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KHALIL-UR-RAHMAN v. KING-EMPEROR.

DUNKLEY, J.

the Jury that the question of the intention of the accused was a question of mixed law and fact, and I agree that in so doing I went too far. I should have left the decision as to the accused's intention to the Jury as a question of pure fact, to be decided on a consideration of the established facts, namely, the age of Naw Mu Tu, the circumstances under which she was taken by the accused out of Burma, and the short time that elapsed between the kidnapping and the marriage to the accused's nephew.

FULL BENCH (CRIMINAL).

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Apr. 5.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Bagnley.

MAUNG TIN
v.
MA HMIN.*

*Maintenance order—Criminal Procedure Code (Act V of 1898), s. 488—Refusal to enforce order for one period—Subsequent application for a later period—*Res judicata*—Duty to maintain—Personal law—"Sufficient means"—Burmese Buddhist monk's liability for maintenance—Rules of the* Vinaya.

An order refusing to enforce a maintenance order, made under s. 488 of the Criminal Procedure Code, in respect of arrears of maintenance for one period does not operate as a bar to a subsequent application to enforce the order for arrears of maintenance that have accrued during a different and a later period.

Laraiti v. *Ram Dial*, I.L.R. 5 All. 224; *Ma Su* v. *Sasoon*, 1 U.B.R. (1892-96) 64; *Po So* v. *Ma Kyin May* (1907-08) 4 L.B.R. 337—*referred to.*

S. 488 gives effect to the natural and fundamental duty of a man to maintain his wife and children so long as they are unable to maintain themselves. Its provisions apply and are enforceable whatever may be the personal law by which the persons concerned are governed.

Baran Shanta v. *Ma Chan Tha May*, I L.R. 2 Ran. 682; *Kariyadan* v. *Kutti*, I.L.R. 19 Mad. 461; *Lingappa* v. *Esudasan*, I.L.R. 27 Mad. 13; *Luddun Sahiba* v. *Kudar*, I.L.R. 8 Cal. 736; *Venkatakrishna* v. *Chimmukutti*, I.L.R 22 Mad. 246—*referred to.*

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*Criminal Reference No. 8 of 1933 arising out of Criminal Revision No. 430B of 1932 of this Court at Mandalay.

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Whether a person has "sufficient means" or "sufficient cause" within s. 488 must be determined upon a consideration of the circumstances disclosed in each case. The term "sufficient means" is not confined to pecuniary resources, and a mere denial by an able-bodied man of sufficiency of means is not conclusive proof of want of sufficient means.

In re *Kandasami Chetty*, 50 M.L.J. 44; *Ma Tha* v. *Nga San E*, 1 U.B.R. (1910-13) 90; *T. Pillai* v. *Meenakshi Ammal*, 48 M.L.J. 494—*referred to.*

A Burmese Buddhist monk is amenable to the provisions of s. 488, notwithstanding the fact that he has adopted the yellow robe, and become a member of the *sangha*. It makes no difference whether he does or does not enter the priesthood to avoid his responsibilities as a father. This rule of law is also in consonance with the principles of the *Vinaya*.

U Thiri v. *Ma Pwa Yi*, 4 U.B.R. 138—*approved.*

Ma E Shi v. *U Aditsa*, 1 B.L.J. 97—*dissented from.*

Tha Kin for the applicant. On entering the priesthood a Buddhist severs all his worldly ties, and he cannot be ordered to maintain his child under the provisions of s. 488 of the Criminal Procedure Code. To hold otherwise would be to undermine the Buddhist ecclesiastical system. The lower Court, relying on the decision in *Me Tha* v. *Nga San E* (1) passed an order under s. 488 against the *pongyi* as he was "an able-bodied man" who must be presumed to be capable of maintaining his child. But the lower Court lost sight of the fact that a Buddhist monk has no property which he can call his own. See *U Wilatha* v. *U Thiri* (2) and *U Tilawka* v. *Nga Shwe Kan* (3).

[PAGE, C.J. Is there anything in the civil law which prevents a *pongyi* from holding property of his own?]

No. But the ecclesiastical law prohibits it. The laws of the *Vinaya* state that on entering the priesthood a *pongyi* renounces everything worldly, and whatever he holds is the property of the *sangha*. *Shwe Ton* v. *Tun Lin* (4).

