APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

May 19.

A.L.M. CHETTYAR FIRM (APPELLANT)

v.

MA SINT AND THREE OTHERS (RESPONDENTS).*

Limitation Act, s. 28—Whether extinguishes rights or bars remedies to regain possession after court sale and delivery—Specific Relief Act, s. 42—Whether co-owners should sue for possession—Execution sale—Whether third parties' rights affected—Burmese Buddhist Law—Nissaya *and* Nissita.

In execution of a money decree obtained by the appellant against the husband of the 1st respondent, property in dispute which belonged to the couple was sold by court on the 30th July 1930 and purchased by appellant and he obtained possession through court. At the time of the sale the Full Bench decision of *Ma Paing* v. *Maung Shwe Hpan and others*, I.L.R. 5 Ran. 478, determined the rights of Burmese Buddhist husband and wife. According to that decision an execution sale against husband conveyed wife's interest as well. This decision was later overruled by the Special Bench decision of *N.A.V.R. Chettyar Firm* v. *Maung Than Daing*, I.L.R. 9 Ran. 524, and the effect of that decision was to restore the old law under which execution sale in a decree against the husband did not convey wife's interest. The appellant remained in possession of the disputed properties till evacuation. After evacuation the respondents got into possession. After the British re-occupation, when the appellant tried to regain possession, the respondents filed a suit for declaration of title over the whole property and obtained a decree for 11/12th share. This decision was set aside by the District Court but in second appeal trial Court's decision was restored. In further appeal under s. 31 of Union Judiciary Act it was contended—

(*a*) that no suit for declaration having been filed within six years of the court sale, a suit under s. 42, Specific Relief Act, was barred.

(*b*) as the plaintiff could have claimed further relief, the suit for bare declaration was not maintainable,

(*c*) that the entire property had passed by reason of the ruling in *Ma Paing's* case,

(*d*) that in any case, the share granted by the trial Court was not correct and that the claim could be only for one-half as the property brought to the marriage by the wife had changed character and been sold and the price had been employed in money lending.

Held: That though plaintiff-respondent's right to sue for a declaratory decree before the war had been time-barred yet title in the property was not extinguished and when the plaintiff-respondent regained possession within

* Special Civil Appeal No. 2 of 1948 under s. 31 of the Union Judiciary Act against the decree of the Hon'ble Mr. Justice Blagden in Civil 2nd Appeal No. 112 of 1947 of the High Court of Judicature at Rangoon.

12 years there was a fresh cause of action for a declaratory decree when the defendant disputed her title.

Rajah of Venkatagiri v. *Isakapalli Subbiah and others*, (1903) I.L.R. 26 Mad. 410, referred to.

The relief by way of partition is not a consequential relief. A suit for declaration of title alone lies without a claim for partition.

Joy Narayan Sen Ukil v. *Srikantha Roy*, 26 C.W.N. 206, followed.

Held further: That as the wife was not a party to the auction sale her rights cannot be affected and the ruling in *Abdul Aziz Khan Sahib* v. *Appayasami Naicker and others*, (1904) L.R. 31 I.A. 1, has not the effect of affecting the rights of third parties.

Held further: That though the wife's *payin* had changed character, it will not make any difference in the application of the principle of *Nissaya* and *Nissita*.

May Oung's Buddhist Law, p. 60, referred to.

The children of the marriage had no interest during the parents' lifetime and the decree-holder's share was accordingly held to be one-third and not one-twelfth.

K. R. Venkatram for the appellant.

Kyaw Din for the respondents.

The judgment of the Bench was delivered by

U THEIN MAUNG, C.J.—This is really a Letters Patent Appeal from the judgment and decree of Blagden J. in Civil 2nd Appeal No. 112 of 1947 in the High Court of Judicature at Rangoon, but it has been treated under section 31 of the Union Judiciary Act, 1948, as an appeal under section 20 thereof as it was pending immediately before the coming into operation of the Constitution.

In the said Civil 2nd Appeal, Blagden J. set aside the decree of the District Court of Magwe in Civil Appeal No. 16 of 1947 and restored the decree of the First Assistant Judge, Magwe, in Civil Regular Suit No. 3 of 1947.

In the said suit, the plaintiffs-respondents asked for a decree under section 42 of the Specific Relief Act declaring that they are owners in possession of oil wells

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Nos. 337 and 2922; and the learned Assistant Judge granted them a decree declaring that they are owners of 11/12th of the said oil wells.

