

APPELLATE CIVIL.

Before Sir Benjamin Heald, Kt., Officiating Chief Justice, and
Mr. Justice Maung Ba.

MA NWE *v.* MA SAI DA

MA SAI DA *v.* MA NWE.*

1929

June 24.

Buddhist Law—Inheritance—Payin—Property inherited between two marriages, whether payin to the second marriage—Share of the atet children in such property.

Held, that at Burmese Buddhist law *payin* to the second marriage includes property acquired during the former marriage as also the property acquired after the termination of the first marriage and before the marriage with the second husband or wife.

Held, accordingly that where after the death of the first wife and before marriage with second wife the husband inherited property from his parents, the children by the first marriage are entitled to three-fourths in such property as against their step-mother on the father's death.

Ma Hsin Bwin v. U Shwe Gon, 8 L.B.R. 1. (P.C.)—*referred to*.

Ma Leik v. Maung Nwa, 4 L.B.R. 110—*dissented from*.

Tun Tin for the appellant.

Krishnaswami for the respondent.

HEALD, OFFG. C.J., and MAUNG BA, J.—These two appeals arise out of an administration suit filed in the District Court of Hanthawaddy by one Ma Nwe who claims to be the legitimate daughter of the late U Tun Lin by his wife Ma Ngwe Sa against her step-mother Ma Sai Da. Ma Nwe claimed a three-fourths share valued at Rs. 1,16,000. The status of her mother as a wife was denied, and it was contended that, if Ma Nwe was entitled to any share, it could not be three-fourths. But what the share should be has not been stated in the written statement. The learned District Judge

* Civil First Appeals 24 and 36 of 1929, from the judgment of the District Court of Hanthawaddy in Civil Regular No. 22 of 1928.

held that Ma Nwe is U Tun Lin's legitimate child and passed a decree in her favour giving a half share in the *payin* property of her father and one-eighth share in the *hnapazon* property of the last marriage. Ma Nwe appeals because she considers that she is entitled to three-fourths share in the *payin* property. Ma Sai Da also appeals because Ma Nwe has been held to be the legitimate child of U Tun Lin.

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[The learned Judges after discussing the evidence held that there was no reason to disturb the finding of the District Court that Ma Nwe was the legitimate child of U Tun Lin. The judgment then proceeds :—]

Now we come to the question of shares.

The estate appears to be made up of the *payin* property brought to the last marriage by the deceased as well as of the *hnapazon* of that marriage. The major portion was inherited after the death of Ma Nwe's mother and before the marriage with Ma Sai Da. Tun Lin's father U Ein Ga died in 1273 (1911). A month or two after U Ein Ga's death, there was a partition of his estate between Tun Lin and his step-mother Ma Yon. Ma Sai Da was married about three years later. The inherited property no doubt constituted the *payin* of Tun Lin when he married Ma Sai Da. The learned Judge followed the division made in a similar case of *Ma Leik and others v. Maung Nwa and others* (1), by Mr. Justice Moore, in which Mr. Justice Hartnoll concurred, namely, half to the step-child and half to the step-parent. Mr. Justice Moore, after referring to the *Dhammathats* in section 229 of the Kinwun Mingyi's Digest, observes, "There is thus a fairly general consensus of authority for the proposition that of the property taken by the father to the second marriage the children of the first marriage shall receive

(1) (1909) 4 L.B.R. 110.

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three-quarters and their step-mother one-quarter. I think it is clear from the above quotation that the property referred to is the property of the first marriage, and that the children of the first marriage are awarded a larger share in this property because it was their parents' property at the commencement of their union." Out of the 25 *Dhammathats* quoted in section 229 about seven seem to support that view. They refer to the *payin* brought to the second marriage as the property of the former marriage. But it is very strange that *Manukye* has not been quoted in section 229 at all. The Privy Council has given that *Dhammathat* a commanding position among all the *Dhammathats* and in the case of *Ma Hnin Bwin v. U Shwe Gon* (1), their Lordships have laid down that where *Manukye* is not ambiguous other *Dhammathats* do not require to be referred to.

Section 8 of Book X of the *Manukye* gives the rule of partition between the step-parent and the step-child regarding the *payin* taken to the second marriage and the *lettetpwa* of that marriage. As regards *payin* it gives three-fourths to the *atet* child and one-fourth to the step-parent. This division is the same as that laid down by the majority of the *Dhammathats* quoted in section 229 of the Digest. But *Manukye* does not appear to restrict the *payin* to the property acquired during the former marriage. It seems to include also the property acquired during the two marriages. The expression *Maya dwin shithamya oksa* " (all the properties possessed by the wife) is wide enough to include such property.

The above rule of partition given in the *Manukye* is in no way ambiguous. If the property was inherited before the last marriage, the step-parent is entitled to

only a quarter share, but, if the property was inherited during the last marriage, the step-parent is entitled to half. We therefore cannot accept the rule of division laid down in *Ma Leik's* case. As regards the *hnapazon* of the last marriage, the division made by the lower Court is correct and is in accordance with the rule of partition laid down in the Full Bench case of *Ma Nyein E v. Maung Maung and two* (1).

We accordingly modify the decree of the lower Court by increasing Ma Nwe's share in the inherited property of her father from one half to three-fourths. She is entitled to her costs on the value of the quarter share in this Court and on the value of the three-quarter share in the Court below.

Ma Sai Da's cross-appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Otter.

V.E.A. CHETTYAR FIRM

v.

THE COMMISSIONER OF INCOME-TAX. *

1929
Mar. 25.

Income-tax Act (XI of 1922), ss. 33, 66 (1)—Review order by Commissioner—Court cannot compel Commissioner to state a case on orders passed under s. 33—Specific Relief Act (I of 1877), s. 45—Powers of the Court defined under a special Act cannot be enlarged by reference to a general Act—No power to issue mandatory order.

Where the Commissioner of Income-tax passes an order on review under the provisions of s. 33 of the Income-tax Act and refuses on the application of an assessee to refer the matter to the High Court under the provisions of s. 66 (1), there is no provision in the Act enabling the High Court to require the Commissioner to do so. The High Court cannot use its discretionary powers under s. 45 of the Specific Relief Act in such a case, for the conditions for the exercise of the power of the Court to require the Commissioner to state and refer a case are expressly laid down in s. 66 (3) of the Income-tax Act. Where

* Civil Miscellaneous Application No. 96 of 1928

(1) (1925) 3 Ran. 549.