

Maung Sin - - - - - Appellant

v.

Maung Byaung and Others - - - - - Respondents

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 3RD APRIL, 1941

Present at the Hearing:

LORD ATKIN

LORD THANKERTON

LORD ROMER

SIR GEORGE RANKIN

LORD JUSTICE CLAUSON

[Delivered by LORD ROMER]

This is an appeal from a decree of the High Court of Judicature at Rangoon made in a suit that was begun as long ago as the 20th December, 1912. A complete history of the proceedings in the suit and the events that led up to it would occupy many hundreds of pages of printed matter. But the question to be decided on this appeal is a short one, and the facts material to its decision can be stated with comparative brevity. They are as follows.

One U. Baw, a Burman Buddhist, died intestate on the 28th December, 1907, leaving surviving him a son (the appellant Ko Sin), two daughters, and the widow (the fourth respondent) and three children (the first, second, and third respondents) of a son, Ko Po Cho, who had predeceased him intestate by only 15 days. After some dispute letters of administration to the estate of U. Baw were granted to his son Ko Sin on the 14th January, 1910.

At the time of U. Baw's death there were properties both movable and immovable standing in the joint names of U. Baw, Ko Po Cho, and Ko Sin. There were others that stood in the joint names of Ko Po Cho and Ko Sin. But there appear to have been serious disputes between the members of U. Baw's family as to the beneficial ownership of these various properties.

On the 20th February, 1910, with a view apparently of settling these disputes, an agreement was entered into referring them and some other matters to an arbitrator for decision. The parties to the agreement were Ko Sin, his two sisters, Ko Po Cho's widow, Ma Shwe Yu, and two persons purporting to act as guardians of the three children of Ko Po Cho, who at that time were minors.

Disputes arose at a later date as to the extent of the duties and powers of the arbitrator under this agreement and under a supplemental agreement of the 12th April, 1910, between the same parties. Their Lordships are not however concerned with these matters on this appeal and it is not therefore necessary to consider the precise terms of the agreements. It is sufficient for the present purpose to state that it was provided in effect by clause 5 of the principal agreement that out of the share in the two before mentioned categories of property found to belong to Ma Shwe

Yu and her three children, Ma Shwe Yu was to take one third and the children were to take two thirds.

On the 10th June, 1910, the arbitrator made his award. He did not deal with all the items of property included in the two categories; in particular he excluded from his award such of the items as consisted of mortgages. But he purported to ascertain the shares of the several parties in the remaining items, including the shares in such items of Ma Shwe Yu and her children. It is unnecessary to state in detail the effects of his findings about the several shares. All that need be said about them is that out of the properties in the two categories with which he dealt in his award he found that a very large proportion belonged to U. Baw alone, and that the beneficial interest therein of Ko Po Cho was quite small in comparison.

On the 9th December, 1910, Ko Sin applied to have the award filed in Court. This application was opposed on various grounds by Ma Shwe Yu and her three children, the principal ground of their opposition being that the whole award was invalid owing to the minority of the three children. In the end the application was dismissed by the District Judge by order dated the 4th October, 1912. He was not, he said, prepared to say that the award was invalid or that no suit could be filed to enforce it on the major parties thereto; but it certainly appeared to him that the award was not one which should be filed. No suit was in fact ever filed to enforce it.

Nor for the moment did Ma Shwe Yu take any steps to have the award declared invalid. She merely ignored it, and on the 20th December, 1912, she instituted the present suit with the object (amongst others) of obtaining by a decision of the Court a larger share of the properties contained in the two categories of properties mentioned above than had been given her by the award.

By her plaint she accordingly set out in schedule A thereto various properties movable and immovable standing in the joint names of Ko Po Cho and Ko Sin, and in schedule B similar properties standing in the joint names of U. Baw, Ko Po Cho, and Ko Sin. It should be mentioned that in the schedules are to be found not only properties that had been dealt with by the arbitrator in his award, but also properties that had not been so dealt with by him. The original defendants to the suit were her three children and Ko Sin, but U. Baw's daughter Ma Nge Ma who had by this time acquired her sister's interest in the said properties was added as a defendant shortly after the institution of the suit.

