FULL BENCH (CIVIL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Maung Ba.

MAUNG KUN
v.
MA CHI AND ANOTHER.*

1931
March 9.

Buddhist Law—Inheritance—Unmarried son or daughter dying without issue—Preference of brothers and sisters to parents.

At Buddhist Law, on the death of a son or daughter unmarried and without issue, his or her property devolves upon his or her brothers and sisters in preference to his or her parents whether the deceased was at the time of his or her death living with the parents or separately.

Le Maung v. *Ma Kwe*, 10 L.B.R. 107 ; *Ma Hnin Bwin* v. *U Shwe Gon*, 8 L.B.R. 1 (P.C.) ; *Maung Dwe* v. *Khoo Haung Shein*, 3 Ran. 29—*referred to.*

Ma Ein v. *Tin Nga*, 8 L.B.R. 200 ; *Ma Po Hmon* v. *Maung Kan*, (1901) 2 U.B.R. 157 ; *Ma On Myaing* v. *Ma Me San*, 7 Ran. 75 ; *Mi San Hla Me* v. *Mya Tun*, (1894) P.J. 116—*dissented from.*

The following order of reference for determination by a Full Bench involving a question of the law of inheritance among Burman Buddhists was made by Page, C.J., and Das, J. :—

"In this appeal we propose to refer for the decision of a Full Bench the following question :—

"On the death of a son or daughter unmarried and without issue, does his or her property devolve upon his or her father or mother from whom he or she has not been separated in preference to his or her brothers or sisters ?"

For the purpose of this reference it is necessary to state a few facts only.

One U Po Thaik had married Ma Chu, who died in 1885. Ma Thin was the daughter of U Po Thaik and Ma Chu, and the defendant Ma Hlaing was the

* Civil Reference No. 14 of 1930 arising out of Civil First Appeal No. 123 of 1928 from the judgment of the Original Side in Civil Regular No. 295 of 1926.

1931

MAUNG KUN v. MA CHI.

adopted daughter of the same persons, having been adopted about 1885. Ma Thin throughout her life lived unseparated from her father U Po Thaik. In 1917 there was a partition between U Po Thaik and Ma Thin, and it was agreed that a certain house should fall to the lot of Ma Thin. In 1918 U Po Thaik married the plaintiff Ma Chi, and within a few months of the marriage of U Po Thaik with Ma Chi, Ma Thin died. In 1919 U Po Thaik married the defendant Ma Khin. Now, a contest has arisen between the two widows Ma Chi and Ma Khin who claim through U Po Thaik, the father of Ma Thin, and Ma Hlaing who claims as the sister of Ma Thin with respect to the right to possess the house in suit. The suit was brought by Ma Chi, who impleaded as defendants Ma Khin and Ma Hlaing, and for the purpose in hand it is enough to say that each of the parties denied the status of the others. The case was brought to this Court on appeal, and was remanded, and after remand the suit was heard by Mr. Justice Ormiston. Mr. Justice Ormiston passed a decree in favour of the plaintiff upon the ground that according to Burmese Buddhist Law U Po Thaik as the father of Ma Thin was to be preferred as her heir to Ma Hlaing her sister. From that decree the present appeal has been preferred.

Now, the leading case upon this branch of the law is a decision of the Judicial Committee of the Privy Council in *Ma Hnin Bwin* v. *U Shwe Gon* (1). In that case Lord Shaw, delivering the judgment of the Court, stated that where the Manukye was clear and unambiguous it was to be preferred to any other Dhammathats, and, after discussing the relevant cases and authorities, the Judicial Committee referred

(1) (1915-16) 8 L.B.R. 1.

to the rule set out in Volume X of the Manukye which runs as follows :—

"The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs."

In the course of his judgment Lord Shaw observed :—

"In this Dhammathat, which still remains of the highest authority, the succession of brothers and sisters in preference to parents is established beyond doubt. This being so, the other Dhammathats do not require to be appealed to to clear up any ambiguity. Were that appeal to be made, it would, in the opinion of their Lordships, as already stated, lead to the same result."

And at the conclusion of his judgment his Lordship added :—

"Out of respect to the Judges, and in view of the embarrassments produced by the cases cited and by the conflict among the Dhammathats, as well as of the importance of the general question being authoritatively settled, their Lordships have thought it right to make an independent investigation so as, if possible, to clear up the whole question. In the result they are of opinion that the right of the respondent, the father of the deceased, cannot be maintained as against the right of the appellant, her sister."

