FULL BENCH (CIVIL).

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, Mr. Justice Heald, Mr. Justice Maung Ba, Mr. Justice Mya Bu and Mr. Justice Brown.

1929

April 8.

U PO U AND ANOTHER
v.
MA TOK GYI.*

Buddhist Law—Gift of joint property by husband alone—Effect of such gift if made without the consent of the wife.

Held, that a deed of gift executed by a Burmese Buddhist husband without his wife's consent of part of the joint property of the marriage is wholly void and conveys no title to the donee in respect of the property which it purports to convey.

Ma Paing v. *Maung Shwe Hpaw*, 5 Ran. 296, 478—*followed.*

Ma Shwe U v. *Ma Kyu*, 3 L.B.R. 66—*dissented from.*

Manukye, VIII, 3—*referred to.*

Ganguli for the appellants.

Thein Maung for the respondent.

In Civil First Appeal No. 13 of 1928, a Division Bench of the High Court sitting at Mandalay entertaining doubts on the correctness of the ruling in *Ma Paing* v. *Maung Shwe Phaw* reported at 5 Ran. 478, made a reference to the Full Bench in the following terms.

PRATT, J.—Plaintiff Ma Tok Gyi sued her husband U Po O, *Myothugyi* of Mônywa, and Ma Ngwe Shin for cancellation of two deeds of gift of landed property by the 1st defendant in favour of the 2nd, and was granted a decree.

The defence was that there had been a divorce between plaintiff and 1st defendant, that the suit

* Civil Reference No. 1 of 1929 arising out of Civil First Appeal No. 13 of 1928 (at Mandalay) from the judgment of the District Court, Lower Chindwin in Civil Regular No. 1 of 1928.

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was not maintainable in its present form and should have been for partition.

The District Court held that there had been no divorce.

It is perfectly clear that there was no formal divorce, and having regard to the social position of the parties it is obvious that a divorce would have been effected with some formality in the presence of witnesses. We are also satisfied that there has been no desertion which would operate automatically as a divorce.

It is true that 1st defendant entered into an intrigue with the 2nd and ended by living with her in a separate house some twelve years ago ; but it is admitted by him that the income of the joint property was shared by him with plaintiff and the revenue on the land paid by each in turn in alternate years.

Defendant used to visit his wife's house each year on the occasion of the annual pagoda festival and stay there some four days. He kept his gun, his official *dah*, and his appointment orders in his wife's house.

The fact that his wife did not speak to him from the time he left her house to live with 2nd defendant only means that she was incensed with him. It cannot constitute desertion by the husband. It is also admitted that she occasionally sent him food and it is clear that they must have communicated, if not by word of mouth, through a 3rd person or otherwise.

In the written statement there is no mention of desertion but 1st defendant alleged a divorce by mutual consent twelve years or so ago.

The conditions laid down in *Ma Nyun and Ma Saw Aye* v. *Maung San Thein and U Shwe So* (1), as

(1) (1927) 5 Ran. 537.

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requisite for a divorce by desertion and lapse of time have obviously not been fulfilled.

The property covered by the deed of gift is joint and the interest of the 1st defendant therein is not determinate.

It is contended, however, on behalf of the defendant-appellants that the deeds are valid at least to the extent of the first defendant's interest in the property covered thereby and should not be set aside. Reliance is placed upon the Full Bench ruling of the Lower Burma Chief Court in *Ma Shwe U* v. *Ma Kyu* (1) which lays down categorically that a sale by a Burmese Buddhist of the *hmapason* property of himself and his wife made without her consent constitutes a valid transfer of his share and interest in the property sold.

If this ruling remains sound law then it is good authority for the proposition that a gift of joint property would be valid to the extent of the donor's interest.

"In the Privy Council case of *Ma Thaung* v. *Ma Than* (2), it was observed (at page 178) that in the Burmese social and legal system the wife is, to all intents and purposes a partner.

"In *Ma Paing* v. *Maung Shwe Paw* (3), a Full Bench of this Court, the doctrine of partnership as extended to a Burmese husband and wife was definitely formulated. It was held that husband and wife are partners and all the property of the marriage whether *payin* or *letletpwa*, is partnership property. It was further held that when the interest of a Burmese Buddhist husband in property which was either *payin* brought by him to the marriage or was jointly acquired *letletpwa*, is during the subsisten

(1) (1905) 3 L.B.R. 66. (2) (1927) 5 Ran. 175.
(3) (1927) 5 Ran. 296.

of the marriage sold in execution of a decree for a debt incurred by him in a business carried on by him while he was living with his wife, the buyer of that interest does not acquire the right to have the property partitioned and to obtain possession of part of the property as representing the husband's interest in it.

