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SUPREME COURT

1954

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

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HON'BLE JUDGES OF THE SUPREME COURT OF THE UNION OF BURMA DURING THE YEAR 1954

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2. The Hon'ble Justice *Thado Thiri Thudhamma* U E MAUNG, M.A., LL.M., *Barrister-at-Law* (on leave preparatory to retirement from 1st July, 1954).
3. The Hon'ble Justice *Thado Maha Thray Sithu* U MYINT THEIN, M.A., LL.B., *Barrister-at-Law*.
4. The Hon'ble Justice *Thado Maha Thray Sithu* U CHAN HTOON, LL.B., *Barrister-at-Law* (from 7th October, 1954).

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မြန်မာဗုဒ္ဓဘာသာဓမ္မသတ် ဥပဒေ။ ။လင်ခမ်း မယားခမ်းဆိုင်ရာ ဥပဒေနှင့်အမွေခံဆိုင်ရာ ဥပဒေကွဲပြားခြင်း။ သားမက်၊ ချွေးမတို့သည်၊ သမီး၊ သားတို့နှင့် အတူအမွေဆိုင်များ ဖြစ်ပါသလား။ မထွေးသည်၊ သူ၏ ယောကျ်မယောကျ်ားသူငယ်ထွန်း၏ ပစ္စည်းကို၊ အုပ်ထိန်းစီရင်ခွန့်ခဲ့ပေးစေ လိုသည့် အမှု (Suit for Administration) စွဲဆိုခဲ့၏။ ။သူ၏အဆို လွှာတွင်၊ ဦးထွန်း၏ဇနီးဒေါ်ချစ်စုသည်၊ အလျှင်သေဆုံးခဲ့၍၊ ဦးထွန်းသည်၊ ၁၉၄၆ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၁၄ ရက်နေ့တွင် သေဆုံးခဲ့ကြောင်း။ ဦးထွန်း သေဆုံးသောအခါ၊ ဦးထွန်းနှင့် ဒေါ်ချစ်စုမှ ပေါက်ပွါးသော သား မောင်ကျောင်းနှင့် သမီး မတင်ဦး ကျန်ရစ်ခဲ့ကြောင်း။ မောင်ကျောင်း သည်၊ သူ၏ခင်ပွန်းဖြစ်၍၊ ၎င်းသည်တောဝိရင်း သေဆုံးခဲ့ပြီဖြစ်ကြောင်း။

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သို့အတွက် မထွေးသည်၊ ဦးထွန်းသေဆုံးသောအခါ၊ကျန်ရစ်ခဲ့သောအမွေ ပစ္စည်းများ၏ထက်ဝက်ကို၊ မြန်မာဗုဒ္ဓဘာသာ တရားဥပဒေအရ၊ ရထိုက်ကြောင်း။ ။ထိုအမွေပစ္စည်းများသည်၊ မတင်ဦးလက်ရှိ ဖြစ်နေကြောင်း စသည်ဖြင့် ဖေါ်ပြခဲ့သည်။ တရားလွှတ်တော်တွင်၊ မထွေး၏ ပညာရှိလွှတ်တော်ရှေ့နေကြီးက၊ မောင်ကျောင်း မဒသသေးဘဲ၊ အသက် ရှင်လျက်ရှိနေသေးသည်ဟူသော အောက်ရုံးမင်း၏ စီရင်ဆုံးဖြတ်ချက်ကို၊ လက်ခံသည်။ ဆုံးဖြတ်ချက်။ ။မောင်ကျောင်းနှင့် နှမမတင်ဦးတို့၊ အမွေမခွဲဝေကြရသေး၊ အမွေပစ္စည်းများသည်၊ မတင်ဦးလက်ရှိ ဖြစ်နေသောကြောင့်၊ မောင်ကျောင်းသည်၊ အမွေဆိုင်ရုံသာ ဆိုင်သေး၍၊ အမွေတွင်ပါဝင်သော ပစ္စည်း ဘယ်ဟာတခုခုကိုမျှ၊ တသီး ပုဂ္ဂလပိုင်ပြုဟု၊ မဆိုနိုင်သေးသော သူဖြစ်သည်။ ။ဆိုင်ပင်ဆိုင်ပြုဆိုသော်လည်း၊သူတပါးထံ တောင်းရဦးမည့် အမွေစု၊တောင်း၍ မရလျှင်၊ ရအောင်ပင်ကာကွယ်ရဦးမည့် အမွေစု၊ ဘယ်ပစ္စည်း ဘယ်ပစ္စည်းပါသည် ဟူ၍ပင်မသတ်မှတ်ရသေးသော အမွေစုကို၊ လက်ရောက်ရပြီးဟု၊ အမှတ်ထားပြီး၊ လင်၊ သို့မဟုတ် မယားသည်၊ နှိုးယနှင့်နိုးသိတသောအတိုင်း၊ ဝင်၍ဆိုင်ပြု ပိုင်ပြုဟူ၍၊ ယူဆရန် အကြောင်းမရှိ၊ သို့ဖြစ်၍၊ ယခုအမှုမှာ၊ လင်ရပြီးသောပစ္စည်းတွင်၊ ယေားသုံးပုံတပုံ ဆိုင်သည်ဟူသော လင်ခမ်း မယားခမ်း ဥပဒေအတွင်း ကျရောက်သော အမှု မဟုတ်ချေ။ မောင်ကျောင်းသည်၊မတင်ဦးနှင့် အမွေခွဲဝေကြ၍၊မိမိ၏ အစုတွင် ပါဝင်သော ပစ္စည်းများကို ရပြီးဖြစ်သော်၊ လင်ခမ်းမယားခမ်း ဥပဒေအရ၊ ထိုပစ္စည်းများ၌၊ သုံးပုံတပုံကို၊ ၎င်း၏မယား မထွေးက ဆိုင်မည်။ မြန်မာလူမျိုး ဗုဒ္ဓဘာသာဝင်တို့၏ လင်ခမ်း ယေားခမ်းဆိုင်ရာ ဥပဒေနှင့် အမွေခန်းဆိုင်ရာ ဥပဒေကို၊ စိတ်ထဲတွင်ခွဲခြား၍ထားရလိမ့်မည်။ ၎င်းကို ခွဲခြား၍မထားလျှင်၊ ရှုပ်ထွေးပြီး အမှားမှား အယွင်းယွင်း ဖြစ်နိုင်သည်။ လင်အမွေဆိုင်တိုင်း၊လင်၏အစုမှာလည်း မယားဆိုင်သောကြောင့်၊ မယားလည်း အမွေဆိုင်ဖြစ်ရပေမည်။ မယားအမွေဆိုင်တိုင်း၊ လင်လည်း အမွေဆိုင်ဖြစ်ရပေမည်။ သားမက်၊ ချွေးမတို့သည်၊ သမီး၊သားတို့နှင့်အတူ၊ အမွေဆိုင်များ ဖြစ်ကြရမည်ဟုဆိုလျှင်၊ ကင်းဝန်မင်းကြီး၏၊ အမွေခမ်း ဓမ္မသတ် ပုဒ်မ ၅၁ နှင့် ၈၆ စသည်တို့နှင့် ဆန့်ကျင်လိမ့်မည်။ မြန်မာဗုဒ္ဓဘာသာဝင်များ၏ ယူဆချက်၊ သိနားလည် ချက်တို့နှင့်လည်း၊ ဆန့်ကျင်လိမ့်မည်။ သို့ဖြစ်၍၊ မထွေးသည်၊ ဦးထွန်း၏အမွေကို ရလိုကြောင်းနှင့် မတင်ဦး၏အပေါ်တွင် တရားမစွဲနိုင်ဟု တရားလွှတ်တော်က စီရင်ဆုံးဖြတ်လိုက်ခြင်းသည် သင့်လျော်မှန်ကန်သည်။

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extrinsic evidence, when inapplicable. Held : When a contract is made in a foreign language, the Court, having to construe it, must first obtain a translation of the instrument, and secondly an explanation of the terms. The meaning of words and phrases in the agreement must be determined by the Court like any other question of fact after taking evidence thereon as provided for by s. 98 of the Evidence Act. *The Duchess Di Sora* v. *A. L. Phillipps and others.* 10 H.L.C. 624 ; *Chatenay* v. *The Brazilian Submarine Telegraph Co. Ltd.*, (1891) 1 Q.B. 79, followed. *Held :* It is the duty of the Courts to act upon the official translation of documents unless there is expert evidence which justifies the rejection of such translation. *Rai Harendra Lal Roy Bahadur Estates, Ltd.* v. *Hem Chandra Naskar and another*, A.I.R. (1949) P.C. 179, followed. *Held also :* Proviso 6 of s. 92 of the Evidence Act providing for the admission of extrinsic evidence is not applicable where the document itself is perfectly plain and straightforward, and the disputed phrase in the agreement is clear and does not require any explanation at all. *P.L.M.C.T.K. Krishnappa Chettyar* v. *P.L.M.C.T. Kasiviswanathan Chettyar*, (1949) B.L.R. 153 ; *Ganpatrao Appaji Jagtap* v. *Bapu Bin Tukaram and others*, 44 Bom. 710 ; *Punjab National Bank Ltd. and another* v. *S. B Chowdhry*, A.I.R. (1943) Oudh 392, followed.

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and based upon truth since news items published in a newspaper are likely to be taken as true by the readers. *Held also:* If men of position and intelligence who know the complainant understood the statement complained of as referring to him, it is immaterial that he was not specifically named to enable him to prosecute. *Jones* v. *Hulton & Co. Ltd.*, (1909) 2 K.B. 444 and (1910 A.C. (H.L.) 20; *Cassidy* v. *Daily Mirror Newspaper Ltd.*, (1924) 2 K.B. 331; *Newstead* v. *London Express Newspapers Ltd.*, (1940) 1 K.B. 377, followed. *Held further:* Though truth by itself may not be a complete answer to a charge of defamation, it is the basic ingredient to bring the matter within some of the exceptions. Thus an effective defence would be truth and public good (Exception 1); or truth and goodfaith on the part of the person making the statement, when it concerns public servant (Exceptions 2 and 3); or truth and good faith and for the public good (Exception 9) of s. 499. *Held lastly:* The rule of prudence requires a Court to confine itself to what appears on the record of the case; it would indeed be a dangerous precedent to allow dissatisfied litigants to say at the appeal stage that the deponents had in fact stated much more than what appears on the record. Depositions have to be read over and acknowledged correct by the deponents. If depositions are found incomplete when read over, the attention of the Magistrate should be drawn to it; it is late when such objection is taken only at the appeal stage.

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SUPREME COURT.

HAKIM M. A. RAHIM (APPLICANT)

v.

SUBDIVISIONAL JUDGE, SYRIAM AND TWO OTHERS (RESPONDENTS).*

† S.C. 1954

Jan. 25.

Transfer of Property (Restriction) Act, 1947—Amended by Act XVII of 1952—Sale of immoveable property without permission to a foreigner—Parties liable to prosecution—Transaction not void ab initio—*Foreigner purchaser is landlord within meaning of* s. 2 (e), *Urban Rent Control Act.*

Held : Under the Transfer of Property (Restriction) Act, 1947, as amended by Act XVII of 1952, a sale to a foreigner without the necessary permission renders the parties liable to a prosecution with the sanction of the President ; and only upon a conviction being entered, the President may declare, if he should think fit, the transaction to be void.

Held further : Until the sale transaction is expressly declared to be void under s. 6 of the Transfer of Property (Restriction) Act by the President, the foreigner purchaser must be deemed to be a "landlord" as defined in the Urban Rent Control Act.

J. R. Chowdhury for the applicant.

U Thwe for the respondent No. 3

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The third respondent Hong Swan *alias* Maung Maung purchased a piece of land known as holding No. 14 of 1951-52, Myothit Ward, Bazaar Block No. 13 in Syriam Town from one V.R.R.M.N.R.M. Ramanathan Chettiar Firm. The registered sale deed, dated the 20th October 1952 is exhibited in the proceedings.

There are two buildings on the land and one of them, a one-storeyed structure, was constructed and

* Civil Misc. Application No. 109 of 1953.

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

S.C. 1954

HAKIM M. A. RAHIM v. SUBDIVISIONAL JUDGE, SYRIAM AND TWO OTHERS.

has been occupied by the applicant Hakim M. A. Rahim since the time when the Chettiar Firm was the owner. It is not disputed that he was the Chettiar's tenant in respect of the portion of the land on which this structure stands.

Hong Swan, after his purchase, was served with a notice by the Municipal authorities to dismantle the other and more substantial building and he has complied with the order. He now seeks to rebuild on the land and apparently he intends to use the entire plot for his new building. He therefore sought, under section 14-A (*3*) of the Urban Rent Control Act, a permit to file a suit for ejectment against Hakim Rahim who has so far refused to vacate the land.

Hakim Rahim resisted the application by contending that Hong Swan, as a foreigner, was legally incompetent to purchase the land. The Assistant Controller of Rents, who heard the application, took the view that the question was for a competent Court of Law to decide. As far as he was concerned, he relied upon the registered sale deed as proof of transfer of ownership. He held that Hong Swan fell within the definition of a "landlord" as defined in section 2 (*e*) of the Act. A permit to file a suit for ejectment was granted and this order was confirmed on reference by the Subdivisional Judge, Syriam.

The applicant Hakim Rahim now seeks to have these orders quashed and the contention that is advanced by his learned counsel is that the Assistant Rent Controller had refused to exercise the jurisdiction vested in him by failing to enquire into the question whether Hong Swan was or was not a foreigner. The suggestion is, if Hong Swan were a foreigner the sale would be invalid without the

express permission of the Government *vide* Transfer of Property (Restriction) Act, 1947.

The suggestion does not appear to have any substance. Under the act, as amended by Act XVII of 1952, a sale to a foreigner without the necessary permission renders the parties liable to a prosecution with the sanction of the President; and only upon a conviction being entered, the President may declare, if he should think fit, the transaction to be void. Thus the sale to a foreigner does not appear to be *ab initio* void.

Apart from the statement of Hakim Rahim that Hong Swan is a foreigner, a statement which is denied by Hong Swan, there is no material on which any opinion as to Hong Swan's status can legitimately be based. And even if Hong Swan were a foreigner, the sale transaction entered into by him would stand until expressly declared to be void under section 6 of the Act by the President. The registered sale deed is evidence of the change in ownership, and Hong Swan as the purchaser must be deemed to be a "landlord" as defined in the Act. He was therefore competent to seek permission to sue Hakim Rahim for ejectment. The application was one made under section 14-A of the Act and under sub-section 3, the Controller was under a duty to make "such enquiries as may be deemed to be necessary". This enquiry was duly made and he was of the opinion that the requirement of Hong Swan was *bonâ fide*.

What has been granted to Hong Swan is merely a permit to sue for ejectment. It will be open to Hakim Rahim to raise any plea he may wish to rely upon in that suit.

We can see no reason for interference and the application is dismissed with costs. Advocate's fees eighty-five kyats.

SUPREME COURT·

†S.C. 1954

Jan. 25.

THE UNION OF BURMA
NAZIR HAMED } (APPELLANT)

v.

TAN YU TAIK
THE UNION OF BURMA } (RESPONDENT).*

Criminal Trial—Acquittal—Leave to appeal against Union Judiciary Act, s.6—When granted—Interest of Crown to ensure administration of justice.

Held : Leave to appeal under s. 6 of the Union Judiciary Act will be granted when it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done or that injustice of a serious and substantial character has occurred.

In re *Abraham Mallory Dillet*, (1887) L.R. 12 A.C. 459; *John Oni Akerele* v. *The King*, A.I.R. (1943) (P.C.) 72, followed.

Attorney-General for Ceylon v. *Kumarasinghege Don John Perera*, (1953) A.C. 200; *U Saw and four others* v. *The Union of Burma*, (1948) B.L.R. 249, referred to.

Held further : The interest of the Crown to ensure the due administration of justice in individual cases and preserving the due course of procedure generally is as great as that of the individual.

Regina v. *Bertrand*, L. R. 1 (P.C.) 520, followed.

Choon Foung and *Kyaw Myint* for the appellant.

Dr. Ba Han and *R. E. Henderson* for the respondent.

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

U THEIN MAUNG, C.J.—The learned Special Judge (1), Rangoon, who tried Tan Yu Taik, the respondent in Criminal Appeal No. 2 of 1953 and Nazir Ahmed, the appellant in Criminal Appeal No. 3 of 1953, found

* Criminal Appeals No. 2 and No 3. of 1953.

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

Tan Yu Taik guilty of an offence punishable under section 4 (*1*) (*c*) of the Suppression of Corruption Act, 1948 read with section 4 (*2*) thereof and Nazir Ahmed guilty of an offence punishable under section 4 (*1*) (*c*) and section 4 (*2*) of the said Act read with section 109 of the Penal Code and sentenced both of them to eighteen months' rigorous imprisonment.

On appeal the High Court acquitted Tan Yu Taik and dismissed Nazir Ahmed's appeal after altering his conviction to one under section 4 (*1*) (*c*) of the Suppression of Corruption Act, 1948 read with section 116 of the Penal Code.

So in Criminal Appeal No. 2 of 1953 the Government of the Union of Burma has appealed against Tan Yu Taik's acquittal and in Criminal Appeal No. 3 of 1953 Nazir Ahmed has appealed against his conviction and sentence.

Both the appeals have been filed with special leave of this Court under section 6 of the Union Judiciary Act, 1948 which reads :

> "Notwithstanding anything contained in section 5, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, or final order of any Court (whether passed before or after the commencement of the Constitution) in any civil, criminal or other case."

The provisions of this section are in consonance with the ruling of their Lordships of the Privy Council in *Attorney-General for Ceylon* v. *Kumarasinghege Don John Perera* (1) that—

> "Her Majesty in Council has power to entertain an appeal from any Dominion or Dependency of the Crown in any matter, whether civil or criminal, by whichever party to the proceedings the appeal is brought, unless that right has been expressly renounced."

(1) (1953) A.C. 200.

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As to when special leave to appeal should be granted this Court has already stated in *U Saw and four others* v. *The Union of Burma* (1)—

"Though the jurisdiction of this Court and that of the Privy Council in criminal matters flow from two different sources and this difference in the origin of the jurisdiction of the two Courts is a matter which must not be lost sight of, yet it is clear that many of the rules laid down by the Privy Council in England in the various cases coming before it on applications for special leave to appeal in criminal matters, are rules of wisdom and should receive from this Court a respectful attention and should ordinarily act as guidance in the discharge of its functions under section 6 of the Union Judiciary Act."

In the same case this Court also observed,

"As has been said by the Privy Council in *Regina* v. *Bertrand* (2) it would be the duty of this Court 'to exercise an appellate jurisdiction with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally.' "

The learned Advocate for Tan Yu Taik has cited many Privy Council rulings as to when special leave should or should not be granted; but it will suffice if we mention only the first and the last of them as the other rulings are practically to the same effect. The first one is in re *Abraham Mallory Dillet* (3) where their Lordships of the Privy Council stated :

"Her Majesty will not review criminal proceedings unless it be shewn that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

The last one is *John Oni Akerele* v. *The King* (4) where their Lordships observed :

" 'The exercise of the prerogative', said Lord Haldane in 44 I. A. 137, 'takes place only where it is shown

(1) (1948) B.L.R. 249.
(2) L.R. 1 (P.C.) 520.
(3) (1887) L.R. 12 A.C. 459.
(4) A.I.R. (1943) (P.C.) 72.

that injustice of a serious and substantial character has occurred.' "

In view of the above rulings, we have carefully considered whether " substantial and grave injustice has been done," or whether " injustice of a serious and substantial character has occurred " bearing in mind the observation of their Lordships of the Privy Council in *Regina* v. *Bertrand*, (1865—67 L. R. 1 P. C. Appeal Cases 520) that the interest of the Crown is at least as great in respects of these (*i.e.* in ensuring the due administration of justice in individual cases and preserving the due course of procedure generally) in criminal as in civil cases; and we are satisfied from the judgments of the lower Courts that substantial and grave injustice has been done and that we must, in the interests of justice, interfere with them.

The learned Special Judge has observed in the course of his judgment :

" Nevertheless, he (Tan Yu Taik) can also be deemed to have been brought within the mischief of section 4 (*1*) (*a*), Suppression of Corruption Act, 1948, as he has been proved to have habitually accepted illegal gratification from Nazir Ahmed in the form of ' small pay .' He can as well be charged with having attempted to obtain the illegal gratification from Nazir Ahmed on the 3rd July 1952. "

He could and should, in the interests of justice, have framed an additional charge for an offence under section 4 (*1*) (*a*) of the Suppression of Corruption Act, 1948 when he found that Tan Yu Taik could be deemed to have been brought within the mischief of the said clause, although he could not, as the law stood then *i.e.* before the Act No. 50 of 1951 was amended by Act No. 58 of 1953, frame an additional charge for the attempt to obtain illegal gratification

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from Nazir Ahmed on the 3rd July, 1953. He did not do so although having been a habitual receiver of bribes is a much more serious offence than having received a bribe on a specific occasion.

From the first few lines of the following extract from its judgment, the High Court also appears to have been of the opinion that Tan Yu Taik was in the habit of collecting "small pay" *i.e.* of receiving bribes from Nazir Ahmed as stated by Mohamed Esoof:

> "But, while Esoof's evidence relating to the unlawful activities of the 2nd appellant would appear to have been amply corroborated by the entries found in the account-books alleged to have been maintained by him and the person who ran the common gaming house, the testimony offered by him relating to the receipt of the alleged bribe of K 706 by the 1st appellant from the hands of the 2nd appellant on the morning of 3rd July 1952, the subject-matter of the present charge against them, does not appear to be clear, consistent and trustworthy. Whatever be the statements he might have made to the officers of the BSI when he was examined on the day he was taken to their headquarters after the arrest of the appellants. In the sworn statement made before the 3rd Additional Magistrate, Rangoon, that same day he did not implicate the 1st appellant in any way. His inconsistency on such an important point renders his evidence in Court rather suspect and unworthy of credit."

It will be seen from the latter part of the above extract that the main reason for rejecting Esoof's evidence of Tan Yu Taik having received the bribe of K 706 from Nazir Ahmed on the 3rd July, 1952 is its alleged inconsistency with his sworn statement before the learned Third Additional Magistrate. The said sworn statement, however, is not an exhibit and, apart from the question as to whether there is any real inconsistency or not, it has not been proved as

required by section 145 of the Evidence Act which provides :

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

So the High Court should at least have taken action *e.g.* under section 428 of the Code of Criminal Procedure in order that the requirements of section 145 of the Evidence Act might be fulfilled. As it is, the High Court has acted in contravention of the said section of the Evidence Act.

The High Court was also of the opinion that Tan Yu Taik had committed an attempt to obtain an illegal gratification. It has actually stated in the course of its judgment :

"What appears to have been proved *primâ facie* against the 1st appellant is that he had, by presenting himself before the 2nd appellant and preparing to receive the sum which was being counted out by the latter, committed an attempt to obtain an illegal gratification and if his prosecution had been under the Penal Code, he would clearly be liable to conviction under section 511 read with section 161 of the Code."

We need say no more to show that there has even according to the judgments of the lower Courts, been a grave and substantial miscarriage of justice so far as Tan Yu Taik is concerned; and we do not propose to say more than is necessary as we are ordering retrial and we do not want either party to be prejudiced by any statement in our judgment. In fact we have deliberately abstained from discussing the evidence for the same reason.

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As for Nazir Ahmed, the case against him is that he is the abettor of any such offence as may have been committed by Tan Yu Taik; and since Tan Yu Taik is to be retried he also will have to be retried along with Tan Yu Taik although he has already served a major portion of the sentence of imprisonment which is set aside.

We accordingly set aside the judgments of the lower Courts and direct that Tan Yu Taik and Nazir Ahmed be retried in accordance with law by the Special Judge (2), Rangoon. The said Special Judge should try them independently and assess such evidence as may be produced for and against them according to his own independent judgment, without allowing it to be influenced in any way by what has been stated in this judgment and the judgments of the lower Courts. In the event of either or both of the accused being convicted of any offence, he should, in passing sentence on them, take into consideration, and make allowance for, such imprisonment as they have already undergone under the judgments of the lower Courts.

The bail bond of Tan Yu Taik is cancelled.

SUPREME COURT.

MAUNG TUN SEIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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Mar. 8.

Denunciation by deceased in dying condition, value of—Circumstances nullifying accuracy of identification—Disappearance of accused capable of acceptable explanation—Grave and substantial injustice—Test for interference in criminal cases.

Held : When a conviction rests upon a denunciation it is necessary to exercise caution in appraising its evidentiary value.

Kyin Hoke v. *The Union of Burma*, B.L.R (1949) (H.C.) 154, referred to.

Held : Though a denunciation was made by the deceased, grave doubts exist as to the reliability of his identification as, whether there was moonlight or flashlight, the fact that the assailants were so completely covered and disguised and uttered no sound, rendered a correct identification difficult if not altogether impossible.

Held also : The disappearance of the two alleged assailants from the village was not inconsistent with their innocence as they might have run away to avoid violent retaliation for a crime they had not committed.

Ahmed v. *Emperor*, A.I.R. (1915) Lah. 106.

Held further : This Court will not ordinarily interfere in criminal cases unless grave and substantial injustice have occurred.

Union of Burma v. *Tan Yu Taik*, Criminal Appeal No. 2 of 1953 (S.C.); *Kashmira Singh* v. *The State of Madhya Pradesh*, A.I.R. (1952) (S.C.) 159 ; *Mohinder Singh* v. *The State of Punjab*, A.I.R. (1953) (S.C.) 415.

Ba Thawt for the appellant.

Ba Sein (Government Advocate) for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—Kyibingan village is in Sagu Township, six miles from Minbu Town. Round about midnight on the 12th *lazan* of first *Waso* (26th June 1950) one Maung Po was done to death by two men who stabbed him repeatedly.

* Criminal Appeal No. 4 of 1953.

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

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When these men came in there were in the house, besides Maung Po, his wife Ma Tin (PW 2) and her nephew Maung Hmin (PW 15). Maung Hmin jumped out of the window immediately and hid himself until the next morning so that he could give no useful evidence in regard to the actual assault. Ma Tin who could not recognise the assailants shouted for help and the first to arrive on the scene were U San Hnyin (PW 5) and Maung Kha (PW 16). By the light of a lamp which Ma Tin had lit by then, they found Maung Po dying. Some more people arrived and it is alleged that Maung Po denounced Tun Sein and Lu Hla.

Maung Kha alone said that he denounced these persons repeatedly but this was an obvious exaggeration nullified by his later admission that he was not present when the denunciation was made but that he was told about it.

Maung Po died almost immediately and early in the morning the body was taken to Minbu Police Station by Maung Ya Tin (PW 1) who made the F.I.R. In doing so he stated that those denounced were from Kyibingan village itself although it is not in dispute that Maung Po himself did not mention Kyibingan. This omission is important because at the time there were three other Tun Seins and another Lu Hla living in villages close to Kyibingan. Ya Tin explained his embellishment by stating that he thought the deceased would have been more specific if they were not from Kyibingan.

The police made an investigation but as the locality was under insurgent control then, they could not arrest Tun Sein and Lu Hla who, soon after the incident, disappeared from the village. The investigation was dropped. Lu Hla was not seen again but early in 1952 Tun Sein came back to the village and

at the instance of Ma Tin he was arrested, tried before the 1st Special Judge at Minbu and sentenced to death.

The decision was based upon three points, and these were :

(1) The deceased recognised the assailants even if his wife did not. The actual finding of the learned Judge was :

> " I do not think he could have made a mistake. The assailants entered the house flashing a torch and pulled Maung Po outside and stabbed him on the verandah."

(2) The deceased denounced Tun Sein and Lu Hla. Though there were other Tun Seins and another Lu Hla, the fact that the deceased did not elaborate was enough, the learned Judge thought, to identify the culprits as those from Kyibingan.

(3) The disappearance of Tun Sein and Lu Hla was an added indication of their guilt.

Tun Sein appealed to the High Court but the Bench endorsed the findings of the trial Judge and the sentence was confirmed.

It is clear that the substantive evidence upon which the conviction rests is the denunciation and it is necessary therefore to exercise caution in appraising its evidentiary value. See *Kyin Hoke* v. *The Union of Burma* (1). In assessing its weight it is necessary to consider if the deceased could really have recognised his assailants.

On this point Ma Tin's evidence is :

" When I woke up I saw two men in black. There was no lamp and it was dark inside the house. They flashed a torch at Ko Po. They pulled him to the door of the room

(1) (1949) B.L.R. (H.C.) 154.

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(အခန်းပေါက်) and then to the *Kyanbyin* and there the men assaulted him. I went as far as the door (အပေါက်ဝ)."

U San Hnyin, admittedly the first to arrive on the scene has this to say :

"I went up the house and as it was dark I asked Ma Tin to light a lamp. She did so. By this lamplight I saw Maung Po seated on the floor (ကြမ်း) to the north of the middle post and leaning against it. Because of his wounds he was in great distress. . . . . Maung Po was unconscious off and on and his speech was not clear. Though I heard him I could not make out clearly what he said. I heard those close to him say that he had denounced Tun Sein and Lu Hla."

Maung Kha's evidence also suggests that the house was dark so that he could just see Maung Po seated and leaning against the post when he went up the house with U San Hnyin. The Public Prosecutor thought that this statement was contrary to his statement made to the police, and when Maung Kha was asked if he had not stated to the police that he saw Maung Po covered with blood, he said "Yes" but he explained it by saying that when he saw Maung Po in that state the *Thugyi* and others had arrived. This answer indicates that when he did see Maung Po covered with blood the lamp had been lit. Thus there is no contradiction between his statements and on the whole he confirmed what no witness had denied, that it was dark inside the house.

It is essential to fix the place where the deceased was actually stabbed. No plan of the house is produced but according to Ma Tin :

"Up the house there is a door for people to enter from the front. The house faces south. It is a three post house and thus it is two roomed. There is a door to the western room. In the front of the house is a *Kyanbyin*. I did not move Ko Po. He lay near the middle post in the front (အခြံရဲ့ အလယ်တိုင်) with his head towards the east. U San Hnyin and

Maung Kha being my immediate neighbours were the first to arrive. "

We have quoted Ma Tin where she said that the assailants dragged Maung Po to the door of the room (ဘခန်းတံခါး) and then to the *Kyanbyin* where the men assaulted him. By her reference to the room door it would appear that there is a walled-in room and when she talked of the *Kyanbyin* she may well be referring to the floor outside this room and not to the uncovered *verandah* in front of the house. She was definite that Maung Po lay where he fell and that he was not moved from near the middle post in the front. Both U San Hnyin and Maung Kha referred to the middle post. From this array of evidence it may well be accepted that the assault took place inside the house and not on the uncovered *Kyanbyin*.

Further, Ma Tin stated :

" The two *lusoes* wore black on the head, face and body. Their heads were wrapped in something black. The ears as well as the cheeks were covered. From the time they came and up to the time they jumped off from the house they made no sound. "

We have examined the records with great care and while we accept that a denunciation was made by Maung Po while he was dying and in agony we have grave doubts as to the reliability of his identification. The assailants had their faces covered and had disguised themselves in no uncertain manner rendering identification by sight difficult and improbable. Since they made no sound, identification by voice was out of the question. There was moonlight but there was no light inside the house. The fact that a torch was flashed led the learned trial Judge to conclude that the culprits could have been recognised. But whether there was moonlight or flashlight the fact

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that the assailants were so completely covered and disguised, rendered a correct identification difficult, if not altogether impossible.

In regard to the second point, both the lower Courts had assumed with Ya Tin that the deceased must have meant the appellant and Lu Hla of Kyibingan. We can see no justification for this view when the statement was made by a dying man who was in great pain and gasping for breath. Undoubtedly it was difficult for him then to speak at all, and with equal force it may be argued that the deceased could not elaborate because his physical condition was such that he could not.

In regard to the third point, the fact of their disappearance from the village, there is evidence that one Ye Din had quarrelled with the deceased two or three days prior to the murder, and that two days after the murder the nephew of the deceased, a notorious dacoit leader raided Ye Din's house with ten followers. A girl was shot in the knee and a cow was killed. The evidence of the defence witnesses is that Than Maung on that occasion shouted out that he had come to kill Ye Din who had killed his uncle.

This evidence was discarded by the lower Courts as hearsay but we find that direct evidence in regard to the relationship between Than Maung and Maung Po came, not only from some of the defence witnesses but also from the prosecution witnesses Maung Ya Tin, Maung Kha and Maung Hmin. The latter two gave further evidence of the raid by Than Maung and his accusation of Ye Din, who fortunately escaped.

But apart from this incident the fact that the deceased was the uncle of a notorious dacoit prowling in the locality under insurgent control, was in all probability the reason why Tun Sein and Lu Hla made themselves scarce. In the circumstances

prevailing, their disappearance from the village was not inconsistent with their innocence as they might have run away to avoid violent retaliation for a crime they had not committed—See *Ahmed* v. *Emperor* (1).

How the Appellate Court viewed the case is summed up in the following extract from the judgment :—

> " We are also satisfied from the testimony of Ya Tin and Ma Tin the deceased's wife, that when they dragged him out to the ' kyanbyin ' *i.e.* the verandah, which is an open space and with the 12th *Lazan* moon in its brightness, the deceased could have easily recognised his assailants, and hence his persistent denunciation on the night of the incident. There is nothing on record to show that the assailants' faces were covered or disguised."

But what is the evidence ? What justification is there to hold that the assault took place on the open verandah ? True, Ma Tin spoke of her husband being stabbed on the *Kyanbyin* and Ya Tin said he found him lying on the *Kyanbyin* but the evidence that Maung Po was not moved from where he fell must not be lost sight of. He fell, and was found by U San Hnyin and Maung Kha, in darkness, seated on the floor, to the north of the middle post and leaning against it. This must be inside the house, since the house faces south. The " kyanbyin " referred to by Ma Tin and Ya Tin appears to be the floor outside the door of the western room. Further the assailants had covered their faces and had disguised themselves rendering identification well nigh impossible. The deceased, gasping for breath, spoke with difficulty and the denunciation was made but once.

We have observed in the *Union of Burma* v. *Tan Yu Taik* (2) that this Court would not ordinarily

(1) A.I.R. (1915) Lah. 106. (2) Criminal Appeal No. 2 of 1953 (S.C.).

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interfere in criminal cases unless grave and substantial injustice had occurred. Apart from the authorities that were referred to in that case in support of this view, two more authorities may be cited, these being *Kashmira Singh* v. *The State of Madhya Pradesh* (1) and *Mohinder Singh* v. *The State of Punjab* (2). While it is true that there is a concurrent finding of fact by the Courts below relating to the credibility of identification we feel bound to interfere as such a finding was reached by placing reliance upon inferences which are untenable in the light of the evidence.

The appeal is allowed and Tun Sein will be acquitted and released forthwith as far as this case is concerned.

(1) A.I.R (1952) (S.C.) 159. (2) A.I.R. (1953) (S.C.) 415.

SUPREME COURT.

PANNALAL RANGALAL (APPELLANT)

v.

TIN TIN U (RESPONDENT).*

† S.C. 1954

Mar. 29.

Agreement with specific terms for sale and purchase of shirts in bulk—Sales of Goods Act, s. 38 (2)—Payment before delivery of lots—Breaches in payment, whether contract can be repudiated—Contract Act, ss. 63, 66—Time essence of contract, waiver of—Notice of rescission, when necessary.

Held : If the breach is of such a kind or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries or payments, the whole contract may there and then be regarded as repudiated and may be rescinded.

Held : The main tests to be considered in applying s. 38 (2), Sales of Goods Act are, first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly, the degree of probability or improbability that such a breach will be repeated.

Maple Flock Co. Ltd. v. *Universal Furniture Products (Wembley) Ltd.*, (1934) 1 K.B. 148 at 156-157 ; *Messrs. Sha. Moolchand Kesarimull* v. *Messrs. Associated Agencies*, A.I.R. (1942) Mad. 139, followed.

Held further : The right to insist upon time being of the essence of the contract can only be lost by another agreement between the promisor and the promisee. Mere forbearance in respect of breaches in payments must not be construed as a waiver of that right.

Anandram v. *Bholaram Tanumal*, A.I.R. (1946) Bom. 1 at p. 5 ; *The Paper Sales Ltd.* v. *Chokkani Bros.* A.I.R. (1946) Bom. 429 ; *Appalaswami* v. *Suryanarayanamurti*, A.I.R. (1947) (P.C.) 189; *Anani Bharthi and another* v. *Sarup Singh*, A.I.R. (1928) All. 360, followed.

Held further : Notice of rescission of the agreement in compliance with s. 66 of the Contract Act was not necessary in view of clause 3 of the agreement.

Basu and *Venkatram* for the appellant.

V. S. Venkatram for the respondent.

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* Civil Appeal No. 10 of 1952.

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

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PANNALAL RANGALAL v. TIN TIN U.

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

U THEIN MAUNG, C.J.—With reference to an agreement dated the 22nd November, 1947, by which Tin Tin U agreed to sell and Pannalal Rangalal agreed to buy 150,000 shirts for Rs. 4,50,000 *i.e.* at the uniform rate of Rs. 3 per shirt, Tin Tin U sued Rangalal for recovery of Rs. 62,840 on the ground that although she had delivered 94,280 shirts Rangalal has paid her Rs. 2,20,000 only. Rangalal then claimed in his written statement in her suit that he was entitled to get Rs. 90,000 from her as damages for breach of contract inasmuch as she had delivered only 90,000 shirts and the difference between the contract price and the market price of each of the remaining 60,000 shirts was one rupee and eight annas; and he ultimately filed a cross-suit for recovery of the said amount from her.

The learned Judge on the Original Side of the High Court decreed Tin Tin U's suit and dismissed Rangalal's cross-suit on the ground that it was not Tin Tin U but Rangalal who had broken the contract.

Rangalal appealed from the judgment and decree in both suits and he has further appealed to this Court with the necessary leave under the Union Judiciary Act, 1948, as his first appeal from the judgment and decree in his cross-suit has like the other appeal been dismissed by a Division Bench of the High Court.

The dispute as to the number of shirts which had been delivered by Tin Tin U to Rangalal has been finally decided in her suit where the learned Judge held that as a matter of fact 94,280 shirts had been delivered; and the case has become less complicated

as the learned Advocate for Rangalal has frankly admitted that the questions of estoppel and novation do not arise at all.

The agreement, dated the 22nd November, 1947, on which both the suit and the cross-suit were based reads:

"WHEREAS the seller has purchased Angola Drab shirts (with and without collars) now lying in 226 A.O.D. Rangoon from the British Stores Disposal Board under Sale Voucher B.S.D.E. No. 1824;

AND WHEREAS the seller has agreed to sell and the purchaser to purchase 150,000 of the said shirts for a sum of Rs. 4,50,000 (Rupees Four lakhs fifty thousand only) at uniform rate of Rs. 3 each;

It is hereby agreed between the parties hereto as follows:—

(1) The seller shall allow the purchaser to take delivery of the said goods by *three* weekly instalments of 50,000 pieces each, namely, on 24th November, 1947; 1st December 1947; and 8th December, 1947;

(2) The purchaser shall pay to the seller the sum of Rs. 1,50,000 (Rupees One lakh fifty thousand only) at least twenty-four hours before taking delivery of each instalment of goods;

(3) That upon failure of the purchaser to pay for the goods as required by Clause (2) above, the seller may, if she chose, treat as cancelled the entire agreement or such part thereof as has not been performed without notice to the purchaser, and thereafter, she may dispose of the goods either by public auction or private treaty;

(4) That the purchaser shall bear all losses if any sustained by the seller in consequence of resale under Clause (3) above;

(5) That the goods shall be held by the seller at the risk of the purchaser as from the execution of these presents;

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(6) That time shall be of the essence of the contract; and

(7) That in case of default by the seller, the usual incidents of breach of contract shall follow."

It (1) expressly declares that time is of the essence of the contract, (2) requires Rangalal to pay three sums of Rs. 1,50,000 each on or before the 23rd November, 1947, 30th November 1947, and 7th December 1947, and (3) gives Tin Tin U the option to treat as cancelled the entire agreement or such part thereof as has not been performed without notice to Rangalal upon his failure to make the said payments.

The following is a comparative statement of payments and deliveries :—

Date.	*Payment.*	*Delivery.*
24th November 1947 ...	75,000	28,700 shirts.
25th November 1947 ...	...	45,710 "
26th November 1947 ...	75,000	...
2nd December 1947 ...	...	4,875 "
8th December 1947 ...	50,000	...
9th December 1947 ...	...	14,995 "
10th December 1947 ...	20,000	...
Total ...	2,20,000	94,280 "

No payment was made on the 23rd November 1947, although the first instalment of Rs. 1,50,000 fell due on that date. Nor was any payment made on the 30th November and the 7th December, 1947, when the second and third instalments of the same amounts fell due. Up to the 10th December, 1947, Rangalal paid only Rs. 2,20,000 although he should have paid Rs. 4,50,000 on the 7th December, 1947, by the latest.

Payments made on the 8th and 10th December were on account of the second instalment and

Rangalal admits that he has not made any payment on account of the third instalment although he blames Tin Tin U for her failure to demand payment.

On the other hand Tin Tin U's deliveries have all along been in excess of Rangalal's payments although the contract requires payment before delivery; and ultimately she had to sue Rangalal for the price of 20,946 $\frac{2}{3}$ shirts which she had delivered in excess.

Rangalal has admitted that he never asked for extension of time for taking delivery of goods, that she never asked him to extend time for delivery and that the terms of the agreement were never altered. His learned Advocate also has admitted that there has been breach of contract on his part; but he has contended (1) that breach of contract is not repudiation thereof, (2) that Tin Tin U has waived her right to insist upon payments strictly in accordance with the terms of the contract, (3) that she did not give notice of rescission of the contract as required by section 66 of the Contract Act before she received Rangalal's letter dated the 23rd December, 1947, asking her to deliver the rest of the shirts.

The law relating to the breach of contract on the part of Rangalal is contained in section 38 (*2*) of the Sale of Goods Act which reads:

> "Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated."

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The wording of the sub-section is the same as that of section 31 (*2*) of the (English) Sale of Goods Act, with reference to which Lord Hewart, C.J., has stated in *Maple Flock Co. Ltd.* v. *Universal Furniture Products (Wembley) Ltd* (1) :

"Since the Act, the sub-section has been discussed by a Divisional Court in *Millars' Karri and Jarrah Company (1902)* v. *Weddel, Turner & Co.* (14 Com. Cas. 25), where the contract being for 1,100 pieces of timber, the first instalment of 750 pieces was rejected by the buyers; an arbitrator awarded 'that the said shipment was, and is, so far from complying with the requirements of the said contract as to entitle the buyers to repudiate and to rescind the whole contract and to refuse to accept the said shipment and all further shipments under the said contract.' The Court upheld the award. Bigham J., thus stated what in his opinion was the true test. 'Thus, if the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what may happen; he can at once cancel the contract and rid himself of the difficulty." (*Ibid.* 29.) Walton, J., concurred.

This ruling was more recently applied in *Robert A. Munro & Co.* v. *Meyer* (1930 2 K.B. 312,) where under a contract for the sale of 1,500 tons of bone meal, 611 tons were delivered which were seriously adulterated. The sellers were middlemen, who relied on their suppliers, the manufacturers, for correct delivery; when the buyers discovered that the deliveries did not conform to the contract they claimed that they were entitled to treat the whole contract as repudiated by the sellers. It was held that they were right in so claiming, on the ground that 'in such a case as this, where there is a

(1) (1934) 1 K.B. 148 at 156-157.

persistent breach, deliberate so far as the manufacturers are concerned, continuing for nearly one-half of the total contract quantity, the buyer, if he ascertains in time what the position is, ought to be entitled to say that he will not take the risk of having put upon him further deliveries of this character' . . . . .

With the help of these authorities we deduce that the main tests to be considered in applying the sub-section to the present case are, first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated."

The ruling in the case of *Maple Flock Co. Ltd.*, has been followed in *Messrs. Sha. Moolchand Kesarimull* v. *Messrs. Associated Agencies* (1) where Leach, C.J., stated :

"When there is a contract for the sale of goods to be delivered in two instalments and the buyer wrongly refuses to take delivery of the first instalment the breach of contract is so extensive that the seller is entitled to cancel the contract and be compensated for any loss suffered by him. In (1882) 50 L.J.Q.B. 529 the Court of Appeal held that a seller was entitled to cancel a contract when the buyer had refused to take delivery of goods representing one-third of the total sold under the contract."

The above cases relate to failure to give delivery where payment was to be made on delivery; but their *ratio decidendi* applies with equal force to a case like the present one where payments must be made before delivery can be claimed.

If we apply the first test of Lord Hewart, C.J., *i.e.* the test with reference to the ratio quantitatively which the breach bears to the contract as a whole, we shall find that Rangalal has failed to pay Rs. 2,30,000 out of Rs. 4,50,000 ; and if we apply the second test of his Lordship *i.e.* the test with reference to the degree of probability and improbability that such a breach will be repeated, we shall find

(1) A.I.R. (1942) Mad. 139.

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that there has been so many persistent breaches on his part and that these breaches relate to such a substantial portion of the contract that repetition of such breaches was highly probable.

With reference to the contention of the learned Advocate for Rangalal that the latter never meant to repudiate the contract, we need only quote the following extract from the judgment of Lord Hewart, C.J., in the said case :—

> "In other words, the true test will generally be, not the subjective mental state of the defaulting party, but the objective test of the relation in fact of the default to the whole purpose of the contract."

With reference to the contention that Tin Tin U has lost her right to insist upon time being of the essence of the contract by waiver within the purview of section 63 of the Contract Act, Rangalal has not even asked for extension of time and time can only be extended by an agreement arrived at between the promisor and the promisee. A Division Bench of the Bombay High Court has stated in *Anandram* v. *Bholaram Tanumal* (1) :

> "Under s. 55, Contract Act, the promisee is given the option to avoid the contract where the promisor fails to perform the contract at the time fixed in the contract. It is open to the promisee not to exercise the option or to exercise the option at any time, but it is clear to my mind that the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. Under s. 63, Contract Act, the promisee may make certain concessions to the promisor which are advantageous to the promisor and one of them is that he may extend the time for such performance. But it is clear again that such extension of time cannot be a unilateral extension on the part of the promisee. It is only at the request of the promisor that the promisee may agree to extend the time of performance and

(1) A.I.R. (1946) Bom. 1 at p. 5.

thereby bring about an agreement for extension of time. Therefore it is only as a result of the operation of s. 63, Contract Act, that the time for the performance of the contract can be extended and that time can only be extended by an agreement arrived at between the promisor and the promisee."

This ruling has been followed by another Division Bench of the same High Court in *The Paper Sales Ltd.* v. *Chokkani Bros.* (1) where it observed:

"But it must be an agereement. Mere forbearance from suing or giving a formal notice of rescission does not amount to an extension of time for the performance of a contract within the meaning of s. 63 of the Act, so as to alter the relevant date on which damages are to be assessed."

So time remained of the essence of the contract although Tin Tin U overlooked some delay in respect of some payments. Her forbearance in respect of those payments was only an act of generosity or kindness which must not be construed as an admission of legal obligation. [Cp. *Appalaswami* v. *Suryanarayanamurti* (2)]. Under these circumstances Rangalal, who has admittedly failed to perform his part of the contract and to make the necessary payments within the time prescribed by the contract which requires payments to be made before delivery, cannot claim that Tin Tin U has broken the contract, [Cp., *Anani Bharthi and another* v. *Sarup Singh* (3)] where the High Court of Allahabad stated:

"When the plaintiff did not perform his part of the contract, which he had to do before possession could be taken it does not lie in his mouth to say that the defendants committed a breach. S. 52, contract act, provides that, where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order."

With reference to the contention that Tin Tin U should have given Rangalal notice of her rescission of

(1) A.I.R (1946) Bom. 429. (2) A.I.R. (1947) (P.C.) 189.
(3) A.I.R. (1928) All. 360.

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the agreement in compliance with section 66 of the Contract Act, no such notice is necessary in view of clause (3) of the agreement which enables her upon Rangalal's failure to pay as required by clause (2) thereof, to treat as cancelled the entire agreement or such part thereof as has not been performed without notice to him. However, she did write to him in her reply to the demand made by him on the 23rd December 1947 for delivery of the remaining shirts :

"As you have failed to pay the balance sum of Rs. 62,740 and also to take delivery of the last instalment, you are the party who have committed the breach of contract and I am entitled to claim from you the balance sum of Rs. 62,740 as well as damages for your failure to perform your part of the contract and you are not entitled to call upon me to deliver to you the remaining shirts."

Incidentally, his demand was made 16 days after the last date for payment of the third instalment of Rs. 1,50,000 without any offer to pay up the arrears or to pay for the remaining shirts although the agreement provides for payment at least twenty-four hours before delivery.

The appeal fails and is dismissed with costs.

SUPREME COURT.

TAN CHOO KENG AND TWO OTHERS (APPELLANTS)

v.

SAW CHAIN POON AND ANOTHER (RESPONDENTS).*

† S.C. 1954

Mar. 18.

Urban Rent Control Act, ss. 12 (i) (ii), 13, 14—Occupant under permit of Rent Controller under s. 12 (1)—Decree for possession of premises against him abortive—Subsequent occupation on same footing as tenant—Decree-holder with permit under s. 14-A can sue for ejectment on grounds specified in s. 13—Decree for possession becomes alive and executable.

A obtained a decree against B for possession of certain premises. Before the decree could be executed, B obtained a permit from the Rent Controller to continue occupation. Can B by reason of possession of such a certificate resist dispossession in execution of the decree ?

Held : When an applicant satisfies the requisites mentioned in s. 12 (i) (ii) the Controller is under a statutory duty to issue a permit, as the section is mandatory, to the applicant to continue in occupation of the premises. The fact that a decree for recovery of possession exists has no bearing.

Saw Chain Poon v. *Controller of Rents and eight others*, (1950) B.L.R. (S C.) 109, followed.

Held : Under sub-s. (ii) the applicant on being granted the permit is entitled to stay on so long as the provisions of the section remain effective.

Kuppakutti Admeera v. *Esoof*, (1948) B.L.R. (H.C.) 411 ; *K. E. M. Abdul Majid* v. *M. A. Mador and two others*, (1949) B.L.R. (H.C.) 577, referred to.

Held further : An occupant under a permit is on the same footing as an ordinary tenant as under s. 14-A no suit or proceedings for ejectment or for recovery of possession against a tenant or a person permitted to occupy under s. 12 (i) can be entertained without an order in writing by the Controller of Rents, which can be obtained only when the latter is satisfied that any of the grounds specified in clauses (*d*), (*e*) and (*f*) of s. 11 or clause (*c*) of s. 13 exists.

K. R. Venkatram for the appellants.

Dr. Ba Han and *Ba Tu* for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—Litigation between the parties before us, began in 1947 as a simple suit

* Civil Appeal No. 3 of 1953.

† *Present :* U THEIN MAUNG, Chief Justice of the Union, MR. JUSTICE MYINT THEIN and U AUNG KHINE, J.

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filed in the Original Side of the High Court for recovery of possession of certain premises in Dalhousie Street, Rangoon. It reached the Appellate Court, and during its course it went to a Full Bench. In between, the parties have been to the Controller of Rents, Rangoon and also to this Court by way of certiorari proceedings.

At this stage the dispute has crystallised into a single point of law and this may be put as follows :—

" **A** obtained a decree against **B** for possession of certain premises. Before the decree could be executed **B** obtained a permit from the Rent Controller to continue occupation. Can **B** by reason of possession of such a certificate resist dispossession in execution of the decree ? "

Section 12 of the Urban Rent Control Act upon which the problem turns is reproduced below :

" 12. (*1*) 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.

(*2*) Subject to any orders passed by a Court under section 13 every order passed under sub-section (*1*) granting permission to any person to continue in occupation of any premises shall remain in force for so long as the provisions of this section apply to the area in which the said premises are situated or the class of premises within which the said premises come and for three months afterwards :

Provided that if during this period a person in whose favour an order has been passed shall voluntarily vacate the

premises the Controller may, on the written application of the landlord, cancel such order and shall not thereafter renew it."

It will be noticed that the section is mandatory and when an applicant satisfies the requisites mentioned therein, the Controller is under a statutory duty to issue the permit. The fact that a decree for recovery of possession exists against the applicant, has no bearing. See the certiorari proceedings which is an offshoot of the case before us. *Saw Chain Poon* v. *Controller of Rents and eight others* (1).

The grant of a permit under sub-section (*1*) enables the occupant to stay on and in effect, it gives him a new lease of life. Under sub-section (*2*) he would be entitled to stay on so long as the provisions of the section remain effective in respect of the locality or the class of premises involved, and for three months afterwards. See *Kuppakutti Admeera* v. *Esoof* (2), where the position is fully explained.

The reference to section 13 in sub-section (*2*) of section 12 makes section 13 applicable to occupants under a permit and therefore such an occupant may be ejected for the same reasons that would prevail against ordinary tenants. That an occupant under a permit is more or less on the same footing as an ordinary tenant is made plain by the provisions of section 14-A which lays down that no suit or proceedings for ejectment or for recovery of possession against a tenant or a person permitted to occupy under section 12 (*1*) shall be entertained without an order in writing by the Controller of Rents.

The fact that a decree for recovery of possession exists against such an occupant would not give the landlord any real advantage. To dispossess the

(1) (1950) B.L.R. (S.C.) 109. (2) (1948) B.L.R. (H.C.) 411.

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occupant the landlord would have to go through the same process to obtain an order in writing under section 14-A. Only when that order is obtained, he may seek to execute his decree. Such being the position it is clear that a permit under section 12 (*1*) would be a complete answer to an attempt at dispossession by a decree-holder. See *K. E. M. Abdul Majid* v. *M. A. Mador and two others* (1).

At first sight it might appear odd that a permit granted by a Controller of Rents should, in effect, render a decree passed by a competent Court worthless, but the Urban Rent Control Act was undoubtedly meant to afford relief to occupants and to prevent landlords from dispossessing them at will. To achieve this object wide powers are given under the Act, and thus under section 14, where a decree has already been passed the Court is empowered to alter or even rescind the decree, and it will be noted that specific provision is contained in section 14 to enable persons permitted to occupy under section 12 to seek such relief.

On the other hand, the decree-holder is not without relief, nor can it be said that the decree is altogether nullified. It merely remains dormant in the sense that no execution proceedings can be launched unless either of two events come to pass, namely :

(i) the Rent Controller himself cancels the permit under the proviso to sub-section (*2*) of section 12. This is restrictive in its scope since it envisages a voluntary withdrawal from the premises by the occupant ; or

(ii) the landlord obtains a written order under section 14-A. This, the landlord is

(1) (1949) B.L.R (H.C.) 577.

entitled to obtain if the Controller is satisfied that any of the grounds specified in clauses (*d*), (*e*) and (*f*) of section 11 or clause (*c*) of section 13, exists.

Neither event has happened in the present case and in our judgment the order of the learned Judge on the Original Side dismissing the execution application for want of an order from the Rent Controller under section 14-A is correct, and we uphold this order and set aside the order of the Appellate Side passed in C.M.A. No. 15 of 1950 with costs. Advocate's fees eighty-five kyats.

SUPREME COURT.

† S.C. 1954

Mar. 29.

SHAZADEE BEGAM *(a)* KHIN KHIN NYUNT AND ONE (APPELLANTS)

v.

P. C. DUTT (RESPONDENT).*

Civil Procedure Code, Order 23, Rule 1 (3)—Whether bar to a subsequent suit for ejectment—"Subject-matter"—Urban Rent Control Act, s. 14-A—Permit to sue for ejectment, whether effective for a subsequent suit.

A suit for ejectment instituted with a permit issued by the Rent Controller was withdrawn because of an invalid Notice to quit. A subsequent suit was filed based upon a fresh and valid Notice ; no new permit was sought from the Rent Controller.

Held : Order 23, Rule 1 (3), Civil Procedure Code is no bar to a fresh ejectment suit where an initial suit had failed because the subject-matters in the two suits were not the same.

Rukhmabai v. *Mahadeo Narayan Bundra*, 42 Bom. 155 ; *B. C. Naidu* v. *M. B. Sahib*, 56 Mad. 163, followed.

Held also : The withdrawal of the the first suit owing to a technicality did not exhaust the permit which was one to sue the tenant in respect of a particular tenancy, and thus it remains effective for the purpose of a subsequent suit.

T. G. Chowdhury v. *Manmatha Nath Ghatak*, A.I.R. (1949) Cal. 674, dissented from.

Chotey Lal v. *Shco Shankar*, A.I.R. (1951) All. 478 ; *Pahlad Das* v. *Ganga Sarin*, A.I.R (1952) All. 32, followed.

Tun Aung (2) for the appellants

G. N. Banerjee for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The appellants who are landlords of the premises in suit obtained under section 14-A of the Urban Rent Control Act a permit from the Rent Controller to sue the respondent for ejectment on the ground that they required the premises *bonâ fide* for their own occupation. On

* Civil Appeal No. 4 of 1953.

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

the strength of this permit, an ejectment suit was filed being Civil Regular No. 694 of 1951 of the Rangoon City Civil Court. To this the respondent pleaded that he had not received any notice to quit. This was probably true for the appellants withdrew their suit, on the ground that the notice to quit was not valid. The case was dismissed as withdrawn on the 3rd August 1951.

The next day a fresh notice calling upon the respondent to vacate by the end of August was sent by registered post with acknowledgment and on the respondent's failure to vacate, Civil Regular No. 1086 of 1951 was instituted on the 8th September 1951.

The respondent raised the preliminary issues (1) that as no leave to file a fresh suit was obtained at the time Civil Regular 694 was withdrawn, a fresh suit was barred under Order 23, Rule 1 (3) of the Civil Procedure Code which precludes a fresh suit in respect of the same subject-matter, and (2) that the permit issued by the Controller had exhausted itself with the dismissal of Civil Regular No. 694 and a fresh permit to institute Civil Regular No. 1086 would be necessary.

The trial Judge rejected these pleas but the appellate Judge accepted the second objection as valid and dismissed the suit. Hence the present appeal before us.

The respondent before us relies upon both these objections and we shall therefore deal with both. In regard to the first, there is an authoritative decision of a Bombay Bench—*Rukhmabai* v. *Mahadeo Narayan Bundra* (1) where in exactly similar circumstances it was held that the subject-matters in the two successive suits for ejectment were

1 42 Bom 155

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different. Basil Scott, C.J., in discussing the provisions of Order 23, Rule 1 (3) defined the term "subject-matter" as the series of acts or transactions alleged to exist giving rise to the relief claimed.

It is apparent that in the first suit, Civil Regular No. 694 the series of acts or transactions was incomplete in that there was no valid notice and therefore there could have been no relief. But in the second suit, Civil Regular No. 1086, a complete series of acts or transactions culminating with a valid notice to quit gave rise to a claim for relief, and thus the subject-matter in the latter suit was an entirely new one. The object of seeking permission is to file a fresh suit in respect of the same subject-matter, and if permission had been granted at the time Civil Regular No. 694 was withdrawn, it would have served no purpose. As matters stood then, the tenancy had not been terminated and there was no cause of action. To ask permission to file a fresh suit on a cause of action which did not exist would be meaningless.

Rukhmabai's case was followed by a Bench of the Madras High Court in *B. C. Naidu* v. *M. B. Sahib* (1) where the circumstances were also similar. We endorse, with respect, the observations of Owen Beasley, C.J., that if Order 23, Rule 1 were to be a bar to a fresh suit because an initial ejectment suit had failed, the landlord would never be able to eject a tenant and that the tenant in effect would become the owner.

In regard to the second objection, the learned appellate Judge in sustaining it relied on a Calcutta decision *T. G. Chowdhury* v. *Manmatha Nath Ghatak* (2). The facts were, there was an ejectment suit in 1946 which was instituted with a permit. It

(1) 56 A ad. 163. (2) A.I.R. (1949) Cal. 674.

is not clear what the reason was, but it was dismissed. In 1947 a fresh suit was brought, and after its institution, apparently due to objection by the opposite party, the Rent Controller was moved for the issue of a fresh permit, but the Rent Controller held that the previous permit was still valid. The trial Judge agreed with the Rent Controller but the appellate Judge held otherwise.

A passing reference on the question whether a fresh permit was necessary was made in the appellate judgment in the following terms :—

"The permission must relate to 'such a suit or proceeding.' Therefore in this case it must relate to the suit of 1947. The permission granted in respect of the suit of 1946 can be of no help to the landlord."

However the case really turned on learned Counsel's contention that such a permit may be filed after the institution of the suit. The learned Judge thought not and holding that a permit was a pre-requisite, and that a subsequent production would not cure the initial defect, he dismissed the suit.

In the Allahabad case of *Chotey Lal* v. *Sheo Shankar* (1) Argarwala, J., held that the permit was one to sue the tenant for the determination of a particular tenancy and that therefore a second suit on the same permit was regular. The circumstances were the same as in the case before us, the only difference being, the landlord in withdrawing the first suit was granted permission to file a fresh suit. This fact has no great bearing, as in any case it was unnecessary in that the second suit was based upon a new subject-matter.

Pahlad Das v. *Ganga Sarin* (2) another Allahabad decision followed Chotey Lal's case and Mustaq Ahmed, J., pointed out that the permit, after all

(1) A.I.R. (1951) All. 478. (2) A.I.R. (1952) All. 32.

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was one, to file a suit for ejecting the tenant in respect of a particular tenancy. He said :—

"It did not matter if the object was to be achieved by filing suit No. 1, suit No. 2 or suit No. 3 of such and such year. The object in view could be sought to be achieved by the plaintiff filing a second suit if the suit first filed had for some or other reason proved infructuous."

With the Allahabad view we are in agreement. The permit that was granted by the Rent Controller was for the purpose of filing a suit after the termination of the tenancy to eject the respondent under clause 11 (1) (*f*) *i.e.* on the ground that the premises were required by the landlords themselves. The first suit had to be withdrawn because the tenancy had not been determined for lack of notice. It is not suggested that circumstances had changed in that the landlords do not now require the premises for their own use, and the fact that the first suit had to be withdrawn due to a technicality, would not, in our judgment, exhaust the efficacy of the permit.

In these circumstances we must hold that the permit is of full effect and the case must therefore proceed. We must, however, make it clear that this decision is no authority for a general proposition that a permit once issued would remain forever effective. For example, where a suit filed with a permit takes its natural course and reaches a decision on its merits, then the permit must be deemed to have exhausted itself.

The order of the appellate Court in C.M.A. No. 72 of 1952 is set aside with costs, Advocate's fees one hundred kyats and the case is remanded to the Court of the Third Judge, Rangoon City Civil Court to be dealt with according to law.

တရားလွှတ်တော်ချုပ်။

ဆရာတော် ဦးဩဘာသ (မေတ္တာရပ်ခံသူ)

နှင့်

ဆရာတော် ဦးရေဝတ ပါ (၅) (မေတ္တာရပ်ခံခြင်း ခံရသူများ)။ *

†၁၉၅၄ ဩဂုတ်လ ၉ ရက်။

အမှုရေးစာချွန်တော်အတွက် လျှောက်လွှာ။ ။၁၉၅၃ ခုနှစ်၊ တရားလွှတ်တော်ချုပ် နည်းဥပဒေ အမိန့် ၂၁၊ နည်းဥပဒေ ၀ အရ၊ သတ်မှတ်သည့်ကာလစည်းကမ်း သတ်ပြက္ခဒိန်လ သုံး လ ကျော်လွန်မှတင်သွင်းခြင်း။ ။စည်းကမ်းသတ်အက်ဥပဒေ ပုဒ်မ ၅ အရ၊ စီရင်ချက်ကို ပြန်လည်သုံးသပ်ခြင်း အသစ်ပြင်ဆင်ဆုံးဖြတ်ရန် (Review) လျှောက်လွှာနှင့်စပ်လျဉ်း၍၊ ကုန်လွန်ခဲ့သောအချိန်ကာလကို နုတ်ပယ်သင့် မသင့်။ ။၁၉၁၁ ခုနှစ်၊ နိုင်ငံတော်ဝိနိစ္ဆယဌာနအက်ဥပဒေ ပုဒ်မ ၂၀ (၄) နှင့် ပုဒ်မ ၂၂ (၁) (ခ)။ ။ဝိနိစ္ဆယဌာနမှမိမိ၏စီရင်ချက်ကို ပြန်လည်သုံးသပ်နိုင်ခွင့်မရှိ။ ။ဝိနည်းမိုရ်ဆရာတော်များသည်၊ လိုသောအခါ၊ သက်ဆိုင်သော ဝိနည်းမိုရ်ဆရာတော်များ၏သြဝါဒကိုခံယူနိုင်ခွင့်။

စည်းကမ်းသတ်အက်ဥပဒေ ပုဒ်မ ၅ သည်၊ အယူခံမှု၊ သို့တည်းမဟုတ် စီရင်ချက်ကို ပြန်လည်သုံးသပ်၍ပြင်ဆင်ရန် (Review) လျှောက်လွှာ၊ သို့တည်းမဟုတ် တည်ဆဲ ဥပဒေ တခုခုက၊ ၎င်းနှင့်သက်ဆိုင်စေရမည်ဟူ၍ ပြဋ္ဌာန်းထားသောလျှောက်လွှာနှင့်သာသက်ဆိုင်သည်။ အမှုခံခါစာချွန်တော်အတွက် လျှောက်လွှာများနှင့်သက်ဆိုင်စေရမည်ဟု ဥပဒေ ပြဋ္ဌာန်းချက်တစုံတရာမရှိ။

၎င်းအက်ဥပဒေ ပုဒ်မ ၅ အရ၊ တိုက်ခိုက်သက်ဆိုင်သောအမှုများမှာဝင်၊ စီရင်ချက်ကို ပြန်လည်သုံးသပ်ပြီးပြင်ဆင်ပေးရန် (Review) အတွက် လျှောက်လွှာတင်၍ထားခဲ့ရုံမျှသည်၊ အချိန်ကာလတိုးပေးရန် လုံလေးက်သောအကြောင်းမဟုတ်ခေ့။ ။ထိုတင်သွင်းသောလျှောက်လွှာပေါ်ဟူ၍၊ ဖေါ်ပြသောပြင်ဆင်ရန် အကြောင်းများသည်၊ အကြောင်း

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* ၁၉၅၃ ခုနှစ်၊ တရားမအသေးအဖွဲလျှောက်လွှာ အမှတ် ၇၄။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိန်းမောင်၊ လွှတ်တော်ချုပ် တရားဝန်ကြီးဦးမြင့်သိန်းနှင့် လွှတ်တော်တရားဝန်ကြီး ဦးသောင်းစိန်တို့၏ရှေ့တော်တွင်ကြားနာ၍၊ နိုင်ငံတော် တရားဝန်ကြီးချုပ်အမိန့်ချမှတ်သည်။

၁၉၅၄

ဆရာတော်ဦးဩဘာသနှင့် ဆရာတော်ဦးရေဝတပါ (၅)။

ယုတ္တိရှိသော၊ သင့်လျော်သောအကြောင်းများဖြစ်မှသာလျှင်၊ ရုံးတော်ကအချိန်ကာလကိုးရှိပေးနိုင်သည်။

ကာလစည်းကမ်းသတ်အက်ဥပဒေ ပုဒ်မ ၅ နှင့် မသက်ဆိုင်သော စာချုပ်တော်များအတွက် လျော်ကြွာအလို့ငှါမှာမူကား၊ လျော်ကြွသူသည်၊ မိမိအားတရားဥပဒေကပေးချီထားသောသက်သာခွင့်ကိုရအောင် ဆောင်ရွက်၍၊ ကုန်လွန်သောအချိန်များကိုသာလျှင်၊ ကာလစည်းကမ်းသတ်ရေတွက်ရာတွင် ချန်လှပ်ခွင့်ပြုသင့်သည်။

[Ashanulla v. The Collector of Dacca and others, I.L.R. 15 Cal. 243 at 244; Gandhinagar Motor Transport Society v. State of Bombay, A.I.R. 1954 Bom. 202 at 203 များကိုကိုးကားသည်။]

၁၉၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဌာနအက်ဥပဒေ ပုဒ်မ ၂၂ (၁) (ခ) အရ၊ နိုင်ငံတော်ဝိနိစ္ဆယဌာနမှ မိမိ၏စီရင်ချက်ကို ပြန်လည်သုံးသပ်ပြင်ဆင်ပြောင်းလွဲနိုင်ခွင့်မရှိ။

၎င်းအက်ဥပဒေ ပုဒ်မ ၂၀ (၄) အရ၊ ငိနည်းဓိဂ်ရဆရာတော်များသည်၊ လိုသောအခါ၊ သက်ဆိုင်ရာဩဝါဒရိယဆရာတော်များ၏ ဩဝါဒကို၊ ခံယူနိုင်ခွင့်ရှိပါသည်။ မသက်ဆိုင်သောငိနည်းဓိဂ်ဆရာတော်များနှင့်တိုင်ပင်ခြင်းမှ ရှောင်ရှားတော်မူအပ်ပါသည်။

မစ္စတာ ကာဆင်၊ မေတ္တာရပ်ခံသူအတွက်။

ဦးချန်တွန်း (နိုင်ငံတော်ရွှေနေချုပ်ကြီး) နှင့် ဦးဘစိန် ပဋ္ဌမမှစတုတ္ထအထိ မေတ္တာရပ်ခံခြင်းခံရသူများဘက်မှ။

ဦးသွန်းမောင် ပဉ္စမ မေတ္တာရပ်ခံခြင်းခံရသူအတွက်။

ဦးသိမ်းမောင်။ ။မန္တလေးမြို့၊ အနောက်ပြင် အလွှာကပ္ပ၊ မြို့သာကျောင်းတိုက်အတွင်း၌၊ လွှထောင်ကျောင်းနှင့် မှန်ကျောင်းတို့ တည်ရှိကြ၏။ လွှထောင်ကျောင်းဘုန်းတော်ကြီး ဦးဩဘာသသည်၊ ထိုတိုက်အတွင်း၊ ဝင်းခြံခတ်ရာ၌ မှန်ကျောင်းဘက်ရှိ တဲကျောင်းကလေး၏ အလယ်မဟိုဓါတိုင်တည့်တည့်မှ ဝင်းခြံကာ၍ ခွဲထွင်ယူသားပါကြောင်းနှင့်မူလ မှန်ကျောင်းဆရာတော်၏ တပည့်များဖြစ်ကြသော ဦးနန္ဒိယ၊ ဦးဘာစရ၊ ဦးမေ့သာရနှင့်ဦးဥာဏိန္ဒတို့က၊ လွှထောင်ဘုန်းကြီး ဦးဩဘာသအပေါ်တွင် မန္တလေးမြို့၊ အရှေ့ခမြာက်ခြံနယ် ဝိနိစ္ဆယဌာနတွင် တရားစွဲဆိုခဲ့ကြသည်။ ထိုဝိနိစ္ဆယဌာနကလည်း ထိုအမှုကိုကြားနာစစ်ဆေးပြီးလျှင်၊ အောက်ပါဒေတိုင်း ဒီရင်ချက်ချမှတ်ခဲ့လေသည်။

(၁) လွှထောင်ကျောင်း ဘုန်းကြီး ဦးဩဘာသသည်၊ ရှေးမူလ စည်းရုံးဟောင်း ဖြစ်သော ရောင်းနှ၏ အလယ်မဟိုတည့်တည့်မှ အလွှာကပ္ပအရှေ့စည်းရိုးနိုဝိတ်ထိ ကြောင့်တန်းစွာ ရှေ့ပြောင်းခတ်ထားစေ။

၁၉၅၄

ဆရာဘော်ဦးသြဘာသနှင့် ဆရာတော်ဦးရေဝတပါ (၅)။

(၂) လက်ဒိုစည်းရိုးနှင့် ဆုံးဖြတ်ချက်အရ၊ ရွှေပြောင်းခတ်ထားရမည့် စည်းရိုးသစ်တို့၏ အကြားမြေပေါ်၌ သစ်ပင်တို့အတွက် ဦးဥာဏိန္ဒနှင့်အပေါင်းပါ သံဃာများက၊ ၎င်းအပင်များ၏ အသီးဘန့် ၁၀ ပုံ၊ ၁ ပုံကို အလှူကပွဲတိုက်ဘွင်းရှိ၊ သံဃာများအား ဝေငှလှူဒါန်းရမည်။

ဦးသြဘာသက ထိုဝိနိစ္ဆယစီရင်ချက်ကိုမကျေနပ်၍မန္တလေးမြို့၊ ခရိုင်ဝိနိစ္ဆယဌာနဲ့သို့ အယူခံဝင်ရာတွင် အောက်ဝိနိစ္ဆယဌာနတွင် စောဒကပုဂ္ဂိုလ်များဖြစ်ကြသော ဦးဥာဏိန္ဒ၊ ဦးအာစရ၊ ဦးဓမ္မသာရ၊ ဦးနန္ဒိယ လေးပါးလုံးကိုစုဒိတကအဖြစ်နှင့်မထည့်ဘဲ ဦးဥာဏိန္ဒတပါးတည်းကိုသာ စုဒိတကအဖြစ် ထည့်၍အယူခံဝင်ခဲ့လေသည်။ သို့ရာတွင် ခရိုင်ဝိနိစ္ဆယဌာနကအောက်ဝိနိစ္ဆယဌာန၏ဝိနိစ္ဆယစီရင်ချက်ကို လုံးဝပယ်ဖျက်ပြီးလျှင် အောက်ပါအတိုင်းဝိနိစ္ဆယစီရင်ချက်ချလိုက်လေသည်။

(၁) ဦးသြဘာသ သည်ပင်လျှင် အခံနှင့်တကွ သစ်ပင်များကို ရက္ခိတဂေါဝိတအဖြစ်ဖြင့် စောင့်ရှောက်စေ။

(၂) ၎င်းသံဃိတမြေပေါ်၌ရှိသော သစ်ပင်သစ်သီးများကို သံဃာတော်များအား၊ ဒဿမ-ဘာဂ ပြု၍လှူဒါန်းပြီးသုံးဆောင်စေ။

သို့အတွက် ဦးဥာဏိန္ဒ၊ ဦးအာစရ၊ဦးဓမ္မသာရနှင့်ဦးနန္ဒိယတို့ကမန္တလေးမြို့၊ နိုင်ငံတော် ဝိနိစ္ဆယဌာနသို့ အယူခံဝင်ခဲ့ကြလေသည်။ထိုအခါထိုဝိနိစ္ဆယဌာန၏ တာဝန်ခံဆရာတော်က (ခရိုင်ဝိနိစ္ဆယဌာန၌ စောဒနာဝင် စုဒိတက ကရားရုံးအဖြစ် မပါမရှိပါဘဲလျက်၊ နိုင်ငံတော် ဝိနိစ္ဆယဌာနသို့စောဒနာဝင်လျောက်လွှာတင်သွင်းသောအခါ ရှင်အာစရ၊ ရှင်ဓမ္မသာရ၊ ရှင်နန္ဒိယတို့က ပဌာနအနေမျိုးနှင့် သည့်သွင်း၍ စောဒနာဝင်လွှာတင်သွင်းခြင်းသည် တရားနှင့်မညီညွတ်သောကြောင့်) ဟု အကြောင်းပြပြီးလျှင် ထိုရဟန်းတော် သုံးပါးကို စောဒနာဝင်တရားလိုအဖြစ်မှ ပယ်လိုက်လေသည်။

နောက်ဆုံး၌ နိုင်ငံတော်ဝိနိစ္ဆယဌာနသည်၊ အောက်ပါအတိုင်း ဝိနိစ္ဆယစီရင်ချက်ချလိုက်ခဲ့ပေသည်။

(၁) သခ်ၤကၠေးကျောင်းကလေးနှင့် ခတာဝင်းတက်ရေတွင်းခုံ၏ မြောက်ဘက် ဗဟိုတည့်တည့် ဒန္ဓေ့ အနောက် ဝင်းခြံကိုခတ်ထားစေ။

၁၉၅၄

ဆရာတော်
ဦးဩဘာသ
နှင့်
ဆရာတော်
ဦးရေဝတ
ပါ (၅)။

(၂) ဦးဩဘာသ စိုက်ထားသော သစ်ပင်များကို ရှင်ဥာဏိန္ဒတို့က ဦးဩဘာသ၏ခွင့်ပြုချက်မရဘဲသုံးစွဲခုတ်ဖြတ်ခြင်းမလုပ်ရ။

(၃) ၎င်းသံသိတ မြေပေါ်၌ရှိသောသစ်ပင်များကို (ဒသမဘာဂ) ဆယ်တို့ တတို့ကို တိုက်သံဃာအား လှူဒါန်းပြီး သုံးဆောင်စေ။

ယခု ဤရုံးတော်ရှေ့ရှိ အမှုမှာ နိုင်ငံတော်ဝိနိစ္ဆယဥာနဓ၏ ဝိနိစ္ဆယစီရင်ချက်ကို ပယ်ဖျက်ရန် ဦးဩဘာသက အမှုခေါ် စာချုပ်တော် တောင်းဆသောအမှုဖြစ်သည်။

ပဌမမှ စတုတ္ထအထိ စုဒီတက ပုဂ္ဂိုလ်များဖြစ်တော်မူကြသော နိုင်ငံတော်ဝိနည်းမိရိုးဆရာတော်များအတွက် လိုက်ပါဆောင်ရွက်သော ပညာရှိနိုင်ငံတော်ရှေနေချုပ်ကြီးနှင့် ပဌမစုဒီတကဖြင့်သော ဦးဥာဏိန္ဒအတွက် လိုက်ပါဆောင်ရွက်သော ပညာရှိ လွတ်တော်ရှေနေကြီးက ဦးဩဘာသ၏ အမှုခေါ် စာချုပ်တော်အတွက် စာလွှာမှာ ကာလပရိစ္ဆေဒကျော်လွန်၍နေသော စာလွှာဖြင့်ကြောင်းနှင့် ဦးစွာ ကန့်ကွက်ခဲ့ကြသည်။ သို့အတွက် ဤရုံးတော်က ဤအချက်ကို ရှေးဦးစွာ စီရင်ဆုံးဖြတ်ရပေမည်။

နိုင်ငံတော် ဝိနိစ္ဆယဥာနသည် မိမိ၏ဝိနိစ္ဆယစီရင်ချက်ကို ၁၉၅၂ ခုနှစ်၊ မေလ ၁၆ ရက် (၁၃၁၄ ခုနှစ်၊ ကဆုန်လပြည့်ကျော် ၀ ရက်) နေ့တွင် ချခဲ့လေသည်။

ဦးဩဘာသသည်၊ မိမိ၏ အမှုခေါ် စာချုပ်တော်အတွက် အလွှာကို ဤရုံးတော်၌ ၁၉၅၃ ခုနှစ်၊ ဇူလိုင်လ ၁၈ ရက်နေ့တွင်မှတင်သွင်းခဲ့လေသည်။ တနည်းအားဖြင့်ဆိုသော်၊ နိုင်ငံတော် ဝိနိစ္ဆယဥာနက စီရင်ချက်ချပြီးသည့်နောက်တနှစ်နှစ်လနှင့် နှစ်ရက်ကြာမှ အမှုခေါ် စာချုပ်တော်အတွက် အလွှာကိုတင်သွင်းခဲ့လေသည်။

ထိုစဉ်အခါက အတည်ဖြစ်နေသော ၁၉၄၈ ခုနှစ်၊ တရားလွှတ်တော်ချုပ်နည်းဥပဒေအမိန့် ၂၁၊ နည်းဥပဒေ ၇ မှာလည်း အောက်ပါအတိုင်းဖြစ်သည်။

"၇။ တိုင်တန်းစွဲဆိုသည့်အမိန့်စာကိုသော်၎င်း၊ အမှုတွဲကိုသော်၎င်း၊ မှုခင်းကိုသော်၎င်း၊ ပြိုမှုချက်ကိုသော်၎င်း၊ သင့်မျှစဉ်းစားပြီးကုင်ပြီးသည်နောက် ငြင်းပိန် လသုံးလအတွင်း စာချုပ်တော်လျှောက်တောင်းခြင်း မပြုခဲ့လျှင် မည်သည့်အမှုခေါ် စာချုပ်

တော်ကိုသော်ငင်း၊ တားမြစ်စေ စာချုန်တော်ကိုသော်ငင်း ချပေးထုတ်ဆင့်ခြင်းမပြုရ။''

၁၉၅၄

ဆရာတော် ဦးဩဘာသ နှင့် ဆရာတော် ဦးရေဝတ ပါ (၅)။

ယခုအတည်ဖြစ်လျက်ရှိသော ၁၉၅၃ ခုနှစ်၊ တရားလွှတ်တော်ချုပ် နည်းဥပဒေများအမိန့် ၂၁၊ နည်းဥပဒေ ၈ မှာလည်း သည်အတိုင်းပင် ဖြစ်သည်။ သို့အတွက် ဦးဩဘာသ၏အမှုခေါ် စာချုန်တော်အတွက် အလွှာသည် မျက်မြင်အားဖြင့် ကာလစည်းကမ်း သတ်မှတ်စွာ ကျော်လွန်၍နေသည်။

သို့ကာလစည်းကမ်းသတ်မှတ်စွာ ကျော်လွန်၍နေသော်လည်း၊ ဦးဩဘာသသည် ကာလစည်းကမ်းသတ်တိုးချဲ့၍ပေးပါရန် ဤရုံးတော်တွင် စတင်သွင်းခြင်းလည်း မပြုခဲ့။ တဘက်အမှုသည်များက သူ၏အလွှာမှာ ကာလစည်းကမ်းသတ်ကျော်လွန်နေပြီ ဖြစ်ကြောင်း၊ သို့အတွက် ဤရုံးတော်က ငင်းကိုပယ်ရန်သာရှိကြောင်း။ ကန့်ကွက်ကြသောအခါမှာလည်း (မန္တလေးမြို့၊ နိုင်ငံတော်ဝိနိစ္ဆယဌာနရုံးတော်မှ နောက်ဆုံးအမိန့် ချမှတ်ပေးပို့စာများအရ၊ ရက်ပေါင်း ၉၀ မကျော်လွန်သေးခြင်း) ကိုသာလျှင် အကြောင်းပြု၍၊ ပြန်ကြားလွှာ တင်သွင်းခဲ့သည်။

ဦးဩဘာသ၏ ပြန်ကြားလွှာတွင် ရည်ညွှန်းသော နောက်ဆုံးစာမှာ၊ ၁၉၅၃ ခုနှစ်၊ဧပြီလ ၂၁ ရက် (၁၃၁၅ ခုနှစ်၊ ကဆုန်လဆန်း ၉ ရက်) နေ့စွဲပါ နိုင်ငံတော် ဝိနိစ္ဆယဌာနတာဝန်ခံ ဆရာတော်ဘုရား၏ အမိန့်ဖြစ်သည်။ထိုအမိန့်မှာ အောက်ပါအတိုင်း ဖြစ်သည်။

> ''ကိစ္စ။ ။မန္တလေးမြို့၊ အလွှကပ္ပတိုက် လွှထောင်ကျောင်းနေ ဦးဩဘာသ ကခံလိုက်နာရမည်။ နိုင်ငံတော်ဝိနိစ္ဆယဌာန၏အလွှကပ္ပတိုက်ဝင်းထရံကာအဓိကရုဏ်းမှု စီရင်ဆုံးဖြတ်ချက်အရ၊ ၁၃၁၅ ခုနှစ်၊ နယုန်လအတွင်းပြီးစီးအောင်လိုက်နာ၍ပြီးလုပ်ရမည်။
>
> အကယ်၍ မလိုက်နာခဲ့ပါလျှင် ဝိနိစ္ဆယဌာနအက်ဥပဒေပုဒ်မ ၂၄ အရ၊ သက်ဆိုင်ရာလူရုံးသို့ ဒေကြောင်းကြားရလိမ့်မည်ဖြစ်ကြောင်း သိစေလိုက်သည်။
>
> ထင်းအမိန့်အရ၊ စာတင်သွင်းနေရန်မလိုတော့ပြီဖြစ်ကြောင်း။''

ဤအမိန့်မှာ နိုင်ငံတော် ဝိနိစ္ဆယဌာန၏ စီရင်ချက်အတိုင်း လိုက်နာရမည်။ မလိုက်နာလျှင် ဇာရီလုပ်ရန် လူရုံးသို့အကြောင်းကြားလိမ့်မည်ဟု သိစေလိုက်

၁၉၅၄

ဆရာတော်
ဦးဩဘာသ
နှင့်
ဆရာတော်
ဦးရေဝတ
ပါ (၅)။

သည့် အမိန့်မျှသာဖြစ်သည်။ သို့အတွက် နိုင်ငံတော် ဝိနိစ္ဆယဌာနက စီရင်ချက် ချပြီးသည့်နောက် ထိုစီရင်ချက်ကို ပယ်ဖျက်ရန် အမှုခေါ် စာချွန်တော်အတွက် အလွှာတင်သွင်းလိုလျှင် ပြက္ခဒိန် လသုံးလအတွင်း တင်သွင်းရမည်ဟူသောစည်း မျဉ်းနှင့် မည်သို့မျှ မသက်ဆိုင်သောအမိန့်ဖြစ်သည်။

ထိုအမိန့်အလျောင် နိုင်ငံတော်ဝိနိစ္ဆယဌာနတာဝန်ခံ ဆရာတော်က ၁၉၅၂ ခုနှစ်၊ ဇူလိုင်လ ၁၆ ရက်နေ့ဖြင့် ဦးဩဘာသထံသို့ ပေးသောစာတစောင်ရှိ ပေလေးသည်။ ထိုစာမှာ အောက်ပါအတိုင်းဖြစ်သည်။

> "ကိစ္စ။ ။ဆုံးဖြတ်စီရင်ချက် ရေးသားရင်းဖြစ်သော ဆင်တဲဆရာတော်၏ (ဖြေရှင်း တောင်းပန်ချက်နှင့်ပင်လျှင်..... ဗန်းမော် တိုက်၌ ဖြစ်ပွါးသော အမှုများကို နှလုံးထားစေတော်မူ၍ ကျေစေလိုကြောင်း) မေတ္တာရပ်ခံပါသည်။"

ထိုစာသည်လည်း မျက်မြင်အားဖြင့် ကာလစည်းကမ်းသတ် ဆိုင်ရာနည်း ဥပဒေကို ထိခိုက်နိုင်သောစာမဟုတ်ချေ။

ထို့မှတပါး ထိုစာကိုရပြီးသည့်နောက် တနှစ်နှင့်နှစ်ရက်ကြာမှ ဦးဩဘာသသည် အမှုခေါ်စာချွန်တော်အတွက် ဤရုံးတော်တွင် အလွှာတင်သွင်းခဲ့သောကြောင့် ထိုစာကိုရသောနေ့မှစ၍ ရေတွက်လျှင်လည်း ကာလစည်းကမ်းသတ် ကျော်လွန်၍နေမည်သာ ဖြစ်သည်။

ဦးဩဘာသ၏ ပဉ္စာဒှိ လွှတ်တော်ရှေ့နေကြီးကမူကားနိုင်ငံတော်ဝိနိစ္ဆယဌာနအမှုတွဲတွင် ပါရှိသော ဦးဩဘာသက နိုင်ငံတော် ဝိနိစ္ဆယဌာနတာဝန်ခံ ဆရာတော်ထံ တင်သွင်းခဲ့သော စာ သုံးစောင်ကို ရည်ညွှန်း၍ လျှောက်ထားသည်။ ပဌမစာမှာ ၁၃၁၄ ခုနှစ်၊ နယုန်လဆန်း ၄ ရက် (၁၉၅၂ ခုနှစ်၊ မေလ ၂၇ ရက်) နေ့စွဲပါ စာဖြစ်ပြီး ထိုစာတွင် (ယခုအသနားခံစာလွှာသည်၊ တာဝန်ခံဆရာတော်ကြီးက လက်ခံတော်မူ၍ အသစ်တဖန် ဆုံးဖြတ်ချက်ပေးသနားစေလိုကြောင်း ညွှတ်ပြောင်းငိုကျိုး လက်စုံမိုး၍ လျှောက်လွှာ တင်သွင်းပါသည့် ဘုရား) ဟု ပါရှိသည်။ သို့အတွက် ထိုစာသည် အသစ်ပြင်ဆင်ဆုံးဖြတ်ရန် (Review) အတွက် တင်သွင်းသော လျှောက်လွှာဖြစ်သည်ဟု အဆိုရှိသည်။ ထိုစာတွင် အသစ်ပြင်၍ဆုံးဖြတ်ရန်အောက်ပါအကြောင်းပြချက်ပါ၏သည်။

> "၁၃၁၄ ခုနှစ်၊ ကဆုန်လပြည့်ကျော် ၈ ရက်နေ့က ဆုံးဖြတ်ချက်ကို ကိုယ်ဘိုင်ကြားနာခဲ့ရသည့်နှင့် ယခင်လပြည့်ကျော် ၁၃ ရက်နေ့ မိတ္တူကူး၍ ကြည့်ရှုပြန်သော်၊ မတူကွဲလွဲခြင်းဖြစ်ပါသည်။

ကွဲလွဲပုံကြားနာခဲ့ရသည်မှာ ကျောင်းကလေးနှင့် တံစက်မြိတ် နှင့် တန်းတန်းအရှေ့ဒေသနောက် ဝင်းဆင်ခံတစ်စေ။ ယခုပါရှိသည်မှာ ကျောင်းကလေးနှင့် ကောင်းကင်၊ ရေတွင်းခုံ၏ မြောက်ဘက် ဗဟိုဘည်တည့် အရှေ့ဒေနောက် ဝင်းထဲခံတစ်ထားစေဟု ပါရှိပါသည်။''

၁၉၅၄

ဆရာတော် ဦးဩဘာသ နှင့် ဦး ဆရာတော် ဦးရေဝတ ပါ (၅)။

ဦးဩဘာသ၏ ပညာရှိ လွှတ်တော်ရှေ့နေကြီးက ဦးဩဘာသသည်၊ "အထက်ပါ အကြောင်းပြချက်နှင့် ပြင်ဆင်အမိန့်ချမှတ်ပါရန် တာဝန်ခံဆရာတော်အား လျှောက်ထားပြီးဖြစ်သည့်အတွက် စည်းကမ်းသတ် အက်ဥပဒေ ပုဒ်မ ၅ အရ၊ ထိုသို့လျှောက်ထားခြင်းနှင့် စပ်လျဉ်း၍ ကုန်လွန်ခဲ့သော အချိန်ကာလကို ကာလစည်းကမ်းသတ် ရေတွက်ရာတွင် နှုတ်ပယ်သင့်ပါသည်ဟု လျှောက်ထားသည်။ စင်စစ်သော်ကား ထိုအက်ဥပဒေပုဒ်မသည်၊ အယူခံမှု၊ သို့တည်းမဟုတ် စီရင်ချက်ကိုပြန်လည်သုံးသပ်၍ ပြင်ဆင်ရန် (Review) လျှောက်လွှာ၊ သို့တည်းမဟုတ် အယူခံဝင်ခွင့်လျှောက်လွှာ၊ သို့တည်းမဟုတ် တည်ဆဲဥပဒေတခုခုကို ဖျင်းနှင့်သက်ဆိုင်စေရမည်ဟူ၍ ပြဋ္ဌာန်းထားသောလျှောက်လွှာနှင့်သာ စပ်ဆိုင်သည်။ ထိုပုဒ်မသည်၊ အမှုခေါ်စာချွန်တော်အတွက် လျှောက်လွှာများနှင့်လည်း စပ်ဆိုင်စေရမည်ဟု ဥပဒေပြဋ္ဌာန်းချက်တစုံကရာမရှိ။ သို့ဖြစ်၍ ထိုပုဒ်မသည်၊ ဦးဩဘာသ၏ အမှုခေါ် စာချွန်တော်အတွက် လျှောက်လွှာနှင့်မစပ်ဆိုင်။ သို့ရာတွင် တဘက်မှ လိုက်ပါဆောင်ရွက်သော နိုင်ငံတော် ရှေ့နေချုပ်ကြီးက ဤရုံးဘော်သည်၊ ၁၉၅၃ ခုနှစ်၊ တရားလွှတ်တော်ချုပ် နည်းဥပဒေအမိန့် ၂၀၊ နည်းဥပဒေ (၃) အရ၊ အချိန်တိုး၍ ပေးရန်သင့်မသင့် စဉ်းစားချင့် ထိုပုဒ်မ ၅ ၏ ဒုတိယဧသဘောကိုသော်၎င်း၊ ထိုပုဒ်မ ၅ ဆိုင်ရာ စီရင်ထုံးများ၏ အခြေခံသဘောကိုသော်၎င်း၊ လိုက်နာနိုင်ပါသည်ဟု ဝန်ခံသည်။ သို့အတွက် ၎င်းတို့အရ၊ ဦးဩဘာသအား အချိန်တိုး၍ ပေးရန်သင့်မသင့်။ ဤရုံးတော်ကာ စဉ်းစားဆောင်ရွက်ရမည်။ သို့စဉ်းစားဝေဘန်သောအခါ၊ ဤရုံးတော်သည် အောက်ပါအတိုင်း တွေ့မြင်ရသည်။

ကာလစည်းကမ်းသတ် အက်ဥပဒေပုဒ်မ ၅ အရ၊ တိုက်ရိုက် သက်ဆိုင်သော အမှုများမှာပင် စီရင်ချက်ကို ပြန်လည်သုံးသပ်ပြီး ပြင်ဆင်ပေးရန် (Review) အတွက် လျှောက်လွှာတင်၍ ထားခဲ့ခြင်းမျှသည်၊ အချိန်ကာလတိုး၍ ပေးရန် လုံလောက်သောအကြောင်းမဟုတ်ချေ။ ထိုကင်းသွင်းသောလျှောက်လွှာတွင် ဖော်ပြသောပြင်ဆင်ရန် အကြောင်းများသည် အကြောင်းယုတ္တိရှိသော သင့်လျော်သောအကြောင်းများဖြစ်မှသာလျှင်၊ ရုံးတော်က အချိန်ကာလတိုး၍

၁၉၅၄

ဆရာတော်
ဦးဩဘာသ
နှင့်
ဆရာတော်
ဦးဇေဝတ

ပေးနိုင်သည်။ အကြောင်းယုတ္တိမရှိသော မသင့်လျော်သောအကြောင်းများကိုပြ၍ ထိုကဲ့သို့သော လျောက်လွှာကို တင်သွင်းခဲ့သော်လည်း၊ ရုံးတော်က အချိန် ကာလတိုး၍ ပေးနိုင်သည်မဟုတ်ချေ။ [1]

ပါ(၅)။

ကာလစည်းကမ်းသတ် အက်ဥပဒေ ပုဒ်မ ၅ နှင့် မသက်ဆိုင်သော စာချွန် တော်များအတွက် လျောက်လွှာအလို့ငှါမှာမူကား လျောက်သူသည် မိမိအား တရားဥပဒေက ပေးနိုင်ထားသော သက်သာခွင့်ကို ရအောင်ဆောင်ရွက်၍ ကုန် လွန်သောအချိန်များကိုသာလျှင် ကာလစည်းကမ်းသတ် ရေတွက်ရာတွင် ချန်လှပ် ခွင့်ပြုသင့်သည်။ [2]

ယခု အမှုမှာမူကား၊ ၁၃၁၁ခုနှစ်၊ ဝိနိစ္ဆယဌာန အက်ဥပဒေပုဒ်မ ၂၂ (၁) (ခ)တွင် (မည်သည့် စီရင်ချက်ကိုမျှ ချမှတ်ပြီးသည့်နောက်၊ ပြင်ဆင်ခြင်း ပြောင်းလဲခြင်းမပြုရ) ဟုအတည့်အလင်း ပါရှိသောကြောင့် နိုင်ငံတော်ဝိနိစ္ဆယ ဌာနမှ မိမိ၏စီရင်ချက်ကို ပြန်လည်သုံးသပ်ပြီး ပြင်ဆင် ပြောင်းလဲနိုင်ခွင့်မရှိ။သို့ အတွက်၊ ဦးဩဘာသမှာလည်း ထိုစီရင်ချက်ကို ပြောင်းလဲ၍ ပေးပါရန်၊ လျောက်ထား နိုင်ခွင့်မရှိ။ သို့ဖြစ်၍၊အသစ်တဖန် ဆုံးဖြတ်ချက် ပေးသနားပါရန် လျောက်ထားသောသူ၏ လျောက်လွှာ သည်လည်း သင့်လျော်သော လျောက် လွှာမဟုတ် သည်မျှသာမကသေး၊ အသစ်တဖန် ဆုံးဖြတ်ချက် ချပေးပါရန်၊သူပြု သော အကြောင်းမှာလည်း၊ အထက်တွင် ဖော်ပြခဲ့သည့်အတိုင်း၊ သူမိတ္တူကူး၍ ရသော စီရင်ချက်သည် ကြားနာခဲ့ရသော စီရင်ချက်နှင့် မတူခြင်းမျှသာဖြစ်သည်။ သူ၏အဆိုအရ၊ သူကြားနာခဲ့ရသည်မှာ (ကျောင်းကလေး၏တံစက်မိတ်နှင့်တန်း

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[1] See *Ashanulla* v. *The Collector of Dacca and others*, (1888) I.L.R. 15 Cal. 243 at p. 244 of which Petheram, C.J. observed: " We think that where it is not shown that there were reasonable grounds for making the application for review the mere presentation of it is not a reasonable or sufficient ground for not presenting the appeal within time . . . . . "

See also *Seshgiri Narayan Kamat and others* v. *Venkatesh Laxman Kamat and others*, A.I.R. (1927) Bom. 221.

