

FULL BENCH (CIVIL).

Before Hon'ble Sir Mya Bu, Kt., Offg. Chief Justice, Mr. Justice Ba U, and Mr. Justice Dunkley.

1938

Aug. 22.

MA PWA TIN v. YEO SEIN MAUNG.*

Chinese Buddhists—Succession governed by Chinese customary law—Widow's right to administer property—Succession to the estate—Children of the deceased—Widow's claim to maintenance and funeral expenses—Widow's claim to letters of administration—Maintenance not a right to share in estate or a charge—Burma Laws Act, s. 13 (1) —Transfer of Property Act, s. 39—Succession Act, s. 218 (1).

Under the Chinese customary law the widow has a right to administer the estate of her deceased husband, but it does not follow that she has therefore a right to obtain in every case letters of administration under the Succession Act. Under the customary law the estate of a deceased Chinese is divided among his sons ; daughters only succeed when there are no sons, and the widow succeeds only when there are no children ; otherwise the widow has a right to maintenance, and to have her funeral expenses provided.

Bou Kwei v. S.K.R.S.K.R. Firm, I.L.R. 8 Ran. 172 ; Chan Pui v. Saw Sein, I.L.R. 6 Ran. 623 ; Ma Sein v. Ma Pan Nyun, I.L.R. 2 Ran. 94 ; Ma Sein Byn v. Khoo Soon Thye, I.L.R. 11 Ran. 310 ; Maung Po Maung v. Ma Pyit Ya, I.L.R. 1 Ran. 161, referred to.

Under the provisions of s. 218 (1) of the Succession Act letters of administration of the estate of a deceased Chinese Buddhist may be granted to a person who is entitled to the whole or part of his estate. His widow's right to maintenance is not a right to share in the estate and is not a charge upon the estate except when so made by appropriate action in Court. The widow therefore is not entitled to letters of administration as against the son of a deceased Chinese Buddhist. Customary law cannot override the express provisions of a statute to the contrary.

Lakshman v. Satyabhama Bai, I.L.R. 2 Bom. 494, referred to.

Shwe Khoon v. Ma Sein Nu [1938] Ran. 249, overruled.

The following reference was made for the decision of a Full Bench by

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MYA BU and MACKNEY, JJ.—These appeals arise out of rival applications for letters of administration to the estate of a deceased Chinese Buddhist. The deceased had contracted three successive marriages. By his first wife he had three sons, of whom the respondent is the eldest ; by the second wife he had

* Civil Reference No. 3 of 1938 arising out of Civil First Appeal Nos. 41 and 42 of 1938 of this Court.

two daughters, while by his third wife (the appellant), who survived him, he had two daughters and three sons.

The appellant applied for a grant of letters of administration to the estate of her deceased husband on the ground that she is his surviving widow, while the respondent claims that he is entitled to the grant being the eldest son of the deceased.

The question for determination is : which of the two rival claimants is better entitled to administer the estate ?

Under section 218 (1) of the Succession Act the administration of the estate of a deceased Buddhist may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

It is settled law that in matters of succession or inheritance the estate of a Chinese Buddhist is governed by the Chinese Customary Law. It is also settled law that under the Chinese Customary Law the widow is not one of the heirs but the sons are, the widow being entitled to maintenance only out of her deceased husband's estate. The widow not being an heir while there are sons, it appears to us that a son is ordinarily entitled to be granted letters of administration in preference to the widow. But in *Shwe Khoon v. Ma Sein Nu* (1) it was laid down that—

“ so far as contested applications for letters of administration to the estate of a deceased Chinaman are concerned, when the applicants are a widow and a son, it does not matter whether the deceased was a Buddhist or non-Buddhist, that is, whether the succession to his estate is governed by the Chinese Customary Law or by the Succession Act, for in either case the proper person to obtain letters of administration to his estate is his widow, and other persons having claims to the estate must, if necessary, prosecute those claims in the form of a separate suit against the widow, either for their share or for the administration of the estate by the Court.”

