

Privy Council Appeal No. 81 of 1923.

Kirkwood *alias* Ma Thein and others - - - - *Appellants*

v.

Maung Sin and another - - - - - *Respondents*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 7TH AUGUST, 1924.

Present at the Hearing :

LORD SHAW.

LORD PHILLIMORE.

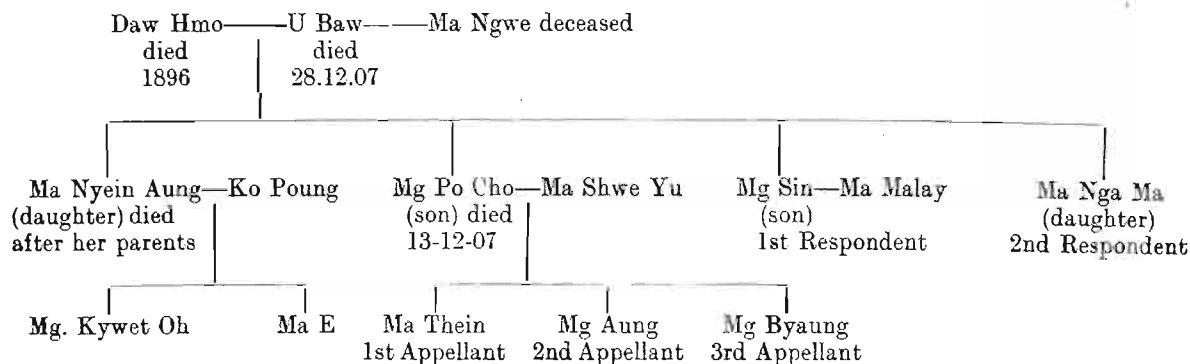
LORD BLANESBURGH.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

This appeal arises out of a suit for the administration of the estate of one U Baw, a native of Burma, subject to the Burmese-Buddist law. U Baw died on the 28th December, 1907; his wife, Daw Hmo, is said to have died some years before. U Baw had by her four children. The following table will explain the relationship of the parties :—



U Baw had a second or junior wife, but she does not enter into the present controversy.

Po Cho, the elder son of U Baw and Daw Hmo, died a fortnight or so before the death of his father, leaving several children, who are the plaintiffs in this action. They claim a one-fourth share of the estate of U Baw on the ground that their father, Po Cho, was the *orasa* son of his father, and was consequently, under the Burmese-Buddist law, entitled to a preferential share of one-fourth in U Baw's estate. The claim is set out thus in the plaint:—

“ That the said Ko Po Cho was the eldest son of the said U Baw and attained his majority and assisted the said U Baw in his business and kept up filial relations with the said U Baw up to his death, and the said Ko Po Cho attained the complete status of an ‘ Orasa ’ son of the said U Baw.”

In paragraph 6 the plaintiffs set out the basis of their own rights. They say that—

“ As children and representatives of the said ‘ Orasa ’ son, they are entitled to an equal share in the estate of U Baw with each of their uncles and aunts, the said Ma Nyein Aung, Maung Sin and Ma Nge Ma, and that as the second or lesser wife Ma Ngwe has since died they claim a one-quarter share of the whole of the said estate of U Baw.”

The defendants deny the plaintiffs' claim and the allegation that Po Cho was the *orasa* son.

In order to understand the controversy and follow exactly the decisions of the Courts in Burma in this case, it is necessary to explain that the Burmese-Buddist law is contained in a series of books entitled *Dhammathats* which have been composed from time to time by the expounders of that law ever since the thirteenth century, if not from before. This is lucidly set out in the Digest of U Gaung, printed under the auspices of the British Government. The author of this work, a distinguished Burmese jurist, describes a *Dhammathat* to be a “ collection of rules which are in accordance with custom and usage ” of the Burmese people. In his remarks on the treatment in these treatises of the subject of inheritance, Mr. Gaung observes that “ the seven divisions of the Law of Inheritance are treated in the *Dhammathats* in such a very unsystematic and unmethodical way that it becomes a tedious task for anyone who attempts to study the subject.” In order to arrive at a definite conclusion on the points in controversy their Lordships have to embark on a survey of the law which, apart from its tediousness, is not free from inconsistencies.

