THE

ALL INDIA REPORTER

1921

LOWER BURMA CHIEF COURT.

* A. I. R. 1921 Lower Burma 1.

HIGINBOTHAM, J.

Maung Yaung Shwe—Defendant-Appellant

v.

Maung Sin—Plaintiff-Respondent.

Second Appeal No. 178 of 1920, decided on 12th May 1920, from a decision of the Divl. J., Tenasserim.

* *Animals—Wild animals—Elephants—Tame elephant escaping—Recaptured by another—Tame at time of recapture—Ownership of former master is not lost.*

By the common law of England which is applicable in India on this subject a person can have only a qualified property in a wild animal, and if such animal escapes to its former liberty, such qualified property in it is lost. Elephants are animals which, though by nature wild, are peculiarly amenable to training and quickly become tame. If any such tame and trained animal should go off with a wild herd of other elephants and remain at liberty so long that when recaptured, it had to be dealt with and trained as if it were a wild animal, which had never before been tamed and trained, it would be correct to say that it had reverted to its natural state and was in fact a wild animal. In such case, the former owner would have lost all property to it. But if on recapture it was found to be tame and could be put to work again almost at once, it would be incorrect to say that it was a wild animal. 85 Cal. 413 Foll. [P. 1, C. 2, P. 2, C. 1.]

Kyar Din—for Appellant.

Ginwala—for Respondent.

Judgment:—In this case the plaintiff sued the defendant for the return of his elephant which he had caught in his keddah. The plaintiff sometime in 1915 purchased the elephant from Maung Ba Dwe and had it in his possession until the 6th June 1917, when it got lost in the jungle. It remained in the jungle until June 1918. The defendant in his written statement took up the attitude that he knew nothing of any such purchase and that he had caught the elephant in the keddah according to law. The Court framed one issue only, with consent, namely, "whether the elephant in suit belongs to the plaintiff or not?" The evidence was led on the question of identification of the elephant as the one which the plaintiff had purchased, and both Courts have held that the plaintiff has succeeded in proving that the elephant caught by the defendant was the same as the elephant purchased by the plaintiff.

The appellant-defendant has brought the case up on second appeal and the grounds of appeal 1 to 7 raise a legal question which was not raised in either of the Courts below, namely, whether the elephant having returned to its wild state, the plaintiff had not lost his property in it.

The point should have been raised by the defendant in the Original Court and it could not be raised in the second appeal to the detriment of the plaintiff, who had no opportunity of calling evidence having a bearing on the point. But the defendant having raised the point for the first time in this Court, if the point is to be decided, the decision must rest on the recorded evidence, although no evidence was specially adduced bearing on the point.

By the common law of England which is applicable to this case, a person can have only a qualified property in a wild animal, and if such animal escapes to its former liberty, such qualified property in it is lost, Volume I, Halsbury's Laws of England, paragraphs 798, 799. It is necessary, therefore, in this case to consider whether on the evidence the defendant-appellant's contention, that when he recaptured the elephant it was a wild animal, can be sustained. Elephants are animals which,

though by nature wild, are peculiarly amenable to training and quickly become tame. If any such tame and trained animal should go off with a wild herd of other elephants and remain at liberty so long that when recaptured, it had to be dealt with and trained as if it were a wild animal, which had never before been tamed and trained, I think it would be correct to say that it had reverted to its natural state and was in fact a wild animal. In such case, the former owner would have lost all property to it. But if on recapture it was found to be tame and could be put to work again almost at once, I think it would be incorrect to say that it was a wild animal. The view that there are animals, which although naturally wild may cease to come within the category of wild animals, is supported by the decision in *Mahadar Mohanta* v. *Balaram Gagoi* (1), which was a case very similar.

The facts as found by both the lower Courts show that the elephant in question was purchased by the plaintiff respondent from Maung Ba Dwe in 1915 after it had been in his hands for about six months, and had been trained. It remained in the plaintiff's possession for over one year and a half and was then lost in June 1917. The plaintiff made a search for it and then offered a reward for its recapture. In June 1918 it was recaptured by the defendant appellant in his keddah. When it was recaptured, it seems to have been able to be put to work within a very short time, which indicates that it was already a tamed animal. Both Courts have held that it was tamed and trained and not wild at the time of its recapture and since it had been working for over eighteen months before it escaped, the finding would seem to be correct. The defendant appellant, therefore, is not able to show that the elephant in this case was in fact a wild animal and his contention that the plaintiff has lost his property in the elephant consequently fails.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) (1908) 35 Cal. 413=12 C. W. N. 547.

A. I. R. 1921 Lower Burma 2.

ROBINSON, C. J. AND HEALD, J.

Ma Ngwe Hnit—Appellant

v.

Maung Po Hmu and others—Respondents.

First Appeal No. 86 of 1919, decided on 17th January 1921, against a decree of the Addl. Dist. J., Maubin.

Buddhist Law—Burmese—Spinster marrying a widower—Wife bringing no payin to marriage—Divorce by mutual consent without fault—Wife is entitled to share in payin property.

In the case where the wife is a spinster but the husband had been previously married, where the husband brings *payin* to the marriage and the wife nothing and where they separate on divorce by mutual consent without any fault on either side the rule to be applied is the rule laid down for the case where neither party had been married before and separate by mutual consent without fault, and where the relation of *nissaya* and *nissita* exists. (Case-law discussed). [P. 4, C. 1.]

Ba U—for Appellant.

Mya Bu—for Respondents.

Robinson, C. J.:—U Ma La, an old man of 70 years of age, who had been previously married, married Ma Ngwe Hnit, a spinster, age 38. U Ma La was a rich man. Ma Ngwe Hnit was poor and brought nothing to the marriage. The marriage was arranged by the elders, and Ma Ngwe Hnit no doubt claimed that a substantial *kanwin* should be settled on her. On the day of the marriage U Ma La merely sent over Rs. 450, whereas he had promised to give 40 acres of paddy land. Ma Ngwe Hnit objected, and the elders went to U Ma La and obtained from him a document purporting to transfer about 44 acres of paddy land. The marriage then took place. After a few years there was a divorce by mutual consent without any fault on either side. She then brought a suit to recover her *kanwin* and her share in the *payin* and *lettetpwa* properties. The learned District Judge has held that the document transferring the 44 acres of paddy land not being registered, is void and of no effect and that she has no claim to these as *kanwin*. As regards the *payin* property he held, following the decision in *Ma Dwe Naw* v. *Maung Tu* (1), that on a divorce each party takes his or her own *payin*, and dismissed this portion of her claim. As regards the *lettetpwa* properties

(1) S. J. L. B. 14.