"It was held also that there is a presumption that a suit brought against either of the partners is a suit against the partnership, and that in such a suit a partner, who is not joined as a party is represented by the partner who is joined as a party, and a decree against either partner can ordinarily be executed against any partnership property, provided the decree was obtained against that spouse as representing the partnership.

"The ruling in *Ma Shwe U* v. *Ma Kyu* (1) was not expressly dissented from.

"If the position remained where it was left by the Full Bench ruling, there would be no difficulty in holding that the gifts are good to the extent of the donor's interest in the property, subject to the reservation that the donee could not claim partition, or possession during the subsistence of the marriage between U Po U and Ma Tok Gyi. It is common ground that the property covered by the gift was joint being partly acquired by inheritance and partly by joint effort of the partners.

"Although the parties to a marriage are partners it is obvious that the partnership is not an ordinary one and that the law of partnership can only be applied with limitations.

"Under partnership law an assignment by a partner of his share without the consent of the other partners

(1) (1905) 3 L.B.R. 66.

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is not wholly in-operative. It entitled the assignee to receive the share of profits to which the assigning partner would otherwise be entitled, and, in case of dissolution of partnership, the share of the partnership assets to which the assigning partner is entitled. (Lindley on Partnership, VIII edition, pp. 423—8.) A partner in a mine, which is regarded as real property, is at liberty to dispose of his interest without reference to his co-owners. In the present instance therefore the donee whilst having no claim against the wife during the subsistence of the marriage with respect to the partnership property might conceivably be entitled to claim the income of his interest in the property from the donee."

In *Ma Paing* v. *Maung Shwe Hpaw* (1), however, in applying the Full Bench ruling on the reference the Bench held that the sale of the husband's interest in the joint property was void and set it aside.

It seems to me the correctness of this conclusion is open to grave doubt, but, if it is correct, it would seem to follow that a gift of joint property by a husband or wife without the other's consent would be void as held by the District Court. I consider the point is one which should be determined by a Full Bench.

I would therefore refer to a Full Bench the question whether a deed of gift executed by a husband, without his wife's consent with reference to lands forming part of the joint property of the marriage is valid to the extent of his interest in the property or is wholly void.

OTTER, J.—I concur ; and I would observe that a sale of a share in partnership property may be subject to considerations different from those applicable to

(1) (1927) 5 Ran. 478.

the facts in the present case. I would further point out that the law relating to a sale of such a share appears to be the same in India as it is in England. See *Juggut Chunder Dutt* v. *Rada Nath Dhur* (1).

The matter came up in due course for hearing before a Full Bench with the result reported below.

MAUNG BA, J.—The following question has been referred to a Full Bench :—

"Whether a deed of gift executed by a husband without his wife's consent with reference to lands forming part of the joint property of the marriage is valid to the extent of his interest in the property or is wholly void ?"

This reference arose out of a suit brought by a Burmese Buddhist wife against her husband for the cancellation of two deeds of gift whereby the latter had given away valuable lands forming part of their joint property to a servant girl who had become his "lesser wife." The old gentleman is *Myothugyi* at Mônywa and the recipient of double decorations, K.I.H. and A.T.M. He is now 77 while his wife is 82 and they have been married nearly 60 years. The girl was the daughter of their syce and was employed in the house as a cook. Some three years ago improper intimacy between her and the old *thugyi* started and the *thugyi's* wife drove her out of the house. That measure failed to stop the intrigue. The *thugyi* bought a small house and went and lived there with the girl and some time later made these gifts to her.

The suit was decreed and it has been contended that at least the gifts should be held good to the extent of the old *thugyi's* share and interest. The ruling in *Ma Shwe U* v. *Ma Kyu* (2), if it can be considered a still good law would support that

(1) (1884) 10 Cal. 669. (2) (1905) 3 L.B.R. 66.

