

PRIVY COUNCIL.

MAUNG THA HNYIN

v.

MAUNG MYA SU.*

[On appeal from the Chief Court of Lower Burma.]

P. C.*
1909
—
Nov. 9;
Dec. 2.

*Title—Priority of Title—Mortgagor and Mortgagee—Deposit of Title Deeds—
Right to decree for Foreclosure—Equity of Redemption—Sale of right, title,
and interest of Mortgagor at Court sale in execution of decree.*

This was a case of contested title to two plots of land near Moulmein. The title of the plaintiff (appellant) was that by deed of 26th July 1890 (Ex. B) the property was mortgaged to a firm who, by deed of transfer dated 8th November 1894 (Ex. A), assigned the mortgage debt and transferred the security for it to one A R, and he, in October 1895, deposited the title deeds with the plaintiff by way of equitable mortgage. In 1901 the plaintiff enforced the mortgage by suit against A R, and on 31st December of that year obtained a decree for sale in default of payment, in pursuance of which the right, title and interest of A R in the property comprised in the above title deeds were sold by auction, and the plaintiff, who bid by leave of the Court, became the purchaser, a certificate to that effect under the hand and seal of the Court being endorsed on Ex. A. The other title was set up by a person who was not one of the original defendants (the mortgagors of 1890), but a person added as a party defendant by consent subsequently to the filing of the suit. He stated that, after the assignment to A R of the mortgage debt, the original mortgage was satisfied by the mortgagors making over the mortgaged property to A R, who by deed dated 14th March 1895 mortgaged it to the defendant, and he brought a suit on the mortgage, and on 21st July 1902 obtained a decree for payment in six months or foreclosure, and, on default being made, became absolute owner of the property. The District Judge found (issue 2) that the mortgaged property was not made over to A R in satisfaction of the mortgage debt, and so holding, thought it unnecessary to decide issue 3, "Did A R mortgage the property to the defendant?" and issue 4, "Did the property, by virtue of the decree of 21st July 1902, become the absolute property of the defendant?" He held that the plaintiff had acquired the rights of the original mortgagee in the property under Ex. B, and gave him a mortgage decree with interest. On appeal, the Chief Court reversed that decision, substantially on the ground that A R had no interest in the property at the date of the sale to the plaintiff. It was pointed out (*inter alia*) on appeal to the Judicial Committee that the mortgage of 14th March 1895 was a usufructuary mortgage on which the defendant had no legal right to a decree for foreclosure; that that mortgage, by

* Present: LORD MACNAGHTEN, LORD COLLINS, LORD SEAW and SIR ARTHUR WILSON.

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reason of the defendant being himself only a mortgagee, the equity of redemption being outstanding in the original mortgagors, was beyond the power of the defendant to grant and was therefore void; that the plaintiff was not a party to the decree of 21st July 1902, and therefore could not be affected by it; and that, notwithstanding the alleged mortgage of 1895, the title deeds remained in the possession of A R.

Their Lordships were of opinion that the decision of the Chief Court was untenable, and finding that it was impossible to pronounce a final judgment without serious risk of doing injustice to one or other of the two parties principally concerned, allowed the appeal, set aside the decrees of the lower Courts, and remanded the suit to the District Judge for findings on issues 3 and 4, with an inquiry as to the priority between the plaintiff and the defendant, and for retrial.

APPEAL from a judgment and decree (23rd April 1907) of the Chief Court of Lower Burma on its Appellate Side, which reversed a judgment and decree (3rd October 1905) of the Court of the District Judge of Amherst.

The plaintiff was the appellant to His Majesty in Council.

The main question for determination in this appeal was one between the plaintiff (the present appellant) and the defendants (respondents 9, 10 and 11), the representatives of one Abdul Guffoor (Ma Satha Pu, his widow, and Ismail and Khatiya Bi, his two children), and concerned the title to two plots of land at Moulmein in Lower Burma, numbered 1 and 2 in the record.

