1924

MAUNG SAN TIN v. MA PHET PU AND FOUR OTHERS.

DUCKWORTH, J.

This, with all respect, is not a true criterion, and I cannot accept such a view. I think that it must be held that the younger son is not a co-heir. This really settles the question, for it is only amongst co-heirs that the right of pre-emption can exist, *i.e.* persons on whom an estate has devolved.

Further, the widow could not be said to have an *absolute* right of disposal, if it was subject to such a qualification as that she must offer the property first to her younger children. Her right would then no longer be *absolute*.

For these reasons, I see no grounds for interference with my original judgment.

The application for review is dismissed with costs, advocate's fee three gold mohurs.

APPELLATE CIVIL.

Before the Hon'ble Mr. Justice Lentaigne.

MAUNG GYI AND ONE *v.* MAUNG AUNG PYO.*

1924

Sep. 5.

Burmese Buddhist Law—Appathitta *child, Share of—Defence of* kittima *relationship—Amendment of defence on appeal to a plea of* appathitta *adoption, whether permissible—Suit for share as* kittima, *whether to be decreed as on basis of* appathitta *adoption.*

Where there was no natural or *kittima* child, *held* that the *appathitta* child took half of the estate of the adoptive parent, the other half going to the relatives of the adoptive parent.

Held also, that where the written statement raised a defence of *kittima* adoption, but the facts established *appathitta* adoption, the Court would, under suitable circumstances, permit the written statement to be amended so as to make the defence also into an alternative one of *appathitta* adoption.

Ma Sa Yi v. *Ma Ma Gale*, 7 B.L.R., 295—*distinguished.*

Kinwun Mingyi's Digest, 198 ; Manugye, X, 25 ; May Oung's Buddhist Law, 122, 123, 129, 144—*referred to.*

* Special Civil Second Appeal No. 327 of 1924 against the decree of the District Court of Prome passed in its Civil Appeal No. 34 of 1923.

1924

MAUNG GYI AND ONE v. MAUNG AUNG PYO.

LENTAIGNE, J.

This was a Special Civil Second Appeal to the High Court in respect of the estate of a deceased Burman Buddhist, one Ma Pu. The plaintiff, Maung Aung Pyo, who was a cousin and the nearest surviving relation of Ma Pu, claimed to be her heir; but the defendant Maung Gyi, a more distant relation, contended that he was the *kittima* adopted son of Ma Pu, and, as such, her sole heir. The trial Court (Township Court of Prome) held that the evidence proved the *kittima* adoption and dismissed the suit. On appeal, however, the District Court came to the conclusion that the evidence established only the fact that Maung Gyi was an *appathitta* son and that since on appeal he could not be allowed to amend his written statement so as to make his defence into an alternative one, Maung Aung Pyo's suit must be decreed on the basis of his having the right to inherit Ma Pu's estate. The point of interest in the High Court's judgment lies in the fact that Maung Gyi was permitted, in the special circumstances of the case, to so amend his written statement as to make his defence in the alternative into that of an *appathitta* son also. The facts arising appear fully in the judgment reported below:

Kya Gaing—for the Appellant.

Ba Thein—for the Respondent.

LENTAIGNE, J.—The plaintiff-respondent instituted the suit now under appeal in the Township Court of Prome against the appellants for recovery of a house and its site valued at Rs. 500 which constituted the only property left by one Ma Pu, a Burmese Buddhist, who died on the 12th waning *Pyatho* 1283. Ma Pu left no children, and, according to the plaint, the plaintiff was her first cousin and her nearest relation; but it was admitted that there were also two children of another first cousin, and they were

1924

MAUNG GYI AND ONE v. MAUNG AUNG PYO.

LENTAIGNE, J.

joined as third and fourth defendants, as they did not wish to be joined as heirs. In their written statements the third and fourth defendants admitted the facts in the plaint, and they have been treated as having no further interest in the estate.

