

Ma Ween Di Vs. Ma Kin

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Court : Mumbai

Decided On : Dec-06-1907

Reported in : (1908)10BOMLR41

Judge : Robertson, ;Collins and ;Arthur Wilson, JJ.

Appellant : Ma Ween Di

Respondent : Ma Kin

Disposition : Appeal dismissed

Judgement :

Robertson, J.

1. The question in this appeal is one of fact; and it has been decided against the appellants by two Courts. The case, however, deserves attention, for there has been a strong appeal made to the general presumption of marriage arising from cohabitation with habit and repute.

2. It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again, the habit and repute, which alone is effective, is habit and repute of the particular status which, in the country

in question, is lawful marriage.

3. The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as matter of fact, a repute of marriage. But, in countries where customs are different, it is necessary to be more discriminating, more especially owing to the laxity with which the word 'wife' is used by witnesses in regard to connexions not reprobated by opinion, but not constituting marriage.

4. In the present case the broad facts are these; a domiciled Burman, Maung Gale, has his house and wife at Moulmcin in Burma; his business took him to Siam, and there he lived for years with various other women, and with the principal appellant, Ma Ween Di, who, for shortness, will be called the appellant. The appellant has maintained that, while the other women were concubines, she was a wife, taken as a second wife, the first wife being all the time in Burma. The opposite contention is that, while the appellant was older than the other women (who all lived in the same house) and had, for that reason and also for reasons of choice, a stronger hold on the man, yet she has not made out the status of a wife. It is a noticeable feature of the case that the appellant, in her own evidence and in the evidence of other witnesses examined for her, endeavoured to set up a marriage ceremony as having inaugurated the connexion; but her Counsel in the appeal declined to maintain this part of her case, which was represented as resting on habit and repute. Now the first difficulty is that apparently this is a part of the world where there are not many people at all to act the part of neighbours or the public; and at all events there is no tangible evidence of recognition of this woman, in her quality of wife, by people external to the house and independent of it. What evidence she has is that of the people who either speak to the abandoned marriage ceremony or distinguish her position in the house as one of more consequence, and her stay in it as of longer duration, than those of the other women. In truth, when all is said, there is little more pointing to marriage 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 shows that it is applied to persons

whose status is not matrimonial.

5. Nor has the appellant, in evidence or in argument, faced the grave difficulty which arises from the existence of the lawful wife in Burma. The following observations of the Chief Judge are apposite and weighty:-

It is not forbidden to a Burman Buddhist to have two wives at the same time; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare and that it is considered disrespectful. On the contrary, I should be inclined to say that if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife; and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife.

6. There remains to be noticed one point which the appellants' Counsel treated as part of his case of habit and repute, and which seemed to be regarded as the most substantial item of it. Maung Gale, in 1887, obtained a certificate of nationality as 'a British subject, proposing to travel in Siam.' In 1891 he renewed it; and as part on the docket of renewal, which is signed by the Acting Vice-Consul, are the words: 'Names of female relations living with Maung Gale : (1) Ma Wun Di, wife ; (2) I Mun, sister-in-law.' The argument upon this document is that the appellant could only be entitled to be named in this certificate of nationality if, by marriage, she had acquired her husband's certified nationality. On this, however, it is to be observed, first, that this is not evidence of repute at all; the Vice-Consul is not proved to have had any personal knowledge of these people at all, and the most it comes to is that, on this occasion, Maung Gale said that Ma Wun Di was his wife. But, further, any value or relevance which this writing has in the present case is entirely taken away by the addition of the sister-in-law, who on no theory was a naturalised British subject. The truth probably is that the entry is put in merely as an item of information identifying Maung Gale, in addition to those given in the body of the certificate.

7. The appellants' Counsel endeavoured to raise the question whether the second appellant, who is the son of the first appellant by Maung Gale, was not entitled to a

share of Maung Gale's estate, even assuming no marriage to be proved. Whether the third issue in the suit was, in its terms, susceptible of the wider construction thus suggested for it or not, the parties, by their conduct of the case, have construed it in the narrower sense of assuming the existence of a marriage; and the point urged by Mr. Roskill having been submitted in the conduct of the case to neither Court. their Lordships are unable to entertain this question.

8. Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

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