

CRIMINAL REVISION.

Before Mr. Justice Spargo.

MA KYIN MYA v. MAUNG SIT HAN.*

1937

Jan. 26.

Marriage—Chinese Confucian and Burmese Buddhist woman—Burmese customary law—Lex loci contractus—Justice, equity and good conscience—Essentials of marriage—Mutual agreement and consummation—Ceremony—Living together—Concubinage—Maintenance—Criminal Procedure Code (Act V of 1898), s. 488—Burma Laws Act (XIII of 1898), s. 13 (1) (a) and (3)—Special Marriage Act (III of 1872), s. 2.

In case of a marriage in Burma between a Chinese Confucian and a Burmese Buddhist woman s. 13 (1) (a) of the Burma Laws Act does not apply as both parties are not Buddhists; and s. 2 of the Special Marriage Act also does not apply as one party is a Confucian and the other a Buddhist. S. 13 (3) of the Burma Laws Act therefore becomes applicable as a matter of justice, equity and good conscience, and in a case of this nature it means, not the application of English law, but of Burmese customary law, the *lex loci contractus*.

In re Ma Yin Mya v. Tan Yauk Pyu, I.L.R. 5 Ran. 406, followed.

To establish a marriage under Burmese Buddhist law there must be mutual agreement that the parties become man and wife coupled with consummation.

Ma Hla Me v. Maung Hla Baw, I.L.R. 8 Ran. 425, referred to.

A ceremony or open living together are not necessary but either is cogent evidence of the central fact, the mutual agreement.

Where a man has a wife and visits another woman but with whom he never goes out in public nor associates her with his relations and friends it is a case of concubinage which does not entitle the woman to claim maintenance.

Guha for the applicant. The decision in *In re Ma Yin Mya v. Tan Yauk Pyu* (1) has not been fully approved in *Chan Pyu v. Saw Sin* (2) and in *Tan Ma Shwe Zin v. Tan Ma Ngwe Zin* (3). Cohabitation raises a presumption of marriage. *Maung Po Maung v. Ma Pyit Ya* (4). The parties have been living together for two years as husband and wife and so the wife is entitled to maintenance.

* Criminal Revision No. 737B of 1936 from the order of the First Additional Magistrate of Nyaunglebin in Cr. Misc. Trial No. 64 of 1936.

(1) I.L.R. 5 Ran. 406.

(3) I.L.R. 10 Ran. 97.

(2) I.L.R. 6 Ran. 623.

(4) I.L.R. 5 Ran. 161.

1937
 MA KYIN
 MYA
 v.
 MAUNG
 SIT HAN.

Ba Han for the respondent. The crucial question is, what law is applicable. The respondent is a Chinese Confucian, and according to his evidence the applicant is a Sino-Burmese woman who professes confucianism. In her examination she calls herself a Burmese woman professing the Buddhist religion, but since this is not a sworn statement the evidence of the respondent on oath should prevail, and she should be considered a Confucian.

If the parties are Confucians s. 13 (1) of the Burma Laws Act will not apply as both parties are not Buddhists. The only enactment applicable is the Special Marriage Act, 1872. A marriage between two Confucians can be celebrated under s. 2 of the Act; but admittedly that was not done.

If it be held that the applicant is a Buddhist then s. 13 (3) of the Burma Laws Act would apply, and the rule of decision should be according to justice, equity and good conscience which has been interpreted by the Privy Council to mean English law as far as it is applicable to local conditions. *Waghela v. Masludin* (1); *Muhrban Khan v. Makhma* (2).

It has been held in *In re Ma Yin Mya* (3) that where the matter for determination is the marriage between a Chinese Buddhist and a Burmese Buddhist woman, Buddhist law as the *lex loci contractus* would ordinarily apply. In *Phan Tiyok v. Lim Kyin Kauk* (4) Heald Offg. Chief Justice suggested that the validity of such a marriage should be decided by considerations of justice, equity and good conscience. In other words Buddhist law should apply as a rule of justice, equity and good conscience, and not as the *lex loci contractus*. This is the sounder view.

(1) 14 I.A. 89, 96.

(2) I.L.R. 11 Lah. 251.

(3) I.L.R. 5 Ran. 406.

(4) I.L.R. 8 Ran. 57, 89.

It is clear from the evidence that the respondent never made any public appearance with the applicant, and there is no publicity regarding their relationship. The position of the applicant is merely that of a mistress.

1937
MA KYIN
MYA
v.
MAUNG
SIT HAN.

SPARGO, J.—This is an application for revision of an order rejecting the application of Ma Kyin Mya for maintenance for herself as the wife of Maung Sit Han and granting her maintenance at the rate of Rs. 5 per mensem on account of her child.

Applicant's case was that she and Maung Sit Han lived together as husband and wife by mutual consent from July 1934 and that he had failed to maintain her and her son from September 1935. In his written statement Maung Sit Han said that he met Ma Kyin Mya in July 1934 and they lived together not publicly but secretly. Ma Kyin Mya knew that he had a chief wife living, and lived with him as a concubine and was therefore not entitled to any maintenance for herself. The paternity of the child was admitted.

The learned Magistrate found that Ma Kyin Mya was not Maung Sit Han's wife and refused to order that maintenance on her account be paid.

