PRIVY COUNCIL.

P.C.*
1916

Nov. 13.

MAUNG TUN THA

v.

MA THIT.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Burmese Law—Inheritance—Right of eldest son in a family to a share of the estate on the death of the father—Right of election to take share or not—Limitation Act (IX of 1908) Sch. I, Art. 123—Manu Kyay, Book X, Rules 5 and 14.

By the Burmese Buddhist law of succession laid down in the Manu Kyay, Rule 5 of Book X, the eldest son in a family takes on the death of the father a definite one-fourth share of the estate, a right which he is at liberty to assert within any period not outside that fixed by Art. 123, Sch. I of the Limitation Act of 1908, as the period within which a claim must be made for a share of property on the death of an intestate. There is no authority to the effect that the eldest son has merely a right to elect within a certain limited period whether he will take the share of the property or not.

APPEAL No. 38 of 1916 from a judgment and decree (31st March 1915) of the Chief Court of Lower Burma, which reversed a decree (20th December 1913) of the Court of the District Judge of Thaton.

The plaintiff was the appellant to His Majesty in Council.

The plaintiff was the eldest son of one U Tu, who died intestate on 19th December 1906. The defendants were Ma Thit, his widow, his children other than the eldest, and a grandchild. He left moveable and immoveable property which was valued in the plaint at Rs. 2,39,590.

* *Present:* THE LORD CHANCELLOR (LORD BUCKMASTER), LORD SHAW, LORD WRENBURY AND MR. AMEER ALI.

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The suit which gave rise to this appeal was brought on 24th June 1913, and the plaintiff claimed a one-fourth share in his father's estate by the Burmese Buddhist law as being the eldest or auratha son of the deceased.

Defendants 1, 3 (a son), 4 (a daughter), and 6 (a granddaughter in their defence denied that the plaintiff was the eldest or auratha son, and in the 5th paragraph of their written statement alleged that even if he was so entitled he "had exercised his election not to claim such share, and could not now do so." They further alleged that the plaintiff had forfeited all right to inherit by reason of his undutiful and unfilial conduct of which they gave particulars.

The defendant 2, a son, did not appear; and defendant 5 admitted the plaintiff's claim and asserted a right as his adopted daughter which was denied by the defendants contesting the suit.

Three issues were raised, the first of which was whether the plaintiff was the auratha son of U Tu and as such entitled to claim one-fourth of the estate? but it was agreed that it was an unnecessary issue, as all matters in dispute were raised in the second (if the plaintiff was ever entitled to a one-fourth share did he elect not to claim such share?), and third (did the plaintiff forfeit his right to inherit by reason of undutiful and unfilial conduct?) issues.

The Additional District Judge found, as a fact, that the plaintiff was the auratha son, and that was not now disputed.

The evidence of the plaintiff's alleged renunciation of his claim rested solely on the fact that he made no demand for a share until more than six years after his father's death. On that issue the District Judge said: "on the second issue it has been argued that exercise of action by the plaintiff must be within a reasonable

time, and if not so taken he must be deemed to have forsaken it." On this issue the Judge held that the suit was not barred by limitation, and that there was no evidence to support the allegation that the plaintiff had abandoned his right of inheritance.

The Additional Judge found, on the third issue, that the plaintiff had not been guilty of undutiful or unfilial conduct, and therefore had not lost his right of inheritance, and that he was entitled to the one-fourth share which he claimed. He made a decree accordingly for the plaintiff.

The defendants 1, 3, 4 and 6 appealed to the Chief Court from the decision of the District Court on the ground that the evidence showed that the plaintiff's misconduct had been such as to debar him from inheriting; and that he had elected to forego his right to the share of an auratha son: but the ground as to misconduct was not argued or decided in the Chief Court (ORMOND and TWOMEY JJ.) the material portion of whose judgment was as follows:—

"The plaintiff made no demand from his mother in respect of his ¼ share until 6½ years after his father's death; but, on the other hand, he collected the rents of the property for his mother as being her property.

"The question in this appeal is whether an eldest son must act with reasonable promptitude in exercising his option of taking ¼ of his parents' joint property on the death of his father, or whether he has 12 years within which he can exercise that option under article 123 of the Limitation Act. We are referred to the case of *Maung Po Min* v. *U Shwe Lu* (1) where it is held that the period of limitation for the recovery of ¼ share by an eldest son is 12 years from the date of the parents' death, under article 123. The facts of that case are not given in the report: but we must assume that the eldest son's option had not lapsed owing to delay in exercising it. The effect of undue delay on the part of the eldest son was not considered and no question was raised on that point. The case can only be regarded as an authority for applying article 123 and reckoning the period of limitation from the date of the parent's death when as a matter of fact the eldest son has acted promptly. In the present case we are not concerned with the

(1) (1903) 2 L. B. Rul. 110.

