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of discovery of new matter or evidence which the applicant alleged could not have been adduced by him when the original decree was passed that the application was allowed. The District Court set aside the order granting the review because it held that the reason for which the review was granted was not sufficient reason within the meaning of Order XLVII, Rule 1. In dealing with the appeal the Court was not considering any objection that could have been raised under the provisions of Rule 7 of Order XLVII, and the Court was therefore in my opinion acting without jurisdiction in setting aside the order granting the review.

I therefore set aside the orders of the District Court and restore those of the trial Court granting the review. The respondent Ma Mya Kyin will pay the costs of the petitioner Lan Tin Ngan in this Court and in the District Court, advocate's fee in this Court two gold mohurs.

APPELLATE CIVIL.

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

MA THEIN

v.

MA MYA AND ONE.*

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Feb. 13.

Buddhist Law—Remarriage of surviving parent—Rights of children other than orasa *to partition*—Kittima *children whether entitled to claim partition on remarriage of parent.*

Held, that on the remarriage of one parent after the death of the other, the *kanitha* children can sue for partition of the estate.

Held, further, that a *kittima* child can exercise the rights of a natural born child on such remarriage and claim partition.

Ma Hnin Bwin v. *U Shwe Gon*, 8 L.B.R. 1; *Ma Thin* v. *Ma Wa Yon*, 2 L.B.R. 255; *Maung Po An* v. *Ma Dwe*, 4 Ran. 184; *Maung Shwe Ywet* v. *Maung Tun Shein*, 9 L B.R. 199; *Mi The O* v. *Mi Swe*, 2 U.B.R. 46—*referred to.*

Maung Po Kin v. *Maung Tun Yin*, 4 Ran. 207—*followed.*

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* Civil First Appeal No. 147 of 1928 from the judgment of the Original Side in Civil Regular No. 408 of 1923.

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K. C. Bose for the appellant.

Hay for the respondents.

RUTLEDGE, C.J., and BROWN, J.—The appellant in this case, Ma Thein, claims to be the adopted daughter of U Maung Maung and his wife, Ma Pwa, deceased. After the death of Ma Pwa, U Maung Maung married Ma Mya, the respondent, who is a sister of Ma Pwa, and the appellant claims that she was again adopted by U Maung Maung and Ma Mya.

U Maung Maung died in 1914, and in 1918 Ma Mya married one Ba Than. The appellant claims partition of property on the ground that her surviving adoptive parent has married again.

The suit has been dismissed on the preliminary ground that such a suit does not lie.

Two questions arose for decision. It was contended in the first instance that under Burmese Buddhist Law, when one parent died and the surviving parent remarried, the *kanitha* children of the first marriage had no right to claim partition of property as against the surviving parent, and, secondly, it was claimed that, even if the *kanitha* children were entitled to claim, an adopted child would have no such right.

On the first point the learned trial Judge held that he was bound by the ruling of a Bench of this Court in the case of *Maung Po Kin and one* v. *Maung Tun Yin and two* (1). But on the second point he held in favour of the defendants, and, therefore, dismissed the suit.

The appellant, while, of course, supporting the finding of the trial Judge on the first point contends that he was wrong on the second point, and that an adopted child has the same right as natural children

(1) (1926) 4 Ran. 207.

to claim partition on remarriage of the surviving parent.

That a *keiktima* child is not in every respect, so far as inheritance is concerned, in the same position as natural children was decided in the case of *Maung Po An* v. *Ma Dwe* (1), where it was held that a *keiktima* adopted son could not claim from the adoptive mother her *auratha* son's quarter share of the estate on the death of the adoptive father, and the learned trial Judge has held that on the same analogy an adopted child cannot claim partition on remarriage.

We think that it will be more convenient in this appeal to deal with the first question raised before the trial Court first.

It is argued before us on behalf of the respondents that, while the trial Court was perfectly right in holding that the adopted child cannot claim partition on remarriage, the decision in *Maung Po Kin's* case was wrong. If we agree with him on this point, the second question raised does not arise; and, if we do not agree with the contention on this point, it will still be necessary to consider the principles on which *Maung Po Kin's* case was decided to enable us to come to a decision as to whether the general rights of *kanitha* children in this respect is a right shared also by adopted children.

