

1936
 MA MYA
 KHIN
 v.
 GGDENHO.
 DUNKLEY, J.

The respondent must pay the costs of this application in revision and also of the proceedings before the Township Magistrate of Chauk, advocate's fee in this Court two gold mohurs.

CRIMINAL REVISION.

Before Mr. Justice Ba U.

1936
 Aug. 14.

MA KYIN HLAING v. MAUNG KYIN SWI.*

Chinese Buddhist couple—Marriage by living together and repute—Maintenance—Criminal Procedure Code (Act V of 1898), s. 488.

Where a Chinese Buddhist man and wife live together as husband and wife and are regarded as such by their relations and friends it is a valid marriage both according to Burmese Buddhist law and Chinese customary law, whichever is applicable, and the wife is entitled to an order for maintenance under s. 488 of the Criminal Procedure Code on the husband's neglect to maintain her.

Ma Sein Byu v. Khoo Soon Thye, I.L.R. 11 Ran. 310; *In re Ma Yin Mya v. Tan Yaak Pyn*, I.L.R. 5 Ran. 406; *Phan Tiyok v. Lim Kyin Kawk*, I.L.R. 8 Ran. 57; *Tan Ma Shwe Zin v. Tan Ma Ngwe Zin*, I.L.R. 10 Ran. 97; *Thein Shin v. Ah Shein*, 8 L.B.R. 222, referred to.

Aung Cheint for the applicant.

Saw Tun Teik for the respondent.

BA U, J.—The parties in this case are Chino-Burmans. They ran away together in February, 1935, and thereafter lived as husband and wife, first, in the house of the mother of the petitioner and, secondly, in the house of the respondent. After a few months' stay in the latter's house the respondent and the petitioner fell out and since then they have been living apart from each other. The petitioner has, therefore, applied for maintenance. The defence is that the petitioner is not the legally married wife of the respondent and that

* Criminal Revision No. 281B of 1936 from the order of the Second Additional Magistrate of Kawa in Criminal Misc. Trial No. 5 of 1936.

even if she is, she is not entitled to maintenance allowance as she refused to live with the respondent.

If not for certain decisions and expressions of opinion given subsequent to the case of *In re Ma Yin Mya and one v. Tan Yauk Pyu and two* (1) I should say that the point that arises now in this case is fully covered by the decision in that case and that the marriage between the petitioner and the respondent must be declared to be a valid marriage.

It is not quite clear from the terms of the reference whether the woman concerned in that case was a Chinese Buddhist woman, as in the present case, or a Burmese Buddhist woman, but from the answer given by Rutledge C.J. the woman seemed to be a Burmese Buddhist woman. Whatever she might be the question referred was so wide as in my opinion to cover not only the case of the marriage of a Chinese Buddhist man with a Burmese Buddhist woman but also the case of the marriage between a Chinese Buddhist man with a Chinese Buddhist woman. The question referred runs as follows :

“ In the case of Chinese Buddhists, is the Burmese Buddhist law regarding marriage applicable to them as the '*lex loci contractus*' or, if not, which is the law applicable ? ”

The answer is that—

- “ (a) the Burmese Buddhist law regarding marriage is *prima facie* applicable to Chinese Buddhists as the *lex loci contractus* ; and
- (b) to escape from the application of Burmese Buddhist law regarding marriage a Chinese Buddhist must prove that he is subject to a custom having the force of law in Burma and that that custom is opposed to the provisions of Burmese Buddhist law applicable to the case ; and

1936

MA KYIN

HLAING

v.

MAUNG KYIN

SWL.

BA U, J.

(1) (1927) I.L.R. 5 Ran. 406.

1936

MA KYIN
HLAING
v.
MAUNG KYIN
SWI.

BA U, J.

(c) in case the matter in issue is the marriage of a Buddhist Chinaman with a Burmese Buddhist woman he must show that the application of the custom having the force of law will not work injustice to the Burmese Buddhist woman."

Subsequently the case of *Phan Tiyoik and another v. Lim Kyin Kauk and others* (1) came up for consideration by another Full Bench. The question involved in that case was whether the Burmese Buddhist law governed the succession to the estate of a Chinese Buddhist born in China, but who was domiciled and died in Burma? The answer given with Otter J. dissenting was that the Indian Succession Act governed such a succession and not the Burmese Buddhist law.

