Privy Council Appeal No. 1 *of* 1931.

U Pe - - - - - - - - - - *Appellant*

v.

U Maung Maung Kha - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH MARCH, 1932.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD THANKERTON.
SIR DINSHAH MULLA.

[*Delivered by* VISCOUNT DUNEDIN.]

This is a suit in which U Maung Maung Kha the plaintiff seeks to set aside a conveyance of certain property gifted to U Pe, the defendant, by Ma Ma Gale, wife of the plaintiff but now deceased. The plaintiff and his wife were Buddhists and their mutual rights depended on Burmese Buddhist law. They were married in 1892 having both been previously married and they had no children but adopted two girls Ma Khin May and Ma E Kyi. The father of Ma Ma Gale was U Pan: he lived in Henzada. The plaintiff lived at Rangoon and his wife lived sometimes with her husband at Rangoon and sometimes at Henzada. She traded on her own account at Henzada.

In 1910 U Pan died leaving two daughters, the said Ma Ma Gale and one Ma Ma Gyi a spinster, and some grandchildren the offspring of a deceased child. In 1912 U Pan's estate was divided between his two daughters. It consisted of two houses, one the pucca house and the other the little house and some paddy fields. The plaintiff then came to Henzada permanently and lived with his wife in U Pan's little house. In 1916 the plaintiff built another house and when it was finished his wife and he lived in it. The

adopted children lived with Ma Ma Gyi in the little house. Ma Ma Gyi began to rebuild the pucca house but died in 1923; the rebuilding was finished by the plaintiff and his wife. On Ma Ma Gyi's death her share of U Pan's property passed to Ma Ma Gale. Ma Ma Gale looked after the two houses and received all rents from them so far as let and also the rents from the paddy lands. A conveyance was then executed by the plaintiff and Ma Ma Gale of the houses and lands in favour of the adopted children, but as it is admitted on both sides that this was benami and did not represent any real transaction it may be ignored. After Ma Ma Gyi's death the little house was sold by the plaintiff and Ma Ma Gale to one Olivari. The adopted children then moved to the pucca house which was nearly finished. In 1924 the spouses quarrelled and after that did not live together the plaintiff living in his own house and Ma Ma Gale in the pucca house. They never lived together again. In 1927 Ma Ma Gale fell ill. The plaintiff attempted to enter the house where his wife was but the door was shut against him. Following on this, on the 2nd March, 1927, Ma Ma Gale removed to the house of the defendant and appellant and on the next day she executed a deed of gift of all her properties inherited from her father U Pan in favour of the defendant. The plaintiff thereupon instituted a suit for restitution of conjugal rights against her but before any progress had been made Ma Ma Gale died on the 28th June, 1927. Thereupon the plaintiff raised the present suit to have the conveyance in favour of the defendant declared void.

Before stating the grounds of action it will be well to state the Burmese Buddhist law in regard to the property of married persons so far as it is not a matter of controversy between the two parties. Married persons hold during the subsistence of the marriage an interest in all property belonging to either or both. What that exactly means will be discussed afterwards. Partition takes place either on death or on divorce. Property consists of three kinds: "*payin*" which is the property which had belonged to the spouses individually before marriage; "*lettetpwa*," which is the property accruing to either spouse individually either by particular exertion or by succession after the marriage; sometimes, therefore, described as of two kinds, viz., ordinary *lettetpwa* and *lettetpwa* by succession; and *hnapazon*, which is the property acquired by the spouses during the marriage by their exertions or from the produce of the property they already have. On partition *lettetpwa* goes two-thirds to the spouse who actually made it or succeeded to it and one-third to the other. *Hnapazon* and *payin* is equally divided.

In the present case the subject of the gift was admittedly *lettetpwa* of the wife acquired by succession on her part as it was the property which either directly or through her sister she had inherited from her father, U Pan.

