APPELLATE CIVIL.

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

1929

Mar. 11.

MA SHWE YU AND OTHERS
v.
MA KIN NYUN AND OTHERS.*

Buddhist Law—Partition on remarriage of surviving parent—Estate subject to such partition the estate at remarriage.

Held, that at Burmese Buddhist law, when after the death of one parent, the surviving parent remarries, the children of the first marriage are entitled to claim partition, unless there has been a previous partition between them and the surviving parent. This right is a vested right.

Held, that the estate subject to such partition is the estate held by the surviving parent at the time of the remarriage.

Quaere: Whether the eldest child, even though a minor and incapable of being an *orasa* son, is entitled on remarriage of his surviving parent to one-fourth of the estate.

Ma Sein Ton v. *Ma Son*, 8 L.B.R. 501; *Ma Thaung* v. *Ma Than*, 5 Ran. 175 (P C.); *Maung Po Kin* v. *Maung Tun Yin*, 4 Ran. 207; *Maung Po San* v. *Maung Po Thet*, 3 Ran. 438; *Tun Tha* v. *Ma Thit*, 9 L.B.R 56 (P.C.)—*followed.*

Maung Kyaw Za v. *U De Bi*, 5 Ran. 125—*referred to.*

Thein Maung for the appellants.

Zeya for the respondents.

RUTLEDGE, C.J., AND CARR, J.—Throughout the hearing of this appeal it has been accepted as settled law that when a widower remarries his children by the first wife at once acquire a right to partition of the estate, and that the share of the children collectively is one-half, while the father takes one-half. That is the effect of the decision of a Bench of this Court in *Maung Po Kin* v. *Maung Tun Yin* (1) and we see no reason to question the correctness of that judgment in this respect. It is true that in our former

* Civil First Appeal No. 254 of 1927 from the judgment of the District Court of Pyapôn in Civil Regular No. 42 of 1926.

(1) (1926) 4 Ran. 207.

judgment in this appeal we did not accept that judgment in its entirety but our doubt was only whether the eldest son as such is individually entitled to a one-fourth share even though he may not have attained the status of *orasa*. That question as we said before, is not of practical importance in this case.

In our former judgment, we assumed, without discussing the question, that the estate to be divided was the joint estate of the parents of the appellants, *i.e.* the estate as it was at the time of the death of the mother. The question before us now is whether that view is correct or whether it should not instead be held that the estate in which the children are entitled to share is the actual estate of the father at the time of his remarriage.

We have been referred to a number of passages in the *Dhammathats* but after a careful consideration of these we are unable to find any very definite guidance in them. In no case does any *Dahammathat* say expressly what estate is to be divided, and such indications as are to be found are in our opinion much too vague to form a safe foundation for any definite finding either way. We think therefore that the question should be decided on considerations of equity having regard to such rules of the law of inheritance as can definitely be laid down.

In *Ma Sein Ton and two* v. *Ma Son* (1), it was ruled by a Full Bench of the late Chief Court of Lower Burma that "Subject to any claim by the *orasa* . . . a Burmese Buddhist widow has an absolute right of disposal of the whole of the joint property of herself and her late husband as against the children of their marriage."

(1) (1915) 8 L.B.R. 501.

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The same rule is, of course, applicable to the widower. This is now definitely settled law, but it is subject to the qualification that the rule applies only as long as the widow or widower does not remarry, and that on remarriage the children of the first marriage become entitled to one-half of the estate, as laid down in *Maung Po Kin's* case (1).

On the analogy of the Privy Council judgment in *Tun Tha* v. *Ma Thit* (2) it must, we think, be held that this right to partition vests in the children from the moment of remarriage of the parent.

Having regard to these rules, there seems to us to be a very strong case for holding that the estate to be divided is that existing at the time of remarriage, *i.e.*, at the time of the vesting of the right to partition. The opposite view clearly brings the rule laid down in *Ma Sein Tun's* case (3) and *Maung Po Kin's* case (1) into conflict, for it is very possible that in the interval between the death of the first spouse and the remarriage, the surviving spouse may, in exercise of his absolute right of disposal, have alienated some of the property forming the joint estate of the first marriage. But such alienation must, we think, be held to be entirely valid and not contestable by the children of the first marriage. If therefore those children are bound by such alienation it is only equitable that they should be entitled to share in any acquisition made by the surviving parent after the death of his first spouse and before his remarriage.