Now the question to be determined upon this appeal is whether, as held by the High Court overruling the District Judge in this respect, the three children although defendants are entitled to have their interests in the properties, the subject matter of the suit, determined by the Court, or whether they are to be forced into bringing a separate suit for the purpose, a suit in which Ko Sin states that he would rely on the Limitation Act as affording him a complete defence. This attitude of his is dictated by the fact that, as will presently appear, the award has been decided to be a nullity so far as the children are concerned. In these circumstances it is necessary to examine carefully the plaint and the subsequent proceedings in the suit. Ma Shwe Yu alleged in her plaint that all the properties set forth in the two schedules had been acquired by moneys advanced by Ko Po Cho during her coverture, as to the properties in schedule A, jointly with Ko Sin, and, as to the properties in schedule B, jointly with Ko Sin and U. Baw. She then claimed that under Burmese Buddhist Law all the assets and estate acquired during her coverture with Ko Po Cho were the joint acquired property of herself and Ko Po Cho and that she was entitled to an undivided half share therein in her own right and to a life estate in the remainder until partition. The plaintiff consequently—so she alleged—joined her three children as pro forma parties and "for the better representation of the estate of Ko Cho." But the children were by no means merely formal defendants. She was claiming an interest in the subject matter of the suit adversely to them, and, as it turned out, quite wrongly. For she had remarried on the 27th January,

1910, and had thereby forfeited all interest in Ko Po Cho's share in the joint property of the two—an interest which as a matter of fact would seem but for her remarriage to have been a larger one than the one she claimed. But apart altogether from this the children were necessary parties to the suit as is made clear in the next allegation in the plaint. For in that allegation she claimed that the joint estate of herself and Ko Cho or in the alternative the estate of Ko Cho was entitled to a half and third shares respectively in the properties specified in schedules A and B; and the children were certainly interested in the question whether it was the joint estate of the widow and Ko Po Cho or the estate of Ko Po Cho alone that was entitled to share in the scheduled properties. The plaintiff prayed for declarations in accordance with these several allegations, and a partition of the properties. There is no mention of the award in the plaint from beginning to end.

In due course written statements were filed on behalf of two of the children disputing their mother's claim to be interested in more than one-half of the joint estate of herself and Ko Po Cho. Written statements were also filed by Ko Sin and Ma Nge Ma pleading the award as a defence to the action. The plaintiff thereupon filed a reply alleging that the award was invalid. It was subsequently held, however, by the District Judge, on an issue framed with a view of having the point decided, that the award must be treated as valid unless and until the plaintiff filed a suit to set it aside and succeeded in so doing. The plaintiff appealed from this decision but her appeal was dismissed. In the meantime one of her sons had instituted a suit against Ko Sin and Ma Nge Ma for the purpose of setting aside the award, and subsequently Ma Shwe Yu and her other two children, who had in the first place been added as defendants, were struck out as defendants and added as plaintiffs. It is unnecessary to trace the history of this suit which ultimately came up for decision by this Board. It is sufficient to say that in the end it was decided that the award was not binding upon any of the three children as they were minors at the date of the reference. But the question whether it ought on that account to be treated as a nullity as regards the other parties to the reference was expressly left open by the Board. This was on the 5th May, 1925.

In the meantime the suit the subject matter of the present appeal had not been entirely at a standstill in the District Court. Issues had been framed including one as follows:

“ What is the extent of Ma Shwe Yu's interest in the property inherited from Ko Cho as against the children of Ko Cho in regard (A) sole property of Ko Cho (B) jointly acquired property of Ko Cho and herself? ” Their Lordships fail to understand why this issue should have been framed if, as is now contended by the appellant, the shares of the children cannot be determined in the suit. The whole object of the issue must have been to enable the Court to effect a partition between the widow and her children of the properties referred to.

