Privy Council Appeal No. 108 *of* 1923.

Ma Sa Bon and others - - - - - - - *Appellants*

v.

Ma Da Twe and others - - - - - - - *Respondents*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 29TH JULY, 1924.

Present at the Hearing:

LORD SHAW.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD BLANESBURGH.]

The question upon this appeal is whether the appellants are entitled, and, if so, on what terms, to have a reconveyance of the properties in suit executed in their favour by the respondents.

The District Court of Akyab by a decree dated the 15th of January, 1920, held that the appellants, the plaintiffs in the suit, were so entitled on the terms prescribed by the decree. The Chief Court of Lower Burma on appeal reversed that decision and dismissed the suit. The plaintiffs appeal.

They are the legal representatives or successors in interest of one Mi Po Ma (who died in March, 1917) and of one Shwe Zan U (who died in October, 1918). Mi Po Ma and Shwe Zan U were the owners of the properties in suit. They each of them died heavily indebted. Amongst their creditors were the Bank of Bengal and the second defendant Maung Tha Nyo. He died while the appeal in the suit to the Chief Court was pending, and his estate is represented before the Board by the respondents 2 (A) to 2 (K). Their Lordships will continue to refer to him and his estate as the second defendant.

On Shwe Zan U's death the Bank and the second defendant took steps to enforce their claims against the estates of their deceased debtors. The Bank obtained a mortgage decree over the properties in suit for upwards of Rs. 88,000; the second defendant obtained before judgment an attachment for an amount not stated upon certain of the properties. Obviously some arrangement was necessary if the interests of the appellants in the properties were not to be sacrificed. Two friends of the deceased came forward to avert this misfortune. One of these was Do Aung Gyaw, the husband of the first respondent, and at the time the cashier at Akyab of the Bank of Bengal. The other was U Tha Do Pyu, a retired Superintendent of Land Records.

These two intermediaries first of all set themselves to make terms with the Bank of Bengal, and they succeeded at length in getting the Bank to accept Rs. 45,000 in satisfaction of its entire debt. Later, an arrangement was concluded with the second defendant that he would accept Rs. 10,500 in full satisfaction of his claims.

But the raising of the necessary moneys proved to be a source of difficulty owing to the apparent desire both of the second defendant and of Do Aung Gyaw to acquire or retain some personal interest in the properties.

At the outset Tha Do Pyu took the leading part in the arrangements, and his first proposal was that the second defendant should buy the properties in suit direct from the appellants for a price at least sufficient to discharge both the Bank's adjusted debt and his own. This proposal, however, fell through. It suited neither the appellants, nor Do Aung Gyaw. The next suggestion was that one Mra Tha, a friend of Tha Do Pyu, should buy the properties for Rs. 50,000, on the terms that although conveyed to him they should remain in possession of the appellants, who were to be entitled to buy them back within three years for Rs. 50,000, with a commission of Rs. 3,600 " for profits or kindness," and deeds were actually prepared to carry out that transaction.

At the last moment, however, Mra Tha withdrew from the negotiation, at the instance, it is suggested, of the second defendant, whose desire to have an interest in the properties was not under that proposal realized. The final arrangement was one under which Mra Tha's place, at the instance, as their Lordships cannot doubt, of her husband Do Aung Gyaw, was taken by the first respondent Ma Da Twe. The deeds as originally prepared with Mra Tha's name inserted were utilized, interlineations and alterations being made in them as they now appear in the actual engrossments. In that form they were at length executed.

The main question—indeed, the only question—as between the appellants and Ma Da Twe, the first respondent—depends upon the true effect of these executed deeds to which she became party, and it will be convenient to refer to them at once, although their Lordships must observe that the real complication in the case is occasioned rather by the relations between the appellants and the second defendant, which arise under a later set of deeds to be subsequently stated.

