APPELLATE CIVIL.

Before Mr. Justice Lentaigne, and Mr. Justice Carr.

1924

Feb. 12.

U PANDAWUN
v.
U SANDIMA AND ONE.*

Buddhist Ecclesiastical Law—Poggalika ownership of a monastery—Gift inter vivos *of a monastery by a monk, whether, valid—Delivery of possession not necessary—Relation of the provisions of sections* 123, 129, *Transfer of Property Act to rules of Buddhist Law.*

Held, that at Buddhist Ecclesiastical Law, a monk may own a monastery as his *poggalika* property and in his life-time validly transfer it as a gift.

Held also, that where a rule of Buddhist Law, requires delivery of possession to perfect a gift of immoveable property, such rule is abrogated by the provisions of sections 123 and 129 of the Transfer of Property Act.

Per LENTAIGNE, J.—"I am satisfied that, if sections 123 and 129 of the Transfer of Property Act, 1882, are read together, section 123 must be construed as enumerating the *formalities* requisite for the making of valid gifts by Hindus and Buddhists, provided that the gifts are otherwise valid under the personal law applicable to the donor. The authorities in *Lallu Singh* v. *Gur Narain* (1) support the proposition that section 123, in effect, does away with the necessity of a delivery of possession as an extra formality in the case of a gift made by a registered deed executed by a Hindu donor. That force of the section is clearly necessary in the case of a gift of moveable property if the registered deed is not to be treated as an unnecessary redundant formality; and a similar uniform construction should be adopted for the same requisite in the same section in its more extended application to gifts of immoveable property. This construction should be equally applicable to gifts made by Hindu and Buddhist donors."

U Teza v. *U Pyinnya*, 2 U.B.R. (1892-96), 59; *Shwe Ton* v. *Tun Lin*, 9 L.B.R., 220—*referred to.*

Lallu Singh v. *Gur Narain*, (1922) 45 All., 115; *U Zayanta* v. *U Naga*, 9 L.B.R., 258—*followed.*

Nga Po Thin v. *U Thi Hla*, 1 U.B.R. (1910-13), 183; *U Meda* v. *U Sandima*, 1 Ran., 494—*dissented from.*

May Oung's Leading Cases on Buddhist Law, 179—*referred to.*

The facts connected with this appeal are fully set out in the judgment of Carr, J., reported below.

Ba Tin—for the Appellant.

Mya Bu—for the Respondent.

* Civil First Appeal No. 139 of 1922 aginst the Decree of the Chief Court of Lower Burma on the Original Side in Civil Regular No. 578 of 1920.

1924

U PANDAWUN v. U SANDIMA.

CARR, J.—The parties to this suit are Buddhist monks. The plaintiff-appellant sued for possession of a *kyaung*.

The facts disclosed are as follows. About the end of the last century one U Zeyanda was in possession of a *Kyaungdaik* in Rangoon. One U Kala applied to him for permission to erect a *sayat* within the *Kyaungdaik*. U Zeyanda granted the permission on condition that U Kala should also build a *kyaung* for him, within the *Kyaungdaik*. U Kala accepted this condition and proceeded to build the *kyaung*, which is the one in dispute in this suit. Before the building was finished U Zeyanda left the priesthood, giving the *Kyaungdaik* to U Ariya. U Kala apparently did not agree that his *kyaung* should pass to U Ariya and sued him in Civil Regular No. 188 of 1902 of the Chief Court of Lower Burma, to recover possession of this *kyaung*. His suit was dismissed and thereafter U Ariya appears to have remained in peaceful possession of the whole *Kyaungdaik* including this *kyaung*.

In September, 1918, by the registered deed, Exhibit A, U Ariya gave the whole *Kyaungdaik*, except the *kyaung* now in dispute, to the defendant-respondent, U Sandima.

On the 6th July, 1920, U Ariya gave the *kyaung* to the appellant, U Pandawun, in a manner said to be in accordance with the rules of the *Vinaya*. This is evidenced by Exhibit C, which however is not registered. On the 17th July the gift was perfected by the execution of the registered deed, Exhibit B.

Some five or six weeks after this U Ariya died. The plaintiff in his evidence gives the date of death as about the 10th waning of Wagaung, 1282 (8th September, 1920).

