APPELLATE CIVIL.

Before Mr. Justice Mosely, and Mr. Justice Sharpe.

1940

Feb. 12.

U SAN YI AND OTHERS

v.

MAUNG PO YI AND OTHERS.*

Burmese Buddhist law—Atetpa *property of* eindaunggyi *couple*—*Not* payin *property*—*No joint interest in* atetpa *property*—*Doctrine of common disaster*—*Death of* eindaunggyi *couple without children*—Atet *children of wife*—*Claim to* atetpa *property of step-father*—*Mortgage and redemption of* atetpa *property out of joint funds.*

The *atetpa* property of an *eindaunggyi* couple does not become their joint property in the way that the *payin* property of a virgin couple may do. When two *eindaunggyis* marry neither of them thereby acquires any interest in the *atetpa* property of the other.

The doctrine of common disaster cannot be applied to mean that the heirs of each spouse are entitled to a share in the *atetpa* of the other spouse as if their parent had been the survivor.

Consequently, on the death of the *eindaunggyi* couple within a few days of each other and without any children of the marriage, the *atet* children of the wife are not entitled to any share in the *atetpa* property of their step-father as against his *atet* children. The fact that during the second marriage, the step-father had mortgaged the property and redeemed it with the joint funds does not change the character of the property.

Chettyar, C.T.P.V. v. *Tha Hlaing*, I.L.R. 3 Ran. 322 (F.B.); *Chettyar, N.A.V.R.* v. *Maung Than Daing*, I.L.R. 9 Ran. 524 ; *Daw Hla On* v. *Ma Nyun*, [1937] Ran. 410 ; *Ma Ein* v. *Tin Nga*, 8 L.B.R. 197 ; *Ma Ein Si* v. *Ma Wa Yon*, (1897-01) 2 U.B.R. 131 ; *Ma Hnin Zan* v. *Ma Myaing*, I.L.R. 13 Ran. 487 ; *Ma Le* v. *Tun Shwe*, 10 L.B.R. 10 ; *Ma Paing* v. *Shwe Hpaw*, I.L.R. 5 Ran. 196 ; *Ma San Shwe* v. *Valliappa Chetty*, 10 Bur. L.R. 49 ; *Maung Shwe Tha* v. *Ma Waing*, 11 L.B.R. 48 ; *Maung Shwe Yan* v. *Ma Ngwe*, (1897-01) 2 U.B.R. 113 ; *Maung Tun* v. *Ma Ya*, A.I.R. (1930) Ran. 237 ; *Mi Dwe Naw* v. *Maung Tu*, S.J.L.B. 14 ; *Mi Saing* v. *Yan Gin*, (1914-16) 2 U.B.R. 127 ; *Nga Tun Baw* v. *Nga Kan*, 4 B.L.J. 244 ; *San Pe* v. *Ma Shwe Zin*, 9 L.B.R. 176 ; *U Maung Nge* v. *P.L.S.P. Chettyar*, A.I.R. (1934) Ran. 200 ; *U Pe* v. *U Maung Maung Kha*, I.L.R. 10 Ran. 261 ; *U Po Tha Dun* v. *Maung Tin*, I.L.R. 8 Ran. 480, discussed.

Daw On Bwint v. *U Ba Sein*, Sp. Civ. 2nd App. 379 of 1938, H.C. Ran., dissented from.

E Maung for the appellants.

Paul for the respondents.

* Special Civil 2nd Appeal No. 71 of 1939 from the judgment of the Assistant District Court of Magwe in Civil Appeal No. 49 of 1938.

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MOSELY, J.—In this second appeal, which has been referred to a Bench of this Court, a question of Buddhist Law is raised, in regard to the interest (if any) which one party to a marriage (here the wife) acquires on marriage in the *atetpa* property of the other party, when both are *eindaunggyis*, that is have been previously married.

The plaintiff-appellants U San Yi and fourteen are the *pubbaka* or *atet* children (children by the first marriage), and the *atet* grandchildren of Ma Shwe Ma, who married U Tun Tha about 1911 and died within a few days of his death in 1927. The defendant-respondents Maung Po Yi and five are the *atet* children and grandchildren of U Tun Tha. There was no issue of the second marriage. The plaintiffs claimed one half of certain land as the *hnapazon* or jointly acquired property of the second marriage. They also made a similar claim to one half of a house and its site. The defendants admitted that the house and site were the *hnapazon* property of the second marriage, and admitted the plaintiffs' claim to a one-half share in it. But they contended that the land was *atetpa* property brought to the second coverture by U Tun Tha. There is nothing on the record to show whether there was *atetpa* property brought to it by Ma Shwe Ma, and the question of *nissaya* and *nissita* need not be discussed.