The learned Assistant Judge found (1) that the principle of *Nissaya* and *Nissita* applied as the 1st respondent Daw Sint brought considerable property to her marriage with the late U Se whereas the latter did not bring any property to it at all, (2) that oil well No. 1643 which was among the properties brought by her to her marriage with U Se was sold for over Rs. 40,000 and that the said oil wells and other properties were purchased with the sale proceeds thereof, (3) that by purchase at the Court sale as per sale certificate dated the 31st July 1930, Exhibit I, the appellant acquired only U Se's share in the oil wells, (4) that the said share was only 1/12th inasmuch as Daw Sint's share therein under the principle of *Nissaya* and *Nissita* was two-thirds and Ma Thein Tin's *orasa* share therein was one-fourth and (5) that the suit is not barred by limitation as the defendant-appellant had not been in possession of the oil wells for six years before the 8th December 1941 when limitation ceased to run till the 1st April 1947 under section 7 of the Courts (Emergency) Provisions Act, 1943.

On appeal from the decree of the Assistant Judge the District Court held that the suit was time-barred inasmuch as the defendant-appellant presumably got possession of the oil wells shortly after the Court sale, *i.e.* more than six years before the 8th December 1941. However, the learned District Judge also observed in the course of his judgment, "It is clear from the evidence of the plaintiff Daw Sint and her witnesses that the plaintiff Daw Sint did bring an oil well to her marriage but the same was later sold and other properties such as oil wells and a house were bought out of the money realized from the sale of this well." He also pointed

out in the course of his judgment " that oil well No. 337 Twingon was acquired through a money-lending transaction and not bought outright with the money solely belonging to Daw Sint as alleged by them."

In the Civil 2nd Appeal Mr. Justice Blagden confirmed the findings of fact by the Court of first instance and held that the suit was not barred by limitation.

With reference to the question of limitation he observed,

" It is true that the right to bring the suit for a declaration, or, more properly, a suit for possession, may have arisen in 1930, when the respondents, as auction purchasers, were put in possession. When, however, the plaintiff-appellant succeeded in getting back possession, there was no point in their bringing a suit for possession, because they had already got it. Nor was there any point in their bringing a suit for a declaration, when, at the moment, no one was challenging their title. They never have had, subsequently, occasion to bring a suit for possession, because it is common ground that they are at the moment in possession. Their right to sue for a declaration only arose when the respondent firm challenged their title by making an application for mutation of names to the Warden of the Oil-fields : that was well within six years, indeed it was only a few months. before suit was brought."

We are in entire agreement with him on the question of limitation. The plaintiffs-respondents may have lost their right to sue for a declaratory decree after the expiry of six years from the date on which the defendant-appellant obtained possession of the oil wells, but it is quite clear from the evidence, and in fact it is admitted by the learned advocate for him, that he had not been in possession for over twelve years before the 8th December 1941. Even though the plaintiffs-respondents' right to sue for a declaratory decree before the war had been time-barred, that bar would affect only the remedy or relief by way of declaration. It

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cannot extinguish their right, title, and interest in the oil wells. [See *Rajah of Venkatagiri* v. *Isakapalli Subbiah and others* (1).] The operation of section 28 of the Limitation Act is limited to cases in which the bar of limitation applies to suits for the possession of property ; and a suit for a declaratory decree under section 42 of the Specific Relief Act is not such a suit. The plaintiffs-respondents' title to the property subsisted in spite of the time-bar against relief by way of declaration, and when they regained possession of the oil wells they again became owners in possession with all the rights and privileges of such owners including the right to sue for a declaratory decree if anyone denies that they are owners in possession. So they have a fresh cause of action for a declaratory decree when the plaintiffs-respondents challenged their title by making an application for mutation of names to the Warden of the Oil-fields after they have regained possession of the oil wells and their full ownership thereof had revived with all the rights and privileges incidental thereto.

The learned advocate for the defendant-appellant has also contended that even if the suit be not barred by limitation it is not maintainable as the plaintiffs-respondents did not ask for further relief, that is, for partition, although they were able to seek further relief than a mere declaration of title. He relies on the proviso to section 42 of the Specific Relief Act, which reads :

"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

However, the proviso is applicable only to such relief as is appropriate to and consequent on the right

(1) (1903) I.L.R. 26 Mad. 410.

asserted. As has been pointed out by Mookerjee J. in *Joy Narayan Sen Ukil* v. *Srikantha Roy* (1) :

"The further relief must consequently be relief in relation to the legal character or right as to property which the Plaintiff is entitled to and whose title to such character or right the Defendant denies or is interested in denying; it must also be relief appropriate to and necessarily consequent on the right of title asserted."

In the present case the plaintiffs-respondents' claim, to begin with, was that they are the full owners in possession of the said oil wells. So they could not very well ask for partition in the same suit. The relief by partition is not appropriate to and consequent on the right asserted by them and denied by the defendant-appellant. The expression "further relief" in the proviso means additional relief which the plaintiff would be in a position to claim by virtue of the title he seeks to establish or be declared. It does not mean a relief in the alternative.

Besides, it has been held in the same case, *Joy Narayan Sen Ukil* v. *Srikantha Roy* :

"Where the plaintiff is in joint possession of immovable property, whether such possession be actual possession of his share of the whole or actual possession of a part coupled with a constructive possession of the remainder, he is entitled to maintain a suit for declaratory relief with a view to remove a cloud on his title created by the act of the defendant disputing his share; in a suit so framed, a declaration of title is all that the plaintiff needs and he is consequently not called upon to ask for consequential relief by way of partition."