The plaintiff attacked the conveyance on three grounds: (1) he said the deed was secured by undue influence on the part

of the defendant; (2) he said that there having been no divorce the wife could not alienate *lettetpwa*; (3) that the only ground on which divorce could have been alleged being desertion, and that being desertion by the wife, she had forfeited her property for her fault. To these assertions the defendant replied (1) that there was no undue influence; (2) and (3) that there was divorce and not for fault; and (4) that in any view she was entitled to deal during the marriage with her *lettetpwa* to the extent of two-thirds. The trial judge held that there was no undue influence and that there was divorce. He, therefore, held that she was entitled to dispose of her *lettetpwa* to the extent of two-thirds, to which extent he confirmed the conveyance. The Court of Appeal held that there was no divorce and that being so that the wife had no power to dispose of any *lettetpwa*. This made it unnecessary for them to consider the question of undue influence but enabled them to recall the judgment and to give decree in favour of the plaintiff. Against this judgment the present appeal has been taken.

The question of undue influence may be at once disposed of. On such a question their Lordships would not willingly reverse the judgment of the Trial Judge, untouched by the Court of Appeal, he having individually seen the majority of the witnesses —some of them were examined by others than himself. But on the evidence as it stands their Lordships are of opinion that the case utterly fails. There is not the slightest trace of evidence of weakness of character or want of intelligence on the part of the wife up to the day of her death. On the contrary she was an able, managing woman, who, according to the testimony of the plaintiff himself, had successfully made much money, had been left by him in entire charge of the properties which came from her father, and had never needed assistance in business matters in any way. It is true that by the conveyance she entirely divested herself in favour of the defendant but he was her friend whom she trusted. She was utterly estranged from her husband; for three years they had no dealings together and all her relations were gone, the adopted children being dead and the grandchild who was still with her having forfeited all claim by elopement. Their Lordships, therefore, have not the slightest hesitation in affirming the decision of the Trial Judge in this matter.

Next, as to divorce. The divorce that has here to be dealt with is of a kind quite foreign to western ideas. It is known as "automatic." The passage of the Laws of Menoo, Bk. 5, Section 17, which is admitted to rule the matter is, as translated by Richardson, as follows:—

> "If the wife not having affection for the husband, shall leave (the house) where they were living together, and if during one year he does not give her one leaf of vegetables, or one stick of firewood, let each have the right of taking another husband and wife; they shall not claim each other as husband and wife; let them have the right to separate and marry again."

The difference of view that developed between the Trial Judge and the Court of Appeal was partly based on a survey of the

evidence as to what communication there had been between the spouses after the wife definitely left her husband, and partly on a difference of opinion as to whether the wife, being admittedly in possession of the total amount of the *lettetpwa* property, one-third of which on partition would belong to the husband, could be held to have been supported by him in a way to meet the text cited above. As to forfeiture on account of fault that matter, which does not seem to have been even stated below but was urged before their Lordships, may at once be dismissed, for the text and decisions which deal with fault show that fault is a fault of another kind, the mere going away, or as in western phraseology it would be termed desertion, not being a fault. Their Lordships, however, do not think it necessary that they should decide as between the Trial Judge and the Court of Appeal on the question of divorce because they are prepared to decide the case on another ground, a ground which though pleaded was not open to the Court below as they were bound by a former decision of a Full Bench. The case which bound them was a case of *Ma Paing* v. *Maung Shwe Hpaw*, 5 Rangoon 296. The head note of that is as follows :—

> " Held, that at Burmese Buddhist law in respect of the property of the marriage whether that property be the *payin* property of either party or *lettetpwa* property of the marriage, a Burmese Buddhist husband and wife are partners and all the property of the marriage, whether *payin* or *lettetpwa*, is partnership property.
>
> Held, further, that at Burmese Buddhist law, the partnership between husband and wife is dissolved only by death or divorce and neither partner is entitled to separate possession of any share of the partnership property or of the profits of the partnership until the partnership is dissolved by the death of one partner or by divorce."

This case was decided by five judges in 1927 but since that case was decided there has been decided the case of *N. A. V. R. Chettyar Firm* v. *Maung Thun Daing* in 1931 by a Special Bench of seven judges, one judge dissenting, and this case overruled the case of *Ma Paing* and the head note of that case held that :—

> " The husband and wife in a Burmese Buddhist marriage do not hold the property as joint tenants, but as tenants in common. Each of them has a vested interest in such joint property, and such an interest is liable to attachment and sale in execution of a decree against the party entitled to it."

Held further :—

> " Either party to the marriage is competent to alienate or otherwise dispose of his or her own interests in the joint property, but neither is entitled to alienate the interest of the other without the consent, express or implied of that party."