If the decision given in *In re Ma Yin Mya's* case (2) were to be followed to its logical conclusion I should say that the Burmese Buddhist law should also govern the succession to the estate of a Chinese Buddhist. The questions of marriage and succession are so intimately bound up that one follows the other as night follows day and so one part of one's life should not be allowed to be governed by one law and the other part should be allowed to be governed by another law. Brown J. who was a member of both the Full Benches which decided those two cases saw this apparent contradiction in the decisions as recorded therein and accordingly his Lordship made the following observations :

"The learned Chief Justice in his judgment in *Ma Yin Mya v. Tan Yauk Pyu* at page 413 remarked :

'It will be observed that the phrase in section 13 (1) of the Burma Laws Act is the Buddhist law where the parties are Buddhists, and not the Burmese Buddhist law. We know that there are Chinese, Tibetan, Sinhalese and Chittagonian Buddhists. The

(1) (1930) I.L.R. 8 Ran. 57, 138. (2) (1927) I.L.R. 5 Ran. 406.

only Buddhist law, however, in my opinion of which the Courts of this province have ever taken cognizance is Burmese Buddhist law. And for a foreign Buddhist to escape from the application of Burmese Buddhist law, he must show that he is subject to a custom having the force of law in this country and that that custom is opposed to the provisions of Burmese Buddhist law applicable to the case.'

1936
MA KYIN
HLAING
 v.
MAUNG KYIN
SWI.
 BA U, J.

I concurred generally in the learned Chief Justice's judgment, but the point before us then was a point only with reference to marriage and although the passage I have quoted from the judgment might suggest that the Burmese Buddhist law would be applicable also to cases of succession amongst Chinese Buddhists, that result did not necessarily follow from our decision on the question before us and we did not intend to lay this down as the general law The Burmese Buddhist law is the law applicable to Burmese Buddhists in Burma but it does not follow that the same law must be applied without any modification to Buddhists coming from another race and country So far as succession is concerned, I do not consider that Burmese Buddhist law is applicable to Chinese Buddhists."

Heald Offg. C.J. and Chari J. got over the difficulty which I have pointed out above by holding that the Chinese Buddhists were not Buddhists within the meaning of section 13 (1) (a) of the Burma Laws Act. This view of Heald Offg. C.J. and Chari J. was not accepted by a Bench consisting of Page C.J. and Cunliffe J. in *Tan Ma Shwe Zin v. Tan Ma Ngwe Zin and others* (1). There his Lordship the Chief Justice said that Chinese Buddhists are Buddhists within the meaning of section 13 of the Burma Laws Act and added :

"As I apprehend the meaning and effect of section 13 of the Burma Laws Act, however, the Burmese customary law is to be applied in Burma to Burmese Buddhists and the Chinese customary

(1) (1932) I.L.R. 10 Ran. 97, 114.

1936
 MA KYIN
 HLAING
 v.
 MAUNG KYIN
 SWI.
 BA U, J.

law to Chinese Buddhists, not because these customary laws are part and parcel of the Buddhist religion, but because they are the personal law by which the Burmans and Chinese in Burma who profess the Buddhist religion respectively are governed."

This decision was followed by Leach J. in *Ma Sein Byu and another v. Khoo Soon Thye and others* (1).

Here again, if Chinese Buddhists are Buddhists within the meaning of section 13 of the Burma Laws Act, and, consequently, their customary law applies to succession to their estates it logically follows that their customary law must also apply in the case of marriage amongst themselves. In that case, what constitutes a valid marriage between a Chinese Buddhist man and a Chinese Buddhist woman in Burma according to their customary law? Jamieson in his book on Chinese Family and Commercial Law, at pages 44 and 45, says :

- "The ordinary requirements to constitute a valid marriage are :
- '(1) Employment of go-betweens who settle verbally the contract between the two families.
 - (2) Exchanging red cards giving the date of birth of each of the couple, and usually drawing up a formal contract of betrothal.
 - (3) Sending and receiving of the wedding presents. (These three constitute a formal betrothal which carries legal consequences, e.g. specific performance may be enforced.)
 - (4) Bringing home the bride with red chair and music.
 - (5) Obeisance by the pair to the bridegroom's parents, and in better class families kneeling to the ancestral tablets.' "

Then the learned author states :

"But though in all respectable families all these formalities are strictly observed, it is submitted that only two or at most three are really essential, *viz.*,—betrothal as evidenced by the go-between or by written contract, the receipt by the bride's family of the

(1) (1933) I.L.R. 11 Ran. 310.

presents which is the consideration, and the handing over of the woman as wife. The only question in any subsequent dispute would be,—was it the intention of the parties to constitute the relationship of Husband and Wife, and was the woman given and accepted as wife?

These formal ceremonies apply only to the first or principal wife. For a second wife no ceremony is required at all, it is purely a matter of bargain and sale; red chair and music are not required nor even allowed."