CP. *Bisheshwar Pratab Sahi* v. *Parath Nath and another*, 39 C.W.N.1 at p. 9 of which their Lordships of the Privy Council observed: ". . . if their right of appeal has been lost, as to which they express no opinion, it was due to their own action in making an application for review, which cannot be supported."

[2] See *Gandhinagar Motor Transport Society* v. *State of Bombay*, A.I.R. (1954) Bom. 202 at p. 203 of which Chagla, C.J. observed with reference to an application for a writ;

" Now, we have had occasion to point out that the only delay which this Court will excuse in presenting a petition is the delay which is caused by the petitioner pursuing a legal remedy which is given to him."

၁၉၅၄

ဆရာတော် ဦးဩဘာသ နှင့် ဆရာတော် ဦးရေဝတ ပါ (၅)။

တန်းအရှေ့အနောက် ဝင်းထရံခတ်စေ) ဟု ကြားနာ ခဲ့ရပါလျက်၊ မိတ္တူတွင် (ကျောင်းကလေး၏ တောင်ဘက် ရေတွင်း ခုံ၏မြောက်ဘက် ဗဟိုတည့်တည့် အရှေ့အနောက်ဝင်းခြံခတ်ထားစေ) ဟုပါရှိနေကြောင်းအဆို ရှိသည်။ထိုအဆိုသည် မျက်မြင်အားဖြင့်၊ မှန်ပုံမပေါ်။ ကျောင်းကလေး၏ တံစက်မိတ်နှင့် တန်းတန်းဆိုသော်၊ ကျောင်းကလေးမှာ တံစက်မိတ် နှစ်ခုရှိမည်ဖြစ်သောကြောင့်၊ မည်သည့် တံစက်မိတ်ကို ဆိုလိုကြောင်း မကဲ့ပြားဘဲ ရှိလိမ့်မည်။ မိတ္တူတွင်ပါသည့်အတိုင်း (ကျောင်းကလေး၏ တောင်ဘက် ရေတွင်းခုံ၏ မြောက်ဘက်ဗဟိုတည့်တည့်) ဆိုလျှင်မူကား၊ တိကျပြတ်သားသည်။ သည်မျှသာမကသေး နိုင်ငံတော်ဝိနိစ္ဆယဌာန၏ ရှေ့နေချုပ်တွင် အချို့စာပိုဒ်များကို မျဉ်းဖြတ်ဆွဲပြီး ဖျက်ထားကြောင်းတွေ့ရသော်လည်း၊ ထိုဖျက်ထားသော စာပိုဒ်များတွင်၎င်း၊ ကျန်စာပိုဒ်များတွင်၎င်း ဦးဩဘာသသည် ကြားနာခဲ့ရသည် ဆိုသော (ကျောင်းကလေး၏ တံစက်မိတ် နှင့်တန်းတန်း) ဟူသောစကားများကိုမတွေ့ရချေ။

သို့ဖြစ်၍ ဦးဩဘာသ၏ အသစ်တဖန် ဆုံးဖြတ်ချက်ပေးသနားရန်လျှောက်လွှာသည်၊ ဥပဒေအရလည်း တင်သွင်းနိုင်ခွင့်မရှိသော လျှောက်လွှာဖြစ်သည့် အပြင် အကြောင်းယုတ္တိလည်းမရှိ၍ မသင့်မလျော်သော လျှောက်လွှာဖြစ်သည်။ ဤရုံးတော်ချုပ်၌ အမှုခေါ် စာချွန်တော်အာဏာက်လျှောက်လွှာအလို့ငှါ၊ထိုလျှောက်လွှာနှင့် စပ်လျဉ်း၍ ကုန်ခဲ့သောအချိန်ကာလကို ခွင့်လွှတ်ရန် အကြောင်းမရှိ။ ခွင့်မလွှတ်တန် လွှတ်သည်တိုင်အောင် ၁၃၁၄ ခုနှစ်၊ ဝါဆိုလပြည့်ကျော် ၁၄ ရက် (၁၉၅၂ ခုနှစ်၊ ဇူလိုင်လ ၂၁ ရက်) အထိသာလျှင်၊ ခွင့်လွှတ်နိုင်လိမ့်မည်၊ အဘယ်ကြောင့်ဆိုသော် ထိုနေ့တွင် နိုင်ငံတော်ဝိနိစ္ဆယဌာန တာဝန်ခံဆရာတော်က ဦးဩဘာသထံ (ဆုံးဖြတ်ချက် ရေးသားရင်းဖြစ်သော ဆင်တဲဆရာခတော်၏ ဖြေရှင်းတောင်းပန်ချက်နှင့်ပင်လျှင် ဗန်းမော်တိုက်၌ ဖြစ်ပွါးသော အမှုများကို နှလုံးထားတော်မူ၍ကျေအေးစေလိုကြောင်း) မေတ္တာရပ်ခံလိုက်သောကြောင့်ဖြစ်သည်။ ထိုနေ့မှစ၍ ရေတွက်လျှင်လည်း၊ဤရုံးတော်ရှေ့ရှိဦးဩဘာသ၏ အလွှာမှာ ဇာနှစ်ခန့်ကြာမှ တင်သွင်းသောအလွှာဖြစ်နေသေး၍၊ ကာလစည်းကမ်းသတ် များစွာ ကျော်လွန်၍ နေသေးသည်သာ ဖြစ်မည်။

ဦးဩဘာသ၏ ပညာရှိလွှတ်တော် ရှေ့နေကြီးအားကိုးသော ဒုတိယစာမှာ ဦးဩဘာသက နိုင်ငံတော် ဝိနိစ္ဆယဌာန တာဝန်ခံဆရာတော်ထံ ရက်စွဲမပါ တင်သွင်းသော (ကမ္မသက္ခာ စာတန်းလျှောက်လွှာ) ဖြစ်သည်။ ထိုစာမှာ နိုင်ငံတော် ဝိနည်းမိုရ် ဆရာတော်တို့၏ ပျက်ကွက်တိမ်းယိမ်းခြင်း လေးဌာနရှိကြောင်း (ဤလေးဌာနပျက်ကွက်မှုကြောင့် တပည့်တော်ကရွှေပြောင်းကာရံခြင်းစသည်ကို

၁၉၅၄

ဆရာတော်ဦးဩဘာသနှင့် ဆရာတော်ဦးရေဝတပါ (၅)။

မပြု၊ ဆရာတော်တို့က အာဏာပြု၍သော်၎င်း၊ ရုံး၊ ဂါတ် ဌာနမှုဝင်း လာန်ပြုပါက ကပည့်တော်က မည်သို့မျှ တားမြစ်လိမ့်မည်မဟုတ်ပါ) ဟု အကြောင်းကြားသိစေသောစာမျှသာဖြစ်သည်။ သို့ဖြစ်၍ ဤစာအတွက် ဦးဩဘာသအား ဤရုံးတော်ကွင် အလွှာတင်သွင်းရန်အချိန်ကာလပို၍ပေးရန်အကြောင်း တစုံတရာ မရှိခဲ့။

ဦးဩဘာသ၏ ပညာရှိလွှတ်တော်ရှေ့နေကြီး အားကိုးသော တတိယစာမှာ ဦးဩဘာသက နိုင်ငံတော်ဝိန္ဓယဌာန တာဝန်ခံဆရာတော်ဝံ (အလွန်အရေးကြီးသော အထူးလျှောက်လွှာ) ဟု ခေါင်းတပ်ပြီး ၁၃၁၄ ခုနှစ်၊ တော်သလင်းလပြည့်ကျော် ၁၅ ရက်နေ့စွဲဖြင့်တင်သွင်းသောစာဖြစ်သည်။ထိုစာမှာ သက်ဆိုင်ရာအမှုတွဲနှင့် မိမိတင်သွင်းပြီးဖြစ်သော စာလွှာစသည်တို့ကို တာဝန်ခံဆရာတော်ဘုရားက (သေချာစွာ သိုးမွှီးသိမ်းဆည်း၍ နောင်အရေးတစုံကြီလာပါက အလွယ်တကူရရှိတို့ရန် ထားသင့်ပါ၏ကြောင်း) ရေးသောစာမျှသာ ဖြစ်သည်။ ထိုစာသည်လည်း ဦးဩဘာသ၏ စာချွန်တော်အတွက် လျှောက်လွှာအတို့အချိန်ကာလ တိုးမြှင့်ပေးရန် သင့်မသင့်ဟူသောပြဿနာနှင့်တစုံတရာစပ်ဆိုင်သောစာမဟုတ်ချေ။

အထက်တွင် ဖော်ပြခဲ့သောအကြောင်းများကြောင့် ဦးဩဘာသအား အမှုခေါ် စာချွန်တော်အတွက် လျှောက်ရန် ဤရုံးတော်၌ ရက်တိုးမြှင့်မပေးနိုင်။ သူ၏လျှောက်လွှာသည် အလွန်ကာလကြာမြင့်စွာ စည်းကမ်းသတ် ကျော်လွန်နေပြီဖြစ်သည့်အတိုင်း တဘက်ကကန့်ကွက်ချက်ကို လက်ခံပြီးလျှင် ဤရုံးတော်သည် သူ၏လျှောက်လွှာကို ပလပ်ရမည်သာဖြစ်သည်။

သို့ရာတွင် သူ၏လျှောက်လွှာကို မပလပ်မီ သူ၏ပညာရှိ လွှတ်တော်ရှေ့နေကြီးက နိုင်ငံတော် ဝိန္ဓယဌာနသည်၊ စီရင်ချက်ကိုချပြီးမှ ပြင်၍ထားပါသည်ဟု စွပ်စွဲခဲ့သောကြောင့် ထိုစွပ်စွဲချက်မှန်တန်ရာသည်၊ မမှန်တန်ရာသည်ကို ဤရုံးတော်က စိစစ်လိုသေးသည်။ သို့စွပ်စွဲရာတွင် ထိုပညာရှိ လွှတ်တော်ရှေ့နေကြီးက နိုင်ငံတော် ဝိန္ဓယဌာန၏ စီရင်ချက်အခြေအနေကိုငင်း၊ စီရင်ချက်ချမှတ်ရာတွင် နိုင်ငံတော် ဝိနည်းမိုရ်အဖြစ်နှင့် ပါဝင်ခဲ့သော ဆင်တဲတိုက်သင်ဆရာတော်၏ စာကိုငင်း အားကိုးအားထားပြုသည်။

နိုင်ငံတော် ဝိန္ဓယဌာန၏ စီရင်ချက်မှာ၊ မူလစီရင်ချက်, အကြောင်းတွင်ပါသော စာပိုဒ်အချို့ကို မျှင်းတား၍၊ သို့မဟုတ် မျှင်းဖြတ်ဆွဲ၍ ပြင်ထားခြင်း၊စာရွက်ငယ်တခုကပ်လျက်ပါရှိခြင်း မှန်ပေ၏။ သို့ရာတွင် အဆိုပါစာပိုဒ်များကိုဖျက်ခြင်း၊ စာရွက်ငယ်ကို တပ်ခြင်းတို့မှာ စီရင်ချက်ချပြီးမှဖျက်ခြင်း၊ ကပ်ခြင်းဖြစ်သည်ဟူ၍

ဤရုံးတော်က ကောက်ယူနိုင်ရန်အကြောင်းတစုံတရာမရှိ။ တရားဥပဒေအရလည်း ဆန့်ကျင်ဘက် သက်သေခံတစုံတရာမရှိလျှင် နိုင်ငံတော် ဝိနိစ္ဆယဌာနသည်၊ ထိုပြင်ခြင်း၊ ကပ်ခြင်းတို့ကို စီရင်ချက်မချခင်က လုပ်ဆိုးလုပ်စဉ် လင်းမှန်အတိုင်း ပြုလုပ်ခဲ့သည်ဟူ၍သာ ဤရုံးတော်က ကောက်ယူရချေမည်။

၁၉၅၄
ဆရာတော် ဦးဩဘာသ နှင့် ဆရာတော် ဦးရေဝတ ပါ (၅)။

ဦးဩဘာသ၏ ပညာရှိလွတ်တော်ရှေ့နေကြီး အားကိုးအားထားပြုသော ဆင်တဲတိုက်သစ် ဆရာတော်၏ စာသည်လည်း သူအကြမ်းရေး၌ တင်သောစီရင်ချက်အကြမ်းကို နိုင်ငံတော် ဝိနိစ္ဆယဌာနသို့ တင်သွင်းသောအခါ သက်ဆိုင်ရာ နိုင်ငံတော် ဝိနည်းမိုရ်ဆရာတော်များက ပြင်ကြကြောင်းကိုသာ ဖော်ပြသော စာဖြစ်သည်။

ထိုမှတပါး ဦးဩဘာသ၏ ၁၃၁၅ ခုနှစ်၊ နယုန်လဆန်း ၄ ရက်နေ့စွဲပါ အသနားခံစာတွင် စီရင်ချက်ချစဉ်က သူကြားခဲ့ရပုံနှင့်နောက်စီရင်ချက်မိတ္တူတွင် ပါရှိပုံ မည်သို့ကွဲလွဲကြောင်းကို အတိအကျနေးသားဖော်ပြပြီးဖြစ်သည်။ ကြားနာခဲ့ရပုံမှာ (ကျောင်းကလေး၏ တံစက်မိတ်နှင့်တန်းတန်း အရှေ့အနောက်ဝင်းထရံခတ်စေ)ဖြစ်ပြီး၊ မိတ္တူမှာ (ကျောင်းကလေး၏ တောင်ဘက် ရေတွင်းခုံ၏ မြောက်ဘက် ဗဟိုတည့်တည့် အရှေ့အနောက် ဝင်းခြံခတ်ထားစေ)ဟု ပါရှိနေသည်ဟု ဆိုသည်။ ထိုအဆိုလည်းမမှန်နိုင်ကြောင်း၊ အထက်တွင်ဤရုံးတော်က အကျယ်ဝေဘန်၍ဆုံးဖြတ်ပြီးဖြစ်သည်။

သို့ဖြစ်၍ နိုင်ငံတော်ဝိနိစ္ဆယဌာနသည် မိမိ၏စီရင်ချက်ကိုချ၍ပြီးမှ ပြင်ဆင်ခဲ့သည်ဟူသော စွပ်စွဲချက်သည်အကြောင်းမသင့်သော စွပ်စွဲချက်မျှသာဖြစ်သည်ဟူ၍ ဤရုံးတော်က သဘောရသည်။

ဦးဩဘာသ၏ ပညာရှိလွတ်တော်ရှေ့နေကြီးက ဆင်တဲတိုက်သစ် ဆရာတော်၏စာကို အားကိုးလျက် ထိုဆရာတော်အကြမ်းရေးသား တင်ပြသောစီရင်ချက်ကို သက်ဆိုင်ရာ နိုင်ငံတော် ဝိနည်းမိုရ်ဆရာတော်များ ဆွေးနွေးကြရာတွင် မသက်ဆိုင်သော နိုင်ငံတော်ဝိနည်းမိုရ်ဆရာတော်တပါးလည်းပါ၍ နေကြောင်း၊ ထိုမသက်ဆိုင်သော ဝိနည်းမိုရ်ဆရာတော်နှင့် တိုင်ပင်ပြီးမှ စီရင်ချက်အကြမ်းကို ပြင်ဆင်ကြခြင်း ဖြစ်ကြောင်း၊ ထိုမသက်ဆိုင်သောနိုင်ငံတော် ဝိနည်းမိုရ်ဆရာတော်ကိုလည်း ဦးဩဘာသသည် အလျင်ကပင် ကန့်ကွက်ထားပြီးဖြစ်ကြောင်း၊ သို့အတွက် နိုင်ငံတော် ဝိနိစ္ဆယဌာန၏ စီရင်ချက်သည် မတည်ထိုက်ပါကြောင်း လျှောက်ထားသေးသည်။ မသက်ဆိုင်သော နိုင်ငံတော် ဝိနည်းမိုရ်ဆိုသည်မှာ အဂ္ဂမဟာပဏ္ဍိတ ဟံသာဝတီ ဆရာတော်ဘုရားဖြစ်သည်။ ထိုဆရာတော်ကို ဦးဩဘာသက ကန့်ကွက်ခဲ့သည် ဆိုရာမှာလည်း ယခင်က ယခုအချင်းဖြစ်ရာ

၁၉၅၄

ဆရာတော် ဦးဩဘာသ နှင့် ဆရာတော် ဦးရေဝတ ပါ (၅)။

ကျောင်းတိုက်မှာပင် ဝိဝါဒါအဓိကရုဏ်းမှုတခုဖြစ်ပေါ်ခဲ့ရာ၊ ထိုစဉ်က ဝိနိစ္ဆယဌာနများလည်းမရှိသေးသောကြောင့်မန္တလေးအရေးပိုင်မင်းက အဂ္ဂမဟာပဏ္ဍိတ ဟံသာဝတီဆရာတော်ဘုရားနှင့် အဂ္ဂမဟာပဏ္ဍိတ ဆရာတော် ဦးကြွယ်တို့အား လွှဲအပ်ခဲ့၍ ထိုဆရာတော်နှစ်ပါးတို့က ထိုအဓိကရုဏ်းကို ဆုံးဖြတ်ခဲ့ဘူးသောကြောင့်သာဖြစ်သည်။ သို့ဖြစ်၍ "သက်ဆိုင်ရာနိုင်ငံတော် ဝိနည်းဓိရ်ဆရာတော်များသည်၊ အခြားနိုင်ငံတော် ဝိနည်းဓိရ်ဆရာတော်ဖြစ်သော "အဂ္ဂမဟာပဏ္ဍိတ ဟံသာဝတီဆရာတော်ဘုရားနှင့် တိုင်ပင်ခဲ့ကြသည့်အတွက်သူတို့၏စီရင်ချက်သည် ပျက်ပြယ်စေရမည်ဟု ဆိုရန်အကြောင်းမရှိ။ ဦးဩဘာသ၏ ပညာရှိလွတ်တော် ရှေနေကြီး အားကိုးသော ဆင်တဲတိုက်သစ် ဆရာဘော်၏ စာအရပင်လျှင် သက်ဆိုင်ရာနိုင်ငံတော် ဝိနည်းဓိရ်ဆရာတော်များသည်၊ အဂ္ဂမဟာ ပဏ္ဍိတ ဟံသာဝတီဆရာတော်နှင့် တိုင်ပင်ပြီးသည့်နောက် တရားမှန်ပြီဟု ကျေနပ်အားရတော်မူကြကြောင်း အလွန်ထင်ရှားသည်။

သို့ရာတွင် သက်ဆိုင်ရာ ဝိနည်းဓိရ်ဆရာတော်များသည် မသက်ဆိုင်သော ဝိနည်းဓိရ် ဆရာတော်တပါးနှင့်တိုင်ပင်မိသည့်အတွက် ရုံးသည့်ဘက်မှ မကျေမနပ်ဖြစ်ကြောင်း၊ ဤအမှုတွင် တွေ့မြင်ရပြီဖြစ်သောကြောင့် နောင်ကို (ပရူပဝါဒ) ဘေးမှ ကင်းဝေးတော်မူကြစေရန် မသက်ဆိုင်သူ ဝိနည်းဓိရ်များနှင့် တိုင်ပင်ခြင်းမှ ရှောင်ရှားတော်မူကြလျှင် ကောင်းပါလိမ့်မည်။ ဤအချာ၌ ဝိနည်းဓိရ်ဆရာတော်များသည် ၁၃၁၁ ခုနှစ်၊ နိုင်ငံဘော် ဝိနိစ္ဆယဌာန အက်ဥပဒေ ပုဒ်မ ၂၀ (၄) ကို သတ်ပြုတော်မူကြပြီးလျှင် လိုသောအခါ သက်ဆိုင်ရာဩဝါဒါစရိယ ဆရာတော်များ၏ ဩဝါဒကို ခံယူကြလျှင် ကောင်းပါလိမ့်မည်။ ထိုပုဒ်မ ၂၀(၄)မှာ အောက်ပါအတိုင်းဖြစ်ပါသည်။

> "(၄) ခရိုင်၊ သို့မဟုတ် နိုင်ငံတော် ဝိနည်းဓိရ်ဆရာတော်များသည်၊ သင့်လျော်သည် ထင်မြင်လျှင်မိမိတို့ထံရှိ စောဒနာဝင်မှုနှင့် သက်ဆိုင်ရာ ဝိနည်းတရားတော် အချက်အလက်များနှင့် စပ်လျဉ်း၍ ဆိုင်ရာခရိုင်၊ သို့မဟုတ် နိုင်ငံတော်ဩဝါဒါစရိယ ဆရာတော်များ၏ဩဝါဒကို ခံယူနိုင်သည်။"

အထက်တွင် ဖော်ပြခဲ့ပြီးဖြစ်သည့်အတိုင်း ဦးဩဘာသ၏ အလွှာမှာကာလ စည်းကမ်းသတ်ကျော်လွန်၍နေပြီးဖြစ်သည့်အပြင် အချိန်ကာလတို့၍ မပေးဘဲ ပယ်လိုက်သော်လည်း၊ ဦးဩဘာသမှာ အကျိုးမယုတ်နိုင်။ တနည်းအားဖြင့် ဆိုသော် အချိန်ကာလ တိုးပေးပြီး လျှောက်လွှာပေါ်တွင်စီရင်ဆုံးဖြတ်လျှင်လည်း အကြောင်းထူးမည်မဟုတ်။ သို့အတွက် ဦးဩဘာသ၏ လျှောက်လွှာကို -ပယ်

၁၉၅၄

ဆရာတော်ဦးဩဘာသနှင့် ဆရာတော်ဦးရေဝတပါ (၅)။

လိုက်သည်။ သို့ရာတွင် နိုင်ငံတော် ဝိနိစ္ဆယဌာန၏ စီရင်ချက်မှာ အချောရေးကူးပြီးမှချသော စီရင်ချက်မဟုတ်ဘဲ စာကြွင်းပေါ်တွင် ပြင်ဆင်ဖြည့်စွက်ခြင်းများနှင့် ချမှတ်သော စီရင်ချက်ဖြစ်သည့်အပြင် စီရင်ချက်မချမှတ်မီ နိုင်ငံတော်ဝိနည်းဓိုရ်တပါးအဖြစ်နှင့်ပါခဲ့သော ဆင်တဲတိုက်သစ် ဆရာတော်၏စာအရေမသက်ဆိုင်သူ အခြားနိုင်ငံတော် ဝိနည်းဓိုရ်တပါးနှင့် တိုင်ပင်ခဲ့ကြောင်း ပါရှိနေ၍ ဦးဩဘာသသည်၊ ဤရုံးတော်တွင် အမှုခေါ် စာချွန်တော်အတွက် အကြောင်းမဲ့လျှောက်ထားခဲ့သည်ဟု မဆိုနိုင်၊ သို့အတွက် နှစ်ဘက်အမှုသည်များသည်၊ မိမိတို့၏တရားစရိတ်ကို မိမိတို့ခံကြရမည်။

တရားလွှတ်တော်ချုပ်

† ၁၉၅၄
ဩဂုတ်လ
၂၅ ရက်။

ဒေါ်ထွေး
နှင့်
မတင်ဦး*

မြန်မာဇဒ္ဓတာသာ မဇ္ဈသက်ဥပဒေ။ ။လင်ခံခြင်း မယားခံခြင်းဆိုင်ရာဥပဒေနှင့်အမွေခြင်းဆိုင်ရာ ဥပဒေကွဲပြားခြင်း။ ။သားကော်၊ ရွှေးမတို့သည်၊ သခင်၊ သားတို့နှင့်အတူအမွေဆိုင်များ ဖြစ်ပါသလား။

မထွေးသည်၊ သူ၏ယောကျ်မ ယောကျ်ားသူ ဦးထွန်း၏ပစ္စည်းကို၊ အုပ်ထိန်းစီရင်ခန့်ခွဲ ပေးစေလိုသည့်အမှု (Suit for Administration) စွဲဆိုခဲ့၏။ သူ၏ အဆိုလျှောတွင်၊ ဦးထွန်း၏ဇနီးဒေါ်ချစ်ဒုသည်၊အလျင်သေဆုံးခဲ့၍၊ဦးထွန်းသည်၊၁၉၄၆ ခုနှစ်၊ဖေဖော်ဝါရီလ ၁၄ ရက်နေ့တွင် သေဆုံးခဲ့ကြောင်း။ ဦးထွန်းသေဆုံးသောအခါ၊ ဦးထွန်းနှင့်ဒေါ်ချစ်စုမှ ပေါက်ပွားသော သား မောင်ကျောင်းနှင့် သမီး မတင်ဦး ကျန်ရစ်ခဲ့ကြောင်း။ မောင်ကျောင်းသည် သူ့ခင်ပွန်းဖြစ်၍ ၎င်းသည်ဘောဂိုရင်း သေဆုံးခဲ့ပြီ ဖြင်ကြောင်း။ သို့အတွက် မထွေးသည်၊ ဦးထွန်းသေဆုံးသောအခါ၊ ကျန်ရစ်ခဲ့သော၊ အမွေပစ္စည်းများ၏ ထက်ဝက်ကို၊ မြန်မာဇဒ္ဓတာသာတရား ဥပဒေအရ၊ရထိုက်ကြောင်း။ ။ထိုအမွေပစ္စည်းများသည်၊ မတင်ဦး လက်ရှိဖြစ်နေကြောင်း စသည်ဖြင့်ဖော်ပြခဲ့သည်။

တရားလွှတ်တော်တွင်း မထွေး၏ ပညာရှိလွှတ်တော်ရှေ့နေကြီးက၊မောင်ကျောင်း မသေ ယေးဘဲ၊ အသက်ရှင်လျက် ရှိနေသေးသည်ဟုသော၊ ဗေဒင်ဆုံးမ်း၏ စီရင်ဆုံးဖြတ်ချက်ကို၊ လက်ခံသည်။

ဆုံးဖြတ်ချက်။

မောင်ကျောင်းနှင့် နှမ မတင်ဦးတို့ အမွေမခွဲဝေကြရသေး။ အမွေပစ္စည်းများသည်၊ တင်ဦး လက်ရှိဖြစ်နေသောကြောင့်၊ မောင်ကျောင်းသည်၊ အမွေဆိုင်ရုံသာ ဆိုင်သေး၍၊ အမွေတွင်ပါဝင်သောပစ္စည်း ဘယ်ဟာတခုခုကိုမျှ၊ တသီးပုဂ္ဂလပိုင်ပြုဟု မဆိုနိုင်သေးသော သူဖြစ်သည်။ ။ဆိုင်ပင်ဆိုင်ပြီဖြစ်သော်လည်း၊ သူတပါးထံတောင်းရဦးမည့်အမွေစု၊ ဘောင်းရှိမရေရှင်၊ ရအောင်ပင်တရားစွဲရဦးမည့်အမွေစု၊ ဘယ်ပစ္စည်း ဘယ်ပစ္စည်းပါသည်၊ ဟူ၍ပင် မသိတတ်မှတ်ရေသေးသောအမွေစုကို၊ ကောက်ရောက်ရပြီးဟု အမှတ်ထားပြီး၊ လင်၊ သို့မဟုတ် မယားသည်၊နိသယနှင့်နှိုင်းသိတာ ဆောင်းအတိုင်း၊ဝင်ရှုံဆုံးပြီ ပိုင်ပြီဟူ၍ ယူဆရန်အကြောင်း မရှိ။ ။သို့ဖြစ်၍၊ ယခုအမွေမှာ၊ လင်ဖြစ်သော ပစ္စည်းတွင်၊ မယားသုံးပုံတပုံ ဆိုင်သည်ဟူသော လင်ခံခြင်း မယားခံခြင်း ဥပဒေအတွင်း ကျရောက်သောအမွေမဟုတ်ချေ။

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* ၁၉၅၄ ခုနှစ်၊ တရားမအယူခံမှုအမှတ် ၅။

† နိုင်ငံတော် တရားဝန်ကြီးချုပ် ဦးဘိမ်းမောင်၊ တရားလွှတ်တော်ချုပ် ဝန်ကြီး ဦးမြင့်သိန်းနှင့် လွှတ်တော်တရားဝန်ကြီး ဦးစံမောင်တို့ ရှေ့တော်တွင် ကြားနာ၍၊ နိုင်ငံတော် တရားဝန်ကြီးချုပ်က စီရင်ချက်ချမှတ်သည်။

မောင်ကျောင်းသည်၊ မဘင်ဦးနှင့် အမွေခွဲဝေကြ၍၊ မိမိ၏အစုတွင် ပါဝင်သော ပစ္စည်းများကို ရပြီးဖြစ်သော်၊ လင်ခင်း မယားခင်းဥပဒေအရ ထိုပစ္စည်းများတွင်၊ သုံးပုံတပုံကို ၎င်း၏မယား မထွေးကဆိုင်မည်။

မြန်မာလူမျိုးဗုဒ္ဓဘာသာဝင်တို့၏ လင်ခင်း မယားခင်းဆိုင်ရာဥပဒေနှင့်အမွေခင်းဆိုင်ရာ ဥပဒေကို၊ စီတံထဲဘွင် ခွဲခြား၍ ထားရလိမ့်မည်။ ၎င်းကိုခွဲခြား၍ မထားလျှင်၊ ရွှဝ်ထွေးပြီး၊ အမှားမှားအယွင်းယွင်း ဖြစ်နိုင်သည်။

လင်အမွေဆိုင်တိုင်း၊ လင်၏အစုမှာလည်း၊ မယားဆိုင်သောကြောင့်၊ မယားလည်းအမွေဆိုင်ဖြစ်ရပေမည်။ မယားအမွေဆိုင်တိုင်း၊ လင်လည်းအမွေဆိုင်ဖြစ်ရပေမည်။သားမက်၊ ချွေးမတို့သည်၊ သမီး၊သားတို့နှင့်အတူ၊ အမွေဆိုင်များ ဖြစ်ကြရမည်ဟုဆိုလျှင်၊ ကင်းဝန်မင်းကြီး၏ အမွေခန်းခွဲသတ် ပုဒ်မ ၅၁ နှင့် ၈၆ စသည်တို့နှင့် ဆန့်ကျင်လိမ့်မည်။ မြန်မာဗုဒ္ဓဘာသာဝင်အများ၏ ယူဆချက်၊ သိနားလည်ချက်တို့နှင့်လည်း ဆန့်ကျင်လိမ့်မည်။

သို့ဖြစ်၍၊ မထွေးသည်၊ ဦးထွန်း၏အမွေကို ရလိုကြောင်းနှင့် မတင်ဦး၏အပေါ်တွင် တရားမခွဲနိုင်ဟု တရားလွှတ်တော်က၊ စီရင်ဆုံ ဖြတ် လိုက်ခြင်းသည်၊ သင့်လျော်မှန်ကန်သည်။

ဦးစံလှိုင် အယူခံတရားလိုအတွက်။

ဦးသန်းစိန် အယူခံတရားခံအတွက်။

နိုင်ငံတော် တရားဝန်ကြီးချုပ် ဦးသိန်းမောင်။ ။အယူခံ တရားလို မထွေးသည်၊ သူ၏ယောကျ်ားသူ ဦးထွန်း၏ ပစ္စည်းကို အုပ်ထိန်းစီရင်ခွင့်ခွဲပေးစေလိုသည့်အမှု (Suit for Administration) ကို၊ မန္တလေးမြို့၊ ခရိုင်တရားမရုံးတော်တွင် စွဲဆိုခဲ့လေသည်။

သို့ဆိုရာ၌၊ မထွေးသည် သူ၏အဆိုလွှာတွင်၊ ဦးထွန်း၏ဇနီး ဒေါ်ချစ်စုသည်၊ ဦးထွန်းအသျှင်သေဆုံးခဲ့ကြောင်း။ ဦးထွန်းသည်၊ ၁၉၄၆ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၁၄ ရက်နေ့တွင် သေဆုံးခဲ့ကြောင်း။ ဦးထွန်းသေဆုံးသောအခါ ဦးထွန်းနှင့် ဒေါ်ချစ်စုမှပေါက်ပွါးသော သား မောင်ကျောင်းနှင့် သမီး မတင်ဦးကျန်ရစ်ခဲ့ကြောင်း။ မောင်ကျောင်းသည်၊ သူ၏ခင်ပွန်းဖြစ်ကြောင်း။ မောင်ကျောင်းသည် တောခိုနေရာင်း၊ ၁၉၄၉ ခုနှစ်၊ ဇန္နဝါရီလ ၇ ရက်နေ့တွင် သေဆုံးခဲ့ကြောင်း။ သို့ဖြင့်၍၊ သူသည် ဦးထွန်းသေဆုံးသောအခါ ကျန်ရစ်ခဲ့သော အမွေပစ္စည်းများ၏ ထက်ဝက်ကို မြန်မာဗုဒ္ဓဘာသာတရားဥပဒေအရ၊ ရထိုက်ကြောင်း။ ထိုအမွေပစ္စည်းများသည်၊ မတင်ဦးလက်ရှိဖြစ်နေကြောင်း။ သူက မတင်ဦးထံတွင် သူ၏

၁၉၅၄

ဒေါ်ထွေးနှင့် မတင်ဦး။

အစုကိုခွဲဝေပေးရန် တောင်းဆိုခဲ့သော်လည်း မတင်ဦးကခွဲဝေမပေးဘဲ နေခဲ့ကြောင်းဖေါ်ပြခဲ့သည်။

ယခု အယူခံတရားခံဖြစ်သူ မတင်ဦးကလည်း၊ ထိုရုံးတော်၌၊ တရားခံအဖြစ်နှင့်ချေလွှာတင်သွင်းရာတွင်၊ မဒထွေးသည်၊ မောင်ကျောင်းကို ၁၄ နှစ်ပစ်၍ထားခဲ့သောကြောင့် မောင်ကျောင်းနှင့်မထွေးတို့မှာ၊ လင်မယားအဖြစ်ပြတ်စဲခဲ့ပြီးဖြစ်ကြောင်း။ မောင်ကျောင်းလည်းမသေဘဲ၊ အသက်ရှင်လျက်ရှိနေသေးကြောင်း။ သို့အတွက် မထွေးမှာ၊ထိုအမွှေကိုခွဲနိုင်ခွင့်မရှိကြောင်းစသောအားဖြင့်၊ ချေပခဲ့လေသည်။

ခရိုင်တရားမရုံးတော်က၊ သက်သေများကို စစ်ဆေးပြီးနောက်၊ မောင်ကျောင်းသည် မသေသေးကြောင်း။ သို့အတွက် မထွေးသည် ဦးထွန်း၏အမွေနှင့်စပ်လျဉ်း၍ ထိုအမွှေကိုခွဲနိုင်ခွင့်မရှိကြောင်း ဆုံးဖြတ်ပြီးလျှင် မထွေး၏အမွှေကို စရိတ်နှင့်တကွ ပလပ်လိုက်လေသည်။

ထိုအမိန့်စီရင်ချက်တွင် ခရိုင်တရားမရုံးတော်က (မောင်ကျောင်းသေပြီဖြစ်ကြောင်းထင်ရှားအောင် သက်သေမပြနိုင်သည့်အတွက် မထွေး၏အမွှေမှာထောက်တည်ရာမရှိ) ဟူ၍သာအကြောင်းပြပြီးလျှင်၊ မတင်ဦးချေလွှာတွင် ချေထားသည့်အတိုင်း မောင်ကျောင်းနှင့်မထွေးတို့ လင်မယားအဖြစ်မပြတ်စဲသေးဟူ၍လည်း ဆုံးဖြတ်လိုက်သေးသည်။

မထွေးက တရားလွှတ်တော်သို့ အယူခံဝင်ရာတွင် သူ၏အယူခံငြင်းချက်များမှာ သူသည်မောင်ကျောင်းမသေသေးသော်လည်း ဦးထွန်း၏ အမွေပစ္စည်းများထဲမှ သူနှင့်မောင်ကျောင်း၏အစုကို လက်ရောက်ရနိုင်ခွင့်ရှိကြောင်း။ အနည်းဆုံးဦးထွန်း၏အမွေပစ္စည်းများထဲမှ မောင်ကျောင်းအမွေရသောပစ္စည်းများ၏ သုံးပုံတပုံကို မိမိရဆိုက်ကြောင်း။ သို့အတွက် မောင်ကျောင်းမသေသေးသော်လည်း သူသည်အဆိုပါအမွှေကို စွဲနိုင်ခွင့်ရှိကြောင်း။ မူလရုံးတော်သည် မောင်ကျောင်းကိုအမွှေသည်တဦးအဖြစ်နှင့် ထည့်သွင်းရန်သာ ညွှန်ကြားခဲ့သင့်ကြောင်းဖေါ်ပြထားသည်။

မထွေး၏အယူခံငြင်းချက်များတွင် မူလရုံးတော်သည် မတင်ဦး၏ချေလွှာတွင် ချေပထားသည့်အတိုင်း မောင်ကျောင်းနှင့်မထွေးလင်မယားအဖြစ် မပြတ်စဲသေးဟုဆုံးဖြတ်ခဲ့ခြင်းသည် မှားယွင်းကြောင်းဖေါ်ပြပါရှိသေးသည်။

တရားလွှတ်တော်တွင် မထွေး၏အယူခံမှုကို ကြားနာသောအခါ သူ၏ပညာရှိလွှတ်တော်ရှေ့နေကြီးက မောင်ကျောင်းမသေသေးဘဲ၊ အသက်ရှင်လျက်ရှိနေသေးသည်ဟူသော အောက်ရုံးမင်း၏ စီရင်ဆုံးဖြတ်ချက်ကို လက်ခံခြီးလျှင်

မောင်ကျောင်း မသေသေးသော်လည်း မထွေးသည်အဆိုပါအမှုကို စွဲနိုင်ခွင့်ရှိ ကြောင်း။ မထွေးသည် သူ၏အတွက်သာမဟုတ်ဘဲ သူနှင့် သူ၏ခင်ပွန်း မောင် ကျောင်းအတွက်ပါပြင်၍ စွဲပြီး မောင်ကျောင်းကိုအမှုသည်အဖြစ်နှင့် ထည့်ရန် သာလိုကြောင်း လျှောက်ထားခဲ့လေသည်။

၁၉၅၄

ဒေါ်ထွေး နှင့် မတင်ဦး။

သို့အတွက် တရားလွှတ်တော်က မထွေး၏ပညာရှိ လွှတ်တော်ရှေ့နေကြီး လျှောက်ထားသည့်အတိုင်း၊ မောင်ကျောင်းအသက်ရှင်နေစဉ် မောင်ကျောင်းနှင့် မတင်ဦးတို့သည် ဦးထွန်း၏အမွေပစ္စည်းများတွင် မိမိတို့၏အစုများကို ခွဲဝေ၍မယူ ကြရသေးမီ ဦးထွန်း၏အမွေပစ္စည်းများသည် မတင်ဦးလက်ရှိဖြစ်နေရာ မထွေး မှာဆိုခဲ့သည့်အတိုင်း၊ တရားခွဲနိုင်ခွင့်ရှိမရှိသာလျှင် စီရင်ဆုံးဖြတ်ဘို့ရှိခဲ့သည်။

သို့အတွက် တရားသူကြီးတော်က——

(၁) ဆိုခဲ့သည့်အဖြစ်အပျက် အခြေအနေများတွင် မထွေးကိုယ်တိုင် တရားစွဲနိုင်ခွင့်ရှိသည်ဟု ဆိုရအောင် အထောက်အထား ဘကိုးဘကား ဥပဒေစိရင်ထုံး တစုံတရာမျှမတွေ့ကြောင်း။

(၂) လင်ယောကျ်ားအမွေရသောပစ္စည်းတွင် မယားသည် သုံးပုံတပုံ ဆိုင်သော်လည်း လင်မယားပေါင်းသင်းနေခိုက်တွင် မယား က မိမိ၏အစုကို လင့်ထံမှခွဲ၍မရနိုင်ကြောင်း။

(၃) အကယ်၍သာ မထွေးသည် အဆိုပါအမှုကို စွဲနိုင်သည်ဟုဆုံး ဖြတ်လိုက်လျှင် လင်အမွေဆိုင်သည်နှင့် တပြိုင်နက် မယား သည်လင်သေဘောမတူဘဲ ယောကျ်မ၏အမွေပစ္စည်းကို အုပ် ထိန်းစီရင်နေခွင့်ရှိသည်ဟု အမှုစွဲနိုင်သည်ဟု ဆုံးဖြတ်ရာရောက်မည် ဖြစ်ကြောင်း။

(၄) တရားမကျင့်ထုံး ကိုဥပဒေနောက်ဆက်တွဲ (ဃ) နံပါတ် ၁၇ (ယခု ၁၅) အရလည်း၊မထွေးစွဲဆိုသောအမှုမျိုးကို အနိုင် ဒီကရီရေး၍မဖြစ်နိုင်ကြောင်း စသည်တို့ကို အကြောင်းပြပြီး လျှင် မထွေး၏အယူခံမှုကို ပယ်လိုက်လေသည်။

သို့ပယ်ရာ၌ တရားလွှတ်တော်သည် မူလရုံးတော်က မောင်ကျောင်းနှင့် မထွေးတို့လင်မယားအဖြစ် မပြတ်စဲသေးဟု ဆုံးဖြတ်လိုက်ခြင်းသည် သက်သေ ထွက်ချက်များကို အလေးဂရုမပြုဘဲ (မောင်ကျောင်းသေသေးလျှင် မထွေး သည် အဆိုပါအမှုကိုမစွဲနိုင်ဟု ဆုံးဖြတ်ပြီးဖြစ်၍) လိုလည်းမလိုတဲ့လျက်ဆုံးဖြတ် လိုက်ခြင်းမျှသာဖြစ်သည်ဟု စီရင်ချက်တွင် ထည့်သွင်းဖော်ပြထားသည်။

၁၉၅၄

ဒေါ်ထွေးနှင့် မတင်ဦး။

ယခုအပူခံမှုမှာ တရားလွှတ်တော်စီရင်ချက်ကို မကျေနပ်၍ မထွေးက ၁၉၄၈ ခုနှစ်၊ ပြည်ထောင်စုမြန်မာနိုင်ငံတော် တရားဝိရင်ရေး အက်ဥပဒေပုဒ်မ ၆ အရ၊ ဤရုံးတော်တွင် အယူခံဝင်ခွင့်တောင်းပြီးလျှင် တင်သွင်းထားသော အယူခံမှုဖြစ်သည်။

ဤအယူခံမှုဝယ်ဝင် ဤရုံးတော်က စိစဉ်ဆုံးဖြတ်ရန်အချက်မှာ မောင်ကျောင်း၏အဘ ဦးထွန်း၏အမွေကို မောင်ကျောင်းနှင့်နှမ မတင်ဦးတို့ခွဲဝင်ကြရာ အမွေပစ္စည်းများသည်လည်း မတင်ဦး လက်ရှိဖြစ်၍နေရာ၊ မောင်ကျောင်းက မိမိ၏အမွေစုကို ရလိုမှုမဲ့ဘဲ မောင်ကျောင်း၏ဇနီးမထွေးက မတင်ဦးအပေါ်တွင် မောင်ကျောင်း၏ အမွေစုအားလုံးအတွက်၊ သို့တည်းမဟုတ် မောင်ကျောင်း၏ အမွေစုသုံးပုံတပုံအတွက် တရားစွဲနိုင်မစွဲနိုင်ဟူသော အချက်ဖြစ်သည်။

ဤအချက်ကို မဆုံးဖြတ်မီ မြန်မာလူမျိုးဗုဒ္ဓဘာသာဝင်တို့၏ လင်ခမ်းမယားခမ်းဆိုင်ရာ ဥပဒေနှင့်အမွေခမ်းဆိုင်ရာ ဥပဒေကို စိတ်ထဲတွင်ခွဲခြားမှတ်ထားရလိမ့်မည်။ ၎င်းတို့ကိုခွဲခြားမှတ်ထားလျှင် ရှုပ်ထွေးပြီး အမှားမှားအယွင်းယွင်းဖြစ်နိုင်သည်။

လင်ခမ်း မယားခမ်း ဥပဒေအရဆိုသော် လင်အမွေရရှိပြီးဖြစ်သော ပစ္စည်းမှာ၊ နိဿယနှင့်နိဿိတသဘောအတိုင်းမယားသည်သုံးပုံတပုံဆိုင်ပေသည် (၁)။

အကယ်၍သာ မောင်ကျောင်းသည် မတင်ဦးနှင့် ဦးထွန်း၏အမွေကိုခွဲဝေကြ၍ မိမိ၏အစုတွင်ပါဝင်သော ပစ္စည်းများကိုရပြီးဖြစ်သော်၊ ထိုပစ္စည်းများတွင် မထွေးသည်သုံးပုံတပုံ သက်ဆိုင်မည်အနှောက်ဖြစ်သည်။ မထွေး၏ပညာရှိလွှတ်တော်ရှေနေကြီးအားကိုးသော အထက်တွင် ဖေါ်ပြပြီးဖြစ်သည့် မောင်သာလှိုင်၏အမှုစီရင်ထုံး၊ မောင်သန်ဗိုင်၏အမှုစီရင်ထုံး၊ မောင်မောင်ခင်၏အမှုစီရင်ထုံးနှင့် ဒေါ်သန့်အမှုစီရင်ထုံးများမှာလည်းခင်ပွန်း၊ သို့မဟုတ် ဇနီးရရှိပြီးဖြစ်သော ပစ္စည်းများနှင့် သက်ဆိုင်သောစီရင်ထုံးများသာ ဖြစ်ကြသည်။

မထွေး၏ပညာရှိလွှတ်တော်ရှေနေကြီးက မောင်ကျောင်းသည် အမွေစုကို မရသေးသော်လည်း အမွေတွင်ထက်ဝက်စုကို ဆိုင်နေပြီဖြစ်သောကြောင့် အစိုးရပစ္စည်းထိန်းနှင့် မန္တင်းစံ (၂) အမှုစီရင်ထုံးအရ မထွေးလည်းသက်ဆိုင်ပါသည်ဟုလျှောက်ထားသည်။ ထိုအမှုမှာ လင်မယားနှစ်ယောက်ပိုင်ငွေနှင့် လင်၏အသက်အာမခံစာချုပ်များဝယ်၍ထားရာ၊ ထိုစာချုပ်များသည် လင်မယားနှစ်ဦး

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(၁) *C.T.P.V. Chetty Firm and others* v. *Maung Tha Hlaing and others*, 3 Ran. 322 ; *N.A.V.R. Chettyar Firm* v. *Maung Than Daing*, 9 Ran. 524 ; *U Po* v. *Maung Maung Kha*, 10 Ran. 261 ; *Ma Aye Tin* v. *Daw Thant* (1940) R.L.R. 831.

(၂) *The Official Assignee* v. *Ma Hnin San*, (1940) R.L.R 208.

ပိုင်ပစ္စည်း ဖြစ်ကြောင်း။ သို့ဖြစ်၍ လင်သေသောအခါ ထိုစာချုပ်များအတွက်ရ သောငွေမှာ မယားဆက်ဝက်ဆိုင်ကြောင်း ဆုံးဖြတ်သောအမှုမျှသာဖြစ်သည်။

၁၉၅၄
ဒေါ်ထွေးနှင့် မတင်ဦး။

ဆိုမှတပါး၊ မထွေး၏ ပညာရှိလွတ်တော်ရှေ့နေကြီးက မောင်ဘတူနှင့် မသက်စုပါ (၄)ဦးတို့၏ အမှုစီရင်ထုံး(၁)ကို ကိုးကားလျက်၊ အမွေမဝေရ သေးသော်လည်း၊ အမွေပစ္စည်းများသည်၊ မတင်ဦး၏လက်တွင်၊ လက်ရှိဖြစ်နေ သေးသော်လည်း၊ ဥပဒေသဘောမှာ မောင်ကျောင်းသည် ထက်ဝက်စုကိုရပြီး ဖြင့်ပါသည်ဟု လျှောက်လဲပြန်သည်။ သို့ရာတွင်ထိုစီရင်ထုံးမှာ၊ စင်စစ်အားဖြင့်၊ မုဒ္ဓဘာသာအမွေးခင်း ဥပဒေအရ၊ အမွေဆိုင်သောသူသည်၊ အမွေခွဲဝေရန် သေသူ့ပစ္စည်းကို အုပ်ထိန်းစီရင်ခန့်ခွဲတို့၊ အမှုတခုခွဲဆိုပြီးနောက်၊ ငှိုကိစ္စအတွက် နောက်ထပ်အမှုတခုမခွဲနိုင်ကြောင်း၊ စီရင်ဆုံးဖြတ်သော စီရင်ထုံးမျှသာဖြစ်သည်။ ထိုဒုတိယအမှုတွင် အမွေဆိုင်သည် မိမိအစုကို ရလိုကြောင်း တရားစွဲနိုင်ခဲ့သည်။ တရားစွဲဆိုနိုင်သည့်အကြောင်းလည်း၊ စွဲဆိုခဲ့ပြီးဖြစ်သည်။ သို့အတွက်ပဋမစွဲသော အမှုကို ပလပ်ပြီးသည့်နောက် နောက်ထပ် တရားမစွဲဆိုနိုင်တော့ပြီ ဟူ၍သာ ဆိုလိုရင်းဖြစ်သည်။ ဓမ္မသတ်ကျမ်းပြုဆရာတို့၏ ပုံဆရာချက်အရ၊ အမွေမမခွဲမီ ကပင်လျှင်၊ အမွေဆိုင်သည်၊ ဆိုင်ရာအစု၏ တဦးချင်း သီးခြားပိုင်ရှင် ဖြစ်ပြီဟူသောစကား (၂) .....သည်၊ အမှုကိုစီရင်ဆုံးဖြတ်ရန်လိုသော စကားလည်းမဟုတ်။ ဓမ္မသတ်တခုခု မည်မည် ရရအထောက်အထားရှိသော စကားလည်းမဟုတ်၊ တရားဝန်ကြီး မစွတာချာရိ၏ အတွေးနောမတိမျှသာဖြစ်သည်။ (၃) .....

မထွေး၏ ပညာရှိလွတ်တော် ရှေ့နေကြီးက၊ ကင်းဝန်မင်းကြီး၏ ခဖ စောင်တွဲ၊ အမွေခံမမသတ်ကြီးပုဒ်မ ၈၇ ကို ကိုးကားပြီး၊ အမွေဆိုင်

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(၁) *Maung Ba Tu* v. *Ma Thet Su and three others*, 5 Ran. 785.

(၂) "Thus according to the conceptions of the *Dhamathat* writers it is the fractional share of each Burmese Buddhist heir which vests in him separately and individually and he is entitled to claim a division of that share on the death of the ancestor, and nothing more. His right extends no further and he cannot be deemed to be with his co-heirs a joint owner or joint tenant of the property nor is he entitled to joint possession of the property with them."

(၃) Chari, J. himself has stated at page 795 of the Report. "There are no direct authorities on the position of the heirs of a deceased Burman Buddhist and the conclusion I have arrived at is merely an inference from the general conceptions of Burman Buddhist Law and the indications given in the *Dhamathats* as to what the writers conceived to be rights of the heirs of a deceased Burman Buddhist."

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ဒေါ်ထွေးနှင့် မတင်ဦး။

သည်၊ အမွေမတောင်းမီ အမွေမဝေမီ မိမိ၏အစုတွင် မည်သည့်အမွေပစ္စည်းများပါရမည်ဟု မသတ်မှတ်ရမီကပင် မိမိ၏အမွေစုကို တသီးပုဂ္ဂလ သီးခြားပိုင်၍ နေပါပြီဟု လျှောက်လဲပြန်သည်။ သို့ရာတွင် ထိုပုဒ်မမှာ "အမွေခွဲဝေသောအခါ အမွေစားတဦးရင်ဝေးနှိုးနေလျှင် အတို့အစု ချန်ထားရသော တရား" နှင့်သာ သက်ဆိုင်သည်။ အတို့အစုကို ချန်ထားရမည်ဆိုသည်မှာလည်း ဒုခြားအမွေဆိုင်များသည် အမွေကိုဝေကြသောအခါ ရင်ဝေးနှိုးအမွေဆိုင်အတွက် ဝေစုမချန်ဘဲ အမွေပစ္စည်းအားလုံးကို မိမိတို့ချည်းခွဲဝေခွင့်ပေးကြမည်ကို စိုးရိမ်သည့်အတွက် တားမြစ်ခြင်းသာဖြစ်သည်။ ချန်ထားရမည့်ပစ္စည်းများကို အမွေမဝေမီကပင် ရင်ဝေးနေအမွေဆိုင်သည် တသီးပုဂ္ဂလ သီးခြားပိုင်ပြီး ဖြစ်သောကြောင့် ဆိုခြင်းမဟုတ်ချေ။ စင်စစ်သော်ကား အမွေဆိုင်သည် ဆိုင်ရုံသာဆိုင်သေး၍ အမွေတွင်ပါဝင်သောပစ္စည်း ဘယ်ဟာဟာခုခုကိုမျှ တသီးပုဂ္ဂလပိုင်ပြီဟု မဆိုနိုင်သေးသောသူဖြစ်သည်။ အချုပ်အားဖြင့်ဆိုင်သော်လည်း မပိုင်သေးသောသူဖြစ်သည်။ သို့အတွက် အမွေဆိုင်သည် အမွေခွဲရန်ကပင်လျှင်၊ မိမိ၏အစုကိုတဦးချည်းသီးခြားပိုင်နေပြီဟူသော စကားကို ဤရုံးတော်က လက်မခံနိုင်။

ယခုအမှုမှာ မောင်ကျော်နှင့် မတင်ဦးတို့ အမွေမခွဲဝေကြရသေးကြောင်း။ မောင်ကျော်သည် အမွေတွင် ထက်ဝက်စုကို ဆိုင်သော်လည်း အမွေမှမည်သည့်ပစ္စည်းကိုမှ မိမိ၏အစုအဖြစ်နှင့် မရသေးကြောင်း။ စင်စစ်အားဖြင့်၊ အမွေပစ္စည်းများသည် မတင်ဦး၏လက်ရှိဖြစ်နေကြောင်း။ မထွေးကိုယ်တိုင်က ဝန်ခံခဲ့ထားသည်။ သို့အတွက် ဤအမှုမှာ လင်ရပြီးဖြစ်သောပစ္စည်းတွင် မယား သုံးပုံတပုံဆိုင်သည်ဟူသော လင်ခန်း မယားခန်း ဥပဒေအတွင်းကျနောက်သော အမှုမဟုတ်ချေ။

ဆိုင်ပင်ဆိုင်ပြီဖြစ်သော်လည်း သူဘာ၊ထိ တောင်းရှိုးမည့် အမွေစု၊ တောင်းခဲ့မရလျှင် ရအောင်တရားပင်ဒဲ့ရှိုးမည့်အမွေစု၊ ဘယ်ပစ္စည်း၊ ဘယ်ပစ္စည်းပါသည်ဟူ၍ပင် မသတ်မှတ်ရသေးသောအမွေစုကို လက်ရောက်ရပြီးဟု အမှတ်ထားရန်အကြောင်းမရှိ၊ လက်ခုက်မရသေးပါဘဲလျက် လက်ရောက်ရပြီးဟု အမှတ်ထားပြီး လင်းသို့မဟုတ်မယားသည် နိဿယနှင့် နိဿိတသဘောအတိုင်း ဝင်ခွဲဆိုင်ပြီ ပိုင်ပြီဟူ၍ ယူဆရန်လည်း အကြောင်းမရှိ။ သို့အမှတ်ထားရန် ယူဆရန်အကြောင်းမရှိပါဘဲလျက် အမှတ်သားလျှင် ယူဆလျှင် မရွှဲခွေးတန်ရွှဲထွေးဘွယ်ရာရှိသည်။

စင်စစ်သော်ကား ဤအမှုသည် အမွေခွဲဝေရန် အမှုဖြစ်သောကြောင့် အမွေခံဥပဒေနှင့်သာ တိုက်ရိုက်စပ်ဆိုင်သောအမှုဖြစ်သည်။ မထွေး၏ ပညာရှိ

လွှတ်ဘော်ရွှေနေကြီးက အမွေခန်းဆိုင်ရာဥပဒေတွင် ယခုအမှုမှာကဲ့သို့သော အဖြစ်အပျက်အခြေအနေမှာ ရွှေးမက ယောကျ်မ၏ အမွေတွင်အစုရလိုကြောင်း တရားစွဲဆိုနိုင်တို့ ဥပဒေအကိုးအကား တစုံတရာရှာ၍မတွေ့ကြောင်း ဝန်ခံသည်။ ရွှေးမသည် သာမန်အားဖြင့် ယောကျ်မ၏အမွေဆိုင် မဟုတ်နိုင်ကြောင်းကိုလည်း ဝန်ခံသည်။ သို့ဝန်ခံပြီးသည့်နောက်မှ မောင်ကျောင်းသည် ဦးထွန်း၏အမွေမှာ ထက်ဝက်ဆိုင်သည်။ သို့အတွက်မထွေးသည် ထိုထက်ဝက်စု၏ သုံးပုံတပုံကို ဆိုင်သည်။ သို့အတွက်မထွေးသည် ဦးထွန်း၏အမွေပစ္စည်းများကို လက်ရှိထားသော မတင်ဦးအပေါ်တွင် အမွေမှုဒဲ့နိုင်သည်ဟူ၍ လျှောက်လဲသည်။

၁၉၅၄

ဒေါ်ထွေးနှင့် မတင်ဦး။

ဤသို့လျှောက်လဲခြင်းသည် လင်ခမ်း မယားခမ်းဥပဒေနှင့် အမွေခမ်းဥပဒေတို့ကို စိတ်ထဲတွင်ခွဲခြား၍ မထားသောကြောင့် ရောရှက် ရှုပ်ထွေးနေသဖြင့် လျှောက်လဲခြင်းဖြစ်သည်။ လင်ခမ်း မယားခမ်းဥပဒေအရ အထက်တွင်ဖော်ပြခဲ့သည့်အတိုင်း အမွေခွဲဝေပြီးနောက် မည်မည်ရရ သတ်မှတ်ထားသောပစ္စည်းများကို မောင်ကျောင်းသည် မိမိ၏ အမွေစု အဖြစ်နှင့် ရပြီးမှသာလျှင် မောင်ကျောင်းရပြီးဖြစ်သော ပစ္စည်းများတွင် သုံးပုံတပုံကို ထွေးကဆိုင်မည်။ ထိုဥပဒေအရ မောင်ကျောင်းသည် အမွေဆိုင်ရုံသာ ဆိုင်သေးသောပစ္စည်း၊ အမွေမခွဲဝေရသေးခင် မောင်ကျောင်းမရသေးသော ပစ္စည်း၏ သုံးပုံတပုံကို မထွေးရနိုင်သေးသည်မဟုတ်ချေ။

အမွေခန်း ဥပဒေအရ အမွေတောင်းဆိုနိုင်သောသူများနှင့် အမွေရလိုမှုခွဲခြားနိုင်သူများမှာ မထွေး၏ ပညာရှိလွှတ်တော်ရွှေနေကြီး ကိုးကားသော ကင်းဝန်မင်းကြီး၏ ၃၆ စောင်တွဲ အမွေခန်းမဋ္ဌသတ်ကျမ်းပုဒ်မ ၅၁ အရပင်လျှင်၊ အမွေဆိုင်များသာဖြစ်သည်။ တိုပုဒ်ပတွင်ပါရှိသော မနုဟယ်မှထုတ်နုတ်ချက်မှာလည်း မိဘတို့သေလျှင် မိဘအမွေကို သားသမီးတို့ ငေယျူကြတို့သာလျှင် ပါရှိသည်။ အသက်တွင်ဖော်ပြခဲ့ပြီးဖြစ်သည့်အတိုင်း မထွေး၏ပညာရှိလွှတ်တော်ရွှေနေကြီးကိုယ်တိုင်လည်း သာမန်အားဖြင့် ရွှေးမသည် ယောကျ်မ၏အမွေဆိုင် မဟုတ်ပါဟု ဝန်ခံပြီးဖြစ်သည်။

မောင်ကျောင်းသည် ဦးထွန်း၏အမွေကိုဆိုင်သည်။ မောင်ကျောင်း၏အစုတွင် သုံးပုံတပုံကို မထွေးဆိုင်သည်။ သို့အတွက် မထွေးသည်အမွေမှုခွဲနိုင်သည်ဆိုရာမှာ စင်စစ်အားဖြင့် မထွေးသည် ဦးထွန်း၏အမွေဆိုင်ဖြစ်ပါသည်ဟု မဆိုနိုင်သေးကြောင့် သွယ်ဝိုက်၍ ဆိုခြင်းမျှသာဖြစ်သည်။ သဘောအရိပ်ရိယ်မှာ မထွေးသည် ဦးထွန်း၏ အမွေဆိုင်ဖြစ်သည်ဟု ဆိုသည်နှင့် ထပ်တူပင်ဖြစ်သည်။ သူ၏လျှောက်လဲချက်အတိုင်းဆိုသော် လင်အမွေဆိုင်တိုင်း လင်၏အစုမှာလည်း

၁၉၅၄
—
ဒေါ်ထွေး
နှင့်
မတင်ဦး။

မယားဆိုင်သောကြောင့် မယားလည်း အမွေဆိုင်ဖြစ်ရပေမည်၊ မယားအမွေဆိုင်တိုင်း လင်လည်းအမွေဆိုင်ဖြစ်ရပေမည်၊ သားမက် ချွေးမသည်လည်း သမီးသားတို့နှင့် အတူအမွေဆိုင်များဖြစ်ကြရမည်ဟု ဆိုလျှင်လည်း ကင်းဝန်မင်းကြီး၏ အမွေခမ်းမမ္မသတ်ပုဒ်မ ၅၁ နှင့် ပုဒ်မ ၁၆ စသည်တို့နှင့် ဆန့်ကျင်လိမ့်မည်။ မြန်မာဗုဒ္ဓဘာသာဝင်အများ၏ ယူဆချက် သိနားလည်ချက် တို့နှင့်လည်း ဆန့်ကျင်လိမ့်မည်။

မထွေး၏ ပညာရှိလွှတ်တော်ရှေ့နေကြီးကိုးကား၍ အထက်တွင်ဖော်ပြခဲ့ပြီးဖြစ်သော ကင်းဝန်မင်းကြီး၏ ၃၆ စောင်တွဲ အမွေခမ်းမွေသတ်ကျမ်းကြီးပုဒ်မ ၈၇ သည် ဤကဲ့သို့သော အခြေအနေမျိုးတွင် ချွေးမသည် အမွေဆိုင်သား၏ အမွေစုအားလုံးကို ဖြစ်စေ၊ တိုအမွေစု၏ အစိတ်အပိုင်းကို ဖြစ်စေ မရရှိင်သေးကြောင်း ဤရုံးတော်၏ ယူဆချက်ကိုကောက်ခံသကဲ့သို့ရှိ၏။ ။ထိုပုဒ်မမှာ အမွေခွဲဝေသောအခါ အမွေဆိုင်တဦးဦး ရပ်ဝေးသို့ရောက်နေလျှင်သူ့အတွက် အတို့အစုချန်ထားရမည်ဟု ဆိုသောပုဒ်မဖြစ်သည်။ ထိုပုဒ်မတွင် အမွေဆိုင်ဟု သားများကိုသာဖော်ပြပြီး ချွေးမများကို ယောကျ်မ၏ အမွေဆိုင်အဖြစ်နှင့် ရည်ညွှန်းချက် အမြွက်လေသံမျှ မပါရှိချေ။ အမွေဆိုင်သောသား ရပ်ဝေးသို့ရောက်နေလျှင်၊ သူ၏အတို့ဝေစုကိုချန်ရှိထားရမည်ဟူ၍သာဆိုသည်။ သူ၏အတို့ဝေစုအားလုံးကိုဖြစ်စေ၊ အစိတ်အပိုင်းကိုဖြစ်စေ၊ သူ၏မယားက တောင်းနိုင်သည်ဟူ၍ငင်း၊ သူ၏မယားအားပေးရမည်ဟူ၍ငင်း မဆို၊ သူ၏မယားကိုမေ့၍ ကျန်ရစ်သည်ဟူ၍လည်း မဆိုနိုင်။ အဘယ့်ကြောင့်ဆိုသော် သူသည် အမွေမဝေမီသေခဲ့လျှင် သူ၏အတို့ဝေစုကို သူ၏သားမယားတို့အား ပေးရမည်ဟု အကိုအလင်းပါရှိ၍ နေသောကြောင့်ဖြစ်သည်။

အထက်တွင်ဖော်ပြခဲ့သော အကြောင်းများကြောင့် မထွေးသည် ဦးထွန်း၏ အမွေကိုရလိုကြောင်းနှင့် မတင်ဦး၏အပေါ်တွင် တရားမစွဲနိုင်ဟု တရားလွှတ်တော်က စီရင်ဆုံးဖြတ်လိုက်ခြင်းသည် သင့်သျော်မှန်ကန်သည်။

ဤရုံးတော်က မထွေး၏အယူခံမှုကို စရိတ်နှင့်တကွ ပလပ်လိုက်သည်။ တရားစရိတ်အတွက် ရှေ့နေခမှာ ကျပ်ဘရာနှင့် ခုနစ်ဆယ်တ်တ် ခြစ်စေရမည်။

တရားလွှတ်တော်ချုပ်
ဦးဥာဏိန္ဒဓဇ
နှင့်
နိုင်ငံတော်ဝိန်ဆယဌာနပါ (၄) *

†၁၉၅၄ ဩဂုတ်လ ၉ ရက်။

နိုင်ငံတော် ဝိန်ဆယဌာန၏ ဝိန်ဆယစီရင်ချက်ကို ပယ်ဖျက်ရန် အမှုခေါ် စာချွန်တော် လျောက်ထားခြင်း။ ။အမှုမှာ၊ ၁၃၁၁ ခုနှစ်၊ ဝိန်ဆယဌာန အက်ဥပဒေ ပုဒ်မ ၁၅ အတွင်း အကျုံးဝင်သော ဝိနည်းဓမ္မကံအဓိကရဏ်းမှ မဟုတ်ဟု တရား လွှတ်တော်ချုပ်ရောက်မှ လျောက်ထားချက်၊

ဆုံးဖြတ်ချက်။

ဘုရားမြေပေါ်ရှိ ဇရပ်နှင့်ကျောင်းတွင် သီတင်းသုံးနေသော ဘုန်းတော်ကြီး တပါးကို၊ ထိုဇရပ်နှင့်ကျောင်းမှ ထွက်ခွါ သွားစေရန်၊ သက်ဆိုင်ရာ ဘုရားဘဏ္ဍာတော်ထိန်း အဖွဲ့က စွဲဆိုသော အမှုသည်၊ ဝိနည်းဓမ္မကံအဓိကရဏ်းမှဖြစ်ပုံပေါ်သည်။

လျောက်သူသည်၊ အောက်ရုံးများဘွင့် ၎င်းတို့မှာဒီရင်ပိုင်ခွင့်အာဏာမရှိပါဟုမငြင်းဆို၊ မကန့်ကွက်ခဲ့လျှင်၊ တရားလွှတ်တော်ချုပ်သို့၊ အမှုခေါ် စာချွန်တော်အတွက်၊ ရောက်သော အခါမှ၊ ထိုသို့မငြင်းဆို၊ မကန့်ကွက်နိုင်ချေ။ ။လျောက်သူသည်၊ သက်ဆိုင်ရာတရားရုံးများမှာ၊ စီရင်ပိုင်ခွင့်အာဏာမရှိပါဟု မငြင်းဆို၊ မကန့်ကွက်ဘဲနေခဲ့ခြင်းသည်၊ ထိုရုံးများရှေ့တွင် မိမိနိုင်ငိုနိုင်ငြား၊ နေခဲ့ခြင်းဖြစ်သည်။ သို့အတွက် တရားလွှတ်တော်ချုပ်ရောက်မှ၊ ၎င်းတို့မှာ စီရင်ပိုင်ခွင့်အာဏာမရှိဟု မဆိုနိုင်ပြီ။

ဦးဘသန်း စောဒကအတွက်။
နိုင်ငံတော်ရှေနေချုပ်ကြီး ဦးချန်ထွန်းနှင့်ဦးဘစိန် စုဒိတကများအတွက်။

နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိန်းမောင်။ ။ဤအမှုတွင်၊ စတုတ္ထ စုဒိတကဖြစ်သော မိုးညီးကောင်းဘုရားဘဏ္ဍာတော်ထိန်းအဖွဲ့က၊ စောဒကပုဂ္ဂိုလ် ဦးဥာဏိန္ဒဓဇအပေါ်တွင်၊ ရန်ကုန်မြို့ အခွဲပိုင်းရှိနယ်ဝိန်ဆယဌာန၌၊ မိုးညီးကောင်း ဘုရားမြေအတွင်းရှိ ဇရပ်နှင့် ကျောင်းမှ ထွက်ခွါ သွားစေရန် တရား စွဲဆိုခဲ့ရာ၊

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* ၁၉၅၄ ခုနှစ်၊ တရားမအယေးအဖွဲလျောက်လွှာအမှတ် ၁၈။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိန်းမောင်၊ တရားလွှတ်တော်ချုပ်တရားဝန်ကြီး ဦးဖြင့်သိန်းနှင့် လွှတ်တော် တရားဝန်ကြီး ဦးသောင်းစိန်တို့ ကြားနာ၍၊ နိုင်ငံတော် တရားဝန်ကြီးချုပ်က၊ စီရင်ချက်ချမှတ်သည်။

၁၉၅၄

ဦးဥာဏိန္ဒဓဇ နှင့် နိုင်ငံတော် ဝိနိစ္ဆယဌာန ပါ(၄)။

ထိုဝိနိစ္ဆယဌာနက၊ ထိုအမှုကို ကြားနာ စစ်ဆေးပြီးလျှင်၊ မိဿံးကောင်း ဘုရား ဘဏ္ဍာတော်ထိန်းအဖွဲ့ကို အနိုင်ပေးခဲ့၍၊ ဝိနိစ္ဆယစီရင်ချက်ချမှတ်ခဲ့လေသည်။

သို့နှင့် ဦးဥာဏိန္ဒဇေက၊ ရန်ကုန် ခရိုင် ဝိုနိစ္ဆယ ဌာနသို့ အယူခံ ဝင်ရာ၊ ထိုဝိနိစ္ဆယဌာနက၊ မြို့နယ် ဝိနိစ္ဆယဌာန၏ ဝိနိစ္ဆယ စီရင်ချက်ကို ပယ်ဖျက်ပြီး၊ ဦးဥာဏိန္ဒဓဇအား အနိုင်ပေးခဲ့လေသည်။

ထို့နောက်၊ ဘဏ္ဍာတော်ထိန်းအဖွဲ့က၊ ရန်ကုန်မြို့နိုင်ငံတော် ဝိနိစ္ဆယဌာနသို့ အယူခံဝင်၍၊ နိုင်ငံတော် ဝိနိစ္ဆယဌာနက၊ ခရိုင်ဝိနိစ္ဆယဌာန၏ ဝိနိစ္ဆယ စီရင်ချက်ကို ပယ်ဖျက် ပြီးလျှင်၊ ဦးဥာဏိန္ဒဓဇအား အနိုင်ပေး၍၊ ဝိနိစ္ဆယ စီရင်ချက်ချမှတ်ခဲ့သည်။ နိုင်ငံတော်ဝိနိစ္ဆယဌာန၏ ဝိနိစ္ဆယစီရင်ချက်အရ၊ ဦးဥာဏိန္ဒဇေသည်၊ အဆိုပါ ဘုရားမြေအတွင်းရှိ ဇရပ်နှင့်ကျောင်းမှ တွက်ခွါ၍ သွားရမည်။ ကျောင်းအဆောက်အဦကိုမူကား ဖျက်၍ယူနိုင်သည်။

ယခု ဤရုံးတော် ရှေ့ရှိ ဦးဥာဏိန္ဒဓဇ၏ စာလွှာမှာ နိုင်ငံတော် ဝိနိစ္ဆယဌာန၏ ဝိနိစ္ဆယစီရင်ချက်ကိုပယ်ဖျက်ရန်းမှုခေါ် စာချွန်တော်အတွက်ဖြစ်သည်။

ဦးဥာဏိန္ဒဓဇ၏ ပညာရှိလွတ်တော်ရှေ့နေကြီးက၊ ဘဏ္ဍာတော်ထိန်းအဖွဲ့နှင့် ဦးဥာဏိန္ဒဓဇ ဖြစ်ပွါးသော အမှုမှာ၊ ၁၃၁၁ ခုနှစ်၊ ဝိနိစ္ဆယ ဌာန အက်ဥပဒေ ပုဒ်မ ၁၅ အတွင်း အကျုံးဝင်သော ဝိနည်းမွေကံဟုခေါ်ရမည်ဖြစ်ကြောင်း၊ သို့အတွက်မြို့နယ်ဝိနိစ္ဆယဌာန-ခရိုင်ဝိနိစ္ဆယဌာနနှင့်နိုင်ငံတော် ဝိနိစ္ဆယဌာနမှာ ထိုအမှုကို လက်ခံ၍ ကြားနာစစ်ဆေး စီရင်ဆုံးဖြတ်ခွင့်အာဏာ မရှိကြောင်း လျှောက်ထားသည်။

သို့လျှောက်ထားပြီးသည့်နောက်၊ ထိုပညာရှိ လွတ်တော် ရှေ့နေကြီးသည်၊ ဝိနိစ္ဆယ ဌာန ၃ ဌာန အနက်၊ မည်သည့် ဌာနမှာမျှ မိမိ၏ အမှုသည်၊ ဝိနည်းမွေကံ အဓိကရုဏ်းမှုမဟုတ်ကြောင်း ဦးဥာဏိန္ဒဓဇ က မလျှောက်လဲခဲ့ကြောင်း။ သို့မလျှောက်လဲခဲ့သည်သာမက၊ ဦးဥာဏိန္ဒဓဇ ကိုယ်တိုင်ပင် လျှင်၊ ခရိုင်ဝိနိစ္ဆယဌာနသို့ အယူးဝင်ခဲ့သေးကြောင်းဝန်ခံသည်။

မျက်မြင်အားဖြင့် ဘုရားမြေပေါ်ရှိဇရပ်နှင့်ကျောင်းတွင်သီတင်းသုံးနေသော ဘုန်းတော်ကြီးတပါးကို ထိုဇရပ်နှင့် ကျောင်းမှ ထွက်ခွါသွားစေရန် သက်ဆိုင်ရာ ဘုရားဘဏ္ဍာတော်ထိန်းအဖွဲ့က စွဲဆိုသောအမှုသည်၊ ဝိနည်းမွေကံ အဓိကရုဏ်းမှုဖြစ်ပုံပေါ်သည်။ အမှုကိုယ်ကိုင်က ဘုရားမြေပေါ်တွင် ဆောက်လုပ် ထားသော ဇရပ်နှင့်ကျောင်း တည်းဟူသော သာသနာ့ရေး အဆောက်အဦများနှင့်ဝတ်း ထိုသာသနာ့ရေးအဆောက်အဦများတွင်နေထိုင်ခွင့်နှင့်ဝင်း သက်ဆိုင်သည်။တရား လိုသည်လည်း၊ ထိုဘုရားဆိုင်ရာ ဘဏ္ဍာတော်ထိန်း အဖွဲ့ ဖြစ်သည်။ တရားခံ

သည်လည်း၊ မြတ်စွာ ဘုရား ပညတ်၍ ထားတော် မူခဲ့သော ဝိနည်း သိက္ခာပုဒ် များကို လိုက်နာကျင့်သုံး ဆောက်တည် ရသော ဘုရားသားတော် ရဟန်းတပါး ဖြစ်သည်။

၁၉၅၄
ဦးဥာဏိန္ဒဇဏှင့် နိုင်ငံတော် ဝိန်ဆွယ်ဌာန ပါ(၄)။

အကယ်၍သာ၊ ဦးဥာဏိန္ဒဇသည် ဝိန်ဆွယ ဌာနများ၌၊ မိမိ၏အမှုသည် ဝိနည်း ဓမ္မကံ အဓိကရဏ်းမှု မဟုတ်ပါဟု ငြင်းဆို ခဲ့လျှင်၊ ဝိန်ဆွယ ဌာန များသည်၊ သူ၏ငြင်းဆိုချက်အပေါ်တွင် အကြောင်းပြု၍ဆုံးဖြတ်ခဲ့ကြပေလိမ့်မည်။ ဦးဥာဏိန္ဒဇ ကိုယ်တိုင်က မိမိ၏ အမှုသည်၊ ဝိနည်းမှုကံ အဓိကရဏ်းမှုမဟုတ် ပါဟု မငြင်းဆိုခဲ့သည့် အတွက်သာလျှင်၊ ဝိန်ဆွယ ဌာနများကသူ၏ အမှုသည် ဝိနည်း ဓမ္မကံ အဓိကရဏ်းမှု ဖြစ်ကြောင်း အကြောင်းပြု၍ မဆုံးဖြတ် ခဲ့ကြခြင်း ဖြစ်ပုံပေါ်သည်။ ၁၉၁၁ ခုနှစ်၊ ဝိန်ဆွယဌာန အက်ဥပဒေ ပုဒ်မ ၁၅ (၅)မှာ အောက်ပါအတိုင်းဖြစ်သည်။

> "(၅) ဤဥပဒေအရတည်ထောင်ထားသည့်ဝိန်ဆွယဌာနတစုံတခုတွင် စွဲဆိုသည့်၊ ဤပုဒ်မဝင် အဓိကရဏ်းမှု တစုံတခုကို၊ ဝိန်ဆွယ ဌာနက စစ်ဆေး စီရင်ပိုင်ခွင့်ရှိမရှိ၊ အမှုသည်တို့ အငြင်းအခုံ ရှိလျှင်၊ ယင်းသည့်အမှုကို လက်ခံထားသည့် ဝိန်ဆွယဌာနက ယင်းသို့ စီရင်ပိုင်ခွင့်ရှိမရှိ ဆုံးဖြတ်ချက် ချမှတ်ရမည်။ ထိုပြင် မည်သည့်အကြောင်းကြောင့်ယင်းသို့ဆုံးဖြတ်ချက်ချခြင်းကြောင်း ဖေါ်ပြပါရှိစေရမည်။"

ဦးဥာဏိန္ဒဇသည်၊ ရဟန်းတော်တပါးဖြစ်သည့်အတိုင်း၊ မိမိ၏အမှုသည်၊ ဝိနည်းဓမ္မကံ အဓိကရဏ်းဟုတ်မဟုတ်ကို သိတန်ပါလျက် ၎င်းသည်ဝိနည်းဓမ္မကံ အဓိကရဏ်းမှု ဟုတ်ဟုတ် ဆုံးဖြတ်နိုင်သော ဝိန်ဆွယဌာန များတွင်၊ ၎င်းသည် ဝိနည်းဓမ္မကံ အဓိကရဏ်းမှု မဟုတ်ပါဟုငြင်းဆိုခဲ့ခြင်းသည်၊ အဓိပ္ပါယ် ရှိသော အပြုအမူတရပ်ဖြစ်ပုံပေါ်သည်။ဝိန်ဆွယဌာနများမှထိုကဲ့သို့မငြင်းဆိုခဲ့ဘဲ၊မည်သည့် နည်းနှင့်မျှ ဝိန်ဆွယဌာနများလောက်၊ ဝိနည်းကို တင်မြောက်သည်ဟု မဆို နိုင် သည့် ဤရုံးတော်တွင်မှသာလျှင် မိမိ၏ အမှုသည် ဝိနည်း ဓမ္မကံ အဓိကရဏ်းမှု မဟုတ်ပါဟု လျှောက်ထားခြင်းသည်လည်း၊ အဓိပ္ပါယ်ရှိသောအပြုအမူပင် ဖြစ်ပုံ ပေါ်သည်။

ဦးဥာဏိန္ဒဇ၏ ပညာရှိလွတ်တော်ရှေ့နေကြီးက အောက်ရုံးများမှာစီရင် ပိုင်ခွင့်အာဏာမရှိလျှင်၊ ၎င်းတို့မှာစီရင်ပိုင်ခွင့်အာဏာမရှိကြောင်း။ ဤရုံးတော်သို့ ရောက်မှ လျှောက်လဲလို့လျှင်၊ လျှောက်လဲနိုင်ကြောင်း လျှောက်ထားသည်။ သူ၏ လျှောက်လဲချက်သည်၊ ဤရုံးတော်၏သာမန်စီရင်ပိုင်ခွင့်အာဏာအတွင်းကျရောက်

၁၉၅၄

ဦးဥာဏိန္ဒဓဇ နှင့် နိုင်ငံတော် ဝိန်ဆွယ်ဌာန ပါ(၄)။

သော အမှုများအတွက် မှန်တန်သလောက်မှန်သော်လည်း၊ ဤရုံးတော်၏ အထူး စီရင်ပိုင်ခွင့် အာဏာ အတွင်း ကသော အမှုများအတွက်မမှန်ချေ။ စာချုန်တော် အတွက် လျောက်လွှာများမှာ၊ ဤရုံးတော်၏ ရိုးရိုးစီရင်ပိုင်ခွင့် အာဏာ အတွင်း မကျရောက်ဘဲ၊ အထူး စီရင်ပိုင်ခွင့်အာဏာ အတွင်းသာ ကျရောက်သည်။ ယခု လျောက်လွှာသည်လည်း အမှုခေါ်စာချုန်တော်အတွက်လျောက်လွှာဖြစ်သည်။

စာချုန်တော်များအတွက် လျောက်သူသည်၊ အောက်ရုံးများတွင်၊ ၎င်းတို့မှာ စီရင်ပိုင်ခွင့်အာဏာမရှိပါဟုမငြင်းဆို၊ မကန့်ကွက်ခဲ့လျှင် ဤရုံးတော်သို့ရောက်သော အခါ၊ ထိုသို့မငြင်းဆိုနိုင်၊ မကန့်ကွက်နိုင်ဖြစ်တတ်သည် (°)။

ဤအမှုမျိုးမှာ သက်ဆိုင်ရာရုံးများမှာ စီရင်ပိုင်ခွင့်အာဏာမရှိပါဟုမငြင်းဆို။ မကန့်ကွက်ခဲ့သည့်အတွက်၊ အကယ်၍သာ ငြင်းဆိုကန့်ကွက်ခဲ့လျှင်၊ထိုရုံးများသည် မည်သို့အကြောင်းပြုလျက် ဆုံးဖြတ်ကြမည်ကို ဤရုံးကောက်ကမသိနိုင်သဖြင့်၊ လျောက်သူအား ဤသို့ဆိုနိုင်သည်။ လျောက်သူသည် သက်ဆိုင်ရာ ရုံးများမှာ စီရင်ပိုင်ခွင့် အာဏာမရှိပါဟု မငြင်းဆို၊ မကန့်ကွက်ဘဲ နေခဲ့ခြင်းသည်၊ ထိုရုံးများရှေ့တွင် မိခဲ နိုင်လုနီးနီးပြားနေခဲ့ခြင်းဖြစ်သည်။ သို့အတွက်ယခုဤရုံးတော်သို့ရောက်မှ ၎င်းတို့မှာ စီရင်ပိုင်ခွင့်အာဏာမရှိဟု မဆိုနိုင်ပြီ (၂)။

ဤအမှုမှာလည်း၊ ဦးဥာဏိန္ဒဓဇသည်၊ထိုကဲ့သို့မကန့်ကွက်ခဲ့ရုံသာမက၊ မိမိ ကိုယ်တိုင်ပင်လျှင်၊ ရိုင်စိုနဲ့ဩယဌာနသို့အယူခံဝင်ခဲ့သေးသောကြောင့်၊ ဝိန်ဆွယ် ဌာနများမှာ စီရင်ပိုင်ခွင့် အာဏာမရှိပါဟု ယခုမှ မလျောက်လဲ နိုင်ပြီဟု ဆိုရန် အကြောင်းတစုံတရာမရှိ။

အထက်ပါအကြောင်းခြင်းရာ များကို ထောက်ဆခြင်း အားဖြင့် အမှုခေါ် စာချုန်တော်ဖြင့် ဝင်စွက်ရန်အကြောင်း တစုံတရာမရှိဟု၊ ဤရုံးတော်က ကောက် ယူဆုံးဖြတ်ပြီးလျှင်၊ ဦးဥာဏိန္ဒဓဇ၏ လျောက်လွှာကို စရိတ်နှင့်တကွ ပယ်လိုက် သည်။ တရားစရိတ်အလို့ငှါ ရှေ့နေခမှာ ကျပ် ၁၀၀ (ကျပ်တရာတိတိ) ဖြစ် စေရမည်။

(°) A party aggrieved may by his conduct preclude himself from taking objection to the jurisdiction of an inferior Court—*The King* v. *Williams and others*, (1914) 1 K.B. 608 at 613.

(၂) Cp. *Gandhinagar Motor Transport Society* v. *State of Bombay*, A.I.R. (1954) Bom. 202 and *R.V.K.M. Surya Rao Bahadur Varu* v. *The Board of Revenue, Madras*, A.I.R. (1953) Mad. 472. In the first case Chagla, C.J. observed: "But the principle is different when the petitioner comes to this Court for a writ. The Court must tell the petitioner: 'It was open to you to raise that point before the tribunal whose order you are challenging. You have sat on the fence, you have taken a chance of the tribunal deciding in your favour, and it is not open to you now to come to us and ask for a writ.'"

SUPREME COURT.

ALI MEAH (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

† S.C. 1954 Oct. 7.

Accomplices, confessions of—Accomplice turned approver retains character of accomplice—Tainted evidence, no corroboration of each other—Evidence Act, s. 114, Illustration (b) *and s. 133, not inconsistent—Rule of prudence amounting to rule of law—Independent corroboration in material particulars a necessity—First Information Report—When it is to be recorded.*

Held : A confession is a unilateral statement untested by cross-examination and the confession of one accused by itself cannot be the basis of a conviction of another. In regard to an approver the fact that he was made a witness under the provisions of s. 377, Criminal Procedure Code does not make his evidence untainted for he remains an accomplice.

Held also : Where the evidence of an approver is mainly on the question of conspiracy, corroboration of such evidence in material particulars should be from untainted sources.

Latifat Hoosain Biswas v. *Emperor*, A.I.R. (1928) Cal. 725 ; *Sharif* v. *Emperor*, A.I.R. (1944) Lah. 472, followed.

Held also : S. 114, Illustration (*b*) and s. 133, Evidence Act are not inconsistent. However, a severe test will have to be made of an approver's evidence, and a conviction based solely on an approver's evidence will be a rare exception rather than a general rule. A rule of prudence has emerged and it is so universally followed as to amount to a rule of law that it is unsafe to convict on the evidence of an accomplice unless it is corroborated in material particulars to implicate the accused.

Bhuboni Sahu v. *The King*, 76 I.A. 147, followed.

Held further : A First Information Report has to be recorded under s. 154, Criminal Procedure Code as the first information of a cognizable crime. If it was given and recorded only after a Police Officer had begun investigation, then it was a statement made by a witness in the course of investigation and not a statement under s. 154, and as such, under s. 162 it will not ordinarily be admissible in evidence

Mon San Hlaing for the appellant.

Ba Sein (Government Advocate) for the respondent.

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* Criminal Appeal No. 3 of 1954 from the order of the High Court (Appellate Side) in Criminal Appeals Nos. 503 and 504 of 1953.

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

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ALI MEAH v. THE UNION OF BURMA.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—Since the insurrection, Paungdawthi has maintained a small defence force paid out of collections made from the public. While there were originally 20 men, by 1953 there were only 15 among whom were Tin Sein the man who was killed, the three accused who were tried, namely Aung Kyi (1), Soe Kyi and Ali Meah, and the approver in the case Aung Kyi (2), Ali Meah though paid the same Rs. 50 a month as the others, was the *Kin-hmu* or commander.

On the evening of the 16th of April 1953 (which was the Burmese New Year) the force as usual was split into three parties and these took up their respective positions in three Posts. In No. 3 Post were Tin Sein the deceased, in command, with the two Aung Kyis and Soe Kyi. At 11 p.m. the sound of rifle and Sten-gun fire was heard by Ali Meah. This woke up U Soe Maung who describes himself as the Deputy Chairman of the force. As he looked out he saw a flash of a torch in front of his house and on hailing discovered it was Ali Meah who was with another guard Tun Myint, who incidentally was not called as a witness. Ali Meah said that he had been inspecting Post No. 1, U Soe Maung told him to hurry in the direction of *Kin* Post No. 3 from where the firing seemed to have emanated.

Ali Meah got to No. 3 *Kin* Post and found Tin Sein dead with a bullet wound on the forehead. He was given to understand that there had been an attack on the Post by insurgents. Ali Meah went back to U Soe Maung, gave him the information and then went to the Police Station with U Soe Maung. They met U Khin Maung, the Investigation Officer who instead of recording there and then the first

information report of Ali Meah, decided to get to the Post to investigate.

