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Containing cases determined by the

Supreme Court of the Union of Burma

BURMA LAW REPORTS

SUPREME COURT

1952

Containing cases determined by the Supreme Court of the Union of Burma

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NAMES OF THE JUDGES AND LAW OFFICERS OF THE UNION

SUPREME COURT

CHIEF JUSTICE OF THE UNION

The Hon'ble *Agga Maha Thray Sithu* SIR BA U, Kt., M.A. (Cantab.), *Barrister-at-Law*, Chief Justice of the Union from 1st January 1952 to 12th March 1952.

The Hon'ble *Thado Thiri Thudhamma* U THEIN MAUNG, M.A., LL.B. (Cantab.), *Barrister-at-Law*, Chief Justice of the Union from 22nd March 1952.

PUISNE JUDGES

The Hon'ble Justice *Thado Thiri Thudhamma* U THEIN MAUNG, M.A., LL.B. (Cantab.), *Barrister-at-Law*, from 1st January 1952 to 21st March 1952.

The Hon'ble Justice *Thado Thiri Thudhamma* U E MAUNG, M.A., LL.M. (Cantab.), *Barrister-at-Law*.

The Hon'ble Justice *Thado Maha Thray Sithu* U MYINT THEIN, M.A., LL.B., *Barrister-at-Law* from 22nd March 1952.

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his occupation. Upon an application for a writ to quash the proceedings. *Held :* That the dispute as to ownership between U Aung Thein and Daw Kha is a matter to be settled in a competent Civil Court. The applicants 1 and 2 came into the premises as Daw Kha's tenants. The order by the Controller that it was immaterial as to whose tenants the applicants were so long as they are tenants of the premises is illegal and unsustainable. In the present case the Controller's action in Proceedings under s. 16-AA. (*4*) (*a*) of the Urban Rent Control Act whereby the Controller could direct the landlord to occupy the premises when they become vacant is wholly irregular as Daw Kha was landlord and no notice was issued to her. All that the Controller could have done under the section was to direct Daw Kha to let the premises to a specified person and wait for compliance of the order. Statements in affidavits should not be made loosely or irresponsibly. An affidavit is made on oath and as such is a solemn statement and care should be taken that loose statements are not made.

CERTIORARI—*Grant of—Regarding trade dispute—Mistake in deciding question of fact by Court of Industrial Arbitration whether ground for writ.* On 25th April 1951, R.E.T.&.S. Co. Ltd., transferred 16 of the workmen from the Boiler House Department to the underground department. On the 26th April 1951, 16 workmen were dismissed on account of their refusal to serve in the undergound department. The Court of the Industrial Arbitration, Burma in Case No. 5 of 1951 made an award for reinstatement of 16 of the discharged workers and granted other reliefs. Upon an application for a writ of certiorari to quash the said award. *Held :* That the question whether there is a decision or agreement regarding inter-departmental transfers was one of fact which the Court of Industrial Arbitration was competent to decide. The mere fact that it made a mistake in deciding such question cannot ordinarily be a ground for a writ of certiorari. Where there was already a dispute between the Company and the Workers' Association regarding the terms and conditions of service relating to inter-departmental transfers and such dispute had not been settled there was a case to go before the Court of Industrial Arbitration and workmen could not be dismissed because they refused to obey orders of transfer without the decision of the said question of transfer.

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ESTOPPEL—S. *116, Evidence Act—Permit granted by persons administering Rangoon Development Trust during occupation period and lease by such permit-holder—Assessment of Encroachment Tax by lawful administrator of Rangoon Development Trust on lessee—Subsequent grant of lease by Rangoon Development Trust —Effect of such lease on the lease by permit-holder—Hague Regulation—Power of Occupying Power—S. 108* (d) (q), *s. 111* (c), *Transfer of Property Act—Trust Act, ss. 86, 88, 90 and 94—Equity.* A obtained a permit to occupy a piece of land from the authorities administering Rangoon Development Trust during Japanese occupation, and built a house thereon. He let out the house and land to the 2nd Respondent. After re-occupation, the administrator of Rangoon Development Trust, assessed the Respondents with encroachment taxes and later granted a lease for 30 years to the Respondents, who filed a suit for declaration of title to the house and land. The trial Judge gave a decree as claimed on appeal to the Appellate Side of the High Court, the decree was modified and house was declared to be that of the appellants, on further appeal to the Supreme Court. *Held :* Article 55 of Hague Regulations of 1908, makes the occupying power only an administrator and usufructuary of land belonging to the State of the occupied country. Therefore the permit granted by the authorities administering Rangoon Development Trust during the Japanese occupation could not give any title to endure beyond the period of such occupation as against Rangoon Development Trust. The right of the appellant under the permit therefore came to an end when Rangoon Development Trust assessed encroachment taxes and later granted lease. There was no estoppel under s. 116 of Evidence Act. The section provides that a tenant cannot deny that the landlord had title to the property at the date of creating tenancy. The section does not prevent a tenant from pleading that the title of the original lessor has come to an end. *Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern*, 64 I.A. 311, followed. *Sm. Bhaigayta Bewah* v. *Himmat Badyahar*, 20 C.W.N. 1335, referred to. S. 108 (*q*) of Transfer of Property Act provides that a lessee on the determination of the lease is bound to put the lessor into possession. But this sub-clause should be read subject to the opening words of the paragraph, *viz.*, that parties to lease "possess the rights and are subject to the liabilities mentioned in the rule next following or *such of them as are applicable to the property leased*" *e.g.*, under s. 111 (*c*) when the interests of the lessor has terminated or s. 108 (*d*) when the interests of lessor and lessee have become vested in the same person, no question of delivery of possession, arises. Ss. 86, 88, 90 and 94 of the Trust Act have no application to the facts of the present case. Failure of the Respondents to inform Rangoon Development Trust when they were assessed with encroachment tax about the permit of the appellant did not amount to fraud or did not raise any equity in favour of the Appellant.

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"aid" is not used in s. 4 (*1*) of the High Treason Act, the words used are "encourage, harbour or comfort". They are not defined in the Statute and no reference can be made to another Statute because only the word "harbour" is found used in the other Statute. The words "encourage and comfort" must therefore bear their ordinary meaning. "Encourage" has been defined to mean "embolden, incite, instigate", "Comfort" as meaning "to strengthen, to encourage, to support, to invigorate, to aid, to abet or to countenance." What the Court must find is what is the intention. The appellant gave a box of surgical instruments and medicine. If it was not his intention to encourage, harbour or comfort the appellant would not be guilty. It is a fundamental principle of law that a crime is not committed if the mind of the person doing the act is innocent. *Ratula Hariprasada Rao* v. *The State*, A.I.R. (1951) Supreme Court Rep. 322, followed. The state of the mind of the appellant should be judged not by a single act of giving some instruments and medicine but all the circumstances of the case must be taken into account. The learned judges in the High Court in coming to a conclusion on the charge went on the presumption that a man intends the natural consequences of his act. But this inference cannot be drawn where an act is done by a person in subjection of the power of others especially if that be a brutal enemy. The guilty intent cannot be presumed and must be proved. If circumstances showed that the act was done in subjection to the power of the enemy or is as consistent with an innocent intent as with the criminal intent or if there be a doubt in the matter the appellant is entitled to be acquitted. In the present case the necessary inference is that the appellant wanted to save his property ; taking the worst view, giving of medicines and instruments was consistent with an innocent intent as well as with the criminal intent ; the benefit of the doubt must be given to the appellant. *Rex v. Steane*, L.R. (1947) 1 K.B. at p. 1006, referred to. What inference should be drawn from proved and admitted facts is a question of law ; if a miscarriage of justice has resulted from a wrong inference the Supreme Court will interfere and put it right.

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could interfere. The Tenancy Disposal Rules make no provision for allocation of land for future years. Nor is there any provision which would enable the District Agricultural Board to order the transfer of land by the owner.

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၁၉၅၁ ခုနှစ်၊ သီးစားချထားရေးနည်းဥပဒေ ၁၀—ရုံးတော်ကအသိအမှတ်ပြုရသောအမိန့်—သီးထောက်ခပေးရန်ပုဂ်ကွက်သူ။ ဤရုံးတော်၏အမှုတွဲတွင်ရှိနေသော လျှောက်လွှာနှင့် ထိုလျှောက်လွှာပေါ်တွင် ကျေးရွာသီးစားချထားရေး အဖွဲ့ဝင်များစုံညီ လက်မှတ်ရေးထိုး၍ ထားသောအမိန့်ကို ဤရုံးတော်ကအသိအမှတ်ပြုချေမည်။ အမှုတွဲတွင် မပါရှိသော အခြားအမိန့် ရှိသည်ဆိုသောစကားကို ဤရုံးတော်က လက်ခံဉာဏ်ငြင်းဆို ရချေမည်၊ သီးထောက်ခကို မည်သည့်နေ့ရက်တွင်ပေးရမည်ဟူ၍ အတိအကျသတ်မှတ်၍ထားခြင်းမရှိ၍၊ သီးစားချထားရန်လျှောက်လွှာ တင်နိုင်သေးလျှင်၊ လျှောက်လွှာတင်ပြီး နောက်တနေ့မှ သီးထောက်ခကိုပေးခြင်းသည်၊ နောက်ကျလွန်းသည်ဟူ၍မဆိုနိုင်။ ထိုမှတပါး ကျေးရွာသီးစားချထားရေးအဖွဲ့၏ အမိန့်မှာလည်း၊ သီးထောက်ခပေးခြင်း နောက်ကျသည်ဟူ၍ အကြောင်းပြချက်မပါရှိချေ၊ သို့ဖြစ်သောကြောင့် ခရိုင်သီးစားချထားရေးအဖွဲ့က၊ သီးစားသည် သီးထောက်ခပေးရန် ပုဂ်ကွက်သူမဟုတ်ကြောင်း၊ နည်းဥပဒေ ၁၀ အရ၊ ထိုမြေကိုဆက်လက်၍ လုပ်ကိုင်စွဲရထိုက်သူဖြစ်ကြောင်း ကောက်ယူဆုံးဖြတ်ခြင်းသည် သင့်လျော်မှန်ကန်သည်။

ကုဂါး (ခေါ်) ကုန်ဘဟာဌးနှင့် ပဲခူးခရိုင် သီးစား ချထားရေး အဖွဲ့ဥက္ကဋ္ဌ—အရေးပိုင်မင်းနှင့်တဦး ၁၀၀

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Tenancies Disposal Rules, 1951, Rule 10—*Reallotment of Tenancies—Tenant—S. 2—Scheme of the Act.* In 1950-51 applicant's land was allotted to the 1st Respondent who sub-let a portion to another without obtaining approval of the authorities. In 1951-52 both parties applied for allotment of land to the Village Land Committee who allotted it to the owner as in the previous year the land had been sub-let without their consent. This was reversed on appeal by the District Committee. Upon a writ of certiorari—*Held:* That the Village Land Committee had taken the correct view having regard to the scheme of the Disposal of Tenancies Act and Rules. Under Rule 10 it is the tenant who is entitled to claim renewal; and tenant has been defined as a "person holding land and liable to pay the rent of the said land." There are two conditions, *viz.*, the actual occupation of the land and the liability to pay the rent. A person who did not hold the land cannot be said to be a tenant under Rule 10. If the owner of a piece of land may not lease out to a tenant of his choice, the tenant may not also sub-let, because allowing of such sub-letting would be inequitable and cannot be the intention of the legislature and a reasonable interpretation must be given.

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Police, (1948) B.L.R. 772 (S.C.), followed. Under s. 5-A (4) of the Public Order (Preservation) Act the Resident or his delegate can during the currency of the order for detention, specify from time to time the place or places where the detenu is to be confined. The Resident was empowered under the Act to direct the confinement of a person detained under his orders at a place outside his district. *Saw Benson* v. *The Commissioner of Police. Rangoon and others*, B.L.R. (1950) (S.C.) 196, followed.

SUPREME COURT.

U BA TU (APPLICANT)

v.

THE RETURNING OFFICER, LASHIO AND OTHERS (RESPONDENTS).*

†S.C. 1951

Sept. 11.

Parliamentary Election Rules 46, 47 and 48—Whether Returning Officer acting under Rule 47 exercises quasi-judicial function—Whether nomination paper can be rejected owing to the absence of the candidate or his agent—Whether certiorari should issue when there is an alternative remedy.

Held: That there could be no doubt that a Returning Officer acting under Rule 47 of Parliamentary Rules exercises quasi-judicial function. According to Rule 46, a candidate or his agent may attend the scrutiny of nomination papers but there is no duty cast upon them to attend such scrutiny. The purpose of the attendance is to enable them to take objection to the nomination papers of other candidates. Nomination paper of a candidate can be rejected only on grounds specified in clauses (*a*), (*b*), (*c*) and (*d*) of sub-rule (1) of Rule 47 and the Returning Officer had no right to reject the nomination paper of a candidate simply because the candidate or his agent was not present.

Ordinarily the direction in the nature of certiorari will be issued when an inferior tribunal exercising judicial or quasi-judicial functions acted in excess of its power but it is not compulsory on Court to issue such directions in every case of excess of jurisdiction.

Where the applicant has other and better remedy available to him the Court normally refuses to exercise its power in certiorari. Again, where disputed questions involve protracted hearing of evidence, which could be more completely examined in other proceedings open to the applicant, the Court will normally refuse to interfere in certiorari.

But in the present case there is no dispute that the Returning Officer has exceeded his jurisdiction. To relegate the applicant to the alternative remedy by way of election petition after polls have been taken, will mean, that

* Civil Misc. Application No. 52 of 1951 against the order of the Returning Officer.

† *Present:* MR. JUSTICE E MAUNG, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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not only the applicant but other candidates to Parliament from this particular constituency will be put to unnecessary expenditure and labour, for the election petition if filed is bound to succeed and the polls which may be taken will have to be declared null and void. The result will be that fresh elections will have to be held. In these circumstances though the applicant had another remedy the Court would quash the proceedings.

Kyaw U for the applicant.

Myint Htoo for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—There can be no doubt that a Returning Officer acting under Rule 47 of the Parliamentary Election Rules exercises a quasi-judicial function. His jurisdiction in such exercise is limited by Rules 46, 47 and 48.

Under Rule 46, a candidate or a person duly authorized by him in writing may attend at the scrutiny of the nomination papers but the candidate or his agent is under no duty to attend such scrutiny. The purpose of attendance by the candidate or his agent is to enable him to take objection to the nomination papers of any other candidate.

No candidate is liable to have his nomination paper rejected by the Returning Officer under Rule 47 except on the grounds specified in clauses (*a*), (*b*), (*c*) and (*d*) of sub-rule (1) of Rule 47. It is clear therefore that when in this case the Returning Officer rejected the applicant's nomination paper he acted in excess of jurisdiction conferred on him by the Parliamentary Election Rules. The learned counsel for the Returning Officer does not contend the contrary.

But the real question remains, namely, whether this Court should exercise its powers to quash the proceedings of the Returning Officer by way of directions in the nature of certiorari. Certiorari can

issue when an inferior tribunal exercising judicial or quasi-judicial functions acted in excess of its powers but it is not compulsory on the Court to issue such directions in every case of excess of jurisdiction. Where the applicant had other and better remedy available to him the Court normally refuses to exercise its powers in certiorari. Again, where disputed questions involve protracted hearings of evidence which could be more completely examined in other proceedings open to the applicant, the Court will normally refuse to interfere in certiorari.

In this case, however, there is not and cannot be any dispute that the Returning Officer had exceeded his jurisdiction. To relegate the applicant to the alternative remedy by way of election petitions after polls had been taken would mean that, not only the applicant but other candidates to Parliament from this particular constituency would be put to unnecessary expenditure and labour, for the election petition if filed is bound to succeed and the polls which in the absence of any interference by this Court, may be taken, will have to be declared null and void, resulting in the elections for the constituency beginning afresh with all its attendant expenditure and labour.

In these circumstances we are satisfied that this is a proper case for the Court to exercise its jurisdiction and to quash the proceedings of the Returning Officer. We accordingly quash the proceedings of the Returning Officer, Lashio, of the 25th May 1951 in so far as he rejected the nomination paper of the applicant, for default of attendance. There will be no orders for costs.

SUPREME COURT.

† S.C. 1951

Sept. 24.

CASSIM EBRAHIM MALIM (APPELLANT)

v.

MARIAM BIBI (*a*) HAJI BIBI AND OTHERS (RESPONDENTS). *

Limitation Act, Article 91—Deed obtained by undue influence—Knowledge of the contents of the documents executed by agents—Suit filed after 4 years whether barred.

Appellant, father of the Respondents, obtained Probate of the estate of his deceased wife who was the mother of the Respondents. Respondents 1 and 2 executed a power-of-attorney in favour of their uncle to execute a deed of release in favour of the appellant, their father, on the ground that they have obtained Rs. 21,000 out of the estate. Accordingly the deed of release was executed by the uncle and he stated that he informed the 1st and 2nd Respondents about the execution of the deeds of releases and there was no cross-examination on the point. The trial Judge held that the claim to set aside the release was barred by limitation. The Appellate Court set it aside.

Held : That when the agent of the 1st and 2nd Respondents informed them about the execution of the deeds of releases, if they did not become aware of their right to impeach the releases it could only have been because they chose not to be enlightened. Both the Courts held that they knew the true nature of the powers-of-attorney. The claim to have the deeds set aside was barred by limitation.

Dutt v. *Dutt*, 9 Luck. 178 at 189 ; *Mitchell* v. *Homfray*, (1881) 8 Q.B.D. 587 ; *Allcard* v. *Skinner*, (1887) 36 Ch. D. 145 ; *Kunwar* v. *Singh*, 14 I.A. 149, referred to.

P. K. Basu for the appellant.

Dawoodjee for the 1st and 2nd respondents.

N. R Burjorjee for 3rd respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The three respondents are two daughters and a son of the appellant by his

* Civil Appeal No. 6 of 1950 against the decree of the High Court, Rangoon in Civil 1st Appeal No. 144 of 1937.

† *Present :* MR. JUSTICE E MAUNG, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

first wife Khatiza Bibi who died in May 1918 having made a will on 22nd November 1916 under which the appellant was appointed the executor and certain benefits were given to the respondents. At the time of Khatiza Bibi's death the respondents were very young, the eldest being about seven years of age and the youngest about five.

Probate of the will was granted to the appellant by the Chief Court of Lower Burma on 1st July 1920, but before that date the appellant had re-married. The children however, continued to live with the father and the step-mother though later they all were married. It was not till the end of 1932 that the father and the children ceased to live together at the joint residence to that date at Rander, in India. On 25th December 1932 at Rander each of the daughters executed a power-of-attorney, by which after reciting that she had the benefit to the extent of Rs. 21,000 out of her mother's estate she appointed three persons, any one or more of them to execute on her behalf a document of release in favour of her father as the executor of the will of her mother. One of the three agents so appointed was Ahmed Ebrahim Malim, 2nd witness for the appellant, and an elder brother of the appellant ; and he on 16th November 1932 executed two deeds of release in exercise of his authority as agent of the two daughters in favour of the appellant.

The two daughters who are the 1st and 2nd respondents before this Court filed a suit for administration of the estate of their mother on the 2nd March 1936 challenging the releases made on their behalf by their uncle in pursuance of the powers-of-attorney granted by them. Their case as set out in their plaint cannot be said to be too clear whether they intended to rest their claim on exercise of undue influence by their father conducing to the execution of

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CASSIM EBRAHIM MALIM v. MARIAM BIBI (a) HAJI BIBI AND OTHERS.

the powers-of-attorney or on fraud in respect of the releases executed by their uncle. But what emerged from the plaint taken as a whole was that the plaintiffs claimed that they did not know that they were granting powers-of-attorney to their uncle and two others when they executed and had registered the two documents of the 25th October 1932 and that they had been kept out of knowledge of the documents of release executed and registered on their behalf till some time in 1935. The appellant's defence was that the daughters knew perfectly well that they were granting authority to three persons named in the powers to grant him releases in respect of his administration of the estate of his wife and that before the daughters executed these powers-of-attorney they had examined such accounts as he maintained and had been satisfied that each of them had had the benefit of Rs. 21,000 out of the estate. He also denied that there was any exercise of undue influence on his part resulting in the execution of these powers-of-attorney.

The learned trial Judge (now the Chief Justice of the Union) on the evidence came to the conclusion that the plaintiffs were perfectly aware of the nature of the documents which they had executed. This finding has been accepted by the Appellate Bench composed of Goodman Roberts C.J. and Braund J. On this view, the learned trial Judge considered that the line of attack open to the plaintiffs in their endeavour to set at naught the releases of November 1932, could only be on the basis that the powers-of-attorney were induced by exercise of undue influence of their father. Certain decisions of the Privy Council and of the High Courts in India enunciated the principles that a transaction induced by undue influence was voidable, in the sense that it was good and effective until cancelled, and that a suit to cancel such transaction if

instituted beyond three years was barred under Article 91 of the Limitation Act. Accepting these principles, the learned trial Judge refrained from recording a finding whether undue influence of the father operated in the granting of the powers-of-attorney, as in any event the claim to cancel the same would be barred at the date of the suit.

However, the trial Court took the view—a view shared by the Appellate Bench—that the two releases did not purport to release the appellant from any claim in excess of Rs. 21,000 by each daughter ; and in the result granted the plaintiffs a preliminary decree for administration with a declaration that each of the plaintiffs must be debited with Rs. 21,000 against the share found due to her on taking accounts of the estate.

The Appellate Bench, as has been stated earlier, accepted the finding of the trial Judge that the plaintiffs were well aware of the true nature of the documents they executed. It held further that the execution of the documents was brought about by undue influence of the appellant ; that the plaintiffs were not aware and were intentionally kept in ignorance of the execution at Rangoon of the two release deeds ; and that it was only in 1935 that the plaintiffs came to learn of these releases.

On these findings, the Appellate Bench reached the conclusion that till the plaintiffs came to have knowledge of the existence of the releases, they could not be said within the meaning of Article 91 of the Limitation Act to know of the facts entitling them to have them cancelled as consequential to undue influence exerted on them in obtaining from them the powers-of-attorney. The suit in this view would not be deemed instituted beyond limitation ; and in appeal a plenary preliminary administration decree was substituted for that granted by the trial Court.

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CASSIM EBRAHIM MALIM v. MARIAM BIBI (a) HAJI BIBI AND OTHERS.

At one stage of the hearing it appeared as if it would be necessary to reconsider the correctness of certain rules laid down in the decisions of the Privy Council and of the High Courts in Burma and India. The definitions in clauses (*g*) and (*i*) of section 2 of the Contract Act have given rise to some difficulty. Can it be reasonably said that a contract voidable by operation of section 19-A of the Act as being induced by undue influence remains operative till set aside? Will not that meaning be inconsistent with the definition that a " Voidable contract " is " enforceable in law at the option of " one party and not at the option of the other? The definition clearly suggests that one of the parties is entitled at his option to treat the agreement as never having been binding on him. This question and the question whether the Privy Council in laying down the rule in *Dutt* v. *Dutt* (1) that the three years permitted by the Limitation Act under Article 91 " began to run not from the discovery of the plaintiff of the true nature of the deed which he had signed, but from the date when he escaped from the influence by which, according to the plaintiff, he was dominated " has taken too narrow a view of Article 91 of the Limitation Act, are of great importance and of no small difficulty. With eminent Judges in *Mitchell* v. *Homfray* (2) and *Allcard* v. *Skinner* (3) might not the words in the third column of the Schedule relating to Article 91 of the Limitation Act be interpreted to mean " when the executant became aware that the transaction was impeachable as being induced by undue influence " or " when he became acquainted with his rights to enable him to assert them " ? The earlier Privy Council ruling in *Kunwar* v. *Singh* (4) was not as uncompromising as

(1) 9 Luck. 178 at 189.
(2) (1881) 8 Q.B.D. 587.
(3) (1887) 36 Ch.D. 145.
(4) 14 I.A. 149.

was the later decision in *Dutt* v. *Dutt* (1). Again, when the Legislature, in defining a "voidable contract" has spoken in terms which has not unequivocably excluded the possibility of such a contract requiring to be affirmed to gain vitality, are the Courts entitled to interpret Article 91 of the Limitation Act in relation to section 19-A of the Contract Act as intentionally excluding the remedy where the person exercising undue influence had been able to keep the other party under control for more than three years.

These and other points, however, do not need to be pursued further in this appeal. Ahmed Ebrahim Malim, who executed the releases as the plaintiffs' attorney and on their behalf, has given evidence at the trial; and he stated definitely that after he executed the release deeds as the plaintiffs' attorney, he wrote to them informing them of the fact. On this point, he was not challenged in cross-examination and it must therefore be taken as established that as far back as 1932 the plaintiffs had knowledge not only of the true nature of the powers-of-attorney they granted to this witness and two others but also of the execution of releases in pursuance of the powers-of-attorney they had granted.

It matters not then for the purposes of this appeal whether a "voidable contract" under the Contract Act is operative till rescinded by the party having the option so to rescind or whether it becomes operative on the party having the option by acquiescence has "enforced" the agreement. It matters not again whether the narrow construction of Article 91 of the Limitation Act adopted in *Dutt* v. *Dutt* (1) or the more liberal interpretation suggested by English cases is the more appropriate. If in 1932, the plaintiffs did not become aware of their right to impeach the

(1) 9 Luck. 178 at 189.

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CASSIM EBRAHIM MALIM v. MARIAM BIBI (a) HAJI BIBI AND OTHERS.

releases it could only have been because they chose not to be enlightened. The two Courts below agreed that they were well aware of the true nature of the powers-of-attorney they were granting; we do not agree with the Appellate Bench that the plaintiffs did not know of the execution of the releases till 1935; on the contrary, we find that that they were informed of their execution by their agent in 1932; and that between that date and the date of the suit they allowed the appellant to make payments to them of various sums of money by way of assistance to them, without in any way questioning the powers-of-attorney or the releases. All this time, the plaintiffs could and did have independent advice; their father was away in Burma and had no means of further exercising influence over them; and they had living with them their husbands.

In these circumstances, the judgment of the Appellate Bench cannot be upheld. We must and do hold that the plaintiffs are not entitled to rescind the releases executed on their behalf by their attorney and that these releases are binding on them. It follows then that the judgment of the Appellate Bench of the High Court must be set aside and that of the trial Judge affirmed.

The appeal is allowed, the judgment of the High Court in appeal is set aside and that of the Original Side of the High Court restored. Certain circumstances disclosed in the evidence, in our opinion, render it inequitable to saddle either party with the costs of the other and we direct that the parties bear their own costs throughout.

SUPREME COURT.

MOHAMED HANIF AND ANOTHER (APPLICANTS)

v.

THE FINANCIAL COMMISSIONER, BURMA AND OTHERS (RESPONDENTS).*

† S.C. 1951

Sept. 27.

Constitution of Burma—Direction in the nature of certiorari against granting of a lease or license to work a quarry—S. 219 of the Constitution—Writ of certiorari against an administrative act.

Held :That granting and cancellation of a licence or a lease is an administrative act and as such the officer granting the licence or lease is not amenable to a direction in the nature of certiorari in respect of his action. Under s. 219 of the Constitution of Burma, minerals can be exploited by the Union or Union may grant the right to citizens of the Union or to Companies or Association at least 60 per cent of the capital of which is owned by such citizens. As the 2nd Applicant was undoubtedly not a citizen at the time when the lease was granted to the 2nd Respondent and he obtained his Certificate of Citizenship during the pendency of his revision to the Financial Commissioner, the subsequent event cannot affect the validity of the Deputy Commissioner's order granting the lease to the 2nd Respondent in preference to that of the 2nd Applicant who was ineligible for the lease at the time of its grant under the Constitution.

Hup For v. *The Deputy Commissioner, Insein and others*, B.L.R. (1950) (S.C.) 86 ; *Nakhuda Ali* v. *M. F. De S. Jayaratne*, (1951) A.C. 66, referred to and applied.

P. K. Basu for the applicants.

Ba Sein for the respondent 1.

Kyaw Min for the respondent 2.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for a writ of certiorari to quash the first respondent's order in Revenue Revision No. 6L-1 of 1951.

The first applicant is the executor to the estate of the late Khan Bahadur Ibrahim who was a lessee of

* Civil Misc. Application No. 41 of 1951.

† *Present :* MR. JUSTICE E MAUNG, MR. JUSTICE THEIN MAUNG and U SAN MAUNG, J.

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MOHAMED HANIF AND ANOTHER v. THE FINANCIAL COMMISSIONER, BURMA AND OTHERS.

the Shwemyindin Stone Quarry first from 1934 to 1939 and again from 1939 to 1944.

Khan Bahadur Ibrahim died in 1944 leaving a will by which he gave the quarry, *i.e.*, the lease thereof, to his son the second applicant; and in 1946 the first applicant, on behalf of the second applicant, obtained a fresh lease of the said mine which expired on the 9th July 1948.

The first applicant applied for a renewal of the said lease about a month before its expiry; but the Deputy Commissioner asked him to produce a Certificate of Citizenship of the Union of Burma and granted him only a temporary permit to continue working the quarry for six months to enable him to produce the required certificate.

The temporary permit expired on the 9th January, 1949, without the first applicant having obtained a Certificate of Citizenship for the second applicant. So on the 22nd June, 1949, the second respondent applied for a lease of the quarry.

The first applicant then filed a written objection dated the 18th August, 1949; but even in the said objection he merely stated:

"That the delay for production of the required Certificate of Citizenship of the Union of Burma is due to the fact that the late K. B. Ibrahim has by his *Will* given the said quarry to his only son, Ismail who is a minor studying in school. The delicate position of the real owner calls for proper legal advice and consultation of other heirs and members of the deceased's family."

He also stated in a subsequent application dated the 15th September 1949:

"The minor Ismail who is the only son of late K. B. Ibrahim and owner of the quarry in question will apply for Certificate of Citizenship of the Union of Burma on attaining the age of majority. He is now 16 years of age attending school at Lahore."

So on the 16th September, 1949 the Deputy Commissioner dismissed his application for extension of time and for a fresh temporary permit and granted a lease of the quarry for ten years to the second respondent.

He then appealed to the Commissioner, Mandalay Division ; on his appeal being dismissed, he applied to the first respondent in revision ; and on his application in revision being rejected, he has filed this application for a writ of certiorari.

We are of the opinion that the application for a writ of certiorari does not lie. In *Hup For* v. *The Deputy Commissioner, Insein and others* (1) this Court has upheld the objectiont hat :

> " The Collector in deciding to cancel the unexpired licenses in favour of the applicants under section 29 (*1*) of the Burma Excise Act is performing a purely administrative function and that therefore the proceedings in which the Collector came to the conclusion now attacked before us by the applicants would not be within the cognizance of this Court in certiorari."

[Cp. *Nakhuda Ali* v. *M. F. De S. Jayaratne,* (1951) A.C. 66 in which their Lordships of the Privy Council held that the Controller of Textiles was taking executive action in cancelling a licence and that he was not therefore amenable to a mandate in the nature of certiorari in respect of that action.]

If cancellation of a licence is an administrative act, granting a licence also must be such an act ; and if granting a licence is an administrative act, granting a lease cannot be anything else.

Besides, the learned Advocate for the applicant has frankly admitted that the applicants cannot claim a lease of the quarry as a matter of right.

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(1) B.L.R. (1950) (S.C.) 86.

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His main contention is that all the officers "proceeded on the wrong assumption that no leases or permits could be granted by Government to a person who has not obtained the Certificate of Citizenship." However, their "assumption" must be held to be correct in view of Article 219 of the Constitution of the Union of Burma which reads:

"All timber and mineral lands, forests, water, fisheries, minerals, coal, petroleum and other mineral oils, all sources of potential energy and other natural resources shall be exploited and developed by the Union; provided that subject to such specific exceptions as may be authorized by an Act of Parliament in the interest of the Union, the Union may grant the right of exploitation, development or utilization of the same to the citizens of the Union or to companies or associations at least sixty per cent of the capital of which is owned by such citizens."

Incidentally, the second applicant applied for a Certificate of Citizenship after all on the 22nd December, 1949, *i.e.*, more than three months after a lease of the quarry had been granted to the second respondent, and obtained such a certificate on the 22nd February, 1951 during the pendency of his application in revision; but these subsequent events cannot affect the validity of the Deputy Commissioner's order granting the lease to the second respondent in preference to the second applicant who had not elected to be a Citizen of the Union of Burma yet and was therefore ineligible for the lease under the Constitution.

The application is dismissed with costs; Advocate's fee ten gold mohurs.

SUPREME COURT

U AUNG KYWE (APPELLANT)

v.

MAUNG PO HLA WIN AND OTHERS (RESPONDENTS).*

† S.C. 1951

Sept. 27

Buddhist law—Step-son claiming the estate of step-mother—Law relating to children of divorced parents—Maintenance of filial relationship with father after the divorce of the mother—S. 145 of Evidence Act—Previous statement used for the purpose of impeaching credit of a witness whether substantive evidence.

U Myat Nyein and Daw Thet were husband and wife and appellant was a son of the union and afterwards they divorced by mutual consent. U Myat Nyein married Daw Sein but had no children by her. After the death of U Myat Nyein, Daw Sein married U San Dun. U San Dun by his first wife Daw Thein Hla had children who are the Respondents in the appeal. Appellant maintained filial relations with his father U Myat Nyein and step-mother Daw Sein.

Held: That Appellant is an heir to the estate of Daw Sein when she died without natural issue.

The law relating to children of divorced parents is greatly misunderstood. As a consequence of incorrect rendering of *Manugye* by Richardson at p. 319 (4th Edition) it has been held that where parents effected a divorce with partition of properties and arrangements by mutual consent were made for the custody or disposal of children after the divorce, the children who went with the father did not retain any right to a share in the mother's estate and *vice versa*. The *Manugye* translation in specifying "children for whom compensation has been paid and children of parents separated" clearly referred not to children of parents divorcing in normal course but to those special classes dealt with in ss. 53, 54 and 55 of Volume X of *Manugye*. The deductions from the right of the parents to give away children in adoption can be valid only in respect of minor children for, whatever the law might have been in early days, by the time the *Manugye* came to be completed, it was settled law that only minor children could be given away in adoption without their wishes being consulted. The right of the children so given away in infancy to return to its natural family on attaining majority was recognised at pages 235 and 236 of *Manugye*. (Reference to 4th Edition).

Yan Aung for the appellant.

Bá Nyunt for the respondents.

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* Civil Appeal No. 1 of 1951 against the decree of the High Court, Rangoon, in Civil 1st Appeal No. 55 of 1949.

† *Present:* MR. JUSTICE E MAUNG, MR. JUSTICE THEIN MAUNG and U SAN MAUNG, J.

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U AUNG KYWE v. MAUNG PO HLA WIN AND OTHERS.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—This dispute relates to the administration of the estate of one Daw Sein who died at Rangoon in 1944. Daw Sein was married twice, her first husband being U Myat Nyein, after whose death she married U San Dun. By neither husband did she have any issue. The appellant is a son of U Myat Nyein by his first wife Daw Thet and the respondents are the children of U San Dun by his first wife Daw Thein Hla.

U Myat Nyein and Daw Thet admittedly effected a divorce by mutual consent before U Myat Nyein married Daw Sein. According to one version the appellant was about 20 years of age at the time of the divorce and U Myat Nyein was a Head Clerk of a Government office in Insein. According to another version the appellant was about 34 years of age when his father and mother effected their divorce and U Myat Nyein was then a Resident Excise Officer, Taikkyi.

The second version appeared from a statement made by the appellant in the course of a civil proceeding earlier than that out of which the present appeal had arisen. When this version was put to him in cross-examination, he explained that it was not accurate but that the other version which he gave at the trial was the correct one. It is not quite clear from the judgment of the Appellate Bench of the High Court which version was accepted as being the true one. In one part of the judgment the facts were stated as if the Bench accepted the version given at the trial. On the next page reliance was placed on the statement made in the earlier proceeding for the purpose of excluding the appellant from a share in the estate of Daw Sein.

The provision of section 145 of the Evidence Act appeared to have been momentarily overlooked by the learned Judges of the Appellate Bench of the High Court. A previous statement can be used for the purpose of impeaching the credit of a witness but is not in itself substantive evidence. And in this case it is clear from the evidence taken as a whole that the version given at the trial by the appellant was the correct one. In fact the learned Judges of the Appellate Bench generally proceeded on the basis of the divorce having been effected at a time when the appellant was about 20 years of age.

To revert now to the course of the proceedings out of which the appeal has arisen, the 1st respondent instituted a suit for administration of the estate of Daw Sein impleading as defendants his two sisters, who are 2nd and 3rd respondents before us and the appellant. About the appellant, however, the 1st respondent's case was that he was not aware of the previous history of his step-mother Daw Sein and that accordingly he could neither admit nor deny the apppellant's claim to be another step-son of Daw Sein. Naturally on such pleadings the issue relating to the status of the appellant was simply whether he was a step-son of Daw Sein. The trial Court accepted the appellant's claim that he was such a step-son, as indeed it was bound to on the evidence before it; and the Appellate Bench of the High Court agreed with the trial Judge. But the Appellate Bench, apparently invited thereto by the 1st respondent on appeal and relying on the appellant's statement already referred to that on his father and mother effecting a divorce when he was about 34 years of age his mother came and lived with him, held that the appellant as a child of divorced parents could not inherit the estate of his father whom he did not accompany on the parent's divorce;

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a fortiori, he could not be an heir to the second wife of his father.

The law relating to children of divorced parents has been greatly misunderstood. The law is mainly case law. Partly as a consequence of the *Manugye* having been incorrectly rendered in Richardson's translation at page 319 (4th Edition) as :

> "These six children shall not inherit, for reasons already laid down. Also children for whom fine or compensation has been paid, and children of parents who have separated."

and partly as a result of deductions from the law relating to adoption of minor children, it has come to be enunciated that where parents effected a divorce with partition of property and arrangements by mutual consent were made for the custody or disposal of children after the divorce, the children who went with the father did not retain any right to a share in the mother's estate and *vice versa*. The *Manugye* translation, in specifying " children for whom fine or compensation has been paid and children of parents separated " clearly referred not to children of parents divorcing in normal course but to those special classes dealt with in sections 53, 54 and 55 preceding of Volume X of the *Manugye*. The deductions from the right of parents to give away children in adoption can be valid only in respect of minor children for, whatever the law might have been in early days, by the time the *Manugye* came to be compiled it was settled law that only minor children could be given away in adoption without their wishes being consulted. See *Manugye*, Volume VIII, sections 3 and 4. And the right of the child so given away in its infancy to return to its natural family on attaining majority was recognised at pages 235 and 236 of the *Manugye*.

Apart from the fact, therefore, that the appellant had admittedly maintained filial relations with his father and step-mother, the rule of exclusion as a consequence of the parents' divorce cannot in law be applicable to the appellant. The appellant is therefore as much an heir as the respondents to the estate of Daw Sein when she died without any natural issue.

The learned trial Judge in rightly granting the 1st respondent a preliminary administration decree, added a declaration that a certain house did not form part of the estate of Daw Sein divisible as such on her death. Such a declaration was premature and should not have been made at the stage of making a preliminary administration decree. As a consequence of the decree, accounts will have to be taken of the estate of Daw Sein and at the stage of taking accounts it would be open to the parties to seek to establish the nature and the value of the estate ; and at that stage, if the appellant so chooses, he may challenge the correctness of the 1st respondent's entry of the house as forming part of Daw Sein's estate. Till then it is premature to consider the extent of the estate and we set aside that part of the decree of the trial Court wherein the declaration was made in respect of this house.

In the event we set aside the decree of both the trial Court and the Appellate Bench of the High Court and direct that accounts be taken of the estate of Daw Sein and that shares of the appellant and the three respondents be determined.

As neither party can be said to be wholly free from blame for the complications that have arisen in the dispute, each party will bear its own costs up to this stage in the litigation.

SUPREME COURT.

† S.C. 1951

Oct. 5.

DALBIR (APPLICANT)

v.

THE SECRETARY, MINISTRY OF HEALTH AND LOCAL GOVERNMENT AND TWO OTHERS (RESPONDENTS). *

Local Authorities (Suspension) Act, 1946—Effect on Municipal Acts and Rules—Military Administration Proclamation 8 of 1949 and 7 of 1950—Effect on Municipal Act and Rules.

Application for directions in the nature of *quo warranto* against Respondents 3 (*a*) to 3 (*n*) from holding office and acting as members of the Maymyo Municipality on the ground that their election was null and void as the same were ordered without the express authority of the Supreme Commander.

Held : The Local Authorities (Suspension) Act, 1946 contains no express provision in the Act or elsewhere that rules made under the Municipal Acts are suspended on coming into force of the said Act. S. 8 contains internal evidence of the intention of the Legislature to leave the rules untouched.

Held also : That Military Proclamation No. 8 of 1949 was issued by the Supreme Commander as the President of the Union of Burma, in exercise of powers granted under s. 2 of the Proclamation of Martial Law Ordinance, 1948 and had directed by proclamation that Martial Law should be enforced in the Mandalay District. The said Ordinance does not expressly provide that any law should be suspended or deemed to be suspended in such area and the proclamations issued by the President and Supreme Commander do not purport to suspend any law. So all laws remain in force in such area except those which are inconsistent of the Ordinance and the primary object thereof.

Held also : The Supreme Commander had in Military Proclamation No. 8 of 1949 directed that the administration of all departments in the District, except the Judiciary, should be under the charge of a Committee and delegated powers of administration to such Committee but no order or direction about Municipal elections had been issued by him after such delegation. Consequently, the Municipal elections held in accordance with Municipal Rules and the Election of the Respondents are not impeachable.

Further by Notification dated 5th March 1951 the President has declared that the said Act [Local Authorities (Suspension) Act, 1946] shall no longer be in force from the 10th March 1951 ; hence the Pespondents can hold office and function as usual.

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* Civil Misc. Application No. 45 of 1951 against the order of the Secretary, Ministry of Health and Local Government.

† *Present :* MR. JUSTICE E MAUNG, MR. JUSTICE THEIN MAUNG and U SAN MAUNG, J.

Choung Po for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for directions in the nature of *quo warranto* against the respondents Nos. 3 (*a*) to 3 (*n*) to prevent them from holding office and acting as members of the Maymyo Municipality on the ground that their election was null and void inasmuch as "the Municipal elections were ordered without the express authority of the Supreme Commander."

Two important questions of law arise on this application and they are (1) as to the effect of the Local Authorities (Suspension) Act, 1946 on the Municipal Act and the Rules made thereunder and (2) as to the effect of Military Administration Proclamations No. 8 of 1949 and No. 7 of 1950 on the Municipal Act and the Rules made thereunder so far as the Districts mentioned in them are concerned.

The learned Advocate for the relator has contended that all rules made under the Municipal Act are suspended on the coming into force of the Local Authorities (Suspension) Act, 1946. However, there is no express provision to that effect in the said Act or anywhere else. As a matter of fact section 8 thereof contains internal evidence of the intention of the Legislature to leave the rules untouched. It reads :

"Subject to the control of the Governor, the person or persons appointed under section 4 shall have authority to appoint such officers and servants as may be considered necessary for the effective discharge of the duties, powers and functions, imposed

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DALBIR v. THE SECRETARY, MINISTRY OF HEALTH AND LOCAL GOVERNMENT AND TWO OTHERS.

upon or vested in such person or persons, and, subject to the provisions of this Act, the provisions of the Municipal Act or the Rural Self-Government Act, and the rules made thereunder, whichever of these Acts may be relevant, shall apply to any officer or servant so appointed."

The learned Advocate for the relator has further contended that even if Municipal rules were not suspended on the coming into force of the said Act, they were suspended by the Military Administration Proclamations or at least that municipal elections in the areas covered by the Proclamations could be held only under specific directions given by the Supreme Commander.

Military Administration Proclamation No. 8 of 1949 was issued by the Supreme Commander as the President of the Union of Burma, in exercise of the powers vested in him under section 2 of the Proclamation of Martial Law Ordinance, 1948, had by Proclamation dated the 6th April, 1949 directed that Martial Law should be enforced in the Mandalay District.

The said Ordinance does not expressly provide that any law should be suspended or be deemed to have been suspended in the area in which Martial Law is enforced; and the Proclamations issued by the President and the Supreme Commander do not purport to suspend any law at all.

So all the laws remain in force in such an area except those, which are inconsistent with the provisions of the Ordinance and the primary object thereof, as stated in section 3, that the area shall be administered as directed by the Supreme Commander and which must on that account be deemed *ex necessitate* to have been kept in abeyance for the time being by implication; and it has not even been suggested that the Municipal Act and the Rules thereunder are inconsistent with them.

With reference to the contention that municipal elections could be held only under specific directions given by the Supreme Commander himself, the Supreme Commander has in Military Administration Proclamation No. 8 of 1949 directed that the administration of all departments in the District, except judicial, shall be under the charge of a Committee and delegated to the said Committee full authority to conduct on his behalf the military administration of the civil population in the District, subject always to his orders and directions which he might issue from time to time ; and it has not even been suggested by the learned Advocate for the relator that the Supreme Commander has issued any order or direction about Municipal elections after he had delegated full authority to the said Committee.

So the Municipal Elections which have been held in accordance with the Municipal Rules made by the President of the Union of Burma (in supersession of some of the Municipal Rules, 1934) and published on the 11th August, 1950 and the election of the said respondents which has been notified under section 22 of the Municipal Act by the Chairman of the said Committee, as reconstituted by Military Administration Proclamation No. 7 of 1950, are not impeachable at all.

Besides, the said respondents can hold office and the Maymyo Municipal Committee can function as usual since the President of the Union of Burma has, in exercise of the powers conferred by section 1 sub-section (2) of the Local Authorities (Suspension) Act, 1946, and by a notification, dated the 5th March 1951 declared that the said Act shall no longer be in force with effect from the 10th March, 1951 (*i.e.*, on the very next day after the elections) in respect (*inter alia*) of Maymyo Municipality.

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Incidentally, the President of the Union of Burma has also directed by Proclamation No. 2 of 1951 that Mandalay District (*inter alia*) shall cease to be under military administration with effect from the 1st June, 1951.

The application is dismissed with costs; Advocate's fee ten gold mohurs.

SUPREME COURT.

V. RAMASWAMY IYENGAR AND OTHERS (APPELLANTS)

v.

S.V.K.V. VELAYUDHAN CHETTIAR AND ONE (RESPONDENTS).*

†S.C. 1951

Oct. 24.

Contract of Agency—Agent in enemy occupied territory, principal in India—Effect—Law applicable—Burma Laws Act, s. 13 (3)—Whether International Law or laws of Burma applicable—Defence of Burma Act—Contract Act—Ss. 23 and 56—Conflict of laws—Contract of agency if governed by the law where the principal resides or carries on business—Intention—Mixed question of law and fact—New case on appeal—Whether permissible.

The Appellants (Receivers in India) appointed Arunachalam as agent to continue to carry on money lending business in Rangoon. War broke out and Burma was occupied by the Japanese. During occupation the Respondent paid in Japanese currency his debt to the agent Arunachalam. The Appellants contended that the Contract of Agency came to an end by operation of law and the agent had no authority to accept the amount.

Held Under s. 13 (*3*) of the Burma Laws Act in cases not provided for by sub-s. 1, *viz.*, succession, inheritance, marriage, etc., the ordinary law of the land, if any, should apply and, if there is no such law, the case should be decided according to justice, equity and good conscience.

International law deals with the question of relations between States and not between individuals. The laws of Burma applicable to the case are to be found in the Defence of Burma Act and its Rules and the Contract Act. The Defence of Burma Act is designed or intended for protecting Burma during the War. With this object it was provided that no person resident in Burma should trade or have intercourse with the subject of any enemy state or with any person residing in enemy occupied country. The prohibition did not apply to intercourse between persons living in Burma and those living in other parts of the British Empire. The Act never contemplated that Burma would be occupied or, if occupied, there should be no intercourse between persons in Burma and in other parts of the British Empire. The Defence of Burma Act is therefore not applicable.

The provisions of the Contract Act that are applicable are ss. 23 and 56. S. 56 deals with supervening illegality. As intercourse between people living in enemy-occupied Burma and people in India was not prohibited under the Defence of Burma Act, the contract of agency did not become illegal under

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* Civil Appeal No. 20 of 1949 against the decree of the Appellate Side, High Court, Rangoon, in Civil 1st Appeal No. 39 of 1949, dated 25th July 1949.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE MAUNG and U ON PE, J.

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V. RAMASWAMY IYENGAR AND OTHERS *v.* S.V.K.V. VELAYUDHAN CHETTIAR AND ONE.

this section when Burma fell under the occupation of the enemy. S. 23 provides if the Court regards the consideration or object of an agreement as opposed to public policy, the agreement is void. Public policy is not defined in the Act. It is used in such a way as to serve the interest of one's own country. Different policies have been adopted by England and other countries following the British system and by continental countries on the effect of war on contracts. In England the giving of opportunity for the conveyance of information which may hurt the conduct of war, or may tend to increase the resources of the enemy or cripples the resources of the King's subjects, is prohibited under the Act.

Ertell Bieber Case, (1918) A.C. 260 at 274, referred to.

The principle followed by Germany, Austria-Hungary, Holland and Italy was to allow intercourse and trade between persons residing in those countries and persons residing in enemy countries even after the outbreak of war unless it was prohibited by special enactment, the reason being that it would be in their interest.

Oppenheims International Law, Vol. II (5th Edn.) 263, referred to.

By allowing trade and intercourse as in this case, the interests of Burma would not only be not injured but be promoted. Looking on the question from the interest of this country (and that alone must be taken into account) such intercourse cannot be held to be opposed to Public Policy under section 23 of the Contract Act.

Further, where the principal and agent live in different countries there is no presumption that the contract will be subject to the law where the principal resides and not where he carries on business. The conclusion may sometimes be justified that they intended their contracts to be governed by the law of the country in which the agent is intended to act.

Dicey's Conflict of Laws:(6th Edn.), 710-711.

The intention of the parties being a mixed question of law and fact and the point not having been pleaded and no evidence taken cannot be raised for the first time in appeal.

P. K. Basu for the appellants.

Dr. Ba Han for the respondent No. 1.

R. Basu for the respondent No. 2.

The judgment of the Court was delivered by the Chief Justice of the Union.

SIR BA U.—The present case is an offshoot of an administration suit filed in the Court of the Subordinate Judge of Devakottah, Southern India. The administration suit concerned the esta-

of one RM.AR.AR.RM. Arunachalam Chettyar. Arunachalam had one son. The son died before the father, leaving a widow surviving him. A few years later the father died leaving surviving him two widows. On the death of the father the widow of the son filed the aforesaid administration suit, making the two widows of the father as parties to the suit. In the course of the proceedings all the three widows adopted a son each in accordance with their personal law and the said adopted sons were subsequently made parties to the suit. In that suit appellants Nos. 1 and 2, V. Ramaswamy Iyengar and K. R. Subramania Iyer were appointed receivers. As receivers the appellants 1 and 2 took charge of the estate of the deceased, Arunachalam, including the money-lending business in Rangoon. The money-lending business was then in charge of an agent called Arunachalam. Arunachalam was reappointed as agent by the receivers and allowed to continue carrying on the business.

Then the war broke out and Burma was occupied by the Japanese. During the time of the Japanese occupation the defendant-respondent No. 1, S.V.K.V. Velayudhan Chettiar paid a sum of over Rs. 17,000 in Japanese currency to the agent Arunachalam towards the partial discharge of a loan of Rs. 20,000 and interest taken before the war on an equitable mortgage of some immoveable properties in Rangoon. On the re-occupation of Burma the two receivers and the heirs of RM.AR.AR.RM. Arunachalam filed the present suit against the debtor Velayudhan Chettiar for payment of the loan of Rs. 20,000 and interest due thereon mainly on the ground that, when Burma was occupied by the Japanese, the contract of agency between the agent, Arunachalam, living in enemy-occupied Burma and his two principals living in India came by operation of law to an end and

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consequently Arunachalam had no authority to accept any payment on behalf of his former principals and give a discharge therefor. In support of this contention a good number of English authorities were cited at the Bar ; but before we deal with these authorities, what we must first determine is what law is applicable to the case, Municipal or International law.

Section 13 (*3*) of the Burma Laws Act provides:

"In cases not provided for by sub-section (*1*), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience."

Sub-section (*1*) deals with the application of Buddhist Law in the matter of succession, inheritance, marriage and etc. in cases where the parties are Buddhists, Hindu Law where the parties are Hindus and Mohammedan Law where the parties are Mohammedans. In other words, what the Burma Laws Act provides is that in cases involving the question of succession, inheritance, marriage and etc., the personal law of the parties concerned should apply but in other cases the ordinary law of the land should apply if there be any ; but if there is none, the case should be decided according to justice, equity and good conscience.

The present case must therefore be decided according to the law of this country. International Law is a law that deals with the question of relations between States and not between individuals as in this case. The law of this country applicable to this case is to be found in the Defence of Burma Act and the Rules made thereunder and the Contract Act. The Defence of Burma Act is no longer in force. It was repealed some years ago but at the time relevant to this case it was in force. The Act was designed and

enacted with the sole object of protecting Burma during the war and to ensure the achievement of this object it was provided *inter alia* that no person residing in Burma should trade or have intercourse with a subject of an enemy state or with any person residing in an enemy state or in enemy-occupied country. The prohibition did not apply to intercourse between persons living in this country and those living in other parts of the British Empire. Having regard to this prohibition, what is clear is that the framers of the Act never contemplated that Burma would be occupied by an enemy and, if occupied, there should be no intercourse between persons living in this country and persons living in the other parts of the British Empire.

The Defence of Burma Act is therefore not applicable to this case. What is applicable is the Contract Act. There are two provisions in the said Act which have a bearing on the point in issue. They are sections 23 and 56. Section 56 says, *inter alia* :

> "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

The section, as it stands, deals with the questions of supervening illegality. As intercourse between a person living in enemy-occupied Burma and a person living in India was not prohibited by the Defence of Burma Act, the contract of agency between Arunachalam and his two principals did not become illegal under the said Act when Burma fell under the occupation of the enemy. If the contract of agency was to become illegal, it would

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become illegal under section 23 of the Contract Act which, *inter alia* says:

"The consideration or object of an agreement is lawful unless—

* * * * *

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

Now, what is meant by public policy? It is defined nowhere. It is a loose term and so it is used in such a way as to serve the interests of one's own country. This is best illustrated by the different policies followed by England and other countries which have adopted the British system of jurisprudence and continental countries of Europe in dealing with the question of effect of war on contract.

The classical exposition of the principle followed by England and other countries which follow her system of law is to be found in the *Ertell Bieber* case (1) where Lord Dunedin said:

"From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law."

Accordingly in all the cases cited at the Bar what is found is that a contract entered into

(1) (1918) A.C. 260—274.

between a British subject or anybody living in England and a subject of the enemy state or a person living in the enemy state or enemy-occupied country becomes abrogated on the outbreak of war.

On the other hand, the principle followed by Germany, Austria-Hungary, Holland and Italy, at least before the First World War, was to allow intercourse and trade between persons residing in those countries and the persons residing in enemy countries even after the outbreak of the war unless it was prohibited by special enactment, the reason being that it would be in their interest to allow it. See *Oppenheims International Law*, Vol. II (5th Edn.), 263.

Now, was it in the interest of this country that there should be no trade and no intercourse between persons residing in this country after its occupation by the Japanese and the persons living in India? The answer must be in the negative. By allowing intercourse and trade, if possible, between persons living in this country after its occupation by the Japanese and the persons living in India, the interests of this country would not only not be injured but on the contrary be promoted in that it would afford greater and better facilities and opportunities for the liberation of this country. Therefore, looking at the question purely from the interest of this country, and the interest of the country only must be taken into account, intercourse and trade between persons living in this country even after its occupation by the enemy and the persons living in India must be held not to be opposed to public policy as laid down in section 23 of the Contract Act.

It therefore follows that the contract of agency between Arunachalam and his two principals in

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India did not become abrogated under section 23 of the Contract Act.

It is, however, urged that if according to the law of this country the contract in question did not become abrogated, it must still be held to have become abrogated according to the law of India as it was in India the contract of agency was created. Put it in other words, the submission is that the question of the termination of agency or otherwise must be decided in accordance with the law of the country where the agency is created. This, we do not think, is the correct exposition of law. What is, in our opinion, correct is laid down in *Dicey*'s *Conflict of Laws* (1), where the learned author observes :

> " When principal and agent live in different countries, there is no presumption that the contract will be subject to the law where the principal resides or carries on business. In this case, and even in a case in which both parties live in the same country, the conclusion may and will sometimes be justified that they intended their contract to be governed by the law of the country in which the agent is intended to act."

Before deciding what law is applicable, the intention of the parties must first be determined. In the present case the point in question was not pleaded and no evidence was therefore taken thereon. Such a point, being a mixed question of law and fact, cannot be raised for the first time in this Court.

In this view of the case the appeal fails and is dismissed with costs.

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(1) 6th Edn , pp. 710, 711.

SUPREME COURT.

THET TUN (APPLICANT)

v.

DEPUTY COMMISSIONER, SHWEBO AND ANOTHER (RESPONDENTS).*

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Oct. 24.

Public Order (Preservation) Act—Application for writ of habeas corpus—*Order of detention, in signal—Indefinite detention of detenue for 4 years—Validity—Delegation of powers of detention and attendant dangers.*

An order of detention, 'in signal' was received from the Deputy Commissioner, Shwebo and the detenue kept in detention since December 1947. The original order produced before the Court showed that it was issued on the 22nd December 1949 in supersession of the detention 'in signal'. The Deputy Commissioner applied to the Court for time not less than 30 days to compile a History Sheet of the Applicant after receipt of notice of an application for release.

Held: That an order of detention 'in signal' cannot be acted upon and a citizen of the Union cannot be kept in detention on authority of any such signal.

Detention for a short period pending investigation is entirely different from indefinite detention for a period of nearly four years. Inspite of the detenue having been in custody for nearly four years, as the authorities directing such detention were unable to state without further enquiry the grounds of detention, the order of detention should be quashed.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The facts and circumstances of this case reflect no little discredit on the administrative officials concerned and exemplify the dangers attendant on extensive powers of detention under the Public Order (Preservation) Act being so freely delegated as it has been.

The applicant in his petition to this Court stated that he has remained in detention in various prisons

* Criminal Misc. Application No. 289 of 1951.

† *Present*: SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE THEIN MAUNG.

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in the Union since the 24th December 1947; but the Nominal Roll from the Annexe Jail, Insein, gives the date of the order of detention as the 22nd December 1949. Accordingly, in directing notice to show cause the Deputy Commissioner, Shwebo, was asked "to state in his return if the applicant had been in detention since 24th December 1947 as alleged in his petition and if so, how and why the present order of detention was that of the 22nd December 1949."

Notices of the application were served on the Superintendent, Annexe Jail, Insein, and the Deputy Commissioner, Shwebo on the 5th and 14th September respectively. The Superintendent of the Jail filed his return submitting what purported to be a true copy of the order of detention. This copy, however, omitted an important detail, namely, the date of the order, and he was called upon to produce the original. The original order showed that it was issued by the Deputy Commissioner, Shwebo, on the 22nd December 1949 in supersession of "the detention order, in signal, ... issued under this No. J 911/49" in District Office Miscellaneous General Proceedings No. 16/XVI of 1948.

The Deputy Commissioner, Shwebo, applied to this Court by a letter of the 15th September 1951 for "time not less than 30 days so as to enable me to compile a History Sheet of the applicant Thet Tun." This letter was received on the 22nd September 1951 in this Court and the Judge in Chambers made the following diary order :—

"I cannot understand the request of the Deputy Commissioner for time. He or his predecessor had the detenu locked up since 1947 if the allegations in the application are true; and for the Deputy Commissioner only now to hunt up materials against the detenu is clearly illegal."

The Deputy Commissioner was directed to file his return by the 5th October 1951. A copy of the order was supplied to the Attorney-General and another copy was issued to the Secretary, Ministry for Home Affairs.

On the 5th October 1951 the Government Advocate stated before the Judge in Chambers that he had not been able to obtain any instruction from the Deputy Commissioner, Shwebo. The case was accordingly placed before Court on 8th October 1951. The Court on 8th October 1951 granted the request of the Government Advocate for a final opportunity to obtain a return from the Deputy Commissioner, Shwebo, and the hearing of the case was peremptorily adjourned to the 22nd October 1951. On the last mentioned date the Government Advocate again stated that he had no instruction at all from the Deputy Commissioner, Shwebo. On this we directed the immediate release of the applicant, postponing the statement of our reasons for the order of release to a later date.

The order of detention produced by the Superintendent of the Annexe Jail, Insein, and the endorsements thereon support the applicant's statement in his petition that he was first taken into custody on the 24th December 1947, then sent to Mandalay Jail on the 28th December 1947 and later transferred to the Rangoon Jail whence he was again removed to the Annexe Jail at Insein. Thus the applicant had been in custody for nearly four years. In spite of that, the authorities who directed his detention were apparently unable at the end of that period to state without further enquiry the grounds on which he had been detained. Arrest and detention for a short period on suspicion pending investigation are entirely different things from indefinite detention for a period of nearly

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four years. What is clear in this case is that having put the applicant in detention the authorities forgot all about him and his case till their attention was drawn to the matter by a notice issued from this Court.

It is hard to conceive of a more arbitrary exercise of the powers under the Public Order (Preservation) Act than has been disclosed in this case. It is also difficult to understand how an order of detention ' in signal ' came to be acted upon and a citizen of the Union kept in detention on the authority of such a signal.

We must say that the failure of the Deputy Commissioner in making a return in the circumstances set out above is highly reprehensible. Only the possibility that abnormal conditions in Shwebo District might be responsible for the Deputy Commissioner's default deters us from taking further action for what *primâ facie* is a contempt of the authority of this Court.

SUPREME COURT.

TAN KHY WET (APPLICANT)

v.

U YIN AND ANOTHER (RESPONDENTS).*

S.C. 1951

Oct. 29.

Tenancies Disposal Rules, 1951, Rule 10—Re-allotment of tenancies—Tenant—S. 2—Scheme of the Act.

In 1950-51 applicant's land was allotted to the 1st Respondent who sub-let a portion to another without obtaining approval of the authorities. In 1951-52 both parties applied for allotment of land to the Village Land Committee who allotted it to the owner as in the previous year the land had been sub-let without their consent. This was reversed on appeal by the District Committee. Upon a writ of certiorari—

Held: That the Village Land Committee had taken the correct view having regard to the scheme of the Disposal of Tenancies Act and Rules. Under Rule 10 it is the tenant who is entitled to claim renewal; and tenant has been defined as a "person holding land and liable to pay the rent of the said land." There are two conditions, *viz.*, the actual occupation of the land and the liability to pay the rent. A person who did not hold the land cannot be said to be a tenant under Rule 10. If the owner of a piece of land may not lease out to a tenant of his choice, the tenant may not also sub-let, because allowing of such sub-letting would be inequitable and cannot be the intention of the legislature and a reasonable interpretation must be given.

Tun I for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—This case turns on the true interpretation of Rule 10 of the Tenancies Disposal Rules, 1951. The applicant admittedly is an agriculturist and his principal means of subsistence is by agriculture. In addition he is also the owner of the land in dispute. In 1950-51 the land was allotted to

* Civil Misc. Application No. 91 of 1951 against the order of the District Land Committee, Amherst District.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE THEIN MAUNG.

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the 1st respondent by the Village Land Committee and that allotment was confirmed by the District Land Committee. The 1st respondent, however, did not work the entire land by himself ; instead he sub-let a portion of it to another person, clearly without obtaining the approval of either the Village Committee or the District Land Committee.

When the agricultural season for the year 1951-52 arrived the applicant as well as the 1st respondent applied to the Village Committee for allotment of the land. The Village Committee allotted the land to the applicant on the ground that the 1st respondent though allotted the land for the year 1950-51 was not entitled to have the land re-allotted to him for the year 1951-52 as in the previous year he had sub-let a portion of the land. On appeal, the Amherst District Land Committee held that the sub-letting of the land by a tenant in the previous year is not such a default as would entitle the Village Land Committee to refuse him renewal for the next year.

A superficial examination of Rule 10 of the Disposal of Tenancies Rules, 1951, appears to support the District Land Committee in the view taken by it. But when the whole scheme of the Disposal of Tenancies Act and the rules thereunder are examined closely it is clear to us that the correct view was that taken by the Village Land Committee in this case. Under Rule 10 it is the "tenant" if he had been allotted the land in 1950-51, who is entitled to claim renewal. "Tenant" has been defined in section 2 of the Act as meaning "a person or organization which holds land and is liable to pay the rent for the said land."

Now, there are two conditions, *viz.*, the actual occupation of the land for the year 1950-51 and the liability to pay the rent for that year. The person who did not hold the land in that period cannot be said to

be a tenant within the meaning of Rule 10. To hold otherwise would be to lead to this absurd result that a person who is allotted a piece of land for cultivation in 1950-51 and who, sub-letting that piece of land to a third party, engaged himself in other pursuits and became thereby an absentee under-landlord, would have a right superior to that of the owner or the person who actually worked the land. That the owner of a piece of land may not lease it to a tenant of his choice but that the tenant may sub-let it to any person and yet be allowed to take cover under Rule 10 is clearly inequitable and cannot have been the intention of the legislature. Of course, if the Legislature had clearly indicated its intentions the mere inequity of the rule cannot entitle us to override them. But in this case the provisions of Rule 10 can be reasonably interpreted in the sense we have indicated earlier and it is in consonance with the accepted principles of interpretation that the equitable interpretation should be preferred.

In these circumstances we are clearly of the opinion that the Amherst District Land Committee in allowing the appeal of the 1st respondent erred in law and we quash its decision with costs. Advocate's fees five gold mohurs.

SUPREME COURT.

†S.C. 1951

Nov. 9.

M. E. BHAIYAT & SONS (APPLICANTS)

v.

THE CHIEF JUDGE OF THE RANGOON CITY CIVIL COURT AND TWO OTHERS (RESPONDENTS).*

Urban Rent Control Act, s. 19 (2)—Principles applicable—Refusal of jurisdiction and failure to exercise jurisdiction no difference—Writ of certiorari.

There were 8 rooms in House No. 240/250, Edward Street, Rangoon on each of the three floors, divided into four sets of rooms of equal size. On the 1st September 1939 two tenants were paying at Rs. 300 a month and two others at Rs. 400 a month. Relying on Notification No. 77, dated 17th March 1949 of the Ministry of Finance and Revenue the owner charged 12½ per cent increase upon the rental calculated since April 1947. The landlord then applied under s. 19 of the Urban Rent Control Act to certify standard rent at Rs. 450 in respect of the rooms. The Rent Controller fixed at Rs. 375 a month in respect of two tenants who occupied since 1st September 1939 and in respect of the other tenants fixed it at Rs. 450 per mensem and claimed that he was bound to do so upon the basis of the 1939 rents.

Held: Where a tribunal owing to wrong interpretation of an enactment held that it was incompetent to entertain a certain matter and did not on such view entertain it a writ of certiorari could issue.

There is no distinction between cases of refusal to exercise jurisdiction and a failure to exercise jurisdiction arising from a mistaken view of the extent of powers conferred. The Controller was wrong in his interpretation of the Notification and failed to exercise his jurisdiction, hence his order must be quashed.

Mirza Md. Rafi for the applicants.

Chan Htoon for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The learned Attorney-General who appears for the Chief Judge of the Rangoon City Civil Court and for the Controller of

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* Civil Misc. Application No. 58 of 1951 against the order of the Chief Judge of the Rangoon City Civil Court in Civil Rent Reference No. 21 of 1950.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE THEIN MAUNG.

Rents, Rangoon, and who has also been briefed by the 3rd respondents the Sooratee Bara Bazaar Company, has addressed the Court at great length and with great learning. In spite of all that, however, we are satisfied that this is really a very simple case and can be disposed of on a short point.

House No. 240/250 in Edward Street, Rangoon, is a three-storey building with 8 rooms on each floor and divided into four sets of rooms of equal size and convenience. The house was let to four tenants, two of these tenants paying on 1st September 1939 Rs. 300 per mensem as rent and two others, of whom one is the applicant before us, Rs. 400 per mensem. The difference between the rents has been explained as being due to the former two tenants having paid *salamis* to the owners on their entering on the leases of their different sets of rooms in the house.

In April 1947 the owners, who are the 3rd respondents before us, reduced the rent of the set of rooms occupied by the applicant to Rs. 300 per mensem. In July 1949, apparently relying on Notification No. 77 of the 17th March 1949, issued by the Ministry of Finance and Revenue, the owner charged the applicant Rs. 337-8-0 being 12½ per cent increase on the rent which they had been charging the applicant since April 1947.

Later, apparently realising that under the Notification referred to earlier 12½ per cent increase should have been on the rent paid on 1st September 1939, the 3rd respondents applied to the Controller of Rents, Rangoon, under section 19 of the Urban Rent Control Act to certify the standard rent at Rs. 450 in respect of all the premises in the house. Objections were filed to that application by all four tenants. The Rent Controller in respect of those two tenants who were on 1st September 1939 paying Rs. 300 per mensem fixed

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the standard rent at Rs. 375 per mensem. In respect of the applicant and the other tenant, who were on that date paying Rs. 400 per mensem, he fixed the standard rent at Rs. 450 per mensem.

In fixing two different sets of standard rent the Controller said :

> "It would be anomalous in that the standard rents of the 4 sets are not uniform while the sizes of the rooms are the same but I am bound under the Act to fix the standard rents basing on the 1939 rentals which were varying."

It is this order that is sought to be quashed by the applicant and which the learned Attorney-General on behalf of all three respondents strenuously sought to maintain. Mr. Rafi for the applicant claims that it is clear from the order taken as a whole that the Controller took the view that he was bound absolutely by the Notification and that whether the figure worked out in accordance with the Notification was just or otherwise, he was under a duty automatically to fix that figure as the standard rent.

The learned Attorney-General concedes that if the order can be reasonably interpreted in that sense, the Controller must be taken to have failed to exercise a jurisdiction which is rightly vested in him by section 19 (2) of the Act. It is true that the learned Attorney-General sought to draw a distinction between a refusal of jurisdiction and a failure to exercise jurisdiction arising from a mistaken view of the extent of the powers of the Controller. If we do not do him injustice, the learned Attorney-General contended that a tribunal refusing to exercise its jurisdiction which to its knowledge is vested in it, is in a different position altogether for the purpose of certiorari from a tribunal which owing to a wrong interpretation of an enactment thought it was incompetent to entertain a certain matter

and did not on such view entertain it. This is very ingenious but we see no substance in the distinction.

The learned Attorney-General further contended that the order was not capable of the interpretation which Mr. Rafi sought to put on it and that what the Controller intended to say really was that Rs. 450 per mensem was a reasonable figure for the set of rooms occupied by the applicant but that he regretted his inability, in view of certain restrictions on his power, to assess the rent in respect of the two other rooms at a figure in excess of Rs. 375 per mensem. The matter therefore resolves into a simple one of interpretation of the order of the Controller. We are clearly of the opinion that the interpretation sought to be put on it by the learned Attorney-General is a strained one and that the natural interpretation is that put on it by Mr. Rafi. It is interesting to note that the learned counsel who appeared for the 3rd respondents in the first instance in this Court and who settled the necessary affidavits, obviously accepted the interpretation which Mr. Rafi placed on that order. Paragraph 5 of the affidavit of Cassim Ali Bham, Secretary of the Sooratee Bara Bazaar Company, is clear on this point.

It follows therefore that the order of the Controller must be quashed. It is of course open to the 3rd respondents to move the Controller, and to the Controller, on such motion, to consider the matter further and come to a decision in accordance with law. But the present order cannot be allowed to stand.

The order of the Rent Controller is accordingly quashed with costs. The case was heard before the Court on two days and in view of the fact that senior advocates were engaged we assess Advocate's fees at twenty gold mohurs.

SUPREME COURT.

† S.C. 1951

Nov. 12.

DR. GORDON S. SEAGRAVE (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

High Treason Act, s. 4 (1)—Charge of abetting rebels—Encourage, harbour, comfort, meaning of—Intention to encourage, etc., necessary—Presumption of law of a man intending the natural consequences of his act rebuttable—Benefit of doubt must be given to accused.

The High Court confirmed the Special Tribunal's judgment and sentence against the accused on a charge that he had encouraged, aided and comforted Naw Seng and his followers by giving them medicines and surgical instruments and that thereby he committed an offence under s. 4 (*1*) of the High Treason Act, 1948.

In saying that the giving away of instruments and medicines would be an aid the High Court assumed that the appellant pleaded guilty to the said charge.

Held : On appeal by special leave, no person shall be presumed to have pleaded guilty to a charge and that what he says is within the mischief of the charge. What the appellant pleaded amounted only to an admission of facts and not of the offence charged.

The word "aid" is not used in s. 4 (*1*) of the High Treason Act, the words used are "encourage, harbour or comfort". They are not defined in the Statute and no reference can be made to another Statute because only the word "harbour" is found used in the other Statute. The words "encourage and comfort" must therefore bear their ordinary meaning.

"Encourage" has been defined to mean "embolden, incite, instigate", "Comfort" as meaning "to strengthen, to encourage, to support, to invigorate, to aid, to abet or to countenance." What the Court must find is what is the intention. The appellant gave a box of surgical instruments and medicine. If it was not his intention to encourage, harbour or comfort the appellant would not be guilty. It is a fundamental principle of law that a crime is not committed if the mind of the person doing the act is innocent.

Ravula Hariprasada Rao v. *The State*, A.I.R. (1951) Supreme Court Rep. 322, followed.

The state of the mind of the appellant should be judged not by a single act of giving some instruments and medicine but all the circumstances of the case must be taken into account.

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* Criminal Appeal No. 46 of 1951.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

The learned Judges in the High Court in coming to a conclusion on the charge went on the presumption that a man intends the natural consequences of his act. But this inference cannot be drawn where an act is done by a person in subjection of the power of others especially if that be a brutal enemy. The guilty intent cannot be presumed and must be proved. If circumstances showed that the act was done in subjection to the power of the enemy or is as consistent with an innocent intent as with the criminal intent or if there be a doubt in the matter the appellant is entitled to be acquitted. In the present case the necessary inference is that the appellant wanted to save his property : taking the worst view, giving of medicines and instruments was consistent with an innocent intent as well as with the criminal intent ; the benefit of the doubt must be given to the appellant.

Rex v. Steane L.R. (1947) 1 K.B. 997 at p. 1006, referred to.

What inference should be drawn from proved and admitted facts is a question of law ; if a miscarriage of justice has resulted from a wrong inference the Supreme Court will interfere and put it right.

Kyaw Myint, *K. R. Venkatram*, *G. Horrocks* and *C. H. Chan* for the appellant.

Chan Tun Aung (Assistant Attorney-General), for the respondent.

The judgment of the Court was delivered by the Chief Justice of the Union.

SIR BA U.—This is an appeal by special leave. The appellant is an American citizen and a medical practitioner by profession. He was tried by a Special Tribunal on three charges under section 4 (*1*) of the High Treason Act, 1948, *i.e.*, for encouraging and comforting a rebel named Naw Seng and his followers. He was found not guilty on the first charge and acquitted. But he was found guilty on the second and third charges. On the second charge he was given six years' rigorous imprisonment and on the third charge one year's rigorous imprisonment. The sentences were directed to run concurrently.

On appeal to the High Court the conviction and sentence passed on the second charge was set aside and the appellant was acquitted in respect thereof. The

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conviction passed on the third charge was confirmed but the sentence was reduced to the term already undergone.

The facts, as found by both the Trial and the Appellate Courts, stating them briefly, are these. In or about the last week of January 1949 Toungoo fell to the Karen rebels ; whereupon Lt.-Col. Zaw Gawng of the 1st Kachin Rifles sent three companies under the command of Naw Seng who was then a Captain in the Army from Thawutti to Yedashe. On arrival there Captain Naw Seng forswore his allegiance to the Union Government and went over to the Karen rebels and joined forces with them. Some time later he broke into the Shan State and went upwards with some Kachin and Karen rebels, seizing Taunggyi, Lashio and Hsenwi on the way. They arrived at Namkham in or about the last week of August and remained in occupation thereof. They were there for not more than a week before they were driven out by Brigadier Lazun Tang and his men. They were chased from place to place but by double-tracking they were able to get back to Namkham in the month of December for a few days' occupation. During their short occupation they managed to get a box of surgical instruments and some medicine from the appellant, who was then in charge of the Mission Hospital in Namkham. The giving of the box of surgical instruments and medicine formed the subject-matter of the third charge.

The third charge is in the following terms:

"That you, during December 1949—January 1950 when Naw Seng and his followers occupied Namkham and its environs for the second time, enccuraged, aided and comforted them knowing them or having reasonable grounds for believing them to be engaged in committing High Treason by giving them medicines and surgical instruments and thereby committed

an offence punishable under section 4 (*1*) of the High Treason Act, 1948, and within our cognizance."

In dealing with this charge the learned Judges of the High Court said:

"It will be observed that Dr. Seagrave knew when he gave the surgical instruments and medicines to Naw Seng that these instruments and medicines, to use his own words, would be 'an aid' to the rebels."

It will be noticed that the learned Judges of both the Special Tribunal and the High Court made use of the word "aid". In fact, the learned Judges of the High Court appeared, with due respect to them, to have been swayed in their decision by the word "aid" used by the appellant in the course of his statement made to the Court. If the appellant had not used the word "aid" what, we wonder, would have been the observations of the learned Judges. In saying that his giving away the surgical instruments and medicine would be an aid to Naw Seng and his men, the learned Judges of the High Court assumed that the appellant pleaded guilty to the third charge under section 4 (*1*) of the High Treason Act. No person shall be presumed to plead guilty to a charge unless he knows the nature of the charge and that what he says is within the mischief of the charge.

What the appellant in this case has pleaded amounts only to an admission of facts and not of the offence charged. In dealing with this question what one must bear in mind is that the word "aid" is not used in section 4 (*1*) of the High Treason Act. What the said section says is as follows:

"Whoever encourages, harbours or comforts any person whom he knows or has reasonable grounds for believing to be engaged in committing high treason shall be punished with

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transportation for life or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to a fine."

Now, what is the meaning of each of the words "encourage", "harbour" or "comfort" as used therein? They are not explained or defined, as is usually done in most of the penal statutes. Nor can any reference be made to another statute in accordance with the rule that "where there are different statutes *in pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other", because none of these words, except the word "harbour" is found used in other statutes. The word "harbour" is explained in the Criminal Law Amendment Act, 1950, as follows:

> ". . . . . the word 'harbour' includes supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting of a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension."

In the case of the words "encourage" and "comfort" they must, in accordance with the well-established principle of interpretation, be construed in their ordinary meaning. The Oxford English Dictionary defines the word "encourage" as "embolden, incite, instigate." In the case of the word "comfort" it is defined as meaning "to strengthen, to encourage, to support, to invigorate, to aid, to abet or to countenance."

Now, if the act of the appellant in giving a box of surgical instruments and medicine to Naw Seng is construed in the light of the above definition of the words "encourage" or "comfort", there can hardly be any doubt that it comes within the mischief of

section 4 (*1*) of the High Treason Act. But that does not conclude the matter. What we must find is with what intention the appellant gave a box of surgical instruments and medicine to Naw Seng. Was it his intention to encourage, harbour and comfort Naw Seng and his followers ? If he did not have that intention, the appellant would not be guilty. It is one of the principles of the English Law as well as that of our law that a crime is not committed if the mind of the person doing the act is innocent. The same view was adopted by the Supreme Court of India in *Ravula Hariprasada Rao* v. *The State* (1) the head note of which says :

" Unless a statute clearly or by necessary implication rules out *mens rea* as a constituent part of the crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind. "

Whether a person has a guilty mind or not in doing an act prohibited by law must be judged by the surrounding circumstances of each case. In the present case the state of the mind of the appellant should not be judged by a single act of giving some surgical instruments and medicine. All the circumstances of the case must be taken into account. As pointed out, the appellant was acquitted by the trial Court on the first charge and on the second charge by the High Court. The first and second charges embraced some of the incidents that took place during the first occupation of Namkham by Naw Seng and his men. The incidents were (1) that some of Naw Seng's men played football in the hospital compound, (2) that Naw Seng's men had free access to the hospital, (3) that one morning Naw Seng and a Karen officer

(1) A.I.R (1951) S.C.R. 322.

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were seen seated at a table with the appellant drinking tea, and (4) that Naw Seng's men took up defensive positions in the hospital compound and fought against Brigadier Lazun Tang's men when the latter tried to re-capture Namkham. In connection with these allegations the appellant denied that he gave permission to Naw Seng and his men to take up defensive positions in the hospital compound and that he allowed them to play football in the hospital compound. He further said that he never entertained Naw Seng to tea and that the hospital being a public institution, people could come and see their friends there if they wanted to.

This explanation of the appellant was accepted by the trial Court and, as mentioned above, he was held not guilty under the first charge.

In the case of the second charge, a letter written by the appellant to one of his nurses named Nang Leng, whereby the appellant told Nang Leng not to disclose what she heard from one Peggy Min about the intended arrest of the Sawbwa of Hsenwi to anybody and that if she did so, he would hand her over to Naw Seng as a spy, formed the subject matter of it.

The appellant admitted having written that letter but said that when he wrote the letter he was frantic with anxiety lest there should be a panic and fight among his nurses made up, as they were, of Burmese, Karens, Kachins and Shans in case the news of the intended arrest of the Sawbwa of Hsenwi were to spread about.

In dealing with this explanation of the appellant the trial Court observed :

" A frantic frame of mind was apparent ; but if the anxiety was about a fight among the girls, the heat was entirely irrelevant to the purpose of the letter. "

This is where the learned Judges of the trial Court went wrong. They entirely ignored the state of the mind of the appellant. This was corrected by the learned Judges of the Appellate Court. Though they did not say so in so many words, the learned Judges of the Appellate Court accepted the explanation of the appellant and held that he had no guilty mind in writing the letter in the way he did and acquitted him of the said charge.

But when they came to deal with the third charge the learned Judges of the Appellate Court held different views.

The learned Judges observed :

" It appears to us that the surgical instruments and anaesthetics would be a boon to the wounded rebels, as their possession would be most useful in the treatment of wounded rebels, in that many of the wounded rebels could be easily operated upon or treated and be made available again to assist in the fight against the Union of Burma. The wounded rebels are also likely to be easily discouraged, if the rebels, whose numbers were large, had no proper or efficient surgical instruments, or sufficient anaesthetics, with them for the purpose of attending on the wounded rebels. Thus Dr. Seagrave could be said to have done something in encouraging or giving comfort to the rebels in their revolt against the Government of the Union of Burma."

In making these observations the learned Judges appear to have been influenced by the saying that a man intends the natural consequences of his act. This is a presumption of law and this presumption is not unrebuttable. In the case of *Rex* v. *Steane* (1) Lord Goddard C.J., said :

"In our opinion it is impossible to say that where an act was done by a person in subjection to the power of others, especially if that other be a brutal enemy, an inference that he intended the natural consequences of his act must be drawn

(1) L.R. (1947) 1 K.B. 997 at p. 1006

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merely from the fact that he did it. The guilty intent cannot be presumed and must be proved. The proper direction to the jury in this case would have been that it was for the prosecution to prove the criminal intent, and that while the jury would be entitled to presume that intent if they thought that the act was done as the result of the free uncontrolled action of the accused, they would not be entitled to presume it, if the circumstances showed that the act was done in subjection to the power of the enemy, or was as consistent with an innocent intent as with a criminal intent, for example, the innocent intent of a desire to save his wife and children from a concentration camp. They should only convict if satisfied by the evidence that the act complained of was in fact done to assist the enemy, and if there was doubt about the matter, the prisoner was entitled to be acquitted."

These observations are clearly apposite to the present case. It is true that the appellant was not in fear of the loss of his life or of injury to himself or to those dear and near to him as in the case of *Steane*. But he was in fear of losing his valuable stock of medicine and sustaining damage to his hospital building. Because of this fear he said he gave a box of surgical instruments and some medicine. This statement remains unchallenged. Taking this fact and the fact that he was held not to have a guilty mind in doing what he did in the incidents which formed the subject-matter of the first and second charges into consideration, what inference should be drawn? The necessary, and, in fact, the almost unavoidable inference to be drawn is that the giving of a box of surgical instruments and medicine to Naw Seng was not so much to help him in his revolt against the Union Government as to save his (appellant's) property. Even taking the worst view of the case, one cannot help but say that the act of the appellant in giving a box of surgical instruments and medicine to Naw Seng was as consistent with an innocent intent as with a criminal

intent. The benefit of the doubt must then be given to the appellant. Therefore whatever view is taken of the case, the appellant must be held to be not guilty.

It may perhaps be urged that this Court should not interfere, as has in fact been urged at one stage of the hearing of this appeal, as there has been a concurrent finding of facts by two Courts. The conviction of the appellant is not based on the proved and admitted facts but on an inference drawn from those proved and admitted facts. What inference should be drawn from proved and admitted facts is a question of law. If on a wrong inference a miscarriage of justice has resulted, this Court must interfere and put it right.

One more word and we are done. On going through the bulky record of the proceedings, we cannot help thinking that the appellant himself has brought all this trouble upon himself. His attitude towards the Karen nurses and Naw Seng and his men during their first occupation of Namkham and his attitude towards Brigadier Lazun Tang would make some people suspect that his sympathies were with the Karens. Once this suspicion was engendered, whatever he did or said would appear not only to a lay mind but even to some trained minds as an act to help and encourage the Karen rebels. This is exactly what has happened in this case. Therefore, what we would like to urge is that those who come to our country and enjoy our hospitality should not give grounds for suspicion, either by words or deeds, that they are taking sides in our internal affairs. We are a small country and we desire, as is the policy of our Government, to live on terms of friendship with everybody. We like to settle our affairs and promote the welfare of our people in our own way. If anybody is found interfering in our

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internal affairs in disregard of our law, he will be punished irrespective of whoever and whatever he may be.

The appeal is allowed. The conviction and sentence on the third charge is set aside and the appellant is acquitted thereof.

SUPREME COURT.

LIM PWE HTIN (APPLICANT)

v.

THE CHAIRMAN, PUBLIC PROPERTY PROTECTION COMMITTEE AND ANOTHER (RESPONDENTS). *

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Dec. 4.

Habeas Corpus—*Application for directions in the nature of—First arrest of detenue under s. 7 (2), Public Property Protection Act—Release of detenue by Court—Amendment of s. 7 (2) and re-arrest—Purpose of.*

On the 10th October 1951 the detenue was arrested by an officer. On the 20th October 1951 the President directed detention following the arrest. The Supreme Court directed his release on the ground that there was no authority to detain for the purpose of prosecution for a completed offence. S. 7 (2) of the Public Property Protection Act was amended during the proceedings and authorised arrest and detention for purposes of investigation. The detenue was re-arrested.

Held: There can be no question of legality of the subsequent arrest and detention under s. 7 (2), Public Property Protection Act, but the person detained should be either sent up for trial or released since investigation is completed and should not be detained for the maximum period of six months provided for in the Act. The fact that the co-accused of the detenue has not been apprehended and his whereabouts are not known, is not a ground for continued detention as the case can proceed against that co-accused under s. 512 of the Criminal Procedure Code.

Directions in the nature of *habeas corpus* may issue not only to discharge a person illegally detained but also to direct that the person detained be brought up before the appropriate Court or Tribunal for hearing and determination of the charges against him. Once the investigation is completed, the detenue is entitled to be tried speedily in accordance with law.

U Ba Yi and others v. *The Officer-in-charge of Jail, Yamèthin*, B.L.R. (1950) (S.C.) 130, referred to.

San Hlaing for the applicant.

Ba Sein for the respondents.

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* Criminal Misc. Application No. 369 of 1951.

† *Present:* MR. JUSTICE E MAUNG, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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LIM PWE HTIN v. THE CHAIRMAN, PUBLIC PROPERTY PROTECTION COMMITTEE AND ANOTHER.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The applicant's brother was arrested by the Bureau of Special Investigation on the 10th October 1951 and has been in custody since that date. In Criminal Miscellaneous Application No. 354 of 1951 this Court directed the applicant's brother to be discharged in respect of the detention order of the 10th October 1951 by the arresting officer, followed by the order of the 20th October 1951 of the President of the Union, on the sole ground that under the law in force at the date of arrest and orders of detention there was no authority for arrest and detention for the purpose of prosecution for a completed offence. Section 7 (2) of the Public Property Protection Act having been amended, during the pendency of that proceeding, authorising the arrest and detention for the purpose of investigation and prosecution for a completed offence, the applicant's brother was under the amended provisions rearrested following his discharge under the orders of this Court.

There can be no question of the legality of the subsequent arrest and detention under section 7 (2) of the Act as at present in force. But, as this Court has laid down in the case of *U Ba Yi and others* v. *The Officer-in-charge of Jail, Yamèthin* (1), a person who has been detained in custody under section 7 (3) of the Act should either be sent up for trial or released as soon as investigation is complete and such person should not be detained in custody for the maximum period of six months provided in the Act. In the present case it is not suggested that investigation is not complete. All that has been said is that the co-accused of the applicant's brother has not been apprehended and his present whereabouts are not known to the

(1) B.L.R. (1950) (S.C.) 130.

authorities. The investigating officer is unable to say when he expects to be able to apprehend the co-accused, if at all. When the Court pointed out the provisions of section 512 of the Criminal Procedure Code under which, inspite of the co-accused not yet being apprehended, the detenue could be sent up for trial, the learned Government Advocate could not adduce cogent reasons to show why this procedure should not be followed.

Directions in the nature of *habeas corpus* may issue not only to discharge a person illegally detained but also to direct that the person detained in any prison be brought up before an appropriate Court or tribunal to have the charges against him heard and determined. In this case, as we have said, the arrest and custody of the applicant's brother are legal for the purpose of investigation and subsequent trial. That investigation having been completed he is entitled to claim that he be tried speedily in accordance with law.

We accordingly direct that the person of the detenue be brought up in custody before the District Magistrate, Rangoon, in the forenoon of the 12th December 1951 together with a report in writing why he had been arrested by the Bureau of Special Investigation on the 10th October 1951, to have cognizance taken of any offence or offences committed by him and to be dealt with in accordance with law.

SUPREME COURT.

†S.C. 1951.

Dec. 21.

YAYA PATEL (APPLICANT)

v.

THE DISTRICT JUDGE, BASSEIN AND ANOTHER (RESPONDENT).*

Municipal Election Rules, Rules 63 and 65—District Judge whether persona designata—*Revision to High Court whether lies—Writ of certiorari if can be made.*

Held : The District Judge in declaring an election void under Rules 63 and 65 of the Municipal Election Rules acts as a Court and not a mere *persona designata*. His orders are therefore subject to revision by the High Court.

The Municipal Rules have been amended and Appendix C to the new Rules makes it clear that the District Judge acts as a Court. The proceedings are "in the Court of the District Judge"; they are to be Civil Miscellaneous cases and notices of hearing are to be given under the seal of the Court.

The Rules in 3 Ran. 560, 11 Ran. 1, distinguished as proceeding upon a consideration of different Acts and Rules.

Habib Sahib v. *Sheik Budhoo*, A.I.R. (1939) Ran. 143, approved.

Tun Aung for the applicant.

P. B. Sen for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for a writ of certiorari to quash the order by which the first respondent, the District Judge, Bassein has declared under Rules 63 and 65 of the Municipal Election Rules that the election of the applicant is void and that the second respondent, who received the largest number of votes next to the applicant, is duly elected.

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* Civil Misc. Application No. 113 of 1951 against the order of the District Judge, Bassein in Civil Misc. Case No. 4 of 1951.

† *Present :* MR. JUSTICE E MAUNG, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

In answer to the preliminary objection of the learned Advocate for the second respondent that the applicant should have moved the High Court in revision, the learned Advocate for the applicant has stated that he has to file the application in this Court, instead of applying to the High Court to revise the said order under section 115 of the Code of Civil Procedure, as there are authorities to the effect that District Judges act as mere *persona designata* and not as Courts in disposing of Municipal Election Petitions.

He has also invited our attention to *The Municipal Corporation of Rangoon* v. *M. A. Shakur* (1) and *U Ba Pe and another* v. *U Ba Shwe and others* (2). In the first case it was held that the Chief Judge of the Rangoon Small Cause Court, who performed the functions assigned to him by section 14 of the Rangoon Municipal Act, 1922, acted as a *persona designata* and not as a Court and that the High Court had no jurisdiction to interfere in revision with his decisions. In the second case it was held that the District Judge who held an enquiry under the electoral rules of the Mandalay Municipality acted as a *persona designata* and that his opinion was not subject to any revision by the High Court.

However, these rulings are distinguishable from the case before us as they proceeded upon a consideration of the respective Acts and the Rules which were in force then.

The Municipal Rules have been amended and Appendix C to the new Rules leave no room for doubt that District Judges, who hear Municipal Election Petitions, are to act as Courts and not as mere *persona designata*.

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(1) (1925) I.L.R. 3 Ran. 560. (2) (1933) I.L.R. 11 Ran. 1.

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The Appendix reads:

"NOTICE

IN THE COURT OF THE JUDGE,

CIVIL MISCELLANEOUS CASE NO. OF 19 .

In the Matter of the objection petition to the Election of as Member for at the Municipal Election held on

To

Notice is hereby given that the abovementioned objection petition has been received by me and the same will be considered on the day of 19 and you are hereby directed to appear either in person or by a duly authorised advocate before me at 10 a.m. on the aforesaid date, and on your failure to do so, the aforesaid petition will be heard *ex parte*.

Given under my hand and the seal of the Court this day 19 .

Exempt from process-fees.

Clerk.

Judge."

The proceedings are "in the Court of the District Judge"; they are to be Civil Miscellaneous Cases and notices of hearing are to be given under the seal of the Court.

Even before the Rules were amended, the High Court of Judicature at Rangoon interfered in revision with an order passed by a District Judge as "what he purported to do was to sit in the District Court of Yamèthin and to sign a judgment purporting to be a judgment of the Court and stamp it with a Court stamp." [See *Habib Sahib* v. *Sheik Budhoo* (1)].

We accordingly hold that the District Judge acts as a Court and not as a mere *persona designata* in

(1) A.I.R. (1939) Ran. 143.

hearing election petitions under the new Municipal Rules and that his orders are subject to revision by the High Court.

The application is dismissed with costs, Advocate's fee five gold mohurs, on the preliminary ground that the High Court has jurisdiction to interfere in revision with the order in question.

SUPREME COURT.

†S.C. 1952

Jan. 14.

K. K. S. KADER (APPLICANT)

v.

THE CONTROLLER OF RENTS, RANGOON AND OTHERS (RESPONDENTS).*

Writ of certiorari—Cancellation of permit under s. 12 (1), Urban Rent Control Act for want of notice to owner's agents and taking permit on the back of the party interested. Controller's power of review of predecessor's order—S. 21 (a), Urban Rent Control Act and Order 47, Rules 1 and 2 of the Code of Civil Procedure.

Controller of Rents cancelled a permit granted under s. 12 (*1*) of the Urban Rent Control Act, 1948 on the ground that applicant deliberately suppressed his knowledge of the presence of the owner's agent in Burma and has practised fraud on the office by taking out such a permit at the back of the party interested. Upon an objection that the Controller of Rents had no power to review the order granted by his predecessor.

Held : S.21 (*1*) of the Urban Rent Control Act, 1948 must be read with Order 47, Rules 1 and 2 of the Code of Civil Procedure. The discovery by the 2nd and 3rd Respondents not parties to the permit application that the same had been obtained behind their back is discovery of a new and important matter under Order 47, Rule 2 to review the order of his predecessor-in-office, and the Controller of Rents was competent to review the order of his predecessor.

Kyaw Min and *Mya Than Nu* for the applicant.

Ba Sein (Government Advocate) for the respondent 1.

Dr. Ba Han and *N. R. Burjorjee* for the respondent 2.

A. I. Modan for the respondent No. 3.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for a writ of certiorari in respect of an order passed by the Controller of Rents, Rangoon, cancelling a permit,

* Civil Misc. Application No. 54 of 1951 against the order of the Controller of Rents.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE MAUNG and MR. JUSTICE THEIN MAUNG.

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which his predecessor-in-office had granted to the applicant under section 12 (*1*) of the Urban Rent Control Act, 1948.

He has cancelled the said permit on the grounds (1) that the applicant "had deliberately suppressed his knowledge of the presence of the owner's authorized agent N. M. Salehji in Burma at the time he made the application for a permit under section 12 (*1*) to this office" and (2) that he had practised "fraud on this office by taking out the permit at the back of the parties who are interested in the property".

The questions as to whether there has been such suppression of fact or such practice of fraud are mere questions of fact and we are satisfied that there is no ground whatsoever for interference with the decision of the Controller of Rents on these questions of fact.

The learned Advocate for the applicant has contended that the Controller of Rents has no power to review the order of his predecessor-in-office. However, section 21-A of the Urban Rent Control Act, 1948 must be read together with Order 47 of the First Schedule to the Code of Civil Procedure ; discovery by the second and third respondents, who were not made parties to the application for the permit, that the permit had been obtained behind their back is discovery of new and important matter within the purview of Order 47, Rule 1 and the ground for review being discovery of such new and important matter, the Controller of Rents is competent under Order 47, Rule 2 to review the order of his predecessor-in-office.

So the application fails and is dismissed with costs, Advocate's fee five gold mohurs.

However, the Controller of Rents must proceed to dispose of the application for a permit under section 12 (*1*) of the Act in accordance with law.

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The applicant may amend it by addition of the necessary parties and in that case, the Controller of Rents will have to dispose of it only after due notice to them.

SUPREME COURT.

MA AIN YU (APPELLANT)

v.

DR. MISS A. G. D. NETTO AND OTHERS (RESPONDENTS).*

†S.C. 1952

Feb. 5

Question of law—Inference from facts—S. 15, Contract Act—Coercion.

Held : The proper legal effect of a proved fact is essentially a question of law.

Ram Gopal and another v. *Shamskhatoon and others*, 19 I.A. 228 ; *Mafar Chandra Pal* v. *Shukur and others*, 45 I.A. 183, referred to and followed.

The practice with regard to the concurrent findings of fact is well established. Such findings will not be disturbed unless there has been a miscarriage of justice or violation of some principle of law or procedure.

Satgur Prasad v. *Mahant Har Narain Das*, 59 I.A. 147, distinguished.

Torture is an act forbidden by the Penal Code. A threat to commit such an act would come within the purview of s. 15 of the Contract Act. In the present case the 1st Respondent apprehended that she would be tortured by the Japanese and in that apprehension she executed the deed of sale sought to be cancelled.

S. T. Leong for the appellant.

P. B. Sen for the respondent No. 1.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—The 1st respondent Dr. Miss Netto sued the appellant and the 2nd, 3rd and 4th respondents for cancellation of a deed of sale and for recovery of possession of the subject-matter thereof on the ground that she had executed the deed of sale under coercion.

The Court of first instance dismissed her suit on the ground that there was no coercion and the Court

* Civil Appeal No. 14 of 1950 against the decree of the High Court in Civil 2nd Appeal No. 30 of 1949, dated 24th December 1949.

† *Present :* MR. JUSTICE E MAUNG, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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of first appeal also confirmed the decree of dismissal. However, on her second appeal, the High Court held that there was coercion, and that she was entitled to have the deed of sale cancelled and possession of the subject-matter restored to her on payment into Court of a sum of Rs. 1,500 less the amount payable to her as costs.

The learned Advocate for the appellant has contended that the High Court should not have set aside the concurrent findings of fact as to whether there was coercion or not. However, as the High Court has rightly pointed out on the authority of *Ram Gopal and another* v. *Shamskhatoon and others* (1) and *Mafar Chandra Pal* v. *Shukur and others* (2), the proper legal effect of a proved fact is essentially a question of law. The learned Advocate for the appellant relies on *Satgur Prasad* v. *Mahant Har Narain Das* (3). That, however, was a case in which no ground for disturbing concurrent findings of fact had been shown; and even in that case their Lordships of the Privy Council observed:

> "The practice of this Board with regard to concurrent findings of fact is well established. Such findings will not be disturbed unless it is shown that there has been a miscarriage of justice, or the violation of some principle of law or procedure."

The learned Advocate for the appellant has further contended that there was no coercion at all. However, the evidence of the appellant's own husband Ah Yin clearly shows :

(1) That the 1st respondent's "attitude all along was that she did not want to allow us to redeem the garden ";

(1) 19 I.A. 228. (2) 45 I.A. 183.
(3) 59 I.A. 147.

(2) That she wanted British currency and not the so-called Japanese currency ;

(3) That in those days the use of British currency was prohibited and that "any one dealing with British currency was tortured by the Japs"; and

(4) That the appellant's lawyer Mr. Hashim Ahmed wrote Exhibit C to the 1st respondent's lawyer Mr. Esoof. Mr. Ahmed stated in Exhibit C, which is dated the 10th September, 1943 "your client insisted on having British notes and also gave various other excuses to prevent my client from re-purchasing the lands". He has merely deposed "I cannot say whether the insertion in my notice that the plaintiff had been insisting on British money had the effect of frightening the plaintiff". But this deposition must be read together with Ah Yin's deposition that in those days "anyone dealing with British currency was tortured by the Japs"; and there can be no doubt of the plaintiff having been frightened thereby since she hastened to reply denying that she had "insisted on having British notes" (*see* Exhibit D, dated the 12th September 1943) and subsequently accepted payment in Japanese currency which she admittedly did not want.

There is also evidence of a Police Officer having come to her and made inquiries at the instance of the Japanese Kimpetai about that time as to whether she had asked for British notes in consideration for the re-transfer.

The learned Advocate for the appellant has also contended that there could not have been any coercion

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within the purview of section 15 of the Contract Act at all since there was no threat to commit any act forbidden by the Penal Code. However, torture is an act forbidden by the Penal Code ; and having regard to all the circumstances of the case there can be no doubt of the first respondent having apprehended that she might be tortured by the Japanese and of her having been placed under that apprehension with the intention of making her execute the deed of sale.

With reference to the further contention that there could not have been coercion "as the execution of the sale deed was under the advice of her Advocate Mr. Esoof," Mr. Esoof himself has deposed:

> "Mr. Menon told me that not only the notices had come from the other party, the latter was approaching the Jap Kimpetai (Jap Military Police) with the result that one police was often coming to the plaintiff and pressing for this transfer to be made by her (plaintiff). I told Mr. Menon that that plaintiff (Dr.) was a lady and nobody knew what the Jap Kimpetai would stoop to do and that it was best to see that the transfer was made so that there might not be any harassment. This was my final advice. I myself was frightened to act in this matter, that is to say, dared not give professional advice freely lest I might be harassed by the Jap Kimpetai."

The appeal fails and is dismissed with costs.

SUPREME COURT.

M. E. BHAIYAT & SONS (BURMA) LTD. (APPLICANTS)

†S.C. 1952

Feb. 5.

v.

CHIEF JUDGE OF THE RANGOON CITY CIVIL COURT AND TWO OTHERS (RESPONDENTS). *

Urban Rent Control Act—Issue of permit to sue for eviction—Reference under s. 22, Urban Rent Control Act to City Civil Court—Application for certiorari—Whether lies.

Controller of Rents granted a permit to 2nd Applicant to sue for eviction of 3rd Respondent. Upon a reference under s. 22 of the Urban Rent Control Act by the 3rd Respondent it was contended that he cannot be said to be in *bonâ fide* need of the room in question. An application for a writ of certiorari was made to the Supreme Court and on a preliminary objection taken that the order of the Chief Judge was subject to revision by the High Court under s. 115 of the Code of Civil Procedure :

Held : That the Chief Judge in reference proceedings was required as far as possible to follow the rules of procedure laid down in the Civil Procedure Code under s. 25 of the Rent Act of 1920. In s. 23 of the Urban Rent Control Act of 1948 " the Judge may in his discretion follow as nearly as possible the procedure laid down for trial of suits." Such Court acts in a quasi-judicial capacity and it is impossible to say it is doing so as a Court subordinate to the High Court.

Held further : The Chief Judge of the City Court held that Room No. 5 (the room in question) was not *bonâ fide* required for his own residence by 2nd defendant's brothers. The permit in the case is a subsisting permit and has never been set aside in due course. Such a permit cannot be questioned by the Chief Judge or by any other person in the absence of the person to whom it was granted and in proceeding as he did the Chief Judge assumed a jurisdiction beyond his competence and the proceedings can therefore be quashed by certiorari.

Mahomed Ebrahim Moolla v. *S. R. Jandass*, 11 L.B.R. 387.

The Municipal Corporation of Rangoon v. *M. A. Shakur*, 3 Ran. 560, referred to and distinguished.

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* Civil Misc. Application No. 220 of 1951 for directions in the nature of certiorari.

† *Present* : MR. JUSTICE E MAUNG, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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M. M. Rafi for the applicants.

Ba Sein for the respondents 1 and 2.

Tun Sein for the respondent 3.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The 2nd applicant Ayoob Mohamed Bhaiyat has a brother by name Ahmed Mohamed Bhaiyat. As heirs of their deceased father they are the owners of rooms Nos. 8 and 5 of house No. 258/260, Edward Street, Rangoon. Room No. 5 was at one time in the occupation of Abdul Habib Ismail, a witness cited by the 3rd respondent before the Controller of Rents in the proceedings out of which the present application has arisen. The 2nd applicant's brother made an application to the Controller of Rents for a permit to sue for the ejectment of Abdul Habib Ismail and as the Controller was satisfied that the applicant's brother wanted that room *bonâ fide* for his own residence, granted the necessary permit. Abdul Habib Ismail stated at one place of his evidence that he vacated Room No. 5 on the 5th March 1950 but he admitted that on the 27th July 1950 he instructed his lawyer to reply to the 2nd applicant's brother that he was not going to vacate the room as he had no alternative accommodation elsewhere. It is clear therefore that Abdul Habib Ismail vacated the room only sometime in July 1950 at the earliest.

On the 18th February 1950 the 2nd applicant also finding need for his own accommodation, made an application against the 3rd respondent for a permit to sue him for ejectment. The proceedings before the Controller of Rents were very much protracted and came to a close only on the 28th January 1951. While

these proceedings were pending, Room No. 5 having been vacated the 2nd applicant went into occupation of it and has been in occupation to this date.

On the Controller of Rents having granted on the 28th January 1951 a permit to the 2nd applicant to sue for eviction of the 3rd respondent, a reference was made to the Rangoon City Civil Court under section 22 of the Urban Rent Control Act by the 3rd respondent challenging the issue of the permit. One of the main grounds taken in the reference was that the 2nd applicant now has Room No. 5 in the house to occupy and that he cannot therefore be said to be in *bonâ fide* need of Room No. 8 for his own residential purposes. The learned Chief Judge of the City Civil Court, as he was entitled to do, further examined the 3rd respondent and on the materials before the Controller of Rents, as also the evidence taken by him, came to the conclusion that the 2nd applicant's application for a permit was not *bonâ fide* in that his brother, who had obtained the permit to evict the tenant from Room No. 5, did not really need that room for himself and that the room had been vacated by its previous tenant for the use of the 2nd applicant in this case.

In his order the learned Chief Judge commented on the failure of the 2nd applicant's brother to give evidence in support of the claim that the permit to evict the tenant of Room No. 5 was sought and obtained for residential purposes of himself and his family which was expected to arrive in Rangoon within a short time from India.

A preliminary objection was taken on behalf of the 3rd respondent to the application for directions in the nature of certiorari. It is claimed that the applicants should apply to the High Court under section 115 of the Civil Procedure Code to revise the order of the Chief Judge of the City Civil Court. The case of

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Mahomed Ebrahim Moolla v. *S. R. Jandass* (1) was relied on for the proposition that the Chief Judge of the City Civil Court in entertaining the reference, under the Urban Rent Control Act, acted as a Court subordinate to the High Court and that therefore the proper remedy for the applicants would be under section 115 of the Civil Procedure Code. Apart from the fact that the correctness of this decision has been questioned by the late High Court of Judicature in *The Municipal Corporation of Rangoon* v. *M. A. Shakur* (2) and other cases, the Rent Act of 1920 and the Urban Rent Control Act of 1948 are not *pari materia* on this point. In section 25 of the Rent Act of 1920 the Chief Judge of the Rangoon Small Cause Court or a Judge of any Court entertaining reference proceedings, was required as far as possible to follow the rules of procedure laid down in the Civil Procedure Code. The provision was mandatory. But section 23 of the Urban Rent Control Act of 1948 is in very different terms. The provision there is that "the Judge may in his discretion follow as nearly as possible either the procedure laid down for the trial of suits by the City Civil Court of Rangoon or the procedure laid down for the regular trial of suits." In any case under the Urban Rent Control Act, 1948, it is entirely for the Judge to say whether he is going to be bound by any rules of procedure or whether he is going to invent his own rules of procedure suited to the reference. It is impossible to conceive of a "Court" which is not bound by any prescribed rule of procedure and which may at its discretion adopt *ad hoc* any procedure it thinks fit. While we have no doubt that the Judge either of the City Civil Court or of any other Court in rent reference proceedings, acts in a quasi-judicial capacity we find it impossible to accept the

(1) 11 L.B.R. 387. (2) 3 Ran. 560.

contention that it is as a Court subordinate to the High Court that he acts in such proceedings. Accordingly the preliminary objection fails.

On the merits it has been strenuously contended on behalf of the 3rd respondent that the most that can be urged against the order of the Chief Judge of the City Civil Court is that it errs on facts and that this Court in certiorari will not interfere with findings on facts. It would appear at first sight that there is some substance in this contention. The decision of the Chief Judge of the City Civil Court was that the 2nd applicant does not *bonâ fide* require Room No. 8 in the house in dispute for his own residential purposes, he having Room No. 5 in which to live with his family. But in arriving at that decision, the learned Chief Judge assumed to himself a jurisdiction to examine whether the grant of a permit in another proceedings in respect of Room No. 5 to the 2nd applicant's brother was proper or not. It was solely on the ground that Room No. 5 was not *bonâ fide* required by the 2nd applicant's brother for his own residence and that the permit for eviction in respect of that room was sought in the interests of the 2nd applicant that the learned Chief Judge reversed the order of the Rent Controller in the proceedings under review. The permit in the other case is a subsisting permit and has never been set aside in due course ; and at the back of the 2nd applicant's brother that permit cannot be questioned either by the learned Chief Judge or by any other person. Under the authority of that permit the 2nd applicant's brother can at any moment sue to evict the 2nd applicant from the room in which he has been temporarily accommodated pending the arrival of the former's family from India.

But for the assumption of a jurisdiction beyond his competence, it is clear that the learned Chief Judge of

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the Rangoon City Civil Court would have rejected the reference. The contention of the learned counsel for the 3rd respondent that no question of excess of jurisdiction is involved in this case cannot therefore be accepted.

The application is allowed and the order of the Chief Judge of the Rangoon City Civil Court is quashed with costs. Advocate's fees ten gold mohurs.

SUPREME COURT

THE RANGOON ELECTRIC TRAMWAY & SUPPLY Co. LTD., RANGOON (APPLICANTS)

†S.C. 1952

Feb. 11.

v.

THE COURT OF INDUSTRIAL ARBITRATION, BURMA AND ONE (RESPONDENTS).*

Certiorari—Grant of—Regarding trade dispute—Mistake in deciding question of fact by Court of Industrial Arbitration whether ground for writ.

On 25th April 1951 R.E.T. & S. Co. Ltd., transferred 16 of the workmen from the Boiler House Department to the underground department. On the 26th April 1951, 16 workmen were dismissed on account of their refusal to serve in the underground department. The Court of the Industrial Arbitration, Burma, in Case No. 5 of 1951 made an award for reinstatement of 16 of the discharged workers and granted other reliefs. Upon an application for a writ of certiorari to quash the said award :

Held : That the question whether there is a decision or agreement regarding inter-departmental transfers was one of fact which the Court of Industrial Arbitration was competent to decide. The mere fact that it made a mistake in deciding such question cannot ordinarily be a ground for a writ of certiorari.

Where there was already a dispute between the Company and the Workers' Association regarding the terms and conditions of service relating to inter-departmental transfers and such dispute had not been settled there was a case to go before the Court of Industrial Arbitration and workmen could not be dismissed because they refused to obey orders of transfer without the decision of the said question of transfer.

Kan Toon for the applicants.

T. P. Wan for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for a writ of certiorari to quash the award of the Court of Industrial Arbitration, Burma, in Case No. 5 of 1951.

* Civil Misc. Application No. 61 of 1951.

† *Present* : SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE THEIN MAUNG.

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The award is to the effect that 16 discharged workmen shall be reinstated forthwith and that they shall be entitled to get half monthly wages *plus* half cost of living allowance from the date of their dismissal to the date of their reinstatement.

The workmen were ash coolies in the Power Station Boiler House Department and they were discharged as they refused to be transferred to the Underground Department when the boiler was taken off for survey and reconditioning.

The case of the applicant company is that it had the right to transfer its employees from one department to another, that their refusal to be so transferred amount to misconduct and dereliction of duty and that they were liable to be dismissed under the agreed terms and conditions of service.

On the other hand, the case of the Workers' Association is that the Company had no right to make inter-departmental transfers without the consent of the workmen concerned, that there were no agreed terms and conditions of service in respect of such transfers and that the transfer of ash coolies from the Boiler House Department to the Underground Department was unprecedented and unjustifiable.

The Court of Industrial Arbitration has found on the questions of fact that "the parties are in conflict in their understanding of the terms and conditions of service issued by the Company" and that there does not appear to have been a definite decision (or agreement) on the question of inter-departmental transfer.

It has also found that the objection of the workmen to their being employed in the Underground Department is justified and that the Company is not justified in dismissing them solely for their refusal to serve therein.

The question as to whether there was a definite decision or agreement regarding inter-departmental transfers is a question of fact which the Court of Industrial Arbitration is competent to decide. The mere fact that it has made a mistake in deciding such a question of fact cannot *ordinarily* be a ground for issuing a writ of certiorari to quash its award; and in this particular case we are not at all satisfied that its decision on the question of fact is erroneous.

Although the question of inter-departmental transfer was discussed on the 7th and 8th October, 1947, the Company, according to its Manager R. G. Tyner "did not get an opportunity to draft new terms and conditions until the latter part of 1951 (*sic*? 1950)". The new terms and conditions were sent to the Workers' Association with the forwarding letter Exhibit E dated the 8th January, 1951; and the Association protested against them at a special meeting held on the 21st January, 1951; their general protest was conveyed to the manager on the 26th January, 1951; and the latter acknowledged receipt thereof on the 5th February, 1951. (*See* Exhibits F and G.)

Besides, the manager, who claims that the new terms and conditions of service came into force on 1st January, 1951, has admitted: "We have received protest against paragraph 29 of Exhibit 5 on the 4th April, 1951. Ever since the protest on the 4th April, 1951, no final settlement has ever been arrived at." Exhibit 5 is the same as Exhibit E and paragraph 29 thereof relates to inter-departmental transfers.

So it is quite clear that there already was a dispute between the Company and the Workers' Association over the terms and conditions of service relating to inter-departmental transfers before the question of the workmen's transfer from the Boiler House Department

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to the Underground Department arose and that it had not been settled on the 25th April, 1951, when the Company transferred 16 of the workmen from the Boiler House Department to the Underground Department or on the 26th April 1951 when 16 workmen were dismissed on account of their refusal to serve in the Underground Department.

The application fails and must be dismissed for the reasons which we have already stated. We need not, for the purpose of this application, go into any other question *e.g.*, (1) as to the power of the Court of Industrial Arbitration (*a*) to extend an existing agreement or make a new one, or (*b*) in general to create a new obligation or to modify old obligations or (2) as to the extent to which the rights of employers have been affected by a new conception of social duties and responsibilities in the interests of industrial peace and production.

However, we must add incidentally that the dispute would not have arisen at all if the Company had, on the removal of the boiler for annual survey, provided a substitute in accordance with its pre-war practice and that the award cannot cause undue hardship to the Company as the boiler has admittedly been surveyed, the Company's contemplation to use oil as fuel instead of coal has been frustrated and the Company has now reverted to usage of coal.

The application is dismissed with costs ; Advocate's fee twenty gold mohurs.

တရားလွှတ်တော်ချုပ်။

နိုင်ငံတော်သမတ ရွှေးကောက်ပွဲကိစ္စနှင့်စပ်လျဉ်း၍ ပေါ်ပေါက်သော ပြဿနာကိုဆုံးဖြတ်ချက်ရယူရန်လွှဲအပ်မှု။

အဂ္ဂမဟာသရေစည်သူဥပဒေပါရဂူ

ဦးဘဦး (အရွှေးခံသူ)

နှင့်

ဦးချစ်လှိုင် (လွှဲအပ်ရန်တောင်းဆိုသူ)။ *

၁၉၅၉ ခုနှစ်၊ နိုင်ငံတော်သမတ ရွှေးကောက်တင်မြှောက်မှုအက်ဥပဒေပုဒ်မ ၄ နှင့် ၇—အမည်တင်သွင်းလွှာအသီးသီး—အမည်တင်သွင်းလွှာ တစောင်ထက်ပိုသောအမည်တင်သွင်းလွှာများတွင် ပါရှိသော လက်မှတ်များကို စုပေါင်း၍ မရေတွက်နိုင်—အသေးအဖွဲချွတ်ယွင်းချက်ဟုတ် မဟုတ်—အမည်တင်သွင်းလွှာပုံစံတွင် လက်မှတ်ထိုးသူတို့၏ ရည်ရွယ်ချက်—ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌသည်၊ အမည်တင်သွင်းလွှာကိုပြင်ခွင့်ပေးနိုင် မပေးနိုင်—အက်ဥပဒေပြဋ္ဌာန်းချက်ကို အဓိပ္ပါယ်ပြန်ခြင်း—ပြဿနာများကိုဖြေဆိုခြင်း။

၁၉၅၂

မတ်လ ၁၁။

အမည်တင်သွင်းလွှာ နှစ်စောင်ဖြစ်၍နေသည်ကို အမည်တင်သွင်းခြင်းခံရသူက သော်၎င်း၊ အခြားမည်သူတစုံတယောက်ကသော်၎င်း၊ တစောင်တည်းပါဟု ဆိုခါမျှနှင့်တစောင်တည်းမဖြစ်နိုင်။ စက္ကူချဉ်လွတ်တခုတွင်နောက်ထပ်လိုသောလက်မှတ်များကိုထိုး၍တင်ခြင်းနှင့် အမည်တင်သွင်းလွှာအပြည့်အစုံကို တစုံတရာမဖျက်ဘဲသုံးခြင်းသည် အလွန်ကွာခြားသည်။ လက်မှတ်များသာပါသောအလွတ်စက္ကူကို အမည်တင်သွင်းလွှာသီးခြားဖြစ်သည်ဟု မည်သူမျှဆိုနိုင်မည်မဟုတ်သော်လည်း၊ အမည်တင်သွင်းလွှာပုံစံအပြည့်အစုံနှင့်ရေးသားသောအလွှာကိုမူကား၊ အမည်တင်သွင်းလွှာဟူ၍သာကောက်ယူကြရလိမ့်မည်။

အမတ်များသည်။ မည်သည့်အတွက်အမည်တင်သွင်းလွှာတခုတည်းတွင် တစုတပေါင်းတည်း လက်မှတ်ရေးထိုးခြင်းမပြုနိုင်ကြောင်းကို ဤရုံးတော်ကစီစစ်ဝေဘန်ရန်မလိုချေ။

၁၉၅၉ ခုနှစ်၊ နိုင်ငံတော်သမတရွေးကောက်တင်မြှောက်မှုအက်ဥပဒေပုဒ်မ ၄(၁)(ဂ) က "အမည်တင်သွင်းလွှာအသီးသီးတွင်၊ သုံးဆယ်အောက်မနည်းသော ပါလီမန်အမတ်များ၏ကိုယ်တိုင်ရေးထိုးသော လက်မှတ်များပါရှိစေရမည်။" ဟု ပြဋ္ဌာန်း၍ထားသည်။ ထိုပြဋ္ဌာန်းချက်သည်၊ အလွန်တိကျပြတ်သား၍ အဓိပ္ပါယ်ထင်ရှားသော ပြဋ္ဌာန်းချက်ဖြစ်သည်။

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* ၁၉၅၂ ခုနှစ်၊ လွှဲအပ်မှုအမှတ် (၁)။

နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင်၊ လွှတ်တော်တရားဝန်ကြီး ဦးထွန်းဖြူနှင့် ဦးသောင်းဝိန်တို့ရွှေတော်တွင်ကြားနာသည်။

၁၉၅၂

ဦးဘဦး နှင့် ဦးချစ်လှိုင်၊

ထိုပြဋ္ဌာန်းချက်သည် ပုဂ္ဂိုလ်တဦးဦးအတွက် အမည်တင်သွင်းလွှာတစောင်ထက်ပိုရှိတင်သွင်းခြင်းကိုမဘားမြစ်သော်လည်း အမည်တင်သွင်းလွှာတိုင်းတွင် ပါလီမန်အမတ်အနည်းဆုံးသုံးဆယ်၏ကိုယ်တိုင် ရေးထိုးသောလက်မှတ်များပါရမည်ဟု အတိအလင်းဆိုသည်။ ထိုပြဋ္ဌာန်းချက်တွင် ခြွင်းချက်တစုံတရာလည်းမရှိချေ။ သို့ဖြစ်၍ မည်သည့်အကြောင်းကြောင့်ပင်ဖြစ်စေ၊အမည်တင်သွင်းလွှာတစောင်တွင် ပါလီမန်အမတ်အနည်းဆုံး သုံးဆယ်၏ကိုယ်တိုင် ရေးထိုးသောလက်မှတ်များမပါလျှင်၊ ထိုအမည်တင်သွင်းလွှာသည်၊ ထိုပြဋ္ဌာန်းချက်နှင့် မညီညွတ်ဟူ၍သာလျှင်စီရင်ဆုံးဖြတ်ကြရချေမည်။

ထိုပြဋ္ဌာန်းချက်တွင်လက်မှတ်အရေအတွက်ပြည့်မှီအောင် အမည်တင်သွင်းလွှာတစောင်ထက်ပိုသော အမည်တင်သွင်းလွှာများတွင်ပါရှိသော လက်မှတ်များကို စုပေါင်း၍ရေတွက်နိုင်ရန်ခြွင်းချက်ခွင့်ပြုချက်တစုံတရာမရှိချေ။

အမည်တင်သွင်းလွှာအသီးသီးတွင် ပါလီမန်အမတ်အနည်းဆုံး သုံးဆယ်ကိုယ်တိုင် ရေးထိုးသောလက်မှတ်များပါရှိရမည်ဟု ပြဋ္ဌာန်းထားလျက်လက်မှတ်များ ၁၂၊ သို့မဟုတ် ၁၉ သာပါ၍နေခြင်းသည် အသေးအဖွဲဆွတ်ယွင်းချက်မဟုတ်ချေ။

အောက်ပါစီရင်ထုံးများကိုစဉ်းစားသည်။

Sen & Poddar's Indian Election Cases, 1935—51, 1 and 13, Ambala North (Sikh) Rural Constituency, 1937; Daobia's Indian Election Cases I, p. 247, Punjab Anglo-Indian Constituency (Case No. 1).

