APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mackney.

1938

July 14.

MA SINT *v.* MA MA GALE.*

Burmese Customary law—Apatitha *child—Inheritance from adoptive parents—Sharing with relatives of adoptive parents—Conditions—Remarriage of adoptive parent—Death of parent and survival of second wife—Rights of* keittima *child and* kilita *child*—Apatitha *child's claim to inheritance.*

An *apatitha* child is adopted with no intention on the part of its adoptive parents that it shall inherit from them. In *Manugye* the *apatitha* child is placed on an equality with the relatives of the adoptive parents on certain conditions and they succeed only when there is no survivor of the adoptive couple and no natural or *keittima* child or children.

Ko Pe Kyai v. *Ma Thein Kha*, [1937] Ran. 426; *Ma Than Nyun* v. *Daw Shwe Thit*, I.L.R. 14 Ran. 557; *Maung Gyi* v. *Maung Aung Pyo*, I.L.R. 2 Ran. 661, referred to.

A *keittima* child on the remarriage of one parent after the death of the other can sue for partition of the estate in the same manner as a natural born child.

Ma Thein v. *Ma Mya*, I.L.R. 7 Ran. 193; *Po An* v. *Ma Dwe*, I.L.R. 4 Ran. 184, referred to.

But a *kilita* child who has greater privileges than an *apatitha* child has no right to share with his father's widow in the father's estate.

Ma Hnya v. *Ma On Bwin*, 9 L.B.R. 1, referred to.

After the death of his wife, the adoptive father of an *apatitha* child married again. On his death the *apatitha* child claimed a share of inheritance in his estate.

Held that the *apatitha* child could not share in the estate of her adoptive father during the life time of his second wife.

E Maung for the appellant.

Tha Kin for the respondent.

MACKNEY, J.—The plaintiff-respondent Ma Ma Gale has been held by the original Court to be an *apatitha* child of U Tun Gyaw and his wife Ma Lon Byu both deceased. Ma Lon Byu was the natural aunt of Ma Ma Gale. She predeceased her husband U Tun Gyaw and after her death U Tun Gyaw married the defendant-

* Civil First Appeal No. 6 of 1938 from the judgment of the Assistant District Court of Bassein in Civil Regular No. 9 of 1937.

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appellant Ma Sint. Ma Ma Gale has brought a suit for the administration of the estate of U Tun Gyaw. The original Court having found that she is an *apatitha* child decided that she was entitled to one-half of the share of the natural child. Therefore as the share of a natural child in the present circumstances would have been three-quarters, it awarded Ma Ma Gale a three-eighth share. Against this decision Ma Sint has now preferred this appeal. One of the grounds set out in the written memorandum of appeal is that the original Court erred in holding that the plaintiff-respondent was an *apatitha* child of U Tun Gyaw and Ma Lon Byu. This contention, however, was not urged before us. The main contention raised is that in Burmese Buddhist Law the *apatitha* child has no right of inheritance in the presence of a wife of the deceased.

It is quite clear that in the absence of *keittima* or natural children the *apatitha* child is entitled to inherit in the estate of his adoptive parents : *Ko Pe Kyai* v. *Ma Thein Kha and others* (1), *Ma Than Nyun* v. *Daw Shwe Thit* (2) and *Maung Gyi and one* v. *Maung Aung Pyo* (3). Where there are no natural or *keittima* children the *apatitha* child takes half of the estate of the adoptive parents, the other half going to the relatives.

In *Manugye*, Volume X, Article 25, is laid down the law for partition of the property between the adopted son and the relations of the adopting father and mother. Generally throughout the article it is assumed that both the adoptive parents are dead. If the adopted child shall be living with the adopting parents at the time of their death, he is to share equally with the relations of the deceased. If he shall have already received a portion and be living separate, he shall have no further share ; the property shall descend to the relatives of

(1) [1937] Ran. 426. (2) (1936) I L.R. 14 Ran. 557.
(3) (1924) I.L.R. 2 Ran. 661.

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the deceased. To this proposition a proviso is attached, namely, that if the deceased man and his wife had *payin* and *leiletpwa* property, the survivor was the heir and on the death of the survivor his or her relatives would inherit. Finally there is the case where the adopted child is one of the six relatives entitled to inherit. In his case, although he be living separately, if there be no natural children, he shall take an equal share with the relatives.