The plaint in the suit, out of which the appeal arose, which was filed on 12th May 1903, alleged that by a deed dated 26th July 1890 (Exhibit B), plots 1 and 2, and two others numbered 3 and 4, were mortgaged by the owners (now represented by respondents 1 to 8 in the appeal) to a firm of M. M. R. M. Chetty to secure a loan of Rs. 11,000 and interest, and that by a deed of transfer dated 8th November 1894 (Exhibit A) that firm assigned for valuable consideration to one Abdul Rahman the whole of their right, title and interest in the above-mentioned loan and mortgage. In the 5th paragraph of the plaint it was stated that "the plaintiff obtained a decree against Abdul Rahman in Civil Regular Suit No. 77 of 1901 of the District Court of Amherst, and in execution of that decree the above-mentioned mortgage and the principal money and interest due thereunder were attached and put up for sale by auction, and

at such sale were sold to the plaintiff, and the right, title and interest of the mortgagee was transferred by endorsement upon the instrument of transfer." That decree was dated the 31st December 1901, and the sale to the plaintiff, who had permission from the Court to bid, was on 28th August 1902. It was further stated in the plaint that a portion of the mortgaged property, namely plots 3 and 4, had already been sold by Abdul Rahman; and the plaintiff asked for an account, an order for payment, and consequential relief.

The written statements in the interest of the original defendants were not relevant to the present appeal; but that of Abdul Guffoor (who was joined as a defendant by order of the Court, dated 7th August 1903, on the petition of Abdul Rahman), alleged that the original mortgagors made over the whole of the mortgaged property absolutely in satisfaction of the debt to Abdul Rahman, who on 14th March 1895 joined with one Emam Sahib in mortgaging that (together with other) property to him, Abdul Guffoor; and that on 21st July 1902 in a suit No. 118 of that year a foreclosure decree was made by the Amherst District Court in his favour in default of payment of the mortgage debt and interest and costs within six months from the date of the decree; that such default was made and that thereupon he, Abdul Guffoor, became absolute owner of the plots of land mortgaged, with possession. Abdul Guffoor therefore denied that Abdul Rahman had any interest in the said plots of land at the date of his sale to the appellant by order of the Court.

The issues raised on these pleadings, so far as they are now material, are set out in their Lordships' judgment.

The District Judge found that in October 1895 Abdul Rahman deposited his two title deeds, namely, the mortgage deed of 26th July 1890, and the deed of transfer dated 8th November 1894, with the plaintiff as additional security for advances of money made to him by the plaintiff. And it appeared from the documentary evidence that the mortgage of the 14th March 1895, executed by Abdul Rahman in favour of Abdul Guffoor, was a usufructuary mortgage (the equity of redemption

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in the original mortgage still remaining in the original mortgagors), the conditions of which were that Abdul Guffoor, the mortgagee, was to be put into possession and take the rents and profits in lieu of interest, the amount of the principal continuing unaffected. It also appeared that the original mortgagors were not parties to the suit brought on that mortgage.

The documentary evidence also showed that on 14th August 1902 Abdul Rahman brought a suit (No. 159 of 1902) against the plaintiff for a declaration that the original mortgage of 26th July 1890, and the deed of transfer of 8th November 1894, were not included in the decree of 31st December 1901 in suit 77 of 1901; but that suit was dismissed on 26th August 1902, the Court holding that those deeds and the property to which they related were clearly included in the decree in favour of the plaintiff in the mortgage suit.

Of the issues relevant to this appeal, namely, issues 2, 3, 4, 5 and 7, the District Judge held on the 2nd issue that there was no evidence to prove that the mortgaged property after the assignment was transferred to Abdul Rahman absolutely in satisfaction of the mortgage debt; but that Abdul Rahman stepped into the shoes of the Chetty firm, the original mortgagees, and acquired no better title than they had. After that finding, the District Judge was of opinion that it was unnecessary to deal with issues 3 and 4; but as the plaintiff had waived his claim to any lien on plots 3 and 4, and as the 2nd issue had been decided in the negative, he held on the 5th issue that the plaintiff had acquired the rights of the original mortgagees as contained in Exhibit B in respect of plots 1 and 2. As to issue 7, he found that the plaintiff was entitled to a mortgage decree in respect of plots 1 and 2 to the extent of Rs. 11,000 with interest at 1 per cent. per mensem from the date of the execution of Exhibit B, namely, 26th July 1890, together with costs on that amount.

