

APPELLATE CIVIL.

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

MAUNG PO ZAW AND OTHERS

v.

MAUNG AN AND OTHERS.*

1938

June 1.

Burmese Customary law—Marriage of widower and widow, each with atet children—Atet child of widow paid his share on her re-marriage out of atetpa property—Lettetpwa property acquired by couple—Death of couple without issue—Division of Lettetpwa property among atet children—Succession per stirpes.

A Burmese Buddhist man and woman married. Each of them had children by their respective previous spouses, the wife's children being two sons. One of the sons died shortly after the mother's remarriage, and his widow demanded and obtained his share in the *atetpa* property of the mother on account of the remarriage. The couple acquired property during the marriage and died without any issue of the marriage. The *atet* children of the husband admitted the claim of the surviving *atet* son of the wife in the whole of her remaining *payin* property, but contended that he was only entitled to a quarter share in the *lettetpwa* property of the parents as the deceased son had been paid his share.

Held, that as the share of the deceased son was paid out of the *atetpa* property of his mother and not out of the *lettetpwa* property of the parents it could not affect the share of the other *atet* son in the latter property, and consequently the *lettetpwa* property of the parents was divisible in equal shares between the *atet* children of the husband on the one hand and the surviving *atet* child of the wife (or he having died, his representatives) on the other, the division between the respective groups being *per stirpes* and not *per capita*.

Maung Po San v. Maung Po Thei, I.L.R. 3 Ran. 438, referred to.

Maung Po Aung v. Maung Kha, I.L.R. 6 Ran. 427, distinguished.

E Maung for the appellant.

K. C. Sanyal for respondents 1 to 6.

No appearance for the 7th respondent.

The appeal came on for hearing in the first instance before Mackney J. The learned Judge thought that

* Civil Second Appeal No. 354 of 1937 from the judgment of the District Court of Bassein in Civil Appeal No. 16 of 1937.

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owing to its importance he would eventually have to make a reference, and so directed the proceedings to be laid before the Chief Justice who ordered the appeal to be heard by a Bench. The order of Mackney J. is as follows :

MACKNEY, J.—The suit out of which this appeal arises is a contest between the children of U Tun Hla and the children of Daw Mo, begotten in each case by previous spouses, on whose death U Tun Hla and Daw Mo married. The plaintiffs are the children of Po Myit, one of the two sons of Daw Mo by her former marriage. They ask for administration of the estate of U Tun Hla and Daw Mo. U Tun Hla died in 1929 and Daw Mo in 1934.

There was another child of Daw Mo, named Po Sint, but it has been held that his share of the estate had been given to his widow shortly after Tun Hla's marriage with Daw Mo, which occurred some forty years ago. The defendants, who represent the children of Tun Hla by his former marriage, claim that Po Myit also had his share given to him, but both the lower Courts have found against them on this point. The Subdivisional Court granted a decree for administration in which it declared that the plaintiffs were entitled to one-half of the "joint" [jointly acquired (?)] property of Tun Hla and Daw Mo and the whole of Daw Mo's *payin* property, whilst the defendants, the children of U Tun Hla, were entitled to the other half of the "joint" property of U Tun Hla and Daw Mo. On appeal to the District Court, the only point taken was that the Trial Court should have held that Po Myit had received his half share in the estate. The District Court dismissed the appeal. The defendants now appeal to this Court.

It should be noted that the 7th respondent Ma Thet Pu is the widow of Maung Po Sint. She was originally joined as a defendant and apparently takes no interest in the suit whatsoever.

Of the grounds of appeal set out in the memorandum of appeal, grounds 3 and 4 have been abandoned. It is admitted that the children of Po Myit are entitled to the whole of the *payin* property of Daw Mo. What is now urged is that the children of Po Myit are entitled not to half of the jointly acquired property but only to a quarter thereof, inasmuch as Po Sint's heirs have already taken his share ; and reliance is placed on the decision

of a Full Bench of this Court in *Maung Po Aung and 15 v. Maung Khq* (1). A further ground of appeal has been added as it has been discovered that the decree is not in accordance with law in that accounts were not directed to be taken for funeral expenses as provided in Form 17, Appendix D to the Civil Procedure Code. The learned Counsel for the respondents has raised the preliminary objection that as the ground of appeal now put forward has never been put forward either in the Trial Court or in the Lower Appellate Court, the appellants are not entitled to rely on it now. Reference is made to the remark of the learned District Judge in his appellate judgment, where he says :

“The defendants appeal. They do not deny that the Trial Judge's findings are in accordance with the Buddhist Law of Succession, but they contend that Daw Mo's son Po Myit, by a family arrangement, had received his share in his mother's estate and that this family arrangement debarred the plaintiffs from any share in the *Letletpwa* property of Tun Hla and Daw Mo.”

