Privy Council Appeal No. 126 of 1915.

Maung Kyin, since deceased (now represented by Maung Kyaw), and Another - - *Appellants,*

v.

Ma Shwe La, since deceased, and Others - *Respondents,*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1917.

Present at the Hearing:

LORD DUNEDIN.
LORD SHAW.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD SHAW.]

This is an appeal originally brought by the defendants Maung Kyin, since deceased, and Maung Kyaw, from a judgment and decree of the Chief Court of Lower Burma in its Civil Appellate Jurisdiction, dated the 3rd August, 1914, reversing the judgment and decree of the Chief Court in its Civil Original Jurisdiction, dated the 17th June, 1912. The matters in suit between the parties have, on a former occasion, formed the subject of an appeal to this Board. The judgment upon that appeal was pronounced on the 11th July, 1911, and is reported in 38 Indian Appeals, p. 85. The meaning and effect of that judgment will be presently referred to.

The property which is the subject of the appeal consists of four different parcels of land situated in Kemmendine, a suburb of Rangoon. The facts of the case may be briefly stated thus: The owner of these plots of land was one Ko Shwe Myaing. On the 30th November, 1901, Myaing, having

borrowed from Maung Kyin and Ma Ngwe Zan, his wife, 8,500 rupees, to bear interest at 1·8 per cent. per month, granted an out-and-out conveyance of two of these properties, which may be called (*a*) and (*b*), in favour of Kyin and his wife. No possession passed; interest was paid by Myaing and repayment of the loan to the extent of 3,500 rupees was also made. This left an unpaid balance of 5,000 rupees. On the 4th March, 1903, Kyin and his wife obtained payment of this sum from U Shwe Pe and his wife, and conveyed the properties (*a*) and (*b*) to the latter.

There were two other plots of land, which may be called (*c*) and (*d*). Kyin and his wife on the 13th February, 1902, having advanced 11,565 rupees, purchased these properties, which then also belonged to Myaing, by public auction. No possession passed. On the 4th March, 1903, Kyin and his wife transferred these properties to Shwe Pe and his wife in consideration of a payment of 11,000 rupees, 565 rupees having in the meantime been paid by Myaing. The state of matters accordingly was that, on the date last mentioned, namely, the 4th March, 1903, U Shwe Pe and his wife became by *ex facie* absolute conveyances from Kyin and his wife vested in all the properties in suit.

Myaing was no party to these later transactions, but there is some correspondence showing that his part in the transaction was that he was desirous of having, and he obtained the benefit of, a reduction in the rate of interest from 1·8 per cent. per month to 1 per cent.

Then, on the 20th November, 1905, Myaing conveyed to the Kyins his equity of redemption. The footing upon which this deed was granted was manifestly that Myaing, notwithstanding the absolute conveyances, still considered himself as only having granted mortgages over his property, and having therefore an equity of redemption thereon, which he was free to dispose of.

U Shwe Pe having died, his widow and children brought this suit for possession of the lands, it being directed against Kyin and his wife. They resist possession being given, and maintain in substance that, although the conveyances to U Shwe Pe and his wife bear to be absolute in form, it was well known to them that the true nature of the transaction was one of mortgage upon the security of the properties. In particular, it is maintained that Shwe Pe and his wife knew that Kyin and his wife, who purported to grant the conveyance in absolute terms, were not in fact the owners of the property, but themselves only lenders thereon. This is an important consideration, as will afterwards appear, because it amounts to this: that the transfer, although *ex facie* of the deeds absolute in form, was in truth and to the knowledge of both parties a transfer *a non domino*. The dominus was Myaing, who was not a grantor. In short, the Kyins were purporting to sell and the Shwe Pes purporting to buy what both the nominal sellers and buyers knew to belong to somebody else.

When the matters in dispute were before this Board upon a former occasion, it was decided that evidence upon the topics above mentioned could be received, but no final judgment was given as to the effect to be given to such evidence after its reception.

The proof having been taken, their Lordships are now in possession of the facts and of concurrent findings upon the most important of these. It may be well to note how this stands The learned Judge of the Chief Court (Original Civil Jurisdiction) puts the matter thus:—

"The evidence in my opinion taken as a whole, coupled with the conduct of the parties, shows that U Myaing and defendant meant their dealings resulting in Exhibits C and D to be mortgages. It is clear that U Myaing's object in the negotiations, which resulted in Exhibits A and B, was to transfer defendant's mortgage to his relative U Shwe Pe at a lower rate of interest, and U Shwe Pe's letters show he knew this and agreed to take over a mortgage. If he deliberately got deeds of sale executed, it was a gross fraud on U Myaing, and the evidence is admissible to show this. He now endeavours to profit by his fraud or has since determined to try and get the property by taking advantage of the old Burmese custom of taking a sale deed where a mortgage only was contemplated. He cannot profit by this fraud.

"I therefore hold that defendants were mortgagees only and that U Shwe Pe had notice of the fact."

Upon appeal in the Chief Court (Civil Appeal) the learned Judges held:

"If, however, evidence is admissible for the purpose of showing what was the real transaction: the facts (apart from the evidence which has been admitted under section 33 of the Evidence Act) would clearly show that the parties concerned, viz.: U Myaing, defendant Maung Kyin and U Shwe Pe, all intended that U Shwe Pe and his wife should take a transfer of the defendant's mortgages in the form of outright sales."

Upon the non-admissibility of the evidence reliance is placed by the respondents upon section 92 of the Indian Evidence Act of 1872. It provides that when the terms of a contract, grant, or disposition are reduced to writing "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 first proviso is to the effect that "any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud . . . ., want of failure of consideration, or mistake in fact or law."