They found the dead body and the other three guards, who upon being questioned, repeated their story about an attack on the Post. They returned to the Police Station and only then Ali Meah's statement was recorded as the First Information Report. Aung Kyi (1) was brought with them while Aung Kyi (2) and Soe Kyi were posted to *Kin* Post 2. Next U Khin Maung told U Soe Maung quietly that he was suspicious about the story of the attack and that he could smell liquor on Aung Kyi (2). So Ali Meah and Aung Kyi (1) were sent to fetch Aung Kyi (2), who was brought and disarmed. U Soe Maung and Ali Meah left the station. Aung Kyi (1) apparently remained at *Kin* Post 2. This was at about 2·30 a.m. At 4·30 a.m. U Soe Maung was called to the Police Station in consequence of statements made by Aung Kyi (2). The other Aung Kyi and Soe Kyi were also summoned, disarmed on arrival and placed under arrest. At 5 a.m. Ali Meah was arrested as well. He denied complicity in the crime.

Aung Kyi (1), Aung Kyi (2) and Soe Kyi were produced before a Magistrate on the 17th and their confessions recorded. In these they stated that they were sent for by Ali Meah on the 16th to the house of witness U Shwe Thin where some waterthrowing took place, the day being the last day of the water festival. It is alleged that Ali Meah told them that as Tin Sein was his rival [*vide* confession of Aung Kyi (1)] they would have to kill him. Aung Kyi (2) said he was afraid but Aung Kyi (1) apparently agreed readily. Next it is stated Ali Meah pricked the arms of the three men with a pin and the blood from each of them was mixed together with Ali Meah's own blood which was drawn by Aung Kyi (2)

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with the same pin, and that the concoction added to water, was drunk by all with a solemn oath at the altar with a picture of Buddha overhanging it, that they would keep the secret to themselves. In furtherance of the agreement to kill, at about 11 p.m. Tin Sein who was asleep as his turn for duty would be only at dawn, was shot by Aung Kyi (1), while Soe Kyi played the torch-light on Tin Sein so that Aung Kyi (1) could see. Aung Kyi (2) apparently took no part in the actual killing. To give an air of attack by insurgents, Aung Kyi (1) and Soe Kyi went out of the Post and rattled off a few rounds.

On these statements the case was built and Aung Kyi (1), Soe Kyi and Ali Meah were sent up for trial before the Sessions Judge, Pegu. Aung Kyi (1) and Soe Kyi retracted their confessions giving the usual reason that they were ill-treated into making false confessions. Aung Kyi (2) was made an approver under section 337 of the Criminal Procedure Code and examined as such in the trial Court.

Aung Kyi (2) got his discharge while the three accused were sentenced to death. On appeal the sentences were confirmed by a Bench of the High Court.

Leave to appeal was granted by this Court under section 6 of the Union Judiciary Act to all the three but at the hearing stage learned Advocate for Aung Kyi (1) and Soe Kyi asked for leave to withdraw the two appeals on the ground that his clients came under an amnesty order promulgated at the opening of the Sixth Buddhist Synod at Rangoon and that sentences of death had been commuted to imprisonment for life. The appeals therefore were dismissed as withdrawn.

Learned Counsel for Ali Meah however insists that his client is innocent and hence the necessity of hearing his appeal.

We find that the trial Court had treated both the confessions and the approver's evidence as substantive evidence corroborative of each other. The Appellate Court treated the approver's statement as substantial evidence and the confessions as corroborative.

Now, the question, how much reliance can be placed upon the evidence of an accomplice, has been the subject matter of many decisions. The Evidence Act itself provides under section 133 that an accomplice is a competent witness and that a conviction based upon his evidence is "not illegal". But then under section 114 the Court may presume that an accomplice is unworthy of credit, unless he is "corroborated in material particulars" [*See* illustration (B) to the section]. In between these provisions a law of prudence has come to be accepted as observed by Viscount Simon in *Bhuboni Sahu* v. *The King* (1).

> "Reading these two enactments together, the Courts in India have held that whilst it is not illegal to act on the uncorroborated evidence of an accomplice it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material respects to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice."

On the question whether confessions may be taken as corroborative of the evidence of an approver, we quote with approval the remarks of Ghose, J. in *Latifat Hoosain Biswas* v. *Emperor* (2) where he said:

> "But having regard to the circumstances of this case where the evidence of the approver is principally on the question of conspiracy and where the evidence is sought to be corroborated by the evidence of the confessing appellant . . . it amounts

(1) 76 I.A. 147. (2) A.I.R. (1928) Cal. 725.

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to this, that one tainted piece of evidence is sought to be corroborated by another piece of tainted evidence."

This view also found support in *Sharif* v. *Emperor* (1) where it was said that no conviction could safely be based on the evidence of an approver and the confession of a co-accused.

And if we may add to these observations, section 114, Illustration "B" and section 133 of the Evidence Act are not inconsistent. The evidence of an accomplice is at all times open to suspicion, for on his own showing he is a person of bad character who had taken part in a crime and who by his admission of guilt had placed himself in a position antagonistic to the other accused who deny complicity; furthermore there is no guarantee that while the story, in the main, may be true it may well be embellished so as to implicate an innocent man along with others who had really participated in the crime. And because such evidence is tainted, it is a necessary rule of prudence to insist upon independent corroboration in material particulars. Section 133 makes an accomplice a competent witness and though it says that it is "not illegal" to base a conviction on his uncorroborated testimony, the fact that his evidence is tainted must not be lost sight of. A severe test will have to be made to assess its evidentiary value and it is only after such a test that a conviction may be entered. And it is obvious that a conviction based solely on an accomplice's evidence will be rare exception rather than the general rule. To say that a conviction is "not illegal" is no exhortation that an accused should be convicted solely on the evidence of an accomplice.

We shall now examine the case before us in the light of our observations regarding the legal position.

(1) A.I.R. (1944) Lah. 472.

Aung Kyi (1) and Soe Kyi after retracting their confessions at the trial, stated that Tin Sein was shot by the enemy. This portion of the story we find no difficulty in rejecting, for the medical evidence is that there was even blackening on the wound, a sign which indicates that he was shot at close quarters. Secondly, the *Kin* Post 3, judging by the exhibit photograph, is a bunker, well protected by high steel sheets, rendering it impossible for even a stray rifle shot to enter and hit Tin Sein who was asleep inside the bunker. It must therefore be accepted that the killing was done at close quarters by somebody who was with him.

To connect Ali Meah with the crime, the allegation that he had in fact instigated the other three to kill Tin Sein must be proved. The conspiracy is alleged to have taken place at Shwe Thin's house. Shwe Thin, a prosecution witness, denies it. Apart from the unlikely fact that such a conspiracy was hatched in another person's house on a festival day, it seems to us equally unlikely that a Muslim like Ali Meah would have taken the oath by drinking blood mixed with water in front of a Buddhist altar.

In regard to the drawing of blood, both the lower Courts were impressed by the pin-prick wounds on the three men and a scratch on Ali Meah's arms. The story according to Aung Kyi (2) was that the pin-pricks were made by Ali Meah to draw blood and that Aung Kyi (1) made a jab on Ali Meah's arm. Aung Kyi (1) himself made no mention as to who jabbed Ali Meah's arm. Ali Meah's version is that the scratch on him was caused by an aluminium cup with a jagged edge which struck him when water was thrown at him by witness Myat San, who corroborates him. Such corroboration also comes

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from Shwe Thin's evidence. The medical evidence in regard to the wound is :

"A small scratch on the inner side of the left arm. It was simple and caused by a pointed instrument. It is possible that the injury was caused by scratching with the point of a needle * * * The injury * * * could have been caused by any pointed instrument. The injury found on him is in the nature of a scratch and not a prick or poke. The injury found on Ali Meah could also produce blood."

In respect of the pin-prick injuries on the other three, the medical evidence describes them as very superficial and that blood could ooze out. It is unfortunate that it struck nobody in the trial Court to ask if it was possible for blood from these superficial wounds to be collected into a tumbler as alleged in the confessions.

The Appellate Court in rejecting Ali Meah's story said that if Ali Meah was hit by the aluminium cup while he was trying to cover himself the wound should be on the outer side of the arm and not on the inner side. We are unable to follow this reasoning for it would be far more natural for a man to cover himself with his hands, with the palms outside and if he is hit at all by a flying cup it would be on the inner side of the arm.

One other point made by the Appellate Court was that in the First Information Report Ali Meah stated that Tin Sein was shot while on duty, the suggestion being that it was knowingly false since he was told at the bunker that Tin Sein was killed by enemy fire while he was asleep. This, in our judgment is not a valid inference for the report, which is in Burmese, contains the phrase "တင်းဒေတွဲ့ကျသူ", which may mean that Tin Sein was detailed for duty at the *Kin* Post.

We would like to take the opportunity of observing here that the document that is exhibited in the case as the First Information Report is no First Information Report at all. A First Information Report has to be recorded under section 154, Criminal Procedure Code as the first information of a cognizable crime. If, as in this case, it was given and recorded only after a Police Officer had begun investigation, then it was a statement made by a witness in the course of investigation and not a statement under section 154, and as such under section 162 it will not ordinarily be admissible as evidence.

It remains for us to deal with two points mentioned in the trial Court's judgment. Ali Meah on the day of the murder is alleged to have given an extra-ordinary order that if an attack should develop on any *Kin* Post that night, the guards of the other *Kins* must not go to its help. We find this piece of evidence in the statement of San Myine, a brother of the deceased, but though several of the *Kin* guards were examined at the trial, none of them made mention of this order. We do not think it would be safe to act on San Myine's sole statement.

The other point is about motive. It was Aung Kyi (1) who had stated in his confession that Ali Meah had said that Tin Sein was his rival and that therefore he should be done away with. Aung Kyi (2) made no mention of this in his confession but embellished the story in his statement in Court that Ali Meah had said that U Soe Maung and U Hla Maung the Secretary of the Defence Force were showing Tin Sein undue favours and that he (Ali Meah) would be ousted from his post. Both U Hla Maung and U Soe Maung were specifically asked if such was the case and both of them denied it. In fact both spoke in favour of Ali Meah and thus the

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attempt to supply a motive for Ali Meah's interest in Tin Sein's death, failed also.

Taking the case as a whole we are left with two pieces of doubtful evidence as against Ali Meah, namely the retracted confessions on one part and the evidence of the approver on the other part. The one piece of independent corroborative evidence may have been the superficial scratch on his arm but in respect of that he has given a convincing account supported by the witnesses Myat San and Shwe Thin. A confession is a unilateral statement untested by cross-examination and the confession by itself of one accused cannot be the basis of a conviction of another. When this confession is retracted by the maker then it becomes valueless as against a co-accused. In regard to the approver the fact that he was made a witness under the provisions of section 377, Criminal Procedure Code, does not make his evidence untainted for he remains an accomplice. It only means that he had undertaken to give a truthful account of the crime in which he had participated on the understanding that he would be pardoned if he carries out his undertaking.

In our judgment the evidence in regard to the complicity of Ali Meah in the murder, is *primâ facie* incredible. We find ourselves unable to rely upon the statements of three irresponsible young men, Aung Kyi (2) who gave his age as 20, or Aung Kyi (1) and Soe Kyi whose ages were fixed by the medical officer at between 15 and 16 and at between 17 and 18 respectively. If they had no qualms of murdering a sleeping man it is not beyond them to bring in falsely, an innocent man as the instigator of the crime. Their confessions in so far as they implicate themselves seem to have the ring of truth but it was easy for them to bring in Ali Meah's name. That

they could have concocted the story and that they had the opportunity of concerted action at the Police Station at the time they were arrested, is made clear by the Investigating Officer U Khin Maung who stated:

> " When Aung Kyi (1) and Soe Kyi arrived (at the Police Station) I told them what Aung Kyi (2) had stated and they also stated as Aung Kyi (2) had done."

The learned Government Advocate has submitted that there is a concurrent finding of fact in regard to Ali Meah's complicity in the crime and that therefore we should not disturb this finding.

We have repeatedly emphasised that this Court is no ordinary Court of Appeal and that we are reluctant to constitute ourselves into a third Court of facts. But the case before us presents a concurrent finding which was arrived at by relying solely on the evidence of accomplices and by discarding the rule of prudence which requires such testimony to be thoroughly tested and independently corroborated in material particulars. Because there has been grave and substantial injustice we must interfere and set aside the conviction and the sentence of death passed on the appellant. We therefore order his acquittal and his immediate release as far as this case is concerned.

SUPREME COURT.

† S.C. 1954

Sept. 20.

U LAW YONE (APPLICANT)

v.

U HLA MAUNG (RESPONDENT).*

Union Judiciary Act, s. 6—Special leave to appeal in criminal case, when permissible—Defamation, s. 499, Penal Code—Editor of a newspaper, no special position—Though not specifically named, if understood to refer to him, a person can complain of defamation—Exceptions to s. 499, Penal Code defined—Truth basic ingredient of defence but no defence per se*—Accuracy of depositions of witness, when can be challenged.*

Held : The Supreme Court is no ordinary Court of criminal appeal ; special leave will not be granted unless grave and substantial injustice has been done.

The Union of Burma v. *Tan Yu Taik*, Cr. Misc. Appln. No. 2 of 1953 of Supreme Court ; *Tun Sein* v. *The Union of Burma*, Cr. Misc. Appln. No. 4 of 1953 of Supreme Court, re-affirmed.

Held : The fact that defamatory statements were made by an Editor in his newspaper would not bring the case out of the ambit of s. 499. An Editor is in no special position and his liability for defamation is to the same extent as that of any other person ; he has even a greater responsibility to exercise due caution and convince himself that his comments are fair and based upon truth since news items published in a newspaper are likely to be taken as true by the readers.

Held also : If men of position and intelligence who know the complainant understood the statement complained of as referring to him, it is immaterial that he was not specifically named to enable him to prosecute.

Jones v. *Hulton & Co. Ltd.*, (1909) 2 K.B. 444 and (1910) A.C. (H.L.) 20 ; *Cassidy* v. *Daily Mirror Newspaper Ltd.*, (1924) 2 K.B. 331 ; *Newstead* v. *London Express Newspapers Ltd.*, (1940) 1 K.B. 377, followed.

Held further : Though truth by itself may not be a complete answer to a charge of defamation, it is the basic ingredient to bring the matter within some of the exceptions. Thus an effective defence would be truth and public good (Exception 1) ; or truth and goodfaith on part of the person making the statement, when it concerns public servant (Exceptions 2 and 3) ; or truth and goodfaith and for the public good (Exception 9) of s. 499.

Held lastly : The rule of prudence requires a Court to confine itself to what appears on the record of the case ; it would indeed be a dangerous precedent to allow dissatisfied litigants to say at the appeal stage that the deponents had in fact stated much more than what appears on the record.

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* Civil Misc. Application No. 74 of 1954.

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

Depositions have to be read over and acknowledged correct by the deponents. If depositions are found incomplete when read over, the attention of the Magistrate should be drawn to it; it is late when such objection is taken only at the appeal stage.

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U LAW YONE v. U HLA MAUNG.

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

Dr. Ba Han for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The applicant U Law Yone is the Editor, Printer and Publisher of a newspaper called the "Nation" while the respondent U Hla Maung was, at the time of the publications complained of, a Secretary to the Government in the Ministry of Finance and Revenue, and in the Ministry of Planning. He was also the Chairman of the Burmese counterpart of the organisation for American Aid. As was to be expected U Hla Maung and his Committee had to deal with various development projects which were carried out partly with American aid.

About the end of 1951 U Law Yone started what turned out to be a crusade against those he considered responsible for the wasteful way in which the airport was being constructed. By the end of the year a series of articles entitled "The Mingaladon Story" had been published in the "Nation". U Law Yone claims that it was at his instance that one Mr. Human who had resigned from his post as Supervising Engineer interviewed the Prime Minister resulting in a secret enquiry, which later was followed by a public enquiry regarding the Airport construction.

U Law Yone went on with his articles and in his own words "it was a sustained attack which I kept up against the Mingaladon Airport Construction

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Committee in general and U Hla Maung in particular."

Prior to the publication of the report of the Inquiry Commission and actually on the 9th April 1952 an article entitled "ECA Good Friend of the Burmese Communists" appeared in the "Nation" which U Hla Maung considered to be defamatory of him. The next publication which U Hla Maung considered to be also defamatory was published in the "Nation" of the 31st July entitled "Termites". Another article entitled "It Occurs To Me" was published in the issue of the 25th August. These were not isolated attacks but they formed part of the "sustained attack" and, when U Hla Maung sought legal redress on the 8th September with his complaint for defamation against U Law Yone he chose these three articles as the basis for his charges, the Criminal Procedure Code permitting only three in one trial. In due course U Law Yone was found guilty in respect of all the three charges and consequently he was directed to enter into a bond for good behaviour for one year in respect of the first charge, ordered to pay a fine of Rs. 3,000 in respect of the second and to undergo one month's simple imprisonment in respect of the third. On appeal to the High Court the convictions in respect of the first two charges were confirmed while the conviction in respect of the third charge was quashed.

The passage which forms the basis of the first charge runs :

"For ECA in Burma is not anti-communist, nor anti-anything. It is simply pro-U Hla Maung. Its accomplishment can be measured in terms of the number of times it has pulled U Hla Maung's chestnuts out of the fire, beginning with Mingaladon Airport. How many follies Mr. Abbot Low Moffat will perpetrate before ECA earns universal opprobrium in this

country depends on how many more 'white elephant' projects will be initiated in the fertile brain of U Hla Maung, and then sustained by American raw products and American dollars."

The relevant passage for the second charge is:

"The result is that the country is being impoverished by the Five Percenters who systematically put up one costly object after another with a view to collecting their rake-off from contractor or manufacturer, and who then seek immunity under this or that Minister, secure in the knowledge that, since the contractor or manufacturer is not likely to betray him the guilt can never be fastened on him. It was with pride that the Prime Minister, when he picked his Cabinet, told us not very long ago, 'I have confidence in my Ministers.' Yet he has even bemoaned the fact, not only that corruption is rife, but that convictions cannot be got against the big thieves and the economic insurgents. If he will look a little below the Ministerial level he will find some big termites, because of whom everyone who has something to sell to Burma is inflating his price. Recently a manufacturer's representative told us that he had every prospect of selling certain useful machinery to a Government department. And so he had, until the project went up to the civil servant who had to make the final recommendation. There it was killed because, although the manufacturer could reply to every other question, he had no ready answer to the pointed one of 'How much is there in it for me?'

Leave is now sought under section 6 of the Union Judiciary Act to appeal against the conviction and we have heard learned Counsel for the applicant at length. He has stressed the fact that U Law Yone was not defended by a lawyer in the trial Court, the suggestion being that as a layman he was unable to cope with the intricacies of legal procedure. We note that this fact led the District Magistrate to show great latitude to U Law Yone who was even permitted to file a written argument which incidentally reveals why he had chosen to defend himself. This

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document which is filed in the proceedings as originally typed runs:

> "It is not that I could not afford a lawyer but this is such an interesting case that I could not forego the pleasure of conducting it myself."

This passage was scored out and substituted by something less candid but it seems to us that the original passage gives the reason why U Law Yone chose to defend himself. The applicant is by no means an ignorant or helpless litigant and there is really nothing on the record to suggest that he was in any way handicapped. It is suggested that the statements of some witnesses were not fully recorded, and in support copies of the "Nation" together with an affidavit of one Miss Daphne Whittam, Associate Editor of the paper are submitted. The rule of prudence requires us to confine ourselves to what appears on the record of the case itself and it would indeed be a dangerous precedent to allow dissatisfied litigants to come to Court and to say that deponents had in fact stated much more than what appears on the record. Depositions are read over and acknowledged correct and if in reading over, a deponent should feel that it is incomplete, that would be the time to draw the Magistrate's attention. It is late when such objection is taken only at the appeal stage.

Three points of law were advanced by learned Counsel, the first being that the lower Courts in interpreting the meaning of words contained in the article of the 9th April 1952 on which the first charge was based, had erred in taking into consideration articles subsequent to the one complained of. Our view is, even without recourse to any other publication the meaning of the words appearing in the article complained of were clear in themselves, and further that

as these publications were part of the general attack against the Mingaladon Airport Construction Committee in general and U Hla Maung in particular, as admitted by U Law Yone himself, everyone of them could be taken into consideration under sections 9 and 15 of the Evidence Act.

The second point is that the second article complained of, dated the 31st July 1952, was directed against a class of persons and not at U Hla Maung. It is submitted that in a criminal case the person defamed must be ascertainable.

The test is whether the words complained of contain an imputation concerning a particular person or persons whose identity can be established. We note that in this case it was established by three witnesses for the prosecution U Tun Shein, Permanent Secretary, Foreign Office, U Tin Gyi of the State Timber Board and Mr. R. C. Barber of the Planning Department. These gentlemen who stated that they took the article to refer to U Hla Maung were not even cross-examined. Further U Law Yone himself in his statement said with reference to the articles generally " Wherever U Hla Maung has been named the reference is to nobody else than the complainant. But where no names have been used, I am referring to many forms of corruption and irregular practices regarding many people of whom U Hla Maung may be one." Thus even if U Law Yone did not intend that the defamatory statement should refer to U Hla Maung he was fully alive to the possibility of U Hla Maung being identified with the person to whom the statement refers.

It is no defence to say, as the applicant's learned Counsel now says, that it was not the applicant's intention to direct his statement at U Hla Maung, for after all a man must be held responsible for the

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natural consequences of his act. The classic example of a man throwing a squib into a crowd with no intention of hurting anybody in particular is a near parallel, and thus the question whether the applicant did or did not intend that the statement in question should refer to the complainant is of less import than the real question, whether people who read the statement would take it to refer to the complainant. And if, as in this case, men of position and intelligence who know the complainant and who had followed the writings in the "Nation" understood the statement complained of as referring to U Hla Maung, then such a statement would render the applicant liable to a prosecution by U Hla Maung. See *Jones* v. *Hulton & Co. Ltd.* (1); *Cassidy* v. *Daily Mirror Newspapers Ltd.* (2); *Newstead* v. *London Express Newspapers Ltd.* (3)

The third point is that there has been promiscuous claims of privilege to withhold documents and even at answering questions by government officials who gave evidence The accused wanted to have the records of the secret and preliminary enquiry to be put in as an exhibit, the idea being to show that Mr. Human had made certain allegations against U Hla Maung. The Minister for Planning U Win who was examined as a defence witness admitted that it was so but declined to answer what Mr. Human had said to him in the enquiry. To make him answer would amount to the admission of inadmissible hearsay evidence because Mr. Human did not appear in Court. The Chief Secretary U Khin Maung Pyu was within his rights as the Head of a Department to claim privilege under section 123 of the Evidence Act in respect of a document he

(1) (1909) 2 K.B. 444; (1910) A.C. 20 (on appeal to the House of Lords).
(2) (1924) 2 K.B. 331. (3) (1940) 1 K.B. 377.

considered to be a State document. And so was U Chan Tha the Chairman of the Special Bureau of Investigation in the same position when he declined to answer questions relating to communications made to him in official confidence, *vide* section 124 of the Evidence Act and section 20, sub-section 4 *(a)* of Bureau of Special Investigation Act.

In regard to the audit report concerning the Spinning factory the applicant achieved his purpose of bringing it on the record even if he was denied detailed examination of the witness U Ba Khin, the accountant who produced it. Whether the Spinning factory was being mismanaged at the time or whether there were irregularities from an audit point of view are matters that are of no great relevancy in this case, for the Spinning factory like the Airport Construction were projects that were initiated by the Government of Burma before the advent of U Hla Maung on the scene and were under way long before the advent of American aid in Burma. Their management was in the hands of Boards of which U Hla Maung happened to be a member. The laches of these Boards as a whole, if any, cannot be levelled at U Hla Maung alone. It was the applicant's case that U Hla Maung was the dominating member and that it was U Hla Maung alone who did what he liked and therefore responsible for mishaps; but that must remain only the applicant's surmise since it is unsupported by evidence.

The only point left to be considered is the plea of justification based upon the contention that the statements were substantially true and that they were made in good faith and for the public good.

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Defamation, which embraces both libel and slander is defined in section 499 of the Penal Code. Not only does the section define defamation but it also sets out ten exceptions under which defamatory statements would not amount to an offence. Read as a whole the section is clear that though truth, by itself, may not be a complete answer to a charge of defamation, it is the basic ingredient to bring the matter within some of the exceptions enumerated. Thus an effective defence in the case before us would be truth and public good (Exception 1); or truth and good faith on the part of the person making the statement, when it concerns a public servant (Exceptions 2 and 3); or truth and good faith and for the public good (Exception 9).

For the applicant to be acquitted he must show that he falls within these exceptions but at the present stage the difficulty that faces him is that both the lower Courts have found that there was no truth whatsoever in regard to the statements complained of. Further the lower Courts have held that the statements were not made in good faith for (*a*) in making them, the applicant had not exercised due care and attention as to the truth. This finding is based upon the applicant's statement before the Inquiry Commission that if he had proof of shady practices he would have published it in his paper, and his repeated statements before the trial Court that he had nothing really by way of proof beyond suspicion against U Hla Maung, and (*b*) it was an unrestrained press campaign against U Hla Maung rather than a fair comment on the conduct of a public servant in the discharge of his duties. This finding is supported by the publications themselves and the applicant's statements in Court that he felt that U Hla Maung should have the decency to

resign as a result of these attacks and also that he considered U Hla Maung not only unfit to hold on to his position but that he was a menace to the country.

Two Courts have weighed the evidence and found that there was no justification in that neither truth nor good faith had been displayed, and it would be in violation of all principles and precedents if we were to consider ourselves to be a third Court of fact and to assess once again minutely and in detail, the evidence, and to come to a conclusion contrary to that of the two Courts below.

This being the position, we must repeat what we have said before that this Court is no ordinary Court of Criminal Appeal, and that ordinarily no such leave would be granted unless it could be shown that grave and substantial injustice had been done. See *The Union of Burma* v. *Tan Yu Taik* (1) and *Tun Sein* v. *The Union of Burma* (2). The case before us does not present any such feature nor can we see exceptional or special circumstances which would warrrant our interference. The fact that these defamatory publications were made by an Editor in his newspaper would not bring the case out of the ambit of section 499. An Editor is in no special position and his liability for defamation is to the same extent as that of any other person, and since news items or comments published in a newspaper are likely to be taken by the public as true or fair as the case may be, an Editor has even a greater responsibility to exercise due caution and to convince himself that what he publishes is based upon substantial truth and that his comments are fair and based upon such truth. The lower Courts came to

(1) S.C.Cr. Misc Appln. No. 2 of 1953.
(2) S.C.Cr. Misc. Appln. No. 4 of 1953.

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the conclusion that such caution was not exercised by U Law Yone in respect of the articles complained of and we can see no justification to vary this finding.

The application for special leave is dismissed.

SUPREME COURT.

YEO TONG HOE (APPELLANT)

v.

TAN SOON LEE (RESPONDENT).*

† S.C. 1954

Oct. 4.

Document in foreign language—Meaning of expressions, question of fact—How interpreted—Evidence Act, s. 98—Practice of Courts—Acceptance or rejection of official translation, how determined—Evidence Act, s. 92, Proviso 6—Admission of extrinsic evidence, when inapplicable.

Held : When a contract is made in a foreign language, the Court, having to construe it, must first obtain a translation of the instrument, and secondly an explanation of the terms. The meaning of words and phrases in the agreement must be determined by the Court like any other question of fact after taking evidence thereon as provided for by s. 98 of the Evidence Act.

The Duchess Di Sora v. *A. L. Phillipps and others*, 10 H L.C. 624 ; *Chatenay* v. *The Brazilian Submarine Telegraph Co. Ltd.*, (1891) 1 Q. B. 79, followed.

Held : It is the duty of the Courts to act upon the official translation of documents unless there is expert evidence which justifies the rejection of such translation.

Rai Harendra Lal Roy Bahadur Estates Ltd. v. *Hem Chandra Naskar and another*, A.I.R. (1949) (P.C.) 179, followed.

Held also : Proviso 6 of s. 92 of the Evidence Act providing for the admission of extrinsic evidence is not applicable where the document itself is perfectly plain and straightforward, and the disputed phrase in the agreement is clear and does not require any explanation at all.

P. L. M. C. T. K. Krishnappa Chettyar v. *P. L. M. C. T. Kasiviswanathan Chettyar*, (1949) B.L.R. 153 ; *Ganpatrao Appaji Jagtap* v. *Bapu Bin Tukaram and others*, 44 Bom. 710 ; *Punjab National Bank Ltd. and another* v. *S. B. Chowdhry*, A.I.R. (1943) Oudh 392, followed.

Chan Htoon for the appellant.

Dr. Ba Han for the respondent.

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

U THEIN MAUNG, C.J.—Yeo Tong Hoe sued Tan Soon Lee on the Original Side of the High Court

* Civil Appeal No. 1 of 1953 against the decree of the High Court, Appellate Side, in Civil 1st Appeal No. 46 of 1949.

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

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for recovery of Rs. 33,000 advanced for forming a partnership on the grounds that Tan Soon Lee had made false representations to him and that the agreement to enter into partnership was contingent on Tan Soon Lee tendering to buy matches from NAAFI and on the tender being successful. On his suit being dismissed he appealed to the Appellate Side of the High Court; and on his appeal thereto being dismissed, he has appealed to this Court with a certificate granted by the Appellate Court under section 5 of the Union Judiciary Act, 1948.

His claim is based on the agreement Exhibit C which is in Chinese and the main dispute is as to the meaning of the first three words in the phrase "seng mai NAAFI khum eong khwai chai" in that agreement. The parties agree that the last four words in the said phrase mean military matches.

The House of Lords has held in *The Duchess Di Sora* v. *A. L. Phillipps and others* (1):

> "When a contract is made in a foreign country, and in a foreign language, an English Court, having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if any); thirdly, evidence of the foreign law applicable to it; and fourthly, evidence of any peculiar rules of construction which may exist in that law, and must then itself interpret the instrument on ordinary principles of construction."

Lord Chelmsford also observed in the course of his judgment in the said case:

> "The office of construction of a written instrument, whether foreign or domestic, brought into controversy before our tribunals, properly belongs to the Judge. * * * * * * * * * * * *
> But the witnesses having supplied the Judge with all these facts, they must retire and leave his sufficiently informed mind

(1) 10 H.L.C. 624.

to his own proper office—that of ascertaining for himself the intention of the parties; or, in other words, of construing the language of the instrument in question."

Section 98 of the Evidence Act also provides:

"Evidence may be given to show the meaning of foreign expressions."

So the meaning of the said phrase in the agreement must be determined by the Courts like other questions of fact. (Cp. *Chatenay* v. *The Brazilian Submarine Telegraph Co. Ltd.* (1). Lindley, L.J., observed in the course of his judgment therein:

"The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law."

There is an official translation of the agreement by Mr. C. Ah Khain, Senior Chinese Interpreter of the High Court who by the way has also given evidence as to the meaning of the said phrase as a witness called by the trial Court; and their Lordships of the Privy Council have stated in *Rai Harendra Lal Roy Bahadur Estates Ltd.* v. *Hem Chandra Naskar and another* (2):

"Their Lordships have laid it down in several cases that it is the duty of the Courts in India to act upon the official translation of documents unless there is expert evidence which justifies the rejection of such translation. See *Sasiman Chowdhurain* v. *Shib Narain Chowdhury*, 49 I. A. 25: [A.I.R. (9) (1922) P.C. 63], *Rajendra Prasad Bose* v. *Gopal Prasad Sen*, 57 I. A. 296: [A.I.R. (17) (1930) P.C. 242] and *Sellamani Ammal* v. *Thillai Ammal*, . I. A. 264: [A. I. R. (33) (1946) P. C. 185]."

However, Tan Soon Lee has challenged the official translation of the said phrase and examined

(1) (1891) 1 Q.B. 79. (2) A.I.R. (1949) (P.C.) 179.

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Mr. L. Lin Su, B. A., B. L., Advocate of the High Court and somewhile Secretary to the Chinese Consulate in Rangoon to show that the official translation is wrong; and both of the lower Courts have accepted his translation in preference to the official translation. So one of the questions for consideration is whether there is expert evidence which justifies the rejection of the official translation and the acceptance of the non-official translation.

It is not the case for either party that the language used in the document is, on its face, ambiguous or defective so as to render section 93 of the Evidenec Act applicable. Yeo Tong Hoe's case is that the joint capital was to be used to contract to buy *from* NAAFI military matches; and his case is supported by the official translation. Tan Soon Lee's defence is that the joint capital was to be used to contract to buy NAAFI military matches; and his defence is supported by the non-official translation. So the parties agree that the phrase in the agreement " seng mai NAAFI khun eong khwai chai " has a definite meaning. They have joined issue only as to what that definite meaning is, one saying that it means " to contract to buy *from* NAAFI military matches " and the other saying that it means " to contract to buy NAAFI military matches. " In other words the dispute is only as to whether the phase " seng mai " means " to contract to buy " or " to contract to buy from ".

The official translator, Mr. Ah Khain, has admitted that the word " from " is not there and that "seng mai NAAFI military matches " would mean " to contract to buy NAAFI military matches "; and he has explained that he inserted the word " from " to make the meaning clearer according to his own idea. He has further explained that NAAFI is a noun

which cannot be used as an adjective to qualify military matches, that if NAAFI is used as an adjective some word such as " ti " or " kyi ", which indicate possessive case, must be placed after NAAFI, and that the meaning must be made clearer as to where to buy or from whom to buy. So the basic idea underlying his translation of the phrase is that NAAFI is a noun which cannot be used as an adjective to qualify military matches.

However, the question as to whether NAAFI can or cannot be so used is hardly a question for an expert in the Chinese language ; and we do not see any reason why the word cannot be used as an adjective at all. As a matter of fact, it is used as an adjective in one of Yeo Tong Hoe's own exhibits *viz.* Exhibit A where the phrases " NAAFI/EFI Surplus Stores " and " NAAFI Disposal Committee " occur ; and one of his own witnesses *viz.* Tan Swee Seong has referred to the matches which were to be bought as NAAFI military matches.

Moreover, the official translator has gone beyond his bounds in trying to make the meaning of the phrase clearer by inserting the word " from ", which admittedly was not there in the Chinese text, as according to his own idea the agreement must indicate not only what must be bought but also where or from whom it must be bought.

On the other hand Mr. Lin Su has explained that NAAFI is some sort of proper noun used more or less as an adjective to qualify military matches, that " seng " by itself cannot imply " from " and that " seng " must be followed by a preposition meaning " from " if the phrase is to have the meaning " to buy from ". The learned Advocate for Yeo Tong Hoe himself asked Mr. Lin Su whether the prepositions " Yu ", " Tzu "and " Ts'ung " would be used

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for the English word "from" and Mr. Lin Su's answer was in the affirmative.

Under these circumstances we are clearly of the opinion that the lower Courts are justified in rejecting the official translation and accepting the non-official one. The correct translation is "to contract to buy NAAFI military matches" and it is common ground that the oral agreement which preceded the purchase of military matches was in the same terms as the subsequent written agreement. So Yeo Tong Hoe cannot recover his share of the capital either on the ground that Tan Soon Lee has made a misrepresentation of fact that he had bought or would buy from NAAFI or on the ground that Tan Soon Lee has bought military matches not directly from NAAFI but from a third party whose tender for the same had been accepted by NAAFI.

Both the lower Courts have come to the same conclusion. However, the trial Court observed in the course of its judgment:

"To arrive at a surer solution of this etymological and grammatical difficulty it is necessary to attempt to understand the meaning of these two words by reference to the actual context of relevant facts and circumstances on which they have a direct bearing."

The Appellate Court also observed in the course of its judgment:

"As the true meaning of the words 'seng mai NAAFI' is not at all clear and is in dispute, we are convinced that the reasoning of the learned Judge of the Original Side 'that to arrive at a surer solution of this etymological and grammatical difficulty, it is necessary to attempt to understand the meaning of these two words by reference to the actual context of relevant facts and circumstances on which they have a direct bearing' is unassailable."

They finally accepted the non-official translation of the said phrase only after they had found that it did

and the official translation did not, fit "the actual context of relevant facts and circumstances."

So the learned Advocate for Yeo Tong Hoe has contended that they should have decided the case solely on the terms of the written agreement without having resort to extraneous oral evidence as to the said context. They had resort to such evidence *ex abundanti cautela*—"to arrive at a surer solution"—as they felt that they were "very much handicapped by the lack of knowledge of Chinese"; but they were technically wrong.

As the High Court has decided in *P.L.M.C.T.K Krishnappa Chettyar* v. *P.L.M.C.T. Kasiviswanathan Chettyar* (1) :

> "Oral evidence of the intention of parties to a document is not admissible for the purpose of construing the deed or ascertaining the intention of the parties. The question before the Court is not what the parties may have intended to do by entering into the deed but what is the meaning of the words used in the deed.
>
> * * * * *
>
> Proviso 6 of s. 92 of the Evidence Act provides for the admission of such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. This can arise only when the terms of documents required explanation."

Cp. *Ganpatrao Appaji Jagtap* v. *Bapu Bin Tukaram and others* (2) in which the Bombay High Court held :

> "Where the document itself is perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required and it will therefore be admitted. But it can only be in cases where the terms of the documents

(1) (1949) B.L.R. 153. (2) 44 Bom. 710.

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themselves require explanation, that extrinsic evidence can be led within the restrictions laid down by proviso (6) of section 92, Evidence Act, 1872."

See also *Punjab National Bank Ltd. and another* v. *S. B. Chowdhry* (1).

So proviso 6 to section 92 of the Evidence Act, under which the lower Courts have referred to the said evidence, does not apply as the phrase in the agreement is clear and does not require any explanation at all.

However, their technical error has not in any way affected the merits of the case.

The appeal is dismissed with costs.

(1) A.I.R. (1943) Oudh 392.

BURMA LAW REPORTS

HIGH COURT

1954

Containing cases determined by the High Court, Rangoon

MR. B. W. BA TUN, M.A., LL.B., *Bar.-at-Law*, EDITOR.
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HON'BLE JUDGES OF THE HIGH COURT OF THE UNION OF BURMA DURING THE YEAR 1954

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3. The Hon'ble Justice U AUNG THA GYAW, B.A., B.L.
4. The Hon'ble Justice *Maha Thiri Thudhamma* U THAUNG SEIN, B.Sc., I.C.S. (Retd.).
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7. The Hon'ble Justice *Thray Sithu* U CHAN TUN AUNG, B.A., B.L., *Barrister-at-Law* (from 18th March to 6th October, 1954).
8. The Hon'ble Justice U BA THOUNG, *Barrister-at-Law* (from 18th March, 1954).

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it is open to the Court to take this question into consideration if the facts warrant it. *The King* v. *Hla Maung*, (1946) B.L.R. 50, followed.

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to. *Held further :* S. 53-A, Transfer of Property Act cannot be invoked against a person whose title is paramount and who is claiming the land independently of the transferor.

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CIVIL PROCEDURE CODE, ORDER 3, RULE 5—*Advocates and Pleaders, authority to act, when terminates—Service of notice upon Advocate—Presumed effective service upon client. Held:* An Advocate or Pleader who has been engaged to represent a party may continue to act for that party until all proceedings in the suit are ended so far as regards the client. *E. F. Sandys* v. *Upendra Chandra Sinha Roy*, 13 C.W.N. 112; *Shaikh Muhammad Jamil* v. *Musammat Bibi Tufailan*, 65 I.A. 47, distinguished. *Held also:* Order 3, Rule 5, Civil Procedure Code explicitly lays down that any process served on an Advocate of any party shall be presumed to be good and effective service on that party, but it is a rebuttable presumption.

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CRIMINAL PROCEDURE CODE, S. 552—*Restoration of woman or female child under 16—Unlawful detention—Unlawful purpose—What amounts to. Held:* If a girl is being detained by her father contrary to her own wish, it would constitute unlawful detention, within the purview of s. 339, Penal Code and would therefore be detention for unlawful purpose. The unlawful detention of a minor wife by her father would afford a cause of action to the husband to recover possession of his wife by a civil action and therefore the purpose of such detention would be unlawful *Tulsidas Janglvadas* v. *Chalavdas Domadas and another*, A.I.R. (1933) Nag. 374; *Nathu Maistry* (a) *Nritya Lal Patto* v. *Nari Lal Maistry*, 15 C. L.J. 712, followed.

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FOREIGN EXCHANGE REGULATION ACT, 1947, S. 9 (*1*) READ WITH S. 24 (*1*)—*Illicit import of gold in bars secreted in torch cells—Accomplice, statements by—Evidentiary value of—Degree of corroboration required. Held:* A person who was not privy to the plot or design to bring in the contraband gold, and all that he did was to try and persuade the Customs official to pass the goods after he had learnt of the existence of the contraband, is only an accessory after the fact. No doubt his evidence needs some corroboration but the degree of corroboration need not be of the same standard as that required of an accomplice who was a guilty associate in the crime from its very inception.

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GOVERNMENT OF BURMA ACT, 1935, s. 39 (3)—"G" *Circular No. 15 of 1940—Dismissal from Government service—Preliminary Enquiry—Orders passed by Governor at Simla—Reasonable opportunity to show cause against enquiry and final orders, whether afforded—India and Burma (Temporary and Miscellaneous Provisions) Act, 1942, s. 5. Held:* It appears to be clear from the rules made in the "G" Circular No. 15 of 1940, which were scrupulously observed, that every effort had been made to give the Government servant, against whom the departmental enquiry was to be conducted, a reasonable opportunity of showing cause against the action which was proposed to be taken against him. Moreover he was also afforded an opportunity of representing his grievance against the order of dismissal in the form of an appeal to the Governor. *High Commissioner for India and another* v. *I. M. Lall*, (1948) 75 I.A. 225, distinguished. *Held also:* The Governor had the authority and power to dismiss the appellant while in India by virtue of the explicit provisions of s. 5 of the India and Burma (Temporary and Miscellaneous Provisions) Act, 1942.

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MAINTENANCE—*Criminal Procedure Code, s. 488—Maintenance of wife and child—Separation by mutual consent—Husband donning yellow robes for four years—Effect of subsequent disrobing and absence of contact. Held:* When a man enters the priesthood intending to renounce the world and not merely to become a *Dunlaba Rahan*, there is a severance of the marriage tie especially when the wife consents to such a step. There seems no reason why she should have lost touch with him for such a long period unless he had obtained a divorce.

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MORTGAGE—*Suit for recovery of mortgage debt—Third party claiming title paramount—Not a necessary party. Held:* Persons claiming under a title adversely to that of both the mortgagor and the mortgagee are not proper parties, and the claim of the person so claiming adversely cannot be adjudicated in a mortgage suit. *M.V.A.L. Viswanathan Chettyar* v. *Ma Aye and three others*, (1926) I.L.R. 4 Ran. 214; *Maung San Myaing* v. *U Po Gyaw*, (1926 I.L.R. 11 Ran. 106; *U Shwe Kyu and four others* v. *Ma Tin U*, (1948) B.L.R. 606; *Ma Tin U* v. *U Shwe Kyu and four others*, (1950) B.L.R. (S.C.) 128; *Tinkhari Dasee* v. *Narendranath Mukherji*, (1932) 59 Cal. 548; *Satagauda Appanna Atagaoudanavar* v. *Salapa Bin Darigaouda Genapnavar*, (1920) 44 Bom. 698, followed.

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MORTGAGE DEBT—*Limitation Act, Article 132—Payment when due—Where no date specified debt becomes due only on demand—Limitation runs from date of demand—Civil Procedure Code, Order 41, Rule 22—Without cross-objections respondents not entitled to attack adverse findings. Held:* The question when

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the mortgage money becomes due has to be determined with reference to the terms of the particular document; if there is no mention of any specific date for the payment of the mortgage debt, it does not become due till a demand has been made for payment. *Raghubir Singh, Raja and another* v. *Kunwar Rajendra Bahadur Singh*, I.L.R. 8 Luck. 488; *Mukhdeo Singh* v. *Harakh Narayan Singh*, I.L.R. 11 Pat. 112; *Nilkanth Balwant Natu and others* v. *Vidya Narasingh Bharati and others*, I.L.R. 54 Bom. 495; *Maruthappa Maistriar and others* v. *Soosai Anthonimuthu Mudaliar and others*, A.I.R. (1944) Mad. 172; *Megah Nath and another* v. *The Collector, Cawnpore*, A.I.R. (1947) All. 7, followed. *Held also:* The respondent-defendants having failed to file a cross-objection to the decree they cannot be allowed to attack any adverse findings against them by the trial Court. *Raja Ram* v. *Lehna and another*, A.I.R. (1942) Lah. 87; *Mahagu and another* v. *Narayan and others*, I.L.R. (1950 Nag. 679, followed.

TAN KEAT KHANG AND ONE *v.* MA THEIN SHIN AND SEVEN OTHERS 103

MURDER—*Initial robbery followed after lapse of time by murder of hostage—Identity of murderer not established—Confession, admissibility of, after maker's death, against surviving robber—Conviction under s. 302 (1) (c) read with s. 34, Penal Code—Common intention to commit murder, inference whether reasonable—Conviction altered to one for robbery though not charged with it. Held:* A confession is admissible in evidence though the maker is dead: *Maung Shin and two others* v. *The Union of Burma*, (1948) B.L.R. 425. *Held also:* From the mere fact that the appellant was a participant in the robbery it does not necessarily follow that the only reasonable inference possible is that there was a common intention to kill the owner of the the hut. *Maung Myint* v. *The Union of Burma*, (1948) B.L.R. 379. *Held further:* As the appellant confessed to taking part in the robbery he probably envisaged the possibility of being convicted of robbery, and is therefore not prejudiced in any way by the absence of a specific charge when the conviction is altered to one of robbery.

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NEWSPAPERS—*Contempt of Court, what constitutes—Responsibilities of Editor and Publisher—Scurrilous imputations—Verification of truth and identity of writer desirable before release—Apology, when acceptable. Held:* A publication which is calculated to prejudice the course of justice or to lower the dignity or authority of the Court will constitute a contempt. *The Queen* v. *Gray*, (1900) 2 Q.B.D. 36 at 40; *The King* v. *Davies*, (1906) 1 K.B.D. 32 at 40, followed. *Held:* An editor and the printer and publisher of a newspaper must understand that they should not allow their newspaper to be made the medium of baseless attacks upon Judges and Courts by malicious persons, found later to be fictitious, and disgruntled litigants. *Held further*. An apology cannot be accepted as a complete palliation in view of the fact that the publications clearly constituted a mischievous and wholly baseless contempt of the High Court. It is not a magic formula which when incanted will stave off punishment. *In the case of Jawaharlal*, (1941) I.L.R. Nag. 304 at 307, referred to.

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NEWSPAPER, DEFAMATION BY—*Penal Code, s. 499—Editor, his duty and responsibility—Plea of justification and fair comment when good defence—Specific mention of name unnecessary if understood to refer to a particular person—Evidence Act, ss. 9 and 15—Subsequent articles admissible to explain relevant facts—Applicability of Exceptions to s. 499, Penal Code, how determined—Evidence Act, ss. 123, 124, 162—Claim of privilege—Affidavit not necessary for State documents. Held:* An Editor should abstain from making injurious imputation or personal invective upon another person without carefully ascertaining whether there are reliable or proper facts to substantiate the imputation or invective. *Held:* The appellant must in order to succeed upon the plea of justification prove that the defamatory statements are true or at least substantially true; the fact that the matter is of great public interest will not relieve him from the necessity of proof. The plea of fair comment will fail if the foundation upon which the comment was made did not exist and when therefore the comment cannot be said to be made *bonâ fide*. *Held also:* It is not necessary for the purpose of s. 499, Penal Code for the name of the defamed person to be specifically mentioned if it is understood by those who know him to refer to him by reason of an earlier publication in the same newspaper. *Gaya Din and others* v. *King-Emperor*, (1934) I.L.R. 9 Luck. p. 517 at 523. *Held also:* In view of ss. 9 and 15 of the Evidence Act subsequent publications to that complained of are admissible to explain relevant facts in issue and to prove that the words complained of were published with a knowledge that they imputed a disparaging conduct upon the person defamed. *Held further:* It is now a rule of law in considering whether any of the pleas under the Exceptions to s. 499 of the Penal Code is applicable that the publication concerned should be read in a liberal spirit, allowing for certain exaggerations or exuberant expressions, which an enthusiastic or public spirited person might reasonably entertain *Davis and Sons* v. *Shepstone*, (1886) 11 A.C., p. 187 at 190; *Merivale* v. *Carson*, (1888) 20 Q.B.D., p. 275 at 281; *Peter Walker & Son, Ltd.* v. *Hodgson*, (1909) 1 K.B., p. 239 at 253, followed. *Held lastly:* There is nothing in ss. 123, 124 and 162, Evidence Act to warrant the assumption that an affidavit has to be filed before a claim of privilege can be allowed by a Court; where the documents relate to affairs of the State, it is at the discretion of the head of the department to claim privilege.

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URBAN RENT CONTROL ACT—S. *11* (1) (f) *and s. 13* (1) (c), *distinction between—"Member of family" extent of interpretation limited. Held :* If the legislature had meant that a tenant may be ejected from the premises occupied by him, if such premises are *bonâ fide* required by the owner for occupation by himself or any member of his family, the same expression as occurs in clause (c) of sub-section (*1*) of section 13 would have been used in clause (*f*) of sub-section (*1*) of section 11, in which the omission of the words "or any member of his family" is significant. *Held further :* The word "himself" in section 11 (*1*) (*f*) must be interpreted to cover only the owner and his wife and such members of his family as are entirely dependent upon and living with him.

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AFFIDAVIT—*Suit dismissed for default of appearance under Order IX, Rule 8, Civil Procedure Code -Application to restore suit—Affidavit presented in support—Contents, admissibility of, in evidence. Held :* Although an affidavit ought not ordinarily to be considered as evidence, it is clearly admissible as evidence if it can be brough within the purview of Order XIX of the Civil Procedure Code ; the words "any application" in Rule 2 are used in a very wide sense to include applications of a substantive nature, such as an application under Order IX, Rule 9 of the Civil Procedure Code. It is the duty of a Court of Law to expound the provisions of a statute in accordance with the real sense of the words used in a Statute. *Federal India Assurance C. Ltd* v. *Anandrao Pandurangrao Dixit*, A I.R. (1944) Nag. 161 ; *Gopikabai and others* v. *Narayan Govinda Samarth and others*, A I.R. (1953) Nag. 135, dissented from. *Shib Sahai* v. *Tika*, I.L.R. 18 Luck. 104 at 107, followed. *Magor and St. Mellons Rural District Council and Newport Corporation*, (1952) A.C. 189 (H.L.), referred to

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Goverdhandass, (1947-48) C.W.N. 826 at 831 followed. *Ram Narain Gunga Bissen* v. *Liladhur Lowjee*, (1906) 33 Cal. Series, 1237 ; *Udaichand Panna Lall* v *Debibux Jewanram*, (1920) 47 Cal. Series 951 ; *The Grahams Trading Co. (India) Ltd.* v. *Chandulal Parmanand*, A.I.R. (1935) Sind 228, discussed

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CRIMINAL PROCEDURE CODE, S 526—*Application for transfer of case—Paramount duty of trial Magistrate— Courtesy calls and fraternization between Magistrate and prosecuting Government official deprecated—Apprehension of accused, and not existence of bias, deciding factor. Held :* For purposes of transfer on grounds set out in clause (*a*) sub s. (*1*) of s. 526, Criminal Procedure Code, it is not necessary to establish actual bias in the mind of the Magistrate concerned. What should be considered is whether incidents that took place before the Magistrate are such as are calculated to create in the mind of the applicant for transfer a reasonable or justifiable apprehension that he would not have a fair or impartial trial. *M. De Carmo Lobo* v. *G. C. Bhattacharjee*, A.I.R. (1937) Ran. 272, followed.

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CRIMINAL PROCEDURE CODE, S. 403—*Autre fois convict plea of—When tenable—Prosecution under s. 6 (1) of the Public Property Protection Act—Prosecution under ss. 409 and 380, Penal Code not barred. Held :* A prosecution for unauthorised possession of Government property under s. 6 (*1*) of the Public Property Protection Act is for a distinct offence from the offences of breach of trust and theft under ss. 409 and 380, Penal Code in respect of other Government properties, and therefore the prosecution was not barred under the principle of *Autre fois convict*. *Emperor* v. *Deoki Koeri*, I.L.R. 48 All. 496, followed.

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CRIMINAL PROCEDURE CODE, S. 562—*Release on probation for good conduct—Conditions requisite for exercise of discretion. Held :* To enable a Court to release an offender under s. 562, Criminal Procedure Code, there must be no previous conviction and the

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offence must be one of those specified therein. If these two conditions are fulfilled the Court has quite a wide discretion to act under the said section having regard to the points specified therein such as youth, character, antecedents, trivial nature of offence and to any extenuating circumstances under which the offence was committed.

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CRIMINAL TRIAL—*Penal Code, ss. 409 and 477-A—Accused initially tried by Inferior Military Court under military administration—Evidence recorded summarily—Withdrawal of military, reversion to civil administration—Same judge continuing trial—Former evidence cannot be used—Consent of accused immaterial—Transfer of Magistrate Case sent from successor with incompetent powers to another Magistrate under s. 346, Criminal Procedure Code—De novo trial imperative—S. 350, Criminal Procedure Code—Waiver by accused immaterial—Misjoinder of charges—Not curable under s. 537, Criminal Procedure Code. Held :* After the withdrawal of military administration in the relevant area and after the Magistrate had reverted to service under the civil administration, he was incompetent, notwithstanding consent of the parties concerned, to accept the evidence already recorded in his capacity as an Inferior Military Court, and use them in the new trial of the applicant. *Ba Yi* v. *Ma Sein Myint*, Criminal Revision No. 178-B of 1951, followed. *Held also :* As sub-s. 2 of s. 350, Criminal Procedure Code expressly excludes disposal of cases coming under circumstances set out in s. 346 (*1*), the Magistrate to whom the case has been sent for disposal under the latter section has no option but to start the trial afresh. The question of *de novo* does not arise, consequently waiver of the right is irrelevant. *Sashti Gopal Sami and another* v. *Haridas Bagdi*, A.I.R. (1938) Cal. 415 ; *Shar Khan* v. *King-Emperor*, A.I.R. (1933) Sind 191 ; *Gura and others* v. *Emperor*, A.I.R. (1943) Lah. 37 ; *In re K. K. Ummar Haji and others*, A.I.R. (1923) Mad. 32 ; *Chinna Venka Naidu*, A.I.R. (1923) Mad. 327 ; *Mohamed and another* v. *Emperor*, 2 C.L.J. 569, followed. *Held further :* Criminal breach of trust and falsification of accounts cannot be joined at one trial if it is established that they do not arise out of the same transaction. *Dubri Misir* v. *King-Emperor*, I.L.R. 6 Luck. 441 ; *Kasi Viswanathan* v. *Emperor*, I.L.R. 30 Mad. 328 ; *Emperor* v. *Jiban Kristo Bagchi*, I.L.R. 40 Cal. 318 ; *Rameshwar Brijmohan* v. *Emperor*, A.I.R. (1933) Nag. 327 ; *Nga San Mya* v. *Emperor*, A.I.R. (1933) Ran. 325 ; *Subramania Ayyar* v. *Emperor*, I.L.R. 25 Mad. 61 I.A. 257, followed.

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DISMISSAL OF SUIT FOR DEFAULT OF APPEARANCE—*Civil Procedure Code, Order IX, Rule 8—Contrast with dismissal under Order XVIII, Rule 3—Power of Attorney in suit ensures for application to restore suit dismissed for default—Contents of affidavit in support of application, whether admissible as evidence. Held :* As adjournments in the suit were obtained not to enable the plaintiffs to produce their evidence or to perform any other act necessary to the progress of the suit, in which case Order XVII, Rule 3 would apply, but to await the orders of the High Court, the dismissal of the suit for default of appearance must be

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considered to be under Order IX, Rule 8 of the Civil Procedure Code. *Held also*: In the absence of restrictions contained in a power of attorney given by a litigant to his pleader for the purposes of a suit, the pleader has authority without any fresh power to file an application to set aside a dismissal order, and such an application forms part of the proceedings in the suit within Order III, Rule 4, sub-rule (2) of the Code of Civil Procedure. *Bashir Ahmad* v. *Mrs. Mary Minck*, 19 Lah. 417, referred to. *Abdul Aziz* v. *The Punjab National Bank, Ltd.*, 19 Lah. 570; *U Oak and others* v. *Ma Khin and others*, (1941) R.L.R. 253, followed. *Held further*: On a reference it has been decided by a Bench of this Court that the contents of an affidavit can be treated as evidence in support of an application under Order IX, Rule 9 of the Civil Procedure Code for the restoration of a suit dismissed for default. *Federal India Assurance Co. Ltd.* v. *Anandrao Pandurangrao Dixit*, (1944 Nag. 161; *Marneedi Satyan* v. *Masimukula Venkataswami and others*, A.I.R. (1949) Mad. 689; *Gopikabai and others* v. *Narayan Govinda Samarth and others*, A.I.R. (1953) Nag 135, discussed.

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added as a defendant and against whom there is no claim whatsoever, such a person should not be added as a defendant. An order contravening this principle is not only erroneous but is an illegal assumption of jurisdiction by the Court. *A. M. A. Murugappa Chettyar* v. *L.K.S S. Firm*, (1926) A.I.R. Mad. 135 ; *C. Narayanaswami Naidu* v. *N. Subbaramulu Naidu and another*, (1935) A.I.R. Mad. 394 ; *Ranganayaki Ammal* v. *Janaki Ammal*, (1937) A.I.R. Mad. 338 ; *Chaya Lakshmidayamma* v. *Chaya Nagayya*, (1949) A.I.R. Mad. 369 ; *Norris and another* v. *Beasley*, Common Pleas Divn. (1876-7) L.R. 80 ; *V.P.S.A.K. Tiruvaduthurai Adhinam* v. *Sadasiya Iyer and others*, (1926) A.I.R. Mad. 836, followed.

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ought to be dealt with. They empower the Registrar on the Original Side to entertain the application for reconstruction of lost records, and even if he has no power to examine witnesses and pass an order the proceeding validly initiated is not void *ab initio*. *Held further* : The order of the Judge directing the reconstruction of the lost record is in no sense a decree ; it did not decide the rights of the parties involved in the suit or any matter in issue. No appeal lies, therefore, from such order. *Held also* : The word "judgment" in s. 20 of the Union Judiciary Act, 1948 has the same meaning attributed to it in Clause 13 of the old Rangoon Letters Patent, and cannot be interpreted to give it a more extensive meaning. *Holme* v. *Guy*, (1877) 5 Ch. D. p. 901 at 905 ; *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*, (1943) L.R. (A. C.) p. 402 at 411.

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APPEAL AGAINST ACQUITTAL—*Principles underlying acceptance—Criminal Procedure Code, ss. 417, 418 and 423. Held :* In exercising the power conferred by ss. 417, 418 and 423 of the Code of Criminal Procedure, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of witnesses ; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial ; (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an Appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. In short the appeal against an acquittal should only succeed where the order was clearly wrong and involved a miscarriage of justice. *King-Emperor* v. *U San Win*, I.L.R. 10 Ran. 312 ; *Sheo Swarup and others* v. *Emperor*, Vol. 36, Cr.L.J. 786 (P.C.) ; *Emperor* v. *Nga Mya Maung*, (1936) A.I.R., Ran, 90 ; *Emperor* v. *Haji Gulab Shah Kadir Shah*, Vol. 39, Cr. L.J. 504, followed.

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APPEAL—*Necessary party, impleading of—Suit against two persons jointly for recovery of money—Separate defences of non-liability—Claim decreed against one—Appeal by, without impleading dismissed defendant, when incompetent—Authority of case cited, applicability of. Held :* Where the claim by the plaintiff against the two defendants for payment of sale commission is not in the alternative, and where his pleadings do not evince any doubt as to their liabilities, and where the two defendants filed separate and inconsistent defences, an appeal by the defendant against whom the claim is decreed is not incompetent merely for failure to implead the dismissed defendant as the latter is no more an interested party in the subsequent litigation. *Sein Dass* v. *Lakhajee and another*, (1940) R.L.R. 693, distinguished. *Ma Than May* v. *Mohamed Eusoof*, I.L.R. 9 Ran. 624 ; *V.P.R.V. Chokalingam Chetty* v. *Seethai Acha and others*, I.L.R. 6 Ran. 29, referred to. *Held also :* Every judgment must be read as

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CRIMINAL PROCEDURE CODE, s. 476—*Complaint by Court for offence under s. 193, Penal Code—Right of appeal, whether order by Court* suo motu *or at instance of interested party—Complaint, necessity of prompt action. Held :* The provisions of s. 476 (*b*), Criminal Procedure Code give a right of appeal to any person against whom a complaint has been made by a Court acting under s. 476 or s. 476 (*a*), and it is immaterial whether the Court acts *suo motu* or on an application made to it by some interested person. *Mt. Satto* v. *Emperor*, A.I.R. (1929) Lah. 9, dissented from. *Thiraj* v. *Emperor*, A.I.R. (1929) Lah. 641 ; *Master Zodpa* v. *Emperor*, A.I.R. (1936) Lah. 828, followed. *Held :* If the Court decides of its own motion to act under s. 476 of the Code of Criminal Procedure, that action should be taken immediately after the judgment was passed in the proceedings ; nor should a Court entertain an application for action when made after an inordinate delay. *Mohamed Kaka and others* v. *The District Judge of Bassein*, (1937) Rang. 276 ; *U Po Thein* v. *Buta Khan*, A.I.R. (1936) Rang. 473 ; *Hwe Eve Hain and one* v. *The King*, (1948) B.L.R. 40, followed.

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CRIMINAL TRESPASS—*Penal Code, ss. 441, 447—Ingredients essential to establish offence—Criminal Procedure Code, s. 582, restoration of land, when proper—Two sets of accused, two trials—Complainant and facts same—One judgment only, procedure improper. Held :* To establish an offence of criminal trespass under ss. 441, 447 of the Penal Code, it must be shown that the complainant is in actual physical possession, and not mere juridical possession of the land ; and that the trespassers had the intention to intimidate, insult or annoy the person in possession. Mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within s. 441, Penal Code. *Bageshwari Davi and others* v. *Indian Union*, 51 Cr.L.J. 821, followed. *Held :* As there is no evidence on record and there is no finding by the Magistrate that the complainant had been dispossessed of the land by criminal force or show of force or by criminal intimidation, the order of restoration of the land under s. 522, Criminal Procedure Code is illegal. *Bageshwari Davi and others* v. *Indian Union*, 51 Cr.L.J. 821, followed. *Held also :* Where evidence was recorded in two cases against two sets of accused persons, though the complainant and the facts are the same, it is the duty of the Magistrate to deal with each case separately ; the procedure adopted of writing a single judgment to cover both cases is bad. *Doat Ali and others* v. *King-Emperor*, A.I.R. (1928) Cal. 230, followed.

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EXTORTION—*Penal Code, s. 384—Concurrent findings by lower courts—High Court, revisional powers of, in such cases—Evidence of victim of extortion distinguished from evidence of willing accomplice as regards necessity of corroboration. Held :* The High Court as a Court of revision will not approach the application as a court of appeal, and will not as a rule go into the evidence but will accept the concurrent findings of facts by the lower courts, except where the judgment of the facts is manifestly wrong and palpably unjust. *Maung Mya Sein and others* v. *The Union of Burma*, Criminial Revision 2-B of 1953 ; *M. B. Ignatious* v. *Alagamma*, A.I.R. (1935) Ran. 192 ; *Jumman* v. *Emperor*, A I.R. (1944) Nag. 285 ; followed. *Held also :* The evidence of a person who is a victim of extortion is to be regarded as standing on a different footing from that of another who is a willing accomplice in the crime committed. *Papa Kamalkhan* v. *Emperor* I.L.R. 59 Bom. 486 at 495 ; *Srinivas Mall Bairoliva and another* v. *Emperor*, A.I R. (1947) (P.C.) 135, followed.

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HANDWRITING—*Finger-prints—Value of—Expert opinion on handwriting, sole basis for conviction, rarely safe. Held :* Comparison of handwriting with a view to discover the identity of the writer, regarded as a science, is much less developed than the comparison of finger-prints with a view to establish identity. Though it is safe to regard finger-prints as a reliable form of identification of a person the same can hardly be said of handwriting. The correct approach is to regard the opinion of the handwriting expert as strong corroboration generally. In re *Venkata Row*, 36 Mad 159 ; *Ladharam Narsinghdas* v. *Emperor*, A.I.R. (1945) Sind 4, referred to. *Held also :* Cases in which the peculiarities in the handwriting of a person are so numerous and striking that the Court might well come to the safe conclusion on expert evidence alone that the writing is that of a particluar person are much rarer than other scientific means of identification of persons.

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MAINTENANCE—*Criminal Procedure Code, s. 448 (4)—Wife, refusal by, to resume cohabitation offered by husband—Duty of Court—Enquiry into sufficiency of reason. Held :* Where the husband has made an offer to live again with his wife, a Court is bound to hold an inquiry into the sufficiency of her reasons for refusing to resume cohabitation before dismissing the application for the mere refusal under s. 488 (4) of the Criminal Procedure Code. *Sultan* v. *Mahtab Bibi*, 27 Cr.L. J. 1319 ; *Said Bibi* v. *Umar Din*, 130 I.C. 51, followed.

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MUNICIPAL CORPORATION—*Suit for damages for wrongful dismissal from service—Civil Procedure Code, Order VIII, Rule 5—Court may require proof even though allegation not specifically denied—Departmental enquiry before dismissal or removal—Public servant not entitled to as of right—Municipal Corporation of the City of Rangoon (Suspensions) Act, 1943, ss. 2 (1), 4—Sole administrator*

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vested with wide powers—Municipal Act, ss. 203 and 204 (1) (b)—Maintainability of suit for act done in good faith—Limitation for such a suit. Held : Although an allegation in the plaint not having been specifically denied in the written statement can be taken as having been tacitly admitted, yet the proviso to Order VIII, Rule 5 enables the Court in its discretion to require any facts so admitted to be proved otherwise than by such admission. *Shriram Surajmal* v. *Shriram Jhunjhuniwa*, A.I.R. (1936) Bom. 285, distinguished. *Held :* Rules made prescribing the procedure to be followed in the conduct of departmental enquiries do not limit the right of the Corporation to dismiss any officer appointed under the City of Rangoon Municipal Act, nor does the Act provide anywhere expressly or by implication that a Municipal officer can as of right claim that an enquiry should be held before he is dismissed or removed. *The Secretary of State for India in Council* v. *C. J. Maurice*. (1937) R.L.R 37, referred to. *R. T. Rangachari* v. *The Secretary of State for India in Council*, I.L.R. 57 Mad. 857, referred to. *Held :* A sole administrator appointed under s. 2 (*1*) of the Municipal Corporation of the City of Rangoon (Suspensions) Act, 1943, has, under s. 4, very wide powers subject only to the control of the Government, and he is not limited to rules framed under the original Municipal Corporation of the City of Rangoon Act. *Held also :* As the administrator acted in good faith within the meaning of s. 203 of the City of Rangoon Municipal Act, no suit is maintainable against the Corporation ; and further as the suit was brought after the expiry of six months as provided by s. 204 (*1*) for such a suit, it is barred by limitation. *Parvateppa Mallappa Hubli* v. *Hubli Municipality*, A.I.R. (1937) Bom. 491, referred to.

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PLEA OF "GUILTY"—*Perfunctory acceptance by Court followed by conviction—High Court—Revisional and inherent powers unrestricted—Duty of Court when accused pleads 'guilty'. Held :* Even when an accused person pleads 'guilty', before it accepts the plea and enters a conviction, the trial Court should consider whether the accused fully understands the nature of the charge, the facts of the case and the serious consequences which such a plea would entail. *Nga Ywa and another* v. *King-Emperor*, I.L.R. 12 Ran. 616. *Held also :* Though the High Court's powers are restricted by s. 412 of the Criminal Procedure Code against entertaining appeals in cases where the accused has been convicted on his own plea of guilty, yet its revisional powers in such matters are not similarly restricted, and, at the same time, its inherent jurisdiction under s. 561-A of the Criminal Procedure Code can be invoked to quash the conviction and sentence. *Ali Hoosein* v. *Emperor*, A.I.R. (1930) Ran. 439 ; *Emperor* v. *Nana Shahu Sonavane and another*, A.I.R. (1943) Bom. 209 ; *Emperor* v.

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Kisim, 48 Cr. L.J. 631 ; In re *Arunachala Goundan*, A.I.R. (1948) Mad. 492 ; *Krishna Chandra Sinha* v. *Emperor*, A.I.R. (1943) Pat. 313, followed.

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RANGOON MUNICIPAL ACT, RULE 12-A 289

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SPECIFIC RELIEF ACT, S. 42—*Declaratory suit—Roadside and encroachment stalls, title to—Rangoon Municipal Act, statutory rules made thereunder—Rule 12-A—Occupation merely by sufferance of Corporation. Held :* There is no right in law for any person to be in occupation of a roadside or encroachment stall ; he is merely there on sufferance by the Rangoon Corporation. Under Rule 12-A, of the statutory rules made under the Municipal Act, the occupancy of such stalls and the transfer of right of occupancy are entirely at the discretion of the authorities of the Corporation.

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———FOR POSSESSION 280

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TRANSFER OF PROPERTY ACT, S. 41—*Ostensible ownership—Enquiry into title, when incumbent upon transferee—Evidence Act, s. 115—Estoppel by conduct, what amounts to. Held :* Where the contents of a document of title are not consistent with existing facts, as where the land is assessed to revenue in the name of a person other than the donee of a gift by deed, it is incumbent upon a transferee to investigate the validity of the title ; he cannot invoke s. 41, Transfer of Property Act claiming purchase from an ostensible owner. *P.L.T.A.R. Chettyar Firm* v. *Maung Kyaing*, 7 Ran. 275, distinguished. *Held also :* Estoppel can arise from conduct by negligence or omission where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth. *R.M. P.A.L. Chettiar Firm* v. *Ko Maung Gale and others*, 13 Ran. 346 ; *Tan Soon Li* v. *The Burma Oil Co. Ltd.*, (1941) R.L.R. 153, followed.

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URBAN RENT CONTROL ACT, S. 2, CLAUSE (*g*)—*Tenant, definition of—Suit for possession—Permit of Rent Controller under s. 14-A* (3)—*Permit for suit under s. 13* (1) (c) *not available for suit under*

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s. 11 (1) (d). *Held :* The word tenant in s. 2 (*g*) of the Urban Rent Control Act, 1948 includes a person remaining in possession of the premises let to him after the termination of the tenancy or lease with or without the assent of the landlord. *Held also :* For a suit under s. 11 (*1*) (*d*) the landord must obtain from the Controller an order in writing under s. 14-A (3) to institute such a suit. An order in writing permitting the institution of a suit under s. 13 (*1*) (*c*) is not admissible for the filing of a suit under s. (11) (1) (*d*) ... ...

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APPELLATE CRIMINAL

Before U Tun Byu, C.J., and U Aung Khine, J.

MAUNG NYO (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1953

Jan. 14.

High Treason Act, ss. 3 (1), 4 (1)—Active combat against Government forces not sole constituent of high treason—Providing sinews of war—Succouring, comforting and encouraging combatants are equally acts of high treason.

Held : The fact that appellant was never found in active combat with the Government forces is not in itself alone a factor which would decide the question as to whether the offence committed by him amounts to levying war against the Government. A man who incites or who provides the sinews of war, or who succours, comforts and encourages those actively engaged in levying war against the Government are equally culpable as the man who by his own volition commits violence, and he is in law a principal of the same degree with those who actually go into combat.

Mon San Hlaing for the appellant.

Choon Foung (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U AUNG KHINE, J.—Appellant Maung Nyo was found guilty under section 4 (*1*) and section 3 (*1*) of the High Treason Act, 1948, and he was sentenced to suffer seven years' rigorous imprisonment on the first count and to death on the second count by the Sessions Judge, Hanthawaddy and Rangoon Town

* Criminal Appeal No. 491 of 1955 against the order of the Special Judge, Hanthawaddy and Rangoon Town District, in Criminal Regular No. 19 of 1952.

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MAUNG NYO v. THE UNION OF BURMA.

U AUNG KHINE, J.

District, sitting as a Special Judge, Rangoon, in his Criminal Regular Trial No. 19 of 1952. He now appeals against the convictions and sentences passed upon him in the said trial. Originally the appellant and two other accused in the case were sent up before the Sessions Judge, Toungoo. Subsequently, on the motion of the Attorney-General for and on behalf of the Union Government, the case was transferred to the Court of Sessions Judge, Hanthawaddy and Rangoon Town District.

The facts of the case are quite simple, and briefly they are these. On the 21st July, 1951, appellant Maung Nyo was arrested in Kindangyi village, Pyu, by the Reconnaissance Patrol of the 5th Burma Regiment stationed at Zeyawaddy. Kindangyi at that time was a sort of " No Man's Land". It fell alternately into the hands of the Government forces and of the Communist insurgents. Whenever the Government forces went into the village the Communists would withdraw, only to return on the departure of the Government forces. At the time of his arrest, the appellant had a rifle and a haversack which contained Communist literature and personal correspondence, correspondence dealing mainly with the activities of the Burma Communist Party. Exhibit A, which was found on the appellant, clearly indicates that he is a member of the Burma Communist Party. After his arrest at Kindangyi, the appellant was made over to the Investigating Officer, U Saw Tin by Bo Tat Sein. The latter has identified before the trial Court the exhibit documents A to W as those found in the haversack belonging to the appellant and in the absence of any indication to show that Bo Tat Sein is an interested person in the case, we must accept his evidence.

The fact that the appellant Maung Nyo was one of the leaders of the Burma Communist Party can be seen clearly from the evidence of Maung Ko (PW 3), coupled with the documentary evidence *vide*, Exhibit A. Maung Ko in his evidence stated that he knew the appellant Maung Nyo before Pyu was occupied by the Karens. He himself was a member of the Communist Party *Tha-magga* which was formed in the year 1947, paying regular subscriptions. Maung Nyo from then was one of the leaders. After the All-Burma Communist Party Conference at Pyinmana in 1948, in which a resolution was passed to revolt against the Government by force of arms, the appellant Maung Nyo was given specific duties to perform. A few days later after the Conference at Pyinmana a meeting was held amongst the Communist adherents at Bathakwet at Pyu. The meeting was attended by about three hundred persons, and at the meeting the appellant Maung Nyo was one of the leaders. It was resolved at the meeting to resort to arms to overthrow the Government and following that resolution about 500 members of the Communist Party went underground, and among them was the appellant Maung Nyo. After Pyu was overrun by the Karen insurgents they received the collaboration of the Communists and when the Karens and the Communists together ran the administration of the town, appellant Maung Nyo was one of the administrators, and in that capacity he collected money from the Communist *Tha-magga* Members. Later, the Communists fell foul of the Karen insurgents, and they had to go underground once again. During this period Maung Ko came across the appellant at Peinnwegôn where he was working as an Officer-in-charge of the Commissariat of the Communist Army.

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Maung Than (PW 3) was at one time a member of the Communist Party at Pyu. His evidence is to the effect that the appellant Maung Nyo was an active member of the Communist Party and was present at the time when the Government buildings in the Police Lines at Pyu were dismantled. He corroborated Maung Ko (PW 2) by saying that the appellant Maung Nyo was in charge of the Commissariat of the Communist Army. Maung Nyo was also found collecting *Set-kyays* from the villagers.

Maung Tin (PW 4) was present when the appellant Maung Nyo along with others were dismantling the Government buildings in the Police Lines at Pyu. The materials obtained from such dismantling were taken away in 50 or 60 carts brought by appellant Maung Nyo and one Ko Yar Baing. This witness also spoke about the murder of one Ko Pon, a member of the AFPFL by the insurgents. The murder took place after the occupation of Pyu by the Karens and the Communists. A few days after the murder, some Communist leaders accompanied by the appellant Maung Nyo came and explained to the villagers as to why they had to kill Ko Pon. They said Ko Pon was a member of the AFPFL and that he had betrayed the Communists.

According to Maung Pu (PW 5), a few months before the Karen occupation of Pyu he joined the Communist Party at the behest of appellant Maung Nyo. He was present at the meeting of the Communist Party at Pyu when a resolution was passed to revolt against the Government. Soon afterwards, the Communists went underground. He also saw Maung Nyo taking part in the dismantling of the Government buildings in the Police Lines at Pyu. A day after that, appellant Maung Nyo accompanied by one Htay Aung came to his garden. Maung

Nyo and Htay Aung were searching for *ten-house gaung*, Ba Tun and U Phu Nyo. U Phu Nyo was first brought and he was kept tied to a post while appellant Maung Nyo mounted guard over him. Ba Tun was next found and he was also produced before appellant Maung Nyo and Htay Aung. Ko Phu Nyo and Ba Tun were then tied together and taken away towards Leikthaychaung in the west. About an hour later, a report of a gun was heard from that direction. On the following day, both Ba Tun and Phu Nyo were found murdered near Leikthaychaung. Ba Tun had a gunshot injury under the arm-pit. About 6 days later, a band of Communists including appellant Maung Nyo came and explained to the villagers that Ba Tun and Phu Nyo had been killed as they had spied for Government.

U Sein (PW 6) was present when Maung Nyo accompanied Htay Aung and others came to Targya village to explain to the villagers why Ko Pon was shot dead by the Communists.

Lu Tin (PW 10) also saw Maung Nyo in the group of Communists who had come to dismantle Government buildings in the Police Lines at Pyu.

It is submitted by the learned Counsel for the appellant that evidence of prosecution witnesses namely, Maung Tin, Maung Pu and Lu Tin should, not be believed, for according to the First Information Report, Exhibit Z, they were the persons who had given information to the insurgents relating to the dispositions and movements of the Union troops and who had also encouraged the insurgents by supplying them with materials for the manufacture of gun-powder and also provided the insurgents with funds, thus helping to prolong the insurrection aimed at overthrowing the Government. It is also submitted

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that these witnesses were kept in custody for quite a long period at Zeyawaddy where the appellant himself was also detained. Finally, it is submitted that these witnesses are, individually, not worthy of belief. So far as the detention of these witnesses at Zeyawaddy is concerned, the prosecution has furnished an explanation. On their own admission, these men belonged to the Communist Party at one time and they became suspects and therefore their names were mentioned in the First Information Report. Moreover it is only from individual witnesses who had been members of the Communist Party that the true activities of Maung Nyo could be accurately ascertained. The evidence of all these witnesses fully corroborate the documentary evidence indicating that the appellant was an active member of the Communist Party. While remaining underground he took charge of the Commissariat of the Communist Army who had taken up arms against the Government. On two occasions he was seen in the company of the well-known Communist leaders who had come to explain to the villagers as to why three persons, namely Ko Pon, Ba Tun and Ko Phu Nyo had been killed. In their explanation the Communists did not conceal the fact that these three persons had been killed because they were loyal to the Government.

It is true that the appellant Maung Nyo was never found in actual combat with the Government forces but that alone is not in itself a factor which would decide the question as to whether the offence committed by him amounts to levying war against the Government. The correspondence seized from the appellant were dated after the 18th March 1950, the date on which the High Treason Act was repealed. However, these documents serve to show the standing of the appellant among the Communists in that area.

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U AUNG KHINE, J.

In law, to be guilty of treason it does not require a person to take part in any attack against Government forces. A man who incites or who provides the sinews of war can equally be culpable as the man who by his own volition commits any violence, and he is, in law, a principal of the same degree with those who actually go into combat. The appellant has not been able to rebut the evidence that he was an active leader of the Communist Party in Pyu area and that he looked after the well being not only of the Communist Party but also of the Communist Army. It is quite clear from the terms of the resolutions passed at the Pyinmana Conference and subsequently, at the meeting of the Communist Party at Pyu that the intention of the Burma Communist Party in that area was to overthrow the Government by force of arms. Therefore, if in pursuance of the terms of those resolutions any person committed any overt act to achieve the common purpose, he must be considered to have committed treason. The dismantling of the Government buildings in the Police Lines cannot be regarded as a mere mischief or theft only ; it was an act of open defiance against the lawful authority of Government. The evidence clearly shows that the appellant had been engaged actively, in collaboration with other Communist leaders, in levying war and also providing the sinews of war within the meaning of section 2 *(a)* and *(c)* of the High Treason Act. Therefore, in our opinion his conviction under section 3 *(1)* of the High Treason Act is correct. There is also evidence that he had been collecting funds for the support of Communist bands who were in revolt against the Government ; and the materials obtained after the dismantling of the Government buildings were intended for the use of the Communist Party

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remaining in revolt. These acts amount to succouring, comforting and encouraging those actively engaged in levying war against the Government. His conviction under section 4 (*1*) of the High Treason Act is therefore fully justified also by the evidence on record.

In the result, the appeal of Maung Nyo is dismissed and we confirm the sentence of death passed on him under section 3 (*1*) of the High Treason Act. Maung Nyo was, of course, not seen taking part in any fight against any of the Government forces, nor is there any definite evidence to show that he took any part in the actual killing of Ba Tun, Phu Nyo or Ko Pon, but these are not matters which the Court can consider in an offence under section 3 (*1*) of the High Treason Act.

U TUN BYU, C.J.—I agree.

APPELLATE CIVIL.

Before U Bo Gyi and U Thaung Sein, JJ.

P. CHINNIAH (APPELLANT)

v.

A. C. DEY (RESPONDENT). *

H.C. 1953

Oct. 22.

Compromise-decree—Payment by instalments of amount claimed—Failure in payment—Second decree for payment of amount in full—Neither bad in law nor penal in nature—Civil Procedure Code, ss. 47, 151, order under appealable.

Held: An order on an application objecting to the execution of a decree comes within s. 47 read with s. 151 of the Code of Civil Procedure, and an appeal is competent.

Frank Monterio v. *Mrs. M. Astridge*, A.I.R. (1943) Sind 247, followed.

Held: There is no provision in the Civil Procedure Code that prohibits the making of a second decree, and it is not bad in law.

Babburu Basavayya and others v. *Babburu Guaravayya and one*, A.I.R. (1951) Mad. 938, referred to.

Held further: In the circumstances of the case and on the authority of the decision in *Frank Monterio* v. *Mrs. M. Astridge*, the order for the payment in full of the amount claimed in the second decree is not penal in nature.

J. B. Sanyal for the appellant.

Respondent in person.

The judgment of the Bench was delivered by

U BO GYI, J.—This appeal is against the order dated the 18th December 1952 of the Chief Judge of the Rangoon City Civil Court, dismissing the appellant P. Chinniah's application for rectification of the decree made by the learned Judge on the 2nd June 1952 in the following circumstances. The respondent A. C. Dey (*a*) U Ne Aung had brought a suit against the appellant for recovery of a sum of

* Civil Misc. Appeal No. 5 of 1953 against the order of the Chief Judge, City Civil Court, Rangoon, in Civil Misc. No. 174 of 1952.

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U BO GYI, J.

Rs. 952 due for money lent and advanced. On the 18th April 1952 the parties filed a joint compromise-petition and on the same day the Court passed a decree in terms of the compromise. On the 3rd May 1952 the respondent filed an application praying that since the appellant had failed to pay any instalment in terms of the decree, a decree for the full amount of the claim might be passed as stipulated. The Court accordingly passed a decree for the full amount of the claim, *viz.*, Rs. 952, and also decreed payment of the costs of the suit Rs. 157-14-0 although there was no provision for the payment of such costs in the compromise-petition or the decree passed in pursuance of it.

The order under review was passed on an application filed by the appellant objecting to the execution of the decree against him and asking for its rectification, and consequently comes within section 47 read with section 151 of the Code of Civil Procedure, and the present appeal is therefore competent—*Frank Monterio* v. *Mrs. M. Astridge* (1).

It is contended on appellant's behalf that in view of the decree passed on the 18th April 1952, the second decree could not have been made. But the second decree was necessitated by the terms of the compromise-petition and the decree passed thereon. The compromise-decree might have been drawn up in such a way as to obviate the necessity of a fresh decree being drawn up. In any case, however, there is no provision in the Civil Procedure Code that prohibits the making of a second decree; and in the peculiar circumstances of the case, we are not prepared to hold that the second decree is bad in law—See in this connection the case of *Babburu Basavayya and others* v. *Babburu Guaravayya and one* (2).

(1) A.I.R. (1943) Sind 247. (2) A.I.R. (1951) Mad. 938 at 940.

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U BO GYI, J.

As regards the argument that the provision in the compromise-decree for payment of the full amount claimed is penal in nature, we hold in the circumstances of the case and on the authority of the decision in *Frank Monterio* v. *Mrs. M. Astridge* (1), with which we agree, that the provision is not of a penal character.

We consider that the incorporation in the second decree of the order for payment of the costs of the suit cannot be allowed to stand. There was no provision for payment of such costs either in the compromise-petition or in the decree passed upon it.

We accordingly set aside the order for payment of costs Rs. 157-14-0 in the decree dated the 2nd June 1952. Otherwise the decree stands. As in the lower Court, the parties will bear their own costs.

(1) A.I.R. (1943) Sind 247.

APPELLATE CIVIL.

Before U Bo Gyi and U Aung Khine, JJ.

H.C. 1953

Oct. 21.

P.R.P.L. RAMASWAMI CHETTYAR (APPELLANT)

v.

MA AYE AND TWO OTHERS (RESPONDENTS).*

Civil Procedure Code, s. 151—Inherent powers of Court—Restitution—Damages for wrongful execution—Remedy by separate suit, not in execution proceedings.

Held : Whenever a party is prejudiced by any wrong act or order of the Court, the Court possesses inherent jurisdiction to restore the *status quo* and to undo that wrong. It is not, however, within the competence of a Court to pass an order of damages in execution proceedings.

Chital Prasad v. *Tapasera*, A.I.R. (1953) All. 573; *Badruddin Khan* v. *Mahvar Khan*, A.I.R. (1939) All. 66, followed.

P. B. Sen for the appellant.

N. C. Sen for the respondents.

The judgment of the Bench was delivered by

U BO GYI, J.—This appeal is against the order dated the 25th March, 1952, of the District Court of Bassein in Civil Execution No. 4 of 1948, by which the learned District Judge has ordered one U Ba Kywa to pay a sum of K 1,000 to the judgment-debtors in the case. The order was passed in the following circumstances. In Civil Regular No. 9 of 1947 of the Court, the appellant P.R.P.L. Ramaswami Chettyar obtained a mortgage decree over certain properties including a granary and in the fullness of time brought them to sale by Court. No purchasers were forthcoming at the Court auction and the appellant with the permission of the Court purchased the properties for K 7,000 setting off the purchase-price against the

* Civil Misc. Appeal No. 29 of 1952 against the decree of the District Court of Bassein in Civil Execution No. 4 of 1952.

decretal amount. The sale having been made absolute the appellant sold the properties to U Ba Kywa and two others for K 4,000. It was found out however that appellant being a foreigner within the meaning of the Transfer of Immoveable Property (Restriction) Act, the sale was void. The sale was accordingly set aside and the learned District Judge by his order dated the 6th October, 1950, directed that the properties be restored to the judgment-debtors. Meanwhile, U Ba Kywa had dismantled the granary and used the materials in the construction of a godown at another place. The order of the District Judge was confirmed by a Bench of this Court in Civil Miscellaneous Appeal No. 36 of 1950, the learned Judges agreeing with the District Judge in regard to the exercise of the inherent powers of the Court under section 151 of the Code of Civil Procedure. This Court made the following observations :—

> " . . . . , the Court ought to exercise its inherent power where good reason and justice require it and where no provisions of law exist in the Code of Civil Procedure or *elsewhere,* which will meet the necessity of the case under consideration."

Thereafter, the appellant moved the District Court to sell the properties again except the granary. One of the judgment-debtors, Daw Aye, thereupon raised objection that the properties should not be resold until after they had been restored to the judgment-debtors and that U Ba Kywa and his co-purchasers be directed to make good the value of the granary to the judgment-debtors. The Court after inquiry found that the value of the granary was K 1,000 and held that that sum of money, as representing the value of the granary, should be paid

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U BO GYI, J.

to the judgment-debtors by U Ba Kywa as compensation. Hence the present appeal.

U Ba Kywa has not preferred an appeal against the order but the present appellant has come up on appeal contending that by reason of the principle of substituted security the money should not have been ordered to be paid outright to the judgment-debtors as it is subject to the mortgage decree in his favour. He cites the provisions of section 73 of the Transfer of Property Act in support of his contention. It appears that the circumstances envisaged in section 49 of the Act are more analogous to those of the present case. The section enacts:

> "Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property."

It is contended on the respondents' behalf that the appellant should not be allowed to benefit by his own wrong. In the circumstances obtaining in the present case, it is difficult to see what wrong the appellant has committed such as would deprive him of the benefit of his security in the money representing the value of the granary over which he has obtained the mortgage decree. The appellant has even offered to agree to an arrangement by which the money should be deposited in Court to be eventually withdrawn by one or other of the parties found entitled to it. This offer the respondents have rejected.

The appellant has raised an alternative contention that the District Court had no jurisdiction to pass the order it did. This contention is not without

substance. The facts of the present case are similar in essentials to those in *Chital Prasad* v. *Tapasera* (1) where the decree-holder who had obtained a decree for possession of land and for demolition of a certain building executed the decree in excess of the terms of the decree and, on objection by the judgment-debtors, were ordered to restore possession of the excess land and to pay a sum of money as damages for the loss occasioned by the demolition of the building in excess of the terms of the decree. When the matter came before the High Court, Brij Mohan Lall, J., observed :

". . . . Whenever a party is prejudiced by any wrong act or order of the Court, the Court possesses inherent jurisdiction to restore the *status quo* and to undo that wrong. Consequently, in so far as the Court ordered the judgment-debtors to be put in possession over that area of land from which they had been dispossessed against the terms of the decree, the Court was perfectly within its right to do so. But different considerations arise in respect of a claim for damages. In awarding damages the Court is not, strictly speaking, putting the parties in the same position in which they were before the wrong execution of the decree. Had the building still existed and had it been in the possession of the decree-holders, the Court could certainly say that possession should be given back to the judgment-debtors over that portion from which they had been ejected otherwise than in accordance with the terms of the decree. But that is not the position here. The Court is not restoring the building to their possession. It has awarded damages for the loss caused to the respondents. This does not amount to restoration of *status quo*. I am, therefore, of the opinion that it was not within the competence of the Court to pass an order of damages in the execution proceedings. The judgment-debtors should have been left to enforce their claim for damages for wrongful execution of the decree by means of a separate suit. It was held in the case of *Badruddin Khan* v. *Mahvar Khan* (2) that :

'It is true that the jurisdiction to make restitution is inherent in every Court, but where the relief

(1) A.I.R. (1953) All. 573. (2) A.I.R. (1939) All. 66 (A).

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U BO GYI, J.

claimed is not really restitution and can appropriately be claimed by a suit, recourse cannot be had to the inherent powers of the Court under s. 151 of the Civil P.C.'

With this remark I respectfully agree. I am thus of the opinion that the claim for damages should have been enforced by means of a regular suit."

With these observations we respectfully agree, and we accordingly set aside the order under appeal with costs; Advocate's fee in this Court three gold mohurs.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U San Maung, J.

U CHAW AND ONE (APPELLANTS)

v.

MA AH SHAR (*a*) MA MI (RESPONDENT).*

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Nov. 9.

Second Appeal—New plea, when entertained—Transfer of Property Act, s. 41—When available as defence—S.53-A inapplicable to person with title paramount and independent of transferor.

Held: A new plea can be allowed if the court is satisfied that the evidence upon which the Court is asked to decide establishes beyond doubt that the facts if investigated would have supported it, but where evidence is necessary or is not complete, permission will not be granted.

Bishwa Nath Rai v. *Kashi Nath Rai*, (1948) B.L.R. 449 ; *Esoof Golam Mohamed Piperdi* v. *Ariff Mohamed Bham and one*, (1950) B.L.R. 163, followed.

Held: As there is no valid transfer there can be no question of voiding it since s. 41 of the Transfer of Property Act postulates a transfer of property which is valid.

Jamna Das and others v. *Uma Shankar and Lal Mohamed and one*, 36 All. 308, referred to.

Held further: S. 53-A Transfer of Property Act cannot be invoked against a person whose title is paramount and who is claiming the land independently of the transferor.

Ba Shun for the appellants.

M. E. Dawoodjee for the respondent.

U SAN MAUNG, J.—In Civil Regular suit No. 3 of 1951 of the Subdivisional Court of Thazi the plaintiff-respondent Ma Ah Shar obtained a decree for possession of the suit land against the defendant-appellants Maung Chaw and Ma Thein Nyun and for the payment of Rs. 450 to her as mesne profits. On appeal to the District Court of Meiktila by the defendants the learned District Judge confirmed that

* Civil 2nd Appeal No. 70 of 1952 against the decree of the District Court, Meiktila, in Civil Appeal No. 4 of 1952, arising out of Civil Regular No. 3 of 1951 of the Subdivisional Court of Meiktila.

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U SAN MAUNG, J.

part of the decree which related to the possession of the land though he set aside that relating to the payment of mesne profits to the plaintiff. The defendants being dissatisfied with the judgment and decree of the learned District Judge have now appealed to this Court to set aside the decree for possession passed against them and to dismiss the plaintiff-respondent's suit with costs.

