

## APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

MAUNG BA KYAW AND FIVE OTHERS (APPELLANTS)

v.

MAUNG BA SHEIN (RESPONDENT).\*

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June 8.

"Parabaik" Upper Burma Registration Regulation, 1897. s. 4—Mortgage for Rs. 200 and Rs. 500 recorded in "Parabaik" admissibility.

The consensus of judicial opinion has been to treat mortgage transactions recorded in "Parabaiks" as completed mortgage instruments and where the validity of such transactions depended upon registration the unregistered instrument has been held to be inadmissible in evidence to prove its terms. The case law on the point discussed.

*Queen-Empress v. Mi Nan Tha*, 1. U.B.R. (1892—96) 303; *Mi Ta v. Nga Sein*, 2 U.B.R. (Civil) (1907—09) Execution-Signing 5; *In re Chet Po*, 7 L.B.R. 77; *Ma Sat Pu v. Ma Sin*, 3 U.B.R. (1917—20) 258; *Maung Po Din v. Maung Po Nyein*, 4 U.B.R. 80; *Ma Saw v. Maung Ba*, 5 Ran. 650; *Maung Ba v. Maung Tha Kyu*, (1939) Ran. 39, referred to and discussed.

*Sein Bwa* (for *T. K. Boon*) for the appellants.

*Dr. Ba Han* for the respondent.

U AUNG THA GYAW, J.—In Civil Suit No. 50 of 1946 of the Court of the Assistant Judge, Sagaing, the appellants sued the respondent for redemption of a piece of land alleged to have been mortgaged with possession to the respondent U Po Lone and his wife (deceased), for two separate debts of Rs. 200 and Rs. 50 taken in the years 1908 and 1913. The mortgages alleged were recorded in the "Parabaik", Exhibits A and A1 and on the strength of this documentary evidence and the oral evidence offered by way of corroboration to the entries found therein, the usual mortgage decree was granted in favour of the

\* Civil Appeal No. 3 of 1948 against the decree of the Appellate Side of High Court, Rangoon, in Civil Second Appeal No. 76 of 1947, dated the 20th November 1947.

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appellants. This decree was confirmed, on appeal, by the District Court of Sagaing. The respondent preferred his appeal to this Court in Civil Appeal No. 76 of 1947 and obtained a reversal of these decisions. The learned Judge who dealt with this appeal held the view that the "Parabaik" being the repository of all the terms of the mortgage transactions, was the only evidence that was admissible under section 91 of the Evidence Act and not being registered under section 4 of the Upper Burma Registration Regulation, 1897, the said document could not be legally admitted in evidence and in consequence, the mortgage in suit was not proved to entitle the appellants to the decree.

It is now contended in the present appeal that the "Parabaik" in question is not an executed document and is not in consequence, subject to the requirements of section 4 of the Upper Burma Registration Regulation, 1897.

The "Parabaik" in suit purports to record the mortgage transaction in the following terms :

"On the 7th Waning of *Kason*, 1270 B.E., Ko Thaung Paw and Ko Lu Hla, residents of Sat-pan-gon Village, say to Ko Po Lone and wife Ma Saw, residents of Tha-ya-baung Village (thus), '(We) are in need of money to spend. (We) want to mortgage one set of big and small paddy lands, known as Ta-bet-pyit-chaung paddy land(s), situate in Thi-la-pon *Kwin*, bounded on the east by *chaung* (creek) and on the west by U Lu Gale, to which we have title, for Rs. 200 (Rupees two hundred). Please accept mortgage.' According to the proposal of the said Ko Thaung Paw and Ko Lu Hla, Ko Po Lone and wife Ma Saw count out and give Rs. 200 (two hundred) into the hands of Ko Thaung Paw and Ko Lu Hla. By mutual consent 'ngwe-pay-mye-ya' (usufructuary) mortgage is made of the paddy land without limiting the period. The witnesses are U Po Oh and Maung Po Hmi and the writer Maung Tun Za.

On the 10th Waxing of *Nayon*, 1275 B.E., Ko Thaung Paw, owner of the land, says, 'Please give an additional loan of

Rs. 50 on the previous original mortgage of the paddy land(s), known as Ta-bet-pyit-chaung paddy land(s).’ According to the said request U Po Lore and wife Ma Saw given an additional loan of Rs. 50 (fifty) into the hand of U Thaung Paw. The witness is U Po Hmi and the writer U Chit Su.”

It is apparent that the transaction was executed in a manner which was judicially noticed in the case of *Queen-Empress v. Mi Nan Tha* (1) where the following observations occur :

“ Under Burmese law and practice signatures were absolutely unknown, and it was the fashion to draw up documents (after the manner noticed in this case). Everyday the Courts admit in evidence documents in the same form as duly executed instruments, and rightly so.”

Transactions similar to the one now under notice had often in the past come before the Courts but mostly on the question of their liability to stamp duty by reason of the fact that they were not signed by the executants. [See *Mi Ta v. Nga Sein* (2), *In re Chet Po* (3), *Ma Sat Pu v. Ma Sin* (4); *Maung Po Din v. Maung Po Nyein* (5); *Ma Saw v. Maung Ba* (6).

