APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Otter.

MA THEIN NWE
v.
MAUNG KHA.*

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Apl. 2.

Buddhist law—Divorce—Husband's adultery—Wife cannot obtain divorce solely on ground of adultery—Suit for restitution of conjugal rights—Misconduct of the party suing.

Mere adultery on the part of the husband does not by itself entitle a wife to a divorce according to Burmese Buddhist law.

A suit for restitution of conjugal rights lies under Burmese Buddhist law. But a husband will not obtain such restitution on account of his misconduct.

Ma Ein v. *Te Naung*, 5 L.B.R. 87 ; *Maung Sein* v. *Kin Thet Gyi*, (1904-06) U.B.R. Vol. 2 (Marriage 5) ; *Nga Chit Dat* v. *Mi Kin Pu*, (1907-09) U.B.R. Vol. 2 (Buddhist Law, Marriage) 1—*referred to.*

Kyaw Din for the appellant.

Thein Maung for the respondent.

HEALD, J.—In Suit No. 13A of 1927 of the District Court of Tharrawaddy appellant sued respondent for divorce as by mutual consent on the ground of respondent's repeated acts of adultery, and she also claimed partition of the property of the marriage.

In Suit No. 16A of the same Court, respondent sued appellant for restitution of conjugal rights and it was agreed between the parties that the evidence recorded in the earlier suit should be evidence in the later suit, and that the plaint in the earlier suit should be regarded as a written statement in the later suit.

* Civil First Appeal No. 175 of 1928 from the judgment of the District Court of Tharrawaddy in Civil Regular No. 13A of 1927.

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The suits were therefore in effect heard together and the judgment in the later suit followed the judgment in the earlier suit.

Both suits were dismissed, the Court holding that mere adultery on the part of the husband does not entitle the wife to divorce, and that in the circumstances of the case respondent was not entitled to claim restitution of conjugal rights.

Appellant appeals against the dismissal of her suit for divorce, and respondent, instead of appealing against the dismissal of his suit for restitution, has taken the mistaken course of filing a cross-objection to appellant's appeal.

Appellant's sole ground of appeal at the hearing in this Court was that according to the Burmese Buddhist law laid down in the *Dhammathats* adultery by the husband is by itself sufficient to entitle the wife to divorce.

The learned advocate's argument is more ingenious than convincing, and can hardly be taken seriously. He says that because one *Dhammathat* says that a wife may abuse a husband who commits adultery and another *Dhammathat* says that a husband may divorce a wife who abuses him, the *Dhammathats* must be taken as regarding adultery by the husband as a sufficient ground for divorce.

The actual passages in the *Dhammathats* on which he bases this argument are a passage in *Maungye* (XII, 46) which says, "No blame attaches to a wife who uses abusive language towards a husband who does not consort with her but consorts with prostitutes and continues to frequent their company in spite of her protests," and a verse from a metrical *Dhammathat* know as "Myingun" cited in section 302 of the Kinwun Mingyi's Digest (Vol. II) which says that a husband may leave a wife whose

language is unrestrained, who is excessively coarse and disgusting, who has a hard and bitter tongue who sulks and has a violent temper and whom he does not want, and that in these circumstances he may live with the wife of his desire.

It is hardly necessary to say that even if these two passages are read together, and there is no reason why they should be, they do not go far towards establishing the proposition that the husband's adultery by itself is a ground for divorce in a suit brought by the wife.

The learned advocate has however referred us also to two passages from the *Dhammathats* which are cited in section 230 of the Digest. The first of these is an extract from *Kaingsa* which runs as follows: "If a wife say to her husband you have violated another man's house and belongings, you are suffering from a loathsome disease, I do not want to live together with you, she shall not be blamed." The second is a passage from *Dhamma* which says that a wife may discard a husband who is a drunkard and a gambler and who seduces other men's wives, if he continues in his misconduct in spite of having promised the wisemen three times in writing to give up his evil ways.

He has referred us further to a passage in *Dhammathatkyaw* cited in section 256 of the Digest which says that if the wife is guilty of adultery, she is to have her head shaved in four patches and to be sold into slavery, and that if the husband keeps a paramour he is to leave the house with only the clothes he is wearing.

The last of these passages is the only one which goes any way towards supporting appellant's argument that a wife may divorce a husband for mere adultery, and it can hardly be contended that the

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Courts are bound to enforce that law at the present day.