The suit land originally belonged to Lal Meah, husband of the plaintiff, who had purchased the same from one Ma Ma Yi, wife of a Station Master of Thazi, for a sum of Rs. 300 by a registered deed, Exhibit 2. This transaction took place on the 30th of January 1940. Subsequently, on the 2nd of June 1940 Lal Meah transferred the land to his wife Ma Ah Shar, the plaintiff in the suit, by a registered deed, Exhibit B, wherein it is recited that the consideration for the transfer was the "Mahar" money due to her in consideration of the marriage which took place over 30 years ago. After the deed of conveyance had been executed Lal Meah continued to manage the suit land for his wife until the 8th of October 1946 when he sold it to the defendants Ko Chaw and Ma Thein Nyun for Rs. 250 by an un-registered deed of sale. At the same time he made over to the defendants the sale deed Exhibit 2 relating to his purchase of the suit land from Ma Ma Yi as well as another sale deed, Exhibit 1, relating to the purchase of the suit land by Ma Ma Yi herself from her predecessor-in-title U Po Saung. In the present suit the plaintiff has alleged that the defendants are in unauthorized possession of the suit land as they have entered it without her knowledge and consent and that she is entitled not only to eject them but to payment of a specified sum of money as damages for use and occupation. The defendants by

their written statement attacked the validity of the deed of transfer, Exhibit B, and alleged that the suit was brought against them by the plaintiff in collusion with her husband Lal Meah who had been in possession not only of the land but also the title deeds relating thereto, which he had handed over to them at the time the land was sold to them by him. On the pleadings the trial Court framed several issues, of which those relevant to the purpose in hand are these:

1. Is the plaintiff an owner of the land in suit by virtue of the registered deed dated the 2nd June 1940 ?

2. Is the deed of sale dated the 8th October 1946 relied on by the defendants, by virtue of which they are alleged to become owners, admissible in evidence for want of registration ?

3. Is the present suit filed by the plaintiff in collusion with the original owner Lal Meah ?

On these issues both the trial Court and the learned Judge of the lower appellate Court came to the conclusion that the plaintiff was the owner of the suit land and that the deed of sale relied upon by the defendants was inadmissible in evidence for want of registration. The learned Judge of the lower appellate Court was inclined to think that the suit brought against the defendants was collusive.

The grounds of appeal urged in favour of the appellants are these:

1. That both the Judges of the lower Courts have overlooked the provisions of section 53-A of the Transfer of Property Act in rejecting the sale deed dated the 8th October 1946 relied upon by the defendants as inadmissible in evidence.

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2. That both the Judges of the lower Courts have ignored the contention raised in paragraph 6 of the written statement and in paragraph 5 of the written reply that the plaintiff's husband Lal Meah was a necessary party to the suit.

3. That both the learned Judges of the lower Courts have committed an error in not holding that the transfer, Exhibit B, was void for want of consideration.

In addition to the above, the learned Advocate for the appellants has argued that the provisions of section 41 of the Transfer of Property Act can be invoked in favour of the defendants, though this is not a ground taken in either of the lower Courts or even in the memorandum of appeal.

No doubt there is ample authority for the proposition that if there are facts either admitted or proved beyond controversy, a new plea could be entertained on appeal. See *Bishwa Nath Rai* v. *Kashi Nath Rai* (1). However, as pointed out by U Thein Maung, J., in *Esoof Golam Mohamed Piperdi* v. *Ariff Mohamed Bham and one* (2) a new plea should not be allowed unless the Court is satisfied that the evidence upon which the Court is asked to decide, establishes beyond doubt that the facts if investigated would have supported it. The evidence given on one point cannot be interpreted as evidence on another point not raised by the parties in the trial Court and where evidence is necessary, or is not complete, permission to raise a new point should not be granted. The questions whether a person in apparent possession of immoveable property is the ostensible owner with the consent, express or implied, of the real owner, within the meaning of section 41 of

(1) (1948) B.L.R. p. 449. (2) (1950) B.L.R. p. 163.

the Transfer of Property Act, and whether a transferee from such a person took the transfer *bonâ fide* after taking reasonable care to ascertain the title of his transferor, are essentially questions of fact; see *Jamna Das and others* v. *Uma Shankar and Lal Mohamed and one* (1). Therefore, in my opinion the defendants should not in second appeal be allowed to raise the issue which they had not raised in the trial Court and even in the first appellate Court. However, even assuming for the sake of argument that the defendants had raised such a plea under section 41 of the Transfer of Property Act, as is attempted to be raised for the first time in this Court, I am of the opinion that this section is quite irrelevant for the purpose in hand as there is no valid transfer in their favour by Lal Meah. Section 41 of the Transfer of Property Act reads as follows:

> "Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, *the transfer shall not be voidable* on the ground that the transferor was not authorized to make it: . . . ."

The italics are mine. There is no question of voiding a transfer which is invalid in law and therefore what section 41 of the Transfer of the Property Act postulates is that if a person who is an ostensible owner of a property, with the consent, express or implied, of the real owner, makes a transfer of the property which is otherwise valid, the transfer cannot be avoided by the real owner on the ground that the transferor did not have the authority to make it.

The next question for consideration is whether section 53-A of the Transfer of Property Act can be

(1) 36 All. 308.

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invoked by the defendants to resist the plaintiff's claim for possession. The relevant portion of this section reads as follows :—

" Where any person contracts to transfer for consideration any immoveable property by writing signed by him and the transferee has, in part performance of the contract, taken possession of the property and has performed his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed by law, the transferor or *any person claiming under him* shall be debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken possession, other than a right expressly provided by the terms of the contract."

In the present case there is a concurrent finding of fact that the transfer of the land by Lal Meah to his wife Ma Ah Shar in the year 1940 was for consideration and is valid in law and this is a finding of fact which is binding on this Court in second appeal. Therefore, Ma Ah Shar's title to the suit land was paramount since that date. She is by no means a person claiming under Lal Meah the transfer to her having taken place more than six years before the invalid sale to the defendants. Therefore, they cannot take shelter behind section 53-A of the Transfer of Property Act for the purpose of resisting the plaintiff's claim for possession. In this view of the case also Lal Meah was not a necessary party to the suit. For these reasons I hold that the learned Judges of the trial Court and the first appellate Court are right in coming to the conclusion that the plaintiff-respondent's suit for possession must be decreed.

In the result the appeal fails and must be dismissed with costs ; Advocate's fees in this Court five gold mohurs (eighty-five kyats).

APPELLATE CRIMINAL.

Before U San Maung, J.

M. E. ARIFF (APPLICANT)

v.

THE UNION OF BURMA (E. M. SYED MOHAMED) (RESPONDENT). *

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Jan. 21.

Penal Code, s. 193—False statement before Controller of Rents—In proceedings under Urban Rent Control Act, s. 12, acts as Executiv Officer, not as a Court—Criminal Procedure Code, s. 195 (1) (b) requiring Court's written complaint, no application—S. 190 (a) authorises cognizance of offence upon complaint of private individual.

Held : The Controller when granting or cancelling the grant of a permit under s.12 (2) of the Urban Rent Control Act to a person to occupy any premises acts not as a Court, but as an Executive Officer of the government. Accordingly, the offence committed by a person giving false evidence before him falls under the second part of s. 193, Penal Code, and the provisions of s.195 (1) (*b*) of the Criminal Procedure Code are irrelevant.

Held further : Courts can take cognizance of offences under s.193, Penal Code when such an offence is alleged to have been committed in relation to the proceedings before the Controller without the complaint in writing of such Controller.

Butto Kristo Shaha v. *Panchu Gopal Shaha*, (1946) 2 Cal. 198; *Hari Charan Kundu* v. *Kaushi Charan Dey*, A.I.R. (1940) Cal. 286, referred to.

Kyaw Myint for the applicant.

J. R. Chowdhury and *U Kyaw* (Government Advocate) for the respondent.

U SAN MAUNG, J.—This is an application by M. E. Ariff, a landlord of No. 100, 30th Street, Rangoon, to quash the proceedings in Criminal Regular Trial No. 248 of 1953 of the Court of the 7th Additional Magistrate, Rangoon, wherein he is being prosecuted for an offence under section 193 of

*Criminal Revision No. 163-B of 1953 being Review of the order of the 7th Additional Magistrate, Rangoon, in Criminal Regular No. 248 of 1953.

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the Penal Code upon the direct complaint of E. M. Syed Mohamed, the respondent in this case. The facts of the case have been summarized in the application as follows :

(*a*) That the applicant and his brother I. E. Ariff had instituted rent control proceedings No. 482-w of 1949-50 of the Controller of Rents against the respondent.

(*b*) That in the said proceedings the applicant had stated that Syed Mohamed had entered the room in dispute under section 12 (*2*) of the Urban Rent Control Act, 1948, at a standard rent of Rs. 50 per mensem.

(*c*) That the respondent, contending that the above statement was false, subsequently filed a petition before the Controller of Rents, praying that action may be taken against the applicant under sections 195 and 476 of the Criminal Procedure Code.

(*d*) That the applicant then contended before the Controller of Rents that the Controller was not a Court within the purview of sections 195 and 476 and consequently the respondent did not continue the proceedings before the Controller of Rents.

(*e*) That thereafter the respondent filed a direct complaint in Court whereupon the applicant raised an objection that the Court of the 7th Additional Magistrate, Rangoon, could not take cognizance of the matter without a complaint by the Controller of Rents.

(*f*) That the Magistrate, however, held that the objection was not sustainable and ordered the case to be proceeded with.

The learned 7th Additional Magistrate in overruling the objection of the applicant has written a very lengthy and learned order. However, since

it is the first time that this matter has come before this Court I shall deal with it on first principles rather than by reference to the various authorities quoted in the learned Magistrate's order now sought to be revised.

Now, section 190 of the Criminal Procedure Code enacts that cognizance may be taken of criminal offences in one of the three ways enumerated therein, namely—

(*a*) upon receiving a complaint of facts which constitute such offence;

(*b*) upon a report in writing of such facts made by any police-officer;

(*c*) upon information received from any person other than a police-officer, or upon the magistrate's own knowledge or suspicion, that an offence has been committed.

This is the general provision of law relating to the taking of cognizance of offences by Magistrates. One of the exceptions to this rule is section 195 (1) (*b*) of the Criminal Procedure Code, the relevant portion of which is that no Court shall take cognizance of any offence punishable under sections 193 and 195 of the Penal Code when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. Section 193 of the Penal Code, however, is in two parts, namely, (1) relating to the intentional giving of false evidence in any stage of a judicial proceeding and (2) relating to the intentional giving of false evidence in any other case, that is to say, in any case other than in a stage of judicial proceeding.

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Consequently, if the Controller of Rents in exercising any particular function required of him under the Urban Rent Control Act acts as a Court, any offence punishable under section 193 or 195 of the Penal Code, when alleged to have been committed in, or in relation to, a proceeding before him for the purpose of exercising such a function, will not be cognizable except on the complaint in writing of the Controller of Rents. However, a perusal of the Urban Rent Control Act shows that the Controller, at any rate, when granting or cancelling the grant of a permit under section 12 (*2*) of the Urban Rent Control Act to a person to occupy any premises, acts not as a Court but as an Executive Officer of the Government carrying out the policy for which the Urban Rent Control Act was enacted, namely, the restriction of rents of premises in urban areas and the making of provisions for other matters incidental to or connected with such restriction of rents. Therefore, notwithstanding the fact that under the rules framed for the purpose, the Controller in conducting an enquiry under the Act may examine the parties, witnesses and other persons and such persons, whether examined on oath or not, are bound to state the truth and are liable to be prosecuted under section 193 of the Penal Code when they intentionally make a false statement, the Controller in making such enquiries acts not as a Court but as an Executive Officer of the Government. Accordingly, the offence committed by a person giving false evidence before him would fall under the second part of section 193 of the Penal Code and the provisions of section 195 (1) (*b*) of the Criminal Procedure Code are quite irrelevant. Courts can, therefore, take cognizance of offences under section 193 of the Penal Code when such an offence is alleged to have been committed

in relation to the proceedings before the Controller without the complaint in writing of such Controller.

In this connection it is interesting to compare the ruling in the case of *Butto Kristo Shaha* v. *Panchu Gopal Shaha* (1), where it was held that the Controller in exercising the powers conferred by paragraphs 9-A and 9-B of the Calcutta House Rent Control Order, 1943, acts not as a Court but in an executive capacity and *Hari Charan Kundu* v. *Kaushi Charan Dey* (2) where it was held that the Debt Settlement Boards under the Bengal Agricultural Debtors Act which had been constituted for the purpose of settling debts were not Courts but were merely units of a department of Government.

In the result the application for revision fails and must be dismissed.

(1) (1946) 2 Cal. p. 198. (2) A.I.R. (1940) Cal. 286.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

H.C. 1953

Dec. 19.

MAUNG HMAT (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 97—Right of private defence—Right extends to defence of another against offence affecting human body—Right must be considered if facts warrant, though not pleaded.

Held : S. 97 of the Penal Code lays down that every person has a right subject to the restrictions contained in s. 99 to defend his own body and the body of any other person against any offence affecting the human body.

Held also : Even though the appellant failed to set up a plea of private defence nevertheless it is open to the Court to take this question into consideration if the facts warrant it.

The King v. *Hla Maung*, (1946) B.L.R. 50, followed.

Ba Kyaing (Government Advocate) for the respondent.

U THAUNG SEIN, J.—The appellant Maung Hmat, a prominent member of the Village Defence Force and the Village Tenancy Board of Kyan-kaing-kyun village in Yenangyaung township has been convicted by the learned 1st Special Judge (Sessions Judge), Yenangyaung of an offence under section 304 of the Penal Code and sentenced to five years' rigorous imprisonment on the following facts :—

In the evening of 3rd March 1953, Maung Chit Tee (PW 3) and Maung Kar Sin (co-accused with appellant in the trial Court), two members of the Village Defence Force, were deputed to patrol the village of Kyan-kaing-kyun especially with a view to check on gambling *waings*. These two individuals strolled along the village path and on seeing a crowd

*Criminal Appeal No. 423 of 1953 against the order of the 1st Special Judge, Yenangyaung, in Criminal Regular Trial No. 8 of 1953.

in the house of one Ko U, entered the compound as they suspected that a gambling *waing* was in progress. They were mistaken, however, as the crowd were merely chatting and there was no trace of any gambling instruments. Unfortunately, the deceased Maung Ohn Nyunt, who was apparently of a quarrelsome nature was in the house at the time and took offence at the arrival of the members of the Village Defence Force. Consequently, he abused Maung Kar Sin and drove him out of the house after squeezing his neck. If we are to believe Ko Chit Tee the deceased also attempted to deprive Maung Kar Sin of the locally made gun held by the latter but this part of his evidence was apparently an exaggeration. Be that as it may, Maung Kar Sin and Maung Chit Tee proceeded to the house of then *lugyi*, namely, the appellant Maung Hmat and there reported the incident. The appellant in turn was highly offended at the action against the members of the Village Defence Force and decided to take immediate reprisals against the deceased Maung Ohn Nyunt. Accordingly, he set out with a crowd of followers including Kar Sin to trace the deceased and to place him under arrest. They visited the house of Maung U but as the deceased was no longer at that place, followed up to an *Ahlu* but could not trace him there either, and instead, met two *pongyis* to whom the matter was reported. The venerable *pongyis* wisely counselled the appellant and his party to refrain from any further action during the night and to settle the matter in the morning. This advice was accepted and the appellant and his party retraced their steps along the village pathway. At that time, the appellant was armed with a rifle while Kar Sin carried a *dah*. After proceeding for a short distance they heard footsteps in the dark and on flashing an

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electric torch in the direction of those sounds saw the deceased Maung Ohn Nyunt and an unknown companion rushing towards them with *dahs*. The appellant called out to the deceased not to approach but to no avail. The unknown companion, however, turned and disappeared in the dark but the deceased Ohn Nyunt who was armed with a *dashe* abused the Village Defence Force and ran towards Kar Sin and rained down several blows on him. Fortunately for Kar Sin, he warded off the blows and retaliated with his own *dah*. At that instant there was a gunshot and the deceased Ohn Nyunt fell dead on the ground. The fatal gunshot was fired by none other than the appellant Maung Hmat.

A report of the incident was lodged with the police in the following morning and the corpse of Maung Ohn Nyunt was also examined by Dr. U Aye (PW 16) at the Yenangyaung Hospital. In all there were two large incised wounds on the head and a gunshot wound which penetrated the abdomen from the rear and both wounds were necessarily fatal. Needless to say, the incised wounds were the ones inflicted by Maung Kar Sin while the gunshot injury was caused by the appellant Maung Hmat. Both Kar Sin and Maung Hmat were sent up before the learned 1st Special Judge, Yenangyaung, charged with the murder of Maung Ohn Nyunt but the former was acquitted on the ground that he was entitled to act in the right of private defence. In the case of the appellant Maung Hmat, it was held that he had exceeded the right of private defence and was accordingly convicted of the offence under section 304 of the Penal Code.

It may be noted that the appellant did not plead that he shot the deceased Ohn Nyunt in the exercise of the right of private defence. On the

contrary, in his examination he tried to make out that when the deceased Ohn Nyunt rushed at the party he, (appellant) backed into a fence and the trigger of the rifle was accidentally released. This statement was by no means the truth and the evidence on record leave no room for doubt that he deliberately fired at the deceased. The question is whether he was justified in shooting at and killing the deceased Ohn Nyunt. As pointed out in the ruling in *The King* v. *Hla Maung* (1) even though the appellant failed to set up a plea of private defence nevertheless it is open to the Court to take this question into consideration if the facts warrant it.

Now, the deceased Maung Ohn Nyunt was heavily armed and in a fighting mood when he met the appellant's party and charged at Kar Sin. The learned trial Judge has rightly held that Kar Sin was entitled to defend himself even to the extent of causing the death of Ohn Nyunt. With regard to the appellant Maung Hmat he apparently overlooked the provisions of section 97 of the Penal Code which lays down that, " Every person has a right subject to the restrictions contained in section 99 to defend his own body and the body of any other person against any offence affecting the human body ". After all, Kar Sin's life was in grave danger and his companions were entitled to defend him against the attacks by the deceased. To all appearances, the appellant fired at the deceased from an angle and not from the rear of the latter. The learned trial Judge remarked that this clearly indicates that there was no direct attack on the appellant and hence the right of private defence was exceeded. I agree that the deceased did not make a frontal attack on the appellant and that the assault was aimed at Kar Sin. But the appellant

(1) (1946) B.L.R. 50.

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was entitled to defend Kar Sin to the same degree as the latter. Hence, the appellant was clearly justified in having caused the death of Maung Ohn Nyunt and he is entitled to an acquittal.

This appeal is allowed and the conviction and sentence passed on the appellant Maung Hmat are hereby set aside and he is acquitted and released so far as this case is concerned.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

P. C. DUTT (APPELLANT)

v.

THE UNION OF BURMA (P. R. PAUL) (RESPONDENT).*

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Dec. 21.

Act or omission constituting offence under two enactments—Penal Code and Urban Rent Control Act—Offender not liable to two punishments—General Clauses Act, s. 26, Criminal Procedure Code, s. 403 and Penal Code, s. 71—Summary Trial, judgment in requirements of.

Held : Reading s. 26 of the General Clauses Act with s. 403 (*1*) of the Criminal Procedure Code and s. 71 of the Penal Code the only reasonable construction to be placed on the words " shall not be liable to be punished twice for the same offence " is that the offender is not liable to punishment twice over for the same act or omission constituting the offence.

Held also : A judgment in an appealable case tried summarily must set out the substance of the evidence in such a manner that the appellate Court can decide the appeal on the basis of the judgment.

G. N. Banerji for the appellant.

N. R. Mazumdar for the respondent.

U BO GYI, J.—The case against the appellant before the Honorary Magistrates was that on the 12th April, 1952 he heaped scrap iron in the room which was in the occupation of his sub-tenants and thereby restrained them from using the room, and he was convicted under section 341 of the Penal Code and sentenced to a fine of K 250 with imprisonment in default. For the same act, he had been convicted and sentenced under section 25 (*1*) of the Urban Rent Control Act in Summary Trial No. 389/52 of the Court of the Second Additional Magistrate, Rangoon.

* Criminal Appeal No. 252 of 1953 from the First Bench of the Honorary Magistrates, Rangoon, in Criminal Summary Trial No. 720 of 1952.

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U BO GYI, J.

Now, it is common ground that the two criminal proceedings have been instituted in respect of the single act of heaping scrap iron in the room occupied by the appellant's sub-tenants. The proceedings under review are accordingly hit by the provisions of section 403 (*1*) of the Code of Criminal Procedure and of section 26 of the General Clauses Act. The terms of section 403 (*1*) of the Code need no comment. It is contended, with regard to section 26 of the General Clauses Act, that the appellant who had been convicted under section 25 (*1*) of the Urban Rent Control Act has in this case been convicted not of the same offence, but of a different offence under section 341 of the Penal Code. Section 26 of the General Clauses Act runs: "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence." Reading this section together with section 403 (*1*) of the Criminal Procedure Code and section 71 of the Penal Code, the only reasonable construction to be placed on the words " shall not be liable to be punished twice for the same offence " is that the offender is not liable to punishment twice over for the same act or omission constituting the offence. Apparently, the previous conviction and sentence of the appellant were not brought to the notice of the learned Honorary Magistrates.

The conviction and sentence are set aside and the fine, if paid in, will be refunded to the appellant.

Attention is invited to section 264 of the Criminal Procedure Code which provides that the judgment in an appealable case tried summarily must contain not only the particulars mentioned in section 263 of the

Code but also the substance of the evidence on which the conviction is founded. The judgment must set out the substance of the evidence in such a manner that the appellate Court can decide the appeal on the basis of the judgment, for under section 264 (*2*) of the Code, such judgment must be the only record in the case

APPELLATE CRIMINAL.

Before U Aung Khine, J.

H.C. 1953

Dec. 7.

THE UNION OF BURMA (APPLICANT)

v.

MAUNG NYO AND FOUR OTHERS (RESPONDENTS).*

Penal Code, ss. 239—242, Counterfeit coin—Uttering and Possession of—Proof necessary for conviction of offence.

Held: There must be definite proof that the coins were counterfeit. Expert evidence must be produced. There must be definite evidence on record to show that when a person delivered a counterfeit coin he knew that the coin was counterfeit. Likewise, in the case of possession, it must be proved that the person had the coins with intent to defraud or with intent that fraud might be committed.

Ba Kyaing (Government Advocate) for the applicant.

U AUNG KHINE, J.—The learned Sessions Judge, Sagaing, has recommended that the convictions and sentences passed upon different accused in Criminal Regular Trial No. 107 of 1952 in the Court of the Subdivisional Magistrate, Kalewa, be set aside. On 25th November 1952, Township Officer, U Ohn Pe of Tamu accompanied by Inspector of Police U Aung Pwa, visited the Tea Shop belonging to Ma Ya Chi (PW 4) and had some tea. They paid for the drinks and when Ma Ya Chi gave them some change, they discovered that a four-anna bit was counterfeit. From Ma Ya Chi they learned that she received this coin from Maung Nyo, one of the accused. So the party proceeded to Maung Nyo's house and during a search there they found that accused U Tha Khant had in his possession

*Criminal Revision No. 119-B of 1953 of the order of the Subdivisional Magistrate, Kalewa, in Criminal Regular Trial No. 107 of 1952.

4 four-anna bits, accused U Po Su, 2 four-anna bits, accused Ma Nan Chit 4 four-anna bits. U Po Su and Ma Nan Chit are the parents of Maung Nyo. Ma Nan Chit stated that she received the coins found on her from Maung Nyo and U Po Su said the coins found on him were given to him by Ma Nan Chit. All the persons found with these coins stated that they did not know that the coins were counterfeit.

Now, there is no definite proof that the coins were counterfeit. The two officers concerned U Ohn Pe and U Aung Pwa, did not say why they asserted that these coins were counterfeit. No expert evidence was produced. According to Maung Tha Khant, the coins were given to them by one Ohn Maung and that they did not know at that time that they were counterfeit. The fact that (PW 4) Ma Ya Chi accepted one of the coins as genuine would serve to show that these coins could easily be mistaken for genuine ones even if they are actually counterfeit. There must be definite evidence on record to show that when a person delivered a counterfeit coin he knew that the coin was counterfeit before a conviction can be entered. Likewise, in the case of possession it must be proved that the person who had in his possession counterfeit coins had them with intent to defraud or with intent that fraud might be committed. These important elements being absent in the case, I am in entire agreement with the learned Sessions Judge that the convictions against the accused persons cannot be sustained.

The recommendation of the learned Sessions Judge is accepted and I direct that the convictions and sentences passed on Maung Nyo, U Po Su, Ma Nan Chit and U Tha Khant in Criminal Regular

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U AUNG KHINE, J.

Trial No. 107 of 1952 of the Court of the Subdivisional Magistrate, Kalewa, be set aside and they be acquitted so far as this case is concerned. The fines imposed in the case, if already credited must be refunded.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

(1) CHAN LIM (2) UNG BOON HOO (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Dec. 7.

Excise Act, s 47 Proviso—Motor vehicles used in carrying opium, on the confiscation of—Notice to show cause and enquiry prerequisite.

Held : Before an order of confiscation under s. 11 of the Excise Act of the two motor cars used in conveying the opium is passed the owners must be called upon to show cause and an enquiry must be held whether they knew or had reason to believe that the cars were likely to be used for transport of opium.

In re *G. N. Chakrapany Chettiar and Sons by Managing Member G. N. Chakrapany Chettiar*, A.I.R. (1942) Mad. 724, followed.

Hla Thein and *G. D. Williams* for the applicants.

U Kyaw (Government Advocate) for the respondent.

U BO GYI, J.—Applicants Chan Lim and Ung Boon Hoo are owners of two motor-cars, R.C. 9258 and R. C. 5180 respectively. On the 5th June 1953, Lim Kee Sein was driving the first car and Ei Cheng Gwan the second car when they were stopped by an Excise party and searched, and contraband opium was found in both the motor-cars. They were duly convicted and sentenced to imprisonment.

With regard to the motor-cars, the learned District Magistrate, Rangoon, made the following order :—

" As regards exhibit motor-cars they being conveyances in which opium liable to confiscation being found shall likewise be confiscated under section 11 of the Opium Act."

It has been contended before me that before the order of confiscation was passed the applicants should have

* Criminal Revision No. 197-B of 1953 of the order of the District Magistrate, Rangoon, in Criminal Regular Trial No. 4 of 1953.

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(1) CHAN LIM (2) UNG BOON HOO v. THE UNION OF BURMA.

U BO GYI, J.

been called upon to show cause why the motor-cars should not be confiscated and that the motor-cars should not have been confiscated unless it had been found that the owners knew or had reason to believe that they were likely to be used for transporting opium. Several authorities have been quoted in support of this contention and I need mention only the case of in re *G. N. Chakrapany Chettiar and Sons by Managing Member G. N. Chakrapany Chettiar* (1). The proviso to section 47 of the Excise Act and the proviso to section 33 of the Dangerous Drugs Act enact the same principle.

The learned Government Advocate frankly concedes that the order of confiscation cannot be sustained. The order is accordingly set aside and the District Magistrate is directed to consider afresh the question whether the motor-cars should be confiscated in the light of the above observations.

(1) A.I.R (1942) Mad. 724.

APPELLATE CIVIL.

Before U San Maung, J.

K. A. ELIAS (APPELLANT)

v.

U BA HIN (RESPONDENT). *

H.C. 1953

Dec. 23.

Urban Rent Control Act, s. 14—Order to pay up arrears of rent by instalments forming integral part of ejectment decree—Not an order under s. 14—Application by judgment-debtor for stay of execution after breach of such order whether maintainable.

Held : Where the parties come to a compromise that the decree for ejectment shall be rescinded upon payment of arrears of rent and the compromise has been incorporated in the ejectment decree either as part of the decree or as an annexure thereto, a separate application under s. 14 (*1*), Urban Rent Control Act is maintainable.

K. S. Abdul Kader v. *Sri Kali Temple Trust*, (1949) B.L.R. p. 175, distinguished.

Saw Hla Pru for the appellant.

Kyaw Htoon for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 176 of 1952 of the City Civil Court of Rangoon, the plaintiff U Ba Hin sued the defendant K. A. Elias under section 11(*1*) (*a*) of the Urban Rent Control Act for ejectment of the defendant from the premises in suit for failure to pay arrears of rent. On the 4th March 1952, the following order is recorded in the diary of the learned 4th Judge of the City Civil Court, who tried the case :—

" Noor Mohamed for Plaintiff. Defendant in person. Defendant confesses judgment. There will be an order for ejectment with costs against the defendant. By consent of parties judgment-debtor is allowed to pay the arrears of rent

* Civil Misc. Appeal No. 69 of 1952 against the order of the 4th Judge, City Civil Court, Rangoon in Civil Regular No. 176 of 1952.

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U SAN MAUNG, J.

due and costs of suit by monthly instalments of one month's rent along with the current rent. Payment to commence on or before the 10th of every month from April 1952. Rent is due from 1st September 1951."

After this order was passed payments were made regularly till March 1952. However, the instalment which fell due on the 10th April 1952 was not paid till the 21st April 1952 so that the decree-holder U Ba Hin made an application for execution of the decree for ejectment. The judgment-debtor K. A. Elias then filed an application purporting to be under section 14 of the Urban Rent Control Act to allow him to occupy the suit premises on payment of monthly instalments and the current rent and to suspend the order for the execution of the ejectment decree. The decree-holder objected to this application and contended that the application was not maintainable. The learned 4th Judge of the City Civil Court on the 4th September 1952 held that the order passed by the Court on the 4th March 1952 aforesaid was one under section 14 of the Urban Rent Control Act and that the judgment-debtor having failed to abide by the terms imposed by the Court on the 4th March 1952, an execution of the decree for the ejectment should proceed as ordered on the 7th July 1952. Against this order of the learned Judge of the City Civil Court the judgment-debtor K. A. Elias has now appealed to this Court.

The question now for consideration is whether the case of *K. S. Abdul Kader* v. *Sri Kali Temple Trust* (1) cited by the learned Judge in his order the 9th July 1952 can be distinguishable from the present case on facts. In that case the 2nd Judge of the Rangoon City Civil Court had directed execution of a decree for the ejectment of the appellant from certain premises to proceed as the appellant had failed

(1) (1949) B.L.R. p. 175.

to comply with the condition which was prescribed on his application under section 14 (*1*) of the Urban Rent Control Act, 1948; and it was held by this Court that where the tenant had obtained an order for stay of execution of a decree for ejectment on a certain condition, he cannot, after he has broken that condition, apply again for stay of execution under section 14 (*1*) of the Act.

It is therefore clear that it was not in dispute as to whether or not the order passed by the 2nd Judge of the Rangoon City Civil Court for the stay of execution on payment of the rents due by instalments was really one under section 14 (*1*) of the Urban Rent Control Act. In the present case, however, it would appear from a reading of the diary order dated the 4th March 1952 that both the transactions recorded by the learned Judge were part and parcel of the same agreement between the parties, namely, that the defendant should confess judgment and that the plaintiff would in these circumstances consent to the arrears of rent being paid by monthly instalments. Therefore, the present case is more analogous to that decided by me in Civil Appeal No. 27 of 1952 against the order of the 4th Judge of the City Civil Court, dated the 24th March 1952, in his Civil Regular Case No. 855 of 1950. In that case, the parties had come to a compromise regarding the nature of the decree for ejectment which was to be passed and the payment of the arrears of rent by instalments. When the judgment-debtor after making a default of the terms imposed by the ejectment decree made an application under section 14 (*1*) of the Urban Rent Control Act for stay of execution on the payment of the arrears of rent, etc., by instalments, the learned Judge of the City Civil Court held that the stay of execution having been obtained in terms of compromise-decree

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the judgment-debtor could not make another application for stay of execution under section 14 (*1*) of the Urban Rent Control Act. In connection with the appeal made against this order, I observed as follows:

" The present is an appeal by Kishore Chand Minhas against the order dismissing his application under section 14 (*1*) of the Act.

The question which arises in this appeal is whether a separate application under section 14 (*1*) of the Urban Rent Control Act would be maintainable where the parties had in the suit for the ejectment of a tenant come to a compromise regarding the manner in which the decree for ejectment shall be rescinded upon payment of arrears of rent, etc., as stipulated therein and the compromise has been incorporated in the ejectment decree either as part of the decree or as an annexure thereto. The answer to my mind is clearly in the affirmative.

It is therefore apparent that where the Court passes an order for stay of execution on payment by the tenant of arrears of rent, either at the time of making or giving the order or decree of ejectment or subsequently on the application by the tenant, it has to exercise its own discretion regarding the manner in which the arrears of rent are to be paid by the tenant and not to consider itself bound to pass an order in this regard in terms of the compromise reached by the landlord and the tenant. The words 'as it thinks fit' occurring in section 14 (*1*) of the Act make this point abundantly clear. Although no doubt, in practice, where the parties have come to an agreement regarding the manner in which the arrears of rent should be paid, the Court may take this compromise into consideration in coming to the conclusion as to the manner in which the arrears of rent should be paid before the decree is rescinded. Nevertheless, what the law requires by section 14 (*1*) of the Urban Rent Control Act is that the discretion exercised and the decision arrived at must be that of the Court and not of the parties to the case."

These observations apply with almost equal force to the case now under consideration. I, therefore, hold that the order passed by the learned 4th Judge of the

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City Civil Court on the 4th March 1952 for the payment of arrears of rent due, etc., by monthly instalments is not one made under section 14 (*1*) of the Urban Rent Control Act. I will, therefore, set aside the order of the learned Judge dated the 4th September 1952, dismissing the application of the judgment-debtor K. A. Elias and direct that the application be dealt with according to law in the light of the foregoing remarks. The respondent must pay the appellant the costs of this appeal ; Advocate's fee three gold mohurs.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1954

Feb. 4.

K. MOIDEEN KUTTY KAKA (APPELLANT)

v.

ZAINAB BIBI (RESPONDENT).*

Transfer of Property Act, s. 118—Exchange, whether a partition of undivided property between co-owners constitutes an exchange—Registered deed, necessity of.

Held: Where co-owners possessing undivided share in properties took by arrangement a specific property in lieu of their shares in the others, the transaction is not an exchange within the meaning of s. 118, Transfer of Property Act, but is a partition which is not required by law to be effected by an instrument in writing and registered.

Gyannessa and others v. *Mobarakannessa and others*, 25 Cal. 210.

P. N. Ghosh for the appellant.

A. I. Modan for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 1215 of 1950 of the City Civil Court, Rangoon, the plaintiff-respondent Zainab Bibi sued the defendant-appellant K. Moideen Kutty Kaka for his ejectment from the room in suit on the ground that it was required by her *bonâ fide* for her own occupation. It would appear that the suit room was one of the two rooms comprised in a one-storeyed building known as house No. 452, Lower Pazundaung Road, formerly belonging to the father of Zainab Bibi, on whose death, it was jointly inherited by her and her brother Abdul Kader in the ratio of 1 : 2 according to the Mohamedan law. After their father's death, Zainab Bibi and Abdul Kader came to a mutual arrangement

*Civil 1st Appeal No. 89 of 1952 against the decree of the 4th Judge, City Civil Court, Rangoon, in Civil Regular No. 1215 of 1950.

by which they partitioned the property so that the suit room fell to Zainab Bibi's share. The other room was later sold by Abdul Kader to Zainab Bibi's own husband. What is now contended by the appellant Moideen Kutty Kaka is that Zainab Bibi's husband and not Zainab Bibi herself is the landlord of the room, which he is occupying. But, there is conclusive evidence not only of Abdul Kader, but of the other tenant Kandaro Lal Sil to show that the suit room, which is a room with a tea-shop fell as the share of Zainab Bibi.

The only point for consideration is whether a partition could be effected without a registered deed especially when Zainab Bibi owned only one-third share of the house. However, as held by Macpherson and Ameer Ali, JJ., in *Gyannessa and others* v. *Mobarakannessa and others* (1) when the co-owners possessing undivided share in properties took by arrangement a specific property in lieu of their shares in the others, the transaction is not an exchange within the meaning of section 118 of the Transfer of Property Act, but a "partition" which is not required by law to be effected, by an instrument in writing. There is therefore nothing in law to prevent Zainab Bibi and her brother Abdul Kader to give up the interest in one room in return for the other person's interest in the room allotted to him or her. The arrangement is a partition which could be effected without a registered deed.

Zainab Bibi and her family are now residing in a rented room and they cannot therefore be said to be not in good faith requiring their own property for their residence. Compare *Rustomju Dinshaw Billimoria* v. *Dosibai Rustomji Master* (2), which is a case under the Bombay Rent (War Restrictions) Act.

(1) 25 Cal. p. 210. (2) 45 Bom. p. 1236.

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There, it was held that a landlord is not bound to continue residing in rented premises with all the uncertainties of that tenure, and that if he chooses to live in any portion of his own house, he is entitled to do so, provided he does not seek to occupy more space than is reasonably required for himself and his family.

For these reasons, the appeal fails and must be dismissed. Advocate's fee two gold mohurs.

APPELLATE CIVIL.

Before U Aung Khine, J.

KHAIRATHI (APPLICANT)

v.

LAL DIN (*a*) MAUNG BA THEIN AND TWO OTHERS (RESPONDENTS). *

H.C. 1954

Jan. 22.

Contract Act, s. 30,—Wager, Agreement to share in prize collateral to— Wagering contract not void.

Held : An agreement to share in the prize before a winning Treble Tote ticket was purchased is a collateral agreement to a wagering contract and there is no law which declares such collateral agreements to be void.

Sein Tun (1) for the applicant.

U AUNG KHINE, J.—This is an application in revision against an interlocutory order passed by the District Court of Mandalay in Civil Regular No. 11 of 1952. An interpleader suit was filed by three Directors and Stewards of the Mandalay Race Club for and on behalf of the Chairman and other Directors and Stewards of the said club. The first applicant, Khairathi, was named as a first defendant and the three respondents Lal Din (*a*) Maung Ba Thein, Maung Hmi and Maung Bo were named as seccond, third and fourth defendants. The facts as revealed in the plaint are as follows :—

On 2nd November 1952, in the Treble Tote run by the club, a single ticket won the entire prize of K 61,993. On the same day, the applicant and the three respondents appeared at the tote counter and by arrangement with the authorities of the club, drew

*Civil Revision No. 93 of 1953 against the decree of the District Court, Mandalay, in Civil Regular Suit No. 11 of 1953.

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U AUNG KHINE, J.

only K 11,993 out of the prize money. On the following day, another K 10,000 was paid out to the same four persons by the club authorities. Subsequently, a dispute arose among them regarding the prize money and the club authorities were addressed by the respective lawyers of the applicant and the three respondents not to pay out the balance of the prize money held by them. It appears that the applicant wanted the entire amount in the hands of the club authorities and to this, the respondents objected stating that they had their respective shares in the winning ticket. In the suit, the three following issues were framed :—

1. Whether Khairathi, Lal Din, Maung Hmi and Maung Bo are sharers in the totalisator ticket which drew the prize of K 61,993 in the Mandalay Turf Club races run on 2nd November 1952 ?
2. If so, what were the shares of each of them ?
3. If there was an agreement to share, was the said agreement void under section 30 of the Contract Act ?

The third issue was treated as a preliminary issue and arguments were heard on it. The trial Court held that the agreement between the parties could be enforced according to law. As against this order, the applicant has now come up on revision.

If buying of a tote ticket from the Race Club can be considered a wager, the wager was certainly with the Race Club. The Race Club has not only paid out part of the winning prize but has actually deposited the balance of the prize money in Court. If, for instance, any of the parties now in Court, had obtained the

money from the Race Club, surely the others if they had their shares in the ticket, would be entitled to claim for their respective shares of the prize money won. The person who receives the money would certainly be considered as an agent and he will be bound to make good the amount to the other parties interested in the ticket. I am in entire agreement with the learned District Judge that the agreement, if there be any, as to the sharing out of the prize made before the ticket was purchased, was a collateral agreement. There is no law which declares agreements collateral to wagering contracts to be void. I therefore hold that there is no merit in this application and it is accordingly dismissed.

APPELLATE CIVIL.

Before U Tun Byu, C.J., and U San Maung, J.

H.C. 1954

Jan. 29.

MAHMOOD ABRAHIM ARIFF (APPLICANT)

v.

AISHA BEE BEE AND NINE OTHERS (RESPONDENTS). *

Certificate granting leave to appeal to Supreme Court—Question of law involved—Must be substantial; one fairly open to argument.

Held: As judgment had been passed both on appeal as well as on the Original Side of the High Court against applicant-plaintiff, a certificate granting leave to appeal to the Supreme Court can be granted only if the question of law which is to be raised involves a substantial question of law. It is not every question of law which can be raised in a case that will constitute a substantial question of law. It must be a question of law fairly open to argument, and not merely that an alleged question of law is involved in the appeal.

M. C. Patail and another v. *H. G. Ariff and others*, (1935) 13 Ran. Series 744 at 746; *K. P. Chiara* v. *C.P. Syndicate Ltd. and others*, A.I.R. (1949) Bom. 134 at 135; *Mathura Kurmi* v. *Jagdeo Singh and others*, (1928) 50 All.. Series 208 at 210, followed.

Maung Tun Pe v. *B. K. Haldar and others*, (1936-37) 14 Ran. Series 242 at 251; *Mr. Shafi-ul-Nisa* v. *Mt. Fizal-ul-Nisa*, A.I.R. (1950) East Pun. 276; *Mr. Mohamed Zamani Begam and another* v. *Fazal-ul-Rahaman and another*, A.I.R. (1943) Lah. 241; *Lutchmi Ammal* v. *Narasamma and others*, (1920) 13 B.L.T. 237, referred to.

J. B. Sanyal for the applicant.

M. E. Dawood and *M. M. Rafi* for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The applicant Mahmood Abrahim Ariff applies for the grant of a certificate to appeal to the Supreme Court against the judgment

* Civil Misc. Application No. 27 of 1953 against the order of the Original Side, High Court, in Civil Regular Suit No. 2 of 1950.

passed on the 21st October, 1953, in Civil Miscellaneous Appeal No. 3 of 1952, whereby his appeal against the judgment passed against him on the Original Side was dismissed by a Bench of this Court with costs. The appellate judgment reaffirms the judgment passed against the applicant on the Original Side of the High Court.

The commencement of the judgment passed in Civil Miscellaneous Appeal No. 3 of 1952 reads as follows:

"The plaintiff-appellant Mahmood Ebrahim Ariff instituted a suit for the administration of the estate of one Mohamed Ismail Ariff, who died on the 30th June, 1945; and it was urged, on his behalf, that for the purpose of due administration of his estate, it was necessary, *inter alia*, for Mahmood Ebrahim Ariff to also ask the Court to declare certain transfers of shares in three companies, namely, Mohamed Ismail Ariff Co. Ltd., Mohamed Ismail Mehter Co. Ltd. and Mohamed Ismail Ariff Mehter Co. Ltd., which were said to be in the nature of *benami* transfers, null and void, and it was for that reason that the plaintiff-appellant had asked for the declaration mentioned in item (2) of the prayer in his amended plaint. Asha Bee Bee, Fatima Bee Bee, Amina Bee Bee and Zeena Bee Bee, who are the first, second, third and fourth defendants-respondents and to whom shares had been transferred, denied that the shares belonged to the estate of the deceased Mohamed Ismail Ariff. The first, second and third defendants-respondents are the daughters of Mohamed Ismail Ariff, while the fourth defendant-respondent is his widow, and, according to paragraph 7 of the written-statement, the said shares were said to have been transferred to them under different deeds, and which deeds were executed in 1928 and 1929. These shares are specified in items 1 to 5 of Schedule A attached to the amended plaint.

The learned trial Judge, on the Original Side, held, on a preliminary issue, against the plaintiff-appellant; and the preliminary issue was to the effect, whether the plaintiff-appellant could in a suit for the administration of the estate of the deceased Mohamed Ismail Ariff seek for a declaration that the transfers of the said shares by the deceased in his

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U TUN BYU, C.J.

lifetime to his daughters and widow be declared null and void on the allegation that the transfers were in the nature of *benami* transactions."

The point of law involved has been set out towards the end of the passage reproduced above, and the question was answered in the negative, both on appeal as well as on the Original Side of the High Court.

It has been contended for the applicant that as the Bench has observed that the question raised in the appeal was an important question of law, it should be considered that the case was a fit one for appeal to the Supreme Court, and a certificate ought to be granted for that purpose. We do not consider that merely because an observation has been made to that effect, a certificate to appeal to the Supreme Court ought to be automatically issued. As judgment had been passed, both on appeal as well as on the Original Side of the High Court, against the applicant, who was the plaintiff in the suit, it becomes clear that the certificate can be granted only if the question of law which is to be raised involves a substantial question of law. It is not every question of law, which can be raised in a case, that will constitute a substantial question of law. In *M. C. Patail and another* v. *H. G. Ariff and others* (1), Page, C.J., observed:

"Now, the learned counsel for the applicants contends that under 3 (*f*) a substantial question of law between the parties arises namely, whether under sub-clause 3 (*f*) the company was entitled to purchase real or personal property outside the town of Rangoon. In my opinion, his contention is unsustainable. Merely because learned counsel on behalf of the applicants in an application for leave to appeal to His Majesty in Council asserts that a question of law arises it does not follow that the appeal involves a substantial question of law.

(1) (1935) 13 Ran. Series, p. 744 at p. 746.

* * * *

The learned counsel for the applicants further contended that the words 'substantial question of law' between the parties did not mean a question of law which the Court thought was reasonably debatable, but any alleged question of law, good, bad or indifferent, which if decided against his clients would substantially affect their rights. In my opinion, that is not the meaning of these words as used in section 110 of the Code of Civil Procedure. As I apprehend the meaning of that section, it is incumbent upon the Court in a case where the appellate decree affirms the decree of the lower Court to be satisfied, before it burdens the Judicial Committee of the Privy Council with the hearing of the appeal, that a question of law fairly open to argument, and not merely an alleged question of law, is involved in the appeal."

A similar observation was made by Chagla, C.J., in *K. P. Chiara* v. *C.P. Syndicate Ltd. and others* (1) :

"It must be a substantial question of law as between the parties in the case involved. But here again it must not be forgotten that what is contemplated is not a question of law alone ; it must be a substantial question. One can define it negatively. For instance, if there is a well-established principle of law and that principle of law is applied to a given set of facts, that would certainly not be a substantial question of law."

In the judgment which was delivered in Civil Miscellaneous Appeal No. 3 of 1952, in connection with which a certificate to appeal to the Supreme Court is now being sought for, it was, *inter alia*, observed :

"The present case now under appeal relates to certain shares in three registered companies. A person in whose name shares are registered in the register of a company will, in law, be presumed to be the owners of those shares ; and before this legal position can be disturbed it appears to us to be only reasonable that some action ought to be taken to alter the

(1) A.I R. (1949) Bom. p. 134 at p. 135.

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subsisting legal position. Ordinarily a person who desires to buy a share in a registered company can, in law, assume that what is stated in the register of the company is correct. It is difficult to see how the shares that had been transferred to the defendants-respondents Nos. 1 to 4 can be considered to belong to the estate of the deceased at the time of his death, unless some action has been taken, for one reason or another, to set aside such transfers. The mere allegation that the transfers were *benami* will not alter the strict legal position in which those shares stand. In law, those shares must, at the outset, be presumed to belong to the defendants-respondents Nos. 1 to 4 until the transfers are set aside or declared invalid. We do not consider that it was intended that the scope of the inquiry, under Order XX, Rule 13 (1), of the Code of Civil Procedure should be extended to include an inquiry into the ownership of properties which *primâ facie* belong, in law, to another person at the time of the death of the deceased."

These transactions, which occurred well over 20 years ago, it will be observed, were not strictly *benami* transactions; and Page, C.J., observed in the case of *Maung Tun Pe* v. *B. K. Haldar and others* (1):

". . . . it seems to me that to speak of a *benami* gift is a contradiction in terms; for either there was a gift in which case the donee obtained the title to the property, or there was not a genuine or valid gift, and if that was the case the property never passed from the donor to the donee. We respectfully think that care should be taken not to regard the term '*benami*' as being equivalent to 'not genuine'."

Thus, it becomes clear that the transfer of shares in the present case are not strictly in the nature of *benami* transactions. In any case, it was not a question, particularly in view of the fact that the gifts were made well over 20 years ago, which could properly be dealt with in an administration suit; and there can be in law no doubt as to the real scope of the administration suit. And the cases of

(1) (1936-37) 14 Ran. Series, p. 242 at p 251.

Mr. Shafi-ul-Nisa v. *Mt. Fizal-ul-Nisa* (1), *Mr. Mohamed Zamani Begam and another* v. *Fazal-ul-Rahaman and another* (2), *Lutchmi Ammal* v. *Narasamma and others* (3) had been referred to in the judgment passed in Civil Miscellaneous Appeal No. 3 of 1952 in this connection.

It was observed in the case of *Mathura Kurmi* v. *Jagdeo Singh and others* (4):

"We are not prepared to hold that for this reason the question of law between the parties here, assuming it to arise at all, is a substantial question. It is not made to appear that the appeal, if allowed to proceed, could furnish an occasion for the discussion or enunciation of any fresh legal principle. The matter has been agitated time and again before their Lordships who have repeatedly laid down the law in the sense indicated above. In these circumstances we do not think that the application of well-defined legal principles to a particular set of facts raises any question of law which can fairly be described as substantial."

The decision depends obviously on the particular facts of each case as to whether it might be said that the property concerned constitutes part of the property which was left by the deceased person at the time of his death, and not on what is the law applicable in such a case. There is, therefore, no merit in this application before us; and it is dismissed with costs; Advocate's fee eighty-five kyats.

(1) A.I.R. (1950) East Pun. 276
(2) A.I.R. (1943) Lah. p. 241.
(3) (1920) 13 B.L.T. 237.
(4) (1928) 50 All. Series, p. 208 at 210.

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1954

Mar. 23.

E. A. ASWATH (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Procedure Code, s. 552—Restoration of woman or female child under 16 - Unlawful detention—Unlawful purpose, what amounts to.

Held : If a girl is being detained by her father contrary to her own wish, it would constitute unlawful detention within the purview of s. 339, Penal Code and would therefore be detention for unlawful purpose. The unlawful detention of a minor wife by her father would afford a cause of action to the husband to recover possession of his wife by a civil action and therefore the purpose of such detention would be unlawful.

Tulsidas Janglvadas v. *Chatandas Domadas and another*, A.I.R. (1933) Nag. 374 ; *Nathu Maistry* (a) *Nritya Lal Patto* v. *Nari Lal Maistry*, 15 Cr. L.J. 712, followed.

B. W. Ba Tun for the applicant.

Maung Maung (Government Advocate) for the respondent.

U SAN MAUNG, J.—On the 21st of December 1953, applicant E. A. Aswath, filed an application before the District Magistrate, Rangoon, under section 552 of the Criminal Procedure Code, for an order directing his alleged parents-in-law, Abdul Gaffar and Ishar Bibi, to restore to him their daughter Jubi (*a*) Zubeida Bibi, who he claimed to be his lawfully wedded wife. In the application, it is stated that the applicant and Jubi fell in love with each other while they were occupying the upper and lower flats of house No. 127, in 27th Street, Rangoon ; that on Jubi attaining the age of 16, they eloped and were

* Criminal Revision No. 253-B of 1953 being Review of the order of the District Magistrate, Rangoon, in Criminal Misc. No. 172 of 1953

married according to Mohomedan rites as well as by swearing affidavits before the Third Additional Magistrate, Rangoon, and that, while they were living together as husband and wife, respondents Abdul Gaffar and his wife Ishar Bibi, lodged a report with the police that he had kidnapped their daughter and had, therefore, committed an offence punishable under section 363 of the Penal Code. Subsequent police enquiry revealed that Jubi was over 16 years of age, so no action was taken against the applicant under section 363 of the Penal Code. Nevertheless, the police, instead of returning Jubi to her husband, allowed her to remain in the custody of her parents who refused to restore her to the applicant inspite of notices sent to them through his advocate. Hence his application under section 552 of the Criminal Procedure Code.

The learned District Magistrate, after examining the applicant, Ebrahim Ahmed Aswath on oath and ascertaining from him the facts, as mentioned above, dismissed the application by an order which reads as follows :—

> " Application u/s. 552, Cr.P.C., filed by E. A. Aswath.
>
> Applicant present with U Ba Tun, Advocate. He is examined on affirmation. According to his statement on affirmation the ingredients that a female or a child under 16 years of age have been unlawfully detained for any unlawful purpose is not fulfilled. So the application is dismissed.
>
> Applicant informed."

This order, on the face of it, seems to be wrong because there is material upon which the District Magistrate could and should have proceeded to make further enquiry as to whether or not the female Jubi (*a*) Zubeida Bibi was the wife of E. A. Aswath and whether she was detained by her parents against her

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will. In the case of *Tulsidas Janglvadas* v. *Chatandas Domadas and another* (1), it was held that if the " unlawful detention " of a female is for a purpose which is an offence or is legally prohibited or which is a civil wrong it would constitute an " unlawful purpose " under section 552 of the Criminal Procedure Code. If a girl is being detained by her father contrary to her own wish, such detention would fall within the purview of section 339 of the Penal Code and would equally be detention " for an unlawful purpose". The unlawful detention of a minor wife by her father would afford a cause of action to the husband to recover possession of his wife by a civil action and therefore, the purpose of such detention would be unlawful within the meaning of section 552 of the Criminal Procedure Code. *See* also *Nathu Maistry* (a) *Nritya Lal Patto* v. *Nari Lal Maistry* (2).

However, the learned Advocate for the applicant has now informed me that the matter is only of academic interest as Jubi, (*a*) Zubeida Bibi, is no longer in the custody of her parents but is being lodged in the premises of the Vigilance Society.

I would, therefore, while dismissing the application, direct that a copy of this order be sent to the District Magistrate, Rangoon, for his future guidance.

(1) A.I.R. (1933) Nag. 374. (2) 15 Cr. L. J. 712.

APPELLATE CIVIL.

Before U Tun Byu, C.J., and U Bo Gyi, J.

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G. D. STEWART (APPELLANT)

v.

Feb. 8.

THE UNION OF BURMA (RESPONDENT).*

Government of Burma Act, 1935, s 397 (3)—"G" Circular No. 15 of 1940—Dismissal from Government service—Preliminary Enquiry—Orders passed by Governor at Simla—Reasonable opportunity to show cause against enquiry and final orders, whether afforded—India and Burma (Temporary and Miscellaneous Provisions) Act, 1942, s. 5.

Held : It appears to be clear from the rules made in the "G" Circular No. 15 of 1940, which were scrupulously observed, that every effort had been made to give the Government servant, against whom the departmental enquiry was to be conducted, a reasonable opportunity of showing cause against the action which was proposed to be taken against him. Moreover he was also afforded an opportunity of representing his grievance against the order of dismissal in the form of an appeal to the Governor.

High Commissioner for India and another v. *I. M. Lall*, (1948) 75 I.A. 225, distinguished.

Held also : The Governor had the authority and power to dismiss the appellant while in India by virtue of the explicit provisions of s. 5 of the India and Burma (Temporary and Miscellaneous Provisions) Act, 1942.

Basu and *Venkatram* for the appellant.

Choon Foung (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-appellant G. D. Stewart instituted a suit on the 29th May, 1950 for a declaration that the order dismissing him from the Burma Civil Service was *ultra vires* and inoperative and that he still continued, in law, to remain a member of the Class II of

* Civil 1st Appeal No. 62 of 1951 against the decree of the High Court on the Original Side in Civil Regular No. 35 of 1950.

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the Burma Civil Service. G. D. Stewart joined the Burma Civil Service in 1919. He evacuated during the second world war to India in April, 1942; and he held the post of the Deputy Commissioner, Mawlaik, Upper Chindwin at the time of the evacuation. It appears that he was, at first, placed on average leave-pay in India, and was subsequently appointed as the Secretary to the Premier Sir Paw Tun. He thus continued to be in the service of the Government of Burma while in India. He was, however, dismissed from the service on the 27th December, 1944 under the order of the Governor of Burma.

The Government of Burma was, at the relevant period of this case, functioning at Simla, India, to which it had evacuated in 1942. W. H. Payton, who was said to be the Chief Secretary to the Government of Burma, called upon G. D. Stewart in Exhibit A, dated the 9th June, 1944, to show cause why he should not be dismissed or punished with a lesser sentence in connection with certain acts mentioned therein, which he was said to have committed in 1943, while in India. The departmental enquiry against G. D. Stewart was apparently held under the "G" Circular No. 15 of 1940; and that was the circular which prescribed the procedure for holding a departmental enquiry against a Government servant. On receipt of the report which W. H. Payton submitted after the witnesses for both sides had been examined, the Governor of Burma passed an order dismissing G. D. Stewart from the service of the Government of Burma, with effect from the 27th December, 1944—*vide* Exhibit C.

W. H. Payton in his report, which consisted of 34 pages, carefully dealt with the different points that were raised before him on behalf of

G. D. Stewart, and he found all the charges to have been proved against the latter. We are not concerned, in this appeal, with the merits of the case. U Aung Khine, J., before whom the case was heard on the Original Side, held, on a preliminary issue, that G. D. Stewart had been given, in the circumstances of the present case, a reasonable opportunity of showing cause against "the action proposed to be taken in regard to him", as required in sub-section (*3*) of section 97 of the Government of Burma Act, 1935; and the suit was dismissed.

The real contention, which requires careful consideration in the present appeal is whether it could, in the present case, be said that G. D. Stewart had been given "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him", as prescribed in sub-section (*3*) of section 97 of the Government of Burma Act, 1935. It will be necessary to reproduce the provisions of section 97 of the Government of Burma Act, 1935, which are in these words:—

"97. (*1*) Except as expressly provided by this Act every person who is a member of a civil service of the Crown in Burma, or holds any civil post under the Crown in Burma, holds office during His Majesty's pleasure.

(*2*) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(*3*) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provide that this sub-section shall not apply—

(*a*) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge: or

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(*b*) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(*4*) Notwithstanding that a person holding a civil post under the Crown in Burma holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in Burma, is appointed under this Act to hold such a post may, if the Governor deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation if before the expiration of an agreed period that post is abolished or is, for reasons not connected with any misconduct on his part, required to vacate that post."

Much stress had been placed, on behalf of the plaintiff-appellant, on the decision of the Privy Council in the case of the *High Commissioner for India and another* v. *I. M. Lall* (1), and that was a case which was decided under the provisions of the Government of India Act, 1935, which were similar to those of section 97 of the Government of Burma Act, 1935. It was observed in that case towards the end of page 242 of the report as follows:—

". . . . Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage."

The above observation does not purport, in our opinion, to mean that sub-section (*3*) of section 97 of the Government of Burma Act requires that the plaintiff-appellant should have been afforded two opportunities of showing reasonable cause against

(1) (1948) 75 I.A. 225.

the action proposed to be taken against him; and a contention to the contrary is untenable in view of the clear words appearing in sub-section (*3*) of section 97 of the Government of Burma Act, 1935. We are of opinion that so long as a reasonable opportunity has been afforded to the person concerned of showing cause against the section which is proposed to be taken against him, it will, for the purpose of section 97 (*3*), be sufficient.

The question whether a Government officer has been afforded a reasonable opportunity of showing cause against the action proposed to be taken against him in a departmental enquiry will obviously turn on the peculiar facts obtaining in each case. We might observe that the enquiry proceedings instituted against I. M. Lall in the case which went before the Privy Council was held under Rule 55 of the Civil Service (Classification, Control and Appeal) Rules issued on the 19th June 1930, long before the Government of India Act, 1935 came into force; whereas the departmental enquiry which was opened against G. D. Stewart in the present case was held under the "G" Circular No. 15 of 1940, which was issued a few years after the Government of Burma Act, 1935 became operative. It will be necessary therefore to examine the provisions of the "G" Circular No. 15 of 1940 in order to ascertain whether G. D. Stewart had been afforded a reasonable opportunity of showing cause against the action which was proposed to be taken against him in the departmental enquiry held by W. H. Payton.

It is clear in this case that G. D. Stewart knew that a circular had been issued in connection with the holding of a departmental enquiry against an officer in the service of the Government of Burma

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after the Government of Burma Act, 1935 came into force. The questions and answers, that were put to and made by him on the Original Side, were :—

" *Q.* You have been pretty long in the service of Government and you know the law, rules and procedure relating to holding of enquiries re : dismissal of Government officers ?

A. Yes.

Q. The procedure re : holding of the enquiry is governed by " G " Circular No.15 of 1940 ?

A. I do not quite remember. There is a circular."

It will accordingly be necessary to reproduce the relevant provisions of the " G " Circular No. 15 of 1940 ; and Rules 4 and 5 (1) read :

"4. (1) When it is believed to be desirable to take action against a servant of the Crown, it is necessary to make sure that there is a *primâ facie* case against him. For that purpose a preliminary investigation against him will frequently be necessary to elucidate doubtful points and/or to collect evidence.

(2) At the preliminary investigation witnesses may be examined either privately or in the presence of the respondent ; the respondent also may be examined. If the investigating officer examines witnesses or the respondent in the course of the preliminary investigation, their statements shall be recorded in writing.

(3) At this stage a file shall be opened to contain all relevant papers. At the beginning shall be placed a diary form, on which shall be recorded briefly the progress of the case, office orders, dates fixed, etc. This file shall also contain the record of the formal inquiry, if one is held.

5. (1) The preliminary investigation will reveal whether there is sufficient ground to take formal action against the respondent. . . . "

Thus Rule 4 of the " G " Circular No. 15 of 1940 provides for the holding of a preliminary enquiry for the purpose of ascertaining whether there is a

primâ facie case to proceed against the person against whom it is proposed to take action. Rules 5 (2), 6, 7 and 8 prescribe the procedure which is to be followed in holding a formal enquiry; and Rules 6 (3) (4) and (7) read :

"6. (3) You are therefore called upon to show cause against dismissal or lesser punishment.

(4) Your written statement of defence is to reach me by (here enter date, allowing a reasonable period).

* * * *

(7) You are further warned that if you are found guilty of the charge (s), the following other matters will be taken into consideration in deciding the punishment, and any representation you have to make in this connection should be included in your written statement of defence :

(Here enter the other matters, if any, such as previous bad work, previous punishments, etc.)."

Thus under the rules prescribed in the " G " Circular No. 15 of 1940 G. D. Stewart against whom a formal enquiry was being conducted after the charges had been framed, as required under Rule 6 (1) and (2), could be said to be a person who was to be dismissed or removed from the Government service, if the charges were proved, as the nature of the charges that had been framed against G. D. Stewart showed that G. D. Stewart would clearly have to be dismissed from the Government service, if any of the charges was proved against him. The Exhibit A, which contained the charges that were framed against G. D. Stewart, was in accordance with what was required under Rule 6 of the "G" Circular No. 15 of 1940. The following words " You are further warned that if you are found guilty of the charge (s), the following other matters will be taken into consideration in deciding the punishment, and any representation you have to make in this connection should be included

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in your written statement of defence. . . . . " in item (7) of Rule 6 of the " G " Circular No. 15 of 1940 indicate that the enquiry, which was held against G. D. Stewart was in the nature of a final enquiry.

The circumstances appearing in the case of *I. M. Lall* (1) are quite different from the circumstances, which exist in the present case under appeal. The observations made in the case of *I. M. Lall* (1) would therefore have to be construed in the light of the circumstances proved in that case. There J. D. Anderson, Commissioner, who was appointed to hold the departmental enquiry, examined I. M. Lall on the 10th June, 1938, and apparently no other person was examined up to the time when J. D. Anderson made his report on the 9th August, 1938. J. D. Anderson in his report indicated that a long investigation and further examination of the documents were desirable before any final conclusion could be arrived at. F. L. Brayne, Commissioner, was subsequently appointed to complete the enquiry which Anderson began. Anderson's report was, however, not disclosed to I. M. Lall at any time; and Rule 55 of the Civil Service (Classification, Appeal and Control) Rules of 1930 also does not provide for a preliminary enquiry. On the other hand the enquiry under Rules 5, 6, 7 and 8 of the " G " Circular No. 15 of 1940 was really in the nature of a final enquiry, and could not be confused with, or mistaken for a preliminary enquiry mentioned in Rule 4.

G. D. Stewart was informed in Exhibit C, dated the 30th December, 1944 that he had been dismissed from the service of the Government of Burma with effect from the 27th December, 1944, and he was supplied, at the same time, with a copy of the report

(1) (1948) 75 I.A. 225.

which W. H. Payton made. It was also intimated that he could appeal to the Governor, if he so desired. The appeal which he filed against the order of dismissal was however dismissed by the Governor—*vide* Exhibit 1, dated the 12th July, 1945. We are therefore unable, in the circumstances of the present case, to see any real force in the argument that G. D. Stewart had not been given a reasonable opportunity of showing cause against the action which was proposed to be taken against him in the departmental enquiry held by W. H. Payton.

We are also unable to accede to the contention that the effect of the provisions of section 97 of the Government of Burma Act, 1935 had not been correctly appreciated, as it appears to be clear from the rules made in the " G " Circular No. 15 of 1940 that every effort had been made to give the Government servant, against whom the departmental enquiry was to be conducted, a reasonable opportunity of showing cause against the action which was proposed to be taken against him. Moreover, G. D. Stewart was also afforded an opportunity of representing his grievance against the order of dismissal in the form of an appeal to the Governor.

The following passage which appears at the end of page 242 of the report in *I. M. Lall*'s case (1) is significant, and it reads :

> " If the civil servant has been through an inquiry under r. 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the inquiry."

In the present case, it could, in our opinion, be said that G. D. Stewart was, in any case, given an

(1) (1948) 75 I.A. 225.

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opportunity to represent against the punishment passed upon him by the Governor when he took the opportunity of representing in the form of an appeal to the Governor against the order of dismissal communicated to him in Exhibit C. In allowing G. D. Stewart to appeal, the Governor of Burma had, in effect, afforded G. D. Stewart an opportunity of setting out, in his memorandum of appeal, any fact or circumstance which might suggest that the charges had not really been proved against him, or that wrong inferences, whether of fact or in law, had been made against him in that report or that the punishment inflicted was wrong or improper or excessively severe. We accordingly agree with the learned Judge on the Original Side that G. D. Stewart could, in the circumstances of the present case, be considered to have been given a reasonable opportunity of showing cause against the punishment proposed to be taken against him as required under sub-section (*3*) of section 97 of the Government of Burma Act, 1935.

It has been urged in this appeal that G. D. Stewart had been prejudiced in his defence in the enquiry proceedings which W. H. Payton held, in that he was not allowed to examine Miss Paw Tun as a witness in his defence; and it was also alleged that he was not given an opportunity of examining the witnesses, who were in Burma, for his defence. We are unable to find anything in the record, which might indicate what relevant evidence Miss Paw Tun could testify to, if she were to be examined as a witness; nor have we been able to discover anything in the record, which might indicate what exactly the Burma witnesses, whom G. D. Stewart desired to examine,could state. It is not possible, in the circumstances, to say that G. D. Stewart must have been prejudiced in his defence by the absence of

those witnesses. The report which W. H. Payton made does not show that G. D. Stewart had protested against the non-availability of the witnesses from Burma. W. H. Payton observed towards the end of his report :

" Finally, the defence evidence on both claims is demonstrably false. Admittedly there are persons in Japanese-occupied territory who might have given relevant evidence but who cannot be called ; in my opinion, however, there is enough on record already to prove the respondent's guilt."

The above observation, on the other hand, mentions about the witnesses in Burma who might have been called to strengthen the charges against G. D. Stewart at the enquiry ; and it also indicates that any additional witness whom G. D. Stewart might desire to examine for his defence was not likely to be believed.

We see no merit in the contention that the Governor of Burma had no authority or power to dismiss the appellant while in India, in view of the explicit provisions of section 5 of the India and Burma (Temporary and Miscellaneous Provisions) Act, 1942, the relevant portion of which reads :

" 5. (1) Any references in the Government of Burma Act, 1935, to the raising of forces in Burma shall, as respects the war period, be construed as including, and as always having included, references to the raising of forces in India by or for the Government of Burma, and any references in the said Act to the civil services of, or civil posts under, the Crown in Burma or to any authorities in Burma shall, as respects the war period, be construed as including, and as always having included, references to services, posts or authorities established in India in continuation of or in substitution for those services, posts or authorities."

We are also of opinion that there is no force in the contention that the order of the Governor of Burma dismissing G. D. Stewart from the service of

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the Government of Burma was illegal in that no reference was made in the present case to the Public Service Commission as mentioned in section 120 of the Government of Burma Act, 1935. The Public Service Commission ceased to function after the Government of Burma evacuated to India in 1942, and it was therefore impossible to make the consultation envisaged in section 120 (*2*) of the Government of Burma Act, 1935. In any case, the Governor was not bound, under section 120 of the Government of Burma Act, 1935, to accept the suggestion or recommendation of the Public Service Commission, whose function was, under section 120, merely consultative. Thus, it was, at most, a mere irregularity which did not affect the merits of the departmental enquiry which was held against G. D. Stewart.

The appeal is, for the reasons set out above, dismissed with costs, and the Advocates' fees is fixed at K 150.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1954

Mar. 13.

MA THEIN TIN (APPELLANT)

v.

MA AYE TIN (RESPONDENT).*

Adverse possession as basis of claim or defence—Where possession had its inception under legal contract, continued possession can never be adverse.

Held: It is not permissible for the defendant to say that she was in possession of the land because its owner had agreed to transfer it to her upon payment of Rs. 125, and at the same time to contend that she has all along been in adverse possession of the land.

Dadoba and others v. *Krishna and others*, 7 Bom. 34; *Tarubai and others* v. *Venkatrao and others*, (1903) 27 Bom. 43, followed.

Than Sein for the appellant.

C. H. Chan for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 25 of 1951 of the Court of the Subordinate Judge, Myitkyina, the plaintiff-respondent Ma Aye Tin sued the defendant-appellant Ma Thein Tin for her ejectment from the land in suit. This land belonged originally to one Daw Saing Hlaw who died during the Japanese regime about 6 or 7 years ago. The plaintiff Ma Aye Tin has been living together with Daw Saing Hlaw for more than 20 years and was treated by the old lady more or less as her own daughter. The defendant Ma Thein Tin came to live on part of the suit land about 6 years before the Second World War. She evacuated along with other villagers during the Japanese occupation period and

* Civil 2nd Appeal No. 83 of 1952 against the decree of the Additional District Court, Myitkyina, in Civil Appeal No. 6-M of 1952.

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U SAN MAUNG, J

came back after the British arrived When asked by the plaintiff to leave the land, she claimed that it had been sold to her for a sum of Rs. 125 by Daw Saing Hlaw, that she had already paid Rs. 65 by instalments, and that Daw Saing Hlaw agreed to convey the land to her formally by a registered deed of sale when the whole of the purchase price had been paid. Ma Thein Tin asked Ma Aye Tin to honour the pledge of Daw Saing Hlaw by accepting the sum of Rs. 60 and then allowing her to continue living on the land in dispute. Ma Aye Tin, who claimed ownership by virtue of a registered deed of gift Exhibit A executed by Daw Saing Hlaw, would rather refund to Ma Thein Tin the sum of Rs. 65 said to have been paid to Daw Saing Hlaw, than to convey the land to Ma Thein Tin. Hence a dispute arose between them and attempts at mediation by Maung Ba Aye (DW 2), Headman of Mogaung, U Ba Maung (DW 3), retired Sub-Inspector of Police U Ba Myaing (DW 4), School Teacher were unsuccessful. According to Maung Ba Aye, Ma Aye Tin admitted that the land was sold by her grandmother Daw Saing Hlaw to Ma Thein Tin as alleged by Ma Thein Tin. Other defence witnesses only said that Ma Aye Tin offered to refund the sum of Rs. 65 said to have been given to Daw Saing Hlaw. The learned Subordinate Judge dismissed the plaintiff's suit on the ground that Ma Thein Tin was in possession of the suit land because of the agreement of sale between her and Daw Saing Hlaw and that she could not be ejected therefrom as she has been in continuous possession for over 12 years. The learned District Judge, Myitkyina on appeal by Ma Aye Tin held that Ma Thein Tin could successfully resist Ma Aye Tin's suit only if she had been in adverse possession for 12 years and that even if Ma Thein Tin's possession be deemed to be adverse she

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U SAN MAUNG, J.

could not have been in possession for the statutory period as she was out of possession during the Japanese occupation period. He accordingly reversed the judgment and decree of the Subordinate Judge and decreed the plaintiff's suit with costs; hence this second appeal by the defendant-appellant Ma Thein Tin. In my opinion, on the defendant's own showing, she cannot be held to have been in adverse possession of the suit land for any period. She was admittedly in possession of the land with the permission of Daw Saing Hlaw before the alleged sale to her. In fact it was not an outright sale but merely an agreement to sell for a sum of Rs. 125, as according to Ma Thein Tin herself a formal transfer was to be made only at the time when the agreed sum of Rs. 125 was fully paid up. When the commencement and continuance of possession of a person is legal and proper, as for example when it can be referred to a contract expressed or implied, it cannot be presumed adverse. In the case of *Dadoba and others* v. *Krishna and others* (1) it was held that when the possession by the defendant may be referred to the contract of tenancy under which the tenant entered, mere length of enjoyment without payment of rent does not, under ordinary circumstances, affect the relation of the parties. *See* also *Tarubai and others* v. *Venkatrao and others* (2). In the case under appeal it is not permissible for the defendant to say that she was in possession of the suit land because its owner had agreed to transfer the land to her upon payment of Rs. 125, and at the same time to contend that she has all along been in adverse possession of the land.

In the result the appeal fails and must be dismissed with costs. Advocates' fees 3 gold mohurs.

(1) 7 Bom. 34. (2) (1903) 27 Bom. 43.

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1954

Mar. 25.

MAUNG NYUNT TIN (*a*) MAUNG AUNG THEIN (APPELLANT)

v.

MA PU (RESPONDENT).*

Maintenance—Criminal Procedure Code, s. 488—Maintenance of wife and child—Separation by mutual consent—Husband donning yellow robes for 4 years—Effect of—Subsequent disrobing and absence of contact.

Held: When a man enters the priesthood intending to renounce the world and not merely to become a *Dunlaba Rahan*, there is a severance of the marriage tie, especially when the wife consents to such a step. There seems no reason why she should have lost touch with him for such a long period unless there had been a severance.

U Chit for the appellant.

U SAN MAUNG, J.—In Criminal Miscellaneous case No. 129 of 1953 of the Third Additional Magistrate, Rangoon, the respondent Ma Pu was awarded a sum of K 20 per mensem as maintenance for herself and K 15 as maintenance for her child as against the appellant Maung Nyunt Tin (*a*) Maung Aung Thein. Ma Pu claimed that she married Maung Aung Thein about 10 years ago and that she and her husband lived in his parents' house for about 3 years during which a daughter was born to the marriage. When the child was about 2 years old, her husband left her in his parents' house saying that he was going to look for work. Since he did not return although she waited for about a month, she went back to her parents' house and lost touch with him till about a

* Criminal Appeal No. 532 of 1953 from the order of the 3rd Additional Magistrate, Rangoon, in Criminal Misc. No. 129 of 1953.

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U SAN MAUNG, J.

year ago when she heard that he was in Rangoon; so she came to Rangoon and found him at an ice drink shop. He had remarried. He promised to pay her K 50 there and then, and some more money later, however, his wife protested he did not give her anything. Therefore, she claimed maintenance for herself and for her child.

The appellant Maung Aung Thein admitted having married Ma Pu and living with her at his parents' house after the marriage. He, however, stated that when his daughter was about 2 months old he left his wife by mutual consent and thereafter went to Mandalay to wear yellow robes for about 4 years. He thereafter left his priesthood and came down to Rangoon where he remarried. He had not been in touch with his former wife or seen her for the past 8 or 9 years. Ma Pu when cross-examined, stated that she was given to understand that Maung Aung Thein was wearing yellow robes and she actually saw him in such robes at his parents' house about a month or two after he had left her.

Therefore considering the circumstances, it is quite probable that Maung Aung Thein became a monk after he had obtained a divorce from his wife. Otherwise there seems no reason why she should have lost touch with him for such a long period. When a man enters the priesthood intending to renounce the world and not merely to become a *Dunlaba Rahan*, there is a severance of the marriage tie especially when the wife consents to such a step. Therefore, I hold that the marriage tie between the appellant and the respondent no longer existed and that therefore the respondent was not entitled to maintain allowance from the appellant. The appellant is undoubtedly liable to pay K 15 per mensem as the maintenance of his daughter.

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MAUNG NYUNT TIN (a) MAUNG AUNG THEIN v. MA PU.

U SAN MAUNG, J.

For these reasons, I would set aside the order of the Third Additional Magistrate directing the appellant to pay K 20 per mensem as maintenance for the respondent Ma Pu while confirming that part of the order relating to the child. There will be no order as to cost of this appeal.

APPELLATE CRIMINAL.

Before U San Maung and U Thaung Sein, JJ.

H.C. 1954

Mar. 5.

MAUNG TUN SHIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Murder—Initial robbery followed after lapse of time by murder of hostage—Identity of murderer not established—Confession, admissibility of, after maker's death, against surviving robber—Conviction under s. 302 (1) (c) read with s. 34, Penal Code – Common intention to commit murder, inference whether reasonable—Conviction altered to one for robbery though not charged with it.

Held: A confession is admissible in evidence though the maker is dead.

Maung Shin and two others v. *The Union of Burma*, (1948) B.L.R. 425.

Held also: From the mere fact that the appellant was a participant in the robbery it does not necessarily follow that the only reasonable inference possible is that there was a common intention to kill the owner of the hut.

Maung Myint v. *The Union of Burma*, (1948) B.L.R. 379.

Held further: As the appellant confessed to taking part in the robbery he probably envisaged the possibility of being convicted of robbery, and is therefore not prejudiced in any way by the absence of a specific charge when the conviction is altered to one of robbery.

Thein Maung for the appellant.

U Chit (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U THAUNG SEIN, J.—This is an appeal by one Maung Tun Shin who has been convicted by the learned Special Judge (Sessions Judge), Pegu, of an offence under section 302 (1) (*c*), read with section 34, of the Penal Code, and sentenced to death. The

* Criminal Appeal No. 64 of 1954 from the order of the Special Judge, Pegu, in Criminal Regular Trial No. 14 of 1953.

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facts leading up to that conviction and sentence are briefly as follows :—

The scene of the tragedy lay near the field hut of U Tun Kyaw (deceased) situated at a short distance from Hnet-gyi-ye-gyaw village in the Pegu District. On the night of the 9th July 1953, while the deceased and his family were seated outside the hut they were surprised to hear footsteps approaching in their direction. Suddenly a voice called out to them to go into an adjoining cow-shed and lie on their stomachs. This was followed by what has been described by the inmates as the sound of the bolt action of a gun thus indicating that the *lusoes* were armed with a rifle. Needless to say, U Tun Kyaw and family ran into the cow-shed and lay face downwards just as two robbers rushed into the hut. There was a third *lusoe* but he took good care to remain in the dark outside the hut. As usual the robbers ransacked the hut and after assaulting U Tun Kyaw and his wife Ma Hla (PW 2) demanded cash and jewellery. But the family were not possessed of jewellery and cash and could not therefore produce them.

While the ransacking of the hut was in progress, Maung Nyun Tin (PW 1), the son of U Tun Kyaw, who was near his father, happened to raise his head and in the faint light thrown from the lamp burning in the hut he was shocked to recognise the *lusoe* outside the hut as the appellant Maung Tun Shin. It appears that they had been old friends and met for the first time several years ago at Rangoon while they were both employed as coolies in the Supplies Department. They soon became close friends and when Maung Nyun Tin returned to his native village of Hnet-gyi-ye-gyaw the appellant went along with him. After living with U Tun Kyaw's family for some

months the appellant eloped with a girl from the neighbouring village of Banda and thus moved to that village. In short, the appellant was a friend of U Tun Kyaw's household and it was on this account that he took good care to hide his identity on the night in question. To continue with the sequence of events, after an abortive attempt to extort cash and jewellery the *lusoes* decamped with a trifling loot of three fowls and a *dashe*. Strangely enough though there was no danger of pursuit from the villagers, they led away U Tun Kyaw as a hostage. Shortly after their departure Maung Nyun Tin lodged a report of the incident with a neighbour named Ko San Kyu (PW 4) and a search began for U Tun Kyaw. Day dawned without any trace of the unfortunate U Tun Kyaw and Maung Nyun Tin proceeded to Hnet-gyi-ye-gyaw village and reported the matter to U Sein Tun (PW 5), the headman. In that report he clearly mentioned that one of the robbers was the appellant Maung Tun Shin. This led to the arrest of the appellant by the headman of Banda village. Apparently the appellant realised that the game was up so far as he was concerned and made what was thought to be a clean breast of the whole affair before the village *lugyis*. His statement was recorded by Maung Khe Maung (PW 13), the President of the Ba-Ta-La-Sa, and a hidden Japanese rifle was also pointed out by the appellant among some bushes. In that statement he admitted having participated in the attack on U Tun Kyaw's hut along with one Maung Yan Maung, who has since absconded, and Maung Ni Kwe. But he asserted that he was an unwilling participant and that he had been compelled by means of threats to accompany Maung Yan Maung and Maung Ni Kwe. He then went on to describe how U Tun Kyaw was brought away as a

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hostage and the murderous attack on the latter by Maung Ni Kwe in a *chaung* at some distance from the hut. After the murder of U Tun Kyaw by Maung Ni Kwe—so says the appellant—the party proceeded towards the latter's hut. A few minutes later, Maung Ni Kwe in turn met his fate when a venomous snake bit him on the leg. They hurried to the hut of his employer Ko Than Doke (PW 6) but on reaching it he was already in a grave and critical condition. Here they parted company and each returned to his respective hut.

The appellant was handed over by the *lugyis* to the Police who produced him before a Magistrate and his confession was duly recorded as per Exhibit (ę) in the trial record. It may be noted that this confession was merely a repetition of his former statement to the village elders and he adhered to it throughout the trial. Immediately after the arrest of the appellant the Police visited the hut of Maung Ni Kwe only to find the latter's corpse. That Maung Ni Kwe died of snake bite was clearly proved by the evidence of two *se-sayas* Maung Tun Sein (PW 7) and Maung Bu (PW 17), who were called in to attend on him on the night in question. By the time these *se-sayas* arrived Maung Ni Kwe, who was in a hopeless condition, realised that his end was drawing nigh. Consequently he was in a penitent mood and confessed to the *se-sayas* that he had been guilty of a grave crime. He then described the attack on U Tun Kyaw's hut along with the appellant and Maung Yan Maung and of the murder of U Tun Kyaw in a *chaung*. But he insisted that this murder was the work of the appellant alone and that he had no hand in it. That such a confession is admissible in evidence, despite the fact that the confessor is dead, has been laid down in *Maung Shin and two*

others v. *The Union of Burma* (1). As indicated by Maung Ni Kwe and the appellant, the corpse of U Tun Kyaw was found in a *chaung*, and the post-mortem examination revealed that he had been brutally hacked to death.

As stated earlier, the appellant on his part stuck to his "confession" and disclaimed all responsibility for the murder. According to the Exhibit (ခ) confession, he even went to the extent of pleading for U Tun Kyaw's life and was almost shot by Maung Ni Kwe. On the other hand, Maung Ni Kwe's version is that the murderer was the appellant. The question is which of these two versions is the truth. The learned trial Judge was of the view that it is immaterial as to who actually inflicted the fatal injuries as all the participants in the robbery were equally liable for the murder "under the law enacted under section 34 of the Penal Code." Obviously he overlooked the ruling in *Maung Myint* v. *The Union of Burma* (2), where the law relating to "common intention" in respect of acts committed by several accused was discussed and laid down as follows:—

> "Essence of joint liability under s. 34 of the Penal Code is the existence of a commom intention leading to doing of a criminal act in furtherance of such intention. Such inference of common intention should not be reached unless it is a necessary inference. 'Necessary inference' must mean the only reasonable inference possible, not merely the probable inference."

Now, it is impossible to decide from the evidence on record as to who actually murdered the deceased U Tun Kyaw. Then again, from the mere fact that the appellant was a participant in the robbery it does not necessarily follow that "the only reasonable inference possible" is that there was a common

(1) (1948) B.L.R. 425. (2) (1948) B.L.R. 379.

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intention on the part of the robbers to kill the owner of the hut. In short, the conviction under section 302 (1) (*c*), read with section 34, of the Penal Code, was clearly wrong and will have to be set aside. The question then arises whether he should be convicted and sentenced under section 392 of the Penal Code. After all, he admitted both in his confession and throughout the trial of having taken part in the robbery and his story of the coercion and threats by the other two companions was undoubtedly a gross invention. But he was not charged with an offence under section 392 of the Penal Code in the trial Court and the problem is whether he will be prejudiced by the alteration of the conviction under section 302 (1) (*c*), read with section 34, of the Penal Code, to one under the former section. In this connection the following observations in *Maung Myint* v. *The Union of Burma* (1) are most apposite :—

> " The true test for alteration of conviction is whether the facts are such as to give the accused notice of offence for which he is going to be convicted though not charged and that the accused is not prejudiced by the mere absence of a specific charge."

The defence set up by the appellant clearly indicated that he was bent on proving that he had been forced to join the robbers. In other words, he probably envisaged the possibility of being convicted of robbery and set out to meet that charge. He was thus not prejudiced in any way by the absence of a specific charge under section 392 of the Penal Code. We are convinced therefore that the conviction in this case can be altered to one under section 392 of the Penal Code.

(1) (1948) B.L.R. 379.

Accordingly, the conviction of the appellant Maung Tun Shin under section 302 (1) (*c*), read with section 34, of the Penal Code, will be altered to one under section 392 of the Code. In view of the brutal manner in which the hut owner U Tun Kyaw was murdered, we consider that the appellant should be awarded the maximum penalty under the latter section. The sentence of death passed on the appellant will therefore be set aside and instead he is directed to undergo 10 (ten) years' rigorous imprisonment.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu, C.J., and U San Maung, J.

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Feb. 26.

N. A. ANNAMALAI CHETTYAR (APPELLANT)

v.

MOHAMED YAYA AND TWO OTHERS (RESPONDENTS).*

Mortgage—Suit for recovery of mortgage debt—Third party claiming title paramount—Not a necessary party.

Held: Persons claiming under a title adversely to that of both the mortgagor and the mortgagee are not proper parties, and the claim of the person so claiming adversely cannot be adjudicated in a mortgage suit.

M.V.A.L. Vrswanathan Chettyar v. *Ma Aye and three others*, (1926) I.L.R. 4 Ran. 214; *Maung San Myaing* v. *U Po Gyaw*, (1924) I.L.R. 11. Ran. 106; *U Shwe Kyu and four others* v. *Ma Tin U*, (1948) B.L.R. 606; *Ma Tin U* v. *U Shwe Kyu and four others*, (1950) B.L.R. (S.C.) 128; *Tinkhari Dasee* v. *Narendranath Mukherji*, (1932) 59 Cal. 548; *Satagauda Appanna Atagaoudanavar* v. *Satapa Bin Darigaouda Genapnavar*, (1920) 44 Bom. 698, followed.

P. B. Sen and *B. K. Sen* for the appellant.

N. C. Sen for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The brief facts of the case, which are set out in the plaint, are that on or about the 11th June, 1941, one Kongo U Yeyama, a Japanese gentleman, was said to have sold the premises, known as the Kongo Photographic Studio, situated at No. 35, Merchant Street, Bassein, to the first defendant Maung Khin for a sum of Rs. 10,000 and that thereafter on or about the 15th July 1941, Maung Khin and his parents and sisters were said to have taken a loan of a sum of Rs. 30,000 from the plaintiff

* Civil Misc. Appeal No. 83 of 1952 against the order of the District Court, Bassein, in Civil Regular No. 5 of 1952.

N. Annamalai Chettyar under a promissory-note of the same date and that they also deposited by way of equitable mortgage the title deeds of certain properties, including the title deeds of the premises, known as the Kongo Photographic Studio, with the plaintiff. Kongo U Yeyama was said to have left Burma a few days before the war with Japan broke out in December 1941 and that he returned to Burma again towards the end of 1942. It was alleged that Kongo U Yeyama obtained, by means of threat and coercion a deed of release, in respect of the aforesaid equitable mortgage of the premises known as Kongo Photographic Studio, from the agent of the plaintiff on or about 24th August 1944, and that, on or about the 12th March 1945, Kongo U Yeyama conveyed the premises known as the Kongo Photographic Studio to Mohamed Yaya and his wife Ma Ah Ma, who were the second and third defendants. Subsequently, the first defendant Maung Khin repaid part of the money due under the promissory-note of the 15th July, 1941, and obtained a release of two of the items of the properties which were subject to the equitable mortgage created in July 1941, and Maung Khin also executed a new mortgage over the premises known as the Kongo Photographic Studio on the 1st April, 1947 in favour of the plaintiff for the sum of Rs. 10,000 which was said to be still due by him in respect of the mortgage created in July, 1941. The present claim of the plaintiff is, in effect, primarily a claim for the payment of the money due on the subsequent mortgage created in April 1947 in which Mohamed Yaya and his wife were not parties.

The second and third defendants Mohamed Yaya and Ma Ah Ma claimed, *inter alia*, a paramount title to the property in dispute and contended that they were not necessary parties to the present litigation.

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N. A. ANNAMALAI CHETTYAR v. MOHAMED YAYA AND TWO OTHERS.

U TUN BYU, C.J.

The learned District Judge, Bassein, held on the preliminary issues, that Mohamed Yaya and his wife Ma Ah Ma who set up a paramount title to the premises in question were not necessary parties to the plaintiff suit, which was primarily a suit to enforce payment of the money due on a registered mortgage executed by the first defendant Maung Khin alone.

It was submitted on behalf of the plaintiff-appellant that the second and third defendants Mohamed Yaya and Ma Ah Ma should, in the circumstances of the present case, be considered to be proper parties to the present litigation although they had nothing to do with the mortgage which gave rise to the mortgage suit; and certain cases, particularly cases decided by Allahabad High Court were referred to on behalf of the plaintiff-appellant in the arguments before us. So far as the Courts in Burma are concerned this aspect of the law was settled in *M.V.A.L Viswanathan Chettyar* v. *Ma Aye and three others* (1) were it was held that, in a suit to enforce a mortgage,—

> "Persons claiming under a title adversely to that of both the mortgagor and the mortgagee are not proper parties and the claims of the person so claiming adversely cannot be adjudicated in a mortgage suit."

There was also a decision of a single Judge in the case of *Maung San Myaing* v. *U Po Gyaw* (2) to the same effect. After the Independence it was also held in a Bench case of *U Shwe Kyu and four others* v. *Ma Tin U* (3)—

> "That parties who are claiming under a title adversely to that of both the mortgagor and the mortgagee are not proper parties to the mortgage suit and the claims made by them cannot be adjudicated in the same."

(1) (1926) I.L.R. 4 Ran. p. 214 at 216. (2) (1924) I.L.R. 11 Ran. p. 106.
(3) (1948) B.L.R. p. 606 at 617.

The parties in the above case appealed to the Supreme Court in the case of *Ma Tin U* v. *U Shwe Kyu and four others* (1) where it was observed :

". . . . the decree of the trial Court was obviously one which could not have been supported in law, it having granted a mortgage decree against persons who were not parties to the mortgage and who were merely claiming adversely to the mortgagor."

It was submitted on behalf of the plaintiff-appellant that the above observation of the Supreme Court was in the nature of an *obiter dictum*. However, although the above observation was in the nature of an *obiter dictum*, yet coming as it did from the highest Court in the country it should be received with great respect; and moreover it expresses the same view as the Courts in Burma did prior to Independence. We may with respect venture to add that the Supreme Court observation in the case of *Ma Tin U* v. *U Shwe Kyu and four others* (1)expresses the correct view of the law. The matters that will have to be considered in a mortgage suit are wholly different from the question which might arise in a suit between the plaintiff-appellant and the second and third defendants who claim a paramount title in the property in dispute. We consider that it is a salutary rule that the issues in a mortgage suit should be maintained within the narrow confine of such suit; and such a suit should not be allowed to embrace other matters not arising out of or connected with the mortgage in question.

In the case of *Tinkhari Dasee* v. *Narendranath Mukherji* (2) it was also held that the—

"Question of paramount title should not, in general, be tried in a mortgage suit."

(1) (1950) B.L.R. (S.C.) p. 128. (2) (1932) 59 Cal. p. 548.

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MacCleod, C.J., in *Satagauda Appanna Atagaoudanavar* v. *Satapa Bin Darigaouda Genapnavar* (1) also observed:

> "It is obvious that a suit for redemption is a suit between the mortgagor and mortgagee, and only those parties can be joined who claim an interest in the mortgage security or in a right to redeem. For if you bring in outsiders who claim a title to the property independently of the rights of the mortgagor and the mortgagee, you are introducing entirely new matter into the suit, new matter which would be absolutely irrelevant to the issues which would be framed in the mortgage suit."

The above observation expresses the view which the Court in Burma has constantly pursued in respect of this aspect of the law.

We have listened attentively to the arguments that have been advanced on behalf of the plaintiff-appellant, and we are unable to see any good reason why the scope of a mortgage suit should be allowed to be enlarged to include matters or issues which are irrelevant to, or unconnected with, the issues which arise directly in a mortgage suit. The appeal is accordingly dismissed with costs, with K 85 as Advocate fee.

(1) (1920) 44 Bom. p. 698 at 701.

APPELLATE CIVIL.

Before U San Maung, J.

ROWTHER GANI (APPELLANT)

v.

