LETTERS PATENT APPEAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Dunkley, and Mr. Justice Braund.

1938
June 20.

MAUNG THEIN AND ANOTHER

v.

MAUNG NYO SEIN AND ANOTHER.*

*Burmese customary law—Children of first marriage—Contemporaneous second marriage—No children or descendants of second wife—Death of parents of first marriage—Right of children to succeed to property of step-mother on her death—*Pubbaka *children—"Former husband and wife"—"Former marriage."*

Where a Burmese Buddhist male has contracted two marriages and both wives have been alive at the same time, the children of the first marriage in point of time, whose parents both predeceased their step-mother, are heirs of their step-mother in respect of her separate property, when there are no children or direct descendants of the second wife.

Maung Aung Pe v. *U Tun Aung Gyaw*, I.L.R. 8 Ran. 524, referred to.

Ma Ni v. *Ma Shwe Pu*, I.L.R. 8 Ran. 590, distinguished.

The expressions "former husband" and "former wife" may connote that the marriage in question has terminated, but the expression "former marriage" means a marriage which is earlier in point of time and may be subsisting with a marriage contracted later. The children of the first marriage are *pubbaka* children of the second marriage, and entitled to inherit in the absence of descendants of the second wife.

Ma Gun Bon v. *Maung Po Kywe*, (1897-01) 2 U.B.R. 66; *Maung Thein Maung* v. *Ma Kywe*, I.L.R. 13 Ran. 412, referred to.

Special Civil Second Appeal No. 191 of 1937 of the High Court from the judgment of the District Court of Tharrawaddy in Civil Appeal No. 3 of 1937. The facts and the law are set out in the judgments reported below.

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MYA BU, J.—This appeal arises out of a suit by the appellants against one Maung Myint and the respondents for the recovery of possession of certain immoveable property which had been conveyed by Maung Myint in favour of the respondents by a

* Letters Patent Appeal No. 4 of 1938 arising out of Special Civil Second Appeal No. 191 of 1937 of this Court.

registered deed. The appellants claim that the property in question was theirs as it had devolved on the first appellant on the death of Daw Khant Gyi, who was admittedly the owner of it during her life-time. It is their case that Maung Myint had no right, title or interest in the property, and that therefore the conveyance by Maung Myint in favour of the respondents conveyed no right, title or interest whatever to the respondents in the property in question.

The first appellant, Maung Nyo Seint, and the second appellant, Ma Tha Li, are husband and wife. The former is the son of U Sein and Daw The U. Daw The U died many years ago. About 3 years before her death, while the marriage between U Sein and Daw The U was still subsisting, U Sein married Daw Khant Gyi. A few years after Daw The U's death U Sein died. There was no issue of U Sein and Daw Khant Gyi. About a year or so after U Sein's death Daw Khant Gyi died. The transfer by Maung Myint in favour of the respondents took place thereafter.

The respondents raised many defences with a view to showing that Maung Nyo Seint had no right to inherit the estate of Daw Khant Gyi, but that Maung Myint was the rightful heir inasmuch as he was a *keittima* adopted son of Daw Khant Gyi. The pleadings gave rise to many issues of fact among which the most material one was whether Maung Myint was the *keittima* adopted son of Daw Khant Gyi. The trial Court found all the questions of fact in favour of the appellants, and upon the issue of law held that Maung Nyo Seint was the sole heir of Daw Khant Gyi. The result was that the trial Court passed a decree for possession of the property in suit in favour of the appellants. Maung Myint, who took no interest whatever in the proceeding in the trial Court, did not appeal against the decree, but the respondents filed their appeal in the District Court without joining Maung Myint either as appellant or as respondent. The appellants, however, did not take any objection on the ground of incompetency of the appeal, in the District Court. One of the grounds of appeal in this Court is that that appeal was incompetent. In disposing of the present appeal I do not propose to consider this ground of appeal.

