

*Somabhai & another* (1) was followed. The same principle seems to me to apply to this case. \* The suit must be treated as though it had been tried by a Court of Small Causes and no appeal lay. The orders passed by the District Court are therefore illegal.

I therefore set aside the decree of the District Court and restore that of the trial Court dismissing the suit of the plaintiff-respondent. The plaintiff-respondent will pay the costs of the defendant-petitioner in all three Courts.

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### APPELLATE CIVIL.

*Before Mr. Justice Chari and Mr. Justice Brown.*

MA KIN

v.

MAUNG PO MYIT AND OTHERS.\*

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Sept. 2.

*Buddhist Law—Inheritance—Nephews—Children of elder brother not excluded by children of younger brother.*

*Held*, that whilst a younger brother of the deceased Buddhist would exclude an elder brother, if they survive him, a nephew by the elder brother would not be excluded by a nephew by the younger brother, where no brother or sister of the deceased survives him.

*Ma Kyaw v. Ma Pu*, 2 U.B.R. (92-96), 189; *Maung Ba Gon v. Ma Pwa Thit* 5 Ran. 747; *Maung Po Thu Daw v. Maung Po Thau*, 1 Ran. 316—referred to.

*Po Han* for the appellant.

*Ba Maung* and *Maung Myint* for the respondents.

CHARI and BROWN, JJ.—The property in dispute in this case is the estate of one Daw Pwa, a Burman

(1) (1900) 25 Bom. 417.

\* Civil First Appeal No. 60 of 1929 from the judgment of the Original Side in Civil Regular No. 139 of 1928.

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Buddhist, deceased. At the time of her death, she left surviving the plaintiff-respondent Po Myit and the defendant-respondent Ko Tun Gyaw, who are sons of her elder brother, the defendant-appellant Ma Kin, a daughter of a younger brother, and some grand-nephews and nieces. The only question for decision in this appeal is as to the shares which the different heirs take in her estate.

The trial Judge has found that the grand nephews and nieces take no share, and the correctness of this decision has not been questioned before us. The trial Judge further found that the three nephews and nieces are entitled under Buddhist Law to share in the estate equally. It is against this decision that the present appeal is filed.

It is contended on behalf of the appellant Ma Kin that as she is the daughter of a younger brother of the deceased, whereas Po Myit and Tun Gyaw are sons of an elder brother, she is entitled to the whole estate. The claim is based on the general principle that inheritance shall never ascend when it is possible for it to descend. In volume 10, section 18, of the *Manugye Dhammathat*, the following passage occurs :

"When after the death of the parents each of the children is established in his own house, the law that the property shall not ascend is this : If after the heirs have received their share, and established themselves separately, one shall die without leaving direct heirs, *i.e.*, wife or husband, son or daughter, let the property not ascend to the elder brothers or sisters ; let the younger brothers and sisters only of the deceased share it. This is what is meant by not allowing the property to ascend."

From this it is clear that a younger brother or sister would exclude an elder brother or sister. The question we have to decide is whether the same principle has to be extended to the case of nephews and nieces. It might be argued that as succession to an elder brother is held to involve ascent of

inheritance, the claim of the children of an elder brother also involves ascent of inheritance and that the children of the younger brother should therefore be preferred to them. But it is dangerous to go too far in making too great deductions from the various principles set forth in the *Dhammathats*, and we think that the question must depend on whether nephews and nieces are regarded as inheriting in their own right or as representing their deceased parents.

In the case of *Maung Kyaw and 3 v. Ma Pu and one* (1), there were three brothers and sisters. The two elder died first each leaving children. On the death of the youngest sister without heirs, it was held that the children of the elder brother and sister inherited *per stirpes*, that is to say, that their claim was not in their own right but as representing their parents. If this decision were correct, it would be a strong argument in favour of the contention put forward on behalf of the appellant in this case, but in view of the recent decisions of this Court, we think it is very doubtful whether the decision in *Maung Kyaw's* case can now be considered as good law.

In the case of *Maung Po Thu Daw v. Maung Po Than* (2), it was held that where the only heirs were grand-children, the grand-children were entitled to claim *per capita* and not *per stirpes*. At page 333 of the judgment the following passage occurs:—

“The balance of probability seems however to be in favour of the former view, since the Burmese system of inheritance is based largely on the personal relations shown to have subsisted between the deceased and the heirs. . . . Where, therefore, several individuals stand in the same degree of relationship towards the *propositus*, and, presumably, their personal connection with the latter was the same, there does not seem to be any *primâ*

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(1) U.B.R. Vol. 2 (1892-96) 189.

(2) (1923) 1 Ran. 316.

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*factis* reason why an only child should be favoured over and above another who is in exactly the same position except that he is one of several born of the same parents. Both of them 'reached the inheritance' in the same way."

This case was followed and the principle extended in the case of *Maung Ba Gon v. Ma Pwa Thit* (1). The claimants in that case were cousins of the deceased and it was held that they were entitled to claim *per capita*, that is to say, in their own right and not as representing their parents. The principle followed in that case was that when the heirs are all related in the same degree to the *propositus* they inherit each in his own right and not by representation, and that therefore each shares equally with all the others.

In this case the three claimants are all related in the same degree, as nephew and niece, and following the principle held in *Maung Ba Gon's* case they are entitled to inherit in their own right. That being so, although had their parents been alive at the time of the death of Daw Pwa, the parent of Ma Kin would have inherited the whole estate, it does not follow that now that the parents are dead, Ma Kin would inherit the whole of the estate. She does not represent her parent, but claims merely as a niece. No case has been cited to us in which the principle that inheritance should not ascend has been carried to the extent we are asked to carry it by the appellant in this case. We are of opinion that the parties must be considered in this case as claiming as nephews and niece and not as representing their deceased parents and that the decision of the trial Judge that they are entitled to equal third shares in the estate is correct.

We therefore dismiss this appeal with costs.

(1) (1927) 5 Ran. 747.