DR. G. SARIN (RESPONDENT).*

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Mar. 13.

Urban Rent Control Act—S. 11 1) (f) and S. 13 (1) (c), distinction between—"Member of family" extent of interpretation, limited.

Held: If the legislature had meant that a tenant may be ejected from the premises occupied by him, if such premises are *bonâ fide* required by the owner for occupation by himself or any member of his family, the same expression as occurs in clause (*c*) of sub-s. (*1*) of s. 13 would have been used in clause (*f*) of sub-s. (*1*) of s. 11, in which the omission of the words "or any member of his family" is significant.

Held further: The word "himself" in s. 11 (*1*) (*f*) must be interpreted to cover only the owner and his wife and such members of his family as are entirely dependent upon and living with him.

Hla Pe for the appellant.

N. R. Burjorjee for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 773 of 1952 of the City Civil Court of Rangoon, the plaintiff-respondent Dr. Gurudatta Sarin sued the defendant-appellant Rowther Gani for the possession of one of the rooms on the first floor of House No. 34/46 in 53rd Street, Rangoon. This house is a two-storeyed building belonging to the plaintiff. There are four rooms on the first floor and four on the ground floor. Two of the rooms on the first floor are in the occupation of the plaintiff, while the defendant-appellant is occupying Room No. 2 from the north which adjoins one of the two rooms occupied by the plaintiff. All the rooms on the ground floor

* Civil 1st Appeal No. 135 of 1952 against the decree of the City Civil Court in Civil Regular No. 773 of 1952.

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ROWTHER GANI v. DR. G. SARIN.

U SAN MAUNG, J.

are in the occupation of tenants. It is the plaintiff's case that he and the members of his family are too numerous to be comfortably accommodated in the two rooms now in his occupation and that therefore he is in need of the defendant's room for the possession of which he is filing a suit under section 11 (*l*) (*f*) of the Urban Rent Control Act. The defendant's case is that the plaintiff does not really require the suit room *bonâ fide* for his own occupation. The learned trial Judge, however, considers that clause (*f*) of sub-section (*l*) of section 11 of the Urban Rent Control Act should be so interpreted as to include within the meaning of the expression "*bonâ fide* required by the owner for occupation by himself" *bonâ fide* requirement by the owner for occupation of himself and the members of his family whether or not dependent upon him. In my opinion, the interpretation sought to be put upon the above-mentioned phrase by the learned trial Judge is wrong. In the corresponding section 13 (*l*) (*c*) it is enacted that where any person has been permitted to occupy any premises under the provisions of section 12 of the Urban Rent Control Act he may be ejected therefrom if the premises are reasonably and *bonâ fide* required by the landlord for occupation by himself or by any member of his family. Therefore if the legislature had meant that a tenant may be ejected from the premises occupied by him, if such premises are *bonâ fide* required by the owner for occupation by himself or by any member of his family, the same expression as occurs in clause (*c*) of sub-section (*l*) of section 13 of the Act would have been used in enacting clause (*f*) of sub-section (*l*) of section 11. The omission of the words "or any member of his family" from clause (*f*) is therefore significant and clearly shows that a tenant can only be ejected from

the premises occupied by him, if the same is *bonâ fide* required by the owner for occupation by himself.

No doubt, the word " himself " occurring therein may be interpreted as not only the owner but wife and such members of his family as are entirely dependent upon him and living with him. Such is not the case with the members of the family now living with the plaintiff-respondent Dr. Gurudatta Sarin. For instance, Dr. Brihaspati Sarin (PW 2), the younger son of the plaintiff, was living in India until about a year ago. On his return from India he and his family came to live with the plaintiff. One of the daughters, Mrs. Sonia who was living with her husband in Pyinmana, came very recently to live with the plaintiff, her father, bringing with her the children whom she wished to put in school in Rangoon. That is one of the reasons why the two rooms now being occupied by the plaintiff is overcrowded. The other son, Bikramdat Sarin (PW 1), was also in India during the war and he and his family came to occupy the rooms occupied by his father after the war was over. He is also a person of independent means. For these reasons, I consider that the learned trial Judge was wrong in considering that the suit room is *bonâ fide* required by the plaintiff for his occupation so as to attract the provisions of clause (*f*) of sub-section (*l*) of section 11 of the Urban Rent Control Act.

In the result, the appeal succeeds. The judgment and the decree of the fourth Judge of the City Civil Court of Rangoon are set aside and the plaintiff-respondent's suit dismissed with costs ; Advocate's fee three gold mohurs.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

H.C. 1954

Feb. 17.

S. E. TONG (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Foreign Exchange Regulation Act, 1947, s. 9 (1) read with s. 24 (1)—Illicit import of gold in bars secreted in torch cells—Accomplice, statements by—Evidentiary value of—Degree of corroboration required.

Held: A person who was not privy to the plot or design to bring in the contraband gold, and all that he did was to try and persuade the Customs official to pass the goods after he had learnt of the existence of the contraband is only an accessory after the fact. No doubt his evidence needs some corroboration but the degree of corroboration need not be of the same standard as that required of an accomplice who was a guilty associate in the crime from its very inception.

C. C. Khoo and *Kyin Htone* for the appellant.

Mya Thein (Government Advocate) for the respondent.

U THAUNG SEIN, J.—This is the outcome of a sensational seizure by the Customs Department and the Bureau of Special Investigation of 1,008 gold bars weighing 5,670 ticals and valued at K 11,28,330 which were cleverly concealed in some dry cell torch batteries that arrived per S.S. "Leneverette" from Hongkong on the 7th February 1952. The appellant S. E. Tong, who is a dealer in torch batteries and Chinese medicines, is alleged to have brought in this consignment and he has accordingly been convicted by the learned First Special Judge (U Shwe Pon), Rangoon, of an offence under section 9 (*1*) read

* Criminal Appeal No. 417 of 1953 from the order of the Special Judge (I) (SIAB & BSIA) of Rangoon in Criminal Regular Trial No. 44 of 1952.

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U THAUNG SEIN, J.

with section 24 (*1*) of the Foreign Exchange Regulation Act, 1947, and sentenced to one year's rigorous imprisonment.

It appears that the appellant S. E. Tong had been under suspicion by the Customs Department and the Bureau of Special Investigation for some time past and hence when a consignment of 100 cases of " Flying Bomb " battery cells arrived for him per S.S. " Sirdhana " on 30th January 1952 these were subjected to a thorough and meticulous examination. But this examination proved abortive and as no contraband was discovered the consignment was passed by the Customs authorities. Yet another consignment of 100 cases of the same brand of cells arrived from Hongkong for the appellant on the S.S. " Leneverette " which docked at Rangoon on 7th February 1952. Strangely enough though the appellant was still under a cloud of suspicion this second consignment was not subjected to anything more than a routine search and passed by the Customs. There still remained 16 cases of another brand of torch cells, namely, " Five Rams " which had arrived by the same boat and those were consigned to the firm of " Hok Hing of No. 160, 20th Street, Rangoon." The Customs Department and the Bureau of Special Investigation kept a wary eye over this consignment and before long their vigilance was amply rewarded, when one Aw Koon Ain (PW 2), a shipping clerk, appeared on the 11th February 1952 to clear the goods. Clearance was allowed but Aw Koon Ain was informed that the packing cases and their contents would be carefully examined by the Customs officials before delivery. This examination was carried out on the following day by no less an officer than U Oung Sein (PW 14), Assistant Collector of Customs (Preventive), and it was soon discovered

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that the packing cases were not of uniform weight. In particular, cases marked with even numbers were heavier than those marked with uneven numbers. The contents of each torch cell in these cases were examined and in all 1,008 bars of gold were found embedded in them.

It may be noted that though this consignment was addressed to " Hok Hing of No. 160, 20th Street, Rangoon," it was cleared by the shipping clerk Aw Koon Ain (PW 2) who purported to act on behalf of the consignee. But the consignee, *i.e.*, Hok Hing of No. 160, 20th Street, Rangoon was a fictitious firm as there is no such firm as Hok Hing nor is there any house in 20th Street bearing No. 160, the highest number in that street being No. 150. The question is how did Aw Koon Ain manage to clear the goods on behalf of this fictitious firm ? According to him, the Bills of Lading and Invoice relating to this consignment were handed over to him on the morning of the 11th February 1952 by the appellant S. E. Tong with a request to clear the goods mentioned therein on behalf of an undisclosed friend. Aw Koon Ain states that as he had been acting as a clearing agent of the appellant for many years past he undertook to do the needful in respect of the consignment under consideration. He goes on to relate that immediately on receipt of the above documents he drew up the necessary Bill of Entry as per Exhibit " D " with the assistance of the Pass Writer Maung Thein (PW 4) and put it up to U Poo (PW 7), an accredited Custom House clearing agent, for signature on behalf of the consignee. Strange as it may seem, U Poo made no enquiries whatsoever after the alleged importer or consignee and willingly signed the Bill of Entry. I am not familiar with the rules and workings of the Custom

House but cannot help being surprised that Custom House clearing agents are authorised to sign Bills of Entry blindly and with impunity. Had U Poo refrained from signing the Bill of Entry in this case, the consignee would have had to sign it himself and thus provided an excellent clue to the identity of the real culprit. Be that as it may, Aw Koon Ain goes on to explain that at about 1 p.m. the appellant appeared once again at the Custom House and handed over some money to pay for the Customs dues and other charges. After this the consignment was passed subject to a search and examination. Aw Koon Ain was apparently taken by surprise with the decision of the Customs authorities to search the cases and broke the news immediately to the appellant. It appears that the appellant became panicky and remarked that there were medicines valued at K 50,000 in the packing cases and that every effort should be made to have them cleared without further delay. Aw Koon Ain then set out for the house of Mr. J. A. D'Lima (PW 3), Wharf Inspector, Customs Department, and there tried his utmost to persuade the latter to pass the goods without an examination. But all his efforts were in vain as U Oung Sein (PW 14) had already issued instructions that he would personally check the goods on the following day. As a result of that examination the appellant was arrested and eventually sent up for trial and convicted as stated already.

The learned trial Judge has pointed out rather rightly that the case for the prosecution rests mainly on the evidence of Aw Koon Ain (PW 2). As might be expected, on appeal the evidence of this witness has been attacked most vehemently by the learned counsel for the appellant and I have been asked to hold that Aw Koon Ain is not only an unreliable

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witness but also an accomplice whose evidence has not been corroborated in material particulars, so far as the appellant is concerned. In particular, it has been argued that in the first place the documents relating to the consignment were produced by Aw Koon Ain and unless he could explain as to how he had come by them he was certain to be held responsible for the goods. There is some force in this argument but it should be remembered that Aw Koon Ain is only a shipping clerk and could not possibly have brought in gold valued at over K 11 lakhs. This fact was apparently accepted both by the Customs Department and the Bureau of Special Investigation who did not treat him as the owner of the goods and merely regarded him as a clearing agent. But of course it was certainly necessary for Aw Koon Ain to explain as to how and where he obtained the documents in question. If his evidence is accepted, then indeed they were handed over to him by the appellant S. E. Tong at the Custom House on the morning of the 11th February 1952. The appellant admits having visited the Custom House on that morning but asserts that he went there to enquire after the probable date of arrival of some Ginseng (Chinese medicine) which he had ordered from the USA *via* India. There he is said to have met another clearing agent named K. Soo Chee (DW 3) and entrusted him with the task of clearing this consignment. The medicines referred to arrived several days later and were eventually cleared by K. Soo Chee. The appellant states that Aw Koon Ain (PW 2) who had been his clearing agent of long standing was annoyed over the employment of K. Soo Chee and showed his annoyance in his facial expression. It has been suggested that it was on this account that Aw Koon Ain dragged him into this

case. I am by no means certain that the appellant did not misjudge the expression on Aw Koon Ain's face. Even if Aw Koon Ain was annoyed over the employment of K. Soo Chee, it does not necessarily follow that he would concoct a false case against his benefactor. Actually the appellant was at a loss to explain why Aw Koon Ain should have singled him out for attack from among the many importers whose goods he had cleared in his capacity as shipping clerk.

With regard to the payment of Customs dues and other charges, Aw Koon Ain's account has not been a very consistent one and he has therefore been dubbed by the learned counsel for the appellant as an unreliable individual. For instance, he gave three different amounts namely, Rs. 861-1-0, Rs. 1,000 and Rs. 1,100 as the sum which was handed over to him. The appellant not only denied this payment but set out to prove that he was in his office at about 1 p.m. of that day and not at the Custom House. One Chaung Boon Kee (DW 4), a schoolmaster, has deposed that at about 1 p.m. of that day he was in the office of the appellant and collected from the latter an annual subscription for a Chinese school. There is no reason to doubt the testimony of this witness but, as pointed out by the learned trial Judge, it was an easy matter for the appellant to have proceeded to the Custom House a few minutes later. After all, the times given by Aw Koon Ain (PW 2) were not put dead accurate. The discrepancies as to the amount of money handed over may be due to a faulty memory and they do not necessarily indicate that the witness is an untrustworthy one.

The next question for consideration is whether Aw Koon Ain (PW 2) should be regarded as an accomplice. As far as I can see from the evidence

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on record, Aw Koon Ain was not aware of the contents of the packing cases till his meeting with the appellant on the evening of 11th February 1952. By then he knew of the illicit contents of the packing cases and this is borne out by the following passage from Mr. J. A. D'Lima's (PW 3) evidence :

> "I did not enquire from the shipping clerk for whom he had come to clear that consignment. The shipping clerk next told me that he would find out from the owner whether there was any contraband in the consignment or not. I gave my residential address to him and instructed him to come to me if there was any contraband in the consignment. I returned home at 5 p.m. Some time after 6 p.m. shipping clerk (Aw Koon Ain) came to my house, and informed me that there was something in the cases. He informed me that in the cases bearing even numbers there was contraband of gold and that the cases bearing odd numbers had no gold. He next asked to be lenient."

Oddly enough the Customs officials do not appear to have questioned Aw Koon Ain as to the identity of the person on whose behalf the goods were being cleared. But there can be little doubt that Aw Koon Ain had tried to shield the appellant and endeavoured to clear the goods without an examination. Then again, it has been pointed out by the learned counsel for the appellant that instead of insisting upon the consignee signing the Bill of Entry, Aw Koon Ain calmly put it up to U Poo for signature. This fact is said to indicate Aw Koon Ain's complicity with those responsible for the bringing in of the gold into the country. In my opinion, the reason for obtaining U Poo's signature is plain. No doubt in respect of previous consignments which arrived in the name of the appellant, Aw Koon Ain had always obtained the signature of the appellant himself. But in the present case the goods were meant for a friend of the appellant who was unknown to

Aw Koon Ain. Under the circumstances and probably with a view to avoid delay, the Bill of Entry was put up to U Poo for signature.

Now, the term " accomplice " is not defined in the Evidence Act or in any other enactment, but several rulings have attempted to lay down its meaning. I do not propose to enter into any detailed discussion of these rulings as they are to be found in any annotated edition of the Evidence Act. But the following passage at pages 952-953 of the Law of Evidence, by Woodroffe and Ameer Ali, Ninth Edition, 1931, is an extremely useful guide as to the meaning of the term " accomplice " and the value of the testimony of such individuals :

" An accomplice is one concerned with another or others in the commission of a crime. The term ' accomplices ' may include all *participes criminis*. An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he can be jointly indicted with the defendant (principal). But it is not every participation in a crime which makes a party an accomplice in it, so as to require his testimony to be confirmed : much depends on the nature of the offence and the extent of the complicity of the witness in it. It is generally unsafe to convict a person on the evidence of accomplices unless corroborated in material particulars. But in considering whether this general maxim does or does not apply to a particular case, it is to be remembered that all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing ; the nature of the offence and the circumstances under which the accomplices make their statements must always be considered. No general rule on the subject can be laid down."

This passage is based on numerous rulings which are set out in the foot-notes. Applying these principles to the present case, I would say that at the worst Aw Koon Ain (PW 2) might be regarded as an accessory after the fact. It should be remembered that he was

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not privy to the plot or design to bring in the contraband gold and all that he did was to try and persuade Mr. J. A. D'Lima (PW 3) to pass the goods after he had learnt from the appellant that the consignment contained illicit gold. No doubt his evidence needs some corroboration but the degree of corroboration need not be of the same standard as that required of an accomplice who was a guilty associate in the crime from its very inception. The appellant by his own admission that he was present at the Custom House and met Aw Koon Ain has provided the required corroboration.

Finally, it has been urged on the appellant's behalf that even if he is proved to be the consignee of the torch cells which contained illicit gold, he cannot be held to have brought in the gold into Burma within the ambit of section 9 of the Foreign Exchange Regulation Act. I cannot quite understand this argument unless of course it is meant that no one can be guilty of an offence under section 9 of the Foreign Exchange Regulation Act unless the gold is found in his pocket or on his person. There are many ways by which a person may "bring" gold into the country, *e.g.*, on his person, or through some other person, or in a boat, or in an aeroplane, etc., and it is absurd to say that when the contraband is not on his person he cannot be held responsible for it.

On the whole, I agree with the learned trial Judge that the appellant S. E. Tong must be held responsible for the illicit gold in the present case and he was thus rightly convicted and deserved the sentence meted out to him.

The appeal is dismissed.

APPELLATE CIVIL.

Before U San Maung and U Thaung Sein, JJ.

TAN KEAT KHANG AND ONE (APPELLANTS)

v.

MA THEIN SHIN AND SEVEN OTHERS (RESPONDENTS).*

H.C. 1954 — *Feb. 19.*

Mortgage debt—Limitation Act, Article 132—Payment when due—Where no date specified, debt becomes due only on demand—Limitation runs from date of demand—Civil Procedure Code, Order 41, Rule 22—Without cross-objections respondents not entitled to attack adverse findings.

Held : The question when the mortgage money becomes due has to be determined with reference to the terms of the particular document ; if there is no mention of any specific date for the payment of the mortgage debt, it does not become due till a demand has been made for payment.

Raghubir Singh, Raja and another v. *Kunwar Rajendra Bahadur Singh*, I.L.R. 8 Luck. 488 ; *Mukhdeo Singh* v. *Harakh Narayan Singh* I.L.R. 11 Pat. 112 ; *Nilkanth Balwant Natu and others* v. *Vidya Narasingh Bharati and others*, I.L.R. 54 Bom. 495 ; *Maruthappa Maistriar and others* v. *Soosai Anthonimutu Mudaliar and others*, A.I.R. (1944) Mad. 172 ; *Megah Nath and another* v. *The Collector, Cawnpore*, A.I.R. (1947) All. 7, followed.

Held also : The respondent-defendants having failed to file a cross-objection to the decree they cannot be allowed to attack any adverse findings against them by the trial Court.

Raja Ram v. *Lehna and another*, A.I.R. (1942) Lah. 87 ; *Mahagu and another* v. *Narayan and others*, I.L.R. (1950) Nag. 679, followed.

L. Hoke Sein for the appellants.

M. Sulaiman for the respondents Nos. 1, 2, 3, 4 and 6.

The judgment of the Bench was delivered by

U THAUNG SEIN, J.—This is an appeal against the judgment and decree of the District Court of Pyapôn dismissing the appellant-plaintiffs' suit for

* Civil 1st Appeal No. 17 of 1952 against the decree of the District Court, Pyapôn, in Civil Regular No. 1 of 1950.

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the recovery of K 77,145.50 alleged to be due on a mortgage bond. The facts involved are as follows :—

The appellant-plaintiffs Tan Keat Khang and Tan Chong Awant are the sons of one Tan Keik Cheik who along with his brother Tan Shu Yon (since deceased) were the joint owners of an electric lighting plant and machinery at Pyapôn. On the 11th March 1931 Tan Keik Cheik who had planned to go back to China decided to sell out his share in the above properties to his brother Tan Shu Yon and accordingly executed a sale deed as per Exhibit "ခ" in the trial record. But as Tan Shu Yon did not have the ready cash to pay up the sale price, he in turn mortgaged the properties to the sons of Tan Keik Cheik, namely, the appellant-plaintiffs as per Exhibit "ဃ" deed. It should be noted that the sale deed and the mortgage bond (Exhibits "ခ" and "ဃ") were executed on the same day, *i.e.*, 11th March 1931. The amount of the loan mentioned in the mortgage bond was Rs. 65,000 bearing interest at 1 per cent per mensem. In particular it was stipulated in this deed that the loan was to be repaid in monthly instalments of Rs. 1,000 towards principal and also the interest due. The appellant-plaintiffs' case is that payments were made from time to time both towards principal and interest and that there is now due a sum of Rs. 1,14,257-11-0. Out of this sum Rs. 37,112-2-0 was waived and the appellant-plaintiffs sought a decree for K 77,145.50.

It appears that the mortgagor Tan Shu Yon was a much married man and died on the 24th December 1946, leaving no less than six widows, namely, Ma Thein Shin (1st respondent), Ma Kyin Mae (2nd respondent), Ma Kyin Nyunt (3rd respondent), Ma Kyin U (4th respondent), Ma Saw Hla (7th

respondent), and Ma Tin (8th respondent), and a son and daughter named Maung Gwan Lye (5th respondent),and Ma Than Yin (6th respondent). These heirs accordingly featured as the defendants in the suit, and with the exception of Maung Gwan Lye and Ma Than Yin, contested the claim of the appellant-plaintiffs on various grounds. In addition to denying the execution of the mortgage deed by Tan Shu Yon, they went on to contend that the mortgage, if any, was void *ab initio* as being opposed to the provisions of section 9 (*2*) of the Burma Electricity Act. Furthermore, it was contended that the appellant-plaintiffs were unregistered money lenders and therefore not entitled to any decree *vide* section 9 of the Money Lenders Act.

The learned District Judge framed two preliminary issues one of which was whether the mortgage was void *ab initio*, and answered that issue in the negative. The respondent-defendants came up to the High Court on revision against that finding but without result. The suit then went to trial on the other issues and after evidence of both sides had been recorded the respondent-defendants filed a written statement in which they pleaded that the suit was barred by limitation. The appellant-plaintiffs objected to this belated additional written statement being put in but, as pointed out by the learned District Judge, in view of the clear provisions of section 3 of the Limitation Act, the Court was bound to consider the question of limitation even if it had not been pleaded as the appellant-plaintiffs' suit was *primâ facie* time-barred. Fortunately for the respondent-defendants the plea of limitation proved to be their trump card in the trial Court and the suit was dismissed by the learned District Judge on the ground that it was time-barrred.

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On appeal it has been strenuously urged on behalf of the appellant-plaintiffs that the learned District Judge was wrong and that the suit was within time and ought to have been decreed as prayed for. It is interesting to note that but for the finding that the suit was barred by limitation the learned District Judge would certainly have granted the appellant-plaintiffs a decree for the amount sued for as the findings on all the other issuse in the case were against the respondent-defendants. An attempt was made by the learned counsel for the respondent-defendants to attack these findings but he was not permitted to do so in view of the provisions of Order 41, Rule 22 of the Code of Civil Procedure and the rulings in *Raja Ram* v. *Lehna and another* (1) and *Mahagu and another* v. *Narayan and others* (2). In other words, the respondent-defendants having failed to file any cross-objection to the decree they cannot be allowed to attack any adverse findings against them by the trial Court. This view is supported by the following passage from the head-note in *Raja Ram* v. *Lehna and another* (1):

> "Order 41, R. 22 gives a respondent power only to support the decision of the lower Court; not to attack it. Hence he has no right to raise a point in an appeal against a decision he has not appealed or even put in cross-objection."

The only question for decision in this appeal is thus whether the appellant-plaintiffs' suit was time-barred or not. Now the date of the mortgage deed is 11th March 1931 and as the suit was filed on 20th January 1950 only, it was *primâ facie* time-barred *vide* Article 132 of the Limitation Act. The limitation period fixed by this article is 12 years from the date "when the money sued for becomes due."

(1) A.I.R. (29) (1942) Lah. 87. (2) I.L.R. (1950) Nag. 679.

This leads on to the question as to when the mortgage money in the present case became due. There is no provision either in section 67 or any other section of the Transfer of Property Act as to the method by which the time when the mortgage money " becomes due " may be determined, and hence this question will have to be determined with reference to the terms of the particular document in question. If any authority is required for this view, reference may be made to *Raghubir Singh, Raja and another* v. *Kunwar Rajendra Bahadur Singh* (1) and *Mukhdeo Singh* v. *Harakh Narayan Singh* (2).

Coming to the actual terms of the mortgage deed (Exhibit "က") in the present case, there is the following significant passage which reads:—

"အောက်စာရင်းပါ ပစ္စည်းရပ်များ အားလုံးကို ယခုပဋိဉာ အပေါင်ပေးသွင်းထားပါမည်။ ငွေ ၁၀၀ ကို အတိုး ၁ လလျှင် ၀ (တကျပ်) တိုးနှုန်းကျနှင့် ငွေရင်း ၆၅,၀၀၀ (ခြောက်သောင်းငါးထောင်ကျပ်) ချေးပါ။ ၎င်းရင်းတိုးငွေမပြေမီ ထိုအပေါင်ဝင် ပစ္စည်းများကို အခြားသူထံ ထပ်မံပေါင်နှံရောင်းချပေးအပ်ခြင်း မပြုလုပ်ပါ။ ၎င်း၏အတိုးငွေကို အစိုလိပ်လရက်ဖြင့် တွက်၍ လစဉ် တလတကြိမ်ပေးပါမည်။ အရင်းငွေကိုလည်း လစဉ် တလတကြိမ် ငွေရင်း ၁,၀၀၀ (တထောင်ကျပ်) ကျ အဝင်ပေးဆပ်သွားပါမည်။ ၎င်းကတ်ထားသည့်အတိုင်း မပျက်မကွက်ဘဲ မှန်ကန်စွာ ပေးဆပ်သွားပါမည်။ ကတိမတ်သည် ပျက်ကွက်ခဲ့လျှင်၊ တရားအတိုင်းပြုလုပ်ယူရာ ကုန်စရိတ်ပါ ကျခံပါမည်။"

In short, the mortgagor was given a chance of paying up the mortgage money in monthly instalments and so long as these instalments were paid regularly the mortgagees impliedly undertook to take no action for the recovery of the entire amount. Neither in this clause nor in any other portion of the deed is there mention of any specific date for the payment of the mortgage debt and according to the Privy Council

(1) I.L.R. 8 Luck. 488. (2) I.L.R. 11 Pat. 112.

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ruling in *Nilkanth Balwant Natu and others* v. *Yidya Narasingh Bharati and others* (1), in cases of this nature the mortgage debt does not become due till a demand has been made for payment. This is borne out by the following passage at page 509 of that ruling which reads :—

> " In the second place there was no specific time fixed for the payment of the debt, and their Lordships are of opinion on the facts of this case that the money did not become due and the cause of action did not arise until demand for the payment of the mortgage debt was made by the mortgagee and it was refused by the mortgagor."

The appellant-plaintiffs assert—in paragraph 8 of the plaint—that the cause of action in the present case arose only on 15th January 1949 when a notice of demand was presented to the respondent-defendants. That the cause of action in cases of the present nature arise only on demand for payment of the debt is further supported by the rulings in *Maruthappa Maistriar and others* v. *Soosai Anthonimutu Mudaliar and others* (2) and *Megah Nath and another* v. *The Collector, Cawnpore* (3), the head-note of which is in the following strain :—

> " Where the mortgage money is payable by instalments and the deed provides that the mortgagee is entitled to recover any instalment as it falls due and in default of its payment is further entitled to sue for the entire money limitation does not start when only one instalment becomes due. No doubt the mortgagee has an option to sue for the entire money on the happening of the default, but if he does not exercise that option, limitation does not start running."

In view of these authorities there can be no doubt that the appellant-plaintiffs' suit was clearly within time and the learned District Judge erred in

(1) I.L.R. 54 Bom. 495. (2) A.I.R (31) (1944) Mad. 172.
(3) A.I.R. (34) (1947) All. 7.

holding that the mortgage debt became due with effect from 11th March 1931, *i.e.*, the date of the execution of the mortgage bond. Accordingly, this appeal is allowed with costs and the judgment and decree of the lower Court are hereby set aside and instead there will be the usual preliminary mortgage decree in favour of the appellant-plaintiffs as prayed for in the plaint.

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U THAUNG SEIN, J.

APPELLATE CRIMINAL.

Before U Tun Byu, C.J., and U Aung Khine, J.

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Mar. 24.

THE UNION OF BURMA (APPLICANT)

v.

(1) U PE TIN, (2) U AYE PE (RESPONDENTS).*

Newspapers—Contempt of Court, what constitutes—Responsibilities of Editor and Publisher—Scurrilous imputations—Verification of truth and identity of writer desirable before release—Apology, when acceptable.

Held: A publication which is calculated to prejudice the course of justice or to lower the dignity or authority of the Court will constitute a contempt.

The Queen v. *Gray*, (1900) 2 Q.B.D. 36 at 40; *The King* v. *Davies*, (1906) 1 K.B.D. 32 at 40, followed.

Held: An editor and the printer and publisher of a newspaper must understand that they should not allow their newspaper to be made the medium of baseless attacks upon Judges and Courts by malicious or fictitious persons, and disgruntled litigants.

Held further: An apology cannot be accepted as a complete palliation in view of the fact that the publications clearly constituted a mischievous and wholly baseless contempt of the High Court. It is not a magic formula which when incanted will stave off punishment.

In the case of Jawaharlal, (1941) I.L.R. Nag. 304 at 307, referred to.

Choon Foung (Government Advocate) for the applicant.

C. A. Soorma for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The first respondent U Pe Tin is the editor of the *New Times of Burma* and the second respondent U Aye Pe is the printer and publisher of the said newspaper. They have

* Criminal Misc. Application No. 5 of 1954.

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U TUN BYU, C.J.

been called upon to show cause why the publication which appeared in the *New Times of Burma*, dated the 30th December, 1953, under the heading of "Is The Judiciary Independent" and the publication which appeared in the *New Times of Burma*, dated the 8th January, 1954, under the heading "From B.L. Rangoon" should not be considered to constitute contempt of the High Court and why they should not be punished for contempt in accordance with law. Lord Russel of Killowen, C.J., observed in *The Queen* v. *Gray* (1) that—

> "any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt."

The reason why a proceeding for contempt, in a suitable case, is opened is set out by Wells, J., in the case of *The King* v. *Davies* (2) :

> "What then is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders? It will be found to be, not the purpose of protecting either the Court as a whole or the individual judges of the Court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired."

It is clear that a publication which is calculated to prejudice the course of justice or to lower the dignity or authority of the Court will constitute a contempt. It will be most wrong, if we were to allow the authority or dignity of the Court to be undermined or its prestige to be impaired in any way.

(1)(1900) 2 Q. B. D. p. 36 at p 40. (2) (1906) 1 K.B.D. p. 32 at p. 40.

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A mere perusal of the publication which appeared under the heading "Is The Judiciary Independent" discloses at once that it constitutes a gross and mischievous contempt of the High Court. The allegations contained therein are obviously false, and the article might be described as most pernicious and mischievous. The publication which appeared under the heading "From B.L. Rangoon" also constitutes a gross and mischievous contempt of the High Court. This subsequent publication in effect approves of the allegations contained in the publication made in the *New Times of Burma*, dated the 30th December, 1953. It also constitutes a gross contempt of a learned Judge of the High Court who has been spoken of in a most derogatory manner, which was impossible to be true. The effect of both the publications in the *New Times of Burma* was clearly and unmistakably to undermine the authority and dignity of the High Court, and they accordingly constitute the worst form of contempt one could possibly conceive, particularly at a time when certain unruly elements still prevail in Burma and when it is very essential that there should be universal respect for law and order in the country. It does not require any imagination to realise that if the authority and dignity of the Courts are undermined and impaired the consequence would be most disastrous.

The editor U Pe Tin and the printer and publisher U Aye Pe have both tendered apology, and they both have stated that it was never their intention "to cast any reflection on the integrity or impartiality of the Hon'ble Judges." We, however, do not consider that we can properly, in the circumstances of the present case, accept their apology as a complete palliation, in view of the fact that the publications which appeared in the *New Times of*

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Burma clearly constituted a mischievous and wholly baseless contempt of the High Court. We cannot conceive how such publications could have been released by either the editor or the printer or publisher without realizing that they were most obnoxious publications which no lawyer or advocate or any responsible person would venture to state. It was accordingly not surprising that the authors of those articles were found to be fictitious. The reference to the learned Judge on the Original Side was made in a manner which no person with any legal experience could possibly have thought it to be true. An editor and the printer and publisher of a newspaper must understand that they should not allow their newspaper to be made the medium of baseless attacks upon Judges and Courts by malicious persons or disgruntled litigants.

The two publications, which appeared in the *New Times of Burma* on the 30th December, 1953 and the 8th January, 1954 were of a nature for which ordinarily a commitment to prison would have been the only proper and reasonable course. However, bearing in mind that both the editor and the printer and the publisher have both tendered apology at an early stage of the proceedings, disavowing themselves from all the allegations and imputations, which those publications might convey, that their advocates had candidly from the outset of the hearing before us admitted that the two publications did constitute a clear contempt of Court and left the respondents to be dealt with in any manner which the Court might think fit and proper, and that in view of the fact that both the editor and the printer and the publisher had stated that they would refrain in the future, from publishing anything which might cast any reflection on the integrity and

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impartiality of a Judge, we refrain from committing the editor and the printer and publisher to prison. We think, however, we ought, in this connection, to reproduce the observation which was made in the case of *Jawaharlal* (1):

> "There appears to be an impression abroad that an apology consists of a magic formula or words which has but to be uttered as an incantation at the last possible moment when all else has failed and it is evident that retribution is inevitable, to stave off punishment. It appears to be felt that a man should be free to continue unfounded attacks upon another's honour and character and integrity with the utmost license till the last possible moment and then when he is unable to stave off the consequences of his infamous conduct any longer, all he need do is to wave this magic formula called an apology in a Judge's face in order to emerge triumphantly from the fray. Nothing can be further from the truth.
>
> An apology is not a weapon of defence forged to purge the guilty of their offences. . . . ."

It appears to us to be only appropriate in the circumstances of this case that we ought to impose a fine, which will constitute a sufficient deterrent also to others. We accordingly find that U Pe Tin is guilty of contempt of Court by reason of the two said publications, and he is hereby directed to pay a fine of K 500 within seven days hereof, or in default to suffer two months' simple imprisonment. We also find U Aye Pe to be guilty of contempt of Court by reason of the two said publications, and he is hereby directed to pay a fine of K 250, or in default of such payment, within 7 days hereof, to suffer simple imprisonment for one month.

We might add that it will constitute no excuse in such a case, even if the printer and publisher has not read the publication complained of in the

(1) (1941) I.L.R. Nag. Series, p. 304 at 307.

paper in which he is the printer and publisher, as it is equally his responsibility to see that the newspaper does not contain anything which constitutes a contempt of Court.

U AUNG KHINE, J.—I agree.

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THE UNION OF BURMA
v.
(1) U PE TIN.
(2) U AYE PE.

U TUN BYU, C.J.

APPELLATE CRIMINAL

Before I Tun Byu, C.J., and U Bo Gyi, J.

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Feb. 24.

U LAW YONE (APPELLANT)

v.

THE UNION OF BURMA (U HLA MAUNG) (RESPONDENT).*

Newspaper, defamation by—Penal Code, s. 499—Editor, his duty and responsibility—Plea of justification and fair comment when good defence—Specific mention of name unnecessary if understood to refer to a particular person—Evidence Act, ss. 9 and 15—Subsequent articles admissible to explain relevant facts—Applicability of Exceptions to s. 499, Penal Code, how determined—Evidence Act, ss. 123, 124, 162—Claim of privilege—Affidavit not necessary for State documents.

Held : An Editor should abstain from making injurious imputation or personal invective upon another person without carefully ascertaining whether there are reliable or proper facts to substantiate the imputation or invective.

Held : The appellant must in order to succeed upon the plea of justification prove that the defamatory statements are true or at least substantially true ; the fact that the matter is of great public interest will not relieve him from the necessity of proof. The plea of fair comment will fail if the foundation upon which the comment was made did not exist and when therefore the comment cannot be said to be made *bonâ fide*.

Held also : It is not necessary for the purpose of s. 499, Penal Code for the name of the defamed person to be specifically mentioned if it is understood by those who know him to refer to him, or by reason of an earlier publication in the same newspaper.

Gaya Din and others v. *King-Emperor*, (1934) I.L.R. 9 Luck. p. 517 at 522, followed.

Held also : In view of ss. 9 and 15 of the Evidence Act subsequent publications to that complained of are admissible to explain relevant facts in issue and to prove that the words complained of were published with a knowledge that they imputed a disparaging conduct upon the person defamed.

Held further : It is now a rule of law in considering whether any of the pleas under the Exceptions to s. 499 of the Penal Code is applicable that the publication concerned should be read in a liberal spirit, allowing for certain exaggerations or exuberant expressions, which an enthusiastic or public spirited person might reasonably entertain.

* Criminal Appeal No. 162 of 1953 from the order of the District Magistrate, Rangoon, in Criminal Regular No. 21 of 1952.

Davis and Sons v. *Shepstone*, (1886) 11 A.C. p. 187 at 190; *Merivale* v. *Carson*, (1888), 20 Q.B.D., p. 275 at 281; *Peter Walker & Son, Ltd.* v. *Hodgson*, (1909) I.K.B. p. 239 at 253, followed.

Held lastly: There is nothing in ss. 123, 124 and 162, Evidence Act to warrant the assumption that an affidavit has to be filed before a claim of privilege can be allowed by a Court; where the documents relate to affairs of the State, it is at the discretion of the head of the department to claim privilege.

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

Dr. Ba Han for the respondent.

The judgement of the Bench was delivered by

U TUN BYU, C.J.—The appellant U Law Yone, editor, printer and publisher of the *Nation* newspaper, was convicted in the court of the District Magistrate, Rangoon, on all the three charges that were framed against him under section 500 of the Penal Code in connection with the statements, which appeared in the *Nation* newspaper, dated the 9th April, 1952, 31st July, 1952, and 25th August, 1952, respectively; and he was directed in respect of the first charge, to execute a bond for the sum of K 3,000, with two sureties, to be of good behaviour for a period of one year, and to pay a fine of K 3,000 in respect of the second charge, or in default of payment of the fine to suffer three months simple imprisonment, and to suffer simple imprisonment for a period of 30 days in respect of the third charge.

The complainant U Hla Maung was, at all relevant periods of the case, the Secretary of the Ministry of Finance and Revenue as well as the Secretary of the Ministry of National Planning; and he thus was holding high and responsible offices in the civil service of the Government of Burma. U Hla Maung succeeded U Kyin as the Secretary of the Ministry of Finance and Revenue, and, as the Secretary of the Ministry of National Planning, he was the *ex-officio* Chairman of the Burma Economic Aid

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Committee, popularly called BEAC, which was constituted by the Government in 1950. U Aung Soe, Secretary of the Ministry of Agriculture and Forest, U Nyun, Secretary of the Ministry of Commerce and Supply, U Shwe Mra, Secretary of the Ministry of Transport and Communications, U Kyaw Thein, Secretary of the Ministry of Industry and Mines, and Major Shan Lone, Secretary of the Ministry of Kachin State, were members of the Burma Economic Aid Committee. U Hla Maung was also the Chief Executive Officer of the National Planning Board, which was constituted by the Ministry of National Planning; and it was said that the National Planning Board ceased to function after October, 1952, and that was after the Mingaladon Aerodrome Construction Enquiry Committee had published its report, which was filed as Exhibit 17. The main function of the National Planning Board was apparently to prepare or devise plans for the development of Burma generally.

In pursuance of an agreement, which was known as the Economic Co-operation Administration Agreement, made with the Government of Burma, the Government of the United States of America maintained a Special Technical and Economic Mission in Burma, popularly called STEM, and Mr. Abbot Low Moffat was the head of the Special Technical and Economic Mission in Burma. One of the functions of BEAC was to negotiate for aids, which some departments of the Government might require, with the Special Technical and Economic Mission; and it appeared that BEAC asked for aids only after the approval of the Cabinet had been obtained.

U Kyin, as Secretary of the Ministry of Finance and Revenue, first negotiated for the purchase of the machinery, which was required for the Government Cotton Spinning and Weaving Factory, in 1947, and the

negotiation for the purchase of the machinery for the Government Cotton Spinning and Weaving Factory was completed by the complainant U Hla Maung in 1948, in his capacity as the Secretary of the Ministry of National Planning, while he was on visit to U.S.A. Exhibit B, dated the 3rd April, 1948, was the first contract made with Messrs. H & B American Machine Co. for this purpose ; and a second contract, namely Exhibit E, for the purchase of additional machinery was made on the 21st September, 1948. It might be mentioned that U Hla Maung, as Secretary of the Ministry of Finance and Revenue and Secretary of the Ministry of National Planning, was also a member of the Cotton Spinning and Weaving Factory Board.

In 1950, the Ministry of Transport and Communications constituted the Mingaladon Aerodrome Construction Committee, popularly known as MACC, with the Minister for Transport and Communications as the Chairman of the Committee ; and U Hla Maung, Secretary of the Ministry of Finance and Revenue and of the Ministry of National Planning, U Shwe Mra, Secretary of the Ministry of Transport and Communications, U Saw Lwin, Secretary of the Ministry of Public Works and Rehabilitation, U Ba Maung Chain, Chief Engineer of the Public Works Department, Holroyd Smith, Director of Civil Aviation, U Tin Nyunt, Parliamentary Secretary to the Hon'ble Minister for Transport and Communications, and U Tha Tun Aung, President of the Burmese Chamber of Commerce, were members of the Mingaladon Aerodrome Construction Committee. The costs of the construction of the Mingaladon Aerodrome were originally estimated at about 270 lakhs, but subsequently it was discovered that the actual costs exceeded the original estimate, and the actual costs

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were said to have arisen to over 505 lakhs. It was alleged on behalf of the appellant that this huge excess of expenditure was due largely to U Hla Maung siding with the contractors, and against the reports of the Supervising Engineer Mr. Human, with the result that Mr. Human resigned from the post of the Supervising Engineer. Mr. Human was, however, not examined as a witness in the present case. Subsequently, the Mingaladon Aerodrome Construction Inquiry Commission was constituted to enquire into the affairs of the Mingaladon Aerodrome Construction, with U Thaung Sein, J., as the Chairman. The Report of the Mingaladon Aerodrome Construction Inquiry Commission, dated the 2nd June, 1952, has already been mentioned early in this judgment.

The following passage occurred in the editorial of the *Nation*, dated the 9th April, 1952 :—

> "For EAC in Burma is not anti-Communist, nor anti-anything. It is simply pro U Hla Maung. Its accomplishments can be measured in terms of the number of times it has pulled U Hla Maung's chestnuts out of the fire, beginning with the Cotton and Spinning Factory and resting with the Mingaladon Airport. How many more follies Mr. Abbot Low Moffat will perpetrate before EAC earns universal opprobriun in this country depends on how many more 'white elephant' projects will be initiated in the fertile brain of U Hla Maung and then sustained by American raw products and American dollars."

The above passage in Exhibit H-5 forms the basis of the first charge. We are of opinion that when this passage is considered in the light of other circumstances appearing in the present case it is clearly defamatory of U Hla Maung, a highly responsible officer of the Government and an *ex*-I.C.S. officer. It has been urged that the above passage is merely a portion of a longer editorial which appeared in the *Nation* on the 9th April, 1952. We have carefully

read through the whole editorial, and we are unable to find anything in the other portions of the editorial, which will render the statements complained of innocuous. The fact that the name of U Hla Maung was specifically brought out when it could have been written without mentioning his name suggests that it was intended, by means of the statements complained of, to harm his reputation, as a high and responsible officer of the Government. It is impossible to accede to the suggestion that it is not defamatory to accuse U Hla Maung, who held the highly responsible offices of the Secretary of the Ministry of Finance and Revenue, and of the Secretary of the Ministry of National Planning, of having initiated very costly projects, one project after another, which brought in inadequate or little profits. It is obvious that the implication behind this accusation is that U Hla Maung was, at least, inefficient in the discharge of his highly responsible duties, and as such he would be unfit to hold any high or responsible position under the Government. It is plainly defamatory, within the meaning of section 499 of the Penal Code, for any person to speak of a high and responsible officer of the Government in that disparaging or invidious manner, unless he can excuse his action under one of the exceptions specified in section 499. And U Law Yone also stated in his examination at the trial as follows :—

". . . . But I have not tried to hide facts that in my opinion as expressed in my editorial columns U Hla Maung is not only unfit to hold the position which he does, but that he is a menace to this country ."

The expression " white elephant " occurs also in the editorial of the *Nation*, dated the 12th August, 1952, marked Exhibit H-11 ; and Exhibit H-11 gives us a fairly accurate idea of what that expression means

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in the editorial appearing in Exhibit H-5. The Editor also published in the *Nation*, dated the 16th August, 1952, filed as Exhibit H-13, under the heading " It Occurs to Me By The Editor ", as follows :—

" The principal reason why I and many others like myself are against investing crores on projects of doubtful utility is that we are convinced there has come into being a set of unscrupulous persons who wormed their way into the affection of the Government for the opportunity of heading purchasing missions abroad. It is a well known practice for the sellers of expensive goods, be they aircraft, or gunboats or mills, to give a commission to the man who negotiates the purchase."

The first sentence in the above passage explains more precisely what the appellant intended to convey by the expression " white elephant", as occurred in the earlier editorial of the *Nation* in Exhibit H-5 and the second sentence brings out the insidious implication which the appellant purported to convey in the statements complained of in Exhibit H-5.

It was submitted on behalf of the appellant in the arguments before us that Exhibits H-11 and H-13, being subsequent publications, were inadmissible in evidence. There is no substance in this objection, because Exhibits H-11 and H-13 are clearly admissible in view of the provisions of section 9 of the Evidence Act, whereby facts which are necessary to explain relevant facts in issue are also admissible in evidence. The complainant can also prove under section 15 of the Evidence Act other extraneous facts or circumstances to indicate that the words complained of were published with an insidious intention or, at least, with a knowledge that it imputed a contumacious or disparaging conduct upon U Hla Maung.

It must be remembered that in ascertaining whether the words complained of are defamatory or not, the question is not what the writer meant, or what he

intended to convey, but whether the statements published by the appellant could be said to be defamatory within the meaning of section 499 of the Penal Code. When Exhibit H-5 is read in the light of Exhibits H-11 and H-13, the " white elephant " projects mentioned in Exhibit H-5 was intended to refer to those costly projects, which had involved financial loss to the Government, and that would explain why Mr. Abbot Low Moffat was alleged to have already earned "opprobrium", although he was a highly responsible American citizen and had nothing to do with the initiation or the working of any of those projects. The use of the word " follies " in Exhibit H-5 also lends support to this meaning.

The appellant must, in order to succeed upon the plea of justification, prove that the defamatory statements are true or, at least, substantially true. The fact that the matter is of great public interest will not relieve him from proving for the purpose of Exception 1 that the facts are true, or at least substantially true. U Hla Maung specifically denied that he initiated any of the projects; and no one, who had been associated with U Hla Maung, either in the Committee or Board of which U Hla Maung was a member, and who had been examined as witnesses in the present case, had stated that U Hla Maung was responsible for any alleged " white elephant " projects.

According to U Hla Maung, it was U Kyin, his predecessor in the Ministry of Finance and Revenue, who commenced the negotiation for the purchase of machinery required for the Government Cotton Spinning and Weaving Factory, and what he did was merely to complete the negotiation, so far as the first purchase of the machinery was concerned. Thus U Hla Maung was not the person who initiated the purchase of the machinery. U Hla Maung also had

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nothing to do with the second purchase of the machinery for the Government Spinning and Weaving Factory. Even if he had initiated the purchase of the machinery for the Government Cotton Spinning and Weaving Factory, there was no evidence to prove that the cotton grown in Burma could not be used for the machinery which was purchased for the Government Cotton Spinning and Weaving Factory. Exhibit 5 does not contain anything which will prove that no cotton grown in Burma could be used for the Government Cotton Spinning and Weaving Factory. On the other hand the statement which U Hla Maung made in answer to a question put to him in the cross-examination suggests that cotton grown in Burma could be used for the Government Cotton Spinning and Weaving Factory:

"*Q*. I suggest from the foregoing that you are interested in spending crores of rupees in buying machinery, but that you are not interested and had no intention of getting the Cotton Spinning Project to run on commercial principles ?

A. That suggestion is completely baseless. It is true that accused came to see me once before he started publishing about Cotton Spinning and Weaving Machinery. I do not remember whether accused gave me the information about raw cotton and persons who know about the running of the machinery. What I remember was that accused told me that 50,000 bales of Mahlaing cotton would be available."

Exhibit 14, which purported to be an audit report, had not been properly proved; and, even if it were admissible as evidence, there was nothing in Exhibit 14 to indicate that U Hla Maung had initiated the purchase of the machinery for the Government Cotton Spinning and Weaving Factory, or that he was concerned in any of the minor irregularities that occurred at the Factory afterwards.

With regard to the Mingaladon Aerodrome Construction, there is no evidence to prove that U Hla Maung initiated it, or that he was one of those persons who initiated it. U Hla Maung was not the Chairman of the Mingaladon Aerodrome Construction Committee, and he was not the Secretary of the Committee. There is no reason whatever why his statement that he had not initiated it, should not be accepted; and we accept his statement. It was observed at the end of page 20 of the Mingaladon Aerodrome Construction Inquiry Commission's Report —

> " . . . we are firmly of the opinion that the Government were not fully alive to the dangers and implications of a 'cost-plus' contract at the time when the Mingaladon project was sanctioned."

We do not, however, consider that U Hla Maung could in any way be blamed for this form of contract. He was not even the Secretary of the Mingaladon Aerodrome Construction Committee. Moreover, the agreement which was made with Messrs. Christiani and Nielson must have been submitted to the office of the Attorney-General for advice before it was signed. It is thus difficult to see how any blame can at all be attached to U Hla Maung for the peculiar form in which the agreement with Messrs. Christiani and Nielson assumed.

Exhibit J and Exhibit 6 were relied upon to show that U Hla Maung initiated the survey of what was designated as the King's Highway, but we could not trace anything in them to lead us to this conclusion. Colonel H. Pettit, who was examined on behalf of the appellant, moreover, stated :

> " We had a proposal to improve the alignment from Rangoon to a point near Mingaladon Airport. As far as I can

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remember it was initiated by the Transportation Section of KTA Organization in Burma. I am familiar with Exhibit 6. The King's Highway mentioned in Exhibit 6 is the same Highway mentioned in KTA's report . . . . To my knowledge U Hla Maung had no part in the preparation of this proposal."

The evidence of U Shwe Mra, Secretary of the Ministry of Transport and Communications and Chairman of the Sub-Committee which considered KTA's proposal for the King's Highway was to the same effect.

There is also no evidence to prove that the purchase of the Dredger Irrawaddy was initiated by U Hla Maung. U Hla Maung stated that what he did in that connection was merely to request, as the Chairman of BEAC, for a dredger or dredgers on behalf of the Ministry of Transport and Communications. We do not find anything in the evidence of U Shwe Mra, Secretary of the Ministry of Transport and Communications, which will suggest that it was U Hla Maung who initiated the plan for the purchase of the Dredger Irrawaddy.

It was alleged also that U Hla Maung was responsible for the large sum which had been incurred over the Report of Dr. Behre. U Hla Maung denied that the report was unnecessary, and he also denied that Dr. Behre's Report was of the kind which a graduate in Geology might have prepared. We have no evidence to indicate to the contrary beyond the suggestion made in the cross-examination of U Hla Maung. The Report appears to us to be of a nature which can be very useful as a preliminary guide for the development of the natural resources of Burma.

Thus the allegation that U Hla Maung initiated "white elephant projects", or that he was about to initiate fresh white elephant projects are clearly incorrect; and there was no proper ground or basis for

such assumption. The appellant's plea of justification under Exception 1 therefore fails.

An editor of a newspaper should realise from the outset that hearsay is no evidence, and that, where a newspaper publishes a defamatory statement of another person, rumours, vague statements or distorted informations, which he might hear or receive, would altogether be insufficient to support any plea of truth or justification. An editor must recollect that he has taken upon himself a heavy burden, as soon as he publishes a defamatory statement upon another person, and that his responsibility is great as his writings will be read widely, and even in far distant places, and by many persons who are likely to believe that the defamatory allegation is true, although when the true facts are sifted in a Court of law there might be nothing in it at all. It might be conceded that an editor of a newspaper has a responsible duty to perform, but it must also be borne in mind that he should abstain from making injurious imputation or personal invective upon another person, without carefully ascertaining whether there are reliable or proper facts to substantiate his imputation or personal invective. Exceptions 2, 3 and 9 to section 499 of the Penal Code cannot, therefore, be extended to cover, in the circumstances of this case, the publication made in Exhibit H-5.

The portion of the editorial of the *Nation* in Exhibit H-10, dated the 31st July, 1952, which constituted the basis for the second charge, is in these words :—

" The result is that the country is being impoverished by the Five Percenters who systematically put up one costly project after another, with a view to collecting their rake-off from contractor or manufacturer, and who then seek immunity under this or that minister, secure in the knowledge that, since the

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contractor or manufacturer is not likely to betray him, the guilt can never be fastened on him. It was with pride that the Prime Minister, when he picked his Cabinet, told us not very long ago, 'I have confidence in my ministers'. Yet he has ever bemoaned the fact, not only that corruption is rife, but that convictions cannot be got against the big thieves and the economic insurgents. If he will look a little below the ministerial level he will find some big termites, because of whom everyone who has something to sell to Burma is inflating his price. Recently a manufacturer's representative told us that he had every prospect of selling certain useful machinery to a Government department. And so he had, until the project went up to the civil servant who had to make the final recommendation. There it was killed because, although the manufacturer could reply to every other question, he had no ready answer to the pointed one of 'How much is there in it for me ?'."

The implication contained in the above statements is very grave, so far as the person against whom they were published is concerned. The expression "big termites" and the expression "Five percenters" are obviously synonymous in meaning. The last sentence of the extract from Exhibit H-10 also reveals the highly defamatory character of the statements which gave rise to the second charge. U Hla Maung's name does not appear in Exhibit H-10; and it was contended that the appellant could not be convicted in respect of the second charge. The first question is whether those defamatory statements applied to U Hla Maung. It will not be necessary for the purpose of section 499 of the Penal Code for U Hla Maung's name to be specifically mentioned in Exhibit H-10. It will be sufficient if it can be shown that the objectionable portion of Exhibit H-10 is purported to refer and did refer, in the circumstances of the present case, to U Hla Maung and that it is understood to be so by those who are acquainted with him, or by reason of an earlier publication in the same newspaper. If

this is proved, the appellant can be said to have done something, which he knows or has reason to believe will harm the reputation of another person, as the words complained of in Exhibit H-10 are decidedly of a highly defamatory nature, falling within the mischief of section 499 of the Penal Code. There is no difference in this aspect of the law between a civil defamation and a criminal defamation; and we accordingly cannot accept the argument advanced before us that there should be some allusion to U Hla Maung in Exhibit H-10 before the appellant can be convicted on the second charge. U Tun Shein, Permanent Secretary in the Foreign Office, considered paragraphs 3, 4 and 5 of Exhibit H-10, which forms the subject of the second charge, to be an attack on U Hla Maung, and he was not cross-examined on this statement. U Tin Gyi, Director of Milling and Marketing, State Timber Board, also considered paragraph 5 of Exhibit H-10 as referring to U Hla Maung, and he too was not cross-examined about it. R. C. Barber, Officer on Special Duty, Ministry of National Planning, also considered paragraph 5 of Exhibit H-10 as an attack upon U Hla Maung and he was also not cross-examined on it. U Thant, Secretary of the Ministry of Information, apparently thought that the imputation in paragraph 5 of Exhibit H-10 was directed against U Hla Maung because he even sent for the appellant and informed him that U Hla Maung had no hand in the purchase of the printing machinery mentioned in paragraph 5 of Exhibit H-10. The following words in Exhibit H-10 are significant :—

"The result is that the country is being impoverished by the Five Percenters who systematically put up one costly project after another . . . If we will look a little below the Ministerial level we will find some big termites, because of whom

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everyone who has something to sell to Burma is inflating his price."

If those words are read in light of Exhibit H-5, where U Hla Maung's name was specifically mentioned as the person who was alleged to have initiated costly projects, which yielded little or no profit, but who was expected to inititate some more unprofitable projects, it seems to us that there is sufficient evidence in the present case on which the learned trial Magistrate might properly arrive at the conclusion that the attack in respect of the second charge has been proved to be an attack upon U Hla Maung. We are unable to accept the appellant's explanation that he did not intend to refer to U Hla Maung in Exhibit H-10, but to one Mr. Holroyd Smith, at the time Exhibit H-10 was published.

It will be useful to reproduce some of the observations that have been made in certain English cases in connection with the plea of fair comment, as those observations apply with equal force when considering the pleas, which might be raised under Exceptions 2, 3 and 9 to section 499 of the Penal Code. It was observed in *Davis and Sons* v. *Shepstone* (1) :

> " There is no doubt that public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the Press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

It can now be said to be a rule of law that in considering whether any of the pleas under the

(1) (1886) 11 A.C. p. 187 at 190.

Exceptions to section 499 of the Penal Code is applicable, it is proper and reasonable that the publication concerned should be read in a liberal spirit, allowing for certain exaggerations or exuberant expressions, which an enthusiastic or public spirited person might reasonably entertain or be influenced by ; and in *Merivale* v. *Carson* (1) Lord Esher observed :

"Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth or however prejudiced the writer, it may still be within the prescribed limit."

In *Peter Walker & Son, Limited* v. *Hodgson* (2), it was also observed :

" . . . Upon fair comment, however, if it be established that the facts stated are true, the defence of fair comment will succeed even if the imputation or innuendo be not justified as true, but be fair and *bonâ fide* comment upon a matter of public interest. The plea of fair comment will succeed if . . . the defendant had an honest belief in the truth of his statements and his belief was not without foundation."

A criticism cannot, therefore, be employed as a cloak for personal imputations which are not based on facts, as occurred in Exhibit H-10 ; and this is what the expression " *bonâ fide* " in Exceptions 2, 3 and 9 to section 499 of the Penal Code implies ; and section 52 of the Penal Code reads :

" 52. Nothing is said to be done or believed in ' good faith ' which is done or believed without due care and attention."

It might be said that a comment or criticism cannot be said to be *bonâ fide*, unless it is based upon fact, or is built upon fact which is substantially true. In

(1) (1888), 20 Q.B.D. p. 275 at 281. (2) (1909), 1 K.B. p. 239 at 253.

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other words, comment which is purported to be made upon a certain set of facts cannot be said to be made *bonâ fide*, if the foundation upon which the comment was made did not exist ; and in such circumstances the plea of fair comment will fail. And in *Gaya Din and others* v. *King-Emperor* (1) it was stated thus :

" The phrase ' due care and attention ' implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief. When a question arises as to whether a person acted in good faith, then it devolves upon him to show not merely that he had a good intention but that he exercised such care and skill as the duty reasonably demanded for its due discharge. Where the question is whether a public servant was justified in doing a certain thing, his justification must have a better foundation than his mere private belief, for a man may be very foolish in believing himself justified but the law could not adopt so vague and unsafe a criterion."

It is thus clear that even if the objectionable passage in Exhibit H-10 can be considered to be in the nature of criticism or comment, it was not made *bonâ fide* ; and the pleas under Exceptions 2, 3 and 9 to section 499 of the Penal Code accordingly fails.

The publication which forms the subject of the third charge appeared in the editorial of the *Nation*, dated the 25th August, 1952, *vide* Exhibit H-15 ; and it was in these words :

" Believe me, there's going to be a plethora of spending done by this country in the next few months. They are working like beavers in the Secretariat to get their appropriations so that they can sign the contracts and later the cheques. Take roads for example. U Hla Maung and the Americans are busy planning the ' King"s Highway', the road from Rangoon to Mingaladon that was surveyed by Christiani and Nielson, and which I expect will cost about 5 million kyats."

Exhibit H-15 appeared to have been issued during the Budget Session of the parliament. It was made

(1) (1934) I.L.R. 9 Luck p. 517 at 522/523.

after the Mingaladon Aerodrome Construction Inquiry Commission had published its report, Exhibit 17, where it became clear that the costs of the Mingaladon Aerodrome Construction rose up very much higher than the original estimated costs. If allowance is made for the prejudice which the appellant might entertain over all costly projects, especially after what had occurred in connection with the Mingaladon Aerodrome Construction, and for the exaggeration which an enthusiastic journalist might reasonably indulge, we do not consider that it can properly be said that the words complained of in Exhibit H-15 are distinctly and unequivocally defamatory. There do not appear to be anything sinister in the allusion to the " beavers " in Exhibit H-15. U Hla Maung had, moreover, not been engaged in any purchasing mission. We are unable, reading Exhibit H-15 as a whole, to consider that the words complained of in the third charge are distinctly defamatory or of a disreputable nature. We do not consider that the allegation that U Hla Maung and the Americans were busy planning the " King's Highway ", which was to cost about 5 millions of kyats is of a derogatory nature. U Hla Maung, as the Chairman of BEAC, had in fact addressed a letter to the U.S. Special Technical and Economic Mission, dated the 28th April, 1952, which set out the GUB projects proposal No. 54 Highway Rehabilitation Programme, including a proposal for the construction of the " King's Highway ", the estimated cost of which was shown to be over 5 million kyats— *vide* Exhibit 6. It is also difficult to conceive how it can be said to be derogatory of any officer of the Government to allege that he was proposing the construction of a highway which would cost over 5 million kyats, as ordinarily a good highway is an asset to a country. The word " plethora " also does not imply

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any dishonest or disreputable conduct, especially when the costs of the construction of the highways will run into many millions of kyats—*vide*, Exhibit 6. In any case it is doubtful if the words which form the subject of the third charge in Exhibit H-15 can be said to be of a distinctly defamatory nature; and the appellant will be entitled to the benefit of doubt in respect of the third charge.

It was urged on behalf of the appellant that he was greatly prejudiced at the trial by the non-production of the records of the preliminary enquiry held in connection with the Mingaladon Aerodrome Construction. It is clear in the present case that the Minister concerned objected to the production of those records; and in our opinion the objection was rightly allowed by the learned District Magistrate. The Mingaladon Aerodrome Construction was obviously the affair of the Government; and it was under the control of MACC, of which the Minister of the Ministry concerned was the Chairman. It was the Minister who ordered the preliminary enquiry in connection with the Mingaladon Aerodrome Construction; and in the Court he, in effect, claimed privilege in respect of the records of the preliminary enquiry. The Chief Secretary had also claimed privilege in respect of those records before the Minister was examined as a witness.

The primary question which arises under section 123 of the Evidence Act is, whether the document, in respect of which privilege is claimed is, in fact, a document which relates to the affairs of State. The Mingaladon Aerodrome Construction was manifestly a Government project of great importance. Before the construction was fully completed it was discovered that the costs of the Mingaladon Aerodrome new construction had soared up beyond what was originally

estimated or could have been contemplated at the outset. The Minister ordered the Chief Secretary of the Government of Burma to hold a preliminary enquiry with the object of ascertaining whether a formal enquiry ought to be instituted in connection with the new construction of the Mingaladon Aerodrome. He subsequently ordered a formal enquiry to be held also ; and the Report of the Mingaladon Aerodrome Construction Inquiry Commission was filed as Exhibit 17 in the case. It therefore becomes obvious that records of the preliminary enquiry were unpublished records relating to the affairs of State ; and thus the contents of those records cannot be disclosed under section 123 of the Evidence Act, except with the consent of the head of the department. It follows that once the privilege is established, no verbal evidence of the contents of those records can also be permitted.

It has been argued on behalf of the appellant that an affidavit should have been filed before the claim of privilege can be allowed, but we are unable to see anything in sections 123, 124, or 162 of the Evidence Act, which will really warrant such assumption ; and moreover, the Court ought not to read anything into the provisions of a statute, nor attempt to embellish anything into them, which cannot, on a plain reading of the provisions concerned, be found, or be reasonably deduced from the words employed. We have not been shown any rule of law which will suggest that it is incumbent on the Court to demand an affidavit before it decides whether the privilege can be claimed or not, although it might in certain cases be proper to ask for affidavits to be produced. Moreover, it does not appear that any suggestion was made to any witness at the trial by the appellant to show that the records were of the nature where the claim of privilege cannot

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possibly be entertained. We cannot see what useful purpose will be served to demand an affidavit in the present case, where it is apparent that the documents relate to the affairs of State ; and the discretion rests entirely with the head of the department whether to withhold or give permission in such a case. It will, therefore, not be necessary for the purpose of the present appeal to deal specifically with the cases that have been referred to, during the arguments, in connection with this aspect of the law. Those were cases where the circumstances are entirely different.

U Chan Tha, Chairman of SIAB, has rightly declined to disclose the statements which U Law Yone made to him in view of section 20 (*4*) of SIAB and BSI Act, 1951. The appellant, in our opinion, was also not, in any way, prejudiced in this respect, because he could have, in his statements made before the Court, set out what he said to U Chan Tha, if he thought that those statements were relevant for the purpose of the charges that were framed against him. We might add that we are unable to see how the appellant could strictly be said to have been prejudiced by the non-production of the unpublished records of the preliminary enquiry held by the Chief Secretary, because the relevant evidence which any witness might have stated at the preliminary enquiry could have been obtained by careful examination of the same witness again at the trial. Mr. Human, on the other hand, was not a witness at the trial ; nor was he a witness before the Mingaladon Aerodrome Construction Inquiry Commission ; and thus his statements made at the preliminary enquiry cannot be made evidence at the trial.

For the reasons which we have set out in this judgment, the appellant U Law Yone was, therefore, rightly convicted in respect of the first and second

charges, and we see no reason to interfere with the sentences passed upon him on those two charges.

The conviction and sentence passed upon U Law Yone in respect of the third charge will, however, for the reasons we have already stated, be set aside, and he will be acquitted so far as the third charge is concerned.

APPELLATE CRIMINAL

Before U San Maung, J.

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U TUN KYI (APPLICANT)

Feb. 22.

v.

THE UNION OF BURMA (RESPONDENT).*

General Sales Tax Act, 1949, s. 23 (1) (b) (e)—General Sales Tax Rules, Rule 35 (b)—Failure to pay tax and to submit returns—Upon conviction, sum assessed to be recovered as fine—Distress warrant, against whom to issue.

Held: The person who was prosecuted and convicted for the default in question was the President of the Society and not the Society itself. If any distress warrant is to be issued, it should be as against the convicted person, and not against the Society. The seizure of the stock-in-trade of the Society is without jurisdiction.

H. Subramaniam for the applicant.

Ba Kyaw (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 723 of 1952 of the Second Additional Magistrate, Rangoon, the accused U Ba who was President of the Ngadatkyi Shwegondaing Co-operative Society, Limited, was prosecuted for the offence punishable under clauses (*b*) and (*e*) of sub-section (*1*) of section 23 of the General Sales Tax Act, 1949, for failure to pay within the time allowed the tax assessed on the Society and for failure to submit returns as required by the provisions of the Act and the rules thereunder. He was tried summarily and was convicted on his plea of guilty. Subsequently, the Magistrate issued a distress warrant against the

* Criminal Revision No. 179-B of 1953 being Review of the order of the Second Additional Magistrate, Rangoon, in Criminal Regular No. 723 of 1952.

Society for the recovery of the sum assessed and in doing so he purported to act under the provisions of clause (*b*) of Rule 35 of the General Sales Tax Rules, 1949. When the Society came to know that a distress warrant had been issued an application was made by the Secretary thereof for leave to pay the tax in instalments of K 250 a month. The Magistrate directed the Secretary of the Society to apply to the Commissioner of the Sales Tax Department. For this purpose an application which was accordingly made was fruitless. The Magistrate then by an order dated the 29th August, 1953, issued another distress warrant attaching the stock-in-trade of the Society. The warrant was returnable on the 17th of September, 1953. The Society being dissatisfied with this order has applied to this Court to set it aside in revision and one of the grounds urged is that the learned Magistrate acted beyond his powers in issuing a distress warrant against the properties of the Society without a proper enquiry. However, when the case came up for argument it transpired that the Magistrate acted entirely without jurisdiction in issuing such a warrant.

The relevant portion of Rule 35 of the General Sales Tax Rules, 1949, is in these terms :

" After the date fixed by notice under sub-rule (*1*) of Rule 29, or when the date is extended under the proviso thereto, after the extended date, any sum assessed or any part remaining unpaid, may be recovered from the defaulter under the proviso to sub-section (*1*) of section 23 as fine on his conviction by a Magistrate. "

Now, the proviso referred to therein reads as follows :—

" Provided that in the case of a conviction under clause (*b*) (*c*) (*d*) or (*f*) the Magistrate shall specify in the order the

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tax, fee or other amount, which the person convicted has failed or evaded to pay or has wrongfully collected, and the tax, fee or amount so specified shall be recoverable as if it were a fine".

When clause (*b*) of Rule 35 is read with the proviso to sub-section (*1*) of section 23 of the Act it is clear that the tax or other sum assessed can only be recovered as a fine if and when the defaulter has been convicted under clause (*b*) (*c*) (*d*) or (*f*) of sub-section (*1*) of section 23 of the General Sales Tax Act.

The person who was prosecuted and convicted for the default in question was the President of the Ngadatkyi Shwegondaing Co-operative Society, Limited, and not the Society itself. Therefore, if any distress warrant is to be issued, it should be as against the convicted person, namely, the President of the Society and not against the Society. The action of the Second Additional Magistrate in issuing a distress for the seizure of the stock-in-trade of the Society is clearly without jurisdiction and his order is hereby set aside.

APPELLATE CIVIL

Before U San Maung and U Thaung Sein, JJ.

U YEWATA AND FOUR OTHERS (APPELLANTS)

v.

EINDAWYA PAGODA TRUSTEES (RESPONDENTS).*

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Feb. 25.

Civil Procedure Code, Order 3, Rule 5—Advocates and Pleaders, authority to act, when terminates—Service of notice upon Advocate—Presumed effective service upon client.

Held : An Advocate or Pleader who has been engaged to represent a party may continue to act for that party until all proceedings in the suit are ended so far as regards the client.

E. F. Sandys v. *Upendra Chandra Sinha Roy*, 13 C.W.N. 142 ; *Shaikh Muhammad Jamil* v. *Musammat Bibi Tufailan*, 63 I.A. 47, distinguished.

Held also : Order 3, Rule 5, Civil Procedure Code explicitly lays down that any process served on an Advocate of any party shall be presumed to be good and effective service on that party, but it is a rebuttable presumption.

San Hlaing for the appellants.

Kyaw Htoon for the respondents.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—The short point for decision in this appeal is whether the service of notice on the Advocates of the appellant-defendants fixing the date of hearing of the suit was good and effective service under Order 3, Rule 5 of the Civil Procedure Code. There is no dispute as to the facts. The respondent-plaintiffs (Trustees of the Eindawya Pagoda) sued the appellant-defendants : U Yewata, U Ah Saya, U Nipauna, Maung Lu Wa and Daw Yoo, in the

* Civil 1st Appeal No. 34 of 1953 against the decree of the Chief Judge, City Civil Court, Rangoon, in Civil Regular No. 1447 of 1953.

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City Civil Court for the ejectment of the latter from a certain *Kyaung* situated within the precincts of the Eindawya Pagoda. The learned Chief Judge of the City Civil Court who dealt with the case returned the plaint to respondent-plaintiffs under Order 7, Rule 10, as he was under the impression that the subject-matter of the suit lay outside the jursidiction of the City Civil Court and within the jurisdiction of a *Vinissaya* Court. On revision, the High Court set aside that order and directed the City Civil Court to accept the plaint and dispose of the suit according to law. Though the order of the High Court was dated the 2nd December 1952, it reached the City Civil Court on the 7th January 1953 only and notices were issued immediately to the Advocates of the parties to appear on 19th January 1953 for the purpose of fixing a date for hearing. On the latter date the appearances as per Diary entry in the trial record were as follows :—

"၁၉-၁-၅၃ တရားလိုကိုယ်တိုင် တရားခံများအတွက် ဦးဆိန်းဟန် အမှုကိုကြားနာစစ်ဆေးရန်ရက်ချိန်း။

သိမ်းမောင်—၆-၂-၅၃
တရားသူကြီးချုပ်၊
ရန်ကုန်မြို့တော် တရားမရုံးတော်။"

Presumably, U Thein Han was merely holding the brief for U San Hlaing and U Ba Gyaw, Advocates for the appellant-defendants. It is noteworthy that no objection was taken at the time as to the date fixed for hearing. But on 6th February 1953, *i.e.*, the date fixed for hearing, U Ba Gyaw, one of the Advocates for the appellant-defendants appeared and applied for an adjournment on the ground that his clients were absent and that U San Hlaing who was actually in charge of the case was unavoidably absent. The learned Chief Judge of the City Civil

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Court refused to accede to this request and pointed out that the parties had been given sufficient time to prepare their cases. The trial then proceeded and only one witness, namely, U Tun Aung, one of the Pagoda Trustees, was examined by the respondent-plaintiffs while U Ba Gyaw, the learned Advocate for the appellant-defendants refrained from cross-examining him. The suit was then decreed in the respondent-plaintiffs' favour.

It has been urged before us on appeal that the Advocates, U San Hlaing and U Ba Gyaw, who had originally appeared for the appellant-defendants were not competent to accept notices after the suit had been dismissed by the trial Court. In other words, the authority of these Advocates to appear and act on behalf of the appellant-defendants ceased with the dismissal of the suit and that this authority was not revived with the remand of the suit by the High Court.

According to the provisions of Order 3, Rule 4, Civil Procedure Code, any Advocate or pleader who has been engaged to represent a party may continue to act for that party " until all proceedings in the suit are ended so far as regards the client. " The learned Counsel for the appellant-defendants asserts that so far as his clients were concerned the suit had terminated when "the Lower Court on 3rd April 1952, dismissed the said suit on the ground that the suit property, *Phongyi Kyaungs*, being *Sanghi-Ka* property, it had no jurisdiction to adjudicate the matter, which was within the jurisdiction of the *Vinissaya* Court." (*See* paragaph 2 of the Memorandum of Appeal.) In support of this view he relies on *E. F. Sandys* v. *Upendra Chandra Sinha Roy* (1). But this case is clearly distinguishable from the one under consideration as

(1) 15 C.W.N 142 at 143.

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the latter suit was not, in fact, dismissed. All that the learned Chief Judge of the City Civil Court did was to return the plaint for presentation to a competent Court. Besides this, the facts are entirely dissimilar and this is borne out by the following passage at page 143 :—

" The case came on for hearing on the 18th and was decreed *ex parte* in the Plaintiff's favour. The question is, whether the notice to the pleader in this case was notice to the Defendant. The pleader appeared in Court on the application under appeal and swore that he did not inform his client of the order, and that as far as he knew it was not brought to his client's notice. It was only a week's notice, and looking at all the circumstances of the case we are of opinion that the presumption that notice to the pleader was good notice to the party has been rebutted by the facts proved on the record. "

There was no hint or suggestion before the learned Chief Judge of the City Civil Court that the notice was too short or that the Advocates concerned had not contacted their clients.

The next ruling relied upon is *Shaikh Muhammad Jamil* v. *Musammat Bibi Tufailan* (1) and the relevant portion from the Headnote of which reads :—

"Held . . . . . .

* * * *

(3) that the suit had come to an end when the *ex parte* decree was passed and that the plaintiff's pleader did not continue to represent his client for the purpose of an application to set set aside the *ex parte* decree."

It is difficult to understand how this ruling could have any bearing on the present case.

Order 3, Rule 5, explicitly lays down that any process served on an Advocate of any party shall be

(1) 63 I.A. 47.

presumed to be good and effective service on that party. This is, of course, a rebuttable presumption as pointed out in the case of *E. F. Sandys* v. *Upendra Chandra Sinha Roy* (1) *supra*. In the present case, the appellant-defendants made no attempt to rebut that presumption and indeed, their learned Advocates accepted the notices served on them and agreed to the date fixed for hearing, *i.e.*, 6th February 1953. The only point left for consideration is whether the proceedings in the suit had in fact and law ended after the return of the plaint to the respondent-plaintiffs. That order of the Chief Judge of the City Civil Court was set aside and the whole proceedings were revived by the High Court in revision. In short, the *status quo* was restored by the High Court and it is unreasonable to suggest that the original authority granted by the appellant-defendants to Advocates U San Hlaing and U Ba Gyaw had expired beyond revival. If it had expired then it is strange that this was not specifically pleaded before the learned Chief Judge of the City Civil Court.

On the whole, there are no merits in this appeal and we hold that service of notice on the Advocates, U San Hlaing and U Ba Gyaw was good and effective service on the appellant-defendants. Hence this appeal fails and is dismissed with costs.

(1) 13 C.W.N. 142 at 143.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

H.C. 1954

April 6.

DR. U KYAW ZAN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Procedure Code, s. 403—Autre fois convict, *plea of—When tenable—Prosecution under s. 6 (1) of the Public Property Protection Act—Prosecution under ss. 409 and 380 of the Penal Code not barred.*

Held : A prosecution for unauthorised possession of Government property under s. 6 (*1*) of the Public Property Protection Act is for a distinct offence from the offences of breach of trust and theft under ss. 409 and 380, Penal Code in respect of other Government properties, and therefore the prosecution was not barred under the principel of *Autre fois convict*.

Emperor v. *Deoki Koeri*, I.L.R 48 All. 496, followed.

W. Kyin Htone for the appellant.

Nyunt Tin (Assistant Government Advocate) for the respondent.

U BA THOUNG, J.—The appellant U Kyaw Zan, an ex-Civil Surgeon of Mergui was convicted under section 6 (*1*) of the Public Property Protection Act, 1947 for being found in unauthorised possession of a microscope belonging to the Mergui Civil Hospital, and he was sentenced by the 1st Additional Special Power Magistrate, Mergui, acting as a Judge under the B.S.I. Act, to undergo ten months' simple imprisonment.

The exhibit microscope valued at K 3,000 originally belonged to the Victoria Point Civil Hospital but it was exchanged by appellant with a microscope from the Mergui Hospital. After it was brought over from Victoria Point it was kept at the

* Criminal Appeal No. 77 of 1954 against the order of the 1st Additional (S.P.) Magistrate Mergui, in Criminal Regular No. 20 of 1953.

Quarters of the appellant in the hospital compound at Mergui. It was explained by the appellant that he kept it at his Quarters because there was already one microscope for use at the hospital and as he was afraid that if the exhibit microscope was kept at the hospital it might become damaged, and also because he had to clean its lens every now and then. The appellant explained that he failed to enter in the hospital stock book register about this exhibit microscope owing to his perfunctory nature.

That the exhibit microscope is a government property is not denied by the appellant. From the evidence of the appellant on oath it appears that the appellant resigned from Government service in December 1951, and when he came to Rangoon to tender his resignation and two days after he had resigned from service, he wrote to Mr. Ahmed (DW 8) a contractor at Mergui to remove his belongings from his Quarters to town. His belongings were then removed from the hospital Quarters to a rented house in town and he went and lived there. The exhibit microscope was brought to that house with his belongings and it is not denied by the appellant that before the exhibit microscope was seized from him in October 1952, the District Superintendent of Police came and enquired about it in September 1952 and that he failed to return it to the hospital as he was worried about the other criminal cases instituted against him. It may be mentioned here that in August 1952 two Criminal proceedings were instituted against him. They were Criminal Trial Nos. 58 and 59 of 1952 of the Court of the 1st Additional Magistrate, Mergui. In the former case he was convicted under section 409 of the Penal Code for Breach of Trust in respect of 256 packets (each packet worth about 4 annas) of

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U BA THOUNG, J.

field dressings belonging to the Mergui Civil Hospital and he was sentenced to pay a fine of K 500 or in default to four months' rigorous imprisonment; and in the latter case he was convicted under section 380 of the Penal Code for theft of one cot, one dental chair and one wash basin also belonging to the Mergui Civil Hospital, and he was sentenced to suffer imprisonment till the rising of the Court and to pay a fine of K 250 or 3 months' rigorous imprisonment. The learned Counsel for the appellant here contended that as the appellant had been convicted in those two Criminal cases, the prosecution in the present case was barred on the principle of *autre fois convict*. I do not agree with his contention. Section 403, sub-section (*2*), of the Code of Criminal Procedure permits a second trial for a distinct offence for which a charge might have been framed under section 235 (*1*) as having been committed in the course of the same transaction.

The expression "distinct offence" means an offence entirely unconnected with a former offence charged. In the present case the facts are also not the same as those in the other two cases, and the offence here is a distinct offence being one under section 6 (*1*) of the Public Property Protection Act, 1947 for unauthorised possession of the exhibit microscope which is a Government property. In the case of *Emperor* v. *Deoki Koeri* (1), it was held that a conviction of theft under section 379 of the Indian Penal Code in respect of a certain amount of crude opium is no bar to a subsequent trial and conviction of the convict under section 9 of the Indian Opium Act, 1878.

On the facts of the case, the appellant did not deny that the exhibit microscope is a Government

(1) I.L.R. 48 All. 496.

property and that it was found in his possession, and furthermore he cannot prove that his possession of the same was authorised. The appellant was therefore rightly convicted under section 6 (*1*) of the Public Property Protection Act, 1947, and his conviction must be upheld.

Regarding the question of sentence, I consider that the sentence imposed on the appellant by the Trial Court is a bit severe in view of his antecedents. There is the evidence of U Shwe Yun (DW 2) and U Hone Bi (DW 5), members of the Mergui Civil Hospital Committee that the appellant had done a lot of good work for the Mergui Civil Hospital, and that it was due to his untiring effort that an X'Ray department was successfully opened there. That he had even carried out repairs at the hospital at his own expense is also borne out by the evidence of Daw Kyu (DW 7). All these witnesses are well known and respectable residents of Mergui.

For the above reasons I consider that a sentence of six months' simple imprisonment would meet the ends of justice in this case.

I therefore uphold the conviction of the appellant but I alter the sentence to one of six months' simple imprisonment.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, J.

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April 22.

MA HLA YIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Procedure Code, s. 562—Release on probation for good conduct—Conditions requisite for exercise of discretion.

Held: To enable a Court to release an offender under s. 562, Criminal Procedure Code, there must be no previous conviction and the offence must be one of those specified therein. If these two conditions are fulfilled the Court has quite a wide discretion to act under the said section having regard to the points specified therein such as youth, character, antecedents, trivial nature of offence and to any extenuating circumstances under which the offence was committed.

Maung Gyi for the appellant.

U Chit (Government Advocate) for the respondent.

U CHAN TUN AUNG, J.—In his Criminal Regular Trial No. 314 of 1953, the Eastern Subdivisional Magistrate has found appellant Ma Hla Yin and two other accused persons, namely, Thaung Nyun and Tun Myint, guilty of offences under section 380 of the Penal Code so far as Thaung Nyun and Tun Myint are concerned, and under section 411 of the Penal Code so far as appellant Ma Hla Yin was concerned. Thaung Nyun was sentenced to undergo one year's rigorous imprisonment; so was Tun Myint. The appellant as receiver of the stolen property was sentenced to suffer six months' rigorous imprisonment. Thaung Nyun and Tun Myint have not appealed against their convictions and sentences.

* Criminal Appeal No. 148 of 1954 against the order of the Eastern Subdivisional Magistrate, Rangoon, in Criminal Regular Trial No. 314 of 1953.

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U CHAN TUN AUNG, J.

Ma Hla Yin has now appealed, not as against the conviction, but as against the sentence only. The learned Counsel appearing for the appellant does not dispute the finding of fact by the lower Court. What has been canvassed on behalf of the appellant is that the sentence imposed upon her was too severe and that having regard to the fact that the appellant is a woman and that the offence she has committed being one not punishable with death or transportation for life, the learned trial Magistrate should have invoked the provision of section 562 of the Criminal Procedure Code. I understand that my learned Brother, U San Maung, J., who admitted the appeal has, pending the appeal, enlarged the appellant on bail in the sum of K 2,000 in view of the fact that appellant was in the family way, about to be confined. The appellant has just given birth to a child and she appeared in person before the Court and it is apparent that her health has been very much impaired. The question now for consideration is whether, in the circumstances of the case and also in view of the fact that the appellant is a woman whose character and antecedents have not been questioned in any way, because there is nothing on record to suggest or indicate that she is of a questionable character, her case is one to which the provision of section 562 of the Criminal Procedure Code can properly be applied. The learned Government Advocate has drawn my attention to the decision in *King Emperor* v. *Ba Han* (1) wherein it has been held that in order to enable a Court to exercise the powers conferred by section 562 of the Criminal Procedure Code, it is not necessary that the offender should be young or that the offence

(1) (1903-04) 2 L.B.R. 65.

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should be trivial and that there should be extenuating circumstances. I respectfully agree with this decision. To enable a Court to release an offender under section 562, Criminal Procedure Code, there must, in my view, be two conditions precedent, *viz.*: (1) there must be no previous conviction and (2) the offence must be one of those specified therein. If these two conditions are fulfilled the Court has quite a wide discretion to act under the said section having regard to the points specified therein such as youth, character, antecedents, trivial nature of offence and to any extenuating circumstances under which the offence was committed. These points are, to my mind, not essential points, but they merely indicate the lines on which the Court is to exercise its discretion in a given case.

In this case the property stolen were some bales of *Khaki* cloth belonging to the Police Supplies Depôt.

The loss took place on the night of the 18th November 1953. On the 19th a report was lodged with the police and on the night of the 19th they were traced to the appellant's shop in the Dalhousie Street pavement between 23rd and 24th Streets. The appellant did not deny the finding of the property in her possession; but merely stated that they were handed over to her by two unknown persons. She could not adduce any defence witnesses whatsoever. Neither could she seriously contend that she never knew that the bales of *Khaki* were stolen property. I would have viewed the matter seriously if the appellant were found to have been habitually dealing in stolen property. It appears that this is her first offence and giving consideration to her character and antecedents—there being nothing against her on the record—I think, it is proper that she should be released

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U CHAN TUN AUNG, J.

under the provision of section 562 of the Criminal Procedure Code on her entering into a bond with two sureties in the sum of K 2,000 each, that she shall, for a period of *three years*, keep peace and be of good behaviour.

The sentence of imprisonment imposed upon her by the trial Court is therefore set aside and in lieu thereof she will be released on probation of good conduct as aforesaid.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, J.

H.C. 1954

May 11.

MAUNG MAUNG (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT). *

Criminal Trial—Penal Code, ss. 409 and 477-A—Accused initially tried by Inferior Military Court under military administration—Evidence recorded summarily—Withdrawal of military, reversion to Civil administration—Same Judge continuing trial—Former evidence cannot be used—Consent of accused immaterial—Transfer of Magistrate—Case sent from successor with incompetent powers to another Magistrate under s. 346, Criminal Procedure Code—De novo trial imperative—S. 350, Criminal Procedure Code—Waiver by accused immaterial—Misjoinder of charges—Not curable under s. 537, Criminal Procedure Code.

Held: After the withdrawal of military administration in the relevant area and after the Magistrate had reverted to service under the civil administration, he was incompetent, notwithstanding consent of the parties concerned, to accept the evidence already recorded in his capacity as an Inferior Military Court, and use them in the new trial of the applicant.

Ba Yi v. *Ma Sein Myint*, Criminal Revision No. 178-B of 1951, followed.

Held also: As sub-s. 2 of s. 350, Criminal Procedure Code expressly excludes disposal of cases coming under circumstances set out in s. 346 (*1*), the Magistrate to whom the case has been sent for disposal under the latter section has no option but to start the trial afresh. The question of *de novo* does not arise, consequently waiver of the right is irrelevant.

Sashti Gopal Sami and another v. *Haridas Bagdi*, A.I.R. (1938) Cal. 415; *Shar Khan* v. *King-Emperor*, A.I.R. (1933) Sind 191; *Gura and others* v. *Emperor*, A.I.R. (1943) Lah. 37; In re *K. K. Ummar Haji and others*, A.I.R. (1923) Mad. 32; *Chinna Venka Naidu*, A.I.R (1923) Mad. 327; *Mohamed and another* v. *Emperor*, 2 Cr.L.J. 369, followed.

Held further: Criminal breach of trust and falsification of accounts cannot be joined at one trial if it is established that they do not arise out of the same transaction.

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* Criminal Revision No. 250-B of 1953 being a review of the order of the 2nd Additional (S.P) Magistrate, Meiktila, in Criminal Regular Trial No. 8 of 1953.

Dubri Misir v. *King-Emperor*, I.L.R. 6 Luck. 441 ; *Kasi Viswanathan* v. *Emperor*, I.L.R. 30 Mad. 328 ; *Emperor* v. *Jiban Kristo Bagchi*, I.L.R. 40 Cal. 318 ; *Rameshwar Brijmohan* v. *Emperor*, A.I.R. (1933) Nag. 327; *Nga San Mya* v. *Emperor*, A.I.R. (1933) Rang. 325 ; *Subramania Ayyar* v. *Emperor*, I.L.R. 25 Mad. 61-I.A. 257, followed.

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Ba Shun for the applicant.

U Chit (Government Advocate) for the respondent.

U CHAN TUN AUNG, J.—There are serious irregularities in the trial of the applicant's case and in view of the order I now propose to make, I feel that the least I say about the merits of the case the better.

In Criminal Regular Trial No. 8 of 1953 of the Court of the 1st Additional Magistrate, Meiktila, the applicant Maung Maung was found guilty under sections 409 and 477-A of the Penal Code for alleged offences of criminal misappropriation and falsification of accounts committed on several dates and was sentenced to undergo three years' rigorous imprisonment and to pay a fine of K 500 or in default to suffer three months' rigorous imprisonment on each head of charges. The applicant preferred an appeal against the said convictions and sentences before the Sessions Judge, Meiktila, and his appeal was dismissed.

In this revision the applicant's Counsel has raised three legal objections for setting aside the conviction of the applicant.

The learned Counsel's contentions are briefly as follows :

At the time the applicant's case was sent up for trial, Meiktila was under military administration and the Court of trial Magistrate (U Ba Thaw) was one constituted as an Inferior Military Court. U Ba Thaw took cognizance of the case and tried the applicant

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in that capacity. Three prosecution witnesses were examined by U Ba Thaw in accordance with the procedure laid down by the Supreme Commander of the Union Armed Forces in his Military Administration Proclamation No. 3 of 1949 affecting the relevant area. In the said proclamation clause 5 provides that the Courts constituted under the military proclamation by the Supreme Commander shall have power to try any offence without the offender being committed to it for trial and the provision of section 264 (1) of the Code of Criminal Procedure apply to such trials except that such Court shall record a memorandum only of the substance of the evidence of each witness. Such being the procedure for recording evidence, the evidence of the three witnesses for the prosecution, *viz.*, U Ohn, U Sein Yin and U Tun Sein, could not have been in the manner laid down by the Criminal Procedure Code, but in a summary manner. Therefore, on the 30th August 1951 after the withdrawal of military administration in the relevant area, and after U Ba Thaw had reverted as a Magistrate under the civil administration, he was incompetent, notwithstanding consent on the part of parties concerned, to accept the evidence already recorded in his capacity as an Inferior Military Court and use them in the new trial of the applicant. The applicant's willingness, it is contended, to forego his right of *de novo* trial is entirely irrelevant. In other words, what the learned Counsel submits is that U Ba Thaw has recorded, as an Inferior Military Court, the evidence of the aforesaid three witnesses, and though the applicant has consented to the use of their evidence in the new trial yet, U Ba Thaw having held two different status as a Magistrate, and there being no specific provisions in the Criminal Procedure Code for such contingency, and also in

view of the decision given by U San Maung, J. in *Ba Yi* v. *Ma Sein Myint* [*Criminal Revision No. 178 (B) of 1951 of the High Court*], the use as prosecution evidence, the recorded testimony of the said three witnesses without examining them afresh in the regular way and without affording the applicant an opportunity to cross-examine them, the trial was irregular and has prejudiced the applicant. The second ground canvassed in challenging the validity of the trial is that, on the 5th February 1953, according to the Case Diary on page 11 of the trial proceedings, U Ba Thaw was succeeded by another Magistrate, U Kyaw Myint; and it appears that U Kyaw Myint was incompetent to try the applicant. So he submitted the proceedings to the District Magistrate with the following remarks: "Case submitted to D.M. for transfer to other competent Magistrate". On the 10th February 1953, the District Magistrate had the case transferred to the 2nd Additional Magistrate, U Ba Ko, Meiktila, for trial. On 17th February 1953 the applicant appeared before U Ba Ko with his lawyer and the learned 2nd Additional Magistrate recorded in the diary *inter alia* as follows:

> "Accused says that he does not wish to claim a *de novo* trial. I will hear argument as to charge on 22nd March 1953".

In the circumstances and in view of the provisions of section 346 read with section 350, sub-section (2) of the Criminal Procedure Code, the applicant's waiver of right to claim a *de novo* trial is immaterial, and the error in his trial in that respect is an error in law which has caused a grave injustice to the applicant. It is contended that the provision of section 350 (1) has no application, when U Ba Ko proceeded with the hearing of the case. He was not exercising his jurisdiction in succession to another

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competent magistrate as contemplated therein. Sub-section (2) of section 350 of the Criminal Procedure Code expressly excludes disposal of cases coming under circumstances set out in section 346 (1).