In *Chet Po's* case (3) a Bench of the late Chief Court of Lower Burma held that an instrument written on a “Parabaik” but not signed by the parties was not “executed” within the meaning of the Indian Stamp Act, 1899, and need not be stamped; but “that the mere fact that such an instrument was not ‘executed’ within the meaning of the Indian Stamp Act did not necessarily imply that the instrument is incomplete for the purposes for which it was drawn up.” In *Maung Po Din's* (5) case a similar view was adopted and it was further held that “where a mortgage for less than

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(1) 1. U.B.R. (1892—96) 303.

(2) U.B.R. 2 (Civil) (1907—09)

Execution-Signing 5.

(3) 7 L.B.R. 77.

(4) 3 U.B.R. (1917—20) 258.

(5) 4 U.B.R. 80.

(6) 5 Ran., 650.

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Rs. 100 is effected by delivery of possession an unregistered document recording the terms of the mortgage executed after the Registration Act came into force in Upper Burma is admissible in evidence to prove the terms of the mortgage and may be the only admissible evidence of such terms." On this latter point, the learned Judge observed,

"The unregistered document having been drawn up after the introduction of the Registration Act did not require registration to be admissible in evidence, as it would have required it if it had been drawn up while the Registration Regulation contained the law applicable in the matter in Upper Burma."

This latter dictum is pertinent in the consideration of the matter now in dispute in view of what follows in *Ma Sat Pu's* case (1) where the learned Judge held that documents completed in the Burmese fashion without being signed were "executed" within the meaning of section 4 of the Upper Burma Registration Regulation. The practice of documents being executed on "parabaiks" or palm leaves is here noticed as follows :

"It is true that "parabaik" or palm-leaf documents were not usually signed but this Court continually accepts and has always accepted such documents as complete records of the transactions embodied in them and as excluding oral evidence of those transactions."

It appears that the same contentions as now set up on behalf of the appellants were raised in this reported case for the judgment continues,

"The Registration Regulation, which came into force at the end of 1897, expressly stated that a document which was required to be registered should not affect any immoveable property comprised in it or be received as evidence of any transaction

affecting that property unless it had been registered. Under the Local Government's General Department Notification No. 25, dated the 17th February 1898, which was issued in exercise of the power conferred by section 4 of the Regulation, all non-testamentary instruments executed on or after the 1st of July 1898, and purporting or operating to create, declare, assign, limit or extinguish any right, title, or interest in immoveable property were required to be registered. . . . The question whether documents which according to Burmese custom were complete without signature could be said to be 'executed' was considered by this Court in *Queen-Empress v. Mi Nan Tha* (1) and *Mi Ta v. Nga Sein* (2), and it was decided that such documents were 'executed' at any rate within the meaning of the Stamp Act of 1879. I have not been able to trace any published ruling in which the meaning of the word 'executed' in section 4 of the Regulation or in Notifications under that section has been considered, but this Court has always held that such unsigned documents were compulsorily registrable and were inadmissible in evidence if unregistered and I see no reason to believe that that view is incorrect."

In *Ma Saw v. Maung Ba* (1) the contrary view was found expressed relating to the admissibility of secondary evidence in respect of the contents of a formal deed of mortgage, drawn up on an unstamped palm-leaf not signed by the mortgagor but it appears from the body of the ruling in question that the writing on the palm-leaf was not an instrument of mortgage but was merely a note that a mortgage had taken place; and it was there further remarked that the mortgage transaction had not been reduced to the form of a document within the meaning of section 91 of the Evidence Act.

In *Maung Ba v. Maung Tha Kyu* (2) it was held that a mortgagor who sought to redeem an usufructuary mortgage for loan of less than one hundred rupees must prove the terms of the contract, and that in view of section 91 of the Evidence Act, it could

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(1) 5 Ran. 650.

(2) (1939) Ran. 39.

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only be proved by the document itself, though there was delivery of possession of the property. If such a document had not been registered it was inadmissible in evidence under section 49 of the Registration Act to prove the transaction. The mortgage sought to be redeemed in this case was made in 1900 for a sum of Rs. 95 and it was pointed out that section 59 of the Transfer of Property Act which was assumed to apply to the case was to be read as supplemental to the Registration Act, and that owing to the amendment of the Registration Act in 1929 an unregistered document was not admissible in evidence to prove the terms of the mortgage.

Thus, the consensus of judicial opinion in the past has been to treat mortgage transactions recorded in "parabaiks" as completed mortgage instruments and where the validity of such transactions depended upon their compliance with the requirements of the law of registration, the unregistered instrument or "parabaik" had been held to be inadmissible in evidence in order to prove its terms. In the present case the document in question fails to comply with the requirements of Notification No. 5, dated the 17th February 1898, issued by the Local Government under section 4 of the Upper Burma Registration Regulation No. 2 of 1897 and under section 6 of the said Regulation, the document cannot be received in evidence of the mortgage it purported to create. Accordingly, this appeal fails and will be dismissed with costs.

U TUN BYU, J.—I agree.