Privy Council Appeal No. 87 *of* 1924.

Kirkwood *alias* **Ma Thein and another** - - - - *Appellants*

v.

Maung Sin and another - - - - - *Respondents*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH MAY, 1925.

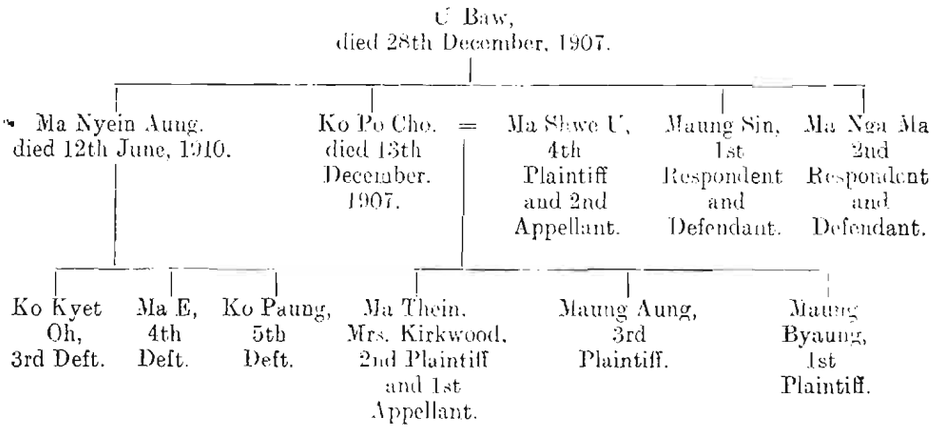
Present at the Hearing:

LORD ATKINSON.
LORD CARSON.
SIR JOHN EDGE.

[*Delivered by* LORD ATKINSON.]

The facts of this case are complicated and involved. This is due to the circumstance that several of the parties concerned have on many occasions embarked somewhat recklessly on needless litigation, the different branches of which were not always consistent with each other. It is nevertheless essential to unravel these complicated facts in order to apprehend clearly what are the questions which must be dealt with on this appeal, and to appreciate the true nature and reach of the decisions upon them. The subject matter from which the litigation sprung was the administration and distribution of the assets of two Burmese Buddhists, father and son, named respectively U Baw and Ko Po Cho, the latter of whom died on the 13th of December, 1907, and the former of whom, the father, died fifteen days later, namely, the 28th of December, 1907. To make the proceedings

which have taken place intelligible it is necessary as a preliminary to examine the following pedigree : —



The words "plaintiff" and "defendant" and "appellant" and "respondent" printed underneath the names of the members of this family indicate the positions they respectively assumed, and the action they respectively took, in the legal proceedings subsequently instituted to assert their claims to certain shares to the assets of U Baw and Ko Po Cho, deceased. At the date of the latter's death it is admitted that his three children were minors ; that none of them had come of age before the 20th of February, 1910, when the submission to arbitration hereinafter dealt with was entered into ; that two of them, namely, Maung Aung and Maung Byaung, were still minors on the 13th of March, 1914, when the suit was instituted in which the order appealed from was made, and that the girl Ma Thien, the eldest of the three children, had failed to establish that she was a minor within three years of the 13th of March, 1914. Letters of administration of the estate of U Baw, deceased, were in the year 1910 granted to his son Maung Sin. Ma Shwe U, the widow of Ko Po Cho, deceased, married again in the year 1910 a man named Maung Po Yeik, and Ma Thein, the daughter, married Colonel Kirkwood on the 1st of July, 1913. Disputes having arisen between the descendants of U Baw and the members of the family of Ko Po Cho, a submission of these disputes to the arbitration of one Lugyi U Hla Baw was on the 20th of February, 1910, drawn up. It purported to have been executed by Ma Nyein Aung, Maung Sin and Ma Nga Ma, descendants of U Baw and Ma Shwe Yu. These executing parties were all adults. The submission further purported to have been executed in addition by the three children of Ko Po Cho, then minors, by two guardians, one Maung Tundu, acting on behalf of Ma Thein and Maung Aung, and the second, Maung Po Yeik, on behalf of Maung Byaung. It was not disputed on this appeal that these two persons so purporting to sign this submission as guardians for the three minors, the children of Ko Po Cho, were never appointed guardians of the children on whose behalf they purported to sign and had no right or authority whatever so

