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M.K. KASIVISWANATHAN CHETTYAR v. R.M.S.L. LAKSHMANAN CHETTYAR.

BA U, J.

This is exactly what has happened in this case, and for all the reasons given above I hold that the endorsement on the suit promissory note is an acknowledgment within the meaning of section 19 of the Limitation Act and the suit is consequently not barred by time. I grant a decree in the terms prayed for with costs.

APPELLATE CIVIL.

Before Mr. Justice Baguley, and Mr. Justice Mosely.

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May 6.

KO PE KYAI
v.
MA THEIN KHA AND OTHERS. *

Burmese customary law—Inheritance—Apatittha *child living apart from parents*—Manugye, *Vol. X, paragraph 25*—Keittima *child living apart from adoptive parents—Intention of adoptive parents.*

An *apatittha* child who lives apart from his parents is not entitled to inherit from them. According to *Manugye*, Vol. X, paragraph 25, if the adopted child be not living with the parents, and their own children are, he has no right to share, and when there are other relations, if the adopted child be living separate, the property shall descend to the relatives of the deceased. The only exception is when the adopted child is not a stranger but within the six degrees which entitle him to a share.

The rule that a *keittima* child must live with his adoptive parents in order to inherit has been abrogated by recent decisions of the Courts, but that is because a *keittima* child gets his right of inheritance from the intention of the adoptive parents that he shall inherit, whereas such intention is absent in the case of an *apatittha* child.

Ma Than Nyun v. *Daw Shwe Thit*, I.L.R. 3 Ran. 557, referred to.

Tha Kin for the appellant.

Kyaw Myint for the respondents.

BAGULEY, J.—This appeal arises out of a suit filed in the District Court of Bassein to recover the estate of U Tha Kho and Ma Eik. The plaint is a peculiar one. is headed "Suit for Administration," and it begins

* Civil First Appeal No. 111 of 1936 from the judgment of the District Court of Bassein in Civil Regular Suit No. 19 of 1935.

by setting out that the plaintiff Ma Thein Kha was the sole heir of U Tha Kho and Ma Shwe Zin, a Burmese Buddhist couple. The second paragraph of the plaint asserts that she is the only heir who is entitled to inherit. The next few paragraphs, however, allege that after the death of U Tha Kho she and Ma Shwe Zin agreed to divide the inheritance half and half. In paragraph 12 she states that a half share in the estate belongs to her as joint owner. Then in paragraph 15 she states that as she may not get the whole estate of Ma Shwe Zin if any of the defendants proved that they have been adopted in the *keittima* form her share in the estate will be reduced, so she values the relief claimed at Rs. 15,500 for the purpose of court-fees and jurisdiction. It may be noted that the plaint does not apparently give any indication whatever of what the value of the estate may be. Objection was raised by the defendants so far as their relations were concerned and the learned Judge in an order dated the 23rd December 1935 held that the plaintiff could value the suit at anything she liked relying on *C. K. Ummar* v. *C. K. Ali Ummar* (1) and *Ma Thin On* v. *Ma Ngwe Hmon* (2). The plaintiff in the first place was obviously suing for the recovery of the estate. Merely asserting that a suit is a suit for administration does not make it one, and if a party sues to recover an estate the valuation of the suit must be the value of the estate he seeks to recover.

The defendants in the suit were Maung Myit, Ma Than Kyi and Ko Pe Kyai as shown in the plaint. The first two claim to have been adopted in the *keittima* form by Ma Shwe Zin after the death of U Tha Kho and they have settled their dispute with the plaintiff. Ko Pe Kyai, however, claims to have been

(1) (1931) I.L.R. 9 Ran. 165. (2) (1934) I.L.R. 12 Ran. 512.

