

LETTERS PATENT APPEAL.

Before Mr. Justice Dunkley, and Mr. Justice Wright.

U RAI GYAW THOO & CO., LTD.

v.

MA HLA U PRU.*

Burmese Buddhist husband and wife—Mortgage of joint property by husband—Knowledge and consent of wife—Mortgage binding on wife—Payment by husband saving limitation against both—Concurrent findings of fact—Interference by second appellate Court—Absence of evidence to support finding.

Where a Burmese Buddhist wife consents to her husband mortgaging the joint property as if it were his sole property, she thereby holds him out to the mortgagee as her agent, not only in respect of the execution of the mortgage but also in respect of all subsequent transactions in connection with the mortgage. Payment of interest by the husband under such circumstances will save limitation both against husband and wife.

Bhagwan Singh v. Ujagar Singh, 30 Bom. L.R. 267 (P.C.); *N.A.V.R. Chettyar Firm v. Maung Thau Daing*, I.L.R. 9 Ran. 524; *Ma Nyun v. Teixeira*, 10 L.B.R. 36, referred to.

On second appeal it is not the concurrent finding of fact which cannot be interfered with; it is the finding of fact of the first appellate Court: and there is no question of it being within the discretion of the second appellate Court to interfere. The second appellate Court cannot interfere however erroneous it may think such finding to be. The only circumstance under which it can interfere is when the alleged finding of fact is not in reality a finding of fact because it is supported by no evidence whatever.

Durga Choudhrai v. Jawahir Singh, 17 I.A. 122; *Ramratan Sukal v. Mussamat Nandu*, 19 I.A. 1, referred to.

Hay (with him *Zakaria*) for the appellant. The findings of the Lower Courts were concurrent and could not be interfered with by the High Court on second appeal. See *Mussumat Durga v. Jawahir Singh* (1); *Ramratan Sukal v. Mussumat Nandu* (2).

It has been found that the respondent in addition to attesting the mortgage deed had consented to and acquiesced in the husband mortgaging the property which stood in his sole name. Her interest as well was

* Letters Patent Appeal No. 4 of 1939 from the judgment of this Court in Civil Second Appeal No. 22 of 1939.

(1) 17 I.A. 122,

(2) 19 I.A. 1.

therefore bound by the mortgage and she was estopped from denying it. See *N.A.V.R. Chettyar Firm v. Maung Than Daing* (1); *Ma Nyun v. Miss E. E. Teixeira* (2); *Bhagwan Singh v. Ujagar Singh* (3).

The person liable to pay the debt under the mortgage deed was the husband alone and payment of interest by him was sufficient to keep the debt alive and enforceable against the entire property.

Sein Tun Aung for the respondent. Where a payment is made by a person filling two capacities it is a question of fact in each case in which capacity the payment is made. Payment of interest by one of two co-mortgagors who is not the agent of the other does not by itself keep the debt alive. *Azizur Rahman v. Upendra Nath* (4); *Thayammal v. Muthukumaraswami* (5).

The husband has declared himself to be the sole owner of the property in the registered mortgage deed and oral evidence cannot be given to contradict it or to bind the interest of the wife, if any, in the property. There can be no estoppel in such a case.

Moreover there is absolutely no evidence whatever to find that the payment made by the husband was on behalf of the respondent also, and therefore the suit against her is barred by limitation.

DUNKLEY, J.—This is an appeal under the Letters Patent on a certificate of the learned Judge who heard the second appeal. It is of the utmost importance to notice that the appeal before the learned Judge was an appeal under the provisions of section 100 of the Civil Procedure Code and that, therefore, he was not

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(1) I.L.R. 9 Ran. 524.

(3) 30 Bom. L.R. 267, P.C.

(2) 10 L.B.R. 36.

(4) 42 C.W.N. 18.

(5) I.L.R. 53 Mad. 119.

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entitled to interfere with the findings of fact of the first appellate Court, however grossly inexcusable or erroneous those findings of fact might appear to him to be.—*Mussummat Durga Choudhrain v. Jawahir Singh Choudhri* (1) and *Ramratan Sukal v. Mussumat Nandu* (2).

Now, the suit out of which this appeal arises was a suit upon a registered deed of mortgage which was executed by Maung Sein Pho, who was the first defendant in the original suit, in favour of the present appellant company. Ma Hla U Pru, the present respondent, who was the second defendant in the suit, is the wife of Maung Sein Pho, and it is common ground that she was married to Maung Sein Pho when the property now in suit, which was mortgaged to the appellant company, was purchased. The purchase was made on the 29th July, 1920, and was made in the sole name of Maung Sein Pho. On the 31st August, 1920, this land was mortgaged by Maung Sein Pho alone by a registered deed to the appellant company, and it has been held by the original Court and by the District Court on first appeal that this mortgage was made with the knowledge and consent of the respondent. Consequently a decree was passed granting the appellant company a preliminary mortgage decree over the interest of both Sein Pho and the respondent in this property. The point which was raised on second appeal was whether the interest of the respondent in the mortgaged property was bound by the mortgage, and the learned Judge held that her interest was not bound because the knowledge and consent of the respondent to this mortgage by her husband had not been proved, and, consequently, he reversed the judgments and decrees of both the original Court and

(1) (1890) 17 I.A. 122.

(2) (1891) 19 I.A. 1.

the first appellate Court. Now, this question was a pure question of fact, and if there was any evidence on which the first appellate Court could find that the mortgage by Sein Pho had been made with the knowledge and consent of the respondent, then that ended the matter and this point could not be raised on second appeal before this Court.

