
(1931) 07 PRI CK 0011

In the Privy Council

Case No : Privy Council Appeal No. 65 of 1929

U Po Lein and another

APPELLANT

Vs

Ma Huin Hlaing

RESPONDENT

Date of Decision : 28-07-1931

Acts Referred:

Citation : (1931) AIR(PC) 317

Hon'ble Judges : Dinshah Mulla, Macmillan, Lords Tomlin, JJ.

Advocate : Heathcote Williams, Mg. Kya Gaing of Burma, L.De Gruyther, G.C. McNair, E.B. Raikes, for the Appearing Parties.

Judgement

Sir Dinshah Mulla, J.

The sole question for the decision of their Lordships on this appeal is whether the respondent is the keittima daughter of U San Ywe, a Burmese Buddhist, and his wife, Daw Hnit. If she was, then she inherits Daw Hnit's estate; if not, the appellant

U Po Lein, who is the brother of Daw Hnit, is entitled to succeed to it as her heir.

The litigation arose out of a petition for letters of administration to the estate of Daw Unit presented by the appellant to the Court of the District Judge of Pegu on 27th September 1924. The respondent filed a caveat, and on 3rd December 1924 she made a counter petition for letters of administration against which a caveat was entered by the appellant. The proceedings then took the form of a suit with the respondent as plaintiff and the appellant as defendant, and the case was by consent of parties heard as a regular suit for the determination of the question of succession to the estate of Daw Hnit. The District Judge found that the adoption was not proved, and directed letters of administration to be granted to the appellant. On appeal the High Court at Rangoon found that the respondent had proved the adoption, and they ordered letters of all ministration to issue to the respondent. From this decree of the High Court the present appeal has been brought.

U San Ywe and Daw Hnit were residents of Yitkangyi in the Pega District, and they were well known as the richest persons in the place. They took into their family several poor children and maintained and helped them in life. At the date of the alleged adoption they had an only son named Tun Hmyin, who died about the year 1908. U San Ywe died in 1911, and Daw Hnit on 29th April 1924.

The respondent's natural father was a hawker, and during the rains of 1903, while he was crossing a river with his family, the boat was capsized, and his wife and one child were drowned. The respondent, who with her father survived, was then about six months old and her case is that a few weeks after this incident she was adopted by U San Ywa and Daw Hnit as their keittima daughter, and was brought up by them and lived continuously with them until the death of Daw Hnit in 1924, except for a short interval in 1919, when being then about 16 years old, she eloped with Maung Tun Pe, a disciple of U Wimala, the head of a monastery at Yitkangyi, and married him at Thaton. The couple after living there together for about four or six months were brought back to Daw Hnit by U Win, a village headman, and were received back by her in her house. While the respondent was living with Daw Hnit two children were born to her, and she, with her husband and children, lived with Daw Hnit in her house until her death. On 4th September 1922 Daw Hnit executed a deed confirming the adoption, and at the same time she executed a power-of-attorney in favour of Tun Pe, empowering him to manage her estate and affairs, which he did until her death.

The appellant denied the adoption, and alleged that neither the deed of adoption nor the power-of-attorney was executed by Daw Hnit, and that even if the deed of adoption was executed by her, it was not explained to her and was obtained by misrepresentation and fraud. He admitted that the respondent lived continuously with Daw Hnit, but alleged that her position in the house was no better than that of other servant girls who were maintained in the house out of charity.

A keittima child is a child adopted publicly with the intention that the child shall inherit. The existence of natural children is no bar to such an adoption. No formal ceremony is necessary to constitute adoption, but the adoption must be a matter of publicity and notoriety. It can either be proved by direct evidence of the taking as a keittima child on a specified occasion, or it may be inferred from a course of conduct inconsistent with any other supposition: *Ma Ywet v. Ma Me*, 1909 36 Cal 978= 36 IA 192 =3 IC 797 (PC) *Maung Thwe v. Maung Tun*, AIR 1917 PC 186=42 IC 863=44 IA 251=45 Cal 1 (PC).