It is, therefore, clear that the judgment of the Board in this case must depend on whether they agree with the law as laid down in the earlier or the later of these two cases. To appreciate the question it is necessary to go back to the case law as it stood when the earlier case of *Ma Paing* came up for decision. In the case of *Ma Shwe U* v. *Ma Kyu* in 1905, 3 L.B. 66, a Full Bench had held that a sale by the Burmese Buddhist husband of the *hnapazon*

property of himself and his wife without her consent amounted to a valid transfer of his share in the property sold. It is obvious that the case of *lettetpwa* property is *a fortiori* of this as to the interest of one spouse therein. This was clear law and stood undisturbed till 1927 when Ma Paing's case was decided. There were other decisions to the same effect and it was candidly admitted by the judges in Ma Paing's case that they were overruling the existing law.

Ma Paing's case was this. A Burmese trader had had five wives. He got into difficulties through speculation and his creditors attached his various properties. These properties were the whole properties enjoyed during the marriage. The last of the five wives applied at the time of the attachment for the release of her interest which was granted. The properties were sold. The wife then brought the action against the purchaser seeking a declaration that her interest in the properties amounted to half. The Trial Judge dismissed the suit. The wife appealed and the case came before a Divisional Court of two judges, Heald and Chari, JJ. They did not, however, decide it at once but made a reference to the Full Bench in the following terms :—

> " (1) where the interest of a Burmese Buddhist husband in property which was *payin* property brought by him to the marriage, is during the subsistence of the marriage sold in execution of a decree against him for a debt incurred by him in a business carried on by him while he was living with the wife, does the buyer acquire the right to have the property partitioned and to obtain possession of part of the property as representing the husband's interest in it ?
>
> (2) in a similar case, where the property is jointly acquired *lettetpwa* and not *payin*, does the buyer acquire a right to partition and possession of a share ?
>
> (3) can a decree against a Burmese Buddhist husband be executed against (*a*) *payin* property brought by him to the marriage and (*b*) jointly acquired *lettetpwa* property of the marriage, to the extent of the whole of such property or if not to the extent of the whole to the extent of any part of such property, and if to the extent of part only to the extent of what part ? "

The reference was accompanied by a disquisition on reported cases by Heald J. which is far too long to quote. It must be incidentally stated that in this disquisition and in the phraseology of the questions referred the term *lettetpwa* is used as including what is more accurately called *hnapazon*. The accurate nomenclature is used by the Full Bench to which the case was referred and is in accordance with what has already been said above. He ends the disquisition by these words " on the authorities I am unable to decide what answer ought to be given in the present case. It seems clear that the case law is conflicting and unsatisfactory and there are practically no rules in the Dhammathats." But he had previously given no uncertain sign as to what his own opinion was. Two citations will be sufficient :—

> " Most of the cases mentioned above were considered by a Full Bench of the Chief Court in the case of *Ma Shwe U* v. *Ma Kyu* where it was held

that a Burmese Buddhist husband cannot sell or alienate the *hnapazon* (*lettetpwa*) property of himself and his wife without the consent of the wife express or implied or against her will but that a sale by a Burmese Buddhist husband of such property without the consent of his wife constitutes a valid sale of his share and interest in the property sold. These two findings seem to be inconsistent and with all respect I venture to suggest that the latter part of this decision was mistaken."

(Inconsistent they certainly are not though the latter part may be mistaken.) And again :—

" It would seem to follow that if the interest of one of a married couple is attached all that can be attached is the expectancy of receiving a share of the family property on divorce or death and since neither of the parties can claim partition or separate possession of any part of the property or can alienate any part of it without the consent of the other it is difficult to see how a creditor attaching the interest of one of the couple can enforce partition or alienation of any particular item of the property, or can attach or bring to sale more than the expectancy, which his debtor has, of receiving something on divorce or at the death of one of the parties."