I am of opinion that this preliminary objection must fail. The point now raised is a point of law and it has been observed by their Lordships of the Privy Council in *Connecticut Fire Insurance Company v. Kavanagh* (2), which is quoted by their Lordships again in *M. E. Moolla Sons, Limited (in liquidation) v. Burjorjee* 3 :

“When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea.”

Here it has clearly been admitted by the legal representative of Po Sint that Po Sint has received his share and both the lower Courts have accepted this as true : nor does it appear to have been disputed by any of the parties.

It is not clear from the learned District Judge's remark whether the counsel for the defendants-appellant in his Court had expressly admitted that the trial Judge's findings were in accordance with the Buddhist Law of Succession. It may well be that the learned Judge was simply commenting on the fact that these findings had not been disputed. However, even if the counsel

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(1) (1925) I.L.R. 6 Ran. 427. (2) (1892) A.C. 473, 480.

(3) (1932) I.L.R. 10 Ran. 242, 254, 255.

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had made such an admission, it does not appear to me that that would preclude them from raising this point of law in the present appeal. See *Beni Pershad Koeri v. Dudhnath Roy and others* (1). In that case it is observed :

“ The High Court seem to have understood Counsel to have admitted that receipt of rent by the Maharajah operated as a confirmation of the pottah, and the only question therefore which remained was the construction of the pottah. In the opinion of their Lordships this admission, if correctly understood, was erroneous in point of law, and does not preclude the Counsel for the appellant on this appeal from claiming his client's legal right.”

In *Venkata Narasimha Naidu and another v. Bhashyakarl Naidu and 2 others* (2), it was pointed out that the admission of a vakil made with due authority would bind his client. It is evident that the kind of admission contemplated was an admission which in effect is but dispensing with proof of the facts admitted,—which, in effect, would amount to abandoning an issue, and the remarks do not apply to an admission in regard to a point of law.

It is clear that in the lower Appellate Court the appellants relied entirely on their contention that the children of Po Myit were not entitled to anything, and hence did not trouble to argue the point that if they were entitled at all, they could only be entitled to one-quarter of the jointly acquired property. Consequently this point has not been dealt with in the District Court.

I have not proceeded further with the hearing of the appeal because, in my opinion, this is an appeal which should properly be heard by a Bench of this Court. The Full Bench decision on which the appellants rely [*Maung Po Aung and 15 v. Maung Kha* (3)] was a decision on a reference of the following question :

“ A Burman Buddhist died leaving surviving him children by his first wife and also the second wife and children by her. The second wife has died and since her death one of the children of the first marriage has put forward a claim for partition of the inheritance. To what proportion of the property acquired during the continuance of the second marriage are the children of the first marriage entitled in such a suit.”

(1) (1899) I.L.R. 27 Cal. 156, 162, 163 (P.C.).

(2) (1902) I.L.R. 25 Mad. 367, 372, 373 (P.C.).

(3) (1928) I.L.R. 6 Ran. 427.

It will be seen that the case is one not quite similar to the present, the difference being that there were no children by the second wife, although the second wife had brought children with her to the marriage. It was decided that in such a case the children of the first marriage are entitled to one-third of the property acquired during the second marriage. Applying the principles enunciated, it is clear that in this case the children of the two parents by earlier spouses must stand on an equal footing as regards the division of the property acquired during the second marriage and they would be entitled to one-half share each. However, in the case of *Po Aung* it appears that Maung Ka's sister had already taken her share (just as in our case Po Sint's legal representative has taken Po Sint's share) and the Court proceeded to add *obiter* that since his sister had already taken her share, Maung Ka's share would be one-half of one-third, *i.e.*, one-sixth. The appellants argue that on the analogy of this decision, the children of Po Myit are entitled only to one-half of one-half, *i.e.*, one-quarter of the jointly acquired property.

