

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mosely.

U ARZEINA

v.

MA KYIN SHWE AND ANOTHER.*

1940

Apl. 25.

Burmese Buddhist monk—Order for maintenance of child by magistrate—Declaratory suit by monk denying paternity—Monk not civilly dead—Declaratory decree—Procedure for cancellation of magistrate's order—Criminal Procedure Code, s. 489—Specific Relief Act, s. 42.

A Burmese Buddhist monk against whom a summary order for maintenance has been obtained in a criminal Court in respect of a child alleged to be his has the right to file a suit under s. 42 of the Specific Relief Act for a declaration that he is not the father of the child.

Though a Burman Buddhist, when he becomes a *rahan*, is automatically divested of his property, he is not to be regarded as civilly dead and the declaration he seeks in the civil Court affects his liability to pay the amount of maintenance imposed on him by the criminal Court.

Chettyar Firm of A.R.L.P. v. U Po Kyaing, [1939] Ran. 311; *Ganeshi Lal v. Anwar Khan Mahtob Co.*, I.L.R. 55 All. 702; *Kailasa v. Raghubar*, 26 I.C. 526; *Maung Dun v. Ma Sein*, I.L.R. 3 Ran. 150; *Maung Po Kwe v. Ma Pwa Shein*, [1939] Ran. 741; *Maung Tin v. Ma Hnin*, I.L.R. 11 Ran. 226; *Po Thein v. Ma Me San*, (1921-22) 4 U.B.R. 120; *U Pyinnya v. Maung Law*, I.L.R. 7 Ran. 677, referred to.

If the plaintiff is successful in his civil suit, the proper course for him is to approach the criminal Court under s. 489 (2) of the Criminal Procedure Code and apply to have the order for maintenance cancelled.

Chan Htoon for the appellant.

E Maung (1) for the respondents.

MYA BU and MOSELY, JJ.—In the suit under appeal the plaintiff-appellant, a Burmese Buddhist monk, sued the defendant-respondent, a woman who had obtained an order at the rate of Rs. 10 a month against him for maintenance of an infant son, who was also made a defendant. The suit was brought under section 42

* Civil First Appeal No. 17 of 1940 from the judgment of the Assistant District Court of Mandalay in Civil Regular No. 18 of 1939.

of the Specific Relief Act for a declaration that the plaintiff was not the father of this child and for such other relief as the nature of the case might admit.

It was contended, *inter alia*, in the written statement for the defence that the suit was one for a declaration of want of status, and did not lie under section 42 of the Act.

The learned Assistant District Judge found, first of all, that the plaintiff, *qua* monk, had died a civil death, or was *civilitate mortuus*, in the sense that he had become divested not only of his property but also of all his civil rights, and that therefore he had no right of suit.

It would be an anomaly if a monk against whom a summary order for maintenance can be obtained in a criminal Court [*Maung Tin v. Ma Hnin* (1)] cannot have the remedy common to other litigants to re-agitate the question of his liability in a regular proceeding in a civil Court; but it has been decided by this Court in *A.R.L.P. Firm v. U Po Kyaing* (2) that though a Burman Buddhist, when he becomes a *rahan*, is automatically divested of his property, yet it would be erroneous to regard him as civilly dead. This judgment passed in February 1939 appears not to have been brought to the notice of the learned Assistant District Judge who passed his judgment in December of that year. It has also previously been held in *U Pyinnya v. Maung Law* (3) that a Buddhist monk is competent to contract and sue on contracts, and where questions of religious institution or usage are not concerned is not civilly dead. The Judge went on to hold that in any case a suit for a declaration of this character, a declaration we may say of non-paternity and of non-liability in consequence to pay maintenance, does not

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(1) (1933) I.L.R. 11 Ran. 226.

(2) [1939] Ran. 311.

(3) (1927) I.L.R. 7 Ran. 677.

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lie under section 42 of the Act. That provision of law enacts that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying his title to such character or right, and the Court may in its discretion make a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief : provided that the Court would not make such declaration where the plaintiff, being able to seek further relief than a mere declaration of title—that is to say, further relief that he should sue for in respect of that title—omits to do so.

The learned Judge went on to hold that the plaintiff was seeking for a bare declaration as to his status of paternity or non-paternity, and that that declaration would not affect either the plaintiff's legal character or his right to any property. The plain answer to that of course is that the declaration affects the plaintiff's liability to pay the amount of maintenance in question, which is property, and, as remarked in *Ganeshi Lal v. Anwar Khan Mahboob Co.* (1), the provision of law under which the declaration is sued for properly covers not only a declaration to assert a positive right but a declaration to negative the right asserted by the defendant against the plaintiff which affect the plaintiff's property, that is to say the liabilities to the plaintiff's estate.

