

Ma Ngwe Naing - - - - - *Appellant*

v.

Maung Tha Maung - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER, 1928.

Present at the Hearing :

LORD PHILLIMORE.

LORD ATKIN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD ATKIN.]

This is an appeal from the High Court at Rangoon allowing an appeal from a decree of the District Judge of Tharrawaddy, made in favour of the plaintiff, the present appellant. The suit was brought by the plaintiff, Ma Ngwe Naing, against her father, the defendant, Maung Tha Maung, claiming possession of certain lands, of which she was the registered owner. It is not disputed that the father, by deed dated January 15th, 1904, purported to have made a partition of property and to have conveyed the property in question to his daughter. He alleges, however, that the transaction was a fictitious transaction intended merely to defeat his creditors. The High Court reversing the District Judge have so held ; the daughter has appealed.

Maung Tha Maung married as his first wife Ma Pu ; the plaintiff is the only issue of the marriage. In February, 1903, Ma Pu died ; the plaintiff was then 8 or 9 years old. Later, in 1903, the defendant married Ngwe Hlaing. On the remarriage the plaintiff undoubtedly became entitled to a share of the joint marital property of her father and deceased mother. Three or four months after the marriage the father took all the steps

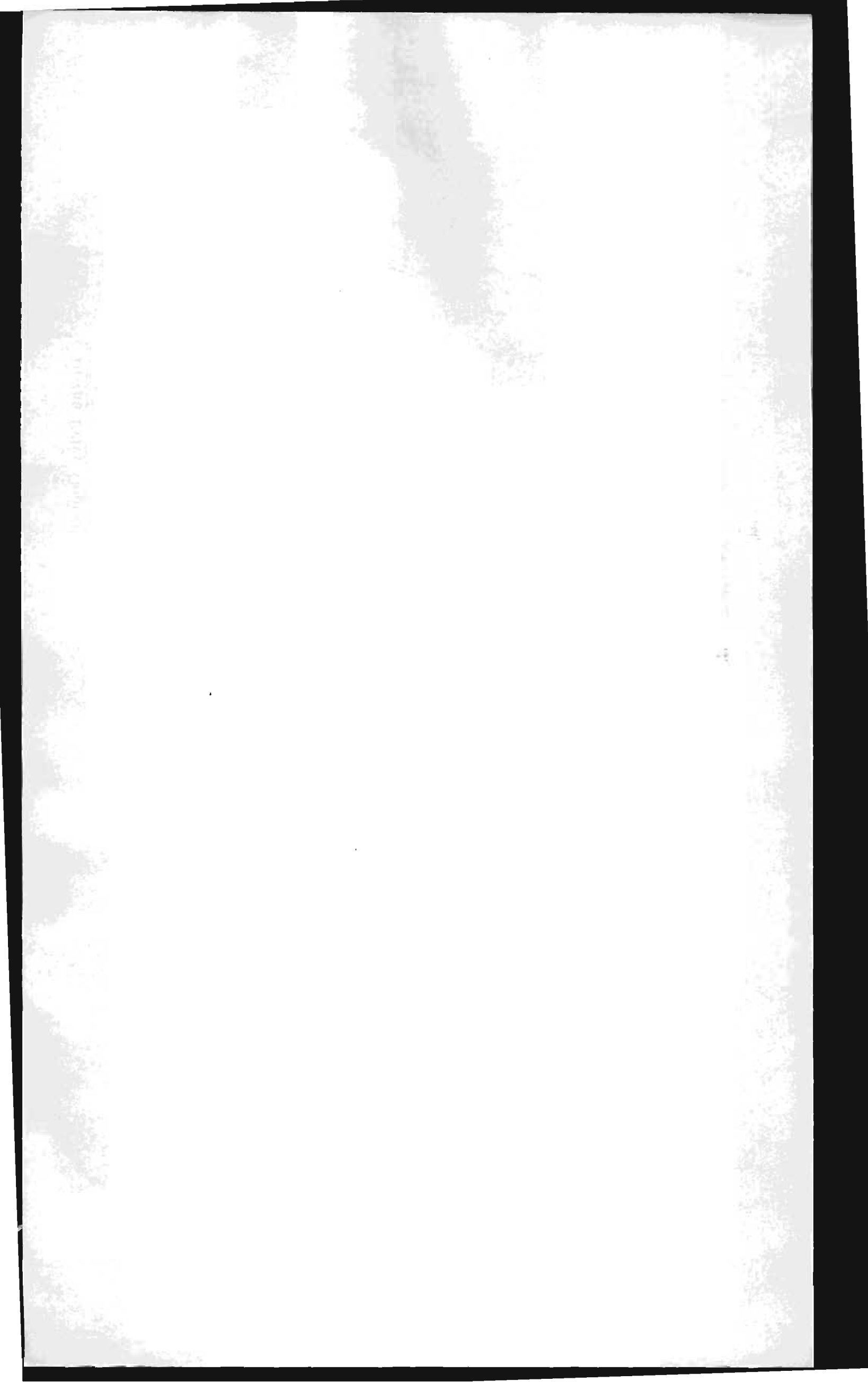
necessary to carry out a legal partition and to vest the appropriate share in the daughter. The family were consulted. Luyis were summoned to authenticate the partition, and a formal document was executed by the father on January 15th, 1904, which is Exhibit I. It recites that the father divides and gives outright possession by way of inheritance of one-fourth of the whole estate to his daughter for the mother's share, and that Ma Shwe Hnit, the grandmother of the daughter, undertook to take charge of the daughter's share until the daughter's majority. It then defines the share, which consisted of 78 acres of paddy land, estimated in the deed as worth 3,500 rupees, and a house and compound worth 500 rupees, and concludes with formal words of conveyance. The document was duly registered. In due course the grandmother petitioned the Court of the District Judge for a grant of letters of administration to the deceased Ma Pu, alleging that the father had made over the guardianship and one-fourth share due to his deceased wife in trust for the daughter. On February 20th letters of administration of the estate of Ma Pu in general form were granted to Ma Shwe Hnit. In 1908 the father's creditors who had obtained decrees against him by way of execution attached the property in question. The grandmother, acting on behalf of the daughter, with the approval and assistance of the father, took proceedings to have the attachment set aside and succeeded. The father subsequently made a composition with his creditors. About the time of the deed of partition the plaintiff went to live with her maternal grandmother, Shwe Pai, with whom apparently she continued to live until her marriage in 1924. She attained her majority in 1911. During the whole of this period the father, as found by the trial Judge, continued in possession of the property, receiving the rents and produce. He, however, contributed to the daughter's support. The trial Judge finds that about 1915 the daughter went with her maternal uncle and another witness to her father to demand possession of the lands, and received an assurance from the father that the property was safe and would be restored to her. Representations had been made in 1924 and preceding years by the father to various revenue officers that the lands in question were the daughter's and that he was leasing them on her behalf. The father gave evidence to the effect that at the time of the alleged partition he owed 30,000 rupees, that he executed the document to save the property from his creditors, and that under it he transferred all his property to his daughter's name. He says that after the partition he absconded for a time to avoid his creditors. On return he was sued and was imprisoned for debt. He made an unsuccessful application to be declared an insolvent. After the creditors had failed in their attachment of the lands in suit he says he compounded his debts of Rs. 30,000 for Rs. 3,000. He says he always remained in possession, and was supported by several witnesses, who spoke to acts of ownership at all material

