

A certificate for the refund of the court-fee paid on the memorandum of appeal should issue.

CUNLIFFE, J.—I agree.

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MA CHON
v.
MAUNG
MYINT
HEALD, J.

PRIVY COUNCIL.

MAUNG PO NYUN (*Defendant*)

v.

MA SAW TIN (*Plaintiff*)

J.C.*
1927
July 26.

(On appeal from the High Court at Rangoon.)

Buddhist Law—Divorce—Partition on divorce—Desertion by husband—Desertion of second wife and return to first.

The appellant married the respondent, both being Burmese, falsely representing that he had divorced his wife. He deserted the respondent after a few months and for more than three years before the suit had not resumed conjugal relations with her, nor given her any maintenance. The respondent sued for a divorce and partition of property. She claimed one-third of certain properties inherited by the appellant during the marriage, and one-sixth of estimated profits therefrom during three years. The High Court affirming the District Judge, granted the relief claimed. The right of the respondent to a divorce was not contested on the appeal.

Held, that the view expressed by both Courts in Burma that as the appellant had been guilty of desertion, the respondent was entitled strictly to the whole of his property, except the interest of the first wife therein was not supported by any text or authority; but that the decree granting the partition actually claimed, not being unreasonable nor contrary to justice, equity and good conscience should be affirmed.

Appeal (No. 62 of 1926) from a decree of the High Court (February 27, 1926) affirming a decree of the District Court of Myaungmya (December 13, 1923).

The respondent instituted a suit in the District Court claiming a divorce from the appellant on the ground of his desertion, also, by a partition of his properties, a one-third share of properties (Schedule A) which the appellant had inherited from his adoptive mother after the marriage, and a one-sixth share of

* PRESENT :—LORD SINHA, LORD BLANESBURGH, LORD SALVESEN, SIR JOSEPH WALLIS and SIR LANCELOT SANDERSON.

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estimated profits (Schedule B) derived therefrom during three years. She claimed that she was so entitled by Burmese Buddhist Law.

The appellant by his written statement denied that he had deserted the respondent, alleging that she had deserted him, and he contended that she was not entitled to any property upon divorce.

The circumstances of the case appear from the judgment of the Judicial Committee.

The District Judge found that the defendant had deserted the respondent for over three years. He made a decree for the relief claimed. With regard to the claim under Schedule A he was of opinion that the plaintiff was really entitled to one-third of the *payin* and one-half of the *letletpwa*, but as she claimed a smaller share he decreed accordingly.

An appeal to the High Court was dismissed. The learned Judges (Heald and Chari, JJ.) agreed as to the desertion, and the view of the lower Court that the two wives were on an equal footing. As the Burmese Buddhist law books laid down no rule as to partition on the divorce of a husband by one of two or more wives, and there was no case law on the point, it was necessary to decide according to justice, equity and good conscience, having regard to the general rules of Burmese Buddhist law. A husband was to be regarded as bringing to a second marriage no more than his interest in the property during the first marriage, *viz.*, two-thirds of the property he brought to the first marriage, and one half of the jointly acquired property. A second wife, getting a third of this, would on a divorce by mutual consent get two-ninths of the property brought by the husband to the first marriage, or inherited during it, and one-sixth of the jointly acquired property. On the divorce of a husband

for misconduct a wife was ordinarily entitled to the whole of her husband's property. But it would be contrary to the principles of Burmese Buddhist law to divest the husband entirely of property in which his first wife had an interest. The learned Judges thought that the just rule was that a second wife divorcing her husband for misconduct should take all his property except his first wife's interest. They concluded as follows: "as we have found that the appellant deserted the respondent, and that she was therefore entitled to divorce with possession of all her husband's interest in the property, she would on that basis be entitled to two-thirds of the immovable property and two-thirds of the jointly acquired property. She has however claimed only one-third of the immovable property and one-sixth of the latter, and she has been given a decree in accordance with her claim. For the reasons which we have given we see no ground to believe that the decree was wrong."