The trial Court found that the land (worth some Rs. 300) was U Tun Tha's *atetpa* property, but that it had been mortgaged for the small sum of Rs. 40 and had been redeemed, presumably with the joint funds, by U Tun Tha, and had therefore changed its character and had become *hnapazon* property. It was decreed that the plaintiffs should have half the land, the parties to bear their own costs.

In appeal the learned Additional District Judge held rightly that the land had not been merged in the

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jointly acquired property or changed its character. See *Maung Shwe Tha* v. *Ma Waing* (1), and other authorities cited in May Oung's Buddhist Law 2nd edition Part I page 57. He also held on the authority of *Ma Hnin Zan* v. *Ma Myaing* (2) that the plaintiffs were not entitled to any interest in this property, and dismissed the suit with costs throughout.

In *Ma Hnin Zan*'s case (2), the *atet* children of the wife sued the *atet* children of the husband for a share in the *atetpa* property of the husband. There the wife predeceased the husband, and there was no *hnapazon* property of the second coverture. It was held that the plaintiffs were not entitled to inherit any share of the *atetpa* property, the *Kaingza Tejo* and *Vannadhamma Dhammathats* quoted (pp. 489, 490) and the *Kungyalinga Dhammathat* [p. 504, quoted in section 253 of the Digest *Maung Shwe Tha*'s case (1) at p. 50] being followed in preference to the rule given in *Manugye* Book X section 9. To the *Dhammathats* quoted may be added the Kinwun Mingyi's *Attathankepa* sections 222 and 223 [quoted in *Maung Shwe Yan* v. *Ma Ngwe* (3)].

It is argued in the present appeal that the law of partition on divorce by mutual consent is no guide to the law of devolution by inheritance. It is contended that by the doctrine of common disaster the heirs of husband and wife share equally, or in the alternative that Ma Shwe Ma had obtained a vested right to the extent of one-third in this *atetpa* property which is inherited by her *atet* children. I do not think that the doctrine of common disaster (*Manugye* Book X sections 56 and 32) is of any assistance to the

(1) 11 L.B.R. 48. (2) (1935) I.L.R. 13 Ran. 487.
(3) (1897-01) 2 U.B.R. 113.

appellants. The head note in *Ma Ein* v. *Tin Nga* (1) is misleading. It reads :

" When a husband and wife die childless within a short time of one another their esta e retains its character as the joint estate of both."

This can only mean that what was joint before remains joint. Both section 56 and section 32 however go beyond this. Neither section 56 nor section 32 refer specifically to *eindaunggyis*. Section 56, it is true, does provide that in such a case the collateral relatives of both sides are to " inherit " (*i.e.* presumably the hereditary property previously mentioned) " and also the property acquired during marriage." But the section is expressly limited to the case where neither spouse left children, grandchildren or great grandchildren or parents. Section 32 provides that the parents shall take the *payin* of their child, but if one spouse had no property originally and the other had, that is if they stood to one another in the relationship of *nissita* and *nissaya*, the parents of the *nissita* spouse were to take a one-third share of the original property and those of the *nissaya* a two-third share. This again only deals with inheritance by the parents where there are no children of the marriage.

It is the joint estate that is shared equally by the relations on both sides, *U Po Tha Dun* v. *Maung Tin* (2) and *Maung Tun* v. *Ma Ya* (3). See Lahiri's Buddhist Law 4th edition pages 183, 184.

Presuming that Ma Shwe Ma would have succeeded to a quarter share of U Tun Tha's *atetpa* property if she had survived him [*Manugye* X 10, Digest section 229, *Ma Le* v. *Tun Shwe* (4)], yet the doctrine of common disaster cannot be applied to mean that the

(1) 8 L.B.R. 197.
(2) (1930) I.L.R. 8 Ran. 480.
(3) A.I.R. (1930) Ran. 237.
(4) 10 L.B.R. 10.

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heirs of each spouse are entitled to a share in the *atetpa* of the other spouse as if their parent had been the survivor.

