1929

D. R. SAKLAT, A. B MEHTA, v. J. HORMASJEE.

HEALD AND MAUNG BA, JJ.

we dispose of the matter on the assumption that personally both candidates are entirely suitable. We are of opinion that in the case of such an appointment the wishes of the community ought to be considered and that unless there is some cogent reason to the contrary the person who has the support of the majority of the community ought to be appointed. We do not consider that the learned Judge's opinion that the trustees ought not to be related to each other was sufficient in the circumstances of this case to warrant his disregarding the wishes of the community for the expression of which the Scheme itself provided.

We are therefore constrained to set aside the order of the learned Judge appointing respondent to be trustee, and we appoint Mr. A. B. Mehta to be trustee in the vacancy caused by the death of Mr. B. Cowasjee.

We see no reason why either the Trust or the respondent should be made liable for the costs of these proceedings and accordingly we direct that the parties do bear their own costs.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

MA AYE YIN AND OTHERS

v.

MA MI MI AND OTHERS.*

1929

June 13.

Buddhist Law—Orasa—*Eldest child dying in infancy—Second child whether entitled to the status—Joint living and active assistance in parent's business not essential.*

Held, that if the first born child dies before attaining the age of majority, the eldest child who attains the age at which he or she would be able to take the place of the father or the mother in case of their death is the *orasa*.

Held, also, that for an *orasa* to qualify for his special rights, joint living with the surviving parent and active assistance in his or her duties is not necessary.

* Civil First Appeal 249 of 1928, from the judgment of the District Court of Amherst in Civil Regular No. 11 of 1928.

1929

MA AYE YIN v. MA MI MI.

Kirkwood v. *Maung Sin*, 2 Ran. 693 (P.C.) ; *Ma Hla U* v. *Maung Shwe* . 1 Ran. 370 ; *Tun Myaing* v. *Ba Tun*, 2 L.B.R. 292—*referred to*.

Anklesaria for the appellants.

Htoon Aung Gyaw for the respondents.

RUTLEDGE, C.J., and BROWN, J.—The property in dispute in this case is the estate of one U Aung Min deceased. U Aung Min married one Daw Ma Ma and they had in all ten children. The eldest child was a girl Ma May, who died at the age of 4. The second child was Maung Kin Maung, the father of the respondents in this case. Maung Kin Maung predeceased U Aung Min. The appellents are the five surviving children of U Aung Min. The respondents brought a suit for the administration of the estate, claiming that Maung Kin Maung was the *orasa* child, and that they were therefore entitled to share equally with the surviving sons and daughters. They claimed therefore a one-sixth share in the estate. It is admitted that, if Maung Kin Maung had the status of *orasa*, they are entitled to this one-sixth share, and that if he had not, they are entitled only to a one-twenty-fourth share. The trial Judge has found that the plaintiffs established the *orasa* status of their father, and has passed a decree, declaring them entitled to a one-sixth share in his estate. Against this decree the defendants have appealed.

The appellants claim that Maung Kin Maung could not be the *orasa* child, because he was not the first born child, and even if he did acquire the status of *orasa* his children have forfeited the right to base their claim on that status by reason of the fact that he did not live with his parents or helped in the acquisition of the family estate. The question of the rights of an *orasa* was dealt with at very great length by a Full Bench of the late Chief Court of

Lower Burma and subsequently by their Lordships of the Privy Council in the case of *Kirkwood* alias *Ma Thein and others* v. *Maung Sin and another* (1). It is pointed out in that case that the rights of an *orasa* have to be considered in two different aspects. There are first of all the rights of a son claiming a quarter share of the estate on his mother's death, or of a daughter claiming a similar share on the death of the father. There are secondly the rights of the children of an *orasa*, who predeceased the parents, claiming a share in the inheritance equal to that of the younger brothers' and sisters. *Ma Thein's* case dealt with the claims of an *orasa* in the latter aspect. The finding was that the *orasa* must be the eldest born child capable of undertaking the responsibilities of the deceased parents, and that that status should be attained during the life-time of both parents by a son, if he was the eldest born child, and by a daughter, if she was the eldest born. Once the status has been attained either by the son or the daughter, no one else can claim that status.

It was suggested in argument before us in the present case that, as U Aung Min was predeceased by his wife, it would be a daughter, and not a son, who could claim as *orasa*. This contention was in our opinion disposed of in *Ma Thein's* case. Maung Kin Maung attained the age of majority during the life-time of both his parents, and was capable, therefore, of attaining the status of an *orasa*. If he did attain that status, then it makes no difference to his status that it was his mother, and not his father, who died first. On his mother's death he would not be entitled to claim a quarter share of the estate, but his status so far as the claims of the children

(1) (1924) 2 Ran. 693.