The lower appellate Court concurred in all the findings of fact of the Court of first instance. Thus both the Courts below have found that the alleged *keittima* adoption of Maung Myint was not established by the evidence on the record. The lower appellate

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Court however reversed the decree of the Court of first instance on the ground that Maung Nyo Seint was not the heir of Daw Khant Gyi under the Burmese Buddhist Law. The learned District Judge, following the decision in the case of *Ma Ni* v. *Ma Shwe Pu and others* (1), held that Maung Nyo Seint was not an heir of Daw Khant Gyi and therefore was not entitled to recover possession of Daw Khant Gyi's property from the respondents. In my opinion that proposition cannot be maintained. Neither the ruling in *Ma Ni* v. *Ma Shwe Pu and others* (1) nor the decision of the Full Bench in *Maung Thein Maung* v. *Ma Kywe and others* (2) is an authority for the proposition that the son of one of the wives of a contemporaneous marriage is in a less favourable position than a step-child in the matter of inheritance in the estate of his father's wife other than his own mother. In *Ma Ni*'s case (1) the dispute was between a child of one of the contemporaneous wives and the child or children of another wife with reference to the property left by the latter. In *Maung Thein Maung*'s case (2) the claim was by a son for an *orasa* share in the property in the hands of his father's second wife as against the second wife. Therefore no analogy exists between either of those cases and the present case. It cannot be disputed that even if the marriages of U Sein and Daw The U and U Sein and Daw Khant Gyi were, instead of being contemporaneous, successive, on the death of Daw Khant Gyi leaving no husband and issue, Maung Nyo Seint would have an indefeasible claim to her property.

For these reasons I allow this appeal, set aside the judgment and decree of the lower appellate Court, and restore the decree of the trial Court with costs throughout.

The respondents obtained leave for Letters Patent Appeal.

P. K. Basu for the appellants. Where a husband marries a second wife during the life-time of the first wife, the children of the first wife can have no claim to inherit the property of the second wife in case she and the parents of the children die, and there is no issue of the second marriage. The right of *pubbaka* children to inherit is set out in Richardson's translation of *Manugye*,

(1) (1930) I.L.R. 8 Ran. 590. (2) (1935) I.L.R. 13 Ran. 412.

Book X, and *pubbaka* children are said to include "children male or female, of a wife by a former husband, or of a husband by a former wife." See also May Oung's Buddhist law, 1914 ed., p. 253; U Gaung's Digest, Vol. 1, s. 15, pp. 27, 28. In order that children of a former marriage shall be *pubbaka* children the first marriage must be terminated before the remarriage of one parent. *Ma Ni* v. *Ma Shwe Pu* (1). There is a distinction between a man marrying a second wife after the death of the first wife and a man entering into contemporaneous marriages. In the former case the children of the first wife continue to remain members of the same family and there is but one family; whereas in the latter case there are two distinct households.

E Maung for the respondents. The respondent is a *pubbaka* child as contemplated by section 16 of the Digest, Vol. 1. This is made clear from the provisions of the texts cited at section 305 of the same volume. A child of an inferior wife can be an heir to a superior wife; a fortiori the child of the first wife must be an heir of the second wife of the same status and contemporaneous in time with the first.

P. K. Basu in reply. The sections cited refer to successive marriages. The contention of the respondent cannot be correct because if the second wife and the husband had predeceased the first wife leaving children these children would not be *pubbaka* children of the first marriage and therefore not be entitled to inherit from the first wife.

ROBERTS, C.J.—I am of opinion that this appeal must be dismissed, and should indeed have regarded the judgment of my learned brother Mya Bu to which we

(1) I.L.R. 8 Ran. 590.

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have been referred as conclusive in the matter, were it not for the ingenious and careful argument which has been addressed to us by Mr. Basu.

As the learned Judge pointed out, the case of *Ma Ni* v. *Ma Shwe Pu* (1) is no authority for saying that a step-son cannot inherit merely because his step-mother and mother were both living at the same time, that is to say, in a case where two valid marriages overlap each other and do not succeed each other in point of time.

