

Maung Kyi Oh and another - - - - - *Appellants*

v.

Ma Thet Pon - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1926.

Present at the Hearing :

VISCOUNT DUNEDIN.

MR. AMEER ALI.

SIR ARTHUR CHANNELL.

[*Delivered by VISCOUNT DUNEDIN.*]

The land, the contention as to which is the matter of this suit, belonged originally to one U. Laik, who died somewhere about the year 1893. He left the land burdened with a mortgage. U. Laik was survived by a large family; to most of the family there is no reason that any particular reference should be made, but the youngest daughter married U. Bauk. That lady died and U. Bauk married again. The lady had before her death a daughter called Ma Thet Pon, and Ma Thet Pon is the plaintiff in the present suit. After her death and his second marriage U. Bauk had certain children, and one of them and her husband are the administrators of U. Bauk's estate and are the first two defendants in the present suit. In the year 1909 there was brought a redemption suit to redeem the lands from the mortgage with which they had been encumbered by U. Laik during his life. What happened in that redemption suit was that the money which was paid into the Court to effect the redemption was paid in by the hand of U. Bauk. The decree for redemption decreed the land in the name of the heirs of U. Laik, but there is a controversy as to

whether U. Bauk immediately entered into possession or whether the heirs entered into possession. At any rate, U. Bauk was eventually in possession, whether as agent or on his own account, as has been said, is a matter of controversy, and at the time of the institution of this suit U. Bauk was in possession. The suit as instituted by Ma Thet Pon is in right of her mother Ma Saw Ma, and, as such, as heir of U. Laik. She avers, and a certain agreement has been referred to in the judgment of the High Court and put in before this Board which bears out her averment, that the other heirs, that is to say, the elder brothers and sisters of her mother, Ma Saw Ma, had agreed to renounce their rights upon certain terms. She says that, first of all, she is the heir, and, secondly, that it was her money which effected the redemption, although the actual hand that paid the money into Court was that of her father, U. Bauk. The defendants, who are the administrators of U. Bauk, say that U. Bauk himself was an heir, in right of his first wife, and it was his own money which he paid for the redemption. It is apparent that one of the crucial facts in this matter is, Was U. Bauk an heir of U. Laik or not? Their Lordships recognise that in a case from a District Court in Burma pleadings, and, indeed, the whole conduct of the case, can scarcely be scrutinised with the strictness with which a case would be scrutinised in this country. That allowances must be made is abundantly clear from the history of the proceedings in this case, because it is apparent when the pleadings are looked at that really both the plaintiff and the defendants floundered as to their real case, and that the Court quite rightly took upon itself to straighten out the whole matter and try to discover what the real question between the parties was.

As their Lordships have already said, one crucial fact is, Was U. Bauk an heir or was he not? That depended necessarily upon whether his first wife, Ma Saw Ma, survived or did not survive her father. If she did not survive her father, then U. Bauk had no status as an heir at all; if she did survive her father then the Burmese law is that U. Bauk, being the surviving husband of a person who *ex hypothesi* is the then surviving daughter, is treated as one of the heirs of the father. Their Lordships cannot say that the matter is altogether satisfactory in this respect, but it is the fact that the High Court, setting forth the family of U. Laik, in the very next sentence say that his family comprised a daughter, Ma Saw Ma, who predeceased him, and then they go on to say that in the redemption suit U. Bauk with another person were unnecessarily made plaintiffs, since their respective spouses had died before they were within reach of the inheritance. It has been very properly argued by Mr. Raikes that there is no real proof of this statement, and he has also called the attention of their Lordships to the fact that in the redemption suit and indeed in this plaint it was alleged by the plaintiff that when U. Laik died he was succeeded by his

children, among whom Ma Saw Ma is mentioned as one. Notwithstanding that, their Lordships feel that, when there is a distinct statement by the High Court that U. Laik's daughter, who was U. Bauk's wife, had predeceased him, they cannot go behind that statement. The High Court was in possession of facts which are not before their Lordships; they certainly had before them whatever admissions counsel may have made in the course of the case, and their Lordships feel that, if a judgment was given out in which there was an absolute mis-statement of fact on a perfectly plain question, it would have been the duty of the person aggrieved to have gone to the High Court and said: "Your judgment is vitiated by an obvious error on a pure question of fact"; and to have attempted, at any rate, before the High Court, to put it right.

There is another matter also: It is quite clear that, taking a strict view of the law, if the defendants showed that this statement was completely wrong, they went a long way towards winning the case, and therefore in the ordinary and proper conduct of the case it would have been one of the things that one would have supposed the defendants' counsel would have tried, before all other things, to bring out, that U. Bauk had real possession as an heir. When one comes to the depositions of the witnesses in the case and the other documentary evidence, there is really nothing on which an actual determination can be founded. There are certain calculations, based upon a calculation as to age, on which one may come to certain conclusions; but there is nothing positive in the material before their Lordships on which they can come to a conclusion as to the proper date.

In those circumstances, their Lordships feel that they are really bound to take the fact as stated by the High Court that U. Laik's daughter had predeceased him. If that is so, then U. Bauk was not an heir, and it is in the complexion of that fact that he was not an heir that the rest of the evidence must be looked at. U. Bauk was then, so to speak, a volunteer. It is equally possible that U. Bauk redeemed the mortgage with his own money or with money which was given him by Ma Thet Pon, and here, of course, there is the actual testimony that was given about the advance of the money by Ma Thet Pon. U. Bauk is dead, and so unfortunately their Lordships cannot have his evidence; but not only does Ma Thet Pon depose quite clearly that she gave the money, but there is also the testimony of one other witness. It is quite true that the learned Judge of first instance disregarded that testimony, and, if he had based his judgment upon the matter upon the demeanour of the witness and said that he thought from her demeanour that she was lying, or that the corroboratory witness was lying, it would be another instance of what has so often been said, that a Judge who sees the witness is in a better position than a Court of Appeal, which does not; but that is scarcely what the learned Judge of first instance said. He did not seem to go so much upon the demeanour of the witness as

upon what may be called the inherent probabilities of the story ; the inherent probabilities of the story are taken up by the High Court, and their Lordships can only say that they think the High Court has commented on those inherent probabilities in a way that commends itself to their Lordships' judgment.

Upon the whole matter, therefore, their Lordships do not think that a case has been made out to disturb the judgment of the High Court. That, after all, is a question for a Court of Appeal always, and it is especially a question for a Court of Appeal such as their Lordships' Board, which is a long way from the place and without any knowledge of the local circumstances.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

MAUNG KYI OH AND ANOTHER

v.

MA THET PON.

DELIVERED BY VISCOUNT DUNEDIN.