

APPELLATE CIVIL.

Before U Tun Byu and U San Maung, JJ.

MA OHN NU (APPELLANT)

v.

MA NYUN (RESPONDENT).*

H.C.
1948

Mar. 8.

Succession Act, s. 298—Burmese Buddhist—Representation of—Discretion of Court to refuse.

Ma Ohn Nu applied for letters to the estate of her aunt, a Burmese Buddhist, who died on 5th August 1926. She claimed as *kittima* adopted daughter. The application was refused on the ground of delay and as she would still have to sue for possession.

Held on appeal: That representation for Burmese Buddhist is not compulsory under the Succession Act.

Observations of E Maung J. in *Maung Sein v. U Po Toke and others* (Civil 1st Appeal No. 28 of 1946 of the High Court of Judicature at Rangoon), referred to.

Held further: That under s. 298 of the Succession Act where the deceased was a Buddhist the Court has a discretion to refuse letters. The application in this case was made 20 years after the death of Daw Kyin and 10 years after the applicant's marriage and the applicant had not explained the delay.

U Hla Tun Pru for the appellant.

M. Eunoose for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 1 of 1947 of the High Court of Judicature at Rangoon the appellant, Ma Ohn Nu, applied for letters of administration to the estate of her aunt, Daw Kyin, a Burmese Buddhist spinster, who died on the 5th of August, 1926. Ma Ohn Nu claimed that, as the *kittima* adopted daughter of Daw Kyin, she was the heir of Daw Kyin to the exclusion of everybody else and was entitled to letters of administration of Daw Kyin's property which was in the possession of the defendant Ma Nyun, widow of U Nyo, who was Daw Kyin's younger brother.

* Civil 1st Appeal No. 52 of 1947 against the decree of the High Court of Rangoon in Civil Regular Suit No. 1 of 1947, dated the 17th June 1947.

H.C.
1948
—
MA OHN NU
v.
MA NYUN.
—
U SAN
MAUNG, J.

In the objections and the affidavit filed in support thereof the defendant, Ma Nyun, alleged that the plaintiff, as a daughter of U Nyun in Civil Regular Suit No. 315 of 1928 of the High Court of Judicature at Rangoon, obtained a share in the estate of her paternal aunt Daw Tsee, that in Civil Regular Suit No. 316 of the same Court she also obtained a share of the estate of her paternal grandmother Daw Sone, and that she was therefore precluded from pleading that she was not the daughter of U Nyun. The fact that the plaintiff did receive the shares aforesaid was admitted, but the plaintiff stated that, by reason of her minority and of fraud on the part of U Nyo and others, the decrees in the suits were not binding upon her. Two preliminary issues, as set out in the judgment appealed against, were framed, and both were decided in favour of the plaintiff. The learned trial Judge (Kyaw Myint J.) however refused to grant the plaintiff's application for letters of administration on the ground that there was inordinate delay on her part in making her application, and that, even if the plaintiff had been granted letters of administration, she would still have to sue for the possession of the estate. In taking this course of action the learned Judge relied upon a dictum of E Maung J. in the case of *Maung Sein v. U Po Toke and others* (1) where the learned Judge observed :

“ The representation of a Burman Buddhist is not compulsory under the Succession Act, and the application appeared to have been made to have a decision on the disputed claims of Maung Sein and also of Daw Hnit settled in a cheap way. I am not prepared to encourage this method, especially in the circumstances of the present case.”

Gledhill J., who was a party to that decision, also agreed. In this appeal by Ma Ohn Nu against the

(1) Civil 1st Appeal No. 28 of 1946 of High Court, Rangoon.

dismissal of her suit it is urged that the learned trial Judge erred in law in going beyond the issues that fell for determination, that the learned Judge had overlooked the reasons for the delay which was stated in Ma Ohn Nu's application and affidavits in support thereof, and that the circumstances in this case were entirely different from the case of *Maung Sein v. U Po Toke and others* (1).

Now, section 298 of the Succession Act provides that :

" Notwithstanding anything hereinbefore contained, it shall, where the deceased was a Buddhist, be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act."

The application made by Ma Ohn Nu 20 years after the death of Daw Kyin is *prima facie* belated. It is therefore incumbent upon Ma Ohn Nu to state clearly in her petition and in the affidavits in support thereof the reasons for such a delay. In paragraphs 5 and 6 of her affidavit Ma Ohn Nu states that when her adopted mother Ma Kyin died at Takaw she was only 11 years old, that since then her uncle U Nyo kept her at a school in Rangoon and thereafter at his house at Pazundaung for a number of years, and that U Nyo advised her not to press for her share in Daw Kyin's estate as he feared that she might dissipate it. He also told her that it was his intention to give it to her sometime, but that, if she sued him for it, he would oppose her in Court, which would not recognize her adoption as it was unregistered. It is therefore incumbent on us to consider whether this explanation sufficiently accounts for the delay in making the

H.C.
1948

MA OHN NU

v.

MA NYUN.

U SAN
MAUNG, J.

(1) Civil 1st Appeal No. 28 of 1946 of High Court, Rangoon.

H.C.
1948

MA OHN NU
v.
MA NYUN.
U SAN
MAUNG, J.

application for letters of administration. According to her own affidavit Ma Ohn Nu was 31 years old at the time of making her application. Therefore, she must have attained majority ten years ago. Furthermore, it is admitted by her counsel, U Hla Tun Pru, that she became married since before she attained majority, and that her husband is still alive. Therefore even assuming that she was under U Nyo's tutelage before she attained majority or before she became married, there seems no reason why she should not have asserted her rights after she attained majority, or after she married her husband. There is a delay of at least ten years to be accounted for, and the facts stated in paragraph 4 of her reply to Ma Nyun's objection that U Nyo was a much married man only tends to weaken her case. Obviously the longer Ma Ohn Nu waited for the assertion of her rights, the lesser would be the chances of her ultimate success. Surely neither Ma Ohn Nu nor her husband could have been blind to such a fact. Therefore, the delay on the part of Ma Ohn Nu in the making of her application for letters of administration is, in my opinion, sufficient ground for refusal under section 298 of the Succession Act. The fact that no issue was framed by the learned trial Judge in regard to this delay is not quite material in this case as Ma Nyun had taken objection to it at the very first opportunity, and Ma Ohn Nu herself in her reply to the objection says that the reasons for the delay in filing her application were to be found in paragraph 5 of her affidavit. In any event, where an application for letters of administration is *prima facie* belated, it is incumbent upon the applicant to give full reasons for the delay. Otherwise, this alone may be a sufficient ground for the refusal of the Court to grant letters of administration as provided in section 298 of the Succession Act.

In the result the appeal fails, and must be dismissed with costs. Advocate's fees five gold mohurs.

U TUN BYU, J.—I agree.

H.C.
1948

MA OHN NU

v.

MA NYUN.

U SAN
MAUNG, J.