It is said that the words "former marriage" in the *Dhammathats* do not mean merely a former marriage but a marriage which came to an end by death or divorce. But in my opinion it is clear that two contemporaneous or overlapping marriages may be described as former and latter, the former being that which was contracted earlier and the latter being that which was contracted later, where the two marriages subsist for some time side by side.

Though such contemporaneous or overlapping marriages are recognized by the *Dhammathats*, if Mr. Basu is right it would seem that there were no provisions for inheritance made in those cases, and, as has been pointed out to us by the learned counsel for the respondents, there is provision in the Digest for children of wives of an inferior class taking part of the inheritance on the death of the husband and wives of the superior class; but there is no provision for children of wives of the four superior classes *inter se*, and the answer seems to me that it is because such children must be *pubbaka* within the meaning of section 16 of the Digest.

One would be reluctant to hold that a step-son was ousted merely because the two marriages overlapped.

(1) (1930) I.L.R. 8 Ran. 590.

I respectfully agree with some observations which fell from Baguley J. in the case of *Maung Aung Pe* v. *U Tun Aung Gyaw* (1) where he said :

> " If the father married one day after the death of his first wife the children would get their right of partition. Why should they not have a right of partition if he hurried matters to the extent of marrying one day before the other wife died ? "

Unless the inferior children in the case mentioned in section 305 of the Digest had provision made for them, they would not succeed, and so this provision is inserted. When a second wife has children they of course oust her step-children from inheritance under the rule in *Ma Ni* v. *Ma Shwe Pu* (2) ; but if she has no children it seems to me clear that her step-children—those begotten of her husband by a former wife—can have a share of the inheritance.

Accordingly, in my opinion, this appeal must be dismissed and the judgment of Mya Bu J. will be affirmed with costs, advocate's fee here twelve gold mohurs.

DUNKLEY, J.—The question for decision in this appeal is whether, when a Burmese Buddhist male has contracted two marriages and both wives have been alive at the same time, the children of the first marriage in point of time, whose parents both predeceased their step-mother, are heirs of their step-mother in respect of her separate property, when there are no children or direct descendants of the second wife. It is conceded that were the two marriages successive, *i.e.*, were the second marriage contracted after the death of the first wife, they would be entitled to succeed, but the argument for the appellants is that when the two marriages are contemporaneous, or, more accurately, when the

(1) (1930) I.L.R. 8 Ran. 524, 537. (2) (1930) I.L.R. 8 Ran. 590.

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second marriage is contracted before the death of the first wife, the children of the earlier marriage cannot under any circumstances be the heirs of their step-mother. In my opinion, such a contention is opposed both to law and to reason. The common-sense point of view has been expressed by Baguley J. in *Maung Aung Pe* v. *U Tun Aung Gyaw and two* (1).

As regards the law, step-children constitute the fifth class of the six classes of children entitled to inherit, which are set out in the last section of Book X of the *Manugye Dhammathat.* They are the *pubbaka* children. According to Richardson's translation of the *Manugye*, this class includes "children, male or female, of a wife by a former husband, or of a husband by a former wife," and on this translation is based the argument that in order that children of a former marriage should be *pubbaka* children the first marriage must be terminated before the remarriage of one parent. But, in my opinion, this translation is not an accurate translation of the original Burmese text, which does not suggest that the first marriage must have terminated before the second marriage was contracted. A more accurate translation of the Burmese is contained in section 16 of U Gaung's Digest of Burmese Buddhist law, which reads as follows "children of the husband or the wife by a former marriage." This is in accordance with the texts of all the other *Dhammathats* mentioned in the Digest. The expressions "former husband" and "former wife" do perhaps connote that the marriage in question has terminated, but the expression "former marriage" means merely a marriage which is earlier in point of time, and as polygamy is recognized under Burmese Buddhist Law, the first marriage of a Burmese Buddhist male will be a

(1) (1930) I.L.R. 8 Ran. 524, 537.

