Privy Council Appeal No. 7 of 1931.

Maung Sein Done - - - - - - - - *Appellant*

v.

Ma Pan Nyun 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 12TH APRIL, 1932.

Present at the Hearing:

LORD RUSSELL OF KILLOWEN.
SIR GEORGE LOWNDES.
SIR DINSHAH MULLA.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

In this appeal their Lordships find it unnecessary to decide upon the merits of the case as in their opinion the plea of *res judicata* must prevail. In order, however, to explain how the plea arises, it is necessary to relate the facts in some detail.

The four parties to this appeal are two sons and two daughters of Chan Sit Shan and Ma Myit, his wife. Chan Sit Shan had three other children born of this wife, two of whom died before their father; the third died in 1903.

Chan Sit Shan was a Chinaman, who was born in China and settled in Pyapon, Burma. There he married Ma Myit, a native of Pyapon, who before her marriage was a Burmese Buddhist. At some time, Chan Sit Shan went back to China and there married a second wife, a Chinawoman, named Ma Kee Ya. He returned to Burma with this second wife and a Chinese boy named Pwin Lit whom they had adopted. Subsequently his wife, Ma Kee Ya. bore him a daughter, who was named Ma Kyin Myaing.

Chan Sit Shan died in 1902 intestate. On his death, there was a division of property between his two families as a result

of which no further claim has arisen from or on behalf of Ma Kee Ya, Pwin Lit, and Ma Kyin Myaing, or any of them.

When Chan Sit Shan died, the eldest of his five surviving children, offspring of Ma Myit, was only about 15 or 16 years old. Their mother took possession of and managed the property which had not, on the division, gone to the other family, and she seems to have remained in possession and management until her death, which took place on the 22nd January, 1918.

She was survived by her two sons, the respondent Maung Sit Paung, and the appellant, Maung Sein Done, and her two daughters, the respondents, Ma Pan Nyun and Ma Sein. On her death her two sons took possession.

Thereupon one of the daughters instituted legal proceedings, the nature and course of which require consideration, inasmuch as these are the earlier proceedings upon which the defence to the present suit of *res judicata* is founded.

The suit was instituted in the District Court of Pyapon, the parties being Ma Sein, plaintiff, and her sister and two brothers defendants. The plaint is dated the 21st December, 1918. By it the plaintiff alleges that Ma Myit, a Burmese Buddhist, died intestate possessed of considerable moveable and immoveable properties, set out in an annexed schedule; that she left as her heirs and representatives under Burmese Buddhist law, her children, the plaintiff and the defendants; that the two sons had taken possession of her property without taking out letters of administration; that the plaintiff, as a daughter, was entitled to an equal fourth share in the estate and effects of the deceased; and that Ma Pan Nyun was also an heir and was joined as a formal defendant. The relief claimed included administration of the estate of Ma Myit, accounts against the sons as executors *de son tort* of the deceased, and the appointment of a receiver of her estate.

The two sons put in a joint written statement. By it they denied that Ma Myit left any property at her death, and alleged that the property in suit represented the natural growth and increase of Chan Sit Shan's property which, after his death, had been managed by Ma Myit. As to both Chan Sit Shan's property and the property (if any) owned by Ma Myit, the two sons by their written statement further alleged (1) that the succession thereto was governed by Chinese customary law and not by Burmese Buddhist law, because Chan Sit Shan was a Chinaman and Ma Myit had become a Chinawoman and had died a Chinese widow; and (2) that by Chinese customary law (females being excluded by that law in the presence of male issue), the plaintiff had no right to inherit from either parent, and that her suit was therefore not maintainable.

The daugher, Ma Pan Nyun, filed no written statement, but she gave evidence, at the hearing, on behalf of the plaintiff, and in support of her claim.

The suit was tried by a Burmese judge, the issues including (amongst others) the following :—

"1. Was Ma Myit a Burman Buddhist at the time of her death ?

"4. Is the plaintiff entitled to inherit the estate of Ma Myit ? If so, to what extent ?

"7. Are the parties legitimate children of Chan Sit Shan and Ma Myit and, if so, what law of succession should be applied ?

