

(1925) 07 PRI CK 0004

Privy Council

Case No: Privy Council Appeal No. 123 of 1924

Ma Chit Su

APPELLANT

Vs

National Bank of India, Ltd. and
another

RESPONDENT

Date of Decision: July 23, 1925

Citation: (1925) AIR(PC) 261

Hon'ble Judges: Duff, Ameer Ali, John Edge, Viscount Finlay, JJ.

Advocate: Sanderson Lee and Co., Light and fultun, E. B. Raikes, G. Lowndes, F. W. Besley,
G. Lawrence, E., for the Appearing Parties.

Judgement

Sir John Edge, J.

This is an appeal from a decree of the 11th July 1922, of the Chief Court of Lower Burma, in its Civil Appellate Jurisdiction, which affirm ed a decree of the 9th June 1920, of the Chief Court in its Original Civil Jurisdic tion. The parties to the appeal are Ma Chit Su, a defendant, who is the appellant, and the National Bank of India, Ltd., who was the plaintiff, and Maung Myat Thin, the 1st defendant, who are the respondents. The suit was brought against Maung Myat Thin and the Bank of Bengal for a decree for specific performance of a con tract to sell immovable property in Ran goon. The appellant, who is the mother of Maung Myat Thin, was on her own application brought on the record on the 1st March 1920, as a defendant. The trial Judge gave the plaintiff a decree for specific performance. From that decree Ma Chit Su appealed. The appellate Court, by its decree dismissed that appeal, and from that decree of dismissal this ap peal has been brought. The questions in this appeal are (1) : Whether there was a completed agreement for the sale of the property" (2) whether the alleged agree ment to sell the property was not subject to a condition that any litigation relating to the property should be settled before the agreement could take effect" and (3) whether the agreement to sell was within the scope of the authority of Maung Myat Thin.

"Facts": Maung Myat Thin was the eldest child of Maung Shwe Oh and his wife Ma Chit Su. Maung Shwe Oh died on the 5th June 1906, leaving his wife Ma Chit Su and his nine children surviving him. At the time of his death the property in question in this suit belonged to Maung Shwe Oh and his brother Maung Shwe Goh jointly. They had carried on business in partnership. On the 17th March 1907, Letters of administration were, on the application of this appellant, Ma Chit Su, granted by the District Court of Amherst under the Probate and Administration Act, 1881 (Act V of 1881) to Maung Myat Thin to administer the estate of his late father Maung Shwe Oh. After the grant of the Letters of Administration the business, which had been carried on by Maung Shwe Oh and Maung Shwe Goh, was carried on by Maung Myat Thin as such administrator and Maung Shwe Goh in partnership. On the 12th June 1913, the partnership, was by a preliminary decree dissolved, a compromise was agreed to, and by a consent decree Maung Myat Thin became entitled as such administrator to all the assets of the partnership, including the property in question, and became liable to all the debts of the partnership with certain exceptions which are not material and need not be further referred to. On the 27th November 1913, Maung Shwe Goh executed releases in favour of Maung Myat Thin of all the immovable property of the partnership, including the property in question.

As such administrator Maung Myat Thin was indebted to the Bank of Bengal for moneys advanced. As security for the loan the title-deeds of the property in question had been deposited with that bank on the 7th May 1901, which thereby acquired an equitable mortgage. Maung Myat Thin was involved in some litigation with members of his family. Early in 1914 an administration suit was instituted in the Chief Court of Lower Burma by Ma Chit Su on her own behalf, and on behalf of her eight younger children, against Maung Myat Thin and others for the administration by the Court of the estate which was in his hands. It will be remembered that Maung Myat Thin was then the administrator who had been appointed by the District Court of Amherst. On the 22nd November 1916, Maung Myat Thin made a deposition in that suit for administration in the High Court, in which he stated: "So far as I am concerned I consent to its" (the estate) "being administered by the Court. I understand that the administration will be taken out of my hands." He was alluding to his rights as an administrator on his appointment by the District Judge of Amherst in 1907. On the 22nd November 1916 the High Court in the administration suit ordered that certain accounts should be taken and certain enquiries made, and that the suit should stand adjourned for making a final decree until the accounts and enquiries had been taken and made. A final decree was at some time made by the Chief Court, but is not before their Lordships. It is true that the Chief Court had not been asked to appoint a receiver or to issue an injunction to Maung Myat Thin not to continue to act as an administrator under his appointment as an administrator by the District Judge of Amherst. The preliminary decree which was made by the Chief Court on 22nd November 1916 seems to have been a common form of such decrees in suits for administration in the Chief Court. It appears to

their Lordships that it is advisable that that form of decree should be revised by the Court, now the High Court, so that there can in future be no question as to a conflict of authority between the High Court in an administration suit and a District Court which had appointed an administrator of the same estate. Such a conflict could not have arisen, as it did in this case, if the High Court had either appointed a receiver or had issued an injunction" either would have determined any right which Maung Myat Thin had under his appointment as an administrator by the District Judge of Amherst.

On the 27th April 1917 Maung Myat Thin applied to the Court of the District Judge of Amherst for permission to sell the property in question, and on 26th June 1917 that Court granted to him permission to sell that property. That application was made under S. 90 of the Probate and Administration Act, 1881, as amended by Act VI of 1889.

On the 9th July 1918 Maung Myat Thin, on the introduction of the Bank of Bengal, called on Mr. Smith, the manager of the plaintiff bank, and they discussed the terms upon which Maung Myat Thin would sell to the National Bank of India, Limited and that bank would purchase from Maung Myat Thin the property in question. After that interview Mr. Smith, on behalf of the bank, on the 9th July 1918, wrote the following letter to Maung Myat Thin :

"National Bank of India, Limited,

Rangoon, 9th July 1918.