The respondent herself gave evidence in the case, and called several witnesses who deposed to the giving and taking in adoption in the presence of some elders specially invited for the occasion. Though they could not fix the exact date of adoption, they all agreed that it was some time after the drowning incident. She also called a large number of witnesses who deposed that they were told by U San Ywe and Daw Hnit that the respondent was their adopted daughter, and that the respondent was treated by them as their own child. The respondent also produced in support of her case several documents amongst which were the

deed of adoption, and the power of attorney, and she relied on the terms of certain inscriptions on six marble slabs presented by U San Ywe and Daw Hnit in 1909 to the Shwemawdaw pagoda at Pegu. The respondent called 21 witnesses in all, and after she herself and 11 of her witnesses including those that had deposed to the adoption had been examined before the District Judge, he was transferred to another place, and the rest of the case was heard by his successor. The appellant also was examined in the case, and he called some evidence to show that the respondent was treated by U San Ywe and Daw Hnit not as their own child, but as a servant girl.

The deed of adoption and power-of-attorney were alleged to have been executed by Daw Hnit when she was at Natogyi in 1922 for treatment for paralysis. As to the deed of adoption the District Judge found that it was not prepared under the instructions of Daw Hnit, and that even if it was signed by her, as to which the Judge was doubtful, it was not explained to her, and her signature was obtained by fraud. As regards the power of attorney however, he found that it was executed by her with full knowledge of its contents.

As regards the marble slabs, each slab is said to have inscribed on it at the top the names of U San Ywe, Daw Hnit, their son, Ko Tun Hmyin (who was then dead), and the respondent. As to these slabs there was a conflict of evidence. Mating Pe, a sculptor of Mandaluy, gave evidence on behalf of the respondent that the slabs were inscribed by him in 1909 as they now stand on instructions from U San Ywe, and that four of them bore his name on the back and the other two the name of his deceased partner, Maung Po Ket. On the other hand, Maung Sein, a witness for the appellant, said that his father U Gan had in 1909 ordered 111 slabs for the pagoda, that he allowed several persons to subscribe for some of them, that 6 out of the 111 slabs were subscribed for by U San Ywe and Daw Hnit, and that the headings now on those 6 slabs were not the headings which were originally inscribed on them. It seems that photographs were taken of the inscriptions, but only one was produced. It showed that the letters of the heading were larger than those of the text below and that; the date of the heading was in letters slightly smaller than those of the rest of the heading. Upon this evidence the District Judge found that the headings were forgeries.

The District Judge did not discuss the oral testimony of the witnesses, and having found that the signature of Daw Hnit to the deed of adoption was obtained by fraud, and that the headings of the inscriptions were forgeries he inferred that the evidence given by the respondent's witnesses was not worthy of credit, and disbelieved the respondent's case.

The learned Judges of the High Court, while agreeing substantially with the District Judge as to his finding on the deed of adoption, differed from him as to his finding on the inscriptions on the slabs. They found that the headings were not subsequent forgeries, but they held that the respondent had failed to prove that the headings were inscribed on the instructions of U San Ywe or Daw Hnit. They examined the other documentary evidence in the case and accepted the

oral testimony of the respondent's witnesses, and held that the adoption was proved.

Their Lordships think that neither the deed of adoption nor the headings on the tablets support the respondent's case. As to the deed of adoption, there are concurrent findings of both the Courts in India, and no case has been made out for departing from the general rule of this Board not to interfere with such findings. As regards the headings on the tablets, their Lordships have examined the evidence, and they see no reason to differ from the finding of the High Court. But though neither of these items is helpful to the respondent's case, there is, in their Lordships' opinion, other documentary evidence which lends support to her case.