No judicial determination of the issue, however, became requisite inasmuch as on the 1st August, 1918, Ma Shwe Yu and her three children, all of whom had by that time reached majority, arrived at an agreement that the estate of Ko Po Cho should be divided between them in equal fourth shares.

On the 15th August, 1918, a preliminary decree was passed ordering (amongst other things) that enquiries be made (a) as to the property belonging to the estate of Ko Po Cho (b) as to the liabilities of that estate. It seems reasonably clear that these enquiries were not intended to apply to the whole estate of Ko Po Cho but only to the interest of his estate in the properties included in schedules A and B to the plaint. There is nothing, however, to indicate that the enquiries were to be limited to ascertaining the share of Ma Shwe Yu in that part of his estate or the liabilities attaching to that share. It was the whole of that part of his estate that was the subject matter of the enquiries. Directions were subsequently given to the Commissioner entrusted with the enquiries that he was to distinguish between the properties that had and those that had not been adjudicated

upon by the award and that as regards the latter the Commissioner was to come to his own findings in respect of them.

The Commissioner having made the enquiries pursuant to the preliminary decree and to the subsequent directions, which enquiries took about 8 years to complete, submitted his report to the District Court in 1929. Various objections to the report were filed by the parties, and the matter eventually came before the District Court for the purpose of having a final decree pronounced. On the 7th May, 1931, the District Judge pronounced judgment. For reasons that need not be set out here he thought it advisable not to come to any conclusion upon the question whether the award was binding upon Ma Shwe Yu: he left that to the Appellate Court. But he held that the shares of the three children of Ko Po Cho were not to be determined in the present suit. It was he said a partition suit pure and simple and not a suit for administration. Accordingly, after an exhaustive examination of the Commissioner's report, the parties' objections to it, and a mass of evidence, he contented himself with finding the share in the estate of Ko Po Cho to which Ma Shwe Yu was entitled. He first found what she was entitled to in the items of property numbered 1 to 19 in the schedules to the plaint, which items were the only ones included in the award. As to these items the Commissioner's report had apparently merely followed the award under which Ma Shwe Yu had got, (a) one-eighteenth share in items Nos. 1 to 5, (b) one-twelfth share in items Nos. 6 to 17, and (c) one-ninth share in items Nos. 18 and 19. Now these shares represented the one-third share to which Ma Shwe Yu was entitled by reason of clause 5 of the agreement of reference of the 20th February, 1910, in the interest in these various items found to belong to the estate of Ko Po Cho; so that the shares to which his estate was entitled in the items under the above headings were (a) one-sixth, (b) one-fourth and (c) one-third respectively. But before the learned District Judge Ko Sin and Ma Nge Ma through their advocates had stated that they were willing that there should be given to Ma Shwe Yu not only her own interest in these items but also the two-thirds interest therein to which her three children would have been entitled if the award had been binding upon them. And this the learned Judge strangely enough proceeded to do. Having held that the children could not have their proper shares in Ko Po Cho's estate ascertained in the present suit (and they would of course have had to be ascertained upon the footing that they were not bound by the award) he nevertheless treats them as though they had been so bound; decreed that their mother was entitled to the shares in the 19 items which they had been awarded; ordered that the properties should be partitioned on that footing; and that the mother should be given possession of the share so decreed to her. The learned Judge apparently also dealt with the properties that were not covered by the award in the same way, decreeing the whole share of Ko Po Cho in these properties to Ma Shwe Yu, differentiating in no way between her and her children. This was of no great moment to the children as they were willing to trust their mother to carry out the agreement that they had made with her in August, 1918. But it was a very different matter as regards the properties dealt with by the award, inasmuch as if the decree of the District Judge were allowed to stand they would be for ever debarred from establishing their right to a larger share in such properties than the Arbitrator had given them. Ma Shwe Yu was also desirous of disputing the validity of the award as regards herself. Accordingly she and her three children jointly presented an appeal to the High Court at Rangoon from the decree of the District Judge.