Dunn, K.C., and *E. B. Raikes* for the appellant. The respondent was not entitled to more than the share of a wife on a divorce by mutual consent; her plaint was really upon that basis. Under Burmese Buddhist law desertion is not a serious matrimonial offence for instance it is not so serious as persistent ill-treatment. On the other hand the taking of a second wife is a serious offence against the first wife unless she consents. The judgments in Burma were based upon the view that a wife (if the only wife) divorcing her husband for desertion is entitled to the whole of the property. There is no text or decided case laying down that principle. The High Court also erroneously treated the spouses as a "virgin couple." It is conceded that no text or decision covers this case; it is submitted that according to the principles of Burmese Buddhist law the respondent

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is entitled to no greater share than she would have taken on a divorce by mutual consent. [Reference was made to *C.T.P.V. Chetty Firm v. Maung Tha Hlaing* (1), *Maung Hone v. Ma Sein* (2), *Ma Sa v. Maung Nyi Ba* (3), and *U Gaung's Digest*, ss. 224, 253 to 258, 271, 303, 306, 312.]

A. P. Pennell for the respondent. The respondent is entitled to hold the decree. There are in Burmese Buddhist law three kinds of divorce, namely, (1) for misconduct, (2) by mutual consent, (3) at will, without fault of either party: *Maung Nga v. Ma Pym* (4). It is clearly laid down in that case, also in *Mi Sa Bin v. Nga San Nyun* (5), that in the case of a divorce for misconduct the innocent party takes the whole property. The divorce to which the respondent was entitled was of that class. Continued desertion is a serious matrimonial offence in Burmese Buddhist law; a deserting spouse was liable to penal proceedings; *Manukye VI*, 30; *Jardine II*, 17; *Digest*, s. 306. It is conceded that there is no reported case as to desertion by a husband. There is however a case as to desertion by a wife; she was held to have lost all her rights in the joint property: *Ma Thet v. Ma Sa On* (6). The respondent claimed and was decreed less than she was entitled to. There is no ground for saying that the plaintiff claimed on the basis of a divorce by mutual consent. The decree was in accordance with justice, equity, and good conscience. [Reference was made fully to *C.T.P.V. Chetty v. Maung Tha Hlaing* (1).]

Dunne, K.C., in reply. Although desertion may put an end to a marriage, it is not treated in the texts as an offence, see *U Gaung's Digest*, s. 312.

(1) (1925) 3 Ran. 322.

(2) (1918) 9 L.B.R. 191.

(3) (1921) 4 U.B.R. 68.

(4) (1920) 3 U.B.R. 251 254.

(5) (1914) 2 U.B.R. 32.

(6) (1903) 2 L.B.R. 85.

July 26. The judgment of their Lordships was delivered by—

SIR LANCELOT SANDESON.—This is an appeal by Maung Po Nyun, who was the defendant in the suit, against a decree of the High Court of Judicature at Rangoon, dated the 27th February, 1925, affirming a decree of the District Judge of Myaungmya, dated the 13th December, 1923.

The plaintiff, who is the respondent in this appeal, brought the suit against her husband, claiming a divorce on account of his desertion and a partition of the properties specified in the Schedules A and B of the plaint. She alleged that she was entitled to one-third of the properties in Schedule A and to one-sixth of the profits in Schedule B.

The learned District Judge made a decree granting the plaintiff a divorce and the shares in the above-mentioned properties which she claimed. The defendant appealed to the High Court, which dismissed his appeal with costs.

At the hearing of the appeal before their Lordships, the learned counsel, who appeared for the appellant-defendant, did not contest the plaintiff's right to a decree for divorce, and the arguments on both sides were confined to that part of the decree which awarded to the plaintiff one-third of the properties mentioned in Schedule A and one-sixth of the profits specified in Schedule B.

The learned counsel for the appellant-defendant did not contest the plaintiff's right to the one-sixth of the profits in Schedule B, but he argued that the plaintiff was entitled merely to one-sixth of the property comprised in Schedule A and not to one-third thereof, as decreed by the Courts in Burma.

The appeal, however, involves much more than the point which has been stated above, and that is by

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reason of a principle which was adopted by the Courts in Burma and upon which they based their judgments.

For the moment it may briefly be referred to in the words of the learned District Judge as follows :—
“Where a divorce is adjudged through the fault of one party, the innocent party obtains all the property, including the joint property as well as the separate property of the guilty spouse.”

It is clear, therefore, from the above-mentioned statement, that this appeal involves a question of great importance, and it is necessary for their Lordships to decide whether this statement of the law, which must obviously have far-reaching effects, can be supported.

The facts of the case may be shortly stated as follows :—

The defendant had married another wife before he married the plaintiff. The first wife lived with the defendant and his adoptive mother for some time, and then, in consequence of quarrels, the first wife left the defendant and went to live with her parents.

A few months later the defendant expressed a desire to marry the plaintiff, and his mother accordingly approached the plaintiff's parents with a view to their daughter's marriage.

