

## APPELLATE CIVIL.

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

## MA PWA SHIN v. MA GALE AND ANOTHER.\*

1940

May 29.

*Burmese Buddhist law—Husband and wife—Property inherited during marriage from collateral by husband—Death of husband and wife within short time of one another—No issue of marriage—Succession to property inherited from collateral—Inheritance on the footing of payin property—Husband's relatives, interest two thirds and wife's one third.*

Under Burmese Buddhist law, in cases where husband and wife die within a short time of one another, if property has been inherited during marriage from collaterals by one party only it should be treated not like property inherited from parents, nor as jointly acquired property, but on the same footing as *payin* property, or as inherited *lettetpwa* in cases of divorce by mutual consent, and should go to the extent of two-thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party.

E and H, Burmese Buddhist husband and wife, died within a short time of each other leaving no issue. The appellant P was the sister of H and the respondents G and M were E's sister and half brother respectively. The estate of the deceased couple consisted of their jointly acquired (*hnapazon*) property and E's share, which was one-third, in the estate of his deceased cousin Z. The trial Court allowed P's half share in the *hnapazon* property. The question on appeal was as to P's share in Z's estate.

*Held*, that E's share in Z's estate being one-third, the share of P was one-ninth.

*Kin Kin Gyi v. Kan Gyi*, (1902-03) 2 U.B.R. Budd. Law, Divorce, 1; *Ma Ngwe Bwin v. Maung Lun Maung*, P.J. 295; *Ma Ngwe Hnit v. Maung Po Hmee*, 11 L.B.R. 52; *Ma Pwa Thin v. U Nyo*, I.L.R. 12 Ran. 409; *Maung Kun v. Ma Chi*, I.L.R. 9 Ran. 217; *Mi Lan v. Maung Shwe Daing*, (1892-96) 2 U.B.R. 121; *Mi Myin v. Nga Twe*, (1904-06) 2 U.B.R. Budd. Law, Divorce, 19; *Mi Saing v. Yan Gin*, (1914-16) 2 U.B.R. 127; *U Pe Gyi v. U Pyo*, I.L.R. 3 Ran. 271; *U Po Tha Dun v. Maung Tin*, I.L.R. 8 Ran. 480, considered.

*Chan Htoon* for the appellant.

*E Maung* for the respondents.

MOSELY, J.—The plaintiff-appellant Ma Pwa Shin, sued for a share in and administration of the estate of Maung Tun E and his wife Ma Hmin, who died within

\* Civil First Appeal No. 34 of 1940 from the judgment of the Assistant District Court of Tharrawaddy in Civil Regular No. 3 of 1939.

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a short time of one another. Ma Pwa Shin is the sister of Ma Hmin. The defendants-respondents Ma Gale and Maung Hla Maung are the sister and the half brother of Maung Tun E. The estate claimed consists of the *hnapazon* or jointly acquired property of Maung Tun E and Ma Hmin and the share which Maung Tun E inherited just before his death in the estate of his first cousin once removed Daw Pwa Zon, with whom he and Ma Hmin lived. That share according to the pleadings (paragraph 6 of the plaint) was one third of Daw Pwa Zon's estate. Daw Pwa Zon died on May 1st 1939, Ma Hmin on May 4th and Maung Tun E on May 19th of that year.

The Assistant District Court allowed the claim in respect of one half of the *hnapazon* property of Maung Tun E and Ma Hmin, but not in respect of the property inherited by Maung Tun E from Daw Pwa Zon. The provisions as to inheritance by collaterals of both sides where husband and wife die within a short time of one another are contained in a well known and disjointed part of the *Manugye Dhammathat*, Book X paragraph 56. This section deals also with the ordinary case where one party dies more than a short time before the other. It says that if either spouse left no direct descendants and if their parents had predeceased them the relations who should inherit are "the six relations" of the husband or wife, that is the six kinds of uncles, father's elder and younger brother etc. It is clear that there are really eight kinds, not six, and the deceased's father's younger sister and the mother's younger brother were held to be entitled to inherit in *U Pe Gyi v. U Pyo* (1). The section omits any reference to the brothers and sisters of the deceased, who are preferred to uncles and aunts [*Manugye* Book X paragraph 19, see *U Po Tha Dun v. Maung Tin* (2)]. The relations of the wife

(1) (1925) I.L.R. 3 Ran. 271. (2) (1930) I.L.R. 8 Ran. 480.

are to take the property that came to her by descent from her parents (*Miba ga pa thaw ossa yat*), and the relations of the husband are to take what came to him by descent from his parents.

It would seem that this refers to cases where the husband and wife die within a short interval, as the section goes on to say that if one party dies (a considerable time) before the other the relations of the survivor only are to inherit. If the survivor sell any of the hereditary property (*ossa yo*) it is to be offered to the next of kin.

This expression *ossa yo* appears to mean not all property inherited from the parents but entailed property, such as land held on hereditary tenure (*Manugye* Vol. VIII paragraphs 1 & 2), heirlooms, insignia and the like, *Mi Lan v. Maung Shwe Daung* (1).

