

sole heir. As Maung Hla Baw had acquired legal title to the property in suit at the time of his death the plaintiff-appellant is entitled to a decree as prayed for in her plaint.

I agree that this appeal be allowed and decree of the lower Court be set aside and plaintiff's suit decreed with costs throughout.

1927
 MA TIN U
 v.
 MA MA
 THAN
 AND TWO.
 —
 MYA BU, J.

APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mya Bu.

MAUNG THU KA AND ONE

v.

U THUNANDA AND ONE.*

1927
 Feb. 18.

Buddhist Law—Disposal of property by a document, in form as of gift, whether and when void as being testamentary in nature—Deferring the vesting of the property till the death of settlor.

Where a document by which property was disposed of under the guise of a deed of gift or trust was in reality an attempt to dispose of the owner's property after death in order to defeat the operation of the ordinary laws of inheritance, *held*, that the document being a will is void if executed by a person subject to the Buddhist law.

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

Tha Gywe and S. Mukerjee—for Appellants.

Mitter—for 1st Respondent.

PRATT AND MYA BU, JJ.—Plaintiff, U Thunanda, a Buddhist monk, sued for a declaration of title with regard to certain trust property, a house and land, for possession, mesne profits and a decree for administration of the trust by himself or by the Court.

The property originally belonged to Ma Shin, a Burmese Buddhist lady who died in 1924.

* Civil First Appeal No. 49 of 1926 (at Mandalay).

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MAUNG
THU KA
AND ONE

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U THUNANDA
AND ONE.PRATT AND
MYA BU, JJ.

On the 2nd March 1916 Ma Shin executed the document Exhibit B, which was stamped and registered, in favour of U Wimala, a Buddhist monk.

By the document Ma Shin purported to make over the suit property with possession to U Wimala, as a pious offering, with the direction that after her death he will sell the house and land and with Rs. 2,000 of the sale proceeds pay Rs. 1,000 to her sister Me Ni, Rs. 500 to her daughter-in-law Ma Shin, and Rs. 500 to Ma Pyu, mother of Ma Shin.

The balance of the sale proceeds is to be devoted to building a pagoda.

Unfortunately U Wimala died before he could carry out the directions in the document and was succeeded by U Thunanda the present plaintiff.

According to U Thunanda, U Wimala was in possession of the suit property and made it over to him as his successor in the monastery.

On the 30th March 1920 Ma Shin executed a fresh document Exhibit C in favour of plaintiff.

The document recites that U Wimala died on the 27th July 1917, that before his death he made over his properties including the house and land in suit with possession to his senior disciple U Thunanda and that Ma Shin desires for a second time to make a charitable gift with possession of the house and land. She announces her intention to use and occupy the property during her lifetime, and directs that on her death U Thunanda is to have it sold, give Rs. 1,500 to the mother of Ma Shin, (which is altered to Rs. 1,000 in a latter portion of the document) and devote the balance of the sale proceeds to erection of a pagoda.

The learned District Judge framed an issue as to whether the Exhibits B and C were on the face of

them wills and found that they were not. He held that they were outright gifts subject to conditions that they were irrevocable, vesting the land in the donees immediately, subject to the retention of a life interest by the donor, and were not wills.

It is to be regretted that the Judge did not frame the issue somewhat differently in view of his finding that it was clear that Ma Shin was trying to dispose of her property after her death to prevent the operation of the ordinary laws of inheritance, and that the two deeds fulfil the definition of a will given in section 2 (h) of the Succession Act.

This is tantamount to a finding that the documents are *prima facie* wills, and the Judge would have been saved this apparent contradiction, had he framed the issue in the form "Are B and C documents of a testamentary nature."

The two documents must also be taken separately. The first, Exhibit B, is clearly not a gift. It professes to make over possession to U Wimala, but gives him no personal interest therein, the only directions being for the disposal of the property after the death of Ma Shin. At its most favourable construction the document creates a trust and makes U Wimala a trustee. The lower Court was wrong in saying that Ma Shin retained a life interest under Exhibit B. There is no such provision.

The document is, however, obviously a will under the guise of a deed of gift or trust and as the lower Court saw was an attempt to dispose of the owner's property after death in order to defeat the operation of the ordinary laws of inheritance. Regarded as a trust deed it ceased to have any effect on the death of the trustee.

If it be regarded as of the nature of a will, then it was invalid.

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Exhibit C is of a similar nature. It gives instructions for the disposal of the property after Ma Shin's death, but although it professes to give possession to U Thunanda, it reserves the right of use and occupation to Ma Shin during her lifetime. It is clear that the real possession throughout remained with Ma Shin.

The document is not a deed of gift for the *pôngyi* gets nothing but symbolical possession of the property, and on the death of Ma Shin he has to dispose of the property in accordance with her directions, himself receiving no benefit from the estate.

It is in form a deed of trust but is in effect a will. It complies exactly with the terms of the definition of will in the Succession Act, namely "the legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death."

It is obviously a deliberate attempt to evade the ordinary Buddhist law of inheritance and as such invalid.

The attention of the District Court does not appear to have been drawn to the case of *Ma Thin Myaing v. Maung Gyi* (1), where the facts are very similar.

In that case the parties were Buddhists and a mother made a gift of land by deed of sale to three of her five children, subject to a condition that the gift was to take effect on her death. It was held that the gift was void, as it was in effect a disposition of property by will, though under the guise of a gift.

On the view taken by us of the documents plaintiff's suit was bound to fail.

We set aside the finding and decree of the District Court and dismiss the suit with costs in both Courts in favour of the appellant-defendants.

(1) (1923) 1 Ran. 351.