

APPELLATE CIVIL.

Before Mr. Justice Mosely.

DAW YON *v.* U MIN SIN.*

1939

Mar. 22,

Assignments of rents and profits of immovable property—Benefits to arise out of land—Rents and profits exceeding Rs. 100—Registered instrument necessary—Transfer of Property Act, ss. 58, 59—General Clauses Act, s. 2 (29).

An assignment of rents and profits of land is a transfer of immovable property within s. 2 (29) of the General Clauses Act. The section defines immovable property to include, *inter alia*, benefits to arise out of land, and if the value of the rents and profits exceeds Rs. 100 the transfer can only be effected by a registered instrument.

Babu Lal v. Bhavani Das, 15 I.C. 32, referred to.

Anklesaria for the appellant.

Beecheno for the respondent.

MOSELY, J.—The plaintiff-appellant, Daw Yon, sued the brother of her deceased husband, U Min Sin, for recovery of twelve “rent documents”, or, in the alternative, for Rs. 1,500, damages. The plaintiff’s case was that she got the property in question, some three hundred acres of paddy land, at a partition of her deceased husband’s estate, and as she had no previous experience of letting lands to tenants, she asked the defendant to have lease deeds printed and lease her lands for her. The defendant, however, got the lease deeds printed with his name as lessor and collected the rents. She claimed in her plaint that she had collected the bulk of the rents herself, and it appears that the valuation of the suit was based on an order of the District Court in its Civil Appeal 20 of 1937, the record of which is not before the Court. It is not argued that

* Special Civil Second Appeal No. 376 of 1935 from the judgment of the District Court of Yamèthin in Civil Appeal No. 58 of 1938.

1939
DAW YON
v.
U MIN SIN.
MOSELY, J.

that valuation was not correct. The defendant in his written statement claimed that he had spent Rs. 5,000 on behalf of the plaintiff in the previous litigation by which she obtained partition, and that though he did not ask for repayment, the plaintiff wanted to show her gratitude, and as she could not pay him she requested him to let out the lands in his name and take the rents for himself, more particularly since, as she had only just succeeded to the property, the tenants would not be likely to pay her the rents. The plaintiff claimed, and the defendant's agent, U Maung, in his evidence admitted, that the plaintiff, in the two months between the filing of the suit and the date of the plaintiff giving evidence, had succeeded in collecting the rents. The plaintiff, however, was entitled to go on with the suit in any event, because after she filed this suit the defendant sued all the tenants for rent, and, of course, if he won in those suits, she would have to indemnify those tenants. It is obvious, however, that she should have impleaded the tenants in this suit, and sued also for a declaration against both U Min Sin and them that she was the beneficial owner of the leaseholds and was entitled to the rents. Under the circumstances, however, a decision has to be arrived at on the case as it stands and on the relief claimed.

The Judge of the trial Court gave judgment for the plaintiff, and, rightly in my opinion, held that she was altogether unlikely to have made a gratuitous offer of so large a sum of money when she herself had nothing and had to pay the taxes, and he said that if the agreement had been as the defendant said it was, there was no reason why the tenants should not have paid him the money.

A previous agreement between the parties is Exhibit 1, which recites that U Min Sin had advanced this five thousand rupees in question, and it also says that he

was not going to make any claim whatever for it ; so it does not help the defendant. There is no other proof of the matter.

The learned District Judge reversed the judgment of the trial Court and dismissed the plaintiff's suit on the ground that the burden of proving agency was on the plaintiff and that the tenants were likely to side with her as they were interested to do so, and that there was no other evidence to prove her case.

In my opinion, the whole case can be decided on an issue of law which has been raised in this appeal (ground 3). The transfer in question is alleged to have been an oral one, made by Daw Yon at U Min Sin's house ; she herself admits that she spoke of the arrangement there. The assignment made is supposed to have been one of the rents and profits of the land and, in my opinion, it could only be made by a registered instrument. Immovable property is not defined in the Transfer of Property Act, which merely says that it does not include standing timber, growing crops or grass ; but it is defined in section 2, sub-section (29) of the General Clauses Act, and this definition applies to transfers of property. According to this definition, "immovable property" shall include land, *benefits to arise out of land*, and things attached to the earth, or permanently fastened to anything attached to the earth.

The transaction in question was claimed by the defendant to be one of assignment of the rents for one year only, the Burmese year 1298. The defendant does not claim that he got a lease of the land itself from the plaintiff. Had he got a lease for one year, that lease could have been made by an oral agreement accompanied by delivery of possession (section 107, Transfer of Property Act). Delivery of possession, of course, means delivery of possession of the immovable property dealt

1939
 DAW YON
 v.
 U MIN SIN.
 MOSELY, J.

1939
 DAW YON
 v.
 U MIN SIN.
 MOSELY, J.

with in the section, that is to say, the land itself. In such a case the lessee is under certain liabilities set out in section 108 of the Act, even if he make sub-leases [section 108, sub-section (j)], including liabilities to keep the property in good condition and restore it in such condition, and other liabilities mentioned in this section. It is argued for the defendant that the transaction was in effect such a lease, but he does not claim this in his written statement; he merely says that he was to be allowed to take the rents and profits which were assigned to him for this old debt. Nor do his witnesses support such a case.

If it were possible to treat the assignment as a usufructuary mortgage for one year for this old debt, then it could not be made orally, being of property worth over one hundred rupees (sections 58 and 59, Transfer of Property Act).

A somewhat similar case was *Babu Lal v. Bhawani Das and others* (1), where the property was the rents of a bazaar leased by the mortgagee in possession to another. It may be said that in that case the tenants were already in possession and there could be no question of sub-leasing, and the position of the lessee was unequivocal, for he could only be the lessee of the rents, and not of the shops; whereas in the present case the arrangement was for U Min Sin to grant the tenancies as well as to receive the rents. It appears that he gave tenancies in some cases to old tenants and in others to new tenants. I conceive that this fact that U Min Sin was to lease the lands does not make any difference, and that the transaction set up here was that he was to let out the land instead of the plaintiff, and that the rents were assigned to him.

If the transaction set up by the defendant is, as in my opinion it is, to be considered as one by which the

(1) (1912) 15 I.C. 32.

plaintiff assigned these rents, then I consider that the defendant is out of Court. As already said the defendant did not take up the position that the land itself was leased to him. He did not plead and it would have been futile to plead that he was to make the leases *on behalf of the plaintiff*, and collect and keep the rents, for that would still have been an assignment of future rents,—immovable property,—which could only be effected by registered deed.

In any case on the evidence I think that the plaintiff succeeded in proving that the defendant was merely her agent for the purpose of leasing out the land, and that she did not agree or intend to assign to him or to let him retain the rents at all.

[His Lordship discussed the evidence and held the plaintiff's case proved, and reversed the decree of the lower Appellate Court and restored that of the trial Court with costs throughout.]

1939
 DAW YON
 v.
 U MIN SIN.
 MOSELY, J.