The defendants, the representatives of Abdul Guffoor, preferred an appeal from that decision to the Chief Court, which was heard by Mr. C. E. Fox (Chief Judge) and Mr. H. S. HARTNOLL (Judge), who reversed the decree of the District

Judge mainly on the ground that at the date of the sale of the property to the plaintiff, Abdul Rahman had no interest in it, either as owner or as mortgagee, he having already parted with it by the mortgage of 14th March 1895 to Abdul Guffoor. The material portions of the judgments were as follows :—

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Mr. Fox said :—

“These defendants appeal on the ground, amongst others, that the Judge should have decided the 2nd issue in their favour, and that he should have come to a finding on the 3rd and 4th issues, and such findings should have been in their favour.

“I am not prepared to hold that the Judge decided the 2nd issue wrongly, but his finding that the mortgaged property was not made over to Abdul Rahman in satisfaction of the debt afforded no ground for not deciding the 3rd and 4th issues.

“The mortgage deed of the 14th March 1895, by which Abdul Rahman mortgaged the properties in suit to Abdul Guffoor, is filed in Suit No. 118 of 1902, in which Abdul Guffoor obtained his foreclosure decree. No doubt Abdul Rahman purports by it to transfer the land as owner; but if he was only mortgagee, the deed operated to transfer his interest as mortgagee. The rule is expressed in section 8 of the Transfer of Property Act, thus—‘Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.’

“It was argued in this Court that the mortgage to Abdul Guffoor was collusive and fraudulent, but no such question was raised in the District Court, nor was the fact that the mortgage deed had been executed contested. In such a case it seems unnecessary to remand the case for a finding on the 3rd and 4th issues. The deed was executed and registered long before the plaintiff bought; whatever he did buy, in execution of his decree against Abdul Rahman, and consequently the latter at the time of the sale had no interest in the property in suit either as owner or mortgagee. The plaintiff then did not stand in the shoes of the original mortgagee, and he had no right to proceed against the property in suit or against the surviving original mortgagor, and legal representatives of the other mortgagors, or against any one now interested in the properties.

“I would allow the appeal, and would reverse the decree of the District Court, and dismiss the suit and order the plaintiff to pay the appellants’ costs in the District Court and in this Court. As the ground that the plaintiff had no rights as mortgagee was common ground to all the defendants, the decree of the District Court should, under section 544 of the Code of Civil Procedure, be reversed and set aside as against all the defendants.”

Mr. Hartnoll said :—

“Maung Tha Hnyin bought at the Court sale on 28th August 1902 the right, title and interest of Abdul Rahman in the properties, the subject of the present suit. This right, title and interest seems to have been the

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interest Abdul Rahman secured by the assignment to him of the mortgage deed of 26th July 1890, subject to a further charge of Rs. 6,000 created on the property by himself on 14th March 1895, and with regard to which a decree dated 21st July 1902 was then existing. Maung Tha Hnyin must be held, in my opinion, to have stood in Abdul Rahman's shoes in every respect. He did not satisfy the decree, and so by the terms of it he lost all interest that he obtained in the property by his purchase at the Court sale on 21st January 1903. I am, therefore, of opinion that he cannot now sue in respect of it on the case that he now sets up.

"At the hearing of the appeal it was suggested that the deed of the 14th March 1895 was a fraudulent one, and, further, that section 78 of the Transfer of Property Act should be considered. These matters were not part of Maung Tha Hnyin's case and are not mentioned in the pleadings, and in my opinion they cannot now be raised. Maung Tha Hnyin sued as the auction-purchaser of Abdul Rahman's right, title and interest and on that alone.

"I therefore concur in the order proposed by the learned Chief Judge."

