

16 years of age at the time when the order was passed, the order of detention for a period of three years was legal under clause (b) of section 24 of the Act, and, therefore, no ground for interference in revision arises.

A copy of these remarks may be sent to the learned Sessions Judge and to the trying Magistrate for their information.

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APPELLATE CIVIL.

Before Mr. Justice Ba U.

S.A.S. CHETTYAR FIRM

v.

U MAUNG GYI AND ANOTHER.*

1936
Mar. 16.

Burmese customary law—Desertion of husband by wife—Automatic divorce at end of one year—Eindaunggyi couple—Loss by wife of her right in the hnazon property.

In the case of a Burmese Buddhist couple if the wife deserts her husband the marriage becomes automatically dissolved at the end of one year from the date of desertion.

Ma Nyun v. Maung San Thein, I.L.R. 5 Ran. 537—referred to.

Where on account of the wife's adultery and desertion a divorce has automatically taken place the wife loses all her right in the hnazon property, and her share therein is forfeited to her husband. It makes no difference whether the parties were married for the first time or were *eindaunggyis*.

Maung Yin Maung v. Ma So, (1897-1901) 2 U.B.R. Budd. Law, Div. 34—referred to.

Chari for the appellant.

Tun Aung for the respondent.

BA U, J.—This appeal arises out of a suit filed by the appellant Chettyar for a declaration that the second defendant-respondent, Ma Htwe, is entitled to a half share in the suit land and that her share is liable to

* Civil Second Appeal No. 156 of 1935 from the judgment of the District Court of Pyinmana in Civil Appeal No. 5 of 1935.

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attachment in execution of a money decree which he has obtained against her.

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

The two respondents are Burmese Buddhists. They became man and wife over ten years ago. At the time of the marriage both of them were *eindaunggyis*. During their coverture they acquired the suit land. About four years ago, the second respondent, Ma Htwe, eloped with a paramour and since then she has not been heard of.

On these facts two questions arise :

- (i) Whether the marriage tie between the respondents has become dissolved automatically because of the desertion of the first respondent by the second respondent ; and
- (ii) Whether the second respondent has forfeited her right in the suit land because of her adultery.

I have no doubt in my mind what the answers should be. The law on the question of automatic divorce among Burman Buddhists may now be said to be quite settled. In the case of Ma Nyun v. Maung San Thein (1), a Full Bench of this Court dealt with the question of desertion of a wife by a husband and laid down the law as follows :

“ That where a Burmese Buddhist husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her the marriage is automatically dissolved on the expiration of the three years from the date of desertion ; neither is any further and expressed act of volition on the part of the deserted party necessary to effect such dissolution.”

(1) (1927) I.L.R. 5 Ran. 537.

The present case is the converse of that case. The desertion in the present case was by the wife. The only difference between the two cases is that in the case of desertion of a husband by a wife the marriage becomes automatically dissolved at the end of one year from the date of desertion, but in the case of desertion of a wife by a husband the marriage becomes dissolved at the end of three years from the date of desertion. This is clearly pointed out in section 17, Book V, of the *Manugye*, which lays down, *inter alia*, as follows :

“ Any husband and wife living together, if the husband, saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetables, or one stick of firewood, at the expiration of three years, let each have the right to take another wife and husband. If the wife, not having affection for the husband, shall leave (the house) where they were living together, and if during one year he does not give her one leaf of vegetables, or one stick of firewood, let each have the right of taking another husband and wife ; they shall not claim each other as husband and wife ; let them have the right to separate and marry again.”

I would, therefore, hold that the marriage between the two respondents became dissolved at the end of one year from the date of desertion. That would be about two years prior to the institution of the suit.

As regards the second question, I have not come across a single case wherein this point has been dealt with directly. None has also been brought to my notice. There are, however, some *Dhammathats* which deal with the question of disposal of property in cases where a divorce is adjudged between *nge-lin-nga-maya* (married from youth) for adultery on the part of the wife. The texts relating to this question are collected in section 256 of U Gaung's Digest, Volume II. Some of the texts collected therein do not

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clearly show that they deal specifically with such a case, but if the heading of the section is read along with the headings of the two previous sections it will be seen that they do deal with such a case. The heading of section 254 is in the following terms :

“Divorce by mutual consent between husband and wife neither of whom has previously been married.”

The next section is headed :

“Divorce between husband and wife when only one party desires it and neither of whom has previously been married.”

Then comes section 256, the heading of which runs as follows :

“Divorce between *such* husband and wife when either is guilty of incontinence.”

That the texts set out in these sections deal with the case of a divorce between *nge-lin-nge-maya* on account of adultery on the part of the wife is also proved by what the *Dhammathats* quoted right at the beginning of the sections say. The first *Dhammathat* quoted in that section is the *Yasathat*. It says :

“In a married couple where neither party has previously been married, if either is guilty of a matrimonial fault, such as the husband taking a second wife or the wife keeping a paramour, divorce may be granted, and the party in fault shall be compelled to pay his or her *kobo* to the other.”

The next *Dhammathat* which deals with such a question is the *Dhammathatkyaw* which says, *inter alia*,—

“If the wife is guilty of adultery, she shall be sold after shaving her head in four patches.”

Then comes the *Dhamma* which states :

“If the wife is proved guilty of adultery, let the husband take the whole of the animate and inanimate property, and let her pay

him her *kobo* ; she shall moreover be punished (criminally). The rule applies to the separation of the husband and wife neither of whom has previously been married."