The learned advocate for the defendant-appellant has further contended that inasmuch as the ruling in *Ma Paing* v. *Maung Shwe Hpan and others* (2) had not been overruled at the time of the Court sale of the oil wells in execution of the decree against U Se, the right,

(1) 26 C.W.N. 206. (2) (1927) I.L.R. 5 Ran. 478.

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title, and interest of his wife Daw Sint therein also passed to his client who was the purchaser thereat. The said ruling has been overruled in *N.A.V.R. Chettyar Firm* v. *Maung Than Daing* (1), but according to the learned advocate for the defendant-appellant it does not make any difference in view of the ruling in *Abdul Aziz Khan Sahib* v. *Appayasami Naicker and others* (2). However, as Blagden J. has pointed out in the course of his judgment :

> " It is not competent for this Court to legislate and alter the law, and when a Full Bench overrules a previous decision of the Court, it is laying down what the law of Burma was from the beginning of time, whatever views about it may have been previously held. * * * *
>
> Their Lordships did not say that, because an erroneous view of the law prevailed at a given date, and was held by all the parties concerned in execution proceedings, the property of a third party, not impleaded in those proceedings, can be taken to pay the judgment-debtor's debts, but only, following *Lloyd* v. *Guibert* (3), that the quantum of the vendor's interest in a given piece of property must, for the purpose of construing that contract, be measured by the contemporary view of what the law was."

The plaintiffs-respondents were not parties to the execution proceedings in the course of which the oil wells were sold and their right, title, and interest thereof cannot be affected by what was done behind their back. Besides, their Lordships' decision in *Abdul Aziz Khan Sahib*'s case did not affect the right of any one who was not a party to the proceedings in execution. As a matter of fact it had the effect of protecting the rights of a third party, namely, the brother of Bangaru, the judgment-debtor, who constituted an undivided Hindu family with Bangaru, inasmuch as it declared that what passed under the

(1) (1931) I.L.R. 9 Ran. 524. (2) (1904) L.R. 31, I.A. 1.
(3) (1865) 6 B & S 100.

Court sale was only the life interest of Bangaru in the zemindari, and not the entire estate therein.

Up to this stage we have written our judgment as if we agree that the plaintiffs-respondents are entitled to 11/12th of the oil wells for the sake of simplicity, but we do not agree that all the plaintiffs-respondents have shares therein and that their shares do aggregate to 11/12th thereof.

The 2nd, 3rd and 4th plaintiffs-respondents are the children of U Se and the 1st plaintiff-respondent Daw Sint. During the lifetime of U Se and Daw Sint none of them is entitled to any share in the properties belonging to U Se and Daw Sint. It has been claimed that the 2nd plaintiff-respondent Ma Thein Tin is their *orasa* daughter and that as such she is entitled to a quarter share of the oil wells. However, she cannot be an *orasa* daughter nor can she claim any share as such inasmuch as her mother Daw Sint is still alive and has not contracted any marriage since the death of her father U Se.

Daw Sint alone is entitled to a share in the said oil wells and both the Assistant Judge and Blagden J. have held that she is entitled to a two-thirds share therein according to the doctrine of *Nissaya* and *Nissita*. The learned advocate for the defendant-appellant has contended that the doctrine cannot apply inasmuch as Daw Sint's *payin* has changed its character. It is true that the oil well which was brought by her as *payin* has been sold, but the Court of first instance has held that the oil wells in suit and other properties were purchased with the sale proceeds thereof. The District Court has also held that oil wells and a house had been bought with the money realized from the sale of her oil well. With reference to oil well No. 337, there is some dispute as to whether it was bought with the sale proceeds of Daw Sint's oil well or was transferred to

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Daw Sint and U Se by a person who was unable to repay debts due to them. However, as Mr. Justice Blagden has rightly pointed out in the course of his judgment, it will not make any difference even if the oil well was acquired in the course of the money-lending business inasmuch as the capital for the business was contributed by Daw Sint out of the sale proceeds of her oil well. "A wife is said to be the *nissaya* and her husband *nissita* when the wife at the time of the marriage possesses large property which may increase by being used as principal in trade." (*See* May Oung's Buddhist Law at page 60.)

So the appeal succeeds so far as the alleged *orasa* share of the 2nd plaintiff-respondent Ma Thein Tin is concerned and the decree in favour of the plaintiffs-respondents must be modified accordingly.

Let there be a decree declaring that the 1st plaintiff-respondent is the owner of a two-thirds share of the two oil wells and dismissing the suit so far as the other plaintiffs-respondents are concerned.

Previous orders as to costs will stand. However, all parties must bear their own costs so far as this appeal is concerned.