In the Digest of U Gaung six classes of sons are said to be entitled to inherit the property of their parents. In the first category stands the son born of a union contracted with parental sanction, and is known as *orasa*. As religious formalities do not appear essential to lawful wedlock, this form of marriage is evidently regarded to constitute a valid marriage. The term *orasa* is admittedly borrowed from the Sanscrit *aurasa* used

in works on Hindu law and has been corrupted into *auratha* or *orasa*, Mr. Richardson, the translator of the *Manugye Dhammathat* uses the word *auratha*, and Mr. Justice Heald, of the Chief Court, adopts the same spelling. Whether the word is spelt *auratha* or *orasa* it undoubtedly denotes a son born of a union contracted with parental sanction; in other words, a legitimate son. In course of time, judging from a comparison of the enunciations in the *Dhammathats*, it acquired a special meaning; it came to signify a son who, by virtue of his position in the family and his competency to assume the duties of the father, was vested with a defined right in the parental estate. Similarly, in the course of time, as the *Dhammathats* show, the word was extended to include a daughter standing in the same position and vested with the same right.

The plaintiffs' case is that although Ma Nyein Aung was the eldest born daughter of U Baw and Daw Hmo, the appellant's father, Po Cho, as the eldest son, possessed the qualifications necessary for being vested with the status of an *orasa* son. They contend, and their contentions have been urged with great force before the Board, that, in the first place a woman is inferior to a man, and secondly, that the *Dhammathats* do not lay down the rule that the son who is vested with the status of an *orasa* son and acquires a preferential right to a fourth share of the family estate should be the eldest born, or, to speak more correctly, the first-born child. In support of their contention they rely on the provisions in the *Dhammathats* that in certain cases the younger son may be vested with the rights of the *orasa* or privileged son.

The suit was instituted in the Court of the District Judge of Hanthawaddy.

The substantial issue before him was whether Po Cho, who predeceased his father, acquired before his death the status of a privileged or *orasa* son and became thereby entitled to the preferential share of one-fourth in the parental estate, which he passed on to his children, the plaintiffs.

In using the term "privileged" their Lordships do not wish to introduce another element of complexity to a sufficiently perplexing question. They use it simply as a synonym for *auratha* or *orasa*.

Admittedly the entire property in dispute was acquired as stated in the plaint "during the marriage of the said U Baw and Daw Hmo," and thus husband and wife under the Burmese-Buddist law were entitled to equal shares in the property. If this fact is borne in mind much of the difficulty in the case would disappear.

The District Judge felt himself constrained by previous decisions in the Burma Courts to hold that the plaintiffs had made out their claim and were entitled to a one-fourth share in the estate.

From the District Judge's decree the defendants appealed to the Chief Court. The appeal was in the first instance heard by a Division Bench consisting of Robinson, C.J., and Duckworth, J. In view of the fact that the decisions in previous cases were by no means consistent and having regard to the complexity and

importance of the controversy in the present litigation, the learned Judges felt it advisable to refer the points at issue to a Full Bench of their Court; and considering that the reference should be based on specific questions, they submitted to the Full Bench six questions, which appear to cover a far larger ground than perhaps was actually necessary for the decision of this case.

It is interesting, however, to note the questions, as they furnish the key to the major part of the decisions of the Full Court. They are as follow:—

1. In a family consisting of both sons and daughters, can any child acquire the full status of orasa prior to the death of either parent?
2. If so, in such a family where the eldest child is a daughter, can any son become orasa until his father dies?
3. In such a family, can the question which child is the orasa be decided before the death of either parent?
4. Can there be in such a family two orasas?
5. Are sons always to be preferred to daughters as orasa?
6. In such a family, can there be an orasa son who, predeceasing his parents, can transmit to his children a right to preferential treatment in the division of the estate?

The matter thus came before a Full Bench of five Judges. Although some of them considered the questions rather wide in view of the actual facts of the case, all concurred substantially in the answers which Mr. Justice Maung Kin gave. His answers are as follow:—

“ Question 1—in the affirmative.

“ Question 2—Where the eldest child is a daughter, no son can become orasa.

“ Question 3—in the affirmative.

“ Question 4—in the negative.

“ Question 5—in the negative, unless the son is the eldest born.

“ As regards Question 6, I may say that the word ‘transmit’ is not quite a happy term. The eldest born son is the orasa. If he predeceased his parents, his children will have a right to preferential treatment as laid down in the first paragraph of section 15 of the Manukye, or section 162 of the Digest. If the eldest born son died before he became competent to take his father’s place, a younger son, being fully qualified, may become orasa, and, if that son had predeceased his parents, his children will have a right to the same preferential treatment. But if the eldest born child was a daughter and predeceased her parents after she had become competent to take her mother’s place, her children will have a right to the same preferential treatment. It is doubtful whether another daughter, younger than a son, can ever take the place of the eldest born daughter who is not competent or died before she became able to take her mother’s place.”