to do. The consequence of this is that the three minor children are no parties to the submission and are not bound by the award made in pursuance of it. On the 12th of April, 1910, a further question touching the ownership and disposition of certain property, was by the agreement of the pleaders representing the parties to the first submission, referred to the arbitration of the same arbitrator. The submission is very obscurely worded, and its provisions are to a great extent immaterial in the present appeal. They are in addition rather peculiar in character. The first begins by reciting that the parties to it have a dispute amongst themselves, that they bind themselves to abide by the decision of the arbitrator, that he may decide this dispute finally in the manner thereinafter indicated, that is, first by partitioning in the manner set out certain properties which are stated to be the subject of the dispute. These properties are divided in five classes or categories, marked by five letters of the alphabet. The first class (*a*) comprises land and rent belonging to U Baw, Ko Po Cho, and Ko Sin. The second class (*b*) comprises similar lands and rents belonging to Ko Po Cho and Ko Sin. The third class (*c*) comprises certain paddy lands, 216·11 acres in extent, belonging to Daw Hmo. The fourth class (*d*) comprises moveable and immoveable property, debts, rents, etc., belonging to Ko Po Cho and his wife Ma Shwe U. The fifth class (*e*) comprises debts due and to be paid to, and debts to be recovered by Ko Po Cho, his wife, and his three children. As to the first class (*a*) the direction is that U Baw's share is to be left out of it and the remainder of the property comprised in it is to be divided into four shares, one of which is to be given to Ma Shwe U and her three children, and the three remaining shares to be given to the persons named. The property comprised in class (*b*) is to be similarly dealt with. The paddy lands, 216·11 acres in extent, are to be divided into three shares, one to be taken by the widow Ma Shwe U and her children, the two remaining shares to go to the persons named. The fourth class (*d*) is to be divided into two shares, Ma Shwe U taking one of them and the remaining share to go to the same three children. Further minute directions are given as to the manner in which the indicated partitions are to be effected. They are not material, however, to the matter now in hand. If the law as to the limitation of property existing amongst Burmese Buddhists were the same as the English law dealing with such matters, it might be plausibly contended that under the limitation directed and carried out, Ma Shwe U and her three children would become joint tenants of the lands to be allotted to them, with rights of survivorship amongst them.

The authorities examined and criticised in the judgment of the Board in the case of *Kirkwood and another, Maung Sin and another*, 51 I.A., 334. seem to lead one to the conclusion that no such rights of survivorship would exist amongst these four beneficiaries if the award were made according or conformed to Burmese Buddhist

law. That was a suit instituted in the year 1918 for the administration of the estate of U Baw, a Burmese Buddhist, governed by Burmese Buddhist law. The plaintiff-appellants were the children of Po Cho, who was himself the eldest son, but second born child, of his father U Baw. The defendants-respondents were the two surviving children of U Baw and Daw Hmo, and the representatives of their eldest born child, a daughter, Ma Nyein Aung, who had attained majority and survived both her parents, but died before the institution of the administration suit. By the decision of the Board affirming that of the Chief Court it was held that Po Cho, not being the eldest born, was not the orasa son, and that his children were therefore only entitled to a one-sixteenth share of the estate of U Baw.

As far as the Board have been able to ascertain, the proceedings in this suit have not since the year 1924, when the decision of the Board was delivered, proceeded farther. On the 20th December, 1912, nearly 13 years ago, Ma Shwe U filed a suit against her three children and Maung Sin, alleged to be in possession of part of her deceased husband's estate, for apparently the partition and administration of that estate. For nearly six years this litigation was carried on, and ultimately on the 15th of August, 1918, a preliminary decree was made directing that accounts of the properties belonging to Po Cho, of the liabilities thereon, and of mesne profits payable by Maung Sin in respect thereof, should be taken by a Commissioner. The accounts are apparently still being taken, and no final decree has as yet been made. These facts appear from the judgment of Mr. Justice Heald, p. 214 of the Record. It was during the hearing of this appeal much pressed by Mr. Dunne on behalf of the respondents, either that the present suit was unnecessary, or that the claim of all the parties concerned to interests in the assets of U Baw or Po Cho could be adjusted and satisfied in one or other or both of these administration suits. It is quite obvious, however, that the information before the Board is not full enough or precise enough to enable it to express any definite opinion on the soundness of Mr. Dunne's contention on this point.