In arriving at this conclusion the learned Judges followed the dictum of Heald J. appearing in *Maung Po Maung and one v. Ma Pyit Ya* (alias *Ma Thein Tin*) (2), which is in these words :

“ If there are sons or daughters the widow has only a right to administer the estate and to be maintained out of it

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and a claim on the estate for provision for her funeral, but the property vests not in her but in the children."

For this *dictum*, reliance was placed on the works of Jernigan and Alabaster of which works the former is not available for reference by us, but we have referred to the apposite passage in Alabaster on page 578 which runs as follows :

"NOTE.—The principle laid down is that at the death of a father his property is considered to be vested in all his sons equally, whether by the venter of his principal or secondary wife ; and although the principal wife if surviving has a certain right of administration, and a claim on the estate for provision for her funeral, the property does not vest in her, and may on cause shewn be distributed among the heirs ; also that on the decease of one of the joint heirs, his interest vests in his heir or heirs. Further it appears that a secondary wife has no claim on an estate."

This principle was deduced from a case which is set out on pages 575, 576 and 577. The facts of the case and the decision given thereon by the Magistrate do not contain any indication of any right of administration enjoyed by the widow as against the sons. Be that as it may, the learned author does not speak of any definite right of administration but uses the word somewhat loosely.

The law appears to have been more clearly stated on pages 25 and 26 of the "Chinese Family and Commercial Law" by Mr. Jamieson. The learned author observed :

"No special provision is made for the widow as such, but she is amply cared for. If she is also the mother of the family she can refuse to consent to a division of the estate, in which case she has the practical control of the whole inheritance On the death of a father the legal estate so to speak rests in the sons, but equity in the shape of custom forbids their dealing with it without the sanction of the mother. So long as the family estate was undivided, the sons would be tenants in common and would all be bound to join in a transfer of any portion, but even then, to give validity to the transaction, the mother must also be a party."

It is probable that "a certain right of administration" spoken of by Mr. Alabaster refers to the "practical control" appearing in the above observation which deals, it should be remembered, with

the position of the widow as regards her sons only. Between a mother and her sons there may be some moral sanction which gives rise to the mother's control over the sons' dealings with the estate, but it is not possible to conceive of the existence of similar sanction in the case of a widow with reference to the children of the other wives of her deceased husband. The mother's right of control as is recognized in the principles expounded by the learned authors is, in our opinion, quite insufficient to place the widow in the same position as a person who is entitled to letters of administration under section 218 (1) of the Succession Act. For these reasons it appears to us to be desirable to differentiate a case relating to the application for letters of administration to the estate of a deceased Chinese, who is a Buddhist, from one for letters of administration to the estate of a deceased Chinese who is a non-Buddhist; for the estate of a deceased Chinese who is a non-Buddhist is governed by the rules of succession and inheritance laid down in the Succession Act.

In following the *dictum* of Heald J. in *Maung Po Maung and one v. Ma Pyit Ya (alias) Ma Thein Tin* (1) the learned Judge delivering the judgment of the Court in *Shwe Khoon's* case (2) mentioned the fact that the former case had been approved of in two subsequent Bench decisions of this Court; the two subsequent Bench decisions appear to be those in *Ma Sein v. Ma Pan Nyun and two* (3) and *Chan Pyu v. Saw Sin and others* (4) which do not turn upon the matter involved in this case.

In the result we are of the opinion, with all respect, that the ruling in *Shwe Khoon v. Ma Sein Nu* (2) ought to be reconsidered with reference to the granting of letters of administration to the estate of a Chinese Buddhist who has died intestate. Therefore, we refer the following questions for the consideration of a Full Bench:

- (1) Whether the widow of an intestate Chinese Buddhist deceased in Burma, succession to whose estate is governed by the Chinese Customary Law, is entitled to the grant of letters of administration to that estate as against the son of the deceased?
- (2) If the answer is in the affirmative, would she be so entitled where she is not the mother of the opposing son?

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(1) (1923) I.L.R. 1 Ran. 161, 168.

(3) (1924) I.L.R. 2 Ran. 94.

(2) [1938] Ran. 249.

(4) (1928) I.L.R. 6 Ran. 623.