The case has been treated solely as a contest between the nearest collateral as heir of Ma Pu and the appellants Maung Gyi and his wife ; and though Maung Gyi, the 1st appellant, was a relation of Ma Pu, it is admitted that he was a more distant relation than plaintiff and that his only claim to inherit Ma Pu's estate must depend on his claim to be a *kittima* adopted son of Ma Pu, or in the alternative, as an *appathitta* adopted son of Ma Pu, if that claim is admissible. It is clear that Maung Gyi has continued in occupation of the property in suit since the death of Ma Pu. It is shown also that Maung Gyi, who is now twenty-six years of age, had in recent years looked after Ma Pu and had lived with her since he was a child of about four or five years of age. Originally Maung Gyi and his brother Maung Lat were taken into Ma Pu's house because their father was poor, and it is stated by a defence witness that the house which had belonged to Aung Pe the father of Maung Gyi, was bought by Ma Pu from Aung Pe who also came and lived in that house for three or four years with Ma Pu and his children, but eventually Aung Pe moved into another house and the children remained with Ma Pu The plaintiff, however, alleges that the house was inherited by Ma Pu from her mother. Aung Pe died when Maung Gyi was about twelve years of age.

A *Pôngyi*, U Eindaka, who managed a school, has deposed that about twenty years ago Ma Pu placed Maung Gyi and Maung Lat at his school and told

1924

MAUNG GYI AND ONE v. MAUNG AUNG PYO.

LENTAIGNE, J.

him that she had adopted them (*Mweza de*); but when his registers were referred to, it was discovered that he had entered the name of the parent of the children as Aung Pe the natural father, and not as Ma Pu the alleged adoptive mother. Subsequently, Maung Lat died. Plaintiff's fifth witness Maung Po Ka admits that Ma Pu *shinpyooed* Maung Gyi, but he says that he is unable to say whether Maung Gyi was her adopted son or not; that he used to call her "aunt," and before his marriage he used to eat out of the same dish as Ma Pu.

Maung Gyi also states that Ma Pu performed his marriage ceremony when he was twenty years of age, and as he is now twenty-six that would be six years ago. It is clear that Ma Pu was present at the marriage of Maung Gyi, because Ma Yôk So, a witness for the plaintiff, refers to a conversation which she had with Ma Pu when Ma Pu came back from the "Marriage Feast of Maung Gyi," in which she asked Ma Pu what property she had given and Ma Pu replied that she had no property to give. A defence witness, U Sa Nyein, states that at the marriage Ma Pu had a conversation with him in which the question of bringing property to the marriage was discussed and that Ma Pu said that though she had got a house, she must sell the house and maintain herself before her death; and that she also said—"They are responsible if I have got no property and they can enjoy if I have got property."

Maung Gyi is a clerk according to his own account, but his wife describes herself as a cigar-maker and in the plaint Maung Gyi is described as a Tobacco seller. He claims to have had to feed Ma Pu since he was twenty, that is for the six years since his marriage. He also states that he spent about Rs. 300 when Ma Pu was ill. He admits that plaintiff came

1924

MAUNG GYI AND ONE v. MAUNG AUNG PYO.

LENTAIGNE, J.

and attended Ma Pu for one month before her death and brought in a physician about ten days before her death. The plaintiff claims to have spent about Rs. 60 for buying eatables and fees, but he also admits that she had been ill for a year. That Maung Gyi had previously employed a doctor, Saya Thin, is corroborated by that witness who states that he attended Ma Pu four or five times and that Maung Gyi's wife paid his fees, but he did not know with whose money she paid him; and he also states that his wife told him that the sick woman was the mother of Maung Gyi. I have just set out the less controversial facts.

The additional evidence, as to whether Maung Gyi was a *kittima* adopted son, consists of the evidence of Maung Paw, a goldsmith, who states that he saw Maung Gyi and Ma Pu living together when Maung Gyi was about three years old; and he told her that she was all right, having children, and that she replied that it was troublesome when they were young, but that they would give help when they grew up, and that they were adopted sons to inherit. He also says that it was known in the quarter that Maung Lat and Maung Gyi were adopted sons of Ma Pu. Ma Mya Thi, a teacher, who is now aged thirty-five, states that they were known in the quarter as adopted sons of Ma Pu, and she describes a remark addressed to Ma Pu by the natural father when this witness was about twelve in which Aung Pe said to Ma Pu: "You may suffer if they become bad and you may enjoy if they turn out good," which is an indefinite remark and one which might be applicable even to an *appathitta* adoption.

That the relationship subsequently appeared to be one either of *kittima* adoption or bordering on that relationship is apparent even on the evidence

1924

MAUNG GYI AND ONE v. MAUNG AUNG PYO.

