

1928
 ADAMJEE
 HAJEE
 DAWOOD &
 CO., LTD.
 v.
 THE
 SWEDISH
 MATCH
 COMPANY.
 RUTLEDGE,
 C. J.,
 AND
 BROWN, J.

Swedish matches, or to establish in the minds of the public such a necessary connection that "Star" mark meant "Swedish manufacture." In other words, we are of opinion that the plaintiffs have established sufficient user of "Three Star" and "J.W.T. Star" label as would justify us in restraining any other competitor in Burma from a colourable imitation of either of these marks, but they have not, in our opinion established a right to restrain all and sundry from using a design for matches in which any number of stars is a distinctive mark. As we have already indicated, we are of opinion that the defendants' label Exhibit E does not infringe any of the plaintiffs' labels.

That being so, the appeal must be allowed and the plaintiff-respondents' suit dismissed.

APPELLATE CIVIL.

Before Mr. Justice Brown.

MA PU

v.

MAUNG NGO AND OTHERS.*

Buddhist Law—Payin when converted to lettelpwa—Payin property constituting a squatter's right, whether subsequent grant of lease change in character

Where *payin* property formed a piece of land occupied as a squatter, held that a subsequent grant of lease during the second *coverture* converts the property into *lettelpwa*.

Ma Ba We v. Mi Sa U, 2 L.B.R. 174 ; *Maung Shwe Tha v. Ma Waing*, 11 L.B.R. 48—referred to.

Kale for the appellant.

Maung Ni for the respondents.

* Special Civil Second Appeal No. 386 of 1927.

BROWN, J.—The principal point of contention in this appeal is as to whether a certain house site was the *lettetpwa* property of the appellant, Ma Pu, and her deceased husband, Maung Po Myit, or whether it was the *payin* property of Maung Po Myit before he married Ma Pu.

The main facts of the case are not now in dispute. Maung Po Myit originally married one Ma Nyein Bin and the respondents to this appeal are the descendants of Po Myit by that marriage. Ma Nyein Bin died some 25 or 30 years ago. The land in suit is a small piece of village land. During her lifetime, Ma Nyein Bin lived on this land with Maung Po Myit and they had a house on the land. After Ma Nyein Bin's death, a fire took place in the village which burnt the house down. Before the occurrence of the fire, Po Myit had married the appellant Ma Pu. After the fire, on the 23rd of May 1905, Maung Po Myit obtained a lease of the land from Government and he was holding the land under that lease until his death.

The Trial Court held that on these facts the house site must be held to be the *lettetpwa* property of the second marriage. The house on the site was built during the second marriage and it is not disputed that that has rightly been treated as *lettetpwa* of that marriage.

The District Court on appeal held on the authority of *Maung Shwe Tha v. Ma Waing* (1), that although the lease was taken out by Po Myit during his coverture with Ma Pu, the property which he then obtained in the land was in fact the same as the property he had beforehand in the land although in another form and that therefore it must be treated as *payin* of the second marriage.

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The question for decision in *Maung Shwe Tha's* case had reference to partition of property on divorce. The question in the present case is as to the rival claims to inheritance of the children by the first marriage and the widow of the second marriage. In the case of *Ma Ba U v. Mi Sa U* (1), a husband had during the existence of a second marriage purchased property with money he had brought to the marriage. It was held that the presumption was that property which changed its character during the marriage had become *lettetpwa* of that marriage and the property which had been purchased was found to be the *lettetpwa* of the second marriage.

If that case be followed, then it would seem clear the property in the case must be treated as *lettetpwa* of the marriage with Ma Pu. The facts of this case can be distinguished from the facts in *Maung Shwe Tha's* case. In *Shwe Tha's* case Ma Waing inherited land jointly with her brother and purchased half of the land from her brother with money of her own which was her *payin* property. It was held that this was a mere change of form of her property and did not change its character. It is difficult however in this case to say that there was merely a change of form of the property in the house site. Prior to the issue of the lease, Po Myit was merely occupying the land as a squatter and although he had the right to retain possession against anyone other than the real owner, *i.e.*, Government, he had no title to the land and was liable to eviction by Government at any time. On his acquiring the lease, his legal position was entirely changed. Provided he complied with the conditions of the lease, he had a complete title to the land during its subsistence and was not liable to eviction by Government or

(1) 2 L.B.R. 174.

by anyone else. It is probable that the lease was given to him partly at any rate because he had been on the land before, but in obtaining the lease, he did far more than merely change the form of his property. In place of the insecure position of a mere squatter, he obtained the legal rights of a lessee and although he presumably obtained this lease in part on account of his previous possession, he had no legal claim to the lease on account of that previous possession and it is impossible to say now that that was the only consideration which led the Deputy Commissioner to grant the lease to him. He obtained the lease whilst married to Ma Pu and I think it must be presumed in the circumstances that the lease was obtained by their joint skill and industry. In my opinion therefore the rights subsisting in the land at the time of Po Myit's death must be held to have been the *lettelpwa* property of the marriage of Po Myit and Ma Pu. The children by the former marriage were therefore entitled to one-eighth only of the site and not three-fourths as granted by the District Court.

The only other question raised in this appeal is as to costs. The decree of the Trial Court was apparently not in accordance with its judgment. A fresh decree will now have to be drawn up and this can therefore be rectified.

I set aside the decree of the District Court and restore the decree of the Trial Court directing that the defendant-appellant Ma Pu deliver one-eighth of the house site or Rs. 62-8-0 to the plaintiff-respondents and the value of one-eighth of the house Rs. 50. In the circumstances, the plaintiffs having been only partially successful in the Trial Court, the parties in that Court will each bear their own costs, but as the decree of the Trial Court has now been in

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substance restored, the costs of the defendant-appellant in this Court and in the District Court will be borne by the plaintiffs-respondents.

APPELLATE CIVIL.

Before Mr. Justice Pratt

1928
 Jan. 31.

MAUNG CHIT SU

v.

MAUNG SAN GYAW.*

Small cause nature, suit of a—Addition of a claim for declaration—Declaration when essential—Money paid to compound a non-compoundable case whether recoverable.

Held, that a suit for a declaration that an award was void and for the return of money paid under the award is not a suit of a small cause nature.

Held, further, that a voluntary payment made to compound a non-compoundable case is not recoverable by suit.

Amjademessa Bibi v. Rahim Buksh Sikdar, 42 Cal. 286 ; *Ramachendraiyyar v. Noorulla Sahib*, 30 Mad. 101—*referred to*.

Sanyal for the appellant.

Day for the respondent.

PRATT, J.—Plaintiff Maung Chit Su sued for a declaration that an award made by arbitrators for repayment of Rs. 150 was void, and for recovery of that sum paid by him to compound the criminal proceedings against his son together with Rs. 12-8 being costs incurred in the previous suit to enforce the award, which was withdrawn.

The trial Court granted plaintiff a decree.

On appeal the District Court held that the money was paid under an illegal and void contract to

* Civil Second Appeal No. 131 of 1927 of Mandalay.