On receiving the answers to the questions submitted, the Division Bench reversed the decree of the District Judge and awarded a decree to the plaintiffs in respect of a one-sixteenth share of the estate, in lieu of the one-fourth that had been given to them by the Court of first instance. From this decree the present appeal has been preferred, and the arguments which were pressed in the Chief Court have been forcibly addressed to their Lordships.

Three principal grounds have been urged in support of the plaintiffs’ claim, and on these grounds the correctness of the

judgments of the Full Bench is challenged. First, that the *Dhammathats* do not, when speaking of an *orasa* son, lay down any rule that he should be the eldest or first born of the children. Secondly, that a daughter, by the rule in the *Dhammathats* relating to the inferiority of the female sex in relation to the male, can never be the *orasa* child; and, thirdly, that when there is a son, a daughter cannot be an *orasa* child, which appears to be only a branch of the second argument.

Before referring to the judgments of the Full Bench, their Lordships desire to state the result of their own examination of the *Dhammathats*.

In respect of the first proposition advanced on behalf of the plaintiffs, viz., that in the *Dhammathats* the status of *orasa* is not confined to the eldest or first born, it appears to their Lordships that the argument is based upon a misconception of the rules laid down in the Burmese-Buddist law. Chapter 6 of the Digest deals with the subject of partition between parents and their own children, *i.e.*, descendants of the first degree. Section 30 relates to partition between mother and son on the death of the father. All the *Dhammathats* agree that on the death of the father the eldest son should be entitled to a one-fourth share of the estate, and that the mother should be entitled to the remaining three-fourths for herself and her younger children. The *Vilasa* states as follows:—

“ On the death of the father the rule of partition between mother and son is as follows:—

“ If the son is the eldest born and if he helps the parents in the acquisition of the family property, he shall get his father's elephant and pony, together with their keepers; the cup, spear, tray and plates used by his father; the clothes, ornaments, and belt worn by him; the lands held as an appanage of his office; the town or village, the usufruct of which he enjoyed, and the office held by him. The mother shall get her belt, finger-rings, bracelets, ear-rings, necklaces, combs, betel-box, stool, and personal ornaments given her during the father's lifetime. The remainder, such as gold, silver, bullocks, buffaloes, goats, pigs, fowls, ducks, clothes, paddy rice, Indian-corn, peas, millets, barley, sessamum, cotton, and household furniture shall be divided into four shares; the mother shall get three shares and the son one share. Even if there are ten sons, only one-fourth shall be given them.”

The *Kaingza* states the rule thus:—

“ The reason why the mother gets three shares is that when the property was being acquired, the son was not yet born, and after he was born he could not (during his minority) do anything towards the retention of what was already acquired; even the father can merely acquire, but cannot prevent waste. It is the mother alone who takes care of the property.”

In the *Myingun* the rule is stated in the following terms:—

“ If the son is one who is competent to assume the father's responsibilities, and is known to the local authorities, he shall get his father's pony, drinking-cup, betel-box, sword, lands held as emoluments of office, lands worked by him, personal ornaments and wearing apparel, cups, trays, spoons and plates, spears large and small, armour, and such other articles worn by men only. Stored-up grain, bullocks, buffaloes, slaves, fowls, pigs, and

utensils shall be divided into four shares ; the mother shall get three shares and the son one share."

¹Richardson's
Translation,
Book X,
sec. 6, p. 273.

The *Manugye* states the principle in identical terms.¹ It declares that on the father predeceasing the mother, the estate, after the apportionment of the specific articles as laid down in the *Dhammathats*, should be divided into four shares out of which the "eldest son" should be entitled to one share and the mother and "younger children" to three shares. In section 12 it declares that when the mother dies in the lifetime of the father the same rule should apply to the "daughter's" claim to share in the estate.

It is unnecessary to refer to the passages in the other *Dhammathats* as set out in the Digest relating to the right of the "eldest son" to a one-fourth share on the death of the father, as they state the rule substantially in the same terms.

On these rules the question arises, who is the son who becomes entitled to this right? The respondents' contention is that this special right is given to the *eldest born* son, while the appellants urge that the words "eldest son" are not restricted to "the eldest born," but applies equally to a son who, in a family consisting of a number of children of both sexes, stands in relation to them as the eldest son. And on this ground they contend that Po Cho was the "eldest son" and entitled to the one-fourth share as *orasa* son.

The answer to the question, however, is furnished by the *Dhammathats* themselves. The reason why the mother becomes entitled to a three-fourth's share in the estate in which she and the deceased father held equal shares explains also who "the eldest son" is who becomes entitled to the one-fourth share.

