

1927  
 R. SEWARAM  
 v.  
 LACHMI-  
 NARAYAN.  
 MAUNG BA,  
 J.

Applying this Article to the case the wages other than those for February and December 1924 would become time-barred. The amount of Rs. 300 has been held to be a part payment towards the wages and so the respondent would be at liberty to apply the same towards wages for previous months.

As regards the counter claim no sufficient ground is made out for interference in revision with the finding of the lower Court.

I therefore modify the decree by reducing the amount to Rs. 160 with costs on that amount in both Courts.

## APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Chari.

1927  
 June 1.

MA PAING

v.

MAUNG SHWE HPAN AND OTHERS.\*

*Buddhist Law—Civil Procedure Code (Act V of 1908), s. 60—Buddhist husband's interest in properties of the marriage indeterminate and therefore not a saleable property in execution of decree against husband—Wife's suit for partition and declaration of half share not maintainable—Liability of marriage property to satisfy family debts—Procedure.*

In execution of their decrees against a Buddhist husband who was managing the family business and had incurred the debts, the creditors attached certain properties of the marriage between the husband and his wife. The wife obtained from the executing Court a release of her interest, whatever it was, in the properties from the attachments. Respondents bought the properties at the execution sale and were put in possession. The wife filed a suit for a declaration that she had half share in the properties and asked for possession of such share.

*Held*, that the interests of a Burmese Buddhist husband and wife are impartible and indeterminate so long as the marriage subsists and that where the husband manages the business of the family a decree against the husband can be executed against the whole property of the marriage. The wife's claim to partition was not sustainable. The husband's share too was impartible and his

\* Civil First Appeal No. 132 of 1925. For the Full Bench Reference in this Case and Judgment, see (1927) 5 Ran. 296.

interest was indeterminate; such an interest therefore is not saleable property within the meaning of section 60 of the Civil Procedure Code. Such a sale has to be set aside, but the whole property including the interest of both husband and wife was liable to be attached and sold in execution of the decrees against the husband alone.

*P. B. Sen*—for the Appellant.

*Dhar*—for the Respondents.

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SHWE HPAN  
AND  
OTHERS.

HEALD AND CHARI, JJ.—Po Kaing and the present appellant Ma Paing are husband and wife. Po Kaing managed the family business and incurred very heavy debts. A number of creditors sued Po Kaing without joining Ma Paing as a defendant and obtained decrees against Po Kaing alone. In execution, certain properties of the marriage between Po Kaing and Ma Paing were attached. Ma Paing applied for removal of the attachment to the extent of her interest in them. The executing Court found that Ma Paing as Po Kaing's wife had an interest in the properties as being properties of the marriage, and released her interest, whatever it might be, from the attachment. The properties, less Ma Paing's supposed interest, were sold and respondents were the purchasers. Respondents were put into possession of the properties.

Ma Paing sued respondents for a declaration that her interest in the properties is a one half share and for possession of that share.

The trial Court dismissed her suit.

She appealed to this Court and there was a reference to a Full Bench on questions whether the interests of a Burmese Buddhist husband and wife are partible while the marriage subsists; and whether a decree against a Burmese Buddhist husband can be executed against the whole of the property of the marriage or only against the husband's interest or supposed interest in that property.

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SHWE HPAW  
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OTHERS.

HEALD AND  
CHARI, JJ.

The Full Bench decided that the property of the marriage of a Burmese Buddhist husband and wife is not partible so long as the marriage subsists, and that where the husband manages the business of the family, a decree against the husband can be executed against the whole of the property of the marriage, including the wife's interest in such property (1).

We have now to apply those findings to the facts of the present case. It is clear that what was actually sold to the respondents was the husband's supposed interest in the property. Appellant's claim is that her interest, which was not sold, was one half and that she is entitled to partition of the property and possession of her half share. The Full Bench has held that the interests of a Burmese Buddhist husband and wife are impartible so long as the marriage subsists and therefore it is clear that appellant's suit in so far as it is a suit for partition must be dismissed.

Further, it would seem that during the subsistence of a Burmese Buddhist marriage the separate interests of the parties to the marriage in the property of the marriage are not only impartible but are also indeterminate and indeterminable, since they can be determined only on divorce or on the death of one party. The shares taken by the parties on divorce vary according as the divorce is by consent or as by consent or is a divorce for serious misconduct on the part of one of the parties, and the interest of either party, whether at death or divorce, is not an interest in any particular item of property, but is an interest in the estate as a whole, including liabilities as well as assets, so that if the liabilities equal or

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(1) Reported at p. 296, (1927) 5 Ran.

exceed the assets the interest may be nil or even a minus quantity.