Founding upon this section, the respondents maintain that the whole of the evidence led must be rejected. On the contrary, the appellants maintain that, notwithstanding the terms of the section, they are entitled to set up and prove the acts and conduct of the parties as inconsistent with the transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of

mortgage. They found upon a considerable body of authority to that effect, the cases cited being *Baksu Lakshman* v. *Govinda Kanji and Another* (I.L.R. 4 Bombay, p. 594), *Hem Chunder Soor* v. *Kally Churn Das* (I.L.R. 9 Calcutta, p. 528), *Rakken and Another* v. *Alagappudayan* (I.L.R. 16 Madras, p. 80), *Preonath Shaha* v. *Madhu Sudan Bhuiya* (I.L.R. 25 Calcutta, p. 603), *Khankar Abdur Rahman* v. *Ali Hafez and Others* (I.L.R. 28 Calcutta, p. 256), *Mahomed Ali Hossein* v. *Nazar Ali and Others* (I.L.R. 28 Calcutta, p. 289). The judgment of Mr. Justice Melville in the first of these cases is repeatedly founded upon in the course of the series, in which that learned Judge expressly followed the English equity doctrine as expressed in *Lincoln* v. *Wright* (4 De G. and J. 16) by Lord Justice Turner thus :—

"The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plaintiff and Wright, the transaction should be a mortgage transaction, it is, in the eye of this Court, fraud to insist on the conveyance as being absolute, and parole evidence must be admissible to prove the fraud."

In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davey in the case of *Balkishen Das and Others* v. *Legge* (27 Indian Appeals, p. 58). It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents. Lord Davey cites section 92 of the Indian Evidence Act, and adds :—

"The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

Notwithstanding the decision of this Board, however, a certain conflict of authority on the subject still remains in India. But the respondents rightly refer to *Achutaramaraju and Another* v. *Subbaraju* (I.L.R. 25 Madras, p. 7), *Maung Bin* v. *Ma Hlaing* (3 Lower Burmah Rulings, p. 100), and *Dattoo valad Totaram* v. *Chandra Totaram and Another* (I.L.R. 30 Bombay, p. 119), and in particular to the judgment of Chief Justice Jenkins in the last case. In these the judgment of the Board, as pronounced by Lord Davey, has been rightly followed and applied.

The principles of equity which are universal forbid a person to deal with an estate which he knows that he holds in security as if he held it in property. But, to apply the principles, you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing

in the particular jurisdiction. In England the laws of evidence, for the reasons set forth in *Lincoln* v. *Wright* and other cases, permit such facts to be established by a proof at large, the general view being that, unless this were done, the Statute of Frauds would be used as a protection or vehicle for frauds. But in India the matter of evidence is regulated by section 92 of the Indian Evidence Act, and it accordingly remains to be asked, What is the evidence which under that statute may be competently adduced? The language of the section in terms applies and applies alone "as between the parties to any such instrument or their representatives in interest." Wherever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case accordingly the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions.

Their Lordships view the case accordingly as having been dealt with on that footing by their predecessors at the Board. Thus, while in the course of the judgment of Lord Robson reference was made to evidence which might be taken "relating to the acts and conduct of the parties as distinguished from oral evidence and conversations constituting in themselves some agreement between them," nothing was decided upon that head, except that it would give rise to important and difficult questions under the Indian Evidence Act. That question has now been settled by their Lordships, adversely to the reception of the evidence.

But the later passage of the judgment of Lord Robson is upon a topic much more crucial to the situation which the facts proved in the case admittedly disclose :—

> "Their Lordships," said he, "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."

Upon the facts it now turns out quite plainly, and it was, indeed, admitted in argument that, when Shwe Pe took the conveyance from the Kyins, he knew that it was a conveyance of property which belonged to Myaing, and that accordingly the grant proceeded *a non domino*. If section 92 applied, proviso 1 would seem to be in point, because it would be

a fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it. But, in the opinion of their Lordships, section 92 does not apply, because the evidence, the admissibility of which is in question, is evidence going to show what were the rights of a third person, namely Myaing, in the property, and there are concurrent findings to the effect that the property was in that owner and not in the Kyins, who to the knowledge of Shwe Pe never purported to dispose of it as theirs. If a purchaser for onerous consideration and without notice had been the grantee under a deed of absolute conveyance, a totally different set of considerations would have arisen. In the present case, however, both grantor and grantee were dealing with the property of an owner who was a third person, who was not in the language of the statute either a party to the instrument or a representative in interest of a party to the instrument. The evidence led as to that third party's rights is admissible, and, if admissible, is most relevant. Their Lordships do not hold any doubt upon the subject of fact, in that respect entirely agreeing with all the Courts below. It is true that the Court of Appeal felt precluded by the terms of section 92 of the Evidence Act from agreeing with the Judge of the Chief Court, but in the opinion of the Board the section is, in the important particular last dealt with, no bar to the admission of the light on the true situation of the case.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, the decree of the Chief Court in its appellate jurisdiction, dated the 3rd August, 1914, set aside with costs, and the decree of the Chief Court in its original jurisdiction restored.

The respondents will pay the costs of the appeal.

In the Privy Council.

MAUNG KYIN, SINCE DECEASED (NOW REPRESENTED BY MAUNG KYAW), AND ANOTHER

v.

MA SHWE LA, SINCE DECEASED, AND OTHERS.

DELIVERED BY LORD SHAW.

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