

APPELLATE CIVIL.

Before U San Maung, J.

MAUNG THA YAN AND TWO OTHERS (APPELLANTS)

v.

U MYAT MAUNG (RESPONDENT).*

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1948

June 30.

Buddhist Law—Succession to the estate of a deaf mute person—Whether mere relation who is not a co-heir can succeed on the ground that he supported the deaf mute person—Suit for possession on the basis of title lies without any offer to pay the money due on an invalid mortgage of the land.

Held : That only a co-heir looking after a deaf mute person can inherit to the exclusion of other co-heirs ; but a mere relation or an outsider looking after a deaf mute person, cannot exclude his natural heirs.

S. (iii) of Vol. I of *ex-Kinwun Mingyi's Digest, Ma Saw Win v. Ko Maung Gyi and four*, I.L.R. 2 Ran. 328 and *Mi Kan Yon v. Nga Pwe*, 5 B.L.T. 61, followed.

Inaccuracy in Richardson's Translation of Section Book of *Manugye* pointed out.

When a mortgage is invalid, the owner of the land can sue for possession on the basis of title without any offer to pay the money payable under the invalid mortgage.

Ma Kyi v. Ma Thon, I.L.R. 13 Ran. 274 (F.B.), followed.

Ba Sein and Thein Maung for the appellants.

Hla Pe (alias) *Arthur H. Paul* for the respondent.

U SAN MAUNG, J.—This is an appeal by Maung Tha Yan, Maung Nyo Lon and Maung Aung Ban against the judgment and decree of the District Judge of Magwe in Civil Appeal No. 24 of 1947 in which the learned District Judge reversed the judgment and decree of the 2nd Assistant Judge, Taungdwingyi, in Civil Regular Suit No. 6 of 1947, and granted a decree to the respondent U Myat Maung for recovery of possession of the land in suit, on the ground that

* Civil 2nd Appeal No. 158 of 1947 against the decree of the District Court of Magwe in Civil Appeal No. 24 of 1947, dated the 15th September 1947.

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U Myat Maung, as an heir of the deceased U Myat Hmwe, was entitled to inherit U Myat Hmwe's estate.

As the facts of the case have been clearly set out in the judgment appealed against it is not necessary for me to repeat them here. Only two points arise for decision in this appeal, *viz.* (1) whether the learned District Judge was justified in coming to the conclusion that the respondent U Myat Maung was the sole heir of the deceased U Myat Hmwe, and (2) if he was the heir, whether he could obtain possession of the land without repaying the amount for which the land was mortgaged to U Tha Yan.

As U Myat Maung was the elder brother of the deceased U Myat Hmwe *prima facie* he was entitled to inherit U Myat Hmwe's estate in preference to the appellant Maung Nyo Lon who was only a nephew. However, the Judge of the trial Court held that the deceased U Myat Hmwe who was somewhat mentally deranged was looked after during his life-time by Maung Nyo Lon and that, therefore, Maung Nyo Lon was entitled to inherit U Myat Hmwe's estate to the exclusion of U Myat Maung. For this he relied upon the ruling in the case of *Ma Saw Win v. Ko Maung Gyi and four* (1) where it was held by Duckworth J. that at Buddhist Law, on the death of a deaf-mute, his estate devolves on the co-heir who supported him during his life-time. The learned District Judge thought that the law as propounded in that case would be applicable to the case before him if it was proved that U Myat Hmwe was looked after by Maung Nyo Lon, but held that there was no satisfactory evidence in support of Maung Nyo Lon's contention that he had to look after U Myat Hmwe. In fact, the learned District Judge observed that U Myat Hmwe died in his old age in the jungle not looked after by anybody,

(1) I.L.R. 2 Ran. 328.

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that it was only after his death his dead body was brought back to the village and the funeral rites performed by the plaintiff U Myat Maung and other relatives, that the *soonthut* ceremony was performed in the house of U Myat Maung, and that U Myat Maung who was about eighty-one years old at the time of U Myat Hmwe's death was not failing in his duties towards U Myat Hmwe as he himself needed looking after.

