

APPELLATE CIVIL.

Before Mr. Justice Ba U and Mr. Justice E Maung.

MA PU (APPELLANT)

v.

DAW AYE MYA AND OTHERS (RESPONDENTS).*

1947

Sept. 16.

Burmese Buddhist Law—Adoption—Proof—Document admittedly signed by natural parents of the child—Its admissibility—Cancellation of adoption.

Held: That where *kittima* adoption is established, adoptive parents cannot disown the *kittima* adopted child for eloping with and marrying a person whom the adoptive parents do not approve. In any case one of the adoptive parents alone cannot cancel the adoption.

Ma Kyin Sein v. Maung Kyin Htain, (1940) R.L.R. 783, followed. ✓

Held per BA, U, J.—Where an unregistered deed of adoption † is proved to have been signed by the natural parents of the adopted child but the alleged signatures of adoptive parents are not proved to have been made, at that time, the document is still admissible for a collateral purpose, *viz.* for proving the reliability and trustworthiness of witnesses to prove a course of conduct and notoriety of the relationship of the adopted child with the adoptive parents. ✓

Parbati Charan Mukherjee v. A. N. Bhattacharjee, I.L.R. 53 Cal. 418, followed.

Per E MAUNG, J.—The document of adoption having been proved to have been executed in presence of several persons would be sufficient to establish *kittima* status of the girl adopted.

Ma Mu v. U Nyun, I.L.R. 12 Ran. 634, followed.

Chan Htoon for the appellant.

Dr. Thein for the respondents.

BA U, J.—We must allow this appeal. It appears to us that the learned District Judge has allowed his judgment to be unduly influenced by Exhibit 2. If he

* Civil 1st Appeal No. 9 of 1947 against the decree of the District Court of Magwe in Civil Regular No. 1 of 1946, dated the 19th November 1946.

† The Registration of *Kittima* Adoption Act, 1941, was not applicable in the present case.

1947

MA PU
v.
DAW AYE
MYA AND
OTHERS.
BA U, J.

had viewed Exhibit 2 in its true perspective in its relation to Exhibit A, we are sure that he would have come to a correct decision in this case.

The facts are these. U Chit Tha and Daw Min Myaing *alias* Daw Myaing, who were Burman Buddhists, were husband and wife. They lived permanently in Myenekin Quarter, Yenangyaung. During the time of the war they moved to a small village called Thabyebin and lived there. While living there they died one after the other at an interval of seven days. U Chit Tha died on the 5th January, while his wife died on the 13th January 1945. They left surviving them no natural issue of their own. But U Chit Tha left one younger sister, Ma Aye Mya, surviving him, while Daw Min Myaing left two younger brothers, U Ba Din and U Ba Ye, surviving her. The fight now for the possession of the estate of the deceased couple is between Daw Min Myaing's younger brother, U Ba Ye, and her niece, Ma Pu, who is the natural daughter of U Ba Din. Ma Pu alleges that she is the *kittima* daughter of the deceased couple, U Chit Tha and Daw Min Myaing, and, as such, she is the only person entitled to inherit their estate. She accordingly applies for letters to administer their estate. U Ba Ye denies the alleged adoption of Ma Pu by U Chit Tha and Daw Min Myaing and claims letters for himself. Ma Pu's natural father U Ba Din supports the claim of Ma Pu, but in the case of Daw Aye Mya, she opposes the claims of both Ma Pu and U Ba Ye and says that as she was the younger sister of U Chit Tha, she is the only person entitled to inherit them. She does not, however, apply for letters. The whole question for decision in this case is whether Ma Pu is able to prove her adoption as a *kittima* child by the deceased couple satisfactorily or not. If she is able to do it, she must get letters.

To prove her adoption by the deceased couple, Ma Pu relies on the following :

(1) A specific act and occasion when she was given by her natural parents and taken in adoption by the deceased couple ;

(2) The declarations made by the deceased couple to their friends and relations ;

(3) The course of conduct of the deceased couple towards her ; and

(4) The notoriety of her relationship with the deceased couple.

As regards the first point, Ma Pu relies on the evidence of some people alleged to be present at the time of the adoption and mention of the execution of the document, Exhibit A.

Before we examine the evidence of the witnesses alleged to be present on the occasion in question, we should, in my opinion, examine the legal effect of the document, Exhibit A.