The point as to whether Maung Ka's share was to be the whole of one-third or one-half of one-third was not referred to the Full Bench for decision. It is true that the learned Judges have stated it as their view that he was entitled to only one-half of one-third, but the point was not fully considered save by Mr. Justice Brown, and he observes :

"The *Dhammathats* lay down no express rule as to the share to be claimed by one only of the co-heirs when another co-heir has already claimed her share, and general principles of equity must be applied. On these general principles I find it difficult to hold that Maung Kha is now entitled to the whole share of the family of his own parents less only the small share already taken by Ma On. The one-eighth share claimable by Ma On and Maung Kha jointly on the death of their father must be held to be equivalent to a one-third share claimable at a later stage on the death of the step-mother, and it does not seem to me equitable to the step-mother's own family to deprive them of the whole one-third share now less only a one-sixteenth in spite of the fact that the estate has already lost what is now equivalent to a one-sixth part of it. It is impossible to be entirely logical in such a case, but it seems to me more equitable to hold that Ma On has

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already received what is now equivalent to a one-sixth share of the estate, and that her brother Maung Kha is therefore entitled only to the one-sixth share remaining of the one-third which his branch of the family is entitled to claim."

The observations of the learned Judges composing the Full Bench were accepted by the Divisional Bench which had referred the question. It was observed :

" This last question was not actually referred but we agree with the opinion thus expressed, for the reasons stated by our brother Brown in his judgment on the reference."

It appears to me, with the greatest respect, that the dicta of the members of the Full Bench in *Maung Po Aung's* case do not necessarily afford support to the appellants' contention in the present appeal. The property which we are now considering is jointly acquired property, that is to say it is property which has come into existence after the marriage of Maung Tun Hla with Daw Mo, and after Po Sint's widow took Po Sint's share. It does not appear to me to be possible to say that Po Sint's widow has already received the equivalent of one-quarter of the jointly acquired property : not only has she not received it, but she could not possibly have received it because it was not then in existence. It does not seem to me to be reasonable that the children of the one parent should alone benefit because one of the two children of the other parent took the share to which he was then entitled immediately after the remarriage, and that the remaining child of the other parent should get less than he would have done if he had had no brother at all.

The great difference between our present case and the case of *Po Aung* is this : The sister of Maung Kha, when she left the family on the death of the step-parent, took the share of the jointly acquired property to which she was entitled then ; and, of course, after the death of the step-parent, there could be no further property jointly acquired. The arguments employed by the learned Judges who decided the case of *Po Aung* obviously have considerable force in regard to the case before them. The present case is very different in this respect because Po Sint's widow received her husband's share very shortly after the marriage of Tun Hla and Daw Mo and consequently there was no jointly acquired property in which she could share.

The case, however, to my mind is of considerable importance and if I were to hear this appeal, I think I should feel myself compelled to make a reference with the consequence that the appeal would have to be heard all over again and much time would be wasted. The proceedings will, therefore, be laid before my Lord the Chief Justice for his orders.

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MYA BU, J.—This case raises a question of Burmese Buddhist law which, in certain aspects, is not covered by direct textual or judicial authority. It arises in the following way :

One U Tun Hla, a widower, married Daw Mo, a widow, about forty years ago. They had children of their respective previous marriages and also some *payin* property. Daw Mo's children were her two sons, Maung Po Sint and Maung Po Myit. Shortly after the marriage of Daw Mo and U Tun Hla, Maung Po Sint died leaving a widow who demanded and received the share to which her husband was entitled in Daw Mo's *atetpa* property (*i.e.* property which Daw Mo brought from her previous marriage) on account of her marriage with U Tun Hla. Maung Po Sint's share was one half of the half share to which the two sons, Maung Po Sint and Maung Po Myit, were entitled in the estate of their parents on account of Daw Mo's remarriage after the death of their father.

U Tun Hla's children by his previous marriage were six in number and they are represented by the eleven defendant-appellants.

U Tun Hla died in 1929 and Daw Mo in 1934. There was no issue of the marriage of U Tun Hla and Daw Mo. During their coverture they acquired properties which are referred to as the *lettetpwa* or *hnapazon* property of U Tun Hla and Daw Mo. (The distinction between *lettetpwa* property and *hnapazon* property is of no importance in this case.)

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The suit is by the first six respondents who are the children of Po Myit who predeceased Daw Mo. By a preliminary decree passed by the trial Court, which has been confirmed by the lower appellate Court, the plaintiff-respondents have been declared to be entitled to the whole of the *payin* property of Daw Mo (*i.e.* property which Daw Mo brought to her marriage with U Tun Hla) less the share of Maung Po Sint which the latter's widow had already received, and that they are also entitled to half of the *lettetpwa* or *hnapazon* property of U Tun Hla and Daw Mo.

