FULL BENCH (CIVIL).

Before U Thein Maung, Chief Justice, U Aung Tha Gyaw and U Bo Gyi, JJ.

H.C. 1948

Mar. 17.

MA THEIN NU (APPELLANT)

v.

MA PWA THIT AND ONE (RESPONDENTS).*

Burmese Buddhist Law—Grandchild of parents when divorced—Does not maintain filial relationship with one of its parents—Whether loses its right of inheritance of that parent's parent.

Held by the Full Bench : That a child who after the divorce of its parents who are Burmese Buddhists, neither lives with nor maintains filial relationship with one of its parents does not lose its right of inheritance to the property of that parent's parent and it is not necessary that filial relationship between itself and its parent should be resumed before it can inherit from the grandparent.

Mi Thaik v. *Mi Tu*, (1872—92) S.J.L.B. 184 ; *Ma Shwe Ge* v. *Nga Lan and one*, (1872—92) S.J.L.B. 296 ; *Ma Pon and others* v. *Maung Po Chan and others*, (1897—1901) 2 U.B.R. 116 ; *Ma Sein Nyo* v. *Ma Kywe*, (1892—96) 2 U.B.R. 159 ; *Maung Pan* v. *Ma Hnyi*, (1897—1901) 2 U.B.R. 104 ; *Ma Yi* v. *Ma Ga'e*, 5 L.B.R. 133 ; *Ma E Me* v. *Maung Po Mya*, 11 B.L.R. 316 ; *Ma Hla Kin* v. *Maung Chit Po and others*, (1910) 3 B.L.T. 109 ; *Mi Nyo* v. *Mi Nyein Tha*, (1904—06) 2 U.B.R., Buddhist Law of Inheritance, p. 15 ; *Le Maung* v. *Ma Kwe*, (1919) 10 L.B.R. 107 ; *Maung Dwe and others* v. *Khoo Haung Shein and others*, (1925) I.L.R. 3 Ran. 29 ; *Maung Hmat and others* v. *Ma Po Zon*, (1893—1900) P.J.L.B. 469 at p. 470 ; *Maung Po Thu Daw* v. *Maung Po Than*, (1923) I.L.R. 1 Ran. 316 (F.B.) ; *U Sein* v. *Ma Buk and others*, (1933) I.L.R. 11 Ran. 158 ; *Maung Paik* v. *Maung Tha Shun and another* (1940) R.L.R. 28, referred to.

Hla Gyaw for the appellant.

Tun Maung for the respondent.

The following judgment of the Full Bench was delivered by

U THEIN MAUNG, C.J.—The question which has been referred to the Full Bench is as follows :

"Does a child who, after the divorce of its parents (being Burmese Buddhists) neither lives with, nor maintains filial

* Civil Reference No. 8 of 1947 against the decree of the District Court of Sagaing in Civil Appeal No. 43 of 1946.

relations with, one of its parents, lose its rights of inheritance to the property of that parent's parents unless and until filial relations between itself and that parent are resumed ?"

There is no express provision in the *Dhammathats* as to whether such a child should lose his rights of inheritance to the estate of the grandparents at all ; and the reference has been made to find out whether the law relating to the rights of inheritance of such a child in respect of the estate of his own parent, with whom he has not maintained filial relations, should or should not be extended to cover the case.

As has been pointed out by U E Maung (now a Judge in the Supreme Court of the Union of Burma) at page 245 of his book on Burmese Buddhist Law the law relating to the children of divorced parents is mainly case-law. *Mi Thaik* v. *Mi Tu* (1) is the leading case. It decided "where husband and wife divorced by mutual consent and the young daughter remained till her father's death in the house of her mother and her mother's second husband, and did not renew filial connection with her own father, and where there was no special contract to a contrary effect at the time of the divorce, the daughter is not entitled to a share of the joint property acquired by the father and the second wife." In the course of his judgment therein Jardine J.C. observed, "The principle applied to an adopted son runs more or less through the whole law of inheritance. It is presumed that the children will be dutiful to their parents even if they (the children) have married and received as gifts the wherewithal to set up separate establishments. In the 5th section of the *Dhammavilasa* the reason why the eldest son gets a share is said to be that he with his parents had planned and worked. In section 17 it is mentioned

(1) (1872—92) S.J.L.B. 184.

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that the son who lives with his parents is better able to help them in lawsuits and disputes; and the written law and present opinion coincide in requiring the principal heir to take up the parent's burden on the parent's death. Section 13 of the *Wunnana* shows clearly that children who expect to inherit should remember their parents in adversity as well as in prosperity. If the parents become too poor to support themselves, filial piety would induce the children to sell themselves in order to provide the means. See also sections 9 to 12 of the *Mchavicchedani*, Notes on Buddhist Law, VI: 'If the eldest son or eldest daughter do not perform the business of their father and mother, the share of such son or daughter shall be forfeited or made less.'"

In *Ma Shwe Ge* v. *Nga Lan and Nga On* (1), Ward J.C. observed "The rule (in *Mi Thaik* v. *Mi Tu*), moreover, is an equitable rule and should I think be maintained so long as there is no distinct provision in the *Dhammathats* which conflicts with it." And in *Ma Pon and two others* v. *Maung Po Chan and two others* (2), Thirkell White J.C. cited with approval the following passage from the judgment in *Ma Sein Nyo* v. *Ma Kywe* (3), "Now, it appears to be clearly a principle of Buddhist Law that the child who is to inherit must aid and cherish the parent, and live with him, or under such circumstances as to show that filial duty is discharged according to his wishes and that the family tie is unbroken." And he has also observed in the course of his judgment therein, "The intention of the law seems to be that on divorce separate households should be constituted and that the members of each household should not retain the right of sharing in the estate of the other. As Mr. Jardine observed in

(1) (1872—92) S.J.L.B. 296. (2) (1897—1901) 2 U.B.R. 116.
(3) (1892—96) 2 U.B.R. 159.

a passage already quoted, 'The principle applied to an adopted son runs more or less through the whole law of inheritance.' If, as was held in the case of *Maung Pan* v. *Ma Hnyi* (1), the adopted child has no claim to share in the estate of his natural father, there does not seem to be any reason why daughters, who separate from their father's house in consequence and on the occasion of their parents' divorce, should retain any claim to their father's estate."