On this appeal, which was heard *ex parte*,

J. W. McCarthy, for the appellant, contended that the Chief Court was wrong in holding that the case of the appellant was confined merely to his position as decree-holder; his full titles to the property in suit as equitable mortgagee, holder of foreclosure-decree, and purchaser at public auction with conveyance by the Court, were stated in paragraph 5 of the plaint by reference therein to the record of his suit for foreclosure, and were in issue in the present suit. But even if his title were limited, as held by the Appellate Court, it was complete as against the original mortgagors, and neither Abdul Rahman nor Abdul Guffoor had any better title. The appellant's title ought, under the circumstances of the case, to have priority over that of Abdul Guffoor, (a) because he had so dealt with the title-deeds as to enable the mortgagor to obtain advances from the appellant, and was thereby guilty of gross neglect within the meaning of section 78 of the Transfer of Property Act; (b) because the appellant, by the purchase of the property in suit at the Court sale, and by getting it conveyed to him by the Court, acquired a complete title to it independently of his titles as equitable mortgagee and decree-holder; and (c) because Abdul Guffoor, as usufructuary mortgagee, had no legal right to a foreclosure-decree which he had only obtained by collusion with Abdul Rahman who omitted

to make the appellant a party to the proceedings, and thereby concealed from the Court the fact that it had a year previously made a similar decree in favour of the appellant, and had thus allowed Abdul Guffoor to obtain a decree to which he was not in law or fact entitled. Moreover, Abdul Rahman being only a mortgagee, with the equity of redemption outstanding in the original mortgagors, could not grant a mortgage of the same premises to another person; such mortgage was, therefore, invalid and void; and under the circumstances, section 8 of the Transfer of Property Act had no such effect as the Appellate Court had wrongly held it to have; the original mortgagors, moreover, were not made parties to those proceedings, and their interests were, therefore, not affected by the decree of 21st July 1902. The interests of all parties in the property in suit were merged in the decree for foreclosure and sale in favour of the appellant in suit 77 of 1901; and the only remedy of Abdul Guffoor was against Abdul Rahman on the personal covenant in the mortgage of March 14th, 1895, or to get the judgment set aside, which he had not done, whilst Abdul Rahman's attempt to do so had been unsuccessful.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal in a mortgage suit. It was heard *ex parte*.

Dec. 2.

It is the appeal of the plaintiff from a judgment and decree of the Chief Court of Lower Burma on its Appellate side, reversing a judgment and decree of the Judge of the District Court of Amherst, which was in the plaintiff's favour, and dismissing his suit with costs.

Owing to the confused state of the record and the manner in which the case was presented to the Courts below, their Lordships have felt more than the ordinary difficulty, which attends an *ex parte* hearing, in dealing with the materials placed before them. They find it impossible to pronounce a final judgment without serious risk of doing injustice to one or other of the two parties principally concerned.

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Some of the facts are beyond dispute.

On the 26th of July 1890, four persons, who are all dead and are now represented by the first eight respondents, mortgaged four plots of ground, Nos. 1, 2, 3 and 4, in or near Moulmein, to the firm of M. M. R. M. Chetty for the purpose of securing Rs. 11,000 and interest. The mortgage is Exhibit B.

On the 8th of November 1894, the Chetty firm assigned the mortgage debt and transferred the security for it to one Abdul Rahman. The transfer is Exhibit A.

In October 1895, Abdul Rahman deposited the title-deeds of the mortgaged property (Exhibits A & B) with the plaintiff by way of equitable mortgage.

In 1901 the plaintiff brought a suit (No. 77 of 1901) against Abdul Rahman, Abdul Rahman's father Emam Sahib, and others, to enforce certain mortgage securities, including that created by the deposit of Exhibits A and B.

On the 31st of December 1901, the District Court of Amherst found that the deposited title-deeds were held by the plaintiff by way of equitable security, and a decree for sale was pronounced in default of payment. Payment was to be made before the 10th of July 1902.