Then comes the last *Dhammathat* the *Kyannet* which deals with such a question. It says :

"If divorce is sought on account of the wife's adultery, she shall pay the husband her *kobo* as compensation and shall also be disgraced."

No extract from the *Manugye* has been quoted in that section ; but the *Manugye* deals with such a case in section 43, Book XII, where it says :

"Concerning putting away a woman who does not conform to the habits of her class, but addicts herself to low habits, it is thus said : 'If a woman, without regard to the credit of her family takes a paramour, or without the knowledge of her husband steals, or conceals his property, it is not said the husband shall only cease connubial intercourse with her ; her habits are bad ; she has certainly no regard to the honour of her family. For this reason, let him take all the property, and have a right to put her away.'"

In principle I do not see any difference between the case of a *nge-lin-nge-maya* and that of an *ein-damnggyi* (previously married couple) in cases where a divorce is adjudged on account of adultery on the part of the wife. The *Dhammathats* are impregnated with the teachings of Lord Buddha in places where they deal with the questions relating to the relations between a husband and wife. One of the teachings of Lord Buddha is that the husband shall love and cherish his wife and be faithful to her and that the wife shall respect and obey her husband and be faithful to him. This teaching has been made a foundation by most of the writers of the *Dhammathats* on which they have built up the rules

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regulating the conduct between a husband and wife :
 See Chapter X of U Gaung's Digest, Volume II, where the texts collected first show what the duties of a husband and wife towards each other are ; then they show what the qualities of a good husband and a good wife are ; then they point out what kind of a husband and wife should be cherished and loved and what kind of a husband and wife should be put away ; then they say that if the husband and wife behave towards each other in the manner as laid down by them they will go to the abode of the *Nats* (Celestial Beings) on their death. In support thereof I may refer to the *Manussika*. It says :

“ If the husband is virtuous while the wife is not, on their death, he will ascend to the *Deva* world while she descends to hell. Such a union is like that of a *Deva* with a female lower animal. If the wife is virtuous, while the husband is not, the union would be like that of a *Devi* with a male lower animal. If both are virtuous, the union would correspond with that of a *Deva* and a *Devi*.

See the extract given in section 215 of U Gaung's Digest, Volume II.

Therefore, in order to enforce obedience to this teaching of Lord Buddha, the essence of which is the sacredness of a family tie, the writers of the *Dhammathats* have imposed forfeiture of the right to property on the spouse who is guilty of adultery. Such being the case, I do not see, as I have said above, any difference in principle between the case of a *nge-lin-nge-maya* and that of an *eindaunggyi* in so far as it relates to the imposition of forfeiture on the guilty spouse. I am strengthened in this view by what *Mingyi U Gaung*

himself said in his book *Attasankhepa*. He said in section 393 as follows :

“ The law of separation between a previously married couple of the ruling class, when either of the parties is guilty of a matrimonial offence, is as follows :

‘ If the separation takes place because of the wife’s adultery, let the property originally brought to the marriage be taken by the party who brought it, and let the husband take the jointly acquired property together with the *thinthi* property given by the king, and let the wife pay all the debts contracted by both. Let her also give her husband the price of her body as well as damages for the offence of adultery.’ ”

Why the guilty wife in the case of an *eindaunggyi* is allowed to take back her *payin* is not explained, but the reason may be as stated by Mr. Burgess in the case of *Maung Yin Maung v. Ma So* (1), where the learned Judicial Commissioner said :

“ There are two rules of Buddhist Law on the subject of a divorce for adultery, one of them relating to the case of husband and wife married from their youth, and the other to the case of husband and wife where there has been a previous marriage by one or both, or at least by the wife. In the present instance the parties were unmarried before they became husband and wife, but they subsequently separated and then re-united. Under which rule should they come ?

No authority has been brought forward on this point, and I must decide it on principle.

It seems to me that the reason for making a distinction is plain enough and it is this : when a woman has been married before, the probability is that she has formed relations through giving birth to children or through the acquisition of property, which ought to be considered when she has entered into a subsequent union which has to be dissolved.

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Although she may be in fault, there are others besides herself to be considered, and it would be unjust and cruel to make them suffer for her misconduct.

On the other hand, when the woman has been only once married there is nobody to be considered but herself and the children, and as the latter are the offspring of the husband, it is probably immaterial, so far as they are concerned, to which parent the property goes, as they would eventually inherit from one or the other."

My conclusion, therefore, is that in the case of a divorce between an *chindaunggyi* couple on account of the wife's adultery the wife loses all her right in the *lma-pazon* property.

The result is that the appeal fails and is dismissed with costs.

ORIGINAL CIVIL.

Before Mr. Justice Braund.

MAHANTH SINGH

v.

U AYE AND OTHERS.*

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Apl. 9.

Contract by trustees—Personal liability of trustees contracting—Exclusion of personal liability by express or implied term of the contract—Effect of contracting merely "as trustees"—Indemnity out of the trust estate—Position of executors compared—Creditor's remedies against trustees or executors—Trustee's right of indemnity against trust estate an asset of trustee—Creditor's right to such asset by subrogation—Suit for money against contracting trustees—Change of trustees—Claim against new trustees.

There is, as regards the liability of the contracting parties, normally no difference between a contract to which *A* is a party in his capacity as "a trustee" and one to which *A* is a party in his personal capacity. In either case the opposite contracting party contracts with *A* and with no one else; and, in the absence of an express or clearly implied term of the contract itself that the personal liability of the contracting trustee is to be excluded, no limitation upon *A*'s personal liability arises by virtue only of his being in fact, and by his being described as, a trustee. In either case the trustee

* Civil Regular Suit No. 276 of 1934.