

# THE INDIAN LAW REPORTS

*Rangoon Series.*

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## APPELLATE CIVIL.

*Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Carr.*

MA KIN

*v.*

MAUNG PO SEIN AND THREE.\*

1927

Aug. 8.

*Buddhist Law—Partition on divorce through desertion—Share of a wife of polygamous husband.*

*Held*, that since essentially the case of a divorce by desertion is a divorce at the instance of one party against the wish of the other, the deserting party must forfeit all his or her interest in the property of the marriage.

*Held, also*, that on the dissolution of a marriage through the desertion by the polygamous husband of one of his two wives, the deserted wife will be entitled to a half of the *lettetpwa* of the marriage.

*Semble* :—In the property acquired virtually by the husband alone (and being other than inherited *lettetpwa*) during the subsistence of the marriage, the principle of *nissayit* and *nissit* does not apply.

*C.T.P.V. Chetty Firm v. Maung Tha Hlaing*, 3 Ran. 322 ; *Ma Shwe Ma v. Mi Me*, (1910-13) U.B.R. 114 , *Ma Thein Yin v. Maung Tha Dun*, 2 Ran. 64 ; *Ma U Byu v. Ma Hmyin*, (1897-01) II U.B.R. 160 ; *Maung Po Nyun v. Ma Saw Tin*, 3 Ran. 160—*referred to*.

*Paw Tun* for the appellant.

*Po Han* and *Halkar* for the respondents.

The appellant Ma Kin claimed divorce and partition from the 1st respondent, who had two wives, Ma Kin and Ma The Hmon. Ma Kin claimed

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\* Civil First Appeal No. 275 of 1926.

[This case was decided previous to the receipt of the judgment of the Privy Council in *Maung Po Nyun v. Ma Saw Tin*, 5 Ran. 841.—*Ed.*]

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that as the dissolution of the marriage was due to the husband's desertion, the husband forfeited his entire interest in the property of the marriage. The trial Court dismissed her suit on the ground that she was only an inferior wife. On appeal, the Division Bench of the Court held on the facts that she had attained the status of a superior wife and that she was entitled to claim partition on divorce as by desertion on the part of the husband. The learned Judges then proceeded to consider the law relating to the shares taken by the claimant, the other wife and the husband on such divorce, the relevant portion of the judgment being reported below.

RUTLEDGE, C.J., and CARR, J.—It is claimed for the respondents that in case of divorce for desertion the property must be divided in the same manner as on a divorce by mutual consent when neither party is in fault. This is based on the extracts in section 312 of the Kinwun Mingyi's Digest, which do not make provision for partition, except in the case in which the deserted party remarries before the expiry of the prescribed period. We are not prepared to accept this argument. In the case of a divorce at the instance of one party, against the wish of the other, dealt with in section 255 of the Digest, it is provided that the party wishing to divorce must relinquish all the property. Essentially the case of a divorce by desertion is the same. The divorce follows upon the act of the deserting party, which is a form of expression of the wish to separate. In the absence of an express provision to the contrary we think that the same rule should be followed in the two cases. In this respect we accept the decision in *Maung Po Nyun v. Ma Saw Tin* (1) as correct.

On the question of the interests of the husband and the wives in the joint property there is a conflict between that case and the Full Bench decision in *C.T.P.V. Chetty Firm v. Maung Tha Hlaing* (1). This case was decided a few weeks after *Po Nyun's*, which was not brought to the notice of the Full Bench and so was not considered. There is admittedly no express rule in the *Dhammathats*. In *Maung Po Nyun's* case the learned Judges considered it equitable that the husband and each of the two wives should have an equal interest in the joint property when neither wife could be said to have contributed to its acquisition more than the other. In the present case it would seem that Ma The Hmon did not contribute to the acquisition of the Rangoon house. Indeed in all probability this was in fact bought out of *Po Sin's* property acquired before either of the marriages now in question. And Ma Kin certainly did not contribute directly to the acquisition of the *Thilwa* property.

But we are not satisfied that contribution to the acquisition of the property is necessary to give the wife an interest. In the case of the property inherited by the husband during the marriage the relation of *nissaya* and *nissita* arises and the husband admittedly has the larger interest. It has been suggested that this relation arises also when the property is acquired virtually by the husband alone, but we are not aware of any decision to this effect. And certainly it could not be held that in such a case the wife had no interest in such property. At the least she would take one-third interest and we are not satisfied that there was sufficient authority even in such a case for holding her interest to be less

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than the usual one-half. In the cases of *Ma U Byu v. Ma Hmyin* (1) and *Ma Shwe Ma v. Mi Me* (2), it was held that on the death of the husband two wives both of full equal status were entitled to share the inheritance equally. And in *Ma Thein Yin v. Maung Tha Dun* (3), May Oung, J., said on page 64, speaking of wives of equal status "such wives whether they live together with the husband or not, inherit on an equal footing." And if these decisions are correct it seems to follow that during the lifetime of the husband the interests of two such wives are equal, whether it can or it cannot be said that one of them has contributed more than the other to the acquisition of the property.

