

## APPELLATE CIVIL.

*Before U Aung Tha Gyaw, J.*

MAUNG TUN MIN (APPELLANT)

v.

MA TIN NYUN AND THREE OTHERS (RESPONDENTS).\*

H.C.  
1948

May 27.

*Suit for possession alleging invalid mortgage in favour of defendants—S. 91, Evidence Act—How far a bar to oral evidence—Plea of adverse possession by the defendant—Whether sustainable.*

The plaintiff-respondent alleged that defendant-appellant was in possession of a land under a mortgage from plaintiff's grandparent Daw Yu. The said mortgage was not registered. The properties were admittedly in defendant's possession for 15 years before the suit. Consequently the burden rested on the plaintiff to show how the said property passed into defendant's possession. In proof of the mortgage oral evidence was led and objection was raised that such evidence was inadmissible.

*Held*: That the factum of possession under an invalid mortgage could be proved orally. S. 91 of the Evidence Act did not stand in the way of such evidence. The plea of adverse possession, therefore, which rested on this was not sustainable.

*Maung Sin and another v. Maung So Min*, 8 Ran. 556; *U Thet Pan and another v. Ma Phu Saing*, (1937) Ran. 442, referred to.

*Ma Kyi v. Ma Tsou*, 13 Ran. 274, followed.

*U'Ni* for the appellant.

*A. N. Basu* for the respondents.

U AUNG THA GYAW, J.—The defendant-appellant is in possession of the lands in suit which, according to the plaintiff-respondents, their grandparent Daw Yu had mortgaged for a debt of Rs. 400 in the year 1296 B.E. (1934). Alleging further that the said mortgage was invalid owing to the failure of the parties thereto to comply with the provisions of the Registration Act and the Transfer of Property Act, they, the plaintiff-respondents, contended that the defendant-appellant was not entitled to remain in further possession of the land, and

\* Civil 2nd Appeal No. 135 of 1947 against the decree of the District Court of Meiktila in Civil Appeal No. 36 of 1947, dated the 22nd September 1947.

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on this ground they claimed recovery of possession of the same from the defendant-appellant.

The defendant-appellant denied that he was in possession as Daw Yu's mortgagee, and alleged that he bought the property outright under an unregistered deed some 30 years ago from one U Po Saung.

On the evidence produced in the case, both the Courts below found that the defendant-appellant obtained possession of the property under the invalid mortgage executed by Daw Yu, to whom the property originally belonged, and accordingly granted the decree for possession claimed by the plaintiff-respondents.

In this appeal it has been contended that the respondents, having pleaded that the defendant-appellant was a trespasser, cannot prefer the present claim after the lapse of the statutory period of 12 years adverse possession in favour of the defendant-appellant. He has further put forward the plea that the invalid mortgage having been executed under an unregistered deed, the same is incapable of legal proof, and on this ground the plea of adverse possession should have prevailed against the respondents' claim.

That the title to the property originally rested with the respondents' grandparent Daw Yu has been conclusively found in their favour by both the Courts below and, in view of the nature of the evidence adduced by them in this regard, it is not possible for this Court to disagree on the point in question. The force of oral evidence, combined with the entries in the revenue registers, afford sufficient ground for the findings arrived at by the trial Court and the lower appellate Court in regard to this important question of Daw Yu's original title to the properties in suit.

The suit properties, according to the respondents, had been in the defendant-appellant's possession for

15 years before the present suit was brought by them. According to the latter, this possession came to him some 30 years ago in a manner different from that alleged by the respondents. Having succeeded in showing that the property had once been part of their grandmother's estate, the burden rested then with the plaintiff-respondents to show in what manner the suit properties passed into the defendant-appellant's possession. In this connection, the respondents have set up the story about the usufructuary mortgage in favour of the defendant-appellant for a mortgage debt of Rs. 400. In proof of this transaction they have led some oral evidence, to the admission of which the defendant-appellant has now lodged his protest. The objection so raised by the defendant-appellant cannot have any force by reason of the existence of a number of decisions of this Court in which it was held that in claims preferred in the manner now shown in this case, it was admissible for the plaintiffs to lead oral evidence of the abortive mortgage for the collateral purpose of showing the circumstances under which the defendant obtained possession of the property in suit. *Maung Sin and another v. Maung So Min* (1) is one of the cases in point.

In the present case, however, the usufructuary mortgage set up by the plaintiff-respondents was said to have been executed by means of an unregistered mortgage bond and, according to the appellant, although the plaintiff-respondents would be entitled to adduce evidence of this mortgage in order to prove the nature of the defendant-appellant's possession of the suit property, they would not, in view of the terms of section 91 of the Evidence Act, be entitled to adduce oral proof of the said mortgage. Witness

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(1) 8 Ran. 556.

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U Maung Nge (P.W. 6) has deposed that it was he who wrote the deed of mortgage, and U Ba Sin (P.W. 5) has stated that he had attested the document as a witness. Nothing however has been said in the evidence of the other witnesses for the plaintiff-respondents to explain the non-production of this unregistered deed and, in the absence of any such explanation, it is urged that secondary evidence in proof of the contents of the said mortgage would be inadmissible.

The decision in *Maung Sin and another v. Maung So Min* (1) was followed in the case of *U Thet Pan and another v. Ma Phu Saing* (2), where it was said that a person can sue for delivery of possession of the land which had been transferred to another under an abortive usufructuary mortgage and may give evidence of the factum of the abortive mortgage, though not of its terms, for the collateral purpose of showing the character of the defendant's possession, viz. that it was not adverse to the plaintiff. The decision given in *Maung Sin and another v. Maung So Min* (1) did not in fact go to the extent of permitting the plaintiff to adduce inadmissible oral evidence in proof of the abortive mortgage for the collateral purpose of showing the circumstances under which a change of possession took place in the defendant's favour.

But the leading case of *Ma Kyi v. Ma Thon* (3) does afford an effective answer to the defendant-appellant's objection, as from the facts set out in the referring judgment of Dunkley J. it clearly appears that the transactions in question with which the decision dealt were oral ones, and the objection regarding the admissibility of evidence taken under section 91 of the Evidence Act possibly arose in the circumstances and was considered in that case. The

(1) 8 Ran. 556.

(2) (1937) Ran. 442.

(3) 13 Ran. 274.

plaintiff-respondents in this case are thus undoubtedly entitled to produce oral proof of the usufructuary mortgage executed by Daw Yu, their grandmother, and such evidence would not, according to the authorities above cited, offend the provisions of section 91 of the Evidence Act. Since the mortgage alleged by the plaintiff-respondents can thus be properly proved, the plea of adverse possession raised on the defendant-appellant's behalf cannot prevail despite the admitted fact that he had been in possession of the suit property for more than 12 years.

Accordingly, this appeal is dismissed with costs.

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