times by the defendant. The learned trial Judge found that the defendant had not discharged the onus of proof that the transaction was fictitious. The High Court, on the contrary, find that the transaction was wholly fictitious. They rely upon the circumstances that, as they find, the defendant was heavily indebted at the date of the deed ; that the property assigned amounted to nearly the whole of the defendant's assets ; that the guardian appointed was not the daughter's maternal grandmother with whom she lived, but the father's mother, and that the defendant continued in possession of the land throughout. They further came to the conclusion that the defendant's possession was throughout adverse to his daughter, and that he had acquired a title by limitation. While appreciating the grounds of suspicion which the above circumstances afford, their Lordships are of opinion upon consideration of the whole case that the defendant failed to discharge the onus which lay heavily upon him in the circumstances to show that the transaction was fictitious. The defendant's case is that the partition was intended to defraud his creditors. He has to admit that this fraud, if it was one, was successful ; that he repelled the creditors' attempt to attach the property, procuring his daughter's title to be set up, and that thereupon the frustrated creditors accepted a small composition.

Their Lordships listened to a forcible argument that in such circumstances, where a grantor alleges that a transaction apparently real was actually fictitious, and was for the purpose of effecting a fraud, and the fraud was completed, he cannot be heard in a Court of Law to say that the transaction was other than what it appears to be. There have been various decisions on this point in India which appear to conflict. Their Lordships find it unnecessary to decide the point. But they have no doubt that facts that can be relied on in support of such a plea make it the duty of the Court adjudicating on the allegation of such a grantor to see that he proves by cogent evidence the averment that he makes. The present case differs from the usual form of alleged benami transactions in that there was an undoubted legal right of the transferee existing independently of the impugned transaction to receive a transfer of some property. Their Lordships think it probable that the father was at the date in question in debt, though not to the extent suggested of 30,000 rupees. Such a condition of affairs would be as likely to lead to the father making a real partition as a fictitious one. In these circumstances again it may well be that intending the property really to vest in the daughter, and so be removed from the creditors, he may have made in the partition a generous estimate of a fourth. It was contended in argument that in any case the share of an only daughter would be one-half. Their Lordships consider that for the purposes of estimating the good faith of the parties the expressed intention of giving one-fourth should alone be looked at. But it is obvious from the evidence

that the defendant is inaccurate when he says that the transfer was of all his property, and the excessive share given to the daughter does not in the circumstances appear to be inconsistent with a genuine transaction.

Similarly, the retaining of the possession and management by the father in the circumstances of the daughter being an infant, and the guardian of the property being the paternal grandmother, appears entirely consistent with the possession and management being conducted in accordance with the legal title that is for and on account of the daughter. In this respect it would appear unfortunate that the learned Judges of the High Court have not referred to the admission in 1915 by the father to his daughter and her uncle found by the trial Judge on evidence which their Lordships find no reason to doubt. If as the trial Judge found, in their Lordships' opinion correctly, the possession of the father is in accordance with the legal purport of the deed, no title would be acquired by the father under the law of limitation. For these reasons their Lordships agree with the learned trial Judge in thinking that the defendant failed to establish his defence. Their Lordships therefore are of opinion that the appeal should be allowed and the decree of the learned trial Judge restored, and will humbly advise His Majesty accordingly. The appellant should have her costs here and in the High Court.



In the Privy Council.

MA NGWE NAING

2.

MAUNG THA MAUNG.

DELIVERED BY LORD ATKIN.

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