APPELLATE CIVIL.

Before Mr. Justice Brown.

1927

June 10.

MAUNG AUNG TUN

v.

MAUNG SAN NYUN AND OTHERS.*

Limitation Act (IX of 1908), Sched. I, Art. 144—Time runs only on possession becoming adverse—Father's possession not necessarily adverse to his children—Gift distinguished from partition—Mesne profits when recoverable.

A father on his remarriage made over by registered deed the land in suit to his four children by his deceased wife towards their mother's share of inheritance in full satisfaction. He continued to be in possession but the property was managed for the joint benefit of the co-owners.

Held, that such possession was not adverse to the claim of the heir of one of his children for partition, made after twelve years from the date of the deed. Mesne profits are claimable only when the possession of the defendant is wrongful.

Held, also, that a disposition of property by way of gift by a Buddhist intended to take effect after his death, is void, but a partition of property by a father with his children on his remarriage is not such a gift.

Ma Thin Myaing v. *Maung Gyi*, 1 Ran. 351—*distinguished.*

Kalayanwalla—for Appellant.

Surty—for 1st Respondent.

Tun Aung—for 5th Respondent.

BROWN, J.—The 5th defendant respondent, U Po, a Burman Buddhist, by his wife Ma Pu Lay had four children, Ma E Mai, Ma E Tin, Maung San Nyun and Ma E Mi. Ma E Mai, the eldest child is still alive and has given evidence in the case. Ma E Tin, the second child, was the wife of the plaintiff-appellant Maung Aung Tun. She died childless in the year 1921. Maung San Nyun is the 1st defendant-respondent. Ma E Mi, the youngest child is dead, and her heirs are her husband, the 2nd respondent,

* Civil Second Appeal No. 544 of 1926.

Maung Ohn Pe, and her children the 3rd and 4th respondents. After the death of Ma Pu Lay, U Po married again and, about the time of the remarriage he executed a registered deed whereby he made over the land in suit outright to his four children by Ma Pu Lay towards their mother Ma Pu Lay's share of inheritance in full satisfaction. Originally only Maung San Nyun and Maung Ohn Pe were joined as defendants the plaintiff's case being that since the death of his wife these two defendants have refused to allow him any share of the profits of the land and he sued for partition and mesne profits. Subsequently he added U Po as 3rd defendant on the ground that he had been told that U Po was in possession of the land.

The execution of the registered deed is not denied. The defence is that the claim is barred by limitation and that U Po never intended to make an outright gift of the land but merely intended to provide for the disposal of the land on his death.

The trial Court held on the merits that plaintiff had failed to substantiate his case and dismissed his suit.

The lower Appellate Court did not consider the merits of the case but dismissed the suit solely on the ground that it was barred by limitation.

The plaintiff has now come to this Court in second appeal.

I am unable to agree with the finding of the District Court on the point of limitation. The learned Judge remarks that the article of the Limitation Act applicable is admittedly Article 144 and then goes on to say that as it is twelve years since the deed was executed the suit is barred. He appears, however, to have overlooked the fact that limitation under Article 144 does not begin to run until possession becomes

1927

MAUNG AUNG TUN v. MAUNG SAN NYUN

BROWN, J.

adverse to the plaintiff. Even if it were admitted that U Po had been in uninterrupted possession of the land since the date of execution of the deed that would not necessarily conclude the case. There would be no necessary presumption from this possession that his possession was adverse to the claim of his children, and in a suit under Article 144, the burden of proving that possession is adverse rests on the defendant.

It has been suggested before me that the article applicable is Article 127. It seems to me at least doubtful whether the property in the present suit can be called a joint family property within the meaning of that article. But, even if the article were applicable, limitation under it does not begin to run until the exclusion from the property becomes known to the plaintiff. There is no evidence that plaintiff was in any way excluded from his rights to the property, at any rate, prior to the death of his wife in 1921. As regards possession since the execution of the deed, the evidence is conflicting.

[His Lordship after discussing the evidence held that the land was managed for the benefit of the co-owners and that U Po was not in uninterrupted possession of the land from the date of the deed until the filing of the suit. Ma E Mai the first daughter had conveyed all her share in the land to her brother and sisters]. His Lordship proceeded :—

The present appeal is filed under the provisions of section 100 of the Code of Civil Procedure, and this Court cannot, therefore, interfere on a pure question of fact. But it does not appear from the judgment that the Additional District Judge really considered the evidence on this point at all. All that he remarks is "From the evidence it would appear that U Po has been in uninterrupted possession of the land from the

date of execution of the deed, and his children had derived no benefit from the land." It is impossible to hold, on a bare statement of this sort made simply in connection with a point of limitation, that the evidence on this point of possession was really considered by the learned Judge. I am of opinion that the suit was not barred by limitation.

