

Maung Maung Gyi and another - - - - - *Appellants*

*v.*

Ma Nyi Ma Gyi and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 20TH JANUARY, 1933.

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*Present at the Hearing :*

LORD TOMLIN.

LORD THANKERTON.

SIR GEORGE LOWNDES.

[*Delivered by* LORD TOMLIN.]

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This is an appeal from a judgment and decree of the High Court of Judicature at Rangoon, which affirmed the judgment and decree of the District Court of Myaungmya. The action is one by a sister and her husband against her brother and his wife in relation to property which the sister alleges formed part of their mother's estate, and is therefore divisible between her brother and herself, they being the only two children of their mother.

The matter arises in this way. In the lifetime of the mother a site for a mill was obtained by exchanging certain property of the mother for the site required for the mill. On that site there were built a mill and other buildings, which have been since their construction in the possession of the brother. The property itself has always been recorded in the brother's name. The sister, who was married during the mother's lifetime, lived with her husband with the mother. The mother died in September, 1925. Thereafter the sister and her husband were in possession of all the property of the mother, with the exception of the

property claimed in this action, which was in the brother's possession and consisted of the mill, another small holding of land, some motor and other boats, and the sale proceeds of some paddy. It also appears that the son was in possession of another 100 acres, which he alleged had been given to him by the mother. The son also claimed that there were certain moneys of his deposited with the mother at the time of her death. Disputes arose after the death of the mother between the brother and sister in relation to the mother's estate, the brother asserting that the site of the mill and other property claimed in the action were his property and not part of the mother's estate at all, and asserting also that the 100 acres to which reference has been made was not part of the mother's estate.

On the 31st December, 1926, a partition deed was executed between the brother and sister, and the point which their Lordships now have to determine depends on the construction of that deed. But before that deed is read it will be well to state what the course of events was. When the deed had been executed the sister paid Rs. 50,000 to the brother in respect of the money deposited by him with the mother. The partition deed itself did not purport to deal specifically with the mill or other property claimed in the action. It is said that it does deal with the 100 acres, but there seems some difficulty in identifying those 100 acres.

Some two years after the partition deed was executed, namely, on the 17th August, 1928, the sister and her husband launched the action out of which this appeal arises, claiming one-half of the mill and other property not included in the partition deed. The Judge of first instance held that upon the facts the mill and such other property formed part of the estate of the mother, and that on the construction of the partition deed there had been no settlement of the dispute in reference to the mill and such other property, so that it was still open to the sister to claim her moiety of them.

The High Court on appeal affirmed the District Judge in regard to the facts, holding that prior to the partition the mill and such other property were part of the estate of the mother. In that respect there are therefore concurrent findings. The High Court also affirmed the District Judge upon the construction of the partition deed, holding that the deed did not in any way affect the position as regards the mill and other property which were outside the matter altogether, and that the rights of the parties in that respect were unaltered by it.

Against that decision the son appealed to His Majesty in Council. Recognising that, having regard to the concurrent findings it is not practicable for him to question that the mill and other property were *prima facie* the property of the mother, he is here only able to contend that upon the true construction of the partition deed the mill and other property were in effect, as part of the terms of compromise, to be treated as not part of

the mother's estate and as belonging to himself. That is the substance of his plea.

Now, bearing that in mind, it is necessary to turn to the document itself, which is found at page 84 of the record. It begins by stating that the brother and sister "make partition of properties with consent and take as follows." It then recites the deaths of the father and mother and that only the brother and sister are left surviving them, and that they, brother and sister, do thereby divide and take the properties mentioned therein below with satisfaction and mutual consent. Thereafter it proceeds in the following terms:—

"The said brother and sister agree and promise that after they have thus partitioned and taken (the properties) neither of them shall at any time say that he or she has still a right to claim, that he or she still wants to claim, and that there is something yet left to be got or recovered in respect of the properties which have been partitioned and taken. Accordingly in confirmation of the partition and acceptance this deed is signed and registered."

The pieces of land which are to belong in severalty to the brother and sister respectively are then set out, and certain debts are allotted to one or other of the brother and sister, and then certain further lands are stated to belong to both of them jointly. The concluding words of the document provide that certain timber in the mill compound, and certain props in the village, shall jointly belong to the brother and sister. That is the only reference in the document to the mill.

Now it has been said by Counsel on behalf of the brother that on the true construction of the passage which has been read the parties have agreed that the mother's estate shall be treated as consisting only of those properties which are mentioned in the partition deed, and that everything else is to be left out and to remain with those who have possession of it. That is the substance of the argument.

Their Lordships think it is enough to say that it is impossible upon the language employed to reach any such conclusion. In the first place, the parties agreed to divide and take the properties mentioned below in the deed, and only the properties so mentioned. No mention is made of the mill and other disputed property, as to whether they are or are not to be treated as part of the mother's estate, and the obligation which they impose on themselves not to make any further claim is strictly limited to "something yet left to be got or recovered in respect of the properties which have been partitioned and taken." In the face of that language it is impossible to say that they have precluded themselves from making any claim in respect of properties which have not been partitioned and taken. It may be that, if certain of those words had been left out, an argument of more strength could have been advanced; but it is unnecessary to consider anything except the actual words, and on those there can only be one conclusion—that the Courts below were right.

In the circumstances, therefore, their Lordships will humbly advise His Majesty that the appeal should be dismissed. It will be dismissed with costs.

In the Privy Council.

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DELIVERED BY LORD TOMLIN.

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