Before *Maung Po Kin's* case was decided there were two directly contrary decisions bearing on this point. In the case of *Ma Thin and one* v. *Ma Wa Yon* (2), it was held that a daughter, being an only child, is entitled to claim a one-fourth share of her parents' joint estate from her mother, when the latter remarries after the father's death. The question then

(1) (1926) 4 Ran. 184.

(2) (1903-04) 2 L.B.R. 255.

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decided had reference only to the case of an eldest daughter, but the learned Judges who decided the case were clearly of opinion that the children generally were entitled to claim partition on remarriage.

A directly contrary view of the law was taken in Upper Burma in the case of *Mi The O* v. *Mi Swe and others* (1). In that case the late Mr. McColl held that on the remarriage of her mother, the eldest daughter could not make a general claim on the estate ; and, if he is right in this contention, clearly the *kanitha* children could make no such claim. There is no direct reference to *Mi The O's* case in the judgment in the case of *Maung Po Kin*. There is, however, a reference to an earlier case, that of *Maung Shwe Ywet and others* v. *Maung Tun Shein* (2), in which *Mi The O's* case was referred to. The correctness of the decision in *Mi The O's* case was not then directly in question, but Mr. Justice Heald in his judgment expressed a doubt as to whether the decision was good law.

The Bench decision of this Court in *Maung Po Kin's* case is admittedly not founded on any texts in the *Manugye Dhammathat* and admittedly the *Manugye Dhammathat* is binding on us if its provisions are clear on the point. That was definitely decided by their Lordships of the Privy Council in the case of *Ma Hnin Bwin* v. *U Shwe Gon* (3).

It is to be noted that *Mi The O's* case appears to have been decided before the decision of the Privy Council in *Ma Hnin Bwin's* case, but Mr. McColl nevertheless based his decision in that case in part on the *Manugye*. He does not, however, deal with the provisions of the *Manugye Dhammathat* on the point in any detail.

(1) (1914-16) 2 U.B.R. 46. (2) (1921-22) 11 L.B.R. 199.
(3) (1915-16) 8 L.B.R. 1.

In *Ma Thin's* case, from the decision in which he was dissenting, Birks, J., remarked :—

"* * * the Manugye, Manu, Amwebon seem to say that the eldest daughter is merely entitled to a one-fourth share of the father's clothes and ornaments."

The provisions of the *Manugye Dhammathat* were exhaustively discussed by Heald, J., in *Maung Shwe Ywet's* case, and he came to the definite conclusion that the provisions of this *Dhammathat* on the question whether an eldest child, other than the *auratha*, can claim partition on the remarriage of the surviving parent were by no means clear. That view was impliedly adopted by a Bench of this Court in *Maung Po Kin's* case, which was only a development of *Maung Shwe Ywet's* case. Admittedly the point is one on which the *Dhammathats* themselves are in conflict, and it is possible to cite texts from them in support of either view.

After a consideration of the case, a Bench of this Court has definitely held that, on the remarriage of the surviving parent, the eldest child, if he or she has not already taken a quarter share in the joint estate as *auratha*, becomes entitled to a quarter share in the estate ; and also that the children, other than the eldest child, become entitled to a quarter share of the joint estate.

On a point on which the *Dhammathats* are so divided in opinion, we are not prepared to differ from this finding. We accept the decision in *Maung Po Kin's* case that *kanitha* children can sue for partition after the death of one parent on the remarriage of the surviving parent.

That being so, it remains for us to decide whether this right to claim partition can be exercised by the *keiktima* child. The learned trial Judge has answered this question in the negative. It was held by a Full Bench of this Court in the case of *Maung*

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Po An v. *Ma Dwe* (1), that a *keiktima* adopted son is not entitled to claim from the adoptive mother on the death of the adoptive father, the *auratha* son's quarter share of the estate of the adoptive parents.

The learned Judge was unable to see the distinction between the case of a *keiktima* child claiming partition on the death of the parent on the strength of his being *auratha*, and that of a *keiktima* child claiming partition on the remarriage of the surviving parent.

