APPELLATE CIVIL.

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

1940

Feb. 19.

MAUNG MAUNG *v.* MA SEIN KYI.*

Burmese Buddhist law—Marriage—Proof of marriage—Conduct of parties—Cohabitation—Conjugal relationship—Clandestine intercourse—Avowal of marriage—Treatment of couple as husband and wife—Statements as to relationship, admissibility of—Burden of proof—Evidence Act, s. 50.

If the Court has to decide whether or not a Burmese Buddhist couple have by mutual consent entered into the married state it can only do so by inferring the relationship from the conduct of the parties themselves or from the conduct of neighbours and friends who treated them during the period under dispute as though they were man and wife A bare statement by a witness that a certain couple are man and wife is not evidence.

Cohabitation means living in conjugal relationship and the term cannot properly be used in connection with clandestine intercourse. In a lawful union there must be an open avowal of the married state as distinct from the relationship between a man and his mistress, or proof of a mode of living by a couple such as to induce members of the public, not to gossip about the relationship, but to show by their conduct that they treat the pair as man and wife.

Ma Wun Di v. *Ma Kin*, 4 L.B.R. 175 ; *Maung Hmoot* v. *Official Receiver, Mandalay*, I.L.R. 14 Ran. 704 ; *Mi Me* v. *Mi Shwe Ma*, (1910-13) 1 U.B.R. 111 (P.C.), referred to.

Where on the issue before the Court for decision both sides have adduced all their evidence in support of their respective allegations, the Court has to come to a finding on a consideration of all the evidence before it and the question of burden of proof does not arise.

Chidambara v. *Reddi*, I.L.R. 45 Mad 586 (P.C.) ; *Kumar Basanta Roy* v. *Secretary of State for India*, 44 I.A. 104 ; *Seturatnam Aiyer* v. *Govinda*, I.L.R. 43 Mad. 567 (P.C.), referred to.

Ba Han for the appellant. The Burmese word "maya" is applied equally to a lawfully wedded wife as well as to a mistress. *Ma Shwe Yin* v. *Maung Ba Tin* (1) ; *Mi Me* v. *Mi Shwe* (2) ; *Ma Wun Di* v. *Ma Kin* (3). Statements of witnesses who merely say that the respondent is the "wife" of

*Civil 1st Appeal No. 128 of 1939 from the judgment of the Assistant District Court of Mandalay in Civil Reg. Suit No. 1 of 1939.

(1) I.L.R. 1 Ran. 343. (2) (1910-13) 1 U.B.R. 111.

(3) 4 L.B.R. 175.

the appellant are of no value. And mere evidence of reputation that the parties are husband and wife is inadmissible in evidence. Section 50 of the Evidence Act renders admissible only the opinion of any person who, as a member of the family or otherwise, has special means of knowledge of the relationship. Illustration (*a*) to that section shows that it is only the fact that the parties are received and treated by their friends as husband and wife which is relevant.

When all the evidence is before the Court, the question of burden of proof is merely of academic interest. It is of importance only where the evidence on both the sides is equally balanced. *Robins* v. *National Trust Company, Limited* (1). In the present case, there is no admissible evidence that the respondent is appellant's lawfully wedded wife.

Hirjee for the respondent. In a revision application, this Court had to consider whether the respondent was not entitled to the order of maintenance passed in her favour by the trial Court on the ground that she was the lawful wife of the appellant, and that judgment is entitled to great weight. Further, even on the evidence given by some of the witnesses for the appellant, there is material to hold that the respondent is, by reputation at least, the wife of the appellant.

ROBERTS, C.J.—The appellant instituted a suit against the respondent for a declaration that she was not his wife according to Burmese Buddhist law. The suit having failed in the Court below he then appealed and we have already stated that his appeal must succeed but have taken time to express the reasons for our decision. It appears to us that the learned Judge of first instance has failed to appreciate how a claim of this kind may be proved.

(1) (1927) A.C. 515, 520.

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As he has said, the burden of proof at the outset rests upon the party who would fail if no evidence were given on either side. But all that the appellant could do here, in the nature of the case, was to deny that he had ever married the respondent, to prove that he had married another wife, and to call witnesses to say that that lady was the only person whom he had ever treated or who had ever been treated as such. Unless it could be shown in cross-examination that such evidence was unworthy of belief there would be a case to answer, and it would be for the respondent to adduce such evidence in rebuttal as would lead the Court to think, when the whole story on both sides had been told, that the appellant had not made out his case. This could only be done by the respondent putting forward some evidence, which, if accepted, would clearly point to the existence of a valid marriage, according to Burmese Buddhist law, between the parties.

The question of the burden of proof has been dealt with in *Maung Hmoot* v. *The Official Receiver of Mandalay* (1) and I need not set out here what was laid down in that case.