It would appear that the oral gift was made while U Ariya was still residing in the *kyaung* in dispute,

but that afterwards he was removed to the plaintiff's own *kyaung*, where the registered deed was executed, and where he died. It was claimed that possession had been given to the plaintiff and that he locked up the *kyaung* when U Ariya left it.

The plaintiff alleged that the defendants had forcibly taken possession of the *kyaung* and sued for possession.

It may be noted that on the 6th July, 1920, the defendant, U Sandima, filed a suit against U Ariya for possession of this *kyaung* (Civil Regular No. 336 of 1920 of the Chief Court of Lower Burma). This suit was withdrawn after U Ariya's death, on the 10th January, 1921.

The first issue in the suit was "whether U Ariya, who purported to give the *kyaung* to the plaintiff, was the "*poggalika*" owner and had the right to give away the *kyaung*?"

The learned Judge on the Original Side did not record any definite finding on this issue but held that U Ariya "had been in undisturbed possession since 1902 when the *Kyaungdaga* had sought without success to evict him and had acquired a title by adverse possession which by ordinary law as distinct from Buddhist Ecclesiastical law he could transfer, and if he did so transfer it his transferee would stand in his shoes."

He then proceeded to consider whether there had been actual delivery of possession to the plaintiff by U Ariya, and came to the finding that there had not. On that ground he dismissed the suit.

There was no discussion of the question whether delivery of possession was in law necessary to the validity of the gift. If the case falls under the ordinary law—the Transfer of Property Act—I think that there can be no doubt that such delivery was not essential.

1924

U PANDAWUN v. U SANDIMA.

CARR, J.

If the case were governed by the Buddhist law, whether ecclesiastical or lay, it may be that delivery of possession was essential. There is some doubt whether such a gift as this would under the Buddhist law require delivery of possession. I do not think it necessary to consider what the rule of Buddhist law would be, for I am of opinion that the question is decided by sections 123 and 129 of the Transfer of Property Act. There is a long series of decisions of the Indian Courts to the effect that the rule of Hindu law making delivery of possession essential to the validity of a gift has been abrogated by the Transfer of Property Act. It is not necessary to quote all these. They are well summed up in the case of *Lallu Singh* v. *Gur Narain* (1) in which it was held (at page 121) that "we are therefore clearly of opinion that it must now be accepted that the provisions of section 123 (of the Transfer of Property Act) do away with the necessity for the delivery of possession even if it was required by the strict Hindu law."

I have not been able to find any Burma decision on the question in its relation to the Buddhist law. But the provisions of section 129 of the Transfer of Property Act with regard to the Hindu law and the Buddhist law are exactly the same and if those provisions read with section 123 have the effect of abrogating a rule of Hindu law they must also abrogate an exactly similar rule of Buddhist law. I think therefore that the Indian decisions should be followed. I hold that delivery of possession was not necessary to the validity of the gift. The basis of the decision in the Court below thus fails.

But that decision is supported by the respondent on other grounds. It has not been suggested in the appeal that U Ariya did not make the gift or that it

(1) (1922) 45 All., 115.

was invalid on any ordinary grounds. It has, however, been urged that it was a deathbed gift and therefore invalid. I do not think we can consider this contention. It was not raised in the Court below and it involves questions of fact for the determination of which there are not materials on the record. It is too late now to raise this defence.

The main ground now urged in support of the decision is that U Ariya had no power to make such a gift. In support of this proposition we have the decision in *Nga Po Thin* v. *U Thi Hla* (2) in which it was held that "a gift by a monk whether to a layman or to another monk of a monastery or a site for a monastery, whether it has been dedicated to him personally or not, is invalid." This has been followed in this Court in *U Meda* v. *U Sandima* (3).

If these decisions are correct the only possible conclusion is that Burmese Buddhist monks as a body are completely ignorant of their own ecclesiastical law. Such gifts of *kyaungs* are of constant occurrence. We have three of them in the case now under consideration and in the documents evidencing two of them it is expressly stated that the gifts have been so made as to comply with the rules of the *Vinaya*. We have the witness U Zagaya (2 p.w.), a monk who claims 45 "*was*" saying in his evidence "After a building has been dedicated to a *pôngyi* for his personal use the donee can give it away to a third person". Again "If it is a *poggalika* gift it can be given away but not when it is *thingikha* property". "He can give the property to anybody he likes whether layman or ecclesiastic." Defendant, U Sandima, himself says: "U Ariya owned the land, though I say he did not own the *kyaung*. So he could lawfully give away the land."