The document is in the following terms :

"On the 7th waxing of *Nattaw* 1283 B.E. Ma Pu Gyi, daughter of Ko Ba Din and Ma Tha Me of Myenikhin Village, is given to elder brother Ko Chit Tha and elder sister Ma Myaing for the purpose of adopting Ma Pu Gyi as daughter of father Ko Chit Tha and mother Ma Myaing with right to inherit from them for good or bad. Agreeing to the terms of the said document, Ko Ba Din and Ma Tha Me sign the document in the presence of the witnesses and give daughter Ma Pu Gyi to Ko Chit Tha and Ma Myaing outright as their daughter.

(Sd.) MAUNG CHIT THA.

(Sd.) MA MYAING.

(Sd.) MAUNG BA DIN.

× mark of Ma Tha Me."

Witnesses—

(Sd.) (Undecipherable.)

(Sd.) MAUNG SEIN.

Written by—

(Sd.) MAUNG PO HTAIK.

1947

MA PU

v.

DAW AYE
MYA AND
OTHERS.

BA U, J.

1947
 MA PU
 v.
 DAW AYE
 MYA AND
 OTHERS.
 BA U, J.

Now, if the document is accepted as genuine, and if admissible in evidence, the adoption of the plaintiff-appellant Ma Pu must be held to be proved.

Of the two witnesses who signed the document, the name of one witness alone is decipherable and the name is Maung Sein. He is a witness in the case. The other witness, according to Maung Sein and others, is U Chit. U Chit is a witness. The writer, U Po Htaik, is also a witness. All these three witnesses agree that the document, Exhibit A, was executed by U Ba Din and his wife and also U Chit Tha and his wife. They are related to both parties more or less in the same degree and so they have no reason to side with the one as against the other.

But the learned trial Judge has rejected their evidence on the strength of what the deceased Ma Myaing said in the deed, Exhibit 2. This deed (Exhibit 2) was signed by Ma Myaing and attested by her husband. By this deed Ma Myaing gave away her half share in the oil-wells owned by her and her husband to her younger brother U Ba Ye, respondent. The deed recites *inter alia*: "Whereas I, the donor Ma Myaing, having no heir, *i.e.* son and daughter, and whereas I, donor, having had love and affection as my own child for Maung Ba Ye, my own youngest brother, do hereby convey out and out half of the oil-well site, etc."

The learned trial Judge made much of the above-mentioned statement and said that if Ma Pu had really been adopted, Ma Myaing would not have said what she had, that is to say, Ma Myaing would not have said that she had no son or daughter to inherit her property. This finding is in effect a finding that the two attesting witnesses, Maung Chit and Maung Sein, and the writer, U Po Htaik, are perjured witnesses. Why these witnesses should have purposely perjured themselves for the sake of Ma Pu, the learned trial Judge has not

explained satisfactorily. The learned advocate for U Ba Ye has not even ventured to suggest this, but what he submits is that the signatures of Maung Chit Tha and Ma Myaing have been put in very recently and that, therefore, the document, Exhibit A, is inadmissible. We have examined the document carefully and we are not satisfied that the names of U Chit Tha and Ma Myaing were put in only recently. It is true that the ink with which these two names were written is somewhat darker than the ink with which the names of other executants and attesting witnesses were written. Because of the difference in colour of the ink alone we cannot hold that the names of the deceased couple were recently put in. The stamp-paper on which the document was written is an old stamp-paper and it has all the signs of age. Even assuming for the sake of argument that the names of the deceased couple were put in recently, it does not render the document inadmissible for the purpose of proving a collateral fact.* For instance, it is in my opinion admissible for the purpose of proving the reliability and trustworthiness of witnesses called to prove the course of conduct between the deceased couple and the present claimant Ma Pu and the notoriety of their relationship. The law on this point is fully explained in *Parbati Charan Mukherjee v. A. N. Bhattacharjee* (1) and the cases cited therein.

Now, take the evidence of the witnesses called to prove the admissions made by both or either of the deceased couple that they had adopted Ma Pu as their adopted *kittima* child. I would first deal with the evidence of two witnesses, namely, U Ardeiksa and U Kethaya (P.Ws. 3 and 4).

* It was admitted that signature and cross mark of natural parents of Ma Pu, i.e. of U Ba Din and Ma Tha Me were genuine.—*Ed.*

(1) I.L.R. 53 Cal. 418.

1947
 MA PU
 v.
 DAW AYE
 MYA AND
 OTHERS.
 BA U, J.

1947

MA PU
v.
DAW AYE
MYA AND
OTHERS.
BA U, J.