I note that the case of *Ma Ein Si* v. *Ma Wa Yon* (1) referred to by May Oung in his book at page 260 was not as he says one where the doctrine of common disaster was applied. There the *atet* daughter of the husband was given a one-fourth share of the *atetpa* property of the wife as against the *atet* children of the wife because the husband had survived the wife.

Manugye Book X section 9 would not help the appellants. It gives the law of partition when there are three kinds of sons,—that is the *auk* children (children by the second marriage) and the two sets of *atet* children, and says that on the death of the parents the son of the mother is to have the property she brought with her as her portion (*atetpa*), the son of the father what he possessed at the time of the marriage (his *atetpa*), and the son of both what had been acquired during the marriage. It was only when there was no *hnapazon* acquired during the last marriage that the *auk* child was allowed a share of the *atet* property one-fourth. If one spouse brought *atetpa* property and the other none, and there was no property acquired in the second marriage (*Attathankepa* 222 omits this second qualification), the son of the spouse who brought the property was given a three-fifth share, the others a one-fifth share each. At divorce *eindaunggyis* take back their *atetpa* property entire (*Manugye* Book XII section 3, page 345, section 264 Digest), while in the case of a virgin couple (persons who have not been previously married), they can only take back two-thirds of their *payin* property (which corresponds to the *atetpa* of the *eindaunggyi*), *vide Manugye* Book XII page 342. The earliest ruling

(1) (1897-01) 2 U.B.R. 131, 134.

on the subject is *Mi Dwe Naw* v. *Maung Tu* (1), followed in *Mi Saing* v. *Nga Yan Gin* (2). During the continuance of the marriage the *eindaunggyi* husband can alienate his own *atetpa* property, *Panam Dhammathat* section 252 Digest and section 406 of the *Attasankepa*. See too MacColl A.J.C. in *Nga Tun Baw* v. *Nga Kan* (3). *Per contra* Maung Ba J. in *Ma Paing* v. *Shwe Hpaw* (4).

The same view was formerly held as regards the *payin* of virgin couples, *cf. Ma San Shwe* v. *Valliappa Chetty and two* (5), until the Full Bench ruling in *C.T.P.V. Chettyar* v. *Tha Hlaing* (6). Carr J. there (at page 346) gives the reason for not giving to each *eindaunggyi* spouse the same rights in the *payin* property of the other as are given on a first marriage,—and that is, of course, the necessity of considering the interests of the children of the first marriage.

In the same ruling Carr J. (at page 347) gives reasons for following the law of partition on divorce for the purposes of partition on inheritance (where no specific provisions of customary law to the contrary exist), which a Bench of which I was a member followed in *Daw Hla On* v. *Ma Nyun* (7). In *San Pe and two* v. *Ma Shwe Zin and three* (8) Twomey C.J. and Ormond J. laid down that it is only when the surviving step-parent dies leaving no natural issue and no widow surviving him that the children of the step-parent's deceased wife by a former husband are entitled to the step-parent's property. This judgment was followed in *Ma Hnin Zan*'s case (9) as regards *payin* property (pages 491 and 505 *ibid.*).

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(1) S.J.L.B. 14
(2) (1914-16) 2 U.B.R. 127.
(3) 4 B.L.T. 244.
(4) (1927) I.L.R. 5 Ran. 296, 332.
(5) 10 B.L.R. 49.
(6) (1925) I.L.R. 3 Ran. 122.
(7) [1937] Ran. 410, 413.
(8) 9 L.B.R. 176.
(9) (1935) I.L.R. 13 Ran. 487.

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Mya Bu J. in his judgment there (at page 504) says that it is an accepted modern notion that as regards the *payin* property of an *eindaunggyi* spouse neither the spouse nor the spouses' children by a previous marriage have any interest in it during the life-time of the party who brought the property. He considers that it is settled law that since the extent of the relative interests of husband and wife in property during marriage is to be decided by the rules applicable to a partition upon divorce where neither party is at fault, and that upon a divorce by mutual consent between an *eindaunggyi* couple neither can obtain any share in the *atetpa* property of the other, an *eindaunggyi* spouse possesses no right whatever in the *payin* property of the other *eindaunggyi* spouse during the latter's life-time. There is no cogent reason he thinks, why the *atet* children of an *eindaunggyi* spouse should share in the property brought to the marriage by the other *eindaunggyi* spouse.

