

*Privy Council Appeals Nos. 146 and 147 of 1919.*

Ma Yait - - - - - *Appellant*

*v.*

Maung Chit Maung - - - - - *Respondent.*

Maung Chit Maung - - - - - *Appellant*

*v.*

Ma Yait and Another - - - - - *Respondents*  
(*Consolidated Appeals*)

FROM

THE CHIEF COURT OF LOWER BURMA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 1ST AUGUST, 1921.

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*Present at the Hearing :*

VISCOUNT HALDANE.

LORD ATKINSON.

LORD PHILLIMORE.

SIR JOHN EDGE.

[*Delivered by* VISCOUNT HALDANE.]

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These are consolidated appeals from the judgments of the Chief Court of Lower Burma, which varied judgments of that Court on its original side. The real question to be determined is whether one Maung Ohn Ghine, who died on the 10th June, 1911, and who was an opulent and prominent merchant in Rangoon, was a Hindu within the meaning of Section 13 of the Burma Laws Act, 1898. If he was, it is not in controversy that Hindu law so governed the succession to his estates that a voluntary settlement made by him of the 5th May, 1908, could not be fully operative. Section 13 of the Act referred to is in these terms :—

“(1) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, (a) the Buddhist

law in cases where the parties are Buddhists, (b) the Muhammadan law in cases where the parties are Muhammadans, and (c) the Hindu law in cases where the parties are Hindus, shall form the rule of decision except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law.

“(2) Subject to the provisions of subsection (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction.

“(3) In cases not provided for by subsection (1) or subsection (2) or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.”

The consolidated appeals arise out of two suits. In one of these a declaration was sought that the settlement referred to was wholly inoperative, and alternatively for a declaration that the dispositions in favour of persons unborn at the date of the settlement were void. The other suit was for administration of the estate under the direction of the Court. The Judge of first instance held that Maung Ohn Ghine was not a Hindu or a Buddhist within the meaning of the Act, and it was not suggested that he was a Muhammadan. He therefore held that the law which applied was that provided by the Indian Succession Act of 1865, according to which, excepting in the case of succession to some one belonging to one of these three classes, there are laid down provisions equivalent to rules of justice, equity and good conscience, which permitted the validity of the settlement of the 5th May, 1908. Under this Maung Ohn Ghine conveyed property, reserving his life interest in it, to trustees for his wife and children and their issue, some of whom might be unborn, as in the deed provided. If the learned Judge was right in thinking that the settlor did not come within any one of the three specified classes, it is not disputed that this further conclusion was correct.

The answer to the question raised in these appeals therefore turns on the question of the status of Maung Ohn Ghine. If he was not a Hindu within the meaning of the two Acts cited, in each of which the term Hindu is used in the same sense, this decision of the learned Judge was right. But the Chief Court on appeal held him to be a Hindu.

In order to decide which of the views of his status was right, it is necessary to turn to the story of Maung Ohn Ghine's life. He was a merchant in Rangoon who died during a visit to England. Among other positions he held that of a municipal commissioner and magistrate in Rangoon. It is clear that he was a Kalai, which means that he was the descendant of a Hindu who had married a Burmese woman. His parents also were Kalais, and he himself married a Kalai. His paternal grandfather was apparently a Hindu who had migrated from Madras to Burma and had married a Burmese. His son was therefore a Kalai, and the latter married a Kalai. Maung Ohn Ghine was therefore a Kalai, and he lived in Burma all his life, excepting when absent

on short visits. Twomey, J., when delivering his judgment in the Court of Appeal, gave a description of Maung Ohn Ghine's career which is instructive.

"In matters of daily life, apart from his religion, Ohn Ghine was hardly distinguishable from the Burmese community in general, and it appears that it was as a prominent member of the Burmese Community that he was sent to England at the time of King Edward's Coronation. Great stress has been laid on the leading part taken by Ohn Ghine in supporting various important Buddhist interests. In 1900 he wrote to the Governor of Madras urging that certain Buddhist relics lying in the Madras Museum should be made over to him to be placed in a shrine which he was preparing at Rangoon, and he referred in this letter to his Buddhist 'co-religionists.' In a letter dated the 18th February, 1901, to the Colonial Secretary, Ceylon, he joined with several others in advocating the cause of the Burmese Buddhist pilgrims to the Buddhist temple of the Sacred Tooth Relic at Kandy, and the writers of this letter describe themselves as 'Burmese pilgrims now on a visit to Ceylon.' As one of the community of the Buddha Gaya Missionary Society he also championed the cause of the Burmese Buddhists against the mohunt of a Hindu temple at Gaya with reference to a certain zayat erected there by King Mindon for the use of the Burmese pilgrims. He was one of the residents of Rangoon who presented an address on behalf of the Buddhist community to the Viceroy, Lord Curzon, on his visit to Rangoon in 1901."