In the present appeal, the correctness of the decision that the first six respondents as representatives of Maung Po Myit are entitled to receive the whole of the remaining *payin* property of Daw Mo is not disputed. The dispute centres around the division of the *lettetpwa* or *hnapazon* property of U Tun Hla and Daw Mo. Even there it is not disputed that if Maung Po Sint's share in the *atetpa* property of Daw Mo had not been separated and taken away by Maung Po Sint's widow after Daw Mo's marriage with U Tun Hla, then Maung Po Sint (or his heirs) and Maung Po Myit (or his heirs) as the *atet* children of Daw Mo or their representatives, would be entitled to a half share in the estate of Daw Mo and U Tun Hla as against the *atet* children of U Tun Hla who would be entitled to the other half, under the authority of *Maung Po San and others v. Maung Po Thet* (1), the correctness of which has never been disputed or doubted.

The question that falls for determination, however, is whether, in view of the fact that Maung Po Sint's widow had taken away Maung Po Sint's share in Daw Mo's *atetpa* property by reason of her remarriage, and Maung Po Sint's interest in the remainder of such

(1) (1925) I.L.R. 3 Ran. 438.

property and in the property acquired after the marriage of U Tun Hla and Daw Mo was consequently eliminated, Po Myit's representatives were entitled to the entire half share in the *lettetpwa* or *hnapazon* property of U Tun Hla and Daw Mo. Under the Burmese Buddhist law a child who takes his share in the estate of his parents after the death of one parent and upon the remarriage of the surviving parent, ceases to have any further claim in the remainder of such estate and in the property acquired subsequent to the remarriage of the surviving parent except probably in the event of the surviving parent dying without leaving a widow or widower or descendants. Therefore, it is clear that so far as Maung Po Sint's representatives were concerned they could make no claim whatever in the remainder of the property of Daw Mo's previous marriage or in that of her subsequent marriage as Daw Mo died leaving her surviving other descendants.

A very near approach to the question before us is to be found in the case of *Maung Po Aung and fifteen v. Maung Kha* (1), in which the parties to the dispute were one of the two children of the previous marriage of the husband who had children by his subsequent marriage and predeceased his second wife. Upon his death one of his *atet* children, *i.e.*, the children of his previous marriage—a daughter—sued for her share, while the other *atet* child—her brother—did not join her in the claim with the result that she received a one-eighth share in the *hnapazon* properties of her father and her step-mother. Thereafter the step-mother died. Upon the death of the step-mother her brother sued the half-brothers and half-sisters (children of the father and the step-mother) for his share in the *hnapazon* property of the father and the step-mother. In that case it was

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ruled by the Full Bench that as one of the two *atet* children had already taken her share on the death of their parent the other *atet* child would be entitled to only half of one-third of the *hmapason* property of the couple, upon the footing that the *atet* children of the husband would be entitled to only one-third of the property acquired by their father with their step-mother upon the death of both as against the children of the marriage of their father and their step-mother. It was observed by Heald J. in the course of his judgment :

“As the sister has already claimed and received her share and has presumably left the family on receipt of that share, it is arguable that she should not be considered at all, and that the plaintiff, as being the sole child of the first family who continued to be a member of the second family, ought to get the whole one-third share of such of the jointly-acquired property of the second marriage as was left at the death of the step-parent. It is also arguable that he should receive the one-third share diminished by the share which his sister has already taken, and that is the share which the plaintiff actually claims in this case. On the other hand it is arguable that because they were in fact two children of the first family and one has already received her share, the other should receive only half of the one-third share to which the two together would have been entitled. It is difficult to guess what share the Burmese Buddhist law-givers would have given in such a case, but on grounds of justice, equity and good conscience I am inclined to think that the plaintiff should be given only half of the one-third share, that is one-sixth of such of the jointly-acquired property of the second marriage as was left at the death of his step-mother.”

The *ratio decidendi* in that case, therefore, proceeds upon the footing that, as there were two persons who would be entitled to a one-third share, and as one of them had previously taken away what he or she was entitled to, in the circumstances obtaining at that time, in the property which is now to be divided, the other person should not be given a share in that property to which the other would, if he or she had previously

not taken in satisfaction of his or her claim, have been entitled.

