

Privy Council Appeal No. 59 of 1928.

Ma Mya and another - - - - - *Appellants*

v.

Ma Me Kyin and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 23RD APRIL, 1929.

Present at the Hearing :

LORD CARSON.

LORD SALVESEN.

SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

One U Tun, a Burman, residing at Thayetkon in the District of Myaungmya, died a number of years ago leaving him surviving his widow Daw Hmo and one son Lu Pe. Their Lordships were told that under the Buddhist law by which the parties are governed, the whole of U Tun's property, which consisted of a house, some paddy land, and jewellery, and apparently a substantial sum in cash, devolved upon his widow, his son Lu Pe taking no share in it during his mother's life time. U Tun and his wife had brought up a nephew of Daw Hmo's, by name Hmat, whose parents had died in his infancy, and it is admitted that he was always on terms of great affection with both Daw Hmo and Lu Pe, and was treated during the whole of his life as a member of their family. Lu Pe was some years older than Hmat and it appears that after U Tun's death Lu Pe carried on the family money lending business and acquired paddy lands and other immovable properties, the deeds of most of which were taken in his name. He had so far as the record discloses no independent means of his own, and it seems probable that the source of his

acquisitions was in reality what had devolved upon his mother on U Tun's death. When Hmat attained years of discretion he was initiated into the family business and eventually came to take a considerable part in it. Between the years 1917 and 1922 five purchases of paddy land and one of a house and bullocks were made in the joint names of Lu Pe and Hmat and during various periods, beginning apparently in 1911, his name appeared as one of the lenders on promissory notes taken in the ordinary course of the money lending business. Hmat died in May, 1923, leaving him surviving a widow Me Kyin and a minor son by a previous wife, who are the respondents in this appeal. Lu Pe died a month or two later leaving a widow Ma Mya and a minor daughter, who are the present appellants.

The harmony which had prevailed for so many years in the family seems to have been disturbed very soon after the death of Lu Pe. First there were disputes between Lu Pe's widow Ma Mya and her mother-in-law Daw Hmo, which were eventually settled by an agreement, the terms of which are not material to this appeal. Then Hmat's widow, Me Kyin, set up a claim that her husband had been adopted by Daw Hmo and her husband, and filed a suit to have this established. It is sufficient to say however that this suit was dismissed, and the only possibly material fact connected with it is that Daw Hmo gave evidence in the suit and denied that any part of the family property, which at Lu Pe's death was considerable, belonged to her. On the failure of the adoption suit Me Kyin instituted the suit out of which this appeal arises in the Court of the District Judge of Myaungmya. By her plaint she claimed that the whole of the family property was the joint acquisition of Daw Hmo, Lu Pe and Hmat, but, inasmuch as Daw Hmo had disclaimed all interest in it, that she and the minor plaintiff were entitled to one half of the estate. Daw Hmo and Lu Pe's widow put in a joint written statement of defence, denying the claim, and asserting that Lu Pe was the sole owner subject to the rights of Daw Hmo "who being the mother has right and interest over [the property] according to the Buddhist law." Ma Mya contested the suit, but Daw Hmo seems to have taken no further part in the litigation, and owing to her age and infirmities she was not examined as a witness. The main issue in the case was formulated by the District Judge after hearing the parties, in a wide form:—"Whether Maung Hmat at the time of his death had any interest in the suit properties, and if so to what extent?"

The materials upon which the District Judge was called to determine this issue were voluminous but indecisive. A mass of purchase deeds, leases, and mortgages were recorded, of which the purchase deeds in respect of the six properties above referred to were in the joint names of Lu Pe and Hmat, all the rest (a great majority) being apparently in the name of Lu Pe alone. As to the six deeds Ma Mya, Lu Pe's widow, who was the principal witness for the defence, said that in her view Lu Pe wanted to

give Hmat some interest in these properties for his services, but that as Hmat was "fond of pleasure" Lu Pe did not keep the property entirely in his name. The Subordinate Judge accepted this view, calling in aid of his decision the provisions of sec. 45 of the Transfer of Property Act, 1882. He accordingly held that Hmat's widow and child were entitled to a half share of these six properties. He also included with one of the properties a thousand baskets of paddy, apparently as representing a year's produce of the land. Apart from these properties he disallowed the plaintiffs' claim. He thought that the case of joint acquisition in respect of the other properties, including the outstanding assets of the money lending business, had not been established.

In the High Court at Rangoon to which the plaintiffs appealed, the contest turned mostly on so much of these assets as consisted of promissory notes on which Hmat's name appeared as one of the lenders. During at all events specific periods between 1909 and 1923 counter-foil books of promissory notes were used in the business in which the name of Hmat was printed as one of the lenders. Lu Pe's name always appeared jointly in these books with Hmat's, and at different times the names of Lu Pe's wife and daughters also appeared on them. After Hmat's death his name continued to be used for some little time as a lender, probably in the case of renewals of previous loans to which he had been a party, as in one case it was struck out, and similarly after Lu Pe's death his name continued to be used. Eventually new promissory notes were substituted in the names of Daw Hmo and Ma Mya. With reference to the appearance of Hmat's name on the promissory notes, Ma Mya said that it was merely inserted to give him "status," but she asserted that the money was all Lu Pe's. No other explanation was suggested; no account books were produced showing how each particular transaction was debited or credited, and their Lordships were told that books are not ordinarily kept in this class of business in Burma. There were, however, a number of memoranda in Hmat's handwriting showing settlements of account. These were exhibited in the Trial Court but have not been printed in the record. Their Lordships cannot help thinking that they might have thrown some light upon the transactions. The witnesses who were called spoke of the loans being made by both Lu Pe and Hmat, and said that one never acted without the other. There was no proof that Hmat was paid for his services. He merely lived with the family in a separate house provided by the family, and was supported by it.