အမည်တင်သွင်းလွှာတစောင်တွင် အမတ်များ ကိုယ်တိုင်ရေးထိုးသောလက်မှတ်သုံးဆယ်မပါလျှင်၊ ဥပဒေနှင့်မကိုက်ညီဟူ၍သာ ဆုံးဖြတ်ရမည်ဖြစ်သောကြောင့် ပြည်သူ့လွှတ်တော်ဥက္ကဋ္ဌသည်၊ ဘာကြောင့်အမည်တင်သွင်းသော အမတ်အားလုံး အမည်တင်သွင်းလွှာပုံစံတခုတည်းတွင်လက်မှတ်မထိုးနိုင်ကြကြောင်း၊ သူတို့၏ရည်ရွယ်ချက်မည်သို့ ဖြစ်ကြောင်းများကိုစစ်ဆေးစုံစမ်းရန်မလိုချေ။

အကဲဉပဒေတွင်ပြည်သူ့လွှတ်တော်ဥက္ကဋ္ဌက အမည်တင်သွင်းလွှာကို ပြင်ခွင့်ပေးနိုင်ရန်၊ ပြဋ္ဌာန်းချက်တစုံတရာမရှိချေ။

အကဲဉပဒေပြဋ္ဌာန်းချက်သည် ရှင်းလင်းပြတ်သားရှိအဓိပ္ပါယ်ပေါ်လွင်လျှင်၊ ထိုပေါ်လွင်ထင်ရှားသောအဓိပ္ပါယ်အတိုင်းသာလျှင်စီရင်ဆုံးဖြတ်ကြရမည်။

ဤရုံးတော်သည်ပါလီမန်ကပြဋ္ဌာန်းခဲ့ထားသောအကဲဉပဒေအတိုင်းသာလျှင်၊ပြဿနာများကိုဖြေဆိုရ၏။

လွှတ်တော်ရွေးနေကြီးဦးဘညွန့်အရွေးခံသူအဟုတ်။

လွှတ်တော်ရွေးနေကြီး ဒေါက်တာဘာမော်နှင့် ဦးကျော်မင်း၊ လွှဲအပ်ရန်တောင်းဆိုသူအတွက်။

နိုင်ငံတော်ရွေးနေချုပ်ကြီး ဦးချန်ထွန်း၊ ပြည်ထောင်စု မြန်မာနိုင်ငံတော်အစိုးရအတွက်။

နိုင်ငံတော်တရားဝန်ကြီးချုပ်က အဓိန့်ချမှတ်သည်။

၁၉၅၂

ဦးဘဦး နှင့် ဦးချစ်လှိုင်။

နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးဆိန်းမောင်း ။ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၊ ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌက၊ ၁၉၄၉ ခုနှစ်၊ နိုင်ငံတော်သမတ ရွေးကောက်တင်မြှောက်မှု အက်ဥပဒေ ပုဒ်မ ၇ အရ၊ ဤရုံးတော်သို့ ဆုံးဖြတ်ရန် လွှဲအပ်သောပြဿနာမှာ အချုပ်အားဖြင့်၊ အောက်ပါအတိုင်းဖြစ်သည်။

''ဦးချစ်လှိုင်၏အမည်တင်သွင်းလွှာတခုတွင် ကိုယ်တိုင် လက်မှတ်ရေးထိုးသော ပါလီမန်အမတ်များ၏ ဦးရေမှာ (၁၉) ယောက်သာရှိပြီး၊ ဦးချစ်လှိုင်၏ အခြားအမည်တင်သွင်းလွှာတွင်ကိုယ်တိုင်လက်မှတ်ရေးထိုးသောပါလီမန်အမတ်များ၏ ဦးရေမှာ (၁၂) ယောက်သာရှိရာ ထိုအမည်တင်သွင်းလွှာများသည်၊ နိုင်ငံတော်သမတ ရွေးကောက်တင်မြှောက်မှု အက်ဥပဒေ ပုဒ်မ ၄၊ ပုဒ်မခွဲ (၁)၊ အပိုဒ် (ဂ) နှင့် ကိုက်ညီသည်မကိုက်ညီသည်။ ထို အက်ဥပဒေပုဒ်မ ၄ (၁) မှာ အောက်ပါအတိုင်းဖြစ်သည်။

၄။ ။(၁) နိုင်ငံတော်သမတ ရွေးကောက် တင်မြှောက်ရဲ့ အတွက် အမည်တင်သွင်းလွှာအသီးသီးသည်၊အောက်ပါပြဋ္ဌာန်းချက်များနှင့် ညီညွတ်စေရမည်။

(က) ထိုအမည်တင်သွင်းလွှာသည်၊ ဤအက်ဥပဒေ ပဋမဇယားတွင် ဖေါ်ပြထားသည့်ပုံစံနှင့်ညီညွတ်ရမည်။

(ခ) ထိုအမည်တင်သွင်းလွှာတွင်၊ အမည်တင်သွင်းခြင်း ခံရသူ၏ အမည်၊ အသက်၊ နေရပ်၊ မွေးဖွါးရာအရပ်၊အလုပ်အကိုင်၊ မိဘနှစ်ပါးအမည်နှင့် မွေးဖွါးရာအရပ်၊ထို့ပြင် အမည်တင်သွင်းလွှာပုံစံတွင်ဖေါ်ပြထားသည့် အခြားလိုအပ်ချက်များပါရှိစေရမည်။

(ဂ) အမည်တင်သွင်းလွှာ အသီးသီးတွင် သုံးဆယ်အောက်မနည်း သောပါလီမန် အမတ်များ၏ကိုယ်တိုင်ရေးထိုးသောလက်မှတ်များပါရှိစေရမည်။

(ဃ) အမည် တင်သွင်းလွှာ အသီးသီးကို လူမျိုးစု လွှတ်တော် အတွင်းဝန်သို့ ပေးအပ်ရမည် ''။

ဤရုံးတော်သို့ ဆုံးဖြတ်ဘို့လွှဲအပ်ရန် တောင်းဆိုသူ ဦးချစ်လှိုင်သည် မိမိအတွက်အမည်တင်သွင်းလွှာ နှစ်စောင်တင်သွင်းခဲ့သည်။ ထိုနှစ်စောင်လုံး ဒိုင်ယျက်မြင်အားဖြင့်၊ ပါလီမန်အမတ်များ၏ လက်မှတ်အရေအတွက် များမှတပါး၊ တစောင်စီတစောင်စီပင်ပြီးသော၊ပြည့်စုံသော၊သီးခြား၊အမည်တင်သွင်းလွှာများဖြစ်ကြသည်။ထိုနှစ်စောင်လုံး ထိုအက်ဥပဒေ ပဋမဇယားတွင်ဖေါ်ပြထားသည့်ပုံစံ

၁၉၅၂

ဦးဘဦး
နှင့်
ဦးချစ်လှိုင်။

အတိုင်းဖြစ်၍၊ ထိုအက်ဥပဒေပုဒ်မ ၄ (၁) (က) နှင့် ညီညွတ်ကြသည်။ အမည်တင်သွင်းခြင်း ခံရသူ၏အမည်၊ အသက်အစရှိသည်တို့ အပြည့်အစုံ ပါရှိသည့် အတွက်၊ ထိုအက်ဥပဒေ ပုဒ်မ ၄ (၁) (ခ) နှင့်လည်း ညီညွတ်ကြသည်။ ထိုမှတပါး၊ ဦးချစ်လှိုင်သည် ထိုအလှောနှစ်စောင်ကို လူမျိုးစုလွတ်တော်အတွင်းဝန်သို့ ပေးအပ်ခဲ့သောကြောင့်၊ ဂုဏ်တို့သည် ထိုအက်ဥပဒေပုဒ်မ ၄ (၁) (ဃ) နှင့်လည်း ညီညွတ်ကြသည်။

ထိုအမည်တင်သွင်းလွှာများသည်၊ တစောင်စီ တစောင်စီပင်၊ ထိုအက်ဥပဒေ ပုဒ်မ ၄ (၁) (က) (ခ) (ဃ) နှင့် ညီညွတ်ကြသည် သာမက၊ တစောင်တွင် အခြားတစောင်ကို ရည်ညွှန်းခြင်းတစုံတရာမပါမရှိချေ။ တစောင်သည် အခြားတစောင်၏အဖြည့်ခံ၊ သို့မဟုတ် အဖြည့်အစွက်ဖြစ်ကြောင်းတစုံတရာမပါမရှိချေ။

စင်စစ်အားဖြင့် ဦးချစ်လှိုင်ကိုယ်တိုင်ကပင်လျှင်၊ ပြည်သူ့လွှတ်တော်ဥက္ကဋ္ဌ၏ ရှေ့တွင်၊ အမည်တင်သွင်းလွှာနှစ်စောင်ဖြစ်၍နေကြောင်းဝန်ခံပြီး၊ ဂုဏ်တို့နှစ်ခုကို၊ တခုတည်းဟုအမှတ်ပြုရန် ပြောဆိုခဲ့လေသည်။ ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌက၊ ဤရုံးတော်သို့ စီရင်ဆုံးဖြတ်ရန် လွှဲအပ်သောစာတွင်၊ ဤအချက်နှင့် စပ်လျဉ်း၍ အောက်ပါအတိုင်းရေးသားပါရှိပါသည်။

"ဤကန့်ကွက်ခုက်နှင့် ပတ်သက်၍၊ ဦးချစ်လှိုင်၏ ချေပချက်မှာ၊ ဂုဏ်အား အမည်တင်သွင်းသော အမတ်များသည် အမည်တင်သွင်းလွှာတခုတည်းတွင် တစုတပေါင်းတည်း လက်မှတ်ရေးထိုးခြင်းမပြုနိုင်သောကြောင့်၊ ဤကဲ့သို့ အမည်တင်သွင်းလွှာနှစ်ခုအား ဖြင့်ပြုလုပ်ရပါသည်ဟုဆိုပါသည်။ အမည်တင်သွင်းလွှာ နှစ်ခုကို အမည်တင်သွင်းလွှာ တခုတည်းဟု အသိအမှတ်ပြုရန်ပြောဆိုပါသည်။"

ဤရုံးတော်တွင်မူကား၊ ဦးချစ်လှိုင်၏လွှတ်တော်ရှေ့နေကြီးက၊ ဦးချစ်လှိုင်သည် စာနှစ်ခုဖြစ်သော်လည်း၊ အမည်တင်သွင်းလွှာ တစောင်သာ ဖြစ်သည်ဟု ပြောခဲ့ပါသည်ဟုဆိုသည်။

မည်သို့ပင်ဖြစ်စေ၊ အထင်အရှား အမည်တင်သွင်းလွှာ နှစ်စောင်ဖြစ်၍နေသည်ကို၊ ဦးချစ်လှိုင်ကသော်၎င်း၊ အခြားမည်သူဝါစုံတယောက်ကသော်၎င်း၊ တစောင်ထည်းပါဟုဆိုခါမျှနှင့်တစောင်တည်းမဖြစ်နိုင်။ ဦးချစ်လှိုင်၏လွှတ်တော်ရှေ့နေကြီးက၊ အကယ်၍သာဦးချစ်လှိုင်သည်၊ အမည်တင်သွင်းလွှာပုံစံနှစ်ခုကို မသုံးဘဲ၊ အမည်တင်သွင်းလွှာပုံစံတခုတွင်အမတ်များ၏လက်မှတ် ၁၂ ခု၊ သို့မဟုတ် ၁၉ ခုသာပါစေပြီး၊ စက္ကူချပ်လွတ်တခုတွင်၊ နောက်ထပ်လိုသောလက်မှတ်များကိုထိုးရှိတင်လျှင်၊ အမည်တင်သွင်းလွှာနှစ်စောင်ဖြစ်သည်ဟုဆိုနိုင်မည်မဟုတ်ကြောင်း၊ သို့အတွက်အမည်တင်သွင်းလွှာ ပုံစံနှစ်ခုနှင့် အပြည့်အစုံတင်ခဲ့သော်

သည်း၊ ထိုနည်းအတိုင်းသာဖြစ်ထိုက်ကြောင်းလျှောက်လဲခဲ့သေးသည်။သို့ရာတွင်၊ အလွတ်စကားကို အသုံးပြုခြင်းနှင့် အမည်တင်သွင်းလွှာအပြည့်အစုံကိုတစုံတရာ မဖျက်ဘဲသုံးခြင်းသည် အလွန်ကွာခြားသည်၊ လက်မှတ်များသာပါသော အလွတ်စကားကို အမည်တင်သွင်းလွှာသီးခြားဖြစ်သည်ဟု၊ မည်သူမျှဆိုနိုင်မည် မဟုတ်သော်လည်း၊ အမည်တင်သွင်းလွှာ ပုံစံအပြည့်အစုံနှင့်ရေးသားသောအလွှာကိုမူကား၊ အမည်တင်သွင်းလွှာဟူ၍သာကောက်ယူကြရလိမ့်မည်။

သို့ဖြစ်၍၊ဦးချစ်လှိုင်၏အမည်တင်သွင်းလွှာများနှစ်စောင်ဖြစ်၍ နေကြောင်း၊ ပြည်သူ့လွှတ်တော်ဥက္ကဋ္ဌ၏ဆုံးဖြတ်ချက်သည်အထင်အရှားမှန်ကန်သောဆုံးဖြတ်ချက်ဖြစ်သည်။

ထိုအမည်တင်သွင်းလွှာနှစ်စောင်ကို၊ တစောင်ထည်းဟု အသိအမှတ်ပြုရန် တောင်းဆိုရာတွင် ဦးချစ်လှိုင်ပြသော အကြောင်းမှာ၊ ''အမည်တင်သွင်းသော အမတ် များသည်၊ အမည်တင်သွင်းလွှာ တခုတည်းတွင် တစုတပေါင်းတည်း၊ လက်မှတ်ရေးထိုးခြင်းမပြုနိုင်သောကြောင့်''ဟူသောအကြောင်းဖြစ်သည်။ ။ထို အမတ်များသည်၊ မည်သည့်အတွက် အမည်တင်သွင်းလွှာတခုထည်းတွင်၊ တစုတပေါင်းတည်း၊ လက်မှတ်ရေးထိုးခြင်း မပြုနိုင်ကြောင်းကို၊ ဤရုံးတော်ကစိစစ်ဝေဘန်ရန်မလိုချေ။စင်စစ်အားဖြင့်၊ အမည်တင်သွင်းလွှာပုံစံတွင်၊ အမတ်ဦးရေငါးဆယ် လက်မှတ်ရေးထိုးကြရန်၊ ဂဏန်းစဉ် တပ်ခိုင်ထားသော နေရာများရှိချေသည်။ အဂ္ဂမဟာသရေစည်သူ ဥပဒေပါရဂူ ဦးဘဦး၏ အမည်တင်သွင်းလွှာတစောင်ထည်းတွင်၊ အမည်ဦးရေငါးဆယ်ပင်လက်မှတ်ထိုးခြင်းထားကြကြောင်းကိုလည်း၊ ဤရုံးတော်ကတွေ့မြင်ရချေသည်။

မည်သို့ပင်ဖြစ်စေ၊တရားရုံးတော်များသည်တရားဥပဒေရှိသည့်အတိုင်းသာလျှင်၊စီရင်ဆုံးဖြတ်ကြရသည်။အက်ဥပဒေပြဋ္ဌာန်းချက်ရှိသောအချက်များကို စီရင်ဆုံးဖြတ်ကြရာ၌၊ အက်ဥပဒေပြဋ္ဌာန်းချက်သည် ရှင်းလင်းပြတ်သားခြင်း အဓိပ္ပါယ်ထင်ရှားပေါ်လွင်လျှင်၊ထိုပေါ်လွင်ထင်ရှားသော အဓိပ္ပါယ်အတိုင်းသာလျှင်စီရင်ဆုံးဖြတ်ကြရသည်။

၁၉၄၉ ခုနှစ်၊ နိုင်ငံတော်သမတ ရွေးကောက်တင်မြှောက်မှု အက်ဥပဒေ ပုဒ်မ ၄ (၁) (ဂ)က''အမည်တင်သွင်းလွှာအသီးသီးတွင်၊ သုံးဆယ်အောက်မနည်းသော ပါလီမန်အမတ်များ၏ ကိုယ်တိုင်ရေးထိုးသောလက်မှတ်ပါရှိစေရမည်''ဟုပြဋ္ဌာန်းထားခြင်းထားသည်။ ထိုပြဋ္ဌာန်းချက်သည် အလွန်တိကျပြတ်သားခြင်း အဓိပ္ပါယ်ထင်ရှားသော ပြဋ္ဌာန်းချက်ဖြစ်သည်။ ။ထိုပြဋ္ဌာန်းချက်သည်၊ပုဂ္ဂိုလ်တဦးဦးအတွက်၊ အမည်တင်သွင်းလွှာတစောင်ထက်ပိုခြင် တင်သွင်းခြင်းကို မတားဘဲ

၁၉၅၂

ဦးဘဦး
နှင့်
ဦးချစ်လှိုင်။

မြစ်သော်လည်း၊ အမည်တင်သွင်းလွှာအသီးသီးတွင်။ ဝာနည်း။ ။အမည်တင်သွင်းလွှာအစောင်တိုင်းတွင်၊ ပါလီမန်အမတ်အနည်းဆုံး သုံးဆယ်၏ကိုယ်ဘိုင်ရေးထိုးသော လက်မှတ်များပါရမည်ဟုအတိအလင်းဆိုသည်။ထိုပြဋ္ဌာန်းချက်တွင်၊ ခြွင်းချက်တစုံတရာလည်းမရှိချေ။သို့ဖြစ်၍၊ မည်သည့်အကြောင်းကြောင့်ပင်ဖြစ်စေ အမည်တင်သွင်းလွှာ တစောင်တွင်၊ ပါလီမန် အမတ်အနည်းဆုံး သုံးဆယ်၏ကိုယ်တိုင်ရေးထိုးသော လက်မှတ်များမပါလျှင်၊ ထိုအမည် တင်သွင်းလွှာသည်၊ ထိုပြဋ္ဌာန်းချက်နှင့် မညီညွတ် ဟူ၍သာလျှင်စီရင်ဆုံးဖြတ်ကြရချေသည်။

သို့အတွက်၊ဦးချစ်လှိုင်၏အမည်တင်သွင်းလွှာနှစ်စောင်လုံး ထိုပြဋ္ဌာန်းချက်နှင့်မညီညွတ်ကြောင်းပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌ၏ဆုံးဖြတ်ချက်သည်၊ဥပဒေအရမှန်ကန်သောဆုံးဖြတ်ချက်ဖြစ်သည်။

ဦးချစ်လှိုင်နှင့်သူ၏ လွှတ်တော်ရွေးနေကြီးက၊ ဦးချစ်လှိုင်၏အမည်တင်လွှာနှစ်စောင်ကို၊ တစောင်ထည်းဟု အသိအမှတ် ပြုဘို့တောင်းဆိုခြင်းသည်၊ ဒေမှန်ဖြစ်ရှိနေသော အခြေအနေနှင့်ဝင်း၊ အက်ဥပဒေ ပုဒ်မ ၄ (၁) (ဂ) ပါပြဋ္ဌာန်းချက်နှင့်ဝင်း၊ အထင်အရှားဆန့်ကျင်၏၊ဒေမှန်အားဖြင့်၊ အမည်တင်သွင်းလွှာနှစ်စောင်သီးခြားရှိနေ၏၊အက်ဥပဒေ ၄ (၁) (ဂ) ကလည်း၊အမည်တင်သွင်းလွှာအသီးသီးတွင် ပါလီမန်အမတ် အနည်းဆုံး သုံးဆယ် ကိုယ်တိုင်ရေးထိုးသော လက်မှတ်များပါရှိရမည်ဆို၏။ ။ထိုပြဋ္ဌာန်းချက်တွင် လက်မှတ်အရေအတွက်ပြည့်မှီအောင်အမည်တင်သွင်းလွှာတစောင်ထက်ပိုသောအမည်တင်သွင်းလွှာများတွင်ပါရှိသောလက်မှတ်များကို၊စုပေါင်း၍ ရေတွက်နိုင်ရန်ခြွင်းချက်ခွင့်ပြုချက်တစုံတရာမရှိချေ။

ဦးချစ်လှိုင်၏လွှတ်တော်ရွေးနေကြီးကိုးကားထားသောပဋမစီရင်ထုံးများမှာ၊ Ambala North Sikh Rural Constituency, 1937 ဖြစ်၏။ ၎င်းအမှုမှာ၊ အမည်တင်သွင်းလွှာတွင် အဆိုသွင်းသူ၏အမည်၊ ဓဓာရင်းတွင်ပါသောဆမ္မဒိဋိဇံကို ထင်ရှားမဖေါ်ပြမိခြင်းသည် အလွန်သေးငယ်သော ချို့ယွင်းချက်ဖြစ်ကြောင်း။ ၎င်းအတွက် အမည်တင်သွင်းလွှာ မပျက်ကြောင်း ဆုံးဖြတ်ချက်များရှိ၏။ ။ သို့ရာတွင်၎င်းအမှုဌ်ရွေးကောက်ပွဲတာဝန်ခံအရာရှိမှာ၊ အဆိုသွင်းသူ မည်သူဖြစ်ကြောင်း သံသယတစုံတရာမရှိခဲ့ချေ။ (Sen and Poddar's Indian Election Cases, 1935—51, 1 and 13) စီရင်ထုံးသည်၊ ၁၉၄၉ ခုနှစ်၊ နိုင်ငံတော်သမတရွေးကောက်တင်မြှောက်မှုအက်ဥပဒေ ပုဒ်မ ၆ (၃) နှင့်အလားတူသောစီရင်ထုံးများသာဖြစ်သည်။ ပုဒ်မ ၆ (၃) သည်လည်း၊ ပုဒ်မ ၇ (၂) ကိုမလွှမ်းမိုးမယှဉ်နိုင်ချေ။ ပုဒ်မ ၆ (၃) သည်အောက်ပါအတိုင်းဖြစ်သည်။

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ဦးဘဦး နှင့် ဦးချစ်လှိုင်။

"အမည်တင်သွင်းလွှာတွင်အမည်တင်သွင်းခြင်း ခံရသူ၏ အမည်၊ အသက်၊ နေရပ်စသောလိုအပ်ချက်များပြည့်စုံစွာဖေါ်ပြထားခြင်း၊ ယှဉ်တည်းမဟုတ် မှန်ကန်စွာ ဖေါ်ပြထားခြင်းများမရှိစေကာမူအမည်တင်သွင်းခံရသူသည်မည်သူဖြစ်သည်ဟုသေချာစွာသိနိုင်လောက်အောင်အကြောင်းလုံလောက်စွာပါရှိလျှင်၊ထိုအမည်တင်သွင်းလွှာကိုမပယ်ရ။"

ဦးချစ်လှိုင်၏ လွှတ်တော်ရွေးနေကြိုး ကိုးကားသော ဒုတိယစီရင်ထုံးမှာ Punjab Anglo-Indian Constituency (Case No. I), Daobia's Indian Election Cases, Vol. I, p. 247 ဖြစ်သည်။ ၎င်းသည်လည်း ပဌမစီရင်ထုံးနှင့် အလားတူအမည်တင်သွင်းလွှာတွင် မဲစာရင်းပါသော ဆမ္မဒီဝိဇ်၏ အမည်ကို မဖေါ်ပြမိသောအမှု၊ သို့မဖေါ်ပြသည့်အတွက်၊ သက်ဆိုင်ရာ ပုဂ္ဂိုလ်မည်သူဖြစ်ကြောင်း မသိပါဟု တစုံတယောက်ကမှု မကန့်ကွက်သောအမှု ဖြစ်ချေသည် (စာမျက်နှာ ၂၅၄ ကိုကြည့်ပါ) သို့ဖြစ်၍၊ ၎င်းစီရင်ထုံးသည်လည်း အမည်တင်သွင်းလွှာပုံစံကိုရေးထည့်ရာတွင်အသေးအဖဲ့မှုဖြစ်သော ချို့ယွင်းချက်များနှင့်သာ သက်ဆိုင်သောစီရင်ထုံးဖြစ်ချေသည်။

အမည်တင်သွင်းလွှာအသီးသီးတွင်၊ ပါလီမန်အမတ် အနည်းဆုံးသုံးဆယ်ကိုယ်တိုင်ရေးထိုးသော လက်မှတ်များ ပါရှိစေရမည်ဟု ပြဋ္ဌာန်းထားပါလျက်၊ လက်မှတ်များ ၁၂၊ သို့မဟုတ် ၁၉ သာပါရှိ နေခြင်းသည်၊ အသေးအဖဲ့ချို့ယွင်းချက်မဟုတ်ချေ။ ထိုချို့ယွင်းချက်သည် အဆိုပါစီရင်ထုံးများ အောက်တွင်သော် ၎င်း၊ အက်ဥပဒေပုဒ်မ ၆ (၃) အောက်တွင်သော်၎င်း၊ ကျရောက်နိုင်သောချို့ယွင်းချက်မျိုးမဟုတ်ချေ။ အက်ဥပဒေပုဒ်မ ၄ (၁၁) (ဂ) ကာ "အမည်တင်သွင်းလွှာအသီးသီးတွင်" ဟု ဆိုသဖြင့်အမည်တင်သွင်းလွှာနှစ်စောင်တွင်မဖြစ်နိုင်၊ စင်စစ်အားဖြင့်မူကား၊ အမည်တင်သွင်းလွှာနှစ်စောင်ကို၊ တစောင်ထည်းဟုအမှတ်ပြုပြီး၊ ၎င်းတို့တွင် ပါလီမန် အမတ်များကိုယ်တိုင် ရေးထိုးကြသော လက်မှတ်များကို၊ တစောင်ထည်းတွင် ထိုးကြသောလက်မှတ်များဖြစ်ကြလေဟန် စီရင်ဆုံးဖြတ်လျှင် "အမည်တင်သွင်းလွှာ အသီးသီးတွင်၊ သုံးဆယ်အောက်မနည်းသော ပါလီမန်အမတ်များ၏ကိုယ်တိုင် ရေးထိုးသောလက်မှတ်များ ပါရှိစေရမည်" ဟူသော ဥပဒေပြဋ္ဌာန်းချက်ကို၊ လျှော့စားခြင်း၊ ဖေါက်ဖျက်ခြင်းသာဖြစ်လိမ့်မည်။

ထိုအက်ဥပဒေ ပုဒ်မ ၇ (၂) မှာလည်း၊ အောက်ပါအတိုင်းဖြစ်သည်။

"(၂) အရွေးခံသူ၏အမည်၊ အသက်၊ နေရပ်စသည့်လိုအပ်ချက်များသည်၊ အမည်တင်သွင်းလွှာတွင် ပြည့်စုံသည်၊ မပြည့်စုံသည်၊ မှန်ကန်သည်၊ မမှန်ကန်သည်နှင့်ပတ်သက်၍ ပေါ်ပေါက်သောပြဿနာများကိုလူမျိုးစုလွှတ်တော် နာယက ကသော်၎င်း၊ထိုနာယကမရှိ

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ဦးဘဦး နှင့် ဦးချစ်လှိုင်။

လျှင် ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌကသော်၎င်း၊ ဆုံးဖြတ်ချိုလိုအင်ချက်များ မပြည့်စုံဟုသဘော ရရှိလျှင်၊ ထိုအမည်တင်သွင်းလွှာကိုပယ်နိုင်သည်။''

သို့ဖြစ်၍၊ ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌက၊ ဦးချစ်လှိုင်၏ အမည်တင်သွင်းလွှာများမှာ အသိုးသီး ပါလီမန်အမတ်အနည်းဆုံး သုံးဆယ်ကိုယ်တိုင်ရေးထိုးသော လက်မှတ်များမပါ၍၊ ထိုအက်ဥပဒေ ပုဒ်မ ၄ (၁) (ဂ) အရ လိုအပ်ချက်များ မပြည့်စုံဟုဆုံးဖြတ်ပြီး၊ ထိုအလွှာများကို ပယ်လိုက်ခြင်းသည် ဥပဒေနှင့်ညီညွတ်သည်။

ဦးချစ်လှိုင်၏ လွှတ်တော်ရွေးနေကြိုးက၊ ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌသည်၊ အက်ဥပဒေပုဒ်မ ၇ (၂) အရ၊ ဦးချစ်လှိုင်၏ အမည်တင်သွင်းလွှာများကို မပယ်မီ ဘာကြောင့် ဦးချစ်လှိုင်ကို အမည်တင်သွင်းသော အမတ်အားလုံး အမည်တင်သွင်းလွှာ ပုံစံတခုထည်းတွင် လက်မှတ်မထိုးနိုင်ကြကြောင်း၊ သူတို့၏ရည်ရွယ်ချက်မည်သို့ဖြစ်ကြောင်း၊ စစ်ဆေးစုံစမ်းခဲ့သင့်သည်ဟုဆိုရာ၊ မည်သည့်အကြောင်းကြောင့်ပင်ဖြစ်စေ၊ သူတို့၏ ရည်ရွယ်ချက်သည် မည်သို့ပင်ဖြစ်စေ၊ အမည်တင်သွင်းလွှာတစောင်တွင် အမတ်များကိုယ်တိုင် ရေးထိုးသောလက်မှတ် သုံးဆယ်မပါလျှင်၊ ဥပဒေနှင့်မကိုက်ညီဟူ၍သာ ဆုံးဖြတ်ရမည်ဖြစ်သောကြောင့်၊ ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌသည် ထိုအချက်များကိုစစ်ဆေးစုံစမ်းရန်မလိုခဲ့ချေ။

ထိုမှတပါး ဦးချစ်လှိုင်၏ လွှတ်တော်ရွေးနေကြိုးက၊ ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌသည်၊ ဦးချစ်လှိုင်အား အမည်တင်သွင်းလွှာကို ပြင်ခွင့်ပေးခဲ့သင့်သည်ဟုဆိုရာ၊ ပြင်ခွင့်ပေးပါမည်အကြောင်း ဦးချစ်လှိုင်ကိုယ်တိုင်ကလည်း မတောင်းဆိုခဲ့ချေ။ တောင်းခဲ့လျှင်လည်း အက်ဥပဒေမှာ ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌကပြင်ခွင့်ပေးနိုင်ရန်၊ ပြဋ္ဌာန်းချက်တစုံတရာမရှိချေ။

ဦးချစ်လှိုင်၏လွှတ်တော်ရွေးနေကြိုးက ဦးချစ်လှိုင်၏အမည်တင်သွင်းလွှာကို ပယ်လျှင်း၊ ပါလီမန်အမတ်များ၏လွတ်လပ်စွာနိုင်ငံတော်သမတ ရွေးချယ်နိုင်ခွင့်ကို ထိခိုက်မည်ဟုဆို၏။ သို့ရာတွင် ဤရုံးတော်သည် ပါလီမန်က ပြဋ္ဌာန်း၍ထားသော အက်ဥပဒေအတိုင်းသာလျှင် ပြဿနာများကို ဖြေဆိုရ၏။ သို့ဖြေဆိုခြင်းသည် လည်းပါလီမန်ကို စင်စစ်ကောန် အမှန်လေးစားခြင်းပင် ဖြစ်၏။ ပြည်ထောင်စုမြန်မာနိုင်ငံတော်၏ ကျေးဇူးသမ္မာတော်ကို တာဝန်ဝတ္တရားအတိုင်း ဂစာင့်သိရိုသေခြင်းပင်ဖြစ်၏။

SUPREME COURT.

U KYAW U (*a*) MYOCHIT KYAW U AND OTHERS (APPLICANTS)

v.

BUREAU OF SPECIAL INVESTIGATION AND ANOTHER (RESPONDENTS).*

† S.C. 1952

Mar. 21

Direction in the nature of habeas corpus—*Arrest under s. 7 (2-A) of the Public Property Protection Act, 1947—Detention for six months under s. 7 (3) and (5) of the Act—Alternative ground of suspicion.*

In the present case the arresting officer has stated in his order—

"Whereas I have reason to suspect and do in fact suspect that . . . has committed and/or is committing a prejudicial act".

Held: The mere fact that the order is couched in alternative is not sufficient to vitiate it when there is a sworn affidavit of the officer concerned stating that he suspected the detenu of having committed and of committing prejudicial acts and that he merely failed to strike off the word "or".

Vimlabai Deshpande, A.I.R. (1945) Nag. 9, distinguished.

Where the arresting officer has placed materials on which he has acted (in compliance with the decisions of the Supreme Court) and materials so placed show sufficient ground for suspicion, the arrest cannot be challenged.

The law does not require that the arresting officer is *to be satisfied*. Suspicion of the arresting officer, that the detenu has committed or is committing a prejudicial act, is sufficient.

In an application for direction in the nature of *habeas corpus* the Supreme Court cannot go into the pleas of the detenu as a criminal court can do when trying the detenu for prejudicial acts.

The Supreme Court will not interfere with the order of detention in any way, not even by granting bail, when the arresting officer has sufficient reason to suspect the detenu of having committed prejudicial act.

Kin Ma Ma v. *The Chairman, Public Property Protection Board and two* [1948] B.L.R. 574; *Tinza Maw Naing* v. *The Commissioner of Police, Rangoon and one*, (1950) B.L.R. (S.C.) 17; *Daw Khin Tee* v. *U Chan Tha and one*, (1949) B.L.R. (S.C.) 193, referred to.

M. M. Rafi and *Sein Tun* } for the applicants.

Chan Tun Aung, Assistant Attorney-General for the respondents.

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* Criminal Misc. Application Nos. 67, 68, 71, 72, 92 and 93 of 1952.

† *Present:* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and U THAUNG SEIN, J.

S.C. 1952

U KYAW U (a) MYOCHIT KYAW U AND OTHERS v. BUREAU OF SPECIAL INVESTIGATION AND ANOTHER.

The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—Criminal Miscellaneous Application Nos. 67, 68, 71, 72, 92 and 93 of 1952 have been heard together as the facts are more or less similar and the questions of law involved therein are the same.

The detenues in all these cases were arrested in or about the last week of January, 1952, under section 7 (2-A) of the Public Property Protection Act, 1947; and the President of the Union of Burma directed their detention for six months under section 7 (3) and (5) of the Act.

The said orders of the President were withdrawn and all the detenues were released on the 18th February, 1952, *i.e.*, during the pendency in this Court of their applications for writs of *habeas corpus* in respect thereof.

However, four of the detenues were rearrested on the same day and the remaining two were rearrested about a week later under section 7 (2) of the Act; and the President has by orders, dated the 28th February 1952, under section 7 (3) and (5) of the Act directed their detention for a period not exceeding four months for the purposes of investigation as he is satisfied that they have committed prejudicial acts.

The present applications are for *habeas corpus* in respect of the subsequent arrests and the subsequent orders of detention.

Relying on the authority of *Vimlabai Deshpande* (1) the learned Advocates for the detenues have tried to make capital of the arresting officer having stated in his orders under section 7 (2) of the Act "Whereas I . . . have reason to suspect and do in fact suspect

(1) A. I. R. (1945) Nag. 9.

that . . . has committed and/or is committing a prejudicial act". However, that was a case in which the order of detention, couched in alternative terms only, was not supported by any affidavit of the arresting officer at all. In the present cases the arresting officer has filed affidavits from which it is quite clear that he suspected them *inter alia* of having committed prejudicial acts and that he has merely failed to strike off the word " or " in the printed forms.

The learned Advocates for the detenues have also contended that the arresting officer had no reasonable ground to suspect them of having committed prejudicial acts. However, the arresting officer has placed the facts and materials on which he has acted before this Court by affidavits in compliance with the ruling in *Kin Ma Ma* v. *The Chairman, Public Property Protection Board and two* (1); and we are satisfied that he has sufficient reason to suspect them as aforesaid and to make investigation against them.

Their learned Advocates have invited our attention to the distinction between reasonable satisfaction and apprehension born of vague anticipation which this Court has pointed out in *Tinza Maw Naing* v. *The Commissioner of Police, Rangoon and one* (2).

However, section 7 (2) provides:

" Any officer authorized in this behalf by general or special order by the President of the Union may arrest without warrant any person whom he suspects of having committed or of committing any prejudicial act."

It does not require the arresting officer to be satisfied; and in the present cases the suspicion of the arresting officer is not mere apprehension born of vague anticipation. It is in respect of past prejudicial

(1) (1948) B.L.R. 574. (2) (1950) B.L.R. (S.C.) 17.

S.C. 1952

U KYAW U (a) MYOCHIT KYAW U AND OTHERS v. BUREAU OF SPECIAL INVESTIGATION AND ANOTHER.

acts which can properly form the subject-matter of investigation.

It has been suggested that the subsequent arrests and orders of detention for investigation could not have been made in good faith since the first arrests and detentions were under section 7 (2-A), *i.e.*, for prevention of future prejudicial acts and not for investigation of past prejudicial acts. However, they were expressly stated to have been on account of the detenues having committed and/or of committing or being about to commit prejudicial acts. The allegations that they had committed prejudicial acts were there from the very beginning and the mere fact that the officer arrested them first only for the purpose of prevention cannot preclude further action on his part by way of arresting them for investigation into past prejudicial acts.

The prejudicial acts are those of smuggling rice into Pakistan ; and some of the detenues have pleaded *inter alia* that Pakistan was a surplus country to which rice could not be exported profitably, that it was impossible to smuggle rice into Pakistan on account of the anti-smuggling squad, that all rice produced in the area could be accounted for without leaving any room for smuggling and that rice could not have been smuggled through a particular creek as alleged. However, we cannot at this stage and for the purpose of these applications go into these pleas as if we were trying the detenues for the prejudicial acts. The cases are still at the stage of investigation and the pleas can be taken in their defence if and when they are sent up for trial.

Their learned Advocates have urged that, in the case of our holding that there are grounds for suspicion and investigation, they may be released on bail with such restrictions we may think fit and proper.

However, we cannot interfere with orders of detention in any way—not even by granting bail—after finding, as we do, that the arresting officer had sufficient reason to suspect them of having committed prejudicial acts and to make investigations against them. *Daw Khin Tee* v. *U Chan Tha and one* (1), which has been cited by the learned Advocates, was a case in which this Court held that it had power in proper cases to grant bail to persons in custody or under detention pending the hearing of their applications for directions in the nature of *habeas corpus*; and the question of granting bail pending the hearing of the applications for *habeas corpus* does not arise as we have already heard them in full and are disposing of them on the merits by this very order.

All of the six applications are dismissed.

(1) (1949) B.L.R. (S.C.) 193.

SUPREME COURT.

†S.C. 1952

May 30.

DAW KYWE (APPLICANT)

v.

THE DEPUTY COMMISSIONER, PEGU AND ANOTHER (RESPONDENTS).*

Direction in the nature of habeas corpus—*Order 19, Rule 1, Supreme Court Rules, 1948—Public Order Preservation Act—Detention under—Commission of offence of High Treason.—*

Held : That Order 19, Rule 1 provides that an application for direction in the nature of a writ for *habeas corpus* shall be made by the presentation of a petition duly verified by an affidavit by the person restrained and the application should contain a statement that it is made at his instance and that it should also set out the nature of the restraint ; when the application is made by some other person it should state that the person restrained is unable to make the affidavit and the application is made at his instance.

Offences against the State are prejudicial to public safety and maintenance of public order. When a person is detained under s. 5-*A* (*1*) (*b*) of Public Order Preservation Act, the real test is whether the Deputy Commissioner could on materials before him, have been satisfied that it was necessary to detain the person concerned to prevent him from acting in any manner prejudicial to the public safety and the maintenance of public order. The mere fact that the materials also show that the person detained could and might also be prosecuted for high treason, would not deprive the Deputy Commissioner of his power to take preventive action under s. 5-*A* (*1*) (*b*) of the Act.

A person who has committed the offence of high treason, might be detained to prevent him from committing further offences against the State.

Ma Kyin Hnin v. *The Commissioner of Police, Rangoon and another*, (1948) B.L.R. 777; *U Kyu* v. *The Commissioner of Police, Rangoon*, (1949) B.L.R. (S.C.) 18, distinguished.

Tun Maung for the applicant.

Kyaw (Government Advocate) for the respondents.

The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—This application for a writ in the nature of *habeas corpus* is not in order.

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* Criminal Misc. Application No. 107 of 1952.

† *Present :* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE MYINT THEIN and U BO GYI, J.

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DAW KYWE v. THE DEPUTY COMMISSIONER, PEGU AND ANOTHER.

Order 19, Rule 1 of the Supreme Court Rules, 1948 provides :

"An application for a direction in the nature of a writ of *habeas corpus* shall be made by the presentation of a petition duly verified by affidavit by the person restrained saying that it is made at his instance and setting out the nature of the restraint :

Provided that where the person restrained is unable owing to the restraint to make the affidavit, the application shall be accompained by an affidavit made by some other person to the like effect and shall state that the person restrained is unable to make the affidavit himself."

In spite of the above rule this application has been made, not by the detenu Maung Ye Hla, but by his wife without any affidavit of his. She has not even alleged that the application is made at his instance and that he is unable to make any affidavit.

However, we have heard the application on the merits as the Judge in Chamber has already issued summonses to show cause and the respondents have filed their returns.

The returns show that the detenu was an active member of B.C.P., that in the year 1948 he led B.C.P. insurgents in the looting of Village Defence firearms, and that he has been "serving with" B.C.P. insurgents since then ; and they are supported by the record of proceedings before the Deputy Commissioner.

They also show that police investigation of the cases against the detenue under section 122 of the Penal Code is about to be completed. So the learned Advocate for the applicant has contended on the authority of *Ma Kyin Hnin* v. *The Commissioner of Police, Rangoon and another* (1) and *U Kyu* v. *The Commissioner of Police, Rangoon* (2) that the Public Order (Preservation) Act, 1947, has been misused in connection with an offence under the Penal Code.

(1) (1948) B.L.R. 777. (2) (1949) B.L.R. (S.C.) 18.

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However, the said rulings are easily distinguishable. In *Ma Kyin Hnin*'s case the grounds for detention were merely that the detenu associated with some criminals, that he had been organizing a dacoit gang and that he was suspected to have been the brain behind a particular dacoity ; and in *U Kyu*'s case the only ground for detention was that he acted as an informer (*let-tauk*) in connection with a dacoity. Both were cases relating to offences against property whereas in the present case the offence is against the State, *viz.*, high treason under section 122 of the Penal Code.

Section 5-A (*1*) (*b*) of the Act reads :

"If the Governor is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order it is necessary so to do, the Governor may make an order directing that he be detained."

And it is fairly obvious that offences against the State are prejudicial to the public safety and the maintenance of public order and therefore within the purview of section 5-A (*1*) (*b*), unlike dacoity and other offences against property.

The real test is whether the Deputy Commissioner could, on the materials before him, have been satisfied that it was necessary to detain Maung Ye Hla to prevent him from acting in any manner prejudicial to the public safety and the maintenance of public order; and we are clearly of the opinion that he could have been so satisfied. The mere fact that the materials also show that Maung Ye Hla could and might also be prosecuted for high treason could not deprive him of his power to take preventive action under section 5-A (*1*) (*b*) of the Act at all.

To put it briefly there is no reason why a person, who has committed the offence of high treason, should

not be detained in case of necessity to prevent him from committing further offences against the State, and there is nothing in the Act itself to indicate that such a person cannot be detained thereunder. In fact the very object of the Act will be defeated to a considerable extent if we hold otherwise.

The application is dismissed.

SUPREME COURT.

† S.C. 1952

June 9.

U PO MYA (APPLICANT)

v.

THE DISTRICT AGRICULTURAL COMMITTEE, INSEIN AND ONE (RESPONDENTS).*

Tenancy Disposal Act and Rules—The orders of the District Agricultural Board passed ex parte and allocation of land for future years.

Held: That when the District Agricultural Board proceeded *ex parte* without any reason, the Supreme Court could interfere. The Tenancy Disposal Rules make no provision for allocation of land for future years nor is there any provision which would enable the District Agricultural Board to order the transfer of land by the owner.

Ba Maung for the applicant.

Kyaw (Government Advocate) for the respondent 1.

Thein Han for the respondent 2.

The judgment of the Court was delivered be

MR. JUSTICE MYINT THEIN.—This application concerns a piece of land known as Holding No. 27 in Yezu Kwin No. 526-A, Insein Township measuring 7·42 acres. It is common ground that prior to 1950 this land was worked for successive years by the 2nd respondent U Po Kun as the tenant of a Chettyar.

The affidavits and the depositions of witnesses in the proceedings before the Bwetkyi Village Board leave no room for doubt that as U Po Kun did not pay rent for the successive years that he had worked the the land and as he would not or could not buy the land, it was sold by the Chettyar to the applicant U Po Mya in March 1950.

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* Civil Misc. Application No. 33 of 1952.

† *Present:* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

That year, when U Po Mya being a cultivator himself, was making preparations to till the land, U Po Kun applied to the Village Board for permission to work the same land. The elders prevailed upon U Po Mya to permit U Po Kun to work the land in 1950, and it was agreed that U Po Mya himself would work the land in 1951.

In 1951 when U Po Mya once again made preparations to till the land U Po Kun made his second application to the Village Board. The application was enquired into and by an order dated the 7th *Nayon Lazok* 1313 B.E. (11th June 1951) the Board pointed out that U Po Kun had worked the land in 1950 without paying rent or revenue and that in the past also he had been a consistent defaulter. The Board unanimously rejected U Po Kun's application.

We have perused the records of the proceedings in the District Board and though we cannot find the actual memorandum of appeal, the Diary Order of the 15th June 1951 shows that such an appeal was filed. The proceedings of the Village Board were called for, and without any notice to U Po Mya, the District Board resorted to *ex parte* proceedings and examined U Po Kun and his witnesses. By an order dated 15th September 1951, the District Board decided (*a*) that U Po Mya should work the land for the season 1951, (*b*) that in the event of U Po Kun paying Rs. 700 to U Po Mya in *Taboung* 1313 B.E. (February-March 1952) U Po Mya would have to permit U Po Kun to work the land and (*c*) that if no such payment should be made, U Po Mya would be allowed to continue working the land.

U Po Mya was apparently never informed and was oblivious to what had happened until he received a notice, dated the 25th February 1952 from the District Board informing him that U Po Kun had deposited

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U PO MYA v. THE DISTRICT AGRICULTURAL COMMITTEE, INSEIN AND ONE.

Rs. 700 and requiring U Po Mya to withdraw the same and to transfer the land to U Po Kun. U Po Mya received this notice on the 2nd March and on the 3rd March he intimated that he had no desire to sell the land to U Po Kun.

On the 7th March, under the signature of Thakin Kya Nyun, Secretary of the District Board an order was passed to the effect that as U Po Kun had deposited Rs. 700 on the 3rd March he would be permitted to work the holding in question.

The Petitioner U Po Mya, aggrieved with this order seeks the quashing of the proceedings of the District Board and in our judgment the proceedings must be quashed.

Thakin Tin Mya, Vice-Chairman of the District Board in his affidavit has attempted to justify the order passed on what he considers to be equitable grounds. He also stated that notice of appeal was given to U Po Mya and that though U Po Mya himself was not present his children attended on the days the Board sat to deal with the case. This contention is not borne out by the Diary Orders and in fact the various entries in the proceedings bear out U Po Mya's contention that he was not summoned and that he did not know anything about the matter until he received the notice on the 2nd of March instructing him to withdraw the Rs. 700 purported to have been deposited by U Po Kun.

We can see no justification to allow the orders of the District Board to stand. Apart from the *ex parte* nature of the proceedings which by itself is a ground for interference by this Court, two points stand out and these are, *firstly*, the Tenancy Disposal Rules, 1951 make no provision for the allocation of land for future years. The order of the District Board was that U Po Mya should work the land for 1951, thereby

rejecting U Po Kun's application. The further order was that under certain conditions U Po Kun should work the land in 1952. *Secondly*, we can find nothing in the rules which would permit a District Board to order the transfer of land by an owner. Nor can such an order be implemented by a Secretary of a District Board.

It is clear that the Insein District Board has assumed powers that are not vested in it and the orders passed by the Board in this case must be considered null and void. We accordingly quash the proceedings of the District Board of Insein with costs ; Advocate's fees seven gold mohurs.

တရားလွှတ်တော်ချုပ်

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ဇွန်လ ၁၆။

ကျဂါး (ခေါ်) ကျန်ဘဟာဒူ (လျှောက်ထားသူ)

နှင့်

ပဲခူးခရိုင် သီးစားချထားရေးအဖွဲ့ဥက္ကဋ္ဌ—အရေးပိုင်မင်းနှင့် တဦး (လျှောက်ထားခံရသူများ) *

၁၉၅၁ ခုနှစ်၊ သီးစားချထားရေးနည်းဥပဒေ ၁၀—ရုံးတော်က အသိအမှတ်ပြုရသော အဓိပ္ပာယ်—သီးထောက်ခပေးရန်ပျက်ကွက်သူ။

ဤရုံးတော်၏အမှုတွဲတွင်ရှိနေသောလျှောက်လွှာနှင့် ထိုလျှောက်လွှာပေါ်တွင်ကျေးရွာသီးစားချထားရေးအဖွဲ့ဝင်များစုံညီ လက်မှတ်ရေးထိုးရှိထားသောအဓိပ္ပာယ်ကို ဤရုံးတော်က အသိအမှတ်ပြုချေမည်။ အမှုတွဲတွင်မပါရှိသော အခြားအဓိပ္ပာယ်ရှိသည်ဆိုသောစကားကို ဤရုံးတော်က လက်ခံဘိုင်ခြင်းဆိုရချေမည်။

သီးထောက်ခကို မည်သည့်နေ့ရက်တွင်ပေးရမည်ဟူ၍ အတိအကျသတ်မှတ်ချက်မရှိ၍၊ သီးစားချထားရန်လျှောက်လွှာတင်နိုင်သေးလျှင်၊ လျှောက်လွှာတင်ပြီး နောက်တနေ့မှ သီးထောက်ခကို ပေးခြင်းသည်၊ နောက်ကျလွန်းသည်ဟူ၍မဆိုနိုင်။ ထို့ပြင်တပါး ကျေးရွာသီးစားချထားရေးအဖွဲ့၏ အဓိပ္ပာယ်မှာလည်း၊ သီးထောက်ခပေးခြင်း နောက်ကျသည်ဟူ၍ အကြောင်းပြချက်မပါရှိချေ။ သို့ဖြစ်သောကြောင့် ခရိုင်သီးစားချထားရေးအဖွဲ့က၊ သီးစားသည် သီးထောက်ခပေးရန်ပျက်ကွက်သူမဟုတ်ကြောင်း၊ နည်းဥပဒေ ၁၀ အရ၊ ထိုမြေကို ဆက်လက်၍လုပ်ကိုင်စွဲရထိုက်သူဖြစ်ကြောင်း ကောက်ယူဆုံးဖြတ်ခြင်းသည် သင့်လျော်မှန်ကန်သည်။

ရွှေနေကြီး မဟာမက်ကာဆင်၊ လျှောက်ထားသူအတွက်။

အစိုးရရွှေနေကြီး ဦးကျော် (၁)၊ လျှောက်ထားခံရသူများအတွက်။

ရုံးတော်၏ စီရင်ချက်ကို နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင်က ချမှတ်သည်။

ပဲခူးခရိုင်၊ ညောင်လေးပင်အနောက်မြို့နယ်၊ ကျားချောင်းတော၊ တောင်ကွင်းနံပါတ် ၆၃ ရှိ၊ ၁၉၅၀-၅၁ ခုနှစ်အတွက် ဦးပိုင်နံပါတ် ၆၁၈၊ မြေချိန် ၁၀ ဧကခန့်ကို သက်ဆိုင်ရာ ကျေးရွာသီးစားချထားရေးကော်မတီက၊ ယခုဤရုံးတော်

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* ၁၉၅၁ ခုနှစ်၊ တရားမ အသေးအဖွဲ့ လျှောက်လွှာအမှတ် ၂၁၅။

နိုင်ငံတော်တရားဝန်ကြီးချုပ်ဦးသိမ်းမောင်၊ တရားဝန်ကြီးဦးမောင်နှင့် တရားဝန်ကြီးဦးမြင့်သိန်းတို့ကြားနာသည်။

၁၉၅၂

ဂုဂါး(ခေါ်)
ဂျန်ဘဟာဒူ
နှင့်
ဝဲခူးခရိုင်
သီးစား ချထား
ရေးအဖွဲ့ ဥက္ကဋ္ဌ၊
အရေးပိုင်မင်း
နှင့် တဦး။

တွင် လျှောက်ထားသူဂုဂါးအား၊ ၁၉၅၁-၅၂ ခုနှစ်အတွက် သီးစားချထား လိုက်ခြင်းကို မကျေနပ်၍၊ ယခုလျှောက်ထားခြင်းခံရသူ အမှတ် ၂၊ မောင်သန်း မောင်က သက်ဆိုင်ရာခရိုင်သီးစားချထားရေးကော်မိတီသို့ အယူခံဝင်ရာ၊ ခရိုင် သီးစားချထားရေးကော်မိတီက ကျေးရွာသီးစားချထားရေးကော်မိတီ၏ အမိန့် ကို ပယ်ဖျက်ပြီးလျှင် ထိုလယ်ကို မောင်သန်းမောင်အား ချထားလိုက်လေသည်။

ယခု ဤရုံးတော်ရှေ့ရှိလျှောက်လွှာသည်၊ ထိုခရိုင်သီးစားချထားရေး ကော်မိ တီ၏အမိန့်ကိုပယ်ဖျက်ရန် အမှုခေါ်စာချုပ်တော်အတွက်၊ ဂုဂါး၏လျှောက်လွှာ ဖြစ်သည်။

ဂုဂါးက ကျေးရွာသီးစားချထားရေးကော်မိတီသည်၊ ထိုမြေကို သူ့အား၊ ၁၉၅၁ ခုနှစ်၊ မေလ ၃ ရက်နေ့ကသီးစားချထားလိုက်ပြီးဖြစ်ကြောင်း၊ သို့အတွက် မောင်သန်းမောင်၏ ၁၉၅၁ ခုနှစ်၊ မေလ ၂၉ ရက်နေ့စွဲပါ ထိုလယ်ကို မိမိ အား သီးစားချထားပါရန် ကျေးရွာသီးစားချထားရေးအဖွဲ့သို့၊ တင်သွင်းသည် ဆိုသော လျှောက်လွှာသည် နောက်ကျကြောင်း။ ထိုအလွှာကို ကျေးရွာသီးစား ချထားရေးအဖွဲ့သည်၊ လက်ခံနိုင်ခွင့် မရှိပြီဖြစ်ကြောင်း အဆိုရှိသည်။ သို့ရာတွင် ကျေးရွာသီးစားချထားရေးအဖွဲ့၏အမှုတွဲတွင်၊ ၁၉၅၁ ခုနှစ်၊ မေလ ၃ ရက်နေ့ မှာ ထိုမြေကို ဂုဂါးအား သီးစားချထားလိုက်ကြောင်း အမိန့်တစုံတရာမရှိချေ။ ထိုအမှုတွဲတွင် ၁၉၅၁ ခုနှစ်၊ မေလ ၂၉ ရက်နေ့စွဲပါ၊ မောင်သန်းမောင်၏ လျှောက်လွှာကား ရှိသည်။ ထိုလျှောက်လွှာပေါ်မှာလည်း၊ ကျေးရွာသီးစား ချထားရေးအဖွဲ့က အောက်ပါအတိုင်း အမိန့်ချမှတ်၍ အဖွဲ့ဝင်လူကြီးများစုံညီ လက်မှတ်ရေးထိုးခဲ့ထားကြသည်။

(၁၃၁၃ ခုနှစ်၊ ဝါခေါင်လဆန်း ၃ ရက်နေ့၊ ကျေးရွာမြေယာချထားရေး အဖွဲ့မှ ဆွေးနွေးဆုံးဖြတ်ကြပြီး၊ ဂုဂါးအား ဇေါ်ပြပါ လယ်မြေ ၉ ဧကကိုချထား လိုက်သည်) ၁၃၁၃ ခုနှစ်၊ ဝါခေါင်လဆန်း ၃ ရက်နေ့သည် ၁၉၅၁ ခုနှစ်၊ ဩဂုတ်လ ၅ ရက်နေ့ပင်ဖြစ်သည်။

အထက်ပါအမိန့်တွင်၊ ၁၉၅၁ ခုနှစ်၊ မေလ ၃ ရက်နေ့ကပင် ထိုမြေကို ဂုဂါးအား သီးစားချထားလိုက်ပြီ ဖြစ်ကြောင်း မပါချေ။ စင်စစ်သော်ကား၊ ထိုအမိန့်သည်၊ ၁၉၅၁ ခုနှစ်၊ မေလ ၃ ရက်နေ့ကပင်၊ ထိုမြေကို ဂုဂါးအား ချထားလိုက်ပြီဖြစ်သည်ဟူသော ဂုဂါး၏အဆိုနှင့်ဆန့်ကျင်သည်။ ထိုမှတပါး အကယ်၍သာ ၁၉၅၁ ခုနှစ်၊ မေလ ၃ ရက်နေ့ကပင် ထိုမြေကို ဂုဂါးအား သီးစားချလိုက်ပြီးဖြစ်ခဲ့ပါလျှင်၊ ကျေးရွာသီးစားချထားရေးအဖွဲ့သည်၊ မောင်သန်း မောင် ၁၉၅၁ ခုနှစ်၊ မေလ ၂၉ ရက်နေ့မှာ တင်သွင်းသောလျှောက်လွှာကို

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ဂျဂါး(ခေါ်) ကျန်ဘဟာဒုနှင့် ဝဲခူးခရိုင် သီးစား ချထားရေးအဖွဲ့ ဥက္ကဋ္ဌ၊ အရေးပိုင်မင်း နှင့် တဦး။

လက်ခံတော့မည်မဟုတ်ချေ။ အကယ်၍လက်ခံပြန်လျှင်လည်း၊ ဂျဂါးအားသီးစား ချထားပြီးဖြစ်ကြောင်း မောင်သန်းမောင်အား ပြောကြားလိုက်မည်ပင် ဖြစ်ချေသည်။

လျှောက်ထားသူအတွက် ပညာရှိလွတ်တော်၌ ရှေနေကြီးက၊ မောင်သန်းမောင်၏ ၁၉၅၁ ခုနှစ်၊ ဇွန်လ ၃ ရက်နေ့စွဲပါ ညောင်လေးပင်မြို့၊ မြို့ပိုင်မင်းထံ တင်သွင်းသောလျှောက်လွှာနှင့် ၁၉၅၁ ခုနှစ်၊ ဇွန်လ ၁၁ ရက်နေ့စွဲပါ ဝဲခူးမြို့၊ အရေးပိုင်မင်းထံ တင်သွင်းသောလျှောက်လွှာများကို ကိုးကား၍ လျှောက်ထားခဲ့သည်။

သို့ရာတွင်၊ ထိုလျှောက်လွှာနှစ်စောင်စလုံး၌ (ကျွန်တော်၏ လုပ်ငှတ်မြေကို ပြန်လည်လုပ်ကိုင်ခွင့် ပြုပါရန်၊ ကျေးရိုး၊ ကျေးရွာ မြေယာချထားရေး အဖွဲ့သို့ လျှောက်ထားသည်ကို မြေယာချထားရေးအဖွဲ့ဥက္ကဋ္ဌသူကြီးက၊ ကျွန်တော်အား ပြန်လည်ချထားခြင်းမပြုတော့ဟုပြောဆိုသဖြင့်၊ ကျွန်တော်အား ပြန်လည်ချထားခွင့် အမိန့်ချမှတ်ပေးပါရန်၊ ဤရုံးတော်သို့ လျှောက်ထားပါသည်) ဟူ၍သာ ပါရှိသည်။ ထိုလျှောက်လွှာများတွင်၊ မောင်သန်းမောင်က ကျေးရွာသီးစားချထားရေးအဖွဲ့သည် ထိုမြေကို၊ ဂျဂါးသို့ချလိုက်ပါပြီဟူ၍ရေးသားဖော်ပြခဲ့သည် မဟုတ်ချေ။ ထိုမှတပါး ကျေးရွာသီးစားချထားရေးအဖွဲ့ဥက္ကဋ္ဌသူကြီး တဦးတည်းကသာ သူ့အား ပြန်လည်ချထားခြင်းမပြုတော့ဟု ပြောလိုက်သဖြင့်၊ သူသည် သူကြီး၏ အထက်က မြို့ပိုင်မင်းနှင့်အရေးပိုင်မင်းအားလျှောက်ထားခဲ့ပုံပေါ်သည်။

လျှောက်ထားသူ၏ ပညာရှိလွတ်တော်ရှေနေကြီးက၊ ခရိုင်သီးစားချထားရေးအဖွဲ့၏ အမှုတွဲတွင်ပါရှိသော၊ ကျေးရွာသီးစားချထားရေးအဖွဲ့၏၊ ၁၉၅၁ ခုနှစ်၊ ဩဂုတ်လ ၅ ရက်နေ့စွဲပါစာကို၊ အားကိုးသေးသည်။ ထိုစာမှာ (၁၉၅၁ ခုနှစ်၊ မေလ ၂၉ ရက်နေ့စွဲနှင့်လျှောက်သည်ဆိုသောလျှောက်လွှာမှာ ယခုမှတွေ့ရသည်။ ကျွန်တော်ထံတွင်၊ မူလကမလျှောက်ဘူးပါ၊ အကယ်၍လျှောက်သည်ဟုယူဆလျှင်လည်း၊ ဂျဂါးအား ၁၉၅၁ ခုနှစ်၊ မေလ ၃ ရက်နေ့ကချပေးပြီး၊ ၂၆ ရက်ကြာမှဖြစ်သဖြင့်၊ ၎င်းလျှောက်လွှာကို စဉ်းစားရန်မလိုပါ) ဟုပါရှိသည်။ သို့ရာတွင်၊ ဤစာသည် အလွန်ထူးဆန်းသောစာဖြစ်သည်။ မောင်သန်းမောင်သည် ၁၉၅၁ ခုနှစ်၊ မေလ ၂၉ ရက်နေ့ကမလျှောက်ခဲ့လျှင် ထိုနေ့စွဲပါ သူ၏ လျှောက်လွှာသည်၊ ကျေးရွာသီးစားချထားရေးအဖွဲ့သို့ ဘယ်အခါက ဘယ်ပုံရောက်လာခဲ့သလဲ။ ဘာကြောင့်ထိုလျှောက်လွှာစာရွက်ပေါ်မှာပင် ၁၉၅၁ ခုနှစ်၊ ဩဂုတ်လ ၅ ရက်နေ့မှာ ကျေးရွာသီးစားချထားရေး အဖွဲ့ဝင်များစုံညီအမိန့်ရေးပြီး အမိန့်ချမှတ်လက်မှတ်ရေးထိုးခဲ့ကြသလဲ။ မောင်သန်းမောင်၏လျှောက်လွှာစာရွက်

ပေါ်တွင်၊ အထက်တွင်ဖေါ်ပြခဲ့သည့်အတိုင်း အမိန့်ချမှတ်ပြီးမှ၊ သီးခြားထိုစာကို ဘာ့ကြောင့်ရေးကြပြန်သလဲ။

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ဂုဂါး(ခေါ်) ဂျန်ဘဟာဒူ နှင့် ပဲခူးခရိုင် သီးစား ချထားရေးအဖွဲ့ဥက္ကဋ္ဌ၊ အရေးပိုင်မင်း နှင့် တဦး။

မည်သို့ပင်ဖြစ်စေ၊ ဤရုံးတော်၏အမှုတွဲတွင်ရှိနေသော မောင်သန်းမောင်၏ ၁၉၅၁ ခုနှစ်၊ မေလ ၂၉ ရက်နေ့စွဲပါလျှောက်လွှာနှင့်၊ ထိုလျှောက်လွှာပေါ်တွင် ကျေးရွာသီးစားချထားရေးအဖွဲ့ဝင်များစုံညီ လက်မှတ်ရေးထိုးခဲ့ထားသော အမိန့်ကို ဤရုံးတော်က အသိအမှတ်ပြုရချေမည်။ အမှုတွဲတွင် မပါရှိသော ၁၉၅၁ ခုနှစ်၊ မေလ ၃ ရက်နေ့စွဲပါ အမိန့်ရှိသည်ဆိုသောစကားကို၊ အထက်ပါ အကြောင်းအချက်များကြောင့်၊ ဤရုံးတော်က လက်ခံဘို့ငြင်းဆိုရချေမည်။ ဂုဂါးသည် မြေပိုင်ရှင်တဦးဖြစ်သည့်ပြင်၊ ၁၉၄၉-၅၀ ခုနှစ်ကလည်း အချင်းဖြစ်မြေကို အဓိကအသက်မွေးဝမ်းကျောင်းအဖြစ် လုပ်ကိုင်ခဲ့သူဖြစ်သည့်အပြင်၊ ၁၉၅၀-၅၁ ခုနှစ်ကလည်း ကိုယ်တိုင် ထွန်ယက်လုပ်ကိုင်ပြီးမှ လက်လွှတ်ခဲ့ရသူဖြစ်သည့်အတိုင်း၊ ဂုဂါးအား ၁၉၅၁ ခုနှစ်၊ ဧပြီလ ၂၃ ရက်နေ့ အထူးအမိန့်ပြန်တမ်း ပုဒ်မ ၁၁ (ခ) အရ၊ ၎င်းအားချထားနိုင်သည် ဟု ကျေးရွာသီးစားချထားရေးအဖွဲ့၏ ၁၉၅၁ ခုနှစ်၊ ဩဂုတ်လ ၅ ရက်နေ့စွဲပါစာတွင်ပါရှိသည်။ သို့ရာတွင် စင်စစ်အားဖြင့်၊ အချင်းဖြစ်မြေသည် ကျောက်တံခါးဂရုံလီမိတက်ပိုင် မြေဖြစ်သည်။ ဂုဂါးသည်၊ ကျောက်တံခါးဂရုံမှတဆင့် ခံယူရှိသီးစားချခဲ့သော သူမျှသာဖြစ်သည်။ သူ၏ကျမ်းကျိန်စာအရပင်လျှင်၊ အချင်းဖြစ်မြေကို ၁၉၄၆-၄၇၊ ၁၉၄၇-၄၈၊ ၁၉၄၈-၄၉၊ ၁၉၄၉-၅၀ ခုနှစ်များတွင် မောင်သန်းမောင်သည် သီးစားအဖြစ်နှင့် လုပ်ခဲ့သည်။ ၁၉၅၀-၅၁ ခုနှစ်မှာလည်း၊ ကျေးရွာသီးစားချထားရေးအဖွဲ့က အချင်းဖြစ်မြေကို မောင်သန်းမောင်အားပင်လျှင် သီးစားချခဲ့သည်။ ထိုအခါ ဂုဂါးကထိုမြေကိုဝင်ရောက်လုပ်ကိုင်သည့်အတွက် မောင်သန်းမောင်က ဂုဂါးကို ရာဇဝတ်မှုပင်စွဲဆိုခဲ့သေးသည်။ ခရိုင်သီးစားချထားရေးအဖွဲ့ကလည်း ထိုမြေကို ၁၉၅၀-၅၁ ခုနှစ်အတွက်၊ မောင်သန်းမောင်အား သီးစားချခြင်းကို အတည်ပြုပြီး၊ သူ့အားငွေ ၁၅၀ လျော်ကြေးငွေပေးစေရန်သာ အမိန့်ချမှတ်ခဲ့လေသည်။ သို့အမိန့် ချမှတ်ခဲ့သည့်အတိုင်း၊ မောင်သန်းမောင်သည် လျော်ကြေးငွေ ၁၅၀ နှင့်သီးထောက်ခငွေ ၆၇ ကို ကိုပေးခဲ့ပြီးဖြစ်သည်။ သို့အတွက် ၁၉၅၁-၅၂ ခုနှစ် အတွင်းမှာလည်း၊ ခရိုင်သီးစားချထားရေးအဖွဲ့က၊ ကျေးရွာသီးစားချထားရေးအဖွဲ့၏အမိန့်ကိုပယ်ဖျက်ပြီး၊ ထိုမြေကို မောင်သန်းမောင်အား သီးစားချလိုက်ခြင်းဖြစ်သည်။ အထက်ပါအကျိုးအကြောင်းအဖြစ်အပျက်များကို ထောက်သောအားဖြင့်၊ ကျေးရွာသီးစားချထားရေး အဖွဲ့က [အမိန့် ပြန်တမ်း ပုဒ်မ ၁၁ (ခ) အရ ဂုဂါးအား ချထားနိုင်သည်] ဟု ယူဆခြင်းသည် မှားယွင်း

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ကျဝါး(ခေါ်) ကျန်ဘာဟာဒူ နှင့် ပဲခူးခရိုင် သီးစား ချထား ရေးအဖွဲ့ ဥက္ကဋ္ဌ၊ အရေးပိုင်မင်း နှင့် တဦး။

သည်။ ဤအချာ၌၊ အမိန့်ပြန်တမ်း ပုဒ်မ ၁၁ (ခ) ဆိုသည်မှာ၊ ၁၉၅၁ ခုနှစ်၊ သီးစားချထားရေး နည်းဥပဒေ ၁၁ (၁) (ခ) ကို ဆိုလိုသည်ဟု ဤရုံးတော်က ယူဆသည်။

လျှောက်ထားသူ၏ပညာရှိလွှတ်တော်ရွေးနေကြီးက၊ မောင်သန်းမောင်သည် လယ်မြေကို မိမိအားသီးစားချရန်၊ ကျေးရွာသီးစားချထားရေး ကော်မိတီအား၊ ၁၉၅၁ ခုနှစ်၊ မေလ ၂၉ ရက်နေ့တွင်လျှောက်ထားပြီးသီးထောက်ခကိုနောက်တနေ့ (၁၉၅၁ ခုနှစ်၊ မေလ ၃၀ ရက်နေ့) မှာမှ ပေးသောကြောင့်၊ မောင်သန်းမောင်သည် ၁၉၅၁ ခုနှစ်၊ သီးစားချထားရေး နည်းဥပဒေ ၁၀ (ခ) အရ ပျက်ကွက်သူဖြစ်ကြောင်း။ သို့အတွက်မောင်သန်းမောင်သည် ထိုမြေကိုဆက်လက်၍ စိုက်ပျိုးလုပ်ကိုင်ခွင့် မရနိုင်ပြီဖြစ်ကြောင်း လျှောက်ထားသည်။ သို့ရာတွင် သီးထောက်ခကို မည်သည့်နေ့ရက်တွင် ပေးရမည်ဟူ၍ အတိအကျသတ်မှတ်၍ ထားခြင်းရှိသည်ဟူ၍၊ လျှောက်ထားသူ၏ပညာရှိလွှတ်တော်ရွေးနေကြီးက မဆို နိုင်ချေ။ ၁၉၅၁ ခုနှစ်၊ မေလ ၂၉ ရက်နေ့မှ သီးစားချထားရန် လျှောက်လွှာတင်သွင်း နိုင်သေးလျှင်၊ နောက်တနေ့မှာ သီးထောက်ခကို ပေးခြင်းသည်၊ နောက်ကျလွန်းသည်ဟူ၍မဆိုနိုင်၊ ထိုမှတပါး ကျေးရွာသီးစားချထားရေးအဖွဲ့၏၊ ၁၉၅၁ ခုနှစ်၊ မတ်လ ၅ ရက်နေ့စွဲပါ အမိန့်မှာလည်း၊ သီးထောက်ခပေးခြင်း နောက်ကျသည်ဟူ၍ အကြောင်းပြချက်မပါရှိချေ။ သို့ဖြစ်သောကြောင့် ခရိုင်သီးစား ချထားရေး အဖွဲ့က၊ မောင်သန်းမောင်သည် သီးထောက်ခပေးရန် ပျက်ကွက်သူမဟုတ်ကြောင်း၊ နည်းဥပဒေ ၁၀ အရ၊ ထိုမြေကိုဆက်လက်၍လုပ်ကိုင်ခွင့်ရထိုက်သူဖြစ်ကြောင်း ကောက်ယူခံုးဖြတ်ခြင်းသည် သင့်လျော်မှန်ကန်သည်။

ကျဝါး၏လျှောက်လွှာကို စရိတ်နှင့်တကွ ပလပ်လိုက်သည်။ ရှေ့နေခအတွက် ငွေ ၁၀၀ ကျခံရမည်။

SUPREME COURT.

† S.C. 1952

July 2.

J. KIMATRAI & Co. (APPLICANTS)

v.

MINISTER FOR FINANCE AND REVENUE AND ANOTHER (RESPONDENTS).*

Direction in the nature of certiorari—Burma Customs Tariff Act, Schedule I, Item 119—Preferential rate for goods from United Kingdom, British Colonies, India or Pakistan—Goods imported from Singapore.

Held: That under s. 3 of the Burma Customs Tariff Act cotton fabrics manufactured in the United Kingdom, British Colonies, India or Pakistan are to be taxed at a preferential rate. Rule 3 provides that goods manufactured in the United Kingdom or British Colonies will be taxed at preferential rates only when imported direct from the United Kingdom or Colonies. The rule was made when Burma was part of the Indian Empire. After separation and/or independence of Burma no rule similar to Rule 3 was made regarding goods of Indian origin. According to ss. 2 and 3 of Burma Customs Tariff Act when goods are shown to have been the produce or manufacture of India, the importer becomes entitled to avail himself of the preferential rate of duty even though it be not imported directly from India.

Ba Win and *Kyaw Min* } for the applicants.

Chan Tun Aung, Assistant Attorney-General, and *Ba Sein* } for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The applicant Company imported into the Port of Rangoon on the 2nd August 1950 thirty-one bales of cotton fabrics, admittedly of Indian produce and manufacture. The goods, however, were not imported direct from India but were brought into Burma from Singapore where apparently they had been lying for some time previously.

* Civil Misc. Application No. 38 of 1952.

† *Present:* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

S.C. 1952

J. KIMATRAI & CO. v. MINISTER FOR FINANCE AND REVENUE AND ANOTHER.

Under the First Schedule to the Burma Customs Tariff Act, preferential rates of duty are prescribed in respect of cotton fabrics manufactured in the United Kingdom, British Colonies, India or Pakistan. Item 119 of the First Schedule prescribes 50 per cent *ad valorem* as the standard rate of duty in respect of cotton fabrics and 10 per cent in respect of such goods when they are "the produce and manufacture of India or Pakistan."

The applicant Company, on the strength of such entries in the Schedule, claims to pay only the preferential rate of 10 per cent *ad valorem* on the goods imported by it. The claim was rejected by the Collector of Customs and that rejection was upheld by the Financial Commissioner (Commerce) and the Ministry of Finance and Revenue.

The denial to the applicant Company of the preferential rate of duty was sought to be justified on established practice since 1941 whereby preferential treatment had been accorded only to goods of Indian produce or manufacture if such goods were "sent direct from India". This practice appears to have arisen from the fact that rules under section 3 of the Burma Customs Tariff Act provided that in case of goods produced or manufactured in the United Kingdom or the British Colonies and for which preferential rates of duty are prescribed in the First Schedule to the Act, such rates are valid only if the goods are imported direct from the United Kingdom or the British Colonies. It might appear to have been thought reasonable to treat goods produced or manufactured in India in the same way.

Unfortunately, however, for the Revenue authorities, section 3 of the Act makes no reference whatsoever to India or Pakistan, obviously because Burma was part of the Indian Empire at the time the

Act was enacted. It does not appear to have occurred to anyone, after Burma had become separated from India or after Burma had become independent, to amend this section. The rules under section 3 therefore cannot in any way operate in respect of goods of Indian origin.

That being so, section 2, read together with the relevant entry in the First Schedule, must be our sole guide and under these provisions once the goods are shown to have been the produce or manufacture of India the importer becomes entitled to avail himself of the preferential rate of duty wherever it is prescribed. The learned Assistant Attorney-General concedes that it must be so.

In the result the proceedings of the Minister of Finance and Revenue, affirming the proceedings of the Financial Commissioner (Commerce) and of the Collector of Customs, Rangoon, assessing the applicant Company at the standard rate of duty in respect of 31 bales of cotton fabrics imported by it on the 2nd of August 1950 from Singapore by S.S. "Taiksang", must be and are hereby quashed. The applicant Company is entitled to costs. Advocate's fees ten gold mohurs.

SUPREME COURT.

†S.C. 1952

July 4.

U PO NGE (APPELLANT)

v.

V.R.A. VEERAPPA CHETTYAR (RESPONDENT). *

Transfer of Property Act—Mortgage by deposit of title deeds—S. 58 of the Transfer of Property Act—What documents must be deposited—Parties to mortgage suit—Title of mortgagor and mortgagee sold in execution of the decree purchased by a third party—Suit by third party—Whether the original mortgagors are necessary parties.

Held: That tax-tickets and "counterfoils for alience" issued by a Headman under s. 22-A of Land and Revenue Act are not such documents of title the deposit of which would create a mortgage by deposit of title deeds.

Ma Khin Kyaw v. *R. C. Dey*, I.L.R. 4 Ran. 96; *V.P.R.V. Chokalingam Chetty* v. *Sethai Acha and others*, I.L.R. 6 Ran. 29; *Ma Joo Tean and another* v. *Ma Thein Nyun and others*, I.L.R. 10 Ran. 403; *V.E.R.M.A.R. Firm* v. *Ma Joo Tean*, I.L.R. 11 Ran. 239; *Maung Shwe Lon* v. *Maung Shwe An*, P.J.L.B. 68; *Maung Lu Gale* v. *Maung Kyaw Yan*, P.J.L.B. 158; *Maung Kin Lay* v. *Maung Tun Thaing*, 5 Ran. 679; *Punjab Sind Bank* v. *Ganesh Das Nathu Rane*, I.L.R. 16 Lah. 1113; *Jowala Das Govind Ram* v. *Thakar Das*, A.I.R. (1936) Lah. 251, followed.

K.L.C.T. Chidambaram Firm v. *Aziz Meah*, (1938) Ran. 316, distinguished.

The counterfoil for alience is not a document of title. It is a mere record of a report of alienation.

A, a mortgagee, filed a suit against B, a mortgagor, without joining C a person who had bought the same lands at a Court auction arising out of execution proceedings in respect of a money decree against the mortgagor B.

The mortgage suit was decreed and the right title and interest of the mortgagor were sold to D.

A subsequent suit by D against C alone is competent since the original mortgagee A or the mortgagor B are not necessary parties as they had no more interest either in the mortgage security or in the equity of redemption.

Po Aye for the appellant.

A. H. Paul for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The facts of the case are briefly these. One Daw Thin Mya who was involved in various financial dealings was sued by

* Civil Appeal No. 2 of 1950 against the decree of the High Court of Rangoon in Special Appeal No. 2 of 1949.

† *Present:* MR. JUSTICE MYINT THEIN, U ON PE and U AUNG THA GYAW, JJ.

Veerappa Chettyar, the respondent in this appeal, in C.R. No. 412 of 1936 in the High Court of Judicature at Rangoon and in execution of the decree, in Civil Execution No. 4 of 1938 of the Assistant District Court of Hanthawaddy, he caused certain properties to be sold. He himself purchased four holdings of land, three of which being the subject-matter of the suit from which the present appeal has arisen. The three holdings are described as holdings Nos. 9, 30 and 46 of 1933-34 or alternatively as Nos. 6, 12 and 28 of 1915-16. The sale to the Chettyar is evidenced by Exhibit III which is a Sale Certificate issued by the Court.

Daw Thin Mya was sued in C.R. No. 59 of 1939 of the late High Court by one U Ba Tin in respect of an equitable mortgage alleged to have been created by the deposit of certain title deeds relating to a house known as No. 109 on the Insein Road in Kamayut and the three holdings Nos. 9, 30 and 46. A preliminary decree was passed, *vide* Exhibit V.

In execution, the sale of these properties was sought and though the Chettyar was not impleaded in the suit, notice was served on him, presumably on the ground that he had bought them in another proceedings and was in possession of the land. Subject to the rights of the Chettyar the three holdings were purchased at the Court auction by the present appellant U Po Nge. The house was bought by the decree-holder U Ba Tin.

As was to be expected litigation, civil and criminal between U Po Nge and the Chettyar arose out of the situation created, culminating in a mortgage suit out of which this appeal has arisen brought by U Po Nge against (1) Daw Thin Mya, (2) U Ba Tin, and (3) Veerappa Chettyar. The suit was first instituted in the High Court in 1940 but the plaint was later returned

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for presentation to the proper Court. The war years intervened and it was not till 1947 that the plaint was presented to the Court of the Second Assistant Judge, Hanthawaddy, and registered as Civil Suit No. 17 of 1947. Daw Thin Mya and U Ba Tin did not contest the suit but the Chettyar did and took the stand that no equitable mortgage was created, the documents deposited not being documents of title as required under section 58 (*f*) of the Transfer of Property Act. The suit, however, was decreed against all the three defendants.

The case was taken to the District Court of Hanthawaddy by the Chettyar on appeal with U Po Nge as the sole respondent. U Po Nge in that Court contended that the appeal was incompetent because of the failure on the part of the appellant to join Daw Thin Mya and U Ba Tin. U Po Nge has kept up this contention throughout the various Courts that this case has passed through and his learned counsel has repeated it before us, that being his first ground of appeal.

To us, the fact that Daw Thin Mya and U Ba Tin took no interest in the proceedings is understandable. The attitude that Daw Thin Mya presumably took was that the decree against her had been satisfied, she had lost her properties and the mortgage had been exhausted. U Ba Tin's attitude was that he had obtained satisfaction and had bought merely the house with which U Po Nge was not concerned. Neither Daw Thin Mya nor U Ba Tin had any more interest "either in the mortgage security or in the right of redemption" to quote the provisions of Order 34, Rule 1 of the Civil Procedure Code. This rule makes it clear that they were not necessary parties even in the original suit. A suit against the Chettyar would have been proper and sufficient since the plaintiff as the purchaser of the

interests of the mortgagor and the mortgagee was entitled to sue on the mortgage and the mere fact that the Chettyar had not been impleaded in C.R. No. 59 of 1939 could not extinguish the rights of U Po Nge to sue the Chettyar: vide *Ma Khin Kyaw* v. *R. C. Dey* (1).

Appellant's learned counsel has referred us to *V.P.R.V. Chokalingam Chetty* v. *Sethai Acha and others* (2) where a plantiff had made a purchase by way of speculation, of property which had belonged to an insolvent. He sought to set aside a sale by the insolvent made previous to his adjudication as such. By the time the suit was filed the property had passed through many hands. He sued the original purchaser and the subsequent transferees for setting aside the sales but his suit was dismissed. He took the matter on appeal against all the subsequent transferees but dropped out the original purchaser. The learned Judges who heard the appeal pointed out that the foundation of the title of all the subsequent transferees was the sale to the original purchaser, and as the trial Court had found the sale to be good, it was *res judicata* as between the plaintiff and the first purchaser and that it was *res judicata* also as between the plaintiff and those who had claimed through the first purchaser. This view was confirmed by the Privy Council. Here, the original purchaser was a vital party in the original suit but in Civil Suit No. 17 of 1947, U Ba Tin and Daw Thin Mya were not necessary parties and to us it appears that neither the fact that Daw Thin Mya and U Ba Tin had of their own accord dropped out of the proceedings at the earliest stage nor the fact that they had been dropped out by the Chettyar in the first appeal and had been

(1) I.L.R. 4 Ran. 96. (2) I.L.R. 6 Ran. 29.

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consistently dropped out in turn by whoever took the case up on further appeal, can have fatal results on the competence of the appeal before us. Therefore the contention that non-joinder of Daw Thin Mya and U Ba Tin in the first appeal was a fatal flaw must be rejected.

The other ground of appeal advanced is that the documents in the case are documents of title, the deposit of which created a mortgage by deposit of Title Deeds under section 58 (*f*) of the Transfer of Property Act.

The documents are Exhibits B1 to B27, a series of Revenue receipts in respect of the three holdings for the nine years covering 1915-16 to 1933-34, and Exhibit B28 which is a "Counterfoil for alience". This counterfoil is issued by a Headman in relation to section 22-A of the Land and Revenue Act which requires occupiers of land to report to the Revenue Surveyor or to the Headman any alienation of land whether permanent or temporary.

Now in regard to revenue receipts it is settled law that they are not documents of title. Cunliffe J., in *Ma Joo Tean and another* v. *Ma Thein Nyun and others* (1), said :

"We are thrown back therefore on the question whether a tax-receipt and a copy of a map are documents of title or title deeds within the meaning of the section. In my opinion they are not. They do not even afford reliable evidence of title. I decline to hold that the nature of the document and subject of a deposit may be merely symbolic and that, sanctified by the intention of the depositor, it can be metamorphosed and drawn by equity into the requisite category laid down in the section.

If these were so I apprehend that a series of tram tickets issued from a terminus, conveniently situated near the property encumbered might well fulfil the test. I see no reason to extend

(1) I.L.R. 10 Ran. 403.

the meaning of the expressions 'documents of title' or 'title deeds' further than the natural meaning contained in these expressions."

This decision of Cunliffe J., was confirmed on appeal and the appellate judgment is reported in *V.E.R.M.A.R. Firm* v. *Ma Joo Tean* (1). Page C.J., in an exhaustive judgment propounded the dictum [which incidentally was regarded as obiter by a Full Bench of the High Court in *K.L.C.T. Chidambaram Firm* v. *Aziz Meah* (2)] that documents of title must not only relate to the mortgagor's title but must also disclose an apparent title in the mortgagor. As to the merits of the case itself Page C.J., held that neither the tax-ticket nor the map were documents of title.

The observations of Cunliffe J., and Page C.J., are sufficient to convince us that revenue receipts or tax-tickets as they are more commonly called, are not documents of title. If further data for conviction is necessary one need only look at the revenue receipts themselves in the case. They are issued under section 37 of the Land and Revenue Act and are issued solely for revenue purposes. They are prepared with the assessee's name already written in and each receipt contains the notice printed both in Burmese and in English : "This form is a receipt for revenue only and is not a document of title". And to our minds it is clear that they are not.

We must now consider what a "Counterfoil for Alience" is. Their nature has often been discussed. We have been referred to the Printed Judgments of the Court of the Judicial Commissioner for Lower Burma and the first relevant judgment in the series is *Maung Shwe Lon* v. *Maung Shwe An* (3). The question was whether a report entered in a Headman's

(1) I.L.R. 11 Ran. 239. (2) (1938) Ran. L.R. 316.
(3) P.J.L.B. 68.

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Register No. IX (presumably a Register of Mutations maintained under section 22-A) required to be stamped as a document purporting to transfer land. The learned Commissioner said :

"The register is kept for revenue purposes only. An entry in the register though signed by the transferor cannot be regarded as the instrument by which the land is transferred on sale, mortgage or lease, as the case may be. The entry, moreover, only purports to be a report of a transaction which has taken place."

Maung Shwe Lon's case was quoted with approval by another Judicial Commissioner in *Maung Lu Gale* v. *Maung Kyaw Yan* (1).

In more recent years there was the case of *Maung Kin Lay* v. *Maung Tun Thaing* (2) where it was held that a "pyatpaing" (counterfoil) was merely a report of an actual sale and that a "pyatpaing" merely recorded a report to the revenue authorities for revenue purposes. The judgment does not say explicitly what "pyatpaing" was involved but since there is only section 22-A which requires such a report of alienation, in all probability it was a counterfoil of Register No. IX.

Register No. IX seems to have gone out of use as Exhibit B28 purports to be a counterfoil of Register No. VII.

Departmental directions in regard to the maintenance of a Register under section 22-A as they appear in the Land and Revenue Manual of 1927, read as follows :

"75. Section 22-A of the (Lower) Burma Land and Revenue Act enjoins the report by occupiers of land to the revenue surveyor of any alienation of land, whether permanent or

(1) P.J.L.B. 158. (2) 5 Ran. 679.

temporary and under that section a form of register is prescribed which is No. VII of the Land Records Manual . . . . . .

77. . . . . .

The report may be made either orally or in writing and the revenue surveyor shall enter the particulars reported in the inner-foil of Register No. VII. At the same time he should fill up the two outer-foils and give one to the alienor and one to the alienee as an acknowledgment of receiving the report. The parties are not to be required to sign the report but if the revenue surveyor is not personally acquainted with them he should endeavour to satisfy himself of their identity particularly as regards the alienor . . . . . "

The latest Manual of 1945 omits the reference to Regisiter No. VII and omits also the specific directions in 77 and merely requires the revenue surveyor to enter particulars of the transfer. Direction 75 as amended requires him to enter permanent transfers in a new Register No. IA. Thus Register No. VII too seems to have gone out of use. The points of interest in Direction 77 are that the report need not be signed as in the case of Register No. IX and that the counter-foils are issued both to the alienee and alienor merely as an acknowledgment. It is apparent that the record is maintained merely for revenue purposes.

It appears that similar registers are maintained in India and extracts from such registers have received judicial evaluation. These registers are referred to as "Jamabandi" and described as "Mutation Registers" in *Punjab Sind Bank* v. *Ganesh Das Nathu Rane* (1) and also in *Jowala Das Govind Ram* v. *Thakar Das* (2) where it was held that copies of Jamabandi extracts were not documents of title, the registers being merely revenue records.

Learned Counsel for appellant has laid great stress on *K.L.C.T. Chidambaram Chettyar* v. *Aziz Meah* (3).

(1) I.L.R. 16 Lah. 1113. (2) A.I.R. (1936) Lah. 251.
(3) (1938) Ran. L.R. 316.

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It has been mentioned earlier in this judgment that Page C.J., had said that to create an equitable mortgage the documents deposited must not only relate to the mortgagor's title but must also disclose an apparent title in the mortgagor himself. The Full Bench held that the documents need not disclose a title in the depositor himself and the rulings in *Ma Joo Tean*'s cases (1), (2), were over-ruled only in this respect. Dunkley J., who wrote the main judgment said : " It is sufficient if the deeds deposited *bonâ fide* relate to the property or are material evidence of title ". Learned Counsel lays great reliance on this passage in the judgment but we venture to think that Dunkley J., had in mind the actual documents in the case which were (i) a governmental grant to the mortgagor's immediate predecessor in title, the deposit of which alone, Dunkley J., said, would create a mortgage, (ii) a record of a report made to a revenue surveyor presumably a certificate similar to Exhibit B28 and (iii) a series of tax-tickets. Said Dunkley J. :

" When all these documents are taken together (and they may be so considered) they suffice to disclose an apparent title in the mortgagor of the property."

The learned Judge could not possibly have meant that any document which merely relates to the property would be sufficient, for if that were so, the very tax-tickets which certainly relate to the property would be sufficient, and even the tram tickets mentioned by Cunliffe J., would be sufficient.

Towards the end of his argument learned Counsel said that even if certificates of alience in general were insufficient, Exhibit B28 stood on a different footing because of a reference made to a registered deed of gift by the alienor to the alienee in the Headman's

(1) I.L.R. 10 Ran. 403. (2) I.L.R. 11 Ran. 239.

endorsement. He maintained that such reference to the existence of a deed of gift rendered Exhibit B28 a document of title. We are unable to subscribe to this view. The counterfoil is one issued under section 22-A and Direction 77, and the Headman as in duty bound had made the endorsement which was a gist of the report made to him. This endorsement was necessary because of the instructions on the back of the form which classifies the various types of alienation. We do not even know if either a deed in fact existed or whether it was even produced to the Headman. In any case the Headman could not insist upon its production. We are unable to see any cogent reason why an endorsement made in the usual course should convert a revenue record into a document of title.

We have been urged to hold that the Exhibits B1 to B28 taken together, coupled with long possession, evidenced by the tax-tickets, goes towards proving ownership. That may be but we cannot agree more with Sale J., when he said in *Jowala Das Govind Ram*'s case (1) that in order to restrict the scope of the doctrine of equitable mortagages and in order to prevent frauds it was necessary to distinguish between documents creating title and documents evidencing title.

Exhibits B1 to B28 are admittedly of the latter category but in our judgment they are not documents of title which show an apparent title in the mortgagor. Accordingly we must hold that no mortgage by deposit of title deeds could have been created. The appeal is therefore dismissed with costs throughout and in the result Civil Suit No. 17 of 1947 of the Court of the 2nd Assistant Judge, Hanthawaddy, remains dismissed.

(1) A.I.R. (1936) Lah. 251.

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July 21

VRAJLAL NARANDAS AND ONE (APPLICANTS)

v.

THE COLLECTOR OF RANGOON (RESPONDENT).*

Directions in the nature of mandamus—Requisitioning (Emergency Provisions) Act, 1947, s. 2—Government of Burma Act, s. 145 (2)—Constitution of the Union of Burma, s. 222 (1)—Existing law—Whether Requisitioning Act ultra vires *of s. 23 (4) of the Constitution—Requisitioning whether judicial or quasi-judicial act—Rule 2 (g), Requisitioning (Claims and Compensation) Order, 1949—"Owner" (meaning of—Tenant how far owner.*

The Collector of Rangoon by order under s. 2 of the Requisitioning (Emergency Provisions) Act, 1947 requisitioned a portion of the 4th floor of No. 545—547, Merchant Street, Rangoon, then in the occupation of the 2nd applicant as tenant and employee under the 1st applicant. Requisition was challenged on the ground that the Requisitioning Act, 1947 was *ultra vires* in view of the Government of Burma Act and of the Constitution of Burma as no provision had been made for payment of compensation in the rules framed under the Act to tenants who had substantial interest in the lands.

Held : That the Requisitioning Act, was not *ultra vires* on account of s. 145 (2) of the Government of Burma Act, 1935. It is not also *ultra vires* on account of s. 23 (4) of the Constitution of Burma.

The question whether compensation is payable to any tenant in occupation is covered by the decision in *Charles K. Manasseh* v. *The Collector of Rangoon, and Dr. Kun Lwin,* B.L.R. (1951) (S.C.) 201. The tenant is included within the definition of owner of property to whom compensation is payable.

That the amount of compensation and the principles on which and the manner in which the compensation is to be determined are sufficiently specified in s. 6 (1) and (2) of the Requisitioning Act. These principles are —

(*a*) The owner must be compensated for any loss sustained by him as a result of requisitioning ;

(*b*) The amount of compensation must be fixed by agreement if possible ;

(*c*) In default of such agreement amount of compensation is to be by arbitration by an arbitrator to be appointed by the President, who by a general or special order may prescribe the conditions to which such arbitrator shall have regard in determining the amount of compensation.

Held also : Requisitioning property under the Requisitioning Act is not a judicial or quasi-judicial act but a mere administrative act. No direction in the nature of certiorari can therefore be issued in such case.

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* Civil Misc. Application No. 14 of 1952.

† *Present :* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. USTICE E MAUNG and MR. JUSTICE MYINT THEIN.

Carltona Ltd. v. *Commissioners of Works and others*, (1943) All. Eng. Law Reports, Vol. II, 560; *Province of Bombay* v. *Kulsaldas S. Advani and others*, (1950) S.C.R. 621, referred to.

G. Horrocks for the applicants.

Chan Htoon, Attorney-General, with *Chan Tun Aung*, Assistant Attorney-General } for the respondent.

The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—This is an application for directions in the nature of mandamus in respect of an order by which the Collector of Rangoon has, in exercise of the powers conferred upon him under section 2 of the Requisitioning (Emergency Provisions) Act, 1947, requisitioned a portion of the fourth floor of No. 545—547, Merchant Street, Rangoon.

It has been heard together with Civil Miscellaneous Applications Nos. 137 and 223 of 1951 and Nos. 11 and 29 of 1952 so far as the questions of law, which are common to all of them, are concerned. Those questions of law are (*a*) whether the said Act is "existing law" as defined in section 222 (1) of the Constitution of the Union of Burma, (*b*) whether it is not *ultra vires* in view of section 23 (4) of the Constitution, and (*c*) whether requisitioning premises under it is a judicial (or a quasi-judicial) act and not a merely executive (or administrative) act.

It has been argued that the Act is not existing law since it was *ultra vires* inasmuch as it did not comply with section 145 (2) of the Government of Burma Act, 1935, which reads :

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"The Legislature shall not have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, it is to be determined."

The contention is that the Requisitioning (Emergency Provisions) Act, 1947, neither fixes the amount of compensation for the property acquired nor specifies the principles on which and the manner in which, it is to be determined.

However, section 6 (*1*) and (*2*) of the Act provide :

"(*1*) Where any property or thing is requisitioned, or is deemed to have been requisitioned, under the provisions of this Act, the owner of such property or thing shall be paid such compensation for any loss he may have sustained as a result of such requisitioning as may be fixed in accordance with the provisions of this section.

(*2*) In default of agreement between the Government and the owner of the property, the Governor shall, by general or special order specify the authority or persons through which or whom any claim for compensation under sub-section (*1*) shall be submitted and the authority or person by which or whom any such claim shall be adjudged or awarded."

We are clearly of the opinion that section 6 does specify the principles on which, and the manner in which, compensation is to be determined. These principles are :

1. That the owner must be paid compensation for any loss he may have sustained as a result of requisitioning ;
2. That the amount of compensation must be fixed by agreement between the owner and the Government, if it be possible to do so ;

3. That in default of such agreement, the amount of compensation shall be adjudged or awarded by an arbitrator ; and
4. That the arbitrator must be appointed by the Governor.

The Governor may by general or special order under sub-section (*3*) of the same section prescribe the conditions to which the arbitrator shall have regard in determining the amount of compensation payable to the owner ; but this does not affect the principle of arbitration as the Governor cannot prevent the arbitrator from taking any other relevant matter into consideration and no rule made by the Governor under this sub-section can affect the principle that the owner must be paid compensation for any loss he may have sustained as a result of requisitioning.

We accordingly hold that the Act was not *ultra vires* and that it is " existing law " as defined in section 222 (1) of the Constitution of the Union of Burma.

Section 23 (4) of the Constitution provides :

" Private property may be limited or expropriated if the public interest so requires but only in accordance with law which shall prescribe in which cases and to what extent the owner shall be compensated."

It only requires the law to prescribe in which cases and to what extent the owner shall be compensated; so an Act which was *intra vires* under section 145 of the Government of Burma Act, 1935 is not likely to become *ultra vires* on account of the Constitution having come into force after its enactment. Besides, so far as the Requisitioning (Emergency Provisions) Act, 1947 is concerned it does provide for payment of compensation in all cases of requisitioning and it does prescribe the extent to which the owner shall be compensated. As we have stated above,

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section 6 (*1*) provides that the owner shall be paid compensation for any loss he may have sustained as a result of requisitioning and section 6 (*2*) provides for settlement of the amount of compensation by agreement or award.

It has also been argued that the Act is *ultra vires* inasmuch as it does not provide for payment of compensation to any tenant in occupation of a requisitioned building.

However, this Court has already held in *Charles R. Manasseh* v. *The Collector of Rangoon and Dr. Kun Lwin* (1) that the Act is not *ultra vires* in that respect. This Court has observed therein :

"It is true that the tenant of a house has right of property in the house to the extent of his term as a tenant and that term may be for a shorter or a longer period. To that extent he is the owner of an interest in the house. Can it then be said that when section 6 of the Requisitioning Act provides machinery for the assessment and payment of compensation to the 'owner of such property' (*i.e.*, the property requisitioned) no provision exists in the Act to satisfy the requirements of section 23 (4) of the Constitution in relation to every person having different and concurring estates of ownership in the property requisitioned? It is elementary learning that in respect of immoveable property both the person having exclusive and unlimited right of enjoyment of the property and the person having exclusive but restricted—it may be in measure of time or otherwise—right of enjoyment may be correctly termed owners of that property."

The above observation of this Court may be compared with the following extracts from pages 821 and 823 of Willis on Constitutional Law :—

"Ownership relates to rights, powers, privileges and immunities concerning either land or chattels . . . . . There is taking whenever any incident of property, whether a right, power, privilege or immunity of ownership is taken from the

(1) B.L.R. (1951) (S.C.) 201.

owner . . . . . .when leased premises are taken, the bonus value of the lease to the tenants is also taken. "

Besides, the Requisitioning (Emergency Provisions) Act, 1947, which does provide for payment of compensation to "the owner" as required by the Government of Burma Act, 1935, and the Constitution of the Union of Burma, cannot be *ultra vires* for failure to provide for payment of compensation to tenants, even if they are not "owners" as suggested by the learned Advocate for the applicants.

It has also been argued that Rule 2 (*g*) of the Requisitioning (Claims and Compensation) Order, 1949, which reads "'owner' in relation to property means the person entitled to sell the property," must be *ultra vires*; but the short answer to this argument is that a tenant is a person entitled to sell the property, the property which he can sell being the rights of a lessee.

We accordingly hold that neither the Act nor the Rule is *ultra vires* under the Constitution of the Union of Burma.

With reference to the question as to whether requisitioning property under the Requisitioning (Emergency Provisions) Act, 1947, is a judicial or quasi-judicial act and not a mere administrative act, the learned Advocates have hardly made any attempt to show that it is a judicial or quasi-judicial act. On the other hand the Court of Appeal has held in *Carltona Ltd.* v. *Commissioners of Works and others* (1), which is a case under Defence (General) Regulations, 1939 :

"Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion, if *bonâ fide* exercised, no court can interfere. All that the court can

(1) (1943) All Eng. Law Reports, Vol. II, p. 560.

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do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that these powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction."

The Supreme Court of India has also held in *Province of Bombay* v. *Kulsaldas S. Advani and others* (1), which is a case under Bombay Land Requisition Ordinance :

". . that on a proper construction of section 3 of the Ordinance the decision of the Bombay Government that the property was required for a public purpose was not a judicial or quasi-judicial decision but an administrative act and the High Court of Bombay had therefore no jurisdiction to issue a writ of certiorari in respect of the order of requisition."

Besides, requisitioning property under section 2 of the Requisitioning (Emergency Provisions) Act, 1947, is like taking property in exercise of eminent domain and there is nothing in the Act to indicate that such requisitioning must be a judicial or quasi-judicial act and not a purely administrative act.

We accordingly hold that requisitioning property under the Requisitioning (Emergency Provisions) Act, 1947, is an administrative act and not a judicial or quasi-judicial act in respect of which directions in the nature of certiorari can be issued.

As regards the facts of this case, there is nothing in the contentions of the learned Advocate for the applicants that their interest in the premises had not been requisitioned and that they had not been served with notice of requisition. The Collector has stated in his Requisition Order :

"I do hereby under the provisions of section 2 of the Requisitioning (Emergency Provisions) Act, 1947, requisition the

(1) (1950) S.C.R. 621.

premises known as the portion of accommodation on the fourth floor of No. 545—547, Merchant Street, Rangoon, as indicated in the attached sketch plan.

I do further direct that the above portion of the said (premises and building) shall be made available for the use of Civil Government with immediate effect."

A copy of this order was affixed on the premises and another copy was served on the Oriental Government Security Life Assurance Co. Ltd. as owner. Besides, the Collector had an Order to quit the premises served on the first applicant, of whom the second applicant is a mere representative, as soon as the Assurance Co. informed him of the premises having been let to it.

We are not really concerned with the allegation that the period of 7 days is wholly insufficient to enable the applicants to obtain alternative accommodation for conducting the family business of rice-millers and bankers ; and they have had more time as this Court issued an interim stay order; but we do hope that the Collector would, with due regard to the paucity of housing accommodation in Rangoon, give reasonable time to quit whenever he has to requisition buidings which are already occupied by others.

The application is dismissed with costs ; Advocates' fees ten gold mohurs.

The rule *nisi* is discharged and the interim stay order is cancelled.

SUPREME COURT.

† S.C. 1952

July 21.

MAURICE BOWER PADGETT AND ANOTHER (APPLICANTS)

v.

COLLECTOR OF RANGOON AND ANOTHER (RESPONDENTS).*

Direction in the nature of certiorari and mandamus—Requisitioning of house under s. 2 of Requisitioning (Emergency Provisions) Act, 1947—Allegation that building requisitioned is a temple and place of religious worship—S. 25 of the Constitution of the Union of Burma—Disputed questions of fact—Practice.

The Masonic Hall in Rangoon was requisitioned by the Collector of Rangoon under s. 2 of Requisitioning (Emergency Provisions) Act, 1947. An application was filed in the Supreme Court for issue of appropriate writ on the grounds :—

(*a*) The Requisitioning Act was *ultra vires* on account of s. 145 (*2*) of Government of Burma Act, 1935 and also of the Constitution of Burma and

(*b*) the first floor of the building is used as a temple and place of religious worship and hence could not be requisitioned.

The Collector in reply to the application did not specifically deny that the building was not a place of worship but merely stated he was not aware of the allegations about the building being used as a temple or that Freemasonry was a form of religious worship.

Held : The question as to whether the Act was *ultra vires* on account of the Government of Burma Act or Constitution of Burma has been decided in *Vrajlal Narayandas* v. *Collector of Rangoon*, B.L.R. (1952) (S.C.) 118 and judicial notice can be taken of the facts that—

(*a*) Freemasons have always been regarded as members of a Society the objects of which are mutual help and promotion of brotherly feeling among its members,

(*b*) that those, who profess different religions and cannot therefore have a common place of worship, have been members of the same Society, and

(*c*) that the Freemason Hall has never been regarded by the public as a place of public worship.

As the activities of Freemasons in this country have been shrouded in mystery, the Masonic Hall has not been open to the public and all Freemasons are under strict oaths of secrecy, no adverse inference could be drawn

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* Civil Misc. Application No. 11 of 1952.

† *Present :* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

from the Collector's failure to deny specifically the allegation that the Hall was a place of public worship.

Held: Further that requisitioning is not a judicial but an administrative act and therefore cannot be challenged by writ of prohibition or certiorari.

Where there are disputed questions of fact, which cannot be satisfactorily adjudicated in proceedings, suits should be instituted to obtain the necessary relief.

Ram Prasad Narayan Sahi and others v. *The State of Bihar and others*, A.I.R. (1952) Pat. 194 at 199-200, followed.

P. K. Basu for the applicants.

Chan Htoon, Attorney-General, with *Chan Tun Aung*, Assistant Attorney-General } for the respondents.

The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—This is an application for directions in the nature of mandamus, certiorari and/or prohibition in respect of an order by which the Collector of Rangoon has requisitioned the Masonic Hall in Simpson Road, Rangoon, for the War Office.

It has been heard together with Civil Miscellaneous Application No. 14 of 1952 * on the common questions of law and we have decided in the said case (*a*) that the Requisitioning (Emergency Provisions) Act, 1947, is "existing law" as defined in section 222 (1) of the Constitution of the Union of Burma, (*b*) that it is not *ultra vires* on account of section 23 (4) of the Constitution, and (*c*) that requisitioning properties under it is not a judicial act but an executive or administrative act.

Writs of certiorari and prohibition are out of question in view of the said decision; and the only question that remains for consideration is whether the applicant is entitled to a writ of mandamus in respect

* Reported at p. 118—Editor.

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of the first floor of the building, which is claimed to be a place of religious worship.

The first applicant has stated in paragraphs 4 and 7 of his affidavit :

"4. The first floor of the building is used as temple and a place of religious worship and the ground floor is used as Hall and office.

7. That Freemasonry, which is universally spread throughout the world, has been practised in Burma as a form of religious worship for well over a hundred years."

And the Collector has merely stated in his counter-affidavit " I am not aware of the allegations contained in paragraphs 4 and 7 of the affidavit." So the learned Advocate for the applicants has argued that the first applicant's statement that the first floor of the building is a place of religious worship must be accepted as correct.

However, the activities of freemasons in this country have always been shrouded in mystery, the Masonic Hall has not been open to the public and all freemasons appear to have been under oaths of strict secrecy. Under these circumstances, which are very special, we cannot draw any adverse inference from the Collector's bare statement " I am not aware of the allegations."

On the other hand we must take judicial notice of the facts (1) that freemasons in this country have always been regarded as members of a society, the objects of which are mutual help and the promotion of brotherly feeling among its members (*Cp.* A New English Dictionary Edited by Sir James Murray, Vol. IV, p. 527 *op. cit.* freemason), (2) that those, who profess different religions and therefore cannot have a common place of worship, have been members of the same society, and (3) that freemason halls have never

been regarded by the public as places of religious worship.

It is true that according to the first proviso to section 2 (*1*) of the Requisitioning (Emergency Provisions) Act, 1947, no land, premises or things used for the purpose of religious worship can be requisitioned under the Act. But directions in the nature of mandamus are issued only if (*inter alia*) it is clearly incumbent on a person holding a public office to do or forbear doing a specific act [*Cp.* section 45 (*b*) of the Specific Relief Act]. In this case it is not at all clear that freemasonry has been practised in Burma as a form of religious worship and that the top floor of the Freemason Hall in question, the ground floor of which is admittedly used as hall and office, is a place of religious worship. So this is not a case in which it is clearly incumbent on the Collector to forbear requisitioning the top floor of the Hall.

Section 226 of the Constitution of India is the counterpart or equivalent of section 25 of the Constitution of the Union of Burma and in *Ram Prasad Narayan Sahi and others* v. *The State of Bihar and others* (1), which is a case under section 226, Ramaswami J., observed :

"It is plain that the petitioner's title depends upon disputed questions of fact which cannot be satisfactorily determined in these summary proceedings. The remedy given by Article 226 is an extraordinary one and can be invoked only in exceptional circumstances by those who have no alternative remedy by way of suit or otherwise. In the present case, the settlement of the land which the petitioners claim appears *primâ facie* illegal. If the allegation of the respondents is correct, the Court of Wards has committed a breach of trust in making the settlement. There is also no satisfactory reason why the petitioners should not institute a suit for obtaining the reliefs they seek."

(1) A.I.R. (1952) Pat. 194 at 199 and 200.

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MAURICE BOWER PADGETT AND ANOTHER v. COLLECTOR OF RANGOON AND ANOTHER.

Sarjoo Prosad J., also observed in the same case :

"I am not satisfied '*primâ facie*' for the reasons already stated in the judgment of my learned brother that the petitioners have established a clear title or 'legal right' necessitating our interference under Article 226 . . . . . I have no desire to prejudice the case of the petitioners in any subsequent litigation that may arise between the parties ; but it is abundantly clear to me for the present that the petitioners' title or right, if any, depends upon disputed questions of fact which cannot be satisfactorily adjudicated in these summary proceedings."

These observations are applicable with equal force, though *mutatis mutandis*, to the present case, which is under section 25 of the Constitution of the Union of Burma.

Besides, if the top floor be really a place of religious worship and the Collector really has no power to requisition it, the applicants can obtain full relief in an ordinary suit, which unlike the present application, must be disposed of after hearing all such evidence as the parties like to produce.

The application is dismissed, the rule *nisi* is discharged and the interim stay order is cancelled ; but there will be no order for costs.

SUPREME COURT.

S. HUIE (APPLICANT)

v.

THE COLLECTOR OF RANGOON AND ANOTHER (RESPONDENTS).*

†S.C. 1952

July 21.

Mandamus, directions in the nature of—Government of Burma Act, 1935, s. 16 (3) and (4)—Rules of executive business—Requisitioning of property against such rules—Property in possession of Honorary Magistrate whether cannot be requisitioned—Press Communiqué how far relevant.

The Collector of Rangoon requisitioned No. 77, Signal Pagoda Road, Rangoon, for the War Office. It was contended by the owner that the requisition was not made through the Ministry of Public Works and Labour as required by Rules of Executive Business made under s. 16 (3) and (4) of the Government of Burma Act, 1935, that the owner being an Honorary Magistrate his house could not be requisitioned, that there was a Press Communiqué issued by the Government of Burma that requisition was to be resorted to only where the present tenant was either willing to vacate or leaving and that was not the case.

Held : That rules relating to transactions of government business have nothing to do with the requisitioning of property by the Collector. The petitioner has failed to satisfy the Court that the needs of the War Office cannot be greater than that of a mere Honorary Magistrate and that it was incumbent on the Collector to do or forbear from doing a specific act under s. 45 (3) of the Specific Relief Act and the petitioner failed to satisfy these conditions.

Held further : There is nothing in the Requisitioning Act to prevent the house of an Honorary Magistrate being requisitioned. The Court is concerned with administering the law as it is found in the Act and the Rules thereunder but not with any statement in the Press Communiqué.

Choung Po for the applicant.

Chan Htoon, Attorney-General, with *Chan Tun Aung*, Assistant Attorney-General. } for the respondents.

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*Civil Misc. Application No. 223 of 1951.

† *Present :* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

S.C. 1952

S. HUIE v. THE COLLECTOR OF RANGOON AND ANOTHER.

The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—This is an application for a writ of mandamus in respect of an order by which the Collector of Rangoon has requisitioned the premises known as No. 77, Signal Pagoda Road, Rangoon, for the War Office.

It has been heard together with Civil Miscellaneous Application No. 14 of 1952 so far as the principal questions of law are concerned and those questions have been decided therein.

Apart from the said questions of law the learned Advocate for the applicant has contended:

"According to rules, the War Office if it wanted additional accommodation it was to approach the Ministry of Public Works and Labour which in turn should ask the Collector of Rangoon to requisition suitable premises."

The reference is to Rules of Executive Business made by the Governor under sub-sections (*3*) and (*4*) of section 16 of the Government of Burma Act, 1935, which read:

"(*3*) The Governor shall make rules for the more convenient transaction of the business of the Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion.

(*4*) The rules shall include provisions requiring ministers and secretaries to Government to transmit to the Governor all such information with respect to the business of the Government as may be specified in the rules, or as the Governor may otherwise require to be so transmitted, and in particular requiring a minister to bring to the notice of the Governor, and the appropriate secretary to bring to the notice of the minister concerned and of the Governor, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor."

However, these are Rules relating to transaction of Government business which have nothing to do with the requisitioning of property by the Collector.

The learned Advocate for the applicant has further contended that his house cannot be requisitioned as he is an Honorary Magistrate. However, there is nothing in the Requisitioning (Emergency Provisions) Act, 1947, to prevent a house of an Honorary Magistrate being requisitioned; we are not at all satisfied (1) that the needs of the War Office of the Union of Burma cannot be greater than those of a mere Honorary Magistrate of Rangoon, and (2) that it was clearly incumbent on the Collector to have abstained from requisitioning the premises; and directions in the nature of mandamus will be issued only if (*inter alia*) it be clearly incumbent on a person holding a public office to do or to forbear doing a specific act [*Cp.* The Specific Relief Act, section 45 (*3*)].

The learned Advocate for the applicant has invited our attention to a Press Communiqué issued by Government on the 11th April 1952, which contains the following statement:—

"Government has not requisitioned any house at the instance of the Ministry of National Planning which has involved the eviction of tenants in permanent or long-term occupation. Requisitioning has been resorted to only in cases where there is definite information that the present tenant is either leaving or is willing to vacate."

We are not really concerned with the said statement, as we have to administer the law as we find it in the Requisitioning (Emergency Provisions) Act, 1947, and the Rules thereunder. However, we do hope that the example which has been set by the Ministry of National Planning would be followed by others whenever and wherever it is possible to do so.

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The application is dismissed with costs ; Advocates' fees ten gold mohurs. The rule *nisi* is discharged and the interim stay order is cancelled.

တရားလွှတ်တော်ချုပ်

ပြည်နယ်များ

နှင့်

ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ*

† ၁၉၅၂

ဇူလိုင်လ ၉။

၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေး အက်ဥပဒေ—ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၃၀၊ ပုဒ်မငယ် (၂)၊ ပုဒ်မ ၉၂၊ ပုဒ်မငယ်(၁)၊(၂)နှင့် ၎င်းတို့တွင်ရည်ညွှန်းသောတတိယဇယား၊ ပုဒ်မ ၁၅၁၊ ၂၂၄—ပါလီမန်မှာ ၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေးအက်ဥပဒေကို ပြည်နယ်များအတွက် ပြဋ္ဌာန်းရန် အာဏာရှိ မရှိ—ရှမ်းပြည်နယ်လက်စွဲ၊ ၁၈၉၉ ခုနှစ်၊ အထက်ဗမာပြည်မြေနှင့် အခွန်တော် (ရက်ဂူလေးရှင်း) ပုဒ်မ ၂၆—၁၈၉၈ ခုနှစ်၊ မြန်မာနိုင်ငံတော်အက်ဥပဒေအမှတ် ၁၊ ပုဒ်မ ၃။

အက်ဥပဒေအတိုင်း ပြည်ထောင်စု မြန်မာနိုင်ငံတဝှမ်းလုံးတွင် အာဏာတည်သည်။ မိမိတို့အထဲမှာပင်လျှင် ထိုသို့အာဏာမတည်ကြအောင် အတိုအလင်း ပြဋ္ဌာန်းချက်ပါရှိမှသာလျှင် ပြည်ထောင်စုမြန်မာနိုင်ငံတဝှမ်းလုံးတွင် အာဏာမတည်ဘဲရှိနိုင်သည်။ ၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေးအက်ဥပဒေမှာလည်း၊ ပြည်ထောင်စုမြန်မာနိုင်ငံတဝှမ်းလုံးတွင် အာဏာမတည်စေရန် အတိုအလင်းပြဋ္ဌာန်းချက်တစုံတရာမပါချေ။

ပြည်ထောင်စုမြန်မာနိုင်ငံဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၂၂၄ အရ၊ လယ်ယာမြေများကို ပြည်ထောင်စုမြန်မာနိုင်ငံအစိုးရကသာလျှင်ပိုင်ဆိုင်သည်။

လယ်မြေများကိုထိုကဲ့သို့ပြန်၍သိမ်းယူခြင်းသည်၊ ထိုအက်ဥပဒေ၏အဓိကရည်ရွယ်ချက်မဟုတ်၊ ၎င်း၏အဓိကရည်ရွယ်ချက်မှာ ကိုယ်တိုင်လယ်ယာမလုပ်သောသူများ လယ်ယာမြေများကို ပိုင်ဆိုင်ခွင့်မရှိစေရဟူ၍ဖြင်း၊ ကိုယ်တိုင်လယ်ယာလုပ်ကိုင်သော သူများပင် တဦးလျှင် ကေမည်မျှစီထက်ပိုမို၍မပိုင်ဆိုင်စေရဟူ၍ဖြင်း မြေယာပိုင်ခွင့်စံနစ်စည်းမျဉ်းများကို ပြင်ဆင်၍သတ်မှတ်ရန်ဖြစ်သည်။ မြေယာများကို ပြန်၍သိမ်းယူခြင်းမှာ အသစ်ပြင်၍သတ်မှတ်သော မြေယာပိုင်ခွင့်စံနစ်စည်းမျဉ်းများအရ မြေယာများကို မပိုင်ဆိုင်နိုင်ကြပြီဖြစ်သော သူများထံမှသာ ပြန်၍သိမ်းယူခြင်းဖြစ်သည်။ သို့သိမ်းယူခြင်းမှာ မူလရည်ရွယ်ချက် အောင်မြင်စေရန် အထောက်အပံ့မျှသာဖြစ်သည်။

အက်ဥပဒေတရပ်သည်၊ မည်သည့်ဥပဒေပြုအဖွဲ့၏ ဥပဒေပြုပိုင်ခွင့်အာဏာအတွင်းကျရောက်သည်ဟုစီရင်ဆုံးဖြတ်ရာတွင် ထိုဥပဒေ၏ " Pith and substance " အဆိုအနှစ်ကိုသာစီစစ်ရမည်။ အကယ်၍အဆိုအနှစ်သည်၊ ဥပဒေပြုအဖွဲ့တခု၏ ဥပဒေပြုပိုင်ခွင့်အာဏာအတွင်းကျရောက်လျှင် အဖွဲ့အစည်းအနားကအခြားဥပဒေပြုအဖွဲ့၏ ဥပဒေပြုပိုင်ခွင့် အာဏာအတွင်းကျူးကျော်ထိပါးငြိစွန်းသော်လည်း၊ ထိုဥပဒေသည်အတည်ဖြစ်စေရမည်။

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*၁၉၄၈ ခုနှစ်၊ လွှတ်အပ်မှုအမှတ် (၁)

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိန်းမောင်၊ တရားဝန်ကြီးဦးစောင်နှင့် တရားဝန်ကြီးဒဲ့မြင့်သိန်းတို့ကြားနာသည်။

၁၉၅၂

ပြည်နယ်များနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ။

Charles Russell v. *The Queen*, (1881-82) L.R. 7 A.C. 829, *Gallagher* v. *Lynn*, (1937) A.C. 863 ; *Attorney-General for Canada* v. *Attorney-General for British Columbia and others*, (1930) A.C. 111.

ထိုဥပဒေသည်၊ မြေယာပိုင်ခွင့်စံနစ်စည်းမျဉ်းကို ပြင်ရှိသတ်မှတ်သောဥပဒေဖြစ်သည်။ သို့ပြင် ရှိသတ်မှတ်သည့်အတွက် မြေယာများကိုဆက်လက်၍ မပိုင်ဆိုင်နိုင်ကြခြင်းသည်၊ မြေယာပိုင်ခွင့်စံနစ်စည်းမျဉ်းအသစ်သတ်မှတ်ခြင်းကြောင့်သာဖြစ်သည်။ ထိုအက်ဥပဒေသည် လယ်ယာမြေများကို မည်သူမျှမပိုင်ဆိုင်စေရပြီဟု မြေယာပိုင်ခွင့်စံနစ်ကိုလုံးဝဖျက်သိမ်းသော အက်ဥပဒေမဟုတ်ချေ။

ပါလီမန်မှာပြည်ထောင်စုနိုင်ငံကိစ္စများအကွက် ပစ္စည်းရယူရေးအလို့ငှါ ဥပဒေပြုလုပ်နိုင်ခွင့်အာဏာရှိသည်။

ထိုအက်ဥပဒေသည်၊ ပြည်ထောင်စုနိုင်ငံ၏ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၃၀ တွင် ပါရှိသော တောင်သူလယ်သမားများအတွက် နိုင်ငံတော်၏တာဝန်ဝတ္တရားများကို အထိုက်အလျောက်တစိတ်တဒေသအားဖြင့် ကျေပွန်အောင်ဆောင်ရွက်ပေးနိုင်စေမည့် အက်ဥပဒေ တရပ်ဖြစ်သည်။ ပြည်နယ်များတွင်အာဏာတည်သည်။

လွှတ်တော်ရှေ့နေကြီး ဗိ၊ ကေ၊ ဘာဆူး နှင့် ဝတ်လုံတော်ရဲ ဦးမြင့်ထူးတို့ပြည်နယ်များအတွက်လိုက်ပါဆောင်ရွက်သည်။

နိုင်ငံတော်ရှေ့နေချုပ်ကြီး ဦးချန်ထွန်း နှင့် အစိုးရရှေ့နေ ဦးဘစိန် တို့ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရအတွက်လိုက်ပါဆောင်ရွက်သည်။

ရုံးတော်၏စီရင်ချက်ကို နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင် ကချမှတ်သည်။

* * * *

ပြည်ထောင်စုမြန်မာနိုင်ငံတော်ယာယီသမတသည်၊ အောက်ပါအမိန့်ဖြင့် ပြဿနာတရပ်ကို ဤရုံးတော်သို့စဉ်းစားရန်လွှဲအပ်ခဲ့လေသည်။

"နိုင်ငံတော်တရားဝန်ကြီးချုပ်ထံသို့အကြောင်းကြားအပ်ပါသည်။

ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၁၅၁ အရ၊ တရားလွှတ်တော်ချုပ်၏ထင်မြင်ယူဆချက်ကို ရယူလေ့လာအောင်ပြည်သူများအတွက် အရေးကြီးသောဥပဒေကြောင်းဆိုင်ရာအောက်ပါပြဿနာတရပ်ပေါ်ပေါက်လာသည်ဟုဂုဏ်း၊ ပေါ်ပေါက်ရန်အကြောင်းရှိသည်ဟု ထင်မြင်ယူဆပါသဖြင့် ထိုပြဿနာကိုစဉ်းစားရန် တရားလွှတ်တော်ချုပ်သို့ လွှဲအပ်ပါသည်။ တရားလွှတ်တော်ချုပ်က လျော်ကန်သင့်မြတ်သည်ထင်သည့်အတိုင်း ကြားနာစစ်ဆေးပြီးနောက် အစီရင်ခံစေလိုပါသည်။

ပါလီမန်ကပြုလုပ်သော ၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေး အက်ဥပဒေ (၁၉၄၈ ခုနှစ်၊ အက်ဥပဒေ အမှတ် ၆၀)သည်၊ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေအရ၊ပြည်နယ်များတွင်အာဏာတည်သည် မတည်သည်။"

၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေးအက်ဥပဒေ ပုဒ်မ ၁၊ ပုဒ်မငယ် (၂) မှာ အောက်ပါအတိုင်းဖြစ်သည်။

၁၉၅၂
ပြည်နယ်များနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ။

"ဤအက်ဥပဒေကို နိုင်ငံတော်သမတက အမိန့်ကြော်ငြာစာထုတ်ပြန်ကျေညာသတ်မှတ်သည့်နေ့တွင်အတည်ဖြစ်ရမည်ဖြစ်ပြီး ပြည်ထောင်စုမြန်မာနိုင်ငံတွင်ပါဝင်သော အရပ်ဒေသကိုပိုင်းခြားဦးနှောက်များကိုခွဲခြားသတ်မှတ်နိုင်သည်။"

သို့ဖြစ်၍ ထိုအက်ဥပဒေသည်၊ပြည်နယ်များတွင်အာဏာတည်စေကာမူ ၎င်းကိုယ်တိုင် အတည်မဖြစ်သေးသော အက်ဥပဒေဖြစ်သည်။ ယာယီသမတက သိလိုသောအချက်များမှာ အောက်ပါအတိုင်းဖြစ်တန်ရာသည်။

(၁) ထိုအက်ဥပဒေကိုပြဋ္ဌာန်းရာတွင် ပါလီမန်သည်၊ ပြည်နယ်များမှာလည်း အာဏာတည်စေရန်ရည်ရွယ်ခဲ့သည် ဟုတ်မဟုတ်။

(၂) ရည်ရွယ်ခဲ့လျှင်လည်း ပါလီမန်မှာ ထိုအက်ဥပဒေကို ပြည်နယ်များအတွက်ပြဋ္ဌာန်းရန်အာဏာ ရှိမရှိ။

ဤရုံးတော်သို့ လွှဲအပ်လိုက်သောပြဿနာသည်၊ အရေးကြီးသောပြဿနာဖြစ်သည်နှင့်လျော်ညီစွာ ဤရုံးတော်သည်၊ ပြည်နယ်များအတွက်လိုက်ပါဆောင်ရွက်ကြသော ပြည်ထောင်စုပြည်နယ်များအား၊ ဥပဒေအကြံပေးအရာရှိဦးမြင့်ထူးနှင့်လွှတ်တော်ရှေ့နေကြီး မစ္စတာ ဝီ၊ ကေ၊ ဘာဆူး နှစ်ဦးလုံးအား ဤရုံးတော်တွင် လျှောက်လဲခွင့်ပေးခဲ့သည်။

ဦးမြင့်ထူးက ပြဿနာများကိုဖြေရှင်းကြရာတွင် တရားရုံးများသည်အခြေခံဥပဒေများကို သုံးသပ်ဝေဘန်ခြင်းမှငင်း၊ ထိုဥပဒေများ၏အခြေခံသဘောများကိုသုံးသပ်ဝေဘန်ခြင်းမှငင်း ရှောင်ရှားနိုင်သမျှရှောင်ရှားကြသော အစဉ်အလာရှိကြောင်း။ သို့ဖြစ်၍ နိုင်ငံတော်ယာယီသမတကလွှဲအပ်သောပြဿနာကိုဖြေရှင်းရာတွင် ဤရုံးတော်သည်၊ လက်ဦးအစတွင် ၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေးအက်ဥပဒေကိုသာလျှင် ကြည့်ရှုစဉ်းစားဖြတ်သင့်ကြောင်း။ ထိုအက်ဥပဒေအရပင်လျှင် ပါလီမန်သည်၊ ၎င်းကိုပြည်နယ်များတွင် အာဏာတည်စေရန်မရည်ရွယ်ခဲ့ခြင်းသည်ထင်ရှားကြောင်း။ အဘယ်ကြောင့်ဆိုသော် ထိုအက်ဥပဒေ ပုဒ်မ ၃ တွင် (ဤအက်ဥပဒေအတည်ဖြစ်သည့်မှစ၍ ဇယား ၁ တွင်သီးခြားဖေါ်ပြထား၍ အဆိုပါဇယားနှင့် ပုဒ်မ ၄ တွင် ဖေါ်ပြရာပါအတိုင်းအတာရှိသော လယ်ယာမြေများမှတပါး အခြားလယ်ယာမြေများအားလုံးကို နိုင်ငံတော်ကပြန်လည်သိမ်းယူလိမ့်မည်) ဟု ပါရှိရာ၊မူလပိုင်ရှင်ကသာလျှင် ပြန်သိမ်းယူနိုင်မည်ဖြစ်သောကြောင့်တကြောင်း၊ပြည်နယ်များရှိလယ်ယာမြေများကို ပြည်နယ်များကသာပိုင်ကြ

၁၉၅၂

ပြည်နယ်များနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ။

သောကြောင့်တကြောင်း၊ ထိုအက်ဥပဒေပါ ဇယား ၂ တွင် ဖော်ပြထားသော မြေမျိုး ပြည်နယ်များတွင် မရှိသောကြောင့်တကြောင်း ဖြစ်ပါသည်ဟုလျှောက်ထားသည်။

သို့ရာတွင် ၁၀၉၀ ခုနှစ်၊ မြန်မာနိုင်ငံတော်အက်ဥပဒေ အမှတ် ၁၊ ပုဒ်မ ၃ အရ၊ အက်ဥပဒေတိုင်း ပြည်ထောင်စုမြန်မာနိုင်ငံတဝှမ်းလုံးတွင် အာဏာတည်သည်။ မိမိတို့အထဲမှာပင်လျှင်၊ ထိုသို့အာဏာမတည်ကြအောင် အတိအလင်း ပြဋ္ဌာန်းချက်ပါရှိမှသာလျှင်၊ ပြည်ထောင်စု မြန်မာနိုင်ငံတဝှမ်းလုံးတွင် အာဏာမတည်ဘဲရှိနိုင်သည်။ ၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေးအက်ဥပဒေမှာလည်း ပြည်ထောင်စုမြန်မာနိုင်ငံတဝှမ်းလုံးတွင် အာဏာမတည်စေရန်အတိအလင်းပြဋ္ဌာန်းချက်တစုံတရာမပါချေ။

သည်မျှသာမကသေး၊ ထိုအက်ဥပဒေ ပုဒ်မ ၁၊ ပုဒ်မငယ် (၂) မှာလည်း၊ "နိုင်ငံတော်သမတက * * * ပြည်ထောင်စုမြန်မာနိုင်ငံတွင် ပါဝင်သော အရပ်ဒေသများကိုပိုင်းခြားပြီး၊ နေ့ရက်များကိုခွဲခြား၍ သတ်မှတ်နိုင်သည်" ဟု အတိအလင်းပါရှိသည်။ သို့အတွက် ပါလီမန်သည်၊ ပြည်နယ်များအပါအဝင် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်တဝှမ်းလုံးတွင်၊ ထိုအက်ဥပဒေ အာဏာတည်စေရန်ရည်ရွယ်ကြောင်း ထင်ရှားသည်။

ပြည်နယ်များအတွင်းရှိ လယ်ယာမြေများကို၊ ပြည်နယ်များကသာပိုင်၍၊ ပြည်နယ်များကသာ ပြန်လည်သိမ်းယူနိုင်မည်ဆိုရာမှာလည်း၊ ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၂၂၄ အရ၊ လယ်ယာမြေများကို ပြည်ထောင်စုမြန်မာနိုင်ငံအစိုးရကသာလျှင် ပိုင်ဆိုင်သည်။ ပုဒ်မ ၂၂၄ မှာ အောက်ပါအတိုင်းဖြစ်သည်။

"၎င်းအခြေခံဥပဒေအာဏာတည်အံ့ဆဲဆဲကာလက၊ မြန်မာနိုင်ငံတော်နှင့်ကရင်နီနယ်များ၏စီရင်အုပ်ချုပ်ရေးကိစ္စအလို့ငှါ မြို့တိုသျှဘုရင်မင်းမြတ်၌၊ သို့တည်းမဟုတ် အခြားအာဏာပိုင်တခုခု၌ တည်ရှိခဲ့သောအခွင့်အရေးများ၊ ပိုင်ဆိုင်သောပစ္စည်းများနှင့် ဓောင်းဆိုရယူခွင့်များသည်၊ ၎င်းအခြေခံဥပဒေအာဏာတည်သည့်မှစ၍ ပြည်ထောင်စုမြန်မာနိုင်ငံအစိုးရ၌ တည်ရှိရမည်။

အထူးအားဖြင့် သစ်တောအားလုံး၊ မြေအောက်ရှိသတ္တုနှင့် အခြားပစ္စည်းအားလုံး၊ ဓါတ်ဘက်ဝင် ဆေးဘက်ဝင်ရေစသောရေများ၊ သဘာဝအင်အားတို့၏ ပင်ရင်းအခြေအမြစ်များ၊ သံလမ်းဖြင့်သယ်ယူပို့ဆောင်ရေး ဆိုင်ရာပစ္စည်းများ၊ စာပို့ဆောင်ရေးဆိုင်ရာပစ္စည်းများ၊ ကြေးနန်းနှင့် ကြေးနန်းဆက်သွယ်ရေး ဆိုင်ရာပစ္စည်းများ၊ အသံလွှင့်လုပ်ငန်းဆိုင်ရာပစ္စည်းများသည်၊ ၎င်းအခြေခံဥပဒေအာဏာတည်သည့်မှစ၍၊ ပြည်ထောင်စုနိုင်ငံ၏ပစ္စည်းများဖြစ်ရမည်။"

၁၉၅၂

ပြည်နယ်များနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ။

ပြည်နယ်များတွင်၊ ၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေးအက်ဥပဒေပါဇယား ၂ တွင် ဖေါ်ပြထားသောမြေမျိုးမရှိဟုဆိုပြီး၊ ရှမ်းပြည်နယ်ကို နမူနာ ပြရာမှာလည်း၊ ရှမ်းပြည်နယ် လက်စွဲ စာမျက်နှာ ၃၀၊၃၁ နှင့် ၃၂ တွင်၊ ၁၈၉၉ ခုနှစ်၊ အထက်ဗမာပြည်မြေနှင့် အခွန်တော် (ရက်ဂူလေးရှင်း) ပုဒ်မ ၂၆ ကို၊ ရှမ်းပြည်နယ်သို့ တိုးချဲ့၍ထားကြောင်း။ ရှမ်းပြည်နယ်တွင်နိုင်ငံတော်ပိုင်မြေများရှိကြောင်းတွေ့မြင်ရသည်။ မည်သို့ပင်ဖြစ်စေ၊ ယခု၌ရုံးတော်ရှေ့ရှိပြဿနာမှာ၊ ထိုအက်ဥပဒေသည်၊ ပြည်နယ်များတွင်အာဏာတည် မတည်မျှသာဖြစ်သည်။ လယ်ယာမြေတခုခု၊ သို့မဟုတ် တမျိုးမျိုးစပ်ဆိုင်သည် မစပ်ဆိုင်သည်ဟူသော ပြဿနာမဟုတ်ချေ။ လယ်ယာမြေတခုခု၊ သို့မဟုတ် တမျိုးမျိုးနှင့် စပ်ဆိုင်သည် မစပ်ဆိုင်သည်ဟူသောပြဿနာမှာထိုအက်ဥပဒေ ပုဒ်မ ၁ (၂) အရ၊ နိုင်ငံတော်သမတ ကအဓိန့်ကျေညာစာထုတ်ပြန်၍ပြည်နယ်များတွင်၊ ထိုအက်ဥပဒေအတည်ဖြစ်ပြီးသည့်နောက် ထိုလယ်ယာမြေကို၊ သို့မဟုတ် လယ်ယာမြေမျိုးကိုသိမ်းယူသောအခါမှသာလျှင် ပေါ်ပေါက်နိုင်သောပြဿနာဖြစ်သည်။

သို့အတွက် ဤရုံးတော်သို့လွှဲအပ်သော ပြဿနာကိုဖြေရှင်းရန်၊ ပါလီမန်မှာ ထိုအက်ဥပဒေကို ပြည်နယ်များအတွက်ပါ ပြဋ္ဌာန်းနိုင်ခွင့်ရှိ မရှိကို ဝေဘန်ရမည်သာဖြစ်သည်။

ပါလီမန်မှာ ထိုအက်ဥပဒေကို ပြည်နယ်များအတွက်ပါပြုရန်အာဏာ ရှိမရှိ ဝေဘန်ရာ၌၊ ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၉၂၊ ပုဒ်မငယ် (၁)၊ (၂) နှင့် ၎င်းတို့တွင် ရည်ညွှန်းသော တတိယဇယားကို အဓိကထား၍ဝေဘန်ရမည်။

ပုဒ်မ ၉၂ (၁) နှင့် (၂) မှာ အောက်ပါအတိုင်းဖြစ်သည်။

"(၁) တဆက်တည်းဖြစ်သောအောက်ပုဒ်မခွဲဖြင့် ပြည်နယ်ကောင်စီများသို့ လုံးဝခွဲဝေလွှဲအပ်သော ဥပဒေပြုအာဏာမှလွဲ၍၊ ပါလီမန်တွင် ပြည်ထောင်စုတနိုင်ငံလုံးအတွက် ဖြစ်စေ၊ ပြည်ထောင်စုနိုင်ငံ၏ တစိတ်တဒေသအတွက်ဖြစ်စေ ဥပဒေများကိုပြုရန် အာဏာရှိရမည်။

၎င်းပုဒ်မ၌ ရှေ့ကဖေါ်ပြခဲ့သော စည်းကမ်းချက်တို့၏ ယေဘုယျသဘောကို အဆုံးတိုအနှယ်မဖြစ်စေဘဲ၊ ထို့ပြင် သေချာသည်ထက်သေချာအောင်၊ တဆက်တည်းဖြစ်သော အောက်ပုဒ်မခွဲ၌ မည်သို့ပင်ဆိုထားစေကာမူ၊ ပါလီမန်၌သာရှိသော ဥပဒေပြုမှုအခွင့်အာဏာသည်၊ (ပြည်ထောင်စု ဥပဒေပြုစာရင်းဟု ဖေါ်ပြလာသော) ဤအခြေခံဥပဒေ၏ တတိယဇယားရှိစာရင်း ၁ တွင်၊ သီးခြားရေတွက်ပြထားသော ကိစ္စအားလုံးအပေါ်၌သက်ရောက်ပုံနှံ့ရမည်ဟု ကျေညာလိုက်သည်။

၁၉၅၂

ပြည်နယ်များနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ။

အဆိုပါစာရင်းတွင် သီးခြားရေတွက်ဖော်ပြထားသော ဆောင်ရွက်ဖွယ်အကြောင်းအရာအမျိုးအစားတခုခု ပါဝင်နေသည့်ကိစ္စတခုခုသည်၊ တဆက်တည်းဖြစ်သော အောက်ပုဒ်မခွဲဖြင့် ပြည်နယ်ကောင်စီများသို့ လုံးဝခွဲဝေလွှဲအပ်ထားသည့် ပြည်နယ် ဒေသန္တရသဘောသက်ဝင်သော၊ သို့တည်းမဟုတ် ပြည်နယ်တွင်းရေးသဘောသက်ဝင်သော ဆောင်ရွက်ဖွယ်အကြောင်းအရာစာရင်းတွင် ပါဝင်သည်ဟု မမှတ်ယူရ။

(၂) ပြည်နယ်ဥပဒေပြုစာရင်းဟု ဖော်ပြလတ္တံ့သော အဆိုပါဇယားရှိစာရင်း ၂ ခု၌ သီးခြားရေတွက်ပြထားသည့် ကိစ္စတခုခုနှင့်စပ်လျဉ်း၍၊ ပြည်နယ်အတွက်သော်၎င်း၊ ပြည်နယ်၏တစိတ်တဒေသအတွက်သော်၎င်း ဥပဒေများကိုပြုရန် ပြည်နယ်ကောင်စီ၌သာ အာဏာရှိရမည်။''

ပုဒ်မ ၉၂ အရ၊ ပါလီမန်တွင် ပြည်နယ်ကောင်စီများသို့ လုံးဝခွဲဝေလွှဲအပ်သောကိစ္စများမှတပါး၊ အခြားကိစ္စအားလုံးအတွက် အက်ဥပဒေများကိုပြုရန် အာဏာရှိ၏။

တတိယဇယား စာရင်း ၁၊ ပြည်ထောင်စုနိုင်ငံ ဥပဒေပြုစာရင်းတွင်ပါရှိသော အမှတ် ၄၀ မှာလည်း၊ (စာရင်း ၂၊ ပြည်နယ်ဥပဒေပြု စာရင်းတွင် ရေတွက်ဖော်ပြထားခြင်းမရှိသော အခြားကိစ္စများ အားလုံးပါရှိသည်)။

ပြည်နယ်ကောင်စီများမှာ စာရင်း ၂၊ ပြည်နယ်ဥပဒေပြုစာရင်းတွင်ရေတွက်ဖော်ပြထားသော ကိစ္စများအတွက်သာလျှင်၊ ဥပဒေပြုရန်အာဏာရှိသည်။

တတိယဇယား စာရင်း ၁၊ ပြည်ထောင်စုနိုင်ငံ ဥပဒေပြုစာရင်းတွင် ပါရှိသော အမှတ် ၂၉ မှာ အောက်ပါအတိုင်းဖြစ်သည်။

''မြေရှင်နှင့် သီးစားတို့ဆက်ဆံရေး၊ မြေငှါးခတောင်းခံရေးတို့ပါဝင်သော မြေယာပိုင်ခွင့်စံနစ်စည်းမျဉ်းသတ်မှတ်ရေး၊ မြေယာလွှဲပြောင်းခြင်း၊ မြေယာစွန့်လွှတ်ခြင်း၊ မြေယာဆက်ခံစေခြင်းများ။''

သို့ရာတွင် စာရင်း ၂၊ ပြည်နယ်ဥပဒေပြုစာရင်းတွင် ပါရှိသော အမှတ် ၂ (၃) မှာလည်း၊ အောက်ပါအတိုင်းဖြစ်သည်။

''မြေယာ၊ မြေခွန်တော်၊ မြေယာတိုးတက်ကောင်းမွန်ရေးနှင့် လယ်ယာအမတော်ကြေးများ၊ စုပေါင်းရှိနေရာသစ်တည်ခြင်း၊ ကြွေးမြီအပေါင်အနှံမကင်းသော မြေယာပစ္စည်းအဆောက်အအုံများနှင့် ဝရမ်းအကာပံခရသောမြေယာပစ္စည်းအဆောက်အအုံများ၊ ရတနာသိုက်များ။''

၁၉၅၂

ပြည်နယ်များနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ။

သို့စာရင်းများတွင် အသီးအသီးပါရှိနေသောကြောင့်သာလျှင်၊ ၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေးအက်ဥပဒေကို၊ ပြည်နယ်များအတွက်ပါ ပြုလုပ်ရန်၊ ပါလီမန်မှာအာဏာရှိ မရှိဟူသောပြဿနာပေါ်ပေါက်ခဲ့ရသည်။

ပါလီမန်မှာ ထိုအက်ဥပဒေကို၊ ပြည်နယ်များအတွက်ပါပြုလုပ်ရန် အာဏာရှိ မရှိဆုံးဖြတ်နိုင်ရန်၊ ထိုအက်ဥပဒေ၏ရည်ရွယ်ချက်နှင့် အခြေခံသဘောများကို၊ ပဌမဇစ်စစ်ရချေမည်။ ထိုအက်ဥပဒေတခုလုံးကို ဖြိုချိုကြည့်သော်၊ ၎င်း၏ရည်ရွယ်ချက်နှင့် အခြေခံသဘောများမှာ—

(၁) မိမိတို့ကိုယ်တိုင် လယ်ယာမလုပ်မကိုင်သော သူများအား၊ လယ်ယာမြေများကို ပိုင်ဆိုင်ခွင့်မပေးတော့ဘဲ၊ သူတို့ပိုင်ဆိုင်ခဲ့သော မြေများကိုကိုယ်တိုင်လယ်ယာမြေလုပ်ကိုင်သော သူများအား၊ ဝေငှချထားရန်နှင့်

(၂) ကိုယ်တိုင် လယ်ယာမြေများ လုပ်ကိုင်သောသူများအတွက်မှာ ပင်တဦးလျှင် ၅ကမည်မျှစီထက်ပိုမို၍ မပိုင်ဆိုင်စေရဟု သတ်မှတ်ရန်ဖြစ်သည်။

ပြည်နယ်များအတွက် လိုက်ပါဆောင်ရွက်သူ ပညာရှိ လွှတ်တော်ရှေ့နေကြီး မစွတာ ဗို၊ ကေ၊ ဘာဆူး က၊ ထိုကဲ့သို့သော အက်ဥပဒေကို ပြည်နယ်များအတွက် ပြည်နယ်ကောင်စီတို့က အပြည့်အစုံမပြုလုပ်နိုင်ကြောင်း ဝန်ခံသည်။ သို့ရာတွင် သူ၏ လျှောက်လဲချက်အရ၊ (မြေယာ) သည် စာရင်း ၂၊ ပြည်နယ်ဥပဒေပြုစာရင်းတွင် ပါ၍နေသောကြောင့်၊ မြေယာသိမ်းရန်ဥပဒေကို ပြည်နယ်ကောင်စီများကသာ ပြုလုပ်နိုင်မည်။ ပြည်နယ်များကသိမ်းငြီး မြေများကိုဝေငှချထားရန်အတွက် (မြေယာပိုင်ဆိုင်ခွင့်စံနစ် စည်းမျဉ်းသတ်မှတ်ရေး) ဆိုင်ရာဥပဒေကိုမူကား၊ ပါလီမန်ကသာလျှင် ပြည်နယ်များအတွက်ပြုလုပ်၍ပေးနိုင်မည်။

သို့ရာတွင် စာရင်း ၁၊ ပြည်ထောင်စုနိုင်ငံ ဥပဒေပြုစာရင်း ပါအမှတ် ၅၅ (၄) အရ၊ "ပြည်ထောင်စုနိုင်ငံ ကိစ္စများအတွက် ပစ္စည်းရယူရေး" သည်၊ ပါလီမန်၏ဥပဒေပြုပိုင်ခွင့်အာဏာအတွင်းကျရောက်သည်။ ကိုယ်တိုင် လယ်ယာလုပ်ကိုင်သော သူများအား၊ ဝေငှချထားရန်၊ ကိုယ်တိုင်လယ်ယာမလုပ်မကိုင်သောသူများထံမှ လယ်များကိုသိမ်းယူရေးသည်လည်း၊ ပြည်ထောင်စုနိုင်ငံကိစ္စပင်ဖြစ်သည်။

ပြည်ထောင်စု မြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၉၂ (၁) အရလည်း၊ ထိုပုဒ်မ၊ ပုဒ်မငယ် (၂) တွင် မည်သို့ပင် ပါရှိစေကာမူ၊

၁၉၅၂ စာရင်း ၁၊ ပြည်ထောင်စုနိုင်ငံဥပဒေပြုစာရင်းတွင်ပါသောကိစ္စအားလုံးအတွက် ဥပဒေပြုမှုအခွင့်အာဏာသည်၊ ပါလီမန်၌သာရှိသည်။

ပြည်နယ်များနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ။

ထိုမှတပါး လယ်ယာမြေများကို ထိုကဲ့သို့ ပြန်၍သိမ်းယူခြင်းသည် ထိုအက်ဥပဒေ၏ အဓိကရည်ရွယ်ချက်မဟုတ်။ ၎င်း၏အဓိကရည်ရွယ်ချက်မှာ ကိုယ်တိုင်လယ်ယာမလုပ်သောသူများ၊ လယ်ယာမြေများကို ပိုင်ဆိုင်ခွင့်မရှိစေရ ဟူ၍ဖြစ်၊ ကိုယ်တိုင် လယ်ယာလုပ်ကိုင်သောသူများပင် တဦးလျှင် ကေမည်မျှ စီထက်ပိုမိုး၍ မပိုင်ဆိုင်စေရဟူ၍ဖြင့်း မြေယာပိုင်ခွင့်စံနစ်စည်းမျဉ်းများကို ပြင်ဆင်၍သတ်မှတ်ရန်ဖြစ်သည်။ မြေယာများကို ပြန်၍သိမ်းယူခြင်းမှာ အသစ်ပြင်၍ သတ်မှတ်သော မြေယာပိုင်ခွင့်စံနစ်စည်းမျဉ်းများအရ၊ မြေယာများကိုမပိုင်ဆိုင်နိုင်ကြပြီဖြစ်သောသူများထံမှသာ ပြန်၍သိမ်းယူခြင်းဖြစ်သည်။ သို့သိမ်းယူရခြင်းမှာ၊ မူလရည်ရွယ်ချက်အောင်မြင်စေရန်အထောက်အပံ့မျှသာဖြစ်သည်။

ပြည်နယ်များအတွက် လိုက်ပါဆောင်ရွက်သော ပညာရှိလွှတ်တော်ရှေ့နေကြီးများ ကိုးကားတင်ပြသောစီရင်ထုံးများမှာပင်လျှင်၊ အက်ဥပဒေတရပ်သည်၊ မည်သည့်ဥပဒေပြုအဖွဲ့၏ ဥပဒေပြုပိုင်ခွင့်အာဏာအတွင်း ကျရောက်သည်ဟု စီရင်ဆုံးဖြတ်ရာတွင်၊ ထိုအက်ဥပဒေ၏ "Pith and Substance" အဆို အနှစ်ကိုသာ စိစစ်ရမည်ဖြစ်ကြောင်း။ အကယ်၍ အဆိုအနှစ်သည်၊ ဥပဒေပြုအဖွဲ့တခု၏ဥပဒေပြုပိုင်ခွင့်အာဏာအတွင်းကျရောက်လျှင်၊ အဖျားအနားက အခြားဥပဒေပြုအဖွဲ့၏ ဥပဒေပြုပိုင်ခွင့်အာဏာအတွင်း ကျူးကျော်ထိပါးငြိစွန်းသော်လည်း၊ ထိုဥပဒေသည် အတည်ဖြစ်စေရမည်ဟူ၍ပါရှိသည်။

[See *Charles Russell* v. *The Queen*, (1881-82) L.R. 7 A.C. p. 829 at pp. 839-840; *Gallagher* v. *Lynn*, (1937) A.C. 863 at p. 870 where Lord Atkin has observed :

"It is well established that you are to look at the 'true nature and character of the legislation': *Russell* v. *The Queen* 'the pith and substance of the legislation' If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field."