It is, however, urged on behalf of the respondent that even so the suit must fail. The deed on which the plaintiff relies is merely a deed of gift, and it is contended that the gift was never accepted by the donees. I think, however, that there is sufficient on the record to justify the view that it was accepted. Five years after its execution Ma E Mai executed a registered deed whereby she purported to convey all her rights in this land to her brother and sisters, thereby clearly recognising that she had a right to the property, and I see no reason to discard all the evidence as to Ma E Tin's having at least had some share in the profits of the land. I do not think the case can fail on this ground. There may, however, be a somewhat more difficult question as to whether the gift was valid at all. U Po urges that it was never his intention to make an outright gift and that his intention was merely that the property should go to his children on his death. If this intention of his is absolutely clear from the subsequent conduct of the parties then, on the authority of *Ma Thin Myaing* v. *Maung Gyi* (1), it might be necessary to hold that evidence of intention contradictory to the terms of the document was admissible that the disposition of the property was really in the nature of a will and that, therefore, it was invalid. But I think the circumstances of the present case can clearly be distinguished from those of *Ma Thin Myaing*'s case. In that case the transaction

(1923) 1 Ran. 351.

1927

MAUNG AUNG TUN v. MAUNG SAN NYUN.

BROWN, J.

was a gift pure and simple. In this case it partakes of the nature of a partition by a father with his children on his remarriage. U Po himself says that he had no other property at the time; but, on this point, the evidence seems to be against him. His witness Kya Zan says that there is another land measuring about 25 acres which belongs to U Po and Ma Pu Lay. Po Mya, a witness for the plaintiff, says that at the time of the execution of the deed the land lying north of Dabein was in U Po's hand, which land was apparently distinct from the land in suit. There is nothing, therefore, on the record to justify the contention that U Po had parted with all his property, and the transaction was really in the nature of a partition on remarriage. Further the evidence that U Po merely intended that this document should operate as a will is unconvincing. U Po Shan the brother of Ma Pu Lay says that U Po at first did not want to make over the land but yielded to persuasion on the understanding that the children were to take the land only after his death. Kya Zan merely says that U Po was not willing but yielded as pressure was put upon him and on his being told that he would not have to part with the land forthwith. Kya Zan definitely says there was no understanding when he was to part with the land. Maung Ba Thein, one of the attesting witnesses, merely says that the deed was executed in order that the children might get the land. Even Ma E Mai, U Po's daughter, says in her evidence "Nothing was said about when the deed was to take effect." It seems to me to be impossible, therefore, to hold that U Po's intention was that the gift should have no effect until his death. The children may have agreed to his working the land for a time but there is nothing to show that they agreed that he should treat the land as his own. The wording of the document is, on the

face of it very clear, and even if oral evidence is admissible to show that it was not in fact an outright gift that evidence would have to be clearly convincing. It does not seem to me that convincing evidence on the point has been produced. The result of the gift if valid is that the property vested in Ma E Tin before her death and now goes to the plaintiff as her heir. Were the gift not valid the property of U Po would go to his surviving children on his death to the exclusion of the plaintiff. Ever since the gift the land has stood in the names of the children and land revenue has been paid in their names. The eldest daughter Ma E Mai has definitely recognised the gift by a deed of conveyance of her share in the property. In all the circumstances I am unable to hold that the deed was not what it appears on the face of it, a deed of outright transfer. That being so the plaintiff is, in my opinion, entitled to the one-third of the property that he claims. He is of course not entitled to mesne profits for more than three years before filing the suit. Nor am I satisfied that he has made out his claim for mesne profits prior to the institution of the suit at all. Mesne profits are claimable when the possession of the defendant is wrongful. The original plaint speaks of a notice as to partition having issued to the then defendants (amongst whom U Po was not included) in February 1925. But prior to that date it is not shewn that the plaintiff did not acquiesce in the lands being managed by U Po. There is evidence to which I have already alluded as to documents having been handed over to U Po after Ma E Tin's death, and it would appear to have been recognised that so long as the property remained undivided the plaintiff was not the proper person to look after the property. Ma E Tin as the eldest child was in a different position. It must I

1927

MAUNG AUNG TUN v. MAUNG SAN NYUN.

BROWN, J.

think be held that the plaintiff did not insist on partition at the time, and allowed the property to be managed as a whole for the joint benefit of the co-owners. There was no wrongful possession and no question of mesne profits prior to February 1925 arises. The suit was instituted in June 1925 and it does not appear that any claim was made from U Po before then. The plaintiff has made no claim in this suit for mesne profits subsequent to the institution of the suit.

I set aside the decrees of the lower Courts, and pass a decree directing that the land be partitioned and the plaintiff-appellant be given possession of a one-third portion thereof. The claim as to mesne profits prior to the institution of the suit is dismissed.

The defendants Maung San Nyun and U Po will pay the appellant his costs throughout on his claim for partition and possession only.

APPELLATE CIVIL.

Before Mr. Justice Brown.

1927

June 14.

MAUNG SHWE AN AND ONE *v.* MAUNG TOK PYU AND ONE.*

Limitation Act (IX of 1908), Sched. I, Arts. 123, 144—Co-heir's suit for a share in the corpus of an inheritance governed by Article 123—Suit for distribution of estate, where one person holds property for benefit of all the heirs by consent, governed by Article 142 or 144.

Held, that the appropriate article for suits, instituted by co-heirs for a share in the corpus of an inheritance is Article 123, of the Limitation Act. But where a person holds the property with the consent, express or implied, of all the heirs on behalf of them all, then a suit for distribution of such an estate is governed by Article 142 or 144 of the Limitation Act.

The descendants of a person by his former wife had a right to claim partition of his estate as his heirs against his second wife and her children on that person's

* Civil Second Appeal No. 373 of 1926.