The third legal objection relates to misjoinder of charges. It is contended that the charges framed against the applicant are in respect of several distinct acts of misappropriation and for falsification of accounts on three separate occasions. There were, it is contended, 22 distinct offences alleged to have been committed by the applicant and that the applicant has been greatly prejudiced by such misjoinder of charges contrary to the provisions of section 222, sub-section (2) and section 233 of the Criminal Procedure Code.

I have given careful consideration to these submissions and for reasons hereunder, I must hold that there have been serious irregularities resulting in miscarriage of justice which would warrant setting aside the conviction of the applicant and order his retrial.

The factual statements raised in the first ground are clearly borne out by the records, and with respect, I am inclined to agree with the views expressed by U San Maung, J., in Criminal Revision No. 178 (B) of 1951, that "a Magistrate appointed by the Commander-in-Chief under the Military Proclamation issued by him from time to time when the relevant area was brought under Martial Law Ordinance No. 4 of 1948, such a Magistrate exercising certain magisterial functions having to comply with certain procedure quite outside the pale of Criminal Procedure Code in certain respects cannot be said to continue in that capacity of a Magistrate as though appointed under the Criminal Procedure Code thereby

enabling him to continue the trial of a case from the stage where it has been left off by a Magistrate exercising jurisdiction and powers conferred upon him under the provisions of the Military Administration Proclamation of the Commander-in-Chief." In my view, the word "Magistrate" in the trial of criminal cases under the Criminal Procedure Code has a limited meaning and that it cannot include a Magistrate appointed by the Supreme Commander in respect of certain parts of the country under military administration. In other words, such Magistrates' Courts are not courts of Magistrates whose constitutions and powers are defined in Chapters II and III of the Criminal Procedure Code. Therefore, the first contention urged on behalf of the applicant must be accepted. After his reversion as a civil magistrate U Ba Thaw is entirely incompetent to use the depositions of the prosecution witnesses recorded by him as an Inferior Military Court. If he used them even with the consent of the parties concerned, such consent, especially in a criminal trial, cannot cure the illegality already occasioned. There are numerous authorities on this point and I shall discuss them when considering the second contention put forth by the learned Counsel.

As regards the second objection raised, it is quite clear from the entries in the Case Diary that when U Kyaw Myint succeeded U Ba Thaw, the former was incompetent to proceed with the trial. Therefore, the reference to the District Magistrate for transfer of the case to a competent magistrate for trial, must have been made under section 346 (1) of the Criminal Procedure Code. By section 350, sub-section (2) of the Criminal Procedure Code, the procedure for acting on the evidence recorded by a previous magistrate when he has been succeeded by another,

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and the privilege of the accused to demand the re-hearing of witnesses or to claim a *de novo* trial, are made not applicable to cases or trials in which the proceedings have been stayed or submitted to a competent Magistrate for trial under section 346 (1) of the Criminal Procedure Code. The first part of sub-section (2) of section 350 is clearly to that effect. This interpretation of the law finds favour in *Sashti Gopal Sami and another* v. *Haridas Bagdi* (1); *Shar Khan* v. *King-Emperor* (2); *Gura and others* v. *Emperor* (3). Besides pointing out to the non-applicability of the procedure prescribed in sub-section (1) of section 350 of the Criminal Procedure Code where one Magistrate has taken charge of the case from another under circumstances set out in section 346 (1), the following decisions indicate that consent on the part of the accused not to demand a *de novo* trial would not validate the proceedings in view of express statutory provisions containing in sub-section (2) of section 350, Criminal Procedure Code. See In re *K. K. Ummar Haji and others* (4), *Chinna Venka Naidu* (5); see also *Mohamed and another* v. *Emperor* (6). It will thus be seen that in view of express statutory provision set out in sub-section (2) of section 350 of the Code of Criminal Procedure accused's right to demand or not to demend a *de novo* trial is entirely out of the question and is not at all applicable to cases transferred or stayed for trial by a competent Magistrate as contemplated in

(1) A.I.R. (1938) Cal. 415.
(2) A.I.R. (1933) Sind 191.
(3) A.I.R. (1943) Lah. 37.
(4) A.I.R. (1923) Mad. 32.
(5) A.I.R. (1923) Mad. 327.
(6) 2 Cr. L.J. 369.

section 346 (1) of the Criminal Procedure Code. Failure to comply with the statutory provisions is an illegality and the consent given by the accused not to demand a retrial cannot cure such illegality. Therefore, I must uphold the contention of the learned Counsel.

The third contention relates to misjoinder of charges. It seems clear that the offences alleged against the applicant relates to criminal breach of certain savings bank deposits maintained by some persons in the Post Office Bank at Meiktila and also falsification of accounts in the journals relating to such deposits. It appears that the applicant was a Clerk in the Meiktila Head Post Office in the year 1946-47. He was, in fact, the Post Office Savings Bank Clerk. In that capacity he was concerned, among others, with the savings bank accounts maintained by the following persons: D. S. Dhar (Pass Book No. 286); Maung Ba Lay (Pass Book No. 182), and Maung Khin Maung Saw (Pass Book No. 532). It is alleged by the prosecution that the following sums deposited on dates shown against each item by D. S. Dhar (Pass Book No. 286, Exhibit A):—

		K	
	(*a*)	300	deposited on 6 May 1946.
	(*b*)	150	deposited on 31 May 1946.
Total	....	450	

though found duly credited and entered in the pass book, were not found to have been entered in the Ledger maintained in the office of the Controller of Post and Telegraph Accounts in Rangoon, the duty for making such entry being that of the applicant.

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Similarly, the following sums deposited by Maung Ba Lay (Pass Book No. 182, Exhibit F):—

		K	
	(*a*)	120	deposited on 27 May 1946.
	(*b*)	50	deposited on 3 June 1946.
	(*c*)	100	deposited on 2 July 1946.
	(*d*)	80	deposited on 8 July 1946.
	(*e*)	100	deposited on 28 July 1946.
	(*f*)	100	deposited on 2 September 1946.
	(*g*)	120	deposited on 21 October 1946.
Total	....	670	

though found duly entered in Maung Ba Lay's Pass Book and also in the Ledger of the Meiktila Head Office, yet they were not entered by the applicant in the Ledger maintained in the office of the Controller of Post and Telegraph Accounts in Rangoon.

So also the following sums deposited by Maung Khin Maung Saw (Pass Book No. 532, Exhibit N):—

		K	
	(*a*)	415	deposited on 11 July 1946.
	(*b*)	250	deposited on 7 August 1946.
Total	....	665	

though found to have been entered in Khin Maung Saw's Pass Book and also in the Meiktila Head Office Ledger, the applicant had not entered them in the Ledger of the Controller of Post and Telegraph Accounts.

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For the said offences the trial Court has framed a charge with three heads which reads as follows :

"I, U Ba Ko, 2nd Additional (S.P.) Magistrate, Meiktila, hereby charge you Maung Maung son of Mr. C. K. Chawa (*a*) U Soon as follows :

Fristly.—That you during the period from 6th to 31st May 1946 at Meiktila, being a public servant in the employment of Postal Department, and with domain over certain property, to wit, Rs. 450 being deposited money in respect of S.B. Pass Book No. 286 of D. S. Dhar committed criminal breach of trust with respect to the said money ; And also wilfully, and with intent to defraud, altered or falsified certain papers, to wit, Journals of S.B. Deposits (Exhibits B & D) for the first and 4th week of May 1946 respectively by not showing therein the aforesaid deposited sums of monies and thereby committed an offence punishable under section 409/477-A of the Penal Code, etc., etc.

Secondly.—That you during the period from 27-5-1946 to 21-10-1946, being a public servant in the employment of Postal Department at Meiktila, and with domain over certain property, to wit, Rs. 670 in all being deposited monies in respect of S.B. Pass Book No. 182 of Maung Ba Lay, committed criminal breach of trust with respect to the said money ; And also wilfully, and with intent to defraud, altered or falsified certain papers, to wit, Journals of S.B. Deposits (Exhibits G.K,K1, K2, K3, K4 and K5) for the first week of June, 1st and 2nd week of July, 1st week of August, 1st week of September and 3rd week of October 1946, respectively by not showing therein the aforesaid sum of monies, etc., etc.

Thirdly.—That you, on the 11th July 1946 and 7th August 1946, at Meiktila, being a public servant in the employment of Postal Department and with domain over certain property, to wit,

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Rs. 665 being deposited monies in respect of S.B. Pass Book No. 532 of Khin Maung Saw, committed criminal breach of trust with respect to the said money; And also wilfully, and with intent to defraud, altered or falsified certain papers, to wit, Journals of S.B. Deposits (Ex. O & P) for the 2nd week of July 1946 and 2nd week of August 1946 respectively, by not showing therein the aforesaid sums of monies, etc., etc."

It will thus be seen from the heads of charges shown above that the applicant has been charged with criminal breach of trust and falsification of accounts in respect of three different persons with reference to three distinct occasions and three distinct transactions. If the learned trial Magistrate's attention has been directed to section 233 of the Criminal Procedure Code he would find that, except in cases mentioned in sections 234, 235 and 239 of the Criminal Procedure Code, no joinder of charges is permitted inasmuch as every distinct offence of which any person is accused, he is as of right entitled to a separate charge and to a separate trial. In the case under consideration the provisions of sections 236 and 239 are irrelevant. Neither need we consider the joining of three offences of the same kind as contemplated in section 234 of the Criminal Procedure Code in view of sub-section (2) of section 222 of that Code. The question therefore is whether sub-section (1) of section 235 applies, that is to say, whether the alleged acts and omissions on the part of the applicant were so connected as to form part of the same transaction for the purpose of charges at one trial.

From the facts of the case stated above, it seems clear that the alleged criminal misappropriations so far as Dhar's accounts is concerned were committed on two occasions, *i.e.* on 6-5-46 and 31-5-46. (*See* Exhibit

A). So far as Maung Ba Lay's account is concerned (*See* Exhibit F) there are 7 distinct alleged acts of misappropriation. As regards Khin Maung Saw's account (*See* Exhibit N) the sums alleged to have been misappropriated were on two distinct dates. As regards the charge for falsification of accounts under section 477-A, the first charge relates to falsification of Dhar's accounts on two occasions (*vide* Exhibits B and D), the second relates to falsification of accounts on 7 different occasions *vide* Exhibits G, K 1, K 2, K 3, K 4 and K 5. The third charge relates to two items *vide* Exhibits O and P.

It will thus be seen that the applicant has committed on different occasions, altogether 22 distinct offences. Though section 234 of the Criminal Procedure Code permits joinder of three offences of the same kind committed within one year, yet in this case the applicant had been charged in one trial with the commission of 22 offences arisen out of three different transactions. It is obvious that the misappropriation and falsification of accounts relating to D. S. Dhar's savings bank deposits are quite distinct from those of Maung Ba Lay's. So also from those of Maung Khin Maung Saw's. The first charge relates to acts done in May 1946. The second charge relates to acts done in July and August 1946. Therefore, I am clearly of the view that the whole trial of the applicant on the charges aforesaid is illegal as the plain provision of law has been infringed. Though it might be conceded that while misappropriating a person's savings bank deposits, falsification of accounts relating to his deposits could also be committed in the same transaction, and as such could have been joined and charged at one trial, yet how can it be maintained that the criminal breach of trust

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and falsification of accounts perpetrated on different dates as against different persons be said to be so connected as to form part of the same transaction? There are numerous decisions to show that criminal breach of trust and falsification of accounts cannot be joined at one trial if it is established that they do not arise out of the same transaction. See *Dubri Misir* v. *King-Emperor* (1); *Kasi Viswanathan* v. *Emperor* (2); *Emperor* v. *Jiban Kristo Bagchi* (3); *Rameshwar Brijmohan* v. *Emperor* (4); *Nga San Mya* v. *Emperor* (5).

From the above decisions it is clear that charges under sections 409 and 477-A of the Penal Code in relation to different transactions on different times which are not covered by section 234 or 235, must be tried separately and if there is misjoinder of such charges, not justified by the facts and circumstances clearly indicated in the case, such misjoinder constitutes not merely an irregularity but an illegality which vitiates the entire trial. In some of the aforesaid rulings reference has been made to the wellknown Privy Council case of *Subramania Ayyar* v. *Emperor* (6) which clearly enunciates that except in cases of distinct offences covered by sections 234 and 239 of the Criminal Procedure Code, separate trial must be had, and a defect in the trial of an offence not covered by the said section is to be held as an illegality not curable by section 537 of the Criminal Procedure Code. I must therefore uphold the third contention raised by the learned Counsel for the applicant.

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(1) I.L.R. 6 Luck. (1931) 441.
(2) I.L.R. 30 Mad. 328 (1907).
(3) I.L.R. 40 Cal. 318.
(4) A.I.R. (1933) Nag. 327.
(5) A.I.R. (1933) Ran. 325.
(6) I.L.R. 25 Mad. 61-I.A. 257.

In view of the above circumstances I must allow the application in revision and set aside the conviction of the applicant and order his retrial by such competent magistrate as the District Magistrate, Meiktila, may propose to select in that behalf.

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APPELLATE CIVIL.

Before U San Maung, J.

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June 21.

MRS. L. STEVENSON AND ONE (APPLICANTS)

v.

MA HLA YIN AND FOUR OTHERS (RESPONDENTS).*

Dismissal of suit for default of appearance—Civil Procedure Code, Order IX, Rule 8—Dismissal of suit under Order XVII, Rule 3, contrast—Power of Attorney in suit enures for application to restore suit dismissed for default—Contents of affidavit in support of application, admissibility of, as evidence, question of law referred to Bench for decision.

(The Judgment of the Bench in Civil Reference No. 19 of 1953 is also reported.)

Held: As adjournments in the suit were obtained not to enable the plaintiffs to produce their evidence or to perform any other act necessary to the progress of the suit, in which case Order XVII Rule 3 would apply, but to await the orders of the High Court, the dismissal of the suit for default of appearance must be considered to be under Order IX, Rule 8 of the Civil Procedure Code.

Held also: In the absence of restrictions contained in a power of attorney given by a litigant to his pleader for the purposes of a suit, the pleader has authority without any fresh power to file an application to set aside a dismissal order, and such an application forms part of the proceedings in the suit within Order III, Rule 4, sub-rule 2 of the Code of Civil Procedure.

Fakhir Ahmad v. *Mrs. Mary Minck*, 19 Lah. 417, referred to.

Abdul Aziz v. *The Punjab National Bank, Ltd.*, 10 Lah. 570; *U Oak and others* v. *Ma Khin and others*, (1941) R.L.R. p. 254, followed.

Held further: The question whether the contents of an affidavit are admissible in evidence in support of an application for the restoration of a suit dismissed for default is an important point of law and is therefore referred to a Bench for decision.

Federal India Assurance Co. Ltd. v. *Anantrao Pandurangrao Divit*, (1944) Nag. 161; *Marneedi Satyan* v. *Masimukula Venkataswami and others*, A.I.R. (1949) Mad. 689; *Gopikabai and others* v. *Narayan Govinda Samarth and others*, A.I.R. (1953) Nag. 135, discussed.

* Civil Revision No. 39 of 1952 against the order of the District Court, Mandalay, in Civil Regular Suit No. 1 of 1949.

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MRS. L. STEVENSON AND ONE v. MA HLA YIN AND FOUR OTHERS.

Ba Shun for the applicants.

U Sein and *Saw Hla Pru* for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 1 of 1949 of the District Court of Mandalay, the plaintiffs Ma Hla Yin and five others sued the defendants Mrs. L. Stevenson and Dr. M. M. Chauhan for a declaration that the building in suit belonged to one Daw Yin (*a*) Mrs. B. Purcell and that on her death, it devolved on the plaintiffs as her heirs, and for the ejectment of both the defendants from the suit building and payment of damages for the use and occupation thereof. One of the defences raised by the defendants in the suit was that the suit property was undervalued and on an issue being raised on its valuation, the learned District Judge came to the conclusion that the suit property was Rs. 80,000 and not Rs. 20,000 only as valued by the plaintiffs and that *ad valorem* Court fees of that amount should be paid. The plaintiffs being dissatisfied with this order of the learned District Judge, came up to this Court on revision. After several adjournments have been given to their advocates for the production of an order from the High Court, staying further proceedings in the case, the following diary order appeared :—

" 15-8-51.—Case called. U Sein for the plaintiffs present. Mr. Emanuel *vice* Mr. Bose for the defendants present.

U Sein asks the Court a month's time to file the 'Stay Order' stating that he undertakes to pay the required court fees on the date fixed if he fails to produce the Stay Order from High Court.

Case adjourned till 15-9-51."

In the meantime, on the 27th of August, 1951, this Court passed an order staying the proceedings

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before the District Judge and directing that telegraphic intimation to this effect be sent to him. Consequently, on the 1st of September, 1951, the following diary's orders appeared in the proceedings of the District Judge :—

" 1-9-51.—To-day received from the Asst. Registrar, High Court, Rangoon, a copy of Order staying execution, directing to stay the case pending the disposal of the application.

Put up on date fixed 15-9-51."

The next entry reads :

" 15-9-51.—Case called. Mr. Wajid *vice* U Sein, Advocate for plaintiffs present.

U Tun Pe *vice* Mr. Bose for the respondent present.

The case will now be stayed as ordered by the High Court.

For mention on 22-10-51."

" 22-10-51.—Case called. U Mg. Latt *vice* U Sein for plaintiffs and Mr. Bose for the defendant present

For mention on 22-11-51."

In the meantime, on the 12th of October, 1951, this Court passed an order dismissing the plaintiffs' application for revision. Consequently, on the 29th of October, 1951, the following order appeared in the case diary of the District Court :—

" 29-10-51.—Received a copy of judgment in Civil Revision No. 45 of 1951 of the High Court, Rangoon, dismissing the application for revision against the order of this Court, dated the 29-5-1951

Put up on date fixed 22-11-51. '

The next entry which is crucial is as follows :

" 22-11-51.—Case called twice first at 11.15 and another at 12 a.m. No appearance for the plaintiff.

Mr. Bose for the defendant present.

The case is dismissed with costs for default."

Subsequently, the plaintiffs filed an application purporting to be under Order IX, Rule 9 of the Civil

Procedure Code, for an order setting aside the dismissal of the suit upon such terms as to costs as the Court thought fit. The affidavit accompanying the application was that of the plaintiffs' advocate, U Sein, who stated that he represented the plaintiffs in the suit, that he was away in Rangoon in connection with his case in the High Court and did not know what happened to the suit until he was told on the 26th of November, 1951, by a clerk of the District Court that it had been dismissed for default and that he did not know of the receipt of the judgment of the High Court in the District Court of Mandalay. The application was opposed by the defendants on the ground that the plaintiffs did not give sufficient reasons in their application for their absence on the date when the case was called by the Court and that it was the duty of the party to the proceedings to appear in Court on every day on which the case was fixed so that their failure to do so without sufficient cause, warranted the dismissal of the suit. In the reply to the written-objection, it was stated that it was not reasonable to expect the plaintiffs who were residing in Rangoon to appear on every day the case was fixed for mention. In a further affidavit filed by U Sein, it is stated that since he was not well on the 15th of September, 1951, he wrote a letter to a pleader, Mr. Wajid, to file his petition praying for time, for filing of a stay order of the High Court and that he was informed by Mr. Wajid that there was no necessity to file such a petition as a stay order had already arrived from the High Court. Mr. Wajid did not inform him that the case was fixed for the 22nd October, 1951, for mention. He did not make any request either personally or by letter or by other means to U Maung

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Latt to appear for him on the 22nd of October 1951, and that U Maung Latt also did not inform him that on the 22nd of October, 1951, the suit was fixed for mention on the 22nd of November, 1951, the date on which it was dismissed for default. U Sein also pleaded that he was ill on his return from Rangoon from the first week of November to the third week of November and that he was still convalescing during the first half of December, 1951. In an enquiry which followed regarding the existence or otherwise of sufficient cause for the non-appearance of the plaintiffs or their pleader when the suit was called for mention on the 22nd November, 1951, U Sein did not give any evidence on oath. His clerk Maung Than Shwe stated, that at U Sein's behest, he had asked Mr. Wajid to file an application to the Court for grant of time for filing of a stay order from the High Court and that Mr. Wajid had told him that it was unnecessary to do so as a stay order from the High Court had already been received. Mr. Wajid supported Maung Than Shwe on this point. When cross-examined, he stated that it was usual for the Court in such a matter to give a date for mention but that he did not remember whether, in this particular case, any such date was fixed. Mr. Bose's clerk Ko Ba Khin in giving evidence for the defendants, stated that on that day the Court fixed 22nd October 1951 as the date for mention and that on that day, U Maung Latt appeared for U Sein for the getting of a further date for mention.

The learned District Judge, believing the statement made by U Sein in his affidavit, came to the conclusion that U Maung Latt was never asked by U Sein to appear for him on the 22nd of October, 1951, and that neither Mr. Wajid nor U Maung Latt

had informed U Sein of the several dates fixed. He accordingly held that there was sufficient cause for the non-appearance of U Sein for the plaintiffs on the 22nd of November, 1951, when the case was fixed merely for mention and that, therefore, his order of that date dismissing the suit should be set aside and the suit restored to file on payment of Rs. 51 by the plaintiffs to the defendants as costs. Being dissatisfied with this order of the District Judge, the defendants have now applied to this Court for revision.

The first point urged on behalf of the defendants-applicants by the learned advocate can be easily disposed of. The learned advocate says that the facts and circumstances clearly show that the learned Judge of the District Court had acted under Order XVII, Rule 3 of the Civil Procedure Code in dismissing the plaintiffs-respondents' suit and, as such, the petition filed by the plaintiff-respondents under Order IX, Rule 9, was misconceived. Now, it is apparent to me that the dismissal of the plaintiffs' suit by the learned District Judge on the 22nd of November, 1951, was under the provisions of Order IX, Rule 8 of the Civil Procedure Code and not under Order XVII, Rule 3, thereof. The provisions of Order XVII, Rule 3 do not appply unless :

(1) the hearing is adjourned on the application of a party to the suit,

(2) the hearing is adjourned on the application of the party who subsequently makes the default,

(3) the adjournment is granted to enable the party to produce his evidence or to perform any other act necessary to the further progress of the suit and if the

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party fails to perform any of the acts for which the adjournment was granted within the time allowed by the Court.

In the present case, the adjournment of the suit from time to time for the purpose of awaiting the order of the High Court in revision can hardly be said to be at the instance of the plaintiffs. It is more likely an adjournment by the Court of its own motion. Even assuming that the adjournment was made on the plaintiffs' motion, it was not to enable him to produce his evidence or to perform any other act necessary to the progress of the suit. If the plaintiffs or their pleader U Sein was present on the 22nd of November, 1951, the case was bound to be adjourned again for the purpose of enabling the plaintiffs or their pleader to deposit the deficit Court fees.

Therefore, the dismissal of the suit by the District Judge on the 22nd of November, 1951, must be considered to be one under Order IX, Rule 8 of the Civil Procedure Code, so that an application for the restoration of the suit under Order IX, Rule 9 was proper.

The second point urged by the learned advocate for the defendants is that, assuming that the plaintiffs-respondents' advocate could file an application under Order IX, Rule 9 of the Civil Procedure Code, he had no right to represent the plaintiffs after the dismissal of the suit without obtaining a fresh power of attorney duly executed by the plaintiffs. In support of this argument, the learned advocate has cited a case reported in IV Rangoon, page 249. There it was held that an advocate "acts" when he files a Memorandum of Appeal or Cross-objections or any other document in a case other than a Memorandum

of Appearance under Rule 4 (5) and that in all such cases a power of attorney is necessary. Following this case, a Bench of the High Court of Lahore has held in *Bashir Ahmad* v. *Mrs. Mary Minck* (1) that where a suit has been dismissed for default of appearance, an application for its restoration can only be made by a pleader whose appointment has been duly made in writing. However, a case more in point is that of *Abdul Aziz* v. *The Punjab National Bank Ltd.* (2). There, a single Judge of the Lahore High Court held that Counsel may be engaged to conduct a suit, to prosecute or defend an appeal and to execute the decree, by one power of attorney, and that where the Counsel's engagement is for the prosecution or the conduct of a suit including all proceedings till its final decision in the Court concerned no fresh power of attorney is needed to enable him to apply for the restoration of a case which has been dismissed for the default of appearance. This case was followed in *U Oak and others* v. *Ma Khin and others* (3) where it was held by Justice U Ba U, as he then was, that in the absence of restrictions contained in a power of attorney given by a litigant to his pleader for the purposes of a suit, the pleader has authority, without any fresh power, to consent to the application of the opposite party to restore the suit which was dismissed for default and that an application to set aside an *ex-parte* decree or dismissal order and opposition or consent to such an application form part of the proceedings in the suit within Order III, Rule 4, sub-rule (2) of the Code of Civil Procedure. The power of attorney given by the plaintiffs to U Sein in the suit now under consideration being a general one, he has, in my

(1) 19 Lah. 417. (2) 10 Lah. 570.
(3) R.L.R. (1941) 254.

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opinion, authority to file an application under Order IX, Rule 9 of the Civil Procedure Code for the restoration of the suit which had been dismissed for default without filing a fresh power.

The third point urged in favour of the defendants by the learned advocate is much more difficult than those dealt with above and this point is, in my opinion, important enough for a decision by a larger Bench than that of a single Judge. In coming to a decision that the suit should be restored to file, the learned Judge of the District Court seems to have relied almost entirely upon the affidavit of U Sein to the effect that he had not authorised either Mr. Wajid or U Maung Latt to obtain adjournments on the 15th of September, 1951, and on the 22nd of October, 1951, respectively and that Mr. Wajid never informed him on the first occasion that the case was fixed on 22nd October 1951 for mention. If U Sein's statement on these points can be accepted as correct, and it must be accepted in the absence of a counter-affidavit, it may well be said that he had sufficient ground for not being present in Court on the 22nd of November, 1951, when the case was dismissed for default of his appearance. However, the learned advocate for the plaintiffs-respondents has cited three cases in support of his contention that in dealing with an application under Order IX, Rule 9 of the Civil Procedure Code, contents of an affidavit or affidavits cannot be treated as evidence. In *Federal India Assurance Co. Ltd.* v. *Anandrao Pandurangrao Dixit* (1), it was held that Order XIX, Rule 2 of the Civil Procedure Code applies only to interlocutory applications and not to those of a substantive nature such as for instance

(1) (1944) Nag. 161

applications under Order XXI, Rule 90, Order XXI, Rule 100, Order XXXIII, Rule 2, Order IX, Rule 13, etc., and that substantive applications would be those which initiate proceedings, the interlocutory applications, being incidental to such proceedings and made while they are pending. In *Marneedi Satyan* v. *Masimukula Venkataswami and others* (1) also it was held that affidavit evidence is not permitted except where there is an agreement between parties that evidence may be taken by affidavit or where under Order XIX, Rule 1, Civil Procedure Code, there is an order of the Court that particular facts may be proved by an affidavit or that affidavits of any witness may be read at the hearing and that, therefore, the only basis on which the affidavit of a living person not called into the witness box can be acted upon as admissible evidence is that it should be capable of being regarded as a statement in writing complying with the conditions prescribed in section 32, Evidence Act. The latest case on the point seems to be *Gopikabai and others* v. *Narayan Govinda Samarth and others* (2). There, Deo J., who went into the matter somewhat thoroughly held that Order XIX, Rule 2, applies only to interlocutory applications like applications for attachment before judgment, etc., and does not apply to applications of a substantive nature like an application under Order IX, Rule 13 of the Civil Procedure Code. However, the matter is not free from difficulty as these decisions seem to run counter to a practice widely established of accepting affidavits and counter-affidavits in applications under Order IX, Rule 9, and Order IX, Rule 13 of the Civil Procedure Code. Therefore, as provided for in Rule 25 of

(1) A.I.R. (1949) Mad. 689. (2) A.I.R. (1953) Nag. 135.

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the Appellate Side Rules of Procedure, (Civil), as published in the High Court General Notification No. 4, dated the 27th of May, 1949, I would refer the following question for the decision of a Bench or of a Full Bench as may be directed by my lord the Chief Justice :—

"Can the contents of an affidavit or affidavits be treated as evidence in support of an application under Order IX, Rule 9 of the Civil Procedure Code, for the restoration of a suit which had been dismissed for the default of appearance of the plaintiff on his pleader ? "

APPELLATE CIVIL.

Before U Tun Byu, C.J. and U Aung Khine, J.

MRS. L. STEVENSON AND ONE (APPLICANTS)

v.

MA HLA YIN AND FOUR OTHERS (RESPONDENTS).*

H.C. 1954

March, 9.

Affidavit—Suit dismissed for default of appearance under Order IX, Rule 8, Civil Procedure Code—Application to restore suit—Affidavit presented in support—Contents, admissibility of, in evidence.

Held: Although an affidavit ought not ordinarily to be considered as evidence, it is clearly admissible as evidence if it can be brought within the purview of Order XIX of the Civil Procedure Code; the words "any application" in Rule 2 are used in a very wide sense to include applications of a substantive nature, such as an application under Order IX, Rule 9 of the Civil Procedure Code It is the duty of a Court of Law to expound the provisions of a statute in accordance with the real sense of the words used in a Statute.

Federal India Assurance Co. Ltd. v. *Anandrao Pandurangrao Dixit*, A.I.R. (1944) Nag. 161; *Gopikabai and others* v. *Narayan Govinda Samarth and others*, A.I.R. (1953) Nag. 135, dissented from.

Shib Sahai v. *Tika*, I.L.R. 18 Luck. 104 at 107, followed.

Magor and St. Mellons Rural District Council and Newport Corporation, (1952) A.C. 189 (H.L.), referred to.

Ba Shun for the applicants.

Saw Hla Pru for the respondents.

Choon Foung (Government Advocate) *Amicus Curiae.*

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The point of law which falls for consideration in the present reference reads:

"Can the contents of an affidavit or affidavits be treated as evidence in support of an application under Order IX,

* Reference made by Justice U San Maung in Civil Revision No. 39 of 1952.

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Rule 9, of the Civil Procedure Code, for the restoration of a suit which had been dismissed for the default of appearance of the plaintiff or his pleader ?"

The plaintiffs-respondents Ma Hla Yin and others instituted a suit against the two defendants-applicants in the District Court of Mandalay, where one of the pleas which was raised by the defendants-applicants was that the suit was undervalued ; and the learned District Judge held that the value of the premises mentioned in the plaint was Rs. 80,000, and not Rs. 20,000 as alleged in the plaints ; and he directed that the *ad valorem* court-fee should be paid on the higher sum of Rs. 80,000.

The plaintiffs-respondents applied to the High Court, in Civil Revision No. 45 of 1951, to revise the said order of the District Judge directing them to pay the increased court-fee ; and the application for revision was dismissed. The case in the District Court, Mandalay, was, while the revision application was pending in the High Court, adjourned from time to time ; and the last two entries in the diary order of the proceedings before the District Court read :

"29-10-51.—Received a copy of judgment in Civil Revision No. 45 of 1951 of the High Court, Rangoon, dismissing the application for revision against the order of this Court, dated the 29-5-1951.

Put up on date fixed 22-11-51."

"22-11-51.—Case called twice first at 11-15 and another at 12 a.m. No appearance for the plaintiff.

Mr. Bose for the defendant present.

The case is dismissed with costs for default."

The plaintiffs-respondents thereafter applied to the District Court, under Order IX, Rule 9, of the Civil Procedure Code, to set aside the order of dismissal for the default of appearance ; and the learned District Judge accepted the statements of

U Sein, which he made in his affidavit which was filed with the application to set aside the order of dismissal for the default of appearance passed on the 22nd November, 1951. The learned District Judge held that there was sufficient cause for the non-appearance of U Sein on the 22nd November, 1951, and he set aside the order of dismissal for the default of appearance. It might be mentioned that U Sein appeared as advocate for the plaintiffs-respondents in the District Court, Mandalay, but we were informed during the arguments that U Sein had died since. It was submitted by the learned Advocate, who appeared on behalf of the defendants-applicants in this reference, that as affidavits could not be received as evidence under the Evidence Act, the learned District Judge had acted illegally and with material irregularity in accepting and acting upon the affidavit of U Sein, and that, without U Sein's affidavit, there was no material on which the learned Judge could have passed his subsequent order to set aside the order of dismissal for the default of appearance. The learned Advocate also relied on certain decisions of the Nagpur High Court in support of his argument. It will be necessary in this reference to reproduce the provisions of Rules 2 and 3 of Order XIX of the Civil Procedure Code, which are in these words :

"2. (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated.

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(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same."

It will be observed that, although an affidavit ought not ordinarily to be considered as evidence, it is clearly admissible as evidence if it can be brought within the purview of Order XIX of the Civil Procedure Code; and, in our opinion, there can be no mistake about this proposition of law. We have also not been able to discover in *Federal India Assurance Co. Ltd.* v. *Anandrao Pandurangrao Dixit* (1), and *Gopikabai and others* v. *Narayan Govinda Samarth and others* (2), which approved the decision in the former case, anything which will indicate to the contrary in this respect.

The word "any" which precedes the word "application" in Rule 2 of Order XIX of the Civil Procedure Code, indicates that Rule 2 was intended to apply generally to all applications. We have not been able to see anything in Rule 2, or in any other rule of Order XIX, which would suggest that Rule 2 was intended to apply only to interlocutory applications, and not to "applications of a substantive nature," as was held in *Federal India Assurance Co., Ltd.* v. *Anandrao Pandurangrao Dixit* (1), and *Gopikabai and others* v. *Narayan Govinda Samarth and others* (2). With respect, we must dissent from the restricted interpretation given of Rule 2 in the two Nagpur High Court cases. The appearance of the words "except on interlocutory applications" in Rule 3 of Order XIX, also lends support to the construction that the words "any application" in Rule 2 are used in a very wide sense to include also "applications of

(1) A.I.R. (1944) Nag. 161. (2) A.I.R. (1953) Nag. 135.

a substantive nature," like the application made under Order IX, Rule 9, of the Code of Civil Procedure.

It is the duty of a court of law to expound the provisions of a statute in accordance with the real sense of the words used in a statute; and in Maxwell on the Interpretation of Statutes, tenth edition, at page 4, it was observed:

> "The rule of construction is 'to intend the legislature to have meant what they have actually expressed.' It matters not, in such a case, what the consequences may be. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous."

The head-note of the case of *Magor and St. Mellons Rural District Council and Newport Corporation* (1), also reads:

> "In the construction of a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the legislature."

There is also nothing in clause (*c*) of section 30 of the Civil Procedure Code to support the suggestion which has been advanced before us that the expression "any application" in Rule 2 of Order XIX of the Civil Procedure Code was intended to refer to interlocutory applications only. Moreover, Rule 2 of Order XIX will have to be considered to be in the nature of a special provision, and it will override the provisions of a more general provision of law, where the two provisions of law conflict and cannot be made to exist side by side.

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(1) (1952) A.C. 189 (H.L.).

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In *Shib Sahai* v. *Tika* (1), it was observed :

". . , . Rule 2 of Order XIX of the Code of Civil Procedure puts the matter further beyond doubt. This rule is to the effect that upon any application evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent. It was perfectly open to the lower court to have ordered the production of the witness, either of its own motion or at the instance of the defendant, for cross-examination in order to satisfy itself about the truth of the allegations in the affidavit. It does not appear from the record that the defendant's counsel asked the court to order the attendance of the plaintiff so as to give him an opportunity to cross-examine him, nor did the court *suo motu* think it necessary to order the plaintiff's attendance. . . . ."

The above observations apply appositely to the matter now under reference, and they express the view which the Courts in Burma have all along adopted.

For the reasons which we have set out above, the answer to the reference will be in the affirmative. Each party will bear its own costs so far as this reference is concerned.

U AUNG KHINE, J.—I agree.

(1) I.L.R. (1943) 18 Luck. 104, at 107.

APPELLATE CIVIL.

Before U San Maung, J.

SIDDIQUE AHMED (APPLICANT)

v.

HABIBAR RAHMAN AND EIGHT OTHERS (RESPONDENTS).*

H.C. 1954

Mar. 20.

Legal Practitioner—Fiduciary relation with client—Appearance for other party, not forbidden by law, but open to grave misconception, therefore highly improper—Court, when should disallow such appearance.

Held : If an advocate had appeared on behalf of a client and had in the course of his employment been made acquainted with any secrets of his client which is a fair presumption, he should not be permitted to appear against that client after the termination of his employment if he might utilise those secrets to his former client's prejudice.

In the matter of Mr. Ram Lal Anand, Advocate, High Court of Judicature at Lahore, 27 Lah 173 ; *Emperor* v. *Shanti Narain Manocha*, A.I.R. (1946) Lah 329, distinguished.

Mary Lilian Hira Devi v. *Kunwar Digbijai Singh*, A.I.R. (1917) (P.C.) 80 ; *Maung Sein Gyi* v. *J. Maneckjee*, 8 Ran. 44 ; *U Ko Ko Gyi* v. *U San Mya*, 8 Ran. 446, followed.

Aung Min (1) for the applicant.

B. B. Sen for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 1 of 1952 of the District Court of Prome Habibar Rahman and eight others sued Siddique Ahmed for partition of the properties specified in the Schedule attached to the plaint and for an order directing the defendant to account for the profits accruing from these properties. One of the items of properties mentioned in the Schedule is a sawmill situated in Prome Township. The plaintiffs allege that they are

* Civil Revision No. 109 of 1952 against the order of the District Court, Prome, in Civil Regular Suit No. 1 of 1952.

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U SAN MAUNG, J.

the heirs of Mosibar Rahman who died in India in the year 1935 and that Mosibar Rahman and the defendant Siddique Ahmed who were half brothers were the joint owners of the properties in suit. The first, second and third plaintiffs are the brothers and sister of Mosibar Rahman, the fourth plaintiff is the widow of Naimuddin Ahmed, brother of Mosibar Rahman, and the 5th to 9th defendants are the children of Naimuddin Ahmed. One of the allegations contained in the plaint is that after the death of Mosibar Rahman an agreement was arrived at between Naimuddin Ahmed and Habibar Rahman for and on behalf of the heirs of Mosibar Rahman on the one part and the defendant Siddique Ahmed on the other, by which the defendant was put in possession of the mill for which he was to pay an annual rent of Rs. 2,000 to the heirs of Mosibar Rahman and that owing to the failure of Siddique Ahmed to keep his part of the agreement the heirs of Mosibar Rahman are no longer willing to allow him to be in possession of the properties in suit including the saw-mill.

The defendant Siddique Ahmed in his written statement admits that the properties in suit belonged to him and to the deceased Mosibar Rahman in equal shares. He however contends that the heirs of Mosibar Rahman, who are residents of East Pakistan, never intended to come to settle down in Burma and that therefore in or about February, 1947, they had come to an agreement with him, whereby the properties in suit became his properties, while the properties in Pakistan became their absolute properties.

During the progress of the case an application was filed by the first plaintiff Habibar Rahman objecting to the appearance of U Khin Maung,

pleader for the defendant, on the ground that U Khin Maung had been given instructions by him concerning the facts of the case which had been filed by the plaintiffs during 1951 when the plaintiffs by their agent Habibar Rahman gave a notice, Exhibit ∞, to the defendant. Habibar Rahman in the affidavit in support of his application states that at the time he gave instructions for the issue of that notice he had given U Khin Maung all the facts of the case. U Khin Maung in a counter affidavit states that the only instructions that were given were in respect of non-payment of rent due by Siddique Ahmed and that no confidential information had passed concerning the matters now in dispute such as would prejudice the plaintiffs were he to appear on the opposite side. The learned District Judge, however, on a consideration of the two affidavits and of the contents of the notice Exhibit ∞ came to the conclusion that U Khin Maung had received all the instructions which would be necessary for the purpose of the present suit as well. In the result he allowed the application of the plaintiff Habibar Rahman with costs. Hence this application for revision by the defendant Siddique Ahmed.

Now, I have carefully read the plaint and the written statement as well as the notice Exhibit ∞ and I am of the opinion that the probabilities are that certain informations were given to U Khin Maung which could embarrass the plaintiffs in the conduct of the present suit. In that notice it is stated that since the death of Mosibar Rahman there had been an amicable arrangement between the heirs of Mosibar Rahman and Siddique Ahmed whereby the defendant was to be in possession of the mill premises and other properties for which he was to pay an annual rent of Rs. 2,000 to the heirs

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of Mosibar Rahman in respect of the mill but that when in the year 1947 Habibar Rahman as representing the heirs of Mosibar Rahman demanded a settlement the defendant told him before elders that he could not pay Habibar Rahman alone as there were other co-heirs whose power of attorney Habibar Rahman had not yet obtained, etc. This indicates that at the time Habibar Rahman gave instructions to U Khin Maung the whole matter regarding the settlement between the heirs of Mosibar Rahman and Siddique Ahmed had been discussed by him with U Khin Maung who was then his legal adviser.

In the matter of Mr. Ram Lal Anand, Advocate, High Court of Judicature at Lahore (1) it was held by a Full Bench of the Lahore High Court that although change of sides by a legal practitioner is not forbidden by law, there should be no change of sides if there are confidential communications by one side which may be made use of when the lawyer represents the other party. This was a case under section 13 of the Legal Practitioners Act and clause 8 of the Letters Patent for the taking of disciplinary action against Mr. Ram Lal Anand. In *Emperor* v. *Shanti Narain Manocha* (2), another case of a similar nature, it was held that it was no breach of confidence on the part of the pleader in changing sides as no confidential information was imparted to him by the plaintiff. In *Mary Lilian Hira Devi* v. *Kunwar Digbijai Singh* (3) it was laid down by their Lordships of the Privy Council that it is improper for a legal practitioner who has acted for one party in a dispute, acting for the other party in subsequent litigation between them relating to or

(1) 27 Lah. 173. (2) A.I.R. (1946) Lah. 329. (3) A.I.R. (1917) (P.C.) 80.

arising out of that dispute as such conduct is open to misconception and is likely to raise suspicion in the mind of the original client and to embitter the subsequent litigation. Two cases of the old High Court of Judicature at Rangoon are apposite. In *Maung Sein Gyi* v. *J. Maneckjee* (1) it was held that although a legal practitioner may change sides, the Court should not allow him to appear for the other party if such conduct is likely to cause mischief or reasonable misapprehension in the mind of his late client. The test therefore seems to be whether reasonable misapprehension is likely to be caused in the mind of the late client of a legal practitioner. In *U Ko Ko Gyi* v. *U San Mya* (2) Baguley, J. reviewed a number of cases bearing on the subject and observed as follows :

"The principle that emerges from all these cases appears to be that if an advocate had appeared on behalf of a client and had in the course of his employment been made acquainted with any secrets of his client, he is not permitted to appear against that client after the termination of his employment if he might utilise those secrets to his former client's prejudice."

As to the manner how an application for revision such as the present should be treated Brown, J., has made the following remarks :

"The question we have to consider here is not whether we should issue an injunction but whether we should interfere with the action of the District Court in refusing to allow the appellant to appear in that Court. The real test appears to be whether confidential information was acquired by the appellant as the result of the interviews with the respondent which might be of use to him in conducting the case for the other side * * * In all the circumstances of the case, although there is no direct proof of any confidential information having passed, I think it is a fair presumption that some such communication did pass from the respondent to the appellant."

(1) 8 Ran. 44. (2) 8 Ran. 446.

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U SAN MAUNG, J.

In the present case also I consider that it is a fair presumption that some confidential information has passed such as is likely to cause an apprehension in the mind of the plaintiff Habibar Rahman that his erstwhile legal adviser would use it to his opponent's advantage.

In the result the application for revision fails and must be dismissed with costs; Advocate's fee three gold mohurs.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, J.

U BA KHIN (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1954

June 17.

Criminal Procedure Code, s. 526—Application for transfer of case—Paramount duty of trial Magistrate—Courtesy calls and fraternization between Magistrate and prosecuting Government official deprecated—Apprehension of accused, and not existence of bias, deciding factor.

Held : For purposes of transfer on grounds set out in clause (*a*) sub-s. (1) of s. 526 Criminal Procedure Code, it is not necessary to establish actual bias in the mind of the Magistrate concerned. What should be considered is whether incidents that took place before the Magistrate are such as are calculated to create in the mind of the applicant for transfer a reasonable or justifiable apprehension that he would not have a fair or impartial trial.

M. De Carmo Lobo v. *G. C. Bhattacharjee*, A.I.R. (1937) Ran. 272, followed.

Ba Shun for the applicant.

Maung Maung (Government Advocate) for the respondent.

U CHAN TUN AUNG, J.—This is an application for transfer of the Criminal Regular Trial No. 34 of 1953 from the Court of the Subdivisional Magistrate, Kanbalu, Shwebo District, to any other competent Court in Shwebo. The applicant U Ba Khin is a timber trader residing at Kanbalu and he has been standing trial for an offence under section 58 (*a*) read with Rule 22 of the Forest Act. It appears that the prosecution under the said Act was launched at

* Criminal Misc. Application No. 3 of 1954 for transfer of Criminal Regular Trial No. 34 of 1953 from the Court of the Subdivisional Magistrate, Kanbalu.

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U CHAN TUN AUNG, J.

the instance of one Saw Abbot, Revenue Assistant, Shwebo, after necessary enquiry into the alleged offence by U Shwe Zin, the Divisional Forest Officer. It also appears that U Shwe Zin made the preliminary enquiry against the applicant and thereafter certain demands for compensation for the alleged offence were made from the applicant. It was only after applicant's failure to make the payment, was the order for the prosecution of the applicant given by U Shwe Zin. The criminal trial record shows that U Shwe Zin figured as one of the prosecution witnesses. He was examined by the Subdivisional Magistrate Mr. T. C. Matthews on the 22nd July 1953. As a matter of fact, the complaint laid before the Subdivisional Magistrate Mr. Matthews was approved by U Shwe Zin before it was filed on the 15th May 1953. The applicant, had in fact, on grounds which have now been put forward before this Court, sought for transfer of the pending case to a Court in Shwebo, before the District Magistrate in his Criminal Miscellaneous Application No. 7 of 1953, but he was unsuccessful.

The main grounds now taken by applicant for transfer are *inter alia* as follows:

(1) On the days fixed for hearing of the case, U Shwe Zin, the Divisional Forest Officer, went *two* or *three* times into Mr. Matthews' chambers and there he was seen talking very familiarly with Mr. Matthews before the hearing began on the days fixed.

(2) During the pendency of the case, when U Shwe Zin came to Kanbalu to give evidence, he was seen visiting Mr. Matthews' house twice at Kanbalu.

(3) At one time during the pendency of the case when Mr. Matthews went over to Shwebo in connection with Pyidawtha Conference, U Shwe Zin

met Mr. Matthews at the railway station and took him in U Shwe Zin's jeep to U Shwe Zin's house at Shwebo where Mr. Matthews put up for few days while attending the Conference at Shwebo.

There are, however, some other grounds, but I do not propose to consider them as they are, for the present purpose not of much significance. To these assertions, though, U Shwe Zin conceded that he did visit and he did see the Magistrate in his chambers during the pendency of the case, he replied that they were merely official courtesy calls which a district official used to make whenever they visited administrative officers who were stationed at a place outside the district headquarters. U Shwe Zin did not however specifically deny that he met the Subdivisional Magistrate in his jeep at the railway station and that the Subdivisional Magistrate put up in his house when he (the Subdivisional Magistrate) came to Shwebo for the Pyidawtha Conference. In fact, Mr. Matthews himself in a report made to the District Magistrate, before whom the applicant made his first application for transfer, admitted that during the pendency of the case he, out of courtesy, invited U Shwe Zin to have tea with him. He also admitted that on invitation by U Shwe Zin he once put up at U Shwe Zin's house in Shwebo when he went down to that place for the District Pyidawtha Conference. But he averred that though he was friendly with the Divisional Forest Officer U Shwe Zin, yet he had shown no favour to the prosecution in any way. In other words, what the learned Subdivisional Magistrate asserts is that inspite of these friendly or familiar gestures shown by him and by U Shwe Zin, no motive to show favour or bias should be attributed to him in the trial of criminal case in which the applicant is concerned.

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U CHAN TUN AUNG, J.

From the facts appearing in the application which are not seriously disputed by the learned Subdivisional Magistrate and also by U Shwe Zin, the question for consideration is whether the applicant has made out a good ground for transfer as laid out in sub-section (1) of section 526 of the Criminal Procedure Code. It may be observed that clause (*a*) of sub-section (1) of section 526, Criminal Procedure Code, provides that transfer may be made by the High Court when it is made to appear that a fair and impartial enquiry or trial cannot be had in a subordinate Court. There are numerous judicial decisions on this point and they clearly indicate that where there is a reasonable apprehension in the mind of the accused that a fair and impartial trial cannot be had before the Court in which the trial is pending against him a transfer would be allowed. What is reasonable apprehension is, of course, to be decided in each case with reference to facts and surrounding circumstances obtaining therein. Now, in the case under consideration, I do not really understand why the learned Subdivisional Magistrate should have been found acting so familiarly with U Shwe Zin knowing full well that the applicant was standing trial before him in a prosecution launched at U Shwe Zin's instance. The learned Subdivisional Magistrate should have realized that this familiarity or friendly gesture with the Divisional Forest Officer, especially during the pendency of the case, would raise an apprehension in the mind of the applicant that he would not get a fair and impartial trial. It need hardly be pointed out that it is of great importance that when a person is an accused before a criminal Court he should have confidence in the impartiality of the Court before whom he is being tried; and with reference to any incidents that might take place

during the pendency of the case we do not, for purposes of transfer on grounds set out in clause (*a*), sub-section (1) of section 526, Criminal Procedure Code, consider whether there is actual bias in the mind of the magistrate or not as against one of the parties, but we are more concerned with the apprehension entertained by one of them appearing before him. Thus, it is not necessary to establish actual bias in the mind of the Magistrate concerned. What should be considered is whether incidents that took place before the Magistrate are such as are calculated to create in the mind of the applicant seeking for transfer a reasonable or justifiable apprehension that he would not have a fair or impartial trial. See the case of *M. De Carmo Lobo* v. *G. C. Bhattacharjee* (1). Considering the facts and circumstances disclosed in this case, I must hold that the acts and conduct on the part of the Subdivisional Magistrate and also those of the most important prosecution witness U Shwe Zin, are such as would raise a reasonable apprehension in the mind of the applicant that he would not get a fair and impartial trial.

For the said reasons, I would therefore transfer the Criminal Regular Trial No. 34 of 1953 now pending in the Court of the Subdivisional Magistrate, Kanbalu, to any other competent Magistrate in Shwebo whom the District Magistrate may select in that behalf.

(1) A.I.R. (1937) Rang. p. 272.

APPELLATE CIVIL.

Before U San Maung, J.

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April 1.

U OHN PE AND ONE (APPELLANTS)

v.

MR. V. J. MUNRO BY AGENT MR. W. J. MUNRO (RESPONDENTS).*

Urban Rent Control Act, ss. 12 (1), 13 (1) (a) and (b)—Tenants in occupation by permission of Rent Controller—Waste and deterioration of property—Felling of tree providing fruit and shade without consent of owner—Grounds for ejectment.

Held: A mango tree is undoubtedly valuable not only because of the fruit it bears but because it offers good shade in the garden. Unless the appellants could give satisfactory evidence in proof of the fact that the tree was a danger to the house they must be deemed to have committed an act of waste by which the premises had deteriorated in value, and can therefore be ejected under s. 13 (*1*) (*a*) and (*i*) of the Urban Rent Control Act.

R. Jaganathan for the appellants.

Hla Thein for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 998 of 1950 of the City Civil Court, Rangoon, the appellant U Ohn Pe and Daw Chone were sued by the respondent Mr. V. J. Munro by his agent Mr. W. J. Munro for their ejectment from the house in suit namely No. 8, Ching Tsong Avenue, Kokine, Rangoon. This house belonged to the respondent and the appellants were in occupation thereof with the permission granted by the Controller of Rents under section 12 (*1*) of the Urban Rent Control Act. It is alleged by the respondent that the appellant had not only been in

* Civil 1st Appeal No. 136 of 1952 against the decree of the City Civil Court, Rangoon, in Civil Regular No. 998 of 1950.

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arrears of rent but that he had committed acts of waste causing deterioration of the premises in suit and that he should therefore be ejected therefrom under section 13 (*1*) (*a*) and (*b*) of the Urban Rent Control Act. The fact that there was arrears of rent is admitted. However, the appellant denied that they had committed any act of waste. The learned trial Judge after an examination of the witnesses cited by both parties came to the conclusion that there was no proof in regard to the alleged destruction of the garden, out-houses and the wooden gate as alleged by the respondent. He, however, held that the appellant had cut down a large mango tree in the garden and thus causing deterioration in the value of the house by depriving it not only of a fruit bearing tree but also the benefit of the shade from that tree. He also held that the pucca foundation at the back of the house had been destroyed by the appellants. He accordingly gave a decree to the respondent as prayed for by him.

The question now to be determined is whether the appellants had cut down the mango tree with or without the permission of the respondent's agent and whether the removal of the tree was an act of waste causing deterioration to the respondent's property.

It is the respondent's case that the tree was endangering the house because it was an old tree with overhanging branches over the roof and that he had to cut it down with the permission of the respondent as a measure of safety. However, of the witnesses cited by him, U Ba Zin (DW 1), although stating that the tree was an old one, never said that the house was in danger because of that tree. He never knew of any permission having been granted to the respondent to fell that tree. U Ba Aye (DW 3) stated

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that he was present at the time of the conversation between the appellant U Ohn Pe and the respondent's agent regarding the tree but had to admit that he could not understand what they were saying as they were speaking in English, a language which he did not understand. U Sein (DW 2) no doubt stated in his examination-in-chief that he overheard the conversation between the appellant U Ohn Pe and the respondent's agent regarding the mango tree. U Ohn Pe was heard to say that the mango tree was an old one which should be felled because of the danger to the house and the respondent's agent was also heard to reply that the tree should be felled. However, in cross-examination, this witness admitted that he did not know whether or not the appellant U Ohn Pe received permission from the respondent's agent to fell that tree.

The respondent's agent in giving evidence on oath denied that such permission was ever asked for or granted by him. On the other hand, he stated that he was so incensed at the appellants' conduct in felling the tree without his permission that he made a report of the matter to the Police, a fact supported by his witness U Mya Sein who was at the time of the occurrence of this case the guard-writer of the Bahan Police Station.

The learned trial Judge on a review of the evidence on this point came to a finding that the tree in question was felled without any permission having been given to the appellants and sitting as a Court of Appeal, I am not prepared to come to a contrary decision. The mango tree is undoubtedly valuable not only because of the fruit it bears but because it offers good shade in the garden. Therefore unless the appellants could give satisfactory evidence in proof of the fact that the tree was a danger to the house they must be deemed

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to have committed an act of waste by which the premises in suit had deteriorated in value. In my opinion, there is no satisfactory evidence on record to show that it was necessary to cut down the tree because it was a source of danger to the house.

In this view of the case, it is unnecessary to consider whether or not the appellant had removed the brick foundation behind the house and whether this was an act of waste causing deterioration to the property. In the result, the judgment and decree of the trial Court must be confirmed and the appeal dismissed with costs. Advocates' fees three gold mohurs.

APPELLATE CIVIL.

Before U Tun Byu, C.J. and U Chan Tun Aung, J.

H.C 1954

June 23.

U SEIN WIN & Co., LTD. (In voluntary liquidation) By one of its Liquidators U Ba (APPELLANT)

v.

THE STATE AGRICULTURAL MARKETING BOARD (GOVERNMENT OF BURMA) By the Chairman (RESPONDENT).*

Arbitration Act, 1940—S. 30 (a)—Dispute regarding payment of compensation in paddy contract—Referred to arbitrator by one party as per clause in agency agreement—Misconduct of arbitrator, what constitutes.

Held: As the claims of the Company for various sums of money had not been acquiesced to, it follows that a dispute had arisen between the Company and the Board for which a reference could be made to arbitration under clause 21 of the Agreement.

Held also: It is not necessary to allege any dishonesty or moral turpitude to attribute legal misconduct on the part of an arbitrator, which term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice.

Williams v. *Wallis and Cox*, (1914) 2 K.B. 478 at 485; *Aboobaker Latif* v. *Reception Committee of the 48th Indian National Congress and another*, A I.R. (1937) Bom. 410 at 411; *Messrs. Khusiram Benarshilal* v. *Messrs. Mathuradass Goverdhandass*, (1947-48) C.W.N. 826 at 831, followed.

Ram Narain Gunga Bissen v. *Liladhur Lowjee*, (1906) 33 Cal. Series 1237; *Udaichand Panna Lall* v. *Debibuv Jewanram*, (1920) 47 Cal. Series 951: *The Grahams Trading Co. (India) Ltd.* v. *Chandulal Parmanand*, A.I.R. (1935) Sind 228, discussed.

P. K. Basu for the appellant.

Ba Shun for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—This is an appeal against the order of the learned Judge on the Original Side,

* Civil Misc. Appeal No. 54 of 1952 against the order of the High Court, (Original Side) in Civil Misc Case No. 109 of 1951.

passed against U Sein Win & Co., Ltd. (in voluntary liquidation), hereinafter called "the Company", in Civil Miscellaneous Case No. 109 of 1951 of the Original Side of the High Court, which set aside the award, made by the sole arbitrator in favour of the Company for the payment of a sum of over four lakhs of rupees by the State Agricultural Marketing Board, hereinafter called "the Board."

The Company became, in pursuance of the Agreement, dated the 29th January, 1947, an agent of the Agricultural Projects Board, which was the predecessor of the State Agricultural Marketing Board, for the purchase of paddy, rice and rice products in the areas known as Zone No. 7 of Pegu South. Subsequently, widespread lootings of paddy and rice occurred in the said areas; and a Committee was constituted, under the Lootings of Rice and Paddy Enquiry Act, 1947, which was to enquire into—

"(*a*) the extent and value of the loss resulting from cases of looting of rice-mills, godowns, etc., in Burma . . . . referred to the Committee by the Agricultural Projects Board;

(*b*) to what extent the commodities and articles looted in each case are deemed to be the property of the Agricultural Projects Board, the rice millers and other parties concerned; and

(*c*) consequent on (*b*) above, how the loss resulting from each looting incident is to be apportioned between the parties who have suffered by the looting."

This Committee was said to have investigated into 27 cases of lootings in the said areas, which were alleged to have occurred at the mills and godowns of

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the Company. The Committee considered that the conduct of the employees of the Company were not wholly above suspicion in four cases; and in pursuance of the reports which the Company submitted in respect of those four cases, the State Agricultural Marketing Board withheld payment of large sums of money, which were said to be due to the Company. The Company protested against the action of the Board in withholding payment of the moneys that were said to be due to them. On the 28th October, 1950, the Company sent a lawyer's notice, Exhibit F, to the Board, in which they protested against the delay in the payment of moneys due to them. The Company wrote to the Board again on the 14th December, 1950, in which they intimated that they had nominated U Ba Pe, ex-Minister of Commerce and Supply, as arbitrator in pursuance of clause 21 of the Agreement. They also enclosed a copy of the letter which they sent to U Ba Pe, in which they informed him that they had nominated him as arbitrator. The State Agricultural Marketing Board, in their reply, dated the 27th December, 1950 contended that no dispute or controversy had arisen to require a reference to arbitration under clause 21 of the Agreement; and they accordingly made no effort to appoint an arbitrator as desired by the Company. The Company, in their reply Exhibit J, dated the 30th December, 1950, contended that a dispute had arisen within the meaning of clause 21 of the Agreement and stated that they had appointed U Ba Pe, ex-Minister of Commerce and Supply, as the sole arbitrator under section 9 (*b*) of the Arbitration Act, 1944. The Board's reply to Exhibit J letter has been filed as Exhibit K, dated the 11th January, 1951, in which the Board again repeated their contention that no

dispute had arisen between them and the Company to require them to appoint an arbitrator.

In the meanwhile, the arbitrator sent the Exhibit L notice, dated the 7th January, 1951, requiring the Board to appear before him on the 22nd January, 1951, but this notice was not received by the Board before they sent their letter, dated the 11th January, 1951 to the Company. We might mention that the arbitrator also sent the particulars of the claims and counter-claims of the Company along with the notice, which he issued on the 7th January, 1951. On the 17th January, 1951, the Board wrote to the arbitrator in answer to the notice which the latter issued on the 7th January, 1951, in which the Board repeated their earlier contention that no dispute had arisen to require a reference to arbitration. On the 22nd January, 1951, the arbitrator held that a dispute had arisen for the purpose of clause 21 of the Agreement and that he had jurisdiction to proceed as sole arbitrator in the matter in dispute.

The learned Judge on the Original Side observed on this aspect of the case as follows :

> " . . . . The attitude adopted by the Board through its Chief Executive Officer, the Chairman, was clearly the result of an unfortunate want of a just and proper appreciation of the legal aspects of the Company's claims. The objection that there was no dispute at the time the Company decided to refer its claims against the Board to arbitration is therefore without any substance, ... "

It appears to us to be clear from the brief statement of facts set out earlier that the finding of the learned Judge on the Original Side that there was a dispute for the purpose of clause 21 of the Agreement is correct; and it has not been contended to the contrary before us in this appeal. The dispute, so

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far as the Company is concerned, is whether they were entitled to the payments which they claimed; and as their claim for the payment of various sums of money had not been acquiesced to, it must necessarily follow that a dispute had arisen between the Company and the Board for which a reference to arbitration could be made under clause 21 of the Agreement.

The point which requires careful consideration in the present appeal is, whether it can, in the circumstances of the present case, be properly said that the arbitrator has been guilty of legal misconduct in the arbitration proceeding which came before him. In considering such question, one ought to bear in mind that the proceeding before an arbitrator is in the nature of quasi-judicial enquiry and that the arbitrator can, in suitable circumstances, proceed with the hearing *ex parte*. It seems to us that the arbitrator acted rightly in issuing the Exhibit N notice to the Board, intimating that the hearing had been fixed for the 7th February, 1951, and that in default of appearance, the case would be proceeded with in the absence of the Board.

The Company had not however filed their statement of claims before the arbitrator even on the 7th February, 1951, and in fact, the Company had to ask for time to be extended on not less than four occasions to enable them to file the statement of claims before the arbitrator. It was only on the 29th March, 1951, that the statement of claim, which consisted of 55 pages, was filed before the arbitrator, and the diary order of that date reads:

"Case called. U Ba Liquidator for claimant Company appeared and filed statement of claims. He stated that copy

of the statement of claims has been sent by his Advocates to Agricultural Secretary and Chairman, S.A.M.B.

Issue summons to each of them to file objection on or before 4-4-51 and to appear with witnesses for final hearing on 5-4-51.

Hearing to proceed until the case is finished."

The above order is clearly prejudicial to the Board; and the arbitrator could, in the circumstances, be said to have been guilty of legal misconduct in passing the order of the 29th March, 1951 in view of the wide wording which appears in clause (*a*) of section 30 of the Arbitration Act, 1944; and it is not necessary for this purpose to allege any dishonesty or moral turpitude on the part of the arbitrator. It was observed in *Williams* v. *Wallis and Cox* (1):

"With regard to the main question it appears to me that the deputy county court judge formed a misconception as to the meaning of 'misconduct'. That expression does not necessarily involve personal turpitude on the part of the arbitrator, and any such suggestion has been expressly disclaimed in this case. The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice, and one instance that may be given is where the arbitrator refuses to hear evidence upon a material issue."

There was clearly, in our opinion, a mishandling of the proceeding in the present case when the arbitrator passed the order of the 29th March, 1951, because it would be unreasonable to expect the objection to the statement of claim to be filed in six or seven days when the statement of claim, which had been filed before him was clearly very long and complicated and would obviously require careful study. It was clearly unfair to expect the Board to be ready not only with their written objection in six or seven days, but that they should also be ready

(1) (1914) 2 K.B. p. 478 at p. 485.

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with their witnesses in the short space of seven or eight days. The case of *Williams* v. *Wallis and Cox* (1) was referred to with approval in the case of *Aboobaker Latif* v. *Reception Committee of the 48th Indian National Congress and another* (2). The expression " misconduct " was also considered in the case of *Messrs. Khusiram Benarshilal* v. *Messrs. Mathuradass Goverdhandass* (3), where it was stated :

" ' Misconduct ' is an ambiguous word and includes any mishandling of the arbitration proceedings or any neglect of duty on the part of the arbitrators which is likely to lead to substantial miscarriage of justice."

This case was decided after the Arbitration Act, 1944 was enacted. The introduction of the words " of proceeding " in clause (*a*) of section 30 of the Arbitration Act, 1944 indicates that the expression " misconduct " appearing in that section was intended to be construed widely. What will constitute misconduct for the purpose of clause (*a*) of section 30 of the Arbitration Act, 1944, will however depend on the circumstances of each case.

In the present case, the diary orders of the proceeding which came before the arbitrator show clearly that the Company had not prepared their statement of claim when the proceeding was initiated before the arbitrator; and it was only after repeated adjournments had been obtained from the arbitrator that the Company was able to file their statement of claim before him, and that was only on the 23rd March, 1951. The claims of the Company comprised of nine items of claims, which amounted, in all, to over four lakhs of rupees. Thus, the value of the Company's claim before the arbitrator could be said to

(1) (1914) 2 K.B., p. 478 at p. 485. (2) A.I.R. (1937) Bom. 410 at 411.
(3) (1947-48) 52 C.W.N. p. 826 at p. 831.

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be very large and complicated, particularly when the statement of claim consisted of no less than 55 pages. It was accordingly unreasonable to expect the State Agricultural Marketing Board to file their objection to the statement of claim within a week or so, or to expect the Board to be ready with their witnesses within such short space of time. Moreover, the arbitrator must have realised from the outset that the State Agricultural Marketing Board were at first unable to appreciate the exact points of the dispute, *vide* the Board's letters Exhibits H, K, M and O. The six or seven days' time allowed to the State Agricultural Marketing Board within which they were to file their objection and to procure their witnesses for the hearing was therefore manifestly inadequate, and unreasonable. The proceedings before the arbitrator could, therefore, be described as clearly irregular and prejudicial to the Board. The Chairman of the Board in paragraph 10 (*a*) of his affidavit, dated the 27th September, 1951, stated:

"(*a*) The issue of summons by U Ba Pe on the 29th March 1951 to the Board to answer the Company's claims on the 4th and 5th April 1951 was improper and hasty in view of the fact that U Ba Pe should have known that it was physically impossible for the Board to give a proper reply within so short a time to Messrs. Basu & Venkatram in respect of the Company's Statement of Claims which was typed out on 55 (fifty-five) sheets of paper."

We accept the above statement of the Chairman of the State Agricultural Marketing Board. We also accept the statement of the Executive Officer (Enquiry) of the State Agricultural Marketing Board, set out in paragraphs 30 and 31 of his affidavit, dated the 27th September 1951, which is also to the same effect:

"30. I say that having regard to the complicated nature of the case now under consideration, it was physically impossible for the Officers concerned to compile within a few

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days all the relevant statements and connected papers for giving proper instructions to the Attorney-General to ascertain the nature of dispute between the Company and the Board as proposed by the Company's Advocates, Messrs. Basu & Venkatram. The Company's Statement of Claims is a lengthy one. It is typed on 55 (fifty-five) sheets of paper. It took me some hours to go through it and I had to read it again and again to understand it as I was responsible for the preparation of notes for the Chairman of the Board and the Attorney-General.

31. I say that after I had collected all the relevant statements and the connected papers from the Departments concerned, I sent them to the Office of the Attorney-General for legal advice."

The State Agricultural Marketing Board sent a letter to the Company's Advocates on the 2nd April, 1951, asking for a more concise statement of the Company's claim; and a copy of this letter was sent to the arbitrator. This is therefore not a case where the Board had refused to participate in the proceeding before the arbitrator.

The cases of *Ram Narain Gunga Bissen* v. *Liladhur Lowjee* (1), *Udaichand Panna Lall* v. *Debibux Jewanram* (2), *The Grahams Trading Co. (India) Ltd.* v. *Chandulal Parmanand* (3) had been referred to on behalf of the Company during the argument before us. Those were cases, in which the opposite party could be said to have definitely refused to appear before the arbitrator, whereas it could not, when the circumstances of the present case are carefully scrutinized, be said that the State Agricultural Marketing Board had refused to participate in the arbitration proceeding, especially in the light of the letter which the Board wrote to the Company on the 2nd April, 1951, a copy of which

(1) (1900) 33 Cal. Series, 1237. (2) (1920) 47 Cal. Series, p. 951.
(3) A.I.R. (1935) Sind p. 228.

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was sent to the arbitrator. The arbitrator could, in the circumstances, be said to have acted irregularly and unreasonably in proceeding with the hearing *ex parte* on the 5th April, 1951. The learned Judge on the Original Side, therefore, had sufficient materials before him on which he might properly and justly arrive at the conclusion which he did.

It was submitted by the learned Advocate, who appeared on behalf of the appellant-Company, that the matter in dispute, even if the Court were to hold against the Company on the point involved in this appeal, should be remitted back for the dispute to be decided by arbitration. We do not consider, in view of what has already occurred, that it will be advisable to accede to such request. Moreover, the Company had since instituted a suit for the claims that came before the arbitrator. The appeal is accordingly dismissed with costs, K 170 (One hundred and seventy kyats only).

APPELLATE CIVIL.

Before U Tun Byu, C.J. and U Aung Khine, J.

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Mar. 24.

U THA HLA (APPELLANT)

v.

THE MUNICIPAL CORPORATION OF RANGOON AND TWO OTHERS (RESPONDENTS).*

Specific Relief Act, s. 45—Suit for directions to enforce performance—Tenancy of refreshment stall under Municipal Corporation control—Recommendation of Commissioner for three years tenancy to appellant—Accepted for one year only by resolution of Committee—City of Rangoon Municipal Act, Chapter VI, Schedule I—Suit not tenable, as another remedy available.

Held : The minutes of the meeting of the Municipal Corporation show that the Corporation decided to grant the right of occupancy of the refreshment stall to U Tha Hla for a period of one year at Rs. 250 per month ; under paragraph 7 of the Rangoon Municipal Act, Chapter VI of Schedule I, the Commissioner can in, no sense be said, in the present case, to have decided to grant the right of occupancy for a period of three years.

Held also : If the appellant is right in his allegation that the right to occupy the stall for three years had been granted to him, it becomes a case where he could have claimed for damages if he is allowed to hold the refreshment stall for a period of one year only, in contravention of what had been actually granted to him.

Ba Maung for the appellant.

C. C. Khoo for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The appellant U Tha Hla, in brief, applied on the Original Side of the High Court under section 45 of the Specific Relief Act for an order to direct the Municipal Corporation of Rangoon, the Mayor and the Secretary of the Municipal Corporation of Rangoon, to grant to him

* Civil Misc. Appeal No. 44 of 1952 against the order of the High Court (Original Side) in Civil Misc. No. 54 of 1951.

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the right of occupancy of a refreshment stall, which is situated at the north-east corner of the Bandoola Square, for a period of three years, at the rate of Rs. 250 per month. His application, which was known as Civil Miscellaneous No. 54 of 1951 was dismissed by the learned Judge on the Original Side on the 13th June, 1952

It appears that U Tha Hla obtained a right of occupancy of the refreshment stall for three years from the 1st February, 1947 to the 1st February, 1950 at the rate of Rs. 300 per month, which was afterwards reduced to Rs. 250 per month. Subsequently, the Municipal Corporation of Rangoon invited tenders for the disposal of the right of occupancy of the refreshment stall at the north-east corner of Bandoola Square, and U Tha Hla was said to have submitted a tender, at Rs. 200 per month, for a right to occupy the refreshment stall, for a period of three years. The Commissioner of the Municipal Corporation of Rangoon was said to have recommended for the grant of the right of occupancy of the refreshment stall for three years to U Tha Hla, at Rs. 200 per month, and he submitted the papers to the Finance Committee of the Municipal Corporation of Rangoon for its approval. The Finance Committee, however, considered that fresh tenders ought to be called for ; and the matter was brought up before the meeting of the Municipal Corporation of Rangoon held on 13th June, 1950. There, on a proposal made by U Min Oh, one of the Municipal Councillors, a resolution was passed to grant the right of occupancy of the refreshment stall to U Tha Hla for a period of one year, at Rs. 250 per month. The case for the respondents, in short, is that the Municipal C orporation of Rangoon had passed a resolution to grant a right of occupancy of

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the refreshment stall to U Tha Hla for a period of one year only, that the resolution was in order and that U Tha Hla was not entitled to the issue of the order he claimed in view of the provisions of section 45 of the Specific Relief Act.

We must say at once that we are also of the same opinion as the learned Judge on the Original Side that the application of U Tha Hla must be dismissed, even on the merits. The minutes of the meeting of the Municipal Corporation of Rangoon held on the 13th June, 1950 shows that the Municipal Corporation of Rangoon, at its monthly meeting decided to grant the right of occupancy of the refreshment stall to U Tha Hla for a period of one year, at Rs. 250 per month. The minutes were confirmed at the next monthly meeting of the Municipal Corporation of Rangoon ; and U Min Oh, who made the proposal to grant the right of occupancy to U Tha Hla at the monthly meeting in June, 1950, also admitted in his statement made at the Original Side that the minutes of the meeting of June, 1950 were confirmed in the subsequent month of July, 1950. There is also nothing on the record to show that the minutes of the meeting of the Corporation of Rangoon held on the 13th June 1950 had not been correctly recorded. Thus, there is sufficient evidence on which the learned Judge on the Original Side could properly arrive at the conclusion that the Municipal Corporation of Rangoon decided to grant the right of occupancy to U Tha Hla, at Rs. 250 per month, for a period of one year only.

It was contended, however, that as the Commissioner had arrived at the decision to grant the right of occupancy of the refreshment stall to U Tha Hla, his reference to the Finance Committee should be considered to be superfluous and unnecessary, and in

other words, the Commissioner should be considered to have granted the right of occupancy to U Tha Hla for a period of three years. There is no substance in this contention. The relevant rule, which is contained in paragraph 7 of Chaper (VI) of Schedule I of the City of Rangoon Municipal Act reads as follows :

"7. * * * *

(1) The Commissioner may dispose of, by sale or otherwise, any moveable property belonging to the Corporation not exceeding in value, in each instance, five hundred rupees, or grant a lease of any immoveable property belonging to the Corporation, including any right of grazing or of cutting grass or of taking fruit or the like, for any period not exceeding twelve months at a time : provided that every such lease granted by the Commissioner shall be reported by him to the Finance Committee at its next meeting.

(2) The Commissioner may dispose of the right of occupancy of any bazaar stalls in bazaars belonging to the Corporation, or of any roadside stalls the property of the Corporation, or of licenses for pawnshops, for any period not exceeding three years at a time, provided that if such right of occupancy or license is disposed of otherwise than by auction the approval of the Finance Committee shall be required.

* * * * "

It will be observed that sub-rule (2) refers only to the bazaar stalls, road stalls and pawnshops, and they must therefore be considered to be special provisions so far as the bazaar stalls, roadside stalls and pawnshops are concerned, and sub-rule (2) will therefore, in accordance with the rule of interpretation of the statutes, override the more general provisions contained in sub-rule (1), if the two were to conflict.

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It is clear that sub-rule (2) requires the approval of the Finance Committee in a case like the present, and the Commissioner therefore rightly submitted the matter for the approval of the Finance Committee. In no sense therefore could the Commissioner be said to have granted the right of occupancy of the refreshment stall to U Tha Hla for a period of three years.

It will be convenient also to reproduce the relevant portion of section 45 of the Specific Relief Act, which reads as follows :

" 45. The High Court may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature :

Provided—

(*a*) that any application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act ;

(*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character ;

(*c*) * * * *

(*d*) that the applicant has no other specific and adequate legal remedy ;

* * * * "

If the appellant U Tha Hla was right in his allegation that the right to occupy the refreshment stall for three years had been granted to him, it becomes a case where he could have claimed for damages, if he was allowed to hold the refreshment stall for a period of one year only, in contravention

of what had been actually granted to him. The nature of the damage could easily be ascertained, because U Tha Hla had maintained refreshment stall there in previous years. It was not therefore a case where he could not have had adequate remedy. His application should also have been dismissed by reason of clause (*d*) of section 45 of the Specific Relief Act. The appeal of U Tha Hla is accordingly dismissed with costs, with Advocates' fees of one hundred kyats for each of the three respondents.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu, C.J., and U Chan Tun Aung, J.

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July 21.

AHMED MURAD BY AGENT A. R. D. ABOO (APPELLANT)

v.

M. A. HAMID AND TWO OTHERS (RESPONDENTS).*

Reconstruction of record—Power of Registrar to whom petition presented—Application not provided for in Rule 6 of the Original Side Rules—High Court Notification No. 2 of 1945 (General) and High Court General Letter No. 19 of 1945 deal with application—Order passed by Judge directing reconstruction not a judgment within meaning of Clause 13, Letters Patent re-enacted as s. 20, Union Judiciary Act, 1948—No appeal lies—interpretation of words in Statutes, restriction of.

Held: Rule 6 of the Original Side Rules of Procedure (Civil) which empowers the Registrar on the Original Side to deal with certain matters does not include an application for the reconstruction of lost records of the Court. High Court Notification No. 2 (General), dated the 22nd December 1945 provides for such application and High Court's General Letter No. 19 of 1945, dated the 22nd December 1945, indicates how such application ought to be dealt with. They empower the Registrar on the Original Side to entertain the application for reconstruction of lost records, and even if he has no power to examine witnesses and pass an order the proceeding validly initiated is not void *ab initio*.

Held further: The order of the Judge directing the reconstruction of the lost record is in no sense a decree; it did not decide the rights of the parties involved in the suit or any matter in issue. No appeal lies, therefore, from such order.

Held also: The word "judgment" in s. 20 of the Union Judiciary Act, 1948 has the same meaning attributed to it in Clause 13 of the old Rangoon Letters Patent, and cannot be interpreted to give it a more extensive meaning.

Dayabhai Jiwandas v. *A.M.M. Murugappa Chettiar*, I.L.R. 13 Ran. p. 457; *Holme* v. *Guy*, (1877) 5 Ch. D. p. 901 at 905; *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.*, (1933) L.R. (A.C.), p. 402 at 411.

Tun Sein for the appellant.

M. M. Rafi for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—Haji Munshi Murad Bux, who is said to have died in 1912, left a considerable

* Civil Misc. Appeal No. 82 of 1952 against the order of the High Court (Original Side) in Civil Misc. No. 58 of 1950.

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estate behind, including a timber business which was carried on under the name of Munshi Murad Bux & Sons. The deceased had three sons and a daugther, whose names were Abdul Aziz, Abdul Razak, Abdul Rahmin and Mariam Bibi respectively, and he also left a widow behind. Abdul Rahmin, the youngest son, was said to have been in charge of the deceased's estate until his death in 1927. The second son Abdul Razak and the widow were also dead by 1928, when the eldest son Abdul Aziz instituted a suit against the heirs of Abdul Rahmin and Abdul Razak for the administration and partition of the estate of the deceased Haji Munshi Murad Bux; and the suit was known as Civil Regular Suit No. 34 of 1928 of the Original Side of the High Court of Judicature at Rangoon. It might be mentioned that Mariam Bibi is also dead.

A preliminary decree for the administration and partition of the estate of the deceased Haji Munshi Murad Bux, was passed in 1928; and the Official Referee was directed to take accounts of the estate of deceased Haji Munshi Murad Bux. It was said that the enquiries before the Official Referee were completed by 1942 and that what remained to be done when the war with Japan broke out towards the end of 1942 was for the court to consider the final report of the Official Referee and pass order thereon. Unfortunately, the records of Civil Regular Suit No. 34 of 1928 were lost after the Japanese occupation of Burma.

M. A. Hamid and Rahima Bibi, a son and widow respectively of Abdul Aziz, and M. M. Rafi, and executor to the estate of Abdul Aziz, applied in 1950 for the reconstruction of the records of Civil Regular Suit No. 34 of 1928. Their application was

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opposed by Ahmed Murad, a surviving heir of Abdul Rahim, who managed the estate of the deceased Haji Munshi Murad Bux after the latter's demise. The application for the reconstruction of the lost records came before the Registrar on the Original Side. He recorded the evidence and heard the arguments; and on the 1st April 1952, he passed an order allowing the records of Civil Regular Suit No. 34 of 1928 to be reconstructed in the manner as indicated at the end of his order. The matter was next placed before the learned Judge on the Original Side, by reason of Rule 7 of the Original Side Rules of Procedure (Civil); and it was contended that the proceeding before the Registrar was entirely illegal, as he had no jurisdiction to record the evidence and pass the order made on the 1st April 1952. The learned Judge on the Original Side heard the arguments on both sides, and he overruled this contention. The learned Judge later heard this matter on the merits, and it was said before us during the arguments that the arguments before the learned Judge on the Original Side continued for many days; and in a subsequent order, he allowed the records of Civil Regular Suit No. 34 of 1928 to be reconstructed to the extent as indicated in the order of the Registrar.

The learned advocate for the respondent has raised a preliminary objection before us and has submitted that the order of the learned Judge on the Original Side was not a judgment within the meaning of section 20 of the Union Judiciary Act, 1948, and as such no appeal lies against such order. It was however urged on behalf of the appellant that, as the entire proceeding before the Registrar was void, there was accordingly no proceeding to go before the learned Judge on the Original Side to enable him to pass any order subsequently, and therefore the order

passed by the learned Judge on the Original Side must be considered to have been made without jurisdiction. In other words, it was contended that the proceeding before the Registrar, Original Side, was void *ab initio*, and consequently the order of the learned Judge on the Original Side, which became the subject of this appeal should be considered to be void also. Rule 6 of the Original Side Rules of Procedure (Civil), which empowers the Registrar on the Original Side to deal with certain matters set out in that rule does not appear to include an application for the reconstruction of lost records of the Court, unless it is possible to bring such application within item (52) of the same rule. The High Court Notification No. 2 (General), dated the 22nd December, 1945, provides for such application, and the High Court's General Letter No. 19 of 1945, dated the 22nd December, 1945, indicates how such application ought to be dealt with. The High Court Notification No. 2 (General), dated 22nd December, 1945, therefore contains provisions which deal specifically with applications for the reconstruction of lost records of the Court, and it will therefore override anything which appears to be in a contrary sense in the more general provision of Rule 6 of the High Court Original Side Rules of Procedure (Civil).

Paragraph 1 of Notification No. 2 (General), dated the 22nd December, 1945, was in these terms :

> " 1. An application for the reconstruction of the record of a pending suit or other proceeding should be made to the Judge, or, in the High Court or a District Court, to a Registrar, of the Court in which the case is pending."

It becomes clear therefore that the Registrar on the Original Side has power to entertain an application for the reconstruction of lost records so far as the High Court is concerned ; and the proceeding before

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him was not a proceeding which was void *ab initio*. Much stress was placed on the wording which appeared at the commencement of Rule 6 of the Original Side Rules of Procedure (Civil), which was in these words:

"6. All *ex parte* and consent applications, and all contested applications of the description, or relating to matters, hereunder mentioned shall be made to and disposed of by a Registrar * * * * * * * * *"

The difference in the wording of paragraph 1 of the High Court Notification No. 2 (General), dated the 22nd December, 1945, and the wording which appears in the commencement of Rule 6 of the Original Side Rules of Procedure (Civil) does not in any way indicate that the application for the reconstruction of lost records, which was filed before the Registrar was void *ab initio*. Even if the contention of the learned Advocate for the appellant be correct that the Registrar had no power to record evidence and pass an order thereon, it is difficult to conceive how the proceeding which was validly initiated before the Registrar could logically be regarded as void *ab initio*. If the application for the reconstruction of the lost records had been validly instituted, what occurred afterwards would amount clearly to an irregularity only, and no more. Even if the learned Registrar on the Original Side had no power to dispose of the application, *i.e.* no power to examine witneses and pass an order thereon, what occurred on the Original Side was merely an irregularity. The evidence which the Registrar recorded was done in the presence of the parties, each side was afforded every opportunity of cross-examining the witnesses and of presenting their aspect of the case properly. It was not alleged during the

arguments before us that the evidence had not been properly recorded by the Registrar or that the parties were not afforded proper opportunities of presenting their case before him. It was, therefore, only an irregularity if the learned Judge heard the arguments on the evidence recorded by the Registrar and passed his order thereon, without having the evidence actually recorded in his presence. It has not been explained in what manner the appellant could be said to have been prejudiced. We are also unable to see how the appellant could be said to have been prejudiced by the irregularity which occurred. It also appears that when the matter came for hearing before the learned Judge on the Original Side he heard the parties exhaustively on the merits of the application and that the conclusion which he had arrived at was an independent conclusion, uninfluenced by the observations which the Registrar made in his order on the lst April 1952.

It is difficult to imagine how the order of the learned Judge on the Original Side could be considered to be an order which was appealable, unless it was in the nature of a judgment as envisaged in section 20 of the Union Judiciary Act, 1948. There can be no right of appeal unless it is given by a statute; and this is acceded to by the learned Advocate for the appellant. It will thus be necessary to consider whether the order appealed against falls within the meaning of "judgment" in section 20 of the Union Judiciary Act, 1948 which reads:

> "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."

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It was contended that the application for the reconstruction of the lost records of Civil Regular Suit No. 34 of 1928 was in reality in the nature of an independent proceeding, and that the order of the learned Judge on the Original Side could accordingly be said to have affected the rights of the appellant in that independent proceeding. We are unable, however, to accept this argument. It cannot be disputed that the application for the reconstruction of the lost records of Civil Regular Suit No. 34 of 1928 would not have arisen if the case was not still pending in the High Court, requiring further decision from the Court before the matters that were in dispute between the parties could be said to have been fully adjudicated by the Court in which the suit was pending. The contention which was advanced on behalf of the appellant was that it was not possible for the original suit to have been heard again unless the application for the reconstruction was granted. It might be so, but we are unable to see how this circumstance in itself could convert the application for the reconstruction of the lost records of Civil Regular Suit No. 34 of 1928 into an independent proceeding, which has no connection whatsoever with the original suit. The application for the reconstruction of the lost records is clearly, in our opinion, in the nature of an ancillary proceeding, arising directly out of Civil Regular Suit No. 34 of 1928, which was pending in the High Court before they were lost in circumstances, which were beyond the control of the parties.

The next contention which was advanced on behalf of the appellant was that the order of the learned Judge allowing the reconstruction of the lost records was in the nature of a final order, and as such it falls within the meaning of the expression

"judgment" in section 20 of the Union Judiciary Act, 1948. Even if the order of the learned Judge could be regarded as being in the nature of a final order, it does not necessarily follow that the order so passed is appealable, because such order will not be appealable if it does not fall within the meaning of the expression "judgment" in section 20 of the Union Judiciary Act, 1948. What is then the meaning of "judgment" as appears in section 20? It was suggested on behalf of the appellant that the expression "judgment" in section 20 should be read in the sense as set out in section 2 (9) of the Code of Civil Procedure which reads:

> "'judgment' means the statement given by the Judge of the grounds of a decree or order."

The meaning of "judgment" in clause 13 of the old Rangoon Letters Patent was considered in the case of *Dayabhai Jiwandas* v. *A. M. M. Murugappa Chettiar* (1). Page, C.J., observed, at pages 472 and 474, as follows:

> "Now, the word 'judgment' is not always used in the same sense. It depends on the collocation in which it is found. For instance, it is sometimes synonymous with 'trial', as in 'the Last Judgment,' or 'a Daniel come to judgment.' Or it may mean 'the statement given by the Judge of the grounds of a decree or order,' which is the meaning that it is deemed to bear in section 2 (9) of the Civil Procedure Code of 1908. But it must be remembered that the terms of the Letters Patent of the High Courts in India were settled in England, and for an English lawyer in 1862 'judgment' had a distinct and special meaning."
>
> * * * * * * "
>
> ". . . . Of course, in the popular sense of the word 'order' every 'judgment' connotes that an order has been passed, but it does not follow, and in my opinion it would be incorrect to affirm, that every 'order' is a 'judgment,'

(1) (1935) 13 I.L.R. p. 457 (Ran.).

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giving to the words the special meaning which lawyers would understand them to bear."

"I am of opinion that in the Letters Patent of the High Courts the word 'judgment' means and is a decree in a suit by which the rights of the parties at issue in the suit are determined."

It is not and cannot be disputed that section 20 of the Union Judiciary Act, 1948, corresponds to the clause 13 of the old Rangoon Letters Patent. As the expression 'judgment' in the clause 13 of the Rangoon Letters Patent had acquired a "distinct and special meaning," as indicated in *Dayabhai Jiwandas* v. *A. M. M. Murugappa Chettiar* (1), which was an unanimous decision of seven learned Judges of the High Court of Judicature at Rangoon, and as the decision had been followed continuously up to the date of the Independence of Burma it could be said that the expression "judgment" had acquired a distinctive meaning at the time section 20 of the Union Judiciary Act, 1948 was enacted. It is therefore only reasonable to assume that the legislature must have intended to extend the same meaning to the word "judgment" appearing in section 20, as existed at the time the Union Judiciary Act, 1948 became law, unless there is something in the Union Judiciary Act to suggest to the contrary. We have not, however, been able to trace any such indication. The legislature, or at least those persons who were actively responsible for the form in which section 20 assumes must have known about the decision of the Full Bench case in *Dayabhai Jiwandas* v. *A. M. M. Murugappa Chettiar* (1). As the Full Bench case dealt with an aspect of the law which had caused protracted and intricate controversies in the Courts in India and in Burma, giving rise to decisions often

(1) (1935) 13 I.L.R. p. 457 (Ran.).

most divergent, we would, in the circumstances, have expected the legislature to express distinctly in some way or other, if it was intended to impart a wider meaning to the expression " judgment " in section 20 of the Union Judiciary Act, 1948 and open out new avenues for endless controversies, which might lead to confusions worse confounded, as was observed in the case of *Dayabhai Jiwandas* v. *A. M. M. Murugappa Chettiar* (1). We are of opinion that section 20 of the Union Judiciary Act, 1948 purported to leave the law as it stood when section 20 was enacted. The order of the learned Judge on the Original Side could in no sense be called a decree. It did not decide the rights of the parties involved in the suit or any matter in issue between the parties in the suit, nor could any decree be drawn up by reason of the order in question. No appeal would therefore lie from such order; and we are unable to give a more extended meaning to the word " judgment " in section 20 of the Union Judiciary Act, 1948 than the meaning attributed to a similar expression in clause 13 of the old Rangoon Letters Patent. In *Holme* v. *Guy* (2), Jassel, M.R., observed :

> " Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court, and prior judgment tells this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view of finding out what it means, and not with a view to extending it to something that was not intended. "

We have already stated that section 20 of the Union Judiciary Act, 1948 was intended merely to reproduce, in fewer words, the effect of clause 13 of the old

(1) (1935) 13 I.L.R. p. 457 (Ran.). (2) (1877) 5 Ch. D. p. 901 at 905.

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Rangoon Letters Patent; and we are unable to see any good reason for extending a wider meaning to the word "judgment" which reappears in section 20 of the Union Judiciary Act, 1948.

In the case of *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.* (1) Viscount Buckmaster also observed:

> ". . . It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

The above observation applies precisely to the present appeal; and it lays down a principle which will lead to consistency in judicial interpretation and avoid unnecessary inconsistency in the interpretation of law. The nature of the order which is being appealed against can appropriately be described to be an order which merely prepares the way for the Civil Regular Suit No. 34 of 1928 to be heard in Court from the stage at which the hearing would have continued if the records had not been lost. No appeal would lie against such order, even prior to the pronouncement of the Full Bench decision in *Dayabhai Jiwandas* v. *A.M.M. Murugappa Chettiar* (1).

The preliminary objection is accordingly upheld, and the appeal is dismissed with costs; Advocates fees K 170.

(1) (1933) L.R. (A.C.) p. 402 at 411. (2) (1935) 13 I.L.R. p. 457 (Ran.).

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

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B.S.M.A.K. HALIM SAHIB (APPELLANT)

v.

MOIDEEN PILLAY (RESPONDENT).*

July 26.

Arbitration—By consent of parties dispute referred to Board of eleven arbitrators—Award filed but remitted for reconsideration—Four arbitrators resigned, one absent—Order referring dispute to remaining six arbitrators for reconsideration void—Inconsistent with original reference by consent for decision and award by eleven arbitrators.

Held: As in the original agreement it was mentioned that the parties would abide by the decision made by all of the eleven arbitrators named by consent, and now as four of them are no longer prepared to take part in the reconsideration of the award, a remission of the dispute for reconsideration by the remaining six arbitrators is void under s. 16 (3) of the Arbitration Act as the reconsidered award will not be that of the original eleven arbitrators.

Sitra Ram and another v. *Shanti Lal*, A.I.R. (1952) Vindhya Pradesh p. 76, followed.

S. A. Pillay for the appellant.

Kyaw Htoon for the respondent.

The judgment of the Bench was delivered by

U AUNG KHINE, J.—On the 22nd August 1950 the appellant B.S.M. Abdul Kader Halim Sahib and the respondent Moideen Pillay entered into an agreement by which they referred certain disputes between them for arbitration to 11 arbitrators and they agreed to abide by the decision made by them.

An award dated the 3rd September 1950 was filed by the respondent in the Rangoon City Civil Court. On an objection raised by the appellant an

* Civil Misc. Appeal No. 3 of 1953 against the order of the 2nd Judge, City Civil Court, Rangoon, in Civil Misc. No. 8 of 1951.