ပြည်ထောင်စုနိုင်ငံတော်အတွက်၊ နိုင်ငံတော်ရှေ့နေချုပ်ကြီးကိုးကားတင်ပြသောစီရင်ထုံးမှာလည်း၊ နည်းဥပဒေသ ၄ ခုပါရှိရာ၊ အမှတ် (၁)၊(၃) နှင့်

(၄) တို့သည်၊ ဤရုံးတော်၏ ယူဆချက်ကိုထောက်ခံသော နည်းဥပဒေသများ ဖြစ်ကြသည်။

၁၉၅၂

ပြည်နယ်များနှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်အစိုးရ။

[See *Attorney-General for Canada* v. *Attorney-General for British Columbia and others*, (1930) A.C. 111 at p. 118 of which their Lordships of the Privy Council have observed :

"Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated :—

(1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in section 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by section 92 : see *Tennant* v. *Union Bank of Canada*, (1894) A.C. 31.

* * * *

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in section 91 : see *Attorney-General of Ontario* v. *Attorney-General for the Dominion*, (1894) A.C. 189 ; and *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, (1896) A.C. 348.

(4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail : see *Grand Trunk Ry. of Canada* v. *Attorney-General of Canada*, (1907) A.C. 65.".

ဤစီရင်ထုံးသည်၊ ကနေဒါပြည်၏ အုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၉၁ နှင့် စပ်လျဉ်းသော စီရင်ထုံးဖြစ်သော်လည်း၊ ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၉၂ သည်ပင်လျှင်၊ ထိုပုဒ်မပေါ်တွင်အခြေတည်ပြီး၊ ထိုပုဒ်မတွင်ပါသော For the Peace, Order and good Government ဟူသော စည်းကမ်းသတ်စာလုံးများကို ချုန်လှပ်ချွတ်ထားခြင်းအားဖြင့်၊ ပါလီမန်အား၊ ပိုမို ကျယ်ပြန့်သော ဥပဒေပြုခွင့်အာဏာကိုပေးသောပုဒ်မဖြစ်ချေသည်။

၁၉၅၂

ပြည်နယ်များနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ။

ပြည်နယ်များအတွက် လိုက်ပါဆောင်ရွက်သော ပညာရှိ လွှတ်တော်ရှေ့နေကြီး မစ္စတာ ဝီ၊ကေ၊ဘာဆူး က၊ ၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေးအက်ဥပဒေသည်၊ မြေယာပိုင်ခွင့် စံနစ်စည်းမျဉ်း သတ်မှတ်ရေး အတွက်သာမဟုတ်ဘဲ၊ ကိုယ်တိုင်မြေယာမလုပ်သူများ၏ ပိုင်ဆိုင်ခြင်းကို ဖျက်သိမ်းသောဥပဒေဖြစ်ကြောင်း ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၃၀၊ပုဒ်မငယ် (၂) အရလည်း၊ မြေယာပိုင်ခွင့်စံနစ်များကို စည်းမျဉ်းတကျဖြစ်စေခြင်း၊ လွှဲပြောင်းခြင်းသည် တခြား၊ မြေယာပိုင်ခွင့်စံနစ်များကို ဖျက်သိမ်းခြင်းသည် တခြားဖြစ်ကြောင်းထင်ရှားသည်။ သို့အတွက် ပါလီမန်မှာထိုအက်ဥပဒေကိုပြုလုပ်ရန်အာဏာမရှိဟုဆိုပြန်သည်။ သို့ဆိုရာ၌ မစ္စတာ ဝီ၊ ကေ၊ ဘာဆူးသည်၊ ပရစ်ဗီကောင်စီလွှတ်တော်၏ စီရင်ထုံးတခုကို ကိုးကားပြီး၊ အရာဝတ္ထုတခုခုနှင့်စပ်လျဉ်း၍ စံနစ်စည်းမျဉ်းသတ်မှတ်ရာတွင်၊ ထိုအရာဝတ္ထုကိုဖျက်ဆီး၍မပစ်ရန်။ အကယ်၍၊ ထိုအရာဝတ္ထုကို ဖျက်ဆီး၍ပစ်ခဲ့လျှင်၊ ၎င်းနှင့်စပ်လျဉ်း၍၊ စံနစ်စည်းမျဉ်းသတ်မှတ်ခြင်းမျှသာမဟုတ်ဟူ၍ လျှောက်လဲခဲ့သည်။

[See *Attorney-General for Ontario* v. *Attorney-General for the Dominion and the Distillers and Brewers' Association of Ontario*, (1896) A.C. 349 at p. 363 where their Lordships of the Privy Council have observed :

"A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation ".

သို့ရာတွင် ထိုအက်ဥပဒေသည်၊ အထက်တွင် ဖေါ်ပြခဲ့ပြီးဖြစ်သည့်အတိုင်း ကိုယ်တိုင်လယ်ယာမလုပ်ကိုင်သူများ၊ လယ်ယာမြေကို မပိုင်ဆိုင်စေရဟူ၍ဖြင့်၊ လယ်ယာလုပ်သောသူများသည်လည်း တဦးလျှင် ဧကမည်မျှစီထက်ပို၍မပိုင်ဆိုင်စေရဟူ၍ဖြင့် မြေယာပိုင်ခွင့် စံနစ်စည်းမျဉ်းကို ပြင်၍သတ်မှတ်သောဥပဒေဖြစ်သည်။ သို့ပြင်၍သတ်မှတ်သည့်အတွက်၊ မြေယာများကို ဆက်လက်၍မပိုင်ဆိုင်နိုင်ကြသောသူများ ရှိသည်မှန်သော်လည်း၊ ထိုသူတို့ ဆက်လက်၍မပိုင်ဆိုင်နိုင်ကြခြင်းသည်၊ မြေယာပိုင်ခွင့်စံနစ်စည်းမျဉ်းအသစ် သတ်မှတ်ခြင်းကြောင့်သာဖြစ်သည်။ ထိုအက်ဥပဒေသည် လယ်ယာမြေများကို မည်သူမျှ မပိုင်ဆိုင်စေရပြီဟု မြေယာပိုင်ခွင့်စံနစ်ကို လုံးဝဖျက်သိမ်းသော အက်ဥပဒေမဟုတ်ချေ။

၁၉၅၂

ပြည်နယ်များနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ။

ထိုမှတပါး၊ အထက်တွင် ဖော်ပြခဲ့သည့်အတိုင်း၊ ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ တတိယဇယား စာရင်း ၁၊ ပြည်ထောင်စုနိုင်ငံဥပဒေပြုစာရင်း ပါ အမှတ် ၅ (၄) အရလည်း၊ ပါလီမန်မှာ ပြည်ထောင်စုနိုင်ငံကိစ္စများအတွက် ပစ္စည်းရယူရေး အလို့ငှါ၊ ဥပဒေပြုလုပ်နိုင်ခွင့် အာဏာရှိသေးသည်။

သည်မျှသာမကသေး၊ ၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေး အက်ဥပဒေသည်၊ ပြည်ထောင်စုနိုင်ငံ၏ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေ ပုဒ်မ ၃၀ တွင်ပါရှိသော တောင်သူလယ်သမားများအတွက်၊ နိုင်ငံတော်၏တာဝန်ဝတ္တရားများကို အထိုက်အလျောက်တစိတ်တဒေသအားဖြင့် ကျေပွန်အောင် ဆောင်ရွက်ပေးနိုင်စေမည့် အက်ဥပဒေတရပ်ဖြစ်ချေသည်။

အထက်တွင်ဖော်ပြခဲ့သောအကြောင်းချင်းရာများကိုထောက်ဆ၍၊ ၁၉၄၈ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေး အက်ဥပဒေသည်၊ ဖွဲ့စည်း အုပ်ချုပ်ပုံ အခြေခံဥပဒေအရ၊ ပြည်နယ်များတွင် အာဏာတည်သည်ဟု ကျွန်ုပ်တို့သဘောရကြသည်။

ကျွန်ုပ်တို့သည်၊ ဤသို့သဘောရကြသည့်အတိုင်း နိုင်ငံတော်သမတထံအစီရင်ခံကြမည်။

SUPREME COURT.

† S.C. 1952

July 9.

HUSSEIN BUKSH KHAN (APPELLANT)

v.

MUDALIA AND ANOTHER (RESPONDENTS).*

Estoppel--S. 116, Evidence Act—Permit granted by persons administering Rangoon Development Trust during occupation period and lease by such permit-holder—Assessment of Encroachment Tax by lawful administration of Rangoon Development Trust on lessee—Subsequent grant of lease by Rangoon Development Trust—Effect of such lease on the lease by permit-holder—Hague Regulation—Power of Occupying Power—S. 108 (d) (q), *s. 111* (c), *Transfer of Property Act—Trust Act, ss. 86, 88, 90 and 94—Equity.*

A obtained a permit to occupy a piece of land from the authorities administering Rangoon Development Trust during Japanese occupation, and built a house thereon. He let out the house and land to the 2nd Respondent. After re-occupation, the administrator of Rangoon Development Trust, assessed the Respondents with encroachment taxes and later granted a lease for 30 years to the Respondents, who filed a suit for declaration of title to the house and land. The trial Judge gave a decree as claimed ; on appeal to the Appellate Side of the High Court, the decree was modified and house was declared to be that of the appellants ; on further appeal to the Supreme Court—

Held : Article 55 of Hague Regulations of 1908, makes the occupying power only an administrator and usufructuary of land belonging to the State of the occupied country. Therefore the permit granted by the authorities administering Rangoon Development Trust during the Japanese occupation, could not give any title to endure beyond the period of such occupation as against Rangoon Development Trust.

The right of the appellant under the permit therefore came to an end when Rangoon Development Trust assessed encroachment taxes and later granted lease.

There was no estoppel under s. 116 of Evidence Act. The section provides that a tenant cannot deny that the landlord had title to the property at the date of creating tenancy. The section does not prevent a tenant from pleading that the title of the original lessor has come to an end.

Krishna Prosad Lal Singha Deo v. *Barabondi Coal Concern*, 64 I.A. 311, followed.

Sm. Bhaiganta Bewah v. *Himmat Badyakar* 20, C.W.N. 1335, referred to.

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* Civil Appeal No. 10 of 1950 against the decree of the High Court of Rangoon in Civil 1st Appeal No. 36 of 1949.

† *Present :* MR. JUSTICE E MAUNG, MR. JUSTICE MYINT THEIN and U AUNG THA GYAW, J.

S. 108 (*q*) of Transfer of Property Act provides that a lessee on the determination of the lease is bound to put the lessor into possession. But this sub-clause should be read subject to the opening words of the paragraph, *viz.* that parties to lease "possess the rights and are subject to the liabilities mentioned in the rule next following or *such of them as are applicable to the property leased*" *e.g.*, under s. 111 (*c*) when the interests of the lessor has terminated or s. 111 (*d*) when the interests of lessor and lessee have become vested in the same person, no question of delivery of possession, arises.

Ss. 86, 88, 90 and 94 of the Trust Act have no application to the facts of the present case.

Failure of the Respondents to inform Rangoon Development Trust when they were assessed with encroachment tax about the permit of the appellant did not amount to fraud or did not raise any equity in favour of the Appellant.

J. B. Sanyal for the appellant.

Ba Than for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The main dispute in this appeal is on the right claimed by the respondents as grantees under a lease of 24th April 1947 from the Rangoon Development Trust of Lot No. 45 in Survey Block No. 29B3, Kemmendine East Circle of the City of Rangoon.

This piece of land appears to have been vacant till the 30th August 1943 when the appellant sought and obtained a permit from the authorities then administering the Rangoon Development Trust in which the land was vested, to occupy the land. This was during the Japanese occupation of Rangoon. Having obtained the permit, the appellant constructed a dwelling house which does not appear to be of a substantial character on the plot of land.

The permit has not been exhibited in evidence in the suit under appeal though it appears from the records placed before us that it was, at all times material, in the possession or at the disposal of the appellant. It is therefore impossible to say definitely

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whether the permit to occupy was for a period specified or was in any other way restricted in the manner of enjoyment of the plot of land. But from the evidence of the appellant in cross-examination at the trial, it appears that when the permit was issued to him the authorities then administering the Rangoon Development Trust did not fix the rent payable for temporary occupation of the land and that to this date he has not paid anything towards the rent of the land.

In March 1945 the lawful government of the country reoccupied Rangoon and it was only some time thereafter that the civil administration by the lawful government of the country was resumed. It was then for the first time that rent was fixed on the 11th June 1946 by the Rangoon Development Trust for temporary occupation of the suit land at the rate of Rs. 12-8-0 per quarter payable with effect from the third quarter of the financial year 1945-46. By that time the respondents were in physical occupation of the land, the 2nd respondent, who is the lst respondent's wife, having taken a lease from month to month of the house in October 1945 from the appellant. The authorities of the Rangoon Development Trust, finding the respondents in actual occupation, demanded what was called encroachment tax from them. The respondents paid it till they were granted on the 24th April 1947 a 30-year lease of the same plot of land. Thereafter, of course, the respondents paid the quarterly rent stipulated under the lease from the Rangoon Development Trust.

The demands of the appellant for rent from the 2nd respondent from April 1946 did not meet with success, apparently because from that time onwards encroachment rent had been assessed on and paid by the respondents themselves in their own name. Accordingly, in Small Cause Suit No. 2212 of 1947

of the City Civil Court of Rangoon the appellant sued the 2nd respondent for a sum of Rs. 160 representing house rent for 16 months ending with 31st July 1947. A decree was passed in favour of the appellant.

On the strength of this decree for rent, the appellant applied to the Rangoon Development Trust to have the lease previously granted to the respondents in respect of the plot of land transferred into his name. Notice of this application was given to the repondents who instituted the suit under appeal to remove the doubt cast on their title as holders of a 30-year lease of the suit land. In the suit under appeal the respondents sought a declaration of their right to the land and the house thereon which they claimed to have been constructed by them at their own cost. They also sought to have the decree in the rent suit vacated as having been obtained by fraud.

The trial Court granted the respondents a decree declaring their right to the land and the house thereon but refused to vacate the earlier decree for rent passed against the 2nd respondent.

The respondents were apparently content to accept the decree of the trial Court but the appellant appealed and a Bench of the High Court varied the trial decree by affirming the declaration of title in respect of the land in favour of the respondents but, on the ground that the house thereon was constructed by and at the cost of the appellant, granted him permission to remove the same within a month of the appellate decree.

The appellant in this appeal before us challenges the correctness of the decision of the trial Court and of the High Court in respect of the suit land.

Two main points were taken at the hearing of the appeal on behalf of the appellant. The principle of estoppel by tenancy was invoked in denial of the respondents' claim to the land and in support of the

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appellant's title thereto. It was also argued that a tenant stands in a fiduciary relation to his landlord and that the lease which was obtained by the respondents must in equity be treated as obtained on behalf of and as trustees for the appellant. Incidentally and in support of the second limb of the case for the appellant, it was argued that the lease was obtained by fraudulent concealment of facts and therefore was void.

Reliance was placed on a decision of the Calcutta High Court in *Sm. Bhaiganta Bewah* v. *Himmat Badyakar* (1) for the proposition that section 116 of the Evidence Act "does not imply that after the expiration of tenancy, the tenant is free to dispute the title of the landlord". At page 1339 of the report Mookerjee J. expressed the opinion that the Evidence Act had not altered the earlier law in India which he summed up as:

> "Two conditions, then, are essential to the existence of the estoppel, first, possession, secondly, permission; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues."

On this dictum it was contended before us that the 2nd respondent at any rate, having come into possession by permission of the appellant as a monthly tenant, is estopped so long as she continues that possession from disputing the title of the appellant. In further support of this proposition, learned Counsel relies also on section 108 (*q*) of the Transfer of Property Act under which it was claimed that on the determination of the lease the lessee is bound to put the lessor into possession of the property and that till that has been done the lessee's obligations are not at an end.

(1) 20 C.W.N. 1335.

The argument based on section 108 (*q*) of the Transfer of Property Act overlooks one very pertinent factor. Section 108 in enumerating the rights and liabilities of the lessor and the lessee did not make an unqualified enunciation of the same. It was said of the lessor and the lessee in the opening paragraph of the section that they "possess the rights and are subject to the liabilities mentioned in the rules next following, *or such of them as are applicable to the property leased*". The justice of the qualifications become apparent when we look, for instance, at the provisions of section 111 of the Act. Under clause (*c*) of this section the lease becomes determined because the interests of the lessor in the property has terminated, or, under clause (*d*) because the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right, and the obligation to put the lessor into possession of the property cannot possibly arise.

The effect of section 116 of the Evidence Act has been more authoritatively defined in a decision later than that of the Calcutta High Court by the Privy Council in *Krishna Prosad Lal Singha Deo* v. *Barabondi Coal Concern* (1). At page 319 of the report it was said :

> " The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property . . . . . Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end."

This exposition of law by the Privy Council, if we may say so with respect, is no more than giving to the

(1) 64 I.A. 311.

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plain words of section 116 of the Evidence Act their plain meaning.

Applying, then, these results to the facts of the present case, it is impossible to see how the principle of estoppel can help the appellant. As we have said earlier, the actual terms of the permit relied upon by the appellant are not known to us as the appellant has chosen not to exhibit the document which was either in his possession or at his disposal when the suit went to trial. Assuming everything in favour of the appellant, that permit which was granted to him by the authorities administering the Rangoon Development Trust during the Japanese occupation of the City of Rangoon could not give him any title to endure beyond the period of such occupation as against the Rangoon Development Trust. Article 55 of the Hague Regulations of 1908 makes the occupying State only an administrator and usufructuary of land belonging to the State of the occupied country and the authority of the occupying State does not extend beyond the period of occupation. It was clearly open to the authorities of the Rangoon Development Trust after re-occupation of Rangoon by the lawful government, to oust a person who held lands belonging to it under grant of or permit by the authorities appointed by the occupying State to administer its lands during the occupation. To such a person the lawful administrators of the Trust owed no duty of any kind and when on the 11th June 1946 the respondents were treated by the Rangoon Development Trust as permissive occupiers and were charged encroachment rent as from the third quarter of 1945-46, any right which the appellant might have had, under the original permit during the Japanese regime and subsequent acquiescence by the lawful administrators of the Trust, definitely came to an end. From that moment section 111 (*c*) of the Transfer of

Property Act would come into operation. Clause (*c*) of the same section also became then applicable. In either case, after that date the continuance of the tenure which is one of the essential conditions for estoppel under section 116 of the Evidence Act cannot be said to subsist. Besides, in the present case the respondents are not interested so much in challenging the right of the appellant in October 1945 which marked the beginning of the tenancy, as the continuance of any right in the land in the appellant after June 1946. This challenge is not barred by the words of section 116 of the Evidence Act.

In support of the proposition that the respondents stand in a fiduciary relation to the appellant with the consequence that the lease granted to them is, in equity, for the benefit of and on trust of the appellant, the provisions of sections 86, 88, 90 and 94 for the Trust Act are relied on. Section 86 can have nc application as between the appellant and the respondents. It is impossible to bring the respondents within the class of persons defined in section 88. It is also difficult to see the relevancy of section 90 of the Act. This section requires for its application that the person who gains the advantage must have done so in derogation of the rights of the other person interested in the property. What right had the appellant on 10th June 1946 or thereafter ? His permit from the occupation authorities did not give him any right beyond the period of occupation.

Section 94 clearly is not in point.

Learned Counsel for the appellant, obviously in desperation, then had recourse to some ill-defined principles of what he called equity. He claimed that when the lawful administrators of the Rangoon Development Trust in June 1946 demanded the encroachment rent from the respondents, the latter

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were under a duty to inform such administrators that the appellant had a permit from the occupation authorities and should have insisted on the encroachment rent being demanded from the appellant. By failing to do so, learned Counsel claims that the respondents committed a fraud on the Rangoon Development Trust and that the lease obtained subsequently by the respondents on the strength of their being already on the land was void. Learned Counsel did not support this proposition by any authority, statutory or otherwise, and when it was pointed out to him that section 19 of the Contract Act merely makes an agreement induced by fraud "a contract voidable at the option of the party whose consent was so caused" and not void *in toto*, no convincing answer was forthcoming from him.

In these circumstances the appeal fails and must be dismissed with costs; Advocate's fees ten gold mohurs.

SUPREME COURT.

STEEL BROS. & CO. LTD. (APPLICANTS)

v.

THE COLLECTOR OF RANGOON (RESPONDENT).*

† S.C. 1952

July 21.

Writ of Mandamus in respect of requisitioning of a house—Question of reasonableness or policy of requisition, if relevant.

A house in Rangoon was requisitioned by the Collector for use as a Labour Welfare Centre and amongst other contentions it was objected that it was not in the public interest and that the centre could be accommodated elsewhere.

Held : That the act was an administrative act and that the Court cannot inquire into "the reasonableness, policy or the sense or any other aspect of the transaction."

The Province of Bombay v. *Kulsaldas S. Advani and others*, (1950) S.C.R. 621 ; *Carlona Ltd.* v. *Commissioners of Works and others*, (1943) All Eng. L.R., Vol. II., p. 560, referred to.

It is for the government to decide whether a Welfare Centre is necessary for a particular locality and how such a Centre should be accommodated.

G. Horrocks for the applicants.

Chan Htoon, Attorney-General, Burma with *Chan Tun Aung*, Assistant Attorney-General, Burma } for the respondent.

The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—This is an application for directions in the nature of mandamus and for prohibition in respect of an order by which the Collector of Rangoon has requisitioned the premises known as No. Lansdown Street, Rangoon, together with the whole building thereon for use by Government as a Labour Welfare Centre.

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* Civil Misc. Application No. 29 of 1952.

† *Present :* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

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It has been heard together with Civil Miscellaneous Application No. 14 of 1952 and the principal questions of law have been decided therein.

Apart from the said questions of law, the applicants have contended in their affidavit :

"6. I understand that the said premises have been requisitioned as aforesaid for use as a Labour Welfare Centre, but I aver that the Monkey Point area never had a Welfare Centre in the past and I submit that, if the public interest requires that a Welfare Centre be established in that area, there is no sufficient reason why Government should not erect a building for that purpose on one of the many pieces of vacant land in that area without resorting to the requisition of existing buildings which are in occupation.

7. Adjacent to the said premises, there is a large piece of vacant land presently under lease to the applicant and I aver that the applicant is ready and willing to make a sufficient portion of the said land available to Government.

8. Furthermore, I respectfully submit that the said premises are unsuited for a Welfare Centre in that the building thereon has no ground floor and the rooms of the said building are about 14 feet from the ground level. I submit that a building erected about 3 feet from the ground level would be more satisfactory for the purpose of a Welfare Centre and that a wooden building suitable for use as a Welfare Centre and having the same floor space as the suit premises could be built in from four to six weeks."

However, the learned Advocate for the applicants has conceded that opening a Labour Welfare Centre must be in public interest ; and it is for Government to decide (1) whether a Labour Welfare Centre is necessary for the particular locality, and (2) how such a Centre should be accommodated. The decision of the Government that the building is required for a public purpose is an administrative act ; and we have no power at all to inquire into the "reasonableness, the policy, the sense or any other aspect of the

transaction " [Cp. , *The Province of Bombay* v. *Kulsaldas S. Advani and others* (1) and *Carlona Ltd.* v. *Commissioners of Works and others* (2)].

The application is dismissed with costs ; Advocates' fee ten gold mohurs. The rule *nisi* is discharged and the interim stay order is cancelled.

(1) (1950) S.C.R. 621. (2) (1943) All Eng. L.R., Vol. II, p. 560

SUPREME COURT.

† S.C 1952

U ON KHIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Press (Emergency Powers) Act, s. 4 (1) (d)—Meaning of the words "class or section of persons resident in Burma"—Whether the Socialists or the Socialist Party form a class or section of persons within the meaning of that section.

Held : The golden rule of interpretation is that the words of a Statute must *primâ facie* be given their ordinary meaning.

Nokes v. *Doncaster Amalgamated Collieries*, (1940) A.C. 1014 at 1022 ; *Rolla Ram* v. *The Province of East Punjab*, A.I.R. (1949) F.C. 81 ; *R.* v. *Peters*, (1886) 16 Q.B.D. 636 at 641 ; Cp. *Re. Ripon Housing Order*, (1939) 2 K.B. 838, followed.

Though dictionaries are not to be taken as authoritative exponents of the meanings of words in Acts of Parliament, still the Court often has to determine the meaning of the words by reference to the dictionary.

A "class" or "section" within the meaning of s. 4 (*1*) (*d*) of Press (Emergency Powers) Act, is a definitely ascertainable body of numerous individuals with clearly defined characteristics or criteria by which they may be distinguished from any other body or group. In other words "class" or "section" is a set of persons all filling one common character and possessing common and exclusive characteristics and the terms carry with them the idea of a readily ascertainable group having some element of permanence, stability and sufficiently numerous and widespread.

It cannot be laid down that the common bond of every political party is transitory or that all political parties are susceptible to rapid changes in their complexion and composition and that no political party can ever have any element of permanence or stability. If a political party is well-defined and the number of persons owing allegiance to it is large enough, there is no reason why it should not be regarded as a class or at least as a section.

Judged by the above tests, the Socialist Party or the Socialists in Burma are a class or section of persons resident in Burma within the meaning of the Act.

But mere criticism of the members or of the ideologies of a political party, which comes within the definition of class or section will not come within the mischief of s. 4 (*1*) (*d*) of the Act unless such criticism tends directly or indirectly to bring the members or the party into hatred or contempt.

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* Civil Appeal No. 13 of 1950 against the decree of the High Court, Rangoon, in Civil Misc. No. 172 of 1950.

† *Present :* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

Raj Pal v. *The Crown*, (1922) I.L.R. 3 Lah. 405 ; *Emperor* v. *Miss Maniben L. Kara*, 57 Bom. 253 ; *In the Matter of the "Sun Press" Ltd.*, A.I.R. (1938) Ran. 417 ; *Kamal Sarkar* v. *Emperor*, (1938) I.L.R. 1 Cal. 455 ; *Kumar Badri Narain Singh* v. *Chief Secretary to the Government of Bihar*, A.I.R (1941) Pat. 132 ; *Emperor* v. *Banomali Maharana*, (1943) I.L.R. 22 Pat. 48 ; "*Daily Zamindar*", (*Urdu*), *Lahore*, A.I.R. (1947) Lah. 340 ; "*Daily Parbhat*", *Lahore* v. *Emperor*, A.I.R. (1947) Lah. 366 at 371 ; *Dattatraya Sitaram* v *Emperor*, A.I.R. (1948) Bom. 239 at 243 ; *Ma Khin Than* v. *The Commissioner of Police, Rangoon and one*, (1949) B.L.R. 13 at 16, referred to and followed.

"*Nawai Waqt Daily*" v. *The Crown*, (1947) I.L.R. 28 Lah. 497 ; *Newspaper* "*Partap*" *Urdu Daily of Lahore*, (1947) I.L.R. 28 Lah. 795, Majority view, dissented from.

P. K. Basu for the appellant.

Chan Htoon, Attorney-General, Burma with *Choon Foung* (Government-Advocate) } for the respondent.

The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—This is an appeal by special leave under section 6 of the Union Judiciary Act, 1948, from the judgment passed by a Special Bench of the High Court under section 24 of the Press (Emergency Powers) Act.

The appellant who is the owner of the "Bamakhit Press," Rangoon, has been ordered by the President under section 3 (*3*) of the said Act to deposit Rs. 3,000 with the District Magistrate, Rangoon, on the ground that the article under the headline "ဆိုရှယ်လစ်ဓနရှင်စနစ်ပျိုးလွန်းတော့မည်" published in the "Bamakhit Daily" of the 28th February, 1950, contained matter of the nature described in section 4 (*1*) of the Act ; and the Special Bench which consists of U Tun Byu C. J., U Aung Tha Gyaw J. and U Bo Gyi J., has held (U Aung Tha Gyaw J., dissenting) that the article in question must be considered to be an article which tends, indirectly at

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U ON KHIN v. THE UNION OF BURMA.

least, to create feeling of hatred or contempt against the Socialist Party in Burma and that the Socialist Party is a class or section of persons resident in the Union of Burma, *i.e.*, that the article does contain words of the nature described in section 4 (*1*)(*d*) of the Act as amended by the Union of Burma (Adaptation of Laws) Order, 1948.

The relevant part of section 4 (*1*) (*d*) as amended reads :

". . . any newspaper . . . . containing any words . . . . . which tend, directly or indirectly . . . . . .

(*d*) to bring into hatred or contempt the Government established by law in the Union of Burma or the administration of justice in the Union of Burma or any class or section of persons, resident in the Union of Burma or to excite disaffection towards the said Government."

There are only two questions for decision in this appeal. They are (1) whether the Socialists or the Socialist Party form a class or section of persons resident in the Union of Burma and (2) whether the article tends, at least indirectly, to bring the Socialists or the Socialist Party into hatred or contempt.

The words "class" and "section" are not defined in the Press (Emergency Powers) Act and the General Clauses Act ; and the golden rule of interpretation is that the words of a statute must *primâ facie* be given their ordinary meaning. [See *Nokes* v. *Doncaster Amalgamated Collieries* (1).]

Besides, these words are not terms of art and they are not unfamiliar or uncommon words ; and, as the Federal Court of India has observed in *Ralla Ram* v. *The Province of East Punjab* (2) :

" . . . when the words used in the Act are clear and unambiguous, and they are not unfamiliar and uncommon words

(1) (1940) A.C. 1014 at 1022. (2) A.I.R. (1949) F.C. 81.

or such words as may be aptly described as terms of art, it is unnecessary to travel beyond the Act for the purpose of construing them."

According to A New English Dictionary, Edited by Sir James Murray, Vol. II, p. 466 *op. cit*, "class" means—

"A number of individuals (persons or things) possessing common attributes and grouped under a general or 'class' name ; a kind, sort, division ; "

and this is now the leading sense of the word.

According to the same Dictionary, Vol. VIII, p. 360 *op. cit*, "section" means—

"a separate portion of any collection or aggregate of persons *e.g.*, of the population of a country ; a group distinguished by a special variety of opinion, forming part of a political or religious party."

Dictionaries are not to be taken as authoritative exponents of the meanings of words in Acts of Parliament, but as Lord Coleridge has pointed out in *R.* v. *Peters* (1) "it is a well-known rule of courts of law that words shall be taken to be used in their ordinary sense and we are therefore sent for instruction to these books." [Cp. *Re. Ripon Housing Order* (2) where the Court determined the meaning of "park" by reference to the Oxford English Dictionary.]

However, the matter is not *res integra*. The High Court of Lahore has held in *Raj Pal* v. *The Crown* (3) that a fortuitous concourse of one or two Inspectors or Sub-Inspectors and a few policemen who happen to be employed at a particular place cannot be designated a section, much less a class of His Majesty's subjects.

The High Court of Bombay has held in *Emperor* v. *Miss Maniben L. Kara* (4) that the word "classes" in section 153-A of the Penal Code included any definite

(1) (1886) 16 Q.B.D. 636 at 641.
(2) (1939) 2 K.B. 838.
(3) (1922) I.L.R. 3 Lah. 405.
(4) 57 Bom. 253.

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and ascertainable class of His Majesty's subjects although the classes may not be divided on racial or religious ground and that the word "capitalist" is too vague to denote a definite and ascertainable class.

The High Court of Rangoon has held *In the Matter of the "Sun Press," Ltd.* (1) that Indian bad characters are not a class of His Majesty's subjects.

The High Court of Calcutta has held in *Kamal Sarkar* v. *Emperor* (2):

> "The words 'class or section' in clause (*d*) of section 4 (*l*) to my mind must mean a definitely ascertainable body of individuals, not an indeterminate body or group having no clearly defined or non-variable characteristics or criteria by which they may be distinguished from any other body or group. Exploiters or capitalists as such, any more than, say, literates or illiterates, or the rich or the poor, do not in my opinion constitute a 'class' or 'section' within the meaning of this clause."

The High Court of Patna held in *Kumar Badri Narain Singh* v. *Chief Secretary to the Government of Bihar* (3) that the words "masters or exploiters" are too wide and vague to denote a definite or ascertainable class. It has also held in *Emperor* v. *Banomali Maharana* (4):

> "The Legislature in framing section 153-A, Penal Code, 1860, never contemplated that it should be used with reference to particular small groups of people. The 'classes' contemplated under the section must be not only clearly defined and separable but also numerous.
>
> Consequently, a small and limited group of zamindars cannot be regarded as constituting a 'class' within the meaning of the section."

So far there is a consensus of opinion to the effect that "class or section" is a definitely ascertainable body of numerous individuals with clearly defined

(1) A.I.R. (1938) Ran. 417.
(2) (1938) I.L.R. 1 Cal. 455.
(3) A.I.R. (1941) Pat. 132.
(4) (1943) I.L.R. 22 Pat. 48.

characteristics or criteria by which they may be distinguished from any other body or group; and this is in consonance with the meaning of the words as given in the said Dictionary.

However, the matter does not rest there. In the matter of the "*Nawai Waqt Daily*" v. *The Crown* (1), a Full Bench of the High Court of Lahore, consisting of Muhammad Munir, Achhru Ram and Mohammad Shariff JJ., held (Achhru Ram J., dissenting) that the words "different classes" in section 4 of the Indian Press (Emergency Powers) Act refer to religious, racial, social, tribal and possibly economic or functional but not to political classes like the Congress, the Mahasabha or the Indian National Congress.

In the matter of the Newspaper "*Partap*" *Urdu Daily of Lahore* (2), which also is a Full Bench decision, Muhammad Munir and Mohammad Shariff JJ., again held that a political body like the Muslim League was not a class or section within the meaning of section 4 (*1*) (*d*) or (*h*) of the Act, while Bhandari J., did not deem it necessary to decide the question at all.

In the matter of "*Daily Zamindar*" (*Urdu*), *Lahore* (3), another Full Bench of the Lahore High Court, consisting of the same three learned Judges as in the matter of the Newspaper "*Partap*" *Urdu Daily of Lahore* (2) has held unanimously that a political organization like the Congress cannot fall within the ambit of the expression "class".

We must look into the reasons given for the last three rulings more closely as they have been strongly relied upon by the learned Advocate for the applicant in support of his contention that the Socialists and the

(1) (1947) I.L.R. 28 Lah. 497. (2) (1947) I.L.R. 28 Lah. 795.
(3) A.I.R. (1947) Lah. 340.

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Socialist Party cannot be a class or section within the purview of section 4 (*1*) (*d*) of the Press (Emergency Powers) Act.

Muhammad Munir J.'s reasons are contained in the following extract from his judgment in the matter of the "*Partap*" (*Urdu*) *Daily, Lahore* (1) :—

"In my opinion, the words 'class' and 'section' in clause (*d*) and the word 'classes' in clause (*h*) of sub-section (*i*) of section 4 are not applicable to political parties. They undoubtedly include within their scope religious, racial and tribal divisions and possibly functional, lingual and territorial divisions inasmuch as such aggregates have sufficient numerical strength and carry some fixed and permanent trait or feature which distinguishes them from others. The common bond of a political party, however, is only a transitory and constantly fluctuating phenomenon and is not capable of any durable definition. While the religion, origin, avocation, language or residence of a people is a non-varying attribute or charactersitic making them a class by themselves, the mere holding of political opinion on a particular matter at a given time or of having for the time being a political ideal does not constitute the people holding that opinion or having that ideal a class any more than the holding of a certain opinion on a matter of art makes the people holding that opinion a class."

Mohammad Shariff J., has given his reasons in the following extract from his judgment in the matter of the "*Nawai Waqt Daily*", *Lahore* (2) :—

"The expression 'classes' as used in section 153-A of the Indian Penal Code and in section 4 of the Press Emergency Act is difficult of exact definition. It certainly covers well-defined religious denominations and racial groups readily ascertainable where there is some element of permanence and the group is sufficiently numerous. [*Emperor* v. *Miss Maniben* (3)]. Beyond that it is not safe to speculate and each case must be decided on its own facts. But it cannot cover a political party or group held together by the community of interests to achieve a common

(1) (1947) I.L.R. 28 Lah. 795. (2) (1947) I.L.R. 28 Lah. 497.
(3) 57 Bom. 253.

object. Political parties come and go and are susceptible to rapid changes in their complexion and composition. To hold otherwise would lead to strange and inconvenient results. In that case a severe attack on the motives and methods of a political party may be actionable and this would retard the growth of a better and healthier society particularly in countries which aim at a democratic form of government."

As regards the word "sections," he has stated in his judgment in the matter of the "*Partap*" (*Urdu*) *Daily, Lahore* (1):

"There is an attempt 'to bring into hatred or contempt' the Muslim League but I doubt if a political body is a 'section' of His Majesty's subjects. The very considerations which prevent a political body from becoming a 'class' do also prohibit its being a 'section' which too demands some element of permanence which is not to be found in groups held together by a common political objective."

To put it briefly Muhammad Munir and Mohammad Shariff JJ., have held that a political party or organisation cannot be a class or section within the purview of section 4 (*1*) (*d*) of the Act as the common bond of a political party is transitory and political parties are susceptible to rapid changes in their complexion and composition; and Mohammad Shariff J., has also observed that to hold otherwise would lead to strange and inconvenient results.

Bhandari J., has accepted the majority view *i.e.*, the view of Muhammad Munir and Mohammad Sharif JJ., in the subsequent case in the matter of "*Daily Zamindar*" (*Urdu*), *Lahore* (2) where he has stated:

"But two questions at once arise. The first is whether a political organisation such as the Congress or the Muslim League can be regarded as a 'class or section' of His Majesty's subjects. The expression 'class' appearing in clauses (*d*) and (*h*) has not been defined in the statute and it is necessary, therefore, to refer

(1) (1947) I.L.R. 28 Lah. 795. (2) A.I.R. (1947) Lah. 340.

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to a standard Dictionary of the English language for ascertaining its ordinary signification. According to the Shorter Oxford Dictionary, the expression 'class' means 'a number of individuals (persons or things), possessing common attributes and grouped together under a general or 'class' name; a kind; sort; division. But ordinary dictionaries are somewhat delusive guides in the construction of statutory terms. The word 'class' is vague and to find out what is meant by it, we must look at the scope of section 4. The explanations to this section accord full recognition to the right of an individual to make a fair comment on matters of public interest so long as such comment does not have the effect of tending to excite sedition or to excite strife between classes. Indeed it is a privilege of the press freely to adopt a policy and pursue it and to exercise its own judgment on matters of public interest. If that were not so, a very large number of daily papers and weekly periodicals which are unceasingly engaged in supporting political parties will have to cease publication. Our attention has not been invited to a single authority in which a political organization was declared to be a 'class' of His Majesty's subjects. A class or section of His Majesty's subjects is a set of persons all filling one common character and possessing common and exclusive characteristics which may be associated with their origin, race or religion. The term 'class' carries with it the idea of a readily ascertainable group having some element of permanence, stability and sufficiently numerous and widespread to be designated a class. It is in this sense that the expression has been commonly understood in this country and it is in this sense that it ought, in my opinion, to be construed."

We can accept the view which, after all, is the common view of Muhammad Munir, Mohammad Shariff and Bhandari JJ., that a class or section is "a set of persons all filling one common character and possessing common and exclusive characteristics" and that the terms carry with them the idea of a readily ascertainable group having some element of permanence, stability and sufficiently numerous and widespread; but we cannot agree that the common bond of every political party is transitory or that all political parties

are susceptible to rapid changes in their complexion and composition or that no political party can ever have any element of permanence or stability.

Achhru Ram J., has observed in his dissenting judgment therein :

"I, with all respect, feel bound to express my inability to subscribe to the very wide proposition enunciated by my learned brother that such parties can, under no circumstances, be regarded as such classes.

* * * *

If a well-defined group or collection of persons, of sufficient importance numerically, bearing one common and exclusive name, is bound together by common attributes or characteristics, I do not see any reason, on principle, why it cannot be regarded as a class within the meaning of section 153-A, Indian Penal Code or section 4 (*1*) of the Indian Press (Emergency Powers) Act, and why feelings of enmity or hatred between two such groups can be promoted or attempted to be promoted with impunity, merely because the common attributes or characteristics which bind them together consist of their respective political programmes and ideologies."

Teja Singh J., another Judge of the Lahore High Court, has also stated in "*Daily Parbhat,*" *Lahore* v. *Emperor* (1), which was decided by a Special Bench consisting of Bhandari J., Mohammad Shariff J., and himself :

"With all deference to my learned brother, I am unable to subscribe to the proposition that a political party can in no case be regarded as a class or section of His Majesty's subjects within the meaning of clauses (*d*) and (*h*) of sub-section (1) of section 4. My opinion is that if a political party is well-defined and the number of persons owing allegiance to it is large enough, there is no reason why it should not be regarded as a class or at

(1) A.I.R. (1947) Lah. 366 at 371.

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least a section of His Majesty's subjects for, after all, the underlying object under the provisions of the Indian Press (Emergency Powers) Act was to put down and penalise the writings appearing in newspapers and journals that have the tendency to create disorder in the country either by bringing into hatred the Government established by law or by creating enmity between different sections of people and there does not appear to me to be any reason why a writing which creates serious hatred or enmity between the well-defined political parties consisting of large numbers, of the nature that is likely to result in open conflict between them should not be hit by the Act.

We respectfully agree with Achhru Ram and Teja Singh JJ., and hold that a political party or organization can be a class or section within the purview of section 4 (*1*) (*d*) of the Press (Emergency Powers) Act.

We must now consider whether the meaning of the words "class or section" should not be modified in the light of the observation of Mohammad Shariff J., that a political party being held to be a class or section would lead to strange and inconvenient results.

Maxwell has stated :

"To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act.

* * * *

Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

(*See* pages 22 and 236 of *Maxwell on Interpretation of Statutes*, 9th Edition.)

Besides, the High Court of Bombay has held in *Dattatraya Sitaram* v. *Emperor* (1) :

"It is the duty of a Court to attempt to find the intention of the legislature and to give effect to that intention. The more literal construction ought not to prevail if it is opposed to the intention of the legislature as apparent from the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

With reference to the aim and object of the Act, we agree with Achhru Ram J., who has stated in the matter of the "*Nawai Waqt Daily*", *Lahore* v. *The Crown* (2) :

"Both the provisons of the law mentioned above [*i.e.*, the provisions of section 153-A of the Penal Code and section 4 (*1*) of the Press (Emergency Powers)] Act are meant for preserving the public peace, and I can see no reasonable ground at all for assuming that the legislature intended to hit promoting or attempting to promote feelings of hatred or enmity between those groups of bodies of persons only which were bound together by common religious, racial, social, tribal, economic or functional attributes (my learned brother is prepared to extend the definition of 'classes' to all such groups), but had no intention of preventing such feelings being promoted or attempted to be promoted between groups, however great their importance numerically and however sharp the line dividing them from each other, where each of them is bound together only by common attributes consisting of a common political programme or ideology ; although the need for preventing such feelings being promoted between them may be the greatest."

With reference to the suggestion that the scope of the Act must be determined in the light of the explanations to section 4 thereof, Explanations 1 and 4 are irrelevant ; and both Explanations 2 and 3 contain the qualifying clause "without exciting or attempting to excite hatred, contempt or disaffection."

(1) A.I.R.(1948) Bom. 239 at 243. (2) (1947) I.L.R. 28 Lah. 497.

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Even where a political organization is a "class or section" mere criticism of the members or the ideologies of that political organization will not come within the mischief of section 4 (*1*) (*d*) unless such criticism tends, directly or indirectly, to bring the members or the organization into hatred or contempt ; and this really is in consonance, and not in conflict, with the following statement of this Court in *Ma Khin Than* v. *The Commissioner of Police, Rangoon and one* (1) :—

> "It is of the essence of democratic government that one political organization is entitled to criticize and attack another political organization so long as such criticism and attack is legitimate and is not prohibited by law."

To the contention of the learned Counsel for the applicant that a statute which fetters freedom of expression on the activities of political parties is not in consonance with the spirit of a democratic Constitution, we do not need to say more than that the Act we are considering is a legacy of the colonial days inherited as "existing law" under section 226 (1) of the Constitution and that its retention seems to be an indication of the Government's view as to its continued necessity.

So there is nothing in the aim, scope and object of the Act to prevent any political organization from being a class or section of persons resident in the Union of Burma. There is nothing to justify the presumption that the Legislature never intended such inconvenience or hardship as might ensue from a political organization being treated as a class or section. Under these circumstances we cannot apply the rule of exceptional construction and modify the language of the Act to exclude political organizations. "The underlying

(1) (1949) B.L.R. 13 at p. 16.

principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the Court as to what is just or expedient ". (See *Maxwell on Interpretation of Statutes*, 9th Edn., p. 4.)

We have discussed the question of law at considerable length as it is of great importance and there has been difference of opinion on it, not only in the High Court of Lahore but also in the High Court of Rangoon.

The facts however are fairly simple. The Socialist Party is a well-known political organization which has been in existence for several years. Its members are numerous and that the party has a widespread following in the Union appears from the number of its representatives in both Houses of Parliament. It certainly cannot be said of it that its common bond "is only a transitory and constantly fluctuating phenomenon and is not capable of any durable definition". It certainly is a definitely ascertainable body of numerous individuals with clearly defined characteristics or criteria by which they can be distinguished from any other body or group.

So we agree with U Tun Byu C.J. and U Bo Gyi J., that the Socialists and the Socialist Party do form a class or section of persons residing in the Union of Burma and that they fall within the purview of section 4 (*1*) (*d*) of the Press (Emergency Powers) Act. We must make it clear, however, that being the majority party in Parliament or in the Union is not a relevant criterion. Whatever the creed or colour of a particular political party or organization, whether in power or out of power, provided it is a readily ascertainable group with some element of permanence and stability and with a sufficiently numerous and widespread

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following, such a party or organization will fall within the meaning of the terms "class" or "section"; and in the event that such a party or organization is brought into hatred or contempt by means of a publication, the Press (Emergency Powers) Act will have application.

As regards the article itself, it was published at a time when insurrection was at its height in many parts of the Union of Burma and even the general elections had to be postponed on account thereof, inspite of the express provision in section 233 of the Constitution that the first general elections shall be held within eighteen months from the date of the coming into operation of the Constitution.

The gist of the article which is alleged to have been based on an inquiry in the Socialist Party itself, is as follows: The Socialist Party taking undue advantage of the general elections having been postponed for a year was going to do what it liked. It would expel U Tin, U Tun Pe and U Ba Gyan from the Cabinet and make it impossible for U Nu to remain therein. Thereafter it would form a purely Socialist Government with Bogyoke Ne Win, Supreme Commander, as Prime Minister. It will then purge itself and expel U Win also from the Cabinet. It would take the said steps which are not only new but also destructive as the Socialists bore a grudge against U Nu and Independent Ministers and could not forgive them for certain specified reasons. If the Socialists carried out their programme the country would be absolutely ruined. The States might not take it lying down, the expected foreign aid and loan might be withheld, and the Socialists might then have to negotiate with Red China. In fact the consequences would be so disastrous that the writer dared not contemplate them at all.

The allegation that the Socialist Party was going to take destructive measures out of spite, taking undue

advantage of the general elections having been postponed and regardless of even such consequences as the ruin of the Union of Burma, must necesarily have a tendency to bring it into hatred or contempt. As a matter of fact the writer himself appears to have realised that his article must have that effect since he has stated therein : " I have no desire whatsoever to make the country hate the Socialists by publishing false statements. It is not necessary for me to publish false statements about them in order that they may be hated by the public. Things have already been moving in their natural course by their own force and momentum " (meaning that the Socialists have already been incurring public hatred by their own action). He has even added : " Mogyo appreciates fully that danger to his personal safety is increased in writing this article, but as he knows well what the law of mutability is, he is undaunted ; a person is born only to die ".

The matter does not rest there even. He has concluded his article with the statement : " As regards the Socialists' plan about the Burma Army, however, Mogyo dares not write about it at all ".

The learned Advocate for the applicant has argued that we must not speculate about what has not been actually written, but we are clearly of the opinion that the said statement must be taken with its context and that it becomes highly significant against the Socialists and the Socialist Party when it is construed in the light thereof.

So we agree with the majority decision of the Special Bench of the High Court that the article does contain words which tend to bring the Socialists and the Socialist Party into hatred or contempt.

The appeal is dismissed with costs ; Advocates' fee ten gold mohurs.

တရားလွှတ်တော်ချုပ်။

၁၉၅၂
ဇူလိုင်လ ၂၀။

ဦးလှအောင်ကြီး (လျှောက်ထားသူ)

နှင့်

ဦးသန်းလှိုင်နှင့်ငါးဦး (လျှောက်ထားခံရသူများ)*

၁၉၄၈ ခုနှစ်၊ သီးစားချထားရေး အက်ဥပဒေ ပုဒ်မ ၃၊ ခြင်းချက် (ခ)—ဘာသာ ရေးနှင့် သော်ငှင်း၊ ကုသိုလ်ရေးနှင့်သော်ငှင်း သက်ဆိုင်သည့်အသင်းအဖွဲ့တစုံတရာပိုင်မြေ—ဗုဒ္ဓပမုခသံဃိက သဘောသက်ဝင်သော သာသနာမြေ—လူဒါန်းသူသည်၊ မိမိတဦး တည်းကိုပင်လျှင်၊ ဘဏ္ဍာထိန်း အဖြစ်လွဲအပ်ခန့်ထားနိုင်သည်။ ၁၉၅၁ ခုနှစ်၊သီးစား ချထားရေးနည်း ဥပဒေ ၁၆ (ဂ)။

မူလပိုင်ရှင်က လူဒါန်းစာဖြင့် လူကြီးဖြစ်သောကြောင့်၊အချင်းဖြစ်လယ်များသည်၊ မူလပိုင် ရှင်ပိုင်လယ်များအဖြစ်မှရပ်စဲခဲ့ပြီး၊ ၎င်းတို့သည်၊ လူးဒါန်းစာတွင် ပါရှိသော သာသနာရေး ကိစ္စများအတွက်သာလျှင်၊ ဘဏ္ဍာထိန်းလူကြီးများက ထိန်းသိမ်း စောင့်ရှောက် ရသော သာသနာမြေအဖြစ်သို့ ပြောင်းလဲရောက်ရှိ ခဲ့ကြပေပြီ။

အဆိုပါ သာသနာရေးကိစ္စများမှာလည်း၊ ဘုရားတန်ဆောင်းများကို ပြင်ရန်၊ ကျောင်းတိုက် နှစ်တိုက်ကို ပြင်ရန်၊ ကျောင်းတိုက်တိုက်ရှိ သံဃာတော်များအား၊ ပစ္စည်း လေးပါး လူဒါန်း ထောက်ပံ့ရန်နှင့် ပရိယတ္တိ သာသနာတော်ကို အားပေးမွေးမြူကာရန် ဖြစ်သည်။ သို့အတွက် ထိုမြေများသည်၊ ဗုဒ္ဓပမုခသံဃိက သဘောသက်ဝင်သော၊ သာသနာမြေများဖြစ်ခဲ့ကြပေပြီ။

ရဟန်းသံဃာ တပါးပါးထံ ရေစက်ချ၍ လူဒါန်းမှ အလူအဆမြောက်၍၊ သာသနာမြေ ဖြစ်သည်ဟု ယူဆခြင်းသည်၊ တရားဥပဒေအရမှားယွင်းသည်။

ဘဏ္ဍာတော်ထိန်းလူကြီးများသည်၊ ဘုရား တံခွန်ဆောင်း အတွက်သော်ငှင်း၊ ကျောင်း တိုက်များအတွက်သော်ငှင်း၊ပရိယတ္တိသာသနာတော်အတွက် သော်ငှင်း သာလျှင် လုပ်ခွင့် များကိုထိန်းသိမ်း စောင့်ရှောက်ကြရမည် ဖြစ်သောကြောင့်၊ ထိုလယ်မြေများကို ဘုရားအမှူး ရှိသော သံဃာတော်များအား လူဒါန်းပြီး ဖြစ်သည်။

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* ၁၉၅၂ ခုနှစ်၊ တရားမ အသေးအဖွဲ့ လျှောက်လွှာအမှတ် ၆၈။

၁၉၅၂

ဦးလှအောင်ကြီး နှင့် ဦးသန်းလှိုင် နှင့် ငါးဦး။

တရားဥပဒေအရ လွှဲဒါန်းသူသည်၊ မိမိတဦးတည်းကိုပင်လျှင်၊ ဘဏ္ဍာထိန်းအဖြစ် လွှဲအပ်ခန့်ထားလျက် လွှဲဒါန်းလိုသော် လွှဲဒါန်းနိုင်သည်။

ဦးထွန်းအိ၊ လျှောက်ထားသူအတွက်ရှေ့နေကြီး။

အောင်ရှိန်ဝန်း၊ လျှောက်ထားခံရသူများအတွက် အစိုးရရှေ့နေကြီး။

ရုံးတော်၏စီရင်ချက်ကို နိုင်ငံတော် တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင်က ချမှတ်သည်။

ဤလျှောက်လွှာသည်၊ မျော်လင့်ကျေးရွာ သီးစားချထားရေး ကော်မိတီ နှင့် ကျိုက္ခမီခရိုင် သီးစားချထားရေးကော်မိတီတို့က၊ လယ်မြေအချို့ကို၊ ယခု လျှောက်ထားခြင်းခံရသူအမှတ် ၁၊ ၂၊၃ နှင့် ၄ တို့အား၊ ၁၉၅၂-၅၃ ခုနှစ် အတွက်၊ သီးစားချထားလိုက်သည်ကို မကျေနပ်၍၊ ၎င်းတို့၏ အမိန့်များကို ပယ်ဖျက်ရန်၊ အမှုခေါ်စာချွန်တော်အတွက် လျှောက်လွှာဖြစ်သည်။

အချင်းဖြစ်မြေများသည်၊ မူလက ဒေါ်အေးသန့်ပိုင်သော မြေများဖြစ်ခဲ့သည်။ ဒေါ်အေးသန့်က၊ ထိုမြေများကို ၁၉၅၁ ခုနှစ်၊ နိုဝင်ဘာလ ၁၆ ရက် နေ့စွဲပါ၊ မှတ်ပုံတင်ရှိထားသော လွှဲဒါန်းစာဖြင့်၊ အောက်ပါကိစ္စများအတွက် လွှဲဒါန်းခဲ့သည်။

၁။ ။အောက်ပါအဆောက်အဦးများကိုပြင်ဆင်ရန်။

(က) မော်လမြိုင် တောင်ပေါက်ကျောင်းတိုက်။

(ခ) ရှမ်းပြည် တောင်ပိုင်း၊ ညောင်ရွှေမြို့၊ အင်းတိန်ဘုရားရှိ တန်ဆောင်း။

(ဂ) ရှမ်းပြည်တောင်ပိုင်း၊ ညောင်ရွှေမြို့၊ တောင်တိုးဘုရားရှိ တန်ဆောင်း။

(ဃ) ရှမ်းပြည်တောင်ပိုင်း၊ ညောင်ရွှေမြို့ရှိ ကျေးပေါ်ခုံကျောင်းတိုက်။

၂။ ။မော်လမြိုင်မြို့၊ တောင်ပေါက်ကျောင်းတိုက်ရှိ၊ သံဃာတော်များအား၊ ပစ္စည်းလေးပါးထောက်ပံ့လွှဲဒါန်းရန်။

၃။ ။အောက်ပါစည်းကမ်းများကို၊ အထောက်အထားပြု၍ ဤလွှဲဒါန်းစာဖြင့် ခန့်အပ်သော ဘဏ္ဍာထိန်းလွှဲကြီးများ သဘောတူကြသည့် အတိုင်း၊ မုဒ္ဓဘာသာ သာသနာတော်တိုးတက်ကြီးပွါးရေးကို ဆောင်ရွက်ရန်။

ထိုလွှဲဒါန်းစာအရလွှဲအပ်ခန့်ထားသော ဘဏ္ဍာထိန်းများမှာ ဦးထွန်းလှ၊ ဦးလှအောင်ကြီးနှင့် အလွှဲရှင် ဒေါ်အေးသန့်ဖြစ်ကြသည်။ -

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ဦးလှအောင်ကြီး နှင့် ဦးသန်းလှိုင် နှင့် ငါးဦး။

အချင်းဖြစ်လယ်မြေများကို၊ အထက်တွင်ဖေါ်ပြခဲ့သည့်အတိုင်း၊ မှတ်ပုံတင် ၍ထားသော လူဒါန်းစာဖြင့်၊ ဒေါ်အေးသန့်က၊လူဒါန်းပြီးသည့်နောက်၊တွဲဘက် ဘဏ္ဍာထိန်းဖြစ်သူ ဦးလှအောင်ကြီးက ယခင်က လယ်မြေများကို သီးစားလုပ်ခဲ့ ကြသူ ဒေါ်မြရင်၊ ကိုရွှေလှိုင်၊ ဦးချစ်လှိုင်နှင့် ဦးမြစောတို့အား၊ နှိုတစ်စာပေး၍၊ ထိုမြေများကို လူဒါန်းပြီးဖြစ်ကြောင်း၊ သို့အတွက် ထိုမြေများကို ဆက်လက်၍ သီးစားအဖြစ်နှင့် လုပ်လိုကြမသေးလျှင်၊ ဘဏ္ဍာထိန်းလူကြီးများထံ လျှောက်ထား ရမည်ဖြစ်ကြောင်း အကြောင်းကြား လိုက်လေသည်။ သို့ရာတွင် သူတို့က ထိုနှိုတစ်စာကို အလေးဂရု မပြုဘဲ၊ ကျေးရွာ သီးစား ချထားရေး ကော်မိတီသို့၊ ထိုမြေများကို မိမိတို့အား၊သီးစားချထားပါရန် လျှောက် တောင်းခဲ့လေသည်။ ကျေးရွာသီးစားချထားရေး ကော်မိတီကလည်း၊ ထိုလယ် မြေများကို [ရုဟန်းသံဃာတပါးပါးထံ ရေစက်ချလူဒါန်းခြင်းမပြုရသေးခြင်း ကြောင့်၊ သံဃိကသဘောသက်ဝင်သော သာသနာမြေမျိုးသို့ မရောက်ရှိသေး သည်ကတကြောင်း၊ ရေစစ်ရှိ စာချုပ်တွင်၊ ဆွေမျိုးသားချင်း သုံးဦးသာပါဝင် သဖြင့်၊ ကုသိုလ်ဖြစ်အဖွဲ့အစည်းဟုဆိုသောစကား၏ အဓိပ္ပါယ်ပြည့်စုံစွာ မရောက် ရှိသေးသည်ကတကြောင်း မြေယာချထားရေးနည်းဥပဒေ ၁၆ (ဂ)နှင့် မညီ ညွတ်သေးဟု မြေယာချထားရေးကော်မိတီများက ယူဆကြသည့်အတိုင်း] သူတို့ အား၊ သီးစားဟောင်းများအဖြစ်နှင့် ဆက်လက်၍လုပ်ကိုင်ရန် ခွင့်ပြုလိုက်ကြ လေသည်။

ခရိုင်သီးစားချထားရေးကော်မိတီကလည်း၊ [မော်လမြိုင်မြို့တွင် သာသနာ အဖွဲ့အစည်းပေါင်းများစွာရှိသော်လည်း၊မည်သည့်အသင်းအဖွဲ့အား‌မျှ လွှဲပြောင်း လူဒါန်းခြင်းမရှိ၊ မည်သည့်ကျောင်း၊ ပုထိုး၊ စေတီ၊ သာသနာအဆောက်အဦ တို့အား၊ လွှဲပြောင်းလူဒါန်းခြင်းမရှိ၊ ဝတ္ထုကမြေအမှု ဦးလှအောင်ကြီးနှင့် နှစ်ဦး အား‌သာ ဘဏ္ဍာထိန်းအဖြစ် လွှဲပြောင်းသည်ဟု ပါရှိသဖြင့်၊ သံဃိကသဘော သက်ဝင်ခြင်းမရှိဘဲ၊ မြေယာချထားရေး နည်းဥပဒေ အပိုဒ် ၁၆ (ဂ)နှင့် ကွဲလွဲ ဆန့်ကျင်သဖြင့်] ဟုအကြောင်းပြလျက်၊ ကျေးရွာသီးစားချထားရေးကော်မိတီ၏ အမိန့်ကိုအတည်ပြုလိုက်လေသည်။

၁၉၄၈ ခုနှစ်၊ သီးစားချထားရေးအက်ဥပဒေ ပုဒ်မ ၃၊ ခြွင်းချက် (ခ)မှာ (၎အက်ဥပဒေပါ ပြဋ္ဌာန်းချက်များမှာ ဘာသာရေးနှင့်သော်ငင်း၊ ကုသိုလ်ရေး နှင့်သော်ငင်း သက်ဆိုင်သည့်အသင်းအဖွဲ့တစုံတရာပိုင် မြေတစုံတရာ၊ သို့မဟုတ် မြေများနှင့်သက်ဆိုင်ခြင်းမရှိစေရ)ဟု ပါရှိသည်။

၁၉၅၁

ဦးလှအောင်ကြီးနှင့် ဦးသန်းလှိုင်နှင့် ငါးဦး။

၁၉၅၁ ခုနှစ်၊ သီးစားချထားရေး နည်းဥပဒေ ၁၆ (၈) မှာလည်း၊ ဤနည်းဥပဒေများပါ ပြဋ္ဌာန်းချက်များမှာ၊ သံဃိကသဘော သက်ဝင်သော သာသနာမြေနှင့် ကုသိုလ်ဖြစ်အဖွဲ့အစည်းဝိုင်မြေများနှင့် သက်ဆိုင်ခြင်းမရှိစေရဟု ပါရှိသည်။

မူလပိုင်ရှင် ဒေါ်အေးသန့်သည်၊ အချင်းဖြစ်မြေများကို လှူဒါန်းစာဖြင့် လှူဒါန်းပြီးဖြစ်သောကြောင့်၊ ထိုလယ်များသည် ဒေါ်အေးသန့်ဝိုင် လယ်များ အဖြစ်မှရပ်စဲခဲ့ပြီး၊ ၎င်းတို့သည်၊ လှူဒါန်းစာတွင်ပါရှိသော သာသနာရေးကိစ္စများ အတွက်သာလျှင်၊ ဘဏ္ဍာထိန်းလူကြီးများက ထိန်းသိမ်းစောင့်ရှောက်ရသော သာသနာမြေအဖြစ်သို့ ပြောင်းလဲရောက်ရှိခဲ့ကြပေပြီ။ အဆိုပါသာသနာရေးကိစ္စများမှာလည်း၊ ဘုရားတန်ဆောင်းများကိုပြင်ရန်၊ ကျောင်းတိုက် နှစ်တိုက်ကို ပြင်ရန်၊ ကျောင်းတိုက်တိုက်ရှိ သံဃာတော်များအား၊ ပစ္စည်းလေးပါးလှူဒါန်း ထောက်ပံ့ရန်နှင့် ပရိယတ္တိသာသနာတော်ကို အားပေးချီးမြှောက်ရန်ဖြစ်သည်။ သို့အတွက် ထိုမြေများသည်၊ ဗုဒ္ဓပမုခသံဃိက သဘောသက်ဝင်သော သာသနာမြေများဖြစ်ခဲ့ကြပေပြီ။

ကျေးရွာ သီးစားချထားရေး ကော်မိတီက၊ ရဟန်းသံဃာ တပါးပါးထံ ရေစက်ချ၍လှူဒါန်းမှ အလှူအထမြောက်၍၊ သာသနာမြေဖြစ်သည်ဟု ယူဆခြင်းသည်၊ တရားဥပဒေအရမှားယွင်းသည်။ ခရိုင်သီးစားချထားရေး ကော်မိတီက (မည်သည့် ကျောင်း ပုထိုး စေတီ သာသနာ အဆောက်အဦတို့ အားလှဲပြောင်း လှူဒါန်းခြင်းမရှိ) ဟု ယူဆခြင်းသည်လည်း မှားယွင်းသည်။ ကန့်စင်စစ်မှာ ဘဏ္ဍာထိန်းလူကြီးများသည်၊ အထက်တွင်ဖော်ပြခဲ့သော ဘုရား တန်ဆောင်းများအတွက်၎င်း၊ ကျောင်းတိုက်များအတွက်၎င်း ပရိယတ္တိ သာသနာတော်အတွက်၎င်း သာလျှင်၊ ထိုလယ်မြေများကို ထိန်းသိမ်းစောင့် ရှောက်ကြရမည်ဖြစ်သောကြောင့်၊ ထိုလယ်မြေများကို ဘုရားအမှုရှိသော သံဃာတော်များအား လှူဒါန်းပြီးဖြစ်သည်။

(မော်လမြိုင်မြို့တွင် သာသနာရေးအသင်း အဖွဲ့ပေါင်း များစွာရှိပါလျက်၊ မည်သည့် အသင်း အဖွဲ့အားမျှလှဲပြောင်း လှူဒါန်းခြင်းမရှိ) ဆိုရာမှာလည်း တရားဥပဒေ အရ လှူဒါန်းသူသည်၊ မိမိတဦးတည်းကိုပင်လျှင်၊ ဘဏ္ဍာထိန်း အဖြစ် လှဲအပ်ခန့်ထားလျက် လှူဒါန်းလိုသော် လှူဒါန်းနိုင်သေးသည်။ ယခုမှာမူ လှူဒါန်းသူသည်၊ မိမိတဦးတည်းကိုသာ ဘဏ္ဍာထိန်းအဖြစ် မလှဲမအပ်မခန့်ထားဘဲ၊ အခြားသူ နှစ်ယောက်ကိုလည်း ထည့်သွင်း၍ လှဲအပ်ခန့်ထားခဲ့ပေ

၁၉၅၂

ဦးလှအောင်ကြီး နှင့် ဦးသန်းလှိုင် နှင့် ငါးဦး။

သည်။ သည်မျှသာမကသေး လူဒါန်းသူသည်ပဌမဘဏ္ဍာထိန်းများကွယ်လွန်ရှိဖြစ်စေ၊ နတ်ထွက်ရှိဖြစ်စေ နေရာလစ်လပ်လျှင် ဖြည့်စွက်ရှိ ဘဏ္ဍာထိန်းများ အစဉ်အဆက် ထိန်းသိမ်းစောင့်ရှောက်ရှိ သွားနိုင်ရန်လည်း လူဒါန်းစာတွင် အတိအလင်း ထည့်သွင်းရေးသားရှိ ထားပေသည်။

အထက်တွင် ဖေါ်ပြခဲ့သော အကြောင်းအချက်များကို ထောက်သောအားဖြင့်၊ အချင်းဖြစ်မြေများသည် သံဃိက သဘောသက်ဝင်သော မြေများဖြစ်ကြသည်။ ၎င်းတို့သည်၊ ၁၉၄၈ ခုနှစ်၊ သီးစားချထားရေး အက်ဥပဒေနှင့် မသက်ဆိုင်သော မြေများဖြစ်ကြသည်။ သို့အတွက် ကျေးရွာသီးစား ချထားရေး ကော်မိတီနှင့် ခရိုင်သီးစားချထားရေး ကော်မိတီက၊ ထိုမြေများကို ထို အက်ဥပဒေနှင့် ၁၉၅၁ ခုနှစ်၊ သီးစားချထားရေး နည်းဥပဒေ အရ၊ သီးစားချထားလိုက်ကြခြင်းသည်၊ မိမိတို့မှာ အာဏာမရှိဘဲလျက် ချထားလိုက်ကြခြင်းဖြစ်သည်။

သို့ဖြစ်၍၊ ဤရုံးတော်ကကျေးရွာသီးစားချထားရေး ကော်မိတီ နှင့် ခရိုင်သီးစားချထားရေး ကော်မိတီ၏ အမိန့်များကိုစရိတ်နှင့်တကွ ပယ်ဖျက်လိုက်သည်။ လျှောက်ထားခံရသူတို့သည်၊ လျှောက်သူ၏ တရားစရိတ်ကိုခံကြရမည်။ ရှေ့နေခအတွက်မှာ ငွေ ၀၅ ခံကြရမည်။

SUPREME COURT.

MAUNG KHO LAN (APPLICANT)

†S.C. 1952

v.

Aug. 7.

MA NGWE LWAI AND ONE (RESPONDENTS).*

Direction in the nature of certiorari—Allotment by District Tenancy Disposal Committee setting aside Village Committee's order—Rule 13 (1) (i) of Disposal Rules—District Committee not applying mind to real question—Facts, contrary to findings, how far can be proved by affidavits in writ of certiorari.

The Village Committee allotted a piece of land to applicant the owner in the previous year. On appeal the District Committee set it aside. For the current agricultural season parties again applied. The Village Committee found that the 1st respondent defaulted in payment of rent and allotted the land to the owner to cultivate his own land. On appeal it was simply stated that the dispute was exactly the same as in the previous year and that the appeal must be allowed as in the previous year. Upon an application for a writ of certiorari.

Held: That the District Committee had not applied its mind to the real question at issue whether rent was paid in the previous year by 1st respondent or not. Where facts are at issue before Inferior Tribunals they should have been thoroughly thrashed out there, and new facts cannot be allowed to be proved by affidavits on the application for a writ. The Supreme Court will not normally go beyond the record. The finding by the Village Committee, in the absence of contrary finding on appeal, is binding on the Supreme Court and there was nothing in that finding whereby the Village Committee acted illegally or otherwise than in due course of law.

Tun I for the applicant.

O. S. Woon for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The Thatôn District Tenancy Disposal Committee which, by the order under review in these proceedings, has set aside the allotment made by the relevant Village Tenancy

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* Civil Misc. Application No. 74 of 1952, being application for direction in the nature of certiorari.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

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Disposal Committee, has not submitted the proceedings of the Village Committee. The proceedings which it has submitted to this Court of itself are also very scanty and consist only of a memorandum of appeal, a copy of the order of the Village Committee and its own appellate order, together with a certified copy of its appellate order in respect of the same land in the previous agricultural season. The provisions of Rule 13(1) (*f*) appear to have been a dead letter as far as this District Committee is concerned.

In the previous tenancy year the Village Tenancy Disposal Committee allotted the disputed land to the applicant who appears to be the owner. An appeal was preferred by the 1st respondent to the District Tenancy Disposal Committee which set aside the allotment made in favour of the applicant. In the present agricultural season the parties applied again for a new allotment and the applicant's case before the Village Committee, as before us as well, is that the 1st respondent defaulted in payment of rent for the previous agricultural season. This claim was accepted by the Village Committee and on the specific ground that the 1st respondent, a tenant of the previous year, had defaulted in payment of rent, refused to re-allot the land to her for the current year. The Village Committee then proceeded to grant leave to the applicant as an owner-cultivator to till his own land.

An appeal was preferred by the 1st respondent to the Thatôn District Tenancy Disposal Committee. In the petition of appeal no reference whatsoever was made to the point really at issue. It was not alleged by her that she had paid or had made any attempt to pay the rent for the previous year. As far as the proceedings show no one appears to have been examined and the order merely stated that the dispute between the parties was exactly the same dispute

which the Committee had considered in the previous year. It then proceeded to hold that as in the previous year the appeal must be allowed. It does not appear that the District Committee ever applied its mind to the real question at issue, namely, whether the rent for the previous year was paid by the 1st respondent or not.

Before us affidavits have been filed on behalf of the 1st respondent claiming that she did tender the statutory rent to the applicant but that he refused to accept the same. The practice of seeking to prove facts by affidavits filed before us when the same facts were at issue before inferior tribunals and should have been thoroughly thrashed out in such tribunals is to be deprecated. We should not normally, as a Court from which directions in the nature of certiorari are sought, go beyond the record. The finding of fact that the 1st respondent has not paid the rent for the previous year to the applicant, specifically arrived at by the Village Committee, in the absence of a contrary finding by the appellate District Committee, is binding on us unless it is made clear to us that the Village Committee arrived at that finding illegally or acting otherwise than in due course of law. Such circumstances do not exist in the present case.

The application is therefore allowed. The order of the Thatôn District Tenancy Disposal Committee is quashed with costs ; Advocate's fees five gold mohurs.

SUPREME COURT.

†S.C. 1952

Aug. 7.

ISMAIL MOHAMED (AHMED) BODI & SONS AND ANOTHER (APPLICANTS)

v.

CHIEF JUDGE, CITY CIVIL COURT, RANGOON AND OTHERS (RESPONDENTS). *

Mandamus—Direction in the nature of Mandamus against order of City Court under s. 22 (1), *Urban Rent Control Act—Allegation that relevant section of the Act not considered—Whether sufficient—Time spent in pursuing infructuous review without any ground whether can be excused.*

The Controller of Rents fixed Standard Rent on 30th May 1950. A reference was taken to the Chief Judge, City Civil Courts, Rangoon, under s. 22 (1), Urban Rent Control Act and was dismissed. An application for review was also dismissed. The applicants sought to move the Supreme Court by a writ of mandamus and alleged that the learned Chief Judge did not consider or apply the relevant section of the Urban Rent Control Act and he should be directed to do so. The application was sought to be amended to include the prayer for issue of certiorari for which a period of limitation of 90 days has been fixed by Supreme Court Rules.

Held :—That inordinate delay in making application for direction in the nature of mandamus should be explained. Time unnecessarily spent without justifiable cause in pursuing infructuous proceedings for review cannot be excluded for calculating the period of 90 days within which an application for a writ of certiorari should be made to the Supreme Court under the rules.

The excuse that applicant acted under advice in making the review application was not a valid reason for enlargement of time in the case.

Held further : That no writ of mandamus can be issued on the ground that the learned Chief Justice did not consider or apply relevant sections of the Act. This can be canvassed only in a court of appeal.

Tun Sein for the applicants.

O. S. Woon for the respondents 1 and 2.

C. A. Soorma for the respondent 3.

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* Civil Misc. Application No. 212 of 1951, being application for directions in the nature of mandamus.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The 3rd respondent in this application, the Soortee Bara Bazaar Co., applied to the Controller of Rents for fixation of standard rent in respect of rooms occupied by the applicants. The applicants contended before him that they had paid Rs. 10,000 each as " salami " and that therefore it was agreed that rent would be kept stationary at Rs. 300 per mensem in respect of each set of rooms.

The Controller mentioned this contention in his order of the 30th May 1950 but said that the 1939 rent of Rs. 300 was unduly low and he therefore ordered a 25 per cent increase and fixed the rent at Rs. 375.

The applicants being dissatisfied took the matter on reference to the Chief Judge of the Rangoon City Civil Court under section 22 (*1*) of the Urban Rent Control Act but the application was dismissed. An application for review of the dismissal order was also dismissed.

On 30th November 1951 the applicants filed an application in this Court seeking :

" (1) A rule *nisi* in the nature of a writ of Mandamus to the 1st respondent (the Chief Judge of the City Civil Court) directing him to comply with and to apply the provisions of section 19 (*2*) (*c*) of the Urban Rent Control Act . . . . . in the determination of the standard rent in question . . . . .

(2) Notices of this petition to be issued to respondents 2 and 3 (Controller of Rents; Soortee Bara Bazaar Co.) who are interested in the matter . . . ."

The application came up for hearing in the usual way and the learned Advocate for the applicant was asked to explain the inordinate delay in filing the application. He obtained an adjournment to apply formally for extension of time under the Limitation Act.

We have now before us an application dated the 27th June 1952 which is (1) for extension of time to

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condone the statutory period of limitation and (2) for leave to amend the original petition for Mandamus to one for both Mandamus and Certiorari.

It is argued that the applicable writ is Mandamus since the learned Chief Judge did not consider or apply the provisions of the relevant section of the Urban Rent Control Act in determining the case and that therefore the learned Chief Judge should now be directed to do so. This contention to say the least is an ingenious one and if a writ of Mandamus were to lie whenever a relevant provision of law is not applied, the repercussions would be unimaginable. There would be no need to have Courts of Appeal even and there will be no room for writs of certiorari to issue. The contention cannot be countenanced.

In regard to a writ of certiorari, the rules of this Court prescribes a period of 90 days within which to make an application.

A very long time has elapsed since the original order of the Chief Judge was passed and unnecessary time was spent without justifiable cause in pursuing the infructuous proceedings of Review. The affidavits filed by the applicants stress the excuse that they had acted under advice of Counsel. We can however see no valid reason why the enlargement of time prayed for should be granted.

The application for extension of time is dismissed ; leave to amend the original petition is dismissed and it follows that the original petition itself is dismissed with costs ; Advocate's fees five gold mohurs.

SUPREME COURT.

S.C. 1952

Aug. 7.

BO KYI MYINT AND OTHERS (APPLICANTS)

v.

CONTROLLER OF RENTS, RANGOON AND OTHERS (RESPONDENTS).*

Direction in the nature of certiorari—Proceedings under Urban Rent Control Act, s. 16-BB (2)—Alloting premises to owner for occupation—Assumption by Controller that applicant is the owner—S. 16-AA (4) (a) how far applicable—When there is dispute as to ownership—Affidavits, loose and irresponsible statements, deprecated.

U Ba Yi agreed to purchase House No. 11, South Race Course Road from Mrs. Malkhoo in 1939. The purchaser was put in possession before the payment of full purchase price. The premises were rented by U Ba Yi's widow Daw Kha and the previous owner sold the premises in 1949 to U Aung Thein who attempted to establish title by application for fixing Standard Rent. No notice was issued to Daw Kha, the Controller holding that U Aung Thein was the landlord as defined in the Act. U Aung Thein later issued notice to 1st and 2nd Applicants, the occupants, to vacate the premises. They applied to the Controller for continued occupation. The Controller dismissed the application holding that they were tenants of Daw Kha. Finally U Aung Thein applied to the Controller for sanction to prosecute the 1st and 2nd applicants for vacating the premises. The Controller held that U Aung Thein was owner by reason of his title deed and that the occupiers were liable to summary eviction under s. 16-BB (2) of the Urban Rent Control Act. Later the Controller proceeded to allot the premises as President of the Advisory Board to U Aung Thein as owner for his occupation. Upon an application for a writ to quash the proceedings—

Held: That the dispute as to ownership between U Aung Thein and Daw Kha is a matter to be settled in a competent Civil Court. The applicants 1 and 2 came into the premises as Daw Kha's tenants. The order by the Controller that it was immaterial as to whose tenants the applicants were so long as they are tenants of the premises is illegal and unsustainable.

In the present case the Controller's action in Proceedings under s. 16-AA (4) (a) of the Urban Rent Control Act whereby the Controller could direct the landlord to occupy the premises when they become vacant is wholly irregular as Daw Kha was landlord and no notice was issued to her. All that the Controller could have done under the section was to direct Daw Kha to let the premises to a specified person and wait for compliance of the order.

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* Civil Misc. Application No. 31 of 1952, being application for directions in the nature of certiorari.

† *Present:* U THEIN MAUNG., Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

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Statements in affidavits should not be made loosely or irresponsibly. An affidavit is made on oath and as such is asolemn statement and care should be taken that loose statements are not made.

Myint Toon for the applicants.

O. S. Woon for the respondents 1 and 2.

C. C. Khoo for the respondent 3.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—This case has a long history.

In 1939 one U Ba Yi obtained possession of House No. 11, South Race Course Road, under an agreement of sale entered into with Mrs. Malkhoo. Under the agreement he was to make 48 monthly instalments of Rs. 60 and on the completion of these payments the house and land were to be conveyed to U Ba Yi. By the time the Japanese invasion took place U Ba Yi had paid some 29 instalments. U Ba Yi died before the liberation and it appears that no further collections were made from Daw Kha (his widow) by Mrs. Malkhoo who instead sold the premises to U Aung Thein (the 3rd respondent in the present application) in 1949.

At the time of the sale to U Aung Thein the premises were occupied by one Daw Than Nyun who admittedly was the tenant of Daw Kha. U Aung Thein's first attempt to establish his title to the premises was by way of an application to the Controller of Rents, Rangoon, in Proceedings No. 489-E of 1948-49 for the fixation of standard rent. The application was directed against Daw Than Nyun who was described as a trespasser. Daw Than Nyun took the stand that she was Daw Kha's tenant and that she had been so for the four years previous to the application. The

Controller held that U Aung Thein was the owner of the premises and as such was entitled to receive rent and that therefore he was a "landlord" as defined under the Act. No opportunity was afforded to Daw Kha to make her representations and the Controller fixed the standard rent at Rs. 30 per mensem, an order which affected nobody.

In 1951 U Aung Thein made new efforts to better his position in regard to the premises and issued notices to Bo Kyi Myint and Ma Khin Aye (1st and 2nd applicants in this case) who by then were the occupants, to vacate the premises. These new tenants were alarmed and therefore made an application to the Controller of Rents for permission for continued occupation. They were indifferent as to whom they should pay rent but wanted to pay to the person entitled. The Controller in Proceedings No. 331-E of 1950-51 held that they were in fact tenants of Daw Kha and that their application was not maintainable.

In Proceedings No. 27-M of 1951-52, U Aung Thein once again made his final effort out of which the proceedings before us have arisen. By an application dated the 24th November 1951 he asked the Controller for sanction to prosecute Bo Kyi Myint and Ma Khin Aye for vacating the premises and installing Daw Hla Myaing and others (the other applicants before this Court) without formal permission of the Controller.

The Controller held an enquiry and despite the contention of Bo Kyi Myint and Ma Khin Aye that they had not vacated the premises, found that they had done so and that they had installed the others. He held (*vide* paragraph 2 of his order of the 5th March) that the point of ownership was settled by U Aung Thein's production of title deeds. He held also that the occupiers, as unauthorised tenants, were liable to

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summary eviction under section 16-BB (*2*) of the Urban Rent Control Act. His order ended with the remarks :

"Before action indicated therein can be taken, it is necessary that the premises should first be allotted to a suitable person by the Advisory Board. The proceedings will therefore be put up at the next meeting of the Board for necessary action."

This order, as has been pointed out, was made on the 5th March. On the previous day U Aung Thein had filed an application for permission to occupy the premises "as owner". The endorsement under date 4th March by the Controller is : "Put up with connected proceedings at tomorrow's meeting of the Advisory Board".

The Advisory Board of which the Controller is the Chairman made its recommendation on the 5th March to allot the premises to "U Aung Thein, owner, for his occupation".

The Diary order of the 6th March in 27-M of 1951-52 is this:

"This proceeding was put up before the Board. The Board recommends the allotment of the premises to the owner U Aung Thein for his *bonâ fide* occupation. Issue allotment order. At the same time issue notices under section 16-AA (*4*) (*d*) to the present occupants."

This order was implemented fully the same day. It is in respect of these orders that the application before us is made.

We desire to say from the outset that the dispute as to the ownership between U Aung Thein and Daw Kha is a matter which should be settled in a competent Civil Court. For the purpose of the case before us the landlord involved is Daw Kha and not U Aung Thein. The original tenant Daw Than Nyun was Daw Kha's tenant and Bo Kyi Myint and Ma Khin Aye

came in as Daw Kha's tenants. If the Controller's allotment order in favour of U Aung Thein is to be allowed to stand he will occupy the premises not as "owner for *bonâ fide* occupation" but as Daw Kha's tenant on the standard rent of Rs. 30 fixed in Proceedings No. 489-E of 1948-49.

The Controller had dealt with Proceedings No. 27-M on the wrong assumption that U Aung Thein was the landlord. U Aung Thein as well as the applicants in the case made it clear that Daw Kha had put in the occupiers as her tenants but the Controller was swayed by U Aung Thein's title-deeds and was reduced to saying in his order of the 5th March: "It is immaterial whether they were the tenants of the petitioner or not so long as they are tenants of the premises in question, it is sufficient for the purpose of the present case".

The Controller's explanation is that he had acted according to the procedure laid down in section 16-AA *4*) (*a*). This section provides that if he should receive information that any premises are vacant or are about to be vacant, then with the advice of the Advisory Board he may direct the landlord to let the premises, when they become vacant, to any person specified in the direction. Instead of issuing the requisite direction to Daw Kha he issued notices to U Aung Thein and the occupiers to deliver possession of the premises to U Aung Thein.

The stage for the issue of notices to the occupiers had not arrived. All that the Controller could have done was to issue a notice and a direction to Daw Kha to let the premises to a specified person and wait for DawKha to comply with the order or to consider her objections, if any should be forthcoming.

Taking the case as a whole we are led to the conclusion that the order of the Controller of the 5th March 1952 cannot be allowed to stand and we

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accordingly quash this order together with all the subsequent orders passed by the Controller in implementation. Advocate's fees ten gold mohurs.

The Controller is directed to dispose of U Aung Thein's application on its merits bearing in mind that for the purposes of the case before him Daw Kha is the landlord of No. 11, South Race Course Road.

One other matter we desire to mention. We have noticed in many cases that come before us that statements in affidavits are loosely and irresponsibly made. Very often the statements are not borne out by and in fact are contrary to the entries in the records. In the present proceedings the Controller's statement in his affidavit that he did not decide the question of U Aung Thein's title is contradicted by paragraph 2 of his order. He stated also that the description of U Aung Thein as owner of 11, South Race Course Road, was an oversight. It could not have been a mere oversight for U Aung Thein's case is based upon his allegation that he is the owner. The recommendation of the Advisory Board of which the Controller is the Chairman was in favour of "U Aung Thein, owner, for his occupation". The Diary Order of the 6th March mentioned "allotment of the premises to the owner U Aung Thein for his *bonâ fide* occupation".

An affidavit is made on oath and is a solemn statement and care should be taken that loose statements are not made.

SUPREME COURT

THAKIN HLA KYWAY (APPLICANT)

v.

U NYI NYI (RESPONDENT). *

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Aug. 7.

Co-operative Societies' Act, s. 44-A—Registrar dissolving a Committee of a Co-operative Society and declaring some members to be disqualified for election for 2 years—Application for writ of certiorari—Applicant who was the President of the Society in the previous term also disqualified. Power of the Registrar under s. 44 (a) whether extends to members of a Committee whose term has expired—Whether order judicial or administrative.

Held : Under s. 44-A of the Co-operative Societies Act the Registrar may dissolve the Committee and also direct that all or any of its members shall be disqualified from being elected for a period specified in the order. The Committee that can be dissolved is the Committee which has mismanaged the affairs of the Society and the disqualification is "against its members". The test in such cases must be whether applicant was a member of the Committee which is dissolved. Since the applicant had ceased to be a member of the Committee long before the proceedings were initiated against the Society s.44-A can have no application to him. Further the section cannot be invoked to cover the case of past member of the Committee even if the mismanagement began at the time the applicant was President.

Held further : That the order in the case was one expressly under s.44-A of the Act and that is the only provision under which an order of dissolution and disqualification can be made—hence it is not an administrative act but liable to be quashed if in excess of jurisdiction.

T. P. Wan for the applicant.

O. S. Woon for the respondent.

The judgment of the Court was delivered by

MP. JUSTICE MYINT THEIN.—The respondent who is the Registrar of Co-operative Societies, acting under section 44-A of the Co-operative Societies' Act, passed an order dated the 19th April 1952 dissolving the

* Civil Misc. Application No. 55 of 1952.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG AND MR. JUSTICE MYINT THEIN.

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THAKIN HLA KYWAY v. U NYI NYI.

Committee of the Dock Workers' Co-operative Society Ltd. (a society registered under the Act), for mismanagement. In the same order, eight out of the eleven Committee Members were declared disqualified from being elected to office for a period of two years. Further in the same order a disqualification for the same period was imposed upon the applicant Thakin Hla Kyway who was the President of the Society in 1950-51 and who had ceased to be a member of the Committee long before the proceedings were initiated against the Society.

The application before us is not concerned with the dissolution of the Committee nor with the disqualification of its eight members. It is the application of Thakin Hla Kyway for directions by way of a writ of certiorari to quash the order of the Registrar in so far as the disqualification regarding himself is concerned.

His learned Advocate contends that section 44-A contemplates action against an existing Committee and that the disqualification can be declared only in respect of those actually serving on the Committee dissolved. In our judgment this contention must be upheld.

Section 44-A runs:

"If in the opinion of the Registrar, the Committee of any registered society is mismanaging the affairs of the society, he may by order in writing, after giving the Committee an opportunity to state their objections, if any, dissolve the Committee and direct that all or any of its members shall be disqualified from being elected to the Committee of the society for a period to be specified in the order not exceeding three years."

From the wording of the section it is clear that the body that can be dissolved is the Committee which "is mismanaging the affairs of the society" and that

the disqualification can be directed only against " its members ". The test in this case must be, " Is the applicant a member of the Committee which is dissolved ?" The answer is in the negative and therefore it follows that section 44-A can have no application to the applicant who had ceased to be a member of the Committee since 1951. Even if the mismanagement began at the time the applicant was the President (as contended by the learned Government Advocate) section 44-A cannot be invoked as it cannot cover the case of a past member of the Committee.

The learned Government Advocate's second point is based upon the statement in the respondent's affidavit that the order in question was an administrative order in respect of which a writ of certiorari can have no application. We can see no force in this argument since the order itself expressly stated that it was one made under the section. In point of fact this is the only provision under which a dissolution of a Committee and the disqualification of its members could have been ordered.

For these reasons, the portion of the respondent's order dated the 19th April 1952 in so far as it relates to the applicant Thakin Hla Kyway's disqualification for a period of two years, is quashed. Advocate' fees five gold mohurs.

SUPREME COURT.

† S.C. 1952

Aug. 14.

U HAN SHEIN & SONS (APPLICANT)

v.

THE HON'BLE MINISTER FOR FINANCE AND REVENUE (RESPONDENT).*

Sea Customs Act, s. 167 (37), s. 183—Import of goods with incorrect description and value—Levy of customs duty—Interference by way of certiorari—Questions of fact how far can be decided.

Motor car accessories and spare parts were imported by petitioner and he declared the place of origin and value. On examination it was found that the value was wrong, that some of the goods were of different origin than those declared and that some goods had not been declared at all or misdeclared. The Respondent set aside the orders of the Collector and Financial Commissioner and directed levy of duty at a particular rate. Upon an application for a writ of certiorari to quash such order on the ground that a mistake had been made in accepting the Collector's valuation and not that of the petitioner:

Held: That the question of what is the value of goods is a pure question of fact. The Respondent was competent to decide the same and the Court will not interfere even if it disagreed on such a question.

Gwan Kee v. The Union of Burma, B.L.R. (1949) (S.C.) 151, followed.

In view of petitioner's admission that some goods were undeclared and some were of origin other than those declared and not covered by licence, the Court will not interfere with the Respondent's finding as to valuation.

Kyaw Min for the applicant.

O. S. Woon (Government Advocate) for the respondent.

The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—This is an application for directions in the nature of certiorari in respect of an order passed by the first respondent under sections 167 (37) and 183 of the Sea Customs Act.

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* Civil Misc. Application No. 84 of 1952.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

The petitioners imported motor car accessories and spare parts declaring them to be of USA, U.K. and Australian origins and declaring their value to be Rs. 39,062 c.i.f., Rangoon.

On actual examination of the goods, the Collector of Customs, Rangoon, found (1) that the goods were worth Rs. 66,814; (2) that the goods worth Rs. 2,784 were of Canadian origin and therefore not covered by petitioners' licence; (3) that some of the goods had not been declared at all; and (4) that the petitioners had deliberately misdeclared the contents and value of the goods imported. He accordingly confiscated the entire consignment giving the petitioners an option to pay in lieu of confiscation a fine of Rs. 15,000 *plus* the duty calculated on the basis of the "ascertained value" and also imposed a penalty of Rs. 12,400.

On appeal the Financial Commissioner set aside the Collector's order; but in revision the respondent set aside the orders of both the Collector and the Financial Commissioner and directed the petitioners to pay duty on Rs. 66,814 and to pay a fine of Rs. 3,000 only.

The learned Advocate for the petitioners has urged that the respondent made a mistake in accepting the Collector's valuation of the goods in preference to theirs; and the petitioners themselves have stated in paragraph 9 of their affidavit:

> "Petitioners had however imported under the Invoice articles similar to the so-called non-invoiced components and these had been accepted by the Collector of Customs at petitioners' Invoice values, and it was strange that the so-called non-invoiced components referred to in paragraph 8 above should now be valued at 'ascertained' or market prices."

However, the question as to what is the value of the goods is a pure question of fact which the respondent is competent to decide and this Court will not interfere

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even if it does not agree with him on such a question. [See *Gwan Kee* v. *The Union of Burma* (1).]

The fine must be held to have been rightly imposed as some goods were admittedly undeclared, some goods were admittedly of Canadian origin and therefore uncovered by the licence, and the whole consignment which was declared by the petitioners to have been worth Rs. 39,062 only have been found to have been worth as much as Rs. 66,814.

The application is dismissed with costs; Advocate's fee ten gold mohurs.

(1) B.L.R. (1949) (S.C.) 151.

SUPREME COURT.

T. N. AHUJA & Co. (APPLICANTS)

†S.C. 1952

v.

Aug. 14.

ABDUL LATIFF JAMAL & Co. (RESPONDENTS).*

Application for special leave—S. 6, Union Judiciary Act, 1948—Advance whether loan or for purchase of a hundi by way of discount—Findings of fact—Cause of action on original consideration when extinguished—Accord and satisfaction.

The Lower Courts found that the original transaction between the parties was not one of loan but of discounting a hundi *i.e.*, purchase of a hundi for less than its face value. On an application for special leave:

Held: That the finding of fact that the original transaction was not one of loan but of discounting of hundi cannot be challenged on appeal.

Held further: That the cause of action in the original consideration is extinguished if the lender by negotiating a negotiable instrument has made the Bill his own and thereby accepted the instrument as accord and satisfaction of the original consideration, *viz.*, liability of the borrower.

Maung Chit v. *Roshan N. M. A. Kareem Oomer & Co.*, 12 Ran. 500.

P. K. Basu for the applicants.

S. A. A. Pillay for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—All that can be said in support of the present application for special leave to appeal under section 6 of the Union Judiciary Act has been said by the learned counsel for the applicant. However, we are not satisfied that this is a fit case for special leave to be granted and the application therefore stands dismissed.

The present proceedings arose out of a suit instituted by the applicants for the recovery of Rs. 5,000 with interest thereon on the basis that the sum of Rs. 5,000

* Civil Misc. Application No. 2 of 1952 being application for Special Leave to appeal.

† *Present*: U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

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T. N. AHUJA & Co. v. ABDUL LATIFF JAMAL & Co.

represented a loan made by the applicants to the respondents on 19th May 1939. The facts, which are not in dispute, are that on that date the applicants issued a cheque for Rs. 5,000 in favour of the respondents and the respondents endorsed in favour of the applicants a hundi made out in favour of the respondents by the United Oil Mills Ltd. This hundi was later endorsed by the applicants in favour of the National City Bank of New York which again endorsed the same back to the appplicants.

The applicants' claim that they issued the cheque for Rs. 5,000 in favour of the respondents by way of a loan of a sum represented by the cheque was disputed by the respondents in their written statement. The suit was dismissed by the trial Court on grounds into which it is not necessary to enter here. On appeal being preferred by the applicants to the High Court it was dismissed. In dismissing the appeal a Bench of the High Court rejecting applicants' claim that the transaction resulting in the issue of the cheque for Rs. 5,000 was one of loan, said :

"What really seems to have happened was that a hundi which was drawn in favour of Abdul Latiff Jamal & Company by the United Oil Mills Limited in a manner similar to Exhibits 1 and 2 was discounted by the plaintiffs T .N. Ahuja & Company at the rate of 9 per cent per annum and the same was endorsed in their favour by the defendants Abdul Latiff Jamal & Company. It was then endorsed by the plaintiff Company to the Bank for consideration as was usually done, the plaintiffs having benefited by the difference in the rate of interest charged by them to the defendant Company and that charged to them by the Bank."

The learned counsel for the applicants relies strongly on a Full Bench decision of the High Court of Judicature in *Maung Chit* v. *Roshan N. M. A. Kareem Oomer & Co.* (1). With respect, it is difficult

(1) 12 Ran. 500.

to see the application of the decision to the present proceedings before us. The High Court had come to a finding on facts that the original transaction between the parties was not one of loan but was one of discounting of a hundi.

On the basis then that the cheque for Rs. 5,000 was issued by the applicants to the respondents in pursuance of a discount transaction (and accordingly payment by the applicants was in consideration of the hundi which had been endorsed over to them and which in ordinary language may be described as being bought by them), a claim as on a loan clearly is not appropriate in the circumstances. Further, *Maung Chit*'s case (1) provides a complete answer to the applicants' case even on the assumption that the original transaction was one of loan. As was said at page 505 of the report :

> "On the other hand the cause of action on the original consideration is extinguished when the amount due under the negotiable instrument is paid or if the lender by negotiating the instrument or by laches or otherwise has made the bill his own, and thus must be regarded as having accepted the negotiable instrument in accord and satisfaction of the borrower's liability on the original consideration."

The application is dismissed with costs ; Advocate's fee five gold mohurs.

(1) 12 Ran. 500.

SUPREME COURT.

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Aug. 14.

PONOYA AND TWO OTHERS (APPLICANTS)

v.

THE SECRETARY, DISTRICT AGRICULTURAL BOARD, PYAPÔN AND OTHERS (RESPONDENTS).*

Disposal of Tenancy Rule—Rule 10—No default in payment of rent by tenant—His right to work the same land for the next season.

For 1951-52 the children of the owner of the lands applied for permission to cultivate them as owners and the tenants also applied. The application of the children of the owner was rejected in both the Ward and District Boards on the ground that their title to the property had not been proved. For the year 1952-53 they made a similar application. The Ward Committee rejected it on the ground that there was no default in payment of rent or repayment of agricultural loan by the tenants, they were therefore entitled to work the lands. The Committee further held that the owners never earned their living as cultivators. The District Board disagreed on both counts; upon an application for a writ of certiorari:

Held: The fact that respondents 2 and 3 are owners and would be in a position to work the land has no bearing on the case. Under Rule 10 of the Tenancy Disposal Rules, if a tenant is not in default he is entitled to work the land in the next season. As there was no dispute that rent had been paid and there was no default in repayment of agricultural loan, the order of the District Board should be quashed.

P. M. Beecheno and Khin Maung for the applicants.

P. K. Basu for the respondents 2 and 3.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The applicants in this case have been working the lands in dispute for some years past. For the season 1951-52 the respondents 2 and 3, Maung Khin Maung and Ma Hla Myint, children of the owner Shafat Ali, deceased, applied for permission to cultivate these lands as owners but their application was rejected by both the Ward and the District Boards.

* Civil Misc. Application No. 80 of 1952 being application for directions in the nature of certiorari.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

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This year the respondents made a similar application and again the Ward Board dismissed it pointing out that the tenants who had not defaulted either in the payment of rent or in the repayment of agricultural loans were entitled to continue as tenants. The members of the Board in their order of dismissal expressed the view that the respondents had never earned their living as cultivators and that they were not in a position to work the land themselves.

The District Board, to which the matter was taken on appeal by the respondents, disagreed with these views. Stressing the fact of ownership and holding that in the past Maung Khin Maung had earned his living as a cultivator, the District Board decided that the lands should be restored to the respondents as owners for their cultivation.

Neither the fact that the respondents are the owners nor the probability that Maung Khin Maung would be able to work the land himself can have any bearing upon the case before us. Rule 10 of the Tenancy Disposal Rules provides that in respect of land which had been worked the previous year by a tenant (whether installed without dispute or installed by a Tenancy Board) if there is no default in the payment of rent nor in the repayment of agricultural loan, then such a tenant is entitled to work the land in the coming season.

In this case the receipt of rent is admitted in paragraph 4 of Maung Khin Maung's affidavit. Repayment of agricultural loans by the applicants is not denied. Therefore under Rule 10 they must be accepted as tenants for the present season. The order of the Ward Board was correct and proper and in the result the order of the District Board of Pyapôn, dated the 30th May 1952 must be and is hereby quashed. Advocate's fee eighty-five kyats.

SUPREME COURT.

† S.C. 1952

Aug. 20.

U PO THIN (APPLICANT)

v.

DISTRICT AGRICULTURAL BOARD, MAUBIN AND OTHERS (RESPONDENTS).*

Disposal of tenancy—Default by tenant in paying rent in previous year—Allotment to Respondents by Village Committee—Whether land could be re-allotted on tender of rent in arrears.

The application for re-allotment of the land by applicant was rejected by the Village and District Tenancy Disposal Committees on the ground that he had committed default in payment of rent; the land was allotted to 3rd Respondent. The applicant then offered to pay the defaulted amount to the Headman.

Held: That the land had been validly allotted by the Village Committee and accordingly there could be no re-allotment of the land in question as both the District Committee and the Village Committee have acted in accordance with law.

Ba Than for the applicant.

O. S. Woon (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—On the applicant's own showing it is clear that his application has no merits. Both the Village and the District Tenancy Disposal Committees rejected his request for re-allotment of the land in dispute, of which he had been a tenant in the previous year, on the ground that he had committed default in payment of rent.

The application for allotment was considered by the Village Committee on the 15th March 1952 and on that date, on the ground that the applicant had

* Civil Misc. Application No. 99 of 1952 being application for directions in certiorari.

† *Present*: U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

committed default in the payment of rent in the two previous years, refused to re-allot the land to him. It was only on the 23rd March 1952 that the applicant, on his own showing, went to the headman of the village and offered to pay the rent in default. Why the applicant tendered the rent in default to the headman and not to his landlord is due to the fact that the sum in default represented the land revenue due on the land for the previous two years. What appears to have happened was that the owner instead of collecting twice the land revenue from his tenant and paying out of that collection the land revenue to the headman, received for himself only the rent due to him and left it to the applicant to pay that part of the rent which represents the land revenue direct to the headman.

At the time the applicant offered to pay the sum in default to the headman the land had been allotted to the 3rd respondent by the Village Committee and accordingly the applicant could not in any case receive re-allotment of the land in question.

The learned counsel for the applicant was forced to concede in these circumstances that neither the District Tenancy Disposal Committee nor the Village Tenancy Disposal Committee had acted otherwise than in accordance with law.

The application therefore fails and is dismissed with costs, Advocate's fee five gold mohurs.

SUPREME COURT.

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Aug. 22.

K. E. MOHAMED EBRAHIM AND ANOTHER (APPELLANTS)

v.

THE TAJMAHAL STATIONERY MART (RESPONDENT).*

Passing-off action—Principles—Evidence of witness as to opinion whether admissible.

Held: The guiding principles applicable to cases of passing-off actions are clear and beyond dispute. No man can represent his goods as being the goods of another man, and no man is permitted to use any mark, sign or symbol, device or means, whereby without making a direct false representation himself to a purchaser who purchases from him, he enables the purchaser to make a false representation to somebody else who is the ultimate customer.

Rights of property may be acquired in a trade-mark on the proved association in the market of the device, name, sign, symbol or other means in question with the goods of the plaintiff. Use of the same by the defendant, whether intentional or otherwise, will amount to false representation.

Singer Manufacturing Co. v. *Loog*, (1880) 18 Ch. D. 395 at 412; *Thomas Bear & Sons (India) Ltd.* v. *Prayag Narain*, (1940) 67 I.A. 212 at 216, followed.

In the present case the appellants have established their right to the trade-mark "Chinthe" in respect of diaries and exercise books.

Opinion is one thing and direct evidence is another. Some of the witnesses examined were not experts and cannot consequently give expert testimony by opinion. The Court is in possession of the same materials as the witnesses and their opinion can add nothing to the materials for judgment by the Court but will only encumber the proceedings.

J. K. Munshi for the appellants.

M. M. Rafi for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—A wealth of authorities has been cited by learned counsel at the hearing

* Civil Appeal No. 11 of 1950 against the decree in Civil 1st Appeal No. 44 of 1949.

† *Present:* MR. JUSTICE E. MAUNG, MR. JUSTICE MYINT THEIN and U ON PE, J.

of this appeal which arises out of a claim by the appellants for injunction and ancillary reliefs in what may be shortly described as a "passing-off action". But the guiding principles applicable to the appeal are clear and beyond dispute.

As was said in *Singer Manufacturing Co.* v. *Loog* (1):

"No man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer."

This principle has been enunciated in a slightly different way in *Thomas Bear & Sons (India) Ltd.* v. *Prayag Narain* (2) thus:

"It is clear that the right of property that may be acquired in such a trade-mark is based on the proved association in the market of the device, name, sign, symbol or other means in question, with the goods of the plaintiff, so that the use by the defendant on such goods of the trade-mark will amount—whether the defendant intends it or knows it or not—to the false representation that the goods are manufactured or put on the market by the plaintiff."

This representation can be to the eye or to the ear but whether there has been such a representation, either to the eye or to the ear, must be determined having regard to the special conditions peculiar to the country where the trade-mark is being put forward. The mythical "Chinthe" has been a common symbol in this country even before it attained independence, and after independence, by its adoption in the Court of Arms of the Union, the symbol has become almost

(1) (1880) 18 Ch. D. 395 at 412. (2) (1940) 67 I.A. 212 at 216.

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universal. It must also be remembered that the vital element in such disputes, namely, the probability of deception, will turn wholly or partly, on questions of fact.

The appellants, who are engaged in business as General Importers and Wholesale Dealers of various classes of goods, claimed that in respect of stationery articles they are entitled to the use of the "Chinthe" mark as in Exhibits A and B on all stationery articles and that the respondents by their marks Exhibits C and D are passing-off a colourable imitation of the appellants' trade-marks Exhibits A and B.

Exhibits A and B are identical representations of a mythical animal which is described as a "Chinthe". That term is also descriptive of a lion as found in nature. Mark Exhibit B is smaller in size and is used on diaries issued by the appellants, whereas Exhibit A, which is of larger size, is used on exercise books issued by them. Exhibit D which was used by the respondents on exercise books and diaries issued by them represents the mythical "Chinthe" in a different posture from that adopted by the appellants in their marks A and B. There can be no dispute in this appeal as regards Exhibit D. The trial Judge, as also the Appellate Bench of the High Court, has held that this constitutes a colourable imitation of the appellants' "Chinthe" trade-mark Exhibits A and B, and the respondents have not appealed against that finding. Where the Appellate Bench differed from the trial Judge is that while the trial judge granted the appellants the reliefs they sought in respect of this trade-mark in connection with all stationery articles, the Appellate Bench restricted the reliefs to exercise books only.

With respect, we are of the opinion that a slight departure is necessary from the terms of both the

decrees granted by the trial Judge and the Appellate Bench in respect of this mark. With the Appellate Bench we agree that the appellants, on the evidence, have not established their right to this trade-mark in respect of all stationery articles ; but there is sufficient evidence on the record to justify the conclusion arrived at by the trial Judge that they have established the right to the trade-mark in respect of diaries in addition to exercise books. To that extent we shall vary the appellate decree of the High Court.

Coming now to the trade-mark Exhibit C as used by the respondents. The Appellate Bench has well described it as consisting—"not only of the Chinthay, in a sitting posture but also of two dragons—one on each side of the Chinthay. The dragons are copies of the dragons on the City Hall of the Rangoon Municipal Corporation. They are much larger than the Chinthay itself ; they are not by any means less prominent than the Chinthay, even though the latter happens to be in the middle . . . ." Their Lordships might well have added that the dragons are not only copies of the figures on the City Hall of the Rangoon Corporation but are also such as a Burman sees in every village monastery or every pagoda. We stress this as some of the non-Burman witnesses called in support of the appellants' case profess to be unable to distinguish between a chinthe and a dragon. Thus Kader Mohideen, the 7th witness for the appellants, said of the two figures at the side in trade-mark Exhibit C "These are also 'Chinthes'" and also "To me they appear to be 'Chinthes'".

At the hearing of the appeal, learned counsel for the appellants relied strongly on many statements made by witnesses for the respondents in their cross-examination as strengthening their case that Exhibit C also is a colourable imitation of their trade-marks

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K. E. MOHAMED EBRAHIM AND ANOTHER v. THE TAJMAHAL STATIONERY MART.

Exhibits A and B. Kumaran, one of the witnesses for the respondents, in answer to a question "If you had in your shop exercise books bearing Mark C and if a purchaser came and said 'Give me a Chinthe brand exercise book' would you give it to him?" said "Yes. If I have it in stock". A similar answer was given by him in respect of Exhibit B and of Exhibit D. Another witness, A. M. Khan, said in answer to a question as to what he would do if a customer asked for a chinthe trade-mark exercise book and he had in stock only exercise books bearing Exhibit C trade-mark, that he would give the customer such a book. Other witnesses for the defence engaged in retail sale of exercise books did not go so far as these two witnesses but they substantially agreed that if they had only exercise books with Exhibit C trade-mark on them they might have given the customer such books when asked to produce chinthe exercise books. However, not one of these witnesses, so strongly relied upon by learned counsel for the appellants, had actually sold an exercise book bearing trade-mark Exhibit C as a chinthe exercise book. Their statements only amount to this that they are of the opinion—or, in simple language, that they think—that if in their retail business a customer were to ask for a chinthe exercise book they might indifferently have delivered to such customer either exercise books with trade-mark Exhibit A or Exhibit C as they happen to have in stock at that moment.

Now, this is not evidence. They are stating not to facts but only to what they think might have happened. Opinion is one thing and direct evidence is another. These witnesses were not examined as expert witnesses and are not persons to give expert testimony. The Court is in possession of the same materials of opinion as any of these witnesses and their opinion can add

nothing to the materials for judgment by the Court but rather help only to encumber the proceedings. It would have been different if the witnesses had spoken to facts within their knowledge, such as that on such and such occasions they did succeed in selling exercise books bearing Exhibit C when the demand was for exercise books bearing the Chinthe trade-mark of the appellants or that they themselves had been deceived into purchasing as appellants' exercise books the exercise books bearing the disputed trade-mark Exhibit C. With respect, it appears to us that the learned trial Judge allowed himself to be influenced by such inadmissible statements in arriving at the conclusion that Exhibit C is a colourable imitation of the appellants' trade-mark Exhibit A.

We respectfully agree with the Appellate Bench of the High Court that the exercise books bearing Exhibit C trade-mark cannot be mistaken for the exercise books bearing the trade-mark Exhibit A. As the learned Judges have said: "The addition of two different symbols, *viz.*, the dragons, is so conspicuous and the total dissimilarity of the general combination of marks is such that to any one at all acquainted with the respondents' trade-mark, we can hardly think that even on the most cursory glance there could be any deception."

In these circumstances the decree of the Appellate Bench of the High Court is affirmed subject to the variation that the appellants are entitled also to reliefs in respect of diaries bearing the offending trade-mark Exhibit D or a colourable imitation of the appellants' trade-mark Exhibits A and B.

The parties will bear their own costs of this appeal.

SUPREME COURT.

†S.C. 1952

Sept. 10.

KHADIZA BIBI (APPLICANT)

v.

THE RESIDENT, SOUTHERN SHAN STATE AND ANOTHER (RESPONDENTS).*

Writ of habeas corpus—*Public Order (Preservation) Act, 1947, s. 5-A* (1) (b)—*Jurisdiction of the Resident, Southern Shan State when detenu in Mandalay—Jurisdiction to order detention in Mandalay Jail.*

Golam Rasul, a Wireless Operator, attached to the Union Military Police at the outpost at Loimwe in Southern Shan State was alleged to have joined the U.M.P. mutineers at Loimwe and left his post with them taking with him the W/T sets and charging engines, the property of the 19 W/T Battalion and handed them over to the K.N.D.O. insurgents at Nyaungzin. On a report from the Headquarters of that Battalion the Resident of Southern Shan State directed his detention in Mandalay Jail on 23rd August 1950. It was contended for the detenu that the Resident had no jurisdiction as the detenu was in Mandalay at the time of passing of the order and that the Resident had no jurisdiction to order detention in Mandalay Jail.

Held: That the Resident had jurisdiction as the detenu was a resident of Southern Shan State and his activity which constituted a menace to public safety and order commenced in Loimwe, when he joined the mutineers and delivered the W/T sets and charging engines.

Ma Aye Kyi v. *Commissioner of Police*, (1948) B.L.R. 772 (S.C.), followed.

Under s. 5-A (4) of the Public Order (Preservation) Act the Resident or his delegate can during the currency of the order for detention, specify from time to time the place or places where the detenu is to be confined. The Resident was empowered under the Act to direct the confinement of a person detained under his orders at a place outside his district.

Saw Benson v. *The Commissioner of Police, Rangoon and others*, B.L.R. (1950) (S.C.) 196, followed.

Tun I and Ba Chit for the applicant.

O. S. Woon (Government Advocate) for the respondents.

The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—This is an application for a writ of *habeas corpus* for the production and release of the

* Criminal Misc. Application No. 183 of 1952 being application for directions in the nature of *habeas corpus*.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

applicant's husband Golam Rasul who was a wireless operator attached to the Union Military Police outpost at Loimwe in the Southern Shan State.

On the 23rd August, 1950, the Resident of the said State directed his detention in the Mandalay Jail under section 5-A (*1*) (*b*) of the Public Order (Preservation) Act, 1947 "as there was reliable information that he had been acting as a wireless operator in KNDO camps in Karrenni (now Kayah) State"; and the Resident's statement in the return that he "joined the UMP mutineers at Loimwe and left his post with them taking with him the W/T sets and charging engines, the property of the 19 W/T Battalion, and handed them over to the KNDO insurgents at Nyaungzin, Kayah State, and later sided with the KNDO insurgents when they occupied Loikaw, Kayah State" is based on the Report of HQ, 19th W/T Battalion, UMP, dated the 23rd December 1948. So we are satisfied that the Resident had sufficient materials before him to justify the order of detention.

The learned Advocate for the applicant has contended that the Resident had no jurisdiction as Golam Rasul was already under arrest in Mandalay, outside his territorial jurisdiction, when he passed the said order. However, this Court has already held in *Ma Aye Kyi* v. *Commissioner of Police*, (1):

"..... the power of the Commissioner of Police, Rangoon, to order detention under section 5-A of the Act is limited to residents of Rangoon or the activities must be within the Town of Rangoon. When a person was not a resident in the Town of Rangoon or his activities do not constitute a menace to public safety or public order in the Town of Rangoon, the Commissioner of Police, Rangoon, has no jurisdiction to order detention."

(1) (1948) B.L.R. 772. (S.C.)

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In the present case Golam Rasul was a resident of Southern Shan State, and his activities which constituted a menace to public safety and order commenced in Loimwe, where he joined the mutineers and whence he took away the W/T sets and charging engines.

The learned Advocate for the applicant has further contended that the Resident had no jurisdiction to order detention in Mandalay Jail. However, this Court has already stated in *Saw Benson* v. *The Commissioner of Police, Rangoon and others* (1) :

"The question whether an officer directing detention can direct the confinement of the detenu in a place outside the district though not, for the reasons given above, arising in respect of the Deputy Commissioner, Amherst, must be considered as it has an important bearing on the subsequent detention order made by the Deputy Commissioner, Insein. It appears to us that this objection overlooks the provisions of section 5-A (*4*) of the Public Order (Preservation) Act. Section 5-A (*4*) of the Act empowers the President or his delegate in respect of a person directed to be detained under section 5-A (*1*) (*b*), during the currency of the order for detention, to specify from time to time the place or places where the detenu is to be confined. 'We are clearly of the opinion therefore that a Deputy Commissioner empowered to act under the Public Order (Preservation) Act may direct the confinement of a person detained under his orders at a place outside his district."

We accordingly hold that the Resident had jurisdiction not only to order Golam Rasul's detention under the enactment but also to direct his detention in Mandalay Jail.

The application is dismissed ; but in view of some correspondence in the record of the proceedings before the Resident, we must add (i) that he should, review the case of the detenu and decide whether his further detention is necessary to prevent him from acting in any manner prejudicial to the public safety and the maintenance

(1) B.L.R. (1950) (S.C.) 196.

of public order, (ii) that in deciding the said question he should, after consideration of all relevant facts and circumstances, exercise his own independent judgment and discretion, and (iii) that he should order release of the detenu as soon as he has come to a decision in exercise of his own independent judgment and discretion, that his further detention for the said purpose is unnecessary.

SUPREME COURT.

† S.C. 1952

Sept. 17.

U KYONE MYAING (APPLICANT)

v.

THE FINANCIAL COMMISSIONER, BURMA AND OTHERS (RESPONDENTS).*

Writ of certiorari—If applicable—Lower Burma Town and Village Lands Act and Rules—S. 16 (a) *and Rule 9* (b) *—Lease granted under, by Deputy Commissioner—Deputy Commissioner's Order up-held by Financial Commissioner—Review by succeeding Financial Commissioner on a reference by the President—Action of Deputy Commissioner whether judicial or quasi-judicial or administrative.*

The Deputy Commissioner, Hanthawaddy acting under Rule 9 (*b*) of the Rules made in pursuance of s. 16 (*a*) of the Lower Burma Town and Village Lands Act granted a lease to U Kyone Myaing for 30 years renewable for a further term of 60 years. The grant was with the previous sanction of the Commissioner of the Division. Respondents 2 to 4 took the matter before the Financial Commissioner and the appeal was dismissed. They petitioned the President who referred the matter to the successor of the Financial Commissioner. The successor set aside the order granting the lease. It was contended that the second Financial Commissioner had no jurisdiction to review an order by the earlier Financial Commissioner, that the order was a nullity and that the Applicant was entitled to the benefit of the original order.

Held : That though the contentions are of great interest and general importance, the Deputy Commissioner, the Commissioner and the Financial Commissioner were all acting as Revenue Officers of the Government and exercised no jurisdiction of a judicial or quasi-judicial nature. In making the final order the Financial Commissioner was performing an administrative function pure and simple. If such order was *ultra vires*, petitioners had their remedy elsewhere and the writ of certiorari was not the proper remedy which could be invoked in the case.

Hup For v. *The Deputy Commissioner, Insein*, B.L.R. (1950) (S.C.) 86 ; *Mohamed Hanif and one* v. *The Financial Commissioner*, B.L.R. (1952) (S.C.) 11, followed.

Chaung Po for the applicant.

O. S. Woon (Government Advocate) for the 1st respondent.

Thein Han for the 2nd to 4th respondents.

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* Civil Misc. Application No. 49 of 1952 being application for direction in the nature of certiorari.

† *Present :* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

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The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—An interesting question of law relating to the power of the Financial Commissioner to review an order made by his predecessor under the Lower Burma Town and Village Lands Act and the Rules thereunder was raised. But from the nature of proceedings in certiorari that question does not fall to be determined here and must await determination elsewhere in appropriate proceedings.

The Deputy Commissioner, Hanthawaddy, acting under Rule 9 (*b*) of the Rules made in pursuance of section 16 (*a*) of the Act, granted a lease for a term of 30 years renewable for a further term of 60 years of a piece of land in the town of Syriam to the applicant for industrial purposes. The grant was with the previous sanction of the Commissioner of the Division, as required by the Rules. The second to fourth respondents, who are residents of Syriam, were among those opposed to the piece of land being granted to the applicant for industrial purposes and they had been raising objections to such grant both before the Deputy Commissioner and elsewhere. When the grant was made by the Deputy Commissioner, they took the matter up before the Financial Commissioner in Revenue Revision No. 5T-9 of 1951 without success. The order of the Financial Commissioner dismissing their application in revision was passed on the 24th September 1951. In no way discouraged by the refusal of the Financial Commissioner to set aside the grant of the lease made by the Deputy Commissioner, they petitioned to the President of the Union and their petition was referred to the successor in office of the Financial Commissioner who dismissed their previous application. The new Financial Commissioner took a different view from that of his

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predecessor and on the 24th February 1952 set aside the order of the Deputy Commissioner granting a lease to the applicant.

It has been strenuously contended before us that neither on a reference by the President of the Union nor on his own authority has the second Financial Commissioner jurisdiction to review the order of his predecessor. The learned counsel points to Rule 75 of the Rules made under section 16 (*a*) of the Act and to the terms of section 40 of the Act in support of his contention. He claims that the order of February 1952 made without jurisdiction is a nullity and that the applicants are entitled to retain the benefit of the lease which had been affirmed by the earlier order of September 1951 of the first Financial Commissioner.

These contentions as we have said earlier are of great interest and also of general importance. But in view of the previous decision of this Court in *Hup For* v. *The Deputy Commissioner, Insein* (1) and *Mohamed Hanif and one* v. *The Financial Commissioner* (2) it is clear that in these proceedings as now framed the questions do not call for consideration.

The entire series of proceedings beginning with that before the Deputy Commissioner, Hanthawaddy and ending with the second review order of the Financial Commissioner, Burma of the 24th February 1952 deal solely with the question whether a piece of land at the disposal of the Government situated in the town of Syriam should or should not be leased for industrial purposes to the applicant. The Deputy Commissioner, the Commissioner of the Division and the Financial Commissioners were all acting on behalf of the Government and as Revenue Officers of the Government. The functions which they were

(1) B.L.R. (1950) (S.C.) 86. (2) B.L.R. (1952) (S.C.) 11.

exercising and the question which engaged their attention in such proceedings are in no way different from those which an owner of a piece of land would be engaged in or be exercising when about to grant a lease of his land to another person. There was no question of the exercise of judicial or quasi-judicial function. In passing the order of the 24th February 1952, the Financial Commissioner was performing an administrative function pure and simple. If as contended on behalf of the applicants that order was made in excess of the powers of the Financial Commissioner and the applicants are not bound by it they have their remedy elsewhere. But as we said earlier, certiorari is not the proper remedy which the applicants could invoke.

The application is therefore dismissed with costs, Advocate's fee ten gold mohurs.

SUPREME COURT.

†S.C. 1952

Sept. 17.

U BA NYUNT (APPLICANT)

v.

THE CONTROLLER OF RENTS, RANGOON AND OTHERS (RESPONDENTS).*

Urban Rent Control Act, s. 16-A (1)—Change in tenancy not reported under s. 16-AA (1)—Action of Advisory Board on footing of unauthorised occupation by new occupant under s. 16-AA (4) (a)—Jurisdiction to allot such premises and to evict occupant.

P. A. Lazarus was tenant of Room No. 8, House No. 361/365, Sparks Street, Rangoon, in 1946. In June 1951, S. Wong went into occupation of the premises and Lazarus went out of the premises. In February 1952 U Ba Nyunt was installed by Wong and an application was made to recognise him. The Controller held that change in tenancy had not been reported to him under s. 16-AA (*1*) and U Ba Nyunt was in unauthorized occupation. On the 23rd of June 1952 the Advisory Board acting under s. 16-AA (*4*) (*a*) of the Urban Rent Control Act allotted the premises to the 2nd Respondent and on the 25th June issued notice under sub-clause (*d*) of s. 16-AA (*4*) to U Ba Nyunt to surrender the premises. Upon an application for directions in the nature of certiorari questioning the last two orders on the ground that there was no jurisdiction to issue the order under s. 16-AA (*4*) (*a*) :

Held : That the order was within the jurisdiction of the Controller. The ruling in (1950) B.L.R. 156 (S.C.) deciding that for s. 16-AA (*4*) (*a*) to apply, the residential premises must actually be vacant or about to be vacant. The section however has been amended after that judgment by Act 50 of 1950. Wong was introduced after such amendment. Neither Wong nor U Ba Nyunt had obtained the requisite permit from the Controller and both were liable to summary eviction and to be called on to deliver possession and the orders were within the competence and jurisdiction of the Controller of Rents.

U Sein Lin v. The Controller of Rents, Rangoon, B.L.R. (1950) (S.C.) 156, referred to.

Ba Tin for the applicant.

O. S. Woon (Government Advocate) for the respondents 1 and 2.

Jaffer for the 3rd respondent.

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* Civil Misc. Application No. 85 of 1952 being application for directions in the nature of certiorari.

† *Present :* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—One P. A. Lazarus, whose whereabouts are unknown, became the tenant of residential premises known as Room No. 8, 361/365, Sparks Street, in 1946. In June 1951 he vacated the premises after installing one Shankee Wong. In February 1952 Wong left after installing the applicant U Ba Nyunt.

An application under section 16-AA (*1*) of the Urban Rent Control Act, dated the 18th February 1952 and signed "P. A. Lazarus" for permission to sublet to U Ba Nyunt was filed with the Controller. Notice was issued to the landlord and on the 26th February 1952 the enquiry took place. What transpired then is embodied in the Diary Order of that date which runs:

"G. S. Smith who signed the application passing himself as P. A. Lazarus present and examined. His statement reveals that he was neither the tenant of the room nor had he ever lived in the room. He had merely come forward to personate the real tenant Lazarus who had vacated the room about six or seven months ago. . . . ."

Mr. Smith's evidence is revealing. We quote the following from his statement :—

"I had signed the application at the request of Mr. Wong who was then occupying Room No. 8. . . . . I know the tenancy of the rooms stand in the name of P. A. Lazarus. . . . Mr. Wong told me definitely that he had purchased the room in question from Lazarus for Rs. 2,600 to 2,800 or so, and that he had sold it again to U Ba Nyunt for Rs. 4,200."

The Controller probed into the case further and later examined Wali Ullah, the Bill Collector of the landlord, U Ba Nyunt and Lolita, the wife of Shankee Wong who was said to be out of Rangoon. The Collector held that as the change in tenancy had not

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been reported to him as required under section 16-AA (*1*) U Ba Nyunt was in unauthorized occupation.

He followed up the matter by placing the proceedings before the Advisory Board at its meeting of the 23rd June which allotted the premises under section 16-AA (*4*) (*a*), to the second respondent U Sein Thin. On the 25th June this allotment order was implemented by the issue of a notice under section 16-AA (*4*) (*d*) to U Ba Nyunt requiring him to surrender the premises.

It is against these orders that the present application before us is directed. The main contention is that the Collector had no jurisdiction to issue the order under section 16-AA (*4*) (*a*). Reliance is placed upon *U Sein Lin.* v. *The Controller of Rents, Rangoon* (1) in which this Court had held that for this section to apply, the residential premises must actually be vacant or are about to be vacant. The section however has been amended after that judgment was passed, by Act 50 of 1950 and the amended section now runs :

> " When the Controller . . . receives information that any residential premises are vacant or about to be vacant ***or that such premises have been vacated by a tenant, and are occupied after the commencement of the Urban Rent Control (Amendment) Act, 1950, by any person without the permission of the Controller***, he acting with the advice of the Advisory Board . . . . may direct the landlord to let the premises when they become vacant . . . . to a person or persons specified in such direction ; "

The words italicized have been added to the original section. It is clear that the original tenant was Lazarus. He installed Wong in June 1951, that is, after the enactment of the Urban Rent Control (Amendment) Act of 1950. Wong left and U Ba Nyunt commenced to occupy the premises in February 1952. Neither Wong

(1) B.L R. 1950 (S.C.) 156.

nor U Ba Nyunt had obtained the requisite permit from the Controller, and therefore the Controller took action under section 16-AA (4) (*a*). With the advice of the Advisory Board he directed the landlord to accept U Sein Thin as the tenant. In implementation of this order he acted under section 16-AA (4) (*a*) by calling upon U Ba Nyunt, who is liable to summary eviction, to deliver possession.

On the facts established it is clear that the Controller's action was well within his competence and jurisdiction, and therefore this application must be and is hereby dismissed with costs. Advocate's fees eighty-five kyats. The *ad-interim* stay order is discharged.

The case is an unsavoury one and we wish to observe that on the statements recorded and on the material before him, the Controller should have considered the advisability of launching criminal proceedings against Smith and others for the offences they appear to have committed. It is not too late for such action to be taken.

SUPREME COURT.

† S.C. 1952

Sept. 22.

AH KAM (APPLICANT)

v.

U SHWE PHONE AND OTHERS (RESPONDENTS).*

Writ of certiorari and prohibition—Offence under s. 417, Penal Code read with s. 109—S. 21 (2), Bureau of Special Investigation Act, 1951—Schedule 1 amended by the President under s. 24 of the Act—Delegation of power by the President to Bureau of Special Investigation—How far valid—Jurisdiction of Special Court to proceed with the trial.

Applicant and other accused were charged with an offence under s. 417, Penal Code read with s. 109. It was transferred to the Court of the Special Judge, Rangoon for trial. In pursuance of the powers granted to the President under s. 24 of the Act to amend the Schedule to the Act, the President added an item to the Schedule including "such offences within the mischief of ss. 405, 415 and 463 of the Penal Code, as are investigated and sent up for trial by the Bureau of Special Investigation". The applicant asked for directions in the nature of certiorari and prohibition on the ground that the amendment of Schedule 1 by the insertion of this clause is *ultra vires* and that therefore the Special Judge had no jurisdiction to try the case.

Held: That the President has by the said amendment given a *carte blanche* to the Bureau to pick up and choose in which of those cases it will or will not assume powers and duties and which of those cases it will investigate and send up for trial before the Special Judge. It also empowered the Bureau to decide whether a Special Judge should not have power to try any of the cases. The Legislature confided the trust in the President, relied upon his administrative wisdom and political sagacity. So far as the offences mentioned above are concerned, the President has practically refused to use his judgment and discretion and delegated his power to the Bureau of Special Investigation. Such delegation is not authorized by the Act and is against the principle that where a trust or discretion in the agent is involved and the exercise of which has been delegated, such agent cannot lawfully appoint another to perform his duties. The amendment by insertion of item (q) in the Schedule is *ultra vires* and the Special Judge cannot take cognizance of such a case even after it has been transferred to his Court by the President.

Re. *The Initiative and Referendum Act*, (1919) A.C. 935 at 945; Re. *The Delhi Laws Act, 1912*, (1951) S.C.R. 747 at 907, referred to and followed.

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* Criminal Misc. Application No. 137 of 1952 being application for direction in the nature of prohibition and/or certiorari.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

Kyaw Myint and *Kyaw Min* } for the applicant.

Chan Htoon, Attorney-General with

Chan Tun Aung, Assistant Attorney-General and

O. S. Woon (Government Advocate) for the respondents.

The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—This is an application for directions in the nature of certiorari and prohibition in respect of proceedings which are pending as *U Pa Kyin* v. *Ah Kam and six others*, Criminal Regular Trial No. 38 of 1952 in the Court of the Special Judge, Rangoon.

The application is made on several grounds ; but as it must succeed on two of them, *viz.*, (1) that the amendment of Schedule I to the Special Investigation Administrative Board and Bureau of Special Investigation Act, 1951 by insertion of Item (q) is *ultra vires* and (2) that the Special Judge appointed under the Act therefore has no jurisdiction to try the case, we shall abstain from discussing the other grounds in accordance with the well known judicial practice of not deciding more than is strictly necessary. [*Cp.* the remarks of Their Lordships of the Privy Council in Re. *The Initiative and Referendum Act* (1), which are cited in Re. *The Delhi Laws Act, 1912* (2).]

The case against the applicant Ah Kam and his co-accused is one under section 417 of the Penal Code read with section 109 thereof. It has been described as such not only by the complainant, who is an Assistant Director of the Bureau of Special

(1) (1919) A.C. 935 at 945. (2) (1951) S.C.R. 747 at 907.

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Investigation, but also by the District Magistrate of Rangoon before whom the complaint was filed and the Special Judge to whom it has been transferred by the President under section 21 (2) of the Act read with Schedule I thereto.

Section 21 (2) authorizes the President to transfer any case relating to any of the offences mentioned in the Schedule from an ordinary Criminal Court to the Court of the Special Judge. However, an offence under section 417 of the Penal Code was not in the original schedule to the Act. It is covered by the schedule now as the President has amended the schedule in exercise of his power under section 24 of the Act by adding Item (ဈ).

Section 24 does authorize the President to amend the schedule. However, the schedule itself is really a list of offences (1) in respect of which the Special Investigation Administrative Board has certain powers and duties under sections 4, 5 and 7 of the Act and the Bureau of Special Investigation has certain powers and duties under section 17 thereof and (2) for trial of which a Special Judge is appointed under section 21 (1) thereof ; and yet Item (ဈ) which has been inserted by way of amendment merely reads :

"(ဈ) အထူးစုံစမ်း စစ်ဆေးစေးငွေးနှောနကာ စုံစမ်းစစ်ဆေးခြင် အမှုစစ်ဆေးစီရင်ရန် ရုံးသို့ တင်ပို့သည့်ရာစသတ်ကြီး ၄၀၅ ၄၁၅ နှင့် ၄၆၃ များနှင့်ဝေါ်ပြထားသော အစိုးပါယ် တွင် အကျုံးဝင်သော ပြစ်မှုများ (Such offences within the mischief of sections 405, 415 and 463 of the Penal Code as are investigated and sent up for trial by the Bureau of Special Investigation.)"

So far as offences within the mischief of the said sections are concerned the President has, by the said amendment, given a *carte blanche* to the Bureau. It will be at liberty to pick up and choose (1) in which of those cases it will or will not assume the powers and

duties under the Act and (2) which of those cases it will investigate and send up for trial before a Special Judge. It will not only be able, without any let or hindrance, to invest itself with powers in respect of some cases under the said sections of the Penal Code and disown any duty in respect of other cases under the same sections but also to decide *ad hoc* whether a Special Judge should or should not have jurisdiction to try any of those cases.

The legislature trusted the President, relied upon his administrative wisdom and political sagacity, and left it to him to alter the list of offences ; but, so far as offences under the said sections are concerned, the President has practically refused to exercise his judgment and discretion and delegated his power under section 24 of the Act to the Special Investigation Bureau. In doing so, he has virtually authorized it to decide—not even in advance and therefore in the abstract—but *ad hoc* and therefore retrospectively as regards each concrete case under any of the said sections—whether it should be entered in the schedule or not. Such delegation is not authorized by section 24 or any other provision of the Act. On the other hand as the authority to amend the schedule that has been given by the Legislature to the President certainly "involves a trust or discretion in the agent for the exercise of which he is selected", its delegation by the President to any other agency is prohibited by the well-known rule "*vicarius non habet vicarium*" (such an agent cannot lawfully appoint another to perform the duties of his agency). (*Cp.* Broom's Legal Maxims, 10th Edition, p. 570.) The President to whose judgment, wisdom and patriotism the duty of amending the schedule has been entrusted cannot relieve himself of the responsibility by choosing another agency upon which the duty should be

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devolved ; nor can he substitute the judgment, wisdom and patriotism of any other body for those to which alone the Legislature has seen fit to confide the trust.

So the amendment by insertion of Item (9) in the schedule is *ultra vires* ; an offence under section 417 of the Penal Code read with section 109 thereof remains an offence which cannot be tried by the Special Judge ; a case relating to such an offence cannot be transferred by the President from an ordinary Criminal Court to the Court of a Special Judge under section 21 (*2*) of the Act or at all ; and a Special Judge cannot take cognizance of such a case even after it has been transferred to his Court by the President.

The rule *nisi* is made absolute. The order transferring this case from the Court of the District Magistrate, Rangoon to the Court of the Special Judge and the proceedings in the Court of the Special Judge after the transfer are quashed ; and the Special Judge is prohibited from proceeding with the trial of the applicant and his co-accused in Criminal Regular Trial No. 38 of 1952.

The Special Judge should return the case against the applicant and his co-accused to the District Magistrate, Rangoon, from whose Court it was transferred to his.

SUPREME COURT.

M/s. RANCHHODDAS JETHABHAI & Co. (APPLICANTS)

v.

THE HON'BLE MINISTER FOR JUDICIAL AFFAIRS AND OTHERS (RESPONDENTS).*

† S.C. 1952

Sept. 29.

