

ORIGINAL CIVIL.

Before Mr. Justice Dunkley.

MA SAW NWE v. U AUNG SOE.*

1939
Jan. 10.

Buddhist law—Suit by wife against husband for maintenance—Express or implied contract created by marriage—Duty of Burmese Buddhist husband to maintain his wife—Maintenance suit a suit of civil nature—Claim for arrears of maintenance—Civil Procedure Code, s. 9.

Marriage, whatever the form of the contract may be, constitutes, if not an express, at all events an implied contract between the parties that the husband shall maintain his wife.

Ardascer v. Peroceboye, 6 Moo. I.A. 348, referred to.

Under Burmese Buddhist law there is a positive duty cast on the husband to maintain his wife or wives. Hence a suit for maintenance by a Burmese Buddhist wife against her husband who is living separately from her is maintainable.

Maung Hmuu Taw v. Ma Pwa, (1872-92) S.J., L.B. 258 ; *Moonshee Buzloor Ruheem v. Shunsoon-nissa Begum*, 11 Moo. I.A. 551, referred to.

A suit for maintenance is a suit of a civil nature within s. 9 of the Civil Procedure Code. In such a suit maintenance can be claimed from the date of the filing of the suit but not arrears of maintenance before such date.

Ba Han for the plaintiff.

E Maung for the defendant.

DUNKLEY, J.—This is a suit by a Burmese Buddhist wife against her husband for maintenance. The plaintiff asks for a decree for maintenance at the rate of Rs. 166 *per mensem* from the date of suit, and also for arrears of maintenance at this rate from the date on which the defendant first failed to maintain the plaintiff. It is now admitted that, in view of the judgment of their Lordships of the Privy Council in *Maung Hmuu Taw v. Ma Pwa* (1), the claim for arrears of maintenance cannot be sustained, and the parties have agreed that, if a suit for future maintenance is maintainable, the amount to be decreed for such maintenance shall be fixed at Rs. 150 *per mensem*. Consequently, the sole question which

* Civil Regular Suit No. 227 of 1937.

(1) (1872-92) S.J., L.B. 258 (P.C).

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falls for decision is whether a Burmese Buddhist wife can bring a suit for maintenance against a husband from whom she has separated.

No evidence has been called by either party, and the case has been argued on an agreed statement of facts. The plaintiff and the defendant were married on the 28th December, 1931. They are still wife and husband. They cohabited until the beginning of February 1937, when they separated on the defendant contracting a second marriage. They have since been living separately. Since their separation the defendant has not contributed anything to the maintenance of the plaintiff.

The defence of the defendant to the present suit is that no suit for maintenance lies by a Burmese Buddhist wife against her husband. Section 9 of the Code of Civil Procedure enacts that :

“The Courts shall . . . have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.”

A suit for maintenance is a suit of a civil nature. But U E Maung, for the defendant, contends that the cognizance of a suit for maintenance between a Burmese Buddhist wife and husband is barred by the Burmese Buddhist law. It is conceded that the question at issue is a question regarding marriage and, therefore, has to be decided according to the Burmese Buddhist law. In *Ardaseer Cursetjee v. Perozboye* (1), a case which was decided in 1856, their Lordships of the Privy Council said :

“Marriage, whatever the form of the contract may be, constitutes, if not an express, at all events an implied contract between the parties that the husband shall maintain his wife. In Christian

(1) 1856 6 Moo. I.A. 348, 372, 373.

countries a breach of this contract cannot be enforced by the wife in a Civil Court directly against the husband, because the law considers a man and his wife as one person, and will not permit an action by the wife against her husband ; but no such principle is known to the Mahomedan, Hindoo, or Parsee law ; and the Supreme Courts at Calcutta and here have always treated native married women as *femmes sole*, and indeed it is quite impossible, upon any *à priori* or natural reasoning, to treat them as anything else."

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U E Maung, for the defendant, urges that in this respect a Burmese Buddhist marriage is similar to the Christian marriage. He does not suggest that in law a Burmese husband and wife are one person ; in fact, he could not possibly do so. But he argues that, because all the property acquired by them during marriage is their joint property, therefore the position in regard to an action by the wife for maintenance is just the same. He says that to allow such an action would be tantamount to allowing the wife to sue for her own property which is in her possession through her husband, and that it would lead to the anomalous result that the wife would, in the form of maintenance, obtain some part of her share in the joint property, and yet still be able to claim her full interest in the remainder. The answer to this argument is, in my opinion, that if the husband has obtained control over the whole of the joint property and, by living separately from his wife and refusing to maintain her, denies her right to be maintained out of that property, there is nothing opposed either to law or to reason in granting her a cause of action to enforce that right ; and that as the wife would be maintained out of the joint property if she were living with her husband and would still retain her full rights in the surplus remaining after the maintenance of the joint household, there is nothing anomalous in her receiving, when they are living separately, a portion

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of the joint property for her maintenance and still retaining her rights in the balance of such property. In *Maung Hmun Tarw v. Ma Pwa* (1) their Lordships said (at page 259) :

“ It is the duty of the husband to provide subsistence for his wife, and to furnish her with suitable clothes and ornaments.”

On behalf of the defendant it is urged that this opinion was not necessary to the decision of the question before their Lordships and, therefore, must be treated as *obiter dictum*. But, as I have already pointed out, in *Ardaseer Cursetjee v. Perozeboye* (2) their Lordships said that marriage, whatever the form of the contract may be, constitutes, if not an express, at all events an implied contract between the parties that the husband shall maintain his wife. Moreover, all the *Dhammathats* declare that it is the duty of the husband to maintain the wife. See *Manugye*, volume V, section 17, and the extracts of the *Dhammathats* collected in U Gaung's Digest, volume II, sections 208, 236, 244 and 253. It is clear that under Burmese Buddhist law there is a positive duty cast on the husband to maintain his wife or wives. Where, by law, a person is under a duty towards another person, there is vested in that other a corresponding right to have that duty performed. In *Moonshee Buzloor Ruheem v. Shumsoon-nissa Begum* (3) their Lordships said :

“ If the law which regulates the relations of the parties gives to one of them a right, and that right be denied, the denial is a wrong ; and unless the contrary be shown by authority, or by strong arguments, it must be presumed that for that wrong there must be a remedy in a Court of Justice.”

The plaintiff, as a Burmese Buddhist wife, has a right to be maintained by her husband, and that right has in

(1) (1872-92) S.J., L.B. 228 (P.C.I.) (2) (1856) 6 Moo. I.A. 348.

(3) (1867) 11 Moo. I.A. 551, 606.

this case been denied by her husband. It has not been shown, either by authority or by argument, that she has not a remedy in a Court of Justice to enforce that right which has been denied to her. Hence it must be held that a suit for maintenance by a Burmese Buddhist wife against her husband, who is living separately from her, is maintainable. Whether such a suit could be successful if the wife had at her disposal sufficient means to maintain herself it is unnecessary to decide, because it is not alleged in the present case that the plaintiff has such means.

I hold that the present suit is maintainable and must be decreed. There will be a decree ordering the defendant to pay to the plaintiff the sum of Rs. 150 *per mensem* as her maintenance with effect from the date of institution of this suit (*i.e.* the 4th August, 1937) and for so long as the marriage between them may subsist, or for so long as they continue to live separately. The defendant will pay to the plaintiff her costs of this suit, assessed proportionately on the amount which has been decreed, *viz.* Rs. 18,000.

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