The defendant had told his mother that he had severed his connection with his first wife, and accordingly the defendant's mother, when asked by the plaintiff's parents as to the first marriage, assured them that the defendant had divorced his first wife.

The plaintiff's parents, having received this assurance, consented to their daughter's marriage. She was married the same day and she went to live with the defendant and his mother.

A few months later the defendant's mother died.

The defendant continued to live with the plaintiff for about two months longer, and then, in or about

April, 1920, he left her and went to live with his first wife, whom, in fact, he had not divorced. The suit was filed in September, 1923, more than three years after the plaintiff was deserted by the defendant, and it was found by the learned District Judge, and his finding has not been disputed, that during the period from April, 1920, up to September, 1923, the defendant did not resume conjugal relations with the plaintiff, and did not give her any maintenance.

The learned Judge found that the defendant deserted the plaintiff and that the marriage was brought about by the above-mentioned misrepresentation that his connection with his first wife had been severed and he held that the plaintiff was entitled to a decree for divorce. The High Court agreed that the plaintiff was entitled to a decree for divorce, and that part of the decree, as already stated, has not been contested before their Lordships.

It appears that the defendant's mother died in January, 1920, and that about four months before she died she had given to the defendant by deed about 185 acres, which were part of the 233.38 acres mentioned in Schedule A.

After her death her inheritance was divided, the defendant getting the house and the remainder of the property mentioned in Schedule A, which included 29 acres which had been given shortly after the defendant's marriage with the plaintiff.

On the question of partition, both the Courts in Burma held that, inasmuch as the plaintiff was entitled to a divorce on the ground of the defendant's desertion, she was, strictly speaking, entitled to all the husband's property except the first wife's interest therein; or stating the same proposition in another way, that the plaintiff was entitled to all the husband's interest in the property, which would be considerably

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more than the shares which the plaintiff had claimed in her plaint. The learned Judges of the High Court expressed the opinion that it was difficult to understand on what principle the plaintiff's claim was based ; but they came to the conclusion that as she had confined her claim to the shares mentioned in the plaint and had obtained a decree in respect thereof, they saw no reason for saying that the decree was wrong or that the defendant had been prejudiced by it.

The question whether the plaintiff was entitled to all the husband's interest in the property was argued at great length, and the attention of their Lordships was drawn to the translations of many of the *Dhammathats* and to many reported decisions.

Their Lordships do not think it necessary to refer to them in detail, because it is clear, as was admitted by the learned counsel who appeared for the plaintiff, that there is no text which imposes forfeiture of property upon a husband who deserts his wife, and that there is no reported case in which a decree for forfeiture of his property has been made against a husband by reason of his desertion of his wife or one of his wives.

Further, the learned Judges of the High Court stated that

" it is admitted that the Burmese law books do not lay down any rule of partition on the divorce of the husband by one of two or more wives of equal status, and that there is no case law on the subject. It is, therefore, necessary to decide the matter in accordance with the principle of justice, equity and good conscience, having regard to the general rules of Burmese Buddhist law so far as these rules can be applied."

Their Lordships desire to make it clear that the opinion expressed by them is confined to the particular facts of this case and the question arising in respect thereof, *viz.*, assuming that defendant deserted the plaintiff, his second wife, in April,

1920, and that for more than three years he did not resume conjugal relations and gave her no maintenance, and that consequently the plaintiff was entitled to a decree for a divorce, was she entitled to the whole of the husband's interest in the property, which was the subject-matter in the suit?

The learned counsel for the appellant argued strenuously that on the true construction of the plaint, the suit was really based on an allegation of divorce by mutual consent.

Their Lordships are not able to accept that argument, and the case must be considered upon the basis of the findings of fact of the Courts in India.

The learned District Judge began his judgment on this part of the case by saying, "The parties will have to be considered as virgin couple."

Before his marriage with the plaintiff, the defendant had been married to another woman, who was alive at the time of the marriage with the plaintiff, and from whom he had not been divorced.

The plaintiff, of course, had not been married before, and, while some indications are to be found in the texts to the effect that where the spouse in that position is the aggrieved party, the union may be so described in proceedings for divorce, in their Lordships' opinion, it is not necessary in this case to decide the point and they must not be taken as affirming the above-mentioned proposition.

The learned District Judge then proceeded to the statement which has already been quoted, and which for convenience may be restated, as follows:—

"Where a divorce is adjudged through the fault of one party, the innocent party obtains all the property, including the joint property as well as the separate property of the guilty spouse; but, of course, the share of the head wife must be excluded."