"former marriage" even though the marriage still subsists when the second marriage is contracted, and the children of the first marriage will therefore be *pubbaka* children of the second marriage, and entitled to inherit in the absence of descendants of the second wife.

It has been urged on behalf of the appellants that this cannot be the correct rule because, if the second wife and the common husband had predeceased the first wife, leaving children of the second marriage, those children would not be *pubbaka* children of the first marriage and therefore could not be the heirs of the first wife, but this consideration is really beside the point, and does not fall for decision in the present case. However, with the greatest respect, the remarks of Page C.J. in *Maung Thein Maung* v. *Ma Kywe and others* (1) appear to me to be extremely apposite to this matter. The learned Chief Justice said :

"The truth is that the Burmese customary law of inheritance as set forth in the *Dhammathats* is not strictly speaking a system of law at all, but a congeries of decisions which are merely pronouncements *ad hoc* upon particular cases as they have arisen, and which for the most part do not purport to be determined pursuant to any general or guiding principle. Of course, the *Dhammathats* are not the sole repository of Burmese customary law, and I agree with U May Oung that 'the present customs are a safer guide than the little known law of the *Dhammathats*.'"

The task of the Courts of British Burma has been, and still is, to deduce from the *ad hoc* decisions compiled in the *Dhammathats* general principles of the common law of Burma which are in accordance with the habits and customs of the Burman of today. Now a fundamental principle of the Burmese Buddhist law of inheritance, which has been laid down by the Courts,

(1) (1935) I.L.R. 13 Ran. 412, 420.

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is that an inheritance shall not ascend where it can descend [*Ma Gun Bon* v. *Maung Po Kywe and one* (1)], and I should have no hesitation in applying this principle in the case of the children of the second wife, and in holding, on the analogy of the rights of the children of the first wife in the property of the second wife when she has no descendants, that they are entitled to inherit the first wife's property in the absence of natural descendants of the first wife.

The decision of my learned brother Mya Bu on second appeal was, in my opinion, correct, and I agree that this appeal must be dismissed.

BRAUND, J.—I only desire to add a few words because at one point of the argument in this case I felt and, I think, permitted myself to express, some slight doubt.

In my opinion, in order that a child, in circumstances such as this, may inherit, it is necessary that he or she should come under one of the six classes of persons capable of inheritance that are defined in the *Dhammathats*, and, in this particular case, that he or she should qualify as a *pubbaka child*.

In Richardson's "Laws of Menoo" we were referred by Mr. Basu to a definition of "*pubbaka*" child which described him as being the child of a former husband or wife as the case may be. With great respect, I venture to think that that is slightly misleading. When one looks at the *Dhammathats* themselves, which are summarized in the Digest, it is found that the qualification of a *pubbaka* child is that he or she should be a child of "a former marriage." There seems, in my opinion, to be a difference between a child of a former husband or wife and one of a former marriage. The words "former husband" or "former

(1) (1897-01) 2 U.B.R. 66.

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wife " must, I think, refer to a person who was once a husband or wife but is no longer. In that sense I felt some difficulty in ascribing to the child of what has been called a " contemporaneous " marriage the qualities which are necessary to qualify as a " *pubbaka* " child. But when once it is conceded that what is necessary is merely that there should have been a " former marriage ", and not a former husband or wife in the sense I have explained, that difficulty entirely disappears.

Moreover, the moment of time which is relevant is the time at which the right to inherit arises. Accordingly, at that moment the former wife or husband as the case may be can *ex hypothesi* no longer be in existence.

Once those difficulties are overcome, I have no difficulty in agreeing with my Lord the Chief Justice and with my learned brother Mr. Justice Dunkley, that there is no reason for conceding a right of succession to the child of a " successive " marriage while excluding from succession the child of a marriage which is contemporaneous in the sense—in my opinion, in the rather misleading sense—in which that expression has been used in this case.

I agree that this appeal should be dismissed.