Heald, J., who referred the question in *Maung Po An's* case for reference to the Full Bench, remarks in his referring judgment at page 195 as follows :—

"But even if the obscure passage cited above from the 26th chapter of the 10th Book of *Manugye* be read as meaning that the *keiktima* child takes its place according to its age among the own children of his adoptive parents, then, although under the modern rule it would share equally with the other children, it does not seem to me to follow that if it was the eldest child of the family it would necessarily acquire the special rights of the *auratha* or eldest-born child either on the death of one parent or on the remarriage of the survivor. On the contrary I am strongly of opinion, as I have suggested above, that any Burman jurist who was familiar with the *Dhammathats* and with the constant opposition in meaning between *auratha* and *keiktima*, would have regarded the proposition that the *keiktima* could ever be *auratha* as a contradiction in terms."

The Full Bench answered the reference as follows :—

"A *keiktima* adopted son is not entitled to claim from an adoptive mother on the death of the adoptive father the *auratha* son's quarter share of the estate of the adoptive parents."

And at page 200 of their judgment, the following passage occurs :—

"We are satisfied that according to the *Dhammathats* the position of the *keiktima* child in respect of inheritance was inferior to that of own children, but in view of the judicial decisions which for many years have recognized the right of

(1) (1926) 4 Ran. 184

the *keiktima* child to share equally with the own children we are of opinion that that right should not now be questioned. But, apart from the recent case of *Ma Thein* v. *Ma Mya* (Civil First Appeal No. 171 of 1925), mentioned in the order of reference, there seems to be no case in which it has been expressly decided that an only or eldest *keiktima* child can be *auratha* or that if it fulfils the conditions which would entitle an own child to be *auratha*, it can on the death of one parent claim from the surviving parent the *auratha* child's share of the jointly-acquired property of the parents * * *. The special right of the *auratha* is an exception to the general rule of equal partition among children which is now settled law and in the absence of any authority in the *Dhammathats* or of any long course of judicial decisions extending that right to the *keiktima* child, we are of opinion that it should not be so extended."

It is clear, therefore, that it must now be regarded as settled law that a *keiktima* child is in all ordinary circumstances entitled to equal partition of inheritance with the natural children.

That being so, we are unable to see how the right of a natural child to claim inheritance after one parent has died on the remarriage of the surviving parent can be denied to a *keiktima* child. The rights of an *auratha* are very special rights that are not shared by the younger children, and the refusal to recognize the claims of a *keiktima* to these special rights in no way conflicts with his rights to equal partition with the other children.

The learned trial Judge speaks of the right to partition in this eventuality as a special right to which the ordinary rules do not apply. But, if a natural born child can claim his rights and the *keiktima* child cannot, it does not seem to us that the rights of partition are equal. The ordinary children are given the right of severing themselves from the family of their natural parent on his or her remarriage and claiming their share in the family property.

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They are not bound to make that claim, and, if they do not do so, they can then claim a different share on the death of the surviving parent.

In the case of a natural child, the disadvantages in awaiting the death of the surviving parent are at least no greater than in the case of a *keiktima* child. It is obvious that the longer a *keiktima* child awaits to make his claim, the more difficult it will be for him to establish it; and it is at least as likely that a natural child would elect to continue in the family of his natural parent after remarriage as that a *keiktima* child would elect to live with his adoptive parent on a change of circumstances.

In the case before us, there are no natural children, but, if the decision of the trial Judge is correct, the same rule applies if there are both *keiktima* children and natural children. And we should then have the anomalous position that of different children, who all have precisely the same rights of partition, some could claim to exercise that right while the others would be debarred from doing so.

Whatever may have been the intention of the ancient law givers, we are of opinion that it is impossible, consistently with the principles of equal partition definitely accepted in *Maung Po An's* case, to hold that the right of a *kanitha* child to claim partition after the death of one parent on the remarriage of the survivor cannot be claimed by a *keiktima* child.

We are of opinion that the learned trial Judge was wrong in rejecting her claim on the preliminary point. We, therefore, set aside the decision of the trial Judge and remand the case to the trial Court for a decision on the merits.

The respondents will pay the costs of the appellant in this appeal, advocate's fee five gold mohurs.

G.B.C.P.O.—No. 5, H.C.R., 30-5-1929—3,000