The *Mano Dhammathat* explains the reason why the mother gets the three-fourth's share in these terms:—

"The mother gets three shares because while the property was being acquired the son was not yet born, and when acquired the mother is the only person to take care of it and prevent it from being wasted."

The *Dhammathat-pyu* gives it thus:—

"On the death of the father the partition between mother and son shall be as follows:—

It states the question first, "Why should the mother get three shares?" and then gives the reply:—

"Because during the early days of her wedded life, while family property was being acquired the son was not yet born and whatever was acquired by his father the mother took care of and laid by. Hence the mother shall get three shares, she being the principal agent in the acquisition of the family property."

The *Vilasa* declares that on the death of the father the rule of partition between mother and son is as follows. It specifically states: "If the son is the eldest born," and "if he helped the parents in the acquisition of the family property, he shall get his father's elephant, etc. The remainder of the estate shall be divided into four shares—the mother shall get three shares and the son one share"

and to the question, "Why should the 'eldest born child' get a fourth share?" the answer is:—

"the parents obtained the child at the commencement of their wedded life by their earnest prayer and acquired the property with *his* or *her* assistance."

What can all this mean, except that "the eldest son" referred to in all the *Dhammathats* is *the eldest born child* of the wedded pair.

In section 33 of Mr. Gaung's Digest the rules of the *Dhammathats* referring to the rights of the "eldest daughter" in the family estate on the death of the mother are set out at length. These rules require careful analysis and consideration in conjunction with the rules relating to the rights of the son on the death of the father, leaving the mother surviving him.

A comparison between these rules regarding the son's rights and the daughter's rights will elucidate still more clearly what is meant by the "eldest son" or the "eldest daughter" in the *Dhammathats*.

Section 33 deals with the subject of partition between father and the eldest daughter on the death of the mother, as happened in the present case. Daw Hmo died before her husband, leaving Ma Nyein Aung, the eldest born child of the marriage. Her status and her rights are clearly stated in the *Dhammathats*. The *Manugye*, the authority of which has been recognised by the Board, after setting out the specific articles belonging to the mother or in her sole use in her lifetime, such as ear-rings, bracelets, belt, cups for eating and drinking, clothes and ornaments worn by women to which the eldest daughter became entitled, states the rule as to the partition of the residue of the family property between the surviving parent, the father, and the eldest daughter thus:—

Partition between father and daughter on the death of the mother.

"Let the father have his riding elephant and horse, his goblet, the slave who carries his water and betel, his sword, betel apparatus, clothes, and ornaments. Let the daughter have her mother's ornaments, clothes, and the slave who cooked her rice; and having divided the residue into four shares, let the daughter have one and the father three."

¹Richardson's
Translation
of *Manugye*—
Book X,
sec. 3, p. 271.

In the *Kungyalinga* the rule is stated in the following terms:—

"The mode of partition between the *orasa* daughter and father on the death of the mother is, *mutatis mutandis*, the same as that between mother and son on the death of the father."—*The Digest*, p. 88.

In the *Warulinga* it is as follows:—

"The mode of partition between father and daughter on the death of the mother is, *mutatis mutandis*, the same as that between mother and son on the death of the father. The daughter shall get in addition her clothes, ornaments and gold flowers, one female slave, and her mother's personal belongings, just as the son gets his father's personal belongings."

The *Cittara* states the rule thus:—

"The mode of partition between father and *orasa* daughter on the death of the mother is, *mutatis mutandis*, the same as that between mother and son on the death of the father."

The *Kyetyo* gives the rule more fully ;

“ The mode of partition between father and *orasa* daughter on the death of the mother is as follows :—

“ The daughter shall get her anklets, bracelets, earrings, belt, necklaces, etc., given her during the mother’s lifetime, and by both parents, these having become her separate property. She shall also get her mother’s belt, necklaces, combs, finger-rings, ear-rings, bracelets, betel-box, cushions, and other personal ornaments. The ornaments worn by the daughter during the mother’s lifetime shall go to her. The rest of the property such as gold, silver, copper, iron, slaves buffaloes, bullocks, goats, pigs, fowls, ducks, paddy, rice, Indian corn, millets, barley, sessamum, cotton and household furniture shall be divided into four shares ; the father shall get three shares and the daughter one share.”

“ The above rule applies when the daughter is the eldest born. The younger daughters shall get their shares only on the death of both parents.”