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In their Lordships' opinion, this statement is made in too wide and too general terms.

In the first place, it takes no account of the difference between the position, rights and duties of the husband and those of the wife in Burmese law.

It is clear that the *Dhammathats* recognised the difference in many respects which it is not necessary to mention in detail.

In the second place, as has already been stated, there is no case in which a wife has obtained a decree of forfeiture of all her husband's interest in the property on the ground of his desertion.

It is also the fact that there is no case in which a wife has claimed such a forfeiture, and even in the case before their Lordships the plaintiff has not made such a claim.

As already mentioned, the *Dhammathats* do not contain any text which provides that if the husband deserts his wife, or one of his wives, she is entitled to the whole of her husband's interest in the property.

In the digest of Burmese Buddhist law arranged by U Gaung, Volume II, dealing with marriage, section 312 (*Maungye*), desertion is dealt with, and some of the rights of the parties ensuing upon desertion, such as the right to marry again, are described.

If it had been the law that the husband would forfeit all his interest in the property, joint or separate, if he deserted his wife, or one of his wives, for three years and left her without maintenance, it is almost inconceivable that there would not have been found in the *Dhammathats* a statement of the law to that effect.

The proposition which the Courts in Burma adopted as the basis of their judgment, *viz.*, that because the defendant deserted the plaintiff she was entitled to divorce with possession of all the husband's

interest in the property, the subject-matter of the suit, is in itself a startling proposition, and if adopted would have very far-reaching effects.

There is no text in the *Dhammathats* or in the Burmese Buddhist law books to support it, there is no case law on the subject, and the respondent's learned counsel was not able to draw their Lordships' attention to any case in which even a claim based on such a proposition had been made.

In these circumstances, their Lordships are not prepared to accept and endorse the above-mentioned proposition.

This, however, does not dispose of the appeal, because it still remains to be considered whether the appellant-defendant has succeeded in showing sufficient reason to justify their Lordships in interfering with the decree which the plaintiff in fact obtained as to her shares in the property and the profits thereof.

In deciding this question, their Lordships think it is material to take into consideration the general rules of the Burmese Buddhist law as regards the interest which the wife obtains in the husband's property at the time of the marriage, and in the property acquired by him after the marriage, and the fact that the *Dhammathats* treat the division of property as part of the law of divorce, as to which there does not seem to be any serious dispute.

In their opinion, it is also material and important to consider the facts of this case; as, for instance, that the marriage with the plaintiff was brought about by misrepresentation, that the plaintiff was an entirely innocent party, that, shortly stated, the facts relating to the desertion were of an aggravated nature and quite unjustifiable, and that desertion, where there is a duty to comfort and support, is regarded by the Burmese as a serious offence.

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Taking these matters into consideration and the above-mentioned rules of the Burmese law as to the wife's interest in her husband's property, their Lordships are not prepared to say that the decree appealed from, which awarded to the plaintiff the shares in the properties in suit specified therein, was unreasonable or contrary to justice, equity and good conscience.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant—*Douglas, Grant & Bold.*
 Solicitors for respondent—*J. E. Lambert.*

PRIVY COUNCIL.

V.E.A.R.M. FIRM AND ANOTHER (*Defendants*)

v.

MAUNG BÀ KYIN AND ANOTHER (*Plaintiffs*).

(On appeal from the High Court at Rangoon.)

Declaratory suit by ostensible owner under a registered sale deed under O. 21, r. 63, Civil Procedure Code (Act V of 1908)—Burden of proof on attaching creditor to show sale to be fraudulent—Adequacy of consideration.

Held, that where the ostensible owner of a property under a registered sale deed institutes a suit under Order 21, Rule 63 of the Civil Procedure Code to establish his right thereto, the burden of proof to show that the sale is a fraudulent one is on the creditor who has attached the property for somebody else's debt. He may prove that by showing utter inadequacy of consideration but where, as in this case, the substantial part of the consideration was proved, the mere failure to prove a comparatively small part of it as paid in cash, cannot lead to the conclusion that the sale was fraudulent.

Decree of the High Court affirmed.

Appeal (No. 85 of 1926) from the decree of the High Court (August 4, 1925) reversing the decree of the District Court of Myaungmya in Civil Regular Suit No. 4 of 1924.

* PRESENT :—VISCOUNT DUNEDIN, LORD SHAW, LORD SINHA and SIR JOHN WALLIS.

(This appeal has been reported locally—Ed.)