Two Burma cases on the subject have not been referred to by the learned Assistant District Judge. In *Nga Po Thein v. Ma Me San* (2), which was a case exactly on all fours with the present one, it was held that such a suit would lie, and indeed we do not know that it has ever been questioned in this country that such a suit would lie any more than the common form of suit by a husband against a woman claiming to be

(1) (1933) LL.R. 55 All. 702, 703.

(2) (1921-22) 4 U.B.R. 120.

his wife for a declaration that she is not his legal wife : in both cases not merely a legal character but a right to property or earnings is involved.

The matter might well have been left there, but it is again contended in argument for the respondent that such a suit does not lie. Some of the rulings of other High Courts on the subject have been discussed in *Maung Dun v. Ma Sein* (1), a judgment on a cognate point which was not cited in a somewhat similar case decided by a member of this Bench in *Maung Po Kwe v. Ma Pwa Shein* (2). In *Maung Dun v. Ma Sein* (1) it was held that such a suit would lie. Other cases in which a similar conclusion had been arrived at or was assumed are referred to in *Maung Dun's* case,—*Maddu Venkaya v. Kamireddi Padamma* (3), *M.A.A. Kadar v. Ludden Sahiba* (4) and *D.M. Naika v. Marati Kaveri* (5). There are two decisions to the contrary quoted : *Subad Donmi v. Katiram Dome* (6) and *Subhudra v. Basdeo Dube* (7) but they give no reasons for such an interpretation of the law. Good reason however is given for holding that such a suit comes clearly within the ambit of section 42 in *Kailasa v. Raghubar* (8), where it is said :

“ No person can come for a declaration in a Civil Court under the Specific Relief Act on mere speculative grounds. He will have no cause of action on which a Court in its discretion will give him a decree until there is some infringement or threatened infringement of some right ; but if a cloud is cast upon that right he will be entitled to sue for a declaration to remove that cloud. In the present instance the plaintiff has been saddled by the finding of the Magistrate with an illegitimate child of which he says he is not the father. Such a legal character necessarily carries with it rights and obligations above and beyond the one

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(1) (1925) I.L.R. 3 Ran 150.

(2) [1939] Ran. 741.

(3) (1923) I.L.R. 46 Mad. 721.

(4) (1886) I.L.R. 14 Cal. 276.

(5) (1907) I.L.R. 30 Mad. 400

(6) (1877) 20 W.R.Cr. 58.

(7) (1895) I.L.R. 18 All. 29.

(8) 26 I. C. 526, 527.

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obligation to provide the maintenance for the child which the Magistrate has ordered. It is by that order that the cloud has been cast upon his legal character, and it is for that reason that he must base his cause of action upon that order. He does not seek to set it aside."

Other cases are quoted in this decision where such a type of suit has been allowed, namely, *Waryam Singh v. Musammat Premon* (1), and *Musammat Bakhan v. Ala Bakshli* (2), to which may be added *Bai Shri Vaktuba v. Thakore Agarsinghji Raisinghji* (3).

Some of the cases cited by the learned Assistant District Judge are cases where it has been held that the plaintiff has not a present title to any property but merely a contingent title, and that the Court would not in its discretion grant a decree in such cases which would be infructuous, such as suits brought in the life time of the adoptive parent by an adopted son to declare the factum of adoption, or suits to declare a title which was merely a *spes successionis*. We are not concerned here with such types of suit.

It is not in our opinion necessary that the plaintiff should sue for an injunction to restrain the defendant from drawing the maintenance awarded by the criminal Court. Nor of course could the plaintiff sue for an injunction to restrain the criminal Court from paying such sums of maintenance to the defendant, as was pointed out in *Maung Dun v. Ma Sein* (4). The proper course in such cases is for the plaintiff, if he is successful in his civil suit, to approach the criminal Court under section 489 (2) of the Criminal Procedure Code, and apply to the Magistrate to cancel or vary the order for maintenance accordingly.

For these reasons the decree of the Assistant District Court of Mandalay will be set aside and it will

(1) 50 P.R. 1901.

(2) 26 P.R. 1903.

(3) (1910) I L.R. 34 Bam. 676.

(4) (1925) I.L.R. 3 Ran. 115.

be directed to proceed with the case on the merits.
The appellant is entitled to the costs of this appeal,
advocate's fee three gold mohurs.

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