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argument. There it was held though a Burman Buddhist husband cannot sell or alienate the *hnapazon* of himself and his wife without her consent or against her will, yet such a sale constitutes a valid transfer of his share and interest in the property. This ruling means that the share of the husband or wife is partible even during the subsistence of marriage and is therefore saleable in execution of a decree. This view was dissented from in the later case of *Ma Paing* v. *Maung Shwe Hpaw* (1), where it was held that the share of a Burmese Buddhist husband or wife is impartible and indeterminate so long as marriage subsists and is therefore not saleable in execution of a decree. This decision was based upon the principles previously laid down in the Full Bench case of *Ma Paing* v. *Maung Shwe Hpaw* (2), where it was held that at Burmese Buddhist law a Burmese Buddhist husband and wife are partners and all the property of the marriage, whether *payin* or *letletpwa*, is partnership property, that neither partner is entitled to separate possession of any share of the partnership property or of the profits of the partnership until the partnership is dissolved by the death of one partner or by divorce.

The learned udge who made this Reference was however of opinion that the ruling in *Ma Shwe U* v. *Ma Kyu* (3) had not been expressly dissented from by the Full Bench and that the correctness of the decision in the later case of *Ma Paing* v. *Maung Shwe Hpaw* (1), was open to grave doubt. With great respect to that learned Judge I venture to think that the Full Bench has overruled the ruling in *Ma Shwe U's* case (3). Heald, J., made a reference to that Full Bench because he considered the ruling in *Ma Shwe U* (3) to

(1) (1927) 5 Ran. 478. (2) (1927) 5 Ran. 296.
(3) (1905) 3 L.B.R. 66.

be incorrect. In the course of his order of reference he observed "Most of the cases mentioned above were considered by a Full Bench of the Chief Court in the case of *Ma Shwe U* v. *Ma Kyu* (1) where it was held that a Burmese Buddhist husband cannot sell or alienate the *hnapazon* (*lettetpwa*) property of himself and his wife without the consent of the wife, express or implied, or against her will, but that a sale by a Burmese Buddhist husband of such property without the consent of his wife constitutes a valid sale of his share and interest in the property sold. These two findings seem to be inconsistent and with all respect I venture to suggest that the latter part of this decision was mistaken."

In my judgment in the Full Bench case it is true that I did not quote *Ma Shwe U's* case (1), but I quoted an earlier case, *viz.*, *Maung Po Sein* v. *Ma Pwa* (2) which had enunciated a similar principle. In the course of my judgment I observed : "Where one of a Buddhist couple dealt with joint property singly, it has been held that, in the absence of express or implied consent of the other party the alienation is not wholly void but is still valid so far as the alienator's share is concerned. Such a decision is to be found in *Maung Po Sein* v. *Ma Pwa* decided by the learned Judicial Commissioner of Lower Burma in 1897 * * * *. That property is *lettetpwa*, and he has not been able to cite any authority from any of the *Dhammathats* for that view. He has evidently overlooked the main principle of Burmese Buddhist law that while marriage subsists neither husband nor wife is entitled to alienate or claim separate possession of any property of the marriage". I have also observed "If either the husband or wife can dispose of his or her share without the consent of the other, it will no

(1) (1905) 3 L.B.R. 66. (2) (1897) Printed Judgments 403.

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doubt undermine the foundation upon which joint property system of a Buddhist couple has grown up".

Chari, J., in the course of his judgment observed: "It is settled law that no partner can alienate even his own interest in any individual partnership property. This follows from the liability of the whole of the partnership property for the partnership debts. Similarly, in the case of a Burmese Buddhist couple it is not open to either the husband or the wife to alienate his or her own interest in any particular property. To allow him or her to do so will be to throw the burden of the joint debts on to the party who has not disposed of his interest."

I think the above extracts would sufficiently show that the previous law in *Ma Shwe U's* case (1) that a Burmese Buddhist husband or wife can alienate his or her interest in their joint property without the consent of the other has, as a matter of fact, been overruled. This may dispose of the Reference. However, I should like to note that the partnership under Burmese Buddhist law is not exactly the same as an ordinary partnership founded upon contract. In the case of an ordinary partnership, the assignment of a partner's share without the consent of other partners brings about immediate dissolution. It cannot for a moment be conceded that such a consequence must follow if a Burmese Buddhist husband or wife without the consent of the other assigns his or her share in joint property. The partnership under Burmese Buddhist law terminates only on the death of a partner or on divorce. Again, under ordinary partnership law the assignment is not wholly inoperative but when dissolution results upon assignment without consent the assignee has a right to sue not as a partner but as an assignee for an account and