The two deeds executed on the 9th of December, 1918, are a deed of sale of the properties in suit by the appellants to the first respondent, and an agreement of reconveyance by that respondent to the appellants. The deed of sale recites the arrangement with the Bank for settlement of its debt for Rs. 45,000, and it proceeds :

> " The said sum of Rs. 45,000 cannot be paid. Moreover there are a lot of expenses incurred now also. The properties described and written below are therefore sold outright for value Rs. 50,000."

The operative part of the agreement of reconveyance is, when translated, as follows :—

> " On the 9th day of December, 1918, Ma San Bon, Ma Huin U Khine, Ma Aung Kraw San and Twe Hla Pru (four persons) have sold moveable and unmoveable properties to me female Ma Da Twe for value Rs. 50,000. I female Ma Da Twe or my female heirs undertake to resell the same properties to you (male) you (female plural) and your (male) your (female plural) heirs for the very sum of Rs. 50,000 either on the expiry of three years or within these three years. You female may keep possession of the properties now sold and enjoy (such) profits or suffer (such) loss as may accrue thereupon."

In relation to these deeds, the controversy between the appellants and the first respondent in the Courts below turned upon this last sentence, which raised what was then treated as the vital question in the case. Who, under it, was entitled pending completion to have possession of the properties? The first respondent or the first female appellant? The learned Judge of the District Court was of opinion that it was the first female appellant, and so decided. The Chief Court took the other view. To this question their Lordships propose to revert after they have completed their statement of the facts.

To return to them. The substitution of the first respondent's name for that of Mra Tha in these deeds as originally prepared was, their Lordships cannot doubt, part of an arrangement, ultimately carried out, under which the actual money necessary to pay off the Bank was found by the second defendant. It is assumed by the learned District Judge for the purposes of the present case—and their Lordships make the same assumption in favour of the first respondent—that she herself found Rs. 5,000 from her own moneys. It is certain that she found no more, and it is denied by the appellants that she found anything at all. But even so the first deed of the 9th of December, 1918, gave her command of properties worth very soon afterwards, if not then also, much more than the Rs. 50,000 there mentioned; and she was at the same time enabled to raise the further moneys necessary to pay off both the Bank and the second defendant by the appellants executing in her favour, as they did, two promissory notes for Rs. 8,000 and Rs. 2,500 respectively. At their face value accordingly the documents obtained by the first respondent represented property and money worth Rs. 62,500—an excess of Rs. 2,000 over the exact sum required, even if her story is accepted, that she paid out of her own moneys Rs. 5,000 to the appellants. The whole transaction is, however, made clearer by the two later deeds of the 16th of December, 1918, above referred to, to each of which the second defendant was a party. These show that he had then become the paymaster. Of his debt of Rs. 10,500 he received from the first respondent Rs. 8,000, part of the proceeds of the two promissory notes, and he, with a super-added obligation to resell, agreed to purchase from her the properties in suit for Rs. 47,500 —to be paid as to Rs. 45,000 in discharging the debt of the

appellants to the Bank: and to be retained as regards the residue of Rs. 2,500, in discharge of the balance of his own debt of Rs. 10,500. In this way, as will be seen, the debts of the appellants to the Bank and to the second defendant were liquidated: that result, with, it is said, the receipt also of Rs. 5,000 being obtained by the appellants' execution of the deed of sale of the 9th of December, 1918, and their making of the promissory notes for Rs. 10,500: while there was reserved to them the right of repurchase contained in the second deed of the 9th of December, 1918.

But the terms of the deeds of the 16th of December, 1918, now become important in connection with this right of repurchase. The first of these, made by the first respondent in favour of the second defendant, is an assurance of the properties in suit for Rs. 47,500, with a right to possession. Knowledge of its execution is brought home to the appellants by the fact that they, as well as U Do Aung Gyaw, sign it as witnesses. To the second deed, the appellants, with the first respondent, are actually parties, and under it the second defendant gave to the first respondent the right to buy back the properties for the original price of Rs. 47,500, paying interest on that sum at the rate of Rs. 1–6 per cent. per month and subject to the conditions:

1. That Rs. 25,000 should be paid on or before the 31st of May, 1919.
2. That the balance of principal and interest should be paid on or before the 31st of May, 1920.