The learned Judge goes on to make some observations on this evidence.

"At first sight these incidents in his career appear to support the contention that Ohn Ghine was as much a Buddhist as a Hindu. To understand their real meaning it is necessary to look at Ohn Ghine's career and aspirations as a whole. He was a man of ambition who had amassed a considerable fortune by his business capacity and industry. Sprung from an obscure class, he had little prospect of taking a leading place so long as he was identified merely with the Kalais. Caste prejudices kept Indian Hindus aloof from him and would prevent him from any kind of leadership among the Hindus generally. But by throwing in his lot with the tolerant Burmese, who formed the bulk of the population of the province, he could hope to attain some distinction. He was as much Burmese as Indian by blood, and in dress, language and manner of life he was more Burmese than Indian. He admired the Buddhist doctrines and found much that was attractive in Buddhist religious practices. Material interests chimed with his inclinations, and Ohn Ghine stood forth as a representative of the Burmese. He received more than one mark of distinction from Government, and probably hoped for more. In these circumstances no special significance can be attached to his posing as a member of the Burmese Buddhist Community, by associating with which he had achieved most of his success in life. His readiness to figure as a co-religionist of Buddhists in 1901 may be compared with his attitude of conservative Hinduism in Ma Nu's case five years later. On each occasion there was exaggeration with a purpose, and neither incident affords a safe guide to Ohn Ghine's actual religious status. The evidence shows that he never renounced or repudiated his membership of the Kale Community, and in spite of his liberality to Buddhist monks and his liking for Buddhist prayers and practices, he drew the line at having his sons *shinbyued* (that is, initiated as Buddhist novices). He continued his Hindu worship at the Kale Temple, and when he died it did not occur to his family to have his obsequies conducted according to any rites except those of the Hindus, and his ashes were sent to Benares. The marriage of his son, Chit Maung, with a Burmese girl, according to Burmese custom in 1910, was no doubt

a serious lapse from rectitude for a Hindu, but this incident can only be regarded as an example of the general laxity of the marriage customs of the Kale Community as compared with those of the recognised Hindu castes."

This description of Ohn Ghine's life their Lordships have but little occasion to question, excepting in the conclusions which the learned Judge draws about the religious status of the dead man. Before, however, proceeding to this it is desirable to supplement the narrative on certain points. The case of Ma Nu in 1906, to which reference is made by Twomey, J., was one in which Ohn Ghine was prosecuting a Burman for abducting his daughter, and the question was whether she was abducted or had merely eloped. Ohn Ghine, who objected to any suggestion of marriage, swore that he himself was a Hindu, in which case no marriage could properly have taken place. He had obviously a special motive for taking this course, and the incident comes to very little. As against it may be set the fact that he sent his sons to a Buddhist Kyaung for instruction in the Buddhist faith, and that to one of his sons who was in England he dispatched a card of admonition enjoining him to "daily think of the Buddha." This was in August, 1907. As for the sending of Ohn Ghine's ashes to Benares, this seems to have been permitted by his widow in consequence of some suggestion made to her. When Ohn Ghine's daughter, Ma Mya, died in 1910, he appears not to have himself sent her ashes to the Ganges. They were only sent there after his death along with his own. No doubt Ohn Ghine's body was cremated when it was brought to Rangoon from England. But the cremation took place in a compound which was not an exclusively Hindu cemetery, and, although Hindu rites were observed, Buddhist priests or *pongyis* were standing round the body and received offerings, while the burning was carried out by Burmans. It is true that Ohn Ghine had supported the Hindu temple in Phayre Street, Rangoon, and was a trustee of it. But this temple was built by subscriptions from Kalais who frequented it, and does not appear to have been one where strict Hinduism was observed. Moreover, he also supported and went to Buddhist pagodas and worshipped there regularly, observing the Buddhist lents, and making gifts to the priests.

Their Lordships have examined the evidence relative to Ohn Ghine's religious life, and the conclusion to which they have come is that Robinson, J., the learned Judge who tried this case, was right in thinking that Ohn Ghine observed to a certain extent the rites and ceremonies of the Hindu religion, but that he also observed and followed the Buddhist religion to a great extent and was far from being an orthodox Hindu. That this should have been so appears to them to have been far from unnatural, considering the nature of the Kalai Community, of which he was a member. They think that the real question in the appeal is whether the Kalais as a community are Hindus within the meaning of the expression as used in the Burma Laws Act of 1898. It is not necessary for their Lordships to express any opinion upon the construction which Ormond, J., put upon the judgment of

