

Criminal Regular Trial No. 88 of 1935, in which he found Kong Kwi guilty of an offence under section 9 (a) of the Opium Act and sentenced him to pay a fine of Rs. 10, in default to suffer one week's rigorous imprisonment, are set aside, Kong Kwi is acquitted and the fine, if paid by him, shall be refunded to him.

1936
KING-
EMPEROR
v.
KONG KWI.
MACKNEY, J.

APPELLATE CIVIL.

Before Mr. Justice Dunkley.

S.P.L.S. CHETTYAR FIRM

v.

MA PU.*

1936
Mar. 11.

Burmese customary law—Husband with two wives—House built on payin land with lettetpwa funds—House becomes payin—Quicquid plantatur solo, solo cedit—Share of two wives jointly in lettetpwa property of both marriages—Death of first wife—Second wife's share in property acquired during first marriage and in property acquired during second marriage.

The appellant firm obtained against S a Burmese Buddhist and his children by his first wife a mortgage decree over four houses and their sites. Two of these houses with their sites were acquired by S during coverture with his first wife and prior to his marriage with his second wife, the respondent. The houses were, however, dismantled and rebuilt after the second marriage. The two other houses with their sites were acquired subsequent to the second marriage. The first wife had died before the suit, and now the respondent claimed that the mortgaged properties were *lettetpwa* properties of her marriage with S and that she had a half share therein which was not affected by the firm's decree.

Held, that where a house is built on *payin* land with *lettetpwa* funds the house becomes *payin*. The more valuable part of the property was the site and the maxim *quicquid plantatur solo, solo cedit* applied.

Ma San Shwe v. Valliappa Chetty, 10 B.L.R. 49—*referred to*.

Held, therefore, that the sites acquired before the respondent's marriage with S and the houses thereon were the *lettetpwa* of the first marriage of S and the respondent's share therein was one-sixth.

Held further that the share of the respondent in the sites and houses acquired after her marriage was one-quarter. The share of two wives jointly

* Civil Second Appeal No. 261 of 1935 from the judgment of the District Court of Pyapôn in Civil Appeal No. 29 of 1935.

1936

S.P.L.S.
CHETTYAR
FIRM
v.
IMA PU.

in *lettetpwa* property of both marriages is the same as the share of one wife where there is a single wife.

C.T.P.V. Chetty Firm v. Maung Tha Hlaing, I.L.R. 3 Ran. 322; *Ma Kin v. Maung Po Sin*, I.L.R. 6 Ran. 1; *Maung Po Nyun v. Ma Saw Tin*, I.L.R. 3 Ran. 160—*referred to*.

The respondent's share became enlarged on the death of S's first wife to whom he succeeded as heir. She gained through her husband a one-third share of the first wife's half share in the *lettetpwa* property of the first marriage, and a one-third share of the first wife's quarter share in the *lettetpwa* of both marriages. Her share therefore was one-sixth *plus* one-sixth in the first property and one-fourth *plus* one-twelfth in the second.

Held, therefore, that her one-third share in all the properties was not affected by the mortgage decree.

Doctor for the appellant.

S. C. Mukerjee for the respondent.

DUNKLEY, J.—The defendant-appellant firm obtained a mortgage decree against U San Win and his children by his first wife. The plaintiff-respondent is U San Win's second wife. The mortgaged properties were four houses and their sites. The plaintiff-respondent instituted a suit for a declaration that these properties are *lettetpwa* properties of her marriage with U San Win and that she is therefore entitled to a half-share therein, and that the appellant's mortgage decree is not binding on her share. The learned Subdivisional Judge, who tried the suit, held that she is entitled to a four-ninths share of these properties, and an appeal against this decision to the District Court was dismissed, although the learned District Judge made not the slightest endeavour to deal with the points raised before him.

It has been held by the learned Subdivisional Judge that two of these houses and their sites were acquired by U San Win prior to his marriage with the respondent, and two were acquired after that marriage. But, in regard to the two former properties, he has further held that they have changed their character and become *lettetpwa* of U San Win's second marriage because

the houses were dismantled and rebuilt after the marriage. He has overlooked the fact that the more valuable part of a house and site is ordinarily the site, and the application of the maxim *quicquid plantatur solo, solo cedit*. So long as the corpus of *payin* property is unchanged, it will always remain *payin*. Where a house is built on *payin* land with *lettetpwa* funds the house becomes *payin* [*Ma San Shwe v. Valliappa Chetty and two* (1)]. Consequently it must be held that these two houses and their sites were acquired prior to the respondent's marriage. They were *lettetpwa* of the first marriage of U San Win, and brought by him to the second marriage. I have already held, in my judgment in second appeals nos. 284, 285 and 310 of 1935, that the share of the respondent in such property is one-sixth.

As regards the other two houses and their sites, the learned Subdivisional Judge, relying on the case of *Maung Po Nyun v. Ma Saw Tin* (2), held that the respondent's share therein was one-third. But subsequently in the Full Bench case of *C.T.P.V. Chetty Firm and others v. Maung Tha Hlaing and others* (3) it was held that the share of two wives jointly in *lettetpwa* property of both marriages is the same as the share of one wife where there is a single wife. It is true that *Maung Po Nyun's* case (2) was apparently not brought to the notice of the learned Judges who constituted the Full Bench, but, nevertheless, the Full Bench decision must be followed in preference to the earlier decision in so far as it differs from it. In fact, *C.T.P.V. Chetty's* case (3) was subsequently followed, in preference to *Maung Po Nyun's* case (2), in the case of *Ma Kin v. Maung Po Sin and three* (4). Consequently the share of the

1936

S.P.L.S.
CHETTYAR
FIRMv.
MA PU.

DUNKLEY, J.

(1) 10 B.L.R. 49.

(3) (1925) I.L.R. 3 Ran. 322.

(2) (1925) I.L.R. 3 Ran. 160.

(4) (1927) I.L.R. 6 Ran. 1, 4.

1936

S.P.L.S.
CHETTYAR
FIRMv.
MA PU.

DUNKLEY, J.

respondent in these two houses and their sites is one-quarter.

I agree with the learned Subdivisional Judge that the respondent's original share became enlarged when U San Win's first wife died and he became her heir. She would become entitled to a one-third share in the property inherited by him from his first wife. The first wife's share in the *lettetpwa* property of the first marriage was one-half, and in the *lettetpwa* property of both marriages was one-quarter. Hence the respondent gained by the first wife's death a one-sixth share in property of the first category, and a one-twelfth share in property of the second category. That is, her shares are now as follows :

(1) In the two houses and sites acquired prior to her marriage = $\frac{1}{6} + \frac{1}{6} = \frac{1}{3}$.

(2) In the two houses and sites acquired after her marriage = $\frac{1}{4} + \frac{1}{12} = \frac{1}{3}$.

Hence, in the result, it appears that the plaintiff-respondent is entitled to a one-third share of all the properties in suit. The decree of the Subdivisional Court will be varied accordingly by granting to the plaintiff-respondent a declaration in respect of a one-third share.

The defendant-appellant firm will be granted proportionate costs, to the extent to which it has been successful, of this appeal and of the first appeal in the District Court. The plaintiff-respondent will be granted proportionate costs, to the extent to which she has been successful, of the original suit. Advocates' fees throughout to be calculated on the valuation for jurisdiction.