In my opinion, the case cited by the learned Judge of the trial Court is clearly distinguishable from the present case. Both in the case of *Ma Saw Win v. Ko Maung Gyi and four* (1) as well as in *Mi Kan Yon v. Nga Pwe* (2) which was relied upon by Duckworth J. it was held that a co-heir who maintained and looked after a deaf-mute or a lunatic in his life-time, was entitled to inherit the estate of the deaf-mute or lunatic on the latter's death. The authorities relied upon by Duckworth J. and the learned Judicial Commissioner for Upper Burma are the rules contained in section 111 of Volume I of *ex-Kinwun Mingyi's Digest*, especially the passage from *Manugye* which reads :

“ Of the children born in lawful wedlock, if one is physically defective or dumb, or is suffering from an incurable disease or an incapacitating physical deformity, the due share of inheritance shall be allotted to such child, who shall be taken care of by one of the co-heirs. On the death of such co-heir, his or her share of inheritance shall be obtained by the co-heir who supported and maintained the deceased.”

The other two useful passages from this section are these :

“ If a co-heir is physically defective, dumb, leprous or deformed, the due share of inheritance shall be allotted to him or her, but it shall be taken in trust by one of the co-heirs who shall

(1) I.L.R. 2 Ran. 328.

(2) 5 B.L.T. 61.

tend and maintain the invalid. On the death of such co-heir, his or her property shall be obtained by the co-heir who maintained the deceased when living. (*Dhamma.*)

Among brothers and sisters, if one becomes insane, lame, leprous, blind or dumb, he or she shall get an equal share with the others, and the share shall be taken in trust by one of the co-heirs who shall tend and maintain him or her. On his or her death any property left shall be inherited by the supporter. (*Cittara.*) "

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The Burmese text of section 36, Book X, of *Manugye* is to the same effect though the translation by Richardson is somewhat misleading as he says,

" If amongst the children of a couple so given in marriage by their parents, one shall have severe disease, shall be unable to walk, shall stutter, or be dumb, let the share such child is entitled to be set aside, and let its relations support it, and at its death let the person who so supports take his share,"

and the word " relations " appearing therein can be misinterpreted as meaning relations other than co-heirs.

In the case now under consideration the appellant Maung Nyo Lon and the respondent U Myat Maung are not co-heirs inasmuch as the brother of a deceased person normally excludes the nephews and nieces from inheritance, the former being much nearer in the order of succession than the latter : See General Order of Succession given in Chapter VIII of Lahiri's Principles of Modern Burmese Buddhist Law, 4th edition.

Even assuming for the sake of argument that Maung Nyo Lon was a co-heir with U Myat Maung to the estate of U Myat Hmwe, I am in entire agreement with the learned Judge of the District Court that on the evidence on record it has not been established that U Myat Hmwe was in his lifetime maintained and looked after by Maung Nyo Lon.

Regarding the second point as to whether U Myat Maung was entitled to possession of the suit land

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without paying the amount for which it was mortgaged to U Tha Yan, the ruling in the case of *Ma Kyi v. Ma Thon* (1) is apposite. A person cannot sue for redemption of his property under an oral mortgage which by law must be created by a registered instrument, but he can sue for possession relying on his title. He need not make an offer to pay the amount for which the land was mortgaged. As the land in suit was mortgaged to U Tha Yan orally, U Myat Maung is entitled to its possession without paying anything either to U Tha Yan or to U Aung Ban who had redeemed it from U Tha Yan. U Aung Ban having derived his right to possession from U Tha Yan cannot be in a better position than U Tha Yan himself. The learned Judge of the District Court was quite right in granting U Myat Maung a decree for recovery of possession of the suit land as prayed for by the plaintiff.

In the result, the appeal fails and must be dismissed with costs.

(1) I.L.R. 13 Ran. 274 (F.R.).