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U AUNG KHINE, J.

enquiry was made by the Court and subsequently an order remitting the award for reconsideration was passed under section 16 of the Arbitration Act. Three months time was given within which to submit their decision.

After the passing of the above order, 4 of the arbitrators tendered their resignations; and the whereabouts of the 5th arbitrator could not be ascertained. On the 17th October 1952, the respondent filed a second petition in Court praying that new arbitrators be appointed in place of those who had resigned or in the alternative to remit the award to the remaining 6 arbitrators. An objection was again raised by the appellant to the adoption of either course suggested by the respondent. The objection, however, was overruled and on the 8th December 1952, the court directed the remaining 6 arbitrators to reconsider the award and to submit their decision within two months. It was against this order that this appeal was presented by the appellant.

The learned Judge of the lower Court was of the opinion that in the absence of certain of the members of the original Arbitration Board, the remaining members could reconsider the award remitted by Court under section 16 of the Act ; and the award so made shall prevail by reason of the fact that it was made by a majority of the members as provided in section 10 (2) of the Act. It appears to us that the learned Judge of the lower Court has overlooked the fact that all the original 11 arbitrators were named by consent of the parties and in the original agreement it was mentioned that the parties would abide by the decision made by *all* of the arbitrators. There are available only 6 of the 11 arbitrators agreed upon to reconsider the award and

any decision given by them will be the decision of the 6 arbitrators and not of the eleven.

Besides this, there appears to be some confusion of thought in the mind of the learned Judge of the lower Court about what is meant by a majority decision? In *Sitra Ram and another* v. *Shanti Lal* (1) the points now under consideration are succinctly explained. It was observed :

> "Where the reference is to two or more arbitrators, all must act together. If one of them declines to act during arbitration proceedings, and the award is made by the remaining arbitrators, the award is invalid even though there might have been provision in the arbitration agreement that the majority view should prevail. The majority decision is something different from what can be called a decision after only the majority deliberate. If all the arbitrators deliberate, the majority decision unless otherwise provided is binding; on the other hand if only the majority take part in the arbitration the decision is not binding because one or more arbitrator has not at all brought his personal judgment to bear on the case."

The principle underlying this decision seems to be that the subject matter of the arbitration must receive the united attention of all the arbitrators. What is applicable in the case of an original award must equally apply to the award remitted for reconsideration under section 16 of the Act. Now, as four of the arbitrators are no longer prepared to take part in the reconsideration of the award, the same must be considered void under section 16 (*3*) of the Act.

In the result, the appeal is allowed and the order of the 2nd Judge, Rangoon City Civil Court, dated the 8th December 1952 remitting the award made by the 11 arbitrators on the 3rd September 1950 for reconsideration to six out of the original eleven

(1) A.I.R. (1952) Vindhya Pradesh, p. 76.

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arbitrators is set aside. And it is further declared that the original award in view of the provisions under section 16 (*3*) of the Act, is now void. The respondent Moideen Pillay shall bear the costs of this appeal. Advocates fees is assessed at Kyats 50.

APPELLATE CIVIL.

Before U Ba Thoung, J.

DALBIR CHETTRY (APPELLANT)

v.

NARAYAN PRASAD (RESPONDENT).*

H.C. ~~1954~~
July 31.

Promissory-note—Joint executants—Evidence Act, s. 92—Oral evidence to show one signed as surety inadmissible—Contract Act, s. 145—Recovery of money paid by surety from principal debtor.

Held : Oral evidence to show one of the executants of a monetary bond to the knowledge of the money lender signed it only as a surety is inadmissible.

Maung Ko Gyi v. *U Kyaw*, I.L.R. 5 Ran. 168, followed.

Mulchand v. *Madho*, I.L.R. 10 All. 421, dissented from.

Khoo Joo Tin v. *Ma Sein*, I.L.R. 6 Ran. 261, referred to.

Held also : S. 145, Contract Act enabling a surety to recover money paid on behalf of principal debtor is inapplicable where by reason of s. 92, Evidence Act suretyship cannot be proved.

Nur Samand Khan v. *Fajja and others*, A.I.R. (1924) Lah. 657 ; *Anand Singh and another* v. *Collector of Bijnor*, A.I.R. (1932) All. 610.

N. R. Majumder for the appellant.

Than Sein for the respondent.

U BA THOUNG, J.—In Civil Regular Suit No. 5 of 1947 of the Court of the Assistant Judge, Myitkyina, one Hansraji Devi sued both the appellant and the respondent for recovery of Rs. 1,200 being the balance price of goods sold to them on credit and for which they had jointly executed a promissory-note dated 25th March 1946. As the promissory-note was not properly stamped the suit had to be based on the original consideration. In that suit the respondent Narayan Prasad admitted the claim, but the appellant Dalbir Chettry denied having bought the goods and

* Civil 2nd Appeal No. 89 of 1952 against the decree of the Addl. District Court, Myitkyina, in Civil Appeal No. 14-M of 1952.

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asserted that Hansraji Devi filed the suit against him in collusion with Narayan Prasad. The trial Court found that the goods were sold and delivered to the appellant and the respondent and a decree for Rs. 1,200 with costs was passed against them. The appellant Dalbir Chettry filed an appeal against the decree in the District Court of Myitkyina but his appeal was dismissed. In the execution case which arises out of that suit, the appellant Dalbir Chettry paid Rs. 750 to Hansraji Devi towards her decree.

Then the appellant Dalbir Chettry sued the respondent Narayan Prasad in Civil Regular Suit No. 58 of 1951 of the Court of the Subordinate Judge, Myitkyina for recovery of that sum of Rs. 750 alleging that he executed the promissory-note along with the respondent in favour of Hansraji Devi as a surety for the respondent and that he was entitled to recover the amount of Rs. 750 which he had paid to Hansraji Devi towards her decretal amount. The respondent asserted that the appellant signed the promissory-note jointly as principal debtors and that the decree was obtained by Hansraji Devi against both of them jointly and that as the appellant paid the sum of Rs. 750 being his portion of half the decretal amount, he was not entitled to recover this money.

The trial Court held on the oral evidence given that the plaintiff-appellant signed the promissory-note in favour of Hansraji Devi as a surety for the defendant-respondent, and that he was therefore entitled to recover the sum of Rs. 750 which he paid towards the decree of Hansraji Devi and passed a decree accordingly. On appeal to the District Court of Myitkyina by the defendant-respondent, the judgment and decree of the trial Court were set aside and the plaintiff-appellant's suit was dismissed. Hence this appeal.

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The learned District Judge held that the promissory-note in favour of Hansraji Devi shows that both the plaintiff-appellant and the defendant-respondent signed it as principal debtors, and therefore the oral evidence, to show that the plaintiff-appellant signed it only as a surety for the defendant-respondent, was not admissible under section 92 of the Evidence Act. It is contended for the appellant that section 92 of the Evidence Act would be applicable only in the suit in Civil Regular suit No. 5 of 1947 which was filed against the parties *i.e.*, the appellant and the respondent who signed the promissory-note, and that it is not applicable in this case. I do not agree with his contention. It is true that in the case of *Mulchand* v. *Madho* (1), it was held that section 92, Evidence Act, does not apply to the parties who are on the same side of a document. It was observed that in the case of the promisors of a joint note, it is competent to one of them, who has had to pay the entire debt, to show in variation of the terms of the note, as against a co-promisor, that the payer was a surety only, and proving this to get a decree for indemnification against his co-promisor ; but this dictum has been dissented from in the ruling of this High Court in the case of *Maung Ko Gyi* v. *U Kyaw* (2) where it was held that oral evidence to show that one of the executants of a monetary bond to the knowledge of the money lender signed it only as a surety is not admissible. I consider that the learned Judge was correct in following the ruling in the case of *Maung Ko Gyi* v. *U Kyaw* in preference to the case of *Mulchand* v. *Madho*. See the case of *Khoo Joo Tin* v. *Ma Sein* (3).

(1) I.L.R. 10 All. p. 421 at 423, 424. (2) I.L.R. 5 Ran. p. 168.
(3) I.L.R. (1928) 6 Ran. p. 261.

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It is also contended that section 145, Contract Act applies to this case and that the appellant surety is entitled to recover the money he paid to Hansraji Devi and in support of his contention he cited Rulings of the Lahore and Allahabad High Court. *Nur Samand Khan* v. *Fajja and others* (1). *Anand Singh and another* v. *Collector of Bijnor* (2). It is true that in these cases it has been held that the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully and that the right of the surety under section 145 is not limited to the rights of the creditor against the principal debtor ; but in the present case the promissory-note was jointly executed by both the appellant and the respondent, and in view of section 92 of the Evidence Act it cannot be proved that the appellant was a surety and that he executed the promissory-note merely as a surety. Under these circumstances I do not consider that section 145 of the Contract Act and the rulings quoted by the appellant are applicable to this case.

For the above reasons the appeal fails and is dismissed with costs.

(1) A.I.R. (1924) Lah. p. 657. (2) A.I.R. (1932) All. p. 610.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1954

July 7.

DAW NGWE ME AND ONE (APPLICANTS)

v.

KO THAN MAUNG (RESPONDENT).*

Civil Procedure Code, Order 41, Rule 25—Remand order—No appeal lies—Co-owners of immoveable property—One alone can maintain action for ejectment of a trespasser.

Held : No appeal is maintainable against an order of remand under the provisions of Order 41, Rule 25, Civil Procedure Code.

Held further : One of several co-owners of immoveable property can maintain an action for ejectment of a trespasser without joining the other co-owner or co-owners as parties to the action.

Gurrimbhoy & Co. Ltd. v. *L. A. Creet and others*, (1930) A.I.R. Cal. p. 113 ; *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain Singh*, (1881) I.L.R. 35 Cal. p. 807 at 811 ; *Radha Proshad Wasti and others* v. *Esuf and others*, (1881) I.L.R. 7 Cal. p. 414 ; *Kabil Sardar* v. *Chundar Nat Nag Chowdhry*, (1892) I.L.R. 20 Cal. p. 592 ; *Shri Thakurji and another* v. *Hara Lal*, (1922) I.L.R. 44 All. p. 634; *Magaulal Dulabhdas* v. *Budhar Purshottam and another*, (1926) I.L.R. 51 Bom. p. 149 ; *Syed Ahmed Sahib Shutari* v. *The Magnesite Syndicate Ltd.*, (1915) I.L.R. 39 Mad. p. 501.

P. C. Dias for the applicants.

San Thein for the respondent.

U SAN MAUNG, J.—This is an appeal by Daw Ngwe Me and Maung Ko Gyi, the defendants in Civil Regular Suit No. 23 of 1951 of the Subdivisional Judge, Mandalay, against the order of the District Judge, Mandalay in his Civil Appeal No. 4 of 1952 remanding the suit to the trial Court in the following terms :—

" The decree of the lower Court cannot be sustained. The case will have to be remanded to it, and the lower Court will ask the respondent to file an amended plaint bringing on ecord all necessary parties to the suit. The amended plaint hould clearly and distinctly state the nature of the relief

* Civil Revision No. 52 of 1954 converted from Civil 2nd Appeal No. 103 of 1952 against the order of the District Court, Mandalay, in Civil Appeal No. 4 of 1952.

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U SAN MAUNG, J.

claimed, that is whether for ejectment of the whole of holdings Nos. 8 and 30 of 1949-50, or for only a portion of holding No. 8 measuring about 25′ x 25′ which is admittedly in the possession of the appellants. The lower Court will also frame fresh issues, if found necessary, and also record further evidence if required to do so, and then submit the proceedings back to this Court with its findings on the issues if framed as early as possible."

As the remand by the learned District Judge is apparently under the provisions of Order 41, Rule 25 of the Civil Procedure Code, the memorandum of appeal will be considered as an application for revision as prayed for in the application dated 16th October 1952 filed in these proceedings. Both the Appellate Side of the High Court and the learned Registrar, who has admitted the appeal, had overlooked this application as well as the fact that no appeal is maintainable.

As the facts of the case have been fully set out in the order of the learned District Judge, it is not necessary to recapitulate them here. I am not prepared to say that the learned District Judge was wrong in directing the plaint to be amended so as to make Ma Mya Lay, wife of respondent Maung Than Maung, a co-plaintiff in this suit, although he seems to have overlooked the fact that Maung Than Maung alone could have brought the suit for possession if he could prove that the permission granted by his predecessors in interest to Daw Ngwe Me and others to build houses on the suit land had since the date of the purchase of the land by him and his wife been revoked by them. In that event, Daw Ngwe Me and others would be in the position of mere trespassers for continuing to occupy the land and there is ample authority for the proposition that one of several

co-owners of immoveable property can maintain an action for ejectment of a trespasser without joining the other co-owner or co-owners as parties to the action. See *Gurrimbhoy & Co. Ltd.* v. *L. A. Creet and others* (1), *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain Singh* (2), *Radha Proshad Wasti and others* v. *Esuf and others* (3), *Kabil Sardar* v. *Chundar Nat Nag Chowdhry* (4), *Shri Thakurji and another* v. *Hara Lal* (5), *Maganlal Dulabhdas* v. *Budhar Purshottam and another* (6) and *Syed Ahmed Sahib Shutari* v. *The Magnesite Syndicate Ltd.* (7). Furthermore, although it was quite competent for the plaintiffs to bring several suits against the several persons trespassing on their land the learned District Judge had insisted that all these persons should be joined in one suit. However, this action of the learned District Judge should have brought a protest not from the defendants Daw Ngwe Me and Maung Ko Gyi but from the plaintiffs Ko Than Maung and his wife Ma Mya Lay. As they have not filed any application for the revision of the learned District Judge's order on this point, I see no reason for interference.

For these reasons, the application for revision fails and must be dismissed with costs. Advocates fees three gold mohurs.

(1) (1930) A.I.R. Cal. p. 113.
(2) (1881) I.L.R. 35 Cal. p. 807 at p. 811.
(3) (1881) I.L.R. 7 Cal. p. 414.
(4) (1892) I.L.R. 20 Cal. p. 592.
(5) (1922) I.L.R. 44 All. p. 634 at p. 636.
(6) (1926) I.L.R. 51 Bom. p. 149.
(7) (1915) I.L.R. 39 Mad. p. 501.

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1954

June 15.

MAUNG LA NGU (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, ss. 339 and 340—Wrongful restraint and wrongful confinement—What constitutes—Actual physical obstruction not essential

Held: Proof of actual physical obstruction is not essential to support a charge of wrongful confinement. If there is no actual physical obstruction, it must be proved that such an impression has been created in the mind of the person detained as to lead him reasonably to believe that he was not free to depart and that he would be forthwith restrained if he attempted to do so. There can be no wrongful confinement if an escape is open to a person if he wishes to avail himself of it.

Ramdai and others, 4 C.W.N. p. 105.

——— for applicant.

Kyaw Thoung (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 93 of 1953 of the Subdivisional Magistrate of Kalewa, the applicant Maung La Ngu was convicted of an offence punishable under section 342 of the Penal Code and was sentenced to a fine of K 60 or one month's rigorous imprisonment in default. The fine has been paid. Maung La Ngu applied to the District Magistrate, Upper Chindwin to set aside the conviction and sentence against him on the ground that he has committed no offence punishable under section 342 of the Penal Code. The learned District Magistrate has, however, recommended to this Court that the conviction and sentence on Maung La Ngu

* Criminal Revision No. 62-B of 1954 being a Review of the order of the Subdivisional Magistrate, Kalewa, in Criminal Regular No. 93 of 1953.

be set aside but that he should be retried for the offence with which he has been charged. The reason given by the learned District Magistrate is that the charge framed against Maung La Ngu by the Sub-divisional Magistrate has been so defective that a fair trial had not taken place against the accused person.

The facts of the case as set out in the judgment of the learned Subdivisional Magistrate may be briefly stated as follows:

The applicant Maung La Ngu was the bazaar lessee of Kalewa where Ma Thein Kyi, Ma Mya Khin and Ma Ngwe Thaung (PW 1, 2 and 3) were among those who sold fish on the day this case occurred. Maung La Ngu, as bazaar lessee asked each of them to pay their dues, thereupon, each of the bazaar sellers offered him only 2 annas which he refused to accept. He then took from each of them either the tray in which they sold their fish or the bunches of fish in their trays. Being aggrieved with Maung La Ngu's action, the women went and made a report at Kalewa Police Station where Maung La Ngu also followed. After the complaint had been made and the women came out of the Police Station, Maung La Ngu told them to follow him to his house. This they did. On arrival at his house, Maung La Ngu made them sit on the road in front of the house for about two pots boil. During that time Ma Thein Kyi (PW 1) managed to slip away to make a report to U Ba Nyein (PW 4) before coming back to join her companions. Subsequently a formal report Exhibit A was made at the Police Station.

The learned Subdivisional Magistrate held that there was no evidence to show that Maung La Ngu used physical force to compel Ma Thein Kyi and her companions to obey his orders. He, however, thought that because Maung La Ngu happened to be

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U SAN MAUNG, J.

bazaar lessee, Ma Thein Kyi and others were afraid to disobey his orders.

The learned District Magistrate thought that the offence committed by Maung La Ngu was wrongful restraint of the bazaar women rather than of wrongfully confining them. In my opinion, however, there was neither wrongful restraint nor wrongful confinement as defined in sections 339 and 340 of the Penal Code.

In the Law of Crimes by Ratanlal, the learned Author has quoted an observation from a case reported in 4 Bombay L.R. Page 79, in his commentary to section 340 of the Penal Code. It runs as follows :

> " Proof of actual physical obstruction is not essential to support a charge of wrongful confinement. It must in each case, be proved that there was at least such an impression produced in the mind of the person detained as to lead him reasonably to believe that he was not free to depart and that he would be forthwith restrained if he attempted to do so. The mere threat of some future harm in case of departure would not suffice if he knew that it was open to him to go away and refrained from doing so lest he should suffer such harm. But if the circumstances were such as to justify and to create the belief that he could not depart without being seized immediately, then it would be proper to hold that he was obstructed and confined."

This observation in my opinion, summarizes the law on the subject as to what constitutes wrongful confinement. If there is no actual physical obstruction, it must be proved that such an impression has been created in the mind of the person detained as to lead him reasonably to believe that he was not free to depart and that he would be forthwith restrained if he attempted to do so. In the case now under review there is no evidence whatsoever to show that the women alleged to have been wrongfully confined

believed not only that they were not free to depart but that they would be forthwith restrained if they attempted to do so. On the contrary, there is specific evidence to show that Ma Thein Kyi (PW 1) believed that she could depart if she wished to do so.

In the case of *Ramdai and others* (1) it was held by a Bench of the Calcutta High Court that there can be no wrongful confinement if an escape is open to a person if he wishes to avail himself of it. In the case under review it is clear that all the women could have escaped in the same way as Ma Thein Kyi if they had wished to slip away.

For these reasons I hold that the applicant Maung La Ngu has been wrongly convicted of the offence punishable under section 342 of the Penal Code. He may be guilty of some other criminal offence for having forcibly taken away the tray or the fish from the bazaar sellers but this is not a matter with which we are concerned at present. The conviction and sentence on Maung La Ngu under section 342 of the Penal Code are set aside.

The fine paid by him must be refunded.

(1) 4 C.W.N. p. 105.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

H C. 1954

July 9.

MAUNG TIN HLA (APPLICANT)

v.

MA NGWE SEIN (RESPONDENT).*

Criminal Procedure Code, s. 488, sub-s. 4—Wife "living in adultery" not entitled to maintenance—Meaning and extent of phrase.

Held : The phrase "living in adultery" under s. 488 (4), Criminal Procedure Code refers to a continuous course of guilty conduct and not to isolated act of immorality. It means that the woman must be living in a state of quasi permanent union with the man with whom she is committing adultery.

Ma Mya Khin v. *Godenho*, (1936) A.I.R. Ran. 446, followed.

Ma Thein v. *Maung Mya Khin*, (1937) A.I.R. Ran. 67, distinguished.

N. C. Dutt for the applicant.

Kyaw Khin for the respondent.

U BA THOUNG, J.—The respondent sued the applicant under section 488, Criminal Procedure Code for maintenance for herself and child in the Court of the 2nd Additional Magistrate, Monywa and obtained an order directing the applicant to pay Rs. 30 and Rs. 10 for the wife and child respectively. The applicant filed an appeal against the order in the Court of the Sessions Judge, Sagaing, and his appeal was dismissed. He has now come up on Revision against the order of the lower Courts.

In the lower appellate Court the applicant contended that the child born on 29th March 1953 was not his child and that his wife had been living in adultery within the purview of section 488 (4), Criminal Procedure Code. Both the lower Courts held that the child is the child of the applicant,

* Criminal Revision No. 16-B of 1954 being Review of the order of the Sessions Judge, Monywa, in Criminal Appeal No. 43 of 1953.

and the applicant is not contending against it in this Revision application. What is seriously contended here is that his wife had been living in adultery and under section 488 (4), Criminal Procedure Code, she is not entitled to maintenance for herself.

The trial Court held that it has not been established in this case that the respondent had been living in adultery; and the lower appellate Court came to a finding on the evidence on record that the respondent had committed misconduct with one Maung Ko once while she was living in the house of Ma Thein May and twice while she was living in the house of Ko Chit, and although the learned Sessions Judge was somewhat reluctant to uphold the order awarding maintenance to the respondent, he upheld the trial Courts order relying on the case of "*Ma Mya Khin* v. *Godenho*" (1) where it has been held :

> "The words 'living in adultery' denote a continuous course of conduct as distinguished from isolated acts of immorality and mean that the woman must be living in a state of quasi permanent union with the man with whom she is committing adultery : one or two lapses from virtue would be acts of adultery but would be quite insufficient to show that the woman was living in adultery. Words used are 'living in adultery' and not 'committed adultery.'"

The learned Sessions Judge's finding was that the respondent has had two or three lapses from virtue during the absence of the applicant, but after that, she led a virtuous life with the applicant and a child was born to them ; and the learned Sessions Judge did not consider in this case that the respondent was living in a state of quasi permanent union with Maung Ko with whom she committed adultery. I think the view taken by

(1) A.I.R. (1936) Ran. 446.

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the learned Sessions Judge is correct. The phrase "living in adultery" under section 488 (4), Criminal Procedure Code refers to a continuous course of guilty conduct and not isolated acts of immorality.

The learned counsel for the applicant contended that the case of "*Ma Thein* v. *Maung Mya Khin*" (1) should be relied upon in this case. It is true that in the case of *Ma Thein* v. *Maung Mya Khin* it has been held that the wife must have been guilty of adultery on more than one occasion and therefore she was not entitled to any maintenance under section 488, Criminal Procedure Code, but the facts in that case are different. In that case it was found that the child was not the child of the husband as the child was begotten when the husband could not get access to the wife, and the presumption is that the wife had been guilty of misconduct with another man on more than one occasion and that there was continuance of misconduct till the child was begotten, and not confined to two or three lapses from virtue as in this case and where the child was found to be the child of the husband. There is also nothing on record to show that the respondent committed misconduct with Maung Ko again after those two or three lapses from virtue as stated above.

In fact it appeared that she led a virtuous life with the applicant and a child was born to them. The learned counsel for the applicant referred to one incident when Maung Ko was seen sleeping on a cot with the respondent just about a week after the child was born, but it is impossible to believe that the respondent committed misconduct with Maung Ko so soon after her child birth.

Under these circumstances the application cannot be allowed and it is dismissed with costs.

(1) A.I.R. (1937) Ran. 67.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thaung, JJ.

S. RAMIAH PILLAY (APPELLANT)

v.

K. M. ABDUL KADER (RESPONDENT).*

H.C. 1954 — *Aug. 9.*

Money decree payable by instalments against three defendants—Where other two defaulted, Court cannot permit remaining defendant, against whom execution proceedings are brought, to pay only third share of decree.

Held : As the three defendants are jointly and severally liable to satisfy the decree passed against them, the decree-holder is entitled on default of payment of an instalment to apply for the execution of the decree against any one of the judgment-debtors.

N. R. Burjorjee for the appellant.

J. B. Sanyal for the respondent.

The judgment of the Bench was delivered by

U AUNG KHINE, J.—This is an appeal against the order and judgment dated the 23rd February 1953, passed by the Rangoon City Civil Court in its Civil Regular No. 96 of 1953.

In this suit by consent a decree for the payment of K 2,400 was passed without costs against the three defendants, namely, K.N.M. Abdul Kader, V.M.K. Mohamed Esoof and M.M.K. Razak. The defendants by the terms of the agreement were allowed to pay up the decretal amount by monthly instalments of K 150. The defendants paid in only a single instalment and after that they defaulted. Thereupon the decree-holder, S. Ramiah Pillay,

* Civil Misc. Appeal No. 20 of 1953 against the order of the City Civil Court, Rangoon, in Civil Regular No. 96 of 1953.

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S. RAMIAH PILLAY v. K. M. ABDUL KADER.

U AUNG KHINE, J.

applied to execute the decree against the respondent K.N.M. Abdul Kader, one of the three defendants, only.

When notice was served on the respondent he filed a written objection in which he stated, *inter alia*, that there were three defendants in the case and that they had agreed to contribute K 50 each per mensem for making a total of K 150 to pay in the monthly instalments in terms of the consent decree. Although he was willing to fulfil his part the other two defendants, although in a position to pay, had failed to do so. He prayed that he may be allowed to pay in K 50 per month. In due course, the lower Court passed an order directing the payment of his share of the arrears of instalments by the respondent and also directing the respondent to continue paying at the rate of K 50 per mensem towards the satisfaction of the decree. It is against this order that the appellant has now preferred his appeal.

The consent decree was passed against the three defendants including the respondent and it is not denied that they are jointly and severally liable to satisfy the decree. As there has been default in payment of monthly instalments, the decree-holder had every right to apply for the execution of the decree against any one of the judgment-debtors. The sum of K 150, the amount to be paid in as instalment cannot be split up and apportioned equally amongst the three judgment-debtors so that they should come and pay in K 50 monthly towards the satisfaction of the decree. In the course of the argument the learned Counsel for the appellant submitted that so long as the monthly instalments of K 150 are paid in regularly, it does not matter by which of

the judgment-debtors, the appellant would be quite satisfied and he would not apply for the execution of the decree against any of the judgment-debtors.

Under section 96 (3) of the Code of Civil Procedure, no decree passed by consent of the parties is appealable. Where the consent decree passed includes terms relating to the suit all the terms may be enforced in the execution of the decree. The Court cannot, therefore, go behind the terms agreed upon in this case and direct that payment of K 50 only by the respondent as part of the instalment. Thus, the order of the lower Court varying the terms of the consent decree must be set aside.

In the result, the appeal is allowed and the order of the lower Court directing the respondent to pay in his share of arrears of instalments and continue paying at the rate of K 50 per mensem is vacated. The respondent shall pay the costs of this appeal. Advocate's fee K 50.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1954

Aug. 3

SHWE HIN (APPLICANT)

v.

SITAL (RESPONDENT).*

Costs—Civil Procedure Code, s. 35—Except for cogent reasons to be detailed, costs limited to amount decreed.

Held: The general rule is that costs should be apportioned according to the amount recovered and not to the sum claimed; and where a Court departs from this rule and directs that costs shall not follow the event sub-s. 2 of s. 35, Civil Procedure Code enacts that it shall state its reasons in writing.

In Velu Pillai and Ghose Mahomed, (1894) 17 Mad. 293.

L. Lim Su (a) *U Ba Than* for the appellant.

R. Jaganathan for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 2 of 1952 of the Township Court of Pyu the plaintiff-respondent Sital sued the defendant-appellant Shwe Hin for a sum of K 985 as damages for assault. The suit was dismissed. On appeal to the District Court of Toungoo Sital made a claim for only K 510 waiving the rest. The learned District Judge, Toungoo, reversed the finding of the Township Judge as to whether damages should be awarded for the alleged assault and awarded K 150 as damages. In the decree, however, full costs was awarded to Sital both in respect of the proceedings in the Township Court and in the District Court. Being aggrieved with this, the defendant Shwe Hin has filed the present appeal. The only ground

* Civil 2nd Appeal No. 126 of 1952 against the decree of the District Court, Toungoo, in Civil Appeal No. 18 of 1952.

urged in favour of the appellant is that costs should be limited to the amount decreed. This contention, in my opinion, should be allowed to prevail. In *Velu Pillai and Ghose Mahomed* (1) a Bench of the Madras High Court has made the following observation :—

"Objection has been filed by respondent against that part of the lower Court's decree which awards to plaintiffs costs on the whole amount sued for, instead of limiting the same to the amount decreed. The general rule is that if a plaintiff recovers a less amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed. * * * The Judge has given no reason for departing from this rule. The decree will be modified by awarding costs to plaintiffs only on the amount decreed."

In sub-section (2) of section 35 of the Civil Procedure Code it is enacted that where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. If the learned District Judge had wished to award full costs in spite of the fact that he had decreed a sum of K 150 only, he should have stated his reasons in writing. This has not been done.

The decree of the District Court will accordingly be modified by awarding costs to the plaintiff Sital only on the amount of K 150 which had been decreed.

As the appellant has abandoned his appeal on facts and had only objected to the costs, I would direct that each party bear its costs in this Court.

(1) (1894) 17 Mad. 203.

APPELLATE CIVIL.

Before U Ba Thoung, J.

H.C. 1954

July 1.

SOFIA KHATOON (*a*) MA MYA KHIN (APPELLANT)

v.

MOTHU RODIN (RESPONDENT).*

Mohamedan Law—Restitution of conjugal rights—Cruelty, what constitutes—When a valid defence in a suit for restitution.

Held : According to principles of Mohamedan Law, cruelty, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to a suit for restitution of conjugal rights.

Held further : Each case should be considered on its own facts. A single act of violence on the part of the husband of a not serious nature provoked by the wife and unlikely to be repeated will not constitute cruelty to justify a divorce.

Maung Kywe v. *Ma Thein Tin*, 7 Ran. 790, referred to.

Husaini Begam v. *Muhammad Rustam Ali Khan*, I.L.R. 29 All. 222' followed.

P. N. Ghosh for the appellant.

Aung Min (1) for the respondent.

U BA THOUNG, J.—The plaintiff-respondent sued the defendant-appellant for restitution of conjugal rights in the Court of the Subdivisional Judge, Wakema. The suit was dismissed and on appeal to the District Court of Myaungmya, the lower Appellate Court set aside the judgment and decree of the Subdivisional Court, and the plaintiff-respondent's suit was decreed with costs. The defendant-appellant has now come up on second appeal.

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* Civil 2nd Appeal No. 111 of 1952 against the decree of the District Court, Myaungmya, in Civil Appeal No. 11 of 1952.

The parties are Mohamedans and they were married according to Mohamedan rites about four years ago. The plaintiff-respondent was a labourer of the defendant-appellant's parents, and he was staying with them before his marriage with their daughter. It was alleged by the plaintiff-respondent that owing to the interference of the defendant-appellant's parents, the defendant-appellant refused to cohabit with him, and when he asked her to come away with him she refused to do so.

The defendant-appellant denied that her parents interfered and that she refused to cohabit with the plaintiff-respondent. She asserted that the plaintiff-respondent habitually ill-treated her and eventually left her house after a quarrel when he squeezed her neck and pulled her neck with a towel. She denied that he ever came and called her since he left the house.

The only issue filed in the case in the trial Court was "Is the plaintiff entitled to the restitution of conjugal rights. The lower Appellate Court considered that the trial Court had failed to frame necessary issues and therefore the following additional issues were framed :—

(1) Whether there was any matrimonial fault on the part of the plaintiff ?

(2) Has the plaintiff ever asked the respondent Sofia Khatoon (*a*) Ma Mya Khin to come and stay with him ?

The question to be considered in this case is whether there was any legal cruelty on the part of the plaintiff-respondent which would give a valid defence to the defendant-appellant in this case.

It is pointed out in section 281 (2) of the principles of Mohamedan Law by Mulla, 13th edition at page 246 that "Cruelty, when it is of

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SOFIA KHATOON (*a*) MA MYA KHIN *v.* MOTHU RODIN.

U BA THOUNG, J.

such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit (suit for restitution of conjugal rights)."

In this case there is evidence on record to show that the plaintiff-respondent in quarrelling with his wife before he left her house had squeezed her neck and dragged her neck with a towel. This is borne out by the evidence of the defendant-appellant supported by her witnesses Abdul Kodim (PW 2), Maung Sein (DW 3) and Meah San (*a*) Ko Myat San (DW 4.) This incident, I think, is sufficient to show that the plaintiff-respondent had committed an act of cruelty to his wife. His action in squeezing the neck and dragging the neck of his wife with a towel must be considered as an act of cruelty of such a character as to render the defendant-appellant unsafe to return and live with the plaintiff-respondent. If the husband had acted in such a cruel manner once, I think it is quite likely that he would make a repetition of it again. At least the wife would always apprehend and would be in constant fear that her husband would ill-treat her again in that cruel manner. This itself, I think is mental cruelty.

It was contended for the plaintiff-respondent that a single act of violence does not constitute cruelty, and the case in *Maung Kywe* v. *Ma Thein Tin* (1) was quoted. It was held in that case thus :

"A single assault by a husband, which was provoked by the wife, is not a sufficient ground for the granting of a divorce to a wife on any terms, when the character and habits of the husband are not of a nature to suggest any likelihood of a repetition of the offence ; cruelty consists in indifference, or delight in, another's pain. Hence a single act

(1) 7 Ran. 790.

of violence is not necessarily an act of cruelty in every case, justifying a divorce."

I think each case should be considered on its own facts. In that case a single assault was made by the husband on provocation by the wife, and the nature of the assault made was not serious as in this case. In this case squeezing the neck of the wife and tying it with a towel by the husband have endangered the life of the wife or at least caused her reasonable apprehension that her life would be endangered if she returns to her husband. See the case of *Husaini Begam* v. *Muhammad Rustam Ali Khan* (1). For this reason I consider that it would be unsafe for the defendant-appellant to return to her husband.

The result is, the appeal is allowed and the judgment and decree of the lower Appellate Court are set aside, and the plaintiff-respondent's suit is dismissed with costs throughout.

(1) I.L.R. 29 All. 222.

APPELLATE CRIMINAL

Before U Chan Tun Aung, J.

H.C. 1954

July 8.

THE UNION OF BURMA (APPLICANT)

v.

(1) MAUNG NYEIN
(2) MAUNG KAUNG } (RESPONDENTS).*

Criminal Procedure Code—Execution of sentence—Ss. 381 to 400—Ss. 383 and 397—Ante-dating a sentence not provided for in the Code.

Held : The Criminal Procedure Code nowhere contemplates the imposition of a sentence upon an accused person to take effect from a date prior to the date of passing of a judgment. Accordingly, the order dated the 20th October 1953 imposing a sentence of imprisonment to take effect from the 1st July 1953 is clearly wrong.

Emperor v. *Nga Po Min*, (1933) A.I.R. Rang. 28, followed.

Mya Thein (Government Advocate) for the applicant.

U CHAN TUN AUNG, J.—The two respondents above-named were tried along with one Maung Hla Myint for the offence of armed robbery under section 397 of the Penal Code and each was sentenced to seven years' rigorous imprisonment by the Additional Sessions Judge, Hsipaw State, Hsipaw, in his Criminal Trial No. 5 (G) of 1952-53. Maung Hla Myint preferred an appeal to this Court and in Criminal Appeal No. 30 of 1954 his conviction was set aside. The two respondents did not, however, appeal and it appears that they were convicted by the trial Court on their own plea of guilt of the

* Criminal Revision No. 63-A of 1954 being a Review of the order of the Additional Sessions Judge, Hsipaw, in Criminal Regular Trial No. 5 (G) of 1952-53.

offence with which they have been charged. However, while dealing with Maung Hla Myint's appeal in this Court it is found that the learned trial Judge has, in imposing the sentences upon the two respondents ordered that their sentences shall take effect from the 1st July 1953, though his judgment was dated the 20th October 1953. In other words, it is found that the learned trial Judge has antedated the sentences imposed upon the two respondents, with the result that on the date when he passed judgment, *i.e.*, 20th October 1953, the two respondents would be deemed to have already undergone nearly 3 months and 20 days of imprisonment.

To my mind, a sentence passed on an accused person cannot be made to operate from a date prior to the date on which the sentence was passed. Criminal Procedure Code nowhere contemplates the imposition of sentence upon an accused person to take effect from a date prior to the date of passing of a judgment. A perusal of the relevant sections dealing with execution of sentence prescribed in section 381 to 400 would show that antedating of sentence imposed upon an accused person is never contemplated by the Code. In particular, if a reference is made to section 383 of the Criminal Procedure Code, it will be seen that an accused person who is sentenced to imprisonment shall be forwarded to the jail in which he is to be confined and nowhere in the said section one finds any words which would warrant the antedating of the sentence. Section 397 which deals with postponement of commencement of sentence of imprisonment under certain circumstances neither provide the antedating of sentence of imprisonment. Thus, the sentences imposed upon the respondents by the trial Judge

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THE UNION OF BURMA v. (1) MG. NYEIN (2) MG. KAUNG.

U CHAN TUN AUNG, J.

was clearly wrong. See the case of *Emperor* v. *Nga Po Min* (1). In view of this error on the part of the trial Judge the two respondents have been called upon to show cause in revision why their sentences should not be altered. Though they have been properly served with the notice of revision, they stated in writing on the notice duly served upon them that they did not wish to appear before the Court.

In view of the above circumstances and also having regard to the relevant provisions of the Criminal Procedure Code, I direct that the sentences imposed upon the two respondents shall take effect not from the 1st July 1953, but from the date of the judgment of the Additional Sessions Judge, Hsipaw, *i.e.*, 20th October 1953 and their sentences shall be altered accordingly.

(1) A.I.R. (1933) Ran. p. 28.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, J.

THE UNION OF BURMA (APPLICANT)

v.

MAUNG TIN CHO (RESPONDENT)*.

H.C. 1954

July 9.

Child, under 7 years of age, immunity of—Penal Code, ss. 30 and 82—Offence under Excise Act—Admonished under Young Offenders Act.

Held: Under s. 82, Penal Code a child under 7 years of age cannot be guilty of any offence; and the offence contemplated therein not only includes an offence under the Penal Code but also an offence made punishable under Special or Local Law as laid down in s. 40, Penal Code.

The King v. *Ba Pa Sein*, (1938) R.L.R. 227.

—for the applicant.

—for the respondent.

U CHAN TUN AUNG, J.—The Sessions Judge, Arakan Division, has recommended under section 438 of the Criminal Procedure Code to set aside the conviction and sentence recorded against the respondent Maung Tin Cho, a boy of six years of age, by the 2nd Additional Magistrate, Sandoway, in his Criminal Summary Trial No. 9 of 1954. It appears that Maung Tin Cho was found in illegal possession of 8 quarts of toddy, and on his plea of guilt he was convicted and sentenced under section 30 (*a*) of the Excise Act, and the nature of sentence recorded against him by the trial Magistrate was a discharge order after due admonition invoking the provision of section 16 (*a*) of the Young Offenders Act.

* Criminal Revision No. 108-B of 1954 being Review of the order of the 2nd Additional Magistrate, Sandoway, in Summary Trial No. 9 of 1954 as recommended by Sessions Judge, Arakan, in Criminal Revision No. 71 of 1954.

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THE UNION OF BURMA v. MAUNG TIN CHO.

U CHAN TUN AUNG, J.

The age of Maung Tin Cho is not in dispute. He has been found to be six years of age. Under section 82 of the Penal Code, it is obvious that a child under seven years of age cannot be guilty of an offence; and the offence contemplated therein not only includes the offence under the Penal Code, but also the offence made punishable under special or local law—*vide* section 40 of the Penal Code. In *The King* v. *Ba Ba Sein* (1) it has been held that a child under seven years of age is immune from any criminal liability and that such immunity is not only confined to offences under the Penal Code but extends to offences under any special or local law, unless the particular enactment contains provisions to the contrary. It is clear that the Excise Act does not contain any special provisions making a child under seven years of age liable for any offence under the said Act.

In the result, the recommendation of the Sessions Judge, Arakan Division, is accepted and I direct that the conviction and sentence imposed upon Maung Tin Cho be set aside.

(1) (1938) R.L.R. p. 227.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, J.

U KYAW HLA (APPLICANT)

v.

THE UNION OF BURMA (U TIN MAUNG) (RESPONDENT) *

H.C. 1954

July 1.

Criminal Procedure Code, s. 522 (1)—Restoration of immovable property—Grounds justifying order for.

Held : S. 522 (1) of the Criminal Procedure Code clearly lays down that only in case of conviction of an offence attended by criminal force or show of criminal force or by criminal intimidation can a Court be justified in ordering the restoration of property in dispute to the person dispossessed. As the complainant's case is one of trespass simply without the necessary features the order for restoration of the property is not justified.

Daw Mya and another v. *Emperor*, (1937) A.I.R. Ran. 248 ; *Jamuna Das* v. *Emperor*, (1945) A.I.R. All. 26 ; *D. K. Aswatha Narayana Gupta* v. *J. Muneppa and three others*, I.L.R. (1943) Mad. 903, followed.

Kyaw Htoon for the applicant.

Ba Than (3) for the respondent.

U CHAN TUN AUNG, J.—This is an application in revision by U Kyaw Hla who has been convicted by the 7th Additional Magistrate, Rangoon, under section 447 of the Penal Code and has been sentenced to pay a fine of K 60 or in default to suffer 3 weeks' rigorous imprisonment. He has been further ordered under section 522 (1) of the Criminal Procedure Code to restore the house site now in his possession and occupation to U Tin Maung, the complainant. The petitioner U Kyaw Hla was tried summarily for the alleged offence and the facts

* Criminal Revision No. 69-B of 1954 being Review of the order of the 7th Additional Magistrate, Rangoon, in Criminal Summary Trial No. 344 of 1953.

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U KYAW HLA v. THE UNION OF BURMA. (U TIN MAUNG).

U CHAN TUN AUNG, J.

leading to his conviction and sentence as could be gathered from the judgment of the trial Court are briefly, as follows:

Some time in the early part of 1952 a fire broke out in St. John's Kwetthit within the Lanmadaw Police Station Jurisdiction, and 27 elders of that locality were elected by the residents to form a Committee called St. John's Fire Relief Committee for the purpose of looking after the allocation of house sites to the fire victims. The Committee thus formed apparently functioned under the auspices of the local AFPFL. The President of the Committee was U Ba Shin, the ward headman. On or about the 23rd March 1952 the Committee allotted the piece of land now in dispute (house site) to U Tin Maung (PW 1) for the construction of a school. The plot is numbered 64/65. The letter of allotment in favour of U Tin Maung is Exhibit "A". U Tin Maung then took possession of the plot on the 24th March 1952 by placing a barbed wire fence around it. This plot of land, like other plots in the said area, is presumably Government land and the occupants thereon, before the fire, were mere squatters; but the re-allocation of these sites after the fire by the said Committee of elders was apparently made with the consensus of the local people and thus the Committee has no legal authority whatsoever to vest a *de jure* title to any person in respect of the sites in question. In fact, the learned counsel appearing for the petitioner has conceded this legal aspect.

The petitioner's case on the other hand is that one Thakin Thein Maung (DW 2), said to be a member of the Economic and Commercial Association, has allotted him the plot in question and that he had gone into possession of the same *bonâ fide*. But no evidence has been led by the petitioner at the trial as

regards what status Thakin Thein Maung (DW 2) actually holds and what authority he had in the allocation of the sites to the fire victims while the AFPFL Committee was still functioning.

It is clear from the evidence that the petitioner demolished the fencing already constructed by U Tin Maung (PW 1) and entered upon the land in question and built a hut thereon. U Tin Maung then made a report to the Lanmadaw Police Station and the petitioner was thus sent up under section 447 of the Penal Code. The learned trial Magistrate has found on the evidence that the petitioner has committed the offence under section 447 of the Penal Code and convicted him as aforesaid.

It has been urged on behalf of the petitioner, firstly that under the facts and circumstances established by the prosecution no offence under section 447 of the Penal Code has been made out against the petitioner and, secondly, that the order under section 522 (1) of the Criminal Procedure Code directing the petitioner to restore possession of the house site in dispute to U Tin Maung is clearly wrong. I am afraid I cannot accept the first contention. There is clear evidence on the record that the petitioner knew that the land had been allotted to U Tin Maung (PW 1) by the Committee of elders and that U Tin Maung had put up a barbed wire fencing around it. In spite of these measures taken by U Tin Maung the petitioner entered upon the site after removing the barbed wire fencing which had been put up obviously against intrusion by others. From such acts on the part of the petitioner the intention to insult or annoy U Tin Maung the complainant is so clearly inherent as to form essential part of the purpose with which his entry upon the vacant site in question was effected. Thus the petitioner's act

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U CHAN TUN AUNG, J.

of entry upon the land in dispute definitely falls within the definition of criminal trespass as set out in section 441 of the Penal Code. I see no reason whatsoever to interfere in revision with the conviction and sentence recorded by the trial Court in that regard as against the petitioner. His application for revision to that extent must therefore be rejected.

Regarding the second point raised, that is, the order of the learned Magistrate under section 522 (1) of the Criminal Procedure Code directing the house site in dispute to be restored to the possession of U Tin Maung, it appears to me that the petitioner has a much stronger case. Section 522 (1) of the Criminal Procedure Code clearly lays down that only in case of conviction of an offence attended by criminal force or show of criminal force or by criminal intimidation can a Court be justified in ordering the restoration of property in dispute to the person dispossessed. In other words, to justify the application of section 522 of the Criminal Procedure Code there must be a conviction of the person concerned for the offence of criminal trespass attended by criminal force or show of force or by criminal intimidation. In the absence of any of those features it has also been judicially held that the order of restoration would not be justified. See *Daw Mya and another* v. *Emperor* (1) and *Jamuna Das* v. *Emperor* (2). In both these cases it is observed that for purposes of section 522, Criminal Procedure Code, it must be shown that the owner or occupier of the land was dispossessed by reason of force shown to him or her. Similarly in *D. K. Aswatha Narayana Gupta* v. *J. Muneppa and three others* (3), it has been held that an order for restoration of possession

(1) (1937) A.I.R. p. 248. (2) (1945) A.I.R. All. p. 26.
(3) (1943) I.L.R. Mad. p. 900.

of an immovable property cannot be made under section 522 of the Criminal Procedure Code where the criminal force attending the dispossession complained of is used not against the person dispossessed but against the property in his absence. In the case under consideration none of those features is present. There is not a shred of evidence that the petitioner had trespassed upon the complainant's land by criminal force or show of force or by criminal intimidation. In fact it was never the complainant's case that such features were present. The complaint against the petitioner, as could be gathered from the trial record, was criminal trespass *simpliciter*, involving annoyance only.

In these circumstances I must therefore dismiss the petition in revision so far as it relates to the petitioner's conviction under section 447 of the Penal Code; but I would allow his petition so far as it relates to the order of the trial Court under section 522 (1) of the Criminal Procedure Code directing him the restoration of the site in dispute to the complainant U Tin Maung, and accordingly that order is therefore set aside.

APPELLATE CIVIL.

Before U Chan Tun Aung, J.

H.C. 1954

July 29.

U MAUNG AND ONE (APPLICANTS)

v.

MA HLA YIN AND SEVEN OTHERS (RESPONDENTS).*

Civil Procedure Code, Order 1, Rule 10—Addition of parties—When necessary—Order by Court to add parties, when not justified—Illegal assumption of jurisdiction—Revision lies under s. 115, Civil Procedure Code.

Held: Whether parties should be added as defendants or not depends upon whether the plaintiff has some cause of complaint against them which the Court ought to determine in the action instituted. Where the plaintiff never intended to seek any remedy from a person to be added as a defendant and against whom there is no claim whatsoever, such a person should not be added as a defendant. An order contravening this principle is not only erroneous but is an illegal assumption of jurisdiction by the Court.

A.M.A. Murugappa Chettyar v. *L.K.S.S. Firm*, A.I.R. (1926) Mad. 135; *C. Narayanaswami Naidu* v. *N. Subbaramulu Naidu and another*, A.I.R. (1937) Mad. 394; *Ranganayaki Ammal* v. *Janaki Ammal*, A.I.R. (1937) Mad. 338; *Chaya Lakshmidayamma* v. *Chaya Nagayya*, A.I.R. (1949) Mad. 369; *Norris and another* v. *Beasley*, Common Pleas Divn. (1876-7) L.R. 80; *V.P.S.A.K. Tiruvaduthurai Adhinam* v. *Sadasiya Iyer and others*, A.I.R. (1926) Mad. 836, followed.

Tun On for the applicants.

——— for the respondents.

U CHAN TUN AUNG, J.—This is an application in revision against the order of the learned Subdivisional Judge, Pyinmana, who after holding that all the heirs of U Nyo Seint and Daw Phan (both deceased) are necessary parties to a suit filed by the applicants, has directed the applicants to amend

*Civil Revision No. 111 of 1953 against the order of the Subdivisional Judge, Pyinmana, in Civil Regular No. 11 of 1953.

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U CHAN TUN AUNG, J.

their plaint by adding such heirs as parties to the suit. The facts as alleged by the applicants in their suit are quite simple. The applicants claimed that a piece of land measuring 17·14 acres known as Holding No. 23-24 (ဃ) 24 (ခ) of 1953-1954, in Lewe town, Ku-Thabeik Ah-shai Kwin No. 1806 (ဃ) was theirs, being an allotment to them after a family partition that took place after the death of their father U Nyo Seint. They further claimed that being owners thereof they had leased out the same to the 1st and 2nd respondents who after paying rents for three years permitted the other respondents to occupy the same with applicant's consent. The applicants now seek for eviction and for possession of the said land. The first and second respondents contended that the suit land was their property by virtue of the fact that their mother Daw Saw (since deceased) had inherited the same from U Nyo Seint and Daw Phan. They further averred that all the heirs of late U Nyo Seint and Daw Phan should be added as parties to the suit. In other words, the suit filed by the applicants against the respondents was a suit on the basis of their title by virtue of a family partition effected after the death of their parents; and whereas the respondents', (some of whom being nephew and nieces of the applicants') case is that the suit land was allotted to their mother Daw Saw (deceased) at the family partition and not to the applicants, and that the same belonged to them by way of inheritance, on the death of Daw Saw. There is thus a straightforward contest between the applicants on one hand, and the respondents on the other who sought to base their claim by way of inheritance in consequence of a family partition which has been admitted by both sides. Notwithstanding this, the Subdivisional Judge held that all the heirs of U Nyo Seint and Daw Phan

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should be added as parties to the suit and directed the applicants to amend their plaint accordingly.

It is now urged in revision that the order of the learned Subdivisional Judge, Pyinmana, directing the adding of all the heirs of U Nyo Seint and Daw Phan as necessary parties to the applicants' suit is not merely a procedural error, but an error which tantamounts to illegal and erroneous exercise of jurisdiction and as such it ought to be revised by this Court. My attention has been drawn in support of this contention to a number of decisions of the Madras High Court. From these decisions it seems that a Subordinate Court will be held to have acted illegally or with material irregularity in the exercise of its jurisdiction where it improperly refused to add a necessary party, or where it improperly added a party who ought not to have been added, causing thereby a misjoinder of parties and cause of action. Such orders are considered to be manifestly just and revisions have been allowed. In *A.M.A. Murugappa Chettyar* v. *L.K.S.S. Firm* (1), it was held that if by the addition of a party, there was not only misjoinder of parties, but also a misjoinder of causes of action, the High Court should interfere in revision; though such addition of a party under Order 1, Rule 10, Civil Procedure Code was a matter of discretion of the Court trying the suit and an erroneous exercise of such discretion being a matter of procedure was ordinarily not open to revision under section 115, Civil Procedure Code. In *C. Narayanaswami Naidu* v. *N. Subbaramulu Naidu and another* (2), the import of the expression "all questions involved in the suit" appearing in Order 1, Rule 10, sub-rule (2), Civil Procedure Code was considered and it was held that the addition of a party to a suit on the mere fact that such a person would be

(1) A.I.R. (1926) Mad. 135. (2) A.I.R. (1935) Mad. 394.

affected by the result of the suit was not a good reason for allowing him to be added as a party and that the order allowing him to be added was not only illegal but one passed without jurisdiction and a revision was allowed. In the said case, the person seeking to be added as a party was no other than a person financing the litigation. Again in the case of *Ranganayaki Ammal* v. *Janaki Ammal* (1) it was held that an order under Order 1, Rule 10 can be revised under section 115 of the Civil Procedure Code when the Subordinate Court fails to exercise the discretion vested in it and when its failure is due to error. In the said case, a joint family property of two minors was attached by a person in execution of his money decree. Subsequently, a maintenance suit was brought by the grandmother of the minors claiming a charge on the same property. The guardian of the minors then conveyed some property to the person seeking attachment to avoid a Court sale. An application was therefore made by the person attaching the property in execution of his money decree to be joined as party to the maintenance suit. It was held, in Revision, that the attaching person was the proper party to the suit and the lower Court's order rejecting his application was set aside. Similarly in *Chaya Lakshmidayamma* v. *Chaya Nagayya* (2) an erroneous order passed by a Subordinate Court under Order 1, Rule 10, Civil Procedure Code was revised by the High Court under section 115 of the Civil Procedure Code. Thus, the High Court's power of revision in such an interlocutory matter appears to be fairly established under certain specific circumstances and the decisions just cited have considerably reinforced the arguments submitted by the learned Counsel for the applicant. The question

(1) A.I.R. (1937) Mad. 338. (2) A.I.R. (1949) Mad. 369.

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now is whether, on the facts and circumstances disclosed in the pleadings, other heirs of the late U Nyo Seint and Daw Phan should be added as necessary parties to the suit for the purpose of the proper determination of the question in issue. The answer seems to be quite clear, because the applicants in their plaint obviously do not desire to proceed against the other heirs of late U Nyo Seint and Daw Phan. They are merely seeking their remedy by virtue of their title to the suit land on the basis of a family partition as against the 1st and 2nd respondents only. The 1st and 2nd respondents, on the other hand, while admitting the family partition of the suit land claim that the suit property was allotted to their mother Daw Saw (deceased) and not to the applicants. The contest is thus one based upon family partition admitted by both the contending parties and the specific issue for decision is whether the suit land was allotted to the applicants or to the respondent's mother Daw Saw (deceased). In *Norris and another* v. *Beazley* (1) which was quoted with approval in Civil Revision No. 50 of 1952 of this Court, Lord Coleridge, C.J., at page 84 observed:

> " . . . the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as a defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any. "

This decision has been relied upon in the case of *V.P.S.A.K. Tiruvaduthurai Adhinam* v. *Sadasiva Iyer and others* (2). Therefore, the principle applicable in a case whether certain persons should be added as

(1 Common Pleas Divn. (1876—7) L.R. 80. (2) A.I.R. (1926) Mad. 836.

defendants or not depends upon whether the plaintiff has some cause of complaint against them so that the Court ought to have determined in the action instituted. But where the plaintiff never intended to seek any remedy from a person to be added as defendants and against whom there is no claim whatsoever, such person should not be added as defendants. In the present case it seems very clear from the plaint and from the written statement filed by the respective parties, that the issue involved is a straight-forward one between the applicants on one hand and the 1st and 2nd respondents on the other, other respondents being persons claiming through them. The question in issue is whether the suit land is one that had been allotted to the petitioners at the family partition soon after the death of their father U Nyo Seint, or to the mother of the 1st and 2nd respondents; and under these facts and circumstances I do not see how the other heirs of U Nyo Seint and Daw Phan are necessary parties for the proper determination of the issue involved. I consider therefore that the order of the Subdivisional Judge that they should be added as parties to the suit is not only erroneous, but an illegal assumption of jurisdiction vested in him.

In the result this application for revision is therefore allowed and the order complained against is vacated with costs.

APPELLATE CIVIL.

Before U Tun Byu, C.J. and U Chan Tun Aung, J.

H.C. 1954

Aug. 17.

CHINA-SIAM LINE by their local Agents CHIP HWAT (APPELLANT)

v.

NAY YI YI STORES (RESPONDENT).*

Carriage of Goods by Sea—Bill of lading prepared in Hongkong, foreign port—Clause 13 providing for claims to be made at port of delivery, governing clause—Burma Carriage of Goods by Sea Act applicable by reason of Burma Laws Act, s. 13 (3)—Witness, absence of cross-examination—Court not bound to accept—Value of evidence assessed in light of all circumstances.

Held : Where clause 13 of the Bill of Lading prepared in the foreign port of Hongkong provides that all claims must be made at port of delivery, the implication is that parties intend the law of Burma to apply to the claims made in respect of goods to be delivered at Rangoon.

Irrawaddy Flotilla Company v. *Bugwandas*, I.L.R. 18 Cal. 620, followed.

Held : In the absence of any law in Burma which governs the carriage of goods by sea from ports outside Burma, the Burma Carriage of Goods by Sea Act must be relied upon for decision, and such decision must be considered to be according to justice, equity and good conscience, as enjoined by s. 13 (3) of the Burma Laws Act.

Held also: The Court is not bound to act on the evidence of a witness merely because he has not been cross-examined. It should examine his statement in the light of other circumstances which appear in the record.

Bhogilal Bhikachand and others v. *Royal Insurance Co.*, 6 Ran. 142, distinguished.

The Queen v. *Madhub Chunder Jiri Mohunt*, 21 Weekly Reporter, Criminal, 13 at 19, followed.

Beecheno and *Horrocks* for the appellant.

Chaung Po for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—Nay Yi Yi Stores, who are the plaintiffs-respondents, despatched 8 cases of Promin Solution from Hongkong by S.S. "Hiram", which

* Civil 1st Appeal No. 25 of 1952 against the decree of the High Court (Original Side) in Civil Regular No. 7 of 1950.

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U TUN BYU, C J.

belonged to China-Siam Line, the defendants-appellants. Exhibit A was the bill of lading, which was made in connection with the despatch of those goods. S.S. " Hiram " arrived at Rangoon on or about the 24th June 1949; and Nay Yi Yi Stores received 7 out of the 8 cases of Promin Solution sent from Hongkong, with the result that they instituted a suit on the Original Side of the High Court to recover the value of the lost goods and for the loss of profits, which would have accrued to them. The main contention which China-Siam Line put forward was that all the 8 cases of Promin Solution had been discharged from the ship onto No. 4 Sule Pagoda Wharf, after the ship arrived at Rangoon. A decree was however passed in favour of Nay Yi Yi Stores for the value of the lost case of Promin Solution, which they did not receive, *i.e.* for a sum of Rs. 6,567-12-0, with proportionate costs.

There is, in our opinion, when the evidence adduced in the present case is carefully considered sufficient material on which the learned Judge on the Original Side might properly arrive at the conclusion that it has not been proved satisfactorily that 8 cases of Promin Solution were, in fact, discharged from S.S. " Hiram " after she arrived at Rangoon towards the end of June 1949. It cannot be disputed in the present case that only 7 out of the 8 cases of Promin Solution was actually received by Nay Yi Yi Stores. The Outturn Report of the Port Commissioners, which has been filed as Exhibit F, shows that, after the cargoes from S.S. "Hiram" were received at the Port Commissioners' godown, it was discovered that there was, *inter alia*, a shortage of one case of Promin Solution. Exhibit F, Outturn Report, was a document which was maintained in the ordinary course of business by the Port Commissioners, and it was

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therefore admissible as evidence in the present case. U Pe Than, Deputy Traffic Manager of the Port Commissioners, stated that the Outturn Reports of the Port Commissioners, had always been received as correct by the ship's agents in Rangoon. We accept his statement.

Exhibit 2 letter, dated the 30th June 1949, which was written by U Aye Pe, proprietor of Nay Yi Yi Stores, has no real significance in the present case. U Aye Pe was not present at the wharf, and he had no personal knowledge of what occurred at the Sule Pagoda Wharf, or at the Port Commissioners' godown, at the time the goods from S.S. "Hiram" were unloaded. U Myint and U Kyin Su, who were in touch with U Aye Pe, also had no personal knowledge of how the loss of one case of Promin Solution occurred. It was, of course, possible for the goods to have been stolen while in the hold of the ship before they were discharged onto the Sule Pagoda Wharf, or for the loss to have occurred after the goods were discharged onto the Sule Pagoda Wharf but before they were delivered into the Port Commissioners' godown. It was also possible that the goods might have been lost in the Port Commissioners' godown before Nay Yi Yi Stores took delivery of part of the goods they received.

It will be necessary to consider whether 8 cases of Promin Solution mentioned in the bill of lading were all discharged from S.S. "Hiram" after she arrived at Rangoon. The burden of proving that those 8 cases of Promin Solution were discharged from S.S. "Hiram" falls on the appellants-defendants, who owned the vessel in question, especially in view of the statement on the bill of lading that the goods had been shipped in apparently good order and condition. The learned Judge on the Original Side

was apparently not impressed with the evidence adduced on behalf of the appellants-defendants China-Siam Line. The evidence produced at the trial has been read before us during the hearing of this appeal, and we have also looked at the exhibits that have been produced at the trial. We agree with the learned Judge on the Original Side that it has not been proved in the present case that 8 cases of Promin Solution were discharged from S.S. "Hiram" onto the Sule Pagoda Wharf after she arrived at Rangoon. We also agree with the learned Judge that Exhibit 7, exercise book, is not an "impressive document." We cannot imagine how K. Issac, an employee of the agent of the appellants-defendants, could have certified, from the figures appearing at the page marked as Exhibit 7 (*a*), that the total number of packages delivered by S.S. "Hiram" was 431, when it is clear from what was written at the page marked as Exhibit 7 (*a*) that the total of the figures shown there was less than 400. What appears to be suspicious in Exhibit 7 (*a*) is that, at the place where the 8 packages marked with NYY were written, a figure had obviously been erased between the figure "4" in ink and the figure "2" in pencil. Such erasure does not occur at any other place. Moreover, at the place of erasure the fullstop (.) which was written in ink is still visible. We must state that we are unable to place any reliance on Exhibit 7 (*a*). Ng Yung Kwok, tally clerk of the ship, was examined on commission on behalf of the appellants-defendants. He was, however, not the tally clerk who wrote the entries on Exhibit 7 (*a*), which were said to have indicated that 8 cases of Promin Solution had been discharged from S.S. "Hiram." Ng Yung Kwok therefore had no personal knowledge about what was written on Exhibit 7 (*a*). Thus his evidence does not help to

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dispel the unfavourable impression which Exhibit 7 and 7 (*a*) created. It is not known why the tally clerk, who wrote the Exhibit 7 (*a*), was not examined in the present case, and there is nothing on the record to suggest that he was not available.

We are also not prepared to act on K. Issac's evidence. He was, moreover, an employee of the agent of the defendants-appellants. We are also not impressed with the tally sheet which he was alleged to have made at the wharf while the goods were being discharged from S.S. "Hiram". He was the person who signed on Exhibit 7 (*a*), apparently, without actually ascertaining whether it really shows 341 packages or not. Thus, this is a case where it could properly be said that the learned Judge had sufficient material before him on which he might decline to act on the evidence adduced on behalf of the defendants-appellants. We are unable to trace anything on the record which might indicate that the lost case of Promin Solution might have been stolen or lost while it was in the Port Commissioners' godown.

The points which fell for consideration in *Bhogilal Bhikachand and others* v. *Royal Insurance Co. Ltd.* (1) are totally different from those which arise in the case now under appeal before us. We are unable to find anything in the present case which will help to indicate that the defendants-appellants had properly discharged the burden of proof, which primarily rests upon them. It is clear that the burden of proving that 8 cases of Promin Solution were all discharged from S.S. "Hiram" falls heavily upon the defendants-appellants; and it is for the Court to consider whether on the evidence adduced by the defendants-appellants they could be said to have

(1) (1928) I.L.R. 6 Rn. 142.

discharged the burden of proof placed upon them. It is the function of the Court to assess what value it ought to give to the evidence produced in Court, and in attempting to assess the value of such evidence the Court will have to consider it in the light of other circumstamces appearing in the case. The Court is not bound to act on the evidence of a witness merely because he had not been cross-examined. It seems to us to be only proper that the Court should examine his statement in the light of other circumstances which might appear in other part of his deposition, or elsewhere in the record of the case.

The observation, which Birch, J. made in *The Queen* v. *Madhub Chunder Jiri Mohunt* (1), applies with equal force to a civil litigation, and the learned Judge observed :

> "For weighing evidence and drawing inferences from it there can be no cannon. Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case, which a Judge of fact in this country, discharging the functions of a Jury in England, has to weigh and decide upon."

We respectfully agree with Marshall, J., when he observed in *Bourda* v. *Jones* (2) :

> ". . . . . It is not infrequently supposed that a sworn statement is necessarily proof, and that, if uncontradicted, it establishes the fact involved which is by no means the law."

The question which next arises is what is the liability of the defendants-appellants in respect of the case which was not delivered to the plaintiffs-respondents. Exhibit A, bill of lading, was made in Hongkong. We do not consider that the bill of

(1) (1874), 21 Weekly Reporter, Criminal, p. 13 at 19.
(2) 110 Wis. 52 : 85 NW 671 (American).

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lading is void merely because it did not contain a statement to the effect required in clause 4 of the Hongkong Carriage of Goods by Sea Ordinance, 1928. It appears to us that clause 2 is the operative clause of the Ordinance, and that clause 4 is merely directory; and this was the view adopted in the case of *Vita Food Products* (1), where the effect of the New Foundland Carriage of Goods by Sea Act, 1932, which contains similar provisions, was exhaustively discussed. The bill of lading in the present case is therefore a valid document; and it will be necessary to determine the law which will apply in the present case. We ought to examine and see if there is anything in the bill of lading in question, which will help to reveal what the real intention of the parties in this respect was. Clause 13 of Exhibit A, bill of lading, is in these words:

> "13. No claim made under this Bill of Lading will be admitted unless made and properly attested within 8 days after the goods had been landed. The ship and Owners shall in no case be liable for more than the first costs of the goods and charges at the port of shipment, including freight if paid. All claims must be made at port of delivery."

The last sentence appears to us to be significant. It must be remembered that Burma is a foreign country so far as Hongkong is concerned; and the implication is that the intention of the parties to the bill of lading is that the law of Burma is to apply to the claims to be made in respect of the goods which were to be delivered at Rangoon. We have not found anything in the bill of lading which will suggest to the contrary.

It might be argued that in view of clause 1 of the Hongkong Carriage of Goods by Sea Ordinance, 1928, the rules contained in the Schedule to the

(1) (1939) A.C. p. 277.

Ordinance of 1928 might be deemed to apply to all bills of lading made at Hongkong, even though there is no express statement made to that effect, as envisaged in clause 4 of the Ordinance. We do not consider that such conclusion necessarily follows in the present case. The plaintiffs-respondents are not residents of Hongkong; and the Hongkong Ordinance will not ordinarily apply to them. It is also open to the parties in the present case to make provision that the law of the country where the goods were to be delivered should apply, should any dispute were to arise there, *i.e.* at Rangoon. We consider that clause 13 of Exhibit A, bill of lading, has made provision for this purpose, in that the effect of clause 13 of Exhibit A is to make the law of Burma applicable to claims arising out of the contract of carriage by sea made at Hongkong between the parties to the present litigation.

In the *Irrawaddy Flotilla Company* v. *Bugwandas* (1), at pages 629 and 631 of the report, Lord MacNaughten observed:

". . . . . the obligation imposed by law upon common carriers has nothing to do with the Contract Act in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward."

. . . . . .

". . . . . the Act of 1872 was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailment, they think that common carriers are not within the Act."

Thus, the Contract Act is not the law which ordinarily governs common carriers, and it will not be necessary to consider what is the effect of the provisions of section 151 or section 152 of the Contract Act.

(1) (1891) I.L.R. 18 Cal. p.620.

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Sub-section (*3*) of section 13 of the Burma Laws Act, however, reads:

"(*3*). In cases not provided 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."

In the absence of any law in Burma, which ordinarily governs the carriage of goods by sea from ports outside Burma, it seems to us to be only reasonable that we should apply the provisions of the Burma Carriage of Goods by Sea Act in the circumstances of the present case, as being just and equitable. The relevant portion of clause (5) of Article 4 of the Schedule to the Burma Carriage of Goods by Sea Act reads:

"(5). Neither the carrier nor the shipper shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *primâ facie* evidence, but shall not be binding or conclusive on the carrier."

Nay Yi Yi Stores will not therefore be entitled to recover more than K 1,350, which is the equivalent of £100 at the present, for the non-delivery of one case of Promin Solution, in the absence of the required declaration and endorsement on the bill of lading. Nowhere was the value of the goods mentioned in the bill of lading, Exhibit A. Clause 4 of the bill of lading will not absolve the defend ants-appellants from liability in the circumstances of the present case, in view of clause 8 of Article III of

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the Schedule to the Burma Carriage of Goods by Sea Act, which is in these words:

"8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article, or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability."

It is the duty of a carrier to deliver the goods at the port of discharge; and the appellants-defendants are therefore responsible, in the circumstances of the present case, for the non-delivery of one case of Promin Solution at Rangoon after S.S. "Hiram" arrived here.

The judgment and decree on the Original Side will therefore be modified in the sense set out above. Each party will bear its own costs in this appeal, but the plaintiffs-respondents will be allowed proportionate costs on the amount granted in this Court, so far as the Original Side is concerned.

APPELLATE CIVIL.

Before U San Maung, J.

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Aug. 20.

DAW SAW (APPELLANT)

v.

DAW PWA THIN AND FOUR (RESPONDENTS).*

Urban Rent Control Act, s. 2, clause (g)—Tenant, definition of—Suit for possession—Permit of Rent Controller under s 14-A (3)—Permit for suit under s. 13 (1) (c) not available for suit under s. 11 (1) (d).

Held : The word tenant in s. 2 (g) of the Urban Rent Control Act, 1948 includes a person remaining in possession of the premises let to him after the termination of the tenancy or lease with or without the assent of the landlord.

Held also : For a suit under s. 11 (*1*) (*d*) the landlord must obtain from the Controller an order in writing under s. 14-A (*3*) to institute such a suit. An order in writing permitting the institution of a suit under s. 13 (*1*) (*c*) is not admissible for the filing of a suit under s. 11 (*1*) (*d*).

V. S. Venkatram for the appellant.

Tun Maung for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 4 of 1952 of the Township Court of Nattalin the plaintiff-appellant Daw Saw sued the defendant-respondents Daw Pwa Thin and four others for their ejectment from the house site in suit. Daw Saw's case is that the house site belonged to the Bank of Chettinad from whom she had purchased it for a sum of Rs. 1,500 in the name of herself and her minor daughter Mangalan. The defendants were the tenants of the Bank in respect of a house standing on that site and when the house was burnt down during the month of February, 1949, by the insurgents the defendants erected a hut thereon and continued

* Civil 2nd Appeal No. 133 of 1952 against the decree of the District Court, Tharrawaddy, in Civil Appeal No. 9 of 1952.

to live on the land without any express permission from the owner, the Bank of Chettinad, and they refused to vacate when she gave them a notice dated the 8th of August 1951. The learned Township Judge considered that the suit fell under section 11 (*l*) (*d*) of the Urban Rent Control Act and he accordingly gave a decree for possession on condition that the plaintiff executed a bond for a sum of Rs. 500, that the suit land would be utilized for the purpose of erecting a building thereon and that she would reinstate the defendants on completion of the building in case the same was erected for the purpose of letting. On appeal by Daw Pwa Thin and others to the District Court the learned District Judge pointed out that on the permit granted by the Rent Controller to the plaintiff for filing a suit under section 13 (*l*) (*c*) of the Urban Rent Control Act a decree for possession could not be given on the ground that the suit fell under section 11 (*l*) (*d*) of the Act. He accordingly dismissed the plaintiff's suit with costs; hence this appeal.

In my opinion the learned District Judge was quite correct in the conclusion arrived at by him on this point. From the definition of the word "tenant" given in clause (*g*) of section 2 of the Urban Rent Control Act, 1948, it is clear that it includes a person remaining in possession of the premises let to him after the termination of the tenancy or lease with or without the assent of the landlord. In the case now under consideration the fact that the house was burnt down in no way terminated the tenancy if the tenant continued living on the land and paying a monthly rental therefor. Therefore, the respondent Daw Pwa Thin and others remained the tenants of the Bank of Chettinad at the time the land was sold by that Bank to the appellant, even if the Bank had decided to

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terminate the lease, which is nowhere apparent. The fact that Daw Saw as a successor in title to the Bank of Chettinad had terminated the lease by a notice dated the 8th of August, 1951, will be of no avail in view of the definition of the word " tenant " as stated above.

The learned Controller of Rents had upon a misapprehension of the true position considered that the suit intended to be filed by Daw Saw fell under section 13 (*1*) (*c*) of the Urban Rent Control Act. He accordingly granted her a permit under section 14-A (*3*) authorising her to file a suit under the provisions of that section. The question is whether a suit under section 11 (*1*) (*d*) of the Urban Rent Control Act can be instituted on such a permit. The answer is obviously in the negative. The relevant portion of section 14-A (*1*) reads—

> " No suit or proceeding by a landlord for ejectment or recovery of possession of any premises against a tenant in which any of the grounds specified in clause (*d*), (*e*) or (*f*) of section 11 is taken as a ground for such ejectment or such recovery of possession shall 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 ".

Therefore, if a suit under section 11 (*1*) (*d*) is intended to be filed, the landlord must obtain from the Controller an order in writing under sub-section (*3*) of section 14-A to institute such a suit. An order in writing permitting the institution of a suit under section 13 (*1*) (*c*) is clearly not admissible for the filing of a suit under section 11 (*1*) (*d*).

For these reasons I would dismiss the appeal of the plaintiff-appellant Daw Saw with costs ; Advocate fees three gold mohurs.

APPELLATE CRIMINAL.

Before U Ba Thaung, J.

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Oct. 8.

KO THAN MAUNG AND SIX OTHERS (APPLICANTS)

v.

THE UNION OF BURMA (KO SEIN) (RESPONDENT).*

Criminal Trespass—Penal Code, ss. 441, 447—Ingredients essential to establish offence—Criminal Procedure Code, s. 522, restoration of land, when proper—Two sets of accused, two trials—Complainant and facts same—One judgment only, procedure improper.

Held: To establish an offence of criminal trespass under ss. 441, 447 of the Penal Code, it must be shown that the complainant is in actual physical possession, and not mere juridical possession of the land; and that the trespassers had the intention to intimidate, insult or annoy the person in possession. Mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within s. 441, Penal Code.

Bageshwari Davi and others v. *Indian Union*, 51 Cr.L.J. 821, followed

Held: As there is no evidence on record and no finding by the Magistrate that the complainant had been dispossessed of the land by criminal force or show of force or by crimnial intimidation, the order of restoration of the land under s. 522, Criminal Procedure Code is illegal.

Bageshwari Davi and others v. *Indian Union*, 51 Cr.L.J. 821, followed.

Held also: Where evidence was recorded in two cases against two sets of accused persons, though the complainant and the facts are the same, it is the duty of the Magistrate to deal with each case separately; the procedure adopted of writing a single judgment to cover both cases is bad.

Doat Ali and others v. *King-Emperor*, A.I.R. (1923) Cal. 230, followed.

Po Aye for the applicants.

Po Ba (Government Advocate) for the respondent.

U BA THAUNG, J.—This is an application for revision of the order of the First Additional Magistrate of Thongwa passed in his Criminal Regular

* Criminal Revision No. 124-B of 1954 being a Review of the 1st Additional Magistrate, Thongwa, in Criminal Regular Trial No. 15 of 1954.

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(KO SEIN).

U BA THAUNG, J.

Trial No. 16 of 1954, in which the petitioners were convicted under section 447 of the Penal Code and sentenced to pay fines varying from K 30 to K 50 each or in default to suffer 2 to 3 weeks' rigorous imprisonment. The learned Magistrate also passed an order under section 522 of the Code of Criminal Procedure to the effect that the complainant be restored to the possession of the land.

The facts of the case are the same as those which appeared in Criminal Regular Trial No. 8 of 1954 of the same Court except that the petitioners in the present case entered upon the land and built houses for their residential purpose on the 6th March 1954 *i.e.*, about one month after the accused in the other case had entered upon the same land and started building their dwelling houses on it. Evidence was recorded separately in these two cases but the learned Magistrate instead of writing a separate judgment in each case wrote a single judgment for both the cases in his Criminal Regular Trial No. 8 of 1954. In connection with this I have pointed out to the learned Magistrate in Criminal Revision No. 123-B of 1954 that the procedure followed by him was bad, for it is the duty of the learned Magistrate to deal with each case separately on its own merits, confining himself to the evidence given in each case, and in support of this I have cited the case of *Doat Ali and others* v. *King-Emperor* (1).

There are three things to be considered in the present case (1) whether the land on which the petitioners had constructed their buildings was in actual physical possession of the complainant at the time of the alleged offence, (2) whether the petitioners entered upon the land in question with intent to commit an offence or to intimidate, insult

(1) A.I.R. (1928) Cal. p. 230.

or annoy the complainant, as contemplated in section 441 of the Penal Code, (3) whether the complainant has been dispossessed of the land by the petitioners by criminal force or show of force or by criminal intimidation to justify an order under section 522 of the Code of Criminal Procedure. Firstly it is apparent from the statements of the complainant U Sein that he was merely a tenant to whom the Thongwa Town Tenancy Disposal Board allotted the land to work for the year 1315 B.E. 1953-54 and that he had to apply to that Tenancy Board once a year to work on the said land. He has clearly stated in his evidence that during the year 1315 B.E. (1953-54) paddy was reaped in the month of *Tazaungmon* (November), winnowed in the month of *Nataw* (December) and that all his work there was completed by the month of *Pyatho* (January 1954). He has stated that he has not yet applied to work the said land for the year 1316 B.E. Since the work on the said land for the agricultural season for the year 1315 B.E. has been completed by the complainant in the month of *Pyatho* (January 1954), the said land must be deemed to be vacant thereafter. The complainant U Sein had already completed his work there for the year 1315 B.E. and he cannot hold the land over till the next agricultural season begins in 1316 B.E., for the land may be allotted to anyone who applies to the Tenancy Board for the year 1316 B.E. Therefore the complainant U Sein cannot be said to be either in actual physical possession or juridical possession of the land after the end of January 1954.

In the case of *Toke Gyi* v. *King-Emperor* (1) it has been held that the " possession " contemplated in section 441, Penal Code is actual physical possession,

(1) 8 L.B.R. 425.

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not mere juridical possession. Where there is a person in actual physical possession of property, he is the only person whose feelings have to be considered under that section. It therefore follows in the present case that since the complainant U Sein cannot be said to be in actual physical possession of the land at the time the petitioners started building their houses on the land on the 17th February 1954, he cannot prosecute the petitioners under section 447 of the Penal Code.

Secondly even assuming that the complainant U Sein was in actual physical possession of the land, then it has yet to be considered whether the petitioners entered upon the land with intent to commit an offence or to intimidate, insult or annoy the complainant.

Section 441, Penal Code requires that in order to constitute criminal trespass " The act must have been done with intent to commit an offence or to intimidate, insult or annoy any person in possession of any such property." This criminal intent has to be gathered from the circumstances of each case. In this case the petitioners had to evacuate to Thongwa because of the insurgents' attack in and around their village, and being in need of dwelling houses for their residential purposes, they did the proper thing in applying to the Deputy Commissioner, Hanthawaddy, for allotment of house sites for them. The Township Officer, Thongwa under orders of the Deputy Commissioner enquired into the matter and opened Revenue Proceedings and a site plan for allotment of house sites for the petitioners had already been drawn up and filed in the proceedings. Then as the land for their house sites belongs to a Chettyar Firm of Thongwa they negotiated for the purchase of the land and had actually paid the

purchase price for it. They then waited till the work on the said land by the complainant had been completed for the year 1315 B.E. and only after the complainant's work had been completed there, they started building their houses on the 17th February 1954. From these circumstances there can be no doubt that the petitioners could not have any intention to commit an offence or to intimidate, insult or annoy the complainant when they started building their houses on the land. Besides, there is no evidence on record to show that there was any intention by the petitioners to commit an offence or to intimidate, insult or annoy the complainant. In the case of *Bageshwari Davi and others* v. *Indian Union* (1) the Patna High Court has held that in order to constitute criminal trespass, the prosecution must prove that the accused had the intention to intimidate, insult or annoy when he made the entry. A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within section 441, Penal Code. Where certain persons reoccupied the lands acquired from them by the government in the belief that the lands would be restored to them on return of the compensation money, they cannot be held guilty, under section 441 in the absence of any criminal intention as required by the section.

For the above reasons I hold that the petitioners have been wrongly convicted of an offence under section 447, Penal Code and the order of conviction and sentence passed against them must be set aside.

Regarding the order for restoration passed against them under section 522 of the Code of Criminal Procedure, it must also be set aside as there

(1) 51 Cr.L.J. (1950) p. 821.

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(KO SEIN).

U FA THAUNG, J.

is no evidence on record to show that the complainant has been dispossessed of the land by the petitioners by criminal force or show of force or by criminal intimidation, and there is no finding by the learned Magistrate that the petitioners had acted by criminal force or show of force or criminal intimidation. In the same case of *Bageshwari Davi and others* v. *Indian Union* decided by the Patna High Court (quoted above) it has been held that an order for restoration under section 522 of the Code of Criminal Procedure can be passed in favour of a person only if he has been dispossessed by use of criminal force. Otherwise, the order would be illegal.

In the result this application in revision succeeds. The convictions and sentences passed against the petitioners are set aside and the petitioners are acquitted. The order of restoration under section 522 of the Code of Criminal Procedure passed against them is also set aside.

APPELLATE CIVIL.

Before U San Maung, and U Ba Thaung, JJ.

MA THAN (APPELLANT)

v.

SEIN KHET (*a*) YI YI GYOKE (RESPONDENT).*

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Sept 29.

Specific Relief Act, s. 42—Declaratory suit—Roadside and encroachment stalls, title to—Rangoon Municipal Act, statutory rules made thereunder—Rule 12-A—Occupation merely by sufferance of Corporation.

Held: There is no right in law for any person to be in occupation of a roadside or encroachment stall: he is merely there on sufferance by the Rangoon Corporation. Under Rule 12-A, of the statutory rules made under the Municipal Act, the occupancy of such stalls and the transfer of right of occupancy are entirely at the discretion of the authorities of the Corporation.

Than Sein for the appellant.

Hla Pe for the respondent.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 1440 of 1951 of the City Civil Court, Rangoon, the plaintiff-appellant Ma Than sued the defendant-respondent Sein Khet (*a*) Yi Yi Gyoke for a declaration that she is the tenant of one Sein Khet, who had gone to China, in respect of a roadside stall No. 27 situated on the southern side of the Dalhousie Street between 17th Street and Godwin Road, Rangoon. Her case is that this stall had been let out to her at a monthly rent of Rs. 60 by one Sein Khet about four years ago and that when Sein Khet left for China he authorized the defendant Yi Yi Gyoke to collect rent

* Civil 1st Appeal No. 87 of 1952 against the decree of the 4th Judeg, City Civil Court, Rangoon, in Civil Regular Suit No. 1440 of 1951.

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U SAN MAUNG, J.

on his behalf. Subsequently, Yi Yi Gyoke by misrepresenting himself as the original Sein Khet applied to the Rangoon Corporation to recognise his claim to the stall in question. When the plaintiff objected she was directed by the Rangoon Corporation authorities to file a suit in a Court of law for a declaration of the nature which she now seeks to obtain. The defendant in his written statement denied that he was an agent of Sein Khet and claimed that he was the original Sein Khet who had the right to occupy the stall in question. The learned 4th Judge, City Civil Court, after examining the witnesses cited by both parties came to the conclusion that the plaintiff was not a tenant of Sein Khet, who had left for China, and that the defendant was the agent of the said Sein Khet. In the result, the plaintiff's suit was dismissed with costs.

On this appeal by the plaintiff Ma Than a question arises as to whether even if the facts set out in her plaint be correct a declaration such as that prayed for by her can be granted. It is an admitted fact that the stall in question was an encroachment stall and for such encroachment fine had to be paid to the Rangoon Corporation. The Rules relating to the roadside and encroachment stalls, which are statutory rules made under the Municipal Act, have been reproduced at page 366 of the Rangoon Municipal Manual, 1941 Edition. These Rules must be reproduced as follows:

"9. No person shall, within Municipal limits, set up or occupy any stall or occupy any land vested in the Corporation for the purpose of selling or exposing for sale goods on any streets, unless he shall first have obtained a pass signed by the Revenue Inspector. Such pass shall authorize the person obtaining it to set up and occupy either an encroachment stall

or night stall or to occupy land vested in the Corporation and shall be in force for a period of one month from the date of issue.

10. The Revenue Inspector shall, before granting any such pass, satisfy himself that such stall or place is not likely to cause obstruction or to become a nuisance and is approved by the Health Officer, provided the owner of the house facing the proposed site does not object.

11. The Revenue Inspector may, without assigning any reason reject any application for a pass or direct that any stall or place for which a pass has been granted shall be removed.

12. The pass signed by the Revenue Inspector for any stall or place shall be valid for one month only and may be cancelled at the expiration for which it was granted, without any reason being assigned for such cancellation.

12A. The right of occupancy of any night stall or encroachment stall may be transferred in special cases at the discretion of the Commissioner on payment of such fee as may be fixed by the Commissioner in each case."

From Rule 12-A it is clear that it is entirely at the discretion of the Commissioner of the Rangoon Corporation to transfer the occupancy right (if any) of any encroachment stall. In fact the term right of occupancy according to Rule 12-A is a misnomer as there is really no right in law for any person to be in occupation of such an encroachment stall. The persons in occupation of such stalls are there merely on sufferance.

The grant of declaratory decrees are governed under section 42 of the Specific Relief Act, the relevant portion of which reads:

"42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled. . . . . ."

In the case, now under consideration, there is no right to which the plaintiff can make her claim. She

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has no right whatsoever as a tenant of a person in occupation of an encroachment stall. And as already observed above, the occupancy of such stalls and the transfer of right of occupancy are merely at the discretion of the authorities of the Rangoon Corporation.

In the result, the appeal fails and must be dismissed. As regards costs, we are inclined to believe that the plaintiff's story on facts is substantially true and she cannot be blamed for bringing up the present appeal as a novel point of law is involved in the case. For these reasons we direct that each party bear its own cost of this appeal.

APPELLATE CRIMINAL.

Before U San Maung, J

H.C. 1954

July 14.

MAUNG TUN SEIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Extortion—Penal Code, s. 384—Concurrent findings by lower courts—High Court, revisional powers of, in such cases—Evidence of victim of extortion distinguished from evidence of willing accomplice as regards necessity of corroboration.

Held: The High Court as a Court of revision will not approach the application as a court of appeal, and will not as a rule go into the evidence but will accept the concurrent findings of facts by the lower courts, except where the judgment of the facts is manifestly wrong and palpably unjust.

Maung Mya Sein and others v. *The Union of Burma*, Criminal Revision 2-B of 1953; *M. B. Ignatious* v. *Aligamma*, A.I.R. (1935) Ran. 192; *Jumman* v. *Emperor*, A.I.R.(1944) Nag. 285, followed.

Held also: The evidence of a person who is a victim of extortion is to be regarded as standing on a different footing from that of another who is a willing accomplice in the crime committed.

Papa Kamalkhan v. *Emperor*, I.L.R. 59 Bom. 486 at 495; *Srinivas Mall Bairolia and another* v. *Emperor*, A.I.R (1947) (P.C.) 135, followed.

Hla Tin for the appellant.

Kyaw Thaung (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 1 of 1952 of the District Magistrate of Yamèthin, the applicant Maung Tun Sein who at the time of the occurrence of this case was Police Station Officer, Pyinmana, was convicted under section 384 of the Penal Code for having extorted money from a number of residents of Pyinmana and was sentenced to 6 months' rigorous imprisonment. The appeal by

* Criminal Revision No. 24-B of 1953, being review of the order of the Sessions Judge of Pyinmana in Criminal Appeal No. 29 of 1953.

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Maung Tun Sein to the Sessions Judge of Pyinmana against his conviction and sentence was dismissed by that Judge in his Criminal Appeal No. 29 of 1953. The present is an application by Maung Tun Sein to set aside in revision the conviction and sentence which have been passed upon him.

The manner in which the High Court in exercise of its revisional jurisdiction usually deals with an application such as the present has been fully discussed in my order dated the 21st February 1953 in Criminal Revision No. 2-B of 1953—*Maung Mya Sein and others* v. *The Union of Burma.* There I pointed out how the High Court usually accepts the concurrent findings of fact by the lower Courts and does not as a rule go into the evidence save in exceptional cases as where the judgment of the facts is manifestly wrong and palpably unjust. In addition to this case, the learned Government Advocate has brought to my attention the case of *M. B. Ignatious* v. *Alagamma* (1), where Mackney, J. observed that a Court of revision will not approach the matter as if it were a Court of appeal, and that so long as the proceedings of the Magistrate are in order and so long as the Magistrate has fairly estimated the evidence before him in his own mind, his decision should not be disturbed, even if the revisional Court should be of the opinion that on the evidence another conclusion might have been reached. Another case which has been quoted with approval in Criminal Revision No. 2-B of 1953 has also been cited. This is *Jumman* v. *Emperor* (2) where Niyogi, J., observed as follows:

"The learned counsel is virtually seeking to impugn the correctness of the inferences drawn from the evidence which undoubtedly exists whatever weight might be attached to it. In such a case it is imperative on this Court in revision to

(1) A.I.R. (1935) Ran. 192. (2) A.I.R. (1944), Nag. 285.

follow the rule laid down by Lord Sumner in 1927 A.C. 371 at p. 47 as follows :

> 'The higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.'"

In spite of these observations I have nevertheless gone carefully into the evidence adduced by the witnesses for the prosecution and for the defence and I must certainly say that there is sufficient evidence on record which, if believed, would justify the conviction of the applicant Maung Tun Sein under section 384 of the Penal Code. The various acts of extortion alleged to have been committed by the applicant Maung Tun Sein were the outcome of a single anonymous letter implicating several residents of Pyinmana of having intercourse with the Communist-insurgents. Maung Sein Maung (PW 1) deposed how he had to give a sum of Rs. 250 to the applicant who made a demand for Rs. 500 for the purpose of desisting from taking action against him in pursuance of the anonymous letter which he had received. Maung Tun Sein told Maung Sein Maung that he would have to share the money with four other persons and that therefore a sum of Rs. 500 was necessary, and Maung Sein Maung was hard put to make Maung Tun Sein reduce the demand to Rs. 250 which was subsequently accepted. If the threat made to Maung Sein Maung was more or less veiled this was hardly the case with U Nay Dun (PW 3) from whom Maung Tun Sein extorted a sum of Rs. 100. When U Nay Dun told Maung Tun Sein that it would indeed be very hard upon him if action were taken against him merely upon the strength of an anonymous letter, Maung Tun Sein scolded him for

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being so dense and told him that he would send one Maung Gale as his messenger two days later. Accordingly Maung Gale came on the day fixed and told U Nay Dun that Maung Tun Sein had sent him to make a demand for money. U Nay Dun sent Maung Gale with a sum of Rs. 100 for Maung Tun Sein, but Maung Gale came back about fifteen minutes later to say that Maung Tun Sein had demurred saying that other people had given him Rs. 250 to Rs. 300, and U Nay Dun was hard put to ask Maung Gale to intercede for him. Daw Aye Cho (PW 5) was a dealer in articles of jewellery and she had to pay a sum of Rs. 500 to Maung Tun Sein in order that no action might be taken against Tun Wa, Maung Sein and Maung Ko, three of her workmen. Her evidence in this respect is both straightforward and convincing.

There is ample corroboration of the evidence given by these three main witnesses for the prosecution. U Chit Pe (PW 4) has stated that Maung Sein Maung (PW 1) had told him of the manner how he had to pay a sum of Rs. 250 to Maung Tun Sein to make him desist from taking action against his brother Maung Hla Maung (PW 2). No cogent reason has been assigned as to why this witness should have given false testimony to implicate Maung Tun Sein.

The defence is that the whole case has been engineered by Dr. U Than Gyaw, Thakin Ba Ni and Thakin Par Gyi who were on bad terms with the Pyinmana Police and who had vowed to bring the members of the Police into trouble. This aspect of the case has been fully discussed by the trial Magistrate as well as by the learned Sessions Judge on appeal, and I have no reason to differ from their conclusions that although these three persons have shown great interest

in the proceedings the case was not the outcome of a conspiracy to foist a false charge upon the applicant Maung Tun Sein.

In the course of his judgment the learned Sessions Judge has quoted with approval certain observations by Beaumont, C.J., in *Papa Kamalkhan* v. *Emperor* (1). There the learned C.J. said :

> " In my opinion, the rule of the Court which requires corroboration of the evidence of an accomplice as against each accused, if it applies at all, applies with very little force to a case like the present, in which the accused is charged with extorting a bribe from other persons. The objections which usually arise to the evidence of an accomplice do not really apply where the alleged accomplice, that is, the person who pays the bribe, is not a willing participant in the offence, but is really a victim of that offence. "

This observation was approved by their Lordships of the Privy Council in *Srinivas Mall Bairoliva and another* v. *Emperor* (2), where it was held that " when the accomplices act under a form of pressure which it would require some firmness to resist, reliance can be placed on their uncorroborated evidence." In my opinion, authority is hardly needed for the proposition that the evidence of a person who is a victim of extortion is to be regarded as standing on a different footing from that of another who had under his own volition offered a bribe to a public servant to dissuade him from carrying out his duty. One is clearly the victim while the other a willing accomplice in the crime committed by the public servant.

