

APPELLATE CRIMINAL.

Before Mr. Justice Gledhill.

U THEIN (APPELLANT)

v.

MA KHIN NYUNT (RESPONDENT).*

Criminal Procedure Code, ss. 488, 489.

Held : An order for payment of maintenance remains valid and enforceable until it is cancelled or modified according to law. Mere subsequent cohabitation does not necessarily revoke the order though it would be automatically suspended for the period of cohabitation. If the marriage between the parties is dissolved by virtue of desertion, on the dissolution of marriage, the wife is not entitled to maintenance.

Pearey Lal v. Naraini, 58 All. 379 ; *Kanagammal v. Pandara Nadar*, I.L.R. 50 Mad. 663 ; *Shah Abu Ilyas v. Ulfat Bibi*, I.L.R. 19 All. 50, followed.

Kyaw Din for the appellant.

Ba Sein and *Thein Maung* for the respondent.

GLEDHILL, J.—U Thein, the petitioner in this case, was the husband of Ma Khin Nyunt, the respondent in this case and the petitioner in the other two cases. U Thein has not cohabited with the respondent since 1931. Ma Khin Nyunt obtained an order for maintenance under section 488 (1) of the Code of Criminal Procedure and in Criminal Miscellaneous No. 72 of 1941 of the Headquarters Magistrate, Henzada, on the 1st January 1942, the allowance was enhanced to Rs. 100 per mensem. Since then, despite the fact that Ma Khin Nyunt filed four applications to recover the maintenance due to her under the order, nothing has

* Criminal Revisions Nos. 152B, 158B and 159B of 1947 being review of the order of Headquarters Magistrate, Henzada, dated the 31st March 1947, passed in Criminal Revision No. 1 of 1947.

been paid by U Thein, except a sum paid under the stay order of Wright J. in Criminal Revision No. 174B of 1947.

In Criminal Miscellaneous No. 1 of 1946 of the Headquarters Magistrate, Henzada, Ma Khin Nyunt filed an application to recover arrears of maintenance for 49 months at Rs. 100 per mensem, and the application was granted.

U Thein unsuccessfully appealed to the Court of Session, but, in Criminal Revision No. 174B of 1946 of this Court, I held that it was open to U Thein to plead that his marriage with Ma Khin Nyunt had been dissolved under the rule in section 17 of Book V of *Manugye*, and I remanded the case for hearing the issues whether, and if so when, the marriage had been dissolved. The learned Magistrate held that the marriage was dissolved on 1st January 1945. Both parties unsuccessfully appealed to the Court of Session, and both parties now apply to this Court in revision, U Thein to have it held that the marriage was dissolved in 1935, and Ma Khin Nyunt to have it held that the marriage is still subsisting.

I do not wish to repeat what I have said in my judgment in Criminal Revision No. 174B of 1946, but both lower Courts have shown a reluctance to accept my ruling in that case, which makes it necessary that I should comment on some of the remarks in their judgments.

The learned Magistrate appears aggrieved that U Thein, by omitting to pay maintenance during the Japanese occupation, should be able to put himself in a better position than he would be in if he had paid. He says "if the Buddhist law is strictly applied, as done in the present case, many wives will be deprived of their allowances through no fault of theirs. I therefore think that section 488, Criminal Procedure Code,

1947

U THEIN

v.

MA KHIN

NYUNT.

GLEDHILL, J.

1947

U THEIN

v.
MA KHIN
NYUNT.

GLEDHILL, J.

and the rule in section 17 of Book V of *Manugye* need consideration."

The fact that, in unexpected circumstances, a strict application of the law produces curious results, is no reason for a Judge assuming the functions of the Legislature.

In his judgment, the learned Sessions Judge has remarked "Where the operation of a principle of the personal law of the parties is bound to result in a change or abrogation of any provision of law created by statute and defeat the purpose for which the statute was enacted, it is submitted that public policy demand that despite the seeming conflict the settled rule of statute law should be held to prevail."

Now had I held that a rule in the *Dhammathats* respecting contract prevailed over a rule laid down in the Contract Act, this implied criticism might have been deserved, but I must point that, in questions relating to marriage, the Buddhist Law has statutory force by the provisions of section 13 (1) of the Burma Laws Act. There is no conflict between the Code of Criminal Procedure and the Burma Laws Act in this case. Chapter XXXVI of the Code was intended to provide for maintenance of wives, not to prevent divorce. The basis of an order of maintenance, and its enforcement is that there should be a valid marriage and that it should be still subsisting. In deciding whether that status exists, a Criminal Court must apply the law as laid down in the Burma Laws Act.

On behalf of Ma Khin Nyunt it has been submitted that the order for payment must remain valid and enforceable until it is cancelled or modified, and *Pearey Lal v. Naraini* (1) and *Kanagammal v. Pandara Nadar* (2) have been cited. In both these

(1) 58 All. 379.

(2) I.L.R. 50 Mad. 663.

cases reference has been made to the general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of circumstances remains in force until cancelled.

I observe, however, that the only provision in Chapter XXXVI of the Code of Criminal Procedure for the cancellation of an order passed under section 488 (1) is that set out in section 489 (2) which is only applicable when a decree of a Civil Court affects the position of the parties.

In the cases cited, the question was whether a maintenance order obtained by a wife was revoked by subsequent cohabitation with the husband, and in both cases the finding was in the negative, but in both cases it was held that the order would be automatically suspended for the period of cohabitation.

In *Kanagammal's* case (1) reference was made to *Shah Abu Ilyas v. Ulfat Bibi* (2), and the judgment was, in part, founded upon the decision in that case that it was the duty of the Court, when a plea of divorce had been established, to decline to enforce the maintenance order.

It was chiefly upon the last cited case that I based my judgment in Criminal Revision No. 174B of 1946. When an application to enforce a maintenance order is made under section 488 (3) the respondent is entitled to show cause, and the magistrate has a discretion to refuse to enforce it. What cause can be more sufficient than the fact that the relationship of husband and wife, the essential basis of the order, has ceased to exist?

As for U Thein's contention that the marriage was dissolved in 1935, I think it is quite clear from the

1947

U THEIN
v.
MA KHEIN
NYUNT.

GLEDHILL, J.

(1) I.L.R. 50 Mad. 663.

(2) I.L.R. 19 All. 50.

1947

U THEIN

v.

MA KHIN
NYUNT.

GLEDHILL, J.

evidence that it cannot be sustained. It appears that U Thein's father, U Po Sein, paid the money, due under the orders, first into Court for about two years, and subsequently to Ma Khin Nyunt direct. During this period, U Thein was making his father an allowance, and U Po Sein says that, on one occasion he wrote to U Thein and asked for an increase in the allowance, as the Court had enhanced Ma Khin Nyunt's allowance. It is futile, in the face of these statements, to contend that U Thein was unaware of, or did not acquiesce in, these payments. So long as they continued, the marriage tie subsisted.

It seems to me then that the starting point of the period of three years' desertion required to bring the case within the rule in section 17 of Book V of *Manugye* is 1st January 1942, as held by the lower Courts, and that the marriage was dissolved on 1st January 1945. The consequential order of the learned Magistrate is correct.

The applications are dismissed.