The question seems to arise whether or not such an impartible and indeterminate interest, which is an interest not in particular properties but in an estate as it may exist on the happening of certain contingencies, which is not certain but varies according to certain contingencies, and which in certain cases may be valueless, is saleable property belonging to the judgment-debtor or over which or the profits of which he has a disposing power which he may exercise for his own benefit.

The present case shows the inconvenience of holding that such an interest is saleable, and I would hold that such an interest is not saleable property within the meaning of section 60 of the Code of Civil Procedure.

I have already said that appellant is in my opinion not entitled to partition and possession of her share of the properties in suit and she is certainly not entitled to the declaration, which she claims, that her interest in the properties is a one half share. But it seems clear that she has an interest in the properties, and I think that in spite of the fact that we cannot give her the particular declaration which she claims we have power to give her such a declaration as the facts of the case warrant. The difficulty is to decide on the form of the declaration to which she is entitled.

The position is that her husband's interest in the property, which interest I hold to be unsaleable, has been sold to respondents, and that appellant has been left with an interest which in my view is equally unsaleable. The sale of the husband's unsaleable interest to respondents was in my opinion no sale and I think that the only declaration to which

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appellant can be held to be entitled is a declaration to that effect. The result of such a declaration would be that the property as a whole, including the interests of both appellant and her husband Po Kaing would still be liable to attachment and sale in execution of the decrees against Po Kaing. But in view of the fact that the defect in the sales to respondents was due to appellant's unsustainable claim that her interest be excluded I think that we should not be justified in giving appellant a declaration that the sales were invalid without protecting the interests of the respondents by directing appellant to give security for the payment to respondents of any amount by which the prices realised on a resale may fall short of the amounts which they paid for the properties. It is of course unlikely that properties sold with a clear title will realise less than the same properties realised when sold with an interest reserved, but there is a possibility that they may realise less and I do not think that respondents should run any risk of loss.

I would therefore direct that on appellants giving a bond signed by herself and two sureties, to be approved by this Court on the report of the Bailiff of this Court or of the District Court of Toungoo, for the payment to the several respondents of any amount by which the price realised on the resale of any particular property may after payment of the expenses of the sale fall short of the price which may have been paid for that property by the respondent who bought it, appellant shall be entitled to a decree declaring the sales to respondents null and void.

The proceeds of the resale of each particular property, after payment of the expenses of the sale will be used in the first instance to pay to the respondent who bought that property the amount, if

any, which he paid for it. Such of the respondents as were decree-holders and were allowed to set-off the price against the amount of their decree will of course receive no payment on this account. The balance of the sale proceeds, after payment to such of the respondents as under this order are entitled to payment, will be available for satisfaction of the decrees.

In view of the fact that this litigation has arisen out of appellant's claim to the exclusion of her interest from the attachment and sale, appellant will pay the respondents' costs in all Courts in respect of this suit.

### ORIGINAL CIVIL.

*Before Mr. Justice Chari.*

MANJEEBHAI KHATAW & Co.

*v.*

JAMAL BROTHERS & Co., LTD.\*

1927

MA PAING

*v.*

MAUNG  
SHWE HPAN  
AND  
OTHERS.

HEALD AND  
CHARI, JJ.

1925

June 25.

*Companies Act (VII of 1913), s. 163 (1)—Creditor's demand "under his hand"—Whether demand by advocate of creditor sufficient—Whether statutory right can be exercised by means of an agent.*

In order to make out that a right conferred by statute is to be exercised personally and not by an agent, there must be something in the Act, either by way of express enactment or necessary implication which limits the common law right of any person who is *sui juris* to appoint an agent to act on his behalf. *Held*, that an advocate's notice of demand on behalf of a creditor does not satisfy the requirements of the Indian Companies Act, section 163 (1) and is not a demand "under his hand."

*Hyde v. Johnson*, 2 Bing. N.C. 776; *Jackson Co. v. Napier*, 35 Ch.D. 162; *Reg. v. Justices of Kent*, L.R. 8 Q.B. 305; *In re Whitley Partners Ltd.*, 32 Ch.D. 337; *Wilson v. Wallani*, 5 Ex.D. 155—referred to.

*N. M. Cowasjee*—for Petitioners.

*Keith*—for Respondents.

CHARI, J.—This is an application by Manjeebhai Khataw & Co. for an order to wind up Jamal