U Ardeiksa says :

"About 20 or 25 years ago on the invitation of U Chit Tha and Daw Min Myaing I had meals in their house at Myenekin about three or four times. On those occasions I have seen the plaintiff Ma Pu in their house. On one of those occasions I was invited by them to give a sermon at night in their house and I went to their house and gave a sermon. After the sermon was over, Daw Min Myaing told me thus : 'I have adopted a daughter of my brother Ba Din with a view to inherit. She is Ma Pu Gyi,'
* * * * * At that time there were several people present
* * * * * Daw Min Myaing told me on that morning when she invited me for breakfast that she wanted me to give a sermon in her house that evening for two reasons, namely, to avert evil things and also to publicly announce the adoption by them of Ma Pu Gyi as their own daughter."

In the case of U Kethaya, he says :

"Whenever Daw Min Myaing visited the monastery to keep sabbath, the plaintiff used to come along with her. One day, I think about 20 years ago, U Chit Tha and Daw Min Myaing together with Ma Pu came to our monastery to keep sabbath. Seeing the plaintiff always with them when they came to the monastery, I asked them who she was, and they told me that they had adopted her with a view to inherit."

If the evidence of these two witnesses is believed, then it is clear that the deceased couple admitted at least on two occasions that they had adopted Ma Pu as their *kittima* daughter. There is no reason why the evidence of these two witnesses should not be believed, seeing that both of them are members of the order of *Sangha*. One is 64 and a presiding monk, and the other is 46. If further evidence is needed on this point, I might refer to the evidence of Saya Phe (P.W. 5).
Saya Phe says :

"My house was about 600 feet from that of U Chit Tha and Daw Min Myaing at Myenekin. I used to visit their house once or twice in a month. About I think 20 years ago when I visited

their house, U Chit Tha and Daw Min Myaing told me that they had adopted Ma Pu Gyi as their daughter with a view to inherit. No one was present then. I used to see her in their house whenever I go (went) there. She was treated like their own."

This witness, Saya Phe, is a *twinsa* and aged 70. He is not related to either party and evidently held in respect by the people of the quarter. Therefore, we cannot expect to get a more independent and impartial witness than Saya Phe.

Again, there is the evidence of U Ko Ko Gyi (P.W. 11) to consider. U Ko Ko Gyi is now a Sub-Inspector of Police, but before he joined the Police Force he was a teacher in the B.O.C. School at Yenangyaung and while he was there, Ma Pu was a pupil in his class. He says that he always looked upon Ma Pu as the natural daughter of U Chit Tha and Daw Min Myaing in view of the way they treated her. He came to know that she was not their natural daughter but only an adopted daughter when she eloped with her present husband.

Next, there is the evidence of U Ba Din (P.W. 1) to consider. He says that he and his wife gave their daughter Ma Pu in adoption to U Chit Tha and Daw Min Myaing.

Now, that is where the document, Exhibit A, comes into play. Assuming, as contended by the learned counsel for the respondent U Ba Ye, that the names of U Chit Tha and Daw Min Myaing were put in only recently, though we do not agree with him on this point, the said document is admissible to corroborate U Ba Din's evidence, as pointed out above. If so believed and there is no reason why we should not accept U Ba Din's evidence, what becomes clear is that the giving of Ma Pu by her natural parents to U Chit Tha and Ma Myaing becomes established

1947

MA PU

v.

DAW AYE
MYA AND
OTHERS.

BA U J.

1947
 MA PU
 v.
 DAW AYE
 MYA AND
 OTHERS.
 BA U, J.

beyond any controversy. As a corollary, the taking of Ma Pu in adoption by the deceased must be held to be proved. In fact, it must be held to be proved by the evidence cited above.

The learned trial Judge has not considered this aspect of the case ; nor has he gone into the question of the trustworthiness or reliability of the witnesses of the plaintiff-appellant. He relies on document, Exhibit 1, but if the document, Exhibit 1, is considered in the light of the above circumstances, what Daw Myaing meant by saying therein that she had no heir, *i.e.* son or daughter, becomes quite clear. She meant to disown Ma Pu as her *killima* adopted daughter. She did so because she was angry with Ma Pu as the latter eloped with her present husband who in the opinion of Ma Myaing was not a good match for Ma Pu. This is quite clear from the evidence on the record.