In pursuance of this decree, the right, title and interest of Abdul Rahman in the property comprised in the deposited deeds, Exhibits A and B, were put up for sale on the 28th of August 1902. The plaintiff, who had the leave of the Court to bid, was declared the purchaser for Rs. 5,000. A certificate to that effect, under the hand of the District Judge and the seal of the Court, was endorsed on Exhibit A.

So far there seems to be no room for dispute, and if it had not been for a claim put forward on behalf of one Abdul Guffoor, whose brother was married to Abdul Rahman's sister, the decree of the District Court would seem to have been substantially right under the circumstances.

Abdul Guffoor's claim was brought on the record in the following manner. On the present suit being instituted, Abdul Rahman presented a petition, asking that he and Abdul Guffoor might be made parties. His story was that, after the

assignment to him of the mortgage debt, the mortgage was satisfied by the mortgagors making over to him all the mortgaged property, and that he mortgaged the property No. 2 to Abdul Guffoor, who filed a suit against him, obtained a decree for foreclosure, and thus became the owner of the property.

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By consent, Abdul Guffoor was added as a defendant. He put in a written statement, in which he alleged that Eman Sahib and Abdul Rahman, as owner, mortgaged to him, amongst other property, plots 1 and 2 by a registered deed dated the 14th of March 1895; that he brought a suit for foreclosure (No. 118 of 1902); that a decree was passed in his favour for payment or foreclosure; that default was made in payment; and that he thus became the absolute owner of the mortgaged property.

No amendment was made in the statement or in the prayer of the plaint in consequence of Abdul Guffoor being added as a defendant.

The following issues, with others which are not now material, were framed by the Judge:

- i. Was Exhibit B executed by the parties named as mortgagors?
- ii. Was the mortgaged property made over to Abdul Rahman in satisfaction of the debt?
- iii. Did Abdul Rahman mortgage properties 1 and 2 to Abdul Guffoor?
- iv. Did this property, by virtue of the decree in No. 118 of 1902, become the absolute property of the defendant Abdul Guffoor?
- v. What rights, if any, did the plaintiff acquire by his purchase of the bonds, Exhibits A and B?
- vi. To what relief is the plaintiff entitled?

On the 3rd of October 1905, the District Judge delivered judgment. He found that Exhibit B was duly executed, and that the mortgaged property was not made over to Abdul Rahman in satisfaction of the mortgage debt.

Abdul Guffoor, though represented by counsel at the hearing, did not offer himself as a witness, nor was there any

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evidence on his behalf beyond the production of the registered deed of the 14th of March 1895, and the decree in the suit No. 118 of 1902, dated the 21st of July 1902. He seems to have rested his case on Abdul Rahman's story, which was disbelieved, and not to have claimed the rights of a mortgagee in any event. As he did not go into the witness-box, there was no explanation of the fact that, notwithstanding the alleged mortgage to him, the title-deeds, Exhibits A and B, were left with Abdul Rahman, a circumstance which, unexplained, would justify the postponement of his security, if any, to the security of the plaintiff created by the deposit of those deeds.

It is to be observed that the suit No. 118 of 1902 was instituted early in the month of July 1902. The decree was made by consent on the 21st of that month. Now, the 10th of July 1902 was the date fixed for payment in the plaintiff's suit No. 77 of 1901. It is difficult to imagine that Abdul Guffoor was in ignorance of what had been done in that suit. There seems to be ground for supposing that the suit No. 118 of 1902 was instituted for the purpose of defeating the decree in the suit No. 77 of 1901, in so far as it related to Exhibits A and B. However that may be, it is material to bear in mind that the plaintiff was not made a party to No. 118 of 1902, nor was the decree served on him, and therefore his rights, whatever they may have been, remained unaffected by the decree in that suit.

In August 1902 Abdul Rahman, who, according to his own account, had at the time no interest in the mortgaged property, brought a suit, No. 159 of 1902, against the plaintiff, to have it declared that the mortgage of the 26th of July 1890, Exhibit B, and the assignment of the 8th of November 1894, Exhibit A, did not form any portion of the mortgaged property affected by the decree in No. 77 of 1901. On the 28th of August 1902, suit No. 159 of 1902 was dismissed with costs.

