

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Maung
Tha Hnyin v. Maung Mya Su and others,
from the Chief Court of Lower Burma;
delivered the 2nd December, 1909.*

Present at the Hearing :

LORD MACNAGHTEN.

LORD COLLINS.

LORD SHAW.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This is an Appeal in a mortgage suit. It was heard *ex parte*.

It is the Appeal of the Plaintiff from a Judgment and Decree of the Chief Court of Lower Burma on its Appellate side, reversing a Judgment and Decree of the Judge of the District Court of Amherst, which was in the Plaintiff's favour, and dismissing his suit with costs.

Owing to the confused state of the record and the manner in which the case was presented to the Courts below, their Lordships have felt more than the ordinary difficulty, which attends an *ex parte* hearing, in dealing with the materials placed before them. They find it impossible to pronounce a final Judgment without serious risk

of doing injustice to one or other of the two parties principally concerned.

Some of the facts are beyond dispute.

On the 26th of July, 1890, four persons, who are all dead and are now represented by the first eight Respondents, mortgaged four plots of ground, Nos. I., II., III., and IV., in or near Moulmein, to the firm of M. M. R. M. Chetty for the purpose of securing Rs.11,000 and interest. The mortgage is Exhibit B.

On the 8th of November, 1894, the Chetty firm assigned the mortgage debt and transferred the security for it to one Abdul Rahman. The transfer is Exhibit A.

In October, 1895, Abdul Rahman deposited the title deeds of the mortgaged property (Exhibits A and B) with the Plaintiff by way of equitable mortgage.

In 1901 the Plaintiff brought a suit (No. 77 of 1901) against Abdul Rahman, Abdul Rahman's father Eman Saib, and others, to enforce certain mortgage securities, including that created by the deposit of Exhibits A and B.

On the 31st of December, 1901, the District Court of Amherst found that the deposited title deeds were held by the Plaintiff by way of equitable security and a Decree for sale was pronounced in default of payment. Payment was to be made before the 10th of July, 1902.

In pursuance of this Decree, the right, title, and interest of Abdul Rahman in the property comprised in the deposited deeds, Exhibits A and B, were put up for sale on the 28th of August, 1902. The Plaintiff, who had the leave of the Court to bid, was declared the purchaser for Rs.5,000. A certificate to that effect, under the

hand of the District Judge and the seal of the Court, was endorsed on Exhibit A.

So far there seems to be no room for dispute, and if it had not been for a claim put forward on behalf of one Abdul Guffoor, whose brother was married to Abdul Rahman's sister, the Decree of the District Court would seem to have been substantially right under the circumstances.

Abdul Guffoor's claim was brought on the Record in the following manner. On the present suit being instituted, Abdul Rahman presented a petition, asking that he and Abdul Guffoor might be made parties. His story was that, after the assignment to him of the mortgage debt, the mortgage was satisfied by the mortgagors making over to him all the mortgaged property, and that he mortgaged the property No. II. to Abdul Guffoor, who filed a suit against him, obtained a Decree for foreclosure, and thus became the owner of the property.

By consent, Abdul Guffoor was added as a Defendant. He put in a written statement, in which he alleged that Eman Saib and Abdul Rahman, as owner, mortgaged to him, amongst other property, plots I. and II. by a registered deed dated the 14th of March, 1895; that he brought a suit for foreclosure (No. 118 of 1902); that a Decree was passed in his favour for payment or foreclosure; that default was made in payment; and that he thus became the absolute owner of the mortgaged property.

No amendment was made in the statement or in the prayer of the plaint in consequence of Abdul Guffoor being added as a Defendant.

The following issues, with others which are not now material, were framed by the Judge :

1. Was Exhibit B executed by the parties named as mortgagors?

2. Was the mortgaged property made over to Abdul Rahman in satisfaction of the debt?
3. Did Abdul Rahman mortgage properties I. and II. to Abdul Guffoor?
4. Did this property, by virtue of the Decree in No. 118 of 1902, become the absolute property of the Defendant Abdul Guffoor?
5. What rights, if any, did the Plaintiff acquire by his purchase of the bonds, Exhibits A and B?
6. To what relief is the Plaintiff entitled?

On the 3rd of October, 1905, the District Judge delivered Judgment. He found that Exhibit B was duly executed, and that the mortgaged property was not made over to Abdul Rahman in satisfaction of the mortgage debt.