In the course of his judgment Lord Shaw, however, observed that :—

"It may be taken as a salient fact in the present case that the life lived for years by these ladies (*i.e.* the deceased and the sisters of the deceased) was lived as a life separate from and independent of their father.

The need for this fact being pointedly alluded to is that their Lordships are desirous that the present case should not be held as dealing with or affecting parental rights in cases where the family continues to live together."

After alluding to the *patria potestas*, and the dominant position of the father under earlier Roman Law his Lordship added :—

"These observations are, of course, not made to give any colour to the view that rights to such an extent still remain in

1931

MAUNG KUN v. MA CHI.

modern Burmese Law or Practice, but to indicate that the idea of the powers of a parent in his patriarchal capacity over an undivided household may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately settled in life."

After this decision of the Privy Council, in *Ma Ein* v. *Tin Nga and others* (1) the effect of the decision of the Privy Council in *Ma Hnin Bwin's* case was considered, and Mr. Justice Twomey, as he then was, observed at page 200 :—

"But (in the Privy Council case) their Lordships were careful to distinguish the special case of parents living with the deceased. They said that *Ma Hnin Bwin's* case 'should not be held as dealing with or affecting the parental rights in cases where the family continues to live together.' Accordingly, though the rule given in section 32 of the Manukye may not now be applied to cases where the parents and children lived apart from one another, it is still applicable where they lived together as in the present case."

In *Le Maung* v. *Ma Kywe and one* (2) the judgment of the Privy Council in *Ma Hnin Bwin's* case was again considered, and Chief Judge Twomey in that case made the following observations with reference to it :—

"Their Lordships pointed out as a salient feature in that case that the deceased and her sister Ma Hnin Bwin had for years lived a life separate from and independent of their father, and their Lordships desired that *Ma Hnin Bwin's* case should not be held as dealing with or affecting parental rights in cases where the family continues to live together. They referred to the traditional patriarchal powers of Burmese parents over their households and suggested that a consideration of these powers 'may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately settled in life.' It is clear that their Lordships meant to leave us unfettered in disposing of such a case as the present where the estate in dispute is that of a boy who lived with and was controlled and supported by his

(1) (1915-16) 8 L.B.R. 197. (2) (1919-20) 10 L.B.R. 107.

father up to the time of his death at the early age of 13. The texts indicating the wide extent of parental authority are cited in the judgments of the Appellate Bench of this Court in *Ma Hnin Bwin's* case. But the principle that inheritance if possible should not ascend is of general application, and the rule of succession deduced by their Lordships from the Dhammathats is wide enough to cover all cases. No actual textual authority has been cited to us which would warrant special differentiation in favour of parents with whom the deceased child has lived, and I doubt if we can differentiate merely by inference from the texts showing the power of parents over their children in former times. These texts appear to be more in the nature of moral precepts than positive rules, and none of them touch the question of inheritance."

In *Maung Dwe and others* v. *Khoo Haung Shein and others* (1) in the course of delivering the judgment of the Privy Council, Lord Dunedin observed that "Their Lordships think it clear that conduct can indeed operate as a disqualification of the right (*i.e.* of inheritance), but that it is in no sense a necessary qualification to obtain the right." As at present advised we are disposed to think that for the purpose of inheritance it makes no difference whether the deceased child at the time of his death was living separately and independently from his parents or not, and that the rule laid down by the Privy Council in *Ma Hnin Bwin's* case is of general application. We have been referred, however, to a decision of Pratt and Otter, JJ. in *Ma On Myaing* v. *Ma Me San* (2) which appears to be in conflict with the view that we are disposed to take upon this matter.

As the issue involved is one of some importance, affecting as it does the law of inheritance among Burmese Buddhists, we refer to a Full Bench for determination the question which we have set out above."

(1) (1925) I.L.R. 3 Ran. 29. (2) (1929) I.L.R. 7 Ran. 75.

1931

MAUNG KUN v. MA CHI.

Jeejeebhoy for the appellant. The judgment in *Ma On Myaing* v. *Ma Me San* (7 Ran. 75) is unsound. The learned judges in that case did not correctly interpret the decision of their Lordships of the Privy Council in *Ma Hnin Bwin's* case (8 L.B.R. 1) which is the leading case on the subject and propounds the rule of law. The Privy Council did not contemplate that any exception could be engrafted upon that rule, although it did not close the door to a possible contention of that character. There is nothing in the Buddhist texts or in legal decisions to show that it has ever been suggested, much less recognised, that joint residence with the father at the time of death creates an exception to the general rule enunciated in *Ma Hnin Bwin's* case. In *Ma Ein* v. *Tin Nga* (8 L.B.R. 197) the Bench made a reference as to the effect of *Ma Hnin Bwin's* case but came to no conclusive decision. In *Le Maung* v. *Ma Kywe* (10 L.B.R. 107) Twomey, C.J., departing from his views in *Ma Ein's* case, came to the conclusion that no exception exists to affect the general rule in *Ma Hnin Bwin's* case. *Maung Dwe* v. *Khoo Haung Shein* (3 Ran. 29) is the Privy Council's authority for the proposition that conduct can operate as a disqualification of the right to inherit but that it is in no sense a necessary qualification to obtain the right.