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period of limitation. If the plaintiff had demanded his quarter share promptly after his father'a death and had been refused, he would no doubt have 12 years from the date of his father's death to sue for the share. But though he was a married man with a family of his own and living apart from his mother when his father died, he did nothing for 6½ years and the question we have to decide is whether he should not therefore be deemed to have abandoned his claim to partition and elected to wait for his mother's death and then share with his brothers and sisters. It is not expressly provided in the Dhammathats that the eldest son must decide promptly which course he will take. But from the nature of the option it is necessary, in the interests of the family, that it should be exercised without delay. According as it is exercised or not, the mode of managing the property must vary and the prospects of the other heirs would also vary. It can hardly be intended that a widow should be compelled to keep a quarter of the estate tied up indefinitely on the chance that any time within 12 years the eldest son may demand his ¼ share. Such a restriction would materially affect the widow's management of the estate. If such a course were admissible the eldest son might conceivably wait till ¾ of the estate has through some misfortune been lost and then claim the whole of the remaining quarter to the entire exclusion of his brothers and sisters, although they may have counted for years on coming in when their mother dies and sharing equally with the eldest son.

"We think that the right given to the eldest son (Manu Kyay, Book X, section 5) of claiming a quarter share of the joint estate on his father's death must be exercised as soon as possible after that event and that if the option is not exercised without unreasonable delay it lapses altogether.

"The appeal is allowed. The decree of the lower Court is set aside and the suit is dismissed with costs in both Courts."

On this appeal,

De Gruyther, K. C., and *E. U. Eddis*, for the appellant, contended that the claim of the appellant had been wrongly treated as if it were an option which had to be exercised as soon as possible after the father's death, and was lost if not enforced without delay. But the one-fourth share the appellant claimed was a right to which he was entitled under the Burmese Buddhist law. Reference was made to Mingye's Digest where the rules of succession are given; and to *Ma Nhin Bwin* v. *U Shwe Gone* (1) and the Manu

(1) (1914) I. L. R. 41 Calc. 887; L. R. 41 I. A. 121.

Kyay, Book X, Rule 5. On the father's death three-fourths of his estate is absolutely vested in the mother, and the eldest son takes a one-fourth share. No child gets any definite share except the eldest son: Mingye's Digest, page 90, section 34. Children other than eldest son are entitled to partition only on the mother's death: Attasankepa (published in 1907 under the authority of the Government), see Chan Toon's Principles of Burma Buddhist law, page 17. There is no authority for the proposition that the eldest son does not get a one-fourth share as a right, but only has an option which must be exercised promptly or it may be lost. On the contrary, the one-fourth share vests in the eldest son by inheritance on the death of the father wholly irrespective of any claim by him: Attasankepa, section 155. There was no evidence whatever that the appellant had elected not to claim the one-fourth share to which he was entitled, or had in any way abandoned his claim. He was by law entitled to enforce his right at any time within the statutory period of limitation which is 123 Schedule I of the Limitation Act, 1908, which gives 12 years from the date when the share becomes due or payable, that is, in this case, the death of the father. The Chief Court holds that he must assert his claim to get a title, but it is submitted that he has a title by law; and to say that the rights of the younger children may possibly be affected by his delay was not a good reason for the contention that he was bound to put in his claim at once. Reference was made to the Manu Kyay, Book X, Rule 14, as to the division of the estate on the mother's death.

Sir H. Erle Richards, K. C., and *F. J. Coltman*, for the respondents, contended that the appellant not having claimed as auratha son the one-fourth share of the joint estate of his parents within a reasonable time

