APPELLATE CIVIL.

Before Mr. Justice Mosely and Mr. Justice Ba U.

MA THAN NYUN
v.
DAW SHWE THIT.*

1936
April 7.

Burmese customary law—Adoption—Keittima *form of adoption—Intention to inherit—Publicity*—Apatitha *child—Difference between* keittima *and* apatitha *child—Inheritance by* apatitha *child.*

The intention of the person who takes the child of another in adoption that the child shall inherit from the adoptive parent is the principal requisite of *keittima* adoption, and it is this intention that must be given publicity.

Ma Ma Gale v. *Ma Sa Yi*, 4 L.B.R. 172; *Ma Ywet* v. *Ma Me*, 5 L.B.R. 118—*referred to.*

An *apatitha* child is one who has been adopted casually and without any intention expressed on the part of the adoptive parent that the child shall inherit. The intention forms the dividing line between a *keittima* child and an *apatitha* child; in other respects their position is the same.

Shwe Kin v. *Maung Sin*, 10 L.B.R. 376; *Tet Tun* v. *Ma Chein*, 5 L.B.R. 216—*dicta dissented from.*

Where the adoptive parent leaves neither a natural child nor a *keittima* child, the *apatitha* child inherits the estate of the adoptive parent in equal share with the near relative of the adoptive parent.

Maung Gyi v. *Maung Aung Pyo*, I.L.R. 2 Ran. 661—*referred to.*

Thein Maung for the appellant.

Zeya for the respondent.

BA U, J.—The dispute in this case is in respect of the estate left by one Daw Shwe Yu. Daw Shwe Yu was a Burman Buddhist. She was by turn a widow and a divorcee. Her first husband was U Po So. Some time after the death of U Po So she married a man named U Po Sin. They lived together as husband and wife for four years and then had a divorce from each other. That was in 1272 B.E. From that time onwards till she died in 1290 B.E. (1928)

*Civil First Appeal 17 of 1935 from the judgment of the District Court of Pyapôn in Civil Regular Suit 81 of 1932.

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she remained single. She was 70 years of age at the time of her death. She had no child either by her first or second husband and she left only one younger sister, namely, the respondent Daw Shwe Thit, surviving her. Daw Shwe Thit would, therefore, in the normal course of events, succeed to her estate ; but the plaintiff-appellant Ma Than Nyun claimed that she, being the only adopted daughter of Daw Shwe Yu, was the one entitled to succeed to her estate. She accordingly instituted the present suit, asking for a declaration that she was the *keittima* adopted daughter of Daw Shwe Yu, or in the alternative an *apatitha* daughter.

As is to be expected, her claim was disputed by the respondent Daw Shwe Thit. She said that the plaintiff-appellant lived with the deceased Daw Shwe Yu for some time as she was her grand-niece but never as her adopted daughter.

Now, the facts that are not in dispute are these :

Daw Shwe Yu and Daw Shwe Thit had a half sister named Ma Pok. Ma Pok had a son named Po Htin. He is the father of the plaintiff-appellant Ma Than Nyun. Ma Than Nyun is one of his four children by his first wife Ma Mya May. Ma Mya May died in 1280 B.E. During the life-time of Ma Mya May Po Htin took another wife named Ma Saw Hla. He got two children by her. At the time of her mother Ma Mya May's death the plaintiff-appellant was about six years of age. Soon after her mother's death she went and lived with Daw Shwe Yu till the latter died in 1290 B.E. The question is—how did the plaintiff-appellant come to live with the deceased Daw Shwe Yu ?

The plaintiff-appellant states that she went and lived with Daw Shwe Yu as the latter took her

in adoption with a view to inherit; while the defendant-respondent says that Daw Shwe Yu allowed the plaintiff-appellant to live with her simply out of compassion as she had lost her mother and as her father was living with his lesser wife and her children. In these circumstances it is incumbent on the plaintiff-appellant to prove that she was the *keittima* adopted daughter of Daw Shwe Yu. To discharge the burden that lies heavily on her the plaintiff-appellant relies on the following facts:

(1) That her father Po Htin gave her in adoption to Daw Shwe Yu in compliance with the latter's request;

(2) That the deceased Daw Shwe Yu made known to the people at large that she (plaintiff-appellant) was her *keittima* adopted daughter by—

(*a*) making admissions;
(*b*) purchasing properties in their joint names;
(*c*) lending out money on promissory notes in their joint names as mother and daughter;
(*d*) having their names inscribed as mother and daughter on a "tazaung" on Mandalay Hill;
(*e*) giving her jewellery to wear.

