APPELLATE CIVIL.

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

U TAUK TA AND ANOTHER *v.* MA OHN YIN.*

1938

Dec. 20.

Burmese customary law—Child of marriage an only daughter—Daughter an orasa *before mother's death—No claim made on mother's death—Remarriage of father—Claim of half share of estate—Claim of eldest child on remarriage of parent—Fresh right—New period of limitation—Limitation Act, Sch. I, art 123.*

The daughter and only child of a Burmese Buddhist couple who has attained the status of an *orasa* before the death of her mother and has not claimed her share as *orasa* on her mother's death, is entitled to the shares both of an eldest child and of *kanitha* (younger) children, and therefore to claim, on the remarriage of her father, one half of the estate existing at the date of the remarriage.

It is contrary to Burmese notions and contrary to the provisions of the *Dhammathats* that an *orasa* child who has refrained from claiming and has not received his or her share on the death of his or her parent, within 12 years from the date of death, must be regarded as having received his or her share and that consequently he or she has fallen out of the family. The eldest child, whether an *orasa* or not, on the remarriage of the surviving parent becomes entitled to a quarter share of the estate held by the surviving parent at the time of remarriage, if such child, *qua orasa*, has not already taken the *orasa*'s share. The remarriage gives the eldest child a fresh right and a new period of limitation.

Ma Thein v. *Ma Mya*, I.L.R. 7 Ran. 193 ; *Ma Shwe Yu* v. *Ma Kin Nyun* ; I.L.R. 7 Ran. 240 ; *Maung Aung Pe* v. *U Tun Aung Gyaw*, I.L.R. 8 Ran. 524 (P.C.) ; *Maung Kyin* v. *Ma Kya Gaing*, I.L.R. 8 Ran. 396 ; *Maung No* v. *Maung Po Thein*, I.L.R. 1 Ran. 363 ; *Maung Pan On* v. *Maung Tun Tha*, 11 L.B.R. 292 ; *Maung Po Aung* v. *Maung Kha*, I.L.R. 6 Ran. 427 ; *Maung Po Chain* v. *U Po Mya*, Civil 1st Ap. 113 of 1930, H.C. Ran. ; *Maung Po Kin* v. *Maung Tun Yin*, I.L.R. 4 Ran. 207 ; *Maung Sein Ba* v. *Maung Kywe*, I.L.R. 12 Ran. 55 ; and Civil 1st Ap. 71 of 1935, H.C. Ran. ; *Maung Sein Shwe* v. *Maung Sein Gyi*, LL.R. 13 Ran. 69 (P.C.) ; *Tun Tha* v. *Ma Thit*, 9 L.B.R. 56, referred to.

E Maung for the appellants.

P. K. Basu for the respondent.

MYA BU and MACKNEY, JJ.—The plaintiff-respondent, Ma Ohn Yin, is the daughter of the

* Civil First Appeal No. 62 of 1938 from the judgment of the District Court of Maubin in Civil Regular No. 9 of 1937.

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defendant-appellant, U Tauk Ta, by one Daw Hpyu, who died about June, 1922. There were some allegations that U Tauk Ta married again in 1924, but it is now admitted that there is no sufficient evidence of this marriage. It has, however, been established that U Tauk Ta married the second defendant-appellant, Ma Sein Tin, about June 1926. Ma Ohn Yin is the only child of U Tauk Ta and Daw Hpyu. She has claimed to be entitled to one-half of the properties which U Tauk Ta possessed at the time of his second marriage with Ma Sein Tin, in virtue of her being the only child of U Tauk Ta and, therefore, entitled to the rights of an eldest child and of younger children. Ma Ohn Yin attained the status of *orasa* child before the death of her mother Daw Hpyu : consequently, on the death of the latter she became entitled to one-quarter of the estate. This claim, however, she did not make. The suit was filed on the 24th November, 1937. Therefore, at that date her claim as an *orasa* child to partition on the death of her mother was time-barred. The District Court has decreed her claim. U Tauk Ta and Ma Sein Tin now appeal against the decree of the District Court.