The Full Bench consisted of the two judges who had made the reference with the addition of Maung Ba and Doyle JJ. and Rutledge C.J. Now though all the learned judges agreed in answering questions 1 and 2 in the negative and question 3 in the affirmative " so long as the debt was incurred in the usual course of business by or on behalf of the firm consisting of husband and wife " they did not quite agree in their views. One view ran through all their opinions and that was that the right in common which indubitably a Burmese husband and wife had as to all property to which either or both could lay a claim was a right of partnership and that being settled they had recourse for the consequences which flowed from that to the law of partnership as is understood and incorporated in the Indian Contract Act. Now one consequence of partnership is that partnership property is joint property ; the partners are joint tenants. This necessarily overrules the proposition which had been laid down in Maung Shwe U's case but when it came to the discussion as to what was to be done about attachment and realisation their views did not agree. The one set thought that as regards a partnership debt attachment and realisation was simple, and in the case of debts singly contracted by husband or wife alone they laid down the proposition that there was a presumption that such debts were incurred by the husband or wife as the case may be as agent for the partnership. Obviously this could not apply to an ante-nuptial debt and in that case the creditor would either have to wait until the partnership was dissolved by death or divorce or could proceed under Order XXI, Rule 49, of the Code of Civil Procedure. The others went further and thought that so far as an individual debt was concerned there was no fund to be looked to other than a sort of *spes successionis* when death dissolved the partnership and partition took place, and that no proceedings could be taken under Order XXI, Rule 49. A very few quotations will illustrate this. Both sets of judges are obviously struggling with the idea that the law they are laying

down would be subversive of business with any married Buddhist. Thus Maung Ba says, 5 Rangoon, p. 329, " a person dealing with a Buddhist has the ordinary law of contract to fall back upon." This at first sight looks like a confusion of thought. The law of contract in the abstract has nothing to do with the question of what property can be attached in respect of an obligation admitted or decreed but in the next sentence he gives his real reasons and shows that he means the law of contract as embodied in the law of partnership : " It has been rightly held from time to time that to all intents and purposes Burmese husbands and wives may be regarded as partners. A partner can bind his partner and every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership." Assuming that the law of partnership applies he holds that any debt as say the debt in the case before him contracted by the husband in the course of business binds the wife as incurred by her partner agent. Obviously the reasoning did not deal with an ante-nuptial debt by either but that case was dealt with by Chari J. who followed him. He held that the partnership created by marriage could only be dissolved by divorce or death and that if one of the couple alienated his or her interest in the partnership it was possible for the alienee to make good his right by putting in force Order XXI, Rule 49, of the Code of Civil Procedure. This rule provides for the charging of a partnership share at the instance of the creditor of an individual partner so that the profits of a share of the partnership become payable to the charger but does not allow of the sale of partnership property. This view, however, did not commend itself to either Heald or Doyle J. They went the full length and said that there was no partnership property out of which a debt due by the husband or wife could be satisfied during the subsistence of the marriage, and when the case after the reference came to be finally determined by Heald and Doyle they laid it down as settled by the judgment in the reference (though their Lordships doubt whether they were quite fair to all their brethren in saying so) that during the subsistence of the marriage the separate interest of the partners to the marriage in the property of the marriage was not only impartible but also indeterminate and indeterminable since it can only be determined on the death or divorce of the parties and further they held that such an interest is not saleable property within the meaning of Section 60 of the Code of Civil Procedure and as such liable to attachment and sale in execution of a decree. That is equivalent to saying that it does not come within the words " all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit."

Then came the case of *Chettyar Firm*. The facts are simple. There was an ante-nuptial debt of the wife for which debt the husband was not liable. The property sought to be taken in execution was proper *lettetpwa* of the marriage. Now, this case

was not ruled by the actual decision in *Ma Paing's* case but it was obviously affected by what had been said in the general review of the law given in the reference in that case. The Trial Judge accordingly referred to a Full Bench the following question :—

> " Whether the joint property acquired by the husband and wife possibly out of the property brought to the marriage by the couple is liable to pay the debt contracted by either of the couple before the marriage ? "

The three judges who constituted the full bench had such doubts as to the soundness of what had been laid down in *Ma Paing's case* that they in their turn referred to a special bench of seven judges the following questions :—

> " (1) Whether the joint property of a Burmese Buddhist husband and wife can be attached in execution of a decree obtained against one of the spouses in respect of an ante-nuptial debt contracted by such spouse alone ?
>
> (2) Whether in such circumstances the interest therein of the judgment debtor can be attached ?
>
> (3) Whether in such circumstances the separate property (if any) of the judgment debtor can be attached ?
>
> (4) Whether the principles of law enunciated in Ma Paing's case are correct ? "