If the couple die within a short interval "the relations of both are to inherit according to consanguinity, and also the property that accrued to the couple during marriage" (*hnit pa dwin pwa thi ossa*). This last expression is translated by Richardson "property acquired by the deceased couple during marriage", but is not the equivalent of the word "hnapazon" in its modern signification, that is property acquired by joint exertion as opposed to *lettetpwa*;—another modern term, which includes property acquired by inheritance, *Ma Ngwe Bwin v. Maung Lun Maung* (2). In fact "*hna pa dwin pwa thi ossa*" seems to be the equivalent of the modern "*lettetpwa*". The corresponding text of other *Dhammathats* will be found in section 308 of Volume I of the Digest. For *miba ga pa thaw ossa* some *Dhammathats* give *meimma pa ossa* or *lin pa ossa*, property brought to the marriage by husband or wife, *i.e.*, *payin*. For *hnit pa dwin pwa thi ossa* the *Anwe-bon Dhammathat*, which merely

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copies the portions of *Manugye* that deal with inheritance, gives *hnit pa son dwin pwa ossa* which can only mean the same. In *Manugye* Volume XII paragraph 3 at p. 345 a distinction is drawn between property brought to the marriage, *payin*, and property acquired during the coverture,—Richardson translates “acquired mutually”,—*hnit pa son dwin ossa*. The section further defines property acquired during marriage, “*hnit pa son lettet pwa thi*,” as of two kinds, property inherited from the parents during the coverture (Richardson omits the words “during the coverture”, *thin ne ya dwin*), and property acquired by the joint efforts and work of the couple (*hnit u tha kyan si lok saung*).

The fact is that the *Dhammalhats* do not specifically deal with property inherited from collaterals during coverture, but the distinction is throughout that between property inherited from the parents and property otherwise acquired by the couple.

Another section of *Manugye*, Vol. X paragraph 32, deals with the partition of the property of a couple dwelling apart from their parents who both die (*hnit pa son the*) without leaving issue. The early part of the section relates evidently, though it is not so stated, to cases where the couple die within a short interval of one another, for the last part of it lays down a different rule in the opposite case. The parents of each spouse are to take what he or she brought to the marriage (*payin*), while the property that accrued to the couple during the marriage (*hnit pa son pyit pwa thi ossa*), is to be divided equally amongst the parents of both spouses.

This section in terms applies only to parents, but if the doctrine of common disaster is to apply at all the heirs who are to be preferred to parents, e.g., brothers and sisters, *Maung Kun v. Ma Chi* (1) must also

(1) (1931) I.L.R. 9 Ran. 217.

come under its provisions. The section goes on to lay down that where one spouse brought no property to the marriage—(payin) the parents of that spouse were to take one share of the *payin* and the parents of the spouse who brought *payin* to the marriage two shares,—(the parties being in the relationship of *nissita* and *nissiya*). The corresponding texts of other *Dhammathats* are given in section 347 of the Digest.

In Volume XII paragraph 3 of *Manugye* the same principle of division is applied to the *payin* property of virgin couples at divorce where one spouse only brought *payin* to the marriage, and also to *lettetpwa* by succession, *Kin Kin Gyi v. Kan Gyi* (1), *Mi Myin v. Nga Twe* (2), *Mi Saing v. Yan Gin* (3), *Ma Ngwe Hnit v. Maung Po Hmee* (4).

The trial Court was of the opinion that the method of division laid down by *Manugye* in the case of hereditary property ought to be extended by analogy to the case of property inherited from collaterals during coverture. But these special and exceptional rules of the customary law of inheritance should not be extended beyond the cases actually covered by them, *Ma Pwa Thin v. U Nyo* (5), except where it is necessary by implication to hold that heirs who exclude parents or uncles and aunts are entitled to the same rights as they. It would further seem that it is only property inherited from the parents which is to go solely to the relatives of the spouse who had it. It must be held then in cases where husband and wife die within a short time of one another that where property has been inherited during marriage from collaterals by one party only it should be treated not like property inherited from parents, nor as jointly acquired property, but on the same footing as

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(1) (1902-03) 2 U.B.R. Budd. Law, Divr., 1. (3) (1914-16) 2 U.B.R. 127.  
(2) (1904-06) 2 U.B.R. Budd. Law, Divr., 19. (4) 11 L.B.R. 52.  
(5) (1934) I.L.R. 12 Ran. 409, 414.

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*payin* property, or as inherited *lettetpwa* in cases of divorce by mutual consent, and should go to the extent of two-thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party.

The preliminary decree of the lower Court will therefore be altered to one declaring that the plaintiff-appellant is entitled to one third of Maung Tun E's share in the property inherited by him from Ma Pwa Zon, that is to say to one-ninth of Ma Pwa Zon's estate, and the Commissioner will be directed to make the necessary inquiries and take accounts and report accordingly.

The respondent must pay the costs of this appeal, advocate's fee *ad valorem* on the estimated value of the share in respect of which the appellant has been successful, namely Rs. 562.

MYA BU, J.—I agree.