The arbitrator in the present case made his award on the 10th of June, 1910. He found that by the terms of the submission he had power to direct the division among the co-heirs of the properties described in it under the heads (*a*), (*b*), (*c*), (*d*), and (*e*) already mentioned, following the rules of division set out therein, and to declare the rights of each and every of the co-heirs thereto. He further states that as to all property not included in those five categories, he will be guided by the ordinary Buddhist law of inheritance. He then proceeds to determine the ownership of the property he was directed to divide. It is difficult to see how he could identify it otherwise,

and he then determines in which of the five categories it is included. He finds that most of the debts have been time barred, sets out in a schedule (No. 6) those he considered good, and directs that they are to be divided on the same principle as the properties in a list he indicates. He further holds that the estate of U Baw is indebted to the extent of Rs. 33004.9.0, which ought to be deducted from U Baw's estate before division, and that the latter's co-heirs are liable for this debt according to the value of the properties they receive. He then appoints Ko Sin guardian of the persons of Ma Thein and Maung Aung, and Ma Shwe U guardian of the person of Maung Byaung. He further appoints the last-named lady, Ma Shwe U, guardian of the properties of her three above-named children, "until Ma Thein attains the age of majority," on "her (*i.e.*, Ma Shwe Yu) furnishing security to the amount of Rs. 8,000." On the 9th of December, 1910, Maung Sin filed an application in the District Court of Hanthawaddy to have the award filed in Court under Sections 20 and 21 of the Second Schedule of the Code of Civil Procedure. This application was opposed by Ma Shwe U, both personally and on behalf of her minor child, Maung Byaung; her other children, Maung Aung and Ma Thein, were made defendants on the application, and a document was filed by Ma Shwe U, on behalf of herself and as guardian of the minors, stating in detail numerous objections to the aforesaid award. Amongst these are to be found the following:—(1) That the persons who purported to sign the submission as guardians of her three children were not at the time of so signing, or at any subsequent time, guardians of the persons or property of these three minors. (2) That the arbitrator erroneously appointed a guardian to the aforesaid minors, which he had no authority to do. (3) That the arbitrator, in declaring certain properties admittedly in the joint names of Ko Cho, deceased, and Ko Sin, to belong to the estate of U Baw, deceased, exceeded his authority to the detriment of the minors. (4) That the arbitrator failed to decide what debts were left by U Baw and Ko Cho, and what debts were due to the estates of U Baw and Ko Cho. Issues were joined upon these objections. On the 9th of September, 1912, the District Judge of Hanthawaddy (Casson, J.) made a preliminary order dealing with these issues. He held that the arbitrator had no power to appoint guardians *ad litem* or other of the minor children of Ma Shwe U, and that therefore the arbitration proceedings were not binding on these minors; that the question of the validity of the award as regards them did not arise; that the consequence was that they should be dismissed from the suit. In the formal order drawn up, dated the 4th of October, 1912, the learned Judge, in the final passage of the order, states as follows: "I am not prepared to say the award is invalid, or that no suit can be filed to enforce it, on the major parties thereto, but it certainly appears to me that