[His Lordship discussed the evidence and came to the following conclusion]:

If we now sum up, we get the following facts:

(1) That there is no reliable evidence to prove that Daw Shwe Yu asked for the plaintiff-appellant to be given to her in adoption with a view to inherit.

(2) That there is no reliable evidence to prove that Daw Shwe Yu ever told anybody that the plaintiff-appellant was her *keittima* adopted daughter, but

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there is some evidence to show that she told some of her friends that she had adopted the child.

(3) That Daw Shwe Yu lent money on several occasions on promissory notes in the joint names of herself and the plaintiff-appellant as mother and daughter.

(4) That except on one occasion Daw Shwe Yu dedicated some "tazaungs" and images of Lord Buddha in her name alone as donor.

(5) That Daw Shwe Yu gave some jewelleries to the plaintiff-appellant to wear during her life time.

The question is—do these facts fit in with the *keittima* form of adoption?

Section 79, Book X, of the *Manugye* describes the *keittima* child as follows :

အခြားသူတို့၏သားသမီးကို အမွေခံသားသမီးပြုမည်။ သူသိသူထင်နှင့်ယူ၍မွေးသောအ-
ကျော်အစောဖြစ်သောကြွိမဟုဆိုရသောခဓိမ္မ-ယောက်ျားတပါး။

Richardson has given a translation of it as follows :

"The children of another person, adopted publicly with a promise that they shall inherit, which is a matter of public notoriety, these are called kiek-tee-ma."

This translation is slightly different from the translation given by the learned author of May Oung's Buddhist Law. His translation is in these terms :

"One kind is the boy or girl called kittima, which is the son or daughter of others taken and brought up, to the knowledge of the public, with the intention 'we will make the son or daughter to receive inheritance, and who are well known as such,"

The translation as given by the learned author of May Oung's Buddhist Law is, in my opinion, more correct. Be that as it may, what is emphasized in both is the intention of the person who takes the child of another in adoption that the child shall inherit. Intention that the child shall inherit is the principal requisite for *keittima* adoption. This is brought out

very clearly in section 26, Book X, of the *Manugye* which says :

" If a man has children by his wife, and *shall publicly state his intention* of adopting the child of another person, and shall take and support the child openly, the two laws for the partition of the property are these :— * * * "

For that reason their Lordships of the Privy Council observed in *Ma Me Gale* v. *Ma Sa Yi* (1) as follows :

" There must be, on the one hand, the consent of the natural parents, and on the other, the taking of the child by the adoptive parents with *the intention* and on the footing that the child shall inherit."

These observations would, of course, apply if either or both the natural parents of the adopted child were alive at the time of adoption. They will not apply to a case where adoption takes place only after the death of the natural parents of the adopted child. For that reason Lord Dunedin, delivering the judgment of the Board in *Ma Ywet* v. *Ma Me* (2), said :

" It has been laid down by this Board that, according to the law of Burma, no formal ceremony is necessary to constitute adoption. One may go further and say that, though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to."

Publicity insisted upon in this case is the publicity of the intention of the person who takes the child of another in adoption that the child shall inherit.

Now, the facts set out above as proved do not in the least show that Daw Shwe Yu brought up the plaintiff-appellant with the intention that she should inherit from

(1) (1904) 4 L.B.R. 172. (2) (1909) 5 L.B.R. 118.

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her. In fact according to the evidence of U San Hla and U Tha Kin the deceased Daw Shwe Yu told them that the plaintiff-appellant was not her *keittima* adopted daughter. These two gentlemen are members of the legal profession and their evidence has been accepted by the trial Judge. Unless there are strong reasons, and I see none in the present case, why we should differ from the trial Judge on the question of assessing the value of the evidence of witnesses, the opinion of the trial Judge must be accepted. *Chinnaya* v. *U Kha* (1).

Do they however prove that the plaintiff-appellant was an *apatitha* child of Daw Shwe Yu as pleaded by her alternatively ? What is then an *apatitha* child ? The texts collected in section 16 of U Gaung's Digest, Volume I, which deal with six classes of sons who are entitled to inherit are not unanimous in the description they give of the *apatitha* child.