On this state of facts the Judges of the High Court came to the conclusion that the only explanation of the promissory notes being taken in this form was that Hmat was intended to have a definite interest in them. In all the outstanding notes on which Hmat's name appeared, that of Ma Mya also appeared along with the name of Lu Pe, and the learned judges held that the reasonable inference was that each of them was interested to the

extent of one-third. With regard to the paddy lands held under the joint title, they did not disturb the finding of the District Judge, the defendants' cross-objections on this point having been held to be out of time. The defendants have now appealed to His Majesty in Council, and their Lordships are invited to hold upon these facts that the plaintiffs had no interest in the property and that the suit should have been dismissed. It is unfortunate that the plaintiffs (respondents) are not represented before their Lordships. It is also unfortunate that the appellants in their desire to reduce the bulk of the record have printed practically none of the large number of material documents which were before the Courts in Burma. None of the sale deeds are printed, whether in the joint names of Lu Pe and Hmat or of Lu Pe alone : none of the memoranda of accounts : none of the counterfoil books or counterfoils of the promissory notes are reproduced ; a power of attorney which is said to have been given by Lu Pe to Hmat in 1918, and which might be an important document is also omitted. All this material is represented merely by an index which indeed briefly describes the nature of the documents, but is of no real assistance.

The arguments addressed to their Lordships were naturally based on the absence of proof of the possession by Hmat of any independent means by which he could have joined in the purchase of immovable property or have made loans to customers. All the monetary resources are said to have been Lu Pe's. How what was apparently Daw Hmo's property at her husband's death passed to Lu Pe has not been explained. In fact Mr. Pennell the junior counsel for the appellants asked their Lordships to hold that the whole property was really Daw Hmo's, Lu Pe having only acted as her agent and manager. If there was no partition between the mother and son, he asserted that the whole of the acquisitions would be the property of the mother. Mr. De Gruyther took the opposite view, that everything was Lu Pe's, and indeed seeing that the appellants were Lu Pe's widow and daughter and that Daw Hmo though a party to the litigation apparently made no claim to the property, it was almost essential to the appellants' case to assert Lu Pe's ownership. One striking fact that seems to negative the assertion by the plaintiffs of joint acquisition in respect of the whole property is that when money was borrowed for the business it was taken in the names of Lu Pe and his wife, Hmat being no party to any such transaction. Several chetties from whom Lu Pe had been in the habit of borrowing were called for the defence, and it was clearly established that Hmat was never a party responsible for any loan by them. The High Court however point out that there is no proof that any of the joint transactions, whether by way of purchase of paddy lands or loans on promissory notes, were founded on these advances, and it may well be that the monies borrowed from the chetties would be employed in the independent dealings of Lu Pe which were admittedly of considerable extent.

Their Lordships also feel that much weight must be attached to the position of Hmat in the family. He was evidently treated by Daw Hmo as a foster son, and by Lu Pe as a foster brother. He was educated, married and maintained at the family expense and took a prominent part in the family business and acquisitions ; and under these circumstances, especially if the foundation of the family fortunes was really the sole property of Daw Hmo, it appears not unnatural to their Lordships that when specific pieces of property are found to be in the joint names of the two, or, in the case of particular advances, the names of both appear as lenders, the intention should have been to express a joint interest and a joint right. It is objected that this necessarily implies a gift by Lu Pe to Hmat, and that no gift is either alleged or proved. Their Lordships think that this, though perhaps technically correct if they were satisfied that the nucleus was the independent property of Lu Pe, is hardly convincing having regard to the known facts. They think it not improbable that by mutual understanding a portion of the family acquisitions was without any particular formality treated as joint and so entered in the only documents in existence by which any title could be shown. Their Lordships have little doubt that this was the definite intention in the case of the particular paddy lands and other immovable property purchased in the names of the two, and though the question of the promissory notes is more involved, their Lordships are not satisfied that the finding of the High Court, based as it was on documents which have not been made available to the Board, is wrong.

Under the circumstances therefore their Lordships find themselves unable to dissent from the main conclusions of the High Court. Objection however has been taken, and their Lordships think rightly, to the way in which the learned Judges have dealt in their decree with the assumed proceeds of the promissory notes in which they held Me Kyin and her stepson to be interested. Their Lordships think that the right method of working out the decree in such a case is by the appointment in India of a Receiver to realise the monies due on the notes and to pay over to the respondents the third share of the recoveries to which they have been held entitled.

Their Lordships will accordingly humbly advise His Majesty that the decree of the High Court should be varied to this extent but should otherwise be affirmed.

In the Privy Council.

MA MYA AND ANOTHER

v.

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DELIVERED BY SIR GEORGE LOWNDES.

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