The Court is asked to interpret the law as it stands. The Court is not administering equity but is stating the law. Consequently it must decide entirely in favour of the father or of the sister. The Court cannot apportion shares as between the father and the sister.

If there is any exception to the general rule in *Ma Hnin Bwin's* case it must be clear and unambiguous. There is no legal foundation for any such exception. The Dhamatthats are meticulous in apportioning shares of father, son, daughter, and brothers and sisters—see

sections 19 and 29 and the sections around them. The omission in these circumstances of any alleged change of rights of inheritance between father and sister *inter se* as the result of joint residence of deceased with her father is significant as indicating that such residence made no difference.

Hla Tun Pru for the respondents. In *Ma Hnin Bwin* v. *U Shwe Gon* (8 L.B.R. 1) the Privy Council emphasised the fact that the decision was on the special facts there. The father in that case lived separate from the deceased daughter, who lived and worked with the surviving sister. Even this result was arrived at as a result of an incorrect rendering of the text in Manukye, X, 19. Dr. Richardson translated "သားသမီးတော်ကိုယ်" as "son, daughter, brother or sister," whereas it is submitted the correct rendering would be "children, namely those who are birth companions." In the same section, it is explicitly laid down that a grandparent would exclude an uncle; it is inconceivable that the rule would be otherwise with a parent and a brother. Again, Manukye, X, 28-30, provide that in certain circumstances, a parent would be entitled to share with the widow of the deceased son; a brother or sister never does. It is clear that the rights of a parent are superior to those of a brother or sister.

PAGE, C.J.—The following question has been referred to the Full Bench for determination :—

"On the death of a son or daughter unmarried and without issue, does his or her property devolve upon his or her father or mother from whom he or she has not been separated in preference to his or her brothers or sisters?"

In my opinion the answer to the question propounded is in the negative.

1931

MAUNG KUN v. MA CHI.

PAGE, C.J.

To my mind the matter is concluded by the decision of the Judicial Committee of the Privy Council in *Ma Hnin Bwin* v. *U Shwe Gon* (1).

The facts of the case are set out in the order of reference and need not be repeated. There can be no doubt that until the decision of the Judicial Committee in *Ma Hnin Bwin* v. *U Shwe Gon* the generally accepted view had been that the parents of an unmarried child succeeded to the child's estate in preference to his or her brothers and sisters, whether the parents and the child were living together or "separately," whatever may be the meaning of that term when used in this connection. I cannot find any text in the Dhammathats in which it has been laid down or even suggested that the question whether the parents of an unmarried child or the child's brothers and sisters are to be preferred as heirs depends upon whether or not at the time of the child's death the parents and the child were living together. It seems strange, if the right of the parents to inherit the estate of their unmarried child is dependant upon such a contingency, that there is no authority to be found in any of the Burmese Buddhist texts for such a proposition. On the contrary, in the authorities it seems to be assumed that the same rule of inheritance will apply whether the parents and the child are living together or separately. Again, what is meant by "separation" in this connection? Does it mean separate residence? And if so, must the separate residence be permanent, or may it be temporary? And when is such residence to be deemed permanent, and when temporary?

The notion that the right of the parents to be preferred depends upon where or with whom the child happens to be living at any particular time appears to

(1) (1915-16) 8 L.B.R. 1.

me to be both anomalous and fantastic. U May Oung in his Leading Cases on Buddhist Law (1926 edition at page 307) suggests that 'living apart' means separate residence *after division of property*, such as, for instance in the cases in Manukye, X, 29 and 78, or where a son or daughter has obtained partition on the death of one of the parents or on the remarriage of the survivor. Or, where there was too little or no property to be divided, or no partition takes place, separation due to estrangement followed by continued interruption of ordinary family duties. Each case must depend on the circumstances disclosed therein, and no hard and fast rule is possible." But there is no text and no authority in support of such a theory, which to my mind is wholly unwarrantable.