the award is not one which should be filed, and the application is dismissed with costs." This dismissal may have *per se* deprived the adult parties to the award of the power of enforcing it by certain effective statutory methods, but it did not in their Lordships' view render the award void or otherwise unenforcible as against those parties. Ma Thein was named as one of the defendants in an application dated the 17th of January, 1911, by Maung Sin to have guardians *ad litem* appointed for Maung Byaung and Maung Aung, sons of Ma Shwe U. In the third paragraph of the application it is stated that the plaintiff had ascertained that Ma Thein was an adult and could conduct her own case. In the objections filed on behalf of Ma Shwe Yu and Maung Byaung on the 28th of March, 1911, it is stated she was then still a minor. The District Judge, in delivering judgment on the 22nd of October, 1917, in the main suit hereinafter dealt with, held that Ma Thein claimed that she did not attain her majority till the 19th of April, 1912, while the defendants pleaded that she attained it on the 21st of April, 1910. After dealing exhaustively with all the evidence given on this point, he held that it had not been proved that Ma Thein was a minor within three years ending with the institution of that suit, *i.e.*, within the three years ending on the 13th of March, 1914; so that she must have attained her majority before the 13th of March, 1911, but how long before is not found. Having regard to the amount of evidence taken by the arbitrator during the course of the arbitration, their Lordships think that there can be little, if any, doubt that at the date of the award both Ma Thein and her mother must have become perfectly well aware of all the facts entitling them to have the award set aside.

No appeal was taken by Maung Sin or any other party against the District Judge's refusal to file the award. On the 20th of December, 1912, Ma Shwe U instituted a suit in the District Court of Hanthawaddy for a partition of her share of the estate of Po Cho, citing as defendants her three children and Maung Sin and Ma Nga Ma, but whether by mistake or otherwise she omitted to pray expressly to have the award set aside. The Court ultimately held that the award barred these proceedings as to all properties included within it, and that the Court could only deal with properties not included in it. The proceedings are still pending. On the 13th of March, 1914, Maung Byaung, still a minor, by his next friend Maung Ba San, instituted a suit against his mother Ma Shwe Yu, his sister, Mrs. Kirkwood, his brother Maung Aung, his uncle Maung Sin and aunt Ma Nga Ma, brother and sister of his father, and the representatives of Ma Nyein Aung, another aunt, deceased, praying first for a declaration that the two submissions to arbitration, dated respectively the 20th February, 1910, and the 11th of April in the same year, and the award dated the 10th of June, 1910, made in pursuance thereof, were not binding

on him; and, second, that they were absolutely void and might be set aside. He based his claim on this allegation, amongst others, that he was a minor at the times the submissions bore date, and that therefore the agreements of reference was not binding on him and it and the award were void together. His brother and then his mother and sister were subsequently joined with Maung Byaung as plaintiffs in the suit. As more than three years had then elapsed from the date of the award, Myaung Byaung claimed exemption from limitation on the ground of minority: Ma Thein on the ground that she was a minor till the 19th April, 1912, and Maung Aung that he was a minor till the 6th October, 1913. Ma Thein and Ma Shwe Yu also claimed to exclude the time occupied by the other proceedings already mentioned. Ma Shwe Yu also based her claim on the averment contained in the 10th paragraph of the amended plaint, which runs as follows:—

> "10. That the plaintiffs submit that the said agreement of reference and the award are not binding on the 1st, 2nd and 3rd plaintiffs as they were minors at the time and the said agreement and the award being void in part are void altogether, having regard also to the decision of this Honourable Court in Civil Regular No. 107 of 1910 and having regard to the fact that the Arbitrator failed to adjudicate on all the matters referred to him by the agreement and proceeded to deal with certain matters which were not referred and having regard to the fact that this Honourable Court dismissed the application to file the award in Suit No. 107 of 1910."

The principal defendant, Maung Sin, filed two written statements. The first on the 7th of June, 1915, and the second, an amended one, on the 22nd of July, 1915. In these statements he practically admits that the various events already detailed had happened in the course of this long litigation. He relies, however, on the following special defences: First, that the award was binding on the three minor children of Po Cho because they were properly represented in the making of the agreements to refer to arbitration, and were also represented in the arbitration proceedings. Second, that this question was in issue in suit No. 54 of 1912, and that though no order was actually made by the Court upon this issue, the learned presiding Judge stated such an order was ready and could be delivered when necessary, that this suit is still pending, and that the matter is therefore *res judicata*, or in the alternative that as this formed an issue in suit No. 54, 1912, when the present suit, filed on the 13th of March, 1914, was instituted it could not be maintained till that issue had been disposed of. He further submitted that this latter suit is not maintainable having regard to the 42nd section of the Specific Relief Act. In this amended statement the defendant, in addition, averred that the plaint disclosed no cause of action in favour of the fourth plaintiff Ma Shwe Yu, that any alleged cause of action in her favour is barred by Article 91 of the Indian Limitation Act, and that as to the fourth plaintiff, he averred that the suit was not maintainable having regard to the provisions of the 42nd section of