On behalf of the appellants it has been urged that the *ratio decidendi* in *Maung Po Aung's* case should be followed and that the first six respondents were not entitled to the full half share in the *lettetpwa* or *hnapazon* property of the second marriage. But the present case is fundamentally different from *Maung Po Aung's* case in that, in the latter, the property which was to be divided was the property in respect of which one of the *atet* children had taken away what he or she was entitled to receive in the circumstances obtaining at the time of her claim, and the question arose between an *atet* child of one of the deceased couple and his brothers and sisters of the half-blood, while in the present case there is no dispute as regards the rights of the first six respondents in the *payin* property of Daw Mo which was the only property out of which Maung Po Sint's widow took Maung Po Sint's share, and the question of division of the *lettetpwa* or *hnapazon* property of the marriage of U Tun Hla and Daw Mo arises between the *atet* children of Daw Mo and the *atet* children of U Tun Hla. It does not appear to be logical that, because Maung Po Sint or his representatives had taken away his share in the property of Daw Mo's previous marriage and Maung Po Sint thus dropped out of the new family, the share to which Maung Po Myit or his representatives are entitled in the property acquired subsequent to Daw Mo's marriage with U Tun Hla should be reduced by the share which Maung Po Sint would have had in it if he or his representatives had not taken away the share in the *atetpa* property upon the remarriage of Daw Mo. For these reasons, in my judgment, the rule laid down in *Maung Po Aung's* case is inapplicable to the case under consideration.

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It is a settled rule of Burmese Buddhist law that the division of the property of the subsequent marriage between the *atet* children of the husband and of the wife is *per stirpes* and not *per capita*; therefore, in the division of such property the numerical strength of the group or family makes no difference to the share which it is entitled to get. If there was only one *atet* child of Daw Mo he would be entitled to half of the property of Daw Mo and U Tun Hla quite irrespective of the number of the *atet* children of U Tun Hla. If it was out of the *lettetpwa* or *hnapazon* property of U Tun Hla and Daw Mo that Maung Po Sint's widow had taken Maung Po Sint's share (this could not possibly be either in fact or in law), then there might be some reason for withholding from what is due to the *atet* children of Daw Mo in the present division of the estate what might have been due to Maung Po Sint's representatives in such estate if he or his widow had not previously taken his share.

For these reasons I am of the opinion that it is just and equitable and consistent with the general principles of division of inheritance under the Burmese Buddhist law to grant Maung Po Myit or his representatives an entire half share in the *lettetpwa* or *hnapazon* property of U Tun Hla and Daw Mo.

The appeal fails in substance but we find that the preliminary decree, which has been drawn up by the trial Court, does not contain directions for enquiry into the funeral and testamentary expenses of Daw Mo. This omission should be rectified. Therefore, while affirming the preliminary decree passed by the trial Court and confirmed by the District Court in substance, we order a direction to be inserted in the preliminary decree requiring the Commissioner for the taking of accounts, if necessary, to enquire into the funeral

expenses of Daw Mo. The appellant to pay the costs of the first six respondents in this appeal.

SPARGO, J.—*Maung Po Aung and fifteen v. Maung Kha* (1) is clearly distinguishable from the present case. In that case one of two step-children had secured a share in the jointly acquired property of her father and her step-mother after the death of her father but before the death of the step-mother. After the death of the step-mother the remaining step-child, Maung Kha, sought a share of the same property as that out of which Ma On had previously taken her share and it was held that the fact that Ma On had taken a share of that property previously reduced the share which Maung Kha could secure.

But in the present case what Maung Po Sint or his widow had secured was his share in the *atetpa* property of Daw Mo. He secured no share in the jointly acquired property of Daw Mo and U Tun Hla. He could not, because at the time it had not yet come into existence. What is in question now is the division of this jointly acquired property. *Maung Po Aung's* case can surely furnish no reason for supposing Maung Po Myit's share of the jointly acquired property is affected by the previous partition in which Maung Po Sint obtained his share of the *lettetpwa* property.

I agree with my learned brother that the two cases can also be distinguished because in *Maung Po Aung's* case the parties were children of the half-blood and in the present case they are not blood relations at all.

Neither can I see any reason why the fact that Maung Po Sint had obtained a share of the *atetpa* property immediately after the marriage of his mother with U Tun Hla should affect Maung Po Myit's share of the

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 ZAW Daw Mo's death.
 v. I agree, therefore, with my learned brother that this
 MAUNG AN. appeal must be dismissed in substance subject to the
 SPARGO, J. amendments which he has ordered.

The procedure adopted by the Court does not appear to have been correct. For the proper procedure reference might be made to *Balakkala Dasee v. Jadunath Das* (1).

(1) (1930) I.L.R. 57 Cal. 1358, 1364.