Ten of the *Dhammathats*, namely, *Mano*, *Waru*, *Kaingza*, *Pakasani*, *Manu*, *Panam*, *Kungyalinga*, *Dayajja*, *Dhammasara*, and *Cittara*, describe the *apatitha* child as a foundling adopted casually and brought up in the family.

Four other *Dhammathats*, namely, *Kandaw*, *Tejo Vannadhamma* and *Rasi*, however, describe the *apatitha* child as a child adopted casually through compassion.

The three remaining *Dhammathats*, *Manugye*, *Dhamma* and *Amwebon*, describe the *apatitha* child as a child adopted casually whether its parents are known or unknown.

As the extract of the *Manugye* as given in the Digest is not quite full I propose to give the full text. It is to be found in section 79, Book X, of the *Manugye* :

(1) (1936) I.L.R. 14 Ran. 11.

မိဘမသိမရှိ။ပေါက်ဘော်ဆွေမျိုးသားချင်းမရှိမသိ။မပေါ်ဖြစ်စေ။မိဘအသိအရှိ။ ပေါက်ဘော်ဆွေမျိုးညာတိ။ အသိအရှိဖြစ်စေ။သားပြုမည်ဟု။ အမှတ်မဲ့ကောက်ယူထိန်းသိမ်း မွေးစာ: သောဒိဋ္ဌကာမည်သော်သားဟုဆိုရသောယောက်ျားမိမ္မလည်းတပါး။

" Children, male or female, who have no parents, or whose parents or relations are not known, or whose parents or relations are known, who have been casually taken charge of and brought up, are called teek-tee-ka."

"Teek-tee-ka" as used here is another name for *apatitha*. Mingyi U Gaung used the word "apatitha" for "teek-tee-ka" in his extract from the *Manugye* in the Digest. The learned author of May Oung's Buddhist Law has also substituted the word "apatitha" for "teek-tee-ka" in his quotation of the above extract in his book.

As what the *Manugye* states is not in the least ambiguous it must be followed in preference to the other *Dhammathats*: *Ma Hnin Bwin* v. *U Shwe Gon* (1). An *apatitha* child may therefore be described as one who has been adopted casually and without any intention expressed on the part of the adoptive parent that it shall inherit.

An intention either express or implied on the part of the adoptive parent that the adopted child shall or shall not inherit forms the dividing line between a *keittima* child and an *apatitha* child. In other respects the position of an *apatitha* child is the same as that of a *keittima* child.

The description of the *apatitha* child as given by Hartnoll J. in *Tet Tun* v. *Ma Chein* (2) and as given by Maung Kin, O.C.J., in *Shwe Kin and others* v. *Maung Sin* (3) is, with all respect to those learned Judges, in my opinion not quite correct. In the first case Hartnoll J. said :

" Moreover, looking at the definition of an *apatitha* son in the Digest of Buddhist Law the term would seem to refer to a foundling,

(1) (1914) 8 L.B.R. 1. (2) (1910) 5 L.B.R. 216.
(3) (1920) 10 L.B.R. 376.

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a child casually adopted whether its parents and relatives are known or not, a child casually adopted and brought up in the family of the adoptive parents being abandoned by its natural parents, a child casually adopted through compassion, a destitute child casually adopted. The principle underlying the definition of the term seems to be that an *apatitha* adoption is a compassionate one which takes place in consequence of the child being destitute with no one to maintain it through abandonment by, or the decease of, its natural parents or some such similar cause."

In the second case Maung Kin, O.C.J., said :

"Even in the *Dhammathats* there is a distinction between ကောင်းမွေခံဆိုးမွေခံမွေးစားသောသား။ ' and ကောက်ယူမွေးစားသောသား။ ' The former expression means an adoption with a view to inherit and the latter merely brought up out of pity, the former being known as the *keittima* form and the latter as the *apatitha* form."

The learned author of May Oung's Buddhist Law also dissents from this view respectfully.