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adopted in the *keittima* form by U Tha Kho and his former wife Ma Eik and the case has been decided solely on the point whether Pe Kyai has proved his adoption. He claims to have been adopted in the *keittima* form, but in the course of argument it was suggested that if he had not proved his adoption in the *keittima* form the case should be sent back for further enquiry as to whether he had proved his adoption in the *apatittha* form and if so what portion of the estate he would be entitled to inherit on that ground. The learned Judge found that Pe Kyai had not proved that he had been adopted in the *keittima* form and the question whether he had been adopted in the *apatittha* form was not really gone into at all. The burden of proving his adoption lay on Pe Kyai. He gave his age when examined as a witness as 62. He claims to have been adopted when he was about nine years old. The burden of proving his claim lies upon him, and is a very heavy one indeed, because it is admitted that he is a full blooded Indian. He says his father was a Chulia hawker who brought him to Burma without his mother and he says that his father found difficulty in looking after him when going his rounds hawking, so he left him in the village, and as U Tha Kho and his former wife Ma Eik had just lost their child they wished to adopt him : so they first clandestinely weaned him from the Mohammedan religion by giving him forbidden food to eat and subsequently tattooing his thighs. His father then left him behind with them for good, and they adopted him.

Now, the total experience of the members of this bench is over sixty years, and we have never come across a case of an Indian being adopted as a *keittima* child by a Burman Buddhist couple, and I have consulted four Judges of this Court whose experience of this country is the longest and none has ever heard of such

an event taking place or even of such a claim having been put forward. Naturally anybody who has to prove such an unusual event has a difficult task before him. In the present case the learned Judge before whom the witnesses were examined has found against him, so we are bound to support his finding unless we are satisfied that it is incorrect. A further point which appears to me to militate strongly against the idea that this Burmese Buddhist couple adopted the appellant with the intention of making him in all respects as their own son is the fact that he has kept his Indian name. The plaintiff in her plaint, possibly out of courtesy, refers to him as Ko Pe Kyai which might perhaps be a possible Burmese name but it is worthy of note that appellant himself in his written statement does not Burmanize his name at all. He signs in Burmese characters as Ko Pi Kyai which is obviously the Chulia name for "Pitchay." The appellant admits that he does not know whether U Tha Kho asked his father for him or not. He then goes on to say :

"My father remained in Yonbin for one year. When he left U Tha Kho and Ma Eik said to me 'Don't go with him. We will hide you in the house.' My father returned to Yonbin village about a year, later. He found that I had been tattooed and he said 'you are no longer fit to be an Indian. You are an outcaste, so I leave you to be adopted by U Tha Kho.'"

There is, therefore, no evidence of a formal adoption, and it is difficult to believe that U Tha Kho formed any active intention of giving this boy the right to inherit from him because at this time he and his wife had absolutely no property at all. It is said that they only owned one blanket for two of them.

[His Lordship further discussed the evidence, and held that the learned District Judge had come to the right conclusion in disallowing Ko Pe Kyai's claim.]

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So far as the request made to us that the case should be sent back for further inquiry as to whether the appellant was entitled to any claim to inherit on the ground that his adoption constituted an adoption in the *apatittha* form I am of opinion that no good purpose would be served by doing this. On the appellant's own showing he has certainly been living apart from U Tha Kho ever since U Tha Kho married Ma Shwe Zin as from that date he even ceased to put his paddy in Tha Kho's paddy bin. He was living apart from those whom he claimed to be his adoptive parents. An *apatittha* child who lives apart from his parents is not entitled to inherit from them. *Manugye*, Vol. X, paragraph 25, is clear on the point:—"If the adopted child be not living with the parents, and their own children are," he has no right to share, and where there are other relations, if the adopted child be living separate the property shall descend to the relatives of the deceased; and the only exception given in the paragraph is when the adopted child is not a stranger but within the six degrees which entitle him to a share. The *Manugye* is quite definite on this point and therefore perhaps there is no need to quote other authorities, but it may be mentioned that in the *Attasankhepa*, paragraph 173, the most modern of the *Dhammathats*, the same view appears

> "If the *apatittha* son was living apart, he shall only have the right to retain such property as has been given him by the parents and is already in his possession, but he must not be allowed to claim any share in the inheritance."