"8. What relief is the plaintiff entitled to ? "

The judge delivered judgment on the 18th February, 1921. After a detailed examination of the evidence he answered the first issue in the negative. He decided that she was a Chinese Buddhist at her death. The fourth issue he answered in the negative. His finding in regard to the seventh issue was that as both Chan Sit Shan and Ma Myit were Chinese Buddhists the Chinese customary law must be applied to them. Upon the eighth issue he said : " As I have held that Ma Myit was not a Burman Buddhist, the plaintiff is not entitled to a fourth share in her estate." He dismissed the suit with costs.

Ma Sein appealed to the High Court of Judicature at Rangoon upon the ground that Ma Myit was a Burmese Buddhist and that therefore Ma Sein was one of her heirs. The appeal was dismissed on the 21st January, 1924, upon the grounds (1) that upon the facts of the case Chinese customary law governed the succession to the property (if any) left by Ma Myit and (2) that under that law her sons and not her daughters would inherit.

Thus a suit to administer the estate of Ma Myit, to which Ma Pan Nyun was a necessary and proper party if she had any interest in her mother's estate, was dismissed upon the grounds that Chinese customary law applied to the succession to Ma Myit's property and that under that law no female could inherit in the presence of male issue.

The suit which has given rise to the present appeal was instituted on the 23rd July, 1927, in the District Court of Pyapon. The plaintiff is the daughter Ma Pan Nyun ; the defendants are the two sons and the other daughter who had been the plaintiff in the former suit. The plaint is, with the necessary alterations, substantially the same as the plaint in that suit. The relief sought is establishment of the plaintiff's right to a one-fourth share in Ma Myit's estate, and administration of that estate, the claim to that relief being based upon the allegation that Ma Myit died a Burman Buddhist leaving as her heirs her two sons and her two daughters. The defendant Maung Sein Done (who is the appellant before their Lordships' Board) filed a written statement in August, 1927, dealing briefly with the claim on the merits, but raising also the plea that the plaintiff's claim was " barred by *res judicata* " by reason of the previous litigation and the judgments and decrees therein. The other defendants did not defend.

A preliminary issue was tried viz., " Is the suit barred by the doctrine of *res judicata* ? " The District Judge delivered his judgment on the 24th November, 1927, answering the issue in the

negative, and stating as his reason, without entering into particulars, that " all the conditions requisite for *res judicata* between parties who were co-defendants in a former suit, are not present in this case." He, however, dismissed the suit upon the ground that the High Court's ruling in the previous case was binding upon him, viz., that Ma Myit could have no share according to Chinese customary law in the estate of her deceased husband, and that since the plaintiff before him claimed through Ma Myit, she could have no better claim than Ma Myit. It seems to have been overlooked by the judge that Ma Pan Nyun's action related to her mother's estate and not to her father's estate. By his decree, dated the 24th November, 1927, it was ordered that the suit be dismissed with certain provisions as to costs.

Upon appeal (No. 9 of 1928) to the High Court the order of the District Judge was on the 7th June, 1928, set aside, and the case was returned to the District Court to be disposed of on the merits. The judges on appeal treated the judgment of the District Judge as founded on the view that the plaintiff could have no cause of action because a Bench of the High Court had ruled that her mother, Ma Myit, was a Chinese Buddhist and that ruling was binding upon him. If that was in truth the foundation of the decision it was obviously wrong; for unless the matter were *res judicata*, it would be open to the plaintiff upon sufficient evidence to obtain a different decision. Upon the question of *res judicata* the judges on appeal thought that the case did not fall within section 11 of the Code of Civil Procedure, 1908, because there was in the former suit " no active contest as to rights and no decision thereon as between Ma Pan Nyun and her co-defendants." By their decree dated the 7th June, 1928, it was ordered that the decree of the 24th November, 1927, be set aside, that the case be returned to the District Court for disposal on the merits, and that the costs do follow the event.

The suit was ultimately tried on the merits, with the result that on the 10th December, 1928 a decree was made ordering accounts to be taken of Ma Myit's estate from the date of her death to the date of the decree. Upon appeal (No. 296 of 1928) to the High Court a decree (dated the 1st April, 1930) was made confirming the decree of the 10th December, 1928, and containing certain provisions as to costs.

If, however, the plea of *res judicata* affords a decisive answer to the claim of Ma Pan Nyun, the trial should not have proceeded. Their Lordships accordingly do not propose to examine the evidence which was adduced, but proceed at once to consider whether the plaintiff is bound by what was decided in the earlier litigation.