LENTAIGNE, J.

produced by the plaintiff. U Tha Gywe, a coolie-gaung, who is the seventh witness for the plaintiff, was present when there was a dispute between Ma Pu and Maung Gyi, and Ma Pu was reproving Maung Gyi as being obstinate and speaking against her. He states that being under the impression that Maung Gyi was her adopted son, he asked her whether she had adopted him to inherit her estate, and she replied, "No, not to inherit but to grow up." That evidence of a witness for the plaintiff would clearly establish the fact that Maung Gyi was at least an *appathitta* son. He then admitted that Ma Pu was angry at the time and later on he said that he did not know whether Ma Pu was telling the truth or not, and he also admitted that some people used to tell their children that they would not inherit, when they were angry.

It is also clear that Maung Gyi and his wife were themselves in doubt shortly before Ma Pu died as to whether Maung Gyi would be able to establish his claim to inherit Ma Pu's estate and that shortly after the plaintiff had begun to come to Ma Pu's house during her last illness, Maung Gyi and his wife were pressing Ma Pu to transfer the house into Maung Gyi's name, the suggestion in Court being that she had promised to do so at the time of the marriage. Both sides give evidence about these conversations. Maung Gyi's wife alleges this and Maung Hla Gyi, a clerk aged twenty-five, deposes that Maung Gyi said to Ma Pu—"Aunt, Aunt. It is said that Maung Pyo comes frequently because he wants to get the properties. Please make the matter clear;" and that Ma Pu replied—"Don't speak about it, who will inherit these properties besides you after my death." The plaintiff's witnesses Ma Yôk So, a Bazaar-seller, who claims to have sold goods together with Ma Pu, and likewise Ma Kin, who claims to have lived with

Ma Pu for about eight years, both state that Ma Pu told them about these requests and that Ma Pu said she would not sell or transfer to Maung Gyi. The latter witness Ma Kin adds that Ma Pu said the house belonged to the deceased. This witness, however, admits that she went to engage a pleader for the plaintiff. Plaintiff's witness Ma Sôk also claims to have lived with Ma Pu for two years and says that Ma Pu told her that Maung Gyi had demanded the title deeds and Ma Pu had also told her that Maung Gyi was not adopted to inherit.

The plaintiff Maung Pyo makes a very significant admission referring to the funeral expenses of Ma Pu; he says "I did not incur any expense for Ma Pu's funeral, because Maung Gyi said that he would mortgage the house to get money to meet the funeral expenses. *I agreed* and told him not to spend more than Rs. 150; Maung Gyi did not mortgage the house. I don't know whether Maung Gyi spent his own money or mortgaged the house to meet funeral expenses." Now this is a complete contradiction of a statement made by the plaintiff at the beginning of his evidence where he alleged that the funeral expenses of Ma Pu were performed with her money. Maung Gyi swears that he defrayed the funeral expenses and this statement is shown to be true by the above admission of the plaintiff. I think also that this admission by the plaintiff that he had recognised the right of Maung Gyi to mortgage the house for the funeral expenses is clear evidence that the plaintiff must have recognised that Maung Gyi was an heir of Ma Pu, and it also shows that the plaintiff is not acting honestly when he claims to be entitled to recover the house from Maung Gyi without any offer to recompense Maung Gyi for the expenses which he had incurred.

1924

MAUNG GYI AND ONE v. MAUNG AUNG PYO.

LENTAIGNE, J.

It is obvious that the witnesses in this case were not examined as fully as they should have been and that the case for Maung Gyi was not put before the Court in as clear a way as it should ; because we do not find any examination of Maung Gyi about this conversation with plaintiff, etc., which was subsequently admitted by the plaintiff. The last witness for the defendant, U San Nyein, was merely examined about the conversations as to the house at the time of Maung Gyi's marriage and though he also had lived in Ma Pu's house as a tenant for some years, he was not asked any direct questions on the subject of adoption ; but he states that after Ma Pu's death plaintiff asked him to go and consult a pleader as to whether plaintiff could make a claim, because Maung Gyi was Ma Pu's nephew and adopted son ; and that he told plaintiff that the adopted son had a better claim than a nephew.

