

*Privy Council Appeal No. 10 of 1923.*

Ma Thaung and another - - - - - *Appellants*

*v.*

Ma Than and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1923.

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*Present at the Hearing :*

LORD SHAW.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALLI.

SIR LAWRENCE JENKINS.

[*Delivered by MR. AMEER ALLI.*]

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This appeal arises out of a suit brought by the plaintiffs in the Court of the District Judge of Mandalay, Upper Burma, for a share in the inheritance of one U Nyein, a Burmese, subject to the Burmese Buddhistic law. It was treated in the first Court as a suit for administration, and a decree was made therein by the District Judge on the 1st June 1920. This decree was reversed on the 25th October 1921 by the Judicial Commissioner of Upper Burma, and the plaintiffs' claim was dismissed : hence this appeal to His Majesty in Council.

The facts of the litigation are set out with clearness and precision in the able judgment of Mr. Mosley, the District Judge.

U Nyein was a trader by profession and appears to have carried on in conjunction with his wife, Ma Gale, a profitable business in rice.

They had a rice mill which, it is stated, was opened in 1894 and appears to have been at the time of Ma Gale's death in December

1904, a valuable property. It is to be noted that in the Burmanese social and legal system the wife is to all intents and purposes, a partner.

U Nyein had by Ma Gale five sons and two daughters, who were all *sui juris* when she died. Although under the Burmese law, the eldest daughter became entitled on Ma Gale's death to a definite share in her property, no division took place, and the father and the children continued, as in her lifetime, working in common.

Some months after Ma Gale's death, U Nyein appears to have contemplated marrying again. Before, however, the marriage was actually contracted, on the 11th May 1905, he executed the document exhibit L on the construction and meaning of which the determination of this appeal turns. About a fortnight later U Nyein married Ma Than, the contesting respondent in this appeal.

Exhibit L is in form a partnership deed, but the respondent contends that in fact it is a partition deed by which U Nyein divided his property amongst his children. It is urged on her behalf that, under the law of the Dhammathats, the children have, after the partition, no right in the property retained by the father. The plaintiffs deny the correctness of the legal proposition on which the respondent bases her contention, and they urge that whatever the meaning of exhibit L, they are entitled to a share in their father's inheritance.

A number of issues were framed in the Court of the District Judge; the two following embody the substance of the matter now in dispute.

- (i) Was the deed of arrangement dated the 11th May 1905 (exhibit L) between U Nyein and his children a division of inheritance in view of his approaching marriage with Ma Than, or was it a mere agreement of partnership?
- (ii) Are his children who signed that agreement entitled as heirs to share in the property retained by U Nyein under that agreement?

The District Judge on the form of the document coupled with the evidence to which he refers in his judgment, came to the conclusion that exhibit L was not a deed of partition but merely a partnership agreement, and he accordingly, as stated already, made an administration decree with respect to the inheritance of U Nyein.

On appeal the Judicial Commissioner has taken a different view. From the circumstances proved in the case he infers that contemporaneously with exhibit L there must have been between U Nyein and his children some agreement, necessarily parole, which led him to put the division in the shape it has taken. In one place he says as follows:—

“It is open to the parties to prove that it was a condition precedent to the attaching of any obligation under the contract, that the disposition should be regarded as a partition of property in view of the marriage, and that the claims of the children of U Nyein as his heirs on his death should

be modified accordingly. Further Ma Than was not a party to the document, nor can she I think for this purpose be regarded as the representative in interest of such a party. She is therefore entitled under the provisions of section 99 of the Evidence Act to show a contemporaneous agreement. It does not seem to me however that Ma Than is trying to show such a contemporaneous agreement. She does not deny that the terms of agreement between the parties were those of a partnership. Her contention is that that agreement formed a part of a larger transaction and that it was made for the purpose of effecting a division of property. I am of opinion that it is open to her to prove her contention by oral evidence. At the time that the deed was drawn up Ma Than was a stranger to the family. It is not surprising therefore that she is unable to bring any direct evidence as to the intention of the parties when the deed was drawn up, and as to the effect of the deed."

He is, however, definite in his conclusion that the deed in question was drawn up in view of the approaching marriage, and that by this instrument U Nyein did effect a partition of his property with his children by Ma Gale.

Owing to this divergence of opinion between the two Courts in Burma, their Lordships have carefully examined the terms of the document (exhibit L). In their opinion, it speaks for itself. It begins with the usual formula :—

On the 11th May 1905, corresponding to the 9th *Waxing* of the month of *Kason* 1267 (Burmese Era), at Mandalay, U Nyein and his sons and daughters, in order to carry on business, execute this agreement as follows :—

U Nyein will transfer all the properties, which have been in his name up to this date, to the name of the partnership.

All the house sites, buildings, rice, paddy, ponies, gharries, gold and money, which have been in existence up to this date, will belong to the partnership.

The sums of money, which Maung On Shwe, Maung San Hnyin and Maung Aung Min have taken before this date, will be considered as the money belonging to the partnership.

The mill and all machines connected with it, which have been already taken possession of, belong to the partnership.

Without the consent of the majority (but not one) of the partners, the husband, wife, or co-heir of a partner cannot make use of the properties belonging to the partnership.

The shares, to which the partners have the right to ownership in all the partnership properties are shown below.

Either partner Ma E Yin or partner Ma Thaung will take charge of all the private properties belonging to partnership, such as jewellery, etc.

The partnership is responsible for all the debts which have been owed to, or owed by, other people up to this date.

The partnership will carry on business in accordance with the wish of the majority of the partners.