Sea Customs Act, s. 191 (2)—Review of Financial Commissioner's Order imposing penalty for goods imported without a license—"Import" meaning of—S. 2 (b) of Control of Imports and Exports (Temporary) Act, 1947—Deputy Director's power to grant import license under Notification No. 93—Whether offence under s. 167 (8) of the Sea Customs Act can be condoned by grant of import license—Grant of powers of review with retrospective effect under the New Act—Duties of Court to administer—Proceedings in Revision and Appeal continuation not new proceedings—S. 191 (2) (b), Sea Customs Act as amended—Powers of President—Constitution of the Union of Burma,—s. 24.

On 20th October 1947 Applicants applied for a license to import gunny bags. The goods were landed at Rangoon on the 8th November before any import license had been issued. The goods were allowed to be cleared on payment of a token fine of Rs. 1,000 by the Director of Supplies. The Collector of Customs later passed an order of confiscation under s. 167 (8) subject to redemption on payment of a fine of Rs. 1,000 and the amount of duty involved. Later his successor issued notice to show cause why a penalty should not be imposed for importing goods without a license. A penalty twice the value of the imported goods was then imposed. The Financial Commissioner set aside the order on the ground that it was *ultra vires* and the Collector had no power to review or supplement his predecessor's order.

The President on review set aside the order of the Financial Commissioner and imposed only a penalty of Rs. 4,000 in review proceedings under s. 192 (2) of the Act. All came to the conclusion that the Applicant knew that goods could only be imported after the license and shipment against anticipated issue of import license was against the regulations. The Applicants applied for a writ of certiorari to quash the order in the Review Proceedings.

Held: That "import" according to s. 2 (*b*) of the Control of Imports and Exports (Temporary) Act, 1947 means bringing into Burma by sea,

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* Civil Misc. Application No. 63 of 1952 being application for direction in the nature of certiorari.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE MYINT THEIN and U ON PE, J.

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land or air. The Applicants had committed an offence under s. 167 (*8*) of the Sea Customs Act when goods not covered by any license as required by law arrived in Rangoon. The contention that the Deputy Director of Supplies condoned the said offence is not correct as the Deputy Director is not authorized under s. 167 (*8*) of the Sea Customs Act to condone any offence. He is merely authorized to issue license to import goods into Burma and the conditions with which license may be issued must clearly be conditions to be fulfilled by the importers and not by the Customs Officers. Endorsement by the Deputy Director that goods were authorized to be cleared on payment of a token fine are not conditions authorized by Notification No. 93 under which the Deputy Director can issue an import license.

The questions whether it is fair or reasonable to give an Act retrospective effect or whether a particular Act should be given retrospective effect or not, are to be decided by the Legislature. If, however, the Legislature in its supreme wisdom has thought it fit to give an Act retrospective effect, Judges must administer the law, as they find it whatever their own opinion as to its merits may be. The validity of an Act cannot be questioned on the ground that it is unfair or unreasonable.

Gwan Kee v. *The Union of Burma*, (1949) B.L.R. 151 (S.C.), referred to and followed.

The principle of *autre fois convict* also does not arise in the case as proceedings in review, revision and appeal are really continuations of the original proceedings and not initiation of new proceedings. Since the President under s. 191 (*2*) of the Sea Customs Act can at any time call for the records of a case for the purpose of satisfying himself as to the correctness, legality or propriety of a decision and the President has called for the entire records including those of the Collector and his successor and the Financial Commissioner, it makes no difference if the succeeding Collector's order was one passed in review or otherwise.

No time limit has been prescribed for the President's action under s. 191 (*2*) (*b*) of the said Act but the President in this case called for the records and called upon the Applicants to show cause within a reasonable time after the Financial Commissioner's Order.

The President's order did not contravene s. 24 of the Constitution of the Union of Burma as the Applicant had been penalised only for violation of a law in force at the time of the commission of the act charged as an offence, *viz.*, importing goods without an import license and they have not been subjected to a penalty greater than that applicable at the time of the commission of the offence.

C. A. Soorma for the applicants.

Chan Tun Aung, Assistant Attorney-General with

O. S. Woon (Government Advocate) for the respondents.

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The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—This is an application for a writ of certiorari to quash the order of the first respondent dated the 18th February 1952.

The facts have been set out fully in the judgment of this Court on a previous application by the same applicants for directions in the nature of a writ of prohibition restraining the first respondent from further action in the proceedings in which the said order has been passed subsequently. [See *Ranchhoddas Jethabhai & Co.* v. *The Secretary of the Union Government, Ministry of Judicial Affairs and two others* (1).] So we shall set out only such facts as are relevant for the purpose of this judgment.

The applicant applied on the 20th October 1947 for a license to import 48 bales of gunny bags valued at Rs. 22,272 ; but the goods arrived and were landed at Rangoon on the 8th November 1947 before any import license had been issued to them. Thereafter they got an import license dated the 14th November 1947. On a representation being made by them that the goods had already arrived, the Deputy Director of Supply made two endorsements both dated the 23rd December 1947, on the said import license. One endorsement reads, " Goods authorized to be cleared on payment of a token fine of Rs. 1,000 (Rupees one thousand only)" and the other endorsement read, "Valid for shipment on 5th November 1947".

The Collector of Customs, Rangoon (Mr. V. B. Reynaud) passed the following order on the 21st January 1948 :—

" At the time of importation of the goods they were not covered by a valid import license. As import of goods withou

(1) B.L.R. (1950) (S.C.) 68.

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a valid license constitutes an infringement of the Import Trade Control regulations, the goods are confiscated under section 167 (8) of the Sea Customs Act, subject to redemption under section 183 *ibid* on payment of a fine of Rs. 1,000 (Rupees one thousand only) *plus* the amount of duty involved. In view of the fact that the license has since been amended by the Commerce and Supply Department to cover the consignment in question, only a token penalty has been imposed ".

His successor in office (U Ko Ko Gyi) then called upon the applicant to show cause why, in addition to the fine already paid, a further penalty should not be imposed on them for having imported the goods without a license ; and he ultimately imposed a further penalty of Rs. 44,544, *i.e.*, twice the value of the imported goods. He considered that the applicants did not deserve to be treated leniently as they did not instruct the shippers not to ship the goods before the license was received, although they knew (1) that the goods could be shipped only after obtaining a license and (2) that shipment in anticipation of the receipt of the necessary license was against the regulation.

On appeal by the applicants the Financial Commissioner set U Ko Ko Gyi's order aside on the ground that it was *ultra vires*, as, under the Sea Customs Act as it stood then, U Ko Ko Gyi had no power to review or supplement Mr. Reynaud's order at all.

Now the President or rather his *alter ego*, the Hon'ble Minister for Judicial Affairs, who has been authorized in this behalf by the Council of Ministers, has set aside the order of the Financial Commissioner and imposed a penalty of only Rs. 4,000 in review under section 191 (2) of the Sea Customs Act, this Court having dismissed the applicants' application for a writ of prohibition to prevent review of the said order. The President has come to the same finding

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of facts as U Ko Ko Gyi that the applicants knew that the goods could be shipped only after obtaining the license and that shipment in anticipation of the receipt of the necessary license was against the Import Trade Control Regulations, but he reduced the penalty having regard to the circumstances of the case.

The present application is for a writ of certiorari to quash the order passed in the said review.

" Import " according to section 2 (*b*) of the Control of Imports and Exports (Temporary) Act, 1947 means bringing into Burma by sea, land or air. So the applicants must be deemed to have committed an offence under section 167 (*8*) of the Sea Customs Act on the 8th November 1947 when their goods, which were not covered by any license, as required by the Order under section 3 (*1*) of the Control of Imports and Exports Act, 1947 arrived in Rangoon. (*See* the Commerce and Supply Department Notification No. 93, dated the 30th September 1947.)

The learned Advocate for the applicants cannot and does not contend that the offence has not been committed. He can only say (1) that although the applicants themselves are not free from blame, the offence that they have committed is a purely technical one and (2) that the offence if any has been virtually condoned by the Deputy Director of Supply who made the said endorsements on the Import License.

However, the relevant part of Notification No. 93 under which the Deputy Director can issue an import license merely reads :

". . . . the Governor (now President) is pleased to prohibit the import into Burma from any place outside Burma of any of the goods of the descriptions specified in column 2 of the

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First Schedule appended to the Burma Tariff Act as revised from time to time except the following :—

. . . . . ,

(ix) Any goods . . . . . covered by a special license or an open general license as the case may be issued without conditions or with conditions as the case may be specified in writing by . . . a Deputy Director of Supply . . . ."

It merely authorizes the Deputy Director to issue licenses to import goods into Burma. It does not, by any means, authorize him to condone any offence under section 167 (*8*) of the Sea Customs Act. He can issue only licenses to import goods which have not been imported yet ; but he cannot issue licenses in respect of goods which have already been imported and in respect of which an offence under the Act has already been committed. He himself must have realized that he could not condone any such offence at all since he merely endorsed " Goods authorized to be cleared on payment of a token fine of Rs. 1,000 ". Conditions with which licenses may be issued by him must clearly be conditions to be fulfilled not by Customs Officers but by the respective importers. So his endorsements are not conditions authorized by the said Notification. They are not binding on the Customs Officers at all ; and Mr. Reynaud erred in abstaining on account of the said endorsements from imposing any penalty in addition to the fine in lieu of confiscation.

The learned Advocate for the applicants has also laid stress on the facts that before the Sea Customs (Amendment) Act, 1949 was enacted the Collector of Customs could not review any order of his predecessor in office and that the President could not *suo motu* review any case disposed of by any officer of Customs or the Chief Customs authority ; and he has also urged

that it is neither reasonable nor fair for the legislature to give them the powers of review with retrospective effect from the 4th January 1948. However, the legislature in its supreme wisdom has thought fit to do so and we must administer the law as we find it whatever our own opinion as to its merits may be [*Cp.* the ruling of this Court in *Gwan Kee* v. *The Union of Burma* (1).]

The validity of an Act cannot be questioned on the ground that it is unreasonable or unfair; and, in fairness to the learned Advocate for the applicants, we must add that he has not actually questioned the validity of the Amendment Act at all.

With reference to his contention that U Ko Ko Gyi did not say in his order that he was reviewing Mr. Reynaud's order, U Ko Ko Gyi, who had Mr. Reynaud's order before him, called upon the applicants to show cause why a penalty under section 167 (*8*) of the Sea Customs Act should not be imposed on them in addition to the fine in lieu of confiscation under Mr. Reynaud's order and ultimately imposed such a penalty. So we are satisfied that U Ko Ko Gyi meant to and did actually review Mr. Reynaud's order as he felt that Mr. Reynaud made a mistake in abstaining from imposing any penalty at all.

With reference to his further contention that U Ko Ko Gyi violated the principle of *autre fois convict* in imposing the penalty after Mr. Reynaud had merely fined the applicants in lieu of confiscation, the principle does not apply to an order on review of the original order just as it does not apply to an order on appeal from or in revision of the original order as proceedings in review, in revision and on appeal are really continuations of the original proceedings.

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(1) B.L.R. (1949) (S.C.) 151.

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Section 191 (2) (*b*) of the Sea Customs Act, as amended by the said Amendment Act, reads :

" The President of the Union may, at any time and on application or otherwise, call for the record of any case disposed of by any officer of Customs or the Chief Customs-authority for the purpose of satisfying himself as to the correctness, legality or propriety of any decision or order made and may make such orders as he thinks fit."

And in the present case the President has called for the entire record of the case including Mr. Reynaud's order and U Ko Ko Gyi's order as well as the Financial Commissioner's order and made such order as he thinks fit. So it will not make any difference even if U Ko Ko Gyi's order was not passed in review of Mr. Reynaud's order.

The learned Advocate for the applicants has commented on the facts (1) that U Ko Ko Gyi called upon them to show cause only on the 16th August 1948, *i.e.*, about eight months after Mr. Reynaud had passed order (2) that the President called upon them to show cause only on the 14th July 1949, *i.e.*, about six months after the Financial Commissioner had passed orders and (3) that the President himself passed orders only on the 19th February 1952. However, U Ko Ko Gyi acted well within two years which is the period prescribed by proviso (*e*) to section 191 (*1*) of the Sea Customs Act ; no time limit has been prescribed for the President's action under section 191 (2) (*b*) thereof; and the President called for the records and called upon the applicants to show cause within a reasonable time after the Financial Commissioner had passed orders.

As regards the amount of penalty, it is a matter within the discretion of the President subject only to the maximum prescribed by the Act and he has, in

view of the circumstances of the case, actually reduced it from Rs. 44,544 to Rs. 4,000 only.

The learned Advocate for the applicants has urged for the first time before us and by way of last resort that the President's order contravenes section 24 of the Constitution of the Union of Burma. However, section 24 thereof merely provides :

" No person shall be convicted of crime except for violation of a law in force at the time of the commission of the act charged as an offence, nor shall he be subject to a penalty greater than that applicable at the time of the commission of the offence."

This section has not been violated as the substantive law has remained the same and (1) the President has penalised the applicants only " for violation of a law in force at the time of the commission of the act charged as an offence" *i.e.*, for having imported goods without an import license and (2) they have not been " subject to a penalty greater than that applicable at the time of the commission of the offence."

We accordingly hold that the President has not exceeded his jurisdiction in passing the order in question and that there is no ground whatsoever for interfering with it.

The application is dismissed with costs; Advocates' fee twenty gold mohurs.

SUPREME COURT.

†S.C. 1952

Dec. 4.

A. C. AKHOON AND ONE (APPELLANT)

v.

A. HABIB (RESPONDENT).*

High Court, Original Side—Court-fees, payment of—Regulated by Rules and Orders, not by Court Fees Act—Amendment of plaint, nature and extent of, permissible in law—Limitation—Amendment relates back to date of original plaint—Whether decree on inconsistent set of facts raised by defendant can be given to plaintiff—Set-off—Whether necessary to be specifically pleaded to be allowed.

The 2nd Deputy Registrar called into question the correctness of court-fees paid on a plaint filed on the 8th November 1948 for recovery of price of goods sold on three different occasions ending the 8th November 1945. An amended plaint was filed on the 23rd November 1948 stating that the three different transactions formed parts of a single contract. Defendants contended that the transaction was an entrustment of goods to be sold for the plaintiff on a commission basis, and some goods unsold had been returned.

Held : Whatever the position might have been where the proceedings are regulated by the Civil Procedure Code and the Court Fees Act, the suit instituted on the Original Side of the High Court where neither Act applies must be deemed to have been instituted on the 8th November 1948, and the amendment which was allowed of the plaint on the 23rd November 1948 must be deemed to have related back to the earlier date. Section 6 of the Court Fees Act read together with section 8 (*4*) makes it clear that payments of court-fees on the Original Side of the High Court are regulated not by the Act but by the relevant rules of the High Court in its Rules and Orders.

Held : The variation between the first plaint and the second plaint is not of such importance as to attract the rule in *Ma Shwe Mya* v. *Maung Mo Hnaung*.

Ma Shwe Mya v. *Maung Mo Hnaung*, 4 U.B.R. p. 30 at 33, distinguished.

Held Obiter : There is no decision which goes to the length of permitting the Court to reject the plaintiff's case and to grant the plaintiff a decree on an inconsistent set of facts set up by the defendant in answer to the plaintiff's case.

Held further : There was a tacit understanding between the parties that the value of the goods taken re-delivery of by the respondent would be treated

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* Civil Appeal No. 15 of 1950 against the decree of the High Court in Civil 1st Appeal No. 54 of 1949.

† *Present :* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

as payment towards the account of the original sale for entire lot of goods; appellants need not make a specific plea of set-off to have the claim of the respondent treated as *pro tanto* discharged by mutual consent.

Hoe Moe v. *Seedat*, 2 Ran. 349, applied.

M. M. Rafi for the appellants.

P. B. Sen for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—This is an appeal in a suit where the respondent claimed a sum of Rs. 34,471 as the contract price for goods sold and delivered to the appellants. The appellants denied the sale which was pleaded by the respondent and claims that the transaction was one under which "the defendants' firm should be plaintiff's sole commission agents for sale of plaintiff's perfumeries on prices fixed by the plaintiff, the commission being 5 per cent on the gross price". The learned trial Judge on the Original Side of the High Court accepted the respondent's case that the transaction was one of sale and granted him a decree for Rs. 32,271 with costs on that amount. On appeal, an Appellate Bench of the High Court rejected the respondent's version and relying on the appellants' account of the transaction varied the decree of the trial Court and granted the respondent a decree for Rs. 19,771.

The appellants appeal to this Court and the respondent has filed a cross-objection. The appellants' main contentions are that the suit was barred by limitation, that the amendment allowed on the Original Side of the High Court of the plaint was not permissible in law, and that no plaintiff can succeed on a case inconsistent with that set up by him in his pleadings. The respondent, on the other hand, complains that the Appellate Bench erred on the facts

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in differing from the trial Judge's view of the true nature of the transaction between the parties, that the transaction was one of sale and that the decree of the trial Judge should have been confirmed by the Appellate Bench.

The learned counsel on both sides cited several decisions bearing on the points of law at issue in the case. But for reasons which will become apparent later, it is not necessary in this judgment to examine and discuss them in detail. These decisions relate to the question how far a departure is permissible, if at all, from the ordinary rule, that the plaintiff can succeed only on the cause of action pleaded by him or consistent with his pleadings. It is claimed on behalf of the appellants that the Appellate Bench of the High Court having negatived the respondent's case of sale had no justification to make out a new case for him on the basis of the appellants' written statement that the transaction was one of entrustment for sale on commission. What the Appellate Bench had done amounts to changing, without even the respondent seeking to amend his plaint, the subject-matter of the suit. Reliance is placed amongst others on the decision in *Ma Shwe Mya* v. *Maung Mo Hnaung* (1) wherein it was said, "When once that contract has been negatived, to permit the plaintiff to set up and establish another and an independent contract altogether would, in their Lordship's opinion, be to go outside the provisions established by the Code of Civil Procedure, to which reference has been made". Since such an amendment of the plaint would not be permissible, the learned counsel for the appellants says, a decree on a new case without amendment, *a jortiori* is not permissible.

(1) 4. U.B. R. p. 30 at 33.

The learned counsel for the respondent, on the other hand, claims that the appellants cannot be said to have been taken by surprise, as after all it was his own case which was accepted by the Appellate Bench and on the basis of which the appellate decree was made in substitution of the trial decree. In view, however, of our conclusions on the facts it is not necessary, as indicated earlier, to examine in detail these conflicting points of view. Suffice it to say that no decision has been placed before us, and we know of none, which goes to the length of permitting the Court to reject the plaintiff's case and to grant the plaintiff a decree on an inconsistent set of facts set up by the defendant in answer to the plaintiff's case.

The question of limitation was raised at an early stage of the hearing of the appeal by the Court. The point arose in this way. On the 8th November 1948 the respondent filed on the Original Side of the High Court a plaint alleging three separate sales on three different dates and claiming as a result of the three transactions a total sum of Rs. 34,471. Court-fees then paid was a sum of Rs. 1,540. The 2nd Deputy Registrar, before whom the plaint was filed, took the view that the three separate transactions called for the application of section 17 of the Court Fees Act in which case there would be a deficit in court-fees paid. Accordingly by his diary order the learned Deputy Registrar called upon the plaintiff to explain why deficit court-fees should not be paid on the plaint as then filed. Instead of explaining the alleged deficiency, the plaintiff on the 23rd November 1948 filed a petition seeking leave to amend the earlier plaint. In the new plaint, the three transactions earlier pleaded were alleged to form parts of a single contract of sale entered into on the 8th November 1945. This application was granted by the Deputy Registrar, necessarily without

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issue of notices to the appellants as by that date no notice had yet been issued of the earlier plaint to them.

The statement in the diary order of the 8th November 1948 that as the learned 2nd Deputy Registrar was not satisfied that sufficient court-fees had been paid on the plaint presented, he was then not admitting the plaint but kept it pending awaiting an explanation from counsel, raised doubts in our mind if the suit must not be taken as instituted on the 23rd November 1948 on which date what has been described as an amended plaint was filed and admitted by the 2nd Deputy Registrar on the court-fees already paid on the earlier plaint. It is true that this is a most technical point especially as the deficit court-fees on the original plaint was of a small amount only. But, technical point or not, if the suit must be deemed to have been instituted only on the 23rd November 1948, the suit is admittedly out of time.

After hearing learned counsel we are satisfied that whatever the position might have been where the proceedings are regulated by the Civil Procedure Code and the Court Fees Act, the present suit instituted on the Original Side of the High Court where neither Act applies, must be deemed to have been instituted on the 8th November 1948. Section 6 of the Court Fees Act read together with section 8 (*4*) thereof makes it clear that payments of court-fees on the Original Side of the High Court are regulated not by that Act but by the relevant rules of the High Court which are to be found at page 56 of its Rules and Orders (1946 Edition). The Deputy Registrar had not in this case followed the procedure laid down in Rules 20, 21 and 22 of the Rules of Procedure of the High Court on the Original Side. The statement of the learned Deputy Registrar in his diary entry of the

8th November 1948 that the plaint was not admitted can have no meaning in view of these rules. The plaint must have been deemed to have been admitted then and the amendment which was allowed of the plaint on the 23rd November 1948 must be deemed to have related back to the earlier date.

The objection taken on behalf of the appellants that the learned Deputy Registrar should not have allowed the amendment to be made on the 23rd November 1948, in our opinion, is not at all substantial once we take the view that the suit must be deemed to have been instituted on the 8th November 1948. The variation between the first plaint and the second plaint is not of such importance as to attract the rule in *Ma Shwe Mya* v. *Maung Mo Hnaung* (1).

The legal questions having then been settled in favour of the respondent, it is necessary next to examine how far the Appellate Bench was justified in holding that the transaction was one of entrustment for sale on commission. As was indicated earlier in this judgment, we are of the opinion that on the facts the learned trial Judge is right in holding that the transaction was one of sale as alleged by the respondent and not one of entrustment on commission as alleged by the appellants.

The respondent examined himself and two of his *ex*-employees and the first appellant examined himself for the defence. Thus there is no independent testimony on either side. The evidence of the two witnesses examined on behalf of the respondent also is not very helpful as they profess not to be present at the time of talk between the parties. And we are satisfied that neither the first appellant nor the respondent has been as truthful in their testimony as can be desired. Both of them appear to have engaged

(1) 4 U.B.R. p. 30 at 33.

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in a good deal of fencing with the opposite counsel and with the Court in the course of their examination. In this state of affairs we are left with the surrounding circumstances and the admitted documentary evidence on the record to arrive at the true nature of the transaction.

What is common ground is that on the 8th, 9th and 11th November 1945 the respondent delivered at the appellants' shop various perfumery goods and accessories together with the statements of their values and that the goods thus delivered were accepted and the statements were endorsed with the signature of the first appellant and returned to the respondent's employees who delivered the goods. These statements do not specifically indicate the nature of the transactions between the parties they being merely lists of goods and their values. We have also the accepted fact that sometime later, the exact date is in dispute, part of the goods found their way back into the respondent's possession. How they got back to the respondent is in dispute. The appellants claim that the respondent came and took them back on their informing him that they were not prepared to continue to act as commission agents. The respondent, on the other hand, claims that the appellants came and dumped them at his doors inspite of his refusal to receive the goods back.

Of the two versions relating to how part of the goods found their way back into the respondent's possession two factors go a long way to support the respondent's version. One of these two factors is that the second appellant, who, and not the first appellant, took part in this particular transaction of re-delivery did not give evidence in the trial Court, though he admittedly was then in Rangoon. Equally important was the fact that Exhibit "F" which is a list of the

goods purported to have been given re-delivery of to the respondent and which was prepared by the appellants for signature by the respondent on his acceptance of the goods were produced at the trial by the respondent without his having signed the same.

The goods which were delivered to the appellants by the respondent on the 8th November, 1945 were admittedly unfinished goods. They require manipulation before being sold as perfumes. And the story that the perfumery goods were entrusted for sale on commission basis at the rate of 5 per cent for the agents clearly does not explain the transaction satisfactorily. The unsatisfactory nature of this defence must have been apparent to the appellants as well, for the first appellant in his evidence at the trial varied the entrustment story of the goods for sale on commission considerably. Instead of entrustment for sale on commission basis with the appellants, the respondent was alleged to have been merely permitted to keep the goods for making into perfumes ready for sale at the appellants' shop, but in the custody of the respondent's own employee who was supposed to turn the raw materials into finished goods prior to sale. This variance between the written statement and the evidence was necessitated also by the fact that the appellants did not produce any account of the goods sold on commission between the dates the goods were deposited at their shop and the date when a fair portion of them, evidenced by Exhibit "F" found their way back into the respondent's possession. It must clearly have occurred to the first appellant that his story of entrustment for sale on commission basis would require the production of account books relating to sales of the goods.

Then again, there is also the payment of a total sum of Rs. 7,100 made by the appellants to the

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respondent beginning with the payment of Rs. 1,000 on the 29th November, 1945 and thereafter very regular daily payments of Rs. 100 till the 28th January, 1946. These payments were claimed by the appellants to be advances "on condition that the advances would be set-off against the commission when due on actual outturn and sale". Bearing in mind that the commission was due, if the appellants' story is true, from the respondent to the appellants this is meaningless. The first appellant's suggestion that these payments were made to accommodate the respondent who was in financial difficulties at the time also is clearly negatived by the letter of the 6th December, 1945, which is Exhibit 9 produced by the appellants. This letter reads, " Kindly give to the bearer of this letter Rupees three hundred on account of three days. Our motor car is out of order, so we are unable to come. We will come tomorrow and write in the books". This is not a letter which a person seeking a favour would write to his benefactor. This clearly is the kind of letter, though very polite in tone, which a person who has a right to make a demand would write to his debtor.

All these factors are inconsistent with the appellants' story of entrustment of the goods for sale on commission basis. On the other hand, they lend strong support to the respondent's claim that the transaction resulting in the delivery of these goods on three separate dates in November, 1945 by the respondent at the appellants' shop was one of sale of the goods at the prices fixed in the three documents acknowledging the receipt of the goods by the appellants.

It has been suggested on behalf of the appellants that the three transactions evidenced by Exhibits 2, 3 and 4 militate strongly against the respondent's

version of the original transaction being one of sale. Exhibit 2 is a receipt in respect of 40 gross of empty bottles at Rs. 100 per gross. It bears the date 15th January, 1946. Exhibit 3 is a letter requesting the appellants to deliver to the bearer 4 oz. of Musk Nepal. The letter closed with the statement "The money has already been received here". This letter is dated 6th December, 1945. Exhibit 4 is a receipt in respect of four different classes of perfumery goods all to a total value of Rs. 8,250 signed by the respondent on the 3rd January, 1946. The appellants' learned counsel claims that the prices mentioned in Exhibits 2 and 4 are identical with the prices stated in the original list of goods delivered to the appellants in November, 1945. He says that if the transaction in November, 1945 had been one of sale, it is not at all probable that the appellants would have charged identical prices on a resale of the goods. There would, in normal circumstances, be some force in this contention. But in the present case, part of the cross-examination of the respondent was directed towards showing that the prices stated in the three original lists of November, 1945 were highly inflated and did not bear a fair proportion to the real prices of the goods. It is also in evidence that the appellants found difficulty in converting the raw materials into finished goods and even if finished goods could be manufactured they found difficulty in disposing of the goods at the rates stated in the original three lists. In such circumstances the appellants must have considered themselves very fortunate in being able to persuade the respondent to take back the goods referred to in these three exhibits at the original valuations.

The delivery in November, 1945 of the goods by the respondent at the appellants' premises could not have been therefore for sale on commission basis by the

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appellants as the respondent's agents. There can be no other explanation, then, of the transaction but that it was a sale as alleged by the respondent. We therefore uphold the trial Judge's finding that the original transaction which resulted in the delivery of the goods evidenced by Exhibits A, B and C on the 8th, 9th and 11th November, 1945 was one of sale.

To what extent, then, does the consideration for the sale of the goods by the respondent to the appellants remain undischarged? The trial Judge took the view that the amount still outstanding is a sum of Rs. 32,271. In arriving at this figure the learned trial Judge refused to take into consideration the value of the goods re-delivered by the appellants under Exhibits 2, 3 and 4 to the extent of Rs. 12,500. The judgment does not state why no account was taken of this sum in adjusting the liabilities of the parties. But it is clear that the learned trial Judge took the view that the appellants should have pleaded a set-off, in the absence of which he did not feel competent to give to the appellants credit for this sum. The Appellate Bench in the view it took of the nature of the original transaction had no difficulty in adjusting against the value of the goods which did not reach the respondent this sum of Rs. 12,500.

The question when a plea of set-off is necessary and when it is not has been discussed in the case of *Hoe Moe* v. *Seedat* (1). We are in agreement with what has been said in this case by Lentaigne J., at pages 357 and 358 of the report. In the present case it is clear from the statement of the respondent himself at the trial that there was a tacit understanding between the parties that the value of the goods taken re-delivery of by the respondent would be treated as payment towards the account of the original sale for

(1) 2. Ran. p. 349.

entire lot of goods. For example, when the respondent was asked why the sums due in respect of Exhibits 2, 3 or 4 had not been paid, his answer was, "I do not make this payment under the impression that when I received my money this amount will be deducted". Again, he stated in answer to a similar question in respect of 4 oz. of Musk Nepal delivered to a third party by the appellants under his instructions he gave a similar answer, "I thought this amount will be deducted from the money due to me." About the end of his cross-examination he stated that he did not give credit to the appellants for this sum of Rs. 12,500 as, after a lapse of 4 years, he had forgotten the transactions. In these circumstances we are satisfied that the appellants need not make a specific plea of set-off in respect of the sum of Rs. 12,500 but are entitled to have the claim of the respondent treated as *pro tanto* discharged by mutual consent.

The result is that while we do not entirely agree with the reasons given by the Appellate Bench of the High Court, we are of the opinion that the respondent is not entitled to anything more than the sum awarded to him by the Appellate Bench. Accordingly we affirm the decree of the Appellate Bench of the High Court, the appeal and the cross-objection are both dismissed. Each party will bear its own costs throughout.

SUPREME COURT.

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Nov. 10.

B. S. MOHAMED EUSOOF (APPELLANT)

v.

BAKRIDI AND ANOTHER (RESPONDENTS).*

Urban Rent Control Act, 1948—Order of Controller under s 16-A not final—Jurisdiction when vested in Civil Courts to declare order null and void—Specific Relief Act, s. 42.—Proviso—Suit for bare declaration in special circumstances not precluded.

Held: The Urban Rent Control Act, 1948 does not expressly provide that the order of the Controller of Rents under s. 16-A shall be final; even if it does, a defiance of or non-compliance with the essentials of procedure will give ground for questioning the proceedings in a Court of law, and civil Courts will have jurisdiction to examine into cases where the provisions of the Act have not been complied with.

The Secretary of State for India in Council v. *Roy Jitindra Nath Chowdhry and another*, A.I.R. (1924) (P.C.) 175 at 179; *The Secretary of State for India* v. *Mask & Co.*, I.L.R. (1940) Mad. 599 at 614, followed.

The Secretary of State for India in Council v. *Maharajadhiraja Kameshwar Singh Bahadur*, I.L.R. (1936) 15 Pat. 246, distinguished.

Held further: No specific plea was raised that a suit for a bare declaration did not lie, in which event the plaint could have been amended.

S.T.K. Chetty Firm v. *Balasundram*, 10 L.B.R. 199, referred to.

In the special circumstances of the case, inspite of the proviso to s. 42 of the Specific Relief Act the suit for a bare declaration does lie.

Babu Sagarmal Tibrewala v. *G. M. Latimour*, (1948) B.L.R. 113; *Robert Fischer* v. *The Secretary of State for India in Council*, (1899) I.L.R. 22 Mad. 270 (P.C.), referred to.

G. N. Banerjee for the appellant.

Aung Min (1) for the 1st respondent.

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* Civil Appeal No. 2 of 1951 against the decree of the High Court, Rangoon in Civil Revision No. 1 of 1950.

† *Present*: U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE MYINT THEIN and U BO GYI, J.

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The judgment of the Court was delivered by the Chief Justice of the Union.

U THEIN MAUNG.—On the 19th November, 1948, the first respondent Bakridi who is a tenant of a stall, gave notice to the second respondent S. M. Ahmed, who was his sub-tenant in respect of the said stall, to quit, vacate and give peaceful possession thereof to him by the end of December, 1948.

On the 24th December, 1948, S. M. Ahmed applied to the Controller of Rents under section 16-A of the Urban Rent Control Act, 1948 for permission to sub-let the said stall to the appellant B. S. M. Eusoof.

On the 2nd January, 1949, Bakridi instituted Civil Regular Suit No. 8 of 1949 in the Rangoon City Civil Court against S. M. Ahmed for his ejectment from the stall.

On the 10th January, 1949, the Controller of Rents passed an order permitting S. M. Ahmed to sub-let the stall to Eusoof with effect from the 1st January, 1949.

On the 17th February, 1949, Bakridi applied to the Controller of Rents to review the said order ; but his application was dismissed on the 24th of that month.

On the 29th March, 1949, Bakridi instituted Civil Regular Suit No. 212 of 1949 in the Rangoon City Civil Court against Ahmed and Eusoof for declaration that the said order of the Controller of Rents was null and void. This suit was heard together with the previous suit, the evidence in both suits was recorded in it by consent, and both of them were decreed on the 24th December, 1949.

Eusoof and Ahmed then applied to the High Court to set aside the declaratory decree in revision ; and as this application has been dismissed by the High Court, Eusoof has appealed to this Court with special leave under section 6 of the Union Judiciary Act, 1948.

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Eusoof's learned Advocate has raised two questions of law in this appeal, *viz.*: (1) that the civil Courts have no jurisdiction to declare the order of the Controller of Rents null and void and (2) that the suit for bare declaration does not lie.

With reference to the first question their Lordships of the Privy Council have observed in *The Secretary of State for India in Council* v. *Roy Jitindra Nath Chowdhry and another* (1) :—

"The words of this statute imposing finality upon the orders of the Board of Revenue in such a situation appear to their Lordships not only to be imperative but most salutary. Two conditions, however, must be noted ; the first is that mentioned, *viz.*, that fundamental irregularity, that is to say, a defiance of or non-compliance with the essentials of the procedure would still give ground for questioning the proceedings in a Court of law. The second proposition is that the burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it."

Their Lordships have also observed in *The Secretary of State for India* v. *Mask & Co.* (2) :—

"It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.,"

The Urban Rent Control Act, 1948 does not expressly provide that the order of the Controller of Rents under section 16-A thereof shall be final ; but, even if it does, a defiance of or non-compliance with the essentials of the procedure will, according to

(1) A.I.R. (1924) (P.C.) 175 at 179. (2) I.L.R. (1940) Mad. 599 at p. 614.

The Secretary of State for India in Council v. *Roy Jitindra Nath Chowdhry and another* (1) still give ground for questioning the proceedings in a Court of law and the civi lCourts will, according to *The Secretary of State for India* v. *Mask & Co.* (2) still have "jurisdiction to examine into cases where the provisions of the Act have not been complied with."

In the present case the Controller of Rents has passed the said order without notice to Bakridi inspite of the fact that section 19-A (*1*) of the Act expressly provides "Before exercising any of the powers conferred on him by this Act, the Controller shall give notice of his intention to the landlord and tenant or occupier if any." It clearly is a case in which there has been a defiance of or non-compliance with the essentials of procedure—a case in which the provisions of the Act have not been complied with.

Eusoof's learned Advocate has further contended that Bakridi having availed himself of the remedy provided by the Act and applied to the Controller for review of the said order, he has no further remedy in civil Courts. He relies upon *The Secretary of State for India in Council* v. *Maharajadhiraja Kameshwar Singh Bahadur* (3). However, Mohamad Noor J., who wrote the leading judgment observed in that very case :

"It is well-settled law that if any private right is interfered with under the authority of any statute and no remedy is provided in the statute itself, the aggrieved party has none ; but if a remedy has been given in the statute, the aggrieved party can get that remedy only in the manner stated, provided always that those in authority who interfere with private rights do so strictly according to the mode prescribed in the statute."

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(1) A.I.R. (1924) (P.C.) 175 at 179. (2) I.L.R. (1940) Mad. 599 at 614.
(3) I.L.R. (1936) 15 Pat. 246.

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The present case is not one in which the person in authority, *viz.*, the Controller, has interfered with Bakridi's private rights strictly according to the mode prescribed in the statute. Moreover, if the Controller had given notice to Bakridi as required by section 19-A (*1*) of the Act, Bakridi could have shown that notice to quit, vacate and give peaceful possession had already been given to Ahmed and that as a result thereof Ahmed's own sub-tenancy would terminate at the end of December, 1948. As it is the Controller has passed an order on the 10th January, 1949, permitting sub-letting or assignment with effect from the 1st January, 1949 of a sub-tenancy which had already expired on the 31st December, 1948.

With reference to the contention that the suit for bare declaration does not lie, Eusoof did not make a specific plea to this effect in the Rangoon City Civil Court. He merely pleaded in paragraph 6 of his written statement therein "A mere declaration as prayed for would create an anomalous position." If he had pleaded specifically that the suit did not lie and if there really be any substance in that plea, Bakridi could have applied for permission to amend the plaint. See *S.T.K. Chetty Firm* v. *Balasundram* (1).

Be that as it may, we are of the opinion that the suit for bare declaration does lie inspite of the proviso to section 42 of the Specific Relief Act. Bakridi had already filed the suit for ejectment of Ahmed on the 2nd January, 1949 and Ahmed's own sub-tenancy had already expired on the 31st December, 1948. So alleged sub-letting or assignment of the sub-tenancy on the 10th January, 1949, with effect from the 1st of that month during the pendency of the ejectment suit, even though it was with the permission of the Controller, cannot affect the decree in that suit ; and according to

(1) 10 L B.R. 199.

the Full Bench ruling of the High Court in *Babu Sagarmal Tibrewala* v. *G. M. Latimour* (1), the said decree may be executable under Order 21, Rules 97 and 98 of the Code of Civil Procedure against Eusoof who according to paragraph 2 of his own written statement in the Rangoon City Civil Court "has been in possession (of the stall) long before the 1st January 1949" presumably with the consent of Ahmed. In this connection it is rather significant that Eusoof has pleaded in paragraph 5 of the said written statement:

"This defendant submits that the suit is premature and should be dismissed as the cause of action had not yet ARISEN at the time of the institution of the suit (having regard to pendency of the suit in Civil Regular Suit No. 8 of 1949 of this Honourable Court."

Equally significant are the facts that the said suits were heard together and that evidence in both suits was recorded by consent in the suit for declaration only.

The case is somewhat similar to *Robert Fischer* v. *The Secretary of State for India in Council* (2). There "if the so-called cancellation (of separate registration) is pronounced void, the order of the Government falls to the ground and the decision of the Collector stands good and operative". In the present case if the Controller's order permitting assignment is declared null and void, *status quo ante* will be restored and the decree in the ejectment suit will have full effect in accordance with the said Full Bench Ruling. The legal position will be the same as if this Court has quashed the proceedings of the Controller by directions in the nature of a writ of certiorari. As a matter of fact Bakridi would have obtained the same relief much quicker if he had applied to this Court for the said

(1) (1948) B L.R. 113. (2) (1899) I.L.R. 22 Mad. 270 (P.C.).

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directions instead of first applying to the Controller for review of his own order and then filing the suit for declaration that the order is null and void.

We accordingly hold that civil Courts have jurisdiction to declare the Controller's order null and void, that their order declaring it null and void is correct and that under the special circumstances of the case the suit for bare declaration does lie.

The appeal is dismissed with costs ; Advocate's fee ten gold mohurs.

SUPREME COURT.

K. K. DEVER (APPLICANT)

v.

THE CHAIRMAN, DISTRICT TENANCY DISPOSAL COMMITTEE, HANTHAWADDY, AND TWO OTHERS (RESPONDENTS).*

†S.C. 1952

Dec. 4.

Disposal of Tenancy Act and Rules—Land subject to allotment—Land in possession of a Receiver not exempted.

Held: A Receiver's "possession" of land cannot in any way curtail the power of a Tenancy Board to allot the same. The "possession" of a Receiver cannot be on a footing more privileged than that of an owner whose lands are subject to allotment by a Tenancy Board.

G. N. Banerji for the applicant.

Ba Sein (Government Advocate) for the 1st and 2nd respondents.

K. R. Venkatram for the 3rd respondent.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The 30 acres of paddy land involved in this application forms part of the estate of A. A. Thever Brothers of which the applicant K. K. Dever is the Receiver.

The 3rd respondent A. M. Palanichami Thever was allotted these 30 acres by the Kyauktan Township Tenancy Board for the season 1951-52 in preference to one Gurusinga. The latter's appeal to the Hanthawaddy District Board was dismissed.

Palanichami proceeded to work the land but the Receiver obtained an *ad interim* injunction order in

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* Civil Misc. Application No. 187 of 1952.

† *Present:* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG, and MR. JUSTICE MYINT THEIN.

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the High Court prohibiting the 3rd respondent from interfering with the Receiver's possession. The 3rd respondent was dispossessed.

For the current season 1952-53, the 3rd respondent was once again re-allotted these lands, despite the contentions of the Receiver who was represented by his agent Gurusingha. The District Board confirmed the Village Board's order.

Applicant's learned Advocate contends that because of the order of injunction prohibiting the 3rd respondent from interfering with the possession of the Receiver, the Tenancy Boards had acted beyond their jurisdiction in allotting the lands. This contention, however, has no substance. A Receiver's "possession" of land cannot in any way curtail the power of a Tenancy Board to allot the same. The "possession" of a Receiver cannot be on a footing more privileged than that of an owner whose lands are subject to allotment by a Tenancy Board, under the provisions of the Disposal of Tenancy Act and Rules.

The applicant's learned Advocate also contends that since the 3rd respondent was dispossessed it cannot be said that he was the tenant for the previous year. That again is incorrect. The 3rd respondent was the legal tenant and actually worked the lands until he was dispossessed on a wrong construction of the injunction order. He was unable to reap the paddy because of the action of the applicant himself.

Under Rule 10 of the Tenancy Disposal Rules land has to be re-allotted to the tenant of the previous year if he had not defaulted in respect of rent or agricultural loan. No such default has been suggested and therefore, in our judgment, he was rightly re-allotted these lands.

The application is dismissed with costs ; Advocate's fees eighty-five kyats.

SUPREME COURT.

U E MAUNG AND ONE (APPLICANTS)

v.

U PO THIT AND TWO OTHERS (RESPONDENTS)*.

† S.C. 1952

Sept. 17.

Disposal of Tenancy Act and Rules—Revocation of allotment—Resumption of land and seizure of standing crops without notice illegal—Sub-letting—Whether it disqualifies tenant of previous year from re-allotment—Tenancy Disposal Rules.

Held : The order of a District Board revoking the allotment and a subsequent order resuming the land together with the standing crops without notice to the tenants are not warranted either by the Disposal of Tenancies Act or by the Tenancy Disposal Rules.

Held further : Sub-letting is not a disqualification under Rule 10 of the Tenancy Disposal Rules so as to bar re-allotment in the next tenancy year.

Tun On for the applicants.

Ba Nyunt for the 1st respondent.

O. S. Woon (Government Advocate) for the 2nd and 3rd respondents.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—In May 1951, holding No. 10 in Kwin No. 752, Yinnyein West, measuring fifty acres belonging to one Ma Nisha of Rangoon was allotted in two separate portions, twenty acres being allotted to U E Maung and thirty to U Po Sein, the applicants before this Court.

Trouble began when U Thein Maung (who is described as a Member of Parliament, President of the Thatôn Peasants' Organisation and Peace Officer of the District) wrote to the Officer-in-Charge of the Police Outpost at Yinnyein on the 2nd November 1951

* Civil Misc. Application No. 92 of 1952.

† *Present :* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

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informing the latter that sub-letting of lands had taken place and asking him to prevent the collection of paddy in order to prevent a breach of the peace. Action was swift. Both U E Maung and U Po Sein were arrested, bail was refused and they were kept in custody for a fortnight. The paddy on their *talins* were seized and a prosecution under Rule 17 (*a*) of the Tenancies Disposal Rules was launched against them on the allegation that U Po Sein had sub-let five out of his thirty acres to one U Tha Dwe.

After their release from custody the two applicants tried to gather the remaining paddy when they were promptly re-arrested, kept in custody for 3 days and charged with theft.

The two applicants have retaliated with a complaint against those they consider responsible for their detention and suffering.

These cases are pending.

On the 8th January 1952 a meeting of the District Board of Thatôn was held. On the information of U Thein Maung who is a member of the Board, that five acres of the fifty had been sub-let, the Board there and then decided that the allocation of the fifty acres should be revoked, without informing U E Maung or U Po Sein and without giving them an opportunity of meeting the charge. The order was all the more inequitable in that U E Maung was penalised when it was a five acre plot out of U Po Sein's thirty that was alleged to have been sub-let.

When the current cultivation season drew near, U E Maung and U Po Sein (who were not even aware of the order of the 8th January 1952) made their applications in the usual course, for re-allotment of the same lands. By an order dated the 29th February 1952, the Village Board held that these lands had

already been resumed by order of the District Board and had been re-allotted to one U Po Thit and that therefore only U Po Thit would be entitled to work the lands.

An appeal was lodged with the District Board and by its order of the 14th May 1952 the Board reiterated that the lands had been resumed because of sub-letting and that this order of resumption had not been appealed against, and that therefore it remained unchallenged. The appeal was accordingly dismissed.

Applicants maintain that there had been no sub-letting. They maintain that they are the victims of harassment.

We must emphasise that this order of the 8th January 1952 passed by the District Board and the subsequent order resuming the land together with the standing crops are not warranted either by the Disposal of Tenancies Act or by the Tenancy Disposal Rules. These orders therefore have no legal effect.

We express no opinion whether there has been sub-letting in this case but we must point out that even if the sub-letting is proved, it will have no bearing upon the right of a tenant to be re-allotted the lands he had worked in the previous season. Under Rule 10 of the Tenancy Disposal Rules, as it stands, if a tenant of the previous year has paid his rent in full and if he has repaid the agricultural loan if he had taken it, he is entitled to be re-allotted for the current season the same lands that were allotted to him in the previous year. Thus even if the sub-letting is proved, apart from the possibility of facing a charge under Rule 17 (*a*) of the Rules, his rights to be re-allotted the same lands are not affected on that ground.

Clearly therefore the District Board in ordering resumption of the lands acted without jurisdiction. The Village Board erred in accepting this illegal order

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as binding and in refusing to re-allot the lands to U E Maung and U Po Sein. The District Board erred again in relying upon their previous order.

For these reasons the order of the Thatôn District Board of the 8th January 1952 together with its order of resumption of the lands in question, the order of the Yinnyein Village Board of the 29th February 1952 and the order of the District Board of the 14th May 1952 are quashed, and the proceedings are returned to the Village Board for disposal of the applications of U E Maung and U Po Sein with the observation that on the materials before us we are of opinion that U E Maung and U Po Sein are entitled to be allotted the lands which they had worked in the season 1951-52, that is twenty and thirty acres respectively of Holding No. 10 measuring fifty acres in Yinnyein West Kwin No. 772, Paung Township, Thatôn District. Advocate's fees eighty-five kyats.

တရားလွှတ်တော်ချုပ်။

ဆိကံဒါ (လျှောက်ထားသူ) † ၁၉၅၂

နှင့် ဒီဇင်ဘာလ ၁၂

စစ်တွေခရိုင် သီးစားချထားရေးကော်မိတီပါ ၆ ဦး၊ စစ်တွေမြို့ (လျှောက်ထားခံရသူများ)။ *

သီးစားသည် မြေကို မိမိလုပ်ခွင့်ရပါလျက် မလုပ်ဘဲ တဆင့် သီးစား ချထားခြင်း—၁၉၅၁ ခုနှစ်၊သီးစားချထားရေးနည်းဥပဒေ၊အပိုဒ် ၁၀—"သီးစား"၏အဓိပ္ပါယ်—၁၉၄၈ ခုနှစ်၊ သီးစားချထားရေးအက်ဥပဒေ၊ ပုဒ်မ ၂ (၂)—"သီးစား" ဆိုသည်မှာ မြေကို လက်ရှိထားပြီးလျှင် ၎င်းမြေအတွက် သီးစားခပေးရန်တာဝန်ရှိသူ၊သို့မဟုတ် အဖွဲ့—မူလသီးစားနှင့် တဆင့်သီးစားလုပ်သူတို့အပြိုင်အဆိုင် ဆက်လက်လုပ်ကိုင်ခွင့် လျှောက်ထားခြင်း—တဆင့် သီးစားချလိုက်ခြင်းဖြင့်မိမိသဘောအလိုအလျောက် မြေကိုလက်လွှတ်လိုက်ခြင်း—မူလ သီးစား၏အခွင့်အရေးသည်မြေပိုင်ရှင်၏အရေးအခွင့် ထက်မကြီးမမြင့်နိုင်—တဆင့်သီးစားလုပ်သူမှာသီးထောက်ခပေးရန်၊ သို့မဟုတ် အမ တော်ပေးဆပ်ရန်ပျက်ကွက်မှုရှိမှသာလျှင် မူလသီးစားသည် မြေကိုပြန်ရှိရရှိနိုင်သည်။

ဦးကျော်ခင်၊ လျှောက်ထားသူအတွက်။

ဦးဘစိန် (အစိုးရရှေ့နေကြီး) ပဌမ နှင့် ဒုတိယ လျှောက်ထားခံရသူများ အတွက်။

ဦးဘကျော်၊ တတိယ၊ စတုတ္ထ နှင့်ဆဋ္ဌမ လျှောက်ထားခံရသူများအတွက်။

နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင် အမိန့်ချမှတ်သည်။

လျှောက်ထားသူက၊ အချင်းဖြစ် မြေချိန် ၃ ကျပ် ၁၄ ကာနီကို မိမိအား၊ ကျေးရွာသီးစားချထားရေး ကော်မိတီကလုပ်ခွင့်ပြုခဲ့သည့်အတိုင်း၊ ၁၉၅၁-၅၂ ခုနှစ်တွင်၊မိမိကိုယ်တိုင်လုပ်ခဲ့ကြောင်း။ သို့အတွက်၊အချင်းဖြစ်မြေကို ၁၉၅၂-၅၃ ခုနှစ်အတွက်လည်း၊ မိမိပင်ဆက်လက်၍လုပ်ခွင့်ရထိုက်ကြောင်း၊ ကျေးရွာသီးစား ချထားရေး ကော်မိတီတွင်လျှောက်တောင်းခဲ့လေသည်။

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* တရားမအသေးအဖွဲလျှောက်လွှာအမှတ် ၁၅၆။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင်၊ တရားဝန်ကြီး ဦးမောင်နှင့်တရား ဝန်ကြီးဦးမြင့်သိန်းတို့၏ရှေ့တော်တွင်။

၁၉၅၂

ဆီကံဒါ နှင့် စစ်တွေခရိုင် သီးစား ချထား ရေး ကော်မိတီ ပါ ဒုဋ္ဌ၊ စစ်တွေမြို့။

သို့ရာတွင်ကျေးရွာသီးစားချထားရေး ကော်မိတီက၊ သူသည်အချင်းဖြစ်မြေ ပိုင်ရှင်၏ ကိုယ်စားလည်အဖြစ်နှင့် ၁၉၅၁-၅၂ ခုနှစ်အတွက်၊ ကိုယ်တိုင်လုပ် ကိုင်ရန်လုပ်ခွင့်အမိန့်တောင်းယူပြီး၊ ကိုယ်တိုင်မလုပ်ကိုင်ဘဲ၊ အစိုးရ သတ်မှတ်ထား သောနှုန်းထက် မြေခပိုမိုရစေခြင်းငှါ၊ ယခုလျှောက်ထားခံရသူ အမှတ် (၃) (၄) (၅) (၆) နှင့်အခြားသူနှစ်ယောက်တို့အား၊ မြေတကျပ်လျှင်အငှါးခ စပါးတင်း သုံးရာကျစီနှင့် အငှါးချထားခဲ့ကြောင်း ထင်ရှားသည်ဟု ဆုံးဖြတ်ပြီးလျှင်၊ အချင်း ဖြစ်မြေကိုသူအားမချဘဲ၊ ယခုလျှောက်ထားခြင်းခံရသူ အမှတ် (၃) (၄) (၅) (၆) နှင့်အခြားနှစ်ယောက်တို့အား၊ ၁၉၅၁ ခုနှစ်၊ သီးစားချထားရေးနည်း ဥပဒေ အပိုဒ် ၁၀ အရ၊ ချထားလိုက်သည်။

သို့ချထားလိုက်သည်ကို၊ ယခုလျှောက်ထားသူကမကျေနပ်၍၊ ခရိုင်သီးစားချ ထားရေး ကော်မိတီသို့အယူခံဝင်သောအခါမှာလည်း၊ ခရိုင်သီးစားချထားရေး ကော်မိတီက၊ ကျေးရွာသီးစားချထားရေးကော်မိတီကဲ့သို့ပင်လျှင်၊ သူသည် အချင်း ဖြစ်မြေကိုလုပ်သူမဟုတ်။ တဆင့်သီးစားချပေးနေသူသာဖြစ်သည်ဟု ဆုံးဖြတ်ပြီး လျှင်သူ၏အယူခံလွှာကို ပလပ်လိုက်လေသည်။ သို့ရာတွင်၊ ကျေးရွာသီးစားချထား ရေးကော်မိတီက၊ အချင်းဖြစ်မြေ ၃ ကျပ် နှင့် ၁၄ ကာနီအားလုံးကို၊ ယခုလျှောက် ထားခံရသူ အမှတ် (၃) (၄) (၅) (၆) နှင့် အခြားသူနှစ်ယောက်တို့အားချ လိုက်ရာ၊ အခြားသူနှစ်ယောက်တို့က မိမိတို့ရထိုက်သောအစုကို မလုပ်လိုကြသဖြင့် ခရိုင် သီးစားချထားရေး ကော်မိတီက၊ အချင်းဖြစ်မြေ ၃ ကျပ် ၁၄ ကာနီ အနက် ယခုလျှောက်ထားခြင်းခံရသူ အမှတ် (၃) (၄) (၅) (၆) တို့အား မြေချိန် ၂ ကျပ်နှင့် ၁၂ ကာနီချလိုက်ခြင်းကိုသာအတည်ပြုပြီး၊ ကျန်မြေ ၁ ကျပ် နှင့် ၂ ကာနီကို ကျေးရွာသီးစားချထားရေးကော်မိတီက၊ မြေမရသေးသော လယ်လုပ် သူများအား သီးစားချပေးရမည်ဟု အမိန့်ချမှတ်လိုက်လေသည်။

ကျေးရွာသီးစားချထားရေး ကော်မိတီနှင့် ခရိုင်သီးစားချထားရေးကော်မိတီ တို့က၊ လျှောက်ထားသူသည် ၁၉၅၁-၅၂ ခုနှစ်က အချင်းဖြစ်မြေကို မိမိလုပ်ခွင့် ရပါလျက် မလုပ်ဘဲ၊ လျှောက်ထားခံရသူ အမှတ် (၃) (၄) (၅) (၆) နှင့် အခြားသူတို့အားတဆင့်၊ သီးထောက်ခချလိုက်ကြောင်းဆုံးဖြတ်၍ ဂ၁ကြသည် ကို၊ ဤရုံးတော်ကလက်မခံနိုင်ရန်အကြောင်းတစုံတရာမရှိ။

လျှောက်သူ၏ပညာရှိလွတ်တော်ရှေ့နေကြီးက၊ လျှောက်သူသည် ကျေးရွာ နှင့်ခရိုင်သီးစားချထားရေးကော်မိတီများက၊ စီရင်ဆုံးဖြတ်ခဲ့သည့်အတိုင်း၊ အချင်း ဖြစ်မြေကို ၁၉၅၁-၅၂ နှစ်က၊ လျှောက်ထားခံရသူ အမှတ် (၃) (၄) (၅) (၆) နှင့်အခြားသူနှစ်ယောက်အားတဆင့်ချခဲ့စေကာမူ၊ ၁၉၅၁ ခုနှစ်၊ သီးစားချ

ထားရေး နည်းဥပဒေ အပိုဒ် ၁၀ အရ၊လျှောက်ထားသူသာလျှင်အချင်းဖြစ်မြေကို ၁၉၅၂ -၅၃ ခုနှစ် အတွက်လည်း၊ ဆက်လက်၍ လုပ်ခွင့်ရှိ ရမည်ဖြစ်ကြောင်း။ ကျေးရွာနှင့် ခရိုင်သီးစားချထားရေး ကော်မိတီများက၊ လျှောက်သူကိုမချဘဲ၊ အထက်တွင်ဖေါ်ပြခဲ့သည့်အတိုင်းချလိုက်ကြခြင်းသည်၊ ထိုနည်းဥပဒေနှင့်ဆန့်ကျင်ကြောင်းလျှောက်လဲခဲ့သည်။

၁၉၅၂
ဆိုက်ဒါ နှင့် စစ်တွေခရိုင် သီးစား ချထားရေး ကော်မိတီ ပါ ၆ ဦး၊ စစ်တွေမြို့။

သို့ရာတွင်၊ နည်းဥပဒေ အပိုဒ် ၁၀ ၏၊ သက်ဆိုင်ရာအပိုင်းမှာ အောက်ပါအတိုင်းဖြစ်သည်။

"၁၀။ ။မည်သည့်သီးစားမဆို၊မှုခင်းဖြစ်ပွါးခြင်းမရှိခဲ့သောလယ်ယာမြေကိုပြုခဲ့သည့် စိုက်ပျိုးရေးနှစ်က စိုက်ပျိုးလုပ်ကိုင်ခဲ့လျှင်၊ သို့မဟုတ် မှုခင်းဖြစ်ပွါးခြင်းရှိသော်လည်း၊တည်ဆဲ နည်းဥပဒေများအရ ပဲ့စည်းထားသော သီးစားချထားရေးကော်မိတီ အဖွဲ့တဖွဲ့မှ သီးစားချထားခြင်းခံရလျှင်၊လာမည့်သီးနှံစိုက်ပျိုးသောနှစ်တွင်အဆိုပါ လယ်မြေကို အောက်ပါအချက်များနှင့်ဆန့်ကျင်ခြင်းမရှိခဲ့သော်၊ဆက်လက်၍စိုက်ပျိုးလုပ်ကိုင်ခွင့်ရှိစေရမည်။"

နည်းဥပဒေ အပိုဒ် ၁၀ အရ၊ဆက်လက်၍ စိုက်ပျိုးလုပ်ကိုင်ခွင့် ရနိုင်သော သီးစားများမှာ၊နှစ်မျိုးရှိသည်။ တမျိုးမှာမှုခင်းဖြစ်ပွါးခြင်းမရှိခဲ့သော မြေယာမြေကိုပြုခဲ့သည့်၊စိုက်ပျိုးရေးနှစ်ကစိုက်ပျိုးလုပ်ကိုင်ခဲ့သော သီးစား၊နောက်တမျိုးမှာ မှုခင်းဖြစ်ပွါးခြင်းရှိသော်လည်း၊သီးစားချထားရေး ကော်မိတီအဖွဲ့မှသီးစားချထားခြင်းခံခဲ့ရသောသီးစား။

၁၉၅၁ ခုနှစ်၊သီးစားချထားရေး နည်းဥပဒေမှာ (သီးစား) အဓိပ္ပါယ်သတ်မှတ်ချက်မပါ။သို့ရာတွင် ထိုနည်းဥပဒေသည်၊ ၁၉၄၈ ခုနှစ်၊ သီးစားချထားရေး အက်ဥပဒေအပြောလုပ်သော နည်းဥပဒေဖြစ်၍ ၎င်းတွင်ပါရှိသော (သီးစား) ၏ အဓိပ္ပါယ်ကို၊ ထိုအက်ဥပဒေတွင် သတ်မှတ်ထားသည်အတိုင်း၊ ကောက်ယူရမည်။ ထိုအက်ဥပဒေပုဒ်မ ၂ (၂) အရ၊ (သီးစား) ဆိုသည်မှာ၊ မြေကိုလက်ရှိထားပြီးလျှင်၊ဆိုခဲ့သည်မြေအတွက်၊သီးစားခပေးရန်တာဝန်ရှိသောသူ၊ သို့မဟုတ် အဖွဲ့ကိုဆိုလိုသည်။

ထိုအဓိပ္ပါယ် သတ်မှတ်ချက်အရ၊ယခုလျှောက်ထားသူသည် ၁၉၅၁-၅၂ ခုနှစ်အတွက်၊ ကျေးရွာသီးစားချထားရေးကော်မိတီက၊ အချင်းဖြစ်မြေကိုချထားခြင်းခံခဲ့ရ၍၊သီးစားဖြစ်ခဲ့၏။ သို့ရာတွင် သူကထိုမြေကိုတဆင့်သီးစားချလိုက်သော လျှောက်ထားခြင်းခံရသူ အမှတ် (၃) (၄) (၅) (၆) နှင့် အခြားသူနှစ်ယောက်တို့သည်လည်း၊ (မှုခင်းဖြစ်ပွါးခြင်းမရှိခဲ့သောလယ်ယာမြေကို ပြုခဲ့သည့်စိုက်ပျိုးရေးနှစ်က စိုက်ပျိုးလုပ်ကိုင်ခဲ့) သောသီးစားများပင်ဖြစ်ခဲ့ကြ၏။ လျှောက်ထား

၁၉၅၂

ဆိုက်ဒါ နှင့် စစ်တွေခရိုင် သီးစား ချထားရေး ကော်မတီ ပါ ၆ ဦး၊ စစ်တွေမြို့။

သူသည်၊အချင်းဖြစ်မြေကိုလုပ်ခွင့်ရရန်၊ ကျေးရွာသီးစားချထားရေးကော်မိတီတွင် လျှောက်ထားခဲ့ရသည့်အတွက်၊ သူ့အတွိုဆိုလျှင်၊ထိုမြေသည် မှုခင်းဖြစ်ပွါးခြင်း ရှိခဲ့၏။ သို့ရာတွင် သူကလျှောက်ထားခံရသူ အမှတ် (၃) (၄) (၅) (၆) နှင့် အခြားသူနှစ်ဦးတို့အားတဆင့်ချလိုက်ခြင်းမှာ၊ သူ၏သဘောအလိုအတိုင်းသာဖြစ်ရ၍ ထိုသူများအတွိုမှာ၊ ထိုမြေသည်မှုခင်းဖြစ်ပွါးခြင်းမရှိခဲ့သော၊ လယ်ယာမြေသာဖြစ်ခဲ့၏။

သို့အတွက်မျက်မြင်အားဖြင့်၊ လျှောက်ထားသူနှင့် လျှောက်ထားခြင်းခံရသူ အမှတ် (၃) (၄) (၅) (၆) နှင့် အခြားသူနှစ်ယောက်တို့သည်၊ နည်းဥပဒေ အပိုဒ် ၁၀ အရ၊ ဆက်လက်၍လုပ်ခွင့်ရထိုက်သူများချည်းသာဖြစ်သကဲ့သို့ရှိကြ၏။ သို့ရာတွင် ထပ်မံ၍ စဉ်းစားသောအခါ ၁၉၄၈ ခုနှစ်၊ သီးစား ချထားရေး အက်ဥပဒေ ပုဒ်မ ၂ (၂) တွင်၊သီးစား၏အဓိပ္ပါယ်ကိုသတ်မှတ်ရာ၌ (မြေကိုလက်ရှိထားပြီးလျှင်) ဟု အတည့်အလင်းပါရှိနေရာ၊လျှောက်ထားခံရသူ အမှတ် (၃) (၄) (၅) (၆) နှင့်အခြားသူနှစ်ဦးသာလျှင်၊ထိုမြေကိုလက်ရှိထားခဲ့ကြကြောင်း၊ လျှောက်ထားသူသည်၊ အချင်းဖြစ်မြေကို၊သူတို့အားတဆင့် သီးစားချထားလိုက်ခြင်းဖြင့်၊မိမိ၏သဘောအလိုအလျောက်ထိုမြေကိုလက်လွှတ်လိုက်ခြင်းဖြစ်ကြောင်း ထင်ရှားရှိလာသည်။ သို့အတွက် လျှောက်ထားသူမူလသီးစားနှင့်လျှောက်ထားခံရသူ မူလသီးစားက တဆင့်သီးစားချလိုက်သော သူများတွင်၊ တဆင့် သီးစားချထားခြင်းခံရ၍ အချင်းဖြစ်မြေကိုလက်ရှိထားပြီး စိုက်ပျိုးလုပ်ကိုင်ခဲ့သော၊သူများက မူလသီးစားထက် ဆက်လက်၍ လုပ်ခွင့်ရထိုက်ကြောင်း၊ ပိုမိုထင်ရှားရှိလာသည်။

ထိုမှတပါး၊မူလသီးစား၏အရေးအခွင့်သည်၊မြေပိုင်ရှင်၏ အရေးအခွင့်ထက်မကြီးမြင့်နိုင်။မြေပိုင်ရှင်တဦးတယောက်သည်၊မိမိ၏မြေကို မိမိကိုယ်တိုင်မလုပ်ဘဲ သူတပါးအား၊တန်စ်တွက်သီးစားချလိုက်လျှင်၊သာမန်အားဖြင့် ထိုမြေကိုနောင်နှစ်များအတွက်၊မိမိကိုယ်တိုင်လုပ်ရန်သီးစားထံမှပြန်၍မရနိုင်ပြီး၊နည်းဥပဒေ အပိုဒ် ၁၀ အရ၊ သီးစားမှာသာလျှင်ဆက်လက်၍လုပ်ရခွင့်ရှိသည်။သီးစားမှာ သီးထောက်ခံပေးရန်ပျက်ကွက်မှု၊သို့မဟုတ် အမတော်ကြေးပေးဆပ်ရန်ပျက်ကွက်မှုရှိမှသာလျှင်၊ မြေပိုင်ရှင်သည် သီးစားထံမှ ထိုမြေကိုပြန်၍ရနိုင်ခွင့်ရှိတော့သည်။ ထိုနည်းအတူ မူလသီးစားသည်လည်း၊ သူတပါးအားတဆင့် သီးစားချလိုက်လျှင်၊ သို့ချလိုက်သောမြေကိုတဆင့်သီးစားလုပ်သူထံမှ မိမိကိုယ်တိုင်လုပ်ရန်ပြန်၍မရနိုင်ပြီ။ တဆင့်သီးစားလုပ်သူမှာသီးထောက်ခံပေးရန်၊ သို့မဟုတ် အမတော်ပေးဆပ်ရန်ပျက်ကွက်မှုရှိမှသာလျှင်ပြန်၍ရနိုင်တော့မည်။

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ဆိုက်ဒါ နှင့် စစ်တွေခရိုင် သီးစားချထားရေး ကော်မိတီ ပါ ၆ ဦး၊ စစ်တွေမြို့။

ကျေးရွာသီးစားချထားရေးကော်မိတီနှင့် ခရိုင်သီးစားချထားရေးကော်မိတီ တို့ကဲ့နည်းဥပဒေ အပိုဒ် ၁၀ ၏အဓိပ္ပါယ်ကို ကောက်ယူခြင်းသဖြစ်၍၎င်း၊ ထိုနည်းဥပဒေကို၊ ကိုးကားရှုအမိန့်ချမှတ်ခြင်းသည်၎င်းသင့်လျော်မှန်ကန်သည်။ လျှောက်သူ၏ပညာရှိလွှတ်တော်ရှေ့နေကြီးကလျှောက်သူသည်၊ မိမိအား ၁၉၅၁-၅၂ ခုနှစ်က၊ စိုက်ပျိုးလုပ်ကိုင်ရန် သီးစားချထားလိုက်သော လယ်မြေပေါ်တွင် မလုပ်မကိုင်ခဲ့လျှင်၊ ၁၉၅၁ ခုနှစ်၊ သီးစားချထားရေး နည်းဥပဒေ အပိုဒ် ၁၇(က) အရ သူ့ကိုရာဇဝတ်မှုစွဲဆိုနိုင်ပါသည်။ သို့စွဲဆိုနိုင်ပါလျက်၊ မစွဲဆိုဘဲ လျှောက်ထားသူသည်၊ ထိုမြေကိုမလုပ်ခဲ့ဟု မဆုံးဖြတ်သင့်ပါကြောင်း လျှောက်ထားသေးသည်။ သို့ရာတွင် သူ့ကိုရာဇဝတ်မှုစွဲဆိုရန်မှာ၊ ယခုလျှောက်ထားခြင်းခံရသူ အမှတ် (၃) (၄) (၅) (၆) တို့၏တာဝန်မဟုတ်။ သူ့ကိုရာဇဝတ်မှုစွဲဆိုခြင်းမရှိသော်လည်း၊ သူသည်အခြားသူများအားတဆင့်သီးထောက်ခံ ချ-မချကိုကျေးရွာနှင့်ခရိုင်သီးစားချထားရေးကော်မိတီက စစ်ဆေးဆုံးဖြတ်နိုင်သည်၊ စစ်ဆေးဆုံးဖြတ်ရမည်သာ ဖြစ်သည်။

သို့အတွက် ဤလျှောက်လွှာကိုစရိတ်နှင့်တကွပလပ်လိုက်သည်။ တရားစရိတ်အလို့ငှါ၊ ဤရုံးတော်တွင်ရှေ့နေခမှာ ငွေ ၈၅ ဖြစ်စေရမည်။

SUPREME COURT.

†S.C. 1952

Dec. 4.

U KO KO GYI (APPLICANT)

v.

ENGINEER-IN-CHARGE, RANGOON CORPORATION AND ANOTHER (RESPONDENTS).*

Directions in the nature of Certiorari and Prohibition—City of Rangoon Municipal Act—Construction and Implication of the phrase "having the duty to act according to law."

Held : There is no provision in the Corporation of Rangoon Municipal Act which requires the Engineer-in-charge, in issuing an order directing the demolition or removal of an unauthorised structure, to act in anything but an administrative or executive capacity.

Held further : The test of "having the duty to act according to law" taken by itself is not sufficient. Everyone is under a duty to act according to law but failure to act according to law will not in every case give rise to a right in the injured party to seek directions in the nature of certiorari and prohibition.

U Htwe v. *U Tun Ohn*, (1948) B.L.R. 541, followed.

Khin Maung for the applicant.

C. C. Khoo for the 1st respondent.

Yan Aung for the 2nd respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The applicant was on the 16th September 1952 served with an order from the Engineer-in-Charge, Buildings Department, Municipal Corporation of Rangoon calling upon him to demolish a structure occupied by him at No. 171, 50th Street, Rangoon, as having been put up without any

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* Civil Misc. Application No. 280 of 1952.

† *Present :* U THEIN MAUNG, Chief Justice of the Union of Burma MR. JUSTICE E MAUNG and MR. JUSTICE MYINT THEIN.

authorisation under the City of Rangoon Municipal Act. The order called upon the applicant to have the structure removed by the 23rd September 1952.

On the 17th October 1952 the applicant, who some how had managed to put off the day for the demolition under the order served on him, applied to this Court for directions in the nature of certiorari and prohibition.

The respondents do not specifically plead in their objections that directions in the nature of certiorari and prohibition are not the appropriate remedies in the circumstances. But the 1st respondent Engineer-in-Charge, Buildings Department of the Corporation of Rangoon, pleads in paragraph 13 of his affidavit that " the applicant is entitled to other remedies and could have sought relief in the inferior Courts".

At the hearing the learned counsel for the applicant was asked to direct his attention primarily to the question whether the Engineer, in directing the applicant to remove his structure with the alternative of having it demolished, was or was not acting in a judicial or quasi-judicial capacity; for unless the officer in question acted or purported to act in such capacity no directions of the nature sought can be issued by this Court.

We have heard U Khin Maung at length. He contends that whenever a person's rights are infringed or attempted to be infringed otherwise than in due course of law, such person is entitled to seek relief before this Court. This is going too far. There is no provision in the Corporation of Rangoon Municipal Act which requires the Engineer-in-Charge in issuing an order of the kind challenged in this case to act in anything but an administrative or executive capacity.

From what has been said before us by the learned counsel for the applicant and from what we have often

S.C. 1952

U KO KO GYI v. ENGINEER-IN-CHARGE, RANGOON CORPORATION AND ANOTHER.

heard in other cases it seems to us that the decision of this Court in *U Htwe* v. *U Tun Ohn* (1) has been misunderstood. At page 550 of the report the late Chief Justice of the Union said:

> " Therefore, when Atkin L.J., used the phrase ' having the duty to act judicially ' we must in relation to the Constitution construe it as ' having the duty to act according to law'."

This statement read apart from its context appears to have resulted in a good deal of misapprehension. The text of " having the duty to act according to law ", taken by itself, is not sufficient. Everyone is under a duty to act according to law but failure to act according to law will not in every case give rise to a right in the injured party to seek directions in the nature of certiorari or prohibition.

In these circumstances the application must be dismissed as not being competent. The applicant will pay the respondents costs. Advocate's fees eighty-five kyats.

(1) (1948) B.L.R. 541.

BURMA LAW REPORTS

HIGH COURT

1952

Containing cases determined by the High Court at Rangoon

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HIGH COURT

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The Hon'ble *Maha Thiri Thudhamma* U TUN BYU, M.A. (Cantab.), *Barrister-at-Law*.

PUISNE JUDGES

The Hon'ble U ON PE, B.A., *Barrister-at-Law*.
The Hon'ble U SAN MAUNG, B.Sc., I.C.S. (Retd.).
The Hon'ble U AUNG THA GYAW, B.A., B.L.
The Hon'ble *Maha Thiri Thudhamma* U THAUNG SEIN, B.Sc., I.C.S. (Retd.).
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The Hon'ble U AUNG KHINE, M.A. (Cantab.), *Barrister-at-Law*.
The Hon'ble U SI BU, B.A., B.L. (from 1st January 1952 to 20th February 1952).
The Hon'ble U BA THOUNG, *Barrister-at-Law* (from 21st August 1952 to 6th November 1952).

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jurisdiction to the Court to order execution. *Shyam Mandal* v. *Satinath Banerjee*, (1917) 44 Cal. 954 at 961 ; *Raghunath Das* v. *Sundar Das Khetri*, (1914) 42 Cal. 72 ; *Gopal Chunder* v. *Gunamani Dasi*, (1892) 20 Cal 370 ; *Sahdeo Pandey* v. *Ghasiram*, (1893) 21 Cal. 19 ; *Parashram* v. *Balmukund*, (1908) 32 Bom. 572, referred to. There is nothing in the record to show that such notices had been issued. The issue of such notices cannot be presumed having regard to s. 114 of Evidence Act. It is for the person who alleges that the liability has been incurred to prove that the conditions prescribed in the Act had been actually done. There is no presumption in law that any particular act had been done. *Narendra Lal Khan* v. *Jogi Hari*, (1935) 32 Cal. 1107 at 1121 ; *Walvekar* v. *Emperor*, (1926) 53 Cal. 718 at 728 : *Ashanullah* v. *Trilochan Bagchi*, (1886) 13 Cal. 197, referred to.

AHMED MURAD *v.* M.A.L. CHETTYAR FIRM 66

CIVIL PROCEDURE CODE, ORDER 21, RULE 90—*Whose "interest" affected by sale—Meaning of the word—Whether includes an auction-purchaser - Rule for the interpretation of statutes—Court sale—Misrepresentation whether material fact. Held:* Auction-purchaser is not a person "whose interests are affected by the sale" within the meaning of Order 21, Rule 90 (1) Code of Civil Procedure. *K.V.A.L. Chettyar Firm* v. *M. P. Maricar*, (1928) I.L.R. 6 Ran. 621 at 622 ; *Baidyanath Mullick* v. *Sm. Radharani Dassee*, (1945-46) C.W.N. 394 at 397 ; *Kiram Bala Shaha* v. *Suniti Brabha Shaha*, (1939) Vol. I, Cal. Series, 373 at 375 ; *Nihal Chand Gopaldas* v. *Pritam Singh and another*, (1932) 14 Lah. 1 ; *Balkrishna Waman Kharkar* v. *Sukharam Babaji Mestry*, (1936) 60 Bom. 70 ; *Kalumal Tolaram* v. *Ahmad Nur Mahomad*, A.I.R. (1931) Sind 107, followed. *Ravinandan Prasad* v. *Jagarnath Sahu and Ajudhia and others*, I.L.R. (1925) 47 All. 479 ; *Bhavirisetti Gopalkrishnayya* v. *Pakanati Pedda Sanjeeva Reddy and another*, A.I.R. (1920) Mad. 145 ; *Mahadeo Ram* v. *Raja Mohan Vikaram Sah*, I.L.R. (1933) 12 Pat 665 ; *The All India Railwaymen's Benefits Fund Ltd. and one* v. *Ram Chand and another*, I.L.R. (1939) Nag. 35 ; *L. Jhangi Ram* v. *L. Ram Saran*, A.I.R. (1944) Pesh. 42, dissented from. It is quite proper and reasonable to examine earlier decisions or previous law relating to the same or similar subject-matter, in order to clear up any doubt which might arise in the construction of an existing provision of an Act *MacMillan* v. *Dent*, (1907) 1 Ch. 107 at 120 ; *Craies on Statutes & Laws*, (1936), Edn 87, followed. In sales under the direction of the Court It is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, and absolutely shocking, if the Court were to enforce against a purchaser misled by its only accredited agents a bargain so illusory and so unconscientious as this *Mahomed Kala Mea* v. *Harperink and others*, (1908-09) 36 I.A. 32 at 37 : *A. M. Hashim Ispahany* v. *N.A.P.K Chettyar Firm*, (1915-16) 8 L.B.R. 427 at 431, followed. Where the auction-purchaser was misled by the Bailiff of the Court into believing that the properties belonged to the judgment-debtor and that there was no encumbrance, and both the statements were found to be incorrect the sale should be set aside. When a purchaser at a Court auction is not a citizen of the Union of Burma he has no right to purchase immoveable property. Under s. 65 of the Code of Civil Procedure auction-purchaser will be deemed to

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Court would be justified in exercising the powers under s. 562 (1) of the Criminal Procedure Code. An offence of theft cannot be obliterated by the subsequent restitution of property.

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CONTRACT ACT, s. 2—*Consideration—Meaning of*—Where a document was executed by a son and widow of a deceased person in consideration of certain debts due by the deceased and the recital did not show the creditor promised to give up any right, *i.e.*, to do or abstain from doing anything. *Held* : That the document was without consideration. The principle about settlement of a disputed claim or forbearance from suing has no application in the present case. *Gulab Chand* v. *Kamal Singh and another*, I.L.R. 44 All. 424 ; *Debi Radha Rani* v. *Ram Dass*, A.I.R. (1941) Pat. 282, distinguished.

MAUNG PAR (*a*) MAUNG PASI (*a*) MAUNG MYO NYUNT *v.* U TUN HLAING AND ANOTHER 32

CONTRACT ACT, s. 189—*Agent of necessity—Looting—Burden of proof—Ratification*. Respondents executed a promissory-note in favour of Appellant whose agent left Burma before the British evacuation and no one was appointed to look after the affairs. The 2nd defendant claimed that by payment of Rs. 11,000 on 1st September 1944 to one Veerappa Chettyar the claim was satisfied and contended that Veerappa Chettyar was an agent of necessity. *Held* : That the authority under s. 189 of the Contract Act is one granted by the law to a person acting in a particular transaction. Such a person is not an agent *ex contractu* *R.M.M. R.M. Perichiappa Chettyar* v. *Ko Kyaw Than*, (1949) B.L.R. 64 at 70, referred to and followed. Acceptance of Japanese currency from the 2nd defendant could not be said to be a transaction in the interest of the firm or for its benefit especially when there was an endorsement of interest on the 1st April 1944 and no apprehension of the claim becoming time-barred. When defendant relied upon a statement of fact that the paddy belonging to the Appellant firm had been looted the burden of proof rests on him and it had not been satisfied in this case. No evidence had been adduced in this case from which an inference of ratification could be reasonably made.

S.K.A.R.S.T. CHETTYAR FIRM *v.* P.S.A.P. ALAGAN AND OTHERS 59

CONTRAVENTION OF S. 193, CRIMINAL PROCEDURE CODE RENDERS TRIAL NULL AND VOID 381

CONVERSION, WHAT AMOUNTS TO 374, 356

CO-OWNER SUING A STRANGER IN POSSESSION AND CLAIMING HALF SHARE, WHETHER LIABLE TO BE DEFEATED AS FOR PARTIAL PARTITION 344

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Procedure whose powers are defined in Chapters II and III of the Criminal Procedure Code. The word "Magistrate" is not defined in s. 4 of the Code of Criminal Procedure. It must mean Magistrate appointed by the Government under the provisions of ss. 10, 11,12 and 13 of the Criminal Procedure Code. S. 5 of the Criminal Procedure Code enacts that all offences under the Penal Code must be dealt with according to the provisions contained in the Code. Cognizance must be taken by a Magistrate appointed under the Code. There is no provision in the Code by which a Magistrate can continue a case from the stage where it was left by another Magistrate acting under the provisions of the Proclamation of Martial Law Ordinance, 1948. *Ramchandra Modak* v. *King-Emperor*, 5 Pat. 110; *The King* v. *Maung Po and others*, (1946) R.L.R. 41, referred to and distinguished. The contention that s. 3 (*1*) of the Indemnity and Validating Act, 1950 validated the order of the Magistrate issuing process under the Military Administration is fallacious. The word "order" in s. 3 (*1*) must be interpreted *ejusdem generis*, with the words "judgment and sentences" in the same section and the orders referred to must be final orders affecting the rights of the accused person and not interlocutory orders relating to issue of process, etc. However the taking of fresh cognizance of the same offence by the Magistrate was valid and when he issued notice to the accused he took cognizance as a Magistrate under the Criminal Procedure Code. The omission to examine the complainant on oath is a mere irregularity under s. 537, Criminal Procedure Code which did not prejudice the applicant in any way. *Emperor* v. *Bateshar*, 37 All. 628; *Phagu Sahu and another* v. *Emperor*, A.I.R. (1916) Pat. 129; *Mahr Chiragh Din* v. *The Crown*, 4 Lah. 359; *Desaibhai Khushalbhai Patel* v. *Emperor*, A.I.R. (1938) Bom. 50, referred to. The High Court will not interfere in revision except in exceptional cases and the present case did not come within that category. *Khan Bahadur Hajee Gulam Sheraze* v. *The King*, (1941) R.L.R. 599; *U Wa Gyi* v. *The Union of Burma*, (1948) B L.R. 652; *S. M. Bashir* v. *The King*, (1946) R.L.R. 306.

PENAL CODE, s. 122 (1)—*Criminal Procedure Code, s. 196—Sanction under—How to be signed—President's Notification No. 123—Burma General Clauses Act, s. 13. Held :* If a man joins rebels he is guilty of high treason. In rebellions it frequently happens that few are let into the real design, but yet all who join in it are guilty of rebellion. *R.* v. *Purchaser*, (1839) 4 State Trials (N.S.) 93 at 94, referred to. Where sanction of the President under s. 196 of the Criminal Procedure Code issued from the Secretary to the Government was signed by another officer for him and the officer so signing was an accredited officer in whose name orders of the Government can be issued, sanction is good. Under President's Notification No. 123, dated 4th January 1948 all orders or instruments executed for the Union Government shall be expressed to be made by the order of the President and such order or instrument can be signed by the Secretary, Additional Secretary, Deputy Secretary, Under Secretary or Assistant Secretary in the Ministry concerned. Under s. 13 of Burma General Clauses (Amendment) Act, 1950 any powers conferred or duty imposed on the President shall be exercisable or performable in his name by the Government. As the officer who actually signed was authorised to sign for the President, the sanction in the case was therefore rightly issued. *Md. Oziullah* v. *Beni Madhab Chawdhury*, A.I.R. (1922) Cal. 298, referred to.

BA BOO AND OTHERS *v.* THE UNION OF BURMA 83

PENAL CODE, s. 304—*Penal Code (Amendment) Act, 1947 (Act XXXII of 1947)—Effect of amendment.* Ss. 302 and 304 of the Penal Code have been amended by the Penal Code (Amendment) Act, 1947. *Held :* Culpable homicide, as now amended, also includes the doing of an act "with the intention of causing bodily injury as in fact is sufficient in the ordinary course of nature to cause death." Where such an injury is in fact sufficient as mentioned above and does cause death, the offence would be one of murder unless it falls under the exceptions mentioned in s. 299. The ruling in *Baba Naya*'s case (reported in 5 Ran. 817) is thus no longer applicable to cases where death has in fact ensued from an injury which is proved to have been sufficient in the ordinary course of nature to cause death. *Baba Naya* v. *King Emperor*, 5 Ran. 817, not applicable.

PADUWAR *v.* THE UNION OF BURMA 91

PENAL CODE, s. 500—*Defamation of wife—Whether husband can file complaint—Aggrieved person—Meaning—S. 198, Criminal Procedure Code.* A husband filed a complaint under s. 500, Penal Code as a person aggrieved by his wife being defamed. Upon an objection being raised that the wife being an adult and *sui juris* should have filed the complaint personally as she was the only person competent to compound such an offence. *Held :* That in the case of a married woman the husband is an aggrieved person and therefore he can make a complaint under s. 198 of the Code. *Chellan Naidu* v. *Ramasami*, I.L.R. 14 Mad. 379; *Chhotalal Lalubhai* v. *Nalkabhai Becharand another*, I.L.R. 25 Bom. 151; *Gurdit Singh and others* v. *The Crown*, I.L.R. 5 Lah. 301, referred to.

been taken at the earliest possible opportunity and there is no consequent failure of justice. *Budha Mal* v. *Rallia Ram and others*, (1928) 9 Lah. 418 at 423; *Moolchand Motilal* v. *Ram Kishen and others*, (1933) 55 All. 315 at 323; *Sri Rajah Ravu Venkata Mahipathi Gangadhara Rama Rao Bahadur Garu, Yuvarajah of Pithapuram and another* v. *Province of Madras*, A.I.R. (1947) Mad. 135 at 136, followed. Where the amendment of a plaint has not introduced any new cause of action or did not bring in any inconsistent cause of action, the amendment is in order. Further where the amendment is necessitated as a sort of rejoinder to the allegations in the written statement, the Judge in allowing the amendment did not act illegally. *N.P.L.S. T. Muthayya Chettyar* v. *R.M.A.R.M. Chettyar Firm and another* (1948) B.L.R. 855, distinguished. It is not necessary in order to constitute a colourable imitation that two marks should be similar in every particular, but it will be sufficient in law to constitute a colourable imitation if there exists such similarity between the two marks which could, in the circumstances of a particular case be considered to be calculated to deceive the class of persons for whom the goods are ordinarily or primarily intended. *Perry* v. *Truffitt*, (1842) 6 Beav. 66 at 73; *Seixo* v. *Provezende*, (1886) 1 Ch. Appeal 192 at 196, followed. The Judge looking at the exhibits before him and also paying due attention to the evidence adduced must not surrender his own independent judgment to that of any witness. The principle is perfectly clear—no man is entitled to sell his goods as the goods of another person. The difficulty lies in the application when it is a case of colourable imitation. It is desirable to bear in mind that no general rule can be laid down to what is a colourable imitation or not. Each case must be dealt with as it arises, regard being had to the circumstances of the particular case. The question is not whether a person looking at the two trade-marks side by side, would be confused. The question is whether the person who sees the proposed trade-mark in the absence of the other trade-mark, and in view only of his general recollection of what the nature of the other trade-mark was, would be liable to be deceived and to think that the trade mark before him is the same as the other of which he has a general recollection. *Payton and Co.* v. *Snelling Lampard and Co.*, (1901) A.C. 308 at 311; *Sandow Limited's application*, (1914) 30 L.T. 394, followed. If an Advocate simply stated that he had over-valued the suit in order to bring it within the jurisdiction of the High Court and the statement was not in connection with any matter actually in dispute between the parties at the time of the trial and the question of jurisdiction was not raised and no issue was framed, the alleged admission should be received with caution and should be considered in the light of the circumstances of the case. *S.P.M. Muthiah Chettiar and others* v. *Muthu K.R.A.R. Karuppan Chetti and others*, (1927) 50 Mad. 786 at 797, referred to.

GAW SHAN SOOT *v.* E. C. MADHA BROTHERS ... 136

TRADE-MARK—*Trade name—Questions involved in—Infringement of —"Shwe-nan-thein-gi" "whether produce or description of plaintiffs medicine—Onus of proof—Descriptive word losing original meaning.* Plaintiff and defendant manufactured blood purifiers. Each gave the same name "Shwe-nan-thein-gi" and except for the name mentioned in the label, the get-ups were entirely different. The plaintiff applied for an injunction to restrain the defendant from using the same name. The

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FULL BENCH (APPELLATE CIVIL).

Before U Tun Byu, Chief Justice, U On Pe and U San Maung, JJ.

DAW HNIN (APPLICANT)

v.

U KYAW AND OTHERS (RESPONDENTS).*

H.C.
1951
Nov. 22

Arbitration Act, 1944—S. 49—Providing for repeal and amendment—Third Schedule amending Article 178 of Limitation Act—Third Schedule and s. 49 of the Act deleted by Union of Burma Adaptation of Laws Order, 1948—General Clauses Act as amended by Act II of 1945—S. 5-A of General Clauses Act—Its effect.

S. 49 of the Arbitration Act provides for repeal and amendment of certain Acts. The Third Schedule of the Act amended Article 178 of the Limitation Act. Union of Burma Adaptation of Laws Order, 1948 deleted both s. 49 and the Third Schedule. The question referred to the Full Bench was what was the effect of deleting of s. 49 and Third Schedule of the Arbitration Act, 1944.

Held: S. 5-A of the General Clauses Act introduced by Burma Act II of 1945 specifically provides for the question referred to. Where an Act or Regulation repeals an enactment by which the text of any other enactment was amended by express omission, insertion or substitution of any matter then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal.

S. 5-A of the General Clauses Act embodied the general principle of law that the amendment, once it becomes law, forms part of the original enactment, that it takes the place of the provision for which it was substituted, and that ordinarily an amending Act completes all its function once it is enacted; and it can afterwards be repealed without effecting the operation of the new provision, which the amending act has introduced.

The period of limitation for the purpose required is to be calculated in accordance with Article 178 of the First Schedule to the Limitation Act as amended by the Third Schedule of the Arbitration Act, 1944.

Kay v. *Goodwin*, (1930) Bing. 576, referred to.

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* Civil Reference No. 14 of 1951.

H.C. 1951

DAW HNIN v. U KYAW AND OTHERS.

P. K. Basu for the applicant.

N. R. Burjorjee for the respondents.

The judgment of the Full Bench was delivered by

U TUN BYU, C.J.—It appears that Daw Kyi Kyi, a Burmese Buddhist, died leaving behind her five heirs, namely, the applicant Daw Hnin, and Daw Shwe, Daw May, Daw Tint and Ma Than, the 4th, 5th, 6th and 7th respondents. The five heirs referred their dispute in respect of the estate of Daw Kyi Kyi to three arbitrators, namely, U Kyaw, U Mya Maung and U Set Pe, who are the 1st, 2nd and 3rd respondents.

The arbitrators made their award on the 8th March, 1948, but no notices in respect thereof were issued to the parties until the 6th October, 1948, with the result that their award was not filed in the District Court until the 8th October, 1948. Daw May and Ma Than contended, *inter alia*, that the filing of the award was barred by the law of limitation ; and the learned District Judge, in his order, upheld their objection and declined to file the award.

Daw Hnin, the applicant, next applied to the High Court to revise the said order of the District Judge dated the 16th January, 1951. The learned Judge, before whom the revision application came for hearing, has referred the following question for decision :

" In view of the recent amendments made in the Arbitration Act, 1944, by the Adaptation of Laws Order, 1948, what is now the period of limitation for the filing in Court of an award in a suit made in any matter referred to arbitration by the order of the Court, or of an award made in any matter referred to arbitration without the intervention of a Court ; and the time from which the period begins to run ? "

We do not consider that it is necessary in this reference to deal with the point referred to in the last line of the question propounded as it appears to us that this point is a matter which ought properly to be decided by the learned Judge dealing with the revision proceeding after the main question has been answered in this reference. The order of reference will therefore have to be deemed to be modified in the sense in dicated above.

The law of arbitration which appertains to the case under revision is the Arbitration Act, 1944, and section 49 of the Act reads :

"49. (*1*) The enactments specified in Part I of the Third Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

(*2*) The enactments specified in Part II of the Third Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof."

And the relevant portion in Part II of the Third Schedule to the Arbitration Act, 1944, relating to Article 178 of the Limitation Act, reads :

"(iii) for Article 178 the following *shall be substituted*, namely :

'178. Under the Arbitration Act, 1944, for the filing in Court of an award.	Ninety days.	The date of service of the notice of the making of the award.'"

Section 49 of the Arbitration Act as well as the Third Schedule were subsequently omitted by the Union of Burma (Adaptation of Laws) Order, 1948.

The question before us resolves into, what is the effect of the Union of Burma (Adaptation of Laws) Order, 1948? The learned Advocate for the

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DAW HNIN v. U KYAW AND OTHERS.

U TUN BYU, C.J.

respondents has referred us to the observation of Tindal C. J., in *Kay* v. *Goodwin* (1), which reads :

"I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed ; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law."

The Court was not dealing in the above case with a simple amending act, but the entirely earlier statute was repealed there.

The answer to the question propounded has become very simple as the answer has been specifically provided for in section 5-A of the Burma General Clauses Act as amended by the Burma Act No. II of 1945, and it reads :

"5-A. Where any Act, Regulation or Ordinance repeals any enactment by which the text of any other enactment was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal."

The above provisions in effect embody the general principle of law that the amendment, once it becomes law, forms a part of the original enactment, that it takes the place of the provision for which it was substituted, and that ordinarily an amending act completes all its function once it is enacted ; and it can afterwards be repealed without affecting the operation of the new provision, which the amending act has introduced. The answer to the question propounded as modified by us is that the period of limitation for

(1) (1930) Bing. at 576.

the purpose required is to be calculated in accordance with Article 178 of the First Schedule to the Limitation Act, as amended under the Third Schedule to the Arbitration Act, 1944. Each party is to bear its own costs in this reference.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U Si Bu, J.

H.C. 1951

Nov. 19.

THE UNION OF BURMA (APPLICANT)

v.

EBRAHIM SULEMAN VARIAVA (RESPONDENT).*

Union Citizenship (Election) Act, 1948, s. 3—Necessary qualifications.

Two conditions are necessary to be fulfilled before a Certificate of Citizenship can be issued under s. 3 of the Union Citizenship (Election) Act, 1948. The first is that the applicant must be born within the territory specified and he should also possess the residential qualifications prescribed in the section.

Tin Maung (Government Advocate) for the applicant.

N. R. Burjorjee for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—Ebrahim Suleman Variava applied in Citizenship (Election) Proceedings No. 3019 of 1949 of the office of the Citizenship (Election) Officer, Rangoon, for the issue of a certificate of citizenship to him. His place of birth was said to be in Rangoon. However, he mentioned in his affidavit that he was in residence at Rangoon from 1928 to 1938 and that he was in India from 1938 to 1948.

Section 3 of the Union Citizenship (Election) Act, 1948, requires that a person to whom a certificate of citizenship is to be issued should not only be born in one of the territories which was included in His Britannic Majesty's dominions at the time of his birth but that he should also possess the residential qualification prescribed in that section. It will therefore be

* Civil Reference No. 11 of 1951 against the order of the Citizenship (Election) Officer of Rangoon in Proceedings No. 3019 of 1949.

necessary for Ebrahim Suleman Variava to prove that he was in residence in Burma at least for a period of eight years in the ten years which immediately preceded either the first day of January 1942 or the fourth day of January 1948. His affidavit, which has already been referred to, shows that his residence in Burma before he went to India in 1938 would at most amount to about seven years, and not more, and that his residence in Burma between 1938 and 1948 was practically negligible and could not under any stretch of imagination amount to even one year. This is therefore a case where Ebrahim Suleman Variava could be said not to have possessed the necessary residential qualification for the purpose of a certificate of citizenship being issued to him, and the order of the Citizenship (Election) Officer, dated the 30th March 1951 is hereby set aside. We regret to add that the Citizenship (Election) Officer concerned appears to have dealt with the case most casually in that he has not attempted to state what the facts of the case are and how those facts could justify his order recommending the issue of the certificate to Ebrahim Suleman Variava. The reference is accordingly allowed, and we do not think we ought to award any cost.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U Si Bu, J.

H.C. 1951

Nov. 20.

GOVINDASWAMY AND ANOTHER (APPELLANTS)

v.

N. CHINA TAMBI (RESPONDENT).*

Guardians and Wards Act, s. 25—S. 47—Appeal from consent order.

Held: For the purpose of s. 25 of the Guardians and Wards Act a child must be deemed to have been all the time in the custody of father. Even though the child all the time was living with mother and on mother's death went to the custody of the petitioners yet s. 25 applied to such cases.

Maung Zaw v. *Maung Hla Din*, I.L.R. 12 Ran. 161, followed.

No appeal lies against a consent order.

When the question of custody of a minor child comes before the Court the paramount consideration must be the welfare of the minor as a whole. The Court is not so much concerned with the feelings of parents and natural guardian as with the proper welfare of the minor. When an order for the return of the minor to the custody of the father is based upon a compromise between the contesting parties it cannot be assumed that the order is necessarily for the real welfare of the minor. The compromise may be collusive between the contesting parties. The Court should hold an enquiry before custody of the child is given to the father.

Ba Tun for the appellants.

Ba Tu for the respondent.

U SI BU, J.—This is an appeal from the order of the learned District Judge, Thatôn, passed under section 25 of the Guardians and Wards Act. As the order appealed from was a consent order, it is admitted by the appellants that no appeal lay from it either under section 47 or under any other section of the

* Civil Misc. Appeal No 8 of 1951
Civil Revision No. 72 of 1951 against the order of the District Court of Thatôn in Civil Misc. No. 21 of 1948.

said Act. As, however, minors were involved, and we were anxious that their interests should not suffer we have allowed it to be converted into a revision application and allowed the case to be argued as a revision application.

The facts alleged are these. The respondent filed an application against the petitioners in the District Court of Thatôn under section 25 of the Guardians and Wards Act, praying for the return of his two minor daughters to his custody. The minors are now 16 and 14 years of age respectively.

Their mother died in the year 1941, and on her death, their father made them over to their maternal grandmother with whom they lived until her death in 1947. In the grandmother's house, there also lived the aunt of the minors, who is a sister of their mother, and her husband, who are now the present petitioners. On the death of their grandmother, the father again entrusted the minors to the two petitioners, and they have been living with them since then.

The petitioners opposed the application on the following grounds :—

(1) That the respondent was living with mistress ;

(2) That the minors were made over to them and not to the grandmother on the death of their mother ;

(3) That the respondent never visited the minors and never contributed anything towards their upkeep;

(4) That the minors were receiving proper education and were being maintained by the petitioners at their expense ; and

(5) That it would not be for the welfare of the minors that they should by returned to the custody of their father.

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GOVINDASWAMY AND ANOTHER v. N. CHINA TAMBI.

U SI BU, J.

The case was fixed for enquiry on the 23rd December, 1949, but on the 22nd December, 1949, the petitioners' Advocate withdrew from the case with the result that the case was taken up immediately, *i.e.*, a day earlier than was fixed originally; the respondent was then examined and an *ex parte* order made for the return of the minors to his custody.

On the 12th January 1950, the petitioners applied to set aside the *ex parte* order and on the 26th January 1950, it was set aside by consent and enquiry was eventually fixed on the 26th July 1950. On that date, the petitioners intimated that they would not oppose the application of the respondent and admitted the respondent's right to the custody of the minors. In view of the turn the matter took, the learned District Judge saw no need for taking evidence and directed the return of the minors to the applicant.

On the 23rd August 1950, two petitions were filed —one by the respondent *i.e.*, the father, for the arrest of the minors and the other by the applicants before us "to cancel, alter and set aside" the order directing the return of the minors on the ground mainly that the welfare of the minors had not been considered.

On the 24th January 1951, the applicants intimated that they would not press their application of the 23rd August 1950, and it was dismissed accordingly.

As regards the respondent's petition for the arrest of the minors, which was opposed, the learned District Judge passed an order on the 27th January 1951, pointing out that the order he had made on the 26th July 1950 was a consent order and that so long as it remained good, the same matter could not be reagitated. He therefore allowed the application.

The respondent then said that he did not desire to press for the arrest of the minors but desired to give

the petitioners a chance to produce the minors, and consequently 22nd February 1951 was fixed for that purpose. Meanwhile, steps appeared to have been taken in this Court resulting in the stay of further proceedings in the District Court.

A preliminary point has been taken up before us on behalf of the petitioners that as the minors have never been in the custody of the respondent, his application for guardianship of the minors does not lie under section 25 of the Guardians and Wards Act and that he should file a suit for the custody of the said minors. Section 25 (*1*) of the Guardians and Wards Act provides :

"If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian, may make an order for his return . . . ."

The learned Advocate for the petitioners argues that as the minors had all along been in the custody of the mother, and after her death in that of the petitioners, they could not be said to have left or were removed from the custody of their father and that being the case, the . . . application does not come within the provisions of section 25 (*1*) of the Act and it should have been dismissed.

In this connection, please see the written statement of the petitioners Govindaswamy and Neala Ammal, dated the 14th August 1948. In paragraph (2) they clearly state " . . . . and when the minors' mother died, the petitioner (father) allowed the minors to stay with the respondents (petitioners before this Court) being aunt and uncle of the minors . . . . From that time till date, the minors are staying with the respondents, who have their children as companions." The petitioners' admission that they obtained custody of

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U SI BU, J.

the two minors from their father the respondent and their refusal now to hand over the minors to the father clearly comes, in our opinion, within the meaning of "as removed from the custody of a guardian of his person . . . ." in section 25 (*1*).

It has also been held by Page C.J., in the case of *Maung Zaw* v. *Maung Hla Din* (1), that :

> "Although at the time of the child's birth, the mother was not living with the father, for the purposes of section 25 of the Guardians and Wards Act, the child must be deemed to have been at that time in the custody of the father, and in the circumstances of the case he was entitled to apply for and obtain the custody of his child."

There are therefore no merits in the point raised.

The next point raised before us by the learned Advocate for the petitioners is that the learned District Judge has failed to apply his mind to the most important condition laid down in section 25 (*1*) of the Guardians and Wards Act, namely, that the Court should make an order under this section only when "it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian . . ."

In this respect it is contended by the learned Advocate for the respondent that, as the order passed on the 26th July 1950 was a consent order, made as a result of an admission on the part of the present petitioners that the respondent had the right to the custody of the minors, and as the petitioners had withdrawn their objections to the application, petitioners cannot now challenge that order.

It is a well-established principle of law that in a case of this nature, the paramount consideration must be the welfare of the minors as a whole. The Court is not so much concerned with the feelings of parents

(1) I.L.R. 12 Ran. 161.

and natural guardians as with the proper welfare of the minors. The fact that the order made for the return of the minors to the custody of their father is one based upon a compromise between the contesting parties does not necessarily indicate that such an order is for the real welfare of the minors. Supposing, as a result of a collusive compromise arrived at between the contesting parties, a fraud is practised upon the minors or that their interest has suffered, could it be said that the compromise was consistent with the welfare of the minors ? Obviously not.

We think it highly desirable in the particular circumstances of this case that an inquiry should be held with a view to ascertain whether it would be for the welfare of the minors to return to the custody of their father. The minors are of a reasonable age and they must be examined. The lower Court should also examine other witnesses on this point, if available before it.

For the reasons given above, we set aside the order of the District Judge dated the 26th July 1950 and remand the case to the District Court of Thatôn for inquiry on the lines indicated above and pass such order as it thinks fit and proper. Each party should bear its own costs so far incurred, in the lower Court and there will be no order as to costs in this Court too.

U TUN BYU, C.J.—I agree.

APPELLATE CIVIL.

Before U On Pe and U Thaung Sein, JJ.

H.C. 1951

Nov. 6.

M.R. ARUMUGAM CHETTIAR (APPELLANT)

v.

A. MUTHIA CHETTIAR (RESPONDENT).*

Promissory-note—Execution of promissory note—Promissory-note not duly stamped and so inadmissible in evidence—Right to fall back on the original consideration.

In settlement of money due on partnership accounts the defendant executed a promissory-note in favour of the plaintiff and that promissory-note was insufficiently stamped and as such was inadmissible in evidence. Plaintiff filed a suit on the original consideration and defendant contended that the rights of the plaintiff were restricted to the promissory-note and as the promissory-note was inadmissible the suit should be dismissed.

Held: That the question whether plaintiff's right is restricted to the document in question alone and nothing else, is a question of fact to be determined in particular circumstances obtaining in a case. Where a promissory-note states that it was given in payment, for instance, of goods sold and delivered or for money due as here for a share in partnership, the presumption would be that the promissory-note was given by way of conditional payment; in such cases the promissory-note not having been paid on demand it may be treated as dishonoured and in that case the original debt would revive giving right to plaintiff to fall back upon the original consideration.

Maung Chitand another v. *Roshan N. M. A. Kareem Omer Co.*, I.L.R. 12 Ran. 500, followed.

Ramasami Pillai v. *Murugiah Padayachi and another*, I.L.R. 59 Mad. 268, distinguished.

Sheik Akbar v. *Sheikh Khan*, I.L.R. 7 Cal. 256; *Nazir Khan* v. *Ram Mohan*, I.L.R. 53 All. 114, not followed.

P. N. Ghosh for the appellant.

P. B. Sen for the respondent.

The judgment of the Bench was delivered by

U ON PE, J.—This is an appeal against the judgment and decree of the 2nd Judge, Rangoon City Civil Court in Civil Regular Suit No. 312 of 1948. In that suit the respondent claimed Rs. 5,610, being Rs. 5,000

* Civil 1st Appeal No. 69 of 1950 against the decree of the City Civil Court, Rangoon in Civil Regular No. 312 of 1948, dated 4th September 1950.

due as principal on a document purported to be a promissory-note executed in favour of the respondent by the appellant, and Rs. 600 as interest at 1 per cent per annum for one year and 6 days from 1st April 1947 to 6th April 1948. This promissory-note came to be executed in the following circumstances :—

The appellant, the respondent, and one N. Ramasawmi Naidu formed a partnership on the 24th March 1947 to carry on the business of Lime and Grocery Shop under the name and style of Indo-Burma Lime Company. The said partnership was embodied in a duly registered document. The appellant and the respondent in fact had been carrying on the Grocery Shop business together from 1st May 1946 with a capital subscribed equally by each and N. Ramasawmi Naidu was only a working partner in the business of the Indo-Burma Lime Company in which the profit and loss were apportioned at 8 annas, 5 annas and 3 annas for the appellant, respondent and N. Ramasawmi Naidu, respectively. For reasons which we need not go into, the respondent severed his connection with the partnership on the 3rd April 1947 on the terms and conditions which were embodied in a document called, wrongly, a Deed of Dissolution of Partnership, dated 1st April 1947. This document is not by any means a Deed of Dissolution of Partnership as there was no dissolution of partnership, the two partners, the appellant and N. Ramasawmi Naidu, having continued to carry on the partnership after the respondent retired from the partnership. The right of withdrawal from the partnership is provided in clause 4 of the Partnership Deed of the 24th March 1947 and it reads as follows :

" 4. That the partnership shall exist and continue at will so long as the partners wish to carry on jointly and any partner

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withdrawing from the partnership shall not utilise the business name in any manner whatsoever."

It is also provided how books of accounts are to be maintained and clause 10 of this Deed reads :

"10. That the Books of Accounts shall be maintained under the direct and mutual supervision of the partners at the Head Office No. 31-Best Street, Thingangyun, and the accounts of the branches shall also be incorporated into the above."

At the retirement of the respondent, as must have happened in such a similar situation, terms and conditions were discussed which took shape as contained in the document called Deed of Dissolution of Partnership (Exhibit 6) in the following terms :—

"The parties having closed the partnership accounts upto date and having ascertained the 2nd party's share of Capital and profit in the Partnership business as Rs. 10,000 the 1st party, *viz*, M.R. Arumugam Chettiar and N. Ramasawmi Naidu, jointly paid Rs. 5,000 in cash this day to 2nd party A. Muthia Chettiar, the receipt of which is hereby acknowledged by A. Muthia Chettiar and further M.R. Arunugam Chettiar No. 1 of the 1st party having executed a Promissory-note for Rs. 5,000 in favour of the 2nd party A. Muthia Chettiar, payable in 5 monthly instalments."

The respondent, after having received the Rs. 5,000 out of the Rs. 10,000, failed to recover the balance of Rs. 5,000 and thus filed this suit.

The suit, when originally filed, was for recovery of the suit sum the basis of the claim being as set out in paragraph 3 of his plaint which is as follows :

"In pursuance of the promise aforesaid the Defendant executed a document purported to be a promissory-note in favour of the Plaintiff promising to pay the Plaintiff Rs. 5,000 bearing interest at one per cent per mensem. The Plaintiff will, if necessary, produce the document in evidence, but he is not basing his claim on the said document, but upon the original consideration."

This plaint was amended by an addition of an alternative prayer to the effect that *if the Court were to re-open the accounts then a decree for such amount as may be found to be due on proper taking of accounts be passed.*

The appellant in his defence pleaded that there was no settlement of accounts, that there was falsification of accounts, and that the promissory-note was accepted as an accord and satisfaction of his claim and therefore he was restricted to rights thereunder only. He also counter-claimed Rs. 1,500 with the usual undertaking for payment of additional Court-fees.

The suit went to trial on 5 Issues framed which are as follows :

1. Is the document mentioned in paragraph 2 of the plaint duly stamped and, if not, is the suit maintainable on this document ?

2. Is the document mentioned in paragraph 3 of the plaint alleged to have been executed by the defendant in plaintiff's favour for a sum of Rs. 5,000 a promissory-note and is the plaintiff's claim restricted to this document and was it executed in satisfaction of the plaintiff's claim ?

3. Was the document mentioned in paragraph 2 of the plaint executed by the defendant under circumstances as alleged in paragraphs 4 to 8 and 10 to 13 of the written statement of the defendant and was he forced to sign this document as alleged by him under those circumstances. Even if he was forced to sign under those circumstances as alleged by him, does it constitute coercion under the law?

4. Whether in the present suit the defendant can plead that there was falsification of accounts by the plaintiff ?

5. To what relief, if any, is the plaintiff entitled ?

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Issues Nos. 1 and 2 were decided in favour of the respondent, and Issue No. 4 was decided that "the defendant can plead that there was falsification of accounts by the plaintiff." As regards Issue No. 3, the Court held that there was no coercion as alleged by the defendant nor were there any circumstances which would warrant it to come to the conclusion that the accounts should be re-opened between the parties. The suit was decreed for Rs. 5,610, with costs, and further interest at 1 per cent per mensem on Rs. 5,000 from the date of suit till the date of decree and at the Court rate from the date of decree till the date of realisation. Advocate's costs of five gold mohurs each on the three interlocutory orders were also awarded, while the counter-claim of the defendant for Rs. 1,500 was dismissed, with costs.

It has been urged before us that the claim of the respondent should be held as restricted to the promissory-note of Rs. 5,000, and as the said promissory-note has been held by the lower Court to be inadmissible for not being duly stamped and as the respondent himself has deliberately abandoned his claim on it, the suit should have been dismissed with costs. It is also contended, among other grounds, that even if it be held that the respondent can sue on the original consideration, the suit should have been dismissed as the respondent's claim could arise only on the result of the partnership accounts and on proof of settlement of accounts, which were not gone into at all.

The lower Court in disposing of Issue No. 2 has decided that the document referred to in paragraph 3 of the plaint is a promissory-note and that the same not being duly stamped is inadmissible, but that the plaintiff-respondent could recover the amount falling back on the original consideration. This point was argued at great length before us and evidently also

before the lower Court. What is deducible from the authorities cited on this point is that the question whether the plaintiff-respondent's right is restricted to the document in question alone and nothing else, is a question of fact to be determined according to the particular circumstances obtaining in each case. We consider that the Full Bench decision of this late High Court in the case of *Maung Chit and another* v. *Roshan N. M. A. Kareem Omer Co.* (1), lays down the principles to be followed in a case as the present :

> " Normally and *primâ facie* a lender is regarded as taking a negotiable instrument only as conditional payment, and not in satisfaction of the loan. Where the handing over of the money and of the instrument is simultaneous it does not follow that the instrument is the sole repository of the terms of the agreement. It is not the time when, but the terms upon which, the loan was made that matters, and that is a question of fact to be determined according to the particular circumstances obtaining in each case. "

This Rangoon case was discussed in *Ramasami Pillai* v. *Murugiah Padayachi and another* (2), a Full Bench case of the Madras High Court, where Beasley C.J., after pointing out that the view expressed in the Rangoon case that *primâ facie* a negotiable instrument was given as a conditional payment for a loan is too general, agreed " that in all cases the Court must be guided by what appears on the face of the promissory-note, and that if it is expressed in such a way as to leave what was intended by the parties in any way in doubt, then the facts must settle the question. "

It follows from these principles laid down that where a promissory-note states that it was given in payment, for instance, for goods sold and delivered or for money due, as here for a share in a partnership, the

(1) I.L.R. 12 Ran. 500. (2) I.L.R. 59 Mad. 268.

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presumption would be that the promissory-note was given by way of conditional payment. In such cases the promissory-note, not having been paid on demand, may be treated as dishonoured, in which case the original debt would revive giving the right to the plaintiff to fall back upon it. Holding this view, which is in accordance with the principles laid down in the Full Bench case of the Rangoon High Court quoted above, we agree that the lower Court was right in not accepting the decisions laid down in *Sheik Akbar* v. *Sheikh Khan* (1), and *Nazir Khan* v. *Ram Mohan* (2), both of which were dissented from in the above decision of this High Court. In the present case the circumstances leading to the execution of the promissory-note leave no room for doubt that the promissory-note was given as a conditional payment and does not amount to a new contract. A perusal of the Deed of Dissolution of Partnership strengthens this view. We, therefore, hold that the decision of the lower Court in allowing the plaintiff-respondent to fall back, in the absence of the promissory-note, on the original consideration is correct.

The next point which was hotly contested is as to whether the defendant-appellant can plead that there was falsification of accounts by the plaintiff-respondent. The lower Court has answered this Issue in the affirmative after discussing authorities quoted by both sides. We do not propose to discuss the cases cited on this point in view of the lower Court's finding that there are no circumstances in this case which would warrant re-opening of the accounts between the parties. We have weighed the entire evidence in the case and we cannot but agree with the finding of the lower Court that there was no falsification of accounts. It should not be forgotten that the plaintiff-respondent

(1) I.L.R. 7 Cal. 256. (2) I.L.R. 53 All. 114.

was not an accounting party in this case as will be borne out by the Partnership Deed which clearly shows that the accounts were kept under mutual supervision. The evidence in the case also supports this view. He was admittedly a retiring partner who was being paid off—circumstances which would distinguish this case from those where accounts were ordered to be re-opened on discovery of important errors in the accounts. There was no dissolution of partnership for accounts to be taken in the sense as contemplated in section 48 of the Partnership Act. Evidence which could be relied on indicates that Rs. 10,000 was agreed to be paid to the plaintiff-respondent at his retirement as his share in accordance with the terms of the partnership; Rs. 5,000 was consequently paid to the plaintiff-respondent who paid out of the sum so received the amount due to N. Ramasawmi Naidu, who was a working partner, and under that arrangement the plaintiff-respondent was to receive a further sum of Rs. 5,000, which is the subject-matter of the present suit. There can be no doubt that the amount of Rs. 10,000 was arrived at after the matter was duly considered in such manner as was thought sufficient in the circumstances of the situation. It may be that the accounts were not gone into as contemplated in section 48 of the Partnership Act as there was no occasion for it.

There was the contention that the defendant-appellant was forced to sign the document, *viz.*, Deed of Dissolution of Partnership but there is no proof for it and the failure to substantiate this contention by legal proof tends to lend strength to the plea set up by the respondent that the accounts had been settled amicably to the knowledge of N. Ramasawmi Naidu, the working partner, and Karim, an employee who wrote the books of the partnership, who were available but not called by the defendant-appellant.

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In the result the suit will be decreed for Rs. 5,000 without any interest. The defendant-appellant has succeeded on one preliminary issue which was decided by the lower Court in his favour by its order, dated 29th March 1949, according to which no costs were awarded. In respect of the order passed on another preliminary issue, *viz.*, Issue No. 4 on the 20th September 1948, the Court's order shows that there was to be no order as to costs. The order as regards costs on the three interlocutory orders of five gold mohurs each payable by the defendant-appellant does not appear to be sustainable on the face of the orders themselves and must be set aside. In view of the partial success of the defendant-appellant in this appeal on the question of interest and the costs of fifteen gold mohurs on the interlocutory orders, there will be no order as to costs in this appeal.

This appeal is dismissed, except that the judgment of the lower Court is set aside in so far as the award of interest claimed on Rs. 5,000 and that of fifteen gold mohurs which is the cost on interlocutory orders payable by the defendant-appellant are concerned.

APPELLATE CIVIL.

Before U On Pe and U San Maung, JJ.

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Nov. 19.

A. DIVAN (APPELLANT)

v.

DOST MOHAMED (RESPONDENT).*

Civil Procedure Code, Order 21, Rule 2—Its true interpretation—Marginal note of an Act when can be referred to.

Held: Owing to the conflict of opinion on the interpretation of s. 258 of the Code of 1877 the words 'of any kind' was introduced into the section and the section was re-enacted as Order 21, Rule 2 of the Code of Civil Procedure of 1908.

If a decree provides for payment of money as well as for other reliefs it comes within the ambit of Order 21, Rule 2 of the Code of Civil Procedure but this rule does not apply when no money whatsoever is payable under the decree. Costs awarded by a decree must also be deemed as money payable under the decree as it can be satisfied by payment into Court in the manner laid down in Order 21, Rule 1.

Abdul Latiff Sahib and another v. *Bathula Bibi Ammal*, A.I.R. (1914) Mad. 360; *Sethurama Sahib* v. *Cholta Raja Sahib*, A.I.R. (1918) Mad. 751; *Narayanasami Naidu and others* v. *Rangaswami Naidu and others*, 49 Mad. 716, followed.

Ellis Enas Pavlo Gharry v. *Kilter Philip Gowrya and another*, 46 Bom. 226; *Shaikh Niamat* v. *Shaikh Jalil*, A.I.R. (1928) Cal. 715; *Shadi and others* v. *Ram Ditta*, A.I.R. (1936) Lah. 842, not followed.

Baba Mohamed v. *Webb*, 6 Cal. 786; *Sankaran Nambiar* v. *Kunara Kurup* 12 Mad. 182, referred to.

Marginal note may be referred to in aid of interpretation; though it forms no part of the section, it is of assistance inasmuch as it shows the drift of the section.

Nicholson v. *Fields*, (1862) 31 L.J. Ex. 233; *Bushell* v. *Hammond*, (1904) 73 L.J. (K.B.) 1005 at 1007, followed.

N. Eose for the appellant.

Aung Min (2) for the respondent.

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* Civil Misc. Appeal No. 5 of 1951 against the order of the 4th Judge of City Civil Court, Rangoon in Civil Regular No. 1081 of 1948, dated 24th January 1951.

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The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 1081 of 1948 of the City Civil Court of Rangoon, Dost Mohamed, the respondent in the present appeal, obtained a decree against A. Divan, the present appellant, for his ejectment from Room No. 4 of house No. 117 in 42nd Street, Rangoon, and for payment of Rs. 47-12 as costs of the suit. The suit being one under section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948, the appellant A. Divan was able to obtain an order under section 14 (*1*) of the Act staying the execution of the decree on his paying the arrears of rent and costs of the suit in eight equal monthly instalments commencing from the 8th July, 1949, in addition to the future rents as they fell due. He, however, made a default in respect of the November instalment resulting in the filing of an application for execution of the decree for ejectment. This application was granted on the 16th January, 1950, but the appellant A. Divan was able to obtain a further stay of execution on the 14th March, 1950, as he offered to pay all the arrears due. His stay application was, however, ultimately dismissed on the 17th March, 1950, as he was absent on that date which was the day fixed for mentioning whether or not the arrears had been paid in full. On the 14th June, 1950, the appellant filed an application under Order 21, Rule 2 of the Civil Procedure Code asking the Court to record an adjustment of the decree alleged to have been made out of Court on the 16th March, 1950, on the eve of the departure of the respondent Dost Mohamed to India. Paragraphs 5 and 6 of the application read as follows:

"5. On the eve of the decree-holder's departure to India the judgment-debtor offered out of court Rs. 600 to the

decree-holder in full satisfaction of his claim against the judgment-debtor so far as the above suit is concerned. The decree-holder accepted the offer and directed the judgment-debtor to deposit the amount with the decree-holder's Advocate through his bill collector. So the sum of Rs. 600 was left with the decree-holder's bill collector on the 16th March 1950. As the said bill collector was busy on 16th March 1950 for his master's departure he could not take the judgment-debtor to the decree-holder's Advocate Mr. Modan before 20th March 1950. On the bill collector's assurance that the judgment-debtor's presence in the Court will not be required on 17th March 1950 the judgment-debtor did not appear in the court on that date under a *bonâ fide* belief that a compromise has been duly affected between the parties.

6. On 20th March 1950 the bill collector brought the judgment-debtor to Mr. Modan and handed over Rs. 600 in terms of the compromise. The judgment-debtor then left under a *bonâ fide* belief that the above decree was settled."

The respondent A. Divan in his written objection denied the allegations contained in paragraph 5. As regards paragraph 6 he stated that Dost Mohamed never went to Mr. Modan at any time with anybody but that sometime during the last week of March 1950 one Mr. K. Ahmed came to Mr. Modan and informed him that the case had been settled and that he had come to pay all the arrears and costs of the suit. Mr. Modan then told K. Ahmed that he had no instruction whatsoever from Dost Mohamed regarding the settlement and that on the contrary his instructions were to execute the decree as soon as possible. However, Mr. Modan agreed to accept the money and to refrain from executing the decree until such time as Dost Mohamed arrived and instructions could be obtained from him regarding the matter. Mr. Modan calculated the amount due and found that it was Rs. 757-12. The sum of Rs. 600 paid by K. Ahmed was accepted as part payment as K. Ahmed promised to bring back the balance the next

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day. This balance amount was never paid. Later, when Mr. Modan found out that there was no such settlement as alleged by K. Ahmed the sum of Rs. 600 was returned to him.

On the allegations contained in the application and in the written objection thereto the learned Fourth Judge of the City Civil Court made an enquiry as to whether or not the decree had been adjusted out of Court as alleged by A. Divan. After the examination of the appellant, his witness M. M. Anwar, the respondent and his witnesses Pir Mohamed and Mr. Modan, the learned Judge came to the conclusion that there was no such agreement between A. Divan and Dost Mohamed as alleged by the former and that therefore the compromise for adjustment could not be recorded. Hence this appeal by A. Divan.

On the facts it is clear that A. Divan's allegation that the sum of Rs. 600 was offered by him to Dost Mohamed on the 16th March, 1950, and accepted by the latter in full satisfaction of his claim under the ejectment decree has been rightly rejected by the learned Fourth Judge of the City Civil Court of Rangoon. A. Divan contends that the payment of Rs. 600 was accepted by Dost Mohamed himself but that Dost Mohamed deputed his bill collector Noor Hug to take the money to Mr. Modan as he (Dost Mohamed) was on the eve of his departure to India. In this he is supported by M. M. Anwar (PW 1) the Ward-headman, who is also a co-trustee with Dost Mohamed of the Bengalee Mosque. However, both Dost Mohamed and the bill collector Pir Mohamed denied that Noor Hug was an employee of Dost Mohamed. They contended that Noor Hug was a servant of the Mosque and that his duty was to collect the rents due only from the houses belonging to the Mosque. This contention of Dost Mohamed

and his witnesses has not, in our opinion, been sufficiently contradicted by cogent evidence to the contrary. Furthermore, if the story told by A. Divan and M. M. Anwar be true there seems no reason why the sum of Rs. 600 was actually handed over to Mr. Modan by K. Ahmed and not by Noor Hug. Mr. Modan, who has given evidence for Dost Mohamed, has stated specifically that it was K. Ahmed who had handed over this sum to him and his evidence is borne out by the fact that when the money had to be returned a cheque was made out in the name of K. Ahmed. No cogent explanation is forthcoming as to why K. Ahmed should come into the picture at all. If as A. Divan had contended that the sum of Rs. 600 was, in fact, accepted by Dost Mohamed, who then delegated Noor Hug, to hand over the money to Mr. Modan there seems no reason why the act of handing over this money should have been delegated by Noor Hug to K. Ahmed or to any other person. Noor Hug has not been cited as a witness to substantiate A. Divan's story and this omission is fatal to his case. The story told by Mr. Modan consequently stands out in bold relief and it strongly corroborates Dost Mohamed's denial of any settlement having been arrived at between him and A. Divan on the 16th March, 1950, as alleged. What Mr. Modan stated was that sometime during the last week of March 1950 some two or three persons, of whom K. Ahmed was one, came and told him that they had settled the matter relating to the ejectment decree with Dost Mohamed and that on his replying that he had received no instructions on the matter pressed him to accept Rs. 600 promising to pay the balance Rs. 157-12 the next day. He accepted the money and undertook not to execute the decree until such time as Dost Mohamed returned from India

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when he would try and obtain further instructions on the matter. On Dost Mohamed's return he was informed that there was no such compromise as alleged. Accordingly he returned the money to K. Ahmed by cheque.

Considering the nature of the evidence adduced and the fact that the learned Fourth Judge of the Rangoon City Civil Court, who has had an opportunity of seeing the witnesses and appraising their credibility, has rejected the story told by A. Divan and his witnesses we see no sufficient reason for coming to a finding contrary to that arrived at by the learned Judge.

As regards the point of law involved it is not of much significance as the decree obtained by Dost Mohamed against A. Divan is not only for ejectment but also for costs. It is a composite decree of the kind contemplated by Order 21, Rule 2 of the Civil Procedure Code, regarding which rule some difference of opinion prevails in India. In *Baba Mohamed* v. *Webb* (1) which was a decision under the Civil Procedure Code, 1877, the High Court of Calcutta held that section 258 of that Code (corresponding to Order 21, Rule 2) applied to the adjustment of any decree whatever may be the nature of the relief granted by the decree. The Madras High Court in *Sankaran Nambiar* v. *Kanara Kurup* (2) was of a different opinion. It held that section 258 of the Civil Procedure Code, 1882 (corresponding to section 258 of the Code of 1877) referred only to execution of decrees under which money is payable and therefore not applicable to decrees for possession of immoveable property. After the words " of any kind " have been inserted by the Code of 1908 the Madras High Court

(1) 6 Cal. 786. (2) 12 Mad. 182.

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held in *Abdul Latiff Sahib and another* v. *Bathula Eibi Ammal* (1) that this amendment had the effect of making the rule applicable to decrees of any kind under which money is payable and this decision is followed in *Sethurama Sahib* v. *Chotla Raja Sahib* (2). The Bombay High Court, on the other hand, held in *Ellis Enas Pavlo Gharry* v. *Kitter Philip Gowrya and another* (3) that the provisions of Order 21, Rule 2 were not confined to money decrees, but extended to any kind of decree and that the principle of the rule was that the Court executing the decree should not be troubled with any disputes between parties with regard to any payment or adjustment unless the same had been duly recorded and certified. In the year 1926 the Madras High Court in *Narayanasami Naidu and others* v. *Rangaswami Naidu and others* (4) went exhaustively into the matter and held that Order 21, Rule 2 of the Civil Procedure Code, referred to a decree under which money was payable, whether there were other reliefs granted by the decree or not, and that the words "money payable under a decree" in that rule did not mean money which the party might, if he had chosen, pay, but money which was recoverable by a party in execution against the party liable to pay it. In coming to this conclusion emphasis was laid upon the article "the" appearing before the word "decree" in sub-rule (1) of Rule 2 as pointing to the fact that the decree must be of the nature mentioned in the first clause namely a decree under which money was payable. The learned Judges of the Madras High Court also held that the addition of the words "of any kind" after the word "decree" in that clause merely meant that the decree might be of any kind provided that money was payable

(1) A.I.R. (1914) Mad. 360.
(2) A.I.R. (1918) Mad. 751.
(3) 46 Bom. 226.
(4) 49 Mad. 716.

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thereunder whether or not there were other reliefs granted as well. This decision of the Madras High Court was dissented from and that of the Bombay High Court already mentioned was followed, by the Calcutta High Court in *Shaikh Niamat* v. *Shaikh Jalil* (1) where the learned Judges observed that to hold that the rule had no application to decrees other than decrees for payment of money would be to leave disputes with regard to adjustment of other decrees open for discussion, for as long as three years after the passing of the decree and that this could not have been contemplated by the legislature. The Lahore High Court in *Shadi and others* v. *Ram Ditta* (2) followed the Bombay view and dissented from that of Madras.

In our opinion, the view taken by the Madras High Court is preferable to that of the other High Courts in India. If the legislature had intened that Order 21, Rule 2 should apply to all decrees whether or not money is payable thereunder nothing could have been simpler than to have redrafted it in 1908 Code as follows:

> "Where any money payable under a decree of any kind is paid out of Court, or a decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly."

The use of the article "the" instead of "a" before the word "decree" in sub-rule (1) is significant and can only be interpreted as meaning the decree of the kind mentioned in the first clause, namely a decree of any kind under which money is payable. This conclusion is also justified by the place which Order 21,

(1) A.I.R. (1928) Cal. 715. (2) A.I.R. (1936) Lah. 842.

Rule 2 occupies in the Code ; it is the second of the two rules appearing under the caption " Payment under Decree."

The marginal note may also be referred to as an aid to interpretation, as observed in *Maxwell on Interpretation of Statutes*, at page 45 of the Ninth Edition :

" But, as regards marginal notes, the rule regarding their rejection for the purposes of interpretation is now of imperfect obligation. For the purpose of interpretation a marginal note was used by Martin B. in *Nicholson* v. *Fields* (1) and by Collin M.R. in *Bushell* v. *Hammond* (2), the latter learned Judge saying, in *Bushell* v. *Hammond* (2), ' the side-note, although it forms no part of the section, is of some assistance, inasmuch as it shows the drift of the section.'"

The marginal note to Rule 2 which is in these terms, *viz.*, " payment out of Court to decree-holder " undoubtedly indicates that the decree contemplated in that rule is one under which money is payable.

For these reasons we are of the opinion that if a decree provides for payment of money as well as for other reliefs it comes within the ambit of Order 21, Rule 2 of the Civil Procedure Code but that this rule does not apply where no money whatsoever is payable under the decree. However, costs awarded by a decree must also be deemed as money payable under the decree as it can be satisfied by payment into Court in the manner laid down in Order 21, Rule 1.

For all the above reasons we hold that while an application under Order 21, Rule 2 of the Civil Procedure Code for the adjustment of the decree in this case is maintainable in law it has been rightly rejected on the facts.

In the result, the appeal fails and must be dismissed with costs ; Advocate's fees three gold mohurs.

(1) (1862) 31 L.J. Ex. 233. (2) (1904) 73 L.J. (K B) 1005 at 1007.

APPELLATE CIVIL.

Before U On Pe and U San Maung, JJ.

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Nov. 19.

MAUNG PAR (*a*) MAUNG PASI (*a*) MAUNG MYO NYUNT (APPELLANT)

v.

U TUN HLAING AND ANOTHER (RESPONDENTS).*

Contract Act, s. 2—Consideration—Meaning of.

Where a document was executed by a son and widow of a deceased person in consideration of certain debts due by the deceased and the recital did not show the creditor promised to give up any right, *i.e.*, to do or abstain from doing anything.

Held : That the document was without consideration.

The principle about settlement of a disputed claim or forbearance from suing has no application in the present case.

Gulab Chand v. *Kamal Singh and another*, I.L.R. 44 All 424 ; *Debi Radha Rani* v. *Ram Dass*, A.I.R. (1941) Pat. 282, distinguished.

Ba Nyunt for the appellant.

S. K. Narayana Aiyar for the respondent 1.

P. N. Ghosh for the respondent 2.

U ON PE, J.—The suit out of which this appeal has arisen was brought by the 1st respondent U Tun Hlaing for the recovery of a sum of Rs. 3,000 against the appellant Maung Par and the 2nd respondent Daw Tin Kyi (*a*) Daw Tin Sein, who are the son and widow, respectively, of the deceased U Hein, personally as well as in their capacity as heirs and legal representatives of U Hein.

* Civil 1st Appeal No. 70 of 1950 against the decree of the 3rd Judge, City Civil Court, Rangoon, in Civil Regular Suit No. 892 of 1949, dated 25th August 1950.

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MAUNG PAR (a) MAUNG PASI (a) MAUNG MYO NYUNT v. U TUN HLAING AND ANOTHER.

U ON PE, J.

The admitted facts are that U Hein and U Tun Hlaing were the Treasurer and Secretary, respectively, of the Phayre Street Concos, that as Treasurer U Hein held monies belonging to the Concos deposited by the Secretary U Tun Hlaing and that the monies so deposited totalled Rs. 3,500 on the 17th July 1949, when U Hein died. The basis of the claim in the suit against the two defendants is a document (Exhibit C), which is an agreement executed by the defendants, as set out in paragraph 5 of the plaint :

"5. That on the 17th day of July 1949 the defendants admitted the liability of the said sum of money and executed an agreement undertaking to repay the same on or before the 31st August 1949 since they have spent the same."

In answer to the plaint, the material plea set up by the 1st defendant is set out in paragraph 5 of her written statement which reads :

"5. That with reference to paragraph 5 of the plaint, this defendant submits that the agreement dated 17th July 1949 was executed in the following circumstances and is void. The late U Hein died at about 10 a.m. on the 17th July 1949. The same night the plaintiff came to the funeral house bringing with him a written agreement on a stamped paper and by fraud, coercion and undue influence forced this defendant to sign the same *without any consideration* at a spot a few feet away from where the corpse of U Hein was placed."

The 2nd defendant Maung Par has admitted having executed the agreement to pay the debt in his capacity as an heir and legal representative of his father U Hein, but not in his personal capacity, and averred that under pressure he had to pay Rs. 500 out of the proceeds of the sale of his own properties.

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MAUNG PAR (a) MAUNG PASI (a) MAUNG MYO NYUNT v. U TUN HLAING AND ANOTHER.

U ON PE, J.

The following issues were framed in the case :

1. Whether the plaintiff entrusted the sum of Rs. 3,500 with the late U Hein before his death ?

2. If so, whether the defendants are personally liable ?

3. Whether the defendants executed the agreement as alleged in paragraph 5 of the plaint ? Or, under fraud, coercion and threat, as alleged in paragraph 5 of the written statement of the 1st defendant ?

4. Was the sum of Rs. 500 paid by the two defendants or by the 2nd defendant alone ?

5. To what relief, if any, is the plaintiff entitled ?

The lower Court has decreed the suit for Rs. 3,000, with costs, against the defendants personally and also in their capacity as heirs and legal representatives of U Hein.

The present appeal is by Maung Par only. The main grounds urged before us are that no personal decree can be passed against the appellant, and that the agreement executed on the day U Hein died (Exhibit C) was obtained illegally and under undue influence and without consideration. The substantial question for consideration in this appeal is whether the agreement, as contended by the appellant, is without consideration. We do not propose to go into the other questions raised in issue No. 3, *viz.*, fraud, coercion and threat, in view of the fact that the question of consideration would suffice to dispose of this appeal. The decision on the question of consideration rests on whether the agreement contained a contract which is supported by consideration. For that we shall have to see whether the recital contained any consideration moving from U Tun Hlaing for the agreement to pay up the liability of the deceased by Maung Par and

Daw Tin Kyi. The agreement (Exhibit C), which is in Burmese, in effect says that " the amount deposited with the deceased having been spent on his (U Hein) sickness, the two executants Daw Tin Sein and Maung Par, promise to pay back the amount in question before 31st August as they are not in a position to pay back now." Reading this recital, we do not see anything in it which would suggest that U Tun Hlaing has promised to give up any right, that is, to do or abstain from doing anything.

What is " consideration " has been brought out in the case of *Gulab Chand* v. *Kamal Singh and another* (1), where it is held as follows :

> " If a person believes that he has a *bonâ fide* claim to enforce, his forbearance from trying to put that claim in court and to have it decided will be a good consideration for a contract, however the claim, if brought, may be decided."