1929

MA AYE YIN v. MA MI MI.

RUTLEDGE, C.J., AND BROWN, J.

are concerned would not be affected. It is further contended, however, that Maung Kin Maung never did attain the status of *orasa*, and that he could not do so, as he was not the eldest born child. In the case of *Tun Myaing* v. *Ba Tun* (1), at page 294 the following principles were enunciated: "The eldest born son is the *orasa* by right; but he does not attain the complete status as such till he attains his majority, and becomes fit to assume his father's duties and responsibilities and to assist in the acquisition or management of the family estate. If he dies before he attains his majority, or if he is incompetent to fulfil the above conditions, then his next younger brother, subject to the same conditions, succeeds to his position as *orasa*. If, however, the eldest son attains his majority and fulfils the prescribed conditions, and then dies before his parents, his position as *orasa* remains unfilled and the next brother does not succeed to it." If this enunciation of the law is correct, then it is clear that for the status of *orasa* to be attained it is not in all cases necessary for the child, for whom that status is claimed, to have been the eldest born if the eldest born died in infancy.

It is contended, however, that this decision and any other decision of a like nature were overruled by the decision of the Privy Council in *Ma Thein's* case. In their discussion of the relevant passages from the *Dhammathats* in their judgment in that case their Lordships pointed out the insistence on the *orasa* child being the eldest born child of the wedded pair. Thus at page 783 they remark:—

"The *Vilasa* declares that on the death of the father the rule of partition between mother and son is as follows. It specifically states: 'If the son is the eldest born,' and 'if he

(1) (1924) 2 L.B.R. 292.

helped the parents in the acquisition of the family property, he shall get his father's elephant, etc. The remainder of the estate shall be divided into four shares the mother shall get three shares and the son one share' and to the question, 'Why should the eldest-born child get a fourth share?' the answer is :—'the parents obtained the child at the commencement of their wedded life by their earnest prayer and acquired the property with his or her assistance.' What can all this mean, except that 'the eldest son' referred to in all the *Dhammathats* is the eldest-born child of the wedded pair."

In the case before them their Lordships had not for consideration a case in which the eldest born child had died in infancy, and we do not think that their decision directly or impliedly involved a finding that, if the eldest born child died in infancy, no other child could ever attain the status of an *orasa*. It is true that in summing up the decision, their Lordships remark at page 786 :—

"The status does not depend on the decease of the father, where the child is a son ; or of the mother, where it is a daughter ; it comes into existence on the fulfilment of three conditions, *viz* : (1) that he or she is the first-born child ; (2) that it attains majority ; and (3) helps either in the acquisition of the family property and the discharge of the father's responsibilities ; or, if a daughter, helps the mother in the care of the property and the control and management of the household, which lie particularly within the mother's duties."

But as we have said there is no question in that case of the first born child having died in infancy, nor did their Lordships in any part of their judgment deal with such a case. In their final conclusion their Lordships expressed general assent with the observations of the Judges of the Chief Court, and on this point Mr. Justice Heald expressed his opinion clearly in the course of his judgment. At page 746 he remarks :—

"The question then arises whether if the eldest child dies in infancy, the next child succeeds as *auratha*. The *Dhammathats*, so far as I know, give no answer to this

1929

MA AYE YIN v. MA MI MI.

RUTLEDGE, C.J., AND BROWN, J.

question though as I have said the *Attasankhepa* considers the possibility of a case in which there is no *auratha* but only younger children. I think from my experience of cases under Burmese Buddhist law for more than twenty years, that there can be no doubt that children who do not grow up are always disregarded and that the eldest child who reaches an age at which he or she would be able to take the place of the father or mother in case of death would always be regarded as *auratha*."

Again at page 759 of his judgment he remarks:—

"The case of *Ma Ein Thu* v. *Maung Hla Dun* (5 B.L.T. 73) was one in which the question of the rights of grand-children arose and it was held that where the eldest child was a son who died in infancy, the son of the next eldest child, who was a daughter and who grew up, was entitled to share equally with his mother's younger sister. That decision was in my opinion correct, but the judgment seems to suggest that if there had been a son surviving instead of two daughters, the son might possibly have been *auratha* to the exclusion of the elder sister, and that view, I think, would be mistaken. The ruling was not, however officially reported."

He then proceeded to quote the case of *Ma Su* v. *Ma Tin* (1), in which the same view as to the effect of the eldest born child dying in infancy was considered. Certain remarks of Mr. Justice Duckworth suggest that he might have taken a contrary view. He states at pages 770 and 771 :—

"The point is that, if a son is not the first-born child, he can never be *auratha*, unless the eldest child dies before reaching majority or competency, and then only when the eldest child is a male. It is very doubtful whether, according to the *Dhammathats* another can become *auratha* in place of the deceased eldest daughter."