the Judicial Committee in *Abraham v. Abraham* (9 Moore, I.A. 195). Whatever might be the conclusion on that matter would not dispose of the present controversy. If Ohn Ghine had been born a Hindu, mere deviation from orthodoxy would not have been sufficient to deprive him of Hindu status. He might have continued to possess it had he become a member of the Bramo Somaj, as was decided by this Board in *Bhagwan Koer v. Bose* (30 I.A. 249), and he would not have the less possessed the status if he had been, say, a Sikh or a Jain, or probably if he had even at times worshipped with Buddhists. But Ohn Ghine was not born a Hindu unless the Kalai Community generally is Hindu, and this raises a question of much more difficulty than that which arises in the case of a single individual to whom considerable latitude of action is extended before he is deemed to have deprived himself of the religion which gave him his law by anything that does not amount to clear renunciation of that religion. In the instance of a community the question must always be whether there has been continuity of character. No doubt there may develop gradually among a set of people who live and worship together, variations from the regular practices of those who are Hindus which, though considerable, ought not to be taken to be such as have destroyed continuity of relationship.

In the valuable judgment delivered in 1909 by Sankaran-Nair, J., in *Muthusami Mudaliar v. Masilamani* (33 I.L.R. Madras 342), that learned Judge considers the criteria according to which new castes which have been evolved among the descendants of Hindus are to be considered as having retained the Hindu religion. He points out that the formation of new castes is a process which is constantly taking place. Usage has modified old principles and it governs in the sects which have adopted such usage. Contact with other religions may well have evolved sects which have discarded many characteristics of orthodox Hinduism, and have adopted ideas and rites which are popularly supposed to belong to other systems. Continuity may not in such cases have been destroyed; but there is a limit to such processes. Continuity may be so broken that the new sect is outside the original pale. The Hindu law which the Courts administer rests on the Shastras, which claim divine sanction and are followed by Brahmins generally. There may have been introduced usages which constitute a departure from the principles of the Shastras so great that the community which has adopted them must be taken to have lost the character of being one in which Hindu religion governs. In the case of a sect at a distance from Hindu centres, where the surroundings are Burman and Buddhist and the mode of life is different from that of the Hindu communities in India proper, popularly known as such, it is easier to determine it as being outside Hinduism than it is in the case of an isolated individual who has merely lapsed into unorthodox practices. It is obvious that few influences can be more potent in producing new communities of this separate kind than the combined operation of

migration, intermarriage and new occupations. When these influences have operated for sufficiently long a different community, with its peculiar religion and usages, may well result and be so outside Hinduism in the proper meaning of the word. To the members of such a community the expression Hindu in the Indian Succession Act and the Burma Laws Act would not be applicable.

Of the mode in which this principle is applied, the judgment of this Committee, delivered in 1908 by Sir Arthur Wilson in *Bhagwan Koer v. Bose* (30 I.A. 249), is a good illustration. There it was explained how Sikhs and Jains can properly be treated as Hindus, and how even entry into membership of the Brahma Somaj does not necessarily destroy continuity with a religion which is so elastic in its scope as is Hinduism. It is plain that the application of any merely abstract principle may be insufficient to solve the problem in concrete cases. A method which takes account of historical as well as other considerations must be applied, and the subject-matter must in each instance be looked at as a whole. In the recent appeal of *Abdurahhin Haji Ismail Mithu v. Halimabai* (43 I.A. 35), a case of migration of a sect from India to East Africa, their Lordships laid down that where a Hindu family migrates from one part of India to another, prima facie they carry with them their personal law, and if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted; but where such a family emigrate to another country and, having earlier become themselves Muhammadans, settle among Muhammadans, the presumption that they have accepted the law of the people whom they have joined should be made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environment. It was observed that the analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from circumstances.

If a twice-born Hindu migrates across the sea to Burma and marries a Burmese woman, that in itself may not necessarily deprive him of his Hindu status in the eye of the law. But if he has descendants who have been born and have always lived in Burma, and who have intermarried with its people, then, even though they may form a community of their own which inherits many traces of Hindu usage, if the usages and religion are of a character so divergent from Hinduism as those of this community are, the community cannot, in their Lordships' opinion, be regarded as Hindu. They think that the Kalais acquired a non-Hindu status of their own of this kind, and, further, that Maung Ohn Ghine had so distinctly identified himself with the Kalais that his status was determined by theirs.

They are therefore unable to draw the inferences made by the learned Judges of the Appellate Court. They think that

the contention of Ma Yait is well founded, and that her appeal ought to succeed, while the cross-appeal of Maung Chit Maung must fail. It follows that the decrees of the Appellate Court in the two suits should be set aside and the decrees of Robinson, J., restored, excepting in so far as that in the Appellate Court costs were given out of the estate. This part of the decrees may stand.

Their Lordships will humbly advise His Majesty accordingly.  
Maung Chit Maung must pay the costs of the appeals.

In the Privy Council.

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DELIVERED BY VISCOUNT HALDANE.

Printed by  
Harrison & Sons, Ltd., St Martin's Lane, W.C.  
1921.