This deed recites the right of repurchase reserved to the appellants by the deed of the 9th of December, 1918, but declares that the first respondent's promise mentioned in that document—has "no concern whatever with" the second defendant, and the appellants acquiesce in that statement and moreover agree to the first respondent's "sale and absolute delivery of possession of the" properties to the second defendant.

It is, however, provided that, in the event of repurchase, the second defendant is, in effect, to account for all profits received by him from the properties and in relation to them he is given power to appoint the first respondent and her husband his agents or attorneys. If, therefore, the second defendant receives on repurchase the full amount of his principal and interest he has no concern, as a separate matter, with the intermediate rents and profits of the properties, an important consideration in relation to the proper form of decree in this case, if the appellants establish their general position. The result of the whole deed as regards the appellants' rights of repurchase in relation to the second defendant is striking but not so subversive as seems to have been assumed below. It may be shortly stated as follows:—

As against the first respondent their right to repurchase remains unaffected, and on compliance by them with the terms of the second deed of the 9th of December, 1918, they are entitled

to require the first respondent to reconvey the properties to them or by their direction free from all claims on the part of the second defendant. To the latter they are under no obligation, but as a result of their being parties to the second deed of the 16th of December, 1918, and as a consequence of the declarations therein made by them, they cannot object to possession of the properties being taken by the second defendant nor can they require him to reconvey the properties to them except on payment to him of all that under his agreement with the first respondent he is entitled to demand from her.

The remaining facts are few. Possession of the properties was not in fact taken at all by the first respondent in her own right, although it seems to have been somewhat faintly asked for by her, possibly on behalf of the second defendant. Possession has remained in fact with the appellants or one of them. In these circumstances as early as the 9th of April, 1919, the greater value of the properties having become apparent, the appellants called upon the second defendant to reconvey, and on his denying privity with them, they called upon the first respondent to reconvey. She at once declined to do so, alleging that the appellants had not performed their part of the agreement of the 9th of December, 1918, in that they had made default in giving to her the possession of the property to which under that deed she was, she alleged, entitled. This has been the great issue between these parties.

The second defendant has always expressed himself as ready to reconvey on being paid the price of reconveyance prescribed in his agreement to resell: he has made no difficulty as to the non-delivery of possession to himself or his agents, or indeed any other difficulty.

The first question, therefore, is whether as between the appellants and the first respondent, the latter was ever entitled in her own right under the second deed of the 9th of December, 1918, to the possession she alleges. Has there been any default on the appellants' part in this respect ?

This, as their Lordships have already stated, was the great controversy in the Courts below. The deeds as originally engrossed with Mra Tha as a party, undoubtedly left the possession with the appellants, but the effect of the alterations actually appearing on the engrossment was, it was contended, clearly to transfer the possession to the first respondent. The arguments in both Courts centred on these alterations and their effect. The learned District Judge, as above stated, took one view of them: the Chief Court another. Their Lordships do not find it necessary to continue the discussion. The terms of the documents as actually executed are upon this point as they think sufficiently clear to make it unnecessary for them to adopt the somewhat doubtful course of examining, as an aid to construction, interlineations and erasures as these now appear upon the parchment. They prefer to take the document as it stands in the form already set

forth in this judgment, and so doing, they find it impossible on construction to read the word "you" as applying to the first respondent either in the context where it is found, or, although less pointedly, in relation to the expression "keep" possession. The first respondent had, in fact, no possession to "keep." The possession was in the appellants or one of them.

Their Lordships do not forget of course that, upon this construction, there was on the face of the transaction little advantage to be gained out of it by the first respondent. But this consideration is of less importance when it is remembered that there were contemporaneous transactions between the appellants and the first respondent's husband. The complete relations indeed between the parties are not set forth in the deeds before the Board.