The leading judgment was a very exhaustive and able judgment by Page C.J. It begins by pointing out the serious results of upholding *Ma Paing's case* which had upset the standing judgments of about 20 years. It comes to this, that no one would be in safety to deal commercially with a married Burmese Buddhist unless he was sure that the wife could be held party to the transaction, and further, that as far as ante-nuptial liability was concerned that would be for practical purposes escaped by marriage. And now it may be as well to say something as to the law by which Burmese Buddhists' relations fall to be determined. The *Dhammathats* are a body of authority, consisting of many texts, sometimes contradictory but yet in their entirety forming what may be called the Institutional Buddhist Law. There is no difficulty in holding this as the supreme authority where such questions as succession are concerned and an instance may be given in the judgment of this Board in the case of *Mah Nhin Bwin* v. *U Schwe Gone*, 41 I.A. 121. But when commercial relations or execution for debt come into question, then they are not necessarily in accordance with modern conditions. The ancient idea of making good a debt by selling the debtor into slavery is, for instance, quite obsolete. Indeed, the Court in *Ma Paing's case* felt this ; recognising that the *Dhammathats* provided for a right to both husband and wife in all property during the marriage, they assumed that that right was a right of partnership, with the consequences set forth above. The key to the judgment in *Chettyar Firm* is to show that the position is best established by holding that the spouses are in western nomenclature not joint tenants but tenants in common. Thus the idea of an interest in common asserted by the *Dhammathats* is preserved without the evil consequences following from holding that that is the joint interest of partnership. It is admitted by all the judges in ***Ma Paing's case*** that the *Dhammathats* do not deal exactly with the situation. They

could not well do so. Their Lordships do not think it is necessary to examine the texts quoted because that has been done with great thoroughness by Page C.J. in his judgment. The outcome of it is that there is nothing in them which would point more to joint ownership than to tenancy in common, and therefore it is quite right to prefer the one which leads to the least evil consequences. After all, the ancient law has still a wide scope if admittedly all property acquired by either or both of the spouses before or during marriage passes into the common enjoyment and it is only dealt with by either according to his or her vested interest therein.

One word more remains to be said. Maung Ba J. was one of the Court that decided *Ma Paing*. He was also one of the Court that sat on *Chettyar Firm*. It would have been quite understandable if he had chosen to remain of his original opinion and dissented, but he did not do that. He was content to abandon nearly all the points that had been laid down in *Ma Paing* but thought he might save something out of the wreck. So he said that subject to the right of creditors, neither the husband nor the wife as between themselves had the right to alienate his or her interest in the joint property without the consent express or implied of the other. This was dead in the teeth of what the others had laid down. They had said that either party to the marriage is competent to alienate or otherwise dispose of his or her interest in the joint property. The others were bound to lay this down, not because the facts of the case needed it but because the reference had referred the whole law as laid down in *Ma Paing's case*, and *Ma Paing's case* had laid down exactly the opposite. But in truth Maung Ba J.'s position is an impossible one. Once he had given up as he had given up the theory of joint property and of the interest of the spouses being indeterminate and indeterminable, there was no possibility of excluding creditors, and creditors not being excluded it followed that there was a power of disposition. Of course there are situations in which property may be beyond the disposing power of the owner and yet be liable to be taken by creditors, but that is only when there is something which affects the property itself. The simplest illustration is that of property held under strict settlement but on which there is a mortgage which was put on the property before it was put in settlement. But when there is nothing which affects the property as such, then if the owner's personal creditors can attach, the owner can dispose. The position of unburdened property which can be attached but cannot be disposed of is a juridical contradiction in terms.

The result is that the conveyance was good to the extent of Ma Ma Gale's interest therein, viz., two-thirds. That is the same result as arrived at by the Trial Judge though on different grounds.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be allowed and the decree of the Trial Judge restored ; the respondent paying to the appellant the costs in the Court of Appeal and before this Board.

In the Privy Council.

U PE

v.

U MAUNG MAUNG KHA.

DELIVERED BY VISCOUNT DUNEDIN.

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