

1929

SULAIMAN

v.

TAN HWI

YA.

HEALD,
OFFG. C.J.

that appellant would be relieved of liability under his separate agreement to pay the debt, since that agreement was not void under section 23 of the Contract Act. There was certainly a debt due by Thein Maung and his wife to respondent, and I see no reason why appellant should be relieved from the liability, which he undertook, to pay so much of that debt as was covered by the bond.

I would therefore hold that the personal decree against appellant was properly given and I would dismiss his appeal with costs.

CHARI, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Chari.

1929

Aug. 28,

DAW YWET

v.

KO THA HTUT.*

Partnership Debt—Surviving partner's right to sue without joining legal representative of deceased partner—Contract Act (IX of 1872) s. 45—Buddhist couple, analogous position to that of partnership—Buddhist widow's right to sue without obtaining Letters of Administration.

Notwithstanding the provisions of s. 45 of the Indian Contract Act, the surviving partner can file a suit in respect of a debt due to the partnership without joining the legal representatives of the deceased partner.

K.V.P.L. Perianen Chetty v. Armuga Pather, 4 L.B.R. 99—*referred to.*

U Guna v. U Kyaw Gaung, 2 U.B.R. (1892-96) 204—*dissented from.*

The position of a Buddhist couple being analogous to that of a partnership, a Burmese Buddhist wife can maintain a suit in respect of a partnership asset in her capacity as surviving partner without any reference to her succession to the interest of her deceased husband in the asset or debt due to them jointly. It is therefore not necessary for her to get a succession certificate or Letters of Administration in respect of such asset or debt.

Ma Paing v. Maung Shwe Hpaaw, 5 Ran. 296—*referred to.*

* Civil Revision No. 231 of 1929 from the judgment of the Small Cause Court of Rangoon in Civil Regular No. 3471 of 1929.

Dangali for the applicant.

CHARI, J.—The plaintiff in the suit in the Small Cause Court is the survivor of a Buddhist couple. She claimed to recover a debt due to her deceased husband in which she presumably had a half interest as the wife.

The defendant objected to the suit on the ground that the plaintiff could not file a suit without first obtaining Letters of Administration or a Succession Certificate.

The learned Judge of the Small Cause Court held that he was bound by the previous practice, which was to insist upon the production of a Succession Certificate or Letters of Administration by a Burmese Buddhist wife or husband when a suit was filed in respect of a debt jointly due to them.

In some of the old rulings of the late Chief Court of Lower Burma and of the Judicial Commissioner's Court of Upper Burma it was assumed that one of a Buddhist couple got the whole estate not by survivorship but by succession so far as one half of the estate was concerned and therefore it was necessary for him or her to get a Succession Certificate or Letters of Administration in respect of the debt.

The position of a Buddhist couple as regards their proprietary rights has been considered in the Full Bench case of *Ma Paing v. Maung Shwe Hpaw and eight others* (1). In that case it was held that their position was analogous to that of a partnership, and that all the incidents of a partnership which were not obviously inapplicable to them because their relationship was not a contractual one but a result of status, might be applied in consideration of their rights, proprietary or otherwise. If this is so, it

1929

DAW YWET

 ၃
 RO THA
 HTUT.

CHARI, J.

1929
 DAW YWET
 ၁.
 KO THA
 HTUT.
 CHARI, J.

follows that standing in the position of a surviving partner, the widow could maintain a suit in respect of an asset of the partnership, irrespective of the question whether the share of the deceased partner belonged to the surviving partner or some body else. In these cases what the law recognizes is the right of the surviving partner to realize the assets of the partnership. Order XXX, Rule 4, of the Code of Civil Procedure, makes this clear, but even before this provision of law it had been held by the late Chief Court of Lower Burma that a partner could maintain a suit in his or her own name in respect of a partnership asset without joining the legal representatives of the deceased partner in the suit. *K.V.P.L. Perianen Chetty v. Armuga Pather* (1). In that case Sir Charles Fox dissented from the Calcutta ruling, which took a contrary view, and agreed with the rulings of Madras and Bombay. This position is made clear in an Upper Burma Case, *U Guna v. U Kyaw Gaung* (2). The Judicial Commissioner of Upper Burma there recognized the position that the union of a husband and wife among Burman Buddhists should be treated as a partnership but held that because of the provisions of section 45 of the Indian Contract Act the wife could not sue in her personal capacity alone and must, therefore, obtain a Succession Certificate in respect of the share of the other partner. But a different view of the applicability of section 45 of the Indian Contract Act was taken in lower Burma in the case I have cited above where it was held that notwithstanding the provisions of section 45 of the Indian Contract Act, the surviving partner could file a suit in respect of a debt

(1) (1907-08) 4 L.B.R. 99.

(2) (1892-96) U.B.R. (Buddhist Law, Marriage) 204.

due to the partnership without joining the legal representatives of the deceased partner.

It, therefore, follows that a Buddhist wife can maintain a suit in respect of a partnership asset in her capacity as surviving partner without any reference to her succession to the interest of her husband in the asset or debt due to them jointly.

As this is the sole point on which the learned Judge of the Small Cause Court dismissed the case I set aside his decree and remand the case for disposal on the merits.

1929
DAW YWET
7.
KO THA
HTUT.
CHARI, J.

APPELLATE CIVIL.

Before Mr. Justice Brown.

MAUNG TIN

7.

KYINNAHON.*

1929
Aug. 30.

Suit of a Small Cause nature—Trial by Township Judge as such, though invested with powers of a Small Cause Court—character of suit not altered by the mistake—no appeal to District Court.

Where the same judge presides over a Small Cause Court and a Township Court and tries by mistake as Judge of the Township Court a case of a Small Cause nature, the mistake does not alter the character of the suit and no appeal lies from the decree to the District Court.

Nga Shwe Tha v. Nga Po, 2 U.B.R. (1907-09) Small Cause, 1—referred to.

Gutha for the applicant.

Hock for the respondent.

BROWN, J.—The respondent brought a suit against the petitioner for recovery of Rs. 181-6, the value of damage which he alleged was caused to his paddy by the petitioner. The trial Court held that it had

* Civil Revision No. 65 of 1929 from the judgment of the District Court of Tharrawaddy in Civil Appeal No. 120 of 1928.