

Ma Than Than - - - - - *Appellant*

v.

Ma Pwa Thit - - - - - *Respondent*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 6TH JULY, 1923.

Present at the Hearing :

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD PARMOOR.

[*Delivered by* LORD PARMOOR.]

The question involved in this appeal is whether the appellant is the *keittima* adopted daughter of Ko Po Kyaw and Ma Nyun. Ko Po Kyaw died at Edward Street, in Rangoon, on the 27th October, 1916, leaving considerable property, worth from Rs. 1,00,000 to Rs. 1,50,000. Ma Nyun was the first wife of Ko Po Kyaw. The appellant claims that she was adopted as *keittima* daughter in or about 1893, after the deceased, and his first wife, had been married 16 years without children. The respondent was the fifth of the six wives of the deceased. She was married to the deceased about 1906, was divorced from him about six months later, but resumed living with him after the death of his sixth wife, and was living with him at the time of his death. The appellant was born in 1892, being the daughter of Ma Gyoke, who was a cousin of Ko Po Kyaw, and married to Ko Maung Gale. In the first Court the Judge, Mr. Justice Robinson, gave judgment in favour of the appellant, but this judgment was set aside in the Court of Appeal.

At the trial of the action, there was a considerable conflict of evidence between the witnesses, called respectively on behalf of the appellant and respondent. Mr. Justice Robinson held that implicit trust might be placed in the evidence of Maung So Naing, who had joined Ko Po Kyaw in business many years ago, and was the trusted manager of the business. He lived in Ko Po Kyaw's house, and was treated like a brother. There is no doubt of the importance of the evidence of Maung So Naing, but in the Court of Appeal his evidence was treated as unreliable, and the Chief Justice regrets that he cannot agree with the learned Judge's opinion of this man's impartiality. Before further considering the weight that should be given to the evidence of Maung So Naing, it will be well to state shortly certain facts which are either not disputed, or which, in the opinion of their Lordships, have been clearly established.

Ko Po Kyaw and Ma Nyun took the appellant, when she was a child, aged about one year, away from her parents, and she lived in the house of Ko Po Kyaw in Edwards Street for the next thirteen or fourteen years. She was taken to Ko Po Kyaw's house with the consent of the natural parents, and Ma Gyoke, the natural mother, states that she was taken to be adopted by Ko Po Kyaw and Ma Nyun; and this statement, which alone might be of little value, is in accord with the subsequent sequence of events. From the time that the appellant was taken to the house of Ko Po Kyaw she appears to have been brought up publicly as his daughter, and to have lived openly and continuously under his protection. Their Lordships attach much importance to the evidence of Maung Po Lun, who kept a school in Rangoon, and who entered the appellant's name in the School Register for the month of March, 1899, according to the regulations prescribed for the students' names in native schools. The entry in the register was produced, and in the column in which the name and occupation of parent or guardian is entered, the name entered is :—

“ Maung Ba Kyaw,
Trader,
Edward Street.”

In the first place, it is clear that the name entered in the register is not the name of the natural parents, and secondly, their Lordships see no reason for doubting that the name actually entered was that of Ko Po Kyaw, although some doubt is thrown on this in the judgment in the Court of Appeal. Evidence was further given that the school fees were paid by Ko Po Kyaw during the time that the appellant remained at school. A further exhibit from the school register was produced containing the entry of the appellant's sister, Ma Than Kin, and in this case the name entered as parent is that of the natural father Mg. Mg. Gale. After the appellant had left school she continued to sleep in Ko Po Kyaw's house until she was about fourteen years of

age, after which she slept in the house of her natural mother Ma Gyoke. The reason given for this change is that, at this time, Ko Po Kyaw brought Ma Pwa Gya as a wife from Mandalay, and that, as she often went up to Mandalay, there was no female companion for the appellant at Edward Street. The appellant did not cease to visit Ko Po Kyaw's house frequently, and it is not suggested that, if she had become his adopted daughter, there was any action which denoted repudiation of her adoption, even if such repudiation is possible, a matter not before their Lordships, and on which their Lordships give no opinion.

The facts stated above point directly to the conclusion that Ko Po Kyaw did adopt the appellant as his *keittima* daughter. There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. It is strong evidence of such publicity and notoriety, that the appellant lived continuously in the house of Ko Po Kyaw from her babyhood for twelve or thirteen years, and that he was entered on the register of the school as her parent, and paid the school fees. Moreover, there is evidence that the appellant was given jewelry by Ko Po Kyaw to wear, and that Ko Po Kyaw also paid for her clothes. It is, however, suggested that this evidence is consistent with Ko Po Kyaw taking over the charge of the daughter of his relative, Ma Gyoke, and bringing her up in his house, as an assistance to his relative, but without the intention of adopting her as his *keittima* daughter. It is in reference to this suggestion that it becomes necessary to consider shortly the more important evidence adduced at the hearing. Undoubtedly, the most important witness is Maung So Naing. Mr. Justice Robinson, who saw Maung So Naing and heard his evidence, held that he was a credible witness, that is to say, a witness whose evidence could be trusted and who intended, within the best of his recollection, to tell the truth.