(1) (1910—13) 1 U.B.R. 90.
(2) 8 L.B.R. 342.
(3) (1914—16) 2 U.B.R. 61.
(4) 9 L.B.R. 241.

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In *Ma E Shi* v. *U Aditsa* (1) it was held that a *pongyi* is not liable to pay maintenance under s. 488 of the Code of Criminal Procedure. *U Thiri* v. *Ma Pwa Yi* (2), in which a contrary view is expressed, can be distinguished from the present case by the fact that in that case the child was begotten whilst the father was a monk, and the ecclesiastical law says that a Buddhist monk who has sexual intercourse ceases to be a monk.

Moreover, there is nothing in this case to suggest that the appellant entered the priesthood in order to avoid liability to pay maintenance.

Kyaw Zan for the respondent. Rules laid down in the *Vinaya* may regulate the religious conduct of a Buddhist monk; but the only rules of Buddhist law enforced by the State are those laid down in s. 13 of the Burma Laws Act. A priest cannot claim immunity from criminal liability, or from providing maintenance for his child, by pleading his personal law. The statute law has overridden his personal law in that respect. *U Pyinnya* v. *Maung Law* (3); *Kariyadam Pokkar* v. *Kayat Beeran Kutti* (4); *Lingappa Goundan* v. *Esudasan* (5); in *the matter of Luddan Sahiba* (6) and *Venkatakrishna Patter* v. *Chimmukutti* (7).

S. 488 does not contemplate that the father must have sufficient visible means to support his child. If he is shown to be an able-bodied man he is presumed to have the means to support his child. *Kandasami Chetty* v. *Emperor* (8) and *U Thiri* v. *Ma Pwa Yi* cited *ante*.

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(1) 1 B.L.J. 97.
(2) (1921-22) 4 U.B.R. 138.
(3) I.L.R. 7 Ran. 677.
(4) I.L.R. 19 Mad. 461.
(5) I.L.R. 27 Mad. 13.
(6) I.L.R. 8 Cal. 736.
(7) I.L.R. 22 Mad. 246.
(8) (1926) M.W.N. 146.

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The appellant, before turning a monk, gave away all his property to his mother, dedicating it to charity and the child was left with nothing. If the Court were to hold that a member of the priestly class is immune from his statutory liabilities it would only be to make room for fraud.

PAGE, C.J.—Two questions have been referred for the determination of the High Court—

(1) "Whether the dismissal of an application to execute an order for maintenance is a legal bar to an order allowing execution of that order of maintenance on the same grounds on a subsequent application, and

(2) Whether a Burmese Buddhist monk is liable for the maintenance of his child."

The material facts are not in dispute, and lie within a narrow compass.

Maung Tin and Ma Hmin were husband and wife, and had issue one son, Maung Mya Han. In March 1922 Ma Hmin left the house of her mother-in-law Ma Cho, where she had been living with her husband upon the ground that Maung Tin and his mother had been illtreating her. She took with her Maung Mya Han, who was then three years old. Soon after the departure of Ma Hmin and Maung Mya Han from Ma Cho's house Maung Tin took as a second wife Ma Saw Kin, and from that time onwards Maung Tin has failed to provide either for Ma Hmin or for Maung Mya Han, his child by her. On 8th August 1922, Ma Hmin obtained an order against Maung Tin under s. 488 of the Criminal Procedure Code for the payment to her of Rs. 3 per mensem for the maintenance of Maung Mya Han. On 2nd July 1923, the order for maintenance was increased to Rs. 4 per mensem, and on the 17th February 1926 to Rs. 7-8 per mensem. These orders

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were passed by the Headquarters Magistrate at Pyapôn, the order of 17th February 1926 has not been cancelled, and is still subsisting. Soon afterwards Ma Saw Kin died, and Maung Tin, having given all the property that he possessed to charity, became a *pongyi*, and was ordained as an *upazin*.

On the 24th June 1930, Ma Hmin applied that Maung Tin should be directed to pay four months' arrears of maintenance under the order of the 17th February 1926, and on the 4th July 1930 the Headquarters Magistrate at Pyapôn passed the following order :

"Applicant and Respondent are present. The Respondent is now a *pongyi* and owns no moveable property. I do not under the circumstances see how recovery can be made, and in fact so long as he remains a *pongyi* I will not enforce the order. The application is therefore rejected, and the case closed."