On this evidence the Township Court held that the defendant Maung Gyi was a *kittima* adopted son and dismissed the suit with costs. On first appeal the District Court reversed that decision holding that the evidence was insufficient to prove a *kittima* adoption. I have set out the effect of the evidence above and I agree with the finding of the learned District Judge that the evidence in this case is not sufficient to establish a *kittima* adoption according to the standard required in the more recent decisions.

The learned District Judge recognised the fact that it was established that Maung Gyi was an *appathitta* child, but he referred to a decision in an unofficial report which was to the effect that where a plaintiff has based his suit on a claim to be a *kittima* adopted child and without any claim in the alternative for a declaration as an *appathitta*, it is not open to

an Appellate Court to allow the plaintiff to amend his plaint and insert the alternative claim for relief as an *appathitta* child; and following this decision, he has granted the plaintiff-respondent in this case a decree as prayed with costs in both Courts.

The learned District Judge has, however, overlooked the fact that Maung Gyi is a defendant and that in that case it is not a question of altering the cause of action in the suit. The cause of action of the plaintiff-respondent remains the same whether the defence is based on a claim to a *kittima* adoption or to an *appathitta* adoption, and the question which the Court has to decide is whether the plaintiff is entitled to relief against the defendant. Even on the admissions of the plaintiff in his evidence in this case, it is apparent that the plaintiff had in effect recognised Maung Gyi as an heir of Ma Pu after her death and had consented to Maung Gyi incurring all the funeral expenses and mortgaging the house if necessary for that purpose. It is clear, therefore, that it would be most inequitable to allow the plaintiff to take the whole estate and to deprive the defendant of his right as heir which is shown to have been recognised even on the admissions of the plaintiff in addition to depriving the defendant of all rights to reimbursement of the funeral expenses, etc. Maung Gyi was also apparently allowed to continue in possession of the house and the suit is one for possession. Having regard to this admission which shows that Maung Gyi must be treated as an heir, it is in the interests of the plaintiff that the amendment should be allowed, because the plaintiff cannot be allowed to eject a person shown to have been recognised as an heir by the plaintiff, unless the plaintiff shows that he was mistaken or takes the equitable course of according to such heir the rights as an heir. It is therefore in the interest of the

1924

MAUNG GYI AND ONE v. MAUNG AUNG PYO.

LENTAIGNE, J.

plaintiff that the more limited right of defendant as an *appathitta* should be recognised in order that the plaintiff may be granted a decree for plaintiff's share, if any.

In the case of *Ma Sa Yi* v. *Ma Ma Gale* (1), the plaintiff had sued as a *kittima* child and when it was held that she had failed to establish her claim as a *kittima*, it was pointed out by Birks, J., that she could not succeed as an *appathitta*, because she had lived apart from the adoptive parents for the last eleven years; but Fox, J. (afterwards Sir Charles Fox), held that she had made no alternative claim as an *appathitta* daughter and that consequently he did not consider it necessary to consider what her share of inheritance possibly might be, if she had made such alternative claim. A doubt as to the admissibility of such an amendment on appeal had also previously been expressed in an Upper Burma decision. Later on, it appears to have been held in Lower Burma that if the claim as *appathitta* has not been made as an alternative claim in the plaint, it is not open to the plaintiff to obtain the amendment on appeal. In theory there can be no doubt that the two forms of adoption are distinct causes of action; but I suspect that many cases of recognised *kittima* adoption are cases in which the relationship had started as an *appathitta* adoption and had ripened into such affection that there was a subsequent notorious recognition of a *kittima* adoption. If the development has not been sufficiently notorious as to be capable of clear proof, the adopted child may honestly make the claim as *kittima* and discover, when it is too late, that the failure to weaken the claim as *kittima* child by pleading in the alternative a claim as an *appathitta*

(1) (1901) 7 B.L.R., 295.

has created a technical bar under the rule of procedure restricting the cases in which a plaint can be amended on appeal, which in effect bars the recovery of the smaller share as an *appathitta*. The question has occurred to me whether the theoretical distinction between the two forms of adoption and the two causes of action has not been relaxed in practice in some cases or whether there may not be other special circumstances which would justify an Appellate Court to make allowance for *bonâ fide* mistakes, in applying a mere rule of procedure. In the first instance I had thought of referring this question to a Bench, but, on reconsideration, I have come to the conclusion that the case now before me should be distinguished from the previous decisions on the ground that different considerations may arise, as they do arise in this case, for allowing a greater latitude in favour of an amendment in the case of the written statement of a defendant.

