1927

MAUNG THAN GYAUNG v. MAUNG PYU AND ONE.

CARR, J.

Evidence Act does not apply and does not debar him from proving the agreement that he sets up.

The case is in fact very similar to that of *Maung Kyin* v. *Ma Shwe La* (1), which was decided by the Privy Council and on the authority of that case I think that the decisions of the Courts below are wrong.

I therefore set aside the judgments and decrees of the Courts below and remand the case to Township Court for disposal on its merits. Appellants will be granted a certificate for the refund of the court-fee paid on this appeal. The other costs of this appeal and all the costs in the District Court will be costs in the suit and will follow the result.

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## APPELLATE CIVIL

*Before Mr. Justice Heald and Mr. Justice Cunliffe.*

1927

*Mar.* 3.

## MA CHON
v.
## MAUNG MYINT *

*Civil Procedure Code (Act V of 1908), s. 2 (2) (b), O. 17, rr. 2 and 3—Order of dismissal for default—When order is appealable as a decree.*

In the absence of appellant and her witnesses, her advocate applied for an adjournment on the day the case was peremptorily fixed for hearing. The trial Court refused the adjournment and dismissed the suit. Appellant appealed against the dismissal of her suit.

*Held*, that appeal lies against the dismissal of a suit under the provisions of Order 17, Rule 3, of the Civil Procedure Code, but that rule only applies when time has been expressly granted for a specific purpose and the party to whom time has been so granted has failed to do what was necessary for that purpose which was not the case in this suit. No appeal lies against an order of dismissal for default. But in the appellant's case it was a decree, since it was the final expression of an adjudication which so far as regards the Court expressing it conclusively determined the rights of the parties with regard with to the matters in controversy in the suit, hence appeal lies.

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* Civil First Appeal No. 241 of 1925.

(1) (1917) 9 L.B.R. 114.

*Rahman*—for Appellant.

*Ba Maw*—for Respondent.

HEALD, J.—Appellant sued respondent for divorce on grounds of what may be called "legal cruelty," and claimed that she was entitled to all the property of the marriage. Respondent contested the suit and issues were framed. Both sides filed lists of witnesses, and on the date fixed for hearing both sides had witnesses present. The case was however adjourned owing to the absence of the Judge. On the date to which the case was adjourned the advocates on both sides asked for a postponement and the case was postponed and was fixed peremptorily for the 3rd of September and two following days.

On the 27th of August appellant applied for summonses for two witnesses for the 3rd of September, and the summonses were issued but were not personally served.

On the 3rd of September appellant's advocate appeared but neither appellant nor any of her witnesses were present. Appellant's advocate applied for an adjournment on the ground that appellant was ill.

Respondent's advocate opposed the application. The Judge heard both the advocates, presumably on the application for an adjournment, and next day passed orders refusing the adjournment and dismissing appellant's suit.

Appellant appeals against the dismissal of her suit but no appeal lies against an order of dismissal for default. An appeal does however lie against the dismissal of a suit under the provisions of Order 17, Rule 3 and appellant's view is apparently that this is such an appeal.

It seems clear on the authorities that a suit can be dismissed under Order 17, Rule 3 only when time has been expressly granted for a specific purpose and the

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party to whom time has been so granted has failed to do what was necessary for that purpose. If that is the correct view of the meaning of the Rule then it is clear that the Rule did not apply in this case, since time was not expressly granted to appellant for the purpose of causing the attendance of her witnesses, it would seem to follow that the order could not have been made under that rule.

The question then arises whether or not the order is appealable. *Primâ facie* it is a decree, since it is the final expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to the matters in controversy in the suit and it is not an adjudication from which an appeal lies as an appeal from an order and I do not think that it can be regarded as an order of dismissal for default within the meaning of section 2 (2) (*b*) of the Code.

I would therefore hold that the order is appealable as a decree.

It is clear that the decision of the learned Judge of the District Court was mistaken. Appellant had actually taken the steps necessary to cause the attendance of two of her witnesses. There is nothing to show that she was in any way to blame far their failure to appear and the Judge ought to have given her a further opportunity of causing their attendance.

For these reasons I am of opinion that the judgment and decree of the lower Court should be set aside and the case should be remanded with direction to re-admit the suit under its original number and to proceed to determine it.

The costs of the hearing in this Court except as otherwise directed in the order of this Court dated the 24th of January 1927 should abide the final order in the suit as to costs.

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.

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## PRIVY COUNCIL.

J.C.*
1927
*July* 26.

MAUNG PO NYUN (*Defendant*)
*v.*
MA SAW TIN (*Plaintiff*)

(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 JOHN WALLIS and SIR LANCELOT SANDERSON.