It is argued before us that the claim of Ma Ohn Yin as an *orasa* child to a one-quarter share of the estate brought by her father to his remarriage is not a different claim from her claim to partition as an *orasa* child on the death of her mother. On the death of her mother she became entitled to one-quarter of the estate. On the remarriage of her father she could not become further entitled to that which had already been fully vested in her. Consequently, the remarriage of her father did not start a fresh period of limitation within which Ma Ohn Yin could make her claim for her inheritance. That being so, she is now debarred from claiming as *orasa* child a quarter share on the remarriage

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of her father, the period of limitation being laid down by Article 123 of the Limitation Act as twelve years from the date when the share became recoverable. As regards the rest of her claim, if indeed she be entitled to any more than a quarter of the estate on the remarriage, then she can only claim what the younger children, had there been any, could have claimed, *i.e.*, one quarter of the estate remaining after the *orasa*'s share has been distributed, that is to say, three-sixteenths of the estate.

The claim that there had been a remarriage previous to that with Ma Sein Tin has been abandoned and it is not necessary to deal with the consequences which might have arisen had that alleged earlier remarriage been established.

Following on the decision of their Lordships of the Privy Council in *Tun Tha* v. *Ma Thit and others* (1) to the effect that what an *orasa* child in the position of Ma Ohn Yin obtains is a definite one-fourth part of the estate, a right which she was at liberty to assert within any period which was not outside of that which is fixed by Article 123 of the Indian Limitation Act, it has been held by this Court that the right of an *orasa* child to partition is a vested right and that his quarter share becomes vested in him on the death of the appropriate parent. [See, *Maung Pan On* v. *Maung Tun Tha and others* (2), *Maung No and one* v. *Maung Po Thein and six others* (3) and numerous other cases.]

From this the learned counsel for the appellants argues that the *orasa*'s share having once become vested in Ma Ohn Yin on the death of her mother could not again become vested in her on the remarriage of her father and, therefore, her claim to the *orasa*'s share

(1) 9 L.B.R. 56. (2) 11 L.B.R. 292.
(3) (1923) I.L.R. 1 Ran. 363

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became barred after the lapse of twelve years from the death of her mother. A similar argument to this has been dealt with fully in *Maung Po Aung and fifteen* v. *Maung Kha* (1). There it was held that if no claim for partition has been made on the death of one parent or on the remarriage of the surviving parent or on the subsequent death of the surviving parent, a claim for partition may be made at the death of the step-parent. In his judgment Maung Ba J. observes :

"I can find no authority for holding that because he has not claimed his vested share within that period (*i.e.*, 12 years) he would forfeit his right to get his proper share under section 14 (*Manugye*, Chapter X) when his mother died subsequently."

Again,

"When there are two rules one more favourable than the other, I do not see any reason why an heir entitled to come under either of them should be bound down to any particular rule. When no immediate partition is claimed the share not claimed still forms part of the estate and all the members of the family are entitled to the advantages accruing therefrom."

And Heald J. observed :

"I am quite certain that the idea that a child who has refrained from claiming and has not received a share to which it was entitled must be regarded as having received that share is entirely foreign to Burmese Buddhist law. That idea is directly contrary to the provisions of the *Dhammathats*, since, if it were accepted, the children of a first marriage who had failed to claim their share on the remarriage of the surviving parent would be debarred from claiming on the death of that parent or on the death of the step-parent and the express provisions of the *Dhammathats* which provide for such claims would be entirely nugatory."

It is true that in a later case, *Maung Po Chain and five others* v. *U Po Mya and one* (2)—unreported—Heald J. expressed a contrary opinion, namely, that

(1) (1928) I.L.R. 6 Ran. 427. (2) Civ. 1st Ap. 113 of 1930, H.C. Ran.

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the quarter share of the *orasa* (in the case before him) had become vested in her and she could not acquire by reason of her father's subsequent remarriage a better title to it than she had already : the legal position was that the *orasa* child's quarter share was already vested at the time of her father's remarriage and the basis of her suit that on that marriage she acquired a new right to a quarter share of that property was mistaken. These remarks, however, were *obiter* as it had been admitted that the claimant was a co-sharer in the property.