In *N.A.V.R. Chettyar* v. *Maung Than Daing* (1) Carr J. quoted *in extenso* the passage from Book VIII of *Manugye* (at pages 239, 240) which is relied upon but not quoted in *Tun Baw*'s case. The words in italics quoted in that judgment at page 551 bear out Carr J's. contention that the *atetpa* property of an *eindaunggyi* couple does not become their joint property in the way (Carr J. says " to the same extent ") that the *payin* property of a virgin couple may do.

It may be noted here that the *obiter* remark in *U Pe* v. *U Maung Maung Kha* (2), a decision of their Lordships of the Privy Council, that on partition *payin* property is equally divided between the parties is clearly a mistake, as has been pointed out in *U Maung Nge* v. *P.L.S.P. Chettyar* (3).

(1) (1931) I.L.R. 9 Ran. 524, 550. (2) (1932) I.L.R. 10 Ran. 261.
(3) A.I.R. (1934) Ran. 200.

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It would seem clear that the appellants are not entitled to any share in the *atetpa* property of their step-father and this appeal will be dismissed with costs *ad-valorem*.

SHARPE, J.—The husband and wife in the present case were *eindaunggyis*, that is to say that each of them had been previously married. To this marriage the husband brought certain property, his *atetpa*. After this marriage the husband and wife mortgaged the piece of land in question, which was part of the *atetpa* property of the husband, and later on that land was redeemed by them. Subsequently both the husband and wife died, within a week of each other. There was no issue of this, their last marriage, but both of them left children and grandchildren by their former spouses. Those of the wife are the present appellants and those of the husband are the respondents.

I agree with the conclusion of the lower appellate Court that, on the authority of *Ma Hnin Zan* v. *Ma Myaing* (1), the mortgage and redemption after the second marriage did not change the character of the land, which remained the *atetpa* property of the husband. I am unable to accept the appellants' contention that the fact that the wife survived the husband, albeit only by five days, renders the decision on *Ma Hnin Zan*'s case (1) inapplicable to the facts of the present case.

There remains for our determination the question whether the appellants are entitled to a share in the land in question, or, in more general terms, as my learned Brother has put it, whether, in a case where both the parties to a marriage have been previously married, one party to such marriage acquires on

(1) (1935) I.L.R. 13 Ran. 487.

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marriage any (and, if so, what) interest in the property which the other party brought to that marriage.

In the case of the *N.A.V.R. Chettyar Firm* v. *Maung Than Daing* (1) Carr J. cited a passage in Book VIII of *Manugye* which seemed to him, as he expressed it,

> "at least to suggest a doubt whether the *atetpa* property of an *eindaunggyi* couple becomes their joint property to the same extent as the *payin* property of a virgin couple may do."

In the unreported case of *Daw On Bwint* v. *U Ba Sein* (2) Baguley J. said that in principle he could see no difference between the *atetpa* property brought by an *eindaunggyi* wife to a marriage and the *payin* property brought by a virgin to her first marriage, and he held that the settled rule of Burmese Buddhist Law, as regards *payin* property where the relationship of *nissaya* and *nissita* exists, namely, two-thirds for the party bringing the *payin* and one-third for the other party, also applies to *atetpa* property in the case of *eindaunggyis*.

The present appeal originally came before Dunkley J. who, in view of the conflict between Baguley J's. decision and the observations of Carr J. which I have just mentioned, thought it desirable that this appeal should be decided by a Bench.

I have had the benefit of reading the judgment just delivered by my brother Mosely, and therefore it is enough, I think, for me to say this : In my judgment the passage from Book VIII of *Manugye* quoted by Carr J. in *N.A.V.R. Chettyar Firm* v. *Maung Than Daing* (1) does more than merely give rise to the doubt expressed by that learned Judge ; to my mind that passage may be taken as authority for the proposition,

(1) (1931) I.L.R. 9 Ran. 524, 551, 552.

(2) Spl. Civ. 2nd Ap. 379 of 1938, H.C. Ran.

not only that the *atetpa* property of an *eindaunggyi* couple is not governed by the same rules as the *payin* property of a virgin couple, but also that, when two *eindaunggyis* marry, neither of them thereby acquires any interest in the *atetpa* property of the other. Accordingly I must, with all respect, dissent from the view taken by Baguley J. in *Daw On Bwint*'s case (1).

I agree with my learned brother that in the case now before us the appellants are not entitled to any share in the *atetpa* property of their step-father, and that their appeal must be dismissed with costs.

(1) Spl. Civ. 2nd Ap. 379 of 1938, H.C. Ran.