The history of the problem that we are invited to solve is that until the judgment of the Judicial Committee in *Ma Hnin Bwin* v. *U Shwe Gon* it had been regarded as well settled that

> "On the death of a person who leaves no surviving husband, wife or direct descendants, his parents succeed to his estate in preference to all other relatives. The texts are various and conflicting, but so far as they are precise, the weight of authority seems to incline to this conclusion. The rule is that which has already been accepted in this Court and in Lower Burma. It is, moreover, in accordance with natural justice and the ordinary rules of the devolution of inheritance." (Per Thirkell White, J.C. in *Ma Po Hmon* v. *Maung Kan and Ma Ami* (1).)

The right of the parents to succeed in preference to the brothers and sisters of an unmarried child, whether they were living together or separately at the time of the child's death, was based upon the view that, although under Burmese Customary Law the general rule is that inheritance, whenever possible, should not ascend, in the case of parents succeeding to the estate of an unmarried child another principle is brought into

(1) (1901) 2 U.B.R. 157 at p. 195.

1931

MAUNG KUN v. MA CHI.

PAGE, C.J.

play, namely, that the nearer relation excludes the more remote, and that it would be both fair and in accordance with principle that the property of the unmarried child should fall to the parents who had maintained it from infancy, and were more nearly akin to the child than his or her brothers and sisters.

Until the Judicial Committee in *Ma Hnin Bwin* v. *U Shwe Gon* decided that when the parents and their unmarried child were living a separate and independent life the brothers and sisters of the child were to be preferred to the parents as the child's heirs, the view that had obtained, as I have stated, was that the parents were entitled to succeed upon the principle that in matters of succession the nearer relation excludes the more remote; and that principle is equally *ad rem* whether "the family continues to live together" or not. The truth is that the judgment of the Judicial Committee delivered by Lord Shaw in *Ma Hnin Bwin* v. *U Shwe Gon* completely upset and reversed what had been the accepted and settled opinion on the subject. It was for this reason that the learned advocate for the respondents, notwithstanding protests from the Bench, for some time persisted in contending that the judgment in *Ma Hnin Bwin* v. *U Shwe Gon* was not in consonance with the principles of the Burmese Customary Law of inheritance. But that is a matter with which the Court is not concerned, and if the law as expounded in that case needs correction the remedy lies with the Legislature, and not with the Courts. It is the duty of the Court loyally to follow the decisions of the Judicial Committee, and to accept the principles of law laid down by that tribunal. Such a contention as that which the learned advocate for the respondents urged before us cannot be entertained, and the Court will enforce the principles of law enunciated in *Ma*

Hnin Bwin v. *U Shwe Gon* in all cases to which they are applicable.

The only ground upon which it could, with any show of reason, be urged that the case of *Ma Hnin Bwin* v. *U Shwe Gon* does not govern the present case is that there are—

"various texts in the Dhammathats which prescribe schemes for partition between the parents of a person who has died childless on the one hand and the surviving husband or wife on the other (see sections 28, 29, 30 and 31, Manukye, and the cognate texts given in Chapter XIX of the Digest). The ordinary rule of inheritance under the Buddhist Law is that the husband is sole heir to the wife and the wife sole heir to the husband, whether there be issue of the marriage or not. The texts cited above show that in certain cases the surviving parent of a childless son or daughter is allowed to share with the surviving wife or husband, while brothers and sisters do not come in at all. It would seem *a fortiori* that, when both husband and wife die within a short interval of one another and the estate is treated as the joint estate of both, a surviving parent must be recognised as having a substantial interest in the estate, if indeed he does not altogether oust all other relatives including brothers and sisters of the deceased person, at any rate in cases where the deceased couple lived with the parent;" per Twomey, J. in *Ma Ein* v. *Tin Nga* (1), see also *Mi San Hla Me* v. *Mya Tun* (2).

But, in my opinion, this contention cannot be accepted.

In *Ma Hnin Bwin* v. *U Shwe Gon* Lord Shaw referred to section 19, Chapter X, of the Manukye, which runs as follows :—

"*Though it is said the property shall not ascend, the law when it shall do so.*

"Though this is the law, why is it also said 'the father and mother of the deceased have a right to his property?' Because if the parents be alive, and the deceased has no other relations,

(1) (1915-16) 8 L.B.R. 197 at p. 200.
(2) (1894) P. J. 116.

1931

MAUNG KUN v. MA CHI.

PAGE, C.J.

they shall inherit his property, as by way of illustration, the offerings intended to be made to the priests may be offered to God."