(2) (1913) 1 U.B.R. (1910-13), 183. (3) (1923) 1 Rangoon, 494.

1924

U PANDAWUN v. U SANDIMA.

CARR, J.

In *U Meda's* case (3) there was a similar gift by U Ke Tu to U Meda. A subsequent dispute was referred to the *Le-myo-gaing-gyok Sayadaw*, whose decision is thus described (p. 496) "It is to the effect that although the land may once have belonged to Maung Kan Shun's ancestors yet for 200 years past it has been *kyaung* land and U Meda has title to it under the document given by U Ke Tu in his lifetime". In other words the *Sayadaw* held that the gift by U Ke Tu was valid.

The ultimate basis of the decision in *Nga Po Thin's* case (2) was a finding that a monastery cannot be the property of an individual monk, or *poggalika* property. The learned Judge admitted the proposition to be a novel one but justified it by reference to the texts of the *Vinaya*. He pointed out that earlier decisions in which *kyaungs* had been recognised as *poggalika* property and in which gifts of them had passed without question were based on the *Dhammathats*, which are not the authorities on which the Ecclesiastical authorities themselves decide such questions. This is quite true but I think that it is impossible thus to brush aside the rules contained in the *Dhammathats*. It is highly unlikely that *poggalika* ownership of a monastery would have received such general recognition in the *Dhammathats*, and in general usage, had such ownership been prohibited by the Ecclesiastical law and not recognised by the Ecclesiastical authorities.

With reference to that case U May Oung, now Mr. Justice May Oung, says : (4) "It is doubtful whether, in the Buddha's life-time, there was any ownership other than *sanghika*—except as regards robes and food. But according to the commentaries, the *Dhammathats* and universal custom in Burma there is individual ownership of all kinds of monastic property." In *Nga*

(4) Leading Cases on Buddhist Law, 179.

Po Thin v. *U Thi Hla* the learned Additional Judicial Commissioner of Upper Burma, relying solely on the canonical text of the *Vinaya*, doubted whether a monastery or its site could be the subject of a *poggalika* gift and deduced the proposition that a monk cannot act as owner of a monastery, whether dedicated to him personally by the *Kyaungtaga* (donor) or allotted to him by other monks, for more than 12 years. This was not, however, definitely decided, the case being disposed of on the ground that a monk is not competent to make a valid gift of a *poggalika* monastery or its site. It is submitted, with all due deference, that long-established usage is against the view put forward in this case, and that, unless and until the ecclesiastical authorities declare that individual ownership is unlawful, the Civil Courts should continue to recognise it as they have done in the past. In *Maung Talok* v. *Ma Kun* (5), where the subject matter of the suit consisted of culturable lands which had originally been given to a monk and which the latter had in turn given to the defendants, Mr. Copleston, J.C., said, dismissing a claim made by the heirs of the original donor :—

" I do not think it can be doubted that, whatever may have been the primitive rules of Buddhism, Buddhist monks at the present day do and may, as far as authorities I have quoted go, possess property. At any rate I must hold that it has not been shown that they may not do so." In several other cases (6, 7 and 8) both in Lower and in Upper Burma, individual ownership has been given effect to and in *Mra Paw* v. *U Pyinnya* (9) it was held that a *pôngyi* can sue

(5) 2 U.B.R., (1892-96), 78.
(6) U Telawka *v.* Maung Po Ka, (1893-1900) P.J., L.B., 597.
(7) Maung On Gaing *v.* U Pandisa, *ibid*, 614.
(8) U Teza *v.* U Pyinnya, 2 U.B.R. (1892-96), 59.
(9) (1922-23) 14 B.L.R., 277.

1924

U PANDAWUN v. U SANDIMA.