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Woon for the applicant. In *Maung Po Maung v. Ma Pyit Ya* (1) it has been laid down that according to Chinese customary law though there are children of a deceased Chinese the widow has the right to administer the estate, and she has a right to maintenance out of the estate and a claim on the estate for provision of her funeral expenses. She can therefore be said to be entitled to a part of the estate within s. 218 (1) of the Succession Act. The Court has a discretion to appoint the widow administratrix under this section and also under s. 254 of the Act. The mother can represent the whole family and look after its interest, but a son cannot. The words "entitled to" in s. 218 (1) of the Succession Act must be given a wide meaning and there is no reason why the customary law of the Chinese should not prevail. In *Bon Kwi v. S.K.R.S.K.R.* (2) the Privy Council has recognized the right of the widow to administer her deceased husband's estate. The applicant is the mother and natural guardian of three sons and three daughters of the deceased, whilst the respondent only represents himself.

Khoo for the respondent. S. 218 (1) of the Succession Act is conclusive. The widow is not entitled to any share of the estate and is not an heir of the deceased. Her claim to maintenance is but an actionable claim for a debt.

DUNKLEY, J.—The questions which in this reference have been propounded for the decision of the Full Bench are as follows :

(1) Whether the widow of an intestate Chinese Buddhist deceased in Burma, succession to whose estate is governed by the Chinese Customary Law, is entitled to the grant of letters of administration to that estate as against the son of the deceased ?

(1) I.L.R. 1 Ran. 161.

(2) I.L.R. 8 Ran. 172.

(2) If the answer is in the affirmative, would she be so entitled where she is not the mother of the opposing son?

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The learned Judges who made the reference doubted the correctness of the decision in *Shwe Khoon v. Ma Sein Nu* (1) in respect of the grant of letters of administration to the estate of a deceased Chinese Buddhist and, therefore, this decision falls for further consideration by the Full Bench.

The head note of *Shwe Khoon's* case (1) reads as follows :

"In case of contested applications for letters of administration to the estate of a deceased Chinaman, when the applicants are a widow and a son, it does not matter whether the deceased was a Buddhist or a non-Buddhist or whether the succession to his estate is governed by Chinese customary law or the Succession Act, for in either case the proper person to obtain letters of administration to his estate is his widow, and other persons having claims to the estate must, if necessary, prosecute those claims in the form of a separate suit against the widow, either for their share or for the administration of the estate by the Court."

This head note correctly summarizes the decision, which was based upon a statement of the Chinese customary law made in the case of *Maung Po Maung and one v. Ma Pyit Ya (alias) Ma Thein Tin* (2), where it was laid down that if there are sons or daughters the widow has only a right to administer the estate and to be maintained out of it and a claim on the estate for provision for her funeral, but the property vests not in her but in the children. This statement of the law was subsequently quoted with approval in *Ma Sein v. Ma Pan Nyun and two* (3) and *Chan Pyu v. Saw Sin and others* (4); and in *Bon Kwi and others v. S.K.R.S.K.R. Firm* (5) their Lordships of the Privy Council appear to

(1) [1938] Ran. 349.

(3) (1924) I.L.R. 2 Ran. 91.

(2) (1923) I.L.R. 1 Ran. 161, 168.

(4) (1928) I.L.R. 6 Ran. 623.

(5) (1929) I.L.R. 8 Ran. 172.

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have recognized the right of the widow of a Chinese Buddhist to administer her deceased husband's estate. I have referred to such authorities on Chinese customary law as are available to us, and I have no doubt that the statement of the widow's rights which was laid down in *Maung Po Maung v. Ma Pyit Ya* (1) is a correct statement of the Chinese customary law.

Following this decision, it was assumed in *Shwe Khoo v. Ma Sein Nu* (2) assumed that, as the widow has under the Chinese customary law a right to administer her deceased husband's estate, she is entitled to the grant of letters of administration to his estate; but that assumption was not justified. It does not follow that because under the customary law the widow has a right of administration she therefore has a right to obtain letters of administration under the Succession Act. Section 13 (1) of the Burma Laws Act enacts that in any question regarding succession or inheritance the Buddhist Law shall be applicable in cases where the parties are Buddhists except in so far as such law has by enactment been altered or abolished; and it is therefore necessary to consider whether this rule of the Chinese customary law has been "altered" by the provisions of the Succession Act. The relevant provision is section 218 (1) of that Act, which enacts that if the deceased has died intestate, and was a Buddhist, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate. Consequently the widow cannot be entitled to the grant of letters of administration unless, according to the rules of the Chinese customary law for the distribution of the estate of a

(1) (1923) I.L.R. 1 Ran. 161, 168.