There is no authority which we know of, which allows an adoptive parent to disown a *kittima* adopted child under such circumstances as are obtaining in the present case. Nor do we know of any law which allows one adoptive parent alone to cancel the adoption.

For all these reasons I would allow this appeal, set aside the judgment and decree of the lower Court and direct the issue of letters to Ma Pu on her paying the Court-fees as prescribed by law and on furnishing security in the sum of Rs. 30,000 within one month from the date of the receipt of this order by the trial Court. The respondent shall pay the costs of this suit both in this Court and the lower Court.

E MAUNG. J.—Once the genuineness of the document, Exhibit A, is established there is an end of the case *Ma Mu v. U Nyun* (1) is definite authority that the execution of a document of adoption in the

(1) I.L.R. 12 Ran. 634.

presence of several persons would be sufficient to establish the status of a *kittima* child. I agree with my Lord that there can be no reason to doubt the genuineness of the document, Exhibit A. It purports to be executed on the 7th waxing of *Nadaw* 1283 B.E. This corresponds, though not so specified in the document, to the 6th December 1921. The stamp sheet on which it is written bears an endorsement by the stamp vendor, indicating that the stamp sheet was issued by him to the purchaser on the 20th August 1921.

U Chit (P.W. 2), Maung Sein (F.W. 6) and U Po Htaik (P.W. 7), whose signatures appear on the face of this document, Exhibit A, have testified to the due execution of it by U Ba Din (P.W. 1) and his deceased wife Daw Tha Me as well as by U Chit Tha and Daw Min Myaing. U Ba Din also has spoken to having executed the document.

If the document had been a recent fabrication, it is not at all likely that it would have borne the Burmese date only on it or that the date given according to the Burmese era would have followed so closely the date of the issue of the stamp sheet by the stamp vendor. As my Lord has pointed out, there is nothing on the record to suggest that U Chit, Maung Sein and U Po Htaik have perjured themselves or that they or any of them had any reason to perjure themselves in support of the appellant's case. What purports to be the signatures of U Chit Tha and Daw Min Myaing on Exhibit A have been compared by me with the admitted signatures of these two persons appearing on Exhibit 2. I do not claim to be an expert in handwriting but I have not been able to see any indication which would enable me to say that the signatures on Exhibit A of these two persons are forgeries. In fact my impression is to the contrary.

1947

MA PU

v.

DAW AYE
MYA AND
OTHERS.

E MAUNG, J.

1947

MA PU

v.

DAW AYE
MYA AND
OTHERS.

E MAUNG, J.

The suggestion that Ba Din, being the natural father of the appellant Ma Pu would support her overlooks the consideration that Ba Din's interest in the matter of the estate of Daw Min Myaing runs counter to that of the appellant. U Chit Tha died on the 5th January 1945 and Daw Min Myaing died nine days thereafter. Accordingly, the exceptional rule of joint disaster could not apply and U Chit Tha's brothers and sisters, if any, would be excluded by Daw Min Myaing's brothers and sisters if the couple had not been survived by a child, natural born or adopted. I cannot conceive of Ba Din falsely giving evidence in favour of Ma Pu when Ma Pu, if she had succeeded in this litigation, would have taken the whole estate, whereas if Ma Pu had failed, Ba Din and his brother Ba Ye would have divided the estate in equal shares. Ma Pu successful might at most make to Ba Din *ex gratia* payment which I cannot conceive of anything exceeding half the estate of Daw Min Myaing; whereas with Ma Pu defeated, Ba Din would have *ex debito justitiæ* a half interest in that estate.

It is not necessary for the purposes of this case to embark on an enquiry why in Exhibit 2 Daw Min Myaing is purported to have declared that she had no child living. Several explanations are possible. It is no part of the case for the respondents that if Ma Pu had been adopted the adoption had been subsequently cancelled, either unilaterally by the adoptive parents or by the adoptive parents with Ma Pu's consent. The law relating to the termination of the *kittima* relationship, once created, has been fully discussed by a Bench of this Court in *Ma Kyin Sein v. Maung Kyin Htain* (1). I have no reason whatsoever to think that the law as laid down in that case requires further

(1) (1940) R.L.R. 783.

consideration. Tested by that case there can be no question of Ma Pu having lost the *kittima* status which she acquired as a result of the document of adoption, Exhibit A, since the 6th December 1921.

I agree with the order proposed by my Lord.

1947

MA PU

v.

DAW AYE
MYA AND
OTHERS.

E MAUNG, J.