Messrs. Shwe Oh Bros. and Co.,

Dear sirs,

With reference to your Maung Myat Thin's call to-day, I hereby confirm the arrangement whereby the bank agrees to purchase the property No. 3, Phayre St. and No. 62, 37th Street, subject to a clear title, for Rupees one lac seventy-seven thousand, say Rs. 1,77,000

Your confirmation in writing of above arrangement is requested.

I am, yours faithfully.

JAMES SMITH, Manager."

In reply to that letter Maung Myat Thin sent the following letter.

"No. 3, Phayre Street,

The Manager, Rangoon, 10th July 1918.

National Bank of India, Limited, Rangoon.

Dear Sir,

With reference to your letter of the 2nd (sic) instant re house No. 3, Phayre Street and house No. 63, 37th Street, I hereby confirm the arrangement for sale of the above properties to your bank for Rs. 1,77,000 subject to settlement being effected of any litigation relating to the same properties.

I am. yours faithfully,

(Signed) MAUNG MYAT THIN.

The next thing which happened was that the lawyers who were acting for the National Bank of India, Limited, sent a requisition on title to Maung Myat Thin. The third, fourth, fifth, sixth and eighth requisitions, which alone seem to be of any importance in this suit, with the replies, were as follows :-

"3. On 4th August 1900 the property was conveyed to Maung Shwe Oh and Mg. Shwe Goh, who were heirs to Maung Shwe Oh. Have any claims been made by any persons other than Mah Hnin Get and Maung Myat Thin to share in the estate of Maung Shwe Oh deceased ?"

Reply. - "A suit for administration of Mg. Shwe Oh's estate is pending in Chief Court. Commissioner is inquiring into accounts, etc., and I believe he will decide who are the heirs to the said estate."

"4. In Mr. Myat Thin's letter dated 10th July 1918, the sale is confirmed "subject to settlement being effected of any litigation relating to the properties." What litigation is referred to in the sentence ?"

Reply. - "There is an application pending in Chief Court for execution of decree against Shwe Oh Bros. and Co., by Ma Thein Zin, a decree holder" also there is the administration suit referred to in answer to question (3)."

"5. Are there any (and if so what, claims being made or threatened in respect of the above property ? (Give full particulars.)"

Reply. - ""Whether any claims will be made or not in respect to this property will depend on the finding of the Commissioner referred to in answer to Q. 3.

"6. Are there any (and if so what) persons likely to object to the sale to the National Bank of India, Limited ?"

Reply. - "Same answer as to No. 5 question."

"8. A certified copy of the order granting leave to sell must be furnished."

Reply. - "I shall write to the Bank of Bengal to send the copy which is, I believe, with them."

On the 7th January 1919 the solicitors of Maung Myat Thin informed Mr. Smith, the manager of the National Bank of India, Limited, that he was unwilling to transfer the property in question to the bank, as his mother was objecting to the sale. Maung

Myat Thin had made full disclosure to the National Bank of India, Limited, of his position and of such right as he had to sell the property in question, and that bank accepted such title to sell as he had and brought this suit for specific performance. Their Lordships find that by the 10th June 1918 Maung Myat Thin and Mr. Smith, as the manager and agent of the bank with full authority to act on behalf of the bank, had come to a complete agreement for the sale of the property in question to the Bank. The condition that the agreement should be subject to a settlement of any litigation relating to the property before the agreement should take effect was a condition for the protection of Maung Myat Thin, and the National Bank of India, Limited, took the risk of any such litigation" there was no substantial litigation which could prevent Maung Myat Thin selling.

Their Lordships have had some difficulty in arriving at a conclusion that Maung Myat Thin had power to sell the property without having obtained the previous permission of the Chief Court to do so. The suit for an administration of the estate had been entertained by the Chief Court, and was pending in that Court" and it is difficult for their Lordships to understand that the Legislature could have intended that when a suit for administration of an estate is before a Court competent to entertain it and to order that accounts should be taken in the suit, any other Court should have power to grant permission for the sale of property part of the estate" but it appears from the judgments in this suit of the Chief Court that according to some rules of practice of the Chief Court, the Chief Court recognized a power of another Court to grant permission, for the sale of property of the estate before the Chief Court.

Mr. Justice Young, who was the trial Judge in this suit, and had been the Judge who had made the decree in the administration suit, referred to *Berry v Gibbons* LR 8 Ch 747 : 42 LJ Ch 89 : 29 LT 88 : 21 WR 754 as an authority that a judgment in England for administration does not prevent executors from exercising a discretionary power vested in them except so far as its exercise conflicts with the order of the Court, The passage in *Berry v. Gibbons* (1) which Mr. Justice Young was considering as applicable to the question before him was evidently a passage in the judgment of Lord Justice James at page 750 of the Report. What Lord Justice James is there reported to have said was :

"The doctrine of *lis pendens* has no bearing on the case, for a mere administration decree, no receiver having been appointed, nor any injunction granted, to prevent the executrix from dealing with the assets, would not take away her legal powers so as to invalidate the title of persons claiming under a disposition made by her in exercise of those powers.

The passage in Lord Justice James's judgment to which their Lordships have referred must be read with a knowledge of what was then the statute law in England, and has no possible bearing on a case in India to which an Act of the Indian Legislature applies.

Their Lordships hesitate to interfere with what appears to be a rule of practice of the Chief Court, and to declare that in this case the Chief Court ought not to have found that the Court of the District Judge of Amherst had power to grant to Maung Myat Thin permission to sell the property in question.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.