As a matter of fact the distinction between wife and husband in the matter of adultery as a ground for divorce is clearly shown in the passage from *Manugye* (V, 24) which is reproduced in section 302 of the Digest immediately after the verse from *Myingun* mentioned above. That passage says that where one party to a marriage behaves like an animal it shall be no defence to a suit for divorce brought by the other party for the husband, if the suit is brought by the wife, to say that he has not been guilty of cruelty and has not taken a lesser wife, or for the wife if the suit has been brought by the husband, to say that she has not taken a paramour. This passage supports the view that the ordinary grounds for divorce are cruelty and adultery on the part of the husband and adultery on the part of the wife.

That is the view of the law which has hitherto been taken by the Courts, *vide* the case of *Ma Ein* v. *Te Naung* (1), and we are not convinced by the reasoning of the appellant's learned advocate or by the passages in the *Dhammathats* which he has cited that we ought to hold that mere adultery on the part of the husband is by itself a sufficient ground for divorce.

It follows that, since appellant bases her case merely on adultery, her appeal should be dismissed.

As for respondent's cross-objection, it clearly does not arise in respect of appellant's suit and appeal, but supposing that it could be regarded as an appeal against the decree in respondent's suit, all that need be said about it is that in view of respondent's misconduct, which I would hold proved, the case

(1) (1909) 5 L.B.R. 87.

is not one in which restitution of conjugal rights ought to be ordered.

The cross-objection should in my opinion be dismissed.

In the circumstances, each party should bear its own costs in this Court.

OTTER, J.—This is an appeal against a judgment of the District Court of Tharrawaddy refusing to grant a decree for divorce at the instance of the appellant. The suit was heard together with a cross suit in which the respondent asked for a decree for restitution of conjugal rights. He was refused a this decree. He now files a cross-objection to the appeal of the appellant asking that the decree of the lower Court should be modified by granting him restitution of conjugal rights.

The only ground relied on by the appellant in her appeal is that the respondent was guilty of adultery. No allegation of cruelty was put forward and there is no suggestion that the respondent took to himself a second wife. The parties are Burmese Buddhists. The first question therefore is whether, according to the Burmese Buddhist law, a divorce can be granted to a wife against her husband upon the sole ground of adultery.

Mr. Kyaw Din who appeared for the appellant referred us to a large number of extracts from the *Dhammathat*s, and I would say at once that with the possible exception of an extract from the *Kaingza* appearing in section 230 of U Gaung's Digest of the Burmese Buddhist law, all the passages referred to appear to us to point to a conclusion contrary to that contended for by him. It is necessary to point out that the *Dhammathat*s can only be regarded as

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directory and not as statements of the law which are necessarily binding in law. Moreover there is authority, which in my view shows that it is not and never has been the law, that a Burmese Buddhist woman can divorce her husband on the sole ground that he has had sexual intercourse with a woman not his wife.

The extract from the *Kaingza* appearing in section 230 of the Digest, to which I have referred, says that the wife has the right of refusing to cohabit with her husband who is adulterous, or is suffering from some repugnant disease. In my view this expression of opinion, though perhaps then in accordance with the usages of Burmese Buddhists, does not amount to a statement that under such circumstances a divorce, even by mutual consent could be obtained.

Turning to the decided cases upon the point the case of *Ma Ein* v. *Te Naung* (1), (decided by a Bench of the late Chief Court) lays down that in the case of Burman Buddhist married couple, adultery on the part of the husband does not alone, or even accompanied by a single act of cruelty, entitle the wife to a divorce. In that case the Court expressed the opinion that it appears from the *Dhammathats* that adultery on the part of the husband does not alone, or even accompanied by a single act of cruelty, entitle the wife to a divorce. A wife is, however, entitled to a divorce as by mutual consent, if her husband takes a lesser wife without her approval. This was decided after examination of a mass of conflicting authorities by a Full Bench of the late Chief Court in the well known case of *In re Maung Hme* v. *Ma Sein* (2). But the act of adultery, quite apart from that of taking another woman to wife, is

(1) (1909) 5 L.B.R. 87 (2) (1918) 9 L.B.R. 191.

different, and on this point no authority was cited in support of the appellant's contention.

Thus the proposition that adultery alone does not entitle a wife to divorce her husband has been established and there is no case were the correctness of this view has since been questioned.