In this Court the question was argued, what law would govern a marriage in Burma between the parties? Mr. Guha for the original applicant (Ma Kyin Mya) said that Chinese Customary law applies. Dr. Ba Han for the respondent (Maung Sit Han) that the Special Marriage Act of 1872 applies. There appears to be some obscurity as to whether Ma Kyin Mya is a Buddhist or a Confucian. Dr. Ba Han said that she was a Confucian, but the only evidence recorded apart from a statement by the respondent is that among the particulars recorded of Ma Kyin Mya when she was examined as a witness a large B has been written for her race and religion, the recognized abbreviation for Burmese and Buddhist.

1937

MA KYIN

MYA

v.

MAUNG
SIT HAN.

SPARGO, J.

This may or may not mean much. These particulars are sometimes written mechanically and possibly are not read out to the witness, but the presumption is that they were so read out, and it would not be in the least unusual to find such a woman as Ma Kyin Mya professing the Buddhist faith. I therefore find that she is a Buddhist.

Maung Sit Han says he is a Confucian and there being no reason to doubt that, and there being no other evidence on the point, I decide that he is a Confucian.

The parties are not both Buddhists and therefore section 13 (1) (a) of the Burma Laws Act does not apply. Section 2 of the Special Marriage Act to which I was referred does not appear to me to apply either because one party is a Buddhist and the other is a Confucian.

Section 13 (3) of the Burma Laws Act then lays down that in the absence of any other enactment for the time being in force (and my attention has not been drawn to any such enactment) the decision shall be according to equity, justice and good conscience.

Dr. Ba Han suggested that this phrase has been interpreted to mean "according to English Law", and though no doubt cases may arise where this interpretation is appropriate it is obviously not the case here. It cannot have been intended that such a marriage should have to be solemnized according to English Law. The decision must be according to equity, justice and good conscience ascertained by reference to either Chinese customary law or Burmese Buddhist law.

In re Ma Yin Mya and one v. Tan Yauk Pyu and two (1) dealt with the case of a marriage in Burma between two Chinese Buddhists and decided that the Burmese Buddhist Law regarding marriage is *prima facie*

applicable as the *lex loci contractus*. The reasons given for this decision are to be found at page 419 of the report and with them I respectfully agree. I am of opinion that they apply with equal force to the case of a Chinese Confucian and a Burmese Buddhist woman and I decide that that law is applicable to the present case.

What is required to establish a marriage under that law? It is that there be mutual agreement that the parties become man and wife coupled with consummation—see *Ma Hlu Me v. Maung Hla Barw* (1). The ceremony is not necessary; it is no more if it takes place than evidence whereby the fact of this mutual agreement can be proved. Similarly open living together is not necessary but is cogent evidence to prove the central fact, the mutual agreement.

In the present case the woman admits that the man already had a wife when she first associated with him. She admits that they never went out in public together, never went to any pagoda or *kyaung* together, or to any *ahlu* or funeral in the town. They never received any friends in the house as husband and wife. It is true that she produced witnesses who referred to them as husband and wife but it is well known that these expressions are loosely used in Burma and frequently mean not marriage but concubinage. These witnesses described Maung Sit Han's visits to Ma Kyin Mya as daily, but they have only taken place for the space of 2 or 3 years, and cannot be described as openly living together as husband and wife. It is true that the woman lives in a house built by the man but this cannot be taken as proof of that mutual agreement to become husband and wife necessary to constitute marriage. It is equally consistent with making provision for a kept woman and her child.

1937
 MA KYIN
 MYA
 v.
 MAUNG
 SIT HAN.
 SPARGO, J.

(1) (1930) I.L.R. 8 Ran. 425.

1937

MA KYIN
MYA
MAUNG
SIT HAN.

SPARGO, J.

I see no reason therefore to alter the order respecting the woman. As to the maintenance ordered for the child I cannot see that it is insufficient and I therefore dismiss this application.

CIVIL REVISION.

Before Mr. Justice Mosely.

C. MACLEOD

v.

THE BOMBAY FURNITURE MART.*

1937

Feb. 15.

Attachment before judgment—Salary of public officer—Property at the disposal of defendant—Salary not earned or paid—Civil Procedure Code (Act V of 1908), s. 60, O. 38, r. 5.

Property for the purposes of Order 38, rule 5 of the Civil Procedure Code means property already in existence, belonging to and at the disposal of the defendant. Salary which has not yet accrued or been earned is not attachable in execution, and the special exception made in s. 60 of the Code as to attachment in execution of the salary of a public officer or servant has not been applied to attachments before judgment.

The salary, not having yet been earned or paid, cannot be "disposed of" until it has at least become payable, and so it is illegal to attach before judgment the salary of a public servant or of any employee until it has accrued.

Aaron for the applicant.

K. C. Sanyal for the respondent.

MOSELY, J.—This is an application in revision against an order of the Small Cause Court directing a moiety of the salary of the defendant, a temporary public officer, to be attached before judgment. The order purported to be passed under Order XXXVIII, rule 5, of the Civil Procedure Code. The application was made on the day that the suit was filed, and in the affidavit of the plaintiff's agent on which the application was granted

* Civil Revision No. 397 of 1936 from the order of the Small Cause Court of Rangoon in Civil Misc. No. 666 of 1936.