Now, if the facts set out above as proved are considered in the light of the law thus explained, I am clearly of opinion that though they may fall just short of proving that the plaintiff-appellant was the *keittima* adopted daughter of Daw Shwe Yu, yet they undoubtedly prove that she was her *apatitha* child. If Daw Shwe Yu did not have the intention of bringing the plaintiff-appellant up as if she were her own child but only as a mere dependant, as pleaded by the defendant-respondent, I do not think she would have given her jewelleries to wear, lent out money in the joint names of herself and the plaintiff-appellant as mother and daughter, purchased some lands in her name and that of the plaintiff-appellant and described her as a joint donor with her of a "tazaung." Nobody would have treated a mere dependant in such a way. I am confirmed in this view by the conduct of the defendant-respondent herself. It is in her evidence that while the plaintiff-appellant lived in the house of U Tha Kin, advocate, in Rangoon,

for nearly two years she allowed her to keep and wear jewelleries worth at least three or four thousand rupees. Why did she do that? She would not have done that unless she thought judging by the manner of treatment accorded to her by the deceased Daw Shwe Yu that the plaintiff-appellant had some sort of claim on her estate. Again, why did U Tha Kin and U San Hla, as stated by them, ask Daw Shwe Yu whether the plaintiff-appellant was her *keittima* adopted daughter? If the treatment of the plaintiff-appellant by Daw Shwe Yu was that of a mere dependant, I am sure they would not have asked that question. For all these reasons I hold that the plaintiff-appellant was the *apatitha* child of Daw Shwe Yu.

Though an *apatitha* child is a child adopted casually and without an intention expressed on the part of the adoptive parent that it shall inherit, the child is still in certain circumstances entitled to inherit. If the adoptive parent leaves neither his natural nor *keittima* child, the *apatitha* child inherits his estate in equal share with the near relative of the adoptive parent: *Maung Gyi and one* v. *Maung Aung Pyo* (1).

For all these reasons I set aside the judgment and decree of the lower Court and grant a decree declaring that the plaintiff-appellant as an *apatitha* child of Daw Shwe Yu is entitled to half of her estate. The decree will be drawn up in accordance with Form No. 17, Appendix D, Schedule I, Civil Procedure Code. Each party will bear its own costs in both Courts as neither party has been wholly successful. The plaintiff-appellant will pay court-fee in both Courts on the amount decreed in her favour,

(1) (1924) I.L.R. 2 Ran. 661.

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which she would have had to pay if she had not been allowed, first, to sue and, secondly, to appeal as a pauper.

MOSELY, J.—I agree. As May Oung points out in his Buddhist Law (page 135, 2nd Edition) the "foundling" is the *chatabhatta* not the *apatitha* child.

APPELLATE CIVIL.

Before Hon'ble E. H. Goodman Roberts, Chief Justice, and Mr. Justice Mya Bu.

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April 29.

U ZAWTIKA
v.
U KALYANA.*

Burmese ecclesiastical law—Poggalika *property—Death of* poggalika *owner, effect of*– Sanghika *property*—Aramika *and* Ganika sanghika—*Oral Death-bed gift of* poggalika *property—Leasehold converted by monk in charge to freehold—Benefit of freehold—Trust in favour of* sangha.

On the death of a *poggalika* owner of a monastery the property becomes *sanghika* property and belongs to the *sangha* in general. It is either *Aramika sanghika* (*i.e.* property for the use of the *sangha* dwelling in a particular locality) or *Ganika sanghika* (*i.e.* property for the use of the *sangha* of a particular sect). The power of control of the property in the former case vests in the presiding monk of that locality, and in the latter case in the leading monks of the sect or one of them.

A Buddhist monk O was the *poggalika* owner of two *kyaungdikes*, and lived in one of them along with another monk S. On O's death his nephew, the plaintiff-respondent, claimed that the deceased monk had made an oral gift of the two *kyaungdikes* to him on his death-bed, and that he had placed S in charge of one of the *kyaungdikes*, the subject matter of the suit. When S died the defendant-appellant, also a monk, was residing in the *kyaungdike*. S had collected moneys from his followers to meet the cost of obtaining a freehold grant of the land which at the time was a leasehold. After his death the plaintiff succeeded in obtaining the grant in his own name. The plaintiff sought to eject the defendant on the ground of his being the *poggalika* owner of the property. He alleged no misconduct or breach of discipline on the part of the defendant. The trial Court allowed the claim ; the defendant appealed.

Held, that (1) O's alleged gift in favour of the plaintiff having failed for want of a registered instrument, on O's death the property became *sanghika*

* Civil First Appeal No. 18 of 1936 from the judgment of this Court on the Original Side in Civil Regular No. 316 of 1935.