On the 23rd June 1932 Ma Hmin filed the present application to recover arrears of maintenance under the order of 17th February 1926 for ten months prior to the date of the application, and on the 12th July 1932 an order to the following effect was passed by the Headquarters Magistrate, Pyapôn :

"No sufficient cause has been shown under s. 488 (3). Respondent being an able-bodied person, though an ordained monk, shall pay the arrears, *i.e.* Rs. 75 (seventy-five only) with costs Rs. 6-8 as by 5th August 1932."

Maung Tin *alias* U Nemeinda filed an application for revision of the above order to the Sessions Judge of Pyapôn, and on the 27th September 1932 the Additional Sessions Judge, being of opinion "that there was no suggestion made by the respondent Ma Hmin in the case that the present applicant deliberately entered the priesthood in order to avoid his responsibilities as the father of the child", submitted the proceedings to the High

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Court with a recommendation that the order under revision should be set aside. Mosely J. thereupon propounded the two questions under consideration for determination by the High Court.

As regards the first question it is provided under s. 488 (3) of the Criminal Procedure Code that if any person against whom an order for maintenance has been made "fails without sufficient cause to comply with the order any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due" as therein provided. I am clearly of opinion that an order refusing to enforce the maintenance order in respect of arrears of maintenance for one period does not operate as a bar to a subsequent application to enforce the order for arrears of maintenance that have accrued during a different and a later period.

In the circumstances of the present case the learned advocate for Maung Tin at the hearing of the reference conceded that he could not reasonably contend that the order of the 4th July 1930 barred the present application.

In *Laraiti* v. *Ram Dial* (1) which was cited by Mosely J. in his order of reference, Ram Dial objected to pay the sum awarded to his wife Laraiti as maintenance upon the ground that she was then living in adultery, and on the 2nd March 1880 the Magistrate disallowed the objection on the ground that the wife's alleged adultery had not been proved. Laraiti subsequently filed another application for the maintenance order to be enforced, and Ram Dial again alleged that his wife was living in adultery. On 4th August 1882 the Magistrate held that adultery had been

(1) (1882) I.L.R. 5 All. 224.

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established, and ordered that payment of the allowance to the wife should be discontinued. In the subsequent revisional proceedings it appeared that the Magistrate who passed the later order had relied upon the evidence of witnesses whose testimony related to a period antecedent to the 2nd March 1880, and in the course of his judgment Mahmood J. observed :

"I am of opinion that the order of the District Magistrate, dated the 2nd March 1880, must be taken to have adjudicated upon all the facts antecedent thereto, and connected with the objection of Ram Dial as to his wife leading an adulterous life. Upon the general principles of the rule of *res judicata*, I am of opinion that the Deputy Magistrate was wrong in law in re-opening matters already adjudicated upon, and his order directing the discontinuance of maintenance on the ground of facts antecedent to the District Magistrate's order must be held to be illegal.

I therefore set aside the order of the Deputy Magistrate, dated the 4th August 1882, and direct that he should hold an enquiry *de novo* in regard to the adulterous conduct of Laraiti, alleged by her husband Ram Dial, *with reference to the period subsequent to the District Magistrate's order of the 2nd March 1880.*"

In the present case it is unnecessary to consider whether the rule of *res judicata* was correctly explained in *Po So* v *Ma Kyin May* (1) but as I understand *Laraiti* v. *Ram Dial* (2), *Ma Su* v. *Paul Sasoon* (3) and *Po So* v *Ma Kyin May* (1) for the purpose in hand the law as laid down in those cases does not conflict with the opinion that I hold and have ventured to express. I am further of opinion that, in so far as the Headquarters Magistrate in the order of 4th July 1930 held that he would not enforce the order of maintenance "so long as Maung Tin remained a *pongyi*", thereby purporting to pass an order in respect of maintenance for a period later than that to which the

(1) (1907-08) 4 L.B.R. 337. (2) (1882) I.L.R. 5 All. 224.
(3) (1892—96) 1 U.B.R. 64.

application then before him referred, the order was *ultra vires* and inoperative. I would answer the first question in that sense.

The second question propounded raises an issue of general importance to Buddhists in Burma.