In U Gaung's Digest, section 200, the extracts from seven *Dhammathats* are all in agreement in the same sense, the only exception being, it would appear, in the case of an *apatittha* who is related by blood to the adoptive parents, as shown in the extracts given in

section 199. It may perhaps be argued that under the *Dhammathats* a child adopted in *keittima* form has to live with the adoptive parents to keep his right to inherit, but that this rule has been abrogated by recent decisions of the Courts. This is quite true but, it must be remembered that a *keittima* child gets his right of inheritance from the intention of the adoptive parents that he shall inherit : *vide Ma Than Nyun* v. *Daw Shwe Thit* (1) and the cases therein referred to. On the other hand an *apatittha* child does not get any right to inherit from the intention of the person who adopts, because the person who adopts has no intention to give him any such right, and no doubt the right to inherit in this case is to some extent analogous to the right given in the absence of relatives to the person who looked after the deceased persons on their death bed. If, therefore, the taking of the appellant by U Tha Kho and Ma Eik constituted an adoption in the *apatittha* form, (personally it looks to me more like an adoption in the *chattabhata* form), the fact that the appellant has lived apart from U Tha Kho since, at the latest, the time when Ma Eik died (1915-1916), he has lost all his right to claim inheritance from U Tha Kho, and his right to inherit from Ma Eik was long ago barred by limitation.

The only point on which the appellant can succeed is a point with which the respondents are not concerned. In his written statement the appellant asked that the suit may be dismissed with costs "and if it is found that this defendant is entitled to any share in the estate, a decree may be passed in his favour for which he will then pay the necessary court fees." Such an offer on his behalf was quite unnecessary. It was in fact premature, but in consequence of it he has been directed to pay a court-fee of Rs. 1,325. A reference to Order 20,

(1) (1925) I.L.R. 3 Ran. 557, 561.

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rule 13 (2), shows that the time for any payment of this sort to be made is after the preliminary decree has been passed in the administration suit. As this case never got to the position when there was a preliminary administration decree under which the payment could be made he was under no necessity to pay any court-fees at all.

I would, therefore, alter the decree by striking out the order that the appellant must pay court-fees in the sum of Rs. 1,325 but otherwise I would dismiss the appeal with costs in favour of the respondents (one set only).

MOSELY, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Baguley, and Mr. Justice Shaw.

1937

May 25.

S.R.M.S. SUBRAMANIAN CHETTYAR

v.

V.K. SHIVALKER AND OTHERS.*

Mortgage—Mortgagee advancing his own money or of another—Benamidar *mortgagee—Right to sue—Mortgagee named in document—Dismissal of suit—Leave to bring fresh suit.*

A Court has no power to dismiss a suit with liberty to bring a fresh suit. *Fateh Singh* v. *Jagannath*, I.L.R. 47 All. 158, referred to.

A mortgage in the ordinary way is executed by a mortgagor in favour of the mortgagee. The mortgagee may be the person who advances the money or he may be advancing funds belonging to some other person who allows the mortgagee named in the document to hold himself out as the true mortgagee, *i.e.*, he is a *benamidar*. The mortgagee named in the mortgage has a right to sue on the mortgage whether the funds advanced belonged to him or to some other person.

Gur Narayan v. *Sheo Lal*, 46 I.A. 1; *Narayan Vagle* v. *Mohidin*, I.L.R. 49 Bom. 832; *Parmeshwar Dat* v. *Anardan Dat*, I.L.R. 37 All. 113; *Sachitanand*[a] v. *Baloram*, I.L.R. 24 Cal. 644; *Singa Pillay* v. *Reddy*, I.L.R. 41 Mad. 435, referred to.

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* Civil First Appeal No. 31 of 1937 from the judgment of the District Court of Meiktila in Civil Regular No. 2 of 1936.