In our opinion, it is quite contrary to the ordinary notions current amongst the Burmese to hold that an *orasa* child who does not claim his share on the death of his parent nevertheless must be regarded as having taken it, with the further consequence that he falls out of the family. Certainly, a perusal of the *Dhammathats* does not lend any support to such an idea. It is not wise to press to the utmost the logical sequences of a legal conception imported from another system of law into a system of customary law : to do so will inevitably result in a conclusion which is quite contrary to ordinary practice.

We have no doubt that in the present case Ma Ohn Yin's claim to one quarter share as eldest child must be deemed to have received a new period of limitation beginning from the remarriage of her father. It may be noted that, as the eldest child, Ma Ohn Yin, on the remarriage of her father, would be entitled to claim a one-quarter share of the estate, whether *orasa* child or not [See, *Maung Kyin and one* v. *Ma Kya Gaing and others* (1)].

As regards the share to which Ma Ohn Yin is entitled, we are of opinion that the weight of authority

(1) (1930) I.L.R. 8 Ran. 396

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is in favour of holding that she is entitled to one half of the estate brought to the remarriage by her father. (See "Attasankhepa Vannana Dhammathat", section 159.)

In *Ma Thein* v. *Ma Mya and one* (1) it was held that on the remarriage of one parent after the death of the other, the *kanitha* children can sue for partition of the estate. This decision followed *Maung Po Kin and one* v. *Maung Tun Yin and two* (2), where it was held that the eldest child, on the remarriage of the surviving parent, becomes entitled to a quarter share in the joint estate of the parents if he or she has not taken a share as *orasa*, and on such remarriage the younger children become entitled collectively to a quarter share.

It would seem, therefore, that an only child would become entitled to a one-half share. [See *Maung Sein Ba* v. *Maung Kywe and others* (3) and the cases quoted therein.] It is true that in one part of the latter judgment words are used which would suggest that what the children are entitled to on the remarriage of their father is their mother's interest in the joint property; but, with great respect, we do not think that this can be held correctly to state the law.

In *Maung Sein Shwe* v. *Maung Sein Gyi and others* (4) their Lordships of the Privy Council referred to *Ma Shwe Yu and others* v. *Ma Kin Nyun and others* (5) as establishing the proposition that by Burmese law, when after the death of one parent the surviving parent remarries, the children of the first marriage are entitled to claim partition, unless there has been a previous partition between them and the surviving parent, that such right has been regarded as vesting on the remarriage and that the estate subject to such

(1) (1929) I.L.R. 7 Ran. 193.
(2) (1926) I.L.R. 4 Ran. 207.
(3) (1933) I.L.R. 12 Ran. 55.
(4) (1934) I.L.R. 13 Ran. 69.
(5) (1929) I.L.R. 7 Ran. 240.

partition is the estate held by the surviving parent at the time of the remarriage.

Such a rule is in conformity with equity, for it would be unreasonable to require a parent to make good to his children by a former marriage a part of the estate which, through no fault of his, might have disappeared subsequent to the death of the first wife and prior to his remarriage. It is reasonable that the estate to be divided should be the estate existing at the time the reason for partition arises.

In *Maung Aung Pe* v. *U Tun Aung Gyaw and two* (1), to which reference was made in *Maung Sein Ba* v. *Maung Kywe and others* (2), it is remarked :

" It is settled law that on the re-marriage of a surviving parent the children of the former marriage acquire a vested interest in the joint-property of that marriage to the extent of their deceased parent's share."

We have been unable to discover in what decisions prior to *Maung Aung Pe*'s case (1) such a proposition had been laid down. In *Maung Aung Pe*'s case (1) their Lordships were dealing with the special case of two contemporary wives one of whom had died, and they held that the children of one wife were entitled on her death to claim partition against their father and the other wife, and their manner of stating the proposition cited above seems, if we may say so with respect, to have been influenced by the particular nature of the case before them.

We would add that in a more recent case, *Maung Sein Ba* v. *Maung Kywe and another* (3), *Ma Shwe Yu and others* v. *Ma Kin Nyun and others* (4) has been followed.

For these reasons, we see no sufficient cause to interfere with the decision of the lower Court and this appeal is dismissed with costs.

(1) (1930) I.L.R. 8 Ran. 524.
(2) (1933) I.L.R. 12 Ran. 55.
(3) Civ. 1st Ap. 71 of 1935, H.C. Ran.
(4) (1929) I.L.R. 7 Ran 240.