The learned Judge of first instance, dealing with the present case, was of opinion that, as issue No. 2 had been decided in the negative, there was no need to go into issues Nos. 3 and 4, and, after observing that the plaintiff had waived his claim to any lien on properties 3 and 4, decided that the plaintiff had

acquired the rights of the original mortgagee, as contained in Exhibit B, in respect of properties 1 and 2, and he came to the conclusion that the plaintiff was entitled to a mortgage decree on properties 1 and 2 to the extent of Rs. 11,000 with interest. As it was not asserted by any of the defendants that any portion of the principal and interest due on the mortgage, Exhibit B, had been paid, the learned Judge did not think it necessary to direct an account of what was due on the mortgage, though it was asked for by the plaintiff.

From this decree the representatives of Abdul Guffoor, who was then dead, alone appealed. Judgment on the appeal was given on the 23rd of April 1907. The Chief Judge did not dissent from the judgment of the Court below on issue No. 2; but he held that the deed of the 14th of March 1895—which, on the face of it, appears to be a mortgage by an owner in fee, and was at most a sub-mortgage, as Abdul Rahman was not the owner of the property, but transferee of the mortgage, Exhibit B—operated to transfer to Abdul Guffoor the whole right and interest of Abdul Rahman in the mortgage, Exhibit B, assigned to him by Exhibit A. “The deed,” he observes—that is, the deed of the 14th of March 1895—“was executed and registered long before the plaintiff bought whatever he did buy in execution of his decree against Abdul Rahman, and consequently the latter at the time of the sale had no interest in the property in suit either as owner or mortgagee.”

That view seems to their Lordships to be quite untenable. Indeed, it does not appear to have been suggested by anybody at the hearing before the Chief Court.

The view of Hartnoll, J., who was the other Judge in the Chief Court, was not the same as that of the Chief Judge, but it seems to be equally untenable. He thought the plaintiff must be “held to have stood in Abdul Rahman’s shoes in every respect.” “He did not,” the learned Judge adds, “satisfy the decree,” that is, the decree of the 21st of July 1902, “and so by the terms of it he lost all interest that he obtained in the property by his purchase at the Court sale on the 21st January 1903.” The sale was on the 28th of August 1902. The error

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in date is immaterial. But it is difficult to see how the plaintiff could be barred or affected by a decree in a suit to which he was not a party.

Their Lordships are, therefore, of opinion that the judgment of the Chief Court should be reversed with costs to be paid by the appellants in that Court, the representatives of Abdul Guffoor, the decree of the District Judge discharged, and the suit remanded to the District Judge for findings on issues 3 and 4, with an enquiry as to priority between the plaintiff and Abdul Guffoor and for retrial. The District Judge will deal with the costs not dealt with by this judgment.

Their Lordships will humbly advise His Majesty accordingly.

The last three respondents, the representatives of Abdul Guffoor, who alone appealed to the Chief Court, will pay the costs of the appeal.

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Appeal allowed.

Solicitors for the appellants : *Bramall & White.*

CRIMINAL REVISION.

Before Mr. Justice Mookerjee and Mr. Justice Chatterjee.

JADU NANDAN SINGH

v.

EMPEROR.*

1909
 Nov. 15.

Jurisdiction of Criminal Court—Order directing prosecution for instituting a false case—False information to the police—Subsequent complaint before the Magistrate—Grounds of the exercise of such jurisdiction—Criminal Procedure Code (Act V of 1898), ss. 195 (b) and 476.

Section 476 of the Criminal Procedure Code must be read subject to the restrictions contained in section 195 (b), and does not, therefore, empower a Court to direct a prosecution for making a false charge before the police.

Dharmadas Kavar v. King-Emperor (1) followed.

* Criminal Revision No. 1019 of 1909, against the order of H. Foster, Sessions Judge of Saran, dated Aug. 9, 1909.

(1) (1908) 7 C. L. J. 373.