It then gives the shares as follows :—

- |  |  |
|--|--|
| 1. U Nyein has the right of ownership to one-eighth share. |  |
| 2. Maung On Shwe   | } These 5 persons have the right of ownership to six-eighth share. |
| 3. Ma E Yin  |  |
| 4. Maung San Hnyin   |  |
| 5. Maung Aung Min  |  |
| 6. Ma Thaung   |  |
| 7. Maung Po Thaung   | } These 2 persons have the right of ownership to one-eighth share. |
| 8. Maung Po Ka   |  |

The deed was duly signed by all the executants.

The strange similarity of language between the terms of the provision contained in the second paragraph of exhibit L and the rules laid down in the Dhammathats for division of family property on the demise of one of the parents is striking. The paragraph in question provides that "all the house sites, buildings, rice, paddy, ponies, gharries, gold and money which have been in existence up to this date will belong to the partnership." In any ordinary partnership the inclusion of these articles would be regarded as unusual; but bearing in mind the rules of the Dhammathats it would be natural and in the ordinary course in a deed of partition. Again, the paragraph relating to jewellery appears to be unusual in a deed of partnership designed for carrying on business.

The provision is as follows:—

"Either partner Ma E Yin or partner Ma 'Thaung" (two of the daughters) "will take charge of all the private properties belonging to the partnership such as jewellery, etc."

These particular provisions appear in their Lordship's opinion, to furnish the key to the solution of the question whether exhibit L is a deed of partnership or a deed of partition. U Nyein was about to contract a second marriage. Under the Burmese law whatever he possessed at the time of contracting the relationship which he contemplated, would become on the marriage the common property of his wife and himself. Nothing was more natural than that, influenced by the effect of such an eventuality on the position of his children by Ma Gale, he should, in order to provide for them during his lifetime, whilst he was absolute owner of the properties he possessed, decide upon a partition which would secure a definite share in his or her own right to each child. He accordingly, with the agreement and consent of his sons and daughters, entered into the arrangement embodied in exhibit L. None of them was entitled to any share in his lifetime. By this deed he allotted to five of his children a six-eighth share of his property and to the two younger ones one-eighth between them, retaining for himself an eighth share. The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings. The mode, therefore, in which the sons and daughters of U Nyein dealt with their shares is material; it helps to strengthen the conclusion that exhibit L was more a record of a division of rights and interest rather than a deed of partnership.

There were not only independent dealings between one or other of the children, but also between them on one side and Ma Than and U Nyein on the other. In 1907 in a suit brought by the minor son of U Nyein's third son, against U Nyein and his other children the rights of the parties came into debate. In his written statement U Nyein distinctly states that the business of

rice-miller was started by him on his own account with his own capital and that "by way of providing for his children he gave them the shares in the business mentioned in the partnership deed." U Nyein's statement was confirmed by the other defendants in a joint defence filed by them. The attempt to make out they had made that admission under the instigation of U Nyein signally failed in the first Court.

After her marriage with U Nyein Ma Than appears from the evidence to have assisted him in his business and although there was no definite separation between U Nyein and his children by Ma Gale, the new *ménage* was carried on quite independently and separately from them.

On the whole, their Lordships have come to the conclusion that exhibit L evidences a partition of the rice-mill business and other property U Nyein possessed at the time. That being so, the question arises whether the provision of law the respondent invokes in her favour excludes Ma Gale's children from sharing in the inheritance of U Nyein. It has to be noticed that U Nyein died nine years after his marriage with Ma Than and within this period U Nyein and Ma Than appear to have accumulated considerable property. The present claim therefore cannot be regarded as unreasonable or unnatural.

The passage on which the respondent relies is contained in Section 213 of Mr. U Gaung's Digest of the Burmese Buddhist law, volume 1, page 276. The heading of the section runs thus :—

" AFTER PARTITION BETWEEN CHILDREN AND SURVIVING PARENT, THE LATTER MARRIES AGAIN AND DIES : THE CHILDREN ARE NOT ENTITLED TO CLAIM INHERITANCE FROM THE STEPFATHER OR STEPMOTHER."

The rule which follows is in these terms :—

" After the death of the husband, the wife partitions the property with her children and marries again taking her share with her. On her death the children of her former marriage cannot claim from their stepfather any property which she took to the second marriage ; because they have already obtained their shares."

" The same rule applies when, after the death of the wife, the husband marries again after having given the children their respective shares."

It is contended on behalf of Ma Than that under the latter clause, the plaintiffs having received from U Nyein their respective shares, cannot claim any further share in his inheritance. On the side of the plaintiffs it is urged that this latter rule does not occur in any of the other Dhammathats and ought not therefore to have effect given to it.

Admittedly this is the only passage which expressly declares that the children will not be entitled to share in the inheritance of their father after a partition in his lifetime allotting them specific shares in the property he possessed.

The Burmese Dhammathats are numerous and the criterion for arriving at a definite conclusion with regard to a particular

rule is indicated in the judgment of the Board in the case of *Mah Nhin Bwin v. U Schwe Gone*.<sup>1</sup>

Their Lordships, however, do not think it necessary in the present case to go through all the Dhammathats for the purpose of discovering what the other Dhammathats declare. Nothing has been shown to militate against the authenticity or the binding character of the rule on which the respondent relies; and in the present state of the authorities, their Lordships are not prepared to dissent from the view expressed by the Judicial Commissioner. They are, accordingly, of opinion that this appeal fails and should be dismissed.

Their Lordships will humbly advise His Majesty to this effect. There will be no order as to costs.

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<sup>1</sup> L.R. 41 I.A. 121.



In the Privy Council.

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DELIVERED BY MR. AMEER ALI.

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