It is, I apprehend, the primary duty of a man to maintain his wife, and also his children so long as they are unable to maintain themselves. It is because s. 488 was enacted to give effect to this natural and fundamental duty that its provisions have been held to apply and are enforceable, whatever may be the personal law by which the persons concerned are governed.

Luddun Sahiba v. *Mirza Kamar Kudar* (1), *Venkatakrishna Patter* v. *Chimmukutti* (2), *Baran Shanta* v. *Ma Chan Tha May* (3), *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (4), *Lingappa Goundan and another* v. *Esudasan* (5), May Oung's Buddhist Law (1919), p. 46.

A maintenance order under s. 488 (*1*), however, cannot be passed against a husband or a father who has *not* "*sufficient means*" to maintain his wife or children; nor can a maintenance order be enforced under s. 488 (*3*) unless the person against whom the order has been passed has failed "without sufficient cause" to comply with it.

In my opinion it is a question of fact, to be determined upon a consideration of the circumstances disclosed in each case, whether the person against whom it is sought to obtain or enforce a maintenance order has "sufficient means" or "sufficient cause", as the case may be, within s. 488. But the term "sufficient means" in my judgment,

(1) (1882) I.L.R. 8 Cal. 736.
(2) (1899) I.L.R. 22 Mad. 246.
(3) (1924) I.L.R. 2 Ran. 682.
(4) (1895) I.L.R. 19 Mad. 461.
(5) (1903) I.L.R. 27 Mad. 13.

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is not confined to pecuniary resources, and I agree with the view expressed by Eales J.C. in *Ma Tha* v. *Nga San E* (1) that

> "a mere denial by a man himself of sufficiency of means, when that man is an able-bodied man, is not conclusive proof of want of sufficient means."

[See also In re *Kandasami Chetty* (2) and *Theetharappa Pillai* v. *Meenakshi Ammal* (3).] Even an order of discharge in insolvency does not release the insolvent from "any liability under an order of maintenance made under s. 488 of the Code of Criminal Procedure, 1898" [see Presidency Towns Insolvency Act, s. 45, 1 (*d*).]

Now, why should a man who otherwise would be bound to maintain his wife and children, be placed in a privileged position, and be held exempt from liability to have a maintenance order passed or enforced against him under s. 488 merely because he is a *pongyi*?

Upon what legal principle, or upon what reasonable or moral ground could an order to that effect be supported? I cannot conceive of any. Surely for so holding there could be no justification. A man is none the less the father of his child because he happens to be a *pongyi*, and the child of a monk will starve as certainly as the child of a layman if it is not supplied with sustenance. In his written objection in the present case Maung Tin stated that he had entered the *sangha* because he was "disgusted with worldly affairs." Be it so. Many a man has found fatherhood irksome, and would feign be released from the obligations that attach to it. The answer, however, that is given to such a person, as well by the legislator as by

(1) (1910-13) 1 U.B.R. 90. (2) 50 M.L.J. 44.
(3) 48 M.L.J. 494.

the moralist, is that he should have considered the consequences that might ensue before he ran the risk of becoming a father.

In the referring order Mosely J. cited *Ma E Shi* v. *U Aditsa* (1) in support of the proposition that the provisions of s. 488 do not apply to a *pongyi*. I am bound to say that there are certain observations of Saunders J.C. in that case which I read with surprise—I had almost said with consternation—and from which with all respect I profoundly dissent.

In *U Aditsa's* case a *pongyi* had illicit intercourse with a woman, as a result of which a child was born. The woman then applied for a maintenance order against the *pongyi* under s. 488 for the support of their child.

In these circumstances Saunders J.C. observed :

"It has no doubt been held in Upper Burma that an able-bodied father who is capable of earning money by the work of his hands has means with which to support a child, and it is possible that, if a layman were deliberately to enter the priesthood in order to avoid his responsibilities as a father, the law might refuse to recognise such an evasion. Here, however, the respondent had been in the priesthood for a great many years, and it does not appear to me to be in the public interest that a woman who allows herself to be seduced by a member of the priesthood should obtain support for the child born of such intercourse by what after all, in my opinion, would be a straining of the law contained in the provisions of the Criminal Procedure Code."

But can it seriously or reasonably be contended that if a *pongyi* begets an illegitimate child it is not in the public interest that he should be compelled to support it ?