It is possible to read this last clause as a special case of the adopted child who has received his portion and is living separate, and in that case it would indicate that after the death of the survivor he is entitled to an equal share with the relations. Be that as it may, it must be conceded that the *Manugye* does not clearly state whether the adopted son has or has not any right to share in the estate in such a case as the one that is now before us.

I think there can be no doubt that if such a case as the present had been mentioned in the *Dhammathats*, it would have been stated that the *apatitha* child would have no right to inherit when the adoptive father on the death of the adoptive mother had married again and died.

It has only been comparatively recently, *i.e.* in 1929, that it has been laid down that a *keittima* child on the remarriage of one parent after the death of the other can sue for partition of the estate in the same manner as can a natural born child : *Ma Thein* v. *Ma Mya and one* (1). The learned Judges who decided this case quote the following observation from *Po An* v. *Ma Dwe* (2), a Full Bench decision :

"We are satisfied that according to the *Dhammathats* the position of the *keiktima* child in respect of inheritance was inferior

(1) (1929) I.L.R. 7 Ran. 193. (2) (1926) I.L.R. 4 Ran. 184.

to that of own children, but in view of the judicial decisions which for many years have recognized the right of the *keiklima* child to share equally with the own children we are of opinion that that right should not now be questioned."

The learned Judges who decided *Ma Thein* v. *Ma Mya and one* (1) were unable to decide how the right of a natural child to claim inheritance after one parent had died, and on the remarriage of the surviving parent, could be denied to a *keittima* child.

In *Ko Pe Kyai* v. *Ma Thein Kha and others* (2) it was pointed out that the *keittima* child gets his right of inheritance from the intention of the adoptive parents that he shall inherit. On the other hand an *apatitha* child does not get any right of inheritance from the intention of the person who adopts because the person who adopts has no intention to give him any such right. There is, therefore, a very good reason why the same rights which have been extended to a *keittima* child notwithstanding the *Dhammathats* should not be extended to the *apatitha* child.

In Volume X, Article 25 of the *Manugye* it is made quite clear that the *apatitha* child in certain circumstances can come in with the relatives in sharing the estate. As, however, the relatives do not inherit until the survivor of the husband or wife dies, it would seem to follow that the *apatitha* child also cannot inherit until the survivor dies unless special provision has been made for his so inheriting, as was formerly in existence for the natural children only, but now exists in favour of a *keittima* child also.

Again the *kilita* child has greater privileges than the *apatitha*. On the death of his parents, the co-heirs have no claim to the property, he shall inherit the whole of the property : Kinwun Mingyi's Digest of Burmese Buddhist Law, section 301. In *Ma Hnya* v.

(1) (1929) I.L.R. 7 Ran. 193. (2) [1937] Ran. 426.

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Ma On Bwin (1)—a Full Bench decision of the Chief Court of Lower Burma—it was held that a *kilita* child could not share with his father's widow in the father's estate. In this case the *kilita* child was the child of a man by a woman who was not his wife. The man had subsequently married another woman. On his death the illegitimate daughter brought a suit for three-quarters of the share of his estate.

As therefore, so far as inheritance in the estate of parents goes, the *kilita* child who is more privileged than the *apatitha* child may not share with the survivor, it would follow that all the more certainly is the *apatitha* child excluded.

The *apatitha* child has been adopted with no intention to inherit ; no thought for its future has been taken. In certain special circumstances it is allowed to inherit in the estate of its adoptive parents : but it is quite clear that it cannot do so when there is a direct claimant. It has been placed, on certain conditions, on an equality with the relatives of the deceased ; but these themselves succeed only when there is no survivor of the deceased couple. Such a survivor is the recognized heir of the deceased and his or her rights can be affected in certain circumstances only by the natural children or the *keittima* child, that is to say, the children in whose status the right of inheritance is inherent.

I would, therefore, hold that Ma Ma Gale has no right to share in the estate of U Tun Gyaw in the lifetime of Ma Sint. I would therefore allow this appeal and set aside the judgment and decree of the trial Court with costs throughout, advocate's fees in this Court five gold mohurs.

MYA BU, J.—I agree.

(1) 9 L.B.R. 1.