CARR, J.

to have it declared that *poggalika* property is his. Nor is direct textual authority wanting. As regards monasteries the *Culava-atthakatha-nissaya* mentions both *sanghika* and *poggalika vihara*, and in the *Thalon Sayadaw's wini-pyatton* there is to be found a form of ritual to be used in dedicating a *poggalika kyaung*".

The case of *U Teza* v. *U Pyinnya* (8) merits further consideration. What was decided in the case was " That the orders and proceedings of the Buddhist Ecclesiastical authorities, so long as they keep within their jurisdiction and do nothing contrary to law, cannot be questioned in the Civil Courts." The present importance of the case lies in the nature of the orders of these authorities.

The case related to a *kyaungdaik* in Mandalay built by King Thibaw for the *Nanu Saya*. The plaintiffs claimed by virtue of a gift to them by the *Nanu Saya*. The dispute went before the *Hladwe Sayadaw* and the *Thathanabaing*. In his order the former said :—

" The said *Nanu* monastery was founded by King Thibaw under the appellation of *Zeya Mangala Rama taik* and dedicated to one *Nanu Sayadaw*, who was his preceptor before he become sovereign. The said *Nanu Sayadaw* appointed *Shin Teza* and *Shin Pandawa* as *taikok* and *taikkyat* in charge of the *Shanghas* residing in the said monastery, and when the said *Nanu Sayadaw* abandoned the priesthood he made a gift and endowment of the entire monastery to the said *Shin Teza* and *Shin Pandawa*."

It was ordered that these two monks should have control over the monastery and the monks residing therein.

This order was confirmed by the *Thathanabaing* and his Council, in whose order the following words

occur :—" when the said *Nanu Sayadaw* abandoned the priesthood and became lay man the said monastery was given over as a gift by him to *Shin Teza* and *Shin Pandawa.*"

Certain texts were quoted, of which the following may be reproduced :—

Culava Atthakatha Text, Senasana Khandaka, page 202—

> " If a donor out of respect and regard for an individual (priest) builds a *kyaung* and says I will make an offering of it to the Lord ; and has done so, the *kyaung* becomes (the property) of that *Rahan.*"

Viniya Lankara Tika Text, page 166—

> " If the owner of a *poggalika kyaung* is alive and it is given away by him to the *Sangha* or to the assemblage or chapter of *Sanghas* or to an individual priest, the *Rahan* who gets the *kyaung* given by its owner has control over it."

Viniya Lankara Text, page 170—

> " In another way, if a donor out of regard and respect for a certain individual (priest) has built a *kyaung* and furnished it and given it to that individual (priest) as an offering, in what manner or under what saying was the gift made ? This *kyaung* was given as a gift to the Lord : it is in this wise the *kyaung* was given."

These texts clearly authorise *poggalika* ownership of the *kyaung* and recognise the right of the *poggalika* owner to make a gift of the *kyaung* to another *Rahan.* Both of these propositions are accepted without question in the orders of the *Hladwe Sayadaw* and the *Thathanabaing.*

1924

U PANDAWUN v. U SANDIMA.

CARR, J.

In *Shwe Ton* v. *Tun Lin* (10) a question arose as to paddy lands possessed by a *pôngyi*, which were regarded as having been given to him outright as a religious gift. The case coming first before a single judge of the Chief Court a reference was made to a bench. The judges of this bench differed, one of them holding that a *pôngyi* could not hold paddy lands as religious property. The reference then went before a full bench of five judges. Certain questions were referred to the *Thathanabaing* and some of this answer are of importance in this case.

He said that in dealing with such a dispute the tribunal should be guided by the five books of the *Vinaya* Text *and* the commentaries, sub-commentaries and scholia thereon—the *Atthakathas*, *Tikas* and *Ghandhandara*—and that the *Thathanabaing* and his Council did not recognise the authority of the *Dhammathats*.

