

APPELLATE CIVIL.

Before Mr. Justice Otter.

MAUNG KYAW ZA

v.

U DE BI AND ONE.*

1927

Jan. 13.

Buddhist Law—Property subject to Orasa's share—Subsequent property not subject to partition on remarriage of one parent—Partition what amounts to—Partition and gift distinguished—Orasa's share extinguished after twelve years and not merely barred—Limitation Act (IX of 1908), section 28.

Held, that the *orasa's* quarter share or the share of the children on remarriage of surviving parent is confined only to the property acquired during the course of the marriage of the parents.

Held, further that, unless at the time of the transfer of property, the transferee held an interest in the property, the transfer cannot be in law a partition.

Held, also that a gratuitous transfer to a person having no vested interest as joint owner in the property transferred is a gift and if the subject-matter is immoveable property, it must be effected by registered deed.

Held, further that the *orasa's* quarter share and the share of the children on remarriage of the surviving parent are extinguished at the end of twelve years.

Maung Po Kin and two others v. Maung Shwe Bya, 1 Ran. 405 ; *P.K.A.C.T. Chokalingam Chetty v. Yaung Ni and others*, 6 L.B.R. 170 ; *Shwe Po and one v. Maung Bein and one*, 8 L.B.R. 115—referred to.

Khoo—for the Appellant.

E Maung (1)—for the Respondents.

OTTER, J.—This was an action for the recovery of a sum of money being the value (*inter alia*) of certain immoveable property to which the appellant claimed to be entitled as having been transferred to his deceased wife in her lifetime by her father the 1st respondent.

In the lower Court one issue only was framed, *viz.*—

Do the properties mentioned in the schedule of the plaint belong to the deceased Ma The U as alleged?

* Special Civil Second Appeal No. 648 of 1925 against the decree of the District Court of Bassein in Civil Appeal No. 145 of 1925.

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The matter was gone into at some length and the facts and arguments appear clearly from the judgments in the two lower Courts. I am only concerned here with the immoveable property, for the claim in respect of certain other property was dismissed. I do not propose to discuss the contention put forward on the evidence called below at all, for Mr. E Maung who appears for the respondents, has taken points in the nature of preliminary points, which I think dispose of the matter. As I have indicated the 1st respondent is the father-in-law of the appellant, Ma The U, his daughter, having been married to the appellant. The suggestion on behalf of the appellant was that on the occasion of a third marriage of the father-in-law, he, by way of partition, transferred the suit property to his daughter, and that therefore the appellant would by inheritance be entitled to one-fourth share of it, and in that case the other three-fourths would go to his step-daughter the 2nd respondent. The 1st respondent is in possession of the property.

The first point taken by Mr. E Maung is that if the transfer by the father-in-law was said to be by way of partition it must be bad, for his deceased wife had no interest in the property at the time of the alleged partition. If on the other hand it is suggested that the transfer was by way of gift it is equally bad, for no registered document exists.

Upon the *first point* the evidence is that Ma The U's mother (and 1st respondent's first wife) died 30 years ago. Subsequently (some 27 years ago) it was stated that the 1st respondent married a second wife, and after her death (some twelve years ago) he married his third wife.

Mr. E Maung says that in order to obtain any interest at all Ma The U must have attained the age of 18 years on her mother's death, and there is no

evidence as to how old she was. If the matter had rested here I might have remanded the case for further evidence upon this point for it is a new point. But Mr. E Maung goes further, he says even if Ma The U was of an age to obtain an interest, her interest was extinguished by process of limitation of time, and he refers me to Article 123 and section 28 of the Limitation Act of 1908. I can see no answer to this point, nor can Mr. Khoo on behalf of the appellant suggest one. Furthermore it is argued for the respondents that even if Ma The U's interest had revived upon the second marriage (as it might in law) her rights with regard to it must also be extinguished by reason of the same provisions of the Limitation Act, for more than twelve years has elapsed since such revival.

Mr. E Maung also argues that as it is in evidence that the suit property was acquired during the second marriage, Ma The U could never have acquired an interest in it at all, for it is only in respect of property acquired during the course of the marriage between her mother and the 1st respondent that she could acquire rights according to Burmese Buddhist Law. To this point again no answer has been suggested, and I can see none.

Thus it is clear to my mind that even if Ma The U ever in fact acquired an interest to this property (and I think she did not) such interest must have been extinguished before the time of the suggested partition. The following authorities were cited in the argument and they bear out the contentions of the respondents to which they were directed. *P.K.A.C.T. Chockalingam Chetty v. Yaung Ni and others* (1); *Shwe Po and one v. Maung Bein and one* (2); *Maung Po Kin and two others v. Maung Shwe Bya* (3).

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(1) 6 L.B.R. 170.

(2) 8 L.B.R. 115.

(3) (1923) 1 Ran. 405.

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If therefore Ma The U had no interest at the time of the alleged partition the transfer cannot be said to have been *by way of partition*.

That being so it cannot be suggested that any transfer was effectual, for a mere gift of immoveable property must be effected by a registered instrument (section 123 of the Transfer of Property Act of 1882).

Mr. Khoo on behalf of the appellant has contended that as these points are new points and were not raised in the lower Courts I ought at least to remand the case for further evidence to be taken. He does not argue that they are not good points upon the evidence upon the record.

I do not think I ought to accede to this suggestion, for it is difficult to see what evidence could be called which would be likely to assist the appellant. Evidence was given as to the dates of the marriages and deaths I have referred to and I have no doubt it is approximately correct. It is only upon the question of dates that further evidence would be relevant upon the questions of limitation, and I have no doubt at all that the position would not be altered by the recording of such evidence, if available.

In these circumstances the appellant cannot prove a right to the immoveable property in suit and the decision of the District Court must be upheld, though on different grounds. The appeal is dismissed with costs.