In the case under appeal error has been reached by complete misconception of a sentence in the judgment of Lord Macnaghten in *Mi Me* v. *Mi Shwe Ma* (2). He said :

"The law relating to marriage in Burma is extremely lax. No ceremony of any kind is essential. Mutual consent is all that is required. In the absence of direct proof consent may be inferred from the conduct of the parties or established by reputation."

Now, plainly, a reputation can only be established by means of admissible evidence. Section 50 of the Evidence Act says :

"When the Court has to form an opinion as to the relationship of one person to another, the opinion, *expressed by conduct*,

(1) (1936) I.L.R. 14 Ran. 704, 713, 714. (2) (1910-13) 1 U.B.R. 111 (P.C.).

as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact."

What people think may be expressed in words, or by conduct. If there is a rumour, or gossip, to the effect that two persons are married the existence of that rumour or gossip is inadmissible in evidence. On the other hand, as pointed out in the illustration to the section, when the question is whether two persons were married the fact that they were usually received and treated by their friends as husband and wife is relevant. In other words, if the Court has to decide whether or not a couple have by mutual consent entered into the married state it can only do so by inferring the relationship from the conduct of the parties themselves, or from the conduct of neighbours and friends who treated them during the period under dispute as though they were man and wife. Such conduct must be inconsistent with the existence of another relationship, namely, that which subsists between a man and his mistress, and must point plainly to the relationship of wedlock.

Hence, in these cases, the use of such phrases as "I learnt that they were living together as man and wife" or "They were man and wife" are not receivable as evidence. The witness must prove conduct on the part of the man and woman, or on the part of their friends and neighbours, from which the Court can draw this conclusion. It is not for the witness to draw the conclusion himself and to express a mere opinion about the very matter which the Court has to decide.

The general reputation of a man amongst the community may no doubt be evidence in inquiries under section 110 of the Criminal Procedure Code [see *King-Emperor* v. *Po Yin and one* (1)]. The nature

(1) (1924) I.L.R. 2 Ran. 686.

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of the section is such as to render admissible what persons who know him think of him. But this fact in no way nullifies the provisions of section 50 of the Evidence Act, which lays down a clear rule as to the limits within which opinion may be evidence when a question of relationship has to be decided. The learned Judge in the present case has taken into account a mass of so-called evidence which was entirely irrelevant. In particular he said that the evidence of U San Hla Baw was " most damaging to the plaintiff's case " whereas what was regarded as an admission by him against the appellant was not evidence at all.

The respondent half-heartedly tried to suggest that there had actually been some kind of marriage ceremony. She said :

" Maung Maung brought his clerk and others to my house and in their presence my parents gave me in marriage (pesathi). There were U Hla and Ba Kin (now dead), U Than father of Ma Ama was present then. I do not cite them as witnesses."

In this respect the case has features in common with that of *Ma Wun Di* v. *Ma Kin* (1), in which Lord Robertson pointed out that the contention of an open ceremony having been abandoned the claim was allowed to rest on habit and repute. He added that there was little more in that case than the use of the word "wife" by some of the witnesses ; and the most cursory, as well as the most careful examination of the evidence showed that it was applied to persons whose status was not matrimonial.

The same is true here. A witness called by the defendant herself was Mr. Winser, a man of some substance, who said :

" Ma Sein Kyi was called Maung Maung's *Meinma*. It is fairly common that the word *Meinma* is applied both to the wedded wife as well as to the mistress."

(1) 4 L.B.R. 175.

There was no cohabitation. Respondent stayed at the house of the appellant's mother. There was a great deal of illicit intercourse under that roof. When respondent had been pregnant for about four months she suddenly left the house. She says that during her stay there, various guests came who treated her as the appellant's wife, but she did not call any of them as witnesses.

The phrase "secret and clandestine cohabitation" used by the learned Judge in his judgment shows that the term "cohabitation" has been misapplied. Cohabitation means living in a conjugal relationship, and what the young lady says is that secret acts of intercourse took place and later on that they were not secret acts at all. The learned Judge has come to the conclusion that as soon as the plaintiff's mother knew of the defendant's condition the latter was turned out of the house. At this time, therefore, there could be no public repute that they were man and wife.

When the respondent went to live with her parents she says that the appellant "did not sleep the night at our house because his mother was ill." Miss Hopwood, a witness for the defence, says that Ma Sein Kyi's father or mother came and took a lease of the witness's house and paid the rent. It was not the appellant who took it. He used to visit her it is true, but there was no sort of evidence that neighbours treated them in a way which was incompatible with the existence of an irregular union.

One piece of evidence which is relied on for the defence is that the parties went to the bioscope unaccompanied. The respondent says so, and says Daw Ma knew of this. Daw Ma gave evidence and was never even asked about it. The triviality of the matter illustrates the weakness of the whole case set up by the respondent.