The same principle is followed in the case of *Debi Radha Rani* v. *Ram Dass* (2), where it is held as follows :

> " Where a wife who is ready to sue her husband for maintenance allowance has foreborne to sue on husband's agreeing to pay her monthly allowance by way of maintenance, the contract is supported by consideration as wife's forbearance to sue amounts to consideration for husband's agreement for payment of maintenance allowance."

In this case there is nothing which would amount to a contract supported by consideration on the part of U Tun Hlaing to do or abstain from doing anything. The claim was for money due by the deceased U Hein, and not by the appellant, and there can be no question that the cause of action for recovery of the suit amount would be against the deceased's estate only. It is not

(1) I.L.R. 44 All. 424. (2) A.I.R. (1941) Pat. 282.

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MAUNG PAR (a) MAUNG PASI (a) MAUNG MYO NYUNT v. U TUN HLAING AND ANOTHER.

U ON PE, J.

material how the money in question had been disposed of, although in this case, it is in evidence that the money had been spent on U Hein's sickness, for which the liability must fall on his estate. The lower Court, in giving the personal decree against the defendants, has erred in taking the view that personal liability had arisen out of the agreement, relying on paragraphs 3 and 4 of the agreement showing the defendants' undertaking to pay the money personally. The lower Court also relied on the fact that the second defendant Maung Par had paid Rs. 500 by selling his properties, but this fact is, in our view, immaterial as the document in question (Exhibit C) is without consideration. Both in law and in fact, we are satisfied that the agreement entered into by the defendants was without consideration and must be held to be void. It follows that the claim based on it must fail.

In the result this appeal is allowed in so far as the decree passed against the appellant personally is concerned, with costs. The decree against the appellant as heir and legal representative of the deseased U Hein will stand, but without costs in the lower Court.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1951

KO TIN (APPELLANT)

v.

Nov. 8.

KO KYIN THEIN AND ONE (RESPONDENTS).*

Urban Rent Control Act, s. 11 (1) (a)—Fixing of standard rent—Whether effect retrospective—Notice to quit—Claiming at contract rate prior to such fixing whether valid.

A contract of lease should be considered binding upon the parties until it has been modified by agreement or by operation of law. Until the Controller of Rents issues a certificate fixing Standrad Rent, the original contract of lease cannot be said to be altered in any way; only such fixation alters the rate agreed upon originally. Where, therefore, a notice of demand at the agreed rate for a period prior to the fixation of Standard Rent is served and not complied with, the landlord's notice cannot be said to be bad in law. The fixation of Standard Rent has no retrospective effect.

S. I. Abowath and five others v. *T. H. Khan*, (1950) B.L.R. 308; *S. L. Barua* v. *S. M. Abowath*, (1950) B.L.R. 404, referred to.

Khin Maung for the appellant.

Ba Hpu for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 989 of 1950 of the City Civil Court, Rangoon, the plaintiff-appellant Ko Tin sued the defendant-respondents Ko Kyin Thein and Ma Than Kyi for their ejectment from the premises in suit namely, one room in house No. 29 of 1st Street, Old Race Course Qwethit, Rangoon. The suit is one under section 11 (*1*) (*a*) of the Urban Rent Control Act and the plaintiff alleged that rents for the months of May, June and July were due at the time the suit was filed on the

* Civil 1st Appeal No. 60 of 1951 against the decree of the City Civil Court, Rangoon, in Civil Regular Suit No. 989 of 1950, dated the 31st May 1951.

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KO TIN v. KO KYIN THEIN AND ONE.

U SAN MAUNG, J.

4th September 1950, and that notice to quit under the Transfer of Property Act, as also the requisite notice, under section 11 (*1*) (*a*) have been duly sent. The defendants in their written statement denied that rent was due at the rate of Rs. 20 per mensem as the standard rent had been fixed at Rs. 12 per mensem by the Controller of Rents, Rangoon, in his Proceeding No. 445W of 1949-50 and that they had, in reply to the plaintiff's notice, offered to pay Rs. 12 which was the amount due after setting off the amounts which they had already paid in excess of the standard rent. Two issues were framed by the learned 4th Judge of the City Civil Court as follows :

"1. Did the plaintiff refuse to accept the rent at reduced rates ? If so what is the legal effect ?

2. Is the notice bad in law as the standard rent has been fixed at Rs. 12 ? "

After examining the parties in the case the learned Judge held that the notice was valid as the standard rent had not yet been fixed at the date of the notice but that the defendants should not be ejected as only Rs. 12 was due after adjustment of the excess rent paid by them as provided for in section 17 of Urban Rent Control Act and the offer to pay this sum was refused by the plaintiff's Advocate. In the result the suit for the ejectment of the defendants was dismissed with costs. Hence this appeal. Now, it is clear that the learned 4th Judge of the City Civil Court has entirely misconceived the law when he held, as he did, that the fixation of the standard rent by the Rent Controller had a retrospective effect. The standard rent was only fixed on the 18th August 1950 as admitted by the defendant Maung Kyin Thein in his evidence. Therefore rent due for the period prior to the 18th August 1950 was the contractual rent. In

this connection, the observation of a Bench of this High Court in *S. I. Abowath and five others* v. *T. H. Klan* (1) is apposite. There the learned Judges observed :

" It seems to us that a contract of lease, which has been agreed upon between the parties, should be considered to be binding or subsisting, until it has been modified by agreement between the parties or by an operation of law. We are unable to understand how the original contract of lease made between the parties could be said to have been altered or modified in this case until the Controller of Rent had issued the certificate fixing the standard rent. It appears to us that until the Controller of Rent issued a certificate fixing the standard rent nothing could be said to have been done or to have occurred by which it might be said that the original contract of lease which the parties have agreed upon had been altered, so far as the rate at which the rent is to be paid is concerned."

No doubt in *Abowath*'s case (1), the standard rent fixed by the Controller of Rents was higher than the contractual rent. However, as pointed out by another Bench of this Court of which I was a member, in *S. L Barua* v. *S. M. Abowath* (2), there is really no difference in principle between the case where the contractual rent is raised by the Controller of Rents in fixing the standard rent and that in which the contractual rent is reduced by the Controller in exercising his powers under section 19 of the Urban Rent Control Act. The following observation made by us in that case may be usefully repeated. We observed :—

" Now section 5 (*1*) of the Urban Rent Control Act, 1948, provides that subject to the provisions of the Act, where the rent of any premises has been increased prior to the date on which the Act came into force or is increased during the continuance of the Act above the standard rent, the amount by which such increased rent exceeds the standard rent shall, notwithstanding

(1) (1950) B.L.R. 308. (2) (1950) B.L.R. 404.

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any agreement to the contrary, be irrecoverable. Therefore, where the standard rent has been fixed by the Controller of Rents under section 19 of the Urban Rent Control Act or is fixed by law under clause (II) of the definition of 'standard rent' occurring in section 2 (*l*), any rent in excess of the standard rent is a rent which is not lawfully due. In the absence of any standard rent having been fixed under section 19 of the Urban Rent Control Act or under clause (II) of the definition, the contractual rent must be deemed to be the lawful rent, as it cannot be said to exceed the 'standard rent' which is non-existent. In this connection we agree with the observations of a Bench of this Court in *S. I. Abowath and others* v. *T. H. Khan* (1) where the learned Judges said :

'It seems to us that a contract of lease, which has been agreed upon between the parties, should be considered to be binding or subsisting, until it has been modified by agreement between the parties or by operation of law. We are unable to understand how the original contract of lease made between the parties could be said to have been altered or modified in this case until the Controller of Rents had issued the certificate fixing the standard rent. It appears to us that until the Controller of Rents issues a certificate fixing the standard rent nothing could be said to have been done or to have occurred by which it might be said that the original contract of lease which the parties have agreed upon had been altered, so far as the rate at which the rent is to be paid is concerned.' "

Therefore when by a notice, dated the 8th August 1950 the plaintiff demanded rent from the defendants for three previous months at the rate of Rs. 20 per mensem, it was not sufficient for the defendants, in reply to that notice, to offer to pay rent for these three months merely at the rate of Rs. 12 per mensem and also to deduct therefrom excess rent said to have been paid for the months of February, March and April 1950. Furthermore, when the landlord refuses to accept any rent referred to in clause (*a*) of section 11 (*1*), the proper course which a tentant should adopt is to deposit such rent with the Controller as provided

(1) (1950) B.L.R. 308.

for in section 14 (*b*) of the Urban Rent Control Act. This has not been done.

It may perhaps be asked of what use is section 17 of the Urban Rent Control Act, if the fixation of the standard rent has no retrospective effect. However, as pointed out by us in *S. L. Baruu* v. *S. M. Abowath* (1) the contractual rent remains the lawful rent in the absence of any standard rent having been fixed by the Controller under section 19 of the Urban Rent Control Act itself in cases coming under clause (II) of the definition of standard rent given in section 2 of the Act. There may be cases where a tenant may have been paying more than the standard rent fixed under clause II of the definition or where he has been compelled to pay or through ignorance had been paying rent in excess of the standard rent fixed by the Controller under section 19 of the Act. In such cases, section 17 (*1*) of the Urban Rent Control Act could be resorted to.

For these reasons I would set aside the order of the 4th Judge of the City Civil Court dismissing the plaintiff-appellant's suit and direct that the defendant-respondents be ejected from the suit premises as provided for in section 11 (*1*) of the Urban Rent Control Act for non-payment of the arrears of rent due from them. The defendant-respondents shall pay the costs of the plaintiff-appellant in the City Civil Court as well as in this Court. Advocate's fees in this Court, two gold mohurs. I would further add that it is still open to the defendants to make an application to the City Civil Court under section 14 of the Urban Rent Control Act for the rescission of the decree upon the fulfilment of such terms and conditions as may be imposed upon them by that Court.

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(1) (1950) B.L.R. 404.

CIVIL REVISION.

Before U Aung Khine, J.

H.C. 1951 — *Nov. 14.*

M/S. U THARRAWADDY MAUNG MAUNG AGENCIES LTD. (APPLICANTS)

v.

S. M. BHOLAT (RESPONDENT). *

Application for commission—Discretion of trial Court—Interference in revision—S. 115 of the Code of Civil Procedure.

Whether a commission for examination of a witness should be issued or not is a matter within the discretion of the Court, having regard to the circumstances of each case. When the Lower Court has duly considered the circumstances and the law applicable, the High Court will not interfere, even though the decision is erroneous.

Fut Chong v. *Maung Po Cho*, I.L.R. 7 Ran. 339, referred to.

N. R. Burjorjee for the applicants.

Aung Min (*1*) for the respondent.

U AUNG KHINE, J.—This is an application in revision by the applicants Messrs. U Tharrawaddy Maung Maung Agencies Limited against the order of the 4th Judge, City Civil Court, declining to issue a commission to examine the General Manager, Indian Overseas Air Lines Ltd., of "Mayfair" Churchgate, Bombay. The applicants are the approved Sales Agent of the International Air Transport Association. In June 1950 the respondent S. M. Bholat of Rangoon on his journey to India wanted a return air passage from Bombay to Calcutta and for that purpose applied to the applicant firm to secure a ticket for him. The applicant accepted Rs. 185 and issued an exchange order addressed to the Indian Overseas Airlines Ltd.,

* Civil Revision No. 61 of 1951 against the order of the 4th Judge, City Civil Court, Rangoon, in case No. 551 of 1951, dated 10th August 1951.

Bombay, requesting the latter to issue a single ticket for travel from Bombay to Calcutta. The respondent reached Bombay and when he applied for his ticket for the return journey producing the exchange order at the said airline office, he was unable to obtain it.

It is now stated that the Indian Overseas Airlines has gone into liquidation. On his return to Rangoon the respondent approached the applicant and demanded the refund of Rs. 185 paid by him for his passage from Bombay to Calcutta. The applicants having failed to refund the amount, the respondent filed his suit for the recovery of the same.

It is the contention of the applicants that they remitted the amount mentioned in the exchange order to the above said airlines company and that they are neither responsible nor are they liable for the respondent not securing any passage from Bombay to Calcutta. They desired to have a commission issued to examine the General Manager of the Indian Overseas Airlines Ltd., Bombay, to show that the money had been remitted to the said airline company by them and also to show reasons why the said airline was unable to afford an air passage to the respondent from Bombay to Calcutta.

The Lower Court considered that the above points are not necessary to be proved for the proper determination of the suit and declined to issue the commission as desired by the applicants.

The question as to whether a commission should be issued or not is a matter left entirely to the discretion of the Court having regard to the circumstances of each particular case. It is settled principle of law that where the Lower Court had duly considered all the pros and cons of the respective cases of parties and the law applicable thereto, the High Court will not interfere in revision although the decision may be

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M/S. U THARRAWADDY MAUNG MAUNG AGENCIES LTD. v. S. M. BHOLAI.

U AUNG KHINE, J.

erroneous. [See *Fut Chong* v. *Maung Po Cho* (1)]. The applicants no doubt will be able to place before the Court sufficient material to prove that they had remitted the money to the airline company concerned and therefore they will not be entirely deprived of the opportunity to furnish the necessary proof in support of their claim. The main question in this case is whether the applicants are the agents of the said airlines, and if so, whether they would be liable to reimburse the amount they have accepted from the respondents and which they state they had remitted to the airline concerned. Since the Lower Court has considered the matter carefully and had appreciated the principles involved, I cannot say that it had not exercised its discretion properly.

Under the circumstances, I see no reason to interfere. The application is dismissed with costs.

(1) I.L.R. 7 Ran. Series, p. 339.

CIVIL REVISION

Before U San Maung, J.

H.C. 1951

DAW THI (APPLICANT)

v

Nov. 15.

DAW SAN MYA (RESPONDENT). *

Urban Rent Control Act, ss. 14-A (1) and 22(1)—Whether Judges mentioned in s. 22 (1) are persona designata—*Courts Act, 1950, s. 22.*

An application under s. 22 (*1*) of the Urban Rent Control Act to the Subdivisional Judge, Myingyan questioning the order fixing Standard Rent by the Assistant Controller of Rents was returned to the applicant. Upon revision to the High Court.

Held: That the Judges mentioned in s. 22 (*1*) of the Urban Rent Control Act were *persona designata* and s. 22 of the Courts Act, 1950 had no application to the case before them. The words in s. 22 refers to Courts of Law established under the Courts Act and not to *persona designata.*

Hla Sein for the applicant.

Hla Gyaw for the respondent.

U SAN MAUNG, J.—This is an application for revision by Daw Thi against the order of the Subdivisional Judge, Myingyan, returning her application under section 22 (*1*) of the Urban Rent Control Act questioning the decision of the Assistant Controller of Rents, Myingyan, fixing the standard rent, and his order under section 14-A (*1*), granting permission to the landlord to file a suit for ejection against the applicant. It is contended that the learned Subdivisional Judge erred in law in holding that he had no jurisdiction to entertain a reference under section 22 of the Urban Rent Control Act.

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* Civil Revision No. 41 of 1951 against the order of the Subdivisional Judge's Court of Myingyan in Civil Misc. No. 2 of 1951, dated 18th June 1951.

H.C. 1951

DAW THI v. DAW SAN MYA.

U SAN MAUNG, J.

What really happened was this. The order of the Assistant Controller of Rents sought to be questioned was passed on the 13th of April 1951. By that time the Courts Act, 1950, had already come into force so that Assistant Judges were replaced by Subdivisional Judges. However, Lands and Survey Branch Notification No. 366, dated the 3rd of December 1948 still remained unamended so that the Judge appointed by the President for the purpose specified in section 22 (*1*) of the Urban Rent Control Act still remained the Assistant Judge, Myingyan, although there was no longer any such Judge in existence. The matter was only rectified when the Subdivisional Judge of Myingyan was appointed to be the Judge before whom references against the decisions or orders of the Controller should be made. This was a few months after the Subdivisional Judge had dismissed the application of Daw Thi on the ground that he had no jurisdiction to entertain the same. As the Judges mentioned in section 22 (*1*) were *persona designata*, section 22 of the Courts Act, 1950, had no application to cases before them. The words (တရားရုံး) occurring in that section refer to Courts of law established under the Courts Act and not to *persona designata* such as those appointed under section 22 (*1*) of the Urban Rent Control Act. The application for revision is therefore dismissed. There will be no order as to costs.

APPELLATE CIVIL.

Before U San Maung, J.

KO KYI MYAING (APPELLANT)

v.

DAW MAI SHEIN (RESPONDENT).*

H.C. 1951

Nov. 15.

Urban Rent Control Act, ss. 11 (1) (f), 14-A(1) and 22—Formal order in writing by Controller if necessary.

No suit under s. 11 (*1*) (*f*) of the Urban Rent Control Act should be entertained by any Court " unless the landlord has been permitted by the Controller by order in writing to institute such suit or proceeding and has produced before such Court proof that such permission has been granted." The provisions of s. 14-A (*1*) must be read subject to the provisions of sub-s (*3*) and of the provisions of s. 22 (*1*) of the Urban Rent Control Act. Under s. 14-A (*3*), upon an application from the landlord, the Controller, after making enquiry, should make an order in writing granting or rejecting the application. This order is not final and is subject to reference under s. 22 (*1*). The decision on reference is final.

The Judge in disposing of the Reference should follow as nearly as possible the procedure for trial of regular suits. When a decision is arrived at by a Judge on Reference, it entirely supersedes that of the Controller, and it is not necessary to refer the matter back to Controller for issue of a formal order permitting the institution of proceedings.

Sub-s. (*1*) of s. 14-A does not say that the suit filed by the landlord must be accompanied by the order in writing of the Controller. The landlord is only to prove that permission has been granted. The only proof, in a case where there is a Reference to the Court, is proof of permission being granted by the ultimate authority dealing with the orders of the Rent Controller.

Though the appellate authority in the case did not specifically say that permission was granted to file a suit under s. 11 (*a*) (*f*) it can be inferred from the language of the order.

N. C. Sen for the appellant.

Thein Moung for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 16 of 1951 of the First Subordinate Judge, Bassein which was later converted into Civil Regular Suit No. 41 of 1951 of the Township Judge, Bassein West, the

* Civil 2nd Appeal No. 43 of 1951 against the decree of the Additional District Court of Bassein in Civil Appeal No. 12 of 1951, dated 2nd June 1951.

H.C. 1951

KO KYI MYAING v. DAW MAI SHEIN.

U SAN MAUNG, J.

plaintiff-respondent Daw Mai Shein sued the defendant-appellant Ko Kyin Myaing for his ejectment from the premises in suit. The suit being one under clause (*f*) of sub-section (*1*) of section 11 of the Urban Rent Control Act, it could only be filed with the permission of a competent authority. Therefore a preliminary objection to the maintainability of the suit was raised by the defendant on the ground that there was no order in writing by the Controller permitting Daw Mai Shein to file the suit and that the suit was therefore liable to be dismissed for non-compliance of the provisions of section 14-A (*1*) of the Urban Rent Control Act. This objection was upheld by the learned trial Judge who accordingly dismissed the plaintiff-respondent's suit. On appeal to the Additional District Court of Bassein, the learned Judge of the Additional District Court held that the order of the Assistant Controller of Rents dismissing the application of Daw Mai Shein for permission to file a suit against Ko Kyin Myaing under section 11(*1*)(*f*) of the Urban Rent Control Act having been set aside by the Assistant Judge, Bassein [who was a Judge appointed under section 22 (*1*) of the Act to deal with the references against the order of the Rent Controller] on the ground that the premises in question was required by Daw Mai Shein *bonâ fide* for her own residence, no formal order of the Controller of Rents permitting Daw Mai Shein to file the suit was necessary. He accordingly set aside the judgment and decree of the trial Court dismissing the plaintiff-respondent's suit and remanded the suit to the trial Court for its disposal on the merits. This remand is apparently under Order 41, Rule 23 of the Civil Procedure Code, which provides that where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed

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KO KYI MYAING v. DAW MAI SHEIN.

U SAN MAUNG, J.

in appeal, the Appellate Court may remand the case with directions to re-admit the suit under its original number in the register of Civil Suits and to proceed to determine the suit. Therefore an appeal lies to this Court against the order of remand, *vide* Clause (*u*) of Rule 1 of Order 43, Civil Procedure Code.

In appeal it is urged that the Lower Appellate Court erred in Law in holding that the trial Court could have held that the plaintiff-respondent had obtained permission to file the suit under section 11 (*1*) (*f*) of the Urban Control Act; and that section 14-A (*1*) of the Act is specific on the point that no suit under section 11 (*1*) (*f*) should be entertained by any Court, "unless the landlord has been permitted by the Controller by an order in writing under sub-section (*3*) to institute such suit or proceeding and has produced before such Court proof that such permission has been granted."

In my opinion, in a case like the present a formal order in writing by the Controller permitting the landlord to institute the suit is quite unnecessary. The provisions of section 14-A (*1*) must be read subject to the provisions of sub-section (*3*) of that section and of section 22 of the Urban Rent Control Act. It is clear from the provisions of sub-section (*3*) of section 14-A that on receipt of an application from the landlord who desires to obtain from him an order referred to in sub-section (*1*) the Controller should after making such enquiries as may be deemed necessary make an order in writing granting the application or rejecting the application as the case may be. This order is, however, not final. It is subject to reference to the authority specified in sub-section (*1*) of section 22, and section 5 thereof enacts that the decision of such an authority shall be final. Section 23 provides that in disposing of

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KO KYI MYAING v. DAW MAI SHEIN.

U SAN MAUNG, J.

references from the decision of the Controller, the Judge concerned may in his discretion follow as nearly as possible the procedure laid down for the trial of regular suits. However, it does not rule out the possibility of his making use of the evidence recorded by the Controller for the purpose of coming to a decision. When that decision is arrived at, it entirely supersedes that of the Controller. Therefore, it is unnecessary to refer the matter back to the Controller for the purpose of issuing a formal order permitting the landlord to institute his suit.

In this connection it is important to note that sub-section (*1*) of section 14-A does not say that the suit filed by the landlord must be accompanied by the order in writing of the Controller. All that it says is that the landlord must produce proof before the trial Court that permission had been granted by the Controller. Therefore where the law allows, as it does, the supersession of the order of the Controller by that of the authorities specified in section 22 (*1*) of the Urban Rent Control Act the only proof that is necessary to be produced before the trial Court is that of the fact that the necessary permission has been granted by the ultimate authority, namely, the Judge whose duty it is to deal with the orders of the Rent Controller questioned before him.

No doubt the First Assistant Judge, Bassein, who had to deal with the reference against the order of the Rent Controller did not in his order specifically say that permission should be granted to Daw Mai Shein to file her suit under section 11 (*1*) (*f*) of the Urban Rent Control Act but it must be necessarily inferred from the language of his order that he held that Daw Mai Shein should be permitted to file the suit.

In the result the appeal fails and must be dismissed with costs ; Advocate's fees three gold mohurs.

ORIGINAL CIVIL.

Before U Bo Gyi, J.

S.R.M.N.N. RAMANATHAN CHETTIAR (PLAINTIFF)

v.

RAMAIAH PILLAY (DEFENDANT). *

H.C. 1951

Nov. 21.

The Liabilities (War-Time Adjustment) Act, 1945, s. 2—Leave to execute— Jurisdiction.

Under s. 2 of the Liabilities (War-Time Adjustment) Act, 1945, the District Court or any other Court designated by the High Court under rules made under s. 8 of the Act can grant permission to execute a decree. The debtor however must reside within the local limits of the jurisdiction or carry on business or personally work for gain. If he lives within the jurisdiction of the High Court, the High Court alone grants leave.

In the present case as the debtor was not shown to be residing within the jurisdiction of the High Court but in the Ramnad District and there was nothing to show that he carried on business or personally worked for gain within the jurisdiction of the High Court, the High Court cannot grant such leave.

R. Jaganathan for the plaintiff.

R. Basu for the defendant.

ORDER.

U BO GYI, J.—This is an application by S.R.M.N.N. Ramanathan Chettiar under the Liabilities (War-Time Adjustment) Act, 1945, for permission to execute the decree obtained by the firm against S. R. Subbiah Pillay for the sum of Rs. 1,369 in the Rangoon City Civil Court. The judgment-debtor S. R. Subbiah Pillay is dead and the application made is against his son and heir Ramaiah Pillay. The application is opposed by Ramaiah Pillay on the ground that this Court has no jurisdiction to grant the permission.

* Civil Mics. No. 143 of 1951 of the High Court, Rangoon.

H.C. 1951

S.K.M.N.N. RAMANATHAN CHETTIAR v. RAMAIAH PILLAY.

U BO GYI, J.

The Court which can grant the permission to execute the decree is mentioned in section 2 of the Liabilities (War-Time Adjustment) Act, 1945, according to which, in the case of a money decree, it is the District Court, or any other Court designated by High Court by rules made under section 8 of th within the local limits of whose jurisdiction the ordinarily resides or carries on business or perso works for gain, that can grant the leave. Under the proviso to the section, if the debtor ordinarily resides or carries on business or personally works for gain, within the local limits of the ordinary original jurisdiction of the High Court, it is the High Court that can grant the leave. Here, in this case the debtor is shown as residing in Ramnad District, India, and there is nothing to show that he carries on business or personally works for gain within the local limits of the ordinary original jurisdiction of the High Court.

It must be held, therefore, that this Court cannot grant the leave applied for, and the application is accordingly dismissed, with costs.

Advocate's fee one gold mohur.

FULL BENCH (APPELLATE CIVIL).

Before U Tun Byu, Chief Justice, U Aung Khine and U Si Bu, JJ.

JOHN WILLIAM CREE (APPLICANT)

v.

VIOLET ELIZABETH CREE (RESPONDENT).*

H.C. 1951

Dec. 12.

Burma Divorce Act, 1948—Decree nisi *passed by the High Court of Judicature—Application for confirmation to he High Court after Independence—Burma Independence Act, 1947, s. 5 (3)—Retrospective effect of statute—Effect of confirmation of decree* nisi.

V. E. Cree obtained a decree *nisi* for divorce against J. W. Cree on 21st December 1941 under the Indian and Colonial Divorce Jurisdiction Act, 1926 in the High Court of Judicature at Rangoon. On 20th July 1950, the husband applied in the High Court, Rangoon, for a decree absolute. The question regarding authority to pass such a decree was referred to a Full Bench.

Held: That under s. 2 of the Burma Divorce Act, 1948 the High Court was not competent to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in Burma at the time when the petition is presented.

J. W. Cree was admittedly not so domiciled and he could not have applied under the provisions of the Burma Divorce Act as it stood before the amendment made in 1948.

Under s. 5 (3) of the Burma Independence Act, 1947 it is provided that if by the law of Burma any enactment specified in the 2nd Schedule to the Act is continued on or after coming into force of independence, it is part of the law of Burma. No such legislation had been made to continue the provision of either the Indian and Colonial Divorce Jurisdiction Act, 1926 or the Indian and Colonial Divorce Jurisdiction Act, 1940. It is a settled rule of construction that retrospective operation is not to be given to a statute so as to impair existing rights unless the language of the enactment requires it. As the previous Divorce Acts of 1926 and 1940 were repealed, the High Court in Burma has no power to act under the previous law.

Re. *Athlumney*, (1898) 2 Q.B.D. 551 at 552, referred to.

It is really the decree absolute which should be considered to be the final decree in the Divorce Act. The decree *nisi* does not alter the status of the parties.

Hyman v. *Hyman and Goldman*, (1904) Law Reports, Probate Division 403 at 406, referred to.

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* Civil Reference No. 21 of 1951 being reference made by the High Court, Rangoon (U Bo Gyi, J) in Civil Regular No. 198/41, dated 7th September 1951.

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Decree *nisi* passed under the old law cannot therefore be confirmed by the present High Court.

G. Horrocks for the applicant.

L. Choon Foung for the respondent.

The judgment of the Full Bench was delivered by

U TUN BYU, C.J.—Violet Elizabeth Cree obtained, on the 21st December, 1941, a decree *nisi*, under the Indian and Colonial Divorce Jurisdiction Act, 1926, for the dissolution of her marriage with John William Cree, whose domicile was in the British Isles. Violet Elizabeth Cree, as well as John William Cree, evacuated to India, and they apparently remained in India during the Japanese military occupation of Burma. Violet Elizabeth Cree next applied, on or about the 1st September, 1942, to the High Court of Judicature at Fort William in Bengal, to have the decree *nisi*, which was obtained in Burma, made absolute, but her application was rejected on the ground that it was not a matter which the High Court of Judicature at Fort William had jurisdiction to deal with.

On the 20th July, 1950, John William Cree applied for the decree *nisi* passed in Civil Regular Suit No. 198 of 1941 of the High Court of Judicature at Rangoon, instituted by Violet Elizabeth Cree, to be made absolute. The learned Judge, before whom the application to make the decree *nisi* absolute came for hearing, has referred the following questions for decision :—

1. Can a decree *nisi* passed by the late High Court of Judicature at Rangoon under the Indian and Colonial Divorce Jurisdiction Act, 1926, be confirmed by the High Court ?

2. If so, under what enactment can the decree *nisi* be confirmed ?

The Indian and Colonial Divorce Jurisdiction Act, 1926, and the Indian and Colonial Divorce Jurisdiction Act, 1940, were, however, repealed by the Burma Independence Act, 1947. The High Court in Burma no longer possesses a power to act under either the Indian and Colonial Divorce Jurisdiction Act, 1926, or the Indian and Colonial Divorce Jurisdiction Act, 1940, unless a legislation had been enacted to enable this to be done ; and this becomes obvious when we consider the provisions of sub-section (*3*) of section 5 of the Burma Independence Act, 1947, which read :

"(*3*) The enactments specified in the Second Schedule to this Act are hereby repealed as from the appointed day to the extent specified in that Schedule :

Provided that, if by the law of Burma, any such enactment is continued on or after the appointed day as part of the law of Burma, nothing in this repeal shall be taken to prevent the recognition outside Burma of that enactment as part of the law of Burma."

No legislation had, however, been made in Burma to continue the provisions of either the Indian and Colonial Divorce Jurisdiction Act, 1926, or the Indian and Colonial Divorce Jurisdiction Act, 1940.

Admittedly, John William Cree was residing in Ireland when his application to make the decree *nisi* absolute was filed in the High Court on the 20th July 1950 ; and he is still living in Ireland.

The application of John William Cree was made under the Burma Divorce Act, as subsequently amended, and it has been contended on his behalf that the application for an order to make the decree *nisi* absolute is competent in view of the subsequent deletion or repeal of a portion of section 2 of the Burma Divorce Act, which required the parties to be domiciled in Burma before they could institute proceedings for divorce under the Burma Divorce Act.

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We ought to mention here that the learned Advocate who appeared on behalf of John William Cree had been most candid in his arguments and he did his best to place his arguments most fairly before this Court.

The question which arises in this reference is really, what is the effect of the amendment of section 2 of the Burma Divorce Act, or, to be more precise, whether the amendment has, in law, the effect of allowing the High Court in Burma, after the Independence, to make a decree *nisi* absolute in the circumstances obtaining in the present case? It is a rule of interpretation of statutes that an Act is not to be construed to have effect retrospectively, unless it is clear that it should be so construed, at least by a clear or necessary implication. In *Re. Athlumney* (1), Wright J., expressed the rule as follows:

> "No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

What is the effect of the amendment of section 2 of the Burma Divorce Act, as referred to in the earlier portion of this judgment? It seems to us to be obvious that the amendment has the effect of enlarging the right of a party to institute a divorce proceeding under the Burma Divorce Act. A party is no longer required to be domiciled in Burma before he can institute a proceeding for divorce in Burma, and this amendment cannot, therefore, be considered to relate solely to a matter of procedure.

(1) (1898) 2 Q.B.D. 551 at 552.

A decree *nisi* does not have the effect of altering the status of the parties. It of course confers a right on the parties to apply to the Court subsequently for an order to make the decree *nisi* absolute ; but the Court also has power, for proper reasons, to set aside the decree *nisi*. Thus, it is really the decree absolute which should be considered to be the final decree in a divorce suit. It was observed in *Hyman* v. *Hyman and Goldman* (1), as follows :

" . . . . It very frequently happens, although I cannot cite at this moment any specific authority from the books, that the King's Proctor brings to the knowledge of the Court adultery, for instance, committed after the date of the decree *nisi*, which in the absence of any special circumstances, has the effect, not only of stopping the decree from being made absolute, but of setting aside the decree *nisi*. When one considers the matter, this must be the logical effect, because the decree absolute is the only final decree in the suit. . . . ."

This is accordingly a case which must be considered in the light of the provisions of the law which existed prior to the amendment of section 2 of the Burma Divorce Act effected in 1948, and the relevant portion of section 2 of the Burma Divorce Act, which was deleted in 1948, reads :

"2. . . . . or to make decrees of dissolution of marriage, except where the parties to the marriage are domiciled in Burma at the time when the petition is presented. . . ."

It is, therefore, clear that no Court in Burma could grant a decree for the dissolution of marriage under the Burma Divorce Act before the amendment made in 1948, unless the parties to the marriage were domiciled in Burma at the time when the petition for the dissolution of marriage was instituted in Court.

(1) (1904) Law Reports, Probate Division, 403 at 406.

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It follows that John William Cree, whose domicile is admittedly outside Burma, could not have resorted to the provisions of the Burma Divorce Act, as it stood before the amendment made in 1948, to aid him in his application to have the decree *nisi* made absolute.

Section 31 of the Union Judiciary Act, 1948, also cannot help him in that it cannot be utilised to revive either the Indian and Colonial Divorce Jurisdiction Act, 1926, or the Indian and Colonial Divorce Jurisdiction Act, 1940, both of which were expressly repealed by the Burma Independence Act, 1947. The proviso to sub-section (*3*) of section 5 of the Burma Independence Act, 1947, indicates quite clearly that what was intended to be done was that the Indian and Colonial Divorce Jurisdiction Act, 1926, and the Indian and Colonial Divorce Jurisdiction Act, 1940, were no longer to be considered as being in force in Burma after the Independence, unless there was a law made in Burma to allow them to continue to be in force after the Independence of Burma ; and no such law had been enacted in Burma.

For the reasons which we have set out above, the answer to the first question which has been propounded will have to be answered in the negative ; and in view of our answer to the first question, it will not be necessary to answer the second question.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U Si Bu, J.

S.K.A.R.S.T. CHETTYAR FIRM (APPELLANTS)

v.

P.S.A.P. ALAGAN AND OTHERS (RESPONDENTS).*

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Dec. 10.

Contract Act, s. 189—Agent of necessity—Looting—Burden of proof—Ratification.

Respondents executed a promissory note in favour of Appellant whose agent left Burma before the British evacuation and no one was appointed to look after the affairs. The 2nd defendant claimed that by payment of Rs. 11,000 on 1st September 1944 to one Veerappa Chettyar the claim was satisfied and contended that Veerappa Chettyar was an agent of necessity.

Held : That the authority under s. 189 of the Contract Act is one granted by the law to a person acting in a particular transaction. Such a person is not an agent *ex contractu*.

R.M.M.R.M. Perichiappa Chettyar v. *Ko Kyaw Than*, (1949) B.L.R. 64 at 70, referred to and followed.

Acceptance of Japanese currency from the 2nd defendant could not be said to be a transaction in the interest of the firm or for its benefit especially when there was an endorsement of interest on the 1st April 1944 and no apprehension of the claim becoming time-barred.

When defendant relied upon a statement of fact that the paddy belonging to the Appellant firm had been looted the burden of proof rests on him and it had not been satisfied in this case. No evidence had been adduced in this case from which an inference of ratification could be reasonably made.

K. R. Venkatram for the appellants.

N. Bose for the respondents.

U TUN BYU, C.J.—The three defendant-respondents P.S.A.P. Alagan, P.S.A.V. Pichan and P.S.A.A.L. Suri executed a promissory note, on the 2nd August, 1949, in favour of the plaintiff-appellant S.K.A.R.S.T. Chettyar Firm for a sum af Rs. 15,000, with an interest

* Civil 1st Appeal No. 40 of 1949 against the decree of this Court in Civil Suit No. 20 of 1947, dated 20th June 1949.

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of 9 annas per centum per mensem. A considerable sum was still due to the plaintiff-appellant firm in respect of the said promissory note when the British evacuated Burma early in 1942. The agent of the plaintiff-appellant firm had left Burma sometime before the British evacuation of Burma; and no one had been duly appointed to look after the affairs of the plaintiff-appellant firm in Burma.

After the Japanese occupied Burma in 1942, some relations of one Chidambaram Chettyar, who was a senior partner of the plaintiff-appellant firm, requested one Veerappa Chettyar, who had previously held a power-of-attorney from Chidambaram Chettyar, but who had ceased to be employed by the latter more than a year before the Japanese invasion of Burma, to assist in saving the properties of the plaintiff-appellant firm and to look after its affairs. Veerappa Chettyar was asked to do so, because he had previously held a power-of-attorney from Chidambaram Chettyar and in that the power-of-attorney, which was withdrawn from him, was still at the premises of the plaintiff-appellant firm in Rangoon. We accept the statement of Karuppaih, who was an employee of the plaintiff-appellant firm, that Veerappa Chettyar assisted in looking after the affairs of the plaintiff-appellant firm during the Japanese occupation of Burma and that Kailasam, who was an employee of the plaintiff-appellant firm, also assisted in looking after the affairs of the plaintiff-appellant firm during the Japanese occupation of Burma. Lakshmanan Chettyar, the present agent of the plaintiff-appellant firm also gave evidence to similar effect. The Exhibit A7, written by Veerappa Chettyar, also suggests that Veerappa Chettyar assisted in looking after the affairs of the plaintiff-appellant firm during the Japanese occupation of Burma.

On the 1st September, 1944, the second defendant-respondent P.S.A.V. Pichan repaid a sum of Rs. 11,000 which was still due by him on the said promissory note; and this money was borrowed from Veerappa Chettyar. The learned trial Judge on the Original Side held that Veerappa Chettyar was, in the circumstances of this case, an "agent of necessity" within the meaning of section 189 of the Contract Act in respect of the repayment of the loan made on the 1st September, 1944; and he also held that the plaintiff-appellant firm had also ratified the action of Veerappa Chettyar in accepting the repayment of Rs. 11,000, in Japanese currency, from P.S.A.V. Pichan.

The two questions which arise in this appeal are whether the act of Veerappa Chettyar in accepting the repayment from P.S.A.V. Pichan on the 1st September, 1944, could, in the circumstances of this case, be properly considered to fall within the purview of section 189 of the Contract Act, and if not, whether the transaction, which took place on the 1st September, 1944, could be said to have been ratified by the plaintiff-appellant firm. Section 189 of the Contract Act reads:

"189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances."

In *R.M.M.R.M. Perichiappa Chettyar* v. *Ko Kyaw Than* (1) U E Maung J., in delivering the judgment of the Supreme Court, observed:

"It, therefore, follows that the authority of the so-called agent under section 189 of the Contract Act is an authority which the law has granted to a person who was acting, not as

(1) (1949) B.L.R. p. 64 at p. 70.

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an agent *ex contractu*, so far as that particular transaction was concerned, but outside the scope of his employment by the principal. Status, and not contract, is the determining factor in both cases."

We respectfully agree that the Court has to consider each transaction in its own peculiar circumstances as to whether the act of an agent can be said to fall within the ambits of the provisions of section 189 of the Contract Act. It will be observed that in order to come within the provisions of section 189 of the Contract Act, it will also be necessary to establish that the act or transaction was done or made for the purpose of protecting the principal from loss.

Three creditors of the plaintiff-appellant firm were admittedly repaid the sums due to them by the plaintiff-appellant firm in September, 1944, and those three repayments had undisputedly been accepted by the plaintiff-appellant firm. It is also clear that the repayments in the Japanese currency to the three creditors of the plaintiff-appellant firm in September, 1944 were transactions made in the interest or for the good of the latter, because the Japanese currency was depreciating very rapidly in value at that time. It will be necessary to consider whether there was any connection between the three repayments made to the creditors of the plaintiff-appellant firm in September, 1944 and the repayment, which P.S.A.V. Pichan made towards the debt due by him on the 1st September, 1944. We have been taken through the evidence in this case, and we have not been shown any evidence which will indicate that there must have been some connection between the three repayments made to the creditors of the plaintiff-appellant firm and the repayment made by P.S.A.V. Pichan for the amount due on the promissory note executed on the 2nd August, 1939; and unless some sort of connection is established

between the two sets of repayments it could not, in our opinion, be said that the acceptance of the Japanese currency from P.S.A.V. Pichan was a transaction made in the interest or for the good of the plaintiff-appellant firm. There is also no evidence to indicate that the creditors of the plaintiff-appellant firm, who were repaid in September, 1944, would not have accepted any of the three repayments, unless the plaintiff-appellant firm had also accepted the repayment of Rs. 11,000 from P.S.A.V. Pichan. We are also unable to find any evidence on the record which will indicate, more or less clearly, that Veerappa Chettyar and Kailasam, who were looking after the affairs of the plaintiff-appellant firm during the Japanese occupation of Burma, could not have repaid the sum of Rs. 18,000, in Japanese currency, to the three creditors of the plaintiff-appellant firm in September, 1944, unless they had accepted the repayment of Rs. 11,000 from P.S.A.V. Pichan on the 1st September, 1944.

According to Kailasam, who was examined on commission, about 40,000 to 50,000 baskets of paddy were collected by them and that the paddy had been sold. Veerappa Chettyar, who was also examined on commission, also stated that they collected about Rs. 20,000 to Rs. 25,000 from the outstandings due to the plaintiff-appellant firm. In the absence of any evidence to suggest that the money obtained by Veerappa Chettyar and Kailasam on behalf of the plaintiff-appellant firm had been utilised in discharging other liabilities of the plaintiff-appellant firm, it is only reasonable to assume that at least a part of the sums collected by them on behalf of the plaintiff-appellant firm was still available for use in September, 1944. It has been urged on behalf of the defendant-respondents that the evidence of Kailasam shows that some of the paddy belonging to the plaintiff-appellant firm had

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been looted during the Japanese occupation of Burma. There is no evidence, however, to show how much of the paddy was actually looted, and it will not be proper, in the circumstances, to assume that almost all the 40,000 or 50,000 baskets of paddy belonging to the plaintiff-appellant firm must have been looted. The burden of proof, on this point, rests on the defendant-respondents; and we would have expected either Veerappa or Kailasam to have been cross-examined about it, if the suggestion made before us was true. It could not therefore be said that there could not have been sufficient money available to repay the sum of Rs. 18,000 to the three creditors of the plaintiff-appellant firm in September, 1944, without the money which was received from P.S.A.V. Pichan on the 1st September, 1944. There is also no evidence to support the suggestion that unless Veerappa Chettyar or Kailasam had accepted the repayment of Rs. 11,000 from P.S.A.V. Pichan, the properties of the plaintiff-appellant firm, or some of them, would have been seized or confiscated by the Japanese Military administration.

As regards the question of ratification, it has been contended on behalf of the defendants-respondents that the fact that the plaintiff-appellant firm approved of the three payments to their creditors made in September, 1944 clearly implies that the plaintiff-appellant firm also approved of the repayment of the debt due to them by P.S.A.V. Pichan. It has to be remembered that those two sets of payment were distinct transactions; and no evidence has been adduced on which such inference can reasonably be made. It has been urged that P.S.A.V. Pichan's evidence shows that demands were made for the repayment of the promissory note due by him by Kailasam and others during the Japanese occupation of Burma. It

will not be proper in the circumstances of this case to accept P.S.A.V. Pichan's evidence in this respect without some corroboration. Neither Veerappa Chettyar nor Kailasam had been questioned in this matter. Moreover, even if the demands for payment was made, it will not absolve the defendant-respondents from establishing that Veerappa Chettyar came within the provisions of section 189 of the Contract Act in accepting the repayment of the debt due on the promissory note executed on the 2nd August, 1939. The third endorsement made on the reverse of the promissory note also shows that a sum of Rs. 1,000 was repaid as interest on the 1st April, 1944, and no apprehension about the promissory note being time-barred could have arisen at the time the repayment of Rs. 11,000 was received from P.S.A.V. Pichan on the 1st September, 1944.

The appeal will, for the reasons already stated, be allowed ; and the judgment and decree passed in Civil Regular No. 90 of 1947, will be set aside, and there will be a decree for the payment of Rs. 13,000 by the defendants-respondents to the plaintiff-appellant firm with interest at 6 per centum per annum from the date of decree until date of realisation, with costs in both Courts.

APPELLATE CIVIL.

U Tun Byu, Chief Justice, and U Aung Khine, J.

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Jan. 15.

AHMED MURAD (APPELLANT)

v.

M.A.L. CHETTYAR FIRM (RESPONDENTS).*

Code of Civil Procedure, Order 22, Rule 12—Notices under—Defect which goes to the root of jurisdiction—Evidence Act, s. 114—Presumption as to regularity of official act—When arises.

On the 28th November 1929 Respondent obtained a decree in the High Court of Judicature at Rangoon against H. M. A. Rahim who died. On the 9th July 1941 the decree-holder applied for execution and the records were lost during the war. In 1947 the decree-holder applied for reconstruction of Civil Execution No. 175 of 1941 said to be pending at the date of evacuation and reconstruction was ordered. After reconstruction and permission to execute the decree had been obtained the decree-holder applied for sale of the property.

Held: The application for execution of the decree having been filed in 1941, within 12 years was in time, under Article 183 of the Limitation Act. The only question that arose was whether notices to the judgment-debtors must be held to have been issued as required under Order 22, Rule 12 of the Code of Civil Procedure. Such a notice is essential to give jurisdiction to the Court to order execution.

Shyam Mandal v. *Satinath Banerjee*, (1917) 44 Cal. 954 at 961; *Raghunath Das* v. *Sundar Das Khetri*, (1914) 42 Cal. 72; *Gopal Chunder* v. *Gunamani Dasi*, (1892) 20 Cal. 370; *Sahdeo Pandey* v. *Ghasiram*, (1893) 21 Cal. 19; *Parashram* v. *Balmukund*, (1908) 32 Bom. 572, referred to.

There is nothing in the record to show that such notices had been issued. The issue of such notices cannot be presumed having regard to s. 114 of Evidence Act. It is for the person who alleges that the liability has been incurred to prove that the conditions prescribed in the Act had been actually done. There is no presumption in law that any particular act had been done.

Narendra Lal Khan v. *Jogi Hari*, (1905) 32 Cal. 1107 at 1121; *Walvekar* v. *Emperor*, (1926) 53 Cal. 718 at 728; *Ashanullah* v. *Trilochan Bagchi*, (1886) 13 Cal. 197, referred to.

Tun Sein for the appellant.

G. Horrocks for the respondents.

* Civil Misc. Appeal No. 4 of 1951 against the order of the Original Side, High Court, Rangoon in Civil Execution No. 25 of 1950, dated 17th January 1951.

The judgment of the Court was delivered by

U TUN BYU, C.J.—A decree was passed, on the 28th November, 1929, in favour of the respondent M.A.L. Chettyar Firm against Haroon Nissa Bibi and Hajee Munshi Abdul Rahim in Civil Regular No. 639 of 1928 of the High Court of Judicature at Rangoon. Hafiz Bibi, Mohamed Murad and Ahmed Murad were the legal representatives of Hajee Munshi Abdul Rahim who died subsequently. It is said that Haroon Nissa Bibi, Hafiz Bibi and Mohamed Murad are also dead now, but this fact is of no importance, so far as the present appeal is concerned, in view of the provisions of Order 22, Rule 12, of the Code of Civil Procedure.

On the 9th July, 1941, M.A.L. Chettyar Firm applied in the High Court of Judicature at Rangoon for execution of the aforesaid decree in Civil Execution No. 175 of 1941, and the records of the original suit as well as those of the Civil Execution proceedings were subsequently lost, due to circumstances arising out of the last Great War. M.A.L. Chettyar Firm applied, later on, in Civil Miscellaneous No. 218 of 1947 for the reconstruction of the relevant portions of the records of Civil Execution No. 175 of 1941, which it was said was still pending at the date of the evacuation of Burma in 1942; and an order, allowing the reconstruction, was passed on or about the 7th March, 1949.

M.A.L. Chettyar Firm also applied for and obtained permission in Civil Miscellaneous No. 92 of 1949, under The Liabilities (War-Time Adjustment) Act, 1947, to execute the decree they obtained in Civil Regular No. 639 of 1928. This permission was granted on 12th December, 1949; and on the 10th February, 1950, M.A.L. Chettyar Firm applied for the sale of the property, which was said to have been attached in

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Civil Execution No. 175 of 1941. Paragraphs 1 and 5 of their application show that it was not a new application but that it was an application requesting the Court to continue to proceed with the old execution proceedings of 1941. The fresh proceedings, known as Civil Execution No. 25 of 1950, must in the circumstances be considered to be a continuation of the old Civil Execution No. 175 of 1941.

The application for execution of the decree in Civil Regular No. 639 of 1928, having been filed in 1941, was clearly filed within 12 years of the date on which the decree was granted ; and it must accordingly be considered to have been made within time, as prescribed in Article 183 of the First Schedule to the Limitation Act. We must say at once that we are unable to appreciate how the question of "revivor" arises in the present appeal, in view of the fact that Civil Execution No. 175 of 1941 was the first and the only application which M.A.L. Chettyar Firm filed for execution of the decree passed in their favour, and when it is clear from the wording of the application, which M.A.L. Chettyar Firm filed on the 10th February, 1950, that what was being done was merely to request the Court to continue with the old execution proceedings of 1941.

It is not disputed that the application for execution which was filed in 1941 was made more than 3 years afterwards, and that, in the circumstances, the provisions of Order 21, Rule 22 of the Code of Civil Procedure apply. It was observed in *Shyam Mandal* v. *Satinath Banerjee* (1) :

" It was pointed out by the Judicial Committee in *Raghunath Das* v. *Sundar Das Khetri* (2) that the notice prescribed by section 248 of the Code of 1882 (now replaced by

(1) (1917) 44 Cal. 954 at 961. (2) (1914) 42 Cal. 72.

Order 21, Rule 22) is necessary in order that the Court should obtain jurisdiction to proceed against the property of the judgment-debtor by way of execution. The omission to give notice, as required by the rule, is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding and renders it void for want of jurisdiction : *Gopal Chunder* v. *Gunamani Dasi* (1), *Sahdeo Pandey* v. *Ghasiram* (2), *Parashram* v. *Balmukund* (3)."

It becomes necessary to consider whether it could, in the case now under appeal, be said that the notices to the judgment-debtors were or must have been issued, as required under Order 21, Rule 22. Paragraph 3 of the affidavit of N.V.E.N. Narayanan Chettyar, an attorney of M.A.L. Chettyar Firm, dated 20th December, 1948, shows that a sum of Rs. 2 had been incurred as stamp fees for the application for execution, and that an additional sum of Rs. 5 was also incurred for attachment of the property mentioned in the application for execution in Civil Execution No. 175 of 1941. An extract from an account book of the Chettyar Firm had also been filed, and it was to the same effect. We are, however, unable to see anything in any of the records, which are now before us, which will indicate that a fee for the issue of notices to the judgment-debtors, as required under Order 21, Rule 22, had been paid into Court; nor has the attorney or the clerk of the Chettyar Firm made any statement to that effect. There is also nothing in any of the records to show that the notices had been issued by the Court to the process-server. Thus, nothing has been brought out to enable the provisions of section 114 of the Evidence Act to operate in the present case. It will not be really correct to presume that the notices must have been issued upon the judgment-debtors

(1) (1892) 20 Cal. 370. (2) (1893) 21 Cal. 19.
(3) (1908) 32 Bom. 572.

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unless at least there is something to prove that the stamp fee required for the issue of the notices to the judgment-debtors had been paid into Court, or that notices had in fact been prepared or issued by the Court to a process-server for service on the judgment-debtors. It will also not be safe or proper to assume that a well-known firm of lawyers must have followed the procedure prescribed in Order 21, Rule 22, of the Code of Civil Procedure, to enable the attachment to be issued in accordance with law ; and in any case we do not consider that there is proper material before the Court on which it might reasonably be presumed that the notices required under Order 21, Rule 22, must have been issued by the Court. We cannot conceive how a Court can properly presume that the notices required under Order 21, Rule 22 must have been served on the judgment-debtors in the absence at least of something to indicate that steps had, in fact, been taken for the issue of such notices to the judgment-debtors. Woodroffe J., stated in *Narendra Lal Khan* v. *Jogi Hari* (1), in connection with clause (*c*) of section 114 of the Evidence Act, as follows :

" The meaning however of that provision is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential for a plaintiff's case."

Ghose J., in *Walvekar* v. *Emperor* (2), had also observed :

"The meaning of that provision is that if an official act is proved to have been done, it will be presumed to have been regularly done. In other words, as had been laid down by Mr. Justice Mitter, where, under an Act, certain things are required to be done before any liability attaches to any person in respect of any right

(1) (1905) 32 Cal. 1107 at 1121. (2) (1926) 53 Cal. 718 at 728.

or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done—see *Ashanullah* v. *Trilochan Bagchi* (1). There are various other authorities to this effect, and in my opinion unless the law expressly says that no proof shall be required, evidence ought to be required in every case of this description that the essential preliminaries precedent to the issue of such a warrant have been complied with."

The above observation was made in connection with the provisions of section 46 of the Calcutta Police Act, but the principle expressed therein applies appropriately to the presumption which is sought to be raised in the case now under appeal on behalf of M.A.L. Chettyar Firm. It must accordingly be held that there is no material in this case on which it could properly be assumed that notices must have been issued or served on the judgment-debtors in the case now under appeal, as required under the provisions of Order 21, Rule 22, of the Code of Civil Procedure.

There is also not sufficient material on the records on which we can reasonably conclude that Civil Execution No. 175 of 1941 of the High Court of Judicature at Rangoon was, or must have been, pending at the time of the evacuation of Burma early in 1942. It is true that Narayanan Chettyar has stated in his affidavit that the execution proceedings were still pending at the time of the British evacuation of Burma, but we do not think it will be safe to act on this statement in the circumstances of the present case. He does not mention in which month the order to keep the execution proceeding pending was passed. His affidavit does not disclose what had exactly been done after the application for execution was filed on the 9th July, 1941, nor is there anything on the record to

(1) (1886) 13 Cal. 197.

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indicate what exactly the attorney or clerk of M.A.L. Chettyar Firm did, from time to time, after the execution application was filed. There was no mention anywhere in the affidavit, which had been filed on behalf of M.A.L. Chettyar Firm, of any expense having been incurred for making searches in the relevant registers for the purpose of having the sale proclamation prepared. The offices of the High Court were functioning for about 6 months, if not more, after the execution application was filed on the 9th July, 1941, and if the application for execution had been attended to regularly, we would have expected either the attorney or clerk of M.A.L. Chettyar Firm to give a more detailed account of what took place after the execution proceedings were instituted, particularly when the point of limitation had been raised in the affidavit of Athurunissa Begum, dated 10th October, 1949. It was contended on behalf of M.A.L. Chettyar Firm that paragraph 5 of the Statement of Facts filed in the Memorandum of Appeal shows that the appellant had, in paragraph 5 thereof, admitted that the execution proceedings were still pending at the time of the evacuation in 1942. The learned Advocate who appeared on behalf of the appellant, however, submitted that paragraph 5 of the Statement of Facts in the Memorandum of Appeal ought to be read with paragraphs 5, 6 and 7 of the Grounds of Appeal, and if that were done, it would be clear that what he meant in paragraph 5 was that the execution proceedings were alleged to be pending at the time of the evacuation, and no more. We accept the explanation of the learned Advocate appearing for the appellant in this respect, and we hold that paragraph 5 of the Statement of Facts in the Memorandum of Appeal did not purport to be an admission that the execution proceedings were in fact pending at the time of the evacuation.

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For the reasons which we have stated above, we also hold that there is not sufficient and reliable material on which the Court might properly conclude that Civil Execution No. 175 of 1941 was still pending in Court at the time of the British evacuation of Burma early in 1942. This appeal must be allowed, with costs, Advocate's fees five gold mohurs. The order of the learned Judge on the Original Side dated 17th January, 1951, is therefore set aside, while the order of the Deputy Registrar, dismissing the application of M.A.L. Chettyar Firm, dated 10th February, 1950, is restored. The appellant will be entitled also to costs, as Advocate's fees three gold mohurs in the hearing before the learned Judge on the Original Side.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

H.C. 1951 — *Jan. 23.*

THE MOOLLA HASHIM FAMILY ENDOWMENT WAQF ESTATE (APPELLANTS)

v.

M. E. DAWOODJEE AND OTHERS (RESPONDENTS).*

Order for costs in decree—Decree not appealed against—Whether such order can be challenged in execution—Scheme suit—Decree for costs in favour of various plaintiffs—High Court Taxation Rules, Rule 19.

Held: It is possible that various plaintiffs in a scheme suit might have difference in minor aspects of the case though they might agree as to the necessity of removal of trustees. There could also be differences as to who should be appointed new trustees and as to the particular scheme necessary. Consequently it is possible in exceptional cases to provide separate sets of costs for advocates appearing for different plaintiffs in such a suit.

The Taxing Master was bound to follow the directions contained in the judgment which is final.

In the Rules of the High Court Taxation Rules, Rule 19, there is a direction to issue notice to the "opposite party". It refers to a notice to a party in the suit or proceedings in which the costs were awarded and not to the new Trustees appointed later. The new Trustees did in fact appear before the Taxing Master and cannot be said to be prejudiced by non-issue of notices.

The order which embodies the decree as to costs is the final judgment in the original case. No appeal having been instituted against such judgment it was not competent to present objections to the separate award of costs in favour of various plaintiffs in proceedings before the Taxing Master who is bound to follow the decree.

P. B. Sen for the appellants.

M. M. Rafi for the respondent 1.

K. R. Venkatram for the respondents 4 and 5.

U TUN BYU, C.J.—Ibrahim Mohamed Seedat and Hashim Mohamed Kanamiya instituted a suit known as Civil Regular No. 619 of 1933 of the High Court of

* Civil Misc. Appeal No. 11 of 1951 against the order of the Original Side, High Court, Rangoon, in Bill No. 4 of 1950, dated 9th February 1951 arising out of Civil Regular No. 619 of 1933.

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Judicature at Rangoon, for the removal of the Trustees and for accounts, and also for the framing of a new Trust Scheme for the Moolla Hashim Family Endowment Trust. Hashim Mohamed Kanamiya, the 2nd plaintiff, died afterwards; and Moolla Azim Moolla Dawood, who was the 8th defendant in the above suit, was transposed and brought in as the 2nd plaintiff in the said suit. The 3rd defendant Moolla Ahmed Moolla Dawood was an old Trustee of the aforesaid Trust. It is said that some of the defendants were added in the said suit only after the suit was instituted. A preliminary order for accounts was passed, and the Official Referee subsequently submitted his report thereon. All this took place before the last Great War broke out. The records of the proceedings were, however, lost in circumstances arising out of the last Great War; and the records were allowed to be reconstructed subsequently with the available material.

On the 8th April, 1950, the learned Judge on the Original Side approved of the amended scheme, and he formally removed the 3rd defendant Moolla Ahmed Moolla Dawood from the Trusteeship, and appointed the three appellants as new Trustees under the new amended scheme. The last paragraph of his judgment reads:

> "The parties will bear their own costs. The costs of the Advocates appearing in this suit will be taxed and will come out of the estate. The Advocates will file their bills before the Taxing Master. The Official Receiver, before paying out the money in his hands to the Trustees, will keep in his hands a sufficient sum of money to meet the Advocates' fees."

The Advocates, who are the respondents in the present appeal, subsequently lodged their bills of costs with the Taxing Master although at different times. On the 24th July, 1950, the three new Trustees appeared before the Taxing Master, and they were permitted to

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file their objections, which they did on the 7th August, 1950. On the 14th December, 1950, the Taxing Master passed his order on the objections raised therein. The matter was next brought before the learned Judge who delivered the judgment, dated 8th April, 1950, whereby costs were awarded to the Advocates appearing in the case. The learned Judge upheld the decision of the Taxing Master on the points decided by the latter. The learned Judge observed, in connection with the first point which was raised before the Taxing Master, in the following terms :—

> " As regards the first point raised before the Taxing Master, I am in no two minds about the effect of my order regarding the costs of the suit and the learned Taxing Master has correctly interpreted my intention. My intention was that the parties should not claim costs as against each other, but that their advocates should get their respective fees and costs out of the trust estate. The directions given by me should be read as a whole and not piecemeal."

We entirely agree with the interpretation placed by the learned Judge, and it is, in our opinion, correct. We have carefully perused the wording of the last paragraph of the judgment delivered on the 8th April, 1950, and it is clearly, and reasonably, capable of the construction which the learned Judge expressed in his order, dated 9th February, 1951.

It was next submitted on behalf of the appellant-Trustees that the learned Judge acted against a fundamental principle of justice when he awarded separate costs to the Advocates who appeared for the plaintiffs in Civil Regular No. 619 of 1933. There is, in our opinion, no substance in this contention. In the case now under appeal, Moolla Azim Moolla Dawood was originally a defendant ; and he was subsequently transposed and brought forward as 2nd plaintiff in the

suit after the death of the original 2nd plaintiff Hashim Mohamed Kanamiya. It is, therefore, not impossible in the circumstances for Moolla Azim Moolla Dawood to have differed in certain minor aspects of the case from the 1st plaintiff Ibrahim Mohamed Seedat, although they agreed on the main issues, namely, that it was necessary that the old Trustees should be removed and new Trustees to be appointed, that the accounts of the Trust properties should be gone into, and that an amended scheme should be framed. It is possible for Moolla Azim Moolla Dawood and Ibrahim Mohamed Seedat, in the circumstances, to have differed as to who should be appointed as new Trustees and in some of the details in which the old scheme should be amended. We are, therefore, unable to subscribe to the suggestion made on behalf of the appellant-Trustees that it was not possible, in any circumstances whatsoever for the plaintiffs in a case instituted under section 92 of the Code of Civil Procedure, to be properly represented by separate Advocates. It appears to us that it is possible, in exceptional circumstances, to award separate costs for Advocates appearing for the different plaintiffs.

The learned trial Judge had obviously exercised his discretion when he awarded costs to the different Advocates who appeared in the case, and no appeal had been instituted against the judgment in which the costs were awarded. The Taxing Master was, therefore, bound in law to follow the direction contained in the judgment, which had become final. We cannot conceive how he could act otherwise. The appellant-Trustees could not accordingly question the legality or correctness of the judgment of the learned trial Judge in the proceedings before the Taxing Master. The costs awarded to the Advocates must, in the circumstances of the case, be considered to be good and valid.

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It was also urged on behalf of the appellant-Trustees that the proceedings before the Taxing Master should be considered as invalid on the ground that the Taxing Master had not issued any notice to the new Trustees who were interested in seeing that no loss or waste was incurred unnecessarily by the Trust Estate. Rule 19 of the High Court Taxation Rules prescribes for issue of notice to the "opposite party". The new Trustees were admittedly not a party to Civil Regular No. 619 of 1933, where costs were awarded to the different Advocates appearing in the case, and they could not, therefore, be properly described as the "opposite party" in so far as Civil Regular No. 619 of 1933 was concerned. The expression "the opposite party" refers clearly to a party in the suit or proceedings in which the costs were awarded.

We are also of opinion that there is no force in the contention that the Taxing Master was bound, under Rule 22 of the High Court Taxation Rules, to issue notice to the new Trustees who were not a party to the suit in which the costs were awarded. Rule 22 gives the Taxing Master a discretion, and it follows that the fact that the Taxing Master has not thought fit to issue notice to the new Trustees could not be considered to have vitiated the proceedings before him. Moreover, the new Trustees did, in fact, appear before the Taxing Master, and they were allowed to file their objections. Thus, the new Trustees could not strictly be said to have been prejudiced by the non-issue of notice to them by the Taxing Master.

A preliminary objection had, moreover, been raised on behalf of the respondents that the appeal was incompetent. The order of the learned Judge dated 9th February, 1951, which upheld the decision of the Taxing Master, was, in our opinion, not an appealable order, and neither was it a judgment. It has, however,

been argued on behalf of the appellant-Trustees that an appeal lies in that the order of the learned Judge dated 9th February, 1951, was an order awarding costs in a suit and that an important principle was involved in the case. We are unable to see any merit in this contention because it is the judgment passed on the 8th April, 1950, which awarded the costs to the different Advocates appearing in the suit, and not the order of the learned Judge passed subsequently on the 9th February, 1951, as the latter order merely upheld the decision of the Taxing Master on the law points raised before the latter on behalf of the appellant-Trustees. The question whether the Advocates who appeared for the plaintiffs in Civil Regular No. 619 of 1933 ought to be allowed separate costs, could properly arise only in an appeal against the judgment passed on the 8th April, 1950. No appeal had admittedly been instituted against the judgment dated 8th April, 1950. The appeal now before us must therefore be considered to be incompetent in that it sought, in effect, to modify the judgment passed on the 8th April, 1950, which had become final.

The appeal, is, therefore, dismissed, with costs ; Advocate's fees to be two gold mohurs for each of the respondents in this appeal.

APPELLATE CIVIL.

Before U On Pe and U San Maung, JJ.

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Jan. 2.

MAUNG TIN MAUNG I (APPELLANT)

v.

UNION OF BURMA AIRWAYS (RESPONDENTS).*

Workmen's Compensation Act, 1923—Appeal against order of compensation for injury—Basis of calculation of loss of earning capacity—Medical certificate in Commissioner's Proceedings whether evidence—S. 4 (1) (c) of the Act.

One Maung Tin Maung I sustained fracture of left shoulder girdle and 5 ribs on the left side as a result of the injury which he received and the question for decision was the compensation for loss of functional capacity. The Commissioner awarded 10 per cent as such loss, basing it on a medical certificate in the proceedings.

Held : The Medical Certificate is not admissible in evidence in the absence of the evidence of the doctor granting such certificate. Opinion expressed in the certificate is inadmissible in evidence.

Richards v. *Sanders & Sons*, Butterworth's Workmen's Compensation cases, Vol. V, p 352, referred to.

Held further : That the injury sustained is not of the nature specified in Schedule 1 and the workman was entitled to such percentage of compensation as is proportionate to the loss of the earning capacity.

Ba Kyaw for the appellant.

Choon Foung for the respondents.

U SAN MAUNG, J.—This is an appeal under section 30 of the Workmen's Compensation Act, 1923 by Maung Tin Maung I against the order of the Additional Commissioner for Workmen's Compensation, Rangoon, awarding him Rs. 336 as compensation on the basis that the injury sustained by him resulting in a permanent disablement and loss of earning capacity equivalent to 10 per cent of the loss of earning

* Civil Misc. Appeal No. 19 of 1951 against the order of the Court of Additional Commissioner for Workmen's Compensation, Rangoon in Case No. 20 of 1950, dated 29th March 1951.

capacity resulting from the permanent total disablement of his limb. The appellant in his memorandum of appeal contended that the compensation granted to him should be calculated on the basis that his loss of earning capacity was at least 75 per cent. There is now no dispute regarding the liability of the employer namely the Union of Burma Airways to pay compensation to Maung Tin Maung I. There is also no dispute regarding the fact that Maung Tin Maung I sustained fracture of left shoulder girdle and 5 ribs on the left side as a result of the injury which he received on the 26th February, 1950. As already observed the real dispute is as regards the percentage loss of functional capacity of his limb for the purpose of computing the quantum of compensation payable to him. There is in fact no real admissible evidence on record on which the Additional Commissioner for Workmen's Compensation, Rangoon, could have arrived at the finding that the percentage loss of Maung Tin Maung's earning capacity was only 10 per cent. The medical certificate signed by one Dr. Dutta filed at page 11 of Proceedings No. W.C. 20/50 of the office of the Commissioner of Workmen's Compensation, Rangoon is in fact not admissible in evidence. See *Richards* v. *Sanders & Sons* (1) where the Court of appeal held that the medical certificates admitted by the trial Judge who awarded compensation to a painter claiming compensation for a strained heart, were in fact inadmissible in evidence and that a new trial was necessary as the certificate must have influenced the mind of the trial Judge. Dr. Dutta should have been called as a witness, as it is only by examining and cross-examining him before the Commissioner for Workmen's Compensation that the latter could have arrived at correct finding as to the loss in the earning

(1) Butterworth's Workmen's Compensation Cases, Vol. V, p. 352.

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capacity of Maung Tin Maung I resulting from the injury sustained by him. The opinion expressed in the certificate alluded to above is not only inadmissible in evidence but also does not afford sufficient data upon which the Additional Commissioner for Workmen's Compensation could have formed his own opinion regarding this matter. Section 4, sub-section (*1*), Clause (*c*) of the Workmen's Compensation Act reads as follows :

" Where permanent partial disablement results from the injury—

(1) in the case of an injury specified in Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(2) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity permanently caused by the injury ; "

As the injury sustained by the appellant Maung Tin Maung I is not of the nature specified in Schedule I, he is entitled to such percentage of compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity resulting from the injury sustained by Maung Tin Maung I. For these reasons we would set aside the order of the Additional Commissioner for Workmen's Compensation awarding Rs. 336 as compensation to the appellant Maung Tin Maung I and direct a retrial on the issue regarding the percentage loss in the earning capacity of the appellant. There will be no order as to cost of this appeal.

APPELLATE CIVIL.

Before U On Pe and U San Maung, JJ.

BA BOO AND OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Jan. 25.

Penal Code, s. 122 (1)—Criminal Procedure Code, s. 196—Sanction under—How to be signed—President's Notification No. 123—Burma General Clauses Act, s. 13.

Held: If a man joins rebels he is guilty of High Treason. In rebellions it frequently happens that few are let into the real design, but yet all who join in it are guilty of rebellion.

R. v. *Purchaser,* (1839) 4 State Trials (N.S.) 93 at 94, referred to.

Where sanction of the President under s 196 of the Criminal Procedure Code issued from the Secretary to the Government was signed by another officer for him and the officer so signing was an accredited officer in whose name orders of the Government can be issued, sanction is good.

Under President's Notification No. 123, dated 4th January 1948 all orders or instruments executed for the Union Government shall be expressed to be made by the order of the President and such order or instrument can be signed by the Secretary, Additional Secretary, Deputy Secretary, Under Secretary or Assistant Secretary in the Ministry concerned.

Under s. 13 of Burma General Clauses (Amendment) Act, 1950, any powers conferred or duty imposed on the President shall be exercisable or performable in his name by the Government. As the officer who actually signed was authorised to sign for the President, the sanction in the case was therefore rightly issued.

Md. Ozirullah v. *Beni Madhab Chawdhury,* A.I.R. (1922) Cal. 298, referred to.

Kyaw Htoon for the appellants.

Choon Foung for the respondent.

U ON PE, J.—Ba Boo, Aung Shwe, San Bwint and Hpa Lin were all convicted under section 122 (1) of

* Criminal Appeals Nos. 598, 599, 600 and 601 of 1951 being appeal from the order of Special Judge of Thatôn in Criminal Regular Trial No. 11 of 1950.

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the Penal Code and sentenced to suffer death by the Special Judge, Thatôn, in his Criminal Sessions Trial No. 11 of 1950.

The facts are simple and are within a narrow compass.

The offences alleged against the appellants relate to an incident which took place at about 4 a.m. on the morning of 11th June 1950 at the village of Thayagone in Thatôn District. There was stationed at the said village, a platoon of troops known as the P.V.F. under the command of Bo Myint Aung (PW 4) and an engagement took place at the aforesaid time on the day in question between this force and the insurgents in which all the appellants were captured and two of the insurgents were shot dead. At the time of the capture, Ba Boo was armed with a sten gun which had to be snatched from his hands by Bo Myint Aung who threw a hand-grenade and shouted at him to surrender, while the rest of the appellants had no arms. However, four rifles were recovered from the creek nearby with the help of the villagers, one of whom is Maung Pyu (PW 9) who deposed to the fact that he dived for and recovered one rifle from inside the creek. The prosecution story is that the KNDOs, numbering about 50 attacked this village and that, near dawn, by way of strategy the eastern gate of the village was opened when the insurgents rushed into it, whereupon the yebaws surrounded the village resulting in the insurgents being routed to be hotly pursued by the Union Forces. From the evidence of Har Bee (PW 8), who is a Bengali and Maung Pyu (PW 9) who is a Zerbardi, it is disclosed that they lived near the said eastern gate, that the attack was hearlded by the usual war cry of the KNDOs, "Htaw Htaw" and that they saw the appellants being captured in the course of their flight from a nearby place. It is in evidence also that there

was another Government Force at Naunggalar, a place in the neighbourhood where Bo Chit Thein, Tat-khwe-hmu, (PW 10) was in command. According to him a soldier from Thayagone Village came about 4 a.m. on the day in question informing that an engagement was taking place at Thayagone, whereupon he sent his yebaws to help in the operation which lasted about half an hour after their arrival.

The case of the appellants is that they with four others came on the day in question from Thingangyaung to proceed to Thatôn to surrender their arms with San Bwint acting as guide to show the way to Thatôn, that they were fired upon by the force which the appellant Ba Boo, called "B.T.F. Personnel" who were at the gate of the village and that without making any resistance allowed themselves to be arrested. Ba Boo admits that he was then armed with the sten gun and Aung Shwe and Hpa Lin each with a rifle and that the other four companions had three rifles among them. Aung Shwe admits that he threw down the rifle into the creek. San Bwint admits that a hand-grenade was thrown at them that day, but no one was injured. It has also been contended by their counsel that the story of the insurgents being 50 in number is not borne out by the evidence in the case, in that the analysis of the evidence in the case would show that the number of the people opposed to the Government Force was eight as disclosed in the evidence of the appellants. This contention will not, in our view, help the defence case materially, for whatever may be the number, the fact established would show that the fight lasted for about two hours in which the throwing of the hand-grenade and the concealing of the rifles in the creek admittedly took place—circumstances which would strongly discredit the defence story. Moreover, the appellants did not say a word on the spot that they

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came to surrender and their act in throwing the guns into the creek must be said to have been done with an intention which was consistent only with their guilt. On the evidence before us, we must hold that the appellants were there at the scene of fighting and engaged in a skirmish in which they had been overpowered. The story of their being on the spot to surrender will find its own refutation, in that the time and the spot where they were found and their number, assuming it only to be eight, would hardly support such a story. In any event, the fact remains, on their own showing, that they belonged, at the time material to the case, to the rank of the insurgents. They have made no secret that they were in the same camp with the insurgents. Ba Boo says this :

"When insurgents left Papun they forcibly took me along and so I have to go along with them."

Aung Shwe says :

"Over a year ago our village was in the hands of insurgents. The insurgents before they left forced me to come along with them and so I had to go along."

Hpa Lin says this :

"About a year ago when Papun was under insurgents, they forced me to join them as a coolie. I had to come along with them to Bilin and from thence to Thitchadaung."

San Bwint says this :

"Whilst I was then staying at Danu insurgents entered soon after and caught hold of me, beat me which resulted in fracture of my hands and I was then treated at their hospital. . . . I was kept with them and asked to cook food for them."

The principle as to how the guilt of high treason as contemplated under section 122 (1) of the Penal Code

is to be fixed is well established, what has been laid down in *R.* v. *Purchaser* (1) may aptly be quoted :

"We are of opinion that if a man knowingly join with others in breaking the peace, and actually fights the guards in their defence ; if in that breach of the peace they were rebels, he is so too, whether he knew them to be so or not.

In rebellions it is frequent that few are let into the real design, but yet all that join in it are guilty of the rebellion."

In this view of the case, we must hold that the prosecution has established its case in proving that the appellants participated in the attack by insurgents against the Union Force and thereby committed high treason.

A point of some nicety has been raised in this case regarding the sanction required by section 196 of the Criminal Procedure Code and conveyed in the letter Exhibit A, the contention being that the same has not been duly proved. The letter Exhibit A is a copy of letter with this letter head :

"FROM

Thray Sithu U CHAN THA,
Secretary to Union Government,
Ministry of Home Affairs."

and is signed by one "Mya Khin for Secretary" and the relevant passage accompanying the sanction reads as follows:

"I am directed to convey the sanction of the President under section 196 of the Criminal Procedure Code and etc."

This letter has been challenged on the ground that the signature is not that of the Secretary and there is nothing to show in what capacity the signatory, U Mya Khin, signed and that as the same does not

(1) (1839) 4 State Trials (N.S.) at pp. 93. 94.

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purport to have been signed or certified by the head of the department, it could not attract the presumption arising under section 79 of the Evidence Act. The case of *Md. Oziullah* v. *Beni Madhab Chawdhury* (1) has in support of their contention been quoted. In that case it has been held as follows:

"A copy of a letter of sanction, headed from the Chief Secretary to the Government of Bengal and signed by an officer for the Chief Secretary cannot be regarded as a certified copy under section 76 of the Evidence Act nor can it attract the presumption under section 79 of the Act, as it does not purport to have been signed or certified by the head of the department."

It has been argued that in the present case, too, there is nothing to show in what official capacity U Mya Khin signed the letter and that therefore the exhibit letter conveying the sanction could not be said to have been issued by proper authority. There is some substance in this contention and the omission to describe the official capacity in which U Mya Khin signed the letter has unnecessarily given rise to the objection raised on the point. Had he signed Exhibit A in his official capacity, the objection could not have been raised, for he was one of the accredited officers in whose name orders of the Government can be issued. See the order issued by the President by Notification No. 123, dated the 4th January, 1948, which reads :

"No. 123. The following order is published for general information :—

ORDER No. 1 OF 1948.

1. Sao Shwe Thaike, President of the Union of Burma, in exercise of the powers conferred by section 121 of the Constitution of the Union of Burma, make the following rules for the

(1) A.I.R. (1922) Cal. p. 298.

authentication of orders and other instruments made and executed in the name of the President :—

(1) All orders or instruments made or executed by order or on behalf of the Union Government shall be expressed to be made by or by order of the President.

(2) Save in cases where an officer has been specially empowered to sign an order or instrument of the Union Government, every such order or instrument shall be signed by either the Secretary, the Additional Secretary, the Deputy Secretary, the Under Secretary or the Assistant Secretary to the Union Government in the Ministry concerned and such signatures shall be deemed to be the proper authentication of such order or instrument.

SAO SHWE THAIKE,
President."

The next point raised against Exhibit A letter is that as the sanction was issued by the President, this letter should have been signed by someone authorised for the President and not by Secretary to the Union Government. The answer to this objection is to be found in section 13 of the Burma General Clauses (Amendment) Act, 1950, which reads as follows :

" Where, by an Act of the Parliament or any existing law as defined in section 222 of the Constitution, any power is conferred, or any duty imposed, on the President of the Union, then that power shall be exercisable, or that duty shall be performable, in his name by the Government."

The order conveying the sanction of the President in this case must be held, in the light of this provision of law, to have been rightly issued by the Secretary to the Government.

In the result these appeals fail and are accordingly dismissed. Death sentences passed on them are therefore confirmed. Before we leave this case, we feel that we should bring to the notice of the authorities concerned that in this case there are circumstances

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which call for sympathetic consideration in favour of all the appellants. Although we have passed the sentence of death, there being no other alternative sentence under the law, we cannot shut our eyes to the redeeming features in this case, namely, the fact that the appellants had been pressed into their service by the insurgents about which we are not in doubt and the fact that nothing in the way of damage or casualty was caused by their action at their encounter with the Government forces.

U SAN MAUNG, J.—I agree.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

PADUWAR (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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Dec. 13.

Penal Code, s. 304—Penal Code (Amendment) Act, 1947 (Act XXXIII of 1947)—Effect of amendment.

Ss. 302 and 304 of the Penal Code have been amended by the Penal Code (Amendment) Act, 1947.

Held: Culpable homicide, as now amended, also includes the doing of an act "with the intention of causing bodily injury as in fact is sufficient in the ordinary course of nature to cause death". Where such an injury is in fact sufficient as mentioned above and does cause death, the offence would be one of murder unless it falls under the exceptions mentioned in s. 299.

The ruling in *Baba Naya*'s case (reported in 5 Ran. 817) is thus no longer applicable to cases where death has in fact ensued from an injury which is proved to have been sufficient in the ordinary course of nature to cause death.

Baba Naya v. *King Emperor*, 5 Ran. 817, not applicable.

Khin Maung for the respondent.

U THAUNG SEIN, J.—The appellant Paduwar has been convicted by the learned Sessions Judge, Maubin, (U Ba Swe), of an offence under section 304 of the Penal Code and ordered to be detained at the Borstal School for a period of four years on the following facts :—

On the morning of the 23rd December, 1950, the appellant and one Maung Hla Gyaw were busy carting paddy sheaves from the fields to the *talin* outside the village of Wadaw in Maubin District. It appears that the appellant left his fully laden cart near the *talin* and unyoked the bullocks to give them a rest. Meanwhile the cart driven by Maung Hla Gyaw arrived at the *talin*

* Criminal Appeal No. 503 of 1951 against the order of the Sessions Judge, Maubin, dated 29th August 1951 in Special Judge Trial No. 5 of 1951.

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U THAUNG SEIN, J.

and dashed into the stationary cart. The bullocks attached to Maung Hla Gyaw's cart were somewhat unmanageable and so great was the impact that the appellant's cart rolled over to its side and was badly damaged. Needless to say, the appellant was annoyed with the accident and a dispute ensued between him and Hla Gyaw. Several persons, who were at the scene, were drawn into the dispute and amongst them was one Maung Than Maung (PW 1), the brother of the deceased Hla Maung, who apparently sided with Hla Gyaw. From thence the appellant and Maung Than Maung came into the village and the quarrel continued at that place. Maung Than Maung was joined by his brother, the deceased Hla Maung, who came along the village path armed with a rifle. As far as can be gathered from the evidence on record the deceased Hla Maung advanced towards the appellant, who was coming from an opposite direction and shortly before they met the latter, picked up a stick which was lying by the road side. As soon as they came within striking distance of each other the appellant attacked the deceased Hla Maung with the stick while the latter struck back with the butt end of his rifle It is not clear from the evidence on record whether the deceased attempted to fire at the appellant but some of the witnesses deposed to having heard sounds which suggested that the bolt of the rifle was manipulated. The learned trial Judge has, however, disbelieved these witnesses and I would accept his appraisal of their evidence. As pointed out by him there was "hard swearing on both sides" and the trial Judge, who saw and heard the witnesses, is always in a better position than the appellate Court to gauge the veracity of witnesses.

To continue with the sequence of events the fight between the appellant and the deceased ended when

the latter fell on the ground and the former fled from the scene. Many persons went to the assistance of the deceased and found him lying unconscious with two wounds on the face and head and there was profuse bleeding from the nose. He was rushed to the Maubin Hospital but died on the way without regaining consciousness. A post-mortem revealed a wound $1\frac{1}{2}'' \times \frac{1}{4}''$ on the head with a fracture of the skull and death was the direct result of this injury which has been described by Dr. Sarwan Singh (PW 14) as sufficient in the ordinary course of nature to cause death. There was one other injury over the left eye which was apparently caused by the fall on the ground. That the fatal injury was caused by the appellant is beyond all reasonable doubt. The question that arises is what offence has the appellant committed by causing the death of Hla Maung. The learned trial Judge referred to the ruling in *Baba Naya* v. *King-Emperor* (1) which lays down as follows:

"If one person causes the death of another, then if his intention was to cause death or to cause bodily injury sufficient in the ordinary course of nature to cause death, the offence would be murder, even though death resulted in a way different from that expected by the assailant. As to the intention to be presumed in cases of blows on the head with a stick, instinct at least, if not knowledge and experience, tells every man that to hit another human being any violent blow on the head may possibly result or is likely to result or will probably result in serious injury to the person struck, but knowledge, belief or expectation of the amount of injury that may be caused must depend upon what is used in inflicting the blow and the force with which the blow is delivered. Repeated blows or even a single blow forcibly delivered with a heavy weapon would make the offence a murder, but where a sudden blow is struck with a stick that is not heavy, the offence would be culpable homicide not amounting to murder."

(1) 5 Ran. 817.

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This was a ruling under sections 302 and 304 of the Penal Code as they stood prior to the amendment by the Penal Code (Amendment) Act, 1947, (Burma Act No. XXXIII of 1947). Before the amendment section 299 of the Penal Code defines culpable homicide as follows:

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

Culpable homicide was held to be murder "if the act by which the death is caused is done with the intention of causing death" or with the intention of causing such bodily injury as which is sufficient in the ordinary course of nature to cause death provided the act did not fall within any of the exceptions in section 300 of the Penal Code. In other words, in order to bring home a charge of murder under section 302 of the Penal Code it was essential to prove that the accused intended to cause the death of the deceased or to inflict an injury sufficient in the ordinary course of nature to cause death. As pointed in *Baba Naya*'s case (1) where only one blow is struck on the head with an ordinary stick it is difficult to impute to the accused the intention to cause an injury "sufficient in the ordinary course of nature to cause death." But with the amendment of sections 299 and 300 of the Penal Code the old definitions of culpable homicide have been replaced by the following:

"299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as in fact is sufficient in the ordinary course of

(1) 5 Ran. 817.

nature to cause death, commits the offence of culpable homicide not amounting to murder in any of the following cases.

300. Whoever, in the absence of any circumstance which makes the act one of culpable homicide not amounting to murder, causes death by doing an act with the intention of causing death, or with the intention of causing bodily injury as in fact is sufficient in the ordinary course of nature to cause death, commits the offence of murder."

The introduction of the words "with the intention of causing bodily injury as in fact is sufficient in the ordinary course of nature to cause death" in the definition of culpable homicide is significant, and where any injury is in fact sufficient in the ordinary course of nature to cause death and does cause the death of the deceased, the offence would be one of murder unless it falls within the exceptions enumerated in section 299 of the Penal Code. The ruling in *Baba Naya*'s case (1) is thus no longer applicable to cases where death has in fact ensued from an injury which is proved to have been sufficient in the ordinary course of nature to cause death.

In the case now under consideration the appellant would certainly have been guilty of murder but for the fact that the death of Hla Maung occurred during the heat of a sudden quarrel. There can be little doubt that both the appellant and the deceased were in a quarrelsome mood and that they exchanged blows freely during a sudden fight. In other words, the case falls within Exception (D) to section 299 of the Penal Code and hence the appellant was rightly convicted under section 304 of the Penal Code. The appellant has been found to be 18 years of age by the learned trial Judge and the order sending him to the Borstal School was appropriate. The appeal is dismissed.

(1) 5 Ran. 817.

APPELLATE CIVIL.

Before U Si Bu, J.

H.C. 1951

Dec. 24

KO SAN BWINT AND ANOTHER (APPELLANTS)

v.

AH HEIN (RESPONDENT).*

Transfer of Property Act, s. 54—Oral sale for Rs. 75—Whether proof of sale admissible.

Held : S. 54 of the Transfer of Property Act enacts that immoveable property of the value of less than Rs. 100 may be transferred either by registered instrument or by delivery of the property. As the sale deed in this case was unregistered, no evidence can be given to prove its contents.

Held further : There is sufficient evidence to establish the fact of delivery of possession given, which had its inception in a sale.

Daw Yin v. *U Sein Kyi and others*, 1st Appeal No. 56 of 1949 ; *Ma Tin Nyunt* v. *Ma Kyi Kyi and others*, (1950) B.L.R. 33, distinguished.

Tribhovan Hargowan v. *Shankar Desai*, (1943) Bom. 431 ; *Gunga Narain Gope* v. *Bali Ghurn Goala*, I.L.R. 22 Cal. 179 ; *Mohammed Yaqoob Ally* v. *Chhotey Lal*, A.I.R. (1939) Pat. 218 ; *Keshwar* v. *Sheonandan*, A.I.R. (1929) Pat. 620 ; *Dava Ram* v. *Sita Ram and others*, A.I.R. (1925) All. 206 ; *Dharameshwar Sarma* v. *Lakhvadhar Borgohain*, A.I.R. (1950) Assam 107 ; *Kuppuswamy Goundan* v. *Chinnaswami Goundan*, A.I.R. (1928) Mad. 546, referred to.

Kyaw Htoon for the appellants.

Ba Shun for the respondent.

U SI BU, J.—This is a suit for possession of a piece of land of a value of less than Rs. 100 and to recover Rs. 180 as mesne profits.

The plaintiff-respondent's case is that he purchased the suit land for Rs. 75 some twenty years ago and obtained delivery of the property ; and an unregistered deed of sale was executed, but as it is lost it cannot now be produced ; after purchase, he erected a fence round the land and made it over to his nephew

* Civil 2nd Appeal No. 67 of 1951 against the decree of the District Court of Meiktila in Civil Appeal No. 5 of 1951, dated 11th July 1951.

Ton Sha for the purpose of breeding pigs, etc. ; on the eve of the Japanese occupation of this country, he left for China leaving the land in charge of Headman U Po Naing ; presumably, his nephew too left the land soon afterwards ; on his return to Burma, he found the land in the possession of the defendants and hence the suit.

The case of the appellants-defendants is that they purchased the land from the respondent's nephew Ton Sha some 17 years ago and that in any case, they have acquired title by adverse possession.

Both the Courts below have disbelieved the case of the appellants and have held that they are mere trespassers. The trial Court has decreed the suit and the District Court has, on appeal, confirmed it.

The principal ground of appeal before me is that the deed of sale being unregistered, proof of sale was not admissible even though the land was of a value less than Rs. 100.

Section 54 of the Transfer of Property Act says that the transfer of immoveable property of a value less than Rs. 100 may be made either by a registered instrument or by delivery of the property. As the deed of sale was unregistered, no evidence can be given to prove its contents and so, the only question for determination is whether there was delivery of the land by the seller to the respondent and whether such delivery can be traced to a sale.

In his plaint, the respondent has pleaded that there was delivery and both the Courts below have found in his favour on that point.

The learned Advocate for the appellants has referred me to two cases of this Court *Daw Yin* v. *U Sein Kyi and others* (1) and *Ma Tin Nyunt* v. *Ma Kyi Kyi and others* (2).

(1) 1st Appeal No. 56 of 1949. (2) (1950) B.L.R. p. 33.

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U SI BU, J.

Neither of these cases affects the present appeal, as the facts on which they were based were different from the facts before me. In so far as the first one is concerned, I cannot do better than quote a relevant sentence from it.

"She never suggested in her pleading, at the time of settlement of issues or in the course of her evidence, that the sale was by delivery of possession."

Therefore, the plaintiff clearly based her claim on a sale by a document. There was not even a suggestion as to delivery of possession and since the deed was not admissible, there was nothing else to establish the sale.

In the second case too, there was no reference to possession having been given. But, in the present case, there is a statement in the plaint as to delivery of possession—although there is also a reference to an unregistered instrument and what is more, the Courts below have found in respondent's favour on this point.

In the case of *Daw Yin* v. *U Sein Kyi and others* (1), reference has been made to—*Tribhovan Hargowan* v. *Shankar Desai* (2), therein, it was held :

"Merely because there is an unregistered sale deed which cannot be used for proving the title to a property of value of less than Rs. 100 the vendee is not precluded from proving the sale by the delivery of the property."

Similar views have been expressed by the High Courts of Calcutta, Patna, Allahabad and Assam. (Please see *Gunga Narain Gope* v. *Balt Ghurn Goala* (3), *Mohammed Yaqoob Ally* v. *Chhotey Lal* (4), *Keshwar* v. *Sheonandan* (5),

(1) 1st Appeal No. 56 of 1949.
(2) (1943) Bom. 431.
(3) I.L.R. 22 Cal. 179.
(4) A.I.R. (1939) Pat. 218.
(5) A.I.R. (1929) Pat. 620.

Dava Ram v. *Sita Ram and others* (1), and *Dharameshwar Sarma* v. *Lakhvadhar Borgohain* (2).

The next question to be considered is whether there is evidence of sale. U Po Naing, *ex*-Headman who appears to have impressed the learned trial Judge says that it was he who purchased the land for the respondent. Presumably the unregistered deed between the seller and the buyer followed later. Ma Lay Bu, the daughter of the vendors says that her mother (since deceased) told her that the suit land had been sold to the respondent.

There is therefore sufficient evidence to establish the fact that delivery of possession given to the respondent had its inception in a sale and not in a mortgage or lease.

It is true that in *Daw Yin* v. *U Sein Kyi and others* (3), reference is made to the Madras case of *Kuppuswamy Goundan* v. *Chinnaswami Goundan* (4), where it was held that :—

> "The moment the parties reduce the terms to writing, it is the writing that thereafter must be regarded as containing and setting out the terms of the contract and it would not be an apt or correct description of the transaction to call it a sale by delivery of property."

But the point was left undecided because—as is stated therein—it did not arise. It is useful to mention that the Madras case was not followed in the case of *Tribhovan Hargowan* v. *Shankar Desai* (5) the learned Judge remarking—

> "With respect, I prefer the ratio decidendi of the other cases that where there is an unregistered sale deed, which cannot be used for proving the title, the party in question is not precluded from proving the sale by the delivery of the property."

(1) A.I.R. (1925) All. p. 206.
(2) A.I.R. (1950) Assam p. 107.
(3) 1st Appeal No. 56 of 1949.
(4) A.I.R. (1928) Mad. p. 546.
(5) (1943) Bom. 431.

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In the two cases of this Court cited above, there was no question of delivery and no suggestion even of delivery having been made. In the present case the plaint states it and there is a concurrent finding by the Courts below on that point. In addition, there is evidence to show that such delivery of possession is traceable to a sale.

In the result, the appeal fails and is dismissed with costs ; Advocate's fees five gold mohurs.

CIVIL REVISION.

Before U Aung Khine, J.

DAW HNIN (APPLICANT)

v.

U KYAW AND OTHERS (RESPONDENTS). *

H.C. 1952

Jan. 3.

Limitation Act, Article 178—As amended by the Third Schedule of the Arbitration Act, 1944—Commencement of the period of limitation for filing of an award.

Held: That time will begin to run from the date of service of notice of the making of the award and the period of limitation is 90 days.

P. K. Basu for the applicant.

N. R. Burjorjee for the respondent 5.

U AUNG KHINE, J.—One Daw Kyi Kyi, Burmese Buddhist, died in Mandalay leaving behind her 5 heirs namely (1) Daw Tint, (2) Daw Shwe, (3) Daw May, (4) Daw Hnin and (5) Ma Than. There was a dispute amongst the heirs and on 5th February 1948, they referred the matter to a Board of Arbitrators composed of the following namely, (1) U Kyaw, (2) U Mya Maung and (3) U Set Pe. The arbitrators made their award on 8th of March 1948. Notices were issued to the parties on 6th October 1948 and after that the arbitrators themselves made an application in the District Court of Mandalay on 8th October, 1948, together with their proceedings praying that the award made by them may be filed. Objections were raised by Daw May and Ma Than against the filing of the award pleading that the application was barred by the law of limitation. The learned District Judge accepted

* Civil Revision No. 19 of 1951 against the order of the District Court of Mandalay in Civil Misc. No. 48 of 1948, dated 16th January 1951.

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U AUNG KHINE, J.

their plea and held that under provisions of Article 178 of the Limitation Act the application made by the arbitrators was out of time. Hence this revision application in this Court. The Arbitration Act of 1899 was repealed by the Arbitration Act of 1944 and in this latter Act, Article 178, as it appeared in the law of limitation, was substituted by an amendment which appeared in the Third Schedule. In the Union of Burma (Adaptation of Laws) Order, 1948, which came into force on the date on which the constitution of the Union of Burma came into operation, section 49 of the Arbitration Act, 1944 which governed the Third Schedule and the Third Schedule itself were omitted. In view of this recent amendment made in the Arbitration Act, 1944 by the Union of Burma (Adaptation of Laws) Order, 1948, I found it necessary to refer this matter to a Full Bench of this Court for an answer as to what is now the period of limitation for filing in Court of an award in a suit made in any matter referred to arbitration by the order of the Court or of an award made in any matter referred to arbitration without the intervention of a Court. The answer to the question propounded is that the period of limitation for the purpose required is to be calculated in accordance with Article 178 of the First Schedule to the Limitation Act as amended under the Third Schedule of the Arbitration Act, 1944. For the filing in Court of an award, Article 178 had been amended and now the time will begin to run from the date of service of the notice of the making of the award, and the period is 90 days. The order of the learned District Judge must therefore be set aside. The date of service of the notices on the parties has not been established in the lower Court; the notices were issued on the 6th October 1948, and as the application to file the award was made two days later

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by the arbitrators, I presume, it will be well within time. Civil Miscellaneous No. 48 of 1948 of the District Court of Mandalay will therefore be remanded and the District Judge will now proceed to determine the application made by the arbitrators on its merits. The costs in this revision application shall be the costs in the cause. Advocate's fees three gold mohurs.

CRIMINAL REVISION.

Before U Thaung Sein, J.

H.C. 1952

Jan. 7.

THE UNION OF BURMA (APPLICANT)

v.

MA AIN KYWE (RESPONDENT).*

Opium Act, s. 9 (1) (b) and s. 9 (2)—S. 438, Criminal Procedure Code.

Held: That it is not the function of the High Court under s. 438 of the Code of Criminal Procedure to give opinions on questions of law raised during the course of proceedings in Lower Court.

Re. *Palani Gownden*, 15 C.L.J. 472; *Mir Ghawas* v. *Emperor*, 37 C.L.J. 470; In Re. *Gowleru Kotrappa and others*, 50 C.L.J. 83, referred to.

Mya Thein for the applicant.

U THAUNG SEIN, J.—The respondent Ma Ain Kywe was caught by an Excise Party while transporting 95 ticals of opium in a trishaw and on being sent up before the learned Third Additional Magistrate, Toungoo, was convicted of an offence under section 9 (*1*) (*b*) of the Opium Act and sentenced to six months' rigorous imprisonment. The learned Magistrate referred to the proviso to sub-section (2) of section 9 of the Opium Act as inserted by the Opium (Amendment) Act, 1949, (Act No. XIII of 1949) and held that the respondent Ma Ain Kywe was the owner of the opium in question and it was on this account that the imprisonment was fixed at six months' rigorous imprisonment. The respondent then appealed to the Sessions Judge, Toungoo, against the conviction and sentence. It appears that the learned Sessions Judge, is in doubt as to the legality of the sentence meted out

* Criminal Revision No. 732(A) of 1951 being review of the Order of 3rd Additional Magistrate of Toungoo, dated 29th September 1951 passed in Criminal Regular Trial No. 44 of 1951 arising out of the recommendation made by the Sessions Judge, Toungoo, in his Criminal Appeal No. 18 of 1951.

to the respondent and accordingly opened revision proceedings and submitted the case to the High Court with a recommendation that the above sentence be altered to one month's rigorous imprisonment under section 9 (*1*) (*b*) of the Opium Act and "a fresh sentence of six months' rigorous imprisonment may be imposed under the proviso" to that section. In effect, the learned Sessions Judge is seeking for interpretation of the proviso to section 9 (2) of the Opium Act. Presumably the appeal filed by the respondent is still pending and will be decided finally after the High Court has passed orders in the revision case. In other words, the learned Sessions Judge has practically transferred the appellate proceedings pending before him for decision to the High Court. I need hardly say that the provisions of section 438 of the Criminal Procedure Code were never designed to enable a Sessions Judge to get the opinion of the High Court on a point of law arising in a case pending before him or to transfer for the decision of the High Court a difficult question of law that may have arisen before him. There are several authorities which clearly lay down that a Sessions Judge cannot adopt such a course. In Re. *Palani Gownden* (1) it was laid down that "a District Magistrate is not competent to refer to a High Court, under section 438 of the Code of Criminal Procedure, a point of law actually arising in a case pending before him." Then again, in *Mir Ghawas* v. *Emperor* (2) the same view was expressed in the head-note as follows:

"Where an appeal was pending before the Sessions Judge from a conviction, and the Judge without deciding the appeal referred the case to the High Court purporting to act under section 438, Criminal Procedure Code.

(1) 15 C.L.J. 472. (2) 37 C.L.J. 470.

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U THAUNG SEIN, J.

Held: That the procedure was incorrect and that the reporting Court should decide the appeal, and if it considers that it has been unable to do substantial justice, it may then report the case on the revision side with recommendations as to suggested action which as an Appellate Court it was not able to take itself."

So also In Re. *Gowleru Kotrappa and others* (1) the Madras High Court laid down that "it is not the function of the High Court to give opinions on questions of law raised during the course of proceedings in a lower Court."

I regret therefore that I cannot assist the learned Sessions Judge in the interpretation of the proviso to section 9 (2) of the Opium Act as this is a matter which must be dealt with by him in the appellate proceedings pending before him. Let the proceedings be returned with these remarks.

(1) 50 C.L.J. 83.

CRIMINAL REVISION.

Before U Thaung Sein, J.

THE UNION OF BURMA (APPLICANT)

v.

MOHAMED ESHAQUE AND OTHERS (RESPONDENTS).*

H.C. 1952

Jan. 24.

Burma Immigration (Emergency Provisions) Act, 1947, s. 13 (1)—Summary conviction—Implications and meaning—Reference to High Court in pending appeal by District Magistrate.

Held: S. 13 (*1*) of Burma Immigration Act is couched in difficult language. "Summary conviction" used in that section is not defined in the Criminal Procedure Code. The definition given in legal dictionary is "a conviction before Magistrate without the intervention of a Jury."

Burma Immigration Act is a special Act and there is no provision therein suggesting any departure from the usual procedure prescribed by the Criminal Procedure Code for trial of cases. In the present case the Magistrate who tried it was not invested with special powers under s. 260 of the Criminal Procedure Code but he did try it as a regular case, though no charge was framed; this defect was curable under s. 537 of the Criminal Procedure Code provided there is no failure of justice.

The only interpretation to be put on the term "summary conviction" is that an offence under s. 13 (*1*) may be tried summarily. Where a Magistrate has not been invested with summary powers, he must try the case in a regular way.

King-Emperor v. *Maung Po Saw*, 13 Ran. 225, referred to.

A Magistrate is not competent to refer to the High Court under s. 438 of the Criminal Procedure Code a point of law actually arising in a case before him.

Re. *Palani Gownden*, 15 C.L.J. 472, referred to.

Mya Thein for the applicant.

U THAUNG SEIN, J.—This is revision case opened as a result of a reference by the learned Additional District Magistrate, Akyab, who has propounded the

* Criminal Revision No. 137 (B) of 1951, being review of the order of Subdivisional Magistrate of Maungdaw, dated 2nd July 1951 passed in Criminal Regular Trial No. 77 of 1951 arising out of reference made by Additional Magistrate, Akyab in Criminal Regular Revision No. 318 of 1951, dated 12th September 1951.

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THE UNION OF BURMA v. MOHAMED ESHAQUE AND OTHERS.

U THAUNG SEIN, J.

following questions for the opinion of the High Court :—

"(1) What is the correct interpretations and implications of the words 'Summary Conviction' in section 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947 ;

(2) Whether a Magistrate of first class or Subdivisional Magistrate, not empowered to act under section 260 of the Code of Criminal Procedure, can try the offence under section 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947, summarily in the procedure laid in Chapter XXII of the Code of Criminal Procedure by virtue of the word 'Summary Conviction' used in the same section ; and

(3) Whether an appeal lies in a case in which a Subdivisional Magistrate of second class passes a sentence of Rs. 100 only on summary conviction of an accused person under section 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947."

These are questions which have arisen in an appeal pending before the learned Additional District Magistrate and ordinarily no notice should have been taken of such a reference especially in view of the Ruling in Re. *Palani Gownden* (1) which lays down that "a District Magistrate is not competent to refer to the High Court, under section 438 of the Code of Criminal Procedure, a point of law actually arising in a case pending before him." However, in the present case the reference is not from the appeal proceedings itself but from a revision proceedings opened *suo motu* by the learned Additional District Magistrate. Some common points of law and fact arose in both these cases and it was on this account that the learned Additional District Magistrate chose to get an authoritative decision by the High Court before he decides the appeal pending before him.

The reason and the facts giving rise to the reference are as follows :—The five respondents, Mohamed

(1) 15 C.L.J. 472.

Eshaque, Habibulla, Shrirazal Haque, Abul Bashar, Nozir Rahman and one Nazir Ahmed, were sent up for trial before the learned Subdivisional Magistrate, Maungdaw, charged with offences under section 13 (*1*) of the Burma Immigration Act, 1947, on the allegation that they had entered Burma from Pakistan without a lawful permit or pass. The learned Subdivisional Magistrate, who is only a second class Magistrate, took cognizance of the offence in accordance with section 14 of the Burma Immigration Act and eventually convicted all the six accused and sentenced each of them to pay a fine of Rs. 100 or in default, 3 months' rigorous imprisonment. Of these six accused, only one *viz.*, Nazir Ahmed, preferred an appeal to the District Magistrate, Akyab, against his conviction and sentence. This appeal was dealt with by the learned Additional District Magistrate who found himself in a quandary as regards the interpretation of section 13 (*1*) of the Burma Immigration Act and accordingly opened revision proceedings in respect of the five accused, Mohamed Eshaque, Habibulla, Shrirazal Haque, Abul Bashar, Nozir Rahman, who had not appealed and made a reference to the High Court on the points enumerated earlier.

At the outset, I would say that I am in entire agreement with the learned Additional District Magistrate that section 13 (*1*) of the Burma Immigration Act is couched in somewhat difficult language and reads as follows :

" Whoever enters or attempts to enter the Union of Burma or whoever after legal entry remains or attempts to remain in the Union of Burma in contravention of any of the provisions of this Act or the rules made thereunder or any of the conditions set out in any permit or visa shall be liable on ***summary conviction*** to imprisonment for a term not exceeding one year or to fine or to both."

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U THAUNG SEIN, J.

The problem in this case is to find out the meaning of the term "summary conviction" occurring in that section. In this connection, I regret to note that this section does not appear to have been drafted with any care and the learned Government Advocate, who appeared for the Government of the Union of Burma, has admitted that he is at a loss to explain how such a term crept into the Burma Immigration Act. As far as he is aware, this term was probably copied from an English Act but, he is unable to trace the Act in question. I have also searched in vain for the Act which might have served as a model for the legal draftsmen. The term "summary conviction", is not to be found in the Criminal Procedure Code and I have therefore searched several legal dictionaries for a definition of the term and the only one which I could trace, was in Nozley and Whiteley's Law Dictionary, 5th edition, and reads as follows:

> "Summary conviction—is a conviction before Magistrates without the intervention of a jury. To this head may perhaps be added the committal of an offender by a Judge for contempt of Court."

Obviously, this definition is quite inapplicable to trials before Magistrates in Burma as no juries are ever empanelled for such trials. The procedure to be followed by Magistrates in the trial of cases is laid down in section 5 of the Criminal Procedure Code. According to that section, all trials under the Penal Code must be dealt with in accordance with the provisions of the Criminal Procedure Code. With regard to trials under any special Acts, the procedure prescribed by the Criminal Procedure Code must be followed unless the Act in question, sets out any other form of procedure. The Burma Immigration Act is, of course, a special Act but, there is no provision therein which suggests any

departure from the usual procedure prescribed by the Criminal Procedure Code for the trial of cases. What then is the meaning of the term "summary conviction" occurring in section 13 (*1*) of the Burma Immigration Act? The learned Additional Magistrate is of the opinion that the trial Magistrate was under the mistaken belief that he could try the case summarily even though he had not been invested with powers under section 260 of the Criminal Procedure Code. This was due to the rather unusual procedure adopted by the trial Magistrate. For instance, the fly leaf of the proceedings is headed Criminal Regular Trial No. 77 of 1951 and the evidence of witnesses were recorded verbatim as in a Regular Trial. But, the judgment was recorded on Form Criminal 74 ($\frac{\text{Record}}{\text{Judgment}}$ of Summary Trial under section $\frac{263}{264}$ of the Code of Criminal Procedure, 1898). It is interesting to note that in the column "serial number" of this Form, the case is entered as "C.R.T. No. 77 of 1951", *i.e.*, Criminal Regular Trial No. 77 of 1951. From the mere fact that Form-Criminal 74 was utilized, it does not necessarily follow that the Magistrate did, in fact, try the case summarily. Had the learned Magistrate meant to try the case summarily, he would probably have refrained from recording the evidence of witnesses at length and the evidence, if any, so recorded should not have formed part of the trial record, *vide* the Ruling in *King-Emperor* v. *Maung Po Saw* (1). There is however, one noticeable defect in the proceedings namely no charge was framed against any of the accused. This defect is however curable under section 537 of the Criminal Procedure Code provided there has been no failure of justice by the omission to frame a

(1) 13 Ran. p. 225.

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charge. There is no hint or suggestion that this omission has occasioned a failure of justice in the present case and, on the contrary, five out of the six accused are apparently satisfied with the judgment of the Magistrate and refrained from appealing against their convictions and sentences. The omission to frame a charge should therefore be deemed to have been cured under section 537 of the Criminal Procedure Code.

As far as I can see, the case was in fact tried by the learned Subdivisional Magistrate, Maungdaw, in a regular way. Had the case been tried summarily, it would have been void *ab initio*, *vide* section 530 (*q*) of the Criminal Procedure Code, as the trial Magistrate has not been invested with summary powers and cannot be invested with such powers as he is only a second class Magistrate. The term "summary conviction" cannot possibly be interpreted to mean that the Magistrate, who is empowered to take cognizance of offence under section 13 (*1*) of the Burma Immigration Act, is automatically invested with summary powers under section 260 of the Criminal Procedure Code. Summary powers are conferred on Magistrates under Chapter XXII of the Criminal Procedure Code and no Magistrate can exercise such powers until he has been invested with them under section 260. From the mere fact that certain cases may be tried summarily, it does not follow that the Magistrate trying it is automatically invested with summary powers. In the present case, the only reasonable interpretation to be put on the term "summary conviction", is that an offence under section 13 (*1*) of the Burma Immigration Act may be tried summarily. In view of the provisions of section 260 (1) (*a*) of the Criminal Procedure Code such an offence is triable summarily and there was then hardly

any necessity for the use of the term summary in the section under consideration. It should be remembered however that an offence which is triable summarily may also be tried regularly. Besides this section 260 (2), Criminal Procedure Code, lays down that a Magistrate may, in the course of a summary trial, revert to the regular procedure and try the case afresh.

To sum up I would hold that the term "summary conviction" in section 13 (*1*) of the Burma Immigration Act means that an offence under this section may be tried summarily. In order to try an offence under this section summarily, the Magistrate concerned must have been invested with summary powers under section 260 of the Criminal Procedure Code. Where a Magistrate has not been invested with summary powers, he must try the case in a regular manner. I have been given to understand that Government is taking necessary steps to have this section suitably amended to avoid further troubles in the interpretation of the term "summary conviction".

The above observations should provide an answer to the first two questions propounded by the learned Additional District Magistrate. The third question raised by him is a matter which must be dealt with by the learned Additional District Magistrate in his appeal proceedings and no opinion nor advice can be furnished by this Court. The learned Additional District Magistrate has set out the facts of the case in his order of reference and recommended that the convictions and sentences passed on the respondents be set aside. I desire to express no opinion on the facts of the case except to say that the respondents themselves have not thought fit to question the findings of the trial Magistrate. I do not propose therefore to interfere with the conviction or sentence passed on any of the respondents. Let the proceedings be returned with these remarks.

SPECIAL BENCH (APPELLATE CRIMINAL)

Before U Tun Byu, Chief Justice, U On Pe and U Si Bu, JJ.

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Sept. 10.

THE UNION OF BURMA (APPELLANT)

v.

U KHIN MAUNG LAT AND ONE (RESPONDENTS).*

Special Crimes (Tribunal) Act, 1947, s. 8—Whether appeal lies against the order of acquittal—S. 417 of the Criminal Procedure Code—Ss. 409 and 420, Penal Code—Ingredients—Dishonest intention essential pre-requisite in evidence of criminal breach of trust as well as cheating—S. 24, Penal Code—Meaning of the word "dishonestly"—Sugar Control Order, 1948, powers under—Civil Supplies Management and Control Order, 1947, s. 3 confers right of purchase on Commissioner.

Held: In order to ascertain the full intention of the Legislature the proper course is to apply the broad general rule of construction that a section or an enactment must be construed as a whole, each portion throwing light, if need be, on the rest. Words of a statute must be given their full effect and where their meaning is plain, it is the duty of the court to expound them in accordance with their plain meaning.

Jennings and another v. *Kelly*, (1940) A.C. 206 at 229.

A proviso to a section might generally be considered as placing a restriction or limitation upon an otherwise general application of the provision of an Act to which it is attached. A proviso relates as a rule, only to that portion of the Act to which it is actually attached.

The main provision of s. 8, Special Crimes (Tribunal) Act refers to appeal from and confirmation of sentences, and proviso (ii) only provides a limitation of appeal against conviction. The proviso has no application to a case of acquittal, and read with the main provision the proviso does not preclude an appeal from acquittal.

A dishonest intention is an essential pre-requisite both in the offence of a criminal breach of trust as well as an offence of cheating. It is the dishonest intention which converts the acts of a person into a criminal offence so far as these two offences are concerned. Therefore the primary motive in making payments in this case must be clearly shown to be dishonest if the accused are to be convicted of criminal breach of trust or cheating. The word "dishonestly" is defined in s. 24 of the Penal Code, *viz.*:

"Whoever does anything with the intention of passing wrongful gain to one person or wrongful loss to another person is said to do that act dishonestly."

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* Criminal Appeal No. 240 of 1951 against order of the Special Tribunal of Rangoon, dated 21st November 1950 passed in Special Trial No. 2 of 1950.

Unless these two ingredients, *viz.*, wrong motive and wrongful gain or loss are clearly established no offence of criminal breach of trust or cheating is established.

Sugar has been declared to be an essential commodity and, under s. 3 of Civil Supplies Management Order of 1947, Commissioner of Civil Supplies has power to purchase essential commodities required for distribution to the public. Paragraph 5 (1) of the Sugar Control Order of 1948 confers power to regulate and control the production and distribution of sugar ; it did not confer on the Board the power to purchase sugar which by the earlier order had vested in the Commissioner of Civil Supplies. The power of the Commissioner of Civil Supplies to enter into contract for the purchase of sugar is allowed and is not restricted by the Sugar Control Order of 1948.

When it is not proved beyond reasonable doubt that an accused person has acted dishonestly or so recklessly as to imply dishonesty on his part he cannot be convicted of cheating or criminal breach of trust.

Chan Tun Aung, Assistant Attorney-General, for the appellant.

Paing and *Sein Tun* } for the respondents.

U TUN BYU, C.J.—The first respondent U Khin Maung Lat was acquitted, in Special Trial No. 2 of 1950, by the Special Tribunal which was constituted under the Special Crimes (Tribunal) Act, 1947, of the three charges that were framed against him under section 409 of the Penal Code. U Khin Maung Lat was also charged in the alternative under section 420 of the Penal Code in connection with the third charge, and he was also acquitted of this alternative charge. The second respondent U Tha Din was also acquitted of the charge of abetment of the offences framed against U Khin Maung Lat under the third charge.

An appeal has been filed under section 417 of the Criminal Procedure Code against the order of acquittal, passed in favour of the respondents, by the Special Tribunal. A preliminary objection has been taken on behalf of the two respondents that no appeal lies in

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view of proviso (ii) to section 8 of the Special Crimes (Tribunal) Act, 1947. Section 8 of the Act reads :

"Save as otherwise provided in this Act, the provisions of the Code and of any other law for the time being in force shall, to such extent as may be applicable, apply to trials before the Tribunal constituted under this Act, and to appeals from and confirmations of sentences of such Tribunal, and all other matters connected with or arising from such trials, as if the Tribunal was a Court of Session exercising original jurisdiction :

Provided that—

(i) the provisions of section 526 of the Code shall not apply to the proceeding held before the Special Tribunal ;

(ii) no lappeal shall lie in any case tried by the Special Tribunal unless the Special Tribunal passes a sentence of death or a sentence of transportation or imprisonment exceeding five years."

The observation of this Court made in Criminal Revision No. 57B of 1950 * in which the present two respondents were ordered to be retried should, in our opinion, be read in the light of the circumstances obtaining at the time that case was heard. This Court did not, in the earlier case, discuss the effect of proviso (ii) to section 8 of the Special Crimes (Tribunal) Act, 1947, as it was not necessary to consider the effect of proviso (ii), for the purpose of dealing with the matters which required consideration on the earlier occasion.

A proviso might generally be considered as placing a restriction or limitation upon an otherwise general application of the provision of an Act to which it is attached ; and a proviso relates, as a rule, only to that portion of an Act to which it is actually attached. It will be necessary to read proviso (ii) with the main provisions of section 8, in which it appears, in order to ascertain what the real meaning and effect of

* Reported in 1950 B.L.R. 376 (F.B.)—Editor.

proviso (ii) are. In *Jennings and another* v. *Kelly* (1) it was observed :

". . . . the proviso may simply be an exception out of what is clearly defined in the first part, or it may be some qualification not inconsistent with what is expressed in the first part. But in the present case, not only is the first part of the section deficient in express definition, but the second part is complementary and necessary in order to ascertain the full intention of the Legislature. The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest."

The words of a statute must be given their full effect and, where their meaning is plain, it is the duty of the Court to expound them in accordance with their plain meaning. We must not, however, lose sight of the words in the main provision of section 8, which refers to the appeals from and confirmations of sentences passed by the Special Tribunal, in attempting to construe what proviso (ii) purported to do. An order of acquittal cannot properly be considered to be a sentence passed by the Special Tribunal because in truth no sentence is, in fact, imposed, nor any punishment inflicted when the Special Tribunal acquits an accused person. We are unable to agree that proviso (ii) was obviously intended to preclude an appeal being filed against an order of acquittal. Proviso (ii) purports to deal only with the cases in which a sentence of some sort was passed by the Special Tribunal, and not with cases where no sentence was passed upon the accused person. This construction will also render the whole provisions of section 8, including the provisos, harmonious and consistent with the general purpose of section 8, which

(1) (1940) A.C. 206 at 229.

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was to make the provisions of the Code of Criminal Procedure apply generally to the proceedings before the Special Tribunal, except what has been clearly excluded by the provisos to section 8 and in other parts of the Special Crimes (Tribunal) Act, 1947. Proviso (ii) cannot, in our opinion, be read disjunctively and apart from the main provisions in section 8, but it should be read with the words closely connected with it, appearing in the main provisions of section 8 to which it has been attached.

Cases which are tried under section 409 or section 420 of the Penal Code are not cases, where a sentence of imprisonment above five years could not have been passed by the Special Tribunal. A perusal of section 8 shows that section 417 of the Code of Criminal Procedure, which allows an appeal to be instituted against an order of acquittal, was made applicable to cases tried before the Special Tribunal by reason of the words "and other matters connected with or arising from such trials, as if the Tribunal was a Court of Session exercising original jurisdiction," read in the light of section 5 of the Special Crimes (Tribunal) Act, 1947. Section 5 prescribes that the Special Tribunal in taking cognizance of the offences must follow the procedure prescribed for the trial of warrant cases in the Code of Criminal Procedure. It seems to us that we ought to give that construction to proviso (ii) which will make the entire provisions of section 8 as comprehensive as it can reasonably be done for the purpose of efficient administration of Criminal Justice in this country, unless it is not possible to do so, without rendering the proviso ineffective, unintelligent or unreasonable. As an appeal against an order of acquittal is a common feature in cases which have been tried as warrant case, we would expect the proviso (ii) to be worded more explicitly, if it was intended

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to exclude an appeal being instituted against an order of acquittal passed by the Special Tribunal. The preliminary objection is therefore overruled.

The Civil Supplies Department commenced their purchase of sugar from the Zeyawaddy Sugar Factory in 1946, but no formal agreement was executed for the purchases for the years of 1946-47 and 1947-48. The sugar, which the Civil Supplies Department purchased for 1947-48, was said to have been of the value of one and half crores of rupees.

The first respondent U Khin Maung Lat became the Additional Commissioner of the Civil Supplies Department in October, 1947; and, on the retirement of U Hla Shein, he succeeded the latter as the Commissioner of Civil Supplies Department in March, 1948. The second respondent U Tha Din was posted in the Civil Supplies Department much earlier than U Khin Maung Lat, and he was, during the relevant period of this case, the Secretary to the Commissioner of Civil Supplies Department. U Khin Maung Lat and U Tha Din also held, at the same time, the posts of Additional Secretary and Assistant Secretary, respectively, in the Ministry of Commerce and Supplies.

The Sugar Control Board, which functioned under the Sugar Control Order, 1948, decided, on the 16th October, 1948, to purchase sugar for the year 1948-49 at the rate of Rs. 1-6-0 per viss, *ex*-godown. The mode of payment and the question of storage of the sugar were left to be decided by the Commissioner of Civil Supplies Department and the Resident Director of the Zeyawaddy Sugar Factory; and the Commissioner was required to report to the Sugar Control Board the decisions which he and the Resident Director arrived at. No one apparently demurred against the purchase of sugar for the year 1948-49, at the rate

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of Rs. 1-6-0 per viss, *ex*-godown. The Zeyawaddy Sugar Factory was requested to commence the production of sugar for the year 1948-49 from the 1st November, 1948, and this was what U Ba Nyein, who was the Secretary of the Sugar Control Board, stated. His statement is supported by the minutes of an informal meeting, Exhibit Z, held on the 20th October, 1948, where U Ba Nyein and the Director of Agriculture, who was also a member of the Sugar Control Board and the Resident Director of the Zeyawaddy Sugar Factory were present. Mr. Chhaganjee set out in his letter, Exhibit 2C, dated the 4th November, 1948, what he considered the terms of the contract for the supply of sugar for 1948-49 should be. He said that he saw both U Ba Nyein and U Khin Maung Lat soon after he sent the letter Exhibit 2C, that at his interview with U Khin Maung Lat the latter also urged him to commence producing the sugar for 1948-49, and that the Zeyawaddy Sugar Factory commenced to produce sugar from the 20th November, 1948. We accept the statement of Mr. Chhaganjee that he was asked by both U Ba Nyein, the Secretary of the Sugar Board and U Khin Maung Lat to commence producing sugar for the supply of 1948-49 from the month of November, 1948.

The Zeyawaddy Sugar Factory sent a letter, Exhibit 13, dated the 23rd December, 1948, to the Commissioner of Civil Supplies, who was the first respondent, and paragraphs 5, 6, 8 and 9 read:

"5. We will not accept less than Rs. 1-6-0 per viss excise paid for our sugar, *ex*-Sugar House, Zeyawaddy. The risk of sugar deteriorating in stock is entirely yours.

6. As the Banks will not risk loans to us, to enable us to carry on our business and pay cultivators for their cane, our fortnightly bills should be met on presentation as you will receive from us a daily production report and a godown report giving

the position of stocks in godowns and these statements may be signed by your Inspector of Movements at the Factory.

8. A godown statement showing our present stock will be submitted to you and this stock should be paid for to allow us to meet our immediate commitments and every subsequent payment be made on the 1st and 16th of every month.

9. Pending settlement of the agreement at an early date, we would request you, in the meanwhile, to pay us for the year 1948-49 stocks accumulated, on presentation of our bills, by the end of this month."

The Zeyawaddy Sugar Factory intimated that they desired payment for the stock of sugar accumulated in the godown; and they set out in paragraph 6 of their letter reproduced above the reasons why they required payment. On 28th December, 1948, the Zeyawaddy Sugar Factory sent in a bill, Exhibit 8, for the payment of the twelve thousand bags of sugar that were already in the godown. Their letter, Exhibit S, indicates that the payment was to be considered as provisional payment, as no formal agreement had yet been executed. On the 29th December, 1948, a sum of Rs. 10,22,010 was paid, under the order of the Commissioner of Civil Supplies, to the Zeyawaddy Sugar Factory.

The Finance and Revenue Ministry issued a memorandum, dated the 6th January, 1948, restraining large scale purchases, exceeding Rs. 50,000 in value, without a prior approval of that Ministry, and this memorandum was admittedly received in the office of the Civil Supplies Department. On the 14th January, 1949, the Zeyawaddy Sugar Factory presented a second bill for payment. Their letter, Exhibit T, shows that they were requesting payment for the sugar, which was already stocked in the godown. A sum of Rs. 11,07,176-8-0 was paid to the Zeyawaddy Sugar Factory on the 15th January, 1949, in accordance with their bill, Exhibit 10; and this payment was also made

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under the order of the Commissioner of Civil Supplies. No sanction of the Finance and Revenue Ministry was however obtained for the payment of Rs. 11,07,176-8-0.

On the 31st January, 1949, the Zeyawaddy Sugar Factory presented a third bill, Exhibit P2, for payment. Their covering letter, Exhibit P, of the same date also discloses that they were asking for payment on sugar which had been stored in the godown. There was a delay over the payment of the third bill for Rs. 12,77,512-8-0 as the matter had to be referred to the Ministry of Finance and Revenue for approval, in view of the restriction imposed under the memorandum, Exhibit L, which restrained the Civil Supplies Department from making any fresh purchase which exceeds Rs. 50,000 in value, unless a prior approval of the Ministry of Finance and Revenue was first obtained. The sum of Rs. 12,77,512-8-0 was paid, after the approval of the Ministry of Finance and Revenue had been obtained, to the Zeyawaddy Sugar Factory on the 22nd February, 1949.

A dishonest intention is an essential pre-requisite both in the offence of a criminal breach of trust as well as in the offence of cheating; and it is the dishonest intention which converts the act of a person into a criminal offence, so far as these two offences are concerned. The primary motive in making the three payments required by the Zeyawaddy Sugar Factory under their bills, Exhibits 8, 10 and P2, must be shown to be clearly dishonest in order to constitute the offence, either of criminal breach of trust or of cheating. The word "dishonestly", which is present both in sections 405 and 420 of the Penal Code, has been defined in section 24 of the Penal Code. It has been argued by the learned Assistant Attorney-General that the

respondents, in making the three payments in the circumstances proved in this case, must be considered to have acted dishonestly, in that, they both fully realised that in making the payments to the Zeyawaddy Sugar Factory, they would be depriving the Government of the use of large sums of money for some time at least. In other words, it was argued that there was a dishonest intention on the part of the two respondents at the time the payments were made to cause a temporary loss of money to the Government. It is said that it was very fortunate in the present case that the Government suffered no actual loss of sugar during the period when the Karen rebels were in occupation of areas round about the sugar factory at Zeyawaddy and that this circumstance was immaterial and irrelevant for the purposes of this case, as there had been a temporary misappropriation of money belonging to the Government.

The evidence on the record is much more complete now than when this case first came before this Court on an earlier occasion. We now know what statements the two respondents and the Resident Director of the Zeyawaddy Sugar Factory made in this case. Sugar has been declared to be an essential commodity, and paragraph 3 of the Civil Supplies Management and Control Order, 1947, gives the Commissioner of Civil Supplies power to purchase essential commodities required for distribution to the civil population. The Commissioner of Civil Supplies has therefore power in law to enter into contract for the purchase of sugar from the Zeyawaddy Sugar Factory, if the purchase was within the budget allotment made to the Civil Supplies Department, *vide* paragraph 6 of the Civil Supplies Management and Control Order, 1947. The learned Assistant Attorney-General

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submitted during the argument that the power to purchase sugar given to the Commissioner of Civil Supplise under section 3 of the Civil Supplies Management and Control Order, 1947, has been curtailed by the Sugar Control Order, 1948, which was issued subsequently, as the Sugar Control Board, which was constituted under the Sugar Control Order, 1948, had power to control the action of the Commissioner of Civil Supplies, so far as the purchase of sugar was concerned. We are unable to agree with him. Paragraph 5 (1) of the Sugar Control Order, 1948, reads :

"It shall be the duty of the Board to regulate and control the production and distribution of sugar in such manner as it may think fit including the establishment and acquisition of sugar factories."

It will be observed that the Sugar Control Board was not assigned the power to regulate or control the purchase of sugar ; and this omission was probably intentional as the power to purchase sugar had already been allocated to the Commissioner of Civil Supplies under the Civil Supplies Management and Control Order, 1947. We are unable to accept the contention that the word "distribution" in paragraph 5 (1) of the Sugar Control Order, 1948, includes a power to control the purchase of sugar by the Commissioner of Civil Supplies, as we would be placing on the word "distribution" a meaning which it does not possess. It must also be remembered that the word "purchase" had been introduced in an earlier Order of the Civil Supplies Management and Control Order, 1947, and we would expect that word to have been introduced in a subsequent Sugar Control Order, 1948, if it was intended to give the Sugar Control Board also a power to

purchase sugar or to control the purchase of sugar by the Commissioner of Civil Supplies. The fact that a sugar fund has been created under the Sugar Control Order, 1948, does not help to make the meaning of the word "distribution" wider, because the Sugar Control Board has power to establish or acquire sugar factories also, for which a fund would obviously be required. Moreover, there was a separate budget allotment allocated to the Civil Supplies Department under paragraph 6 of the Civil Supplies Management and Control Order, 1947, to enable the Commissioner of Civil Supplies to purchase sugar required by the Civil Supplies Department. The Commissioner of Civil Supplies therefore has, in law, power to enter into contract for the purchase of sugar, and this power has not been restricted by anything contained in the Sugar Control Order, 1948.

The fact that the sugar for the year 1947-48 which was stored in the godown at Zeyawaddy could be moved away to other places outside Zeyawaddy between the 26th December, 1948 and the 3rd January 1949, suggests clearly that there was no real difficulty in removing the sugar from the godown at Zeyawaddy to other places or towns, at least before the 3rd January, 1949. It will not be unreasonable to conclude, in the circumstances, that no reasonable business man would have thought that the sugar stored in the godown at Zeyawaddy was likely to be lost through the insurgents' activities at or about the 28th December, 1948, at the time the first payment was made, especially when the Karen rebellion had not commenced. U Khin Maung Lat could not, in the circumstances, be said to have acted dishonestly or recklessly in according the payment desired under the Exhibit 8 bill, for Rs. 10,22,010, on the 28th December, 1948.

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It was contended that the Government would have to pay about 0-5-0 extra per viss, which would amount to a considerable sum when the purchase was made *ex*-sugar house by U Khin Maung Lat, and not *ex*-godown, as decided by the Sugar Control Board on the 16th December, 1948; but as it was intended that the Government should have complete control of the sugar as soon as it was produced and when the purchase *ex*-sugar house would give the Government full control over the sugar as soon as it was produced, we do not consider it to be correct to say that U Khin Maung Lat must have intended to act dishonestly when he decided definitely to purchase the sugar at the rate of Rs. 1-6-0 per viss, *ex*-sugar house. U Khin Maung Lat stated that he also consulted U Ba Nyein, Secretary of the Sugar Control Board, over this matter, and that it was only after his consultation with U Ba Nyein that he definitely informed Mr. Chhaganjee that the purchase was being made *ex*-sugar house. It is probable, it seems to us, that U Khin Maung Lat did consult U Ba Nyein on receipt of a copy of the minutes of the Sugar Board marked Exhibit 2B.

We find it difficult to appreciate how U Khin Maung Lat could properly be said to have acted dishonestly when he verbally agreed to purchase sugar for 1948-49 at the rate of Rs. 1-6-0 per viss *ex*-sugar house in the month of November, 1948, after the Sugar Control Board had decided to purchase sugar from the Zeyawaddy Sugar Factory at the rate of Rs. 1-6-0 per viss, and when it is clear from U Ba Nyein's statement that the Sugar Control Board was anxious to have a complete control of all sugar as soon as it was produced and when that object could only be achieved by making the purchase *ex*-sugar house.

The note, which U Tha Din made in connection with the letter, Exhibit S, which was sent along with the bill, Exhibit 8, reads :

"CCS has agreed to this provisional payment and CAO may now be instructed to do the needful. A copy of this document will be kept in this office.

(Sd.) THA DIN."

28th December 1948.

According to Exhibit S letter, there were over 3,000 bags of sugar in the godown at Zeyawaddy in excess of the 12,000 bags of sugar for which the Factory was asking for payment ; and it was suggested in Exhibit S that the payment should be treated as provisional payment. We accept the statement of U Thi Han, Assistant Controller, Civil Supplies Department, that the payment made to the Zeyawaddy Sugar Factory was, to use his own words, "against delivery and not in the nature of advance." The evidence shows that there was sufficient sugar to cover the amounts actually paid to the Zeyawaddy Sugar Factory on all the three occasions which formed the subject of the three charges that were framed against U Khin Maung Lat. The date mentioned in Exhibit 3 CI, which was a weekly statement showing the stock of sugar for 1948-49 that had already been milled and placed in the godown at Zeyawaddy, clearly suggests that one or more officers in the Clearance and Movement Section of the Civil Supplies Department must have been on duty at Zeyawaddy on or about the 26th December, 1948. The Exhibit 3CI also shows that there were at least 15,000 bags of sugar on the 26th December, 1948, a statement which agrees with what Mr. Chhaganjee stated in his letter, Exhibit S. It has been argued, however, by the learned Assistant Attorney-General

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that U Khin Maung Lat acted wrongly and dishonestly in sanctioning payment of Rs. 10,72,010 without attempting to ascertain beforehand as to whether the 12,000 bags of sugar mentioned in the letter, Exhibit S, were in reality in the godown or not. We are unable to see any real force in this argument. We cannot concede that U Khin Maung Lat was not acting like an ordinary business man when he accepted the statement of Mr. Chhaganjee in view of the fact that Mr. Chhaganjee was a responsible business man doing a very big business at Zeyawaddy, and when he had made the statement in writing.

The Karen rebellion, as is well-known, broke out only towards the end of January, 1949; and no evidence has been adduced in this case to show that there was no possibility of removing the sugar out of Zeyawaddy before the Karen rebellion commenced. It could not, in the circumstances, be said that in making the provisional payment of Rs. 10,22,010 on the 28th December, 1948, U Khin Maung Lat was acting with the full knowledge that he was doing something which an ordinary business man must have realised would cause financial loss to the Government. We have also not been shown any evidence which will indicate that the rebels were about to occupy Zeyawaddy at about the time that the first payment was made to the Zeyawaddy Sugar Factory.

The payment of Rs. 11,07,176-8-0 to the Zeyawaddy Sugar Factory on the 15th January, 1949, was admittedly made after the Exhibit L memorandum from the Ministry of Finance and Revenue was received in the Civil Supplies Department. We do not, however, see how we could justly conclude from the mere fact that, because the payment of Rs. 11,07,176-8-0 was made without obtaining the prior sanction of the Ministry of Finance and Revenue, it must be

considered to have been made dishonestly. The attitude of U Khin Maung Lat was that the Exhibit L memorandum referred to new purchases only, and not to the purchase of sugar for the year 1948-49, which had been made by him prior to the receipt of Exhibit L memorandum. Exhibit L is in the following terms :—

"MEMORANDUM

SUBJECT.—*Purchases by Civil Supplies Department.*

The Additional Secretary, Ministry of Commerce and Supply, is informed that *no fresh purchases* on a large scale exceeding Rs. 50,000 in each case, should be undertaken by the Civil Supplies Department during January and February 1949 in the first instance without the prior approval of this Ministry. The question of extending the ban beyond February 1949 or not will depend on circumstances then prevailing and a further communication to you on the subject will be issued in due course.

(Sd.) AUNG MYINT,
Secretary."

We have italicised the words "no fresh purchases." The Exhibit L shows that it is possible to read it in the manner which U Khin Maung Lat contended, because he had already agreed with Mr. Chhaganjee earlier in December, 1948, to purchase the whole of the output of sugar from the Zeyawaddy Sugar Factory, for 1948-49, at the rate of Rs. 1-6-0 per viss, *ex*-sugar house. The letter of Mr. Chhaganjee, Exhibit 13, dated the 23rd December, 1948, where the offer of U Khin Maung Lat to buy the sugar at the rate of Rs. 1-6-0 per viss, *ex*-sugar house, was mentioned, supports U Khin Maung Lat that he had decided to purchase the sugar for the year 1948-49 in December, 1948. We have observed earlier that U Khin Maung Lat had, in law, power to purchase sugar, so long as it was within the budget allotment ; and it has not been

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proved that the purchase of the sugar, which he made, was in excess of the budget allotment allowed for that purpose. U Khin Maung Lat could not therefore be said to have acted recklessly or dishonestly in adopting the view that the payment of Rs. 11,07,176-8-0, which he made on the second occasion, was not in respect of a new purchase but that it was paid in respect of a contract which had already been concluded.

U Khin, who was the Secretary in the Ministry of Finance and Revenue at the relevant period of this case, also stated that the ban which was imposed by Exhibit L referred to fresh purchases only. T. R. Fernandez, an officer in the Clearance and Movement Section of the Civil Supplies Department, said that when he arrived at Zeyawaddy on the 19th January, 1949, there were about 30,000 bags of sugar in the godown. Mr. Fernandez in effect confirms the statement, which Mr. Chhaganjee made in his letter, Exhibit T, that there were about 25,433 bags of sugar stored in the godown on the 14th January, 1949. Moreover, the second payment was also made before the Karen rebellion broke out.