And then comes this important question¹ :—

“ Why should the mother get three shares and the eldest child only one share ? Because the mother saves the property acquired by the father and thereby accumulates it at the early period of her wedded life, before the eldest child was born ; and during the minority of the eldest child, before he or she could assist the parents the mother accumulates the property acquired by the father. The eldest child gets one share because he or she upholds the parent’s position and rank and continues the family. Having to bear the children, the mother has not the heart to make them work, nor can she see them suffer privation ; she cherishes them and brings them up. Children lie under greater obligation to the mother than to the father. Hence the mother gets three shares and the son one share. Should the property enumerated above be exhausted by the mother for her sustenance or in performing works of merit, let it be so. The sons shall not also claim the residue of the property to which the mother alone is entitled.”

It is to be specially noted that the words here used are “ eldest child,” clearly indicating that the expression includes children of both sexes.

This passage from the *Kyetyo* shows not only that on the death of the mother the eldest born daughter is entitled to a one-fourth share, but it also explains why she becomes so entitled. The eldest born daughter steps into the shoes of the mother, assumes her responsibilities, manages the household and takes care of the younger children like the mother, and is confirmed in the status of the *orasa* child. The status does not depend on the decease of the father, where the child is a son ; or of the mother, where it is a daughter ; it comes into existence on the fulfilment of three conditions, viz. : (1) that he or she is the first-born child ; (2) that it attains majority ; and (3) helps either in the acquisition of the family property and the discharge of the father’s responsibilities ; or, if a daughter, helps the mother in the care of the property and the control and management of the household, which lie particularly within the mother’s duties.

In their Lordships’ judgment, although it is not easy always to reconcile the inconsistencies with which the *Dhammathats* bristle, upon a careful comparison of the different enunciations so laboriously brought together in the Digest, the following propositions

¹*Kyetyo*,
sec. 33.

clearly emerge from the rules propounded in the *Dhammathats*, viz., that the designation *orasa* is not limited to a son and that it connotes the eldest or first-born child who is competent to undertake the responsibilities of the deceased parent.

The grounds on which "the eldest child" may be "superseded" or displaced from his or her status are collected in sec. 62 (p. 117) of the Digest. When a son is incompetent to assume the duties and responsibilities of the father, either from physical defects or otherwise, it is declared that the next brother should step into his shoes. Supposing there is a daughter intervening between the two sons, viz., the first born and the next born son, she could not possibly be the *orasa* child. The law does not say that on the mother's death a daughter who was not the eldest or first born should become the *orasa* child and become entitled to a preferential share. As already observed, the provision is for the first born, whether male or female, if competent.

In the present case the mother died several years before the father; it is not disputed that the eldest daughter, the first-born child, Ma Nyein Aung, assumed all her responsibilities. Nor is it disputed that she was quite competent to do so. It may be taken for granted that she looked after the conservation of the property as her mother did during her lifetime and took care of the younger children. She was thus the *orasa* child of the marriage of U Baw and Daw Hmo. The second son, Po Cho, could never become the *orasa* child and could never acquire the status in his own right. There was no eldest born son whom he had superseded for "incompetency" or into whose shoes he had stepped on his death before attaining majority.

It is contended, however, that the sections dealing with partition between an elder sister and a younger brother on the death of the parents (Digest, sec. 140) places the son on the same level as the elder daughter. The *Kyetyo* says:—

"If the eldest born is a daughter and the second child a son, let them share the estate equally between them."

The *Kyannet* makes the following statement:—

"If, after the establishment of a daughter as an *orasa*, a son is born they shall share the estate equally between them.

"If the elder daughter and the younger son are both childless, the estate shall not be divided equally between them, because the son is deemed the *orasa*."

Similar statements occur in other *Dhammathats*. Their Lordships do not propose to undertake the task of trying to reconcile transparent inconsistencies. Whether the prescriptions to which the plaintiffs have referred as showing the superior right of a younger son to that of the elder daughter were actuated by a desire for a fair and equal division, it is difficult to say. It was certainly so in the case of one younger brother co-existing with the eldest born sister even after she was installed as *orasa*. Whatever may be the reason of these inconsistencies, it is clear that these arbitrary rules of distribution cannot override or control the previous express provisions relative to substantive right.

Sections 162 and 163 of the Digest deal with the rights of the children of the eldest son or eldest daughter dying before the parents. Section 162 is headed thus :—

“ The eldest son dies before the parents ; the son of the deceased is entitled to the same share as his father’s youngest brother.”

And section 163 has the following heading, clearly indicating the subject dealt with in the section :—

“ The eldest daughter dies before the parents ; the deceased’s child is entitled to the same share as the deceased’s youngest sister.”