1936
 MA KYIN
 HLAING
 v.
 MAUNG KYIN
 SWI.
 BA U J.

Later on the learned author says :

"When the betrothal is complete as evidenced by written contract and by receipt of the marriage presents, either party can compel the other side to fulfil the engagement."

The same view is taken by Harper Parker. After describing the six preliminary steps to a first class marriage the learned author says in a foot-note at page 9 of his book on Comparative Chinese Family law as follows :

"Like the *sponsalia* of the Romans, the above forms are usual but not indispensable : they have the effect of an agreement to marry, which agreement is enforceable by positive law."

P. G. Von Mollendorff in his book, *The Family Law of the Chinese*, as translated by Mrs. S. M. Broadbent, describes the same formalities as are described by Jamieson and Parker as being essential to a first class marriage and states :

"In China the Church has nothing to do with marriage, still the usual ceremonies and festivities are indispensable and needful for the completion of a proper marriage, as well as the *consensus matrimonialis* of those persons who signed the Betrothal. For example, if the bride has been brought up in the house of her future husband, which happens sometimes, then the red carrying chair, the music and the display of the presents through the streets is unnecessary. However, like the Jews the Chinese invite

1936
 MA KYIN
 HLAING
 v.
 MAUNG KYIN
 SWL.
 BA U, J.

numerous guests, relations and friends, who keep the feast for three days and so give to it sufficient publicity and the needful importance.

Marriage is, as we have seen, in China concluded according to the will of the contracting parties, and has in some way or other to be made public."

From these observations and comments of the three learned authors what appears to my mind to be the object in going through those formalities is to have a binding marriage contract made before the actual marriage takes place. A binding marriage contract entails certain legal consequences. They are not, in my opinion, essential to the validity of a marriage. Three of them such as the employment of a go-between, the sending of presents to the parents of the bride and the handing over of the bride on receipt of the presents are essential, if the status of a chief or first wife is to be acquired. But where the question of such a status is not involved, what, in my opinion, really constitutes a valid marriage is the consent of the parties concerned to live together as husband and wife. They must, however, give sufficient publicity to their relationship.

The same view was taken by a Bench of the late Chief Court in *Thein Shin and one v. Ah Shein* (1) where the learned Judges said at page 224 :

" Parker in his Essay on Comparative Chinese Family Law mentions six preliminary steps to a first class marriage. But it is explained in a foot-note that though these forms are usual in China they are not indispensable. The evidence of Chinese elders produced for the plaintiff in this case shows that the customs are not insisted on in the case of Chinese marriages in Burma and that relaxation is permitted also in the case of poor people."

Such in my opinion being the legal position the result is the same whether the Burmese Buddhist Law

(1) 8 L.B.R. 222.

or Chinese Customary Law applies to a marriage between a Chinese Buddhist man and a Chinese Buddhist woman.

If reference is now made to the evidence produced in this case I have no doubt, in my mind that the marriage between the parties is a valid one. The evidence produced in the case shows clearly that the parties lived together as husband and wife for some time and they were accepted as such by their relations and friends. There is no reliable evidence to prove that the petitioner refused to live with respondent.

For these reasons I set aside the order of the Magistrate and allow a maintenance allowance of Rs. 20 a month with effect from the date of the institution of this case, that is, the 25th January 1936.

APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Leach.

HAJEE SHAKUL HAMID AND OTHERS

v.

K. MOHAMED IBRAHIM.*

Judgment—Letters Patent, clause 13—Scheme for management of mosque—Scheme embodied in final decree—Order directing trustees to hold meeting to fill up vacancies—Order not a judgment—Appeals from Original Side—Civil Procedure Code (Act V of 1908), ss. 2, 96.

An order directing the trustees of a mosque to call a meeting for the election of new trustees to fill up vacancies in accordance with the provisions of the scheme of management which had been settled in a suit on the Original Side of this Court and embodied in its final decree is not a judgment within clause 13 of the Letters Patent, and is not appealable.

In re Dayabhai v. Murugappa Chettyar, I.L.R. 13 Ran. 457, followed.

Appeals from the Original Side of the High Court are governed by clause 13 of the Letters Patent and not by s. 96 of the Civil Procedure Code, and s. 2 of the Code has no application. The order in question was only a consequential

* Civil First Appeal No. 131 of 1936 from the order of this Court on the Original Side in Civil Regular No. 264 of 1933.

1936

MA KYIN
HLAING

v.
MAUNG KYIN
SWI.

BA U, J.

1937

Jan. 21.