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also for a distributive share. It has therefore been urged that in the case of a partnership under Buddhist law why should not such a right be suspended till dissolution takes place and why should not the assignment be held good for that purpose. In my opinion it would be extremely dangerous and also against public policy to make such a concession. There would be great temptation to the third party to try and bring about death or divorce as the case might be. Besides, the assignment of such a nature appears to be obnoxious to the provision of clause (*b*) of section 6 of the Transfer of Property Act, which says that the chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.

For these reasons my answer to the question referred will be :

A deed of gift executed by a Burmese Buddhist husband without his wife's consent with reference to lands forming part of the joint property of the marriage is wholly void.

RUTLEDGE, C.J.—I would like to add one thing to the judgment of my brother Maung Ba with which I am in full agreement, so that it may not be misinterpreted to require in all cases the consent of the other party in express terms to be proved. As was observed in *Ma Paing* v. *Maung Shwe Hpaw* (1) : "The partnership assets are liable in respect of all partnership debts and either partner can bind his co-partner in respect of any contract or agreement necessary for or usually done in connection with such a partnership." In the transactions before us it cannot be suggested that they were in the interest of the partnership,

(1) (1927) 5 Ran. at p. 334.

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I agree that the case of *Ma Shwe U* v. *Ma Kyu* (1), has in fact been overruled by *Ma Paing's* case abovementioned.

HEALD, J.—I am of opinion that on the basis of the decision of the Full Bench in *Ma Paing's* case (2), we are bound to hold that the gift in this case, which was a gift of property of the marriage made by the husband to a "lesser wife" or mistress without the consent and against the will of the wife was invalid.

It must be admitted that this decision is not in accordance with a passage in Book VIII, section 3 of *Manugye*. That passage says: "If the husband without the knowledge of his wife make a gift of property which belongs to both husband and wife and the person to whom the property is given be not a wife or a lesser wife or a bought woman or a mistress, the person who receives the gift shall keep it according as it was given. The wife shall not say "It is the property of both. I did not know of the gift". The reason for this rule is that the husband is lord of the wife. But if the gift is given with the intention of making the person to whom it is given a lesser wife, a bought woman, or a mistress then when the wife comes to know of the gift, if in fact it was made without the wife's knowledge, one half of the property given shall be restored to the wife. As for the other half, it is the share belonging to the husband. If the gift is a gift of property which the wife brought to the marriage, there is no right to give in any case whatever. The wife must have the whole of such property, because she has to bear the debts which she brought to the marriage. But if the property which is given is property which

(1) (1905) 3 L.B.R. 66. (2) (1927) 5 Ran. at p. 334.

the husband brought to the marriage, the person to whom the property is given shall have the property according as it is given. The wife shall not have the right to say "I did not know of the gift" because the husband has to pay the debts which he brought to the marriage. If a wife make a gift to a person, even a person who is not her paramour, without her husband's knowledge she shall have no right to make the gift without her husband's knowledge. This is said of property which belongs equally to both. If the case arises between a married couple who have been married before, and the wife without the husband's knowledge give property, which she brought to the marriage, to a person who is not her paramour, let her have the right to give it and let the husband not take it back. As for the penalty for a wife's giving without her husband's knowledge and without telling him, let the husband have the right to punish the wife. But even if the property given is property brought to the marriage by the wife, if the gift be to a paramour or to a person whom the husband suspects, let the wife not say "It is property which I brought to the marriage". Since it is property given without the knowledge of the husband, the wife has no right to give it. Let the husband get it all back".