The position of a Burmese Buddhist husband and wife in regard to the mortgage by one of them of property belonging to both has been finally settled by the judgment of a Full Bench of this Court in *N.A.V.R. Chettyar Firm v. Maung Than Daing* (1), and in the course of that judgment it was stated that

“either party to the marriage is competent to alienate or otherwise dispose of his or her own interest in the joint property, but neither of them is entitled to alienate the interest of the other without the consent, express or implied, of that party.”

And further :

“There are no presumptions, *de facto* or *de jure*, that a Burmese Buddhist couple, living together, are agents for each other, or that the wife is deemed to consent to the acts of her husband. It is a question of fact to be determined according to the circumstances of each case.”

This Full Bench restored the authority of the case of *Ma Nyun v. Miss E. E. Teixeira* (2), and in the course of the judgment of the Full Bench of the Chief Court of Lower Burma in that case Twomey C.J. said :

“There can be no doubt that the mortgage effected with the wife's knowledge and consent bound the wife's interest in the property as well as her husband's interest.”

Consequently, the only point which was before the original Courts for decision in this case was a question of fact, namely, whether the mortgage of this property to the appellant company by Sein Pho was made with

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the knowledge and consent of the respondent. The first appellate Court has held that this mortgage was made with the respondent's knowledge and consent. There was evidence upon which it could so be held, because, apart from the deed of mortgage itself which bears the signature of the respondent the evidence showed that the document was read and explained to her before she signed it and there is the evidence of Maung Me that she consented to the mortgage of this property by her husband.

In the course of his judgment the learned Judge on second appeal said :

" Ordinarily, on second appeal it would not be possible for this Court to interfere with a concurrent finding of fact by both the lower Courts. Where, however, it is clear that the finding is based on an entirely erroneous and illegitimate interpretation of the facts before the Court, it is right and proper for this Court to interfere."

With the greatest respect, in view of the two judgments of their Lordships of the Privy Council to which I have already referred, and which have been repeatedly mentioned in subsequent judgments of the Judicial Committee, this is not a correct exposition of the law. On second appeal it is not the concurrent finding of fact which cannot be interfered with: it is the finding of fact of the first appellate Court: and there is no question of it being within the discretion of the second appellate Court to interfere: the second appellate Court cannot interfere, however erroneous it may think this finding of fact to be. The only circumstance under which it can interfere is when the alleged finding of fact is not in reality a finding of fact because it is supported by no evidence whatever. Consequently, the decision of the first appellate Court that this mortgage was binding upon the interest of the respondent in the

mortgaged property was a decision which could not be canvassed on second appeal.

U Sein Tun Aung on behalf of the respondent has said that the points of law which he actually raised in his memorandum of second appeal were not decided by the learned Judge. He has referred to two such points. He has said that, in view of the statement in the registered deed of mortgage that Sein Pho was the sole owner of this mortgaged property, oral evidence is inadmissible to show that the respondent has an interest in this property as a co-owner with Sein Pho, and that therefore no decree binding upon her interest could be passed. The answer to this argument is that by her consent to this deed of mortgage the respondent is estopped from denying that Sein Pho had authority to mortgage the whole of this property as if he were the sole owner. In *Bhagwan Singh v. Ujagar Singh* (1) their Lordships of the Privy Council said:

“Attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed the execution of the deed, and by *itself* it does not show that he consented to the transaction which the document effects. Where, however, in addition to the fact that he attested the deed, there is evidence to show that he consented to and acquiesced in the execution of the document (a mortgage deed), it is a legitimate inference to draw from such evidence that he not only witnessed the execution of the mortgage by the mortgagor, but also that he consented to the transaction and acquiesced in the mortgage being given.”

Consequently, the inference of fact arising from the respondent's signing the mortgage deed after it had been read and explained to her is that she consented to Sein Pho mortgaging the whole of the property as if he were the sole owner.

U Sein Tun Aung has further urged that the suit on the mortgage was barred by limitation as against the

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respondent, and he says that, although the question as to whether the payments of interest by Sein Pho were payments made on behalf of the respondent as her agent is a question of fact, yet this is a question of fact which could be reviewed on second appeal because the finding of the first appellate Court was supported by no evidence whatever. On this point the learned District Judge on first appeal said this :

“It should be remembered that the finding that she is bound by this transaction has been arrived at not on the footing that she was a co-executant, but on the footing that she had given her consent to her husband to enter into it, which was subsequently entered into with her full knowledge and that the husband was at all material times manager of the joint family business. Upon proof of this fact, namely, the fact that the husband entered into the mortgage transaction with her knowledge and consent, the husband must of necessity be considered as standing in the position of agent to her at the time of that transaction and always thereafter in respect of or with reference to the debt under or on account of this mortgage transaction.”

With this statement of the law I am bound to say that I am in entire agreement. Where a Burmese Buddhist wife consents to her husband mortgaging the joint property as if it were his sole property, then clearly she is holding him out to the mortgagee as her agent, not only in respect of the execution of the mortgage but also in respect of all subsequent transactions in connection with the mortgage.

In my opinion, there were no grounds on which this Court could interfere with the judgment and decree of the District Court passed on first appeal, and the second appeal was wrongly entertained, and the judgment and decree of the District Court ought not to have been reversed.

This appeal is therefore allowed, and the judgment and decree of the Subdivisional Court of Akyab,

granting a preliminary mortgage decree against the respondent as well as against her husband Sein Pho, are restored with costs in all Courts.

WRIGHT, J.—I agree with the judgment of my learned brother, but there is one point in connection with U Sein Tun Aung's contention that the suit is barred by limitation on which I should like to comment. The sole mortgagor was Maung Sein Pho. The respondent, Ma Hla U Pru, was not a mortgagor, and it was not for her to make payments in respect of the mortgage debt. It seems to me that this is a complete answer to U Sein Tun Aung's contention that the suit is barred by limitation as against his client because she did not herself make any payments towards the mortgage money and because her husband was not entitled to make payments on her behalf.

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