It may well be that although a witness is credible, yet that his recollection of a particular incident is not of such a character as to carry much weight, but in this instance, if Maung So Naing is to be accepted as a credible witness, it is hardly possible to reject the evidence which he gives as to the adoption of the appellant. He states that he was present at the time of adoption, together with the members of the household of Ko Po Kyaw, and that a *kinmoodat* ceremony was performed, and that the *phoongyis* were invited and fed. If this evidence has been invented for the purpose of the case, Maung So Naing could not be regarded as in any sense a credible witness: and the Court of Appeal in rejecting it have directly differed from Mr. Justice Robinson on the question of credibility. In the Court of Appeal certain inconsistencies in the evidence of Maung So Naing were referred to in support of the view that he was not a credible witness, and he was further criticised for his conduct in withholding the key of the safe after the death of Ko Po Kyaw, but it appears to their Lordships that, in this respect, he acted rightly, and in

accord with the responsibilities which he came under at the death of Ko Po Kyaw. Where the Judge, who has seen a witness, and has heard his evidence, comes to the conclusion that the witness is credible, that is to say, a witness who to the best of his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence, but of the attitude and trustworthiness of the witness, and of the effect of his whole demeanour in the witness box. In the opinion of their Lordships there are no such exceptional circumstances in the present case, and accepting Maung So Naing as a credible witness, it is clear that the appellant lived in the house of Ko Po Kyaw as his adopted daughter, and was publicly recognised by him as his adopted daughter. Evidence was given on behalf of the respondent by three near relatives of Ma Nyun and by U. Maung Gyi, a Pagoda Trustee, and rice miller, who state that they knew nothing of the adoption of the appellant by Ko Po Kyaw, but if the evidence of Maung So Naing is believed this negative evidence has little value.

There is a further special incident in the case to be considered. It is said that the dispute was referred by the parties to the arbitration of four *lugys*, or elders, each party nominating two elders, and that on the 10th November, 1916, the parties executed an agreement of reference. There is a question as to what were the matters in dispute to which the deed of agreement referred, but on the same day the *lugys* made and delivered, what purported to be an award, finding that, under the Buddhist Dhammathats, the *keittima* daughter, Ma Than Than, is entitled to a fourth share of the estate of Ko Po Kyaw, or Rs. 30,000, and that in accordance with this award the defendant, Ma Pwa Thit, shall, at the time of registration, in the Registration Office at Rangoon, pay the said sum in full into the hands of the *keittima* daughter, Ma Than Than. On the following day a sum of Rs. 30,000 was paid to the appellant by the respondent, and a deed of release was executed by the parties in the presence of witnesses. What is the effect of this award and release? Mr. Justice Robinson held that the arbitrators acted collusively with the respondent, and that, by reason of such collusion, the award was invalid. It was not thought necessary to give any decision on this point in the Court of Appeal, but, in the opinion of their Lordships, the evidence is amply sufficient to maintain the finding of Mr. Justice Robinson. The result is that the award must be regarded as invalid. The finding in the award, that the appellant was the *keittima* daughter of Ko Po Kyaw, is not a finding on which the appellant can rely, and the payment of Rs. 30,000 under the terms of the award cannot be regarded as a valid release of the claims of the appellant against the estate of Ko Po Kyaw. This sum is part of the terms of an award based on the collusive action of the arbitrators, and such an award is necessarily wholly invalid owing to their misconduct. Their Lordships are unable

to attach importance to the subsequent inconsistent evidence given by the *lugys* at the trial, and agree with Mr. Justice Robinson that the release fails by reason of the decision that the award itself is vitiated by the collusive misconduct of the arbitrators.

In the result their Lordships will humbly advise His Majesty that the judgment of the Court of Appeal should be set aside with costs, and the judgment of Mr. Justice Robinson restored. In the Court of Appeal the appellant is entitled to costs, and in addition to the ordinary costs, special advocate's fees of 10 gold *mohurs* a day for each day's hearing after the first. The respondent will pay the costs of the appeal.

In the Privy Council.

MA THAN THAN

0.

MA PWA THIT.

DELIVERED BY LORD PARMOOR.

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

1928.