Is a *pongyi* to be allowed to have illicit intercourse with women without fear and with impunity, so far as s. 488 is concerned, although in so

(1) 1 B.L.J. 97.

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misconducting himself he commits one of the four unpardonable sins according to the rules of his order? Why should a *pongyi* in sexual matters be sacrosanct? And what difference does it make whether he does or does not "enter the priesthood in order to avoid his responsibilities as a father"? I can see none. In either case if a layman enters the *sangha* with a maintenance order for his child subsisting against him he deliberately does an act which, if s. 488 does not apply to a *pongyi*, *ipso facto* has the effect of releasing him from the obligations that attach to him as a father. By so doing it seems to me that he will acquire merit neither in this world nor the next.

In my opinion a man is not, and ought not to be, permitted by his own voluntary act to free himself from the elementary duty of maintaining his wife and children, and I hold that a *pongyi* is amenable to the provisions of s. 488, notwithstanding the fact that he has adopted the yellow robe, and become a member of the *sangha*.

The opinion that I have expressed, and which I am persuaded is the correct view to take of this matter, is supported by the decision of MacColl J.C. in *U Thiri* v. *Ma Pwa Yi* (1), and is also in consonance with what I apprehend to be the tenets of Buddhist religious teaching, to be collected from the principles and rules set out in the *Vinaya* by which the life and conduct of a *pongyi* is to be regulated.

In *U Thiri's* case MacColl J.C. observed,

"Next it is contended that the applicant is not liable to support the child, even though it be his, because he is a Buddhist monk. He cannot get rid of his statutory obligation in that way; the Criminal Procedure Code must override his

(1) (1921-22) 4 U.B.R. 138.

personal law, if it conflicts with it. As a matter of fact his own witness U Wunna says that on a Buddhist monk having sexual intercourse he *ipso facto* becomes a layman."

Again, in the *Mahavagga* (book I, chapter 76, Muller's Sacred Books of the East, Vol. XIII), in which the proceedings requisite for the ordination of a Buddhist priest are set forth, the following passage occurs :

"At that time ordained *Bhikkhus* were seen who were afflicted with leprosy, boils, dry leprosy, consumption and fits. They told this thing to the Blessed One. I prescribe, O *Bhikkhus*, that he who confers the *upasampada* ordination, ask (the person to be ordained) about the Disqualifications (for receiving the ordination). And let him ask, O *Bhikkhus*, in this way :

"Are you afflicted with the following diseases :—leprosy, boils, dry leprosy, consumption and fits ?
Are you a man ?
Are you a male ?
Are you a free man ?
Have you no debts ?
Are you not in the royal service ?
Have your father and mother given their consent ?
Are you full twenty years old ?
Are your alms-bowl and your robes in due state ?
What is your name ?
What is your *upagghaya's* name ?"

Again in *Shwe Ton* v. *Tun Lin* (1) certain questions were submitted to the *Thathanabaing*, and in support of the answers that he gave the *Thathanabaing* relied upon certain texts, of which one ran as follow :

"*Bhikkhus*, a debtor should not be ordained. He who ordains such a one is guilty of a *dukkata* offence. (*Vinaya Mahavagga.*)

(1) (1918) 9 L.B.R. 241.

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O, *Bhikkhus*. The meaning of 'debtor' in the sentence 'a debtor should not be ordained' is as follows:

A man's father or grandfather has contracted debts; or he himself has contracted debts; or his parents have taken property from others with limiting conditions; that person commences to pay the debts or binds himself to pay the debts; for that reason he is called a debtor."

In my opinion it is clear from the principles and rules that prescribe the duties and govern the life of the Buddhist *sangha* in Burma that it would be an offence to ordain as a *pongyi* a layman against whom a maintenance order remains outstanding, unless and until he has made due provision for the sustenance and support of his children, and I apprehend that such a person would be as unfit to be ordained as a member of the *sangha* as a person would be unfit to remain a member of that body if he has had illicit intercourse with a woman, or by her has become the father of a child.

The second question that has been propounded for our determination touches nearly the life of Buddhists in Burma; we have anxiously considered what our answer should be in the light of the material texts and authorities, and we are persuaded that the conclusion at which we have arrived is correct in principle, supported by authority, and follows the dictates both of morality and of common sense.

I would answer the second question in the affirmative.

MYA BU, J.—I agree.

BAGULEY, J.—I agree.