Bom. 550 ; *Maung Po Din v. Maung Po Nyein*, (1921) 4 U.B.R. 80 ; *Sheikh Juman v. Mohammad*, 21 C.J.V.N. 1149 ; *Sohan Lal v. Mohan Lal*, I.L.R. 50 All. 986, distinguished.

The proviso to s. 49 of the Registration Act does not entitle the plaintiff-mortgagor to use the document in evidence, for the right conferred by s. 53A of the Transfer of Property Act is a right only available to a defendant to protect his possession.

*In re Jambad Coal Syndicate, Ltd.*, I.L.R. 62 Cal. 294, referred to.

*K. C. Sanyal* for the appellant.

*Kyaw Din* for the respondents.

MOSELY, J.—The parents of the plaintiff-respondents Maung Tha Kyu and Maung Tha Htu sued for redemption of an usufructuary mortgage of certain lands

\* Civil Second Appeal No. 340 of 1937 from the judgment of the Assistant District Court of Thayathmy in Civil Appeal No. 130 of 1937.

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made in 1900 for the sum of Rs. 95 to the first defendant, U Khan Sit, by unregistered deed. Exhibit B accompanied by delivery of possession. It would appear from the evidence that the land has been assessed in U Khan Sit's name from about 14 years ago. Recently U Khan Sit's interest in the land was sold in execution of a decree in favour of the second defendant Chettyar firm and purchased by the third defendant appellant Maung Ba. The plaintiffs obtained a decree in the trial Court which was upheld on appeal by the learned Additional District Judge.

The question for decision is whether there was any admissible evidence of the *terms* of the transaction in question, for of course the plaintiffs could only succeed in their suit on proof of the terms of the contract and in particular of the amount for which they were entitled to redeem.

Section 59 of the Transfer of Property Act enacts that where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument or (except in the case of a simple mortgage) by delivery of the property.

Section 4 lays down that section 59 shall be read as supplemental to (that is to say added to) the Registration Act.

Section 17 of the Registration Act makes registration compulsory only in the case of mortgages to the amount of Rs. 100 and upwards.

Section 49 of the same Act provides that no document required by section 17 *or by any provision of the Transfer of Property Act* to be registered shall (c) be received as evidence of any transaction affecting such property unless it has been registered. (The words italicized were inserted by section 10 of the Transfer of Property Supplementary Act, 1929.) The proviso to the section however enacts that unregistered documents

affecting immovable property and required by the Registration Act or the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for Specific Performance or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act. Provided that nothing in the section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

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In addition, we have to consider the effect of section 91 of the Evidence Act, which says that when the terms of a contract have been reduced to the form of a document, no evidence shall be given in proof of terms of such contract except the document itself or secondary evidence of its contents where admissible. Both the lower Courts found that the unregistered document in question was admissible in evidence. It is clear, however, that this could no longer be held to be the case since the amendment of the Registration Act in 1929.

It was previously held that the effect of section 4 of the Transfer of Property Act was merely to add to the list of documents of which registration was compulsory, and not to include them in section 17 so as to bring them within the scope of section 49 : see *Sohan Lal v. Mohan Lal* (1), the judgment of Macleod C.J. in *Dawal v. Dharma* (2) and *Rama v. Gowro* (3). These cases it may be remarked were not cases where the terms of the documents were in question, but only where the nature of the contract or the nature of possession was in dispute.

The case cited by the lower appellate Court—*Maung Po Din v. Maung Po Nyein* (4)—was a case on all fours with the present one, and it was held there that

(1) (1928) I.L.R. 50 All. 986.

(3) (1920) I.L.R. 44 Mad. 55.

(2) (1917) I.L.R. 41 Bom. 550.

(4) (1921) 4 U.B.R. 80.

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such a document was admissible in evidence because the Registration Act then in force did not require registration of it. That case was decided prior to the amendment of section 49 of the Registration Act in 1929, which came into force on April 1st 1930.

Another decision, is *Sheikh Juman and others v. Mohammad Nobineaz* (1). It was said there :

"Where there is a grant and a writing to support it, oral evidence of the terms of the grant is excluded. That would seem to be so even when the grant is made not by the document, but by the delivery of possession which accompanies it "

"Though the document does not confer title and is merely evidentiary, it still seems to be the only admissible evidence of the nature and terms of the transaction."

*A. S. Gnanaprakasam Pillai v. F. S. Vaz* (2), a case decided after 1st April 1930, dealt with an unregistered lease of 1924. The amendment to section 49 of the Registration Act was not considered there, though as was said in *Khoda Bakhsh v. Sheo Din* (3) the question of admissibility being a matter of procedure is governed by the present law.

I agree with the learned authors of Mulla's Commentary on the Transfer of Property Act (see page 262, 2nd Edition), that the right conferred by section 53 (a) is a right only available to a defendant to protect his possession. That is sufficiently plain from the language of the section. See *In re Jambad Coal Syndicate, Limited* (4). But in any case it is evident here that the transferee defendant appellant Maung Ba had no notice of the usufructuary mortgage,—the land being in the mortgagee's name.

It is clear, I consider, since the amendment of the Registration Act that the terms of the mortgage now in

(1) 21 C.W.N. 1149.

(2) (1885) I.L.R. 8 All. 405.

(2) 60 M.L.J. 293.

(4) (1935) I.L.R. 62 Cal. 294.

suit could only be proved by the document even though there was delivery of possession, and this document is inadmissible in evidence under section 49 of the Registration Act. No evidence whatever, therefore, can be given of the terms of the transaction in suit.

• This appeal will be successful and the decree of the appellate Court reversed with costs throughout.

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