In this connection, referring to *Nga Po Thin's* case, the full bench said " we are at one with Mr. MacColl in holding that cases of this nature should be decided according to the ecclesiastical law, but we think that in basing his decision on the *Palidaw* (the five books of the *Vinaya* Texts) alone he took too narrow a stand-point." After saying that the *Dhammathats* could not be recognised as an authentic guide they said " At the same time we cannot entirely exclude the *Dhammathats* from consideration and where the ecclesiastical law is silent we are of opinion that the provisions of the *Dhammathats* should be taken into account if they are not inconsistent with the *Vinaya* and its commentaries, for the *Dhammathats* throw a valuable light on the established custom of the country even in regard to ecclesiastical matters, at a period still very recent when compared with the

(10) (1917-1918) 9 L.B.R., 220.

age of the *Vinaya* and the early commentaries thereon."

The *Thathanabaing's* sixth answer was as follows :—

"VI. The properties which a *Bhikku* can lawfully own as his *poggalika* are :—

(*a*) Robes, food monastery and medicine known as the four requisites ;

(*b*) All utensils allowed by the *Vinaya* ;

(*c*) When paddy lands are made over to a layman (the *kappiya kuraka*) and the benefits derived from the said lands are handed over to the *bhikku*, he can enjoy them according to the *vinaya* rules.

The *bhikku* owns the paddy lands as his *poggalika* and has full rights of disposal.

The seventh answer was :—

"VII. Bearing in mind the answers to questions 4, 5, and 6, if a *bhikku* dies leaving paddy lands without disposing of them in his life-time, the lands so left become *Sanghika* property. If in his life-time he gave them away in accordance with the *vinaya* to others and the donees accept them in accordance with the *vinaya* rules the donees who so accept them are the owners thereof."

The decision of the Court was "A *pôngyi* after his ordination cannot inherit from his lay relatives. On the death of a *pôngyi* his lay relatives cannot inherit from him land which had been given to him outright as a religious gift."

This decision was strictly limited to an answer to the questions referred. Consequently the finding that a *pôngyi* can hold lands as his *poggalika* property

1924

U PANDAWUN v. U SANDIMA.

CARR, J.

was not expressed. But it is necessarily implied. And if he can so hold paddy lands I think it must necessarily be held that he can hold a *kyaung* as *poggalika property.*

This view is further supported by the case of *U Zeyanta* v. *U Naga* (11), judgment in which was delivered by two of the judges who decided *Shwe Ton's* case (10), on the same day as the judgment in that case.

In view of these decisions and the other authorities quoted I think it must be held that the decision in *Nga Po Thin's* case was wrong. I hold that a *pôngyi* may own a *kyaung* as his *poggalika* property and that he can in his life-time validly transfer it by gift.

I can find no other ground for holding that U Ariya's gift of the *kyaung* in dispute to the appellant was invalid. I would therefore allow this appeal and give judgment for the plaintiff-appellant as prayed, with costs in both Courts. Advocate's fee in this Court ten gold mohurs.

LENTAIGNE, J.—I concur.

I am satisfied that, if sections 123 and 129 of the Transfer of Property Act, 1882, are read together, section 123 must be contrued as enumerating the *formalities* requisite for the making of valid gifts by Hindus and Buddhists, provided that the gifts are otherwise valid under the personal law applicable to the donor. The authorities cited in *Lallu Singh* v. *Gur Narain* (i) support the proposition that section 123, in effect, does away with the necessity of a delivery of possession as an extra formality in the case of a gift made by a registered deed executed by a Hindu donor. That force of the section is clearly necessary in the case of gift of moveable property if

(11) (1917-1918) 9 L.B.R., 258. (i) (1922), 45 All., 115.

the registered deed is not to be treated as an unnecessary redundant or mality ; and a similar uniform construction should be adopted for the same requisite in the same section in its more extended application to gifts of immoveable property. This construction should be equally applicable to gifts made by Hindu and Buddhist donors.

As regards the decision in *Nga Po Thin* v. *U Thi Hla* (2), I think that the preponderance of the authorities is strongly in favour of the finding come to by my brother Carr on that part of the case and that *Nga Po Thin's* case was wrongly decided. I would hold that the plaintiff-appellant has proved his title to recover possession of the *kyaung* as donee under the deed of gift on which his case is based.

I would, therefore, set aside the decree of the lower Court and grant the plaintiff-appellant a decree for recovery of possession of the *kyaung* with costs in both Courts. I would fix Advocate's fee in this Court at 10 gold mohurs.

(2) (1913), U.B.R. (1910-13), Vol. I, page 183.