

APPELLATE CIVIL.

Before Mr. Justice Duckworth.

1924

May 23

MA SAW WIN

v.

MAUNG GYI AND FOUR *

Buddhist Law—Inheritance to the estate of a deaf-mute—Contest between younger and elder brothers—The deceased supported by the elder brother—Right of a pothudaw to inherit from a relation.

Held, that at Buddhist Law, on the death of a deaf-mute, his estate devolves on the co-heir who supported him during his life-time.

Held further, that under his personal law a *pothudaw* is not precluded from inheriting property.

Mi Kan Yon v. Nga Pawe, 5 B.L.T., 61—*followed*.

Kinwun Mingyi's Digest, I, 111; *Manukye*, X, 36—*referred to*.

Sanyal—for the Appellant.

T. K. Banerjee—for the Respondents 1 and 2.

DUCKWORTH, J.—The facts have been set out in the judgments of the two Lower Courts, but, for the sake of clearness, it is necessary again to set out the salient facts of the case. The two Kainggyi lands in suit, which were claimed by Maung Tha Li (the sole plaintiff, who died during suit), originally belonged to U San and Ma Pa Don. They had six children, Maung Gyi, the 1st respondent-defendant, Ma Le, Maung Gale, Maung Lu Dok, Maung Lu Htat, and 2nd respondent, Ma Myit. After the death of the parents, the lands, and other lands and property not in suit, were administered by Maung Gyi as eldest son. Then there was admittedly a partition, by means of which Maung Gale, Maung Lu Dok and Maung Lu Htat

* Special Civil Second Appeal No. 217 of 1923 (at Mandalay), from the decree of the District Court of Sagaing in Civil Appeal No. 47 of 1923.

took their shares, whilst the shares of Ma Le and Ma Myit, who were respectively a deaf-mute, and an epileptic, and were incapable of taking effective possession, were held in trust by Maung Gyi, as the eldest brother, and senior member of the family. Ma Le has since died.

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The plaintiff Maung Tha Li was the son of Maung Lu Htat. Ma Le admittedly predeceased Lu Htat, and it is admitted that Maung Gale and Maung Lu Dok are also dead.

Maung Tha Li sued for possession of the property in suit, which went to his aunt Ma Le at the partition, and for mesne profits, impleading both Maung Gyi in whose possession the property is, and his aunt Ma Myit. On Tha Li's death the appellant, Ma Saw Win, was made his legal representative. The respondents 3, 4 and 5 are her children, and are *pro forma* respondents in this appeal.

Maung Gyi's defence was, in effect, that he was entitled to the share of Ma Le, since he took it in trust for her, and supported and looked after her up to her death. He also urged that he had taken the lands in return for paying his parents' debts.

Ma Myit endorsed the defence of Maung Gyi.

The trial Court found that Maung Gyi had maintained and supported Ma Le, and that she even elected to go and die at the monastery, where he was staying as a *pothudaw*, whilst it held that Lu Htat, father of Tha Li, was a wanderer, and did nothing for her. Further it held that Maung Lu Htat did not live at the same house as Ma Le, but only paid occasional visits. Finally it found that a brother excluded a nephew under Buddhist Law, and that as Tha Li was only a nephew and had died *pendente lite*, there was an end to his claim. The suit was dismissed.

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The District Court, on the Buddhist Law question, differed from the Trial Court and held that the right of suit survived to Tha Li's legal representative, and that Tha Li's claim to Ma Le's estate was not made, *qua* nephew but on behalf of his father, Lu Htat, who died after Ma Le. The District Court held further that Maung Gyi had failed to prove that he was entitled to hold the property in return for having paid his parents' debts. There can be no doubt that this latter finding was correct. The learned Judge dismissed the appeal, however, on the ground that Maung Gyi, as a co-heir, and as the supporter of Ma Le, who was a deaf-mute, and as trustee of her share of inheritance, was entitled to take it, as against the other co-heirs, quoting the Kinwun Mingyi's Digest, section 111 and section 36 of Chapter X of the Manukye.

Against this decision Ma Saw Win appeals, her principal grounds being that the law relied on was inapplicable to the present case; that the District Court should not have decided the appeal on a *new* point, about which there was no issue and no finding; and that, after finding that Tha Li was entitled to a share in Ma Le's estate, the District Court was in error in holding that Maung Gyi alone maintained and looked after Ma Le, and overlooked the fact that Maung Gyi, as a *pothudaw*, was not qualified to succeed to any earthly possessions.

Now there is no dispute that, when Ma Le died her share would, under Buddhist Law, normally pass to her younger brothers and sisters, if any were alive, and, failing them, to the elder brothers and sisters. Thus it would seem that both Lu Htat and respondent, Ma Myit, would have had a claim. Normally Maung Gyi would have had no claim, except in exceptional circumstances. As regards Tha Li

(a nephew), he, on Lu Htat's death, would probably have a claim to his rights. However it is not necessary definitely to decide this point in this case because I think that the whole matter was correctly decided by the learned District Judge, according to the texts in section 111 of the Kinwun Mingyi's Digest and especially that in section 36, Book X of the Manukye. This was not a new point taken by the District Court, there was an issue sufficiently covering it in the trial Court, and the point was raised by respondent, Maung Gyi, in his written statement. Moreover the point was referred to in the memorandum of appeal filed before the District Court.

The Manukye is now a safe and proper guide, when not in conflict with justice or equity, and the present feelings of the Burmans. Section 36, Book X, reads according to Richardson's translation:—

“If amongst the children so given in marriage by their parents, one shall have severe disease, shall be unable to work, shall stutter, or be dumb, let the share such child is entitled to be set aside, and let its *relations* support it, and at its death, let the person who so supports it take its share.” The Burmese word for relations is *Pauk paw*, which is usually synonymous with *Thagyin* and *Thagyin* (co-heirs) are defined in Volume I, section 11 of the Digest as “one's elder and younger brothers, elder and younger sisters, and their children.” I think therefore that Maung Gyi was a co-heir (or *Pauk paw*) with Ma Le.

The position was fully dealt with by MacColl, A.J.C. (now MacColl, J.), in the case of *Mi Kan Yon v. Nga Pwe* (1). It is quite clear from that decision that Maung Gyi is entitled, under the parties' personal law to hold the share of Ma Le, deceased,

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as he supported and maintained her. There is ample evidence that he did support and maintain her, even one of the plaintiff-appellant's own witnesses Maung Po Tin giving evidence, which went to corroborate this fact. As regards Maung Lu Htat it is clearly shown that he was a wanderer, one witness asserting that he was only one month in the year in the parental house. Beyond the facts that he and Tha Li visited Ma Le when sick, there is no reliable evidence that he did anything for Ma Le whatever.

Maung Gyi is a *pothudaw*, but I cannot find that, as such, he is in any way precluded from inheriting property under his personal law. As I understand the matter, a *pothudaw* is in no sense a monk or *pōngyi*, and the evidence shows that Maung Gyi has held and dealt with property without objection for several years. No authority for the appellant's claim has been produced, and I could not allow the appeal on that ground in the absence of very strong authority.

The case was, I think, rightly decided in the District Court. The appeal is dismissed with costs.