The *Manugye*, in section 15, Book X, states the rule as to the devolution of the share of the eldest born son or eldest born daughter on his or her predeceasing the parents :—

“ If the eldest son dies before his father and mother, the law of inheritance between his son and his son’s uncles and aunts is this : because in case of the death of father and mother the eldest son is called father, let his son, and his (the eldest son’s) younger brothers, share alike.

“ Should the eldest daughter die before the father and mother, this is the law for the partition of the inheritance between her daughter and her daughter’s uncles and aunts : that the daughter of the eldest daughter and her (the eldest daughter’s) younger sisters shall share alike, because the eldest daughter, when grown up, stands in the place of a mother.

“ In case of the death of the younger children occurring before the parents the law for partition of the inheritance between their children and the (co-heirs) relations of their parents is this : the children of the deceased have one-fourth of the share which would have come to their parents.”

The *Vilasa* declares that “ the eldest son of a deceased *orasa* shall receive as much of the inheritance as the youngest of his uncles. But the younger sons should receive only a quarter as much. Because a son is a nearer kin than a grandson, the latter shall not receive out of the estate of his grandfather as much as the co-heirs of his deceased father.”

The prescriptions in most of the other *Dhammathats* are substantially the same.

These sections clearly refer to the rights of the children of the eldest born son or eldest born daughter. Po Cho did not belong to this category, and he had no right to the one-fourth of the estate to pass to the plaintiffs.

Section 164 refers to the shares of the children of one of the younger children predeceasing the parents.

“ The child of a (deceased) younger son shall receive one-fourth of the share to which the deceased was entitled. He or she shall not receive an equal share with the aunts and uncles.

“ The child of a (deceased) co-heir who was not the eldest shall receive a quarter of the share to which the deceased was entitled. The remaining three-fourths shall revert to the estate.”

This is the conclusion at which their Lordships have arrived upon an independent review of the *Dhammathats*, and the view of the law that has forced itself upon them is supported and confirmed by the detailed and scrupulously careful examination to which the provisions of the Burmese-Buddhist law have been

subjected by the learned Judges of the Chief Court. Maung Kin, J., who is himself a Burmese, conversant with the Burmese language and customs, and well versed in the Burmese-Buddhist law, has fully discussed the rules of the different *Dhammathats* concerning the questions with which the Court had to deal. In the course of his judgment he says :—

“ All the *Dhammathats* mentioned in section 30 of the Digest, when considered as a whole, lead to the inference that it is the eldest born legitimate son who is entitled to claim a quarter of the parental estate from his mother on the death of the father, provided he has helped the parents in the acquisition of property and takes the deceased father's place and continues the family. It appears that the *Dhammathats* take it for granted that the son, if competent to do so, will take his father's place and continue the family; but “ whether this duty is a mere moral obligation or can be enforced at law is at present undetermined so far as decisions go.” And this eldest born son, who is entitled to a quarter share, is by later *Dhammathats* called an *orasa*.”

and he then makes the following comment on the argument against the view he has just expressed :—

“ It may be argued that what is material is the fulfilling of the conditions and not the order in which the sons are born, so that even where the eldest born is a daughter a son who fulfils the conditions would be entitled to the quarter share from the mother on the death of the father.

“ In my judgment the argument is not sustainable. It can only be founded on the *Dhammathats* noticed above which do not call the son entitled to the share by any description, such as *Tha-u*, *thagyi*, *thagyi auratha* or *auratha*, but which describe him only as the son who bears the father's burden or responsibilities. It appears to me that these *Dhammathats* put the matter in a comprehensive form, because whether the claim is made by the eldest born son or by a younger son, the conditions must be fulfilled. These *Dhammathats* do not, in my opinion, contradict the proposition that the eldest born son, if competent, can claim the share from the mother, and if not competent, he will be superseded by another son who is competent; but that if the eldest born is not a son, the right to a quarter share does not exist in favour of a son though he may be the eldest of the sons. I have deduced this by a consideration of the *Dhammathats* alone.”

And his conclusion is as follows :—

“ It has, however, been urged that, as the *Dhammathats* look upon the son as being superior to the daughter, the eldest born daughter cannot be allowed to claim the quarter share where there are sons. Among others, sections 140 and 150 have been referred to in support of the contention. These sections and the others contain rules of distribution after both the parents are dead. These are the rules which this Court has disregarded in *Ma Kyi Kyi's* case. They do certainly show that the son is regarded as superior to the daughter. But they do not give him, unless he is the eldest born, any greater share than the eldest of the daughters. For if the eldest is a daughter and there is a son younger than she is, that son, instead of getting a smaller share in accordance with the order of the births of the children, gets a share equal to the eldest daughter, and in my judgment wherever, in these rules, the word *auratha* is used, it is used to indicate the eldest child but not with reference to the right to claim a quarter share from the surviving parent. When both the parents are dead the question is not who is the eldest born but who is eldest of the surviving children, and all the surviving children get their fractional shares, larger or smaller, according to the priority of birth.”