the Specific Relief Act. He further avers that the second plaintiff, Mrs. Kirkwood, attained her majority on the 21st of April, 1910, and that as against her the suit was barred by Article 91, Indian Limitation Act; he then denies all the averments contained in the statement filed by the plaintiffs, which were not specially admitted. The averments contained in the written statement filed by defendant Ma Nga Ma on the 7th of June, 1915, are substantially to the same effect as those contained in the written statement filed by Maung Sin.

Their Lordships think they had better deal at once with the point raised that Section 42 of the Specific Relief Act applies to this suit and renders it unmaintainable. In their view the section of that Act which applies to and covers this suit is the 39th section and not the 42nd section, and has no such effect as it is claimed would result if it were covered by the latter section.

It was held both by the District Court and the Chief Court of Burma that Ma Thein, having failed to prove she had attained majority during the three years terminating on the 13th of March, 1914, the present suit was, as regards her and her mother, barred under the 91st Article of the Indian Limitation Act of 1908. Their Lordships concur in, and approve of, that decision, notwithstanding the ingenious contention of Mr. Geoffrey Lawrence to the effect that the time which bars began to run, not from the date of the award, but from the date of the refusal of the learned Judge to file it. It was found by the District Judge and stated in the Court of Appeal that the three minors, Ma Thein, Maung Byaung, and Maung Aung had not been properly represented when the agreement to refer to arbitration was entered into, and that they were not bound by the submission or by the award made in pursuance of it. Their Lordships also concur in and approve of that conclusion. In accordance therewith the Chief Court by its decree dated the 18th of April, 1921, declared that as against the minors, Maung Byaung and Maung Aung, the award should be set aside and they should be remitted to their original rights. As regards Mrs. Kirkwood, the Chief Court held that, though she was not and could not be bound by the award, yet as her present suit for a declaration to that effect was time barred, it was immaterial to her whether or not she got a declaration to effect what she desired. The point that the matter in controversy as to whether the minors were properly represented in the entering into the reference to arbitration, and were therefore bound by the award, was in issue in the Suit No. 54, 1912, which is still pending, and that, therefore, the controversy in the present suit was *res judicata*, was not mentioned in the memorandum of appeal and apparently was abandoned. There remains, however, the important question whether the award of the 10th of June, 1910, having been set aside as regards the two minors, Maung Byaung and Maung Aung, it should, in addition be set aside in its entirety. That is a question which must be decided

according to Burmese Buddhist law. Well, one has only to refer to the judgment of the Board in *Kirkwood* v. *Maung Sin* (*supra*, 334–338), to see how unascertainable that law is. It is stated to be contained in a series of books entitled Dhamathats, which have been composed from time to time by the expounders of that law ever since the thirteenth century, if not before. A distinguished Burmese jurist of the name of U Gaung has, at the expense of the British Government, compiled a digest of these books, and says it is a collection of rules which are in accordance with the custom and usage of the Burmese people. It may possibly be that in Burma these rules have in the course of ages crystallised, as it were, into rules of positive law. It was by an analogous process that the Common Law of England was built up and formed. The District Judge held the view, apparently strongly, that the award should in this instance be set aside in its entirety. At page 170 of the record he says: "Looked on as a matter of contract, the terms of the contract become so uncertain in their application that the contract becomes well nigh impossible of enforcement. As regards the authorities on the point the case of *Ma Gyi* v. *Maung Po Hmyin*, *Burma Law Times*, Vol. III, p. 45, has been cited to me on behalf of the plaintiffs. In that case there had been a reference to arbitrators as to the partition of the estate of a Burman Buddhist and an award thereon. Certain of the children of Po Ko were not parties to the award, and for this reason, and for this reason only, it was found that the award was not binding on the parties, and it was ordered that the estate be administered by the Court." After dealing with several authorities which had been cited to him, he, at page 172 of the record, returns to this Burma case, and says, "*The Burma Law Times* case, cited on behalf of the plaintiffs, is distinct authority for the view that in such an event the award becomes invalid in its entirety and the estate becomes open to the administration by the Court. The reasons for this finding are not given, but it seems to me that the test in such cases must be whether the different parts of the award are so severable that it is possible to carry out the intentions of the remaining parties thereto whilst allowing one party to claim entirely independently of the award."