Upon this part of the case I need mention one further point only. There was some evidence that adultery took place during the temporary absence of the appellant in a house where they had been living together, and some suggestion was put forward that such adultery under these circumstances might amount to legal cruelty. No authority was put forward in support of this view, and moreover so far as we know there is nothing even in the *Dhamma-thats* which supports this view.

It seems to me, therefore, that the appellant cannot in law succeed in this appeal. It is unnecessary, therefore, to examine the facts upon which she relies.

The only remaining question is whether the learned District Judge was right in refusing to the respondent an order for restitution of conjugal rights. For many years doubts had existed as to whether such a suit would lie under the Burmese Buddhist law. In 1907, however, the question was decided in the affirmative. See the Upper Burma case of *Nga Chit Dat* v. *Mi Kin Pu* (1). In all such cases, however, the party seeking a decree must be free from blame. See as to this the case of *Maung Sein* v. *Kin Thet Gyi* (2). In the present case there was abundant evidence to justify the lower Court in coming to the conclusion, as apparently it did, that the respondent misconducted himself on several

(1) (1907-09) II Upper Burma Rulings, page 1, Buddhist Law, Marriage.
(2) (1904-06) II Upper Burma Rulings, page 5, Buddhist Law, Marriage.

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occasions with Ma Saw Mya. Comment was made that the evidence called for the appellant upon this matter ought not to be relied upon owing to the low station in life, or relationship to the appellant, of certain of the witnesses. Such comment is, of course, permissible, but I have read the evidence and see no reason to disagree with the view taken by the District Judge who heard these witnesses give their evidence.

The learned District Judge also pointed out that the respondent was at fault in that he left the appellant after a heated quarrel with his wife. There seems to have been repeated quarrels between them. A serious quarrel occurred some three months or so before the final rupture. On this occasion the respondent left the house taking with him some, at any rate, of the family furniture, and an apparently false charge of infidelity was made by the respondent against his wife. I have little doubt that a contributory cause of the quarrels between the parties was the tendency on the part of the respondent to excessive drinking. The respondent finally left his wife saying he would obtain a divorce, and some preparation was made to have a deed drawn up. While a discussion about this was going on, the two brothers of the respondent arrived, and after a conversation between them and the respondent the two brothers violently abused the appellant. It was said on his behalf that the final quarrel was entirely due to resentment by the appellant on account of this abuse. It seems impossible to hold that this was so. It is true that in a letter (Exhibit 3) written by the appellant to the respondent after the separation there are many statements which show her resentment at the conduct of the appellant's family. It is equally clear, however, that the respondent was in the habit of abusing the appellant to members of his family,

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and there can be no doubt that they took his part against her.

It is unnecessary for us to deal more in detail with the evidence, for I agree with the conclusion arrived at by the learned District Judge. From the whole of the evidence it is plain that the respondent has treated the appellant extremely badly and he is not a man whom the Court will assist by ordering his wife to return.

The appeal and the cross-objection thereto must, therefore, be dismissed. Neither party is successful, and we, therefore, order that each party will bear their own costs of this appeal and the order of the lower Court as to costs will stand.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Otter.

1929

Apl. 2.

MAUNG MYA TIN
v.
MAUNG PAIK SAN.*

Buddhist Law—Inheritance—Step-children, rights of in step-parent's estate—Partition on parent's death, whether a bar—Difference between partition on death of parents and remarriage of step-parents.

Held, that stepchildren or step-grandchildren who have made a partition with the step-parent or grandparent on the death of their parent or grandparent are not by such partition debarred from being heirs of the step-parent or the step-grandparent.

Held, further, that whilst the partition on remarriage of the parent may bar the child from subsequent claim against the step-parent to a share of inheritance in the deceased parent's estate, it does not necessarily operate as a bar to a claim as heir of the step-parent on the step-parent's subsequent death.

Ma Gun Bon v. *Maung Po Kywe*, (1897-1901) U.B.R. Vol. 2, 66 ; *Maung Dwe* v. *Khoo Haung Shein*, 3 Ran. 29 (P.C.)—*referred to.*

Po Saw v. *Ma Gyi*, C. 1st A. 106 of 1925, H.C. Ran.—*followed.*

Ma Thaung v. *Ma Than*, 5 Ran. 175 (P.C.)—*distinguished.*

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* Civil Miscellaneous Appeal 113 of 1928 from the judgment of the District Court of Yamèthin in Civil Regular No. 1A of 1928.