But he cites no authority in support of his view. The tendency of judicial decisions of recent years has been to place the sexes on a status of absolute equality with regard to their claims of inheritance in the estate of their deceased parents, and we know of no authority in the *Dhammathats* for the view that, if the eldest born child is a daughter and dies in

(1) (1912) 6 L.B.R. 77.

infancy, no other child can attain the status of an *orasa*. The views of Mr. Justice Heald on this point are generally in accord with previous decisions in Burma and we agree in those views.

The result is that Maung Kin Maung, who did not die apparently till he was over 40 years of age, did attain the status of *orasa*, and that he retained that status until his death unless it be held that he failed to fulfil certain other requisite conditions besides that of being the eldest child. We have already referred to the passage in their judgment in *Ma Thein's* case where their Lordships set forth the three conditions necessary for the coming into existence of the status of *orasa* by a son or daughter: (1) that he or she is the first-born child; (2) that it attains majority; and (3) helps in the acquisition of the family property and the discharge of the father's responsibilities if a son. In our view of the reasons we have already given, the first two requisites are satisfied in this case, and in stating the third requisite we do not think that their Lordships intended to lay down a definite rule which must be rigorously followed in every case.

In deciding on the applicability of these remarks to the present case, it must be remembered that in the case before their Lordships there was no question of the *orasa* not having helped in the acquisition of the family property, and on this point the remarks of their Lordships amount to little more than that these requisites are set forth in the Kyetyo *Dhammathat*. The remarks on the point are a summary of the result of extracts from the *Dhammathats* and cannot in our opinion be interpreted as intended to lay down any definite law on this point. There are certain passages in the *Dhammathats* which suggest that a child loses its rights of

1929

MA AYE YIN v. MA MI MI.

RUTLEDGE, C.J., AND BROWN, J.

inheritance on failure to live with its parents, and it is contended that this rule has still greater force when the rights claimed are the special rights of the *orasa*. In the case of *Ma Hla U* v. *Maung Shwe Yin and one* (1), the eldest daughter on the death of the mother claimed a quarter share in the joint estate. It was held that the mere fact that she had lived separately from her father and that she had never assumed the duties of her deceased mother in the family was not sufficient reason for denying her rights.

In the present case U Aung Min was a goldsmith. He sent his son Kin Maung to an English School and after leaving the School Kin Maung first became a clerk in a lawyer's office. Subsequently he became a teacher and then a clerk in the Deputy Commissioner's office, Thatôn. He was subsequently transferred to Pa-an as Sub-Accountant and later joined the establishment of the Divisional and Sessions Judge, Moulmein. He was then appointed a Myoôk. It is quite clear from his training and his subsequent occupation that he could not well assist his father in his business as a goldsmith, and indeed that his father never expected him to do so. There is no evidence that his relations with his parents were other than normal. In the course of his work he had been transferred away from Moulmein where his parents lived. But he never ceased to maintain filial relations with them, and there is evidence to the effect that he did at times help them with presents of money. Certain remarks by Heald, J., in *Ma Thein's* case on this point at pages 746 and 747 have been cited by the trial Judge :—

"There can, I think be no doubt that the *Dhammathats* which give a special share to the eldest child who is competent to take

(1) (1923) 1 Ran. 370.

the place of father or mother contemplate a family in which the *auratha* is living in the family house and does actually take the place of the parent. Indeed I doubt whether the *Dhammathats* contemplated the *auratha's* taking away the special share unless he or she was ousted from the position of head of the family by the surviving parents marrying again. Some of the *Dhammathats* would deprive a son or daughter, who does not live with the family and take the father's or mother's place of the *auratha* child's share, *vide* the texts cited in sections 36, 37, 40, 41 and 62 of the Digest, but I think that in this case, as in certain other cases, *e.g.*, the cases of adopted and step-children, the necessity for joint living may now be considered as archaic and obsolete and may be disregarded."

With these remarks we agree. There is nothing to show that Kin Maung's special help was ever asked for by his father or refused by him. His working first as a clerk in a lawyer's office and later on as a clerk in the Government service was apparently in accordance with the wishes of his parents. There is nothing to show that he ever failed his parents in any way in any family crisis and that being so, we do not consider that the mere fact of his not living with his parents and not having actively assisted in their business is sufficient reason for depriving him of the status of *orasa*. We are therefore of opinion that the case has been rightly decided by the trial Court, and that the respondents collectively are entitled to share equally in the estate of U Aung Min with the five appellants.

We accordingly dismiss this appeal. The trial Court directed the costs in that Court to come out of the estate, and we think that, in the circumstances, a similar order might fairly be passed here. We therefore direct that the costs of this appeal be awarded out of the estate.