

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Maung Kyin and another v. Ma Shwe La and
others, from the Chief Court of Lower Burma ;
delivered the 11th July 1911.*

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ROBSON.

SIR ARTHUR WILSON.

MR. AMEER ALI.

[DELIVERED BY LORD ROBSON.]

The Appellants are Defendants in this action which was brought by the Respondents in the Chief Court of Lower Burma on its original civil side. Judgment was there given in favour of the Respondents, and was affirmed on appeal to the Court on its Appellate side.

The action was brought to recover possession of certain parcels of land which may be conveniently referred to as the first, second, third, and fourth hereditaments. The Respondents claimed under certain deeds which purported to be absolute conveyances, but which the Appellants contended were meant to be, and had always in fact been, treated by all the parties concerned as mortgages only, and they tendered evidence of the acts and conduct of the parties to that effect. This evidence was excluded by the Courts below

under Section 92 of the Indian Evidence Act, 1872, and the principal question arising on this Appeal is whether or not that evidence was properly rejected.

The Respondents also claimed that the Appellants were bound under the covenants for title contained in the conveyance they had executed in favour of the Respondents, to discharge a mortgage existing on the premises at the time of the conveyance.

On the 21st May 1895 Ko Shwe Myaing owned all the properties in question and he mortgaged the first hereditaments (with certain other properties not in dispute) to one Morison for 12,000 rupees. On the 30th November 1901 he executed, what purported to be an absolute conveyance of the first and second hereditaments to the Appellants for the sum of Rs. 8,500, saying nothing in the conveyance about the mortgage to Morison. The Appellants allege that this document, though in form a conveyance, was in truth a mortgage, and that possession of the property was retained by Ko Shwe Myaing who paid various sums by way of interest on the alleged purchase money, and in part repayment of the principal sum showing, as they contend, that it was merely a loan.

Early in 1902 the third and fourth hereditaments were sold under an order of the Court in an action by one Miller against Ko Shwe Myaing. They were purchased by the Appellants for Rs. 11,565, and a certificate of the sale was accordingly given by the Court to the Appellants. With regard to this transaction the Appellants contend that it also was in substance a mortgage and that Ko Shwe Myaing remained in possession until the 20th November 1905 when he executed a deed purporting to transfer the equity of redemption in all the said properties to the Appellants absolutely.

On the 4th March 1903, by two instruments of conveyance of that date, the Appellants purported to convey the before-mentioned four sets of hereditaments to U Shwe Pe and his wife Ma Shwe La. The consideration money for the first and second hereditaments was stated as being 5,000 rupees, and for the third and fourth hereditaments as 11,000 rupees. The Appellants allege that U Shwe Pe and Ma Shwe La knew that they, the Appellants, were mortgagees merely, and that the supposed purchase monies for the properties were simply the amounts of the mortgage debts outstanding, they having been to some extent reduced by repayments of principal, so that the deeds in question were in truth mere transfers of mortgages, and not absolute conveyances. The deeds of the 4th March 1903 were not followed by possession on the part of the Respondents, except as to the fourth hereditaments, possession of which was, according to the Appellants, taken by the Respondents on the terms that they, the Respondents, should account for the rents and profits against interest at a reduced rate in respect of the mortgage debts.

In the month of December 1903 the said U Shwe Pe, as the holder of a decree against the said Ko Shwe Myaing, took proceedings to attach the first hereditaments, and, in order to preserve them from execution, the Appellant, Maung Kyin, at the request of Ko Shwe Myaing, paid U Shwe Pe the amount of his execution debt. Of course a transaction of this kind, if proved, was clearly inconsistent with the Respondents' contention that U Shwe Pe had become the owner of these premises by the deed of the 4th March 1903, and would go to establish the contention of the Appellants that that deed was only a transfer of a mortgage.