First in order of date are certain entries in the assessment rolls. The respondent is described in those entries as Daw Hnit's daughter, and her name appears with that of Daw Hnit in the column of owners. The first entry appears, in the assessment rolls for the year 1913-14, which would be about three years after the death of U San Ywe, and her name continues up to the year 1919-20, when it is said it was struck out on instructions from Daw Unit., this being about the time when she eloped with Tun Pe. The respondent's name was again restored in 1922-23, and it remained on the rolls until the death of Daw Hnit in 1924.

It is the case of both sides that the first entry was made by the revenue officer on instructions from Maung Lu Swe, the head labourer and rent collector of Daw Unit, but it is urged for the appellant that there is no proof that Lu Swe had any authority from Daw Hnit to ask the revenue officer to enter the respondent's name on the rolls. Lu Swe was not examined as a witness, the explanation given by the respondent being that he was then on hostile terms with her. This leaves the position somewhat obscure, and it has been commented upon by both the Courts in India. Their Lordships however cannot overlook the fact that in 1913, when the first entry was made, the respondent was only ten years old and she could not possibly have had any hand in having her name inserted in the records. Her natural father had long since severed all connexion with her, and her husband, Tun Pe, had not yet appeared on the scene. There is nothing to suggest that Lu Swe had any interest in having her name entered on the rolls, and above all, in describing her as Daw Hnit's daughter. In these circumstances their Lordships think that the entry must have been authorized by Daw Hnit, and it must have been made with her knowledge and consent. The removal of respondent's name in the year 1919-20 coincides with her elopement and the consequent change of feeling on the part of Daw Hnit, while the reinsertion of her name in the year 1922-23 marks the restoration of cordial and harmonious relations once again between the two ladies.

Next come the depositions of Daw Hnit in two suits in 1923. It seems that in the year 1922 Daw Hnit granted a lease of her lands to Maung Po Tok, a grand nephew of U San Ywe, in the joint names of herself and the respondent. In the same year Po Tok borrowed Rs. 510 from Daw Hnit, and executed a promissory

note in favour of Daw Hnit and the respondent. In 1923 Daw Hnit and respondent brought a suit against Po Tok for rent and for money lent. Po Tok put in a defence that the lands had been let to him free of rent because he was a keittima son of Daw Hnit. This defence did not succeed, and a decree was passed against him. In that suit Daw Hnit was examined in Court, and in the course of her evidence she said: "Hnin Hlaing is my daughter. Tun Pe is my son-in-law and Po Tok is not related to me."

This statement seems to their Lordships to be a clear recognition by Daw Hnit of the respondent's status as her adopted daughter.

This was followed by a suit, also in 1923, by Maung Po Kun, another grand-nephew of U San Ywe, against Daw Hnit, in which he claimed a fourth share of the estate on the allegation that he was a keittima son of U San Ywe and Daw Hnit, and was also the orasa son. The suit was dismissed on the ground that Po Kun had failed to prove the alleged adoption. In that suit Daw Hnit was examined on commission, and in her evidence she said:

"I did not adopt Maung Po Kun.....I have affection for Ma Hnin Hlaing. Ma Hnin Laing does not want (lit, like) me to give money to anybody, not only to Po Kun."

This statement indicates, at the least, that Daw Hnit did not regard the respondent as a mere menial servant in her house. Their Lordships are satisfied that there is sufficient evidence in this case not only of the giving and taking in adoption, but also of a course of conduct from which adoption may legitimately be inferred. As regards the appellant himself it appears from his evidence that he left Yitkangyi a few years after the death of U San Ywe, and that he took no interest whatever in the affairs of Daw Hnit. Though present at her funeral ceremonies, he made no claim to perform them which he was entitled to do had he been the heir to her estate. His conduct throughout lends support to the view that he regarded the respondent as the adopted daughter of Daw Hnit and the heir to her estate.

For the reasons stated above, their Lordships are of opinion that this appeal fails, and that it should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the respondent's costs of this appeal.