

Confidential.

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mounng Hmoon Htaw v. Mah Hpwah from the Court of the Recorder of Rangoon, delivered 9th February 1884.

Present :

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The Appellant was the Defendant in an action brought by the Respondent in the Court of the Recorder of Rangoon, in which the Respondent alleged that she was married in Rangoon to the Appellant according to Burmese rights and customs, and claimed Rs. 10,000 for her expenses of necessaries and living for five years, deducting Rs. 1,400, the amount realized by the sale of a house given to her by the Appellant. The Appellant denied the marriage and that the Respondent was entitled to any maintenance. The Recorder found as a fact that she was the wife of the Defendant by a validly constituted marriage, the Burmese law recognizing a plurality of wives, and the Plaintiff being what is generally called a lesser wife. Their Lordships are of opinion that this was quite in accordance with the evidence. He then considered the question of maintenance, as to which the material facts may be taken from the evidence which the Plaintiff herself gave.

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They were married in Tagoo 1235 (about 1873 A.D.). The Defendant is a trader in timber and a forester, and has forest leases in Zimmay, the Mine-loon-gyee forest. The Plaintiff carried on a business of her own at Rangoon. At the marriage the Defendant gave her a dower of Rs. 20,000, and they lived together for some time, principally at Rangoon, but the Defendant's business frequently took him away. He wished her to reside at Rangoon, and requested her to live in a respectable style, which she did, entertaining the relatives and friends of the Defendant, and he not giving her any money towards the expenses of those entertainments. The Plaintiff always carried on a business of her own, dealing in mineral oil and rice, and accumulated Rs. 80,000 in different kinds of property; and lived, she said, in the same style after marrying the Defendant as she had done before. In the opinion of the Recorder the Plaintiff received from the Defendant about Rs. 23,500, but she said she had expended all that and large sums of her own in works of merit for the Defendant at his request.

Upon the question of maintenance, the Recorder said, "There are many passages in the "Menoo Wyonanna and Menoo Tara Shwe "Myeen Damathâts, both recognized as of high "authority, which show that a husband is bound "to maintain his wife, and in the Menoo Kyay "Damathât, translated by the late Dr. Richard- "son, which is the Damathât hitherto most "generally used as a guide in questions of "Burmese law, probably from the fact of it "being the only one translated into English, in "the chapter on the different kind of wives, "para. 14, page 14, the liability is clearly "indicated." Then after stating what was there laid down, he said he was of opinion that the Plaintiff was entitled to maintenance suitable to her position as second wife, having reference to

the Defendant's means and ability to pay. The judgement, from which it is unnecessary to quote more, ended by saying that the Plaintiff was not estopped from claiming for the period during which she lived at her cost, provided it was not barred by the law of limitation, and giving the Plaintiff a decree for the amount claimed, viz., Rs. 10,000, and costs.

Since this judgement was given, Mr. Jardine, the present Judicial Commissioner of British Burma, has published some valuable notes on Buddhist law, with translations of the Wonnana Dhammathât, and several others, on marriage and divorce, and inheritance and partition, with notes, and cases illustrating the Burmese law of marriage and divorce as now administered in the British Courts. In coming to an opinion upon this appeal, their Lordships have had the advantage of this additional information about Burmese law.

For the purposes of marriage, divorce, and inheritance, the property of the married persons is considered separate or joint.

The following is defined as separate property of the husband and wife by Major Sparks in his Code, which has been used in the British Courts as an authority on Burmese law :—

1. What belonged to either before marriage.
2. What has been given specially to either since marriage.
3. What has come into the possession of either by inheritance from his or her own family since marriage.
4. Clothes, jewels, and ornaments.

The profits or interest arising since marriage from the employment or investment of the separate property of either husband or wife, as also the property acquired during the coverture by their mutual skill and industry, are their joint property.

It is the duty of the husband to provide subsistence for his wife, and to furnish her with suitable clothes and ornaments. If he fails to do so he is liable to pay debts contracted by her for necessaries; but it appears to their Lordships that this law would not be applicable where she has sufficient means of her own. They have not found any authority for saying that where the wife has maintained herself she can sue her husband for maintenance for the period during which she has done so.

By the Burma Courts Act, 1875, Sect. 4, it is enacted that where in any suit or proceeding it is necessary for any Court under that Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Buddhist law, in cases where the parties are Buddhists, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished, or is opposed to any custom having the force of law in British Burma. And in cases not provided for by the former part of the section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience. It appears to their Lordships that this is a question regarding marriage, and is to be decided according to the Buddhist law; but assuming that it is a case in which the Court is to act according to justice, equity, and good conscience, their Lordships have considered whether the decree appealed from can be supported on those grounds. The Recorder seems to have taken this view of the case, for he says, "It seems to me unjust that
" merely because a wife had tacitly lived at her
" own expense under a particular set of circum-
" stances, she should, as it were, be taken thereby
" to have contracted herself out of her rights,
" and be unable to recover them when those

“ circumstances have become changed, and that through the fault of the husband.” Their Lordships do not agree to this. Having regard to the Burmese law as to the property of married persons, they do not see in the facts of this case any ground in equity or good conscience for making the Defendant liable for maintenance. It may be that he requested the Plaintiff to live in a respectable manner, but she incurred no additional expenses in consequence. It did not cause any change in her style of living, and it is not possible to assign any portion of her claim to that request.

It remains to be noticed that in the reasons for the appeal it is said that there had been a divorce according to Buddhist law by the conduct of the parties. This was not made a ground of defence in the Defendant’s written statement, and there was no issue upon it. And consequently their Lordships intimated to the Counsel for the Appellant that they could not allow this question to be argued.

For the reasons above given their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder’s Court, and to order the suit to be dismissed with costs in that Court. The costs of the appeal to be paid by the Respondent.