Abdul Guffoor, though represented by Counsel at the hearing, did not offer himself as a witness, nor was there any evidence on his behalf beyond the production of the registered deed of the 14th of March, 1895, and the Decree in the suit No. 118 of 1902, dated the 21st of July, 1902. He seems to have rested his case on Abdul Rahman's story, which was disbelieved, and not to have claimed the rights of a mortgagee in any event. As he did not go into the witness-box, there was no explanation of the fact that, notwithstanding the alleged mortgage to him, the title deeds, Exhibits A and B, were left with Abdul Rahman, a circumstance which, unexplained, would justify the postponement of his security, if any, to the security of the Plaintiff created by the deposit of those deeds.

It is to be observed that the suit No. 118 of 1902 was instituted early in the month of July, 1902. The Decree was made by consent on the

21st of that month. Now, the 10th of July, 1902, was the date fixed for payment in the Plaintiff's suit, No. 77 of 1901. It is difficult to imagine that Abdul Guffoor was in ignorance of what had been done in that suit. There seems to be ground for supposing that the suit No. 118 of 1902 was instituted for the purpose of defeating the Decree in the suit No. 77 of 1901, in so far as it related to Exhibits A and B. However that may be, it is material to bear in mind that the Plaintiff was not made a party to No. 118 of 1902, nor was the Decree served on him, and therefore his rights, whatever they may have been, remained unaffected by the Decree in that suit.

In August, 1902, Abdul Rahman, who according to his own account, had at the time no interest in the mortgaged property, brought a suit, No. 159 of 1902, against the Plaintiff, to have it declared that the mortgage of the 26th of July, 1890, Exhibit B, and the assignment of the 8th of November, 1894, Exhibit A, did not form any portion of the mortgaged property affected by the Decree in No. 77 of 1901. On the 28th of August, 1902, suit No. 159 of 1902 was dismissed with costs.

The learned Judge of first instance, dealing with the present case, was of opinion that, as issue No. 2 had been decided in the negative, there was no need to go into issues Nos. 3 and 4, and, after observing that the Plaintiff had waived his claim to any lien on properties III. and IV., decided that the Plaintiff had acquired the rights of the original mortgagee, as contained in Exhibit B, in respect of properties I. and II., and he came to the conclusion that the Plaintiff was entitled to a mortgage decree on properties I. and II., to the extent of Rs.11,000 with interest. As it was not asserted by any of the

Defendants that any portion of the principal and interest due on the mortgage Exhibit B had been paid, the learned Judge did not think it necessary to direct an account of what was due on the mortgage, though it was asked for by the plaintiff.

From this Decree the representatives of Abdul Guffoor, who was then dead, alone appealed. Judgment on the appeal was given on the 23rd of April, 1907. The Chief Judge did not dissent from the Judgment of the Court below on issue No. 2. But he held that the deed of the 14th of March, 1895—which on the face of it appears to be a mortgage by an owner in fee, and was at most a sub-mortgage, as Abdul Rahman was not the owner of the property, but transferee of the mortgage Exhibit B—operated to transfer to Abdul Guffoor the whole right and interest of Abdul Rahman in the mortgage Exhibit B assigned to him by Exhibit A. “The deed” he observes—that is, the deed of the 14th of March, 1895—“was executed and registered long before the Plaintiff bought whatever he did buy in execution of his Decree against Abdul Rahman, and consequently the latter at the time of the sale had no interest in the property in suit either as owner or mortgagee.”

That view seems to their Lordships to be quite untenable. Indeed it does not appear to have been suggested by anybody at the hearing before the Chief Court.

The view of Hartnoll, J., who was the other Judge in the Chief Court, was not the same as that of the Chief Judge, but it seems to be equally untenable. He thought the Plaintiff must be “held to have stood in Abdul Rahman’s shoes in every respect.” “He did not,” the learned Judge adds, “satisfy the Decree,” that is, the Decree of the 21st of July, 1902, “and so by

the terms of it he lost all interest that he obtained in the property by his purchase at the Court sale on the 21st January, 1903." The sale was on the 28th of August, 1902. The error in date is immaterial. But it is difficult to see how the Plaintiff could be barred or affected by a Decree in a suit to which he was not a party.

Their Lordships are therefore of opinion that the Judgment of the Chief Court should be reversed with costs to be paid by the Appellants in that Court, the representatives of Abdul Guffoor, the Decree of the District Judge discharged, and the suit remanded to the District Judge for findings on issues 3 and 4, with an enquiry as to priority between the Plaintiff and Abdul Guffoor and for retrial. The District Judge will deal with the costs not dealt with by this Judgment.

Their Lordships will humbly advise His Majesty accordingly.

The last three Respondents, the representatives of Abdul Guffoor, who alone appealed to the Chief Court, will pay the costs of the Appeal.