Maung Kin, J., refers to his own experience of the meaning attached by the Burmese people to the position of the eldest daughter. His remarks deserve attention :—

“ There is an additional reason why these rules of distribution of inheritance after both the parents are dead do not apply to cases where the eldest daughter claims a quarter share from her surviving parent, the father. It is that the claim is allowed her under very special circumstances, and as a reward for her past assistance in the acquisition of property and the possibility (which the lawgivers expected in the times they lived) of her taking her mother's place and continuing the family and controlling the younger children as her mother had done in her lifetime. In the extract from *Dhammathatkyaw* which is given in section 62 of the Digest we find the principle. . . . The eldest brother is in the position of the father, the eldest sister in the position of the mother. This is in the mouth of every Burman, and it is clear from the fact of the principle being recorded in that *Dhammathat* word for word the same as it exists in the mouth of the people that it is a well recognised principle. And so far as my experience goes the principle has never been taken to mean that in the case of the eldest daughter, only her younger sisters give her the position of their mother. The younger brothers also respect her as they had their deceased mother. This happy state of things exists to-day and long may it continue.

“ Another point is that even if those rules of distribution among all the children are applicable to the question of the eldest daughter's right to a quarter on the death of her mother, the younger son cannot take her place, he can only prevent her from claiming the right. Then in that case there would be no *orasa* at all, a position which the *Dhammathats* can hardly be held to have contemplated.

“ In my judgment it is really unnecessary to go into the question of the applicability of these rules because it is perfectly clear, as shown above, that the *Dhammathats*, in giving a quarter to the eldest child, have in view the case of there being both sons and daughters in the family.”

The Burmese adopted the Buddhist religion, which was imported from India, and with the religion they also seem to have received the Indo-Aryan conception of the superior rights of men. And Mr. Justice Maung Kin thinks that the Hindu notion of sex superiority found its way among some of the text-writers. There appears to be considerable force in his observations, as will be seen from the use in the *Dhammathats* of various legal terms borrowed from the Sanscrit. Gradually, as the compilers of the *Dhammathats* absorbed the national customs and usages, the sex equalisation, which is the dominant feature of the Burmese law, prevailed, and the later *Dhammathats* show that the eldest born son and the eldest born daughter stand on the same footing.

With reference to this subject the learned Judge makes the following remarks :—

“ Among the Burmese-Buddhists equality of the sexes is recognized in the *Dhammathats* with occasional aberrations to the effect that the male is superior to the female. But when we come to consider what superior rights are given to the man we find that his rights are hardly superior to the woman's. Although they borrowed their laws from the Hindu Institutes of Manu, the Burmese carefully refrained from adopting the sex inequalities of the Hindu law. For instance, in Hindu law, the term

aurasa was applied originally only to the legitimate son. Next the Rishis evolved him into a son of a very superior type, namely, the son begotten by a man of a wife of the same caste who was espoused in an approved form of marriage with religious rites, was a virgin at the time of her marriage and had not passed through the marriage ceremony or a part of it with another man. This was done on spiritual grounds. In Hindu law a daughter is not called an *aurasa* and is not allowed to confer spiritual benefits on her father as the *aurasa* son is."

"The Burmese borrowed the word *aurasa* and Burmanized it as *auratha*, but gave their own meaning to it suitable to the conditions of family life which they approved. Thus they called a child (son or daughter) born in lawful wedlock an *auratha* child, putting the son and daughter generally on an equal footing."

and he winds up by saying:--

"In the result I would hold that the eldest born legitimate daughter has the right to claim a quarter share on the death of her mother whether she co-exists with sons or not, and that the eldest born child is the *orasa*, although, as regards the claim to a quarter share on the death of one of the parents, it would depend upon the circumstances of each particular case whether the claim can be made or not, that is to say, if the child is a son, he can only make the claim from the mother, on the ground that he steps into his deceased father's place; similarly, if a daughter, she can only claim as one who takes the place of her mother. It is clear also that there cannot be two *orasas*, a male and a female, in the same family, because an *orasa* is either the eldest born or the one who supersedes the eldest born."

His decision is practically embodied in his answer to question 6, already quoted.

Pratt, J., who followed him in delivering judgment, substantially agreed with his Burmese colleague.