The word translated by Richardson "other relations" in this section is in Burmese "ဆွေမျိုးသား" which means "womb or birth companions," or, in the sense in which it is used in the Dhammathats, "brothers and sisters". His Lordship then proceeded to lay down that

"in this Dhammathat, which still remains of the highest authority, the succession of brothers and sisters in preference to parents is established beyond doubt. This being so, the other Dhammathats do not require to be appealed to to clear up any ambiguity. Were that appeal to be made, it would, in the opinion of their Lordships, as already stated, lead to the same result."

No limitation is set in Manukye X, 19, to the generality of the language in which the right of inheritance of brothers and sisters is expressed. At the same time Lord Shaw observed in that case that "the idea of the powers of a parent in his patriarchal capacity over an undivided household may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately setted in life."

But in *Le Maung* v. *Ma Kwe* (1), Twomey, C.J., who appears to have resiled from the view that he had expressed in *Ma Ein* v. *Tin Nga* (2) held that—

"The principle that inheritance if possible should not ascend is of general application, and the rule of succession deduced by their Lordships from the Dhammathats is wide enough to cover all cases. No actual textual authority has been cited to us which would warrant special differentiation in favour of parents with whom the deceased child has lived, and I doubt if we can differentiate merely by inference from the texts showing the power of parents over their children in former times. These texts appear to be more in the nature of moral precepts than positive rules, and none of them touch the question of inheritance."

I can see no answer to this reasoning.

(1) (1919-20) 10 L.B.R. 107 at p. 109. (2) (1915-16) 8 L.B.R. 197.

Again, what difference can there be in principle with respect to the right of succession whether at the time of the death of their unmarried child the deceased and his or her parents happened to be living together? None, in my opinion.

In *Maung Dwe and others* v. *Khoo Haung Shein and others* (1) Lord Dunedin, delivering the judgment of the Judicial Committee, observed that

"Their Lordships think it clear that conduct can indeed operate as a disqualification of the right (*i.e.*, of inheritance), but that it is in no sense a necessary qualification to obtain the right;"

and I agree with the observations of U May Oung at page 194 of his Leading Cases on Buddhist Law (1919 edition), that

"it might be laid down as a general rule that where a claimant was a spouse of, or connected by blood with, the deceased, mere separate living, without proof of actual division or of neglect in the performance of family duties, does not affect the right to inherit."

Now, the right of the brothers and sisters to be preferred to the parents is laid down in Manukye, X, 19, in clear and unequivocal terms, and if the authors of the Manukye had been aware that under the Burmese Customary Law any qualification existed of the right of the brothers and sisters which was set out in such precise and unambiguous language in Chapter X, 19, it cannot be doubted that they would have given expression to it. In sections 28 to 32 of this Chapter, however, no reference is made to the rights of the brothers and sisters, and no limitation is set to their right of inheritance as definitely laid down in section 19. It follows, in my opinion, that sections 28 to 32 of Chapter X must be regarded as referring to cases in which there were no surviving brothers or sisters of

(1) (1925) I.L.R. 3 Ran. 29 at page 34.

1931

MAUNG KUN v. MA CHI.

PAGE, C.J.

the deceased child. Having regard to the law laid down in *Ma Hnin Bwin* v. *U Shwe Gon* section 32 of Chapter X obviously must be so construed, and I cannot persuade myself that any other construction should be placed upon sections 28 to 31.

In my opinion it is abundantly clear that the rule that parents should be preferred to brothers and sisters as the heirs of an unmarried child has always been based upon the doctrine that in matters of succession the nearer relation excludes the more remote, and that the right of inheritance has never been, and cannot reasonably be, regarded as dependant upon whether or not the "family continued to live together." Applying the principles enunciated by the Judicial Committee in *Ma Hnin Bwin* v. *U Shwe Gon* the rule of construction to be applied for determining whether the parents or the brothers and sisters in such a case are the heirs of the deceased is under the Burmese Customary Law that the right of succession, whenever possible, is not to ascend, and that rule is to prevail rather than the rule that the nearer relation excludes the more remote. The Courts of Burma are bound to follow and to apply the principles of law laid down by the Judicial Committee in *Ma Hnin Bwin* v. *U Shwe Gon*.

It follows, therefore, that the law as stated in *Mi San Hla Me* v. *Mya Tun* (1); *Ma Ein* v. *Tin Nga* (2) and *Ma On Myaing* v. *Ma Me San* (3) is incorrect and, in my opinion, the answer to the question propounded is in the negative.

DAS, J.—I agree.

MAUNG BA, J.—I agree.

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(1) (1894) P.J. 116. (2) (1915-16) 8 L B.R. 197.
(3) (1929) I.L.R. 7 Ran. 75.