For these reasons and bearing in mind the observations quoted above, I hold that in this case there is sufficient evidence which, if believed, would justify the conviction of the applicant Maung Tun Sein. The only mistake which the learned District

(1) I.L.R. 59 Bom. 486 at 495. (2) A.I.R. (1947) (P.C.) 135 at 136.

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Magistrate had made was not to have convicted the applicant of all the three charges which he had framed against the applicant for extorting money from (1) Maung Sein Maung, (2) U Nay Dun and (3) Daw Aye Cho. These are three separate transactions for which the applicant should have been convicted. However, as the mistake made by the District Magistrate was not to the prejudice of the applicant, no interference is necessary in this respect.

The application for revision fails and must be dismissed.

APPELLATE CIVIL.

Before U San Maung, J.

MAUNG TUN SOE (APPELLANT)

v.

MAUNG CHIT AND TWO OTHERS (RESPONDENTS) *.

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Aug. 16.

Transfer of Property Act, s. 41—Ostensible ownership—Enquiry into title, when incumbent upon transferee—Evidence Act, s. 115—Estoppel by conduct, what amounts to.

Held: Where the contents of a document of title are not consistent with existing facts, as where the land is assessed to revenue in the name of a person other than the donee of a gift by deed, it is incumbent upon a transferee to investigate the validity of the title; he cannot invoke s. 41, Transfer of Property Act claiming purchase from an ostensible owner.

P.L.T.A.R. Chettyar Firm v. *Maung Kyaing*, 7 Ran. 276, distinguished.

Held also: Estoppel can arise from conduct by negligence or omission were there is a duty cast upon a person by usage of trade or otherwise to disclose the truth.

R.M.P.A.L. Chettiar Firm v. *Ko Maung Gale and others*, 13 Ran. 346; *Tan Soon Li* v. *The Burma Oil Co., Ltd.*, (1941) R.L.R. 153, followed.

Hla Pe for the appellant.

M. San Hlaing for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 11 of 1951 of the Subdivisional Court of Wakèma the plaintiff Daw Hmwe, now deceased, sued the defendant-appellant Maung Tun Soe and his co-defendants Maung Chit and Ma Thaung for a declaration that the two houses and their site in suit belonged to her. The facts giving rise to the suit are these. The suit land, together with a house standing thereon, was purchased by the plaintiff Daw Hmwe and her deceased husband U Po Hmyar for a sum of Rs. 400

* Civil 2nd Appeal No. 116 of 1952 from the decree of the District Court, Myaungmya, in Civil Appeal No. 9 of 1952.

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by a registered deed of sale, Exhibit C, dated the 28th August 1936. About four years later the house was dismantled and a new house built thereon. With the materials supplied by U Po Hmyar and Daw Hmwe, Ko Ba Shwe (PW 2) built another house on the same land and stayed therein without paying any rent for about one year. Thereafter he paid rent sometimes to Daw Hmwe and sometimes to Maung Chit who was a nephew of U Po Hmyar. The first house was partitioned into three rooms of which Daw Hmwe occupied one room together with Maung Chit and his wife Ma Thaung while the other two were rented out to other persons. About one year later Daw Hmwe went to live in Kungyan Village leaving Maung Chit and Ma Thaung in possession. The rents in respect of the two rooms were collected by Maung Chit who gave some to Daw Hmwe while spending the rest. The house was assessed to municipal taxes in the name of U Po Hmyar and both these taxes and the land tax were paid by Daw Hmwe. On the 11th May 1948 Maung Chit and Ma Thaung sold one of the houses on the suit land to the defendant-appellant Maung Tun Soe for a sum of Rs. 1,600 by a registered deed of sale. However, as he did not get possession of the property which he had bought Maung Tun Soe sued Maung Chit and his wife Ma Thaung for possession or for the return of the purchase money. The suit was decreed and in Civil Execution Case No. 6 of 1950 of the Court of the 2nd Assistant Judge, Wakèma, which was subsequently converted into Civil Execution Case No. 8 (A) of 1951 of the Court of the Subdivisional Judge, Wakèma, Maung Tun Soe applied for the execution of the decree for possession and a delivery order was issued. The tenants, however, refused to vacate the house and Maung Tun Soe

made an application under Order XXI, Rule 97 of the Civil Procedure Code against 17 persons, including Daw Hmwe, Maung Chit and Ma Thaung. The application against Daw Hmwe was, however, subsequently withdrawn. Hence, the suit out of which the present appeal has arisen for a declaration that the house and its site belonged to Daw Hmwe. The suit was contested by Maung Tun Soe alone so that it was heard *ex parte* as against Maung Chit and Ma Thaung. The learned Judge of the trial Court held that although the house and its site were the property of the plaintiff Daw Hmwe, she was estopped from denying that her nephew Maung Chit and his wife Ma Thaung who were in possession of the same, were the owners. He also held that section 41 of the Transfer of Property Act operated in favour of the defendant Maung Tun Soe. On appeal to the District Court the learned District Judge held that neither the principles of estoppel nor the provisions of section 41 of the Transfer of Property Act could be invoked by the defendant Maung Tun Soe and that Daw Hmwe's suit for declaration should therefore be decreed. Hence, this appeal by Maung Tun Soe to this Court and Daw Hmwe having died in the meantime, Maung Chit and Ma Thaung have been impleaded as respondents not only in their personal capacity but as heirs and legal representatives of Daw Hmwe. The third respondent in the appeal is Ma Thein Sint, daughter of Daw Hmwe. The facts upon which the learned trial Judge relied for his finding that the principles of estoppel and the provisions of section 41 of the Transfer of Property Act were applicable are these. (1) In Civil Regular Suit No. 192 of 1938 of the Township Judge of Wakèma in which Maung Chit and Ma Thaung sued for the rocovery of the suit land Daw Hmwe gave

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evidence to the effect that she had given the piece of land orally to these persons. (2) On the 6th March 1946 Maung Chit and Ma Thaung sold the western portion of the suit land to Maung Kyin Po and his wife Ma Shwe (DW 5) for a sum of Rs. 1,200 by a registered deed of sale. (3) The suit land and the house thereon were mortgaged by Maung Chit and Ma Thaung once to Ko Sein Kyauk and Ma Thant for a sum of Rs. 600 and again to Maung Kyin Whyet for a sum of Rs. 900 by unregistered deeds of mortgage.

However, as regards these facts, it is clear that even if Daw Hmwe had stated in her evidence in Civil Regular Suit No. 192 of 1938 of the Court of the Township Judge of Wakèma that she had given the suit land orally to Maung Chit and Ma Thaung, the Additional District Court of Myaungmya in the appeal against the decision of the Township Judge in that suit held that the so-called gift was invalid and that U Po Hmyar and Daw Hmwe were still the owners of the suit land. Assuming for the sake of argument that the defendant-appellant Maung Tun Soe had heard about the statement made by Daw Hmwe in that suit, he should have heard that that statement was of no avail to Maung Chit and Ma Thaung.

As regards the second point, although it is no doubt true that the western portion of the suit land was sold to Maung Kyin Po and Ma Shwe (DW 5), the sale was made in the name of Maung Chit and Ma Thaung. There is in the evidence of Ma Shwe herself that when Daw Hmwe came to hear of the intended sale she claimed the property to be hers and that therefore she had to be paid a sum of Rs. 700 the advance of Rs. 500 having been given to Maung Chit and Ma Thaung. Therefore it is clear that Daw Hmwe not only did not represent that the

property belong to Maung Chit and Ma Thaung but, on the contrary, claimed it to be hers.

As regards the third point, there is not a tittle of evidence whatsoever to show that Daw Hmwe was aware of the mortgages made by Maung Chit and Ma Thaung. In these circumstances, it cannot be presumed that she had acquiesced in them.

Looking at the very deed of sale by which the defendant-appellant Maung Tun Soe claimed title to the suit property, it is clear that section 41 of the Transfer of Property Act could not be invoked in his favour. In the deed it is mentioned that the suit land belonged to U Po Hmyar of whom Maung Chit claimed to be a son and that the property was given by U Po Hmyar and his wife to him as a gift. In these circumstances, and in view of the fact that the houses were still assessed in the name of U Po Hmyar, it was incumbent upon Maung Tun Soe to make such enquiries as may be necessary to find out whether there had been a valid gift by U Po Hmyar and his wife Daw Hmwe. No such enquiry was obviously made and therefore it cannot be held that the proviso to section 41 of the Transfer of Property Act has been fulfilled. This section reads as follows:

"Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

The learned Advocate for the appellant has cited the case of *P.L.T.A.R. Chettyar Firm* v. *Maung Kyaing* (1) where the purchaser was able to take

(1) 7 Ran. 276.

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shelter behind the provisions of section 41 of the Transfer of Property Act. In that case a purchaser by a registered instrument of Government leasehold land from the original lessee had allowed the lessee to remain in possession of the land and to be in possession of the document of lease which also stood in the name of the lessee. In these circumstances, it was held that he had acted negligently and must be taken to consent to the original lessee being the ostensible owner and that a *bonâ fide* purchaser of the land from the ostensible owner in possession under such circumstances could not reasonably be expected to look beyond the lease itself and his vendor's possession and could not be held to be guilty of any default such as would deprive him of the rights given by section 41 of the Transfer of Property Act. The facts of this case are clearly distinguishable from those of the present. Regarding section 115 of the Evidence Act, there is no doubt such a thing as estoppel by conduct exists. See *R.M.P.A.L. Chettiar Firm* v. *Ko Maung Gale and others* (1) and *Tan Soon Li* v. *The Burma Oil Co., Ltd.* (2). In the latter case it was held that estoppel can arise from conduct by negligence or omission where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth. However, as observed by Blagden, J. at page 171 of the report, the case of a passive mis-representation, as contra-distinct from an active one, is much more difficult to consider. However, in the present case I do not consider how the conduct of Daw Hmwe can be regarded as a passive mis-representation such as would estop her from making a claim to the property in suit. The property still stood in her husband's name, she was enjoying part of the rent as collected by her husband's

(1) 13 Ran. 346. (2) (1941) R.L.R. 153.

nephew Maung Chit, and she did not know of the mortgages effected by unregistered deeds. On the other hand, as soon as she found out that part of the property was being sold by her nephew she at once made a claim and had to be paid part of the purchase price.

In these circumstances, I am of the opinion that the learned District Judge of Myaungmya was right in the conclusion arrived at by him that the plaintiff Daw Hmwe was entitled to the decree or declaration as prayed for. In the result, the appeal fails and must be dismissed with costs. Advocate's fee five gold mohurs.

APPELLATE CIVIL.

Before U Chan Tun Aung, J.

H.C. 1954

Sept. 3.

MRS. SATWANT KAUR (*a*) MRS. UDHAM SINGH (APPELLANT)

v.

H. R. YOUNG (RESPONDENT).*

Appeal—Necessary party, impleading of—Suit against two persons jointly for recovery of money—Separate defences of non-liability—Claim decreed against one—Appeal by, without impleading dismissed defendant, when incompetent—Authority of case cited, extent of.

Held : Where the claim by the plaintiff against the two defendants for payment of sale commission is not in the alternative, and where his pleadings do not evince any doubt as to their liabilities, and where the two defendants filed separate and inconsistent defences, an appeal by the defendant against whom the claim is decreed is not incompetent merely for failure to implead the dismissed defendant as the latter is no more an interested party in the subsequent litigation.

Sein Dass v. *Lakhajee and another*, (1940) R.L.R. 693, distinguished.

Ma Than May v. *Mohamed Eusoof*, I.L.R. 9 Ran. 624 ; *V.P.R.V. Chokalingam Chetty* v. *Seethai Acha and others*, I.L.R. 6 Ran. 29, referred to.

Held also : Every judgment must be read as applicable to the particular facts proved, and therefore a case is only an authority for what it actually decides.

Quinn and Leathem, A.C. (1901) (H.L.) 495 at 506, followed.

S. R. Chowdry for the appellant.

P. B. Sen for the respondent.

U CHAN TUN AUNG, J.—This second appeal arises out of a suit filed by the respondent-plaintiff, H. R. Young against the appellant-defendant, Mrs. Satwant Kaur (*a*) Mrs. Udham Singh and her husband Dr. Udham Singh for recovery of K 1,250 on account of commission said to have been earned by him (respondent-plaintiff) in negotiating the sale of

* Civil 2nd Appeal No. 129 of 1952 against the order of the Court of the Resident, Southen Shan States, in Civil Appeal No. 3 of 1951-52 .

premises belonging to the appellant-defendant, situate on Lots Nos. 33, 34, 35 and 36, Main Road, Taunggyi. The suit was instituted before the Court of the Assistant Superintendent for Civil Justice, Taunggyi, and the appellant-defendant's husband was alleged to have acted as her agent and was therefore impleaded as a defendant in the case.

In his plaint the respondent-plaintiff asserted *inter alia* that Dr. Udham Singh, as agent of the appellant-defendant, agreed to pay a commission of 2½ per cent on the sale price of the said premises in the event the respondent-plaintiff succeeded in finding a purchaser thereof at a price agreed upon. The said property was eventually sold, and the purchaser was one Feroze Khan who paid K 50,000 to Dr. Udham Singh. The respondent-plaintiff further asserted that Mrs. Satwant Kaur (*a*) Mrs. Udham Singh was impleaded as a co-defendant in the case, " to make the decree valid and binding on the 2nd defendant (Mrs. Satwant Kaur) in the event of a decree being passed by the Hon'ble Court in favour of the plaintiff. " To this claim Dr. Udham Singh and his wife filed two separate written statements. Dr. Udham Singh admits that his wife was the owner of the said premises for which a sale had been effected by the respondent-plaintiff, and he also admits that his wife was his principal. In paragraph 6 of his written statement he says that, as he has acted as his wife's agent, no suit lies against him in his personal capacity. He contends that the commission which the respondent-plaintiff has earned, if at all he has any claim to it, should be the liability of his wife, the 2nd defendant, and that he, as agent of the 2nd defendant, is not personally liable. Mrs. Satwant Kaur (*a*) Mrs. Udham Singh in a separate written statement states, to use her very words :

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"That the plaint does not disclose any cause of action against her, paragraph 11 of the pleadings gives no reason or discloses no ground why she should be a party to the suit." She asked that the plaintiff's suit, as far as she was concerned, be dismissed with costs.

It will thus be seen from the material part of the pleadings that the respondent-plaintiff's case as against both the defendants is for the realisation of the commission earned by him for the sale of premises which admittedly belonged to Mrs. Satwant Kaur (*a*) Mrs. Udham Singh; and to this claim the defendants denied *in toto*, the husband alleging that he was not personally liable, the wife asserting that there was no cause of action against her. In other words, Mrs. Udham Singh disclaimed any liability for payment of the commission earned by the respondent-plaintiff, although her husband made a specific admission that he was acting as her agent when the respondent-plaintiff's services were secured for the sale of the premises in question.

Suitable issues were framed by the trial Court and after hearing the evidence adduced by the parties it gave a judgment and decree in favour of the respondent-plaintiff as against Mrs. Satwant Kaur (*a*) Mrs. Udham Singh alone and not as against her husband, the agent. Against that judgment and decree Mrs. Satwant Kaur (*a*) Mrs. Udham Singh filed an appeal before the Court of the Resident, Southern Shan States, Taunggyi. In that appeal she did not implead her husband Dr. Udham Singh as a party to the appeal. Here, I would like to set out some of the grounds raised by her in appeal. Ground (2) reads: "That in view of the admission by the plaintiff-respondent (H. R. Young) that he had never spoken to the appellant and that the plaintiff-

respondent had nothing in writing to show that she agreed to his selling her property or to give him 2½ per cent commission, the lower Court erred in law in holding that there was cause of action against the appellant." Ground (3) asserts: "That in view of the fact that Dr. Udham Singh, 1st defendant, was granted power-of-attorney only on the 22nd February 1949, the lower Court erred in law in holding that the appellant was responsible for the alleged verbal contract said to have been made on the 24th January 1949." Ground (6) sets out: "That having regard to the fact that no cause of action was disclosed in the plaint against the appellant, the lower Court was wrong in deciding the issue No. 6 in favour of the plaintiff-respondent." Ground (8) is of great significance and it reads: "That in the absence of any evidence, the lower Court erred in not holding that the appellant had no knowledge of the so-called contract said to have been made on the 24th January 1949."

It is therefore abundantly clear that from a separate written statement filed by her and from the various assertions made in her grounds of appeal just set out above the appellant-defendant Mrs. Satwant Kaur (*a*) Mrs. Udham Singh has from the very outset impugned the respondent-plaintiff's claim by raising issues quite distinct and separate from those of her husband. Her husband claimed that he was not liable personally under the contract because the transaction entered into by him with the respondent-plaintiff was one where the principal had been disclosed.

Before the first appellate Court two preliminary objections were taken by the respondent-plaintiff's lawyer challenging the competency of the appeal as framed; and they were to the effect (1) that the

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claim against the 1st defendant Dr. Udham Singh having been dismissed by the trial Court, the appellant-defendant should have impleaded Dr. Udham Singh as a respondent in the appeal, he being an interested party in the result of the appeal, and (2) that even if the appellate Court directed that Dr. Udham Singh be impleaded as a party to the appeal, that order would be ineffective because the period of limitation would have by then run in favour of Dr. Udham Singh.

On these preliminary objections the first appellate Court, after hearing the parties, held that Dr. Udham Singh was an interested party in the result of the appeal, and that appellant-defendant's failure to implead Dr. Udham Singh, in time, rendered her appeal incompetent. In the result her appeal could not be proceeded with; and the same was dismissed with costs. It is as against the said order of the first appellate Court that this appeal has been preferred to this Court.

It will be observed that the learned first appellate Judge in rejecting the appellant-defendant's appeal as being incompetent for failure to implead Dr. Udham Singh placed great reliance on the decision in *Sein Dass* v. *Lakhajee and another* (1) besides other decisions; but in this appeal the learned counsel appearing for both the parties—Mr. S. R. Chowdry for the appellant-defendant, and Mr. P. B. Sen for the respondent-plaintiff—agree that the only apposite authority that could be said to have some approximation, if any, to the facts and circumstances of the case was *Sein Dass* v. *Lakhajee and another* (1). The case of *Ma Than May* v. *Mohamed Eusoof* (2) is certainly not an authority which can help us in the decision of the question involved in

(1) (1940) R.L.R. 693. (2) I.L.R. 9 Ran. 624.

the present case. There, the dispute was in respect of a share in an estate in which the plaintiff and the defendant had certain definite shares of interest. In an appeal to the High Court by one of the defendants against the final decree of the District Court on the basis of the Commissioner's report presented to it, one of the defendants who had been given a definite share was not impleaded but only the plaintiff in the suit was impleaded, and it was held that in the absence of the necessary party the appeal could not proceed against the original respondent. Reliance was also placed on the case of *V.P.R.V. Chokalingam Chetty* v. *Seethai Acha and others* (1). There again, the facts of the case do not bear any analogy to those obtaining in the present case. It was a case where the plaintiff bought from the Official Assginee certain property which belonged to an insolvent, and he sought to recover the said property alleging at the same time that there had been successive transfers of the same from the 1st defendant to the other and that such transfers were invalid. The suit was dismissed. In appeal to the High Court the plaintiff failed to join the 1st defendant in whose hands the property had been once, as the respondent. At the hearing of the said appeal, the time limited for appealing having then elapsed, the plaintiff sought to join the 1st defendant. The application was refused. Thus, in the said case the necessity for impleading a party in appeal had arisen by a claim of title having derived from another person in a sort of chain of transfer.

In this appeal it is strenuously contended on behalf of the appellant-defendant that the facts and circumstances obtaining in the case of *Sein*

(1) I L.R. 6 Ran. 29.

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Dass v. *Lakhajee and another* (1) are clearly distinguishable from those obtaining in the present case and that that decision being only an authority for what it actually decides, the first appellate Court was entirely wrong in rejecting the appellant-defendant's appeal for non-impleading of Dr. Udham Singh. There is much force in this contention. What has been laid down in *Sein Dass* v. *Lakhajee and another* (1) is that in a suit where the plaintiff is in doubt as to whether he should proceed against the *principal* or against *his agent* and in view of that doubt if the plaintiff makes an alternative claim in his plaint and if he obtains a decree against one and the other is dismissed, in an appeal preferred by one of the unsuccessful defendants the successful defendant cannot be left out from being impleaded as a respondent in the appeal. It is clear that in the said case, the plaintiff specifically asserted in his plaint that the defendant executed a promissory-note as agent for one Ranglal, and he definitely claimed *relief in the alternative*, *i.e.*, as against the agent and as against Ranglal.

But in the present case the respondent-plaintiff's claim as against the present appellant-defendant and her husband was never in the alternative. Nor can it be said that he was in doubt as to whether the appellant-defendant was alone liable or her husband was. The appellant-defendant and her husband filed two separate written statements, one setting up quite a different and inconsistent case from the other. The grounds raised by the appellant-defendant before the first appellate Court clearly indicate that hers was a completely different case from that of her husband, who only maintained that he was not personally liable. I am therefore

(1) (1940) R.L R. 693.

of the view that what was decided in *Sein Dass* v. *Lakhajee and another* (1) being only authority for particular facts and circumstances obtaining in the said case and since they materially differ from those obtaining in the present case, the order of the first appellate Court dismissing the appellant-defendant's appeal is untenable. However, Mr. Sen on behalf of the respondent-plaintiff submits that the plaint filed by his client as against the appellant-defendant and her husband, when read as a whole and also by implication, is one in which the respondent-plaintiff can be said to have been in doubt as to whether his claim was against the husband *alone* or as against the wife *alone*, and that the decision in *Sein Dass* v. *Lakhajee and another* (1) should apply even if the facts are not identical.

I regret I cannot accept this submission. In this connection I would respectfully quote the observation of Lord Halsbury, L.C., in *Quinn and Leathem* (2), which is as follows:

> ". . . There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. . . ."

Thus, on a careful examination of the entire case I must hold that the first appellate Judge has wrongly applied the decision in *Sein Dass* v *Lakhajee and another* (1) to the facts and

(1) (1940) R L.R. 693. (2) A.C. (1901) (H.L.) 495 at 506.

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circumstances of the present case, and as such his order is incorrect. The other authorities cited by him are inapposite because those were claims where one party had derived the title from the other, or where there had been a definite share of interest in certain properties which formed the subject-matter of the claim thus given rise to the necessity for impleading them as interested parties in appeal. In view of the above finding, the question as to whether the adding of Dr. Udham Singh as a party to the appeal has become time-barred or not, does not at all arise.

I therefore hold that the appeal preferred by the appellant-defendant before the Court of the Resident, Southern Shan States, Taunggyi, is quite competent, and I set aside the order of the Resident, Southern Shan States, Taunggyi, dismissing the appeal. I also direct that the said appeal as framed be proceeded with. The costs will follow the result of the appeal before the Court of the Resident, Southern Shan States, Taunggyi.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

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Aug. 11.

SHAHJEHAN MUSTIKHAN TRADING CORPORATION, RANGOON (APPELLANT)

v.

RANGOON COMMERCIAL HOUSE (RESPONDENT).*

Contract of sale or contract of agency, circumstance determining—Where principal is disclosed, suit against agent as principal not maintainable.

Held : When a party did not accept any payment as the price of the goods but merely took 3 per cent commission on the amount mentioned in the letter of credit, it can be said that the contract was merely one of agency.

Mahomedally Ebrahim Pirkhan v. *Schiller, Dosogne & Co.*, I.L.R. 13 Bom. 471.

Held also : Where the principals have been disclosed there is no cause of action for a suit against the agents as principals.

Dr. Ba Maw and *Nyunt Maung* for the appellant.

Kyaw Din and *S. B. Leong* for the respondent.

The judgment of the Bench was delivered by

U AUNG KHINE, J.—This appeal arises out of Civil Regular Suit No. 196 of 1951 of the City Civil Court, Rangoon, in which a decree for Rs. 7,940-12-0 was passed in favour of the plaintiff-respondents, Rangoon Commercial House, against the defendants-appellants Shahjehan Mustikhan Trading Corporation in a suit for damages for breach of contract. The case for the plaintiff-respondents is that they entered into a contract of sale as per Exhibit "A"

* Civil 1st Appeal No. 5 of 1952 against the decree of the Chief Judge, City Civil Court, Rangoon, in Civil Regular No. 196 of 1951.

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filed in the suit with the defendant-appellants for the purchase of 30,000 yards of Swatch No. 2003, Prints, at the rate of 29 cents per yard C.I.F. Rangoon, and the shipments of the same to be made in November/December 1950. On the day the Letter of Credit was opened in favour of Chugai Trading Co. Ltd., Japan, a sum of Rs. 1,239-12-0 was paid to the defendant-appellants as indenting commission. The goods were not delivered on time and subsequently, the plaintiff-respondents had to withdraw the letter of credit, hence the suit. The damages as claimed by the plaintiff-respondents were itemised as follows :

	Rs.	A.
Difference in price at the market rate and the price of 29 Cents per yard C.I.F. Rangoon	6,456	6
Refund of commission paid to the defendant-appellants	1,239	12
Bank's commission for opening Letter of Credit	158	8
Cable charges	21	14
Do.	19	4
Do.	15	0
Do.	30	0
Total ...	7,940	12

The defendant-appellants contested the suit on the ground that they were merely brokers and therefore no claim could be made against them, and in any case the plaintiff-respondents were precluded from filing this suit in view of the provisions in clauses (4) and (9) of the conditions attached to the document Exhibit " A ". The following four issues were framed, namely :—

1. Did the defendant company enter into the contract dated the 29th September as

the seller of the goods mentioned in paragraph 1 of the plaint or did he merely act as a broker between the defendant company and the sellers in Japan, and if so, does the provisions of clauses (9) and (4) of the contract preclude the filing of the suit against the defendant ?

2. If the defendant acted only as a broker did he do everything in his power to obtain the goods from the manufacturers ?
3. If the defendant was the seller of the goods did they commit a breach of contract by not supplying the goods during the contractual period ?
4. To what relief, is the plaintiff entitled ?

On evidence the Court held that defendant-appellants were the seller of the goods as principals and were not brokers and that clauses (4) and (9) in the conditions attached to Exhibit " A " are not relevant to the facts of the case and further that the defendant-appellants had committed a breach of the contract. The amount of damages as assessed by the plaintiff-respondents was accepted and a decree was passed in favour of the plaintiff-respondents as prayed for in the plaint.

The entire case, it appears to us, turns on a single issue as to whether the transaction as witnessed by Exhibit " A " was a contract of sale or a contract of agency. It has been contended on behalf of the defendant-appellants that they were merely agents clothed with an authority to sell ; and that they were not to be treated as principals.

On the other hand it is contended by the plaintiff-respondents that document Exhibit " A " clearly

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shows that the defendant-appellants were the sellers and it was they who undertook to supply the goods within the period of the contract. It was to them that they looked to for the supply of goods. They had no business transactions with the Chugai Trading Co. of Japan and they had no understanding whatsoever with that Japanese firm. The offer to purchase the goods was made to the defendant-appellants and the defendant-appellants accepted the same and then only Exhibit " A " was drawn up.

The defendant-appellants replied that they had done all they could to get the goods. When Chugai Trading Co. was unable to execute the order, there was another firm by the name of Messrs. Asano Bussan & Co. Ltd. which was willing to take over the same. Then on their instructions the letter of credit was altered and made payable to Chugai Trading Co. or its assignee by the plaintiff-respondents. Subsequently, it was discovered that the latter Japanese firm was unable to ship the goods in time and therefore the defendant-appellants requested the plaintiff-respondents to extend the period of the letter of credit. The plaintiff-respondents, however, was not prepared to do that and they withdrew the letter of credit but without informing the defendant-appellants.

The exact nature of Exhibit " A " as to whether it is a contract of sale or what else it is would have to be judged not only by the terms embodied therein but also by other facts and circumstances as they appear on record. The intention of the parties must be gathered from the words used in the document Exhibit " A " and the correspondence that followed between the parties. Exhibit " A " is a printed form used in the ordinary course of business by the defendant-appellants with their clients. In this

instance, in the printed form type-written words had been inserted against relevant headings. After a careful reading of this document, it is clear to us that the type-written portion cannot be read into the printed words to clearly make out the exact nature of the contract. The reason why we say this will be clear from the following facts :—

There are two heads in print on top of the document which is dated Rangoon, September 29th, 1950. They read as

"*Indent No.*

Contract No."

Against the heading "Indent No." there are the type-written words "SM/109/50" followed by these words "We Messrs. Rangoon Commercial House, No. 79 Mg. Khine Street, Rangoon, hereinafter called the Buyers, do hereby acknowledge having purchased from Shahjehan Mustikhan Trading Corporation, Rangoon, hereinafter called the Sellers, the undermentioned goods on the terms and conditions as printed on the reverse." Except for the words "Messrs. Rangoon Commercial House No. 79 Mg Khine Street, Rangoon" which are type-written, the rest are in print. Then came the particulars as shown below—

"ARTICLE	...	Swatch No. 2003, Prints.
SPECIFICATION	...	36" × 40 yards Quantity—30,000 yards.
PRICE	...	29 cents per yard c.i.f. Rangoon.
SHIPMENT	...	November/December 1950.
PACKING	...	...
INSURANCE	...	...

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TERMS	...	3 per cent indenting commission to be paid at the time of opening letter of credit.
REMARKS	...	BOOKED UNDER OGL. Letter of Credit No. opened in favour of Messrs. Chugai Trading Co. Ltd., 10, 3 Chome Koraibashi, Higashiku, Osaka, Japan."

On the reverse of the document are the conditions attached to the contract.

Following this, on 2nd October 1950 the defendant-appellants sent a letter to Messrs. Chugai Trading Co. Ltd., in Japan, in which they said they were enclosing an indent No. SM/109/50, dated the 29th Sepember 1950 for Swatch No. 2003 Print, representing an order *placed* by the dealers Messrs. Rangoon Commercial House, No. 79 Mg. Khine Street, Rangoon (Exhibit 3). If this letter Exhibit 3 and document Exhibit " A " are read together, it would appear that the defendant-appellants were merely forwarding an indent for certain kind of textile goods. Thus, the description given to them as sellers in the document Exhibit " A " was not in keeping with the task they had actually undertaken. They had no goods in hand to supply to the plaintiff-respondents, and therefore they had to order them from a Japanese firm. This fact was noted by the plaintiff-respondents themselves and in Exhibit " G " Messrs. Chugai Trading Co. Ltd., was referred to as the principals of the defendant-appellants. This admission on the part of the plaintiff-respondents is of great significance in the determination of the nature

of the contract entered into by the parties. The defendant-appellants did not accept the purchase price on behalf of the Japanse firm but merely asked the plaintiff-respondents to open a letter of credit in the name of the said Japanese firm. For all the trouble they had taken, the defendant-appellants merely charged 3 per cent commission on the amount mentioned in the letter of credit. That was about all they had received as remuneration and the subsequent rise or fall in the price of the goods ordered would not affect them in any way. Therefore, if they had sold the goods at all as mentioned in Exhibit " A " they could not have been selling them on their own account and it would not be wrong to say that they were selling for and on behalf of Messrs. Chugai Trading Co. of Japan. This reasoning is in line with what the plaintiff-respondents said in their Exhibit " G " letter to the effect that they considered that Messrs. Chugai Trading Co. as principals of the defendant-appellants. At no time did the defendant-appellants conceal as to who their principals were. If the principals had remained undisclosed at the date of the contract, then it could be said that the defendant-appellants were acting on their own behalves and entered into the contract as principals. From the circumstances outlined above, we are of the opinion that the defendant-appellants were merely agents earning their commission for the indent of the goods. When a party accepts payment as commission it can be said that the contract was merely one of agency. Here in this case the defendant-appellants did not accept any payment as the price of the goods sold but merely took 3 per cent commission on the amount mentioned in the letter of credit. We would, therefore, hold that the contract between the parties was one of agency. We are

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fortified in this view by the decision in the Bombay case of *Mahomedally Ebrahim Pirkhan* v. *Schiller, Dosogne & Co.* (1). The facts in the present case are somewhat similar to those obtaining in that case. The facts in the Bombay case are as follows :

The defendants traded in Bombay as merchants and commission agents under the style of Schiller, Dosogne & Co. being a branch of a French firm trading in Paris under the same name, of which firm also the defendants were members. The Paris firm were agents for certain manufacturers of zinc. The plaintiff, a merchant in Bombay gave an order for 40 casks of zinc sheets through the defendants by an indent in the following form : " I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below ". Such terms, *inter alia,* gave the price of goods and the time within which the shipments were to be made. An indent was forwarded to the Paris firm and the defendant informed the plaintiff of their acceptance of the plaintiff's order. Subsequently the plaintiff was informed by the defendants that the manufacturers being full with orders the zinc sheets would not be ready for shipment as soon as previously had been expected and the plaintiff was asked whether he would agree to give an extension of time or whether he would desire to cancel the indent. The plaintiff replied that as the contract time had been exceeded, he would buy similar goods locally on the defendant's account. This was done and subsequently he having paid a higher price sought to recover the difference in price as damages from the defendants. It was held that neither the defendants nor their Paris firm had entered into any contract of sale on which they

(1) (1889) I.L.R. 13 Bom. p. 471.

were liable to the plaintiff. They had constituted themselves as agents " to place " his order, *i.e.* to effect a contract of purchase on his account with the manufacturers of zinc and consequently the action as brought would not lie.

The plaintiff-respondents knew that the defendant-appellants were unable to supply the goods themselves and therefore they would in turn have to place an indent with a firm in Japan. The document Exhibit " A " clearly shows that, and subsequently the defendant-appellants forwarded the letter Exhibit 3, which clearly showed that they forwarded the indent No. SM/109/50 representing an order placed by the plaintiff-respondents. We are, therefore, of the opinion that if at all, the defendant-appellants would only be liable to be sued as agents for the Japanese firm. As the defendant-appellants now have been sued as principals, we would hold that the suit as framed does not disclose any cause of action against them. In view of our answer to the main question, we do not think we need pursue the point regarding the condition 9 attached to the document Exhibit " A ", in connection with the failure of supplies by the manufacturers within the period of the contract.

We have given careful consideration as to whether the commission accepted by the defendant-appellants should not be returned to the plaintiff-respondents as the goods ordered were not received by them in this case. But since the defendant-appellants have not been sued as an agent, we must hold that we are not competent to go into the question. The defendant-appellants were not called upon to explain specifically why the remuneration earned by them should not be returned to the plaintiff-respondents. It is quite possible that they may have a complete

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defence against the claim for the return of the remuneration accepted by them if a claim should be so made.

In the result, the appeal is allowed and the judgment and decree passed by the lower Court will be set aside and the plaintiff-respondents suit dismissed with costs throughout.

U BA THOUNG, J.—I agree

APPELLATE CRIMINAL.

Before U Ba Thaung, J.

H.C. 1954

Oct. 10.

SHIAH SINGH (APPLICANT)

v.

BUGA SINGH (RESPONDENT).*

Criminal Procedure Code, s. 476—Complaint by Court for offence under s. 193, Penal Code—Right of appeal, whether order by Court suo motu *or at instance of interested party—Complaint, necessity of prompt action.*

Held : The provisions of s. 476 (*b*), Criminal Procedure Code give a right of appeal to any person against whom a complaint has been made by a Court acting under s. 476 or s. 476 (*a*), and it is immaterial whether the Court acts *suo motu* or on an application made to it by some interested person.

Mt. Satto v. *Emperor*, A.I.R. (1929) Lah. 9, dissented from.

Thiraj v. *Emperor*, A.I.R. (1929) Lah. 641 ; *Master Zodpa* v. *Emperor*, A.I.R. (1936) Lah. 828, followed.

Held : If the Court decides of its own motion to act under s. 476 of the Code of Criminal Procedure, that action should be taken immediately after the judgment was passed in the proceedings ; nor should a Court entertain an application for action when made after an inordinate delay.

Mohamed Kaka and others v. *The District Judge of Bassein*, (1937) Ran. 276; *U Po Thein* v. *Buta Khan*, A.I.R. (1936) Ran 473; *Hwe Eve Hain and one* v. *The King*, (1948) B.L.R. 40, followed.

Ba Shun for the applicant.

Tun Aung (2) for the respondent.

U BA THAUNG, J.—In Criminal Regular Trial No. 58 of 1953 of the Court of the Subdivisional Magistrate of Mônywa, the respondent Buga Singh filed a complaint against the petitioner Shiah Singh and eight others under section 506 of the Penal Code alleging that they had threatened to beat him to death. The learned Subdivisional Magistrate after examining Buga Singh's witnesses charged the accused under section 506 (1) of the Penal Code. The

* Criminal Revision No. 94 (B) of 1954 being Review of the order of the Sessions Judge, Monywa, in Criminal Appeal No. 22 of 1954.

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accused and their witnesses were next examined, and after hearing both sides of the case the learned Subdivisional Magistrate acquitted all the accused including the petitioner on the 26th December, 1953, classifying the case as "false."

Then on the 12th January, 1954 the respondent Buga Singh filed an application before the District Magistrate of Mônywa to set aside the order classifying his case as "false." The learned District Magistrate after going through the proceedings of the lower Court set aside its order classifying the case as "false", and instead thereof classified it as "mistaken". This order was passed on the 29th January, 1954.

Then 25 days later 23rd February 1954 the learned Subdivisional Magistrate of Mônywa opened proceedings *suo motu* against the respondent Buga Singh under section 476 of the Code of Criminal Procedure as he was of the opinion that in the interest of justice he should lay a complaint against Buga Singh under section 193 of the Penal Code read with section 195 (1) (*b*) of the Code of Criminal Procedure, and after holding an enquiry, directed the laying of a complaint against the respondent Buga Singh under section 193 of the Penal Code. The case was transferred to the Headquarters Magistrate of Mônywa for disposal on 11th March 1954. On 12th March 1954 the respondent Buga Singh appealed to the Court of the Sessions Judge. Sagaing, against the laying of the complaint against him The learned Sessions Judge of Sagaing went through the proceedings of the Court of the Subdivisional Magistrate, and that of the District Magistrate, Mônywa, carefully, and came to a finding in a well considered judgment that the action taken by the learned Subdivisional Magistrate of Mônywa under section

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476 of the Code of Criminal Procedure was a belated and an afterthought one, and that no desirability of prosecution has ever been present in the mind of the Subdivisional Magistrate when he pronounced the judgment acquitting the petitioner and the other accused in the case brought by the respondent Buga Singh against them, and that the learned Subdivisional Magistrate did not take action under section 476 of the Code of Criminal Procedure immediately after he had passed judgment but took action only after the learned District Magistrate had set aside his order and re-classified the case as "mistaken." The learned Sessions Judge then allowed the appeal of Buga Singh and directed that the complaint laid against him by the learned Subdivisional Magistrate be withdrawn.

This application is for revision of the order of the learned Sessions Judge of Sagaing to have it set aside, and to restore the order of the learned Subdivisional Magistrate of Mônywa laying a complaint against the respondent under section 193 (1) of the Penal Code.

This application for revision was admitted mainly on the ground to consider whether section 476 (*b*) of the Criminal Procedure Code gives a right of appeal to the person against whom a Court files a complaint at its own instance and not on some body's application. In connection with this matter the learned Counsel for the petitioners cited the case of *Mt. Satto* v. *Emperor* (1). In that case it was held by Zafar Ali, J., that no appeal lies from a complaint made by a Magistrate at his own instance and not on some body's application. The same question arose in the case of *Thiraj* v. *Emperor* (2), and a Bench of the same Lahore High Court consisted

(1) A.I.R. (1929) Lah. 6. (2) A.I.R. (1929) Lah. 641.

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of Zafar Ali and Bhide, JJ. considered the question and as Bhide, J. dissented from the view of Zafar Ali J., that no appeal lies from a complaint made by a Magistrate at his own instance and not on some body's application, a reference was made to a third Judge Broadway, J., and Broadway, J., agreed with Bhide, J. that the provisions of section 476 (*b*) of the Criminal Procedure Code, give a right of appeal to any person against whom a complaint has been made by a Court acting under the provisions of section 476, or 476 (*a*) of the Criminal Procedure Code, and that it is immaterial whether the Court acts *suo motu*, or on an application made to it by some interested person. Therefore on the same question it has been held by a Bench of the same Lahore High Court that an appeal lies when a complaint has been made against a person either by a Magistrate by his own instance or on some body's application. The decision in the case of *Master Zodpa* v. *Emperor* by the Lahore High Court (1) also supports this view. It has been held in that case that where a complaint has been filed under section 193 of the Penal Code, and the prosecution has been ordered by the trial Magistrate, an appeal lies under section 476 (*b*) to the Sessions Judge. Following the above rulings I hold that an appeal by the respondent Buga Singh against the order of the Subdivisional Magistrate of Mônywa dated 9th March 1954 lies to the court of the Sessions Judge, Sagaing. Now the next question to consider is whether the learned Sessions Judge was correct in directing the complaint laid by the learned Subdivisional Magistrate, Mônywa, against the respondent Buga Singh, to be withdrawn. In this connection, the learned Sessions Judge has given very cogent reasons in his judgment justifying his order

(1) A.I.R. (1936) Lah. 828.

relying on the case of *Mohamed Kaka and others* v. *The District Judge of Bassein* (1) and the case of *U Po Thein* v. *Buta Khan* (2) in which it has been decided that if the Court decides of its own motion to act under section 476 of the Code of Criminal Procedure, that action should be taken immediately after the judgment was passed in the proceedings, for the desirability of prosecution must be present in the learned Judge's mind at the time when the judgment was pronounced. In this case judgment was passed by the Subdivisional Magistrate of Mônywa acquitting the petitioner Shiah Singh and eight other accused on the 26th December 1953 and although he classified the case as "false" no action was taken against the respondent Buga Singh. From this it is evident that the desirability of prosecution against the respondent Buga Singh had not been present in the mind of the learned Magistrate when he pronounced his judgment nor is there any indication either in the judgment or in the proceedings that he desired to prosecute respondent Buga Singh in the interest of public justice. Only when the District Magistrate had set aside his order and re-classified the case as "mistaken" then only he took action under section 476 of the Code of Criminal Procedure. The learned Sessions Judge was therefore correct in saying that the action taken by the learned Subdivisional Magistrate under section 476 of the Code of Criminal Procedure was a belated and an afterthought one. In the case of *Hwe Eve Hain and one* v. *The King* (3) it has been held that where there has been inordinate delay in making application for action under section 476 of the Criminal Procedure Code, the Court should not entertain such an

(1) (1937) Ran. 276. (2) A.I.R. (1936) Ran. 473.
(3) (1948) B.L.R. 40.

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application. Complaint should not be filed unless there is a reasonable probability of conviction. There can be no doubt that there has been an inordinate delay in this case on the part of the learned Subdivisional Magistrate in taking action against the respondent Buga Singh under section 476 of the Code of Criminal Procedure.

For the above reasons this revision application fails and is dismissed.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, J.

SRI SAWARMAL (APPLICANT)

v.

THE UNION OF BURMA (U THEIN MAUNG) (RESPONDENT).*

H.C. 1954 — *Aug. 7.*

Plea of "Guilty"—Perfunctory acceptance by Court followed by conviction—High Court—Revisional and inherent powers unrestricted—Duty of Court when accused pleads "guilty."

Held: Even when an accused person pleads "guilty," before it accepts the plea and enters a conviction, the trial Court should consider whether the accused fully understands the nature of the charge, the facts of the case and the serious consequences which such a plea would entail.

Nga Ywa and another v. *King-Emperor*, I.L.R. 12 Ran. 616.

Held also: Though the High Court's powers are restricted by s. 412 of the Criminal Procedure Code against entertaining appeals in cases where the accused has been convicted on his own plea of guilty, yet its revisional powers in such matters are not similarly restricted, and, at the same time, its inherent jurisdiction under s. 561-A of the Criminal Procedure Code can be invoked to quash the conviction and sentence.

Ali Hoosein v. *Emperor*, A.I.R. (1930) Ran. 439; *Emperor* v. *Nana Shahu Sonavane and another*, A.I.R. (1943) Bom. 209; *Emperor* v. *Kisim*, 48 Cr.L.J. 631; In re *Arunachala Goundan*, A.I.R. (1948) Mad. 492; *Krishna Chandra Sinha* v. *Emperor*, A.I.R. (1943) Pat. 313, followed.

Ba Win for the applicant.

Ba Pe (Government Advocate) for the respondent.

U CHAN TUN AUNG, J.—This application in revision is against the conviction and sentence of fine of K 125 or in default, two months' rigorous imprisonment passed against the applicant for an offence under section 13 (*7*) (*b*) of the Burma Immigration (Emergency Provisions) Act, 1947, by

* Criminal Revision No. 57-B of 1954 against the order of the 3rd Additional Magistrate, Rangoon, in Criminal Summary No. 221 of 1954.

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the 3rd Additional Magistrate, Rangoon, in his Criminal Summary Trial No. 221 of 1954. The applicant, as the trial record shows, pleaded "guilty" to the offence, and on that plea, the trial Magistrate has convicted and sentenced him as aforesaid. However, in revision, it has been urged, supported by applicant's own affidavit, that the applicant was never made aware of the contents of the complaint made by the Immigration Officer; nor was he shown which of the statements he had made, in obtaining the certificate for issue of a stay permit were false; that no evidence at all was led on that point by the prosecution; but that the applicant was told by the trial Magistrate that if he pleaded guilty, it would not affect his right of stay in this country and that on that assurance, he pleaded guilty. In other words, what is now urged in revision is that the applicant never had a fair trial before the trial Court with the offence charged; that his plea of guilty was based not upon a proper conception of the facts of the case and also of their implications, and that under the circumstances, his conviction was illegal.

I do not wish to say anything affecting the merits of the case in view of the order which I propose to pass. I was, at first, doubtful whether in a case where the accused had pleaded guilty and had been convicted on his own plea, he could at all invoke the revisional powers of this Court against his conviction in view of section 412 of the Criminal Procedure Code. However, my attention has been drawn to a number of decisions where it has been held that, though the High Court's appellate powers are restricted by section 412 of the Criminal Procedure Code against entertaining appeals in cases where the accused has been convicted on his own plea of guilty, yet its revisional powers in such matters are not similarly restricted

and that at the same time, inherent jurisdiction exercisable by the High Court under section 561-A of the Criminal Procedure Code can be invoked in appropriate cases, to quash the conviction and sentence. See *Ali Hoosein* v. *Emperor* (1); *Emperor* v. *Nana Shahu Sonavane and another* (2); *Emperor* v. *Kisim* (3); In re *Arunachala Goundan* (4); and *Krishna Chandra Sinha* v. *Emperor* (5).

Even if the law prescribes that if an accused person pleads guilty he can be convicted on his own plea, yet before a trial Court accepts the plea, the facts and circumstances in which the accused pleaded guilty must be scrutinised with care and the trial Court should consider whether the accused fully understood the nature of the charge to which, and the circumstances in which, he pleaded guilty. This principle is clearly enunciated in *Nga Ywa and another* v. *King-Emperor* (6).

In the case under consideration, the trial being a summary trial, the records so far as the accused's plea is concerned merely show the entry of the word " guilty " as against the column " plea of the accused ". The relevant portion of the complaint filed by U Thein Maung, the Immigration Officer, reads :

> " That on or about the 4th September 1953, the accused filed an application for issue of stay permit stating that he resided in Burma continuously during the period between 1st January 1932 and 1st November 1941 without absence.
>
> That the statement of the accused is false in asmuch as he had resided in Burma for about 5 years only during the period between 1st January 1932 and 1st January 1942. "

Thus, the complaint nowhere stated how and under what circumstances the applicant's statement had

(1) A.I.R. (1930) Ran. p. 439.
(2) A.I.R (30) (1943) Bom. 209.
(3) 48 Cr. L.J. p. 631.
(4) A.I.R. (1948) Mad. p. 492.
(5) A.I.R. (30) (1943) Pat. 313.
(6) I.L.R. 12 Ran. p. 616.

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been found to be false. Unless the facts and circumstances under which falsity of applicant's statement came to light are clearly set out, and the applicant's attention clearly drawn to it before his plea of guilty is recorded, his conviction in such a brief and summary manner entailing as it does, a serious consequence affecting his future right of entry into the Union of Burma, must be held to be unfair and highly prejudicial to him. In a summary trial, where serious consequence is likely to follow, such as in the present case, there should, to my mind, be on the record the full particulars of the offence and the facts proved sufficient to constitute the offence so that the accused may fully realise the implications of the offence with which he has been charged. In the present case, there is nothing on the record whether the applicant was fully aware of the implications of a conviction under section 13 (*7*) (*b*) of the Burma Immigration (Emergency Provisions) Act and the serious consequence that entails from such conviction. The learned Government Advocate who appears on behalf of the Immigration Department frankly conceded that in the circumstances of this case, and in view of the serious consequence involved when a conviction is entered, the trial records should contain more fuller statements than it is now of the facts constituting the offence, specific evidence adduced in that regard and a brief reason therefor even if a conviction is maintained on plea of guilty.

In view of the above circumstance and in order to meet the ends of justice, I would set aside the conviction and sentence passed against the applicant, and order his re-trial by such other competent Magistrate in the Rangoon Town District whom the District Magistrate, Rangoon, may select in that behalf.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

H.C. 1954 — *Aug. 3.*

THE MUNICIPAL CORPORATION, RANGOON AND ONE (APPELLANTS)

v.

U MYA, by his legal representatives MAUNG SAN HLAING AND THREE OTHERS (RESPONDENTS). *

Municipal Corporation—Suit for damages for wrongful dismissal from service—Civil Procedure Code, Order VIII, Rule 5—Court may require proof even though allegation not specifically denied—Departmental enquiry before dismissal or removal—Public servant not entitled to as of right—Municipal Corporation of the City of Rangoon (Suspensions) Act, 1943, ss. 2 (1), 4—Sole administrator vested with wide powers—Municipal Act, ss. 203 and 204 (1) (b)—Maintainability of suit for act done in good faith—Limitation for such a suit.

Held : Although an allegation in the plaint not having been specifically denied in the written statement can be taken as having been tacitly admitted, yet the proviso to Order VIII, Rule 5 enables the Court in its discretion to require any fact so admitted to be proved otherwise than by such admission.

Shriram Surajmal v. *Shriram Jhunjhuniva*, A.I.R. (1936) Bom. 285, distinguished.

Held : Rules made prescribing the procedure to be followed in the conduct of departmental enquiries do not limit the right of the Corporation to dismiss any officer appointed under the City of Rangoon Municipal Act, nor does the Act provide anywhere expressly or by implication that a Municipal officer can as of right claim that an enquiry should be held before he is dismissed or removed.

The Secretary of State for India in Council v. *C. J. Maurice*, (1937) R.L.R. 37; *R.T. Rangachari* v. *The Secretary of State for India in Council*, I.L.R. 57 Mad. 857, referred to.

Held : A sole administrator appointed under s. 2 (1) of the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, has, under s. 4, very wide powers subject only to the control of the Government, and he is not limited to rules framed under the original Municipal Corporation of the City of Rangoon Act.

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* Civil 1st Appeal No. 4 of 1952 against the decree of the High Court Original Side) in Civil Regular No. 74 of 1950.

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Held also: As the administrator acted in good faith within the meaning of s. 203 of the City of Rangoon Municipal Act, no suit is maintainable against the Corporation; and further as the suit was brought after the expiry of six months as provided by s. 204 (*1*) for such a suit, it is barred by limitation.

Parvateppa Mallappa Hubli v. *Hubli Municipality*, A.I.R. (1937) Bom. 491, referred to.

C. C. Khoo for the appellants.

Leong and *Thein* for the respondents.

The judgment of the Bench was delivered by

U BA THOUNG, J.—The plaintiff-respondent U Mya sued the defendant-appellant Municipal Corporation of the City of Rangoon and its late Administrator U Tun Ohn on the Original Side of this Court for recovery of a sum of Rs. 1 lakh as damages for wrongful dispensation of his services.

The plaintiff-respondent who was qualified as a Civil Engineer from the Technical Institute, Insein, in 1921, was employed by the Rangoon Municipal Corporation in December 1924, first as a permanent Architectural Assistant and later as an Assistant Engineer and he was in charge of rehabilitation work as such when his services were dispensed with by U Tun Ohn, by an order dated the 25th March 1948. This order reads as follows:

> "I find U Mya, Assistant Engineer, is careless and greatly negligent in his duties. His actions are such that they are greatly detrimental to the good discipline and smooth working of the Corporation. I therefore dispense with his services with effect from 1st May 1948.
>
> (Sd.) TUN OHN."

It is alleged by the plaintiff-respondent that this dispensation order was made by U Tun Ohn without

calling for an explanation from him, or holding any departmental enquiry as required under the Rules for conducting departmental enquiries provided in schedule I, Chapter XVIII of the Rangoon Municipal Manual, that it was made maliciously and in contravention of the statutory rules framed in exercise of the powers conferred under section 235, clause vi (*c*) of the Rangoon Municipal Act. The plaintiff-respondent contended that the dispensation of his services, legally amounted to a wrongful dismissal and that wrongful dismissal entitled him to claim damages, which he assessed at Rs. 1 lakh, made up of (*a*) salaries for a period of 7 years and 2 months which he could have put in had his services been not dispensed with, at Rs. 1,000 per month, (*b*) for loss of Provident Fund Contributions equivalent to 1/12th of his salaries for the above period and (*c*) for loss of gratuity equivalent to one year's salary at Rs. 1,000 per month. He waived a sum of Rs. 5,166-10 which was in excess of the total amount claimed in the suit.

The defendant-appellant contended that the plaintiff-respondent's services were dispensed with because of his carelessness and negligence in the discharge of his duties and that he was given ample opportunity to represent his case and offer an explanation, but such opportunity was not taken by the plaintiff-respondent. The defendant-appellant further contended that the procedure adopted by him in dispensing with the plaintiff-respondent's services was in accordance with the provisions of section 4 of the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943. He denied that the dispensation of the plaintiff-respondent's services amounted to wrongful dismissal; and asserted that under section 203 of the Rangoon Municipal Act, the plaintiff-respondent had no right of suit against the Rangoon

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Municipal Corporation, for anything done in good faith and with due care and attention under the Act.

By consent of the parties the following issues were framed by the learned Judge on the Original Side :—

1. Was the plaintiff employed by the defendant Municipal Corporation as a permanent Assistant Engineer on the implied contract that his services shall not be determined by way of punishment for any cause except in conformity with the provisions of the Rangoon Municipal Act and/or statutory rules made thereunder ?
2. Did the defendants knowingly and intentionally, in contravention of the aforesaid statutory rules framed in exercise of the powers conferred under section 235, clause vi (*c*) of the Rangoon Municipal Act, wrongfully and maliciously terminate the plaintiff's services ?
3. Was the 2nd defendant empowered under section 4 of the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, to terminate the plaintiff's services in the manner alleged by the plaintiff ?
4. Did the dispensing of the plaintiff's services, in the circumstances, amount to wrongful dismissal from service as claimed or alleged by the plaintiff ?
5. Did the defendant in dispensing with the plaintiff's services act in good faith and with due care and attention within the meaning of section 203 of the City of Rangoon Municipal Act and has the plaintiff no right of suit for the said reason ?

6. What damages, if any, is the plaintiff entitled to ?

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The learned Judge on the Original Side held that the plaintiff-respondent was employed as a permanent Assistant Engineer by the Rangoon Municipal Corporation on the implied contract that his services shall not be determined by way of punishment for any cause except in conformity with the provisions of the Rangoon Municipal Act and/ or statutory rules made thereunder; that the plaintiff-respondent's services were wrongfully terminated by the defendants-appellants in contravention of the statutory rules framed under the City of Rangoon Municipal Act, that the dispensing of the plaintiff-respondent's services amounted to wrongful dismissal and that it was not done in good faith and with due care and attention within the meaning of section 203 of the City of Rangoon Municipal Act and the remedy lay by way of suit and that the defendant-appellant U Tun Ohn was not empowered under section 4 of the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, to terminate the plaintiff-respondent's services in the manner adopted by him in this suit. The learned Judge assessed the damages at Rs. 36,960 and awarded a decree for that amount with costs to the plaintiff-respondent.

The defendant-appellant has appealed against the judgment and decree, and the plaintiff-respondent has also filed a cross appeal relating to the damages awarded.

The learned Judge on the Original Side took the view that the existence of an implied contract between the plaintiff-respondent and the defendants-appellants to the effect that disciplinary measures against him would only be taken in due conformity

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with the statutory provisions made under the Municipal Act, was expressly stated in the amended plaint; and that as it has not been denied in the defendant-appellant's written statement, it must be held to have been admitted by the defendants-appellants and that they were bound by the allegations in the plaint. The case of *Shriram Surajmal* v. *Shriram Jhunjhuniva* (1) was referred to where it has been held that "under Order 8, Rule 5, every allegation of fact in the plaint must be taken as admitted unlesss denied or stated to be not admitted in the pleading of the defendant. Hence where there is no pleading of the defendant there can be no denial or non-admission on his part and he is bound by all the allegations in the plaint." However, it has to be considered in this case that although the allegation made by the plaintiff-respondent in the amended plaint that he was employed by the Municipal Corporation on an implied contract, has not been specifically denied by the defendant-appellant in the written statement, yet an issue on this point was framed by consent of both the parties; therefore the defendant-appellant must be deemed to have denied this allegation. The proviso to Order 8, Rule 5 enables the Court in its discretion to require any fact so admitted to be proved otherwise than by such admission; and so in this case even if there be no express denial in the written statement regarding the alleged implied contract and if that fact was taken as an admission, the Court could still exercise its discretion to get the question of the alleged implied contract to be proved otherwise than by admission. This question should therefore have been dealt with and fully considered in the light of the relevant facts obtained in the case.

(1) A.I.R. (1936) Bom. 285.

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There is a complete lack of oral evidence on this point. The Rules for the conducting of departmental enquiries were inserted in schedule 1 of the City of Rangoon Municipal Act only on the 24th April 1935 and therefore it is impossible to say that at the time of U Mya's appointment there was any implied understanding that his services on punishment would be dispensed with only after conforming to the Rules which were then non-existent. These Rules were of later introduction made in exercise of the powers conferred by section 235 of the City of Rangoon Municipal Act, prescribing the procedure to be followed in the conduct of departmental enquiries involving dismissal or removal from his appointment of any Municipal Officer. These Rules were, however, not intended in any way to limit the right of the Corporation to dismiss any officer appointed under section 31 of the Act. It does not say any where nor can it be implied that the Municipal Officer can as of right claim that an enquiry should be held before he is dismissed or removed. We are of the opinion that U Mya's position in relation to the Corporation was no better than that of a Government servant in relation to the Crown. In *The Secretary of State for India in Council* v. *C. J. Maurice* (1), it was held as follows:

"A Government servant has no legal remedy sounding in damages for his alleged wrongful dismissal by Government from his appointment in the civil service. It is a prerogative of the Crown to dismiss his service at will, unless the Crown limits its prerogative by an enactment or a special contract

Section 96-B of the Government of India Act, 1919, does not abrogate the prerogative but reiterates and emphasizes it, and the words 'subject to the provisions of this Act and of rules made thereunder' do not in any way limit that right. The statute does not entitle the public servant to an enquiry

(1) (1937) R.L.R. p. 37.

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before dismissal but directs as a departmental matter that an enquiry shall be held, and a breach of the rules regarding enquiry does not give rise to a cause of action."

We quote with approval the following observation of Braund, J., in the above case:—

"To put the matter quite shortly, the rules made under that section appear to me to be regulations, devised for the benefit of the civil servant but to which he has no contractual privity, prescribing merely the machinery by which the pleasure of the Crown is, as between itself and the Local Government, to be exercised."

A similar view was taken by a Bench of the Madras High Court in the case of *R. T. Rangachari* v. *The Secretary of State for India in Council* (1). The decision in R. T. Rangachari's case was later upheld by the Privy Council. For these reasons, we are unable to agree with the learned Judge on the Original Side in his finding on this issue which we will now answer in the negative.

The learned judge on the Original Side came to a further finding that the plaintiff-respondent's services were wrongfully terminated by the defendant-appellant in contravention of the statutory rules framed under the City of Rangoon Municipal Act. U Tun Ohn was appointed the sole administrator of the Municipal Corporation of Rangoon under sub-section (*1*) of section 2 of the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943. According to U Tun Ohn, in 1947 the working in all the departments of the Corporation was found to be highly unsatisfactory because the officers and servants of the Corporation were inclined to accept bribes, indulged in corrupt practices, incurred unnecessary expenditure and caused undue delay in carrying out

(1) (1933) I.L.R. 57 Mad. p. 857.

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their duties. In the Engineering Department the buildings which had been completed under the supervision of its officers were found to have flaws. On top of everything the Corporation was in perpetual financial difficulty and often the Government had to come to its rescue. In fact as everything was so much in disorder, the administration of the Corporation came very near to the point of collapse. It was then the Government in order to stop further worsening appointed U Tun Ohn as an administrator with full powers to sweep the whole Corporation clean. He consulted the Heads of the Departments and at the time U Hla Thwin was the Head of the Engineering Department. In his talk with U Hla Thwin it was reported to him that the services of the respondent U Mya was no longer desirable for the good of his department because of his doubtful integrity and as he was more occupied with his racing ponies than his legitimate work. U Hla Thwin told U Tun Ohn that he could not take further responsibility for the work of U Mya ; U Tun Ohn had also received information from others that some of the rehabilitation constructions at Gyobyu carried out under the supervision of U Mya were not satisfactory. He made inspection of these constructions and with his own eyes he saw that plastering work was at fault and one of the walls in the building was out of alignment and it was only when these defects were pointed out that fresh plastering work was done and the wall put into alignment. U Tun Ohn therefore asked U Mya to proceed on leave and shortly before the leave expired on 12th February 1948, U Tun Ohn asked U Mya to see him. U Mya failed to turn up, and on the 28th February 1948 U Mya was again asked to call on U Tun Ohn. He again failed to turn up and on the lst March 1948 he sent a letter

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Exhibit 4 to the Secretary, Rangoon Municipal Corporation stating that although he had attempted to see the Administrator on the 22nd February 1948 he could not do so as the Administrator's office was crowded with people. U Mya added that he was not very well but as he had received the letter of the 28th February 1948 he requested that an interview may be arranged. U Tun Ohn considered U Mya's explanation that he could not see the Administrator because the latter's office was crowded to be merely an excuse. He said U Mya would never have been refused an interview if he had just sent in his name. U Mya's action was considered to be an act of insubordination. Therefore, U Tun Ohn consulted the legal advisor of the Rangoon Corporation as to what should be done. It was only after such consultation that U Mya's services were dispensed with. It is submitted on behalf of respondent U Mya that the procedure adopted by U Tun Ohn was contrary to the rules of natural justice in that U Mya should have been given a reasonable opportunity to explain before he was dismissed.

Section 4 of the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, reads as follows :

> "Notwithstanding anything contained in the Act the person or persons appointed under sub-section (*1*) of section 2 may, subject to the control of Government, adopt such procedure as may be deemed practicable for the due exercise and discharge of the duties, powers and functions imposed upon or vested in such person or persons."

It will thus be seen that very wide powers were conferred upon the sole Administrator appointed under sub-section (*1*) of section 2 of the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943. In this instance, U Tun Ohn adopted a

peculiar procedure of his own in the matter of dealing with officers, who in his opinion did not make the grade. In the case of the respondent U Mya, U Tun Ohn consulted U Hla Thwin the Head of the department concerned regarding the respondent U Mya's work and conduct; he made private enquiries of his own; he inspected the buildings constructed under the supervision of U Mya. After having done these, he made U Mya go on leave. Then he sent for U Mya so that he could talk matters over with him. U Mya failed to turn up and U Tun Ohn thought that he was deliberately staying away. It was only after that the advice of the legal advisor was taken and the dismissal order was passed. It is true that no departmental enquiry was held in this case to prove into the delinquency of the respondent U Mya, but it cannot be said that steps taken by U Tun Ohn were contrary to the rules of natural justice. As malice on the part of U Tun Ohn has not only been not proved in this case, and his explanation that he had acted in the matter without malice has been accepted by the plaintiff-respondent, it must be considered that he had acted in good faith in dispensing with the services of the respondent U Mya. We have already stated our view that the respondent U Mya could not as of right claim a departmental enquiry before his dismissal. For these reasons we are constrained to hold a different view from that of the learned judge on the Original Side in respect of the second and fourth issues. We would answer both these issues in the negative.

Regarding the third issue as to whether the 2nd defendant U Tun Ohn was empowered under section 4 of the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, to terminate the plaintiff's services in the manner alleged by the plaintiff, the

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wording of the section itself is clear. A person appointed under sub-section (*1*) of section 2, subject to the control of the Governor, could adopt such procedure as may be deemed practicable for the due exercise and discharge of the duties, powers and functions imposed upon or vested in him. These powers granted to U Tun Ohn were very wide and they clothed him with authority to adopt drastic measures in cases where the situation had become well nigh impossible. The learned Judge on the Original Side found it difficult to see how the powers granted to U Tun Ohn under section 4 should enable him to dismiss his employees at his pleasure in contravention of the statutory rules framed under the Act. It was to meet the abnormal situation that had arisen that the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, was enacted, and the Administrator given wide powers to adopt any procedure as may be deemed practicable so as to enable him to carry out the onerous duties thrust upon him satisfactorily. We are of the opinion that whenever section 4 of the Municipal Corporation of the City of Rangoon (Suspension) Act was brought into play the rules framed under the original Municipal Corporation of the City of Rangoon Act were rendered nugatory. We would, therefore, answer this issue in the affirmative.

Regarding the 5th issue as to whether the defendant in dispensing with the plaintiff's services had acted in good faith and with due care and attention within the meaning of section 203 of the City of Rangoon Municipal Act and as to whether the plaintiff had or had not the right of suit, in view of the finding arrived at previously that as no malice on the part of U Tun Ohn has been proved, it must be considered that he had acted in good faith in the

dispensation of the plaintiff-respondent's services. He had given the plaintiff-respondent ample opportunity to come and see him and explain matters which the plaintiff-respondent failed to do and he had acted only after taking proper legal advise from the legal advisor U Kyaw Din. Under these circumstances it must be held that the defendant-appellant had acted in good faith and with due care and attention within the meaning of section 203 of the City of Rangoon Municipal Act; and that being so the plaintiff-respondent's suit is not maintainable under section 203 of the Act which reads:

"No suit shall be maintainable against the Corporation or any committee or the Education Board or officer or servant or any person acting under and in accordance with the directions of such authority, officer or servant or of a magistrate in respect of anything in good faith and with due care and attention done or intended to be done under this Act."

Furthermore, section 204 (*1*) (*b*) of the City of Rangoon Municipal Act provides six months time within which to file the suit. Section 204 (*1*) reads:

"No suit shall be instituted against the Corporation or against the Commissioner or any other municipal officer or servant in respect of any act done in pursuance or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act—

(*b*) unless it is commenced within six months next after the accrual of the cause of action."

The plaintiff's services were dispensed with from the 1st May 1948, and the suit was filed only on the 2nd November 1950. Thus the suit even if maintainable, was clearly time barred. It is contended by the learned counsel for the respondent that section 204 of the City of Rangoon Municipal Act does not apply in this case as the defendant-appellant

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dispensed with the services of the plaintiff-respondent not in pursuance or execution of the Act, but dispensed with the plaintiff-respondent's services, knowingly that a departmental enquiry should be held, and without holding such enquiry before, dismissal. We are unable to accept his contention as we have already held that the plaintiff-respondent could not as of right claim a departmental enquiry before his services were dispensed with. The case of *Parvateppa Mallappa Hubli* v. *Hubli Municipality* (1) is somewhat similar to this case. It has been held in that case thus :

> " The effect of the protective words ' anything done or purporting to have been done in pursuance of the Act' in section 206, Bombay Municipal Boroughs Act, is to protect the Municipality or its officers in respect of anything done or purporting to have been done in pursuance of the Act, whether such action is '*bonâ-fide*' or '*mala-fide*'. A suit therefore for malicious prosecution against the Municipality on the acquittal of a person who has been prosecuted for alleged infringement of some provision is governed by section 206 of the Act and must be brought within six months of the Act complained of and is not governed by Art. 2 or Art. 23, Limitation Act. "

For the reasons stated above this appeal must succeed, and it is allowed with costs, and the plaintiff-respondent's suit is dismissed with costs. The cross appeal filed by the respondent relating to damages is also dismissed with costs.

U AUNG KHINE, J.—I agree.

(1) (1937) A.I.R. Bom. p. 491.

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1954

Sept. 10.

THE UNION OF BURMA (APPELLANT)

v.

MAUNG PU (*a*) THAKIN PU (RESPONDENT).*

Appeal against acquittal—Principles underlying acceptance—Criminal Procedure Code, ss. 417, 418 and 423.

Held: In exercising the power conferred by ss. 417, 418 and 423 of the Code of Criminal Procedure, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of witnesses ; (2)the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial ; (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses, In short the appeal against an acquittal should only succeed where the order was clearly wrong and involved a miscarriage of justice.

King-Emperor v. *U San Win*, I.L.R. 10 Ran. 312 ; *Sheo Swarup and others* v. *Emperor*, Vol. 36, Cr. L.J. 786 (P.C.) ; *Emperor* v. *Nga Mya Maung*, (1936) A.I.R. Ran. 90 ; *Emperor* v. *Haji Gulab Shah Kadir Shah*, Vol. 39, Cr.L.J. 504, followed.

Ba Kyaing (Government Advocate) for the appellant.

Tun Maung for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 267 of 1951 of the 4th Additional Magistrate, Mandalay, Maung Pu *alias* Thakin Pu, the respondent in the present appeal, was acquitted of the offence under section 420 of the Penal Code with which he has been charged. The Government being

* Criminal Appeal No. 228 of 1954 against the order of the 4th Additional Magistrate, Mandalay, in Criminal Regular Trial No. 267 of 1951.

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dissatisfied with the order of acquittal has preferred this appeal under the provisions of section 417 of the Criminal Procedure Code.

His Lordship here stated and analysed the facts of the case.

The facts of the case are briefly these :

The Respondent Maung Pu was the Manager and Secretary of the Mandalay Nandawshe Concos of which U Maung Ko (PW 3) was the President. It would appear that at a meeting held at the Office of the Deputy Commissioner, Mandalay, on the 27th April 1951 of the representatives of the Union of Burma Airways, the Chamber of Commerce, *Sa-pa-ka-tha*, the Inland Water Transport, the Rice Merchants, the Wholesalers' Co-operative Society and the S.A.M.B., it was decided that Ngasein rice was to be sold at the rate of Rs. 31-10-0 per bag to the Concos for the purpose of being sold to consumers at the rate of Rs. 32-4-0 per bag and 11 annas per *pyi*, and that in respect of supplies to the Concos by the S.A.M.B. it was to be done on the recommendation of the Wholesalers' Co-operative Society. On the 6th of July 1951, 100 bags of Ngasein rice were delivered from the S.A.M.B. godown to a messenger from Nandawshe Concos on an indent made 2 days previously, supported by the recommendation of U Ba Thaung (PW 12), the Secretary of the Wholesalers' Co-operative Society. Of these 100 bags of rice only 10 were taken to the premises of the Nandawshe Concos, while 10 bags found their way to the house of the respondent Maung Pu and 80 to the riverside for transport to Ngazun. U Aye Maung (PW 9) an Inspector of the S.A.M.B. on discovering this fact made enquiries and found out that the rice had been sold to Daw Sein Sein (PW 6), a rice dealer of Mandalay, who had

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in turn sold the same to the traders from Ngazun. U Aye Maung, therefore reported the matter to the Secretary of the Wholesalers' Co-operative Society in which he stated that the rice was sold by Daw Sein Sein to U Hla Gyaw, Maung Chit Han and U Kan Nyunt of Myinmu, Sagaing District, at the rate of Rs. 35 per bag. The Wholesalers' Co-operative Society then took the Nandawshe Concos to task and a special committee meeting of that Concos had to be held with a view to clear up the matter. It was then found that the indent for 100 bags of rice was made by the respondent Maung Pu on his own initiative as Secretary and Manager of the Concos without first getting the assent of the committee or even of his sub-committee, whose duty was to supervise the retail sale of commodities. The committee of the Concos, however, exonerated the manager on the ground that he had acted in good faith on the representation of one Maung Po Din that he would sell the rice to consumers at the rate fixed. The officers of the S.A.M.B. were, however, not satisfied with this explanation and hence the prosecution of the respondent under section 420 of the Penal Code.

The learned trial Magistrate held that there was not sufficient evidence on record to show that at the time the rice was taken from the S.A.M.B., the respondent Maung Pu had the intention of deceiving the officers of that department into delivering the said rice and that if any deception could be held to have taken place, or rather that if intention to deceive could be held to be present it was the intention on the part of respondent Maung Pu to deceive the members of the Concos in whose name he purchased the rice without intending to distribute them but that in the circumstances obtaining in this case such an intention could not also be ascribed to Maung Pu as

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he only gave permission to Maung Po Din to sell 80 bags of rice because some of the members of the Concos were dissatisfied with the quality of the rice issued by the S.A.M.B.

Now, the offence of cheating is defined in section 415 of the Penal Code, the relevant portion of which reads : " Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person is said to 'cheat'. *Explanation*—Dishonest concealment of facts is a deception within the meaning of this section."

Now, it is an admitted fact that the resolutions of the meeting held at the Deputy Commissioner's Office on the 27th April 1951 were not sent to the Secretary of the Nandawshe Concos. Therefore, the respondent was not in a position to know the exact nature of the resolutions passed at that meeting. No doubt, the respondent who gave evidence on oath admitted that he knew that rice was to be sold to members of the Concos at the rate of 11 annas per *pyi*. His contention is that although he was not authorized by the committee to buy as much as 100 bags of rice he had been influenced by the fact that on a previous occasion when an indent was made for only 10 bags of rice the Secretary of the Wholesalers' Co-operative Society had urged him by a message sent through Maung Maung, (the person taking delivery of that 10 bags of rice) that he should indent for as much as 100 bags. This fact is admitted by U Ba Thaung (PW 12) in his cross-examination. Furthermore, there is a number of witnesses who have been cited to show that the rice received at Nandawshe Concos from the S.A.M.B. was of inferior quality and so not popular with the consumers at Mandalay. These witnesses are members of the Nandawshe

Concos and their evidence has been accepted by the learned trial Magistrate.

On the other hand, there is a significant admission on the part of U Maung Lay (PW 1), an officer of the S.A.M.B., that his department had not laid down any conditions regarding the sale and distribution of the rice and that all they were concerned was to see whether the person who came to buy rice wholesale had the recommendation of the Wholesalers' Co-operative Society. In these circumstances, it is difficult to understand how it would be possible for the Court to come to a finding that the S.A.M.B. was deceived into delivering the 100 bags of rice to the respondent Maung Pu considering that the whole of the price had been paid by Maung Pu prior to the delivery of that rice. If any deception had been practised it must have been upon the Secretary of the Wholesalers' Co-operative Society who had been induced to make the recommendation because he was under the impression that the Nandawshe Concos was requiring that quantity of rice. In order to establish this fact the prosecution had sought to show—

(1) that the Nandawshe Concos did not have sufficient money to purchase as much as 10 bags of rice and that the purchase was made by the respondent Maung Pu without the prior sanction of the committee,

(2) that only 10 bags found their way to the Nandawshe Concos while 10 bags were retained by the respondent and 80 sold to Daw Sein Sein, and

(3) that Daw Sein Sein had sold the rice to traders from Ngazun at the rate of

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Rs. 35 per bag thus making considerable profit.

From these circumstances, the prosecution has asked the Court to hold that Maung Pu had from the very beginning intended to sell not less than 80 bags of rice in the black-market at a profit.

Now, it is an admitted fact that Maung Pu had to borrow money from Maung Po Din (his co-accused who was discharged by the trial Magistrate), for the purpose of buying the 90 extra bags of rice from the S.A.M.B. It was the same Maung Po Din through whom Maung Pu sold the 80 bags of rice to Daw Sein Sein. Daw Sein Sein (PW 6), who has given evidence on oath on behalf of the prosecution said that she did not remember what price she paid for the rice. The only thing she remembered was that she sold the rice at a profit of 8 annas per bag to the traders from Ngazun. The price which these traders had to pay was Rs. 35 per bag *vide* voucher, Exhibit F (3). Therefore, apparently Daw Sein Sein had to pay Rs. 34-8-0 per bag. However, there is no evidence to show that Maung Pu received Rs. 34-8-0 per bag and his evidence to the effect that he told Maung Po Din to sell the rice at a profit of 8 annas per bag only stands uncontradicted. Furthermore, the learned trial Magistrate had accepted his story that this profit of 8 annas was intended to be credited to the Nandawshe Concos. In these circumstances, the learned trial Magistrate held that although Maung Pu had acted without any authorization on the part of the Nandawshe Concos Committee, he had the intention of buying 100 bags of rice for that Concos and sell it at some profit and that therefore no deception could be held to have been practised either on the Concos or the Secretary of the Wolesalers' Co-operative Society, who made the

recommendation for the supply of rice because he thought that the rice was meant for the Concos.

Now, as this is an appeal against acquittal we have to consider what is the practice of the Courts in dealing with such appeals.

In the case of *King-Emperor* v. *U San Win*.(1) it was held by a Bench of the late High Court that an appeal against an acquittal should only succeed where the order of acquittal was clearly wrong, and involved a miscarriage of justice, and that the High Court ought not to interfere if there is no question of law involved in the appeal but only the appraisement of evidence. This case, however, was decided in 1932 before the pronouncements of the Privy Council in *Sheo Swarup and others* v. *Emperor* (2). Their Lordships observed as follows :

" There is, in their opinion, no foundation for the view, apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the Lower Court has ' obstinately blundered ', or has ' through incompetence, stupidity or perversity ' reached such " distorted conclusions as to produce a positive miscarriage of justice ', or has in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result.

Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses ; (2) the presumption of the innocence in favour of

(1) (1932) I.L.R. 10 Ran. p. 312. (2) (1935) Cr.L.J., Vol. 36. p. 786.

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the accused a presumption certainly not weakened by the fact that he has been acquitted at his trial ; (3) the right of the accused to the benefit of any doubt and (4) the slowness of an Appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

This ruling was followed by the late High Court in *Emperor* v. *Nga Mya Maung* (1) and Sind Judicial Commissioner's Court in *Emperor* v. *Haji Gulab Shah Kadir Shah* (2). In the latter case the learned Judicial Commissioners observed that the High Court will not interfere and reverse an order of acquittal merely because there is room for an honest difference of opinion, merely because upon the evidence the Judge might have come to the conclusion that the accused was guilty and that the High Court will not interfere unless it is clear that the Judge or the Magistrate whose judgment or acquittal is appealed against is wrong and the Court must in every case, assuming that Government have appointed competent Judges and competent Magistrates, give careful consideration and due weight to findings of the lower Courts. In the case under appeal I consider that there is room for honest difference of opinion as to whether or not the respondent Maung Pu had the intention to deceive at the time he made the indent for 100 bags of rice from the S.A.M.B. Had I been the trial Judge it is quite possible that I might on the evidence have come to the finding that the respondent Maung Pu had from the very beginning intended to sell the rice in the black-market. However, this fact alone is not sufficient. It is necessary for me to come to

(1) (1936) A.I.R., Ran. p. 90. (2) (1936) 39 Cr.L.J., p. 504.

the conclusion that the judgment of acquittal appealed against is wrong and this I am not prepared to do.

Therefore, relying upon the rulings quoted above I consider that this appeal by the Government against the acquittal of respondent Maung Pu should be dismissed.

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1954
Sept. 10.

TIN SHWE (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Handwriting—Finger-prints—Value of—Expert opinion on handwriting, sole basis for conviction, rarely safe.

Held: Comparison of handwriting with a view to discover the identity of the writer, regarded as a science, is much less developed than the comparison of finger-prints with a view to establish identity. Though it is safe to regard finger-prints as a reliable form of identification of a person the same can hardly be said of handwritings. The correct approach is to regard the opinion of the handwriting expert as strong corroboration generally.

In re *Venkata Row*, 36 Mad. 159; *Ladharam Narsinghdas* v. *Emperor*, A.I.R. (1945) Sind 4, referred to.

Held also: Cases in which the peculiarities in the handwriting of a person are so numerous and striking that the Court might well come to the safe conclusion on expert evidence alone that the writing is that of a particular person are much rarer than other scientific means of identification of persons.

Ba Kyaing (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 2 of 1953 of the Additional Sessions Judge, Insein sitting as a Special Judge, the appellant Tin Shwe was convicted of offences punishable under sections 395 and 364 of the Penal Code and was sentenced to five years and ten years rigorous imprisonment respectively, the sentences to run concurrently. The facts of the case are briefly these:

On the 9th of December 1953 at about midnight a number of *lusoes* armed with *dahs* and rifles came to the field hut of U Tha Din and after

* Criminal Appeal No. 209 of 1954 against the order of the Additional Sessions Judge, Insein, in Criminal Regular No. 2 of 1953.

ransacking that hut for properties took U Tha Din and his son-in-law Pein Ta (PW 2) as hostage. On the way Pein Ta noticed that the *lusoes* were five in number. While the *lusoes* were still in the hut they flashed their electric torch here and there and from the light of that torch Pein Ta recognised one of that *lusoes* as the appellant Tin Shwe. On the way also Tin Shwe asked Pein Ta the way to In-Kauk and when Pein Ta said he did not know, Tin Shwe told him to bring three thousand rupees to In-Kauk road as ransom for the release of his father-in-law U Tha Din. When Pein Ta was released he came back to the village and told his mother-in-law Daw Aye Lon (PW 1) what had occurred mentioning the fact that among the *lusoes* he had recognised the appellant Tin Shwe and one Aye Maung who had been acquitted by the trial Court. To the Ten-House-*Gaung* Ko Ba Than (PW 4) also he reported the fact that he had recognised Tin Shwe and Aye Maung. The next morning Pein Ta went to his father U Tun Ohn (PW 6) and told him that his father-in-law was being held to ransom and that among the five *lusoes* he had recognised Aye Maung and Tin Shwe.

On the appointed day Daw Aye Lon (PW 1) and Pein Ta (PW 2) went to the spot indicated by Tin Shwe but they did not succeed in making any contact with the *lusoes*. On the 15th December, 1952 *i.e.*, about six days after the dacoity Daw Aye Lon received a letter Exhibit A containing directions as to where and when the ransom was to be brought. Although the sum demanded was Rs. 3,000 she could collect Rs. 300 only. Therefore accompanied by Ko Ba Than (PW 4), Daw Aye Lon went to the appointed place and met three *lusoes* two of whom accepted the money after saying that they would release U Tha Din. However, U Tha Din did not

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U SAN MAUNG, J.

return home and on hearing rumours to the effect that her husband had been killed, Daw Aye Lon asked Maung Khin Tun (PW 11) a member of the Village Defence Committee to cause the arrest of Tin Shwe and Aye Maung. Accordingly the appellant and his co-accused Aye Maung were arrested by Bo Sein Win (PW 20) of the Union Military Police and sent to the police station. On the 1st of July 1953 Ko Tun Hmat (PW 9) and his companions were in Kya-In-Zu when on looking into a disused well they saw the dead body of a person wearing black checked *longyi*. Ko Tun Hmat informed Daw Aye Lon and when the body was retrieved from the well Daw Aye Lon could identify the *longyi*, the blanket, the pipe, etc., found along with the body as those of her husband U Tha Din. From these facts it was presumed that the body was that of U Tha Din.

The handwriting of the letter Exhibit A was compared with those of the appellant Tin Shwe by U Ba Kyaing (PW 25) who is an expert on this subject. They were found to be the handwriting of one and the same person. For these reasons the learned trial Judge although acquitting the co-accused Aye Maung considered that the evidence on record were sufficient to warrant the conviction of the appellant Tin Shwe. He considered that the opinion of the handwriting expert U Ba Kyaing as to the identity of the handwriting in Exhibit A with that of the appellant to be sufficient to warrant the conviction of the appellant when corroborated by the evidence of Pein Ta (PW 2) who had stated that he had recognised the appellant Tin Shwe. In my opinion the learned trial Judge has made a wrong approach to the matter in issue in the case under consideration. As regards the opinion of handwriting expert, a Bench of the Madras High

Court had discussed the various authorities that were canvassed before them in re *B. Venkata Row* (1) before observing that there may be cases in which the peculiarities in the handwriting of a person are so numerous and striking and there are so many mannerisms of the forger that he has been unable to avoid in committing his forgery that the Court might well come to the safe conclusion on expert evidence alone that the writing is that of a particular person. In the case of *Ladharam Narsinghdas* v. *Emperor* (2) relied upon by the learned trial Judge a Bench of the Sind High Court held that in so far as it is a question of law there is nothing in the Evidence Act to require the evidence given by an expert in any particular case to be corroborated before it could be acted upon as sufficient proof of what the expert stated, and that the question as to how much reliance a Court would be entitled to place on the statements of any particular witness in any particular case must necessarily depend on the facts and circumstances of that particular case.

However it must be remembered that the comparison of handwriting with a view to discover the identity of the writer, regarded as a science is much less developed that the comparison of finger-prints with a view to establish identity. Whereas in the case of finger-prints it has now been established that the chances of two persons having the same characteristic are so remote as to make it safe to regard finger-prints as a reliable form of identification of a person the same can hardly be said of handwritings. Cases in which the peculiarities in the handwriting of a person are so numerous and striking that the Court might well come to the safe

(1) 36 Mad. p. 159. (2) A.I.R. (1945) Sind. 4.

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conclusion on expert evidence alone that the writing is that of a particular person, are much rarer than other scientific means of identification of persons.

Therefore, the correct approach in the present case is to consider firstly whether the identification of Tin Shwe by Pein Ta (PW 2) is reliable and if so whether the identification of the handwriting in Exhibit A can be regarded as in corroboration of Pein Ta's testimony.

In my opinion Pein Ta was in a position to recognise the appellant Tin Shwe. It is no doubt true that when the dacoits entered U Tha Din's field hut and made a search for properties by flashing their electric torch, they would not throw the beam of light directly at each other's faces. However, as the hut is a small one the light reflected from the floor and the side walls would be sufficiently bright to enable Pein Ta to recognise Tin Shwe whom he had the opportunity of seeing at close quarters. Furthermore, when Pein Ta was being taken away as a hostage Tin Shwe spoke to him and knowing Tin Shwe since he was a young boy Pein Ta was in a position to recognise Tin Shwe by his voice as well. The fact that Pein Ta had recognised him is strongly corroborated by his prompt denunciation to his mother-in-law Daw Aye Lon and to the Ten-House-*Gaung* U Ba Than (PW 4). No doubt U Ba Than stated in his evidence that when he arrived at Daw Aye Lon's hut Pein Ta was fast asleep so that the report was made to him by Daw Aye Lon. However, U Ba Than is probably mistaken on this point as both Pein Ta and Daw Aye Lon said that it was Pein Ta who had made that report. In any event, even assuming that U Ba Than was right it is clear that Daw Aye Lon could only have

denounced the name of Tin Shwe and Aye Maung because Pein Ta had told her that these persons were among the dacoits. The fact that when Pein Ta met his father the next morning he told his father that the appellant Tin Shwe was one of the dacoits is fully corroborated by the evidence of U Tun Ohn (PW 6).

It is true, neither Pein Ta nor Daw Aye Lon reported the matter promptly to the police. However it is clear that they were afraid to make such a report lest U Tha Din might be killed by the *lusoes*. It was only when hopes of U Tha Din's return were dim that action was taken to have the appellant Tin Shwe arrested.

Regarding the evidence of the handwriting expert U Ba Kyaing (PW 25) who had compared the handwriting in Exhibit A with that of the appellant Tin Shwe I have studied the handwritings in the light of the opinion expressed by the expert regarding the identity of the characteristics noticed therein. I am of the opinion that the handwriting in Exhibit A is sufficiently similar to that of the appellant Tin Shwe to regard the expert's evidence as a strong piece of corroborative evidence regarding the identity of Tin Shwe as one of those who took part in the dacoity and in the holding of U Tha Din to ransom.

The appellant Tin Shwe's defence was an *alibi*. He said that he was away reaping paddy at a field belonging to Ma Nyunt in the company of Ko Aye Maung (DW 2) and Ma Ohn Nyunt for the period from 21st November 1952 to 25th December 1952. He is corroborated by Aye Maung who has been acquitted by the learned trial Judge. Ma Nyunt (DW 5) stated that she had engaged Tin Shwe, Ohn Maung and Ma Ohn Nyunt to reap

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her fields. She is, however, not in a position to say whether the appellant was at her field hut at the time of occurrence of this case. Ma Ohn Nyunt (DW 6) who is the relation of Aye Maung's wife also stated that she reaped paddy in the company of Tin Shwe and Ohn Maung. She also was not in a position to say that the appellant did not go to U Tha Din's field hut at the time this case occurred.

The alibi sought to be set up by the appellant Tin Shwe does not establish the fact that he could not have been at the field hut of the deceased U Tha Din when the dacoity took place. His defence must therefore be rejected.

For these reasons I consider that the appellant has been rightly convicted of offence punishable under sections 395/364 of the Penal Code. The sentences awarded to him did not call for any interference. The appeal is therefore dismissed.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, J.

U KIN YONE (*a*) U KIN HONE (APPELLANT)

v.

MA THAN (RESPONDENT).*

H.C. 1954

May 6.

Maintenance—Criminal Procedure Code, s. 488 (4)—Wife, refusal by, to resume cohabitation offered by husband—Duty of Court—Enquiry into sufficiency of reason.

Held: Where the husband has made an offer to live again with his wife, a Court is bound to hold an inquiry into the sufficiency of her reasons for refusing to resume cohabitation before dismissing the application for the mere refusal under s. 488 (4) of the Criminal Procedure Code.

Sultan v. *Mahtab Bibi*, 27 Cr.L.J. 1319; *Said Bibi* v. *Umar Din*, 130 I.C. 51, followed.

S. B. Leong for the appellant.

Hla Tin for the respondent.

U CHAN TUN AUNG, J.—The appellant was ordered to pay maintenance of K 50 per month to the respondent Ma Than by the 3rd Additional Magistrate, Rangoon, in his Criminal Miscellaneous Trial No. 142 of 1953. The facts are fairly simple. The respondent alleges that she is the lawful wife of the appellant, that without any reasonable ground the appellant left her some time in June 1953 while they were staying at No. 8, Shwegondine Kwethit, Rangoon, and that since that date the appellant had neglected her and refused maintenance to her. The appellant does not deny these facts; but he maintains that the respondent was so quarrelsome as to make his life unbearable, and hence his leaving the matrimonial home. He further maintains that

* Criminal Appeal No. 133 of 1954 against the order of the 3rd Additional Magistrate, Rangoon, in Criminal Misc Trial No. 142 of 1953.

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U CHAN TUN AUNG, J.

he was not in a position to provide the necessary maintenance in view of his limited income and the heavy expenditure he has to bear.

From the petition filed by the respondent and the objection made by the appellant, there is no serious dispute about the facts. But, in the course of the inquiry by the learned Magistrate the parties took time to settle the case amicably. The respondent herself in her examination before the Court states: "I would like to consider cohabiting with the 'respondent' (appellant) again." Adjournment was thus given by the Court, and later, it appears that no reconciliation was possible. Hence the Magistrate passed the aforesaid order against the appellant directing payment of K 50 per mensem as maintenance to the respondent. In view of the order I propose to make now, I do not wish to say anything about the merits of the claim put forth by the respondent.

Under sub-section (4) of section 488 of the Criminal Procedure Code a wife shall not be entitled to receive an allowance from her husband if without any sufficient reason she refuses to live with her husband. In the present case, there is nothing on the record to show whether a proper inquiry has been made by the trial Magistrate to find out the reason why the respondent refused to live with the appellant, especially when the appellant has in the course of the proceedings definitely expressed the desire that he was willing to cohabit with the respondent again. Besides the bare statements of the respondent and the appellant about the frequent quarrels between them and the appellant's allegation that the respondent was a spendthrift, I find no sufficient reason given by the respondent why she cannot live with the appellant after the offer made

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by the appellant to cohabit again. In *Sultan* v. *Mahtab Bibi* (1) it has been held that an order for maintenance of a wife should not be passed against the husband where in spite of latter's willingness to receive and cohabit with the wife, the wife refuses to live with the husband and where no sufficient reasons have been advanced for refusal. Again, in *Said Bibi* v. *Umar Din* (2) an application for maintenance of a wife was held not to be dismissible merely on the ground that the wife expresses her unwillingness to live with her husband without giving her an opportunity to substantiate the reasons for not living with her husband. It therefore appears that where the husband has, in the course of the proceedings, made an offer to live again with his wife, the Magistrate making the inquiry should give full opportunity to the wife to substantiate her reasons for refusing to live with her husband ; and only after such an inquiry and only after a careful consideration as to the reasonableness or otherwise of the grounds for refusal to cohabit, can the Magistrate pass an order either granting or refusing the application.

Now, on going through the records of the present case I find that the learned trial Magistrate has not properly inquired into that question.

Therefore, for reasons stated above I must set aside the order of maintenance passed against the appellant, and I would direct that the case be retried by such other competent Magistrate as the District Magistrate, Rangoon may select in that behalf.

(1) 27 Cr.L.J. (1926) 1319. (2) 130 I.C. (1931) 51.