Heald, J., deals with the facts and the law of the case with equal care and minuteness. He reviews in great detail the *Dhammathats* and the decided cases of the Burma Chief Court. He expresses his dissent from those which accorded the superior position to the younger son in preference to the eldest born daughter, and gives his reasons therefor. His experience of the country and of the people extends over twenty years. In his general conclusion he is in agreement with Maung Kin, J. He holds that *auratha* or *orasa* is applied to both eldest born son and eldest born daughter; and states that this view is clear from the enunciations of most of the *Dhammathats*. He reviews the *Dhammathats* according to their antiquity. He refers to the *Vilasa*, which was compiled in the twelfth century, and to the *Wagaru* in the thirteenth century, where the term *auratha* or *orasa* are applied to both eldest son and eldest daughter. He states that in the *Dhammathats Kyaw* and the *Kyangsa*, written in 1630, the same expression occurs, so also in the *Vaicchaya* of 1775. He refers to U Gaung's authority, who is, as already stated, the author of the Digest. Heald, J.'s conclusion is:—

"From the above survey of the *Dhammathats* I think that it is fairly clear that the word *auratha* is commonly used to mean the eldest child, whether son or daughter, and that if the eldest child, being a son, is competent on the father's death to take the father's place in the family, or, being

a daughter, is competent on the mother's death to take the mother's place, then he or she is *auratha*, and on the father's or mother's death is, according to the *Dhammathats*, entitled to the father's or mother's personal property and to one-fourth of the rest of the estate, and, further, that if the eldest child, whether son or daughter, dies without having become entitled to that interest in the estate, his or her children are entitled to share equally in the estate with the younger brothers and sisters of the deceased."

Dealing with the inconsistent statements in some of the *Dhammathats* showing a certain preference for sons in relation to the eldest daughter, he says as follows :—

"The *Vicchedani*, when dealing with the partition between brothers and sisters after the death of both parents, actually says : ' Though the eldest child be a daughter she does not reach the status of *auratha* and she must share equally with her younger brother,' and one or two of the minor *Dhammathats* contain similar passages, which I have no doubt were taken from some old book and reproduced Hindu or possibly pre-Hindu ideas. But just as the *Dhammathats*, when translating passages which are evidently taken direct from what may be called the Hindu law books, use *auratha* in its original sense of ' legitimate ' and, nevertheless, when they come to apply it to Burmese Buddhist law use it in the special sense of ' an eldest born child who is competent,' so, although they reproduce passages which follow the Hindu law in saying that a daughter can never be *auratha*, nevertheless when they come to the actual division of the property of the estate of a Burmese family they put the daughter practically, and in some cases entirely, in the same position as the son."

Duckworth, J., and the Chief Justice adopted the views of Maung Kin, J. Duckworth, J., says :—

" It is perfectly clear that section 163 of the Digest applies to families consisting of both sons and daughters. Among the Burmese people generally, there is no doubt that the eldest legitimate child, whether it be a son or daughter, is regarded as taking the place of the parent of the same sex when that parent dies."

Their Lordships do not feel called upon to discuss in detail the decisions of the Burma Courts cited at the Bar, as they agree generally with the observations of the Judges of the Full Bench.

In so far as those decisions expressly or by implication are adverse to the rights of the eldest born daughter, their Lordships have no doubt they proceeded on an insufficient consideration of the status assigned to the first-born child by the Buddhist-Burmese law as embodied in the *Dhammathats*, and expressed in the existing customs and usages to which Mr. Justice Maung Kin so forcibly refers.

The eldest born child occupies an extraordinarily favoured position as compared with the younger children, inasmuch as the parents, to use the quaint language of the *Vilasa*, " obtained the child by their earnest prayers at the commencement of their wedded life, and acquired the property with his or her assistance."

— These considerations have led their Lordships to the conclusion that in the present case Po Cho, being a younger child, although the eldest son, did not acquire the status of *orasa* and did not become entitled to the privileged position allotted to the eldest or first-born son. In these circumstances the judgments

of the Full Bench and the decree of the Chief Court appear to their Lordships to be perfectly right, and they are of opinion that this appeal fails and should be dismissed. In view, however, of the importance of the case and the difference of opinion prevailing until the decision of the Full Bench on the questions at issue, their Lordships think that the costs of both parties should come out of the estate. And they will humbly advise His Majesty accordingly.

In the Privy Council.

KIRKWOOD *alias* MA THEIN AND OTHERS

v.

MAUNG SIN AND ANOTHER.

DELIVERED BY MR. AMEER ALI.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2
1924.