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Then it is said that appellant showed some concern about the confinement of the respondent. The mere fact that he did not behave with brutal indifference on this occasion does not show that the mother was any more than his mistress. Is it to be said that if a man has a child by his mistress and treats her with humanity and even with affection at such a time, this proves that she is his wife?

What must be proved in cases of this kind to raise a *prima facie* presumption of marriage is that the acts of intercourse were not clandestine, but that there was an open avowal of the married state as distinct from the relationship between a man and his mistress. And if the parties made no open avowal their method of living must have been such as to induce members of the public, not to gossip about the relationship, but to show by their conduct that they were treating the pair as man and wife. There is no evidence of married life here.

The appellant put in issue the question whether he was married to Ma Sein Kyi. He swore that he was not married to her. Such evidence as has been adduced to the contrary goes no further than to show that she was his mistress, a fact which is admitted. He was therefore entitled to a decree, and this appeal must be allowed, and the decree as prayed for granted, with costs in both Courts, advocate's fee in this Court 20 gold mohurs.

DUNKLEY, J.—I agree. Throughout this case the word "cohabitation" has been used in a wrong sense. In his judgment the learned Assistant District Judge uses the expression "secret and clandestine cohabitation"; this is a contradiction in terms. "Cohabitation" means a dwelling or living together. It is common ground that the parties had frequent sexual

intercourse with one another, but there is no evidence that they ever lived together. They lived under the same roof for some years in the appellant's mother's house, where the appellant, in his adolescence, was naturally living, and the respondent was brought up, according to her step-mother, as a sort of adopted daughter; but that was not "cohabitation". The respondent admits that after she left the appellant's mother's house he merely visited her during the day time and did not spend a single night in the same house with her, and hence there was no cohabitation during this period.

The learned Assistant District Judge has stated in his judgment that the burden of proof lay heavily on the appellant to prove that the respondent was not his wife. That shows, in my opinion, a complete misconception of the position. The appellant, of course, had to begin, and to produce evidence which, if credited and unrebutted, would lead to the conclusion that he was not married to the respondent. He did so, and consequently the respondent had to call her evidence in support of the marriage. The sole issue for decision was whether the appellant and respondent were husband and wife, and on this issue both the parties adduced all their available evidence in support of their respective allegations. The Court then had to decide the issue on the whole evidence, and the question of *onus* became immaterial. In *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (1), their Lordships of the Privy Council observed:

"When the entire evidence on both sides is once before the Court the debate as to onus is purely academical."

(1) (1922) I.L.R. 45 Mad. 586, 607 (P.C.).

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And in *Seturatnam Aiyer* v. *Venkatachela Goundan and others* (1) their Lordships said :

"The controversy had passed the stage at which discussion as to the burden of proof was pertinent ; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them."

In *Kumar Basanta Roy and others* v. *Secretary of State for India in Council and others* (2), Lord Sumner, delivering the judgment of the Judicial Committee, said : "A good deal has been said about the burden of proof in either case, but as their Lordships find the evidence sufficient to establish a clear conclusion of fact it cannot matter now by which party it was given." In the present case, all the evidence was before the Court, and it is our duty, as it was the duty of the learned Assistant District Judge, to come to a finding on the whole evidence. What evidence is there in support of a marriage between the parties ? In my opinion, there is none. Statements by witnesses that the parties are husband and wife are clearly inadmissible, for such statements are merely opinions of the witnesses on the very question which the Court has to decide. Evidence of general repute, as distinguished from evidence of conduct, is inadmissible unless it falls within the fifth and sixth clauses of section 32 of the Evidence Act ; but evidence of opinion, as expressed by conduct, is admissible under section 50. Statements as to what is being generally said in the neighbourhood are mere hearsay, and the kind of evidence which is admissible is evidence as to how the parties behaved towards one another in their daily life and towards their relatives and friends and neighbours, and how they were treated by their relatives and persons who knew them. There is an

(1) (1919) I.L.R 43 Mad. 567, 577 (P.C.). (2) (1917) 44 I.A. 104, 111.

almost entire absence of such evidence in this case. Ma Htun Yin says that the appellant admitted to her that the respondent was his wife, but her evidence is entirely unsupported, and the term "wife" is used in a very loose manner in the Burmese language. One fact which, to my mind, completely negatives the existence of a marriage is that when his son died the appellant was so indifferent that he did not take the trouble to return to Mandalay for the funeral, although at the time of the death he was only a few hours' journey from Mandalay; he would not have behaved in this way if the child had been his legitimate son.

In my opinion, the evidence in this case, when viewed in the right light, shows that the parties were never husband and wife.