

Ma Saw Kin and others - - - - - *Appellants*

v.

Maung Tun Aung Gyaw - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 21ST NOVEMBER, 1927.

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*Present at the Hearing :*

VISCOUNT SUMNER.

LORD SINHA.

SIR JOHN WALLIS.

SIR LANCELOT SANDERSON.

[*Delivered by* SIR JOHN WALLIS.]

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This is an appeal from a decree of the High Court at Rangoon reversing a decree of the District Court of Thayetmyo. The suit was brought by the plaintiff, Maung Tun Aung, claiming as heir of his deceased wife, Ma Thet Shay, against the three defendants, her sister and her sister's husband, Ma Saw Kin and Maung Shein, and Maung Aung Pe, his son by his deceased wife, for a partition of the properties inherited by the sisters Ma Thet Shay and Ma Saw Kin from their father U Hle, and also of properties acquired by the joint exertions of the plaintiff, his deceased wife and her sister Ma Saw Kin, the first defendant.

The defendants pleaded that the plaintiff and his wife were divorced in or about Tabaung, 1277 (March, 1916), and that the plaintiff was not entitled to any share in the property of U Hle, his deceased wife's father. They also denied that any property had been acquired by the joint exertions of the plaintiff, his wife and the first defendant, or that they were in possession of any properties to which he was entitled. Issues were then settled, the first issue being: " Was the plaintiff divorced from Ma Thet

Shay, as alleged by the defendants?" Subsequently the defendants were allowed to amend their pleadings by inserting the following plea: "In the alternative, these defendants plead that the plaintiff having deserted Ma Thet Shay for over three years and contracted a second marriage, the parties had thereby become divorced."

An additional issue was framed on this amendment: "Was there a desertion as alleged in the written statements on or about Tabaung, 1277, and does such desertion operate as a divorce?"

On the first issue the defendants gave evidence of a divorce by mutual consent, but this evidence was disbelieved both by the District Judge and the High Court, so that there are concurrent findings that there was no divorce by mutual consent. On the additional issue as to the alleged desertion by the husband in March, 1916, and its operating as a divorce, the District Judge did not find that there had been any actual desertion by the husband, as it was clearly proved that the separate living was against his will, but he held with reference to certain decisions of the Burmese Courts that the plaintiff's conduct having, as he found, justified his wife in living apart from him, their separation for three years might be treated as desertion for that period by the husband, and accompanied as it was by his openly living with his junior wife, Ma Ngwe Yon might be treated as having dissolved the marriage.

On appeal the learned Judges of the High Court, whilst agreeing with the Trial Judge that there had been no divorce by mutual consent, held that the desertion, if any, was by the wife and not by the husband, and that on the facts proved there had been no divorce.

As to the plea that the parties had become divorced by reason of the plaintiff's having deserted his wife for over three years and taken another wife, their Lordships have come to the conclusion that the finding of the High Court, in which they concur, that there was no desertion by the husband, amounts to a finding for the plaintiff on the additional issue, and is sufficient to dispose of the appeal, as the appellants have failed to prove the grounds of divorce on which they went to trial, and cannot now be allowed to set up a fresh case.

According to the ruling of their Lordships in *Mah Nhin Bwin v. U Schwe Gone* (41 J.A. 121), the Burmese law in this and similar questions is to be determined by the Manugye or Damathat of the Laws of Menoo, with such assistance as may be derived where necessary from the other Damathats. As regards the question of divorce, there have been considerable differences of judicial opinion in Burma both as to the proper interpretation of the texts themselves and as to whether some of them should not be considered obsolete. Thus the question whether either party has a right to divorce without fault of the other on giving up all share in the joint property in accordance with Manugye XII, s. 3, has given rise to conflicting decisions, which are cited in the case of *Ma Hman v. Mawng Tin Kawk*, J.L.R., 1 Rangoon 722.

