

Privy Council Appeal No. 37 of 1918.

Ma Hnit and others - - - - - *Appellants*

v.

Maung Po Pu - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 22ND MAY, 1919.

Present at the Hearing :

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.

Delivered by VISCOUNT HALDANE.

On the 20th October, 1909, U-Lu-Gale, the father of the appellants, who sue as his legal representatives, entered into a written agreement to sell an oil well in Upper Burma to the respondent for Rs. 45,000, of which 10,000 were to be paid when the agreement was executed, and the balance of 35,000 within 45 days. The purchaser was to execute a deed of sale, and the vendor was also to execute and to register the deed. On the 4th December following the purchaser gave a promissory note for 35,000, the balance of rupees, with interest at one rupee per cent. per month, till payment, and the vendor signed a receipt acknowledging receipt of the price in full. The purchaser later on, on the 10th November, 1910, signed another promissory note in favour of the appellants, the vendor having died just before, by which he promised to pay them Rs. 1,050, with interest also at the rate of one rupee per cent. per month. This sum represented interest unpaid under the first promissory note. The respondent afterwards paid interest for five months to the appellants, and since then he has paid nothing.

The action out of which this appeal arises was brought by the appellants against the respondent to recover the sums due under the two promissory notes with interest, the total amount claimed being Rs. 42,899/8. The question which now arises is whether the respondent can decline to pay this, on the ground that he has been prevented from obtaining possession of the title deeds to the well, because U-Lu-Gale refused to hand them over until the money due under the first note was paid. From the evidence and the findings of fact in the Courts below it appears that the purchaser did, while the money so due remained unpaid, try to get the title deeds from the vendor, in order that he might effect a re-sale. The vendor objected to hand them over, the purchase not having been completed. It does not appear that the purchaser at any time tendered a conveyance, which is the preliminary to registration.

The Judge of the District Court, who tried the case, held that the vendor was within his rights in thus refusing to hand over the title deeds, and gave judgment for the appellants. This judgment was reversed by the Judge who heard the appeal to the Court of the Judicial Commissioner of Upper Burma. He took the view that the promissory note of the 4th December, 1909, followed by the receipt already referred to, effected a novation, and put the purchaser in the same position as if he had actually paid the full price. He was therefore entitled to claim the title deeds. He accordingly held that the contract had been broken by the vendor, and that it was at an end, with the result that there had been failure of the consideration for which the promissory notes were given, and that they could not be enforced.

With this conclusion their Lordships find themselves unable to agree. There was no defence to the action for the amount due under the notes, unless the purchaser could establish a counterclaim to set aside the main contract on the ground that the vendor had broken it by refusing to hand over the deeds. But the duty of the purchaser, having regard to the analogy of what is laid down by section 55 of the Indian Transfer of Property Act, 1882, which is treated as defining what ought to be the practice in Upper Burma, was to tender a conveyance, and he would then, and not before such a tender was either made or waived, have the right to the deeds as the accompaniment of the transferred title. There is no evidence that the purchaser in this case ever tendered any conveyance or asked for a change in the register. Probably all he thought of was how, at a time when oil wells were fetching a higher price than they did later on, to get deeds which would show a possible purchaser from himself that he had an actual title to a well. Whether the Judge of Appeal was right in treating the receipt given on the 4th December, 1909, with the first promissory note in exchange for which it was signed, as having effected a novation, is a question which may require consideration. But even if it were answered affirmatively, it is far from clear that the purchaser could have counterclaimed against the vendor for rescission,

without being ready to pay the amount due under the note. It is, however, enough for the decision of this appeal to say that their Lordships agree with the Judge of first instance that there was no right to obtain the deeds without first tendering a conveyance.

Their Lordships do not attach importance to the suggestion that the appellants are not strictly shown to be the legal representatives of the vendor. Any difficulty in this respect could obviously be cured by amendment, and the learned counsel for the respondent have wisely abstained from pressing a point which could only add to the cost of this litigation.

The only other observation which their Lordships desire to make is that there appears to have been much delay in disposing of the appeal to the Court of the Judicial Commissioner. The judgment of the District Judge was given on the 23rd September, 1913. The case was not heard in the Court of Appeal until the 8th March, 1917, although the appeal to that Court was presented on the 24th November, 1913. The diary of the Court of the Judicial Commissioner discloses a series of postponements, some of which were due to the apparent inability of the Court to sit for the hearing of the case. Their Lordships think that so great a delay in disposing of the appeal should have been avoided if possible.

They will humbly advise His Majesty that the judgment of the Court of the Judicial Commissioner should be reversed, and that of the District Judge restored. The respondent will pay the costs of this appeal, and of the appeal to the Court of the Judicial Commissioners.

In the Privy Council.

MA HNIṬ AND OTHERS

vs.

MAUNG PO PU.

DELIVERED BY VISCOUNT HALDANE.

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