I have been unable to find any reported case in which a decree has been passed in favour of an *appathitta* child for a share of inheritance ; but I believe that this is, to a great extent, due to the fact that the claim is invariably made by the child on the basis of a *kittima* adoption and without any alternative plea based on a claim to be an *appathitta* ; and that consequently the omission of the Courts to decide the point is due to the rule as to the amendment of a plaint to which I have referred above. The alternative claim could only be of importance in the cases where there is no natural or other *kittima* adopted child ; and in such cases the greater affection existing between the adopted child and the adoptive parents would, in some cases, have resulted in the child being able to produce evidence of a notorious recognition as a *kittima* child.

1924

MAUNG GYI AND ONE v. MAUNG AUNG PYO.

LENTAIGNE, J.

The rights of an *appathitta* in a case like the present one where there is no natural or *kittima* child are summarised in section 198 of the Kinwun Mingyi's Digest and there is also the passage in section 25 of Book X of the *Manugye* ; and the rule is laid down that in such a case the *appathitta* child is allowed half the estate and the other half goes to the relatives of the deceased. The question is also discussed in Mr. Justice May Oung's "Buddhist Law" at page 144. He also discusses other questions touching this form of adoption at pages 122, 123 and 129. Following these authorities, I hold that the defendant Maung Gyi is an *appathitta* adopted son of Ma Pu and is entitled to have his written statement amended so as to make such defence in the alternative ; and that he is entitled to half the estate and house now in suit and that the plaintiff as representing himself and the other relatives, if any, is only entitled to the other half.

Before the division is made, I think that an enquiry should be made as to the funeral expenses incurred by Maung Gyi and that the amount of such expenses should be reimbursed to Maung Gyi before the shares are estimated.

For the above reasons, I set aside the decree of both the lower Courts and instead I direct that the plaintiff be granted a decree declaring that Maung Gyi is entitled to a half share in the estate in suit and that the plaintiff as representing himself and any other person entitled as relative of Ma Pu, deceased, is entitled to the other half share in the estate in suit ; but that before such partition is made, an enquiry be held by the Township Court as to the amount contributed and spent by Maung Gyi on the funeral expenses of Ma Pu, and that such amount be reimbursed to Maung Gyi out of the value of the house;

and that after such enquiry has been held and such re-imbursement made, the shares in the estate be estimated and a final decree be passed by the Township Court for the purpose of granting the plaintiff possession of his share or recovery of its equivalent in money.

As regards costs I award the defendant half his costs in this Court and I think that each party should bear his own costs in the lower Courts.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Baguley.

1924

Sep. 6.

ALLAN BROTHERS & CO.
v.
SHAIK JOOMAN SONS & CO. *(represented by the Official Assignee).**

Presidency-Towns Insolvency Act (III of 1909), sections 52, 53—Execution of decree—Order, prior to adjudication of the judgment-debtor, for satisfaction of decree by monthly instalments and also for security in the form of a mortgage on his immoveable property, under Civil Procedure Code, Order 20, Rule 11 (2)—Unsuccessful attempts by the judgment-creditor to discharge the order for instalments and security and to proceed with the execution—Mortgage unexecuted up to date of adjudication—Civil Procedure Code, section 36.

Where the Court, acting under the provisions of Order 20, Rule 11 (2), of the Civil Procedure Code, ordered that the judgment-debtor shall satisfy the decree against him by monthly instalments and shall, in the meanwhile by way of security for such monthly payments, execute in favour of the decree-holder a mortgage on his immoveable property, *held* that the subsequent adjudication of the judgment-debtor could not affect the position of the decree-holder.

Held further, that so long as the order for security remained undischarged the fact that up to the date of the judgment-debtor's adjudication the mortgage ordered had not been executed owing to the decree-holder's unsuccessful attempts to have the order in question discharged so that he might forthwith be able to proceed to execution, did not deprive the decree-holder of his right to obtain from the insolvent judgment-debtor the mortgage in accordance with the Court's order.

Chandra Kumar De v. *Kusum Kumari Roy*, 28 C.W.N. 187—*referred to.*

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* Civil Miscellaneous Appeal No. 94 of 1924 against the order of the High Court in its Civil Regular Suit No. 609 of 1923.