The third bill for a sum of Rs. 12,77,512-8-0 which forms the subject of the third charge against U Khin Maung Lat, was presented for payment on the 31st January, 1949, and this was also after the ban had been imposed by the Ministry of Finance and Revenue. It was urged that as U Khin Maung Lat had no means of verifying the stock of sugar at Zeyawaddy, he was acting dishonestly, or at least recklessly, when he said :

> " The bill may be paid if CAO is satisfied and if Finance and Revenue Ministry agrees,"

especially as the Karen rebellion had already commenced. It was contended that it was most

unbusinesslike for U Khin Maung Lat to have asked the Ministry of Finance and Revenue to approve payment of the third bill after the Karen rebellion had broken out, and that U Khin Maung Lat must have realised by the 14th February, 1949, that the Civil Supplies Department would not be able to move the sugar out of Zeyawaddy for some considerable time, owing to the activities of the Karen insurgents in the areas round about there. The approval of the Ministry of Finance and Revenue for the payment of Rs. 12,77,512-8-0 was obtained on the 22nd February, 1949; but in view of the fact that U Khin Maung Lat had power to enter into agreement for the purchase of sugar for the year 1948-49 and that he had, in pursuance of that power, agreed to purchase all the sugar produced at the Zeyawaddy Sugar Factory in 1948-49, we do not think that it could properly be said that U Khin Maung Lat was acting dishonestly in asking for the approval of the Ministry of Finance and Revenue for the payment of the third bill for Rs. 12,77,512-8-0.

It is true that Mr. Chhaganjee mentioned in one of his letters that the insurgents were already active round about the Factory as early as October, 1948, but we do not consider that it will be reasonable to conclude from this circumstance alone that U Khin Maung Lat must have known that the sugar, which was stored in the godown at Zeyawaddy, would be seized by the rebels. Some of the sugar bags were taken away by the insurgents after Zeyawaddy came under the control of the Karen rebels, but we are unable to see anything in this case which will suggest that the insurgents intended to seize the sugar factory at Zeyawaddy or to take possession of the entire stock of sugar there. The Zeyawaddy Sugar Factory is moreover owned by members of the Indian nationality.

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Neither have we been shown anything on the record which will indicate that the Karens or any other rebels had at any time contemplated seizing sugar wholesale at Zeyawaddy. U Khin Maung Lat could not, in the circumstances, be said to have acted dishonestly in asking for the approval of the Ministry of Finance and Revenue for the payment of the third bill. Thus U Khin Maung Lat must be considered to have been rightly given the benefit of doubt and acquitted.

It is alleged that the note which the 2nd respondent U Tha Din made in connection with the third bill was misleading and untrue and that he should be considered to have abetted U Khin Maung Lat in dishonestly inducing the Government to sanction payment required under the third bill. U Tha Din's note reads :

" S.C.C.S.

The Civil Supplies Department is committed to pay a sum of Rs. 10 lakhs for the cost of sugar purchased from the Zeyawaddy Sugar Factory Ltd. Will the Ministry of Finance and Revenue kindly concur ?

According to the terms of agreement payments are to be made regularly on the 1st and the 16th of each month, and this department has not yet made the payment which fell due on the 1st February 1949.

This may please be treated as 'Immediate.'

(Sd.) THA DIN,
for *Addl. Secy. (Supplies)*.
Ministry of C. & S."

SECRETARY,
MINISTRY OF FINANCE AND REVENUE.

U Ba Latt, who was the Assistant Secretary in the Ministry of Finance and Revenue at that time, consulted U Ba Nyein, Secretary to the Sugar Control Board, before he made his note recommending payment. Thus it could not be strictly said that it was

really the note of U Tha Din which induced U Ba Latt to recommend payment on the third bill presented by the Zeyawaddy Sugar Factory. U Kyin, who was then Secretary in the Ministry of Finance and Revenue stated:

"When I passed the order 'Concur,' I meant to say that I had the money to pay. I was not concerned with the noting put up to me. If I had merely put my initials to the noting, that would have amounted to my agreeing to what had been written above. But, here in this case, I took care to pass orders, and this shows, that I was not influenced by the noting put up to me by my office."

Moreover, it is possible for a layman to assume, in the circumstances of this case, that the Commissioner, Civil Supplies Department, had entered into an effective contract to buy sugar at the rate of Rs. 1-6-0 per viss *ex*-sugar house, and it could not therefore be said that it has been proved beyond all reasonable doubt that U Tha Din must have acted dishonestly. In any case, as we have held that it has not been proved beyond all reasonable doubt that U Khin Maung Lat acted dishonestly, or recklessly so as to imply dishonesty on his part, we must also hold that U Tha Din, who was alleged to have aided or abetted U Khin Maung Lat in respect of the third payment made to the Zeyawaddy Sugar Factory, was also rightly acquitted.

The appeal is, therefore, dismissed.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U Si Bu, J.

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MUNICIPAL CORPORATION OF RANGOON (APPELLANTS)

v.

THE SOORATEE BARA BAZAAR CO. LTD. (RESPONDENTS).*

Arbitration Act, 1944, s. 39 (2)—Appeal against an order—Filing an award.

Held : That where the Judge refused to remit the award to the arbitrators and ordered it to be filed, no appeal lies against such an order.

Myo Kin for the appellants.

C. A. Soorma for the respondents.

U SI BU, J.—This is an appeal from the order of U Aung Tha Gyaw J., directing that an award made by a Board of Arbitrators consisting of U Bo Gyi J., Mr. Horrocks, *Bar.-at-Law* and U Lun Baw be filed. It would appear that the Municipal Corporation of Rangoon had leased the Sooratee Bara Bazaar from the Sooratee Bara Bazaar Company, Limited. A dispute arose subsequently between them as to the fair monthly rent payable, and the dispute was referred to the Arbitration Board mentioned above. The Board was unanimous in fixing Rs. 35,000 as the fair monthly rent, and in doing so observed that they had not taken into account the taxes payable in respect of the bazaar in question because of the extreme difficulty experienced by it. The Corporation occupies the dual role of a public authority and tenant. The Board left the matter of taxes to the parties and expressed the hope that they

* Civil Misc. Appeal No. 35 of 1950 against the order of the High Court in Civil Misc. Case No. 219 of 1950, dated 25th August 1950.

would resolve that matter with the same cordiality and good sense as they had shown throughout the proceedings before it. An application was made, at the instance of the Bazaar Company, to file the award ; and the Municipal Corporation entered an objection to the award and wanted it to be remitted to the Arbitrators on the ground that the Bazaar had been assessed already and that the acceptance of the award would entail a reassessment which the Corporation was unwilling to do.

The learned Judge who heard the matter has given his reasons for not remitting the reward and directing that it be filed. We agree with his reasons.

A competent Board of Arbitrators has, after a careful consideration, come to a definite finding ; and we do not think that the mere fact that the Corporation may have to make a reassessment is sufficient for either remitting the award or refusing to file it. The Corporation apparently has facility for ascertaining what the taxes would be. This appeal is not in any case competent, *vide* section 39 (*2*) of the Arbitration Act, 1944, as it does not come under any of the clauses enumerated in sub-section (*1*) of the said section. The appeal is dismissed. We make no order as to costs.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U Si Bu, J.

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GAW SHAN SOOT (APPELLANT)

v.

E. C. MADHA BROTHERS (RESPONDENTS). *

Trade-mark—Suit relating to—Valuation of the suit for Court Fees and Jurisdiction—S. 11 of Suits Valuation Act—Amendment of plaint—Colourable imitation—What it is—Function of the Judge—Admission of a counsel.

Held : It is always difficult to fix accurately at the outset what the actual damage would be. It is even difficult to obtain a rough or reliable estimate of damages and owing to these difficulties, under s. 7(4) of the Court Fees Act, legislature gave the plaintiff right of placing what value he considers suitable for the relief claimed. If the claim for damages could not reasonably be considered illegal, palpably absurd, manifesty illogical or radically wrong, a Court will not interfere with the plaintiff's valuation.

The Narayanganj Central Co-operative Sale and Supply Society Ltd. v. *Mafijuddin Ahmed*, (1934) 61 Cal. 796 at 808 ; *Ma Kyin Myaing and others* v. *Hoe Lan and others*, (1949) B.L.R. 358 ; *Boidya Nath Adya and others* v. *Makhan Lal Adya*, (1893) 17 Cal. 680 ; *Rajendra Bakhsh Singh* v. *Bahu Rani and another*, (1928) A.I.R. Oudh 260 ; *U Ba Pe and another* v. *U Ba Shwe and others*, (1933) A.I.R. Ran. 40, followed.

Even if the claim for damages has been over-valued by the plaintiff s. 11 of the Suits Valuation Act will apply in the circumstances, and unless it could be shown that the valuation has prejudicially affected the disposal of the suit on its merits, the Appellate Court will not interfere.

It is a general principle that defect of jurisdiction on territorial and pecuniary grounds are not to render proceedings in a case abortive, if such objection has not been taken at the earliest possible opportunity and there is no consequent failure of justice.

Budha Mal v. *Rallia Ram and others*, (1928) 9 Lah. 418 at 423 ; *Moolchand Motilal* v. *Ram Kishen and others*, (1933) 55 All. 315 at 323.; *Sri Rajah Ravu Venkata Mahipathi Gangadhara Rama Rao Bahadur Garu, Yuvarajah of Pithapuram and another* v. *Province of Madras*, A.I.R. (1947) Mad. 135 at 136, followed.

Where the amendment of a plaint has not introduced any new cause of action or did not bring in any inconsistent cause of action, the amendment is in order. Further where the amendment is necessitated as a sort of re-joinder to the allegations in the written statement, the Judge in allowing the amendment did not act illegally.

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* Civil 1st Appeal No. 19 of 1950 against the decree of the High Court in Civil Regular No. 14 of 1948, dated 27th January 1950.

N.P.L.ST. Muthayya Chettyar v. *RM.A.RM. Chettyar Firm and another*, (1948) B.L.R. 855, distinguished.

It is not necessary in order to constitute a colourable imitation that two marks should be similar in every particular, but it will be sufficient in law to constitute a colourable imitation if there exists such similarity between the two marks which could, in the circumstances of a particular case be considered to be calculated to deceive the class of persons for whom the goods are ordinarily or primarily intended.

Perry v. *Trufitt*, (1842) 6 Beav. 66 at 73; *Seixo* v. *Provenzende*, (1886) 1 Ch. Appeal 192 at 196, followed.

The Judge looking at the exhibits before him and also paying due attention to the evidence adduced must not surrender his own independent judgment to that of any witness. The principle is perfectly clear—no man is entitled to sell his goods as the goods of another person. The difficulty lies in the application when it is a case of colourable imitation. It is desirable to bear in mind that no general rule can be laid down to what is a colourable imitation or not. Each case must be dealt with as it arises, regard being had to the circumstances of the particular case. The question is not whether a person looking at the two trade-marks side by side, would be confused. The question is whether the person who sees the proposed trade- mark in the absence of the other trade-mark, and in view only of his general recollection of what the nature of the other trade-mark was, would be liable to be deceived and to think that the trade-mark before him is the same as the other of which he has a general recollection.

Payton & Co. v. *Snelling Lampard & Co.*, (1901) A.C. 308 at 311; *Byramjee Cowasjee* v. *Vera Somabhai Motibhai and another*, (1951-16) 8 L.B.R. 561; *Sandow Limited's application*, (1914) 30 L.T. 394, followed.

If an Advocate simply stated that he had over-valued the suit in order to bring it within the jurisdiction of the High Court and the statement was not in connection with any matter actually in dispute between the parties at the time of the trial and the question of jurisdiction was not raised and no issue was framed, the alleged admission should be received with caution and should be considered in the light of the circumstances of the case.

S.P.M. Muthiah Chettiar and others v. *Muthu K.R.A.R. Karuppan Chetti and others*, (1927) 50 Mad. 786 at 797, referred to.

S. R. Chowdhury, for the appellant.

C. A. Soorma for the respondents.

The judgment of the Court was delivered by

U TUN BYU, C.J.—The firm of E. C. Madha Brothers instituted a suit, known as Civil Regular No. 14 of 1948, on the Original Side of the High Court against the New Asia Soap Factory, owned by one Gaw Shan Soot, for manufacturing and selling soap bearing a

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trade-mark, which was said to have constituted a colourable imitation of the duck-brand soap of E. C. Madha Brothers, which was said to have been largely used by the *dhobies*; and they obtained an injunction restraining the defendant and his agents and servants from manufacturing soap with a trade-mark, which might constitute a colourable imitation of the duck-brand mark of E. C. Madha Brothers. The defendant-appellant was also directed to surrender all the soaps and wrappers bearing the mark complained of; with all the things used for impressing the mark complained of, and to pay a sum of Rs. 5 in the form of nominal damages.

An objection was taken on behalf of the defendant-appellant that the Original Side of the High Court had no jurisdiction to entertain Civil Regular No. 14 of 1948 on the ground that the New Asia Soap Factory was situated in Insein District, and not in Rangoon area. It was also urged that E. C. Madha Brothers had manifestly and arbitrarily over-valued the amount of damages which they claimed against the defendant-appellant, so as to enable them to have their suit heard in the High Court. Admittedly, Gaw Shan Soot lived at the relevant period at No. 29. Letkokpin, Kamayut. Letkokpin quarter is on the left side of the Rangoon-Insein Road as one proceeds from Rangoon to Insein, and it is on the south of the bridge which divides Rangoon area from Insein District. Exhibit F also gives the address of the New Asia Soap Factory as No. 29, Letkokpin, Kamayut, Rangoon. It is also mentioned in Exhibit H agreement, executed between the firm of E. C. Madha Brothers and Gaw Shan Soot, proprietor of the New Asia Soap Factory, that this factory was in Letkokpin, Kamayut, Rangoon, meaning

that the factory is situated on that portion of Kamayut, which is in Rangoon area. There is thus no substance in the contention that Gaw Shan Soot was not residing within the territorial limit of the Original Side of the High Court.

There is also no reliable evidence to establish that E. C. Madha Brothers had valued their claim for damages at Rs. 10,000 arbitrarily and for the purpose of bringing their suit within the jurisdiction of the Original Side of the High Court. It has been urged that, after the last Great War, Gaw Shan Soot recommenced his business only with a small capital of Rs. 2,000 in October 1947, employing one or two workmen, and that he could not have, in the circumstances, made a large profit of anything like Rs. 10,000 in the four months preceding the institution of Civil Regular No. 14 of 1948. Gaw Shan Soot, however, maintained no books of account, and there was therefore no reliable evidence to support his above statement, or to indicate what exactly his profits from month to month were. It has been said that a witness for the defendant-appellant had also stated that Gaw Shan Soot recommenced his business with a small capital of Rs. 2,000 only. We do not think it will be safe to act on such verbal statement. Moreover, E. C. Madha Brothers were claiming damages up to the date of the judgment, and it is not disputed that the New Asia Soap Factory was manufacturing and selling soap with the mark complained of until the judgment was passed, that is, until the 27th January, 1950. E. C. Madha Brothers were thus entitled, if they were successful in their litigation, to claim damages up to the date of the decree passed in Civil Regular No. 14 of 1948, which would be for a period of 22 months or so. Kanjee Nanjee, factory manager of E. C. Madha

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Brothers, of course, stated that the defendant-appellant was manuacturing soap on a small scale in 1947, but that answer was indefinite. Those words might have been used relatively, in contrast with the quantity of soap manufactured by E. C. Madha Brothers. The fact that Kanjee Nanjee mentioned that E. C. Madha Brothers were not able to obtain sufficient quantity of caustic soda in 1947 to enable them to meet all the demands for their sale does not also necessarily mean that E. C. Madha Brothers were not selling much soap in 1948 and 1949. E. C. Madha Brothers were, in any case, entitled to claim damages for the years 1948 and 1949 also. Gaw Shan Soot stated that his average production of soap was about 400 cases per month and that he sold it at Rs. 16-8-0 per case, which meant that he was selling soap to the extent of about Rs. 6,600 in value per month. Kanjee Nanjee, factory manager, said that there was a decline in the sale of E. C. Madha Brothers' soap, and E. M. Kola, salesman, also made a similar statement. It could not, in the circumstances, be said that, in claiming Rs. 10,000 as damages, E. C. Madha Brothers were valuing their relief arbitrarily or that the damage so claimed was manifestly excessive or absurd.

It is difficult in the present case to fix accurately at the outset what the actual damage would be. In other words, the amount of damages to be claimed in such a case cannot at first be accurately estimated. It seems to us that it would be difficult at the outset to obtain a rough reliable estimate of the damages actually suffered. It is probably because of this difficulty that the Legislature has thought it fit under clause (iv) of section 7 of the Court Fees Act to leave it to the plaintiff the right of placing what value he considers to be suitable for the relief he claims.

The observation of Mukerji J., in *The Narayanganj Central Co-operative Sale and Supply Society, Limited* v. *Mafijuddin Ahmad* (1) was :

" I respectfully agree that, in cases of suits falling within sub-section (iv) of section 7, there must be, having regard to their very nature, a certain amount of option in the plaintiff, because the value of the relief he claims therein would depend not on its intrinsic value but on its value so far as he is concerned. I also agree that, in many such suits, no real objective standard would be possible or, even if possible, would be altogether satisfactory. But such provisions as to valuation, as there already are in the Act, do not also disclose any very definite principle on which they may seem to have proceeded, except presumably the principle that the standards fixed are not unreasonably high. And though it is true that, in suits of various descriptions, no absolute standard at all would be possible, yet it cannot be disputed that reasonable standards may with safety be laid down giving the plaintiff all legitimate option that he may be reasonably entitled to and proceeding on the lines indicated by the legislature in such standards as they themselves have laid down. But I am clearly of opinion that, until such standards are laid down by appropriate rules framed under section 9 of the Suits Valuation Act (VII of 1887), it would not be possible for the court to exercise this power except in those classes of cases falling under the clause in which the valuation made by the plaintiff is illegal, palpably absurd, manifestly illogical or arithmetically wrong."

We are unable to discover anything in the case now under appeal, which will suggest that the valuation which the plaintiff-respondents have placed upon their claim for damages could be reasonably considered to be "illegal, palpably absurd, manifestly illogical or arithmetically wrong."

In the Full Bench case of *Ma Kyin Myaing and others* v. *Hoe Lan and others* (2) the plaintiffs valued their relief at Rs. 500 only, although they, in fact, sought for a declaration that they were the

(1) (1934) 61 Cal. 796 at 808. (2) (1949) B.L.R. 358.

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joint-owners of a lottery ticket, which had drawn a prize of Rs. 20,000, and for possession of the lottery ticket. That was, therefore, a case where the value of the relief claimed could clearly be said to have been made arbitrarily or that it was manifestly absurd. The cases of *Boidya Nath Adya and others* v. *Makhan Lal Adya* (1), *Rajendra Bakhsh Singh* v. *Bahu Rani and another* (2), and *U Ba Pe and another* v. *U Ba Shwe and others* (3) were also cases, where the valuation of the relief sought could be said to have been manifestly low or absurd.

The court-fee has, under section 7 (*4*) of the Court Fees Act, to be determined in accordance with the value of the relief mentioned in the plaint, and the damages in the present case could be considered to be recurring from day to day after the suit was instituted. It was therefore not surprising that no question about the jurisdiction of the Original Side of the High Court to entertain the suit was raised in the written statement filed by the defendent-appellant. No issue was also asked to be framed in this respect; nor was any argument advanced before the learned trial Judge on this point.

It appears to us that, even assuming that E. C. Madha Brothers had over-valued their claim for damages, the provisions of section 11 of the Suits Valuation Act will apply in the circumstances obtaining in this appeal, unless it can be shown that the valuation has prejudicially affected the disposal of the suit on its merits. It is not possible in the present case to estimate with any real accuracy the exact quantum of damages, which can be obtained. The learned Advocate for the defendant-appellant has submitted that section 11 of the Suits Valuation

(1) (1893), 17 Cal., 680. (2) (1928) A.I.R. Oudh, 260.
(3) (1933) A.I.R. Ran. 40.

Act is not applicable to a case where the plaintiff has deliberately over-valued his relief, with the object of bringing his suit within the jurisdiction of a Court which would not ordinarily have jurisdiction to entertain it. There is however no reliable evidence to suggest that the plaintiffs-respondents' claim of Rs. 10,000 as damages, was in fact made arbitrarily or that it was manifestly too high or clearly absurd. It is said that the learned Advocate who appeared for the plaintiffs-respondents had clearly admitted before the learned trial Judge that he had over-valued the relief claimed in order to bring the suit within the jurisdiction of the High Court. The alleged admission was not made in connection with any matter actually in dispute between the parties at the time of the trial. It is clear also from the pleadings that no question concerning the jurisdiction of the Court was raised, and no issue was framed in this respect; nor was any argument advanced before the learned trial Judge on this aspect. The alleged admission of the learned Advocate for the plaintiffs-respondents must therefore be received with great caution; and the portion of the judgment touching the alleged admission should also be considered as a whole and in the light of the circumstances of this case. Looking at it in that light, the alleged admission of the learned Advocate for the plaintiffs-respondents could not properly be considered to be conclusive, as indicating that the plaintiffs-respondents had deliberately over-valued their claim for damages with the object of having their suit heard on the Original Side of the High Court. We ought also to examine other circumstances of the case also.

The case of *S.P.M. Muthiah Chettiar and others* v. *Muthu K.R.A.R. Karuppan Chetti and others* (1) was

(1) (1927), 50 Mad. 786 at 797.

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cited during the argument, and it was argued on behalf of the defendant-appellants that the alleged admission of the learned Advocate for the plaintiffs-respondents came within the fourth clause set out at page 798, which reads :

"(4) Where in the course of a suit a counsel makes an admission as to a collateral matter, or gives up a doubtful claim which is not a subject-matter of the suit, there is a presumption that the counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client."

We are unable to appreciate how the alleged admission in this case could be considered to be a matter collateral to the issues on which the parties proceeded to trial on the Original Side of the High Court. The question of jurisdiction had not, at anytime, been raised before the learned trial Judge, and such admission was therefore unnecessary. We have also not been able to discover anything in the evidence, which will indicate that the value placed by the plaintiffs-respondents in their plaint was manifestly wrong, absurd or too high. Moreover, it is the plaintiffs' valuation, which ordinarily governs the jurisdiction of the Court in a case like the present, unless, of course, the valuation could be shown to have been made arbitrarily or was manifestly absurd, wrong or too high. It was not possible for E. C. Madha Brothers to estimate with any real accuracy what the damages would actually amount to, particularly when the defendant-appellant continued to manufacture and sell soap with the trade-mark complained of up to the date of judgment, which was delivered nearly two years after the suit was instituted.

In *Budha Mal* v. *Rallia Ram and others* (1) it was stated :

" The object of the legislature in both cases is the same, namely, that the defect of jurisdiction on territorial or pecuniary grounds should not render proceedings in a case abortive if such objection was not taken at the earliest opportunity and there has been no consequent failure of justice."

It was also observed in *Moolchand Motilal* v. *Ram Kishen and others* (2) :

" Having regard to the object for which section 11 was enacted, the conclusion is clear that the mere fact that there has been under-valuation and the case has been heard by a Court which should not ordinarily have heard it, should not be allowed to affect the decree if there had been no prejudice in the proper trial of a case on the merits."

There is a similar observation in *Sri Rajah Ravu Venkata Mahipathi Gangadhara Rama Rao Bahadur Garu, Yuvarajah of Pithapuram and another* v. *Province of Madras, represented by the Collector of East Godavari, Coconada* (3):

" There can be no doubt that the sub-clause referred to does lay down the condition that the appellate Court must be satisfied, for reasons to be recorded by it in writing, that the under-valuation has prejudicially affected the disposal of the suit on the merits. In the absence of such a finding, it is not open to the appellate Court to decline to hear the appeal merely because the suit was under-valued. This is what section 11 says in unmistakable terms."

The sub-clause mentioned above was sub-clause (*b*) of section 11 of the Suits Valuation Act. The case of *Yuvarajah of Pithapuram* v. *Province of Madras* (3)

(1) (1928) 9 Lah. 418 at 423. (2) (1933) 55 All. 315 at 323.
(3) A.I.R. (1947)Mad. 135 at 136.

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deals with a case of under-valuation, but the same principle will apply where it is alleged that there had been an over-valuation of the relief claimed. We have not been shown anything in the evidence which will indicate that the defendant-appellant was in any manner prejudiced by having the present case tried on the Original Side of the High Court, and not in the City Civil Court, even assuming that it was a case which should not ordinarily be tried in the High Court. The points involved in the present case appear to us to be points which require very careful consideration. It is said that there was a protracted hearing in the present suit. It is more fit, in the circumstances, for such case to be tried on the Original Side of the High Court than in the Rangoon City Civil Court. It is argued, on behalf of the defendant-appellant, that the provisions of section 11 of the Suits Valuation Act will not apply where there had been a deliberate over-valuation of the relief claimed for the purpose of having the suit tried on the Original Side of the High Court. We have already stated earlier that we have not been shown anything in the pleadings or evidence, which will show that E. C. Madha Brothers must be considered to have valued their claim for damages arbitrarily or that the valuation made by them was manifestly absurd or clearly too high.

It was next contended on behalf of the defendant-appellant that the learned trial Judge wrongly allowed the plaintiffs-respondents to amend their plaint. A perusal of the amended plaint shows clearly that E. C. Madha Brothers, in introducing paragraphs 5-A and 5-B in their amended plaint, has not introduced any new cause of action ; nor did they bring in any inconsistent cause of action into the amended plaint. Paragraphs 5-A and 5-B of the amended plaint were apparently introduced as a re-joinder to the allegations

contained in paragraph 2 of the written statement of the defendant-appellant, dated the 19th March, 1948, where the implication was that the defendant-appellant was entitled under the agreement (Exhibit H), executed between him and E. C. Madha Brothers on the 8th November, 1940, to use the sparrow mark, which formed the subject of the present litigation. There is thus no substance in the contention that the learned trial Judge, in allowing an amendment of the plaint, permitted the plaintiffs-respondents to join a new cause of action founded on contract to the original cause of action which was in the nature of tort.

We might add that the circumstances under which the amendment of the plaint was disallowed in the case of *N. P. L. ST. Muthaya Chettiar* v. *RM.A.RM. Chettyar Firm and one* (1) are entirely different from the circumstances prevailing in the case at present under appeal. There it was sought, by means of amendment, to introduce a new matter which was not in any way connected with any of the allegations contained in the original pleading.

The trade-mark of E. C. Madha Brothers contains the picture of a duck standing on a twig in the centre of the design, which constitutes the essential characteristic of their trade-mark. The colour of the duck is a mixture of black and white. This trade-mark has a round design, with English letters at the top and bottom of the design. There are Burmese letters above the picture of the duck, indicating that the substance on which it is affixed is a duck-brand soap, with the Burmese words (ဝက်ဖြူဘဲ) below the bird. There are Tamil letters below the Burmese words (ဝက်ဖြူဘဲ) to indicate what kind of bird it is. There is a star on each side of the Tamil letters

(1) (1948) B. L. R. 855.

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with Gujarati letters just above the two stars. The trade-mark of the New Asia Soap Factory is also round in design, with a bird in the centre, resting on grass. English letters also appear at the top and bottom edge of this design. There are also Burmese letters above the bird to show what brand of soap it is, and the Burmese words (ဝတ်ဆေးဝိုး), with Tamil letters, also appear below the bird in this design, as in the design of E. C. Madha Brothers. The design of the New Asia Soap Factory also has a star on each side of the Tamil letters. Thus the general get-up of these two designs could be described as being similar.

A contention, which has been strenuously urged on behalf of the defendant-appellant, is that, so long as the picture of the bird in the defendant-appellant's design remains a sparrow, his soap would always continue to be called a sparrow-brand soap and that it could not in that circumstance, be called a duck-brand soap. It follows, it was argued, that it was not possible, in the circumstances, to pass off the defendant-appellant's soap as a soap manufactured by E. C. Madha Brothers, which was known as duck-brand soap. We cannot accede to this very wide proposition. We agree, however, that it is possible for the defendant-appellant to have attempted, when he was planning his new design, to keep himself within law, in that he had not devised his bird in Exhibit B into a distinctive form of a duck; but if it appears that his intention was clearly to imitate the design of E. C. Madha Brothers, and if it is also found that his design could be considered to be a colourable imitation of the design of E. C. Madha Brothers, his appeal will, in our opinion, have to be dismissed.

The Master of the Rolls stated in *Perry* v. *Trufitt* (1):

"A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe, that the goods which he is selling are the manufacture of another person."

The Lord Chancellor, in the well-known case of *Seixo* v. *Provezende* (2), observed:

"What degree of resemblance is necessary from the nature of things, is a matter incapable of definition *a priori*. All that courts of justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use.

If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device."

The above observations, with respect, appear to us to apply appositely to the case now under appeal. It is thus not necessary in order to constitute a colourable imitation that the two marks concerned should be

(1) (1842) 6 Beav; 66 at 73. (2) (1886) 1 Ch. Appeals 192 at 196.

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similar in every particular, but it will be sufficient, in law, to constitute a colourable imitation, if there exists such similarity between the two marks, which could, in the circumstances of a particular case, be considered to be calculated to deceive the class of persons for whom the goods are ordinarily or primarily intended.

Exhibit H agreement, dated the 8th November, 1940, appears to us to be important. It furnishes a useful background. Gaw Shan Soot agreed in that agreement not to use his "zinyaw" (sea-gull) mark on the soap manufactured by him as it was considered by E.C. Madha Brothers to be a colourable imitation of the latters's duck mark. It was also agreed that should E. C. Madha Brothers find that Gaw Shan Soot was using his sparrow mark in a way which could be mistaken for or passed off as the duck mark of E. C. Madha Brothers, he would also cease using his sparrow mark. We have no reason to doubt that Gaw Shan Soot knew that effect of Exhibit H agreement, which he executed in November, 1940. He had been a school teacher previously, and he must, as a businessman, have made himself acquainted with the effect of Exhibit H agreement, especially when he was compelled, under that agreement, to abandon the use of his mark known as "zinyaw brand." It is, therefore, only reasonable to assume that Gaw Shan Soot realised, as far back as 1940, that if the sparrow mark, Exhibit H1, which he was allowed to use under the agreement could, at any time, be mistaken for E. C. Madha Brothers' mark, or become a colourable imitation of the latter's duck-brand mark, he could be restrained from using the design so complained against.

A glance at Exhibit H1 sparrow shows that the sparrow in that mark is very distinctive and that it is altogether unlike a duck. It is difficult to think that

the picture of a sparrow in Exhibit H1 design could have been mistaken at all by anyone for the picture of a duck. The general get-up of the sparrow mark in Exhibit H1 is also more simple. It had no stars in it; nor were any Tamil letters present in that design. There was no grass below the sparrow. Subsequently, the defendant-appellant altered his sparrow mark in Exhibit H1 into the form in Exhibit B. We might say that by that modification, the differences in the general get-up, which existed between Gaw Shan Soot's old Exhibit H1 sparrow mark and E. C. Madha Brothers' duck mark, practically disappeared. To be more precise, Gaw Shan Soot added stars and Tamil letters to the new design of his sparrow mark, although stars and Tamil letters also appear in E. C. Madha's mark. The picture of the sparrow in his new design is smaller relatively, and the bird also has shorter legs. The shape of the sparrow in the new design is also different from the form of the sparrow in the old design, Exhibit H1. Gaw Shan Soot also added grass below the sparrow's legs in his new design.

Gaw Shan Soot was cross-examined about the change in the design of his sparrow mark from the form in Exhibit H1 to the form in Exhibit B, and his answer, with the question, was :

"*Q.* Why have you changed the size of the bird from Exhibit H1 to Exhibit F?

A. Exhibit H1 trade-mark, as it stood, was not very attractive. There was a great competition in the soap market and so we had to make our labels attractive so as to attract our customers. It was with a view to attract these customers that I altered the size of the bird and also with a view to enable me to insert certain Burmese and Indian letterings therein.

. . . . . .

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Q. Please examine Exhibit F and Exhibit H1 and say whether Exhibit F is entirely different from that of Exhibit H1 or not?

A. Exhibit F trade-mark is based on Exhibit H1. Both the trade-marks are 'sarglay tazeik.' I made certain alterations in the size of the bird in order to enable me to insert Burmese and Indian letterings and these make the label more attractive to the customers."

The label Exhibit F is same as Exhibit B. It is clear that Gaw Shan Soot deliberately modified his old sparrow design in Exhibit H1, so that there might be a bigger sale in his soap. However, when we bear in mind that the picture of his sparrow in Exhibit B is entirely different from the form of his sparrow in Exhibit H1, that he added two stars in his new design, Exhibit B, in the same places where the stars appear in the duck mark of E. C. Madha Brothers and that the Indian letterings Gaw Shan Soot added in his new design also occupy the same relative position as in E. C. Madha Brothers' duck-brand mark, it appears to us that Gaw Shan Soot was clearly attempting in his new design to make his mark as similar as he could to the duck brand of E. C. Madha Brothers, without actually transforming the form of his bird into a distinctive form of a duck. This is also supported by the fact that Gaw Shan Soot also made his bird in his new design rest upon grass. The legs of the sparrow in the new design also became shorter. The changes were made, it seems to us, so that incautious or ignorant purchasers might be persuaded into believing that the soap they were purchasing was Madha's duck-brand soap when, in fact, the soap which was offered to them was the defendant's soap. This inference becomes irresistable when we find that stars and Indian letterings, which were inserted in the new design of Gaw Shan Soot's sparrow mark, occupy the

same relative position as the stars and the Indian letterings occupy in E. C. Madha Brothers' duck-brand mark. The grass which appears under the legs of the sparrow in Gaw Shan Soot's new design also occupies the same relative position as the twig on which the duck rests in E. C. Madha Brothers' mark. These things could not have occurred accidentally. They must have been inserted with the intention that it might be possible to mislead incautious or unwary purchasers into purchasing Gaw Shan Soot's soap under the impression that it was Madha's soap.

All purchasers are not expected to examine the label of an article very carefully before they buy. They will ordinarily be guided by the general appearance or general effect of the label. There is evidence, and which evidence we accept, that E. C. Madha Brothers' duck-brand soap is purchased largely by the *dhobies*, a class of the persons who could not generally be expected to read English, Burmese or Tamil letters. E. C. Madha Brothers' label also suggests that their soap is primarily intended for use by the *dhobies*. These persons, for whom E. C. Madha Brothers primarily purported to manufacture and sell their soap to, belong to a class of persons who could genereally be said to be illiterate ; and English, Burmese and Tamil letters, appearing in E. C. Madha Brothers' mark or those of New Asia Soap Factory, will have no significance on this class of illiterate purchasers.

Mathaya, an illiterate ***dhobie***, stated in effect that he once purchased Rs. 2 worth of soap from a shop in Sooratee Bazaar thinking that it was the duck-brand soap meaning the soap manufactured by E. C. Madha Brothers. He soon realised, after he saw Abdul Rahman, who maintained a grocery shop, that the soap he had purchased was not the duck-brand soap, but

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that it was a *kuruvi* or bird-brand soap. Mathaya also said that the bird in Exhibit B (sparrow mark) was "not quite like a duck"; but this answer was made after he had been informed by Abdul Rahman about the mistake he had made in thinking that the soap which he purchased from a shop in Sooratee Bazaar was the duck-brand soap of E. C. Madha Brothers. Abdul Rahman was also examined as a witness, and he supported Mathaya in this matter.

Perumal, also an illiterate *dhobie*, said that he purchased a rupee worth of soap at the Sooratee Bazaar thinking that it was a duck-brand soap. He showed this soap to Narsaya, a shop-keeper, who at once informed him that it was not a duck-brand soap. This witness discovered when he used that soap that what he bought at the bazaar was not a duck-brand soap. According to Perumal, he looked at the bird in the label and the general get-up of the label and concluded that it was a duck-brand label when he purchased the soap at the Sooratee bazaar. This witness's answer, which he made towards the close of his examination by the Court, has been stressed upon strongly on behalf of the defendant-appellant, in that Perumal had stated that the label Exhibit F, which is the same as Exhibit B, is not a duck mark. It will be necessary to reproduce the questions and answers, which were put to and made by Perumal when he was examined by the Court, and they read :

"*Q.* You say that you have been purchasing duck-brand soap ever since you started as a *dhobie*. How are you in a position to recognise duck-brand labels?

A. I can identify duck-brand by the duck in the centre and two stars and letterings around it.

Q. Please look at Exhibit F and say whether this is duck-brand soap or not ?

A. This is not duck-brand soap.

Q. The figure depicted in Exhibit F is not a duck. Is that so ?

A. All that I can say is that it looks like a duck.

Q. At present will you accept soap bearing labels similar to Exhibit F as duck-brand soap ?

A. No. At present I will not accept such soap as duck-brand because I was cheated on a former occasion when I purchased soap at the Sooratee Bazaar."

The answers reproduced above indicate that Perumal had become wiser about the label on the soap after he had seen Narsaya. Thus the fact that Perumal was able to distinguish in Court one mark from the other mark could not be said to indicate that he could not have been deceived into purchasing the soap with a label of the defendant-appellant as soap manufactured and sold by Messrs. E. C. Madha Brothers.

Achaya, an illiterate *dhobie* had also purchased Rs. 2 worth of soap at the Sooratee Bazaar under the same mistaken impression. He too showed the soap to Narsaya who informed him about his mistake and said that it was only an imitation of the duck-brand soap. It must be mentioned here that Narsaya did not say anything about Achaya in his examination in Court, but this does not necessarily suggest that Achaya's evidence must be untrue. We agree, however, that Achaya's evidence must be examined with caution. It has been urged on behalf of the defendant-appellant that the fact that Achaya was able to distinguish in Court the difference in the label between the sparrow mark of the defendant-appellant and the duck mark of E. C. Madha Brothers shows that this witness could not have been deceived, as he attempted to make out in Court, into purchasing a sparrow-brand soap for the

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duck-brand soap. It should however be remembered that, because the two marks when they are examined side by side would not deceive anyone, it does not necessarily follow that the mark which is complained against could not constitute a colourable imitation of another's mark. The marks are not as a rule looked at side by side by purchasers ; nor could the purchasers be expected to retain a definite memory of all the particulars of the mark concerned. The purchasers' recollection will, as a rule, be somewhat indefinite.

It has also been contended on behalf of the defendant-appellant that the *dhobie* witnesses must have been either fools or idiots to have been deceived into purchasing a sparrow-brand soap as a duck-brand soap as stated by them, and their evidence should in the circumstances be rejected. We do not think it will be correct to assume that, because shop-keepers or traders, who are experienced in distinguishing labels, or persons who are literate, would not be deceived by the appearance of certain mark or label, illiterate person or persons of less intelligence could not have been deceived. The case will have to be considered on its own peculiar circumstances. We also cannot accept the suggestion that we must assume that purchasers will examine the details of the label on the soap very carefully before they purchase it, because it is possible for some purchasers to examine the mark somewhat casually, particularly amongst an illiterate class, to which the *dhobies* might be said to generally belong. We cannot accordingly accept the statement of the defence witness Hone Hi that all the purchasers at his stall examined the labels on the soap very carefully before they bought them. The observation that purchasers are expected to "look fairly at the goods, without distinguishing features being concealed,"

made in *Byramjee Cowasjee* v. *Vera Somabhai Motibhai and another* (1), must be considered in the light of the facts of that case. There the labels were affixed on butter tins; and people who ordinarily purchased butter in tins would naturally come from a much more intelligent or critical class than the *dhobies.*

Lord Macnaghten laid down in *Payton & Co.* v. *Snelling Lampard & Co.* (2) what the function of a Judge is in such a case:

"The Judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness."

The learned Lord also observed at page 310:

"The principle is perfectly clear—no man is entitled to sell his goods as the goods of another person. The difficulty lies in the application, and, when it is a case of colourable imitation, I think it is very desirable to bear in mind what Lord Cranworth has said on one occasion—that no general rule can be laid down as to what is a colourable imitation or not; you must deal with each case as it arises, and have regard to the circumstances of the particular case."

The learned Advocate for the defendant-appellant has submitted that the Court ought to express its own view of the marks or labels concerned. We agree that it is for the Court, bearing in mind the evidence adduced at the trial, to express its own view as to whether the label or mark of the defendant-appellant is such so as to be calculated to deceive purchasers of the class for whom the goods are ordinarily manufactured, and in other words, whether there is, in the circumstances of this case, a reasonable likelihood of the mark of the defendant-appellant being mistaken, at least, by the class of purchasers, for whom E. C. Madha Brothers' soap was primarily manufactured, as a duck-brand

(1) (1915-16) 8 L.B.R. 561. (2) (1901) A.C. 308 at 311.

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mark of the latter. Sargant J., in *Sandow Limited's application* (1) observed :

"The question is not whether, if a person looking at the two trade-marks side by side, there would be a possibility of confusion. The question is whether the person who sees the proposed trade-mark in the absence of the other trade-mark, and in view only of his general recollection of what the nature of the other trade-mark was, would be liable to be deceived and to think that the trade-mark before him is the same as the other of which he has a general recollection."

It appears to us that different artists are likely to depict the picture of the same kind of bird somewhat differently; and this is a circumstance which we can properly consider in considering the appeal before us. We have also observed earlier that the picture of the sparrow in Exhibit B new label is entirely different from the picture of the sparrow in Exhibit H 1 old label of the defendant-appellant. We have examined the picture of the bird in the defendant-appellant's mark in Exhibit B as well as the picture of the bird in E. C. Madha Brothers' mark, and bearing in mind the evidence which has been adduced in this case, we are of opinion that it is possible for a purchaser of the class, for whom E. C. Madha Brothers' duck-brand soap is ordinarily manufactured, to be deceived into believing that the soap marked with the Exhibit B label, which he is purchasing, is a duck-brand soap of E. C. Madha Brothers. It is possible for him to think that the bird in Exhibit B is some kind of duckling or a peculiar kind of small duck, and when this circumstance is considered with the fact that the general get-up of the defendant-appellant's new label in Exhibit B is similar to the general get-up of E. C. Madha Brothers' duck mark, it is possible for an illiterate purchaser to be so mistaken. Both marks are round in design. Thus

(1) (1914), 30 Law Times 394.

the defendant-appellant in adopting the design in Exhibit B can, in the circumstances of this case, be properly said to have altered his label in such a way that it is likely to cause his soap to be sold by the same name as E. C. Madha Brothers' duck-brand soap. There is, in our opinion, sufficient materials in the present case under which it could properly be held that the mark of the defendant-appellant is reasonably calculated to mislead illiterate purchasers into thinking that it represents the duck-brand soap of E. C. Madha Brothers. A trader should not, it seems to us, attempt to use any label or mark on his goods, which so resembles the label or mark of another trader as to mislead ignorant or incautious purchasers.

The fact that M. E. Kola, a salesman, Kanjee Nanjee, factory manager of E. C. Madha Brothers, U Sein, a ration-shop owner, U Ba Sein, a provision merchant, and Abdul Rahman, a grocery-shop owner, will not accept a soap sold with the label of the defendant-appellant as E. C. Madha Brothers' duck-brand soap, or that they could clearly distinguish the mark of the defendant-appellant from the mark of E. C. Madha Brothers, appears to us to be of no importance in considering the main question involved in the present appeal. The question is not whether a shop-keeper or a trader is likely to be misled. The question is, whether it is possible for the new label of the defendant-appellant to mislead or deceive purchasers of the class for whom E. C. Madha Brothers' soap is primarily manufactured. The less intelligent or the illiterate class of purchasers might easily be misled or deceived, even in cases which will not deceive a more astute trader or shop-keeper.

The picture of the birds in the labels of the defendant-appellant and E. C. Madha Brothers, of course, forms the most prominent and essential feature of the

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two marks, but the fact that Teik Swe and Tan Su Yon, who are traders, would not in any way be confused about the picture of the two birds, would not, for the reason we have stated earlier, assist us in considering the main question involved in the present appeal. It is not possible for us to accept the suggestion that the pictures of the two birds in Exhibit B and Exhibit H1 are same in form or shape, because a glance at those two exhibits will reveal at once that the two birds are depicted very differently in form and shape, although both of them purported to be the picture of a sparrow.

Ma Kyin and Ma Chone are bazaar sellers, and these defence witnesses will naturally be more intelligent or shrewd in making purchases at the bazaar than the *dhobies* or illiterate purchasers.

Hone Hi, also a defence witness, is a miscellaneous-goods seller. He could distinguish the difference in the English and Burmese letters in the label of the defendant-appellant and that of E. C. Madha Brothers.

Ma Thein, a defence witness, could also read Burmese ; and she had been a bazaar seller too. Thus we have not been shown anything in the evidence adduced on behalf of the defendant, which will indicate that illiterate persons, or persons of the class of *dhobies* could not possibly have been misled into thinking that the label Exhibit B is a duck-brand label.

The portion of the decree which reads :

"IT IS ORDERED AND DECREED that the defendants, their agents and servants be and they are hereby restrained from manufacturing any soap got up or bearing a mark which may be a colourable imitation of the plaintiffs' well-known 'Duck Brand' trade-mark or of offering such or any other soap for sale in wrappers similarly got up to resemble the wrappers used by the plaintiffs and bearing the said 'Duck Brand' trade-mark."

has, in our opinion, been expressed too widely, and is therefore modified as follows :

"IT IS ORDERED AND DECEED that the defendants, their agents and servants be and they are hereby restrained from manufacturing any soap bearing the mark in Exhibit B or any mark similar to the mark in Exhibit B which may be a colourable imitation of the plaintiffs' duck-brand trade-mark or of offering any soap for sale in wrappers bearing the mark in Exhibit B or any mark similar to the mark in Exhibit B which may be a colourable imitation of the plaintiffs' duck-brand trade-mark :"

The judgment and decree passed on the Original Side will accordingly be considered to have been modified as indicated above, and, except for the above modification, the appeal is dismissed with costs; Advocate's fee twenty gold mohurs.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U Si Bu, J.

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Jan. 3.

GOR KYIN SEIN (APPELLANT)

v.

U KYAW DIN AND OTHERS (RESPONDENTS).*

Code of Civil Procedure, Order 21, Rule 90—Whose "interests" affected by sale—Meaning of the word—Whether includes an auction-purchaser—Rule for the interpretation of statutes—Court sale—Misrepresentation whether material fact.

Held: Auction purchaser is not a person "whose interests are affected by the sale" within the meaning of Order 21, Rule 90 (1), Code of Civil Procedure.

K.V.A.L. Chettyar Firm v. *M. P. Maricar*, (1928) I.L.R. 6 Ran. 621 at 622; *Baidyanath Mullick* v. *Sm. Radharani Dassee*, (1945-46) C.W.N. 394 at 397; *Kiran Bala Shaha* v. *Suniti Brabha Shaha*, (1939) Vol. I, Cal. Series, 373 at 375; *Nihal Chand-Gopal Das* v. *Pritam Singh and another*, (1932) 14 Lah. 1; *Balkrishna Wamam Kharkar* v. *Sakharam Babaji Mestry*, (1936) 60 Bom. 70; *Kalumal Tolaram* v. *Ahmad Nur Mahomed*, A.I.R. (1931) Sind 107, followed.

Ravinandan Prasad v. *Jagarnath Sahu and Ajudhia and others*, I.L.R. (1925) 47 All. 479; *Bhavirisetti Gopalkrishnayya* v. *Pakanati Pedda Sanjeeva Reddy and another*, A.I.R. (1920) Mad. 145; *Mahadeo Ram* v. *Raja Mohan Vikaram Sah*, I.L.R. (1933) 12 Pat. 665; *The All-India Railwaymen's Benefits Fund Ltd. and one* v. *Ram Chand and another*, I.L.R. (1939) Nag. 357; *L. Jhangi Ram* v. *L. Ram Saran*, A.I.R. (1944) Pesh. 42, dissented from.

It is quite proper and reasonable to examine earlier decisions or previous law relating to the same or similar subject-matter, in order to clear up any doubt which might arise in the construction of an existing provision of an Act.

MacMillan v. *Dent*, (1907) 1 Ch. 107 at 120; *Craig's on Statutes & Laws*, (1936), Edn. 87, followed.

In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, and absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this.

Mahomed Kala Mea v. *Harperink and others*, (1908-09) 36 I.A. 32 at 37; *A. M. Hashim Isphahany* v. *N.A.P.K. Chettyar Firm*, (1915-16) 8 L.B.R. 427 at 431, followed.

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* Civil 1st Appeal No. 66 of 1950 against decree of the High Court in Civil Regular No. 92 of 1949, dated the 16th August 1950.

Where the auction-purchaser was misled by the Bailiff of the Court into believing that the properties belonged to the Judgment-debtor and that there was no encumbrance, and both the statements were found to be incorrect, the sale should be set aside.

When a purchaser at a Court auction is not a citizen of the Union of Burma he has no right to purchase immoveable property. Under s. 65 of the Code of Civil Procedure auction-purchaser will be deemed to have acquired interest in the immoveable property purchased by him from the date of the auction sale. In other words, by reason of the provisions of section 65 the title in the property relates back from the date of the sale and if ths purchaser be a non-citizen of the Union of Burma, the sale would be void.

T. Wan Hock for the appellant.

Kyaw Din in person
Hla Sein
Sein Tun
N. R. Buriorjee } for the other respondents.

The judgment of the court was delivered by

U TUN BYU, C.J.—The plaintiff-appellant Gor Kyin Sein instituted a suit known as Civil Regular No. 92 of 1949 of the Original Side of the High Court, to set aside an auction sale which was held in connection with Civil Execution Proceedings No. 317 of 1948, which arose out of Civil Regular Suit No. 1868 of 1947 of the City Civil Court, Rangoon, and for the return of the purchase money paid by him in the proportion, which has been received by the defendant-respondents.

The facts which led to the institution of the Civil Regular Suit No. 92 of 1949 are that U Kyaw Din, the 1st defendant-respondent, obtained a decree in his favour in Civil Regular Suit No. 1868 of 1947, and he subsequently applied in Civil Execution Proceedings No. 317 of 1948, for the attachment and sale of a four-storeyed pucca building stituate at No. 71, Godwin Road, Rangoon, which he described as the property of his judgment-debtor L. Sin Nyan, who died subsequently ; and the defendant-respondents Nos. 2—9 are

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his legal representatives. The plaintiff-appellant Gor Kyin Sein purchased the building at Godwin Road in an auction sale, which was conducted by U Hla Maung, Bailiff of the City Civil Court, Rangoon, for the sum of Rs. 45,000 on the 5th October, 1948. Gor Kyin Sein set out in paragraph 5 of his plaint the various sums that were said to have been paid out by the Court to the various persons mentioned therein.

We ought to mention here that the sale was not confirmed by the Court till 21st March, 1949. The delay was due to the fact that Gor Kyin Sein was not, at the date of the auction sale, a citizen of the Union of Burma. He applied to become a citizen of Burma only subsequently, with the result that the Certificate of Citizenship was not issued to him till the 19th March, 1949.

U Kyaw Din mentioned in his application for execution that the building at No. 71, Godwin Road, was the property of the judgment-debtor L. Sin Nyan. U Kyaw Din also stated in his Written Reply (Exhibit E) that the house, which he had attached was said to be the property of L. Sin Nyan. The particulars of the property to be sold, which were required to be set out under Order 21, Rule 66, of the Code of Civil Procedure, were filed by U Kyaw Din's Advocate ; but they were clearly defective. It was not signed by U Kyaw Din, the decree-holder ; nor was any verification made, as was required under Order 21, Rule 66 (3). No notices were apparently issued by the Court to settle the particulars of the property to be sold. It is most astounding that such serious irregularities should have been allowed to have occurred.

The first question which arises in this appeal is, whether an auction-purchaser is a person "whose interests are affected by the sale," within the meaning

of the provisions of Order 21, Rule 90 (1), of the Code of Civil Procedure. The decisions of the Courts in India are not uniform. The Courts in Madras, Allahabad, Patna, Nagpur and Peshawar, maintain the view that the word "interests" in the expression "whose interests are affected by the sale," includes "interests" created by the sale, and is not confined to "interests" existing prior to the sale ; while the Courts at Calcutta, Bombay, Lahore, Sind and Rangoon, hold that it does not include "interests" which arise as a result of the sale, but that it refers only to "interests" which exist independently of the sale.

It was observed in *K.V.A.L. Chettyar Firm* v. *M. P. Maricar* (1) :

> "It is quite clear to our mind that the word 'interests' mentioned in that rule refers to interest existing at the time of the sale and not to interest created by the sale. The only rule under which an auction-purchaser can apply to set aside the sale is Order 21, Rule 91, of the Code of Civil Procedure, and if the Legislature had intended to allow an auction-purchaser to apply under Order 21, Rule 90, of the Code of Civil Procedure, his name would have been specifically mentioned in that rule."

Rule 91 of Order 21 of the Code of Civil Procedure is, in effect, a reproduction of section 313 of the old Code of 1882. Rule 91 allows an auction-purchaser to apply for the sale to be set aside in the restricted circumstances set out therein. If it was intended under the Code of 1908 to enlarge the right of an auction-purchaser to have the sale set aside over and above what he was permitted to do under section 313 of the old Code of 1882, the appropriate place for giving effect to this purpose would clearly be in Rule 91. Thus, the fact that the scope of section 313 of the old Code of 1882

(1) (1928) I.L.R. 6 Ran. 621 at 622.

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had not been enlarged when it was reproduced in the present form of Rule 91, is a circumstance which ought to deter us from giving a wider meaning than what the wording of Rule 90 clearly states. In any case, this appears to be a circumstance where, if we are in doubt about the construction of the wording in Rule 90, as far as the auction-purchaser is concerned, we ought to throw the doubt in favour of the interpretation that the Legislature did not intend to alter the law when it enacted the new Code of 1908, so far as the auction-purchaser is concerned.

Clough J., in *Baidyanath Mullick* v. *Sm. Radharani Dassee* (1), state :

> "If 'interest' does mean interest in the property, then the important word is the word 'affect.' Upon plain English it seems to me difficult to find that a person's interests in property can be affected by a sale if, prior to that sale, he had no interests in it at all."

Mukherjea J., also made a similar observation in *Kiran Bala Shaha* v. *Suniti Brabha Shaha* (2) :

> "But whatever the nature of interests might be, it is clear to me from a plain reading of the section that the interests must be in existence at the time when the sale takes place and must be prejudicially affected by it, and if it is created by the sale, it is inconceivable how it can be affected by the sale and give the person a right to set it aside."

The view of the Rangoon High Court and Calcutta High Court was also adopted by the Lahore High Court in *Nihal Chand-Gopaldas* v. *Pritam Singh and another* (3). A similar view was taken by the Bombay High Court in *Balkrishna Waman Kharkar* v. *Sakharam Babaii Mestry* (4).

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(1) (1945-46) C.W.N. 394 at 397.
(2) (1939) Vol. I, Cal, Series, 373 at 375.
(3) (1932) 14 Lah. 1.
(4) (1936) 60 Bom. 70.

The view of the Rangoon High Court was also approved in *Kalumal Tolaram* v. *Ahmad Nur Mahomed* (1), where Rupchand A.C.J., also observed :

"The words used by the Legislature are 'whose interests are affected by the sale.' To my mind, these words presuppose interests which existed at the time of the sale and are affected by it, and not interests which are for the first time created by it."

It appears to us that the view of the Courts at Rangoon, Calcutta, Bomby, Lahore and Sind, where it was held that the expression "interests," in Order 21, Rule 90 of the Code of Civil Procedure, refers to interests which exist independently of the sale, is more reasonable and consistent with the ordinary meaning of the word used in Rule 90 ; and, if we may say so with respect, it is a correct view.

An opposite view was adopted in *Ravinandan Prasad* v. *Jagarnath Sahu and Aiudhia and others* (2), *Bhavirisetti Gopalkrishnayya* v. *Pakanati Pedda Sanjeeva Reddy and another* (3), *Mahadeo Ram* v. *Raja Mohan Vikaram Sah* (4), *The All-India Railwaymen's Benefits Fund Limited and another* v. *Ram Chand and another* (5), and *L. Jhangi Ram* v. *L. Ram Saran* (6).

In *Ravinandan Prasad* v. *Jagarnath Sahu and Ajudhia and others* (2), Walsh J., observed at page 481 as follows :

"It is necessary to observe that this expression was not contained in the corresponding provision which was in force up to 1908, and up to that date the auction-purchaser could not apply but could bring a suit. It follows, therefore, that for the purpose of determining this question, the cases decided before 1908, or decided after 1908, with reference to proceedings which had

(1) A.I.R. (1931) Sind 107.
(2) I.L.R. (1925) 47 All. 479.
(3) A.I.R. (1920) Mad. 145.
(4) I.L.R. (1933) 12 Pat. 665.
(5) I.L.R. (1939) Nag. 357.
(6) A.I.R. (1944) Pesh. 42.

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begun before 1908, bearing upon the question whether auction-purchasers could apply or could properly bring a suit, are wholly irrelevant, and for my part, I decline to look at them."

This observation is, with great respect, not justifiable; and in any case it is a most doubtful attitude to adopt. Rules 90 and 91 of Order 21 of the Code of Civil Procedure, are not strictly new laws. It is, in our opinion, quite proper or reasonable to examine the earlier decision or previous law relating to the same or similar subject-matter in order to clear up any doubt which might arise in the construction of an existing provision of an Act. Moulton L.J., stated in *MacMillan* v. *Dent* (1), as follows:

"In interpreting an Act of Parliament, you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act—not only the common law but the law as it then stood under various statutes—in order to interpret the statute in question."

In *Mahadeo Ram* v. *Raja Mohan Vikaram Sah* (2), Kulvant Sahay J., was a dissentiente. There James J., at 676, observed:

"The correct manner to interpret the rule appears to me to assume that Rule 90 as amended means what it says, and if this interpretation renders Rule 91 superfluous, the matter must be left at that."

We are unable, with great respect, to subscribe to this observation. We ought not to read Rule 91 as superfluous unless it is not possible to construe Rule 90 reasonably, without making Rule 91 superfluous. It is stated in *Craig's on Statutes and Laws*, 1936 Edition, at page 87, as follows:

"The Courts will not lightly impugn the wisdom of the Legislature, and if any alternative construction, although not the

(1) (1907) 1 Ch. 107 at 120. (2) I.L.R. (1933) 12 Pat. 665.

most obvious, will give a reasonable meaning of the Act and obviate absurdities or inconveniences of absolutely literal construction, the Courts deem themselves free to adopt it."

Niyogi J., who delivered the opinion of the Bench in the case of *The All-India Railwaymen's Benefits Fund Limited and another* v. *Ram Chand and another* (1), observed at page 364 as follows :

"To deny a right to the auction-purchaser while conceding it to the judgment-debtor or decree-holder would be manifestly unjust and unreasonable. It would be wrong to impute to the Legislature an intention to create such an anomaly."

We must say that we find it difficult to appreciate how an injustice could really arise, because, if Rule 90 of Order 21 of the Code of Civil Procedure does not apply to an auction-purchaser, he would still have a remedy, as he was entitled to previous to the Code of 1908, by means of a regular suit in a case, which is not covered by Rule 91.

It does not appear that the cases, which held the opposite view, were referred to in the case of *Bhavirisetti Gopalkrishnayya* v. *Pakanati Pedda Sanjeeva Reddy and another* (2). Mir Ahmed J., observed in *L. Jhangi Ram* v. *L. Ram Saran* (3), at page 44 :

"We may point out that the Legislature had the auction-purchaser before its mind for he is mentioned in Rule 91, and they would not have failed to exclude him from the operation of Rule 90, if that was the intention."

It is only reasonable to assume that the Legislature must have had its attention drawn to the provisions of Rule 91 when it enacted the present Rule 90. This circumstance, if we may say with respect, goes more in favour of the contention that if the Legislature had

(1) I.L.R. (1939) Nag. 357. (2) A.I.R. (1920) Mad. 145.
(3) A.I.R. (1944) Pesh. 42.

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intended to change the law, so far as the auction-purchaser is concerned, one would have expected the Legislature to do it in Rule 91, which deals specifically with the auction-purchaser. It will not accordingly be reasonable to construe, in the absence of more explicit words, the provisions of Rule 90 of Order 21 of the Code of Civil Procedure, as having the effect of taking away the right of an auction-purchaser to sue for recovery of his purchase money in circumstances which are not covered by the provisions of Rule 91.

The observation of Lord Macnaughten in *Mahomed Kala Mea* v. *Harperink and others* (1), is cogent and salutary, although it was made in a case, which arose prior to the introduction of the new Code of 1908; and it was in these words:

> " It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this."

The auction-purchaser in the above case was, as in the case now under appeal, a casual bidder, who came suddenly to the auction sale and gave the highest bid, without previous investigation into the title of the property and knew nothing about it, except what was mentioned by the auctioneer. The passage reproduced above was cited with approval in *A. M. Hashim Isphany* v. *N.A.P.K. Chettyar Firm* (2).

(1) (1908-09) 36 I.A. 32 at 37. (2) (1915-16) 8 L.B.R. 427 at 431.

The Bailiff, U Hla Maung, who conducted the auction sale, frankly admitted that he mentioned, when the auction sale was about to take place, that the property, which was being sold, was the property of the judgment-debtor and that it was free from mortgage; and we accept U Hla Maung's statement. Gor Kyin Sein also said that when he made his bids at the auction sale, he was under the impression that the property belonged to the judgment-debtor entirely and that it was free from mortgage; and he is supported by two other bidders, who were present at the time the auction sale was held. This probably explains why the bids for the purchase of the building in question rose higher than the estimate given by U Kha, an Engineer. Tan Shi Khoo and Lin Kyin Khin were two of the persons who also bid at the auction sale. Lin Kyin Khin was said to have offered up to Rs. 42,000 for the building in Godwin Road. The high bids, which were obtained at the time the auction sale was held, point clearly to the conclusion that the bidders must have been informed that the property, which was being sold, belonged entirely to the judgment-debtor and that it was free from mortgage. It could, in the circumstances, be said that there was a material irregularity in the conduct of the sale of the building in question by U Hla Maung. There was a definite misrepresentation of a very material fact. It is obvious that no bidder would have gone anywhere near Rs. 40,000 in his bid for the purchase of the building unless the property had been sold as the sole property of the judgment-debtor, without any encumbrances attached to it.

The principle of *caveat emptor* does not, in our opinion, apply in the circumstances of the present case. Gor Kyin Sein did, in this case, enquire from the Bailiff of the Rangoon City Civil Court whether the

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property was being sold as the property of the judgment-debtor; and he is, in our opinion, entitled to accept the statement made by the Bailiff as accurate. This is not only reasonable, but also just, in that a Bailiff is a responsible officer and he represents the Court at the time of the auction sale. It has been argued on behalf of the defendant-respondents that the proclamation of sale should have placed Gor Kyin Sein on his guard, but as we have stated earlier, he came suddenly to the auction sale, without an opportunity to investigate into the title of the property; and there is accordingly no force in this contention.

It has also been contended on behalf of the defendant-respondents that there is no evidence to prove that Gor Kyin Sein suffered any substantial injury or loss in the present case. The property in Godwin Road, it is not disputed, belonged to one L. Soo Lim, father of the judgment-debtor L. Sin Nyan. U Kyaw Din stated in paragraphs 4 and 5 of his affidavit, Exhibit K, dated the 16th December, 1947:

"4. I say that the 1st defendant L. Sin Nyan who was most substantial of the judgment-debtors and was able to pay the amount died suddenly on the 14th of October 1947 after the decree had been passed.

5. I say that he has a share in the house in which he lived and died as part of the inheritance from his father being No. 71, Godwin Road, Rangoon and he has no other immoveable properties in Burma."

Gor Kyin Sein's evidence also shows that he had been obstructed, in his attempt to obtain possession of the building in Gowin Road, by a brother-in-law of the defendant-respondent Ma Moi, wife of the deceased L. Sin Nyan. Thus, the failure to mention at the time of the auction sale that the judgment-debtor L. Sin Nyan owned only a share in the property to be sold,

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must be considered to be a material irregularity in the conduct of the sale, as that was a fact which the bidders, who had come there, would like to have known to enable them to gauge how high they might bid. It was, therefore, a serious mis-statement of fact, which misled the bidders. As the judgment-debtor possessed only a share in the property sold, it becomes obvious that a substantial loss or injury would be caused to the auction-purchaser who bought the property in question on the understanding that it belonged to the judgment-debtor only.

The effect of sections 3 and 5 of the Transfer of Property (Restriction) Act, 1947, is to make a transfer of immoveable property void, if it is made in favour, or for the benefit, of a foreigner. The auction sale in the present case was made on the 5th October, 1948; and this sale was confirmed by the Court on the 21st March, 1949; and thus the sale became absolute only on the 21st March, 1949—*vide* Order 21, Rule 92 of the Code of Civil Procedure. It is also clear that the certificate of sale was granted only after the sale had been made absolute. The title in the property purchased at the auction sale will ordinarily vest in the auction-purchaser at the time the sale becomes absolute as it is only then can the title in the property purchased be properly said to have been transferred to the auction-purchaser.

We will, however, have to consider the effect of the provisions of section 65 of the Code of Civil Procedure, which provide that after the sale has been confirmed, the property is to be deemed to have been vested in the auction-purchaser from the date of the sale. Thus, by reason of section 65 of the Code of Civil Procedure, an auction-purchaser in the present case must, in law, be deemed to have acquired interest in the immoveable property purchased by him from

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the date of the auction sale. In other words, by reason of the provisions of section 65 of the Code of Civil Procedure the transfer of the title in the immoveable property in question must be considered, in law, to have been effected on the 5th October, 1948. Gor Kyin Sein was a non-citizen of the Union of Burma at the date of the auction sale; and he did not apply for a certificate of citizenship until after the sale. He obtained the certificate of citizenship on the 19th March, 1949. The provisions of sections 3 and 5 of the Transfer of Immoveable Property (Restriction) Act, 1947, made it clear that any transfer of immoveable property which will have the effect of vesting the immoveable property on Gor Kyin Sein prior to the 19th March, 1949, must be considered to be void. Sub-sections (4) and (5) of section 8 of the Union Citizenship (Election) Act, 1948, read :

"(4) The officer shall, on receipt of the certificate, call upon the applicant to appear before him on a date fixed by him and to subscribe a declaration on oath or affirmation renouncing any other nationality or status as citizen of any foreign country and, on the applicant making and subscribing such declaration, the officer shall deliver to him the certificate after having endorsed thereon the date of the making of and subscribing the said declaration.

(5) The certificate shall not take effect unless the applicant makes and subscribes the declaration under the last preceding section."

The auction sale to Gor Kyin Sein will have to be held, in the circumstances of this case, to be void by reason of section 5 of the Transfer of Immoveable Property (Restriction) Act, 1947.

The appeal is, for reasons stated above, allowed. The judgment and decree passed on the Original Side in Civil Regular Suit No. 92 of 1949 are set aside, and the defendant-respondents are directed to pay to the

plaintiff-appellant Gor Kyin Sein the sums required of them as indicated in paragraph 15 of the plaint, with proportionate costs against them in both Courts.

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APPELLATE CIVIL.

Before U On Pe and U Thaung Scin, JJ.

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Nov. 6.

DR. U CHIT AND ONE (APPELLANTS)

v.

DAW OHN YIN (RESPONDENT).*

Transfer of Property Act, s. 106—Lease—Notice to quit, sufficiency of—Time of notice by legal requirement and Time of notice by private agreement—Interpretation of notice, principle underlying.

Held: It is clear that thirty days' notice by either party is the requirement to be complied with according to the agreement entered into by the parties; in the light of this construction the provision of s. 106 of the Transfer of Property Act requiring fifteen days' notice expiring with the end of the month of the tenancy is not applicable to the case.

Held also: In interpreting ambiguous words in notices to quit the principle which should guide the Court is to test what the words would mean to tenants conversant with all the facts and circumstances of the tenancy.

Harihar Banerji v. *Ramshashi Roy*, I.L.R. 46 Cal. 458; *Secretary of State* v. *Madhu Sudan Mukerjee and others*, A.I.R. (1933) Cal. 260.

Ba Nyunt for the appellants.

Aye Maung for the respondent.

The judgment of the Bench was delivered by

U ON PE, J.—This is an appeal against the judgment and decree in Civil Regular No. 509 of 1950 of the City Civil Court, Rangoon, by which the appellants as tenants of the house known as No. 53, Bagaya Road, Kemmendine, were ordered to be evicted therefrom the Court having held that the aforesaid house was required for residential purpose of the owner of the house, the respondent, which is one of the grounds entitling landlords to evict tenants under the Urban Rent Control Act.

* Civil 1st Appeal No. 18 of 1951 against the decree of the 2nd Judge, City Civil Court, Rangoon in Civil Regular No. 509 of 1950, dated the 1st February 1951.

There were seven issues framed in the suit, all of which were decided in favour of the respondent and before us in this appeal only two grounds have been urged, which are as follows:

(1) For that the learned Judge having answered that the tenancy period began on the 16th of every previous month and ended on the 15th of every ensuing month, should have held that the notice of ejectment to vacate the suit premises by the 14th April 1950 was not in accordance with law.

(2) For that the learned Judge should have held that they are not the tenants of the respondent in view of the exhibit document.

Ground No. (2) is in effect to assail the right of suit of the respondent but has not been seriously pressed, and we think, rightly too, in view of the evidence in the case which we consider has been well assessed by the lower Court to come to the right finding on the point.

For the disposal of this appeal, the real point for determination is the sufficiency or otherwise of the notice given by the landlord to vacate the premises, or in other words, whether the notice was in accordance with law. The law lays down certain requirements to be complied with by a landlord who desires to successfully eject a tenant from a premises and such requirements are embodied both in the Transfer of Property Act and the Urban Rent Control Act, 1948, which in so far as sufficiency or otherwise of a notice to determine a lease is concerned, have to be read together.

Section 106 of the Transfer of Property Act lays down how periodic tenancies are terminated by notice to quit. The section may be reproduced:

"106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or

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manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy."

The question that presents itself for consideration is whether in view of the agreement admittedly made between the parties in this case, contained in Exhibit 1, section 106 of the Transfer of Property Act is applicable to the present case. The Exhibit 1 document contains the terms of the tenancy agreed to by the parties regarding the determination of the tenancy, one of which is a clause that one month's notice must be given by either party. This clause relating to one month's notice as appearing in Burmese, the counsel for the appellants contends, is capable of being interpreted to give a meaning which would bring the case within the ambit of section 106 of the Transfer of Property Act. The passage reads: "တလအတွင်းတင်ကြို၍ အကြောင်းကြားရမည်။" The counsel for the appellants contends that the notice, terminating the tenancy on the 14th April and thus not having ended with the end of the tenancy which the lower Court has fixed to fall on the 15th April, is invalid. This is a contention which we cannot accept, for, the meaning of the word in question is clear to us that thirty days' notice by either party is the requirement to be complied with and we agree with the lower Court that in the light of this construction the provision of section 106 of the Transfer of Property Act requiring fifteen days' notice expiring with the end of the month of the tenancy is not applicable to this case.

In interpreting any ambiguous words in a document, assuming that the words in question, namely "within a month" or "a month," carry a meaning the

legal effect of which is that tenancy is terminable within a month expiring with the end of the month of the tenancy, the Court will be well guided by following a well established principle such as the one laid down in the case of *Harihar Banerji* v. *Ramshashi Roy* (1). There it is held as follows :

"The principles laid down by the English authorities are equally applicable to cases arising in India. They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law ; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to relate, but what they would mean to tenants presumably conversant with all those facts and circumstances ; and, further, that they are to be construed not with a desire to find faults in them which would render them defective, but in accordance with the maxim 'ut res magis valeat quam pereat' (that an act may avail rather than perish)."

In this case the parties must be presumed to know what was the real intent of the notice Exhibit A which has given more time to quit than prescribed in the agreement between the parties. In *Secretary of State* v. *Madhu Sudan Mukherjee and others* (2) it has been held that a notice to quit is good notwithstanding that more time is given therein than the time prescribed.

In these circumstances we hold that the notice to quit is a valid one the same being in consonance with the terms of the agreement, which therefore rules out the applicability of section 106 of the Transfer of Property Act. In the result the appeal fails and is accordingly dismissed with costs.

(1) I.L.R. 46 Cal. 458. (2) A.I.R. (1933) Cal. p 260.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

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Feb. 11.

SIN TEK AND ANOTHER (APPELLANTS)

v.

LAKHANY BROS. (RESPONDENTS).*

Urban Rent Control Act, s. 11 (1) (b) and s. 14 (1)—Meaning of the word "premises."

Held: That the word "primarily" appearing in clause (*d*) of s.11 (*1*) of the Urban Rent Control Act, 1948 must be read in the light of the expression "and was subsequently let" which follows it. It could accordingly be construed as referring to order in time, meaning at first or originally.

A building to be erected on the site in question need not be in the nature of a residential building. The expression "house" in clause (*d*) should be given its ordinary wide construction and would include a place of business.

"House" does not mean necessarily a mere dwelling house or a house only used, exclusively or principally used, for a residence; the word "house" includes a shop or may consist of a shop.

When a tenancy was determined by due notice and a decree for ejectment was passed but the decree was later rescinded, but the landlord did not receive any rent from the tenant and he filed a suit to eject the tenant under s. 11 (*1*) (*d*) of Urban Rent Control Act to enable the landlord to build a house on the land, fresh notice to quit was not necessary. There is a distinction between the meaning of the word "tenant" in Urban Rent Control Act and meaning of the word "tenant" under the Transfer of Property Act. A tenant holding over after the determination of tenancy is a tenant within the meaning of the Urban Rent Control Act but he is not a tenant under s. 116 of the Transfer of Property Act.

Richards v. *Swansea Improvement and Tramways Co.*, (1878) 9 Ch. D. 425 at 431; *T. H. Khan* v. *Dawood Yusoof Abowath and others*, (1947) R.L.R. 354, referred to.

S. B. Leong for the appellants.

G. Horrocks for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-respondents Lakhany Brothers, who are owners of a plot of land known as No. 575, Dalhousie Street, Rangoon,

* Civil 1st Appeal No. 19 of 1951 against the decree of City Civil Court, Rangoon, in Civil Regular No. 977 of 1950, dated 5th February 1951.

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instituted a suit, known as Civil Regular No. 686 of 1948 of the Rangoon City Civil Court, for the ejectment of the defendant-appellants Sin Tek and C. Seng Chean from the said land ; and a decree was passed in their favour. Lakhany Brothers also instituted a suit for arrears of rent due by the defendant-appellants in Civil Regular No. 780 of 1948 of the Rangoon City Civil Court ; and a decree for arrears of rent for the period between 1st May, 1947 and 1st May, 1948 was also passed in their favour.

The defendant-appellants applied on 1st February, 1950, under section 14 (*1*) of the Urban Rent Control Act, 1948, for the rescission of the decree of ejectment passed against them in Civil Regular No. 686 of 1948 ; and the decree of ejectment was rescinded on the 6th March, 1950. On 30th August, 1950 Lakhany Brothers instituted a third suit, known as Civil Regular No. 977 of 1950 of the Rangoon City Civil Court, for the ejectment of the defendant-appellants from the same plot of land, but on a different ground, namely that they desired to construct a building thereon ; and this suit was also decreed with costs against the defendant-appellants on the 5th February, 1951.

The site in question could, in our opinion, be described as a plot of land "which was primarily used as a house site." The expression "primarily", appearing in clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948, will have to be read in the light of the expression "and was subsequently let" which follows it. It could accordingly be construed as referring to order in time, meaning at first or originally.

It was urged on behalf of the defendant-appellants that the building to be erected on the site in question should be in the nature of a residential building, and

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unless it was so, clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948, does not apply. It was said that as the site in question is opposite to the clock-tower of the Soortee Bazaar and as it is in a busy business centre of Rangoon, it could not have been required *bonâ fide* for the construction of a residential building. The evidence of Tar Mohamed, the managing partner of the firm of Lakhany Brothers, shows that the upper floor of the buildings in the locality in which the site in question is situated are also used for residential purposes. Ko Bulu and Ko Tin, witnesses for the defendant-appellants, also made a statement to the same effect. The expression "house" in clause (*d*) ought, moreover, to be given its ordinary wide construction, including a place of business, in the absence of anything to indicate, more or less clearly, that it was intended to be used in a more restricted sense. James L.J., in *Richards* v. *Swansea Improvement and Tramways Company* (1) *observed*:

> "Of course, the word 'house' does not mean, it seems to me, necessarily a mere dwelling house, or a house only used, or exclusively or principally used, for a residence; the word 'house' includes a shop or may consist of a shop."

There is nothing in clause (*d*) of section 11 (*1*) or in any other part of the Urban Rent Control Act, 1948, which would definitely suggest that the building, which is to be constructed, must necessarily be a dwelling house, or a place of rest or abode. We might mention here that the word "residential" which appears in clause (*f*) of section 11 (*1*) is not present in clause (*d*). If the Legislature had intended that the building or buildings that are to be constructed under clause (*d*) should be residential

(1) (1878) 9 Ch. D. 425 at 431.

building or buildings only, we would in any case expect it to express its intention more precisely.

A plan of the proposed building has been approved by the Building Department of the Corporation of the City of Rangoon, and it could, in the circumstances, be said that there is evidence to indicate that the site in question was required *bonâ fide* for the construction of a building as deposed to by Tar Mohamed.

Admittedly, no notice to quit was issued to the defendant-appellants in the present case; and a question arises whether a notice under section 106 of the Transfer of Property Act is necessary in the circumstances of the present case; and the case of *T. H. Khan* v. *Dawood Yusoof Abowath and others* (1) was referred to on behalf of the defendant-appellants. It was, however, submitted on behalf of the plaintiff-respondents that the defendant-appellants were not, in the present case, tenants who are holding over within the meaning of section 116 of the Transfer of Property Act and that no notice to quit was, in the circumstances, necessary under section 106 of the Transfer of Property Act. There is no evidence in the present case to prove that any rent was paid to or received by the plaintiff-respondents after the rescission of the decree passed in Civil Regular No. 686 of 1948.

It seems to us to be necessary to consider the effect of the order rescinding the decree of ejectment passed in Civil Regular No. 686 of 1948. The order of rescission was made on the 6th March, 1950. The effect of the order of the rescission could be said to relegate as far as possible, the parties back to the position which they would have occupied, as if the decree of ejectment passed in Civil Regular No. 686 of 1948 had not been made. The defendant-

(1) (1947) R.L. R. 354.

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appellants continued in this case to remain on the land in question even after the decree for ejectment had been passed and the contractual period of the lease, which extended up to 31st July, 1949, had expired when the order of rescission of the decree for ejectment was made. This in effect means that the defendant-appellants were no longer lessees under the lease executed on the 29th July 1946 at the time the order of rescission was passed. What is the position of the defendant-appellants? The mere fact of holding over after the expiry of the lease will not in itself create a new tenancy, and it will depend on the circumstances of each case whether a new tenancy had been created after the expiration of the original term of lease.

It was argued on behalf of the defendant-appellants that as the definition of the expression "tenant" in the Urban Rent Control Act, 1948 includes persons in the position of the defendant-appellants, the latter should, for that reason, be regarded as tenants holding over within the meaning of section 116 of the Transfer of Property Act. We are unable to accede to this contention. The definition of the word "tenant" in the Urban Rent Control Act, 1948 is made for the purposes of that Act; and it has to be remembered that the Urban Rent Control Act, 1948 does not provide for the creation of a lease.

We have already observed that the lease which the defendant-appellants held expired by efflux of time after 31st July, 1949. It is difficult to realise how the defendant-appellants could properly be described as tenants holding over unless they could bring themselves within the meaning of section 116 of the Transfer of Property Act. The defendant-appellants had paid no rent to their landlords for the period subsequent to 30th April, 1948. It also does not

appear that Lakhany Brothers had done anything which would indicate that they had assented to the defendant-appellants continuing in possesssion of the site in question. The sum of Rs. 5,578, which the defendant-appellants paid into Court on the 21st February, 1950, was in satisfaction of the rents and costs of the suit due in Civil Regular No. 686 of 1948 and for the purpose of having the decree pased in that suit being rescinded ; and moreover the rent due in that suit was also for a period prior to the 1st May, 1948, that is, for a period before the contractual lease expired by efflux of time. The defendants could not therefore be considered to be tenants holding over within the meaning of section 116 of the Transfer of Property Act ; and no notice to quit was thus necessary in the circumstances of the present case.

We ought to add that the conditions of a bond to be executed under clause (*d*) of section 11 (*1*) of the Urban Rent Control Act should follow strictly the direction given in that clause. It should have been that the plaintiffs are directed to enter into a bond for a sum of Rs. 10,000 that they will erect a building on the site in question within one year from the date of the vacation of the premises by the defendants and that they will, if so desired by the defendants, reinstate them on the premises in question on completion of the erection of the building in case it is erected for the purpose of letting. We have increased the amount of the bond to Rs. 10,000 in view of the fact that the site is in an important business centre of Rangoon and that the plaintiffs propose to construct a four-storied building thereon. The trial Court should accordingly require a new bond to be executed in the place of the old bond. Except for the modification set out above, the appeal should be considered as dismissed with costs.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

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Feb. 11.

HAJI RAHIM BUX (APPLICANT)

v.

SHAIK MUBARAK HUSSAIN (RESPONDENT).*

Rangoon City Civil Court Act—Suit under s. 17 decreed on the basis that the occupant is a licensee—Distinction between a tenant and a licensee—Urban Rent Control Act, ss. 12 (1) and 13.

Held : That a suit against a licensee is maintainable under s. 17 of the Rangoon City Civil Court Act. The Urban Rent Control Act does not apply to a licensee. S. 12 of the Urban Rent Control Act contemplates people whose right of occupation depends on tenancy created by statute.

One point of distinction between a licence and a lease is that there must be exclusive possession in the case of lease and that element of exclusive possession is absent in the case of a licence. Where exclusive possession is lacking a person cannot claim to be a tenant.

S. R. Raju v. *The Assistant Controller of Rents, Rangoon and others*, (1950) B.L.R. 10 ; *Indian Starch Products Ltd. and another* v. *The Controller of Rents, Rangoon and another*, (1950) B.L.R. 64 ; *Gurbachan Singh* v. *Jos. E. Fernando*, (1950). B.L.R.1, referred to.

Ba Gyan for the applicant.

N. R. Burjorjee for the respondent.

U ON PE, J.—This is an application for review of our judgment passed in Civil 1st Appeal No. 60 of 1950, which was an appeal by the applicant against the judgment and decree of ejectment by the Rangoon City Civil Court passed in its Civil Regular No. 587 of 1949. The ground on which this application is based is that one of the grounds raised before us in Civil 1st Appeal No. 6 of 1950 *viz.*, "for that the learned trial Court should not have entertained a suit for ejectment under section 17 of the Rangoon City Civil

* Civil Misc. Application No. 12 of 1951 being application under section 114 read with Order 47 of Code of Civil Procedure for review of judgment and decree passed in Civil 1st Appeal No. 60 of 1950, dated 16th March 1951.

Court Act in respect of the suit premises to which the Urban Rent Control Act of 1948 applies and erred in law in so entertaining and ordering an ejectment, and the judgment is otherwise bad in law", was not considered by us in our judgment dismissing the applicant's appeal.

We might observe that the parties went to trial on one issue only, that is, whether the defendant is a permissive occupant or a tenant of the plaintiff, and this might be said to be the reason why the point now taken up in this review application was not considered specifically. In the appeal before us, we took the same view, on question of fact, agreeing with the finding of the lower Court and, having come to that view, we must have considered that the question of the maintainability of the suit under section 17 of the Rangoon City Civil Court Act did not appear to be material for the decision of the case. On that footing, we disposed of the appeal in the manner we did, without touching any other points in the case which must have appeared to us to be immaterial for deciding the case. It will be true to say now, as when we heard the appeal, that if we see no grounds to change our view on the finding we had previously arrived at, the question of the maintainability of the suit can only be of academic interest.

We have, however, allowed the learned Counsel for the applicant, assuming the point now under review to be an error on the face of the record, to reagitate the matter in his attempt to induce us to change our view on the character of the occupation by the defendant (applicant) of the suit room. he learned Counsel has referred to us the decisions of the Supreme Court in support of this contention that on facts, as in the present case, the Supreme Court held the occupation to be that of a tenant. The first case

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referred to is that of *S. R. Raju* v. *The Assistant Controller of Rents, Rangoon and two others* (1). In that case the occupation was the outcome of an agreement which the parties agreed to describe as a licence and not as a sub-tenancy, and some part of which may be reproduced from the judgment:

"Clause 9 of the agreement recites that as between the 'licensee' and the 'licensor' there shall be no interference and interruption of each other's business. There is also in clause 6 a provision that out of the 14 almirahs in the said premises the 'licensee' shall be entitled to have the exclusive use of 12 almirahs. There is also another provision that the 'licensee' shall be entitled to keep his employee or employees or men to reside in the premises to enable him to run his own business. There is, further, another provision that the 'licensee's' representative will be jointly responsible with the 'licensor's' representative for theft or loss of goods at night time on the premises."

The Supreme Court also found as follows:

"That the third respondent desired to keep this transaction outside the meaning of a lease can be clearly understood, for he was paying to the second respondent Rs. 144 per mensem for the whole ground floor of house No. 99—101, Fraser Street, Rangoon, and was by this transaction obtaining a fee or rental of Rs. 500 per mensem for a part only of the same tenancy,";

and on those grounds it held that the occupation was inconsistent with the applicant being a mere licensee.

The next case of the Supreme Court is the *Indian Starch Products Limited and another* v. *The Controller of Rents, Rangoon, and another* (2) where, following *S. R. Raju*'s case (1) it was held that "the distinction between a licence and a lease is that there must be exclusive possession in the case of lease and that element of exclusive possession is absent in the case of a licence."

(1) (1950) B.L.R. 10 (2) (1950) B.L.R. 64.

The third case of the Supreme Court referred to is *Gurbachan Singh* v. *Jos. E. Fernando* (1), where the test distinguishing between a licence and a lease has been laid down following the principle enunciated in *S. R. Raiu*'s case (2). There was an agreement in this case too under which, as set out in the judgment, " the respondent agreed to allot to the appellant a floor space measuring 17 feet in length and 5 feet in width along the northern side of the show room, reserving to the respondent therein a floor space of 4 feet in length and 22 inches in width. The appellant was under the agreement to pay 'a guaranteed monthly commission' of Rs. 100 to the respondent as consideration for the allotment of the space. On the space allotted to the appellant had been constructed teak-wood fixtures and two show cases for the purpose of the appellant's business in the sale of radio goods and service of radio instruments," and it was held that an exclusive right of occupation in that specified area was given, and that the respondent's case that the appellant was mere licensee necessarily fails.

The case, before us, is distinguishable from those cases. In coming to the finding that the applicant is a licensee in this case we do not consider that we are at variance with the principles laid down in the Supreme Court cases, for the essence of a lease which is exclusive possession is clearly lacking in the present case. We do not think we should reproduce the facts except to say, because on the evidence in the case exclusive possession was found not to have been proved, that we held that the applicant was a licensee. The holding of the key of the premise does not necessarily mean exclusive possession, if there are other circumstances which would indicate, as in this case, that the licensor cannot be excluded from using

(1) (1950) B.L.R. 1. (2) (1950) B. L.R. 10.

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the premises in question. It is clear from the Supreme Court's decision that the allotment of specified space need not be enclosed, provided such allotment gives exclusive possession, to constitute a lease. It is the essence of the transaction that is to be looked at, and, for the reasons already given previously when we heard the appeal, we see no grounds to differ from that finding.

The next point that has been urged is that the Urban Rent Control Act contemplates giving relief to persons who are non-tenants like licensees and that section 12 (*1*) of the Act contains provision which tends to support this view. The relevant portion of section 12 (*1*) reads :

> " In any area or in respect of any class of premises to which the Governor may, by notification, declare this section to apply, any person, not already being a tenant of any premises but being in occupation of such premises *bonâ fide* for residential or business purposes, may make application to the Controller to be permitted to continue in occupation of such premises, and the Controller shall, on the applicant making a written declaration of his willingness to pay the standard rent of such premises, issue a written order to the said applicant permitting him to continue in occupation of the said premises and shall send a copy of his order to the landlord, or his authorized agent, if his whereabouts are known."

It has been submitted that the words "any person, not already being a tenant of any premises, but being in occupation" imply occupation by those persons who are called licensees as in this case and that this interpretation is in accordance with the principle governing the interpretation of statutes.

When one keeps in view the object of the Urban Rent Control Act, which is primarily to give relief to tenant-class of people, the interpretation of the words " any person, not being a tenant but being in occupation

of a premise," which is susceptible of more than one meaning should, in our view, be taken to mean the class of people intended to be protected by the Act. To be entitled to the protection under the Act, one must be a tenant or one who can become a tenant on his complying with the requirement as laid down under the Act. Under section 12 of the Act, a person, not already being a tenant but being in occupation of a premise for residential or business purposes, may make an application to the Controller to be permitted to continue to occupy, giving an undertaking to pay the standard rent and become a statutory tenant. Section 13 of the Act which follows section 12 makes it clear that section 12 refers to persons who are qualified to be statutory tenants. Sections 12 and 13 will have to be read together to get at the right interpretation of the words in question. When these two sections are read together, it becomes clear that section 12 contemplates people whose right of occupation depends on tenancy created by statute.

A licensee stands on a different footing and cannot be classed with the aforesaid persons. His right of occupation is assured to him as long as the licence lasts, whereas the right of occupation on a tenancy rests on payment of rent. In our view, we consider that the case of a licensee is not contemplated to fall within the ambit of the Urban Rent Control Act and, that the suit has, therefore, been rightly entertained under section 17 of the Rangoon City Civil Court Act.

In the result, this application for review cannot be entertained and is accordingly rejected ; Advocate's fees three gold mohurs.

U TUN BYU, C.J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

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Mar. 12.

MAGANLAL PRANJIVAN MEHTA (APPELLANT)

v.

MRS. CHAMPAKUNVAR RATILAL MEHTA AND OTHERS (RESPONDENTS).*

Review—Appeal against order rejecting application for review—Order 47, Rule 7 (1), Code of Civil Procedure—S. 20, Union Judiciary Act, 1948—Judgment—Whether order rejecting review amounts to.

A preliminary mortgage decree was passed by consent on the Original Side. An application for review by Appellant was dismissed as time-barred. The Appellant preferred an appeal and a preliminary objection was raised that no appeal lay.

Held: That under Order 47, Rule 7 (1), Code of Civil Procedure an order of Court rejecting an application for review is not appealable. The said order does not also amount to a judgment within the meaning of s. 20 of the Union Judiciary Act, 1948. S. 20 is in the nature of a general provision relating to appeals. But the special provision in the Code of Civil Procedure excludes appeal in s. 20. A judgment has been defined as a decree made in a suit whereby the rights of the party are determined. The word "judgment" in s. 20 of the Union Judiciary Act, 1948 should not be accorded a wider meaning than under the corresponding clause 13 of the Rangoon Letters Patent.

A decision given by the Judge for sufficient reason, even if erroneous, cannot make it a decision without jurisdiction, and an appeal did not lie in the case.

Dayabhai Jiwandas and others v. *A.M.M. Murugappa Chettiar*, (1935) 13 Ran. 457; *Dr. Hori Ram Singh* v. *Emperor*, A.I.R. (1939) F.C. 43, followed.

Appellant in person.

M. E. Dawoodjee for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The appellant Maganlal Pranjivan Mehta was a defendant in Civil Regular No. 99 of 1949

* Civil Misc. Appeal No. 20 of 1951 against the order of Original Side in Civil Regular No. 99 of 1949, dated the 9th March 1951.

on the Original Side of the High Court, and there it was ordered that the decree be granted in accordance with a compromise-petition, dated the 19th June, 1950 —*vide* the diary order, dated the 26th June, 1950. A preliminary mortgage decree was thereafter drawn up in accordance with the terms of the compromise-petition. Subsequently, on the 9th October, 1950, Maganlal Pranjivan Mehta filed an application for the review of the order allowing the compromise, made on the 26th June, 1950, and for setting aside the preliminary mortgage decree made in pursuance of the compromise-order. The learned Judge on the Original Side held, *inter alia*, that the application for review was barred by limitation of time and that no sufficient cause had been made out by the appellant for not preferring an application for review within the time allowed under the Limitation Act. We agree with the decision of the learned Judge on the Original Side, and the decision is, in our opinion, correct.

A preliminary objection has been raised on behalf of the respondents that no appeal is allowed against an order rejecting an application for review. The relevant portion of Order 47, Rule 7 (1) of the Code of Civil Procedure reads :

> " 7. (1) An order of the Court rejecting the application shall not be appealable ; but an order granting an application may be objected to on the ground that the application was—
>
> (*a*) in contravention of the provisions of Rule 2,
>
> (*b*) in contravention of the provisions of Rule 4, or
>
> (*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause."

It is thus clear that no appeal is allowed under the Code of Civil Procedure against an order rejecting an application for review.

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U TUN BYU, C.J.

It has been urged by the appellant Maganlal Pranjivan Mehta, who appeared in person to argue the present appeal, that an appeal lies against an order rejecting his application for review by reason of section 20 of the Union Judiciary Act, 1948, which provides :

"20. An appeal shall lie to the High Court from the judgment of a single Judge of the High Court sitting in the exercise of its original jurisdiction or in the exercise of its appellate jurisdiction, not including revisional jurisdiction ; provided that in the latter case the Judge declares that the case is a fit one for appeal."

Section 20 of the Union Judiciary Act, 1948, is, in effect, a reproduction, in a more concise form, of clause 13 of the Rangoon Letters Patent. Rule 7 (1) of Order 47 of the Code of Civil Procedure expressly disallows an appeal being preferred against an order rejecting an application for review, and it ought therefore to be considered as being in the nature of a special provision of law, relating to an order rejecting an application for review. Section 20 of the Union Judiciary Act, 1948, is in the nature of a general provision, applying to appeal generally.

It was contended that an order rejecting an application for review should be considered to be a judgment within the meaning of section 20 of the Union Judiciary Act, 1948. We cannot accept this contention. It was held in a Full Bench case of *Dayabhai Jiwandas and others* v. *A.M.M. Murugappa Chettiar* (1) that the word " judgment" in clause 13 of the Letters Patent means a decree made in a suit whereby the rights of the party are determined. The above Full Bench case was also

(1) (1935) 13 Ran. 457.

referred to in a recent case in the Federal Court of India in *Dr. Hori Ram Singh* v. *Emperor* (1), and there it was observed as follows :

" In view of the observation, made by their Lordships of the Privy Council, the word 'judgment' cannot now be taken in its widest possible sense so as to include every order which terminates a proceeding pending in a High Court so far as that Court is concerned."

We are unable to see any good reason why the expression " judgment " in section 20 of the Union Judiciary Act, 1948, should be accorded a wider meaning than it possesses under clause 13 of the Rangoon Letters Patent. The appellant Maganlal Pranjivan Mehta had a right to have the consent decree set aside in certain circumstances, on appeal ; and he had not preferred any appeal against the preliminary mortgage decree which was drawn up in accordance with the compromise-petition. The appellant could also, if he had proper grounds to support it, institute a suit to declare the decree void, and he is thus not without a remedy.

It is not disputed in the present case that the learned Judge on the Original Side had jurisdiction to hear the application for review and that he had given reasons for the decision arrived at by him. His decisions, even if they could be shown to be erroneous, would not convert them into decisions made without jurisdiction. It could not therefore be said that the learned Judge on the Original Side had acted in excess of his jurisdiction. Moreover the law, as expressed in Order 47, Rule 7, of the Code of Civil Procedure being a special provision relating to an order rejecting an application for review, must be considered to

(1) A.I.R. (1939) F.C. 43.

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U TUN BYU, C.J.

override a more general provision of law contained in section 20 of the Union Judiciary Act. The preliminary objection raised is therefore upheld, and the appeal is dismissed with costs ; Advocate's fee five gold mohurs.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

T. M. MOHAMED CASSIM (APPELLANT) H.C. 1952 Mar

v.

M/s. A. C. MARTIN & Co. LTD. (RESPONDENTS).*

Promissory note not duly stamped—Defence that promissory-note was taken in satisfaction of the claim—Transfer of rights and liabilities by partnership to a limited company—Whether transferee could sue on original cause of action—Cause of action—Repayment of advance when arises.

Held: The burden of establishing that a promissory-note was accepted in satisfaction of a debt is upon the party pleading to that effect. Since the party did not give evidence or examine witnesses on this plea it could not be held that this plea was established.

Maung Chit and another v. *Roshan N. M. A. Kareem Oomer & Co.*, (1934) I.L.R. 12 Ran. 500 at 504, referred to and followed.

The Respondent, a limited company, as the successors to the firm of A. C. Martin & Co. had taken over all the assets, rights and liabilities of the firm under a written agreement ; as such they acquired the right to file a suit on the original cause of action in favour of the firm. The firm can have no right of repayment for advances made by the firm against supply of bricks by appellant until the appellant ceased to supply bricks. He so ceased to supply on the 12th April 1948 and that was the first time when it could be ascertained that appellant owed money in respect of such advances. A suit which was instituted in 1950, was therefore within time.

Maung Aung Min and others v. *Mulu Curuppan Chetty and others*, (1907), Vol. I, B.L.T. 50, distinguished.

N. Bose for the appellant.

A. C. Rodrigues for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-respondents A. C. Martin & Co. Ltd. are the successors to the firm of A. C. Martin & Co. Paragraphs 2 and 3 of the Agreement, dated 10th April, 1950, show that A. C. Martin & Co. Ltd. had taken over the assets, rights and liabilities of the firm of A. C. Martin & Co.

* Civil 1st Appeal No. 65 of 1951 against decree of City Civil Court in Civil Regular No. 1174 of 1950, dated 27th July 1951.

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T. M MOHAMED CASSIM v. M/S. A.C. MARTIN & CO. LTD.

U TUN BYU, C.J.

The defendant-appellant T. M. Mohamed Cassim used to supply bricks to the firm of A. C. Martin & Co.; and the firm of A. C. Martin & Co. made advances, from time to time, to T. M. Mohamed Cassim against the supply of bricks to be made by the latter. T. M. Mohamed Cassim admitted in his written statement that he supplied bricks to the firm of A. C. Martin & Co. up to the 12th April, 1948, to the value of Rs. 2,353 in all. There was a settlement of accounts between T. M. Mohamed Cassim and the firm of A. C. Martin & Co. on the 12th April, 1948, when it was discovered that T. M. Mohamed Cassim owed a sum of Rs. 3,147 to the firm of A. C. Martin & Co., after giving credit for the bricks supplied by him in respect of the advances which T. M. Mohamed Cassim received from the firm of A. C. Martin & Co. On the same day T. M. Mohamed Cassim executed a promissory-note for the sum of Rs. 3,147 found to be owed by him, but the promissory-note had not been sufficiently stamped, with the result that the plaintiff-respondents A. C. Martin & Co. Ltd. founded their claim against T. M. Mohamed Cassim on the original cause of action, and not on the promissory-note, which was said to have been executed on the 12th April, 1948.

The learned Second Judge of the Rangoon City Civil Court found the issues in favour of the plaintiff-respondents, and their suit was decreed.

It was urged on behalf of T. M. Mohamed Cassim that the plaintiff-respondents could not in this case sue on the original cause of action on the ground that the firm of A. C. Martin & Co. had accepted the promissory-note for Rs. 3,147 from T. M. Mohamed Cassim in satisfaction of the debt of Rs. 3,147 found due by the latter on the settlement of accounts on the 12th April, 1948. On the other hand, it was contended on behalf of the plaintiff-respondents, who acquired the assets,

rights and liabilities of the firm of A. C. Martin & Co., that the promissory-note for the sum of Rs. 3,147 was taken merely as a collateral security for the repayment of the excess of the advances made to T. M. Mohamed Cassim, as found due when the accounts were gone into by the parties on the 12th April, 1948.

Two of the propositions laid down in the Full Bench case of *Maung Chit and another* v. *Roshan N. M. A. Kareem Oomer & Co.* (1), read :

" (3) It is *primâ facie* to be presumed (although the presumption is rebuttable), that the parties to the loan transaction have agreed that the promissory-note or other negotiable instrument given and taken in such circumstances shall be treated as conditional payment of the loan ; the cause of action on the original consideration for money lent being suspended during the currency of the negotiable instrument, and if and so long as the rights of the parties under the instrument subsist and are enforceable ; but the cause of action to recover the amount of the debt revives if the negotiable instrument is dishonoured or the rights thereunder are not enforceable. On the other hand the cause of action on the original consideration is extinguished when the amount due under the negotiable instrument is paid or if the lender by negotiating the instrument or by laches or otherwise has made the bill his own, and thus must be regarded as having accepted the negotiable instrument in accord and satisfaction of the borrower's liability on the original consideration.

. . . . . .

(4) * * * *

(5) If it is agreed between the parties that the promissory-note or other negotiable instrument shall be taken merely as collateral security for the repayment of the loan, the lender is entitled to sue upon the original consideration independently of the security, and without regard to any rights that he may possess under the negotiable instrument. "

Thus, the burden of establishing that the promissory-note for Rs. 3,147, which T. M. Mohamed Cassim

(1) (1934) I.L.R. 12 Ran. 500 at 504.

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executed on the 12th April, 1948, was accepted in satisfaction of the debt of Rs. 3,147 found to be due by him on that date falls on T. M. Mohamed Cassim. There is, in our opinion, no proper material on the record by which the Court might conclude that the promissory-note for Rs. 3,147 was taken in satisfaction of the debt of Rs. 3,147 which T. M. Mohamed Cassim was found to have owed to the firm of A. C. Martin & Co., in connection with the advances which he received from the latter firm.

It was submitted on behalf of T. M. Mohamed Cassim that the promissory-note for Rs. 3,147 should not be considered to have been taken as collateral security in that there was no monetary transaction entered into on the 12th April, 1948, for which the promissory-note might be said to constitute a collateral security. We cannot, however, accede to this contention.

M. Esak, Head Clerk of the firm of A. C. Martin & Co., who went into the accounts with T. M. Mohamed Cassim on the 12th April, 1948, stated that they found on that date that T. M. Mohamed Cassim owed a sum of Rs. 3,147 to the firm of A. C. Martin & Co., in respect of the advances made to him ; but he nowhere stated that the promissory-note for Rs. 3,147 was taken in accord and satisfaction of the debt of Rs. 3,147, found to be due by T. M. Mohamed Cassim. The statement, which M. Esak made in Court, also does not indicate that the promissory-note for Rs. 3,147 must have been taken in full discharge or satisfaction of the debt of Rs. 3,147 found to be due to the firm of A. C. Martin & Co. on the 12th April, 1948. The appellant-defendant T. M. Mohamed Cassim had, moreover, not gone into the witness box to give evidence in this case, nor had he examined any witness on his behalf. It could not therefore, be said in this case that the

promissory-note for Rs. 3,147 was taken in satisfaction of or as a discharge for the debt of Rs. 3,147, found to be owed by T. M. Mohamed Cassim when the accounts were gone into.

The case of *Maung Aung Min and three others* v. *Mutu Curuppan Chetty and two others* (1), affords no help to the defendant-appellant in the present case; and the headnote of which is in the following terms :—

"When promissory notes are drawn in favour of one firm and when partners in that firm change and a new firm is formed, the latter cannot sue on them unless they are endorsed over to them by or on behalf of the former."

The plaintiff-respondents had not in this case based their suit on a promissory-note. There is also no evidence to show that the promissory-note for Rs. 3,147 had been endorsed in favour of the plaintiff-respondents. Paragraph 4 of the plaint makes it clear that they based their claim on the original cause of action, and not on the promissory-note which T. M. Mohamed Cassim executed on the 12th April, 1948; and their suit was, in our opinion, rightly instituted in that they had, under a written agreement, acquired all the assets, rights and liabilities of the firm of A. C. Martin & Co.

A question arises whether the suit of the plaintiff-respondents was instituted in time. The plaintiff-respondents instituted their suit on the 19th September, 1950; and this was beyond 3 years from the date of the last advance made to T. M. Mohamed Cassim, namely, a sum of Rs. 1,000 on the 22nd January, 1947. It cannot, however, be disputed, in view of the express admission of the defendant-appellant in his written statement that the three advances, which T. M. Mohamed

(1) (1907) Vol. I, B.L.T. 50.

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Cassim obtained from the firm of A. C. Martin & Co., were advances made against the supply of bricks to be delivered from time to time by him. It is, therefore, obvious that the firm of A. C. Martin & Co. would have no right to demand for the repayment of the advances so made, until T. M. Mohamed Cassim had ceased to supply the bricks to the firm of A. C. Martin & Co. Paragraph 4 of the written statement show that T.M. Mohamed Cassim ceased to supply bricks only from the 12th April, 1948. It was, therefore, only on the 12th April, 1948 that it could be ascertained for the first time whether T. M. Mohamed Cassim really owed any money to the firm of A. C. Martin & Co. in connection with the advances made to him against the bricks to be supplied by him. The cause of action in the present case can thus be said to have arisen from 12th April, 1948, only ; and the present suit, which was instituted on the 19th September, 1950, must therefore be considered to have been instituted in time.

The appeal is accordingly dismissed, with costs.

APPELLATE CIVIL.

Before U San Maung and U Si Bu, JJ.

M/S. KALIDAS & SONS (APPELLANTS)

v.

KHOLI RAHMAN (RESPONDENT).*

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Jan. 7.

Workmen's Compensation Act, s. 30 (1) (a)—Commission whether can be issued.

Held: In proceedings under the Workmen's Compensation Act, the Commissioner has no power to issue a commission for the examination of witnesses.

Singh v. *Burma Railways*, (1938) R.L.R, 641; *Brigstock Edulji and Co.* v. *Gaguji Devji and one*, A.I.R. (1930) Sind, 221, followed.

H. Subramanyam for the appellants.

Tun Sein for the respondent.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—This is an appeal under section 30 (*1*)(*a*) of the Workmen's Compensation Act by Messrs. Kalidas & Sons, boat owners of Bassein, against the order of the Commissioner for Workmen's Compensation, Bassein District, awarding a sum of Rs. 2,100 *plus* cost of the application to the respondent Kholi Rahman, for injuries received by him, resulting in permanent partial disablement. The injuries said to have been received by the respondent have been fully described in the order under appeal and it was the respondent's case that they were received by him in course of the employment of the appellants and that

* Civil Misc. Appeal No. 17 of 1951 against the order of the Commissioner for Workmen's Compensation, Bassein District in C.W.C Case No. 1 of 1950, dated 27th February 1951.

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the fracture of the bones of the left hand necessitated its amputation. The appellants in their written statement before the Commissioner for Workmen's Compensation denied all the allegations made by the respondent; therefore the respondent had to prove not only that the injuries were sustained by him as a result of an accident arising out of and in the course of his employment as Sukhani of the steam launch belonging to the appellants, but also that the injuries were such that amputation of his left hand was entirely necessary. In these circumstances the evidence of the Medical Officer who treated the respondent at Myaungmya, is important for the determination of the case against the appellants. This Medical Officer was not called to be examined as a witness before the learned Commissioner as it was represented to him that his attendance could not be procured without much inconvenience. A Commission was accordingly issued for his examination by the District Magistrate of Myaungmya, who was also Commissioner for Workmen's Compensation in Myaungmya District. His answers to the interrogatories and the cross-interrogatories were treated as evidence in the case. Therefore one of the points raised by the appellants in this appeal is that the statements made by the Medical Officer before Commissioner for Workmen's Compensation, Myaungmya, were not admissible in evidence and that therefore there was no basis on which the Commissioner for Workmen's Compensation, Bassein, could have made his award of Rs. 2,100 to the respondent. This contention must in our opinion prevail. As held in *Singh* v. *Burma Railways* (1) :

> " Under the Workmen's Compensation Act a Commissioner has no jurisdiction to issue a commission for the examination of witnesses."

(1) (1938) R.L.R. 641.

See also *Brigstock Edulji & Co.* v. *Gaguji Devji and another* (1).

Although the fact that the respondent did receive injuries on the left forearm appears in his own evidence, it is only the Medical Officer who can state with any show of authority that amputation of the left hand of the respondent was an absolute necessity. Therefore the evidence of the Medical Officer who had treated the respondent cannot be dispensed with.

For these reasons we would set aside the order of the Commissioner for Workmen's Compensation, Bassein awarding Rs. 2,100 and costs to the respondent, and direct that the case be remanded to him to proceed to record such evidence as parties may desire to adduce according to law and upon such evidence together with the evidence which had already been taken before the passing of the order under appeal to dispose of the case according to law. Each party must bear its own costs of this appeal.

(1) A.I.R. (1930) Sind 221.

APPELLATE CRIMINAL.

Before U On Pe and U San Maung, JJ.

H.C. 1952

Jan. 25.

THE UNION OF BURMA (APPELLANTS)

v.

BOH SEIN TUN (RESPONDENT).*

The Constitution of Burma, s. 60—Right of amnesty how to be exercised—Distinction between amnesty and pardon—Principles on which it is based—General Clauses Act as amended by Act XI of 1950—Ss. 21 (1), 22 and 63 of the Constitution—Principle on which punishment is to be inflicted—S. 562(1), Criminal Procedure Code.

Held : That a notification issued by the Government of the Union of Burma, Ministry of Home Affairs, Police II Branch Notification No. 370, dated 10th May 1950 is no more than a promise by the Government not to take any action against those who surrender in terms thereof and has no legal effect unless it has been implemented by an Act of Parliament.

The word " pardon " includes Amnesty.

Phillips v. *Eyre* (1868) L.R. 4 Q.B. 225 and (1870) L.R. 6 Q.B. (Ex. Ch.); *Burdick* v. *United States* 236 U.S. 79; *John Knote* v. *United States*, 95 U.S 149, followed.

Amnesty is a modified form of pardon and may be granted before or after a conviction. There is nothing in the Constitution which prohibits the President from extending a general pardon to offenders or classes of offenders so long as it is known that they have committed offences punishable under the penal law of the country.

Under s. 63 of the Constitution the powers and functions conferred on the President by the Constitution shall be exercisable and performable by him only on the advice of the Union Government save where it is provided that he shall act in his own discretion and s. 60 which vests the right of pardon in the President does not provide that in exercising this right he shall act in his discretion. Therefore the right of pardon is only exercisable on the advice of the Union Government.

Though s. 13 of the General Clauses Act as amended by the Act XI of 1950 enacts that whery be an Act of Parliament or by any existing law as defined in s. 222 of the Constitution any power is conferred or any duty imposed on the President of the Union, the power shall be exercisable and the duties performable in his name by the Government. But the power conferred on the President by s. 60 is not a power conferred on him by any Act of Parliament or by any existing law.

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* Criminal Appeal No. 306 of 1951 being appeal from the order of the 2nd Special Judge of Maubin, dated 12th April 1951 in Criminal Regular Trial No. 8 of 1950.

S. 121 (1) of the Constitution provides that all executive actions of the Union Government shall be expressed to be taken in the name of the President but this does not mean that all actions taken in the name of the President are *ipso facto* executive actions of the Union Government as s. 63 of the Constitution makes it clear that the powers conferred on the President by the Constitution shall be exercisable and performable by him though of course only on the advice of the Union Government. All executive actions of the Union Government must be in the name of the President but all actions taken in the name of the President are not necessarily executive actions of the Union Government.

The Amnesty Order is nothing more than a promise by the Government not to take any action against those who surrendered and as such not cognisable by Courts of Law unless and until the promise contained therein is implemented by an act of Legislature.

Where the main offender has not been prosecuted but has been allowed to serve the Government the Court would be justified in exercising the powers under s. 562 (1) of the Criminal Procedure Code.

An offence of theft cannot be obliterated by the subsequent restitution of property.

Chan Htoon, Attorney-General, Burma with *Choon Foung* (Government Advocate), Burma } for the appellants.

Tin Hla for the respondent.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—This is an appeal by the Government of the Union of Burma under section 417 of the Code of Criminal Procedure against the judgment of the 2nd Special Judge, Maubin, in his Criminal Regular Trial No. 8 of 1950 acquitting the respondent Boh Sein Tun of the offence under section 395 of the Penal Code for which he was sent up for trial. The learned trial Judge's judgment proceeded on the basis that the offence committed by Boh Sein Tun was really one under section 392 of the Penal Code but that the prosecution was barred by virtue of the amended Amnesty Order issued by the Government of the Union of Burma, Ministry of Home Affairs, Police II

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Branch Notification No. 370, dated the 10th May 1950. The grounds of appeal are :—

(1) That the offence committed by Boh Sein Tun really fell under section 395 of the Penal Code and not merely under section 392 as held by the learned trial Judge and,

(2) That the revised Amnesty Order aforesaid, was only an administrative act not binding upon the Courts of Law.

Therefore the first point for consideration in this appeal is whether those who come within the ambit of the revised Amnesty Order aforesaid, can plead it as an effective bar to criminal prosecution if Government were to prosecute them inspite of the fact that they had surrendered strictly in terms of that order. The relevant portion of this revised Amnesty Order runs as follows :

" Whereas the Union Government are willing to repeat their announcement published in the Ministry of Home Affairs' Notification No. 127, dated the 14th March 1949, that they desire to achieve peace and national solidarity by effecting mutual understanding among all the communities and sections of the population, and that accordingly in that announcement they formulated certain terms of amnesty which were offered to the members of the Karen National Defence Organizations, Mon National Defence Organizations and those members of the Government Armed Forces who had been collaborating with these two organizations.

And whereas the Government now consider that time has arrived when the terms of the amnesty which have hitherto been in force should be revised to cover all types of insurgents by widening the scope of their application and by inclusion of a provision that the surrenders that may be made hereafter shall be subject to the condition that the discretion of the Government to proceed against suitable persons for high treason and cognate offences will not be prejudiced.

* * * *

(3) Amnesty in the case of members of other Services of the Government and the general public—Members of the other Services of the Government and the general public who have been involved in the insurrections will, on surrender with all their arms and ammunition, subject in the case of Government servants to departmental action, be granted full amnesty in respect of all offences other than the offences of rape, dacoity or murder. Even in the case of those who have committed any offence for which no amnesty is granted, the fact that they have surrendered themselves with all the arms and ammunition in their possession will be considered a ground for sympathetic consideration when the question of their punishment is finally decided.

2. The Union Government, however, desire it to be known that in the application of the above conditions of the offer of amnesty, Government will use their discretion to take action for high treason or other cognate offences in suitable cases of important persons who were or are responsible for organizing and promoting the insurrection and to decide finally on the question of their punishment.

* * * *

4. No amnesty shall ordinarily be granted in respect of offences committed on or after the 26th May 1950 other than the offence of being a passive member of an insurgent organization."

It is contended by the learned Attorney-General, who has appeared to argue this point on behalf of the Government, that this revised Amnesty Order is no more than a promise by the Government not to take any action against those who have surrendered in terms thereof and that it has no legal effect until and unless it has been implemented by an Act of Parliament. On the other hand, the learned Advocate for the respondent Boh Sein Tun contends that the revised Amnesty Order is in fact the exercise by the President of the right of pardon vested in him by section 60 of the Constitution of the Union of Burma. To this contention, the learned Attorney-General has replied that

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under the Constitution the President has a power only to remit punishment on those found guilty by the Courts of having committed criminal offences whereas the right of granting amnesties which have the effect of overlooking offences is vested only in the legislature. In support of his argument, the learned Attorney-General has invited our attention to paragraph 972 of "Willoughby on the Constitution of the United States" Volume 3, Second Edition, which runs as follows:

"In *Burdick* v. *United States* (1) the Court said: 'It is of little service to assert or deny an analogy between amnesty and pardon. Mr. Justice Field in *Knote* v. *United States* (2) said that 'the distinction between them is one rather of philological interest than of legal importance.' This is so as to their ultimate effect, but there are incidental differences of importance. They are of different character and have different purposes. The one overlooks offence; the other remits punishment. 'The first is usually addressed to crimes against the sovereignty of the state, to political offences, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the state. Amnesty is usually general, addressed to classes or even communities,—a legislative act, or under legislation, constitutional or statutory,—the act of the supreme magistrate. There may or may not be distinct acts of acceptance. If other rights are dependent upon it and are asserted, there is affirmative evidence of acceptance. Examples are afforded in *United States* v. *Klein*, 13 Wall. 128; *Armstrong's Foundry*, 6 Wall. 766; *Carlisle* v. *United States*, 16 Wall. 147. *See* also *Knote* v. *United States* (2), supra. If there be no other rights, its only purpose is to stay the movement of the law. Its function is exercised when it overlooks the offence and the offender, leaving both in oblivion'."

However, it is difficult to get over the effect of the judgment of the Supreme Court of the United States in

(1) 236 U.S. 79. (2) 95 U.S. 149.

John Knote v. *United States* (1), the relevant portion of which reads as follows :

"The Proclamation of the President extended unconditionally and without reservation a full pardon and amnesty for the offence of treason against the United States, or of giving aid and comfort to their enemies, to all persons who had directly or indirectly participated in the rebellion, with a restoration of all rights, privileges and immunities under the Constitution and the laws made in pursuance thereof. Some distinction has been made, or attempted to be made, between pardon and amnesty. It is sometimes said that the latter operates as an extinction of the offence of which it is the object, causing it to be forgotten, so far as the public interests are concerned, whilst the former only operates to remove the penalties of the offence. This distinction is not, however, recognized in our law. The Constitution does not use the word 'amnesty'; and, except that the term is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance. At all events, nothing can be gained in the consideration of the question before us by showing that there is any difference in their operation. All the benefits which can result to the claimant from both pardon and amnesty would equally have accrued to him if the term 'pardon' alone had been used in the Proclamation of the President. In *Klein*'s case, this Court said that pardon included amnesty. 13 Wall., 128 (80.U.S., XX., 519)."

It is for this reason that the learned author of "Corwin's The President Office and Powers" had to observe at page 194 of his publication :

"By the theory of the common law, as summed up by Chief Justice Marshall in the early case of *United States* v. *Wilson*, a pardon is like a deed, to the validity of which delivery and acceptance are essential; nor may it be known judicially, being 'the private though official act of the President,' unless it be pleaded by its intended beneficiary.

(1) 95 U.S. 149.

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In short, the granting of a pardon is an essentially man-to-man transaction, from which it would seem to follow that the power of granting it does not embrace the power to issue a general amnesty, of which the Courts would be obliged to take notice. From the first, nevertheless, the contrary was assumed. General amnesties were issued by Washington in 1795, by Adams in 1800, by Madison in 1815, by Lincoln in 1863, by Johnson in 1865, 1867, 1868, and by the first Roosevelt—Aguinaldo's followers—in 1902. It is true that Johnson's enemies in Congress made a half-hearted effort to challenge his power in this respect, but without avail. In cases decided in 1871 the Court declared that 'pardon includes amnesty,' and that a proclamation of amnesty by the President was a public act of which 'all courts in the United States are held to take notice and to which all courts are bound to give effect.'"

In the "Introduction to American Government" by Frederic A. Ogg and P. Orman Ray (at page 367 of the 8th edition) the authors have this to say regarding the powers of the President of the United States :

"A modified form of pardon is amnesty, which is a sort of blanket pardon extended to numbers of people who, without having been individually convicted, are known to have violated federal law, as by engaging in rebellion. Amnesties may be declared by act of Congress ; but the usual method is that of presidential proclamation."

In Great Britain the Crown enjoys exclusive and inseparable right of granting pardons and this prerogative of the Crown is usually delegated to Colonial Governors. Pardon may, in general, be granted either before or after a conviction. Besides a royal pardon under the Great Seal or under the sign manual, there may be a pardon by an Act of Parliament. *See* Halsbury Laws of England, Volume 6, page 404 and Volume 9, page 444. The Colonial Parliaments also have the power of granting pardons by passing an act

of Indemnity. See *Phillips* v. *Eyre* (1). From the above, it is clear that the President of the Union of Burma has been vested with the right of granting pardon to a person either before or after his conviction by a Court of Law if that person has committed any offence. Although the right of pardon is usually exercised in particular cases, there is nothing in the Constitution which prohibits the President from extending a general pardon to offenders or classes of offenders so long as it is known that they have committed offences punishable under the Penal Law of the country. This is the Constitutional Law and Practice in the United States, the country with a Constitution following which our own Constitution seems to have been fashioned, and it has not been brought to our notice that the Law as laid down by the Supreme Court of the United States in *John Knote* v. *United States* (2) had since been over-ruled. There is, in our Constitution, a safeguard against the President misusing his power of granting pardons as section 63 thereof provides that the powers and functions conferred on the President by the Constitution shall be exercisable and performable by him only on the advice of the Union Government, save where it is provided by the Constitution that he shall act in his discretion or on the advice or nomination of or on receipt of any communication from any other person or body. Section 60 which vest the right of pardon in the President does not provide that in exercising this right he shall act in his discretion. Therefore, the right of pardon is exercisable only on the advice of the Union Government.

Unfortunately for the respondent, the revised Amnesty Order, published in the Ministry of Home

(1) (1868) L.R. 4. Q.B. 225 and (1870) L.R. 6. Q.B. (Ex. Ch.).
(2) 95 U.S. 149.

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Affairs, Police II Branch Notification No. 370, dated the 10th May 1950, was not a proclamation by the President. It was merely an announcement published for general information by the Government of the Union of Burma in the Ministry of Home Affairs. No doubt section 13 of the General Clauses Act as inserted by Act No. XI of 1950 enacts that where by an Act of the Parliament or by any existing law as defined in section 222 of the Constitution, any power is conferred or any duty imposed, on the President of the Union, the power shall be exercisable, or the duty performable in his name by the Government. However, the power conferred upon the President by section 60 of the Constitution is *not* a power conferred upon him by an Act of Parliament or by any existing Law as defined in section 222 of the Constitution so as to attract the provisions of section 13 of the General Clauses Act. Section 121(1) of the Constitution no doubt provides that all executive action of the Union Government shall be expressed to be taken in the name of the President. However, this does not mean that all action taken in the name of the President are *ipso facto* executive actions of the Union Government as section 63 of the Constitution makes it clear that the powers and functions conferred on the President by the Constitution shall be exercisable and performable by the President though of course only on the advice of the Union Government, etc., except where it is provided by the Constitution that he shall act in his discretion. In short, all executive action of the Union Government must be in the name of the President but all action taken in the name of the President are not necessarily executive action of the Union Government.

For these reasons we are of the opinion that the revised Amnesty Order alluded to above, is nothing more or less than a promise by the Government not to

take any action against those who have surrendered in terms of the order and as such, not cognizable by Courts of Law until and unless the promise therein contained has been implemented by an Act of legislature. Unfortunate though the result may be, that in our view, is the correct legal position as contended by the learned Attorney-General. The contention of the learned Advocate for the respondent that the Amnesty Order can be pleaded as an effective bar to criminal prosecution cannot, therefore, be accepted.

Coming to the facts of the case, they have been fully set out in the judgment of the learned Special Judge of Maubin now under appeal. It is therefore only necessary to set out here such of the salient features of the case as would be useful in coming to a decision whether or not Boh Sein Tun has committed any offence punishable under the Penal Code. Boh Sein Tun was the leader of (the People's Volunteer Organization or Pyithuyebaws as they were called) of Maubin District and he was also a member of Parliament until his membership was terminated for his continuous absence from the meetings as a result of going underground when a section of the People's Volunteers known as the White P.V.Os. revolted against the Government. In the month of August 1948, the population of Pantanaw township was in a state of panic because of the danger from the Karen insurgents in Maubin District. Boh Tha San (PW 14), the main witness for the prosecution in this case was the Commander of a Unit of the 15th U.M.P. of which the Company Commander was Boh Toke Shwe who also revolted against the Government by joining hands with the Red Flag Communists and the White P.V.Os. Boh Tha San, whose intention according to his own statement, was to proceed to Rangoon for the purpose

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of allowing himself and the men under his command to be disarmed, arrived at Pantanaw on the 11th or the 12th August 1948 and occupied the town at the request of the elders. On the same day, he caused his Lieutenant Boh Myo Myint to check the cash in the Sub-treasury and when it was found that the cash in the Sub-treasury tallied with the balance shown in the Cash-book and the Sub-treasury Register, Boh Myo Myint made an endorsement in the Sub-treasury Register to that effect. This endorsement was attested by some of the elders like U Ohn Maung (PW 8), the owner of a printing press and U Sein Pe (PW 13), a Lawyer. On that day, arms and ammunitions were withdrawn from the police by Boh Tha San and the town was declared to be under his administration. The Civil Police, guarding the Police Station lock-up, was replaced by Boh Tha San's men who also guarded the Sub-treasury. The Sub-treasury Officer U Maung Khin (PW 15), in whose possession the Sub-treasury key was still allowed to be retained, was ordered by Boh Tha San not to make any disbursement without his expressed orders. A special committee to help Boh Tha San in the administration of the town was formed from among some of the town elders and Government Officers. On the 14th August 1948, Boh Sein Tun appeared at Pantanaw. According to some of the witnesses for the prosecution he was accompanied by a number of his armed followers but, the evidence on this point, is somewhat vague and unsatisfactory. On the day Boh Sein Tun arrived at Pantanaw, some of the Government servants approached Boh Tha San, who was the *de facto* administrator of the town, for disbursement to them of one month's pay, apparently that for August 1948 which would ordinarily be payable only on the 1st September 1948. Boh Tha San was agreeable. So, on that day,

Boh Tha San accompanied by Boh Sein Tun, the Sub-treasury Officer U Maung Khin (PW 15) and the clerk Maung Hla Kyi (PW 16) went to the Sub-treasury vault and removed whatever cash balance that was there. It amounted to Rs. 36,702-10-3. According to U Maung Khin, the money was actually taken by Boh Tha San after deducting the sum payable to the Government servants as their salary, whereas, according to Maung Hla Kyi, the money was actually taken by both Boh Sein Tun and Boh Tha San. However, when Maung Hla Kyi was recalled for further cross-examination on the 3rd November 1950, he admitted that it was Boh Tha San who actually took the money. At the time the money was taken Boh Tha San made an endorsement over his signature dated the 14th of August 1948 that all the money had been seized "ငွေဘဏ်သိမ်းဆီးခြင်းကြောင်း". On the left of Boh Tha San's signature, there appears the signature of Boh Sein Tun, affixed in such a way that the whole of it appears directly underneath the left half of the endorsement, Boh Tha San's signature being underneath the right half of it. According to Boh Tha San, at about 12 noon on the day of the occurrence of this case, he met Boh Sein Tun who asked him whether the treasury had been opened (meaning whether the cash in the treasury had been seized). Boh Tha San replied that since the cash belonged to the country and the people, he felt that he should not make use of it. Thereupon Boh Sein Tun said that in view of the prevailing condition, there was danger of the cash falling into the hands of the Karens and Red Flag Communists. Boh Tha San then consulted U Maung Khin, U Tun Kyaing and U Hla Kyi who told him that since he had already taken over the administration of the town, it was within his discretion to make use of the cash in the manner he deemed fit. Thereupon, Boh Sein Tun reiterated

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his request for the opening of the treasury. Boh Sein Tun then took him and the elders as well as the Sub-treasury Officer to the Sub-treasury whence Rs. 37,000 odd was taken out. About Rs. 18,000 odd were paid to Government servants as their salary. Out of the balance, Rs. 10,000 was taken by Boh Sein Tun and Rs. 9,000 by Boh Tha San. It was agreed between them that they should account for the return of the money to the Government when its administration was restored.

U Tun Kyaing (PW 11) who was the Inspector of Police at Pantanaw, did not support Boh Tha San as regards the advice alleged to be given to him by the elders for dealing with the cash in the Sub-treasury in the manner which he deemed fit. He also denied having accompanied Boh Tha San and Boh Sein Tun to the Sub-treasury. U Maung Khin (PW 15), Sub-treasury Officer, also did not support him on the former point. On the other hand, U Maung Khin said that he had to surrender the cash in the treasury to Boh Tha San because he was afraid of Boh Tha San. Therefore it is clear that Boh Tha San who had assumed to himself the role of the administrator of Pantanaw town had also arrogated to himself the right to deal with the money in the Sub-treasury in the manner which he thought fit. That he had no such power, in fact, is clear from his own statement. He was merely a member of the Union Military Police Force on his way to Rangoon to surrender his arms. He has not been appointed as Administrator of any region, much less to take charge of any Treasury. Therefore, if any offence has been commited in respect of the cash in Pantanaw Sub-treasury, the prime offender is Boh Tha San against whom action was originally taken under section 512 of the Criminal Procedure Code as an absconder but who was

subsequently examined as a witness for the prosecution instead of being made a co-accused with Boh Sein Tun. According to U Chit Aung (PW 12), the police officer who investigated this case, on an enquiry being conducted by him when Boh Tha San was found to be an officer of the 16th U.M.P. on active service, no criminal offence was found to be established as against him. On the facts now appearing in evidence before us this seems to be a strange attitude for the prosecution to have adopted for, as already observed, if any offence has been committed in respect of the cash from Pantanaw Sub-treasury Boh Tha San was the prime offender while Boh Sein Tun could only be an accessory. That this is the correct legal position, is frankly admitted by the learned Government Advocate who has appeared before us to argue this case on facts.

Now, what offence, if any, has Boh Tha San and Boh Sein Tun committed ? The learned Special Judge, Maubin, who tried this case observed as follows :

"There is no evidence to support the statement of Boh Tha San that he was also advised by the Town Elders for the said reason to take and dispose of the cash from the Sub-treasury. As it was not impossible to remove the said cash to Rangoon and as he was not without means for doing so, what Boh Tha San did was obviously not the best course to be followed and decidedly not commendable. The loss which has incurred to the Government by it could have been prevented by removing the cash to Rangoon. Boh Sein Tun seemed to have played only the second fiddle in the matter and the leading role was no doubt played by Bo Tha San. Most of the facts stated above, except what seemed to have been distorted to suit their purpose, are hardly in dispute and well established by the evidence both oral and documentary on record. It seems to be true that Bo Sein Tun took away only Rs. 10,000 from the loot though he denied receiving it. There is ample evidence on record to establish his participation in it.

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The actual looting was done only by Boh Tha San and Boh Sein Tun, both of whom were then according to U Maung Khin unarmed. No doubt U Maung Khin, who was then in charge of the Sub-treasury, though reluctant had to submit to them tamely as the perpetrators though unarmed and only two in number at the actual scene had behind them their armed followers in the town, and Boh Tha San with his armed men had occupied the town and disarmed the police and as discretion was wisely and rightly considered to be the better part of valour when resistance was impossible but a vain effort, which would do more harm than good. There is nothing to show that their armed followers either participated or acquiesced in it. They might not even know that it was then taking place. It is for the prosecution to prove their participation in it beyond doubt, without which no imputation can be made to them for this, when it is found that none of them was then present at or near the scene of crime. To constitute the offence of dacoity the crime must be committed by not less than five persons, but the prosecution has failed to show that the number of perpetrators, who committed it, was five or more."

In consequence he considered that the offence committed by Boh Tha San and Boh Sein Tun fell under section 392 of the Penal Code rather than under section 395. In our opinion, the offence committed by Boh Tha San was theft rather than robbery. Section 390 of the Penal Code enacts that theft is robbery if in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint. It is not apparent from the evidence of either the Sub-treasury Officer or the Treasury clerk that Boh Tha San in carrying the cash away from the Treasury caused or attempted to cause death or hurt or wrongful restraint to them or put them in fear of instant death or instant

hurt or instant wrongful restraint. Since the 12th August, 1948, when Boh Tha San took over the administration of the town there must have been general acquiescence on the part not only of the civilian population but also of the Government Officers to Boh Tha San being the *de facto* administrator. Therefore there was no necessity for Boh Tha San to cause death, hurt or wrongful restraint to the Sub-treasury Officer or his clerk or to put them in fear of instant death, instant hurt, or instant wrongful restraint. The fact that practically all the Government Officers willingly and if we may say so, gratefully received from Boh Tha San one month's pay before it was due, points to the absence of such element as would make the offence committed by Boh Tha San, one of robbery.

Theft, undoubtedly, Boh Tha San has committed because he must be deemed to have known that the cash in the Treasury belonged to the Government and that the Sub-treasury Officer was the proper custodian thereof. Boh Tha San not only took the money but according to his own statement made use of it to the extent of Rs. 9,000 in paying his men and Rs. 10,000 in paying to Boh Sein Tun who had no authority whatsoever to receive it. The intention to cause wrongful loss to Government, must in these circumstances, be inferred from his conduct. It is no sufficient answer to this charge to say that he and Boh Sein Tun had agreed that the money should be later refunded to the Government.

The next question is, is there sufficient evidence on record to warrant the finding that Boh Sein Tun had, in fact, received Rs. 10,000 from Boh Tha San. None of the witnesses for the prosecution actually saw Boh Tha San handing over this sum to Boh Sein Tun. Those of them who stated that Boh Sein Tun was

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given Rs. 10,000 by Boh Tha San were deposing to this fact on mere hearsay. Even U Thein Maung (PW 2), the then Assistant Township Officer, Pantanaw, who sent the report dated the 5th September, 1948, to the Deputy Commissioner, Maubin, admitted that he only heard from others that out of the sum remaining after the disbursement of pay to Government servants, Rs. 10,000 was taken away by Boh Sein Tun and that the rest was retained by Boh Tha San.

Boh Tha San's statement that he actually gave Rs. 10,000 to Boh Sein Tun, being the statement of an accomplice, should not be acted upon without satisfactory corroboration. However, in our opinion this corroboration is afforded by the manner in which Boh Sein Tun had signed under the endorsement, "ငွေအားလုံးသိမ်းဆီးရိုးကြောင်း။" in the Sub-treasury Register. As regards the fixation of Boh Sein Tun's signature thereto, U Maung Khin (PW 15) stated in his examination-in-chief that when he asked Boh Tha San for acknowledgment of the cash taken by him, both Boh Tha San and Boh Sein Tun signed in acknowledgment thereof. However, when cross-examined, he whittled down the effect of this statement by saying that after the money was handed over to Boh Tha San, Boh Tha San asked Boh Sein Tun to sign and that Boh Sein Tun then appended his signature. "မိုလ်သာဆန်းကို ငွေအပ်ရ ပါသည်။ မိုလ်သာဆန်းက မိုလ်စိန်ထွန်းကိုလက်မှတ်ထိုးပါခုံးဆို၍။ မိုလ်စိန်ထွန်းက သက် သေခံအမှတ် (က) နှင့် (ခ) ပေါ်တွင်လက်မှတ်ရေးထိုးပါသည်။"

Boh Sein Tun, who gave evidence on behalf of his own defence, contended that he signed the Register only as an attesting witness. However, his statement on this point is rendered ineffective by the obviously false story which he told the Court. Regarding the circumstance in which his signature was affixed, he stated that he had signed the endorsement in the

company of other elders such as U Ohn Maung (PW 8), and U Sein Pe (PW 13), a statement contradicted by these witnesses. eurthermore, there is conclusive evidence on record to show that U Ohn Maung and U Sein Pe only attested the endorsement made by Boh Myo Myint on the 12th of August 1948 and that these persons were not even in the Sub-treasury on the 14th August 1948, when Boh Tha San made the relevant entry in the Sub-treasury Register.

It is difficult for us to believe that if Boh Sein Tun had nothing whatsoever to do with the cash removed from the treasury he would have signed the endorsement "ငွေအားလုံးသိမ်းဆီးပြီးကြောင်း" in the manner which he did. The signature of Boh Sein Tun and Boh Tha San appearing under the aforesaid endorsement suggest that joint responsibility was taken by both Boh Sein Tun and Boh Tha San for the seizure of cash from the treasury ; not merely that Boh Sein Tun was acting as an attesting witness to the signing of the endorsement by Boh Tha San. Therefore Boh Tha San's story that Boh Sein Tun had to be given a sum of Rs. 10,000 out of the money seized from the treasury must be accepted as true.

Boh Sein Tun had no right to accept any sum out of the money which Boh Tha San took from the treasury though the exigencies of the time were such that Boh Sein Tun might have felt that it was better for the money to be taken by him for the use of his White P.V.Os. rather than allow it to fall into the hands of the Karens or the Communist insurgents. However, as a member of the Parliament, he should have known that it was not lawful for him to take any money belonging to the Government. In any event, ignorance of the Law cannot afford a valid defence to a criminal charge. The fact deposed to by Boh Tha San that he and Boh Sein Tun agreed to refund the

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money to the Government later, cannot be of any avail to Boh Sein Tun, as, an offence of theft cannot be obliterated by the subsequent restitution of property.