It would appear to their Lordships that in modelling this test the learned Judge has relied upon the principles of the English law bearing on such matters rather than on the Burma-Buddhist law, which has not been proved to resemble to any extent the English on this subject. He then proceeds to say: "The difficulties in the way of such a course in the present case seem wellnigh insuperable. If Maung Aung be allowed to claim independently of the award, then the whole basis of the award is upset." And he winds up with the uncompromising statement: "I find on the second issue that if the reference and award are found to be void as regards some, or any of the plaintiffs, then it must be found void as regards all the parties and be set aside

in its entirety." The learned Judges of the Chief Court, however, take a wholly different view on this point. The Chief Judge, S. M. Robinson, in giving judgment, refers to many authorities and particularly to the case of *Davularu Vijaya Ramayya* v. *Davuluru Venkatasabba Rao*, 30 Madras, L.J.R. 465. He says, at page 207 of the record, that several of the authorities to which he had been referred were cited in it, and that he does not think it is an authority for more than this, that there may be cases in which the necessary result will be that the proceedings may have to be set aside entirely, and that at page 485 of the report of this case it is said that :—

> " ' Avoidance by the minor of a decree against him may in some cases *ipso facto* be tantamount to an adjudication of the suit, in others it might be possible and proper for the Court merely to avoid such part of the decree as would affect the minor and that part may be separable from the rest.' This case was concerned in the setting aside of a decree. In the case before us, however, we are concerned with setting aside an award which has not apparently been executed or carried into effect by any active action."

The learned Judge then proceeds to deal at length with this point in the following passage of his judgment :—

> " As regards plaintiffs Nos. 1 and 3 therefore who were minors and not properly represented before the arbitrator there must be a decree declaring that the award is not binding on them. As to whether the decree should go further and declare that the award is not binding on any of the parties to it I am of opinion that in this case there is no ground for passing such a decree. The major parties to the reference in the award acted with their eyes open and with full knowledge of what they were doing. Whatever may have been the immediate object they had in view and whether they were acting under the idea that they were protecting the interests of the minors against their mother after her second marriage or were seeking to protect themselves as well as the minors, there is no ground for holding that they should be relieved of the result of their considered action and their binding agreement to refer. It is no argument to say that the result of remitting the minors to their original rights will have the effect of creating great complications."

Mr. Justice Heald practically concurs in the conclusion reached by his colleague. In the course of the argument of the appeal several additional grounds were mentioned upon which it was contended that the award of the 10th of June, 1910, was void, such as that the arbitrator did not deal with several matters which had been referred to him, and did deal with several matters which had not been referred to him. These objections, however, were not dealt with judicially by the Chief Court. Owing to the course the proceedings took it could not well be otherwise. Their Lordships are clearly of opinion that the several conclusions hereinbefore indicated at which both the District Court and the Chief Court have arrived, and with which their Lordships entirely concur, afford ample and trustworthy materials for the satisfactory and just decision of this appeal. Under these circumstances it appears to them that the more

desirable, and indeed the more satisfactory course for them to pursue is to abstain from expressing any opinion whatever upon the question on which the two tribunals are in conflict, namely, whether this award should be set aside *in toto* or only set aside as it has been against the two minors named in the decree of the Chief Court dated the 18th of April, 1921, and to decide the case upon the findings in which both the Courts concur and of which, as has been already pointed out, their Lordships entirely approve. The opinion which their Lordships have formed on these reliable materials is that this appeal fails, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

KIRKWOOD *alias* MA THEIN AND ANOTHER

v.

MAUNG SIN AND ANOTHER.

DELIVERED BY LORD ATKINSON.

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