The High Court gave judgment on the 22nd March, 1937. They dismissed the Appeal so far as Ma Shwe Yu was concerned. They held that the award was binding upon her. From this decision no appeal has been brought by Ma Shwe Yu, and their Lordships are not asked to express any opinion about it. But the appeal of her three children was allowed. Mya Bu J., in whose judgment Braund, J. concurred, said this: "Whether the suit is to be described technically as a suit for partition or as a suit for administration, it is a clear duty of the Court to declare not only what

properties or shares therein formed the estate of Ko Po Cho but also to declare the rights of Ma Shwe Yu and of her children in such properties." He accordingly held that the final decree passed by the trial Court ought to be set aside and the case remanded to the trial Court for the purpose of enabling the three children to prosecute their claims and of having a proper final decree drawn up after necessary enquiries had been made. As regards such of the properties set out in the schedules to the plaint as were not dealt with by the award, he said that all that would be necessary for the District Court after the remand was to divide the interest of Ko Po Cho therein among the widow and children in accordance with the terms of the agreement of the 1st August, 1918. But as regards the properties disposed of by the award (namely the items 1 to 19 hereinbefore mentioned) he held (a) that the three children must be given an opportunity of claiming which items or shares in items belonged to Ko Po Cho's estate, and that, after Ko Po Cho's interest in such properties had been ascertained, the three children must be declared to be entitled to half that interest upon the footing that they were entitled to that half as against their mother on her remarriage (b) that the shares to which Ma Shwe Yu was personally entitled must be declared to be one-third of one-sixth in items 1 to 5, one-third of one-fourth in items 6 to 17, and one-third of one-third in items 18 and 19 in accordance with clause 5 of the directions in the award (c) that whatever Ma Shwe Yu was declared entitled to under the head (b) and whatever the three children were entitled to under the head (a) must then be divided in equal fourth shares among them in accordance with the terms of the agreement of the 1st August, 1918.

A formal decree was drawn up giving effect to this decision of the High Court, and it is from that decree that an appeal has been brought by Ko Sin (both in his personal capacity and as legal representative of Ma Nge Ma who has died) to His Majesty in Council.

It was urged before their Lordships upon the hearing of the appeal (and this was substantially the only point relied on by the appellant) that the suit was not one for the administration of the estate of Ko Po Cho, and that it was not therefore permissible for his three children, who were merely defendants in the suit, to have their shares in the estate ascertained and decreed to them, more especially in view of the fact that the subject matter of the claim of the plaintiff in the suit was not even the whole estate of Ko Po Cho but merely her share in so much of the scheduled properties as belonged to his estate. It was, the appellant contended, merely a partition suit for the recovery by the plaintiff of that share in severalty.

Their Lordships agree that the suit is not a suit for the administration of Ko Po Cho's estate. There is no claim for administration in the plaint, nor is there any claim for the accounts and enquiries usually directed in such a suit. Its subject matter moreover is not the whole of the dead man's estate but only a portion of it. But this in no way concludes the matter. The pleadings raised a distinct question between the plaintiff and her children as to their respective shares in the subject matter of the suit, and an issue was framed for the purpose of deciding that question. The preliminary decree, moreover, directed an enquiry not merely as to the plaintiff's share, but as to the entire share of Ko Po Cho in the subject matter of the suit. In these circumstances it was in their Lordships' opinion not only competent for the Court to ascertain and declare the shares of the three children of Ko Po Cho; it was their plain duty so to do. In their Lordships' opinion the decree of the High Court should be affirmed and this appeal dismissed.

They will humbly advise His Majesty accordingly.

As the respondents have not appeared there will be no order respecting costs.

In the Privy Council.

MAUNG SIN

v.

MAUNG BYAUNG AND OTHERS

DELIVERED BY LORD ROMER

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