
(1911) 05 BOM CK 0003
In the Bombay High Court

Maung Pe

APPELLANT

Vs

Ma Lon Ma Gale

RESPONDENT

Date of Decision : 09-05-1911

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 42, 43

Citation : (1911) 13 BOMLR 464

Hon'ble Judges : Robson, J;Atkinson, J;Arthur Wilson, J;Ameer Ali, J

Bench : Full Bench

Judgement

Robson, J.—This is an appeal from a judgment of the Chief Court of Lower Burma on its appellate side reversing a judgment in favour of the present appellant, who was plaintiff in the action, and directing that his suit be dismissed with costs. The respondent did not appear on this appeal.

2. The appellant and respondent were Burmese Buddhists, and up to the 6th June 1907 were husband and wife. Sometime prior to that date the husband filed a suit against the respondent for dissolution of the marriage.

3. The alleged ground of divorce was that the respondent had, by sundry fraudulent devices, stolen certain jewels which were the property of the appellant. The question as to whether or not this is an adequate ground for a divorce according to Burmese Buddhist law has not been argued either in the Courts below or here, and their Lordships express no opinion upon it. It is sufficient to say that the divorce was granted, and its validity is not contested. The present dispute is concerned solely with the claim of the appellant to have the property in which the spouses were interested distributed, or dealt with according to Burmese Buddhist law.

4. The first point in dispute is whether the divorce was by mutual consent, or was granted on the fault of the wife. The husband filed his claim in January 1907. In it he set forth the respondent's alleged offence and he prayed for his decree on that ground alone. The respondent thereupon filed her defence denying the

allegations as to her misconduct and asking that the suit be dismissed with costs. Witnesses were summoned, but on the day fixed for hearing the respondent abandoned her defence and, although continuing to deny her guilt, consented to a divorce. Judgment was thereupon given on the 6th June 1907 for a decree "as prayed for."

5. Afterwards, in August 1907, the appellant brought the present action for the recovery of his property which he alleged his divorced wife still fraudulently kept in her possession, and for a partition of their joint property. The shares to which the parties would be respectively entitled under the partition would vary according to whether the divorce had been granted on the ground of a matrimonial offence or had been arranged by consent, and the respondent contended that under the circumstances above stated the divorce had been by consent and had not been granted by reason of her fault. The District Judge found in favour of the appellant on this point, but the Chief Court have cast some doubt upon that finding, although in view of their decision on another point in the case, which is dealt with later on, they did not think it necessary to discuss it fully. Their Lordships however think it desirable to state that they agree with the judgment of the District Judge on this point. Although the respondent at the last moment abandoned her defence and consented to the decree, she certainly ought not to be put in the position of an innocent wife who has contracted for a divorce on an equal footing with her husband. If she had invited her husband to enter into such an agreement before he began his action he would have been at liberty to refuse and to have insisted upon a decree establishing her guilt, in order to determine the basis upon which the subsequent partition should take place, and he was certainly placed in no worse position by the fact that he was obliged to bring the action in order to secure relief. The proceedings at law disclose, not an agreement between husband and wife, but a claim by the husband on a specific ground to which the wife in effect submitted.

6. The ground on which the Chief Court set aside the decree of the District Judge in the present action, was that the appellant had no right to a partition of property unless he asked for it in the action for divorce.

7. There has been some conflict of decisions in the Burmese Courts upon this point, and the Chief Court held, on this appeal, that the matter being one of procedure must be determined by the Civil Procedure Code, Sections 42 and 43.

8. Those sections are aimed against a multiplicity of suits in respect of the same cause of action and, shortly stated, they enact that if a plaintiff fails to sue for the whole of his claim or remedy in respect of a particular cause of action, he shall not afterwards sue in respect of the portion so omitted or relinquished.

9. It is to be observed that the objection founded upon these sections should have been treated as a preliminary point, but no notice of it was given by the respondent in the present action either in her defence, or at the trial, or in the grounds of appeal as first delivered. Under these circumstances, their Lordships

are of opinion that she was too late to raise the point in the Court of appeal except upon terms which would have indemnified the appellant for her omission to raise it at the proper time.

10. With regard, however, to the point itself, their Lordships are of opinion that Sections 42 and 43 of the CPC were not intended to bar an action like the present. The cause of action for the divorce was the misconduct of the wife, but the cause of action for the partition was the divorce of the wife founded on that misconduct. The partition may no doubt be treated as relief consequential upon the divorce and therefore dealt with in the same suit, but the evidence is different and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition can properly arise. There is, therefore, not necessarily any hardship on the defendant in severing the two matters. Indeed it may, and generally would, be the more convenient course finally to settle the question of the divorce and the misconduct before entering upon an enquiry as to partition which would be altogether unnecessary if the decree were refused, or would be put on a different basis if the misconduct were disproved. If the Court should be of opinion that a petitioner has unnecessarily severed his claim for a partition from his claim for a divorce it may, of course, punish the plaintiff by the exercise of its discretion as to costs, but their Lordships are of opinion that such a severance does not come within the mischief aimed at by Sections 42 and 43 of the CPC so as to bar the claim to a partition which may be founded on the decree for divorce itself.

11. Their Lordships will therefore humbly advise His Majesty that this appeal ought to be allowed, the decree of the Chief Court set aside, and that of the District Court restored, with costs in both Courts.

12. The respondent will pay the costs of the appeal.