It seems clear that the rules given in that passage belong to a period before the rights of husband and wife in the property which the other brought to the marriage were recognised, and since the section of *Manugye* in which those rules appear contains also rules for gifts of wives and children into slavery, and gifts for lust, which apparently were not reprobated if the women to whom they were given were below the age of puberty or over the age for childbearing, it is clearly archaic and cannot be regarded as

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having force in the present state of civilisation. The adoption of the rules contained in that section regarding gifts by a husband would clearly defeat what we regard as a basic principle of the Burmese Buddhist law, namely that the property of the marriage of a Burmese Buddhist couple is impartible except on death or divorce, since it would enable a husband by means of a gift of all the property of the marriage to his mistress to effect what was in fact a partition of the property as against his wife. Our judgment in *Ma Paing's* case was an attempt to lay down the general principles of Burmese Buddhist law as to the ownership of property by a Burmese husband and wife now in force and although there may be difficulty in applying that law to particular cases, *e.g.*, to the cases of a fine inflicted on a husband for a criminal offence or damages given against a husband for a tort, or a husband's gambling losses, or to cases where there are several wives, I see no difficulty in its application to the present case, and I have no hesitation in holding that the gift in this case should be regarded as invalid. Buddhist law does not of course apply to gifts as such, since gifts, as such, are not matters regarding succession, inheritance, marriage or caste or any religious usage or institution, and the particular gift in this case is certainly not such a matter. It is not the gift as such that is invalid. Its invalidity consists in the fact that the subject matter of the gift is something that the giver had no power to give. The defect is not in the gift itself but in the capacity or title of the giver. We have held that a husband has no power to alienate property which is property of the marriage, without the wife's consent, express or implied, and in the present case no such consent can be imputed. I would therefore concur in the answer

proposed to be given in respect of the question referred, namely that the deeds of gift in question ~~conveyed~~ no title to the donee in respect of the property which they purported to convey.

BROWN, J.—I agree that in view of the decision of the Full Bench and the general principles approved in *Ma Paing's* case the answer to the question referred must be that the deed of gift is wholly void. The principles accepted in *Ma Paing's* case as I understand them are that during the subsistence of the marriage, a Burman Buddhist husband and wife have a joint interest in the whole estate of the marriage, but that neither party has a specific interest in any part of the estate. Whilst therefore in the present case the husband has a joint interest with his wife in the whole of the property of the marriage, he has no specific interest in the particular part of the estate which he has attempted to transfer by way of gift. To say that the gift is valid to the extent of his share is meaningless because that share is incapable of valuation. He has no definite claim to this particular piece of property, and on divorce he might not obtain any of this property as his share. The property remains liable to all partnership debts. Even though the whole estate becomes his on the death of his wife, the particular property still remains liable for the debts of the partnership, and there is no guarantee that even in that eventuality he will obtain any rights in the property. The analogy of the assignment of a share in a partnership by a partner under ordinary partnership law does not seem to me to be sound. What a partner assigns is not his share in a definite portion of the partnership property, but his share or a part of his share in the whole partnership.

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It is obvious that the consent of the wife cannot be implied to the gift in the present case. In fact it is clear that the gift was against her wishes, and that it was not made in the interests of or on behalf of the partnership. I therefore agree in the answer proposed.

MYA BU, J.—I agree in the answer proposed and have nothing to add to the judgments of my learned brethren.

PRIVY COUNCIL.

J.C.*
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Apl. 23.

MA MYA AND ANOTHER
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MA ME KYIN AND ANOTHER.

(On appeal from the High Court at Rangoon.)

Burmese family—Alleged interest in family business—Participation in business—Absence of decisive evidence—Use of name as payee of promissory notes and in conveyances—Inference of intention.

A Burman died in 1892 leaving a wife and one son, L.P. The deceased and his wife had brought up H, a nephew of the wife who had lost his parents in infancy. After the death of L.P's father L.P. carried on the family money-lending business, and properties were acquired presumably with the money of the widow. When H was old enough he had been initiated into the business, and for many years thereafter he took a very considerable part in it. In 1923 both L.P. and H died leaving widows. H's widow sued claiming a half share in the family property; she alleged that it was all acquired by H, L.P. and L.P.'s mother, and that the last named had disclaimed all interest. No accounts were produced showing how the result of the various transactions had been debited or credited; nor was there any other evidence which showed decisively what share, if any, H was intended to have. It appeared however that between 1917 and 1922, purchases of immoveable property had been made in the joint name of L.P. and H, and during various periods beginning in 1911, H's name appeared jointly on promissory notes taken in the business; in the notes outstanding at the date of suit bearing H's name, the name of L.P.'s widow also appeared. H had received no remuneration for his services, but lived in part of the family house and was maintained by the family. The High Court decreed the plaintiffs a half share in the properties standing in the joint names of H

* *Present*:—LORD CARSON, LORD SALVESEN AND SIR GEORGE LOWNDES.