In the leading case the daughter was an adult who had not maintained filial relations with her father and the father was a man who had married again after his divorce. However, the rule has been extended subsequently to cover (i) the case of a person who was a mere child when its father died and had no opportunity of exercising any option of renewing filial relationship with him. See *Ma Yi* v. *Ma Gale* (2) and *Ma E Me* v. *Maung Po Mya* (3) and (ii) the claim to inherit the estate of a father who did not marry again but lived the rest of his life with a daughter by an earlier marriage. [See *Ma Hla Kin* v. *Maung Chit Po and two* (4).]

Now the question is whether the rule should be further extended to cover the case of a claim to inherit the estate of grandparents. The rule may be an equitable one so far as it relates to a claim to inherit the estate of the parent with whom a child has not maintained filial relations, filial relationship being in the words of U May Oung "the fundamental requisite in order to qualify a child for inheritance." However, the rules relating to the incidents of adoption must be applied with caution. The analogy is not perfect. It is open to the child to renew filial relations and thereby regain the status of an heir and in the case of a son conceived in wedlock but born after divorce he has a

(1) (1897—1901) 2 U.B.R. 104.
(2) 5 L.B.R. 133.
(3) 11 B.L.R. 316.
(4) (1910) 3 B.L.T. 109.

claim upon the estate of his father in the absence of other heirs. [*See* Kinwunmingyi's Digest, Vol. I, ss. 297, 298 and 299 ; *Manukye*, Book X, sections 53 and 55, and *Mi Nyo* v. *Mi Nyein Tha* (1).] A Bench of the Chief Court of Lower Burma observed in *Le Maung* v. *Ma Kwe* (2) "if it were a question of inheriting from Maung Le Maung (the father), we might properly consider the claims of Ma Kwe (a daughter who was born before divorce) if she were the only surviving descendant by blood." And in the case of an adoption, the child cannot have a claim on the estate of the father even in the absence of other heirs.

There is no rule of law which requires grandchildren to live or work with grandparents ; and even in the case of step-grandchildren their Lordships of the Privy Council have held that failure on the part of minor step-grandchildren to live with the step-grandmother and their failure to bury her did not disqualify them from inheriting her estate. [*See Maung Dwe and others* v. *Khoo Haung Shein and others* (3).] Besides a son conceived in wedlock and born after divorce is entitled to inherit the estate of his paternal grandparents although he has been living with his mother for the reason that he is a son begotten after a regular marriage by the consent of parents—an excellent child and entitled to inherit. (မိဘနှစ်ပါးပေးစားသိမ်းမြားရာတွင်ရသောသားနှေသည်၊ သားမြတ်ရမွေခံသင့်သည်။) (*See* Kinwunmingyi's Digest, Vol. I, sections 297, 298 and 299 ; *Manukye*, Book X, section 55.

It may be equitable to hold that a child removed from the father's family and continuously resident with her divorced mother acquires or retains rights in her mother's or new family's property and loses her rights

(1) (1904—06) 2 U.B.R., Buddhist Law, Inheritance, 15.
(2) (1919) 10 L.B.R 107.
(3) (1925) I L.R. 3 Ran. 29.

in the family whence she came as she has not lived and planned or worked with the father's family. [*Cf. Maung Hmat and two others* v. *Ma Po Zon* (1).] But the *ratio decidendi* in such a case does not apply to a claim to inherit the estate of the paternal grandparents, and it will be against justice, equity and good conscience to extend the rule to such a claim. Buddhist Law like all other systems of law attaches great importance to blood relationship and the grandchild in such a case claims to inherit in his own right as a blood relation—as a son begotten after regular marriage by consent of parents (မိဘနှစ်ပါးပေးထိမ်းမြားရာတွင်ရသော သားဖြစ်။)—and not as a representative of the father or his family. [See *Maung Po Thu Daw* v. *Maung Po Than* (2).] *Cf.* section 38 of the Succession Act.

In *U Sein* v. *Ma Bok and others* (3) it was held that the rule in Burmese Customary Law relating to the disinheritance of a dogson does not apply to grandchildren ; and in *Maung Paik* v. *Maung Tha Shun and another* (4) an out-of-time grandchild by an *orasa*, who became a dogson, was held to be entitled to share the estate of his grandparents equally with his uncle. So the same considerations and requirements do not apply to the case of a grandchild as to that of a child.

In the words of Jardine J.C. himself in *Mi Thaik* v. *Mi Tu* (5) "There is no reason therefore to apply the analogy of the one case to the other" ; and it will be "extremely dangerous to make categorical rules out of mere inference" on the analogy of adoption or on the analogy of a claim to inherit the estate of the father himself.

We accordingly answer the question which has been referred to us in the negative.

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(1) (1893—1900) P.J.L.B. 469 at p. 470.
(2) (1923) I.L.R. 1 Ran. 316 (F.B.).
(3) (1933) I.L.R. 11 Ran. 158.
(4) (1940) R.L.R. 28.
(5) (1872—92) S.J.L.B. 184.