(2) [1938] Ran. 349.

deceased person, she is entitled to the whole or any part of her deceased husband's estate. That she is not so entitled is, in my opinion, clear.

In *Ma Sein Byu and another v. Khoo Soon Thye and others* (1) it was laid down that the estate of a deceased person governed by Chinese customary law is divided among his sons; daughters only succeed when there are no sons, and the widow succeeds only when there are no children; otherwise the widow has a right to maintenance, and to have her funeral expenses provided. Hence the widow's sole right in the estate is the right to maintenance and ultimately to funeral expenses. A right to maintenance out of the estate of the deceased is not a right to any share of the estate: it is not even a charge on the estate. This is clear from the provisions of section 39 of the Transfer of Property Act, which reads as follows:

"Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

Hence the right to receive maintenance is not a charge on the property. In regard to the right of a Hindu widow to maintenance it was laid down that this right is not a charge on her deceased husband's estate, as long ago as 1877, by the Bombay High Court in the case of *Lakshman Ramchandra Joshi and another v. Satyabhama Bai* (2), a decision which has since been consistently followed by the High Courts in India. In that case it was decided that according to the *Mitakshara* sons must, from the moment of their

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(1) (1933) I.L.R. 11 Ran. 310.

(2) (1877) I.L.R. 2 Bom. 494.

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father's death, be regarded as sole owners of the estate, yet with a liability to provide for the maintenance of their father's widow, and with a competence on the widow's part to have the estate made answerable; the widow has no proprietorship in the estate, but she has an equity to a provision which the Court will enforce to guard her against attempted fraud. In the course of his judgment in that case West J. said (at page 515):

“The widow's claim being strictly to maintenance and maintenance only, without any defined share in the estate even on partition, and the kind of maintenance even that she can claim being dependent on the perhaps fluctuating circumstances of the joint family, it appears that although she may, at her will, get her claim recognized as chargeable on the estate in the hands of the co-parceners, reduced to certainty, and secured as a specific charge on the estate, * * * yet if she should refrain from that course in the hope of sharing the improving circumstances of the family or through mere carelessness, she leaves the co-parceners an unlimited estate to deal with at their discretion, and must share their ill as well as their good fortune.”

This is a statement of a general principle which applies equally to the right of a Chinese Buddhist widow as to the right of a Hindu widow. The whole of the property vests in the sons of the deceased upon his death, subject to an obligation on their part to maintain their deceased father's widow out of the estate. But this obligation is not in the nature of a charge on the estate, although the widow may by appropriate action before the Courts crystallize it into a charge. Consequently, it cannot be said that the widow of a Chinese Buddhist is a person who is entitled to any part of the deceased's estate, and, therefore, she does not fall within the provisions of section 218 (1) of the Succession Act, and consequently

is not entitled to the grant of letters of administration to the deceased's estate.

Hence the case of *Shwe Khoon v. Ma Sein Nu* (1) was wrongly decided.

The answer to the first question propounded is in the negative, and the second question does not arise. The costs of this reference are assessed at ten gold mohurs to be costs in the appeal in which the reference was made.

MYA BU, OFFG. C.J.—I agree in the order proposed by my learned brother Dunkley J. The judgment of the referring Bench of which I was a member is sufficiently indicative of my opinions upon the points involved in the consideration of the questions referred for the decision of the Full Bench. The reasons given in that judgment and fully explained in the judgment of my learned brother confirm the view that the widow of an intestate Chinese Buddhist deceased in Burma, succession to whose estate is governed by the Chinese Customary Law, is not entitled to the grant of Letters of Administration to that estate as against the son of the deceased.

BA U, J.—I agree.

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