In the present case their Lordships are only concerned with the question of divorce as grounded on desertion, which is dealt with in *Manugye V*, ss. 14-17. Ss. 14-16, which may or may not be obsolete, deal with the right of the wife to remarry in case of the husband's absenting himself for purposes of trade or in search of knowledge, or on military service. In the first two cases the wife's right to remarry only arises where the husband, in addition to being absent for the period mentioned, has failed during that time to send her letters and presents. If he has, the texts give her no right to remarry. The present case is governed by the next section, 17, which has the following caption: "The law when a husband and wife having no affection for each other separate." The material part of the section is as follows:—

"Any husband and wife living together, if the husband, saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetables or one stick of firewood, at the expiration of three years, let each have the right to take another wife and husband. If the wife not having affection for the husband, shall leave the house and where they were living together, and, if during one year he does not give her one leaf of vegetables or one stick of firewood, let each have the right of taking another husband or wife; they shall not claim each other as husband and wife: let them have the right to separate and marry again."

The section goes on to provide that if the wife remarries without waiting for the three years, or if the husband remarries without waiting for the one year, the party so wrongfully remarrying is to forfeit all the joint property of the first marriage,

"and if (the person in fault) comes to the house of the other, the person not in fault may turn (the other) out, but not accuse each other of taking a paramour or seducing husband or wife."

In their Lordships' opinion, provisions of this kind dealing with such a serious matter as the severance of the marriage tie must be strictly construed and fully complied with. There has been much difference of opinion in Burma, and two Full Benches of the High Court have arrived at opposite conclusions, on the question whether, when the husband or wife has left the home, the marriage is put an end to by the fact of the husband's omitting to send the wife anything for three years or one year, as the case may be, or whether there must be some further act of volition showing an intention to determine the marriage relation, such as remarriage or a suit for divorce.

Their Lordships express no opinion on that question, because it only arises under the terms of the section where there has been desertion on the one side or the other and failure on the part of the husband to provide the wife with any maintenance for the specified period. Unless both conditions are satisfied, the text gives the wife no right to remarry, and the marriage tie must be considered as subsisting.

In the present case the plaintiff was married to Ma Thet Shay in 1887, and, as observed by one of the learned Judges, lived with her more or less amicably until the year 1916, a period of nearly thirty years. By that time marital relations between the parties

had ceased for some years, and the plaintiff had taken a junior wife, for whom he provided a separate residence, whilst continuing to reside with the senior wife. Prior to 1916, when the divorce by mutual consent was said to have taken place, there were quarrels between the husband and wife. Ma Thet Shay and her sister Ma Saw Kin, the first defendant, who had inherited considerable property from their father, in which their husbands were entitled to share, lived with their husbands at 171, Main Road until, in consequence of an evil omen, they all moved to No. 17. Not long afterwards Ma Thet Shay and her sister went to live in another house, leaving the plaintiff in No. 17, but they continued to send him his food until 1918, when it was stopped. He then began to live openly with the junior wife, to whom he had long been married.

As Ma Thet Shay had inherited considerable property from her father, and was then in an advanced stage of tuberculosis, of which disease she died in 1922, it was obviously the plaintiff's interest to resist a divorce which might affect his rights of inheritance in his wife's estate. In these circumstances he appears to have acquiesced in his exclusion from his wife's house, to the extent of not suing for restitution of conjugal rights, or himself suing for divorce, but the evidence shows that he always repudiated the notion that there had been any divorce, and that he continued to make unsuccessful efforts to communicate with his wife until she died.

In these circumstances their Lordships agree with the learned Judges of the High Court that the effect of the evidence is that there was only a living apart by mutual consent, or, if there was desertion at all, it was desertion by Ma Thet Shay. That is not the case set up here.

For these reasons their Lordships agree with the learned Judges of the High Court that the defendants have failed to prove that the plaintiff was divorced from Ma Thet Shay, and are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the year 1840

1840

1840

1840

1840

In the Privy Council.

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MA SAW KIN AND OTHERS

vs.

MAUNG TUN AUNG QYAW.

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DELIVERED BY SIR J. WALLIS.

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