On the 29th May 1905 Morison's mortgage was transferred to trustees on behalf of the

Appellants, and was expressly kept alive by the terms of the said Indenture of the 20th November 1905, under which Ko Shwe Myaing purported to convey the equity of redemption to the Appellants absolutely. The Appellants entered into possession of the first, second, and third hereditaments under the conveyance of 1905, and the Respondents brought this action against them on the 20th December 1905 to have it declared that they, the Respondents, were absolute owners of the hereditaments in question. U Shwe Pe had, in the meantime, died, and the action was maintained by his widow and legal representatives.

The Appellants at the trial sought to prove— (1) that the value of the hereditaments far exceeded the amount of the sums specified as the consideration moneys in the conveyances; (2) that interest was paid on those moneys and that they were in part repaid, thus showing that they were loans only; (3) that U Shwe Pe and Ma Shwe La were well aware of this, and knew (as shown by negotiations between themselves and Ko Shwe Myaing as well as the Appellants) that the documents of the 30th November 1901 and 13th February 1902, under which the Appellants claimed and the benefit of which they transferred to U Shwe Pe and Ma Shwe La, were mortgages only; (4) that possession of the hereditaments remained with the alleged vendors; and (5) that after the alleged sale to U Shwe Pe and Ma Shwe La, of the 4th March 1903, U Shwe Pe himself treated the property as belonging to the alleged mortgagor, Ko Shwe Myaing, and attached a portion of it in execution of a decree against him or his wife.

The evidence which the Appellants thus proposed to tender was described in general terms, and their Lordships have not the advantage of dealing with it in the form of questions specifically

put and argued. So far, however, as it is still pressed, it, no doubt, consisted only of evidence relating to the acts and conduct of the parties as distinguished from evidence of oral statements and conversations constituting in themselves some agreement between them. Its object was to show that whatever the terms of the documents may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions, they had always treated the business between them as one of loan secured by mortgage.

This may give rise to important and difficult questions under Section 92 of the Indian Evidence Act, which provides that when the terms of any contract required by law to be reduced to the form of a document (and sales or mortgages of land are, by Sections 54 and 58 of the Transfer of Property Act, 1882, included among such contracts), "no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms."

The case has been argued before their Lordships as though the questions in dispute turned entirely on the construction of this section as applied to the deeds of the 4th March 1903 under which the Respondents claim. Their Lordships, however, are of opinion that the case for the Appellants disclosed a charge of fraud against the Respondents in relation to matters antecedent to those deeds, on which much of the evidence tendered would certainly be material. Thus it is said that the Respondents, or the persons under whom they claim, took absolute

conveyances of property from the Appellants with notice that they in fact belonged to a third person, namely, the alleged mortgagor, Ko Shwe Myaing. If this be so, Section 92 of the Indian Evidence Act, even if construed according to the Respondents' contention, will not avail them. It is applicable to an instrument "as between the parties to any such instrument or their representatives in interest," but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. The evidence of Ko Shwe Myaing is of course material and necessary on this point, and their Lordships after giving to this case very careful consideration, and without at present expressing any opinion on the construction or application of Section 92 of the Indian Evidence Act in relation to the deeds of the 4th March 1903, think that the rejected evidence should be heard, subject to any objections the Respondents may be advised to take. The Court will then be in a position to deal hereafter (if it should become necessary) with the admissibility of the evidence in relation not only to the deeds of the 4th March 1903, but also in relation to the questions that may arise in connection with the alleged knowledge or conduct of the parties antecedent to the execution of those deeds and upon which their validity may possibly depend.

The claim of the Respondents to have the mortgage existing on the premises at the time of the conveyance, discharged by the Appellants will be dealt with, if necessary, after the case has been reheard.

Their Lordships will therefore humbly advise His Majesty that this action be referred to the

Chief Court of Lower Burma for a new trial. The Respondents must pay the costs of this Appeal. The other costs will abide the result of the new trial and will be dealt with by the Chief Court.

In the Privy Council.

MAUNG KYIN AND ANOTHER

v.

MA SHWE LA AND OTHERS.

DELIVERED BY LORD ROBSON.

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