The conflict between the two cases above-mentioned is that in *Po Nyuns'* case (4), the Bench gave each wife individually a share as if she had been the sole wife. In the case of property acquired during both marriages, which is the one before us now, the application of this principle would give a one-third interest each to the husband and the two wives. In *C.T.P.V. Chetty Firm* (5) the Full Bench adopted a different principle, giving the two wives collectively the share that a sole wife would have had. On this principle applied to the present case Po Sin's interest would be one-half and that of each of the two wives one-quarter.

There is no authority on the subject in the *Dhammathats* nor any earlier reported decision. The question, therefore, is which of the two methods is the more equitable and the answer depends very much on the way in which the question is looked at. The Full Bench decision is, however, binding on us unless

(1) (1897-01) 11 U.B.R. 160. (2) (1909) U.B.R. (1910-13) 114.

(3) (1924) 2 Ran. 64. (4) (1925) 3 Ran. 160.

(5) (1925) 3 Ran. 322.

we are of opinion that it is wrong and that the question should be reconsidered by a Full Bench. We are not of opinion that the principle adopted in this case is wrong and therefore we accept it.

We hold therefore, that the interest of Ma Kin in the property in suit is one-quarter and that of Po Sin one-half.

The next question is whether on our preceding findings Ma Kin is entitled to the whole of Po Sin's interest as well as her own. In *Po Nyun's* case (1) the learned judges held that the wife claiming partition was so entitled. The decision was in a sense *obiter*, because the claim made was for much less than on this decision the claimant would have been entitled to.

We do not agree with that decision, which we considered most unjust to the other wife. We regard each wife as being jointly with the husband the owner of one-half of the property and as having at least a contingent interest in the husband's interest in that half. On the death of the husband each wife would, under this principle, take the whole of the half of the property in which he had an interest during his lifetime. In other words the two wives would divide the estate equally between them, and this is in fact the actual rule in such a case. If the whole of the husband's interest in the whole estate is now to be forfeited to the divorcing wife the other wife necessarily loses her prospective right of inheritance. And her possession will be materially worsened even during the lifetime of the husband, for what remains of the estate, that is, the amount of her existing interest in it, will at once become the joint estate of herself and the husband. In our opinion the divorcing wife should not be given more than she would obtain on the death of the husband.

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In our view, therefore, Ma Kin is entitled to her own existing interest in the estate—that is one-quarter—and also to one-half of Po Sin's existing half interest—that is one-quarter—or in all to one-half of the estate.

## APPELLATE CRIMINAL.

Before Mr. Justice Mya Bu and Mr. Justice Brown.

1927

Sep. 2.

### HTIN GYAW AND SEVEN

71.

### KING-EMPEROR.\*

*Criminal Procedure Code (V of 1898), s. 221—Charge in a conspiracy trial—Specific acts of the conspirators whether to be mentioned—Evidence Act (I of 1872), ss. 8, 10 and 11—Previous acts of enmity towards a certain person admissible in a charge for conspiracy against that person.*

*Held*, that a charge for an offence under section 120A (1) of the Indian Penal Code of having agreed to do or cause to be done a series of illegal acts need not set out in all its details the specific acts which the conspirators are alleged to have agreed to do or to cause to be done.

Where the accused was charged with having entered into a conspiracy to bring false evidence against a certain person, his previous acts of having instituted unfounded prosecutions against that person are admissible in evidence.

*Makin v. The Attorney-General for New South Wales*, L.R.A.C. [1894] 57; *Reg v. Flannigan*, 15 Cox C.C. 403; *The King v. John Bond*, 2 K.B.D. [1906] 389; *Thompson v. The King*, L.R.A.C. [1918] 221—*referred to*.

*Daniel O'Connell v. Reg.* 80 Eng. Rep. 155; *Reg v. Parbludas Ambaram* 2 Bom. H.C.R. 90—*distinguished*.

*Keith and Paget* for the appellants.

*Gaunt* (Assistant Government Advocate) for the Crown.

MYA BU and BROWN, JJ.—Htin Gyaw, appellant in this case, and Po Thaung, Po Myit, Tun Sein, San Pe, Ma Hte and Ma Thet Yon, appellants in Criminal Appeal No. 838 have appealed against their convictions under

\* Criminal Appeals Nos. 838 and 839 of 1927 against the order of the Special Magistrate of Insein in Criminal Regular No. 2 of 1927.