So far, therefore, but on these simpler grounds, their Lordships find themselves in accord with the learned District Judge.

But even if they had concurred with the Chief Court in this matter they could not have agreed with them in their order dismissing the suit. In the circumstances of this case failure on the part of the appellants to deliver possession to the first respondent, even if under agreement to do so, was not conduct disentitling them to a decree for specific performance of their agreement for repurchase.

Their Lordships concurring in this respect with the District Judge are disposed to regard the contention here of the first respondent as an attempt on the part of herself and her husband to bring about unfairly what amounts to a forfeiture of the appellants' valuable interests. In no circumstances had she any right to independent possession of the properties after the 16th of December, 1918. After that date the right to possession as against the appellants was in the second defendant, and he makes no complaint on the subject. In any case, however, there was no default on the part of the appellants going to the root of the contract or any omission that could not have been amply compensated by directing the appellants on repurchase and by way of addition to the stipulated purchase price to account for any rents and profits received by them from the properties.

Their Lordships, therefore, are not in agreement with the Chief Court. Nor except to the extent above stated are they in agreement with the learned District Judge in the further details of his order which does not accurately work out, as their Lordships see them, the relations between the appellants and either the second defendant or the first respondent.

There is in their Lordships' judgment no reason whatever for depriving the second defendant of any of the rights under the deeds of the 16th of December, 1918. There was nothing illegitimate in his desire to be interested in the properties in question or to retain them, if he properly could. Ever since the demand for a reconveyance was made upon him his conduct has been in all respects correct. The first respondent has not appeared before

the Board and their Lordships regret to express in her absence a harsh opinion upon her conduct, but a careful perusal of all the evidence in the case satisfies them that for this litigation she and her husband are alone responsible.

In their Lordships' opinion accordingly, the appellants are entitled to a decree for specific performance, and to have the properties reconveyed to them by all the respondents on compliance first with the terms imposed upon the appellants by the deed of the 9th of December, 1918, and secondly on satisfying the rights of the second defendant under that of the 16th of December, 1918. As the first respondent has already paid to the second defendant the Rs. 25,000 payable to him on or before the 31st of May, 1919, the proper order will, as it appears to their Lordships, be comparatively simple.

It may, they think, be summarized as follows :—

Tax the costs of the appeal both of the appellants and of the respondents 2 (A) to 2 (K). Direct that on payment into Court by the appellants within two months after the order is received in Akyab of Rs. 50,000, and on payment out of Court to the second defendant of the sum hereinafter mentioned, the respondents do execute in favour of the appellants, or as they may direct, all necessary deeds of reconveyance and further assurance of the properties in suit, free from incumbrances.

Apply the Rs. 50,000 when paid into Court as follows :—

First, pay out to the respondents 2 (A) to 2 (K) as a first charge thereon :—

(a) The amount remaining due to the second defendant on repurchase under the deed of the 16th December, 1918.

(b) The costs of suit of the second defendant in the Courts below and of this appeal.

Secondly, out of the residue of the fund, pay out to the appellants their costs of suit in the Courts below and of this appeal, and pay out the ultimate balance, if any, to the first respondent.

Should the Rs. 50,000 be insufficient to satisfy the claims of the second defendant thereon pursuant to this order, let the appellants within one month of the deficiency being certified pay the amount thereof into Court, by way of addition to and to be dealt with as part of the Rs. 50,000.

On the payment or payments into Court as directed by this order being made let the first respondent repay to the appellants the amount of any deficiency paid by them as in the last paragraph of this judgment mentioned and pay to them also their costs of suit in the Courts below and of this appeal.

Should the appellants fail to make the payment or payments into Court as directed by this order within the times respectively limited therefor, dismiss this appeal with costs in favour of the respondents 2 (A) to 2 (K).

No costs of this appeal in any event to be paid to the first respondent.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MA SA BON AND OTHERS

v.

MA DA TWE AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

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