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after the death of his father, his right to claim division of the estate on his father's death lapsed. The eldest son had no absolute right, but only a right to claim partition. If he does claim it, he was entitled to a one-fourth share, but he must claim it within a reasonable time after his father's death. He has brought his suit only after 6½ years which, it was submitted, was not a reasonable time. The question is whether the action of the appellant was such that, he is entitled to succeed. The children have no interest in the estate during the life of the parents; but on the death of either parent or of both they have a right to division of the property: Chan Toon's Principles of Burmese Buddhist law, page 104. The appellant was not entitled to stand by and wait. He could, if he wished, abandon his share, and it was submitted that is what he did. The respondents contend that he elected not to claim his one-fourth share of the estate, and so he lost his right to it. His conduct in managing the property after his father's death shows that he acquiesced in its remaining as it was: see Chan Toon's Principles of Burmese Buddhist law, page 104. Every eldest son did not inherit; certain claims by him were excluded; see Chan Toon's Principles of Burmese Buddhist law, page 144 [*Eddis* referred to page 143 last 5 lines]. *Ibid.* page 121 contemplates that if the eldest son has not claimed his share, he is to come in with the other children and share the estate on the death of their mother; see Manu Kyay, page 273; and that is what the respondents say he elected to do. Mingye's Digest, section 30; Manu Kyay, Book X, Rule 14; and *Ma Su* v. *Ma Tin* (1). As the appellant did not make his claim promptly and get his share segregated, he has, it was submitted, to wait until his mother's death when all the other children would be entitled to

(1) (1910) 6 L. B. Rul. 77, 84.

shares; his share then might be quite a different share from that he now claimed.

The appellants were not called upon to reply.

The judgment of their Lordships was delivered by

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The LORD CHANCELLOR. The appellant in this case is the plaintiff in certain proceedings which were instituted in the District Court at Thaton, by which he claimed to have one-fourth share of the estate of his father determined and allotted to him. The claim is stated quite clearly, and with commendable brevity, in the plaint, which sets out allegations which are no longer in dispute, namely, that the plaintiff was the eldest son of his father; that his father died on the 19th December, 1906, intestate, and left a widow and certain other sons and daughters him surviving.

The ground upon which that claim was resisted depended in the main upon an allegation that the plaintiff had behaved in an unfilial and illegal way, and, consequently, had forfeited his rights. That defence was disposed of by the learned Judge who heard the cause, who, although he appears to have been greatly embarrassed by the untrustworthiness of the evidence before him, decided that the defendant had not established this allegation.

The only other matter left for decision was one which, according to the defendants' contention, arose upon paragraph 5 of their defence. That paragraph suggested that the plaintiff had not in fact any share in the estate, but that, on the death of his father, he had obtained a right to elect whether he would have that share or no, and that, in the absence of election within a reasonable time, the claim could not now be brought forward. That view was supported by the Chief Court, and from their decision this appeal has been brought.

The whole of that contention depends, as Mr. Coltman

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very fairly stated, upon considering the two different rules of the Damathat which are applicable to this case. They are Rule 5 and Rule 14. The first relates to the partition of an estate upon the death of the father, and it is under that rule, and, as their Lordships understand it, under that rule alone, that the right of the plaintiff in this case arises. It is in these words: "When the father has died the two laws for the partition of the inheritance between the mother and the sons are these: Let the eldest son have the riding horse" and certain ornaments, and it then proceeds: "Let the residue be divided into four parts, of which let the eldest son have one, and the mother and the younger children three."

It is said that Rule 14, which deals with the division of the estate on the death of the mother, shows that, if the one-fourth had not been segregated, and paid over to the eldest son after the father's death, and before the mother died, there would be a different method of distribution, one that might be more favourable, or that might be more unfavourable, to the eldest son, but which, certainly, would not be the same as that to which he was entitled under Rule 5.

Their Lordships do not think that it is desirable to express an opinion upon the true construction of Rule 14. It is a matter that may arise for determination hereafter, and its determination is not relevant to the present question because, even assuming in favour of the respondents, that the rights of the eldest son would change in the event of his not having segregated his one-fourth before his mother's death, it by no means follows that the right which he got under Rule 5 was merely the right to elect within a certain limited period of time whether he would take the property or no. Their Lordships can find no ground whatever for the suggestion that he got anything

under Rule 5 excepting a definite one-fourth part of the estate, a right which he was at liberty to assert within any period that was not outside the period fixed by article 123 of the Indian Limitation Act as the period within which a claim must be made for a share of property on the death of an intestate.

The respondents have certainly urged before their Lordships all that could be urged in support of their view, but their Lordships find themselves quite unable to accept their arguments or to agree with the view which was formed by the Chief Court in this matter.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the Chief Court set aside with costs, and the decree of the District Court restored.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *Sanderson, Adkin, Lee & Eddis.*

Solicitors for the respondents: *Arnould & Son.*

J. V. W.