A case which is relied upon as supporting this view is *Maung Po San* v. *Maung Po Thet* (4), in which it was laid down that "What the Burmese Buddhist Law regards in its rules for partition is the family rather than the individual, and so long as the

(1) (1926) 4 Ran. 207.
(2) (1916) 9 L.B.R. 56.
(3) (1915) 8 L.B.R. 501.
(4) (1925) 3 Ran. 438.

family subsists all who are members of it are regarded as being entitled to partition on its dissolution. On the surviving parent's remarriage, either the old family might be regarded as continuing or a new family might be regarded as being instituted."

On this principle, which we accept, the proper conception would be that on the death of one parent the surviving parent and the children remain one family and the property is family property, although its management is vested in the parent and the children cannot claim partition. A step-parent introduced into the family is a disintegrating element, whose influence may be detrimental to the interests of the children, and for that reason the right of claiming partition on remarriage of the parent is given.

The Privy Council judgment in *Ma Thaung* v. *Ma Than* (1) lends support to this view. It lays down that when there has been a partition on the remarriage of the parent, the children have no further claim to inherit on the death of the parent. In other words, from the time of the partition the family is broken up, and the parent and step-parent form a new family. This conception is further exemplified in the accepted rule that when there has been no partition on re-marriage the children of the first marriage are entitled to divide the estate with the step-parent on the death of their own parent, but that if even then they do not claim partition they have a further right to inherit on the death of the step-parent.

Having regard to all these rules, we think that on equitable considerations the estate to be divided is the estate as it is at the time of remarriage of the surviving parent.

There seem to be no strong grounds for holding this view to be wrong. It is true that in *Ma Sein*

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Ton's case (1) the learned Judges speak of the "joint estate of the parents" as liable to partition, thus implying that it is the estate as it stood at the death of the first parent that is so liable. But this does not appear to be a considered decision on the question now before us, which in fact did not arise in that case.

And in *Maung Kyaw Za* v. *U De Bi* (2), in which one Judge remarked that the share of the children on remarriage of the surviving parent is confined to property acquired during the marriage of their parents—the dictum was *obiter*, for the only property in question in that case was property acquired during the second marriage. And this also was quite evidently not a considered decision of the question before us.

It has also been urged that what the children take on the remarriage of the surviving parent is merely their deceased parent's share in the *hnapazon* estate, and that therefore it is that *hnapazon* estate that is to be partitioned. We are not satisfied of the correctness of this proposition. If it were a question merely of the disposal of the interest of the deceased parent there seems to be no reason why the surviving parent should not receive a share. And there seems also to be no reason why, on that basis, the children should have no further right to a share on the death of the surviving parent. We think that the more correct view of the matter is that the family is broken up and that it is the family estate that is partitioned.

We hold, therefore, that when, after the death of one parent, the surviving parent remarries the children of the first marriage are entitled to partition of the estate held by the surviving parent at the time of remarriage—unless, of course, there has already been a partition between the surviving parent and the children.

(1) (1925) 8 L.B.R. 501.

(2) (1927) 5 Ran. 125.

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On this view of the law it will be necessary to return the case for further evidence. The issue framed in the District Court related to the debts of Maung Kyaw Yon and his first wife, Ma On, at the time of the latter's death. He must now ascertain what were Kya Yon's debts at the time of his marriage to Ma E Hwi.

The proceedings are returned to the District Court for a trial of and finding on the following issue :—

"What were Maung Kyaw Yon's debts at the time of his marriage to Ma E Hwi?"

This issue should be tried and the finding returned without delay.

FULL BENCH (CIVIL).

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, Mr. Justice Carr, Mr. Justice Maung Ba, Mr. Justice Mya Bu and Mr. Justice Brown.

1929

Mar. 18, 19.

U PYINNYA AND ANOTHER
v.
U DIPA.*

Court Fees Act (VII of 1870), Sch. II, Art. 17 (vi)—Kyaung *and its site, market value of—Court-fees in suit for possession of* kyaung, *how determined—Buddhist Ecclesiastical Law*—Sanghika kyaung, *power of appointment to*—Taik-ok *whether empowered to nominate a successor to a deceased head of a* kyaung—*Trust scheme granting powers of the head of a monastery on trustees —Presiding monk of* sanghika kyaung, *by whom to be elected.*

Held, that in a suit for possession of a *pôngyi kyaung* and its site, court-fees are payable under Art. 17 (vi), Sch. II of the Court Fees Act.

Held, that where a trust scheme for the management of a *sanghika kyaungdaik* granted the trustees powers, to control all persons in the *kyaungdaik* such as are allowed to the head of a monastery by the Buddhist Ecclesiastical Law and to settle disputes relating to the possession of *kyaungs* and *zayats*, the trustees are entitled to appoint a successor to a deceased presiding monk of a *sanghika kyaung*

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* Civil First Appeal No. 176 of 1928 from the judgment of the Original Side in th Civil Regular No. 225 of 1927.