It is unnecessary to consider whether the present case falls within the actual wording of section 11 of the Code. It is well settled that the statement of the doctrine of *res judicata* contained therein is not exhaustive, and that recourse may properly be had to decisions of the English Courts for the purpose of ascer-

taining the general principles governing the application of the doctrine.

The well-known statement of Wigram V.C. in *Cottingham* v. *Earl of Shrewsbury* (3 Hare at p. 638) may, their Lordships think, properly be cited in reference to the present case, viz. : " If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

Further, in a recent case, Sir George Lowndes, in delivering the judgment of this Board, stated what was required in applying the rule of *res judicata* as between co-defendants in the following language :—" In such a case, therefore, three conditions are requisite : (1) There must be a conflict of interest between the defendants concerned ; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims ; and (3) the question between the defendants must have been finally decided." (See *Munni Bibi* v. *Tirloki Nath*, 58 I.A. 158, at p. 165.)

Their Lordships now turn to a consideration of the first litigation.

The suit brought by Ma Sein was an administration suit, the purpose and object of which was to have the mother's estate divided among her four children as her heirs. To that suit all the alleged heirs were necessary and proper parties, for every one entitled to a share would be entitled to be heard upon the question whether or not an order for administration should be made. Further, no person who was not entitled to a share would be entitled to bring such a suit, or to have any voice upon the question of administration. From the outset, it was clear what was the issue to be decided. The plaintiff's only title to sue depended upon the answer to the question whether all the four children were heirs of the mother or whether only the sons were entitled to succeed to her property, and this, in turn, depended upon the answer to the question whether the succession to the mother's property was governed by Chinese customary law or by Burmese Buddhist law. In a word, the question to be determined was one between the sisters on the one hand and the brothers on the other. The rights of each sister in regard to the mother's estate were identical ; they were either both of them co-heirs with their brothers or neither of them was entitled to any share.

The matter which was adjudged was that the succession to Ma Myit's estate was governed by Chinese customary law, and that her daughters, therefore, were not entitled to any share therein. The language actually used in the Appellate Court was as follows :—" I would hold that the Chinese customary law should be applied to her estate. Under that law her sons, and not her daughters, would inherit, and, therefore, appellant's suit was

rightly dismissed." That is, in terms, a finding that neither Ma Sein nor Ma Pan Nyun was entitled to any share in the estate of Ma Myit.

It was urged that the doctrine of *res judicata* could not apply as between co-defendants to a previous suit, if no relief had been granted to the plaintiff in that suit. Their Lordships are aware of no principle or authority which justifies this contention. In Ma Sein's suit there had necessarily to be an adjudication upon the issues involved before the suit could have been dismissed. It was not any less an adjudication because its consequence was the dismissal of the suit, than it would have been if its tenour had been the other way.

The issues involved in the present suit of Ma Pan Nyun are identical with the issues in the earlier suit; and their Lordships are of opinion that in regard to those issues (1) there was in the earlier suit a conflict of interest between Ma Pan Nyun and her brothers; (2) this conflict would necessarily have had to be decided in order to give Ma Sein the relief which she claimed; and (3) the question between Ma Pan Nyun and her brothers (viz., whether she was entitled to any share in her mother's estate) was finally decided.

It follows, therefore, that the plea of *res judicata* raised in the present litigation ought to have been successful and the suit of Ma Pan Nyun ought, on that ground, to have been dismissed.

For these reasons their Lordships are of opinion that this appeal should be allowed. The decrees of the 7th June, 1928, the 10th December, 1928, and the 1st April, 1930, should be set aside and the decree of the 24th November, 1927, restored. In regard to costs, the respondent Ma Pan Nyun should pay to the appellant (1) his costs of the appeal No. 9 of 1928; (2) his costs of the suit incurred subsequently to the 7th June, 1928; (3) his costs of the appeal No. 296 of 1928; and (4) his costs of the appeal before their Lordships' Board. Any costs already paid by the appellant under any former decree in this litigation, should be repaid to him by the person or persons to whom, under such decree, they were payable.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MAUNG SEIN DONE

v.

MA PAN NYUN AND OTHERS.

DELIVERED BY LORD RUSSELL OF KILLOWEN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1932.