For these reasons, we consider that the respondent Boh Sein Tun has committed an offence either of theft punishable under section 379 of the Penal Code or of having received stolen property knowing it to be stolen, an offence punishable under section 411 of the Penal Code. To be on the safe side, he will be convicted under the latter section.

The appeal against the acquittal of the respondent, Boh Sein Tun, is therefore allowed. The order of acquittal passed by the 1st Special Judge, Maubin, in his Criminal Regular Trial No. 8 of 1950 is set aside and Boh Sein Tun is convicted of the offence punishable under section 411 of the Penal Code.

As regards the sentence, considering the circumstances in which this offence was committed and the fact that the main offender, Boh Tha San, was not only not prosecuted but had in fact been allowed to continue to serve the Government, we are of the opinion that this is a fit case for the exercise of our powers under section 562 (1) of the Criminal Procedure Code. Therefore, instead of sentencing the respondent, Boh Sein Tun, at once to any punishment, we would direct that he be released on his entering into a bond for a sum of Rs. 5,000 with two sureties in the like amount to appear and receive sentence when called upon during the period of one year and in the meantime to keep the peace and be of good behaviour.

APPELLATE CIVIL.

Before U On Pe and U San Maung, JJ.

L.N. LETCHUMANAN CHETTIAR FIRM (APPELLANT)

v.

V. M. FIRM AND OTHERS (RESPONDENTS).*

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Mar. 20.

Agent, Power of—to borrow money—Power-of-attorney not produced—S. 187, Contract Act—Whether can be relied on—Description of principal as money-lender whether empowers borrowing—Ratification—Knowledge of principal.

The Appellant's case was that one Therumani Pillai as agent under a Power-of-Attorney of the Respondent No. 1 borrowed money from him which was entered in the books of account, copies of which were sent to the principals and the same had not been challenged. The Appellants contended that the Respondents are responsible either as having ratified the loan transaction or the business being one of money-lending it is a necessary incident for an agent to borrow money.

Held : That the Power-of-Attorney which would define the authority of the Agent had not been produced and had not been shown to be in the possession or custody of the Respondents. In the absence of the production of such an authority the Respondents cannot be made liable.

Though the Respondents described themselves as money-lenders and the business of a chettiar is money-lending, this does not mean that a business like that of the Respondents could not have existed independently of the power-of-attorney to borrow.

Though it may be true that the loan taken by the agent was entered in the books of account, there is nothing to show that they reached the hands of the principals. No question of restoration of an unlawful benefit arises. Where the agent was acting beyond the scope of his power, there can be no question of ratification as the principal had no knowledge of the agent having acted in excess of his authority.

K.S.A.V. Chettyar v. *Mahmoo*, 13 Ran. 87 ; *Palodan Goolabchand* v. *M. J. Miller and another*, M.L.J. (1938) 688 ; *Sultan Mahomed Rowther* v. *Mohammed Eusoof Rowther and others*, A.I.R. (1930) Mad. 476, referred to.

Basu and Venkatram for the appellant.

S. K. N. Aiyar for the respondents.

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* Civil 1st Appeal No. 100 of 1948 against decree of the 1st Assistant Judge's Court of Myaungmya in Civil Regular No. 1 of 1947, dated 26th October 1949.

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L. N. LETCHUMANAN CHETTIAR FIRM v. V.M. FIRM AND OTHERS.

U ON PE, J.—This appeal has arisen out of a suit filed by the appellant against the respondents for the recovery of Rs. 5,450 due on a promissory-note executed by the then agent Therumani Pillai of the first respondent's firm on 31st January 1944. The promissory-note is (Exhibit A). Therumani Pillai executed it with initial V. M. prefixed to his name—a fact which is relied on by the appellant-plaintiff as indicating that the document was signed on behalf of the firm on the authority of the decision in *K.S.A.V. Cheityar* v. *Mahmoo* (1). The respondents contested the suit on the grounds amongst others, that Therumani Pillai borrowed the money in his personal capacity, that he was not a validly appointed agent, and that the firm had no necessity for such a loan and had received no benefit out of the loan. The suit was dismissed on grounds, the most important of which, in our view, is the finding that the power-of-attorney which was said to have been given to Therumani Pillai did not include the power to borrow money on behalf of the respondents. Other issues must necessarily pale into insignificance if the said finding is held to have been correctly arrived at. We therefore propose to examine this finding, which we consider is most material to the disposal of this appeal.

The power-of-attorney is not forthcoming. Therumani Pillai was examined on commission at the instance of the plaintiff and said that he had the power-of-attorney at the time material to the suit and, in this, he was supported by Velaugan Chettyar, who was also examined on commission and who said that at the time he gave the loan of Rs. 5,000 to Therumani Pillai, he saw the power-of-attorney in favour of Therumani Pillai, written in English, but that, as he did not

(1) 13 Ran. 87.

understand English, he asked another person by the name of Ram Chandra Aiyar as to its contents. Ram Chandra Aiyar was not called as a witness with the result that the contents of the power-of-attorney will not be made known. This power-of-attorney was said to have been handed over along with other papers and documents by Therumani Pillai to Pethuperumal (DW1), who succeeded the former as agent. Pethuperumal denied receiving the power-of-attorney though he admitted that several other documents were received by him for which he had given a receipt. The list held by Therumani does not show the power-of-attorney as one of the documents received by Pethuperumal Pillai. This document which would otherwise throw light on the powers of the agent, has thus been suppressed. On the evidence in the case, we accept the finding of the lower Court that it was not one of the documents handed over to the successor, Pethuperumal.

The main grounds taken up in this appeal are that the respondents had suppressed the power-of-attorney, that the Court should have held that the agent had the power to act for them and that the action of the agent in sending copies of accounts to the principals who did not challenge them amounted to ratification. Here it may be mentioned that the loan in question was entered in the books of the respondents, that the power-of-attorney was said to have been produced during the Japanese occupation period and that the accounts were sent to the principals by the subsequent agent who succeeded Therumani Pillai. The most important of these contentions seems to us to be the scope of the authority given to him by the power-of-attorney which is unfortunately not available. The agent's authority as well as the extent of his authority is defined in the Contract Act but where his authority is defined in writing, as in this case, section 187 of the Contract Act

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cannot be relied on, as the agent's authority will have to be found in the four corners of the instrument either in express terms or by necessary implication, the limits of such necessary implication being those defined in section 188 of the Contract Act. [See *Paboodan Goolabchand* v. *M. J. Miller and another* (1).]

What is the extent of Therumani Pillai's authority is, we think, a determining factor in this case. Has the power-of-attorney empowered the agent to raise loans ? If it has not, then we consider that the appellant-plaintiff must be non-suited as against the respondent-defendants, unless it can be shown under section 188 of the Contract Act that the agent has the authority by necessary implication. It is true that the respondents described themselves as money-lenders and that the essential business of the Chettyar is money-lending. But this does not mean that a business, like that of the respondents leasing out paddy lands and collecting rental paddy, could not have existed independently of money-lending business. In fact, Therumani Pillai had stated that there was no more money-lending business after he went to Wakèma. Non-production of this power-of-attorney, in the circumstances of the case, is fatal to the plaintiff's case.

On the question of benefit being derived by the principals in this case, we agree with the lower Court that there is not sufficient evidence on the record to show that the respondents were benefited by the alleged loan. Although it may be true that the loan was entered in the books of account, there is nothing to show that the alleged loan came to the hands of the principals, so that the question of restoration by the principals either under Article 103 or 104 of the Law of Agency could hardly arise.

(1) (1938) M.L.J. 688.

It has been contended by the learned Counsel for the appellant that copies of accounts were sent by the agent to the principals (respondent-defendants) that they were not challenged and that this is sufficient evidence of ratification, in addition to the evidence of demand from the new agent and his reply to the demand. The alleged demand cannot be said to have been proved as Therumani Pillai did not appear to have supported this story of demand. It is in evidence that the account copies came from Wakèma but they were sent back. It is true that where a principal on being appraised of a fact fails to communicate to the agent his determination not to be bound by it within a reasonable time, it may be presumed that there was implied ratification. [See *Sultan Mahomed Rowther* v. *Mohammad Eusoof Rowther and others* (1) .] But in this case the agent seemed to be acting beyond his power and there can be no question of ratification when the principal had no knowledge of the agent having acted in excess of the authority.

Taking all the circumstances in the case, we are satisfied that this suit must fail on account of not only for want of proof in respect of the power of the agent to raise loans but also for other grounds mentioned above.

In the result, this appeal fails and is accordingly dismissed with costs.

U SAN MAUNG, J.—I agree.

(1) A.I. R. (1930) Mad. 476.

APPELLATE CIVIL.

Before U San Maung and U Aung Khine, JJ.

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Apl. 30.

BIN HONG & Co. (APPELLANTS)

v.

MUNSHI MEAH (RESPONDENT).*

Workmen's Compensation Act, s. 8 (1), 2 (1) (d)—Dependants of workmen—Necessity for decision by Commissioner—Report by the Commissioner for Compensation, Chittagong—Definition of Commissioner in s. 2 (1) (d).

A Commissioner for Workmen's Compensation while awarding Rs. 2,400 as damages did not record the finding that the deceased died as a result of an accident in the course of business. He acted upon the report of Commissioner for Workmen's Compensation, Chittagong, and awarded Rs. 2,400 as compensation for Respondent. Both these were challenged as illegal.

Held : That though direct evidence was lacking, there is sufficient evidence of the death being the result of an accident arising in the course of employment and there was nothing in Appellant's evidence to rebut the presumption.

The scheme of the Act under s. 8 (*1*) is for payment of money to the Commissioner by the employer for his protection against claim and it is open to the employer to be a party in the distribution proceedings and contest the status of the alleged dependant. There is a provision for repayment to the employer of money so deposited. If no near relation exists the money cannot be paid to a more distant relation and " dependant " has been defined in the Act under s. 2 (*1*) (*d*).

The report of any other Commissioner mentioned in s. 21 (*d*) cannot include the Commissioner for Workmen's Compensation, Chittagong. It means a Commissioner appointed under s. 20 of the Act by the President of the Union of Burma. The Commissioner, Chittagong is not such a Commissioner. The matter relating to actual payment to or distribution cannot be transferred to another Commissioner under the proviso to s. 21 (*2*). The findings of the Commissioner are therefore illegal as he had acted on no admissible evidence.

In the Matter of Guddai Mutavalu, 7 Ran. 660 ; *In the Matter of Kalka Prasad*, A.I.R. (1929) All. 707, referred to.

Ba Maung for the appellants.

Respondent in person.

* Civil Misc. Appeal No. 24 of 1951 against the order of the Commissioner for Workmen's Compensation Rangoon, in Case No. 31 of 1948.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—This is an appeal against the order of the Commissioner for Workmen's Compensation, Rangoon, dated the 6th March, 1951, directing the sum of Rs. 2,400 deposited by the appellants Bin Hong & Company with him to be transmitted to the Commissioner for Workmen's Compensation, Chittagong, for payment to one Munshi Meah on the ground that Bin Hong & Company was liable to pay compensation for the death of their employee Amina Ullah because of a fatal accident arising out of and in the course of the employment and that Munshi Meah was the only dependant of the deceased Amina Ullah as defined in section 2 (*1*) (*d*) of the Workmen's Compensation Act. The matter has been once before to this Court on appeal by Bin Hong & Company and this Court had in its judgment dated the 4th February, 1949, in Civil Miscellaneous Appeal No. 32 of 1948* taken considerable pains to point out to the Commissioner for Workmen's Compensation the proper procedure to be followed by him in dealing with claims for compensation. The learned Commissioner has again ignored the provisions of law relating to the procedure to be followed by him in such cases. Moreover, he does not seem to have realised that the question whether or not a workman has been killed by accident arising out of and in the course of his employment is a question of fact which, unless specifically admitted, must be proved as an issue in the case. However, we agree that although direct evidence on this point is lacking, the circumstances in which the deceased Amina Ullah met his death are sufficient to raise a presumption that he died as a result of an

* Reported in 1949 B.L.R., 227—*Reporter.*

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accident arising out of and in the course of his employment as a punkah-walla. There is nothing in the evidence adduced by the appellants Bin Hong & Company to rebut this presumption.

However, the order of the learned Commissioner for Workmen's Compensation directing payment of Rs. 2,400 to Munshi Meah must be set aside for the reasons urged by the appellants in their memorandum of appeal. The procedure adopted by the learned Commissioner for Workmen's Compensation in coming to a finding that the applicant Munshi Meah is a dependant of Amina Ullah as defined in section 2 (*1*) (*d*) of the Workmen's Compensation Act is entirely irregular. As pointed out by a Bench of the late High Court of Judicature *In the Matter of Guddai Mutavalu* (1) the whole scheme of section 8 under sub-section (1) whereof compensation must be paid to the Commissioner seems to be designed for the protection of the employer against claims in respect of accidents where his liability is admitted or established. Furthermore, it is open to the employer to be a party to the distribution proceedings and to contest the status of the alleged dependant. The provision of law contained in section 8 (*4*) whereby the Commissioner must repay the employer the balance of the amount deposited by him less the cost of the workman's funeral expenses, if no defendant exists, makes the employer vitally interested in the question whether or not there are dependants of the workman as strictly defined in section 2 (*1*) (*d*). As observed by a Bench of the Allahabad High Court *In the Matter of Kalka Prasad* (2) if no near relation as defined in section 2 (*1*) (*d*) exists, the money cannot be paid to a more distant relation of the deceased employee even

(1) 7 Ran. 660. (2) A.I.R. (1939) All. 707.

though he be his next-of-kin. The amount has got to be refunded to the employer.

Therefore the question whether or not Munshi Meah was a dependant of Amina Ullah as defined in section 2 (*1*) (*d*) of the Workmen's Compensation Act should have been made an issue in the case and enquired into by the Commissioner for Workmen's Compensation. He should not have acted upon the report sent to him by the Commissioner for Workmen's Compensation, Chittagong. In this connection we would like to point out that the words "any other Commissioner" contained in sub-section (*2*) of section 21 of the Workmen's Compensation Act cannot be interpreted as including the Commissioner for Workmen's Compensation, Chittagong. From the definition of the word "Commissioner" given in clause (*b*) of sub-section (*1*) of section 2, it means a Commissioner for Workmen's Compensation appointed under section 20 of the Workmen's Compensation Act and a reference to section 20 shows that Commissioners for Workmen's Compensation in Burma are to be appointed by the President of the Union of Burma. The Commissioner for Workmen's Compensation, Chittagong, is not such a functionary. Besides, the proviso to sub-section (*2*) of section 21 enacts that no matter other than a matter relating to the actual payment to a workman or the actual distribution among dependants of a lump sum shall be transferred for disposal to another Commissioner except with the previous sanction of the President unless all the parties to the proceedings agree to the transfer.

Therefore in the absence of an agreement the question relating to the dependency of Munshi Meah should not be transferred to another Commissioner but should be enquired into by the Commissioner for Workmen's Compensation, Rangoon. The finding

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of the Commissioner for Workmen's Compensation that Munshi Meah is a dependant of the deceased Amina Ullah must also be set aside as having been based on no admissible evidence whatsoever.

For these reasons we would set aside the order of the Commissioner for Workmen's Compensation dated the 6th March 1951, directing payment of Rs. 2,400 to Munshi Meah through the Commissioner for Workmen's Compensation, Chittagong. The proceedings will be remanded to the Commissioner for Workmen's Compensation, Rangoon, to be proceeded with according to law in the light of the observations contained in this judgment and in the judgment of this Court dated the 4th February, 1949. There will be no order as to costs of this appeal.

APPELLATE CRIMINAL.

Before U On Pe, J.

D. N. LOBO (APPLICANT)

v.

J. C. WEBSTER (RESPONDENT).*

H.C. 1952

May 26.

Penal Code, s. 500—Defamation of wife—Whether husband can file complaint—Aggrieved person—Meaning—S. 198, Criminal Procedure Code.

A husband filed a complaint under s. 500, Penal Code as a person aggrieved by his wife being defamed. Upon an objection being raised that the wife being an adult and *sui juris* should have filed the complaint personally as she was the only person competent to compound such an offence.

Held: That in the case of a married woman the husband is an aggrieved person and therefore he can make a complaint under s. 198 of the Criminal Procedure Code.

Chellam Naidu v. *Ramasami*, I.L.R. 14 Mad. 379; *Chhotalal Lalubhai* v. *Nathabhai Bechar and another*, I.L.R. 25 Bom. 151; *Gurdit Singh and others* v. *The Crown*, I.L.R. 5 Lah. 301, referred to.

The use of the term "some aggrieved person" in the Criminal Procedure Code is deliberate as "some aggrieved person" need not necessarily be only the person defamed. The word "aggrieved" in s. 198 of the Criminal Procedure Code must be treated as equivalent to the "person injured" and a husband in the circumstances of this case was so injured.

Queen-Empress v. *Nga Shun*, Selected Judgments L.B.R. (1872—1892) 617, distinguished.

H. M. Fisher for the applicant.

R. E. Henderson for the respondent.

U ON PE, J.—This is an application to revise the order of the learned Sessions Judge, Hanthawaddy, affirming the order of the 2nd Additional Magistrate, Rangoon, ruling against the applicant's preliminary objection to the right of the respondent to file a complaint under section 500 of the Penal Code. The complaint, giving rise to this application, was filed by the respondent who is the husband against the applicant for defaming his wife by the imputation of

* Criminal Revision No. 48-B of 1952 being review of the order of 2nd Additional Magistrate, Rangoon, dated 26th December 1951, passed in Criminal Regular Trial No. 518 of 1951.

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D. N. LOBO v. J. C. WEBSTER.

U ON PE, J.

unchastity to her. The objection was based upon the provision of section 198 of the Criminal Procedure Code which lays down, subject to the proviso, that no Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Penal Code, or under sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence.

The case therefore turns on whether the respondent is an aggrieved person within the terms of that section. Both the lower Courts have held that the complainant-respondent is competent to file the complaint for defamation imputing unchastity to his wife, following the decisions in *Chellam Naidu* v. *Ramasami* (1), *Chhotalal Lalubhai* v. *Nathabhai Bechar and another* (2) *and Gurdit Singh and others* v. *The Crown* (3). The decision in these three cases is to the effect that when a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint the Magistrate may take cognizance of a complaint under section 198 of the Criminal Procedure Code. With respect, I am in agreement with the decisions made in those three cases.

It has been contended by the Counsel for the applicant that the decisions in the aforesaid three cases were made before the amendment of section 198 of the Criminal Procedure Code, inserting the proviso by the Criminal Procedure Code (Amendment) Act of 1923 and that the object of the amendment was only to save certain class of complainants who were under a disability from being compelled to appear in Court. In the first place, it is not quite correct to say that all those decisions were made before the proviso came into force, for the Lahore case was dated 7th March 1924

(1) I.L.R. 14 Mad. 379. (2) I.L.R. 25 Bom. 151.
(3) I.L.R 5 Lah. 301.

which was after the 1923 Criminal Procedure Code (Amendment) Act came into force. Secondly, it does not necessarily follow from this proviso that in case of defamation the person defamed must make the complaint herself when she is under no disability. The use of the term "some aggrieved person" in section 198 of the Criminal Procedure Code appears to be deliberate, inasmuch as it is clear from the term "some aggrieved person" that the person competent to make a complaint need not necessarily be only "the person defamed." This is best illustrated by the case where the defamation is made against a dead person and where a complaint has to be filed by some person other than the person defamed. Consistently with the intention of the Legislature to allow persons other than those injured to file complaints under section 198 of the Criminal Procedure Code, a husband, filing a complaint for defamation against his wife, may claim to have the right to do so on stronger ground for reasons which are peculiar to the relationship of a husband and a wife—a relationship which must be said to be unique. The defamation on the honour of the wife affects that of the husband and, in fact, a husband may, in some cases, be more concerned when the chastity of his wife is attacked. When two persons become man and wife they are so bound up as one person each having a part to play in a matrimonial bond, and in this sense the husband can be said to be a much aggrieved person when the chastity of his wife is attacked. In this case, the respondent has therefore rightly complained in paragraph 11 of his complaint "that the accused has defamed both your petitioner as well as his wife as he has, by his imputation that the petitioner's wife is a prostitute, caused direct injury to the reputation and honour of the petitioner and his wife."

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This case is therefore quite distinguishable from the case of *Queen-Empress* v. *Nga Shun* (1) relied on by the applicant's Counsel. There it was held as follows :

"The reputation of a living person who is an adult and *sui juris* is exclusively within his own protection. If he does not take steps to defend it, no one else can. Section 345, Code of Criminal Procedure, show that the only person who can compound a prosecution for defamation is the person defamed, and indicates clearly the intention of the law to leave to every one the exclusive right of vindicating his own reputation "

It is a case in which the complaint was made not by the phongyi who was defamed but by his *kyaungtaga*. The relationship between *kyaungtaga* and phongyi can on no account be treated as similar to the relationship between husband and wife, who have been cemented in a matrimonial bond in a way no other two persons can be cemented, and on this ground alone this Burma case and the present case are clearly distinguishable. The next contention of the applicant is that, in view of the provisions of section 345 of the Criminal Procedure Code where it lays down that the offence of defamation is to be compounded by the person defamed, no person other than the one who is defamed is intended by the law to file a complaint. This is to overlook the fact that in the case of defamation against the wife the husband is an aggrieved person and therefore can be said to be a "person injured." In *Queen-Empress* v. *Nga Shun* (1) quoted above the following view on this point has been held :—

"The word 'aggrieved' in section 198, Code of Criminal Procedure, must, I think, be treated as equivalent in cases of defamation with the expression 'person injured'."

(1) Selected Judgments, L.B.R., (1872—1892) 617.

I do not see how section 345 of the Criminal Procedure Code can be in the way of a husband's complaint, for so long as the injury is considered as having been done to him, a wife's willingness to compound the offence, which, in actual practice, is unlikely will have no bearing on the question.

In all the circumstances of the case I see no ground to interfere with the orders of the lower Courts. The application is dismissed.

APPELLATE CIVIL.

Before U Si Bu, J.

H.C. 1951

Nov. 29.

KO MYA DIN AND ANOTHER (APPELLANTS)

v.

KO BIN NGA (RESPONDENT).*

Transfer of Immoveable Property (Restriction) Act, 1947, ss. 3 and 5—Union Citizenship Election Act, ss. 7 and 8.

Held: That mere filing of an application under Union Citizenship Election Act for Citizenship in Burma and an enquiry held are not sufficient to make a person citizen. A person attains the status of a citizen only when he obtains the Certificate of Citizenship after renouncing any other nationality or status as citizen of any foreign country.

Any transfer of immoveable property obtained by a foreigner who has applied for citizenship but has not yet obtained the certificate would be void under ss. 3 and 5 of the Transfer of Immoveable Property (Restriction) Act, 1947.

San Thein for the appellants.

Kyaw Myint for the respondent.

U SI BU, J.—This is an appeal from the judgment of the District Court of Bassein setting aside the judgment and decree of the Court of the First Subordinate Judge, Bassein, and remanding the case for disposal on merits.

By consent this appeal and appeal Nos. 54, 55, 56 and 57 of 1951 are heard together as the same point of law and facts are involved and the same advocates appear in all the cases. This judgment will therefore deal with all the appeals aforesaid.

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* Civil 2nd Appeal No. 53 of 1951 against the decree of the Additional District Court of Bassein in Civil Appeal No. 1 of 1951 arising out of the decree of the 1st Subordinate Judge's Court of Bassein, in Civil Suit No. 89 of 1950.

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KO MYA DIN AND ANOTHER v. KO BIN NGA.

U SI BU, J.

The plaintiff-respondent sued the defendant-appellants for possession of land, claiming to have purchased it from Messrs. Burma Company Ltd., Rangoon, by a registered deed, dated the 31st March, 1950. The defence relevant to the purpose in hand was that on the date of purchase the respondent was a foreigner and so the sale to him was void. The trial Court framed several issues—but those with which I am concerned are the second and third issues which are as follows :

" *Issue number 2.*—Whether the plaintiff was a foreigner on the day of purchase of the suit land ?

Issue number 3.—Is the sale deed in favour of the plaintiff void in law ? If so, is the suit maintainable ? "

In order to answer these issues and to understand the arguments of the learned Advocates appearing in the case it is necessary to note a few dates.

The land was purchased by the respondent, as already stated, on the 31st March, 1950.

The respondent applied to become a Citizen of the Union of Burma on the 31st December, 1949.

The Officer holding the enquiry under section 7 of the Union Citizenship (Election) Act, 1948, decided that the respondent had established *his right to elect* for citizenship of the Union on the 3rd March, 1950. The certificate of citizenship was delivered to the respondent and took effect on the 2nd November, 1950.

The respondent's contention is that he became a citizen of the Union on the 31st December, 1949, when he applied to become a citizen or, at any rate, on the 3rd March, 1950, when the Officer holding the enquiry held under section 7 of the said Act decided that the respondent had established *his right to elect* for citizenship. The trial Court held that the respondent

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became a citizen of the Union on the 2rd November, 1950, when the certificate took effect; and since he was not a citizen on the 31st March, 1950, when he purchased the land in suit, his purchase was void under sections 3 and 5 of the Transfer of Immoveable Property (Restriction) Act, 1947; and in this view of the case he dismissed the suit. On appeal the District Court held that the respondent became a citizen on the 3rd March, 1950, and set aside the judgment and decree of the trial Court and remanded the case for disposal on merits.

The reason given by the learned District Judge for his finding is that the decision of the Officer holding the enquiry under section 7 is " final and conclusive". Let us now examine if that is correct.

Section 7 of the Union Citizenship (Election) Act, 1948 and also section 8 of the same Act are in these words:

" 7. (*1*) If the officer decides that the applicant has established his right to elect for citizenship of the Union, he shall forthwith transmit to the Minister a certified copy of his decision together with the application for the certificate and the affidavit annexed thereto.

(*2*) If the officer decides that the applicant is not entitled to so elect, the applicant may file an application in revision against the order in the High Court within sixty days from the date of the order.

8. (*1*) When the Minister receives a decision of the officer under section 7, he shall, unless he is in doubt of the correctness of the decision of the officer, issue a certificate of citizenship in such form as may be prescribed and shall send the certificate to the officer by whom the decision was made.

(*2*) If the Minister is in doubt of the correctness of the decision of the officer, he may refer the application to the High Court on the Appellate Side. To such a reference by the Minister or the application under section 7 (*2*) the provisions of Order 41 of the Civil Procedure Code shall apply.

(3) If the High Court, on a reference, confirms the decision of the officer under section 7 (1), or set aside the order under section 7 (2), the Minister shall issue a certificate of citizenship and transmit it to the officer by whom the decision was made.

(4) The officer shall, on receipt of the certificate, call upon the applicant to appear before him on a date fixed by him and to subscribe a declaration on oath or affirmation renouncing any other nationality or status as citizen of any foreign country and, on the applicant making and subscribing such declaration, the officer shall deliver to him the certificate after having endorsed thereon the date of the making of and subscribing the said declaration.

(5) The certificate shall not take effect unless the applicant makes and subscribes the declaration under the last preceding section."

It will be noticed that, after the Officer has made his decision, it is open to this Court, on a proper application made to it, either to confirm or not to confirm the Officer's decision made under section 7 (1) or to set aside or not to set aside the decision made under section 7 (2). That being so, can it be said, as the learned District Judge has done, that the decision of the Officer is "final and conclusive"? I am sure it cannot be.

Another reason why the Officer's decision cannot be "final and conclusive" is that it can be rendered ineffective by the respondent. In spite of the fact that the Officer has made his decision, it is still open to the respondent to change his mind and to refuse to renounce his foreign citizenship when called upon to do so before delivery of the certificate to him. Having assumed, though wrongly, that the Officer's decision is "final and conclusive," the learned District Judge proceeded to hold that once the respondent makes his declaration under section 8 (4) the certificate would take effect not from the date of such declaration, *i.e.*, 2nd November, 1950, but from the date of the Officer's

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decision, *i.e.*, 3rd March, 1950. The answer to that is that there is nothing in the Act to suggest this sort of retrospectivity. In fact, such a construction is textually inadmissible. Once it is appreciated that what the Officer decides is not whether the respondent has become a citizen but whether he has the right to become a citizen—much of the difficulty under which the learned District Judge appears to have been labouring would disappear. To establish that one is entitled to become a citizen is one thing, and actually to become a citizen is quite another thing. Further, before one can assume that the certificate has retrospective effect he must also assume that the renunciation also has retrospective effect, that is to say that though the renunciation was made on the 2nd November, 1950, one must assume that it was made on the 3rd March, 1950. I can find no justification for such an assumption or for the application of the rule as to retrospective effect.

I do not think that there can be any doubt that it is only on compliance with the provisions of section 8 (*5*) of the Act aforesaid and on the day on which they are complied with, that the respondent can be said to have become a citizen of the Union of Burma.

I therefore answer the second issue in the affirmative, and since I have done so it follows that I must having due regard to the provisions of sections 3 and 5 of the Immoveable (Property) Restriction Act, 1947, answer the first part of the third issue in the affirmative, and the second part thereof in the negative.

In the result, the judgment and decree of the District Court are set aside and the judgment and decree of the trial Court restored with costs in all Courts ; Advocate's fees five gold mohurs allowed.

APPELLATE CIVIL.

Before U Aung Khine, J.

DAW THET PU (APPELLANT)

v.

SAYA KHIN (RESPONDENT).*

H.C. 1952

Mar. 11

Trade-mark—Trade name—Questions involved in—Infringement of—"Shwe-nan-thein-gi" whether produce or description of plaintiff's medicine—Onus of proof—Descriptive word loosing original meaning.

Plaintiff and defendant manufactured blood purifiers. Each gave the same name "Shwe-nan-thein-gi" and except for the name mentioned in the label, the get-ups were entirely different. The plaintiff applied for an injunction to restrain the defendant from using the same name. The defendant had been manufacturing and selling medicine for the last 25 years but only recently registered the trade-mark and name.

Held: That the most important question is whether the name "Shwe-nan-thein-gi" has acquired a reputation in the market and became associated with plaintiff and whether the public have always identified the same medicine by this name.

A trade-mark or name which is primarily descriptive of an article or its composition or mode of manufacture, must be open to the trade and cannot be claimed for exclusive use by one trader. The burden of proof of the contention that the name has lost its primary meaning and has acquired by long user a secondary meaning indicating that the medicine sold was not merely medicine of a particular description but medicine made by him, lies heavily on the party asserting it. The term itself was never meant to be a trade name and was given to this type of medicine long ago in a Burmese Royal Palace. The process of manufacture had also been published in "Tse-kyan" (*Materia Medica*).

The Courts are very reluctant to conclude that an ordinary descriptive word has lost its original meaning and has become distinctive of the goods of a particular manufacturer.

Gaw Kan Lye v. *Saw Kyone Saing*, (1939) R.L.R. 488; *Reddaway* v. *Banham*, 13 R.P.C. 218; *Cellular Clothing Co.* v. *Maxton and Murray*, (1899) A.C. 326; *Chivers & Sons* v. *Chivers & Co. Ltd.*, 17 R.P.C. 420; *Burberrys* v. *J. C. Cording & Co. Ltd.*, 26 R.P.C. 693; *Horlicks Malted Milk Co.* v. *Summerskill*, 34 R.P.C. 63; *Hommel* v. *Bauer & Co.*, 22 R.P.C. 43, referred to.

Ba Gyan for the appellant.

Tha Gyaw for the respondent.

* Civil 2nd Appeal No. 80 of 1951 against the decree of the Additional District Court of Mandalay in Civil Appeal No. 1 of 1951, dated 9th July 1951.

H.C. 1952

DAW THET PU v. SAYA KHIN.

U AUNG KHINE, J.—The plaintiff-respondent Saya Khin and the defendant-appellant Daw Thet Pu are manufacturers of blood purifiers and each has given the same name "Shwe-nan-thein-gi" for their respective produce. The blood purifiers which they manufacture are in powder form and they are sold in paper packets as well as in bottles. The get-ups in their labels are entirely different except for the name "Shwe-nan-thein-gi" mentioned on the labels. It was Daw Thet Pu who probably discovered that she and Saya Khin were using the same name "Shwe-nan-thein-gi" for their respective produce. She approached Saya Khin and requested him not to use the same name "Shwe-nan-thein-gi" on his labels. Saya Khin not only disregarded the request made but promptly filed a suit for a declaration that he has the sole right to use this trade name and for an injunction to restrain Daw Thet Pu from the use of the same name when selling her blood purifier.

It is the case of Saya Khin that for the past ten years or so, he has been manufacturing blood purifier known as "Shwe-nan-thein-gi Thwese" and selling the same under the label of ဆွေနန်းသိမ်းဂြိုဟ်သွေးဆေး This name "Shwe-nan-thein-gi Thwese" had, by long user, come to mean a compound of his manufacture. In May 1950, Daw Thet Pu also manufactured and produced the same type of medicine and began using the same name "Shwe-nan-thein-gi Thwese" and had been selling her medicine with the object of deceiving the public, making them believe that her produce was of his manufacture. This has, in turn, resulted in the reduction of his own sales of his medicine. Daw Thet Pu on the other hand, asserted that she had been manufacturing and selling her own blood purifier for the past 25 years or so under the name of "Shwe-nan-thein-gi Thwese". She also stated that her own

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trade-mark and name are quite different from those of Saya Khin. She denied that she had any intention to pass off her medicine as that of Saya Khin.

Two packets of blood purifier, one each from the plaintiff and the defendant, were produced as exhibits in Court. It is not denied that the plaintiff's trade-mark is entirely different from that of the defendant. The plaintiff's label not only shows his own name but also his own picture in contrast to the label of the defendant, showing the picture of a Burmese Royal Palace and the words "Shwe-nan-daw and Shwe-nan-thein-gi Thwese". It was solely on this difference in the get-ups of their respective labels that the plaintiff's suit was dismissed by the trial Court. In the trial Court, the defendant was able to prove that she had been manufacturing and selling this type of medicine under the name of "Shwe-nan-thein-gi Thwese" for the past 25 years or so.

In his appeal before the Additional District Judge, Mandalay, Saya Khin was successful and the judgment and the decree of the trial Court was set aside and his suit was decreed. From a reading of the judgment of the lower Appellate Court, it is clear that the appeal was allowed on one point only and that is, that although the parties had been manufacturing the same kind of medicine and had been using the same name "Shwe-nan-thein-gi Thwese", it was the plaintiff who first got his produce in the market. In this, I am afraid, the lower Appellate Court has taken a very narrow view of the case and has given a restricted interpretation of the decision in *Gaw Kan Lye* v. *Saw Kyone Saing* (1). In that case the question involved is the use of a trade-mark and not of a trade name. Although the defendant has been manufacturing and selling her

(1) (1939) R.L.R. 488.

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U AUNG KHINE, J.

medicine for the last 25 years, the lower Appellate Court held that her produce had not been in the market, probably because she had been selling them not in open market but privately. It is true that it was only recently that the defendant registered her trade-mark and name but it would be erroneous to hold that her produce had not been in the market before that of the plaintiff.

The most important question in this case is whether the name "Shwe-nan-thein-gi" has acquired a reputation in the market together with the plaintiff's medicine and has become associated with him and that the public always indentify his medicine by this name. He would clearly be entitled to a decree if he could prove that it is so.

On the other hand, the trade-mark or name which is primarily descriptive of an article or its composition or its mode of manufacture must remain open to the trade and cannot be claimed for exclusive use by any one trader.

I have heard with interest the address made by the counsel for the respondent Saya Khin that the name "Shwe-nan-thein-gi" which was primarily descriptive of his produce, has now lost its meaning and through long user has acquired a secondary meaning indicating that the medicine sold under this name is not merely medicine of the description but medicine made by him. In support of this contention, reliance has been placed on the decision of *Reddaway* v. *Banham* (1) most commonly known as "Camel Hair Belting case". The burden of proving that the name "Shwe-nan-thein-gi Thwese" has acquired a secondary signification spoken of by Saya Khin lies heavily on him. The term "Shwe-nan-thein-gi" was never meant to

(1) 13 R.P.C. 218.

be a trade name. It was the name given to this type of medicine many years ago in a Burmese Royal Palace. The process of manufacture of this type of medicine had long been published in a "Tse-kyan" (*Materia Medica*) and using this process, this type of medicine must have been produced over and over again under the same name. It is clear therefore that the name had, for years past, been in commercial use as descriptive of the medicine prepared according to this process.

Furthermore, there are numerous decisions to show that the Courts are generally very reluctant to come to the conclusion that an ordinary descriptive word had lost its original meaning and had become distinctive of the goods of a particular manufacturer. See the cases of *Cellular Clothing Co.* v. *Maxton and Murray* (1); *Chivers & Sons* v. *Chivers & Co. Ltd.* (2) and *Burberrys* v. *J. C. Cording & Co. Ltd.* (3). There is not much evidence in the case to support the claim made by Saya Khin that the name "Shwe-nan-thein-gi Thwese" has come to mean the medicine of the plaintiff's manufacture. Thus it would be illogical to hold that the plaintiff has acquired exclusive right to the use of the name "Shwe-nan-thein-gi Thwese".

Finally, it has been held in more than one case that where the plaintiff's name is habitually used along with the trade name of his goods, it is difficult to establish that the trade name has, by itself, become distinctive of his goods. See the cases of *Horlick's Malted Milk Co.* v. *Summerskill* (4) and *Hommel* v. *Bauer & Co.* (5). The second case namely that of *Hommel* v. *Bauer & Co.* (5) has a striking resemblance to the case now under consideration. In that case

(1) (1899) A.C. 326.
(2) 17 R.P.C. 420.
(3) 26 R.P.C. 693.
(4) 34 R.P.C. 63.
(5) 22 R.P.C. 43.

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the plaintiff was selling a proprietary medicine which he called "Hommel's Hæmatogen," and sought to restrain the defendants from selling a similar product under the name "Hæmatogen". The action was dismissed. It was held that the fact that the bottle containing the medicine was marked, "Dr. Hommel's Hæmatogen" showed that "Hæmatogen" had not acquired this secondary meaning exclusively attaching it to Dr. Hommel's preparation. In the present case, on the label of the plaintiff's it was clearly mentioned that "Shwe-nan-thein-gi Thwese" was the manufacture of the plaintiff Saya Khin. The words used are ဆရာခင်ဗေဒါစပ်သောရွှေနန်းသိဂီသွေးဆေး။

For all these reasons the appeal must be allowed. The judgment and the decree of the lower Appellate Court are hereby set aside and the plaintiff-respondent Saya Khin's suit must be dismissed with costs throughout. Advocate's fees in this Court is fixed at five gold mohurs.

APPELLATE CRIMINAL

Before U Bo Gyi, J.

MAUNG NYUNT MAUNG
MAUNG HLA MYINT } (APPLICANTS)

H.C. 1952

May 29.

v.

THE UNION OF BURMA (RESPONDENTS).*

Suppression of Corruption Act, 1948, s. 4 (1) (c) and 4 (2)—S. 109 of the Penal Code.

The applicants were charged before the Special Judge (1), Rangoon, for taking bribe for releasing (PW 3) on bail and for abetment under s. 109, Penal Code. The charge against U Nyunt Maung was that he obtained for himself and also for the other applicant a sum of Rs. 125 as a pecuniary advantage for the release of Maung Aung Khine.

Held: That the charge disclosed no acts of abetment against the other accused applicant. The evidence also did not support any such case. The charge against Maung Hla Myint was quashed.

The Public Prosecutor v. *George Williams*, A.I.R. (1951) Mad. 1042.

San Thein
B. W. Ba Tun } for the applicants.

Ba Sein (Government Advocate) for the respondents.

U BO GYI, J.—These two applications, one by U Nyunt Maung, Court Prosecuting Officer of the Court of the Western Subdivisional Magistrate, Rangoon, and the other by Maung Hla Myint, Bench Clerk of the same Court, will be disposed of in this order. The charge against Maung Hla Myint runs :

" That you, on or about the 21st day of July 1951 (3rd *lasok* of *Waso* 1313 B.E.), at about noon in the " Court-room of the Western Subdivisional Magistrate, Rangoon, abetted U Nyunt Maung, the Court Prosecuting Officer of the same Court as you, a public servant, in the commission of criminal misconduct in the

* Criminal Revision Nos. 9 and 64 (B) being review of order of Special Judge of Rangoon, dated 26th March 1952, passed in Criminal Regular Trial No. 8 of 1952.

H.C. 1952

MAUNG NYUNT MAUNG MAUNG HLA MYINT v. THE UNION OF BURMA.

U BO GYI, J.

discharge of his duties in that he by corrupt or illegal means or otherwise by abuse of his office as a public servant, obtained for himself and also for you as the Bench Clerk of the same Court from U Maung Tin (*alias*) U Thein a sum of Rs. 125 as a pecuniary advantage for the release of Maung Aung Khine (PW 3) on bail, which was committed in consequence of your abetment, and thereby committed an offence punishable under section 4 (*1*) (*c*) /4 (*2*) of the Suppression of Corruption Act, 1948, read with section 109 of the Penal Code and within my cognizance . . ."

This charge shows on the face of it that the facts set out therein do not come within the purview of section 109 of the Penal Code read with section 4(*1*) (*c*) /4(*2*) of the Suppression of Corruption Act, 1948. Under section 107 of the Penal Code a person abets the doing of a thing when he instigates any person to do that thing or engages with one or more other person or persons in a conspiracy for the doing of that thing, or intentionally aids, by any act or illegal omission, the doing of that thing. Here, the charge against Maung Hla Myint is that he abetted U Nyunt Maung in that the latter "obtained for himself and also for you as the Bench Clerk of the same Court from U Maung Tin (*alias*) U Thein a sum of Rs. 125 as a pecuniary advantage for the release of Maung Aung Khine (PW 3) on bail . . . ." It is clear that the charge discloses no offence of abetment against Maung Hla Myint ; neither does the evidence for the prosecution which has been recorded. I have checked the list of the prosecution witnesses mentioned in the Charge Sheet with the witnesses examined for the prosecution and I find that the case for the prosecution had been duly closed when the charge was framed.

The learned Advocate for Maung Hla Myint has taken me through the evidence of the prosecution witnesses and I find that there is nothing to connect Maung Hla Myint with the offence alleged to have been

committed by his co-accused U Nyunt Maung. Maung Hla Myint in his application states that he did not know that U Nyunt Maung demanded a bribe, and on going through the record I can find no evidence to show that he was present when U Nyunt Maung is said to have demanded or received a bribe.

In these circumstances, the learned Government Advocate finds himself unable to support the charge against Maung Hla Myint. There is no evidence whatsoever against Hla Myint and the charge against him will be quashed and he will be discharged.

As to U Nyunt Maung his learned Advocate frankly admits that there is some *primâ facie* evidence against his client. He states that he will not now go into the question whether the evidence of the witnesses who were present when the bribe is alleged to have been given, requires corroboration inasmuch as these witnesses should be treated as abetters of the alleged crime.

The learned Advocate, however, presses for grant of bail. In the circumstances mentioned by the learned Advocate and in view of the fact that the amount involved was only Rs. 125 and after a consideration of the principles enunciated in *The Public Prosecutor* v. *George Williams* (1) regarding cases where bail which has been granted may be cancelled, I am of the opinion that U Nyunt Maung should be given an opportunity to defend himself while on bail. Accordingly, under section 498 of the Code of Criminal Procedure I direct that U Nyunt Maung be released on bail on his furnishing security in the sum of Rs. 2,000 in two sureties in the like amount.

(1) A.I.R. (1951) Mad. 1042.

APPELLATE CIVIL.

Before U On Pe and U San Maung, JJ.

H.C. 1952

June 6.

GAW TUN SHWE (APPELLANT)

v.

MA KYIN AYE (RESPONDENT).*

Moveables given as security for loan—Period of limitation—Article 57, Limitation Act—Suit for enforcing a charge—Article 120—Contract Act, ss. 172 and 176—Rights of pledgee—Whether suit maintainable for sale of pledged articles—Stare decisis *how far applicable in the case.*

Appellant sued for enforcing a charge on jewellery pledged as security with him. The suit was dismissed on the ground that it did not lie and that the loan had become barred by limitation.

Held : That the article the Limitation Act applicable to a decree for ordering defendant to pay a debt is Article 57.

Ma Kyi Kyi v. *Ma Shwe and another*, (1900—02) 1 L.B.R. 154; *Nim Chand Baboo and others* v. *Jagabandhu Ghose*, I.L.R. 22 Cal. 21; *Mahalinga Nadar* v. *Ganapathi Subbien*, I.L.R. 27 Mad. 528, referred to.

The present claim for the debt is clearly time-barred.

There is a conflict of opinion on the question as to which article of the Limitation Act is applicable for enforcement of payment of money charged upon moveable property. Case law referred to.

Vitla Kamti v. *Kalchara*, I.L.R. 11 Mad. 153; *Madan Mohan Lal* v. *Kanhai Lal*, I.L.R. 17 All. 284, referred to.

The rights of a pawnor are governed by s. 176 of the Contract Act. The plaintiff could either sue for debt retaining the pledge as collateral security or he could sell the goods under pledge after reasonable notice. Though the right of suit was barred his right of sale is a statutory right and remained but no suit was maintainable for enforcing such a right as there was no necessity for such a suit. The language of s. 176 of the Contract Act states that the pledgee *may* sell the thing pledged. Where a Statute gives a power to do a certain thing in a certain way, the thing must be done in that way or not at all.

The Queen v. *The County Court Judge of Essex and Clarke*, (1887) 18 Q.B.D. 704; *Lamplugh* v. *Norton and others*, (1889) 22 Q.B.D. 152;

* Civil 1st Appeal No. 58 of 1950 against decree of the District Court of Hanthawaddy in Civil Regular No. 2 of 1949, dated 4th August 1950.

Doe v. *Bridges*, 1 B.& Ad. 847 at 859 ; *Liquidators, Jauda Rubber Works, Ltd.* v. *Collector of Bombay and another*, A.I.R. (1950) East Pun. 204, referred to.

Therefore the only way to enforce sale of a pledged article is to exercise the rights under s. 176 of the Contract Act and not in any other way as by suit.

The question whether the Court has jurisdiction to entertain such a suit was not decided in *Ma Kyi Kyi* v. *Ma Shwe and another*, 1 L.B.R. 154 and therefore the rule of *stare decisis* is not applicable.

Kyaw Myint and V. S. Venkatram } for the appellant.

Dr. Ba Han for the respondent.

U ON PE, J.—This appeal has arisen out of a suit which purports to be one for enforcing a charge of Rs. 12,925 on jewellery alleged to have been pledged with the appellant-plaintiff as security for the loan. The jewelleries pledged are three items mentioned in paragraph 2 of the plaint. It may be mentioned here that these three items of jewellery formed part of the six items of jewellery in respect of which the respondent-defendant and her husband filed a suit for redemption in Civil Regular Suit No. 17 of 1946 of the Court of the 1st Assistant Judge, Moulmein, which decided in favour of the respondent-defendant, holding that all the six items were pledged for the loan of Rs. 6,000, a decision which was upheld and confirmed by the High Court of Rangoon in Civil Second Appeal No. 90 of 1948.

The reliefs asked for in this suit may be reproduced.

These are :—

(1) For a declaration that the said sum with interest is due to the plaintiff and for an order of payment of the said amount by the defendant on the fixed date.

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(2) For an order, in default of such payment, directing the sale of the pledged jewelleries and for payment out of the sale proceeds the amount due to the plaintiff.

The respondent-defendant has contested the suit on the ground that the recovery of the alleged loan is barred by limitation and the claim for the sale of the jewellery alleged to have been pledged does not lie.

The lower Court went to trial on six issues and dismissed the suit on the ground that the claim in respect of the debt was barred by limitation, and that the suit to direct sale of the pledged jewelleries was not maintainable as the property pledged does not fall within the ambit of section 100 of the Transfer of Property Act, whereas the right of action exercisable by the pledgee is one as provided under section 176 of the Contract Act.

As regards limitation, we have been referred to several cases, one of which is a Burma case—*Ma Kyi Kyi* v. *Ma Shwe and another* (1) and which are unanimous that the Article applicable regarding the right to a decree ordering the defendant personally to pay a debt is Article 57 of the Limitation Act.—Please see *Nim Chand Baboo and others* v. *Jagabandhu Ghose* (2) and *Mahalinga Nadar* v. *Ganapathi Subbien* (3). We hold that the present suit in so far as the claim in respect of the debt is concerned is clearly time-barred.

With regard to the point as to maintainability of the suit for enforcing a charge on the articles pledged, cases have been cited dealing with the question as to the Article of Limitation applicable to a suit to enforce payment of money charged upon moveable property. There arose a conflict of opinion on the point, one

(1) (1900—02) 1 L.B.R. 154. (2) I.L.R. 22 Cal. 21.
(3) I.L.R. 27 Mad. 528.

view as in *Ma Kyi Kyi* v. *Ma Shwe and another* (1) and *Nim Chand Baboo and others* v. *Jagabandhu Ghose* (2), holding that the Article applicable is Article 120, there being no provision in the Law of limitation as to the period fixed for instituting such a suit ; and a contrary view holding that the claim, being merely an incident in the nature of an accessory to the right to recover the debt, became barred with the right of suit for that debt, as in *Vitla Kamti* v. *Kalekara* (3), and the judgment by Davies J., in *Mahalinga Nadar* v. *Ganapathi Subbien* (4), where his Lordship held as follows :

" That the claim to proceed against the debtor personally was governed by Article 57 and was barred, but that in so far as the suit was for a sale of the pledged property that was merely an incident in the nature of an accessory to the right to recover the debt, which became barred with the right of suit for that debt. The right of sale, however, remained. "

But it is his Lordship's observation in commenting on the case of *Vitla Kamti* v. *Kalekara* (3), which brought out a new aspect of the case which had been overlooked in *Nim Chand Baboo and others* v. *Jagabandhu Ghose* (2) and *Madan Mohan Lal* v. *Kanhai Lal* (5), and which is as follows :

" The case here is, however, different in one respect from that just quoted [*Vitla Kamti* v. *Kalekara* (3)]. There the property was only hypothecated. Here there was a ' pledge ' within the meaning of section 172 of the Indian Contract Act, and the rights of the pawnee (the plaintiff) are governed by section 176 of that Act. That is the plaintiff could either sue upon the debt, retaining the pledge as a collateral security or he could sell the thing pledged, on reasonable notice to the defendant. His right of suit was barred by limitation, but

(1) (1900—02) 1 L.B.R. 154. (3) I.L.R. 11 Mad. 153.
(2) I.L.R. 22 Cal. 21. (4) I.L.R. 27 Mad. 528.
(5) I.L.R. 17 All. 284.

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his right of sale still remained and this was a right secured to him by law which he could exercise without suit. Hence the suit was not maintainable as there was no necessity for it. This point does not appear to have been considered in the cases of *Nim Chand Baboo and others* v. *Jagabandhu Ghose* (1) and *Madan Mohan Lal* v. *Kanhai Lal* (2)."

We are, with respect, in agreement with this proposition of law that the pledgee's right of sale under section 176 of the Contract Act is secured to him by law which he could exercise without suit and that the suit is not maintainable, as there is no necessity for it. Here, we may observe, that in all the cases quoted above this point as to maintainability of the suit, as pointed out by Davies J., in *Mahalinga Nadar* v. *Ganapathi Subbien* (3), had not been considered with the result that a situation was created in which suit for enforcing a charge on moveable property continued to be filed. This confusion persisted and was made possible by another factor, namely, the failure to keep the distinction in view between a security hypothecated and bailment of pledgee. The difference between the two forms of security is brought out in the following words in the Indian Contract Act by Pollock and Mulla, 6th Edition, at page 544 :—

" It is clear from the definition of ' bailment ' that there can be no pledge of goods unless there is an actual delivery of the goods. The loan, however, may be secured by an hypothecation of goods. Such a transaction does not require delivery of goods for its validity ; nor can it be said to be prohibited by the Contract Act because the Act contains provisions for bailment of pledges and none for hypothecation of goods."

It is the failure to keep the distinction in view between a security hypothecated and a pledged article that seemed to have caused the confusion resulting in suits

(1) I.L.R. 22 Cal. 21. (2) I.L.R. 17 All. 284.
(3) I.L.R. 27 Mad. 528.

being filed even in cases which fall under section 176 of the Contract Act. Section 176 of the Contract Act contemplates articles pledged in the real sense and the present case is one which falls within the ambit of the said section and is, we must therefore hold, not maintainable.

Dr. Ba Han, counsel for the respondent-defendant, has contended that the right given to the pledgee to realise the security under section 176 of the Contract Act is the only way open to the pledgee to impose the charge, and that there is no other way. He has developed his argument on the line that the word "may" in the relevant passage, namely, "or he may sell the thing pledged on giving the pawnor reasonable notice of the sale" in section 176 of the Contract Act means "shall." In support of his argument he has taken us through several decisions to show that where in a statute a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. In *The Queen* v. *The County Court Judge of Essex and Clarke* (1), Lord Esher observed at page 707 :

> "The ordinary rule of construction therefore applies—that where the Legislature has passed a new statute giving a new remedy, that remedy is the only one which can be pursued."

The same principle was followed in *Lamplugh* v. *Norton and others* (2). At page 456 the following passage of the judgment may aptly be quoted :—

> "But I agree with what was said by Lord Tenterden in *Doe* v. *Bridges* (3). He there said, 'Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that the performance cannot be enforced in any other manner."

(1) (1887) 18 Q.B.D. 704. (2) (1889) 22 Q.B.D. 452.
(3) 1 B. & Ad 847 at 859.

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In *Liquidators, Janda Rubber Works, Ltd.* v. *Collector of Bombay and another* (1), it was held as follows :

"Where a statute confers powers and a citizen has a complaint or has suffered an injury because of the exercise of powers conferred by that statute, the remedy for him is to proceed in accordance with the provisions of that statute and seek under it the particular remedy prescribed by it. In such cases the jurisdiction of the ordinary Court is barred."

This is a case in which the Collector of Bombay, as the Custodian of Evacuee Property, declared and sealed a factory known as Universal Rubber Works belonging to a Company in liquidation, by virtue of the power vested in him by the Bombay Act XXIV of 1949, which was subsequently replaced by the Central Ordinance XXVII of 1949. The Liquidators made an application to the High Court for issue of an injunction to the Deputy Custodian to remove his seal from the factory, contending that the factory could not be seized without obtaining in the first instance leave of the Court. The Liquidators' application was dismissed as the High Court had no jurisdiction to deal with the application as the remedy open to the Liquidators was to apply under the provisions of the Bombay Act and not under the Companies Act.

Following these decisions, we are of the opinion that the only way to enforce a pledged article is to exercise the right secured to the pledgee under section 176 of the Contract Act and that there is no other way.

Before we finish with this judgment we may observe that, strange though it may seem, there has been no direct decision in Burma since the decision in the case of *Ma Kyi Kyi* v. *Ma Shwe and another* (2), which was

(1) A.I.R. (1950) East Pun. 204. (2) (1900—02) 1 L.B.R. 154.

made some 50 years ago. That is a case which was decided without reference to the point as to whether the suit was maintainable, and the same cannot therefore be taken as laying down any view differing from the principle that the pledgee's right of sale under section 176 of the Contract Act is secured to him by law which he could exercise without suit. The judicial rule *stare decisis* is therefore not applicable in the present case in which the question is whether the Court has jurisdiction to entertain this suit and does not really relate to the rights of parties. The question of overruling old authorities, on the strength of which many transactions may have been adjusted and their rights determined, does not arise in this case.

In the result this appeal fails and is accordingly dismissed with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CRIMINAL.

Before U San Maung and U Aung Khine, JJ.

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June 13.

HLA MAUNG AND OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

High Treason Act, s. 3 (1)—Special Judges Act, 1946, s. 5 (1)—Criminal Procedure Code, s. 257 (1)—Proceeding to judgment without examining defence witnesses—When permissible—Right of accused persons to have defence witnesses summoned even if temporarily out of reach of the process of law.

Held: That in trial of warrant cases s. 257 (1) of the Criminal Procedure Code gives authority to Court for compelling production of witnesses at the instance of the accused. In the Special Judges Act, 1946 a special procedure is laid down in s. 5 (*1*). The Special Judge may refuse to summon any witness if satisfied that the evidence of such witness will not be material and he shall not be bound to adjourn a trial for any period unless such adjournment is necessary in the interest of justice. In the present case, summons could not be effectively served upon the defence witnesses as they were residing in area under the domination of insurgents and beyond the Government's control. It is against the principles of natural justice that an accused should be deprived of the right of having defence witnesses summoned for examination even in such circumstances. The Special Judge had not stated that the evidence of these witnesses would not be material for defence. Therefore he was wrong in having passed judgment without giving further opportunity for the summoning of such witnesses as defence witnesses.

Khaw Taw and one v. *The Union of Burma*, (1948) B.L.R. 310, referred to.

Nyun Han for the appellants.

Mya Thein for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 8 of 1950 of the Court of the Sessions Judge (U On Pe) of Mvaungmya sitting as the First Special Judge for that District the appellants Hla Maung and 10 others were convicted under section 3 (*1*) of the High

* Criminal Appeal No. 231 of 1952 being appeal from the order of Sessions Judge sitting as 1st Special Judge, Myaungmya, dated 7th April 1952 passed in Criminal Regular Trial No. 8 of 1950.

Treason Act for taking part in an attempt by force of arms to overthrow the civil administration of Moulmeingyun Township and they were each sentenced to death. The facts of the case which have been fully set out in the judgment appealed against may be briefly summarised as follows :

On the 15th of August, 1948, Moulmeingyun was attacked by Communist insurgents and the Police Force which also included contingents from Kyaikpi and Hlaingbone Police Stations was overpowered and over 200 fire-arms including rifles, sten-guns and bren-guns were seized. The Communists occupied the town for three days and withdrew on receiving news to the effect that the Government Forces were on their way. They or a considerable number of them concentrated at Onbinsu village. On the 13th of October, 1948, that is to say about a month after Moulmeingyun was attacked, a combined force of the Union Military Police and Civil Police led by the then District Superintendent of Police Mr. Cornelius of Myaungmya proceeded to Moulmeingyun in two U.B. boats and one tug flying the flags of the Union of Burma. From Moulmeingyun they proceeded, according to plan, to Onbinsu village where they arrived at about 11 a.m. No Communist insurgents were found in Onbinsu village but information was received that on the approach of the Government Forces the insurgents had retreated to the paddy fields in the rear of the village. The Government Force then divided itself into two main groups, one of which was led by the District Superintendent of Police himself and the other by U Thein Maung (PW 1), Deputy Superintendent of Police. The party led by the District Superintendent of Police and Maung Mun Htaw (PW 4), Sub-Inspector of Police, came upon the appellants Ko Ko Gyi and Paw Thein at a spot about

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300 yards away from where the main body of Communist insurgents were resisting the Government Forces. Ko Ko Gyi and Paw Thein were seated among the paddy plants a short distance away from each other. Ko Ko Gyi was unarmed while Paw Thein had in his possession a revolver which was subsequently identified to be one which he had taken away from Moulmeingyun from the possession of Maung Win Maung (PW 20), the Station-Writer, who had hidden it behind a photographic frame. The main body of the Government Forces led by U Thein Maung (PW 1) was attacked by the Communists at a spot about 2 or 3 miles away from Onbinsu village and fighting between the two parties continued from 1-30 p.m. till about 5 p.m. The attack upon the main Government Forces under U Thein Maung was launched from two sides and about 5 p.m. when firing ceased some of the Communists raised up their hands and surrendered. They were the appellants Ohn Tin, Than Nyun, Maung Kyaing, Maung Saing, Ba Maung, Ba Tun, Hla Maung, Kala, Tha Aung and one Kyi Hlaing who has since died. The dead bodies of four persons identified as those of Than Nyun, Khin Nyun *alias* Khin Than, Tun Khin and Hla Kyi were found. There was only one casualty on the Government side and he was Police Constable Aung Nyein who received gunshot wounds to which he succumbed later in the day. Altogether 14 rifles were seized from those who surrendered as well as from near the bodies of the dead Communists and of them 8 were those which were seized by the Communists when they raided Moulmeingyun. The rifles surrendered by the appellants Ba Maung, Kyi Hlaing, Ba Tun, Hla Maung and Kala were among those which have been so identified.

All the Communists who had surrendered and the dead bodies of the four persons who were found

killed in action were taken to Moulmeingyun the same day and on the 14th of October 1948 the Government Forces returned to Myaungmya where they arrived the same evening. On the 16th of October the appellants Ba Tun, Ba Maung and the deceased Kyi Hlaing gave confessions marked as Exhibits B, D and C respectively. The confessions of Ba Tun and Ba Maung are admissible as against their co-accused under section 30 of the Evidence Act while that of the deceased Kyi Hlaing should be left entirely out of consideration.

As against the appellants Hla Maung, Kala, Tha Aung, Ohn Tin, Than Nyun, Maung Kyaing, Maung Saing, Ba Tun and Ba Maung, the prosecution case was that they actually resisted the Government Forces that came to Onbinsu village after the Communist insurgents. Their defence was that the Karen insurgents have been playing havoc in that area by attacking Burmese villages, that they first mistook the Government Forces to be Karen insurgents and therefore opened fire upon them and that as soon as they realised that the men they were fighting belonged to the Government Forces they had laid down their arms and surrendered. The Government's case against them was that they could not possibly have mistaken the Government Forces to be Karen insurgents as the Government Forces went to Onbinsu in two U.B. boats and one tug flying the Union of Burma flags and that the several parties which chased after the Communists carried Union flags attached to the top of Bamboo poles with a view not only to let the insurgents know who they were but also to prevent the various parties of the Government's own forces from opening fire at each other by mistake.

The case against the appellants Paw Thein and Ko Ko Gyi was that although they were not actually among the Communists who offered resistance they

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must have belonged to the same party having run away from Onbinsu at about the same time as the other Communists and having been captured at a spot about 300 yards away from the main body of the Communists. The defence of the appellant Ko Ko Gyi was that he went to Onbinsu village as Paw Thein called him to discuss the matter about the Karen insurgents and that when the Government Forces came he ran away from the village. The appellant Paw Thein stated that he went to Onbinsu village at the request of Ko Tun Gyaw and Ko Hla Maung to protect the villagers against the Karen insurgents and that when the Government Forces came he and Ko Ko Gyi ran away to be arrested before the actual fighting took place.

As regards the appellants Hla Maung and 8 others who were actually arrested at the scene of action and from some of whom weapons which were seized by the Communists from Moulmeingyun were captured, we agree with the learned trial Judge that a *primâ facie* case has been made out against them by the prosecution. The confessions of Ba Tun and Ba Maung to the effect that they knew that the party that came to Onbinsu village belonged to the Government Forces and that they were only fighting a rear guard action to enable the main body of the Communists to escape lend assurance to the presumption against the others that they knew that the forces which they were attacking belonged to the Government.

As regards the appellant Paw Thein, the fact that he was one of those who had participated in the disarming of the Police Forces at Moulmeingyun on the 15th of August 1948, that he was armed with the same revolver which he had taken from the Station-Writer Maung Win Maung (PW 20) and that of the Communists who offered resistance eight were armed

with rifles seized from Moulmeingyun may be sufficient to serve as a connecting link between him and the Communists who actually offered resistance. Therefore a *primâ facie* case may be said to have been established against him also.

As against the appellant Ko Ko Gyi, however, the mere fact that he was found in the paddy fields along with Paw Thein is not by itself sufficient to show that he belonged to the same party as Hla Maung and others who had offered resistance to the Government Forces. Therefore the confessions of his co-accused Ba Tun and Ba Maung should be excluded from consideration in his case and not made to fill up gaps in the prosecution case in so far as he is concerned. See the case of *Khaw Taw and one* v. *The Union of Burma* (1). A *primâ facie* case under section 3 (*1*) of the High Treason Act cannot be said to have been made out against him on the evidence adduced by the prosecution.

As already observed above, the defence raised by the appellant Hla Maung and eight others who were caught red-handed while offering resistance to the Government Forces was that they offered resistance thinking that the KNDOs were after them and that they surrendered as soon as they discovered the true identity of the forces whom they were resisting. They cited witnesses in support of their defence though they declined to give evidence on behalf of their own defence. On the 29th of March 1951, the learned Special Judge who was then dealing with the case (U Pha Tha Htaw) ordered the issue of summonses on the defence witnesses, but the summonses were returned unserved as noted in the diary dated 30th April 1951. Several more attempts were made to summon

(1) (1948) B.L.R. 310.

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these witnesses but in vain. So on the 3rd of September 1951, the learned Special Judge (U Ba Swe) who was then dealing with the case made this note in the diary :

"DWs absent. Summonses to them returned with the report that the DWs are residing in areas now under the domination of insurgents. It will be useless to issue fresh summonses to the DWs until and unless their villages are re-occupied by Government."

After one or two adjournments given with a view to see whether the situation would improve the learned Special Judge (U On Pe) made this note in the diary, dated 5th November, 1951 :

"Accused Ko Ko Gyi gives the new addresses of his two witnesses.

Accused Ohn Tin waives his two witnesses, one of whom has died.

The other accused ask for time to find out whether the witnesses cited by them can come to Court or not as they are now in insurgent-held areas."

The next relevant entry in the diary is dated 21st November 1951. It reads as follows :

"Two defence witnesses present and examined for the defence of Ko Ko Gyi. The remaining accused say that they could not contact their people to enquire about the witnesses cited by them. They ask for further adjournment to contact their own people who are in Moulmeingyun."

Later, after several adjournments being given to enable the accused to contact their witnesses through their relatives warrants of arrest were issued to compel the defence witnesses to appear. This was followed by an entry in the diary, dated 4th February 1952, which reads as follows :

"Warrants of arrest against the defence witnesses returned unexecuted with the report that the witnesses are residing in insurgent-held area. I have warned the accused to produce

their witnesses on the next adjourned date. If no evidence is adduced on that date, no further adjournment will be granted to procure the attendance of the defence witnesses."

Thereafter, after several adjournments were given to enable the defence witnesses to attend if they could be contacted by the relatives of the accused, the learned Special Judge heard arguments in the case and passed orders on 7th April 1952, without hearing the evidence of the defence witnesses whose attendance was desired by Hla Maung and others except Ohn Tin, Ko Ko Gyi and Paw Thein. On the 7th April 1952, the date on which the judgment was delivered, the following entry was also made in the diary :—

"Accused filed a joint application requesting the Court to examine the remaining defence witnesses they have cited. These witnesses are reported to be residing in areas occupied by the insurgents, and all possible effort was made to procure their attendance but without success. Many adjournments were given to get the attendance of these witnesses, and I do not think I will be justified in giving further adjournments for this purpose."

Now, it is one of the fundamental principles of criminal justice in this country that no accused person shall be condemned unheard. To this end in view, every reasonable opportunity has to be given to accused persons to enable them to have their defence witnesses examined by the Court. In the trial of warrant cases the provisions relating to the issue of process for compelling production of evidence at the instance of the accused are laid down in section 257 (1) of the Criminal Procedure Code, which reads as follows :

"257. (1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any

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document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing :

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice."

In cognizable cases such summons are to be issued free of charge and witness expenses are generally to be defrayed by Government.

In the Special Judges Act, 1946, a special procedure has been laid down in the form of a proviso to sub-section (*1*) of section 5. It reads as follows :

"5. (*1*) A Special Judge may take cognizance of offences without the accused being committed for trial, and in trying accused persons shall follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates.

Provided that a Special Judge may refuse to summon any witness if satisfied that the evidence of such witness will not be material, and shall not be bound to adjourn a trial for any purpose whatsoever, unless such adjournment is, in his opinion, necessary in the interests of justice."

This proviso although couched only in one sentence is really composite of two provisos which may be made to read as follows :

"Provided that a Special Judge may refuse to summon any witness if satisfied that the evidence of such witness will not be material ;

Provided also that a Special Judge shall not be bound to adjourn a trial for any purpose whatsoever, unless such adjournment is, in his opinion, necessary in the interests of justice."

Viewed in this manner the first of these two provisos must be considered as constituting the second proviso

to sub-section (1) of section 257 of the Criminal Procedure Code, which, when applied to trials before Special Judges, will read as follows :

"257. (1) If the accused, after he has entered upon his defence, applies to the Special Judge to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Special Judge shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing :

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Special Judge is satisfied that it is necessary for the purposes of justice.

Provided that the Special Judge may refuse to summon any witness if satisfied that the evidence of such witness will not be material."

The case under appeal has never proceeded beyond the stage of issuing summonses or other processes to compel the attendance of witnesses for the defence. Summons could not be effectively served upon the defence witnesses not through any fault or laches on the part of the appellants but because the witnesses cited by them in support of their defence were residing in areas under the domination of the insurgents and beyond the control of the Government. It will be entirely against the principles of natural justice that accused persons should be deprived of the right of having the defence witnesses summoned for their due attendance in Court because they happen to be residing in areas temporarily out of the reach of the process of the Court because of domination by forces in rebellion against the established Government. Mere considerations of delay are quite insufficient to override the

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compelling necessity for affording the accused person an opportunity of defending himself not only by giving a statement whether on oath or otherwise but also by having witnesses examined on his behalf. In the present case it cannot even be said that the delay would be prejudicial to the best interests of the appellants as they have already been convicted for offences under the Arms Act in respect of the weapons seized from their possession. Furthermore, although the appellants were arrested as early as the 13th of October, 1948, the case against them under section 3 (*1*) of the High Treason Act was not instituted against them by the Government till the 27th of July, 1950, the reason given by the prosecution being that Myaungmya District was in a bad state on account of the activities of the insurgents and that no investigation could be made with a view to send up the appellants under the Treason Act. The same reasons now hold for the inability of the Government to have effective summonses issued to compel the attendance of the witnesses for the defence.

The Special Judge has not been able to state that he was satisfied that the evidence of the defence witnesses would not be material to the defence. Therefore the proviso to sub-section (*1*) of section 5 of the Special Judges Act which, as already pointed out above, may be regarded as the second proviso to section 257 (1) of the Criminal Procedure Code, is inapplicable and the Special Judge was wrong in having passed judgment in the case without giving further opportunity to the appellants to have their witnesses summoned for the purpose of being examined as witnesses for the defence. The convictions and sentences on all the appellants are set aside and the appellants, except Ko Ko Gyi, are ordered to be retried for the offence under section 3 (*1*) of the High Treason

Act by a Special Judge of Myaungmya other than the Sessions Judge as may be selected by the Sessions Judge, Myaungmya.

As regards the appellant Ko Ko Gyi, having regard to the fact that we consider that no *primâ facie* case has been made out under section 3 (*1*) of the Treason Act we direct that he be acquitted and released so far as this case is concerned.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U San Maung and U Aung Khine, JJ.

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June 26.

CHANDMAL BIRLA AND ANOTHER (APPELLANTS)

v.

MRS. LEONG WON KEE (*a*) DAW MA HTWE AND OTHERS (RESPONDENTS).*

Limitation Act, Articles 36, 48 and 49—Wrongful conversion of movable property—Compensation for—Whether Article 48 applies to a dishonest conversion or all types of conversion—What amounts to conversion.

Plaintiff in the trial Court claimed compensation from the 2nd defendant for wrongfully detaining a boiler which, it was alleged, he had converted to his own use. The suit was dismissed as barred under Article 36 of the Limitation Act.

Held: That Article 48 of the Limitation Act provides for a claim for specific moveable property lost or acquired by theft or dishonest misappropriation or conversion or for compensation for wrongful taking or detention. The starting point is when the person having the right to the possession of the property first learns in whose possession it is. The article is not confined to dishonest conversion of moveable property but also applies to simple conversion.

L. P. E. Pugh v. *Ashutosh Sen*, 8 Pat. 516 at 524-525; *Adjai Coal Co. Ltd.* v. *Pappalal Ghosh*, A.I.R. (1930) (P.C.) 113; 57 Cal. 1341, referred to.

Conversion is the wrongful interference with goods as by taking, using or destroying them inconsistent with the owner's right of possession.

Fouldes v. *Willoughby*, Messon and Welsby's Reports VIII, 540 at 548; *Lancashire and Yorkshire Rly. Co.* v. *MacNicoll*, (1918) 118 Law Times Reports, 596; *Surat Lall Mondal and others* v. *Umar Haji and others*, 22 Cal. 877, referred to.

The claim in the present case is not therefore barred by limitation.

Kyaw Min for the appellants.

Kyaw Myint for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 1 of 1950 of the District Court of Akyab the plaintiff-appellants Chandmal Birla and Gangabux Birla sued

* Civil 1st Appeal No. 26 of 1951 against the decree of the District Court in Civil Regular No. 1 of 1950, dated 3rd February 1951.

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the defendant-respondents Mrs. Leong Won Kee and her two sons L. Ah Thaik and Ah Khun for the recovery of a sum of Rs. 25,000 as damages or compensation for wrongfully removing a portable steam engine and boiler belonging to them and for converting them to their own use. The respondents in their written statements denied *inter alia* that they were liable to pay compensation either for the alleged wrongful removal or for the alleged conversion of the steam engine and boiler. They also contended that, even assuming that the plaintiffs had a cause of action against them, their suit was barred by limitation. On the pleadings the learned trial Judge, or rather the Registrar of the District Court of Akyab, framed six issues as follows:

1. Did the defendants cause the plaintiffs' engine and boiler to be removed from the latter's mill and use them in their rice mill for their benefits? If so, for what period?
2. Were the engine and boiler damaged and rendered unserviceable because they were used improperly by the defendants?
3. Did the military commandeer and remove the boiler and use it for their purpose in defendants' rice mill? If so, for what period?
4. Is the suit barred by limitation as the cause of action arose since the early part of 1946?
5. Is the suit filed by the plaintiffs for the reasons given in paragraph 6 of the written statement of defendants 1 and 3?
6. Are the plaintiffs entitled to damages? If so, for what property and to what extent?

Thereafter, after hearing the witnesses cited by both parties, the trial Judge held that Article 36 of the

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Limitation Act was applicable to the suit on the facts admitted or proved beyond controversy and that therefore the plaintiffs' suit was barred by limitation. Being dissatisfied with the judgment and decree of the learned District Judge of Akyab dismissing their suit as aforesaid, the plaintiffs filed the present appeal on the grounds, *inter alia*, that the learned District Judge failed to consider the admission of the 2nd defendant-respondent L. Ah Thaik to the effect that after the boiler, which was taken possession of by the British Military Administration, had been abandoned by that Administration, the 2nd defendant-respondent wrongfully took possession of it, and knowing fully well that it belonged to the plaintiff-appellants converted it to his own use during the period November 1945 and June 1946 and that such action on the part of the 2nd defendant-respondent amounted to conversion. It is contended that on the admitted fact of there having been a wrongful conversion of the boiler by the 2nd defendant-respondent, Article 48 of the Limitation Act was applicable to that part of the plaintiff-appellants' claim relating to damages for wrongful conversion and that the limitation prescribed was three years from the time when the plaintiffs first came to learn in whose possession their boiler was. In our opinion this contention of the plaintiff-appellants must be allowed to prevail.

It is not necessary for us to recapitulate here the facts which have been fully set out in the judgment under appeal. The case has been considerably simplified by the admission made by the learned Advocate for the appellants that the plaintiffs' claim so far as it relates to the 1st and 3rd defendant-respondents cannot possibly succeed inasmuch as these defendant-respondents were away from Burma at the time the 2nd defendant-respondent converted the

boiler to his own use by working Leong Won Kee's rice mill with it and there is no specific proof on the point that the 1st and 3rd defendant-respondents had ratified the tortious act of their partner L. Ah Thaik. It is also admitted that that part of the plaintiff-appellants' claim as relates to the action of L. Ah Thaik in running Leong Won Kee's rice mill with the plaintiffs' boiler during the period of the British Military Administration cannot also be supported as L. Ah Thaik was then merely an employee of the British Military Administration which was in fact running the mill having requisitioned not only Leong Won Kee's rice mill but also the plaintiffs' boiler which they had removed from the plaintiffs' premises. The plaintiffs' claim therefore has boiled down to a simple claim for compensation for wrongfully detaining the boiler which the 2nd defendant-respondent was alleged to have converted to his own use.

Although the plaint has been inartistically drafted it seems to us that there is sufficient material therein to found a claim based on simple conversion and wrongful detention of their boiler. Such a claim is implicit in paragraph 3 of the plaint which reads:

"That on enquiry being instituted the plaintiffs came to learn in early 1948 that the said engine and boiler were in defendants' possession at their rice mill known as the Leong Won Kee Rice Mill at Akyab and that the defendants not only caused the said property to be removed by trespassing into the premises of the plaintiffs' rice mill but also used the said engine and boiler in their rice mill deriving enormous gains and benefits to themselves till the said portable steam engine and boiler were damaged and rendered unserviceable."

In paragraph 6 of the plaint also the plaintiffs have stated that the cause of action for their suit arose at Akyab in 1948 when they first came to learn that their properties were in the possession of the defendants.

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Now, Article 48 of the Limitation Act provides that in the case of a claim for specific moveable property lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, the limitation is three years from the date on which the person having the right to the possession of the property first learns in whose possession it is. That this Article of the Limitation Act is not confined to dishonest conversion of moveable property but applies also to simple conversion as well is clear from the following observation of their Lordships of the Privy Council in the case of *L. P. E. Pugh* v. *Ashutosh Sen* (1):

"In their Lordships' opinion the decision of the trial Judge in this case is correct, and Article 48 is the Article that applies. The two Articles are the only ones that apply to claims in respect of specific moveable property. Article 48 alone refers to conversion, and their Lordships can see no ground for splitting up conversion into two classes, one dishonest and the other not dishonest. If such were the intention one would have expected to find such a distinction between different classes of the same tort made clear by the express inclusion in Article 49 of the second of the two classes. The truth is that, if the Article is read without the commas inserted in the print, as a Court of Law is bound to do, the meaning is reasonably clear. 'Conversion,' a well-known legal term for a particular class of tort, is referred to as one of the modes by which specific movable property may be wrongfully acquired, the others being theft and dishonest misappropriation. The opposite view involves giving a different effect to 'or' preceding conversion to that which it has before 'dishonest misappropriation.' In fact, in each case it is equivalent to 'or by.'"

This observation was later approved by the Privy Council in the case of *Adiai Coal Co. Ltd.* v. *Pappalal Ghosh* (2).

(1) 8. Pat. 516 at 524-525. (2) A.I.R. (1930) (P.C.) 113 ; 57 Cal. 1341.

Now, what is conversion? "Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places," observed Alderson, B. in *Fouldes* v. *Willoughby* (1).

In *Lancashire and Yorkshire Rly. Co.* v. *MacNicoll* (2), Lawrence J., in delivering the leading judgment observed :

"A conversion may take place though there may be no intention to commit a wrong. It is converting to your own use the goods of another person without any real excuse."

Atkin J., who agreed, expressed it more elaborately. He said :

" It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, providing it is also established that there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right. But that intention is conclusively proved if the defendant has taken the goods as his own or used the goods as his own."

In *Surat Lall Mondal and others* v. *Umar Haji and others* (3) Norris J., puts it very tersely by saying, " Conversion is a wrongful interference with goods as by taking, using or destroying them inconsistent with the owner's right of possession."

Viewed in the light of these observations, it is clear that the 2nd defendant-respondent's action in making use of the boiler after Leong Won Kee's rice mill was no longer worked by the British Military Administration

(1) Messon and Welsby's Reports VIII, 540 at 548.
(2) (1918) 118 Law Times Reports, 596.
(3) 22 Cal. 877.

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U SAN MAUNG, J.

is conversion inasmuch as this defendant had used the boiler knowing fully well that it belonged to the plaintiffs and that he had no right whatsoever in making use of it in a manner inconsistent with the plaintiffs' ownership thereof. Article 48 of the Limitation Act is therefore applicable to the plaintiffs' claim for compensation for the wrongful detention of his boiler which the 2nd defendant-respondent had converted to his own use. The limitation is therefore three years from the date on which the plaintiffs first learned in whose possession their boiler was.

For these reasons we would set aside the judgment and decree appealed against and, as provided for in Order 41, Rule 23 of the Civil Procedure Code, remand the case to the trial Court which is directed to re-admit it under its original number in the register of civil suits and to proceed to determine the suit according to law. We would also direct that the following issues shall be tried:—

(*a*) When did the plaintiffs first come to learn in whose possession their boiler was?

(*b*) In view of the answer to issue (*a*), is the suit within the period of limitation prescribed by Article 48 of the Limitation Act?

(*c*) What is the amount of compensation, if any, are the plaintiffs entitled to for the wrongful detention of their boiler which the 2nd defendant had converted to his own use?

Costs must abide the final result of the suit on the merits; Advocate's fee in this Court five gold mohurs. In this connection it must be noted that it is apparent that the claim against the 1st and 3rd defendants will be withdrawn in the trial Court in view of the attitude taken by the plaintiff-appellants' Advocate in regard to

them and that it will then be within the discretion of the trial Court to grant them such costs as it may deem fit. Let a certificate for the refund of the Court fees paid by the appellants on the memorandum of appeal be issued to them under section 13 of the Court Fees Act.

U AUNG KHINE, J.—I agree.

APPELLATE CRIMINAL.

Before U On Pe and U Aung Khine, JJ.

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Aug. 11.

MAUNG NYI AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Confession—Conviction under s. 302 (1) (b), Penal Code read with s. 34—Retracted confession—Evidentiary value—Recording of confession by Magistrates—Necessity for removal from Police influence—Recording of confession of accused in the hearing of each other—Gaps in prosecution evidence—Duty of prosecution.

Appellants were convicted by the Sessions Judge, Hanthawaddy sitting as a Special Judge. The conviction rested upon confession by each of the appellants and circumstantial evidence of the conduct of the accused, who were said to be running away in a paddy field a mile away, half an hour after the occurrence and the seizure of a dagger from the Appellant Maung Tee when caught. The confessions were recorded by a Magistrate and the 2nd accused was in a position to hear the first confession. They were placed before the Magistrate from Police custody and taken back to Police custody.

Held: That though an accused person can be lawfully convicted on his own confession even when it has been retracted the Court must be satisfied of its truth and its voluntariness. The accused had no mind to make a confession and it was reasonably clear they did so to escape ill-treatment which they thought they were bound to be confronted with. It is not in dispute that the appellants were taken back after the confessions were made to Police custody and they were in the same room when confessions were made by each of the appellants. The confessions were therefore not voluntary and were recorded in an illegal manner and no weight should be given to it.

Bhagwan Din and others v. *Emperor*, A.I.R. (1934) Oudh 151, referred to

The incriminating pieces of evidence did not connect the appellants with the commission of the crime. There was no evidence that any one chased the culprits from the spot where the murder was committed to the scene where they were seen running away nor was there evidence to suggest that the dagger recovered was used in committing the murder. The gaps in the prosecution evidence had not been filled up and it is not for the defence to supply such gaps.

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*Criminal Appeals Nos. 320/321 of 1952
Criminal Reference No. 17 of 1952 being appeal from the order of the Sessions Judge, Hanthawaddy and Rangoon Town District, sitting as Special Judge, dated 3rd June 1952 passed in Criminal Regular Trial No. 3 of 1952.

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S. A. A. Pillai for the appellants.

Choon Foung for the respondent.

U ON PE, J.—These are appeals by the two appellants Maung Nyi and Maung Tee who were convicted, the former under section 302 (1) (*b*) read with section 34 of the Penal Code, and the latter under section 302 (1) (*b*) of the Penal Code by the Sessions Judge, Hanthawaddy, sitting as a Special Judge in his Criminal Regular Trial No. 3 of 1952 and sentenced to death.

The facts leading to the prosecution are as follows :

On 4th March 1952 at about 10 a.m. by the side of the Twante Canal, East of Kaladan village, an old Indian by the name of Usoof, was attacked by some two persons as a result of which he met his death. According to the medical evidence, Usoof received four stab wounds one of which penetrated into the chest cavity and one in the epigastrium through which the intestines were protruding and three lacerated wounds on the head and neck. On the day in question at about 10 a.m., Tha Htay (PW 1), a sampan plier, and Maung Thein Maung (PW 2), happened to be on the opposite bank of the canal at a place called Setseik. They both saw a man being attacked but could not make out who the assailants were, on account of the distance. The spot from which they saw the attack on the opposite bank was about seven hundred feet across the canal. Tha Htay (PW 1) saw the man being struck by two other persons. Maung Thein Maung (PW 2) whose attention was drawn by Tha Htay saw one man walk away after striking another with what looked like a stick. Thein Maung (PW 2), then reported what he saw to Kyaw Thein (PW 3), who is the Head of the village defence force on this side of the Twante Canal, opposite Kaladan. Kyaw Thein

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collected the villagers and crossed the canal to find out who the assailants were, but in the meantime Chin Khwe (PW 4) of Kaladan village heard some one raise an alarm in Kaladan itself and on looking out saw two men at a distance of nearly a mile away being chased by some other villagers. Chit Maung (PW 5), the Headman of Kaladan village was one of the villagers of Kaladan who joined in the chase and saw a mile away in the open field two persons running away towards the North. Chit Maung and his villagers in their chase came to Thonein Chaung, North East of Thonein village where villagers from Thonein village joined them. Thonein is over a mile from Kaladan village. According to U San U (PW 6), the Headman of Thonein village, he met Chin Khwe (PW 4) who pointed out the two men who were seen at a distance and who were walking away briskly after having come out of a hut to the north of Thonein. It was then about 11 a.m. He did not take part in the chase but ordered Saw Maung Hla (PW 7) to chase the two men. Saw Maung Hla gave chase to two men who were pointed out by U San U and who were walking away. Saw Maung Hla and his party fired two shots into the air by way of warning the two persons not to run, went up to them, and found them to be no other than the appellants Maung Nyi and Maung Tee from his own village. They also found a dagger (Exhibit 2) in its case from the appellant, Maung Tee. The two men were handed over to the Police at Kaladan village at U San U's house and taken to the Police Station at Twante. The following morning they were produced before the Subdivisional Magistrate, Twante, and both made confessions, one after the other, the same being duly recorded in Criminal Miscellaneous No. 4 of 1952, of Subdivisional Magistrate, Twante.

The prosecution case thus rests on confessions made by each of the appellants and circumstantial evidence based on the conduct of two men who were said to be running away in the paddy field a mile away and on the seizure of a dagger from the appellant Maung Tee when he was caught.

It is now for us to consider what evidentiary value is to be attached to the confessions made in the circumstances of this case. It is true that an accused person can be lawfully convicted on his own confession, even when it has been retracted, as has been done in this case, if the Court is satisfied of its truth and of its voluntariness. The circumstances in which the confessions were given by the appellants in this case disclose that their confessions could not be said to have been made voluntarily. To begin with, it is clear from the evidence in the case, that the appellants did not seem to have a mind to make the confessions, as can be seen from what took place on the Police Motor Boat which took them away to the Police Station. This is what U San U (PW 6) says: "The motor boat in which we went is a small boat and it would take about four to ten people. The two boys at first said they did not take part in the commission of the offence while in the motor boat. The boys spoke to me in Karen that if they were ill-treated what could they do? I told them that I could not advise them."

We have no reason to disbelieve this witness, when he said that the boys asked him as to what they should do if they were ill-treated by the police. It is reasonably clear to us that they were thinking of how to escape ill-treatment with which, they seemed to think they were to be confronted soon and that, that was their state of mind before they made their confessions the next day. The question as to whether they were subjected to ill-treatment does not, in the

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circumstances, appear to be material, for rightly or wrongly the appellants were in fear of ill-treatment. That fear seemed to have been aggravated by other circumstances in this case although those circumstances might not have been the result of deliberate design. We refer to the fact that the appellants were taken back, after the confessions were made, to the Police custody and also to the fact that the confessions were taken by the Magistrate while the appellants were in the same room. In the case of *Bhagwan Din and others* v. *Emperor* (1), it has been held as follows :

"It is most desirable that the accused should be sent to jail custody and removed from police influence before they are placed before Magistrates for the recording of their confessions. It is also very necessary in the interests, both of the accused and of the prosecution that the accused after their confessions have been recorded, should not be sent back to police custody and that at a time when the confessions are recorded they should be assured that they need be under no fear of going back in to the custody of the police. Magistrates ought to see that where confessions of several accused are recorded, one accused should not be able to hear the statement made by another."

In this case it is not in dispute that the appellants were taken back after the confessions were made to the police custody and that they were in the same room when confessions were made by each of the appellant—circumstances which clearly contravene the instruction laid down for the guidance of Magistrates. In this case the two confessors having been kept in the same room while confessions were being taken down by the Magistrate, the second confessor who was in a position to hear the confessions of the first confessor could easily have been influenced by what he heard, so that his confessions cannot be said to have any

(1) A.I.R. (1934) Oudh 151.

corroborative value. It could have been a mere repetition of the first confession. This seems to have happened in this case, for the two confessions correspond to each other in every detail. In the circumstances of the case we are not prepared to hold that these confessions had been made voluntarily nor are we impressed with the truth of the contents of the confessions having regard to the illegal manner in which they were recorded.

The next point for consideration is whether incriminating pieces of evidence against the appellants are such as would suffice to connect the two appellants with the commission of the crime. The first piece of evidence relates to the alleged conduct of the appellants who were said to be running away from the north of Kaladan village. We have carefully weighed the prosecution evidence on this point and we are constrained to take the view that the evidence does not create more than a suspicion against the appellants as being likely assailants. It is in evidence that about half an hour had already passed after the crime was committed, when the appellants were said to have been seen by the prosecution witnesses who came out to look for the culprits. It is therefore not impossible for the real culprits to have made good their escape during this half hour. There is also no evidence to show that anyone chased the culprits from the spot where the murder was committed, in other words, from one end to the other end, when the two appellants were stopped in the paddy field. What is clear from the evidence is that those who came out to look for the culprits saw a mile away in the open field two persons who were said to be running towards the north. The weak point in the chain of prosecution evidence is that there is no evidence to show where they were before they were thus seen. Their presence in the place

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where they were seen cannot be said to be an unusual thing, having regard to the fact that they belonged to Thonein village. According to U San U (PW 6), the Headman of Thonein village, the boys of the village used to go out to tend or graze cattle early and return home about 10 or 11 a.m. The presence of the appellants in the open field does not by itself, in our view, help to prove the prosecution case. The prosecution has made capital of the fact that they were running and were being chased. Even assuming that they were running on which, the prosecution evidence is not quite unanimous [*see* the evidence of Saw Maung Hla (PW 7) who says he saw the boys not running but walking briskly] it does not conclusively prove that they ran from the spot where the crime was committed. Moreover, the prosecution evidence does not make any suggestion that any one looked towards any other direction round about the scene of crime.

As regards the seizure of a dagger from the appellant Maung Tee, there is no evidence adduced by the prosecution to suggest that this dagger was used in committing the murder. It is not for the defence to supply the gaps in the prosecution case. It is for the prosecution to show that the dagger was used in inflicting the injuries on the deceased which it has failed to do. Taking all the circumstances in the case into consideration, we cannot hold that this is a case in which the prosecution has proved its case beyond reasonable doubt. In the result, this appeal is allowed and the convictions and sentences passed against the appellants must be set aside. The death sentences are accordingly set aside and the appellants will be acquitted so far as this case is concerned.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U San Maung, J.

NANA MEAH (APPLICANT)

v.

NIRENDRA KUMAR SEAL (*a*) DEVENDRA KUMAR SEAL (RESPONDENT).*

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June 26.

Revision under s. 25, City Civil Court Act—Death of Respondent—Whether Order 22, Rule 3 (4), Code of Civil Procedure applicable—Appeal and Revision.

Held: There is a great deal of analogy between revision applications and appeals but they are not identical. In an appeal the matter is one between the parties and the parties must see that all necessary materials are before the Court for decision. An order in revision is made by the Court of its own motion. It is an essential part of such jurisdiction that no one should be prejudiced by the Court passing orders without being heard. It is therefore necessary that parties who are dead should be properly represented in revision proceedings.

Pendyala Basavanjanagulu and others v. *Lingamullu Ramalingayya*, A.I.R. (1938) Mad. 115; *Nawab Syed Kazim Hussain* v. *Seth Pearey Lal*, A.I.R. (1939) Oudh 277; *Baksho and another* v. *Piaro and others*, A.I.R. (1920) Sind 120; *Mt. Tariff Begum and another* v. *S. R. Razuddin*, A.I.R. (1935) Oudh 219, referred to.

It is desirable that in applications under s. 25 of the City Civil Court Act, recourse should be had to the inherent powers of the Court to see that legal representatives of deceased-respondents are represented.

G. N. Banerji for the applicant.

Ba Shun for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 120 of 1951 of the City Civil Court, Rangoon, the plaintiff Nana Meah sued Nirendra Kumar Seal for his ejectment from a house known as No. 6/62, Bazaar Road, Dallah, on the ground that he was the owner of the house and that the defendant was in wrongful occupation thereof by residing therein without his leave or license.

* Civil Revision No. 67 of 1951 against decree of the City Civil Court, Rangoon in Civil Regular No. 120 of 1951, dated 26th September 1951.

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NANA MEAH v. NIRENDRA KUMAR SEAL (a) DEVENDRA KUMAR SEAL.

U SAN MAUNG, J.

The defendant in his written statement contended that his name was Dabindra Lal Seal and not Nirendra Kumar Seal and that the house which he was occupying, was known as House No. 20 of rice mill compound, Zaylan, Dallah, of which he and Monindra Lal Seal were joint tenants of one U Po Kha. The learned 4th Judge of the City Civil Court, who tried the suit dismissed it on the ground that the plaintiff had not established the fact of his ownership of the house in suit. The plaintiff therefore applied to this Court under section 25 of the City Civil Court Act for the revision of the judgment and decree of the City Civil Court. In the meantime, the defendant Nirendra Kumar Seal died and the plaintiff-applicant has applied that his wife Ma Aye be brought on the record as the legal representative of Nirendra Kumar Seal. Ma Aye objected to this on the ground that she was not a legally wedded wife of Nirendra Kumar Seal or rather, Dabindra Lal Seal and that she should therefore not be brought on the record as the legal representative of Dabindra Lal Seal. However, before going into the question whether anybody should be brought on the record as a legal representative of the respondent in an application for revision under section 25 of the City Civil Court Act, it is necessary to consider whether the provisions of Order 22, Rules 3 and 4 of the Civil Procedure Code are applicable to such applications. In the case of *Pendyala Basawanjanagulu and others* v. *Lingamullu Ramalingayya* (1), it was held by a single Judge of the Madras High Court that Order 22, Rules 3 and 4 are applicable to proceedings under section 115 and that an order passed by the High Court on a petition under section 115 in ignorance of the fact of death of the petitioner more than 90 days previously is one made without jurisdiction. The contrary view is taken by the

(1) A.I.R. (1938) Mad. 115.

Oudh High Court in *Nawab Syed Kazim Hussain* v. *Seth Pearey Lal* (1) where Radha Krishna J., held that the provisions of Order 22, Rules 1 to 11 are applicable only to suits and appeals and that there is no provision of law laying down procedure for substitution in place of a deceased party in a revision application for the obvious reason that the remedy provided by section 115 is absolutely discretionary. The same view was held by the Judicial Commissioners of Sind in [*Baksho and another* v. *Piaro and others* (2)] where they observed as follows :

"It does not appear to us there can be any question of abatement in a revision application. It is urged that there is no procedure laid down for revision applications and that therefore the procedure laid down in the case of appeal must necessarily apply. There is, no doubt, a great deal of analogy between revision applications and appeals, but they are not identical. In the case of an appeal the matter is one between parties and it is obviously for the parties to see that all necessary materials for the Court to decide are before the Court. In the case of a revision application the matter is different. An order in revision is made by the Court of its own motion to redress grievances which come to its notice. The order in revision is of its very nature an essential act of the Court. No doubt the Courts do not pass orders which should prejudice any party to the proceedings without hearing them, and therefore it will be necessary to issue notices to all the parties ; and this seems rather a reason why the Court, if it discovered that certain of the parties were dead and not properly represented, should see that they were properly represented."

The latest reported decision on the subject seems to be that of a Bench of the Oudh High Court in *Mt. Tariff Begum and another* v. *S. R. Raziuddin* (3) where was held that Order 22 did not apply to revisions but that it was necessary for the Court to have the legal

(1) A.I.R. (1939) Oudh 277. (2) A I.R. (1920) Sind 120.
(3) A I R. (1935) Oudh 219.

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U SAN MAUNG, J.

representatives of the deceased on the record before any effective orders could be passed in the revision application, and that the heirs of the deceased-applicant should be brought on the record as his legal representatives. The observations made by the learned Judges of the Oudh High Court and by the Judicial Commissioner of Sind seem equally apposite to applications under section 25 of the City Civil Court Act. It is desirable that the legal representatives of parties to the proceedings initiated by such an application be represented and, to this end in view, recourse could be had to the inherent powers of the Court under section 151 of the Civil Procedure Code.

Let the proceedings be therefore sent to the office to enable the Deputy Registrar to dispose of the application for bringing the legal representative of the deceased-respondent on the record, *vide* Rule 12 of the Appellate Side Rules of Procedure (Civil).

APPELLATE CRIMINAL.

Before U San Maung, J.

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June 14.

MAUNG BA YI (APPLICANT)

v.

MA SEIN MYINT (RESPONDENT).*

Indemnity and Validating Act, 1950, s. 3 (1), s. 3 (3)—Proclamation of Martial Law Ordinance of 1948 by President—Appointment of Magistrate by Supreme Military Commander—Whether he is a Magistrate under Criminal Procedure Code—Continuation of proceedings by same Magistrate after military administration withdrawn—Meaning of 'an order' in s. 3 (1) of Indemnity and Validating Act—Omission to examine Complainant on oath and issuing of process—Whether irregularity or illegality—Interference by High Court on Revision.

Held : That U Khin Maung Lay was appointed as a Magistrate, Mandalay by the Supreme Military Commander under s. 4 of the Proclamation of Martial Law Ordinance, 1948, the said area being proclaimed by the President as having come under Military Administration, and as a result the jurisdiction of all Courts established by the Civil Government ceased. Magistrates appointed under special powers under the Ordinance exercise special powers including summary trial and recording of evidence by way of memorandum only and also in respect of passing sentences. There is no appeal against their judgments, though they may be reviewed by superior military courts appointed from time to time. The Magistrates appointed by the Supreme Military Commander are not therefore Magistrates exercising jurisdiction under the Code of Criminal Procedure whose powers are defined in Chapters II and III of the Criminal Procedure Code.

The word " Magistrate " is not defined in s. 4 of the Code of Criminal Procedure. It must mean Magistrate appointed by the Government under the provisions of ss. 10, 11, 12 and 13 of the Criminal Procedure Code.

S. 5 of the Criminal Procedure Code enacts that all offences under the Penal Code must be dealt with according to the provisions contained in the Code. Cognizance must be taken by a Magistrate appointed under the Code. There is no provision in the Code by which a Magistrate can continue a case from the stage where it was left by another Magistrate acting under the provisions of the Proclamation of Martial Law Ordinance, 1948.

Ramchandra Modak v. *King-Emperor*, 5 Pat. 110 ; *The King* v. *Maung Po nd others*, (1946) R.L.R. 41, referred to and distinguished.

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* Criminal Revision No. 178 (B) of 1951 being review of the Proceeding now pending before 3rd Additional Magistrate, Mandalay in Criminal Regular Trial No. 128 of 1951.

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The contention that s. 3 (*1*) of the Indemnity and Validating Act, 1950 validated the order of the Magistrate issuing process under the Military Administration is fallacious. The word "order" in s. 3 (*1*) must be interpreted *ejusdem generis* with the words "judgments and sentences" in the same section and the orders referred to must be final orders affecting the rights of the accused person and not interlocutory orders relating to issue of process, etc.

However the taking of fresh cognizance of the same offence by the Magistrate was valid and when he issued notice to the accused he took cognizance as a Magistrate under the Criminal Procedure Code. The omission to examine the complainant on oath is a mere irregularity under s. 537, Criminal Procedure Code which did not prejudice the applicant in any way.

Emperor v. *Bateshar*, 37 All. 628 ; *Phagu Sahu and another* v. *Emperor*, A.I.R. (1916) Pat. 129 ; *Mahr Chiragh Din* v. *The Crown*, 4 Lah. 359 ; *Desibhai Khushalbhai Patel* v. *Emperor*, A.I.R. (1938) Bom. 50, referred to.

The High Court will not interfere in revision except in exceptional cases and the present case did not come within that category.

Khan Bahadur Hajee Gulam Sherazee v. *The King*, (1941) R.L.R. 599 ; *U Wa Gyi* v. *The Union of Burma*, (1948) B.L.R. 652 ; *S. M. Bashir* v. *The King*, (1946) R.L.R. 306.

Sein Tun (1) with *San Win* } for the applicant.

Ba Shun for the respondent.

U SAN MAUNG, J.—This is an application by Maung Ba Yi to quash the proceedings of the 3rd Additional Magistrate of Mandalay in his Criminal Regular Trial No. 128 of 1951 wherein action was being taken against him under section 420 of the Penal Code on the direct complaint of the respondent Ma Sein Myint. The facts of the case are briefly these. The applicant Maung Ba Yi was a trader residing in Rangoon who was selling, among other things, silk piece-goods in respect of which he has had several business transactions with the respondent Ma Sein Myint during the period prior to October 1949. On the 15th of October 1949 Maung Ba Yi took delivery of some silk piece-goods valued at Rs. 5,610 from the respondent

Ma Sein Myint, whose case, as alleged in her complaint, is that he had promised to remit the sum of Rs. 5,610 within seven days after his arrival at Rangoon, but that the circumstances were such that he knew fully well that it was practically impossible for him to pay for the goods which he had taken delivery of. No payment for the goods was in fact forthcoming so that Ma Sein Myint came down from Mandalay and was told by Maung Ba Yi that he could not make any payment in respect of the goods delivered to him and that if she were to sue him he would have to seek the protection under the Insolvency Act. Ma Sein Myint then filed a report at Obo Police Station for an alleged offence of criminal breach of trust in respect of the silk piece-goods delivered to Maung Ba Yi. Her case was that she had entrusted these goods for sale to Maung Ba Yi on his representation that he would remit to her the sale proceeds as soon as the goods were sold. Obo Police after making some equiry into the case referred Ma Sein Myint to Chanmyathazi Police Station for necessary action. In the meantime, the applicant Maung Ba Yi filed a complaint under section 500 of the Penal Code in the Court of the 3rd Additional Magistrate, Rangoon, alleging that he had been defamed by Ma Sein Myint. Ma Sein Myint also filed a direct complaint under section 420 of the Penal Code against the applicant at Mandalay and this was dealt with by U Khin Maung Lay who was then a First Class Magistrate under the Military Administration. On the 13th of September 1950 U Khin Maung Lay directed summons to be issued to the applicant for his appearance after he had examined the respondent Ma Sein Myint on oath and had read the report of the Mandalay Police, to whom he had referred the matter for investigation. However, up till the time the military administration was withdrawn from

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Mandalay the applicant Maung Ba Yi never appeared in person before U Khin Maung Lay, and the Advocate who represented him obtained several adjournments on the ground that the applicant was either under treatment at the Rangoon General Hospital or that he was still too ill to be able to travel to Mandalay. Later an attempt was made by the applicant through his Advocate at Mandalay to have the process issued against him withdrawn. When this attempt failed, the matter was taken up to the Court of U Po Yin, sitting as a Reviewing Judge of the Military Court, but no decision was obtained as the petition for review was subsequently dismissed for want of prosecution. In the meantime, military administration was withdrawn from Mandalay District, and U Khin Maung Lay again became a magistrate exercising second class powers which was the same as that which he was exercising before the military administration began. The case by Ma Sein Myint against the applicant Maung Ba Yi was not withdrawn from him because he was being recommended for first class magisterial powers. Subsequently on the 2nd of July 1951 U Khin Maung Lay noted in the diary that he had since been invested with first class powers and that the case pending before him should be transferred to his file and registered as Criminal Regular Trial No. 128 of 1951. One U Ba Thin appeared for the respondent Ma Sein Myint but there was no appearance on behalf of the applicant Maung Ba Yi. Accordingly a notice was ordered to be issued for his appearance before the Court on the 21st of July 1951. On the latter date, one U Sint filed power-of-attorney for the applicant and asked for an adjournment on the ground that he was applying for the transfer of the case from Mandalay to Rangoon. This transfer application, which was made in the High Court, was dismissed by U Aung Khine J., in Criminal

Miscellaneous Application No. 19 of 1951. Subsequently after several adjournments given for the appearance of the applicant at Mandalay, a warrant for his arrest was issued. As this was returned unexecuted a fresh warrant returnable on the 16th of February 1952 was issued. In the meantime the applicant Maung Ba Yi filed the present application for revision on the 17th of December 1951, and this Court ordered a temporary stay of the proceedings and also directed that the warrant for the arrest of the applicant be withdrawn.

Now, before I deal with the merits of the application for revision, it is necessary to deal with the preliminary objection raised by the learned Advocate for the respondent Ma Sein Myint that this Court has no jurisdiction to entertain the application as the matter involved has already been dealt with by the reviewing authority at Mandalay and that if any further action did lie it was only by an application to the persons who have been authorised by the Supreme Commander, Union Armed Forces, to review all judgments, sentences and orders passed by Superior Military Courts of criminal jurisdiction. In order to be able to solve this problem, it is necessary to interpret the provisions of sections 3 (*1*) and 3 (*3*) of the Indemnity and Validating Act, 1950 (Act XXIII of 1950), which in turn requires a consideration of the whole position created by the withdrawal of military administration in Mandalay District and the concurrent restoration of civil administration there. Military administration was introduced in Mandalay District by the exercise of the powers conferred upon the President of the Union of Burma by the Proclamation of Martial Law Ordinance, 1948 (၁၉၄၀ ခုနှစ်၊ စစ်ဥပဒေထုတ်ပြန်ကြေညာခွင့် ဆိုင်ရာ တရားဝင်ထုတ်ပြန်ချက်)။ On any area being proclaimed by the President as having come under the military

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administration, the jurisdiction of all Courts established by the Civil Government ceases, except to such an extent as they may be allowed to continue by the Supreme Commander of the Union Armed Forces. *See* section 4 of the aforesaid Ordinance. This jurisdiction is then exercisable by the Courts established by the Supreme Commander.

By the Military Administration Proclamation No. 4 of 1949, dated the 12th February 1949, the Supreme Commander established Courts of Magistrates in the areas under his control, *vide* section 1 of that Proclamation, which reads :

" 1. Whenever Martial Law has been proclaimed in any area, there shall be, in addition to the Superior and Inferior Military Courts of Criminal Jurisdiction established under Military Proclamation Nos. 2 and 3 of 1949, other Courts of Magistrates under the Military Administration presided over by officers exercising the powers of a District Magistrate, Additional District Magistrate, Subdivisional Magistrate and the Magistrates of the first and second classes.

2. Such Magistrates shall exercise all the powers and perform all the duties conferred and imposed under the Code of Criminal Procedure or under any other law for the time being in force.

etc. etc. etc. "

Special powers are given to such Magistrates and special rules of procedure prescribed for them. For example, all Courts of Magistrates under military administration may take cognizance of offences in any of the modes prescribed by sub-section (*1*) of section 190 of the Code of Criminal Procedure. They have power to try summarily all offences which they are competent to take cognizance of and they need record only a memorandum of the substance of the evidence of each witness. They may pass any sentence authorised by law notwithstanding the limitations contained in clause (2) of section 262 of the Code of

Criminal Procedure. There is no appeal against their judgments though the same may be reviewed by such Superior Military Courts of Criminal Jurisdiction as may be appointed from time to time.

From the above it is clear that the Magistrates appointed by the Supreme Commander in the areas under military administration are not those exercising the jurisdiction and powers of magistrates under the Code of Criminal Procedure, or in other words they are not Courts of Magistrates whose constitution and powers are defined in Chapters II and III of the Criminal Procedure Code. The question now arises is can U Khin Maung Lay as a Magistrate of the first class appointed by the Government under the provisions of section 12 of the Code of Criminal Procedure continue the proceedings of the case against the applicant Maung Ba Yi by the respondent Ma Sein Myint from the stage where it was left off by U Khin Maung Lay as a Magistrate under the military administration exercising the powers of a first class magistrate. The word "Magistrate" is not specifically defined in section 4 of the Criminal Procedure Code, the concluding portion of which reads as follows :

> "all words and expressions used herein and defined in the Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code."

The word "Magistrate", however, is not defined in the Penal Code also. Nevertheless, section 19 in which the word "Judge" has been defined contains illustrations showing that a magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment is a Judge. Therefore a Bench of the Patna High Court has held in the case of *Ramchandra Modak* v. *King-Emperor* (1)

(1) 5 Pat. 110.

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that a Magistrate is a "Judge" within the meaning of section 19, Penal Code, read with section 4 (2), Code of Criminal Procedure, only when he is exercising jurisdiction in a suit or in a proceeding. However, this definition is only helpful when the word "Judge" occurs in the Code of Criminal Procedure, as for instance in section 539. It gives us no help where the word "Magistrate" occurs in the Code of Criminal Procedure, and recourse must therefore be had to whatever meaning can be gleaned from the provisions contained in Chapters II and III of the Code of Criminal Procedure relating to the constitution and powers of the Courts of Magistrates. This brings us back to the same point, *viz.*, that the word "Magistrate" as used in the Code of Criminal Procedure must mean the Magistrate appointed by the Government under the provisions of sections 10, 11, 12 and 13 of the Code of Criminal Procedure.

Now, section 5 of the Code of Criminal Procedure enacts that all offences under the Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the provisions contained in the Code. Therefore the case against the applicant Maung Ba Yi under section 420, Penal Code, must be investigated, enquired into and tried, according to the provisions contained in that Code. Cognizance of the case must be taken by a Magistrate appointed under the Code of Criminal Procedure, and when the accused appears in obedience to the process issued by the Court trial of the case must be in the manner set out in Chapter XXI by the Magistrate appointed under the Code of Criminal Procedure if it is a warrant case, such as the one under section 420 of the Penal Code. There is, so far as I can see, no provision of law contained in the Criminal Procedure Code by which a Magistrate appointed under that Code can continue to

deal with a case from the stage where it is left off by a Magistrate exercising the jurisdiction and powers conferred upon him under the provisions of the Proclamation of Martial Law Ordinance, 1948.

In the case of *The King* v. *Maung Po and others* (1) it was no doubt held by a Bench of the late High Court of Judicature at Rangoon that a magistrate validly appointed as such under the British Military Administration of Burma was a " magistrate " within the meaning of section 26 of the Evidence Act so that confessions recorded by him can be proved in a trial before a municipal Court of British Burma. However, the decision in *The King* v. *Maung Po*'s case (1) proceeded on the basis that there was no definition of the word " magistrate " in the Evidence Act and that the definition given in the General Clauses Act which enacts that the word " magistrate " shall include every person exercising all or any power of a magistrate under the Code of Criminal Procedure is wide enough to include magistrates validly appointed under the British Military Administration. Therefore, it is distinguishable from the present case inasmuch as the magistrates under the Code of Criminal Procedure must for the reasons given by me in the discussion given above be presiding officers of the Courts of Magistrates whose constitution and powers have been defined in Chapters II and III of the Criminal Procedure Code. Besides, the very definition of the word " magistrate " given in the General Clauses Act recognises the fact that magistrates appointed under the Code of Criminal Procedure are a distinct body quite separate from any other kinds of Magistrates.

It has been argued that section 3 (*1*) of the Idemnity and Validating Act, 1950 has validated the order regarding the issue of processes upon Maung Ba Yi by

(1) (1946) R.L.R. 41.

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U Khin Maung Lay acting as a first class Magistrate under the Military Administration, and this order having been validated gives the jurisdiction to U Khin Maung Lay as a magistrate of the first class appointed under the provisions of the Code of Criminal Procedure to proceed with the case from the stage where he had left it off. The fallacy of this argument will be apparent if U Khin Maung Lay while acting under the military administration had examined witnesses for the prosecution and had framed a charge under section 420 of the Penal Code as against Maung Ba Yi. Then if the argument of the learned Advocate for the respondent be valid, U Khin Maung Lay could have proceeded with the case and would have been able to use the memorandum of the substance of the evidence recorded by him, notwithstanding the fact that the Code of Criminal Procedure itself has prescribed that a magistrate trying a warrant case must record the whole of the evidence of each witness as laid down in section 356, and not merely the memorandum of the substance of the evidence which is only permissible in summons cases (*vide* section 355, Code of Criminal Procedure). If, for the sake of argument, the Supreme Commander in his Military Administration Proclamation No. 4 of 1949 had prescribed that only cryptic notes need be kept of the evidence of witnesses in warrant cases, U Khin Maung Lay as a Magistrate of the first class appointed under the provisions of the Criminal Procedure Code could under the provisions of section 350 act upon such notes in finally disposing of the case against Maung Ba Yi. This state of affairs can never have been contemplated by the Legislature in enacting section 3 (*1*) of the Indemnity and Validating Act, 1950.

In my opinion, the word "order" contained in sub-section (*1*) of section 3 of the Indemnity and

Validating Act, 1950 must be interpreted *ejusdem generis* with the words "judgments and sentences" appearing therein in the sense that they must be final orders affecting the rights of the accused person in a criminal case and not such interlocutory orders as those relating to the issue of processes to the accused or directing that charges should be framed against him, etc. The necessity for enacting sub-section (3) of section 3 is apparent when it is realised that when military administration ceases no Court established by the civil Government has the power to deal with the orders, judgments and sentences passed by the military Court and that therefore the Courts or other authorities that had the power to review the orders, judgments and sentences of Inferior Military Courts should continue to have that power as if the Military Administration Proclamation is still in force in the area concerned.

U Khin Maung Lay as a Magistrate of the first class under the civil Government was undoubtedly wrong in not having recalled the respondent Ma Sein Myint for the purpose of examining her again on oath before he issued a notice (which was in fact a summons) for the appearance of the applicant before him. However, it cannot be said that he had not taken fresh cognizance of the offence against the applicant Maung Ba Yi as the taking of cognizance does not involve any formal action or action of any kind being merely a mental process which occurs as soon as a magistrate as such, applies his mind to the suspected commission of an offence ; see *S. M. Bashir* v. *The King* (1). Therefore when he issued the so-called notice to Maung Ba Yi for his appearance at Mandalay, he must be deemed to have taken cognizance of the offence as a first class magistrate appointed under the provisions of the

(1) (1946) R.L.R. 306.

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Criminal Procedure Code. The omission to examine the complainant again on oath is a mere irregularity which can be cured under section 537 of the Criminal Procedure Code as it had obviously not prejudiced the applicant Maung Ba Yi in any way. Cf. *Emperor* v. *Bateshar* (1), *Phagu Sahu and another* v. *Emperor* (2), *Mahr Chiragh Din* v. *The Crown* (3) and *Desaibhai Khushalbhai Patel* v. *Emperor* (4). It is idle to contend that if U Khin Maung Lay had to examine the respondent Ma Sein Myint again on oath he would have changed his mind and desisted from taking further action against the applicant Maung Ba Yi.

As regards the merits of the case I have read the complaint of Ma Sein Myint and her examination on oath before U Khin Maung Lay as well as her statements made to the Mandalay Police and the Rangoon Police. There is no doubt some discrepancy in that whereas in Rangoon she had tried to make out a case of criminal breach of trust, her case before U Khin Maung Lay was that she had been cheated by having to part with her goods on a representation which was knowingly false that Maung Ba Yi was in a position to pay her within seven days from the taking delivery of the goods. I would not like to discuss the case further lest it might prejudice the mind of the trial Magistrate in the trial of the case against the applicant. I would, however, say adopting the words of Mosely J., in *Khan Bahadur Hajee Gulam Sherazee* v. *The King* (5) that the High Court will only interfere in exceptional cases such as where a person is being harassed by an illegal prosecution ; where there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress, where the evidence on

(1) 37 All. 628.
(2) A.I.R. (1916) Pat. 129.
(3) 4 Lah. 359.
(4) A.I.R. (1938) Bom. 50.
(5) (1941) R.L.R. 599.

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record for the prosecution clearly does not justify a charge of any offence, or where the trial is on the face of it an abuse of the process of the Court. I am not prepared to say at this stage that the case against the applicant Maung Ba Yi falls within any of the categories enumerated therein. *See* also the case of *U Wa Gyi* v. *The Union of Burma* (1).

For these reasons although the preliminary objection by the learned Advocate for the respondent Ma Sein Myint has failed, the application of Maung Ba Yi must be dismissed on the merits.

(1) (1948) B.L.R 652.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

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June 20.

UNION OF BURMA / DAW TIN TIN } (APPLICANT)

v.

DAW TIN TIN / UNION OF BURMA } (RESPONDENT).*

Suppression of Brothels Act, s. 5. (1)— "Lives" in s. 7 (1)—Proof of an isolated act of receiving wages of vice—Whether sufficient.

Held: That the essence of an offence under s. 7 (*1*) of the Suppression of Brothels Act consists in the earnings of prostitution, forming the subsistence of the accused either wholly or in part. The word "lives" in s. 7 (*1*) imports continuity and regularity.

Sultan v. *The King*, (1947) R.L.R. 337, referred to and applied.

The Burma Act II of 1921 has now been replaced by Act XXIV of 1949 and the words "any male person" in the previous s. 7 has been changed into "any person" in the new section.

All that had been proved in the case was that Daw Tin Tin received earnings of a prostitute on a single occasion. It does not amount to proving that she is living on the earnings of prostitution.

Ba Tun for the applicant.

U THAUNG SEIN, J.—These two revision cases have arisen out of Criminal Regular Trial No. 320 of 1950 of the Court of the 5th Additional Magistrate, Rangoon, (U Kyi), in which an accused person named Daw Tin Tin has been convicted of an offence under section 5 (*1*) of the Suppression of Brothels Act and sentenced to pay a fine of Rs. 100 or in default 4 months' rigorous imprisonment. This sentence is of course illegal as according to the Suppression of Brothels Act, 1949, imprisonment is imperative for an offence

* Criminal Revision Nos. 84-B and 103-B of 1952 being review of the 5th Additional Magistrate, Rangoon, dated 17th March 1952 in Criminal Regular Trial No. 320 of 1950.

under section 5 (*1*). The illegality was detected by the learned District Magistrate of Rangoon who has submitted the proceedings to the High Court "for orders." The accused Daw Tin Tin on her part has also applied in revision against the conviction and sentence and prays that she be acquitted.

The facts leading up to the conviction of the accused are simple and as follows: On receipt of credible information that house No. 339, Sparks Street, Rangoon, occupied by the accused Daw Tin Tin, was being used as a brothel, U Ba Thet (PW 1) the then Police Station Officer of Kyauktada Police Station, called in a Sino-Burman named Ah Chi and sent him to the house in question with three marked ten-rupee notes for the purpose of contacting the prostitutes if any, at that place. Ah Chi proceeded to the house of the accused and there met a prostitute named Ah Myint (DW 1) and paid Rs. 18 for sexual intercourse with her. He states that he handed over two 10-rupee notes to the accused Daw Tin Tin who returned two rupee-notes as change. He goes on to state that while he was in the act of sexual intercourse, U Ba Thet and his witnesses arrived and the accused was placed in custody. She was then called upon to produce the marked notes which had been handed over to her by Ah Chi, but she refused to do so. U Ba Thet threatened to search her person and this had the desired effect when she threw down two 10-rupee notes hidden in the pockets of her bodice. These notes tallied with the numbers noted by U Ba Thet in his note-book.

That in short was the case for the prosecution. As pointed out by the learned counsel for the accused Daw Tin Tin, there are numerous discrepancies and unsatisfactory features in the statements of the prosecution witnesses. For instance, though U Ba Thet is

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U THAUNG SEIN, J.

positive that two witnesses were present when the notes were marked prior to being handed over to Ah Chi, neither of these witnesses, namely, Maung Maung (PW 3) and N. C. Nandy (PW 6), supported him in this respect. Maung Maung in particular states that he saw the notes for the first time at the house of the accused Daw Tin Tin. So also N. C. Nandy relates that he merely initialled a note-book produced by U Ba Thet in which certain numbers were recorded. In view of these discrepancies it might be unsafe to hold that the notes found on the accused Daw Tin Tin were in fact the ones marked by U Ba Thet.

There can be little doubt, however, that Ah Chi did in fact have sexual intercourse with a prostitute named Ah Myint (DW 1) at the house of the accused and it is quite possible that a sum of money was paid to the accused Daw Tin Tin in consideration for the enjoyment. The question is whether on this fact alone the accused can be convicted of living wholly or partly on the earnings of prostitution ? In this connection the following passage from the head-note of the ruling in *Sultan* v. *The King* (1) appears to be most apposite :

"The gravamen of the offence under section 7 (*1*) of the Suppression of Brothels Act, consists in the earnings of prostitution, forming the subsistence of the accused either wholly or in part.

The word 'lives' in section 7 (*1*) of the Act imports continuity and regularity. Proof of an isolated act of receiving the wages of vice without anything more cannot suffice to establish the offence."

No doubt this ruling was in respect of an offence under the Suppression of Brothels Act, 1921 (Burma Act II of 1921), which has since been replaced by the Suppression of Brothels Act, 1949 (Act No. XXIV of 1949). However, section 7 referred to in the above

(1) (1947) R.L.R. 337.

ruling has practically been reproduced as section 5 of the Suppression of Brothels Act, 1949, with slight amendments. For instance, in place of the words "any male person" occurring in the previous section 7 the words "any person" have been substituted.

Applying the above principles to the present case, all that has been proved against the accused Daw Tin Tin is that she received earnings of a prostitute on a single occasion. It can hardly be held, therefore, that she is "living" on the earnings of prostitution, as required by section 5 (*1*) of the Suppression of Brothels Act, 1949.

Under the circumstances the conviction and sentence passed on the accused Daw Tin Tin must be set aside. Accordingly, I direct that the conviction and sentence passed on the accused Daw Tin Tin under section 5 (*1*) of the Suppression of Brothels Act, 1949, be set aside and she be acquitted. All fines paid by her should be refunded.

APPELLATE CIVIL.

Before U Bo Gyi, J.

H.C. 1952

Aug. 5.

U LAW (APPLICANT)

v.

MAUNG BA PE (RESPONDENT).*

Pleader—Objection to appearance of pleader—Circumstances justifying.

U Law filed a power for defendant in the trial Court. An objection was raised by the plaintiff to such appearance on the ground that plaintiff had engaged him and gave him instructions. This was denied. The trial Court refused permission to the applicant to act in the case for defendant. On revision :

Held : That no information of a confidential nature regarding the dispute between the parties had been conveyed to the advocate which could be used against the party in the litigation. The objection to appearance was not therefore justified.

Saharanpur Grain Chamber Ltd. v. *Maharaj Singh*, I.L.R. (1940) All. Series 262.

Po Aye for the applicant.

U BO GYI, J.—This is an application by U Law, a Higher Grade Pleader of Pyawbwe in Pyinmana District, to have set aside the order of the Additional Subdivisional Judge, Yamèthin, dated the 18th December, 1951, refusing him permission to appear and act for the defendant in Civil Regular Suit No. 14 of 1951 of the Court of the Subdivisional Judge, Yamèthin on objection raised by the respondent U Ba Pe, the plaintiff in the suit. It appears that on the day in question when the case was called on for hearing U Law filed a power-of-attorney for the defendant whereupon U Ba Pe objected to U Law appearing in the case on the ground that he had engaged him and given him certain instructions.

* Civil Revision No. 18 of 1952 against the order of the Additional Subdivisional Judge of Yamèthin in Civil Regular No. 14 of 1951, dated 18th December 1951.

U Law denied this. He has reiterated his denial in his affidavit setting out the relevant circumstances. U Law's statements have not been contradicted.

It seems clear that although there was a talk about engaging U Law by the respondent, in fact there was no actual engagement and there is nothing to show that U Ba Pe has imparted confidential information to U Law. In these circumstances the observations in *Saharanpur Grain Chamber Ltd.* v. *Maharaj Singh* (1) are apposite. The head-note to the case reads :

"An advocate who has been consulted by one party to a litigation may not appear on behalf of the other party, if the first party has conveyed to him any information of a confidential nature regarding the dispute between the parties; he is perfectly free to accept a brief against the first party, if he has not received from him any information of a confidential nature which would be of use against that party in the litigation."

The order under review is accordingly set aside. The respondent shall pay the applicant's cost; Adovcate's fees three gold mohurs.

(1) I.L.R. (1940) All. Series 262.

APPELLATE CIVIL.

Before U Bo Gyi, J.

H.C. 1952

Aug. 7.

HAJEE AJIM CASSIM JEEWA (APPLICANT)

v.

MOMIN BIBI (RESPONDENT).*

Muslim Wakf Validating Act, s. 3—Denial of Wakf—Whether District Court competent to hold an enquiry as to existence of a valid Wakf.

An application was made in the Additional District Court of Amherst under s. 3 of the Muslim Wakf Act calling on Applicant to produce a statement of account into Court. The Applicant denied that there was any valid Wakf but the Additional District Court held that the petition was maintainable. On revision :

Held : The Muslim Wakf Act had not been artistically drafted in certain respects and there are divergent views as to whether the Courts can go into the question whether there is a valid Wakf or not.

Nasrullah Khan v. *Wajid Ali and another*, A.I.R. (1930) All. 8 ; *Taher Saifuddin* v. *Emperor*, I.L.R. 58 Bom. 302 ; *M. A. Abdul Hussain* v. *Mohamed Ebrahim Riza*, A.I.R. (1939) Nag. 205, *Mohammad Baqar* v *Mohammad Casim*, 7 Luck ; 601, referred to.

The balance of authority is in favour of the view that where a Wak is denied the Court cannot hold an enquiry into its existence.

San Hlaing for the applicant.

P. K. Basu for the respondent.

U BO GYI, J.—This is an application to set aside the order of the learned Additional District Judge, Amherst, holding that respondent's petition under section 3 of the Muslim Wakf Act is maintainable although the applicant has denied that there has been a valid Wakf. It appears that the respondent produced a copy of a Will concerning the property in question and that the genuiness of the Will was not disputed.

* Civil Revision No. 73 of 1951 against order of the Additional District Court of Amherst in Civil Miscellaneous No. 2 of 1951, dated 4th October 1951.

However, the petitioner strongly objected to the proceedings being taken under section 3 of the Muslim Wakf Act on the ground that there was no valid Wakf; and the learned Advocates are agreed before me that the question whether the application under section 3 of the Act is maintainable where the validity of the Wakf is denied should be gone into in the first instance.

Several authorities bearing on the Act have been canvassed before me. The Act has not been artistically drafted in certain respects, and consequently there are divergent views as to where the existence or validity of a Wakf is denied, the Courts can go into the question whether there is a Wakf at all. In *Nasrullah Khan* v. *Wajid Ali and another* (1), it was held that where an alleged mutwalli did not admit the applicability of the Muslim Wakf Act to the property in question the Court was incompetent under section 5 of the Act to hold an enquiry and compel him to file a statement of accounts. A Bench of the Bombay High Court in *Taher Saifuddin* v. *Emperor* (2) agreed with this view. Furthermore, in *M. A. Abdul Hussain* v. *Mohamed Ebrahim Riza* (3) occurs this passage :

"It is remarkable as pointed out by Srivastava J., in *Mohammad Baqar* v. *Mohammad Casim* (4) that the Act does not contain any provision requiring the Court to enter upon an inquiry as to the existence of the wakf, as is clearly laid down in section 5, Charitable and Religious Trusts Act, 14 of 1920. The absence of such a clear provision on an important issue which is bound to arise in cases relating to wakf properties negatives the assumption that the Legislature intended that the Court should deal with the controversy of such a fundamental nature. It is true that if it is held that the Court's jurisdiction is excluded when an alleged mutwalli denies his character as a mutwalli it would defeat the very object which the Legislature intended to attain by enacting this statute, but, on the other hand, it must be remembered that

(1) A.I.R. (1930) All. 8.
(2) I.L.R. 58 Bom. 302.
(3) A.I.R. (1939) Nag. 205.
(4) 7. Luck. 601.

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a person on whom a fine is inflicted under section 10 of the Act has no remedy to get back his fine in case he succeeds in getting a declaration in a regular suit that the disputed property is not wakf. In one case there may be no hardship as it is always open to an aggrieved party to seek recourse to his remedy in the ordinary course but in the other case there is positive hardship against which the Act has provided no redress. The Act does not provide for any appeal or revision against orders passed under the Act including that imposing a fine under section 10. It is inconceivable that the Legislature would give on the one hand wide judicial powers to the extent of adjudicating on issues relating to title and on the other hand denying the aggrieved party the remedy by way of appeal or revision."

These observations were made with respect to section 10 of the Muslim Wakf Act, no doubt; but in my opinion they apply *a fortiori* to the present application under section 3 of the Act, and with respect I agree with them.

Mr. Basu, learned Advocate for the respondent asks permission to amend the application to one under section 10 of the Muslim Wakf Act, and this application is strenuously opposed by the learned Advocate for the petitioner. The contents of the application clearly show that the application was under section 3 of the Act and in view of this fact and of the conflict of authority as to whether an inquiry can be held even under section 10 of the Act where a Wakf is denied, I must disallow the request. I confine myself here entirely to the consideration of section 3 of the Act.

The balance of authority is in favour of the view that where a wakf is denied in an application under section 3 of the Muslim Wakf Act the Court cannot hold an inquiry into the existence of the Wakf.

The order under review is accordingly set aside with costs; Advocate's fees three gold mohurs.

ORIGINAL CIVIL.

Before U Aung Tha Gyaw, J.

MA MYA SEIN (PLAINTIFF)

v.

LWEE KIM HAN (DEFENDANT).*

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Advocates—Objection to appearance of advocates—Principles applicable—Whether advocate being cited as witness a bar to appearance.

An objection was taken by the plaintiff to the appearance of S.T.L. as advocate for the opposite party. The affidavits disclosed that Mr. L had been assigned the role of mutual friend of the parties in the dispute, that he had thrown out a suggestion that there should be an amicable settlement, that the defendant later engaged the said advocate and that Mr. L would probably have to appear in Court in connection with the making of a particular Will and Codicil and gift, if the plaintiff thought it necessary to her interest. When the said Will was produced for Mr. L's inspection the plaintiff might have said many things which might have left an impression in her mind that she had been divulging secrets of great importance. Mr. L was never professionally consulted in respect of the very matter in dispute, nor was any formal consultation made in regard to the validity of the Burmese Will produced for inspection. The objection by the plaintiff was based on two grounds, *viz.* :—

(1) that the advocate had become possessed of information of confidential nature regarding matters in dispute between the parties and

(2) plaintiff feared that this might be used to her prejudice and that with reference to the validity of the Burmese Will which was denied by the plaintiff, the advocate's evidence was necessary.

Held : That the legal profession is a noble one and Advocates will do well to avoid any conduct which is reasonably capable of being misunderstood. If a pleader advises or acts for a client he should not appear against him in a subsequent proceeding, if he feels that he might even unconsciously use the information gained from his former client. It is the duty of the legal practitioners to avoid even suspicion that they may possibly use information received in their professional capacity against the client from whom they received it.

Pallonji Merwanji v. *Kallabhai Lallubhai and one*, I.L.R. 12 Bom. 85 ; *Maung Mya U* v. *Sun Singh*, (1897—1901) U.B.R. 368 ; *Damodar Venkatesh* v. *Bhavanishankar Mangesh*, I.L.R. 26 Bom. 423 ; Re. *Cutts*, (1867) 16 L.T. 715 ; *Mr. . . .* v. *Tin Byu U*, (1910—13) U.B.R. 50 ; *Rakusen* v. *Ellis, Munday and Clarke* (1912), 1 Ch. D., 831 ; *Mary Lilian Hira Devi* v. *Kunwar Digbijai Singh*, 21 C.W.N. (P.C.) 1137 ; A.I.R. (1925) Mad. 1201, referred to.

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The High Court of Rangoon had held in *Maung Sein Gyi* v. *J. Maneckjee*, 8 Ran. 44 and *U Ko Ko Gyi* v. *U San Mya*, 8 Ran. 446—that the Court will not allow an advocate to change sides if such conduct is likely to cause mischief or reasonable misapprehension in the mind of the late client. Even if the party refuses to retain him in a case in which he would be embarassed in the discharge of his duty by reason of such confidence reposed in him, he ought not to appear.

To prevent counsel from appearing he must have a definite retainer with a fee paid or must have received such confidential information which would make it improper for him to appear.

Edna May Olivia Hardless v. *Harold Richard Hardless*, A.I.R. (1932) All. 536 ; *T. C. Dhar and others* v. *T. L. Ghosh and others*, (1939) R.L.R. 514, referred to.

Objection on the ground that the advocate might be a witness in the case has received judicial attention in *D. Weston and others* v. *Peary Mohan Dass*, I.L.R. 40 Cal. 898 at 900 ; *S. B. Thakurain* v. *Mrs. F. A. Savi*, I.L.R. 12 Pat. 359 ; *Mohamed Ghazi* v. *U Tun Kywe and others*, (1939) R.L.R. 224 ; *Verrappa Chettiar* v. *P. G. Sundaresa Sastrigal*, A.I.R. (1925) Mad. 1201.

No positive rule was laid down in these cases that the mere prospect of being called a witness would disqualify a counsel from appearing for one of the parties, but the advocate's conduct must be guided by a proper appreciation of the principles of professional conduct approved and accepted in the various courts.

L. Si Park for the plaintiff.

Kyaw Din for the defendant.

U AUNG THA GYAW, J.—In this matter, an objection has been raised by the plaintiff in the case to the engagement and appearance of a Mr. Saw Taik Leong, senior partner in the legal firm of Leong and Thein, as an advocate for the opposite party.

Ma Mya Sein, the plaintiff, claiming to be the widow of the late Lwee Swee Hain, on 7th January 1952, applied for letters of administration to the latter's estate ; on the same date she applied for appointment of an administrator *pendente lite*. Her claim is opposed by Lwee Kim Han, son of the deceased by his Chinese wife. On 21st February 1952, Mr. Pillay appearing for the defendant took time till the 28th February for filing his written objections. On this date the legal

firm of Leong and Thein, in lieu of Mr. Pillay, appeared for the defendant and obtained a further adjournment till the 7th March 1952 for filing objections. These objections were filed on 13th March 1952. On the 15th March 1952, the plaintiff Ma Mya Sein swore the present affidavit in support of her objection to the appearance of Messrs. Leong and Thein as Advocates for the defendant Lwee Kim Han. The affidavit was not actually filed until the 27th June 1952 when her formal objection in that behalf was made in Court.

She states that Mr. S. T. Leong, the senior partner of this legal firm was the legal adviser of her late husband Lwee Swee Hain and herself for a long time and that he had appeared in several cases in Court on their behalf in connection with their properties, business and family affairs. After her husband's death she is alleged to have consulted Mr. Leong and obtained advice from him regarding her late husband's estate and its administration. She further states that a few days before Mr. Leong took up the case for the defendant Lwee Kim Han he sent for her and conveyed to her the impression that Lwee Kim Han had approached him with a view to engage his professional services but that he had refused on the ground that he was acquainted with the facts of the case; that he had advised Lwee Kim Han to settle the matter amicably and was thereupon authorized by the latter to negotiate a settlement. She refers to the allegations made in the counter-affidavit of Lwee Kim Han in support of her apprehension that the legal firm of Leong and Thein has made and will make use of part or all of the communications she had made to Mr. Leong who is further credited with a personal knowledge of all relevant facts relating to the estate of her late husband and his family. She also states that Mr. Leong will be a material and necessary witness in her case for the purpose of clarifying and

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meeting the various allegations set up by the defendant Lwee Kim Han in the objections filed by him.

Mr. Leong has countered these allegations with the denial that he had been the legal adviser to the late Lwee Swee Hain and/or the petitioner for a long time, that he had appeared in several cases in Court on their behalf in connection with their property, business and family affairs. From what he recollects he had never been consulted in his professional capacity regarding these matters. He denies that he had received any information of a confidential nature from the plaintiff or her husband at any time regarding the management or disposition of their properties. He had, however, conducted the defence on their behalf in a criminal prosecution before the 3rd Additional Magistrate, Rangoon, in which charges were brought against them under the Suppression of Brothels Act. He denies that the plaintiff had ever consulted him and that he had given her any legal advice regarding her late husband's estate or its administration, or that she had fully acquainted him with all the facts concerning the same. He admits, however, that she had shown him a Will in Burmese and was questioned as to whether it was in order ; and seeing that the document was attested by U Ba Sein, now Government Advocate, he had hazarded an opinion that it must be in order and had asked her to keep it in safe custody. He admits sending for the petitioner a few days before he was briefed by Lwee Kim Han, the defendant and telling her that he had been approached to appear against her in the case, that it would be in the interests of all concerned to settle the dispute amicably, and that he would not like to accept the brief against her if he could help. He denies receiving any confidential information regarding the case which he could possibly use to her detriment but admits that she went away saying that she would

be reasonable if the opposite party would be fair. He disputes the proposition that he would be a material witness in the case for he knew nothing beyond the existence of the Burmese Will which has been admitted by his client Lwee Kim Han.

The plaintiff Ma Mya Sein in her further affidavit reminded Mr. Leong about the fact that his firm had appeared and conducted for the plaintiff and her husband in Criminal Regular Trial No. 76 of 1947 in the Court of the 4th Additional Magistrate, Rangoon, in connection with theft of property in her husband's Hotel. Mr. Leong was also alleged to have, in 1941 on instructions received from the plaintiff and her late husband, drawn up a registered deed of gift in favour of her sons and had also acted for them in the matter of the mutation of names in respect of this same Kemmendine property which has now been alleged by the defendant, Lwee Kim Han, to belong to the deceased's estate in the counter-affidavit filed by him on 13th March 1952. She mentions the existence of receipts and documents in her possession to substantiate her averment that Mr. Leong in pre-war days had enjoyed the friendship and confidence of her late husband. She is disposed to blame Mr. Leong for the various defences and allegations set up by Lwee Kim Han in the counter-affidavit made by him in opposing the plaintiff's claim. She draws attention also to the objection taken by Lwee Kim Han to the validity of the Burmese Will which she states is inconsistent with the admission made by Mr. Leong and in view of this attitude taken by the defendant to the validity of the Will, the plaintiff would regard Mr. Leong as a material and necessary witness in the case. She repudiates Mr. Leong's suggestion that her objections have been made with a view to deprive him of his legal remuneration by drawing attention to the fact that her

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first affidavit was sworn on the 15th March 1952 shortly after the defendant filed his counter-affidavit on 13th March 1952.

Mr. Leong admits having held a watching brief for the plaintiff's late husband in Criminal Regular Trial No. 76 of 1947 in the Court of the 4th Additional Magistrate, Rangoon, but he has no recollection of having prepared any deed of gift in respect of the deceased's Kemmendine property in 1941 under instructions from the plaintiff; nor does he remember having moved the Corporation of Rangoon for mutation of names in respect of the said property. Although Ma Mya Sein had been to his office once or twice after he had been approached by the defendant Lwee Kim Han to accept his brief, he denies that any secret relating to the estate of her deceased husband was ever imparted to him. The suggestion for an amicable settlement was made by him as a friend of both the parties. Lwee Kim Han, the defendant knew the existence of the Burmese Will and the Chinese Codicil long before he was briefed in the case as there had previously been an effort to settle the dispute before the Chinese elders prior to the making of the defendant's application for letters of administration in Civil Miscellaneous No. 227 of 1950 of this Court.

From these allegations and counter-allegations set out in the affidavits filed by the plaintiff and the defendant's Counsel, it is sufficiently clear that Mr. Leong had somehow been assigned the role of a mutual friend of the parties in this dispute. It was in that belief that he had thrown out the suggestion that the plaintiff should make an effort to arrive at an amicable settlement with the defendant ; but by then, the defendant had taken advice from the legal firm of Leong and Thein and a suggestion has been made by the plaintiff that in the subsequent counter-affidavit filed by the

defendant in opposition to her petition for grant of letters of administration, not only their legal skill but also the knowledge which Mr. Leong had obtained as a friend of the various matters concerning the deceased's family affairs and his properties had been made use of.

Mr. Leong cannot remember whether he had helped the plaintiff in the making of the deed of gift respecting the Kemmendine property in favour of the plaintiff's children but Mr. Park for the plaintiff, having had inspection of the relevant documents, has given him the necessary assurance in this regard.

Now, the making of the Burmese Will and the Chinese Codicil and the gift above mentioned are matters the validity of which the defendant has questioned in his counter-affidavit; and Mr. Leong will probably have to appear in Court if his deposition is considered by the plaintiff to be vital to her interests. It might be that whatever fact or circumstance that had come to the knowledge of Mr. Leong had already been known to the defendant and that there is not any information of a confidential nature which Mr. Leong can usefully disclose in the case to the plaintiff's prejudice, but, in a matter like the present, the justification of the apprehension which the objecting party entertains must be judged in the light of her status in life reflecting the degree of her general intelligence, the nature of the dispute, previous relationship both private and professional between her and Mr. Leong and the latter's exhibition of friendly interest in the abortive settlement. Both at the time when the Burmese Will was produced for Mr. Leong's inspection and in the interviews which took place shortly before the defendant's brief was actually accepted, the plaintiff might have said many things which Mr. Leong might not consider as of having any important bearing on her dispute with the defendant. But these disclosures might have

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nevertheless, left an impression in her mind, erroneous it might be, that she had been divulging secrets of great importance to a lawyer and a friend of long standing.

It is clear that Mr. Leong was never professionally consulted by the plaintiff in respect of the very matter in which the parties are now engaged in their present dispute. The two criminal cases in which his assistance was obtained in the life time of the deceased had no relation whatsoever to the matters now in dispute, namely, the contending claims to the deceased's properties. Mr. Leong's opinion in regard to the nature of the Burmese Will shown to him by the plaintiff was hazarded by him in the capacity of a friend. It does not appear that any formal consultation was made in regard to its validity or otherwise. Mr. Leong himself is alleged to have prepared a deed of gift in 1941 whereby the deceased parted with his Kemmendine property in favour of some of his children. Of this matter Mr. Leong has no clear recollection. It is likely that if the deed of gift is sought to be impugned, he might have to come forward as a witness in the case and throw some light on the matter.

Having found these facts which led to the making of the present objection, it is now necessary to look into the law relating to the conduct of Advocates in circumstances similar to those now met with.

Two aspects of the matter have been presented in the plaintiff's objections. In the first place, she objects to Mr. Leong's appearance for the opposite party, as, in view of Mr. Leong's professional assistance given to her and her deceased husband on the two previous criminal litigations and in the matter of the transfer of the Kemmendine property to some of their children, he had become possessed of information of a confidential nature regarding those matters in dispute between the

parties and she fears that this knowledge has been and might be further used to her prejudice in the case. Secondly, in view of the denial of the validity of the Burmese Will set up by the plaintiff in support of her claim to the deceased's estate, she would be calling Mr. Leong as a witness on her behalf.

A Bench of the Bombay High Court in *Pallonji Merwanji* v. *Kallabhai Lallubhai and one* (1) had this to say with regard to the rights and obligations of pleaders practising in India :

"1. A party to a judicial proceeding is entitled to such professional assistance as he thinks will best suit him.

2. A pleader is free to place his services at the disposal of any such party upon such terms as he may think most advantageous to himself consistently with the honour of his profession and the due administration of justice.

3. A pleader who receives any confidential information from his client in the course of his professional employment is not at liberty to carry that information into the service of his antagonist, or any one who in that very litigation or in any subsequent litigation may be opposed to the client furnishing the information.

4 Pleaders receive certain fees, in return for which they are not at liberty to act against those retaining them, whether they are retained by one client singly or by two or more clients jointly. A pleader who has acted for several persons will not be restrained from afterwards acting for some of them only as against the others, unless it be shown that he is possessed of knowledge arising from his previous employment which might be prejudicial to his other clients.

As a general rule the Court will require a very strong case to be made out before it will interfere by way of injunction, restraining a pleader from appearing for a client, and there must be clear affidavits made to show that special knowledge was acquired by the pleader during his employment by the former client.

'It is misconduct from a professional point of view for an advocate, after being consulted in his capacity of advocate about a case and after learning particulars of the case as stated by one

(1) I.L.R. 12 Bom. 85

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side, to undertake the case in the interest of the opposite party. The fact that there was no definite engagement by the first party makes no difference.' [See *Maung Mya U* v. *Sun Singh* (1).]

'Those things which an attorney learns from his client or in consequence of his employment by his client, he is forbidden to disclose, and any betrayal of his confidence would be visited by the Courts as gross misconduct. But if he learns matters relating to his client under such circumstances, that if questioned about them in a Court of Justice he could not refuse to answer them, he is not within our jurisdiction.' [See *Damodar Venkatesh* v. *Bhavanishankar Mangesh* (2).]"

It was, however, pointed out that this rule laid down by Blackburn J., in Re. *Cutts* (3) should not be taken by pleaders as the standard by which to regulate their professional behaviour as it serves only to indicate the extreme low-water mark of professional conduct.

Following these cases the learned Judicial Commissioner of Upper Burma in *Mr. . . .* v. *Tin Byu U* (4) observed :

"On the point here in question the rule is, putting it shortly, that it is not open to a legal practitioner who has appeared for a party in a case to act for the opposite party in a later stage of the same proceedings or in subsequent litigation, unless he has been discharged without misconduct, or he has completed the business he was engaged to perform, and unless he has no secrets to carry with him that can be used to his former client's prejudice."

The matter received fresh attention in England in *Rakusen* v. *Ellis, Munday and Clarke* (5) where it was held that there was no general rule that a solicitor who had acted for some person either before or after the litigation began could in no case act for the opposite side ; the Court must be satisfied in each case that

(1) (1897—1901) U.B.R. 368.
(2) I.L.R. 26 Bom. 423.
(3) (1867) 16 L.T. 715.
(4) (1910—13) U.B.R. 50.
(5) (1912) 1 Ch. D. 831.

mischief would result from his so acting ; that there could be no danger of any breach of confidence if a solicitor acted for the opposite party.

The Privy Council in *Mary Lilian Hira Devi* v. *Kunwar Digbijai Singh* (1) observed " it is improper for a legal practitioner who has acted for one party in a dispute to act for the other party in subsequent litigation between them as such conduct is open to misconception, and is likely to raise suspicion in the mind of the original client and to embitter subsequent litigation as the matter is one which concerns the honour of the profession."

The legal profession is a very noble one and pleaders would do well to avoid any conduct on their part which is reasonably capable of being misunderstood. If a pleader advises or acts for a client he should not appear against him in any subsequent proceeding if he feels that he might in such proceeding even unconsciously use the information gained from his former client against him. Clients should have the fullest confidence in their legal advisers and should not be deterred or hampered in disclosing the strength and weakness of their cases by the fear that their instructions might at some future time be used against them by their legal advisers. It is the duty of the legal practitioners to avoid even the suspicion that they might possibly use the information which they receive in their professional capacity against the clients from whom they received them. There is no rule, etiquette or code of ethics to govern the conduct of the clients. On the other hand, the pleaders who are guided and governed by the etiquette of the profession are not expected to do anything which would incur the censure of the profession. [See *Veerappa Cheltiar* v. *P. G. Sundaresa Sastrigal* (2).]

(1) 21 C.W.N. (P.C.) 1137 ; A.I.R. (1925) Mad. 1201 (2) A.I.R. (1925) Mad. 1201

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The late High Court of Judicature at Rangoon in the cases of *Maung Sein Gyi* v. *J. Maneckjee* (1) and *U Ko Ko Gyi* v. *U San Mya* (2) had occasion to review the state of law on this particular point and held that a legal practitioner might change sides but if such conduct is likely to cause mischief or reasonable misapprehension in the mind of the late client, the Court will not allow the advocate to appear for the other party; and that a counsel ought not to accept a brief against a party even though that party refuses to retain him, in any case in which he would be embarrassed in the discharge of his duty by reason of the confidence reposed in him by that party.

" In order to prevent counsel appearing for the other party, he must have a definite retainer with a fee paid or he must have had such confidential information from one of the parties as would make it improper for him to appear for the other party." [See *Edna May Olivia Hardless* v. *Harold Richard Hardless* (3).]

The same matter again came up for decision before a Special Bench of the late High Court of Judicature at Rangoon in *T. C. Dhar and others* v. *T. L. Ghosh and others* (4) where it was held that it was improper for a legal practitioner who had acted for one party in a dispute to act for the other party in subsequent litigation between them relating to or arising out of that dispute. An advocate or pleader who had appeared ought not to allow himself to be placed in the position in which there might be some suspicion, whether well or ill founded, that his knowledge of his client's case would be used by him on a subsequent occasion in appearing for another party and against his original client.

Bearing these broad and wholesome principles in mind, it is now necessary to examine, the question as

(1) 8 Ran. 44.
(2) 8 Ran. 446.
(3) A.I.R. (1932) All. 536.
(4) (1939) R.L.R. 514.

to whether Mr. Leong, in the position in which he has placed himself in this particular case, should be restrained from acting for the opposite party in the case. It is clear that whatever confidences which the plaintiff had imparted to him were not specifically in respect of matters pertaining to the present dispute ; but according to the plaintiff—and this is admitted by Mr. Leong—she had paid two visits to his chambers shortly before his services were retained by the defendant in this case in connection with an effort made for an amicable settlement of the dispute. He is also alleged to have arranged a transfer of one of the properties belonging to the deceased to the plaintiff's children—a matter about which he has naturally retained no recollection after a lapse of some ten years.

Mr: Leong admittedly had shown his reluctance to appear for the opposite party in view of the friendly relationship that had existed between him and the plaintiff's family in the past. Plaintiff has alleged that Mr. Leong's embarrassment was the result of his possession of an intimate knowledge of the circumstances which led to the dispute between the parties and although she cannot specifically say that any confidential matters were ever discussed with him, the fact that he had at least used his services on behalf of both the parties to arrive at a settlement had undoubtedly placed him in a peculiar and privileged position likely to give rise to a conflict between his sense of duty to his client and his friendly sentiments for the plaintiff.

The circumstances present in this case have some affinity to those dealt with in *U San Mya*'s case (1). The plaintiff possibly had said many things to Mr. Leong which she believed was of importance to her case and although Mr. Leong's past association with

(1) 8 Ran. 446.

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the plaintiff in his professional capacity in connection with other litigations cannot be taken into account as suggesting any impropriety to his appearing for the opposite party in the present case, the interviews which he sought with the plaintiff and the attempt he made to settle the dispute to the satisfaction of his present client is likely to cause a reasonable apprehension in the mind of the plaintiff that he might make unconscious use of the intimate knowledge which he is alleged to have obtained in regard to the existence or disposition of the deceased's estate to the prejudice of the plaintiff.

Though there is nothing which really savours of gross impropriety in his professional conduct to strictly justify an order to restrain Mr. Leong and his firm from accepting his client's brief and acting for him, yet, in the special circumstances in which he has evidently placed himself in this case, he should bestow further reflection to the matter and decide for himself on the wisdom of his timely withdrawal from the conduct of the case.

The next ground on which objection has been taken to Mr. Leong's appearance for the opposite party in the case is the extreme likelihood of his being called as a witness on the plaintiff's behalf. This matter received judicial attention in *D. Weston and others* v. *Peary Mohan Dass* (1) where the learned Judges of the Calcutta High Court approving the resolutions of the Bar Council held that : (*a*) if counsel knows or has reason to believe that he will be an important witness in a case, he ought not to accept a retainer therein, (*b*) if he accepts a retainer not knowing or having reason to believe that he will be such a witness but at the opening or at any subsequent stage before evidence is concluded it becomes apparent that he is a witness on a material

(1) I.L.R. 40 Cal. 898 at 900.

question of fact, he ought not to continue to appear in the case unless he cannot retire without jeopardising the interests of his client, (*c*) if counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises is likely to be impugned in the case, he ought not to accept a retainer, (*d*) if he accepts a retainer not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned but finds in the course of the case that it is so impugned, he ought to adopt the same course of conduct as is mentioned in clause (*b*) *ante*, (*c*) in either of the cases mentioned in clauses (*b*) and (*d*), there is no rule of professional ethics which debars counsel if he continues to act as counsel in the case, from going into the witness box and being cross-examined.

It was pointed out that as a general practice it was undesirable when the matter to which counsel should depose is other than formal that they should testify either for or against the party whose case they were conducting and that it would be unprofessional for counsel to cross-examine a witness as to facts within his personal knowledge.

This view as to the undesirability of the counsel appearing in a case in which he has reason to believe that he will be called as an important witness was also taken in *S. B. Thakurain* v. *Mrs. F. A. Savi* (1).

Dunkley J., in *Mohamed Ghazi* v. *U Tun Kywe and others* (2) had occasion to refer to these cases with approval.

No positive rule was laid down in any of these cases that the prospect of being called as a witness in the case would disqualify a counsel from appearing for one of the parties in the case, and in this matter also Mr. Leong's conduct must be guided by his proper

(1) I.L.R. 12 Pat. 359. (2) (1939) R.L.R. 224.

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U AUNG THA GYAW, J.

appreciation of the principles of professional conduct approved and accepted by the Judges of the various High Courts in the cases above referred to.

I would therefore refrain from passing any definite order restraining him from appearing for the defendant in this case. There will be no order as to costs.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

ANWAR KHAN (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT). *

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July 29.

Rash or negligent driving—Collision between two lorries—Both drivers charged—Joinder whether proper—S. 256, Criminal Procedure Code as amended not followed.

A lorry driven by applicant and another driven by the 2nd accused collided. Both drivers were charged of negligent driving. One was acquitted and the case proceeded against the other. He was sentenced under s. 279, Penal Code with a fine of Rs. 50. An appeal to the Sessions Court was rejected as it did not lie. On revision to the High Court :

Held : A joint trial should not have been held when the prosecution case against two persons is mutually exclusive, or when the two throw the blame upon each other.

Po Lan v. *The King*, (1947) R.L.R. 379, referred to.

Further the mandatory provision of s. 256 of Criminal Procedure Code as amended had not been followed.

On the mere fact that there was a collision between two cars it must not be presumed that either driver was rash or negligent.

Maung Ant Bwa and one v. *The Union of Burma*, (1948) B.L.R. 863, referred to.

Ba Shun for the applicant.

Kyaw Thaung (Government Advocate) for the respondent.

U Bo GYI, J.—Applicant Anwar Khan has been convicted under section 279 of the Penal Code and sentenced to a fine of Rs. 50 or in default, one month's rigorous imprisonment by the 2nd Additional Magistrate, Hsipaw, who has been invested with first class magisterial powers. He went up to the Sessions Court, Hsipaw State on appeal, but under section 413 of the Code of Criminal Procedure, the appeal did not lie and his application was dismissed.

* Criminal Revision No. 56 (B) of 1952 being review of the order of the Additional Sessions Judge of Hsipaw, dated 13th January 1952 passed in Criminal Appeal No. 1 of 1951.

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The facts are that on the evening of the 30th January 1951, a three-ton lorry driven by the applicant and another three-ton lorry driven by Maung Hla Maung who was the second accused in the case and has been acquitted met under a railway bridge in Hsipaw State and as the road was not wide, the two lorries collided with each other. Fortunately, the lorries must have been driven slowly at the time of the collision; for they were not severely damaged and none of the passengers were hurt. The learned Magistrate went into the question of which of the two accused was responsible of the collision and finding that the applicant was responsible for it, convicted and sentenced him. The first ground taken up before me is that the trial was bad for mis-joinder and in support of this contention, the case of *Po Lan* v. *The King* (1) has been cited. The relevant head-note to the report runs :

"When the prosecution case against two persons is mutually exclusive, or when the two accused throw the blame upon each other, a joint trial cannot be had. The proceedings are bad for mis-joinder."

Another legal objection taken up is that the learned trial Judge has failed to comply with the mandatory provisions of section 256 of the Code of Criminal Procedure as amended, and the case of *Maung Ant Bwe and one* v. *The Union of Burma* (2) is cited in support of the contention. Here again, I must say that the legal objection is not without substance.

In view of the above, I have no option but to set aside the conviction and sentence. In considering the question whether a retrial should be ordered, I may note that from the mere fact that there is a collision between two motor-cars, it cannot be presumed that

(1) (1947) R.L.R. 379. (2) (1948) B.L.R. 863.

either driver was rash or negligent. On going through the judgment of the trial Court and the evidence on record, I am not prepared to hold that the applicant has been proved beyond reasonable doubt to be either rash or negligent at the time the collision occurred.

I accordingly set aside the conviction and sentence and do not order a re-trial. The fine will be refunded.

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ANWAR KHAN v. THE UNION OF BURMA.

U BO GYI, J.

APPELLATE CIVIL.

Before U Aung Khine, J.

H.C. 1952

Aug. 7.

KO BA TUN TIN (APPELLANT)

v.

DAW PWA (RESPONDENT).*

Urban Rent Control Act, ss. 11 (1) (e) and 14-A (3)—Owner requiring building for re erection purposes—Old building used for residential purposes—Whether new building must also be residential—"House" meaning of.

Daw Pwa as owner of house No. 60/72, Phongyi Street, applied for a permit under s. 14-A (3) read with s. 11 (*1*) (*e*) of the Urban Rent Control Act for filing a suit to eject her tenants on the ground that she wanted to put up a new building. The tenants admitted the building required extensive repairs and the Corporation after inspection 3 years back had admitted that the building required extensive repairs. The tenants objected that the new building must be residential building as otherwise the bond executed by the landlord would be entirely useless. The landlord obtained a decree for ejectment. On appeal by the tenants :

Held : That the desire of the landlord to put up a new building was in the circumstances justified. The contention that the new building must necessarily be a residential one had been negatived by a Bench of this Court.

Abdul Jabbar v. *Daw Thein Khin and another*, Civil 1st Appeal No. 27 of 1951 ; *Sin Tek and one* v. *Lakhany Bros.*, (1952) B.L.R. 186, referred to.

The word "house" in clause (*d*) of s. 11 (*1*) of the Urban Rent Control Act ought to be given its ordinary wide construction, including a place of business, in the absence of anything to indicate clearly that it was intended to be used in a more restrictive sense.

Richards v. *Swansea Improvement & Tramways Co.* (1878) 9 Ch. D. 425 at 431, referred to and applied

Htun Tin for the appellant.

Ba Hpu for the respondent.

U AUNG KHINE, J.—This appeal and Civil First Appeals Nos. 109, 110 and 111 of 1951 have been taken up together by consent as the points for decision

* Civil 1st Appeal No 108 of 1951 against decree of City Civil Court of Rangoon in Civil Regular No. 216 of 1951.

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U AUNG KHINE, J

involved in the four cases are identical. The judgment in this appeal will also be the judgments in Appeals Nos. 109, 110 and 111 of 1951. In the lower Court also the sutis, out of which these appeals have arisen, were heard together after the evidence was recorded in one case by consent.

The facts of the case are quite simple and they are briefly these. The respondent Daw Pwa is the owner of a wooden two-storeyed building known as Nos. 60/62, Phongyi Street, Rangoon. There is a cement flooring downstairs. The building has six rooms and Daw Pwa had let out four of these rooms to four tenants. The tenants are the appellant Ko Ba Tun Tin in this appeal, Ko Shauk Wah appellant in Appeal No. 109 of 1951, Maung Hla Kywe appellant in Appeal No. 110 of 1951 and Maung Shin, appellant in Appeal No. 111 of 1951. Daw Pwa herself occupies one room on the first floor and one room on the ground floor. The two other rooms on the first floor are occupied by Ko Shauk Wah and Maung Shin, and Ko Ba Tun Tin and Maung Hla Kywe occupy one room each on the ground floor. This building has become very old and it is not in dispute that it requires extensive repairs. Before the respondent Daw Pwa field her suits in the lower Court, the tenants themselves made an application before the Controller of Rents to direct the respondent to repair some portions of the house. It is also in evidence that the tenants also filed in their application before the Controller of Rents to fix standard rents for the rooms let out by the respondent. Some time afterwards Daw Pwa issued notices to her tenants to vacate their respective rooms on the ground that she wanted to put up a new building in place of the one which they now occupy. Her tenants however did not think it necessary to reply the notices sent to them. An application was filed by the respondent in the office of

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the Controller of Rents, Rangoon, requesting that necessary permission be given to her to file suits for ejectment against her tenants. The Controller of Rents however dismissed her application. A reference was made in the Rangoon City Civil Court, and the learned Chief Judge of that Court set aside the order of the Controller of Rents and at the same time directed him to grant a permit under section 14-A (*3*) read with section 11 (*1*) (*e*) of the Urban Rent Control Act, and this was accordingly done.

Armed with this permit the respondent filed her suits against her tenants, *viz.*, Ko Ba Tun Tin, Ko Shauk Wah, Maung Hla Kywe and Maung Shin. The tenants resisted the suit on the ground that the respondent Daw Pwa did not require the building *bonâ fide* for the purpose of re-erecting a new building. It is their case that although the building requires some extensive repairs the respondent could very well carry out the repairs where needed without bringing down the entire building. It was in the month of September 1949 that Daw Pwa first made an application to allow her to bring down the whole building and to erect a new one in its place on the ground that the present building was in a very damaged condition. Her statement must be accepted as true because when Maung Mya Thein, Building Inspector employed by the Rangoon Corporation, went and inspected the house he found that the cement flooring was in a damaged condition, the walling at the back of the house, the woodwork supporting the cement flooring of the kitchen and the wooden passage leading from the main building to the kitchen were in a decayed condition, the railing of the front verandah was missing and some of the tiles in the roofing were cracked. If that was the condition some three years back, the condition of the house at the present juncture must be worse. I therefore consider

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that the desire of the respondent to put up a new building instead of doing patch-work repairs here and there is understandable and justified. The plan of the proposed new building has been submitted to the Rangoon Corporation and it has received the approval of the Building Engineer subject to certain conditions. It is contended on behalf of the appellant that although the respondent has stated that she was willing to reinstate him and other tenants the nature of the building proposed to be put up is such that there would be no room for them to occupy after the building is completed. I have studied the plan and I see that on the ground floor of the proposed building a big space has been shown as godown. My attention has been drawn to the case of *Abdul Jabbar* v. *Daw Thein Khin and another* (1) wherein U Thaung Sein J., is inclined to the view (1) that the new building to be put up after the eviction of a tenant must be a residential building as opposed to buildings of other characters; (2) that the bond executed under section 11 (*1*) (*e*) of the Act would be entirely useless unless the building or buildings referred to in section 11 (*1*) (*d*) are residential ones.

Relying on the decision in the abovementioned case, it has been strenuously stressed that the building now proposed to be constructed would not fall within the category of the buildings contemplated in section 11 (*1*) (*d*) of the Urban Rent Control Act. However, the facts appearing in that case and those of the present case are not similar. There the owner wishing to extend her business wanted the tenants to be vacated from the buildings erected on a site belonging to her, although she had already three or four other godowns which she could make use of in the pursuit of her

(1) Civil 1st Appeal No. 27 of 1951.

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business. Here the owner who is occupying part of the building itself desires to demolish the same to put up a new one. In the Bench Case of *Sin Tek and one* v. *Lakhany Bros.* (1) it was contended also that the new building to be brought into being under section 11 (*1*) (*d*) of the Urban Rent Control Act must necessarily be a residential one. This was not accepted and it was held that the expression "house" in clause (*d*) ought to be given its ordinary wide construction, including a place of business, in the absence of anything to indicate, more or less clearly, that it was intended to be used in a more restrictive sense. The following observation of James L.J., in *Richards* v. *Swansea Improvement & Tramways Co.* (2) was quoted with approval:

> "Of course, the word 'house' does not mean, it seems to me, necessarily a mere dwelling house, or a house only used, or exclusively or principally used, for a residence; the word 'house' includes a shop or may consist of a shop."

It was further observed that there is nothing in clause (*d*) of section 11 (*1*) or in any part of the Urban Rent Control Act, 1948, which would definitely suggest that the building, which is to be constructed, must necessarily be a dwelling house, or a place of rest or abode and that if the Legislature had intended that the building or buildings that are to be constructed under clause (*d*) should be residential building or buildings only, it would have expressed its intention more precisely.

In view of the above Bench decision I must hold that the building intended to be put up by the respondent is covered by the provision of section 11 (*1*) (*d*) of the Urban Rent Control Act. She has given an

(1) (1952) B.L.R. 180. (2) (1878) 9 Ch. D. 425 at 431.

undertaking that if the tenants so desire she would be prepared to take them in again. As a matter of fact she has already executed a bond under section 11 (*l*) (*e*) of the Act in the lower Court. An undertaking has also been given in the lower Court that after the completion of the building if the tenants desire re-entry, partitions would be put up so that the position would be *status quo*. I have carefully studied the case from different angles and I am of the opinion that the appellant has not been able to show any good cause why he should not be legally evicted. The appeal is therefore dismissed with costs.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

H.C. 1952

Aug. 28.

B. K. HALDER (APPLICANT)

v.

S. KR. CHELLIAH PILLAY AND OTHERS (RESPONDENTS).*

Criminal Procedure Code, s. 435—Application for revision before Sessions Judge—Dismissed for default of appearance—Propriety or Correctness of Order.

Held : Even if the applicant or his advocate does not appear, it is the duty of the Sessions Judge to peruse the lower Court record and satisfy himself as to the correctness, legality or propriety of the order sought to be reviewed, and must dispose of the application on its merits.

Held further : When a Criminal Appeal or Criminal Revision petition is dismissed for default of appearance, there is no decision on the merits, and there is no proper disposal of it according to law ; the order of dismissal is not a judgment.

Kunhammad Haji, I.L.R 46, Mad. 382, referred to.

G. D. Williams for the applicant.

U BA THOUNG, J.—The applicant B. K. Halder filed three complaints against the respondents S. KR. Chelliah Pillay, S. KR. Muthuramalingam and S. KR. Manickam under section 420 of the Penal Code in the Court of the 5th Additional Magistrate, Rangoon, in Criminal Regular Trial Nos. 512, 513 and 514 of 1950. The learned Magistrate dismissed the complaints in Criminal Regular Nos. 512 and 514 of 1950 as being of a civil nature. The applicant then applied to the Sessions Judge, Hanthawaddy, for

* Criminal Revision No. 129-B of 1952 being Review of the order of the Sessions Judge, Hanthawaddy, in Criminal Revision No. 437 of 1951.

revision of the orders of the 5th Additional Magistrate in these two cases in which the complaints were dismissed.

The learned Sessions Judge interfered in revision in respect of Criminal Regular No. 514 of 1950 and sent the case back to the District Magistrate, Rangoon, for further enquiry, who in turn sent it to the 2nd Additional Magistrate, Rangoon, for further enquiry. In respect of Criminal Regular No. 512 of 1950, the learned Sessions Judge admitted the applicant's application for revision in his Criminal Revision No. 437 of 1951 and ordered notice to be issued on the three respondents. The 2nd and 3rd respondents were served with notice, but as the 1st respondent was away in India, notice on him could not be served. A fresh notice was issued and 26th May 1952 was fixed for the return of the notice. The learned Advocate for the applicant, however, thought that the date fixed for the return of notice was 27th May 1952 instead of 26th May 1952. On 26th May 1952 the case was called and the notice on the 1st respondent returned from India unclaimed, but as no appearance was made by the applicant or his Advocate, the learned Sessions Judge dismissed the application for default. On 27th May 1952 the applicant's Advocate appeared in Court and he was told that the return of notice was fixed for 26th May 1952 and that as no appearance was made his application was dismissed for default.

The applicant's Advocate then filed an application on the next day, that is, 28th May 1952 before the learned Sessions Judge, Hanthawaddy, stating that the dismissal for default of appearance in his Criminal Revision Application was not a legal dismissal of the application and that the application may be disposed of on its merits. The learned Sessions Judge,

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U BA THOUNG, J.

however, refused to interfere with his order of dismissal for default. Hence this application for revision.

The application filed by the applicant in the Sessions Court of Hanthawaddy in its Criminal Revision No. 437 of 1951 was for the learned Sessions Judge to call for and examine under section 435 of the Criminal Procedure Code, the record of Criminal Regular No. 512 of 1950 of the Court of the 5th Additional Magistrate, Rangoon, and satisfy himself as to the correctness, legality or propriety of the order of the 5th Additional Magistrate, Rangoon, dismissing under section 203 of the Criminal Procedure Code the applicant's complaint against the respondents, and to set aside that order and to direct a fresh enquiry into the complaint. For that purpose the learned Sessions Judge himself after perusal of the lower Court record could satisfy himself as to the correctness, legality or propriety of the order of the 5th Additional Magistrate and dispose of the application on its merits even if the applicant or his Advocate had not appeared on that day, instead of dismissing the application for default of appearance.

It has been laid down in the case of *Kunhammad Haji* (1) as follows :

" In a criminal matter the question is not between party and party. It is the duty of the Court to go into the matter and dispose of it on the merits. When a Criminal Appeal or Criminal Revision Petition is dismissed for default of appearance, there is no decision on the merits and therefore there is no proper disposal of it according to law, and the Court may re-hear it. The order of dismissal for default of appearance in such case is no judgment at all and the order is tantamount to an adjournment of the case till someone appears and moves the Court to hear him."

(1) I.L.R. 46 Mad. 382.

For the above reasons I do not consider that the order of the learned Sessions Judge, Hanthawaddy, of the 26th May 1952 in his Criminal Revision No. 437 of 1951 dismissing the application for default is correct or proper, and I hereby set it aside and direct that the application in revision be disposed of on its merits.

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APPELLATE CIVIL.

Before U Aung Khine, J.

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Aug. 11.

MA SIM TI AND OTHERS (APPELLANTS)

v.

SAW MAUNG PU AND OTHERS (RESPONDENTS).*

Suit by co-owner against a stranger in possession—Claim for half share—Whether liable to be defeated as for partial partition—Civil Procedure Code, Order 2, Rule 2, Illustration (1).

Held : The general principle is that a partition suit should embrace all the joint properties belonging to the parties to avoid multiplicity of suits.

In the present case, however, as the claim for a half share is not against a co-owner but against strangers in possession,

Held : The suit is not a partition suit in the proper sense of the word ; it is in essence a claim that, in spite of several transfers in respect of the suit land, the plaintiffs' half share remains intact and separable from the share of stranger-transferees in possession.

Ma Mya and others v. *Ma Mya*, U.B.R. (1897—1901) 229 ; *Rajendra Kumar Bose* v. *Brojendra Kumar Bose*, A.I.R. (1923) Cal. 501, distinguished.

D. N. Dutt for the appellants.

Tun I for the respondents.

U AUNG KHINE, J.—This Second Appeal arises out of Civil Appeal No. 7 of 1948 of the District Court of Thatôn in which the learned District Judge confirmed the judgment and decree of the Second Subordinate Judge, Kyaikto, in Civil Regular Suit No. 28 of 1947.

The plaintiff-appellants Ma Sim Ti, Ah Ti, and Kyan Ti are the children of Saw Maung Maung, deceased, son of Ma Khai Ma also deceased. Ma Khai Ma had another son Saw Maung Pu and these two sons survived her, but Saw Maung Maung died shortly after the death of his mother Ma Khai Ma. Some time

* Civil 2nd Appeal No. 62 of 1951 against decree of District Court of Thatôn, in Civil Appeal No. 7 of 1948.

in 1926 Saw Maung Pu mortgaged to one K.S.A.K. Chettyar firm some six items of property including the suit land belonging to the estate of Ma Khai Ma for Rs. 15,000 unknown to other heirs. He had in the meantime also obtained other unsecured loans amounting to Rs. 4,000 from the same firm. A decree was obtained by the said firm against Saw Maung Pu for the recovery of the amount on the unsecured loans. In execution of the decree the six items of property mortgaged were attached for sale. By then Saw Maung Maung had already died leaving his wife Wana and three minor children. Wana was successful in having the attachment removed to the extent of half share in the properties attached. Saw Maung Pu's share, however, was disposed of in the execution of the decree.

The suit land together with a house standing thereon was bought in a Court auction by the same K.S.A.K. Chettyar firm. In 1941 K.S.A.K. Chettyar firm assigned and transferred the same to R M.A.N. firm and in 1946 R.M.A.N. firm sold the house site only to the 3rd and 4th defendant-respondents Eusoof and Kassim. The house standing on the suit land was destroyed during the war.

The plaintiff-appellants as the children of Saw Maung Maung and Wana claimed a half share in the suit house site. They say that they were minors at the time when the suit house was sold in the Court auction and at the time there was nobody to look after their interest. The 1st defendant-respondent Saw Maung Pu admitted the claim of the plaintiff-respondents. The remaining defendant-respondents resisted the suit on several grounds and on the pleadings six issues were framed to be tried. Evidence was then led by the parties and after they had closed their cases and the case put down for argument, the trial Court on

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U AUNG KHINE, J.

its own motion raised an additional issue on the statement made by defendant-respondent Saw Maung Pu who was cited as a witness by the 3rd defendant-respondent. This is what the learned trial Judge said in his judgment :

"On 2nd February 1948 when the 1st defendant who is the plaintiffs' uncle was called and examined as a witness by the 3rd defendant, it was revealed that plaintiffs' grandmother Ma Khai Ma had not only left the suit land but also 4 or 5 items of other properties in the Bilin Township were left behind after her death. Hence the Court took cognizance of this fact and framed the following additional issue under Order 14, Rule 5 Civil Pocedure Code.

Additional Issue.

Whether the plaintiffs' suit is maintainable without bringing the other properties belonging to the estate of Ma Khai Ma, the deceased, into the division for partition ?"

The learned trial Judge was of the view that as the plaintiff-appellants have still interest in other 5 items of property belonging to the original estate of Ma Khai Ma for which they have not included their claim, they are barred from making a partial claim only, in this suit for partition.

The other issues were not discussed at all and the suit was dismissed on the answer given to this additional issue raised by the Court. On appeal by the plaintiff-appellants the District Judge, Thatôn, upheld the decision of the trial Court. The case of *Ma Mya and others* v. *Ma Mya* (1) has been canvassed in support of the case made out by the lower Courts. In that case in a short judgment it was held that a suit for partition cannot be brought unless the whole estate is brought into the division. That was the case in which the plaintiff Ma Mya as a widow of

(1) U.B.R. (1897—1901), 229.

deceased Maung Toe filed a suit on behalf of herself and her two minor children either for possession of a certain house in the possession of the defendant Ma Mya or for her share in the property. The defendant Ma Mya claimed that she was also a widow of deceased Maung Toe. It was discovered that the whole estate of Maung Toe had not been brought into the hotch-pot and therefore the Court held that as a partition suit it must be dismissed. There is no dispute about the correctness of this principle in a case where the parties claim a share in the estate of the deceased person as co-heirs. The lower appellate Court in its judgment also mentioned the case of *Rajendra Kumar Bose* v. *Brojendra Kumar Bose* (1) in support of the view held by the trial Court. In that case the plaintiff sought partition of an ancestral house at Srinagar, two houses at Dacca and a large number of moveables, and the defendant contended that all the joint properties should be included in the suit and divided by the decree therein. The decision in that case simply reaffirmed the principle that a partition suit should embrace all the joint properties belonging to the parties in order to avoid suits being filed in parts or in fragments.

Now, the facts in the present case differ a great deal from those as elicited from the two cases cited. The plaintiff-appellants here are merely trying to get possession of half the suit land as their share, not against Saw Maung Pu, but really against the persons in possession who are strangers to them. It is in the manner in which the suit was framed which has probably led the two lower Courts into thinking that this is a suit for partition. When properly studied it will be seen that the suit is not a partition suit in the proper sense of the word. The fact that Saw Maung Pu was

(1) A.I.R. (1923) Cal. 501.

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U AUNG KHINE, J.

added as a party to the suit does not alter its real nature. It must be remembered that Saw Maung Pu has no longer any interest in the remainder of Ma Khai Ma's estate. His share in the estate had already been disposed of. As a son of Ma Khai Ma his interest in her estate was exactly half and no more. The partition which the plaintiff-appellants seeks now is really to separate their share out of the suit land which is in possession of the 3rd and 4th defendant-respondents. In the process they included those whom they consider to be necessary parties and among whom was Saw Maung Pu. In order not to fall into an error it must be borne in mind that the essence of the plaintiff-appellants' case is that in spite of several transfers in respect of the suit land their half share in it remains intact. The Illustration (1) under Order 2, Rule 2 on page 529 of the Mullah's Code of Civil Procedure, 11th Edition, 1941, is very apposite to this case. It runs as follows:

"A, claiming as his father's heir, sues B for possession of a certain piece of land. He then sues C, also as his father's heir, for possession of another piece of land. The fact that both pieces of land are claimed by A under the same title does not preclude A from maintaining separate suits against B and C."

Following this principle, the plaintiff-appellants will not be debarred from maintaining separate suits against different persons in possession of different items of property belonging to them out of Ma Khai Ma's estate

For all these reasons I would accept the appeal and direct that the judgments and decrees of the two lower Courts be set aside. The original six issues framed in the suit have not been discussed and tried and therefore the suit must be remanded back to the trial Court with a direction that those issues be now tried. The suit will be re-admitted under its original number. Under

section 13 of the Court Fees Act, the appellants will be granted a certificate authorising them to receive back the full amount of fee paid on the memorandum of appeal both in this Court and in the lower appellate Court. They shall also be entitled to costs in this Court and in the lower appellate Court. Advocate's fee in this Court is fixed at three gold mohurs. The costs in the trial Court will abide the ultimate result of the suit.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

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Dec. 1.

MAUNG SHWE (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Murder—Penal Code, s. 302 (2)—Evidence Act—S. 114—Presumption—Possession of properties belonging to the deceased shortly after murder.

Held : There remains only the fact that shortly after the headman had been murdered articles belonging to him were found in appellant's possession. From this fact alone it cannot be presumed that appellant murdered the headman ; for "the highest presumption which can be drawn from possession of stolen property, by itself, is presence at the scene of theft."

Nga Thein Pe v. *The King*, A.I.R. (1939) Ran. 361, followed.

Fakirchand Nandram and another v. *The State*, A.I.R. (1950) (M.B.) 76 (F.B.), referred to.

Chit (Government Advocate) for the respondent.

U BO GYI, J.—Appellant Maung Shwe, aged 23, has been convicted by the learned Additional Sessions Judge of Pegu, sitting as a Special Judge, under section 302 (2) of the Penal Code and sentenced to transportation for life.

The events that took place shortly before the dead body of the Headman U San Dun of Thayetkon Village was found on the Rangoon-Mandalay Trunk Road a few furlongs from the place where a *Zatpwe* was being held near Payagyi Village in celebration of the last Independence Day are not seriously in dispute. Maung Tun Kyi (PW 1) and his companions who were on *kin* duty at Payagyi came upon the dead body of U San Dun about 3 a.m. on the 6th January last,

* Criminal Appeal No. 527 of 1952 being Appeal from the order of the Special Judge (Additional Sessions Judge) of Pegu in Criminal Regular Trial No. 7 of 1952.

and a report was made to the headman, who in his turn laid a First Information Report. At that time no one knew who was responsible for the murder of the headman. Police took up the investigation and on the 11th January U Khin Nyunt (PW 21), the investigating officer, who had received the case from U Thaung (PW 22) visited U San Dun's village Thayetkon where he examined U San Dun's wife, Daw Nyunt (PW 10), and received from her a coat and a tooth. According to Daw Nyunt, on the 5th January her husband left for Pegu to have a tooth extracted and did not return home that night. The next morning her cousin U San Pe came to inform her that her husband had been killed at Payagyi. He had also brought with him a coat belonging to her husband. The next day about 8 a.m. witness Maung Kalagyi (PW 16) came to her house and told her that the headman had been all the time with him and others during the previous night and that he had at last been killed. No mention was made as to the identity of the assailant or assailants. Maung Kalagyi then went to sleep and while he was rolling and turning in his sleep a tooth came out. Daw Nyunt noticed that it had been recently extracted and she saw blood on it. The tooth and the coat were later made over to the police.

The investigating officer, U Khin Nyunt, after examining Daw Nyunt and receiving the coat and tooth from her went over to Wingabaw where he looked for witnesses Maung Kalagyi and Maung Maung (PW 15), who are brothers, belonging to the village. Maung Kalagyi was away from the village and the officer examined Maung Maung. Thereafter a search was made at appellant's house at Payagyi but no incriminating articles were found. The same day the officer and witnesses went to U Kyi Myit's rice-mill at Payagyi where appellant was working. Appellant

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made a search in a heap of paddy husks in the mill compound and produced a fountain pen, a silver amulet, a wooden figure of a lion and a handkerchief. These articles have been satisfactorily identified as property belonging to the deceased headman U San Dun.

Now on the night in question appellant admittedly met the Headman U San Dun and witnesses Maung Maung and Maung Kalagyi at Ma Sein's Chow-Chow shop some distance away from the *pwe* at Payagyi and there they had drinks together. Ma Sein (PW 7), the owner of the shop, noticed that the 4 men left her shop together at about 11 p.m. The headman's dead body was found at about 3 a.m. the next morning on the Trunk road and the place where the body was found was about 2 furlongs north of Ma Sein's shop, and the place where the *pwe* was held would be about 6 furlongs north-west of the place where the dead body was found.

The most important witnesses in the case are the two brothers Maung Maung and Maung Kalagyi. Their story is that after they had left Ma Sein's shop together with appellant and deceased headman U San Dun they were walking along the Rangoon-Mandalay Trunk Road in the direction of the *pwe*, the headman walking in front; and after they had gone some distance appellant told them that he would go up to the headman and kill him. They tried to dissuade him but to no avail. The appellant who was armed with a hatchet strode up to the headman. The moon had set by that time and they heard the sound of a blow. Almost immediately afterwards the appellant returned to them and told them that he had killed the headman and threatened them with death should they divulge what they had witnessed. The two brothers then went back to the *pwe* and there they saw accused Po Toke, who has been discharged, at the *pwe-stalls*.

Sometime later the appellant who had remained behind near the headman's body joined them at the *pwe* and at day-break they were returning to their respective villages. However, on the way Kalagyi said that he would go and tell the headman's wife about the matter and went off towards her village. It is said that Maung Maung told his father, U Ba Kin (P W 3), about the identity of the headman's assailant and also that sometime later Maung Kalagyi when called and examined by Maung Aye Maung (P W 2), Commander of the Village Defence Force, told him that the headman had been killed by the appellant. No report was made by either of these two witnesses to the authorities and since they are intimately connected with Maung Maung and Maung Kalagyi, their evidence must be treated with caution. Similarly, the evidence of Maung San Tun (PW 6) that appellant and Po Toke came and looked at the headman while he was sleeping on a cart at the *pwe* should also be received with caution and does not amount to much.

Now, the medical evidence is that the headman had received a contusion on the left temple, 2 circular abrasions one of which was on the fore-head and the other on the chin, a black eye, an abrasion on the right knee-cap and 2 stab-wounds. The first stab wound was in the chest and the second in the abdomen, and while the former was necessarily fatal, the latter was sufficient in the ordinary course of nature to cause death. According to the Surgeon, these stab-wounds had been caused by a sharp-edged and pointed weapon. It seems clear that the medical evidence badly contradicts the story of the two brothers, Maung Maung and Maung Kalagyi ; and this apparently led the learned trial Judge to observe that probably the headman had not been attacked by the appellant alone. The conduct of Maung Maung and Kalagyi was highly

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suspicious and the suspicion is deepened by the fact that a freshly-drawn tooth was found on Maung Kalagyi. This witness had not left for Pegu with the headman and he has not explained why the freshly-drawn tooth, which apparently had been extracted from the headman was found on him. In these circumstances, I feel that the evidence of these two witnesses must be treated with great caution and the learned Government Advocate agrees with me.

The learned Government Advocate contends, however, that on the available evidence and on the authorities cited by him the conviction should be altered to one under section 392 of the Penal Code. I am inclined to agree with him. A fountain pen, an amulet, a wooden figure of a lion and a handkerchief belonging to the headman were found concealed in a heap of paddy husks near the place where the appellant was working, and he searched for and produced them. These articles were kept concealed. Appellant explained in his examination and also in the memorandum of appeal that these articles had been left with him for safe custody by Maung Maung and Kalagyi at the *pwe* after he had parted with them near Ma Sein's Chow-Chow shop. This story is supported by Ma Mya Khin (DW 3) and Maung Bo Gyi (DW 4). Ma Mya Khin is aunt of appellant's wife, and Maung Bo Gyi is a White-band PVO who has surrendered. Appellant himself is a surrendered White-band PVO. If their story be true, it is highly improbable that the appellant would have kept the articles concealed in the heap of paddy husks. It seems that people in the country side have a lively faith in charms and although the articles in question are of trifling value, the amulet and the figure of a lion which are apparently reckoned as talismans disappeared during the trial.

Now, since the evidence of Maung Maung and Maung Kalagyi is suspicious, there remain only the fact that shortly after the headman had been murdered articles belonging to him were found in appellant's possession. From this fact alone it cannot be presumed that appellant murdered the headman; for "the highest presumption which can be drawn from possession of stolen property, by itself, is presence at the scene of the theft."—vide *Nga Thein Pe* v. *The King* (1). This Bench decision of the late High Court of Judicature at Rangoon has been followed by a Full Bench of the High Court of Madhya Bharat in *Fakirchand Nandram and another* v. *The State* (2) and I find myself in respectful agreement with these decisions. Here in this case the circumstances seem to show that the appellant was not alone at the scene of crime; and there is no sufficient evidence that would justify the Court in presuming that the appellant had a common intention with others to murder the headman.

For all the above reasons I alter the conviction to one under section 392 of the Penal Code and reduce the sentence to 7 years' rigorous imprisonment.

(1) A.I.R. (1939) Ran. 361. (2) A.I.R. (1950) (M.B.) 76 (F.B.).

ORIGINAL CIVIL.

Before U Aung Tha Gyaw, J.

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Sept. 19.

MOHAMED KHAN (PLAINTIFF)

v.

DAMAYANTHI PAREKH AND TWO OTHERS (DEFENDANTS). *

Mohamedan Law—Conversion, what amounts to—Age of convert—Minor under no disability—Majority Act inapplicable to matters of religion—Jurisdiction of Court over non-resident foreigner—Cause of action arising wholly within territorial limits—Conflict between International and Municipal Laws—Local legislation the guiding factor—Effect of subsequent apostasy on marriage—Specific Relief Act, s. 42—Nature of relief entirely discretionary—Events subsequent to institution of suit must also be considered.

In defence to a suit filed by plaintiff for a declaration of a legal and subsisting marriage between him and their daughter, the 1st defendant, and for an injunction prohibiting them from preventing the return of his wife to his dominion, the 2nd and 3rd defendants, a Hindu couple, contended that as their daughter was under 18 years of age she could not become a convert and embrace the Islam faith ; that she is a foreigner and now living in India, and the Court had no jurisdiction ; and that in India she has been lawfully married to one of her own faith.

Held : What amounts to conversion to the Mohamedan faith is set out in paragraph 19 of Mulla's Principles of Mohamedan Law. It is sufficient if the person who embraces the new faith is shown to have professed the Mohamedan religion.

Abdool Razack v. *Aga Mahomed Jaffer Bindaneem*, 21 I.A. 56 at 64, referred to.

Held : S. 3 of the Majority Act fixes the age of a person domiciled in Burma at 18 years, but s. 2 provides that this age of majority cannot affect the capacity of a person to act in matters affecting religion. The Law has provided no age of majority for a change of religion. The fact of a girl being under 18 years of age would not invalidate a conversion to another faith.

Re. Muhammad Alam, (1939) A.I.R. Sind 311 ; *Saral Chandra Chakrabati* v. *Forman and another*, I.L.R. 12 All. 213, referred to.

Held : Where local legislation exists authorising a Court to exercise jurisdiction in respect of absent foreigners, a decree perfectly valid as far as the Court is concerned can be pronounced.

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* Civil Regular No. 63 of 1951 of the High Court.

Sirdar Gurdval Singh v. *The Rajah of Faridkote*, 21 I.A. 171, distinguished.

In a personal action a foreign Court has jurisdiction in an international sense in certain circumstances ; from this emerged the rule that cause of action is not a general ground of jurisdiction in International Law.

Chor Mal Bal Chand v. *Kasturi Chand Seraogi*, I.L.R. 63 Cal. 1033 ; *Vithalbhai Shivbhai Patel* v. *Lalbhai Bimbhai*, I.L.R. (1942) Bom. 688 ; *Rousillon* v. *Rousillon*, (1880) 14 Ch. D. 351 ; *Emanuel and others* v. *Symon*, (1908) 1 K.B. 302, referred to.

S. 20, Civil Procedure Code and s. 15 of the Union Judiciary Act invest this Court with jurisdiction to try a suit where the cause of action is alleged to have taken place within its territorial limits.

Gaekwar Baroda State Railway v. *Habin Ulla*, I.L.R. 56 All. 828 ; *Neelakanda Pillai* v. *K. A. Kunju Pillai*, A.I.R. (1935) Mad. 545 ; *Swaminathan Chettiar* v. *VE.N.K.RM.V.RM. Somasundaram Chettiar and others*, A.I.R. (1938) Mad. 741, referred to.

The question whether the Courts of a nation will or will not entertain jurisdiction of any dispute is to be determined by the nation itself, *i.e.*, by its Municipal Law. If by express legislation the Courts are directed to exercise jurisdiction, they must obey.

Companhia De Mocambique v. *British South Africa Company—De Sousa* v. *Same*, (1892) 2 Q.B.D. 358 at 394 ; *Chunilal Kasturchand Marwadi* v. *Dundappa Damappa Nagalgi*, 52 Bom. L.R. 660, referred to.

The question before the Court is not whether after a decree is passed a foreign Court will recognise it, but whether, having regard to s. 20 of the Civil Procedure Code and s. 15 of the Union Judiciary Act, it can assume jurisdiction in the case and try it against a non-resident foreigner when the cause of action has arisen wholly within its local limits. It will be the duty of the Courts to give effect to local statutory enactments and it is immaterial whether the judgment rendered would be recognised by foreign tribunals as consistent with International Law.

Girdhar Damodar v. *Kassigar Hiragar*, (1893) 17 Bom. 662 at 665 ; *Ex-parte Blaim, in re Sawers*, (1879) 12 Ch. D. 522 at 526, applied.

The grant of relief under s. 42, Specific Relief Act is entirely discretionary a Court has to take into consideration not only well established principles but also the varying factors in each particular case, and it must also take notice of the events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made.

Ram Tawakal Tewari v. *Mt. Dulari and others*, A.I.R. (1934) All. 469 ; *Noor Jehan Begum* v. *Eugene Tiscenko*, A.I.R. (1942) Cal. 325 ; *R. B. B. Saran Singh and one* v. *Ch. Mujtaba Husain and others*, I.L.R. 16 Luck. 742 ; *Hussain Unwar* v. *Fatima Bee*, (1872—1892) S.J.L.B. 368 ; *Ali Asghar* v. *Mi Kra Hla U* 8 L.B.R. 461, referred to.

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MOHAMED KHAN v. DAMAYANTHI PAREKH AND TWO OTHERS.

Dr. Ba Han for the plaintiff.

P. K. Basu for the 2nd and 3rd defendants.

U AUNG THA GYAW, J.—This is a suit brought by one Mohamed Khan, a Muslim youth of No. 284, Edward Street, Rangoon, against his alleged wife Damayanthi Parekh and her two parents, Bhanu Rai Parekh and Mrs. Samratt Laxmi Parekh, claiming firstly, a declaration that Damayanthi was lawfully married to him and that he was therefore entitled to the free exercise of his conjugal rights as against her and, secondly, a permanent injunction against her parents restraining them from keeping their daughter out of the plaintiff's lawful dominion over her person and from preventing her from returning to the plaintiff.

The plaint sets out that the 1st defendant Damayanthi married the plaintiff on 28th September 1950 as a convert to Islam in accordance with Mohamedan Law and had subsequently cohabited with him as man and wife in Rangoon; that two days later, she was removed from the plaintiff's lawful keeping and dominion by the 2nd and 3rd defendants and that they have since prevented her from coming back to the plaintiff. On the facts so pleaded the plaintiff states that he is entitled to the reliefs sought for in the plaint.

The 1st defendant is alleged to have since removed her permanent residence to India and consequently the hearing of this suit has taken place in her absence after due service of summons on her by way of substituted service.

The 2nd and 3rd defendants have contested the plaintiff's claim denying that their daughter, the 1st defendant, became a convert to Islam and that there was any lawful marriage between the plaintiff and the

1st defendant. They claim that the 1st defendant was a minor and that this suit has not been validly instituted as against her. They further contend that the 1st defendant has since before the institution of this suit been permanently residing in India and that this Court has therefore no jurisdiction to entertain this suit against her or to grant a decree for a permanent injunction against them as asked for by the plaintiff in respect of a person who is not in Burma. They also state that the 1st defendant has been lawfully given in marriage as a Hindu to one Omerchand of Gondal, Kathiawar, India, and has since been living there with her husband. The 2nd and 3rd defendants further claim that in taking the 1st defendant to India and getting her married to a Hindu they had exercised their lawful rights as parents under the Hindu Law and had acted in the best interests of the 1st defendant, their only daughter. They deny that the plaintiff is entitled to the reliefs claimed by him.

In his reply the plaintiff states that the 1st defendant was 18 years of age at the time of her marriage to him on 28th September 1950 and that she became a convert to Islam before her marriage and that defendants No. 2 and 3 had thus no right to give her away in marriage to a Hindu under the Hindu Law. It is claimed that the 1st defendant was a major at the time this suit was filed. He denied that defendant No. 1 is a permanent resident of India and that the allegation that they had taken defendant No. 1 to India and that she has been living there is described as false.

On these pleadings the following issues were fixed by consent :—

1. Was the 1st defendant a minor on 28th September 1950, as alleged by defendants No. 2 and 3 ?

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2. Was the 1st defendant lawfully married to the plaintiff under Mohamedan Law?
3. Is the 1st defendant permanently residing in India?
4. If so, has this Court no jurisdiction to entertain this suit or grant any decree against her or grant an injunction against defendants No. 2 and 3 as prayed for in the plaint?
5. What relief, if any, is the plaintiff entitled to?

Issue No. 1.

Section 3 of the Majority Act fixes the age of a person domiciled in Burma at 18 years but section 2 thereof provides that this age of majority fixed by the Act cannot affect the capacity of a person to act in matters of marriage, dower, divorce and adoption. However, a plea has been taken that by reason of the non-representation of the 1st defendant through a formally appointed Guardian for the purposes of this suit no claim whatsoever can be adjudicated against her.

The 2nd and 3rd defendants have sought to show that their daughter, the 1st defendant was born on 6th February 1935 and that on the date this suit was filed in Court, *i.e.*, 27th August 1952, she was still a minor and that it was necessary that she should be represented by a properly appointed Guardian-*ad litem*.

In support of their contention as regards the 1st defendant's age, the horoscope—Exhibit 12, has been put in evidence. This document was said to have been produced some five days after a report was made by the 2nd defendant to the police alleging that his daughter, the 1st defendant was a minor and that she had been kidnapped by the plaintiff and two others. The horoscope was said to have been prepared by an Indian *pandit* named Lal Ji in the 1st defendant's

place of birth, Gondal in India, under instructions given by the 3rd defendant and the 2nd defendant's brother, Raksilal, not called. Besides the 1st defendant, there were five other children, all males, and when questioned about the horoscopes prepared after the birth of these five other children, the 2nd defendant gave the explanation that these documents were destroyed during the period of Japanese occupation. It has not been properly explained as to how this one document, Exhibit 12, has been saved from destruction.

The alleged horoscope is prepared on a piece of ordinary paper suggesting very little of the importance of preserving it for any length of years, and regard being had to the urgent necessity of influencing the course of police investigation in respect of the report made against the plaintiff regarding the charge of kidnapping and the ease with which such a document can be prepared, it is rather difficult to attach any serious weight to the contents of the same.

The passport, Exhibit 1, taken out on the 5th October 1950, has been next referred to as supporting the defendant's contention regarding their daughter's age. This, however, was a document prepared after the criminal complaint was filed in Court against the plaintiff and accordingly lacks the usual evidentiary value attached to such admissions made by persons whose age is in question.

The next document on which reliance is placed is Exhibit 8, the International Certificate of Inoculation and Vaccination wherein Damayanthi's age has been given as 15 on 8th July 1950. This document is said to have been signed by the person who was vaccinated and it has been rightly contended on the plaintiff's behalf that the alleged signature of the 1st defendant appearing on this document has not been identified.

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The next document relied upon is the doctor's certificate, Exhibit 14, which states that the probable age of the 1st defendant at the time of her examination in October 1950 was between 15 and 16 years. This examination as regards her age was made in connection with the criminal complaint laid by the 2nd defendant against the plaintiff and his mother. The reasons for which this opinion regarding the girl's age was formed do not appear on the certificate nor was the medical witness questioned on the point.

As against this evidence the plaintiff has produced a number of recorded admissions alleged to have been made by the 1st defendant in regard to her age. The first of these appears in Exhibit A, an application made by the 1st defendant in the Registration office under the Foreigner's Registration Rules. In this document she signed her name in English and gave the year of her birth as 1933 and the month of her first arrival in Burma as June 1933. This application was accompanied by a duplicate registration report in Form A, giving the year of her birth as 1933.

In the General Diary, Exhibit C (1) recorded by the police officer on 27th September 1950, the 1st defendant is alleged to have admitted her age to be 18 years. Exhibit H is an affidavit sworn by Damayanthi before the 4th Additional Magistrate which she signed in English on the 28th September 1950. Here also she admitted that her age was 18 years. In Exhibit K, a declaration of her religious faith she is alleged to have repeated that her age was 18 years. Neither her handwriting nor her signature in this document has, however, been identified. She is also alleged to have made a similar admission to the Moulvi who made the entries in the Marriage Register in Exhibit L. Apart from the evidence of the 2nd and 3rd defendants there is no other

testimony to corroborate the story that the 1st defendant was born at Gondal in the year 1935, and not in 1933.

The result of the examination of the evidence adduced before the Court regarding the 1st defendant's age would point to the fact that, while her age at the date of her elopement with the plaintiff on the 27th September 1950 was possibly below 18 years—a fact which hardly matters at all in the consideration of the merits of the plaintiff's claim, at the date of suit she had probably attained her majority. Consequently, it cannot be held that the suit has not been validly instituted against the 1st defendant. The 1st Issue is accordingly answered in the above sense.

Issue No. 2.

The next question for determination is the alleged marriage of the 1st defendant to the plaintiff under the Mohamedan Law on 28th September 1950. It is the plaintiff's case that the 1st defendant Damayanthi was converted to Mohamedanism on the aforesaid date and that she was lawfully married to the plaintiff in accordance with Mohamedan Law. Although the 1st defendant was possibly under 18 years of age on the date of her alleged conversion, it cannot be said that by reason of her minority, her act of apostasy was of no legal effect. Conversion was the only means by which the 1st defendant could lawfully contract a marriage with the plaintiff and her capacity to so conduct herself cannot be questioned under section 2 of the Majority Act since religion is also one of the matters excepted from its provisions.

This matter of conversion of a minor received judicial attention in *Re. Muhammad Alam* (1) where the learned Judicial Commissioner of Sind was of opinion that the fact of a girl being under 18 years of

(1) (1939) A.I.R. Sind. 311.

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age would not invalidate the conversion which preceded her marriage to a Mohamedan. A minor, according to him, provided he or she is old enough to understand the nature of his or her acts though under 18 years of age, is able, inspite of the father's power of general control over his or her education, religious and otherwise, to change his or her religion. Religion is a matter of conscience, a matter personal to a minor of age to understand.

A similar change of religious faith was the subject of comment in *Sarat Chandra Chakrabati* v. *Forman and another* (1). At page 227 of the Report Mahmood J., remarked that for a change of religion the law has provided no age of majority and the Majority Act is specifically referred to as not being applicable to matters relating to religion. This question arose incidentally in a case arising under the Guardians and Wards Act but the views expressed in both the cases cited above would seem to indicate that however desirable it might be that the minor should be guided by his guardian in the matter of his religious belief, the question essentially rests upon the intelligent choice of the minor concerned. Such an exercise of intelligent choice should not, of course, be made under duress or from some compelling outside influence working on the will and conscience of the minor. Apart from the infatuation for her lover, the plaintiff, which the alleged minor in this case suffered from at the time she eloped with him, there is no evidence of any such evil influence having been practised on the minor's mind at the time she underwent the experience of her alleged conversion to Mohamedanism in this case.

What amounts to conversion to the Mohamedan faith is set out in paragraph 19 of Mulla's Principles of

(1) I.L.R. 12. All. 213.

Mohamedan Law, 13th Edition, at page 19. Courts cannot test or gauge the sincerity of religious belief and it is said to be sufficient that the person who embraces the new faith is shown to have professed "the Mohamedan religion in the sense that he accepts the unity of God and the prophetic character of Mahomed."

"In all cases where, according to Mohamedan law, unbelief or difference of creed is a bar to marriage with a true believer, it is enough if the alien in religion embraces the Mohamedan faith. Profession with or without conversion is necessary and sufficient to remove the disability." [See *Abdool Razack* v. *Aga Mahomed Jaffer Bindaneem* (1).]

To get at the meaning of the word "profession" used in this connection, Murray's New English Dictionary has been appealed to on the plaintiff's behalf. At page 1427 thereof, the word "profession" is shown as meaning "the declaration, promise or vow made by one entering the religious order, hence the action of entering such an order."

In the light of this meaning attached to the word "profession" evidence has been given in the case on the plaintiff's behalf to show that on the evening of the 28th September 1950, the 1st defendant Damayanthi in the presence of witnesses Raschid and Rahman made her declaration that she believed in God and his Prophet Mohamed. *Kalima* was recited for her to repeat and this she did both willingly and with a full comprehension of the meaning of the words uttered by her.

Before she was asked to repeat the *Kalima* a written declaration of her faith is also said to have been made by the 1st defendant in Exhibit K. The

(1) 21 I.A. 56 at 64.

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document is in the Gujerati language and neither the writing nor the signature has been proved to be that of the 1st defendant. After the *Kalima* was recited and the conversion to the new faith was completed Raschid and Rahman went and fetched the Moulvi—Abdul Salem (PW 4) from the Chulia Mosque in Rowett Street, Pazundaung and when the latter arrived, a Mohamedan marriage is said to have been performed at No. 47, in 54th Street, where the plaintiff and the 1st defendant were stopping after the elopement. The 1st defendant was asked by the witnesses Rahman and Raschid as to whether she consented to the marriage and on receiving her assent, the Moulvi wrote down the entries in the Marriage Register, Exhibit L, the particulars necessary for his purpose and while the plaintiff's signature was actually taken on the document, the 1st defendant, re-named Miriam Bibi, did not do so but at her request Raschid, her *Vakil*, signed the document on her behalf. This Raschid is alleged to have acted throughout the marriage ceremony as the 1st defendant's *Vakil*. A copy of the marriage certificate, Exhibit L (1), entered in the Register is said to have been given to the plaintiff.

In support of the plaintiff, the fact of conversion and the performance of the marriage ceremony by the Moulvi, Abdul Salem, have been deposed to by witnesses Raschid (PW 6), Rahman (PW 7) and Abdul Salem (PW 4). According to these witnesses the words appearing on the certificate "Mark of Mariam Bibi" were entered by Abdul Salem after the certificate was brought back by Raschid and Rahman from the 1st defendant who was asked to place her signature on the same but who, however, contented herself by asking Raschid to do the needful on her behalf.

Moulvi Abdul Salem understood from these witnesses that the conversion of the 1st defendant took place one or two days before they came to fetch him for the celebration of the marriage. Great stress has been laid on this and other serious discrepancies in the evidence of these witnesses and in view of the facts and circumstances disclosed in their testimony this criticism would appear to be well justified. The 1st defendant is shown to have signed her love letters, Exhibits D and E, in Gujerati, the affidavit Exhibit H, in English and the declaration, Exhibit K, again in Gujerati. Exhibit 8 also appears to contain the 1st defendant's signature in her language. Exhibit 1, the 1st defendant's passport also contains a signature of hers. She was thus a literate girl having, according to the entries appearing in Exhibit A, read up to the 3rd Standard. It was rather surprising that the necessity of taking her own signature on the marriage certificate was not thought of by these witnesses at the time the alleged marriage was performed in their presence. It was not an ordinary marriage ceremony performed between members of their own faith. It was a runaway marriage celebrated according to Mohamedan rites in order to conform to the requirements of the plaintiff's personal law in the matter and done in circumstances requiring the exercise, on the plaintiff's part, of great circumspection in order that the status so created should not be open to future dispute.

The absence of the 1st defendant's signature on the marriage contract is thus by itself a matter of some suspicion but there are other discrepancies in the plaintiff's evidence to strengthen this suspicion to serious doubt as to the truth of the whole matter. The girl's declaration, Exhibit K, bears the date 27th September, one day earlier than the alleged

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conversion to Islam and the Muslim marriage celebrated immediately thereafter. Between the evidence of the plaintiff and that of his witnesses a difference is also noticed as regards the time of the performance of the Muslim marriage. According to the plaintiff the Moulvi was fetched after dark and the wedding took place at about 7-30 p.m. Raschid and Rahman place the time earlier, the conversion of the 1st defendant having been done by them at about 5-30 p.m.

It would appear from the affidavits, Exhibits H and J, that on the 28th September 1950, the plaintiff and the 1st defendant appeared before the 4th Additional Magistrate, Rangoon, and swore their respective affidavits declaring that they had taken each other as husband and wife. This practice of celebrating marriages in the purely civil form in the presence of a Magistrate has been in vogue in this city and with the Ward Headman Meera Gunny (PW 5) as their only adviser, these young people would appear to have thus conformed to the prevailing custom in appearing before the 4th Additional Magistrate, Rangoon, and signing their respective declarations. But, their happiness was shortlived, for, consequent upon the report made by the 2nd defendant to the police charging the plaintiff with kidnapping his minor daughter, the plaintiff was placed under arrest and the 1st defendant was restored to the custody of her parents, the 2nd and 3rd defendants on 30th September 1950.

In Criminal Trial No. 332 of 1950 of the Court of the Eastern Subdivisional Magistrate the plaintiff on 5th October 1950 filed a criminal complaint against the 2nd and 3rd defendants charging them with an offence under section 498 of the Penal Code for having illegally taken back the 1st defendant and removed her from his lawful custody. When he was examined

on his complaint he made no mention whatsoever of the Mohamedan marriage which had been performed on the 28th September 1950 before the Moulvi in his house in 54th Street. Both the complaint (Exhibit 2) and his statement on oath or affirmation (Exhibit 3) only mentioned the fact that they were married before the 4th Additional Magistrate, Rangoon. If a proper marriage ceremony had been performed uniting them into lawful wedlock under his own personal law with the help of a Moulvi of his own faith, it was surprising that having the legal assistance of an Advocate of this Court both the complaint and the statement made by the plaintiff on solemn affirmation before the Magistrate should be silent about this vital fact.

The Mosque copy of the certificate of marriage is found in Exhibit L (3). The certificate which immediately precedes Exihibit L (3) appears to be dated the 3th September 1950. The one that follows it appears to be dated the 6th November 1950, five weeks after the alleged marriage, and the plaintiff's copy of the certificate, Exhibit L (2) was received in the Translation Department on 2nd December 1950. The complaint before the Eastern Subdivisional Magistrate was made on 5th October 1950 and the same was dismissed on 14th October 1950 on receipt of a police report—at page 5 of the criminal proceedings. This police report also makes no mention of the fact that the plaintiff and the 1st defendant underwent a wedding ceremony under Muslim rites on the 28th September. The certificates Exhibits L (2) and L (3) could have been prepared any time before 6th November 1950—after the dismissal of the criminal complaint made by the plaintiff. All these facts and circumstances would tend to show that the alleged Mohamedan marriage evidenced by the marriage certificate, Exhibit L (2) did not really take

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place on the date alleged by the plaintiff. Most probably, the young people in the excitement of the escapade were far too removed from sources of proper legal advice and had contented themselves with the performance of the civil formality evidenced by their affidavits, Exhibits H and J before the 4th Additional Magistrate. The alleged Muslim marriage was probably an afterthought.

In view of the probabilities of the case inherent in the nature of the discrepant evidence presented on the plaintiff's behalf it is difficult to believe that the 1st defendant was converted to Mohamedanism and was lawfully married to the plaintiff under Mohamedan Law on 28th September 1950 as alleged by him. The 2nd Issue will accordingly be answered in the negative.

3rd and 4th Issues.

The 3rd and 4th Issues may now be briefly touched upon as on the findings already arrived at on the validity of the alleged marriage, the question of the Court's jurisdiction is no longer vital to the decision of the case. It has been alleged that at the inception of the present suit, the 1st defendant was away in India where she is said to have married and settled down permanently. The 1st defendant in consequence of the report made by the 2nd defendant to the police charging the plaintiff and his mother with the offence of kidnapping was restored to her parents' custody on the morning of the 30th September 1950. A week or so later, that is, on 8th October 1950, the mother Samratt Laxmi Parekh, the 3rd defendant, took her away to India in the company of Doshi (DW 2), in a plane belonging to the Indian National Airways Service of which witness Nadun-gadi (DW 1) is the local Station Superintendent. His office file, Exhibit 5,

has been produced in evidence to show that the 1st defendant travelled to India by the I.N.A. plane on the said date with Passport No. 1092058 and that she was on the occasion issued with the luggage receipt, Exhibit 5A. The number of Doshi's passport is found noted against his name in this document. Exhibit 10 is a receipt granted to the 1st defendant in respect of her Foreigner's Registration Certificate which she had to leave behind on her departure for India; and this affords further corroboration of the story of her absence in India at the time when this suit was brought two months after. In support of the story of her marriage in India Mr. J. M. Vora (DW 3), has produced the invitation card, Exhibit 11, inviting him to the 1st defendant's marriage in India. There is therefore sufficient evidence to prove the fact that the 1st defendant is an Indian National, that she had since before the institution of the present suit been residing in India.

4th Issue.

This affirmative answer to the 3rd Issue then leads to the question of jurisdiction raised in the suit, the contention on the defendant's behalf being that by reason of the 1st defendant's absence in India at the inception of the suit this Court has no jurisdiction to entertain the suit or to grant any decree against the 1st defendant or to grant any injunction against defendant Nos. 2 and 3 as prayed for in the plaint.

The leading case cited as authority on this point is found in *Sirdar Gurdval Singh* v. *The Rajah of Faridkote* (1) the headnote of which reads:

"No territorial legislation can give jurisdiction which any foreign Court ought to recognise against absent foreigners who owe no allegiance or obedience to the Power which so legislates.

(1) 21 I.A. 171.

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U AUNG THA GYAW, J.

In all personal actions the Courts of the country in which the Defendant resides, not the Courts of the country where the cause of action arose, should be resorted to."

Their Lordships of the Privy Council had before them the case of an *ex parte* decree for money passed against the defendant by the Faridkote Court where the defendant had been employed under the Rajah as a treasurer but, at the time of the suit, the defendant had ceased to hold this office and was resident in the State of Jhind of which he was a domiciled subject. At page 185 of the report their Lordships said :

"Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of *status* or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (*e.g.*, under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise agninst foreigners, who owe no allegiance or obedience to the Power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the *forum* by which it was pronounced."

The last part of this quotation would rather seem to indicate that where local legislation exists authorising this Court to exercise jurisdiction in respect of

absent foreigners, a decree perfectly valid as far as this Court is concerned, can be pronounced in the dispute to which the 1st defendant is impleaded as a party.

The same question arose in similar circumstances in *Chor Mal Bal Chand* v. *Kasturi Chand Seraogi* (1) and incidentally the Court held that :

" In a personal action a foreign Court has jurisdiction in an international sense if—

(i) the defendant is the subject of the foreign country in which the judgment has been obtained ; or

(ii) he, the defendant, is a resident in that foreign country when the action began ; or

(iii) where the defendant, in the character of a plaintiff, has selected the forum in which he is afterwards sued ; or

(iv) where he, the defendant, had voluntarily appeared in that Court and submitted to its jurisdiction ; or

(v) where he, the defendant, had contracted to submit himself to the foreign forum in which the judgment was obtained . . "

And this led to the rule that cause of action is not a general ground of jurisdiction recognised by International Law. These rules formulated in Dicey's Conflict of Laws would appear to have been also followed in *Vithalbhai Shivbhai Patel* v. *Lalbhai Bimbhai* (2). The same principles on which a Court acts in enforcing judgments of foreign Courts are found discussed in *Rousillon* v. *Rousillon* (3) and in *Emanuel and others* v. *Symon* (4).

It would thus appear that the principle of law enunciated in these cases cannot be appealed to with a view to deprive this Court of its jurisdiction at the initial stage where an action is being brought against an absent foreigner and against whom the cause of

(1) I.L.R. 63 Cal. 1033.
(2) I.L.R. (1942) Bom. 688.
(3) (1880) 14 Ch. D. 351.
(4) (1908) 1 K.B. 302.

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action is alleged to have taken place wholly within the Court's jurisdiction. Section 20 of the Civil Procedure Code generally and section 15 of the Union Judiciary Act specifically, invests this Court with jurisdiction to try a suit where the cause of action is alleged to have taken place within the territorial limits of the Court's jurisdiction.

Section 15 of the Union Judiciary Act reads :

"The High Court in the exercise of its ordinary original civil jurisdiction shall have power to receive, try and determine suits of every description if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases *if the cause of action shall have arisen either wholly or, in case the leave of the High Court shall have been first obtained, in part within the local limits of the ordinary original civil jurisdiction of the High Court*, or if the defendant at the commencement of the suit shall dwell or carry on business, or personally work for gain within such limits. . . . . "

This question of the Court's jurisdiction to entertain suits against absent foreigners was discussed at length in *Gaekwar Baroda State Railway* v. *Habib Ulla* (1) and the conclusions arrived at by the Bench are found summarized in the headnote at page 829 in these words :

"According to international law, pure and simple, a Court has no jurisdiction to entertain a suit against a foreigner who neither resides within, nor has submitted to its jurisdiction, merely because the cause of action, wholly or in part, arose within its jurisdiction. But different considerations arise where the local legislature has conferred such jurisdiction upon the Court. Such special local legislation is a recognized exception to the said rule of international law ; and it follows that if the Indian legislature has conferred jurisdiction upon the British Indian Courts to entertain suits against non-resident foreigners where the cause of action, wholly or in part, arose within their

(1) I.L.R. 56. All. 828.

jurisdiction, such Courts undoubtedly have jurisdiction, if the conditions provided by the law to which they are subject exist. The language of section 20 (*c*) of the Civil Procedure Code is general and wide enough to apply to the case of non-resident foreigners, and there is nothing in the section which makes an exception as regards them. A Court in British India cannot disclaim jurisdiction against a non-resident foreigner if the plaintiff's cause of action, wholly or in part, arose within its jurisdiction ; what sanctity will attach to its decree if it is questioned in a foreign country is a different question."

This view of the law was also followed in *Neelakanda Pillai* v. *K. A. Kunju Pillai* (1) where it was held that having regard to the provisions of section 20 of the Civil Procedure Code, a British Indian Court can pass a decree against a non-resident foreigner when the cause of action has arisen within its local limits. The same High Court in *Swaminathan Chettiar* v. *VE.N.K.RM.V.RM. Somasundaram Chettiar and others* (2) regarded it as settled law that even as against a non-resident foreigner the Court in British India had jurisdiction *in personam* in suits based upon a cause of action arising in British India. As long ago as 1892 it was pointed out in *Companhia De Mocambique* v. *British South Africa Company—De Sousa* v. *Same* (3) :

" The question, whether the Courts of a nation will or will not entertain jurisdiction of any dispute, is to be determined by the nation itself, *i.e.* by its municipal law. If by express legislation the Courts are directed to exercise jurisdiction, the Courts must obey."

This case was referred to in *Chunilal Kasturchand Marwadi* v. *Dundappa Damappa Nagalgi* (4). The Bench after a review of the case law on the subject held the view that " under section 20 (*c*) of the Civil

(1) A.I.R. (1935) Mad. 545.
(2) A.I.R. (1938) Mad. 741.
(3) (1892) 2 Q.B.D. 358 at 394.
(4) 52 Bom. L.R. 660.

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Procedure Code, 1908, a Court in India cannot disclaim jurisdiction against a non-resident foreigner, if the plaintiff's cause of action, wholly or in part, arises within its jurisdiction ". It was held further that a decree pronounced by a Court of foreign state in a personal action *in absentem*, the absent party not having submitted himself to its authority, is a nullity.

The question now before this Court is not whether after a decree is passed a foreign Court will recognize it, but, whether having regard to section 20 of the Civil Procedure Code and section 15 of the Union Judiciary Act, it can assume jurisdiction in the case and try the suit brought against a non-resident foreigner when the cause of action has arisen wholly within its local limits. On this point Starling J., in *Girdhar Damodar* v. *Kassigar Hiragar* (1) observed that it would be the duty of the Courts acting in the execution of a statutory enactment, to give effect to it, it being immaterial whether the judgment rendered would be in the circumstances recognized by foreign tribunals as being consistent with International Law and the general principles of justice. The observations of James L.J. and Cotton L.J., in *ex parte Blain, in re Sawers* (2) were cited in support of this view.

This being the state of the law on the point in issue it must be accepted as settled law that the Courts of this country can exercise jurisdiction over non-resident foreigners despite their refusal to submit to the same in suits in which the cause of action is alleged to have arisen within the local limits of the Court's jurisdiction.

On the answers to the issues found above, it is hardly necessary to dwell at length on the further objection on the defendant's behalf that even if the 1st

(1) (1893) 17 Bom. 662 at 665. (2) (1879) 12 Ch. D. 522 at 526.

defendant had been legally married to the plaintiff, the declaration for restitution of conjugal rights asked for in this suit should not be granted by the Court, firstly, on the ground that a decree passed against a non-resident foreigner would be null and void and would not in any way be effective, and secondly, for the reason that the decree would not put an end to the dispute between the parties. The grant of relief under section 42 of the Specific Relief Act is entirely discretionary with the Court but this discretion has to be guided by well recognized principles having reference to the varying circumstances present in each particular case. See *Ram Tawakal Tewari* v. *Mt. Dulari and others* (1). A Special Bench of the Calcutta High Court in *Noor Jehan Begum* v. *Eugene Tiscenko* (2) in circumstances similar to those now under consideration held the view that as the declaratory decree sought for would not put a stop to the dispute between the parties, the Court should not exercise its discretion in favour of the plaintiff. At page 330 of the Report, Nasim Ali J., remarked :

"Plaintiff is not domiciled in this country. The defendant is a non-resident foreigner. He has not in any way submitted himself to the jurisdiction of this Court. I am therefore of opinion that the declaration sought for by the plaintiff in the present suit will not put a stop to the dispute in this case. I do not therefore consider this to be a fit case in which the Court in its discretion should pass a decree under section 42, Specific Relief Act, declaring that the marriage of the plaintiff with the defendant has been dissolved. . . . . "

The same principle is found affirmed in *R. B. B. Saran Singh and one* v. *Ch. Mujtaba Husain and others* (3). Moreover, it is incumbent upon a Court of Justice to take notice of the events which have

(1) A.I.R. (1934) All. 469. (2) A.I.R. (1942) Cal. 325.
(3) I.L.R. 16. Luck. 742.

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happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. [See *R. B. B. Saran Singh* (1) *ibid.*]

Evidence has been given in the case that since the institution of this suit the 1st defendant had contracted a Hindu marriage in India with one Omerchand and had settled down there permanently and this fact would seem to raise the further question as to whether she had not by her apostasy implied in her conduct deprived the plaintiff of his right to make his present claim; for as was held in *Hussain Unwar* v. *Fatima Bee* (2) and *Ali Asghar* v. *Mi Kra Hla U* (3) her subsequent apostasy would have the effect of cancelling her marriage with the plaintiff and the latter cannot in the circumstances get a decree for restitution of conjugal rights against her. The 4th Issue will accordingly be answered in the affirmative.

The suit, in the result, will be dismissed with costs.

(1) I.L.R. 16 Luck. 742. (2) (1872—1892) S.J.L.B. 368.
(3) 8 L.B.R. 461.

APPELLATE CRIMINAL.

Before U San Maung, J.

PO SAW (*a*) SAW MAUNG (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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Nov. 24.

Criminal Procedure Code, s. 412—Plea of guilty—Appeal against extent of sentence—Rape—Penal Code, s. 376—Age of valid consent.

Held : The offence was rape only because the girl was 13 years of age, the minimum age at which a girl can consent to sexual intercourse with her being 14. The circumstances obtaining in the case are such as to indicate that she was a consenting party. She was on terms of intimacy with the appellant being his pupil. She admitted receiving presents from him. After the alleged rape she did not tell her mother about it till about seven days later. The sentence of seven years erred on the side of severity.

Kyaw Thaung (Government Advocate) for the respondent.

U SAN MAUNG, J.—The appellant Po Saw (*a*) Saw Maung was convicted of an offence punishable under section 376 of the Penal Code and was sentenced to seven years' rigorous imprisonment on the charge that he had raped a minor girl by the name of Ma Ah Pu after pointing a dagger at her. As the appellant pleaded guilty to the charge there is no appeal against the conviction so that the appeal has been admitted merely for the purpose of considering the sentence. Ma Ah Pu, no doubt, alleged that she had been forced to submit to illicit intercourse with the appellant. However, the circumstances obtaining in the case are such as to indicate that she was a consenting party. She was on terms of intimacy with him being his pupil. She admitted receiving presents from him. After the

* Criminal Appeal No. 463 of 1952 being Appeal from the order of the 5th Additional (Special Power) Magistrate, Yenangyaung, in Criminal Regular Trial No. 31 of 1952.

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alleged rape she did not tell her mother about it till about seven days later. The report to the police station was made the day after she made a complaint to her mother. The reason she gave for keeping silent for so long was that whenever she tried to open her mouth to speak about the incident she found that her lips had been sealed in some magical way. This is not an explanation which we can easily accept. The probabilities are that Ma Ah Pu was a consenting party and that the offence was only rape because she was a girl of 13 years of age, the minimum age at which a girl can consent to sexual intercourse with her being 14. In this view of the case the sentence of seven years' rigorous imprisonment meted out to the appellant seems to err on the side of severity and the learned Government Advocate who appears for the Government himself agrees that the sentence of two or three years' rigorous imprisonment would be sufficient to meet the case. I would accordingly reduce the sentence to three years' rigorous imprisonment.

APPELLATE CRIMINAL.

Before U On Pe and U Bo Gyi, JJ.

H.C. 1952

PYON CHO (APPELLANT)

v.

Sept. 22.

THE UNION OF BURMA (RESPONDENT).*

Special Judges Act, 1946, ss. 3 and 5 (1)—All Sessions Judges and Additional Sessions Judges are by virtue of office Special Judges—Dual capacity—Distinction in trial of case—Criminal Procedure Code, s. 193 governs method of taking cognizance of offences by a Sessions and Additional Sessions Court—Contravention renders the trial null and void—Description of officer determines the capacity in which he tries the case.

Held: The law governing the cognizance of offences by a Court of Sessions is laid down in s. 193 of the Criminal Procedure Code. An Additional Sessions Judge can only try such cases as the President by general or special order may direct him to try, or as a Sessions Judge may make over to him for trial. Where an officer holds a dual capacity, the powers and jurisdiction of the two officers remain distinct and different so that the description of the officer must naturally determine the capacity in which he tries the case.

The Union of Burma v. *Ma Ah M r*, (1951) B.L.R. 1 (F.B); *Ramachandra Ganesh Khadkikar* v. *Emperor*, A.I.R. (1933) Bom. 58 (S.B.), followed.

Ba On for the appellant.

Mya Thein (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U ON PE, J.—The appellant Pyon Cho has been convicted under sections 302 (1) (*c*) and 392 (1) of the Penal Code and sentenced to suffer death on the first charge and to suffer three years' rigorous imprisonment on the second charge by U Kin Maung U, Additional Sessions Judge, Pakôkku, in his Criminal Regular Trial

* Criminal Appeal No. 392 of 1952 being Appeal from the order of the Additional Sessions Judge, Pakôkku, in Criminal Regular Trial No. 3 of 1952.

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U ON PE, J.

No. 3 of 1952. U Kin Maung U, in trying the case, acted all throughout as Additional Sessions Judge and nowhere else in the case is there anything to show that he acted otherwise than as Additional Sessions Judge.

It may be mentioned that U Kin Maung U is also a Special Judge under section 3 of the Special Judges Act, 1946, which reads as follows:

> "All Sessions Judges and Additional Sessions Judges appointed under section 9 of the Code, shall, by virtue of their office, be Special Judges."

A point of considerable importance has arisen in this case relating to trial of a criminal case in original jurisdiction by an Additional Sessions Judge particularly when he holds dual capacity of Additional Sessions Judge and Special Judge. For some time past, an officer holding dual capacity as a Special Judge and a Magistrate was guided in trying a criminal case by the principle that "it is the procedure adopted by a Special Judge in trial of the case, and not the manner in which he designated himself, that determines whether he tries it as a Special Judge or a Magistrate." It appears that U Kin Maung U in trying this case has followed the procedure adopted by a Special Judge although he has designated himself as Additional Sessions Judge. If U Kin Maung U can be held to have tried the case as a Special Judge he certainly had jurisdiction to try it. *See* section 5 (*1*) of the Special Judges Act, 1946. On the other hand, if it cannot be so held for reasons hereafter to be gone into, then the question arises as to whether he had jurisdiction to do so. The law governing the cognizance of offences by a Court of Session is laid down in section 193 of the Criminal Procedure Code. According to this provision firstly no Court of Sessions shall take cognizance of any

offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf, and secondly, an Additional Sessions Judge can only try such cases as the President, by general or special order, may direct him to try, or as a Sessions Judge may make over to him for trial. U Kin Maung U, as Additional Sessions Judge, tried the case without a committal proceeding and even if his Court were a Court of Session, which it is not, it would not have the power to take cognizance as a Court of original jurisdiction. Moreover, the present case is not a case which the President had directed to be tried nor was it one made over by the Sessions Judge to be tried. It is therefore clear that U Kin Maung U had no jurisdiction to try the case as Additional Sessions Judge and the same must, therefore, be considered as null and void.

The next question is whether U Kin Maung U can be deemed to have tried the case as a Special Judge inspite of the description of himself as an Additional Sessions Judge. If it can be deemed that he tried the case as a Special Judge, he had jurisdiction to do so and the question of lack of jurisdiction would not arise. But the trend of judicial opinion is against that view. If any doubt arises as to whether U Kin Maung U did try the case as a Special Judge inspite of the description of himself as Additional Sessions Judge, that doubt must now be set at rest by the Full Bench decision of this Court in Criminal Reference No. 28 of 1950, *The Union of Burma* v. *Ma Ah Mar* (1). In that case it has been held to the effect that where an officer holds a dual capacity as in this case, the powers and jurisdiction of the two offices remain distinct and different so that the description of the officer must naturally determine the capacity in which he tries

(1) (1951) B.L.R. 1 (F.B.).

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U ON PE, J.

the case. A similar view has also been held by a Special Bench in *Ramachandra Ganesh Khadkikar* v. *Emperor* (1). In the light of the decision of the Full Bench of this Court referred to above, we must hold that U Kin Maung U's description of himself as Additional Sessions Judge would determine the capacity in which he tried the case. In this view of the case, U Kin Maung U as Additional Sessions Judge, had no jurisdiction to try this case, and the proceedings before him must therefore be held to be null and void. The proceedings before U Kin Maung U are therefore quashed and we direct the retrial of this case according to law by the Sessions Judge, Myingyan-Pakôkku Sessions Division, as Special Judge or by some other Special Judge of his Division besides U Kin Maung U to whom he may transfer the case.

(1) A.I.R. (1933) Bom. 58 (S.B.).

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1952

Dec. 1.

SOBIKA RAHMAN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Evidence Act, ss. 25 and 27—Confession—Value and admissibility of statements made to the Police—Statement accompanying discovery and statement leading to discovery, contrast.

Held: A statement which admits a substantial portion of the facts which constitute the offence with which the appellant was charged is a confession and having been made to the Police is inadmissible in evidence under s. 25 of the Evidence Act.

Maung Han and others v. *The King*, (1947) R.L.R. 371, followed.

Held further: S. 27 of the Evidence Act is inapplicable as statements alleged to have been made by the appellant are statements which accompanied the discovery of the bundle containing the contraband and did not lead to its discovery.

Tha Nge Gyi and Maung Mya v. *The King*, (1946) R.L.R. 229, followed.

Held also: There being no other proof of ownership a conviction for illegal possession cannot be sustained.

Ma Ein Tha and one v. *King-Emperor*, 5 L.B.R. 131, referred to.

R. E. Henderson for the appellant.

U SAN MAUNG, J.—In Criminal Regular Trial No. 416 of 1952 of the Court of the Second Additional Magistrate, Rangoon, the appellant Sobika Rahman was convicted under section 5 (*1*) of the Control of Imports and Exports (Temporary) (Amendment) Act, 1947 and was sentenced to four months' rigorous imprisonment.

* Criminal Appeal No. 541 of 1952 being Appeal from the order of the 2nd Additional Magistrate (S.P.), Rangoon, in Criminal Regular Trial No. 416 of 1952.

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SOBIKA RAHMAN v. THE UNION OF BURMA.

U SAN MAUNG, J.

The facts of the case are briefly as follows :

At about 8-30 p.m. on the night of 11th July 1952, S.I.P. Maung Soe Tint and two Police Constables Maung Aye Maung (PW 1) and Sein Tun of the Rangoon Port Police were on duty at Lanmadaw foreshore when they saw a sampan coming away from the S.S. "Staffordshire", which was anchored midstream, towards Lanmadaw foreshore. The sampan stopped at the landing stage near Nyaungbinlay Bazaar and the Police party saw an Indian leaving it carrying a bundle in his hand for a tea shop near by. This Indian was next seen entering the tea shop, but he was not recognised by the Police party who saw him from a distance of about 25 yards when he entered that shop. Accompanied by two witnesses, one of whom was Maung Tin Pe (PW 3), the Police party visited the tea shop and found the appellant Sobika Rahman at the entrance of that shop. There were 4 or 5 persons in that shop, including those who were found drinking tea. Maung Soe Tint then made an enquiry as to who was the Indian that had come into the shop with a bundle and according to Maung Soe Tint and other witnesses for the prosecution the appellant himself said that he was the man. Maung Soe Tint then said that he would make a search in that shop whereupon the appellant was alleged to have brought down a bundle from a shelf saying that it was the bundle which he had brought. This bundle when opened was found to contain the three exhibit carpets. They were wrapped up in a piece of cloth upon which was written the words "Bibby Line". Presuming that it was contraband which the appellant had brought from the steamer midstream the Sub-Inspector of Police took him under arrest to the Police Station where the first information report, Exhibit A;

was lodged. In that report the Police Officer did not mention that the appellant admitted the bundle to be his and that it was the bundle which he had brought from the steamer. He mentioned that action was taken against the appellant because he was suspected of having stolen the goods. Eventually when the charge sheet was made out against the appellant it was found that he was to be prosecuted under section 5 (*1*) of the Control of Imports and Exports (Temporary) (Amendment) Act, 1947.

The appellant who gave evidence on oath stated that he was not the man who had brought the exhibit carpets from the S.S. "Staffordshire" but that he was in the tea shop near Nyaungbinlayzay when the Police party arrived and that when he was questioned as to whether anyone brought something into the shop he denied any knowledge of that fact. The Police then seeing a bundle on a shelf asked him to produce it and he merely obeyed that behest. The bundle when opened was found to contain the exhibit carpets. Mashi Ulla (DW 2) and Mazunda (DW 3) said that the appellant earned his living by selling betel leaves in the tea shop and that they were present when the Police arrested the appellant who denied all knowledge of the exhibit carpets. Abdul Rahman (DW 4), the assistant in the tea shop, also supported the appellant.

Now, on the evidence given by the Sub-Inspector of Police Maung Soe Tint who himself lodged the first information report Exhibit A, it is clear that but for the alleged admission by the appellant himself that he was the person in possession of the bundle containing the exhibit carpets which he had brought from the steamer midstream, there was no evidence whatsoever to connect him with the crime of having imported the goods without a licence. Besides the

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SOBIKA RAHMAN v. THE UNION OF BURMA.

U SAN MAUNG, J.

appellant there were many other persons in the tea shop when the Police party made the raid, so that it will be impossible to say who was actually in possession of the bundle seized by the Police.

In the case of *Ma Ein Tha and one* v. *King-Emperor* (1) it was held that an admission as to the ownership of boxes found on search to contain opium and cocaine made to the Police before the search is a confession and cannot be proved under section 25 of the Evidence Act and that when there was no other proof of ownership a conviction for illegal possession of those drugs could not be sustained. In the present case the appellant was alleged to have admitted to the Police that he was the man in possession of the bundle containing the carpets and that he had brought this bundle from the steamer midstream. This is a confession because, if true, it admits a substantial portion of the facts which constitute the offence with which the appellant had been charged. See *Maung Han and others* v. *The King* (2). The confession having been made to the Police is therefore inadmissible in evidence under section 25 of the Evidence Act. Section 27 of the Evidence Act is inapplicable as statements alleged to have been made by the appellant are statements which accompanied the discovery of the bundle containing the carpets and did not lead to its discovery. See *Tha Nge Gyi and Maung Mya* v. *The King* (3).

Apart from this aspect it is to say the least somewhat doubtful that the appellant did make the statements ascribed to him. The first information report is silent on the point and it is improbable that if the appellant did make the admission alleged to have been made by him such admission would

(1) 5 L.B.R. 131. (2) (1947) R.L.R. 371.
(3) (1946) R.L.R. 229.

not find a place in the report made by no other person than a Sub-Inspector of Police.

For these reasons I would set aside the conviction and sentence under section 5 (*1*) of the Control of Imports and Exports (Temporary) (Amendment) Act, 1947, and direct that the appellant be acquitted and released so far as this case is concerned.

APPELLATE CRIMINAL.

Before U Aung Khine, J.

H.C. 1952

Aug. 13.

SURYA NATH SINGH (APPLICANT)

v.

SHIO KARAN SINGH (RESPONDENT).*

Defamation—S. 500, Penal Code—Answer given in cross-examination as distinguished from a voluntary statement—Privilege of, whether absolute or qualified—S. 132, Evidence Act—Ninth Exception, s. 499, Penal Code.

Held : A witness is bound to answer all relevant questions even though the answer may criminate him. An answer so given is one which the witness is " compelled to give " within the meaning of s. 132, Evidence Act. Except for the offence of perjury he will not be liable to any prosecution for making that statement.

Elavarthi Paddabta Reddi v. *Iyyala Varada Reddi*, I.L.R. 52 Mad. 432, dissented from.

Sheo Karan Lal v. *Bandi Prasad*, I.L.R. 21 Pat. 778, applied.

Held further: As there has been a great deal of litigation between the parties it would be safe to presume that the remarks were made by the respondent *bonâ fide* in the protection of his own interest, and as such he would also be protected by the Ninth Exception to s. 499 of the Penal Code.

J. B. Sanyal for the applicant.

Aung Min (1) for the respondent.

U AUNG KHINE, J.—This is an application in revision against the order passed by the 7th Additional Magistrate, Rangoon, in his Criminal Trial No. 605 of 1950 acquitting the respondent Shio Karan Singh. The applicant Surya Nath Singh was the complainant in the case and he had charged the respondent Shio Karan Singh with having defamed him, an offence punishable under section 500 of the Penal Code.

The parties are brothers but they have been at logger-heads for the past few years. Differences arose over the settlement of undivided and joint family

* Criminal Revision No. 40-B of 1952 being Review of the order of the 7th Additional Magistrate, Rangoon, in Criminal Regular Trial No. 605 of 1950.

property. There have been numerous cases, both civil and criminal, between them. As a matter of fact the defamatory statements attributed to the respondent emanated from the record of proceedings, Criminal Regular Trial No. 18 of 1949 of the Court of the 4th Additional Magistrate, Rangoon. That was the case in which the respondent Shio Karan Singh accused the applicant of having committed a theft of some jaggery. The respondent during his cross-examination is alleged to have volunteered a statement to the effect that the applicant is an expert forger. The respondent was being questioned about a certain document filed before a Civil Court when he is supposed to have come out with this statement. There is no concrete proof that the respondent volunteered the statement in question and no record had been made in the body of the deposition to that effect.

It has been contended on behalf of the applicant that this statement even if made during cross-examination is not privileged. Reliance is placed on the case of *Elavarthi Paddabba Reddi* v. *Iyyala Varada Reddi* (1). It was held in that case that the statements made by a witness are entitled not to an absolute but only to a qualified privilege and that a witness who answers a question or questions put to him by counsel without seeking the protection of section 132 of the Evidence Act is not entitled to that protection. This in effect means that before a witness gives an answer which he considers defamatory he must seek the protection of the Court first before he answers the question. Now section 132 of the Evidence Act reads :

" 132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground

(1) I.L.R. 52 Mad. 432.

H.C. 1952

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that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind :

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

A different view of the matter was taken by a Bench of the Patna High Court in the case of *Sheo Karan Lal* v. *Bandi Prasad* (1). I shall quote the words of Chatterji J., in that case :

"I do not think section 132 requires that the witness before he can claim protection under the proviso, must first ask to be excused from answering the question on the ground that the answer will criminate him. What the section really means is that the witness is bound to answer all relevant questions, even though the answer may criminate him, but he will not be liable to prosecution except for perjury. Questions which are allowed by the Court in spite of objection by the pleader must be deemed to be relevant, so far as the witness is concerned, and he is bound to give answer. Answer so given is an answer which the witness is 'compelled to give' within the meaning of section 132."

With respect, I am in entire agreement with this view expressed. Considering that the respondent is an ordinary layman perhaps he thought he was under compulsion to answer every question put to him. An average person in a witness box, I consider, would be under the impression that he is to answer every question put to him either by Court or by Advocates. I have already pointed out that there is no concrete proof that the respondent made the statement complained against him voluntarily. The respondent has denied that he had made the statement voluntarily and

(1) I.L.R. 21 Pat. 778.

his version is that the statement he made was given in answer to the question put to him in cross-examination by Advocate Mr. Henderson. In these circumstances I must hold that the respondent is fully protected under section 132 of the Evidence Act in this matter.

Furthermore, it has got to be borne in mind that there has been a good deal of litigation between the parties, and it would be safe to presume that the remarks were made by the respondent *bonâ fide* in the protection of his own interest, and as such he would also be protected by the provisions of the Ninth Exception to section 499 of the Penal Code.

Finally I am to point out that the revisional jurisdiction of the High Court should ordinarily be exercised sparingly in cases of this nature. For all these reasons I am of the opinion that no interference is called for. The application is dismissed.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

H.C. 1952

Sept. 2

THE UNION OF BURMA (APPLICANT)

v.

U SAW LWIN AND OTHERS (RESPONDENTS).*

Criminal Procedure Code, s. 350—Whether the previous charge against the accused must be quashed before commencement of de novo trial.

Held : When a Magistrate exercises his option under s. 350 (1) of the Criminal Procedure Code of starting a *de novo* trial and does not merely rehear the witnesses to the extent demanded by the accused, the previous charge is no longer in force, and there is no need to quash it.

Tukaram v. ***The King-Emperor and others***, I.L.R. (1936) Nag. 92, referred to.

Chit for the applicant.

U BA THOUNG, J.—Four persons namely, U Saw Lwin, Maung Than Nyun, Maung San Tun Aung and Maung Tun Kyi were sent up for trial under section 408 of the Penal Code for misappropriation of Rs. 25,980-6-0 worth of goods of the Civil Supplies Department Employee Concos, before the First Additional Magistrate, Rangoon. After a prolonged trial, the learned Magistrate framed a charge under section 408 of the Penal Code against U Saw Lwin, Maung Than Nyun and Maung San Tun Aung in his Criminal Regular Trial No. 368 of 1949, and discharged Maung Tun Kyi. After the charge was framed against the three accused and before the trial was concluded, the learned Magistrate submitted a report to the District Magistrate, Rangoon, that he could not proceed further with the trials as there was misjoinder of charges of the accused,

* Criminal Revisions Nos. 86-B/87-B/88-B of 1952 being Review of the order of the District Magistrate, Rangoon, in Criminal Revisions Nos. 44/45/46 of 1952.

and he suggested that the case should be split up into three cases. The learned District Magistrate, in the diary order, dated 16th July, 1951, in Criminal Regular Trial No. 368 of 1949 ordered that the case should be split in the light of the First Additional Magistrate's report and he forwarded it to the 8th Additional Magistrate, Rangoon, for disposal. The 8th Additional Magistrate, Rangoon, U Maung Gyi, split the case into three separate proceedings against the three accused, U Saw Lwin, Maung Than Nyun and Maung San Tun Aung in Criminal Regular Trial Nos. 267, 268 and 269 of 1951. U Maung Gyi was then transferred to Pegu and he was succeeded by U Maung Gale (1) as the 8th Additional Magistrate, Rangoon. U Maung Gale then submitted a report to the District Magistrate, Rangoon, stating that a mere splitting up of the case and opening of separate proceedings against each of the three accused, would not cure the defects while the charges subsist against them in the original proceedings in Criminal Regular Trial No. 368 of 1949 and he suggested, either to have the case withdrawn and to execute fresh proceedings against the accused separately, or, to submit the proceedings to the High Court for quashing the charges against the accused and for order for retrial. The learned District Magistrate has now submitted the record of proceedings in Criminal Regular Trial No. 368 of 1949 of the Court of the First Additional Magistrate, Rangoon, as well as its connected proceedings in Criminal Regular Trial Nos. 267, 268, 269 of 1951 of the 8th Additional Magistrate, Rangoon, with a recommendation for separate trials against the three accused after quashing the charges framed against them in the original proceedings, *i.e.*, Criminal Regular Trial No. 368 of 1949 of the Court of the First Additional Magistrate, Rangoon.

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THE UNION OF BURMA v. U SAW LWIN AND OTHERS.

U BA THOUNG, J.

As regards quashing of the charges framed against the three accused, U Saw Lwin, Maung Than Nyun and Maung San Tun Aung in Criminal Regular Trial No. 368 of 1949, there is no need to quash these charges since the case has now been splitted into three separate proceedings, *i.e.*, Criminal Regular Trial Nos. 267, 268 and 269 of 1951 of the Court of the 8th Additional Magistrate, Rangoon, and as the learned Magistrate is about to start trial afresh under section 350 (1) of the Criminal Procedure Code in these three cases against the three accused.

In the case of *Tukaram* v. *The King-Emperor and others* (1) it has been held that, if the Magistrate exercises his option under section 350 (1) of the Criminal Procedure Code of starting a *de novo* trial and does not merely rehear the witnesses to the extent demanded by the accused, the previous charge is no longer in force.

I therefore consider that the charge framed against each of the three accused U Saw Lwin, Maung Than Nyun and Maung San Tun Aung, in Criminal Regular Trial No. 368 of 1949 of the 1st Additional Magistrate's Court, Rangoon, can no longer be in force.

For these reasons, I direct that the cases against the three accused, U Saw Lwin, Maung Than Nyun and Maung San Tun Aung in Criminal Regular Trial Nos. 267,268 and 269 of 1951 of the Court of the 8th Additional Magistrate, Rangoon, be proceeded on their merits. I am to add that since the three accused have already had a protracted trial in the Court of the 1st Additional Magistrate, Rangoon, the cases against them now in the Court of the 8th Additional Magistrate, Rangoon, should be disposed of as speedily as possible.

(1) I.L.R. (1936) Nag. 92.

APPELLATE CRIMINAL.

Before U San Maung, J.

THE UNION OF BURMA (APPLICANT)

v.

SEIN PO (RESPONDENT).*

H.C. 1952

Nov. 24.

Criminal Procedure Code, s. 341—Trial of persons deaf or dumb or insane—Correct procedure to be adopted by trial Court—Finding that accused understands nature of proceedings and criminal character of act must be recorded before conviction—Distinction between understanding the criminal nature of the act at the time of the trial and the criminal nature of the act at the time of its commission—Whether an offence punishable under the Penal Code has been committed must be decided by the rule enunciated in U Damapala's case.

Held : It was wrong on the part of the Magistrate to have proceeded to pass sentence on the accused when s. 341 of the Criminal Procedure Code provides that when enquiry or trial results in a conviction, the proceeding shall be forwarded to the High Court with a report of the circumstances of the case for that Court to pass such order as it thinks fit thereon. It is essential for the Magistrate before convicting the accused to record a finding that he had sufficient intelligence to understand the criminal character of his act and the nature of the judicial proceedings taken against him.

Emperor v. *Gunga*, A.I.R. (1930) Lah. 64, referred to.

Held : Normally, s. 341 of the Criminal Procedure Code is intended to provide for cases where the accused is unable to understand the proceedings through deafness or dumbness or ignorance of the language of the country and is inapplicable where the inability to understand the proceedings arises from unsoundness of mind.

Empress v. *Husen*, I.L.R. 5 Bom. 262 ; *Queen-Empress* v. *Somir Bowra*, 27 Cal. 369, referred to.

Held further : As observed in *King-Emperor* v. *U Damapala* the test is not whether the accused has proved beyond all reasonable doubt that he comes within any of the exceptions to the Penal Code but whether there is a reasonable doubt in the case for the prosecution whether the accused had committed an offence punishable under the Penal Code. In the circumstances obtaining in the case, reasonable doubt seems to exist whether the accused was sane enough to be capable of knowing the nature of his act or that he was doing what was either wrong or contrary to law.

King-Emperor v. *U Damapala*, I.L.R. 14 Ran. 666, followed.

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* Criminal Revision No. 105-B of 1952 being a Review of the order of the 6th Additional Magistrate, Pyapôn, in Criminal Regular Trial No 6 of 1952.

H.C. 1952

THE UNION OF BURMA v. SEIN PO.

Kyaw Thaung (Government Advocate) for the applicant.

U SAN MAUNG, J.—In Criminal Regular Trial No. 6 of 1952 of the Court of the 6th Additional Magistrate, Pyapôn, the Magistrate convicted the accused Sein Po of an offence punishable under section 326 of the Penal Code for causing grievous hurt to Maung Yi (PW 1), by means of a *dah* and, after sentencing Sein Po to rigorous imprisonment for one year and six months, sent a report to this Court to pass such orders as it thinks fit under the provisions of section 341 of the Criminal Procedure Code. The matter came before U Bo Gyi J., who, by an order dated the 23rd of May, 1952, set aside the sentence of one year and six months' rigorous imprisonment passed upon Sein Po after pointing out that it was wrong on the part of the Magistrate to have proceeded to pass sentence on the accused when section 341 of the Criminal Procedure Code provides that when enquiry or trial results in a conviction, the proceeding shall be forwarded to the High Court with a report of the circumstances of the case for that Court to pass such order as it thinks fit thereon.

The facts of the case are briefly these :

The accused Sein Po used to reside in a *zayat*, within the precincts of *Pyissima-yon Phongyi-Kyaung* of Kyaiklat, with Maung Yi and his wife Ma Ngwe Yin (PWs 1 and 2). The accused, as well as Maung Yi and his wife, were lay servants of the Phongyi and the accused used to cook food while Maung Yi and his wife performed other menial duties. The accused was, by habit, a very morose person and he seldom uttered any word though he was capable of making intelligible speeches. On the day of occurrence, the 7th *Lasan* of *Tabodwe*, 1312 B.E., corresponding to the 2nd of February, 1952, while Maung Yi was sitting at the

door-way of the kitchen of the *zayat* where he and the accused were residing, the accused came back from the pond carrying water. Thereafter, without saying anything, he picked up a mamootee from the kitchen and attacked Maung Yi who was unable to defend himself because of paralysis. Three injuries were inflicted on Maung Yi and these were found by the Sub-Assistant Surgeon, Kyaiklat, Mr. K. Choudhury, (PW 6), who subsequently examined him, to be as follows :

1. One incised gaping wound 3″ × ¼″ on the left side of the head cutting the bone partially.
2. An incised wound 2½ ″ × ¾″ on the right side of the head cutting the bone partially.
3. An incised wound 2½ ″× ¾″ on the left side of the back of the neck.

The injuries were so serious that a dying deposition had to be taken on the day of Maung Yi's admission to hospital but Maung Yi recovered sufficiently to be discharged from hospital about sixteen days after his admission. There was no motive for this sudden and savage attack as the accused and Maung Yi were on good terms. The accused was not addicted to liquor and there was no previous history of insanity except for his moroseness. After the accused was arrested, he was confined as an under-trial in Pyapôn jail where the Jail Doctor, U Ba Pu, had the opportunity of observing him for about two months. After his admission in jail, he exhibited certain peculiarities such as, refusal to have a bath or to eat properly and failure to utter any word. His condition improved after about a month and he was found to eat, drink, sleep and bathe like a normal person. In the opinion of the Doctor, the accused was insane at the time of his admission in jail.

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THE UNION OF BURMA v. SEIN PO.

U SAN MAUNG, J.

The Doctor also opines that the accused was not sufficiently sane to stand his trial. But, with this opinion, the learned Magistrate disagreed because the accused used to *Shikoe* him whenever he came to Court and was even able to put a question to Maung Yi as, " ဖေါက်တူးခွဲဖေါက်သလား "။ The Magistrate also found that the accused should not be given the benefit of section 84 of the Penal Code as he could not be said to be a person who, at the time of cutting Maung Yi, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

Normally, section 341 of the Criminal Procedure Code is intended to provide for cases where the accused is unable to understand the proceedings through deafness, or dumbness, or ignorance of the language of the country and is inapplicable where the inability to understand the proceedings arises from unsoundness of mind. See *Empress* v. *Husen* (1). Therefore, in a case under section 341, it is essential for the Magistrate, before convicting the accused, to record the finding to the effect that he had sufficient intelligence to understand the criminal character of his act and the nature of the judicial proceedings taken against him. Where no such finding is recorded by the Magistrate, the accused cannot be convicted. See *Emperor* v. *Gunga* (2). In the present case, the learned Magistrate had recorded the findings necessary to give him jurisdiction to record a conviction against the accused under section 326 of the Penal Code. He said that the accused was intelligent enough to understand the nature of the judicial proceedings taken against him and that, at the time he committed the offence, he was intelligent enough to understand the criminal character of his act.

(1) I.L.R. 5 Bom. 262. (2) A.I.R. (1930) Lah. 64.

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THE UNION OF BURMA v. SEIN PO.

U SAN MAUNG, J.

Now, while I am inclined to agree with the learned Magistrate that at the time of the trial, the accused was intelligent enough to understand the nature of the criminal proceedings taken against him, I am not inclined to agree with him that, at the time he assaulted Maung Yi, he was capable of knowing the nature of his act, etc. As observed by a Bench of the Calcutta High Court in *Queen-Empress* v. *Somir Bowra* (1), proceedings under section 341 of the Criminal Procedure Code are anomalous and, in all respects, do not represent a complete trial. The High Court, in a case triable by a Magistrate, pass sentence on what is termed a conviction, though it cannot strictly speaking be so termed, seeing that the accused cannot in such a case make a proper defence. In a case referred under section 341 of the Criminal Procedure Code, the legislature seems to have contemplated that there should be a finding by the Magistrate either by what is called a conviction, or a commitment that *primâ facie*, that is to say, on the evidence for the prosecution, an offence has been committed and that the accused though not insane cannot be made to understand the proceedings and there are cases where, on such a report being made, sentence has been passed by the High Court in the absence of any defence for such reason.

From the fact that the accused attacked Maung Yi without any rhyme or reason, that prior to the occurrence of this case, the accused was by habit a person prone to be morose and that when he was confined to jail soon after the occurrence, he appeared to the Jail Doctor to be insane for about a month, I am of the opinion that at the time the accused cut Maung Yi, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

(1) 27 Cal. 369.

H.C. 1952

THE UNION OF BURMA v. SEIN PO.

U SAN MAUNG, J.

As observed in *King-Emperor* v. *U Damapala* (1), the test is not whether the accused has proved beyond all reasonable doubt that he comes within any of the exceptions to the Penal Code but whether there is a reasonable doubt in the case for the prosecution whether the accused had committed an offence punishable under the Penal Code. In the circumstances obtaining in this case, reasonable doubt seems to exist whether the accused was sane enough to be capable of knowing the nature of his act or that it was doing what was either wrong or contrary to law.

However, I am of the opinion that the accused is a dangerous character and that it will be unsafe to allow him to be at large until it can be reasonably inferred from his conduct that he will not harm either himself or other persons. I accordingly direct that he be kept in Insein Jail until the order of the Government shall have been received and that the case be reported to Government for orders. For analogy, *see* the action taken in *Queen-Empress* v. *Somir Bowra* (2), cited above.

(1) I.L.R. 14 Ran. 666. (2) 27 Cal. 369.

APPELLATE CRIMINAL.

Before U Aung Khine, J.

TUN TIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1952

Nov. 24.

Opium Act, s. 9 (a)—Possession and Ownership—Whether two or only one sentence to be inflicted if in addition to possession, ownership is found proved—Proviso to s. 2 (2), Opium (Amendment) Act, 1949—Meaning of.

Held: The proviso in s. 2 (2) of the Opium (Amendment) Act means that there shall be only one sentence, and in that sentence a term of rigorous imprisonment not less than six months shall be inflicted as part of the punishment for being the owner of the opium. Two separate sentences are not allowed by the law on one charge.

San Hlaing for the appellant.

U AUNG KHINE, J—This appeal arises out of Criminal Regular Trial No. 378 of 1952 of the Court of the 8th Additional Magistrate, Rangoon. In that trial the appellant Tun Tin was found guilty under section 9 (*a*) of the Opium Act and was sentenced to undergo 6 months' rigorous imprisonment, and in addition he was also directed to suffer another term of 6 months' rigorous imprisonment as he was considered to be the owner of the opium seized. The facts of the case are quite simple and they are briefly these.

Acting on information received, the house of U San Thein, No. 51, 7th Street, A.F.P.F.L. quarter, was raided by the Police and inside the house 12 viss and 47½ ticals of raw opium was found in a box. It is not denied that this box was in the possession of the appellant who was putting up there. It is his version that he came down to Rangoon from Yamèthin by

* Criminal Appeal No. 489 of 1952 being Appeal from the order of the 8th Additional Magistrate, Rangoon, in Criminal Regular Trial No. 378 of 1952.

H.C. 1952

TUN TIN v. THE UNION OF BURMA.

U AUNG KHINE, J.

train. When the train stopped at Pyinmana, a man by the name of Kyaw Sein came into the same compartment in which he was travelling and sat down next to him. Kyaw Sein left the train at Nyaunglebin and before doing so he entrusted with him (appellant) a box to be taken away to Rangoon saying that he would call for it in a day or two at the house where he (appellant) was going to put up. However, before Kyaw Sein came to take delivery of the box, on the day of the raid, his (appellant's) young niece while playing near the box belonging to Kyaw Sein, opened the same and it was only then that he discovered that the box contained opium. He made a report about this fact to the A.F.P.F.L. leader of the quarter and later to the ward headman. Soon afterwards the Police came and raided the house and seized the opium found. The story as told by the appellant is too tall to be believed and I consider that he has been rightly convicted.

The learned Magistrate directed the appellant to suffer 6 months' rigorous imprisonment and in addition he further directed the appellant to suffer another term of 6 months' rigorous imprisonment as the owner of the opium. In awarding a further 6 months' rigorous imprisonment, probably the learned Magistrate did so not fully understanding the proviso in section 2 (2) of the Opium (Amendment) Act, 1949 (Act No. XIII of 1949). The proviso reads :

> " Provided, that if a person convicted under this section is in the opinion of the convicting Magistrate the true owner of the opium in respect of which he is convicted, rigorous imprisonment for a term which shall not be less than six months shall be inflicted upon him as part of the punishment."

What this proviso really means is that there shall be only one sentence, and in that sentence a term of

rigorous imprisonment of not less than 6 months shall be inflicted as part of the punishment for being the owner of the opium. A cursory reading of the judgment would make it appear that the appellant has been awarded two separate sentences of 6 months, rigorous imprisonment each. However, in the Jail Warrant I notice that only one sentence of one year's rigorous imprisonment is mentioned. The question to be decided now is whether it was the intention of the Magistrate to impose only one sentence or two separate sentences. But the law does not allow two separate sentences to be passed on one charge and the learned Magistrate must have been fully aware of this. I take it that the learned Magistrate fully intended to pass only one sentence of one year's rigorous imprisonment, but that in doing so he has not expressed himself very well. As stated above, his intention is made clear by what has been mentioned in the Jail Warrant. The quantity of the opium is large and the sentence of one year's rigorous imprisonment is not too much.

The appeal is dismissed.

APPELLATE CIVIL.

Before U Tun Byu, C.J., and U On Pe, J.

H.C. 1952

Oct. 24.

U MAUNG MAUNG (APPELLANT)

v.

MA AYE BU (RESPONDENT).*

Guardians and Wards Act, s. 25—Custody of minor illegitimate child—Legal claim of father—Paramount consideration the interest and welfare of the minor.

Held : It is the interest and welfare of the minor which should have paramount consideration. The rights of guardianship under the law to which the minor is subject or on the ground of propinquity must be assigned to a subordinate position.

Tan Swee Kyu v. *Chan Chain Lyan,* (1947) R.L.R. 107, followed.

Held also : The father of an illegitimate child cannot be said to have a legal claim to the custody of such minor.

Maung Myo and one v. *Maung Kyan,* 8 L.B.R. 415, referred to.

N. R. Majundar for the appellant.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The appellant U Maung Maung applied, on the 22nd November, 1951, under section 25 of the Guardians and Wards Act for the custody of his illegitimate son, named Mohamed Yaseen (*a*) Kala, who was said to have been born in December 1946. The respondent Ma Aye Bu is a grandmother of the minor who had been living with his mother Ma Zaw Ta since his birth. Ma Zaw Ta died on or about the 20th October, 1951, and she was, before her death, living with her mother Ma Aye Bu. The appellant's application for the custody of his iliegitimate son was dismissed by the learned District Judge, with costs, on the

* Civil Misc. Appeal No. 39 of 1952 against the order of the District Court, Pyinmana, in Civil Misc. No. 11 of 1951.

17th April, 1952, who, in effect, came to the conclusion that it would not be in the welfare of the minor to allow U Maung Maung to have the custody of the child.

It is not disputed that it is the interest and welfare of the minor which should have paramount consideration in such matter. It was observed in *Tan Swee Kyu* v. *Chan Chain Lyan* (1) :

> " The question of the welfare of the minor is of such paramount consideration that the rights of the guardianship under the law to which the minor is subject or on the ground of propinquity must be assigned subordinate position."

This consideration becomes more important in the present case, where the appellant has also, after the birth of the child, denied the paternity of the minor. We are also of the opinion that the father of an illegitimate child cannot be said to have a legal claim to the custody of such minor.

Fox C.J., in *Maung Myo and one* v. *Maung Kyan* (2) observed :

> " It appears to me that the girl is likely to receive far more affection and attention from her mother's sister who has known her and cared for her from infancy than she is likely to receive from a father who repudiated her from her birth, and only contributed towards her support because he was compelled to do so."

This observation applies appropriately to the circumstances of the present case.

The appellant U Maung Maung must therefore clearly establish that it will be in the interest and welfare of the minor if the latter be placed under the custody of the appellant. The minor was born in December 1946. There is no evidence to prove that

(1) (1947) R.L.R. 107. (2) 8 L.B.R. 415.

H.C. 1952

U MAUNG MAUNG v. MA AYE BU.

U TUN BYU, C.J.

the appellant took any interest in the welfare of this child at any time, or that he was seen in the company of the minor or had been observed to have treated him affectionately. The appellant U Maung Maung admitted that in the application, which Ma Zaw Ta filed against him soon after the birth of the minor under section 488 of the Code of Criminal Procedure, that he even denied the paternity of the minor. The Court, however, decided against him in that case, and ordered him to pay Rs. 5 per month for the maintenance of this child. Although the appellant was comparatively wealthy he did not, moreover, pay for the maintenance of his illegitimate son regularly in spite of the fact that an order of maintenance had been passed against him. This is also a circumstance which goes against U Maung Maung.

U Maung Maung is also a married-man; and he had already been married to Ma Aye Kha for some years when Mohamed Yaseen was born. Moreover, we do not find any evidence in this case which will show that either Ma Aye Kha or U Maung Maung had any real affection for the child. The moneys that were paid either by U Maung Maung or by his wife Ma Aye Kha were apparently made in pursuance of the order of maintenance passed against U Maung Maung. In any case, there is no evidence in this case to prove that they had paid anything more for the minor child in excess of the amount which U Maung Maung was bound to pay under the order of maintenance passed against him. The appellant has also not shown that he has taken any interest in the health or comfort of the minor since its birth.

The evidence also indicates that his wife Ma Aye Kha appears, at the present, to be somewhat sickly. We have perused the evidence of Daw Mi and Ma Aye, and we are unable to see anything in their evidence

which will indicate that U Maung Maung had, at any time, shown fatherly affection towards or taken any real interest in the welfare of the minor. The appeal is dismissed, but without costs.

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APPELLATE CIVIL.

Before U Aung Khine, J.

H.C. 1952

Oct. 30.

U PO THI AND ONE (APPLICANTS)

v.

MAUNG KYAW SINT (RESPONDENT).*

Civil Procedure Code, Order 7, Rule 11—Cause of action, meaning of—A sine qua non to acceptance of plaint.

Held : " Cause of action " means every fact which, if traversed, will be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. The cause of action must be antecedent to the institution of the suit. When the plaintiff files his suit for any relief before he is entitled to it, his suit is bound to fail for want of a cause of action. Order 7, Rule 11 in very clear terms lays down that the plaint shall be rejected where it does not disclose a cause of action.

In re *V. K. P. Chockalingam Ambalam* v. *Maung Tin and others*, I.L.R. 14 Ran. 173 at 185, referred to.

Nyun Han and *Tin Thein* for the applicants.

S. T. Leong for the respondent.

U AUNG KHINE, J.—This application in revision is connected with Civil Second Appeal No. 6 of 1952 of this Court.

In Civil Regular Suit No. 7 of 1951 the Subdivisional Judge, Myingyan, acting under Order 39, Rule 2 (3) of the Civil Procedure Code, passed an order after an enquiry that the 2nd Defendant in the suit, Maung Kyaw Sint, be imprisoned in civil Jail for a period of two months for an alleged disobedience of a temporary injunction order passed by the Court. On appeal the District Judge set aside the Order of the Subdivisional Judge and Maung Kyaw Sint was

* Civil Revision No. 51 of 1952 against the order of the District Court of Myingyan in Civil Regular Suit No. 4 of 1951.

released. After his release Maung Kyaw Sint instituted a suit for recovery of Rs. 6,000 as damages for false and malicious proceedings against U Po Thi and Daw Ngwe Su, husband and wife, the plaintiffs in Civil Regular Suit No. 7 of 1951 of the Court of the Subdivisional Judge, Myingyan.

A preliminary objection was taken to the effect that there was no cause of action existing at the time of the institution of the suit in view of the appeal before the High Court and before the High Court had given its decision. Arguments were heard and the learned District Judge in summing up said :

"My answer to the issue is, no cause of action arises yet, but the interests of justice require that this suit shall be stayed pending result of Civil Second Appeal No. 6 of 1952 before the High Court. When the result is known, the plaintiff may continue the suit if, and so advised."

Thus, there is a definite decision by the Court that there was no cause of action at the time of the institution of the suit. It is clear that this curious order of the learned District Judge cannot be sustained. Order 7, Rule 11 of the Civil Procedure Code reads :

"11. The plaint shall be rejected in the following cases :—

(a) where it does not disclose a cause of action.

. . . . . ."

"Cause of Action" means every fact which, if traversed, will be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. The cause of action must be *antecedent* to the institution of the suit. When the plaintiff files his suit for any relief before he is entitled to, his suit is bound to fail for want of a cause of action. In re

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V. K. P. Chockalingam Ambalam v. *Maung Tin and others* (1), in the course of his judgment Page C.J., observed :

"The Court, however, is bound to exercise its inherent powers cautiously and with circumspection, and it is not at liberty to do so where the order proposed would contravene any principle of the common law or equity, or would affect a matter in respect of which provision has been made by statute either expressly or according to the true intendment thereof."

As stated above, Order 7, Rule 11, in very clear terms says that the plaint *shall* be rejected where it does not disclose a cause of action. Civil Second Appeal No. 6 of 1952 of this Court, where the memorandum of appeal has been treated as an application for revision, has been dismissed but it does not alter the case for the respondent so far as the institution of a suit against the applicants in Civil Regular Suit No. 4 of 1951 in the lower Court is concerned. The question is whether he had cause of action at the time of the institution of his suit.

For these reasons the application is allowed with costs and the order of the learned District Judge, Myingyan, is set aside, and I direct that the plaint be rejected.

(1) I.L.R. 14 Ran. 173 at 185.

APPELLATE CIVIL.

Before U Aung Khine, J.

U YEWADA (APPELLANT)

v.

MAUNG AUNG THEIN AND ONE (RESPONDENTS).*

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Aug. 15.

Evidence Act—S. 116—Estoppel against tenant—Gifts of immovable property without registered deeds—Tenant of original owner attorned to subsequent donees.

Held : Although Maung Aung Thein had been in possession of the suit lands, his status was never that of an owner, but all throughout at different times he had attorned himself as tenant to the original owner Daw Oh, secondly to U Thuseitta and thirdly to U Yewada. He is estopped from denying the title of the plaintiff-appellant.

Vertannes and others v. *Robinson and another*, I.L.R. 5 Ran. 427 ; *Dayalal and Sons* v. *Ko Lon and one*, I.L.R. 6 Ran. 657, followed.

Hla Tun Pru for the appellant.

Ba Maung for the respondents.

U AUNG KHINE, J.—This is an appeal against the judgment and decree of the District Court of Magwe in its Civil Appeal No. 19 of 1951 setting aside the judgment and decree of the Subdivisional Court of Magwe in Civil Regular Suit No. 5 of 1951. In the trial Court, the plaintiff-appellant, U Yewada, filed a suit against the defendant- respondents Maung Aung Thein and his wife Ma Sai I for recovery of possession of two pieces of *Ya* land known as " Yar-gauk " and " Ingyinbin-kwet ", measuring roughly 3·32 acres and 2·80 acres respectively. Admittedly, these two pieces of land belonged to Ma Oh, deceased. During the

* Civil 2nd Appeal No. 98 of 1951 against decree of the District Court of Magwe in Civil Appeal No. 19 of 1951.

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temporary period of Japanese occupation, Ma Oh made a religious gift of all her immoveable property to a Phongyi by the name of U Thuseitta. There was no registered conveyance executed at the time of the gift and before such a document could be drawn up and registered, the donor, Ma Oh, died. Prior to the gift made by Ma Oh, she had leased these two pieces of suit lands for cultivation to the first respondent Maung Aung Thein. It is clear also on record that after Ma Oh had made a gift of these properties, Maung Aung Thein continued working as a tenant for U Thuseitta. The respondent Maung Aung Thein denied he ever was a tenant of U Thuseitta but it is evident from the testimony of his own brother, U Maw (PW 10), that U Thuseitta leased the lands to Maung Aung Thein and the rent was fixed at 50 viss of oil. When the time came for payment of rent, U Thuseitta told Maung Aung Thein to keep the oil in his house. Later, when U Thuseitta required the money, he called upon Maung Aung Thein to give Rs. 500 in lieu of the oil and U Maw had to intercede and ask U Thuseitta to accept Rs. 400. Exhibit (ဃ) was drawn up when Maung Aung Thein accepted the tenancy from U Thuseitta and Maung Aung Thein himself has admitted that the signature "Ko Aung Thein" on this exhibit is his.

Later, just before U Thuseitta died, he made a gift of these two pieces of lands to the plaintiff-appellant, U Yewada. This fact has been accepted by both the lower Courts. This is what the learned District Judge said in his judgment :

"From the evidence on the records I have no doubt in my mind that Daw Oh was the original owner of the suit-lands that she did make a gift of the same to U Thuseitta and that U Thuseitta in turn made a gift of the same to the plaintiff-respondent U Yewada."

In the year 1312 B.E., when the defendant-respondent Maung Aung Thein did not pay the rent when called upon to do so by the plaintiff-appellant, the latter made a complaint about it to the Communist insurgents who were then in occupation of the area. Apparently the Communists decided that the suit lands belonged to U Yewada and declared that the defendant-respondent should pay the rent to U Yewada. The rent was paid and a few days later, Maung Aung Thein himself went to U Yewada and asked U Yewada to continue to lease the suit lands to him which was accordingly done as is evidenced by Exhibit (c). The Communists were later driven out of the area by the Government Forces and again when the time came for payment of rent, the respondent Maung Aung Thein refused to pay the same. Another complaint was made by U Yewada to the U.M.P. Officer, Bo Thein, about the respondent Maung Aung Thein's conduct. Another enquiry was held as Maung Aung Thein declared himself to be the owner of the suit lands. Bo Thein, in the presence of elders, after examining a few witnesses, decided the matter in favour of U Yewada and Exhibit (∞) was drawn up declaring that U Yewada was the owner of the suit lands and the defendant-respondent Maung Aung Thein subscribed his name along with the others at the foot of this document.

The present suit had to be filed because Maung Aung Thein and his wife again refused to pay rent to the plaintiff-appellant for the lands. The trial Court declared U Yewada to be the owner of the suit lands and passed the decree for recovery of possession of the same. On appeal the learned District Judge was of the opinion that as the two gifts, namely the first gift by Daw Oh to U Thuseitta and the second gift by U Thuseitta to U Yewada were not accompanied by

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registered documents, these gifts were invalid and that a suit for possession of the suit lands by the plaintiff-appellant basing his claim on title cannot succeed. It is clear that the learned District Judge did not take into consideration the fact that the defendant-respondent Maung Aung Thein had attorned himself as tenant firstly to Daw Oh, secondly to U Thuseitta and thirdly to U Yewada. Although Maung Aung Thein had been in possession of the suit lands, his status was never that of an owner but all throughout as tenant at different times to the three persons named above. Section 116 of the Evidence Act says :

" No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property ; and no person who came upon any immoveable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given ".

In *Vertannes and others* v. *Robinson and another* (1) a Christian resident in Rangoon by his will appointed his wife executrix and devised and bequeathed to her specified immoveable properties and when this man died, he was possessed of a piece of immoveable property in addition to those specified immoveable properties mentioned in his will. His widow mortgaged this property and later conveyed this property in discharge of the mortgage deed. The mortgagee agreed to let the property to her eldest son for 12 months. Later, the mortgagee filed a suit for ejectment making the eldest son, the widow and the younger children, as defendants. It was held that so far as the said property, not specifically mentioned in the will was concerned, it was an intestate property.

(1) I.L.R. 5 Ran. 427.

It was further held that the widow had no power to convey the property as executrix and that the sale of the land by the widow to the mortgagee, did not convey a good title to the plaintiff so far as the shares of the children were concerned. It was however held definitely that the eldest son, having accepted the lease from the plaintiff, was estopped under section 116 of the Evidence Act from denying the title of the plaintiff, his landlord. Again in *Dayalal and Sons* v. *Ko Lon and one* (1), it was held that a tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he has not openly restored possession by surrender to his landlord. In that case, the tenant was estopped from denying the title of his landlord as he had been let into possession of the property by the landlord. Now in this case, it is clear that the defendant-respondent Maung Aung Thein by executing Exhibit (c) accepted the tenancy from the plaintiff-appellant U Yewada in the year 1312 B.E. Applying the principles set out in the above two cases, there is no alternative but to hold that he is estopped under section 116 of the Evidence Act from denying the title of the plaintiff-appellant. It has been suggested during the course of the argument, that the respondent Maung Aung Thein had to put his signature on the Exhibits (c), (e) (∞) through coercion. There is no evidence so far as Exhibit (c) is concerned, to show that any coercion was exercised to get the respondent Maung Aung Thein to put his signature on this Exhibit. U Yan We (PW 7), who is related to both the parties, said that after the decision had been given by the Communists, Maung Aung Thein himself went to the appellant U Yewada and begged of him to lease out the suit lands to him.

(1) I.L.R. 6 Ran. 657.

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For these reasons, the judgment and decree of the lower appellate Court cannot be sustained. The appeal is allowed and the judgment and decree of the lower appellate Court are set aside and that of the trial Court restored with costs throughout. Advocate's fees in this Court, three gold mohurs.